

**In The  
Supreme Court of the United States**

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U.S. VISION, INC. AND USV OPTICAL, INC.,

*Petitioners,*

v.

DEBRA JOHNSON,

*Respondent.*

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**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit**

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**RESPONDENT'S BRIEF IN OPPOSITION**

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JAMES R. PATTERSON  
*Counsel of Record*  
ALLISON H. GODDARD  
PATTERSON LAW GROUP, APC  
402 W. Broadway, 29th Floor  
San Diego, CA 92101  
(619) 398-4760  
jim@pattersonlawgroup.com

*Attorneys for Respondent Debra Johnson*

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**QUESTION PRESENTED**

Whether the decision below properly found, based on the particular facts and evidence presented in the case, that the amount in controversy in this case does not meet the jurisdictional threshold for removal under the Class Action Fairness Act.

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## INTRODUCTION

The petition for certiorari does not raise any question that warrants review by this Court. There is no substantial conflict between the Ninth Circuit's decision and the decision of any other court of appeals. Each court of appeals properly holds that a removing defendant bears the burden of demonstrating the amount in controversy under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d). Each court of appeals properly holds that a removing defendant must set forth facts to demonstrate that jurisdiction exists, not merely rest on the allegations of a pleading. The minor variations among courts of appeals as to the level of facts required do not create a substantial conflict warranting review by this Court.

Petitioners attempt to manufacture an important question of federal law by repeating selective excerpts from the legislative history of CAFA warning of plaintiffs' lawyers "gaming the system" by pleading around federal jurisdiction. Petitioners ignore the important procedural safeguard in CAFA that removes the one-year limitation on removal that applies to non-CAFA cases. In addition, Petitioners used as the basis for removal the allegations of Respondent's complaint, which are necessarily imprecise because the jurisdictional facts are in the sole possession of Petitioners. The Ninth Circuit correctly held that Petitioners cannot fabricate federal jurisdiction by failing to present facts available from their own business records.

The petition for certiorari should be denied.



### COUNTERSTATEMENT OF THE CASE

This case is a wage and hour class action seeking to recover damages under California law on behalf of California employees. Respondent alleges that class members are entitled to recover unpaid overtime wages, meal and rest break wages, vacation wages, and waiting time penalties under the California Labor Code. (Pet. App. at 99, 102.) Respondent alleges that all claims on behalf of herself and the putative class do not exceed \$5 million. (Pet. App. at 100-01.)

Petitioners removed this action to the United States District Court for the Southern District of California. (Pet. App. at 5.) Respondent filed a motion to remand the action, which the district court denied. (Pet. App. at 4.) The district court held that Petitioners met the legal certainty standard set forth in *Lowdermilk v. U.S. Bank Nat'l Ass'n*, 479 F.3d 994, 999 (9th Cir. 2007), even though the evidence Petitioners presented to support jurisdiction was based only on estimates of class size and hourly wage rates, rather than on actual information available from Petitioners' own time and attendance records. (Pet. App. at 8-12.)

Respondent filed a petition for permission to appeal with the Ninth Circuit pursuant to 28 U.S.C. § 1453. The Ninth Circuit granted this petition and

reversed the district court's decision, finding that Petitioners "failed to carry their burden to demonstrate the amount in controversy exceeds \$5,000,000." (Pet. App. at 3.)

As the court of appeals noted, Petitioners' calculation of the amount in controversy does not rely on actual entries from their time and attendance records. Instead, Petitioners base their calculation on two estimates from their employee records: an estimate of the total number of employees who worked for Defendants in each year of the Class Period; and an hourly average rate for class members during the Class Period. (Pet. App. at 141-42.) The remaining figures used in Petitioners' calculation of the amount in controversy are not based on any facts or records. Petitioners simply made these assumptions:

- Every class member worked off-the-clock on each and every work day;
- Every class member missed both a meal and rest break on each and every work day;
- Every class member lost at least eight hours of earned vacation pay each year;
- Every class member would be entitled to the maximum \$4,000 penalty for inaccurate wage statements, regardless of how long they were actually employed by Defendants;
- Every class member who terminated his or her employment during the class period would be



entitled to the maximum 30-day waiting time penalty; and

- Every class member was paid by a paper payroll check during each pay period, and not by direct deposit.

(Pet. App. at 9-12.)

Contrary to Petitioners' claim, the court below did not entirely preclude them from relying on the allegations of Respondent's complaint. Instead, the court held that Petitioners could not simply assume that all class members would be entitled to the maximum damages allowed based on the allegations in lieu of presenting evidence from their own payroll records to support such an assumption. (Pet. App. at 2-3.)



## **REASONS FOR DENYING THE PETITION**

The petition should be denied because there is not a substantial conflict among the courts of appeals on the question presented, and the Ninth Circuit's decision does not conflict with any decision of this Court. The petition fails to present an important question of federal law, particularly since CAFA contains a provision that mitigates any gamesmanship by removing the one-year limit on removal that applies to non-class action cases. Moreover, the Ninth Circuit correctly found that Petitioners did not meet their burden to present evidence demonstrating that

the amount in controversy here exceeds \$5 million. Respondent respectfully submits that the petition should be denied.

**A. The Ninth Circuit's Decision Does Not Conflict With the Decision of any Other Court of Appeals or With any Decision of This Court.**

The Ninth Circuit first interpreted CAFA in *Abrego Abrego v. The Dow Chem. Co.*, 443 F.3d 676 (9th Cir. 2006). There, the plaintiff did not allege a specific amount of damages. *Id.* The Ninth Circuit first held that a removing defendant bears the burden of proof as to jurisdiction under CAFA. *Id.* at 678. The court then held that when a plaintiff does not specify the amount of damages in the complaint, a removing defendant must demonstrate by a preponderance of the evidence that the amount in controversy meets the CAFA jurisdictional minimum. *Id.* at 682. The court reserved the question of the applicable standard of proof when a plaintiff pleads an amount of damages below the CAFA jurisdictional minimum. *Id.* at 682 n.8.

The Ninth Circuit had the opportunity to resolve this question in *Lowdermilk*. There, the plaintiff alleged that the amount in controversy did not exceed \$5 million. 479 F.3d at 996. The court held that where plaintiff makes such an allegation, a defendant must show to a legal certainty that the amount in controversy exceeds \$5 million to demonstrate CAFA

jurisdiction. *Id.* at 999. The court cited two fundamental principles of federal jurisdiction as the basis of its holding:

First, as federal courts, we are courts of limited jurisdiction and we will strictly construe our jurisdiction. . . .

Second, it is well established that the plaintiff is “master of her complaint” and can plead to avoid federal jurisdiction.

*Id.* at 998-99. (internal citations omitted).

Under this standard, a defendant cannot prove jurisdiction by simply extrapolating from the allegations of the complaint. *Id.* As the party with greater access to the most accurate information to calculate the amount in controversy, a defendant must present evidence from its own records to support jurisdiction. *Id.* at 1002 (“If Defendant, who is the only party with access to its employment records, cannot more accurately approximate the class size, Plaintiff cannot be expected to plead her case with any more specificity than she did.”).

*Lowdermilk* is based upon and consistent with the legal certainty standard set forth by this Court in *St. Paul Mercury Indemn. Co. v. Red Cab Co.*, 303 U.S. 283 (1938). There, this Court held that a plaintiff’s allegations as to the amount in controversy control if “made in good faith.” *Id.* at 288. To defeat the plaintiff’s allegations, it must appear to a “legal certainty” that the amount in controversy is different from the plaintiff’s allegations. *Id.* There is no

conflict between the Ninth Circuit's decision and authority of this Court.

*Lowdermilk* also does not conflict with the decisions from other courts of appeals cited by Petitioners. *Morgan v. Gay*, 471 F.3d 469 (3d Cir. 2006), involved state law claims for false advertising of defendant's skin cream. *Id.* at 471. The defendant removed the action to federal court under CAFA. *Id.* The Third Circuit applied the legal certainty standard and held that a removing defendant cannot rely on inconclusive assumptions to meet its burden of demonstrating CAFA jurisdiction. *Id.* at 475. Defendant failed to meet its jurisdictional burden because, among other things, it did not provide statistical sales information for the product. *Id.* at 476. The Third Circuit's decision is fully consistent with the decision below.

In *Strawn v. AT&T Mobility LLC*, 530 F.3d 293 (4th Cir. 2008), the issue addressed by the Fourth Circuit was whether plaintiffs could narrow their class definition on a motion to remand in order to avoid federal jurisdiction. *Id.* at 298. The court held that plaintiffs could not do so. *Id.* at 299. The Fourth Circuit concluded that the defendant had proved the CAFA jurisdictional minimum was met based on the original class definition in the complaint. *Id.* The court did not specify any particular standard for the level of proof defendant must present. There is no conflict between *Strawn* and the Ninth Circuit ruling in this case.

In *Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 401 (6th Cir. 2007), the Sixth Circuit cited to *Lowdermilk*, recognizing that CAFA does not change the traditional rule that plaintiff is the master of her complaint. *Id.* at 407. The Sixth Circuit affirmed a lower court ruling remanding the case to state court because the defendant could not demonstrate the jurisdictional minimum. *Id.* at 408. The defendant conceded that the amount of damages that the plaintiffs would likely recover was less than \$5 million. *Id.* at 407. The defendant argued nonetheless that the amount in controversy exceeded \$5 million because of the possibility that the plaintiffs might recover punitive damages. *Id.* at 408. The court rejected this argument because plaintiffs did not seek punitive damages, had disclaimed punitive damages, and punitive damages were generally not available for plaintiffs' breach of contract claims. *Id.* The amount or type of proof defendant must present to meet its burden was not at issue in *Smith*.

Petitioners cite to *Oshana v. Coca-Cola Co.*, 472 F.3d 506 (7th Cir. 2006) to support their argument that the Seventh and Ninth Circuits are split on the burden of proof for CAFA jurisdiction. *Oshana*, however, was filed before CAFA was enacted. *Id.* at 511 n.2. The Court's analysis relies solely on the state of the law prior to CAFA and is not evidence of a circuit conflict.

The Seventh Circuit's opinion in *Back Doctors Ltd. v. Metropolitan Prop. & Cas. Ins. Co.*, 637 F.3d

827 (7th Cir. 2011), also does not demonstrate disagreement with the decision below. In *Back Doctors*, the plaintiff alleged that the defendant violated the Illinois Consumer Fraud and Deceptive Business Practices Act by utilizing software that systematically underpaid doctors. *Id.* at 829. The parties did not dispute that at least \$2.9 million was in controversy. *Id.* The issue before the Seventh Circuit was whether a potential punitive damages recovery should be added to the undisputed amount in controversy. *Id.* Unlike the instant case, the plaintiff in *Back Doctors* did not specifically allege that the amount in controversy was under \$5 million. *Id.* at 830. The court thus applied a “preponderance of the evidence” standard. *Id.* at 829. This is consistent with the Ninth Circuit’s rule in *Abrego*, 443 F.3d at 683 (“Where the complaint does not specify the amount of damages sought, the removing defendant must prove by a preponderance of the evidence that the amount in controversy requirement has been met.”).

In *Bell v. The Hershey Co.*, 557 F.3d 953 (8th Cir. 2009), the Eighth Circuit held that a removing party bears the burden of establishing “by a preponderance of the evidence that the jurisdictional minimum is satisfied.” *Id.* at 956. Although the Eighth Circuit objected to the legal certainty standard used in *Lowdermilk* where a plaintiff specifically alleges that the amount in controversy is below \$5 million; ultimately, the *Bell* court reviewed the plaintiff’s complaint as if no allegations regarding the amount in controversy had been made. “Since we construe

Bell's petition as one that does not plead a specific sum, the preponderance burden would apply in any event." *Id.* at 958. Accordingly, that case does not present the factual predicate at issue here.

**B. The Petition Does Not Present any Question of Exceptional Importance Worthy of This Court's Attention.**

The petition does not present an important question warranting this Court's review. Although Petitioners repeatedly quote a passage from CAFA's legislative history stating that CAFA was designed to prevent plaintiffs' attorneys from "gaming the system" by "manipulating the pleadings," Petitioners fail to mention that CAFA deleted the one-year limit for removal set forth in 28 U.S.C. § 1446(b) for qualifying class actions. Thus, defendants who seek a federal forum, but cannot present sufficient facts at the outset to meet the legal certainty standard in cases where a plaintiff has expressly pled damages under the jurisdictional amount, are able to remove later if they can meet their burden of proof. This aspect of CAFA mitigates any potential of abuse by a plaintiff who alleges a low amount in controversy in bad faith to avoid CAFA jurisdiction. See *Lowdermilk*, 479 F.3d at 1002.

A slight delay in removing a case is an insignificant burden compared to the potential risk created by premature removal before the jurisdictional facts are available. Subject matter jurisdiction cannot be

waived by the parties. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1945 (2009); *Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 376 (9th Cir. 1997). If a court finds removal jurisdiction exists in a complex class action based solely on a speculative calculation of the amount in controversy, it is possible that all of the resources expended by the court and the litigants would be for naught if the facts ultimately demonstrate that the amount in controversy was below the jurisdictional threshold. In *Gaus v. Miles*, 980 F.2d 564 (9th Cir. 1992), for example, the court of appeals vacated a final judgment because it determined that it had no subject matter jurisdiction over the action because the amount in controversy requirement was not satisfied. The legal certainty standard adopted in *Lowdermilk* helps protect federal courts and litigants from unnecessarily expending resources on cases in which subject matter jurisdiction is speculative or uncertain.

### **C. The Ninth Circuit's Remand Decision Was Correct.**

The petition should also be denied because the Ninth Circuit's decision was correct. Petitioners failed to demonstrate that the jurisdictional minimum was satisfied here. The only facts presented by Petitioners consisted of skeletal declarations. (Pet. App. at 137-143.) These declarations simply state: 1) the total number of employees who worked for Petitioners in California in specific years; 2) an assumption of how many wage statements an employee would receive if



they worked every pay period during a particular year; 3) the typical operating hours for Petitioners' stores; and 4) general information regarding how employees are scheduled. (Pet. App. at 137-46.) These are the only facts underlying Petitioners' calculation of the amount in controversy.

The Ninth Circuit correctly held that Petitioners needed to show more to meet their jurisdictional burden:

Specifically, Defendants have provided no evidence regarding (1) the number of days per year worked by optechs, (2) the number of vacation days lost by employees due to the "use it or lose it policy," (3) how many employees' shifts exceeded five hours in length (which would determine their eligibility for meal breaks under California law), (4) how many employees may have used check cashing services, making them eligible to sue under California Labor Code §§ 212 and 213, and (5) the average hourly pay of employees who were actually separated from their employment during the four-year period at issue.

(Pet. App. at 3.) Given the absence of this basic information necessary to determine the amount in controversy, it is doubtful that Petitioners could even meet a more relaxed standard. The preponderance of the evidence standard demands a "fact intensive" inquiry. *Bell*, 557 F.3d at 959. And it is the removing defendant's obligation to present those facts. *Id.* at 956; *Abrego*, 443 F.3d at 683. Based on the facts

presented here, the Ninth Circuit's decision was correct and should be affirmed.



### CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES R. PATTERSON

*Counsel of record*

ALLISON H. GODDARD

PATTERSON LAW GROUP, APC

402 W. Broadway, 29th Floor

San Diego, CA 92101

(619) 398-4760

jim@pattersonlawgroup.com

*Attorneys for Respondent Debra Johnson*

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