Case No. S155965

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JOSE A. ARIAS, *Plaintiff-Petitioners*,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SAN JOAQUIN, *Respondent.*

ANGELO DAIRY et al., Real Parties in Interest.

AFTER DECISION BY THE COURT OF APPEAL
THIRD APPELLATE DISTRICT (CASE NO. C054185)

WRIT OF MANDATE PROCEEDING FROM THE SUPERIOR COURT OF THE COUNTY OF SAN JOAQUIN, THE HON. COLEMAN A. BLEASE
(CIVIL CASE NO. CV 028612)

BRIEF OF *AMICI CURIAE* IN SUPPORT OF POSITION OF REAL PARTIES IN INTEREST

(Unfair Competition Case (Bus. & Prof. Code § 17209))

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INTRODUCTION

An individual plaintiff seeking to pursue representative claims on behalf of other employees for underlying Labor Code violations may do so if, and only if, he or she can satisfy the requirements for class actions. The plaintiff in this suit, Jose Arias ("Arias"), tried to circumvent his obligation to seek and obtain class certification by asserting non-class representative claims under Business & Professions Code section 17200 ("17200" or "UCL") for the alleged underlying Labor Code violations for, among other things, overtime compensation and meal and rest break violations. Arias also sought to bring a non-class representative action for statutory penalties for the same alleged Labor Code violations under the Labor Code Private Attorneys General Act of 2004 ("PAGA"), even though the underlying predicate Labor Code claims themselves cannot be litigated without class certification. Thus, even though Arias cannot represent other present and former employees to seek relief for alleged Labor Code violations without securing class action treatment (which he does not even attempt to pursue), he sought to obtain penalties which require, at the minimum, that all of the alleged underlying Labor Code violations be individually proven. Something is seriously amiss.

The California employer community – represented in this case by Amici Curiae Employers Group, the California Employment Law Council, the Chamber of Commerce of the Unites States of America, and the California Restaurant Association ("Employer Amici") – is gravely concerned by efforts

that would significantly jeopardize the due process rights of California employers. Among other things, a non-class representative action gives rise to a problem identical to the phenomenon of "one-way intervention," a process which this Court unanimously recently held in *Fireside Bank v. Superior Court* significantly detrimentally affects the rights of defendants in class litigation. Just as permitting a plaintiff to litigate the merits of a claim prior to obtaining class certification is unfair, inappropriate, and very likely an unconstitutional deprivation of due process, entirely discarding class action protections, as Arias advocates, would have the identical and, indeed, even a more-magnified adverse effect on litigant rights.

The trial court properly struck all of Arias' "representative" claims. The Court of Appeal, however, issued a mixed decision. Without recognizing that this Court in *Fireside Bank* already held that Proposition 64 eliminated the possibility that section 17200 authorizes non-class representative actions, the Court of Appeal correctly ruled that the 2004 ballot initiative had that effect.

The Court of Appeal, however, reached the opposite conclusion with respect to PAGA suits. Based on a serious misreading of that statute, and without examining the legislative history of PAGA or exploring the constitutional implications of its ruling, the Court of Appeal held that "PAGA expressly allows a person to prosecute a representative claim without requiring

that it be brought as a class action." PAGA, however, does nothing of the sort. The Court of Appeal seriously misread the statutory text.

The Court of Appeal's reading of PAGA leads to absurd results and serious constitutional issues. If the lead-in language to Labor Code section 2699 (a) means that the normal statutory processes for civil lawsuits are inapplicable to PAGA suits, then the entire Code of Civil Procedure similarly would have no place in PAGA litigation, an obviously never-intended result. Adding to this untenable conclusion, it cannot possibly have been the intent of the Legislature to permit individuals to pursue massive group suits without any of the protections of class action processes for ***penalties*** when the individual has no legal right to pursue relief for the underlying claimed Labor Code violations without class certification.

The legislative history of PAGA, moreover, shows that the Legislature intended to avoid the abuses of pre-Proposition 64 UCL actions by carefully stating, over and over again, that PAGA was designed to be different. By promising that PAGA representative suits would have res judicata effect, and that "an employer would not have to be concerned with future suits on the same issues by someone else," it was necessarily contemplated that PAGA representative suits would have to be maintained and certified as class actions.

For the reasons that follow, the Employer Amici urge the Court to affirm the holding of the Court of Appeal with respect to the meaning and

effect of Proposition 64 and to reverse the Court of Appeal's ruling that PAGA plaintiffs can pursue non-class representative actions.

ARGUMENT

I

ALTHOUGH CLASS ACTION PROCESSES ARE SOMETIMES SUBJECT TO ABUSE, NON-CLASS REPRESENTATIVE SUITS POSE FAR GREATER THREATS OF UNFAIRNESS, UNWIELDINESS AND POTENTIAL UNCONSTITUTIONALITY

As Arias recognizes, "class actions may create injustice." (Reply Brief, p. 11, quoting *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 458.) That apt observation, however, in no way supports Arias' argument that the Court should authorize *far more unjust* non-class representative suits under the UCL and PAGA. Without in any way endorsing class actions, and their very grave potential for abuse, the Employer Amici wish to emphasize at the outset the grossly unfair, and potentially unconstitutional, nature of non-class representative suits.

A. A Class Action Defendant Can Obtain the Benefits of *Res Judicata* Whereas a Defendant in a Non-Class Action Representative Suit is Subject to Repetitive Litigation

This Court has long recognized, as it did in its seminal class action case, that "[i]n cases properly falling within the category of representative litigation, the judgment or decree would be res judicata for or against the class sought to be represented." (*Weaver v. Pasadena Tournament*

of Roses Association (1948) 32 Cal.2d 833, 842.) The corollary of this rule, as Justice Baxter explained in *Bronco Wine Co. v. Frank A. Logoluso Farms* (1989) 214 Cal.App.3d 699, 717-718, is that "[f]or over 50 years California has recognized that a judgment may not be entered either for or against one who is not a party to an action or proceeding."

To effectuate appropriate protections for defendants, this Court has adopted the sage rule – known as the rule against "one-way intervention" – that a defendant can prevent litigation on the merits of class action claims prior to the class certification process. (*See, e.g., Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1078-1086, quoting *Premier Electrical Construction Co. v. National Electrical Contractors Assn., Inc.* (7th Cir.1987) 814 F.2d 358, 362 ["One-way intervention left a defendant open to 'being pecked to death by ducks. One plaintiff could sue and lose; another could sue and lose; and another and another until one finally prevailed; then everyone else would ride on that single success. This sort of sequence, too, would waste resources; it also could make the minority (and therefore presumptively inaccurate) result the binding one'"]; *accord, e.g., Green v. Obledo* (1981) 29 Cal.3d 126.)[1] Then, once a class is certified, any individual who does not timely "opt out" of the class (after receiving constitutionally-compelled notice

[1] *Fireside Bank* makes clear that the defendant may elect to waive its right to prevent one-way intervention "if it fails to timely object, or affirmatively seeks resolution of the merits before certification." (40 Cal.4th at p. 1082.)

of his or her rights) is bound by the ultimate judgment and the defendant obtains the res judicata effect of a favorable judgment as against all members of the class.

The rule against one-way intervention is not only a wise rule of judicial procedure, but as this Court has indicated repeatedly in dictum, and a number of Courts of Appeal have expressly held, it is a right grounded in the Due Process clauses of the United States and California constitutions. (*See, e.g., Fireside Bank, supra,* 40 Cal.4th at p. 1083 ["in dicta we have gone so far as to attribute to defendants a due process right to avoid one-way intervention"]; *People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 16; *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 937; *Home Savings & Loan Ass'n v. Superior Court* (1975) 42 Cal.App.3d 1006, 1012.)

It easily follows that if it is a denial of due process to litigate the merits of class-wide claims before class certification, it is equally a violation of the defendant's constitutional Due Process rights to eliminate entirely the class certification process and to permit individuals to litigate representative actions on behalf of a multitude of other individuals without any of the panoply of well-established class action protections. (*See, e.g., Bronco Wine, supra,* 214 Cal.App.3d at pp. 717-720 [maintenance of an individual, representative action outside the confines of a class action "raises serious fundamental due process considerations"]; *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 126, 137 [noting that, as indicated by

Bronco Wine, specter of repetitive litigation in this context raises due process concerns]; *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1151-1152 ["substantial due process" concerns attendant to nonrestitutionary disgorgement when defendants are exposed to multiple suits].)

Thus, whereas class action defendants are afforded significant protections against the threat of repetitive litigation, a non-class representative suit of the type advocated by Arias leaves defendants without any such protection. Under the type of lawsuit proposed by Arias, employers would remain subject to one-way intervention and, thus, would be open to "being pecked to death by ducks."

B. Non-Class Representative Actions Present Difficult and Unjust Barriers to Fair and Effective Settlements

As a practical matter, because of the lack of res judicata effect of a settlement of a non-class representative suit, there are difficult barriers to fair resolution of such cases.

Judicial approval of a class action settlement gives defendants a measure of confidence that the dispute is resolved. Defendants know precisely who is bound by the settlement (*i.e.,* all class members who did not opt out), and the class action process also permits them to condition settlement on there being no or limited numbers of "opt outs." By contrast, creating a new breed of non-class representative action leaves defendants open to rounds

of litigation with great amounts of uncertainty. Can an employer be ordered to pay "restitution" or penalties to employees who are in turn free to sue for higher amounts than the settlement called for? The possibility of requiring anyone who receives an award to sign a release, or precluding the possibility of the same individual receiving multiple recoveries (*Kraus, supra,* 23 Cal. at pp. 138-139), does not at all eliminate the fact that such an unwieldy process and the possibility of multiple rounds of litigation will make the possibility of settlement highly unpalatable.

Thus, for fear that they may be on the hook for the settlement as well as copycat litigation, defendants rationally may refuse to settle non-class representative actions. Requiring plaintiffs to comply with class action procedures, therefore, facilitates settlement and ensures fairness for all interested parties.

C. Class Actions Contain Many Other Protections Which Arias Necessarily Contends Should Not Apply to Non-Class "Representative Actions"

In addition to the fact that class actions reduce or eliminate the possibility of repetitive litigation on the same claims, and thereby promote fairness, due process and ultimate settlement, class action procedures contain many other protections for both employees and employers alike. For example, a class action may proceed only to the extent that the named plaintiff can demonstrate that he or she is an adequate class representative. (*City of San Jose v. Superior Court* (1974)12 Cal.3d 447, 464 ["[t]he plaintiffs here

inadequately represent the alleged class because they fail to raise claims reasonably expected to be raised by the members of the class"].) The requirement that "the class representative's personal claim must not be inconsistent with the claims of other members of the class" is another component of "adequacy of representation." (*J. P. Morgan & Co., Inc. v. Superior Court* (2003) 113 Cal.App.4th 195, 212.)

II

CONTRARY TO ARIAS' ARGUMENT, THIS COURT HAS NEVER HELD AT ANY TIME THAT A PRIVATE PLAINTIFF COULD PURSUE A NON-CLASS REPRESENTATIVE ACTION

Arias argues that the courts have held that Code of Civil Procedure section 382 authorizes individual plaintiffs to bring non-class representative suits. He also vigorously argues that prior to Proposition 64, this Court had authorized private plaintiffs to prosecute non-class representative actions under Business & Profession Code section 17200. These contentions simply are not true.

A. Code of Civil Procedure Section 382

Contrary to Arias' contention, this Court has never held that section 382 authorizes individual plaintiffs to bring non-class representative

actions.[2] To the contrary, section 382 authorizes individuals only to pursue class action lawsuits.

In the seminal class action case repeatedly miscited by Arias – which in fact repeatedly used the terms "representative" and "class" suits interchangeably and synonymously[3] – the Court held that section 382 is "based on the doctrine of virtual representation. . . an exception to the general rule of compulsory joinder of all interested parties." (*Weaver, supra,* 32 Cal.2d at p. 837.) The Court rejected prior case law which had required represented litigants to meet the test of "necessary parties," and also held that "representative or class suits" must be premised on a "well-defined 'community of interest' in the questions of law and fact involved as affecting the parties to be represented." (*Id.* at p. 837.) Most critically, for present purposes, the Court held that in order to "properly fall[] within the category of representative litigation, the judgment. . . would [have to] be res judicata for or against the class to be represented." (*Id.* [emphasis added].)

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[2] The conclusion that section 382 does not authorize individual non-class representative actions is supported by the fact that Arias did *not* oppose Angelo Dairy's motion to strike the representative claims for common law violations in the Seventh and Eighth Causes of Action, and also did *not* seek relief via writ with respect to the striking of such claims. It is further supported by the fact that Arias did *not* even attempt to pursue non-class representative claims with respect to the underlying Labor Code claims in his First through Sixth Causes of Action.

[3] In several places, the Court referred to "representative or class suits." (*See, e.g.,* 32 Cal.2d at pp. 836 & 840.) It stated unequivocally that "a representative suit is proper because it is in behalf of a common or joint interest of an *ascertained class* in the subject-matter of the controversy." (*Id.* at p. 839 [emphasis in original].)

Thus, as *Weaver* held, the only type of representative suit authorized by section 382 is one in which all of the represented individuals are bound by the outcome of the proceedings. Thus, by necessity, the type of non-class representative suit advocated by Arias is *not* authorized by section 382.

Weaver thus in no way supports Arias' contention that it is "well settled" that "§ 382 authorizes non-class certified representative actions." (Reply Brief, p. 10.) And, it also bears emphasis that the Court has repeatedly referred to *Weaver* as a case defining the parameters of permissible class litigation. (*See, e.g., City of San Jose, supra,* 12 Cal.3d at p. 459 ["[h]olding that a class action cannot be maintained where each member's right to recover depends on facts peculiar to his case, *Weaver* remains viable in this state"]; *see also, e.g., Civil Service Employees Ins. Co. v. Superior Court* (1978) 22 Cal.3d 362, 386, fn. 2; *Archibald v. Cinerama Hotels* (1976) 15 Cal.3d 853, 861; *Gerhard v. Stephens* (1968) 68 Cal.2d 864, 913.)

The other case of this Court Arias cites to support this contention, *Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276, is not on point because that case held that, at least in some limited instances, organizations may sue under section 382 on behalf of their members.[4]

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[4] *Fire Fighters* involved a claim for injunctive relief by an incorporated union on behalf of its members. Whether or not a union or other organization may seek monetary relief on behalf of its members pursuant to section 382 is an open (continued...)

Over the years, it has been absolutely clear that whether or not an individual plaintiff has the right to litigate a case as a class action depends on whether he or she can satisfy the judicially-created requirements for class action status under section 382. For example, as the Court indicated in *Fireside Bank, supra,* 40 Cal.4th at pp. 1091-1092, in deciding whether to certify a class, a trial court "***determin[es] whether the criteria of Code of Civil Procedure section 382 are met***." (Emphasis added.) Many of these criteria are not found in the statutory text of section 382, and include, among others, numerosity, ascertainability of class, predominance of common questions, typicality, and adequacy of representation. (*Id. at* p. 1089.)[5]

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[4](...continued)
issue which is the subject of certain of the briefing in *Amalgamated Transit Union Local 1756 v. Superior Court,* No. S151615, but an issue which we do not believe is properly before the Court in that case. We submit that section 382 organizational standing would not be permitted in any case where the organization is not in privity with its members for *res judicata* purposes. Whether or not there is privity may very well depend on the nature of the underlying claim, for example, whether the claim is contractual or involves the assertion of an "independent"or "non-waivable" statutory right. (*Compare, e.g., Kelly v. Vons Companies, Inc.* (1998) 67 Cal.App.4th 1329 [union members were in privity with union and therefore were bound by collateral estoppel with respect to common law contract and tort claims] with *Camargo* v. *Calif. Portland Cement Co.* (2001) 86 Cal.App.4th 995 [no privity in case involving statutory discrimination claims].)

[5] *See also, e.g., La Sala v. American Sav. & Loan Ass'n* (1971) 5 Cal.3d 864, 872 ["[a]lthough no California statute or decision governs dismissal of class actions generally, we have previously suggested that trial courts, in the absence of controlling California authority, utilize the class action procedures of the federal rules"]; *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 704 ["[a]lthough [section 382] appears to speak in the alternative, it uniformly has been held that two requirements must be met in order to sustain any class action: (1) there must be an ascertainable class (citations) and (2) there must be a well defined community of interest in the questions of law and fact involved affecting the parties to be (continued...)

Arias tries to argue with a straight face that the Rules of Court – and *not* CCP § 382 – provide the legal authority for class actions. (Opening Brief, pp. 10 & 21.) This argument is entirely fanciful. As Arias concedes, the Rules of Court regarding class actions were not adopted until 2002 (Opening Brief, p.11, fn. 4), and were designed simply to add additional and uniform guidance for applying class action requirements under section 382, just as the detailed procedural rules implementing class action have been defined over the years by the case law rendered by this Court and the Courts of Appeal interpreting section 382.

B. Business & Professions Code Section 17200

To support his contention that non-class action representative suits under section 17200 existed prior to Proposition 64, Arias relies primarily on the First District's decision in *Dean Witter Reynolds, Inc. v. Superior Court* (1989) 211 Cal.App.3d 758, an odd case where the defendant successfully argued that a section 17200-based suit was improperly certified as a class action and, instead, should have been required to proceed as a non-class representative action.

In adopting the defendant's argument, the Court of Appeal concluded that *Fletcher v. Security Pacific National Bank* (1979) 23 Cal.3d 442, 453 had held that a non-class representative action is permitted under

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[5](...continued)
represented"].

Business & Professions Code section 17535 (a provision very similar to section 17200). (211 Cal.App.3d at p. 773.) Significantly, the court recognized that permitting a non-class representative action "may pose some threat to the *defendant,*" but stated that this was not of concern to that case because "the defendant opposes class certification and will presumably not be heard to complain later if it suffers adverse consequences as a result." (*Id.* at p. 774.) Thus, just as a defendant can waive its right to prevent one-way intervention, *see* p. 5, fn. 1 above, the *Dean Witter Reynolds* defendant waived its right to object to a non-class action representative action.

In *Bronco Wine,* Justice Baxter observed that the passage in *Fletcher* relied upon by *Dean Witter Reynolds* was "dictum since *Fletcher* was maintained as a class action." (214 Cal.App.3d at p. 720.) He aptly commented: "One must question the utility of a procedure that results in a judgment that is not binding on the nonparty and has serious and fundamental due process deficiencies for parties and nonparties." (*Id.*) However, *Bronco Wine* found that it was unnecessary to reach the "issue of whether it is proper to maintain an individual, representative action for unfair competition outside the confines of a class action," because *Dean Witter Reynolds* was readily distinguishable on several other grounds.

Fletcher unquestionably was dictum, and distinguishable dictum at that. In that case, the trial court denied a class certification motion. The Court affirmed the trial court order with respect to the breach of contract

claim, but reversed as to the statutory "private attorney general" claim because the trial court had based its decision on an erroneous understanding of the underlying substantive law. (23 Cal.3d at pp. 449-453.)

In remanding the matter back to the trial court for a redetermination of the class motion as to the statutory claim, the Court indicated that it was possible that the trial court might still determine that "the maintenance of the present suit as a class action is precluded on other grounds," including that a non-class representative action might be preferable. (23 Cal.3d at p. 453.) The very brief consideration of what the trial court might determine in a future proceeding was unquestionably dictum because it was in no way necessary to the *holding* that "the trial court's denial of class action status. . . rested upon [an] erroneous legal basis." (*Id.* at p. 454.)[6]

Significantly, although the short *Fletcher* dictum indeed suggested that an individual could maintain a non-class individual action, which it indicated might or might not be preferable to a class action, it is extremely pertinent that in *Fletcher,* like *Dean Witter Reynolds,* the defendant was arguing that an individual non-class action representative suit was preferable to a class action. Thus, *Fletcher* also represents a case where it

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[6] *See, e.g., People v. Mendoza* (2000) 23 Cal.4th 896, 914 [where conviction was reversed because of erroneous exclusion of evidence, discussion of other issues that might arise on retrial "was not necessary to ... case's resolution"]; *People v. Pearson* (1986) 42 Cal.3d 351, 357 [discussion of issue that might arise on remand "was essentially dictum" where court "determined that the judgment would be reversed on other grounds"].)

could be said that the defendant had waived its right to insist upon class action processes.[7]

Finally, contrary to Arias' contention, this Court did *not* hold in *Kraus, supra,* 23 Cal.4th 116, that non-class representative actions are proper. In fact, in rejecting the plaintiff's argument regarding the scope of relief permitted under section 17200, the Court, in another opinion authored by Justice Baxter, held that "we need not address defendants' due process-based argument that UCL defendants must be accorded the protections against multiple suit and duplicative liability, protections available only in a class action." (23 Cal.4th at p. 138.)

Thus, prior to Proposition 64, it remained entirely undecided by this Court whether an individual plaintiff in a section 17200 suit could prosecute a non-class representative action on behalf of others over the objections of a defendant who contended that such a suit should be permitted to proceed, if at all, only as a class action.

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[7] The dictum in *Fletcher* – which was based on language akin to that in section 17200 and in no way based on section 382 – did not address the extremely relevant distinction between suits brought by public officials and those brought by individuals, as reflected by the Court's earlier decision in *People v. Pacific Land Research Co., supra,* 20 Cal.3d 10. We address that distinction at pp. 45-49 below.

III

AFTER PROPOSITION 64, THERE IS NO DOUBT THAT A PRIVATE INDIVIDUAL WISHING TO BRING A REPRESENTATIVE SUIT UNDER BUSINESS & PROFESSIONS CODE SECTION 17200 MUST PROSECUTE THE CASE AS A CLASS ACTION

A. *Fireside Bank* Decided the Very Question at Issue Here

In correctly determining the effect of Proposition 64, the Court of Appeal overlooked that this Court had already determined in *Fireside Bank* that Proposition 64 "modified the UCL by. . . requiring those pursuing representative actions to satisfy the class requirements of Code of Civil Procedure section 382." (40 Cal.4th at p. 1092, fn. 9.)

Arias does not dispute that *Fireside Bank* speaks exactly to the issue at hand, but instead asserts that this was "mere dictum" because the statement was "unanalyzed" and was "not briefed by any party." (Reply Brief, pp. 4-5.) His argument is wholly without merit.

In contrast to the non-binding dictum in *Fletcher* which underlies Arias' ultimate position (*see* pp. 14-16 above), the *Fireside Bank* conclusion *was* essential to the Court's holding. The holding in *Fireside Bank* was that the trial court had properly certified a class. One of the defendant's arguments to vacate the class certification ruling – the same as the argument raised by the defendants in *Dean Witter Reynolds* and *Fletcher* – was that a class action was "not superior to other means of proceeding because this action could proceed

as a non-class representative action." (40 Cal.4th at p. 1092.) This argument was *rejected* in *Fireside Bank* based on the Court's determination that the action could *not* possibly proceed as a non-class representative action as the result of Proposition 64. The Court' conclusion thus unquestionably was a *holding,* not "mere dictum."

A decision does not have to be the subject of judicial analysis to constitute a holding. (*See, e.g. Moore v. Conliffe* (1994) 7 Cal.4th 634, 647 [court's explicit, but unanalyzed statement in prior case that "'an arbitration hearing falls within the scope of [the litigation] privilege because of its analogy to a judicial proceeding' . . . cannot properly be characterized as dictum, but rather was essential to the court's holding"].) And, a decision on a legal issue necessary to the disposition of the case is a holding whether or not it was briefed or argued by the parties. (*Compare* Government Code, § 68081 [mandatory rehearing sometimes required upon timely petition if briefing not afforded]; *People v. Alice* (2007) 41 Cal.4th 668, 674-680 [detailed consideration of issue, including holding that "the fact that a party does not address an issue, mode of analysis, or authority that is raised or fairly included within the issues raised does not implicate the protections of section 68081"].)[8]

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[8] Note that if briefing of an issue by the parties were a requirement for a determination to be a holding, rather than dictum, that would supply yet an additional reason for concluding that the statements in *Fletcher* relied upon in *Dean Witter Reyonolds* – upon which Arias so heavily relies, *see* pp.14-16 above – were dictum.

B. The Court of Appeal Correctly Determined that Proposition 64 Eliminated the Concept of Non-Class Representative Actions Under Section 17200

Even without regard to the holding of *Fireside Bank*, the Court of Appeal correctly ruled as to the intended effect of Proposition 64.[9]

Arias presents a laborious argument that Business & Professions Code section 17203, as amended by Proposition 64, unambiguously supports his position. This argument is clearly wrong for multiple reasons.

First, as the Court of Appeal correctly held, and the analysis at pp. 9-13 supports, section 17203 unambiguously compels just the *opposite* conclusion. "Because section 382 has historically been interpreted to authorize a representative action by an individual as a class action only, the plain meaning of . . . section 17203 requiring a claimant to comply with section 382 is clear: a representative action by an individual must meet the requirements of a class action." (Slip Opn., p. 11.)

Second, even if section 17203 did not unambiguously compel the result reached by the Court of Appeal, it would then unquestionably, at the very least, be ambiguous. The ambiguity would be both "patent" and "latent."

Patent ambiguity would exist because the express wording itself would be subject to differing reasonable interpretations. To say, as section

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[9] It appears that a similar legal issue as to the impact of Proposition 64 on UCL actions is presented by *Amalgamated Transit Union Local 1756 v. Superior Court,* No. S151615. The Second District in that case also correctly, and persuasively, applied Proposition 64.

17203 does, that a private plaintiff must "comply" with CCP § 382, at the very least, suggests that the plaintiff must proceed via class action processes. Indeed, this phraseology is virtually identical to the Court's expression in *Fireside Bank, supra,* 40 Cal.4th at pp. 1091-1092, that in order to certify a class, a trial court must "determine[] whether the criteria of Code of Civil Procedure section 382 are met." (*See also* p. 12 above.)

The conclusion that section 17203 is reasonably susceptible to the interpretation that class action processes are required is confirmed by the fact that *Fireside Bank* and a number of other decisions cited by Angelo Dairy (Answering Brief, pp. 11-14) have uniformly stated that this is the case. Even assuming that Arias could persuade this Court that all of these statements were "mere dictum," the fact that this has appeared to so many courts to be the fair and proper meaning of section 17203 would show beyond doubt that the statute, as amended by Proposition 64, is ambiguous.

Latent ambiguity otherwise would exist because, as Angelo Dairy explains (Answering Brief, pp. 17-18), "extrinsic evidence creates a necessity for interpretation or a choice among two or more possible meanings." (*Mosk v. Superior Court* (1979) 25 Cal.3d 474, 495, fn. 18; *see also, e.g., Stanton v. Panish* (1980) 28 Cal.3d 107, 115 [latent ambiguity exists where language "appears unambiguous on its face"].) The latent ambiguity is established by the content of the Proposition 64 voter pamphlet materials reviewed by the Court of Appeal (Slip Opn., p. 12) and by Angelo Dairy

(Answering Brief, pp. 9-10). (*Mosk, supra,* 25 Cal.3d at p. 495; *Kennedy Wholesale, Inc. v. State Bd. of Equalization* (1991) 53 Cal.3d 245, 249.)

Whether the ambiguity in section 17203 is patent, latent, or both, the statute is appropriately construed with reference to the materials presented to the voters who overwhelmingly approved Proposition 64. As the Court of Appeal correctly observed, "any ambiguity is conclusively resolved by the voter information guide to Proposition 64, which stated: 'This measure requires that unfair competition lawsuits initiated by any person, other than the Attorney General and local public prosecutors, on behalf of others, meet the additional requirements of class action lawsuits.'" (Slip Opn., p. 12, quoting Ballot Pamp., Gen. Elect. (Nov. 2, 2004) Analysis of Prop. 64, p. 39.) The Ballot Measure Summary for Proposition 64 similarly 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." (*Id.,* p. 6.) 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 prosecuted as class actions.

In interpreting section 17203, the Court also should apply the sage and well-established rule that it "must, whenever possible, construe a statute so as to preserve its constitutional validity." (*Kraus, supra,* 23 Cal.4th at p. 129 [applying such rule with respect to section 17200 suit]; *Korea Supply,*

supra, 29 Cal.4th at p. 1146][same].)[10] As *Bronco Wine* well explains, a concern reiterated by this Court in *Kraus* and *Korea Supply,* and as further confirmed by the serious Due Process implications of one-way intervention as described in *Fireside Bank* and other cases (*see* pp. 4-7 above), non-class representative litigation of the type urged by Arias creates serious constitutional issues. Any uncertainty in the meaning of amended section 17203 – and we submit there is none whatsoever – must be resolved to avoid reaching the "serious and doubtful constitutional questions" raised by the specter of non-class representative suits.

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[10] *See also, e.g., People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 509 ["[i]f a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable."]; *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1357 [statutory construction rule designed to "avoid serious constitutional questions" "permits us to avoid the difficult question whether the local rule and order violate petitioner's right to due process of law"].)

IV

UNDER PAGA, A PRIVATE PLAINTIFF WHO WISHES TO SEEK RELIEF ON BEHALF OF OTHER AGGRIEVED EMPLOYEES MUST DO SO IN ACCORDANCE WITH CLASS ACTION REQUIREMENTS

Arias advances PAGA claims and seeks to proceed by way of a non-class representative action under on behalf of unnamed Angelo Dairy employees, both current and former. The Court of Appeal ruled that Arias' approach was authorized by statute, placing heaviest reliance on its conclusion that Labor Code section 2699(a) "specifically states that an aggrieved employee may bring an action on behalf of other employees, '[n]otwithstanding any other provision of law. . .'" (Slip Opn., p. 15.)

The Court of Appeal decision clearly misinterpreted the "notwithstanding any other provision of law" phrase in section 2699(a), a limitation that is nowhere to be found in the other key PAGA provisions, sections 2699(f) and (g). The Court of Appeal also failed to consider relevant legislative history and failed to address the serious constitutional due process issues resulting from its statutory misinterpretation. A proper interpretation will result in the reversal of the Court of Appeal decision with respect to the PAGA issue.

A. Because PAGA Authorizes Stringent, Ever-Mounting Penalties for Major and Minor Labor Code Violations Alike, Which Gives Rise to Significant Constitutional Concerns, it Must Be Interpreted in a Careful, Restrictive Manner

1. An Overview of PAGA

Prior to enactment of PAGA, the Labor Code specified statutory penalties for certain statutory violations and contained no penalties for many other violations. Where statutory penalties were authorized, the Labor Code generally, but not always, placed enforcement of the penalties in the exclusive jurisdiction of the Labor Commissioner's prosecutorial enforcement authority. (*See, e.g.,* Labor Code, § 558 (providing penalties for overtime violations, subject to a Labor Commissioner administrative citation enforcement scheme); *Murphy v. Kenneth Cole Productions, Inc., supra,* 40 Cal.4th at p. 1106.)

PAGA had a dual purpose: First, to permit employees to act as a "private attorney general" to seek to enforce statutory penalties with respect to violations which previously were subject to the exclusive enforcement authority of the Labor Commissioner (Labor Code, § 2699(a))[11];

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[11] The previously-existing penalties previously enforceable solely by the Labor Commissioner vary. For example, an overtime violation is remedied by the penalty imposed by section 558(a): "($50) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages" and "[f]or each subsequent violation, one hundred dollars ($100) for each underpaid employee for each pay period for which the employee was underpaid."

and second, to impose uniform "per employee"/"per pay period" penalties for catch-all Labor Code violations of "one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation" where the Legislature had not authorized a penalty and to permit aggrieved employees to sue to collect such penalties. (§§ 2699(f) & (g).).

Given the "per employee"/"per pay period" nature of PAGA penalties, violations of even minor statutory provisions can give rise to potentially massive statutory penalties. For example, an employer with 1,500 employees and a weekly payroll, who is found to have committed a single ongoing violation of any nature, could be liable for more than $15,000,000 in penalties for just a one-year period (the statutory limitations period for penalty claims) under Arias' PAGA theory.[12] Employers of all sizes, if faced with claims of multiple violations, can be threatened with extinction by PAGA suits.

2. PAGA Gives Rise to Grave Constitutional Concerns

In considering PAGA, the Employer Amici ask the Court to be sensitive to the serious constitutional issues surrounding PAGA. Aside from the Due Process question implicated by Arias' position that he may

[12] It is unclear under PAGA if and when an on-going pay period to pay period violation becomes a "subsequent violation," thus triggering the higher per pay period penalty. Not surprisingly, plaintiffs and employers have differing interpretations.

prosecute a non-class representative suit, which we focus on in this brief, future PAGA cases will give rise to significant issues, among others, of excessive fines and/or improper delegation of executive branch authority.

This Court's leading case on the subject of excessive penalties is *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 728-731, where the lower courts imposed and upheld a statutory penalty of nearly $15,000,000 for free distribution of cigarettes to minors, and which this Court remanded for determination of the statute's constitutionality under both the excessive fine and due process clauses. Other important cases on the subject of excessive penalties include *Hale v. Morgan* (1978) 22 Cal.3d 388 and *Walsh v. Kirby* (1974) 13 Cal.3d 95, both discussed in *R.J. Reynolds.*

Under these cases, as well as relevant United States Supreme Court precedents, whether penalties are excessive turn, in large part, on "(1) the defendant's culpability; (2) the relationship between the harm and the penalty; (3) the penalties imposed in similar statutes; and (4) the defendant's ability to pay." (37 Cal.4th at p. 728.) An equally relevant consideration is whether the enforcing authority delayed bringing an enforcement action, thus permitting large fines to continue mounting. (*Id.* at p. 707; *Walsh v. Kirby, supra,* 13 Cal.3d at pp. 103-104 [agency's actions in permitting cumulation of penalties violated principles of due process].) As the Court explained in *Hale v. Morgan, supra,* 22 Cal.3d at p. 422*,* in the course of invalidating a statutory penalty, "[t]he exercise of a reasoned discretion is

replaced by an adding machine. The challenged statute mandates essentially that a single wrongful act by the landlord, if not corrected, will subject him to potentially infinite penalties."

Underscoring the concern of the potential for constitutionally excessive penalties, many courts have exercised great caution in granting class action status in cases where the plaintiff was suing for statutory penalties. (*See, e.g., London v. Wal-Mart Stores, Inc.* (11th Cir. 2003) 340 F.3d 1246, 1255, fn. 5 [approving cases where class treatment was denied on the ground that the defendant's liability "would be enormous and completely out of proportion to any harm suffered by the plaintiff"]; *Najarian v. Avis Rent A Car System* (C.D. Cal. 2007) 2007 WL 4682071 * 4-5 [citing extensive authority on point].)

PAGA creates constitutional concerns on all of these fronts. Essentially single, on-going violations accumulate penalties on a limitless basis, subject only to the statute of limitations, akin to the daily on-going fines condemned by *Hale v. Morgan*. The penalties can, and routinely are, "accumulated" by plaintiffs and their lawyers electing to sit back before undertaking enforcement action. Particularly when applied on a "per employee"/"per pay period" basis, the penalties can mount to vast amounts, often in circumstances that exceed by eons the employees' actual injuries, if any. And, the penalties are often totally irrational in many ways, including the fact (in true "no good deed goes unpunished" fashion) that employers who pay

their employees more frequently than legally required (e.g. weekly), incur far greater liability than do those who comply with the minimum requirements of law (e.g. twice per month).

In addition to giving rise to constitutionally excessive penalties, the PAGA scheme raises serious concerns of unconstitutional delegation of governmental authority. It is well settled in California that "the delegation of an unlimited power to [an administrative agency to] determine how great a penalty to impose would be an unlawful delegation of legislative discretion (citation omitted) and, certainly, the exercise of such an unlimited power through the device of unlimited cumulative penalties would likewise be unlawful." (*Walsh v. Kirby, supra,* 13 Cal.3d at p. 105.)

Delegation of vast executive power to private parties through the processes authorized by PAGA necessarily raises even greater constitutional concerns. (*See, e.g., Blumenthal v. Board of Medical Examiners* (1962) 57 Cal.2d 228, 235 [delegation of authority to private parties "must be accompanied by suitable safeguards to guide its use and to protect against its misuse"]; *People v. Municipal Court* (1972) 27 Cal.App.3d 193 [improper delegation of authority to private parties to initiate misdemeanor proceedings]; *see also, e.g., United States ex. rel. Stierli v. Shasta Services, Inc.* (E.D. Cal. 2006) 440 F. Supp. 2d 1108, 1112 [the California False Claims Act, which delegates enforcement authority to private parties, "passes muster under a

separation of powers analysis only if the government retains sufficient control over *qui tam* actions pursued in its name"].)

PAGA plaintiffs and their lawyers, whether prosecuting class actions or attempting to litigate "representative actions" without class action safeguards, have the unbridled power under PAGA to sit back and permit alleged violations to accumulate, thus permitting the penalties to multiple faster than rabbits. Furthermore, the principle of prosecutorial discretion which provides such a safeguard against unfair governmental action is totally eliminated when, as here, financially self-interested individuals and their lawyers are given the unrestricted right to sue. (*People v. Municipal Court, supra,* 27 Cal.App.3d at p. 204 ["the decision of when and against whom criminal proceedings are to be instituted is one to be made by the executive, to wit, the district attorney"].)[13]

Here, so long as the state agency opts not to take action on its own, the private party can proceed without any oversight or control whatever by the state agency. The law contains no provisions entitling LWDA to know even whether the PAGA lawsuit has been filed, or whether the aggrieved employee who wrote the initial complaint letter is even the actual

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[13] Proceedings to recover civil penalties, particularly with respect to violations of statutes which also provide for criminal penalties, are legally similar in legal function, thus giving rise to constitutional protections against imposition of fines. (*See* cases cited at pp. 26-27 & 31-32 above and below.)

plaintiff in the PAGA suit. PAGA does not allow the LWDA to supervise or influence the claims alleged, amended, settled, adjudicated, appealed or dismissed.

For all of these reasons, PAGA raises varying serious constitutional concerns of which the Court should be mindful when deciding this case.[14]

3. Penalty Statutes Must Be Interpreted Narrowly

It is a settled rule, in effect in California for over 100 years, that penalty enforcement provisions, whether criminal or civil, are construed by the courts in ways to maximize the defendant's right to due process and to minimize punishment. (*State Comp. Ins. Fund v. Workers'*

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[14] After its enactment, PAGA was amended to authorize judges to decrease the penalties imposed by PAGA, an amendment that was welcome but which does not come close to eliminating the serious potential for the award of constitutionally excessive penalties. (Labor Code, § 2699, subd. (e)(2)[authorizing court to award a "lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory"].)

We have concerns that even with this new provision, the potential for constitutionally excessive penalties under PAGA remains unacceptably high. One problem with PAGA, as amended, is that it seems to create a presumption that the maximum, mandatory penalty is the appropriate penalty and then provides constitutionally vague, discretionary grounds for decreasing the penalty which are not even co-extensive with the relevant constitutional criteria. A second problem is that PAGA does not state at what point in the process a court may reduce the penalty sought, or the process that might be utilized to do so prior to trial. To the extent that the penalty is not reduced (or considered for reduction) until after a trial, the very threat of the award of vastly excessive penalties will cause many employers to "play safe" and settle beforehand.

Comp. Appeals Bd.(Stuart) (1998) 18 Cal.4th 1209, 1215 [although the Labor Code's workers' compensation provisions are generally liberally construed to protect employees, application of its mandatory penalty provisions must be tempered to avoid "harsh or unreasonable results"]; *Hale v. Morgan, supra,* 22 Cal.3d at p. 405 ["[b]ecause the statute is penal, we adopt the narrowest construction of its penalty clause to which it is reasonably susceptible in the light of its legislative purpose"]; *Symmes v. Sierra Nevada Manufacturing Co.* (1915) 171 Cal. 427, 429 ["[s]tatutes imposing penalties are, for humane reasons, subjected to strict construction"]; *Savings and Loan Society v. McKoon* (1898) 120 Cal. 177, 179 **[**"[p]enalties are never favored by courts of law or equity"].)[15]

As the Court explained in *Walsh v. Department of Alcoholic Beverage Control* (1963) 59 Cal.2d 757, 764-765, "it is 'the policy of California (citation) to construe and apply penal statutes as favorably to the defendant as the language of the statute and the circumstances of its application may reasonably permit.' (Citation) These principles are not rendered inapplicable merely because the present action arose out of an administrative proceeding rather than a criminal prosecution; the statute to be

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[15] *See also, e.g., No Oil, Inc. v. Occidental Petroleum Corp.* (1975) 50 Cal.App.3d 8, 29 ["[c]ourts are loath to impose statutory penalties"]; *Waterman Convalescent Hosp. v. Jurupa Community Services Dist.* (1996) 53 Cal.App.4th 1550, 1556 ["[p]enalties and forfeitures are not favored by the courts"].

construed remains a penal one, and the foregoing principles apply even when the underlying action is civil in nature."

The interpretation of PAGA to be made in this case should be made with reference to this longstanding state policy.

B. The Interpretation of PAGA Adopted by the Court of Appeal Resulted From a Clear Misreading of the Statute and Led to a Highly Absurd Result

As indicated previously, PAGA has two primary features.

First, PAGA authorizes employees to sue for penalties that had been subject to the exclusive enforcement jurisdiction of the Labor Commissioner:

> "***Notwithstanding any other provision of law***, any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency . . .for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3." (Labor Code, §2699(a)[emphasis added].)

Second, PAGA established a catch-all penalty that applies to any Labor Code violation for which no civil penalty existed:

> "For all provisions of this code except those for which a civil penalty is specifically provided, there is established a civil penalty for violations of these provisions as follows (1) If, at the time of the alleged violation, the person does not employ one or more employees, the civil penalty is five hundred dollars ($500); (2) If, at the time of the

> alleged violation, the person employs one or more employees, the civil penalty is one hundred dollars for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation." (Labor Code, §2699(f).)

PAGA separately establishes a private right of action for this catch-all penalty:

> "Except as provided in Paragraph (2), an employee may recover the civil penalty in subdivision (f) in a civil action pursuant to the procedures specified in Section 2699.3 filed on behalf of himself or herself and other current or former employees against whom one or more of the violations was committed." (Labor Code, §2699(g).)

Without closely examining the statutory text, and entirely overlooking that certain of Arias' PAGA claims are governed by sections 2699(f) and (g) – and *not* section 2699(a) – the Court of Appeal seized on the lead-in language in section 2699(a). This lead-in phrase provides that "[n]otwithstanding any other provision of law," any Labor Code section which provides for civil penalties to be assessed and collected by the Labor Commissioner may be enforced in a lawsuit by an employee on behalf of himself or herself and other current or former employees.

The Court of Appeal concluded, without any analysis, that this lead-in language speaks to the nature of representative lawsuits authorized by PAGA and expressly exempts private plaintiffs from the class action requirements of section 382. Unfortunately, the Court of Appeal entirely

overlooked that Labor Code section 2699(g), which establishes a comparable private right of action for the catch-all PAGA penalty, does not include the phrase "notwithstanding any other provision of law" or any similar language. If the "notwithstanding any other provision of law" lead-in to section 2699(a) exempts such cases from section 382 and CRC class certification requirements, then Arias' interpretation means that an action under section 2699(a) need not proceed as a class action, while an action under section 2699(g) must be certified as a class action.[16]

Given that there is no sound reason whatever to believe that the Legislature intended to exempt some, but not many other PAGA claims from statutory class action requirements, the Court of Appeal's interpretation of section 2699(a)'s lead-in phrase would appear to be highly implausible, if not downright absurd.

The far more rational reading is that section 2699(a) authorizes private suits "notwithstanding" statutory provisions which state that exclusive enforcement jurisdiction lies in the hands of the Labor Commissioner. (*See Murphy, supra,* 40 Cal.4th at p. 1106.) That's all that phrase means.

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[16] For example, under Arias' argument, his claim for a PAGA penalty under Labor Code § 558 based on the failure to pay overtime would not be required to be pursued as a class action because that statute contains an express penalty to be enforced by the Labor Commissioner, but his claim invoking the PAGA "catch-all" penalty for a violation of Labor Code § 226.7 (for which no Labor Commissioner-enforced penalty exists), would have to be pursued as a class action.

Further, if the lead-in phrase of section 2699(a), "notwithstanding any other provision of law," speaks to the procedures for judicial enforcement of such penalties, its reach becomes almost limitless and the ensuing result even more absurd. As Arias explains, "The clear language of the statute creates a new type of action that can be brought 'notwithstanding' any other of provision of law, including provisions applicable to other types of representative actions." (Opening Brief, p. 24).

The effect of this language, as Angelo Dairy points out (Answering Brief, pp. 27-28), would be to render inapplicable large portions of the Code of Civil Procedure otherwise applicable to the conduct of litigation generally. It would exempt PAGA claims from, among other requirements, filing fees, the requirement that statutory claims be pled with particularity (*Bockrath v. Aldrich Chemical Co.* (1999) 21 Cal.4th 71, 78), discovery and motion procedures and trial processes.

Statutes, of course, are interpreted to avoid absurd results even when – as is *not* the case here – the statute appears at first blush to be unambiguous. (*Dept. of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 751 ["[t]he literal language of enactments may be disregarded to avoid absurd results and to fulfill the apparent intent of the framers"]; *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1335, fn. 7.) By the same token, whether or not the result would be considered "absurd," the Court has long adhered to the view that the dictionary meaning of words of an

isolated statutory term cannot be construed without regard to the statutory provisions "considered as a whole." (*Times Mirror, supra,* 53 Cal.3d at p. 1335, fn. 7; *see also, e.g., Lungren v. Deukmejian* (1987) 45 Cal.3d 727, 735.)

Yet another factor strongly militating in favor of reversing the Court of Appeal decision relating to PAGA is that it leads to the absurd result of permitting individuals to file non-class suits to collect massive penalties for Labor Code violations when the same individuals may seek compensatory remedies and/or injunctive relief for themselves for the underlying violations only if they satisfy class action requirements.

For example, assume that a plaintiff claims that a large number of managers in a statewide enterprise with many locations of varying size and operations should have been paid overtime because they allegedly did not meet the requirements for exempt status as an executive or administrative employee.

It could very well be that a class could never be certified because individual issues with respect to such claims predominate over the common issues. (*See, e.g., Dunbar v. Albertson's, Inc.* (2006) 141 Cal.App.4th 1422.) Or, for the same reason, claims that employees were permitted or required to work "off the clock" or were denied meal and/or rest break might not be appropriately certified as class issues. (*Bell v. Superior Court* (2007) 158 Cal.App.4th 147.) Yet, under Arias' theory of law, an employee claiming to be "aggrieved" in such circumstances would have the power under PAGA to obtain an adjudication with respect to the employer's entire California work

force for penalties for the alleged violations. This is true whether he or she even attempted to obtain class certification with respect to the work force or if class certification was denied because a class-wide determination of liability for Labor Code violations would be too unwieldy or unmanageable.

It simply makes no sense that a court can appropriately be asked to adjudicate claims for penalties for Labor Code violations when there would be no fair or appropriate available process for adjudicating whether there were violations in the first instance. The Legislature simply could not have intended this result. Rather, it is most reasonable to conclude that the Legislature assumed that whoever brought a suit for violations of the Labor Code would accompany that suit with a claim for penalties for the underlying violations.

C. The PAGA Legislative History Refutes Arias' Position

Even though his lawyers' organization, California Rural Legal Assistance ("CRLA"), was one of two co-sponsors of PAGA in 2003 (SB 796), Arias provides little insight as to the legislative history of the statute. In fact, the legislative history strongly refutes his position.

SB 796 was originally introduced on February 21, 2003, and was amended a number of times prior to enactment in September 12, 2003, and approval by Governor Davis on October12, 2003. (Request for Judicial Notice of Amicus Curiae Employers Group et al. ("EG RJN"), Exs. 1-11.)

An extensive report prepared for the Senate Judiciary Committee in preparation for an April 29, 2003 hearing explained that employers were concerned that SB 796 would encourage "vigilante" activity by private attorneys. The report countered that the bill "sponsors are mindful of the recent, well-publicized allegations of private plaintiff abuse of the UCL, and have attempted to craft a private right of action that will not be subject to such abuse." (EG RJN Ex. 13, p. 58.)

Of critical significance to our case was the following explanation of SB 796 set forth in the Senate Judiciary Committee report:

> "[A] private action under this bill would be brought by the employee 'on behalf himself or herself or others' – that is, fellow employees also harmed by the alleged violation – instead of 'on behalf of the general public,' as private suits are brought under the UCL. This would dispense with the issue of res judicata ('finality of the judgment') that is subject of some criticism of private UCL actions. An action on behalf of other aggrieved employees would be final as to those plaintiffs, and an employer would not have to be concerned with future suits on the same issues by someone else 'on behalf of the general public.'"
> (EG RJN Ex. 13, p. 59 [emphasis added].)

On the following page of the report, it was explained that the author had amended the bill "[t]o allay opponents' concerns that res judicata issues may arise if all known potential plaintiffs are not included in the private action." (EG RJN Ex. 13, p. 60.)

The necessary import of these statements is that suits "on behalf of others" would have to be maintained as class actions because non-class representative actions would not have any possible res judicata effect with respect to those individuals who were not named parties. Unnamed plaintiffs can only be "included" in the action if they are part of a certified class. (*See* pp. 4-6 & 10-11 above.)

Similarly, in a report prepared for the Assembly Judiciary Committee for its June 26, 2003 hearing, it was unequivocally stated: "Because there is no provision in the bill allowing for private prosecution on behalf of the general public, there is no issue regarding the lack of finality of judgments against employers, as there has been with respect to private UCL actions." (EG RJN Ex. 15, p. 75.) This again necessarily meant that class actions were intended as the device for representative litigation. There is no other way of explaining the report's assurance that judgments would have finality.

Reports provided to the two Judiciary Committees concerning the subject of res judicata are particularly relevant because those committees are the ones most interested in judicial procedures, and they are composed of lawyers who can best appreciate the niceties of the litigation process.

Consistent with these two detailed legislative reports intended for the respective Judiciary Committees of the Senate and Assembly is a worksheet that CRLA and SB 796 co-sponsor, California Labor Federation

("CLF"), submitted to the Assembly Judiciary Committee staff in July 2003. In that legislative document, in response to the question of what concerns would be raised by the opposition to the bill and state your response, CRLA and CLF stated that the "concern" would be that the bill would "lead to Section 17200-like abuse" and their "response," among other things, was that there would be ***no*** "***res judicata issues with this bill as there are with section 17200 suits***." (EG RJN Ex. 21, p. 109 [emphasis added].)

In addition to assuring employers that there would be no threat of repetitive litigation if they won in litigation, the explanation that PAGA judgments would have res judicata effect further shows that employers could rightfully assume that they would not face one lawsuit for penalties and thereafter litigation for compensatory relief for underlying Labor Code violations. (*See, e.g., Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 897 ["[a] clear and predictable res judicata doctrine promotes judicial economy. Under this doctrine, all claims based on the same cause of action must be decided in a single suit; if not brought initially, they may not be raised at a later date"].) By explaining that representative PAGA judgments have res judicata effect, the Legislature contemplated that compensatory relief and penalties for the same Labor Code violations would be litigated in the same lawsuit, thus necessarily a class action if brought on behalf of unnamed current and/or former employees.

The *only* part of the legislative history to which Arias and CRLA refer is a Senate Rules Committee Floor Analysis of September 10, 2003, which merely noted in passing that "opponents complain that aggrieved employees may file on behalf of a class, but are not required to fulfill class certification requirements." (Opening Brief, p. 28, fn. 8; *see* EG RJN Ex. 20, p. 105.) Arias fails to acknowledge, however, that the purported interpretation of a bill by an opponent is entitled to little, if any, weight. (*See, e.g., Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1072 ["We doubt that statements [of opponents] criticizing the bill help to discern the intent of the majority. . . Opponents' fears hardly prove what the majority wanted or intended"].)

Moreover, the cryptic Senate Floor analysis did not provide or explain the employers' exact complaint or concern. This comment was just a "cut and paste" from the first legislative report on SB 796, prepared for a hearing on April 9, 2003, with respect to an early version of the bill. (EG RJN Ex.12**,** p. 51.)

Our review of the legislative history materials reflects that the only employer comment about class actions was that of Amicus CELC's legislative counsel in a memo to the Senate Labor and Industrial Relations Committee, dated March 25, 2003. (EG RJN, Drapkin Dec., ¶ 6.) This memo characterized SB 796 as a bill which authorized "any employee, acting as a private attorney general, *apparently* without the need for class certification, to

sue on behalf of all employees to recover penalties specified in the Labor Code." (EG RJN Ex. 22**,** p. 111 [emphasis added].) This memo, which was qualified in its reading of an early version of the bill, preceded the *subsequent* Judiciary Committee reports and bill amendments, as well as the co-sponsors' worksheet which unequivocally were designed to "allay opponents' concerns" by stating that PAGA would not lead to section 17200-type abuses – i.e., because PAGA representative suits would have res judicata effect (and, therefore, PAGA representative suits necessarily would have to be class actions).[17]

Thus, the legislative history of SB 796 – which CRLA chose not to share with the Court of Appeal or this Court – strongly supports the conclusion that the Court of Appeal's interpretation of PAGA was incorrect.

D. Arias' Other Arguments are Without Merit

Having primarily if not exclusively relied on the "notwithstanding any other provision of law" argument in the trial court, in the Court of Appeal, and in his opening brief here, Arias seems to have abandoned his argument in the face of Angelo Dairy's strong counter-argument. Instead, as we read Arias' current position, he now contends that class action

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[17] Note that in a report prepared for a July 9, 2003 hearing before the Assembly Committee on Labor and Employment, it was explained that to avoid the potential abuses of the UCL, "amendments [had been] taken in the Senate to clarify the bill's intended scope." (EG RJN Ex. 16, p. 87.)

requirements are inapplicable simply because (1) neither section 2699(a) nor 2699(g) "refers to or requires class certification" and both refer to section 2699.3 procedures, (2) PAGA requires court approval of settlements, and (3) "PAGA plaintiffs stand in the shoes of the Labor Commissioner" and thus may act as a litigant to the same extent, and subject to the exact litigation processes, that the Labor Commissioner could do if she were the plaintiff in civil litigation. (Reply Brief, pp. 15 - 16.)[18] These arguments are not the least bit persuasive.

Sections 2699(a) and 2699(g): Innumerable statutes, whether in the Labor Code or in other codes, provide judicial rights of action without in any way expressly requiring adherence to class action requirements. (*See, e.g.,* Labor Code, § 1194 [overtime suits].) Just as those statutes must be read in conjunction with Code of Civil Procedure section 382 when a plaintiff attempts to sue on behalf of others, the same conclusion easily follows with respect to PAGA.

Arias points out that both section 2699(a) and (g) provide that suits are to be brought "pursuant to the procedures specified in Section 2699.3," as if these sections refer to litigation procedures to be utilized in PAGA suits in lieu of the CCP. However, section 2699.3 has virtually *nothing*

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[18] Note that it is not even correct to draw such an analogy to the Labor Commissioner's powers because she generally is not invested with the authority to sue for civil penalties for alleged Labor Code violations, but instead must pursue such penalties via administrative processes.

to do with litigation processes. Rather, that provision predominantly specifies pre-litigation administrative exhaustion administrative procedures which must be complied with as a prerequisite to bringing PAGA litigation. (*See also* Reply Brief, pp. 17-18.)

Ironically, the one litigation procedure specified in section 2699.3 refutes Arias' argument. Section 2699.3(a)(1)(C) specifies: "Notwithstanding any other provision of law, a plaintiff may as a matter of right amend an existing complaint to add a cause of action arising under this part at any time within 60 days of the time periods specified in this part." If Sections 2699(a) and (g) eliminated Code of Civil Procedure requirements on a wholesale basis, as Arias asserts, then there would be no need to provide a specific exception with regard to the amendment of pleadings. Section 2699.3(a)(1)(C) proves that the CCP, indeed, *is* applicable to PAGA litigation.

Arias makes the highly misleading argument that section 2699.3 contains a requirement that "certain" settlements resulting from PAGA litigation must be judicially approved. (Opening Brief, p. 24.) The provision to which he refers, however, section 2699.3(b)(4), speaks only to the limited number of cases where the PAGA suit is brought with respect to health and safety laws in Labor Code section 6300 et seq.[19]

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[19] Section 2699.3(b)(4) states in relevant part: "The superior court shall review and approve any proposed settlement of alleged violations of the provisions of Division 5 (commencing with Section 6300). . . ."

Approval of Settlements: The general requirement that trial courts approve settlements of PAGA claims is set forth in section 2699, subd. (l) ("l" as in lion). Contrary to Arias' weak contention, this in no way suggests that non-class representative suits are permitted by PAGA. The requirement applies to individual claims as well as to non-filed class claims, neither of which would be subject to court approval under the CCP section 382 case law and CRC 3.769(a). To the extent that the requirement is partially redundant, it is just that and no more.

Private Attorney General: This leaves us with Arias' contention that because a government entity, whether a public prosecutor or state administrative agency, is not bound to class action processes when it has the right to bring a civil suit, and the statute labels individual plaintiffs as "private attorney generals," employees can bring PAGA suits on behalf of others without complying with class action processes. Nothing in the law suggests that the Legislature intended this result.

In *People v. People Land Research Co., supra,* 20 Cal.3d 10, the Court drew a sharp distinction between lawsuits brought by public prosecutors and class actions brought by individuals. While generally adopting and approving the rule against one-way intervention with respect to private lawsuits, the Court held that consumer protection suits brought by public prosecutors were not the "equivalent of class actions brought by private

parties" and did not require the "same safeguards to protect a defendant from multiples suits and other harmful consequences." (20 Cal.3d at p. 17.)

Among other things, in reaching the conclusion it did, the Court relied on the fact that a public prosecutor is "ordinarily not a member of the class, his role as a protector of the public may be inconsistent with the welfare of the class so that he could not adequately protect their interest (citation) and the claims and defenses are not typical of the class." (*Id.* at p. 18.) The Court further reasoned that "the People's action is fundamentally for the benefit of the public even though founded upon the same violations of law which form the basis of the claim for restitution." (*Id.* at p. 19.)

Because the distinctions drawn by the Court in *Pacific Land Research Co.* have equal applicability to a suit filed by a private individual, whether acting as a victim, consumer or "private attorney general," it rightfully can be presumed that the Legislature did not intend to invest aggrieved employees with the full panoply of litigation rights and powers accorded to public prosecutors and administrative agencies.

This conclusion is bolstered by the fact that Business & Professions Code section 17200 et seq., to which Arias tries to draw analogies in his PAGA arguments (Opening Brief, p. 26), authorizes public prosecutors – *but not private parties*– to seek penalties under that statute. (*See, e.g., Korea Supply, supra,* 29 Cal.4th at p. 1144 ["[c]ivil penalties may be assessed in public unfair competition actions"].) It can be presumed that in enacting

PAGA, the Legislature did not intend to invest individuals with the right to take on broad prosecutorial powers to seek millions upon millions of dollars of civil penalties without the careful scrutiny required by class action processes.

Even with respect to pre-Proposition 64 section 17200 case law, involving suits brought by private individuals "on behalf of the general public," it was recognized that the "private attorney general" label did not bestow the full mantle of public prosecutorial powers upon private individuals or organizations.

For example, in *Net2Phone*, *Inc. v. Superior Court* (2003) 109 Cal.App.4th 583, the Second District, Division 5, held that a private 17200 plaintiff was subject to a forum selection clause in an underlying contract to which it was not a party – even though a public prosecutor pursuing the same 17200 claim would not have been – based on "the fundamentally different nature of an action brought by a prosecutor and privately pursued representative actions." (*Id.* at p. 587.) It further aptly explained: "Although the label 'private attorney general' is often used (or misused) to describe a private plaintiff in a UCL action, respondent court construed the term too literally. The filing of a UCL action by a private plaintiff does not confer on that plaintiff the stature of a prosecuting officer, and the fact that the plaintiff may be acting as a so-called private attorney general is irrelevant for purposes of the issue presented here." (*Id.*)

But, there is also a gigantic distinction between pre-Proposition 64 private party suits (as authorized by some Courts of Appeal) and PAGA litigation. Whereas pre-Proposition 64 private UCL suits were brought "on behalf of the general public," PAGA employs a much tighter standard, authorizing suit "on behalf of himself or herself and other current or former employees" (Labor Code, § 2699, subd. (a)) or "on behalf of himself or herself and other current or former employees against whom one or more of the alleged violations was committed" (subd. (g)). As the legislative history of SB 796 so graphically reflects, this difference in language was intentionally drawn to convince the Legislature that PAGA was designed to avoid the pitfalls and past abuses of section 17200 lawsuits and to foreclose the possibility that PAGA suits would leave employers subject to repetitive litigation. (*See* pp. 38-42 above.)

In light of this critical difference in statutory language, and the fact that the legislative history explained at length that PAGA was intended to be different than the UCL, the Court of Appeal was totally incorrect when it stated that "[t]he wording of the PAGA. . . is similar to the former wording of Business and Professions Code section 17204." (Slip Opn., p. 15.)

Thus, despite the fact that PAGA uses the "private attorney general" label, the Legislature did not contemplate that the use of that label would be used as a litigation device to strip defendants of their due process

rights against repetitive litigation. A PAGA plaintiff occupies a fundamentally different role than a public prosecutor or government agency.

Finally, it is noted that in a decision recognizing the practical realities of "private attorney general"-type litigation, the United States Supreme Court held that suits by individuals are fundamentally different than those brought by public officials for what technically might be the same legal violation. Specifically, in *Hughes Aircraft Co. v. Schumer* (1997) 520 U.S. 939, the high court unanimously held that a statutory amendment extending standing to individuals to pursue False Claims Act claims in circumstances where only the Government previously could have sued was not retroactive because functionally this new right was tantamount to a new cause of action. It aptly reasoned:

> "The extension of an FCA cause of action to private parties in circumstances where the action was previously foreclosed is not insignificant. As a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good. . . . *Qui tam* relators are thus less likely than is the Government to forgo an action arguably based on a mere technical noncompliance with reporting requirements that involved no harm to the public fisc. .. . In permitting actions by an expanded universe of plaintiffs with different incentives, the 1986 amendment essentially creates a new cause of action, not just an increased likelihood that an existing cause of action will be pursued." (520 U.S. at pp. 549-550.)

E. The Court Should Otherwise Interpret PAGA So as to Avoid Serious Constitutional Issues With Respect to Non-Class Representative Suits

As established at pp. 4-7 above, if a statute authorized private parties to bring non-class representative lawsuits for legal violations, it would give rise to serious issues whether the statute violates the Due Process clauses of the United States and California constitutions. In order to avoid the serious constitutional issues, if there were any doubt as to the proper statutory construction, the Court must adopt the more limited interpretation of the statute. (*See* pp. 21-22 above.)

Arias makes several unconvincing arguments that non-class representative suits do not raise constitutional issues. He contends that the rule against one-way intervention applied in *Fireside Bank* has no relevance to anything other than class actions because "PAGA does not have class certification requirements." (Reply Brief, p. 18.) Arias misses the point completely. One-way intervention is inappropriate in class actions because it leads to unfair possibilities of multiple litigation without affording res judicata effect to the judgment in the first suit. As the Employer Amici have demonstrated, based on *Bronco Wine* and other cases, the *exact concern* exists with respect to non-class representative suits. (*See* pp. 4-7 above.)

Arias also asserts that the requirements for pre-PAGA litigation exhaustion of administrative remedies in Labor Code section 2699.3 address employer due process concerns with the specter of non-class representative

litigation. (Reply Brief, pp. 17-18.) The fact that the Labor Workforce Development Agency is given a first opportunity to seek to penalize the employer does not in any way address the due process concerns inherent in permitting non-class action litigation under PAGA. Once the administrative process is exhausted (and it is invariably routinely exhausted in this context with no agency intervention), the state agency has no role whatsoever in the supervision or control of the ensuing litigation. Thus, the fact that the litigation may go forward provides employers no protection against the abuses of the unregulated litigation process.

Permitting non-class PAGA representative actions also poses a greater possibility of unconstitutional delegation of executive authority than a class action suit. The less oversight and control of the litigation process by any arm of Government, the greater possibility that delegating the State's power to prosecute statutory violators crosses the line between proper and improper delegation. (*See* pp. 25-30 above.)

Finally, the Court of Appeal's observation that an action for PAGA is "only for the recovery of a civil penalty" misses the boat entirely. (Slip Opn., p. 16.) The fact that PAGA permits private enforcement of ***penalties*** only increases the degree of constitutional concern that can only be avoided in this case by requiring that representative litigation be brought and certified as class actions. (*See* pp. 25-30 above.)

V

THE COURT SHOULD NOT ENDORSE UNFAIR AND POTENTIALLY UNCONSTITUTIONAL LITIGATION PROCEDURES TO ASSIST CRLA'S EFFORTS TO CIRCUMVENT FEDERAL FUNDING RESTRICTIONS

Arias is represented by CRLA, a legal aid organization devoted to representing agricultural industry employees. CRLA's efforts to persuade the Court to rule that all California employers, in all their varied industries and businesses, should be subjected to non-class representative suits for both UCL claims and PAGA penalties is borne out of an idiosyncratic restriction on its activities. Specifically, as acknowledged in Arias' writ petition, by virtue of 45 C.F.R. § 1617.3**, "**CRLA is prohibited from initiating or participating in a class action" and, therefore, if Arias is "forced to seek class certification to pursue his representative claims, CRLA will be forced to withdraw as counsel and will no longer be able to represent [Arias]." (Declaration of Blanca A. Bañuelos in Support of Petition for Writ of Mandate, ¶ 17.)

While the Employer Amici do not fully understand why handling non-class representative suits of the type advocated by CRLA would not violate the spirit and intent of section 1617.3 and, therefore, be equally violative of federal legal services funding restrictions, we otherwise urge the Court to decide the issues in this case without regard to CRLA's desire to be part of the 21st century California employment litigation gold rush. The Employer Amici urge the Court to address the issues here based on the

relevant, guiding statutory language, legislative history, case law and constitutional principles and not based on one organization's financial or professional interests.[20]

[20] In response to Angelo Dairy's similar explanation that "the true goal in this case is [Arias'] counsel's desire to avoid the [federal] funding restrictions," and without acknowledging the declaration his CRLA lawyer filed in support of the writ, Arias inconsistently says that this is an "unfounded and scurrilous accusation." (Reply Brief, p. 12.) Further, given the many California lawyers ready to jump on any class action band wagon, with their potentially huge financial rewards, there is no credibility to the contention that a ruling against Arias' position in this case will "undeniably preclude many low-wage Californians from seeking judicial remedies for wrongs they suffered."

CONCLUSION

For all of these many reasons, the Employer Amici urge the Court to *affirm* the decision of the Court of Appeal with respect to representative suits pursuant to Business & Professions Code section 17200 and to *reverse* the Court of Appeal decision with respect to PAGA litigation.

Dated: May 1, 2008

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CERTIFICATE OF COMPLIANCE

The within amicus brief is proportionately spaced, has a 13 font and contains 13,125 words. This representation is made in reliance on the "word count" feature in the Word Perfect word processing program utilized to prepare this brief.

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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and am not a party to this action; my business address is 11377 West Olympic Boulevard, Suite 900, Los Angeles, California 90064.

On May 1, 2008, I delivered the following documents described as **BRIEF OF AMICUS CURIAE IN SUPPORT OF POSITION OF REAL PARTIES IN INTEREST** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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The envelope was mailed with postage thereon fully prepaid.

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I declare under penalty of perjury that the above is true and correct and that this declaration was executed on May 1, 2008, at Los Angeles, California.

Alicia Estrella
Type or Print Name

Signature