S227228

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MICHAEL WILLIAMS, AN INDIVIDUAL
PETITIONER,

V.

SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
RESPONDENT.

AFTER DECISION BY THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT,
DIVISION ONE, CASE NO. B259967

FROM THE SUPERIOR COURT
COUNTY OF LOS ANGELES, CASE NO. BC503806
THE HONORABLE WILLIAM F. HIGHBERGER

APPLICATION AND BRIEF OF AMICI CURIAE RETAIL LITIGATION CENTER, INC., CALIFORNIA RETAILERS ASSOCIATION, AND CALIFORNIA GROCERS ASSOCIATION

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APPLICATION OF AMICI CURIAE

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and engages in legal proceedings that affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. These members employ millions of people throughout the United States, many of whom are employed at the thousands of retail locations members operate throughout California. The RLC seeks to provide courts with retail-industry perspectives on important legal issues and to highlight the potential industry-wide consequences of significant pending cases. The RLC regularly files *amicus* briefs or supporting letters in connection with important labor and employment cases involving California law.

The California Retailers Association ("CRA") is a statewide trade association that represents all segments of the retail industry, including general merchandise, department stores, mass merchandisers, fast food restaurants, convenience stores, supermarkets and grocery stores, chain drugstores, and specialty retailers such as auto, vision, jewelry, hardware and home stores. The CRA works on behalf of California's retail industry, which currently operates over 164,000 stores with sales in excess of $570 billion annually and employs nearly three million people – almost one-fifth of California's total employment. The CRA regularly files *amicus* briefs or

supporting letters in connection with important labor and employment cases involving California law.

The California Grocers Association ("CGA") is a non-profit, statewide trade association that has represented the food industry since 1898. The CGA represents approximately 500 retail members operating over 6,000 food stores in California and Nevada, and approximately 300 grocery supplier companies. The CGA's members collectively employ approximately 170,000 Californians. Retail membership includes chain and independent supermarkets, convenience stores, and mass merchandisers. The CGA actively promotes and protects the legislative and regulatory interests of the retail food industry before Congress, the California State Legislature, local governments, and state and local regulatory agencies. The CGA regularly files *amicus* briefs in cases of importance to its members, such as the pending action.

Many of *amici*'s members are facing, and will continue to face, civil actions brought under California's Private Attorneys General Act of 2004 ("PAGA"). As such, *amici*'s members have a strong interest in the resolution of this appeal and clarification of the law surrounding PAGA discovery as they are often the recipients of discovery demands that are nearly identical to the one in this case, i.e., demands for extensive statewide or company-wide information or records based solely on unverified allegations in a fact-bare complaint.

The Court's resolution of the issues on appeal will have a significant and immediate impact on all of *amici*'s members. This is especially true for *amici*'s larger retail members who are particularly vulnerable to overreaching discovery demands due to the number of store locations, the number of employees and positions, and the high costs associated with expansive discovery across numerous locations and positions. Discovery demands such as the one at issue in this case have become commonplace in PAGA litigation and clarity is needed with respect to a trial court's role in determining the appropriate scope and sequence of PAGA discovery.

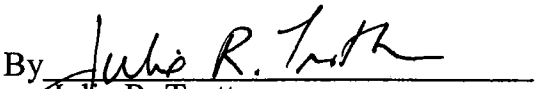
Amici also seek to file this brief because they are concerned that the positions urged by Petitioner Michael Williams (1) would divest trial courts of the discretion they have (and frankly need) under the Discovery Act in order to manage, sequence, and limit discovery in complex and potentially abusive PAGA litigation; and (2) are contrary to the PAGA's text, structure,

and purposes. Therefore, for these reasons, *amici* respectfully submit this Application and accompanying Brief for the Court's consideration.[1]

Dated: May 9, 2016

Respectfully submitted,

CALL & JENSEN
A Professional Corporation
JULIE R. TROTTER

By 
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[1] Williams filed his Reply Brief on April 7, 2016. After confirming the *amicus* briefing deadline with the Court's clerk, *amici* file this Application and Brief in accordance with California Rule of Court 8.520. If the Court interprets this Rule as setting an earlier deadline for *amicus* briefing, *amici* respectfully request that the Chief Justice permit this filing for good cause.

BRIEF OF AMICI CURIAE

I. INTRODUCTION

The trial court in this case – which sits on the Los Angeles County Superior Court's complex panel – did precisely what courts are expected to do when faced with a discovery dispute like the one at issue: it balanced a plaintiff's right to discovery against the privacy rights of non-litigants and the rights of a defendant not to be saddled with undue burden and expense in the face of bare-bones allegations. In determining the appropriate balance, the court *sequenced* discovery in a way that was not only well within its authority under the California Code of Civil Procedure, *see* Cal. Civ. Proc. §§ 2017.020, 2019.020 subd. (b), and 2019.030, but also fully complied with and logically followed from the requirements and purposes of California's Private Attorneys General Act ("PAGA").[2] As the court of appeals held, the trial court's exercise of the discretion provided to it by the Discovery Act in this complex PAGA-only lawsuit is not an abuse of discretion. More importantly, *amici* respectfully submit that the trial court did what should be done in cases where such massive discovery is sought with little or no factual support.

Petitioner Michael Williams' ("Williams") argument that the trial court abused its discretion by sequencing discovery at the outset of the case

[2] As Respondent Marshalls of CA, LLC ("Marshalls") highlighted throughout its brief, the trial court did not deny any discovery.

is a classic case of attorney overreach that has become commonplace in representative litigation, particularly under the PAGA. Specifically, despite having refused to sit for his own deposition on multiple occasions, Williams is taking the remarkable step here of asking this Court to rule that he is entitled to sweeping, statewide discovery as a matter of law simply because he *alleges in an unverified complaint* that Marshalls committed a Labor Code violation against every single one of its nonexempt employees in California. Not only does Williams' argument distort the tenets of key class action cases, but he goes even further by claiming PAGA plaintiffs are entitled to even "greater discovery rights" in contending that the trial court did not have the authority to sequence discovery as it did in this PAGA-only action. See Opening Brief at 4.

To accept this argument, the Court would have to read into the PAGA provisions that do not exist, and read out of the Discovery Act those sections that vest courts with the authority to sequence discovery as the trial court did here. Moreover, Williams' view is especially dangerous given the potential for abuse inherent in private attorney general actions, and if accepted would twist the PAGA into something the Legislature expressly sought to prevent – a means by which private parties could bring "shakedown lawsuits" against California businesses, and fish for potential claims whether or not the named representative is aggrieved or there is an actual factual basis for the allegations. See *Dunlap v. Superior Court* (2006)

142 Cal.App.4th 330, 338-39 [noting one purpose of the Legislature's amendment to the PAGA was to protect businesses from "shakedown lawsuits"]; see also Coffee Jr., *Rescuing The Private Attorney General: Why The Model Of The Lawyer As Bounty Hunter Is Not Working* (1982) 42 Md. L.Rev. 215.

Not only is Williams' position wrong from a legal standpoint, but, from a practical standpoint, accepting it would place employers at an immediate disadvantage in any case that involved a PAGA claim. Every employee who seeks civil penalties under the PAGA would immediately and automatically obtain leverage that would be grossly disproportionate to the employee's actual claims and the likelihood of success on the merits. Therefore, for the reasons explained more fully below, *amici* respectfully request that this Court affirm the trial court's ruling on this matter as the court of appeal did, and, in so doing, unequivocally hold that:

- The PAGA does not divest trial courts of the discretion expressly provided to them by the Discovery Act to manage discovery;
- PAGA plaintiffs are not entitled to any greater discovery rights than other litigants; and
- Trial courts have the right to sequence discovery in PAGA actions as necessary to prevent abuse and to balance a litigant's rights against the countervailing rights to privacy of non-litigants and the right of

the party from whom the discovery is sought to be free from undue burden, intrusion, and expense.

II. THE TRIAL COURT'S ORDER WAS NOT ONLY WELL WITHIN ITS AUTHORITY UNDER THE DISCOVERY ACT, BUT WAS A LOGICAL WAY TO SEQUENCE DISCOVERY IN A PAGA ACTION

The trial court's order was not only well within the discretion afforded by the Discovery Act, it sets forth a logical way to sequence discovery in a PAGA action (especially a PAGA-only action) given PAGA plaintiffs (1) must establish their own "aggrieved employee" status, see Lab. Code § 2699, subds. (a) and (c); and (2) are expected to have a working knowledge of the facts and legal theories on which their claims are based *before* filing a lawsuit. See Lab. Code, § 2699.3, subds. (a)(1), (b)(1), and (c)(1).

A. The Trial Court's Order Was Within The Discretion Given To Trial Courts To Manage And Sequence Discovery Under The Discovery Act

A litigant's right to discovery is not limitless, and where the risk of abuse is amplified and privacy issues abound:

> Courts must insist discovery devices be used as tools to facilitate litigation rather than as weapons to wage litigation. These tools should be well calibrated; the lancet is to be preferred over the sledge hammer.

Calcor Space Facility, Inc. v. Superior Court (1997) 53 Cal.App.4th 216, 221 [also recognizing that "the discovery process is subject to frequent abuse, and, like a cancerous growth, can destroy a meritorious cause or

defense"]; *Irvington-Moore, Inc. v. Superior Court* (1993) 14 Cal.App.4th 733, 738 [noting a court's "discretion" is "so important as a counter-balance to the broad standard of discovery relevance"] (citation omitted).

The Discovery Act gives trial courts the authority to manage, sequence, and limit discovery to balance these competing rights. See Code Civ. Proc., § 2017.020, subd. (a) [courts can limit discovery]; *id.*, § 2019.020, subd. (b) [courts can sequence discovery]; *id.*, § 2019.030 [courts can restrict the frequency or extent of discovery]. In this case, the trial court's order was well within the authority provided by the Discovery Act as it (1) ensured the contact information of the employees at the Marshalls store where Williams worked would be disclosed only after giving those employees notice and an opportunity to opt out of the disclosure; and (2) predicated Williams' receipt of the remaining contact information of approximately 16,000 others to follow *after* he sat for just six hours of deposition and showed the Court he had a good-faith basis on which to pursue this PAGA-only action at Marshall stores where he never worked.[3] In sum, given that this order was well within the trial court's authority under the Discovery Act, Williams' contention that it constitutes an abuse

[3] While this brief does not fully address the privacy rights of non-party employees because Marshalls already has, *amici* have serious concerns regarding Williams' dismissive position on the privacy rights of 16,000 other employees who have never worked with Williams and who, presumably, work in a variety of nonexempt positions which Williams has never held.

of discretion simply because this is a PAGA-only case lacks merit. See *John v. Superior Court* (2006) 38 Cal.4th 1177, 1186 ["we recognize at the threshold that the discovery statutes vest a wide discretion in the trial court in granting or denying discovery and such exercise of discretion may only be disturbed when it can be said that there has been an abuse of discretion"] (internal quotation marks and brackets omitted).

B. The Trial Court's Order is Consistent With Its Authority To Bifurcate Proceedings

Williams' argument against sequencing discovery at the outset of the case is further undermined by the trial court's authority under the Code of Civil Procedure to sequence the proceedings even more definitively via bifurcation. See, e.g., Code Civ. Proc., § 598 [courts may bifurcate issues for the convenience of witnesses, the ends of justice, or economy and efficiency]; § 1048(b) [courts may separate trials of any issues or causes of action for purposes of expedience and efficiency]; *Grappo v. Coventry Fin. Corp.* (1991) 235 Cal.App.3d 496, 504 [courts have broad discretion to bifurcate issues]; *Horton v. Jones* (1972) 26 Cal.App.3d 952, 955 [bifurcation avoids wasting time and money trying unnecessary issues].

Indeed, a court recently utilized bifurcation to do just that in a PAGA action where the plaintiff defined the scope of the action to include approximately 3,200 other employees and recognized "PAGA's public purpose would be ill-served if the court finds [the plaintiff] has not been

aggrieved by a Labor Code violation." *Stafford v. Dollar Tree Stores, Inc.* (E.D. Cal. Nov. 21, 2014) 2014 WL 6633396, at pp. *1, *3-*4. In granting the motion to bifurcate, the *Stafford* court noted that the PAGA "requires a plaintiff to have suffered an injury resulting from an unlawful action." *Id.* at p. *3 [quoting *Amalgamated Transit Union, Local 1756, AFL–CIO v. Superior Court* (2009) 46 Cal.4th 993, 1001]. The court further recognized that "[w]hat gives plaintiff the right to serve as 'a proxy or agent' for the [Labor Workforce and Development Agency's ("LWDA")] LWDA enforcement division is his status as an aggrieved employee, one who has been injured by defendant's violation of at least one provision of the Labor Code." *Id.* at p. *4. It reasoned that:

> in light of the number of potential aggrieved employees, judicial economy favors deferring the representative portion of the PAGA claim until plaintiff's status as an aggrieved employee with the right to bring this action is established. Plaintiff has not pointed to any definite prejudice from bifurcation, but argued more generally that the public purpose of the PAGA enforcement action will not be served by delay. He has not acknowledged, however, that PAGA's public purpose would be ill-served if the court finds he has not been aggrieved by a Labor Code violation.

Id. The court ordered that discovery and trial concerning the other employees would not proceed unless the employee was first found to be an "aggrieved employee." *Id.* at p. *5.[4]

Under the court's authority to manage and bifurcate proceedings, and consistent with the reasoning of *Stafford*, the trial court could have required far more of Williams than it did before allowing him to obtain the private information of thousands of others – that is, the trial court could have required him to prove his "aggrieved employee" status via bifurcation as opposed to just making a limited factual showing. Given the court's power under the Code of Civil Procedure and the threshold requirement that a PAGA plaintiff must himself be aggrieved, *amici* respectfully submit it would be error to find the more limited order at issue here to be an abuse of discretion.

C. The Trial Court's Order Logically Follows From The PAGA's Requirements And Should Serve As A Model To Trial Courts In Managing PAGA Litigation

The trial court's order is consistent with the protections the Legislature wrote into the PAGA in an effort to stem abuse.[5] The

[4] The Court also could have gone further than it did under Code of Civil Procedure section 128.7 and required Williams to show a good faith basis for his allegations of statewide violations of the Labor Code. Where such broad discretion is granted under the Code, Williams is hard pressed to show that it is an abuse of discretion for the Court merely to delay disclosure of 16,000 other employees' personal information until he has sat for a deposition and provided some support for his bare allegations.

Legislature's clear intention was that a PAGA action can only be brought by an aggrieved employee, can only be pursued for the purpose of recovering civil penalties, and must be based on facts and legal theories *known to and articulated by* the would-be plaintiff. The trial court here placed reasonable limitations on discovery until plaintiff could meet these threshold showings.

As a critical starting point, the text of the PAGA expressly limits an employee's rights and powers solely to bringing a "civil action" and collecting and distributing any civil penalties recovered. Lab. Code, § 2699, subds. (a) and (i). Contrary to Williams' arguments in the court of appeal, no other language in the PAGA expressly or implicitly vests an employee with any of the investigatory or other rights or powers the LWDA possesses. See *Williams v. Superior Court* (2015) 236 Cal.App.4th 1151, 1157-58.

This limited role for PAGA plaintiffs as agents for the state is consistent with general agency law principles. For example, under agency law, an agent is confined to those rights and powers conferred upon him by his principal. See Civ. Code, §§ 2315, 2316. Under the PAGA, the Legislature expressly limited its grant of authority to permit an aggrieved

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[5] As detailed in the next section, it is clear that the Legislature's hope to do that has been largely unrealized because this is just one of hundreds of PAGA-only lawsuits that have been filed against California employers in just the past two years.

employee to "bring a civil action" and to collect and distribute any civil penalties recovered. Lab. Code, § 2699, subd. (a). In this way, the PAGA is similar to traditional *qui tam* litigation as this Court has acknowledged. See *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 382 [noting a "PAGA representative action is therefore a type of *qui tam* action"]; see also Gov. Code, § 12652, subd. (c) [limiting a *qui tam* plaintiff to bringing a "civil action" that would be governed by the Discovery Act].

When reviewing private enforcement actions, courts have long noted the importance for the state to maintain careful control over private plaintiffs' enforcement powers lest they lead to abusive and vexatious lawsuits. See *Sanders v. Pacific Gas & Elec. Co.* (1975) 53 Cal.App.3d 661, 675 [noting that *qui tam* actions, "when not carefully controlled, [are] subject to abuse, becoming vexatious or resulting in suits settled for an amount prejudicial to the government's interest"]. The Legislature was keenly aware of the potential for abuse when it enacted the PAGA, and affirmatively sought to restrict the class of persons who could represent the state to "aggrieved employees" and prevent the PAGA from becoming a means by which non-aggrieved employees or their attorneys could pursue speculative or *de minimis* claims. See *Dunlap*, *supra*, 142 Cal.App.4th at pp. 338-39.

The PAGA states unequivocally that only an "aggrieved employee" can recover civil penalties through a civil action brought on behalf of other

current or former employees. Lab. Code, § 2699, subd. (a). It defines "aggrieved employee" as "any person who was employed by the alleged violator and against whom one or more of the alleged violations *was committed*." § 2699, subd. (c) (emphasis added). This Court also has previously noted the requirement that an employee must establish his or her status as an "aggrieved employee" before he or she is allowed to pursue a PAGA claim on behalf of other employees. See *Iskanian, supra,* 59 Cal.4th at p. 387 [acknowledging that "a person may not bring a PAGA action unless he or she is 'an aggrieved employee'"]; *id.* at p. 395 (conc. opn. of Cantil-Sakauye, C.J., Corrigan, J., and Kennard, J.) [noting "only employees who *have been aggrieved* by the employer may bring PAGA actions"] (emphasis added; internal marks omitted). Thus, if an employee cannot establish that at least one of the Labor Code violations alleged in his PAGA action "was committed" against him, he cannot pursue PAGA claims premised on Labor Code violations that may have occurred against others. See *Amalgamated Transit Union, supra,* 46 Cal.4th at p. 1001 [noting PAGA "require[s] a plaintiff to have suffered an injury resulting from an unlawful action"].

Here, the trial court's order sequencing discovery logically follows this requirement because it would be unduly burdensome, expensive, and intrusive to require Marshalls (and also the trial court) to expend significant time and resources on representative discovery related to thousands of other

employees if Williams is unable to show that the Labor Code violations he alleges he suffered have at least some factual merit.[6] The trial court's order is also consistent with the strong protections afforded privacy rights of third party litigants, particularly employees who have never even worked in the same store as Williams. Until there is some basic showing that Williams has grounds for his widespread allegations, the privacy rights of employees should trump his fishing expedition. "The public interest in preserving confidential, personnel information generally outweighs a private litigant's interest in obtaining that information." *Life Technologies Corp. v. Superior Court* (2011) 197 Cal.App.4th 640, 652.

The PAGA's carefully crafted definition of "aggrieved employee" further shows the Legislature has no interest in deputizing every *allegedly* aggrieved employee to represent other employees without some showing that the employee was personally aggrieved. To hold otherwise would be to reject the Legislature's stated intention to avoid extortionary lawsuits by requiring that an employee show an alleged violation was committed against him or her in order to represent other employees as an agent of the state. *See Dunlap, supra*, 142 Cal.App.4th at pp. 338-39.

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[6] Williams misrepresents the trial court's order by claiming it requires him to show that "violations were committed against *other aggrieved employees*" as well as himself. Compare *Williams, supra*, 236 Cal.App.4th at p. 1155, with Reply Brief at 5 (emphasis added).

Finally, the trial court's ruling is consistent with the requirement that a potential PAGA plaintiff be able to articulate the facts and legal theories upon which his or her claim is based. Here, the trial court's order required Williams to show no more than the PAGA already requires him to possess *before* filing a PAGA claim – "facts and theories to support the alleged violation." Lab. Code, § 2699.3, subd. (a)(1). It can hardly be an abuse of discretion for the trial court to order store-wide discovery and then predicate additional discovery for 128 other stores on a factual showing that Williams was required by statute to be able to make prior to filing his PAGA claim and obtaining *any* discovery at all.[7]

In sum, the Court should hold that not only is the trial court's order well within the authority granted by the Discovery Act, but it is consistent with and logically follows the PAGA's text, structure, and purposes. As such, it could serve as a model for all trial courts regarding how they could effectively manage discovery in PAGA actions.

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[7] Although plaintiffs are supposed to provide the "facts and legal theories" in their PAGA notice letter, in reality there is no administrative oversight by the LWDA as to whether this basic requirement is met. See *Amicis'* Request for Judicial Notice, Ex. A, also available at http://web1a.esd.dof.ca.gov/Documents/bcp/1617/FY1617_ORG7350_BCP474.pdf.

III. JUDICIAL OVERSIGHT IS NEEDED TO PREVENT THE PAGA FROM BEING ABUSED IN A WAY THAT TRAMPLES THE RIGHTS OF EMPLOYERS *AND EMPLOYEES*

The PAGA was enacted as a way to "augment the enforcement abilities of the Labor Commissioner" because the Legislature was concerned with declining staff levels and funding. In augmenting these capabilities, though, the Legislature also expressly sought to prevent the PAGA from becoming a means by which to bring "shakedown lawsuits" against California businesses. See *Dunlap*, *supra*, 142 Cal.App.4th at pp. 338-39. However, as explained below, the Legislature's intentions have not been realized. Instead, PAGA litigation is rampant and the LWDA has not had the resources to monitor or act as a gatekeeper for frivolous claims. This reality, in conjunction with the perception that the PAGA gives plaintiffs a windfall of broad discovery without any of the procedural hurdles of a class action, also leads to – and arguably already has created – irreconcilable conflicts of interest between the employees bringing PAGA-only actions (like Williams) and their attorneys.

A. PAGA-Only Lawsuits Are On The Rise, And The LWDA Currently Lacks The Resources Necessary To Stop Potential Abuses

In just the past two years, attorneys across the state have come to view PAGA-only litigation – litigation where no individual or class claims are included – as a preferred litigation strategy, as shown by this *incomplete*

list of PAGA-only actions filed in California just since June 2014. See *Chen v. Morgan Stanley Smith Barney, LLC*, Case No. 8:14-cv-01077-ODW-FFM, Central District of California; *Michael Singleton v. California Safety Investigations LLC et al.*, Case No. BC603729, Los Angeles County Superior Court; *Juan Rodriguez v. Weatherford U.S. LP*, Case No. BCV-15-101531, Kern County Superior Court; *Hernandez v. The Pep Boys Manny Moe & Jack of California Corp.*, Case No. BC 600046, Los Angeles County Superior Court; *Macias v. Grimmway Enterprises, Inc.*, Case No. BCV-15-101406, Kern County Superior Court; *Guerra v. 99 Cents Only Stores, LLC*, Case No. BC599119, Los Angeles County Superior Court; *Powell v. Badger Daylighting Corp.*, Case No. BCV-15-101202, Kern County Superior Court; *Zinzu v. South Bay Family Health Care*, Case No. BC 597679, Los Angeles County Superior Court; *Herrera v. Avalon Bay Communities, Inc.*, Case No. BC 597098, Los Angeles Superior Court; *Melgoza v. Westar Partnership, et al.*, Case No. BCV-15-100028, Kern County Superior Court; *Ricks v. Yard House USA, Inc. et al.*, Case No. BC597097, Los Angeles County Superior Court; *Castro v. General Production Service of California Inc.*, Case No. BCV-15-101164, Kern County Superior Court; *Sandoval v. San Joaquin Valley Rehabilitation Hospital Pharmacy LP et al.*, Case No. 15CECG03118, Fresno County Superior Court; *Salas v. Clean Harbors Environmental Services Inc.*, Case No. BCV-15-101122, Kern County Superior Court; *Morales v. Automotive*

Aftermarket, Inc., Case No. BC596252, Los Angeles County Superior Court; *Salvatierra v. RMI International, Inc.*, Case No. BC596075, Los Angeles County Superior Court; *Calderon v. Nabors Completion & Production Services Co. et al.*, Case No. BCV-15-100995, Kern County Superior Court; *Caldwell v. D Boyd Enterprises, Inc.*, Case No. 15CECG02712, Fresno County Superior Court; *Ludie Ackerman v. Chico's FAS, Inc.*, Case No. BC586078, Los Angeles County Superior Court; *Clark v. Time Warner Cable, Inc. et al.*, Case No. BC575995, Los Angeles County Superior Court; *Sandoval v. Catalina Restaurant Grp.*, Case No. BC571364, Los Angeles County Superior Court; *Saundra Hall v. Cushman & Wakefield, Inc. et al.*, Case No. BC568273, Los Angeles County Superior Court; *Rosales v. Kelly Paper Company*, Case No. BC617205, Los Angeles County Superior Court; *Clavel v. 99 Cents Only Stores, LLC*, BC615559, Los Angeles County Superior Court; *Sheldon v. East Valley Glendora Hospital, L.P.*, BC612058, Los Angeles County Superior Court; *Dominguez v. Andrews International, Inc.*, BC612059, Los Angeles County Superior Court; *Escobar v. Star Sports Theatre Arts & Recreation Inc.*, BC613923, Los Angeles County Superior Court; *Vargas v. C&F Foods, Inc.*, BC612434, Los Angeles County Superior Court; *Jenkins v. Check Into Cash of California, Inc.*, BC568272, Los Angeles County Superior Court; *Tejada v. Timothy L. Behm, Inc.*, BC611544, Los Angeles County Superior Court; *Willis v. Lefiell Manufacturing Company*, BC611788, Los Angeles

County Superior Court; *Zarate v. Staffing Network Holdings, LLC*, BC567063, Los Angeles County Superior Court; *Duran v. Maxim Healthcare Services, Inc.*, BC607342, Los Angeles County Superior Court; *Mixson v. Fitness International, LLC*, BC605681, Los Angeles County Superior Court.

As private parties are starting to pursue this PAGA-only litigation strategy in mass, the LWDA simply has not had the resources to ensure private parties are pursuing PAGA claims in good faith or to perform any sort of gatekeeper function. Specifically, due to resource constraints, the LWDA has not even been able to:

- Monitor or track the notice letters PAGA plaintiffs are required to send to ensure they are not duplicative of other PAGA actions or that they set forth the actual facts and specific legal theories on which their claims are premised pursuant to Labor Code section 2699.3, subdivisions (a)(1), (b)(1), and (c)(1), see *Amicis'* Request for Judicial Notice, Ex. A at p. 1;
- Review or investigate even 1% of PAGA-claims of which it is informed even though the agency receives an average of 632 notice letters of PAGA actions a month, *id.* at p. 2; or
- Ensure that workers and the state are not "shortchanged" in PAGA cases and settlements, *id.* at pp. 2-3.

The LWDA itself recognizes that these resource deficiencies have inhibited its ability to act as "an important check on potential abuses in this area" and has "contributed to a range of concerns about the PAGA statute itself, including that employers are being sued and incurring substantial costs defending against technical or frivolous claims, and that workers and the state often end up being shortchanged when these cases are settled." *Id.* at pp. 1-2. These resource deficiencies are coinciding with an explosion in PAGA-only litigation.

B. A PAGA-Only Litigation Strategy Creates Inherent Conflicts Of Interest Between PAGA Plaintiffs And Their Attorneys

The rise in PAGA-only actions is unsurprising because, from a plaintiffs' attorney's perspective, PAGA-only litigation allows them to (1) recover fees as easily as if they had also brought their clients' individual Labor Code claims, see Lab. Code § 2699, subd. (g)(1); (2) avoid arbitration as long as they do not prosecute their clients' individual Labor Code claims; and (3) sidestep class certification requirements before being required to litigate the merits of alleged Labor Code violations for workers other than their clients. Given the Legislature's intent to avoid abusive and speculative lawsuits and protect employees' rights, this rise in PAGA-only litigation is disconcerting. As it addresses the specific issues raised on appeal, the Court should recognize that accepting Williams' preferred interpretation of the PAGA will hand private parties and their attorneys

even more leverage in PAGA lawsuits and likely lead to even more PAGA-only actions.

Although it is clear why plaintiffs' attorneys view PAGA-only litigation as win-win, it bears noting that PAGA-only litigation – as opposed to bringing PAGA claims alongside individual Labor Code claims – is generally not in the best interest of PAGA plaintiffs with viable Labor Code claims. For example, in this lawsuit, the most that Williams can receive is 25 percent of the civil penalties awarded under PAGA for any Labor Code violations he is found to have suffered. See Lab. Code, § 2699, subd. (i). Under his attorneys' PAGA-only strategy, Williams will forego the recovery he could have obtained from the individual Labor Code claims he could have brought which, if meritorious, would have resulted in a recovery of significantly higher amounts for his alleged off-the-clock work, meal period violations, rest period violations, and other derivative claims and penalties.[8] The PAGA only strategy employed in this case and used by countless other plaintiffs' attorneys prioritizes counsels' interest in maximizing fees over Williams' personal interests in vindicating his rights and recovering the full amount of individualized wages and other damages he is owed.

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[8] Generally such a failure is considered to fall below the expected standard of care for plaintiffs' counsel. See, e.g., *Adams v. Paul* (1995) 11 Cal.4th 583, 589-90; *Janik v. Rudy, Exelrod & Zieff* (2004) 119 Cal.App.4th 930, 936-37.

In *amici*'s experience, Williams' questionable approach to PAGA litigation is becoming more and more common due to the perception that immediate statewide or company-wide discovery is automatic if an employee brings a PAGA claim and seeks to represent an allegedly aggrieved group of "all California employees." The conflict of interest created by a PAGA-only litigation strategy is one more reason why the Court should clarify that the PAGA does not grant employees greater discovery rights and powers than other civil litigants possess. Otherwise, Williams and other employees like him will continue to be advised to pursue a PAGA-only strategy that maximizes the potential leverage and available attorneys' fees at the expense of the employee's individual claims.

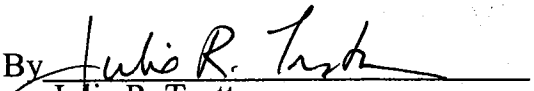
IV. CONCLUSION

For the reasons explained above, *amici* respectfully request that the Court affirm the court of appeal in this matter, and hold the trial court's sequencing of discovery was not an abuse of discretion but, in fact, was a logical manner in which to sequence discovery in a PAGA-only lawsuit.

Dated: May 9, 2016

Respectfully submitted,

CALL & JENSEN
A Professional Corporation
JULIE R. TROTTER

By 
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CERTIFICATION OF WORD COUNT

I hereby certify that, according to the word count feature of Call & Jensen's Microsoft Word word processing program, the number of words in this Amicus Curiae Brief (excluding this Certification of Word Count, the title pages, the Table of Contents, the Table of Authorities, and the Proof of Service) is 4,644.

Respectfully submitted,

Dated: May 9, 2016

Julie R. Trotter

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 610 Newport Center Drive, Suite 700, Newport Beach, CA 92660.

On May 9, 2016, I served the foregoing document described as **APPLICATION AND BRIEF OF AMICI CURIAE RETAIL LITIGATION CENTER, INC., CALIFORNIA RETAILERS ASSOCIATION, AND CALIFORNIA GROCERS ASSOCIATION** on the following person(s) in the manner indicated:

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[ ] (BY ELECTRONIC SERVICE) I am causing the document(s) to be served on the Filing User(s) through the Court's Electronic Filing System.

[X] (BY MAIL) I am familiar with the practice of Call & Jensen for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business. On this date, a copy of said document was placed in a sealed envelope, with postage fully prepaid, addressed as set forth herein, and such envelope was placed for collection and mailing at Call & Jensen, Newport Beach, California, following ordinary business practices.

[X] (BY GSO) I am familiar with the practice of Call & Jensen for collection and processing of correspondence for delivery by overnight courier. Correspondence so collected and processed is deposited in a box or other facility regularly maintained by GSO that same day in the ordinary course of business. On this date, a copy of said document was placed in a sealed envelope designated by GSO with delivery fees paid or provided for, addressed as set forth herein, and such envelope was placed for delivery by GSO at Call & Jensen, Newport Beach, California, following ordinary business practices.

[ ] (BY FACSIMILE TRANSMISSION) On this date, at the time indicated on the transmittal sheet, attached hereto, I transmitted from a facsimile transmission machine, which telephone number is (949) 717-3100, the document described above and a copy of this declaration to the

person, and at the facsimile transmission telephone numbers, set forth herein. The above-described transmission was reported as complete and without error by a properly issued transmission report issued by the facsimile transmission machine upon which the said transmission was made immediately following the transmission.

[ ] (BY ELECTRONIC TRANSMISSION) I served electronically from the electronic notification address of _____ the document described above and a copy of this declaration to the person and at the electronic notification address set forth herein. The electronic transmission was reported as complete and without error.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that this declaration was executed on May 9, 2016, at Newport Beach, California.

Tabitha Muncey

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