In the

Court of Appeal

of the

State of California

FOURTH APPELLATE DISTRICT
DIVISION THREE

G059561

CALIFORNIA BUSINESS & INDUSTRIAL ALLIANCE,
Plaintiff and Appellant,

v.

XAVIER BECERRA,
in his official capacity as the Attorney General of the State of California,
Defendant and Respondent.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE
THE HONORABLE PETER J. WILSON, JUDGE · CASE NO. 30-2018-01035180-CU-JR-CXC

UNOPPOSED APPLICATION TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF CALIFORNIA BUSINESS ROUNDTABLE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF AND APPELLANT CALIFORNIA BUSINESS & INDUSTRIAL ALLIANCE

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APPLICATION TO FILE AMICUS CURIAE BRIEF AND STATEMENT OF INTEREST OF AMICUS CURIAE

Pursuant to Rule 8.200(c) of the California Rules of Court, the California Business Roundtable ("the Roundtable") requests leave to file the attached amicus curiae brief in support of Plaintiff and Appellant California Business & Industrial Alliance ("CABIA").

The Roundtable is a nonpartisan organization comprised of the senior executive leadership of major employers throughout the State, with a combined workforce of over 750,000 employees. For more than 40 years, the Roundtable has identified the issues critical to a healthy business climate and provided the leadership needed to strengthen California's economy and create jobs. Among other things, the Roundtable concerns itself with policies and conditions that undermine economic efficiency and structural stability, diminish the total economic surplus created by California's economy for the collective benefit of all its participants, and place California at a competitive disadvantage in the U.S. and global economies.

The Roundtable submits this amicus curiae brief to assist the Court in its review of the ruling below with reference to economic principles that demonstrate why the Executive branch's retention of "substantial control" is rationally necessary in order that a delegation

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of prosecutorial authority not stray from the public interest and violate the separation of powers doctrine.

"Amicus curiae presentations assist the court by broadening its perspective on the issues raised by the parties." *Bily v. Arthur Young & Co.*, 3 Cal.4th 370, 405 n.14 (1992). The Roundtable submits this proposed amicus brief to assist the Court in its review of the ruling below by providing a lens through which to assess the economic rationality of the competing interpretations of the law at issue, and of a ruling's broader implications for the California economy and its participants.

The questions before this Court are of critical importance to the California economy. Because PAGA fails to keep enforcement decisions within the "substantial control" of the Executive branch officials who are charged to pursue social welfare, the divergence of private versus social litigation incentives leads to results that are not in the public interest. While in economic terms the aim of public law enforcement is to maximize social welfare, private incentives to bring lawsuits are generally not aligned with socially-optimal incentives. The manner in which PAGA substitutes private enforcement in place of government action displaces the broader public interest with private

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interests, causes social welfare to be disregarded, and promotes and results in a socially-excessive level of enforcement activity. That is, private PAGA plaintiffs (driven by private attorneys) are incentivized to (and do) make private cost-benefit decisions to threaten and pursue litigation that would be rejected if the social cost-versus-benefit of enforcement were instead considered.

The resulting excessive enforcement activity under PAGA has the effect of diminishing socially-beneficial economic activity in California, which is a significant social cost that is not in the public interest and does not bode well for the California economy. While public law enforcement officials would be charged and expected to weigh that social cost in exercising enforcement judgment, to the privately-incentivized attorney bar that drives PAGA this socially-detrimental loss of California business activity is not a consideration. Both employers and employees are worse off, as is the California economy as a whole.

When the legislature delegates law enforcement duty to private individuals, the purpose cannot rationally be to undermine social welfare. Rather, as the Roundtable argues in the attached brief, such a delegation is consistent with the separation of powers doctrine only if

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done in a manner that is consistent with the maximization of social welfare, including the level of law enforcement that results. PAGA fails to meet that test.

Plaintiff-Appellant and Defendant-Respondent have been asked and do not oppose the Roundtable's filing of an amicus brief. For the foregoing reasons, and those more fully expressed in the brief, the Roundtable respectfully requests that the Court grant permission to file the accompanying brief.[1]

Dated: January 31, 2022

LEVATOLAW, LLP
Ronald C. Cohen

/s/ Ronald C. Cohen

Counsel for Amicus Curiae, California Business Roundtable

[1] No party or counsel for a party authored this amicus brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the Roundtable, its members, or its counsel in this appeal, made a monetary contribution intended to fund the preparation or submission of this brief. *See* Cal. Rules of Court, Rule 8.200(c)(3).

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BRIEF OF CALIFORNIA BUSINESS ROUNDTABLE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF AND APPELLANT CALIFORNIA BUSINESS & INDUSTRIAL ALLIANCE

INTRODUCTION AND SUMMARY OF ARGUMENT

The California Business Roundtable ("Roundtable") agrees with Plaintiff-Appellant California Business & Industrial Alliance ("CABIA") that California's Private Attorneys General Act ("PAGA") violates the California Constitution's separation of powers by granting private parties the authority to initiate prosecutorial action without any express Executive branch approval, and by failing to authorize the Executive branch to intervene at any time to retake control of the litigation once a case has been filed. Without either of these minimum safeguards, the Executive branch does not maintain the requisite "substantial control" over a PAGA action that is necessary in order for a delegation of prosecutorial power to avoid violating the separation of powers doctrine.

The Roundtable agrees with the legal arguments presented by Plaintiff-Appellant and amicus curiae Chamber of Commerce of the United States of America (the "Chamber"), and will not repeat them here. Rather, we write to explain that the constitutionally-required

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"substantial control" is not only grounded in the California and federal cases addressing separation of powers, but also compelled by economic principles which demonstrate *why* the Executive branch's retention of "substantial control" is rationally necessary in order that a delegation of prosecutorial authority not stray from the public interest and violate the separation of powers doctrine.

While in economic terms the aim of public law enforcement is to maximize social welfare, private incentives to bring lawsuits are generally not aligned with socially optimal incentives. The substitution of private enforcement in place of government action in the manner of PAGA displaces the broader public interest with private interests, and causes social welfare to be disregarded.

Because the legislature's purpose in delegating law enforcement to private individuals cannot rationally be to undermine social welfare, such a delegation is consistent with the separation of powers doctrine only if the delegation is in a manner that remains consistent with the maximization of social welfare. Social welfare is maximized when enforcement occurs at a socially optimal level. However, from a social welfare perspective, PAGA's reliance on private incentives results in too much enforcement. Private-versus-social cost and benefit

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disparities work in the same direction to promote a socially-excessive level of enforcement activity that is not in the public interest. That is, private PAGA plaintiffs (driven by private attorneys) are incentivized to (and do) make private cost-benefit decisions to pursue litigation that would be rejected if the *social* cost-versus-benefit of enforcement were instead considered.

In particular, the primary social benefit of law enforcement is the deterrence of similar harms by other potential defendants. That benefit is substantially lost under PAGA, because in most situations there is little or nothing economically rational that an employer can do to change its behavior *toward its California employees* that will avoid the significant threat of potentially ruinous PAGA litigation that is meritless or based on trivial or hyper-technical violations. To lessen its exposure under the PAGA regime, such an employer's only rational option is to reduce the *level of economic activity* that it conducts in this state in the form of *fewer California employees*.

Thus, PAGA turns the potential social benefit of deterrence into a social *cost*. The deterrent effect is misdirected, as underlying violations of the law are not reduced except by reducing California business activity and employment. PAGA notices and lawsuits often

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lead to layoffs and business closures, and it is likely that new employers and expanded employment from existing employers are discouraged from ever coming to this state in the first place. That loss of socially-beneficial economic activity in California is a social cost that is not in the public interest, and does not bode well for the California economy. While public law enforcement officials would be charged and expected to weigh the social cost in exercising litigation judgment, to the privately-incentivized attorney bar that drives PAGA litigation this socially-detrimental loss of California business activity is not a consideration.

Thus, because PAGA fails to keep litigation decisions within the "substantial control" of the Executive branch officials who are charged to pursue the social welfare, the divergence of private versus social litigation incentives leads to results that are not in the public interest. That is the economic rationale for requiring that the Executive branch retain "substantial control" over a delegation of prosecutorial authority in order not to violate the separation of powers doctrine.

The observed outcomes of PAGA that are alleged in Plaintiff-Appellant's First Amended Complaint ("FAC")[2] are significantly at

[2] Clerk's Transcript ("CT), Vol. 2, p. 337.

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odds with the public interest, to the economic detriment of employees, employers, and the California economy as a whole. Such detrimental outcomes are the predicable economic result when a statute such as this strips the safeguard of "substantial control" from the Executive branch, and their occurrence should be viewed as compelling indicia that, as a matter of fact, no substantial control exists under the PAGA regime.

Treating "the demurrer as admitting all material facts properly pleaded," *Levy v. State Farm Mutual Automobile Ins. Co.*, 150 Cal.App.4th 1, 5 (2007) (citing *Zelig v. County of Los Angeles*, 27 Cal.4th 1112, 1126 (2002)), and construing Plaintiff-Appellant's FAC "liberally . . . with a view to substantial justice between the parties," Code Civ. Proc., § 452, this Court should reverse the trial court's order sustaining the demurrer to Plaintiff-Appellant's First Cause of Action.

ARGUMENT

I. THE FUNDAMENTAL DIVERGENCE BETWEEN THE SOCIAL AND THE PRIVATE VALUE OF PAGA LITIGATION

> Subject to the powers and duties of the Governor, the Attorney General shall be the chief law enforcement officer of the State. It shall be the duty of the Attorney

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> General to see that the laws of the State are uniformly and adequately enforced.

Cal. Const. art. V, § 13.

In economic terms, the aim of public law enforcement is to maximize social welfare.[3] Therefore, the Attorney General's duty as chief law enforcement officer is to enforce the law, including the pursuit of litigation, consistent with maximizing social welfare. When the legislature delegates that law enforcement duty to private individuals, the purpose cannot rationally be to undermine social welfare. Rather, such a delegation is consistent with the separation of powers doctrine only if the delegation is in a manner that is consistent with the maximization of social welfare, including the level of law enforcement that results.

[3] *See* A. Mitchell Polinsky and Steven Shavell, "The Theory of Public Law Enforcement," *Handbook of Law and Economics,* Vol. 1, ch. 6, p. 406 (2007), http://www.law.harvard.edu/faculty/shavell/pdf/07-Polinsky-Shavell-Public%20Enforcement%20of%20Law-Hdbk%20LE.pdf ("Polinsky and Shavell (2007)"). "By social welfare, we refer to the benefits that individuals obtain from their behavior, less the costs that they incur to avoid causing harm, the harm that they do cause, the cost of catching violators, and the costs of imposing sanctions on them (including any costs associated with risk aversion)." *Id.*

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"[A]n aggrieved employee's action under [PAGA] functions as a substitute for an action brought by the government itself … [and] 'is fundamentally a law enforcement action designed to protect the public and not to benefit private parties.'" *Arias v. Superior Court*, 46 Cal.4th 969, 986 (2009) (quoting *People v. Pacific Land Research Co.*, 20 Cal.3d 10, 17 (1977)). Social welfare is maximized when litigation occurs at a socially optimal level. However, the substitution of private enforcement in place of government action – such as PAGA authorizes – introduces the very substantial risk that private interests will displace the public interest, and social welfare disregarded. That is because the private incentives to bring lawsuits are generally not aligned with socially optimal incentives, and, therefore, from a social welfare perspective the reliance on private incentives can result in too much or too little litigation.[4]

> Shavell (1982) was the first to explicitly compare the private and the social value of lawsuits in a costly legal

[4] "[T]he private incentive to bring suit is fundamentally misaligned with the socially optimal incentive to do so, and the deviation between them could be in either direction." Steven Shavell, "Fundamental Divergence Between the Private and the Socially Desirable Level of Suit," *Foundations of Economic Analysis of Law*, ch. 17, p. 391 (The Balknap Press of Harvard University Press 2004) ("Shavell (2004)").

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> system. He pointed out that, while the private value of a suit depends solely on a plaintiff's comparison of the payment he or she expects to receive at trial with the cost of filing suit, the social value depends on the extent to which lawsuits induce the defendant to undertake socially desirable accident prevention. A key finding was that there is no necessary connection between these two values. That is, a suit may be privately valuable but not socially valuable, or the reverse may be true. As a result, in an unrestricted legal system, there may be either too much or too little litigation from a social perspective.

Thomas J. Miceli, "The Social versus Private Incentive to Sue," *Economics Working Papers*, 200812 (April 2008), p. 1 ("Miceli (2008)").[5]

[5] https://opencommons.uconn.edu/cgi/viewcontent.cgi?article=1162&context=econ_wpapers; citing Steven Shavell, "The Social Versus the Private Incentive to Bring Suit in a Costly Legal System," *Journal of Legal Studies*, Vol. XI, p. 333 (June 1982), http://www.law.harvard.edu/faculty/shavell/pdf/11_J_legal_stud_333.pdf ("Shavell (1982)").

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A. PAGA's Private Versus Social Costs

On the cost side, when a private plaintiff considers whether to bring a lawsuit he takes into account only his own private cost of litigation.[6] He does not take into account the social cost of litigation, which include the defendant's cost and the state's cost (including that of operating the judicial system).[7] The private cost of litigation is less than the social cost,[8] and this divergence between the private and social cost of litigation is often large.[9] Thus, a private plaintiff's incentive to bring litigation may be excessive and, all else being equal, lead to a socially excessive level of litigation.[10] In other words, the private litigant would have the incentive to bring litigation even when the total social costs of that litigation make it socially undesirable.[11]

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[6] *See* Shavell (1982), 333; Steven Shavell, "The Level of Litigation: Private Versus Social Optimality of Suit and of Settlement," *International Review of Law and Economics*, p. 100 (1999), https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.537.1691&rep=rep1&type=pdf ("Shavell (1999)"); Shavell (2004), pp. 391, 395.

[7] *Id.*

[8] *See* Shavell (1982), p. 333; Shavell (1999), p. 100. "[I]t will always be the case that the private cost of use of the system will be less than the social cost." Shavell (2004), p. 394.

[9] *See* Shavell (2004), p. 395.

[10] *See* Shavell (1982), p. 333; Shavell (1999), p. 100; Shavell (2004), p. 391.

[11] *Id.*

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Several attributes of the PAGA regime widen the cost disparity that leads to excessive enforcement activity. On the one hand, a private plaintiff can effectively initiate enforcement activity that has coercive power over an employer via the submission of a simple, and low cost, PAGA notice that carries the threat of imminent litigation. On the other hand, the social cost of PAGA litigation is very high. For an employer, a PAGA case is often very expensive to defend, even for meritless cases or those involving only trivial or hyper-technical violations of the law. At the same time, the stakes to an employer (the risk of loss, including especially the potential imposition of PAGA penalties and attorneys' fees) are often so high as to be potential ruinous. An employer's overall cost exposure in such circumstances is so great that many cannot even attempt to defend the typical PAGA case on the merits, and are instead forced to pay substantial money to settle meritless or trivial cases that provide no social benefit at all.

Armed with the knowledge, through experience, that they wield this coercive power to compel settlements by employers, private plaintiffs' attorneys are even more incentivized to initiate PAGA enforcement action that is not in the public interest due to the greater social cost that it imposes. Further, even without considering the

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significant cost imposed on the state's judicial system, the public sustains significant additional social cost from the detrimental effect of threats of PAGA litigation on the state's economic activity.[12]

B. PAGA's Private Versus Social Benefits

On the benefit side, there is a difference between the private and social benefits of a lawsuit that can also be substantial and reinforce the cost-related tendency toward excessive private litigation.[13] To a private plaintiff, the benefit from litigation is the private gain he personally obtains from prevailing; that is, the transfer of money he personally receives from the defendant.[14] On the other hand, the social benefit from litigation comes primarily from the deterrent effect it has on the behavior of potential defendants generally, i.e., to deter the occurrence of similar harms.[15] Where the private benefit of litigation to a potential

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[12] This is discussed in Section B., *infra*.

[13] *See* Shavell (2004), pp. 391, 395.

[14] *See* Shavell (1982), p. 334; Shavell (1999), p. 100; Shavell (2004), p. 391.

[15] *See* Shavell (1982), p. 334; Shavell (1999), p. 100. "One way of expressing this point about deterrence is to observe that by bringing suit, plaintiffs contribute to potential injurers' general impression that they will be sued if they cause harm. Were the law only on the books, but never to result actually in suit, potential injurers would have nothing to fear." Shavell (2004), p. 391, fn. 6. "[T]he private value of a lawsuit depends on the plaintiff's expected gain at trial compared to his or her cost of filing suit, while the social value depends on the incentives lawsuits create for injurers to undertake efficient care to prevent accidents." Miceli (2008), p. 16. "[T]he private benefits from suit will be what the plaintiff will win from suit, usually money, whereas the

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plaintiff exceeds the socially-beneficial deterrent effect of litigation, the reliance on private incentives will exacerbate the cost-related private tendency toward excessive litigation, discussed above.[16]

It is important to acknowledge that the divergence between private and social benefits of litigation may, in other circumstances (not here) work in the opposite direction: Relying on private incentives, there will tend to be too little litigation from a social perspective when the private benefit falls short of the social benefit, i.e., when the deterrent effect of litigation would lead to a reduction in the underlying harm caused by potential defendants that is greater than a private plaintiff's expected gain.[17] A private plaintiff would not usually be expected to consider those social benefits of litigation as a benefit to himself.[18] In that circumstance, reliance on private incentives would counteract the tendency toward excessive litigation due to the difference between private and social costs, discussed above.[19]

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social benefits from suit will ordinarily be different: They will always include deterrence benefits and may include compensation of victims (if insurance is unavailable) and the setting of precedent." Shavell (2004), p. 394.

[16] *See* Shavell (1982), p. 334; Shavell (1999), p. 100.

[17] *See* Shavell (1982), p. 334; Shavell (1999), p. 100.

[18] *See* Shavell (2004), pp. 391, 394.

[19] *See* Shavell (1982), pp. 334. "What is the socially optimal level of litigation given its expense, and how does it compare to the privately

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However, in the case of PAGA, all the cost and benefit incentives work in the *same* direction to promote a socially-excessive level of enforcement activity that is not in the public interest. Under the PAGA regime, the tendency toward excessive enforcement that is caused by the divergence between the lower private cost and higher social cost of litigation, is reinforced and magnified by the higher private benefit and lower social benefit of such enforcement. In other words, private plaintiffs will make the private cost-benefit decision to threaten and pursue litigation under PAGA that would be rejected if the *social* cost-versus-benefit of enforcement were instead considered, as it should be.

On the private plaintiff's side, the benefit of enforcement is far beyond the harm suffered. In particular, the potential for significant penalties and attorneys' fees for even hyper-technical or trivial violations of the law magnifies the private incentive to threaten and file suit regardless of the minimal (or negative, discussed below) social benefit that could be gained from it. The settlement of trivial or

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determined level of litigation? … [T]he former and the latter levels of legal activity generally differ, and the reasons involve two fundamental types of externality. The first is a negative externality: When a party spends on litigation he does not take into account the litigation costs that he induces others to incur. The second is a positive externality: When a party engages in litigation, he does not take into account the effect that this has on incentives to reduce harm." Shavell (1999), p. 99.

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meritless cases after an employer's receipt of a plaintiff's notice of intent to sue provides no social benefit.[20] Even where cases proceed to formal litigation before settlement, the primary beneficiaries, as Plaintiff-Appellant's FAC alleges, are the plaintiffs' attorneys rather than the purported employee-victims. That a substantial portion of the monies that are transferred goes to plaintiffs' attorneys (a private, not social, benefit) rather than to compensate purported victims, skews the attorney-fueled private incentive to threaten or pursue litigation even further away from any appropriate social incentive.

Significantly, the primary social benefit of law enforcement – to deter the occurrence of similar underlying harm to other victims – is substantially lost under PAGA. In most situations, there is little or

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[20] As amicus Chamber observes, citing LWDA's budget request for the 2019/2020 fiscal year:

> "As the LWDA explained, there is evidence that some plaintiffs and their attorneys are pursuing frivolous claims 'only to settle quickly for little money[.]' In other words, plaintiffs routinely give businesses notice of their intent to sue not because they have valid claims, but because they know that businesses will pay to avoid the cost of litigation. These types of shakedowns provide no social benefit and do not advance the State's interests."

Amicus Curiae Brief of Chamber of Commerce of the United States of America in Support of Petitioner and Appellant, p. 22 ("Chamber Amicus Br.") (citations omitted).

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nothing economically rational (i.e., that constitutes "efficient care"[21]) that an employer can do to change its behavior *toward its California employees* that will avoid the threat of meritless PAGA litigation or litigation based on trivial or hyper-technical violations. The only rational thing such an employer can do to lessen its exposure under the PAGA regime is to diminish the *level of economic activity* that it conducts in this state in the form of *fewer California employees*.

> We have been assuming that the sole decision that an individual makes is whether to act in a way that causes harm when engaging in some activity. In many contexts, however, an individual also makes a choice about his *activity level* – that is, not only does he choose whether to act in a harmful way while engaging in an activity, he also chooses whether to engage in that activity, or, more generally, at what level to do so. For example, in addition to deciding whether to comply with auto emissions controls (maintaining a catalytic converter), an individual also chooses how many miles to drive; the number of miles driven is the individual's level of activity. Similarly,

[21] Miceli (2008), p. 16.

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> not only does a firm decide whether to comply with workplace safety regulations, it also chooses its level of production; the output of the firm is its level of activity.

Polinsky and Shavell (2007), p. 425 (underline added for emphasis).

The loss of employers' desirable (i.e., socially-optimal) economic activity in California is a social cost that is not in the public interest; representing an economic loss to employers and employees alike, and the economy as a whole. In fact, as amicus Chamber correctly points out, PAGA notices and lawsuits often lead to layoffs and business closures, and this impact may be especially acute for smaller businesses.[22] In addition to layoffs and closures, it is likely (for the same reasons) that the socially-optimal level of economic activity in California (in the form of new employers and expanded employment from existing employers) is discouraged from ever coming to this state

[22] Chamber Amicus Br., p. 24-25. The Roundtable agrees with the Chamber's further observation that:

> "Faced with the threat of crippling fines, California businesses have been forced to settle hundreds of meritless cases. These settlements – and the threat of future PAGA actions – have forced businesses to lay off employees or shut down altogether. The primary beneficiaries of these extortionate awards have been trial attorneys, not the employees PAGA is ostensibly designed to protect."

Chamber Amicus Br., p. 10.

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in the first place. In other words, the potential social benefit from deterrence becomes no benefit at all; instead, it becomes a social *cost*. To the extent that "by bringing suit, plaintiffs contribute to potential injurers' general impression that they will be sued if they cause harm,"[23] the deterrent effect that is being created is the wrong one. Underlying violations of the law are not reduced, except by reducing business activity and employment. That sort of precedent does not bode well for the California economy.

While law enforcement officials in the Executive branch would be expected (and charged) to weigh these social benefits and costs in exercising litigation judgment, the substantial private attorney bar that now drives PAGA litigation has a strong counter-incentive to maintain PAGA no matter what the greater social cost may be. Indeed, the PAGA plaintiff attorney bar actually *benefits* if PAGA *fails* to deliver a socially-beneficial deterrence of violations by those employers who remain in the economy, because that scenario creates further privately-beneficial litigation opportunities. To privately-incentivized attorneys, the socially-detrimental cost from the loss of California business activity is not a consideration.

[23] Shavell (2004), p. 391, fn. 6.

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II. THE RESULTING EXCESSIVE LEVEL OF SOCIALLY DETRIMENTAL LITIGATION UNDER PAGA

For the reasons discussed above, the structure of the PAGA regime incentivizes private plaintiffs to pursue a level of enforcement activity that is excessive from the standpoint of social welfare and the public interest. Because PAGA fails to keep enforcement decisions within the substantial control of the Executive branch officials who are charged to pursue the social welfare of the state as a whole, PAGA litigation is driven by private plaintiffs and attorneys (pursuing their own private interests) who have a much greater incentive to sue and threaten suit than would the state (pursuing the public interest), and have the incentive to resolve cases in a manner that is privately, rather than socially, beneficial.[24] Thus, Plaintiff-Appellant's FAC alleges that this is precisely what has occurred:

[24] Quoting the California Department of Industrial Relations ("DIR") – the agency responsible for the oversight of PAGA – Plaintiff-Appellant's FAC alleges that the government's "ability to review and investigate a PAGA case is considered an important check on potential abuses in this arena" but such "review and investigations of PAGA claims are quite rare," and "[l]ess than 1% of all PAGA cases are reviewed or investigated." (CT, Vol. 2, pp. 346-347, FAC ¶ 38 and 38(c) (citation omitted); quoting Cal. Dept. of Industrial Relations, Budget Change Proposal for Private Attorneys General Act (PAGA) Resources for Fiscal Year 2016/2017 (2015), pp. 1-2 ("DIR Budget Report (2015)").)

Quoting the Legislative Analyst's Office, the FAC further alleges:

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- Without governmental review and investigation from the standpoint of social welfare, "employers are being sued and incurring substantial costs defending against technical or frivolous claims, and … workers and the state often end up being shortchanged when these cases are settled." (CT, Vol. 2, p. 347, FAC ¶ 38(b) (citation omitted).)[25]

> "ln 2014, less than half of PAGA notices were reviewed, and LWDA estimates that less than 1 percent of PAGA notices have been reviewed or investigated since PAGA was implemented. When a PAGA notice is investigated, LWDA reports that it has difficulty completing the investigation within the timeframes outlined in PAGA. When an investigation is not completed on time, the PAGA claim is automatically authorized to proceed. [¶] (See Legislative Analyst's Office, The 2016-17 Budget: Labor Code Private Attorneys General Act Resources, Budget and Policy Post (Mar. 25, 2016)[.])"

(CT, Vol. 2, p. 375, FAC ¶ 109.)

Amicus Chamber also observes that "the vast majority of PAGA actions have been pursued without *any* government involvement[.]" (Chamber Amicus Br., p. 22.)

> "Of the over 9,000 PAGA notices filed between fiscal years 2016 and 2018, the LWDA conducted a pre-investigative inquiry "to determine whether to accept cases for investigation or authorize commencement of private litigation" for only *forty-nine*—or *0.5%*—of notices, and actually retained only *thirty*—or *0.3%*—of cases. (DLSE FY 19/20 Budget Change Proposal, Analysis of Problem (May 10, 2019), at 2, *available at* https://tinyurl.com/mry9mfhx.) The LWDA did not even *review* two thirds of notices filed between fiscal years 2016 and 2018. (*Ibid.*)"

(*Id.*)

[25] Quoting DIR Budget Report (2015), p. 2.

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- "[T]here is no assurance that [PAGA] settlements are in fact fair to all the affected employees or the state. The dynamics at play in major litigation tend to work against such assurances: protracted litigation creates strong incentive to settle in a way that best protects the interest of the actual plaintiffs and their attorneys, while discounting the claims and interest of other employees and class members." (CT, Vol. 2, p. 347; FAC ¶ 38(h) (citation omitted).)[26]

[26] Quoting DIR Budget Report (2015), p. 2. As amicus Chamber observes, citing LWDA's budget request for the 2019/2020 fiscal year, when PAGA cases proceed to litigation resulting in settlement:

> "Again, the evidence suggests that plaintiffs' attorneys, not employees, are the primary beneficiaries of such settlements. The LWDA reviewed 1,546 settlement agreements between fiscal years 2016 and 2018 and concluded that *seventy-five percent* of those settlements "fell short of protecting the interests of the state and workers[,]" "reflecting the failure of many private plaintiffs' attorneys[.]"

Chamber Amicus Br., p. 23 (citations omitted). And as to the relatively small number of PAGA claims that are litigated to final judgment, the Chamber further observes (citing the same LWDA budget request):

> "In such cases, California businesses have paid, on average, $1,232,000 per case—more than double the average $504,000 per case for LWDA decided cases. Yet employees recover *about half as much* from court-decided cases as from LWDA-decided cases, and it takes them *approximately 50% longer* to recover."

Id., pp. 23-24 (citations omitted).

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- "[W]orkers and the state often end up being shortchanged when cases are settled." (CT, Vol. 2, p. 347, FAC ¶ 38(b) (citation omitted).)[27]

- "[R]evisions to the PAGA statute to improve the state's oversight of PAGA to better insure [sic] that they are pursued in the public's interest and not just for private purposes" are necessary. (CT, Vol. 2, p. 348, FAC ¶ 39 (citation omitted).)[28]

- As it stands, "there is no way to determine if the public's interest is being served or appropriate penalties being recovered in individual cases." (CT, Vol. 2, p. 348, FAC ¶ 40(c) (citation omitted).)[29]

Indeed, when the DIR acknowledges that "greater state oversight and participation in PAGA cases will help reduce PAGA litigation and litigation costs by weeding out marginal and frivolous claims," (CT, Vol. 2, p. 347, FAC ¶ 38(c) (citation omitted),[30] it is a candid admission that, from the standpoint of the public interest, the PAGA regime is resulting in too much litigation (including the pursuit of marginal and

[27] Quoting DIR Budget Report (2015), p. 2.

[28] Quoting DIR Budget Report (2015), p. 4.

[29] Quoting DIR Budget Report (2015), p. 5.

[30] Quoting DIR Budget Report (2015), p. 2.

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frivolous claims that are not in the public interest), at too great a social cost.

III. DISTINGUSHABLE *QUI TAM* STATUTES DO NOT SHARE PAGA'S UNCONSTITUTIONAL DEFICIENCIES

As discussed, when insufficiently checked, the divergence of private versus social litigation incentives leads to results that are not in the public interest. That observation provides the economic rationale for requiring that the Executive branch (which answers to the public interest) retain "substantial control" over a delegation of prosecutorial authority in order not to violate the separation of powers doctrine. Without sufficient procedural safeguards, all *qui tam* regimes would have this inherent potential to result in excessive enforcement activity due to the divergence between private and social incentives.

> Whistle blowing is overprovided whenever *qui tam* private incentives conflict with social enforcement objectives. While the government weighs the wider spectrum of enforcement (the effect of an individual case on a multiple claim suit, etc.) an insider will blow the whistle whenever his expected recovery exceeds the expected costs of litigation.

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Ben Depoorter and Jef De Mot, "Whistle Blowing: An Economic Analysis of the False Claims Act," *Supreme Court Economic Review*, Vol. 14, pp. 135-136 (2006).[31] However, unlike PAGA, *qui tam* statutes such as the California False Claims Act (and its federal equivalent) include significant safeguards designed to keep the level of resulting enforcement in line with social, rather than private, interests.[32] In particular, these *qui tam* statutes require express government approval before a private party can initiate prosecutorial action and/or authorize the government to intervene at any time to retake control of the litigation after a case has been filed. Thus, PAGA uniquely violates the separation of powers doctrine due to features that do not plague these other *qui tam* statutes.

[31] https://www.journals.uchicago.edu/doi/abs/10.1086/scer.14.3655311.

[32] *See* Plaintiff-Appellant's Opening Brief, pp. 51-70; Chamber Amicus Br., pp. 13-19.

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CONCLUSION

For the reasons stated above, amicus curiae respectfully submits that this Court should reverse the trial court's order sustaining the demurrer to Plaintiff-Appellant's First Cause of Action.

Dated: January 31, 2022

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The text of this brief, including footnotes, contains 4,871 words according to the word count provided by Microsoft Word, the computer program used to prepare the brief.

Dated: January 31, 2022

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