No. 19-16184

United States Court of Appeals
for the
Ninth Circuit

RODERICK MAGADIA, individually and on behalf of all those similarly situated,

Plaintiff-Appellee,

– v. –

WAL-MART ASSOCIATES, INC., a Delaware corporation;
WALMART INC., a Delaware corporation,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE
DISTRICT COURT CASE NO. 5:17-cv-00062-LHK

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL RETAIL FEDERATION, and RETAIL LITIGATION CENTER, INC. AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

DEANNA M. RICE
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, DC 20006
(202) 383-5300

ANTON METLITSKY
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, New York 10036
(212) 326-2000

Counsel for Amici Curiae

(Additional Counsel Listed on Inside Cover)

STEVEN P. LEHOTSKY
JONATHAN D. URICK
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

STEPHANIE MARTZ
NATIONAL RETAIL FEDERATION
1101 New York Avenue, N.W.
Washington, DC 20005
(202) 783-7971

Counsel for Amicus Curiae National Retail Federation

DEBORAH R. WHITE
RETAIL LITIGATION CENTER, INC.
1700 N. Moore Street, Suite 2250
Arlington, Virginia 22209
(703) 600-2067

Counsel for Amicus Curiae Retail Litigation Center, Inc.

CORPORATE DISCLOSURE STATEMENT

Amici curiae the Chamber of Commerce of the United States of America, National Retail Federation, and Retail Litigation Center, Inc., have no parent corporation, and no publicly held corporation owns 10% or more of their stock.

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber represents the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community.

The National Retail Federation is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and internet retailers from the United States and more than 45 countries. Retail is the largest private-sector employer in the United States, supporting one in four U.S. jobs—approximately 42 million American workers—and contributing $2.6 trillion to the annual GDP. NRF periodically submits *amicus curiae* briefs in cases raising significant legal issues for the retail community. Specifically, NRF has filed briefs

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel has made any monetary contribution intended to fund the preparation or submission of this brief.

in cases pertaining to California labor and employment laws, including wage and hour laws and orders and lawsuits involving the Private Attorneys General Act.

The Retail Litigation Center, Inc. is the only public policy organization dedicated solely to representing the retail industry in the judiciary. The RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. Since its founding in 2010, the RLC has participated as an *amicus* in more than 150 judicial proceedings of importance to retailers.

The district court's decision expands the scope of California's already broad and complex labor laws beyond the plain language of the Labor Code's text, and in doing so imposes significant burdens on employers charged with complying with those provisions, who face potentially massive penalties if they fail to do so (even unwittingly). It also extends to employees Article III standing to sue for alleged violations of California's wage-statement laws in federal court even where those employees expressly admit that they have not been injured by those statements, and permits employees to sue for alleged Labor Code violations that did not

personally affect them at all. Allowing such claims to proceed not only exceeds the constitutional role of the federal courts, but also encourages abusive, lawyer-driven litigation. Because many of *amici*'s members and affiliates are targets for claims under the California Labor Code—and particularly claims brought under California's Private Attorneys General Act ("PAGA"), which authorizes employees to sue to recover penalties on behalf of themselves, other employees, and the State for alleged Labor Code violations—*amici* have a strong interest in ensuring that federal courts both rigorously apply the Labor Code as written and strictly enforce Article III's standing requirements to ensure that actions under that Code are aimed at addressing real harm—not just lining plaintiffs' lawyers' pockets.

ARGUMENT

The district court below awarded nearly $102 million in statutory damages and penalties against appellants Wal-Mart Associates, Inc. and Wal-Mart, Inc. (collectively, "Wal-Mart"), the overwhelming majority of which were based on Wal-Mart's issuance of wage statements that allegedly did not comply with California Labor Code § 226(a).[2] Section 226(a) requires employers to supply

[2] The court awarded $48,046,000 in statutory damages and $48,046,000 in PAGA penalties on the plaintiff's § 226(a)(9) claim and $5,785,700 in PAGA penalties (but no statutory damages) on his § 226(a)(6) claim. D. Ct. Doc. 217 at 66-67. The court also awarded $70,000 in PAGA penalties (but no statutory

their employees with wage statements containing particular information, including (as relevant here) hourly pay rates, hours worked, and the beginning and end dates of the pay period covered by the statement. Plaintiff Roderick Magadia identified two alleged faults with the statements provided by Wal-Mart—faults that he admits caused him no injury, but that nevertheless resulted in a gargantuan damages award. First, he asserted that the wage statements provided to Wal-Mart employees when their employment with the company is terminated do not comply with § 226 because those statements, unlike the biweekly statements that Wal-Mart also provides, do not include the pay-period start and end dates. Second, Magadia alleged that Wal-Mart violated § 226 by reporting after-the-fact adjustments to employees' overtime pay based on quarterly bonuses as a lump sum, rather than in terms of an "hourly rate in effect during the pay period" with a "corresponding number of hours worked at" that rate.

The district court found Wal-Mart liable on both theories, but only by ignoring the plain meaning of the statutory text and imposing a generalized obligation to include all information the court deemed necessary for the employee to determine whether a paycheck was correctly calculated. The court further erred in concluding that Magadia had Article III standing to pursue his § 226 claims in

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damages) on Magadia's claim under Labor Code § 226.7, relating to meal-break requirements. *Id*.

federal court, despite his express testimony that he was not injured by the wage statements he received. That holding is contrary to established Supreme Court authority (not to mention common sense). So, too, is the court's holding that Magadia could recover PAGA penalties for *another* alleged Labor Code violation related to the timing of meal breaks—one that had not affected Magadia at all.

These errors not only violate well-established legal doctrine but, if allowed to stand, will also result in significant adverse practical consequences. The court's expansive interpretation of the Labor Code, which reaches well beyond the plain meaning of its text, presents serious challenges for employers attempting to comply with California's already detailed and complex labor laws. And the court's broad reading of the substantive provisions at issue, combined with its lax approach to Article III standing, will only further encourage the already sizable subset of PAGA litigation that is not about remedying real harms to employees, but generating fees for plaintiffs' lawyers.

For all of these reasons, this Court should reverse the lower court.

I. The District Court Misconstrued California Labor Code § 226(a), And In Doing So Created Substantial Compliance Challenges For California Employers

A. The District Court's Interpretation Of California Labor Code § 226(a)(6) and (9) Cannot Be Reconciled With The Plain Statutory Text

As relevant here, California Labor Code § 226 directs that "[a]n employer, semimonthly or at the time of each payment of wages, shall furnish to his or her employee … an accurate itemized statement in writing showing" various information listed in the statute. Cal. Labor Code § 226(a). The claims in this case concern two requirements imposed by § 226(a): that the wage statement show "the inclusive dates of the period for which the employee is paid," *id.* § 226(a)(6), and that the statement must reflect "all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee," *id.* § 226(a)(9). The district court's construction of each provision is irreconcilable with its text.

1. The district court concluded that Wal-Mart violated § 226(a)(6) because the statements of final pay it provides upon termination of employment with the company do not list the pay-period start and end dates. But it is undisputed that Wal-Mart *also* provides biweekly wage statements that *do* reflect the associated pay-period dates to terminated employees in accordance with its ordinary biweekly pay schedule (and that all the other biweekly wage statements Wal-Mart provides

to employees include this information). *See* D. Ct. Doc. 217 at 5-6. That fact should have precluded liability, as § 226(a) requires that an employer supply a compliant wage statement "semimonthly *or* at the time of each payment of wages." Cal. Labor Code § 226(a) (emphasis added). The word "or" obviously "is almost always disjunctive," *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141 (2018) (quotation omitted), and ordinary canons of construction direct "that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise," *Reiter v. Sonotone Corp*., 442 U.S. 330, 339 (1979). Nothing about the context surrounding § 226(a) calls for deviation from that firmly established baseline rule here, so the fact that Wal-Mart indisputably *did* set forth the pay-period start and end dates in its "semimonthly" paychecks renders irrelevant whether it also did so "at the time of each payment of wages." The district court's contrary construction reads the "or" in § 226(a) as an "and," impermissibly altering its meaning.

2. The district court also erred in reading § 226(a)(9) to require Wal-Mart to report overtime adjustments based on its payment of quarterly bonuses in an hourly-rate-and-hours-worked format. Section 226(a)(9) instructs that wage statements must reflect "all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee." The lump-sum payments coded as "OVERTIME/INCT" in the wage

statements at issue, however, do not derive from an "applicable hourly rate[] in effect during the pay period" covered by the wage statement, nor is there any "corresponding number of hours worked" by the employee at any such a rate during the relevant pay period. Rather, the payments in question represent additional compensation associated with overtime hours worked in *earlier* pay periods, triggered by Wal-Mart's payment of variable quarterly incentive awards (i.e., bonuses), which retroactively affects the base pay rate that must be used in calculating overtime pay under California law. *See* D. Ct. Doc. 217 at 5. As the district court acknowledged, calculation of the adjustment is "not a simple matter of multiplying an hourly wage by the number of hours worked." D. Ct. Doc. 217 at 53. And there is no requirement in the California Labor Code that wages that *do not* derive from payment of an hourly rate must nevertheless be stated in terms of an hourly rate, particularly when those the wages were paid for work *outside* the relevant work period.

The now-familiar maxim that statutes should be read according to their text thus suffices to resolve this case. *See Olson v. Auto. Club of S. California*, 42 Cal. 4th 1142, 1147 (Cal. 2008) ("Statutory interpretation begins with an analysis of the statutory language," and "[i]f the statute's text evinces an unmistakable plain meaning, [the court] need go no further." (quotation omitted)); *see also Ferra v. Loews Hollywood Hotel, LLC*, 2019 WL 5061494, at *3 (Cal. Ct. App. Oct. 9,

2019) (applying "basic principle" that court "must look first to the words of the statute" in construing Labor Code § 226.7 and rejecting interpretation adopted by the district court in this case (quotation omitted)). Adherence to that rule is particularly appropriate in the context here, where the alleged violations can often be entirely technical—as described further below, the plaintiff here admitted that he was not harmed by them—and yet the statutory penalties are exorbitant. Nearly all of the more than $101 million judgment here was for alleged wage-statement violations—more than $101 million because a judge concluded that Wal-Mart wrote the wrong thing on pay stubs, without any finding of the kind of substantial harm that one would expect to precede such a large award. Courts should always apply statutes as written, but a more than $101 million award for a harmless error makes clear the stakes: if such lawsuits are appropriate at all, *but see infra* at Part II, courts should at least ensure that such substantial awards do not rest on rules made up entirely by judges and never approved by the Legislature.

B. The District Court's Expansive, Atextual Interpretations Of The Labor Code Expose Employers To Serious Compliance Burdens

1. The district court's decision imputing requirements into the Labor Code that the Legislature never adopted presents significant practical problems for California employers—and especially for national employers with employees in both California and many other states, who are expected to comply with the widely varied requirements in each of those jurisdictions.

Even with respect to the relatively discrete issue of wage statements, state requirements take many forms. The vast majority of States and many municipalities require the issuance of wage statements, but some do not. *See* 4 Employment Coordinator Compensation, ch. 37 (Westlaw Mar. 2019 update). States that do require wage statements disagree about how often they must be provided. *See, e.g.*, Cal. Labor Code § 226(a) ("semimonthly or at the time of each payment of wages"); Conn. Gen. Stat. Ann. § 31-13a(a) ("[w]ith each wage payment"); Kan. Stat. Ann. § 44-320 ("[u]pon the request of the employee"); Mo. Rev. Stat. § 290.080 ("at least once a month"). They also have varied requirements regarding the form the statements must take. For example, some States allow electronic statements, *see, e.g.*, Ariz. Rev. Stat. § 23-351(E), while some allow electronic statements only if the employee has access to a printer, *see* Iowa Code Ann. § 91A.6(4); Ky. Rev. Stat. Ann. § 337.070; Minn. Stat. Ann. § 181.032(a). Other States require paper statements. *See, e.g.*, N.M. Stat. § 50-4-2.[3] Yet another set of States leaves the choice to the employee, but even then there is variation: Some require employers to provide electronic statements by default

[3] Moreover, where paper wage statements are provided, jurisdictions disagree about the form they must take. In Delaware, for example, an employer must in certain cases provide the statement "on a separate slip." Del. Code Ann. tit. 19, § 1108(4). But in Wyoming, the employer must provide the statements on a "detachable part of the check." Wyo. Stat. Ann. § 27-4-101(b).

but allow their employees to opt *out of* electronic statements, Minn. Stat. Ann. § 181.032(c), while others require employers to provide paper statements by default but allow their employees to opt *into* electronic statements, Haw. Rev. Stat. § 388-7(4).

States also impose widely varying requirements concerning the contents of wage statements. For example, Arizona requires only that the employer list the employee's earnings and payroll deductions. Ariz. Rev. Stat. § 23-351(E), (F); *see* Idaho Code Ann. § 45-609 (similar). Alaska, by contrast, requires wage statements to list eleven categories of pay-related information. Alaska Admin. Code, tit. 8, § 15.160(h). There is considerable variation among States between these extremes. *See, e.g.*, Cal. Labor Code § 226 (9 requirements); D.C. Code § 32-1008 (7 requirements); Colo. Rev. Stat. § 8-4-103(4) (6 requirements); Conn. Gen. Stat. Ann. § 31-13a (5 requirements); Ind. Code Ann. § 22-2-2-8(a) (3 requirements).

Similar variation exists with respect to the laws governing such facets of labor law as minimum wage requirements, timing of wage payments, payment for terminated employees, overtime, and meal and rest breaks.

Given this patchwork of varied state provisions, it is crucial that state laws provide clear notice of wage-statement requirements before an employer may be exposed to $100-million penalties for non-compliance. It is difficult enough for national employers to keep track of and comply with the multiplicity of state laws

if the statutes are interpreted according to their plain terms. Expanding state labor laws to create legal obligations not evident on their face makes the task impossible. And again, hewing to the text is all the more important here because of the severe monetary consequences resulting from even an inadvertent and wholly unintentional failure to comply with the Labor Code's requirements. While statutory damages under § 226 may be awarded only for knowing and intentional violations, courts have held that a plaintiff may recover PAGA penalties absent any such showing. *See* D. Ct. Doc. 217 at 55 (citing *Lopez v. Friant & Assocs., LLC*, 15 Cal. App. 5th 773, 788 (Cal. Ct. App. 2017)). The district court below awarded nearly $54 million in PAGA penalties alone—and that was after the court exercised its discretion to reduce the penalties awarded below the statutory maximum. *See id.* at 49 (plaintiffs requested $131,427,750 in PAGA penalties for the § 226(a)(9) violation); *id.* at 55 (plaintiffs requested $28,928,500 in PAGA penalties for the § 226(a)(6) violation); *see also id.* at 21 (awarding requested $70,000 in PAGA penalties on § 226.7 violation).

2. The district court's interpretation of § 226(a)(9) raises more specific and troubling compliance concerns. The district court read § 226(a)(9) to require employers to somehow manipulate retroactive overtime pay owed because the employer has chosen to issue discretionary bonuses—amounts that are calculated according to a complex formula—into a format reflecting an "hourly rate[] in

effect during the pay period and the corresponding number of hours worked … by the employee." Cal. Labor Code § 226(a)(9). Again, the district court itself acknowledged that calculating the overtime adjustment is "not a simple matter of multiplying an hourly wage by the number of hours worked." D. Ct. Doc. 217 at 53; *see id.* ("the Court recognizes the difficulty in calculating the OVERTIME/ INCT line item"). Yet the court illogically went on to conclude that this "underscores the importance of Wal-Mart providing the hours and rate on the wage statements." *Id.* In fact, as explained earlier, it is not clear that the additional overtime pay reflected in the challenged "OVERTIME/INCT" entries in Wal-Mart's wage statements *can* be reduced to an hourly rate and corresponding number of hours worked (even aside from the fact that those hours plainly are not "worked" in the period covered by the statement, given that the payment is retroactive).

If a failure to do the impossible subjects California employers to potentially massive liability—and in this case, the district court awarded more than *$92 million* in damages and penalties on the § 226(a)(9) claim alone—employers will inevitably be discouraged from paying discretionary bonuses that trigger overtime true-up payments they have no means of adequately reporting. That absurd outcome obviously does not benefit California employees, and thus perversely undermines the main employee-protective purpose the Labor Code is meant to

further. Courts should not adopt a statutory construction that enriches plaintiffs' lawyers at California employees' expense.

II. The District Court's Decision Is Inconsistent With Well-Established Article III Standing Principles

In addition to the flaws in its analysis of the plaintiffs' substantive claims under the Labor Code, the district court also erred in concluding that Magadia—the lone named plaintiff—had Article III standing to pursue those claims in the first place.

A. An Alleged Labor Code Violation Divorced From Any Concrete Harm Does Not Suffice To Establish Article III Standing

"[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (quotation omitted). "[S]tanding is one of several doctrines that reflect this fundamental limitation." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). The standing doctrine "requires federal courts to satisfy themselves that 'the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction.'" *Id.* (quotation omitted). "[T]he irreducible constitutional minimum of standing contains three elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). To have standing under Article III, a plaintiff must have "(1) suffered an injury-in-fact, (2) that is

fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

Injury-in-fact is the "[f]irst and foremost" of the three standing requirements. *Id.* at 1547-48 (alteration in original) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998)). To satisfy this element, the plaintiff must show that she has suffered a "particularized" injury—an injury that "affect[ed] the plaintiff in a personal and individual way"—and that the injury is "concrete," i.e., that it "actually exist[s]." *Id.* at 1548-49. The injury also must be "actual or imminent, not conjectural or hypothetical." *Id.* at 1548 (quoting *Lujan*, 504 U.S. at 560).

"Injury in fact is a constitutional requirement, and '[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Id.* at 1547-48; *see Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) ("In no event ... may Congress abrogate the Art. III minima"). Thus, as *Spokeo* makes clear, alleging a statutory violation is not in itself sufficient to demonstrate Article III standing. *Spokeo*, 136 S. Ct. at 1549; *see Frank v. Gaos*, 139 S. Ct. 1041, 1045 (2019). That is, "even when a statute has allegedly been violated, Article III requires such violation to have caused some real—as opposed to purely legal—

harm to the plaintiff." *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1112 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 931 (2018).

As the Supreme Court explained in *Spokeo*, "[i]n determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles." *Spokeo*, 136 S. Ct. at 1549. "Because the doctrine of standing derives from the case-or-controversy requirement, and because that requirement in turn is grounded in historical practice, it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Id.* And "because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important." *Id.* Indeed, "Congress may 'elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.'" *Id.* (quoting *Lujan*, 504 U.S. at 578). But because "Article III standing requires a concrete injury even in the context of a statutory violation," a plaintiff cannot "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Id.*; *see Summers*, 555 U.S. at 496 ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation ... is insufficient to create Article III standing."). Thus, where it is possible that a violation of a statute's

procedural requirements may not "cause harm or present any material risk of harm," courts must focus the standing inquiry on "whether the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement." *Spokeo*, 136 S. Ct. at 1550.

Following the Supreme Court's decision in *Spokeo*, this Court has asked two questions when assessing whether a violation of a statutory right has caused a concrete injury for purposes of Article III: "(1) whether the statutory provisions at issue were established to protect [the plaintiff's] concrete interests (as opposed to purely procedural rights), and if so, (2) whether the specific procedural violations alleged in [a particular] case actually harm, or present a material risk of harm to, such interests." *Robins*, 867 F.3d at 1113. Applying that framework here confirms that the violations of § 226(a) alleged by Magadia do not come with the requisite type of harm.

The California Legislature enacted § 226 "to assist the employee in determining whether he or she has been compensated properly." *Soto v. Motel 6 Operating, L.P.*, 4 Cal. App. 5th 385, 390 (Cal. Ct. App. 2016); *see Henry M. Lee Law Corp. v. Super. Ct.*, 204 Cal. App. 4th 1375, 1388 (Cal. Ct. App. 2012) (Labor Code § 226 "play[s] an important role in vindicating th[e] fundamental public policy" "favor[ing] full and prompt payment of an employee's earned wages"). Even if a violation of the procedural requirements of § 226(a)(6) and (a)(9)—

requiring wage statements to report "the inclusive dates of the period for which the employee is paid" and "all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee"—might in *some* circumstances "actually harm, or present a material risk of harm" to an employee's ability to determine whether he or she has been compensated properly, *Robins*, 867 F.3d at 1113, the "specific procedural violations alleged in this case," *id.*, do not. Indeed, Magadia (who is the lone named plaintiff in this case) testified that he had not "been injured in any way because of the pay stubs [he] received" from Wal-Mart, and he "admitted that he did not know of anyone else who was confused by any of Wal-Mart's pay statements" either. D. Ct. Doc. 217 at 40. Absent any evidence that the particular violations asserted in this case confused *anyone* about their pay, it makes no sense at all to conclude that Wal-Mart's wage statements "actually harm[ed]" or "present[ed] a material risk of harm" to Magadia's interest in being able to assess whether he "has been compensated properly." *Soto*, 4 Cal. App. 5th at 390.

The district court nonetheless concluded that Magadia had Article III standing to bring his claims under Labor Code § 226(a) because he had "suffer[ed] from the statutorily-defined injury of the inability to 'promptly and easily determine from the wage statement alone' items required to be disclosed on a wage statement." D. Ct. Doc. 217 at 47; *see* Cal. Labor Code § 226(e)(2)(B)(i) (stating

that "[a]n employee is deemed to suffer injury" in these circumstances). That is, although Magadia openly admitted that he had not been injured by the purportedly deficient wage statements he received, the district court nonetheless believed he had Article III standing to pursue his wage-statement claims because he "testified that he could not determine the start and end dates of the pay period for which he was being paid from the statement of final pay (relating to Plaintiffs' § 226(a)(6) claim)" or "the rate and hours for the OVERTIME/INCT line item (relating to Plaintiffs' § 226(a)(9) claim)." D. Ct. Doc. 217 at 47. In the district court's view, "so long as a plaintiff suffers from the statutorily-defined injury, that is sufficient." *Id.*

Contrary to the district court's suggestion, the California Legislature cannot create an Article III injury where none exists. While a state is free to adopt whatever standing rules it chooses for its own courts, a state legislature cannot give a claimant standing to sue in federal court where the requirements of Article III are not otherwise met. *See Hollingsworth v. Perry*, 570 U.S. 693, 715 (2013) ("States cannot alter th[e limited] role [of the federal courts] simply by issuing to private parties who otherwise lack standing a ticket to the federal courthouse."); *see also, e.g.*, *Cantrell v. City of Long Beach*, 241 F.3d 674, 683 (9th Cir. 2001) ("[A]lthough the [plaintiffs] may well have standing under California law to bring their suit in state court, … [a] party seeking to commence suit in federal court must

meet the stricter federal standing requirements of Article III."); *Taylor v. W. Marine Prods., Inc.*, 2014 WL 1248162, at *2 (N.D. Cal. Mar. 26, 2014) ("A state legislature may relax standing requirements for the state courts, but may not do so for cases heard in federal court"). Thus, even where a plaintiff is deemed to have suffered "injury" under a state statute—and would have standing to bring a claim under that statute in state court—federal courts must independently examine whether the plaintiff has suffered a concrete injury causally related to the statutory violation for purposes of Article III.

Notably, the California Legislature amended § 226(e) in 2013 to "define what constitutes 'suffering injury"' precisely because a number of courts had declined to hear § 226 claims on the ground that "the plaintiffs failed to demonstrate actual injury" connected to the alleged statutory violation. *Garnett v. ADT LLC*, 139 F. Supp. 3d 1121, 1131 (E.D. Cal. 2015). That the Legislature saw the need to amend the statute to make it easier for employees to assert "injury" when they have not actually suffered harm strongly suggests that § 226(a) does not protect against "concrete" harms that satisfy the requirements of Article III, *Spokeo*, 136 S. Ct. at 1548—or at least, not exclusively. Yet the Legislature's fix is obviously inadequate—labeling something an "injury" does not make it so—and if allowed would permit plaintiffs to sue even where their claims involve purely procedural and technical violations of the Labor Code that cause no concrete harm,

as is concededly true in this case. These are precisely the types of claims courts previously rejected based on the absence of an actual injury (and Article III standing). While the amendment to § 226(e) may expand the range of claims that are cognizable in *state* court, the Legislature cannot transform purported harms previously deemed inadequate into claims actionable in federal court simply by declaring that a plaintiff has been "injured" when by all other indications, including his own testimony, he has not been.

B. The District Court's Award Of PAGA Penalties For Alleged Meal-Break Violations That Did Not Impact Magadia In Any Way Is Incompatible With Article III

In addition to its principal penalties awards connected to Magadia's § 226(a) claims, the district court also awarded $70,000 in PAGA penalties for violations of California Labor Code § 226.7's meal-break requirements, despite concluding that Magadia had "failed to show he was wronged under his own theory of liability" on that claim and decertifying the meal-break class on adequacy and typicality grounds. D. Ct. Doc. 217 at 16-17, 21. According to the district court, because Magadia was affected by the alleged *wage-statement* violations, he was also entitled to recover PAGA penalties for violations of any and all *other* Labor Code

provisions he could prove, including those that affected only *other* Wal-Mart employees. D. Ct. Doc. 217 at 21. That is as wrong as it sounds.[4]

In concluding that Magadia was permitted to recover penalties on the § 226.7 claim, the court relied on *Huff v. Securitas Security Services USA, Inc.*, 23 Cal. App. 5th 745 (Cal. Ct. App. 2018), which held that "so long as [the plaintiff] was affected by at least one of the Labor Code violations alleged in the complaint, he can recover penalties for all the violations he proves," including violations that did not personally impact him in any way. *Id.* at 761. But regardless of what procedural rules a state may choose to adopt for claims brought in *state* court, a plaintiff in *federal* court must demonstrate that he or she has Article III standing to pursue each of his or hers claims individually. *See supra* at 19-20; *see also, e.g.*, *Adams v. Luxottica U.S. Holdings Corp.*, 2009 WL 7401970, at *6 (C.D. Cal. July

[4] The district court also erred in concluding that Magadia proved a violation of § 226.7 on the merits, once again reading into the Labor Code requirements it does not actually impose. Section 226.7 states that "[i]f an employer fails to provide an employee a meal … period in accordance with state law … the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal … is not provided." The district court held that "the employee's regular rate of compensation" under the statute "includes the base rate of compensation plus the employee's MyShare incentive award" (i.e., the quarterly bonus payments made by Wal-Mart). D. Ct. Doc. 217 at 20. But the California Court of Appeal recently rejected the district court's approach, explaining that "the statutory terms 'regular rate of pay' and 'regular rate of compensation' are not synonymous, and the premium for missed meal and rest periods is the employees' base hourly wage." *Ferra*, 2019 WL 5061494, at *3.

24, 2009) (PAGA case explaining that "'a plaintiff whose cause of action is perfectly viable in state court under state law may nonetheless be foreclosed from litigating the same cause of action in federal court, if he cannot' meet federal procedural and jurisdictional requirements" (quoting *Lee v. Am. Nat'l Ins. Co.*, 260 F.3d 997, 1001 (9th Cir. 2001)). And the district court's extension of *Huff*'s reasoning to PAGA claims brought in federal court runs afoul of several bedrock principles of *federal* standing law.

For one thing, the Supreme Court has explained that Article III "standing is not dispensed in gross." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008)). "To the contrary, 'a plaintiff must demonstrate standing for each claim he seeks to press.'" *Id.* (quoting *Davis*, 554 U.S. at 734). It is well established, moreover, that as a matter of Article III standing, a plaintiff "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). These precedents foreclose Magadia from relying on any injuries he allegedly suffered in connection with his § 226(a) claims to establish standing to sue for violations of § 227.6, and they likewise preclude him from relying on asserted harms to *other* employees' legal rights for that purpose.

The court in *Huff* suggested otherwise by analogizing a PAGA claim to a *qui tam* proceeding, and reasoning that "traditional standing requirements do not necessarily apply to *qui tam* actions since the plaintiff is acting on behalf of the government." *Huff*, 23 Cal. App. 5th at 757; *see Williams v. Super. Ct.*, 3 Cal. 5th 531, 538 (Cal. 2017) (describing PAGA suit as "essentially a *qui tam* action filed on behalf of the state to assist it with labor law enforcement"). But the Supreme Court has held that, in *qui tam* cases, an uninjured plaintiff may have standing based on the government's effective "assignment" to that individual of the government's right to sue to remedy *its own injuries* (such as the injury to its sovereignty arising from the violation of its laws). *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771-73 (2000). A PAGA plaintiff, however, does not sue merely to vindicate the *government's* interests, but also to remedy purported harms to *other employees*. *See Williams*, 3 Cal. 5th at 545-46 (under PAGA, "an aggrieved employee" acts "on behalf of the state *and* other current or former employees" (emphasis added)); *see also Medlock v. Taco Bell Corp.*, 2014 WL 4319510, at *7 (E.D. Cal. Aug. 29, 2014) (criticizing "characterization of PAGA actions as a 'law enforcement action'" as "entirely artificial," and noting that Labor Code § 2699(a) "expressly states that PAGA actions are civil actions 'brought by an aggrieved employee *on behalf of himself or herself and other current or former employees*'" (emphasis added)). No precedent

even remotely suggests that an individual has Article III standing to assert the claims of entirely unrelated third parties.[5]

III. The District Court's Decision Invites Frivolous Litigation That Harms California Employers And Provides Little Benefit To Employees

Beyond its obvious doctrinal flaws, the district court's decision to construe Section 226 broadly and impose confiscatory penalties for what, at most, are purely technical violations will have significant adverse practical consequences, further encouraging lawyer-driven lawsuits in an area of the law that is already rife with abuse.

Since PAGA was enacted in 2004, "it has become common practice for plaintiffs in employment actions to assert a PAGA claim, as the potential civil penalties for violations can be staggering and often greatly outweigh any actual damages." Matthew J. Goodman, *The Private Attorney General Act: How to Manage the Unmanageable*, 56 Santa Clara L. Rev. 413, 415 (2016) (quotation

[5] To be sure, federal courts permit a plaintiff to pursue claims in a representative capacity if and when the requirements of Rule 23 are met, but a plaintiff must demonstrate his *own* standing before he may avail himself of the Rule 23 procedure. *See O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) ("[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class."); *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022 (9th Cir. 2003) ("[S]tanding is the threshold issue in any suit," and "[i]f the individual plaintiff lacks standing, the court need never reach the class action issue." (quotation omitted)).

omitted). The number of PAGA suits filed annually increased by more than 400% between 2004 and 2014, *id.* at 415 & n.7, and the trend shows no signs of slowing down. A record number of PAGA claims—more than 5,700—were filed with the California Labor and Workforce Development Agency in 2018, up 15% from 2017. Suzy Lee, *"We've Received A PAGA Notice—Now What?" An Employer's 10-Step Guide* (July 1, 2019).[6] A large portion of these suits have been brought by plaintiffs' lawyers that are incredibly prolific in the PAGA sphere. According to one court filing, "over 100 firms have sent 50 or more PAGA Notices to the LWDA since the law was enacted," and five firms have sent more than 500. Complaint at 35-36, *California Business & Industrial Alliance v. Bacerra*, Cal. Super. Ct., Orange Cnty., No. 30-2018-01035180-C*-JR-CXC (Nov. 28, 2018).

The flurry of PAGA lawsuits in recent years includes many cases pressing claims that do not address any real harm to employees, and instead appear to be designed to extract settlements and collect attorneys' fees. *See, e.g., Mays v. Wal-Mart Stores, Inc.*, 354 F. Supp. 3d 1136, 1144 (C.D. Cal. 2019) (alleging paystubs stated employer was "Walmart" instead of legal name "Wal-Mart Stores, Inc."), *appeal filed*, No. 19-55318 (9th Cir. Mar. 20, 2019); *Clarke v. First Transit, Inc.*, 2010 WL 11459322, at *2 (C.D. Cal. Aug. 11, 2010) (alleging paystubs identified

[6] https://www.fisherphillips.com/pp/newsletterarticle-weve-received-a-paga-notice-now-what.pdf?28678

employer as "First Transit" instead of legal name "First Transit Transportation, LLC"); *Jones v. Longs Drug Stores California, Inc.*, 2010 WL 11508656, at *1 (S.D. Cal. Sept. 13, 2010) (alleging paystubs included last 4 digits of employee's social security number instead of full number and listed employer as "Longs Drug Stores" instead of "Longs Drug Stores California, Inc.").

Such settlements often do little to benefit employees but greatly enrich the lawyers who bring the suits. For example, in 2018, Uber settled PAGA claims based on its alleged misclassification of drivers as independent contractors for $7.75 million, ultimately persuading the judge that the settlement, under which individual drivers would receive "roughly $1 each," was reasonable. Alexander M. Tait, *The Gang Settles A Labor Classification Suit: The Price-Uber Settlement Has Finally Been Approved,* Lejer (Jan. 25, 2018)[7]; Melissa Daniels, *Calif. Judge OKs $7.75M Uber Driver Deal Over Objections*, Law360 (Jan. 16, 2018).[8] Safeway recently agreed to pay $12 million to settle PAGA claims; plaintiffs' counsel walked away with $4.2 million in fees, while the class of 30,182 cashiers was allotted an average of about $62 each. *See* Dorothy Atkins, *Safeway Gets Nod*

[7] https://thelejer.wordpress.com/2018/01/25/the-gang-settles-a-labor-classification-suit-the-price-uber-settlement-has-finally-been-approved/

[8] https://www.law360.com/articles/1002461/calif-judge-oks-7-75m-uber-driver-deal-over-objections

for $12M PAGA Deal Ending Seating Suit, Law360 (Oct. 18, 2019).[9] Safeway previously settled PAGA claims related to allegedly inaccurate pay stubs for $1.45 million, of which plaintiffs' counsel sought to recover up to $483,333. The workers would receive an average of $23.19. *See* Dorothy Atkins, *Safeway's $1.45M PAGA Deal Over Pay Stubs Gets Initial OK*, Law360 (Aug. 16, 2019).[10] In 2018, Target paid $9 million to settle several PAGA suits, $3.9 million of which was allocated to attorneys' fees while 90,000 cashiers were left to share the $1.2 million that remained after attorneys' fees and costs and named plaintiff awards were deducted and the LWDA's share was taken out—an average of about $13 each. *See* Dorothy Atkins, *Target's $9M PAGA Deal Ending Seating Suits OK'd*, Law360 (July 24, 2018).[11] Walgreens settled a similar PAGA suit for $15 million earlier this year, with class counsel collecting $5.2 million in fees. *See* Dorothy Atkins, *Walgreens' $15M PAGA Deal Ending Seating Suit Gets OK'd*, Law360 (Aug. 6, 2019).[12]

[9] https://www.law360.com/corporate/articles/1211009/safeway-gets-nod-for-12m-paga-deal-ending-seating-suit

[10] https://www.law360.com/articles/1189549/safeway-s-1-45m-paga-deal-over-pay-stubs-gets-initial-ok

[11] https://www.law360.com/articles/1066403/target-s-9m-paga-deal-ending-seating-suits-ok-d

[12] https://www.law360.com/articles/1185801/walgreens-15m-paga-deal-ending-seating-suit-gets-ok-d

A full solution to these problems, of course, ultimately rests with the California Legislature. The Legislature took a small step in that direction in 2018 when it passed a bill creating a carve-out barring certain construction-industry workers from bringing PAGA claims, responding to concerns that although "PAGA was a well-intentioned law," "it has, in many cases, become another form of litigation abuse by unscrupulous lawyers." AB 1654, Analysis of S. Comm. on Labor and Industrial Relations (June 18, 2018); *see* Cal. Labor Code § 2699.6. But unless and until more comprehensive state-law reforms are adopted, the high risk of abuse in PAGA actions underscores the importance of diligently enforcing the requirements of Article III and ensuring that the Labor Code is not interpreted in an overbroad manner that ignores the plain meaning of its text.

CONCLUSION

For the reasons stated above, the judgment below should be reversed.

Dated: October 28, 2019

Respectfully submitted,

/s/Anton Metlitsky

Anton Metlitsky
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, N.Y. 10036
(212) 326-2000

Deanna M. Rice
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Counsel for Amici Curiae

Steven P. Lehotsky
Jonathan D. Urick
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

Stephanie Martz
NATIONAL RETAIL FEDERATION
1101 New York Avenue, N.W.
Washington, D.C. 20005
(202) 783-7971

Counsel for Amicus Curiae
National Retail Federation

Deborah R. White
RETAIL LITIGATION CENTER, INC.
1700 N. Moore Street
Suite 2250
Arlington, Va. 22209
(703) 600-2067

Counsel for Amicus Curiae
Retail Litigation Center, Inc.

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