XAVIER BECERRA
Attorney General of California
PAUL STEIN
Supervising Deputy Attorney General
AARON JONES
Deputy Attorney General
State Bar No. 248246
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 510-3805
Fax: (415) 703-1234
E-mail: Aaron.Jones@doj.ca.gov
Attorneys for California Attorney General Xavier Becerra

SUPERIOR COURT OF THE STATE OF CALIFORNIA

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 **DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER** Date: March 14, 2019 Time: 2:00 p.m. Dept: CX102 Judge: The Hon. Peter Wilson Trial Date: None set Action Filed: November 28, 2018

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

INTRODUCTION

Plaintiff asserts constitutional challenges to the Labor Code Private Attorneys General Act of 2004, which creates a right of action for aggrieved employees to seek civil penalties for violations of California's labor laws. Plaintiff alleges that the Act's penalties are too high, and that the statute grants an excessive delegation of power to private litigants. Based on allegations such as these, plaintiff asserts violations of several constitutional provisions—excessive fines, separation of powers, due process, and equal protection—and seeks sweeping declaratory and injunctive relief enjoining use of the Act. But Plaintiff lacks standing to assert these claims, and the claims plead no justiciable controversy and are barred by well-settled authority.

Plaintiff's claims, with only one exception, do not challenge the Act on its face, but rather as it allegedly is applied. The allegedly unconstitutional "applications" of the Act are lawsuits filed under the Act against non-party California employers. Plaintiff lacks standing to challenge the Act as applied to non-party employers. Furthermore, the claims present no live controversy about the constitutionality of any lawsuit filed under the Act. Plaintiff cannot re-litigate or collaterally attack prior lawsuits filed under the Act in this action, and any challenge to anticipated future lawsuits is not ripe for adjudication since such claims would require the parties and Court to speculate about the facts and circumstances of the future lawsuits. Therefore, the Complaint presents no justiciable controversy about the Act's purported application.

Plaintiff's claims also are legally defective on the merits. The excessive fines and substantive due process claims all hinge on allegations that the Act's penalties can be too high. The Complaint, however, does not claim that any actual penalties imposed under the Act have been (or will be) excessive, but rather that a plaintiff's mere *pleading* of high penalties is a violation, since it allegedly creates undue pressure to settle. These constitutional provisions do not regulate mere *allegations* of high penalties, or alleged pressure to settle. Plaintiff's separation-of-powers and procedural due process claims also fail, because the California Supreme Court has squarely rejected the legal theories that underpin them. Finally, the equal protection claims, the Complaint's sole facial challenge, also lack merit under well-settled law.

Therefore, the Attorney General respectfully requests that the Court sustain this demurrer.

BACKGROUND

I. THE PRIVATE ATTORNEYS GENERAL ACT.

In September 2003, the Legislature enacted the Labor Code Private Attorneys General Act of 2004 ("PAGA"). (Lab. Code, § 2698 et seq.) The purpose of PAGA was "to supplement enforcement actions by public agencies, which lack adequate resources to bring all such actions themselves." (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 986.)

PAGA allows an "aggrieved employee" to bring a civil action to recover civil penalties for violations of California's Labor Code. It states that, whenever the Labor Code creates a civil penalty that is assessed and collected by the State's labor agencies (the Labor and Workforce Development Agency ("LWDA") or its constituent parts), those penalties "may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees." (Lab. Code, § 2699, subd. (a).) PAGA also established new penalties for violations of provisions of the Labor Code for which no civil penalty previously was provided, recoverable in the same manner. (*Id.*, § 2699, subd. (f)-(g).)[1]

Of the civil penalties recovered, 75 percent goes to the LWDA, and the remaining 25 percent to the aggrieved employees. (*Id.*, § 2699, subd. (i).) PAGA does not limit an employee's right to pursue other remedies in addition to the PAGA penalties, such as an action for lost wages or other damages, either individually or on a class basis. (*Id.*, § 2699, subd. (g)(1).)

Before bringing a civil action, an employee must comply with Labor Code section 2699.3, which requires written notice to LWDA and the employer, gives LWDA an opportunity to investigate the claim and issue a citation (which would foreclose a private action), and, for certain types of violations, gives the employer an opportunity to cure the violation. (*Id*, § 2699.3.) Section 2699.3 creates three different regimes of pre-filing requirements: (1) one for alleged violations of any of the Labor Code provisions listed in section 2699.5; (2) one for alleged violations of the Occupational Safety and Health Act (Lab. Code, § 6300 et seq.); and (3) one for any other alleged Labor Code violations. (*Id.*, § 2699.3, subd. (a)-(c).)

[1] A PAGA action is not a class action and need not satisfy the requirements for class certification. (See *Arias*, *supra*, 46 Cal.4th at p. 975.)

If the Labor Code grants state labor authorities the discretion to assess a penalty for a particular violation, PAGA grants the same discretion to the court. (*Id*., § 2699, subd. (e)(1).) Also, in any action, the court has the discretion to reduce the amount of the penalties 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." (*Id*., § 2699, subd. (e).)

The Superior Court must review and approve the settlement of any PAGA action. (*Id*., § 2699, subd. (l)(2).)[2]

The Legislature has amended PAGA several times since its enactment. In 2018, the Legislature added section 2699.6, which provides that PAGA shall not apply to employees in the construction industry for work performed under a valid collective bargaining agreement, if the agreement contains certain specified terms, including a grievance and arbitration procedure that covers violations that otherwise could have been subject to PAGA. (*Id*., § 2699.6.)

II. THE COMPLAINT'S ALLEGATIONS.

Plaintiff the California Business & Industrial Alliance, an association incorporated in Washington, D.C., asserts challenges to PAGA on behalf of its members, none of whom are identified in the Complaint, but who allegedly include California employers. (Compl. ¶ 7.)

Plaintiff contends that PAGA has become "a tool of extortion and abuse by the Plaintiff's Bar," and that it "empowers greedy and unscrupulous plaintiffs' attorneys to shake down California employers." (*Id*. ¶¶ 4-5.) The Complaint's principal allegations are that PAGA can authorize constitutionally excessive penalties in certain circumstances, and that it grants an unfettered delegation of state power to private citizens and their counsel, with insufficient oversight by the State. (See *id*. ¶¶ 85-109.) The Complaint also alleges that certain of the underlying Labor Code provisions that can be enforced through PAGA are themselves confusing or difficult to follow (*id*. ¶¶ 32-46), but it does not actually challenge any law other than PAGA.

[2] The Complaint mis-quotes PAGA in this regard. It quotes and discusses the pre-2016 version of the statute, which required court review only of "any penalties sought" as part of a settlement. (Compl. ¶¶ 70, 76, 88.) Since 2016, PAGA has provided that the court shall review and approve the entire settlement of any PAGA action. (Lab. Code, § 2699, subd. (l)(2).)

Based on allegations such as these, the Complaint asserts nine causes of action, as follows: violation of the separation of powers clause of the California Constitution (Cause of Action 1); federal and state procedural due process (Causes of Action 2, 4); federal and state substantive due process (Causes of Action 3, 5); the federal and state excessive fines clauses (Causes of Action 6, 7); and the federal and state equal protection clauses (Causes of Action 8, 9).

The Complaint purports to challenge PAGA both facially and as-applied to California employers (see Compl. ¶ 6), although the bulk of the claims assert as-applied challenges.

The excessive fines and substantive due process claims all hinge on allegations that PAGA authorizes excessive penalties. (Compl. ¶¶ 130, 146, 154, 162.) These claims allege that the penalties can be too high as applied to particular employers in particular circumstances, not that PAGA's penalty provisions inevitably are excessive on their face. (See Compl. ¶¶ 90-97.)

The separation of powers claim alleges that PAGA amounts to an unconstitutional delegation of state power to private litigants and their counsel, with insufficient government oversight. (Compl. ¶¶ 80, 85-88, 98-103.) While the claim purports to challenge PAGA both facially and as-applied, the bulk of the allegations assert purported as-applied challenges. (*Ibid*.)

The procedural due process claims allege that PAGA imposes "criminal or quasi-criminal liability" without allegedly required criminal procedural protections, such as the grand jury process, and that PAGA does not provide "a fair, neutral, decision maker." (Compl. ¶¶ 122, 138.) These claims, again, appear to be based on allegations that PAGA can authorize excessive (allegedly criminal) sanctions as applied to particular employers in particular cases, not that PAGA is a criminal or quasi-criminal statute on its face. (See *infra*, pp. 17-18.)

Finally, the equal protection claims allege that PAGA's recently enacted exemption for the construction industry, Labor Code section 2699.6, exempted the construction industry from PAGA without any rational basis, a facial challenge. (Compl. ¶¶ 54-56, 170, 178.)

ARGUMENT

A demurrer properly raises defects appearing on the face of the complaint or from matters subject to judicial notice. (Code Civ. Proc., § 430.50; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) When ruling on a demurrer, the court determines if the complaint sufficiently states a valid

cause of action, assuming the truth of the Complaint's material factual allegations but not the contentions, deductions, or conclusions of fact or law. (*Id*. at p. 318.)

A constitutional challenge to a statute "may be of two types: a facial challenge and an as-applied challenge." (*Pfeifer v. John Crane* (2013) 220 Cal.App.4th 1270, 1310.) An as-applied challenge "contemplates analysis of the facts of a particular case or cases" to determine whether, in "particular circumstances the application [of the statute] deprived the individual to whom it was applied of a protected right." (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.) In contrast, a facial challenge "considers only the text of the measure itself, not its application to the particular circumstances" to determine whether the challenged provisions "inevitably pose a present total and fatal conflict with applicable constitutional prohibitions." (*Ibid*.)

I. PLAINTIFF LACKS STANDING TO CHALLENGE PAGA AS-APPLIED TO ITS MEMBERS OR OTHER CALIFORNIA EMPLOYERS.

Plaintiff lacks standing to challenge PAGA's application to Plaintiff's members or other California employers. Plaintiff appears to rely on the doctrine of associational standing, but Plaintiff fails to establish the requirements for associational standing.[3]

"Standing is a threshold issue necessary to maintain a cause of action, and the burden to allege and establish standing lies with the plaintiff." (*People ex rel. Becerra v. Superior Court* (2018) 29 Cal.App.5th 486, 495.) Standing generally requires that the complainant "either suffered or is about to suffer an injury" of sufficient magnitude. (*Boorstein v. CBS Interactive, Inc.* (2013) 222 Cal.App.4th 456, 465.) The Complaint does not allege that Plaintiff itself has been harmed by PAGA or has any beneficial interest in the issues. Rather, Plaintiff seeks to challenge PAGA "as applied to its members and other California employers." (Compl. ¶¶ 6-7.)

While the plaintiff itself typically must have standing, associations can have standing to bring claims on behalf of their members in limited circumstances. The requirements for associational standing are well-settled: "[a]n association has standing to bring suit on behalf of its

[3] As explained, the as-applied challenges are Causes of Action 1-7. (*Supra*, p. 9.) The standing and justiciability analyses can differ for facial versus as-applied constitutional challenges, as explained further below, and the plaintiff must establish that it has standing for both. (See, e.g., *Prison Law Office v. Koenig* (1986) 186 Cal.App.3d 560, 565). This demurrer challenges only Plaintiff's as-applied claims on standing and justiciability grounds.

members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." (*Prop. Owners of Whispering Palms v. Newport Pac.* (2005) 132 Cal.App.4th 666, 673.) Plaintiff fails to satisfy the first and third requirements of this test.[4]

The Complaint fails to satisfy the first element, because Plaintiff's members would not have standing to sue in their own right. The Complaint alleges that Plaintiff's members have suffered damages in the form of judgments, settlement payments, or legal fees in PAGA cases. (Compl. ¶¶ 7-8.) But Plaintiff's members would be barred from collaterally attacking the results of prior PAGA lawsuits filed against them. If the prior lawsuit resulted in a judgment, claim preclusion would bar Plaintiff's member from challenging the judgment. (See *DKN Holdings v. Faerber* (2015) 61 Cal.4th 813, 824 [describing the elements of claim preclusion]; *Arias, supra*, 46 Cal.4th at p. 986 [explaining that an employee's PAGA action also binds the state].) A court-approved settlement also is given preclusive effect. (*Villacres v. ABM Indus. Inc.* (2010) 189 Cal.App.4th 562, 569.) The Complaint identifies no grounds for relief from any settlement in any event. Nor would Plaintiff's members have standing to challenge possible *future* PAGA lawsuits against them, since such claims would not be ripe for adjudication. (See *infra*, pp. 12-13.) Therefore, Plaintiff fails to establish the first requirement for associational standing.

Plaintiff also fails to satisfy the third requirement for associational standing, because the claims would require the participation of the association's individual members. This prong hinges on whether resolution of the case will require the court "to consider the individual circumstances" of the allegedly aggrieved members. (See *Bhd. of Teamsters & Auto Truck Drivers v. Unemployment Ins. Appeals Bd.* (1987) 190 Cal.App.3d 1515, 1523 [finding the requirement satisfied because the case presented "a pure question of law"].) Here, Plaintiff's claims (even if they were legally viable) would require assessment of wide-ranging individual facts about individual employers and PAGA cases, as set forth in the following sections—facts

[4] While Plaintiff purports to challenge PAGA "as applied to its members and other California employers" (Compl. ¶ 6), it pleads no basis to sue on behalf of non-members.

such as the amounts of the penalties imposed in a particular case, the amount of the actual harm, the defendant's culpability, the defendant's ability to pay, and whether, as Plaintiff alleges, the PAGA portion of particular settlements was too low. (*Infra*, pp. 14-18.) In these circumstances, the participation of the individual members is required. (*Ibid*.)

For these reasons, Plaintiff lacks standing to assert the Complaint's as-applied claims.[5]

II. THE COMPLAINT IDENTIFIES NO JUSTICIABLE CONTROVERSY CHALLENGING PAGA AS-APPLIED TO CALIFORNIA EMPLOYERS.

Even if Plaintiff had standing, the Complaint sets forth no justiciable controversy regarding PAGA's application to California employers. "California courts will decide only justiciable controversies." (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1573.) "The concept of justiciability is a tenet of common law jurisprudence and embodies '[t]he principle that courts will not entertain an action which is not founded on an actual controversy.'" (*Ibid*.) Similarly, declaratory relief requires an "actual controversy." (Code Civ. Proc., § 1060.)

Justiciability includes the concepts of ripeness and mootness. (*Wilson & Wilson*, 191 Cal.App.4th at pp. 1573-1574.) Ripeness "is intended to prevent courts from issuing purely advisory opinions," and is based "on the recognition that judicial decisionmaking is best conducted in the context of an actual set of facts." (*Ibid*.) A dispute is moot if a live dispute may have existed at one time, but has been "deprived of life" due to later events. (*Ibid*.) Mootness focuses on "whether the court can grant the plaintiff any effectual relief" in the dispute. (*Ibid*.)

To the extent Plaintiff alleges that prior PAGA lawsuits actually were unconstitutional applications of the statute, in addition to the defects described in the prior section, the claims would be moot. This Court cannot grant any effectual relief in prior cases or affect the outcome of those cases. (See *id*. at p. 1574.)

To the extent Plaintiff asks the Court to declare unconstitutional, and to enjoin, anticipated future applications of PAGA (i.e., future lawsuits), the claims are not ripe for adjudication. Courts examine two factors to determine whether a challenge to a law or regulation is ripe for

[5] The Complaint also cites the taxpayer-action statute in passing as a purported basis for the issuance of an injunction (Compl. ¶ 15), but it does not even attempt to plead the requirements for a claim under that statute. (See Code Civ. Proc., § 526a.)

adjudication before the challenged enforcement or application occurs: (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration. (*Pac. Legal Found. v. California Coastal Com.* (1982) 33 Cal.3d 158, 171, citing *Abbott Labs. v. Gardner* (1967) 387 U.S. 136, 149.) Plaintiff's as-applied claims fail to satisfy either prong.

Under the first prong, the dispute is not ripe if "the abstract posture of the proceeding makes it difficult to evaluate ... the issues," or if "the court is asked to speculate on the resolution of hypothetical situations." (*Metro. Water Dist. of S. California v. Winograd* (2018) 24 Cal.App.5th 881, 892.) A case is more likely to be ripe if it presents purely legal issues. (*Pac. Legal Found., supra*, 33 Cal.3d at p. 172.) Here, Plaintiff's as-applied claims are entirely speculative. While Plaintiffs asks the Court to declare PAGA unconstitutional "as-applied" based on certain fact-patterns posited in the Complaint, the merit of Plaintiff's claims, again, would hinge on a broad range of case-specific facts, such as the amounts of the penalties imposed in a particular case, the amount of the actual harm, and the defendant's culpability and ability to pay. (*Infra*, pp. 14-18.) Therefore, even if Plaintiff were permitted to re-litigate prior PAGA lawsuits to show that they actually constituted unconstitutional applications of the statute, the showing would not establish that any future lawsuit will be unconstitutional. Plaintiff's claims, as applied to future cases, would hinge on the totality of the facts and circumstances of those future cases, which are entirely speculative. Therefore, the first prong of the test weighs against ripeness.

The second prong also weighs against ripeness. PAGA itself does not impose any duties or obligations on California employers. PAGA merely creates a right of action to enforce rules that otherwise exist in California's labor laws. (*Amalgamated Transit Union v. Sup. Ct.* (2009) 46 Cal.4th 993, 1003.) Plaintiff's members would be harmed only if they were sued under PAGA, and only if PAGA's application in those future cases were somehow unconstitutional. Therefore, any harm is purely speculative. (See *Metro. Water Dist. v. Winograd*, supra, 24 Cal.App.5th at p. 893 [explaining that, under the second prong, "courts generally will not consider issues based on speculative future harm"].) Furthermore, the affected parties can challenge the application of PAGA to them in any future lawsuit, a consideration that also weighs against ripeness under the second prong. (*Ibid.*) Therefore, the second prong also counsels against ripeness.

For all of these reasons, Plaintiff's as-applied claims present no justiciable controversy.

III. THE EXCESSIVE FINES AND RELATED CLAIMS FAIL AS A MATTER OF LAW.

As explained, the federal and state excessive fines and substantive due process claims all hinge on allegations that PAGA penalties can be unconstitutionally high in certain circumstances. (Compl. ¶¶ 130, 146, 154, 162.) These claims all fail as a matter of law.

The federal and state excessive fines clauses operate similarly. (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 728.) These provisions limit the government's power to extract payments "as punishment for some offense." (*U.S. v. Bajakajian* (1998) 524 U.S. 321, 328.) Courts examine four considerations to determine whether such a penalty constitutes an excessive fine: "(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." (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, *supra*, 37 Cal.4th at p. 728.) The excessive fines clauses do not apply to punitive damages in private actions (*ibid.*), but the federal and state due process clauses impose similar limits on punitive damages, guided by similar considerations. (See *Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1311.)

The Complaint does not appear to mount a facial challenge to PAGA under these provisions, and any such claim would lack merit.[6] Rather, these claims assert as-applied challenges to PAGA's penalties, but the Complaint fails to state a claim that PAGA's penalties are excessive as applied to any particular employer. The Complaint does not identify even a *single* instance in which a PAGA case allegedly resulted in an unconstitutionally high penalty award against a California employer. Instead, it gives one "example" of how "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 penalties." (Compl. ¶ 91, italics added.) It does not allege that this "example" sets forth the facts of any actual case, but only that "on information

[6] The Complaint does not, and could not, allege that PAGA's penalties inevitably are excessive on the face of the statute, only that the penalties could be excessive in certain cases. (See Compl. ¶¶ 90-97.) The requirements for these claims are inherently case-specific, turning on matters such as the amount of penalties imposed, the amount of actual harm, and the defendant's culpability. (*Ibid.*) Furthermore, as stated, PAGA grants the court discretion to award less than the maximum penalty amounts specified in the statute in order to avoid results that are "unjust, arbitrary and oppressive, or confiscatory." (Lab. Code, § 2699, subd. (e)(1)-(e)(2).)

and belief" the example is "similar to the allegations that have been *pleaded* against Plaintiff's members." (*Ibid*., italics added.) These allegations fail to state a cognizable claim.

First, the Complaint and its lone "example" of high penalties plead no justiciable claim, since a justiciable controversy cannot be based on a "hypothetical state of facts," as explained above. (*Supra*, pp. 12-13; *Wilson & Wilson*, *supra*, 191 Cal.App.4th at p. 1573.)

More fundamentally, even if this "example" represented the facts of an actual case, it identifies no violation as a matter of law. The Complaint contends only that high penalties have been "pleaded" against Plaintiff's members in some cases (Compl. ¶ 91), not that any PAGA judgment ever has actually *imposed* these or similar penalties. These constitutional provisions limit the government's power to extract payments as punishment for an offense, i.e., actual fines or punitive damages. (See, e.g., *U.S. v. Bajakajian* (1998) 524 U.S. 321, 327-28; *BMW of N. Am. v. Gore* (1996) 517 U.S. 559, 568.) They do not prohibit the mere *pleading* of excessive fines. (*Ibid*.) Similarly, insofar as Plaintiff alleges that settlement payments or attorneys' fees and the costs of litigation are excessive, those types of payments are not penalties or damages imposed for purposes of punishment, and thus are not covered. (*Ibid*.) And regardless, the Complaint fails to allege even a *single* payment of *any* type that Plaintiff claims was unconstitutional.

For these reasons, the excessive fines and substantive due process claims (Cause of Action 3, 5, 6, 7) fail to state a claim upon which relief can be granted.

IV. THE SEPARATION OF POWERS CLAIM FAILS AS A MATTER OF LAW.

The separation of powers claim alleges that PAGA amounts to an unconstitutional delegation of state power to private litigants and their counsel, with insufficient government oversight. (Compl. ¶¶ 85-88, 98-109, 114.) This claim fails as a matter of law, among other reasons, because the California Supreme Court already has rejected it.

In *Iskanian v. CLS Transportation*, the defendant claimed, like Plaintiff does here, that "PAGA violates the principle of separation of powers under the California Constitution." (*Iskanian v. CLS Transp. L.A.* (2014) 59 Cal.4th 348, 389 (hereafter "*Iskanian*").) Like Plaintiff here, the defendant in *Iskanian* argued that PAGA improperly "authoriz[ed] financially interested private citizens to prosecute claims on the state's behalf without governmental supervision," in

violation of separation of powers. (*Id*. at pp. 389-390.) The Court rejected the claim: "we reject CLS's argument that the PAGA violates the separation of powers principle under the California Constitution." (*Id*. at p. 391.) The Court reasoned in part that PAGA is a species of *qui tam* statute, and that separation of powers does not preclude the Legislature from "enlisting willing citizens in the task of civil enforcement" as *qui tam* plaintiffs. (*Id*. at pp. 382, 390.)

The Complaint recognizes that the Supreme Court already has ruled against it on this issue, but argues that the Supreme Court erred. (Compl. ¶ 85 ["the California Supreme Court has incorrectly labeled 'a PAGA representative action . . . a type of qui tam action"].) This Court is not free to revisit the Supreme Court's ruling. (*McClung v. Employment Dev. Dept.* (2004) 34 Cal.4th 467, 473 [explaining that the Supreme Court's decisions are binding on all California courts].) Therefore, the Complaint fails to state a cognizable separation-of-powers claim.

Plaintiff cannot avoid *Iskanian's* holding by framing its claim as an "as applied" challenge. (See Compl. ¶¶ 98-104 [labeling similar allegations "as-applied" challenges].) Plaintiff's purported "as applied" separation-of-powers claim alleges that the State does not sufficiently supervise PAGA plaintiffs and their counsel, creating an "unfettered delegation of power," and that, as a result, plaintiffs' attorneys act to enrich themselves "at the expense of the State of California" and the employees, leading to results that are not in "the interests of the State." (Compl. ¶¶ 80, 98-105.) It alleges, for example, that plaintiffs often assert both PAGA and non-PAGA (often class-action) labor-law claims, and then settle with "a very small allocation" of the overall settlement allocated to the PAGA claims. (*Ibid*.) These allegations, even accepted as true for purposes of demurrer, fail to state a claim upon which relief can be granted.

The Supreme Court, again, already has rejected Plaintiff's theory. As explained, *Iskanian* held that the Legislature validly may enlist private citizens in the task of civil enforcement via *qui tam* statutes like PAGA, and indeed may do so "without government supervision." (*Iskanian*, supra, 59 Cal.4th at p. 390.) Therefore, the Supreme Court has rejected Plaintiff's theory that the State must closely supervise PAGA plaintiffs, or else the statute violates separation of powers.

This result does not hinge on whether certain plaintiffs fail to act in "the interests of the State," as Plaintiff alleges. That is not the standard for a separation-of-powers violation. Instead,

a violation occurs if an act by one branch of government operates to "defeat or materially impair" another branch's exercise of its core constitutional functions. (*Marine Forests Soc'y v. Cal. Coastal Com.* (2005) 36 Cal.4th 1, 25, 44-45.) Again, *Iskanian* ruled that PAGA does not do that, and the Complaint identifies no way in which PAGA defeats or significantly impairs any branch's exercise of its core functions. Plaintiff's allegation that private plaintiffs wielding the PAGA right of action do not act in the "interests of the state" thus would not alter the analysis.

Furthermore, Plaintiff ignores that, by statute, the State *does* oversee settlements. Under PAGA, the superior court "shall review and approve" the settlement of any PAGA action. (Lab. Code, § 2699, subd. (l)(2); see *supra*, fn. 2.) Plaintiff's claim that particular settlement agreements are not in the "interests of the State" (see Compl. ¶¶ 80, 98), thus improperly asks this Court to second guess and supplant the decisions and rulings of the judges tasked by statute with reviewing and approving PAGA settlements, i.e., the judges overseeing the case.

For these reasons, the separation-of-powers claim (Cause of Action 1) fails to state a claim.

V. THE PROCEDURAL DUE PROCESS CLAIMS FAIL AS A MATTER OF LAW.

The federal and state procedural due process claims allege that PAGA results in "criminal or quasi-criminal liability" without allegedly required criminal procedural safeguards, such as the grand jury process, and that "PAGA provides for the taking of property in the absence of a fair, neutral, decision maker." (Compl. ¶¶ 122, 138.) These claims also lack merit.

PAGA clearly imposes civil rather than criminal liability. It expressly states that an aggrieved employee can bring "a civil action" to recover "a civil penalty," as provided. (Lab. Code, § 2699, subds. (a), (f)-(g).) Section 2699.3 similarly describes the requirements for an aggrieved employee to bring "[a] civil action." (*Id*., § 2699.3, subd. (a)-(c).) "The constitutional safeguards applicable in the criminal area do not apply in a case presenting the possible exposure to civil penalties." (*People v. Toomey* (1984) 157 Cal.App.3d 1, 17; see also *Iskanian*, *supra*, 59 Cal.4th at p. 379 [explaining that PAGA enacts civil penalties].)

Plaintiff may be attempting to avail itself of the principles discussed in *County of Santa Clara v. Superior Court* (2010) 50 Cal.4th 35 (*hereafter* "Santa Clara"). (See Compl. ¶ 103, citing *Santa Clara*.) That decision summarized certain rules that apply when a local government

hires private counsel to prosecute a public nuisance action on a contingency-fee basis, making the attorney financially interested in the outcome. Explicating the holding of an earlier case, *People ex rel. Clancy*, it explained that a local government could not use a contingency fee arrangement in certain unique circumstances deemed akin to a criminal prosecution, and that, in certain other circumstances, a government attorney must supervise any contingency-fee counsel. (*Id*. at pp. 51-58.) These decisions were not based on due process, but rather on the court's inherent power to disqualify counsel, although the Court suggested that in an actual criminal prosecution, a financially interested prosecutor might implicate due process concerns. (*Id*. at p. 48, 51.)

But again, the Supreme Court already has rejected this theory as applied to PAGA. In *Iskanian*, the defendant also relied on *Santa Clara*, and the Court squarely ruled that the principles discussed in that decision do not apply to PAGA. (*Iskanian*, 59 Cal.4th at p. 391.)

Furthermore, even if the Supreme Court had not already rejected this theory, the Complaint pleads no facts stating a claim that PAGA actions are akin to criminal prosecution. The Complaint's conclusory allegation that PAGA creates a regime that threatens "the continued operation of an established, lawful business" (Compl. ¶ 103, citing *Santa Clara*), does not state a claim. (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318.) As *Santa Clara* explained, in *People ex rel. Clancy*, the Court had deemed a public nuisance action akin to a criminal prosecution due to the unique circumstances of that case—"a long-running attempt by the City of Corona to shut down a single adult bookstore." (*Cty. of Santa Clara, supra*, 50 Cal.4th at p. 52–53.) This campaign included passage of multiple city ordinances "targeted specifically at the Book Store," followed by a public nuisance action that sought an injunction terminating the operation of the bookstore altogether. (*Id*. at pp. 47-48.) That case also implicated free speech rights of both the defendant and the public, and it carried the threat of criminal liability. (*Id*. at pp. 53-54.)

But *Santa Clara* made clear that a civil case could not be deemed akin to criminal prosecution absent those unusual circumstances. (*Id*. at p. 55.) It further explained that mere monetary exposure, even exposure that may be "very substantial," does not suffice. (*Id*. at p. 56.) Here, the Complaint alleges no circumstances of the type required by *Santa Clara*. Furthermore, as explained, PAGA grants the court discretion to calibrate the amount of penalties to avoid

results that are "unjust, arbitrary and oppressive, or confiscatory." (Lab. Code, § 2699, subd. (e)(2).) Plaintiff does not allege that courts regularly, or indeed ever, have failed to exercise this discretion to avoid an outcome that threatens an employer's continued operation. A PAGA plaintiff's mere pleading of large civil penalties is not akin to criminal prosecution.

Therefore, the procedural due process claims (Causes of Action 2, 4) fail as a matter of law.

VI. THE EQUAL PROTECTION CLAIMS FAIL AS A MATTER OF LAW.

The Complaint's final two causes of action allege that PAGA's partial exemption for the construction industry, Labor Code section 2699.6, violates the federal and state equal protection clauses. (See Compl. ¶¶ 54, 170, 178.) Plaintiff contends that the Legislature exempted the construction industry from PAGA without rational basis. (*Ibid.*)[7]

Under both the federal and state constitutions, the rational basis standard applies to equal protection challenges to economic and social welfare legislation such as PAGA. (*Alviso v. Sonoma Cty. Sheriff's Dep't* (2010) 186 Cal.App. 4th 198, 205.) Under that test, the statutory classification must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." (*Ibid.*) The Legislature's choice "is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." (*Kimco Staffing Servs., Inc. v. State of Cal.* (2015) 236 Cal.App.4th 875, 885.)

Section 2699.6 easily satisfies rational basis. The legislative history identifies circumstances in the construction industry that rationally could have justified section 2699.6. For example, one supporter of the bill explained that the construction industry "is plagued with underground economy contractors who routinely violate laws aimed at protecting workers, consumers, and the general public." (Jones Decl. Ex. A [Senate Jud. Comm. Analysis (AB 1654), June 26, 2018].) In such circumstances, "[l]aws that provide our unions and our employers with the freedom to negotiate alternative dispute resolution procedures, if they wish to do so, can free up court resources to deal with claims by workers who lack union representation." (*Ibid.*)

[7] As explained, Section 2699.6 exempts workers in the construction industry who are covered by a collective bargaining agreement, if that agreement provides for, among other terms, a grievance and arbitration procedure to redress violations that would have been remedied under PAGA, and the agreement expressly waives the requirements of PAGA. (Lab. Code, § 2699.6.)

Furthermore, the Legislature rationally could have believed that section 2699.6 would encourage the use of collective bargaining, bringing more of these underground employers and employees into the formal economy, with improved working conditions. By encouraging collective bargaining, the section also rationally could be viewed as bolstering the State's prevailing wage rules, which rely in part on collective bargaining agreements. (See Lab. Code, § 1773.)

In addition, section 2699.6 is similar to other construction industry-specific laws, such as the optional alternative dispute resolution process for the construction industry in the workers' compensation laws. (See *ibid*.; Lab. Code, § 3201.5.) Section 2699.6 also follows the mold of other similar exemptions that state labor laws have granted for other categories of workers or rules, when collective bargaining agreements provide a remedy for the same violations through the grievance and arbitration process. (*Ibid*.; see, e.g., Lab. Code, §§ 201.9, 514, 750.5, 2512, 3201.81.) The Legislature "must be allowed leeway to approach a perceived problem incrementally," and "the equal protection clause does not prohibit a Legislature from implementing a reform measure 'one step at a time.'" (*Chorn v. Workers' Comp. Appeals Bd.* (2016) 245 Cal.App.4th 1370, 1391.) Therefore, section 2699.6 easily survives rational basis.

Furthermore, the Complaint seeks no relief that would be available for these claims even if the claims had merit. The remedy for a successful equal protection challenge to section 2699.6 would be to strike down that section—a remedy Plaintiff does not seek. Instead, Plaintiff asks the Court to strike down the *entire PAGA* based these claims. (Compl. ¶¶ 172, 179.) That would be an extreme case of the tail wagging the dog, one plainly not supported by the law.[8]

CONCLUSION

For the foregoing reasons, Attorney General Becerra respectfully requests that the Court sustain this demurrer to the Complaint.

[8] See *Woods v. Horton* (2008) 167 Cal.App.4th 658, 678–679 (describing the potential remedies for an equal protection claim, which hinges on "the likely intent of the Legislature, had that body recognized that unequal treatment was constitutionally impermissible"). The legislative history does not remotely suggest that, if the Legislature had known that it could not adopt the exception in section 2699.6, it would have instead chosen to eliminate PAGA altogether. Therefore, the Complaint seeks no relief that would be even potentially available for these claims.

Dated: February 1, 2019

Respectfully Submitted,

XAVIER BECERRA
Attorney General of California
PAUL STEIN
Supervising Deputy Attorney General

AARON JONES
Deputy Attorney General
Attorneys for California Attorney General Xavier Becerra

SA2018103544
42111766.docx