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CALIFORNIA BUSINESS & INDUSTRIAL ALLIANCE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

CALIFORNIA BUSINESS & INDUSTRIAL ALLIANCE, an association representing California-based employers,

Plaintiff,

v.

XAVIER BECERRA, in his official capacity as the Attorney General of the State of California,

Defendant.

Case No.: 30-2018-01035180-CU-JR-CXC

FIRST AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

SYNOPSIS

Are California business owners who inadvertently make a payroll error equivalent to the worst perpetrators of hate crimes? That's the twisted logic that, more than a decade ago, led the California Legislature to pass an unprecedented and harmful law called the Private Attorneys General Act ("PAGA").

PAGA was conceived as a means to help employees right workplace wrongs without further burdening the State bureaucracy. Trial attorneys quickly discovered that they could use the law for their own benefit; today, thousands of PAGA complaints are filed annually against large and small businesses, nonprofit charities, and even labor unions.

PAGA is unconstitutional because of the procedure it creates, who it empowers to leverage the same, and because it irrationally exempts certain employers from PAGA's application. Plaintiff CALIFORNIA BUSINESS AND INDUSTRIAL ALLIANCE ("CABIA" or "Plaintiff") seeks an unremarkable outcome — that this Court order Defendant XAVIER BECERRA to either do his constitutionally-prescribed job, or invalidate the California Legislature's unconstitutional delegation of his job duties (and corresponding powers to achieve the same) to private citizens who hire financially-incentivizes private attorneys that only work to enrich themselves at the expense of everyone else.

INTRODUCTION

1. The California Supreme Court has recognized that "the continued operation of an established, lawful business is subject to heightened protections." (*County of Santa Clara v. Superior Court* (2010) 50 Cal.4th 35, 53.)

2. Notwithstanding, the California Legislature passed an unconstitutional law in 2004 vested every California employee with the scale-tipping power of the State Executive Branch and incentivized private attorneys to exploit that power for their own personal gain.

3. As pleaded in greater detail below, the plain language of PAGA, and how it has been interpreted by California courts is unconstitutional; because, among other reasons: it vests private citizens with executive power without providing executive oversight; the created a paradigm that dissuades all but the unusually aggressive and well capitalized (*i.e.*, atypical)

employer from defensing claims brought thereunder; and it denies equal protection of the law to the vast majority of California employers.

4. As predicted by opponents of PAGA in 2003, it has become a tool of extortion and abuse by financially incentivized plaintiffs' attorneys, who exploit their clients' state-proxy status to: avoid fully-enforceable arbitration agreements with class action waivers, file lawsuits that threaten presumptively ruinous liability for limited liability entities and natural persons alike, engage in otherwise impermissible fishing expeditions for legal claims and theories of which his or her client has no knowledge and (under any other circumstance) has no standing to bring, and other privileges which permit and/or command the extraction of extortionate settlements from California employers. This is not hyperbole, but rather the findings and justifications of the California Legislature for exempting a small subsection of unionized construction employers from PAGA's application in 2019.

5. Each day that PAGA empowers plaintiffs' attorneys to shake down California employers under color of the State executive, the fundamental right to a "continued operation of an established, lawful business" is imperiled, and in many cases destroyed. (*County of Santa Clara, supra*, 50 Cal.4th at 53.)

6. COMES NOW CABIA to challenge the constitutionality of PAGA and seek prospective relief from its enforcement.

THE PARTIES

7. CABIA is an association that was incorporated in Washington, D.C., which principally represents the interests of small and mid-sized businesses in California, a number of which have been sued under PAGA.

8. Many of CABIA's members have suffered harm as a result of PAGA, including, but not limited to: lawsuits that that create exposure to PAGA penalties that, in the typical case, might lead to corporate and/or personal bankruptcy; the expenditure of legal fees to defense PAGA lawsuits; or, often in the alternative, forcing the typical defendant to surrender its procedural due process rights to present meritorious defenses and paying inflated settlements because the PAGA paradigm simply creates too much downside for most employers to attempt

to defend the typical PAGA case.

9. A number of CABIA's members are currently litigating PAGA matters; a number of CABIA's members are currently in receipt of PAGA Notices, which, in the typical case, is the last procedural step a PAGA-plaintiff takes before filing suit; and all off CABIA's members are under constant threat of receiving a PAGA Notice — including those already litigating PAGA matters and those who have recently received a PAGA Notice.

10. None of CABIA's members, however, seek to adjudicate or challenge any issues in this action peculiar to its or their own individual circumstances, past or present. None of CABIA's members seek to re-litigate or challenge any verdicts, judgments, settlements or outcomes from prior or pending PAGA cases through this action. Through this lawsuit, CABIA seeks only the prospective injunction or other prospective remedies this Court deems appropriate, with respect to the enforcement of the unconstitutional PAGA.

11. CABIA was formed for the general purpose of promoting the interests of small and mid-sized businesses through a mix of public education, lobbying, and grassroots organizing; it also seeks the repeal or reform of PAGA.

12. CABIA is willing and capable to represent the interests of its members in this lawsuit, whose individual participation is not required in order for this Court to evaluate and to adjudicate the constitutional challenges asserted against PAGA herein.

13. Defendant Attorney General Xavier Becerra is sued in this action in his official capacity as a representative of the State of California charged with the enforcement of PAGA.

JURISDICTION AND VENUE

14. This Court has original jurisdiction in this matter under Article VI, Section 10, of the California Constitution. This Court also has jurisdiction under Code of Civil Procedure Sections 410.10, 525, 526, 526a, 1060, 1062, and 1085.

15. Venue in this Court is proper under Code of Civil Procedure Sections 393, 395, and 401. Some or all of Plaintiff's members reside, do business, and/or have suffered an injury in this county.

16. Declaratory relief is authorized by Code of Civil Procedure Sections 1060 and

1062.

17. Injunctive relief is authorized by Code of Civil Procedure Sections 525, 526, and 526a.

STATEMENT OF FACTS

I. THE STATUTORY AND CONSTITUTIONAL FRAMEWORK

A. Federal and State Prohibitions on Excessive Fines and Unusual Punishment

18. The Eighth Amendment to the U.S. Constitution provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

(U.S. Const., 8th Amend.)

19. The United States Supreme Court has held that the Excessive Fines Clause applies to the states. (*See Hall v. Florida* (2014) 134 S. Ct. 1986, 1992.)

20. The Excessive Fines Clause, as interpreted by the United States Supreme Court, "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" (*R.L. Austin v. United States* (1993) 509 U.S. 602, 609-10.)

21. "The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law." (*Id.* at 610.)

22. The United States Supreme Court has also observed that the use of civil penalties raises acute constitutional concerns because "[e]xcessive fines can be used, for example, to retaliate against or chill the speech of political enemies . . . . Even absent a political motive, fines may be employed in "measure of accord with the penal goals of retribution and deterrence," for "fines are a source of revenue," while other forms of punishment "cost a State money." (*Timbs v. Indiana* (2019) 139 S.Ct. 682, 689.) "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: the amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." (*United States v. Bajakajian* (1998) 524 U.S. 321, 334 (citing *Austin*, *supra*, 509 U.S. at 622-23).) More specifically, the United States and California Constitutions require that all penalties be assessed by courts for proportionality, which requires consideration of the following factors:

"(1) the defendant's culpability; (2) the relationship between the harm and the penalty; (3) the penalties imposed in similar statutes; and (4) the defendant's ability to pay." (*See People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 728 (citing *Bajakajian*, 524 U.S. at 337-38).)

23. The California Supreme Court, as well as the U.S. Court of Appeals for the Ninth Circuit, have held that these prohibitions apply with equal force to the California State government. (*See id.* at 727 ("[T]he Due Process Clause of the Fourteenth Amendment to the Federal Constitution . . . makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States."); *accord Wright v. Riveland* (9th Cir. 2000) 219 F.3d 905, 916 (analyzing whether state fine was excessive under the Eighth Amendment).)

24. Moreover, the California Constitution contains similar protections to those in the Eighth Amendment; Article I, Section 17, prohibits "cruel or unusual punishment" and "excessive fines"; and Article I, Section 7, prohibits the taking of property "without due process of law." (*R.J. Reynolds Tobacco Co., supra*, 37 Cal.4th at 728.)

B. Procedural Due Process

25. The United States Constitution's Fifth Amended provides, in relevant part:

> "No person shall …be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

(U.S. Const., 5th Amend.)

26. Likewise, the Due Process Clause of the 14th Amendment to the United States Constitution provides that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." (*Id.*, 14th Amend.)

27. The California Constitution also separately prohibits a person from being "deprived of life, liberty, or property without due process of law[.]" (Cal. Const. art. I, § 7.)

28. These Constitutional due process guarantees have both procedural and substantive components, the latter which protects fundamental rights that are so "implicit in the

concept of ordered liberty" that "neither liberty nor justice would exist if they were sacrificed." (*Palko v. Conn.* (1937) 302 U.S. 319, 325.) These fundamental rights include those guaranteed by the Bill of Rights, as well as certain liberty and privacy interests implicitly protected by the Due Process Clause. (*Washington v. Glucksberg* (1997) 521 U.S. 702, 720.)

29. Facial procedural due process challenges have a unique standard; because they do not fail upon the opposing party putting forward a single example of a constitutional application of the challenged procedure. Rather, facial procedural due process challenges can be based, and prevail, on the "typical" case. (*See, e.g., Cal. Teachers Ass'n v. Cal.* (1999) 20 Cal.4th 327, 345 ("The United States Supreme Court has explained that procedural due process rules ' "are shaped by the risk of error inherent in the truth-finding process as applied to the *generality of cases*, not the rare exceptions." [Citation.] . . . Retrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard.' ") (citing *Santosky v. Kramer* (1982) 455 U.S. 745, 757) (emphasis in original).)

30. For the purposes of procedural due process challenges, the United States Supreme Court has rejected absolute rules in favor of balancing three considerations: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (*Mathews v. Eldridge* (1976) 424 U.S. 319, 335.) "With a minor modification, [the California Supreme Court] h[as] adopted the *Mathews* [B]alancing [T]est as the default framework for analyzing challenges to the sufficiency of proceedings under our own due process clause. The first three factors—the private interest affected, the risk of erroneous deprivation, and the government's interest—are the same. [citations]. In addition, [California courts] may also consider a fourth factor, ' "the dignitary interest in informing individuals of the nature, grounds, and consequences of the action and in enabling them to present their side of the story before a responsible government official." ' "

(*Today's Fresh Start, Inc. v. L.A. Cty. Office of Educ.* (2013) 57 Cal.4th 197, 213.)

C. Separation of Powers

31. Pursuant to the California Constitution, the legislative power of the State is vested in the California Legislature, save the reserved powers of initiative and referendum. (*See* Cal. Const. art. IV, § 1.) The supreme executive power of the State is vested in the Governor. (*See id.*, art. V, § 1.) And "[t]he judicial power of this State is vested in the Supreme Court, courts of appeal, and superior courts, all of which are courts of record." (*Id.*, art. VI, § 1.) The California Constitution expressly provides for the separation of these government powers. (*Id.*, art. III, § 3 (hereafter, "Separation of Powers Doctrine").) The California Supreme Court has articulated the "classic understanding of the separation of powers doctrine—that the legislative power is the power to enact statutes, the executive power is the power to execute or enforce statutes, and the judicial power is the power to interpret statutes and to determine their constitutionality." (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1068.)

32. The California Constitution also makes plain the "job description" of the Defendant in this action, describing the mandatory and prohibitory duties of his constitutionally prescribed executive office as follows:

> 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 General to see that the laws of the State are uniformly and adequately enforced.
>
> . . .
>
> Whenever in the opinion of the Attorney General any law of the State is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute any violations of law of which the superior court shall have jurisdiction, and in such cases the Attorney General shall have all the powers of the district attorney.

(Cal. Const. art. V, § 13.)

33. The above provisions, like all provisions of the California Constitution "are

mandatory and prohibitory, unless express words they are declared to be otherwise." (*Id.* art. I, § 26 (previously numbered as Article I, § 22).) "This rule is an admonition placed in this the highest of laws in this state, that its requirements are not meaningless, but that what is said is meant, in brief 'we mean what we say.'" (*See St. Bd. of Ed. v. Levit* (1959) 52 Cal.2d 441, 460.) And in the "judgment [of the California Supreme Court], not only commands that its provisions shall be obeyed, but that disobedience of them is prohibited." (*Ibid.*)

34. Under the Separation of Powers Doctrine, the Legislature cannot exercise any core judicial functions. (*See Pryor v. Downey* (1875) 40 Cal. 388, 403 ("The Legislature of California cannot exercise any judicial function, and no person in this State can be deprived of life, liberty or property without due process of law.").) Similarly, the Separation of Powers Doctrine prohibits the legislative arrogation of executive power. (*See Marine Forests Society v. Cal. Coastal Com.* (2005) 36 Cal.4th 1, 15 ("[T]he California separation of powers clause precludes the adoption of a statutory scheme authorizing the legislative appointment of an executive officer or officers 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.").)

35. The California courts shall hold unconstitutional legislation that violates the Separation of Powers Doctrine. (*See In re Application of Lavine* (1935) 2 Cal.2d 324, 328; *Merco Constr. Eng'rs, Inc. v. Mun. Court* (1978) 21 Cal.3d 724, 731.)

36. With respect to the separation of powers between the Legislative and Judicial Branches, the California Supreme Court has set forth "the basic test for assessing whether the Legislature has overstepped its oversight authority: '[The] legislature may put reasonable restrictions upon constitutional functions of the courts provided they do not defeat or materially impair the exercise of those functions.'" (*Conway v. State Bar* (1989) 47 Cal. 3d 1107, 1128.) And "[w]here a statute creates a special liability upon the part of employers and grants power to an agency of government to determine when liability exists and to render a judgment in favor of the employee against the employer, the power exercised constitutes basic judicial power within the meaning of the Constitution." (*Laisne v. Cal. State Bd. of Optometry* (1942) 19 Cal. 2d 831,

864.)

37. With respect to the Separation of Powers between the Legislative and Executive Branches, the California Supreme Court has also decreed that "[[s]uch] powers as are specially conferred by the constitution upon the governor or any other specified officer, the legislature cannot require or authorize to be performed by any other officer or authority; and from those duties which the constitution requires of him he cannot be excused by law." (*See Levit*, *supra*, 52 Cal.2d at 461 (citation omitted).) And that "[t]hose matters which the constitution specifically confides to [a specified body or agency] the legislature cannot directly or indirectly take control." (*Ibid.*)

38. The California agency responsible for the "oversight" of PAGA, the DIR, has recently asked for additional personnel and resources because it cannot keep up with the vast numbers of PAGA notices it receives each year. More specifically, with its 2016/2017 Budget Request Summary ("DIR Budget Request"), the DIR "request[ed] 1.0 positions for the Labor and Workforce Development Agency (LWDA), 9.0 positions for the Department of Industrial Relations (DIR), and $1.6 million in the Labor and Workforce Development Fund (LWDF) for the 2016/17 fiscal year ($1.5 million ongoing) to stabilize and improve the handling of Private Attorneys General Act cases[.]" The DIR's request was motivated, in part, by the fact that only one employee was available to review the thousands upon thousands of PAGA notices received since the last quarter of the 2013/2014 fiscal year, and thus the "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." (Cal. Dept. of Industrial Relations, Budget Change Proposal for Private Attorneys General Act (PAGA) Resources for Fiscal Year 2016/2017 (2015), at p. 1.) The DIR explained that these resources were needed because "the ability to review and investigate a PAGA case is considered an important check on potential abuses in this arena." (*Id.* at 1-2.) Other justifications and/or reasons DIR requested the resources included:

a. "[T]he LWDA and DIR have not been staffed to perform the review and oversight functions contemplated by the Labor Code §§ 2698-2699.5 (PAGA)."

(*Id.* at 2.)

b. "This has contributed to a range of concerns about the PAGA statute itself, including that employers are being sued and incurring substantial costs defending against technical or frivolous claims, and that workers and the state often end up being shortchanged when these cases are settled." (*Ibid.*)

c. "[G]reater state oversight and participation in PAGA cases will help reduce PAGA litigation and litigation costs by weeding out marginal and frivolous claims." (*Ibid.*)

d. "[L]ess than 1% of all PAGA cases are reviewed or investigated." (*Id.*)

e. "Currently, DIR lacks the resources to reach a solid conclusion and cite or settle within the allotted time before losing the ability to forestall private litigation." (*Ibid.*)

f. "Currently, 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." (*Id.* at 3.)

g. "To fulfill the purpose of the PAGA procedures for agency notice and involvement, the LWDA must have the resources to not only to investigate some of the cases, but also see a case all the way through once an employer has been cited." (*Ibid.*)

h. "Because most judges have no particular expertise in labor law and must rely on the knowledge and representations of counsel, both of whom are interested in having the settlement approved, there is no assurance that 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 tend to work against such assurances: protracted litigation creates strong incentive so 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." (*Ibid.*)

39. The DIR also asked for "modest revisions to the PAGA statute to improve the state's oversight of PAGA cases to better insure [sic] that they are pursued in the public's interest and not just for private purposes[,]" including revisions that would:

a. "Require more detail in the PAGA claim notices filed with the LWDA and require that claims for ten or more employees be verified and accompanied by copy of the proposed complain." (*Id.* at 4.)

b. "Extend the LWDA's time to review PAGA notices from 30 to 60 days and specify that employers may submit a request for the LWDA to investigate a PAGA claim." (*Ibid.*)

c. "Extend the time for the LWDA to investigate an accepted claim from 120 to 180 days." (*Ibid.*)

d. "[R]equire that the Director of DIR be provided with notice and an opportunity to object before the court determines whether to approve a settlement." (*Ibid.*)

40. The DIR warned that failing to provide the requested resources and/or make the requested statutory changes would perpetuate the following negative results:

a. "[T]he reality is that the LWDA lacks the ability to meaningfully review notices or investigate more than [a] handful of the thousands of claims that come through." (*Id.* at 5.)

b. "As a practical matter, the typical PAGA notice will not get reviewed or investigated unless someone calls it to the special attention of the LWDA." (*Ibid.*)

c. "[W]hile current law requires court approval of settlements involving penalties, courts lack the means to provide effective oversight, and there is no way to determine if the public's interest is being served or appropriate penalties being recovered in individual cases." (*Ibid.*)

d. "[T]he potential for time and workload savings, improved outcomes for private litigants, and reduced litigation overall will accordingly continue to elude the state." (*Ibid.*)

41. On information and belief, the State Legislature has denied the requests of the executive agency responsible for the oversight of PAGA the "modest" changes to the PAGA statute; yet the State Legislature did see fit to exempt a small percentage of employers from the complete application of PAGA, as pleaded immediately below.

D. Equal Protection

42. The 14th Amendment to the United States Constitution provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws . . . ." (U.S. Const., 14th Amend.)

43. Similarly, the California Constitution guarantees all persons "equal protection of the laws[.]" (Cal. Const. art. I, § 7.)

E. The California Labor Code

44. The California Labor Code, California Code of Regulations, and the Industrial Welfare Commission Orders (collectively, the "California Labor Laws") govern the rights and obligations of employers, employees, and other "persons," as that term is defined in Labor Code Section 18, with respect to employment and/or the provision of labor by and between parties in the State of California. The California Labor Laws are composed of myriad rules, standards, and obligations that touch nearly every aspect of the employment relationship, including, but not limited to, working hours, payment of minimum wages and overtime, the provision of meal and rest breaks, the temperature of workplace bathrooms, what information that must appear on a paystub, the place and timing of wage payment, the timing of final wage payment, the provision and use of mandatory sick leave, the categorization of gratuities, use of credit reports, what records must be kept and for how long, and numerous other matters.

45. Many of the California Labor Laws are unclear, cumbersome, counterintuitive, impossible to follow, or all of the foregoing.

46. For example, to comply with California law with respect to meal periods, employers must navigate and harmonize a combination of Labor Code Sections, Regulations, Industrial Welfare Commission Orders, and the ever-evolving landscape of judicial interpretation of the foregoing. For example, Labor Code Section 512(a) sets forth a portion of

most employers' obligations with respect to meal periods for non-exempt employees:

> An employer shall not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer shall not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

Additional obligations (and exceptions to the rule) are set forth in the Industrial Welfare Commission orders, many of which contain the following or similar language:

> No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee. Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

(*See, e.g.*, I.W.C. Wage Order 4-2001, § 11, (A)-(B) ("Wage Order 4").) As pleaded in further detail below, attempting to comply with just the timing rules of a meal period is difficult enough. Indeed, it took more than a decade after the codification of meal period obligations in

Labor Code Section 512 for the California Supreme Court to clarify what it means to "provide" a meal break:

> The employer satisfies this obligation if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so. . . .
>
> Bona fide relief from duty and relinquishing of control satisfies the employer's obligations. . . .

(*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1040-41.) This standard all but prohibits the typical California employer from obtaining unassailable compliance, regardless of the measures taken, as any employee can allege that they were not provided a "reasonable opportunity" for a meal period or that relief from duty was not "[b]ona fide." (*Id.*)

47. The penalty for not complying with the meal period rules is set forth in the Labor Code Section 226.7, which provides in relevant part:

> If an employer fails to provide an employee a meal or rest or recovery period in accordance with a[n] . . . order of the Industrial Welfare Commission . . . the employer shall pay at the employee's regular rate of compensation for each workday that the meal or recovery period is not provided.

48. As evidence the multitude of meal period class and/or representative actions filed each year, there is no policy, practice, or combination thereof that can insulate California employers from a meal period lawsuit. This is so because full compliance would require that an employer have perfect foresight regarding how long each shift for each employee would last, which is impracticable. It would also require that an employer be able to read the minds of all its non-exempt employees, specifically whether they felt as if they had a "reasonable opportunity" to take a meal period, which is preposterous. It would also require that an employer anticipate and prevent every possible circumstance, event, or contingency that might lead to an interrupted meal break, which is hopeless.

49. And even if an employer could accomplish all of the foregoing, it would be still

impossible to create, preserve, and provide sufficient evidence of compliance to dissuade self-interest employees and their attorneys from filing suit.

50. California rest period rules, which share many of the characteristics that make meal period compliance unattainable, are virtually impossible to comply in the wake of the California Supreme Court's decision in *Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257 ("*Augustus*").) In *Augustus*, the Supreme Court inferred that employers' responsibilities were "the same for meal and rest periods[,]" even though the language in Wage Order 4 that expressly requires employees to be "relieved of all duty" during meal periods has no corollary in the rules relating to rest periods. (*Id.* at 265.) Applying the inferred rule to the facts of the case, the California Supreme Court went onto hold that merely requiring an employee to carry a communication device, even if never used, was tantamount to an "on-duty" rest period and thus violated the employer's obligation under the Labor Code. (*Id.* at 273.) As highlighted by the dissent in *Augustus*, this was a "marked departure from the approach we have taken in prior cases concerning whether on-call time counts as work, and in sharp contrast to the DLSE's views about what constitutes a duty-free break," and there was "no reason to believe that the bare requirement to carry a radio, phone, or pager necessarily prevents employees from taking brief walks, making phone calls, or otherwise using their rest breaks for their own purposes, and certainly there is no evidence in this record to that effect." (*Id.* at 276.) What *Augustus* means for employers is that virtually every employee in California who carries a cell phone, pager, or other communication device may bring a claim for non-compliant rest breaks. And, again, there is no policy, practice, or combination thereof that can achieve full and irrefutable compliance with the rules as written and applied by the courts.

51. As another example, Labor Code Section 201(a) provides that "[i]f an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately." The penalty for non-compliance is set forth in Labor Code Section 203(a), "[i]f an employer willfully fails to pay, without abatement or reduction, in accordance with §§ 201 . . . the wages of the employee shall continue as a penalty . . . until paid or until an action therefore is commenced; but the wages shall not continue for more than 30 days"

("Section 203"). Although the plain language of Section 203 provides that only volitional or intentional conduct may trigger the penalty, that is not the case in California. Rather, the DIR has adopted a definition of "willful" that materially departs from its common meaning. The DIR's definition of "willful" for the purpose of Section 203 is as follows:

> Assessment of the waiting time penalty does not require that the employer intended the action or anything blameworthy, but rather that the employer knows what he is doing, that the action occurred and is within the employer's control, and that the employer fails to perform a required act.

(*See* Department of Industrial Relations, Waiting time penalty, available at <https://www.dir.ca.gov/dlse/faq_waitingtimepenalty.htm > (last accessed Nov. 21, 2018).) In other words, the DIR reads "will" out of "willful" and redefines it to mean "awareness" or "failure to prevent." This unusual definition has been adopted by California Courts of Appeal:

> In civil cases the word "willful" as ordinarily used in courts of law, does not necessarily imply anything blameable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done, was done or omitted intentionally. It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent.

(*See Nishiki v. Danko Meredith, P.C.* (2018) 25 Cal.App.5th 883, 891 (quoting *Davis v. Morris* (1940) 37 Cal.App.2d 269, 274).)

Thus, under California law, the assessment of waiting time penalties has nothing to do with whether an employer had the "will" to pay or withhold final wages. In California, *mens rea* is irrelevant; the well-meaning and blameless employer is punished the same as the ill-intended and guilty employer. And the Labor Code assesses the same penalty regardless of whether the underpayment is for one dollar or one million dollars (it is a multiple of average daily pay). However, in the vast majority of circumstances, the amount of underpayment is minuscule, and more often than not is the product of mistake, which means the penalty assessed typically exceeds any harm suffered by the separating employee. Below is a chart detailing the maximum

waiting time penalties that can be assessed against an employer who fails to pay a separating employee one dollar, or a million dollars—again, it makes no difference in California:

Hourly Rate	Average Hours Worked	Max Waiting Time Penalties
$11.00 per hour	8	$2,640
$13.50 per hour	8	$3,240
$15.00 per hour	8	$3,600
$25.00 per hour	8	$6,000
$35.00 per hour	8	$8,400
$45.00 per hour	8	$10,800

52. Section 203 penalties are commonly pursued under the theory that that employees were not paid for all hours worked, including for hours they did not record in the established time-keeping system (*i.e.*, "off-the-clock" work). In California, an employer is liable for such "unpaid" wages (and derivative 203 Penalties) if an employee can show that the employer "knew or should have known off-the-clock work was occurring." (*Brinker, supra*, 53 Cal.4th at 1051.) Setting aside the difficulty of proving whether an employer "should have known" of hours that were not recorded or reported to the employer, the California Supreme Court recently, and all but effectively, eliminated an important defense to such claims for small amounts of allegedly unpaid work time. (*See Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829, 848.)

53. California wage statement laws present their own unique challenges for employers. Labor Code Section 226(a) requires employers to furnish paystubs that contain up to nine different pieces of information. These required items of information are: gross wages earned by the employee, total hours worked by the employee, all applicable hourly rates during the pay period, all deductions taken from the employee's wages, the net wages the employee earned, the inclusive dates of the pay period (which recently obtained a new definition for employees that separate mid-pay period), the employee's name and employee ID, the name and address of the legal employer, and (if the employee earns a piece rate), the number of piece-rate

units earned and the applicable piece rate.

54. In order to prevail on a Labor Code Section 226(a) claim, an employee must be able to show that (1) a violation of the statutory provision setting forth criteria for wage statements, (2) the violation was knowing and intentional, and (3) the employee suffered an injury as a result of the violation. (*See Cleveland v. Groceryworks.com, LLC* (N.D. Cal. 2016) 200 F. Supp. 3d 924, 957.) Though not a "strict liability" statute, the Labor Code deems an employee to suffer injury if the employee cannot readily ascertain certain information from the wage statement (*e.g.*, the amount of gross or net wages), even if the employee suffers no financial injury as a result of the error.

55. The absence of any "real" injury requirement has predictably spawned numerous lawsuits alleging hyper-technical violations of Labor Code Section 226. The theories put forward by the same plaintiffs' attorneys who bring PAGA actions include: not totaling (i.e., adding-up) the hours worked; showing net wages as "zero" even where the employees are paid all net wages; not showing the number of hours worked at each applicable rate; recording an incomplete employer name (*e.g.*, "Acme" instead of "Acme, Inc."); recording an incomplete employer address; failing to provide an employee ID number, or reporting a full nine-digit SSN instead of a four-digit SSN.

56. The penalty for violating the wage statement rules are "the greater of all actual damages or fifty dollars ($50) for the initial pay period in which a violation occurs and one hundred dollars ($100) per employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars ($4,000)," and reasonable attorneys' fees. (*See* Lab. Code § 226(e)(1).)

57. The Labor Code also contains numerous one-way fee-shifting provisions in favor of employees who sue to enforce its provisions. (*See*, *e.g.*, Lab. Code § 1194(a).)

58. In sum, before PAGA and now, the California Labor Laws contain a daunting and confusing web of obligations for employers, robust and generous remedies for employees, and a framework that encourages vigorous enforcement through private rights of action.

F. The Labor Code Private Attorneys General Act

1. History of the Law

59. In the early 2000s, the California State Assembly Committee on Labor and Employment held hearings about the effectiveness and efficiency of the enforcement of wage and hour laws by the DIR. (*See* Sen. Bill No. 796, Analysis of S. Jud. Comm., at 1 (Apr. 22, 2003).) The Senate Rules Committee reported that the Legislature had appropriated over $42 million dollars to the State Labor Commission for the enforcement of over 300 laws, and that that the DIR's authorized staffed numbered over 460, which made the DIR the largest state labor law enforcement agency in the country. (*Id.* at 1.) Notwithstanding, Sen. Bill No. 796 (hereafter "PAGA Bill") was devised with to "augment the LWDA's civil enforcement efforts by allowing employees to sue employees for civil penalties." (*Id.* at 2.)

60. The Legislative Digest of the PAGA Bill described it as follows:

> Under existing law, the Labor and Workforce Development Agency and its departments, divisions, commissions, boards, agencies, or employees may assess and collect penalties for violations of the Labor Code. . . .
>
> This bill would allow aggrieved employees to bring civil actions to recover these penalties, if the agency or its departments, divisions, commissions, boards, agencies, or employees do not do so. The penalties collected in these actions would be distributed 50% to the General Fund, 25% to the agency for education, to be available for expenditure upon appropriation by the Legislature, and 25% to the aggrieved employee, except that if the person does not employ one or more persons, the penalties would be distributed 50% to the General Fund and 50% to the agency. In addition, the aggrieved employee would be authorized to recover attorney's fees and costs and, in some cases, penalties. For any violation of the code for which no civil penalty is otherwise established, the bill would establish a civil penalty, but no penalty is established for any failure to act by the Labor and Workplace Development Agency, or any of its departments, divisions, commissions,

boards, agencies, or employees.

(Sen. Bill No. 796, Legislative Counsel's Digest.)

61. A report of the Assembly Committee on Judiciary ("Judiciary Committee") cited the following justifications for the PAGA Bill:

> [M]any Labor Code provisions are unenforced because they are punishable only as criminal misdemeanors, with no civil penalty or other sanction attached. Since district attorneys tend to direct their resources to violent crimes and other public priorities, supporters argue, Labor Code violations rarely result in criminal investigations and prosecutions.

(Sen. Bill No. 796, Assembly Comm. On Jud. Analysis, at 3-4 (June 26, 2003).) The foregoing was reiterated by another Assembly Committee as the "Purpose" of the PAGA Bill. (*See* Sen. Bill No. 796, Assembly Comm. On Appropriations, at 1 (Aug. 20, 2003).) Notably, the Judiciary Committee conceded that "[g]enerally, civil penalties are recoverable only by prosecutors, not by private litigants, and the moneys are paid directly to the government." (Sen. Bill No. 796, Assembly Comm. On Jud. Analysis, at 5 (June 26, 2003).) Seeking to justify this departure from legal norms, the Judiciary Committee posited that "recovery of civil penalties by private litigants does have precedent in law." (*Ibid.*) The sole "precedent" the cited in support of this gross deviation from legal norms was that "the Unruh Civil Rights Act allows the victim of a hate crime to bring an action for a civil penalty of $25,000 against the perpetrator of the crime," (*ibid.*), which provides:

> If a person or persons . . . ***interferes by threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or coercion***, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state, the Attorney General . . . may bring a civil action for injunctive and other appropriate equitable relief in the name of the people of the State of California. . . .

(Civ. Code § 52.1(a) (emphasis added).)

62. The PAGA Bill was supported exclusively by interest groups that would clearly benefit from it, namely: The California Labor Federation, AFL-CIO (co-source), the California Rural Legal Assistance Foundation (co-source), California Applicants Attorneys Association, California Teamsters, and Hotel Employees, Restaurant Employees International Union. (Sen. Bill No. 796, S. Floor Analysis, at 5 (May 21, 2003).) Those in opposition included, but were not limited to, the California Chamber of Commerce, the Civil Justice Association of California, and the Orange County Business Council. (*Id.*) These opponents objections to the PAGA Bill that were recently parroted by the State Legislature when it exempted a small group of employers from PAGA's application, including:

a. That "[a]llowing such 'bounty hunter' provisions will increase costs to businesses of all sizes, and add thousands of new cases to California's already over-burdened civil court system." (Sen. Bill No. 796, Assembly Comm. On Lab. & Emp., at 7 (July 9, 2003).)

b. That "a private enforcement statute in the hands of unscrupulous lawyers is a recipe for disaster." (*Id.*)

c. And that "there is no requirement for the employee to exhaust the administrative procedure or even file with the Labor Commissioner . . . ." (Sen. Bill No. 796, Analysis of S. Comm. on Lab. & Indus. Relations, at 6 (Apr. 9, 2003).)

63. In response to these concerns, and more, the Assembly Committee on Labor Employment proffered the following:

> The sponsors are mindful of the recent, well-publicized allegations of private plaintiffs [sic] abuse of the UCL, and have attempted to craft a private right of action that will not be subject to such abuse, pointing to amendments taken in the Senate to clarify the bill's intended scope. First, unlike the UCL, this bill would not open up private actions to persons who suffered no harm from the alleged wrongful act. Instead, private suits for Labor Code violations could only be brought by an "aggrieved employee" - an employee of the alleged violator against whom the alleged violation

was committed.

. . .

Second, a private action under this bill would be brought by the employee "on behalf of himself or herself and other current or former employees"—that is, fellow employees also harmed by the alleged violation - instead of "on behalf of the general public," as private suits are brought under the UCL.

. . .

Third, the proposed civil penalties are relatively low.

(Sen. Bill No. 796, Assembly Comm. On Lab. & Emp., at 7 (July 9, 2003).)

64. On September 11, 2003, the PAGA Bill was passed by the State Assembly by a margin of just one vote above the bare minimum for passage a regular bill, 42. The following day, September 12, 2003, the State Senate passed the PAGA Bill by the bare minimum number of votes necessary for a regular bill, 21. The PAGA Bill was approved by Governor Gray Davis on October 12, 2003, just five days after the California electorate voted to recall him from office on October 7, 2003. As a result, the first iteration of the PAGA took effect on January 1, 2004.

65. Less than two months after PAGA took effect, on February 20, 2004, Sen. Bill No. 1809 was introduced, which according to the Senate Rules Committee Digest was intended to "significantly amend[] 'The Labor Code Private Attorneys General Act of 2004' [citation] by enacting specified procedural and administrative requirements that must be met prior to bringing a private action to recover civil penalties for Labor Code violations." (Sen. Bill No. 1809, Analysis of Sen. R. Comm., at 1-2 (July 28, 2004).)

66. Sen. Bill No. 1809 became law in July 2004, but because of its status as an emergency measure, it had retroactive application dating back to January 1, 2004. The PAGA Bill, Sen. Bill No. 1809, as well as series of amendments to PAGA in 2016 provide the modern framework for the unconstitutional delegation of State executive authority that plagues the typical California employer, including some of CABIA's members, today.

2. The Legislature Recently Exempted Just One Industry Group from PAGA, Citing Generally Applicable Problems Created by PAGA

67. On September 19, 2018, Governor Jerry Brown signed Assem. Bill No. 1654 ("Assem. Bill No. 1654"), adding Section 2699.6 to the Labor Code ("Section 2699.6"). The effect of Section 2699.6 is to exempt employees in the construction industry who are subject to a collective bargaining agreement (with certain other components) from the entirety of PAGA. Ironically, one of the necessary components for exemption is the existence of a "binding arbitration procedure." (*See* Lab. Code § 2699.6(a).)

68. The justifications put forward by the proponents of Assem. Bill No. 1654 should sound familiar, as they are the same concerns raised by opponents of Sen. Bill No. 796:

a. "[Assem. Bill No. 1654] is needed to protect construction industry employer from frivolous lawsuits brought under PAGA." (Assem. Bill No. 1654, Analysis of S. J. Comm., at 7 (June 18, 2018).)

b. "While well intended to protect aggrieved employees, [PAGA] is a complex legal process that has led to the unintended consequence of significant legal abuse. The threat of extended litigation on behalf of an entire class of workers provides enormous pressure on employers to settle claims regardless of the validity of those claims . . . ." (Assem. Bill No. 1654, Analysis of S. Comm. on Indus. Rel., at 4 (June 18, 2018).)

c. "Attorneys representing workers sue employers for Labor Code violations by limiting their complaints to those arising under PAGA. These 'stand-alone PAGA suits' allow those attorneys to represent all employees potentially affected by the alleged Labor Code violations and to conduct wide-ranging discovery allowed when prosecuting civil claims in court." (*Ibid.*)

d. "PAGA was a well-intended law that gives workers the power to fight unscrupulous employers directly through the court system when the

Labor Commissioner lacks the resources to enforce but it has, in many cases, become another form of litigation abuse by unscrupulous lawyers . . . ." (Assem. Bill No. 1654, Analysis of S. Rules Comm., at 4 (Aug. 24, 2018).)

e. "PAGA, in effect, encourages class action type lawsuits over minor employment issues because once a PAGA lawsuit has been filed, the employee (or class) plaintiff is suing on behalf of the state and the issues involved are no longer subject to arbitration." (Assem. Bill No. 1654, Analysis of Assembly Comm. On Lab. & Emp., at 2 (Aug. 24, 2018).)

69. The above justifications for exempting construction industry employers are equally applicable to CABIA's members and California employers generally. More specifically, Plaintiff's members, and California employers generally, are similarly subject to "frivolous lawsuits," "legal abuse," "enormous pressure … to settle claims regardless of the validity of those claims," "wide ranging discovery," "unscrupulous [plaintiffs'] lawyers," and "lawsuits over minor employment issues."

70. One opponent to Assem. Bill No. 1654, Legal Aid at Work, highlighted the hypocrisy of the bill given PAGA's stated purpose of protecting workers and maximizing compliance with the California Labor Code:

> Among other violations of the California Labor Code, the construction industry is rampant with wage theft. In fact, over 13% of citations issued by the Bureau of Field Enforcement in the 2015-2016 fiscal year were issued to employers in the construction industry. . . . Depriving workers in this industry their right to pursue claims under PAGA would be a gross disservice to a community of workers who are already vulnerable to wage theft.
>
> . . .
>
> The construction industry is heavily subcontracted; in fact, many employers hire day labors other than low wage workers. Many construction workers

> we see at our clinics are not paid all the wages they are owed or are sometimes not paid at all. It is not uncommon for workers to have to work long hours without receiving meal or rest breaks, much less pay for overtime and double time for hours worked. Without a private right of action for many construction workers, it would be increasingly difficult to correct injustices and cause positive change in the industry.

(Analysis of Sen. J. Comm., at 5-6 (June 26, 2018).)

71. There is no rational basis for the Legislature to exempt a subsect of the construction industry from the unfair, unconstitutional, and business-crushing impact of PAGA, as all California employers are equally subjected to the Legislatively-admitted deleterious side effects of PAGA, including "frivolous lawsuits," "legal abuse," "enormous pressure … to settle claims regardless of the validity of those claims," "wide ranging discovery," "unscrupulous [plaintiffs'] lawyers," and "lawsuits over minor employment issues."

72. The legislative history of Assem. Bill No. 1654 admits that the (long-anticipated) problems with PAGA have come to fruition. And because the reasons cited by the Legislature for exempting certain construction industry employers are equally applicable to all California employers, Assem. Bill No. 1654 denies those employers not exempted equal protection of the law.

3. PAGA's Deputization and Three Categories of Violations

73. PAGA "deputizes" so-called "aggrieved employee[s]" in California to sue to recover civil penalties on behalf of the State. (Lab. Code § 2699(a).) To prevail, the aggrieved employee need only show that a violation occurred, not that he or she was actually harmed by the violation. (*See id.*; *see also Raines v. Coastal Pac. Food Distribs., Inc.* (2018) 23 Cal. App. 5th 667 ("the trial court incorrectly found an employee must suffer an injury in order to bring a PAGA claim"); *Lopez v. Friant & Assoc.* (2017) 15 Cal. App. 5th 773, 778.) The statutory timeframe for filing a PAGA claim is one year.

74. PAGA has three categories of violations, each with its own penalty and administrative exhaustion scheme, as pleaded in further detail below:

(a) Category One: Violations of Labor Code Provisions Specifically Listed in Labor Code Section 2699.5

75. This first category ("Category One") includes violations of the Labor Code sections listed in Section 2699.5. The 150+ sections listed include Section 203 (waiting time penalties), Section 226.7 (meal and rest break premiums), Section 1198 (which includes any "conditions prohibited by the wage order"), and certain violations of Section 226 (wage statement penalties). Before filing a lawsuit alleging a Category One claim, an employee must satisfy minimal notice and/or exhaustion requirements. Theoretically, a PAGA lawsuit can be dismissed if the PAGA notice is deficient, but this rarely occurs due to the minimal requirements of the notice. An employee need only list in a letter sent by certified mail to the LWDA and his/her employer the "specific provisions . . . alleged to have been violated, including the facts and theories to support the alleged violation" and pay $75 filing fee. If the LWDA declines to investigate, or otherwise fails to respond to the employee, within 65 days of the postmark date of the notice (which happens in almost all cases), the employee is then cloaked in State executive power to bring a law enforcement PAGA action.

(b) Category Two: Health and Safety Violations (Labor Code Sections 6300 *et seq.*)

76. The second category is for health and safety violations predicated on any section of Labor Code Sections 6300 *et seq.* (other than those listed in Section 2699.5). In addition to sending notice to LWDA and employer, an employee bringing a health and safety-based PAGA claim must also send notice to the Division of Occupational Safety and Health, which is then required to investigate the claim. If the Division issues a citation, the employee is precluded from commencing a civil action under PAGA. In the alternative, if the Division does not issue a citation then the aggrieved employee may appeal to the Superior Court for an order directing the Division to issue a citation.

(c) Category Three: All Other Labor Code Violations

77. The third category ("Category Three") is for Labor Code violations other than those covered by the first two categories. Some common violations include wage statements

that fail to provide inclusive dates of a pay period or the legal employer's name and address, as required by Labor Code Section 226.

78. With respect to Category Three violations, the notice requirement is the same as Category One claims but an employer can "cure" the violation within 33 days of the PAGA notice. To do so, an employer must send a notice to LWDA and employee describing the actions taken to cure the violation. The employee can respond to the LWDA to refute the employer's claim that such actions in fact cure the alleged violation; in such cases the LWDA has 17 days to review the actions taken and make a determination as to whether the employer did, or did not, cure the violations.

79. There are limitations on the number of times an employer can avail itself of the cure provision. If the LWDA determines that the employer did not cure the violations, or otherwise fails to provide a timely response, then the employee can proceed with the civil lawsuit. But even if the LWDA determines the violations have been cured then an employee can appeal the agency's determination by filing an action with the Superior Court.

(d) The PAGA Penalty Framework

80. Where the Labor Code does not prescribe a civil penalty, PAGA creates one. These "default penalties" are assessed against employers in the amount of $100 per employee per pay period for an initial Labor Code violation, and $200 per employee per pay period for each subsequent violation. (*See* Lab. Code § 2699(f)(2).) These penalties can be collected for each employee for each pay period the employee worked within the statutory period, which is one year. PAGA applies serial multiplication of the applicable civil penalty (default or prescribed) regardless of the harm caused or culpability of the defendant (if any). The same default penalty is serially multiplied for a multitude of disparate alleged violations – some of which are punishable as misdemeanors (*e.g.*, failing to pay timely wages) – while others are buried in the minutia of Industrial Welfare Commission Orders (*e.g.*, maintaining a "temperature of not less than 68 degrees in the toilet rooms, resting rooms, and change rooms during hours of use"); finally PAGA imposes the penalties in the first instance without any regard for a defendant's ability to pay said penalties.

81. PAGA prescribes that penalties are to be divided between the California government and the aggrieved employees. (*See, e.g., Thurman v. Bayshore Transp. Mgmt. Inc.* (2012) 203 Cal. App. 4th 1112.) The prescribed split is 75% to the State and 25% to aggrieved employees. (Lab. Code § 2699(i).) PAGA also contains a one-way (employee-only) attorneys' fees and cost shifting provision that does not permit employers to obtain fees and costs even if they could prove a claim was frivolous or brought in bad faith. (*See id.* § 2699(g).) Because only a fraction of PAGA cases are litigated through trial, compensation for PAGA-plaintiffs' counsel usually comes in the form of a substantial portion of the gross settlement amount negotiated at private mediation, which the State does not attend, thus allowing the private attorney to apportion the settlement sum in a way that most benefits himself or herself.

82. PAGA has also been interpreted by some California courts and agencies to allow employees to recover unpaid wages, liquidated damages, and waiting time penalties, as well as civil penalties provided for under other statutes that, historically, could only be enforced by the Labor Commissioner. (*See* Labor Code §§ 558 and 1197.1.)

83. Where the Labor Code prescribes a civil penalty, it displaces the default civil penalty. (*See, e.g., Raines*, 23 Cal.App.5th at 680 (holding that civil penalty for wage statement set forth in 226.3 in the amount of $250 per employee per initial violation and $1000 per employee for each subsequent violation applied over penalty set forth in 2699(f)(2)).)

84. The PAGA statute contains no maximum or "cap" on the amount of civil penalties that may be assessed.

85. Under Labor Code Section 2699(e)(2) (the "Savings Clause"), California courts have the discretion to "award a lesser amount than the maximum civil penalty . . . if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." This is a remittitur-type power that may only be exercised by California courts after a case has been fully litigated through trial and verdict, which is case-specific (*i.e.*, based on the facts of the individual case), which provides no meaningful notice to current or future PAGA defendants of what reduction in penalties (if any) their California court trial judge will apply in their case. And because only a fraction of PAGA

cases go to trial, and even fewer are appealed, there is a dearth of guidance on the application of the Savings Clause, which compounds the lack of notice and/or foresight for the typical PAGA defendant as to what the ultimate penalties will be in their own case. All the typical PAGA defendant can be "assured of" is that if they litigate a mater all the way through trial, that the PAGA penalties in their own case will be the absolute maximum permitted by the United States and California Constitutions, in the discretion of a trial court judge, who is acting with limited judicial guidance in the application penalty paradigm that is completely foreign to American jurisprudence — if the defendant is willing to pay the costs associated with defending a matter all the way through verdict (*i.e.*, California employers must "pay to play" for constitutional protection from the imposition of excessive fines).

(e) The Limited Court and Agency Involvement In Settlement, Court Orders, and Judgments

86. Court approval is required for the settlement of PAGA claims. (*See* Lab. Code § 2699(l).) However, judicial oversight in PAGA claims is strikingly different from the oversight for class actions. In PAGA actions, the Court is not required to exercise anywhere near the same level of scrutiny required in a class action. (*Arias v. Superior Court* (2009) 46 Cal.4th 969 (holding that PAGA actions are not subject to class action requirements).)

87. For example, a representative PAGA action need not meets any of the requirements of Rule 23 of the Federal Rules of Civil Procedure or Civil Procedure Section 382. This means that the typical PAGA plaintiff need not make any showing that he or she has anything in common with the other alleged "aggrieved employees" or that the employer has any uniform practice or procedure in order to proceed to trial. This, ironically, makes the typical PAGA case problematic from a trial manageability standpoint.

88. With respect to settlements, PAGA does not require State input or approval to: engage in settlement negotiations, agree to private mediation, settle a matter, or to apportion all, some, or none of the settlement to PAGA penalties. The sole oversight of PAGA settlements is provided at the tail-end of litigation, by California trial court judges. (*See* Lab. Code § 2699(l)(2).) But as highlighted by the DIR, pleaded *supra*, at Paragraph 38(h):

> [M]ost judges have no particular expertise in labor law and must rely on the knowledge and representations of counsel, both of whom are interested in having the settlement approved, there is no assurance that settlements are in fact fair to all the affected employees or the state.

89. Notably, the California Executive Branch of government has no control or oversight of PAGA litigation or settlements once the above-described exhaustion period expires. Rather, the sole connection of the executive branch to the resolution of PAGA lawsuits is the receipt of proposed settlements, judgments, and orders regarding PAGA penalties must be provided to the LWDA; and PAGA requires nothing of the LWDA with respect to such legal documents. (*See* Lab. Code § 2699(l)(2)-(3).)

4. PAGA's Lack of Judicial and/or Administrative Oversight

90. As outlined above, the State exercises virtually no control over any aspect of PAGA litigation. Rather, the sole connection the California executive branch has to PAGA cases is the pre-lawsuit notices that are received, and rarely reviewed, under Labor Code Section 2699.3. As pleaded *supra*, those notices need only provide a bare-bones description of the alleged facts and list the Labor Code sections for which the employee intends to recover civil penalties; after mailing, the prospective PAGA litigant need only wait a little over a few months for the LWDA to do (in almost all cases) nothing. Following the end of the review period, PAGA cloaks the employee in immense State executive power.

91. PAGA gives this immense and scale-tipping power away to any and all persons who are willing to write a letter and wait a few months. Indeed, CABIA alleges on information and belief that the LWDA often fails to receive or has lost many PAGA notices addressed to its attention by allegedly aggrieved employees. Indeed, the LWDA website all but admits as much:

> The PAGA statute does not require parties to prove affirmatively that documents were received by LWDA. The statute only requires proof that items were mailed or submitted in the required manner.

(*See* Labor Workforce Development Agency, Private Attorneys General Act (PAGA), available at <https://www.labor.ca.gov/Private_Attorneys_General_Act.htm> (last accessed Nov. 21,

2018).)

92. If the LWDA declines to investigate the alleged violations or fails to respond within the time allotted under PAGA, which, is the outcome 99% of the time, that single, pre-litigation event constitutes the only connection the executive branch will ever have to the PAGA lawsuit filed thereafter, other than the LWDA's potential receipt of a settlement agreement, judicial order, and/or receipt of penalties. Indeed, PAGA does not provide the Executive branch any means to intervene or participate in PAGA litigation after the expiration of the PAGA Notice review period.

93. The practical result is that PAGA does not serve its intended purposes, because the State Executive has no ability to ensure that the State or aggrieved employees' interests are being served by the financially-incentivized private attorneys that operate without oversight.

94. Consequently, in the typical PAGA case, the "aggrieved employees" and their financially-incentivized attorneys alone decide whether to file, litigate, try, or settle PAGA lawsuits, and on what terms in each circumstance. This amounts to *carte blanche* authority to exercise the power of the State, but without any of the obligations or responsibilities of a State attorney.

95. As pleaded *supra*, the California executive agency responsible for the oversight of PAGA, the DIR, has acknowledged their lack of oversight and control, and the fact that it has led to litigation abuse, but the California Legislature has done nothing to cure the situation created by the unprecedented arrogation of executive power.

G. PAGA's Delegation of Executive Power to Private Citizens Violates Separation of Powers Between the Legislature and Executive and Contributes to a Paradigm that Violates Procedural Due Process

96. On June 23, 2014, the California Supreme Court issued its decision in *Iskanian v. CLS Transportation Los Angeles, LLC* ("*Iskanian*"), holding that an express class action waiver in an employment arbitration agreement is unenforceable with respect to PAGA claims under California law. (59 Cal.4th 348, 391.) The California Supreme Court reasoned that arbitration agreements precluding representative PAGA claims are invalid as a matter of California public

policy, and that such public policy is not preempted by the Federal Arbitration Act. (*Id.* at 388-89.)

97. The Court also clarified an important open-ended question about who receives the PAGA civil penalties that are recovered through the action. Specifically, the California Supreme Court made clear that the penalties are distributed to all aggrieved employees (unlike a typical *qui tam* action where the bounty hunter keeps all of the money that does not go to the State), unequivocally stating 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." (*Id.* at 382.)

98. The California Supreme Court's opinion included a limited analysis of the question whether PAGA violates constitutional separation of powers, analyzing (and finding inapplicable) the principles set forth by two of its prior decisions involving the separation of powers between the Legislative and Judicial branches of the California government. (*See id.* at 389-390 (analyzing *County of Santa Clara, supra*, 50 Cal.4th 35, and *People ex. Rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740).) Indeed, the *Iskanian* Court's reasoning boils down to a simple syllogism: *qui tam* actions are constitutional; PAGA is a kind of *qui tam* action; therefore, PAGA is constitutional. Such a syllogism is required for the Court to reason that holding PAGA unconstitutional would be tantamount to a "rule disallowing qui tam actions[.]" (*Id.* at 391.) The loose analogy the Supreme Court drew to support this holding was that both PAGA and classic *qui tam* actions: (1) exact a penalty; (2) part of the penalty be paid to the informer; and (3) that, in some way, the informer is authorized to bring suit to recover the penalty. (*Id.* at 382.) The Supreme Court did acknowledge one material distinction, however, "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." (*Ibid.*) But this, the Court reasoned, did not change the fact that the "government entity on whose behalf the plaintiff files suit is always the real party in interest in the suit." (*Ibid.*)

99. Notably, the separation of powers question was not put before the *Iskanian* Court by the parties. Indeed, Iskanian himself argued that "this issue was not raised in CLS's answer to the petition for review and is not properly before [the Court]." (*Id.* at 389.) The Court

grounded its authority to address the unraised issue in a California Rule of Court which provides, in relevant part, that the Supreme Court may "decide an issue that is neither raised nor fairly included in the petition or answer if the case presents the issue and the court has given the parties reasonable notice and opportunity to brief and argue it." (*Ibid.* (citing Cal. R. Ct. 8.516(b)(1)-(2)).) The Court expressly invoked the "reasonable opportunity to brief the issue" portion of the rule, which, at a minimum, is a tacit admission that the Court had an incomplete record before it, at least for the purposes of determining whether PAGA is unconstitutional as applied to CLS in that case.

100. *Iskanian* likewise contains no analysis or discussion of the California Supreme Court's prior authorities that articulate the standard for whether the Separation of Powers Doctrine has been violated — namely under what circumstances a statute arrogates, defeats, and/or materially impairs, the exercise of the core powers of the Judicial or Executive Branches of government. *(See Carmel Valley Fire Prot. Dist. v. Cal.* (2001) 25 Cal.4th 287, 297; *Marine Forests Society v. Cal. Coastal Com., supra*, 36 Cal.4th at 15.) Rather, CABIA alleges that *Iskanian* decided, at most, that CABIA does not violate the Separation of Powers Doctrine with respect to the Legislature and Judiciary. (*See Iskanian, supra*, 59 Cal.4th at 390 ("CLS further contends that because *County of Santa Clara* dealt with regulation of the legal profession, which is the province of this court, the PAGA violates the principle of separation of powers under the California Constitution.") (citing Cal. Const., art. III, § 3; *see also Merco Constr., supra*, 21 Cal.3d at 731).)

101. The *Iskanian* Court did not consider, nor does its holding cover, whether PAGA intrudes upon what might be characterized as 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, or whether the PAGA "compromise[s] the ability of [an] appointed officer (or of the executive body on which the appointee serves) to perform the officer's (or the executive body's) authorized executive functions independently, without legislative coercion or interference." (*Marine Forests Society v. Cal. Coastal Com., supra*, 36

Cal.4th at 16.)

102. PAGA arrogates, defeats, and/or materially impairs the exercise of the core powers of the Executive branch of government. Because the California constitution specially confers upon Defendant, subject only to the powers and duties of the Governor, the duty "to see that the laws of the State are uniformly and adequately enforced." (Cal. Const. art. V, § 13.) And if it is determined that such laws are not being adequately enforced, the California constitution prescribes the remedy; the Attorney General must undertake to enforce the laws himself or herself. (*See ibid.* ("Whenever in the opinion of the Attorney General any law of the State is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute any violations of the law . . . .") The legislative history of PAGA clearly articulates the Legislature's intent to arrogate core Executive duties, which the Attorney General — and no one else (save the Governor) — is required to carry out. (*See* Sen. Bill No. 796, Assembly Comm. On Jud. Analysis, at 3-4 (June 26, 2003) ("[M]any Labor Code provisions are unenforced because they are punishable only as criminal misdemeanors, with no civil penalty or other sanction attached. Since district attorneys tend to direct their resources to violent crimes and other public priorities, supporters argue, Labor Code violations rarely result in criminal investigations and prosecutions.").) The California Supreme Court has repeatedly decreed that PAGA confers on persons other than the Governor and the Attorney General the power to pursue "law enforcement actions." (*See Iskanian, supra*, 59 Cal.4th at 394 ("[A]n aggrieved employee's PAGA action "'is fundamentally a law enforcement action'" that "substitute[s] for an action brought by the government itself.").) Numerous Labor Code provisions that, prior to PAGA, could only be enforced by the Labor Commissioner are still punishable as misdemeanors. (*See, e.g.*, Lab. Code §§ 98.6, 201, 201.3, 204, 204b, 205, 208, 209, and 212.)

103. The above-described delegation of core executive (*i.e.*, law-enforcement) duties, which are specially conferred on the Governor and Attorney General, violates California's Separation of Powers Doctrine. (*See St. Bd. of Ed. v. Levit, supra*, 52 Cal.2d at 461 ("[Such] powers as are specially conferred by the constitution upon the governor or any other specified officer, the legislature cannot require or authorize to be performed by any other officer or

authority; and from those duties which the constitution requires of him he cannot be excused by law."; "Those matters which the constitution specifically confides to [a specified body or agency] the legislature cannot directly or indirectly take control."); *Marine Forests Society v. California Cal. Coastal Com., supra,* 36 Cal.App.4th at 15 ("[T]he California separation of powers clause precludes the adoption of a statutory scheme authorizing the legislative appointment of an executive officer or officers 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.").)

104. On June 29, 2009, the Supreme Court of California issued its decision in *Arias*, holding that representative PAGA claims are not subject to California's class-action requirements because PAGA lawsuits are *law enforcement actions* on behalf of the State. More specifically, the Court reasoned:

> When a government agency is authorized to bring an action on behalf of an individual or in the public interest, and a private person lacks an independent legal right to bring the action, a person who is not a party but who is represented by the agency is bound by the judgment as though the person were a party. [Citation]. Accordingly, with respect to the recovery of civil penalties, nonparty employees as well as the government are bound by the judgment in an action brought under the act, and therefore defendants' due process concerns are to that extent unfounded.

(*Arias, supra*, 46 Cal.4th at 986.)

105. On July 13, 2017, the California Supreme Court issued its decision in *Williams v. Superior Court*, holding that an employee need not provide any proof his or her allegations before being presumptively entitled to State-wide contact information in discovery. Specifically, the Court reasoned:

> PAGA's standing provision similarly contains no evidence of a legislative intent to impose a heightened preliminary proof requirement. Suit may be brought by any "aggrieved employee" [citation]; in turn, an "'aggrieved

> employee'" is defined as "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed" [citation]. If the Legislature intended to demand more than mere allegations as a condition to the filing of suit or preliminary discovery, it could have specified as much. That it did not implies no such heightened requirement was intended.

(*Williams v. Superior Court* (2017) 3 Cal.3d 531, 546.) The *Williams* Court also blessed the PAGA plaintiffs' ability to embark on fishing expeditions:

> The Legislature was aware that establishing a broad right to discovery might permit parties lacking any valid cause of action to engage in "fishing expedition[s]," to a defendant's inevitable annoyance. [citation]. It granted such a right anyway, comfortable in the conclusion that "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."

(*Id.* at 551.)

106. On March 23, 2018, the California Court of Appeal issued its decision in *Huff v. Securitas Security Services USA, Inc.*, holding that PAGA allows an employee who suffers just one Labor Code violation to seek PAGA penalties for any and all other violations committed by that employer against any other employee. ((2018) 23 Cal.App.5th 745.) In so holding, the Court of Appeal disregarded legislative history that demonstrated the California Legislature's intent to limit a PAGA plaintiff's ability to pursue penalties only for the same type of Labor Code violations he or she is alleged to have suffered. (*Id.* at 755-56.) Among the bases for this holding was the court's determination that: "Given the goal of achieving maximum compliance with State labor laws, it would make little sense to prevent a PAGA plaintiff (who is simply a proxy for State enforcement authorities) from seeking penalties for all the violations an employer committed." (*Id.* at 757.) The practical impact of the *Huff* decision is that an employee who alleges to have been aggrieved in one isolated way by an employer is vested with the power of the State to audit a business for all potential violations.

107. On September 29, 2018, the California Court of Appeal issued its decision in *Atempa v. Pedrazzani*, which held that any person who is in fact responsible for overtime and/or minimum wage violations may be held personally liable for civil penalties, and that these penalties can be recovered through PAGA, regardless of whether the person was the employer or whether the employer is a limited liability entity. ((2018) 27 Cal.App.5th 809.) The Court of Appeal reasoned:

> [T]he Legislature has decided that both the employer and any "other person" who causes a violation of the overtime pay or minimum wage laws are subject to specified civil penalties. [citation]. Neither of these statutes mentions the business structure of the employer, the benefits or protections of the corporate form, or any potential reason or basis for disregarding the corporate form. To the contrary, as we explain, the business structure of the employer is irrelevant; if there is evidence and a finding that a party other than the employer "violates, or causes to be violated" the overtime laws (§ 558(a)) or "pays or causes to be paid to any employee" less than minimum wage (§ 1197.1(a)), then that party is liable for certain civil penalties *regardless of the identity or business structure of the employer*.

(*Id.* at 820 (emphasis in original).)

H. At Most, *Iskanian* Stands for the Proposition That PAGA Does Not Violate Separations of Powers Between the Legislative and Judicial Branch; But That Holding Was Premised on a Faulty Analogy

108. In *Iskanian*, the California Supreme Court analogized a "PAGA representative action . . . is a type of *qui tam* action," and found that the right to litigate a PAGA action could not be waived by employee's free and voluntary choice to submit all claims with his or her employer to binding arbitration; because the State—and not the plaintiff—is the real party in interest. CABIA alleges that the Supreme Court's holding with respect to separation of powers rested on a *qui-tam* analogy that, if not faulty at the time, is clearly faulty now given the changes in California law and litigation practices of PAGA attorneys.

109. Unlike *qui tam* actions arising under the False Claims Act, the State of California plays almost no role in a PAGA action. Under PAGA, the LWDA has a limited opportunity to investigate or intervene in an aggrieved employee's claims. In most cases, LWDA has 65 days to determine whether to investigate and, if it does investigate, 120 additional days to complete the investigation and determine whether to issue a citation. The LWDA rarely investigates such claims. A March 25, 2016 report from the Legislative Analysist's Office ("March 2016 Report") stated:

> The LWDA . . . has been able to devote only minimal staff and resources—specifically, one position at DLSE beginning in 2014—to perform a high-level review of PAGA notices and determine which claims to investigate. **In 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, or 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), available at <https://lao.ca.gov/publications/report/3403> (last accessed Nov. 27, 2018) (emphasis added).) The March 2016 Report also noted that:

> [T]he intent of PAGA is that LWDA have the opportunity to review PAGA notices and at least in some cases conduct its own investigation prior to the PAGA claim proceeding. Given the minimal resources currently devoted to the review and investigation of PAGA notices, we do not believe LWDA is currently able to fulfill the role intended for it in the PAGA legislation.

(*Id.*)

110. In contrast to the lack of State governmental involvement in PAGA actions, the

State maintains substantial control in *qui tam* actions. The Attorney General has 60 days in which to intervene and proceed with an action, and may seek numerous extensions of time in which to do so. (Gov't Code §§ 12652(c)(4)-(5).) While the State is investigating a claim, which is first filed under seal, the *qui tam* plaintiff cannot serve the complaint, litigate, or negotiate a settlement. (*See id.* § 12652.) If the State declines to intervene, it can intervene at a later time and assume substantial control over the litigation. (*See id.* §§ 12652(f), (i).) Moreover, the standards for bringing a claim under the False Claims Act, and the information provided to the State, are materially different (and greater) than what is required under PAGA. Until July 2016, PAGA only required that minimal notice be provided to the LWDA. An aggrieved employee was not required to provide a copy of a proposed complaint, settlement agreement, or even report whether the matter has settled. In fact, the March 2016 Report recommended changes to PAGA to require "more detail in the initial PAGA notice and that a copy of the PAGA complaint and any settlement be provided to LWDA," and stated that doing so would be "a reasonable extension of LWDA's oversight of the PAGA process[.]"

111. In contrast, the False Claims Act requires a complaint be filed, under seal, with a copy served on the Attorney General. Furthermore, the *qui tam* Plaintiff is required to furnish to the Attorney General a written disclosure of "substantially all material evidence and information the person possesses." (Gov't Code § 12652(c)(3).)

112. Actions arising under the False Claims Act can also only be dismissed with approval from a court **and** the State Attorney General, "taking into account the best interests of the parties involved and the public purpose of the statute." (*Id.* § 12652(c)(1).) No claim arising under the False Claim Act may be released by a private person, except as part of a court-approved settlement. (*Id.*)

113. PAGA contains no comparable judicial or executive oversight. Rather, in the typical PAGA case, the choice to file, prosecute, settle, or try PAGA claims are within the complete and unfettered control of the aggrieved employees and/or their contingency-fee plaintiffs' attorneys. The practical result is that, in the typical PAGA case, PAGA is used primarily as a vehicle to pressure employers into larges settlements, which often allocate very

little of the settlement sum to the resolution of the PAGA claims. The above-referenced March 2016 Report confirms as much:

> [N]ot all settlements include civil penalties. In fact, LWDA reports that in 2014-15 it received just under 600 payments for PAGA claims that resulted in civil penalties. This number is low relative to the amount of PAGA notices LWDA receives each year (roughly 10 percent of notices received in 2014), implying that the final disposition of a large portion of PAGA claims, and likely many settlements, do not involve civil penalties.

The March 2016 Report also states that the amount of PAGA notices filed with the LWDA in 2014 exceeded 6,300 and the amount of PAGA penalties deposited in the Labor and Workforce Development Fund in 2014 was $8,400,000. On information and belief, the issue identified in the March 2016 Report report—a large portion of PAGA claims settling without allocating civil penalties—continues to this day.

114. The *Iskanian* Court did not have the benefit of the above March 2016 Report, the findings of the DIR's Budget Request Summary, or the evidence that CABIA intends to introduce in this case which will, in CABIA's view, unequivocally prove that the *qui tam* analogy was inapposite then and now.

I. PAGA's Penalty Scheme Contributes to a Paradigm That Violates Procedural Due Process

115. As alleged, *supra*, where the Labor Code prescribes a civil penalty, PAGA exacts a penalty of $100 per employee, per pay period, for initial violations, and $200 per employee, per pay period, for subsequent violations. And though still an open question in the law, the weight of authority suggests that PAGA penalties may be "stacked" or "aggregated" for multiple PAGA violations in the same pay period. (*See*, *e.g.*, *Schiller v. David's Bridal, Inc.*, (E.D. Cal. July 14, 2010) 2010 U.S. Dist. LEXIS 81128, *18 ("Plaintiff cites no authority establishing that PAGA penalties could not be awarded for every cause of action under which they are alleged."; "the Court concludes that Defendant may aggregate all alleged PAGA penalties asserted as to each cause of action for purposes of establishing the amount in

controversy."); *see also Pulera v. F & B, Inc.*, (E.D. Cal. Aug. 19, 2008) 2008 U.S. Dist. LEXIS 72659, at * 2-3 (aggregating 25% of all PAGA penalties alleged when making amount in controversy determination); *Smith v. Brinker Intern, Inc.*, (N.D. Cal. May 5, 2010) 2010 U.S. Dist. LEXIS 54110.)

116. Under this framework, the allegation by a single employee that an employer has unknowingly underpaid him or her by just a few dollars could provide the basis for millions of dollars in PAGA penalties, even for a small employer, and regardless of the employer's innocent intent or mistake. What follows is an example of how such an allegation (which on information and belief is similar to the allegations that have been pleaded against Plaintiff's members, and is comparable to the allegations and potential liability in the typical PAGA case) could lead to such an absurd and unconstitutional result.

117. One Employee ("Employee") alleges (without any proof) that for the past year, he has worked 2 minutes of "off-the-clock" overtime each pay period attending to miscellaneous tasks related to opening or closing Employer's place of business—without telling Employer or recording the hours in the timekeeping system—and that Employer has not paid him for this time. Under the *Starbucks* decision, discussed *supra*, the employee has a cognizable claim of failure to pay minimum wages and overtime. Employee's hourly rate of pay is $11.00 per hour, which means the approximate amount of unpaid minimum wages is: $19.07 (2 minutes x 52 pay periods = 104 minutes; 104 minutes / 60 minutes = 1.73 hours; 1.73 hours x $11.00 = $19.07), and the approximate amount of unpaid overtime wages are: $9.54 ($19.07 x. 0.5 = $ 9.54). So the total approximate amount of wages Employer failed to pay Employee, unknowingly, is $28.61.

118. Below is a breakdown of the statutorily prescribed penalties under PAGA for the underpayment of just $30.00:

Type of Violation	Statute	Penalties Per Employee
Non-Payment of Minimum Wages	1197.1	• Unpaid Wages: $19.07 • Penalties: $12,850
Non-Payment of Overtime	558	• Unpaid Wages: $9.54

		• Penalties: $5150
Failure to Provide Accurate Wage Statements	226.3	• Penalties: $51,250
Failure to Maintain Accurate Payroll Records	1174.5	• Penalties: $500
Total Exposure For Employee	N/A	**$69,508.61**
Workforce Exposure (for 30 employee business)	N/A	**$2,085,258.30**

119. Through PAGA, Employee is presumptively entitled to $69,508.61 civil penalties for the alleged failure of Employer to pay Employee $28.61, which is ***2,430 times Employee's alleged actual damages***. And if Employer has a 30 person workforce, Employee can threaten Employer (through extrapolation) with ***over $2 million dollars in penalties***. This does not even account for additional civil penalties that could be "stacked" for Employer's innocent failure to pay wages it did not know was owed upon termination, which would increase Employer's exposure by $3,640 per separated employee. (*See* Lab. Code § 1197.1(a)(1)-(2) (making available the recovery of Labor Code Section 203).)

120. PAGA's Savings Clause provides the trial court the discretion to "award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." (Lab. Code § 2699(e)(2) ("Section (e)(2)").)

121. However, the discretion of California trial court judges to reduce penalties is constrained, as the California Court of Appeal has made clear that PAGA penalties "are mandatory, not discretionary" and that the considerations enumerated in the Savings Clause may only be exercised to reduce penalties, not for "exercising discretion in general with regard to the amount of penalties, because the amount is fixed by statute." (*Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1213.) In the context of the above illustrative example, this means that the amount of civil penalties and damages to which Employee is entitled under PAGA is presumptively $69,508.61, and that Employee's presumptive representative claim presumptively threatens $2,000,000 in civil penalties against the small, 30-person, Employer. Only if Employer is willing and able to litigate the matter through verdict, likely spending

hundreds of thousands of dollars in the process, does the Court have any discretion to reduce the mandatory ***2,430 multiple of the alleged actual damages*** provided for under PAGA.

122. Thus, under PAGA, the typical employer-defendant must endure years of cost-prohibitive litigation, under the constant threat of bankrupting liability, and proceed all the way to trial on the hope that a judge just might exercise an undefined "discretion" to reduce the mandatory penalties provided for under PAGA. Such a framework is not a fair, reasonable, appropriate, or constitutional state of affairs, as it coerces employers to surrender their constitutional due process rights in lieu of paying extortionate settlements to plaintiffs' attorneys exploiting executive State power.

J. PAGA's Lack of Government Oversight Contributes to A Paradigm that Violates Procedural Due Process

123. The Plaintiffs' Bar—specifically those that focus on wage/hour actions—have exploited the Legislature's unfettered delegation of power through PAGA to enrich themselves at the expense of the State of California, the "aggrieved employees" they purported to represent, and the ethical standards for attorney conduct.

124. The Plaintiffs' Bar routinely exploits the fact that the Supreme Court has ruled that PAGA claims are non-arbitrable to avoid the effect of arbitration agreements, particularly those with class action waivers.

125. More specifically, the typical tactic employed by the Plaintiffs' Bar is to file a class action lawsuit and add non-arbitrable PAGA claims, not to vindicate the interests of the State, or to fulfill the express purpose of PAGA of enhancing employer compliance with California Labor Laws, but rather to coerce employers to agree to early-stage mediation.

126. During the vast majority of these mediations, the Plaintiffs' Bar engages in tactics made possible by PAGA which, in the typical case, contribute to a paradigm that violates employers' procedural due process rights. Such tactics include, but are not limited to:

a. Not requiring the "aggrieved employee" to attend the mediation;

b. Not consulting with the "aggrieved employee" or the State before agreeing to a settlement of PAGA claims;

c. After using PAGA to avoid arbitration (and the effect of a class waiver), attempting to settle for the value of Labor Code violations and allocate only a very small portion of the settlement to PAGA, thereby minimizing the share of the recovery that goes to the State;

d. Threatening to pursue the life savings, homes, college tuition funds, and other personal property as a means to intimidate and coerce those connected with an employer-business to pay large settlements, very little of which is normally allocated to PAGA in the end.

127. As pleaded above, the typical PAGA lacks any meaningful State oversight, which results in the unconstitutional application of the PAGA framework to CABIA's members and California employers generally, including, but not limited to:

a. Not requiring the LWDA or DIR to review any number or percentage of PAGA notices;

b. Not requiring the LWDA or DIR to investigate any number of PAGA notices;

c. Not monitoring or auditing the Plaintiffs' Bar's use of PAGA (*e.g.*, the number of notices filed by firms);

d. Not requiring a representative of LWDA or DIR to be present at mediations, court hearings, or trials involving PAGA claims;

e. Not requiring the LWDA or DIR to review settlement agreements, court orders, or court judgments that are based on or relate to PAGA claims;

f. Understaffing and underfunding the LWDA's PAGA unit;

g. Permitting the LWDA's PAGA unit to lose PAGA notices, and maintain inadequate records of PAGA notices, complaints, settlements, judgments, orders, and civil penalties collected;

h. Failing to establish and enforce ethical guidelines for plaintiffs' attorneys who prosecute PAGA actions; and

i. Failing to vet or screen for plaintiffs' attorneys who prosecute PAGA actions, or even ensure they are licensed to practice law in this State.

128. As anticipated by the opponents of PAGA in 2003, and recently confirmed by the Legislature in its findings supporting the passage of AB 1654, the unconstitutional delegation of State executive power to financially-incentivizes plaintiffs' attorneys has resulted in an oppressive regime of opportunism that threatens, in the typical case, "the continued operation of an established, lawful business" that is subject to heightened protections in this State. (*See County of Santa Clara v. Superior Court*, *supra*, 50 Cal.4th at 53.) The abuse is legion, as evidenced by the fact that State records, which are incomplete, establish that over 100 firms have sent 50 or more PAGA Notices to the LWDA since PAGA was enacted. The 30 most aggressive PAGA plaintiffs' firms (by number of PAGA Notices) appear in the chart below:

No.	Law Firm	PAGA Notices
1	Law Offices of Ramin R. Younessi	753
2	Kingsley & Kingsley	599
3	Lawyers for Workplace Fairness	542
4	Gaines & Gaines	514
5	Initiative Legal Group APC	501
6	Capstone Law APC	440
7	Blumenthal Nordrehaug Bhowmik De Blouw LLP	433
8	Lavi & Ebrahimian LLP	431
9	Crosner Legal P.C.	424
10	Matern Law Group	382
11	Fitzpatrick & Swanston	377
12	Harris & Ruble	369
13	Lawyers for Justice	352
14	JML Law	348
15	Mayall Hurley P.C.	333
16	Law Offices of Stephen Glick	318
17	Mahoney Law Group	300
18	JAMES HAWKINS APLC	291
19	United Employees Law Group, PC	286
20	Diversity Law Group	285
21	Kesluk Silverstein & Jacob	278
22	Aegis Law Firm	258
23	Setareh Law Group	234
24	David Yeremian & Associates, Inc.	227
25	Haines Law Group	227
26	Spivak Law	210

27	Rastegar Law Group	204
28	Law Offices of Gregory A. Douglas	193
29	Shimoda Law Corp	192
30	The Nourmand Law Firm	182

129. No employer is safe from a Plaintiffs' Bar armed with a weapon like PAGA, including ***charities, non-profits, and other employers who provide valuable and charitable services to California residents, including, but not limited to children's hospitals, AIDS centers, senior living centers, ambulance companies, sustainable energy companies, foster homes***, and more; a non-exhaustive list of such employers who have been targeted by the Plaintiffs' Bar thanks to PAGA is below:

Employer Name	Law Firm
Paramount Meadows Nursing Center LP; Paramount Meadows Nursing Center LLC	Aegis Law Firm
Kindercare Education LLC; Kindercare Learning Centers LLC	Baltodano & Baltodano LLP
Sober Living By The Sea, Inc.	Bibiyan Law Group, P.C.
Carriage Funeral Holdings, Inc.	Blumenthal Nordrehaug Bhowmik De Blouw LLP
Kaiser Foundation Hospitals	Blumenthal Nordrehaug Bhowmik De Blouw LLP
Navajo Express, Inc.	Blumenthal Nordrehaug Bhowmik De Blouw LLP
Pride Transport Inc.	Blumenthal Nordrehaug Bhowmik De Blouw LLP
AIDS Healthcare Foundation	Blumenthal Nordrehaug Bhowmik De Blouw LLP
El Camino Hospital	Blumenthal Nordrehaug Bhowmik De Blouw LLP
Methodist Hospital of Sacramento	Bohm Law Group, Inc.
Center for Interventional Spine; Integrated Pain Management Medical Group, et al	Bohm Law Group, Inc.
United Ambulance Services, Inc.	Bohm Law Group, Inc.
Providence Saint John's Health Center	Bradley Grombacher LLP
Center for Elders' Independence	Bradley Grombacher LLP
Victor Valley Union High School District	California School Employees Association
Lifecare Solutions, Inc.	Capstone Law APC
Healing Care Hospice, Inc./Shahrouz Golshani	Chesler McCaffrey LLP
Valley Presbyterian Hospital	Cohelan Khoury & Singer

Max Laufer, Inc. d/b/a MaxCare Ambulance	Cohelan Khoury & Singer
BHC Sierra Vista Hospital, Inc.	Crosner Legal P.C.
Fairwinds-West Hills, A Leisure Care Community, et al.	David Yeremian & Associates, Inc.
24-7 Caregivers Registry, Inc dba Advantage Plus Caregivers	David Yeremian & Associates, Inc.
Mental Health America of Los Angeles	Diana Gevorkian Law Firm
Earthbound Farm, LLC	Diversity Law Group
Planned Parenthood Mar Monte, Inc.	Diversity Law Group
Adventist Health/Reedley Community Hospital	Diversity Law Group
The Salvation Army	Diversity Law Group
Samaritan LLC	Diversity Law Group
Regional Medical Center of San Jose	Diversity Law Group
Grand Terrace Health Care, Inc.	Diversity Law Group
Carmichael Care, Inc.	Diversity Law Group
Watsonville Community Hospital	Diversity Law Group
San Jose Foothill Family Community	Diversity Law Group
Mama Petrillo's-Temple City, Incorporated	Employee Justice Legal Group, LLP
Fresno Community Hospital And Medical Center	Employee Law Group
Westlake Wellbeing Properties LLC	Ferguson Case Orr Paterson LLP
John Muir Health & John Muir Behavioral Health	Gaines & Gaines
Front Porch Communities and Services	Gaines & Gaines
Encore Education Corporation	Gaines & Gaines
The Endoscopy Center of Santa Maria, Inc.	Gaines & Gaines
Sutter Central Valley Hospitals	Gaines & Gaines
Valley Children's Medical Group	Gaines & Gaines
Silver Crown Home Care, LLC	Gaines & Gaines
Childrens Hospital Los Angeles Medical Group, Inc.	Gartenberg Gelfand Hayton LLP
Youth Policy Institute Charter Schools, Monsignor Oscar Romero Charter School...	Genie Harrison Law Firm
Life Alert Emergency Response, Inc.	Geragos & Geragos, APC
Rehabilitation Center of Santa Monica Holding Company GP, LLC	GrahamHollis APC
First Alarm	GrahamHollis APC
Progressus Therapy, LLC & other employers	Gurnee Mason & Forestiere
Soquel Union Elementary School District	Habbu & Park
California Friends Home dba Quaker Gardens	Haines Law Group
Evergreen Hospice Care, Inc.	Haines Law Group
Life Care Centers of America, Inc.	Haines Law Group

Big League Dreams USC, LLC	Haines Law Group
Chhatrala Hospitality Group, LLC dba Howard Johnson Hotel Circle	Hasbini Law Firm
Central Coast Community Health Care, Inc.; Central Coast VNA, VNA Community Serv	Humphrey & Rist, LLP
California Rehabilitation Institute, LLC (and other Defendant in the notice)	J.B. Twomey Law
San Diego Humane Society and S.P.C.A.	Jackson Law, APC
Seasons Hospice & Palliative Care of California-San Bernardino, LLC	Jafari Law Group
Eureka Rehabilitation & Wellness Center, LP.	Janssen Malloy LLP
EFR Environmental Services, Inc.	JUSTICE LAW CORPORATION
Central Coast Home Health, Inc.	JUSTICE LAW CORPORATION
Universal Hospital Services, Inc.	JUSTICE LAW CORPORATION
Covanta Long Beach Renewable Energy Corp.	Kokozian Law Firm, APC
Central City Community Health Center	Kokozian Law Firm, APC
CHLB, LLC dba College Medical Center	Kokozian Law Firm, APC
St. John's Well Child and Family Center, Inc.	Lavi & Ebrahimian LLP
City of Hope National Medical Center	Lavi & Ebrahimian LLP
North Hills Healthcare & Wellness Centre, LP	Lavi & Ebrahimian LLP
Assistalife Family Assisted Care, LLC; Assistalife Family Assisted Care et al.	Law Office of Alfredo Nava Jr.
Greater Los Angeles Agency on Deafness, Inc.	Law Office of Alfredo Nava Jr.
Family Housing and Adult Resources, Inc.	Law Office of Allan A. Villanueva
Brookdale Senior Living, Inc., and others-see PAGA Notice	Law Offices of C. Joe Sayas, Jr.
CHA Hollywood Medical Center, L.P.; CHA Health Systems, Inc.	Law Offices of C. Joe Sayas, Jr.
National Student Aid Care/CSADVO, LLC	Law Offices of Carlin & Buchsbaum
New Life Treatment Center	Law Offices of Carlin & Buchsbaum
J&L Day Care Centers, J&L Day Cares, VOICE	Law Offices of Carlin & Buchsbaum
Redwood Memorial Hospital of Fortuna	Law Offices of Choi & Associates
Silverado Senior Living Management, Inc.	Law Offices of Choi & Associates
Regional Medical Center of San Jose	Law Offices of Kevin T. Barnes
Antelope Valley Hospital Foundation	Law Offices of Kevin T. Barnes
Social Vocational Services, Inc.	Law Offices of Kirk D. Hanson
Ambuserve, Inc; Shoreline Ambulance, LLC; Shoreline Ambulance Company, LLC; M. Harris	Law Offices of Morris Nazarian
We Are Family Center	Law Offices of Ramin R. Younessi
Dr. Sandhu Animal Hospital, Inc.	Law Offices of Stephen Glick
BHC Sierra Vista Hospital (Sierra Vista Hospital); UHS of Delaware; UHS SUB III	Law Offices of Traci M. Hinden

Greenfield Care Center of Fullerton, LLC	Law Offices of Zorik Mooradian
Mercy Services Corp; Mercy Housing, Inc.; Mercy Housing Management Group, Inc.	Lawyers for Justice
St. John's Well Child and Family Center, Inc.	Lawyers for Justice
Always There Homecare	Lidman Law APC
Covenant Care California dba Covenant Care La Jolla LLC	Light & Miller, LLP
Senior Lifestyle Holding Company, LLC dba Sunflower Gardens	Mahoney Law Group
Edgewater Skilled Nursing Center	Mahoney Law Group
California Rehabilitation Institute, LLC	Matern Law Group
South Pasadena Care Center, LLC	Matern Law Group
Valley Oak Residental Treatment Program Inc	Mayall Hurley P.C.
Brookdale Senior Living, Inc.	Mayall Hurley P.C.
Gage Medical Clinic, Inc.	Messrelian Law Inc.
Central Calif Found. for Health dba Delano Reg'l Med. Ctr; Delano Health Assocs.	Moss Bollinger LLP
Greenfield Care Center of Gardena, Inc.	Moss Bollinger LLP
Pacific Coast Tree Experts	Moss Bollinger LLP
New School for Child Development	Otkupman Law Firm
Southern Monterey County Memorial Hospital dba George L. Mee Memorial Hospital	Polaris Law Group LLP
Green Messenger, Inc.	Scott Cole & Associates
St. Jude Medical, Inc.; Bolt Staffing Service, Inc.	Setareh Law Group
American Addiction Centers, Inc.	Setareh Law Group
Karma, Inc. DBA Manteca Care & Rehabilitation Center, et al.	Shimoda Law Corp
Sierra Forever Families, Robert Herne	Shimoda Law Corp
Mom365, Inc.	Shimoda Law Corp
Freda's Residential Care Facility for the Elderly, Inc.; Freda and Zoilo Robles	The Law Office of Nina Baumler
Sheridan Assisted Living, Inc.	Verum Law Group, APC
Desert Valley Hospital, Inc.	Wagner & Pelayes, LLP
Sustainable Energy Outreach, LLC.	Wilshire Law Firm, PLC
A1 Solar Power, Inc./American Pro Energy/Renewable Energy Center, LLC.	Wilshire Law Firm, PLC

130. If Defendant was executing his constitutionally mandated job, he would not focus his efforts on employers like the above. At a minimum, such employers should not be subjected to the aggressive tactics of financially-interested plaintiffs' firms who have no desire or obligation to seek justice as a State prosecutor would.

131. At bottom, PAGA is nothing more than a vehicle that permits plaintiffs' attorneys enrich themselves at the expense of everyone other than themselves (*i.e.*, the State and the aggrieved employees).

132. For example, in *Viceral v. Mistras Group, Inc.*, case number 15-cv-02198-EMC, a federal judge of the Northern District approved a $6,000,000 settlement, of which only $20,000 was allocated to the PAGA claim, even though it was valued at $12,900,000. The plaintiffs' attorneys were awarded $2,000,000 in fees (double the lodestar estimate) and $46,000 in costs.

133. In *Price v. Uber Technologies Inc.*, case number BC55451, a Los Angeles Superior Court judge approved a $7,750,000 settlement, even though the estimated liability was over $1,000,000,000. The plaintiffs' attorneys were awarded $2,325,000, whereas the average Uber Driver was awarded just over one dollar ($1.08).

134. In *John Doe v. Google Inc.*, case number CGC-16-556034, a San Francisco Superior Court judge approved a $1,000,000 settlement, of which the attorneys were awarded $330,000 (which tripled their hourly rate), and each aggrieved employee received just fifteen and one-half dollars ($15.50).

K. The PAGA Paradigm Violates Procedural Due Process, As CABIA Will Prove By Putting On Evidence of How It Operates In the Typical Case

135. As alleged above, the California Supreme Court has recognized a unique and alternative standard for facial procedural due process challenges, wherein an example of a single constitutional application of a statute is not fatal to the claim; rather, a challenging party can prevail by showing that the challenged procedure violates constitutional protections in the "typical" case. (*Cal. Teachers Ass'n, supra*, 20 Cal.4th at 345.) Also as alleged above, at Paragraph 30, "[w]ith a minor modification, [the California Supreme Court] h[as] adopted the *Mathews* balancing test as the default framework for analyzing challenges to the sufficiency of proceedings under our own due process clause. The first three factors—the private interest affected, the risk of erroneous deprivation, and the government's interest—are the same. [citations]. In addition, [California courts] may also consider a fourth factor, ' "the dignitary

interest in informing individuals of the nature, grounds, and consequences of the action and in enabling them to present their side of the story before a responsible government official." ' " (*See Today's Fresh Start, supra*, 57 Cal.4th at 213.) CABIA alleges that PAGA fails the "*Fresh Start* Balancing Test," as pleaded in further detail below.

136. Per the *Mathews* and *Fresh Start* Balancing Tests, the private interests at issue in the typical PAGA case include, but are not limited to:

a. "[T]he continued operation of an established, lawful business[, which] is subject to heightened protections." (*County of Santa Clara, supra*, 50 Cal.4th at 53.)

b. The "implicat[ions for] [California employers'] good name, reputation, honor, or integrity[,]" (*Cal. Teachers Ass'n v. Cal., supra*, 20 Cal.4th at 348) which are called into question and/or damaged by the filing and pursuit of PAGA claims, which are often resolved without any judicial findings that the employers are innocent of the allegations due to the enormous pressure to settle created by the PAGA paradigm;

c. The "meaningful access to the [courts] so that they may present their side of the case and invoke the discretion of the decision maker," (*Id.*), which the typical PAGA defendant is coerced to surrender due to the enormous pressure to settle created by the PAGA paradigm; and

d. Protection from a government takings of private property (*i.e.*, extracting civil penalties from natural persons despite existence of limited liability structures, such as a corporation) without adequate due process (*see Pedrazzani, supra*, 27 Cal.App.5th 809), which, again, all but the rare PAGA defendants must surrender due to the enormous pressure to settle created by the PAGA paradigm.

137. Per the *Mathews* and *Fresh Start* Balancing Tests, the purported public interests at issue in the typical PAGA case include:

a. "[A]chieving maximum compliance with State labor laws." (*Huff, supra*, 23 Cal.App.5th at 757);

b. "[T]o punish and deter employer practices that violate the rights of numerous

employees under the Labor Code." (*See Iskanian*, *supra*, 59 Cal.4th at 384);

c. To "'attack the underground economy and enhance our state's revenues' by allowing workers to crack down on labor violators[.]" (S. Jud. Comm. Analysis (Sen. Bill No. 796), at 4 (Apr.29, 2003) (emphasis added); Assem. Comm. On Jud. Analysis (Sen. Bill No. 796) (June 26,2003); *see also Ochoa-Hernandez v. CJADERS Foods, Inc.*, (N.D. Cal. Apr. 2, 2010), No. C 08-2073 MHP, 2010 U.S. Dist. LEXIS 32774, at*12 (citing *Arias, supra*, 46 Cal.4th at 985).)

In analyzing this factor, California courts do not blindly accept the State's professed interests at face value, but rather undertake an independent analysis. (*See Cal. Teachers Ass'n, supra*, 20 Cal.4th at 341 ("[I]n the present case the state has identified its interest . . . as discouraging 'meritless administrative proceedings," and thereby conserving public resources. Similarly, in the trial court, the state identified its interest as 'preventing groundless challenges to disciplinary proceedings" and "meritless requests for hearing.' As we shall explain, these characterizations of the interest served by the provision are misleading, and the actual interest served by the statute – discouraging hearing requests in which the teacher happens not to prevail – is not a proper legislative goal.").) CABIA therefore alleges that an independent analysis of PAGA must be undertaken by this Court and that such an analysis will reveal that the interests expressed by the California Legislature are misleading and do not serve proper legislative goals. That the State's characterization of the interests supposedly underling PAGA are misleading is supported by the Legislature's findings that supported the passage of Assem. Bill No. 1654 — namely that PAGA leads to extreme litigation abuse, undue pressure to settle, and other long-foreseen problems born of the unconstitutional delegation of State executive power to financially-incentivized private attorneys. And any argument from the State that PAGA is necessary to protect workers and ensure maximum compliance with California Labor Laws is incurably at odds with the fact that AB 1654 exempts from the application of PAGA an industry that the Legislature knew was populated by rampant California Labor Law violators.

138. Per the *Mathews* and *Fresh Start* Balancing Tests, the risk of erroneous deprivation of the private interests enumerated above, and more, is high given the above-

pleaded aspects of the PAGA paradigm that force all but the rarest defendants to settle PAGA lawsuits; those aspects include, but are not limited to: requiring the typical employer to defend a lawsuit that threatens millions of dollars in penalties without any regard to whether the employer did anything wrong, knew it was doing anything wrong, or has the ability to pay the fines; threatening the typical employer with the all but certain additional cost of paying the plaintiff's attorneys' fees if the matter proceeds through verdict; and not providing the typical defendant with any notice or ability to predict what the actual penalties will be until a California trial court judges exercises its limited discretion to lessen the penalties to the absolute maximum the State and federal Constitutions will allow under the facts unique to that case.

139. The State's interest in maintaining the existing procedural scheme is low given the above-pleaded aspects of the PAGA paradigm, including in relevant part that the State's executive agency charged with the enforcement of California Labor Laws has asked (and been denied) "modest" changes to the PAGA statute that directly bear on the procedural paradigm.

140. The "dignitary interest in informing individuals of the nature, grounds, and consequences of the action and enabling them to present their side of the story before a responsible government official," (*Today's Fresh Start, supra*, 57 Cal.4th at 213) is not being served because the current PAGA paradigm places undue pressure on the typical PAGA defendant to settle for the reasons alleged above.

CAUSES OF ACTION

FIRST CAUSE OF ACTION

(Violation of California Separation of Powers Doctrine)

141. Plaintiff realleges and incorporates by reference all preceding Paragraphs of this Complaint as though each was set forth herein in full.

142. This action presents an actual case or controversy between Plaintiff and Defendant concerning the constitutionality and enforceability of PAGA.

143. Plaintiff reasonably believes Defendant will continue to enforce PAGA against Plaintiff's members and other California employers.

144. The California Constitution provides for the separation of the legislative,

executive, and judicial powers of the State government. Under the classic understanding of the Separation of Powers Doctrine, the legislative power is the power to enact statutes, the executive power is the power to execute or enforce statutes, and the judicial power is the power to interpret statutes and to determine their constitutionality. The Separation of Powers Doctrine prohibits the Legislature from exercises any core judicial or executive function or place restrictions on the Judiciary or Executive that materially impair or defeat the exercise of the Judiciary's or Executive's functions. Similarly, neither the Judiciary nor Executive may abdicate the exercise of their functions.

145. As pleaded more fully above, PAGA violates the California Separation of Powers Doctrine because the statutory provisions as a whole, viewed from a realistic and practical perspective, operate to arrogate, defeat, and/or materially impair, the exercise of the core powers and/or constitutional functions of the Executive Branch of the California government.

146. As pleaded more fully above, PAGA violates the California Separation of Powers Doctrine because the statutory provisions as a whole, viewed from a realistic and practical perspective, operate to arrogate, defeat, and/or materially impair, the exercise of the core powers and/or constitutional functions of the Judicial Branch of the California government.

147. This constitutional challenge is not foreclosed by the California Supreme Court's decision in *Iskanian* because (a) the Court, at most, held that PAGA does not violate the separation of powers between the Legislative and Judicial Branches of the California government, leaving open CABIA's right to challenge whether PAGA violates separation of powers between the Legislative and Executive Branches of the California Government, (b) the Supreme Court lacked a sufficient record at the time to fully appreciate how PAGA lawsuits unconstitutionally arrogate executive power under binding precedent and/or why the qui tam analogy employed in *Iskanian* was, and remains, flawed; and (c) the construction of PAGA by California courts, and correspondingly how PAGA lawsuits are litigated, has substantially changed since the *Iskanian* decision, which presents new facts that CABIA will introduce to prove that PAGA operates to arrogate, defeat, and/or materially impair the exercise of the core

powers and/or constitutional functions of the Executive and/or Judicial Branches of the California Government.

148. This Court has the power to issue declaratory relief under Code of Civil Procedure Sections 1060 and 1062. A judicial declaration is necessary and appropriate regarding the proper interpretation of the California Constitutional provision and the legality of the Private Attorneys General Act thereunder, and regarding the respective rights and obligations of Plaintiff and Defendants thereunder. A judicial determination is necessary and proper at this time and under these circumstances in order to determine whether Defendant may continue to enforce the provisions of the Private Attorneys General Act.

149. This Court has the power to issue injunctive relief under Code of Civil Procedure Sections 525, 526, and 526a. Plaintiff seeks a temporary restraining order and a preliminary and temporary injunction to compel Defendant, and those public officers and employees acting by and through their authority, to immediately set aside any and all actions taken to continue to implement or enforce the provisions of the Private Attorneys General Act, pending the hearing on the merits of Plaintiff's claims to avoid irreparable harm to Plaintiff and its members.

150. Plaintiff has no plain, speedy, and adequate remedy at law, in the absence of this Court's injunction, Defendants will continue to implement and enforce the provisions of the Private Attorneys General Act in violation of Section 3, of Article 3 of the California Constitution, Section 17, Article 1, of the California Constitution, and the Eighth and Fourteenth Amendment to the United States Constitution. No amount of monetary damages or other legal remedy can adequately compensate Plaintiff, and its members, for the irreparable harm that it, its members, and California employers generally, would suffer from the violations of law described herein.

SECOND CAUSE OF ACTION

(Violation of the United States Constitution's Fourteenth Amendment Procedural Due Process Protections)

151. Plaintiff realleges and incorporates by reference all preceding Paragraphs of this Complaint as though each was set forth herein in full.

152. This action presents an actual case or controversy between Plaintiff and Defendant concerning the constitutionality and enforceability of PAGA.

153. Plaintiff reasonably believes Defendant will continue to enforce PAGA against Plaintiff's members and other California employers.

154. The Due Process Clause of the Fourteenth Amendment prohibits the states from depriving any person of life, liberty, or process, without due process of law. This due process guarantee has both procedural and substantive components.

155. As pleaded more fully above, PAGA violates the Fourteenth Amendment's procedural due process guarantees because the paradigm created by PAGA fails the *Mathews* Balancing Test in the typical case; more specifically, the PAGA paradigm coerces all but the most daring and well-capitalized employers to surrender their procedural due process rights to proceed to trial; that gantlet being comprised of, in the typical case:

a. assessing presumptive penalties in a manner completely foreign to American jurisprudence, by serial multiplication that takes no account of the alleged harm, the defendant's culpability, or defendant's ability to pay;

b. exposing defendants to presumptive penalties that exceed the net worth of the defendant's business, thereby threatening the defendant with bankruptcy;

c. exposing natural persons associated with a defendant's business to personal liability for civil penalties, regardless of any limited liability structures, thereby allowing plaintiffs' attorneys to threaten personal assets of individuals in addition to the assets of the employer-business;

d. reserving court discretion to reduce the presumptive penalties until after trial, thus forcing a defendant to "pay to play" for the hope that a trial court will exercise its discretion under an ambiguous standard, which (if applied correctly) makes the "functional penalty" in every PAGA case the absolute maximum that the United States and California Constitutions will permit on the facts of each individual case, which provides no meaningful notice to PAGA defendants of what the penalties will be in their current or any future case;

e. exposing defendants to criminal or quasi-criminal levels of punishment that often meet and exceed penalties assessed in felony cases, without any of the procedural protections normally associated with criminal or quasi-criminal proceedings, such as a burden of proof more demanding than a preponderance of the evidence or a *mens rea* requirement;

f. delegating State executive power to individuals who have direct financial incentives in the litigation and creating a paradigm that financially incentivizes such individual to seek the maximum possible civil penalties on each defendant, rather than require that they seek a "just" result, as is the case with State prosecutors;

g. Punishing defendants who dare to defend PAGA (iallegations through the application of a one-way fee-shifting statute that compounds the "pay to play" situation, effectively requiring the typical defendant to pay the hundreds of thousands (if not millions) of dollars in opposing counsel's legal fees for the mere opportunity to reach the stage where the court may apply its vague discretion to reduce the mandatory PAGA penalties;

These aspects of the PAGA paradigm, and more pleaded *supra*, substantially and effectively deter PAGA defendants in the typical case from vindicating their rights in court.

156. This Court has the power to issue declaratory relief under Code of Civil Procedure Sections 1060 and 1062. A judicial declaration is necessary and appropriate regarding the proper interpretation of the United States Constitutional protections and the legality of the Private Attorneys General Act thereunder, and regarding the respective rights and obligations of Plaintiff and Defendants thereunder. A judicial determination is necessary and proper at this time and under these circumstances in order to determine whether Defendant may continue to enforce the provisions of the Private Attorneys General Act.

157. This Court has the power to issue injunctive relief under Code of Civil Procedure Sections 525, 526, and 526a. Plaintiff seeks a temporary restraining order and a preliminary and temporary injunction to compel Defendant, and those public officers and employees acting by

and through their authority, to immediately set aside any and all actions taken to continue to implement or enforce the provisions of the Private Attorneys General Act, pending the hearing on the merits of Plaintiff's claims to avoid irreparable harm to Plaintiff and its members.

158. Plaintiff has no plain, speedy, and adequate remedy at law, in the absence of this Court's injunction, Defendants will continue to implement and enforce the provisions of the Private Attorneys General Act in violation of Section 3, of Article 3 of the California Constitution, Section 17, Article 1, of the California Constitution, and the Eighth and Fourteenth Amendment to the United States Constitution. No amount of monetary damages or other legal remedy can adequately compensate Plaintiff, and its members, for the irreparable harm that it, its members, and California employers generally, would suffer from the violations of law described herein.

THIRD CAUSE OF ACTION

(Violation of California Constitutional Procedural Due Process Protections)

159. Plaintiff realleges and incorporates by reference all preceding Paragraphs of this Complaint as though each was set forth herein in full.

160. This action presents an actual case or controversy between Plaintiff and Defendant concerning the constitutionality and enforceability of PAGA.

161. Plaintiff reasonably believes Defendant will continue to enforce PAGA against Plaintiff's members and other California employers.

162. The California Constitution prohibits the State government from depriving any person of life, liberty, or process, without due process of law. This due process guarantee has both procedural and substantive components.

163. As pleaded more fully above, PAGA violates the procedural due process guarantee of the California Constitution; because the paradigm created by PAGA fails the *Fresh Start* Balancing Test in the typical case; more specifically, the PAGA paradigm coerces all but the most daring and well-capitalized employers to surrender their procedural due process rights to proceed to trial; that gantlet being comprised of, in the typical case:

a. assessing presumptive penalties in a manner completely foreign to American

jurisprudence, by serial multiplication that takes no account of the alleged harm, the defendant's culpability, or defendant's ability to pay;

b. exposing defendants to presumptive penalties that exceed the net worth of the defendant's business, thereby threatening the defendant with bankruptcy;

c. exposing natural persons associated with a defendant's business to personal liability for civil penalties, regardless of any limited liability structures, thereby allowing plaintiffs' attorneys to threaten personal assets of individuals in addition to the assets of the employer-business;

d. reserving court discretion to reduce the presumptive penalties until after trial, thus forcing a defendant to "pay to play" for the hope that a trial court will exercise its discretion under an ambiguous standard, which (if applied correctly) makes the "functional penalty" in every PAGA case the absolute maximum that the United States and California Constitutions will permit on the facts of each individual case, which provides no meaningful notice to PAGA defendants of what the penalties will be in their current or any future case;

e. exposing defendants to criminal or quasi-criminal levels of punishment that often meet and exceed penalties assessed in felony cases, without any of the procedural protections normally associated with criminal or quasi-criminal proceedings, such as a burden of proof more demanding than a preponderance of the evidence or a *mens rea* requirement;

f. delegating State executive power to individuals who have direct financial incentives in the litigation and creating a paradigm that financially incentivizes such individual to seek the maximum possible civil penalties on each defendant, rather than require that they seek a "just" result, as is the case with State prosecutors;

g. Punishing defendants who dare to defend PAGA allegations through the application of a one-way fee-shifting statute that compounds the "pay to play" situation, effectively requiring the typical defendant to pay the hundreds of

thousands (if not millions) of dollars in opposing counsel's legal fees for the mere opportunity to reach the stage where the court may apply its vague discretion to reduce the mandatory PAGA penalties;

These aspects of the PAGA paradigm, and more pleaded *supra*, substantially and effectively deter PAGA defendants in the typical case from vindicating their rights in court.

164. This Court has the power to issue declaratory relief under Code of Civil Procedure Sections 1060 and 1062. A judicial declaration is necessary and appropriate regarding the proper interpretation of the California Constitutional protections and the legality of the Private Attorneys General Act thereunder, and regarding the respective rights and obligations of Plaintiff and Defendants thereunder. A judicial determination is necessary and proper at this time and under these circumstances in order to determine whether Defendant may continue to enforce the provisions of the Private Attorneys General Act.

165. This Court has the power to issue injunctive relief under Code of Civil Procedure Sections 525, 526, and 526a. Plaintiff seeks a temporary restraining order and a preliminary and temporary injunction to compel Defendant, and those public officers and employees acting by and through their authority, to immediately set aside any and all actions taken to continue to implement or enforce the provisions of the Private Attorneys General Act, pending the hearing on the merits of Plaintiff's claims to avoid irreparable harm to Plaintiff and its members.

166. Plaintiff has no plain, speedy, and adequate remedy at law, in the absence of this Court's injunction, Defendants will continue to implement and enforce the provisions of the Private Attorneys General Act in violation of Section 3, of Article 3 of the California Constitution, Section 17, Article 1, of the California Constitution, and the Eighth and Fourteenth Amendment to the United States Constitution. No amount of monetary damages or other legal remedy can adequately compensate Plaintiff, and its members, for the irreparable harm that it, its members, and California employers generally, would suffer from the violations of law described herein.

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FOURTH CAUSE OF ACTION

(Violation of the United States Constitution's Fourteenth Amendment Equal Protection of the Laws Guarantee)

167. Plaintiff realleges and incorporates by reference all preceding Paragraphs of this Complaint as though each was set forth herein in full.

168. This action presents an actual case or controversy between Plaintiff and Defendant concerning the constitutionality and enforceability of PAGA.

169. Plaintiff reasonably believes Defendant will continue to enforce PAGA against Plaintiff's members and other California employers.

170. The Fourteenth Amendment to the United States Constitution prohibits the federal government from denying any person equal protection of the laws. These protections apply to the government of the State of California.

171. As pleaded more fully above, the Private Attorneys General Act violates the Fourteenth Amendment guarantee of equal protection because the California Legislature recently, and without any rational basis, exempted the construction industry from the impact of PAGA via the passage of Assem. Bill No. 1654, now codified in California Labor Code Section 2699.6. In so doing, the California Legislature has unconstitutionally denied Plaintiff's members, and California employers not subject to the exemption, the equal protection of California law.

172. This Court has the power to issue declaratory relief under Code of Civil Procedure Sections 1060 and 1062. A judicial declaration is necessary and appropriate regarding the proper interpretation of the United States Constitutional protections provision and the legality of the Private Attorneys General Act thereunder, and regarding the respective rights and obligations of Plaintiff and Defendants thereunder. A judicial determination is necessary and proper at this time and under these circumstances in order to determine whether Defendant may continue to enforce the provisions of the Private Attorneys General Act.

173. This Court has the power to issue injunctive relief under Code of Civil Procedure Sections 525, 526, and 526a. Plaintiff seeks a temporary restraining order and a preliminary and

temporary injunction to compel Defendant, and those public officers and employees acting by and through their authority, to immediately set aside any and all actions taken to continue to implement or enforce the provisions of the Private Attorneys General Act, pending the hearing on the merits of Plaintiff's claims to avoid irreparable harm to Plaintiff and its members.

174. Plaintiff has no plain, speedy, and adequate remedy at law, in the absence of this Court's injunction, Defendants will continue to implement and enforce the provisions of the Private Attorneys General Act in violation of Section 3, of Article 3 of the California Constitution, Section 17, Article 1, of the California Constitution, and the Eighth and Fourteenth Amendment to the United States Constitution. No amount of monetary damages or other legal remedy can adequately compensate Plaintiff, and its members, for the irreparable harm that it, its members, and California employers generally, would suffer from the violations of law described herein.

FIFTH CAUSE OF ACTION

(Violation of California Constitution's Equal Protection Clause)

175. Plaintiff realleges and incorporates by reference all preceding Paragraphs of this Complaint as though each was set forth herein in full.

176. This action presents an actual case or controversy between Plaintiff and Defendant concerning the constitutionality and enforceability of PAGA.

177. Plaintiff reasonably believes Defendant will continue to enforce PAGA against Plaintiff's members and other California employers.

178. The California Constitution prohibits the State government from denying any person equal protection of the laws.

179. As pleaded more fully above, the Private Attorneys General Act violates the California Constitution's guarantee of equal protection because the California Legislature recently, and without any rational basis, exempted the construction industry from the impact of PAGA via the passage of Assem. Bill No. 1654, now codified in California Labor Code Section 2699.6. In so doing, the California Legislature has unconstitutionally denied Plaintiff's members, and California employers not subject to the exemption, the equal protection of

California law.

180. This Court has the power to issue declaratory relief under Code of Civil Procedure Sections 1060 and 1062. A judicial declaration is necessary and appropriate regarding the proper interpretation of the California Constitutional protections and the legality of the Private Attorneys General Act thereunder, and regarding the respective rights and obligations of Plaintiff and Defendants thereunder. A judicial determination is necessary and proper at this time and under these circumstances in order to determine whether Defendant may continue to enforce the provisions of the Private Attorneys General Act.

181. This Court has the power to issue injunctive relief under Code of Civil Procedure Sections 525, 526, and 526a. Plaintiff seeks a temporary restraining order and a preliminary and temporary injunction to compel Defendant, and those public officers and employees acting by and through their authority, to immediately set aside any and all actions taken to continue to implement or enforce the provisions of the Private Attorneys General Act, pending the hearing on the merits of Plaintiff's claims to avoid irreparable harm to Plaintiff and its members.

182. Plaintiff has no plain, speedy, and adequate remedy at law, in the absence of this Court's injunction, Defendants will continue to implement and enforce the provisions of the Private Attorneys General Act in violation of Section 3, of Article 3 of the California Constitution, Section 17, Article 1, of the California Constitution, and the Eighth and Fourteenth Amendment to the United States Constitution. No amount of monetary damages or other legal remedy can adequately compensate Plaintiff, and its members, for the irreparable harm that it, its members, and California employers generally, would suffer from the violations of law described herein.

PRAYER FOR RELIEF

1. On the First through Fifth Causes of Action, a temporary restraining order and preliminary and permanent injunctions enjoining Defendant from implementing or enforcing the Private Attorneys General Act, or any of its unconstitutional provisions.

2. On the First through Fifth Causes of Action, that this Court issue its judgment declaring that the Private Attorneys General Act is, in whole or in part, unconstitutional and

unenforceable because it violates Section 3, Article III, and/or Section 17, Article I, of the California Constitution, and/or the Eighth and/or Fourteenth Amendment of the United States Constitution.

3. On the First through Fifth Causes of Action, that this Court enter orders reforming the Private Attorneys General Act to the extent mandated by constitutional concerns and permitted by law.

4. On each and every Cause of Action, that this Court grant Plaintiff its costs, including out-of-pocket expenses and reasonable attorneys' fees; and

5. On each and every Cause of Action, that this Court grant such other, different or further, relief as this Court may deem just and proper.

DATED: July 12, 2019

EPSTEIN, BECKER & GREEN, P.C.

By: _____

Richard J. Frey
Robert H. Pepple
David M. Prager
Paul DeCamp
Attorneys for Plaintiff
California Business & Industrial Alliance

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

1. At the time of service I was at least 18 years of age and **not a party to this legal action**.

2. My business address is 1925 Century Park East, Suite 500, Los Angeles, CA 90067.

3. I served copies of the following documents (specify the exact title of each document served):

FIRST AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

4. I served the documents listed above in item 3 on the following persons at the addresses listed:

Aaron Jones
Aaron.jones@doj.ca.gov
Deputy Attorney General | Government Law Section
California Department of Justice
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102

Attorneys for Defendant
Xavier Becerra
In his official capacity as the Attorney General of the State of California

5. a. ☐ By personal service. I personally delivered the documents on the date shown below to the persons at the addresses listed above in item 4. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package clearly labeled to identify the attorney being served with a receptionist or an individual in charge of the office. (2) For a party delivery that was made to the party or by leaving the documents at the party's residence between the hours of eight in the morning and six in the evening with some person not less than 18 years of age.

b. ☒ **By United States mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses in item 4 and (*specify one*).

1. ☐ deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid on the date shown below, or

2. ☒ placed the envelope for collection and mailing on the date shown below, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Los Angeles, California.

c. ☐ **By overnight delivery.** I enclosed the documents on the date shown below in an envelope or package provided by an overnight delivery carrier and addressed to the person at the addresses in item 4. I placed the envelope or package for collection and

overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

d. ☐ **By messenger service.** I served the documents on the date shown below by placing them in an envelope or package addressed to the person on the addresses listed in item 4 and providing them to a professional messenger service for service. (A declaration by the messenger must accompany this proof of service or be contained in the Declaration of Messenger below.)

e. ☐ **By fax transmission.** Based on an agreement of the parties to accept service by fax transmission, I faxed the documents on the date shown below to the fax numbers of the persons listed in item 4. No error was reported by the fax machine that I used. A copy of the fax transmission, which I printed out, is attached.

f. ☒ By electronic service. I caused the above-stated document(s) to be electronically served through the court's E-File Service Provider, One Legal, addressed to all parties appearing on the One Legal E-Service Recipients list for the above-entitled case. The "One Legal Order Receipt" page(s) will be maintained by our office. I did not receive, within a reasonable time after the E-Service transmission, any electronic message or other indication that the transmission was unsuccessful.

6. I served the documents by the means described in item 5 on **July 12, 2019**:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

July 12, 2019	Felecia J. McClendon	
DATE	(TYPE OR PRINT NAME)	(SIGNATURE OF DECLARANT)

DECLARATION OF MESSENGER

☐ **By personal service.** I personally delivered the envelope or package received from the declarant above to the persons at the addresses listed in item 4. I delivered the documents on the date shown below to the persons and addresses listed in item 4. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package clearly labeled to identify the attorney being served with a receptionist or an individual in charge of the office. (2) For a party delivery that was made to the party or by leaving the documents at the party's residence between the hours of eight in the morning and six in the evening with some person not less than 18 years of age.

At the time of service, I was at least 18 years of age. I am not a party to the above referenced legal proceeding.

I served the envelope or package, as stated above, on (*date*): _____

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATE	(TYPE OR PRINT NAME)	(SIGNATURE OF DECLARANT)