No. 12-55644

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH BAUMANN, an individual,
Plaintiff-Appellant,

v.

CHASE INVESTMENT SERVICES CORP., ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
Case No. 2:11-cv-06667-GHK-FMO

AMICUS CURIAE BRIEF OF THE CALIFORNIA EMPLOYMENT LAW COUNCIL, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND EMPLOYERS GROUP IN SUPPORT OF DEFENDANTS/APPELLEES' PETITION FOR REHEARING *EN BANC*

George W. Abele
Melinda A. Gordon
Paul Hastings LLP
515 South Flower Street, 25th Floor
Los Angeles, California 90071-2228
(213) 686-6000

Attorneys for Amici Curiae
California Employment Law Council,
Chamber of Commerce of the
United States of America, and
Employers Group

Kate Comerford Todd
Tyler R. Green
National Chamber Litigation Center
1615 H Street, NW
Washington DC 20062
(202) 463-5337

Attorneys for Amicus Curiae
Chamber of Commerce of the
United States of America

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page(s)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1, the California Employment Law Council, the Chamber of Commerce of the United States of America, and Employers Group certify that they are nonprofit organizations with no parent corporations or any other corporations that owns more than ten percent of their stock, respectively.

DATED: April 21, 2014

Respectfully submitted,

NATIONAL CHAMBER LITIGATION CENTER
KATE COMERFORD TODD
TYLER R. GREEN

PAUL HASTINGS LLP
GEORGE W. ABELE
MELINDA A. GORDON

By: s/ George W. Abele
George W. Abele
Attorneys for *Amici Curiae*
California Employment Law Council, Chamber of Commerce of the United States of America, and Employers Group

I. STATEMENT OF INTEREST

California Employment Law Council ("CELC"), the Chamber of Commerce of the United States of America ("Chamber"), and Employers Group have concurrently filed their Motion For Leave To File *Amicus Curiae* Brief In Support Of Defendants/Appellees' Petition for Rehearing *En Banc* ("Motion for Leave") in accordance with Federal Rule of Appellate Procedure Rule 29(b) and Ninth Cir. R. 29-2. The interests of CELC, Chamber, and Employers Group in this matter are set forth below.

A. Identity of *Amici Curiae*.

CELC is a voluntary, nonprofit organization that promotes the common interests of employers and the general public in fostering the development in California of reasonable, equitable, and progressive rules of employment law.

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents an underlying membership of more than three million businesses and professional organizations of every size, in every industry sector, and from every geographic region of the country. A principal function of the Chamber is to represent the interests of its members by filing amicus briefs in cases involving issues of vital concern to the nation's business community.

Employers Group is the nation's oldest and largest human resources management organization for employers. It represents nearly 3,800 California employers of all sizes and every industry, which collectively employ nearly 3,000,000 employees. Fed. R. App. Proc. 29(c)(4).

B. Interest of *Amici Curiae*.

Amici respectfully submit their views here because of the importance of this case to employers both inside and outside of California. Fed. R. App. Proc. 29(c)(4). The panel decision in this case finding that the total amount of penalties sought in a representative lawsuit in court under California's Labor Code Private Attorneys General Act ("PAGA") cannot be considered as a whole for the purpose of analyzing the amount-in-controversy requirement for diversity jurisdiction denies Defendants/Appellees Chase Investment Services Corp., et al. ("Chase") (and will deny to other non-California employers in similar high-value PAGA cases) the federal jurisdiction expressly intended by Congress in creating diversity jurisdiction.[1] CELC represents the interests of both California-based employers and non-California-based employers doing business in California. The

[1]PAGA, California Labor Code §§ 2698, *et seq.*, deputizes private citizens to sue on a representative basis to collect penalties for violations of the California Labor Code. PAGA penalties are based on the number of such violations, on a per employee, per work period basis. The statute provides that 25 percent of the total penalties awarded must be paid to aggrieved employees, and 75 percent of the penalties awarded must be paid to the State.

Chamber represents the interests of businesses throughout the nation. The Employers Group has a vital interest in seeking clarification and guidance from this Court for the benefit of its employer members and the millions of individuals they employ. Members of all three organizations recognize the critical importance of providing diverse employers with recourse to the federal courts in high-value cases (with no exception for those brought under PAGA), and of maintaining diverse employers' access to federal jurisdiction, in general.

C. Consent And Authority To File.

Amici sought the consent of all parties to file this *amici curiae* brief, prior to filing its Motion for Leave. Fed. R. App. Proc. 29(c)(4); 9th Cir. R. 29-2(a); 9th Cir. R. 29-3. Both Chase and Joseph Baumann, through their respective counsel of record, provided their consent. *Amici* now seek leave from this Court to file this *amici curiae* brief, pursuant to their Motion for Leave and in accordance with Federal Rules of Appellate Procedure 29(b).

D. Authorship.

No party or party's counsel authored this brief in whole or part. Fed. R. App. Proc. 29(c)(5). Nor did a party or party's counsel or any person other than *Amici*, their members, or their counsel contribute money that was intended to fund preparation or submission of the brief. *Id*.

II. SUMMARY OF ARGUMENT

Amici curiae respectfully suggest that the panel decision is wrong, and that the panel's error has serious consequences for employers. The practical effect of the majority's opinion is that PAGA cases brought against out-of-state corporations in California state courts for mammoth amounts of money are never, as a matter of law, removable. This is directly contrary to the intent of the removal statue—that large assertions of liability brought by private plaintiffs against an out-of-state corporation in the courts of a state are normally removable to federal court.

The panel's erroneous decision results from its misunderstanding of the nature of a PAGA action. In assessing whether removal was appropriate, the panel here—and another panel in *Urbino v. Orkin Services of California, Inc.*, 726 F. 3d 1118 (9th Cir. 2013)—mistakenly approached the issue by examining whether it was possible to "aggregate" individual claims of the aggrieved employees. But in the context of a representative lawsuit under PAGA, it is unnecessary to reach the issue of "aggregation." Because PAGA provides that 75 percent of all penalties awarded by a court must be paid to the State, the operative question for purposes of removal is whether the State's interest in that 75 percent share of the total penalties sought by plaintiff Baumann exceeds the $75,000 amount in controversy required for removal under the ordinary diversity jurisdiction statute. Because the panel's decision, if allowed to stand, would result

in a significant category of employment litigation in this Circuit being erroneously excluded from the jurisdiction of the federal courts, *en banc* review is warranted.

III. THE COURT SHOULD GRANT REHEARING *EN BANC*, BECAUSE THE AMOUNT THAT BAUMANN SEEKS FOR THE STATE SATISFIES THE JURISDICTIONAL AMOUNT.

The panel decision here, like the panel decision in *Urbino*, concluded that the required amount in controversy was not satisfied, because "Baumann's portion of any recovery (including fees) would be less than $75,000." *Baumann v. Chase Inv. Servs. Corp.*, ___ F.3d ___, 2014 WL 983587, at *1 n.1 (9th Cir. Mar. 13, 2014). But Baumann's "portion" is immaterial in light of the amount that would be paid to the State if Baumann prevails: 75% of the total award—amounting, in this case, to $9.75 million.

As the Petition explains, Baumann was permitted to bring a claim under PAGA because the State did not bring its own claim for penalties, and therefore did not become a party in litigation regarding Chase's alleged Labor Code violations. If Baumann is successful, 75% of the recovery is paid to the State. By not focusing on this aspect of the amount in controversy, the panel here (and the panel in *Urbino*) incorrectly analyzed the amount in controversy.

A simple hypothetical will demonstrate the majority's error:

Assume that an out-of-state corporation with 10,000 California employees issues paychecks to its employees that do not contain all the elements

that must be included on a paycheck under California Labor Code section 226. The out-of-state corporation quickly realizes its error, and the error is not repeated.

A violation of California Labor Code section 226 has occurred. This results in two types of potential liability for the out-of-state corporation. First, there is a *statutory* penalty payable directly to each employee. The statutory penalty for the first deficient paycheck is "the greater of all actual damages or fifty dollars ($50) . . . and is entitled to an award of costs and reasonable attorneys' fees." Cal. Lab. Code § 226(e)(1). Each employee has an individual right to recover these amounts in a suit under the Labor Code, which can be brought as a class action. In the case at bar, the plaintiff elected not to seek statutory penalties. (As the Petition explains, however, non-PAGA remedies are being sought in a separate matter pending in federal district court, further complicating judicial resolution of one set of underlying conduct.)

Second, under the Private Attorneys General Act, California Labor Code section 2698, *et seq*. ("recovery of civil penalty for violation of Labor Code"), the state of California is entitled to seek a *civil* penalty for each violation. (A civil penalty for an initial violation is $100 per employee per pay period. Cal. Lab. Code § 2699(f)(2)). If the State were to bring its own action, the total amount of money the State is entitled to recover in civil penalties where 10,000 employees

each received a check that did not contain all the necessary elements of information is thus $1,000,000 ($100 times 10,000 employees).

If one of the 10,000 employees wishes to bring a private lawsuit under PAGA seeking civil penalties, however, the employee must offer the State the opportunity to proceed first. If the State does so, and wins, it recovers the sum of $1,000,000. But if the State elects not to proceed, the individual employee is entitled to bring his or her own lawsuit, seeking the same $1 million in penalties.[2]

When this occurs in the context of a representative PAGA lawsuit in court, there is no change in the total $1,000,000 in civil penalties at issue. The sole difference is that, if the plaintiff prevails, our hypothetical $1,000,000 will be divided with 75% going to the State of California Labor and Workforce Development Agency ("LWDA") and 25% "to the aggrieved employees." Cal. Lab. Code § 2699(i). Thus, the relevant amounts in controversy in our hypothetical PAGA case are (1) the sum of $750,000 that would be paid in one lump amount to the State if the plaintiff prevails, and (2) the remaining $250,000 that will be paid to the "aggrieved employees."

One could argue whether counting the $250,000 for purposes of determining the amount at issue for purposes of diversity removal constitutes an

[2] Of course, the employee is not obligated to proceed on this basis and can choose to bring a claim only for the penalty attributable to the wrongful conduct directed against him or her – and not seek the entire $1 million in penalties.

aggregation. But that issue is one that federal courts do not need to reach for the purpose of removal, because the $750,000, in which no individual employee has any actual or potential interest, is an amount payable to one entity (the State) that is being sought by a single plaintiff.

Moving from the hypothetical to the actual facts of this case, according to the Petition, more than $13,000,000 in penalties were at issue. Petition at 17, *citing* ER-5. Seventy-five percent of this amount, if the lawsuit is successful, would go to the State – no employee would have any interest whatsoever, potential or otherwise, in this amount. The remaining 25% would be distributed to the "aggrieved employees." Seventy-five percent of $13,000,000 is $9,750,000, more than 130 times the jurisdictional amount. That is the end of the issue. The individual plaintiff seeks $9.75 million that would be payable to the state of California alone—no one else.

Thus, the issue is not whether or not to aggregate the claims of the individual employees who were the subject of the alleged Labor Code violations. They have their own rights to *statutory* damages and penalties. But with respect to *civil* penalties (leaving aside the 25% that "aggrieved employees" are entitled to receive under PAGA), the sum of $9.75 million—which would be paid only to the State—is being sought by the individual plaintiff. That far exceeds the jurisdictional amount.

IV. CONCLUSION

The $9.75 million sum that would be awarded to the State under the PAGA claim in this action far exceeds the $75,000 amount at issue required for diversity removal. The court should grant rehearing *en banc*, and not allow the panel decision to stand, perpetually banning removal of PAGA suits against out-of-state corporations, regardless of the amount at issue.

DATED: April 21, 2014

Respectfully submitted,

NATIONAL CHAMBER LITIGATION CENTER
KATE COMERFORD TODD
TYLER R. GREEN

PAUL HASTINGS LLP
GEORGE W. ABELE
MELINDA A. GORDON

By: s/ George W. Abele
George W. Abele
Attorneys for *Amici Curiae*
California Employment Law Council, Chamber of Commerce of the United States of America, and Employers Group

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(d), I certify that this Brief for *Amici Curiae* contains 2,131 words, as determined by our firm's word processing system, excluding the parts of the brief exempted by Federal Rules of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirement of Federal Rules of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rules of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using the word processing program Microsoft Word 2010, in 14-point, Times New Roman font.

DATED: April 21, 2014

Respectfully submitted,

PAUL HASTINGS LLP
GEORGE W. ABELE
MELINDA A. GORDON

By: s/ George W. Abele
George W. Abele
Attorneys for *Amici Curiae*
California Employment Law Council, Chamber of Commerce of the United States of America, and Employers Group

CERTIFICATE OF SERVICE

Case No. 12-55644

I hereby certify that on April 21, 2014, I have caused to be electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: April 21, 2014

Respectfully submitted,

PAUL HASTINGS LLP
GEORGE W. ABELE
MELINDA A. GORDON

By: s/ George W. Abele
George W. Abele
Attorneys for *Amici Curiae*
California Employment Law Council, Chamber of Commerce of the United States of America, and Employers Group

LEGAL_US_W # 78400418.3