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
NOV 17 2015
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 OPENING BRIEF ON THE MERITS

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ISSUES PRESENTED

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

(2) In ruling on such a request for employee contact information, should the trial court first determine whether the employees have a protectable privacy interest and, if so, balance that privacy interest against competing or countervailing interests, or is a protectable privacy interest assumed? (See *Hill v. National Collegiate Athletic Association* (1994) 7 Cal.4th 1; *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360.)

INTRODUCTION

Employees pursuing aggregate litigation, including class actions, have long been entitled to contact information of other employees who are potential percipient witnesses to the wage and hour violations at issue. In this enforcement action brought under the Labor Code Private Attorneys General Act ("PAGA"), Appellant Michael Williams sought the names and contact information of Marshalls's current and former California employees so that he could investigate and prove his claims. Departing sharply from well-settled authority, including this Court's decision in *Pioneer Elecs (USA), Inc. v. Super. Ct.* (2007) 40 Cal.4th 360 ("*Pioneer*"), the court below denied nearly all of the discovery sought.

The Court of Appeal granted Williams's motion only as to *less than one percent* of Marshalls's employees' contact information,[1] holding that Williams could only obtain additional employee contact information by satisfying a series of preliminary hurdles related to the merits of his suit. According to the court below, before he can obtain what other courts have called "basic discovery," Williams must: (i) prove through a deposition that he personally suffered Labor Code violations; (ii) demonstrate "personal knowledge" of Marshalls's wage and hour practices at locations throughout California; and (iii) prove that Marshalls's employment practices are in fact uniform throughout the state. Under the decision below, Williams, who is the state's proxy in enforcing California labor laws under PAGA, must in effect establish his *a priori* knowledge of Marshalls's violations *before* he can properly investigate, through interviews with other employees, his allegations that Marshalls violated the Labor Code on a state-wide basis.[2] The reasoning of this decision, at once circular and contrary to all of the analogous case law, is clearly erroneous and must be reversed.

The court below committed several critical errors. First, it found that Williams's motion to compel interrogatory responses was properly denied because he failed to show "good cause." But the Discovery Act requires a moving party to show "good cause" only to compel production of documents for inspection, not to

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[1] The court below granted contact information for employees at just one store location out of Marshalls' 129 locations statewide.

[2] Petitioner's Appendix ["PA"] 14 [¶42]; PA 15 [¶47].

compel responses to interrogatories. This violates this Court's[3] explicit instruction to lower courts to avoid reading a "good cause" requirement into a discovery provision that does not contain that term. Under the controlling standard, *relevance* is the touchstone for discoverability. The contact information of employees who may be percipient witnesses to Marshalls's violative statewide practices is clearly discoverable because that information is relevant to the allegations set forth in Williams's complaint.

Moreover, even if a good cause requirement were to apply here, Williams's request amply satisfies it. Without access to aggrieved employees' contact information, Williams would be put at an unfair disadvantage as Marshalls would maintain exclusive and unfettered access to its employees in preparing its defense. And because PAGA civil penalties are measured by violations against all aggrieved employees, Williams cannot be deprived of his ability to ascertain the amount of civil penalties the state and aggrieved employees may recover at trial through interviews with aggrieved employees.

Second, the court below erred by applying the wrong test in concluding that employees' privacy interests outweigh the need for disclosure at this time. In so holding, the court below relied on the "compelling need" test from *Lantz v. Superior Court* (1994) 28 Cal.App.4th 1839, rather than the *Hill* test adopted by this Court in *Pioneer* and subsequently applied by numerous other California courts. For relatively nonsensitive information like

[3] See *Coy v. Super. Ct.* (1962) 58 Cal.2d, 210, 220.

contact information of percipient witnesses, this Court in *Hill* rejected any showing of "compelling need" or "compelling interest." Rather, under the *Hill/Pioneer* line of cases, courts have ordered the disclosure of percipient witnesses' and class members' contact information, subject to a privacy notice. The *Hill/Pioneer* holding extends to the contact information of aggrieved employees in a PAGA action.

If anything, PAGA plaintiffs should be entitled to even *greater* discovery rights than class action plaintiffs, particularly considering the importance of the public rights and state interest at the core of the PAGA. Instead, by diminishing Williams's PAGA representative action as a mere "parochial claim" and imposing unique, unprecedented preliminary merits hurdles to obtain "basic discovery," the decision below, if affirmed, would cripple the PAGA mechanism, thereby degrading one of the "primary mechanisms for enforcing the Labor Code." (*Iskanian v. CLS Transp. Los Angeles* (2014) 59 Cal.4th 348, 383.)

The decision below is at odds with the *Pioneer* and *Hill* line of cases governing discovery and the important PAGA policies recently affirmed in *Iskanian* and must be reversed.

STATEMENT OF THE CASE

Marshalls is a retailer of discount clothing, housewares and personal items. (PA 9 [¶16].) Marshalls employs hourly-paid, non-exempt workers at retail stores throughout California averaging 31,000 square feet in size. (PA 9 [¶¶ 17 and 19].) Williams was employed as a non-exempt, hourly-paid employee from approximately 2012 to 2013 at Marshalls's Costa Mesa, California location. (PA 9 [¶18].)

Williams filed this action on March 22, 2013, and filed the operative Second Amended Complaint ("SAC") on November 19, 2013, alleging one cause of action under PAGA. (See generally PA 6-19.) This PAGA claim is for civil penalties for violations of Labor Code sections 226.7 and 512(a)[4] for the failure to provide Williams and other aggrieved employees with meal or rest periods or compensation in lieu thereof; section 226(a) for failure to provide accurate wage statements to Williams and other aggrieved employees; sections 2800 and 2802 for failure to reimburse Williams and other aggrieved employees for all necessary business-related expenses; and section 204 for failure to pay all earned wages owed to Williams and other aggrieved employees during employment. (PA 12 [¶36].)

The SAC alleged statewide Labor Code violations based on systematic, company-wide policies. (See, e.g., PA 14 [¶42] ["Defendants implemented a systematic, company-wide policy to erase and/or withdraw meal period premiums from the time and/or payroll records when Plaintiff and aggrieved employees' records reflected that they did not receive compliant meal periods.]; PA 15 [¶47] ["Defendants did not schedule sufficient employees to handle the volume of customer transactions and . . . there were times that Plaintiff and aggrieved employees had to continue working without a rest period," yet "Defendants implemented a systematic, company-wide policy to not pay rest period premiums"]; PA 17 [¶54] [Marshalls had "policy and

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[4] Statutory references are to the Labor Code, unless otherwise indicated.

practice" of not reimbursing employees regarding necessary business-related expenses, such as for travel to banks to obtain cash, change or deliver bank deposits].)

During discovery, Williams sought production of the names and contact information of Marshalls' non-exempt California employees who had worked since March 22, 2012 (corresponding to PAGA's one-year statute of limitations) so that he could investigate and obtain evidence to substantiate his claims. (PA 54.) Williams served his Special Interrogatories, Set One, on Marshalls on February 5, 2014. (PA 53-54.) Special Interrogatory No. 1 asked for the following information:

> Set forth the first, middle and last name, employee identification number, each position held, the dates each position was held, the dates of employment, last known address, and all known telephone numbers of each and every person who is or was employed by Defendant Marshalls of CA, LLC in California as a non-exempt employee at any time since March 22, 2012.

(*Id.*)

Marshalls' response to Special Interrogatory No. 1 consisted solely of objections. (PA 59-60.) As a result, Williams met and conferred with Marshalls and offered to address any privacy concerns with a "*Belaire-West* notice," which is a privacy notice procedure commonly used in class action cases allowing employees the option to opt out of having their contact information produced. (PA 64.) Marshalls rejected this solution and thereafter continued to refuse to produce the requested employee contact information. (PA 67.)

Williams filed a motion to compel Marshalls's response to this interrogatory (see generally PA 27-43), which Marshalls opposed. (See generally PA 94-112.) At the motion hearing on September 9, 2014, the trial court adopted its tentative ruling denying the vast majority of Williams's motion, but granting it in part. Specifically, the trial court held that Marshalls need not produce employee contact information for 128 of its California stores, but did have to produce contact information for its employees at its Costa Mesa store. (PA 229; PA 234.) The trial court ordered this discovery subject to a *Belaire-West* notice process, with the costs to be shared by the parties equally. (PA 229.) It also held that Williams could renew his motion to seek any additional employees' names and contact information, but only after he was deposed "for at least six productive hours," and that Marshalls could refer to this deposition testimony in its opposition if Marshalls believed the deposition "shows the claims presented herein have no factual merit" or whether the challenged corporate policy was uniformly applied throughout the state. (PA 230.)

The trial court requested that the Court of Appeal review the matter and address the scope of discovery in a PAGA action, finding it is the "legitimate subject of an early writ." (PA 257:10.) The trial court certified the question under California Code of Civil Procedure Section 166.1 as presenting a controlling question of law concerning which there are substantial grounds for difference of opinion. (PA 257.)

Williams filed a petition for writ of mandate on

November 10, 2014. The Court of Appeal held oral argument on April 22, 2015, and published its opinion on May 15, 2015, denying the petition for writ of mandate. First, the Court of Appeal ruled that discovery of Marshalls's employee contact information statewide was premature, as Williams had failed to establish "good cause" under Code Civ. Proc., § 2031.310, subd. (b)(1). (*Williams v. Super. Ct. (Marshalls of CA, LLC)* (2015) 236 Cal.App.4th 1151, 1157.) The court held that Williams failed to "evince knowledge of the practices of Marshalls at other stores" or demonstrate that Marshalls has a uniform statewide policy, and thus failed to establish good cause for the contact information for Marshalls's California employees. The court below also found that "[n]othing in the PAGA suggests a private petitioner standing in as a proxy for the DLSE is entitled to the same access," as the DLSE, and thus rejected the argument that PAGA's purpose authorized the discovery sought. (*Id.* at p.1157.)

Second, the court held that Williams had failed to demonstrate a "compelling need [that is] so strong as to outweigh the [employees'] privacy right" under the California Constitution, applying the test articulated in *Lantz v. Superior Court* (1994) 28 Cal.App.4th 1839. (*Id.* at pp.1158-1159.) Despite the fact that the Court of Appeal stated "discovery in a civil action brought under the PAGA be subject to the same rules as discovery in civil actions generally," the court did not cite, much less analyze, any of the controlling cases from this Court or the Court of Appeal regarding the production of non-party employee names and contact information in the context of a wage and hour suit. (*Id.*

at p.1158.) Applying the "compelling need" test, the Court of Appeal held that Williams's "need for the discovery at this time is practically nonexistent." (*Id* at p.1159.) The Court of Appeal concluded by finding that Marshalls's employees' privacy interest will outweigh Plaintiff's interest in disclosure of the employees' names and contact information until Williams (1) sits for a deposition, (2) establishes that he was subjected to Labor Code violations and (3) establishes that Marshalls's employment practices are uniform throughout the company. (*Id.* at p.1159.)

Based on its conclusions regarding lack of "good cause" and the privacy interests at stake, the court below denied the writ petition.

Williams timely filed a petition for review in this Court on June 25, 2015. This Court granted the petition on August 19, 2015.

ARGUMENT

I. THE COURT OF APPEAL COMMITTED REVERSIBLE ERROR BY DENYING WILLIAMS ACCESS TO DISCOVERY RELEVANT TO HIS PAGA CLAIMS

At issue on appeal is whether Williams, in prosecuting this PAGA suit, is entitled to obtain the names and contact information of Marshalls's non-exempt California employees who had worked since March 22, 2012. (PA 54.) In the proceedings below, the Court of Appeal erred by affirming the trial court's order denying Williams access to this basic, eminently discoverable information. In so holding, the Court of Appeal flouted the Civil Discovery Act's "relevance standard" while erroneously requiring that Williams show "good cause"—a

requirement inapplicable to Williams' motion compelling answers to interrogatories. Moreover, by requiring that a PAGA plaintiff establish his knowledge of his allegations before he can gain access to witness contact information—that is, that he have to prove up his claims before he can obtain evidence to investigate his claims—the court below made it difficult, if not impossible, to effectively prosecute his action to enforce the Labor Code.

A. In Resolving Discovery Disputes, Courts Must Heed The Liberal Policy Favoring Discovery

The Civil Discovery Act (the "Act"), enacted in 1957 and amended numerous times since, liberalized pre-trial discovery procedure to "take the 'game' element out of trial preparation" and "do away 'with the sporting theory of litigation—namely surprise at trial.'" (*Greyhound Corp. v. Super. Ct.* (1961) 56 Cal.2d 355, 376 [citations omitted].) By freely allowing facts to be disclosed in the pretrial phase, the Act aims to "educate the parties concerning their claims and defenses so as to encourage settlements and to expedite and facilitate trial." (*Emerson Electric Co. v. Super. Ct.* (1997) 16 Cal.4th 1101, 1107.) The expansive scope of discovery under the Act allows both sides to be able "to investigate the case fully." (*Atari, Inc. v. Super. Ct.* (1985) 166 Cal.App.3d 867, 871.)

Under the Act, "relevance" is the sole standard for discoverable information. As provided by Code of Civil Procedure section 2017.010, "any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action . . . if the matter either is itself admissible in evidence or appears reasonably calculated to lead to

the discovery of admissible evidence." Thus, the scope of discovery extends not only to admissible evidence, but also to any information *that might lead to* evidence admissible at trial. (*Davies v. Super. Ct.* (1984) 36 Cal.3d 291, 301.)

The Act specifically makes discoverable the identity and contact information of persons with knowledge of discoverable matters. (Code Civ. Proc., § 2017.010 ["Discovery may be obtained of the identity and location of persons having knowledge of any discoverable matter."].) Section 2017.010 "provides a broad right to discover any relevant information that is not privileged, including the identity and location of witnesses." (*Crab Addison, Inc. v. Super. Ct.* (2008) 169 Cal.App.4th 958, 965-966.)

In light of this strong policy favoring discovery, the scope of discovery must be construed liberally, and any doubt is generally resolved in favor of permitting discovery—"especially when the precise issues of the litigation have not yet been clearly established." (*Colonial Life & Accident Ins. Co. v. Super. Ct.* (1982) 31 Cal.3d 785, 790, fn.8 [finding that "[c]ourts may appropriately give the applicant [for discovery] substantial leeway" in that instance (citation omitted)].) In *Greyhound,* this Court had specifically singled out an intermediate court that sustained objections to interrogatories, including, *inter alia,* to interrogatories seeking contact information that "were clearly discoverable by deposition." (*Greyhound*, 56 Cal.2d at pp.381-82 [citing *Rust v. Roberts* (1959) 171 Cal.App.2d 772].) *Greyhound* emphasized that the courts below cannot "stultify the purposes of

discovery" by suppressing discovery and failing to consider other ways in which the discovery may be obtained. (*Id.* at p.381.)

Ultimately, *Greyhound* instructed lower courts, in the proper exercise of discretion, to give effect, rather than thwart, the policy favoring discovery, and "liberally construe[] [facts] in favor of discovery, rather than in the most limited and restrictive manner possible." (*Id.* at p.383.) "Any record which indicates a failure to give adequate consideration to these concepts is subject to the attack of abuse of discretion." (*Id.* at p.384.)

B. The Court of Appeal Committed Reversible Error By Denying Williams Access To Contact Information Of Percipient Witnesses And Other Aggrieved Employees In The First Instance

1. The Court of Appeal Failed To Apply Controlling Law Authorizing Discovery of Contact Information of Percipient Witnesses And Potential Participants to Aggregate Litigation

The Court of Appeal committed reversible error by denying Williams's request for contact information of potential percipient witnesses and aggrieved employees without mentioning, much less applying, any of the cases addressing discovery of contact information, including the controlling case that extends that broad right to plaintiffs pursuing aggregate litigation, *Pioneer*. Instead, the Court of Appeal baldly asserted that Williams, through his basic interrogatory request, sought to "wage litigation rather than facilitate it." (*Williams*, 236 Cal.App.4th at p.1157.)

(a) *Pioneer* and Its Progeny Hold That Contact Information of Percipient Witnesses and Potential Class Members is Discoverable

In denying Williams access to over 99% of the requested contact employee information, the courts below flout *Pioneer*, which declared that "[c]ontact information regarding the identity of potential class members is generally discoverable, so that the lead plaintiff may learn the names of other persons who might assist in prosecuting the case."[5] (*Pioneer*, 40 Cal.4th at p.373 [citing cases].) Finding that "many of Pioneer's complaining customers would be *percipient witnesses* to relevant defects in the DVD players," this Court held that the contact information for all complaining customers who purchased the same allegedly defective DVD player was discoverable so long as an opt-out was provided. (*Id.* at pp.364, 374 [emphasis in original].)

Evaluating the competing interests in determining whether to allow discovery, the *Pioneer* Court made several observations. The Court pointed out that by "contact[ing] those customers and learn[ing] of their experiences," the plaintiff could improve their chances of succeeding in litigation "thus perhaps ultimately benefiting some, if not all, those customers." (*Pioneer*, 40 Cal.4th at p.374.) The *Pioneer* Court also noted that denying discovery of contact information would place plaintiffs at an unfair disadvantage, as "Pioneer would possess a significant advantage if it could retain for its own exclusive use and benefit the contact

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[5] *Pioneer* and its progeny will be discussed in greater detail below, in connection with the balance between privacy and discovery. (See *infra*, Section II.)

information of those customers who complained regarding its product." (*Ibid.*) Weighing the interests of promoting discovery and encouraging fair litigation against the right to privacy, *Pioneer* concluded that the interests weigh in favor of allowing discovery. (*Ibid.*)

Courts have applied *Pioneer*'s reasoning to various types of wage and hour actions, each time reaffirming the plaintiff's right to discovery of current and former employees' contact information. In one case, a group of individual employees alleged that that their former employer committed wage and hour violations and by interrogatory sought to discover the names and contact information of non-party employee witnesses. (*Puerto v. Super. Ct.* (2008) 158 Cal.App.4th 1242, 1245-46.) The plaintiffs filed a motion to compel further responses after the defendant provided only employee names but no contact information. (*Id.* at p.1247.) *Puerto* found such routine contact information was discoverable, as the plaintiffs would "need to talk to the witnesses." (*Id.* at p.1254.) The court noted that "it is only under unusual circumstances that the courts restrict discovery of nonparty witnesses' residential contact information." (*Id.*)

Likewise, in a wage and hour class action involving restaurant workers, the court held that the requested names and contact information of *all* employees in California were discoverable. (*Crab Addison,* 169 Cal.App.4th at p.966 ["The disclosure of the names and addresses of potential witnesses is a routine and essential part of pretrial discovery." [citations omitted].) And in *Belaire-West Landscape Inc. v. Super. Ct.*

(2007) 149 Cal.App.4th 554, another wage-and-hour class action, the court allowed production of the names and contact information for *all* current and former employees subject to an opt-out privacy notice. (*Id.* at p.565.) The court found that "current and former employees are potential percipient witnesses to [the defendant employer's] employment and wage practices, and as such their identities and locations are properly discoverable." (*Id.* at p.562.)

Finally, relying on *Pioneer* and *Puerto*, the court in *Lee v. Dynamex, Inc.* (2008) 166 Cal.App.4th 1325 reversed an order denying class certification based, in part, on the trial court's abusing its discretion in denying the plaintiff access to witness contact information. (*Id.* at p.1338.) *Lee* underscored that disclosure of class member contact information is critical to the plaintiff's ability to "develop evidence capable of supporting class certification motion." (*Ibid.*)

The *Pioneer* line of cases firmly hold that non-party employees' contact information—including those who are putative absent class members—is well within the proper scope of discovery *pre-certification* and is thus discoverable irrespective of whether a class was ever certified or whether a fiduciary relationship was ever formed.

(b) *Pioneer*'s Holding Extends To PAGA Enforcement Actions With At Least As Much Force As Other Aggregate Litigation

The fact that a PAGA action is brought solely in the public interest would militate in favor of a PAGA plaintiff having *greater* discovery rights than that of a plaintiff in a class action

seeking only money damages. As this Court declared, the PAGA action is one of the "primary mechanisms for enforcing the Labor Code." (*Iskanian v. CLS Transp. Los Angeles* (2014) 59 Cal.4th 348, 383.) PAGA was enacted to "augment to the limited enforcement of the [Labor Workforce Development] Agency by empowering employees to enforce the Labor Code as representatives of the Agency." (*Id.*) An action under PAGA to recover civil penalties "is essentially a law enforcement action designed to protect the public and not benefit private parties." (*Id.* at p.381 [citation omitted].) Fundamentally, "a PAGA action is a statutory action in which the penalties available are measured by the number of Labor Code violations committed by the employer." (*Sakkab v. Luxottica Retail N. Am., Inc.* (9th Cir. 2015) 803 F.3d 425, 2015 U.S.App.Lexis 17071, *24.) "As the state's proxy, an employee-plaintiff may obtain civil penalties for violations committed against absent employees [citation], just as the state could if it brought an enforcement action directly." (*Ibid.*) Under the PAGA penalties scheme, 75% of the civil penalties recovered goes to the state while the remaining amount is given to the aggrieved employees. (Lab. Code § 2699, subd. (i).)

The PAGA litigant's right to pursue civil penalties on behalf of others is unwaivable based on public policy. (*Iskanian*, 59 Cal.4th at p.384.) Because PAGA is aimed at "deter[ring] and punish[ing] employer practices that violate the rights of numerous employees under the Labor Code," it would not "serve the purpose of the PAGA" to foreclose the right to bring representative PAGA claims. (*Id.* [quoting *Brown v. Ralphs*

Grocery Co. (2011) 197 Cal.App.4th 489, 502].) As a Ninth Circuit panel recently observed, any attempt to limit "representative PAGA claims—that is, claims for penalties arising out of violations against other employees—[would] effectively...limit the penalties of an employee-plaintiff may recover on behalf of the state." (*Sakkab*, 2015 U.S.App.Lexis 17071, at p.*24.)

In light of the above, the principles of *Pioneer* must apply to a PAGA action with at least as much force as they do to a class action. First, "permitting access to relevant information necessary to pursue the litigation" is partly driven by the "the fundamental public policy underlying California's employment laws." (*Puerto*, 158 Cal.App.4th at p.1256; see also *Crab Addison*, 169 Cal.App.4th at p.974 [finding that the policy favoring enforcement of unwaivable right to wages and overtime supports disclosing contact information of class members].) Here, the policy preserving employees' right to pursue a representative PAGA action to enforce labor laws on behalf of the state is, if anything, even greater—as such actions "directly enforce *the state*'s interest in penalizing and deterring employers who violate California's labor laws." (*Iskanian*, 59 Cal.4th at p.387 [emphasis in original].) The state's proxy in a PAGA enforcement action cannot have dramatically reduced discovery rights compared to that conferred on a private plaintiff alleging Labor Code violations.

Second, courts have made class member contact information discoverable partly because those very class

members may benefit from a successful litigation. For instance, *Pioneer* observed that contacting witnesses is more likely to lead to a successful class action, which would benefit those witnesses who are also class members. (*Pioneer*, 40 Cal.4th at p.374.) Indeed, disallowing the disclosure of class member contact information is reversible error when it thwarts a plaintiff from developing evidence supporting class certification. (*Lee v. Dynamex*, 166 Cal.App.4th at p.1338.)

Under the same reasoning, aggrieved employees' contact information should be disclosed because they stand to benefit if the PAGA action is successfully prosecuted. Aggrieved employees not only would share in 25% of civil penalties recovered, their participation would also further PAGA's objective of achieving maximum deterrence of employer misconduct through civil penalties imposed for violations against *all* aggrieved employees. (*Brown*, 197 Cal.App.4th at p.502.) Without the involvement of non-party aggrieved employees, which usually comes after the plaintiff has been able to contact them using contact information obtained from the defendant, the PAGA enforcement action would lose its effectiveness, depriving aggrieved employees of the benefits of a successful PAGA suit.

Third, just as wage and hour class actions benefit workers by informing class members of their employment rights while shielding individual employees from retaliation through the collective action (see *Gentry v. Super. Ct.* (2007) 42 Cal.4th 443, 460-461), so too would Williams's (and his counsel's) communications with fellow aggrieved employees in the course of

his PAGA investigation advance California's policy protecting workers' rights.

Fourth, it would make little sense for a class representative in a putative class action to have broader discovery rights than a PAGA litigant. Plaintiffs in putative class actions have broad discovery rights that stem, in part, from the policy promoting class actions to enforce labor laws. (See *Crab Addison*, 169 Cal.App.4th at p.974 [public policy "favor[s]...enforcing [labor] rights through class action litigation"].)

However, as *Iskanian* underscored, "a PAGA litigant's substantive role in enforcing our labor laws" exists to further public interests, and is thereby preserved even under circumstances in which the right of a private party to seek recovery through a class action is extinguished (such as through a class action waiver in an arbitration agreement in that case). (See *Iskanian*, 59 Cal.4th at pp.387-388.) Thus, in light of "PAGA's central role in enforcing California's labor laws" (*Sakkab*, 2015 U.S.App.Lexis 17071, at p.*34), a PAGA plaintiff cannot face more restrictions in discovery vis-à-vis a class plaintiff.

Finally, if the Legislature had wished to limit discovery for PAGA plaintiffs or engraft new hurdles to obtaining basic discovery beyond the applicable relevancy standard of the Act, the Legislature would have done so. Because the Legislature has enacted no such limitations, PAGA litigants cannot be handcuffed by a rule that denies them discovery tools necessary to effectively prosecute their enforcement actions.

In short, the Court of Appeal, betraying a fundamental misunderstanding of the importance of the PAGA representative action in enforcing labor laws, diminished Williams's action as representing the mere "parochial claim" of "one local individual." (*Willliams,* at pp.1157, 1159.) Failing to consider this Court's precedents and other relevant cases, the Court of Appeal reached a decision at odds with *Iskanian, Pioneer*, and their progeny.

2. The Court of Appeal Erred By Imposing An Inapplicable Good Cause Standard To Interrogatories

(a) "Good Cause" Does Not Apply To A Motion Compelling Responses to Interrogatories

The Court of Appeal also wrongly imposed on Williams the burden of "set[ting] forth specific facts showing good cause justifying the discovery. . ." (*Williams*, at pp.1151, 1156.) Section 2030.300 of the Code of Civil Procedure, which governs motions to compel further responses to interrogatories, does *not* impose a good cause requirement on the moving party. Instead, the Court of Appeal wrongly relied on Section 2031.310 subdivision (b)(1), which imposes a good cause requirement *only* with respect to motions to compel further responses to demands for production of documents, *not* interrogatories. (See *id.* at p.1156 [citing Code Civ. Proc. § 2031.310].)

By misapplying the "good cause" requirement here, the Court of Appeal committed reversible error. In construing a statute, a court must "first look to the words of the statute. [Citations] If the statutory language is clear and unambiguous our inquiry ends." (*Imperial Merchant Svcs., Inc. v. Hunt* (2009)

47 Cal.4th 381, 387.) The court may also construe the statutory language "in light of related statutes." (*Kirby v. Immoos Fire Protec.* (2012) 53 Cal.4th 1244, 1254.) Here, because the applicable statute, Section 2030.300, does not contain a "good cause" requirement while a related statute *does* contain such a requirement, "good cause" cannot be read into that section. (Civ. Code § 3530 ["That which does not appear to exist is to be regarded as it if it did not exist."].)

This Court has cautioned against engrafting a good cause requirement onto provisions of the Discovery Act where there is none:

> The statute does not require any showing of good cause for serving and filing interrogatories. Thus, the burden of showing good cause, which the authorities mention in regard to motions for inspections and some other discovery procedures, does not exist in the case of interrogatories. It would be anomalous to hold that the mere interposing of an objection creates a burden where none existed before.

(*Coy v. Super. Ct.* (1962) 58 Cal.2d 210, 220 ; see also *Kramer v. Super. Ct.* (1965) 237 Cal.App.2d 753, 758 [holding that no "good cause" showing is required to compel answers to a deposition because the at-issue statute did not contain such language].) Thus, in compelling responses to interrogatories, a moving party does *not* bear the burden of showing good cause. The mere interposing of an objection cannot create a burden where none existed before. (*Coy*, 58 Cal.2d at pp.220-21.) Rather, the Act "allows interrogatories as a matter of right unless the opponent

can state a valid objection thereto." (*West Pico Furniture Co. v. Super. Ct.* (1961) 56 Cal.2d 407, 414 fn.2 [citing *Greyhound*, 56 Cal.2d at p.388].)

No prior opinion of this Court or any published intermediate court authority has engrafted a heightened "good cause" requirement onto the general relevance standard invoked by courts to authorize discovery of basic non-party employee contact information. (See *Pioneer*, 40 Cal.4th at p.374 [citing Section 2017.010 and finding that "[o]ur discovery statute recognizes that 'the identity and location of persons having [discoverable] knowledge' are proper subjects of civil discovery"]; *Crab Addison*, 169 Cal.App.4th at pp.965-966 ["[S]ection 2017.010[]... provides a broad right to discover any relevant information that is not privileged, including the identity and location of witnesses"].)

Omitting any discussion of *Pioneer*, *Crab Addison*, *Puerto*, *Belaire-West*, or any other similar case law, the Court of Appeal instead cited only *Calcor Space Facility, Inc. v. Super. Ct.* (1997) 53 Cal.App.4th 216, which dealt with a demand for inspection of documents and is not relevant to an interrogatory response.[6] (*Williams*, at p.1156.)

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[6] *Calcor* is readily distinguishable because it addressed a demand for inspection of documents not applicable here. (See *Calcor*, 236 Cal.App.4th at p.218 ["We hold a subpoena under Code of Civil Procedure section 2020, subdivision (d) . . . must describe the documents to be produced with reasonable particularity."].) The Court of Appeal's exclusive reliance on *Calcor*, a commercial litigation case, to the exclusion of the *Puerto* line of cases that expressly addressed discovery of employee contact information, is ill-considered.

Furthermore, even in those instances where a party is required to show good cause for the discovery sought, an appellate court that denies the discovery because the party "fail[ed] to show *a specific need for the requested information*" has gone "beyond the statutory intent of 'good cause,'" and has likely "place[d] the burden on the wrong party." (*Greyhound*, 56 Cal.2d at p. 378 & fn.6 [expressly disapproving such appellate rulings].) Yet that is precisely what the Court of Appeal concluded by stating that Williams's "need for the discovery at this time is practically nonexistent." (*Williams*, at pp.1151, 1159.) Not only was this conclusion based on the imposition of a "good cause" standard that does not apply and should not have been applied in this case, but the good cause standard imposed was nearly word-for-word that which this Court categorically *rejected* more than fifty years ago in *Greyhound.*

(b) Even If "Good Cause" Were Applicable, Williams Has Met That Standard

Even if a good cause requirement were to apply, Williams amply demonstrated "good cause" under prior California precedent. One basis for "good cause" is the unfairness of allowing the employer exclusive access to potential percipient witnesses. (*Puerto*, 158 Cal.App.4th at p.1256 ["The trial court imposed no order preventing [the defendant] from using the addresses and telephone numbers of these individuals in preparing its case, creating an inequitable situation in which one party has access to all, or nearly all potential witnesses..."].) With exclusive and unfettered access to its own employees, at all

locations, Marshalls likely will interview employees from these locations in its *own* investigation of Williams's allegations. However, this inverts the normal presumptions attaching in wage and hour litigation, where the employer generally is required to produce important information to the plaintiff out of a recognition that many types of data are solely in the employer's possession.[7] Here, however, the Court of Appeal's decision forces PAGA plaintiffs to litigate without any way of knowing the extent of the employer's Labor Code violations, while presumably the employer is fully aware of these facts, thus creating an unfair litigation advantage for the employer.

A second basis for "good cause" is that the information sought is necessary for trial preparation. (See *Glenfeld Develop Corp. v. Super. Ct.* (1997) 53 Cal.App.4th 1113, 1117.) Here, the names and contact information of *all* non-exempt, hourly employees in California are essential to determining how many "aggrieved employees" there are for calculating potential civil penalties. (See *Sakkab*, 2015 U.S.App.Lexis 17071, at p.*30 ["The amount of penalties an employee may recover is measured by the number of violations an employer has committed, and the violations may involve multiple employees."].) Obtaining discovery to determine damages is a necessary part of trial preparation. (See, e.g., *Hecht, Solberg, Robinson, Goldberg & Bagley LLP v. Super. Ct.* (2006) 137 Cal.App.4th 579, 589, 598

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[7] (Cf. *Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680, 687-88 [instructing courts to draw negative inference if the employer, who has a duty to keep wage and time records, fails to furnish them].)

[holding that liability insurance of defendant is discoverable partly because it provides a "measure of damages" were plaintiff to prevail at trial].) Thus, this contact information, integral to Williams's being able to calculate the potential amount in civil penalties, should be disclosed.

A third basis for "good cause" relates to the collateral estoppel effect the PAGA action will have on the non-party aggrieved employees who are represented by a PAGA plaintiff. (See *Iskanian*, 59 Cal.4th at p.381 [holding that "a judgment in [a PAGA] action binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government."].) The fact that any judgment obtained by Williams will bind the non-party aggrieved employees provides "good cause" for allowing a PAGA plaintiff access to these employees in case they want to assist in the suit.

In short, the Court of Appeal erred in imposing a "good cause" requirement, but even if one applied, Williams has met that standard.

3. The Court of Appeal Committed Reversible Error By Denying Discoverable Information Relevant To The Allegations In Williams's PAGA Action

Under controlling authority, Williams need not establish "good cause" to obtain witness contact information—he must simply establish that this information is relevant to his claims. Williams has easily met this standard, and none of the reasons provided by Court of Appeal for denying statewide discovery is valid.

First, the Court of Appeal misconstrued the allegations in

Williams's PAGA complaint, deeming that the factual allegations were "insufficient" to support the disclosure of percipient witness contact information. (*Williams*, at p.1157.) But these supposed pleading deficiencies are either rooted in an overly narrow and restrictive reading of the allegations in the complaint, or they were a pure invention of the Court of Appeal. In either case, Williams's allegations cannot justify denying the requested discovery.

The Court of Appeal first found that Williams had alleged in his complaint only that "he and perhaps other employees" at the Costa Mesa Marshalls location (where he had worked) "were subjected to violations of the Labor Code." (*Williams*, at p.1157.) This is simply incorrect. In fact, Williams made numerous statewide allegations including that Marshalls employs non-exempt hourly paid employees "in various locations throughout California" (PA 9 [¶19]) and that it "implemented systematic, company-wide polic[ies]" (which Williams factually described) that violated certain provisions of the California Labor Code.[8] According to Williams's complaint, one or more these violations were committed against him and Marshalls's current or former employees, rendering them all "aggrieved employees":[9]

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[8] See, e.g., PA 14 [¶42], 15 [¶47], 17 [¶54].

[9] PAGA defines an "aggrieved employee" as "any person who was employed by the alleged violator and against whom one or more of the alleged violations occurred." (Lab. Code §2699(c).) Plaintiff made such allegations. (See PA 11 [¶29] ["Plaintiff and other employees are 'aggrieved employees' as defined by the California Labor Code section 2699(c) in that they are all current or former employees of Defendants and one or more of the alleged

- "Defendants implemented a systematic, company-wide policy to erase and/or withdraw meal period premiums from the time and/or payroll records when Plaintiff and aggrieved employees' records reflected that they did not receive compliant meal periods..." (PA 13-14 [¶42]);
- "Defendants did not schedule sufficient employees to handle the volume of customer transactions and . . . there were times that Plaintiff and aggrieved employees had to continue working without a rest period," yet "Defendants implemented a systematic, company-wide policy to not pay rest period premiums..." (PA 15 [¶47]);
- "Defendants had, and continue to have, a policy of not reimbursing employees, including Plaintiff and aggrieved employees, for said business-related expenses and costs..." (PA 17 [¶54]);

The Court of Appeal's conclusion that Williams did not allege statewide violations is flatly belied by the record, and its construction of Williams's factual allegations in a light that disfavors discovery flouts well-settled policy governing discovery. (See *Colonial Life & Accident Ins.*, 31 Cal.3d at p.790, fn.8.)

The Court of Appeal also concluded that because Williams's operative complaint did not allege that he had "*any knowledge* of the practices of Marshalls at other stores, nor any fact that would lead a reasonable person to believe *he knows* whether Marshalls

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violations were committed against them"].)

has a uniform statewide policy," Williams's right to discovery could be restricted to information concerning the Costa Mesa store where he worked only. (*Williams*, at pp.1151, 1157.) But a complaint only needs to contain "a statement of the facts constituting the cause of action, in ordinary and concise language." (Code Civ.Proc. § 425.10 subd. (a).) Thus, alleging the ultimate facts of a cause of action, not the evidentiary facts, is all that is required. There is no legal basis supporting the court's conclusion that Williams's "knowledge" of Marshalls's statewide policies is an element of a PAGA cause of action or any of the underlying Labor Code violations alleged.

Again, under California law, a matter is discoverable if it "is *relevant to the subject matter involved in the pending action or to the determination of any motion made in that* action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to admissible evidence." (Code Civ.Proc. § 2017.010 [emphasis added].) It is well-settled that allegations in a complaint—even if legally insufficient to state a claim—will suffice to suggest "the subject matter involved in the pending action," although the subject matter of the action "is not restricted to the issues formally raised in the pleadings.

Relevancy to the subject matter is determined by the *potential* as well as actual issues in the case." (*Union Mut. Life Ins.. v. Super. Ct.* (1978) 80 Cal.App.3d 1, 10 [citing *Pacific Tel. & Tel. v. Super. Ct.* (1970) 2 Cal.3d 161, 174].) In *Union Mutual*, the plaintiff sought information by interrogatory concerning potential class members who were not California residents even

though he had not yet alleged a national class action. (*Id.* at p.11.) The defendant, like Marshalls in this case, claimed that the plaintiff could not maintain a valid national class action in state court and therefore information concerning the potential class members was irrelevant to the subject matter of the action. (*Id.*) The court rejected the notion that the validity of a national class action was a threshold issue precluding discovery until the issue was resolved. (*Id.*) The court firmly held that the plaintiff "should not be denied the opportunity to obtain further information simply because of the uncertainty as to whether or not such information will enable him to bring a national class action." (*Id.* at pp.11-12.) "Discovery should only be denied on the grounds of 'irrelevancy' only where there is *no reasonable possibility* that the answers sought . . . will lead to the discovery of admissible evidence or be helpful in preparation for trial." (*Id.* at p.11 [citation omitted].)

In the context of aggregate litigation, California appellate authority clearly establishes the plaintiff's right to discover the names and contact information of these potential percipient witnesses without the limitation imposed on Williams (and future PAGA plaintiffs) by the Court of Appeal. Yet under the skewed logic of the Court of Appeal, Williams represents these aggrieved employees throughout California but cannot contact them outside of the store location for which he worked. Rather, Williams must prove the *validity* of his claims first. The decision below also allows Marshalls to retain exclusive access to the contact information of the percipient witnesses from all stores, giving

Marshalls the opportunity to interview these employees in its *own* investigation of Williams's allegations, while Williams is precluded from doing so. Such a result runs afoul of the fundamental discovery principle that "both sides should be permitted to investigate the case fully." (*Atari*, 166 Cal.App.3d at p.871.) Absent the ability to interview employees from all locations, including employees outside the locations where Williams worked, and potentially obtain declarations from those willing to submit testimony, his ability to support his action is severely compromised.

C. The Court Of Appeal Committed Reversible Error By Requiring Williams To Make a Preliminary Merits Showing Before He Can Obtain Contact Information

The Court of Appeal committed reversible error by endorsing the trial court's order requiring Williams—before he can obtain "basic" discovery such as percipient witness contact information in order to conduct proper investigation—to sit for a deposition to establish his *own* knowledge of Marshalls's violative policies. (*Williams*, at p.1157.) The trial court also expressly allowed Marshalls to oppose any discovery request by showing that Williams's substantive claims have no merit. (*Id.*) At the deposition, moreover, Williams must establish several elements of his case before he can obtain contact information. Only after Williams satisfies each and every element may the trial court entertain the possibility of allowing the discovery of contact information.

The decision below is improper. At the outset, the requirement that a plaintiff sit for deposition *first* before he can

obtain basic contact information cannot be reconciled with the other decisions holding that "our discovery system is founded on the understanding that parties use discovery to obtain names and contact information for possible witnesses as the starting point for further investigations." (*Puerto*, 158 Cal.App.4th at p.1250 [emphasis added]; *Union Mutual*, 80 Cal.App.3d at pp.11-12 [holding that initial discovery should only be denied if there is no "reasonable possibility" of that discovery leading to admissible evidence].) In fact, the court in *Puerto* rejected an argument raised by the defendant that such information could not be disclosed unless the petitioners demonstrated a compelling need and the information could not be obtained through depositions first. (*Puerto*, 158 Cal.App.4th at p.1251.) No depositions were required prior to allowing the discovery requested in *Puerto*.

The specific elements that the Court of Appeal required Williams to satisfy before he can apply to obtain further discovery are also improper. First, the Court of Appeal required Williams to "evince knowledge of the practices of Marshalls at other stores" in his deposition testimony before he can obtain statewide discovery. (*Williams*, at p.237.) But in his operative complaint, Williams has already made good faith allegations regarding Marshalls's policies and practices throughout its California locations. (See PA 14 [¶42], 15 [¶47], 17 [¶54].) Assuming the Court of Appeal is requiring a PAGA plaintiff to allege specific evidentiary facts at the outset of the case, this inverts the normal civil litigation process, forcing a PAGA plaintiff to already possess facts about the employer's policies and practices before

being given the tools to begin his investigation.

Under the Court of Appeal's flawed approach, a plaintiff must *prove* that he has *knowledge* of practices at other stores *prior to* obtaining the contact information necessary to preliminarily investigate and collect proof regarding the practices at other stores. But courts have repeatedly rejected such an impractical, and circular, approach to discovery. (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."].)

Second, the Court of Appeal requires Williams to "establish that he was himself subjected to violations of the Labor Code." (*Williams*, at p.1157.) As set forth above, requiring a plaintiff to prove up his own case for liability and damages before his can obtain discovery is utterly unreasonable. To the extent that the court below wants Williams to further demonstrate standing as a PAGA plaintiff, it is still unreasonable.

There are only three standing requirements for bringing representative PAGA claims: (1) the PAGA plaintiff was "employed by the alleged violator;" (2) the PAGA plaintiff complied with section 2699.3(a)'s notice and administrative exhaustion requirements and pled his or her compliance therewith; and (3) "one or more of the alleged violations was committed" against the PAGA plaintiff.[10] Aside from the

[10] The PAGA statute sets out the requirements for standing

administrative exhaustion requirement, pleading sufficient facts alone will suffice to establish PAGA standing. (See *Rope v. Auto-Chlor Sys. of Wash.* (2013) 220 Cal.App.4th 635, 650 [finding a plaintiff must plead facts supporting underlying Labor Code violations].)

Here, Williams has already satisfied all three requirements by having alleged that Marshalls was his employer (PA 9 [¶18]), having alleged that he filed and served a notice letter to the LWDA and the employer (PA 11-12 [¶¶31-32]), and having alleged that he has suffered one or more violations committed by Marshalls. (PA 11 [¶29].) The Court of Appeal cites to no authority suggesting that a PAGA plaintiff must meet some heightened, non-pleading standard in order to become a proxy of the state, such as by *proving his case*. Indeed, there is no case of which Williams is aware where a plaintiff must meet a fictitious

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to bring PAGA claims. The statute provides that a PAGA-plaintiff must be an "aggrieved employee." (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." (Lab. Code §2699, subd. (c).) The statute also requires that the PAGA-plaintiff send written notice by certified mail to the Agency and the employer of his or her intent to bring an action under PAGA, stating the specific provisions of the [Labor] code s/he allege the employer violated, including facts and theories in support (the "PAGA Notice"). (Lab. Code §2699.3, subd. (a)(1).) If the LWDA either declines to investigate or fails to respond to the PAGA Notice within 33 days, the aggrieved employee may allege PAGA claims. (Lab. Code §2699.3(A)(2)(a).) In addition, the PAGA-plaintiff must "plead compliance with the pre-filing notice and exhaustion requirements in section 2699.3, subdivision (a)." (*Caliber Bodyworks, Inc. v. Super. Ct.* (2005) 134 Cal.App.4th 365, 385.)

heightened standing requirement in order to obtain basic discovery.

Third, the Court of Appeal required Williams to "establish [that] Marshalls's employment practices are *uniform* throughout the company." (*Williams*, at p.1157.) To require a plaintiff to do so *prior to* obtaining statewide discovery is absurd. Whether Marshalls's policies are implemented across all stores is properly the subject of discovery, and a worker cannot be expected to have *a priori* knowledge of the extent of the defendant's practices. (See *Puerto*, 158 Cal.App.4th at p.1256 [placing evidentiary burden on employer who has access to all information].) To hold otherwise runs afoul of the longstanding principle that "the 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." (*West Pico*, 56 Cal.2d at p.419, fn.4.)

Moreover, by requiring that Williams establish "uniform practices" in order to obtain further discovery, the Court of Appeal implicitly imposed a "commonality" requirement inapplicable to PAGA actions. (See *Arias v. Super. Ct.* (2009) 46 Cal.4th 969, 975, 981-82 [holding that a PAGA representative action does not need to meet class action requirements].) The PAGA statute requires no showing that Williams is "typical" of other aggrieved employees or that his grievances are common or the result of uniform policies applied to other aggrieved employees. (Lab. Code, § 2699(c) [defining 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"].) Indeed, a PAGA plaintiff "need not be an aggrieved employee for all alleged PAGA violations in that section 2699(c) uses the phrase 'against whom one or more of the alleged violations was committed.'" (*Jeske v. Maxim Healthcare Servs.* (E.D.Cal. Jan. 10, 2012, No.CVF11-1838 LJO-JLT) 2012 U.S.Dist.Lexis 2963, *37.)

However, under the Court of Appeal's confused ruling, Williams is placed in the worst of all worlds. He must bear discovery burdens far more onerous than those faced by a class action litigant for precertification discovery, including having to clear preliminary merits hurdles to obtain basic discovery to which no other types of litigants are subject. At the same time, Williams must make showings of "commonality" and "typicality" that do not apply to a PAGA representative action. Such a rule makes no sense and must be rejected.

D. The State's Enforcement Rights Would Be Undermined If The Court Of Appeal's Ruling Stands

Finally, denying Williams contact information as to the vast majority of Marshalls's California non-exempt employees prevents Williams from proceeding with his PAGA claims, given that he does not know either the identity or the number of aggrieved employees. This frustrates the very purpose of the PAGA representative action specifically designed to allow "a plaintiff employee to collect penalties not only for himself, but also for other current and former employees." (*Brown*, 197 Cal.App.4th at p.499.) In particular, Williams will have the burden at trial to present *prima facie* evidence that individuals

are "aggrieved employees" who suffered Labor Code violations. The contact information of such employees is necessary in meeting this burden at trial. As it currently stands, Williams does not even have a list of employees from which to determine the general *number* of aggrieved employees let alone the identity of those who would recover these penalties.

The court below's holding also frustrates California's ability to enforce its labor laws. PAGA actions are necessary to ensure adequate labor law enforcement in a time of diminished public budgets. (*Arias*, 46 Cal.4th at p.980 [underscoring the importance to a resource-strapped state of having its labor laws enforced through private attorneys general].) The state's power to enforce labor laws through a proxy would be weakened, if not crippled, were the state's proxy deprived of the requisite investigative tools while seeking to enforce labor laws.

The plaintiff bringing suit under PAGA "does so as the proxy or agent of the state's labor law enforcement agencies." (*Arias*, 46 Cal.4th at p.986.) Thus, a PAGA plaintiff stands in the identical position as these agencies when they enforce the Labor Code. (*Iskanian*, 59 Cal.4th at p.380 ["In a lawsuit brought under the act, the employee plaintiff represents ***the same legal right and interest as state labor law enforcement agencies.*** . . " (emphasis added)].) "[A]n aggrieved employee's action under the [PAGA] functions as a substitute for an action brought by the government itself." (*Id.* at p.381 [citation omitted].)

Although the actual powers between the state and its proxy may not be coextensive in every respect, a plaintiff serving as a

private attorney general in a PAGA enforcement action must be given the minimum litigation tools necessary to enforce the Labor Code. California's labor law enforcement agencies possess plenary authority to investigate and prosecute Labor Code violations. (See Lab. Code § 2699(a).) One agency within the LWDA, the DLSE,[11] is "charged with enforcing Labor Code provisions (§ 1171 *et seq.*) and Industrial Welfare Commission orders governing wage, hour, and working conditions of California employees. (§ 61.)" (*Craib v. Bulmash* (1989) 49 Cal.3d 475, 478.) The DLSE is the main entity for public enforcement of California's wage and hour laws, and is vested with wide authority. (See *Milan v. Restaurant Enterprises Group, Inc.* (1993) 14 Cal.App.4th 477, 486-487.) Among the DLSE's broad enforcement power is filing a civil action against the employer or, in the alternative, conduct an audit and assess civil penalties. (Lab. Code §§ 1193.6, 1194, 1197.1.) Such wide authority is based on the Legislature's mandate that the Labor Commissioner and his or her deputies and agents "shall have free access to all places of labor."[12] (Lab. Code § 90.)

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[11] Pursuant to the Labor Code, the Division of Labor Standards Enforcement ("DLSE"), a subdivision of the Department of Industrial Relations that is headed by the Labor Commissioner (the DLSE's chief), has broad authority to enforce all labor laws in California that are not specifically vested in another state agency. (Lab. Code §§ 95(a), 21, 79, 82(b).) The Department of Labor Relations, in turn, is a division of the LWDA. (See Lab. Code §§ 50, 56.)

[12] The DLSE's Bureau of Field Enforcement (BOFE) investigates employers' places of business, checks postings and employee records, and conducts audits for unpaid wages and

Likewise, the courts have upheld the broad, plenary authority of the state agencies to investigate and prosecute. For instance, in *Craib*, this Court upheld enforcement of a DLSE subpoena requiring the employer to "produce time and wage records, and **names and addresses**, for all persons employed by [a] trust over the previous three-year-period." (*Craib*, 49 Cal.3d at p.479 [emphasis added].) The Court found that "there is no dispute, of course, that the Commissioner is entitled to investigate the type of alleged wage-order violations at issue here (§§ 61, 1193.5), and that such investigations are within the power of the Legislature to command." (*Id.* at p.483.) The Court noted that the subpoena "sought only those records which the Commissioner could minimally expect would be available in light of pertinent record-keeping requirements." (*Id.* at p.483 [citing Lab. Code § 1174].)

To illustrate the practical exercise of DLSE's plenary power to investigate Labor Code violations and obtain employment records from employers, Williams also submitted testimony from Miles Locker, who served in the DLSE for sixteen years and held positions such as Chief Counsel to the Labor Commissioner. (See PA 156-161.) Locker attested to: (1) the DLSE's broad authority to issue subpoenas to compel employers to produce records and to testify in order to carry out the provisions of the Labor Code (PA

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issues citations for civil money penalties when violations are found. (Lab. Code § 90.5.) The DLSE has the authority to issue subpoenas for the production of books, papers and records, take depositions and affidavits, and compel the attendance of witnesses and parties. (Lab. Code §§ 92, 74.)

159-160, ¶9); (2) that 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); (3) DLSE's work in the investigation of the Brinker Restaurant Corporation as an example of a statewide investigation where the DLSE used its subpoena power to obtain Brinker's statewide employee records for its workforce of 30,000 California employees, based only on its belief that the employer had committed Labor Code violations throughout its many California locations. (PA 160-161, ¶12.) To limit the DSLE's investigations of multi-location employers to just one location, Locker opined, would competitively disadvantage smaller employers who operate only at one location. (*Id.*)

At a minimum, that the DLSE would be able to obtain the same information that was denied to Williams further supports a reversal of the decision below. It would make no sense for the Legislature simultaneously to handicap such enforcement by placing the limits on discovery imposed by the court below. However, despite acknowledging the arguments made that, under *Iskanian* and *Arias*, a PAGA plaintiff occupies the precise position and represents the same legal interest as the state's labor law enforcement agencies, and further, that the state enforcement agencies would have free access to the affected employees' names and contact information, the Court of Appeal simply brushed the argument aside. (*Williams*, at pp.1157-58.) Thus, while the Legislature has empowered the PAGA plaintiff to

enforce the Labor Code on the state's behalf, the decision below leaves the state's proxy without the tools effectively to do so.

II. THE COURT OF APPEAL COMMITTED REVERSIBLE ERROR BY HOLDING THAT THE NON-PARTY AGGRIEVED EMPLOYEES' PRIVACY RIGHTS PRECLUDED DISCLOSURE OF THEIR NAMES AND CONTACT INFORMATION

The court below held that, even if discovery of Marshalls's employees' contact information had been "reasonably calculated to lead to admissible evidence," the employees' right to privacy under the California Constitution provided a sufficient basis for affirming the trial court's order denying nearly all the sought discovery. (*Williams*, at p.1158.) The court below mistakenly held that once the constitutional right of privacy is implicated, the party seeking to compel discovery must show a "compelling need" for the discovery that is "so strong as to outweigh the privacy right"—even when the discoverable information is nonsensitive. Compounding this error, the court below held that Williams's need for the disclosure was "practically nonexistent" and outweighed by employees' privacy interests until he has been deposed and satisfied the three elements set forth above.

The court below departed markedly from this Court's jurisprudence, relying on a small group of outlier opinions from other appellate courts without following nor even citing this Court's controlling decisions in *Pioneer* or *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1. Had it applied the proper analysis, the court below would have reversed the trial court and compelled disclosure of Marshalls's employees' names and contact information. Disclosure of such relatively

nonsensitive information has been held not to be a "serious invasion of privacy," especially when balanced against the policies underlying the Labor Code, PAGA and the general public interest in "facilitating the ascertainment of the truth" in legal proceedings, none of which was considered by the court below.

A. Disclosure of Non-Party Employees' Names and Contact Information Has Repeatedly Been Ordered Notwithstanding The Right To Privacy Under The California Constitution

Our state constitution establishes the right of privacy as an "inalienable right":

> All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, *and privacy.*

(Cal. Const. art. I, § 1 [emphasis added].) The phrase "and privacy" was added to the California Constitution, article I, section I, by an initiative adopted by the voters on November 7, 1972.

An invasion of privacy may be demonstrated if each of the following is established: "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct ... constituting a serious invasion of privacy." (*Hill*, 7 Cal.4th at pp.39-40 [emphasis added].)[13] If all three prongs are

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[13] In *Hill* this Court found no violation of the constitutional right of privacy from a nonconsensual drug testing program, including observation of urination, the medical testing of urine, and the exchange of confidential medical information attendant

satisfied, a court will perform a "balancing test," measuring the privacy interest against countervailing interests in disclosure. (*Id.* at p.37; see also *Parris v. Superior Court* (2003) 109 Cal.App.4th 285, 300-301 [balancing privacy rights of putative class members against discovery rights of civil litigants].)

The court may resolve as a question of law whether there is a legally protected privacy interest and, if the facts are undisputed, whether there is a reasonable expectation of privacy and whether any invasion of privacy is serious. (*Hill*, 7 Cal.4th at p.40.) Moreover, not every invasion of privacy transgresses the state constitutional privacy right, and no violation occurs if the intrusion on privacy is "justified by a competing interest" (*id.* at p.38) or "substantively furthers one or more countervailing interests." (*Id.* at p.40.) The three privacy elements identified in *Hill* may be used to "screen out" situations that "do not involve a significant intrusion" on constitutionally protected privacy "as not even to require an explanation or justification"; otherwise, the justification of the intrusion must be considered in the balance. (*American Academy of Pediatrics v. Lungren* (1991) 16 Cal.4th 307, 331 [citations omitted.].)

This Court has applied the above-outlined framework to aggregate litigation, and specifically to the context of disclosure of identifying information of non-parties as part of civil discovery, against a defendant's assertion of the non-parties' privacy rights, including in *Pioneer*.

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upon the administration of the drug-testing, for persons participating in college athletic programs.(*Hill*, 7 Cal.4th at pp. 52-57.)

In *Pioneer*, the plaintiff filed a motion to compel disclosure of unredacted complaints with the names and contact information for each complainant after the defendant produced only redacted complaints it had received from 700 or 800 customers regarding the DVD players. (*Pioneer*, 40 Cal.4th at p.364.) In refusing to produce the requested contact information, the defendant asserted, on the customers' behalf, their privacy rights under California Constitution's privacy provision art. I, section I. (*Ibid.*)

The trial court in *Pioneer* ordered the defendant to disclose the names and contact information for the customers, so long as the parties sent the customers a privacy notice allowing them the option affirmatively to "opt-out" of the disclosure. (*Pioneer*, 40 Cal.4th at p.365.) This Court concluded that the trial court had not abused its discretion and reversed the intermediate court, which held that the trial court's order granting discovery infringed on the defendant's customers' privacy rights. Applying the balancing test weighing privacy interests against the right to discovery, the Court made several holdings.

First, this Court found that, although the customers' identifying information was entitled to "some privacy protection," the customers had a reduced expectation of privacy given that they had, in the past, complained and therefore "might reasonably expect, and even hope" that their contact information would be given to a class action plaintiff. (*Id.* at p.372.) Second, the Court held that the disclosure did not involve a "serious invasion of privacy," given that it only involved relatively non-

sensitive contact, and especially because it followed notice and an opportunity to opt-out. (*Id.* at p.373.) In balancing these interests, the *Pioneer* court placed great weight on discoverable information, finding "contact information regarding the identity of potential class members is generally discoverable, so that the lead plaintiff may learn the names of other people who might assist in prosecuting the case." (*Id.* at p.373 [citations omitted].) The court emphasized that this sort of disclosure does not involve "personal or business secrets, intimate activities, or similar private information, and threatens no undue intrusion into one's personal life." (*Id.*)

The *Pioneer* Court then explained that, because there was no "serious invasion of privacy," and the customers did not have a reasonable expectation of privacy, no balancing of the interests was even required. (*Id.*) However, the Court further reasoned that, even if a balancing of the interests had been required, the trial court could reasonably have concluded that the plaintiff's interest in obtaining contact information for potential percipient witnesses outweighed the possibility of disclosure of some number of customers' contact information against their wishes. (*Id.* at p.374 [citing Code Civ. Proc. §2017.010].) The Court finally noted that to allow the defendant to retain exclusive access to complaining customers' contact information would also simply be unfair. (*Id.* at p.374.)

In the years since this Court's decision in *Pioneer*, a number of intermediate courts have uniformly applied the *Hill/Pioneer* rubric to wage and hour actions to assess purported

claims of privacy under the California Constitution as a defense to disclosure of non-party employees' contact information. In *every one* of these wage and hour actions, the court ordered the employees' names and contact information to be disclosed.

For instance, in *Puerto*, the court applied the "*Pioneer* and *Hill* privacy framework" to the wage and hour plaintiffs' request for contact information for a list of identified potential percipient witnesses. (*Puerto*, 158 Cal.App.4th at pp.1251-52.) The trial court had ordered the defendant in *Puerto* to disclose the witnesses' contact information, albeit pursuant to an "opt-in" privacy notice. The appellate court reversed, holding that ordering an opt-in privacy notice "unduly hamper[ed]" [plaintiffs] in conducting discovery to which they are entitled" and was an abuse of discretion. (*Puerto*, 158 Cal.App.4th p.1252.) The *Puerto* court drew a direct parallel between the *Pioneer* customers' reduced expectation of privacy in their contact information being shared with a class action plaintiff seeking to vindicate similar interests and the "current and former Wild Oats employees [ ] similarly situated to plaintiffs, who might be supposed to want their information disclosed to counsel." (*Id.* at p.1253.) The *Puerto* court noted that that the employees' contact information was "not particularly sensitive," and was "basic civil discovery" thereby implicating no "serious invasion" of privacy. (*Id.* at pp.1253-54.) Like *Pioneer*, the *Puerto* court also found that, because there was no "serious invasion of privacy," there was no need to conduct a balancing of interests, yet it did so anyway. The court found that "the fundamental public policy

underlying California's employment laws" further tipped the balance in favor of permitting access to relevant information necessary to the litigation, and cited *Pioneer*'s point that requiring an "opt-in" privacy waiver would greatly advantage the employer, unfairly resulting in Wild Oats' enjoying exclusive access to the witness' contact information. (*Id.* at p.1256.)

Importantly, the employer-defendant in *Puerto* had argued that the *Hill/Pioneer* privacy framework did not apply, and instead argued that "once an element of privacy is in the mix, information may not be disclosed unless the petitioners demonstrate a compelling need for the particular information and that the information cannot be reasonably obtained through depositions or from nonconfidential sources." (*Puerto*, 158 Cal.App.4th at p.1251 [citing Wild Oats' reliance on *Harding Lawson Associates v. Superior Court* (1992) 10 Cal.App.4th 7, 10].) The *Puerto* court flatly rejected the employer's position, instead holding that the cases cited by Wild Oats could be harmonized with *Hill*. Indeed, the *Puerto* court held that such cases involved "unusual circumstances" where the nature of the disclosure and the surrounding circumstances were fundamentally different, such as where disclosure could cause "true danger" or involved "vastly more serious privacy intrusions." (*Id.* at pp.1254 & 1258 [distinguishing *Planned Parenthood Golden Gate v. Super. Ct.* (2000) 83 Cal.App.4th 347 based on its dealing with names and addresses of abortion clinic staff that could have placed the employees in physical danger].)

Like *Puerto*, other courts have broadly permitted the

discovery of names and contact information of potential witnesses by stressing that a trial court should not refuse to compel disclosure of such information absent identification of a particular privacy concern. In *Belaire-West*, the court, in affirming the discovery of contact information after the dissemination of an opt-out letter, applied the *Pioneer/Hill* privacy framework. (*Belaire-West*, 149 Cal.App.4th at pp.560-61.) In so holding, the court noted that although the employees may not have expected broad dissemination of their contact information, they could be expected to want that information to be shared with a class action plaintiff seeking to recover unpaid wages on their behalf. (*Id.* at p.561.) The court further held that there was no "serious invasion of privacy" because the contact information was "not particularly sensitive" and had been preceded by a privacy notice. (*Id.* at pp.561-62.) Finally, the *Belaire-West* court noted that, even if a balancing of interests were required, it would tip even more sharply in favor of disclosure because the employees were potential percipient witnesses and due to the "fundamental public policy" of prompt payment of wages due an employee underlying California's employment laws. (*Id.* at p. 562 [citing *Phillips v. Gemini Moving Specialists* (1998) 63 Cal.App.4th 563, 571].) A number of other courts have reached similar conclusions. (See, e.g., *Lee v. Dynamex*, 166 Cal.App.4th at pp.1336-38 [holding trial court's denial of motion to compel names and contact information of potential class members in a wage and hour action was an abuse of discretion absent particular privacy concerns or potential

discovery abuses].)

Indeed, even where there has been evidence of the employees' objections to disclosure of their names and contact information, and thus a greater expectation of privacy under *Hill*, disclosure has still been ordered. In *Crab Addison*, the employer argued in its writ petition that disclosure of employees' contact information, subject to an opt-out privacy notice, should not have been compelled by the trial court because some of the employees had signed forms indicating that they did not want their contact information to be shared with third parties, including in the context of class action lawsuits, and therefore had a heightened expectation of privacy in their contact information under the *Hill* rubric. (*Crab Addison*, 169 Cal.App.4th at pp.962-63.) The *Crab Addison* court rejected that argument, in part because public policy concerns favoring enforcement of unwaivable statutory wage and overtime rights through class action litigation outweigh the privacy interest in "relatively nonsensitive [contact] information." (*Id.* at p.974.) The court also relied on *Alch*, an employment discrimination class action in which the court had ordered the trial court to compel disclosure of the names and contact information of 47,000 union members over the objection of approximately 7,700 of them. (*Id.* at pp.973-974 [discussing *Alch*, 165 Cal.App.4th at p.1412].) The *Crab Addison* court noted that the non-party union members in *Alch* likely held a greater expectation of privacy than the employees in the case before it, since they had objected to release of their contact information with full knowledge of the pending litigation. (*Id.* at p.974.)

B. The Court of Appeal Misapplied And Ignored Controlling Law By Denying Access To Marshalls's Employees' Names And Contact Information On Privacy Grounds

1. Applying The *Hill/Pioneer* Privacy Analysis, The Court of Appeal Should Have Reversed The Trial Court And Compelled Disclosure Of The Aggrieved Employees' Names And Contact Information

Despite the numerous cases dealing specifically with the proper analytic framework within which to decide a motion seeking to compel disclosure of names and contact information of non-party employees in aggregate wage and hour litigation, the court below did not cite—much less distinguish—any of them. Instead, the court below held that, once a constitutional right of privacy is implicated, the party seeking disclosure can only obtain the at-issue information by demonstrating a "compelling need" that is "so strong as to outweigh the privacy right when these two competing interests are carefully balanced." (See *Williams*, at p.1158 [citing *Lantz v. Superior Court* (1994) 28 Cal.App.4th 1839, 1853–1854].) The court below clarified that such a "compelling need" can be established by showing that the discovery sought is "directly relevant and essential to the fair resolution of the underlying lawsuit." (*Id.* [citing *Planned Parenthood*, 83 Cal.App.4th at p.367 and *Johnson v. Superior Court* (2000) 80 Cal.App.4th 1050, 1071].) The court below then held that Mr. Williams' interest in the sought discovery was "practically nonexistent," outweighed by the employees' right to be free from "unwanted attention and perhaps fear of

retaliation." (*Id.* at pp.1158-59.)

The court below failed to apply the correct legal analysis, which is the three-part test applied in *Hill* and *Pioneer*. Under the *Hill/Pioneer* framework, while Marshalls's employees do have some privacy interest in their contact information and would not necessarily expect it to be "broadly disseminated" to third parties, they may "reasonably be supposed to want their information disclosed to counsel" who may alert them to similar claims that they may have or who may be seeking relief on their behalf. (See *Puerto,* 158 Cal.App.4th at p.1253; *Belaire-West,* 149 Cal.App.4th at p. 561; *Pioneer,* 40 Cal.4th at pp.371-72.)

Moreover, the information Williams sought here is limited to employees' names and contact information. As this Court held in *Pioneer*, and as other appellate courts have repeatedly held, the mere disclosure of names and contact information, while personal, does not implicate "medical information or financial details, political affiliations, sexual information, or personnel information," and therefore does not amount to a "serious invasion of privacy" under *Hill.* (*Pioneer*, 40 Cal.4th at p.373; see also *Puerto,* 158 Cal.App.4th at pp.1253-54 [citing *Pioneer* and holding that the names and contact information of non-party employees is "not particularly sensitive" and "basic civil discovery"]; *Belaire-West,* 149 Cal.App.4th at pp.561-562.)

Under *Hill,* if there is no "legitimate expectation of privacy" or no "serious invasion of privacy" a court need not even engage in a balancing of competing interests. (*Pioneer*, 40 Cal.4th at p.373 [citing *Hill,* 7 Cal.4th at pp.39-40].) Because there was a

diminished expectation of privacy and no "serious invasion" here, the court below should not even have reached the balancing of interests.

However, if a balancing were necessary, the Court of Appeal erred in that respect as well. The court below failed to consider the key considerations that the courts have used to perform the balancing of interests under the *Hill/Pioneer* test. The court below did not consider the "fundamental public policy underlying California's employment laws." (*Belaire-West*, 149 Cal.App.4th at p.562 [citing *Phillips v. Gemini Moving Specialists* (1998) 63 Cal.App.4th 563, 571].) Aggregate employment litigation such as class and PAGA actions "not only benefit[ ] the individual employee[s], but also serve[ ] the public interest in the enforcement of legal rights." (*Crab Addison*, 169 Cal.App.4th at p.971.) Indeed, this Court specifically held that a PAGA action "is fundamentally a law enforcement action designed to protect the public and not to benefit private parties." (*Iskanian*, 59 Cal.4th at p.387.)

Similarly, the Court of Appeal failed to consider the "general public interest in "'facilitating the ascertainment of truth in connection with legal proceedings' and in obtaining just results in litigation." (*Puerto*, 158 Cal.App.4th at p.1256 [citing *Hooser v. Superior Court* (2000) 84 Cal.App.4th 997, 1004].) Nor did the court below consider the unfairness to the litigants that would result from allowing Marshalls to "retain for its own exclusive use and benefit the contact information" of potential witnesses to Williams's claims. (See *Pioneer*, 40 Cal.4th at p.374;

Puerto, , 158 Cal.App.4th at p.1256.) Finally, the court below did not consider that the non-party aggrieved employees are potential percipient witnesses to Marshalls's employment practices under Code of Civil Procedure section 2017.010 and, as such, their names and identities are discoverable, further tipping the balance of interests in favor of disclosure. (*Belaire-West*, 149 Cal.App.4th at p.562.) This is especially true in light of Williams's allegations in this action, which directly implicate Marshalls's policies and practices throughout Marshalls's California stores. (See, e.g., PA 13-14 [¶42], PA 15 [¶47], PA 17 [¶54].) As the California courts have held, these numerous interests outweigh the employees' right to privacy in "relatively nonsensitive contact information." (*Crab-Addison*, 169 Cal.App.4th at p.974 [citation omitted].)

2. The Court Below Relied On Inapposite Case Law In Its Privacy Analysis

In reaching its conclusion that Marshalls's employees' privacy interests outweigh Williams's interest in litigating the instant action to enforce the Labor Code, the court below relied upon three cases (none of which was a decision of this Court): *Lantz*, *Planned Parenthood*, and *Johnson*. (See *Williams*, at p.1158.) However, all three of those cases involved privacy interests of a much different nature than in the instant case. Both *Lantz* and *Johnson* involved personal medical information. In *Lantz* the defendant sought disclosure of the plaintiff's doctor's records of a double mastectomy in their effort to prove that the plaintiff's surgery had been cosmetic and elective, while in *Johnson* the plaintiffs sought disclosure of an anonymous sperm

donor's identity and medical history, as well as that of the donor's family, and notwithstanding written agreements between the donor and the sperm bank promising nondisclosure, to prove that the sperm bank should have known of the donor's kidney disease. In *Planned Parenthood*, the plaintiff sought to discover the names and addresses of staff and volunteers at an abortion clinic.

None of these cases have any bearing on a court's determination of whether names and contact information of non-party employees should be disclosed in an aggregate employment action. As the California courts have held, "[a] person's medical profile is an area of privacy infinitely more intimate, more personal in quality and nature than many areas already judicially recognized and protected." (*Board of Medical Quality Assurance v. Gherardini* (1979) 93 Cal.App.3d 669, 678.) Therefore, to the extent *Lantz* and *Johnson* appeared to apply a privacy analysis more rigorous than in *Hill* and *Pioneer*, the much more intrusive nature of the privacy interest at stake would explain such a difference.[14] The proposed invasion of the privacy interest in *Planned Parenthood* was even more serious and distinct from the instant case. The trial court in *Planned*

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[14] It is also worth noting that neither *Lantz* nor *Johnson* expressly held that disclosure of the at-issue information should not be compelled. In *Lantz*, the court simply found that the trial court had failed to conduct *any* balancing of the plaintiff's privacy interest as against the need for disclosure, and remanded the matter for the trial court to conduct the requisite balancing in the first instance. (*Lantz*, 28 Cal.App.4th at p.1857.) In *Johnson*, the court actually granted the writ and ordered the trial court to compel disclosure of most of the information sought. (*Johnson*, 80 Cal. App.4th at p.1072.)

Parenthood had balanced the interests in favor of nondisclosure due to the "unique concerns" of the "emotionally charged and often violent" abortion debate, and where the petitioner and his counsel had in the past protested at the homes of clinic workers, the court found that disclosure of the workers' names and addresses could have placed them in physical danger. (*Planned Parenthood*, 83 Cal.App.4th at pp.362-64.) Indeed, the court observed that "human experience distinguishes Planned Parenthood's staff and volunteers from potential witnesses in 'routine' civil litigation." (*Id.* at p.364.)

In stark contrast with this line of authority, the instant case involves no intimate personal or sensitive information. When no such sensitive information is implicated, courts should not depart from the *Hill/Pioneer* analysis to apply a different test that presumes information cannot be disclosed unless the petitioner demonstrates both a compelling need and that the requested information cannot be obtained through depositions or nonconfidential sources. (*Puerto*, 158 Cal.App.4th at p.1242.) The *Puerto* court found that the cases upon which Wild Oats relied for its purportedly different test (including *Planned Parenthood*) could be harmonized with the *Hill/Pioneer* line insofar as in those unusual cases "the existence of a legitimate privacy interest and the fact that a serious invasion of privacy would result from the release of the information involved were both so facially apparent that the court did not need to belabor them with drawn-out analysis." (*Id.* at pp.1242, 1254-55.)

The Court of Appeal failed to engage with the reasoning of

Puerto, a case that expressly found the *Planned Parenthood* line of cases inapplicable in determining whether contact information for witnesses in an employment action is discoverable. By wrongly applying the *Planned Parenthood/Lantz* test instead of the applicable *Hill/Pioneer* framework, the Court of Appeal committed reversible error.

C. Even If The Aggrieved Employees' Privacy Rights Were Implicated, A Privacy Notice And/Or A Protective Order Would Have Addressed Any Possible Concerns

The Court may decide as a matter of law that the state constitutional right of privacy is not impinged by the disclosure in civil discovery of the names and contact information of current and former employees of a defendant employer in a law enforcement action brought under the PAGA. However, if the Court were to conclude that the privacy concern cannot be excluded, then providing the aggrieved employees notice and a chance to opt-out of having their contact information disclosed is a standard procedure that would allay any remaining privacy concern.

The court below did not consider whether a notice might have mitigated the privacy concerns that it found to exist.[15] This

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[15] The trial court had ordered use of an opt-out privacy notice for the narrow group of employees whose contact information it held would be produced. (PA 229.) The court below mostly ignored the privacy notice issue, mentioning it once in connection with its analysis of "good cause," stating that "mailing *Belaire-West* notices and tabulation of responses is costly," militating for limiting disclosure. (*Williams*, at p.1157.) The cost of sending privacy notices, however, was never briefed by the parties, and there is no evidence regarding such costs in

is despite the fact that an opt-out privacy notice procedure, established by this Court in *Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, was implemented in *Pioneer* and each of the wage and hour cases cited above. Indeed, the courts have held that an opt-out privacy notice imposes "vital limits" on proposed disclosure where an ostensible privacy interest is at stake, "requiring written notice of the proposed disclosure to all current and former employees and providing them with the opportunity to object to the release of their contact information to the plaintiffs." (*Belaire-West*, 149 Cal.App.4th at p.562 [holding that the trial court's use of an opt-out privacy notice supported its finding that there had been no serious invasion of privacy].) By concluding that nearly all of the information sought should not be disclosed, despite the well-known availability of an opt-out privacy notice, the court below staked out an extreme position that is inconsistent with the case law and should be reversed.

Finally, in addition to a privacy notice, the courts below also could have utilized other tools to have tipped the privacy analysis in favor of disclosure, such as a protective order. A protective order could have been entered requiring Williams and his counsel to keep the employees' names and contact information confidential, restricting access only to the attorneys and their agents only as needed in investigating and pursuing the

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the record. Moreover, the Court of Appeal's statement appears to assume that this cost would fall on Marshalls, which lacks a basis. Parties often share the costs of sending privacy notices (as the trial court had ordered in this case) and in some instances plaintiff will pay the entire cost of such notice.

litigation. (See *Puerto*, 158 Cal.App.4th at p.1259; see also, *Crab-Addison*, 169 Cal.App.4th at pp.968-69 [holding that trial court's "opt-in" privacy procedure was an abuse of discretion, but that "the trial court was not without the ability to enter a protective order limiting the dissemination of the witnesses' contact information."].) As with the privacy notice, the Court of Appeal did not consider how a protective order might address any privacy concerns in this case.

The Court of Appeal compounded its erroneous privacy analysis by failing to utilize (or consider) either an opt-out privacy notice or protective order as a means for ameliorating its privacy concerns. This provides an additional basis for reversing the decision below.

CONCLUSION

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

Dated: November 16, 2015

Respectfully submitted,

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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 Opening Brief on the Merits was produced using 13-point Century Schoolbook type style and contains **13,975** words. In arriving at that number, counsel has used Microsoft Word's "Word Count" function.

Dated: November 16, 2015

Respectfully submitted,

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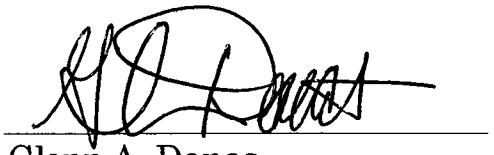
By: 

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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 **November 16, 2015**, I served the document described as: **APPELLANT'S OPENING BRIEF ON THE MERITS** 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.

[☒] **BY OVERNIGHT DELIVERY:** I am "readily familiar" with this firm's practice of collection and processing correspondence for overnight delivery. Under that practice, overnight packages are enclosed in a sealed envelope with a packing slip attached thereto fully prepaid. The packages are picked up by the carrier at our offices or delivered by our office to a designated collection site.

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

Executed this **November 16, 2015**, at Los Angeles, California.

Natalie Torbati
Type or Print Name

Signature

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