Michael Rubin
Testimony to the House Committee on the Judiciary
H. 789, An Act Delegating Public Enforcement Powers to Private Attorneys General

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My name is Michael Rubin, and I am a partner at Altshuler Berzon LLP, a law firm based in San Francisco. In my decades-long career litigating in the service of economic justice and the public interest, I have obtained several federal and state appellate rulings establishing the right of undocumented workers to the protections of American labor law; successfully defended local living wage and minimum wage ordinances at the trial and appellate court levels; negotiated a $22.7 million settlement on behalf of low-wage warehouse workers subcontracted by Walmart in California's Inland Empire; recovered over $100 million for the federal government through whistleblower litigation under the False Claims Act; and obtained an eight-figure settlement in a human trafficking case on behalf of young girls trafficked from Southeastern India. I regularly represent low-wage workers who have experienced wage theft and unsafe working conditions, and I have litigated a number of employment cases involving California's Private Attorney Generals Act (PAGA),[1] which I understand to be a model for H.789.

PAGA's Origins

PAGA was enacted in 2003 as a means of enforcing the California Labor Code, and in particular, to reduce noncompliance in the underground economy and to deter employers from engaging in "unlawful and anti-competitive business practices."[2] By deputizing aggrieved employees to bring lawsuits on behalf of the State of California's Labor and Workplace Development Agency (LWDA), PAGA responded to the severe understaffing and underfunding of enforcement agencies that were responsible for Labor Code enforcement.[3]

Before PAGA was enacted, individual employees could not sue employers directly for statutory civil penalties, but could only file claims with the California Labor Commissioner,

[1] Cal. Lab. Code § 2698-2699.3. All statutory citations are to the California Labor Code unless otherwise noted.
[2] S.B. 796, 2003-2004 Sen. Reg. Sess. (CA 2003).
[3] The Legislature acknowledged these inadequacies directly. *See* Assembly Judiciary Committee, Committee Analysis of S.B. 796, 3-4, 6/26/03 (asserting employers have generally been able to "violate the laws with impunity.").

seeking public-agency enforcement of existing penalty provisions. Depending on the section of the Labor Code at issue, the Labor Commissioner could conduct an investigation or, in some cases, a prosecutor could bring misdemeanor charges.

Although employees could also sue their employers for unpaid wages and other remedies under the various Labor Code provisions that created a private right of action, those workers' inability to pursue the civil penalties provided by statute resulted in many workplace laws being unenforced or underenforced. Budgetary and staffing restrictions dramatically weakened government enforcement capabilities, and the absence of meaningful compliance oversight affected workers in all industries, especially those in the underground economy, including undocumented workers in industries such as hospitality, landscaping, construction, and agriculture.[4] A study by the U.S. Department of Labor estimated that in the Los Angeles garment industry alone, which employed over 100,000 workers, more than 33,000 "serious and ongoing" wage violations existed. Although California's workforce nearly doubled between 1980 and 2003, resources allocated to labor enforcement remained below mid-1980s levels, meaning the ratio of enforcement staff to workers decreased by 36%,[5] while citations declined by 46.4%.[6]

The enactment of PAGA enabled aggrieved employees for the first time to pursue claims against their employers for violation of Labor Code provisions that could trigger the payment of civil penalties, separate and apart from any claims they workers might have for damages or restitution. PAGA also created a new default civil penalty for provisions of the Labor Code that did not previously provide for civil penalties.

Before any worker can file a "representative" PAGA action on behalf of the State LWDA, he or she must exhaust an administrative procedure, beginning with filing a notice to the LWDA and to the employer, giving the LWDA an opportunity to investigate and the employer an opportunity to cure. If the LWDA declines to investigate and the violations are

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[4] The Legislature defined the "underground economy" to mean "businesses operating outside the state's tax and licensing requirements," and in 2003, estimated a tax loss of three to six billion dollars annually due to a lack of regulation. *See* Assembly Judiciary Committee, Committee Analysis of S.B. 796, 3-4, 6/26/03

[5] *See* Paul M. Ong, et al., Analysis of the California Labor and Workforce Development Agency's Enforcement of Wage and Hour Laws, The Ralph and Goldy Lewis Center for Regional Policy Studies UCLA (2004).

[6] *See* Ben Nichols, *Businesses Beware: Chapter 906 Deputizes 17 Million Private Attorneys General to Enforce the Labor Code,* 35 McGeorge L. Rev. 581, 582 2004 (citing a study produced for a legislative analysis report, Tom Gallagher, *Tough On Crime? The Decline Of Labor Law Enforcement In California 1970-2000* (June 2001).

not remedied, the aggrieved employees can sue on behalf of the State for civil penalties. If the suit is successful, the employees are entitled to 25% of the penalties recovered plus attorneys' fees, and the LWDA is entitled to 75% of the penalties, which PAGA specifically requires to be earmarked for Labor Code enforcement and education. If the LWDA responds to the notice by citing the employer or initiating wage collection proceedings, the workers may not proceed with their PAGA action.

PAGA's Impact on Revenue and Compliance

On average, California collected $5.6 million in annual PAGA penalties during the first 10 years of its existence. PAGA revenues continue to rise, from $4.5 million in Fiscal Year 2012/13 and $5.7 million in FY 2013/14, to $8.4 million in FY 2014/15, and considerably more since then (although precise figures are not yet publicly available).[7] Between PAGA's enactment in 2004 and April 2013, California's LWDA collected a total of $24.5 million in PAGA penalties, in 1,255 cases.[8]

PAGA has unquestionably had its desired effect of deterring violations of California's workplace protections, although much more remains to be done. By increasing the potential cost of violating the law, PAGA has spurred employers to invest in compliance. For example, California workers have had the right to "suitable seating" at their workstations since 1919, but only the Labor Commissioner could enforce that standard, and her office prioritized enforcement activities that focused on recovered employees' unpaid wages. In the absence of government enforcement, employers largely ignored the suitable seating requirement, and forced thousands of low-wage workers, particularly in retail and banking, to stand for the duration of their shifts to the detriment of their health and in violation of state law.

I was co-counsel in two landmark cases holding that an employer's suitable seating violations trigger PAGA's default penalty,[9] and another case in the California Supreme Court that clarified the legal standards applicable to this previously unenforced workplace protection.[10] I also represented Bank of America tellers in a case that achieved a $15

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[7] See Department of Industrial Relations Budget Change Proposal, Fiscal Year 2016/2017.
[8] Data supplied in response to a Public Records Act request by Christian Schrieber, April 2013.
[9] *Bright v. 99 Cents Only Stores* (2010) 189 Cal. App. 4th 1472; *Home Depot v. Superior Court* (2011) 191 Cal.App.4th 210.
[10] *Kilby v. CVS Pharmacy, Inc*. (2016) 63 Cal.4th 1.

million settlement and comprehensive injunctive relief that guaranteed all Bank of America tellers the right to seats at their teller counters. Under PAGA, *$10 million of that settlement was paid to the LWDA for Labor Code enforcement and education*, and soon thereafter the Labor Commissioner added nine new enforcement personnel to her staff.

The impact of our suitable seating cases extends far beyond the workers we represented in these cases. Our PAGA actions and resulting settlements have prompted employers throughout the State to re-evaluate their practices and many now ensure that their workers may sit when feasible. As one employer-side attorney noted, "in light of [PAGA], employers should be preemptive in aggressively attempting to identify potential bases for claims against them of nonmonetary California Labor Code violations, and once identified, those issues should be quickly remedied."[11]

PAGA has played a critical role in ensuring that low-wage workers in California can pursue workplace rights in court – and that employers take these rights seriously. Without PAGA, any individual low-wage worker's recovery could be too small to support litigation, even when the employer's savings through aggregated wage theft are substantial. In one case, we represented industrial laundry workers employed by Cintas who were not receiving the wages and benefits required pursuant to a living wage ordinance that covered Cintas' contract to provide uniforms to the City of Hayward. The court awarded the workers $790,489 in unpaid hourly wages and $14,254 in unpaid vacation benefits – and ordered Cintas to pay an additional $258,900 in penalties for violating the Labor Code – 75% of which went to the State LWDA.[12]

In 2016, my firm reached a $3.75 million settlement with McDonald's for violations of wage and hour standards at five franchised locations in the San Francisco Bay Area.[13] Much of the litigation centered on whether the multibillion-dollar corporation shared liability for the workers' unpaid wages and overtime, missed meal breaks, and unpaid work-uniform expenses with the franchisee that operated those restaurants. The settlement represented the first time in the fast food giant's history that McDonald's Corporation had compensated workers at a franchisee-operated restaurant. Although only

[11] Joshua R. Dale, *Power Continues To Flow toward Calif. Plaintiffs via PAGA*, Law360 (May 22, 2015).
[12] *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal. App. 4th 1157.
[13] *Ochoa, et al. v. McDonald's Corp., et al.*, No. 3:14-cv-02098-JD (N.D. Cal.).

$333,000 of that total represented PAGA penalties, with $250,000 paid to LWDA, the potential liability for far more significant penalties allowed us to negotiate a settlement that fully compensated class members and included meaningful injunctive relief.

We are fortunate in California to have a dynamic, committed, and relatively well-funded labor enforcement agency with dedicated and experienced investigators. Yet as in other states, the Labor Commissioner's office prioritizes recovering back wages over imposing penalties – a rational approach given resource constraints. Private enforcement, enabled through PAGA, generates the possibility of more serious consequences; and that possibility has had a demonstrable impact on statewide employer compliance.

In the years since PAGA's enactment, the number of workers constrained by forced arbitration clauses and class action waivers has dramatically increased, stymying private enforcement. Yet, as Professor Gilles' testimony explains in detail, state and federal courts have held that arbitration clauses that require workers to forfeit the right to pursue PAGA claims are unenforceable.[14] The rise of forced arbitration, which hampers private litigation and places far greater burdens for securing compliance on public agencies, has significantly increased the importance of PAGA in California's labor standards enforcement scheme, by expanding public enforcement and preserving access to courts. I urge the committee to consider a policy similar to PAGA to deliver real workplace protections for Vermont's workers.

[14] *See Sakkab v. Luxottica Retail N. Am., Inc.,* 803 F.3d 425 (9th Cir. 2015), *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (Cal. 2015).