SUPREME COURT COPY

No. S227228

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.

SUPREME COURT
FILED
JUN 17 2016
Frank A. McGuire Clerk
Deputy

AFTER DECISION BY THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION ONE,
CASE B259967
FROM THE SUPERIOR COURT,
COUNTY OF LOS ANGELES, CASE NO. BC503806,
ASSIGNED FOR ALL PURPOSES TO JUDGE
WILLIAM F. HIGHBERGER, DEPARTMENT 322

APPELLANT'S CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS

CAPSTONE LAW APC
GLENN A. DANAS (SBN 270317)
RYAN WU (SBN (SBN 222323)
ROBERT DREXLER (SBN 119119)
LIANA CARTER (SBN 201974)
1840 CENTURY PARK EAST, SUITE 450
LOS ANGELES, CA 90067
TELEPHONE: (310) 556-4811
FACSIMILE: (310) 943-0396
GLENN.DANAS@CAPSTONELAWYERS.COM
RYAN.WU@CAPSTONELAWYERS.COM
ROBERT.DREXLER@CAPSTONELAWYERS.COM
LIANA.CARTER@CAPSTONELAWYERS.COM

Attorneys for Plaintiff and Appellant
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LIANA.CARTER@CAPSTONELAWYERS.COM

Attorneys for Plaintiff and Appellant
MICHAEL WILLIAMS

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INTRODUCTION

Amici supporting Real Party in Interest Marshalls of CA, LLC[1] ("Amici") say very little about the decisive principle that compels reversal of the decision below: an uninterrupted line of case law, rooted in *Pioneer Elecs. (USA) v. Super. Ct.* (2007) 40 Cal.4th 360, holding that employee contact information is routine discovery that must be disclosed to an employee-plaintiff alleging labor law violations. Amici present no sound reasons as to why Appellant Michael Williams, as the state's proxy alleging that Marshalls committed Labor Code violations, should be exempted from this rule mandating disclosure of contact information.

Several Amici assert that the Labor Code Private Attorneys General Act ("PAGA") limits the right to such discovery. But they struggle to identify any specific statutory language in the PAGA that supports their claim. Instead, they attempt to rewrite the law itself, making a hash of PAGA's statutory design by claiming that it supports a bifurcated action where the PAGA plaintiff must first prove that he has in fact suffered Labor Code violations, and second, adduce evidence of violations against employees in other locations, before he can obtain employee contact information (with which to investigate the violations).

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[1] Six briefs were filed from organizations supporting Marshalls. They are: (1) International Association of Defense Counsel ("IADC"); (2) National Association of Manufacturers, American Coatings Association and NFIB Small Business Legal Center, jointly ("NAM"); (3) Retail Litigation Center, Inc., California Retailers Association, and California Grocers Association ("RLC"); (4) Prometheus Real Estate Group ("Prometheus"); (5) California Apartment Associate ("CAA"); and (6) The Employer Group ("TEG").

PAGA does not authorize this kind of bifurcation. The provisions on standing cited by Amici do not require the PAGA plaintiff to prove that violations were committed against him simply to maintain his suit. Rather, consistent with other statutes on standing, PAGA only requires that the plaintiff *allege* facts to establish standing. For PAGA, Williams's allegation that he suffered violations, along with his exhaustion of administrative prerequisites, qualifies him to represent the state and other aggrieved employees.

Affirming the decision below would also undermine PAGA's public purpose in deterring unlawful practices through a scheme that imposes civil penalties against employers for violations committed against all employees. If bifurcated discovery were to become the law, the vast majority of low-wage workers serving as whistleblowers would likely be thwarted from maintaining their suits as representative actions. For example, workers who filed suit after observing violations against other employees would still be forced to *prove violations* against them and other employees in the first instance—a nearly-impossible task without the assistance of other employees or records—before being allowed to gather evidence of those violations through interviews. This backwards procedure turns law enforcement on its head, shielding employers from further investigation. Most PAGA actions would be reduced to individual actions before discovery even commences, thus imperiling the objectives of PAGA.

Disabling PAGA is precisely what Amici hopes to achieve. Inveighing against supposedly unscrupulous PAGA litigants with

little more than anti-plaintiff bromides, Amici implore this Court to impose further restrictions on PAGA actions. But if rewriting the PAGA statute is their ultimate goal, Amici should take their issues to the Legislature. To be sure, the Legislature recently amended PAGA, making only modest changes primarily to the settlement process. This enactment shows that the Legislature does not believe that the courts have been inundated with meritless PAGA suits that require substantial reform.

Several Amici address the Civil Discovery Act, resting on the broad proposition that the court has near-limitless discretion on discovery matters. But trial courts have been found to have abused their discretion for denying the disclosure of contact information—precisely the situation here. "Discretion" does not shield the order below from reversal.

Finally, three of the Amici primarily address the privacy issue. None can show that the disclosure of contact information to an employee-plaintiff represents a "serious invasion of privacy" or that there exists some unusual circumstance that requires a restriction of this information. Indeed, Amicus TEG concedes that the privacy interest here would not satisfy the constitutional privacy test this Court adopted in *Hill v. Nat'l Collegiate Athletic Assoc.* (1994) 7 Cal.4th 1. Instead, TEG suggests a new test whereby the PAGA plaintiff must prove his bona fides to represent other employees at multiple stages in the litigation—a test that finds no basis in the Civil Discovery Act or the PAGA statute and must be rejected.

In sum, unlike the Amici supporting Williams, these Amici

cannot ground their positions in well-settled principles of civil discovery or the purpose and statutory language of PAGA. Their call to affirm the erroneous decision below, thereby neutering PAGA's effectiveness, must be rejected.

ARGUMENT

I. THE ORDER BELOW CONTRAVENES PAGA'S STATUTORY DESIGN AND PUBLIC PURPOSE

A. The Court Must Reject Amici's Rewriting Of The PAGA Statute To Require The State's Proxy To Prove The Merits Of His Case Before Routine Discovery Can Be Obtained

Unhappy with a law, PAGA, aimed at achieving "maximum compliance with state labor laws" (*Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 379), Amici attempt to rewrite the statute more to their liking. Amici wants, as a matter of law, for the state's proxy to have to "prove" the merits of her allegations at the outset of discovery before she has the right to obtain discovery in aid of her investigation. This pretzel logic is nowhere in language or design of the PAGA statute, and, if adopted, would undermine the purpose of the Act.

1. In Attempting To Justify The Decision, Amici Manufacture Non-Existent Requirements That Conflict With The Statutory Language And Purpose of PAGA

As explained in Williams's briefs on the merits, the decision below imposes conditions on a PAGA plaintiff not found in the PAGA statute, and which are contrary to the purpose and objectives of PAGA. Without addressing these points, several Amici broadly contend that the discovery order at issue should be affirmed because it forces the PAGA plaintiff to prove standing to

sue and is thereby a logical way to "sequence" discovery. (See RLC Brief at pp. 4-5; IADC Brief at pp. 4-7.) Amici posit that Williams has not yet satisfied an enhanced standing rule that requires a PAGA plaintiff to first prove that violations were in fact committed against him before the action may continue. (See NAM Brief at pp. 5-6 ["The qui tam Plaintiff has not established that he qualifies as an 'aggrieved employee' as defined under PAGA"]; RLC Brief at pp. 11-12.) Of course, this rule is pure fiction, devised by Amici to justify the logic of the decision below, which otherwise makes no sense. Nothing in the PAGA statute requires the plaintiff to *prove* his individual allegations at the outset of the litigation to establish standing.

In evaluating the meaning of a statute, the Court "must first look to the words of the statute, because they generally provide the most reliable indicator of legislative intent." (*Kirby v. Immoos Fire Protection* (2012) 53 Cal.4th 1244, 1250 [internal quotations and citation omitted].) "If the statutory language is clear," the Court's "inquiry ends." (*Id.*) Statutes "governing conditions of employment are to be construed broadly in favor of protecting employees." (*Id.*)

Nothing in the PAGA statute requires that the aggrieved employee-plaintiff must first demonstrate through evidence that he suffered violations before obtaining standing to represent other employees. To the contrary, the PAGA simply states that an action for civil penalties may be "brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section

2699.3." (Lab. Code § 2699 subd. (a).) The statute defines an "aggrieved employee" as "any person who was employed by the **alleged** violator and against whom one or more of the **alleged** violations was committed." (*Id.* § 2699 subd. (c) [emphasis added].) A plaintiff satisfies PAGA's standing requirement if he or she satisfies the requirements of those two subdivisions alone. (See *Amalgamated Transit Union, Local 1756, AFL-CIO v. Super. Ct.* (2009) 46 Cal.4th 993, 1004-05 [analyzing PAGA standing through the prism of Subsection 2699 subd. (a) and subd. (c) only].)

The plain meaning of subsection 2699(a) is that an aggrieved employee, following the completion of the "procedures specified in Section 2699.3"—that is, administrative exhaustion—may bring a PAGA action "on behalf of himself or herself *and* other... employees." The use of the word "and" in this statute connects the aggrieved employee with other employees, meaning that the PAGA action brought by the aggrieved employee is necessarily brought on their behalf. (See *Kobzoff v. Los Angeles Harbor/UCLA Medical Ctr.* (1998) 19 Cal.4th 851, 861 ["[T]he ordinary usage of 'and' is to condition one of two conjoined requirements by the other, thereby causally linking them."].) In other words, under subsection 2699(a), "[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.'" (*Reyes v. Macy's, Inc.* (2011) 202 Cal.App.4th 1119, 1123-24.)

And under the express text of Section 2699 subdivision (c),

a person who *alleges* that violations were committed against him by the employer qualifies as an aggrieved employee. The PAGA statute would not have specified the phrases "alleged violator" or "alleged violations" if it required ***proof*** of those violations in the first instance to establish standing.[2] This is consistent with the general proposition that "[t]he existence of standing generally requires that the plaintiff be able to ***allege*** ... an invasion of his legally protected interests." (*Surrey v. TruBeginnings, LLC* (2008) 168 Cal.App.4th 414, 417 [emphasis added]; see also *Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 175-76 [holding that the plaintiffs under the Unruh Act adequately alleged they had suffered an "invasion of ... legally protected interests" [citation] sufficient to afford them an interest in pursuing their action vigorously. . . "].)

By operation of these two statutes, a plaintiff has standing to bring a PAGA action on behalf of other employees once he has (1) submitted a letter to the LWDA and the employer that complies with Section 2699.3; and (2) alleged that one or more violations were committed against him. It is uncontested that Williams satisfies these requirements, and the statute requires nothing more to establish his standing to represent former and

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[2] To be sure, a defendant may challenge a plaintiff's standing at any time. (*Californians For Disability Rights v. Mervyn's, LLC*, (2006) 39 Cal.4th 223, 232-33 ["[S]tanding must exist at all times until judgment is entered"].) However, since PAGA's standing requirement is established by the plaintiff *alleging* that he has suffered one or more violations, the employer cannot challenge standing by demanding that he "prove" those violations at a later stage.

current employees in seeking civil penalties against Marshalls. The alternative PAGA action proposed by Amici and assumed by the courts below, where the PAGA plaintiff only represents himself until he *proves* otherwise (that he demonstrates proof of violations against himself and/or against other employees), flouts the plain language of PAGA and must be rejected.

Perhaps recognizing that their arguments are not grounded in the statutory language, several Amici argue that this enhanced standing requirement is a *logical extension* of the PAGA language. (See, e.g., RLC Brief at pp. 11-13.) But Amici are not "extending" PAGA's provisions; they are conflating distinct requirements. NAM argues that the "facts and theories" provision of Subdivision 2699.3(a)(1) is meant to "force employees to establish the foundation of their claims and facilitate remedies [with] the qui tam aspect of the law designed to provide employees with a backstop." (See NAM Brief at pp. 7-8.) However, the "facts and theories" requirement pertains solely to the pre-filing administrative exhaustion procedure. Indeed, requiring the plaintiff to specify "facts and theories" of his case is meant to "allow the Labor and Workforce Development Agency to intelligently assess the seriousness of the alleged violation" in deciding whether to investigate the claims in the first instance.[3] (See *Alcantar v. Hobart Serv.* (9th Cir. 2015) 800 F.3d 1047, 1057.) The LWDA notice is meant to provide sufficient facts so

[3] Moreover, any criticism of the sufficiency of Williams's LWDA notice is beside the point. Even there were a deficiency in the LWDA notice, that is properly challenged by a demurrer or other pleading motion, which Marshalls did not do here.

the agency can investigate if it chooses, not to require the PAGA plaintiff to *prove* facts and theories to maintain his suit at a preliminary stage.

Adopting such a requirement for PAGA plaintiffs would also contradict PAGA's public purpose. (See *Iskanian, supra,* 59 Cal.4th at p. 383 [finding that PAGA is "clearly established for a public reason"].) Public enforcement statutes are construed broadly to accomplish their public purpose, including those with a civil penalties provision. (See *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 313.) Applying this principle, this Court in *Iskanian* held that a pre-dispute waiver of an employee's right to bring representative PAGA claims is unenforceable because it "frustrates PAGA's objectives." (*Iskanian, supra,* 59 Cal.4th at p. 384.) Enforcing such a waiver and requiring single-claimant arbitration of PAGA claims "w[ould] not result in the penalties contemplated under the PAGA 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].) Thus, the explicit purpose of *Iskanian*'s holding "is to preserve the deterrence scheme the legislature judged to be optimal." (*Sakkab v. Luxottica Ret. N.A.* (9th Cir. 2015) 803 F.3d 425, 439.)

It makes little sense for a Legislature that created a civil penalties scheme for PAGA where penalties are "measured by the number of violations an employer has committed... [against] multiple employees" (*Sakkab,* 803 F.3d at p. 438) to countenance the decision below, which would restrict the PAGA plaintiff to

prosecuting violations only against himself *unless and until* he proves the employer committed violations against others. Adopting the latter rule would stymie employee-whistleblowers, who may have observed violations against other employees, from investigating company-wide claims. In a PAGA action under this rule, a low-wage employee would have to *show violations* against himself and/or other employees in the first instance before he is allowed to gather actual evidence of violations through the discovery process. A plaintiff that has strong reasons for believing that unlawful practices exist—such as, for example, having been told of such violations by other employees—would still struggle to *prove* the merits of his claims or that violations were committed against others *before discovery* even commences.

The likely consequence is that, in the vast bulk of cases, particularly for low-wage employees where the employee would have little access to management policies, PAGA plaintiffs would be foreclosed from investigating violations against other employees. This would substantially undermine aggrieved employees' ability to obtain civil penalties sufficient to deter violations, thus imperiling the objectives of PAGA. While Marshalls and Amici undoubtedly want this very result, they cannot achieve their goal with the assistance of this Court.

Finally, because the statutory language is unambiguous, the court need not "turn to extrinsic aids to assist in the interpretation," such as legislative history. (*Kirby, supra*, 53 Cal.4th at p. 1251.) But the legislative history of PAGA, even if considered, would not help Amici. Amici cites to the 2004

Amendments, which added the administrative exhaustion requirement, to argue that the amendment somehow also imposed heightened standing requirements. (See, e.g., NAM Brief at pp. 7-8.") Wrong. In fact, the 2004 Amendment to PAGA "was 'the result of an agreement reached between the LWDA, business and labor representatives'" that was designed to "'improve[ ] the Act by allowing the LWDA to act first on more 'serious' violations such as wage and hour violations and give employers an opportunity to cure less serious violations." (*Caliber Bodyworks, Inc. v. Super. Ct.* (2005) 134 Cal.App.4th 365, 375 [quoting Sen. Rules Com. Off. Of Sen. Floor Analyses, analysis of Sen. Bill No. 1809 (2003-2004 Reg. Sess. (internal brackets deleted)].) The 2004 Amendment simply grants the LWDA the right of first refusal to investigate violations through a notice procedure. Amici's attempt to leverage this Amendment into also imposing a greater substantive burden on PAGA plaintiffs fails.

In short, the order below is inconsonant with PAGA's statutory language, statutory objectives and legislative history and must be reversed.

2. The Order Below Exceeds The Trial Court's Authority To Manage The Case

Amici also argue that the discovery order below is well-within with a trial court's authority to manage the case and bifurcate proceedings. (See NAM Brief at pp. 8-9; RLC Brief at pp. 6-8; TEG Brief at p. 19.) Wrong again.

First, the decision of the courts below to bifurcate PAGA is reversible error. The order below institutes a two-step process whereby Williams will need to prove his individual violations

first before representative discovery can commence. (*Williams v. Super. Ct.* (2015) 236 Cal.App.4th 1151, 1157.) The bifurcation is based, in part, on the Court of Appeal's implicit finding that the plaintiff merely has individual claims and must meet some threshold test to investigate his statewide representative claims. (*Id.* ["[J]umping into extensive statewide discovery based only on the bare allegations of one local individual having no knowledge of respondent's statewide practices would be a classic use of discovery tools to wage litigation..."].)

But the Court of Appeal misconstrues PAGA, which cannot be split so that the plaintiff must first prove his individual allegations before he qualifies to pursue representative claims. (See *Williams v. Super. Ct. (Pinkerton)* (2015) 237 Cal.App.4th 642, 649 ["*Pinkerton*"].) In *Pinkerton*, the court reversed a trial court that ordered a PAGA action to be bifurcated, with an initial, separate determination of standing as an aggrieved employee before the plaintiff could pursue his representative PAGA claim. (*Id.* at p. 646.) *Pinkerton* held that the "trial court cited no legal authority for its determination that a single representative action may be split in such a manner." (*Id.* a p. 649.) *Pinkerton* concluded that the plaintiff "does not bring the PAGA claim as an individual claim, but as 'the proxy or agent of the state's labor enforcement agencies," thereby foreclosing a division of the PAGA action between purportedly "individual" and "representative" components. (*Ibid.* [quoting *Reyes, supra*, 202 Cal.App.4th at p. 1124].)

Pinkerton underscores that the plaintiff in a PAGA action

is seeking *only* representative claims on behalf of himself and other employees. For the Court of Appeal to interpose an evidentiary obstacle that the PAGA plaintiff must surmount before he can qualify to investigate his representative claims is contrary to the PAGA statute and cannot stand.

Second, without addressing *Pinkerton*, both NAM and RLC[4] turn to a single, unpublished, outlier district court case, *Stafford v. Dollar Tree Stores* (E.D.Cal. Nov. 21, 2014, No. 13-1187) 2014 WL 6633396 to support their preferred reading of PAGA. In *Stafford*, a pre-*Iskanian* decision, the district court erroneously found that "while plaintiff and the LWDA share the same interest...the other PAGA plaintiffs have ***individual interests***, which will require some individual proof." (*Id.* at p. *4 [emphasis added].) Emphasizing "the scope of individualized assessment necessary to demonstrating Labor Code violations," the *Stafford* court ordered bifurcated proceedings where the plaintiff must first establish his status as an aggrieved employee. (*Ibid.*)

Stafford's reasoning does not survive *Sakkab*, which held that other employees in a PAGA suit do not have individual interests. (*Sakkab*, *supra*, 803 F.3d at 435 ["by obtaining [civil] penalties, the employee-plaintiff does not vindicate absent employees' claims, for the PAGA does not give absent employees any substantive right to bring their 'own' PAGA claims."].) *Stafford*'s premise is therefore wrong. Moreover, *Stafford*'s minimization of PAGA's enforcement function runs afoul of

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[4] RLC also relies on a trial court case bereft of reasoning and an internet article written by a defense attorney.

Sakkab, which held a PAGA plaintiff's "right to recover penalties for violations that did not directly harm the party bringing the action" cannot be curtailed, as it reflects the "state's chosen method of enforcing its labor laws." (*Id.* at p. 440.)

Furthermore, in a well-reasoned recent decision, another district court expressly declined to follow *Stafford*'s misguided holding, post-*Iskanian*. (See *Zackaria v. Wal-Mart Stores, Inc.* (C.D.Cal. Nov. 3, 2015, No. 12-1520) 2015 WL 6745714, *6 n.9.) Citing to large body of decisions that eschewed a manageability requirement for PAGA actions, *Zackaria* emphasized that "[i]mposing... a [manageability] requirement, found nowhere in PAGA itself and apparently not imposed upon the government, would 'obliterate [the] purpose' of representative PAGA actions." (*Id.* at p. *6 ["[T]he imposition of a manageability requirement—which finds its genesis in Rule 23—makes little sense in this context"].)

Amici's invocation of the court's case management powers cannot rescue the order below. There is no "manageability" requirement for PAGA, and the court cannot use its inherent powers to manage the case to rewrite and neutralize the PAGA statute.

B. Amici's Unfounded Claims of PAGA Abuse Should Be Disregarded

Several Amici argue that this Court should take steps to weaken the PAGA action due to the potential for abuse. For instance, NAM expressly compares PAGA actions to False Claim Act ("FCA") cases, which it suggests have "become parasitic" due to the increase in both FCA suits and non-intervened claims.

(NAM Brief at pp. 17-18.) From its unfounded claims of rampant FCA abuse,[5] NAM takes a greater logical leap in concluding that many PAGA actions are similarly meritless, and used for "personal gain," with no evidence to support this inflammatory accusation.

Similarly, RLC warns ominously of a rise in PAGA-only suits before lashing out at plaintiffs' attorneys for a purported conflict of interest in bringing PAGA-only suits—a "conflict" that betrays RLC's misreading of PAGA.[6] (RLC brief at pp. 14-20.)

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[5] NAM baldly misrepresents the FCA and case law. (NAM Brief at pp. 17-18.) A *qui tam* action is not presumed meritless when the government does not intervene. Under the FCA, "[w]hen the government chooses not to take over a qui tam action, the relator 'shall have the right to conduct the action.'" (See *U.S. ex rel. Kelly v. Boeing Co.*, (9th Cir. 1993) 9 F.3d 743, 746.) *United States v. ex rel. Jamison v. McKesson Corp.* (5th Cir. 2011) 649 F.3d 322, 331 does not aid NAM, and that case found that the non-intervened claims presumably lacked merit because the government *did intervene* on *other claims* in the same action. And NAM willfully misquotes *United State ex el. Karvelas v. Melrose-Wakefield Hosp.* (1st Cir. 2004) 360 F.3d 220, 242, fn.31, omitting the key word "potentially" from the full quote, "the government's decision not to intervene in the action also suggested that Karvelas's pleadings of fraud were ***potentially*** inadequate."

[6] RLC's novel suggestion that a "PAGA-only" action creates a purported conflict of interest between the plaintiff and his attorney misapprehends PAGA law. RLC claims that, by serving as a private attorney general, Williams would "forego the recovery he could have obtained from the individual Labor code claims he could have brought." But in bringing a PAGA suit, Williams is seeking only civil penalties on behalf of the state; a judgment on the PAGA action does not preclude Williams from *also* seeking recovery for his individual claims. (See *Arias v. Super. Ct.* (2009) 46 Cal.4th 969, 986.)

And the California Apartment Association ("CAA") takes aim at the private attorney general regime more generally, arguing that it incentivizes plaintiffs' lawyers to unfairly extract concessions from heroic entrepreneurs.[7] (CAA Brief at pp. 17-20.)

Notably, these industry groups' anti-private enforcement, anti-plaintiffs' attorney shibboleths are not supported by any studies or examples related to PAGA itself.[8] From the available information, PAGA actions are being prosecuted in the way the Legislature intended. Far from serving only the plaintiff's own interest, the state has seen a dramatic 53% percent annual increase in revenue generated by PAGA civil penalties, from $5.7 million in the 2013-14 budget year to $8.7 million in the 2014-15 budget year. (Legislative Analyst's Office, Budget and Policy Post, March 25, 2016, "The 2016-17 Budget, Labor Code Private Attorneys General Act Resources" at http://www.lao.ca.gov/Publications/Report/3403.) This revenue increase furthers the state's goal of "receiving the proceeds of civil

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[7] California has a longstanding policy that incentivizes attorneys to pursue statutory actions in the public interest. (See *Woodland Hills Residents Ass'n v. City Council* (1979) 23 Cal.3d 917, 925 [articulating the policy of encouraging public interest litigation through attorney incentives as enacted under California Code of Civil Procedure section 1021.5].)

[8] With little to point to, NAM resorts to quoting an internet article to suggest that no PAGA trial has ever been conducted. (NAM Brief at p. 19.) However, a cursory search reveals that several such trials have occurred. (See, e.g., *Fleming v. Covidien Inc.* (C.D.Cal. Aug. 12, 2011, No. 10-01487, 2011 WL 7563047 [bench trial on PAGA claim for wage statement violations]; *Garvey v. Kmart Corp.* (N.D.Cal. Dec. 18, 2012, No. 11-02575) 2012 WL 6599534 [bench trial on seating violations].)

penalties used to deter violations." (*Iskanian, supra,* 59 Cal.4th at p. 383.) This also furthers the California policy of enforcing the labor code through aggregate litigation. (*Gentry v. Super. Ct.* (2007) 42 Cal.4th 443, 463-64.) Low-wage workers often have no feasible way of pursuing wage violations individually, and cannot do so via class actions due to the widespread use of class action waivers.[9] (*Iskanian, supra,* 59 Cal.4th at p. 366 [abrogating *Gentry* on the invalidation of class waivers in the employment context].) The PAGA action is often the only way to enforce the Labor Code in California.

To the extent that Amici are sincere about the perceived misuse of the PAGA action, they should take their complaints to the Legislature rather than have this Court invent a different law. As it stands, PAGA "reflect[s] California's judgment on how best to enforce its labor laws." (*Sakkab, supra,* 803 F.3d at p. 439.) As part of that judgment, the Legislature already chose to preclude "citizens who were not employees of the defendant employer" from serving as the PAGA plaintiff but instead limited "qui tam plaintiffs to willing employees who had been aggrieved by the employer in order to avoid 'private plaintiff abuse.'" (*Iskanian, supra,* 59 Cal.4th at p. 387.)

If the Legislature believes that a bifurcated structure or a phased discovery scheme where the PAGA plaintiff must first prove the existence of his own violations on the merits before he can qualify to represent other employees, serves the objectives of

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[9] Nicole Wredberg, Subverting Workers' Rights: Class Action Waivers and the Arbitral Threat to the NLRA, 67 Hastings L.J. 881, 884-887 (2016).

PAGA, it can amend the statute to implement such a procedure. Such a dramatic change in the design of PAGA, however, should not be imposed from without.

The Court should also disregard the language contained in a proposed amendment that several Amici cite as evidence of PAGA abuse. (See RLC Brief at pp. 17-18, and Request for Judicial Notice, Ex. 1.) That proposed amendment was not adopted by the Legislature. Instead, on May 18, 2016, the Legislature approved only minor changes to the PAGA statute, limited to:

- That filing fees shall be specified as among the costs that can be recouped by the prevailing attorney (Labor Code § 2699, subdivision (g)(1));
- That a copy of the PAGA complaint must be submitted to the LWDA within ten days of filing (Labor Code § 2699, subdivision (*l*)(1));
- That the trial court is expressly required to approve the settlement following service of the settlement to the LWDA online, and an approval order must also be served on the LWDA (Labor Code § 2699, subdivisions (*l*)(2)-(4));
- Notice letters are to be submitted with a $75 filing fee and filed online, with LWDA reserving the right to extend the initial investigation for an additional 60 days before issuing a formal acceptance or decline notice. (Labor Code § 2699.3);

(See Request for Judicial Notice, Ex. 1.)

There were no changes to the standing provision under Labor Code §2699, subdivision (a) or the "aggrieved employee" definition under subdivision (c). Nor did the Legislature impose new standing requirements upon the PAGA plaintiff. These changes demonstrate that the Legislature has not found any widespread "abuse" of the PAGA device that would necessitate structural changes. Therefore, the Court should decline Amici's inappropriate request to impose additional requirements upon the PAGA plaintiff not imposed by the Legislature itself.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING WILLIAMS ACCESS TO ROUTINE CONTACT INFORMATION OF THIRD PARTY EMPLOYEES

A. The Trial Court Abused Its Discretion By Denying Discoverable Information To Williams In Contravention Of Settled Discovery Principles

The trial court abused its discretion in forcing Williams to shoulder the unique burden of satisfying a series of preliminary merits hurdles prior to obtaining what an unbroken line of California precedent has deemed "basic discovery." (*Puerto v. Super. Ct.* (2008) 158 Cal.App.4th 1242, 1254.) Like Marshalls, Amici provide no valid reason why PAGA plaintiffs seeking discovery of routine employee contact information have a more stringent burden than that placed on any other plaintiffs seeking contact information of percipient witnesses whose discovery requests are governed by the Civil Discovery Act's relevance standard.

Amici pays fealty to the principle that the trial court has broad discretion on discovery matters. (See, e.g., IADC Brief at

pp. 4-6; RLC Brief at pp. 4-5.) But judicial discretion is not unlimited: "[I]n a system of laws discretion is rarely without limits." (*Flight Attendants v. Zipes* (1989) 491 U. S. 754, 758.) "[A] motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." (*Martin v. Franklin Capital Corp.* (2005) 546 U. S. 132, 139.) For discovery orders, the "exercise of discretion does not authorize extension beyond the limits expressed by the Legislature." (*Greyhound Corp. v. Super. Ct.*, (1961) 56 Cal.2d 355, 378-9, 383.)

For instance, a court abuses its discretion when it requires a showing of good cause when "[t]he statute does not require any showing of good cause for serving and filing interrogatories." (*Coy v. Super. Ct.* (1962) 58 Cal.2d 210, 220.) Here, the Court of Appeal did exactly that, imposing a "good cause" requirement for responses to interrogatories that even Marshalls concedes does not exist. (Marshalls's Ans. pp.18-19.) At a minimum, then, the lower court abused its discretion on this issue. Amici also do not show that this error is harmless, as the lower court's shifting of burden to Williams to show good cause was decisive. (See *Williams, supra,* 236 Cal.App.4th at p. 1156 [denying discovery because Williams failed to show good cause for contact information of employees statewide].)

Amici also fail to identify case law that speaks to the facts here. Their citation to cases such as *Calcor Space Facility, Inc. v. Super. Ct.* (1997) 53 Cal.App.4th 216, a commercial case where the dispute centered on a demand for inspection of documents

and what a subpoena for such documents must describe—provide no aid to them. (See Opng. Brief at p. 22 [distinguishing *Calcor.*) Another of Amici's cases, *Irvington-Moore, Inc. v. Super. Ct.* (1993) 14 Cal.App.4th 733, addressed the production of insurance policies in a personal injury action and dealt with inapposite statutory provisions relating to discovery of insurance coverage. (*Id.* at pp. 737.) The court actually acknowledged that the court's discretion is tempered by "the limits expressed by the Legislature" and the liberal policies favoring discovery of relevant information as discussed above, and found the discovery warranted. (*Id.* at pp. 738-39.)

Amici further cite to statutory provisions which, like the cases they cite, simply provide for basic principles such as the trial court's management of discovery.[10]

Amici ignore on-point cases, cited by Williams, reversing trial courts for abusing their discretion when they deny discoverable contact information. (See, e.g., *Lee v. Dynamex, Inc.* (2008) 166 Cal.App.4th 1325, 1338 [finding "there can be no question the trial court abused its discretion by denying the motion to compel disclosure of independent contractor names and addresses through the use of the opt-out procedure proposed by the plaintiff"]; *Puerto, supra,* 158 Cal.App.4th 1242, 1254 [finding the trial court abused its discretion in denying plaintiffs a

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[10] (See RLC Brief at p. 5; *see, e.g.*, Civ. Proc. Code § 2017.020(a) [protective order may issue to limit discovery unlikely to lead to discovery of admissible evidence]; *Id.* at § 2019.030 [protective order may issue to restrict duplicative or cumulative discovery method]; Civ. Proc. Code § 2019.020(b) [a party may file a motion to have discovery sequenced].)

"routine and essential part of pretrial discovery"—the contact information for nonparty employees.); see also Opng. Brief at p. 12-15.)

Thus, Amici's (and Marshalls's) generic invocation of the trial court's discretion does nothing to overcome the body of case law holding that a trial court abuses its discretion by refusing to permit discovery of the names and addresses of *potential* witnesses.

B. Amici Fail To Justify The Trial Court's Denial of Discovery, Which Is Wholly Unsupported By The Facts Of The Case

1. The Trial Court Did Not Merely "Structure" or "Sequence" The Steps For Discovery But Denied Discovery In The First Instance

Amici contend that the rulings below merely sequence or structure discovery rather than outright deny discovery. (See, e.g., IADC Brief at pp. 6-8; RLC Brief at pp. 5-6.) However, conditioning routine discovery on evidentiary proof of the ultimate merits of the allegations is not merely "sequencing" discovery steps for the convenience of the parties. Rather, the courts below denied over 99% of the discovery Williams requested and fashioned an unprecedented merits hurdle prohibiting the rest of the discovery by requiring Plaintiff first to present *knowledge* of statewide practices without any opportunity to conduct statewide discovery.

As a practical matter this hurdle will be nearly impossible to overcome, which is why similar arguments have been roundly rejected by the courts. (See *Alch v. Super. Court* (2008) 165

Cal.App.4th 1412, 1429 ["Real parties in interest's argument is, in effect, a claim that, because privacy interests are involved, the writers must prove that the data they seek will prove their case before they may have access to the data. But there is no support in law, or in logic, for this claim."].)[11]

PAGA plaintiffs would not be able to "prove" statewide allegations in the first instance, prior to discovery, given that employers have exclusive access to such employee information and thus retain an unfair litigation advantage. (See, e.g., *Crab Addison v. Superior Court* (2008) 169 Cal.App.4th 958, 968; *Puerto*, 158 Cal.App.4th at p.1256; *Pioneer Elecs. (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360, 374.) Moreover, proving Labor Code violations is not limited to a defendant-employer's written policies, and can be demonstrated through the employer's practices and implementation of certain policies. (*See, e.g., Sav-On Drug Stores, Inc. v. Super Ct.* (2004) 34 Cal.4th 319.) To that end, a proper investigation of Marshalls's labor law violations

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[11] (See also *W. Pico Furniture Co. of Los Angeles v. Super. Ct.* (1961) 56 Cal.2d 407, 419 fn. 4 ["[T]he fact that a triable issue has not yet been determined cannot bar the disclosure of information sought for the very purpose of trying that issue."]; *Pacific Tel. & Co. v. Super. Ct.* (1970) 2 Cal.3d 161, 174) [finding the requested pretrial discovery warranted when "the nature of the facts that will be relevant and admissible at trial cannot accurately be determined at the pretrial stage of application for discovery"]; *see also Guthrey v. California Dept. of Corrections and Rehabilitation* (E.D.Cal. June 27, 2012, No. 1:10-cv-02177-AW-BAM) 2012 WL 2499938, *2 fn. 1 ["The Court, however, does not consider the underlying merits of Plaintiff's claims in evaluating a motion to compel."].)

would surely lead Williams to interview fellow aggrieved employees that he *already represents statewide.* These witnesses and affected parties would have direct information concerning the employer's day-to-day practices and implementation of its policies. (*Iskanian, supra,* 59 Cal.4th at p. 360.) The courts below turn the logical sequence of discovery—investigation, then proof—upside down by requiring Williams to prove that violations were committed against these employees before he is permitted to contact them. This upsets the policies behind both the Civil Discovery Act and PAGA and cannot be countenanced.

Furthermore, Amici fail to distinguish the case law cited by Williams in earlier briefing establishing that class member contact information is routinely disclosed *at the outset of the case.* (*See, e.g., Pioneer, Crab Addison, Puerto.*) Amici also fail to cite any contrary authority on point. Amici cite to California Code of Civil Procedure section 2019.020(b), yet that provision pertains to discovery that will already take place and puts the onus on the party who wishes to have that discovery sequenced (Marshalls) by filing a motion to support such sequencing. (Civ. Proc. Code § 2019.020(b) ["[O]n motion and for good cause shown, the court may establish the sequence and timing of discovery for the convenience of parties and witnesses and in the interests of justice."].) The other cases Amici cite are also unavailing, as they pre-date PAGA and simply stand for the general proposition that courts have the power to bifurcate issues. (See, e.g., *Grappo v. Coventry Fin. Corp.* (1991) 235 Cal.App.3d 496; *Horton v. Jones* (1972) 26 Cal.App.3d 952.) As bifurcating PAGA actions is

contrary to *Pinkerton* and the PAGA statutory design as explained above, these arguments are meritless.

2. The Trial Court's Order Is Disconnected From The Record In This Case

There are several ways in which the rulings below are not grounded in the facts of this case, which Amici and Marshalls cannot and do not resolve.

First, in affirming the trial court's order, the Court of Appeal failed to give any weight to a PAGA plaintiff's status as a proxy for the state's labor law enforcement agencies. As this Court has held, Williams's role as agent of the state in prosecuting Labor Code violations "is not merely semantic" and encompasses the statewide violations alleged in his complaint. (*Iskanian, supra,* 59 Cal.4th at p. 388.) As a result, discovery cannot be geographically confined to one Marshalls location, as the trial court ordered. To label Williams's claim as "only a parochial claim," as the Court of Appeal did, only reinforces that the decision below failed to give proper consideration to what a PAGA action is, according to both the statute and under this Court's precedents.[12] (*Williams, supra,*236 Cal.App.4th at p. 1159.)

Several amici wrongly argue that the state itself, had it taken up its own investigation, would face similar restrictions in their investigation. (See, e.g., RLC Brief at pp. 8-11; IADC Brief

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[12] To be sure, the Court of Appeal also erroneously found Williams's allegations to be localized to the one Costa Mesa store, despite the fact that Williams's complaint alleges statewide Labor Code violations. (See *Williams, supra,* 236 Cal.App.4th at p. 1147; *see, e.g.,* PA 9-17, ¶¶ 19, 42, 47, 54.)

at pp. 12-15.) For example, Amicus IADC falsely contends that the declaration of Miles Locker,[13] raised by Williams in support of his motion to compel further responses, "illustrates the similarities between the trial court's order and a typical State labor investigation." (IADC Brief at p. 9.) This is belied by Locker's testimony, in which he attested to the Division of Labor Standards Enforcement's ("DLSE") broad authority in investigating Labor Code violations. (See PA 156-161.) Locker explained that, for investigations of employers with multiple employment locations throughout California, DLSE deputies "are instructed to obtain employment records for . . . all locations" to determine "whether the potential violations are localized to one location or systemic throughout all of the employer's California locations." (PA 160, ¶ 11.) This is because "DLSE enforcement policy is to determine compliance on a Statewide level as to employers with multi-location operations." (PA 161, ¶ 13.) This is in line with the DLSE's power to "[i]nvestigate and ascertain the wages of all employees, and the hours and working conditions of all employees employed in any occupation in the state." (Cal. Lab. Code § 1193.5(a).)

As explained by Locker, as part of the Labor Commissioner's investigation into an employer's labor practices, the State will routinely obtain discovery from numerous employer locations at the outset of the case. According to Locker, state deputies will typically obtain a sampling of records from those

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[13] Locker served in the Division of Labor Standards Enforcement ("DLSE") for sixteen years and held positions such as Chief Counsel to the Labor Commissioner. (See PA 156-161.)

numerous locations. (PA 160, ¶ 11 [obtaining all employment records to determine if potential violations are localized or systemic "may be done by first sampling records for ***multiple locations***, and if the sampled records reveal systemic Statewide violations, to obtain complete records for all locations within the State"][emphasis added].) Thus, Locker's testimony exposes the falsity of IADC's claim that discovery in an action by the state would be "virtually identical to what the trial court has done with its discovery order," which limited discovery solely to records from one Costa Mesa Marshalls store. (IADC Brief at p. 10.)

Second, the order below improperly raises the expense of employee contact information discovery as a justification for denying it, despite the complete absence of *any* evidence in the record that Marshalls would incur great expense in producing the contact information of its own employees. (See PA 229; *Williams, supra*, 236 Cal.App.4th at p. 1157.) While Amici decry the supposed rising costs of litigation and discovery abuse generally, none of them have introduced any evidence suggesting that production of employee contact information would be exorbitantly costly. (See, e.g., CAA Brief at p. 12.; NAM Brief at p. 13; IADC at p. 13.) Overheated suggestions that "expansive discovery" "can be a 'cancer' on litigation" (see NAM Brief at p.12) offer little insight into the discovery here.

Generally, the costs of producing employee contact lists should be minimal, as such lists are regularly produced in precertification discovery and for class settlements without exerting any burden on employers. For example, none of the

Pioneer line of cases found the costs of discovery of contact information a reason to deny such discovery. Employers such as Marshalls are in sole possession of that information and are in fact statutorily required to keep such records. (Cal. Lab. Code § 1174(c).) With records stored electronically, generating a list of contact information for one store or for 129 stores can likely be done with a few keystrokes. Moreover, neither Marshalls nor Amici have introduced any evidence of such expense, as Williams discussed in his briefing and Amici fail to refute. (See Reply Brief at pp. 8-9).

Certainly, as there has been no such showing on Marshalls's burden and expense or *any* showing here, there is no valid objection to discovery on this basis. (See *W. Pico Furniture*, 56 Cal.2d at p.417.)

C. The Order Below, If Affirmed, Would Result In A Proliferation Of Post-Deposition Discovery Motions And Thereby Frustrate The Self-Execution Of Interrogatories

Amici and Marshalls also ignore the practical ramifications of the Court of Appeal's ruling. If allowed to stand, the order would upend the "central precept" of the Civil Discovery Act: that "discovery be essentially self-executing." (*Clement v. Alegre* (2009) 177 Cal.App.4th 1277, 1281.) "A self-executing discovery system is 'one that operates without judicial involvement.'" (*Id.*) "Because discovery is a largely self-executing enterprise, in which the parties are expected to, and do, resolve most of their differences without judicial involvement, it is important that the rules governing it be clear." (*Emerson Elec. Co. v. Super. Ct.* (1997) 16 Cal.4th 1101, 1118.)

PAGA actions would no longer be self-executing if the order below is affirmed. Going forward, in every PAGA action where contact information is sought, a PAGA plaintiff must first sit for deposition and make some requisite evidentiary showing regarding the merits of the allegations. Disputes about whether the PAGA plaintiff satisfied his burden would be *de rigueur*. Is testifying to hearsay from other employees who've experienced denial of meal breaks sufficient? Is producing a written policy sufficient, even if it is unclear whether other stores implemented that policy? Must an employer's unlawful conduct be personally observed by the PAGA plaintiff before it is given credence for the purposes of obtaining contact information? The order below would surely spark a cottage industry of discovery litigation, creating a new species of discovery motions for the State's overburdened trial courts to resolve. (Cf. *Clement*, *supra*, 177 Cal.App.4th at pp. 1291-1292 ["Conduct frustrates the goal of a self-executing discovery system when it requires the trial court to become involved in discovery because a dispute leads a party to move for an order compelling a response."].)

III. THE DISCLOSURE OF CONTACT INFORMATION OUTWEIGHS THIRD PARTY PRIVACY INTERESTS UNDER THE *HILL* TEST

A. None Of The Amici Can Show That Employees Have A Heightened Expectation Of Privacy, Much Less A Serious Invasion Of Privacy

None of Amici rebut William's showing that employees have a reduced expectation of privacy regarding the disclosure of contact information to an employee-plaintiff alleging employment law violations. (See *Puerto*, *supra*, 158 Cal.App.4th at pp. 1252-

1253, 1254; *Belaire-West Landscape v. Superior Court* (2007) 149 Cal.App.4th 554, 561 ["Just as the dissatisfied Pioneer customers could be expected to want their information revealed to a class action plaintiff who might obtain relief for the allegedly defective DVD players [citation omitted], so can current and former Belaire-West employees 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."].)

In *County of Los Angeles v. Los Angeles County Employee Relations Commission* (2013) 56 Cal.4th 905, 928 this Court cited *Belaire-West's* analysis with approval when discussing employee expectations of privacy. *County of Los Angeles* addressed different facts, where non-union employees have "a somewhat enhanced privacy expectation" regarding their contact information when sought by a union.[14] (*Ibid.*) But there is no such heightened privacy expectation for the typical case of an employee-plaintiff seeking other employees' contact information. In such a case, the Court "observed that the rules of civil discovery generally permit plaintiffs to discover contact information for potential class members in order to identify additional parties who might assist in prosecuting the case." (*Id.* at p. 930.)

As there is no heightened expectation of privacy, there is also no serious invasion of privacy of nonparty employees' rights.

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[14] The Court noted non-union employees' privacy expectation was reduced in light of the common practice of other public employers giving unions such information. (*City of Los Angeles, supra,* 56 Cal.4th at 928.)

Amici cannot validly argue that there is a serious invasion of privacy in disclosure of employee contact information (see, e.g., Prometheus Brief at p. 12), when the *Puerto* line of cases specifically address this point and conclusively find otherwise. (See *Puerto, supra,* 158 Cal.App.4th at pp. 1252-1253, 1254; *Belaire-West, supra,* 149 Cal.App.4th at p. 562 [finding disclosure of employee contact information with an opt-out notice "presents no serious invasion of their privacy"].)

This Court recently reaffirmed this finding in the class action employment context, citing the cases Williams relies upon. (See *County of Los Angeles, supra,* 56 Cal.4th at p.930 [citing with approval *Crab Addison, Lee, Puerto, Alch,* and *Belaire-West*].) In so doing, this Court emphasized that "it is only under unusual circumstances that the courts restrict discovery of nonparty witnesses' residential contact information." (*Id.* [quoting *Puerto, supra,* 158 Cal.App.4th at p. 1254].) Applying that principle to the unique facts before it, where the actions of employees who had chosen not to join a union and declined in the past to give their contact information signified "a more significant invasion of privacy than disclosure in the class action context" (*Id.* at p. 930), this Court in *County of Los Angeles* nonetheless found the information should be disclosed. (*Id.* at p. 911.) Given that this Court ruled that contact information must be disclosed under facts with far more serious privacy interests at stake, Williams requested discovery, which is "not particularly sensitive," should also be disclosed. (*Belaire-West, supra,* 149 Cal.App.4th at pp. 561-562.)

Tacitly conceding that Marshalls's employees' privacy interests are not particularly strong here—certainly not any that could rise to a serious invasion of privacy—Amicus TEG argues that this Court bypass the constitutional test applied in *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1.[15] (See TEG Brief at p. 5.) Under TEG's approach, so long as there is any modicum of privacy interest involved, the Court would skip the analysis relating to the expectation of privacy or whether there is a serious invasion of privacy and proceed directly to a balancing of interests. (*Id.*)

No authority supports TEG's modified *Hill* test. *Loder v. City of Glendale* (1997) 14 Cal.4th 846, which TEG cites as an example of this so-called more flexible approach, reaffirms that the privacy analysis must turn on the importance of the constitutionally protected privacy interest. (*Id.* at pp. 891-95.) Indeed, *Loder* stated that the "three 'elements' set forth in *Hill* properly must be viewed simply as 'threshold elements' that may be utilized to screen out claims that do not involve a significant intrusion on a privacy interest protected by the state constitutional privacy provision." (Id. at p. 893.) As Williams demonstrated in prior briefs, *Hill* screens out Marshalls's claims

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[15] As Williams discussed in his briefing, the *Hill* test includes three prongs, (1) a claimant must possess a legally protected privacy interest, (2) there must be a reasonable expectation of privacy, and (3) the invasion of privacy must be serious. (See *Hill, supra*, 7 Cal.4th at pp. 35-37.) Once this criteria for an invasion of a privacy interest is met, the interest then must be measured in a "balancing test" against other competing or countervailing interests. (*Id.* at p. 37.)

since they do not involve a significant intrusion into a privacy interest. *Loder* does not support a departure from *Hill.*

Moreover, the viability of the *Hill* test is not at issue, as this Court in *Pioneer* followed *Hill's* test without question and without citation to the 1997 *Loder* decision. Nor did *County of Los Angeles* open up *Hill* to "flexible" interpretations. (See TEG Brief at p. 5.) *County of Los Angeles* followed the steps in *Hill* and then proceeded to a balancing test, as it found that "[b]ecause the County made a sufficient showing on the essential elements of a privacy claim, [it would] next consider whether the invasion of privacy is justified because it would further a substantial countervailing interest," citing *Hill.* (*County of Los Angeles, supra,* 56 Cal.App.4th at p. 930.) The *Puerto* line of cases also followed the steps in *Hill* without any significant departure.

Other Amici's arguments also fail. Instead of addressing the relevant case law, Amicus CAA cites to inapposite statutes protecting consumers' privacy interests from commercial or political solicitation and other general privacy laws allowing for confidentiality in medical information, birth and death certificates, and computerized personal information. (See CAA Brief at pp. 12-17.) CAA's sweeping account of privacy laws sidesteps the directly applicable *Pioneer* and *Puerto,* failing to rebut the core point: that, under those cases, employees have a reduced right to privacy when another employee has alleged company-wide violations.

B. Amici Fail To Show That A Balance Test, If Applied, Should Tip In Favor Of Nondisclosure

1. The *Hill* Test Would Tip In Favor Of Disclosure

To be clear, neither Marshalls nor Amici have established a heightened privacy interest or that disclosure of contact information would cause a serious invasion of privacy. As such, no balancing test is needed pursuant to *Hill*. (*Hill, supra*, 7 Cal.4th at p. 37; see also *Pioneer, supra*, 40 Cal.4th at p. 373 "[Defendant's] failure to demonstrate that its customers entertained a reasonable expectation of privacy, or would suffer a serious invasion of their privacy, could end our inquiry as these elements are essential to any breach of privacy cause of action under *Hill* before any balancing of interests is necessary."]; *Puerto, supra*, 158 Cal.App.4th at p. 1256 ["[W]hen the court concludes that there is no serious invasion of privacy no balance of opposing interests is required."].) Nonetheless, if a balancing test were needed, the interests would tip in Williams's favor.

As Williams is seeking information concerning other aggrieved employees in his capacity as a proxy for the State, the scope of privacy interests and balancing must be analyzed from this perspective. "Because at stake here is the fundamental public policy underlying California's employment laws," courts have found that "the balance of opposing interests here tilts even more in favor of the court's disclosure." (*Belaire-West Landscaping, Inc. v. Super. Ct.* (2007) 149 Cal.App.4th 554, 562; see also Reply Brief at pp. 29-31.)

Any privacy interests in being "outed" as retail store employees are minimal and do not tip the balance against disclosure, as may other more serious invasions of privacy. (*See,*

e.g., Puerto, supra, 158 Cal.App.4th at p. 1254 ["[T]he dangers of being 'outed' as individuals who work at a grocery store cannot be equated with the impingement of associational freedom likely to occur when, as in *Planned Parenthood [Golden Gate v. Superior Court* (2000) 83 Cal.App.4th 347], the disclosure identifies the individual as assisting in the operation of an abortion clinic."].) Employees at Marshalls generally fill positions where they are viewed by the public on a daily basis. They have no expectation that the contact information they gave to their employer would be shielded from agents of the government responsible for enforcing their statutory rights, and may expect that it be disclosed for such purposes. (*Belaire-West, supra,* 149 Cal.App.4th at p. 561.)

Amici fail to balance the policies favoring enforcement of employment laws with any privacy interest. Amicus Prometheus, for instance, premised its "balancing test" on the erroneous proposition that Williams serves only his individual interest at the outset of his PAGA case and therefore has no "legitimate interest" in communicating with the aggrieved employees he represents. (*See, e.g.,* Prometheus Brief at p.17 ["compelling disclosure of employee names and contact information on a statewide basis would further no legitimate interest"].) This failure to account for a litigant's discoverable interest renders Prometheus's test invalid.

Prometheus's reliance on *Life Technologies v. Superior Court* (2011) 197 Cal.App.4th 640, to support a "compelling need" test resulting in nondisclosure, is misplaced. *Life Technologies* was not a representative or class action case and involved only a

single plaintiff who sued on his own behalf for wrongful termination, seeking far more invasive information from *nonwitness* employees than just contact information, such as the employees' ages at termination and reasons for termination, as well as a description of severance benefits. (*Id.* at pp. 648, 652 ["The interrogatories effectively seek the disclosure of confidential, personnel records of nonwitness third parties."].) *Life Technologies* is readily distinguishable on these points, as well as on the fact that the individual plaintiff sought third-party nonwitness information for a statistical analysis to prove disparate impact, when he could obtain the information through less invasive means. (*Id.* at p. 649.)

Amici also cite to several nonbinding federal district court cases to argue that the privacy balancing necessitates disclosure in only one facility. (Prometheus Brief at pp. 21-23.)[16] But these

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[16] For example, Amici rely on *Nguyen v. Baxter Healthcare Corp.* (C.D.Cal. 2011) 275 F.R.D. 503, which is distinguishable as the discovery at issue in that case was limited because the plaintiff conceded that the defendant had produced evidence of company-wide policies consistent with California law and gave no reason for why discovery in other stores was needed beyond plaintiff's counsel's idea that it was just "common sense," which not surprisingly failed to justify the discovery requested. (*Id.* at p. 508.) They also cite other cases that, as discussed below, use federal class action concepts not relevant here, such as *Martinet v. Spherion Atlantic Enterprises, LLC* (S.D.Cal. June 23, 2008, No. 07cv2178) 2008 WL 2557490, where the defendant "argu[ed] that the Plaintiff is not entitled to state-wide discovery absent a showing of Rule 23 Class-Action requirements." (*Id.* at p. *1; see also *Franco v. Bank of America* (S.D.Cal. Dec. 1, 2009, No. 09cv1364-LAB (BLM)) 2009 WL 8729265, *3 ["plaintiffs bear the burden of showing that such discovery is likely to produce

federal discovery standards and the cases cited are based on Federal Rule of Civil Procedure 23 not applicable here and contrary to California case law that (1) allows for discovery at the precertification stage *prior* to proving class elements (see *Atari, Inc. v. Super. Ct.* (1985) 166 Cal.App.3d 867, 869-870); and (2) finds that PAGA plaintiffs need not satisfy class certification requirements. (See *Arias, supra,* 46 Cal.4th at p. 984.) In a state court action, these federal cases must give way to state cases that finds such information the "starting point" of discovery and discoverable under a balancing of interests. (See *Puerto, supra,* 158 Cal.App.4th at p. 1250.)

Finally, like Marshalls, Amici struggle to distinguish actual on-point authority such as *Crab Addison, Belaire-West, Puerto,* and *Lee,* focusing on irrelevant distinctions such as the language used on notice forms[17] or that *Pioneer* involved a consumer

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substantiation of the class allegations"]; *Coleman v. Jenny Craig, Inc.* (S.D.Cal. June 12, 2003, No. 11-cv-1301-MMA (DHB)) 2013 WL 2896884 [same].)

[17] These cases stand for the proposition that employee contact information must be disclosed. The validity of that proposition is unaffected by the individual factual distinctions between those cases and this one. Indeed, in those same cases, the courts observe certain factual distinctions with precedents only to brush them aside as irrelevant to the holding. The court in *Crab Addison,* for instance, noted the factual differences between that case and *Puerto.* (*Crab Addison, supra,* 169 Cal.App.4th at p. 969 [noting that the employer in *Puerto* disclosed witness identities but sought to protect the addresses or telephone numbers, and that there were prior release forms in *Crab Addison* where employees indicated preferences for restricting disclosure of contact information].) But the court specifically "attach[es] no great significance" to this, and finds

dispute. (See Prometheus Brief at pp. 17-20, 23-24.) Of course, courts post-*Pioneer* cite to and apply *Pioneer* in the employment context, often discussing *Pioneer's* application in depth. (See, e.g., *Puerto, supra,* 158 Cal.App.4th at pp. 1250-1259.) This puts to rest the argument that *Pioneer* is somehow limited to consumer cases.

2. Amicus The Employers Group's Proposed Test Is Unworkable

A viable test already exists for analyzing privacy interests with respect to discovery of contact information, as articulated in *Hill* and applied in *Pioneer*, and repeatedly used for discovery of employee contact information in numerous intermediate court decisions thereafter. Amicus TEG nonetheless would like this Court to ignore this valid case law and instead apply its own unworkable test that would favor employer interests. As discussed above, *supra,* Section III.A., TEG wants to avoid applying the controlling *Hill* test in favor of a test that skips steps two and three (whether there is a reasonable expectation of privacy and whether there is a serious invasion of privacy) and instead goes directly to a balancing test. (TEG Brief at pp. 4-5.)

TEG undoubtedly manufactured this new test because applying the actual framework in *Hill* (as *Pioneer, Puerto,* and their progeny performed) results in a clear reversal of the order below. TEG seeks to do away with the weighing of privacy interest because, under the current test, employees' reduced

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that "[u]nder *Puerto,*" disclosure was proper. (*Id.* at pp. 975.) The fact that *Puerto* dealt with slightly different facts or that *Pioneer* was a consumer case was not determinative.

expectation of privacy as to their contact information is dispositive. Indeed, TEG admits that "[i]n *Hill*, this Court stated that a plaintiff bringing an affirmative claim for an invasion of privacy must meet the first three requirements before the court can balance countervailing interests." (TEG Brief at p. 4 [quoting *Hill*].)

TEG's "more flexible approach" to *Hill* (*id.* at p. 5) completely jettisons the core analysis: whether there is a sufficient constitutionally protected privacy interest at stake that would override a litigant's interest in relevant discovery:

> Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right. Thus, the extent and gravity of the invasion is an indispensable consideration in assessing an alleged invasion of privacy.

(*Hill*, *supra*, 7 Cal.4th at p. 37.) As *Pioneer* describes *Hill*, "we have explained that the right of privacy protects the individual's *reasonable* expectation of privacy against a *serious* invasion." (See *Pioneer*, *supra*, 40 Cal.4th at p. 370 [emphasis in original].)

TEG's new test assumes that privacy interests do *override* the litigant's interests at the outset. (TEG Brief at pp. 11-13.) Going directly to a three-step "balancing test," TEG simply posits that a PAGA plaintiff represents only his individual interests until he proves otherwise (step 1), after which he only represents "localized" employees until proven otherwise (step 2), and only then would he represent other employees statewide (step 3). (TEG Brief at pp. 15-23.)

TEG's edifice is premised on the same error as the court

below, assuming that a PAGA plaintiff must first make some evidentiary demonstration before he can even qualify to represent the state and other employees. As explained above, this contravenes PAGA's statutory language and purpose. Indeed, this use of a modified *Hill* framework is merely a fig leaf, simply another way to erect the same preliminary merits hurdles erected by the courts below.

While many of TEG's flawed arguments are already addressed above, several key errors require a response here. TEG claims that Williams could not proceed in a representative PAGA action without establishing liability using common proof.[18] (TEG Brief at pp. 21-22.) But uniform policies are not required for a defendant to be liable for PAGA penalties. (*Plaisted v. Dress Barn, Inc.*, (C.D.Cal. Sep. 20, 2012, No. 12-01679-ODW) 2012 WL 4356158, *2 ["Every PAGA action in some way requires some individualized assessment regarding whether a Labor Code violation has occurred."].) While a PAGA plaintiff *could* prove Labor Code violations by a uniform or common practice, nowhere in the PAGA statute is there a required showing of uniformity. (See Cal. Lab. Code § 2699 *et seq.*)

TEG also strays far afield in asserting that Williams's

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[18] Moreover, how Williams ends up proving liability later in the action, such as through representative or statistical evidence, is not the same thing as *requiring* common proof prior to discovery. Amicus erroneously conflates the two in an attempt to skip over the fact that Williams is correct in arguing that class action concepts of commonality are not required in PAGA actions (whether or not Williams may choose to later use representative proof for liability purposes). (See *Arias, supra*, 46 Cal.4th at 984.)

PAGA action is somehow not a cognizable representative action. (See TEG Brief at pp. 21-22.) In support, TEG raises inapposite cases that pre-date the PAGA and are pre-Proposition 64, Unfair Competition Law ("UCL") non-class representative actions for restitution, damages, and injunctive relief that do not even mention, much less analyze, discovery principles, such as *Bronco Wine Co. v. Frank A. Logoluso Farms* (1989) 214 Cal. App. 3d 699 and *South Bay Chevrolet v. General Motors Acceptance Corp.* (1999) 72 Cal. App. 4th 861. These cases have nothing to do with discovery in a PAGA action and concern irrelevant issues, such as the difficulty in determining the amount of restitution owed individuals under the UCL. (See *Bronco Wine, supra,* 214 Cal.App.3d at pp. 720-721.) "Further, the individualized assessment necessary in a PAGA action would come nowhere close to the individualized and fact-intensive restitution calculations necessary under the UCL, and is in fact an inherent aspect of a PAGA claim." (*Plaisted, supra,* 2012 WL 4356158, at *2.)

As such, TEG cannot question whether the action is cognizable nor is such discussion relevant. At stake is whether Willliams is entitled to the basic contact information of the aggrieved employee's he represents statewide. TEG's unworkable privacy test violates established privacy rules under *Hill,* would favor employers, and provides no reason for affirming the order below.

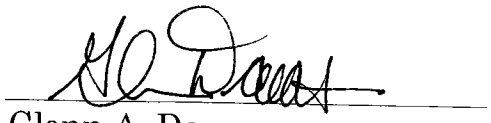
CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeal should be reversed.

Dated: June 16, 2016

Respectfully submitted,

Capstone Law APC

By: 

Glenn A. Danas
Ryan Wu
Robert Drexler
Liana Carter

Attorneys for Plaintiff and
Appellant
MICHAEL WILLIAMS

CERTIFICATE OF WORD COUNT

Counsel of record hereby certifies that, pursuant to the California Rules of Court, Rule 8.504(d)(1) and 8.490, the enclosed Appellant's Reply Brief was produced using 13-point Century Schoolbook type style and contains 10,643 words. In arriving at that number, counsel has used Microsoft Word's "Word Count" function.

Dated: June 16, 2016

Respectfully submitted,

Capstone Law APC

By: 

Glenn A. Danas
Ryan Wu
Robert Drexler
Liana Carter

Attorneys for Plaintiff and Appellant
MICHAEL WILLIAMS

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the State of California, County of Los Angeles. I am over the age of 18 and not a party to the within suit; my business address is 1840 Century Park East, Suite 450, Los Angeles, California 90067.

On **June 16, 2016**, I served the document described as: **APPELLANT'S CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS** on the interested parties in this action by sending on the interested parties in this action by sending [ ] the original [or] [✓] a true copy thereof to interested parties as follows [or] as stated on the attached service list:

See attached service list.

[☒] **BY MAIL (ENCLOSED IN A SEALED ENVELOPE):** I deposited the envelope(s) for mailing in the ordinary course of business at Los Angeles, California. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, sealed envelopes are deposited with the U.S. Postal Service that same day in the ordinary course of business with postage thereon fully prepaid at Los Angeles, California.

[☐] **BY E-MAIL:** I hereby certify that this document was served from Los Angeles, California, by e-mail delivery on the parties listed herein at their most recent known e-mail address or e-mail of record in this action.

[☐] **BY FAX:** I hereby certify that this document was served from Los Angeles, California, by facsimile delivery on the parties listed herein at their most recent fax number of record in this action.

[☐] **BY PERSONAL SERVICE:** I personally delivered the document, enclosed in a sealed envelope, by hand to the offices of the addressee(s) named herein.

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

Executed on **June 16, 2016**, at Los Angeles, California.

Greg Fisk
Type or Print Name


Signature

SERVICE LIST

Frederick Bennett 111 North Hill Street, Room 546 Los Angeles, CA 90012 *via U.S. mail*	**Superior Court of Los Angeles County: Respondent**
Robert Gordon Hulteng Joshua Joseph Cliffe Emily Erin O'Connor Scott D. Helsinger Littler Mendelson, PC 650 California Street, 20th Floor San Francisco, CA 94108-2693 *via FedEx*	**Marshalls of CA, LLC: Real Party in Interest**
Hon. William F. Highberger Los Angeles Superior Court 600 S. Commonwealth Avenue Los Angeles, CA 90005 *via U.S. mail*	**Respondent**
Mary-Christine Sungaila Martin Max Ellison Haynes & Boone, LLP 600 Anton Boulevard, Suite 700 Costa Mesa, CA 92626 *via U.S. mail*	**International Association of Defense Counsel: Amicus curiae**
Karen Kubala Mccay Pahl & Gosselin 160 West Santa Clara Street, Suite 1500 San Jose, CA 95113 *via U.S. mail*	**California Apartment Association: Amicus curiae**
Stephen D. Pahl Julie Elaine Bonnel Pahyl & McCay 225 West Santa Clara Street, Suite 1500 San Jose, CA 95113 *via U.S. mail*	**California Apartment Association: Amicus curiae**
Lisa Barnett Sween Natalja Marie Fulton Douglas G.A. Johnston	**Prometheus Real Estate Group, Inc.: Amicus curiae**

Jackson Lewis P.C. 50 California Street, 9th Floor San Francisco, CA 94111 *via U.S. mail*	
Patrick Joseph Gregory Shook Hardy & Bacon, LLP One Montgomery Tower, Suite 2700 San Francisco, CA 94104 *via U.S. mail*	**National Association of Manufacturers: Amicus curiae**
Patrick Joseph Gregory Shook Hardy & Bacon, LLP One Montgomery Tower, Suite 2700 San Francisco, CA 94104 *via U.S. mail*	**American Coatings Association: Amicus curiae**
Patrick Joseph Gregory Shook Hardy & Bacon, LLP One Montgomery Tower, Suite 2700 San Francisco, CA 94104 *via U.S. mail*	**NFIB Small Business Legal Center: Amicus curiae**
Cynthia L. Rice California Rural Legal Assistance, Inc. 1430 franklin Street, Suite 103 Oakland, CA 94612 *via U.S. mail*	**California Rural Legal Assistance, Inc.: Amicus curiae**
Cynthia L. Rice California Rural Legal Assistance, Inc. 1430 franklin Street, Suite 103 Oakland, CA 94612 *via U.S. mail*	**California Rural Legal Assistance Foundation: Amicus curiae**
Cynthia L. Rice California Rural Legal Assistance, Inc. 1430 franklin Street, Suite 103 Oakland, CA 94612 *via U.S. mail*	**National Employment Law Project and the Legal Aid Society: Amicus curiae**

Cynthia L. Rice California Rural Legal Assistance, Inc. 1430 franklin Street, Suite 103 Oakland, CA 94612 *via U.S. mail*	**Employment Law Center: Amicus curiae**
William Turley The Turley Law Firm, APLC 7428 Trade Street San Diego, CA 92121 *via U.S. mail*	**Consumer Attorneys of California: Amicus curiae**
Apalla U. Chopra O'Melveny & Myers 400 South Hope Street Los Angeles, CA 90071 *via U.S. mail*	**Employers Group: Amicus curiae**
Julie Rae Trotter Call & Jensen 610 Newport Center, Drive #700 Newport Beach, CA 92660 *via U.S. mail*	**Retail Litigation Center, Inc.: Amicus curiae**
Julie Rae Trotter Call & Jensen 610 Newport Center, Drive #700 Newport Beach, CA 92660 *via U.S. mail*	**California Retailers Association: Amicus curiae**
Julie Rae Trotter Call & Jensen 610 Newport Center, Drive #700 Newport Beach, CA 92660 *via U.S. mail*	**California Grocers Association: Amicus curiae**
Michael D. Singer Cohelan Khoury & Singer 605 "C" Street, Suite 200 San Diego, CA 92101 *via U.S. mail*	**California Employment Lawyers Association: Amicus curiae**