S279137

IN THE SUPREME COURT OF CALIFORNIA

TAMELIN STONE ET AL.,
Plaintiffs and Appellants,
v.
ALAMEDA HEALTH SYSTEM,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL
FIRST APPELLATE DISTRICT, DIVISION FIVE
CASE NO. A164021

SUPERIOR COURT FOR ALAMEDA COUNTY
HON. NOEL WISE
CASE NO. RG21092734

APPLICATION OF BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER ALAMEDA HEALTH SYSTEM (CRC RULE 8.520(f))

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ATTORNEYS FOR AMICUS CURIAE
BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER ALAMEDA HEALTH SYSTEM

Board of Trustees of the California State University (CSU) is a public entity and one of the largest employers in California. CSU applies for leave to file the accompanying proposed amicus curiae brief in support of petitioner Alameda Health System pursuant to California Rules of Court, rule 8.520(f). The issues presented by this case under the Labor Code Private Attorneys General Act of 2004, Labor Code, § 2698 et seq. (PAGA) are of vital importance to CSU and all public employers in the state.

CSU is the nation's largest four-year public university. It has 23 campuses and eight off-campus centers, enrolls approximately 477,000 students, and employs nearly 56,000 faculty and staff. The 23 campuses span 800 miles from San Diego to Humboldt and differ in geography, size, budget, and administrative organization, amongst other variables. The campuses are unique, both in locale and subject matter expertise, with varying emphases, including farm and agriculture, maritime, life sciences, and teaching, among others. With over 1300 buildings—not including off-campus branches, laboratories, observatories, etc.—each campus is like a small city and operates similarly, with distinct governance, facility operations, police departments, and administrations to oversee students, faculty, and staff. CSU is governed by a 25-member Board of Trustees.

As both one of California's largest employers and a public entity, CSU is uniquely positioned to provide this Court with some insights into how PAGA cases impact a public entity and its ability to carry out its essential functions. CSU has faced a series of PAGA suits, some leading to appeals. These PAGA suits have often become expensive litigation quagmires, requiring CSU to incur millions in attorney fees. On top of its own fees, CSU has also been hit by millions more in statutory civil penalties and plaintiffs' attorney fee awards, all ultimately having to be paid by California taxpayers.

No party or counsel for any party in this case has authored any part of the proposed amicus brief. No person or entity other than CSU made any contribution intended to fund the preparation or submission of the proposed brief.

Respectfully submitted,

December 1, 2023

Complex Appellate Litigation Group LLP
Jens B. Koepke

By /s/ Jens B. Koepke
Jens B. Koepke

Attorneys for Amicus Curiae ***Board of Trustees of the California State University***

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INTRODUCTION

This Court should make explicit what is implicit in the Labor Code Private Attorneys General Act of 2004 (PAGA): The Legislature did *not* intend it to apply to public entities.

Statutory Construction of PAGA. The only term in PAGA that defines which employers are liable is "person" and the Legislature chose to use the Labor Code section 18 definition of "person," which does *not* include public entities. The statute's undefined use of "employer" and "violator," which could be seen as having a broader definition, cannot supersede the Legislature's express choice to use the narrower section 18 definition. This is particularly true given that this Court has held that public entities are not liable under general statutes, unless there is express language to include them.

Moreover, construing PAGA to cover public entities leads to the absurd result that Labor Code section 2699(h)—which prohibits a civil PAGA action against a "person" if the applicable government agency pursues statutory penalties against that "person"—would protect only private employers, not public employers (who are not "persons"). Having public employers face *greater* PAGA liability cannot have been the Legislature's aim.

The fact that in other parts of the Labor Code the Legislature expressly included public entities in the definition of employer or person further bolsters that this was not its intention in PAGA. Likewise, the Unfair Competition Law (UCL) does not cover public entities, and uses a definition of "person" almost identical to PAGA's. It makes no sense that public

entities would be subject to PAGA, but not UCL liability, given the Legislature's oft-stated assurances in PAGA's legislative history that it was not repeating the well-publicized problems of runaway UCL liability. Although PAGA's legislative history is largely silent, there are some compelling indications there that public entities were not PAGA's target, including this concern over UCL liability.

Furthermore, public policy is strongly behind the position of the Board of Trustees of the California State University (CSU). The legislative history indicates PAGA was passed to increase labor law enforcement against the growing, unaccountable underground economy in California by deputizing private citizens, and to thereby increase enforcement revenue for the labor agencies. Public entities (like CSU), by their very nature, cannot operate in the underground shadows. They are highly regulated and subject to strict public oversight and audit. And levying massive PAGA liability on public entities (which CSU has faced and is facing)—that ultimately must be paid from the General Fund—does not increase government enforcement revenue, but rather reduces it. In direct contrast, the reason that public entities are presumptively *not* liable under general statutes (like PAGA) is to protect the public treasury that these entities draw on to carry out their essential services, like being the largest university system in the state (and the country). The Legislature could not have intended PAGA and its liability to result in re-allocation of the policy-balancing decisions on how to fund various competing needs of state public entities.

Government Code section 818. Section 818 provides another path to arrive at the conclusion that PAGA was not intended to apply to public entities. It prohibits punitive-like civil penalties against public entities. This Court has explained that PAGA's civil penalties are not compensatory, but meant to punish the employer defendant and deter misconduct, and trial courts have full discretion to set the penalty amount. Under this Court's recent section 818 analytical framework laid out in *Los Angeles Unified School District v. Superior Court* (2023) 14 Cal.5th 758, 768 (*LAUSD*), PAGA's civil penalty regime is barred against public entities. And these PAGA penalties are no nominal slap on the wrist—in just one pending PAGA case the plaintiff is seeking some $200 million in civil penalties against CSU (on top of tens of millions in attorney fees).

As a public entity and one of the state's largest employers with years-long experience dealing with PAGA litigation, CSU is in a unique position to explain how and why PAGA, and its civil penalties, were not intended to apply, and should not apply, to public entities. Applying PAGA to public entities not only fails to further the statute's policy aims but also undercuts long-established law limiting public entities' liability, thereby protecting their ability to carry out their essential functions.

ARGUMENT

I. The Legislature Did Not Intend PAGA to Apply to Public Entities, Nor Does That Make Policy Sense.

A comprehensive statutory construction analysis of PAGA leads to one conclusion: The Legislature did not intend PAGA to apply to public entities.

A. Statutory construction principles.

This Court has laid out the "well-settled" principles of statutory construction:

> Our task is to discern the Legislature's intent. The statutory language itself is the most reliable indicator, so we start with the statute's words, assigning them their usual and ordinary meanings, and construing them in context. If the words themselves are not ambiguous, we presume the Legislature meant what it said, and the statute's plain meaning governs. On the other hand, if the language allows more than one reasonable construction, we may look to such aids as the legislative history of the measure and maxims of statutory construction. In cases of uncertain meaning, we may also consider the consequences of a particular interpretation, including its impact on public policy.

(*Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1190; see also *Mitchell v. United National Ins. Co.* (2005) 127 Cal.App.4th 457, 471 [if statutory language ambiguous, "we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public

policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part"].)

More recently, this Court explained that the "fundamental task" is "to determine the Legislature's intent so as to effectuate the law's purpose." (*LAUSD, supra*, 14 Cal.5th at p. 768, internal quotation marks omitted.) "We do not examine th[e] [statutory] language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment." (*Ibid.*)

B. The statutory language indicates that PAGA does not apply to public entities.

1. PAGA's applicable provisions refer to "person" and "employer," but only define "person" and do so in a way to exclude public entities.

When it comes to public entities, this Court has explained that a "traditional rule of statutory construction is that, absent express words to the contrary, governmental agencies are *not included* within the general words of a statute." (*Wells*, *supra*, 39 Cal.4th at p. 1192, emphasis added; accord *Sargent v. Board of Trustees of California State University* (2021) 61 Cal.App.5th 658, 672.)

Labor Code section 2699, the heart of PAGA, provides that for "any provision of [the Labor Code] that provides for a civil penalty," "aggrieved employee[s]" may bring a civil action for themselves and other current or former employees, but does not specify whom the aggrieved employee can sue. (Lab. Code, § 2699, subd. (a).) The statute defines "aggrieved employee" to be

"any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed," but does not define "violator." (*Id.*, subd. (c).) Subdivisions (d), (i), (j) and (k) use the term "employer," but that is not defined either. (*Id.*, subds. (d) & (i)-(k).)

Section 2699 also includes a default penalty prong that covers "provisions of [the Labor Code] except those for which a civil penalty is specifically provided," and sets different default monetary civil penalties based on whether the "person employs one or more employees." (*Id.*, subd. (f).) The statute does define "person" as having "the same meaning as defined in Section 18." (*Id.*, subd. (b).) Section 18 defines "person" to mean "any person, association, organization, partnership, business trust, limited liability company, or corporation." (Lab. Code, § 18.)

And, critically, the section 18 "person" definition does *not* encompass public entities, as it contains no words or phrases commonly used to signify government agencies or public entities. (See *Wells*, *supra*, 39 Cal.4th at pp. 1190-1191 & fn. 14, 1192; *Estate of Miller* (1936) 5 Cal.2d 588, 597.)

Thus, nothing in PAGA's statutory language expressly includes public entities. In contrast, the only relevant statutory language expressly references section 18, which excludes public entities.

PAGA's explicit use of the section 18 definition—as opposed to various broader statutory definitions—is compelling evidence that the Legislature intended to exclude public entities from PAGA liability. The statute's undefined use of "employer" and

"violator," which could be seen as having a broader definition, cannot supersede the Legislature's express choice to use the narrower section 18 definition.

2. Other Labor Code statutes support PAGA's inapplicability to public entities.

In contrast to PAGA, in Division 4 of the Labor Code covering workers' compensation, the Legislature explicitly broadened the definition of "person" to include a "public, quasi public, or private corporation," and created a definition of "employer" that expressly included the "State . . . each county, city, district . . . and public agencies therein." (Lab. Code, §§ 3210, 3300.) Similarly, in statutes concerning paid sick days and employment in civil air patrol, the Legislature explicitly defined "employer" to include the state and municipalities. (See Lab. Code, § 245.5, subd. (b) and § 1501, subd. (d).)

Thus, the Legislature knew how to indicate when Labor Code provisions should cover public entity "persons" or "employers," but chose not to do so in PAGA. (See *Mitchell*, *supra*, 127 Cal.App.4th at p. 472 ["Different statutes within the same code should be interpreted to be consistent."].)

As this Court has explained, "[t]he specific enumeration of [public] entities in one context, but not in the other, weighs heavily against a conclusion that the Legislature intended to include public [entities] as 'persons' exposed to [statutory] liability." (*Wells*, *supra*, 39 Cal.4th at p. 1190.)

Moreover, recently the Court of Appeal confirmed that the "Labor Code applies only to private sector employees unless a

Labor Code provision is 'specifically made applicable to public employees.' " (*Krug v. Board of Trustees of California State University* (2023) 94 Cal.App.5th 1158, 1164.) *Krug* ultimately concluded that nothing in the statutory language or legislative history could make the section 2802 expense reimbursement provision (and therefore also derivative PAGA liability) apply to CSU. (*Id*. at pp. 1166-1170.) Relying on this Court's *Wells* opinion, the court emphasized that " '[l]aws that divert limited educational funds from this core function are an obvious interference with the effective exercise' of sovereign power to provide public education." (*Id*. at p. 1167.)

3. Subdivision (h) of section 2699 will not make sense if PAGA includes public entities.

Subdivision (h) of section 2699 mandates that "[n]o action" can be brought by an aggrieved employee if the governing agency has cited a "person" on the same facts and theories as those stated by the aggrieved employee in her PAGA notice. (Lab. Code, § 2699, subd. (h).) Thus, a "person" cannot be sued under PAGA if that "person" was investigated and cited by the governing agency.

However, pursuant to subd. (b), public entities do not qualify as a "person." That being the case, subd. (h) would not apply to public entities. Consequently, if PAGA is construed as covering public entities, the bizarre result would be that public entities are subject to *greater* liability than private employers. Unlike private employers, public entities cited by the governing

agency would still be subject to a civil PAGA lawsuit and double jeopardy.

That is an absurd result, particularly given that there is no evidence PAGA was intended to cover public entities at all. Instead, if one construes PAGA as not covering public entities, the absurd result from the language of subsection (h) does not occur.[1]

Plaintiff Tamelin Stone's solution to this absurdity is to rely on broad comments in legislative history to suggest that subdivision (h) covers all violators, and thus includes public entities. (Stone Answer Brief at pp. 62-63.) But not only did the Legislature not use "violator" in subdivision (h), it never defined "violator" anyway. Instead, the Legislature used "person" in subdivision (h)—thus, this plain language controls.

4. The ambiguity in subdivision (a) of section 2699 can be explained.

Subsection (a) in PAGA is silent regarding to whom it applies. It does not use *any* term, whether "person," "employer" or "violator" to indicate against whom the aggrieved employee may bring a "civil action." (Lab. Code, § 2699, subd. (a).) Yet, in *Wells* this Court explained that as a matter of "statutory construction," public entities are presumed *not* to be included in a statute unless there are "express words" including them. (*Wells*,

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[1] The only place "person" is used in section 2699 other than subsection (f) is in the definition of "aggrieved employee" in subsection (c), but since that definition covers PAGA plaintiffs (not defendants), it is not helpful to the statutory construction analysis here. (See Lab. Code, § 2699, subd. (c).)

supra, 39 Cal.4th at p. 1192.) Subsection (a) does not have those express words. Statutory construction thus requires that this subsection be interpreted as *not* covering public entities.

Sargent's solution to this problem was simply to import the term "employer" into subsection (a). (*Sargent*, 61 Cal.App.5th at p. 671 [subsection (a) "broadly declares that any employer that is subject to a civil penalty . . . is subject to PAGA"].) And *Stone* cited and followed *Sargent* without doing any additional analysis. (*Stone v. Alameda Health System* (2023) 88 Cal.App.5th 84, 98.) But the Legislature did not actually include "employer" in subsection (a). Before public entities are exposed to wide-ranging penalty liability, it must be clear that the Legislature engaged in the policy balancing and *expressly chose* to place that substantial exposure on public entities.

In fact, in other employment-related statutes the Legislature has been explicit to distinguish the definitions of "person" and "employer." In the Fair Employment and Housing Act the definition of a "person" does not include public entities, but the definition of an "employer" does. (Compare Gov. Code, § 12925, subd. (d) ["person" defined] with *id.* § 12926, subd. (d) ["employer" defined]; see also *Wells*, *supra*, 39 Cal.4th at pp. 1190-1191.)

Subdivision (a)'s silence supports PAGA's exclusion of public entities for another reason: The underlying Labor Code provisions also do not apply to public employers unless the Legislature expressly makes them applicable. In ruling that a water storage district was exempt from certain wage and hour

statutes, the court held that "unless Labor Code provisions are specifically made applicable to public employers, they only apply to employers in the private sector." (*Johnson v. Arvin-Edison Water Storage Dist.* (2009) 174 Cal.App.4th 729, 733, 736.) *Johnson* relied on this Court's discussion about and quotation from the 1992 legislative history to a whistleblower statute in the Labor Code. (*Id.* at p. 736, citing and discussing *Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 330.) As *Johnson* concluded, this legislative history showed that the "Legislature has acknowledged that this [express inclusion] rule applies to the Labor Code." (*Johnson*, *supra*, 174 Cal.App.4th at p. 736.)

Subdivision (a) deals with underlying Labor Code provisions. The Legislature did not expressly say the new "civil action" in subdivision (a) could be brought against public entity employers. And there is no indication whatsoever that subdivision (a) was intended to re-write or amend the underlying Labor Code provisions regarding their inapplicability to public entities. As *Campbell* and *Johnson* explained, the Legislature was fully aware of the express inclusion rule when it enacted PAGA. And yet the Legislature chose not to specifically include public entities in subdivision (a).

5. The UCL uses a similar definition for "person" which excludes public entities. It makes no sense that PAGA liability would be broader.

A comparison to public entity liability under the UCL is useful. The UCL defines "person" to "include natural persons,

corporations, firms, partnerships, joint stock companies, associations and other organizations of persons." (Bus. & Prof. Code, § 17201.) This definition is almost the same as the one in section 18 of the Labor Code.

Not surprisingly, the courts have held that UCL liability does not extend to public entities, because of the way section 17201 defines "person." (*Community Memorial Hosp. v. County of Ventura* (1996) 50 Cal.App.4th 199, 203, 209-211 [county not a "person" under UCL]; *Tuchscher Dev. Enterps., Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1243-1244 ["a governmental entity . . . is not a 'person' within the meaning of [section 17201]."].)

It makes no sense that the Legislature intended PAGA liability to be broader than UCL liability—meaning extending to public entities—even though it used the same definition for "person" in both representative actions. This is particularly true since PAGA's legislative history has multiple references to ensuring that PAGA would not be subject to the "well-publicized" abuses of UCL liability. (Respondent's Motion for Judicial Notice (MJN), Exs. D-2 at pp. 3-4, D-4 at pp. 5-8, D-6 at pp. 5-6, D-7 at pp. 6-8.) Instead, that history said PAGA liability would be more limited and contained than UCL liability. (*Ibid.*) If the Legislature actually intended PAGA liability to be broader when it came to public entity employers, it would be odd that there would be no discussion in the legislative history that PAGA is different from the UCL, because it does cover public entity defendants.

C. The purpose of PAGA supports that it was not intended to apply to public entities.

This Court has described that PAGA's purpose was to aid enforcement of worker protections, particularly in California's large " ' "*underground economy*" ' " involving " 'businesses operating outside the state's tax and licensing requirements.' " (*Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 379, abrogated on other grounds by *Viking River Cruises, Inc. v. Moriana* (2022) 142 S.Ct. 1906, citation omitted, emphasis added.)

The Legislative Counsel's Digest to PAGA said the problem the statute was trying to fix is that "[a]dequate financing of essential labor law enforcement functions is necessary to achieve maximum compliance with state labor laws *in the underground economy* and to ensure an effective disincentive for employers to engage in unlawful anticompetitive business practices." (MJN, Ex. D-1 at p. 1, emphasis added.) The legislative sponsor's (Sen. Dunn) fact sheet, which was provided to the Legislature, said that with declining labor law enforcement, "the underground economy flourished," with estimates of state tax losses in excess of $100 billion, and the bill's co-sponsor (California Labor Federation) echoed that the bill would "attack the underground economy and enhance our state's revenues." (MJN, Ex. D-4 at p. 4.) The Senate Judiciary Committee's analysis also emphasized the need to enforce labor laws against the underground economy, and used the Los Angeles garment industry as a prime example, reporting that a study had

"estimated the existence of over 33,000 serious and ongoing wage violations by the city's garment industry." (MJN, Ex. D-4 at p. 2.)

Of course, public entities are not and have never been part of the "underground economy." By their very status as public entities, CSU and other public employers cannot exist in the shadow economy. Their employment practices are subject to direct legislative oversight and hearings, open meetings, public record act inquiries, and public audits.

Not surprisingly, in the thousands of pages of legislative history concerning the enactment of PAGA, there is not one word about needing to crack down on labor violations by public entities. That's because public entities were not the Legislature's target in passing PAGA.

D. PAGA's legislative history shows it was not intended to cover public entities.

PAGA's legislative history is largely silent regarding its application to public entities. But one bill change was made that strongly suggests the Legislature understood it was excluding public entities.

The original bill that became section 2699 had no definition for "person." The Senate Labor and Industrial Relations Committee staff cautioned that the terms "person" and "employer" are sometimes used interchangeably and can have broad and expansive definitions. (MJN, Ex. D-2 at p. 5.) For that reason, staff suggested that a specific definition for "person" be added, which was done. (See MJN, Exs. D-2 at p. 5, D-3 at p. 2.) That new definition imported the existing definition of "person"

from section 18. And that section 18 definition remained through at least five more rounds of statutory amendments. The fact that the Legislature chose to use the narrow definition in section 18 strongly suggests the Legislature understood it was excluding public entities.

Sargent pointed to comments in the legislative history that the statute would "allow employees to sue their employers" as evidence that PAGA was not limited to private employers. (*Sargent*, *supra*, 61 Cal.App.5th at pp. 673-674.) This reading of the legislative history ignores the fact that the Legislature defined "person" narrowly to exclude public entities. That patent legislative intent overrides an offhand reference to "employers" in the legislative history.

In addition, the August 20, 2003 Assembly Appropriations Committee report said that the "fiscal effect" of PAGA would be "[p]otential increased penalty revenue to the General Fund." (MJN, Ex. D-8 at p. 2.) If that Committee believed that public entities could be liable under PAGA and thus subject to monetary penalties—which ultimately would have to come from the General Fund—it would not have said PAGA's fiscal effect was increased revenue, but would have said the fiscal effect was neutral or unknown.

E. Public policy supports excluding public entities from PAGA's reach.

As this Court has explained, when construing whether a liability statute reaches public entities, part of the analysis is that statute's impact on the public treasury. (See *Wells*, *supra*,

39 Cal.4th at pp. 1193-1196.) That is why the *Wells* analysis is that financially-challenged public entities should not be subject to statutory monetary penalties without express consideration and inclusion by the Legislature. At a minimum, it is evident that the Legislature did not carefully debate whether PAGA would impact the public treasury and financially-challenged public entities, and then determine to expressly include them under PAGA's penumbra.

Indeed, construing PAGA to encompass public entities contradicts one of PAGA's purposes to raise sorely needed enforcement revenue to expand pursuit of Labor Code violations. Subjecting public entities to massive PAGA penalties and fee awards makes it harder (not easier) for the government to have the resources to enforce and prosecute violations.

And even if 75 percent of civil penalties go to the Labor and Workforce Development Agency (LWDA), they come out of the coffers of other public entities (like CSU), effectively shifting funding from one public entity to another. But it is the Legislature that ultimately sets the funding for CSU and LWDA (i.e., all state public entities), based on policy decisions on what essential public functions should take priority. It makes no sense that the Legislature could have intended that its policy-balancing funding decisions should instead be re-allocated through PAGA liability.

Yet the policy concern that *Wells* warned about has come true. In a recent public report by CSU's Sustainable Financial Model Workgroup, CSU reported that one of the nine highest

unfunded costs that the entire CSU system faces is PAGA liability. (CSU Committee on Finance, May 24, 2023, Agenda Item 5, pp. 76-78.)[2] And this unfunded PAGA liability, in part, drove CSU's Board of Trustees to make the contentious and unpopular decision to raise tuition for all CSU students. (See CSU Press Release, *CSU Board of Trustees Approves Multi-Year Tuition Proposal* (Sep. 13, 2023);[3] CSU posted information re: Multi-Year Tuition Increase.[4])

But this unfunded PAGA liability happened without express consideration and directive by the Legislature. Instead, all evidence points to the fact the Legislature never intended PAGA to be used against public entities like CSU.

F. Public entity employees are already robustly protected.

As already discussed, public entity employers were not the unregulated bosses in the underground shadow economy who regularly violated labor laws, which prompted the Legislature to pass PAGA. Instead, public entities like CSU operate in the open, subject to strict legislative and regulatory oversight.

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[2] https://www.calstate.edu/csu-system/board-of-trustees/past-meetings/2023/Documents/FIN-May-21-24-2023.pdf (as of Nov. 28, 2023)

[3] https://www.calstate.edu/csu-system/news/Pages/CSU-Board-of-Trustees-Approves-Multi-Year-Tuition-Proposal.aspx (as of Nov. 28, 2023)

[4] https://www.calstate.edu/attend/paying-for-college/tuition-increase (as of Nov. 28, 2023)

Moreover, public entity employees are not the defenseless, unprotected workers in the shadow economy. Instead, most public employees' worker rights are already robustly protected by MOU collective bargaining agreements or other contractual or statutory substantive and procedural due process protections.

CSU employs nearly 56,000 faculty and staff. More than 80 percent of these positions are classified in one of 14 bargaining units represented by 10 different unions. All 10 unions have or are currently negotiating to update collective bargaining agreements with CSU. (See CSU Annual Employee Profile (Fall 2022);[5] CSU posted information re: Collective Bargaining Agreements.[6]) Labor relations between CSU employers and employees are regulated by the Higher Education Employer-Employee Relations Act of 1979 (HEERA). (Gov. Code, § 3560 et seq.)

Indeed, CSU employees have many unique protections under the Education Code, Title 5 of the California Code of Regulations, as well as several CSU policies and complaint procedures. (See, e.g., Cal. Code Regs., tit. 5, § 42700 et seq.; CSU Policy EO 1115: Complaint Procedures for Protected Disclosure of Improper Governmental Activities and/or

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[5] https://www.calstate.edu/csu-system/faculty-staff/employee-profile/Documents/Fall2022CSUProfiles.pdf (as of Nov. 28, 2023)

[6] https://www.calstate.edu/csu-system/faculty-staff/labor-and-employee-relations/Pages/collective-bargaining-agreements.aspx (as of Nov. 28, 2023)

Significant Threats to Health or Safety;[7] CSU Policy EO 1116: Complaint Procedure for Allegations of Retaliation for Having Made a Protected Disclosure under the California Whistleblower Protection Act.[8])

Additionally, several state agencies enforce protections for CSU employees. For example, CSU is subject to HEERA, which is enforced by the Public Employment Relations Board, a quasi-judicial agency, which oversees labor relations between CSU and its unions. CSU employees who serve in a protected or confidential classification have the right to appeal adverse employment actions to the State Personnel Board (SPB). (Ed. Code, §§ 89538-89539.) The SPB was constitutionally created in 1934 to administer the civil service system and ensure that state employment is based on merit and free of political patronage. The SPB reviews disciplinary and merit related appeals. CSU employees may also file complaints with the State Auditor, which has authority to investigate any violation of state or federal law by CSU or any of its employees, significant waste or misuse of state resources and gross misconduct, incompetency, or inefficiency by a state employee. (Gov. Code, § 8546.1.)

Thus, if PAGA is construed not to cover public entity employers, those public employees will still enjoy wide-ranging procedural and substantive workplace protections.

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[7] https://calstate.policystat.com/policy/6741645/latest (as of Nov. 28, 2023)

[8] https://calstate.policystat.com/policy/6742050/latest (as of Nov. 28, 2023)

II. The Legislature's Prohibition Against Imposing Punitive-Type Penalties Against Public Entities Is an Alternative Reason that PAGA Should Not Apply to Public Entities.

A. Government Code section 818.

Section 818 mandates that "[n]otwithstanding any other provision of law, a public entity is not liable for damages awarded under Section 3294 of the Civil Code or *other damages* imposed primarily for the sake of example and by way of punishing the defendant." (Gov. Code, § 818, emphasis added.)

Although PAGA's civil monetary penalties and attorney fees are not punitive damages under section 3294, they do constitute "other damages imposed primarily" to punish the defendant.

B. The structure of PAGA's civil penalty regime.

PAGA does not provide for compensatory damages or punitive damages. But it allows aggrieved employees to pursue civil penalties on the State's behalf, which "provide recovery to the plaintiff beyond actual losses incurred." (*Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 80-81, 83.) Before PAGA, only the State could sue for statutory penalties provided for in the underlying Labor Code statutes and regulations. (*Id*. at pp. 80-81.)

Critically, this Court has distinguished civil penalties from damages:

> [D]amages and civil penalties have different purposes . . . . Damages are intended to be compensatory, to

> make one whole. Accordingly, there must be an injury to compensate. On the other hand, "Civil penalties, like punitive damages, are intended to punish the wrongdoer and to deter future misconduct." An act may be wrongful and subject to civil penalties even if it does not result in injury.

(*Id*. at p. 86, internal quotation marks omitted.)

Because PAGA's civil penalties are intended to punish defendants, section 818 should expressly prohibit their application to public entities.

C. Under this Court's *LAUSD* analysis, PAGA's civil penalty regime violates section 818.

Recently this Court re-examined how to analyze civil penalty recovery against public entities to determine whether they violate section 818. (See *LAUSD, supra*, 14 Cal.5th 758.) First, *LAUSD* disapproved previous decisions—some of which the *Stone* Court of Appeal relied on—which had construed the section 818 prohibition to apply only to damages or penalties that are " 'simply and solely punitive.' " (*Id.* at pp. 767, 773-776; compare *Stone*, *supra*, 88 Cal.App.5th at p. 99, quoting *Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 147-148.) *LAUSD* held that such a statutory construction ignored the second, "other damages" prong of section 818. (*LAUSD*, *supra*, 14 Cal.5th at pp. 775-776.)

Second, *LAUSD* summarized some "relevant considerations" to determine whether a statutory provision comes under the "other damages" prong. These include whether the provision (a) goes beyond compensatory damages, (b) is

conditioned on morally culpable conduct beyond negligence, (c) includes an element of discretion for the fact finder, and (d) whether actual damages are difficult to establish. (*Id*. at p. 773.) The ultimate question, however, remains whether the penalty/damages is being imposed primarily for the sake of example and by way of punishing defendant. (*Ibid*.)

In recognition that actual damages can sometimes be hard to prove, PAGA's civil penalties are wholly separate from compensatory damages and go beyond those necessary to compensate the plaintiff. The statute expressly gives the judge discretion to set the penalty amount. Further, this Court already confirmed that the civil penalties are intended to punish the violator and deter future misconduct. (See *Kim*, *supra*, 9 Cal.5th at p. 86.)

Thus, under *LAUSD,* PAGA civil penalties cannot be assessed against public entities. (*LAUSD*, *supra*, 14 Cal.5th at p. 773; see also *DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 398 [penalty in workers' compensation statutes regarding delay by government agency in paying worker benefits is barred, in part, by section 818].)

The *Stone* Court of Appeal suggested section 818 was inapplicable because PAGA civil penalties serve purposes different from punitive damages by providing " 'an economic incentive' and 'the means to retain counsel to pursue' " labor law violators. (*Stone*, *supra*, 88 Cal.App.5th at p. 99.) But that ignores the fact that PAGA already mandates an attorney fee

award to successful plaintiffs, providing all the necessary economic incentive and means. (Lab. Code, § 2699, subd. (g)(1).)

D. CSU's experience bears out the essentially punitive and financially burdensome nature of PAGA penalties and attorney fees.

This Court explained the policy underlying the section 818 prohibition, a key part of which is to protect the public treasury:

> [The statute] manifests an appreciation that when additional impositions upon a public entity are "primarily for the sake of example and by way of punishing the defendant", they further drain the public fisc, create a liability that will be borne not by the immediate wrongdoers but by taxpayers, and may not effectively achieve the goals of retribution and deterrence — and for these reasons, such awards should not be permitted, at least without a clear indication by the Legislature that they may be imposed.

(*LAUSD*, *supra*, 14 Cal.5th at p. 770, citation omitted; see also *Wells*, *supra*, 39 Cal.4th at p. 1196, fn. 20 [Section 818's purpose is "to protect [public entities'] tax-funded revenues from legal judgments in amounts beyond those strictly necessary to recompense the injured party"].)

CSU's experience bears out this Court's concern about imposing PAGA civil penalties on public entities. In one pending PAGA case against CSU involving purported health and safety violations at 21 of the 23 campuses, the plaintiff submitted a chart of 5,884 purported historical violations, claiming over $200 million in civil penalties. Plaintiff indicates he will also seek a multiplier based on the number of aggrieved employees per

violation. On top of this, the attorney fees plaintiff is seeking in this gargantuan PAGA case will run into the tens of millions of dollars.

Some $200 million in penalties can only be seen as punitive, especially on top of the additional millions in attorney fees. Equally importantly, when one aggregates the cost of potential civil penalties in multiple PAGA cases against public entities like CSU, the impact on the public treasury is undeniable.

As this Court has cautioned, "[t]he Legislature is aware of the stringent revenue, budget, and appropriations limitations affecting all agencies of government . . . . Given these conditions, we cannot lightly presume an intent to force such entities . . . to pay huge additional amounts, often into the pockets of outside parties. Such a diversion of limited taxpayer funds would interfere significantly with government agencies' fiscal ability to carry out their public missions." (*Wells*, *supra*, 39 Cal.4th at pp. 1195-1196.)

*** *** *** *** ***

Section 818 provides an alternative basis to show that the Legislature did not intend PAGA, and its civil penalty regime, to apply to public entities.

CONCLUSION

The Legislature never intended PAGA to apply to public entities. The only definition referring to a defendant in PAGA—"person"—does *not* include public entities. This is in stark contrast to other parts of the Labor Code, where the Legislature

chose to expressly include public entities. Moreover, exposing public entities to PAGA liability not only undercuts the statute's purpose, but finds no support in its legislative history.

This Court should take this opportunity to make explicit what the Legislature intended: Hold that PAGA's civil liability does not extend over public entities.

Respectfully submitted,

December 1, 2023

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