Case No. G059561

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT

DIVISION THREE

CALIFORNIA BUSINESS & INDUSTRIAL ALLIANCE,
Petitioner

v.

XAVIER BECERRA, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Respondent

FROM THE SUPERIOR COURT FOR ORANGE COUNTY
HON. PETER J. WILSON
SUPERIOR COURT CASE NO. 30-2018-01035180-CU-JR-CXC

PETITIONER CALIFORNIA BUSINESS & INDUSTRIAL ALLIANCE'S OPENING APPELLATE BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Cal. Rules of Court, Rule 8.208)

The following entities or persons have either (1) an ownership interest of 10 percent or more in the party or parties filing this certificate (Cal.Rules of Court, Rule 8.208(e)(1)) or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves (Cal. Rules of Court, rule 8.208(e)(2)):

- California Business & Industrial Alliance
- Xavier Becerra, Attorney General of the State of California

DATED: May 11, 2021

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The trial court made this court's job easy by holding that dictum statements from *Iskanian v. CLS Transportation Los Angeles, LLC* ("*Iskanian*") preclude any claim that the California Private Attorney General Act ("PAGA") violates the separation of powers doctrine, "*regardless of whether it is based on new theories or facts*." (Clerk's Transcript ("CT"), Vol. 2, p. 490, emphasis added, citing *Iskanian* (2014) 59 Cal.4th 348, 360.) By neglecting the elementary principle that cases are not authority for propositions they do not consider, the trial court committed reversible error.

Petitioner California Business & Industrial Alliance's ("CABIA") claim that PAGA strips the *executive branch* of its core prosecutorial functions by placing those powers in the hands of unchecked private PAGA plaintiffs is distinct from the separation of powers question *Iskanian* addressed – i.e., whether PAGA undermines the *judiciary's* authority to regulate the neutrality of public prosecutors. *Iskanian* is also inapposite

because CABIA's First Amended Complaint alleges facts that did not exist when *Iskanian* was decided.

Critically, after the California Supreme Court decided *Iskanian,* the Department of Industrial Relations (DIR) complained to the Legislature that the deficiencies in PAGA's qui tam notice provisions paired with the Labor and Workforce Development Agency's (LWDA) lack of prosecutorial resources operate in tandem to prevent the LWDA from investigating and/or responding to ninety-nine percent of the PAGA notices it receives. (CT, Vol. 2, pp. 346-347, ¶¶ 38 (a), (d).) *Ninety-nine percent!* That means that nearly every individual that commences a PAGA action is empowered to prosecute claims as the state's proxy and bind the state to the resulting judgment simply by sending a letter to the LWDA, which the LWDA admits sits in a proverbial stack on a shelf that nobody looks at.

Amidst this backdrop, Respondent's opposition to CABIA's constitutional challenge to PAGA is perplexing. After all, Respondent has a constitutional mandate to ensure that the

state's laws are uniformly and adequately enforced, and Respondent's executive branch colleagues at the LWDA have unequivocally admitted that PAGA enforcement is anything but uniform or adequate. Still, Respondent – i.e., the Attorney General – has no objection to the Legislature's delegation of unchecked executive powers to "private attorney generals," even though the statute's very name signals the Legislature's intent to usurp Respondent's role as the state's chief law enforcement officer.

CABIA's First Amended Complaint alleges sufficient facts to state a claim that PAGA violates the separation of powers doctrine by effectively creating a fourth branch of government consisting of unchecked private attorney generals.

And because the trial court relied exclusively on *Iskanian* to sustain Respondent's demurrer to the First Amended Complaint, it never considered whether PAGA provides sufficient mechanisms of executive control over PAGA plaintiffs to prevent the usurpation of the executive branch's prosecutorial discretion

and authority. This "sufficient control" standard should have been applied to CABIA's present challenge. Under that standard, CABIA alleges that PAGA's statutory framework, its real-world application, and the judicial decisions that have shaped it create a class of qui tam plaintiffs who wield unchecked, unprecedented, and unconstitutional executive powers. Accordingly, CABIA respectfully requests that this Court reverse the trial court order sustaining Respondent's demurrer to the First Amended Complaint so that it can proceed in proving its claims.

II. BACKGROUND

This appeal is limited to the portion of the trial court's order sustaining Respondent's demurrer to the first cause of action in CABIA's First Amended Complaint alleging that PAGA violates California's separation of powers doctrine. Accordingly, the following procedural background pertains only to those portions of the record pertinent to CABIA's appeal.

A. CABIA's Initial Complaint, Respondent's Demurrer, and the Trial Court's Order

On November 28, 2018, CABIA filed a Complaint for injunctive and declaratory relief alleging that PAGA violates: (1) the California separation of powers doctrine; (2) the procedural due process protections of the United States Constitution's Fourteenth Amendment; (3) the substantive due process protections of the United States Constitution's Fourteenth Amendment; (4) the procedural due process protections of the California Constitution; (5) the substantive due process protections of the California Constitution; (6) the United States Constitution's Eighth Amendment; (7) the excessive fines and unusual punishment protections of the California Constitution; (8) the United States Constitution's Fourteenth Amendment guarantee of equal protection of the laws; and (9) the California Constitution's equal protection clause. (CT, Vol. 1, pp. 37–90.)

On February 1, 2019, Respondent filed a demurrer to CABIA's Complaint arguing, in pertinent part, that *Iskanian* bars CABIA's separation of powers claim. Respondent's argument hinged on *Iskanian's* finding that PAGA is a "species of qui tam

statute, and that separation of powers does not preclude the Legislature from 'enlisting willing citizens in the task of civil enforcement' as qui tam plaintiffs." (CT, Vol. 1, p. 121, citing *Iskanian, supra*, 59 Cal.4th at p. 390.) Separately, Respondent argued that PAGA does not violate the separation of powers doctrine because PAGA provides for judicial review and approval of PAGA settlements. (CT, Vol. 1, p. 122.)

In opposing Respondent's demurrer to the Complaint, CABIA argued: (1) PAGA impermissibly delegates executive powers to PAGA plaintiffs; (2) *Iskanian* did not consider the factual allegations upon which CABIA's separation of powers claim is based; (3) PAGA is distinguishable from other types of qui tam actions because it does not accord the executive branch sufficient control over PAGA plaintiffs; and (4) judicial review of PAGA settlements does not absolve the executive branch of its constitutional obligation to control law enforcement actions prosecuted on behalf of the state. (CT, Vol. 1, pp. 162–167.)

On March 28, 2019, the trial court sustained Respondent's demurrer to CABIA's separation of powers claim with leave to amend.[1] (CT, Vol. 1, p. 234.) It reasoned that because "[a] PAGA representative action is [ ] a type of qui tam action [...] no additional government oversight is necessary" over a PAGA plaintiff if the LWDA "does not choose to pursue a claim." (CT, Vol. 1, p. 234, citing *Iskanian, supra*, 59 Cal.4th at pp. 382, 390–391.) The trial court asserted that CABIA provided "*no authority for the proposition that the government must oversee, have control, or be involved in a qui tam action*." (CT, Vol. 1, p. 234, emphasis added.) Further, it found that *Iskanian* "explicitly rejected that the government-supervision requirement set forth in [*People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740] and [*County of*

[1] Although CABIA's appeal is confined to the trial court's order dismissing the separation of powers claim in the First Amended Complaint, the trial court's reasons for sustaining Respondent's first demurrer highlight the analytical deficiencies informing its ultimate holding.

Santa Clara v. Superior Court (2010) 50 Cal.4th 35] applies to qui tam actions."[2] (CT, Vol. 1, p. 234.)

B. CABIA's First Amended Complaint, Respondent's Demurrer, and The Trial Court's Order

On July 12, 2019, CABIA filed a First Amended Complaint for injunctive and declaratory relief alleging that PAGA violates: (1) California's separation of powers doctrine; (2) the procedural due process protections of the United States Constitution; (3) the substantive due process protections of the United States Constitution; (4) the guarantee of equal protection of the laws in the United States Constitution's Fourteenth Amendment; and (5) the guarantees of the California Constitution's equal protection clause. (CT, Vol. 2, pp. 337–401.)

The First Amended Complaint supplemented the allegations in CABIA's initial complaint by alleging, *inter alia*: (1) PAGA "vests private citizens with executive power without providing executive oversight" (CT, Vol. 2, p. 338, ¶ 3); (2) the

[2] CABIA's separation of powers claim does not rely on the government-supervision requirements in *Clancy* or *Santa Clara.*

DIR has advised the legislature that it has insufficient funding and staff to review and investigate PAGA notices (*id.* at pp. 346-347, ¶ 38); (3) less than 1% of PAGA notices are reviewed or investigated due to underfunding and understaffing of the LWDA (*id.* at pp. 346-347, ¶ 38 (a), (d); *id.* at p, 348, ¶40 (a)–(b)); (4) the DIR has insufficient time to cite or settle PAGA claims before losing the ability to forestall private litigation (*id.* at p. 347, ¶ 38(e); see *id.* at pp. 367–368, ¶¶ 90–95); (5) workers and the state have been "shortchanged" by PAGA settlements and judicial review of such settlement does not provide adequate assurance of fair settlements (*id.* at p. 347, ¶ 38(b), (h)); (6) the DIR does not receive notice or have opportunity to object to PAGA settlements (*id.* at p. 349, ¶ 39(d)); and (7) "in the typical PAGA case, the choice to file, prosecute, settle, or try PAGA claims are within the complete and unfettered control of the aggrieved employees and/or their contingency-fee plaintiffs' attorneys." (*Id.* at p. 376, ¶ 113.)

On August 8, 2019, Respondent demurred to CABIA's First Amended Complaint. (CT, Vol. 2, pp. 404–424.) In pertinent part, Respondent's demurrer argued that: (1) PAGA does not violate Article V, section 13 of the California Constitution because that provision only concerns enforcement of criminal laws[3] (*id.* at pp, 422-423); and (2) the Attorney General's duty to enforce the laws is only discretionary, and thus, PAGA does not usurp the Attorney General's constitutional function. (*Id.* at p. 423.) Notably, Respondent's second demurrer did not argue that *Iskanian* barred CABIA's separation of powers claim.

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[3] Respondent's argument directly contradicts the position it recently advocated for as *amicus curia* in *Abbott Laboratories v. Superior Court of Orange County* (2020) 9 Cal.5th 642 ("*Abbott*"). There, the Attorney General argued that he is the State's "chief law officer" and that local prosecutors may only sue and obtain judgments under the UCL to address misconduct occurring within the prosecutor's city or county. (2019 CA S. Ct. Briefs 2019 WL 1409955 (Cal.), at 11.) In the lower court, the Attorney General argued that "[a] true statewide prosecution must involve the Attorney General." (CA App. Ct. Briefs, 2017 WL 6939447, 19, fn. 7.) Thus, the Attorney General apparently contends that local prosecutors bringing claims under the Unfair Competition Law should be subject to more executive control than PAGA qui tam plaintiffs.

In opposition, CABIA argued that: (1) PAGA defeats or materially impairs the executive's power to enforce statutes on behalf of the state and impedes the Attorney General's exercise of the authority embodied in Section 13 of the California Constitution; (2) Section 13 of the California Constitution is not limited to criminal actions; and (3) legislative action that deprives an administrative agency of the resources to carry out its oversight function violates the separation of powers doctrine. (CT, Vol. 2, pp. 434–438.)

On September 11, 2019, the trial court sustained Respondent's demurrer to CABIA's separation of powers claim without leave to amend. Although Respondent did not rely on *Iskanian* in its demurrer, the Court *sua sponte* invoked *Iskanian* and held that *Iskanian* "precludes any separation of powers claim under the California Constitution *regardless of whether it is based on new theories or facts*." (CT, Vol. 2, p. 490, emphasis added.)

On August 24, 2020, the trial court entered judgment in favor of Respondent. (CT, Vol. 2, p. 498.)

III. STATEMENT OF APPEALABILITY

The August 24, 2020, judgment is appealable under California Code of Civil Procedure, section 904.1(a)(1).

On October 20, 2020, CABIA timely filed a notice of appeal. (CT, Vol. 2, p. 504.) On February 22, 2021, and April 26, 2021, the parties jointly stipulated to extend CABIA's deadline to file an opening brief until May 11, 2021.

CABIA appeals the portion of the trial court's September 11, 2019, order sustaining Respondent's demurrer to the first cause of action alleging that PAGA violates California's separation of powers doctrine.

IV. STANDARD OF REVIEW

On review of an order sustaining a demurrer without leave to amend, the standard of review is de novo; this Court exercises its "'independent judgment about whether the complaint states a cause of action as a matter of law.'" (*Levy v. State Farm Mutual Automobile Ins. Co.* (2007) 150 Cal.App.4th 1, 5, citing *Santa*

Teresa Citizen Action Group v. State Energy Resources Conservation & Development Com. (2003) 105 Cal.App.4th 1441, 1445.) This Court treats "the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Levy, supra*, at p. 5, citing *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) It also considers "matters which may be judicially noticed." (*Levy, supra*, at p. 5.) Further, this Court gives the complaint a "reasonable interpretation, reading it as a whole and its parts in their context." (*Ibid.*)

The Court should construe the complaint "liberally . . . with a view to substantial justice between the parties." (Code Civ. Proc., § 452.) If the complaint states a cause of action on any possible legal theory, the Court must reverse the trial court's order sustaining the demurrer. (*Palestini v. General Dynamics Corp.* (2002) 99 Cal.App.4th 80, 86.)

V. ARGUMENT

The trial court committed reversible error by sustaining Respondent's demurrer to the separation of powers claim in CABIA's First Amended Complaint.

The trial court's error flows from its expansive reading of *Iskanian* and its disregard for the elementary principle that "cases are not authority for propositions that are not considered." (See, e.g., *Kim v. Reins Int'l California, Inc.* (2020) 9 Cal.5th 73, 85, fn. 4, citing *California Building Industry Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1043.)

Despite acknowledging that CABIA's separation of powers claim involved "new theories or facts" that *Iskanian* never considered, the trial court held that *Iskanian* barred any constitutional challenge to PAGA. (See CT, Vol. 2, p. 490.) As a result, the trial court's conclusory order never reached the substance of CABIA's separation of powers claim – i.e., whether PAGA accords "sufficient control" over the delegation of executive powers.

As set forth in Section V.A below, both California and Federal courts have considered statutes that "diminish the executive branch's authority" by delegating core executive powers to non-executive branch actors. (See *U.S. ex rel. Kelly v. Boeing Co.* (9th Cir. 1993) 9 F.3d 743, 750 ("*Boeing*").) In this context, courts look to the relative degree of control accorded to or usurped from the executive branch. (See *ibid.* [separation of powers requires the executive branch to retain "sufficient control" over qui tam plaintiffs]; *Abbott, supra*, 9 Cal.5th at pp. 659–660 [the Attorney General retains ultimate "control and accountability" over the prosecution of civil penalties].)

Section V.B outlines the executive branch's role in the enforcement of California labor laws, and highlights CABIA's allegations demonstrating how PAGA divests the executive branch of control over PAGA enforcement actions. Section V.C discusses prior constitutional challenges to the Federal False Claims Act ("FCA") and California's Unfair Competition Law ("UCL"), and distinguishes PAGA's statutory framework from the

FCA and UCL. Finally, Section V.D explains how the trial court erred when it failed to analyze the sufficiency of the executive control mechanisms in PAGA and expanded *Iskanian* to bar any separation of powers challenge to PAGA.

A. The Legal Standard Applicable to CABIA's Separation of Powers Claim is whether PAGA Provides the Executive Branch "Sufficient Control" Over PAGA Plaintiffs

1. California's Separation of Powers Doctrine

The separation of powers doctrine is a bedrock principle of our tripartite system of government intended to ensure that the coordinate branches of government are subject to sufficient checks and balances. (See *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 53.)

The California Supreme Court has articulated the "classic understanding of the separation of powers doctrine—that the legislative power is the power to enact statutes, the executive power is the power to execute or enforce statutes, and the judicial power is the power to interpret statutes and to determine their

constitutionality." (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1068.)

"[T]he primary purpose of the separation of powers doctrine 'is to prevent the combination in the hands of a single person or group of the basic or fundamental powers of government.'" (*Coastside Fishing Club v. California Resources Agency* (2008) 158 Cal.App.4th 1183, 1204, citing *Parker v. Riley* (1941) 18 Cal.2d 83, 89.) To effectuate this purpose, the doctrine prohibits any of the three branches of government from defeating or materially impairing the core functions of another branch. (See *Carmel Valley Fire Protection Dist. v. State* (2001) 25 Cal.4th 287, 297 ("*Carmel Valley*"), citations omitted.)

The doctrine "is not intended to prohibit one branch from taking action properly within its sphere that has the *incidental* effect of duplicating a function or procedure delegated to another branch." (*Carmel Valley, supra*, 25 Cal.4th at p. 298.) Rather, the doctrine is intended to prevent the usurpation of certain "core" or "essential" functions vested in each branch by the Constitution.

(*People v. Bunn* (2002) 27 Cal.4th 1, 14.) Thus, courts "'have not hesitated to strike down provisions of law that [...] undermine the authority and independence of one or another coordinate Branch.'" (*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 493, citing *Mistretta v. United States* (1989) 488 U.S. 361, 382.)

2. The Federal Separation of Powers Analysis is Applicable to CABIA's Separation of Powers Claim

Although there are differences between the California and United States Constitutions, the California Supreme Court has found that the United State Supreme Court's separation of powers analysis is both consistent with and persuasive for state separation of powers purposes. (See, e.g., *Bunn*, *supra*, 27 Cal.4th at 5, citing *Plaut v. Spendthrift Farm, Inc.* (1995) 514 U.S. 211; *Obrien v. Jones* (2000) 23 Cal.4th 40, 67 ["the federal experience is instructive in construing the separation of powers guarantee of the state Constitution."] (dis. opn. of Kennard, J.); see also *National Paint & Coatings Assn. v. State of California* (1997) 58 Cal.App.4th 753, 762 ("*National Paint*") [California's "separation of powers analysis essentially follows the federal framework"].)

The federal separation of powers doctrine is violated by "provisions of law that *either* accrete to a single Branch powers more appropriately diffused among separate Branches *or* that undermine the authority and independence of one or another coordinate Branch." (*Mistretta, supra*, 488 U.S. at p. 382, emphasis added; see *Kasler, supra*, 23 Cal.4th 472, 493, citing *Mistretta, at p. 382*; *Carmel Valley, supra*, 25 Cal.4th at p. 297, citing *Kasler*, at p. 493.)

A statute violates the separation of powers doctrine if it "impermissibly undermine[s] the powers of the Executive Branch, or disrupt[s] the proper balance between the coordinate branches by preventing the Executive Branch from accomplishing its constitutionally assigned functions." (*Morrison v. Olson* (1988) 487 U.S. 654, 695; *Mistretta, supra*, 488 U.S. at p. 383 [same].) Such a disruption occurs when a statute fails to provide the executive branch "sufficient control" over executive functions to ensure that the executive branch is able to perform its

"constitutionally assigned duties." (*Morrison, supra*, 487 U.S. at p. 696.)

California courts have likewise analyzed challenges involving whether a statute impairs executive functions by looking to the mechanisms of executive control. (See, e.g., *California Assn. of Retail Tobacconists v. State of California* (2003) 109 Cal.App.4th 792, 832–833 [finding no separation of powers violation because statute granting executive powers to a commission contains "many executive controls" and does "not create unchecked power"]; *National Paint, supra*, 58 Cal.App.4th at 757–758 [separation of powers claim failed to allege sufficient facts to state a claim that the "Attorney General's ability to supervise and control enforcement of the [Safe Drinking Water and Toxic Enforcement Act] has been subverted by private enforcement."].)

B. CABIA Alleges Sufficient Facts to State a Claim that PAGA Violates Separation of Powers by Divesting the Executive Branch of Sufficient Control over PAGA Litigation

CABIA's First Amended Complaint alleges sufficient facts to state a claim that PAGA's "statutory provisions as a whole, viewed from a realistic and practical perspective, operate to defeat or materially impair the executive branch's exercise of its constitutional functions." (See *Marine Forests Society v. Cal. Coastal Com.* (2005) 36 Cal.4th 1, 45.) Put differently, CABIA alleges PAGA fails to accord sufficient executive control over PAGA plaintiffs' exercise of the executive branch's prosecutorial authority. (See *ibid.* [noting separation of powers violated by statutes that "improperly intrude upon a core zone of executive authority, impermissibly impeding the Governor (or another constitutionally prescribed executive officer) in the exercise of his or her executive authority or functions."].)

1. The Enforcement and Prosecution of Labor Code Violations is a Core Function of the Executive Branch

The core zone of executive authority at issue here concerns the enforcement and prosecution of California labor laws, and more specifically, the civil penalties prescribed by PAGA. (CT, Vol. 2, pp. 344 –347, ¶¶ 31–38, *id.* at pp. 371–372, ¶¶ 102–103; see *Perry v. Brown* (2011) 52 Cal.4th 1116, 1167 ["[T]he role of California's executive branch officials is to enforce statutory laws…"] (conc. opn. of Kennard, J.) citing *Lockyer*, *supra*, 33 Cal.4th at p. 1068.)

It is well established that the powers "specially conferred by the constitution upon the governor, or upon any other specified officer, the legislature cannot require or authorize to be performed by any other officer or authority; and from those duties which the constitution requires of him he cannot be excused by law." (*State Bd. of Ed. v. Levit* (1959) 52 Cal.2d 441, 461, citation omitted.) Further, "those matters which the constitution specifically confides to [a specified body or agency] the legislature cannot directly or indirectly take from his control." (*Ibid.*)

The California Constitution provides that "[t]he supreme executive power of this State is vested in the Governor. The Governor shall see that the law is faithfully executed." (Cal. Const., art. V, § 1.) "Subject to the powers and duties of the Governor," the Attorney General serves as the "the chief law officer of the State," and has a constitutional duty "to see that the laws of the State are uniformly and adequately enforced." (Cal. Const., art. V, § 13.)

The LWDA is a cabinet-level agency that houses several departments, boards, and panels. (Gov. Code, §§ 12800, 12813.) The LWDA's role is to exercise general supervision over its subordinate entities and advise the Governor on policies and programs within its purview. (Gov. Code, §§ 15554, 15555.)

The DIR is one of the LWDA's constituent departments. (Lab. Code, § 50.) The DIR's role is to improve working conditions for California's wage earners and to advance their opportunities for profitable employment. (Lab. Code, § 50.5.) The Division of Labor Standards Enforcement (DLSE) is a division of the DIR.

(Lab. Code, §§ 56, 79, 82, subd. (b)).) "The DLSE enforces wage and labor standards and all labor laws not specifically delegated to another agency (e.g., Fair Employment and Housing Administration, Division of Occupational Safety and Health, or Division of Workers' Compensation)." (*Rebolledo v. Tilly's, Inc.* (2014) 228 Cal.App.4th 900, 913–914.) The DLSE adjudicates administrative complaints alleging violations of state labor laws, including employees' claims for unpaid wages. (Lab. Code, § 98.) The DLSE also maintains an "administratively and physically separate" enforcement unit "to ensure that minimum labor standards are adequately enforced[.]" (Lab. Code, § 90.5, subd. (b).)

The DLSE is led by the Labor Commissioner ("Commissioner"), whose responsibilities include oversight of the DLSE's adjudicatory operations. (Lab. Code, §§ 79–90.5.) The Commissioner is "appointed by the Governor, subject to confirmation of the Senate," and holds office at the pleasure of the Director of Industrial Relations. (Lab. Code, §§ 79, 82, subd.

(b).) The Commissioner "has broad authority to reject, investigate, adjudicate, or litigate (on behalf of the employee), depending on the nature of the employee's claim." (*Rebolledo, supra*, 228 Cal.App.4th at p. 914, citing Lab. Code, §§ 96, 96.7, 98, 98.3, 1193.6.)

The Commissioner is authorized to investigate and oversee employee complaints through the *Berman* hearing process (Lab. Code, § 98, subd. (a)), or prosecute violations by filing a civil action. (Lab. Code, § 98.3, 1193.6.) Thus, "[t]he Labor Code generally gives the [DLSE] the authority to enforce the provisions of the Labor Code and all state labor laws the enforcement of which is not specifically vested in any other officer, board, or commission." (*Noble v. Draper* (2008) 160 Cal.App.4th 1, 13.)

The Governor and the Attorney General's constitutional obligation to enforce the laws and the statutory roles of the LWDA and its subordinate agencies demonstrate that the prosecution of civil penalties for Labor Code violations falls squarely within the core functions of the executive branch. (See

Arias v. Superior Court (2009) 46 Cal.4th 969, 986 ["an action to recover civil penalties 'is fundamentally a law enforcement action designed to protect the public and not to benefit private parties'"], citing *People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 17; see also *People v. Cimarusti* (1978) 81 Cal.App.3d 314, 323–324 ["Although the prosecution in this case is civil in nature, resulting in the imposition of civil penalties rather than criminal sanctions, the situation is analogous to a criminal proceeding with respect to the division of power between the executive and judicial branches of the government."].)

2. CABIA Alleges PAGA's Statutory Framework Undermines the Executive Branch's Prosecutorial Discretion and Authority over PAGA Enforcement

CABIA alleges that PAGA's statutory framework divests the executive branch of its prosecutorial discretion and authority by providing for nothing more than a façade of executive control over PAGA litigation. (See CT, Vol. 2, p. 375, ¶109 ["The State of California plays almost no role in a PAGA action."].) The only ostensible executive control that PAGA provides for appears in

the statute's qui tam "notice" provisions, but as explained in Section V.B.2(a), those provisions are facially defective. In fact, PAGA's notice provisions undermine the LWDA's prosecutorial authority by permitting prospective PAGA litigants to commence a civil action based on unsubstantiated allegations that the LWDA is not required to review.

As explained in Section V.B.2(b), CABIA alleges that PAGA's facial deficiencies are borne out in application because the LWDA does not review or investigate 99% of the PAGA notices it receives. Consequently, PAGA enforcement rests almost entirely in the hands of private parties purporting to represent the state's interests by prosecuting claims the state has never reviewed.

Finally, Section V.B.2(c) disposes of any argument that other provisions in PAGA grant the executive branch sufficient control over PAGA enforcement.

(a) On its Face, PAGA's Statutory Framework Violates the Separation of Powers Doctrine by Undermining the Executive Branch's Prosecutorial Discretion

On its face, PAGA's statutory framework violates the separation of powers doctrine by allowing PAGA plaintiffs to commence a civil action after filing a PAGA notice even if the LWDA never reviews, investigates, or responds to such notice. (See Lab. Code, § 2699.3, subd. (a)(1)–(2) [authorizing commencement of a civil action if the LWDA does not respond within 65 days]; see generally Lab. Code, §2699 *et seq.* [containing no requirement that the LWDA review, investigate or respond to PAGA notices].)[4] In such a scenario, PAGA plaintiffs are authorized to prosecute civil penalties on behalf of the state

[4] CABIA does not challenge PAGA's qui tam provisions applicable to OSHA claims because section 2699.3(b) prohibits an aggrieved employee from commencing a civil action for an OSHA violation unless the Division of Occupational Safety and Health has investigated such claims pursuant to OSHA's procedures. (Lab. Code § 2699.3, subd. (b)(2).) If the Division fails to issue a citation, the aggrieved employee may pursue a writ. (Lab. Code § 2699.3, subd. (b)(2)(A)(ii).) Because PAGA's OSHA provisions require the Division to investigate claims and the Division can oppose any writ, those provisions do not trigger the separation of powers concerns apparent in section 2699.3(a).

and bind the state to any resulting judgment or settlement (see *Arias, supra*, 46 Cal.4th at p. 986; Lab. Code, § 2699.3, subd. (a)(2)), even though the executive branch has no authority to supervise, intervene in, or assert control over a PAGA action once a civil suit begins. This is the essence of a separation of powers violation. (See, e.g., *Carmel Valley, supra*, 25 Cal.4th at p. 297 [separation of powers violated when one branch's core functions are defeated or materially impaired].)

CABIA will prove that, although PAGA purports to grant the LWDA discretion to investigate PAGA notices, when "viewed from a realistic and practical perspective," (see *Marine Forests Society, supra*, 36 Cal.4th at p. 45), PAGA's perfunctory notice provisions operate to divest the executive branch of its prosecutorial discretion. That is because by design, a PAGA notice consists of "mere allegations" unsupported by evidence and PAGA does not contain penalties to deter the filing of frivolous PAGA notices. (See CT, Vol. 2, pp. 372–373, ¶ 105, citing *Williams v. Superior Court* (2017) 3 Cal.5th 531, 546 ["If the

Legislature intended to demand more than mere allegations as a condition to the filing of suit or preliminary discovery, it could have specified as much."].) CABIA will prove that these notice provisions have predictably caused the LWDA to be inundated with an inordinate number of PAGA notices, thereby hamstringing the LWDA's ability to review or investigate PAGA notices. (CT, Vol. 2, pp. 346–347, ¶ 38.) In other words, because the "substance" of a PAGA notice prevents the LWDA from determining whether the claims alleged have any merit and PAGA does not require the LWDA to review – much less investigate – PAGA notices, PAGA's statutory framework permits the LWDA to ignore the PAGA notices it receives. (*Id.* at p. 348, ¶ 40 ["As a practical matter, the typical PAGA notice will not get reviewed or investigated unless someone calls it to the special attention of the LWDA."].) Resultantly, the LWDA does not, in practice, exercise any discretion in investigating PAGA notices, and thus, the underlying purpose of PAGA's notice provisions are defeated. (See *Thompson Pacific Construction, Inc. v. City of*

Sunnyvale (2007) 155 Cal.App.4th 525, 539, citing *Rojo v. Kliger* (1990) 52 Cal.3d 65, 83 [administrative remedies and exhaustion requirements serve the "salutory [sic] goals of easing the burden on the court system, maximizing the use of administrative agency expertise and capability to order and monitor corrective measures, and providing a more economical and less formal means of resolving the dispute."].)

These features of PAGA's perfunctory notice provisions are readily distinguishable from those in other California qui tam statutes, which traditionally require that a qui tam plaintiff satisfy some evidentiary threshold before commencing a civil action. (See, e.g., Health & Safety Code, § 25249.7, subd. (d)(1) [a private person prosecuting under Proposition 65 must execute a certificate of merit indicating "there is a reasonable and meritorious case for the private action" based on an expert's review of "facts, studies, or other data"]; Gov. Code, § 12652, subd. (c)(2) –(3) [relator filing complaint under the California False Claims Act must file complaint in camera, the complaint

stays under seal for up to 60 days, and the relator must, at the time of filing, serve "the Attorney General with a copy of the complaint and a written disclosure of substantially all material evidence and information the person possesses."].) PAGA also does not penalize the filing of frivolous claims like other California qui tam statutes. (See, e.g., Health & Saf. Code, § 25249.7, subd. (d)(1) (h)(2) [if "no credible factual basis" supports a Proposition 65 claim, "then the action shall be deemed frivolous within the meaning of Section 128.5 of the Code of Civil Procedure."]; Gov. Code, § 12652, subd. (g)(9) [California False Claims Act relator must pay a defendant's reasonable attorneys' fees and expenses if "the claim was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment."].) In the absence of any comparable provisions, PAGA sets a low bar for the filing of PAGA notices. Not surprisingly, this low bar has caused legions of claim letters to be filed with the LWDA, and because those letters contain nothing to aid the executive branch's review or determination of whether to prosecute the case

or allow the private plaintiff to do so, PAGA eviscerates the executive branch's prosecutorial discretion over PAGA enforcement.

These facial deficiencies in PAGA's perfunctory notice provisions are compounded by PAGA's inflexible deadlines governing the LWDA's time to respond to or investigate a PAGA notice. In the exceptionally rare circumstance in which the LWDA responds to a PAGA notice within the allotted 65 days, the LWDA only has 120 days to investigate the allegations and issue a citation. (Lab. Code, § 2699.3, subd. (a)(2)(B).) But if either the 65 day PAGA notice period or the 120 day citation period expires before the LWDA acts, a PAGA plaintiff may commence a civil action "as the proxy or agent of the state's labor law enforcement agencies" (*Arias, supra,* 46 Cal.4th at p. 986) without any executive oversight. This is the essence of a separation of powers violation. (See *Morrison, supra,* 487 U.S. at p. 658 [separation of powers requires the executive branch retain sufficient control over executive functions]; *Abbott, supra*, 9

Cal.5th at pp. 659–660 ["the ultimate locus of control and accountability" for the prosecution of civil penalties rests with the Attorney General].)

(b) CABIA Alleges that the Application of PAGA's Notice Provisions Divest the Executive Branch of its Prosecutorial Authority over PAGA Enforcement

CABIA will also prove that the facial deficiencies in PAGA's perfunctory notice provisions have been borne out in reality. Indeed, CABIA alleges that the LWDA reviews or responds to less than 1% of all of the PAGA notices it receives. (See CT, Vol. 2, p. 368, ¶ 92.) Thus, in addition to CABIA's facial challenge to PAGA, CABIA also alleges sufficient facts to state an as applied claim that PAGA violates the separation of powers doctrine. (See *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084 ["An as applied challenge may seek … an injunction against future application of the statute or ordinance in the allegedly impermissible manner it is shown to have been applied in the past."].)

Additionally, CABIA alleges that the Legislature has denied the LWDA sufficient resources to review and investigate PAGA notices and rejected the LWDA's requests to extend the statutory deadlines for its review and investigation of PAGA notices. (CT, Vol. 2, pp. 346–349, ¶¶ 38–41; *id.* at p. 375, ¶ 109.) As a result of the Legislature's failure to address the LWDA's concerns, PAGA continues to violate separation of powers principles by transferring the executive branch's prosecutorial discretion into the hands of private prosecutors without providing for any degree of executive control over such prosecutions. (See *Hicks v. Board of Supervisors* (1977) 69 Cal.App.3d 228, 244 ["Although the board of supervisors has wide discretion in budgetary matters… the law does not vest the board with authority to transfer control of one officer's statutory function to another officer."]; *Scott v. Common Council* (1996) 44 Cal.App.4th 684, 688–689 [noting judicial intervention in the budgetary process is appropriate when factual findings establish that "budget cuts in the office of an elected official prevent that official

from carrying out his mandated duties."]; see also *Carmel Valley, supra*, 25 Cal.4th at p. 302 [finding no separation of powers violations because the challenged legislative action did not deprive "the administrative agency of the resources necessary to carry out its function."].) Accordingly, because PAGA creates a unique breed of qui tam plaintiff authorized to prosecute civil penalties on behalf of the state without any executive checks, CABIA alleges sufficient facts to state a claim that PAGA is unconstitutional, both facially and as applied.

(c) No Other Provisions in PAGA Provide for Sufficient Executive Control over PAGA Enforcement

Like PAGA's qui tam notice provisions, the only other provisions in PAGA that arguably provide for executive control fail to place any meaningful check on PAGA plaintiffs.

First, Labor Code section 2699(h) prohibits an aggrieved employee from initiating a civil action if the executive branch (1) issues a citation within the timeframes set forth in Labor Code section 2699.3, or (2) initiates a proceeding pursuant to Labor Code section 98.3. However, as noted previously, the LWDA

almost never issues a citation in response to a PAGA notice. Additionally, given that the legislature enacted PAGA in response to the government's lack of "resources to enforce the Labor Code," (see *Iskanian, supra*, 59 Cal.4th at p. 390), prohibiting PAGA actions that are duplicative of proceedings initiated pursuant to Labor Code section 98.3 has no practical effect on the majority of PAGA notices filed with the LWDA. Moreover, section 2699(h) does not alter the fact that PAGA provides no executive control over almost every PAGA plaintiff because PAGA notices never get reviewed by the LWDA before they are authorized to prosecute civil penalties on behalf of the state.

Second, PAGA's provision that requires a PAGA plaintiff to serve the LWDA with "a file-stamped copy of the complaint that includes the case number assigned by the court" ten days *after* commencing a civil suit does not provide any executive control on PAGA plaintiffs. (Lab. Code, § 2699, subd. (l)(1).) Like PAGA's notice provisions, section 2699(l)(1) does not require the LWDA to

review the complaints it receives (it most likely does not review them). Even if it did, PAGA does not authorize the LWDA to intervene in or assert control over PAGA actions. The same rationale applies to PAGA's provisions requiring that settlements, judgments and other orders in PAGA cases be served on the LWDA. (See Lab. Code, § 2699, subd. (l)(2)–(3).) The LWDA's mere receipt of PAGA complaints, settlements and judgements simply does not provide for any executive control or cure the constitutional defects in PAGA.

Nor does judicial approval of PAGA settlements cure the separation of powers violation CABIA alleges. (Lab. Code, § 2699.3, subd. (b)(4).) After all, the Legislature is not empowered to reassign Constitutional functions of the executive branch to the judiciary. (See, e.g., *Carmel Valley, supra*, 25 Cal.4th at p. 297 ["The purpose of the doctrine is to prevent one branch of government from exercising the complete power constitutionally vested in another…"], citations omitted.)

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In short, the only PAGA provisions that arguably provide for any degree of executive control are toothless. The LWDA has insufficient resources to review and investigate within the prescribed time period. When it fails to act (which it does 99/100 times), the executive branch is stripped of all control over PAGA prosecutions. As a result, PAGA violates the separation of powers doctrine by granting PAGA plaintiffs unfettered authority to prosecute claims on behalf of the state without any executive control. (See *Morrison, supra*, 487 U.S. at p. 658 [separation of powers requires the executive branch to retain sufficient control of its core constitutional functions]; *Abbott, supra*, 9 Cal.5th at 659–660 [where a prosecutor seeks civil penalties on behalf of the state, "the ultimate locus of control and accountability" is the Attorney General].)

C. PAGA Does Not Provide Executive Control Comparable To Statutory Schemes that Have Survived Constitutional Challenges Based on the Separation of Powers Doctrine

When compared to other statutory schemes that have survived separation of powers challenges involving the

usurpation of executive powers, PAGA accords the executive branch significantly less control over PAGA plaintiffs in comparison.

In *Boeing*, the Ninth Circuit Court of Appeal rejected a separation of powers challenge to the FCA, reasoning that the executive branch can control a qui tam relator's exercise of prosecutorial powers in several ways, including by dismissing, intervening in, or settling a qui tam action. (*Boeing, supra*, 9 F.3d at p. 753.) As explained in Section V.C.1 below, the FCA's qui tam provisions provide for significantly more executive control than those in PAGA's, including that the FCA permits the executive branch to dismiss, intervene in, and settle FCA claims.

In *Abbott*, the California Supreme Court rejected an argument that the UCL undermines the Attorney General's constitutional role as California's chief law enforcement officer by allowing district attorneys to prosecute civil penalties on behalf of the state. (*Abbott, supra*, 9 Cal.5th at p. 659.) *Abbott* found the Attorney General provides sufficient executive control over a

district attorney's prosecution of UCL claims because the Attorney General has statutory and constitutional authority to intervene in such prosecutions and requires all appellate briefs or petitions be served on the Attorney General. (*Id.* at pp. 659–660.) By contrast, Section V.C.2 explains that neither PAGA nor any other statute authorizes executive intervention after a PAGA plaintiff commences a civil action.

PAGA is devoid of any of the executive control mechanisms that led *Boeing* and *Abbott* to conclude that the FCA and UCL reflect proper delegations of executive powers.

1. The "Sufficient Control" Test Has Been Applied in a Challenge to the Qui Tam Provisions of the Federal False Claims Act

In *Boeing*, the Ninth Circuit Court of Appeals held that the FCA's qui tam provisions do not violate separation of powers principles. *Boeing* is instructive for purposes of understanding the comparative analysis courts employ when considering whether a statute accords the executive branch "sufficient control" over qui tam plaintiffs.

Boeing explained that "the proper separation of powers inquiry is whether [the legislature] has 'impermissibly undermined' the role of [the executive branch]." (*Boeing, supra*, 9 F.3d at p. 750, citing *Commodity Futures Trading Com'n v. Schor* (1986) 478 U.S. 833, 856.) It stated that such an inquiry requires consideration of "whether the [FCA's] qui tam provisions 'disrupt[ ] the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions.'" (*Boeing, supra*, 9 F.3d at p. 751, citing *Morrison, supra*, 487 U.S. at p. 695].) Thus, *Boeing* considered whether the FCA's qui tam provisions accord the executive branch "sufficient control" over the conduct of qui tam plaintiffs to "ensure that the [executive branch] is able to perform [its] constitutionally assigned duties." (*Boeing, supra*, 9 F.3d at p. 751; see also *U.S. ex rel. Truong v. Northrop Corp.* (C.D. Cal. 1989) 728 F.Supp. 615, 621–622 [the executive branch retains sufficient control over FCA relators by ensuring executive

involvement at the time of case initiation, during the litigation, and upon termination of the case].)

Boeing applied *Morrison's* reasoning because both separation of powers challenges involved "the degree to which Congress may assign prosecutorial powers to persons not under the direct control of the Executive Branch."[5] (*Boeing, supra*, 9 F.3d at p. 751.) Accordingly, *Boeing* proceeded to "identify all possible means of executive control in [the FCA's] qui tam provisions, and then compar[ed] them *in toto* to the means of control identified in *Morrison*." (*Id.* at p. 752.)

Although *Boeing* found that the private prosecutor in *Morrison* exercises more governmental powers than an FCA relator, *Boeing's* conclusion that the FCA did not violate the separation of powers doctrine hinged on the respective degree of

[5] In *Morrison,* three former government officials challenged the authority of independent counsel appointed under provisions of the Ethics in Government Act to issue subpoenas compelling their testimony before a grand jury. (*Morrison, supra*, 487 U.S. at p. 659.)

executive control applicable to the independent counsel in *Morrison* as compared to an FCA relator.

Boeing explained that the independent counsel in *Morrison* was subject to executive control because: (1) the Attorney General has unreviewable discretion to request appointment of an independent counsel; (2) the Attorney General may remove an independent counsel upon a showing of "good cause;" (3) the independent counsel's "jurisdiction" is defined with reference to the facts submitted by the Attorney General upon requesting an appointment; and (4) the independent counsel must abide by Department of Justice policies, unless it is not possible to do so. (*Boeing, supra*, 9 F.3d at p. 752.) *Boeing* explained that *Morrison* found these features gave the executive branch "sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties." (*Id.* at p. 743, citing *Morrison, supra*, 487 U.S. at p. 696.)

With respect to the FCA, *Boeing* found that qui tam relators are subject to executive control because the FCA

authorizes the Attorney General to: (1) "intervene in a case and then take primary responsibility for prosecuting the action;" (2) "seek judicial limitation of the relator's participation;" (3) "move for dismissal of a case which it believes has no merit, after notice to the relator and opportunity for a hearing;"[6] (4) "seek a judicial stay of the relator's discovery regardless of whether it intervenes;" and (5) "seek any alternate remedies available, including through any administrative proceeding." (*Boeing, supra*, 9 F.3d at p. 753.)

Comparing the mechanisms of executive control applicable to independent prosecutors and qui tam relators, *Boeing*

[6] In a footnote, *Boeing* noted that "[a]t least one district court has interpreted the FCA to permit the government to move for dismissal of a qui tam action without actually intervening in the case." (*Boeing Co., supra*, 9 F.3d at p. 753, citing *Juliano v. Federal Asset Disposition Ass'n* (D.D.C.1990) 736 F.Supp. 348, aff'd, 959 F.2d 1101 (D.C.Cir.1992).) It explained that in *Juliano*, *"[t]he court stated that in order to avoid serious constitutional questions which unduly curtailing the Attorney General's prosecutorial discretion would raise*," the FCA must be interpreted to allow the government to dismiss an action even in cases where the government has not already intervened. *Boeing* reasoned that *Juliano's* "*interpretation of the FCA is entirely appropriate and provides an illustration of the meaningful control which the Executive Branch can exercise over qui tam actions*." (*Id.* at p. 753, emphasis added.)

reasoned: "Clearly, the government has greater authority to prevent the initiation of prosecution by an independent counsel than by a qui tam relator. But once prosecution has been initiated, the government has greater authority to limit the conduct of the prosecutor and ultimately end the litigation in a qui tam action than it does in an independent counsel's action." (*Boeing, supra*, 9 F.3d at p. 753.) It found "that because the Executive Branch has power, albeit somewhat qualified, to end qui tam litigation, it is not significant that it cannot prevent its start." (*Ibid.*) For that reason, *Boeing* concluded that the FCA provides for "at least an equivalent amount of control over qui tam relators as it does over independent counsels," and thus held that "the FCA gives the Attorney General sufficient means of controlling or supervising relators to satisfy separation of powers concerns." (*Id.* at p. 755.)

Boeing illustrates the stark contrast between the qui tam provisions in the FCA, which contain several mechanisms to preserve executive control over qui tam prosecutors, and those in

PAGA, which do not.[7] Specifically, PAGA does not contain any of the features that led *Morrison* and *Boeing* to uphold the respective statutes those cases considered. Indeed, PAGA does not provide the LWDA (or any other arm of the executive branch) any ability to control a PAGA plaintiff once a PAGA action is filed. (See generally Lab. Code, § 2699.3; cf. *Arias*, *supra*, 46 Cal.4th at p. 986 ["[A] judgment in an employee's action under the act binds not only that employee but also the state labor law enforcement agencies."].)

PAGA similarly does not contain any of the executive control mechanisms provided for by the California False Claims Act ("CFCA"), which is "patterned on [the FCA]." (See *McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, 458 [California courts "rely on cases interpreting the federal statute

[7] Unlike the appellant in *Boeing*, CABIA does not contend that "all prosecutorial power of any kind belongs to the Executive Branch." (*Boeing, supra*, 9 F.3d at 751.) Nor does it need to for purposes of this appeal because PAGA's qui tam provisions divest the executive branch of control over PAGA plaintiffs.

for guidance in interpreting the CFCA"].) Like the FCA, the CFCA contains numerous mechanisms to ensure executive control over qui tam relators. For example, the relator "must file the complaint under seal and serve it, as well as a written disclosure of the material evidence and information in support of his or her claims, on the Attorney General. [Citation.] The Attorney General is required to notify local prosecuting authorities if local funds are involved. [Citation.] The action remains sealed for 'up to 60 days' (although the statutory period is subject to extension for good cause shown) to permit the state and/or local authorities to investigate and determine whether to proceed in the action. [Citation.]" (*San Francisco Unified School Dist. ex rel. Contreras v. Laidlaw Transit, Inc.* (2010) 182 Cal.App.4th 438, 445–446, citation omitted; see Gov. Code, §§ 12652, subd. (b)(1)–(3), (c)(1)–(7).) Thereafter, "[i]f the state and/or a local prosecuting authority elects to proceed with the action, that agency (or those agencies) have the primary responsibility for prosecuting the action, although the qui tam

plaintiff has the right to continue as a party to the action." (*Contreras, supra*, 182 Cal.App.4th at pp. 445–446, citation omitted; see Gov. Code, § 12652, subd. (e).) In such a scenario, the state or political subdivision may dismiss the action despite objections by the qui tam plaintiff upon a showing of good cause for the dismissal. (Gov. Code, § 12652, subd. (e)(2)(A).) Further, the state or political subdivision may settle the action "after a hearing providing the qui tam plaintiff an opportunity to present evidence, that the proposed settlement is fair, adequate, and reasonable under all of the circumstances." (Gov. Code, § 12652, subd. (e)(2)(B).) Alternatively, "[i]f no prosecuting authority decides to proceed with the action, the qui tam plaintiff has the right to do so *subject to the right of the state or political subdivision to intervene in certain circumstances*." (*Contreras, supra*, 182 Cal.App.4th at pp. 445–446, emphasis added; see Gov. Code, § 12652, subd. (e), (f).)

By requiring relators to serve a copy of any complaint and all material evidence on the Attorney General with "return

receipt requested," the CFCA ensures that the executive branch receives actual notice of any claim and all material evidence that the qui tam plaintiff has in support thereof. (Gov. Code, § 12652, subd. (c)(3).) Additionally, the CFCA requires the Attorney General or prosecuting authority to "diligently investigate" alleged violations of the CFCA. (Gov. Code, § 12652, subd. (a)(1), (b)(1).) Further, the CFCA permits the Attorney General to extend the deadline to investigate claims filed by a qui tam plaintiff upon a showing of good cause. (Gov. Code, § 12652, subd. (c); see also *Saltonstall v. City of Sacramento* (2014) 231 Cal.App.4th 837, 856, as modified (Dec. 18, 2014) [finding core judiciary functions were not impaired by permissive statutory deadline requiring only that a court act "to the extent feasible"].)

The CFCA also requires the Attorney General to notify the court whether it intends to proceed with the action, decline the action, or notify the appropriate prosecuting authority of the claim so that it can elect to do the same. (Gov. Code, § 12652, subd. (c)(4).) Further, the Attorney General is authorized to

intervene in and assert primary control over an action filed by a relator at any stage of the litigation. And even if the Attorney General elects not to intervene in the action, the CFCA prohibits the qui tam plaintiff from dismissing an action without the written consent of the court and the Attorney General or local prosecuting authority. (Gov. Code, § 12652, subd. (c)(1).) Each of these provisions ensure that the Attorney General (or the local prosecuting authority subject to the Attorney General's control) has sufficient time to investigate, intervene in, and assert primary control over the prosecution and settlement of qui tam actions under the CFCA.

Conversely, as explained in Section V.B.2, *infra*, PAGA contains no comparable mechanisms to ensure executive control over PAGA plaintiffs. (CT, Vol 2, pp. 375–377, ¶¶ 109-113.) Unlike the CFCA, PAGA does not require PAGA plaintiffs to substantiate the allegations in a PAGA notice with evidence, and it does not require the LWDA to investigate – much less "diligently investigate" – a PAGA notice. Instead, a PAGA

plaintiff may commence a civil action once either of the LWDA's response deadlines expire. (Lab. Code, § 2699.3, subd. (a)(2)(A).) PAGA also does not permit the LWDA to extend its response deadlines for "good cause." (Lab. Code, § 2699.3, subd. (a)(2)(B); compare Gov. Code, § 12652, subd. (c) [CFCA relator must serve the Attorney General at the time complaint is filed in camera and under seal, complaint remains sealed for at least 60 days, and Attorney General may seek extension for good cause] with Lab. Code, § 2699, subd. (1)(1) [PAGA plaintiff must serve the LWDA 10 days *after* filing suit and the LWDA has no authority to intervene]; see CT, Vol. 2, pp. 375–376, ¶ 110 [distinguishing PAGA from the CFCA because PAGA lacks comparable notice and extension provisions].)

Lastly, whereas the CFCA requires the Attorney General to approve settlements and dismissals of claims initiated by relators, PAGA authorizes qui tam plaintiffs to settle or dismiss PAGA violations subject only to *judicial* approval. (Lab. Code, § 2699.3, subd. (b)(4).) This presents yet another material

difference between the executive control applicable to PAGA plaintiffs compared CFCA relators. Indeed, CABIA alleges that PAGA's failure to provide for executive review of PAGA settlements empowers unscrupulous plaintiff attorneys to structure settlements to divert funds away from unrepresented employees and the state. (See CT, Vol. 2, p. 347, ¶ 38(h) [DIR noting "there is no assurance that settlements are in fact fair to all the affected employees or the state."].)[8]

Taken together, these functional differences between PAGA and the FCA and CFCA demonstrate that PAGA creates a breed of qui tam plaintiff that is uniquely positioned to exercise executive prosecutorial functions without any oversight or control by the executive branch. (CT, Vol. 2, pp. 375–377, ¶¶109–113; *id.* pp. 367–368, ¶¶ 90–95.)

[8] The LWDA reported "that in 2014-15 it received just under 600 payments for PAGA claims that resulted in civil penalties. This number is low relative to the amount of PAGA notices LWDA receives each year (roughly 10 percent of notices received in 2014)." (CT, Vol. 2, pp. 376–377, ¶113.)

2. Even Local Public Prosecutors Are Subject to Executive Control When Prosecuting Unfair Competition Claims

Like *Boeing*, the California Supreme Court's decision in *Abbott* is instructive for purposes of understanding what constitutes a proper delegation of executive prosecutorial powers. (*Abbott, supra*, 9 Cal.5th at p. 642.)

In *Abbott*, the plaintiff, Abbott, filed a motion to strike the district attorney's claims for restitution and civil penalties for UCL violations that occurred outside of his jurisdiction. Abbott argued that "a district attorney's enforcement authority under the UCL is limited to the geographic boundaries of his or her county." (*Abbott, supra*, 9 Cal.5th at p. 649.) Specifically, Abbott argued that allowing a district attorney to enforce the UCL and collect civil penalties for violations outside of his jurisdiction would undermine "the 'hierarchical structure of the prosecutorial function within California's executive branch' as set forth in the California Constitution." (*Id.* at p. 658.)

After the Court of Appeal overturned the trial court's order denying Abbott's motion to strike, the Supreme Court granted

the district attorney's petition for review. The Court ultimately held that a district attorney's "authority to enforce California's consumer protection laws under the auspices of the [UCL] is not limited to the county's borders." (*Abbott, supra*, 9 Cal.5th at pp. 648–649.)

In reaching its holding, *Abbott* considered the statutory framework of the UCL. It explained that when the Legislature enacted the UCL, it "created a scheme of overlapping enforcement authority" allowing both public and private prosecutors to enforce the UCL. (*Abbott, supra*, 9 Cal.5th at p. 652, citing Bus. & Prof. Code, § 17204 [authorizing an action for relief under the UCL to be prosecuted by public prosecutors including the Attorney General, a district attorney, county attorneys, city attorneys or any "person who has suffered injury in fact and has lost money or property as a result of the unfair competition"].) However, although the UCL provides for both public and private enforcement, it only authorizes public

prosecutors (e.g., state officials, district attorneys, and city attorneys) to pursue civil penalties. (*Id.* at p. 652.)

Abbott found that "[t]he UCL does not undermine the Attorney General's constitutional role as California's chief law enforcement officer" because "the public enforcement authority that the UCL grants to district attorneys does not constrain the Attorney General's prerogative to *intervene or take control of a civil enforcement action that, in the Attorney General's view, does not adequately serve the public interest*." (*Abbott, supra*, 9 Cal.5th at pp. 659–660, emphasis added, citing Cal. Const., art. V, § 13; Gov. Code, § 12550 [Attorney General "has direct supervision over the district attorneys," and "[w]hen he deems it advisable or necessary in the public interest ..., he shall assist any district attorney in the discharge of his duties, and may, where he deems it necessary, *take full charge of any investigation or prosecution of violations of law of which the superior court has jurisdiction*."], emphasis added.) *Abbott* explained, "[i]n the UCL context, the Attorney General's supervisory role is facilitated by

the requirement that all appellate briefs or petitions in a UCL matter be served upon the Attorney General. ([Bus. & Prof. Code] § 17209.) Thus, the *ultimate locus of control and accountability for UCL actions is the office of the Attorney General.*" (*Abbott, supra*, 9 Cal.5th at pp. 659–660, emphasis added.)

Abbott's reasoning reveals the requisite degree of control that the Attorney General must retain over actions prosecuted on behalf of the state. But the executive control mechanisms discussed in *Abbott* have no counterpart in PAGA. Neither PAGA, the California constitution, nor any other California statute, authorizes the Attorney General (or any other arm of the executive branch) to intervene in or control the prosecution or settlement of PAGA actions once an aggrieved employee files a civil action. [9] Unlike the UCL, which creates a scheme of

[9] The California Constitution provides that "[t]he Attorney General shall have direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law." (Cal. Const., art. V, § 13; see Gov. Code, § 12550.) CABIA is not aware of any authority holding that these constitutional and statutory provisions authorize the Attorney General to assert control over the prosecution of a qui tam action. If the Attorney General possessed such inherent authority, the provisions in the CFCA authorizing the Attorney General to

overlapping enforcement authority for public and private prosecutors, PAGA creates an "*alternative 'private attorney general' system for labor law enforcement*." (*Dunlap v. Superior Court* (2006) 142 Cal.App.4th 330, 337, emphasis added, citing Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Sen. Bill No. 796 (2003–2004 Reg. Sess.).) As CABIA alleges, this "alternative" private attorney general system operates to unconstitutionally undermine the executive branch's prosecutorial authority and discretion to seek civil penalties for violations of the Labor Code.

D. The Trial Court Erred by Holding That *Iskanian* Precluded CABIA's Separation of Powers Claim and Failing to Consider Whether PAGA Provides Sufficient Control over PAGA Plaintiffs

The trial court sustained Respondent's demurrer to CABIA's First Amended Complaint by holding that *Iskanian* precludes any challenge to PAGA under the separation of powers

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intervene in prosecutions of such claims would be entirely superfluous. (See Gov. Code, § 12652, subd. (f).)

doctrine. In so doing, the trial court impermissibly expanded *Iskanian's* reasoning to apply to facts and issues *Iskanian* never considered and neglected to apply the "sufficient control" test applicable to CABIA's separation of powers claim.

The trial court reasoned that "the holding of *Iskanian* is broad and unambiguous" and "precludes any separation of powers claim under the California Constitution regardless of whether it is based on new theories or facts." (CT, Vol. 2, p. 490, citing *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455 [stare decisis binds lower courts]; *Tanguilig v. Bloomingdale's Inc.* (2016) 5 Cal.App.5th 665, 673 [stare decisis precludes appellate court from holding that *Iskanian* incorrectly decided the issue of FAA preemption].)

Without any further explanation or analysis, the trial court held, "[t]he California Supreme Court in *Iskanian* expressly rejected a separation of powers challenge to PAGA, and nothing in the 'as applied' facts alleged here suggests that the California Supreme Court would have reached any different conclusion(s)

had the 'as applied' argument been presented there." (CT, Vol. 1, p. 235.)

In short, the trial court relied exclusively on *Iskanian* to sustain Respondent's demurrer. And because the trial court found itself bound by *Iskanian*, it never considered the adequacy of CABIA's allegations, which demonstrate that PAGA fails to provide the executive branch "sufficient control" over PAGA plaintiffs, as required by *Boeing, Morrison,* and *Abbott.* This oversight supports reversal of the trial court's order.

Critically, *Iskanian's* separation of powers analysis only pertained to the specific issue before it – i.e., whether PAGA undermines the *judiciary's* "regulation of the legal profession." (See *Iskanian, supra*, 59 Cal.4th at pp. 389–90, citing *County of Santa Clara v. Superior Court* (2010) 50 Cal.4th 35, 57 [public prosecutor neutrality ensures "public confidence in the *integrity of the judicial system*"]; *Merco Constr. Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724, 727 ["The exclusive right to determine who is qualified to practice law is claimed to be an

inherent power of the judiciary."].) By contrast, CABIA alleges PAGA divests the *executive branch* of its prosecutorial authority. Because the trial court neglected this distinction, it erred in granting Respondent's demurrer to CABIA's separation of powers claim.

1. *Iskanian* Does Not Preclude Every Challenge to PAGA under the Separation of Powers Doctrine

Contrary to the trial court's conclusion, *Iskanian* does not preclude every challenge to PAGA under California's separation of powers doctrine. In fact, Respondent made no such argument in its demurrer to CABIA's First Amended Complaint, and Respondent did not rely on *Iskanian* for any such proposition.

It is well established that "cases are not authority for propositions that are not considered." (See, e.g., *Kim, supra*, 9 Cal.5th at p. 85, citing *California Building Industry Assn., supra*, 4 Cal.5th at 1043.) In fact, the Supreme Court has found it "axiomatic that an unnecessarily broad holding is 'informed and limited by the fact[s]' of the case in which it is articulated." (*Ixchel Pharma, LLC v. Biogen, Inc.* (2020) 9 Cal.5th 1130, 1153,

citing *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790, fn. 11.) For this reason, courts "must view with caution seemingly categorical directives not essential to earlier decisions." (*Ixchel Pharma, LLC, supra*, 9 Cal.5th at p. 1153, citing *People v. Mendoza* (2000) 23 Cal.4th 896, 915.)

Although excerpts from *Iskanian* may, when taken out of context, reflect a "seemingly categorical directive" that PAGA is immune from any constitutional challenge under California's separation of powers doctrine, basic principles of jurisprudence and the California Rules of Court necessarily limit *Iskanian's* application to the legal questions it considered. Accordingly, the facts and procedural posture that gave rise to *Iskanian* as well as the specific constitutional challenge at issue there are instructive for purposes of understanding *Iskanian's* significance.

2. *Iskanian* Held That the FAA Does Not Preempt PAGA's Prohibition against Predispute PAGA Waivers

The primary issue decided by *Iskanian* involved whether the FAA preempts PAGA, which has nothing to do with CABIA's separation of powers claim.

In *Iskanian*, the respondent, CLS, argued that the plaintiff employee waived his right to bring class and representative proceedings by entering into an arbitration agreement with CLS and that the FAA preempts the state from refusing to enforce that waiver on grounds of public policy or unconscionability. (*Iskanian, supra*, 59 Cal.4th at p. 360.) The Court rejected CLS's argument because it found that allowing employees to waive the right to bring representative PAGA claims on behalf of the State (i.e., the real party in interest) before an actual dispute had arisen would violate California public policy. (*Id.* at p. 387.)

Further, *Iskanian* reasoned that neither the FAA nor the United States Supreme Court's "construction of the [FAA] suggests that the FAA was intended to limit the ability of states to enhance their public enforcement capabilities by enlisting willing employees in qui tam actions." (*Iskanian, supra*, 59 Cal.4th at p. 387.) Thus, *Iskanian* held that PAGA is not preempted by the FAA because a PAGA litigant's status as "the proxy or agent" of the state reflects such person's substantive role

in enforcing the State's "labor laws on behalf of state law enforcement agencies." (*Id.* at p. 388.) However, the Court cautioned that its "FAA holding applies specifically to a state law rule barring predispute waiver of an employee's right to bring an action that can only be brought by the state or its representatives, where any resulting judgment is binding on the state and any monetary penalties largely go to state coffers." (*Ibid.*)

Here, CABIA's challenge is not related to the FAA, pre-dispute class action waivers, or any other material fact or issue addressed by *Iskanian's* FAA holding. Thus, *Iskanian's* FAA holding is not dispositive for purposes of this appeal.

3. *Iskanian* Did Not Consider Whether PAGA Accords the Executive Branch Sufficient Control over PAGA Plaintiffs

Iskanian did not consider CABIA's claim that PAGA defeats core executive functions by divesting the executive branch of sufficient control over PAGA plaintiffs. Nor did it consider the facts CABIA alleges. Indeed it could not have, since many of those facts occurred after the Supreme Court decided *Iskanian.*

The separation of powers discussion in *Iskanian*, which is arguably nothing more than dictum,[10] focused exclusively on the specific constitutional challenge before it – i.e., whether the rule in *County of Santa Clara* requiring a neutral government attorney to oversee private attorneys retained by the government applies to PAGA plaintiffs. By contrast, CABIA's appeal presents only one question: whether PAGA's delegation of executive powers to private attorney generals violates the separation of powers doctrine by granting PAGA plaintiffs unchecked authority to prosecute and settle PAGA claims on behalf of the State.

After definitively ruling on the issue of FAA preemption, *Iskanian* considered CLS's argument that: (1) "PAGA runs afoul of [the Supreme Court's] holding in *County of Santa Clara* by authorizing financially interested private citizens to prosecute

[10] California Supreme Court dictum should generally be followed when it has "has conducted a thorough analysis of the issues or reflects compelling logic." (*Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1169.) CABIA is not aware of any authority that requires appellate courts to broadly interpret the Supreme Court's statements and apply them to facts and legal theories the Court never considered.

claims on the state's behalf without governmental supervision;" and (2) "because *County of Santa Clara* dealt with regulation of the legal profession," which is the province of the courts, "PAGA violates the principle of separation of powers under the California Constitution." (*Iskanian, supra*, 59 Cal.4th at pp. 389–390.) In other words, CLS argued that by enacting PAGA and deputizing financially incentivized private attorneys to pursue actions on behalf of the state, the legislature *impaired the judiciary's ability* to ensure that claims brought on behalf of the State are prosecuted by a neutral government attorney. (See *County of Santa Clara v. Superior Court* (2010) 50 Cal.4th 35, 61 ["[I]n the context of public-nuisance abatement proceedings, critical discretionary decisions [ ] may not be delegated to private counsel possessing an interest in the case, but instead must be made by neutral government attorneys."].)

Although the "issue was not raised in CLS's answer to the petition for review," *Iskanian* justified its decision to address CLS's challenge because it was "directly pertinent to the issue of

whether a PAGA waiver is contrary to state public policy," and the parties "had a reasonable opportunity to brief the issue." (*Iskanian, supra*, 59 Cal.4th at p. 389, citing Cal. Rules of Court, rule 8.516 subd. (b)(1), (2).)

Iskanian approached CLS's separation of powers challenge by analogizing PAGA to the CFCA. Without any analysis of the substantive differences between PAGA and the CFCA, (see Section V.C.1, *supra*) *Iskanian* found that CLS's constitutional challenge "would apply not only to the PAGA but to all qui tam actions, including the California False Claims Act, which authorizes the prosecution of claims on behalf of government entities without government supervision."[11] (*Iskanian, supra*, 59 Cal.4th at p. 390, citing Gov. Code, § 12652, subd. (c).) The Court reasoned that "[n]o court has applied the rule in *Clancy* or *County of Santa Clara* to such actions," and "case law contains no

[11] Although the CFCA does not require government "supervision" over qui tam plaintiffs, it contains numerous mechanisms to ensure sufficient executive control over qui tam relators. (See Section V.C.1, *supra*.)

indication that the enactment of qui tam statutes is anything but a legitimate exercise of legislative authority." (*Id.* at p. 390.) On that basis, it concluded that the rule from *Clancy* and *County of Santa Clara* does not apply to qui tam actions.

Iskanian explained that qui tam statutes fall within the scope of the Legislature's authority because: (1) the Legislature "is charged with allocating scarce budgetary resources […], which includes the provision of resources to the state executive branch for prosecution and law enforcement"; (2) "qui tam actions enhance the state's ability to use such scarce resources by enlisting willing citizens in the task of civil enforcement;" and (3) "the choice often confronting the Legislature is […] between a private citizen suit and no suit at all." (*Iskanian, supra*, 59 Cal.4th at p. 390.) Based on those general characteristics of qui tam actions and the fact that "the lack of government resources to enforce the Labor Code led to a legislative choice to deputize and incentivize employees" to prosecute such violations through

PAGA, the Court found that such legislative choice did not conflict with *County of Santa Clara.* (*Ibid.*)

Iskanian explained that *County of Santa Clara* only "applies to circumstances in which a government entity retains a private law firm or attorney as outside counsel." (*Iskanian, supra*, 59 Cal.4th at p. 390–391.) In that context, it found attorney neutrality to be a concern because "an attorney directly employed by the government, 'has the vast power of the government available to him; he must refrain from abusing that power by failing to act evenhandedly.'" (*Id.* at p. 391, citing *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740, 746.) *Iskanian* reasoned that by contrast, "a litigant who brings a qui tam action on behalf of the government *generally* does not have access to such power." (*Iskanian, supra*, 59 Cal.4th at p. 390–391, emphasis added.) Without explaining when that "general" proposition proves false, the Supreme Court stated, "[t]he qui tam litigant has only his or her own resources and may incur

significant cost if unsuccessful."[12] (*Id.* at p. 391.) Thus, it concluded that PAGA "does not present the same risks of abuse as when a city or county hires outside counsel to do its bidding." (*Ibid.*)

Put differently, *Iskanian* suggested – by way of a flawed syllogism – that because PAGA plaintiffs are qui tam plaintiffs and qui tam plaintiffs "generally" do not have access to the vast power of the government when prosecuting civil actions on the State's behalf, the underlying policy justifications for the *County of Santa Clara* rule do not apply to qui tam actions, including PAGA actions.

Finally, *Iskanian* reasoned that the rule in *County of Santa Clara* "involves minimal if any interference with legislative or executive functions of state or local government" because it "simply requires government entities to supervise the attorneys they choose to hire to pursue public nuisance actions." (*Iskanian,*

[12] *Iskanian* ignored the fact that unlike the CFCA, PAGA does not provide any explicit penalties for bringing frivolous suits. (See Gov. Code, § 12652, subd. (g)(9).)

supra, 59 Cal.4th at p. 391.) By contrast, it found that "a rule disallowing qui tam actions would significantly interfere with a legitimate exercise of legislative authority aimed at accomplishing the important public purpose of augmenting scarce government resources for civil prosecutions." (*Ibid.*) Based on those differences, *Iskanian* declined to extend the rule in *Clancy* and *County of Santa Clara* "beyond the context of attorneys hired by government entities as independent contractors" and rejected CLS's argument that PAGA violates the separation of powers doctrine based on that rule. (*Ibid.*) In other words, *Iskanian* found that the rule in *County of Santa Clara* requiring government oversight over public prosecutors to ensure *attorney neutrality* does not apply to PAGA plaintiffs.

4. *Iskanian* Does Not Preclude CABIA from Alleging That PAGA Violates the Separation of Powers Doctrine Based on Facts and Legal Theories *Iskanian* Never Considered

Iskanian's separation of powers discussion has limited persuasive value in this case because *Iskanian* did not consider the pleading standard applicable to a separation of powers claim

or the facts and legal theories that CABIA alleges. (See *People v. Linkenauger* (1995) 32 Cal.App.4th 1603, 1613 [statements of law by the California Supreme Court do not bind lower courts in cases that present "fairly distinguishable" facts].)

As a threshold matter, *Iskanian* is procedurally distinguishable from this case. In *Iskanian*, CLS challenged PAGA's constitutionality in an attempt to enforce a pre-dispute PAGA waiver. In that context, CLS did not allege facts or introduce evidence in support of an affirmative claim, and the Court had no occasion to consider what threshold factual allegations would be sufficient to state a claim for purposes of surviving a demurrer. In fact, *Iskanian* did not even reference the California Supreme Court's decisions that articulate the standard governing challenges under the separation of powers doctrine. (See *Carmel Valley, supra*, 25 Cal.4th at p. 297; see *Marine Forests, supra*, 36 Cal. 4th at p. 15.) Nor did it analyze the sufficiency of executive control in the manner that *Morrison, Boeing* and *Abbott* did. This procedural distinction alone reveals

that *Iskanian* did not consider the questions before this Court on appeal.

Further, *Iskanian's* separation of powers analysis focused on whether PAGA violates the rule set forth in *County of Santa Clara* – i.e., whether PAGA defeats the *judiciary's* ability to ensure that public prosecutors adhere to the judicially mandated ethical standard of attorney neutrality. That question is separate and apart from CABIA's claim that PAGA undermines the *executive* prosecutorial authority.

Here, CABIA alleges that PAGA divests the executive branch of: (1) its prosecutorial discretion by authorizing PAGA plaintiffs to prosecute Labor Code violations the executive branch has never reviewed; and (2) any control over PAGA prosecutions or settlements, thereby usurping the executive branch's enforcement authority. (See Section V.B.2, *supra.*) As explained below, there is no basis to conclude that *Iskanian* considered, much less decided, CABIA's challenge to PAGA.

First, *Iskanian* did not consider whether PAGA violates the separation of powers doctrine by authorizing an aggrieved employee to commence a civil action without any prior review or investigation by the LWDA. This is evident from the fact that *Iskanian's* separation of powers discussion does not reference or analyze PAGA's notice provisions or the LWDA's role in reviewing and investigating PAGA notices. (See Lab. Code, § 2699.3.) The fact that *Iskanian* is silent on this issue is especially telling because *Iskanian* analogizes PAGA to the CFCA without ever acknowledging the fundamental differences between the statutes' notice provisions. (Compare, e.g., Lab. Code, § 2699.3, subd. (a)(2) [permitting an aggrieved employee to commence a civil action if the LWDA does not respond to a PAGA notice within 65 days] with Gov. Code, § 12652, subd. (a)(1), (b)(1) [requiring the Attorney General or prosecuting authority to "diligently investigate" claims filed by a qui tam plaintiff under the CFCA].) Given *Iskanian's* silence on these facial differences between PAGA and the CFCA, it is readily apparent that

Iskanian never considered whether PAGA's unique delegation of executive authority to PAGA plaintiffs violates separation of powers principles. Thus, *Iskanian* is not binding authority on the issue. (See *Ixchel Pharma, LLC, supra,* 9 Cal.5th at p. 1153 [holdings are necessarily limited by the facts of the case]; Cal. Rules of Court, rule 8.516, subd. (b)(1), (2) [the Supreme Court's authority to rule on issues outside the petition or answer is limited to issues that the parties had reasonable notice and opportunity to brief and argue].)

Moreover, CABIA alleges that as a practical matter, the LWDA declines to investigate and/or fails to respond to 99% of PAGA notices as a result of the Legislature's failure to adequately staff and fund the LWDA. (See CT, Vol. 2, p. 368, ¶ 92; *id.* at pp. 346 –47, ¶ 38) This theory is predicated on factual allegations that did not exist when the Supreme Court published *Iskanian* in 2014. (See, e.g., CT, Vol. 2, pp. 346 –47, ¶ 38, [2015 DIR Budget Change Proposal states the LWDA and DIR have not been adequately staffed to perform the review and oversight

functions contemplated by PAGA]; *id.* at p. 375, ¶ 109 [March 25, 2016, report by the LWDA indicates that less than half of PAGA notices were reviewed and estimating less than 1% of PAGA notices have been reviewed or investigated since PAGA was implemented].) Thus, CABIA's present challenge presents "fairly distinguishable" facts that were not–and could not have been–considered by *Iskanian*. (See *Linkenauger*, *supra*, 32 Cal.App.4th at 1613.)

Similarly, *Iskanian* never considered CABIA's argument that PAGA usurps the Attorney General's constitutional role as the State's chief law officer. Indeed, *Iskanian* contains no reference to or discussion of Article V, section 13 of the California Constitution. Nor does *Iskanian* analyze the role that California's state agencies play in the enforcement of California labor law. The absence of any such discussion further demonstrates that *Iskanian* is not controlling here.

Iskanian's reasoning also demonstrates that the Supreme Court never considered or intended to rule on the separation of

powers theory CABIA alleges. For example, *Iskanian* rejected CLS's separation of powers argument because it found that applying the rule in *County of Santa Clara* to PAGA would result in "a rule disallowing qui tam actions," and thus "significantly interfere with a legitimate exercise of legislative authority." (*Iskanian, supra*, 59 Cal.4th at p. 391.) In contrast, CABIA does not challenge the Legislature's general authority to enact qui tam statutes to enhance the state's ability to maximize "scarce resources by enlisting willing citizens in the task of civil enforcement." (*Id.* at p. 390.) Rather, CABIA's separation of powers challenge arises from the unique manner by which PAGA deputizes private persons to prosecute Labor Code violations without any executive control. Thus, to the extent *Iskanian* compared PAGA to the CFCA to support its conclusion that PAGA is not invalidated by the rule in *County of Santa Clara*, the trial court erred by expanding *Iskanian* broadly to preclude any challenge to PAGA under the separation of powers doctrine.

VI. CONCLUSION

The First Amended Complaint alleges sufficient non-conclusory facts to state a claim that PAGA violates the separation of powers doctrine. Accordingly, this Court should order the trial court to overturn its order sustaining Respondent's demurrer.

DATED: May 11, 2021

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CERTIFICATE OF COMPLIANCE

Counsel hereby certifies pursuant to California rules of Court, Rule 8.204(c)(1), that the Petitioner's Brief on Appeal contains 13-point Century type, including footnotes, and excluding table of contents, tables of authorities, certificate of compliance, certificate of interested entities or persons, and signature block, contains 13,077 words, as counted by Microsoft's word-processing program used to generate this brief.

DATED: May 11, 2021

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PROOF OF SERVICE

I hereby certify that on May 11, 2021, I caused to be served one (1) copy of **PETITIONER CALIFORNIA BUSINESS & INDUSTRIAL ALLIANCE'S OPENING APPELLATE BRIEF** on the following counsel of record via the methods of service indicated below:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 11th of May, 2021 at Los Angeles, California.

/s/Felecia J. McClendon