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 REPLY BRIEF

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I. INTRODUCTION

This case presents a matter of first impression. CABIA is not aware of (and Respondent's Brief does not cite) any California authority that has considered whether the Legislature can take the executive branch's law enforcement power and hand it off to legions of unchecked private citizens.[1] An honest reading of the California Constitution dictates that the answer is unequivocally "no." After all, there is no concept of a fourth branch of government or "Private Attorney Generals" in the Constitution.

The California Constitution only contemplates three branches of government. (See Cal. Const. Art. III, § 3.) Thus, not surprisingly, a separation of powers challenge typically involves one of the three branches of government "arrogat[ing] to itself the core functions of another branch." (See e.g., *Marine Forests Society*

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[1] Although *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, briefly addressed a separation of powers challenge to PAGA, that challenge was fundamentally different than CABIA's claim. (Part II, *infra*; Op. Br. 76-89.)

v. California Coastal Com. (2005) 36 Cal.4th 1, 25 ("*Marine Forests*"), citing *Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 297.)

Respondent's Brief frequently points to the absence of controlling authority to argue that CABIA's claim fails and CABIA's authorities are inapposite. (See e.g., Resp. Br., 42 [arguing *Obrien v. Jones* (2000) 23 Cal.4th 40, 48 is "irrelevant" because it addressed interference with judicial rather than executive functions].) At the same time, however, Respondent relies on cases involving fundamentally distinct statutory schemes and separation of powers theories while inexplicably treating those distinctions as immaterial. (See e.g., Resp. Br. 18–24 [relying on *Iskanian v. CLS Transportation Los Angeles LLC* (2014) 59 Cal.4th 348 ("*Iskanian*") despite admitting *Iskanian* involved interference with judicial functions]; Resp. Br. 46–49 [arguing *Marine Forests*, which involved legislative appointments, precludes CABIA's theory].) Respondent's self-serving treatment of California authority demonstrates the weakness of its position.

Both Parties agree that a legislative enactment violates the separation of powers doctrine "whenever the 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." (*Marine Forests*, 36 Cal.4th at 15.) Thus, the Court must decide whether: (1) the executive branch's law enforcement power constitutes a core constitutional function; and (2) a legislative enactment that assigns such power must contain sufficient mechanisms of executive control to pass constitutional muster.

This Court should answer both of those questions in the affirmative. Tellingly, Respondent's Brief does not address either question. Instead, it seeks to reframe those central questions with straw-man arguments that mischaracterize the allegations in CABIA's Complaint and the arguments in CABIA's Opening Brief. CABIA's Reply Brief seeks to respond to Respondent's repeated mischaracterizations of CABIA's position and authorities in order to clarify the basis for CABIA's appeal.

California's government is, by nature, a public body, and governmental powers are vested exclusively within the three branches of government established by the Constitution. By coining the phrase the "Private Attorney General Act," the Legislature signaled its intent to usurp the Attorney General's powers and permanently assign those powers to private individuals, ostensibly creating a fourth branch of government. This is the essence of a separation of powers violation.

II. *ISKANIAN* DID NOT CONSIDER CABIA'S SEPARATION OF POWERS THEORY

Respondent's primary argument on appeal is that *Iskanian* is dispositive. (Resp. Br. 18–24.) As set forth below, Respondent's argument: (1) ignores the fundamental differences between CABIA's separation of powers challenge and the challenge in *Iskanian*; (2) mischaracterizes CABIA's claim; and (3) neglects the fact that PAGA operates differently than every other California qui tam statute.

A. *Iskanian* Did Not Consider CABIA's Separation of Powers Challenge

CABIA contends that PAGA usurps the executive branch's power to enforce Labor Code violations by failing to provide the executive branch with sufficient mechanisms of control at any stage of a PAGA proceeding. (Op. Br. 40–51.) *Iskanian* did not consider this issue.

Iskanian involved a separation of powers argument premised on the *judiciary*'s constitutional function to oversee the neutrality of government prosecutors. (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 389 ["The basis of CLS's argument is found in *County of Santa Clara v. Superior Court* (2010) 50 Cal.4th 35, 112."].) Because CABIA's claim is not based on *County of Santa Clara* and has nothing to do with the judiciary's role in regulating the prosecutorial neutrality of government attorneys, *Iskanian* is inapposite. (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 ["cases are not authority for propositions that are not considered."].)

B. Respondent Conflates CABIA's Sufficient Control Argument with the Government Supervision Argument *Iskanian* Rejected

Respondent analogizes CABIA's challenge to the separation of powers theory *Iskanian* discussed. The analogy, however, is based on a flawed premise that misstates CABIA's position.

Although Respondent admits that *Iskanian* involved interference with a judicial function and that CABIA alleges interference with an executive function, Respondent argues "that distinction makes no difference" because "[t]he employer's theory in *Iskanian* also hinged on the notion that *government attorneys must supervise and control* PAGA actions."[2] (Resp. Br. 20, emphasis added.) However, CABIA neither plead nor argued that

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[2]Tellingly, Respondent's Brief later attempts distinguish CABIA's authorities by applying the exact same rationale. (See Resp. Br., 42 [arguing *Obrien v. Jones* (2000) 23 Cal.4th 40, 48 is "irrelevant" because it "addressed alleged interference with a core constitutional function of the judicial branch"].)

the executive branch "must supervise and control" PAGA actions. Instead, CABIA contends that when the Legislature delegates the executive branch's core law enforcement power to private individuals, separation of powers principles dictate that such a delegation must provide *sufficient* mechanisms of executive control.[3] (*U.S. ex rel. Kelly v. Boeing Co.* (9th Cir. 1993) 9 F.3d 743, 751 ("*Boeing*") ["To determine whether the qui tam provisions undermine the role of the Executive Branch, we must decide whether [...] these provisions accord the Executive Branch 'sufficient control' over the conduct of relators to 'ensure that the [executive branch] is able to perform [its] constitutionally assigned

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[3] To illustrate, if the Legislature enacted a statute identical to PAGA except the statute deputized non-executive branch government attorneys – rather than private individuals – to prosecute PAGA claims, such a delegation would resolve the separation of powers challenge raised in *Iskanian* because a neutral government attorney would be the prosecuting party. By contrast, CABIA's separation of powers argument would not be impacted by this hypothetical statute, as CABIA's claim pertains to the manner in which PAGA invades the executive branch's law enforcement powers by transferring those powers outside the executive branch.

duties.'"], citing *Morrison v. Olson* (1988) 487 U.S. 654, 696 ("*Morrison*"); see generally Op. Br. 51–59.)

To the extent Respondent conflates CABIA's argument that PAGA fails to provide for sufficient mechanisms of executive control with the employer's argument in *Iskanian* – i.e., that PAGA is unconstitutional because it does not *require* PAGA litigants to be supervised by neutral government attorneys – Respondent fails to address CABIA's position. (Resp. Br. 20.)

C. Affirming CABIA's Challenge to PAGA Would Not Create a Rule Disallowing Qui Tam Actions Because PAGA Operates Differently Than Every Other Qui Tam Statute

Respondent's reliance on *Iskanian* also ignores CABIA's allegations that PAGA operates differently than traditional qui tam statutes.

Unlike the employer's theory in *Iskanian*, CABIA's separation of powers challenge would not result in "a rule disallowing qui tam actions." (*Iskanian*, 59 Cal.4th at 391.) That is because the employer's theory in *Iskanian* arose from the general fact that government attorneys do not supervise PAGA litigants.

CABIA's challenge, on the other hand, is predicated on specific provisions in PAGA's statutory scheme that distinguish it from true qui tam statutes. For example, its (1) sham notice provisions (permissive review of unsubstantiated allegations without penalizing frivolous claims); (2) empowerment of PAGA litigants to vindicate the interests of themselves, the State, and nonparty aggrieved employees; (3) full and permanent assignment of the State's interest to PAGA litigants; and (4) express authorization for PAGA litigants to bind the State to any resulting judgment. (See Op. Br. 59–65, 86–89.)

Because those features are unique to PAGA, CABIA's claim cannot be characterized as an attempt to overturn *Iskanian's* generic finding that the enactment of qui tam statutes constitutes "a legitimate exercise of legislative authority." (*Iskanian*, 59 Cal.4th at 390.) In fact, CABIA acknowledges that PAGA's qui tam provisions in section 2699.3(b), which govern OSHA prosecutions, do not present the same separation of powers concerns triggered by PAGA's so-called qui tam provisions in section 2699.3(a). (Op.

Br., 40 at fn. 4.) CABIA also acknowledges that the CFCA's qui tam provisions contain several mechanisms of executive control that have no counterpart in PAGA's statutory scheme. (Op. Br., 59–65.) Thus, Respondent's characterization of CABIA's separation of powers claim as a general attack on qui tam statutes has no merit. (Resp. Br., 21–22.) By asking this Court to blindly adopt *Iskanian's* inapposite reasoning and find that CABIA's claim fails because it would interfere with the Legislature's prerogative to enact qui tam statutes, Respondent fails to respond to CABIA's arguments. (See Resp. Br. 21.)

Respondent's Brief also attempts to sidestep CABIA's argument that PAGA operates differently than other qui tam statutes by arguing that other courts have "refused to narrowly construe *Iskanian's* holding." (Resp. Br. 21, citing *Snipes v. Dollar Tree Distribution, Inc.* (E.D. Cal. Nov. 13, 2017) No. 2:15-CV-00878-MCE-DB, 2017 WL 5293782, at *3 & fn. 2 ("*Snipes*"); *Garcia v. Schlumberger Lift Sols., LLC* (E.D. Cal. Feb. 25, 2020) No. 118CV01261DADJLT, 2020 WL 903208, at *2 ("*Garcia*").) Aside

from the fact that those unpublished decisions from the United States District Court for the Eastern District of California are not binding on this (or any) Court, both decisions simply parrot *Iskanian's* analysis, which has no application to CABIA's present claim for the reasons stated above. (See *Garcia,* 2020 WL 903208, at *2, citing *Snipes* 2017 WL 5293782, at *3, quoting *Iskanian*, 59 Cal.4th at 390–391.)

Snipes and *Garcia's* limited persuasive value is further diminished by *Magadia v. Wal-Mart Associates, Inc.* (9th Cir. 2021) 999 F.3d 668 ("*Walmart*"). There, the Ninth Circuit's thoughtful analysis distinguishing PAGA from other qui tam statutes undermines *Snipes* and *Garcia's* broad reading of *Iskanian*, and confirms CABIA's position that PAGA operates differently than traditional qui tam statutes.

In *Walmart*, the Ninth Circuit held that an employee lacked Article III standing to bring a PAGA claim for meal-break violations because the employee did not personally suffer any injury relating to a meal-break violation. In reaching that holding,

Walmart probed *Iskanian's* characterization of PAGA as "a *type* of qui tam action," noting courts "must look beyond the mere label attached to the statute and scrutinize the nature of the claim itself." (*Walmart*, 999 F.3d at 675.) Adhering to those principles, *Walmart* reasoned that, "[o]n close inspection, PAGA has several features consistent with traditional qui tam actions—yet *many that are not.*" (*Ibid.*, emphasis added.)

First, *Walmart* explained that PAGA differs from other qui tam actions because it authorizes a PAGA plaintiff to pursue penalties on behalf of nonparty employees:

> *PAGA differs in significant respects from traditional qui tam statutes*. First, PAGA explicitly involves the interests of others besides California and the plaintiff employee—it also implicates the interests of nonparty aggrieved employees. By its text, PAGA authorizes an "aggrieved employee" to bring a civil action "on behalf of himself or herself and other current or former employees." [Citation]. And PAGA requires that "a portion of the penalty goes not only to the citizen bringing the suit but to all employees affected by the Labor Code violation." [Citations]. Finally, a judgment under PAGA binds California, the plaintiff, and the nonparty employees

> from seeking additional penalties under the statute. [Citation]. *PAGA therefore creates an interest in penalties, not only for California and the plaintiff employee, but for nonparty employees as well.*
>
> *This feature is atypical (if not wholly unique) for qui tam statutes.* […]

(*Id.* at 676, emphasis added, citations omitted.)[4]

Second, *Walmart* explained that, unlike a traditional qui tam statute, PAGA uniquely assigns the State's entire interest to an aggrieved employee:

> [A] traditional qui tam action acts only as "a *partial* assignment" of the Government's claim. [Citation]. *The government remains the real party in interest throughout the litigation and "may take complete control of the case if it wishes."* [Citation]. Under the FCA, for instance, the federal government can intervene in a suit, can settle over the objections of the relator, and must give its consent before a relator can have the case dismissed. 31 U.S.C. § 3730(b)–(f). *These "significant procedural controls" ensure*

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[4] In a footnote to the passage above, *Walmart* noted, "by contrast, an FCA relator must sue in the name of the United States [citation], which designates that the government is the real party in interest, [citation]." (*Walmart*, 999 F.3d at 676, fn 2.)

> *that the government maintains "substantial authority over the action."* [Citation]. So even if the government partially assigns a claim to a relator, "*it retains a significant role in the way the action is conducted*." [Citation].
>
> In contrast, PAGA represents a permanent, full assignment of California's interest to the aggrieved employee. True enough, PAGA gives California the right of first refusal in a PAGA action.[5] An aggrieved employee can only sue if California declines to investigate or penalize an alleged violation; and California's issuance of a citation precludes any employees from bringing a PAGA action for the same violation. [Citations]. But once California elects not to issue a citation, *the State has no authority under PAGA to intervene in a case brought by an aggrieved employee*. See *Iskanian*, 59 Cal. 4th at 389–90 (acknowledging that PAGA "authoriz[es] financially interested private citizens to prosecute claims on the state's behalf without governmental supervision"). *PAGA thus lacks the "procedural controls" necessary to ensure that California—not the aggrieved employee (the named party*

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[5] Because *Walmart* concerned Article III standing, it had no reason to consider whether PAGA's pre-litigation notice provisions provide for sufficient control under a separation of powers analysis. (*Walmart* 999 F.3d at 675.)

> *in PAGA suits)—retains "substantial authority" over the case.* [Citation].
>
> Consistent with a full assignment, an aggrieved employee's PAGA judgment precludes California from citing the employer for the same violation. [Citation]. In that way, PAGA prevents California from intervening in a suit brought by the aggrieved employee, yet still binds the State to whatever judgment results. *A complete assignment to this degree—an anomaly among modern qui tam statutes—undermines the notion that the aggrieved employee is solely stepping into the shoes of the State rather than also vindicating the interests of other aggrieved employees.*

(*Id.* at 677, emphasis added, citations omitted.)

Walmart's analysis strongly reinforces CABIA's allegation that the Legislature created a unique breed of qui tam action when it enacted PAGA. Significantly, *Walmart* found that PAGA differs from other qui tam statutes with respect to the interests being prosecuted and the manner by which PAGA permanently divests the executive branch of control over PAGA litigation.

Since PAGA's unique characteristics render it an "anomaly among modern qui tam statutes" (see *id.*), Respondent's reliance

on *Iskanian* is misplaced. *Iskanian* never addressed any of PAGA's atypical qui tam features. By contrast, those features are central to CABIA's claim. Accordingly, *Iskanian* is not controlling, and this Court should reverse the trial court's ruling that *Iskanian* precludes any claim that PAGA violates the separation of powers doctrine "regardless of whether it is based on new theories or facts." (CT, Vol. 2, p. 490.)

III. RESPONDENT MISSTATES THE STANDARD APPLICABLE TO CABIA'S CLAIM

Neither *Marine Forests* nor any other authority supports Respondent's contention that CABIA's separation of powers claim requires showing that PAGA defeats a "function that the constitution *specifically vests with a particular executive officer*." (Resp. Br. 27, citing *Marine Forests,* 36 Cal.4th at 31, emphasis added.)

In *Marine Forests Society v. California Coastal Com.*, the California Supreme Court reached two conclusions. First, it concluded that the separation of powers clause is violated "whenever the statutory provisions as a whole, *viewed from a*

realistic and practical perspective,[6] operate to defeat or materially impair the *executive branch's* exercise of its constitutional functions." (*Marine Forests,* 36 Cal.4th at 15, emphasis added.) Second, it concluded that, "as in other contexts in which one *branch's* actions potentially impinge upon the domain of a coordinate *branch*, the separation of powers clause of the California Constitution imposes limits upon the legislative appointment of executive officers." (*Ibid.* emphasis added.) Both conclusions confirm that the separation of powers doctrine prevents one *branch* of government from intruding upon the constitutional functions of a coordinate *branch* of government.

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[6] CABIA contends that from a "realistic and practical perspective," PAGA inevitably results in a permanent and full assignment of executive branch powers to non-executive actors, and in fact, it does so "in at least 'the generality' [citation] or 'vast majority' [citation] of cases [citation]." (*Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 218, citations omitted.) Indeed, the Executive Branch has admitted that 99 percent of PAGA notices are not even reviewed by the appropriate agency due to the temporal and substantive deficiencies in PAGA's sham notice provisions. (See generally, CT, Vol. 2, pp. 346–348, ¶¶38–40.)

Moreover, despite arguing that CABIA must plead that PAGA interferes with the function of a "particular executive officer," Respondent expressly acknowledges that "the separation-of-powers doctrine prevents acts by one *branch* of state government that defeat or significantly impair the core constitutional functions of another *branch*." (Resp. Br. 24.)

To the extent Respondent argues that a separation of powers violation only occurs when a statute intrudes upon the constitutional powers of a "particular executive officer" (rather than the constitutional functions of a *branch* of government), such arguments should be summarily rejected. (See e.g., Resp. Br. 27 ["PAGA does not impair the constitutional functions of any executive officer."]; Resp. Br. 50 ["For separation-of-powers purposes, what matters is whether a statute significantly impairs a constitutional grant of authority to an executive officer."]; see generally, Resp. Br. 28–36 [arguing that PAGA does not impair the constitutional functions of the Attorney General or any other executive officer].) Respondent's insertion of the "particular

executive officer" language into the separation of powers standard serves only to foreshadow Respondent's straw-man arguments discussed below.

IV. PAGA USURPS THE EXECUTIVE BRANCH'S CORE LAW ENFORCEMENT POWER

PAGA violates the separation of powers doctrine by guaranteeing a permanent and full assignment of the executive branch's core law enforcement power to private PAGA litigants.

As noted above, Respondent misstates the applicable standard by arguing that CABIA's claim fails because PAGA does not impair, restrict, or defeat the core constitutional functions of any executive branch "official." (Resp. Br. 24–25.) For the additional reasons discussed below, Respondent's arguments that PAGA does not impair the functions of the Attorney General or any other executive officer have no merit.

A. A Core Constitutional Function of the Executive Branch Is to Enforce State Law, Including California's Labor Laws

CABIA's Opening Brief correctly argues that the enforcement and prosecution of labor code violations is a core

function of the executive branch. Those powers emanate from the Governor's constitutional obligation to "see that the law is faithfully executed" (Cal. Const., Art. V, § 1) and the Attorney General's function as "the chief *law officer* of the state," which he carries out "[s]ubject to the powers and duties of the Governor." (Cal. Const., Art. V, § 13, emphasis added.) The Attorney General's core function as the State's *chief law officer* is codified by statute. (See Cal. Gov. Code § 12511 ["The Attorney General has charge, as attorney, of *all legal matters in which the State is interested*…], emphasis added.)

The Legislature's establishment of executive branch agencies to assist in the enforcement of California's labor laws further demonstrates that the State's interest in enforcing California labor laws falls squarely within the core constitutional functions of the executive branch.[7] (Op. Br. 34–38.)

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[7] Respondent's own authority, *In re M.C.* (2011) 199 Cal.App.4th 784, discussed in Part V.A, *infra*, undermines Respondent's argument that the "statutory functions of the State's labor agencies lend no support to Plaintiff's claim." (Resp. Br. 36.) *In re*

Without any supporting authority, Respondent argues that the Governor's function to "see that the law is faithfully executed" is a "general duty" rather than a "core constitutional function." (Resp. Br. 27.) Respondent's argument apparently suggests that a statute intruding on a "general" constitutional duty does not violate the separation of powers doctrine. However, if the Constitution's express delegation of executive functions permitted capricious distinctions between "general duties" and "core constitutional functions," the separation of powers doctrine would be upended. By Respondent's rationale, the Legislature could enact legislation tasking the judiciary with ensuring "that the law

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M.C. explained that although article III, section 3 of the California Constitution does not expressly apply to child welfare agencies, "[s]eparation of powers principles are nevertheless applicable because 'the county social service agencies ... are performing powers of the state executive branch and are subject to the administration, supervision and regulation of the State Department of Social Services." (*In re M.C.* (2011) 199 Cal.App.4th 784, 803, fn. 14, citing *In re Danielle W.* (1989) 207 Cal.App.3d 1227, 1235–36, fn. 6.) The same rationale applies to CABIA's challenge to PAGA – i.e., the LWDA performs powers of the executive branch.

is faithfully executed," because the Constitution only delegates that function to the executive branch as a "general duty" rather than a core constitutional function. Respondent's argument makes no sense.

By arguing that the Attorney General's powers are "derived from the common law" (Resp. Br. 30), Respondent similarly seeks to diminish the significance of the fact that the Constitution expressly states: "Subject to the powers and duties of the Governor, the Attorney General shall be the *chief law officer of the State*." (Cal. Const. Art. V, § 13, emphasis added.)

As explained in Respondent's Opening Brief, the enforcement of California laws (including labor laws) falls within the core zone of powers that the Constitution assigns to the executive branch. (Op. Br. 34–38.) That is precisely why every qui tam statute in California (other than PAGA) provides for *some* mechanisms of executive control over qui tam litigation.[8]

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[8] Respondent argues that "private parties routinely bring civil actions to vindicate the public interest and enforce public

B. Respondent Mischaracterizes CABIA's Arguments Regarding the Significance of the Attorney General's Constitutional Function

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statutes." (Resp. Br. 40.) However, the statutes Respondent buries in its footnote 11 do not operate like PAGA. (See (1) Pub. Res. Code, § 30802 [Coastal Act expressly authorizes intervention by Coastal Commission]; *Sanders v. Pacific Gas & Elec. Co.* (1975) 53 Cal.App.3d 661, 678 [Coastal Act is not a qui tam statute because it does not permit "any person other than the state" recover civil penalties]; (2) Health & Saf. Code, § 25249.7 [Prop. 65's qui tam notice provisions require "a certificate of merit"]; (3) Civ. Code, § 1794 [Song-Berverly Consumer Warranty act is not a qui tam statute]; *Suman v. Superior Court* (1995) 39 Cal.App.4th 1309, 1318 [buyer must make reasonable attempts to repair before commencing suit]; (4) Health & Safety Code § 1430 [not a qui tam statute]; *Jarman v. HCR ManorCare, Inc.* (2020) 10 Cal.5th 375, 384-85 [the Long-Term Care Act is "remedial and its central focus is "preventative" and damages are capped at $500 for all violations]; (5) Civ. Code, § 52.1(c) [Tom Bane Civil Rights act is not a qui tam statute because private litigant prosecutes "in his or her own name and on his or her own behalf"]; Civ. Code, §52, subd. (d) [expressly authorizing intervention by the Attorney General or other prosecuting authority]; Civ. Code § 52, subd. (e) [non-exclusive remedy]; (6) Gov. Code § 91000 *et seq.* [Political Reform Act provides 120 days for prosecutor to respond to a notice and disincentives frivolous claims by authorizing prevailing defendants to recover litigation costs]; see also Gov. Code § 91010 [audit required before a filing a request with the civil prosecutor]; Gov. Code § 9102 [either party may request a bond be posted "to guarantee payment of costs."].)

Respondent mischaracterizes CABIA's claim by stating CABIA alleges that Article V, section 13, of the California Constitution vests the Attorney General "with *exclusive authority* to pursue civil enforcement actions" and that "the Attorney General must either pursue such actions or maintain control over them." (Resp. Br. 16, citing CT 371; Resp. Br. 28.) CABIA's position is not so rigid.

CABIA does not contend that the separation of powers doctrine *requires* the Attorney General to pursue or control civil enforcement actions. CABIA contends that a constitutional delegation of the executive branch's enforcement power to non-executive branch actors must provide for "sufficient" mechanisms of executive control. (See *Boeing*, *supra*, 9 F.3d at 751; accord *Marine Forests Society v. California Coastal Com.* (2005) 36 Cal.4th 1, 15 [separation of powers principles prohibit non-executive branch actors from exercising "undue control" over "executive actions"].)

PAGA, however, denies the executive branch "sufficient control" over PAGA litigants because it grants a "permanent, full assignment of California's interest [in enforcing labor law violations] to the aggrieved employee." (*Walmart*, *supra*, 999 F.3d at 677.) In doing so, the statutory scheme "diminish[es] the executive branch's authority." (See *Boeing Co.*, *supra*, 9 F.3d at 750; see also *Abbott*, *supra*, 9 Cal.5th at pp. 659–660 [the Attorney General retains ultimate "control and accountability" over the prosecution of civil penalties].)

The only time that the executive branch arguably has any opportunity to exercise control over a PAGA action is during the pre-litigation notice period. During that short, sixty-five day period, PAGA's "notice" provisions purport to permit the LWDA to investigate and prosecute PAGA notices. (Lab. Code, § 2699.3, subd. (a).) However, because a PAGA notice only contains *allegations* and theories, which the LWDA has no obligation to review before the State's interest is permanently assigned to a PAGA litigant (Lab. Code, § 2699.3, subd. (a)(1)–(2); see *Walmart*,

supra, 999 F.3d at 677), PAGA's perfunctory notice provisions actually amount to no notice at all. (Op. Br., 40–45; Part VII, *infra*.) These facial deficiencies in PAGA's "notice" provisions demonstrate that the Legislature merely paid lip service to the notion of executive control when it enacted PAGA. (See generally, CT, Vol. 2, pp. 346–348, ¶¶ 38–40.) Not surprisingly, "review and investigations of PAGA claims are quite rare, and usually occur only because a case has been called to the LWDA's attention through some other means besides the PAGA notice," which the executive branch admits occurs in "less than 1% of all PAGA cases." (CT, Vol. 2, pp. 346–347 at ¶ 38.) Accordingly, when "viewed from a realistic and practical perspective," PAGA defeats and materially impairs the executive branch's exercise of its constitutional functions. (*See Marine Forests*, 36 Cal.4th at 15.)

In other words, CABIA's claim is based on PAGA's complete assignment of the State's law enforcement power to private litigants without providing for *any* mechanisms of executive control. Respondent's argument that "the Constitution does not

vest the Attorney General, or the executive branch, exclusive control over civil enforcement suits" (Resp. Br., 50) is a false red herring. (*Cf. Abbott Laboratories v. Superior Court of Orange County* (2020) 9 Cal.5th 642. (See Op. Br. 22, fn. 3 [explaining Attorney General's argument that he is the State's "chief law officer" in the context of enforcing civil penalties under California's Unfair Competition Law].)

C. Article V, Section 13 of The California Constitution Is Not Limited to Criminal Actions

Respondent also contends that the "core power" implicated by Section 13 is limited to enforcement of criminal laws and that because PAGA does not authorize criminal prosecutions, it does not affect that function. (Resp. Br. 28–29.) Respondent's position is unavailing for several reasons.

First, CABIA's allegations are not limited to Article V, section 13 ("Section 13"). CABIA alleges that PAGA defeats or materially impairs the traditional executive power to enforce or execute the law. (See e.g., CT, Vol. 2, p. 344 at ¶ 31, pp. 370–371

at ¶¶ 101–102, pp. 390–391 at ¶¶ 144–147; see also *Lockyer v. City & Cty. of San Francisco* (2004) 33 Cal.4th 1055, 1068.).

Second, Respondent's position ignores the plain language of Section 13, which provides that "the Attorney General shall be the chief law officer of the State." Respondent inexplicably injects the word "criminal" into that sentence. (*State Bd. of Ed. v. Levit* (1959) 52 Cal.2d 441, 460 ["The people use plain language in their organic law to express their intent in language which cannot be misunderstood, and we must hold that they meant what they said."]; see also *Abbott Laboratories v. Superior Court of Orange County* (2020) 9 Cal.5th 642, 659 [noting "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."[9]], emphasis added, citing

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[9] Webster's dictionary defines "prerogative" to mean "*an exclusive or special right, power, or privilege*: such as (1): one belonging to an office or an official body." (Retrieved December 14, 2021, from https://www.merriam-webster.com/dictionary/perrogative, emphasis added.)

Cal. Const., Art. V, § 13.]; Gov. Code, § 12511 ["The Attorney General has charge, as attorney, of all legal matters in which the State is interested…"].)

In fact, the Attorney General's Web site expressly states that "[t]he Attorney General is the state's *top lawyer* and law enforcement official." (*About the Office of the Attorney General*, https://oag.ca.gov/office [as of Dec. 14, 2021], emphasis added.) As the "state's top lawyer," the Attorney General *"[r]epresents the People of California in civil* and criminal *matters* before trial courts, appellate courts and the supreme courts of California and the United States" and "*[s]erves* as legal counsel to state officers and, with few exceptions, to *state agencies, boards and commissions.*" (*Id.*, emphasis added.)

Actions for civil penalties under PAGA are plainly law enforcement actions, and Respondent cannot escape CABIA's separation of powers claim by reading the word "criminal" into the California Constitution. (See, e.g., *Arias v. Superior Court* (2009) 46 Cal.4th 969, 986 [describing an action for civil penalties under

PAGA as "fundamentally a law enforcement action" that "substitute[s] for an action brought by the government itself"]; see also, *In re M.C.* (2011) 199 Cal.App.4th 784, 812 ["The California Constitution expressly provides that *law enforcement and* the prosecution of crimes *are* core executive branch functions."], emphasis added.)

Third, Respondent's authorities are inapposite. Neither *Pitts v. County of Kern* (1998) 17 Cal.4th 340 nor *Steen v. Appellate Division of Superior Court* (2014) 59 Cal.4th 1045, hold that the core executive branch function embodied by Section 13 is limited to enforcement of criminal laws. The most those cases can be construed as holding is that the initiation of criminal proceedings is one core function of the executive branch. (*See Steen, supra*, 59 Cal.4th at 1053, citing Section 13.)

Thus, the cases cited by Respondent as examples of the Legislature superseding the Attorney General's authority to bring enforcement actions to protect the public are distinguishable. (Resp. Br. 30–32.) In each, the Legislature vested enforcement

powers in another executive branch department or agency. (See *People v. New Penn Mines, Inc.* (1963) 212 Cal.App.2d 667, 675 [delegation to regional water pollution control – a state agency – the "the exclusive means and procedures … to control water pollution and nuisance"]; *Van de Kamp v. Gumbiner* (1990) 221 Cal.App.3d 1260, 1265 [Attorney General divested of authority to regulate health plans because exclusive authority transferred by the Legislature to the Department of Corporations, a state agency].) Neither case considered legislative action that permanently assigned executive enforcement power to private litigants deputized to prosecute civil penalties on behalf of themselves, others, and the state, as PAGA does.

Although Respondent acknowledges this distinction, Respondent contends it is insignificant, arguing that the Legislature could not transfer authority to prosecute civil enforcement actions to the Department of Corporations, local water control boards, or the State's labor agencies if Section 13, prescribes "an exclusive civil enforcement function" to the

Attorney General. (Resp. Br. 32.) However, CABIA's Complaint contains no such allegation. CABIA does not dispute that the Legislature can transfer executive branch functions *within* the executive branch.

In fact, the Legislature's enactment of statutes that assign executive powers to executive branch agencies (e.g., the Department of Corporations, local water control boards, and the State's labor agencies) proves CABIA's point; namely, that PAGA's permanent, full assignment of executive powers to actors outside of the executive branch is an anomaly.

In short, Section 13, does not pertain exclusively to criminal actions. Even if it did, CABIA's separation of powers claim is not limited to the core functions of the Attorney General as Respondent suggests. (Resp. Br. 35–36). CABIA alleges that PAGA usurps the core constitutional enforcement power of the executive branch.

V. CALIFORNIA AUTHORITY DOES NOT FORECLOSE CABIA'S SEPARATION OF POWERS THEORY

Respondent's argument that California authorities foreclose CABIA's separation of powers theory is based on the same flawed argument that the executive branch does not have "exclusive control over civil enforcement actions" already discussed.[10] (See e.g., Resp. Br. 36.)

As set forth below, neither *In re M.C.* (2011) 199 Cal.App.4th 784 ("*In re M.C.*") nor *Gananian v. Wagstaffe* (2011) 199 Cal.App.4th 1532 ("*Gananian*") – relied on by Respondent – foreclose CABIA's challenge.

A. *In re M.C.* Involved a Juvenile Dependency Proceeding, Which Is Not a Law Enforcement Action

In re M.C. did not involve a challenge to a statute that usurps the executive branch's core law enforcement power. In fact,

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[10] Respondent's "exclusive enforcement" argument completely disregards that CABIA's Opening Brief provides an extended analysis distinguishing PAGA from the CFCA and the FCA, which both permit private litigants to prosecute civil penalties subject to certain procedural control mechanisms. (Op. Br. 40-65.)

the statute at issue in *In re M.C.* did not involve the executive branch's law enforcement power at all.

In *In re M.C.*, a social worker for the agency declined to commence court proceedings on behalf of a juvenile. (*In re M.C.*, 199 Cal.App.4th at 790.) Thereafter, a child advocacy group challenged the agency's decision by filing an application with the juvenile court pursuant to former section 331 of the Welfare and Institutions Code ("section 331"), and the juvenile court ordered the agency to file a dependency petition and take the juvenile into custody. (*Ibid.*) The agency petitioned for writ of mandate, arguing that the court's order violated the separation of powers doctrine in that case (i.e., an as applied challenge) by usurping the agency's "exclusive executive authority" to determine whether to initiate dependency proceedings. (*Id.* at 807.)

In affirming the juvenile court's order, *In re M.C.* rejected the agency's attempt to analogize the decision to initiate dependency proceedings with "the decision to initiate a criminal prosecution" because juvenile dependency proceedings are neither

law enforcement actions nor criminal prosecutions. (See *In re M.C.*, *supra*, 199 Cal.App.4th at 812.) The court reasoned, "[t]he purpose of a dependency proceeding is to *protect* the child, rather than *prosecute* the parent." (*Ibid.*, emphasis added.) In other words, the statutory scheme at issue did not implicate the executive branch's Constitutional power to *enforce* State law.[11]

Disregarding *In re M.C.'s* distinction between law enforcement activities and juvenile dependency proceedings, Respondent's Brief cherry-picks quotations from that opinion to argue that the executive branch does not have constitutional and statutory law enforcement powers "in the civil context." (Resp. Br. 37, misquoting *In re M.C.*, *supra*, 199 Cal.App.4th at 812.) *In re M.C.* says no such thing.

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[11] To the extent Respondent cites other authorities that do not involve the transfer of the executive branch's *law enforcement* powers, those cases are inapposite. (See Resp. Br. 38, citing *Perry v. Brown* (2011) 52 Cal.4th 1116, 1153–1160 [holding official proponents of a ballot initiative are not precluded from *defending* the initiative on the State's behalf].)

In fact, *In re M.C.* expressly contradicts Respondent's position by stating, "[t]he California Constitution expressly provides that *law enforcement and* the prosecution of crimes *are* core executive branch *functions*." (*In re M.C., supra*, 199 Cal.App.4th at 812, emphasis added, citations omitted.) To interpret that sentence to mean that civil law enforcement activities fall outside the executive branch's core functions (as Respondent does) requires disregarding basic principles of English grammar. (Resp. Br. 38.)

In re M.C.'s use of the conjunction "and," plural conjugation ("are"), and the plural noun "functions," clearly signify that "law enforcement" activities *and* "criminal prosecutions" constitute two distinct "core executive branch *functions*." (*In re M.C., supra*, 199 Cal.App.4th at 812, emphasis added.) Read properly, *In re M.C.* held that section 331 did not usurp either of those core executive functions. To the extent *In Re M.C.* discusses a criminal prosecutor's charging discretion, its analysis is merely a byproduct of the agency's failed attempt to analogize juvenile dependency

proceedings to criminal prosecutions. (See *Ibid.*) To conclude otherwise would require finding that a juvenile dependency proceeding, which is intended to "protect the child," constitutes a law enforcement action. (*Id.* at 812.)

Unlike the juvenile dependency statute addressed by *In re M.C.,* CABIA's challenge to PAGA implicates the executive branch's core law enforcement powers. The California Supreme Court has described a PAGA lawsuit as being "fundamentally a law enforcement action." (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 986.) In fact, prior to PAGA's enactment and unconstitutional delegation of executive powers to private individuals, the enforcement of labor laws had been exclusively vested in the executive branch and the State's labor law agencies through the Constitution and by statute. (See e.g., *Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal.App.5th 745, 753, citing *Iskanian*, 49 Cal.4th at 379 ["PAGA was enacted in 2003 to allow private parties to sue for the civil penalties previously only recoverable by a state agency."]; *Rebolledo v. Tilly's, Inc.* (2014)

228 Cal.App.4th 900, 913–914 ["The DLSE enforces wage and labor standards and all labor laws not specifically delegated to another agency."].)

In re M.C. is also distinguishable because the statutory scheme it considered contains at least two mechanisms of executive control that have no counterpart in PAGA's statutory framework.

First, as Respondent admits, *In Re M.C.* involved a statutory scheme that does not transfer executive power until *after* "the agency declines to file a dependency petition." (Resp. Br. 37, citing *In re M.C.*, *supra*, 199 Cal.App.4th at 791–792.) *In re M.C.* explained, "sections 329 and 331 make clear that the social worker *must have already conducted an investigation and have declined to commence dependency proceedings* before section 331 [which authorizes private persons to petition the court to review agency determinations] is invoked." (*In re M.C.*, 199 Cal.App.4th at 806–807, emphasis added.) By contrast, PAGA contains no requirement that the LWDA review PAGA notices before authorizing so-called

private attorney generals to prosecute claims on behalf of the State. Instead, PAGA deputizes PAGA litigants to prosecute claims after the expiration of a short and inflexible notice period.

Second, the statutory scheme addressed by *In re M.C.* requires that an application to commence proceedings in juvenile court contain a sworn "affidavit… setting forth *facts*" in support of the application. (Welf. & Inst. Code, § 329, emphasis added.) A PAGA notice consists of unsworn allegations, which the LWDA has no obligation to review. Thus, even if the LWDA did review the PAGA notices it receives (it does not 99 out of 100 times), PAGA's notice provisions do not equip the LWDA with any means to determine which PAGA notices warrant investigation or prosecution.

In any event, *In re M.C.* involved a challenge to a statutory scheme that permits "[o]ne branch of government [to] *perform an act or exercise a function* affecting another branch." (*In re M.C.* (2011) 199 Cal.App.4th 784, 804.) It did not involve a full

assignment of executive branch powers to private citizens, it has no application to CABIA's claim.

B. *Gananian v. Wagstaffe* Is Also Inapplicable to CABIA's Separation of Powers Challenge

Gananian v. Wagstaffe (2011) 199 Cal.App.4th 1532, is likewise unhelpful to Respondent because it did not involve a separation of powers challenge. (See Resp. Br. 38.)

In *Gananian*, the plaintiff alleged that a school district and its superintendent (the "district") wasted and misused bond proceeds. (*Id.* at 1536.) Thereafter, pursuant to former Government Code section 91007, the plaintiff sent a letter to a district attorney requesting that he prosecute civil claims against the district pursuant to the Political Reform Act (PRA). (*Id.* at 1536–1537.) The district attorney responded to the plaintiff's letter indicating that he had found no basis for prosecuting the claim. (*Id.* at 1537.) The plaintiff then filed a claim alleging, in pertinent part, that the district attorney should be compelled to investigate and prosecute the alleged misuse of bond funds pursuant to Education Code section 15288. (*Id.* at 1537–1538.) The court of

appeal rejected the plaintiff's theory, reasoning that Education Code section 15288 did not impose a mandatory duty on any agency of law enforcement to investigate or prosecute any violation of law associated with the expenditure of bond funds. (*Id.* at 1542.)

Gananian addressed two questions, neither of which apply to CABIA's claim. Specifically, it considered: (1) whether "Education Code section 15288 create[s] an affirmative, nondiscretionary duty on the part of district attorneys to investigate and prosecute *alleged crimes* related to the expenditure of Proposition 39 bond funds;" and (2) if so, whether Education Code section 15288 gives a private right of action to a private individual to enforce that obligatory duty.[12] (*Gananian*,

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[12] Section 15288 provides: "It is the intent of the Legislature that upon receipt of allegations of waste or misuse of bond funds authorized in this chapter, appropriate law enforcement officials shall expeditiously pursue the investigation and prosecution of any violation of law associated with the expenditure of those funds." (Ed. Code, § 15288.)

supra, 199 Cal.App.4th at 1539–1540, emphasis added.) Neither question is relevant here.

And to the extent *Gananian* discussed separation of powers principles, it was in the context of whether a private individual could compel a district attorney to investigate criminal violations. (See *id.* at 1544 ["[A] district attorney cannot be compelled by mandamus to prosecute a *criminal* case."], emphasis added, citations omitted.)

Unlike the plaintiff in *Gananian*, CABIA does not allege that PAGA creates an affirmative duty for the executive branch to investigate and prosecute alleged crimes. Indeed, Respondent's Brief belabors the point that "[t]his appeal does not address the criminal prosecutorial function." (See e.g., Resp. Br. 49.) To that end, Respondent's reliance on *Gananian* is misplaced.

Equally confusing is Respondent's reference to *Gananian's* discussion regarding *Board of Supervisors v. Simpson* (1951) 36 Cal.2d 671 (*"Simpson"*). (Resp. Br. 39.) Respondent incoherently argues that the statute in *Simpson* permitted the board of

supervisors to order a district attorney to bring a civil action in the name of the people of the State of California to abate a public nuisance, and thus, PAGA does not violate the separation of powers doctrine because it "does not allow any party to *overrule* enforcement decisions of the State's labor officials." (Resp. Br. 39, emphasis added.) CABIA's claim has nothing to do with private parties "overrul[ing the] enforcement decisions of the State's labor officials." (See Resp. Br. 39.) CABIA's argument is that PAGA's statutory scheme does not permit the State's labor officials to make enforcement decisions *at all*.

Simpson is also distinguishable because it considered a statute that permitted a board of supervisors to order a district attorney to prosecute a civil enforcement action in the name of the people of the State of California. PAGA, on the other hand, authorizes an "aggrieved employee" to seek civil penalties in her own name "on behalf of the state and other current or former employees." (*Khan v. Dunn-Edwards Corp.* (2018) 19 Cal.App.5th 804, 809.) In fact, *Gananian* distinguished the statute considered

by *Simpson* precisely because "the power to compel the district attorney to proceed rested with the board of supervisors in *Simpson*, *not with the Legislature, and not with any individual citizen.*" (*Gananian*, *supra*, 199 Cal.App.4th at 1544, emphasis added.)

For the reasons stated above, Respondent's reliance on *In re M.C.* and *Gananian* is misplaced. Neither case involves the assignment of civil enforcement powers to private citizens. Further, neither case holds (or even suggests) that the Legislature can fully assign the executive branch's law enforcement powers to private citizens without preserving some degree of executive control. (See Resp. Br. 39.)

VI. RESPONDENT FAILS TO MEANINGFULLY DISTINGUISH CABIA'S FEDERAL AUTHORITIES

A. *Marine Forests* Does Not Render *Morrison* and *Boeing* Inapposite

Since Respondent has no compelling argument that PAGA contains sufficient mechanisms of executive control, Respondent attempts to distinguish *Morrison* and *Boeing* to avoid application of the "sufficient control" test established by those cases.

Respondent argues that *Morrison* and *Boeing* are inapposite because the "federal and state constitutions are not the same or even similar with respect to the functions at issue." (Resp. Br. 47.) However, *Morrison* and *Boeing* both involved alleged interferences with the executive branch's law enforcement functions – i.e., the same function at issue here.

Respondent's attenuated arguments regarding the differences between the California and federal Constitutions misconstrue the Supreme Court's analysis in *Marine Forests*. (Resp. Br. 47–48.) In *Marine Forests*, "the specific governmental function at issue" involved "the appointment of executive officers." (*Marine Forests*, *supra*, 36 Cal.4th at 28.) Accordingly, because the Federal Constitution contains an appointments clause and the California constitution does not, *Marine Forests* provided an overview of the structural differences between the two constitutions to support its ultimate conclusion "that a statute does not violate the provisions of article V, section 1, or the separation of powers clause of the California Constitution simply

because the statutory provision specifies that the appointment of an executive officer is to be made by someone other than the Governor." (*Id.* at 48.)

Respondent's attempt to invoke *Marine Forest's* structural analysis and apply it to CABIA's challenge as a basis to distinguish *Morrison* and *Boeing* is nonsensical. Respondent's argument is based on the fact that the United States Attorney General derives its law enforcement powers from the President's duty to "take Care that the laws be faithfully executed," whereas California's Constitution provides that the Attorney General is the chief law enforcement officer of the State. (Resp. Br., 47–48.) Based on that immaterial distinction, Respondent concludes that "the relevant federal and state provisions certainly are not the same with respect to the function at issue." (*Ibid.*)

However, like the federal Constitution, the California Constitution expressly vests the power to see that "that the law is faithfully executed" in the executive branch. (Cal. Const. Art. V, § 14.) The fact that the California Constitution establishes the

Attorney General as the State's chief law enforcement officer does not alter that fact, especially because the Attorney General's authority is "[s]ubject to the powers and duties of the governor." (Cal. Const. Art. V, § 13.) At most, California's Constitution distributes executive *functions* amongst different executive actors, but that does not mean that law enforcement powers fall outside of the executive branch's core functions. Nor does that structural difference support Respondent's argument that *Morrison* and *Boeing* are inapposite.[13]

Respondent also seeks to avoid *Morrison*'s "sufficient control" test by arguing that "it is irrelevant whether the initiation of civil enforcement actions is in some general sense an 'executive function.'" (Resp. Br., 49–50.) Respondent's argument is based on the flawed premise that CABIA must show interference with the

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[13] To the extent Respondent's argument mischaracterizes CABIA's position, it also fails. (See Resp. Br. 48 ["Plaintiff's *principal contention* is that PAGA interferes with the Attorney General's own constitutional functions under article V, section 13, of the California Constitution."], emphasis added.)

function of a specific executive officer. (Resp. Br., 50 ["For separation-of-powers purposes, what matters is whether a statute significantly impairs a constitutional grant of authority to an executive officer."].) As discussed previously, Respondent misstates the standard. (See Part III, *supra*.)

B. *Boeing's* Separation of Powers Analysis Did Not Hinge on the Federal Constitution's Appointment Clause

Boeing is directly analogous to CABIA's claim to the extent it addressed whether the FCA's qui tam provisions violate separation of powers principles.

Respondent makes no compelling argument to undermine *Boeing's* application to CABIA's claim. Respondent's primary challenge to *Boeing* is that the Ninth Circuit "did not explain in detail why it applied *Morrison* to a civil statute." (Resp. Br. 50.) Respondent's assertion is patently false. Indeed, *Boeing* expressly states: "[c]omparison to *Morrison* is *particularly useful* because that case considers the degree to which Congress may assign *prosecutorial powers to persons not under the direct control of the Executive Branch*." (*Boeing,* 9 F.3d at 751, emphasis added.) In

fact, *Boeing* reasoned, "[t]he authority *most analogous* to this case is *Morrison v. Olson*" and that that "*Morrison* provides a baseline against which we may assess whether Congress has unconstitutionally diminished *executive power* by permitting private plaintiffs to sue in the name of the United States for an injury to the federal treasury." (*Ibid.*) The same rationale applies here.

Boeing's separation of powers analysis involved a legislative enactment that assigned executive law enforcement powers to private qui tam litigants. *Boeing's* separation of powers analysis is persuasive. To the extent it is distinguishable, it is only because *Boeing* considered the FCA, which, unlike PAGA, provides for some level of executive control.[14]

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[14] *Walmart* explained that the FCA contains "significant procedural controls" to "ensure that the government maintains 'substantial authority over the action.'" (*Walmart*, *supra*, 999 F.3d at 677, citing *Stalley ex rel. U.S. v. Orlando Reg'l Healthcare Sys., Inc.* (11th Cir. 2008) 524 F.3d 1229, 1234.) Thus, it reasoned that "even if the government partially assigns a claim to a relator, 'it retains a significant role in the way the action is conducted.'" (*Ibid.*, citing *Stalley v. Methodist Healthcare* (6th Cir. 2008) 517 F.3d

Respondent argues that other federal courts have "disagreed" with *Boeing* and found that *Morrison* "does not apply to civil enforcement actions." (Resp. Br., 50, fn. 50.) However, none of Respondent's authorities reject *Boeing's* reasoning that a constitutional delegation of executive powers must contain sufficient mechanisms of executive control. (See *Riley v. St. Luke's Episcopal Hosp.* (5th Cir. 2001) 252 F.3d 749, 755, fn. 9 ("*Riley*") [noting *Boeing* "used Morrison to examine the question of whether the FCA's qui tam provisions violate separation of powers" and that "the Ninth Circuit relied on the independent counsel provisions discussed in *Morrison* simply as an analogy."]; *Hollander v. Ranbaxy Laboratories Inc.* (E.D. Pa. 2011) 804 F.Supp.2d 344, 351 [noting *Riley* did not apply *Morrison* but

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911, 918.) Conversely, it found that PAGA "lacks the 'procedural controls' necessary to ensure that California—not the aggrieved employee (the named party in PAGA suits)—retains 'substantial authority' over the case." (*Ibid.*)

nevertheless considered whether the Executive Branch "retains sufficient control over the relator"]; *Pequignot v. Solo Cup Co.* (E.D. Va. 2009) 640 F.Supp.2d 714, 727 [citing *Riley* for the proposition Respondent quotes in the context of an Article II standing challenge to a false marketing statute not applicable here].)

C. *Marine Forests* Confirms That the Separation of Powers Doctrine Requires Executive Control Over Executive Functions

Even *Marine Forests*, upon which Respondent relies (even though it exclusively pertains to executive appointments), supports CABIA's argument that the Legislature intrudes on the executive branch's functions when it transfers core executive powers outside the executive branch without sufficient control. Significantly, *Marine Forests* looked to the issue of executive control even though California's Constitution does not contain an appointments clause.

In *Marine Forests,* the California Supreme Court reasoned that California's separation of powers principles are violated in "*at least* two distinct circumstances," including when: (1) a legislative

appointment "intrudes upon … the 'core zone' of the executive functions of the Governor (or another constitutionally prescribed executive officer), impeding that official from exercising the independent discretion contemplated by the Constitution in the performance of his or her essential executive duties"; and (2) "the statutory scheme, taken as a whole, permits the legislative appointing authority to retain *undue control* over an appointee's executive actions." (*Marine Forests, supra*, 36 Cal.4th 1, 15, emphasis added.)

Although CABIA's present challenge does not involve a legislative appointment (as did *Morrison* and *Marine Forests*), that distinction does not disrupt the basic principle that the separation of powers doctrine prevents the Legislature from usurping the executive branch's control over its core constitutional functions. *Marine Forests* unequivocally stated that the separation of powers doctrine is violated when the Legislature: (1) intrudes on core constitutional functions of the executive branch; and (2) accords non-executive branch actors "undue control" over "executive

actions." (*Marine Forests, supra*, 36 Cal.4th at 15.) Thus, *Marine Forests* reinforces the notion that separation of powers requires the executive branch to retain sufficient control over law enforcement actions for a delegation of those functions to be constitutional.

To the extent that *Marine Forests* does not contain the "sufficient control" test articulated in *Boeing* and *Morison,* that is merely because *Marine Forests* only considered the separation of powers it specifically addressed. In fact, *Marine Forests* expressly acknowledges that its discussion pertained only to "two distinct circumstances" in which separation of powers principles might be violated in the context of legislative appointments. (*Marine Forests, supra*, 36 Cal.4th at 15.) *Marine Forests* does not foreclose CABIA's theory that PAGA violates the separation of powers doctrine by fully assigning the executive branch's labor law enforcement powers to private litigants.

VII. PAGA DOES NOT PROVIDE FOR SUFFICIENT EXECUTIVE CONTROL OVER PAGA ENFORCEMENT

Respondent also mischaracterizes CABIA's argument regarding the facial deficiencies in PAGA's notice provisions by stating, "[CABIA] argues that the Legislature must 'require' the labor agencies to investigate the PAGA notices they receive." (Op. Br. 42.; see Resp. Br. 23.) However, CABIA never argued that a proper delegation of executive authority "requires" mandating the LWDA's investigation of PAGA notices or that the absence of such a requirement is the sole reason that PAGA violates separations of powers doctrine. Instead, CABIA argues that PAGA's sham notice provisions have inevitably resulted in less than one percent of PAGA notices being reviewed. (CT, Vol. 2, pp. 346–348, ¶ 38–40.) Even less are actually investigated. (*Id.*, p. 347, ¶ 38 [DIR does not "reach a solid conclusion and cite or settle within the allotted time before losing the ability to forestall private litigation."].)

As discussed, PAGA does not contain mechanisms of executive control comparable to the FCA, the CFCA, or any other qui tam statute. Under the FCA, the Government must be served

with all pleadings and deposition transcripts and has express statutory authority to, *inter alia*: (1) intervene in FCA actions upon receipt of the complaint and material evidence or at a later date upon a showing of good cause; (2) dismiss FCA actions; (3) settle FCA claims over objections by relators; and (4) stay discovery. (31 U.S.C.A. § 3730, subd. (c).) The relevant provisions in CFCA's statutory scheme generally track those in the FCA, and permit the state or prosecuting authority "to intervene in [a CFCA] action with which it had initially declined to proceed if the interest of the state or political subdivision in recovery of the property or funds involved is not being adequately represented by the qui tam plaintiff." (See Gov. Code, § 12652, subd. (f).)

By arguing that the State is "free to intervene as of right in an ongoing PAGA action" (Resp. Br. 53, citing Code Civ. Proc., § 387), Respondent ignores the fact that PAGA does not have any of the features present in the FCA's statutory scheme. (See *Wal-Mart*, *supra*, 999 F.3d 668, 677 [noting that under the FCA, "the federal government can intervene in a suit, can settle over the

objections of the relator, and must give its consent before a relator can have the case dismissed."].) Nor does PAGA contain any provision that authorizes the LWDA to request the deposition transcripts and material evidence in an ongoing PAGA action. (See 31 U.S.C. 3730, subd. (c); Gov. Code § 12652, subd. (f)(1).) Thus, unlike the FCA and CFCA, PAGA does not provide the executive branch with any means to determine whether intervention would even be appropriate.

Respondent's argument also ignores that the FCA expressly allows the Government to dismiss an action and stay discovery without having to intervene in a case. (See *Boeing, supra*, 9 F.3d 743, 753.) The CFCA contains similar provisions that have no counterpart in PAGA. (See e.g., Gov Code § 12652, subd. (c)(1) ["the action may be dismissed only with the written consent of the court *and the Attorney General or prosecuting authority* of a political subdivision"], emphasis added; *id.*, subds. (c)(4), (c)(7)(B), (c)(8)(B) [Attorney general, prosecuting authority, or both may intervene after receipt of "a complaint and written disclosure of material

evidence"]; *id.*, subd. (h) [authorizing request to stay discovery that "would interfere with an investigation or prosecution of a criminal or civil matter arising out of the same facts, regardless of whether the Attorney General or local prosecuting authority proceeds with the action."].) California's general intervention statute simply does not cure the absence of executive control mechanisms in PAGA.

PAGA permanently and fully assigns the executive branch's law enforcement powers to PAGA litigants after the expiration of PAGA's sixty-five day notice period. (*Walmart*, *supra*, 999 F.3d at 677). PAGA's only ostensible mechanisms of executive control can be found in PAGA's pre-litigation notice provisions.[15] These

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[15] To the extent Respondent argues that PAGA provides for sufficient executive control by requiring "that the proposed settlement [in a PAGA action] be provided to LWDA at the same time it is submitted to the court" (Resp. Br. 54), that provision does not provide for sufficient executive control. Unlike the FCA and the CFCA, PAGA does not expressly authorize the LWDA to intervene in a PAGA action and similarly does not require a PAGA litigant to furnish the LWDA with any evidence or updates concerning a PAGA action. Thus, there is no doubt that the LWDA does not "regularly intervene to weigh in on proposed settlements of PAGA actions," as Respondent unilaterally asserts. (Resp. Br. 54, fn. 18.) Regardless, whether the LWDA "regularly intervenes"

perfunctory notice provisions, however, do not contain sufficient mechanisms of executive control when the statutory scheme as a whole is viewed from a realistic and practical perspective.

As explained in CABIA's Opening Brief, the substance of "a PAGA notice consists of 'mere allegations' unsupported by evidence and PAGA does not contain penalties to deter the filing of frivolous PAGA notices."[16] (Op. Br. 41–44; see Lab. Code §

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in PAGA actions is an issue of fact not established by two trial court orders cited by Respondent – especially since thousands of PAGA actions are litigated every year. (See *California Teachers Association v. State of California* (1999) 20 Cal.4th 327, 347 [in considering a facial challenge to a statute, courts cannot "ignore the actual standards contained in a procedural scheme and uphold the law simply because in some hypothetical situation it might lead to a permissible result."].)

[16] Contrary to Respondent's assertion, CABIA's challenge to PAGA's perfunctory notice provisions has nothing to do with the Legislature's budgetary prerogative. (Resp. Br. 22.) In fact, if the Legislature had drafted PAGA to include notice provisions comparable to those in the CFCA, such provisions would shift the costs associated with investigating PAGA notices from the LWDA to PAGA litigants and consequently, provide the LWDA with more "resources" at no cost to the State. Because PAGA does not penalize the filing of frivolous PAGA claims or contain any evidentiary threshold applicable to PAGA notices, PAGA does the opposite. (Op. Br. 42.)

2699.3(a)(1) [PAGA notice must "give written notice [to the LWDA and the employer] of the specific provisions of [the Labor Code] *alleged* to have been violated, including the facts and theories to support the *alleged* violation."], emphasis added.) Thus, even if PAGA required the LWDA to review PAGA notices, such requirement would not resolve the fact that a PAGA notice does not aid the LWDA in determining which PAGA notices warrant investigation.[17] In fact, the threshold requirements for a "sufficient" PAGA notice are so low that the Sixth District Court of Appeal recently held that a PAGA notice does not even need to allege whether the violations impacted "other aggrieved employees

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[17]Webster's Dictionary defines "determine" to mean: "to officially decide (something) especially because of evidence or facts: to establish (something) exactly or with authority." (Retrieved December 14, 2021, from https://www.merriam-webster.com/dictionary/determine.) Yet Labor Code section 2699.3(a)(1) does not require any evidence or facts, only theories and minimal allegations. Thus, the purported "determination" process PAGA provides for stands in stark contrast to, for example, the determination process under Labor Code section 98.7, which confers on the Labor Commissioner "'the authority to evaluate the strength of the public interest at stake...'" (See *Crestwood Behavioral Health, Inc. v. Lacy* (2021) 70 Cal.App.5th 560, 584.)

(or otherwise refer to an employee other than themselves)." (*Santos v. El Guapos Tacos, LLC* (Cal. Ct. App., Nov. 30, 2021, No. H046470) 2021 WL 5626375, at *5 ("*Santos*").)

Given PAGA's sham notice provisions, there is no merit to Respondent's suggestion that PAGA notices "allow[] the labor agencies to determine which notices warrant investigation." (Resp. Br. 22; (CT, Vol. 2, p. 346, ¶ 38 ["review and investigations of PAGA claims are quite rare, and usually occur only because a case has been called to the LWDA's attention through some other means besides the PAGA notice."], p. 347, ¶ 38 (f) ["the size of the task coupled with the lack of extra time and resources operate as a great disincentive against accepting PAGA cases for investigation."], p. 348, ¶ 39 [DIR asked the Legislature to amend PAGA to "[r]equire more detail in the PAGA claim notices" and that PAGA notices "be verified"].) Any purported discretion the LWDA has regarding whether or not to investigate a PAGA notice amounts to nothing more than a choice to investigate PAGA notices at random. To argue otherwise (as Respondent does) is

tantamount to arguing that a trier of fact could make a determination regarding the merits of a lawsuit based solely on the allegations in an unverified civil complaint. (See Resp. Br. 22, 52; accord, CT, Vol. 2, pp. 346–348, ¶¶ 38–40.)

When "viewed from a realistic and practical perspective" (see *Marine Forests*, *supra*, 36 Cal.4th 1, 15), PAGA's statutory scheme actually discourages prospective PAGA litigants from submitting detailed allegations (much less, evidence) in a PAGA notice beyond the nominal requirements set forth in Lab. Code § 2699.3(a)(1). That is because, as a practical matter, the LWDA would be more likely to investigate a PAGA notice supported by detailed allegations and/or evidence, and as a result, more likely to issue a citation, cutting off the aggrieved employees right to pursue penalties, attorney's fees, and costs. (Compare Lab. Code § 2699, subd. (h) [precluding an aggrieved employee from bringing a PAGA claim if when LWDA or another state labor enforcement agency issues a citation] with Gov. Code, § 12652, subd. (f) [CFCA relator

receives 15–33% of the proceeds of the action if the state proceeds with an action initiated by a qui tam plaintiff].)

If a prospective PAGA litigant submits a PAGA notice that barely satisfies the minimal requirements of Labor Code section 2699.3, subd. (a)(1)(A) and the LWDA does not investigate or issue a citation, prospective PAGA litigants (and their contingency-fee attorneys) are fully deputized to prosecute claims on behalf of themselves, the State, and other aggrieved employees without any executive branch oversight (e.g., PAGA does not provide the executive branch express authority to intervene, stay discovery, or approve the terms of a settlement in a PAGA action). And because PAGA litigation is inherently expensive for employers to defend, PAGA litigants have significant leverage to pursue substantial settlement amounts regardless of the merits of their underlying claims. Leverage that is exacerbated by PAGA's fee-shifting provisions. (Lab. Code § 2699.) By providing significant leverage and financial incentives to contingency-fee attorneys, PAGA's statutory scheme all but guarantees that PAGA notices will not

aid the LWDA's determination regarding whether to investigate PAGA notices.

Given these practical realities paired with the facial deficiencies in PAGA's notice requirements, it is no surprise that the LWDA does not even review ninety-nine percent of the PAGA notices it receives. (CT, Vol. 2, p. 347, ¶ 38 (d) ["[L]ess than 1% of all PAGA cases are reviewed or investigated."].) By design, PAGA's facially deficient notice provisions assure this result.

VIII. CABIA'S ARGUMENTS REGARDING PAGA'S APPLICATION ILLUSTRATE PAGA'S FACIAL DEFICIENCIES

Finally, Respondent mischaracterizes CABIA's position by suggesting CABIA's arguments regarding PAGA's application reflect an as-applied rather than facial challenge to PAGA's constitutionality. (See Resp. Br., 55–57.) To the extent CABIA's Opening Brief refers to facts that, if proven, would demonstrate that PAGA violates the separation of powers doctrine, CABIA clarifies that PAGA's "provisions inevitably pose a present total and fatal conflict with" the separation of powers doctrine.

(*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 347 ("*Lungren*").)

Respondent rightly points out that CABIA does not argue facts regarding PAGA's "'application to the particular circumstances'" of a specific plaintiff's case. (Resp. Br., 58, quoting, *Today's Fresh Start, Inc. v. L.A. Cty. Off. of Educ.* (2013) 57 Cal.4th 197, 218.) However, that does not mean that this Court is precluded from considering the realistic and practical effect of PAGA's statutory scheme to determine whether, on its face, PAGA violates the separation of powers doctrine.

The minimum showing the California Supreme Court has required for a facial challenge to the constitutionality of a statute is whether the statute will violate the Constitution in the "great majority of cases." (See *San Remo Hotel L.P. v. City And County of San Francisco* (2002) 27 Cal.4th 643, 673, citing *Kasler v. Lockyer* (2000) 23 Cal.4th 472, 502, *California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, 345, 347, 358–359.) Although the standard for a facial constitutional challenge is "the

subject of some uncertainty," the Supreme Court has nevertheless analyzed facial challenges to determine whether a statute poses constitutional problems "in at least 'the generality' [citation] or 'vast majority' [citation] of cases [citation]." (*Today's Fresh Start, supra*, 57 Cal.4th at 218, citations omitted.)

In *California Teachers Association v. State of California* (1999) 20 Cal.4th 327 ("*CTA*"), the California Supreme Court considered whether a statute violated California's procedural due process clause on its face. The statute required a teacher who wished to challenge his or her termination to pay attorney's fees and split the costs for an administrative hearing. (*Id.* at 322, fn. 2, quoting former Educ. Code § 44944, subd. (e).) *CTA* reasoned, "although we may not invalidate a statute simply because in some future hypothetical situation constitutional problems may arise [citation], *neither may we ignore the actual standards contained in a procedural scheme and uphold the law simply because in some hypothetical situation it might lead to a permissible result*." (*Id.*, at 347, citation omitted, emphasis added.) Considering the

practical effect of the statute's anticipated application in the majority of circumstances, *CTA* concluded: "The statute poses a tangible risk that teachers will be dismissed or suspended—and that baseless charges against teachers will stand—simply because the teacher fears incurring liability for the cost of the adjudicator." (*CTA*, 20 Cal.4th at 357.)

The practical realities of PAGA's statutory framework should be considered in the same manner that the California Supreme Court considered them in *CTA.* Like the facial challenge addressed by *CTA*, CABIA's separation of powers theory is not premised on some abstract or "future hypothetical situation" (see *Lungren, supra,* 16 Cal.4th at 347) in which the occasional PAGA litigant receives a permanent and full assignment of the executive branch's law enforcement powers. Instead, CABIA's challenge is based on the *inevitable* fact that in ninety-nine percent of PAGA actions, the executive branch is fully divested of its law enforcement powers *before* the LWDA ever has any opportunity to review a PAGA notice. (See generally, CT, Vol. 2, pp. 346–348, ¶¶

38–40.) Consequently, in the "generality" or "vast majority" of PAGA actions, unchecked private individuals are deputized to wield the State's law enforcement powers and prosecute labor law violations that neither the LWDA nor any other executive branch actor has any opportunity to review, intervene in, or act upon in any meaningful way.

IX. CONCLUSION

Unlike true qui tam statutes, PAGA's atypical features inevitably result in a permanent and full assignment of the executive branch's law enforcement powers to private individuals. PAGA's unprecedented delegation of executive powers to non-executive branch actors violates the separation of powers doctrine.

DATED: December 17, 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 11,423 words, as counted by Microsoft's word-processing program used to generate this brief.

Date: December 17, 2021 EPSTEIN, BECKER & GREEN, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2021, I caused to be served one (1) copy of **PETITIONER CALIFORNIA BUSINESS & INDUSTRIAL ALLIANCE'S REPLY 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 17th Day of December, 2021 at Los Angeles, California.

/s/ Felecia J. McClendon