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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ORANGE
11

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

14 Plaintiff,

15 v.

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

18 Defendant.
19

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

**DEFENDANT'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF DEMURRER TO THE
FIRST AMENDED COMPLAINT**

Date: Sept. 5, 2019
Time: 2:00 p.m.
Dept: CX102
Judge: The Hon. Peter Wilson
Trial Date: None set

Action Filed: November 28, 2018

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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's original complaint alleged that the Act's penalties are too high, and that PAGA grants an excessive delegation of power to private litigants. Based on allegations such as these, Plaintiff claimed violations of several constitutional provisions—excessive fines, separation of powers, due process, and equal protection. The Court dismissed the bulk of these claims, but granted Plaintiff leave to amend two of them: the procedural due process and separation-of-powers claims. Plaintiff has now filed its amended complaint to amend these two claims. The amended complaint, however, adds no new substantive allegations, and instead pleads substantially the same allegations as the prior complaint with new labels applied to the allegations, and states no legally cognizable claim.

Plaintiff's amended procedural due process claim alleges that PAGA is facially unconstitutional because its penalties are too high and PAGA cases are too costly to litigate, and PAGA thus "coerces" many defendants to settle the cases against them. The original complaint pled precisely these same allegations, styled as excessive fines and substantive due process claims, and this Court dismissed them. The allegations fare no better framed as procedural due process claims. These allegations identify no procedural protection guaranteed by the due process clause that has been denied here, and Plaintiff does not even attempt to identify any provision of PAGA that violates due process on its face, as is required to state a facial challenge.

Plaintiff's separation-of-powers claim alleges that article V, section 13, of the California Constitution, which describes certain powers of the Attorney General, provides that the Attorney General has the exclusive authority to file civil enforcement actions, and that PAGA impermissibly confers that power on others. This claim also is baseless. Article V, section 13, says no such thing. The Complaint identifies no support for this proposition whatsoever, and the claim contradicts well-settled case law, as explained further below.

For these reasons, Defendant now demurs to the amended complaint's procedural due process and separation-of-powers claims.

BACKGROUND

I. THE PRIVATE ATTORNEYS GENERAL ACT.

In September 2003, the Legislature enacted the Labor Code Private Attorneys General Act of 2004 (“PAGA”), which allows aggrieved employees to bring a civil action to recover civil penalties for violations of California’s Labor Code. (Lab. Code, § 2698 et seq.) PAGA’s purpose 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.)¹

PAGA states that, whenever the Labor Code creates a civil penalty that is assessed and collected by the State’s labor agencies, 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 default penalties for violations of Labor Code provisions for which no civil penalty previously was provided, recoverable in the same manner. (*Id.*, § 2699, subd. (f)-(g).)

Seventy-five percent of the civil penalties collected go to the Labor and Workforce Development Agency (“LWDA”), and the remaining twenty-five 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. (*Id.*, § 2699, subd. (g)(1).)

PAGA includes certain pre-filing notice requirements, to give LWDA an opportunity to investigate the claim and issue a citation (which would foreclose a private action), and, for certain types of violations, give the employer an opportunity to cure the violation. (*Id.*, § 2699.3.)

In any PAGA action, the court has the discretion to reduce the maximum amount of the penalties if “based on the facts and circumstances . . . to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” (*Id.*, § 2699, subd. (e).) The Superior Court also must review and approve any settlement of a PAGA action. (*Id.*, § 2699, subd. (l)(2).)

¹ Defendant detailed PAGA at greater length in his demurrer to Plaintiff’s original complaint. (See Def.’s MPA iso Demurrer (Feb. 1, 2019), at pp. 7-8.)

II. FACTUAL AND PROCEDURAL BACKGROUND.

Plaintiff, an association incorporated in Washington, D.C., challenges the constitutionality of PAGA. (Compl. ¶ 7.) Plaintiff's First Amended Complaint ("Complaint"), much like the original complaint, alleges that PAGA "has become a tool of extortion and abuse by financially incentivized plaintiffs' attorneys" and permits plaintiffs' attorneys to "shake down California employers." (Compl. ¶ 4.) Based on allegations such as these, Plaintiff now asserts the two claims for which this Court granted leave to amend—procedural due process and separation of powers—following dismissal of the bulk of the claims pled in the original complaint.

The original complaint alleged nine causes of action, which can be summarized as follows:

(1) excessive fines and substantive due process claims (under both the federal and state constitutions), which all alleged that PAGA authorizes excessive penalties;

(2) a separation-of-powers claim alleging that PAGA impermissibly delegates state power to financially interested private litigants and their counsel, with insufficient oversight;

(3) procedural due process claims alleging that PAGA imposes "criminal or quasi-criminal liability" without allegedly required criminal procedural protections;

(4) equal protection claims challenging PAGA's recently enacted exemption for the construction industry, Labor Code section 2699.6.

Defendant demurred to all claims. On March 28, 2019, this Court issued an order ("Mar. 28 Order") that dismissed the separation-of-powers claim with leave to amend; overruled the demurrer as to the equal protection claims; and requested further briefing on the excessive fines claims (excessive fines and substantive due process) and procedural due process claims.

Following the supplemental briefing, on June 6, 2019, this Court issued an order ("June 6 Order") that dismissed the excessive fines and substantive due process claims without leave to amend, and dismissed the procedural due process claims with leave to amend.

Plaintiff then filed the amended Complaint, which asserts the claims for which the Court granted leave to amend—procedural due process and separation of powers. (The Complaint also includes the previously pled equal protection claims, which are not at issue in this motion.)

1 The amended Complaint's allegations are largely unchanged from the original complaint,
2 apart from a few additions aimed at the new claims. In particular, Plaintiff's new procedural due
3 process theory appears to be set forth at paragraphs 135-140 and 155, and the new separation-of-
4 powers theory at paragraphs 102-103. The remaining allegations are substantially unchanged.

5 Defendant now demurs to the new procedural due process and separation-of-powers claims
6 (first, second, and third causes of action), because they still state no legally cognizable claim.

7 ARGUMENT

8 A demurrer properly raises defects appearing on the face of the complaint or from matters
9 subject to judicial notice. (Code Civ. Proc., § 430.50; *Blank v. Kirwan* (1985) 39 Cal.3d 311,
10 318.) When ruling on a demurrer, the court determines if the complaint sufficiently states a valid
11 cause of action, assuming the truth of the Complaint's material factual allegations but not the
12 contentions, deductions, or conclusions of fact or law. (*Id.* at p. 318.)

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

14 The Complaint's second and third causes of action assert procedural due process claims
15 under the federal and state constitutions, respectively. (Compl. ¶¶ 151-166.) These new claims
16 fail as a matter of law for at least two reasons, as explained below. First, these claims assert a
17 facial challenge to PAGA, but Plaintiff misstates the standards for a facial challenge and does not
18 even attempt to satisfy the well-settled requirements for a facial challenge in California. Second,
19 the Complaint identifies no legally cognizable procedural due process theory.

20 A. Plaintiff Misstates the Requirements for a Facial Challenge and States No 21 Viable Facial Challenge.

22 Plaintiff's new procedural due process claims challenge PAGA on its face, rather than as
23 applied. (See Compl. ¶ 135.) Plaintiff misstates the requirements for a facial challenge and states
24 no viable facial claim.

25 Courts evaluate the merit of a facial challenge by considering "only the text of the measure
26 itself, not its application to the particular circumstances of an individual." (*Tobe v. City of Santa*
27 *Ana* (1995) 9 Cal.4th 1069, 1084; see also *Zuckerman v. State Bd. of Chiropractic Examiners*
28 (2002) 29 Cal.4th 32, 38-39 [same].) To state a viable facial challenge, the plaintiff must

1 demonstrate that the challenged act “inevitably pose[s] a present total and fatal conflict with
2 applicable constitutional prohibitions.” (*Cal. State Pers. Bd. v. Cal. State Empl. Assn.* (2005) 36
3 Cal.4th 758, 769; see also *Tobe, supra*, 9 Cal.4th at p. 1084 [same].) Therefore, Plaintiff must
4 show that PAGA, *on its face*, inevitably violates the requirements of procedural due process.²

5 Plaintiff does not even attempt to satisfy that standard. Plaintiff does not purport to identify
6 anything in “the text of the measure itself” that inherently violates due process. Instead, Plaintiff
7 alleges that it will establish a facial violation by “putting on evidence” of how PAGA operates “in
8 the typical case.” (Compl. ¶ 135 [section header “K”].) Plaintiff does not explain how it will
9 identify a purportedly “typical” PAGA case. Plaintiff also does not say what evidence it will put
10 on about PAGA’s application in this “typical” case or how the evidence will establish a violation.

11 Regardless, as a matter of law, Plaintiff cannot establish a facial claim by “putting on
12 evidence” of how PAGA would be applied in a “typical” case, since, under the binding authority
13 quoted above, in a facial challenge the Court considers “only the text of the measure itself” to
14 determine whether the statute, on its face, “inevitably” conflicts with the constitution.

15 Plaintiff alleges that “the California Supreme Court has recognized a unique and alternative
16 standard for facial procedural due process challenges,” under which “a challenging party can
17 prevail by showing that the challenged procedure violates constitutional protections in the
18 ‘typical’ case.” (Compl. ¶ 135.) For this proposition, Plaintiff cites *California Teachers*
19 *Association v. State of California* (1999) 20 Cal. 4th 327 (hereafter “*California Teachers*
20 *Association*”), but that case did not adopt a new and unique test for facial challenges. It expressly
21 quoted and applied the standards described above, which, as *California Teachers Association*
22 itself stated, “considers only the text of the measure itself.” (*Id.* at p. 338 [citing *Tobe v. City of*
23 *Santa Ana, supra*, 9 Cal.4th at p. 1084].) *California Teachers Association* certainly did not
24 suggest that a plaintiff can establish a facial violation by “putting on evidence” of how a
25 challenged statute operates in a purportedly typical case. To the contrary, it struck down the

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28 ² This Court already recognized and applied these well-settled standards in ruling on the
prior demurrer. (June 6 Order, at pp. 1-2.)

1 provision at issue because, it ruled, “[t]he actual standard *contained in the statute* for imposing
2 costs is unconstitutional,” since it was “inherently flawed.” (*Id.* at p. 345, italics added.)

3 The Supreme Court has repeatedly reaffirmed these requirements for a facial challenge,
4 including in subsequent procedural due process cases that construed *California Teachers*
5 *Association*. (See, e.g., *Today’s Fresh Start, Inc. v. L.A. Cty. Office of Educ.* (2013) 57 Cal.4th
6 197, 218 [“To resolve a facial challenge, we consider ‘only the text of the measure itself, not its
7 application to the particular circumstances’”]; *Zuckerman, supra*, 29 Cal.4th at pp. 38–39 [same].)

8 Plaintiff does not even attempt to identify any provision of PAGA that inherently violates
9 procedural due process on its face, and therefore fails to state a cognizable facial challenge.

10 **B. Plaintiff Identifies No Violation of Procedural Due Process.**

11 Plaintiff’s procedural due process claims also fail as a matter of law because the Complaint
12 identifies no conceivable violation of procedural due process. Plaintiff fundamentally
13 misconstrues the requirements of procedural due process and states no viable claim.

14 The federal and state due process clauses operate similarly. (*Today’s Fresh Start, Inc. v.*
15 *Los Angeles Cty. Office of Educ., supra*, 57 Cal.4th at p. 212 [explaining that the two clauses are
16 “substantially overlapping”].) Due process includes both a procedural and substantive
17 component. (See, e.g., *Zinerman v. Burch* (1990) 494 U.S. 113, 125.) The procedural component
18 focuses only on “what process is due”—that is, whether a deprivation of life, liberty or property
19 occurred “pursuant to constitutionally adequate procedures.” (See, e.g., *Cleveland Bd. of Educ. v.*
20 *Loudermill* (1985) 470 U.S. 532, 541 (hereafter, “*Loudermill*”).) Procedural due process cases
21 involve a two-step inquiry: the first asks “whether there exists a liberty or property interest which
22 has been interfered with by the State,” and second, “whether the procedures attendant upon that
23 deprivation were constitutionally sufficient.” (*Kentucky Dep’t of Corr. v. Thompson* (1989) 490
24 U.S. 454, 460; see also *Franceschi v. Yee* (9th Cir. 2018) 887 F.3d 927, 935 [similar].)

25 The balancing test described in *Mathews v. Eldrige* governs the second step of this inquiry,
26 namely, “what process is due.” (See *Mathews v. Eldrige* (1976) 424 U.S. 319 (hereafter,
27 “*Mathews*”); *Loudermill, supra*, 470 U.S. at pp. 541–543.) Under that test, courts weigh three
28 factors to determine whether a particular procedure is constitutionally required: (1) the private

1 interests affected by the action; (2) the risk of an erroneous deprivation through the procedures
2 used and the probable value of the additional or substitute procedural safeguards; and (3) the
3 government's interests. (*Mathews, supra*, 424 U.S. at p. 335.) California courts sometimes
4 examine a fourth factor, but contrary to Plaintiff's allegation (see Compl. ¶ 135), that factor has
5 no relevance to Plaintiff's claims.³

6 Here, Plaintiff's theory is less than clear, but the Complaint contains two sets of allegations
7 that appear aimed at establishing the procedural due process claim. Neither states a valid claim.

8 First, Plaintiff alleges that the PAGA "scheme"—apparently, the entire PAGA statute—
9 fails the *Mathews* test, without identifying any specific statutory procedure that allegedly is
10 unconstitutional or any additional procedural protection allegedly due. (Compl. ¶¶ 135-140.)

11 Plaintiff misunderstands the nature of procedural due process. As stated, procedural due
12 process only analyzes "what process is due."⁴ Therefore, to state a claim, the plaintiff must
13 identify a constitutionally deficient statutory *procedure* or an additional procedural protection
14 allegedly "due," and courts apply the *Mathews* test to determine whether the constitution requires
15 that specific procedure. This is apparent from the *Mathews* test itself, as well as the nature of
16 procedural due process. The second *Mathews* factor, for example, requires analysis of the
17 "additional or substitute procedural safeguards" that the plaintiff claims are due, and the third
18 factor similarly analyzes the burdens and purposes of "the additional or substitute procedural
19 requirement." (See *Mathews, supra*, 424 U.S. at p. 335.) In *Mathews* itself, the Court examined
20 whether due process required that the plaintiff be afforded an evidentiary hearing prior to the
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22 ³ The fourth factor is "the dignitary interest in informing individuals . . . of the action and
23 in enabling them to present their side of the story." (*Today's Fresh Start, supra*, 57 Cal.4th at p.
24 213.) Those interests, however, "play a role *only* when the rights of *natural persons* are at stake."
25 (*Ibid.*, italics added.) Plaintiff purports to represent the interests of businesses that have allegedly
suffered harm, and not the rights of natural persons. (Compl. ¶¶ 7-11.) Even if individuals can
sometimes be subject to a PAGA action, this factor could play a role only in a challenge to PAGA
as applied to an individual. It provides no basis to challenge PAGA on its face.

26 ⁴ See *Loudermill, supra*, 470 U.S. at pp. 541-543; see also *Zinermon v. Burch* (1990) 494
27 U.S. 113, 125-26 ("In procedural due process claims, the deprivation by state action of a
28 constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional;
what is unconstitutional is the deprivation of such an interest without due process of law").

1 termination of social security disability benefits. (*Mathews, supra*, 424 U.S. at pp. 323, 333.) It
2 examined the interests implicated by *that specific procedure*. (*Id.* at pp. 335-348.)⁵

3 Plaintiff pleads no viable claim under these standards. Plaintiff does not even attempt to
4 identify any specific statutory procedure it claims is unconstitutional or any additional procedural
5 protection allegedly due. (See Compl. ¶¶ 135-140.) As explained, PAGA merely creates a right
6 of action in the Superior Court. (See *supra*, p. 7.) PAGA defendants therefore enjoy all of the
7 procedural protections typically afforded to litigants in state courts. Plaintiff fails to identify any
8 “additional or substitute procedural requirement” allegedly due. (*Mathews, supra*, 424 U.S. at
9 p. 335.) Plaintiff’s general characterization of PAGA as a “procedural scheme” (Compl. ¶ 139)
10 identifies no specific procedural protection allegedly due.⁶ For these reasons, Plaintiff’s
11 allegations that the PAGA “scheme” fails the *Mathews* test state no viable claim.

12 Second, Plaintiff alleges that various characteristics of PAGA that Plaintiff does not (and
13 could not) claim are unconstitutional in and of themselves “coerce” employers to “surrender their
14 procedural due process rights to proceed to trial” (Compl. ¶ 155), apparently because they create
15 “enormous pressure to settle.” (*Id.* ¶ 136.) These allegations also state no cognizable claim.

16 Pressure to settle (or lack thereof) is not, of course, among the procedural protections
17 guaranteed by due process. (See, e.g., *Loudermill, supra*, 470 U.S. at p. 542 [the essential
18 elements of procedural due process are “notice and opportunity for hearing appropriate to the
19 nature of the case”].) Plaintiff identifies various alleged characteristics of PAGA that it claims
20 create this pressure to settle. (Compl. ¶ 155.) This alleged “gauntlet” consists of precisely the
21 same allegations that this Court already rejected, simply relabeled as procedural due process

22 ⁵ Plainly, due process does not provide a generalized tool to strike down state statutes by
23 claiming that the private interests affected by the “scheme” outweigh the public interests, an
24 inquiry that would amount to judicial second-guessing of the wisdom of statutes. (*Exxon Corp. v.*
Governor of Maryland (1978) 437 U.S. 117, 124 [“the Due Process Clause does not empower the
judiciary to sit as a ‘superlegislature to weigh the wisdom of legislation’”].)

25 ⁶ In this regard, Plaintiff does not appear to (and could not) dispute that this type of
26 statutory “scheme” is a valid exercise of legislative authority as a general matter. (See, e.g.,
Iskanian v. CLS Transportation Los Angeles (2014) 59 Cal.4th 348, 390 [“our case law contains
27 no indication that the enactment of *qui tam* statutes is anything but a legitimate exercise of
legislative authority”]; *Hale v. Morgan* (1978) 22 Cal.3d 388, 398 [it is “well accepted that a state
28 may impose reasonable penalties as a means of securing obedience to statutes”].) Plaintiff
identifies no specific unconstitutional procedure in the PAGA statute.

1 claims. In particular, Plaintiff alleges that this pressure to settle arises mainly from potential
2 exposure to penalties that allegedly are too high and not calculated in proportion to the harm, and
3 attorneys' fees. (Compl. ¶ 155, subds. (a)-(d), (g).) The Court has rejected these precise
4 allegations, pled under the excessive fines and substantive due process clauses. (June 6 Order, at
5 p. 2.) These allegations fare no better recast as procedural due process claims—they identify no
6 “additional or substitute procedural requirement” guaranteed by due process. (*Mathews, supra*,
7 424 U.S. at p. 335, italics added; *Loudermill, supra*, 470 U.S. at p. 542 [quoted above].) The
8 amount and calculation of penalties are substantive components of the State’s labor laws, not
9 procedural protections. Furthermore, as this Court already recognized, these allegations of
10 excessive maximum penalties—or pressure to settle caused thereby—cannot state a viable *facial*
11 challenge for the additional reason that PAGA grants the trial court discretion to reduce the
12 amount of the penalties as appropriate. (June 6 Order, at p. 2; Labor Code § 2699, subd. (e)(2).)

13 The remaining aspects of the supposed “gauntlet” that allegedly “coerces” defendants to
14 settle also state no viable claim. Plaintiff repeats the claim pled in the original complaint that
15 PAGA exposes defendants to “criminal or quasi-criminal levels of punishment” without required
16 criminal procedural protections. (Compl. ¶ 155, subd. (e).) This Court already rejected this exact
17 claim. (June 6 Order, at p. 3 [ruling that PAGA penalties are “not criminal in nature”].) Finally,
18 Plaintiff again alleges that PAGA “delegate[s] State executive power to individuals who have
19 direct financial incentives in the litigation.” (*Id.* ¶ 155, subd. (f).) The original complaint
20 included substantially these same allegations, styled as a separation-of-powers claim, and this
21 Court rejected the claim. (Mar. 28 Order, at pp. 2-3.) These allegations also state no viable
22 procedural due process claim, for the reasons described above.

23 For these reasons, the Complaint’s procedural due process claims under the federal and
24 state constitutions (the second and third causes of action) fail as a matter of law.

25 **II. THE SEPARATION OF POWERS CLAIM FAILS AS A MATTER OF LAW.**

26 The first cause of action alleges a new separation-of-powers claim, based on a new legal
27 theory. The claim, while less than clear, appears to assert that the Constitution vests the Attorney
28 General with the exclusive authority to pursue civil enforcement actions. This claim is baseless.

1 A violation of the separation-of-powers doctrine occurs if an act by one branch of
2 government operates to “defeat or materially impair” another branch’s exercise of its core
3 constitutional functions. (*Marine Forests Soc’y v. Cal. Coastal Com.* (2005) 36 Cal.4th 1, 44-
4 45.) The doctrine, however, “recognizes that the three branches of government are
5 interdependent,” and it permits actions of one branch that may “significantly affect those of
6 another branch.” (*Carmel Valley Fire Prot. Dist. v. State* (2001) 25 Cal.4th 287, 298.)
7 Furthermore, unlike the federal government, “the California Legislature possesses *plenary*
8 legislative authority except as specifically limited by the California Constitution.” (*Marine*
9 *Forests Soc’y v. Cal. Coastal Com.*, *supra*, 36 Cal.4th at pp. 31.) Therefore, under the separation-
10 of-powers doctrine, “the Legislature enjoys plenary legislative powers unless there is an *explicit*
11 *prohibition* of legislative action in the Constitution itself.” (*Id.* at p. 39, italics added.) “The
12 courts will presume a statute is constitutional unless its unconstitutionality clearly, positively, and
13 unmistakably appears.” (*City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 10–11.)

14 Here, Plaintiff identifies no relevant core constitutional function of any branch or officer,
15 much less any way in which PAGA defeats or impairs any such core constitutional function.
16 Plaintiff appears to allege that article V, section 13, of the Constitution requires that only the
17 Attorney General can pursue civil “law enforcement actions.” (Compl. ¶¶ 102-103.) Plaintiff
18 relies on the following sentence of section 13, which the Complaint excerpts out of context:

19 “Whenever *in the opinion of the Attorney General* any law of the State is not being
20 adequately enforced in any county, it shall be the duty of the Attorney General to
21 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 a district*
attorney.”

22 (Cal. Const. art. V, § 13, italics added.) Based on this provision, Plaintiff claims that if laws are
23 not being adequately enforced, “the Attorney General must undertake to enforce the laws himself
24 or herself.” (Compl. ¶ 102.) From this premise, Plaintiff appears to claim that only the Governor
25 and Attorney General have the power to pursue “law enforcement actions.” (Compl. ¶ 102.)

26 This claim lacks merit. Article V, section 13, manifestly concerns enforcement of *criminal*
27 laws. The California Supreme Court has explained that the purpose of that section was “to ease
28 the difficulty of solving crimes, and arresting responsible criminals, by coordinating county law

1 enforcement agencies and providing the necessary supervision by the Attorney General over
2 them.” (*Pitts v. Cty. of Kern* (1998) 17 Cal.4th 340, 358 fn. 4.) This also is apparent from the
3 text of section 13, which focuses on the Attorney General’s supervision of district attorneys and
4 sheriffs, and the prosecutorial function. Construing article V, section 13, and related provisions,
5 courts have ruled that the commencement of *criminal* prosecutions is a core executive-branch
6 function. (See, e.g., *Steen v. Superior Court* (2014) 59 Cal.4th 1045, 1048, 1053-1054.)

7 Here, PAGA does not authorize any party to commence criminal prosecutions. PAGA does
8 not affect that function at all, much less defeat or significantly impair it. Plaintiff identifies no
9 authority indicating that article V, section 13, vests the Attorney General with the exclusive
10 constitutional authority to file any particular *civil* action. The Attorney General’s power to pursue
11 *civil* actions is neither exclusive nor free of legislative restriction. (See, e.g., *D’Amico v. Bd. of*
12 *Med. Examiners* (1974) 11 Cal.3d 1, 14–15 [reviewing Attorney General’s powers and explaining
13 that, “*in the absence of any legislative restriction*, (he) has the power to file any civil action or
14 proceeding directly involving the rights and interests of the state, or which he deems necessary
15 for the enforcement of the laws of the state . . .,” italics added].)⁷ Therefore, the Complaint
16 identifies no core constitutional function affected by PAGA at all, much less any manner in which
17 PAGA defeats or significantly impairs any branch’s exercise of its core constitutional functions.

18 Furthermore, Article V, section 13, does not say, as Plaintiff appears to suggest, that only
19 the Attorney General has the power to pursue law enforcement actions, and that section imposes
20 no mandatory duties on the Attorney General whatsoever. It says that if “*in the opinion of the*
21 *Attorney General* any law of the State is not being adequately enforced,” the Attorney General
22 can enforce the law. As this language indicates, section 13 “imposes no mandatory duty to
23 enforce the subject laws” and instead “imposes upon the Attorney General a discretionary duty to
24 enforce the law.” (*State ex rel. Dep’t of Rehab. v. Sup. Ct.* (1982) 137 Cal.App.3d 282, 287.)

25 ⁷ In various instances, the Legislature has superseded the Attorney General’s authority to
26 bring enforcement actions to protect the public. (See, e.g., *People v. New Penn Mines* (1963) 212
27 Cal.App.2d 667 [Dickey Water Pollution Act precluded Attorney General from suing in name of
28 the State for abatement of nuisance; exclusive state agency jurisdiction to handle these matters
was vested in water pollution control boards]; *Van De Kamp v. Gumbiner* (1990) 221 Cal.App.3d
1260 [Legislature superseded the Attorney General’s common law power to oversee health care
service plans].)

1 The Complaint also includes a conclusory assertion that PAGA defeats or impairs a *judicial*
2 function (Compl. ¶ 146), but contains no allegations to support the claim. This conclusory
3 assertion states no claim. (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318 [in a demurrer, the court
4 does not accept contentions, deductions, or conclusions of fact or law].) Insofar as Plaintiff refers
5 to the allegations—repeated from the original complaint—that Plaintiff believes the Supreme
6 Court’s decision in *Iskanian v. CLS Transportation* was wrongly decided and that PAGA
7 delegates state power to financially interested private litigants and their counsel with insufficient
8 oversight (Compl. ¶¶ 96-101), this Court already rejected the claim. (Mar. 28 Order, at pp. 2-3.)

9 For these reasons, the Complaint fails to allege that PAGA defeats or materially impairs
10 any core constitutional function, and therefore fails to state a viable separation-of-powers claim.

11 CONCLUSION

12 For the foregoing reasons, Attorney General Becerra respectfully requests that the Court
13 sustain this demurrer to the First Amended Complaint’s first, second, and third causes of action.

14 Dated: August 8, 2019

Respectfully Submitted,

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