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ALLIANCE

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

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

Plaintiff,

v.

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

Defendant.

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

**FIRST AMENDED COMPLAINT FOR
INJUNCTIVE AND DECLARATORY
RELIEF**

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

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

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

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

19 THE PARTIES

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

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

1 to defend the typical PAGA case.

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

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

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

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

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

21 **JURISDICTION AND VENUE**

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

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

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

1062.

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

STATEMENT OF FACTS

I. THE STATUTORY AND CONSTITUTIONAL FRAMEWORK

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

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

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

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

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

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

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

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

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

5 23. The California Supreme Court, as well as the U.S. Court of Appeals for the
6 Ninth Circuit, have held that these prohibitions apply with equal force to the California State
7 government. (*See id.* at 727 (“[T]he Due Process Clause of the Fourteenth Amendment to the
8 Federal Constitution . . . makes the Eighth Amendment’s prohibition against excessive fines and
9 cruel and unusual punishments applicable to the States.”); *accord Wright v. Riveland* (9th Cir.
10 2000) 219 F.3d 905, 916 (analyzing whether state fine was excessive under the Eighth
11 Amendment).)

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

16 **B. Procedural Due Process**

17 25. The United States Constitution’s Fifth Amendment provides, in relevant part:
18 “No person shall ...be deprived of life, liberty, or property, without due
19 process of law; nor shall private property be taken for public use, without
20 just compensation.”
21 (U.S. Const., 5th Amend.)

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

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

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

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

5 29. Facial procedural due process challenges have a unique standard; because they
6 do not fail upon the opposing party putting forward a single example of a constitutional
7 application of the challenged procedure. Rather, facial procedural due process challenges can be
8 based, and prevail, on the “typical” case. (*See, e.g., Cal. Teachers Ass’n v. Cal.* (1999) 20
9 Cal.4th 327, 345 (“The United States Supreme Court has explained that procedural due process
10 rules ‘ “are shaped by the risk of error inherent in the truth-finding process as applied to the
11 *generality of cases*, not the rare exceptions.” [Citation.] . . . Retrospective case-by-case review
12 cannot preserve fundamental fairness when a class of proceedings is governed by a
13 constitutionally defective evidentiary standard.’ ”) (citing *Santosky v. Kramer* (1982) 455 U.S.
14 745, 757) (emphasis in original).)

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

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

2 **C. Separation of Powers**

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

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

17 Subject to the powers and duties of the Governor, the Attorney General shall
18 be the chief law enforcement officer of the State. It shall be the duty of the
19 Attorney General to see that the laws of the State are uniformly and
20 adequately enforced.

21 . . .

22 Whenever in the opinion of the Attorney General any law of the State is not
23 being adequately enforced in any county, it shall be the duty of the Attorney
24 General to prosecute any violations of law of which the superior court shall
25 have jurisdiction, and in such cases the Attorney General shall have all the
26 powers of the district attorney.

27 (Cal. Const. art. V, § 13.)

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

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

7 34. Under the Separation of Powers Doctrine, the Legislature cannot exercise any
8 core judicial functions. (*See Pryor v. Downey* (1875) 40 Cal. 388, 403 (“The Legislature of
9 California cannot exercise any judicial function, and no person in this State can be deprived of
10 life, liberty or property without due process of law.”).) Similarly, the Separation of Powers
11 Doctrine prohibits the legislative arrogation of executive power. (*See Marine Forests Society v.*
12 *Cal. Coastal Com.* (2005) 36 Cal.4th 1, 15 (“[T]he California separation of powers clause
13 precludes the adoption of a statutory scheme authorizing the legislative appointment of an
14 executive officer or officers whenever the statutory provisions as a whole, viewed from a
15 realistic and practical perspective, operate to defeat or materially impair the executive branch’s
16 exercise of its constitutional functions.”).)

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

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

1 864.)

2 37. With respect to the Separation of Powers between the Legislative and Executive
3 Branches, the California Supreme Court has also decreed that “[s]uch powers as are specially
4 conferred by the constitution upon the governor or any other specified officer, the legislature
5 cannot require or authorize to be performed by any other officer or authority; and from those
6 duties which the constitution requires of him he cannot be excused by law.” (*See Levit, supra*,
7 52 Cal.2d at 461 (citation omitted).) And that “[t]hose matters which the constitution
8 specifically confides to [a specified body or agency] the legislature cannot directly or indirectly
9 take control.” (*Ibid.*)

10 38. The California agency responsible for the “oversight” of PAGA, the DIR, has
11 recently asked for additional personnel and resources because it cannot keep up with the vast
12 numbers of PAGA notices it receives each year. More specifically, with its 2016/2017 Budget
13 Request Summary (“DIR Budget Request”), the DIR “request[ed] 1.0 positions for the Labor
14 and Workforce Development Agency (LWDA), 9.0 positions for the Department of Industrial
15 Relations (DIR), and \$1.6 million in the Labor and Workforce Development Fund (LWDF) for
16 the 2016/17 fiscal year (\$1.5 million ongoing) to stabilize and improve the handling of Private
17 Attorneys General Act cases[.]” The DIR’s request was motivated, in part, by the fact that only
18 one employee was available to review the thousands upon thousands of PAGA notices received
19 since the last quarter of the 2013/2014 fiscal year, and thus the “review and investigations of
20 PAGA claims are quite rare, and usually occur only because a case has been called to the
21 LWDA’s attention through some other means besides the PAGA notice.” (Cal. Dept. of
22 Industrial Relations, Budget Change Proposal for Private Attorneys General Act (PAGA)
23 Resources for Fiscal Year 2016/2017 (2015), at p. 1.) The DIR explained that these resources
24 were needed because “the ability to review and investigate a PAGA case is considered an
25 important check on potential abuses in this arena.” (*Id.* at 1-2.) Other justifications and/or
26 reasons DIR requested the resources included:

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

1 (Id. at 2.)

- 2 b. "This has contributed to a range of concerns about the PAGA statute itself,
3 including that employers are being sued and incurring substantial costs defending
4 against technical or frivolous claims, and that workers and the state often end up
5 being shortchanged when these cases are settled." (*Ibid.*)
- 6 c. "[G]reater state oversight and participation in PAGA cases will help reduce
7 PAGA litigation and litigation costs by weeding out marginal and frivolous
8 claims." (*Ibid.*)
- 9 d. "[L]ess than 1% of all PAGA cases are reviewed or investigated." (*Id.*)
- 10 e. "Currently, DIR lacks the resources to reach a solid conclusion and cite or settle
11 within the allotted time before losing the ability to forestall private litigation."
12 (*Ibid.*)
- 13 f. "Currently, the size of the task coupled with the lack of extra time and resources
14 operate as a great disincentive against accepting PAGA cases for investigation."
15 (*Id.* at 3.)
- 16 g. "To fulfill the purpose of the PAGA procedures for agency notice and
17 involvement, the LWDA must have the resources to not only to investigate some
18 of the cases, but also see a case all the way through once an employer has been
19 cited." (*Ibid.*)
- 20 h. "Because most judges have no particular expertise in labor law and must rely on
21 the knowledge and representations of counsel, both of whom are interested in
22 having the settlement approved, there is no assurance that settlements are in fact
23 fair to all the affected employees or the state. The dynamics at play in major
24 litigation tend to work against such assurances tend to work against such
25 assurances: protracted litigation creates strong incentive so settle in a way that
26 best protects the interest of the actual plaintiffs and their attorneys, while
27 discounting the claims and interest of other employees and class members."
28 (*Ibid.*)

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

- 4 a. “Require more detail in the PAGA claim notices filed with the LWDA and
5 require that claims for ten or more employees be verified and accompanied by
6 copy of the proposed complain.” (*Id.* at 4.)
- 7 b. “Extend the LWDA’s time to review PAGA notices from 30 to 60 days and
8 specify that employers may submit a request for the LWDA to investigate a
9 PAGA claim.” (*Ibid.*)
- 10 c. “Extend the time for the LWDA to investigate an accepted claim from 120 to
11 180 days.” (*Ibid.*)
- 12 d. “[R]equire that the Director of DIR be provided with notice and an opportunity
13 to object before the court determines whether to approve a settlement.” (*Ibid.*)

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

- 16 a. “[T]he reality is that the LWDA lacks the ability to meaningfully review notices
17 or investigate more than [a] handful of the thousands of claims that come
18 through.” (*Id.* at 5.)
- 19 b. “As a practical matter, the typical PAGA notice will not get reviewed or
20 investigated unless someone calls it to the special attention of the LWDA.”
21 (*Ibid.*)
- 22 c. “[W]hile current law requires court approval of settlements involving penalties,
23 courts lack the means to provide effective oversight, and there is no way to
24 determine if the public’s interest is being served or appropriate penalties being
25 recovered in individual cases.” (*Ibid.*)
- 26 d. “[T]he potential for time and workload savings, improved outcomes for private
27 litigants, and reduced litigation overall will accordingly continue to elude the
28 state.” (*Ibid.*)

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

5 **D. Equal Protection**

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

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

11 **E. The California Labor Code**

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

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

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

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

2 An employer shall not employ an employee for a work period of more than
3 five hours per day without providing the employee with a meal period of
4 not less than 30 minutes, except that if the total work period per day of the
5 employee is no more than six hours, the meal period may be waived by
6 mutual consent of both the employer and employee. An employer shall not
7 employ an employee for a work period of more than 10 hours per day
8 without providing the employee with a second meal period of not less than
9 30 minutes, except that if the total hours worked is no more than 12 hours,
10 the second meal period may be waived by mutual consent of the employer
11 and the employee only if the first meal period was not waived.

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

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

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

1 Labor Code Section 512 for the California Supreme Court to clarify what it means to “provide”
2 a meal break:

3 The employer satisfies this obligation if it relieves its employees of all duty,
4 relinquishes control over their activities and permits them a reasonable
5 opportunity to take an uninterrupted 30-minute break, and does not impede
6 or discourage them from doing so. . . .

7 Bona fide relief from duty and relinquishing of control satisfies the
8 employer’s obligations. . . .

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

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

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

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

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

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

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

23 51. As another example, Labor Code Section 201(a) provides that "[i]f an employer
24 discharges an employee, the wages earned and unpaid at the time of discharge are due and
25 payable immediately." The penalty for non-compliance is set forth in Labor Code Section
26 203(a), "[i]f an employer willfully fails to pay, without abatement or reduction, in accordance
27 with §§ 201 . . . the wages of the employee shall continue as a penalty . . . until paid or until an
28 action therefore is commenced; but the wages shall not continue for more than 30 days"

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

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

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

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

19 (See *Nishiki v. Danko Meredith, P.C.* (2018) 25 Cal.App.5th 883, 891 (quoting *Davis v. Morris*
20 (1940) 37 Cal.App.2d 269, 274).)

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

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

3 Hourly Rate	Average Hours Worked	Max Waiting Time Penalties
4 \$11.00 per hour	8	\$2,640
5 \$13.50 per hour	8	\$3,240
6 \$15.00 per hour	8	\$3,600
7 \$25.00 per hour	8	\$6,000
8 \$35.00 per hour	8	\$8,400
9 \$45.00 per hour	8	\$10,800

10
11 52. Section 203 penalties are commonly pursued under the theory that that
12 employees were not paid for all hours worked, including for hours they did not record in the
13 established time-keeping system (*i.e.*, “off-the-clock” work). In California, an employer is liable
14 for such “unpaid” wages (and derivative 203 Penalties) if an employee can show that the
15 employer “knew or should have known off-the-clock work was occurring.” (*Brinker, supra*, 53
16 Cal.4th at 1051.) Setting aside the difficulty of proving whether an employer “should have
17 known” of hours that were not recorded or reported to the employer, the California Supreme
18 Court recently, and all but effectively, eliminated an important defense to such claims for small
19 amounts of allegedly unpaid work time. (*See Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829,
20 848.)

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

1 units earned and the applicable piece rate.

2 54. In order to prevail on a Labor Code Section 226(a) claim, an employee must be
3 able to show that (1) a violation of the statutory provision setting forth criteria for wage
4 statements, (2) the violation was knowing and intentional, and (3) the employee suffered an
5 injury as a result of the violation. (*See Cleveland v. Groceryworks.com, LLC* (N.D. Cal. 2016)
6 200 F. Supp. 3d 924, 957.) Though not a “strict liability” statute, the Labor Code deems an
7 employee to suffer injury if the employee cannot readily ascertain certain information from the
8 wage statement (*e.g.*, the amount of gross or net wages), even if the employee suffers no
9 financial injury as a result of the error.

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

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

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

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

28

1 **F. The Labor Code Private Attorneys General Act**

2 **1. History of the Law**

3 59. In the early 2000s, the California State Assembly Committee on Labor and
4 Employment held hearings about the effectiveness and efficiency of the enforcement of wage
5 and hour laws by the DIR. (*See* Sen. Bill No. 796, Analysis of S. Jud. Comm., at 1 (Apr. 22,
6 2003).) The Senate Rules Committee reported that the Legislature had appropriated over \$42
7 million dollars to the State Labor Commission for the enforcement of over 300 laws, and that
8 that the DIR's authorized staffed numbered over 460, which made the DIR the largest state
9 labor law enforcement agency in the country. (*Id.* at 1.) Notwithstanding, Sen. Bill No. 796
10 (hereafter "PAGA Bill") was devised with to "augment the LWDA's civil enforcement efforts
11 by allowing employees to sue employees for civil penalties." (*Id.* at 2.)

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

13 Under existing law, the Labor and Workforce Development Agency and its
14 departments, divisions, commissions, boards, agencies, or employees may
15 assess and collect penalties for violations of the Labor Code. . . .

16 This bill would allow aggrieved employees to bring civil actions to recover
17 these penalties, if the agency or its departments, divisions, commissions,
18 boards, agencies, or employees do not do so. The penalties collected in these
19 actions would be distributed 50% to the General Fund, 25% to the agency
20 for education, to be available for expenditure upon appropriation by the
21 Legislature, and 25% to the aggrieved employee, except that if the person
22 does not employ one or more persons, the penalties would be distributed
23 50% to the General Fund and 50% to the agency. In addition, the aggrieved
24 employee would be authorized to recover attorney's fees and costs and, in
25 some cases, penalties. For any violation of the code for which no civil
26 penalty is otherwise established, the bill would establish a civil penalty, but
27 no penalty is established for any failure to act by the Labor and Workplace
28 Development Agency, or any of its departments, divisions, commissions,

boards, agencies, or employees.
(Sen. Bill No. 796, Legislative Counsel's Digest.)

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

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

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

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

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

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

- 10 a. That "[a]llowing such 'bounty hunter' provisions will increase costs to
11 businesses of all sizes, and add thousands of new cases to California's already
12 over-burdened civil court system." (Sen. Bill No. 796, Assembly Comm. On
13 Lab. & Emp., at 7 (July 9, 2003).)
- 14 b. That "a private enforcement statute in the hands of unscrupulous lawyers is a
15 recipe for disaster." (*Id.*)
- 16 c. And that "there is no requirement for the employee to exhaust the administrative
17 procedure or even file with the Labor Commissioner" (Sen. Bill No. 796,
18 Analysis of S. Comm. on Lab. & Indus. Relations, at 6 (Apr. 9, 2003).)

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

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

1 was committed.

2 ...

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

8 ...

9 Third, the proposed civil penalties are relatively low.

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

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

17 65. Less than two months after PAGA took effect, on February 20, 2004, Sen. Bill
18 No. 1809 was introduced, which according to the Senate Rules Committee Digest was intended
19 to “significantly amend[] ‘The Labor Code Private Attorneys General Act of 2004’ [citation] by
20 enacting specified procedural and administrative requirements that must be met prior to
21 bringing a private action to recover civil penalties for Labor Code violations.” (Sen. Bill No.
22 1809, Analysis of Sen. R. Comm., at 1-2 (July 28, 2004).)

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

28

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

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

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

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

14 b. "While well intended to protect aggrieved employees, [PAGA] is a
15 complex legal process that has led to the unintended consequence of
16 significant legal abuse. The threat of extended litigation on behalf of an
17 entire class of workers provides enormous pressure on employers to
18 settle claims regardless of the validity of those claims" (Assem.
19 Bill No. 1654, Analysis of S. Comm. on Indus. Rel., at 4 (June 18,
20 2018).)

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

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

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

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

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

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

19 Among other violations of the California Labor Code, the construction
20 industry is rampant with wage theft. In fact, over 13% of citations issued by
21 the Bureau of Field Enforcement in the 2015-2016 fiscal year were issued
22 to employers in the construction industry. . . . Depriving workers in this
23 industry their right to pursue claims under PAGA would be a gross
24 disservice to a community of workers who are already vulnerable to wage
25 theft.

26 . . .

27 The construction industry is heavily subcontracted; in fact, many employers
28 hire day labors other than low wage workers. Many construction workers

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

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

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

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

19 **3. PAGA’s Deputization and Three Categories of Violations**

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

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

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

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

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

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

26 (c) **Category Three: All Other Labor Code Violations**

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

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

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

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

15 **(d) The PAGA Penalty Framework**

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

1 81. PAGA prescribes that penalties are to be divided between the California
2 government and the aggrieved employees. (*See, e.g., Thurman v. Bayshore Transp. Mgmt. Inc.*
3 (2012) 203 Cal. App. 4th 1112.) The prescribed split is 75% to the State and 25% to aggrieved
4 employees. (Lab. Code § 2699(i).) PAGA also contains a one-way (employee-only) attorneys’
5 fees and cost shifting provision that does not permit employers to obtain fees and costs even if
6 they could prove a claim was frivolous or brought in bad faith. (*See id.* § 2699(g).) Because
7 only a fraction of PAGA cases are litigated through trial, compensation for PAGA-plaintiffs’
8 counsel usually comes in the form of a substantial portion of the gross settlement amount
9 negotiated at private mediation, which the State does not attend, thus allowing the private
10 attorney to apportion the settlement sum in a way that most benefits himself or herself.

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

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

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

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

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

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

13 86. Court approval is required for the settlement of PAGA claims. (*See* Lab. Code
14 § 2699(l).) However, judicial oversight in PAGA claims is strikingly different from the
15 oversight for class actions. In PAGA actions, the Court is not required to exercise anywhere
16 near the same level of scrutiny required in a class action. (*Arias v. Superior Court* (2009) 46
17 Cal.4th 969 (holding that PAGA actions are not subject to class action requirements).)

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

24 88. With respect to settlements, PAGA does not require State input or approval to:
25 engage in settlement negotiations, agree to private mediation, settle a matter, or to apportion all,
26 some, or none of the settlement to PAGA penalties. The sole oversight of PAGA settlements is
27 provided at the tail-end of litigation, by California trial court judges. (*See* Lab. Code §
28 2699(l)(2).) But as highlighted by the DIR, pleaded *supra*, at Paragraph 38(h):

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

5 89. Notably, the California Executive Branch of government has no control or
6 oversight of PAGA litigation or settlements once the above-described exhaustion period
7 expires. Rather, the sole connection of the executive branch to the resolution of PAGA lawsuits
8 is the receipt of proposed settlements, judgments, and orders regarding PAGA penalties must be
9 provided to the LWDA; and PAGA requires nothing of the LWDA with respect to such legal
10 documents. (*See* Lab. Code § 2699(1)(2)-(3).)

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

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

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

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

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

1 2018).)

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

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

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

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

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

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

1 policy, and that such public policy is not preempted by the Federal Arbitration Act. (*Id.* at 388-
2 89.)

3 97. The Court also clarified an important open-ended question about who receives
4 the PAGA civil penalties that are recovered through the action. Specifically, the California
5 Supreme Court made clear that the penalties are distributed to all aggrieved employees (unlike a
6 typical *qui tam* action where the bounty hunter keeps all of the money that does not go to the
7 State), unequivocally stating that “a portion of the penalty goes not only to the citizen bringing
8 the suit but to all employees affected by the Labor Code violation.” (*Id.* at 382.)

9 98. The California Supreme Court’s opinion included a limited analysis of the
10 question whether PAGA violates constitutional separation of powers, analyzing (and finding
11 inapplicable) the principles set forth by two of its prior decisions involving the separation of
12 powers between the Legislative and Judicial branches of the California government. (*See id.* at
13 389-390 (analyzing *County of Santa Clara, supra*, 50 Cal.4th 35, and *People ex. Rel. Clancy v.*
14 *Superior Court* (1985) 39 Cal.3d 740).) Indeed, the *Iskanian* Court’s reasoning boils down to a
15 simple syllogism: *qui tam* actions are constitutional; PAGA is a kind of *qui tam* action;
16 therefore, PAGA is constitutional. Such a syllogism is required for the Court to reason that
17 holding PAGA unconstitutional would be tantamount to a “rule disallowing *qui tam* actions[.]”
18 (*Id.* at 391.) The loose analogy the Supreme Court drew to support this holding was that both
19 PAGA and classic *qui tam* actions: (1) exact a penalty; (2) part of the penalty be paid to the
20 informer; and (3) that, in some way, the informer is authorized to bring suit to recover the
21 penalty. (*Id.* at 382.) The Supreme Court did acknowledge one material distinction, however,
22 “that a portion of the penalty goes not only to the citizen bringing the suit but to all employees
23 affected by the Labor Code violation.” (*Ibid.*) But this, the Court reasoned, did not change the
24 fact that the “government entity on whose behalf the plaintiff files suit is always the real party
25 in interest in the suit.” (*Ibid.*)

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

1 grounded its authority to address the unraised issue in a California Rule of Court which
2 provides, in relevant part, that the Supreme Court may “decide an issue that is neither raised nor
3 fairly included in the petition or answer if the case presents the issue and the court has given the
4 parties reasonable notice and opportunity to brief and argue it.” (*Ibid.* (citing Cal. R. Ct.
5 8.516(b)(1)-(2)).) The Court expressly invoked the “reasonable opportunity to brief the issue”
6 portion of the rule, which, at a minimum, is a tacit admission that the Court had an incomplete
7 record before it, at least for the purposes of determining whether PAGA is unconstitutional as
8 applied to CLS in that case.

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

21 101. The *Iskanian* Court did not consider, nor does its holding cover, whether PAGA
22 intrudes upon what might be characterized as the “core zone” of the executive functions of the
23 Governor (or another constitutionally prescribed executive officer), impeding that official from
24 exercising the independent discretion contemplated by the Constitution in the performance of
25 his or her essential executive duties, or whether the PAGA “compromise[s] the ability of [an]
26 appointed officer (or of the executive body on which the appointee serves) to perform the
27 officer's (or the executive body's) authorized executive functions independently, without
28 legislative coercion or interference.” (*Marine Forests Society v. Cal. Coastal Com.*, *supra*, 36

1 Cal.4th at 16.)

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

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

1 authority; and from those duties which the constitution requires of him he cannot be excused by
2 law.”; “Those matters which the constitution specifically confides to [a specified body or
3 agency] the legislature cannot directly or indirectly take control.”); *Marine Forests Society v.*
4 *California Cal. Coastal Com.*, *supra*, 36 Cal.App.4th at 15 (“[T]he California separation of
5 powers clause precludes the adoption of a statutory scheme authorizing the legislative
6 appointment of an executive officer or officers whenever the statutory provisions as a whole,
7 viewed from a realistic and practical perspective, operate to defeat or materially impair the
8 executive branch’s exercise of its constitutional functions.”).)

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

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

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

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

26 PAGA’s standing provision similarly contains no evidence of a legislative
27 intent to impose a heightened preliminary proof requirement. Suit may be
28 brought by any “aggrieved employee” [citation]; in turn, an “aggrieved

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

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

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

15 (*Id.* at 551.)

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

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

7 [T]he Legislature has decided that both the employer and any “other person”
8 who causes a violation of the overtime pay or minimum wage laws are
9 subject to specified civil penalties. [citation]. Neither of these statutes
10 mentions the business structure of the employer, the benefits or protections
11 of the corporate form, or any potential reason or basis for disregarding the
12 corporate form. To the contrary, as we explain, the business structure of the
13 employer is irrelevant; if there is evidence and a finding that a party other
14 than the employer “violates, or causes to be violated” the overtime laws (§
15 558(a)) or “pays or causes to be paid to any employee” less than minimum
16 wage (§ 1197.1(a)), then that party is liable for certain civil penalties
17 *regardless of the identity or business structure of the employer.*

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

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

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

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

8 The LWDA . . . has been able to devote only minimal staff and resources—
9 specifically, one position at DLSE beginning in 2014—to perform a high-
10 level review of PAGA notices and determine which claims to investigate.
11 **In 2014, less than half of PAGA notices were reviewed, and LWDA**
12 **estimates that less than 1 percent of PAGA notices have been reviewed**
13 **or investigated since PAGA was implemented.** When a PAGA notice is
14 investigated, LWDA reports that it has difficulty completing the
15 investigation within the timeframes outlined in PAGA. When an
16 investigation is not completed, or not completed on time, the PAGA claim
17 is automatically authorized to proceed.

18 (See Legislative Analyst's Office, *The 2016-17 Budget: Labor Code Private Attorneys General*
19 *Act Resources*, Budget and Policy Post (Mar. 25, 2016), available at
20 <<https://lao.ca.gov/publications/report/3403>> (last accessed Nov. 27, 2018) (emphasis added).)

21 The March 2016 Report also noted that:

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

27 (*Id.*)

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

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

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

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

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

1 little of the settlement sum to the resolution of the PAGA claims. The above-referenced March
2 2016 Report confirms as much:

3 [N]ot all settlements include civil penalties. In fact, LWDA reports that in
4 2014-15 it received just under 600 payments for PAGA claims that resulted
5 in civil penalties. This number is low relative to the amount of PAGA
6 notices LWDA receives each year (roughly 10 percent of notices received
7 in 2014), implying that the final disposition of a large portion of PAGA
8 claims, and likely many settlements, do not involve civil penalties.

9 The March 2016 Report also states that the amount of PAGA notices filed with the LWDA in
10 2014 exceeded 6,300 and the amount of PAGA penalties deposited in the Labor and Workforce
11 Development Fund in 2014 was \$8,400,000. On information and belief, the issue identified in
12 the March 2016 Report report—a large portion of PAGA claims settling without allocating civil
13 penalties—continues to this day.

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

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

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

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

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

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

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

Type of Violation	Statute	Penalties Per Employee
Non-Payment of Minimum Wages	1197.1	<ul style="list-style-type: none">Unpaid Wages: \$19.07Penalties: \$12,850
Non-Payment of Overtime	558	<ul style="list-style-type: none">Unpaid Wages: \$9.54

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

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

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

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

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

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

10 **J. PAGA’s Lack of Government Oversight Contributes to A Paradigm that**
11 **Violates Procedural Due Process**

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

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

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

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

- 26 a. Not requiring the “aggrieved employee” to attend the mediation;
27 b. Not consulting with the “aggrieved employee” or the State before agreeing to a
28 settlement of PAGA claims;

- c. After using PAGA to avoid arbitration (and the effect of a class waiver), attempting to settle for the value of Labor Code violations and allocate only a very small portion of the settlement to PAGA, thereby minimizing the share of the recovery that goes to the State;
- d. Threatening to pursue the life savings, homes, college tuition funds, and other personal property as a means to intimidate and coerce those connected with an employer-business to pay large settlements, very little of which is normally allocated to PAGA in the end.

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

- a. Not requiring the LWDA or DIR to review any number or percentage of PAGA notices;
- b. Not requiring the LWDA or DIR to investigate any number of PAGA notices;
- c. Not monitoring or auditing the Plaintiffs' Bar's use of PAGA (*e.g.*, the number of notices filed by firms);
- d. Not requiring a representative of LWDA or DIR to be present at mediations, court hearings, or trials involving PAGA claims;
- e. Not requiring the LWDA or DIR to review settlement agreements, court orders, or court judgments that are based on or relate to PAGA claims;
- f. Understaffing and underfunding the LWDA's PAGA unit;
- g. Permitting the LWDA's PAGA unit to lose PAGA notices, and maintain inadequate records of PAGA notices, complaints, settlements, judgments, orders, and civil penalties collected;
- h. Failing to establish and enforce ethical guidelines for plaintiffs' attorneys who prosecute PAGA actions; and
- i. Failing to vet or screen for plaintiffs' attorneys who prosecute PAGA actions, or even ensure they are licensed to practice law in this State.

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

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

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

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

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

1	Max Laufer, Inc. d/b/a MaxCare Ambulance	Cohelan Khoury & Singer
2	BHC Sierra Vista Hospital, Inc.	Crosner Legal P.C.
3	Fairwinds-West Hills, A Leisure Care Community, et al.	David Yeremian & Associates, Inc.
4	24-7 Caregivers Registry, Inc dba Advantage Plus Caregivers	David Yeremian & Associates, Inc.
5	Mental Health America of Los Angeles	Diana Gevorkian Law Firm
6	Earthbound Farm, LLC	Diversity Law Group
7	Planned Parenthood Mar Monte, Inc.	Diversity Law Group
8	Adventist Health/Reedley Community Hospital	Diversity Law Group
9	The Salvation Army	Diversity Law Group
10	Samaritan LLC	Diversity Law Group
11	Regional Medical Center of San Jose	Diversity Law Group
12	Grand Terrace Health Care, Inc.	Diversity Law Group
13	Carmichael Care, Inc.	Diversity Law Group
14	Watsonville Community Hospital	Diversity Law Group
15	San Jose Foothill Family Community	Diversity Law Group
16	Mama Petrillo's-Temple City, Incorporated	Employee Justice Legal Group, LLP
17	Fresno Community Hospital And Medical Center	Employee Law Group
18	Westlake Wellbeing Properties LLC	Ferguson Case Orr Paterson LLP
19	John Muir Health & John Muir Behavioral Health	Gaines & Gaines
20	Front Porch Communities and Services	Gaines & Gaines
21	Encore Education Corporation	Gaines & Gaines
22	The Endoscopy Center of Santa Maria, Inc.	Gaines & Gaines
23	Sutter Central Valley Hospitals	Gaines & Gaines
24	Valley Children's Medical Group	Gaines & Gaines
25	Silver Crown Home Care, LLC	Gaines & Gaines
26	Childrens Hospital Los Angeles Medical Group, Inc.	Gartenberg Gelfand Hayton LLP
27	Youth Policy Institute Charter Schools, Monsignor Oscar Romero Charter School...	Genie Harrison Law Firm
28	Life Alert Emergency Response, Inc.	Geragos & Geragos, APC
	Rehabilitation Center of Santa Monica Holding Company GP, LLC	GrahamHollis APC
	First Alarm	GrahamHollis APC
	Progressus Therapy, LLC & other employers	Gurnee Mason & Forestiere
	Soquel Union Elementary School District	Habbu & Park
	California Friends Home dba Quaker Gardens	Haines Law Group
	Evergreen Hospice Care, Inc.	Haines Law Group
	Life Care Centers of America, Inc.	Haines Law Group

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

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

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

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

4 132. For example, in *Viceral v. Mistras Group, Inc.*, case number 15-cv-02198-EMC,
5 a federal judge of the Northern District approved a \$6,000,000 settlement, of which only
6 \$20,000 was allocated to the PAGA claim, even though it was valued at \$12,900,000. The
7 plaintiffs' attorneys were awarded \$2,000,000 in fees (double the lodestar estimate) and
8 \$46,000 in costs.

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

13 134. In *John Doe v. Google Inc.*, case number CGC-16-556034, a San Francisco
14 Superior Court judge approved a \$1,000,000 settlement, of which the attorneys were awarded
15 \$330,000 (which tripled their hourly rate), and each aggrieved employee received just fifteen
16 and one-half dollars (\$15.50).

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

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

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

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

- 7 a. “[T]he continued operation of an established, lawful business[, which] is subject
8 to heightened protections.” (*County of Santa Clara, supra*, 50 Cal.4th at 53.)
9 b. The “implicat[ions for] [California employers’] good name, reputation, honor, or
10 integrity[,]” (*Cal. Teachers Ass’n v. Cal.*, *supra*, 20 Cal.4th at 348) which are
11 called into question and/or damaged by the filing and pursuit of PAGA claims,
12 which are often resolved without any judicial findings that the employers are
13 innocent of the allegations due to the enormous pressure to settle created by the
14 PAGA paradigm;
15 c. The “meaningful access to the [courts] so that they may present their side of the
16 case and invoke the discretion of the decision maker,” (*Id.*), which the typical
17 PAGA defendant is coerced to surrender due to the enormous pressure to settle
18 created by the PAGA paradigm; and
19 d. Protection from a government takings of private property (*i.e.*, extracting civil
20 penalties from natural persons despite existence of limited liability structures,
21 such as a corporation) without adequate due process (*see Pedrazzani, supra*, 27
22 Cal.App.5th 809), which, again, all but the rare PAGA defendants must
23 surrender due to the enormous pressure to settle created by the PAGA paradigm.

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

- 26 a. “[A]chieving maximum compliance with State labor laws.” (*Huff, supra*, 23
27 Cal.App.5th at 757);
28 b. “[T]o punish and deter employer practices that violate the rights of numerous

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

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

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

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

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

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

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

19 CAUSES OF ACTION

20 FIRST CAUSE OF ACTION

21 (Violation of California Separation of Powers Doctrine)

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

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

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

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

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

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

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

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

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

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

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

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

24 **SECOND CAUSE OF ACTION**

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

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

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

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

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

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

- 13 a. assessing presumptive penalties in a manner completely foreign to American
14 jurisprudence, by serial multiplication that takes no account of the alleged harm,
15 the defendant's culpability, or defendant's ability to pay;
- 16 b. exposing defendants to presumptive penalties that exceed the net worth of the
17 defendant's business, thereby threatening the defendant with bankruptcy;
- 18 c. exposing natural persons associated with a defendant's business to personal
19 liability for civil penalties, regardless of any limited liability structures, thereby
20 allowing plaintiffs' attorneys to threaten personal assets of individuals in
21 addition to the assets of the employer-business;
- 22 d. reserving court discretion to reduce the presumptive penalties until after trial,
23 thus forcing a defendant to "pay to play" for the hope that a trial court will
24 exercise its discretion under an ambiguous standard, which (if applied correctly)
25 makes the "functional penalty" in every PAGA case the absolute maximum that
26 the United States and California Constitutions will permit on the facts of each
27 individual case, which provides no meaningful notice to PAGA defendants of
28 what the penalties will be in their current or any future case;

- 1 e. exposing defendants to criminal or quasi-criminal levels of punishment that often
2 meet and exceed penalties assessed in felony cases, without any of the
3 procedural protections normally associated with criminal or quasi-criminal
4 proceedings, such as a burden of proof more demanding than a preponderance of
5 the evidence or a *mens rea* requirement;
- 6 f. delegating State executive power to individuals who have direct financial
7 incentives in the litigation and creating a paradigm that financially incentivizes
8 such individual to seek the maximum possible civil penalties on each defendant,
9 rather than require that they seek a “just” result, as is the case with State
10 prosecutors;
- 11 g. Punishing defendants who dare to defend PAGA (iallegations through the
12 application of a one-way fee-shifting statute that compounds the “pay to play”
13 situation, effectively requiring the typical defendant to pay the hundreds of
14 thousands (if not millions) of dollars in opposing counsel’s legal fees for the
15 mere opportunity to reach the stage where the court may apply its vague
16 discretion to reduce the mandatory PAGA penalties;

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

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

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

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

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

12 **THIRD CAUSE OF ACTION**

13 (Violation of California Constitutional Procedural Due Process Protections)

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

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

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

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

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

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

- 1 jurisprudence, by serial multiplication that takes no account of the alleged harm,
2 the defendant's culpability, or defendant's ability to pay;
- 3 b. exposing defendants to presumptive penalties that exceed the net worth of the
4 defendant's business, thereby threatening the defendant with bankruptcy;
- 5 c. exposing natural persons associated with a defendant's business to personal
6 liability for civil penalties, regardless of any limited liability structures, thereby
7 allowing plaintiffs' attorneys to threaten personal assets of individuals in
8 addition to the assets of the employer-business;
- 9 d. reserving court discretion to reduce the presumptive penalties until after trial,
10 thus forcing a defendant to "pay to play" for the hope that a trial court will
11 exercise its discretion under an ambiguous standard, which (if applied correctly)
12 makes the "functional penalty" in every PAGA case the absolute maximum that
13 the United States and California Constitutions will permit on the facts of each
14 individual case, which provides no meaningful notice to PAGA defendants of
15 what the penalties will be in their current or any future case;
- 16 e. exposing defendants to criminal or quasi-criminal levels of punishment that often
17 meet and exceed penalties assessed in felony cases, without any of the
18 procedural protections normally associated with criminal or quasi-criminal
19 proceedings, such as a burden of proof more demanding than a preponderance of
20 the evidence or a *mens rea* requirement;
- 21 f. delegating State executive power to individuals who have direct financial
22 incentives in the litigation and creating a paradigm that financially incentivizes
23 such individual to seek the maximum possible civil penalties on each defendant,
24 rather than require that they seek a "just" result, as is the case with State
25 prosecutors;
- 26 g. Punishing defendants who dare to defend PAGA allegations through the
27 application of a one-way fee-shifting statute that compounds the "pay to play"
28 situation, effectively requiring the typical defendant to pay the hundreds of

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

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

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

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

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

27 ///

28 ///

1 **FOURTH CAUSE OF ACTION**

2 (Violation of the United States Constitution's Fourteenth Amendment

3 Equal Protection of the Laws Guarantee)

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

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

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

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

13 171. As pleaded more fully above, the Private Attorneys General Act violates the
14 Fourteenth Amendment guarantee of equal protection because the California Legislature
15 recently, and without any rational basis, exempted the construction industry from the impact of
16 PAGA via the passage of Assem. Bill No. 1654, now codified in California Labor Code Section
17 2699.6. In so doing, the California Legislature has unconstitutionally denied Plaintiff's
18 members, and California employers not subject to the exemption, the equal protection of
19 California law.

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

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

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

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

13 **FIFTH CAUSE OF ACTION**

14 (Violation of California Constitution's Equal Protection Clause)

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

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

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

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

23 179. As pleaded more fully above, the Private Attorneys General Act violates the
24 California Constitution's guarantee of equal protection because the California Legislature
25 recently, and without any rational basis, exempted the construction industry from the impact of
26 PAGA via the passage of Assem. Bill No. 1654, now codified in California Labor Code Section
27 2699.6. In so doing, the California Legislature has unconstitutionally denied Plaintiff's
28 members, and California employers not subject to the exemption, the equal protection of

1 California law.

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

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

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

23 **PRAYER FOR RELIEF**

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

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

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

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

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

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

11
12 DATED: July 12, 2019

EPSTEIN, BECKER & GREEN, P.C.

13
14 By: 

15 Richard J. Frey
16 Robert H. Pepple
17 David M. Prager
18 Paul DeCamp
19 Attorneys for Plaintiff
20 California Business & Industrial Alliance
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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 **FIRST AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY**
7 **RELIEF**

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

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

13 *Attorneys for Defendant*
14 *Xavier Becerra*
15 *In his official capacity as the Attorney General of the*
16 *State of California*

- 17 5. a. ☐ By personal service. I personally delivered the documents on the date shown below to
18 the persons at the addresses listed above in item 4. (1) For a party represented by an attorney,
19 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.

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

- 22 1. ☐ deposited the sealed envelope with the United States Postal Service, with the
postage fully prepaid on the date shown below, or
23 2. ☒ placed the envelope for collection and mailing on the date shown below,
24 following our ordinary business practices. I am readily familiar with this
25 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.

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

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

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

- d. ☐ **By messenger service.** I served the documents on the date shown below by placing them in an envelope or package addressed to the person on the addresses listed in item 4 and providing them to a professional messenger service for service. (A declaration by the messenger must accompany this proof of service or be contained in the Declaration of Messenger below.)
- e. ☐ **By fax transmission.** Based on an agreement of the parties to accept service by fax transmission, I faxed the documents on the date shown below to the fax numbers of the persons listed in item 4. No error was reported by the fax machine that I used. A copy of the fax transmission, which I printed out, is attached.
- f. ☒ **By electronic service.** I caused the above-stated document(s) to be electronically served through the court's E-File Service Provider, One Legal, addressed to all parties appearing on the One Legal E-Service Recipients list for the above-entitled case. The "One Legal Order Receipt" page(s) will be maintained by our office. I did not receive, within a reasonable time after the E-Service transmission, any electronic message or other indication that the transmission was unsuccessful.

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

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

July 12, 2019

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)