No. S151615

IN THE

Supreme Court

OF THE

STATE OF CALIFORNIA

Amalgamated Transit Union Local 1756, *et al.*, *Plaintiff-Petitioners*,

v.

Superior Court of the State of California, County of Los Angeles,
Respondent.

First Transit, Inc., *et al.*, *Real Parties in Interest.*

AFTER DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION EIGHT
(CASE NO. B191879)

WRIT OF MANDATE PROCEEDING FROM THE SUPERIOR COURT OF THE
COUNTY OF LOS ANGELES, THE HONORABLE CARL J. WEST
(CIVIL CASE NO. 043962)

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF REAL PARTIES IN INTEREST; PROPOSED AMICI CURIAE BRIEF

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Pursuant to California Rule of Court 8.520(f), the Employers Group, the California Employment Law Council, the Chamber of Commerce of the United States of America, and the California Chamber of Commerce respectfully request leave to file the attached brief of amici curiae in

support of Real Parties in Interest First Transit, Inc., Laidlaw Transit Services, Inc., ATC/Vancom, Inc., and Progressive Transportation Services, Inc. d/b/a/ Coach USA Transit Services. This application is timely made within 30 days after the filing of the reply brief on the merits.

THE AMICI CURIAE

The Employers Group is the nation's oldest and largest human resources management organization for employers. It represents nearly 3,500 California employers of all sizes and every industry, which collectively employ nearly 3 million employees. The Employers Group has a vital interest in seeking clarification and guidance from this Court for the benefit of its employer members and the millions of individuals they employ. As part of this effort, the Employers Group seeks to enhance the predictability and fairness of the laws and decisions regulating employment relationships. The Employers Group also provides on-line, telephonic, and in-company human resources consulting services to its members.

Because of its collective experience in employment matters, including its appearance as amicus curiae in state and federal forums over many decades, the Employers Group is uniquely able to assess both the impact and implications of the legal issues presented in employment cases such as this one. The Employers Group has been involved as amicus in many significant employment cases, including: *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007); *Prachasaisoradej v. Ralph's Grocery Co.*, 42 Cal. 4th 217 (2007); *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094 (2007); *Pioneer Electronics (USA), Inc. v. Superior Court*, 40 Cal. 4th 360 (2007); *Smith v. L'Oreal USA, Inc.*, 39 Cal. 4th 77 (2006); *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028 (2005); *Lyle v. Warner Bros. Television Productions*, 38 Cal. 4th 264 (2006); *Reynolds v. Bement*, 36 Cal. 4th 1075 (2005); *Grafton Partners L.P. v. Superior Court*, 36 Cal. 4th

944 (2005); *Miller v. Department of Corrections*, 36 Cal. 4th 446 (2005); *Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319 (2004); *State Department of Health Services v. Superior Court*, 31 Cal. 4th 1026 (2003); *Colmenares v. Braemar Country Club, Inc.*, 29 Cal. 4th 1019 (2003); *Echazabel v. Chevron*, 122 S. Ct. 2045 (2002); *Konig v. Fair Employment & Housing Comm'n*, 28 Cal. 4th 743 (2002); *Guz v. Bechtel National, Inc.*, 24 Cal. 4th 317 (2000); *Armendariz v. Foundation Health Psychcare Services*, 24 Cal. 4th 83 (2000); *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal. 4th 163 (2000); *Carrisales v. Department of Corrections*, 21 Cal. 4th 1132 (1999); *White v. Ultramar, Inc.*, 21 Cal. 4th 563 (1999); *Green v. Ralee Engineering Co.*, 19 Cal. 4th 66 (1998); *City of Moorpark v. Superior Court*, 18 Cal. 4th 1143 (1998); *Reno v. Baird*, 18 Cal. 4th 640 (1998); *Jennings v. Marralle*, 8 Cal. 4th 121 (1994); *Hunter v. Up-Right, Inc.*, 6 Cal. 4th 1174 (1993); *Gantt v. Sentry Insurance*, 1 Cal. 4th 1083 (1992); *Rojo v. Kliger*, 52 Cal. 3d 65 (1990); *Shoemaker v. Myers*, 52 Cal. 3d 1 (1990); and *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654 (1988).

The California Employment Law Council ("CELC") is a voluntary, nonprofit organization that works to foster reasonable, equitable, and progressive rules of employment law. CELC's membership comprises more than 50 private-sector employers, including representatives from many different sectors of the nation's economy (aerospace, automotive, banking, technology, construction, energy, manufacturing, telecommunications, and others). CELC's members include some of the nation's most prominent companies, and collectively they employ in excess of half-a-million Californians. CELC has been granted leave to participate as amicus curiae in many of California's leading employment cases, such as: *Green v. State of California*, 42 Cal. 4th 254 (2007); *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094 (2007); *Richards v. CH2M Hill, Inc.*, 26 Cal. 4th 798 (2001); *Asmus v. Pacific Bell*, 23 Cal. 4th

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The Chamber of Commerce of the United States of America (the "U.S. Chamber") is the world's largest business federation representing an underlying membership of more than 3 million businesses of all sizes, sectors, and regions. It includes hundreds of associations, thousands of local chambers, and more than 100 American Chambers of Commerce in 91 countries. Its mission statement is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity, and responsibility. In furtherance of that mission, the U.S. Chamber opposes legislation and legal rules that impose undue and unfair costs on doing business – including the costs that result from unnecessary employment disputes. The U.S. Chamber has served as amicus curiae in numerous cases before this Court, including: *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007); *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094 (2007); *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95 (2006); *Grafton Partners L.P. v. Superior Court*, 36 Cal. 4th 944 (2005); *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005); *Johnson v. Ford Motor Co.*, 35 Cal. 4th 1191 (2005); *Snowney v. Harrah's Entertainment, Inc.*, 35 Cal. 4th 1054 (2005); *State Farm Mut. Auto. Ins. Co. v. Garamendi*, 32 Cal. 4th 1029 (2004); *Intel Corp. v. Hamidi*, 30 Cal. 4th 1342 (2003); *Lockheed Martin Corp. v. Superior Court*, 29 Cal. 4th 1096 (2003); *Washington Mutual Bank, FA v. Superior Court*, 24 Cal. 4th 906 (2001); *Lane v. Hughes Aircraft Co.*, 22

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The California Chamber of Commerce ("CalChamber") is a nonprofit business association with over 16,000 members, both individual and corporate, representing virtually every economic interest in the state of California. For over 100 years, CalChamber has been the voice of California business. While CalChamber represents several of the largest corporations in California, 75 percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and jobs climate by representing business on a broad range of legislative, regulatory and legal issues. CalChamber often advocates before the courts by filing amicus curiae briefs in cases involving issues of paramount concern to the business community. The issue presented in the above-captioned case is but one example.

INTEREST OF AMICI CURIAE

The issues presented in this case relate to the assignability of the right to represent third parties under the Labor Code Private Attorneys General Act of 2004 ("PAGA") and California's Unfair Competition Law (the "UCL"). Their resolution will have a direct and profound impact on the cost to California business of defending against lawsuits brought by individuals and/or organizations that have not been injured by the defendants, and which have not received assignments from all of the individuals they seek to represent. For this reason, the Amici Curiae have a substantial interest in the present matter.

NEED FOR FURTHER BRIEFING

The Amici Curiae are familiar with the issues before this Court and the scope of their presentation. The Amici Curiae believe that further briefing is necessary to address matters not fully addressed by the parties: whether, as a threshold matter, claims under PAGA are assignable at all. If an individual cannot assign his or her own claim under PAGA, then it is unnecessary ever to reach the question whether the individual can assign the right to represent third parties under PAGA.

The Amici Curiae also believe that further briefing is necessary to respond to arguments raised by Petitioners in their reply brief regarding the questions whether representative UCL claims may proceed on a non-class basis and whether such claims are assignable. Finally, the amici curiae believe that further briefing is necessary to identify issues taken for granted by the parties that constitute open issues of California law.

CONCLUSION

For all of the foregoing reasons, the Amici Curiae respectfully request that the Court accept the accompanying brief for filing in this case.

Dated: December 28, 2007.

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INTRODUCTION

The primary issue briefed by the parties in this case is the procedural question whether an assignee of a cause of action obtains the assignor's right to sue as a class representative in a class action or as the representative plaintiff in some sort of non-class "representative action." That question should be answered in the negative. If answered in the affirmative,

however, the parties have briefed the secondary question whether Proposition 64 requires that any representative action to enforce rights under Business & Professions Code §§ 17200 *et seq.* (the "UCL") be brought, if at all, as a class action. If the Court were to reach that question, it should be answered in the affirmative.

The parties also identify – but do not fully explore – an important threshold issue: whether claims under the Labor Code Private Attorneys General Act of 2004 ("PAGA") are assignable at all. If an individual cannot assign even his or her own claim under PAGA – as the Court of Appeal expressly held – then it necessarily follows that an individual cannot assign the right to serve as a class representative or other representative in an action under PAGA.

This threshold issue is of critical importance to the Amici Curiae regardless of how this Court answers the questions on which the parties focus. If Petitioners were to prevail in their general argument that the capacity to serve as a representative is assignable, the Court nevertheless should hold that their representative claims under PAGA must be dismissed on the grounds that it is well-settled – indeed, Petitioners effectively concede – that claims for penalties under PAGA are *not* assignable. Conversely, if Real Parties in Interest were to prevail in their general argument that the capacity to serve as a representative is not assignable, the Court still should hold that the Petitioners' claims under PAGA must be dismissed on the grounds that the individual claims specifically assigned to Petitioners are claims for penalties that are not assignable.

This disposition, urged by Amici Curiae, would narrow the general issues raised by the parties regarding assignability to the specific context of Petitioners' remaining claims under the UCL. The right to represent others under the UCL is not and should not be assignable. Petitioners' attempt to "buy" the right to sue under the UCL is a clear end-run around the will of

the California voters who sought to limit abusive UCL suits by limiting them to plaintiffs who suffered an injury in fact and lost money or property as a result. A suit on behalf of unnamed third parties under the UCL should only be maintainable by an injured person with similar interests – not merely an assignee of such person – and should only be maintainable as a certified class action.

Finally, this brief by Amici Curiae addresses several open issues of California law that the parties have assumed, incorrectly, should be taken as given. In particular, Petitioners assert claims under Labor Code § 226.7 and seek "restitution" of Labor Code § 226.7 payments under the UCL. Amici Curiae submit that there is no private right of action to enforce Labor Code § 226.7, and that, in any event, Petitioners neither "own" the payments nor have "vested" interests in them as required for restitution under the UCL. Nevertheless, Amici Curiae concede that it is unnecessary to decide these issues in order to resolve this case, and these issues have not been briefed by the parties. Accordingly, Amici Curiae simply note the existence of these issues and request that the Court treat them as unresolved issues and so note in its opinion – rather than taking them for granted, as did the parties.

ARGUMENT AND AUTHORITIES

I. PAGA CLAIMS ARE FOR PENALTIES, WHICH ARE NOT ASSIGNABLE; THUS, IT IS A NON-ISSUE WHETHER (1) AN AGGRIEVED EMPLOYEE CAN PROSECUTE A NON-CLASS REPRESENTATIVE ACTION UNDER PAGA AND/OR (2) AN AGGRIEVED EMPLOYEE CAN ASSIGN ANY SUCH RIGHT.

A. The Court Of Appeal Correctly Held That Because PAGA Claims Are For Statutory Penalties, They Are Not Assignable.

The Court of Appeal held that claims for penalties generally, and claims under PAGA in particular, are not assignable. *AmalgamatedTransit Union, Local 1756 v. Superior Court*, 55 Cal. Rptr. 3d 585, 591 n.5 (2007)). At the time of its decision, however, the question whether claims under Labor Code § 226.7 were for "penalties" or "wages" was then pending before this Court in *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094 (2007). The Court of Appeal declined to reach that issue. Instead, it held that the right to serve as a representative was not assignable, which was equally dispositive of the Petitioners' claims. Having reached this conclusion under Labor Code § 226.7, the Court of Appeal simply decided the case the same way for claims under PAGA: whether or not the claims are assignable, the right to serve as a representative is not.

Regardless of the nature of claims under Section 226.7, however, it is indisputable that claims under PAGA are for penalties and, therefore, are not assignable. The Court of Appeal alternatively held, however, that "[t]o the extent PAGA permits aggrieved employees to recover 'a civil penalty' applicable to the underlying Labor Code violation, the right to do so may not be assignable on the additional ground that a right to recover statutory penalties may not be assignable." *Id.* at 592 n.6. Even the dissent agreed on this point. *See id.* at 600 n.5 ("if at a later date, the California Supreme

Court determines that the PAGA claims in this action constitute statutory penalties, the Unions would not be able to pursue the PAGA claims.").

This Court repeatedly has held, and reaffirmed just last year in a case cited in all of the parties' briefs, that claims for punitive damages are *not* assignable. *See Essex Ins. Co. v. Five Star Dye House, Inc.*, 38 Cal. 4th 1252, 1263 (2006) ("damages for emotional distress and punitive damages[] are not assignable."); *accord Murphy v. Allstate Ins. Co.*, 17 Cal. 3d 937, 942 (1976) ("[I]t must be concluded that damage for emotional distress is not assignable. The same is true of a claim for punitive damage.") (citations omitted); *People v. Superior Court (Jayhill Corp.)*, 9 Cal. 3d 283, 287 (1973) ("exemplary damages are allowed only to the immediate person injured.").

The same rule of no assignability has for many years applied equally to claims for statutory penalties. *See Esposti v. River Bros.*, 207 Cal. 570, 573 (1929) ("[T]o treble the same is in the nature of a statutory penalty, and, under the authorities from other jurisdictions, which we hereby approve, is not assignable."); *Peterson v. Ball*, 211 Cal. 461, 480 (1931) ("[T]he naked right to sue upon the statutory penalty is not assignable."); *Western Mortgage & Guaranty Co. v. Gray*, 215 Cal. 191, 198 (1932) ("The right given by said section of the code being in the nature of a statutory penalty . . . such a right is not assignable.") (citation omitted). It is of course appropriate to treat statutory penalties and punitive damages the same way as they serve the same legal function.

From the well-settled rule that claims for punitive damages and statutory penalties are not assignable, it necessarily follows that claims under PAGA – which, by definition, are claims for statutory penalties – cannot be assigned. California Labor Code § 2699(a) provides, in relevant part, that, "any provision of this code that provides for ***a civil penalty*** to be assessed and collected by the Labor and Workforce Development Agency

. . . may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3." (Emphasis added.) *See also Murphy*, 40 Cal. 4th at 1106 n.11 ("The Legislature later adopted the Labor Code Private Attorneys General Act of 2004 (§ 2698 et seq.) permitting, as an alternative, an aggrieved employee to initiate a private civil action to recover civil penalties if the Labor Commissioner does not do so.").

Because it is established that claims for statutory penalties are not assignable, the question of assignability presented in most cases is whether the statute at issue provides for a civil penalty (in which case the claim is not assignable) or for compensatory damages (in which case the claim is assignable). *See, e.g., Agudo v. Monterey County*, 13 Cal. 2d 285, 286-87 (1939) ("The plaintiff concedes that if the statute allows the recovery of a statutory penalty, the county's position is correct, but he claims that as the statute authorizes a property owner to recover only actual damages it confers a compensatory or remedial right which is assignable. The nature of the statute is, therefore, determinative of the question for decision.") (citations omitted). There is no such question, however, with respect to PAGA. The statute expressly authorizes a civil action solely with respect to Labor Code sections providing for "a civil penalty." Cal. Lab. Code § 2699(a). Insofar as other provisions of the Labor Code allow recovery of anything other than civil penalties, such as compensatory damages, any cause of action for such remedies must be provided by the underlying Labor Code provisions – not by PAGA. By its own terms, a claim under PAGA necessarily is a claim for "a civil penalty." Thus, it inevitably follows that PAGA claims are unassignable under the general, well-settled rule that claims for punitive damages and statutory penalties cannot be assigned.

Petitioners effectively conceded in their Opening Brief that penalty claims are not assignable. (Opening Brief at 22 n.10.) They weakly attempt to reverse course in their Reply Brief: Petitioners "[a]ssum[e], *arguendo*, validity to the argument [that PAGA claims for penalties are not assignable] based upon the current law of assignments," but argue that, "[i]ntuitively, such a result makes no sense." (Reply at 7-8.)[1] Specifically, Petitioners argue that application of this settled rule "would require both the assignee Union and the assignor employee to sue in order to gain complete relief." (Reply at 8.) The problem with Petitioners argument, "intuitively," is that the assignable compensatory damages do afford "complete relief." Punitive damages or penalties are not assessed to compensate the plaintiff, but to punish the defendant. It has long been the law that such claims are not assignable, and Petitioners' mere desire to avoid the law fails to provide any reason for allowing such an assignment here.

Accordingly, Amici Curiae respectfully urge this Court to hold that Petitioners lack standing to pursue any claim under PAGA – whether on behalf of an individual who purported to assign his or her PAGA claim or

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[1] In a footnote, Petitioners attempt to hedge their admission that penalties are unassignable with two sentences that read, in full: "By setting out Laidlaw's argument, Petitioners are not agreeing with it. For example, Labor Code § 218 specifically provides that Labor Code § 203 penalties ARE assignable." (Reply at 7 n.7.) Petitioners apparently relegate this argument to obscurity precisely because it is so specious. Labor Code § 218 provides that, "[n]othing in this article shall limit the right of any wage claimant to sue directly or through an assignee for any wages or penalty due him under this article." PAGA, located at Labor Code § 2699, is not in the same "article" as Section 218, and is not affected by it. Even with respect to sections in the same article, it is open to question whether Section 218, in not "limit[ing] the right" to bring suit, constitutes an affirmative grant of authority to assign penalty claims. Since it certainly does not constitute such a grant with respect to PAGA claims (which are not even located in the same part or chapter of the Labor Code, much less the same article), it is unnecessary to interpret Section 218 here.

on behalf of third parties who did not – because PAGA claims are *not* assignable as a matter of law.

B. The Court Of Appeal Also Correctly Held That The Right To Prosecute A Representative Action, If Any, Is Not Assignable.

As the Court of Appeal correctly held:

> While a cause of action is an intangible form of property that may be assigned by its owner, the right to bring a representative suit on behalf of others is another matter entirely. The right to bring a representative suit is not itself a cause of action (or any other form of property) that is owned and therefore assignable.

Amalgamated, 55 Cal. Rptr. 3d at 590. Specifically, the right to represent others falls outside the definition of a thing in action, which is set forth in California Civil Code § 953 as "a right to recover money or other personal property by a judicial proceeding." (*See generally* First Transit, Inc.'s Answer Brief on the Merits at 10-16; Progressive Transportation Services, Inc. d/b/a/ Coach USA Transit Services' Answer Brief on the Merits at 3-8.)

If PAGA claims were assignable – which, as set forth above in Section I.A, they are not – the right to pursue a representative PAGA action still would not be assignable under the general rule that the right to bring a representative suit is not assignable. As the Court of Appeal recognized, "[a]uthorization to bring a representative suit is conferred by the Legislature, and persons authorized to bring suit have no power to assign that authorization to a third party." *Amalgamated*, 55 Cal. Rptr. 3d at 590. In authorizing representative suits, the Legislature created a procedural mechanism whereby one individual can, in certain circumstances, sue on behalf of other, similarly situated individuals. That ability, however, is not exclusive to any particular individual in the group. Thus, if the Court were

to accept Petitioners' argument that the right to serve as a representative could be assigned, "in effect, this would permit an assignor to transfer causes of action he or she does not own to someone else. Any such right would turn the law of assignment on its head." *Id.* at 595.

Thus, whether or not PAGA claims are assignable, the right to bring a representative action under PAGA is not.

C. The Petitioners' Argument For Direct PAGA Standing Is Outside The Issues Presented For Review And Is Patently Without Legal Merit.

In their Consolidated Reply Brief on the Merits, Petitioners "sandbag" the Real Parties in Interest with a new argument claiming that they have "associational standing" as labor unions that allows them to bring representative suits under PAGA even if the assignments they received are ineffective. This novel argument is not within the scope of the issues Petitioners presented for review[2], it has not (other than in Petitioners' Reply) been briefed, and it should not be decided in this case. If the Court were to reach the issue, however, it should reject Petitioners' attempts to dramatically change the law of associational standing: Petitioners' claim of standing is directly contrary to the plain language of PAGA.

At the outset, it is important to note how dramatically Petitioners' arguments regarding associational standing changed between their Opening

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[2] The questions presented for review were: "1. Does a worker's assignment to the worker's union of a cause of action for meal and rest period violations carry with it the worker's right to sue in a representative capacity under the Labor Code Private Attorneys General Act of 2004 (Labor Code § 2698, *et seq.*) or the Unfair Competition Law (Business and Professions Code § 17200, *et seq.*)? 2. Does Business and Professions Code § 17203, as amended by Proposition 64, which provides that representative claims may be brought only if the injured claimant 'complies with Section 382 of the Code of Civil Procedure', require that private representative claims meet the procedural requirements applicable to class action lawsuits?" The summary of the questions on review set forth on the Court's web site is identical.

and Reply Briefs. In their Opening Brief, "Petitioner-Unions concede[d] . . . that the associational standing conferred upon a union by *Professional Fire Fighters* is standing to vindicate the equitable rights of a union's members." (Opening Brief at 17, citing *Professional Fire Fighters, Inc. v. City of Los Angeles*, 60 Cal. 2d 276 (1963).) The Petitioners claimed that they had associational standing to bring a UCL claim under this standard because "the UCL provides for equitable relief only." (Opening Brief at 18.)

In their Reply Brief, however, Petitioners request for the first time that the Court "hold that the Union Petitioners in these cases may sue in a representative capacity to secure remedies for their members under both PAGA and the UCL." (Reply at 6.) Petitioners specifically note that such a holding would allow them to bring claims for penalties under PAGA, which Petitioners "assum[e], *arguendo*," could not be assigned. (Reply at 7.) But Petitioners overlook the obvious fact that penalties are not equitable relief and, therefore, there is no authority that would grant Petitioners associational standing to pursue them.

It is clear that, with specific respect to claims under PAGA, Petitioners do not and cannot have "associational standing" to seek penalties on behalf of their members. PAGA specifically provides that an "aggrieved employee or representative" may give notice to the Labor and Workforce Development Agency of an alleged violation, but it also provides that only "the aggrieved employee may commence a civil action pursuant to Section 2699." Cal. Lab. Code § 2699.3(a). Thus, even assuming, *arguendo*, that Petitioners were correct in their argument that the term "representative" as used in the statute extends beyond legal counsel directly representing the employee to a labor union purporting to represent the employee's interests (Reply at 16), Petitioners still lack authorization to assert claims in court under PAGA.

If the Legislature had intended to allow labor unions to pursue claims in court under PAGA, it could easily have said so. It did not. The Legislature's omission reflects its intent not to grant associational standing to labor unions to bring claims under PAGA. *Cf. Murphy,* 40 Cal. 4th at 1107 ("the Legislature certainly knows how to impose a penalty when it wants to."). By contrast, the Legislature has expressly granted associational standing under other provisions of the Labor Code. *See, e.g.,* Cal. Lab. Code § 1404 ("A person, including a local government or an employee representative, seeking to establish liability against an employer may bring a civil action."). With respect to PAGA, the Legislature expressly granted representatives the right to give notice of an alleged violation to the Labor and Workforce Development Agency in the very same statutory provision, but it declined to include any comparable language when it came to the paragraph allowing employees alone to file suit. The selective inclusion of associational standing for purposes of administrative proceedings strongly indicates the Legislature's intent not to grant such standing for purposes of judicial proceedings.

Petitioners' attempts to slip in an argument regarding "associational standing" under PAGA in their Reply should be rejected. The issue is not before the Court on review. In any event, the Legislature declined to grant such standing, and Petitioners offer no valid reason why this Court should allow it.

D. The Parties Do Not Address, And The Court Should Decline To Reach, The Important Unresolved Issue Whether PAGA Permits Non-Class Representative Actions Prosecuted By Aggrieved Employees.

The question whether claims under PAGA can be brought in a representative action without complying with the safeguards applicable to class actions appears to be presently pending before this Court in a separate case, *Arias v. Superior Court*, No. S155965. The press release issued by

the Court in connection with its grant of review states as much, and the issue is addressed in the opening brief filed in that case. This is an important issue with which Amici Curiae are very concerned.[3]

In light of its importance, Amici Curiae submit that the matter can and should be decided in *Arias*, not here. We provide the following summary of argument to explain why PAGA does not authorize non-class action representative actions and to preview the argument that Amici Curiae will make when the issue is before the Court for decision.

Claims under the Labor Code may, in some circumstances, be appropriate for treatment as class actions. *See Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 332 (2004).In such cases, "[t]he party seeking certification has the burden to establish the existence of both an ascertainable class and a well-defined community of interest among class members." *Id.* at 326.

If an aggrieved employee could seek all of the benefits of proceeding with a representative action under PAGA without even attempting to show either an ascertainable class or a community of interest, the opportunity for abuse would be rampant.

The claims asserted by Petitioners in this case illustrate precisely that kind of abuse. Petitioners assert claims for violation of Labor Code § 226.7, which requires payment of a monetary remedy by employers who fail to provide meal and rest breaks. Assuming, for the sake of argument, that there is a private right of action under Section 226.7, *but see* Section III.A *infra*, it is not at all clear whether the employee could establish the prerequisites for class certification. In such a case, the predominance of individual issues might make class treatment inappropriate, and a trial court might deny class certification.

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[3] Amici have submitted a request for clarification of *Arias* as to the exact scope of issues presented.

If representative PAGA claims could be asserted on a non-class basis, however, the same trial court that denied class certification would be required to allow the representative PAGA claims to proceed – even though the court denied class certification on the grounds that such claims are unmanageable.

On top of the burden on trial courts in attempting to preside over representative PAGA claims that could not be certified as class actions, this Court should also consider the potential for employees to use representative, non-class actions under PAGA to blackmail employers. Unlike class actions, which contain procedural safeguards to protect the interests of the class, nothing would prevent a plaintiff from compromising a representative PAGA claim for his or her own benefit. In light of the impossibility of defending representative PAGA claims with respect to which individual issues predominate (and which, therefore, could not be certified as class actions), employers would have little choice but to pay plaintiffs' settlement demands – however unreasonable. That is bad policy, and it is not the law.

There is no statutory provision for a representative, non-class action under PAGA. While Labor Code § 2699 allows a representative action to be maintained, it is silent as to whether class action procedures must be followed. Although the statute does allow individuals to collect statutory penalties otherwise recoverable only by the government, nothing in the statute otherwise abrogates the Code of Civil Procedure. Under well-established procedural rules, representative actions seeking primarily money – in this case, payments measured by the meal and rest breaks that the Real Parties in Interest allegedly did not provide to individual employees – must be brought as class actions. If the Legislature intended to dispense with those rules and allow a representative action to be maintained notwithstanding the fact that it could not be certified as a class,

it certainly would have expressed that intent with far greater clarity than the statute's silence as to the need for compliance with class action procedures.

This is an important issue that bears further consideration, in a case in which it has been appropriately raised. Since the issue has not been raised here, it should not be decided here.

II. PETITIONER UNIONS CANNOT BRING REPRESENTATIVE UCL CLAIMS.

A. UCL Representative Claims Must Be Certified As Class Actions Under Proposition 64.

Petitioners argue that they may bring a representative action under the UCL without complying with class certification requirements. In order to make this argument, Petitioners claim that the explanation of the amendment relied upon by the California voters in the pamphlet explaining Proposition 64 – which expressly states that the purpose of the amendment is to require plaintiffs to comply with class action procedures – is a legal nullity. Worse, Petitioners claim that the meaning of the statute is precisely the opposite of what the Voter Information Guide and Ballot Information Pamphlet say it means. Petitioners are wrong.

In amending the UCL to require plaintiffs to "comply with Section 382 of the Code of Civil Procedure," the language of Proposition 64 does not (as Petitioners note) expressly state that such actions must be certified as class actions – but neither does it expressly state, as Petitioners assert, that they may be maintained as representative, non-class actions. In asserting in their reply brief that Section 382 must be read to mean the latter, Petitioners rely heavily on the language of Section 382, which states generally that "one or more may sue or defend for the benefit of all." (Reply at 21.) Section 382, however, certainly does not mean what Petitioners apparently assert: that a person may sue on behalf of non-

parties without complying with class action procedures irrespective of the nature of the claim asserted or remedy sought.

Instead, it is well-established – to the point of being completely obvious – that the right to bring such a representative suit under Section 382 may be subject to compliance with class action procedures designed to protect the rights of non-parties. In other words, what it means to "comply with Section 382 of the Code of Civil Procedure" changes depending on the circumstances. Whether or not it means complying with class action requirements is determined, not with reference to the language of Section 382, but by the nature of the underlying claim – in this case, the UCL.

In mandating that claims under the UCL comply with Section 382, the text of the revised statute does not expressly answer the question whether a representative claim must be brought as a class action. To resolve that apparent ambiguity, however, the Court need look no further than the Voter Information Guide and Ballot Information Pamphlet explaining the statutory amendment, which make clear beyond cavil that the answer to that question is "yes."[4]

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[4] In fact, it is arguable that Proposition 64 unambiguously requires that representative UCL claims be maintained as class actions – exactly the opposite of what Petitioners claim is its unambiguous meaning – for all of the reasons set forth by Real Parties in Interest. (*See* First Transit, Inc.'s Answer Brief on the Merits at 23-28 and 32-35; Laidlaw Transit Services, Inc.'s Answer Brief on the Merits at 16-17; ATC/Vancom, Inc.'s Answer Brief on the Merits at 6-11; and Progressive Transportation Services, Inc. d/b/a/ Coach USA Transit Services' Answer Brief on the Merits at 15-19.) Amici Curiae agree with those arguments but need not repeat them here. Assuming for the sake of argument that Proposition 64 were even susceptible to the alternate interpretation advanced by Petitioners, the statute is at least ambiguous. The Voter Information Guide and Ballot Information Pamphlet merely confirm the better interpretation of the statute, which implicitly incorporates class action procedures by referencing Civil Procedure Code § 382 – the provision that is synonymous with those procedures.

The Ballot Measure Summary for Proposition 64 in the Voter Information Guide interpreted the statutory amendment to mean unequivocally that claims brought under the UCL "on behalf of others would have to meet the additional requirements of class action lawsuits." Voter Information Guide, Gen. Elect. (Nov. 4, 2004) ballot measure summary, at 6.[5] The same reference to "the additional requirements of class action lawsuits" is contained in the Ballot Information Pamphlet for Proposition 64. Ballot Pamp., Gen. Elect. (Nov. 2, 2004) Analysis of Prop. 64, at 39. It could not be clearer that the California voters understood that Proposition 64 amended the UCL to permit representative actions by private parties *only* if they were certified as class actions.

Petitioners cannot and do not claim that their contrary interpretation of Proposition 64 can be reconciled with the Voter Information Guide or Ballot Information Pamphlet. Instead, Petitioners simply urge this Court to ignore these probative sources of the voters' intent. (Reply at 23-25.) They do so by asserting that the language of the revised UCL is not ambiguous and that, therefore, resort to "extraneous" matter is impermissible. (*Id.* at 23.) The major flaw with Petitioners' argument is that nothing in the text of the UCL unambiguously answers the question whether UCL representative claims may be brought without complying with class action requirements. Indeed, if that were what Proposition 64 said, its text would be directly contrary to what was explained to the voters. But, of course, there is nothing in the text of Proposition 64 that creates such a contradiction, and there is no reason for this Court to create such an unimaginable conflict by interpreting the statute as Petitioners suggest. Instead, Proposition 64 can and should be read in harmony with the Voter

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[5] Pursuant to Evidence Code §§ 452 and 459, the Court of Appeal took judicial notice of the Voter Information Guide on its own motion. *Amalgamated*, 55 Cal. Rptr. 585, 596 n.11.

Information Guide and Ballot Information Pamphlet to provide that UCL representative actions must be certified as class actions.

B. Whether Or Not Representative UCL Claims Must Be Certified As Class Actions, The Right To Maintain A Representative UCL Claim Cannot Be Assigned.

As set forth above in Section I.B, the Court of Appeal correctly held that the right to bring a representative action is not assignable. This principle applies with equal force in the context of a representative suit under the UCL following the passage of Proposition 64. Proposition 64, in addition to adding statutory language requiring compliance with Civil Procedure Code § 382 (discussed above), added a requirement that the plaintiff meet certain standing requirements. *See* Cal. Bus. & Prof. Code § 17203 ("Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure."). The standing requirements, in turn, were amended by Proposition 64 to replace the phrase "acting for the interests of itself, its members or the general public" with the phrase "who has suffered injury in fact and has lost money or property as a result of such unfair competition." *Id.* § 17204.

In their reply brief, Petitioners wrongly claim that this amendment "at most, now requires . . . Article III standing in order to proceed with a UCL lawsuit." (Reply at 13.) Petitioners' argument is based on their understanding that, "[t]he term, 'injury in fact', as used in Proposition 64, is a term of art meaning an Article III injury giving rise to a case or controversy." (*Id.* at 14.) Contrary to Petitioners' argument, however, Proposition 64 does not "at most" require Article III standing; it requires Article III standing *plus* something more. Specifically, Proposition 64 limits standing to a person "who has suffered injury in fact *and* has lost money or property as a result of such unfair competition." Cal. Bus. &

Prof. Code § 17204 (emphasis added). Petitioners wholly ignore the second half of the clause.[6] Proposition 64 amends the UCL both by removing language allowing an organization to act on behalf of its members and by adding language focusing on the loss suffered by the plaintiff – be it an individual or an association. Even if an individual transfers his or her right to recover for that loss, nothing in the UCL sanctions a transfer of the right to bring a representative action. To the contrary, language allowing just that was specifically removed by Proposition 64.

Beyond these valid, technical reasons for holding that the right to bring a representative action is not assignable, there is an equally compelling, commonsense reason for so holding: a contrary rule would foster abuses of the UCL every bit as bad as the ones that caused voters to pass Proposition 64. Since the UCL authorizes only equitable relief, not damages, the monetary value of a plaintiff's right to bring a representative action frequently will be quite low. In other words, a party seeking an assignment of the right to bring a representative action could buy it cheaply. The will of the voters in enacting Proposition 64 was to eliminate abusive UCL lawsuits, not just to add a step – obtaining an assignment – to them.

The potential for abuse is particularly severe where, as here, an employee purports to assigns his or her right to bring a representative action under the UCL to a union. A union may have no real interest in obtaining equitable relief on various matters that are not even a subject of bargaining,

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[6] Petitioners also claim that their standing to sue under the UCL was not eliminated by Proposition 64 because the amendment did not remove language allowing complaints by "any board, officer, person, corporation or association." (Reply at 21.) Petitioners fail, however, to address the fact that such entities or individuals lack standing unless they too suffered an injury in fact and lost money or property as a result of unfair competition.

such as non-waivable statutory rights. But unions do have a strong incentive to obtain negotiating leverage. If representative claims could be assigned to unions without the protection of class action requirements, then nothing would prevent a union from compromising such claims to achieve bargaining goals wholly unrelated to the substance of the claims. That kind of extortion is precisely the abuse that Proposition 64 eliminates. It also supports the conclusion that the right to serve as a representative, with respect to claims of any nature, cannot be assigned.

III. THE COURT SHOULD NOTE THE EXISTENCE OF UNRESOLVED UNDERLYING ISSUES REGARDING ENFORCEMENT OF LABOR CODE § 226.7, WHICH HAVE NOT BEEN RAISED OR BRIEFED IN THIS CASE.

The questions presented for review in this case deal with procedural issues relating to assignment and representative actions under two rather unique statutes, PAGA and the UCL, that are essentially mechanisms for enforcing other laws. As a result, little if any attention has been paid on appeal to the substance of the Petitioners' underlying claims. Such substantive questions certainly have not been presented for consideration by this Court. Amici Curiae are concerned, however, that there is a potential that parties in future cases may use any holding about assignability of the claims in the current action as a commentary about the validity of the underlying claims at issue here. Amici Curiae believe that any such reliance would be misplaced, but even dicta from this Court carries considerable weight. Amici Curiae, therefore, respectfully request that the Court make clear that whatever conclusion it reaches regarding assignability, the assumption that there is viability to Petitioners' claims is made solely for the sake of argument, and does not constitute a judgment to that effect. Although there are a number of other open substantive questions, Amici Curiae focus on two in particular: (1) the open question whether there is a private right of action to enforce Labor Code § 226.7;

and (2) the open question whether Section 226.7 payments can be collected as "restitution" under the UCL.

A. There Is No Private Right Of Action To Enforce Labor Code § 226.7.

One of a number of open legal issues concerning meal and rest break litigation, which was raised by amici but not considered by the Court in *Murphy*, 40 Cal. 4th 1094, is whether private party litigants have the right to bring a private right of action in court to enforce the payment obligation of Labor Code § 226.7.[7] *Murphy* merely determined that (assuming there were such a right) the suit is governed by the three-year statute of limitations, rather than the one-year period applicable to statutory penalties. This decision – which arose from a Labor Code § 98(a) proceeding, *not* from a suit involving a purported private right of judicial action – did not implicitly reach any determination concerning whether there is or is not a private right of judicial action to collect Section 226.7 payments. *See, e.g.*, *Davies v. Krasna*, 14 Cal. 3d 502, 508 (1974) (Court follows "the admittedly intellectually unsatisfying course of resolving a statute of limitations issue with respect to a theory of liability not yet part of the fabric of this court's law").

Amici Curiae ask this Court to take recognition of this unsettled area of law in its resolution of this case: *if* there were such a right, the ability to

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[7] Amici Curiae note that (1) the private right of action issue was addressed in an amicus brief filed in *Murphy* by the California Association of Health Facilities (*see* 8-11), (2) the Court's order granting leave to file that brief stated: "In granting permission to file the amicus curiae brief, the court does not expand the issues on review beyond those specified in its order of February 22, 2006, or request the parties to brief any issues other than those previously specified," (3) CELC and other amici requested the Court to modify the *Murphy* decision to confirm that this issue was not decided by the Court (4/25/07), and (4) plaintiff Murphy opposed this request on the ground this and other issues were not within the scope of the issues raised on the petition for review and considered by the Court (5/2/07).

pursue it on a class-wide basis may/may not be assigned. Such qualification is necessary because the unstated premise of the briefing before this Court – that there is a right of private enforcement of the Section 226.7 payment – is incorrect. Although determination of that issue should be left for another day, a brief demonstration of the arguments why it is incorrect, as set forth below, illustrates the importance of not simply accepting the assumption that there is such a private right.

Section 226.7 itself is wholly silent about any right of private enforcement and, significantly, a proposed private right of action set forth in the original version of the bill (AB 2509) which gave rise to Section 226.7 was deleted from the final version of the bill. Once the issue becomes ripe, whether Section 226.7 provides a private right of action must be determined primarily by the language of the statute and its legislative history. *See, e.g., Katzberg v. Regents*, 29 Cal. 4th 300, 316 (2002) (determination whether there is private right of action for monetary relief under state constitution provision is guided primarily by evaluation of language and history of enactment); *Moradi-Shalal v. Fireman's Fund Ins. Co.*, 46 Cal. 3d 287, 292, 304-05 (1988) ("[t]he fact that neither the Legislative Analyst nor the Legislative Counsel observed that the new act created a private right of action is a strong indication the Legislature never intended to create such a right of action"); *Violante v. Communities Southwest Develop. & Constr. Co.*, 138 Cal. App. 4th 972, 978 (2006) (no private right of action was permitted under Labor Code provision where the clear statutory language and framework provided that "it is the labor commissioner, not an employee, who pursues such claims").[8]

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[8] *See also Farmers Ins. Exchange v. Superior Court*, 137 Cal. App. 4th 842, 850 (2006) ("a statute creates a private right of action only if the statutory language or legislative history affirmatively indicates such an intent. That intent need not necessarily be expressed explicitly, but if not it must be

The Court's statutory and legislative history analysis in *Murphy* strongly indicates that no implied private right of action under Section 226.7 was intended by the Legislature.

1. Absence of Statutory Language. Just as the use of the word "penalty" in some Labor Code sections made the lack of the same term in Section 226.7 highly significant to this Court in *Murphy*, *see* 40 Cal. 4th at 1107, the fact that Section 226.7 contains no language authorizing a private right of action is equally significant. That the Legislature "certainly knows how [to provide for a private right of action] when it wants to" is evidenced by its having expressly authorized private suits for statutory payments such as overtime, minimum wage, equal pay, and statutory penalties. Lab. Code §§ 1194, 1197.5, 2699; *Murphy*, 40 Cal. 4th at 1109 ("had the Legislature intended section 226.7 to be governed by a one-year statute of limitations, the Legislature knew it could have so indicated by unambiguously labeling it a 'penalty.'").

In this regard, for example, it is clear that the right of employees to sue for statutory overtime payments – to which the Section 226.7 payment was repeatedly analogized in *Murphy* – exists only because it is expressly authorized by Labor Code § 1194. *See, e.g., Reynolds v. Bement*, 36 Cal. 4th 1075, 1092, 1094 (2005) (Moreno, J. concurring) (noting that in Section 1194, "the Legislature has given workers a private right of action to recover

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strongly implied"); *Major v. Silna*, 134 Cal. App. 4th 1485, 1498 (2005) ("[b]ecause a regulatory statute does not invariably create a private right of enforcement, we examine the language of this law and its legislative history to determine whether Malibu intended to authorize Major's action"); *Crusader Ins. Co. v. Scottsdale Ins. Co.*, 54 Cal. App. 4th 121, 125-26 (1997) (California courts employ the "legislative intent" approach, not the Restatement analysis); *Matoff v. Brinker Restaurant Corp.*, 439 F. Supp. 2d 1035 (C.D. Cal. 2006) (no private right of action under Labor Code § 351); *Ruiz v. The Paladin Group*, 2003 WL 2299207 (C.D. Cal. 2003) (no private right of action to enforce Labor Code § 558).

unpaid overtime wages" and commenting that the Legislature has entrusted enforcement of Labor Code provisions to "workers themselves" in "some cases", thus clearly meaning not in all cases.); *Earley v. Superior Court*, 79 Cal. App. 4th 1420, 1427 n.7 (2000) ("Initially, private civil actions were allowed only for recovery of minimum wages. The enforcement of overtime compensation rights was left to the state; however, in 1961, section 1194 was amended to provide that the private right to bring a civil action would extend to include overtime claims.").

2. Rejection of Proposed Statutory Language. Just as the deletion of express penalty provisions from the original version of AB 2509 was significant to the *Murphy* Court because "[t]he rejection of a specific provision contained in an act as originally introduced is 'most persuasive' that the act should not be interpreted to include what was left out," *Murphy*, 40 Cal. 4th at 1107, it is equally significant that the private right of action for the Section 226.7 payment provided for in the initial version of AB 2509 was deleted from the version that was enacted.[9]

Supportive of this position, the Court aptly commented that the failure to provide for private enforcement of the penalty provision in the original version of AB 2509 meant that the Legislature had intended to leave "collection of the penalty to the Labor Commissioner." *Murphy*, 40 Cal. 4th at 1106. Given the subsequent amendment to AB 2509, the same

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[9] The initial version of AB 2509 provided for both a payment to the employee *and* a penalty. *Murphy*, 40 Cal. 4th at 1106. Although the initial version of the bill did not provide a private right of action for the penalty, it did specify that, with respect to the payment, an employee could bring a lawsuit and/or Labor Commissioner proceeding to collect the non-penalty payment, including a right to attorneys' fees. *See id.*; AB 2509, § 12, § 226(c), as introduced Feb. 24, 2000. That provision was deleted from the final version of the bill. AB 2509, § 12, as amended in Senate, Aug. 25, 2000.

conclusion that enforcement now resides solely in the hands of the Labor Commissioner is applicable with respect to Section 226.7 as enacted.[10]

3. Comparable to Enforcement of IWC Wage Orders. The Court's observation in *Murphy* that the final version of AB 2509 was designed to enact into law the language that had been promulgated a few months earlier by the Industrial Welfare Commission (the "IWC"), *Murphy*, 40 Cal. 4th at 1107-08, also supports the conclusion that there is no private right of action under Section 226.7. Adoption of the IWC language suggests that the Legislature intended that this provision would be enforced the same way that IWC orders generally are enforced – solely by Labor Commissioner enforcement and not by private party lawsuits. *See, e.g.*, *Reynolds*, 40 Cal. 4th at 1088-89. It is particularly logical, therefore, to conclude that the deletion of the private right of action language from AB 2509, at the same time the Legislature was copying the IWC-promulgated payment language, was intended to confer enforcement jurisdiction of Section 226.7 exclusively in the hands of the Labor Commissioner.

4. Contrast Between Section 226.7 and Other Parts of AB 2509. The conclusion that there is no private right of action also is supported by the portion of *Murphy* holding that the Legislature's "decision not to label the section 226.7 payment a penalty is particularly instructive because it simultaneously established penalties explicitly labeled as such in provisions

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[10] Amici Curiae are mindful that *Murphy* characterized the deletion of the private right of action from the final version of AB 2509 as the elimination of "the requirement that an employee file an enforcement action, instead creating an affirmative obligation on the employer to pay the employee one hour of pay . . . akin to an employee's immediate entitlement to payment of wages or for overtime." *Murphy*, 40 Cal. 4th at 1108. That statement, however, does not address the private right of action question. An employee must sue to collect overtime pay, and may do so only because such suit is expressly authorized by Labor Code § 1194.

of AB 2509 related to sections 203.1 and 226." *Murphy*, 40 Cal. 4th at 1108. The same reasoning is equally applicable to the private right of action issue inasmuch as Section 226 contains an express provision for private enforcement. *See* Cal. Lab. Code § 226(b), as reflected in AB 2509, § 6, as chaptered, Sept. 29, 2000, now set forth at Section 226(e) (employee may "recover" penalties "and is entitled to an award of costs and reasonable attorney's fees"). The elimination of private right of action language in Section 226.7 "while retaining the use of [such language] in other provisions of AB 2509 is further evidence that the Legislature did not intend section 226.7 [to be enforced via private right of judicial action]." *Murphy*, 40 Cal. 4th at 1108.

These arguments should be considered and the issue decided in another case. For the reasons set forth above, Amici Curiae believe that it should be decided – in a case presenting the issue – that Section 226.7 does not provide for a private right of action.[11]

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[11] Amici anticipate that once this issue is fully considered, the opposition will argue that a private judicial right of action is supported by Labor Code § 218, which states that "[n]othing in this article shall limit the right of any wage claimant to sue directly or through an assignee for any wages or penalty due him under this article." This argument, however, is contrary to this Court's observation in *Murphy* that the lack of a private right of action in the initial version of AB 2509 for penalties was indicative of an intent to remit enforcement of the statutory remedy to the Labor Commissioner, not that Section 218 authorized suit for the penalty. *See* pp. 23-24 above. Moreover, (1) Section 218 is merely an anti-preemption provision which clarifies that nothing in that article of the Labor Code limits or precludes what other rights might be provided, *see, e.g., Rojo v. Kliger,* 52 Cal. 3d 65, 73 (1990), and (2) Section 218, like Section 218.5, is concerned with contractual, not statutory wages. *Earley*, 79 Cal. App. 4th at 1427-28 (Section 218.5 applies to claims for contractual wages); *Reynolds,* 36 Cal. 4th at 1084 (suggesting in dictum that Section 218 provides a right to sue for contractual wages and that Section 1194 provides the right to sue for statutory overtime, but one can sue for breach of contract as a matter of general law without reference to a specific statutory authorization).

B. Section 226.7 Payments Cannot Be Collected As "Restitution" Under The UCL.

Another open question relates to whether plaintiffs may employ the alternate remedy of "restitution" under the UCL to collect payments mandated by Labor Code § 226.7. Whereas the parties assume in their arguments and the Court of Appeal suggested that such a cause of action could be maintained by an individual (and assigned to a union), in fact there is a substantial open issue whether this is true. Amici Curiae respectfully request that the Court's opinion reflect that it is not passing upon this open question in this case.

1. Statutory Wages are Not "Vested". Assuming for purposes of argument that Section 226.7 payments are true wages, as opposed to statutory liquidated damages, *but see* pp. 29-30 below, there is a clear distinction for restitution purposes between contractual and statutory wages, a distinction that has not been addressed by this Court in any UCL case.[12] This distinction is important because in *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1144 (2003), and *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal. 4th 163 (2000), the Court held that restitution could be provided so long as an individual has an "ownership" or "vested" interest in the property. One clearly does not have an ownership interest if, as here, the money was never in the plaintiff's possession. *Korea Supply Co.* , 29 Cal. 4th at 1149. The issue is whether unpaid wages constitute a "vested" interest, an issue not raised or addressed in *Cortez* notwithstanding that it did involve a claim for statutory overtime.

[12] The distinction between contractual and statutory wages, however, was recently noted by this Court in *Gentry v. Superior Court*, 42 Cal. 4th 443, 456 (2007): "An employee's right to wages and overtime compensation clearly have different sources. Straight-time wages (above the minimum wage) are a matter of private contract between the employer and employee. Entitlement to overtime compensation, on the other hand, is mandated by statute and is based on an important public policy."

Whereas one can have a "vested" right in contractual wages, no similar right exists with respect to statutorily-created rights. *See, e.g., Callet v. Alioto*, 210 Cal. 65, 68 (1930) (purely statutory rights are distinct from "vested property right[s]" which accrue by contract, common law, or statute codifying the common law); *Governing Board v. Mann*, 18 Cal. 3d 819, 829 (1977) (the same vested rights rule has been applied in a "multitude of contexts" including criminal penalties, civil penalties, and statutory rights generally); *Younger v. Superior Court*, 21 Cal. 3d 102, 109 (1978) ("an action wholly dependent on statute abates if the statute is repealed without a saving clause before the judgment is final"); *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*, 129 Cal. App. 4th 1228, 1262 (2005) ("[u]nlike a common law right, a 'statutory remedy does not vest until final judgment'"); *Plotkin v. Sajahtera Inc.*, 106 Cal. App. 4th 953, 962 (2003) (rights created by statute are not "vested"); *Graczyk v. Worker's Comp. Appeals Bd.*, 184 Cal. App. 3d 997, 1006-07 (1986) (individual did not have "vested" right to statutory workers' compensation benefits). Because the right to Section 226.7payments was created solely by statute, it cannot be said to be a "vested" right for purposes of restitution under the UCL.

2. Meal/Rest Break "Wages" are Not Quantifiable. Similarly, this Court has made clear that restitution under the UCL is limited to *specific* sums that are withheld. *See Korea Supply Co.*, 29 Cal. 4th at 1145. This Court confirmed that under the UCL, "an individual may recover profits unfairly obtained to the extent that these profits represent monies . . . in which the plaintiff has an ownership interest." *Id.* at 1148. The Court held, in that case, that "the monetary relief requested by [plaintiff] does not represent a *quantifiable sum* owed by defendants to plaintiff." *Id.* at 1150 (emphasis added).

In reaching that holding, the Court distinguished *Cortez*. *Id.* In *Cortez*, this Court held that the UCL was applicable to a situation where a company paid its employees on the basis of four 10-hour days without overtime, emphasizing that the restitution amounts could simply be calculated from the company's own books. *Cortez*, 23 Cal. 4th at 163. Just like in *Korea Supply Co.*, that holding from *Cortez* is inapplicable with respect to a claim under Labor Code § 226.7, where the evidence is in conflict as to whether a meal period or rest breaks were provided to a plaintiff on any given day. In that situation, a plaintiff does not have an "ownership interest" in a "quantifiable sum" – at most he or she has an "expectancy," which the *Korea Supply Co.* Court held is not recoverable under the UCL. *See Korea Supply Co.*, 29 Cal. 4th at 50-52. As in *Korea Supply Co.*, such a plaintiff is unable to identify a specific sum allegedly withheld. Instead, he or she must reconstruct the dates and times worked in alleged violation of Section 226.7 to arrive at an estimated amount of damages. Such a claim is not for a quantifiable sum and, therefore, is not recoverable as restitution.

3. Exclusive Labor Commissioner Enforcement. Yet another reason for rejecting a UCL claim for restitution of Section 226.7 payments is that the Legislature withheld a private right of action to employees to sue directly for Section 226.7 payments for the presumed reason that such enforcement activity should be left exclusively to the Labor Commissioner. *See* Section III.A *supra*. Whereas the failure to provide a private right of action to sue for an underlying statutory right, by itself, does not preclude the use of the UCL remedy, it is clearly improper for courts to permit use of the UCL remedy to sanction an "end run" around the Legislature's decision to enforce a statute through an exclusive administrative enforcement scheme. *See, e.g., Vacanti v. State Comp. Ins. Fund*, 24 Cal. 4th 800, 827-28 (2001) (UCL claims barred by exclusive remedy provision of workers'

compensation statute); *State v. Altus Finance, S.A.*, 36 Cal. 4th 1284, 1303 & n.6 (2005)**Error! Bookmark not defined.** (where agency has exclusive jurisdiction to enforce statute, UCL claim precluded; noting that it is an open issue whether a UCL claim is implicitly precluded when statutory scheme and UCL remedy are "clearly repugnant and so inconsistent that the two cannot have concurrent operation").

4. Section 226.7 Payments are Damages, not Wages. Although *Murphy* decided that Section 226.7 payments are not penalties subject to a one-year statute of limitations, it remains unclear even after *Murphy* whether Section 226.7 payments are truly wages or whether they are simply a form of compensation or "liquidated damages" for intangible personal injuries. The only issue actually presented in *Murphy* was whether or not the payments were penalties. The three-year statute of limitations at issue in *Murphy* is equally applicable whether payments are wages or liquidated damages.

While the wage/liquidated damages distinction was of no moment to the statute of limitations issue in *Murphy*, if the payments are liquidated damages, it is clear no UCL claim for Section 226.7-mandated payments may be maintained. That is because it is settled beyond any doubt that the UCL cannot serve as a vehicle for collecting damages, but only for the very limited purpose of obtaining restitution. *See, e.g., Korea Supply Co.*, 29 Cal. 4th at 1144.

While *Murphy* states that the payments under Section 226.7 are akin to wages, its stated holding is merely that the statutory remedy is a wage or premium pay. *Murphy*, 40 Cal. 4th at 1099. The concept of what exactly was meant by "premium pay" is unclear. More importantly, the Court explained in some detail that the Section 226.7 remedy is designed to compensate employees for non-economic injuries such as stress, denial of the opportunity to accomplish important personal tasks, and facing

increased risk of work-related accidents – injuries for which a value may be "difficult to assign" but for which the "Legislature has selected an amount of compensation it deems appropriate." *Murphy*, 40 Cal. 4th at 1113. Therefore, while it is settled that Section 226.7 payments are not penalties, it is an open question whether they are liquidated damages or true wages. Thus, it remains to be determined in a future case whether Section 226.7 payments may be the subject of restitutionary recovery under the UCL.

For all of these reasons, Amici Curiae request the Court to clarify in its opinion that the availability of a restitution action under the UCL to collect Labor Code § 226.7 payments is an open question not decided in this case.

CONCLUSION

For all of the foregoing reasons, Amici Curiae respectfully request that the Court hold: (1) that claims under PAGA are for penalties and, therefore, are not assignable; (2) that representative claims under the UCL may only proceed as certified class actions; and (3) that the right to serve as a representative plaintiff is not assignable, either generally or specifically with respect to claims under the UCL or PAGA. Amici Curiae also respectfully request that this Court clarify that the following questions remain open: (1) whether representative claims under PAGA may only proceed as certified class actions; (2) whether there is a private right of action under Labor Code § 226.7; and (3) whether Section 226.7 payments can be collected as "restitution" under the UCL.

Dated: December 28, 2007.

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court 8.504(d))

The text of this Amici Curiae Brief In Support Of Real Parties In Interest (excluding the Table of Contents, Table of Authorities, and this certificate) consists of 11,188 words, as counted by the Microsoft Word version 2003 word-processing program used to generate this Brief.

Dated: December 28, 2007.

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PROOF OF SERVICE

I, Adelina Dauz, declare that I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 400 South Hope Street, 18th Floor, Los Angeles, CA 90071-2899. On December 28, 2007, I served the within document:

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF REAL PARTIES IN INTEREST; PROPOSED AMICI CURIAE BRIEF

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

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