CASE NO. S227228

SUPREME COURT COPY

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

MICHAEL WILLIAMS, an individual,
Plaintiff and Appellant,

v.

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

MARSHALLS OF CA, LLC,
Real Party in Interest.

After a Decision Of The Court Of Appeal,
Second Appellate District, Division One,
Case No. B259967

From The Superior Court,
County of Los Angeles, Case No. BC503806,
Assigned For All Purposes To Judge
William F. Highberger, Department 322

APPLICATION BY *AMICUS CURIAE* CONSUMER ATTORNEYS OF CALIFORNIA FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

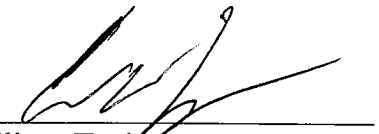
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

The following application and brief are made by the Consumer Attorneys of California ("CAOC").

CAOC is a non-profit organization of attorneys and is not a party to this action. Pursuant to California Rule of Court 8.208, CAOC hereby states that no entity or person has an ownership interest of 10% or more in CAOC, and CAOC knows of no person or entity that has a financial or other interest in the outcome of the proceeding under Rule 8.208.

Date: May 6, 2016

Respectfully Submitted,

By: 

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APPLICATION OF CONSUMER ATTORNEYS OF CALIFORNIA FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF AND APPELLANT

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE AND ASSOCIATE JUSTICES

The undersigned respectfully requests permission to file a brief as amicus curiae in the matter of *Williams v. Marshalls of CA, LLC,* Case No. S227228, under California Rules of Court, rule 8.520(f) in support of Plaintiff and Appellant, Michael Williams, on behalf of Consumer Attorneys of California ("CAOC").

CAOC, founded in 1962, is a voluntary non-profit membership organization of approximately 3,000 consumer attorneys practicing in California. Its members predominantly represent individuals subjected to a variety of unlawful and harmful business practices, including consumer fraud, personal injuries, wage and hour violations, and insurance bad faith.

CAOC has taken a leading role in advancing and protecting the rights of injured citizens and employees in both the courts and the Legislature. This has often occurred through class actions for violations of California's Labor Code and Unfair Competition Law, which is codified at Cal. Bus. & Prof. Code §17200, *et seq.* In recent years, CAOC has participated as amicus curiae in many cases, including: *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 (our firm was one of the Plaintiff's counsel in the

Brinker case); *Kwikset v. Superior Court* (2011) 51 Cal.4th 310; *In re Tobacco II Cases* (2009) 46 Cal.4th 298; *Parks v. MBNA America Bank, N.A.* (2012) 54 Cal.4th 376; and *Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185. CAOC has also participated as an amicus in numerous cases pending at the appellate level.

CAOC has a substantive and abiding interest in ensuring PAGA actions retain their purpose and scope. Consistent with this, CAOC has a strong interest in ensuring PAGA representatives have the necessary access to discovery before the Court makes merits based decisions that will have a collateral estoppel effect on statewide aggrieved employees before they have an opportunity to participate in the PAGA action. CAOC also has a strong interest in preserving the PAGA representative's role as proxy for the state labor law agencies and their ability to investigate Labor Code violations on behalf of employees throughout California.

In response to California Rules of Court, rule 8.520(f)(4), no party or counsel for a party has authored the proposed brief in whole or in part. Except for the authors themselves, no party, counsel for a party, or other person made a monetary contribution to fund the preparation of the following amicus brief.

The proposed brief follows.

Executed in San Diego, California, this 6th day of May, 2016.

Respectfully submitted,

By: _____

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To the Honorable Presiding Justice and the Honorable Associate Justices of the Court of Appeal of the State of California for the Second Appellate District:

INTRODUCTION

The Private Attorney General's Act ("PAGA"), *Labor Code* section 2698, *et seq.*, was created to alleviate overburdened state government agencies that did not have the resources necessary to pursue enforcement of the *Labor Code.* The PAGA allows private citizens to stand in as proxies for California's labor law enforcement agencies. A PAGA representative plaintiff's proxy role is to enforce the law and, on behalf of all aggrieved employees statewide, seek penalties against employers who have violated certain *Labor Code* sections. PAGA representative plaintiffs do not have their own individual claims, but instead, represent the state's interest in enforcing the *Labor Code* and deterring employers from future violations. In order to carry out this role and investigate the employer's *Labor Code* violations, the PAGA representative plaintiff requires access to statewide employee contact information. Such information is routinely discoverable in both PAGA and class actions, in light of the low risk of intrusion to privacy and the overall benefit these employees will have in participating in these actions.

The Court of Appeal ignored established law by this Court, which routinely allows discovery of employee contact information. Instead, the Court below instilled merits based hurdles (prove his own "individual" claims, sit for a deposition, and prove employer's "uniform" violations) that a PAGA representative plaintiff must accomplish before being allowed to conduct statewide discovery – i.e. obtain employee contact information. The Court below failed to consider the ramifications of requiring such merits based hurdles on a PAGA representative plaintiff – namely, the collateral estoppel effect of PAGA judgements. Because aggrieved employees receive no notice of the action, it is extremely important that a PAGA representative plaintiff is allowed to conduct a *Belaire-West* notice procedure, which informs the employees of the action and affords them an opportunity to become involved in the case.

An adverse judgment in a PAGA action will have a collateral estoppel effect on all aggrieved statewide employees and bar them from asserting PAGA claims. These employees will be bound by the judgement that was achieved based on what the PAGA representative plaintiff was able to prove locally and without any input from employees throughout California. It is fundamentally unfair to not allow the PAGA representative plaintiff to investigate and discover the employees whom the adverse PAGA judgement will bind.

It further defies logic and reason that a PAGA representative plaintiff is presumed to bring the case on behalf of all current and former employees throughout California, but is precluded from conducting discovery into whether these same employees are subject to *Labor Code* violations. It is fundamentally unfair for a defendant to prevent statewide discovery of employee contact information, yet also be able to collaterally estop all employees in the State from asserting claims.

The Court of Appeal also misapplied class action requirements to a PAGA action. Demonstrating a uniform statewide policy is applicable to all employees is a class certification requirement. Yet, the Court below requires that a PAGA representative plaintiff establish a defendant's uniform practices before being allowed to conduct statewide discovery. There are no class certification procedures in a PAGA action and this was a misapplication of the law that will only cause confusion in the lower courts regarding the requirements between two very distinct forms of aggregate litigation.

Furthermore, these never-before-seen merits hurdles (prove the plaintiff's individual claim, sit for a deposition, and prove "uniform" violations exist) will be used as a shield by employer defendants to curb necessary pre-certification class action discovery. Employers will use these merits hurdles to throw up roadblocks in class action cases to deny production of class contact information. Once again, employee contact

information is routinely discoverable. If the Court of Appeal's decision is affirmed, it will create a brand new discovery standard heretofore never-before-seen in California law or the 9th Circuit. Both PAGA and class representatives will be required to prove their own individual claims on the merits before being permitted to obtain statewide employee contact information – information that is, more often than not, vital to a plaintiff's investigation of the case and, in a class context, achieving certification.

DISCUSSION

A. The Court Of Appeal's Decision In *Williams* Frustrates The Representative Capacity Of A PAGA Representative Plaintiff – A PAGA Representative Does Not Have Individual Claims

1. A PAGA Representative Plaintiff Is A Proxy For The State's Labor Law Enforcement Agency

A PAGA representative plaintiff is deputized as a private attorney's general to investigate and bring an action for civil penalties on behalf of the state against an employer for violations of the *California Labor Code*. See *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 360.

Labor Code Section 2699(a) provides "...any provision of this code that provides for a civil penalty to be assessed ad collected by the Labor and Workforce Development Agency ("LWDA")...for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself **and other current or former employees**..." Lab. Code § 2699(a)(emphasis added). "'An

employee suing...under the [PAGA] does so as the **proxy or agent of the state's labor law enforcement agencies**... 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 [LWDA].'" *Iskanian, supra,* 59 Cal.4th at 380 (citing *Arias v. Superior Court* (2009) 46 Cal.4th 969, 986)(emphasis added).

2. The Court of Appeal Misinterpreted PAGA When It Imposed The Requirement That A PAGA Representative Plaintiff Must First Prove His "Individual" And Local Claims Before Being Allowed To Conduct Statewide Discovery

The Court below did not give much weight to a PAGA representative plaintiff's status as a proxy or agent of the state's labor law enforcement agencies. The Court of Appeal held that a PAGA Plaintiff could not conduct statewide discovery until he first had evidence to prove that he has "provide[d] some support for his own, local claims..." *Williams v. Superior Court* (2015) 236 Cal.App.4th 1151, 1157. "His first task will be to establish he himself was subjected to violations of the *Labor Code*." *Id.* at 1159. Per *Williams*, before a PAGA representative plaintiff can conduct state-wide discovery and fulfill his or her duty to investigate defendant's state-wide *Labor Code* violations, the plaintiff must 1) prove their "individual claims," 2) sit for a deposition, and 3) prove "uniform" Labor Code violations exist at the Plaintiff's employment location. *Id.* at 1159.

The Court of Appeal's conclusion that a PAGA representative plaintiff must first provide proof to support his own claim before being allowed to conduct discovery regarding all aggrieved employees is based upon a faulty premise. In imposing these requirements, the Court below fails to appreciate the nature of a PAGA claim. PAGA claims are not individual claims. A PAGA plaintiff does not have "his own" individual claims, as the Court of Appeal suggests. A plaintiff may not and does not bring a PAGA claim as an individual, but "as the proxy or agent of the state's labor law enforcement agencies." *Arias v. Superior Court, supra,* 46 Cal.4th at 986. "The purpose of the PAGA is not to recover damages or restitution, but to create a means of 'deputizing' citizens as private attorneys general to enforce the *Labor Code*. [Citation] ... [T]he relief is in large part 'for the benefit of the general public rather than the party bringing the action.'" *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 501.

A plaintiff asserting a PAGA claim may not bring the claim simply on his or her own behalf, but must bring it as a representative action and include "other current or former employees." *Machado v. M.A.T. & Sons Landscape, Inc.* (E.D.Cal., July 23, 2009, No. 2:09-cv-00459) 2009 U.S. Dist. LEXIS 63414 *6. In *Machado*, the District Court, using the "'common acceptation'" of the word "and," held that the claim must be brought on behalf of the other employees. *Ibid.* "[T]he PAGA statute does not enable a

single aggrieved employee to litigate his or her claims, but requires an aggrieved employee 'on behalf of herself or himself and other current or former employees' to enforce violations of the *Labor Code* by their employers." *Urbino v. Orkin Services of California, Inc.* (C.D.Cal. October 5, 2011, No. 2:11-cv-06456) 2011 U.S.Dist. LEXIS 114746 *22; see also *Plows v. Rockwell Collins, Inc.* (C.D.Cal., August 9, 2011, No. SACV 10-01936) 812 F.Supp. 2d 1063; *Brown v. Ralphs Co., supra,* 197 Cal.App.4th 489.

By holding that a PAGA plaintiff must first prove his own claims before being allowed to conduct statewide discovery, the Court of Appeal misinterprets the law and role of a PAGA representative plaintiff. Since it is clear that the PAGA representative plaintiff is required to bring a PAGA claim on behalf of herself or himself and all other current or former employees to enforce the *Labor Code*, the PAGA representative plaintiff must be allowed to investigate and discover potential *Labor Code* violations suffered by statewide employees.

3. PAGA Representative Plaintiffs Seek To Fulfill Their Role As Proxies For The State Labor Law Enforcement Agency By Investigating Labor Code Violations Of The Statewide Employees The Plaintiff Is Required To Represent

The Court of Appeal further dismisses a PAGA representative plaintiff's special representative role by claiming that early statewide discovery is "a classic use of discovery tools to **wage litigation rather than**

facilitate it." *Williams, supra,* 236 Cal.App.4th at 1157 (emphasis added). This language demonstrates that the Court completely misunderstands the purpose of a PAGA action. The PAGA representative plaintiff steps into the shoes of the deputies or agents of California's labor law enforcement agency to represent all current and former aggrieved employees in seeking penalties on behalf of the state. By requesting the contact information of all aggrieved employees statewide, a PAGA representative plaintiff is merely conducting the same investigation as would the LWDA. Because the PAGA requires a representative plaintiff to represent all current and former employees, it is only fair that the representative plaintiff be entitled to the contact information of the people he is required to represent. This is not "waging litigation," but enforcing the law on behalf of the state government, which does not have the resources to do the same.

Yet, the Court of Appeal denies PAGA representative plaintiffs the same "free access to all places of labor" as the Labor Commission, his deputies, and agents – effectively, nullifying a statute put in place to allow PAGA representative plaintiffs to investigate violations of the *Labor Code* and alleviate an overburdened government of the responsibility. Importantly, Appellant herein is not seeking "free access." Appellant is merely seeking Respondent's employee contact information. That is, the employees which will be subjected to the collateral estoppel effect of an adverse determination

if the employer prevails in the PAGA action, which is discussed in more detail below.

In denying Appellant access to statewide employee contact information, the Court stated, "...nothing in the PAGA suggests a private plaintiff standing in as a proxy for the DLSE is entitled to the same access." *Williams, supra,* 236 Cal.App.4th at 1157. However, it is also true that nothing in the PAGA suggests a plaintiff standing in as a proxy for the DLSE has to prove his "individual" claims locally, sit for a deposition, and demonstrate a "uniform" statewide policy before being allowed to investigate his claims on behalf of the aggrieved employees he represents. The PAGA representative Plaintiff is required to represent all current and former employees of the defendant and, therefore, must be allowed access to their contact information.

B. The Court of Appeal's Decision In *Williams* Undermines The Purpose Of The PAGA, Which Is To Alleviate Overburdened State Government Entities, Vindicate The State's Interest In Enforcing The *California Labor Code,* And Deter Employers From Future *Labor Code* Violations

The PAGA was created to address the "shortage of government resources to pursue enforcement" of *Labor Code* violations. *Iskanian v. CLS Transportation Los Angeles, LLC, supra,* 59 Cal.4th at 379. "[T]he Legislature's purpose in enacting the PAGA was to augment the limited enforcement capability of the Labor and Workforce Development Agency by

empowering employees to enforce the *Labor Code* as representatives of the Agency." *Id.* at 383. The PAGA statute reflects California's judgment about how best to enforce its labor laws. *Sakkab v. Luxottica Retail N. Am.* (9th Cir. 2015) 803 F.3d 425, 439.

The PAGA is a critical enforcement tool to protect workers' rights in the state when the state is unable to do so. *Iskanian, supra,* 59 Cal.4th at 379-380. The PAGA allows an aggrieved employee to act as the eyes and ears of the state government and "blow the whistle" on employers for *Labor Code* violations. The PAGA treats the PAGA representative plaintiff as if the plaintiff were "in the shoes" of the state and permits the recovery of civil penalties to deter future violations. *Arias v. Superior Court, supra,* 46 Cal.4th at 986. Even when statutes specify civil penalties, there is a shortage of government resources to pursue enforcement. The legislative history with PAGA discussed this problem at length. *Iskanian, supra,* 59 Cal.4th at 379.

The sole purpose of the *Iskanian* rule "is to vindicate the Labor and Workforce Development Agency's interest in enforcing the *Labor Code*." *Id.* at 388-89. Representative actions under the PAGA "directly enforce *the state's* interest in penalizing and deterring employers who violate California's labor laws." *Id.* at 387. Limiting PAGA rights would harm the state's interests in enforcing the state *Labor Code* and in obtaining civil penalties under the statute to deter future violations. See *Sakkab v. Luxottica*

Retail N. Am., *supra,* 803 F.3d at 439.

Restricting a PAGA representative plaintiff from investigating statewide *Labor Code* violations until after the plaintiff has met certain merits based requirements (i.e. proving the plaintiff's "individual claims, and proving "uniform" violations) limits rights under PAGA and completely frustrates the state's interest in enforcing the *Labor Code* and deterring employers from committing future violations.

As this Court is no doubt aware, forced arbitration agreements severely limit California's ability to bring class action claims. See *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333 (FAA preempts state law invalidating class action waivers, abrogating *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148); *DirecTV, Inc. v. Imburgia* (2015) 136 S. Ct. 463 ("law of your state" is preempted by the FAA). More and more often, employers are forcing employees to sign arbitration agreements that include class action waivers.

Given the widespread use of forced arbitration waivers by employers and the shortage of government resources to pursue enforcement of the *Labor Code*, PAGA actions are one of the only remaining ways California workers' *Labor Code* rights are protected. In order to effectively protect workers' rights, PAGA representative plaintiffs must be afforded the right to investigate and discover statewide claims, including obtain the contact

information of statewide employees. This includes being provided with the same discovery rights that the state would have, since the PAGA representative plaintiff brings the PAGA action on behalf of the state.

C. PAGA Actions Are A Type Of *Qui Tam* Action And A PAGA Representative Plaintiff Should Have Access To Statewide Discovery To Investigate Claims Of Statewide Violations Of The *Labor Code*

PAGA actions are a type of *qui tam* action. "'Traditionally, the requirements for enforcement by a citizen in a *qui tam* action have been (1) that the statute exacts a penalty; (2) that part of the penalty be paid to the informer; and (3) that, in some way, the informer be authorized to bring suit to recover the penalty.' [Citation] The PAGA conforms to these traditional criteria, except that a portion of the penalty goes, not only to the citizen bringing the suit, but to all employees affected by the *Labor Code* violation. The government entity on whose behalf the plaintiff files suit is always the real party in interest in the suit." *Iskanian, supra,* 59 Cal.4th at 382 (citing *Sanders v. Pacific Gas & Elec. Co.* (1975) 53 Cal.App.3d 661, 671; *In re Marriage of Biddle* (1997) 52 Cal.App.4th 396, 399).

Since a PAGA representative action is a type of *qui tam* action, it only makes sense that a PAGA plaintiff be allowed the opportunity and the right to conduct discovery for all potential employees affected by the *Labor Code* violations.

D. The Court of Appeal's Decision In *Williams* Is Fundamentally Unfair To Aggrieved Employees, As It Denies Aggrieved Employees The Opportunity To Participate In The PAGA Action Before the Court Makes Merits Determinations That Could Bind Them To An Adverse Decision That Will Collaterally Estop Them From Asserting Similar Claims

The Court of Appeal held "bare allegations unsupported by any reason to believe a defendant's conduct extends statewide furnishes no good cause for statewide discovery." *Williams, supra,* 236 Cal.App.4th at 1157. The lower Court erred in applying a "good cause" standard on special interrogatories. Appellant actually has good cause to request statewide employee contact information.

The "good cause," which the lower Court fails to consider, is the collateral estoppel effect for all statewide aggrieved employees represented by the PAGA representative plaintiff. The lower Court puts the cart before the horse by requiring the PAGA representative plaintiff to prove his claims before he has been given an opportunity to thoroughly investigate them. Yet, if the PAGA representative plaintiff fails to satisfy the Court as to these requirements, the defendant will obtain a judgment that will be used to collaterally estop statewide aggrieved employees from asserting similar claims.

By creating these merits based requirements a PAGA representative plaintiff must satisfy before accessing statewide discovery, the lower Court effectively put greater importance on statewide aggrieved employees'

privacy (producing employee contact information has been held to carry very low intrusion of privacy) than the aggrieved employee's due process rights. See *Pioneer Elecs. (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360, 373. In other words, if the Court of Appeal's decision is affirmed, these statewide aggrieved employees will be precluded from assisting the PAGA representative plaintiff with his investigation of *Labor Code* violations, but will be bound by any adverse decision the defendants obtain.

1. PAGA Actions Have A Collateral Estoppel Effect For Aggrieved Employees Represented by PAGA Plaintiffs

"Because an aggrieved employee's action under the [PAGA] 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. [PAGA] authorizes a representative action only for the purpose of seeking statutory penalties for *Labor Code* violations and an action to recover civil penalties 'is fundamentally a law enforcement action designed to protect the public and not to benefit private parties.'" *Iskanian, supra,* at 381 (citing *Arias v. Superior Court*, *supra*, 46 Cal.4th at 986)(emphasis added).

The lower Court fails to consider the collateral estoppel effect a PAGA action will have on the aggrieved employees. This very Court has determined that "judgment in such [a PAGA] action is binding not only on

the named employee plaintiff but also on government agencies and **any aggrieved employee not a party to the proceeding**." *Id.* These employees will be bound by any judgment obtained by the PAGA defendant and collaterally estopped from bringing their own PAGA actions.

It is fundamentally unfair to have statewide aggrieved employees bound by an adverse judgment in a PAGA action when they are precluded from having the opportunity to actually participate in the discovery process. The decision below denies statewide aggrieved employees the choice to participate in prosecuting the PAGA action, which will ultimately affect their legal rights.

It is also fundamentally unfair to have employees bound by an adverse PAGA judgment and not provide the PAGA representative plaintiff the opportunity to discover whether these employees are subject to the same *Labor Code* violations. The Court of Appeal instilled requirements on a PAGA plaintiff to 1) prove their "individual claims," 2) sit for a deposition, and 3) prove "uniform" *Labor Code* violations exist at the Plaintiff's employment location before a PAGA plaintiff could be allowed to conduct statewide discovery. See *Williams, supra,* 236 Cal.App.4th at 1159. In other words, an entire state of aggrieved employees could be bound be an adverse decision based on the Court's determination on the merits of the PAGA plaintiff's "individual claims" and his ability to prove "uniform" violations

at his own place of employment without the PAGA representative Plaintiff even having the opportunity to interview other employees in the state about their potential *Labor Code* violations.

2. Unlike Class Actions, California Law Does Not Contain Notice Requirements For Aggrieved Employees Of PAGA Actions, So Plaintiff's Investigation May Be The Only Way These Employees Are Notified And Afforded The Opportunity To Participate In The Case

In a class action, if the class is not certified, there is no preclusive effect on the putative class members who later wish to bring another class action case. But if the class is certified, the class members will be given notice of the case and allowed a chance to participate in the case. Only then will an adverse judgment have the preclusive effect of extinguishing the class member's rights. See *Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1083.

A PAGA action differs from a class action in this regard. With a PAGA action, there is no requirement that notice be provided to the aggrieved employees in order for them to be bound by an adverse judgment. "[A]n employee who, on behalf of himself and other employees, sues an employer under the unfair competition law (Bus. & Prof. Code § 17200 *et seq.*) for *Labor Code* violations must satisfy class action requirements, but that those requirements need not be met when an employee's representative action against an employer is seeking civil penalties under the *Labor Code*

Private Attorneys General Act of 2004 (Lab. Code § 2698 *et seq.*)." See *Arias v. Superior Court, supra,* 46 Cal.4th at 975. Thus, under these circumstances, it is even more important for the PAGA representative plaintiff to be allowed greater freedom to conduct statewide discovery (at the very least, to obtain the contact information of statewide employees) because notice is not required to go out to these employees before they are bound by an adverse decision and precluded from recovering PAGA penalties.

Because of the collateral estoppel effect a PAGA action would have on the aggrieved employees who are presumed represented by a PAGA representative plaintiff, it is fundamentally fair for these employees to receive notice advising them of the case and allowing them the opportunity to participate in the discovery and proof of the *Labor Code* violations. See *Belaire-West Landscape, Inc. v. Superior Court* (2007) 149 Cal.App.4th 554, 562.

Such notice would be provided when the PAGA representative plaintiff requests access to aggrieved employees' contact information via the *Belaire-West* notice procedure. If the Court of Appeal's added merits restrictions to PAGA representative plaintiffs seeking statewide discovery is allowed to stand, aggrieved employees will not be afforded an opportunity to become involved with a PAGA action that could benefit them before the Court makes merits based decisions that would ultimately affect statewide

employees' rights.

E. The Court Of Appeal Mistakenly Applies A Class Action Requirement That Plaintiff Must Demonstrate A Uniform Statewide Policy.

The lower Court imposed several requirements of a PAGA representative plaintiff before he could be allowed to conduct statewide discovery - one of which was that the plaintiff prove "uniform" *Labor Code* violations exist at the plaintiff's employment location. *Williams, supra,* 236 Cal.App.4th at 1159. Since the PAGA representative plaintiff had not shown that Marshalls had a "uniform statewide policy," the Court determined it was not reasonable to allow him to conduct statewide discovery. *Id.* at 1158. In fact, the Court stated that plaintiff's "second task would be to establish Marshall's employment practices are uniform throughout the company, which might be accomplished by reference to a policy manual or perhaps a deposition of a corporate officer." *Id.* at 1159.

Showing that defendant has a uniform statewide policy is a requirement found in California wage and hour class actions, not PAGA representative actions. *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1033. A plaintiff in a wage and hour class action must demonstrate uniformity to achieve class certification. *Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, 37. However, this Court specifically rejected the argument that PAGA actions must fulfill class action

requirements. See *Arias v. Superior Court, supra,* 46 Cal.4th at 983-984.

There are no class certification requirements or procedures in a PAGA claim. A PAGA representative plaintiff need only prove by a preponderance of the evidence that *Labor Code* violations exist – not that the *Labor Code* violations were caused by any uniform policy and/or practice. While these *Labor Code* violations *could* be proven by a uniform policy and/or practice, the PAGA does not require a showing of uniformity. There certainly is no requirement to show the *Labor Code* violations were caused by a uniform policy and/or practice before conducting statewide discovery. The Court of Appeal's imposition of a uniformity requirement – a class action requirement – in a PAGA action is a misinterpretation of the law that conflicts with this Court's ruling that class action requirements do not apply to PAGA actions.

For instance, as is the case with Defendant employer herein, some employers have multiple locations across the state of California. In a class action case, a plaintiff may have to prove uniform practices and/or policies that affect all the employees in the class and/or sub-class. This is the uniformity requirement. Not so for a PAGA action.

We are in no way suggesting a PAGA representative plaintiff does not have to prove *Labor Code* violations for the aggrieved employees. We are suggesting the Court of Appeal misstated the law by requiring the PAGA *Labor Code* violations to be "uniform." Uniformity is a class action

requirement that has no basis in a PAGA action There are potentially other ways to prove the aggrieved employees suffered *Labor Code* violations other than through "uniform" practices and/or policies. For example, an employer with multiple locations across the State may have *Labor Code* violations at only some of the locations. Meaning, they may not be "uniform" in the classical sense used in class action litigation.

F. Employee Contact Information Is Routinely Discoverable – Regardless Of Whether The Matter Is A PAGA Action Or A Class Action

Beyond misunderstanding the purpose of the PAGA and the role of a PAGA representative plaintiff, the Court of Appeal misapplies the law with respect to discovery of employee contact information. It is not the type of *action* that should determine discovery – but the type of *information* sought. Respondent's Answer Brief relies on the differences between PAGA and class actions (i.e. the type of action) to redirect the Court's attention away from the type of information sought. Employee contact information is routinely discoverable and carries little threat of an intrusion into the employee's privacy. *Pioneer Elecs. (USA), Inc. v. Superior Court, supra,* 40 Cal.4th at 373 (production of employee contact information "involves no revelation of personal or business secrets, intimate activities, or similar private information, and threatens no undue intrusion into one's personal life."). There are no requirements that a case must be a class action in order

to obtain this information. There is no distinction between discovery of current and former employees, as requested in a class action or in a representative PAGA action – the same information is requested and the same privacy rights are implicated.

However, the Court of Appeal ignores established law allowing discovery of employee contact information and holds that an employee's right to privacy outweighs the plaintiff's need for the contact information. *Williams, supra,* 236 Cal.App.4th at 1158-1159. Essentially, the Court of Appeal assumes aggrieved employees (who otherwise will have no knowledge of the PAGA lawsuit that will affect their legal rights) will not want to be involved in the PAGA action that may ultimately penalize their employer for violations of the *Labor Code* and could potentially improve their working conditions.

In fact, unlike a class action plaintiff who has to achieve certification before representing the class, a PAGA representative plaintiff already represents aggrieved current and former employees as soon as he receives authorization from the LWDA to sue for PAGA penalties. *Iskanian, supra,* 59 Cal.4th at 360; *Lab. Code* § 2699.3. It logically follows that a PAGA representative plaintiff should have access to the contact information of the aggrieved employees he already represents (which defendant certainly has access to) who may have knowledge of the employer's *Labor Code*

violations.

Yet, the Court below requires a PAGA representative plaintiff to proffer evidence to support that his "individual" claims extend statewide without allowing the plaintiff access to the very discovery that would, in fact, prove the statewide claims. This is a Catch-22. Essentially, the PAGA representative plaintiff is told to prove his claims before conducting the very discovery that would allow him to prove his claims. It is a circular argument that will only cause confusion, resulting in further congesting the courts' dockets with discovery battles and contradictory decisions in lower courts.

G. The Requirements Imposed In *Williams* Before A PAGA Plaintiff Can Seek Statewide Discovery Will Be Used To Deny Class Plaintiff's Class-Wide Pre-Certification Discovery

Although *Williams* is a PAGA action, the Court of Appeal's restrictions and merits hurdles imposed on the PAGA representative plaintiff before he can conduct state-wide discovery – if allowed to stand - will not be limited to PAGA cases or employee contact information discovery. Rather, these restrictions will be used by putative class defendants as a shield to curb *all* pre-certification class-wide discovery. The Court of Appeal reasons, "...bare allegations unsupported by any reason to believe a defendant's conduct extends statewide furnishes no good cause for statewide discovery." *Williams v. Superior Court, supra,* 236 Cal.App.4th at 1157. With such restrictions on statewide discovery, putative class plaintiffs can expect a fight

for all class-wide discovery they seek, which is necessary to achieve class certification.

Wage and hour class actions are not limited to a defendant's policies. For instance, a company's practice or implementation of certain policies can be used to achieve certification. However, in order to understand a company's practice or the implementation of its policies, a putative class plaintiff would need to interview putative class members, making obtaining the class contact information vital to achieving certification. Declarations from putative class members are routinely filed in support of class certification. However, the restrictions imposed by the lower Court's decision will be used to impede a putative class plaintiff from obtaining this vital information pre-certification.

The lower Court's decision also directly conflicts with *Belaire-West Landscape* and its progeny. *Belaire-West Landscape* specifically addressed employee privacy in pre-certification discovery. The *Belaire-West* Court determined employee privacy was considered sufficiently protected by sending out notices to the employees, informing them that the plaintiff sought their personal contact information and that the employees could opt-out of sharing their information with the plaintiff. *Belaire-West Landscape, supra,* 149 Cal.App.4th at 562.

The *Belaire-West* notice process has allowed class action lawsuits to

proceed with pre-certification class-wide discovery, while protecting the privacy interests of putative class members. However, the Court of Appeal presupposes aggrieved employees who may directly benefit from a PAGA action, whether by monetary recovery or by a change in their employer's practices, will not want to be involved in a PAGA action. To the contrary, *Belaire-West Landscape* states that "employees [may] reasonably be expected to want their information disclosed to a class action plaintiff who may ultimately recover for them unpaid wages that they are owed." See *Belaire-West, supra,* 149 Cal.App.4th at 561. Similarly, in PAGA actions, aggrieved employees could be reasonably expected to want their information disclosed to a PAGA representative plaintiff who may ultimately recover PAGA penalties, change their employer's practices, and improve their working conditions.

There are serious concerns with a decision limiting a PAGA plaintiff's ability to obtain the contact information of other employees. Such a decision may be used as a shield by defendants in wage and hour class actions to avoid producing contact information of putative class members. In fact, according to our experience and other members of our organization, after the *Williams* decision was published by the Court of Appeals and before this court granted review – class action defendants in wage and hour class actions jumped at the opportunity to use this decision as a shield, justifying not producing class

member contact information in class action cases.

If the lower Court's newly imposed standard for obtaining statewide discovery (notably, employee contact information) is affirmed, it will set an even more onerous burden on class action plaintiffs than the comparative pre-certification discovery standard in the Ninth Circuit. In the Ninth Circuit, before a plaintiff can obtain class-wide discovery – particularly in the form of class contact information – the plaintiff must make "a prima facie showing that the class action requirements of [FRCP] 23 can be satisfied **or** that discovery is likely to produce substantiation of the class allegations." See *Mantolete v. Bolger* (9th Cir. 1985) 767 F.2d 1416, 1427.

Here, under the Court of Appeal's onerous requirements that a plaintiff first 1) prove their "individual claims," 2) sit for a deposition, and 3) prove "uniform" Labor Code violations exist at the Plaintiff's employment location, before being allowed to conduct statewide discovery, it is certain that these requirements will be imposed on a putative class plaintiff seeking pre-certification class discovery. Cases like *Belaire-West Landscape* and its progeny will gather dust. In other words, putative class defendants will use these requirements to circumvent complying with *Belaire-West* when putative class plaintiffs make pre-certification requests for class contact information.

CONCLUSION

This Court should reverse the lower Court's decision. The lower Court's imposition of the requirements that a plaintiff must 1) prove their "individual claims," 2) sit for a deposition, and 3) prove "uniform" *Labor Code* violations exist at the Plaintiff's employment location before being allowed to conduct statewide discovery frustrates the representative capacity of a PAGA representative plaintiff. PAGA representative plaintiffs are proxies for the state's labor law enforcement agencies and cannot bring their own claims. The Court of Appeals decision further undermines the purpose of the PAGA to alleviate overburdened state labor law enforcement agencies, enforce the law, and deter employers from future violations of the *Labor Code*.

Perhaps of most importance, these requirements hold dangerous due process implications for statewide aggrieved employees who may be held to an adverse judgment and collaterally estopped from seeking PAGA penalties. Statewide employees, whether they are allowed to participate in the PAGA action or not, will be bound by the judgment obtained in the PAGA action. These restrictions before conducting statewide discovery are to the legal detriment of the statewide aggrieved employees the PAGA representative plaintiff represents.

The Court of Appeal misapplied class action uniformity requirements

to a PAGA action, requiring a PAGA plaintiff to prove "statewide uniform policies" before potentially moving forward with statewide discovery. This is a misreading of the law. Uniform policies are not required for a defendant to be liable for PAGA penalties. This misapplication of the law will only muddy the water, as putative class defendants will use this rule to curb putative class plaintiffs' pre-certification requests for class contact information, frustrating wage and hour class action discovery and further clogging court dockets.

Ultimately, the lower Court's imposition of these requirements frustrates established law that makes employee contact information routinely discoverable. Because the lower Court's decision is so contradictory of established law, this Court should, respectfully, reverse the Court of Appeal's decision.

CERTIFICATE OF COMPLIANCE

In accordance with California Rules of Court 8.520(c)(1), Counsel for Amicus Curiae, Consumer Attorneys of California, hereby certifies that this Amicus brief in support of Appellant is proportionately spaced, uses Times New Roman 13-point typeface and contains 6,814 words, including footnotes, but excluding the Table of Contents, Table of Authorities, and this Certificate, as determined by our firm's word processing system used to prepare this brief.

Date: May 6, 2016

Respectfully submitted,

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Case Name: **Williams v. Superior Court of Los Angeles (Marshalls of California)**
Court: **Supreme Court of California**
Case Number: **S227228**

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

I am employed in the County of: San Diego, State of California.

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On May 6, 2016, I served the foregoing document(s) described as:

APPLICATION BY AMICUS CURIAE CONSUMER ATTORNEYS OF CALIFORNIA FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT

On interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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[XX] **(BY UNITED STATES MAIL) (All Other Parties and Attorneys)** On May 6, 2016, I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses named above and deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.

[] **(BY FAX)** In addition to service by mail as set forth above, a copy of said document(s) were also delivered by facsimile transmission to the addresses named above. No error was reported by the fax machine that I used.

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[] **(BY PERSONAL SERVICE)** On, in addition to service methods listed above (if any), the above documents were delivered to the above recipients via personal delivery.

[XX] **(BY FEDEX OVERNIGHT DELIVERY) (As to Supreme Court of California Only)** On May 6, 2016, I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses named above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

[XX] **(DECLARATION)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Dated: May 6, 2016

Scott Kim