S275880

Case No. _____

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

CALIFORNIA BUSINESS & INDUSTRIAL ALLIANCE,
Petitioner

v.

XAVIER BECERRA, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Respondent

Review of a decision by the Court of Appeal
Fourth Appellate District, Division Three, Case No. G059561
Orange County Superior Court
Case No. 30-2018-01035180-cu-jr-cxc

PETITION FOR REVIEW OF PUBLISHED DECISION

Richard J. Frey (State Bar No. 174120)
Robert H. Pepple (State Bar No. 295426)
David M. Prager (State Bar No. 274796)
Brock J. Seraphin (State Bar No. 307041)
Nixon Peabody LLP
300 South Grand Avenue, Suite 4100
Los Angeles, CA 90071
Phone: 213-629-6000 Fax: 213-629-6001
Attorneys for Petitioner
CALIFORNIA BUSINESS & INDUSTRIAL ALLIANCE

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ISSUES PRESENTED FOR REVIEW

Petitioner, California Business & Industrial Alliance (CABIA), filed suit against Respondent, the State's Attorney General ("Respondent"), for injunctive and declaratory relief, alleging, in pertinent part, that California's Private Attorneys General Act (PAGA) violates the separation of powers doctrine of the California Constitution by usurping the executive branch's core constitutional law enforcement powers.

In a published decision, the court of appeal upheld the trial court's order sustaining Respondent's demurrer to CABIA's Complaint. Both the trial court and appellate court found themselves bound by *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 ("*Iskanian*"), despite acknowledging that CABIA's challenge is based on legal theories and factual allegations *Iskanian* never considered. The court of appeal summarily denied CABIA's subsequent petition for rehearing.

CABIA's Petition presents the following issues for review:

(1) Does *Iskanian* foreclose a separation of powers challenge to PAGA based on legislative intrusions on executive power, even though *Iskanian* did not consider the standard applicable to the impairment of executive branch functions articulated in *Marine Forests Society v. California Coastal Com*. (2005) 36 Cal.4th 1, 15 ("*Marine Forests*")?

(2) If CABIA's allegation that the Labor and Workforce Development Agency (LWDA) does not have actual notice of ninety-nine (99%) of the PAGA notices it receives before the executive branch's law enforcement authority is assigned to PAGA

litigants is accepted as true, as it must be on demurrer, has CABIA stated a claim that PAGA impermissibly interferes with the executive branch's core law enforcement powers?

NECESSITY OF REVIEW

The important issues presented by this case come before this Court after the court of appeal issued a published decision with statewide impact.

CABIA's Complaint alleges that in the eighteen years since PAGA's enactment and the eight years since this Court decided *Iskanian*, PAGA's perfunctory notice provisions have predictably yielded a situation in which the State's labor law enforcement agencies do not "retain primacy over private enforcement efforts." (See *Arias v. Superior Ct.* (2009), 46 Cal.4th 969, 980, citing Stats. 2003, ch. 906, § 1.) As CABIA alleges and the LWDA admits, "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," which CABIA alleges occurs in "less than 1% of all PAGA cases." (Department of Industrial Relations (DIR) 2016/2017 Budget Request Summary.) Consequently, PAGA assigns law enforcement powers to private citizens without the executive branch ever receiving actual notice of the labor law violations at issue. The executive branch's lack of actual notice is particularly concerning because PAGA does not provide the executive branch authority to exercise control over a PAGA action once litigation commences and the State is bound by any resulting judgment or settlement. (See *Arias*, *supra*, 46 Cal.4th at 986; Lab. Code, § 2699.3, subd. (a)(2).)

In affirming the trial court's sustaining of Respondent's demurrer without leave to amend, the court of appeal determined that it was bound by this Court's statement in *Iskanian* that PAGA does not impermissibly infringe on the judiciary's powers (see *Iskanian, supra,* 59 Cal.4th at 389) even though *Iskanian* never analyzed whether PAGA, "as a whole, viewed from a realistic and practical perspective, operate[s] to defeat or materially impair the *executive branch's* exercise of its constitutional functions." (*Marine Forests, supra*, 36 Cal.4th 1, 15, emphasis added.) Because *Iskanian* did not consider CABIA's specific challenge or apply the standard in *Marine Forests*, review is necessary to clarify the limited scope of *Iskanian's* holding.

The appellate court also determined that PAGA does not violate the separation of powers clause in the California Constitution even though CABIA alleges – and the LWDA admits – that in ninety-nine percent (99%) of PAGA actions, the State's law enforcement powers are permanently and fully assigned to private citizens before the executive branch has actual notice of the allegations in a PAGA notice. (See *Magadia v. Wal-Mart Associates, Inc.* (9th Cir. 2021) 999 F.3d 668 ("*Wal-Mart*") ["PAGA represents a permanent, full assignment of California's interest to the aggrieved employee."].) Thus, this Court should grant review to clarify whether the LWDA's lack of actual notice is relevant as to whether, "from a realistic and practical perspective, [PAGA] operate[s] to defeat or materially impair the executive branch's exercise of its constitutional functions." (*Marine Forests, supra*, 36 Cal.4th at 15.) This unsettled question is critical for employers,

employees, and the State's executive branch (and more specifically, California's labor law enforcement agencies).

For these reasons and the reasons below, this Court should grant review to advise the people of the State of California whether, for separation of powers purposes, it is permissible for the Legislature to adopt a statutory scheme that fully and permanently assigns the executive branch's law enforcement powers to private individuals without the executive branch ever receiving actual notice of the underlying claims at issue. If such a delegation of executive power to private individuals is permissible, the citizens of this State have a right to know.

Review is "necessary … to settle an important question of law." (Cal. Rules of Court, rule 8.500(b).)

PETITION FOR REHEARING

On June 30, 2022, the appellate court denied CABIA's appeal. On July 15, 2022, CABIA timely filed a Petition for Rehearing, seeking rehearing for three reasons.

First, the Opinion made no reference to CABIA's allegation that the LWDA reviews less than one percent (1%) of PAGA notices before such claims are fully and permanently assigned to private PAGA litigants, and the appellate court did not explain why this allegation did not factor into whether, from a "realistic and practical perspective" (*Marine Forests*, *supra*, 36 Cal.4th at 15), PAGA's statutory scheme violates the separation of powers doctrine.

Second, the Opinion found *Iskanian* binding despite acknowledging that *Iskanian* "involved little discussion of the

executive branch's enforcement authority" (Opinion, p. 11), which goes to the heart of CABIA's appeal.

Third, the Opinion suggested that for separation of powers purposes, there is no material difference between the express right of intervention in the federal False Claims Act (FCA) and the California False Claims Act (CFCA) as compared to California's general intervention statute (Code Civ. Proc., § 387, subd. (d)(1)(B)), even though the Opinion cites no authority for this proposition and neither party had an adequate opportunity to brief this issue. (Gov. Code, § 68081.)

On July 21, 2022, the appellate court issued an order stating: "The petition for rehearing is DENIED."

ARGUMENT

This Court should grant CABIA's Petition for two reasons.

First, review is necessary to clarify whether *Iskanian* precludes any challenge to PAGA under the separation of powers doctrine even though – as the trial and appellate courts acknowledged – CABIA's challenge to PAGA involves allegations and legal theories *Iskanian* never considered.

Second, review is necessary to clarify whether, for separation of powers purposes, the Legislature has authority enact a statutory scheme that permits executive law enforcement powers to be fully and permanently assigned to private citizens before the executive branch has actual notice of the claims at issue.

I. Does *Iskanian* Precludes any Separation of Powers Challenge to PAGA Even if the Challenge is Based on Different Facts and Legal Theories?

To the extent the trial and appellate courts in this action found that *Iskanian* precludes CABIA's separation of powers challenge to PAGA even though *Iskanian* never considered CABIA's specific arguments, review is necessary to settle an important question of law. (See, e.g., *Kim v. Reins Int'l California, Inc.* (2020) 9 Cal.5th 73, 85, fn. 4 ["cases are not authority for propositions that are not considered"], citing *California Building Industry Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1043).)

The primary issue *Iskanian* decided involved whether employers can compel PAGA litigants to arbitrate their individual claims under the Federal Arbitration Act. After deciding that issue, this Court considered CLS's contention that PAGA violates California's separation of powers doctrine. *Iskanian* acknowledged that it addressed the issue based on limited briefing, as it "was not raised in CLS's answer to the petition for review." (*Iskanian, supra*, 59 Cal.4th at p. 389, citing Cal. Rules of Court, rule 8.516 subd. (b)(1), (2).)

CLS's separation of powers challenge arose from *County of Santa Clara v. Superior Court* (2010) 50 Cal.4th 35 ("*County of Santa Clara*"), which reconsidered this Court's decision in *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740 ("*Clancy*"). (*Iskanian, supra*, 59 Cal.4th at p. 389.) *County of Santa Clara* and

Clancy both involved separation of powers challenges directed at legislative intrusions on judicial power.

Iskanian reasoned "[n]o court has applied the rule in *Clancy* or *County of Santa Clara* to [qui tam] actions," and "case law contains no indication that the enactment of qui tam statutes is anything but a legitimate exercise of legislative authority." (*Id.* at p. 390.) On that basis, *Iskanian* rejected "CLS's argument" that PAGA violates the separation of powers doctrine, finding that *Clancy* and *County of Santa Clara* do not apply to qui tam actions. (*Id.* at 391.)

In light of the authorities *Iskanian* considered, its separation of powers holding is limited to challenges alleging that PAGA violates separation of powers by impermissibly impairing judicial functions. Indeed, *Iskanian* makes no reference to *Marine Forests*, which articulates the analytical framework applicable to a separation of powers challenge alleging impermissible impairment of core executive functions–i.e., "whether the statutory provisions as a whole, viewed from a realistic and practical perspective, operate to defeat or materially impair the executive branch's exercise of its constitutional functions." (*Marine Forests, supra*, 36 Cal.4th at 15.)

Here, the appellate court found that *Iskanian* forecloses CABIA's separation of powers challenge even though *Iskanian* "involved little discussion of the executive branch's enforcement authority" and *Iskanian* did not address CABIA's arguments regarding the facial deficiencies in PAGA's notice provisions. (Opinion, p. 11.) Because CABIA's primary contention pertains to

PAGA's usurpation of the executive branch's law enforcement authority, which *Iskanian* did not consider, and "cases are not authority for propositions that are not considered" (*Kim v. Reins Int'l California, Inc.*, *supra*, 9 Cal.5th at 85, fn. 4, citing *California Building Industry Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1043), review is necessary "to settle an important question of law." (Cal. Rules of Court, rule 8.500(b).)

II. Does PAGA's Permanent and Full Assignment of Executive Branch Powers to Private Citizens without Actual Notice to the Executive Branch Violate the Separation of Powers Doctrine?

Review is also necessary to clarify whether a qui tam statute that assigns executive law enforcement powers to private citizens without providing actual notice to the executive branch violates the separation of powers doctrine.

This Court has acknowledged that PAGA's qui tam provisions were enacted "with the understanding that labor law enforcement agencies were to retain primacy over private enforcement efforts." (*Arias, supra*, 46 Cal. 4th at 980, citing Stats. 2003, ch. 906, § 1.) CABIA alleges the LWDA has taken a back seat to private PAGA enforcement efforts, as evidenced by the LWDA's admission that PAGA notices are, for practical purposes, never reviewed. By granting review, this Court has an opportunity to clarify the constitutionality of this dynamic, which has played out over PAGA's eighteen-year history.

Although the appellate court's Opinion purported to adopt the standard articulated by *Marine Forests* (Opinion, p. 11), it ignored CABIA's allegation that the LWDA reviews less than one percent (1%) of all PAGA notices before the State's interest is permanently and fully assigned to private enforcement efforts. Thus, this Court should grant review to clarify whether this factual allegation is relevant to whether, "from a realistic and practical perspective, [PAGA] operate[s] to defeat or materially impair the executive branch's exercise of its constitutional functions." (*Marine Forests, supra*, 36 Cal.4th at 15.)

The conclusory analysis in the appellate court's Opinion states, "[i]n analogous past cases, California and federal courts have held that provisions of this type (giving the executive notice of or permitting it to exercise control over qui tam actions) cured any separation of powers issues arising from qui tam statutes." (Opinion, pp. 13–14, citing *National Paint & Coatings Assn. v. State of California* (1997) 58 Cal.App.4th 753, 762 ("*National Paint*") [holding Proposition 65 does not violate the separation of powers doctrine]; *U.S. ex rel. Kelly v. Boeing Co.* (9th Cir. 1993) 9 F.3d 743, 750 ("*Kelly*") [holding federal False Claims Act does not violate separation of powers doctrine].)[1] The Opinion then mischaracterizes CABIA's arguments regarding the lack of

[1]The Opinion also cites *Riley v. St. Luke's Episcopal Hosp.* (5th Cir. 2001) 252 F.3d 749, 753-757 and *U.S. ex rel. Taxpayers Against Fraud v. Gen. Elec.* (6th Cir. 1994) 41 F.3d 1032, 1040-1041. Because both cases involve separation of powers challenges to the FCA, CABIA refers the Court to its discussion of *Kelly* and the FCA in part II.C, below.

executive control provided for in PAGA as compared to Proposition 65, the FCA, and the CFCA.

As explained below, PAGA's purported mechanisms of executive control cannot properly be analogized to those in Proposition 65, the FCA, and the CFCA. If review is not granted and the appellate court's published Opinion stands, this Court would signal to the Legislature that it is permissible to enact legislation that permanently and fully assigns executive law enforcement powers to private individuals without providing for sufficient executive control.

A. The Opinion Creates Confusion in the Law by Analogizing PAGA to Proposition 65

By hastily analogizing PAGA to Proposition 65 without meaningfully considering CABIA's allegations or the fundamental differences between the degree of executive control provided for in each statute, the Opinion necessitates review to settle an important issue of law.

Rather than engage in a thoughtful analysis regarding the relative degree of executive control granted by PAGA and Proposition 65, the Opinion cites *National Paint* in support of the proposition that PAGA's notice provisions cure any separation of powers problem. (Opinion, p. 13.) The Opinion's attempt to analogize CABIA's claim to the separation of powers challenge in *National Paint* fails for three reasons.

First, *National Paint* predates *Marine Forests*. Thus, *National Paint* did not apply the separation of powers standard

that the appellate court's Opinion purported to adopt in this case. (See *Marine Forests* (2005) 36 Cal.4th 1, 15.)

Second, *National Paint* did not hold that a qui tam statute that provides inadequate notice to the executive branch is permissible under the separation of powers doctrine. Rather, *National Paint* characterized the plaintiffs' allegations regarding the adequacy of Proposition 65's notice provisions as "crucial allegations." (*National Paint* (1997) 58 Cal.App.4th 753, 757.) The reason *National Paint* rejected the plaintiffs' arguments regarding Proposition 65's notice provisions hinged on the fact the plaintiffs' "complaint was not verified" and they "did not affirmatively assert the truth of the matters pleaded, but instead alleged they were 'informed and believed' that the crucial allegations were true." (*Id.*) To that end, the complaint in *National Paint* is inapposite from CABIA's Complaint, which quotes verbatim a DIR report confirming that the LWDA does not review (and thus does not have actual notice of) ninety-nine percent (99%) of the PAGA notices it receives. Since CABIA's Complaint alleges this fact unequivocally – as opposed to "on information and belief" – the appellate court had an obligation to accept it as true, unlike the allegations in *National Paint*. (See e.g., *Levy v. State Farm Mutual Automobile Ins. Co*. (2007) 150 Cal.App.4th 1, 5.)

Third, *National Paint* rejected the separation of powers challenge before it because the plaintiffs' "complaint did not identify specific, concrete instances where […] the Attorney General's ability to supervise and control enforcement of the Act has been subverted by private enforcement." (*National Paint,*

supra, 58 Cal.App.4th at 758.) By contrast, CABIA's Complaint specifically alleges that the LWDA does not receive actual notice of PAGA claims ninety-nine percent (99%) of the time. Further, the Opinion acknowledges that CABIA's Complaint contains specific and detailed allegations regarding PAGA abuses resulting from the lack of executive oversight, including "charts naming law firms" that frequently abuse PAGA and engage in "unethical" and "undesirable tactics." (Opinion, p. 5.)

Still, assuming *arguendo* that *National Paint* is analogous to this case (it is not), Proposition 65 is readily distinguishable from PAGA because Proposition 65 permits the Attorney General to "appear and participate in a proceeding without intervening in the case." (Health & Saf. Code, § 25249.7, subd. (f)(5).) Thus, by this Court's logic, Proposition 65 does not present a separation of powers concern because "the ultimate locus of control and accountability for [Proposition 65] actions is the office of the Attorney General." (See *Abbott Laboratories v. Superior Court of Orange County* (2020) 9 Cal.5th 642, 659–660 [rejecting challenge to Unfair Competition Law that the UCL undermines the Attorney General's constitutional role as California's chief law enforcement officer by allowing district attorneys to prosecute civil penalties on behalf of the state].)

Because PAGA does not permit the LWDA (or any other executive branch actor) to participate in PAGA litigation after PAGA enforcement efforts are permanently and fully assigned to private citizens, the lack of executive control provided for in PAGA cannot rightfully be compared to the significant executive

oversight Proposition 65 provides. Review is thus necessary to clarify this distinction.

B. The Opinion Creates Confusion in the Law by Analogizing PAGA to the CFCA

Review is also necessary to clarify that PAGA does not provide comparable mechanisms of executive control as compared to the CFCA.

PAGA's only ostensible mechanisms of executive control can be found in the statute's pre-litigation notice provisions. During that short, sixty-five-day period, PAGA's "notice" provisions purport to permit the LWDA to investigate and prosecute PAGA notices. (Lab. Code, § 2699.3, subd. (a).) However, because a PAGA notice contains "mere allegations" (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 546), which the LWDA has no obligation to review, CABIA alleges that such provisions have yielded a predictable result – i.e., the vast majority of PAGA notices never get reviewed before the executive branch's law enforcement powers are permanently and fully assigned to private citizens. (See generally Lab. Code, §2699 et seq. [containing no requirement that the LWDA review, investigate, or respond to PAGA notices]; *Walmart, supra*, 999 F.3d at 677.)

Without addressing CABIA's allegation that ninety-nine percent (99%) of PAGA notices never get reviewed, the Opinion suggests that the degree of executive control authorized by PAGA is comparable to that of the CFCA. (Opinion, p. 14.) In so doing, the Opinion neglects the "realistic and practical" effect of the

deficiencies in PAGA's perfunctory notice provisions. (See *Marine Forests, supra*, 36 Cal.4th 1, 15, emphasis added.)

Unlike PAGA, the CFCA contains numerous mechanisms to ensure executive control over qui tam relators. For example, the relator "must file the complaint under seal and serve it, as well as a written disclosure of the material evidence and information in support of his or her claims, on the Attorney General. [Citation.] The Attorney General is required to notify local prosecuting authorities if local funds are involved. [Citation.] The action remains sealed for 'up to 60 days' (although the statutory period is subject to extension for good cause shown) to permit the state and/or local authorities to investigate and determine whether to proceed in the action. [Citation.]" (*San Francisco Unified School Dist. ex rel. Contreras v. Laidlaw Transit, Inc.* (2010) 182 Cal.App.4th 438, 445–446 ("*Contreras*"), citation omitted; see Gov. Code, §§ 12652, subd. (b)(1)–(3), (c)(1)–(7).) Thereafter, "[i]f the state and/or a local prosecuting authority elects to proceed with the action, that agency (or those agencies) have the primary responsibility for prosecuting the action, although the qui tam plaintiff has the right to continue as a party to the action." (*Contreras, supra*, 182 Cal.App.4th at pp. 445–446, citation omitted; see Gov. Code, § 12652, subd. (e).) In such a scenario, the state or political subdivision may dismiss the action despite objections by the qui tam plaintiff upon a showing of good cause for the dismissal. (Gov. Code, § 12652, subd. (e)(2)(A).) Further, the state or political subdivision may settle the action "after a hearing providing the qui tam plaintiff an opportunity to present evidence,

that the proposed settlement is fair, adequate, and reasonable under all of the circumstances." (Gov. Code, § 12652, subd. (e)(2)(B).) Alternatively, "[i]f no prosecuting authority decides to proceed with the action, the qui tam plaintiff has the right to do so subject to the right of the state or political subdivision to intervene in certain circumstances." (*Contreras, supra*, 182 Cal.App.4th at pp. 445–446; see Gov. Code, § 12652, subd. (e), (f).)

The CFCA also contains numerous provisions to ensure that the executive branch is apprised of the developments in a case should it wish to intervene in the action or oversee its resolution. For example, "[i]f the state or political subdivision so requests, and at its expense, the state or political subdivision shall be served with copies of all pleadings filed in the action and supplied with copies of all deposition transcripts." (Gov. Code, § 12652, subd. (f)(1).) Further, the executive branch may intervene in a CFCA action after receipt of "a complaint and written disclosure of material evidence." (*Id.* at subds. (c)(4), (c)(7)(B), (c)(8)(B).) The executive branch also has authority to stay discovery in a CFCA action "regardless of whether [it] proceeds with the action." (*Id.* at subd. (h)." Lastly, "the action may be dismissed only with the written consent of the court *and the Attorney General or prosecuting authority of a political subdivision*." (Gov. Code, § 12652, subd. (c)(1), emphasis added.) In short, the CFCA mandates the executive branch's involvement in a relator's claims from the inception of an action, and provides numerous statutory mechanisms to ensure the executive branch retains sufficient control over the action.

In this respect, PAGA differs significantly from traditional qui tam statutes such as the CFCA. (Compare Gov. Code, § 12652, subd. (a)(1), (b)(1), (c)(6)-(7) [mandating the executive branch "diligently investigate" and take affirmative actions with respect to CFCA claims], with Lab. Code, § 2699.3, subd. (a)(1)–(2) [authorizing the permanent full assignment of law enforcement powers to private individuals without any requirement that the LWDA review a PAGA notice]; see *Wal-Mart*, *supra*, 999 F.3d at 677 [characterizing PAGA's delegation of executive powers as a "permanent and full assignment"].)

Accordingly, review is necessary to settle this important question of law regarding whether PAGA's statutory scheme provides the same degree of executive control as does the CFCA. (Cal. Rules of Court, rule 8.500(b).)

C. The Opinion Creates Confusion in the Law by Analogizing PAGA to the FCA

The Opinion also creates confusion in the law by analogizing CABIA's challenge to PAGA to the challenge to the FCA addressed by *Kelly*.

In *Kelly*, the Ninth Circuit found that the FCA provides sufficient mechanisms of executive control over qui tam relators to survive a separation of powers challenge. (*Kelly, supra*, 9 F.3d at 753.) *Kelly* found that the FCA contained sufficient mechanisms of executive control based on its provisions that authorize the Attorney General to: (1) "intervene in a case and then take primary responsibility for prosecuting the action"; (2) "seek judicial

limitation of the relator's participation"; (3) "move for dismissal of a case which it believes has no merit, after notice to the relator and opportunity for a hearing"; (4) "seek a judicial stay of the relator's discovery regardless of whether it intervenes"; and (5) "seek any alternate remedies available, including through any administrative proceeding."[2] (*Id.*)

As discussed in Part II.B above with respect to the CFCA, PAGA does not contain executive control mechanisms comparable to those in the FCA. The Opinion disagrees, reasoning that PAGA's perfunctory notice provisions are cured by, what the Appellate Court characterizes as the "various provisions of PAGA itself which give the executive branch notice of, and discretion to exercise control over, PAGA claims." (Opinion, pp. 12–13.) The Opinion then refers to the fact that a PAGA litigant must serve the LWDA with a copy of the civil complaint, a copy of any proposed settlement submitted to the court for approval, and a copy of the superior court's judgment within ten days after entry of the judgment or order. (Opinion, pp. 12–13, citing Lab. Code, § 2699, subd. (l)(1)–(3).) However, the Opinion fails to explain how PAGA (as opposed to California's general intervention statute) permits the executive branch to assert control over a PAGA action merely because it purportedly receives "notice" at the inception and conclusion of the action.

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[2]As discussed in Part II.B above, the CFCA, which is "patterned on [the FCA]" (*McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, 458), contains comparable mechanisms of executive control.

CABIA also alleges that the "realistic and practical" effect of the information the LWDA receives regarding active PAGA litigation results in the same outcome as the unreviewed PAGA notices received by the LWDA: the executive branch never asserts control over PAGA actions. (See *Marine Forests* (2005) 36 Cal.4th 1, 15.) Indeed, although thousands of PAGA claims are litigated each year, the Opinion fails to cite even a single example of a case in which the LWDA or the Attorney General has actually attempted to intervene in a PAGA action. Nor does the Opinion explain why the LWDA's receipt of a pre-litigation PAGA notice, an unverified complaint, or a settlement agreement would cause the LWDA or the Attorney General to do so given that PAGA (unlike the FCA) does not require a PAGA litigant to provide the LWDA with discovery obtained during the course of the litigation.

Avoiding this issue, the Opinion merely concludes, "the executive's role does not end" and "the executive will receive notice and can take whatever steps it deems appropriate." (Opinion, pp. 14–15.) It further reasons, without support, that "[i]n the event of an abusive or improper settlement of a PAGA claim (in which a plaintiff might improperly characterize the bulk of the settlement as damages, payable solely to the plaintiff, while minimizing civil penalties owed in part to the state), California law plainly permits the Attorney General to intervene to protect the state's interest in recovering its share of the civil penalties and oppose judicial approval of the settlement." (Opinion, p. 15.)

Given the appellate court's speculation on this point and the absence of any evidence that the executive branch receives actual

notice regarding PAGA litigation, review is necessary to determine whether, from a "realistic and practical perspective," PAGA provides the executive branch sufficient control over private PAGA enforcement efforts. (See *Marine Forests, supra*, 36 Cal.4th at 15.)

D. The Parties Did Not Have an Adequate Opportunity to Brief Whether California's General Intervention Statute Cures the Separation of Powers Concerns Implicated by PAGA's Statutory Scheme

Review should also be granted for the independent reason that the appellate court reasoned, in part, that PAGA does not violate separation of powers principles based on California's general intervention statute, which the parties did not have an adequate opportunity to brief.

In an apparent effort to minimize the lack of executive control in PAGA as compared to Proposition 65, the FCA, and the CFCA, the appellate court pointed to California's general intervention statute. (Opinion, p. 15, citing Code Civ. Proc., § 387, subd. (d)(1)(B).) However, the appellate court cited no authority to demonstrate that California's general intervention statute is sufficient to cure the separation of powers concerns raised by CABIA's complaint.

The California Constitution provides that "[t]he Attorney General shall have direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law." (Cal. Const., art. V, § 13; see Gov. Code, §

12550.) CABIA is not aware of any authority holding that these constitutional and statutory provisions authorize the Attorney General to assert control over the prosecution of a qui tam action. If the Attorney General possessed such inherent authority, the provisions in the CFCA authorizing the Attorney General to intervene in prosecutions of such claims would be entirely superfluous. (See Gov. Code, § 12652, subd. (f).)

Accordingly, review is necessary to determine whether the parties had an adequate opportunity to brief the significance of California's general intervention statute as it pertains to CABIA's challenge. (See Gov. Code, § 68081 ("[b]efore ... a court of appeal ... renders a decision ... based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing.")

CONCLUSION

This Court's prior decision in *Iskanian* did not consider CABIA's present challenge. Nor did it have knowledge of the fact that the LWDA reviews less than one percent (1%) of all PAGA notices, and therefore does not have actual notice of the allegations therein, before the executive branch's law enforcement powers are permanently and fully assigned to PAGA litigants.

The purported mechanisms of executive control in PAGA pale in comparison to traditional qui tam statutes that this Court has previously upheld. By granting review, this Court can provide clarity regarding the minimum threshold of executive control necessary for a qui tam statute to pass constitutional muster.

DATED: August 8, 2022 NIXON PEABODY LLP

By: */s/Richard J. Frey*
Richard J. Frey
Robert H. Pepple
David M. Prager
Brock J. Seraphin
Attorneys for Petitioner
CALIFORNIA BUSINESS
& INDUSTRIAL
ALLIANCE

CERTIFICATE OF COMPLIANCE

I certify that the attached Petition for Review contains 4,737 words, including footnotes, as calculated by Microsoft Word, not counting the portions excluded by California Rules of Court, rule 8.504(d)(3), and that this petition was prepared in a 13-point Century Schoolbook font.

DATED: August 8, 2022 NIXON PEABODY LLP

By: */s/Richard J. Frey*
Richard J. Frey
Robert H. Pepple
David M. Prager
Brock J. Seraphin
Attorneys for Petitioner
CALIFORNIA BUSINESS & INDUSTRIAL ALLIANCE

Filed 6/30/22

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CALIFORNIA BUSINESS & INDUSTRIAL ALLIANCE, Plaintiff and Appellant, v. XAVIER BECERRA, as Attorney General, etc., Defendant and Respondent.	G059561 (Super. Ct. No. 30-2018-01035180) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Peter J. Wilson, Judge. Affirmed.

Epstein Becker & Green, Richard J. Frey, Robert H. Pepple, David M. Prager, Brock J. Seraphin, Devin L. Lindsay; Nixon Peabody and Richard J. Frey for Plaintiff and Appellant.

Eimer Stahl, Robert E. Dunn, John D Tripoli, and Collin J. Vierra for Chamber of Commerce of the United States of America as Amicus Curiae on behalf of Plaintiff and Appellant.

LevatoLaw and Ronald C. Cohen for California Business Roundtable as Amicus Curiae on behalf of Plaintiff and Appellant.

Rob Bonta, Attorney General, Thomas S. Patterson, Assistant Attorney General, Paul Stein and Aaron Jones, Deputy Attorneys General, for Defendant and Respondent.

* * *

Plaintiff California Business & Industrial Alliance appeals from a judgment of dismissal entered after the trial court sustained the demurrer of defendant Xavier Becerra, in his official capacity as Attorney General of the State of California, without leave to amend. Plaintiff, a lobbying group for small and midsized businesses in California, filed this action seeking a judicial declaration that the Labor Code Private Attorneys General Act of 2004 (PAGA; Lab. Code, § 2698 et seq.), is unconstitutional under various theories and an injunction forbidding defendant from implementing or enforcing PAGA. PAGA allows California employees to sue their employers and pursue civil penalties on behalf of the state for violations relating not only to themselves, but also to other California employees of the same employer.

On appeal, plaintiff asserts a single theory: that PAGA violates California's separation of powers doctrine by allowing private citizens to seek civil penalties on the state's behalf without the executive branch exercising sufficient prosecutorial discretion. We reject this theory for two reasons. First, our Supreme Court held in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 (*Iskanian*), that "PAGA does not violate the principle of separation of powers under the California Constitution." (*Id*. at p. 360.) Despite plaintiff's allegation in its complaint that *Iskanian* is "incorrect," and its arguments before us that this statement is either "dictum" or is limited to a different type of separation of powers challenge, *Iskanian* is directly on point and controlling, and we have no authority to defy its mandate.

Second, even if *Iskanian* did not require this result, we would reach it anyway through application of California's preexisting separation of powers doctrine. PAGA is not meaningfully distinguishable from comparable qui tam statutes outside the employment context, including the California False Claims Act (Gov. Code, § 12650 et seq.) the Insurance Frauds Prevention Act (Ins. Code, § 1871 et seq.) the Safe Drinking Water and Toxic Enforcement Act of 1986, colloquially known as Proposition 65 (Health & Saf. Code § 25249.5 et seq.) and many others. Plaintiff and its supporting amici fail to produce even one single case in which any of these many statutes has been held to violate California's separation of powers doctrine. Nor do they identify any sufficiently significant distinctions between those statutes and PAGA, or any other compelling reason for us to break new ground.

Accordingly, we affirm the judgment of the trial court.

FACTS AND PROCEDURAL HISTORY

Plaintiff California Business & Industrial Alliance is a lobbying group, organized in Washington, D.C., which represents small and midsized businesses in California. While plaintiff's general purpose is promoting the interests of these businesses, its specific animating purpose is "accomplishing the repeal or reform of PAGA." In service of that goal, plaintiff sued defendant Xavier Becerra, then California's Attorney General, in his official capacity, seeking declaratory and injunctive relief. Plaintiff sought a judicial declaration that PAGA was unconstitutional and injunctive relief barring defendant from implementing or enforcing PAGA.

Plaintiff's first amended complaint (the complaint)[1] contains extensive allegations regarding perceived defects in PAGA, both legal and practical. The

[1] Defendant demurred to plaintiff's original complaint, which resulted in the filing of the first amended complaint.

complaint begins with a recitation of the background legal principles and sources of authority. In pure legal terms, plaintiff alleges PAGA violates the Eighth Amendment's prohibition against excessive fines, plaintiff's members' Fifth and Fourteenth Amendment rights to due process, California's separation of powers doctrine, and the Fourteenth Amendment's guarantee of equal protection. On a practical level, plaintiff contends the various provisions of the California Labor Code that are enforceable through PAGA are "unclear, cumbersome, counterintuitive, impossible to follow, or all of the foregoing." As an example, plaintiff complains that compliance with California's meal period requirements is "impracticable," "preposterous," and "hopeless." Plaintiff also alleges California's wage statement requirements have "spawned countless lawsuits alleging hyper-technical violations that have required employers to incur significant legal expenses in their defense as well as large settlements and damage awards in numerous cases." Plaintiff summarizes California's labor laws as "a daunting and confusing web of obligations for employers, robust and generous remedies for employees, and a framework that encourages vigorous enforcement through private rights of action."

Plaintiff's complaint next describes the history of PAGA, including certain portions of its legislative history, the coalition of "labor union and applicant attorney special interest groups" that supported it, and the identity of various opponents of the bill.[2] Plaintiff then sets forth the nuts and bolts of PAGA, describing the various categories of violations that can be asserted through PAGA, the resulting civil penalties, various procedural differences between PAGA and class action lawsuits, and the rules for providing notice of a PAGA action to the state. Plaintiff's complaint also discusses various cases interpreting and applying PAGA, including a particularly lengthy discussion of the Supreme Court's decision in *Iskanian*. Lastly, before setting forth its causes of action, plaintiff complains at length about practical consequences of PAGA that

[2] In this section, plaintiff also discusses a subsequent amendment to PAGA which is irrelevant to the issues on this appeal.

plaintiff deems unfair, including a hypothetical calculation of very high civil penalties resulting from a PAGA enforcement action brought based upon a very modest underpayment of wages, various allegations of unethical or undesirable tactics by plaintiffs' attorneys in PAGA actions, and charts naming law firms which have frequently filed PAGA notices with the state and listing various nonprofits, charities, hospitals, and similar entities which have been "targeted" by PAGA.

The complaint contains five causes of action, only one of which is relevant here: plaintiff's cause of action for violation of California's separation of powers doctrine. In connection with this cause of action, plaintiff alleges PAGA's provisions "as a whole, viewed from a realistic and practical perspective, operate to arrogate, defeat, and/or materially impair, the exercise of the core powers and/or constitutional functions" of the executive and judicial branches of California's state government. Plaintiff also specifically alleges that this challenge to PAGA is not barred by *Iskanian* for various reasons.

Defendant demurred, arguing three of plaintiff's five causes of action (relating to plaintiff's separation of powers and due process arguments) fail as a matter of law. The trial court sustained the demurrer without leave to amend, concluding plaintiff's separation of powers claim was barred by *Iskanian* and plaintiff's due process claims failed in view of the rights of any PAGA defendant to notice and a hearing. Plaintiff's final remaining causes of action (relating to issues irrelevant to this appeal) were disposed of via summary judgment. All of plaintiff's claims having thus been defeated, the trial court entered judgment for defendant. Defendant timely appealed.

DISCUSSION

On appeal, plaintiff challenges only the trial court's ruling on defendant's demurrer to plaintiff's cause of action relating to California's separation of powers doctrine, and only as to the executive branch, not the judicial branch. Further, plaintiff

argues solely that the demurrer should not have been sustained, and does not contend leave to amend should have been granted. This limits the scope of our analysis to a single issue of law: whether PAGA violates California's separation of powers doctrine by depriving the executive branch of control over enforcement of California's labor laws. We conclude the Supreme Court has already decided this issue against plaintiff's position in *Iskanian*, *supra*, 59 Cal.4th 348. Moreover, even if *Iskanian* were not applicable, we would nevertheless conclude PAGA does not violate California's separation of powers doctrine.

1. *PAGA's History and Structure*

In 2001, the California Assembly Committee on Labor and Employment held hearings regarding the effectiveness of the enforcement of wage and hour laws by the Department of Industrial Relations (DIR) in enforcing California's wage and hour laws. (Assem. Com. on Labor and Employment, Analysis of Sen. Bill No. 796 (Reg. Sess. 2003-2004) as amended July 2, 2003, p. 3.) The committee found that, despite the DIR's status as the single largest state labor law enforcement organization in the United States, it was failing to achieve effective enforcement of California's labor laws. (*Ibid.*) "Estimates of the size [of] California's 'underground economy'—businesses operating outside the state's tax and licensing requirements—ranged from 60 to 140 billion dollars a year, representing a tax loss to the state of three to six billion dollars annually. Further, a U.S. Department of Labor study of the garment industry in Los Angeles, which employs over 100,000 workers, estimated the existence of over 33,000 serious and ongoing wage violations by the city's garment industry employers, but the DIR was issuing fewer than 100 wage citations per year for all industries throughout the state." (*Ibid.*)

Animated by these findings, the Legislature enacted PAGA, which allowed current and former employees to bring actions against their employers for civil penalties

on behalf of the state, effectively "deputizing employees to prosecute Labor Code violations on the state's behalf." (*Iskanian, supra*, 59 Cal.4th at p. 360.) The "'statute requires the employee to give written notice of the alleged Labor Code violation to both the employer and the Labor and Workforce Development Agency, and the notice must describe facts and theories supporting the violation.'" (*Id.* at p. 380.) The agency has 60 days to decide whether to investigate. (Lab. Code, § 2699.3, subd. (a)(2)(A).) If the agency fails to respond to the notice or declines to investigate, the employee may immediately commence a civil action. (*Ibid.*) If the agency chooses to investigate, it must decide whether to issue a citation within 120 days. (*Id.*, subd. (a)(2)(B).) If the agency decides not to issue a citation or provides no notice of its decision within the time period, the employee may immediately commence a civil action. (*Ibid.*) Having commenced the action, if the employee proves a violation of the Labor Code, the employer must pay a civil penalty for each employee, and each pay period affected by the violation. (Lab. Code, § 2699, subd. (f).) The penalty is divided between the affected employees, who receive 25 percent of the penalty amount, and the state, which receives 75 percent. (*Id.*, subd. (i).)

PAGA actions are qui tam actions. A qui tam action is "'[a]n action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive.'" (*People ex rel. Allstate Ins. Co. v. Weitzman* (2003) 107 Cal.App.4th 534, 538 [quoting Black's Law Dict. (7th ed.1999) p. 1262, col. 1].) Qui tam actions predate the founding of the United States by a considerable margin, originating in England "around the end of the 13th century, when private individuals who had suffered injury began bringing actions in the royal courts on both their own and the Crown's behalf." (*Vermont Agency of Nat. Resources v. U.S.* (2000) 529 U.S. 765, 774.)

Perhaps the most well-known qui tam statute is the federal False Claims Act (31 U.S.C. § 3729 et seq.), which "was originally adopted following a series of

sensational congressional investigations into the sale of provisions and munitions to the War Department" during the American Civil War. (*United States. v. McNinch* (1958) 356 U.S. 595, 599.) California has its own False Claims Act, which, like the federal False Claims Act, allows qui tam plaintiffs to sue government contractors who submit false claims to the government for payment. (Gov. Code, § 12650 et seq.) In addition to PAGA and the False Claims Act, California also has numerous other qui tam statutes, including the Insurance Frauds Prevention Act (Ins. Code, § 1871 et seq.), Proposition 65, and many others.

2. Iskanian *Bars Plaintiff's Claim*

In *Iskanian*, an employee sued his employer for various violations of the Labor Code. (*Iskanian*, *supra*, 59 Cal.4th at p. 361.) The employee sought to bring a class action on behalf of similarly situated employees, and to assert a qui tam action under PAGA. (*Iskanian*, at p. 361.) In response, the employer sought to compel arbitration, citing its arbitration agreement with the plaintiff, and arguing that the United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333 preempted any contrary California law preventing arbitration of employment class action litigation or PAGA claims.[3] (*Iskanian*, at p. 361.)

Before the Supreme Court, the employer raised another argument: that "PAGA violates the principle of separation of powers under the California Constitution. (*Iskanian*, *supra*, 59 Cal.4th at p. 389.) More specifically, the employer argued PAGA violated California's separation of powers doctrine "by authorizing financially interested

[3] After oral argument, the United States Supreme Court decided *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. ___ [2022 U.S. Lexis 2940], which the Attorney General cited to us under California Rules of Court, rule 8.254. We considered the case, which abrogates in part the California Supreme Court's holding in *Iskanian* on arbitrability of PAGA claims. We conclude it has no material impact on our decision, as it does not address the separation of powers issue.

private citizens to prosecute claims on the state's behalf without government supervision." (*Iskanian*, at pp. 389-390.) The employer cited *County of Santa Clara v. Superior Court* (2010) 50 Cal.4th 35, which was, in turn, based on *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740. Both cases involved the permissibility of contingent fee agreements between public entities and attorneys prosecuting public nuisance cases, and the degree of supervision by "neutral" government attorneys necessary in such cases.

The Supreme Court rejected this argument, pointing out that its analysis in those cases was not applicable in the qui tam context, and that "our case law contains no indication that the enactment of qui tam statutes is anything but a legitimate exercise of legislative authority." (*Iskanian*, *supra*, 59 Cal.4th at p. 390.) The Supreme Court also specifically held that "PAGA does not violate the principle of separation of powers under the California Constitution." (*Id.* at p. 360.)

Plaintiff raises several objections to the trial court's application of *Iskanian*'s holding in this case. First, plaintiff argues *Iskanian*'s separation of powers holding is "arguably nothing more than dictum." Plaintiff is mistaken. Dictum is "'[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive).'" (*People v. Vang* (2011) 52 Cal.4th 1038, 1047 fn. 3 [citing Black's Law Dict. (9th ed. 2009) p. 1177, col. 2].)

The employee in *Iskanian* argued the employer had not properly raised the separation of powers argument by failing to mention it in its answer to the employee's petition for review. (*Iskanian, supra,* 59 Cal.4th at p. 389.) However, the Supreme Court rejected this argument stating, "[W]e will decide the merits of this question." (*Ibid*.) The Supreme Court's resolution of the question also determined the outcome of the case. Had the Supreme Court decided PAGA violated California's separation of powers doctrine, it would not have instructed the trial court to consider on remand whether to bifurcate the

case between arbitrable (Labor Code violation) and nonarbitrable (PAGA) claims. (*Iskanian*, at pp. 391-392.) Thus, the Supreme Court's holding is precedential, not dictum, and we are bound to follow it.

Second, plaintiff argues *Iskanian* is distinguishable on procedural grounds—namely that *Iskanian* arose from an attempt to enforce an arbitration agreement and PAGA waiver, while the present case arises from a demurrer to a declaratory relief action directly challenging PAGA's constitutionality. On the question this case presents to us, this procedural distinction has no effect. The question presented is the same: Does PAGA violate California's separation of powers doctrine? The standard of review for this purely legal question is the same as well: de novo review. Plaintiff's argument that its complaint includes an as-applied challenge to PAGA, which could trigger factual analysis and potentially a different standard, also lacks merit. Plaintiff's separation of powers challenge to PAGA is premised on legislative overreach, and the Legislature has done nothing affecting PAGA's enforcement other than pass laws.

Lastly, plaintiff argues *Iskanian* only stands for a narrower proposition in the separation of powers context: the Supreme Court's rejection of the employer's argument, which in turn was based on the public nuisance cases *County of Santa Clara* and *Clancy*. Plaintiff argues the separation of powers challenge in *Iskanian* was, by virtue of being based on these cases, directed at legislative intrusions on *judicial* power, not executive power, and is therefore not relevant here.

It is true, as plaintiff points out, that "'cases are not authority for propositions that are not considered.'" (*Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 85 fn. 4.) And "'[it] is axiomatic that an unnecessarily broad holding is "informed and limited by the fact[s]" of the case in which it is articulated.'" (*Ixchel Pharma, LLC v. Biogen, Inc.* (2020) 9 Cal.5th 1130, 1153.) But the argument considered and rejected by the Supreme Court in *Iskanian* is not as far removed from plaintiff's argument as plaintiff suggests.

Here, plaintiff argues PAGA "divests the executive branch of: (1) its prosecutorial discretion by authorizing PAGA plaintiffs to prosecute Labor Code violations the executive branch has never reviewed; and (2) any control over PAGA prosecutions or settlements, thereby usurping the executive branch's enforcement authority." In short, plaintiff contends PAGA is unconstitutional because it provides insufficient mechanisms for the executive branch to supervise PAGA plaintiffs. The Supreme Court in *Iskanian* rejected the argument that PAGA was unconstitutional because it "authoriz[es] financially interested private citizens to prosecute claims on the state's behalf without governmental supervision." (*Iskanian*, *supra*, 59 Cal.4th at pp. 389-390.) To be sure, the argument in *Iskanian* was couched somewhat different. It focused on prosecutorial neutrality, which is subtly distinct from prosecutorial discretion, and it appears to have involved little discussion of the executive branch's enforcement authority. But at its core, the basic idea is the same. Plaintiff, like the employer in *Iskanian*, argues the separation of powers requires greater governmental oversight over PAGA plaintiffs. The *Iskanian* court rejected that argument, and we are bound to do the same.

3. *PAGA Does Not Violate California's Separation of Powers Doctrine*

Even if we were not bound by *Iskanian*, we would reach the same result by application of California's separation of powers doctrine.

California's separation of powers doctrine prohibits the enactment of statutes that "as a whole, viewed from a realistic and practical perspective, operate to defeat or materially impair the executive branch's exercise of its constitutional functions." (*Marine Forests Society v. California Coastal Com*. (2005) 36 Cal.4th 1, 15.) At the same time, "the separation of powers doctrine does not create an absolute or rigid division of functions." (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1068.) And it "'"does not mean that the three departments of our government are

not in many respects mutually dependent"' [citation], or that the actions of one branch may not significantly affect those of another branch. Indeed, upon reflection, the substantial interrelatedness of the three branches' actions is apparent and commonplace: the judiciary passes upon the constitutional validity of legislative and executive actions, the Legislature enacts statutes that govern the procedures and evidentiary rules applicable in judicial and executive proceedings, and the Governor appoints judges and participates in the legislative process through the veto power. Such interrelationship, of course, lies at the heart of the constitutional theory of 'checks and balances' that the separation of powers doctrine is intended to serve." (*Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 52-53.)

As discussed above, plaintiff contends PAGA violates the separation of powers doctrine—i.e., defeats or materially impairs the executive branch's exercise of its constitutional functions—by depriving the executive branch of (1) prosecutorial discretion in PAGA cases, and (2) control over PAGA prosecutions or settlements. Plaintiff argues PAGA thus prevents the executive branch from performing its core function of enforcing the law by replacing the Attorney General and other prosecutors with private parties and attorneys.[4]

Plaintiff's chief obstacles in making this argument are the various provisions of PAGA itself which give the executive branch notice of, and discretion to

[4] We cannot help but note the irony inherent in the procedural posture of this lawsuit. Plaintiff, a private actor, insists that the Legislature has deprived the executive branch, including specifically the Attorney General, of the ability to exercise one of its core constitutional functions, by devolving those functions to private actors. To effectuate its argument, plaintiff sued the Attorney General, who, for his part, has argued vigorously that his powers are not being usurped. While we do not see the Attorney General's present position as dispositive of the issue, we note at least one court has relied, at least in part, on the Attorney General taking a similar position to resolve a similar separation of powers issue. (*National Paint & Coatings Assn. v. State of California* (1997) 58 Cal.App.4th 753, 764.)

exercise control over, PAGA claims. PAGA requires notice to be given to the executive branch before commencement of a PAGA claim (Lab. Code, § 2699.3, subd. (a)), immediately after the commencement of any such claim (Lab. Code, § 2699, subd. (*l*)(1)), upon submission of any proposed settlement of a PAGA claim for court approval (Lab. Code, § 2699, subd. (*l*)(2)), and upon issuance of judgment or other dispositive order in any PAGA civil action (Lab. Code, § 2699, subd. (*l*)(3)). PAGA also allows the executive to investigate and cite employers for Labor Code violations asserted in a PAGA notice. (Lab. Code, § 2699.3, subd. (a)(2)(B).) PAGA also prohibits the filing of any PAGA action "on the same facts and theories" as a citation issued by the executive or an action brought by the executive under Labor Code section 98.3. (Lab. Code, § 2699, subd. (h).)

In analogous past cases, California and federal courts have held that provisions of this type (giving the executive notice of or permitting it to exercise control over qui tam actions) cured any separation of powers issues arising from qui tam statutes.[5] (See, e.g., *National Paint & Coatings Assn. v. State of California*, *supra*, 58 Cal.App.4th at pp. 762-764 [holding Proposition 65 does not violate separation of powers doctrine in part due to notice provisions]; *U.S. ex rel. Kelly v. Boeing Co.* (9th Cir. 1993) 9 F.3d 743, 745-746, 752-755 [holding federal False Claims Act does not violate separation of powers doctrine in part due to provisions granting executive ability to obtain notice of and exercise control over qui tam actions in certain situations]; *Riley v.*

[5] California's separation of powers doctrine is substantively identical to the federal doctrine on this point. (*National Paint & Coatings Assn. v. State of California*, *supra*, 58 Cal.App.4th at p. 762; compare *Loving v. U.S.* (1996) 517 U.S. 748, 757 ["the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties"] with *Marine Forests Society v. California Coastal Com.*, *supra*, 36 Cal.4th at p. 15 [separation of powers doctrine prohibits statutes that "as a whole, viewed from a realistic and practical perspective, operate to defeat or materially impair the executive branch's exercise of its constitutional functions"].)

St. Luke's Episcopal Hosp. (5th Cir. 2001) 252 F.3d 749, 753-757 [same]; *U.S. ex rel. Taxpayers Against Fraud v. Gen. Elec.* (6th Cir. 1994) 41 F.3d 1032, 1040-1041 [same].)

To deal with these provisions and distinguish this case from these past cases, plaintiff cites differences between PAGA's notice provisions and comparable provisions in other qui tam statutes, including Proposition 65 and the California False Claims Act. Plaintiff highlights three such differences: (1) the absence of an "evidentiary threshold" for the filing of a PAGA claim; (2) the absence of specific statutory authorization for imposition of sanctions to penalize the filing of a frivolous PAGA claim; and (3) PAGA's relatively short deadlines for the executive to respond to a PAGA notice and investigate the allegations, which plaintiff claims allows PAGA plaintiffs to then proceed "without any executive oversight."

However, plaintiff fails to cite any authority for the proposition that any of these differences creates a separation of powers problem. As for the first two items, it is not obvious why either would do so. The absence of an "evidentiary threshold" (a category plaintiff creates to lump together Proposition 65's certificate of merit procedure with the California False Claims Act's in camera filing procedure) for private plaintiffs to commence PAGA litigation has no connection with executive control over PAGA claims. Similarly, sanctions for frivolous PAGA claims have nothing to do with the interplay of executive and legislative authority.

Plaintiff's last claim, that the short deadlines allow plaintiffs to proceed without executive oversight, is simply false.[6] Even after PAGA's deadlines elapse and a PAGA action is initiated by a private plaintiff, the executive's role does not end. As described above, PAGA plaintiffs must still provide notice of the commencement of a

[6] We assume for the sake of argument that PAGA's notice periods are shorter than comparable California qui tam statutes, although plaintiff provides no authority for this proposition, and we note that the California False Claims Act's notice period (the only other one discussed in plaintiff's brief) is an identical 60 days. (Compare Lab. Code, § 2699.3, subd. (a) with Gov. Code, § 12652.)

PAGA action, the submission of any proposed settlement to the court for approval, and the issuance of any judgment or other dispositive order. Should the action itself or a proposed settlement violate California's public policy in some manner, the executive will receive notice and can take whatever steps it deems appropriate.

Plaintiff points out that, unlike the federal False Claims Act, PAGA does not contain an express provision authorizing the executive to intervene in the action. But California law independently *requires* courts to permit intervention in an action by any person who "claims an interest relating to the property or transaction that is the subject of the action and that person is so situated that the disposition of the action may impair or impede that person's ability to protect that interest, unless that person's interest is adequately represented by one or more of the existing parties" (Code Civ. Proc., § 387, subd. (d)(1)(B)) and allows intervention at the discretion of the trial court by any person who "has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both." (*Id.*, subd. (d)(2).) In the event of an abusive or improper settlement of a PAGA claim (in which a plaintiff might improperly characterize the bulk of the settlement as damages, payable solely to the plaintiff, while minimizing civil penalties owed in part to the state), California law plainly permits the Attorney General to intervene to protect the state's interest in recovering its share of the civil penalties and oppose judicial approval of the settlement. Indeed, that is the obvious purpose of the provisions of PAGA requiring timely notice to be given to the executive upon submission of a proposed settlement to the court for approval.

Plaintiff also cites *Abbott Laboratories v. Superior Court* (2020) 9 Cal.5th 642, arguing it shows "the requisite degree of control that the Attorney General must retain over actions prosecuted on behalf of the state," namely that the Attorney General must be permitted to intervene. Leaving aside that *Abbott* is not a separation of powers case and does not involve qui tam actions whatsoever, plaintiff's argument for *Abbott*'s relevance here is premised on the mistaken supposition that "[n]either PAGA, the

California [C]onstitution, nor any other California statute, authorizes the Attorney General (or any other arm of the executive branch) to intervene in or control the prosecution or settlement of PAGA actions once an aggrieved employee files a civil action." As we explain above, section 387, subdivision (d) of the Code of Civil Procedure does precisely that.

In summary, we conclude, as the trial court did, that we are bound to follow our Supreme Court's conclusion in *Iskanian* that "PAGA does not violate the principle of separation of powers under the California Constitution." (*Iskanian*, *supra*, 59 Cal.4th at p. 360.) And even if *Iskanian* did not bind us, applying California's separation of powers doctrine to PAGA leads us to the same conclusion reached by the trial court: PAGA is constitutional.

DISPOSITION

The judgment is affirmed. Defendant shall recover costs on appeal.

SANCHEZ, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.

PROOF OF SERVICE

I hereby certify that on August 8, 2022 I caused to be served: (1) one copy of **PETITIONER CALIFORNIA BUSINESS & INDUSTRIAL ALLIANCE'S PETITION FOR REVIEW**; (2) one copy of the **OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT, DIVISION THREE**, on the following counsel of record and courts via the methods of service indicated below:

Xavier Becerra Attorney General of California Aaron Jones Deputy Attorney 455 Golden Gate Avenue, Suite 1100 San Francisco, CA 94102–7004	*Attorneys for Respondent* Electronic service through TrueFiling
Clerk of the Court of Appeal of the State of California Fourth Appellate District, Division Three 6001 W. Santa Ana Blvd. Santa Ana, California 92701	Electronic Service through TrueFiling
Clerk of the Superior Court Orange County Superior Court Civil Complex Center Hon. Peter J. Wilson Department CX102 751 W Santa Ana Blvd, Santa Ana, California 92701	*Trial Court* Service through First Legal

California Supreme Court San Francisco Office 350 McAllister Street, Room 1295 San Francisco, California 94102	*Supreme Court* Electronic service through TrueFiling

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 8th day of August, 2022 at San Francisco, California.

/s/ Gina Caspersen