NO. S227228

IN THE SUPREME COURT OF CALIFORNIA

MICHAEL WILLIAMS, an individual,
Plaintiff and Appellant,

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTRY OF LOS ANGELES,
Defendant and Respondent.

MARSHALLS OF CA, LLC,
Real Party in Interest.

AFTER A DECISION BY THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION ONE, CASE NO. B259967
FROM THE SUPERIOR COURT, COUNTY OF LOS ANGELES,
CASE NO. BC503806
THE HONORABLE WILLIAM F. HIGHBERGER, JUDGE PRESIDING

AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN COATINGS ASSOCIATION, AND NFIB SMALL BUSINESS LEGAL CENTER IN SUPPORT OF REAL PARTY IN INTEREST MARSHALLS OF CA, LLC

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ISSUES PRESENTED

Is the plaintiff in a representative action under the Labor Code Private Attorneys General Act of 2004 (Lab. Code, § 2698 et seq.) entitled to discovery of the names and contact information of other "aggrieved employees" at the beginning of the proceeding or is the plaintiff first required to show good cause in order to have access to such information?

STATEMENT OF INTEREST

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over 12 million men and women, contributes roughly $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for three-quarters of private-sector research and development. The NAM is the powerful voice of the manufacturing community and leading advocate for policies that help manufacturers compete in the global economy and create jobs across the United States.

The American Coatings Association advances the needs of the paint and coatings industry through advocacy and programs that support environmental protection, product stewardship, health, safety, and the advancement of science and technology.

The NFIB Small Business Legal Center, a nonprofit, public interest law firm established to protect the rights of America's small-business

owners, is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all fifty states. The approximately 325,000 members of NFIB own a wide variety of America's independent businesses from manufacturing firms to hardware stores.

Amici have an interest in this case because they and their members are concerned with the predictability and fairness of California's civil justice system. *Amici* have an interest in ensuring that the civil litigation and workplace laws in California are balanced, reflect sound public policy, and respect due process. Allowing private plaintiffs to leverage the Private Attorney General Act (PAGA) without first laying the factual and legal foundation for their claims and by pursuing discovery demands broader than their allegations violate these principles and would contribute to the growth of opportunistic *qui tam* lawsuits under PAGA. The result would adversely impact *amici's* members and the State's economic climate.

STATEMENT OF THE CASE

Amicus curiae adopts Real Party in Interest Marshalls of CA, LLC's (Marshalls) Statement of the Case.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The California PAGA is a *qui tam* statute that gives private individuals the ability to bring a law enforcement action in the name of the

State. *See Iskanian v. CLS Transp. Los Angeles* (2014) 59 Cal. 4th 348. In 2004, the Legislature enacted PAGA out of concern that the Labor and Workforce Development Agency (LWDA) did not have the resources to sufficiently identify and enforce the Labor Code. The Act gives private individuals a financial incentive to sue their own employers over such violations, but only after showing they were actually "aggrieved" and that there were other such aggrieved employees. Cal. Lab. Code § 2699(a). The employee who brings the action sues on behalf of the State, represents his or her colleagues, and is entitled to 25% of the fines collected plus attorney fees. This "bounty," as it has been called, can be significant. The total fine is determined by multiplying the number of Labor Code provisions violated by each pay period and each aggrieved employee.

While *qui tam* actions can serve an important purpose, they have long been subject to abuse. The conflict inherent to *qui tam* statutes is that private plaintiffs cannot be expected to exercise the prosecutorial judgment that a government agency does when investigating and bringing claims on its own behalf. The plaintiffs' goal, and that of their lawyers, is generally to maximize the *qui tam* bounty. As is needed here, courts are regularly called upon to protect the public from those who would overstep a *qui tam* statute's bounds at the expense of justice. *See, e.g., Schindler Elevator Corp. v. United States ex rel. Kirk* (2011) 563 U.S. 401, 413 (The responsibility of the courts is "to strike *a balance* between encouraging

private persons to root out [violations] and stifling parasitic lawsuits.") (emphasis in original) (quoting *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson* (2010) 559 U.S. 280).

The California Legislature has tried to strike the right balance between facilitating enforcement of workplace violations and protecting against litigation abuse. It amended PAGA quickly after its enactment specifically to guard against actions, such as the one at bar, where employees appear to sue first and ask questions later. These amendments were intended to ensure that the power of the State could be invoked only when someone has a meritorious claim and, in many instances, the employer fails to cure the violation. *See* Cal. Labor Code 2699.3(a), (c)(2)(A) ("Before bringing a civil action for statutory penalties, an employee must" give written notice to the employer and Labor and LWDA of the facts and theories supporting the violation and give the employer the opportunity to cure the alleged violation.). PAGA provides no presumption that the employee's allegations are credible. The credibility of the allegations must be established *before* PAGA conveys any authority to the employee to bring a representative enforcement action.

The case at bar gives the Court the needed opportunity to enforce the boundaries the Legislature intended to establish for (1) the qualifications someone must establish before invoking the power of the State to bring a representative PAGA action, and (2) the authorities PAGA conveys to these

individuals, particularly for pre-trial discovery. Under Plaintiff's theory, he should be able to obtain the government's full investigatory powers, including unfettered discovery of the private employment records of more than 16,000 employees, based on nothing more than mere speculation. Allowing this fishing expedition violates both the letter and intent of PAGA. *See Iskanian*, 59 Cal. 4th at 381 (A PAGA "law enforcement action [is] designed to protect the public and not benefit private parties."). *Amici* respectfully urge the Court to affirm the ruling below.

ARGUMENT

I. PAGA ESTABLISHES A LIMITED REPRESENTATIVE ACTION FOR LABOR CODE VIOLATIONS THAT DOES NOT ESCHEW LONGSTANDING DISCOVERY RULES

The case at bar involves an attempt by an employee of a major statewide and national department store to "jump[] into extensive statewide discovery based only on the bare allegations of one local individual having no knowledge of the defendant's statewide practices." *Williams v. Superior Court* (2015) 236 Cal. App. 4th 1151. The *qui tam* Plaintiff in this case has not established that he qualifies as an "aggrieved employee" as defined under PAGA, or that any other employee sustained injury from the same types of violations that he alleges. *See id.* (noting the litigation "consists solely of the allegations in his complaint," and that he has no "reasonable" basis for his assertion that there are violations against others).

Plaintiff also is seeking discovery authority greater than PAGA

conveys, namely the "free access to all places of labor" that the LWDA itself can invoke when conducting an official state investigation. As the Court of Appeals correctly held, PAGA gives a *qui tam* plaintiff only the authority to bring a "civil action," and, as with all civil actions, discovery is governed by the California Code of Civil Procedure. *See id.* at 1157-58. The Court should affirm both aspects of the lower court's rulings.

A. PAGA Requires a Threshold Showing that Plaintiff Is "Aggrieved" and that There Are Similarly Aggrieved Employees Before Plaintiff Can Be Granted Standing to Bring a Representative PAGA Action

To have standing to bring a representative PAGA action, a plaintiff must first prove that he or she was "aggrieved," that is that he or she actually suffered a Labor Code violation. Cal. Lab. Code § 2699(a) (requiring that the alleged violation "was committed," not merely alleged). As the Legislature explained when enacting the law, the goal was never to "open private actions up to persons who suffered no harm," but rather to ensure that "private suits for Labor Code violations could be brought only by an 'aggrieved employee' – an employee of the alleged violator against whom the alleged violation *was committed.*" Analysis of Sen. Bill 796, Sen. Jud. Comm., Apr. 29, 2003, p. 6 (emphasis added).

The purpose of this requirement is to protect the interests of the State, other workers, and the regulated businesses from individuals who would file a representative PAGA claim without proper foundation. As the

Court has explained, a PAGA plaintiff acts as a "proxy or agent of the state's labor law agencies," and any settlement, award or resolution of the *qui tam* action is binding on the State and other employees who might have sustained injury from the alleged violations. *Arias v. Superior Court* (2009) 46 Cal. 4th 969, 985-87. If the claim fails, neither the State nor other employees would be permitted to bring a subsequent enforcement action. The rights and interests of the State and these employees would be imperiled by the PAGA plaintiff.

PAGA was designed to ensure that only individuals competent to represent the State and other employees can bring a PAGA claim. As a threshold matter, it requires prospective PAGA plaintiffs to "give written notice by certified mail to the Labor and Workforce Development Agency and the employer of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation." Cal. Lab. Code § 2699.3(a)(1). This requirement is supposed to lay the factual and legal foundation for any prospective PAGA claim. The legislation then gives the LWDA the opportunity to investigate the allegations on its own. If the LWDA assess its own penalties or if the company cures the alleged violation, the employee cannot bring the PAGA action; the matter is resolved. *See* Cal. Lab. Code § 2699.3(b).

The primary purpose of PAGA, therefore, is to force employees to establish the foundation for their claims and facilitate remedies. The *qui*

tam aspect of the law was designed to provide employees with a backstop, allowing them to bring claims when the violations may be real, but the LWDA decides against spending resources to pursue the claim. Experience has shown, though, that this process is all too often short-circuited by plaintiffs' counsel, whose notifications amount to mere form letters.

In the past few years, state and federal courts have been assuring that representative PAGA actions cannot move forward in the courts unless or until plaintiffs have fulfilled these obligations. *See, e.g., Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal. 4th 993, 1001 (standing "require[s] a plaintiff to have suffered injury resulting from an unlawful action"); *Jeske v. California Dep't of Corr. & Rehab.* (E.D. Cal. Mar. 20, 2012) 2012 WL 1130639, at *3 (PAGA is not for "the off-chance that a [Labor Code] violation has occurred."); *Jeske v. Maxim Healthcare Serv., Inc.* (E.D. Cal. Jan. 10, 2012) 2012 WL 78242, at *13 (rejecting complaint that failed "to identify how particular aggrieved employees were subject to particular [Labor Code] violations").

Several courts have found that the best way to honor this requirement is to "defer[] the representative portion of the PAGA claim until plaintiff's status as an aggrieved employee ... is established." *Stafford v. Dollar Tree Stores, Inc.* (E.D. Cal. Nov. 21, 2014) 2014 WL 6633396, at *4; *Ybarra v. Apartment Inv. & Mgmt. Co.* (Cal. Super. Ct. Feb. 26, 2016) 2016 WL 1359893, at *1-3; *see also* Tim Freudenberger, et al., *Trends in*

PAGA Claims and What it Means for California Employers, Inside Counsel, Mar. 19, 2015 (explaining courts are "creating a two-track system" where individual claims proceed before the representative actions are heard). In these actions, the parties "first have discovery and trial as to Plaintiff's claims (whether Plaintiff is an 'aggrieved employee,') and if such determination is made, subsequent discovery and trial as to the representative claims of Plaintiff." *Ybarra*, 2016 WL 1359893, at *3. The *Ybarra* court explained that "Plaintiff's status as an aggrieved employee is a threshold issue, which if she cannot establish, will not permit Plaintiff to assert representative claims on behalf of other aggrieved employees." *Id.*

In *Stafford*, a federal district court drew the same conclusions, stating that "judicial economy" requires bifurcation and that bifurcation in no way prejudices the plaintiff. *See* 2014 WL 6633396, at *4. It further explained that "PAGA's public policy purpose would be ill-served if the court finds he has not been aggrieved by a Labor Code violation," but nonetheless allowed the representative action to proceed. *Id.*

Here, Plaintiff alleges only the mere possibility of a Labor Code violation. He has not set forth facts and legal theories establishing that he or any other employee is "aggrieved." He has not sat for a deposition, and there has been no judicial evaluation of his testimony or his allegations. Yet, he is seeking to invoke PAGA's representative action to obtain discovery of private employee records and contact information of more

than 16,000 Marshalls employees at 129 stores throughout California. *See* Real Party in Interest Marshalls Ans. Br. at 8-9. The Court should determine that Plaintiff does not have PAGA standing to bring this representative action because he has not sufficiently alleged, let alone proven that he is an "aggrieved employee."

B. Civil Actions Under PAGA Do Not Come with the LWDA's Broad Investigatory Powers; They Come with the Traditional Discovery Tools for Civil Claims

Plaintiff's overly broad discovery demand also is not supported by the statute. PAGA does not allow a private plaintiff, even if legitimately aggrieved, to have the same access to an employer's files as the LWDA pursuing an investigation under its separately provided legislative authority. *See* Cal. Code Labor §§ 79 et seq., 6300 et seq. (*e.g.*, authorizing the LWDA to investigate potential violations over safety issues "without notice or hearings"). Such government muscle put in the hands of private individuals is ripe for abuse. In enacting PAGA, the Legislature gave qualified individuals only the right to bring a "civil action." Discovery for civil actions is governed by the California Code of Civil Procedure, not the other statutes that authorize LWDA's investigatory and enforcement powers.

Part of the reason why it is important for a Plaintiff bringing a representative PAGA claim to identify specific violations committed against him and other employees is for the trial court to properly limit the

scope of the action to a manageable set of issues. PAGA claims can already be unwieldy, as courts require representative plaintiffs to prove every single alleged violation, for every single person, for every single pay period in the applicable time. *See, e.g., Cardenas v. McLane Foodservice, Inc.* (C.D. Cal. Jan. 31, 2011) 2011 WL 379413, at *3 (PAGA plaintiff "must prove Labor Code violations with respect to each and every individual on whose behalf Plaintiff seeks to recover civil penalties."). The scope of discovery, therefore, must be focused on only information that could reasonably lead to admissible evidence for these specific charges. Without a theory that binds the employees together, discovery would be unmanageable. *See, e.g., Chie v. Reed Elsevier, Inc.* (N.D. Cal. Sept. 2, 2011) 2011 WL 3879495, at *4 ("[T]here must be some specificity as to who the persons are that the plaintiff seeks to represent.").

California's Code of Civil Procedure provides courts with tools needed to "limit the scope of discovery if it determines that the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." Cal. Code Civ. Proc. § 2017.020(a). It also requires, consistent with PAGA, a party seeking to compel discovery to "set forth specific facts showing good cause justifying the discovery sought." Cal. Code Civ. Proc. § 2031.310(b)(1). Importantly, the discovery standards for such individual civil actions, including under PAGA, are distinct from those that apply to

class actions. In these cases, there have been no class certifications to define the group of people for whom a claim is brought. *Cf. Williams v. Lockheed Martin Corp.* (S.D. Cal. Oct. 5, 2011) 2011 WL 4634269, at *2 (denying discovery after class certification was denied because plaintiffs sought same discovery as under a representative PAGA claim).

The trial court here appropriately exercised its discretion under the Code of Civil Procedure to allow incremental discovery. These rulings helped avoid unnecessary costs, the type of fishing expedition that could prejudice the defendant, and invasions of the constitutionally-protected privacy interests of other individuals. *See Williams*, 236 Cal. App. 4th at 1157-58.[1] They also were consistent with California courts' repeated warnings that expansive discovery can be a "cancer" on litigation and used as unsuitable "weapons to wage litigation." *Calcor Space Facility, Inc. v. Superior Court* (1997) 53 Cal. App. 4th 216, 221; *Obregon v. Superior Court* (1998) 67 Cal. App. 4th 424, 431 (stating any discovery request "can be misused in an attempt to generate settlement leverage by creating burden, expense, embarrassment, distraction, etc."); *Columbia Broad. Sys., Inc. v. Superior Court* (1968) 263 Cal. App. 2d 12, 19 ("[D]iscovery, like all matters of procedure, has ultimate and necessary boundaries.").

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[1] The privacy right under the California Constitution is broader than that of the U.S. Constitution. *See* Cal. Const. art. I, § 1; *American Academy of Pediatrics v. Lungren* (1997) 16 Cal. 4th 307, 326-28.

The Court's admonitions and experiences are shared by courts and practitioners around the country who have found that excessive discovery "imposes costs—not only on defendants but also on courts and society." *See 16630 Southfield Ltd. P'ship, v. Flagstar Bank, F.S.B.* (6th Cir. 2013) 727 F.3d 502, 504; ABA Section of Litig. Member Survey on Civil Practice: Detailed Report, at 2 (Dec. 11, 2009) (reporting 83% of its members, which include plaintiffs' and defense counsel, believe the cost of litigation forces settlement in cases that should not be settled on the merits). Discovery is meant to facilitate the courts ability to find the truth. When misused, it can force legal outcomes that are at odds with the truth.

A few years ago, the Supreme Court of the United States toughened federal pleading standards for civil litigation "expressly because of the burdensome costs that result when vague allegations are allowed to proceed to the discovery stage." Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 Geo. Wash. L.Rev. 773, 773 (2011). The Court, here, should hold that a plaintiff can invoke PAGA only when he or she can meet its statutory thresholds and that trial courts should phase discovery in reasonable increments. Allowing litigation to proceed absent factual foundation and through disproportionate discovery demands does not serve justice.

II. THE DELEGATION OF STATE ENFORCEMENT POWER TO PRIVATE PLAINTIFFS UNDER PAGA MUST BE SAFEGUARDED TO PROTECT THE PUBLIC'S INTEREST

When the Court has allowed private individuals to invoke the power of the sovereign in private litigation, it has carefully constricted that power to reduce the potential for abuse. *See, e.g., People ex rel. Clancy v. Superior Court* (1985) 39 Cal. 3d 740, 750 (rejecting delegation of state enforcement power to private contingency fee counsel). In these circumstances, the Court has required delegations of state enforcement power to be clearly expressed, include meaningful safeguards, and be subject to "a heightened standard of neutrality" to protect the public's interest. *County of Santa Clara v. Superior Court* (2010) 50 Cal. 4th 35, 57. It also has required that such authority be given "the narrowest construction to which it is reasonably susceptible in the light of its legislative purpose." *Hale v. Morgan* (1978) 22 Cal. 3d 388, 405.[2]

As with these other delegations of State power, the goal in PAGA cases is to advance the public interest, not the private interests of the *qui tam* plaintiff. *See Iskanian*, 59 Cal. 4th at 381 (stating that PAGA "is fundamentally a law enforcement action designed to protect the public and not to benefit private parties") (internal citation omitted); *Bauman v. Chase*

[2] "The Legislature 'does not ... hide elephants in mouseholes.'" *Jones v. Lodge at Torrey Pines P'ship* (2008) 42 Cal. 4th 1158, 1171 (quoting *Whitman v. Am. Trucking Ass'ns, Inc.* (2001) 531 U.S. 457, 468)).

Inv. Servs. Corp. (9th Cir. 2014) 747 F.3d 1117, 1124 ("A PAGA action is at heart a civil enforcement action filed on behalf of and for the benefit of the state, not a claim for class relief."); *cf. Berger v. United States* (1935) 295 U.S. 78, 88 (Attorneys representing the state are "the representatives not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all.").

In *People ex rel. Clancy v. Superior Court*, the Court explained the importance of neutrality when evaluating the propriety of the Justice Department's delegation of the State's enforcement authority to private attorneys under a contingency fee agreement. *See* 39 Cal. 3d at 746 (calling "neutrality" of a representative of the sovereign "essential to a fair outcome"). The Court invalidated the contingency fee arrangement in that case because the financial incentive to drive up the value of a case was deemed "antithetical to the standard of neutrality" because it could cause the private individuals to "abus[e] that power." *Id.* at 746-50. In *County of Santa Clara v. Atlantic Richfield*, the Court affirmed its concern over the "conflict of interest" of giving private individuals a financial stake in government enforcement actions. 50 Cal. 4th at 57. The Court stated that it allowed a contingency fee agreement in that case only because the government maintained full control of the litigation through "neutral,

conflict-free government attorneys." *Id.*[3]

In PAGA and other *qui tam* actions, there are no "neutral, conflict-free government attorneys" managing the claims. The trial courts must serve this role. While the authority to represent the State is provided by statute, the courts must make sure that the judiciary does not allow *qui tam* plaintiffs to improperly leverage their statutory authority in ways that are at odds with justice. The courts must be the back-stop for neutrality. "The government entity on whose behalf the plaintiff files [a PAGA] suit is always the real party in interest in the suit," and this public interest must be protected. *Iskanian*, 59 Cal.4th at 382.

Experience has shown that when courts do not check the litigation tactics of *qui tam* plaintiffs, the plaintiffs will increasingly look to leverage the statutes for personal, not public, gain. *See* Victor E. Schwartz & Phil Goldberg, *Carrots and Sticks: Placing Rewards as Well as Punishment in Regulatory and Tort Law*, 51 Harv. J. on Leg. 315, 337-353 (2014) (discussing the history of *qui tam* litigation abuse). In *Iskanian*, the Court expressed its appreciation that, although PAGA was "enacted relatively recently," the use of *qui tam* actions has a long history, particularly under the federal False Claims Act (FCA). 59 Cal. 4th at 382. Whenever courts

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[3] *See also Rhode Island v. Lead Indus. Ass'n* (R.I. 2008) 951 A.2d 428, 475 (finding that state must "retain[] absolute and total control over all critical decision-making" where state enforcement power is conferred to private attorneys under a contingency fee agreement).

have lowered standards for when private plaintiffs have standing to bring FCA *qui tam* actions or failed to rein in attempts to broaden FCA *qui tam* authority, the result has been dramatic increases in so-called "parasitic" *qui tam* suits. *United States ex rel. Findley v. FPC-Boron Employees' Club* (D.C. Cir. 1997) 105 F.3d 675, 679-81 (recounting FCA's history).

Today, *qui tam* litigation has once again become "parasitic." According to the Department of Justice, the number of *qui tam* filings, just since 2009, have nearly doubled. *See* U.S. Dep't of Justice, Fraud Statistics, Nov. 23, 2015 *at* http://www.justice.gov/opa/file/796866/ download. This growth in claims is not limited to the pursuit of credible violations. Recent studies have shown that the government declines to participate in about 80% of these claims,[4] which is viewed as a clear indicator that most attempts to bring FCA *qui tam* actions lack merit. *See, e.g., United States v. ex rel. Jamison v. McKesson Corp.* (5th Cir. 2011) 649 F.3d 322, 331 (stating that the non-intervened claims "presumably lacked merit"); *United States ex rel. Karvelas v. Melrose-Wakefield Hosp.* (1st Cir. 2004) 360 F.3d 220, 242 n.31 ("[T]he government's decision not to intervene in the action also suggested that [relator's] pleadings of fraud

[4] *See* U.S. Dep't of Justice, Press Release, Acting Assistant Attorney General Stuart F. Delery Speaks at the American Bar Association's Ninth National Institute on the Civil False Claims Act and Qui Tam Enforcement, June 7, 2012, *at* http://www.justice.gov/iso/opa/civil/speeches/2012/civ-speech-1206071.html.

were inadequate."). These claims, though, are still expensive, burdensome to defend, and often result in settlements.

The FCA and PAGA share many characteristics, which is why PAGA will be subject to the same types of gamesmanship that have long plagued the FCA if the Court does not enforce PAGA's protections against litigation abuse. As with PAGA, the FCA gives private individuals a large financial incentive (up to 30% of a recovery) to bring a civil action that exposes certain types of violations. *See* 31 U.S.C. § 3730. Also, after a *qui tam* plaintiff alerts the government to an alleged violation, the government can intervene to address the problem, either through litigating the case or resolving the issues with the defendant. As with the U.S. Department of Justice and FCA claims, it can be expected that the LWDA will pursue the most meritorious PAGA claims brought to its attention. Also, under both regimes, the *qui tam* actions can be pursued even though the government declines to get involved and with no supervision from government attorneys. As a result, plaintiffs bringing these qui tam actions have no duty to exercise fair judgment or ensure that an action is in the public's interest. *See Hughes Aircraft Co. v. United States ex rel. Schumer* (1997) 520 U.S. 939, 949 ("relators are ... less likely than is the Government to forgo an action arguably based on a mere technical noncompliance with reporting requirements that involved no harm to the public fisc").

Finally, under both regimes, the risk can be too great for a defendant

to try to vindicate itself by taking a claim to trial. Very few FCA claims go to trial. Even meritless claims settle because the litigation costs and liability exposure are high, even when the potential for a loss is remote. *See AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 350 (observing that with "even a small chance of a devastating loss, defendants will be pressured into settling questionable claims"). Similarly, lawyers who follow PAGA litigation are "unaware of any PAGA lawsuit going to trial or any judge in the state issuing PAGA penalties." Aaron Vehling, *9th Circ. Paves Way for PAGA Suits as Class Action Bypass*, Law360, Sept. 15, 2015, *at* http://www.law360.com/articles/ 709462/9th-circ-paves-way-for-paga-suits-as-class-action-bypass. PAGA claims, just like FCA claims, invariably settle.

Amici urge the Court not to allow PAGA to be transformed into another tool for private plaintiffs to leverage government enforcement actions for personal gain, even when the facts and law do not support their claims. "[T]he Government wins its point when justice is done in its courts." *Brady v. Maryland* (1963) 373 U.S. 83, 88 n.2. The timing of this case is critically important. Since enactment, PAGA has been a complementary statute, with its claims added to class actions as settlement leverage. In the wake of *Arias* and *Iskanian*, so-called PAGA-only claims are increasingly being filed as the primary vehicle for mass employment actions. The Court can assure that, as PAGA is increasingly used, the

claims adhere to the statute's stated focus on actual violations and are not subject to regular gamesmanship, including for personal gain.

CONCLUSION

For these reasons, the Court should affirm the decision below.

Respectfully submitted,

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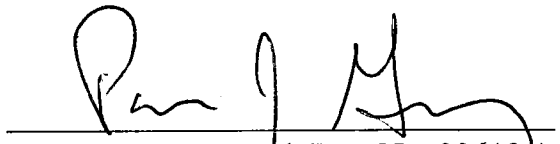
Dated: May 6, 2016

CERTIFICATE OF COMPLIANCE

I, Patrick Gregory, an attorney duly admitted to practice before all courts of the State of California and a member of Shook, Hardy & Bacon L.L.P., counsel of record for *amici curiae*, certify that the foregoing complies with the requirements of Rules 8.520 and 8.204 of the California Rules of Court in that it was prepared in proportionally spaced type in Times Roman 13-point font, double spaced, and contains less than 14,000 words as measured using the word count function of "Word 2010."



Patrick Gregory (Cal. Bar. No. 206121)

Dated: May 6, 2016

PROOF OF SERVICE

STATE OF CALIFORNIA)
COUNTY OF SAN FRANCISCO)

I, Patrick Gregory, declare as follows:

I am a California resident over the age of 18 and not a party to this action. I filed an original and eight copies of the foregoing by hand delivery with:

Clerk, Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

I also served a copy on the following by placing true and correct copies in sealed envelopes sent by U.S. Mail first-class mail, postage pre-paid, to:

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Dated: May 6, 2016

Patrick Gregory