

Case No. A153072

**COURT OF APPEAL OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION 1**

THOMAS R. SARGENT,

Plaintiff and Respondent,

v.

BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY
and CRAIG DAWSON,

Defendants and Appellants.

Appeal from Sonoma County Superior Court

Case No. SCV255399

Honorable Nancy Shaffer

**APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT
OF PLAINTIFF AND RESPONDENT**

**[PROPOSED] BRIEF OF *AMICUS CURIAE*
CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION**

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(Cal. Rules of Court, Rule 8.208)

The following application and brief are made by the California Employment Lawyers Association (CELA). This entity is a non-profit organization of attorneys and is not a party to this action. CELA knows of no entity or person that must be listed under (d)(1) or (2) of rule 8.208.

Date: April 8, 2019



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**APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*
CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION**

Pursuant to California Rule of Court 8.520(f), the California Employment Lawyers Association (“CELA”) respectfully requests leave to file the attached amicus curiae brief in support of plaintiff and respondent Thomas R. Sargent.

CELA is an organization of nearly 1,400 California attorneys whose members primarily represent employees in a wide range of employment cases, including whistleblower actions and Private Attorney General Act (“PAGA”) actions. CELA has a substantial interest in protecting the statutory rights of California workers and ensuring the vindication of the important public policies underlying California employment laws, including through robust enforcement of valuable workplace rights, such as those at issue in this case. CELA and its members have taken a leading role in protecting the rights of California workers, including by submitting amicus briefs and oral argument in such groundbreaking employment rights cases such as *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, *Gentry v. Superior Court* (2007) 42 Cal.4th 443, *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, and *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903.

CELA’s proposed amicus brief will assist the Court by demonstrating the deleterious impact of accepting defendant-petitioner’s arguments, which would hamper the Legislature’s intent with regards to enforcement of the California Occupational Safety

and Health Act (“Cal/OSHA”) and whistleblower protection laws, among other statutes. The proposed brief will present additional perspectives on the development of California’s PAGA to assist the Court with statutory construction, outlining the indispensability of one-way attorney fee provisions to the success of private enforcement mechanisms. As CELA’s proposed brief shows, the California Legislature enacted PAGA to vindicate Labor Code rights for all California employees, including public employees, in the face of insufficient resources dedicated to the Labor and Workforce Development Agency (“LWDA”) charged with enforcement. To accomplish this, the Legislature sought to provide incentives for employees to bring actions to enforce their own rights, on behalf of the State. PAGA’s fee-shifting provisions recognize the immense financial risk employees’ attorneys assume when taking on employment cases, seeking to make PAGA actions economically feasible to prosecute. Wronged employees cannot be deputized to enforce the Labor Code effectively without mitigating the inherent risks of litigation.

The Legislature did not carve public employees out from its Labor Code enforcement scheme in PAGA. If this Court were to rule in favor of the petitioner, attorney-members of CELA would not be financially able to represent employees in key whistleblowing actions against public employers, such as in this case. In turn, public employers would have license to commit serious employment violations, like the retaliation against Sargent for reporting serious public health and safety violations at a public university. CELA’s brief focuses not on the particular facts and circumstances of Sargent’s case, but rather upon the broader issues at stake.

Pursuant to Rule of Court 8.520(f)(4), CELA affirms that no party or counsel for a party to this appeal authored any part of this amicus brief. No person other than the amicus curiae, its members, and its counsel made any monetary contribution to the preparation or submission of this brief.

For the reasons stated above, CELA respectfully requests the Court's leave to file this amicus brief.

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BRIEF OF *AMICUS CURIAE*
CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION

I. INTRODUCTION

Defendant-Petitioner California State University (“CSU”) seeks to create two castes of employees: private employees who can feasibly enforce their Labor Code rights with PAGA, and public employees who cannot. In the absence of any statutory language or legislative history to this effect, CSU’s argument is baseless and dangerous. The Legislature clearly intended that PAGA broaden the enforcement rights of all employees, including public sector whistleblowers.

CELA’s attorney-members are, by design, a critical component of the State’s comprehensive enforcement scheme for deterring violations and enforcing compliance with the core workplace protections established by the California Labor Code. By deputizing aggrieved employees (with the assistance of their attorneys) to fill the enforcement gap resulting from inadequate agency staffing and funding, the Legislature in PAGA enabled the State to enforce the full range of workplace protections without a direct increase in staffing and funding. Criminalizing violations of the Labor Code had not achieved that purpose, because criminal enforcement actions were few and far between. Only by enacting PAGA in 2004 and expanding the use of quasi-*qui tam* actions to vindicate the Labor Code’s previously under-enforced protections, was the Legislature finally able to begin achieving its goal of effective workplace enforcement. In CSU’s view, some employees would be simply unable to stop employer abuses, including whistleblower retaliation of the sort Sargent endured and the health and safety violations

endured by 231 others, because their employers are public entities. Ultimately, the question before this Court is whether public employees can viably enforce their workplace rights or not, and whether public employers must respect the Labor Code’s basic, vital protections.

In addition to CSU’s misreading of PAGA’s plain text, which plaintiff-respondent Sargent adeptly debunks, CSU misreads PAGA’s legislative history in its attempt to write a broad public employer-exemption into the statute. The Legislature did not intend to limit PAGA’s application to enforcement in the so-called “underground economy,” or any particular sectors of the workforce, and instead intended PAGA to apply broadly to all California employees, including those in the public sector. The chief reason for PAGA’s empowerment of employees like government whistleblowers – inadequate government resources to prosecute all violations – remains as true today as when PAGA was first enacted, and the trial court was right in this case to hold CSU accountable for its retaliation and Cal/OSHA violations (and its aggressive, ill-fated defense thereafter) by implementing PAGA’s fee-shifting scheme.

II. ARGUMENT

A. The Legislature Intended PAGA to Provide a Private Right of Action Against Public Employers.

PAGA was enacted “with a stated goal of improving enforcement of existing Labor Code obligations” and “permitting an aggrieved employee to initiate a private civil action on behalf of . . . herself and other current or former employees to recover civil penalties” if the LWDA does not do so. (*Caliber Bodyworks, Inc. v. Superior Court*

(2005) 134 Cal.App.4th 365, 370.) PAGA applies to any violation of the Labor Code, including those brought by public employees. The legislative history of PAGA bears out this interpretation.

1. **PAGA was Enacted to Improve Labor Code Enforcement for All California Employees, Including Public Employees.**

a. The Legislature Intended PAGA to Apply to All Employees Rather than Only Certain Segments of the Workforce.

The Legislature sought to enact a scheme to enforce the Labor Code throughout California, among both private and public employers. The Assembly Republican Bill Analysis for SB 796 recognized PAGA’s applicability to public employers, noting that “this bill likely would result in major costs to state and local employers to defend lawsuits and pay increased penalties and attorneys’ fees.” (Request for Judicial Notice in Support of Amicus Curiae Brief in Support of Real Party in Interest [hereafter, “Amicus RFJN”], Exhibit A, Assembly Republican Bill Analysis (Sept. 2, 2003), SB 796, at p. 48 of bill analysis.) Further confirming that PAGA was understood to apply to all employees no matter their employer, the American Federation of State, County, and Municipal Employees and the California Independent Public Employees Legislative Council supported PAGA’s passage. (*E.g.*, Amicus RFJN Exhibit B, Amicus California Bill Analysis, S.B. 796 Assem., Jul. 9, 2003.¹)

Moreover, the Legislature expressly considered public sector employees in addressing state enforcement of the Labor Code for all California employees, noting that

¹ The applicable legislative history for Senate Bill 796 is available at: http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200320040SB796 (last visited Mar. 30, 2019).

“California’s enforcement agencies are responsible for protecting the legal rights of over 17 million California workers and regulating almost 800,000 private establishments, in addition to all the public sector workplaces in the state.” (Amicus RFJN Exhibit B, California Bill Analysis, S.B. 796 Assem., Jul. 9, 2003, at p. 3.) What is more, the Legislature’s use of the word “person” instead of employer—a drafting decision defendant-petitioner heavily emphasizes—was intended “to provide a more expansive and comprehensive applicability than the term ‘employer,’” rather than apply the limiting definition Defendant proposes. (Amicus RFJN Exhibit C, California Bill Analysis, S.B. 796 Sen., Apr. 9, 2003, at p. 5.)

That the Legislature expressed concern with rampant labor violations in the “underground economy,” *e.g.*, in the garment industry in Los Angeles, does not support the notion that PAGA was enacted exclusively to operate in the garment industry, or other “underground economy” industries – and no Court has limited PAGA’s application in this manner. (*See Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, 507 [affirming PAGA liability against Starbucks Corporation]; *Flowers v. Los Angeles Cty Metropolitan Trans. Auth.* (2015) 243 Cal.App.4th 66, 86 [reversing demurer of plaintiff’s PAGA claims against Los Angeles County Metropolitan Transportation Authority]; *Home Depot U.S.A., Inc. v. Superior Court* (2010) 191 Cal.App.4th 210, 215 [concluding that plaintiff stated a claim under PAGA against Home Depot]. *See also Lloyd v. Cty of Los Angeles* (2009) 172 Cal.App.4th 320, 332 [holding that plaintiff public employee was not required to exhaust internal administrative remedies before filing a PAGA action against public employer]; *Turner v. City and Cty of San Francisco*

(N.D. Cal. 2012) 892 F.Supp.2d 1188, 1202 [same].) Moreover, statutory language “is not to be regarded as modified by examples set forth in the legislative history. An example, after all, is just that: an illustration of a statute’s operation in practice. It is not . . . a definitive interpretation of a statute’s scope.” (*Pension Ben. Guar. Corp. v. LTV Corp.* (1990) 496 U.S. 633, 649.)

CSU references State Senator Joseph Dunn’s letter to Governor Gray Davis (Sept. 16, 2003) (“Dunn Letter”), for the notion that PAGA is limited to enforcement in the “underground economy,” but Sen. Dunn’s letter says nothing of the sort. (Amicus RFJN Exhibit D, Dunn Letter.) Instead, the letter focuses on enforcement of the Labor Code—reiterating that it is “meaningless if not enforced”—and explaining how private enforcement counteracts overwhelmed state enforcement due to the budget crisis. (*Id.*)

b. The Statutory Limits on PAGA Were Implemented in Consideration of the Unfair Competition Act.

Although PAGA’s drafters did not limit the scope of the legislation to particular sectors or industries, they did place limits on PAGA’s scope in light of the private attorney general provision in the Unfair Competition Act, Bus. & Prof. Code Section 17200. Opponents worried the two provisions were too similar, and too employee-friendly. (Amicus RFJN Exhibit B, California Bill Analysis, S.B. 796 Assem., Jul. 9, 2003, at p. 6-8.) For instance, as noted above, the Assembly Republican Bill Analysis worried that that attorneys’ fees paid by public employers would “result in major costs to state and local employers.” (Amicus RFJN, Assembly Republican Bill Analysis (Sept. 2, 2003), S.B. 796, at p. 48 of bill analysis). The Legislature ultimately rejected those

concerns, enacting legislation without first amending it to exempt public employers from the one-way attorney fee provision, or the applicability of any of the law's provisions.

PAGA's sponsors and supporters did not react to opponents' concerns by attempting to narrow PAGA's scope by industry, target the "underground economy," or provide exceptions for certain sectors of the workforce identified by PAGA skeptics as vulnerable to abuse. Instead, they strove to distinguish it from the Unfair Competition Act's private attorney general provision by: (1) allowing only aggrieved employees to bring PAGA actions, (2) requiring PAGA plaintiffs to sue "on behalf of himself or herself or others" rather than on behalf of the general public, (3) providing for relatively low civil penalties, and (4) preserving the LWDA's primacy over PAGA actions. (Amicus RFJN Exhibit E, California Bill Analysis, S.B. 796 Sen., Apr. 29, 2003, at p. 7-8.) Senator Dunn's letter to Governor Davis further expressed proponents' reassurances that SB 796 contained significant employer protections when compared with the Unfair Competition Act, noting in addition to the above protections that reviewing judges had discretion to adjust a disproportionate civil penalty. (Amicus RFJN Exhibit D, Dunn Letter, at p. 2.)

The Legislature addressed these concerns further after PAGA's enactment. The year after PAGA's enactment, the Legislature amended PAGA in response to concerns that PAGA could be abused "in the same manner in which [the Unfair Competition Act] has been abused." (Amicus RFJN Exhibit F, California Bill Analysis, S.B. 1809 Assem.,

Jul. 28, 2004, at p. 5.²) Consequently, PAGA was amended to include “specified procedural and administrative requirements that must be met prior to bringing a private action to recover civil penalties” and expanded judicial review of settlement agreements under PAGA. *Id.* Once again, there was no discussion of narrowing PAGA’s scope to particular sectors or employers.

c. The Legislature Enacted PAGA Due to Inadequate State Agency Enforcement of the Labor Code Across All Sectors of the Workforce.

“[I]n light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection.” (*Ramirez v. Yosemite Water Co., Inc.* (1999) 20 Cal.4th 785, 796 [internal quotations and citations omitted].) Only by interpreting the Labor Code’s protections narrowly does the CSU seek to exempt itself from this enforcement scheme. This interpretation does not comport with the scope of the Labor Code.

Despite the breadth of the Labor Code’s protections, they are meaningless without a robust enforcement mechanism. Enforcement mechanisms were vastly insufficient to combat Labor Code violations in the years preceding PAGA’s enactment in 2003. Although Governor Gray Davis’s administration had been providing additional funding to labor enforcement divisions since 1998, state agencies lacked sufficient resources to enforce the Labor Code. (Amicus RFJN Exhibit E, California Bill Analysis, S.B. 796

² The applicable legislative history regarding the 2004 amendment to PAGA is available at: http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200320040SB1809 (last visited Mar. 31, 2019).

Sen., Apr. 29, 2003.) Noncompliance rates remained inordinately high in many industries. (See Amicus RFJN Exhibit G, Bar-Cohen, Limor & Deana Milam Carillo, *Labor Law Enforcement in California, 1970-2000*, THE STATE OF CALIFORNIA LABOR (2002) at 136.³)

Against this backdrop, in 2003 the Legislature sought to address underenforcement of the Labor Code. The Legislature found: “[S]taffing levels for state labor law enforcement agencies have, in general, declined over the last decade and are likely to fail to keep up with the growth of the labor market in the future.” (Amicus RFJN Exhibit C, California Bill Analysis, S.B. 796 Sen., Apr. 9, 2003, at p. 4.) PAGA’s sponsors further argued that “private actions to enforce the Labor Code are needed because LWDA simply does not have the resources to pursue all of the labor violations occurring in the garment industry, agriculture, and other industries. The bill would authorize[] civil penalties for any Labor Code violation currently lacking a specific penalty provision and authorizes aggrieved employees to bring private civil actions against employers.” (*Home Depot*, 191 Cal.App.4th at 223-24 [citing legislative history] [internal citations omitted]. See also *Iskanian v. CLS Trans. Los Angeles, LLC* (2014) 59 Cal.4th at 378–79 [citing legislative history, stating “resources dedicated to labor law enforcement have not kept pace with the growth of the economy in California.”].)

Accordingly, the Legislature enacted PAGA, including a one-way fee shifting provision, to encourage individual employees to enforce the Labor Code on the state’s behalf. (Amicus RFJN Exhibit E, California Bill Analysis, S.B. 796 Sen., Apr. 29, 2003,

³ Available at: <https://escholarship.org/uc/item/59c025gh> (last visited Apr. 4, 2019).

at p. 2 [“This bill would propose to augment to the LWDA’s civil enforcement efforts by allowing employees to sue employers for civil penalties for labor law violations, and to collect attorneys’ fees and a portion for the penalties upon prevailing in these actions”].) Despite opponents’ objections to the one-way attorney fee provision, it was included in the enacted legislation in order to promote PAGA’s broad enforcement goals. (Amicus RFJN Exhibit H, California Bill Analysis, S.B. 796 Assem., Jul. 16, 2003.) In *Arias v. Superior Court* (2009) 46 Cal.4th 969, 929, the Supreme Court explained:

The Legislature declared that adequate financing of labor law enforcement was necessary to achieve maximum compliance with state labor laws, that staffing levels for labor law enforcement agencies had declined and were unlikely to keep pace with the future growth of the labor market, and that it was therefore in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations (*Id.*)

(*See also, e.g.*, discussing PAGA’s purpose, *Carrington*, 30 Cal.App.5th at 519 [“To enhance the enforcement of the labor laws, the Legislature enacted PAGA in 2003.”] [internal quotation and citation omitted]; *Huff v. Securitas Security Servs. USA, Inc.* (2018) 23 Cal.App.5th 745, 752-53, 756, 761 [“the Legislature . . . enacted PAGA as a way to encourage private parties to pursue Labor Code violations, relieving pressure on overburdened state agencies and achieving maximum compliance with labor laws.”]; *Raines v. Coastal Pacific Food Dist. Inc.* (2018) 23 Cal.App.5th 667, 673-74 [“The Legislature adopted PAGA to address the shortage of government resources to enforce labor laws. The solution was to permit an aggrieved employee to bring an action personally and on behalf of other current or former employees to recover civil penalties.”]; *Flowers*, 243 Cal.App.4th at 86 [“To enhance the enforcement of the labor

laws, the Legislature enacted the Labor Code Private Attorneys General Act.”] [internal quotations, alterations, and citation omitted]; *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 499 [“The PAGA attempted to remedy the understaffing of California’s labor law enforcement agencies by granting employees the authority to bring civil actions against their employers for Labor Code violations.”] [internal quotations and citations omitted].) PAGA was intended to remedy underenforcement of the Labor Code as to all employees, including public employees, not merely to stave off the so-called “underground economy.”

Enforcement agency resources continued to stagnate after PAGA’s enactment. In 2004, the Legislature lamented that “the budget picture is even worse” for the LWDA, and noted that it was “still good policy” to “allow[] employees to seek redress directly when the state has not done so on their behalf.” (Amicus RFJN Exhibit I, California Bill Analysis, S.B. 1809 Sen., Apr. 28, 2004, at p. 2). Although the Assembly Committee on Appropriations sought to amend PAGA in employers’ favor by requiring prospective plaintiffs to exhaust with the LWDA before bringing a PAGA action, the Committee did not consider revising the one-way attorney fee provision or limiting PAGA’s coverage to certain types of employers. (Amicus RFJN Exhibit F, California Bill Analysis, S.B. 1809 Assem., Jul. 28, 2004.)

Today, the state’s enforcement framework leaves thousands of cases uninspected and uninvestigated. (Amicus RFJN Exhibit J, Labor Commissioner, *2016–2017 Fiscal Year Report on the Effectiveness of the Bureau of Field Enforcement*, CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS,

https://www.dir.ca.gov/dlse/BOFE_LegReport2017.pdf [last visited Apr. 5, 2019] [“2017 BOFE Report”], at p. 3.) Labor Commissioner Julie Su acknowledges, “the Division has performed fewer inspections overall compared to the years before this administration.” *Id.* According to the Workload History of the DIR Budget Change Proposal for fiscal year 2017 submitted to the Legislature, the LWDA is still tremendously hampered in its ability to investigate and prosecute Labor Code violations. (See Amicus RFJN Exhibit K, FY2016-2017 Budget Change Proposal, Budget Request Names 7350-003-BCP-DP-2016-GB & 0559-003-BCP-DP-2016-GB, DIR (Jan. 7, 2016), at p. 2, 4.) Consequently, the LWDA recognizes and depends on private enforcement of the Labor Code. In 2015, the LWDA indicated that “neither the LWDA nor [Department of Industrial Relations] has ever had the staffing and resources to effectively review notices, or choose cases for further investigation,” and as a result, “review and investigations of PAGA claims are quite rare, and usually occur only because a case has been called to the LWDA’s attention through some other means besides the PAGA notice.” (*Id.* at p. 1.)

B. One-Way Fee Shifting is Essential to Labor Code Enforcement under PAGA.

PAGA’s basic enforcement mechanism rests on the common-sense notion that a one-way fee shifting scheme encourages broader enforcement of rights by enabling workers to retain competent counsel to prosecute their claims. Absent this fee-shifting, few if any workers could afford legal assistance, which typically runs into the hundreds of thousands or (as in Sargent’s case) millions of dollars for a vigorously-litigated case.

Public sector whistleblowers need representation as much as private sector employees with Labor Code claims.

1. **PAGA’s One-Way Fee Shifting Provision Enables Attorneys to Represent Public and Private Sector Employees Alleging Workplace Violations.**

The drafters of PAGA recognized the necessity of fee shifting to accomplish its enforcement goals. The Legislature considered, and accepted, the sponsors’ argument that “since the UCL [unfair competition law] does not award attorney’s fees to a prevailing plaintiff, few aggrieved employees can afford to bring an action to enjoin the violations.” (Amicus RFJN Exhibit B, California Bill Analysis, S.B. 796 Assem., Jul. 9, 2003, at p. 6-7.) Accordingly, the one-way attorney fee provision was an essential component to encourage broader enforcement of the Labor Code. (*Id.*)

Private enforcement of the Labor Code depends on the results of a cost-benefit analysis conducted by prospective plaintiffs and their would-be attorneys before filing a case. Simply put, employees will not come forward to enforce their Labor Code rights if the case is not worth the risk. The California Supreme Court discussed this kind of analysis extensively in *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 458-62, *abrogated on other grounds*. In addressing the attorney fee provision in California Labor Code Section 1194, the *Gentry* court observed that “employees and their attorneys must weigh the typically modest recovery, and the typically modest means of the employees bringing overtime lawsuits, with the risk of not prevailing and being saddled with the substantial costs of paying their own attorneys.” (*Id.* at 458-59.) One-way fee shifting provides a feasible avenue for attorneys to bring cases on a contingency basis to

“vindicat[e] the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost.” (*Deposit Guaranty Nat’l Bank, Jackson, Miss. v. Roper* (1980) 445 U.S. 326, 338. *See Vasquez v. State of California* (2008) 45 Cal.4th 243, 250 [“The [private attorney general] doctrine rests on the recognition that privately initiated lawsuits, while often essential to effectuate important public policies, will as a practical matter frequently be infeasible without some mechanism authorizing courts to award fees.”]; *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 565 [same]; *EnPalm, LLC v. Teitler Family Tr.* (2008) 162 Cal.App.4th 770, 788 [Cooper, J., dissenting] [same]; *Lealao v. Beneficial Cal., Inc.* (2000) 82 Cal.App.4th 19, 47 [“Given the unique reliance of our legal system on private litigants to enforce substantive provisions of law through class and derivative actions, attorneys providing the essential enforcement services must be provided incentives . . . , as it will otherwise be economic for defendants to increase injurious behavior.”].)

The same cost-benefit analysis applies equally to public and private employees seeking to enforce their Labor Code rights. Plaintiff-respondent and counsel have expended extraordinary effort to litigate this matter despite the significant risk of receiving no compensation of any kind, should the litigation have ended unsuccessfully. Attorneys who pursue whistleblower protection litigation and other Labor Code litigation forego the opportunity to work on other types of cases with the time spent on these enforcement actions. The California Supreme Court observed, “Most lawyers . . . do seem to consider the prospects of success and the fee recoverable before adding to their

crowded calendars a case in which payment is contingent.” (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1133.)

Moreover, in order to pursue contingency fee matters, attorneys “must use savings or incur debt to keep their offices afloat and their families fed” throughout litigation, which can prove substantially lengthy, as in this case. (*Horsford v. Bd. of Trs. Of Cal. State Univ.* (2005) 132 Cal.App.4th 359, 400. [“[A]ny compensation has been deferred . . . from the time an hourly fee attorney would be collecting fees from his or her client”].) Should attorneys’ fee awards become unavailable to public employees, courageous whistleblowers like Plaintiff Sargent and other public employees whose Labor Code rights having been violated will not be able to prosecute their claims, and private enforcement of public employers’ Labor Code violations will cease. As the Court of Appeal recognized in another case involving whistleblower claims centered on employment violations by CSU, “a failure to fully compensate for the enormous risk in bringing even a wholly meritorious case would effectively immunize large or politically powerful defendants from being held to answer for constitutional [or statutory] deprivations, resulting in harm to the public.” (*Id.* at 400.)

These factors determine the ability of attorneys, such as CELA’s members, to represent employees in both the public and private sector. Precluding attorneys from collecting fees in whistleblower and other employment cases against public employers would “incentivize governmental entities to negligently or deliberately run up a claimant’s attorneys’ fees, without concern for consequences.” (*Rogel v. Lynwood Redevelopment Agency* (2011) 194 Cal.App.4th 1319, 1332.) One-way fee shifting is

vital to support the public policy behind PAGA, as the Legislature recognized when enacting it. Without it, the future of private enforcement against public employers is doubtful at best.

2. **PAGA’s One-Way Fee Shifting Provision Allows Public and Private Sector Employees, Including Government Whistleblowers, to Protect Themselves Against Workplace Abuses.**

Employees frequently fall prey to illegal employment practices, including wage and hour violations, workplace discrimination, and retaliation. (*See, e.g.*, Amicus RFJN Exhibit J, 2016 BOFE Report, at p. 1.) Most employees victimized by such practices cannot afford to vindicate their rights in court. The cost of litigating workplace claims when attorneys’ fees generally exceed the claim’s value is often prohibitive (Sargent being a striking example), regardless of the strength of the claim. This is especially true with claims against government entities, whose attorneys are more likely to pursue aggressive litigation (since agencies may not be receiving monthly bills for their attorneys’ fees and costs, often) in CELA’s member-attorneys’ experience.

There are several reasons why employees may not speak out against government wrongdoing, or bring administrative or legal action to enforce other employment rights. Not least of these is the fear of retaliation from their employer. In the absence of strong anti-retaliation protections, and the ability to enforce them with competent counsel, the brunt of the personal and financial costs of reporting government wrongdoing fall squarely on the reporting employee, while any benefits are outsourced to the public. (Richard E. Moberly, *Protecting Whistleblowers by Contract*, 79 COL. L. REV. 975, 980-

81 (2008) [“Moberly”].⁴) The public benefits of government whistleblowing are considerable: increased safety, improved public health, more efficient law enforcement, more efficient use of taxpayer funds, and more reliable and trustworthy legal institutions, to name a few. (See Moberly at 980-81; Harold J. Kent, *Explaining One-Way Fee Shifting*, 79 VA. L. REV. 2039, 2045-46, 2049-50 (1993).⁵)

Retaliation against public employee whistleblowers often includes official reprimand, demotion, or termination, and a corresponding negative impact on their health and personal lives. (See Moberly at 980-81; Roberta Ann Johnson, *Whistleblowing and the Police*, 1 RUTG. UNIV. J. OF L. AND URBAN POLICY, 74 (2005);⁶ Kate Kenny, Marianna Fotaki, & Stacey Scriver, *Mental Health as a Weapon: Whistleblower Retaliation and Normative Violence*, JOURNAL OF BUSINESS ETHICS, Mar. 29, 2018, at 7-12.⁷) Statutory protections for whistleblowers attempt to counterbalance these inherent risks so that whistleblowers, including public employees, can continue to fill this vital public need. (See Moberly at 981.)

Unfortunately, state enforcement agencies provide little comfort to government whistleblowers. Whistleblower protection statutes are chronically under-enforced by state agencies, thereby hampering law enforcement efforts and allowing public employers to continue to violate laws designed to protect the public interest. (E.g., Mary Kreiner Ramirez, *Blowing the Whistle on Whistleblower Protection: A Tale of Reform Versus*

⁴ Available at: <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1027&context=lawfacpub> (last visited Apr. 5, 2019).

⁵ Available at: https://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?referer=https://scholar.google.com/&httpsredir=1&article=1323&context=fac_schol (last visited Apr. 5, 2019)

⁶ Available at: <https://www.bmartin.cc/dissent/documents/Johnson.pdf> (last visited Apr. 5, 2019).

⁷ Available at: <https://link.springer.com/content/pdf/10.1007%2Fs10551-018-3868-4.pdf> (last visited Apr. 2, 2019)

Power, 76 UNIV. CINCINNATI L. REV. 183, 203 (2007).⁸) In the absence of enforcement with teeth, the costs of reporting wrongdoing are too great, and employees will remain silent. (See Moberly at 987; John D. Feerick, *Toward a Model Whistleblowing Law*, 19 FORDHAM URBAN L. J., 585, 593 (1992).⁹)

One-way fee shifting provisions, such as PAGA, alleviate this concern. (See John Leubsdorf, *Does the American Rule Promote Access to Justice? Was That Why it was Adopted?*, 67 DUKE LAW J. 257, 270 (2019).¹⁰) Fee shifting is especially crucial in encouraging claimants to come forward with strong claims that may nonetheless not result in an award substantial enough to justify prosecution based solely upon a contingency fee arrangement. (*Id.* at 2050.) Vitally, one-way fee shifting helps employees with strong claims find representation, even where the damages are limited, making it feasible for attorneys to take strong but limited-dollar-value whistleblower retaliation and other public employment cases. (*Id.* at 2049.)

The California Supreme Court recognized that “[m]ost employers in employment discrimination suits can more readily afford a protracted discrimination suit than their employees. The mandatory award of attorney’s fees encourages aggrieved employees to pursue meritorious but expensive claims, some . . . involving lost pay awards which are small compared to the plaintiff’s attorney’s fees.” (*Jones v. Tracy Sch. Dist.* (1980) 27 Cal.3d 99, 111.) The same is true in whistleblower suits such as this one, as well as suits

⁸ Available at: http://washburnlaw.edu/profiles/faculty/activity/_fulltext/ramirez-mary-2007-76universitycincinnatiawreview183.pdf (last visited Apr. 5, 2019).

⁹ Available at: <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1551&context=ulj> (last visited Apr. 5, 2019).

¹⁰ Available at: https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1065&context=dlj_online (last visited Apr. 5, 2019).

alleging other employment violations. (*Cf.* Robert V. Percival & Gregory Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 LAW & CONTEMP. PROBS. 233, 239-40 (1984)¹¹ [discussing the importance of fee-shifting in federal statutory enforcement schemes].)


III. CONCLUSION

For the foregoing reasons, the *Sargent* decision below should be affirmed.

Dated: April 8, 2019

Respectfully submitted,
BRYAN SCHWARTZ LAW

By: _____



Bryan J. Schwartz
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¹¹ Available at: <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3755&context=lcp> (last visited Apr. 5, 2019).

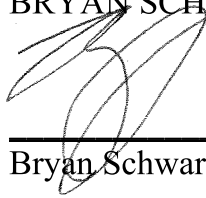
CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.520(c), and in reliance upon the word count feature of the Microsoft Word processing program used, I certify that the foregoing Amicus Curiae Brief, contains 5,031 words, exclusive of those materials not required to be counted under Rule 8.504(d)(3).

Dated: April 8, 2019

Respectfully submitted,

BRYAN SCHWARTZ LAW



Bryan Schwartz

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**COURT OF APPEAL OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION 1**

PROOF OF SERVICE

Case: SARGENT v. THE BOARD OF TRUSTEES OF THE CALIFORNIA
STATE UNIVERSITY and CRAIG DAWSON
Court of Appeal Case No. A153072
Sonoma County Superior Court, Case No. SCV255399

I am over the age of 18 years and not a party to the within entitled action; my business address is 180 Grand Avenue, Suite 1380, Oakland, California 94612. On April 8, 2019 I served the foregoing documents described as:

**APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE
CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION**

**[PROPOSED] BRIEF OF *AMICUS CURIAE* CALIFORNIA EMPLOYMENT
LAWYERS ASSOCIATION**

on the interested parties to said action by the following means:

Where service by **Electronic Service** is indicated below, based on a court order or an agreement of the Parties to accept service by electronic mail or electronic transmission via the Court's Electronic Filing System (EFS) operated by Image Soft TrueFiling (TrueFiling), I provided the document(s) listed above electronically on the TrueFiling website to the Parties on the Service List maintained on the TrueFiling website for this case, or on the below Service List. TrueFiling is the e-service provider designated in this case. Participants in the case who are not registered TrueFiling users will be served by U.S. mail or by other means permitted by the Court rules.

Where service by **U.S. Mail** is indicated below, I placed a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, for collection and mailing on that date following ordinary business practices, in the United States Mail at the offices of Bryan Schwartz Law, Oakland, California, address as shown above. I am readily familiar with this business's practice for collection and processing of correspondence for mailing with the U.S. Postal Service, and in the ordinary course of business correspondence would be deposited with the U.S. Postal Service the same day it was placed for collection and processing.

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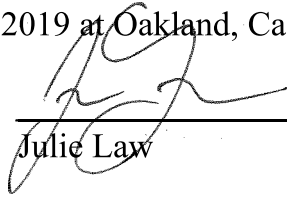
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I declare under penalty of perjury that the foregoing is true and correct, and that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. Executed on April 8, 2019 at Oakland, California.



Julie Law

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