Case No. S279137

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

TAMELIN STONE, ET AL.
Plaintiffs and Appellants,

v.

ALAMEDA HEALTH SYSTEM,
Defendant and Respondent.

Application for Leave to File and Brief of Amicus Curiae California Employment Lawyers Association in Support of Plaintiffs and Appellants

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After Decision by the Court of Appeal for the First Appellate District,
Division Five, Case No. A164021

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There are no interested entities or persons who must be listed in this certificate under Cal. Rules of Court, rule 8.208(e)(3).

June 5, 2023 **STILLER LAW FIRM**

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to California Rules of Court, rule 8.520(f), the California Employment Lawyers Association ("CELA") respectfully requests leave to file the attached amicus curiae brief in support of plaintiffs and appellants, Tamelin Stone and Amanda Kunwar.

CELA is an organization of California attorneys whose members primarily represent employees in a wide range of employment cases, including individual, class, and representative actions under the California Labor Code. CELA has a substantial interest in protecting the constitutional and statutory rights of California workers and ensuring the vindication of the public policies embodied in California's employment laws. The organization has taken a leading role in advancing and protecting the rights of California workers, which has included submitting amicus briefs and letters and appearing before the California Supreme Court in employment rights cases such as *Dynamex Operations v. Superior Court* (2018) 4 Cal.5th 903, *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal. 4th 348, *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal. 4th 522, *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, and others.

CELA has an abiding interest in the development of California law to protect employees, including members of the public workforce. CELA and its members seek to ensure that

public employees enjoy the full benefit of labor protections intended for their protection.

The following proposed brief does not restate the same arguments made by the parties, but instead aims to assist the Court by discussing new and different authorities and lines of reasoning regarding the scope of the sovereign rights defense to Labor Code claims and PAGA's application to public workers.

CELA advocates broad application of worker protections and a narrow construction of the sovereignty canon in which public employers are only exempt from laws that conflict with their sovereign rights—not from all laws that would impact their functions. AHS's "purposes and functions" test amounts to a blanket exemption, contrary to legislative intent for the Labor Code to protect all workers, public and private. Similarly, the court should put to rest the notion that general laws presumptively exclude public workers. The Court has moved away from this historical rule in two cases, yet lower courts continue to apply it. California does not recognize a presumptive exemption of public workers from general laws, but instead exempts them from such laws that conflict with a statutory or constitutional grant of sovereignty.

Finally, CELA's brief adds to the parties' discussion of whether public entities are subject to the Labor Code's Private Attorneys General Act ("PAGA"). The brief contains citations and arguments supporting Stone and Kunwar's position that PAGA's text, history, and purpose evince an intent for the statute to cover public employees.

Pursuant to California Rules of Court, rule 8.520(f)(4), the amicus filing this brief affirms that no party or counsel for a party to this appeal authored any part of this proposed amicus brief. No person other than the proposed amicus and its counsel made any monetary contribution to the preparation or submission of this brief. For the reasons stated above, CELA respectfully requests leave to file the following proposed amicus brief.

June 5, 2023 **STILLER LAW FIRM**

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INTRODUCTION

California does not recognize a "public employer" exception to the Labor Code. While the Legislature lacks the power to create rules entrenching on sovereign rights, all public employers do not enjoy an exemption simply because they're public. Many courts have found that the Labor Code's employee-protective purpose extends to public workers. The legislative intent to protect public employees would become eroded, if not nullified, by AHS's proposal to carve out California's 800,000 public servants from generally applicable laws.

AHS's broad "purposes and functions" test, which would exempt public entities from general Labor Code provisions that impact their "governmental purposes and functions," amounts to a blanket exemption. By necessity, public employers carry out their functions through employees, so offering minimum labor protections decreases the budget for other work. Under AHS's standard, this fact makes all public entities exempt from general protections such as minimum wage, reimbursement requirements, and prohibitions on child labor.

The sovereignty canon has never gone this far to protect employers' "functions" over employee welfare. Instead, this Court has already struck a reasonable balance in cases like *Wells v. One2One Learning Foundation* and *City of Los Angeles v. City of San Fernando*, which exempt public entities from statutes that conflict with their sovereignty:

> [Where] no impairment of sovereign powers would result, the reason underlying [the

> sovereignty canon] ceases to exist and the Legislature may properly be held to have intended that [a] statute apply to governmental bodies even though it use[s] general statutory language.

(*City of Los Angeles v. City of San Fernando* ("*City of Los Angeles*") (1975) 14 Cal.3d 199, 277, disapproved on other grounds, 23 Cal.4th 1224.) To the extent the Court rules under the sovereignty canon, it should construe this doctrine narrowly, consistent with legislative intent for the Labor Code to *protect all workers*.

Finally, the Court should hold that public entities are subject to PAGA. The PAGA statute directly contemplates claims by public employees, and certain provisions within PAGA and other parts of the Labor Code would become meaningless under any other interpretation. PAGA's legislative history shows that policymakers anticipated expenditures by the state to defend PAGA claims by public employees. Applying PAGA to public entities will also serve the important policies underlying the statute by enhancing Labor Code enforcement in public workplaces.

ARGUMENT

A. The Court Should Reject the "Purposes and Functions" Test for Determining Whether General Labor Code Protections Extend to Public Workers

The Court should reject AHS's broad "purposes and functions" test for determining whether generally applicable Labor Code provisions apply to public workers. (See RBM at 23–

25.)[1] AHS's proposed rule exempts public entities from general Labor Code provisions that "interfere with their 'governmental purposes and functions.'" (RBM at 24, quoting *Johnson v. Arvin-Edison Water Storage Dist.* ("*Johnson*") (2009) 174 Cal.App.4th 729, 739; see also OBM at 30.) This standard confers a blanket exemption because complying with minimum labor standards necessarily decreases the budget for other public functions.

Instead of focusing on impairment of "functions," the Court should instead focus on impairment of "sovereignty" as it did in *City of Los Angeles* and *Wells*. Where "no impairment of sovereign powers would result, the reason underlying [the sovereignty canon] ceases to exist and the Legislature may properly be held to have intended that [a] statute apply to governmental bodies even though it use[s] general statutory language." (*City of Los Angeles, supra,* 14 Cal.3d at p. 277.) The Court should follow this long-established rule to construe the sovereign rights exemption narrowly, especially when it comes to Labor Code protections intended to benefit all workers.

1. The "Purposes and Functions" Test Strips Public Workers of Labor Code Protections Intended for Their Benefit

The Legislature's purpose in enacting the Labor Code was to protect workers, public and private. If public employers do not need to comply with general labor statutes that impair their

[1] The abbreviation "OBM" refers to AHS's Opening Brief on the Merits; "ABM" refers to Stone and Kunwar's Answer Brief on the Merits; and "RBM" refers to AHS's Reply Brief on the Merits.

functions, public employees will lose some of the Code's most important protections, contrary to legislative intent.

Many courts have found that the Labor Code's employee-protective purpose extends to public workers:

> in light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection.

(*Flowers v. Los Angeles County Metropolitan Transportation Authority* ("*Flowers*") (2015) 243 Cal.App.4th 66, 82 [internal quotations omitted]; *Marquez v. City of Long Beach* ("*Marquez*") (2019) 32 Cal.App.5th 552, 571 ["state wage and hour laws reflect the strong public policy favoring protection of workers' general welfare and society's interest in a stable job market."] [internal quotations omitted]; *Guerrero v. Superior Court* ("*Guerrero*") (2013) 213 Cal.App.4th 912, 953 ["[s]tatutes governing conditions of employment are construed broadly in favor of protecting employees"] [internal quotations omitted]; *Grier v. Alameda-Contra Costa Transit Dist.* ("*Grier*") (1976) 55 Cal.App.3d 325, 334 ["Labor Code section 2928 is part of what has been termed the 'established policy of our Legislature of protecting and promoting the right of a wage earner to all wages lawfully accrued to him.'"].)

To effectuate the Code's employee-protective purpose, courts have applied its general provisions to public workers unless doing so would be "inconstant with or otherwise create a

conflict" with the employer's sovereign powers. For example, a part-time employee in *Sheppard* sought minimum wage for unpaid time spent preparing for work. (*Sheppard v. North Orange County Regional Occupational Program* (2010) 191 Cal.App.4th 289, 308.) The employer school district association argued it was exempt from minimum wage under Education Code section 45025, which allowed it to "fix[] the compensation of part-time employees." (*Id.* at p. 296 fn. 3 & p. 298.) The court rejected this argument, finding that the employer

> has failed to show how imposing the minimum wage law as to its part-time instructors would be inconsistent with or otherwise create a conflict with any existing provision of the Education Code.

(*Id.* at p. 308.) This tracks similar cases applying the Labor Code and Wage Orders to public workers, all of whom help public employers achieve their "purposes and functions." (See *Guerrero, supra*, 213 Cal.App.4th at p. 955 [county and county-run public authority subject to general minimum wage law]; *Marquez, supra*, 32 Cal.App.5th at p. 569 [city subject to general minimum wage law].)

A judicially created exemption that would erode the Labor Code's remedial purpose should be narrowly construed, consistent with the narrow construction of express statutory exemptions from the Labor Code. "Under California law, exemptions from statutory mandatory overtime provisions are narrowly construed." (*Ramirez v. Yosemite Water Co., Inc.* (1999)

20 Cal.4th 785, 794; see also *Negri v. Koning & Associates* (2013) 216 Cal.App.4th 392, 396 ["Such exemptions are narrowly construed."].)

Contrary to such narrow exemptions, AHS argues that this Court should construe the sovereignty defense in the broadest possible terms. According to AHS, abiding by the Labor Code's overtime and break requirements would impair its ability to provide "cost-effective medical care," so it should not have to comply. (RBM at 24.) By the same token, it could argue that it will achieve greater cost-savings by paying employees $1.00 per hour or by utilizing child labor. (See Lab. Code §§ 1194, 1294.1.)[2] The sovereignty canon has never gone this far to protect employers' "functions" over employee welfare. To the extent the Court's opinion turns on the sovereignty canon, it should construe it narrowly, consistent with legislative intent for the Labor Code to protect all workers, public and private.

2. The Cases AHS Cites Support The "Sovereign Rights" Test, Not the Employer-Friendly "Purposes and Functions" Test

AHS's authorities do not support the broad "purposes and functions" rule. *Johnson* simply enforced a Water Code provision giving a water district the "power to set employees' compensation." (*Johnson, supra*, 174 Cal.App.4th at p. 734, citing Wat. Code §§ 40356, 43152, subd. (c); cf. RBM at 24–25.) Water Code section 40356 allows a water storage district to

[2] Unless otherwise noted, all statutory references are to the California Labor Code.

> fix the compensation to be paid to all . . . employees provided for in this division, to be paid out of the treasury of the district, except as otherwise provided by this division.

(Wat. Code § 40356.) Pursuant to this authority, the district complied with the federal Fair Labor Standards Act, which does not require employers to provide meal periods or daily overtime. (*Johnson, supra*, 174 Cal.App.4th at p. 734.) The employee in *Johnson* sought "compensation" for unpaid daily overtime and missed meal periods, which fell squarely within the district's enumerated powers. (*Johnson, supra*, 174 Cal.App.4th at p. 738–739.) This case stands for the proposition that public employers are not governed by general laws that *conflict* with their sovereign rights, and does not provide a blanket exemption from statutes that impact their functions.

AHS's other case, *Wood v. Kaiser Foundation Hospitals* (2023) 88 Cal.App.5th 742, 761, supports Stone and Kunwar's position. (RBM at 24.) *Wood* held that the general word "person" within Labor Code section 18 *can* include government entities because "nothing in section 18 expressly excludes" them. (*Wood, supra*, 88 Cal.App.5th at p. 761.) "As *Wells* recognized, government agencies are excluded from the operation of general statutory provisions only if their inclusion would result in an infringement upon sovereign governmental powers." (*Ibid.*, internal quotations omitted.)

> Where . . . no impairment of sovereign powers would result, the reason underlying [the sovereignty canon] ceases to exist and the Legislature may properly be held to have intended

> that the statute apply to governmental bodies even though it used general statutory language.

(*Id.* at p. 761, quoting *City of Los Angeles, supra,* 14 Cal.3d at p. 277 [requiring impairment of sovereign authority for sovereign rights canon to apply]; *Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1192 [same].) *Wood* thus supports the rule proposed by Stone and Kunwar that, absent a statutory carveout, public employers are exempt from statutes that infringe their sovereign powers, not from those that merely impact their functions. (See ABM at 19–28.)

In this vein, AHS is wrong that "every California court to apply *Wells*' sovereignty framework to public employers has asked whether the statute would interfere with their 'governmental purposes and functions.'" (ARB at 24.) *Flowers*, *Marquez*, *Guerrero*, *Grier*, and *Sheppard* all applied general Labor Code protections to public employees notwithstanding the impact that compliance might have on the employer's functions. (See *Flowers, supra,* 243 Cal.App.4th at p. 82; *Marquez, supra,* 32 Cal.App.5th at p. 571; *Guerrero, supra,* 213 Cal.App.4th at p. 953; *Grier, supra,* 55 Cal.App.3d at p. 334; *Sheppard, supra,* 191 Cal.App.4th at p. 308; see also DLSE Opn. Ltr. Apr. 25, 2001, available at https://www.dir.ca.gov/dlse/opinions/2001-04-25.pdf [finding that minimum wage laws "apply to the [California] State University . . . whether or not these laws are 'compatible with the [University's] mission and functions.'"].)

AHS incorrectly attempts to distinguish the minimum wage provisions in some of these cases, such as *Guerrero* and

Sheppard, by claiming that they do not construe generally applicable statutes, but instead involve "positive indicia of legislative intent to apply the specific wage and hour obligations at issue to public entities." (ARB at 24, fn. 3.) Not so. The minimum wage law at issue in *Guerrero* and *Sheppard* applies to "employers" generally—not to public employers specifically. The Wage Orders state that "*every employer* shall pay to each employee . . . not less than the applicable minimum wage for all hours worked." (E.g., Cal. Code Regs., tit. 8, § 11040, subd. 4, emphasis added.) The orders do not exempt public employers from this general requirement, just as the Labor Code does not include the provisions at issue here (sections 510, 512, and 1194) within its public-employer exemptions. (See Lab. Code §§ 213, 220.)

"[U]nless the wage order expressly exempts public agency employers from its coverage, they will be covered." (*Guerrero, supra,* 213 Cal.App.4th at p. 954). As other courts have found, general terms such as "[e]very employer" include public employers because "[t]he Legislature . . . knows how to create an exemption from the provisions of an IWC wage order when it intends to do so." (*Flowers, supra*, 243 Cal.App.4th at p. 80.)

Even cases that exempt employers under the sovereignty canon revolve around a conflict between the relevant Labor Code provision and the employer's sovereignty, not the mere impairment of the employer's functions. For instance, *In re Work Uniform Cases* (2005) 133 Cal.App.4th 328, 336, refused to apply Section 2802 to several public entities because of a broad grant of

sovereign immunity that AHS does not possess. That case involved claims by various public workers claiming that they are owed reimbursement for their uniforms. (*Id.* at p. 332.) Some workers were employed by the Regents and others by a charter city or county. (*Ibid.*) The court engaged in an exhaustive analysis of the scope of each entity's sovereign powers and found a conflict between those powers and Section 2802. (*Id.* at p. 345.) The cities and counties were exempt "by virtue of the constitutional powers granted to them to manage their own affairs" and the Regents "because of the[ir] unique constitutional status." (*Ibid.*) The California Constitution "limit[s] the power of the Legislature" to mandate employment regulations of these constitutional sovereigns. (*Work Uniform, supra,* 133 Cal.App.4th at p. 335.) AHS's rule reduces the *Work Uniform* analysis to dicta because—regardless of an employer's sovereignty—reimbursing expenses would impact its functions, making it exempt.

A narrow reading of the sovereignty canon also finds support in *Gomez v. Regents of University of California* (2021) 63 Cal.App.5th 386, 393, which exempted the Regents from minimum wage laws *not* because those laws would interfere with their mission, but because of a constitutional grant of sovereignty that AHS does not possess. *Gomez* turned on the University of California's status as a "constitutional public entity." (*Id.* at p. 400.) The Regents enjoy "general immunity from legislative regulation" based on a constitutional provision giving them "'full powers of organization and government." (*Id.* at p. 393, quoting Cal. Const., art. IX, § 9, subd. (a).)

The court distinguished two cases applying generally applicable Labor Code provisions to public entities that did not enjoy "constitutional immunity" like the Regents, and found that its sovereignty analysis would not apply to California State University as a non-sovereign entity. (*Id.* at p. 404, citing *Marquez v. City of Long Beach* (2019) 32 Cal.App.5th 552 and *Sheppard v. North Orange County Regional Occupational Program* (2010) 191 Cal.App.4th 289; see also *id.* at p. 404, fn. 17.) Again, AHS's rule reduces *Gomez* to dicta. If the Regents are exempt because paying minimum wage impacts their functions, *Gomez*'s sovereignty analysis was unnecessary.

As these cases show, California does not recognize a broad "purposes and functions" test to deprive public workers of minimum Labor Code protections intended for their benefit.

B. Courts Should Not Presume Public Workers Are Excluded from General Labor Code Provisions

For similar reasons, courts should not presume that all general statutory language excludes public entities. (See RBM at 21.) While specific inclusionary language sufficiently evidences an intent to cover public employers, the Legislature does not intend all general statutory language to exclude them.

1. Courts Have Rejected AHS's Proposed "Silence is Exclusion" Principle

AHS derives the "silence is exclusion" principle from dicta in *Campbell v. Regents of Univ. of California* (2005) 35 Cal.4th

311. (See RBM at 16, 29.) That case merely quoted a legislative analysis of a nonretaliation statute saying that, "[g]enerally, provisions of the Labor Code apply only to employees in the private sector unless they are specifically made applicable to public employees." (*Id.* at p. 330.) Other courts have recognized this as dicta by continuing to apply general statutes to public entities unless doing so would conflict with a grant of sovereignty. (See *Guerrero, supra,* 213 Cal.App.4th at p. 953 [applying wage laws to county and public services authority]; *Sheppard, supra,* 191 Cal.App.4th at p. 300 [applying minimum wage law to public educational program]; *Los Angeles Unified School Dist. v. Superior Court* (2007) 151 Cal.App.4th 759, 769 [deeming city to be a "person" eligible to request documents under the public records act].)

Just recently, the court in *Sargent* rejected a public employer's argument to make it "exempt from all laws of general application unless they expressly include" it. (*Sargent v. Board of Trustees of California State University* ("*Sargent*") (2021) 61 Cal.App.5th 658, 667.) That case involved a technician at a California State University campus who sought PAGA penalties for CSU's safety violations under Cal-OSHA. (*Sargent, supra*, 61 Cal.App.5th at p. 661.) PAGA does not specifically apply to CSU or public employees. (*Id.* at p. 667.) But the court rejected CSU's argument that the statute's silence implies an exemption. (*Ibid.*) It cited cases discussing the sovereignty principle but found no "legislative intent for CSU to be exempt from all laws of general application unless they expressly include CSU." (*Id.* at p. 667.)

The school has "long been an employer subject to these penalties [under the Labor Code] in actions brought by the Labor Agency." (*Id.* at p. 671.) While there was no dispute that the underlying Cal-OSHA provisions apply to CSU, PAGA's omission of an express reference to the school was insufficient to confer an exemption from that law. (*Ibid.*)

2. Labor Code Provisions Exempting Public Employers from General Statutory Requirements Would Become Surplusage if Those Employers Were Already Deemed Excluded

To be sure, there are a few examples of Labor Code provisions specifically applying to public workers, but these do not show an intent to exclude them from the Labor Code generally. "[T]he Labor Code . . . is . . . not a model of uniformity in its references to public employees." (*Sheppard, supra*, 191 Cal.App.4th 289, 307–308.) "Some sections expressly include public entities" (*ibid.*, citing Lab. Code §§ 432.7(a); 2808(a); 2809(a)), while "[o]ther sections expressly exclude public employees" (*ibid.*, citing Lab. Code §§ 220(a), 432.2(a)).

However, express inclusions can coexist with general inclusions. For example, some public employers enjoy statutory sovereignty from the Labor Code. It makes sense to specify that those entities are included in certain requirements that would otherwise not apply. (See, e.g., Lab. Code § 2800.2(b) [specifying that public hospitals notify employees of the right to continuing healthcare coverage]; see also Lab. Code §§ 512.1, 2800.2, 2806,

2807, 2808, and 2809.) But it makes no sense to imply a broad exclusion of public entities from the entire Labor Code, especially where the Legislature has specified the provisions from which it intends public employers to be exempt.

Additionally, many of the Labor Code's general provisions presume the government is included. These provisions would become superfluous or nonsensical if the broad exclusionary presumption AHS urges is applied. For instance, the Labor Code classifies "state employers" as subject to the general requirement to pay wages promptly upon discharge. Section 201(a) states that, "[i]f an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately." Subsection 201(b) sets forth rules by which "state employer[s]" may satisfy the generally applicable payment obligation: "the state employer shall be deemed to have made an immediate payment of wages under this section" if an employee elects to have the balance of unpaid wages paid into a state-sponsored retirement plan. (Lab. Code § 201(b).) If Section 201(a) excludes public employers, it would make no sense for Section 201(b) to provide for rules applicable to "state employer[s] . . . under this section." (See also Lab. Code § 201(c).) The same is true for Section 202, which mirrors Section 201 by adopting rules for "state employers" to satisfy the payment requirements applicable to employers generally.

Additionally, the Labor Code excludes public entities from many statutes applicable to "employers" generally, but these

exclusions would become surplusage if the term "employer" was already deemed to exclude them:

- Labor Code section 220(a) carves out "employees directly employed by the State of California" from the coverage of 14 otherwise generally applicable provisions. Many of these apply to "an employer," without naming the state or public entities. (See, e.g., Lab. Code §§ 203.1, 204(a), 205.)

- Section 220(b) makes sections 200–211, and 215–219 inapplicable to employees "directly employed by any county, incorporated city, or town, or other municipal corporation" even though many of these underlying provisions govern "employers" generally and do not expressly include public employers. (See, e.g., Lab. Code § 201 ["If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately."].)

- Section 213 carves out "counties, municipal corporations, quasi-municipal corporations, [and] school districts," from the coverage of Section 212, which prohibits issuing wage checks that cannot be cashed within the state and does not expressly include public entities. (Cf. Lab. Code §§ 212, 213.)

- Section 2755 provides that "the state, counties, and public authorities are not the employer or joint employer of any In-Home Supportive Services provider, except as explicitly set forth under state law."

Courts and state agencies have found these exemptions persuasive in applying general labor protections to public workers. In *Grier, supra*, 55 Cal.App.3d at p. 334, the court found

that, "[a]lthough public entities are exempted by statute from some code provisions relating to wages (e.g., Lab. Code, ss 213 subd. (b), 220)," Labor Code section 2924—a statute of general application—"has been applied to a public entity." Because the Labor Code's exemptions did not cover Section 2928, the *Grier* court applied this generally applicable statute to a public transit district. (*Ibid.*; see *Flowers, supra*, 243 Cal.App.4th at p. 81 [discussing *Grier*].)

Likewise, the California Division of Labor Standards Enforcement ("DLSE") has found that the Code's public-entity exclusions show an intent to bring those entities within the Labor Code's coverage *unless otherwise specified*. In its January 29, 2002 opinion letter, the DLSE addressed whether drivers for the Sacramento Regional Transit District ("RTD") must be compensated for time spent hitching a ride back to where they started their shifts at the end of the day. (DLSE Opn. Letter Jan. 29, 2002 at pp. 1–2, *available at* https://www.dir.ca.gov/dlse/opinions/2002-01-29.pdf.) The DLSE found that Labor Code sections 221–223 govern RTD's compensation requirements and that Section 220(b) "do[es] not make sections 221–223 inapplicable to public employers." (*Id.* at p. 322, fn. 5.)

> The fact that the Legislature expressly excluded these public employers from certain sections contained within this Chapter of the Code indicates an intent to make the remaining sections of the Chapter applicable to such public

> employers, unless the specific section provides an express exemption therefrom.

(*Ibid.*) The DLSE reasonably concluded that these carveouts must mean something. (See *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 ["'a construction making some words surplusage is to be avoided.' [Citation.]"].)

It's true that certain sections regarding employee health coverage apply to employers "public or private," but that does not show a presumption that other sections automatically exclude public employers. (See Lab. Code §§ 2800.2(b), 2806(a), 2807(a) and 2808.) There are different health insurance rules applicable to public and private employers, so it makes sense to specify that health coverage information applies to both. (See, e.g., 42 U.S.C. § 300bb.) Similarly, Labor Code section 555 expressly includes "cities which are cities and counties" in the requirement to offer rest days, but San Francisco is the only consolidated city-and-county in the state, so this could reasonably be interpreted as an effort to clarify San Francisco's unique status without signaling an intent to generally exclude public entities from the Labor Code. (Lab. Code § 555; see *Stitt v. San Francisco Mun. Transp. Agency* (N.D. Cal., Jan. 8, 2013, No. 12-CV-03704 YGR) 2013 WL 121259, at *4 [discussing whether San Francisco's home rule status precludes minimum wage].)

C. Public Entities are Subject to PAGA Penalties

1. PAGA Was Passed to Address California's Failure to Enforce its Own Labor Laws

"Before enactment of the PAGA in 2004, several statutes provided civil penalties for violations of the Labor Code." (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 378, 173 Cal.Rptr.3d 289, 308.) "The Labor Commissioner could bring an action to obtain such penalties, with the money going into the general fund or into a fund created by the [LWDA] for educating employers." (*Ibid.*; *see also* Cal. Labor Code § 98.) However, the sheer volume of Labor Code violations rendered this enforcement mechanism ineffective. (*Iskanian*, *supra*, 59 Cal.4th at 379.)

"The PAGA addressed two problems." (*Iskanian*, *supra*, 59 Cal.4th at 379.) First, the Legislature established civil penalties for Labor Code violations that previously had only criminal penalties attached to them. (*Ibid.*) Those criminal penalties were rarely enforced. (Amicus California Employment Lawyers' Association Request for Judicial Notice [hereafter "Amicus RFJN"] at Exhibit A, Sen. Judiciary Com., Analysis of Sen. Bill No. 796 (Reg.Sess. 2003–2004) as amended Apr. 22, 2003, p. 5 ["Since district attorneys tend to direct their resources to violent crimes and other public priorities, Labor Code violations rarely result in criminal investigations and prosecutions."].)

Second, the Legislature addressed the fact that, "even when statutes specified civil penalties, there was a shortage of

government resources to pursue enforcement."[3] (*Iskanian*, *supra*, 59 Cal.4th at 379.) The Legislature found that California's DIR "was failing to effectively enforce labor law violations." (*Ibid*.; *see also Arias v. Sup. Ct.* (*Angelo Dairy*) (2009) 46 Cal.4th 969, 980-81.) In the Legislature's own words:

> California has important worker protections in statute – some of the most stringent in the nation. However, these laws are meaningless if they are not enforced.
>
> Last year the Legislature and the governor acknowledged that we are unable to increase state enforcement and *we were unwilling to tell workers that the state will turn a blind eye to enforcing laws enacted to protect their safety and their earnings.* The law now allows the employee to seek redress directly where the state has not done so on the employee's behalf. That is why we enacted [PAGA] and it is still good policy today.

(Amicus RFJN Exhibit B, Assembly Jud. Com., Analysis of Sen. Bill No. 1809 (Reg. Sess. 2004-2005, As Amended May 26, 2004, p. 3 [emphasis added].)[4]

PAGA allows aggrieved employees "acting as private attorneys general" to recover civil penalties on behalf of the

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[3] The applicable legislative history for Senate Bill 796 is available at: http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200320040SB796 (last visited December 27, 2023).)

[4] The applicable legislative history regarding the 2004 amendment to PAGA is available at: http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200320040SB1809 (last visited December 27, 2023).

Labor Commissioner. (*Arias*, *supra*, 46 Cal.4th at 980-81 [PAGA plaintiffs are "essentially bringing a law enforcement action designed to protect the public."]; Labor Code § 2699(a), (f).) The Legislature understood that the State could not simply throw more money at enforcement, describing such a strategy as "an impossibility where a budgetary deficit exists." (Amicus RFJN Exhibit C, Senate Com. on Labor and Industrial Relations, Analysis of Sen. Bill No. 796 (Reg. Sess. 2003–2004) as amended March 26, 2003, p. 4.)

PAGA provides for two distinct forms of civil penalty. First, PAGA contains a "pre-existing" penalty provision, which states that, "any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency … may, as an alternative, be recovered through a civil action by an aggrieved employee" on behalf of themselves and other employees. (Cal. Labor Code § 2699(a).)

Second, PAGA permits aggrieved employees to recover "default" penalties for any Labor Code violations that do not contain a pre-existing penalty provision. (Cal. Labor Code § 2699(f) [default penalties of $100 per aggrieved employee during the first violative pay period and $200 per aggrieved employee in each subsequent violative pay period].) As this Court explained in *Iskanian*, the pre-existing enforcement scheme was grossly inadequate, and the Legislature determined that it needed to establish a new civil penalty scheme "significant enough to deter violations." (*Iskanian*, *supra*, 59 Cal.4th at 379; *see also Arias*, *supra*, 46 Cal.4th at 980-81.)

As detailed more fully below, the Legislature intended to apply both pre-existing and default penalties to public entities.

2. PAGA Unambiguously Applies to Public Entities

PAGA's plain language demonstrates that it unambiguously applies to public entities. Where statutory "language is clear, courts must generally follow its plain meaning," limiting the use of extrinsic aids to situations where "the statutory language permits more than one *reasonable* interpretation." (*Bruns v. E-Commerce Exchange, Inc.* ("*Bruns*") (2011) 51 Cal.4th 717, 724, [emphasis added]; accord, *Halbert's Lumber v. Lucky Stores* ("*Halbert's Lumber*") (1992) 6 Cal.App.4th 1233, 1239 ["If the meaning is without ambiguity …. There is nothing to 'interpret' or 'construe'"].)

Labor Code section 2699, itself, resolves any doubt concerning PAGA's applicability to public entities. For instance, Section 2699(f)(3), which concerns the default penalty provisions at issue in this case, states:

> If the alleged violation is a *failure to act* by the Labor and Workplace Development Agency ["LWDA"], or any of its departments, divisions, commissions, boards, agencies, or employees, there shall be *no civil penalty*.

(Emphasis added.) If, as AHS argues, all public agencies are exempt from PAGA liability, there would have been no reason to specifically exclude the LWDA and its affiliates—all of which are public entities—from the PAGA's default penalty provisions.

Other Labor Code sections likewise confirm that PAGA actions must be enforceable against public entities. For example, section 6434.5 requires Cal/OSHA civil or administrative *penalties assessed against public police and fire departments* to be deposited into the Workers' Compensation Administration Revolving Fund. But subsection (c) states,

> This section does not apply to that portion of any civil or administrative penalty that is distributed directly to an aggrieved employee or employees *pursuant to the provisions of Section 2699* [(PAGA)].

(§ 6434.5(c), emphasis added.) It would be absurd—in fact, meaningless—for the statute to exclude the 25% of PAGA penalties distributed directly to aggrieved employees if section 6434.5 (which specifically relates to penalties assessed against *public* police and fire departments) was not applicable to public entities.

Without ever dealing with this immutable statutory language, AHS throws various arguments against the wall hoping something might stick. Nothing does.

AHS begins by arguing that section 18's definition of the word "person" does not include public entities, thereby allegedly precluding PAGA's application to AHS. (Opening Brief ["OBM"] 65-70.) But AHS ignores other statutes and situations defining "person" in terms nearly identical to section 18 that courts have held *do include* public entities.

For example, in *State of California v. Marin Mun. W. Dist.*

(1941) 17 Cal.2d 699, 704, abrogation on other grounds recognized in *Doyle v. Bd. of Barber Examiners* (1963) 219 Cal.App.2d 504, 514–515, this Court held that the public entity *was subject* to a statute that defined "person" to include "any person, firm, partnership, association, corporation, organization, or business trust," with *no mention* of public entities. This language is nearly identical to PAGA's definition: "'Person' means any person, association, organization, partnership, business trust, limited liability company, or corporation." (§ 18.)

Meanwhile, the Unruh Act prohibits any "business establishment" from discriminating against any person on the basis of various protected characteristics. (Civ. Code, § 51.5.) Despite the absence of any reference to public entities anywhere in the statute, t.) Despite the absence of any reference to public entities anywhere in the statute, the court in *Los Angeles County Metropolitan Transportation Authority v. Sup. Ct.* ("LACMTA") (2004) 123 Cal.App.4th 261, 266–267, held that Unruh Act civil penalties are applicable to public entities, a holding this Court recently left undisturbed. (*See also Los Angeles Unified School District v. Sup. Ct.* (*Jane Doe*) (2023) 14 Cal.5th 758, 789-790 and fn. 12 [disapproving a portion of *LACMTA*'s reasoning while expressly declining to overturn its holding].)

But even if the definition of the word "person" in PAGA were susceptible to more than one meaning, the interpretation offered by AHS would still be unreasonable. When the word "person" is analyzed in context, as it must be, AHS's interpretation directly contradicts the foregoing language in

section 2699(f)(3) (expressly excluding one specific public entity from penalties that apply only to "persons" as defined by section 18) and section 6434.5(c) (expressly excluding the 25% of penalties distributed directly to aggrieved employees in PAGA actions against public police and fire agencies).

Both inside *and* outside the PAGA context, the Legislature has plainly used section 18's definition of "person" to refer to public entities. For example, Labor Code section 212 prohibits a "person," as defined by section 18, from issuing payroll checks in a non-negotiable form. Labor Code section 213 carves out several exceptions to this requirement, including exceptions for "counties, municipal corporations . . . [and] school districts."

Once again, these explicit exceptions for certain specified public entities would be improperly rendered null by the interpretation of "person" advanced by AHS. Inexplicably, the *Sargent* Court adopted this flawed interpretation, holding that default PAGA penalties are unavailable against public entities because section 18's definition of "person" purportedly does not encompass them. (*Sargent v. Board of Trustees of the California State University* (2021) 61 Cal.App.5th 658, 672-673.)

Sargent was decidedly wrong—the opinion improperly reads sections 213(b) and 2699(f)(3) out of the Labor Code altogether. The Court of Appeal in this action followed the erroneous holding in *Sargent*. (*Stone v. Alameda Health System* (2023) 88 Cal.App.5th 84, 98.)

This Court has repeatedly held that constructions that

render statutory language superfluous and void are improper and should be avoided. (*Woolsey v. State of California* (1992) 3 Cal.4th 758, 775-776; *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230.) Therefore, this Court should clarify the law by formally disapproving of *Sargent* and holding that PAGA's default penalty scheme unambiguously applies to public entities. This Court should remand this matter with instructions that the trial court permit Plaintiffs to pursue either type of penalty pursuant to PAGA.

3. PAGA's Legislative History Confirms the Intent to Apply the Statute to Public Employers

AHS seeks to create two castes of employees: (1) private employees who can feasibly enforce their Labor Code rights under PAGA and (2) public employees who cannot. In the absence of any statutory language or legislative history to this effect, AHS's argument is baseless and dangerous. The Legislature clearly intended that PAGA broaden the enforcement rights of all employees, including public sector workers, as demonstrated by its legislative history.

The Assembly Republican Bill Analysis for SB 796 recognized PAGA's applicability to public employers, noting that "this bill likely would result in major costs to state and local employers to defend lawsuits and pay increased penalties and attorneys' fees." (Amicus RFJN Exhibit D, Assembly Republican Bill Analysis dated Sept. 2, 2003, SB 796, at numbered p. 48 of the analysis.)

Further confirming that PAGA was understood to apply to all California workers no matter their employer, the American Federation of State, County, and Municipal Employees (AFSCME), the California Independent Public Employees Legislative Council (CIPELC) and the Peace Officers Research Association of California (PORAC) all supported PAGA's passage. (*See*, *e.g.*, Amicus RFJN Exhibit C, Senate Committee on Labor and Industrial Relations Bill Analysis, S.B. 796, April 9, 2003, at p. 7; Amicus RFJN Exhibit E, Assembly Committee on Labor and Employment Bill Analysis, S.B. 796, July 9, 2003, at p. 8.)

Moreover, the Legislature expressly considered public sector employees in addressing state enforcement of the Labor Code for all California employees, noting that: "California's enforcement agencies are responsible for protecting the legal rights of over 17 million California workers and regulating almost 800,000 private establishments, in addition to all the public sector workplaces in the state." (Amicus RFJN Exhibit E, Assembly Committee on Labor and Employment Bill Analysis, S.B. 796 Assem., Jul. 9, 2003, at p. 3.)

Additionally, the Legislature's use of the word "person" rather than "employer"—a drafting decision AHS heavily emphasizes—was intended "to provide a more expansive and comprehensive applicability than the term 'employer.'" (Amicus RFJN Exhibit C, Senate Committee on Labor and Industrial Relations Bill Analysis, S.B. 796 Sen., Apr. 9, 2003, at p. 4.) This expansive intent cannot be reconciled with the limiting definition AHS proposes.

That the Legislature expressed concern with rampant labor violations in the "underground economy" (*e.g.*, in the garment industry in Los Angeles), does not support the notion that PAGA was enacted exclusively to operate in particular industries or illegal settings—and no Court has limited PAGA's application in this manner. (*See Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, 507 [affirming PAGA liability against Starbucks Corporation]; *Flowers v. Los Angeles Cty Metropolitan Trans. Auth.* (2015) 243 Cal.App.4th 66, 86 [reversing demurer of plaintiff's PAGA claims against Los Angeles County Metropolitan Transportation Authority]; *Home Depot U.S.A., Inc. v. Superior Court* (2010) 191 Cal.App.4th 210, 215 [concluding that plaintiff stated a claim under PAGA against Home Depot]; *see also Lloyd v. County of Los Angeles* (2009) 172 Cal.App.4th 320, 332 [holding that plaintiff public employee was not required to exhaust internal administrative remedies before filing a PAGA action against public employer]; *Turner v. City and County of San Francisco* (N.D. Cal. 2012) 892 F.Supp.2d 1188, 1202 [same].)

Moreover, statutory language "is not to be regarded as modified by examples set forth in the legislative history. An example, after all, is just that: an illustration of a statute's operation in practice. It is not . . . a definitive interpretation of a statute's scope." (*Pension Ben. Guar. Corp. v. LTV Corp.* (1990) 496 U.S. 633, 649.)

Although PAGA's drafters did not limit the scope of the legislation to particular sectors or industries, they did place limits on PAGA's scope in light of the private attorney general

provision in the Unfair Competition Act, Bus. & Prof. Code Section 17200. Opponents worried the two statutes were too similar, and too employee friendly. (Amicus RFJN Exhibit E, Assembly Committee on Labor and Employment Bill Analysis, S.B. 796 Assem., Jul. 9, 2003, at p. 6-8.) For instance, as noted above, the Assembly Republican Bill Analysis included concerns that attorneys' fees paid by public employers would "result in major costs to state and local employers." (Amicus RFJN Exhibit D, Assembly Republican Bill Analysis dated Sept. 2, 2003, SB 796, at numbered p. 48 of the analysis.) However, the Legislature ultimately rejected those concerns, enacting legislation without first amending it to exempt public employers from the one-way attorney fee provision, or the applicability of any of the law's provisions.

PAGA's drafters strove to distinguish it from the Unfair Competition Act's private attorney general provision by: (1) allowing only aggrieved employees to bring PAGA actions, (2) permitting a PAGA plaintiff to sue "on behalf of himself or herself or others" rather than on behalf of the general public, (3) providing for relatively low civil penalties, and (4) preserving the LWDA's primacy over PAGA actions. (Amicus RFJN Exhibit A, Sen. Judiciary Com., Analysis of Sen. Bill No. 796, as amended Apr. 22, 2003, at p. 7- 8.) Senator Dunn's letter to Governor Davis further expressed proponents' reassurances that SB 796 contained significant employer protections when compared with the Unfair Competition Act, noting that in addition to the above protections, reviewing judges had discretion to adjust a

disproportionate civil penalty. (Amicus RFJN Exhibit F, Dunn Letter, at p. 2.)

The Legislature addressed these concerns further after PAGA's enactment. The year after PAGA was passed, the Legislature amended the statute in response to concerns that PAGA could be abused "in the same manner in which [the Unfair Competition Act] has been abused." (Amicus RFJN Exhibit G, Assembly Committee on Appropriations Bill Analysis, as amended July 27, 2004, S.B. 1809, at p. 5.)

Consequently, PAGA was amended to include "specified procedural and administrative requirements that must be met prior to bringing a private action to recover civil penalties" and expanded judicial review of settlement agreements under PAGA. (Amicus RFJN Exhibit G, Assembly Committee on Appropriations Bill Analysis, as amended July 27, 2004, S.B. 1809, at p. 5.) Once again, there was no discussion of narrowing PAGA's scope to particular sectors or employers.

4. Public Policy Favors the Application of PAGA to Public Employees

"[I]n light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection." (*Ramirez v. Yosemite Water Co., Inc.* (1999) 20 Cal.4th 785, 796 [internal quotations and citations omitted].) AHS seeks to exempt itself from this enforcement

scheme by interpreting the Labor Code's protections narrowly. This interpretation does not comport with the scope of the Labor Code.

Despite the breadth of the Labor Code's protections, they are meaningless without a robust enforcement mechanism. As noted by the Legislature, such enforcement mechanisms were vastly insufficient to combat Labor Code violations in the years preceding PAGA's enactment in 2003. (Amicus RFJN Exhibit E, Assembly Committee on Labor and Employment Bill Analysis, S.B. 796, July 9, 2003, at pp. 3-4.) Although California had been providing additional funding to labor enforcement divisions since 1998, state agencies lacked sufficient resources to enforce the Labor Code. (Amicus RFJN Exhibit A, Sen. Judiciary Com., Analysis of Sen. Bill No. 796, as amended Apr. 22, 2003, at pp. 1-2.)

For example, between 1980 and 2000, California's workforce grew by 48 percent while Cal/OSHA's budgetary resources actually decreased by 14 percent. (Amicus RFJN Exhibit E, Assembly Committee on Labor and Employment Bill Analysis, S.B. 796, July 9, 2003, at pp. 3-4.) Noncompliance rates remained inordinately high in many industries. (*See* Amicus RFJN Exhibit H, Bar-Cohen, Limor & Deana Milam Carillo, *Labor Law Enforcement in California, 1970-2000*, THE STATE OF CALIFORNIA LABOR (2002) at numbered page 136.[5])

Against this backdrop, in 2003 the Legislature sought to

[5] Available at: https://escholarship.org/uc/item/59c025gh (last visited on December 28, 2023).

address underenforcement of the Labor Code. The Legislature expressly stated that: "[S]taffing levels for state labor law enforcement agencies have, in general, declined over the last decade and are likely to fail to keep up with the growth of the labor market in the future." (Amicus RFJN Exhibit C, Senate Com. on Labor and Industrial Relations, Analysis of Sen. Bill No. 796 (Reg.Sess. 2003–2004) as amended March 26, 2003, at p. 4.)

PAGA's sponsors further argued that:

> [P]rivate actions to enforce the Labor Code are needed because LWDA simply does not have the resources to pursue all of the labor violations occurring in the garment industry, agriculture, and other industries. The bill would authorize[] civil penalties for any Labor Code violation currently lacking a specific penalty provision and authorizes aggrieved employees to bring private civil actions against employers.

(*Home Depot*, *supra*, 191 Cal.App.4th at 223-24 [citing legislative history] [internal citations omitted]. *See also Iskanian*, *supra*, 59 Cal.4th at 378–79 [citing legislative history, stating "resources dedicated to labor law enforcement have not kept pace with the growth of the economy in California."].)

Accordingly, the Legislature enacted PAGA, and included a one-way fee shifting provision, to encourage individual employees to enforce the Labor Code on the state's behalf. (Amicus RFJN Exhibit A, Sen. Judiciary Com., Analysis of Sen. Bill No. 796, as amended Apr. 22, 2003, at p. 2 ["This bill would propose to augment to the LWDA's civil enforcement efforts by allowing employees to sue employers for civil penalties for labor law

violations, and to collect attorneys' fees and a portion for the penalties upon prevailing in these actions . . ."].)

In *Arias*, this Court explained:

> The Legislature declared that adequate financing of labor law enforcement was necessary to achieve maximum compliance with state labor laws, that staffing levels for labor law enforcement agencies had declined and were unlikely to keep pace with the future growth of the labor market, and that it was therefore in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations.

(*Arias*, *supra*, 46 Cal.4th at 929; *see also, e.g.*, discussing PAGA's purpose, *Carrington*, *supra*, 30 Cal.App.5th at 519 ["To enhance the enforcement of the labor laws, the Legislature enacted PAGA in 2003."] [internal quotation and citation omitted]; *Huff v. Securitas Security Servs. USA, Inc.* (2018) 23 Cal.App.5th 745, 752-53, 756, 761 ["the Legislature . . . enacted PAGA as a way to encourage private parties to pursue Labor Code violations, relieving pressure on overburdened state agencies and achieving maximum compliance with labor laws."]; *Raines v. Coastal Pacific Food Dist. Inc.* (2018) 23 Cal.App.5th 667, 673-74 ["The Legislature adopted PAGA to address the shortage of government resources to enforce labor laws. The solution was to permit an aggrieved employee to bring an action personally and on behalf of other current or former employees to recover civil penalties."]; *Flowers*, 243 Cal.App.4th at 86 ["To enhance the enforcement of the labor laws, the Legislature enacted the Labor Code Private

Attorneys General Act."] [internal quotations, alterations, and citation omitted]; *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 499 ["The PAGA attempted to remedy the understaffing of California's labor law enforcement agencies by granting employees the authority to bring civil actions against their employers for Labor Code violations." (Internal quotations and citations omitted)].) PAGA was intended to remedy underenforcement of the Labor Code as to *all employees*, including public employees, not merely to stave off the so-called "underground economy" that exemplified the problem.

Enforcement agency resources continued to stagnate after PAGA's enactment. In 2004, the Legislature lamented that "the budget picture is even worse" for the LWDA, concluding that it was "still good policy" to "allow[] employees to seek redress directly when the state has not done so on their behalf." (Amicus RFJN Exhibit I, Senate Committee on Labor and Industrial Relations Bill Analysis, as amended April 12, 2004, S.B. 1809, at p. 2). Although the Assembly Committee on Appropriations sought to amend PAGA in employers' favor by requiring prospective plaintiffs to exhaust their remedies with the LWDA before bringing a PAGA action, the Committee did not consider limiting PAGA's coverage to certain types of employers. (Amicus RFJN Exhibit G, Assembly Committee on Appropriations Bill Analysis, as amended July 27, 2004, S.B. 1809.)

Today, the state's enforcement efforts remain comically under-resourced and ineffective, despite its best efforts. California's 14 million workers are working for more than 1.2

million distinct employers. (Amicus RFJN Exhibit J [labor market info published by the Employment Development Department].) Meanwhile, in the most recent fiscal year for which data is available, the Labor Commissioner's Bureau of Field Enforcement conducted a mere 492 inspections, leaving millions of workers without an effective remedy through no fault of the agency itself. (Amicus RFJN Exhibit K, Labor Commissioner, *2020–2021 Fiscal Year Report on the Effectiveness of the Bureau of Field Enforcement*, CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, https://www.dir.ca.gov/dlse/BOFE_LegReport2021.pdf [last visited December 27, 2023] ["2021 BOFE Report"], at p. 3.)

PAGA was enacted to supply that remedy, and as a matter of sound public policy it must be applied to the protection of public and private sector workers alike. This is especially important if California hopes to attract and retain dedicated and talented professionals into public service in the future.

5. Government Code Section 818 Does Not Apply to Civil Penalties

AHS argues that "[s]tate law prohibits exemplary and punitive damages against public entities. . . ." (RBM at p. 40.) Government Code section 818 states 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."

In *Younger*, this Court held that Section 818 had no applicability to statutory civil penalties imposed pursuant to the Water Code. (*People ex rel. Younger v. Sup. Ct.* ("*Younger*") (1976) 16 Cal.3d 30, 38-39.) *Younger* reasoned that Section 818 applies only to remedies that are "solely" and "simply" punitive, distinguishing remedies that also fulfill "legitimate and fully justified compensatory functions," which are exempt from Section 818. (*Ibid*; *see also San Francisco Civil Service Assn. v. Sup. Ct.* (1976) 16 Cal.3d 46 [accord].) In *Younger*, the statutory civil penalties at issue fell within the latter category because they were designed to compensate the State for the "unquantifiable" harm caused by oil spills. (*Ibid*; *see also San Francisco Civil Service Assn. v. Sup. Ct.* (1976) 16 Cal.3d 46 [accord].)

In *Kizer*, this Court went further, holding that "the Tort Claims Act in general, and Government Code section 818 in particular," do not apply to statutory civil penalty claims because they are not "tort" remedies at all. (*Kizer v. County of San Mateo* ("*Kizer*") (1991) 53 Cal.3d 139, 141-146.) Rather, the "primary purpose" of civil penalties is "to secure obedience to statutes and regulations imposed to assure important public policy objectives." (*Id.* at 147-148.)

Unlike tort damages, civil penalties "require no showing of actual harm per se," they are "imposed according to a range set by statute irrespective of actual damage suffered," and they "require no showing of malfeasance or intent to injure." (*Kizer*, *supra*, 53 Cal.3d at 147.)

Notably, *Kizer* emphasized the dangers of applying Section

818 to civil penalties under the Long-Term Care, Health, Safety, and Security Act. (*Kizer*, *supra*, 53 Cal.3d at 148.) This Court astutely found that applying Section 818 to the civil penalty scheme would create a "two-tiered system of enforcement" that rendered private sector hospitals "subject to statutory fines" while immunizing public hospitals from those same fines, which in turn would "contradict the very public policy that the Legislature sought to implement with the citation and penalty provisions of the Act." (*Ibid.*) All of these concerns apply equally to PAGA and its penalty scheme.

The *LACMTA* Court followed *Younger*, *Kizer*, and their progeny, holding that Section 818 does not bar civil penalties imposed pursuant to the Unruh Act. (*LACMTA*, *supra*, 123 Cal.App.4th 261, 266-276.) Once again, the Court emphasized that "there are distinctions to be drawn between *punitive* damages and civil penalties." (*Id.* at 275 [original emphasis].) Civil penalties "do more than punish," and they are "mandatory once liability is established" while "punitive damages are awarded at the factfinder's discretion only, upon proof of fraud, oppression, or malice." (*Id.* at 275-276.) Where, as here, "the amount of the civil penalty is set, the problem of limitless jury discretion is eliminated" and "meaningful evidence of defendant's financial condition" is not required. (*Id.* at 276.)

AHS invites this Court to ignore these dispositive cases based upon its recent *LAUSD* opinion, boldly representing to the Court that this new opinion "overruled the *Kizer* test upon which *LACMTA* and the decision below rested." (*Los Angeles Unified*

School District v. Superior Court ("*LAUSD*") (2023) 14 Cal.5th 758*LAUSD*, *supra*, 14 Cal.5th at 769; OBM 75.) This is a half-truth: *LAUSD* overruled *Younger* and its progeny, but only "insofar as these decisions articulate a standard whereby the section 818 inquiry hinges on whether a damages provision is deemed simply and solely, or simply or solely, punitive." (*Id.* at 775.)

This Court then replaced the *Younger* "simply or solely punitive" standard with a new test that is both clearer and hews more closely to the actual language of the statute. (*LAUSD*, *supra*, 14 Cal.5th at 775-776.) Following *LAUSD*, the test under Section 818 is now "whether damages would be awarded under Civil Code section 3294 or would otherwise be 'imposed primarily for the sake of example and by way of punishing the defendant' (Gov. Code, § 818) such that they would function, in essence, as punitive or exemplary damages." (*Ibid.*)

This Court expressly refused to overrule *any* other aspect of *Kizer* and *LACMTA*:

> We note that portions of [LACMTA] relied heavily on our characterization of section 818 as concerned exclusively with damages that are "simply and solely punitive" (*San Francisco Civil Service Assn., supra*, 16 Cal.3d at 50, 127 Cal.Rptr. 131, 544 P.2d 1331; *Younger, supra*, 16 Cal.3d at p. 39, 127 Cal.Rptr. 122, 544 P.2d 1322) or "simply or solely punitive" (*Kizer, supra*, 53 Cal.3d at p. 145, 279 Cal.Rptr. 318, 806 P.2d 1353), an understanding of the statute that we have rejected today. (*[LACMTA]* at pp. 272-275, 20 Cal.Rptr.3d 92.)

> ....
>
> Although such reliance on *Younger* and its progeny is no longer permitted, *we do not believe it necessary to review the reasoning of these decisions beyond what we have discussed in the main text*.

(*LAUSD*, *supra*, 14 Cal.5th at fn. 12 [emphasis added].)

As noted above, *Kizer* and *LACMTA* went beyond *Younger*'s now-repudiated "solely or simply punitive" test, holding further that statutory civil penalties are not tort remedies governed by the Tort Claims Act in any way. (*Kizer*, *supra*, 53 Cal.3d at 141–146; *LACMTA*, *supra*, 123 Cal.App.4th at 273-274.) *LAUSD* expressly declined to disturb this rationale and holding, which remains good law. (*LAUSD*, *supra*, 14 Cal.5th at 787-790 and fn. 12.)

Indeed, *LAUSD* cited with approval *Kizer*'s discourse on the many distinctions between civil penalties and punitive damages, noting that the opinion exemplifies the type of analysis that the new Section 818 test will require. (*LAUSD*, *supra*, 14 Cal.5th at 773 ["These decisions [including *Kizer*], read together, establish that Section 818 requires a fact-specific inquiry concerning the damages provision or principle being applied."].)

Moreover, both *Kizer* and *LACMTA* explained the many "fact-specific" distinctions between civil penalties and punitive damages, including the fact that: (1) civil penalties are mandatory rather than discretionary upon a finding of liability; (2) civil penalties are imposed irrespective of intent; (3) civil penalties compensate the State and/or victims for what are

difficult to quantify or "unquantifiable" harms—to wit, the harm of having one's statutory and regulatory rights violated even in the absence of actual injury; and (4) civil penalties are fixed in amount by statute or regulation without regard to Defendant's financial condition, thereby avoiding the danger of runaway jurors awarding limitless "punitive" damages against a public entity. (*Kizer*, *supra*, 53 Cal.3d 139, 146-148; *LACMTA*, *supra*, 123 Cal.App.4th at 271-276.)

LAUSD expressly adopted these factors as part of its new "primarily for the sake of example and by way of punishing the defendant" test for application of Section 818. (*LAUSD*, *supra*, 14 Cal.5th at 773.) As *LAUSD* explained, the test is now a multi-factor balancing test in all but the most "extreme" and "easily determined" cases (*e.g.*, literal punitive damages under Civil Code section 3294):

> [R]elevant considerations may include, without limitation, whether the damages involved go beyond those necessary to fully compensate the plaintiff; whether a damages remedy functions to offset some otherwise applicable restriction on compensatory damages; whether the challenged form of damages is conditioned on morally culpable conduct, beyond mere negligence; whether there is an element of discretion by the fact finder in the award of damages; and whether in the normal course actual damages are likely to be difficult to establish or quantify. Whenever this inquiry occurs, the ultimate question remains whether, by virtue of being imposed "primarily for the sake of example and by way of punishing the defendant" (§ 818), the

> damages before the court function, in essence, as a form of punitive or exemplary damages.

(*LAUSD*, *supra*, 14 Cal.5th at 773 [citations omitted].) *LAUSD* explicitly cited *Kizer* as support for these factors.

These same factors were thoroughly applied by this Court in *Kizer*, which concluded: "While the civil penalties may have a punitive or deterrent aspect, their primary purpose is to secure obedience to statutes and regulations imposed to assure important public policy objectives." (*Kizer*, *supra*, 53 Cal.3d at 147-148.) The *LACMTA* court also applied these factors, reaching the same conclusion. (*LACMTA*, *supra*, 123 Cal.App.4th at 271-276.)

LAUSD then adopted *Kizer*'s "fact-specific" factors for its new Section 818 test, before confirming that *LACMTA*'s holding was fully consistent with the new test. (*LAUSD*, *supra*, 14 Cal.5th at 789–790 ["To summarize, due to differences in the issues they involved, the statutes they interpreted, and the prominence and plausibility of the nonpunitive rationales they considered, the Court of Appeal decisions described above neither conflict with our holding today nor suggest that we should interpret or apply section 818 differently than we have."]

LAUSD nevertheless contends that PAGA's emphasis on "deterrence" implicates Section 818, improperly conflating the public policy of enforcing regulations with the concept of punishing a wrongdoer. As *Kizer* noted, civil penalties are imposed irrespective of intent or harm precisely because they are fixed amount remedies intended to be "preventive" and to "secure

obedience to statutes and regulations" *before* any actual harm has occurred. (*Kizer*, *supra*, 53 Cal.3d at 147–148.)

This is the exact opposite of remedies that seek to "punish" or make an "example" out of the wrongdoer with limitless damages *after* they have maliciously, oppressively, or fraudulently injured another person—the only type of remedy that Section 818 proscribes. (Gov't. Code § 818; *LAUSD*, *supra*, 14 Cal.5th at 773 ["…the ultimate question remains whether, by virtue of being imposed "primarily for the sake of example and by way of punishing the defendant" (§ 818)"].)

AHS's final Section 818 argument is perhaps its most misguided. AHS contends that the absence of a punitive damages provision in PAGA indicates that its civil penalties are punitive in nature. Notably, this factor is *not* listed amongst the "relevant considerations" set forth in *LAUSD*'s new test for Section 818's applicability. (*LAUSD*, *supra*, 14 Cal.5th at 773.) Moreover, as *Kizer* and *LACMTA* already found, the factors involved in the test all weigh in favor of treating civil penalties as immune from the provisions of the Tort Claim Act.

Nevertheless, AHS is correct that the *LAUSD* opinion cited the Unruh Act's punitive damages as one of its bases for distinguishing, but notably *not* overruling, *LACMTA*'s holding. (*LAUSD*, *supra*, 14 Cal.5th at 789.) AHS simply misreads this language from *LAUSD* and *LACMTA*, which merely confirms that the presence of both remedies in the same statute (the Unruh Act) demonstrates that the Legislature understands civil penalties and punitive damages to be distinct remedies serving

distinct purposes. (*LAUSD*, *supra*, 14 Cal.5th at 789; *LACMTA*, *supra*, 123 Cal.App.4th at 267 ["Plainly, the Legislature regarded these as *separate* remedies."].)

Neither opinion stands for the proposition that a civil penalty suddenly becomes "punitive" merely because the Legislature chooses not to attach a separate punitive damages provision to the same regulated conduct. Rather, that would tend to indicate only that the Legislature intended for a particular statutory scheme to carry no "punishment" whatsoever. In other words, the Legislature has every right to implement exclusively non-punitive remedies, like civil penalties, in a particular statute. Doing so does not magically convert those otherwise non-punitive penalties into a form of "punishment."

Respecting PAGA specifically, it is utterly nonsensical for AHS to claim that the statute "lacks" a punitive damages provision. (See OBM at pp. 75-76.) PAGA is not a substantive statute in and of itself, but rather it creates a new procedural mechanism for enforcing every other provision of the Labor Code through the collection of civil penalties, a mechanism that is expressly layered *on top of* all the remedies already set forth elsewhere. (Labor Code § 2699(a), (f), (g)(1) ["Nothing in this part shall operate to limit an employee's right to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part."].)

There are, indeed, Labor Code provisions that create distinct civil penalty *and* punitive damage remedies for the same

unlawful conduct. (*See*, *e.g.*, Labor Code § 1102.5(f) [authorizing civil penalty for whistleblower retaliation], 1105 [authorizing civil action for damages, including punitive damages, brought by retaliation victim].) For example, PAGA authorizes a civil action to enforce the civil penalty set forth in section 1102.5(f), which is often pursued concurrently with the punitive damages remedy authorized by section 1105. Once again, these Labor Code provisions demonstrate that the Legislature views these remedies as distinct from one another.

This Court should not accept AHS's invitation to throw the baby out with the bathwater, leaving countless public servants without an effective means of enforcing their rights to fair compensation and a safe working environment. *LAUSD* appropriately conformed the test for Section 818 applicability to the language of the statute itself. But it also appropriately confirmed that *Kizer* had engaged in the appropriate "fact-specific" inquiry, that *LACMTA*'s holding was fully consistent with the new test, and that their holdings should not be disturbed.

For the foregoing reasons, this Court should hold that PAGA's civil penalties are not tort remedies, much less tort remedies that "primarily" serve to "punish" or make an "example" out of wrongdoers within the meaning of Government Code section 818.

CONCLUSION

The Court should affirm the Court of Appeal's opinion. It should find that AHS does not enjoy an exemption from Stone and Kunwar's claims for unpaid wages, failure to provide breaks, and other violations, and that employees may pursue claims for these violations under PAGA.

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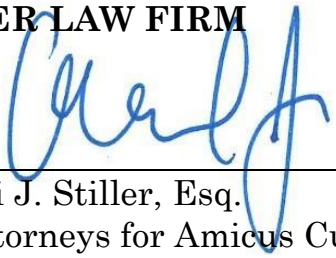

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I certify that, pursuant to California Rule of Court 8.520(c), the attached brief contains 10,096 words, not including the tables of contents and authorities, the caption page, signature blocks, the verification, or this certification page, as counted by the word processing program used to generate it.

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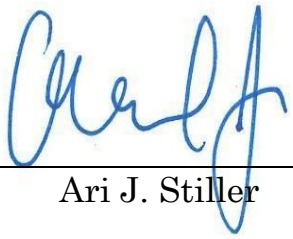

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/s/Ari Stiller

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