No. 12-17623

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NISHA BROWN and KATHY WILLIAMSON,
individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

WAL-MART STORES, INC.,

Defendant-Appellant.

On Appeal From The United States District Court
For The Northern District Of California

APPELLANT'S PETITION FOR PANEL REHEARING OR REHEARING EN BANC

Rachel S. Brass
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street, Suite 3000
San Francisco, CA 94105

Theodore J. Boutrous, Jr.
Counsel of Record
Catherine A. Conway
Katherine V.A. Smith
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000

Counsel for Wal-Mart Stores, Inc.

CORPORATE DISCLOSURE STATEMENT

Wal-Mart Stores, Inc. has no parent company, and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

Page

INTRODUCTION AND RULE 35 STATEMENT 1

FACTUAL AND PROCEDURAL BACKGROUND 3

I. The Statutory Framework 3

II. This Litigation 4

REASONS WHY REHEARING SHOULD BE GRANTED 6

I. Due Process Requires An Individualized Penalty Assessment and An Opportunity To Raise All Individualized Defenses 7

II. At a Minimum, Wal-Mart Respectfully Requests a Remand to the District Court for Reconsideration Under *Kilby* 16

CONCLUSION 18

TABLE OF AUTHORITIES

Page

Cases

Amaral v. Cintas Corp. No. 2,
163 Cal. App. 4th 1157 (2008) 8

Amchem Prods., Inc. v. Windsor,
521 U.S. 591 (1997) 13

Bridge v. Phoenix Bond & Indem. Co.,
553 U.S. 639 (2008) 12

Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.,
492 U.S. 257 (1989) 8

Comcast Corp. v. Behrend,
133 S. Ct. 1426 (2013) 7, 10, 18

Cooper v. Southern Co.,
390 F.3d 695 (11th Cir. 2004) 12

Erica P. John Fund, Inc. v. Halliburton Co.,
563 U.S. 804 (2011) 2, 16, 17

Hohider v. United Parcel Serv., Inc.,
574 F.3d 169 (3d Cir. 2009) 11

Hollingsworth v. Perry,
133 S. Ct. 2652 (2015) 1, 14, 15

Home Depot U.S.A., Inc. v. Superior Court,
191 Cal. App. 4th 210 (2010) 1, 8

Iskanian v. CLS Transp. Los Angeles, LLC,
59 Cal. 4th 348 (2014) 13

Kilby v. CVS Pharmacy, Inc.,
368 P.3d 554 (Cal. 2016) 2, 16

TABLE OF AUTHORITIES
(cont'd)

Page

Kilby v. CVS Pharmacy, Inc.,
739 F.3d 1192 (9th Cir. 2013) 3, 15

Kinney v. Vaccari,
27 Cal. 3d 348 (1980) 8

Lindsey v. Normet,
405 U.S. 56 (1972).....12

Mazza v. Am. Honda Motor Co.,
666 F.3d 581 (2012).....2, 13, 15

McLaughlin v. Am. Tobacco Co.,
522 F.3d 215 (2d Cir.) 12

Pelton v. Panda Rest. Grp., Inc.,
No. CV 10-8458 MANX,
2011 WL 1743268 (C.D. Cal. May 3, 2011).....9

Philip Morris USA v. Williams,
549 U.S. 346 (2007).....1, 12

Powers v. Ohio,
499 U.S. 400 (1991).....15

In re Rail Freight Fuel Surcharge Antitrust Litig.,
725 F.3d 244 (D.C. Cir. 2013).....10

Sakkab v. Luxottica Retail N. Am.,
803 F.3d 425 (9th Cir. 2015) 14

Spokeo, Inc. v. Robins,
136 S. Ct. 1540 (2016).....2, 15

State Farm Mut. Auto. Ins. Co. v. Campbell,
538 U.S. 408 (2003).....1, 8, 12

TABLE OF AUTHORITIES
(cont'd)

Page

Thurman v. Bayshore Transit Mgmt., Inc.,
203 Cal. App. 4th 1112 (2012) 9

United States v. Ruiz,
257 F.3d 1030 (9th Cir. 2001) 17

Urbino v. Orkin Servs. of Cal., Inc.,
726 F.3d 1118 (9th Cir. 2013) 11

Vermont Agency of Nat'l Res. v. U.S. ex rel. Stevens,
529 U.S. 765 (2000) 14

Vinole v. Countrywide Home Loans, Inc.,
571 F.3d 935 (9th Cir. 2009) 18

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011) ..... *passim*

Wang v. Chinese Daily News, Inc.,
737 F.3d 538 (9th Cir. 2013) 11

In re Wells Fargo Home Mortg. Overtime Pay Litig.,
571 F.3d 953 (9th Cir. 2009) 11, 18

Statutes

28 U.S.C. § 2072(b) 13

Cal. Lab. Code § 2699 ..... *passim*

Rules

Fed. R. Civ. P. 23 ..... *passim*

Regulations

California Industrial Welfare Commission Wage Order 7-2001
§ 14(A), Cal. Code Regs. tit. 8, § 11070(14)(A) 2, 3, 6, 16

INTRODUCTION AND RULE 35 STATEMENT

The sheer number of cases filed pursuant to California's Private Attorney General Act ("PAGA")—including the more than 100 currently pending in courts in this Circuit—demand clear guidance on the availability of penalties under that statute. The amplitude of those potential penalties—millions if not hundreds of millions of dollars—requires that any imposition of such penalties comports with constitutional limits and Article III jurisprudence. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2665 (2013); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003); *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007).

Review is warranted here because the panel decision affirming class certification on the basis that PAGA "does not require individualized penalty inquiries that would defeat the commonality or predominance requirements for purposes of class certification" (Order 4) not only fails to provide clear guidance but is irreconcilable with those bedrock principles. Although the panel's decision is unpublished, it is the first of its kind and in a high-profile case; it thus creates acute risk of significant mischief if read to endorse an expansive and contra-textual interpretation of PAGA that permits the imposition of aggregate monetary penalties without any sort of individual assessment. Such an interpretation would be directly contrary to constitutional limits on civil penalty awards and the plain text of the statute. *See Home Depot U.S.A., Inc. v. Superior Court*, 191 Cal. App. 4th 210,

225 (2010), *as modified on denial of reh'g* (Jan. 10, 2011) (recognizing that PAGA penalties must comply with the "principal limits … set by the due process clauses of the federal and state Constitutions" (internal quotation marks omitted)).

Moreover, to the extent the panel's decision excuses courts from assessing whether and to what extent any particular individual was aggrieved, it also creates an impermissible risk that employees who have suffered no actual injury will be allowed to recover civil penalties in contravention of Article III and the Rules Enabling Act. *Contra Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016); *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (2012).

Finally, as the panel itself recognized, the district court's interpretation of "California Wage Order 7-2001 § 14(A)" was "inconsistent with the California Supreme Court's recent guidance in *Kilby v. CVS Pharmacy, Inc.*, 368 P.3d 554 (Cal. 2016)." Order 3 n.1. Yet, the panel nonetheless affirmed the certification order because the *Kilby* standard "appears" to be "more beneficial for Plaintiffs." *Id.* That reasoning falls short of the "rigorous analysis" into commonality that Rule 23 requires, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51 (2011), and cannot be squared with the Supreme Court's direction that the Rule 23 analysis be tethered to "the elements of the underlying cause of action," *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011).

Accordingly, the Court should grant en banc review in order to secure and maintain the uniformity of the Court's decisions on these issues of exceptional importance, or, in the alternative, grant rehearing and remand for reconsideration in light of *Kilby*.

FACTUAL AND PROCEDURAL BACKGROUND

In 2009, Plaintiffs Nisha Brown and Kathy Williamson filed suit against Wal-Mart Stores, Inc. ("Wal-Mart") in California Superior Court, alleging that Wal-Mart "failed to provide its Cashiers, including plaintiffs, with seats, despite the fact that the nature of cashier work reasonably permits the use of seats," and seeking certification of a class including more than 20,000 current and former Wal-Mart cashiers in California. ER 303 ¶¶ 8-9.

I. The Statutory Framework

Section 14(A) of California's Industrial Welfare Commission Wage Order 7-2001 provides that "[a]ll working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats." Cal. Code Regs. tit. 8, § 11070(14)(A). Until the California Supreme Court's opinion in *Kilby*, "no controlling California precedent" had interpreted this provision, which largely sat dormant on the books until discovered by enterprising plaintiffs' attorneys seeking penalties under PAGA. *See Kilby v. CVS Pharmacy, Inc.*, 739 F.3d 1192, 1195 (9th Cir. 2013) (certifying questions to the California Supreme Court).

PAGA permits an "aggrieved employee" to act as a proxy for the state's labor-law enforcement agencies and to bring suit to collect civil penalties "on behalf of himself or herself and other current or former employees" for violations of the California Labor Code, including California's Wage Orders. Cal. Lab. Code § 2699(a). The maximum penalty under PAGA is set on a per-employee per-pay period basis: "one hundred dollars ($100) for *each aggrieved employee* per pay period for the initial violation and two hundred dollars ($200) for *each aggrieved employee* per pay period for each subsequent violation." *Id.* § 2699(f)(2) (emphases added). Consonant with constitutional limits on penalty awards, any award of penalties under PAGA must be reduced "based on the facts and circumstances of the particular case" to avoid "an award that is unjust, arbitrary and oppressive, or confiscatory." *Id.* § 2699(e)(2). If civil penalties are awarded, the state agency collects 75 percent of the award, leaving 25 percent to the "aggrieved employees." *Id.* § 2699(i).

II. This Litigation

Following Wal-Mart's removal of this case to federal court, Ms. Williamson requested certification of a class including "[a]ll persons who … were employed by Wal-Mart in the State of California in the position of Cashier." ER 2, 10. Wal-Mart opposed this request on several grounds, including that the actual work performed by individual cashiers varied widely due to "(1) the variation in cash-

register configurations, (2) the particular shift a cashier is working, (3) the type of merchandise processed at different registers, (4) how and if merchandise is bagged and loaded in the cart, (5) time of year, (6) experience of the cashier, [and] (7) store staffing." ER 10; *see also* ER 153-60 (testimony of named plaintiffs addressing variability in their own cashier experiences).

The district court nonetheless certified the class, identifying two purportedly "common" issues: (1) Wal-Mart's policy of not providing seats to cashiers, and (2) the nature of a cashier's work. ER 7, 9. The district court concluded that "none of the potential sources of variance" among employees Wal-Mart had identified was "sufficient to defeat class certification when Wal-Mart cashiers spend the majority of their time performing common tasks at their registers, and Wal-Mart has a common policy of not providing seats." ER 11-13.

This Court granted Wal-Mart's Rule 23(f) petition for permission to appeal. Doc. 4. Following oral argument, the panel deferred submission of this case "pending a decision by the California Supreme Court on the Certification Order in *Kilby*." Doc. 47.

After *Kilby* was decided, this Court reversed and remanded the class certification orders in two other suitable seating cases for reconsideration "in light of the California Supreme Court's opinion in *Kilby*." *See* Mem., *Kilby v. CVS Pharmacy, Inc.*, No. 12-56130 (9th Cir. June 8, 2016); Mem., *Henderson v. J.P. Morgan*

Chase Bank, N.A., No. 13-56095 (9th Cir. June 8, 2016). It declined to do the same here. Although the panel acknowledged that "the district court appears to have applied a 'holistic approach' in interpreting California Wage Order 7-2001 § 14(A)"—the same approach utilized by the district courts in *Kilby* and *Henderson*—and that this "interpretation is inconsistent with the California Supreme Court's recent guidance in *Kilby*," the panel held that "this error does not undermine the district court's class certification decision, because the California Supreme Court's interpretation of the Wage Order appears to be more beneficial for Plaintiffs than the holistic interpretation used by the district court." Order 3 n.1. The panel also determined that PAGA "does not require individualized penalty inquiries that would defeat the commonality or predominance requirements for purposes of class certification." *Id.* at 4. Despite acknowledging that "PAGA establishes a specific penalty 'for each aggrieved employee,'" the panel held that "even if the district court decides to reduce the mandatory civil penalty, section 2699(e)(2) calls for a case-wide (rather than individualized) inquiry." *Ibid*.

REASONS WHY REHEARING SHOULD BE GRANTED

The panel's decision finds Rule 23(b)(3) predominance by disregarding the existence of numerous individualized issues and defenses under a newly minted standard for liability as to the suitable seating requirements of Section 14(A) of California's Industrial Welfare Commission Wage Order 7-2001. At best, the pan-

el's decision disregards the implications of a change in the substantive law as it relates to whether Rule 23(b)(3)'s "demanding" criterion that "common questions predominate over individual ones" is satisfied. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013). At worst, the panel's decision adopts a novel interpretation of PAGA's penalty provisions that would permit the imposition of aggregate monetary penalties without any opportunity for a defendant to present necessarily individualized defenses in violation of the Due Process Clause of the Fifth Amendment as well as Article III of the Constitution.

It is not clear which approach the panel endorsed here. Given the importance and novelty of these issues, review by the full Court is warranted to provide much needed guidance to lower courts on these recurring issues.

I. Due Process Requires An Individualized Penalty Assessment and An Opportunity To Raise All Individualized Defenses

As the panel acknowledged, "PAGA establishes a specific penalty 'for each aggrieved employee.'" Order 4 n.3 (quoting Cal. Labor Code § 2699(f)). It also expressly provides that "a court may award a lesser amount than the maximum civil penalty … based on the facts and circumstances of the particular case." Cal. Labor Code § 2699(e)(2). The critical question here is the meaning of the phrase "particular case"—does it mean that a court should consider only factors pertaining

to the case as a whole or must the court also consider individual employee circumstances. The answer has to be the latter; otherwise PAGA is unconstitutional.[1]

Any penalty "assessment" under PAGA must "be proportional to defendant's misconduct, sufficient to achieve [the] penalty's deterrent purpose, and not constitutionally excessive." *Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157, 1214 (2008) (citing *Kinney v. Vaccari*, 27 Cal. 3d 348, 356 (1980)). As with any civil penalty, an award under PAGA must also comply with the "principal limits … set by the due process clauses of the federal and state Constitutions." *Home Depot U.S.A., Inc. v. Superior Court*, 191 Cal. App. 4th 210, 225 (2010), *as modified on denial of reh'g* (Jan. 10, 2011). Those limits, including the constraints imposed by the Due Process Clause of the Fifth Amendment and the Excessive Fines Clause of the Eighth Amendment, require penalty awards to have "a nexus to the *specific harm suffered by the plaintiff*." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003) (emphasis added).[2]

The panel did not dispute (or even address) any of this controlling precedent. Instead, in one terse paragraph, it held that PAGA "does not require individualized

---

[1] PAGA's text points in the same direction. *See* Cal. Lab. Code § 2699(a) (referring to the case as a whole as a "civil action").

[2] The government shares in any PAGA proceeds, thereby triggering Eighth Amendment scrutiny. *See Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 268 (1989).

penalty inquiries that would defeat the commonality or predominance requirements for purposes of class certification." Order 4. Citing *Thurman v. Bayshore Transit Management, Inc.*, 203 Cal. App. 4th 1112, 1136 (2012), the panel explained that "section 2699(e)(2) [instead] calls for a case-wide (rather than individualized) inquiry." *Ibid*. And therein lies the rub.

Thurman held only that the inquiry under section 2699(e)(2) *is not limited* to the question "whether the defendant can afford to pay the maximum penalty amount" and affirmed the trial court's reduction of the maximum penalty based on evidence that showed that "defendants took their obligations under Wage Order No. 9 seriously and attempted to comply with the law." 203 Cal. App. 4th at 1135-36. Critically, while the district court there had reduced the civil penalty award for each individual by the same amount, the defendant had not requested a further reduction based on any individualized factors. Thus, although *Thurman* acknowledges that there may be factors that equally affect all aggrieved employees, it did not suggest—much less hold—that issues that may render a penalty award "unjust, arbitrary and oppressive, or confiscatory" with respect to a particular individual may be disregarded. Wal-Mart is aware of no court that has held that PAGA so limits a trial court's inquiry under § 2699(e)(2), and PAGA's plain language precludes such a narrow interpretation. *Accord Pelton v. Panda Rest. Grp., Inc.*, No. CV 10-8458 MANX, 2011 WL 1743268, at *6 (C.D. Cal. May 3, 2011) ("While

section 2699(e) requires the Court to consider damages on a case-by-case basis to avoid an 'award that is unjust arbitrary and oppressive, or confiscatory,' nothing contained therein precludes the Court from assessing on a class-wide basis whether penalties should be reduced when the facts as to each employee are, as in this case, identical.").

Given these standards, no matter what meaning is ascribed to the panel's holding, Wal-Mart's rights are violated. Perhaps the panel agreed that Wal-Mart would be entitled to present its statutory defenses to individual claims and penalty determinations as the Constitution and the plain text of PAGA require, but nonetheless affirmed the certification of a first-of-its-kind sprawling class action despite the myriad individualized issues that the district court itself recognized would need to be "resolved" at a later time. *See* ER 13 (suggesting the impermissible use of statistical sampling). In that case, the panel's decision conflicts with both clear Supreme Court precedent and the decisions of countless other courts of appeals. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 374-75 (2011) ("'[d]issimilarities within the proposed class … have the potential to impede the generation of common answers'" (citation omitted)); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013) (requiring rigorous analysis of purported evidence of commonality, including with respect to damages); *see also*, *e.g.*, *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252-53 (D.C. Cir. 2013) ("Common ques-

tions of fact cannot predominate where there exists no reliable means of proving classwide injury in fact."); *Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169, 184 (3d Cir. 2009) (holding that even if "the existence of the policies alleged by plaintiffs can be adjudicated on a classwide basis," that "does not mean that these policies, if proven to exist, would amount to a classwide showing of unlawful [conduct]"). It conflicts with prior decisions from this Circuit as well. *See*, *e.g.*, *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 545-46 (9th Cir. 2013); *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 958 (9th Cir. 2009).

Alternatively, the panel was the first to hold that PAGA disallows an individualized inquiry into the reasonableness and proportionality of a penalty award. That alternative directly conflicts with constitutional limits on civil penalties and PAGA's plain text. As this Court has previously recognized, under California's Labor Code, "[e]ach employee suffers a unique injury—an injury that can be redressed without the involvement of other employees." *Urbino v. Orkin Servs. of Cal., Inc.*, 726 F.3d 1118, 1122 (9th Cir. 2013); *see also* Cal. Lab. Code § 2699(f)(2) (defining an "aggrieved employee" as "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed"). It necessarily follows that the "harm" that PAGA seeks to remedy occurs with respect to each individual, and a determination of whether a penalty award is reasonable and proportionate to that harm, as the Constitution requires,

must be individualized. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003) (holding that a defendant may "be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business"); *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) ("Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent.").

As courts of appeals have recognized in other contexts, aggregate penalty awards violate due process. *See Cooper v. Southern Co.*, 390 F.3d 695, 721 (11th Cir. 2004) (punitive damages "require detailed, case-by-case fact finding, carefully calibrated for each individual employee"); *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir.) ("estimating the gross damages to the class as a whole" "offends both the Rules Enabling Act and the Due Process Clause"), *partially abrogated on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008). As a result, Wal-Mart must be allowed to present any individualized defenses that would warrant the reduction of the putative civil penalty with respect to a particular individual; any decision to the contrary conflicts with these clear constitutional limits on civil penalties. *See Philip Morris*, 549 U.S. at 353 (holding employer cannot be held liable for penalty awards "without first providing that [employer] with 'an opportunity to present every available defense'" (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972))); *Dukes*, 564 U.S. at 367 ("[A] class

cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims.").

Furthermore, the panel's decision that "PAGA does not require individualized penalty inquiries" eviscerates the Article III standing requirement for absent class members. As this Court made clear in *Mazza v. American Honda Motor Co.*, "[n]o class may be certified that contains members lacking Article III standing." 666 F.3d 581, 594 (2012). But the panel's interpretation that "section 2699(e)(2) calls for a case-wide (rather than individualized) inquiry"—which glosses over PAGA's statutory requirement that each class member be an "aggrieved" employee—creates an impermissible risk that employees who have suffered *no injury* will be permitted to recover civil penalties, effectively treating Rule 23 as an exception to constitutional standing and due process. That runs directly contrary to "[t]he Rules Enabling Act [which] forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" *Dukes*, 564 U.S. at 367 (quoting 28 U.S.C. § 2072(b)); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) ("Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act.").

While PAGA "authorizes an employee to bring an action for civil penalties on behalf of the state … for Labor Code violations committed against the employee and fellow employees," *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th

348, 360 (2014), the Supreme Court has rejected the position that "mere authorization to represent a third party's interests is sufficient to confer Article III standing on private parties with no injury of their own." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2665 (2013); *see id.* at 2667 ("The fact that a State thinks a private party should have standing to seek relief for a generalized grievance cannot override our settled law to the contrary."). PAGA permits *private individuals* "to act as private attorneys general to collect civil penalties for violations of the Labor Code"—not injuries to the state. *See Sakkab v. Luxottica Retail N. Am.*, 803 F.3d 425, 430 (9th Cir. 2015); Cal. Lab. Code § 2699(f)(2). This critical distinction distinguishes PAGA's private attorney general scheme from *qui tam* actions under laws like the False Claims Act. *Cf. Vermont Agency of Nat'l Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 771-78 (2000) (noting that a *qui tam* complaint "asserts an injury to the United States—both the injury to its sovereignty arising from violation of its laws (which suffices to support a criminal lawsuit by the Government) and the proprietary injury resulting from the alleged fraud" and holding that a relator has standing in *qui tam* actions based on a "partial assignment of the Government's damages claim").

That PAGA gives the employee a "concrete private interest in the outcome of [the] suit" is thus not dispositive for Article III purposes where that interest is "unrelated to injury in fact." *See Vermont Agency*, 529 U.S. at 772. To assert the

interests of the state, "the litigants themselves still 'must have suffered an injury in fact, thus giving [them] a sufficiently concrete interest in the outcome of the issue in dispute.'" *Hollingsworth*, 133 S. Ct. at 2663 (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)); *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) ("Article III standing requires a concrete injury even in the context of a statutory violation."). Not only must a plaintiff demonstrate that she is "aggrieved" for purposes of PAGA, she must demonstrate that she has suffered a "concrete and particularized" injury to satisfy Article III. *Spokeo*, 136 S. Ct. at 1548. By this Court's own precedent, these principles extend not only to the named plaintiff but also to every other aggrieved employee for whom she brings the action. *See Mazza* 666 F.3d at 594; *see also Spokeo*, 136 S. Ct. at 1549. The panel's decision guts this threshold requirement entirely.

Given the sheer number of PAGA cases filed each year, the Court should grant rehearing en banc and nip in the bud the errors this opinion invites on these critical questions. As this Court has previously recognized, erroneous legal pronouncements in this context "could have far-reaching effects on California's citizens and businesses." *Kilby*, 739 F.3d at 1196. Wal-Mart, therefore, respectfully submits that clarification and correction of the opinions announced by the panel is warranted.

II. At a Minimum, Wal-Mart Respectfully Requests a Remand to the District Court for Reconsideration Under *Kilby*

As the panel recognized, the district court's interpretation of "California Wage Order 7-2001 § 14(A)" was "inconsistent with the California Supreme Court's recent guidance in *Kilby v. CVS Pharmacy, Inc.*, 368 P.3d 554 (Cal. 2016)." Order 3 n.1. Although the panel noted that the "California Supreme Court's interpretation … *appears* to be more beneficial for Plaintiffs than the holistic interpretation used by the district court" (*ibid.* (emphasis added)), Wal-Mart respectfully submits that this reasoning answers the wrong question. Therefore, Wal-Mart requests reconsideration of this issue and a remand to the district court for full consideration of the implications for class certification of the new suitable seating standard.

The Rule 23 inquiry "begins, of course, with the elements of the underlying cause of action," *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011), and *Kilby* indisputably changed the underlying standard for a suitable seating violation. The California Supreme Court, addressing this requirement for the first time, held: "When evaluating whether the 'nature of the work reasonably permits the use of seats' … Courts should look to the *actual tasks* performed, or reasonably expected to be performed, ***not to abstract characterizations, job titles, or descriptions*** that may or may not reflect the actual work performed." *Kilby*, 368 P.3d at 564 (emphases added). This standard on its face requires an examination

of the "actual tasks at a discrete location" (*id.* at 565), vindicating the position Wal-Mart has maintained throughout the district court proceedings and on appeal—that generalizations and job descriptions are not enough to demonstrate the cohesiveness necessary to certify a class under Rule 23(a)(2) and (b)(3). *See*, *e.g.*, Doc. 22-1 at 3, 7 (arguing that what matters under the relevant statute is evidence of the "actual work performed by cashiers" and "the physical workspace in which they work"). Yet, further departing from Supreme Court precedent, the panel blessed a certified class based on purportedly common "questions of law or fact" that are wholly untethered from these newly pronounced "elements of the underlying cause of action." *See Erica P.*, 563 U.S. at 809. The new *Kilby* standard necessarily raises new questions, and neither the district court nor the panel have analyzed whether those questions are capable of "generat[ing] common *answers* apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350.

This Court reversed and remanded class certification orders in two other suitable seating cases for reconsideration in light of *Kilby*. The same is appropriate here. The certification order, which relied almost exclusively on testimony that Wal-Mart's *job description* for the cashier position generally applied to all cashiers in California as opposed to evidence of the actual worked performed, *see* ER 10-11, cannot be squared with the *Kilby* standard or the plaintiffs' own testimony. *See United States v. Ruiz*, 257 F.3d 1030, 1033 (9th Cir. 2001) ("Application of the

wrong legal standard constitutes an abuse of discretion."); Doc. 9-1 (Wal-Mart Br.) at 26-28 (citing ER 153-54); *see also*, *e.g.*, *Wells Fargo*, 571 F.3d at 958-59 (requiring district court to "ask where the individual employees actually spent their time"); *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 945 (9th Cir. 2009) (requiring "an individualized analysis of the way each employee actually spends his or her time").

Because the party seeking class certification bears the burden of proof under Rule 23 (*Comcast*, 133 S. Ct. at 1432), and under *Kilby* those requirements cannot be satisfied by pointing to "abstract characterizations, job titles, or descriptions," Wal-Mart respectfully requests that the panel reconsider its decision on the effect of *Kilby* and remand this case for reconsideration under the correct legal standard.

CONCLUSION

This Court should grant rehearing or rehearing en banc.

Dated: June 22, 2016

Respectfully submitted,

/s/ Theodore J. Boutrous, Jr.

Theodore J. Boutrous, Jr.
Counsel of Record
Catherine A. Conway
Katherine V.A. Smith
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000

Rachel S. Brass
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street
San Francisco, CA 94105

Counsel for Wal-Mart Stores, Inc.

CERTIFICATE OF COMPLIANCE
WITH CIRCUIT RULES 35-4 AND 40-1 (FORM 11)

I certify that, pursuant to Ninth Circuit Rules 35-4(a) and 40-1(a), the foregoing petition for panel or en banc rehearing is proportionally spaced, has a typeface of 14 points or more, and contains 4,191 words, as determined by the word-count function of Microsoft Word 2010.

/s/ Theodore J. Boutrous, Jr.

Dated: June 22, 2016

CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2016, an electronic copy of the foregoing Petition for Rehearing or Rehearing En Banc was filed with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the Court's appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Theodore J. Boutrous, Jr.

EXHIBIT A

FILED

JUN 08 2016

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NISHA BROWN and KATHY WILLIAMSON, individually and on behalf of all others similarly situated, Plaintiffs - Appellees, v. WAL-MART STORES, INC., Defendant - Appellant.	No. 12-17623 D.C. No. 5:09-cv-03339-EJD MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Edward J. Davila, District Judge, Presiding

Argued December 2, 2013
Submitted June 8, 2016
San Francisco, California

Before: SILVERMAN, CALLAHAN, and N.R. SMITH, Circuit Judges.

Wal-Mart Stores, Inc. appeals the district court's order granting class certification to all Wal-Mart cashiers in California. We affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

1. The district court did not abuse its discretion by certifying the class. Wal-Mart challenges the district court's decision to certify the class with respect to its conclusions on commonality, *see* Fed. R. Civ. P. 23(a)(2), and predominance, *see* Fed. R. Civ. P. 23(b)(3). The commonality rule requires a plaintiff to show that "there are questions of law or fact common to the class." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011) (quoting Fed. R. Civ. P. 23(a)(2)). Moreover, such common questions of law or fact "must be of such a nature that it is capable of classwide resolution." *Id.* at 350. Rule 23(b)(3)'s predominance requirement "is even more demanding than Rule 23(a)." *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013). "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 622 (1997).

The district court did not abuse its discretion by concluding that the proposed class met Rule 23(a)(2)'s commonality requirement. The district court concluded that "Wal-Mart had a common policy of not providing seats for its cashiers." The district court also concluded that there was a common nature of work among the proposed class, finding that (1) "Wal-Mart cashiers spent the

majority of their time working at registers during the class period,"[1] and (2) the work done by cashiers at registers was generally the same across stores, register locations and configurations, shifts, and physical activities. These findings support the district court's conclusion that "a trier of fact could determine whether these common tasks could reasonably be performed while seated, and such a determination would apply to all Wal-Mart cashiers at its California stores." The answer to this question would either establish a violation of California Wage Order 7-2001 § 14(A), or preclude finding one, for all class members. Likewise, the district court did not abuse its discretion by concluding that the proposed class met Rule 23(b)(3)'s predominance requirement. Based on the district court's factual

[1]By reviewing whether cashier's spent the majority of their time working at registers, the district court appears to have applied a "holistic approach" in interpreting California Wage Order 7-2001 § 14(A). Such an interpretation is inconsistent with the California Supreme Court's recent guidance in *Kilby v. CVS Pharmacy, Inc.*, 368 P.3d 554 (Cal. 2016). However, this error does not undermine the district court's class certification decision, because the California Supreme Court's interpretation of the Wage Order appears to be more beneficial for Plaintiffs than the holistic interpretation used by the district court.

findings, individual issues will not predominate in determining whether Wal-Mart has violated California Wage Order 7-2001 § 14(A).[2]

2. California's Private Attorneys General Act of 2004 ("PAGA") does not require individualized penalty inquiries that would defeat the commonality or predominance requirements for purposes of class certification.[3] PAGA specifies civil penalties for violations of California's Labor Code. *See* Cal. Labor Code § 2699(f). Although these civil penalties are "mandatory, not discretionary," *see Amaral v. Cintas Corp. No. 2*, 78 Cal. Rptr. 3d 572, 617 (Cal. Ct. App. 2008), "a court may award a lesser amount than the maximum civil penalty . . . based on the facts and circumstances of the particular case," Cal. Labor Code § 2699(e)(2). However, even if the district court decides to reduce the mandatory civil penalty, section 2699(e)(2) calls for a case-wide (rather than individualized) inquiry. *See*

---

[2]Wal-Mart asks us to take judicial notice of an Amicus Brief of the California Labor Commissioner that addresses how the California Labor and Workforce Development Agency interprets the Wage Order. In light of the California Supreme Court's recent guidance, this motion for judicial notice is DENIED as moot.

[3]We also note that PAGA's system for determining civil penalties is readily distinguishable from *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996). In *Hilao*, we permitted the use of a statistical sample of a class to estimate damages. *Id.* at 782–86. Such statistical sampling is not used to estimate penalties under PAGA. Instead, PAGA establishes a specific penalty "for each aggrieved employee." Cal. Labor Code § 2699(f).

Cal. Labor Code § 2699(a) ("[A]n aggrieved employee on behalf of himself or herself and other current or former employees" may bring a civil action.); *Thurman v. Bayshore Transit Mgmt., Inc.*, 138 Cal. Rptr. 3d 130, 150 (Cal. Ct. App. 2012) (applying section 2699(e)(2) to reduce the civil penalty based on the facts of the case as a whole, as opposed to on an employee-by-employee basis).

3. The district court did not abuse its discretion by excluding affidavits from certain witnesses submitted by Wal-Mart in its response to Plaintiffs' motion for class certification. Wal-Mart was obliged under Federal Rules of Civil Procedure 26(a) and (e) to disclose these witnesses to Plaintiffs before relying on their statements in response to Plaintiffs' motion for class certification. Further, Wal-Mart did not raise any issues with Plaintiffs' request for discovery sanctions before the district court and did not demonstrate that its failure to disclose was substantially justified or harmless. *Cf. Nursing Home Pension Fund, Local 144 v. Oracle Corp. (In re Oracle Corp. Sec. Litig.)*, 627 F.3d 376, 386 (9th Cir. 2010) ("[F]or Plaintiffs to fail to respond to Defendants' objections, and to then challenge the district court's evidentiary rulings on appeal, is to invite the district court to err and then complain of that very error. We cannot countenance such a tactic on appeal.").

AFFIRMED.