

1 Richard J. Frey (SBN 174120)
Robert H. Pepple (SBN 295426)
2 David M. Prager (SBN 274796)
EPSTEIN BECKER & GREEN, P.C.
3 1925 Century Park East, Suite 500
Los Angeles, CA 90067
4 Telephone: 310-556-8861
5 Facsimile: 310-553-2165
rfrey@ebglaw.com
6 rpepple@ebglaw.com
dprager@ebglaw.com

7 Paul DeCamp (SBN 195035)
8 EPSTEIN, BECKER & GREEN, P.C.
1227 25th Street, N.W., Suite 700
9 Washington, D.C. 20037
Telephone: 202-861-0900
10 Facsimile: 202-296-2882
11 PDeCamp@ebglaw.com

12 Attorneys for Plaintiff
13 CALIFORNIA BUSINESS & INDUSTRIAL
ALLIANCE

14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15 **FOR THE COUNTY OF ORANGE**

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

19 Plaintiff,

20 v.

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

23 Defendant.

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

ASSIGNED FOR ALL PURPOSES TO:
Judicial Officer: Honorable Peter Wilson
Department: CX102

**PLAINTIFF CALIFORNIA BUSINESS &
INDUSTRIAL ALLIANCE'S
OPPOSITION TO DEFENDANT'S
DEMURRER TO THE FIRST AMENDED
COMPLAINT**

24 Date: September 5, 2019
Time: 2:00 p.m.
25 Dept.: CX102

26 Complaint Filed: November 28, 2018
27 Trial Date: None Set
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	Page(s)
MEMORANDUM OF POINTS AND AUTHORITIES	6
I. INTRODUCTION	6
II. ARGUMENT	7
A. CABIA Has Pleaded A Cognizable Separation Of Power Claim.....	7
1. California's Separation Of Powers Doctrine.....	7
2. CABIA Has Identified A Core Constitutional Function.....	8
(a) The Executive's Power To Enforce Statutes On Behalf Of The State Is A Core Power Defeated Or Materially Impaired By PAGA	8
(b) Article V, Section 13 Of The California Constitution Is Not Limited To Criminal Actions.....	9
3. CABIA Has Sufficiently Alleged That PAGA Defeats Or Materially Impairs The Executive's Power.....	10
B. CABIA Has Properly Pleaded Procedural Due Process Claims.....	12
1. The FAC Identifies Specific Procedures Created By The Text Of PAGA.....	13
2. CABIA Has Pleaded The Applicable Standard: The <i>Mathews Test</i>	13
3. Statutes That Chill Meritorious Litigation Are Challengeable "Procedures"	15
4. The Demurrer Mischaracterizes What PAGA Actually Is And Does	17
III. CONCLUSION.....	19

TABLE OF AUTHORITIES

	Page(s)
Cases	
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	
<i>Abbott Laboratories v. Superior Court</i> (2018) 24 Cal.App.5th 1	9, 11
<i>Abbott Laboratories v. Superior Court of Orange County,</i> Case No. S249895.....	9
<i>Arias v. Superior Court</i> (2009) 46 Cal.4th 969	10, 11, 18
<i>Bright v. 99¢ Only Stores</i> (2010) 189 Cal.App.4th 1472	17
<i>California Teachers Association v. State of California</i> (1999) 20 Cal.4th 327	14, 15, 16
<i>Carmel Valley Fire Prot. Dist. v. Cal.</i> (2001) 25 Cal.4th 287	7, 11, 12
<i>Cel-Tech Commun., Inc. v. Los Angeles Cellular Tel. Co.</i> (1999) 20 Cal.4th 163	11
<i>Committee on Children’s Television, Inc. v. General Foods Corp.</i> (1983) 35 Cal.3d 197	9, 12
<i>Conway v. State Bar</i> (1989) 47 Cal.3d 1107	8
<i>Cortez v. Purolator Air Filtration Products Co.</i> (2000) 23 Cal.4th 163	11
<i>Home Depot U.S.A., Inc. v. Sup. Court</i> (2010) 191 Cal.App.4th 210	17
<i>Kasky v. Nike, Inc.</i> (2002) 27 Cal.4th 939	11
<i>Lockyer v. City and County of San Francisco</i> (2004) 33 Cal.4th 1055	7, 9
<i>Marine Forests Society v. Cal. Coastal Com.</i> (2005) 36 Cal.4th 1	8

1	<i>Mathews v. Eldridge</i>	
2	(1976) 424 U.S. 319	13
3	<i>People v. New Penn Mines, Inc.</i>	
4	(1963) 212 Cal.App.2d 667	10
5	<i>Pitts v. County of Kern</i>	
6	(1998) 17 Cal.4th 340	10
7	<i>Scott v. Common Council</i>	
8	(1996) 44 Cal.App.4th 684	11, 12
9	<i>State Bd. of Educ. v. Levit</i>	
10	(1959) 52 Cal.2d 441	7, 9
11	<i>Steen v. Appellate Division of Superior Court</i>	
12	(2014) 59 Cal.4th 1045	10
13	<i>Today's Fresh Start, Inc. v. L.A. Cty. Office of Educ.</i>	
14	(2013) 57 Cal.4th 197	15
15	<i>Van de Kamp v. Gumbiner</i>	
16	(1990) 221 Cal.App.3d 1260	10
17	Statutes	
18	Business and Professions Code	
19	§ 17200 <i>et seq.</i>	11
20	§ 17203-04	11
21	§ 17206.....	11
22	Education Code	
23	§ 44944(e).....	15
24	Code Civil Procedure	
25	§ 436.....	12
26	Government Code	
27	§ 12512.....	11
28	Labor Code	
	§ 2699(a),(i)	13

1	§ 2699(e).....	13
2	§ 2699(f)(2).....	13
3	§ 2699(g)(1).....	13, 15

Other Authorities

California Constitution

6	Art. 1, § 26.....	7
7	Art. 3, § 3.....	7
8	Art. 5, § 13.....	6, 10, 11

California Rules of Professional Conduct

10	Rule 3.8, Comment 1.....	19
----	--------------------------	----

28

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 The full title of PAGA, the Labor Code Private Attorneys General Act of 2004,
4 demonstrates its inherent constitutional flaws under California's separation of powers doctrine.
5 There is no such thing as a "private attorney general" under the California Constitution. The duties
6 of the executive, including the Governor and Attorney General, are constitutionally prescribed in
7 Article V. These elected positions are voted on by all Californians. The executive branch enforces
8 the law. Within the executive branch, the Attorney General (subject only to the Governor) is the
9 state's chief law enforcement officer. Unelected private citizens and their counsel are not part of
10 the executive branch, and the Legislature's delegation of state law enforcement power to them via
11 PAGA is prohibited.

12 As recently as March, the Attorney General took the position that under Article V, Section
13 13 of the California Constitution ("Section 13"), he is the state's chief law enforcement officer
14 with the authority and responsibility to pursue statewide civil penalties and that only he may
15 consent to bind the entire State of California in legal proceedings seeking such penalties. But not
16 in this case.

17 In this case, the Attorney General's view of his core constitutional authority is limited to
18 *criminal* actions. In other words, when high-profile unfair competition law claims are at issue, the
19 Attorney General takes an expansive view of his authority to seek statewide civil penalties. But
20 when it comes to the enforcement of the Labor Code, the Attorney General takes a narrow, and
21 constitutionally unsupported, view of his authority.

22 PAGA's improper delegation of executive power to private citizens is also part and parcel
23 of a procedure that unconstitutionally chills the due process rights of California employers.
24 CABIA brings a facial challenge to that procedure, the balance of which is made up by the
25 financial incentive provided to private citizens to bring PAGA claims, the assessment of civil
26 penalties via serial multiplication without tether to harm or culpability, delaying constitutional
27 protection from exposure to excessive fines until after verdict, and requiring non-prevailing
28 employers to pay PAGA plaintiffs' attorneys fees.

1 **II. ARGUMENT**

2 **A. CABIA Has Pleaded A Cognizable Separation Of Power Claim**

3 The Demurrer's separation of powers argument relies on a position that Section 13 of the
4 California Constitution "manifestly concerns enforcement of *criminal* laws." (Dem., p. 15:26-27.)
5 From there, the Demurrer argues that because PAGA does not authorize any party to commence
6 criminal proceedings, it therefore does not "defeat or significantly impair"¹ any "core
7 constitutional function," of the executive or otherwise. (Dem., p. 16:7-17.)

8 As explained below, the Demurrer largely misses the issue raised by CABIA's separation
9 of powers claim: whether PAGA's delegation of the right to seek civil penalties (as opposed to
10 authorizing a private right of action) under the Labor Code to private attorneys general "defeats
11 or materially impairs" the executive branch's core function of enforcing state law.

12 **1. California's Separation Of Powers Doctrine**

13 Article III, section 3 of the California Constitution provides:

14 The powers of state government are legislative, executive, and judicial.
15 Persons charged with the exercise of one power may not exercise either of
16 the others except as permitted by this Constitution.

17 (Cal. Const., art. 3, § 3.) This provision is "mandatory and prohibitory." (Cal. Const., art. 1, § 26
18 ["The provisions of this Constitution are mandatory and prohibitory unless by express words they
19 are declared to be otherwise."]) The power of one branch cannot be delegated or taken by another,
20 and constitutional officers cannot be excused from performing their constitutional duties. (*See id.*;
21 *State Bd. of Educ. v. Levit* (1959) 52 Cal.2d 441, 460-61.)

22 California follows the "classic understanding of the separation of powers doctrine-that the
23 legislative power is the power to enact statutes, the executive power is the power to execute or
24 enforce statutes, and the judicial power is the power to interpret statutes and to determine their
25 constitutionality." (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1068.)

26
27
28

¹ The Demurrer misstates the standard here, which is "defeats or materially impairs." (*See Carmel Valley Fire Prot. Dist. v. Cal.* (2001) 25 Cal.4th 287, 302.)

1 The separation of powers doctrine prohibits the legislative arrogation of executive power.
2 (*See Marine Forests Society v. Cal. Coastal Com.* (2005) 36 Cal.4th 1, 15 ["[T]he California
3 separation of powers clause precludes the adoption of a statutory scheme authorizing the
4 legislative appointment of an executive officer or officers whenever the statutory provisions as a
5 whole, viewed from a realistic and practical perspective, operate to defeat or materially impair
6 the executive branch's exercise of its constitutional functions."].) The same is true with respect to
7 the Legislature's encroachment on judicial power. (*Conway v. State Bar* (1989) 47 Cal.3d 1107,
8 1128 [the "legislature may put reasonable restrictions upon constitutional functions of the courts
9 provided they do not defeat or materially impair the exercise of those functions"].)

10 **2. CABIA Has Identified A Core Constitutional Function**

11 The Attorney General's position that CABIA has failed to identify a core constitutional
12 power is mistaken.

13 (a) **The Executive's Power To Enforce Statutes On Behalf Of The**
14 **State Is A Core Power Defeated Or Materially Impaired By**
PAGA

15 The test for whether a law violates the separation of powers doctrine is whether the law,
16 when viewed from a realistic and practical perspective, "operates to defeat or materially impair
17 the executive branch's exercise of its constitutional functions." (*Marine Forests Society, supra*,
18 36 Cal.4th at 45.) "[I]n applying this standard, it is appropriate to consider whether the statute[]
19 ... improperly intrude[s] upon a core zone of executive authority, impermissibly impeding the
20 Governor (or another constitutionally prescribed executive officer) in the exercise of his or her
21 executive authority or functions." (*Id.*)

22 Here, CABIA has identified the executive's power to enforce statutes on behalf of the state
23 of California as the core power which is "defeat[ed] or materially impair[ed]" by PAGA; in
24 particular, PAGA does so by delegating enforcement of statutes that could previously only be
25 enforced by the executive branch to private citizens. (*E.g.*, FAC, ¶ 31, 101-02, 144-47.) Further,
26 CABIA has alleged that PAGA impermissibly impedes the Governor's or Attorney General's
27 exercise of his or her executive authority or functions embodied in Section 13 of the California
28 Constitution. (FAC, ¶¶ 32, 38-41, 101-02, 144-47.) For purposes of ruling on a demurrer, CABIA

1 has stated a claim. (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35
2 Cal.3d 197, 213.)

3 (b) **Article V, Section 13 Of The California Constitution Is Not**
4 **Limited To Criminal Actions**

5 The Attorney General contends that the "core power" implicated by Section 13 is limited
6 to enforcement of *criminal* laws and that because PAGA does not authorize criminal prosecutions,
7 it does not affect that function. This position is unavailing for several reasons.

8 First, the Attorney General's position ignores CABIA's allegations that PAGA defeats or
9 materially impairs the traditional executive power to enforce or execute statutes; CABIA's
10 allegations are not limited to Section 13. (*E.g.*, FAC, ¶ 31, 101-02, 144-47; *see also Lockyer*,
11 *supra*, 33 Cal.4th at 1068.)

12 Second, the Attorney General's position ignores the plain language of Section 13, which
13 provides that "the Attorney General shall be the chief law officer of the State." The Attorney
14 General would have this Court read the word "criminal" into that sentence, which it cannot do.
15 (*Levit, supra*, 52 Cal.2d at 460 ["The people use plain language in their organic law to express
16 their intent in language which cannot be misunderstood, and we must hold that they meant what
17 they said."]; *see also Abbott Laboratories v. Superior Court* (2018) 24 Cal.App.5th 1, 9 [stating
18 in the context of civil statutes that "[t]he California Constitution designates the Attorney General
19 the 'chief law officer of the State' (Cal. Const., art. V, § 13), and consistent with this constitutional
20 provision, the Attorney General 'has charge, as attorney, of all legal matters in which the State is
21 interested' (Gov. Code, § 12511)"] [cert. granted Aug. 22, 2018] ("*Abbott Labs*").) In
22 connection with *Abbott Labs*, the Attorney General recently filed an *amicus* brief that is directly
23 at odds with the "criminal-only" interpretation of Section 13 proffered in this proceeding.²

24 Actions for civil penalties under PAGA are plainly law enforcement actions and the
25 Attorney General cannot escape CABIA's separation of powers claim by reading the word
26

27 ² In its *amicus* brief to the California Supreme Court in *Abbott Laboratories v. Superior Court of Orange County*,
28 Case No. S249895, the Attorney General argued that he is the State's "chief law officer" and that local prosecutors
may only sue and obtain judgments under the UCL to address misconduct occurring within the prosecutor's city or
county. (2019 CA S. Ct. Briefs LEXIS 307 at 1, 7-15.) In the lower Court, the Attorney General argued that "[a] true
statewide prosecution must involve the Attorney General." (2017 CA App. Ct. Briefs LEXIS 307, fn. 7.)

1 "criminal" into the California Constitution. (*See, e.g., Arias v. Superior Court* (2009) 46 Cal.4th
2 969, 986 [describing an action for civil penalties under PAGA as "fundamentally a law
3 enforcement action" that "substitute[s] for an action brought by the government itself".])

4 Third, the case law relied upon by the Attorney General is inapposite. Neither *Pitts v.*
5 *County of Kern* (1998) 17 Cal.4th 340 nor *Steen v. Appellate Division of Superior Court* (2014)
6 59 Cal.4th 1045 holds that the core executive branch function embodied by Section 13 is *limited*
7 to enforcement of criminal laws. The most those cases can be construed as holding is that the
8 initiation of criminal proceedings is *one* core function of the executive branch. (*See Steen, supra,*
9 59 Cal.4th at 1053 [citing Section 13].)

10 Similarly, the cases cited by the Attorney General as examples of the Legislature
11 superseding the Attorney General's authority to bring enforcement actions to protect the public –
12 relegated to a footnote – are distinguishable. (Dem., p. 16, fn. 4.) In each, the Legislature vested
13 enforcement powers in another executive branch department or agency; none considered
14 legislative action that limited or transferred executive enforcement power to private litigants to
15 seek civil penalties on behalf of themselves, others, and the state, as with PAGA. (*See People v.*
16 *New Penn Mines, Inc.* (1963) 212 Cal.App.2d 667, 675 [delegation to regional water pollution
17 control – a state agency – the "the exclusive means and procedures ... to control water pollution
18 and nuisance"]; *Van de Kamp v. Gumbiner* (1990) 221 Cal.App.3d 1260, 1265 [Attorney General
19 divested of authority to regulate health plans because exclusive authority transferred by the
20 Legislature to the Department of Corporations, a state agency].)

21 3. **CABIA Has Sufficiently Alleged That PAGA Defeats Or Materially**
22 **Impairs The Executive's Power**

23 The Attorney General's position that CABIA has not sufficiently alleged that PAGA
24 defeats or materially impairs a core constitutional function is also meritless.

25 "The Attorney General ... is the chief law officer of the state (Cal. Const., art. V, § 13).
26 As such he possesses not only extensive statutory powers but also broad powers derived from the
27 common law relative to the protection of the public interest. [Citations.] '[H]e represents the
28 interest of the people in a matter of public concern.' [Citation.] Thus, 'in the absence of any

1 legislative restriction, [he] has the power to file any civil action or proceeding directly involving
2 the rights and interests of the state, or which he deems necessary for the enforcement of the laws
3 of the state, the preservation of order, and the protection of public rights and interest.' [Citation.]
4 (Gov. Code, § 12512.)" (*Abbott Labs, supra*, 24 Cal.App.5th at 17; *see also* Cal. Const., art. V, §
5 13 ["It shall be the duty of the Attorney General to see that the laws of the State are uniformly
6 and adequately enforced."].)

7 Here, CABIA has alleged that the Legislature has materially impaired or defeated the
8 executive's power by deputizing private citizens to enforce the Labor Code through statewide law
9 enforcement actions seeking to recover civil penalties. (*E.g.*, FAC, ¶¶ 38-41, 59, 73, 82, 103-04,
10 144-45.) CABIA contends the delegation was improper, *inter alia*, because it usurps the
11 executive's traditional law enforcement powers (*see Arias, supra*, 46 Cal.4th at 986) and "usurps
12 the Attorney General's statewide authority" to seek recovery of civil penalties (*Abbott*
13 *Laboratories, supra*, 24 Cal.App.5th at 10). (FAC, ¶¶ 38-41, 59, 73, 82, 103-04, 144-45.)³

14 Moreover, the creation of a law that requires agency notice, involvement, and oversight
15 of potential Labor Code violations that could otherwise only be pursued by the executive branch—
16 including making a decision regarding whether to investigate a claimed violation—and then
17 underfunding the agency to a point that it cannot even review the initial notices before it loses
18 jurisdiction to bring a claim, raises separation of powers concerns. (*See Carmel Valley Fire Prot.*
19 *Dist. v. Cal.* (2001) 25 Cal.4th 287, 302 [noting that legislative action that deprives administrative
20 agency of the resources necessary to carry out its function may violate separation of powers]
21 [citing *Scott v. Common Council* (1996) 44 Cal.App.4th 684]; *Scott, supra*, 44 Cal.App.4th at 694
22

23
24 ³ In contrast to PAGA, California's unfair competition law ("UCL") (Bus. & Prof. Code § 17200 *et seq.*) illustrates a
25 proper delegation of statewide enforcement power to private citizens. Under the UCL, both public prosecutors and
26 private individuals can bring suit to prevent unfair business practices and restore money or property to victims of
27 these practices. (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 173-74; *Cel-Tech Commun.,*
28 *Inc. v. Los Angeles Cellular Tel. Co.* (1999) 20 Cal.4th 163, 180.) Under section 17204, "a private plaintiff may bring
a UCL action even when the conduct alleged to constitute unfair competition violates a statute for the direct
enforcement of which there is no private right of action. [Citation.]" (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 950
[internal quotations removed].) Remedies under the UCL are limited to injunctive relief and restitution; **however,**
public prosecutors, unlike private litigants, may also obtain civil penalties. (Bus. & Prof. Code § 17203-04,
17206; *Kasky, supra*, 27 Cal.4th at 950-51.) This division of enforcement power preserves the Attorney General's
(and local prosecutors') ability to seek civil penalties and does not otherwise transfer traditional executive power to
enforce statutes to private individuals.

1 [budget cuts that eliminated funding for city attorney's investigative staff was beyond the normal
2 appropriation power of local legislative body because "the budget cuts materially impaired the
3 city attorney in the performance of his prosecutorial duties"].)

4 CABIA has alleged that PAGA defeats or materially impairs the executive's core functions
5 because Labor Workforce Development Agency ("LWDA") and Department of Industrial
6 Relations ("DIR") have not been staffed to perform the review and oversight functions
7 contemplated by PAGA. (FAC, ¶ 38(a); *see generally id.* ¶¶ 38-40, 144-45.) As a result, "the DIR
8 lacks the resources to reach a solid conclusion and cite or settle within the allotted time before
9 losing the ability to forestall private litigation." (FAC, ¶¶ 38(e), 41.) It also alleged that the typical
10 PAGA notice will not get reviewed or investigated. (FAC, ¶¶ 40(a), 41, 127.) These allegations
11 are sufficient to state a claim that PAGA defeats or materially impairs executive power and
12 therefore violates separation of powers. (*Carmel Valley, supra*, 25 Cal.4th at 302; *Scott, supra*,
13 44 Cal.App.4th at 694; *see also* FAC, ¶ 38(g) ["To fulfill the purpose of the PAGA procedures
14 for agency notice and involvement, the LWDA must have the resources to not only to investigate
15 some of the cases, but also see a case all the way through once an employer has been cited."].)
16 These allegations are sufficient for stating a claim at this early stage. (*Committee on Children's*
17 *Television, supra*, 35 Cal.3d at 213.)⁴

18 **B. CABIA Has Properly Pleaded Procedural Due Process Claims**

19 Even if PAGA's delegation of executive enforcement power did not violate separation of
20 powers, it adds to a paradigm that violates the procedural due process rights of the typical
21 employer, as admitted by the California Legislature and DIR.

22 The legislative history of Assembly Bill 1654 admits that PAGA is the cause of
23 "'enormous pressure . . . to settle claims regardless of the validity of those claims,' wide ranging
24 discovery,' . . . and 'lawsuits over minor employment issues.'" (FAC, ¶ 71.) The DIR reached
25 similar conclusions, explaining in a recent Budget Request Proposal that the PAGA has given rise
26 to a paradigm so onerous that many employers feel inordinate pressure to settle frivolous claims.

27
28 ⁴ The Attorney General also takes issue with CABIA's allegation that PAGA defeats or materially impairs a judicial
function. (FAC, ¶ 146.) The Attorney General's complaints are, at best, the proper subject of a motion to strike which
the Attorney General has failed to bring. (*See* Code Civ. Proc. § 436.)

1 (See FAC, ¶ 38.)

2 The Demurrer does not confront or contest these admissions. It also mischaracterizes the
3 standard for pleading a procedural due process claim. These shortcomings, among others,⁵ compel
4 the conclusion that the Demurrer must be overruled on CABIA's due process claims.

5 **1. The FAC Identifies Specific Procedures Created By The Text Of**
6 **PAGA**

7 Contrary to the Demurrer's claim that the FAC "does not purport to identify anything 'in
8 the text of the measure itself that inherently violates due process" (Dem., p. 10:5-6), the FAC is
9 replete with allegations that do so. The allegations that focus on the challenged text of the PAGA
10 statute appear in Paragraphs 155 and 163, which refer to PAGA's delegation of state power to
11 financially incentivized private citizens (Lab. Code § 2699(a),(i)), presumptive penalties that lack
12 any tether to damages or culpability (Lab. Code § 2699(f)(2)), and delaying any reduction in
13 penalties to constitutional maximums until after a full trial on the merits and verdict (Lab. Code
14 § 2699(e)), but only if the employer is willing (and able) to pay plaintiffs' attorneys' fees (Lab.
15 Code § 2699(g)(1)).

16 **2. CABIA Has Pleaded The Applicable Standard: The *Mathews Test***

17 In *Mathews v. Eldridge*, the United States Supreme Court articulated the standard for
18 procedural due process claims:

19 [T]he specific dictates of due process generally requires consideration of
20 three distinct factors: First, the private interest that will be affected by the
21 official action; second, the risk of an erroneous deprivation of such interest
22 through the procedures used, and the probable value, if any, of additional or
23 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.

24 (*Mathews v. Eldridge* (1976) 424 U.S. 319, 335) [the "*Mathews Test*".] The California Supreme

25 _____
26 ⁵ The Demurrer makes much ado about the FAC's allegations about "putting on evidence" of the "typical case." (See
27 Dem. 10:6-10.) These are selective quotations that, when read in context, lay bare the Demurrer's attempt at
28 misdirection – recasting the FAC's description of what will be required to prove its claims with what is necessary to
plead them with legal sufficiency. (See FAC at pp. 51:17-18 ["K. The PAGA Paradigm Violates Procedural Due
Process, As CABIA Will Prove By Putting On Evidence of How It Operates In the Typical Case"] [emphasis added];
FAC, ¶ 135 ["[A] challenging party can prevail by showing that the challenged procedure violates constitutional
protections in the 'typical' case."] [quoting *California Teachers Association v. State of California* (1999) 20 Cal.4th
327, 345] [emphasis added].)

1 Court has adopted a slightly modified version of the *Mathews Test*, which it applied in a case that
2 is controlling here – *California Teachers Association v. State of California* (1999) 20 Cal.4th 327,
3 347 ("CTA").

4 In *CTA*, a public school district notified plaintiff, a permanent public school teacher, of its
5 intent to dismiss him for evident unfitness growing out of alleged immoral conduct (*i.e.*,
6 inappropriate verbal exchanges with students). (*See id.* at 331.) The charge permitted the district
7 to suspend plaintiff immediately without pay. (*See id.*) Plaintiff demanded a hearing under a
8 statutory scheme that would require the district to either rescind the suspension, or provide a
9 hearing before an administrative tribunal that included an administrative law judge, which would
10 hear evidence and provide the final decision. (*See id.* at 331-32.) The statutory scheme also
11 contained the following fee-shifting provisions:

12 If the Commission on Professional Competence determines that the
13 employee should be dismissed or suspended, the governing board and the
14 employee shall share equally the expenses of the hearing, including the cost
15 of the administrative law judge. . . . The employee and the governing board
16 shall pay their own attorney fees.

17 If the Commission on Professional Competence determines that the
18 employee should not be dismissed or suspended, the governing board shall
19 pay the expenses of the hearing, including the cost of the administrative law
20 judge . . . and reasonable attorney fees incurred by the employee.

21 (*See id.* at 332, fn. 2 [quoting former Educ. Code § 44944(e)].) The tribunal determined that
22 plaintiff was not guilty of the alleged immoral conduct but did find him unfit for service on other
23 grounds and dismissed him. (*See id.*) Per the cost-shifting provision, plaintiff was billed for one-
24 half the cost of the administrative hearing, including the cost of the administrative law judge,
25 totaling \$7,747.97. (*See id.*) Plaintiff refused to pay, and as a result was threatened with a having
26 the amount withheld from his future California state income tax refunds. (*See id.*)

27 Plaintiff and the California Teachers Association filed a writ of mandate to prevent the
28 withholding because it had "imposed under a *facially invalid* statute that places an undue burden
on plaintiff's due process right to a hearing intended to determine whether he should lose his
property interest in continued employment." (*Id.* [emphasis added].) The trial court held the
statute *facially invalid* and the Court of Appeal affirmed. (*Id.* at 332-33.)

1 Applying its modified version of the *Mathews Test*,⁶ the Supreme Court explained that the
2 cost shifting provision was facially invalid⁷ because it "invariably will chill the exercise of the
3 right of teachers to a hearing, and its provisions thus inevitably pose a present total and fatal
4 conflict with applicable constitutional prohibitions." (*Id.* at 349.) It also explained that procedural
5 due process challenges, unlike other facial challenges "are shaped by the risk of error inherent in
6 the generality of cases, not the rare exceptions." (*Id.* at 344.)

7 **3. Statutes That Chill Meritorious Litigation Are Challengeable**
8 **"Procedures"**

9 In *CTA*, plaintiff challenged a "procedure" expressed in a former Education Code statute
10 that required non-prevailing teachers to pay for half of the hearing costs. Here, CABIA challenges
11 a "procedure" created by four distinct components of PAGA:

- 12 (1) The establishment of a civil penalty for all violations of the Labor Code (save where
13 otherwise prescribed) of \$100 for the initial violation, and \$200 for each subsequent
14 violation (*see* FAC, ¶¶ 83, 155(a)-(b), 163(a)-(b) [citing and referring to Labor Code
15 § 2699(f)(2)]);
- 16 (2) The delegation of executive power to financially incentivized private citizens to
17 prosecute claims for civil penalties on behalf of the state (*see* FAC, ¶¶ 73, 81, 155(f),
18 163(f) [citing and referring to Labor Code § 2699(a), (i)]);
- 19 (3) The reservation of court discretion to reduce civil penalties from the amount
20 prescribed in the statute until after verdict (*see* FAC, ¶ 85, 120, 155(d), 163(d) [citing
21 and referring to Labor Code § 2699(e)]); and
- 22 (4) The requirement that non-prevailing employers pay plaintiff's attorneys fees (*see*
23 FAC, ¶¶ 138, 155(g), 163(g) [referring to Labor Code § 2699(g)(1)]).

24
25
26 ⁶ California courts may also consider "the dignitary interest in informal individuals of the nature, grounds and
27 consequence 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.)

28 ⁷ "Because plaintiff does not challenge the cost provision in section 44944(e) as it was applied to him in light of the
particular circumstances, we are concerned in the present case only with the facial validity of this provision." (*CTA*,
supra, 20 Cal.4th at 337-38.)

1 The foregoing are the "specific statutory scheme [CABIA] claims is unconstitutional[.]" (Dem.,
2 p. 13:4.) And each procedure appears on the face of the PAGA statute and/or has been interpreted
3 by California courts as a procedure that applies to all PAGA defendants.

4 As for the "additional procedural protection allegedly due" (Dem., p. 13:4-5), the plaintiff
5 in *CTA* alleged, and the California Supreme Court agreed, that the typical teacher should have
6 "procedural protection" *against* the application of a statute that imposed one-half of the hearing
7 costs on the non-prevailing teacher – because it unconstitutionally chilled the average teacher's
8 exercise of the only means to protect their vested property rights⁸ (*i.e.*, the administrative hearing).
9 (*See CTA, supra*, 20 Cal.4th at 346-47].)

10 Here, CABIA similarly alleges that California employers should have the "procedural
11 protection" *against* the application of a statute that places the enforcement of thousands of civil
12 penalties by financially incentivized public prosecutors,⁹ with the only safeguard against
13 unconstitutional takings being nebulous court discretion to lessen the penalties to the maximum
14 that constitutional principles will allow, which is only available to employers who are willing to
15 risk having to paying an award of the plaintiffs' attorneys' fees and the maximum in civil penalties
16 – because it unconstitutionally chills California employers' only access to protect their vested
17 property rights¹⁰ (*i.e.*, defending against PAGA claims in California courts). (*See* FAC, ¶¶ 136-
18 37.)

19 That the above-identified "specific statutory procedure" (Dem., p. 12:9) actually chills
20 California employers from defending against PAGA claims is not speculation or conjecture, but
21 rather is supported by the findings of the California Legislature and DIR. (*See* FAC, ¶¶ 38-40,
22

23 ⁸ "[T]he significance of the private interest in retaining employment cannot be gainsaid. We have frequently
24 recognized the severity of depriving a person of the means of livelihood." (*CTA, supra*, 20 Cal.4th at 348.)

25 ⁹ As illustrated in the FAC, the serial multiplication of penalties under PAGA threatens employers with presumptively
26 ruinous liability even for small infractions of the Labor Code. (*See* FAC, ¶¶ 117-19.)

27 ¹⁰ Those rights include: "the continued operation of an established, lawful business[, which] is subject to heightened
28 protections" (*see* FAC, ¶ 136 [quoting *County of Santa Clara v. Superior Court* (2010) 50 Cal.4th 35, 53]); ensuring
"meaningful access to the [courts] so that [employers] may present their side of the case and invoke the discretion of
the decision maker," which the PAGA paradigm chills (*see id.*) [quoting *CTA, supra*, 20 Cal.4th at 348]); protecting
natural persons from government takings of private property (*i.e.*, civil penalties) for actions taken by a corporate
entity without adequate due process, which PAGA permits (*see* FAC, ¶ 136 [citing *Aempa v. Pedrazzani* (2018)
Cal.App.5th 809]).

1 68.) And the "additional procedural protection allegedly due" (Dem., p. 13:4-5) is also well-
2 pleaded: striking the PAGA statute and declaring it unconstitutional. (FAC, ¶¶ 156-58, 164-66.)

3 **4. The Demurrer Mischaracterizes What PAGA Actually Is And Does**

4 PAGA's procedures are unique and unprecedented in American law. The California
5 Legislature recognized as much when it was drafting PAGA, acknowledging that "[g]enerally,
6 civil penalties are only recoverable by prosecutors, not private litigants, and the moneys are paid
7 directly to the government." (See FAC, ¶ 61.) The only exception the Legislature could find exists
8 in the Unruh Civil Rights Act, which allows the *actual victim* of a *hate crime* to bring an action
9 for *one civil penalty* that is *capped at \$25,000*. (See FAC, ¶ 61.) PAGA is different in nearly every
10 regard from this so-called "precedent," as a PAGA plaintiff need not have suffered the harms for
11 which he or she seeks civil penalties (*see* FAC, ¶ 106), or any harm at all (*see* FAC, ¶ 73), and
12 PAGA does not limit the number of civil penalties or place any cap on the amount of civil
13 penalties a PAGA plaintiff may pursue and/or collect. (See FAC, ¶ 80.) Nor is there meaningful
14 similarity to *qui tam* actions, over which the State maintains substantial and ongoing control. (See
15 FAC, ¶¶ 109-13.)

16 The Demurrer attempts to downplay or normalize PAGA's peculiar and unprecedented
17 procedures with statements like "PAGA merely creates a right of action in the Superior Court[.]"
18 and "PAGA defendants therefore enjoy all of the procedural protections typically afforded to
19 litigants in state courts." (Dem., p. 13:5-7.) These statements are mischaracterizations at best,
20 untruths at worst, and should not serve as a basis for PAGA escaping constitutional review.

21 The claim that "PAGA merely creates a right of action in the Superior Court" (*see* Dem.,
22 p. 13:5-6) ignores, among other things, that PAGA created hundreds or thousands of civil
23 penalties that did not exist before.¹¹ (See FAC, ¶ 80.) It also fails to capture, if not misleads, as to
24 what PAGA's delegation of State executive power does in a practical sense. In reality, the phrase
25

26
27 ¹¹ At the time PAGA was enacted, few Labor Code statutes provided for the assessment of civil penalties, and this
28 remains true today. The California Labor Code contains hundreds of separate provisions, and that PAGA penalties
can be assessed for violating the numerous provisions of the California Industrial Welfare Commission Wage Order.
(See generally *Bright v. 99¢ Only Stores* (2010) 189 Cal.App.4th 1472; *Home Depot U.S.A., Inc. v. Sup. Court* (2010)
191 Cal.App.4th 210.) From this it follows that PAGA created hundreds (or thousands) of new civil penalties where
none existed before.

1 "creates a private right of action" actually means "creates millions of financially incentivized
2 prosecutors with State power but no State oversight." This characterization, rather than the
3 Attorney General's, is a far more accurate translation of what PAGA is, and must be, in order for
4 California courts to have reached the conclusions they have with respect to how PAGA claims
5 differ from the claims upon which they are based.

6 Because the financially incentivized and unsupervised "aggrieved employees" are state
7 proxies, it is also untrue that "PAGA defendants enjoy all of the procedural protections typically
8 afforded to litigants in state courts." (Dem., p. 13:7-8.) For example, defendants in PAGA lawsuits
9 lack the procedural protections of class-action principles, because "PAGA lawsuits are law
10 enforcement actions on behalf of the state." (FAC, ¶ 104 [*Arias, supra*, 46 Cal.4th at 696].)
11 Defendants in PAGA lawsuits lack many of the procedural protections built into the discovery
12 rules, as California courts have held that PAGA plaintiffs have a presumptive right to state-wide
13 contact information and may embark on "fishing expeditions." (FAC, ¶ 105 [citing *Williams v.*
14 *Superior Court* (2017) 3 Cal.3d 531, 546].) Defendants in PAGA lawsuits lack the procedural
15 safeguards inherent in constitutional standing requirements, because the California Courts of
16 appeal have reasoned that "it would make little sense to prevent a PAGA plaintiff (who is simply
17 a proxy for State enforcement authorities) from seeking penalties for all the violations an
18 employer committed." (FAC, ¶ 106 [quoting *Huff v. Securitas Security Services USA, Inc.* (2018)
19 23 Cal.App.5th 745, 757].) PAGA also does away with the procedural protections that grow out
20 of limited liability entities, as PAGA has been interpreted as allowing "Any person who is in fact
21 responsible for overtime and/or minimum wage violations [to] be held personally liable for civil
22 penalties . . . recover[able] through PAGA, regardless of whether the person was the employer or
23 whether the employer is a liability entity." (FAC, ¶ 107 [citing *Atempa v. Pedrazzani* (2018) 27
24 Cal.App.5th 809].)

25 The PAGA paradigm is also unique in its uneven grant of privileges (to plaintiffs) without
26 corresponding risks or obligations. On the one-hand, PAGA plaintiffs enjoy advantages like
27 presumptive access to state-wide discovery, excuse from otherwise binding arbitration
28 agreements, the ability to bypass limited liability structures, the ability to enforce penalties that

1 are admittedly punitive in nature and that do not require proof of any actual harm, among others.
2 In the hands of a state prosecutor, these advantages arguably do not violate due process; because
3 state prosecutors must abide by special rules and pursue certain ends wholly inapplicable to
4 PAGA plaintiffs. (*See, e.g.*, Cal. R. of Prof. Conduct, R. 3.8, Comment 1 ["A prosecutor has a
5 responsibility of a minister of justice and not simply that of an advocate."].)

6 If PAGA imposed an obligation on plaintiffs (and their counsel) to be a "minister of
7 justice," and prohibited permitting them to act in their own financial interest, PAGA might not be
8 the tool of extortion and abuse that the California Legislature and DIR has determined it to be.
9 But PAGA does not, and cannot, impose these obligations. And from this it follows that providing
10 them access to special prosecutorial privileges violates due process.

11 In sum, PAGA's procedures are unprecedented and chill the constitutional due process
12 rights of California employers, as CABIA has pleaded with detail and sufficiency in the FAC.

13 **III. CONCLUSION**

14 For the foregoing reasons, CABIA respectfully requests that the Court OVERRULE the
15 Attorney General's demurrer to its First Amended Complaint.

16
17 DATED: August 22, 2019

EPSTEIN BECKER & GREEN, P.C.

18 By: 

19 Richard J. Frey
20 Robert H. Pepple
21 David M. Prager
22 Paul DeCamp

23 Attorneys for Plaintiff
24 California Business & Industrial Alliance
25
26
27
28

1 **PROOF OF SERVICE**

2 **STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

- 3 1. At the time of service I was at least 18 years of age and **not a party to this legal action.**
4 2. My business address is 1925 Century Park East, Suite 500, Los Angeles, CA 90067.
5 3. I served copies of the following documents (specify the exact title of each document served):

6 **PLAINTIFF CALIFORNIA BUSINESS & INDUSTRIAL ALLIANCE'S**
7 **OPPOSITION TO DEFENDANT'S DEMURRER TO THE FIRST AMENDED**
8 **COMPLAINT**

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

10 Aaron Jones
11 Aaron.jones@doj.ca.gov
12 Deputy Attorney General | Government Law Section
13 California Department of Justice
14 455 Golden Gate Avenue, Suite 11000
15 San Francisco, CA 94102

16 *Attorneys for Defendant*
17 *Xavier Becerra*
18 *In his official capacity as the Attorney General of the*
19 *State of California*

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

- 27 b. **By United States mail.** I enclosed the documents in a sealed envelope or package
28 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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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 **August 22, 2019**:

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

August 22, 2019
DATE

Felecia J. McClendon
(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)