S 227228

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MICHAEL WILLIAMS, an individual, et al
Plaintiff and Appellant,
v.
SUPERIOR COURT OF CALIFORNIA
THE COUNTY OF LOS ANGELES,
Defendant-Respondent.

MARSHALLS OF LLC,
Real Party in Interest.

On Appeal from the Third Appellate District, Case No. C062306
Superior Court of Sacramento County, No. 07AS00032
Hon. Loren E. McMaster

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND [PROPOSED]BRIEF OF AMICI CURIAE CALIFORNIA RURAL LEGAL ASSISTANCE, INC., CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION, LEGAL AID SOCIETY-EMPLOYMENT LAW CENTER, AND NATIONAL EMPLOYMENT LAW PROJECT IN SUPPORT OF PLAINTIFF AND APPELLANT MICHAEL WILLIAMS

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TO: THE HONORABLE CANTIL-SAKAUYE, CHIEF JUSTICE OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to Cal. Rules of Court 8.520(f) California Rural Legal Assistance, Inc., California Rural Legal Assistance Foundation, the National Employment Law Project and the Legal Aid Society – Employment Law Center respectfully request leave to file the accompanying amicus curiae brief in support of the Plaintiff/Appellant MICHAEL WILLIAMS.

I. STATEMENTS OF INTEREST

California Rural Legal Assistance, Inc. (CRLA)

CRLA is a non-profit legal service provider funded in part by grants from the Legal Services Corporation. CRLA provides representation to low income families in rural California. Since its inception in 1966 CRLA has represented low wage workers in administrative and judicial proceedings and has advocated on their behalf in formal rule making and legislative proceedings. CRLA has filed dozens of cases under the PAGA and recovered millions of dollars in underpaid wages and penalties for farm workers, dairy workers, nursery workers, wait staff, janitors, landscapers and others. CRLA was counsel for the Plaintiffs in *Arias v. Superior Court* (2009) 46 Cal.4th 969, and has been granted leave to submit briefing as

amicus curiae in a number of other cases involving labor rights including

California Rural Legal Assistance Foundation ("CRLAF")

CRLAF is a non-profit legal services provider that represents low income families in rural California and engages in regulatory and legislative advocacy which promote the interests of low wage workers, particularly farm workers. Since 1986 CRLAF has recovered wages and other compensation for thousands of farm workers, nearly all of whom are seasonal workers. These workers have been subjected to a variety of schemes intended to defraud them of the minimum wages, contract wages and overtime wages, due them; and been forced to endure working conditions which expose them to pesticides, heat stress, and acute and sustained ergonomic stress. CRLAF has been granted leave to submit briefs as *amicus curiae* in a variety of cases before the California Courts of Appeal and the California Supreme Court on issues relating to PAGA and construction and enforcement of state labor protections including: *Arias v. Superior Court* (2009) 46 Cal.4th 969, *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993, *Arias v. Superior Court* (2009) 46 Cal.4th 969, *Mendoza v. Ruesga* (2008) 169 Cal.App.4th 270, *Brinker Restaurant Corp. v. Superior Court* (2008) 80 Cal.Rptr.3d 781 (Review Granted Previously published at: 165 Cal.App.4th 25),

Fernandez v. California Dept. of Pesticide Regulation (2008)164 Cal.App.4th 1214, *Gentry v. Superior Court* (2007) 42 Cal.4th 443, *Reyes v. Van Elk, Ltd.* (2007)148 Cal.App.4th 604, *Smith v. Superior Court* (2006) 39 Cal.4th 77, *Sav-on Drug Stores, Inc. v. Superior Court* (2004)34 Cal.4th 319.

The National Employment Law Project ("NELP")

NELP is a non-profit organization with almost 40 years of experience advocating for the employment and labor rights of low-wage workers. NELP seeks to ensure that all employees, especially the most vulnerable ones, receive the full protection of labor and employment laws; and that employers are not rewarded by skirting those most basic rights. NELP has litigated and participated as *amicus* in numerous cases addressing the rights of workers to minimum wage and overtime protection as well as adequate working conditions. With offices in New York City, California, the Midwest, Washington state and Washington, D.C., NELP provides technical support and assistance to wage and hour advocates from the private bar, public interest bar, labor unions and community worker organizations. NELP works to ensure that *all* workers receive the basic workplace protections guaranteed in our nation's labor and employment laws; this work has given us the opportunity to learn about job conditions

around the country and to appreciate the critical need for enforcement of wage and hour laws through private litigation due to the lack of public enforcement of these laws. A decision of this Court that the scope of PAGA claims may be different than class action damage claims will assist.

LEGAL AID SOCIETY – EMPLOYMENT LAW CENTER (LAS-ELC)

The LAS-ELC founded in 1916, provides free legal services to low-income and unemployed workers who cannot afford private counsel. Since the 1970's, the LAS-ELC has addressed the employment issues of its clients through a combination of impact litigation and direct services. Through its Workers' Rights Clinic and its Unemployment and Wage Claims Project, the LAS-ELC has provided counsel and representation to thousands of clients with wage claims before the California Labor Commissioner. The LAS-ELC also represents clients with wage-and-hour claims in civil cases in which we use PAGA as a tool to recover unpaid wages. The issues presented in this appeal have a direct impact on the low-income workers whom the LAS-ELC serves.

No party or counsel for any party have made a monetary contribution toward or funded or intend to fund the preparation of this brief. (Cal. Rules of Court Rule 8.520(f)(4).

II. BASIS FOR ADDITIONAL BRIEFING

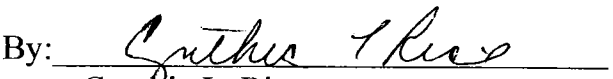
Amici Curiae submit this brief for the purpose of addressing the historical development of the California Labor law, through statute and case

law, which supports Plaintiff/Appellant's position that there should be broad, discovery in a PAGA action subject to limitations on use and disclosure; and that class action procedures, such as discovery opt-out notices and imposing proof burdens on PAGA plaintiffs seeking workforce wide discovery should not be applied.

Amici have effectively use PAGA as a streamlined and effective means of ensuring the employers, particularly those in the underground economy, may not profit by stealing wages from their workers and exposing them to unlawful working conditions. PAGA has become an effective deterrent to unlawful employment practices and must continue to be a powerful tool against worker exploitation. The decisions of the lower courts impede that effectiveness and compromise *Amici's* ability to fully vindicate the rights of the workers who rely on us for representation in workforce wide actions.

Dated: May 5, 2016

California Rural Legal Assistance, Inc.
California Rural Legal Assistance Foundation
National Employment Law Project
Legal Aid Society – Employment Law Center

By: 

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I. INTRODUCTION

Amici submit this brief in support of Appellant and urge this court to consider the historical development and overriding purpose of the PAGA statute when reviewing the discovery orders at issue in this case. Plaintiff in this action brought this case as the proxy of the Labor Commissioner whose role is to ensure consistent compliance with and enforcement of California labor protections. While Mr. Williams, as the Plaintiff in this action, is entitled to his share of the recovery, the purpose of the act and his lawsuit are to ensure enforcement of labor law protections on a workforce wide basis.

The courts below addressed this case, not as an enforcement action, but as a damages case. The orders assume that other aggrieved employees might not want to have their information released and might choose not to have their rights enforced. But that is not what law enforcement is about. A consumer who has a defective VCR can decide it is too much trouble to try to get her money back, and a mortgage holder can elect to continue to pay their mortgage payment rather than challenge a fraudulent loan. But once the attorney general or other enforcement arm takes up the cause, recovery of penalties and even restitution is no longer a matter of personal choice, it is a matter of enforcing the law and promoting the public interest. The California Legislature decided to invest individual employees with that same enforcement power and empower them to bring labor law

enforcement actions. Those enforcement actions cannot be maintained without access to the underlying information establishing the violations, which is generally maintained and controlled by the alleged perpetrator. The courts below have placed unreasonably burdensome limits on the access to the information that is necessary to the development of Mr. Williams' PAGA action and in doing so have undermined the law enforcement purpose of the statute.

The lower courts' order and decision likewise confuse the role of a PAGA plaintiff with that of a class representative. While there is a standing requirement, a PAGA plaintiff need not show that his claims are typical of or common to other aggrieved employees. Nor is there any statutory basis in the PAGA or the Discovery Act that would condition discovery on some kind of factual showing that the named Plaintiff's claims can be sustained. Yet that is the effective result of the trial court's order, as sanctioned by the Court of Appeal. Amici do not suggest that it is never appropriate to impose discovery orders that address the burdensomeness of proposed discovery through timing and case management. That portion of the trial court's order directing that discovery first be produced for one store, might very well have been appropriate under other circumstances, but when made a part of the court's comprehensive order conditioning further discovery on proof of Mr. Williams' claims, and allowing employees – perhaps under pressure from

their employer – to opt-out of providing their contact information to the Plaintiff, the court produced an order that completely undermines the enforcement purpose of the PAGA, and should be reversed.

Amici offer the following argument to support reversal of the lower courts' decision and urge the court to provide directions on shaping discovery and case management orders that promote rather than hinder PAGA actions.

Specifically, we urge this court to reverse the decision below and make clear that 1) privacy interests of other employees encompassed in a PAGA action must be balanced against the public interest in enforcing labor law protections; 2) discovery of the identities of other aggrieved employees is appropriate in PAGA cases and privacy protections must be crafted that take into consideration the specific nature of the interest, while guaranteeing that the plaintiff may obtain all of the information necessary to litigate the causes alleged in the operative complaint; and 3) trial courts may not impose class action requirements or evidentiary burdens on PAGA plaintiffs, either as a means of addressing asserted privacy interests of non-party aggrieved employees, or as a discovery management tool.

II. ARGUMENT

Both the trial court and the appellate court went directly to the question of what limits could be imposed on Williams' demand for discovery without first engaging in the proper balancing of privacy versus

the legitimate interest a PAGA plaintiff has in pursuing his claims. In doing so the courts erred in two ways. They did not evaluate the true interest a PAGA plaintiff has in obtaining workforce wide information and they assumed that employees have broad privacy interests limiting the disclosure of their identities even if that interferes with the enforcement of basic labor protections. This brief examines the historical development of California labor protections, the PAGA, and the nature of the privacy interests of employees. This review leads to the conclusion that broad discovery, with appropriate limits on the disclosure and use of collected information, must be made available in PAGA actions.

A. THE LOWER COURTS FAILED TO GIVE PROPER WEIGHT TO THE PURPOSE OF PAGA WHEN IMPOSING THE DISCOVERY LIMITS AND BURDENS OF PROOF ON WILLIAMS AS A PAGA PLAINTIFF.

The PAGA has become an important method for ensuring that California employers comply with the law and do not gain competitive advantage by underpaying, misclassifying or subjecting their workers to unsafe or hazardous working conditions.

The PAGA is not a statute or procedural mechanism that is designed to maximize the recovery for individual or classes of workers. Its purpose is to expand the enforcement of California labor laws which are designed to ensure that all employers comply with the minimum standards of employment established by statute and regulation. As this court put it "a

PAGA action is a dispute between an employer and the state Agency." *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal. 4th 348, 384.

This legislated extension of the state's labor law enforcement powers must be construed in a manner that promotes the underlying purpose of the statutes being enforced. It is then through this lens that the court must determine the proper scope of discovery and any limits to be imposed on it.

1. The Labor Protections Enforced Through PAGA Have Their Genesis In The Constitutionally Recognized Need For General Labor Protections.

California law has historically recognized that as a society we benefit from the establishment of basic labor protections. The fundamental importance of labor protections is acknowledged in the California constitution which expressly empowers the state to "... provide for minimum wages and for the general welfare of employees ..." Cal. Const., Art. XIV § 1. There is a recognized tension created by this exercise of police powers with other recognized rights, such as the right to contract. However, "[i]n the field of regulation of wages and hours by legislative authority, constitutional guarantees relating to freedom of contract must give way to reasonable police regulations. *Cal. Drive-in Restaurant Assn. v. Clark* (1946) 22 Cal. 2d 287, 295. In that case the court recognized the pressures that could be placed on employees when they alone are responsible for ensuring compliance with the law. *Id.*, at 298-99 (rejecting

the argument that employee self-reporting of tips to be credited toward the minimum wage was an adequate method for ensuring that workers were not cheated given the inevitable pressures that that policy would put on workers to over-report so as not to risk discharge because they didn't garner enough tips to meet the minimum wage.) Since the early years of labor protections California courts have considered constitutional challenges to IWC orders and statutory protections. The overriding public interest in establishing and promoting minimum working standards trumped those arguments.

> "The arbitrary taking of life, liberty, or property cannot, of course, be justified by referring the act to the police power. But if a given piece of legislation may fairly be regarded as necessary or proper for the protection of furthering of a legitimate public interest, the mere fact that it hampers private action in a matter which had therefore been free from interference is not a sufficient ground for nullifying the act." Examples are pointed out where vital legislative changes are of every-day occurrence. "The same may be said of employer and employees. The employment creates a status involving relative rights and obligations, and it is proper for the legislature, acting within the bounds of fairness and reason, to determine the nature, extent, and application of those rights and obligations. " *Moore v. Indian Spring Channel Gold Mining Co.* (1918) 37 Cal. App. 370, 376 (1918), citing *Western Indemnity Co. v. Pillsbury* (1915) 170 Cal. 686, 694). *See also*, *Kerr's Catering Service v. Department of Industrial Relations* (1962) 57 Cal. 2d 319, 327 ("...legislation which is enacted with the object of promoting the welfare of large classes of workers whose personal services constitute their means of livelihood must certainly be regarded as of direct and vital concern to every community and as calculated to confer direct or indirect benefits upon the people as a whole,

thereby coming within the proper exercise of the police power, seeking as it does to promote the welfare of a large class against a real and existing danger." *People v. Vandersee* (1956) 139 Cal.App.2d 388, 390-393); *In Re. Trombley* (1948) 31 Cal.2d 801, 809 ("It has long been recognized that wages are not ordinary debts, that they may be preferred over other claims, and that, because of the economic position of the average worker and, in particular, his dependence on wages for the necessities of life for himself and his family, it is essential to the public welfare that he receive his pay when it is due.")

California has recognized in statute and case law that fundamental worker protections cannot be waived by employees because they promote public policy interests. See Civil Code § 3513 ("[a]nyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement.") Labor Code § 206.5 makes release of the right to wages due, without the actual payment of those wages, null and void. Labor Code § 2804 prohibits waiver of the indemnification rights guaranteed workers under §§ 2800 and 2802. *See Liberio v. Vidal* (1966) 240 Cal.App.2d 273, 276 fn. 1. Labor Code § 1194 likewise makes minimum wage and overtime wages fixed by the Industrial Welfare Commission Wage Orders recoverable notwithstanding any agreement otherwise. *Sav-On Drug Stores v. Sup. Ct.*, 34 Cal.4th 319, 340 (noting that Labor Code section 1194 confirms "a clear

public policy ... that is specifically directed at the enforcement of California's minimum wage and overtime laws for the benefit of workers"). "In short, the statutory right to receive overtime pay embodied in section 1194 is unwaivable." *Gentry v. Superior Court* (2007) 42 Cal. 4th 443, 456 (abrogated on other grounds by *AT&T Mobility LLC v. Concepcion* (2011) *563 U.S. 333,* as construed by *Iskanian v. CLS Transportation Los Angeles*,LLC, *supra,* 59 Cal. 4th 348, 366.) Employees who expressly waive their right to minimum wage or overtime may nonetheless recover and are not considered *in pari delicto* with the employer in violating the law. *Bartholomew v. Heyman Properties, Inc.,* (Cal. App. Dep't Super. Ct. 1955) 281 P.2d 921, 925. Similarly an agreement to accept less than provided in a collective bargaining agreement violates Labor Code §§ 222 and 223 and the equitable defenses of unclean hands and *pari delicto*, are not applicable. *Waters v. San Dimas Ready Mix Concrete* (1963) 222 Cal. App. 2d 380, 383; *see also Hudgins v. Nieman Marcus Group, Inc.*(1995) 34 Cal.App.4th 1109, 1118 (declaring that Sections 221, 222, and 223 were legislative responses to a "strong public policy against fraud and deceit in the employment relationship").

The consistent recognition that basic labor protections were in the public interest and could not be personally waived was not enough to ensure that they were enforced, even though the private right of action to do so was recognized as early as 1918 when the court in *Moore v. Indian*

Spring, supra, held that individual workers could bring an action to recover waiting time penalties for failure to pay wages due under a statute now codified in Labor Code § 203 (rejecting a constitutional attack on the provision in part based on the recognition it was enacted pursuant to the state's police powers because the "intention of the penalty imposed by the act in question is to make it to the interest of the employer to keep faith with his employees and thus avoid injury to them and possible injury to the public at large." *Moore v. Indian Spring Channel Gold Mining Co., supra,* 37 Cal. App. 370, 380.

In furtherance of this public interest the Legislature established specific state enforcement powers for labor protections and vested increasing enforcement powers in state agencies over the course of more than 100 years. See, Stats 1883 ch 21 § 7 p 29, as amended by Stats 1889 ch 10 § 1 p 6, Stats 1915 ch 547 § 1 p 925; Stats 1919 ch 228 § 1 p 330, Stats 1923 ch 257 § 1 p 511; Stats 1929 ch 231 § 1 p 433, Stats 1931 ch 824 § 1 p 1707, (establishing the Department of Industrial Relations) Labor Code § 96 (enacted in 1937 and providing the power to take assignment of and bring actions to recover wages), Labor Code § 98, Labor Code § 98.3; (wages and working conditions enforcement) Labor Code §§ 6300, et seq. (occupational safety and health enforcement), Labor Code § 243 (power to obtain injunctions prohibiting repeat violators from conducting business until judgments for unpaid wages are satisfied.)

It was not enough. State resources were inadequate and labor law violations went unchecked. In 2003 the legislature enacted PAGA as a means of extending the arm of the law by creating a new right to enforce and recover civil penalties due the state that would otherwise go uncollected. As demonstrated in the case law construing PAGA, the Legislature created a public enforcement mechanism, not an individual right of action and discovery, and case management decisions must take that purpose into consideration.

2. PAGA Actions Are Intended To Enforce Workforce Wide, Labor Protections, Those Protections Cannot Be Waived In An Action Brought By The Labor Commissioner, And Cannot Be Waived In PAGA Enforcement Action.

California has recognized that enforcement of individual labor protections through damage claims cannot eliminate the economic incentives that employers have to undercut wages and gain competitive advantage, or alleviate the negative affects it has on the economy and well-being of California citizens. Only a workforce wide enforcement strategy can do that. The PAGA makes employees, like Mr. Williams, a critical arm of that enforcement strategy. His right to proceed under PAGA is derivative of the state's rights to enforce its labor protections. This has been repeatedly recognized by the courts that have construed PAGA. "Thus, the PAG Act empowers or deputizes an aggrieved employee to sue for civil penalties." *Dunlap v. Superior Court* (2006) 142 Cal.App. 4th 330,

337. The *Dunlap* court relied upon legislative history which included an analysis concluding that "*This bill is intended to augment the enforcement abilities of the Labor Commissioner by creating an alternative 'private attorney general' system for labor law enforcement.*" *Id.,* citing Sen. Rules Com., Off. Of Sen. Floor Analyses, analysis of Sen. Bill No. 796, (2003-2004 Reg. Sess.) as amended Sept. 2, 2003, p. 2, italics added.

The right to enforce civil penalties due to the State for labor law violations, and the right to proceed on behalf of other aggrieved employees to do the same, come exclusively from a delegation by the State of California of its right to enforce Labor Code provisions. The court in *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 377-78 explained the distinction between statutory penalties which may be directly recovered by an employee and civil penalties that may be recovered only by the State or by an aggrieved party solely through the delegated power afforded by the legislature in PAGA. The court noted the Legislature's acknowledgment that "'Generally, civil penalties are recoverable only by prosecutors, not by private litigants, and the monies are paid directly to the government. ....' (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 796 (2003–2004 Reg. Sess.), as amended May 12, 2003, p. 5.)" *Id.* at 375.

The primary purpose of PAGA is to enforce labor protections by imposing financial disincentives upon employers that break the law. "In a

lawsuit brought under the act, the employee plaintiff represents the same legal right and interest as state labor law enforcement agencies—namely, recovery of civil penalties that otherwise would have been assessed and collected by the Labor Workforce Development Agency. "*Arias v. Superior Court* (2009) 46 Cal. 4th 969, 986 Limits on the pursuit of workforce wide claims frustrates that purpose. As this court recognized in *Iskanian v. CLS Transportation Los Angeles, LLC, supra,* 59 Cal.4th 348 at 384 the enforcement of penalties is designed "to punish and deter employer practices that violate the rights of numerous employees under the Labor Code.'" *Id.*, quoting *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 502. This workforce wide enforcement is so critical to the public welfare that an employee may not be forced to waive the right to bring a PAGA representative action. *Iskanian* at 388-9. This is because " a PAGA litigant's status as 'the proxy or agent' of the state (*Arias, supra,* 46 Cal.4th at p. 986) is not merely semantic; it reflects a PAGA litigant's substantive role in enforcing our labor laws on behalf of state law enforcement agencies." *Iskanian* at 388.

Because a PAGA action addresses the State's right to collect penalties, not the individual aggrieved workers', it also means that those individual workers cannot waive their rights in a manner that impedes enforcement by the State, or its proxy the PAGA plaintiff. An employee can choose not to claim his or her share of penalties, but that choice does

not affect the State's or the PAGA plaintiff's right to enforce those penalties against the employer.

In the same way that a forced waiver of the right to bring a PAGA action interferes with the law enforcement purpose of PAGA, limiting access to employee information necessary to prove the violations interferes with that purpose.

B. DISCOVERY IN A PAGA CASE MUST BE BROAD ENOUGH TO ALLOW ENFORCEMENT OF WORKFORCE WIDE RIGHTS AND DISCOVERY CANNOT BE LIMITED IN A MANNER THAT IMPEDES THAT ENFORCEMENT.

The right to pursue rights and enforce laws is lost if the information necessary to ultimately prove the enforcement case cannot be obtained. Employers cannot be allowed to withhold critical proof, or the information necessary to obtain that proof. Information regarding the wages, hours and working conditions visited upon specific employees would be available to the Labor Commissioner in an enforcement action. Courts must address discovery controversies in PAGA actions in a manner that provides comparable access, with comparable protections.

That was not done in this case. The lower courts' decisions stand on its head the notion that the primary purposes of California's discovery statutes are to make discovery a simple convenient means of revealing the truth, and to educate the parties concerning their claims and defenses to

encourage settlement and expedite trial. *Greyhound Corp. v. Superior Court,* (1961) 56 Cal. 2d 355, 378.[1]

1. The Employee Privacy Interests Affected By The Proposed Discovery Must Be Balanced Against The State's Interest In Enforcement Of Labor Protections.

Courts must look at the privacy interests asserted by Marshalls with reference to the overriding public interest in enforcing minimum wage and working conditions through PAGA. This consideration must begin with the very real fact that every employer's efforts to withhold the identities and contact information of the employees it has allegedly cheated of wages or subjected to unlawful conditions is *prima facie* self-serving and not in the best interests of those employees, if the employer has indeed broken the law.

The lower court decisions disregard this reality and at the same time ignore the explicit directives given by this Court about balancing privacy

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[1]The Greyhound court articulated nine goals of the discovery act, all of which are furthered by disclosure of employee records in a PAGA action and undermined by the failure to do so. " (1) to give greater assistance to the parties in ascertaining the truth and in checking and preventing perjury; (2) to provide an effective means of detecting and exposing false, fraudulent and sham claims and defenses; (3) to make available, in a simple, convenient and inexpensive way, facts which otherwise could not be proved except with great difficulty; (4) to educate the parties in advance of trial as to the real value of their claims and defenses, thereby encouraging settlements; (5) to expedite litigation; (6) to safeguard against surprise; (7) to prevent delay; (8) to simplify and narrow the issues; and, (9) to expedite and facilitate both preparation and trial.' *Greyhound Corp. v. Superior Court of Merced County, supra,* 56 Cal. 2d 355, 376.

interests with other legitimate interests justifying the disclosure of information. This court articulated the standard in *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal. 4th 1. Information is considered private "when well-established social norms recognize the need to maximize individual control over its dissemination and use to prevent unjustified embarrassment or indignity." *Ibid.* at 36 Additionally, *Hill* recognized the privacy interest "in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference ('autonomy privacy')." *Id.* Those activities are not implicated by knowing that someone is employed at a department store. When construing *Hill,* this court in *Pioneer Electronics (USA), Inc. v. Super. Ct.* (2007) 40 Cal.4th 360 *("Pioneer")* acknowledged that " As with claims of informational privacy, we must examine whether established social norms protect a person's private decisions or activities from "public or private intervention." *Pioneer* at 370, citing *Hill* at 36.

As demonstrated below the employee information disclosed in a PAGA action raises only limited privacy concerns, all of which can be addressed by appropriate protective orders.

2. Discovery Orders Can Be Crafted To Address Privacy Concerns And Provide The Protections From Use And Disclosure Of Employee Information Comparable To Those Limiting The State.

The PAGA plaintiff is seeking information regarding the other aggrieved employees, as a proxy for the State Labor Commissioner. The

scope of the privacy interests of the other aggrieved employees must be analyzed from that perspective. If release of the identity of the employees, and contact information to the State does not implicate a significant privacy interest, then release of that information to a PAGA plaintiff likewise does not, so long as appropriate limits on the use, maintenance and disclosure of that information are comparable to those that would be imposed on the State.

> Confronted with a defense based on countervailing interests, the plaintiff may undertake the burden of demonstrating the availability and use of protective measures, safeguards, and alternatives to defendant's conduct that would minimize the intrusion on privacy interests. (*Whalen, supra,* 429 U.S. at pp. 600-602 [106 L.Ed.2d at pp. 498-500]; *Skinner v. Railway Labor Executives' Assn., supra*, 489 U.S. at p. 626, fn. 7 [103 L.Ed.2d at pp. 665-666].) *For example, if intrusion is limited and confidential information is carefully shielded from disclosure except to those who have a legitimate need to know, privacy concerns are assuaged.* On the other hand, if sensitive information is gathered and feasible safeguards are slipshod or nonexistent, or if defendant's legitimate objectives can be readily accomplished by alternative means having little or no impact on privacy interests, the prospect of actionable invasion of privacy is enhanced.

Hill v. National Collegiate Athletic Assn, supra, 7 Cal. 4th 1, 38, emphasis supplied.

The fact that an individual is employed by a particular employer is not imbued with the expectation that that information is private and not subject to disclosure to the State or its agents. Indeed, an employee's

comings and goings to work are not shrouded in secrecy, and the fact that someone is employed and by whom is often known to members of the public. We routinely identify our employer in connection with credit checks, applications for government benefits, search for other employment, club memberships, and even redemption of coupons and discounts. The State of California, routinely receives information from both employees and employers that discloses the employment relationship.

The employees at Marshalls, in whose interest this PAGA action was filed, mostly fill positions where they are seen by the public every day. Information that someone is employed somewhere "while personal, is not particularly sensitive, as it is...not medical or financial details, political affiliations, sexual relationships, or personnel information." *Puerto v. Superior Court* (2008) 158 Cal. App. 4th 1242, 1253.

Williams' request for the identification of employees -- percipient witnesses -- sought information that Marshalls employees already knew the State could obtain and use for a variety of purposes. They may actually have hoped that information would be used to enforce the labor protections afforded them. Certainly employees could reasonably expect that the State would not use that information for other than legitimate state purposes, or disclose it to others. As anticipated by *Hill,* discovery orders could have and should have been crafted to accomplish exactly that, and sanctions

could have been imposed on Plaintiff or his counsel for any unauthorized use or disclosure.

Similarly, employees have limited or no expectation that the hours they worked, job descriptions, supervision information and shift information would be closely held and not disclosed. Their co-workers and other employees, and even members of the public are privy to this information. It should be discoverable without significant limitations. Amici are not suggesting that there is no privacy interest or protections that should be afforded when identifying information is released. However, crafting protections – like the opt-in *Belair-West* kinds of notices, or limited access to geographic areas – that eliminate a PAGA plaintiff's ability to prove his case are not warranted given the limited nature of the privacy interest. Instead, appropriate limits on the use and disclosure of the information should first be examined and imposed.

Employees do have a higher expectation of privacy with respect to their actual earnings, withholdings and deductions, personnel records and other information that is not readily known to their co-workers, but is available to the State. This information is often critical to the pursuit of wage and hour claims for wage violations, meal and rest period violations of Labor Code § 226.7, violations of Labor Code § 2802, misclassification and violation of critical reporting requirements such as Labor Code § 226.

These facts establish the elements of proof in PAGA claims, and must be made available during discovery in a PAGA action.

Disclosure of payroll information raises more serious privacy concerns, but the parties, and ultimately the court, can and must craft protective orders that limit the disclosure use and maintenance of this information once produced. Initially identities need not be connected with specific payroll entries. Employee names can be redacted and replaced with numbers or the assignment of identifiers that allow the records to be cross-referenced. This would allow for disclosure of the earnings information without invading any privacy interest. Strict limits can be imposed on the use of employee records during motions and trial. Proof of denied meal periods, unpaid overtime hours, and even unreimbursed expenses can be offered without reference to employee names. Damages and penalties calculations can be made and employee identities need only be connected with the records when necessary to distribute the proceeds of a judgment or settlement. These approaches balance the privacy interests of employees without impeding the public interest in rigorous enforcement of labor laws in a manner that protects all affected workers.

Using this standard, PAGA plaintiffs, who stand in the shoes of the Labor Commissioner, would be entitled to obtain the names and contact information, as well as information about hours worked and wages paid to other aggrieved employees, but that information would not necessarily be

connected. With that information plaintiffs can effectively assert the rights of the State and further the State's and the individual interests of the employees through their PAGA cause of action. Without this access, PAGA becomes a nullity.

C. CLASS ACTION PROCEDURES SUCH AS THOSE INVOKED BY THE LOWER COURTS SHOULD NOT BE ADOPTED IN PAGA CASES AS THEY UNDERMINE THE PURPOSE OF WORKFORCE WIDE ENFORCEMENT ON BEHALF OF ANONYMOUS WORKERS.

Amici urge this court not to superimpose class action requirements and procedures on PAGA actions. The court's requirement that Plaintiff first be deposed and establish the bona fides of his claim, is tantamount to the preliminary showing necessary in a class action. Likewise, the use of methods such as the *Belair-West* notice ordered by the trial court[2] is a procedure unique to class actions and should not be a favored method for addressing privacy issues in a PAGA action.[3]

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[2] The trial court held that Marshalls need not produce employee contact information for 128 of its California stores, but did have to produce contact information for its employees at its Costa Mesa store. (PA 229; PA 234.) The trial court ordered this discovery subject to a *Belaire-West* notice process, with the costs to be shared by the parties equally. (PA 229.)

[3] Certainly Appellant invited this error by suggesting the *Belair-West* notice in the first instance. However, Amici raise this argument because the court's decision in this case will likely be dispositive of currently pending and future discovery disputes in a multitude of other PAGA cases. To the extent that the court feels constrained to uphold the trial court's decision on this, it should be limited to the facts and procedural posture of the case and not extended to PAGA cases in general.

1. Use Of The Belair-West Notice And Opt-Out Procedures Are Not Appropriate In A PAGA Action.

A PAGA action is not an individual action or an action enforcing individual rights. It is "an action to recover civil penalties [and as such]'is fundamentally a law enforcement action designed to protect the public and not to benefit private parties' (*People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 17." *Arias v. Superior Court, supra,* 46 Cal. 4th 969, 986. Acknowledging this fundamental difference the *Arias* court held that a PAGA action need not be certified as a class action. The court rejected the argument that not providing notice to other aggrieved employees in a PAGA action would constitute one-way intervention in violation of due process. *Arias* at 985 ("Because an aggrieved employee's action under the Labor Code Private Attorneys General Act of 2004 functions as a substitute for an action brought by the government itself, a judgment in that action binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government.") *Id.*

This argument likewise supports the notion that procedural mechanisms should not be applied to PAGA cases that would have the effect of allowing an employee to "opt-out" or decline to have his or her rights determined by the action. However, the lower court's ruling effectively allows the employee to opt-out of disclosure of identifying information and concomitantly information about hours worked, wages

paid or other unlawful conditions of employment experienced by that employee. Amici, appreciate Plaintiff Williams's efforts to resolve issues of privacy by suggesting a *Belair-West* inspired notice procedure. However, such a notice is not necessary to protect the privacy interests of other aggrieved employees and undermines rather than advances the purpose of PAGA by suggesting that workers can, in effect, opt-out of the benefits of a workforce wide enforcement action by refusing to provide their information.

The Belair-West notice procedure is not based in statute or rule. It is a mechanism born uniquely from class action litigation, where a private individual asserting individual rights seeks discovery that may invade the privacy interests of others. *Belaire-West Landscape, Inc. v. Superior Court* (2007) 149 Cal. App. 4th 554. Class actions are brought for the benefit of individuals who are part of a class of individuals who have personal rights to be vindicated. Courts in addressing the balancing of the privacy rights of those individuals and the rights of plaintiffs to discovery have properly acknowledged that the individuals might want to have a say about whether or not their personal information is released. They might weigh their personal privacy interests against their rights under the class action lawsuit and elect not to participate. After all it is their personal right that is being litigated. A class member may waive his or her rights under the class action judgment or settlement.

However, as this court acknowledged in *Arias,* that is not the case in a PAGA action. A PAGA action is not a class action. The *Belair-West* notice procedure, in this context, imposes a burden not only on the PAGA Plaintiff, but other workers by, in effect, forcing them to choose to whether to release their names and employment information and possibly suffer retaliation, or withhold it and forego their right to recover their lawful wages due. The lower court outrageously used the fact that employees might fear retaliation as a justification for the limits on discovery.[4] Yet, it is this very fear created by the unequal position of employee and employer that independent, public labor law enforcement is supposed to overcome. PAGA was designed to allow enforcement without the need for every worker sign on to the action. Forcing them to do so through use of the *Belair-West* process frustrates rather than promotes the public's interest in enforcing minimum working standards either directly or through a PAGA action.

2. Forcing Plaintiff To Be Deposed And Make Some Kind Of Preliminary Showing That He Suffered The Violations Alleged Is Improper And Not Supported By Provisions Of The PAGA Or The Discovery Act.

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[4] The appellate court opinion identified "the employees' right to be free from unwanted attention and perhaps fear of retaliation from an employer" as a concern that employees might have. *Williams,* at 1159. But rather than address how to insulate those "other aggrieved employees" from possible retaliation the court "protected" them by making it impossible for Plaintiff acting as a proxy for the State, to obtain the information necessary to enforce the very rights those employees might be too frightened to assert.

As amply briefed by Appellant, there is no provision in the Discovery Act that requires a showing of good cause for discovery by way of interrogatories. That requirement is uniquely included in the language of Code Civ. Proc. § 2031.310 subdivision (b)(1), which imposes a good cause requirement *only* with respect to motions to compel further responses to demands for production of documents, *not* interrogatories. Code Civ. Proc. § 2030.300, which applies to interrogatories, does not impose a good cause requirement on the moving party. Amici will not repeat those arguments, but joins in pointing out that the critical importance of the broad and consistent application of the Discovery Act as the touchstone for discovery in PAGA actions. *See, Greyhound Corp. v. Superior Court of Merced County, supra,* 56 Cal. 2d 355, 376.

The appellate court erred in an even more troubling fashion when it further justified the trial court's actions as "eminently reasonable" and sanctioned the courts requirement that " petitioner provide some support for his own, local claims..." before proceeding with broader discovery. *Id.* at 1157. This standard is dangerously close to requiring that the PAGA plaintiff make out a factually supported prima facie case before being allowed to proceed on behalf of other aggrieved employees. It should be rejected by this court as it has no basis in statute or case law. It is also akin to a showing required of a class representative, requiring some kind of

proof of commonality or typicality of claims that is simply not appropriate much the less required in a PAGA or other non-class action.

PAGA requires that the PAGA plaintiff be aggrieved by "one or more" of the violations alleged in the PAGA claim and lawsuit. Labor Code § 2699(c). While this is a standing requirement, it does not allow or in any way suggest that Defendant – or the court -- can take over the PAGA case and hold discovery hostage until some undefined showing is made. Yet the lower courts' focus on requiring a factual showing of Mr. Williams' injuries before proceeding with further discovery suggests that defendant employers may dictate the course of discovery. Such a showing is not necessary or even of particular value since a PAGA plaintiff need not have suffered each and every violation alleged. Accordingly, that aspect of the trial court's order should be reversed and this court should make clear that no preliminary factual showing of harm – beyond the pleadings – is required as a precursor to discovery in a PAGA action.

III. CONCLUSION

While the trial court is vested with the power and responsibility to ensure the efficient management of cases it may not tie the hands of litigants or interfere with the prosecution of causes of action granted to a plaintiff by statute or common law. It may not impose class action requirements on a case that is not a class action. *Arias v. Superior Court, supra,* 46 Cal. 4th 969, 986. The lower court's orders do exactly

that and application of the standards countenanced by the appellate court threaten to so burden PAGA plaintiffs that that law enforcement purpose of the PAGA will be completely thwarted. The decision below should be reversed and the lower court directed to consider orders limiting the disclosures, use and maintenance of all private employee information in a manner that prevents unnecessary disclosure to the public.

Respectfully submitted

Dated: May 6, 2016

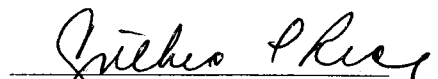
CALIFORNIA RURAL LEGAL ASSISTANCE, INC.

By: _____

Cynthia L. Rice
Attorneys for Amici Curiae

I, CYNTHIA L. RICE, certify that I am counsel for Amicus Curiae California Rural Legal Assistance in the instant manner; that I have prepared the foregoing Amicus Brief in Support of Plaintiff/Appellant Williams in this matter and that the word count for the brief, including footnotes, was under 7,000 as generated by the word-count program in the Word program.

DATED: May 6, 2016



Cynthia L. Rice

PROOF OF SERVICE

I am employed in Alameda County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 1430 Franklin Street, Suite 103, Oakland, California 94612.

On May 6, 2016, I served the foregoing document entitled:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND [PROPOSED]BRIEF OF AMICI CURIAE CALIFORNIA RURAL LEGAL ASSISTANCE, INC., CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION, LEGAL AID SOCIETY-EMPLOYMENT LAW CENTER, AND NATIONAL EMPLOYMENT LAW PROJECT IN SUPPORT OF PLAINTIFF AND APPELLANT MICHAEL WILLIAMS

by serving in the manner described below to each of the parties herein listed

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By OVERNIGHT DELIVERY BI caused the above-referenced envelopes to be delivered to an overnight delivery service for delivery to the addresses above.

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

Executed on May 6, 2016, at Oakland, California.

Cynthia L. Rice