No. S274340

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JORGE LUIS ESTRADA, et al.,

Plaintiffs, Appellants, and Cross-Respondents,

v.

ROYALTY CARPET MILLS, INC.,
now known as ROYALTY CARPET MILLS, LLC,

Defendant, Appellant, and Cross-Respondent.

FOURTH APPELLATE DISTRICT, DIVISION THREE,
NOS. G058397, G058969

ORANGE COUNTY SUPERIOR COURT, NO. 30-2013-00692890

APPLICATION OF EMPLOYERS GROUP AND CALIFORNIA EMPLOYMENT LAW COUNSEL FOR LEAVE TO FILE *AMICI CURIAE* BRIEF; BRIEF OF *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT ROYALTY CARPET MILLS, LLC

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APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Pursuant to Rule 8.250(f)(1) of the California Rules of Court, Employers Group and California Employment Law Counsel ("CELC") respectfully apply for leave to file an *amici curiae* brief in support of Defendant-Appellant Royalty Carpet Mills, LLC. The proposed brief is attached.

I. STATEMENT OF INTEREST

Employers Group. Employers Group is one of the nation's largest and oldest human resources management organizations for employers. It represents nearly 3,000 California employers of all sizes in a wide range of industries, which collectively employ nearly three million employees. As part of its mission, Employers Group maintains an advocacy group designed to represent the interests of employers in government and agency policy decisions and in the courts. As part of that effort, Employers Group seeks to enhance the predictability and fairness of the laws and decisions governing employment relationships.

Employers Group has appeared for decades before this Court as *amicus curiae*, including in: *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858; *Oman v. Delta*

Air Lines, Inc. (2020) 9 Cal.5th 762; *Kim v. Reins Int'l Cal., Inc.* (2020) 9 Cal.5th 73; *Frlekin v. Apple Inc.* (2020) 8 Cal.5th 1038; *Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829; *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903; *Alvarado v. Dart Container Corp. of Cal.* (2018) 4 Cal.5th 542; *Mendoza v. Nordstrom, Inc.* (2017) 2 Cal.5th 1074; *Augustus v. ABM Sec. Servs., Inc.* (2016) 2 Cal.5th 257; *Kilby v. CVS Pharmacy, Inc.* (2016) 63 Cal.4th 1; *Iskanian v. CLS Transp., L.A., LLC* (2014) 59 Cal.4th 348; *Duran v. U.S. Bank Nat'l Ass'n* (2014) 59 Cal.4th 1; and numerous other cases.

California Employment Law Council. CELC is a voluntary, nonprofit organization that promotes the common interests of employers and the general public in fostering the development in California of reasonable, equitable, and progressive rules of employment law. CELC's membership includes approximately 70 private-sector employers in the State of California, who collectively employ hundreds of thousands of Californians.

CELC has been granted leave as *amicus curiae* to orally argue and/or file briefs in many of California's leading employment cases, including in: *Ferra*, *supra*, 11 Cal.5th 858; *Augustus*, *supra*, 2 Cal.5th 257; *Kilby*, *supra*, 63 Cal.4th 1; *Iskanian*, *supra*, 59 Cal.4th 348; *Duran*, *supra*, 59 Cal.4th 1;

Harris v. City of Santa Monica (2013) 56 Cal.4th 203; *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004; and *Murphy v. Kenneth Cole Prods., Inc.* (2007) 40 Cal.4th 1094.

II. PROPOSED *AMICI CURIAE* BRIEF

This case presents an important issue of law: do trial courts have inherent authority to ensure that claims under the Private Attorneys General Act, California Labor Code section 2698, et seq. ("PAGA"), will be manageable at trial, and to strike or narrow such claims if they cannot be managed?

Due to their wide-ranging experience in employment matters, Employers Group and CELC are uniquely equipped to assess the impact and implications of the question presented here. The proposed *amici curiae* brief will assist the Court in deciding this matter by explaining that trial courts have authority to dismiss or narrow unmanageable PAGA actions: (1) under the statutory and constitutional authority vesting trial courts with discretion to manage the cases pending before them; (2) under this Court's prior precedents regarding PAGA and litigation of representative claims; (3) under the express provisions of PAGA itself; and (4) to ensure PAGA litigation is appropriately tailored to protect employees from unlawful employment practices and

to protect employers from "shakedown lawsuits." *Dunlap v. Superior Court* (2006) 142 Cal.App.4th 330, 339 (quoting PAGA's legislative history to confirm its purpose is to "protect[] businesses from shakedown lawsuits, yet ensure[] that labor laws protecting California's working men and women are enforced-either through the Labor Agency or through the courts.").

Dated: October 26, 2022

DLA PIPER LLP (US)

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INTRODUCTION

Ample authority confirms California trial courts are vested with both statutory and inherent authority to manage the cases before them. Trial courts must have the authority to dismiss or narrow enforcement actions filed under the Private Attorneys General Act ("PAGA") for at least two reasons. First, superior courts would become overwhelmed with PAGA trials, to the detriment of other litigation, if they were forced to try unmanageable PAGA actions. As the Court of Appeal has recognized, "'[m]anagerial power is not merely desirable. It is a critical necessity [and] judges must be permitted to bring management power to bear upon massive and complex litigation to prevent it from monopolizing the services of the court to the exclusion of other litigants.'" *Asbestos Claims Facility v. Berry & Berry* (1990) 219 Cal.App.3d 9, 20, *disapproved on other grounds in Kowis v. Howard* (1992) 3 Cal.4th 888, 896-97 (citation omitted).

Second, through PAGA itself, the California Legislature vested trial courts with the same discretion that the Labor and Workforce Development Agency ("LWDA") has to decide whether complaints of alleged Labor Code violations satisfy the State's enforcement goals, *i.e.*, are aimed at redressing and deterring unlawful employment practices that threaten the public welfare. If courts are not allowed to dismiss or

narrow PAGA actions, PAGA plaintiffs can abuse the enforcement procedure by pursuing unwieldy and ill-structured enforcement actions only to coerce settlements designed to enrich PAGA plaintiffs and their attorneys, rather than to achieve PAGA's goal of promoting employer compliance and protecting the general public. *See* PAGA Unit Staffing Alignment, at p. 6[1] (in the context of requesting a larger budget to monitor PAGA litigation, the Division of Labor Standards Enforcement recognized in 2019 that "one of the concerns expressed about PAGA is that some plaintiffs and attorneys pursue claims (frivolous and otherwise) only to settle quickly for little money . . . .").

ARGUMENT

A. Uncontrolled PAGA Litigation Breeds Extortion Rather Than Enforcement.

The California Legislature enacted PAGA to supplement the State's ability to redress and deter Labor Code violations that threaten the general public welfare. *Arias v. Superior Court* (2009) 46 Cal.4th 969, 986 ("[A]n action to recover civil penalties 'is fundamentally a law enforcement action designed to protect the public and not to

[1] *See* https://esd.dof.ca.gov/Documents/bcp/1920/FY1920_ORG7350_BCP3230.pdf.

benefit private parties[.]'" (quoting *People v. Pac. Land Research Co.* (1977) 20 Cal.3d 10, 17)). As amici's members can attest, however, private PAGA litigants are instead using the statute to leverage in terrorem settlements. PAGA plaintiffs file civil lawsuits advancing scores of alleged Labor Code violations on behalf of all of an employer's non-exempt employees in California. Rather than focusing their enforcement actions on unlawful employment practices that can manageably be proven, PAGA plaintiffs argue they are entitled to proceed to trial regarding any and all anecdotal violations of the Labor Code, even if a trial of those actions is unmanageable and would consume excessive amounts of court time and resources. Unless trial courts are allowed to dismiss or narrow unmanageable PAGA actions, California courts will be overwhelmed with PAGA trials to the detriment of litigants in other actions. Moreover, California employers will continue to be forced to settle these cases simply to avoid the oppressive cost of defending unwieldy and often unrelated claims arising from any and every potential Labor Code violation that may occur in the workplace.

1. Virtually all of Employers Group's and CELC's members have been subject to multiple PAGA actions.

Employers Group's and CELC's members are regularly sued by one or more of the numerous plaintiff litigation firms

that sprouted in California as a result of PAGA. These firms frequently use non-lawyers to solicit disgruntled or recently-terminated employees to serve as named plaintiffs for PAGA actions. After exhausting very minimal administrative prerequisites, these firms file generic PAGA complaints alleging a litany of Labor Code violations, *e.g.*, the employer: failed to pay for all hours worked; failed to provide meal and rest breaks; miscalculated the regular rate of pay; provided inaccurate wage statements; failed to timely pay final wages, etc. Moreover, these firms allege employers commit these Labor Code violations against all of their non-exempt employees everywhere in California. As a result, PAGA actions frequently involve employees who work in different facilities, under different supervisors, in different job classifications, and over different periods of time, and who are subject to different workplace policies and practices.

The firms seek civil penalties for the alleged Labor Code violations, which quickly amass into staggering amounts of potential liability. The vast majority of PAGA civil penalties are measured on a per-employee, per-pay-period basis. For example, the default penalty under PAGA is $100 per aggrieved employee per pay period. Thus, from the very inception of a case, a relatively small employer who employs 500 non-exempt employees and pays them on a

weekly basis faces up to $2.6 million in liability for a single alleged Labor Code violation ($100 x 500 employees x 52 pay periods). When a PAGA plaintiff alleges six Labor Code violations, the potential liability from the very inception of the case increases to $15.6 million. And this potential liability continues to accrue each pay period as the litigation proceeds.

In light of this exposure, it makes little or no difference whether the employer actually did anything wrong, because the massive cost to defend a PAGA action and the risk of astronomical PAGA penalties will force a logical employer to settle regardless of the merits. As courts have noted in the context of class actions – which have the procedural protections of class certification – the specter of massive potential liability as a practical matter compels settlements regardless of the strength of the case or applicable defenses. *See, e.g.*, *Epic Sys. Corp. v. Lewis* (2018) 138 S.Ct. 1612, 1632 (class actions "can unfairly 'plac[e] pressure on the defendant to settle even unmeritorious claims'" (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.* (2010) 559 U.S. 393, 445 n.3 (Ginsburg, J., dissenting))); *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 350 (recognizing "the risk of 'in terrorem' settlements that class actions entail"). The practical compulsion to settle would be even greater in PAGA actions if this Court concludes that trial courts have no power

to dismiss or narrow unmanageable PAGA actions. Plaintiffs and their attorneys know defendants can more cost effectively settle PAGA actions than pay to litigate the individual claims of scores of employees over the course of months or years.

Moreover, if this Court prevents trial courts from dismissing or narrowing unmanageable PAGA actions, PAGA plaintiffs will be further incentivized to continue flooding the LWDA and the courts with PAGA claims regardless of whether they can manageably prove the alleged Labor Code violations at trial. Because both PAGA plaintiffs and their attorneys stand to recover more compensation from a PAGA suit by alleging more violations across a greater employee community, they are inherently motivated to cast the broadest net possible through their complaints. As it stands, the volume of pre-lawsuit notices filed with the LWDA is already crushing and getting worse. In 2017, would-be PAGA plaintiffs filed 4,984 LWDA notices, but that number increased to 6,502 in 2021.[2] The annual cost to employers of PAGA lawsuits is also crushing. According to a 2019 LWDA and Department of Industrial Relations budget request, the State's 2016/2017 fiscal year revenue from PAGA settlement

[2] According to data available on the Department of Industrial Relations' online PAGA Case Search, https://cadir.secure.force.com/PagaSearch/.

and judgments was $21,440,000, and that number jumped by nearly 59% to $34,068,000 in the 2017/2018 fiscal year.[3] Because these totals represent only the 75% portion of civil penalties paid to the State under PAGA, the actual impact on employers is even higher after factoring in the 25% portion of civil penalties paid to aggrieved employees, attorneys' fees, administration costs, and incentive awards – not to mention the costs of defense.

B. Courts May Dismiss Or Narrow PAGA Actions In The Same Manner As They Dismiss Or Narrow Civil Actions Generally.

Plaintiffs-Respondents ("Plaintiffs") cite Labor Code section 2699(a) for the proposition that trial courts may not dismiss or limit PAGA actions prior to trial. (Answering Brief, p. 7.) However, section 2699(a) merely authorizes a PAGA plaintiff to file a civil action for alleged Labor Code violations: "Notwithstanding any other provision of law, any provision of [the Labor 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 brought by an aggrieved employee . . . ."

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[3] *See* PAGA Unit Staffing Alignment, at p. 1 of 8 and Attachment II, *available at* https://esd.dof.ca.gov/Documents/bcp/1920/FY1920_ORG7350_BCP3230.pdf.

(Emphasis added.) Thus, PAGA lawsuits are simply civil actions governed by the same procedural rules that apply to all civil actions. Section 2699(a) merely created a new private right of action to recover civil penalties, which up to that point was an enforcement remedy available only to the Division of Labor Standards Enforcement ("DLSE"). Nothing in PAGA generally, or section 2699(a) specifically, guarantees a PAGA plaintiff the right to a trial.

1. Trial courts have statutory and inherent authority to dismiss and narrow cases, even in the absence of express statutory procedures for doing so.

Plaintiffs claim that trial courts have no authority to dismiss or narrow PAGA actions prior to trial. (Answering Brief, pp. 26-27.) [4] But the Legislature has unequivocally

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[4] Specifically, Plaintiffs argue, "All judicial efforts to narrow, strike or dismiss a PAGA claim, [sic] are contrary to the express provisions of this enforcement statute and cannot be reconciled" (Answering Brief, p. 27), and, "Any Attempt To Narrow, Strike, Or Completely Eliminate A PAGA Claim Is Expressly Prohibited By The PAGA Statute And Is Contrary To PAGA's Express Goals." (Answering Brief, p. 26.) Obviously, these are gross overstatements. The Code of Civil Procedure confirms that courts may dismiss or narrow civil actions, and thus PAGA actions, through a multitude of procedural devices. For example, there is no dispute that trial courts may dismiss PAGA claims at the pleading stage based

vested trial courts with broad authority to dismiss or narrow civil cases so that courts may effectively administer justice to all litigants. For example, Code of Civil Procedure section 581 lists several grounds on which trial courts may dismiss a civil action. However, that statute makes clear that the bases for dismissal listed in the statute are not exhaustive, and courts may dismiss civil actions when they deem dismissal appropriate: "The provisions of this section shall not be deemed to be an exclusive enumeration of the court's power to dismiss an action or dismiss a complaint as to a defendant." Cal. Civ. Proc. Code § 581(m) (emphasis added). Similarly,

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on the PAGA plaintiff's failure to state a valid claim. *See, e.g.*, *Robinson v. S. Counties Oil Co.* (2020) 53 Cal.App.5th 476, 481-85 (affirming trial court order sustaining demurrer because the plaintiff's PAGA claims were barred by claim preclusion or because the plaintiff lacked standing to pursue them); *Brown v. Ralphs Grocery Co.* (2018) 28 Cal.App.5th 824, 839, 843-44 (upholding trial court order sustaining demurrer to amended complaint without leave to amend where plaintiff failed to exhaust PAGA administrative remedies as to certain alleged Labor Code violations). Trial courts may also dismiss PAGA claims at the summary judgment stage when the undisputed facts confirm that the PAGA plaintiff cannot prove the alleged Labor Code violations. *See, e.g.*, *Price v. Starbucks Corp.* (2011) 192 Cal.App.4th 1136, 1147 (affirming trial court's order granting defendant's motion for summary judgment; "Price's PAGA claim is based upon the failure to timely pay him upon discharge. Because the underlying causes of action fail, the derivative . . . PAGA claim[] also fail[s]." (citations omitted)).

Code of Civil Procedure section 583.110 et seq. outlines the circumstances under which trial courts may dismiss a civil action due to a plaintiff's delay in prosecuting the action. However, section 583.150 confirms those circumstances for dismissal are not exhaustive: "This chapter [*i.e.*, sections 583.110 to 583.430] does not limit or affect the authority of a court to dismiss an action or impose other sanctions . . . under inherent authority of the court." Cal. Civ. Proc. Code § 583.150 (emphasis added). Therefore, the Legislature has specifically vested trial courts with broad discretion to dismiss or narrow civil actions.

Plaintiffs also argue that because PAGA actions are not class actions, and thus are not governed by certification standards established by Code of Civil Procedure section 382, trial courts have no authority to dismiss or narrow PAGA actions based on manageability findings. (Answering Brief, pp. 25-26.) Again, not so. The Legislature also vested trial courts with the inherent authority to develop procedural mechanisms to manage litigation when statutes do not already provide applicable mechanisms. Code of Civil Procedure section 187 states, "When jurisdiction is, by the Constitution or this Code, or by any other statute, conferred on a Court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this

jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code." Cal. Civ. Proc. Code § 187 (emphasis added); *see also James v. Superior Court* (1978) 77 Cal.App.3d 169, 175 ("Courts have the inherent power to create new forms of procedure in particular pending cases. 'The . . . power arises from necessity where, in the absence of any previously established procedural rule, rights would be lost or the court would be unable to function.' (Witkin, Cal. Procedure (2d ed.) Courts, § 123, p. 392.) This right is codified in Code of Civil Procedure section 187 . . . ."). Thus, the fact that no specific procedural statute addresses the manageability of PAGA actions does not mean that trial courts have no authority to address the manageability of a PAGA action. On the contrary, as section 187 confirms, the absence of a procedural statute addressing manageability in PAGA actions means that trial courts may develop their own procedures to fill that void.

In addition to these statutorily-granted powers, this Court itself has confirmed that civil courts have the inherent authority to manage the cases pending before them. In *Rutherford v. Owens-Illinois, Inc.* (1977) 16 Cal.4th 953, this Court held that it is:

> [W]ell established that courts have fundamental inherent equity, supervisory, and administrative powers, as well as inherent power to control litigation before them. . . . That inherent power entitles trial courts to exercise reasonable control over all proceedings connected with pending litigation . . . in order to insure the orderly administration of justice.

Id. at 967 (citations omitted).

Moreover, this Court has confirmed that trial courts are empowered to create procedures to address litigation problems if and when no procedure is provided by statute: "It is beyond dispute that '[c]ourts have inherent power, as well as power under section 187 of the Code of Civil Procedure, to adopt any suitable method of practice, both in ordinary actions and special proceedings, <u>if the procedure is not specified by statute or by rules adopted by the Judicial Council</u>.'" *Citizens Utilities Co. v. Superior Court* (1963) 59 Cal.2d 805, 812-13 (emphasis added; footnote omitted) (quoting *Tide Water Associated Oil Co. v. Superior Court* (1955) 43 Cal.2d 815, 825 (where trial court devised procedure for valuing condemned property)). So again, the fact that there is no specific statute dictating how trial courts must address manageability issues in PAGA cases does not mean that trial courts have no authority to address such

manageability issues. It means trial courts are free to develop their own procedures for addressing those issues.

The purpose of this statutory and inherent management authority is, in part, to ensure courts can appropriately allocate their resources to the many litigants and cases before them and to avoid having certain matters "monopolize resources to the exclusion of other litigants." *Asbestos Claims Facility*, *supra*, 219 Cal.App.3d at 20 (citation omitted). And this Court has confirmed that, given the central importance of the "inherent powers of the court . . . to insure the orderly administration of justice," statutes should not be construed to impair courts' ability to ensure their own "efficiency." *Walker v. Superior Court* (1991) 53 Cal.3d 257, 266-67 (citations omitted). Therefore, this Court should not, as Plaintiffs urge (*see* Answering Brief, pp. 26-30), interpret PAGA to prohibit trial courts from dismissing or narrowing civil actions based on manageability concerns.

C. This Court's Prior Rulings Demonstrate Why Trial Courts Must Have Authority To Address Manageability Issues In PAGA Cases.

The civil penalties recovered under PAGA are divided between the State and the aggrieved employees: 75% of the civil penalties awarded go to the State; and 25% of the civil

penalties awarded go to the aggrieved employees. However, this Court has already held that before awarding any penalties, a trial court must first find that the employer violated its employees' rights: "[r]ecovery of civil penalties under the act requires proof of a Labor Code violation." [5] *Arias*, *supra*, 46 Cal.4th at 987. Therefore, because PAGA actions are representative in nature, trial courts must have some procedure rooted in due process and manageability to determine whether a plaintiff has established that an employer violated the rights of absent, allegedly-aggrieved employees before imposing civil penalties against an employer. As the *Wesson* court noted, "we are aware of [no authority] privileging the state above other civil litigants and exempting it from the courts' inherent authority to manage the proceedings and ensure fair and efficient administration

[5] Plaintiffs oversimplify the evidentiary burdens associated with PAGA actions, arguing, "hurdles that might otherwise exist for damage calculations under a class action simply do not exist in determining PAGA penalties . . . . [U]nder PAGA's penalty provisions, it is a rather simple multiplication problem." (Answering Brief, pp. 25-26.) But Plaintiffs overlook the fact that a PAGA plaintiff must first prove that the employer violated the rights of the allegedly-aggrieved employees. In many cases, the question of whether any violation occurred turns on entirely individual facts and circumstances.

of justice." *Wesson v. Staples the Office Superstore, LLC* (2021) 68 Cal.App.5th 746.

As this Court confirmed in *Duran v. U.S. Bank Nat'l Ass'n* (2014) 59 Cal.4th 1, when claims on behalf of absent employees are at issue, trial courts must confirm that litigants have a manageable trial plan before allowing disputes to proceed to trial. In so doing, this Court noted all civil actions, not just class actions, require trial plans that ensure due process is preserved:

> Although courts enjoy great latitude in structuring trials, and we have encouraged the use of innovative procedures, any trial must allow for the litigation of affirmative defenses, even in a class action case where the defense touches upon individual issues.

Id. at 33 (emphasis added).

Thus, trial courts must ensure that a trial of a PAGA action is manageable and preserves the parties' due process rights as it would regarding any other civil action.

In *Duran*, this Court also confirmed that not all wage and hour claims can be resolved on a representative basis; some involve individualized questions of fact. Harkening to Justice Werdegar's concurring opinion in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, this Court confirmed that trial courts must address manageability

issues in cases that require a finding of an actual violation as to each employee:

> In her concurring opinion in *Brinker*, Justice Werdegar drew an instructive distinction between the types of affirmative defenses that can undermine manageability: "For purposes of class action manageability, a defense that hinges liability *vel non* on consideration of numerous intricately detailed factual questions, as is sometimes the case in misclassification suits, is different from a defense that raises only one or a few questions and that operates not to extinguish the defendant's liability but only to diminish the amount of a given plaintiff's recovery." . . . [A] defense in which *liability itself* is predicated on factual questions specific to individual claimants poses a much greater challenge to manageability.

Duran, *supra*, 59 Cal.4th at 30 (italics in original; underline added).

Just as class actions can involve claims that raise unmanageable individualized questions of fact, so too can PAGA actions. As this Court noted in *Williams v. Superior Court* (2017) 3 Cal.5th 531, there are many similarities between the evidence required to prosecute class actions and PAGA actions. In that case, this Court concluded that a plaintiff's right to obtain the contact information of allegedly-aggrieved employees in PAGA actions should be the same as a class action plaintiff's right to obtain the contact information of putative class members in class actions

because the evidence required to prove Labor Code violations in either proceeding is largely the same:

> In a class action, fellow class members are potential percipient witnesses to alleged illegalities, and it is on that basis their contact information becomes relevant. . . . Likewise in a PAGA action, the burden is on the plaintiff to establish any violations of the Labor Code, and a complaint that alleges such violations makes any employee allegedly aggrieved a percipient witness and his or her contact information relevant and discoverable.

3 Cal.5th at 547-48 (citations omitted; emphasis added).

Because the evidence necessary to prove Labor Code violations is similar in both class and PAGA actions, it only stands to reason that trials of both class and PAGA actions can present manageability issues as well. Specifically, because trial courts have discretion to deny a class action plaintiff the right to a trial for lack of a manageable trial plan[6], trial courts must have the same discretion to deny a

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[6] *See, e.g.*, *Duran*, *supra*, 59 Cal.4th at 29 ("Trial courts also have the obligation to decertify a class action if individual issues prove unmanageable." (citations omitted)); *McCleery v. Allstate Ins. Co.* (2019) 37 Cal.App.5th 434, 452 ("[B]ecause plaintiffs made no effort to explain how they could establish through common proof what expenses, if any, inspectors incurred for any particular insurer, or how they were deprived of wage statements, the trial court could reasonably

PAGA plaintiff the right to a trial for lack of a manageable trial plan. Indeed, the *Williams* court specifically alluded to the expectation that litigation of PAGA actions must be manageable when it noted, "proof of a uniform policy is one way a plaintiff might seek to render trial of the action manageable." *Williams*, *supra*, 3 Cal.5th at 559.

D. Some PAGA Actions Simply Are Not Amenable To Representative Trial Procedures.

A wage and hour claim that is unmanageable in a class action is no more manageable in a PAGA action. It would be non-sensical to require trial courts to oversee unmanageable trials just because the civil action is an enforcement action prosecuted by the State. Any such rule would inevitably result in "[e]ndless and inefficient litigation." *Mendoza v. Nordstrom, Inc.* (C.D. Cal. Nov. 5, 2012) No. SACV 10-00109-CJC(MLGx), 2012 WL 12950481, at *1 (where the trial court denied the plaintiffs' request to substitute in new plaintiffs after concluding the plaintiffs' individual day of rest claims had no merit).

For example, in *Wesson*, *supra*, the plaintiff brought class and PAGA claims for alleged overtime and meal and

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conclude these claims were unmanageable as well under the trial plan." (citations omitted)).

rest break violations based on Staples's alleged improper classification of its store general managers as exempt. The trial court denied the plaintiff's motion for class certification because "he had not demonstrated that his claims were susceptible to common proof" and "important factual questions relating to whether GMs spent most of their worktime doing exempt, managerial tasks could not be resolved on a classwide basis." *Wesson*, *supra*, 68 Cal.App.5th at 757. The trial court subsequently granted Staples's motion to strike the PAGA claims as unmanageable. The trial court concluded that the plaintiff's "trial plan did not address how the parties might litigate Staples's affirmative defense" and that there was "great variation in how Staples GMs performed their jobs and the extent to which they perform non-managerial tasks." *Id.* at 759. Moreover, the trial court estimated that "trial involving witnesses and documents individually pertaining to each of 346 General Managers" would take more than four years. *Id.* After extensively outlining the legal authorities supporting the trial court's discretion to strike an unmanageable PAGA claim, the Court of Appeal upheld the trial court's decision to do so as "eminently reasonable." *Id.* at 775.

In *Feltzs v. Cox Commc'ns Cal., LLC* (C.D. Cal. 2021) 562 F.Supp.3d 535, the plaintiff alleged class and PAGA

claims based, in part, on alleged meal period violations. To facilitate timely, one-hour meal periods, the employer implemented a policy to set aside a one-hour window during which its cable technicians were not scheduled for in-field service calls. While technicians were always permitted to start their meal period within the first five hours of the shift, if they believed they needed to work through a meal period to address a customer issue, the employer paid a meal period premium. *Id.* at 537-38. The trial court denied class certification of the plaintiff's meal period claim because "in the absence of a class-wide policy or practice, the individualized inquiry to determine liability would require an unmanageable individualized analysis that precludes a finding of predominant common issues." *Id.* at 542 (internal quotations and citation omitted). The court initially denied the defendant's motion to strike the PAGA representative meal period claim. However, following the Court of Appeal's decision in *Wesson*, the trial court in *Feltzs* reconsidered that ruling and concluded that a portion of the PAGA meal period claim should be stricken as unmanageable. Specifically, the court held that the plaintiff had not developed "a feasible trial plan that would allow for the presentation of valid defenses" such as the employer's affirmative defense of individual waiver. *Id.* at 544. The trial court thus allowed a narrowed

PAGA meal period claim to proceed on the basis that the employer had admitted that it was liable for meal period violations on the hundreds of occasions it paid the meal period premiums. *Id.* at 545.

In *Ortiz v. CVS Caremark Corp.* (N.D. Cal. Dec. 2, 2013) No. C-12-05859 EDL, 2013 WL 6236743, the district court denied the plaintiffs' motion for class certification of their claim for alleged off-the-clock work associated with inter-store transfers of merchandise or prescriptions. The court reasoned that "Plaintiffs [had] not shown how the Court could determine whether Defendants' store managers across 850 stores in California over a five year period knew of each instance of an alleged off the clock [inter-store transfer]" and that "individualized questions about whether Defendants knew that [inter-store transfers] were performed off the clock remain." *Id.* at *10.

Unsurprisingly, several months later, the trial court struck the off-the-clock PAGA claim after concluding they were unmanageable for the same reasons: "Proof of this claim would be unmanageable, and could not be done with statistical or survey evidence but only with detailed inquires [sic] about each employee claimed to have done so and her manager's knowledge thereof." *Ortiz v. CVS Caremark Corp.* (N.D. Cal. March 19, 2014) No. C-12-05859 EDL, 2014 WL

1117614, at *4. The trial court did "not conclude that PAGA claims are unmanageable in general, but only that the circumstances of this case [made] the PAGA claim here unmanageable because a multitude of individualized assessments would be necessary." *Id.* (citation omitted; emphasis added).

In *Brown v. American Airlines, Inc.* (C.D. Cal. Nov. 14, 2011) No. CV 10-8431-AG(PJWx), 2011 WL 13242820, the plaintiff asserted class and PAGA claims alleging overtime and wage statement violations. The trial court initially denied the plaintiff's motion for class certification of the overtime claim on the basis that: (a) individualized inquiries into each putative class members' overtime pay predominated over common questions regarding the employer's bonus pay policy; and (b) class adjudication was not a superior mechanism for resolving the claim due to "[t]he fact-intensive inquiry [that] would result in extensive case management difficulties." *Id.* at *5. The court later struck the PAGA claims based on alleged overtime violations as being unmanageable. Specifically, the court held that the same "concerns regarding individual inquiries predominating" that rendered class certification improper, also resulted in "manageability issues exist[ing] regarding [the] PAGA overtime claims[,]" and "[t]here appears to be too many individualized assessments to

determine PAGA violations concerning overtime pay." *Brown v. American Airlines, Inc.* (C.D. Cal. Oct. 5, 2015) No. CV-10-8431-AG (PJWx), 2015 WL 6735217, at *4. However, the court denied the defendant's motion to strike the PAGA wage statement claim after determining that plaintiff's allegation that wage statements reflected two different pay periods was manageable. *Id.* at *4.

The foregoing cases demonstrate that if class action plaintiffs cannot manageably prove their claims on a class-wide basis, there is no rational basis for allowing PAGA plaintiffs to demand that trial courts try unmanageable PAGA claims. Here, Plaintiffs claim they and other PAGA plaintiffs should be permitted to consume months or years of court time and resources in search of any and every potential violation an employer might have committed, rather than limiting enforcement actions to those through which a PAGA plaintiff can manageably prove that the employer's unlawful practices harm numerous employees, and thus the public in general. This Court should confirm that trial courts' statutory and inherent authority includes the discretion to prevent such inefficient use of court resources.

This is not to say that trial courts should dismiss all PAGA actions for lack of manageability. As the cases discussed above confirm, many PAGA actions have alleged

Labor Code violations that can be resolved on a representative basis. But when courts cannot determine whether any potential Labor Code violation occurred without examining the facts and circumstances surrounding each allegedly-aggrieved employee's claim, then courts must have the discretion to dismiss some or all of the action as inconsistent with the overarching purpose of PAGA and as a misuse of public resources.

E. The Presumption Created By Time Records Does Not Render A Meal Period Claim Manageable.

Plaintiffs argue that misclassification claims like the one at issue in *Wesson* are "a world apart" from the meal period claims in this case because a claim for "[m]isclassification of a non-exempt employee requires a more in-depth analysis of individual issues that might overwhelm" courts. (Answering Brief, pp. 30-31.) In making this argument, Plaintiffs appear to concede that some PAGA claims, including misclassification claims, are not suitable for representative litigation.

As importantly, the legal framework for resolving a misclassification claim is strikingly similar to the legal framework for resolving Plaintiffs' meal period claim. In a misclassification case, the law presumes all employees are

eligible for overtime, and it is the defendant employer's burden to prove any exempt employees qualify for one or more of the exemptions from overtime. *See, e.g.*, *Ramirez v. Yosemite Water Co., Inc.* (1999) 20 Cal.4th 785, 794-95 ("[T]he assertion of an exemption from the overtime laws is considered to be an affirmative defense, and therefore the employer bears the burden of proving the employee's exemption." (citations omitted)); *United Parcel Service Wage & Hour Cases* (2010) 190 Cal.App.4th 1001, 1010 ("Generally speaking, California workers are statutorily entitled to overtime compensation for working in excess of a 40-hour work week or in excess of an eight-hour work day, unless they are properly classified as falling within one of the narrow exemption categories." (citations omitted)). Proving that an employee qualifies for an exemption from overtime – and proving in particular that any managerial employees spent more than 50% of his/her time on exempt duties – may require a highly individualized analysis. Therefore, courts frequently conclude misclassification claims cannot be resolved on a class action basis. *See, e.g.*, *Kizer v. Tristar Risk Mgmt.* (2017) 13 Cal.App.5th 830, 850 (affirming denial of class certification where "Plaintiffs failed to satisfy the commonality requirement by presenting evidence to show they could establish through common proof that Tristar

required claims examiners to work overtime."); *Rosenberg v. Renal Advantage, Inc.* (S.D. Cal. June 24, 2013) No. 11-cv-2152-GPC-KSC, 2013 WL 3205426, at *8 ("Plaintiffs have failed to identify any other form of common proof to establish that the [putative class members] have been misclassified under the professional exemption. Ultimately, dissimilarities regarding how [they] perform their job duties prevent a showing that common questions and answers drive the resolution of the litigation on this threshold issue.").

Likewise, for a meal period claim, the law presumes that time punches of a non-compliant meal period represent a meal period violation, and it is the defendant employer's burden to prove that it in fact provided a compliant meal period that the employee voluntarily waived. *See Donohue v. AMN Servs., LLC* (2021) 11 Cal.5th 58, 78 ("If time records show noncompliant meal periods, then a rebuttable presumption of liability arises. . . . [T]he employer may rebut the presumption with evidence of bona fide relief from duty or proper compensation."). Proof that the employer provided a compliant meal period often turns on highly individualized facts and circumstances. For example, Defendant-Appellant Royalty Carpet Mills, Inc. ("Royalty Carpet") here offered evidence that: its written meal period policy was facially lawful; it scheduled meal periods to last at least 30 minutes;

it scheduled meal periods to begin within the first five hours of work; and employees recorded compliant first meal periods from roughly 30% to 90% of the time. *See Estrada v. Royalty Carpet Mills, Inc.* (2022) 76 Cal.App.5th 685, 721. Royalty Carpet further offered evidence that some employees who recorded non-compliant meal periods did so voluntarily. *Id.* at 724-25. This evidence confirmed that the presumption arising from time records alone was insufficient to prove a meal period violation, and that the trial court would have needed to consider the facts and circumstances surrounding each time-punch reflecting a non-compliant meal period to determine whether a meal period violation occurred. Assuming there were 260 allegedly-aggrieved employees covered by Plaintiffs' PAGA claim,[7] and assuming the trial court presided over a one-day trial of the facts and circumstances surrounding each one of those employee's non-compliant meal period punches, this single PAGA action would consume the resources of the court for an entire year.

[7] The *Estrada* decision confirms there were 388 putative class members, but it does not state how many of those 388 individuals were employed within the one-year limitations period applicable to the PAGA claim, and thus it does not confirm the number of allegedly-aggrieved employees at issue in the case. *See Estrada*, *supra*, 76 Cal.App.5th at 699.

F. Trial Courts Must Be Able To Dismiss Or Narrow PAGA Actions That Are Not Designed To Achieve PAGA's Purpose.

Courts must have discretion to dismiss or narrow PAGA actions to ensure that enforcement actions are appropriately tailored to achieve PAGA's goals. As this Court held in *Kim v. Reins*, "[a] PAGA claim is legally and conceptually different from an employee's own suit for damages and statutory penalties. An employee suing under PAGA 'does so as the *proxy or agent of the state's labor law enforcement agencies*.'" *Kim v. Reins Int'l Cal., Inc.* (2020) 9 Cal.5th 73, 81 (quoting *Arias*, *supra*, 46 Cal.4th at 986 (emphasis in original)). PAGA is intended to "punish and deter employer practices that violate the rights of numerous employees under the Labor Code." *Iskanian v. CLS Transp., L.A., LLC* (2014) 59 Cal.4th 348, 384 (quoting *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 502) (emphasis added). Thus, "[r]elief under PAGA is designed primarily to benefit the general public, not the party bringing the action." *Kim*, *supra*, 9 Cal.5th at 81 (citing *Arias*, *supra*, 46 Cal.4th at 986; *Brown*, *supra*, 197 Cal.App.4th at 501) (emphasis added); *see also Iskanian*, *supra*, 59 Cal.4th at 381 (quoting *Arias*, *supra*, 46 Cal.4th at 986). That is why 75% of the civil penalties recovered in PAGA actions are allocated to the State for educating employees and employers about their

rights and responsibilities under the Labor Code. *See* Cal. Labor Code § 2699(i). That is also why a judgment in a PAGA action does not bind employees with respect to their individual Labor Code claims. *See Arias*, *supra*, 46 Cal.4th at 987 ("[T]he nonparty employees, because they were not given notice of the action or afforded any opportunity to be heard [in a PAGA action], would not be bound by the judgment as to remedies other than civil penalties."). In sum, this Court's interpretations of PAGA to date confirm that PAGA is designed to redress and deter unlawful employment practices that violate the rights of numerous employees – and by implication the public at large. PAGA is not designed to force courts to spend enormous amounts of judicial time and resources to ferret out every potential Labor Code violation that an employer is alleged to have committed over many years, in many locations, and under differing circumstances.

Given the purpose of PAGA, the Legislature specifically vested trial courts with the same discretion the LWDA has to determine whether to impose PAGA penalties: "Whenever the Labor and Workforce Development Agency, or any of its departments, divisions, commissions, boards, agencies, or employees, has discretion to assess a civil penalty, a court is authorized to exercise the same discretion, subject to the

same limitations and conditions, to assess a civil penalty."[8] Cal. Labor Code § 2699(e)(1) (emphasis added). And well-established law confirms that the DLSE (the enforcement division of the LWDA) may decide, after investigation, that certain complaints of Labor Code violations are not worth pursuing. *See Painting & Drywall Work Pres. Fund, Inc. v. Aubry* (1988) 206 Cal.App.3d 682, 686 (hereafter "*Painting & Drywall*").

In *Painting & Drywall*, a nonprofit organization ("the Fund") existed to "further the public interest and the interests of its members by investigating both state and federal public works projects and filing complaints with appropriate agencies when investigations reveal possible statutory violations." *Id.* at 685 (emphasis added). Between 1984 and 1986, the Fund submitted nine complaints to the

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[8] This language cannot merely mean that courts may decide whether violations occurred, and thus, whether penalties are awarded. Trial courts already have such authority, and so any interpretation of section 2699(e)(1) to merely reiterate the authority trial courts already have would render the language surplusage. *See Reno v. Baird* (1998) 18 Cal.4th 640, 658 ("It is a maxim of statutory construction that 'Courts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage.'" (quoting *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 22)). Instead, this language must mean that if the LWDA has discretion to not take enforcement action after investigation, then trial courts have discretion to do so as well.

DLSE showing prima facie Labor Code violations. *Id.* When the DLSE failed to take what the Fund deemed to be appropriate action in response to those complaints, the Fund filed a petition for writ of mandate in Superior Court alleging that the DLSE had abused its discretion by failing to enforce the Labor Code. *Id.* at 685 (emphasis added). The trial court agreed and ordered the DLSE to take enforcement action against any employer for whom a complaint showing a prima facie violation had been made. *Id*.

The Labor Commissioner appealed. The DLSE demonstrated that – after investigation – it chose to waive penalties in some cases, to close another case, and to not take action in other cases. *Id*. at 687. The DLSE argued that the trial court exceeded its jurisdiction by ordering the DLSE to take action on every prima facie complaint it receives. *Id.* at 685. The Court of Appeal agreed. The Court of Appeal acknowledged that the State's policy is to "vigorously enforce" its labor standards. *Id.* at 686 (quoting Cal. Labor Code § 90.5(a)). Nonetheless, the Court of Appeal confirmed that "the Labor Commissioner has discretion to determine which investigations to conduct. The statute creates no duty, express or implied, which requires Division to investigate or take action on every complaint which is filed with the Division." *Id.* at 687 (emphasis added).

Through PAGA, the Legislature vested employees with authority to step into the shoes of the State for purposes of investigating and prosecuting suspected Labor Code violations. *See* Cal. Labor Code § 2699(a). And just a few subsections later, the Legislature vested Superior Courts with the authority to exercise discretion regarding whether a PAGA action merits an award of penalties. *See* Cal. Labor Code § 2699(e)(1). Just as the Labor Commissioner can exercise its discretion to not take enforcement action in response to every claim of a Labor Code violation, so too may trial courts.

Thus, if after a PAGA plaintiff has had an adequate opportunity to conduct discovery, that plaintiff is unable to provide a manageable trial plan for proving the defendant is operating under unlawful policies or practices that adversely affect numerous employees – and thus by extension, the general public – a court must have discretion to dismiss or narrow the PAGA plaintiff's case not only to preserve its own resources, but also to ensure the goal of protecting employees from unlawful employment practices and to protect employers from "shakedown lawsuits."[9]

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[9] If a court dismisses or narrows a PAGA action, the individual employees still have a remedy. They may file a wage claim with the Labor Commissioner (free of charge)

If trial courts are unable to dismiss or narrow PAGA actions, unchecked PAGA plaintiffs (and their attorneys) will be incentivized to file enforcement actions alleging numerous Labor Code violations across broad employee populations to maximize the employer's exposure, the burden of defending the action, and thus, the likelihood of a settlement. Under these circumstances, employers may conclude that there is no benefit to having compliant policies and procedures because they will always be subject to endless and inefficient PAGA trials, and thus always be compelled to settle.

In 2019, the DLSE alluded to this dynamic when, in the context of requesting a larger budget to monitor PAGA litigation, the DLSE recognized that "one of the concerns expressed about PAGA is that some plaintiffs and attorneys pursue claims (frivolous and otherwise) only to settle quickly for little money . . . ." PAGA Unit Staffing Alignment, at p. 6, *available at* https://esd.dof.ca.gov/Documents/bcp/1920/FY1920_ORG7350_BCP3230.pdf. The DLSE further noted, "[s]eventy-five percent of the 1,546 settlement agreements reviewed by the PAGA Unit in fiscal years 2016/17 and 2017/18 received a grade of fail or marginal pass, reflecting the failure of many private plaintiffs' attorney to fully protect

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under Labor Code section 98, or a civil lawsuit for statutory or contractual remedies. *See Arias*, *supra*, 46 Cal.4th at 987.

the interests of the aggrieved employees and the state." *Id.* By protecting employers from the risk and burden of defending unbounded ligation, trial courts will incentivize employers to develop compliant policies and procedures that can serve as a defense to unfounded PAGA claims. Put another way, trial courts must be able to require PAGA plaintiffs to present a manageable trial plan designed to punish employers for Labor Code violations that threaten the public welfare. Trial courts need not allow PAGA plaintiffs to proceed to trial in an aimless search for any and every potential Labor Code violation.

The trial courts' ability to make evidentiary rulings would not necessarily "encourage plaintiffs' counsel to be prudent in their approach to PAGA claims and to ensure they can efficiently prove alleged violations to unrepresented employees." *Estrada*, *supra*, 76 Cal.App.5th at 713. There is no reason to expect self-interested plaintiffs' counsel firms to voluntarily narrow their cases when they have no financial incentive to do so. The threat of lengthy and expensive trial costs is one of the most powerful levers that the plaintiffs' bar has for leveraging settlements in PAGA actions. The Court of Appeal suggested that "counsel . . . work with the trial courts during trial planning to define a workable group or groups of aggrieved employees for which violations can more easily be

shown." *Id.* But what if a PAGA plaintiff fails or refuses to present a workable/manageable trial plan? According to Plaintiffs, PAGA requires that the unmanageable case proceed to trial regardless of whether it is aimed at redressing unlawful employment practices that threaten the public welfare, and regardless of the amount of court resources it will consume. To the contrary, as this Court held in *Walker*, *supra*, 53 Cal.3d at 266-67, no statute should be construed to impair a trial court's inherent power to manage the litigation pending before it.

CONCLUSION

The Court should reverse the Court of Appeal's holding and confirm that trial courts have both statutory and inherent authority to dismiss or narrow PAGA actions when a PAGA plaintiff is unable to provide a manageable trial plan.

Dated: October 26, 2022

DLA PIPER LLP (US)

By: */s/ Julie A. Dunne*
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.520(c) of the California Rules of Court, counsel hereby certifies that the enclosed brief contains 7,435 words. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: October 26, 2022

/s/ *Julie A. Dunne*
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

I am over 18 years of age and not a party to this action. I am employed in the County of San Diego, State of California. My business address is DLA Piper LLP (US), 401 B Street, Suite 1700, San Diego, CA 92101.

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

Executed on October 26, 2022 at San Diego, California.

/s/ Michelle Fitzmorris
Michelle Fitzmorris

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **ESTRADA v. ROYALTY CARPET MILLS**
Case Number: **S274340**
Lower Court Case Number: **G058397**

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10/26/2022

Date

/s/Julie Dunne

Signature

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