No. 19-16184

In the United States Court of Appeals for the Ninth Circuit

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

v.

WALMART ASSOCIATES, INC. and WALMART, INC.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California

BRIEF OF PLAINTIFF-APPELLEE

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INTRODUCTION

This case is about Walmart's practice of routinely violating the California Labor Code. The district court found that Walmart violated the law for years by, among other things, failing to include on paystubs the underlying rates and hours from which it calculates many overtime payments, thus depriving employees of the tools necessary to determine whether they have been paid correctly. On appeal, Walmart is unrepentant—the company downplays its widespread violations as "hyper-technical" and the withheld information as "not particularly useful" to employees. California's legislature, however, felt otherwise, enacting the paystub requirement to address concerns that employees' lack of access to information about their wages had allowed employers in the state to "cheat [them] out of billions of dollars." Walmart effectively asks this Court to disregard that legislative judgment and to allow Walmart to continue violating the law with impunity. That position, if accepted by this Court, would give a green light to employers to return to the opaque payment practices that once left employees vulnerable.

The district court rejected those far-reaching aspects of Walmart's argument, instead issuing a balanced judgment that favored the plaintiffs in many respects and Walmart in many others. In nearly 150 pages of written orders, Judge Koh carefully addressed each of Walmart's numerous challenges to the plaintiffs' claims under the California Labor Code and, on many issues, sided with Walmart.

Following a three-day bench trial, the court awarded the plaintiffs damages on only one of their three state-law claims, and dramatically reduced penalties under California's Private Attorneys General Act on all three. Even on the one claim on which the plaintiffs fully prevailed, the amount of damages awarded, though large in total, was actually modest in relation to the massive number of California workers that Walmart employs and the resulting class size. The court awarded damages far below the statutory $4,000 per-employee cap and PAGA penalties of just 36% of the statutory amount.

As in another recent case involving its Labor Code violations, Walmart asks this Court to "erase that judgment," contending that the "district court erred at every step along the way." *Ridgeway v. Walmart*, 946 F.3d 1066, 1071 (9th Cir. 2020). Walmart's appeal challenges all aspects of the court's decisions, from standing and class certification to liability and damages. Many of its arguments depend on misrepresentations of the court's holdings, challenge aspects of its judgment that make no difference to Walmart's liability, or were waived below.

"But it is improper for this court to play armchair district judge," and, for all its numerous objections, Walmart identifies "no reversible error." *Id.* at 1071-72. Walmart's argument that the plaintiffs lack standing contravenes clear Supreme Court precedent and centuries of practice. Its arguments under the Labor Code fail to comport with either the law's plain language or the California Supreme

Court's frequently repeated instruction that the law be liberally construed in favor of protecting workers. And its argument that the remedies awarded are constitutionally excessive—an argument that Walmart did not even adequately raise below—is foreclosed by decisions of both this Court and the U.S. Supreme Court. This Court should therefore affirm the district court's reasoned judgment.

STATEMENT OF THE ISSUES

1. **Standing.** California's Labor Code requires Walmart to provide its employees with certain information about their wages, including how the wages are calculated. Is the denial of that information an "injury in fact" sufficient to give an employee Article III standing, or must the employee identify some *additional* harm?

2. **Liability.** Did the district court correctly find that Walmart violated the California Labor Code by failing to provide required paystub information and by failing to pay the required rate for missed meal breaks?

3. **Relief.** Is the relief awarded by the district court—damages and penalties that are well below the statutory maximum—permissible under California law, the trial record, and the U.S. Constitution?

STATEMENT OF THE CASE

A. Statutory background

For more than a century, California has strictly regulated "wages, hours and working conditions for the protection and benefit of employees." *Indus. Welfare Comm'n. v. Superior Court*, 613 P.2d 579, 585 (1980). The California Supreme Court

construes the state's worker-protection laws liberally, "with an eye to promoting such protection." *Ridgeway*, 946 F.3d at 1078.

The Division of Labor Standards Enforcement (DLSE) "is the state agency charged with enforcing California's labor laws." *Alvarado v. Dart Container Corp.*, 411 P.3d 528, 534 (2018). With "the benefit of many years' experience, the DLSE has developed numerous interpretations" of the labor laws, "which it has compiled in a series of policy manuals." *Id.* Although the DLSE's manuals are not the equivalent of binding regulations, courts "may take into consideration the DLSE's expertise and special competence, as well as the fact that the DLSE Manual is a formal compilation that evidences considerable deliberation at the highest policymaking level of the agency." *Id.* at 538.

1. Overtime and "regular rate of pay"

California generally requires employers to pay overtime to any employee who works more than eight hours a day or forty hours a week—a requirement that the legislature has described as a "fundamental protection for working people." *Alvarado*, 411 P.3d at 539 n.7. The minimum overtime wage that an employer must pay is typically one-and-a-half times the employee's "regular rate of pay." Cal. Labor Code § 510(a). An employee's "regular rate of pay" for purposes of computing overtime "is not the same as the employee's straight time rate (i.e., his or her normal hourly wage rate)." *Alvarado*, 411 P.3d at 533. Under both California

law and the Fair Labor Standards Act—the federal counterpart to the state's overtime laws—the regular rate also includes the "value of any nonhourly compensation the employee has earned." *Id.*; *see* DLSE Enforcement and Interpretations Manual § 49.1 (2019), https://perma.cc/9P4R-9ZHC; 29 U.S.C. § 207(e).

Nondiscretionary bonuses are one common form of non-hourly compensation that employers must include in an employee's regular rate of pay. *See Alvarado*, 411 P.3d at 530; DLSE Manual § 35.7; 29 C.F.R. § 778.209(a). When computing overtime, employers must thus "factor the *per-hour value* of a flat sum bonus into an employee's regular rate of pay for the relevant pay period." *Alvarado*, 411 P.3d at 537 (emphasis added). The per-hour value of a bonus—or "regular bonus rate"—is calculated simply "by dividing the bonus by the total hours worked throughout the period in which the bonus was earned." DLSE Manual § 49.2.4.1; *see Alvarado*, 411 P.3d at 539; 29 C.F.R. § 778.209(a).

Often, employers do not compute and pay bonuses until after the pay periods for which they are earned. In that case, the employer need not include the bonus in the employee's regular rate when paying overtime hours worked during the bonus period. *See* DLSE Manual § 5.2.4. Once the bonus is paid, however, the employer must retroactively adjust the employee's pay for those overtime hours to account for the increased regular rate. *See id.*; 29 C.F.R. § 778.209. The additional

overtime the employer owes is calculated as "half of the regular bonus rate for each [overtime] hour worked" during the bonus period. DLSE Manual § 49.2.4.1.

2. Paystub requirements

The effectiveness of California's wage-and-overtime laws depends on employees and the DLSE being able to determine exactly how much an employer has paid for each hour worked. *See Soto v. Motel 6 Operating, L.P.*, 208 Cal. Rptr. 3d 618, 621, 623 (2016). For that reason, the Labor Code requires an employer, "semimonthly or at the time of each payment of wages," to provide employees with a paystub containing an "accurate itemized statement" of wages. Cal. Labor Code § 226(a). Employers must disclose, among other things, gross and net wages earned, total hours worked, and "the inclusive dates of the period for which the employee is paid." *Id.* § 226(a)(1), (2), (5), (6). They must also disclose "all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate." *Id.* § 226(a)(9).

The legislature intended these requirements to create "transparency as to the calculation of wages" by providing "the information necessary for an employee to verify if he or she is being properly paid in accordance with the law." *Morgan v. United Retail*, 113 Cal. Rptr. 3d 10, 19 (2010). In that way, paystubs "play[] an important role in vindicating the fundamental public policy favoring full and prompt payment of an employee's earned wages." *Soto*, 208 Cal. Rptr. 3d at 621.

3. Meal breaks

California law also "obligates employers to afford their nonexempt employees meal periods … during the workday" to help "ameliorate the consequences of long hours." *Brinker Rest. Corp. v. Superior Court*, 273 P.3d 513, 520-21 (Cal. 2012); *see* Cal. Labor Code § 226.7(b). Employers must provide their employees with uninterrupted meal breaks of at least thirty minutes, with "a first meal period no later than the end of an employee's fifth hour of work, and a second meal period no later than the end of an employee's 10th hour of work." *Brinker*, 273 P.3d at 537.

4. Remedies

The Labor Code provides various remedies for violations of its provisions.

a. Statutory damages. "An employee suffering injury as a result of a knowing and intentional failure by an employer to comply" with § 226(a)'s paystub requirements is entitled to statutory damages of $50 for the first pay period in which a violation occurs and $100 for each subsequent pay-period violation, up to a maximum of $4,000. Cal. Labor Code § 226(e)(1). "An employee is deemed to suffer injury," and is thus entitled to damages, if the "employee cannot promptly and easily determine" the information required by § 226(a) "from the wage statement alone." *Id.* § 226(e)(2)(B).

b. Premium wage. Employers who fail to provide a required meal break must "pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal … period is not provided." *Id.* § 226.7.

c. Civil penalties. In addition, California's enforcement agencies "are authorized to assess and collect civil penalties for specified violations of the Labor Code." *Raines v. Coastal Pac. Food Distribs.*, 234 Cal. Rptr. 3d 1, 6 (2018). But because those agencies often lack the resources to pursue enforcement, the California legislature enacted the Private Attorneys General Act as "an alternative" to public enforcement. *Id.* Under PAGA, an "aggrieved employee" may file a representative action "on behalf of himself or herself and other current or former employees" to recover civil penalties for violations of the Labor Code that otherwise would be collected by the state. Cal. Labor Code § 2699(a). PAGA penalties "are distinct from the statutory damages to which employees may be entitled in their individual capacities." *Iskanian v. CLS Transp. Los Angeles,* 327 P.3d 129, 147 (Cal. 2014); *see* Cal. Labor Code § 2699(g)(1). When a plaintiff recovers civil penalties under PAGA, 75% goes to the state, "leaving the remaining 25 percent for the 'aggrieved employees.'" *Iskanian*, 327 P.3d at 146.

B. Factual background

Walmart is a retail corporation that is the largest company in the world by annual revenue. Fortune, *Global 500* (2019), http://bit.ly/38LelIf (accessed Feb. 18, 2020). It is also, by far, the largest private employer, both domestically and worldwide, with more than 1.5 million employees in the United States and 2.2 million globally. *See id.* In California alone, Walmart operates more than 300 retail stores and employs more than 93,000 employees. Walmart, *Location Facts: California* (Oct. 2019), http://bit.ly/2U2nBUn (accessed Feb. 18, 2020).

1. Walmart's omission of rates and hours under § 226(a)(9) of the Labor Code

Walmart pays employees both in hourly wages and in incentive-based bonuses (called "MyShare" bonuses). ER7, 206, 228, 1248-49. Walmart calculates those bonuses based on a variety of performance-related factors. ER1244. Employees earn the bonus quarterly, at which time Walmart reports the amount on their paystubs as "MYSHARE/INCT." ER7, 229, 710, 1241. Walmart does not dispute that the bonuses are part of its employees' "regular rate of pay" for purposes of computing overtime. Thus, when an employee receives a bonus for a quarter in which the employee has already received overtime pay, Walmart adjusts that employee's overtime rate for that quarter to account for the increased hourly rate attributable to the bonus. ER7, 229, 1248; *see* Walmart Br. 2.

Suppose, for example, that a Walmart employee earns a $500 MyShare bonus at the end of a quarter, which when divided by the number of hours the employee worked during that quarter amounts to additional pay of $.20 per hour. Walmart in that case would pay the employee an extra $.10, representing "half of the regular bonus rate" of $.20, for each hour of overtime that the employee worked in the quarter. DLSE Manual § 49.2.4.1; ER481.

What Walmart does not do, however, is identify that overtime rate or corresponding hours to employees. Walmart simply lists the entire amount of the overtime adjustment as a lump sum on the employee's next biweekly paystub, cryptically titled "OVERTIME/INCT." ER7, 10. It does not state the "applicable hourly rates" of the overtime it pays or the "corresponding number of hours worked" at those rates, as California law requires. ER208. There is thus no way for employees to determine how the amount was calculated, or whether Walmart paid the proper overtime rate for all overtime hours worked during the quarter. *Id.* Employees must simply trust that Walmart honestly and correctly calculated the amount due.

2. Walmart's omission of the inclusive dates of the pay period under § 226(a)(6)

Walmart pays employees every two weeks and provides electronic paystubs at the time of payment. ER7. But California also requires that, when "an employer discharges an employee, the wages earned and unpaid at the time of discharge are

due and payable immediately." Cal. Labor Code § 201(a). Although Walmart gives employees their final paychecks at the time of discharge, it does not give them a compliant paystub with that payment. Instead, it provides a "snapshot of their earnings," Walmart Br. 6, called a "Statement of Final Pay." ER8. That statement omits a key requirement of the paystubs required by California law: the "inclusive dates of the period for which the employee is paid." Cal. Labor Code § 226(a)(6). As a consequence, employees, here, too, have no way to determine from the paystub whether Walmart properly paid them for their work.

3. Walmart's failure to compensate employees for missed meal breaks at their "regular rate of compensation" under § 226.7

Walmart pays employees a premium wage for missed breaks, as required by § 226.7. It takes the position, however, that an employee's "regular rate of compensation," on which the premium is based, is different from "regular rate of pay." Walmart thus pays employees their *base* rate of hourly pay, without including the per-hour value of incentive bonuses and other non-hourly pay. ER9, 21, 205-06.

C. Procedural background

1. This lawsuit. Roderick Magadia worked as a Walmart sales associate from 2008 to 2016. ER7. During that time, Walmart provided him with paystubs that included overtime adjustments designated "OVERTIME/INCT," without

informing him of the hourly rate or number of hours on which Walmart based that amount. ER45-46. When Walmart terminated Magadia in 2016, it gave him his final paycheck along with a "Statement of Final Pay" that did not include the inclusive dates of the period for which Walmart was paying him. ER10.

Magadia sued Walmart on behalf of himself and a class of current and former California Walmart employees, alleging that Walmart's paystub and meal-break policies violate California Labor Code §§ 226(a)(6), 226(a)(9), and 226.7. The district court certified classes for each claim. ER707.

2. Summary judgment. Both sides moved for partial summary judgment. The district court granted the plaintiffs' motion as to the PAGA claims for paystub violations, holding that—based on the undisputed facts—Walmart's paystubs fail to provide either the required rates and hours or the dates of an employee's final pay period as required by § 226(a). ER722-24. The court accordingly denied Walmart's motion. In doing so, the court granted Walmart's request to take judicial notice of the unpublished portions of *Canales v. Wells Fargo Bank, N.A.*, 234 Cal. Rptr. 3d 816 (2018). ER729. But it declined to follow that decision, holding that it conflicts with the earlier published opinion of the California Court of Appeal in *Soto* and "is hard to square with a statute whose avowed goal is to 'insure that employees are adequately informed of compensation received and are not shortchanged by their employers.'" ER736 (quoting *Soto*, 208 Cal. Rptr. 3d at 623). The court also

rejected Walmart's motion on the class's meal-break claims, holding that "regular rate of compensation" and "regular rate of pay," both in ordinary use and under the Labor Code, mean the same thing. ER730-33.

3. Trial. The district court held a three-day bench trial focused on the remaining issues of whether Walmart's violations were "knowing and intentional" and injured the plaintiffs, as required for statutory damages under § 226(e), and the amount of damages and penalties. Following trial, the court issued a carefully reasoned and balanced decision that sided with Walmart on many issues and the plaintiffs on others.

a. Paystub claims under § 226(a)(9). The court agreed with Walmart in holding that the company's violations would not be "knowing and intentional" under § 226(e) if they were based on a "good faith dispute" about the law's requirements. ER31. The court found, however, that Walmart had not relied on any good-faith interpretation of § 226(a)(9) here. ER41. The court also found, based on trial testimony, that employees were injured when Walmart deprived them of required paystub information. ER45-46. And that deprivation of information, the court held, was also a concrete injury sufficient to establish Article III standing. ER47.

The court awarded statutory damages on the § 226(a)(9) violations at § 226(e)'s statutory rate of $50 per employee for the initial pay period of the

violation and $100 for subsequent pay-period violations, for a total of $48 million. Those damages were well below the statutory $4,000 per-employee damages cap: The highest amount of damages for a single employee was $1,650, based on 17 violations of § 226(a). ER521. The court also reduced PAGA penalties to 36% of the statutory amount, or $48 million, to "match[]" the damages awarded under § 226(e). ER55. The aggrieved employees are entitled to 25% of those civil penalties, with the rest going to the state.

b. Paystub claims under § 226(a)(6). On the claim under § 226(a)(6) for inadequate paystubs at the time of termination, the court found that Walmart's reading of the statute was reasonable up to the date that the court granted summary judgment to the class on that issue. Because the plaintiffs' expert had not submitted calculations running from that date, the court found that the plaintiffs had failed to prove an entitlement to statutory damages on the § 226(a)(6) violations and awarded no damages on those claims. ER58-59. Although § 226(e)'s requirements do not apply to PAGA penalties, the court nevertheless cited Walmart's claimed good-faith interpretation to reduce those penalties to 20% of the statutory amount, to $5,785,700 (three-quarters of which will go to the state).

c. Meal-break claims. On the meal-break claims, the court agreed with Walmart that the claims should be limited to cases where Walmart's data showed that "management directed the employee to take a noncompliant meal break."

ER22-23. Finding that Magadia had failed to prove at trial that his missed meal breaks were directed by management, the court granted judgment to Walmart on his individual meal-break claim and, because he was no longer an adequate class representative for that claim, also decertified the meal-break class. ER16-21.

The court noted, however, that an employee under California law who is aggrieved by an employer's Labor Code violations may also recover civil penalties under PAGA for proving *other* violations by the employer, even if the employee is not personally affected by those violations. ER24 (citing *Huff v. Securitas Sec. Servs. USA*, 233 Cal. Rptr. 3d 502, 513 (2018). Because Magadia was affected by Walmart's paystub violations, the court held, he could therefore also recover PAGA penalties for the company's meal-break violations. ER24-25. The court awarded a total of $70,000 in PAGA penalties for the cases where management directed employees to miss meal breaks, of which the aggrieved employees are entitled to $17,500.

SUMMARY OF ARGUMENT

I. Standing. Both Magadia and the class have standing to raise their state-law claims because they were denied information about their own wages to which they are statutorily entitled. Walmart's position that state legislatures lack the power to define injuries for Article III purposes cannot be squared with Supreme Court precedent or centuries of practice. And the inability of class members here to

determine from their paystubs whether they have been paid adequately is just the kind of "inability to obtain information" that, under well-established law, "constitutes a sufficiently distinct injury to provide standing to sue." *Spokeo v. Robins*, 136 S. Ct. 1540, 1549-50 (2016).

Magadia also has standing to assert the PAGA claims. An action under PAGA is a kind of *qui tam* action, under which a plaintiff steps into the state's shoes and recovers on its behalf. Both the Supreme Court and this Court have held that private individuals have standing to assert a state's interests in these circumstances.

II. Liability. The district court correctly found Walmart liable for violating California law. The California Labor Code, by its plain language, structure, and purpose, requires employers to disclose the hourly rates and corresponding hours for all wages *paid* during a pay period, not only for hours *worked* during that period. Similarly, the only sensible way to read the Labor Code is to require employers to provide a compliant paystub any time they pay wages, which Walmart failed to do at the time it gave employees their final paychecks. And the law's plain language, as interpreted by the California Supreme Court, requires employers to pay employees their *full* regular rate of pay for missed meal breaks, not just the base hourly rate that Walmart pays. The district court did not abuse its discretion in relying on Walmart's own records as reliable evidence that Walmart violated that provision.

III. Relief. Nor did the district court err in awarding damages and penalties. *First*, mistake of law is not a defense to statutory damages under the paystub law, and, even if it were, the district court did not clearly err in finding that Walmart failed to show a good-faith mistake of law here. *Second*, Walmart's argument that civil penalties are authorized only when an employer completely fails to provide a paystub would lead to absurd results and would not change the district court's award of penalties anyway. *Third*, Walmart's cursory challenge to the plaintiffs' damages expert ignores the court's reasons for finding the testimony reliable and fails to show prejudice. *Finally*, Walmart failed to adequately raise its constitutional challenges to the remedies below. And the remedies are in any event constitutional because they are well beneath statutory maximums and are large only because of the massive number of California workers Walmart employs.

STANDARDS OF REVIEW

This Court reviews legal conclusions de novo, *Saltarelli v. Bob Baker Grp. Med. Tr.*, 35 F.3d 382, 384-85 (9th Cir. 1994), and evidentiary rulings for abuse of discretion, *Tritchler v. Cnty. of Lake*, 358 F.3d 1150, 1155 (9th Cir. 2004). "In reviewing a bench trial, this court shall not set aside the district court's findings of fact, whether based on oral or documentary evidence, unless they are clearly erroneous." *Saltarelli*, 35 F.3d at 384. Clear-error review also applies to

"computation of damages following a bench trial." *Lentini v. Cal. Ctr. for the Arts, Escondido*, 370 F.3d 837, 843 (9th Cir. 2004).

ARGUMENT

Walmart's brief presents a laundry list of arguments challenging all aspects of the judgment below. Its arguments are of three main types. *First*, it challenges Magadia's and the class's standing to assert their claims. *Second*, it argues that the district court misinterpreted California law in finding liability. *Third*, it disputes the court's award of damages. Walmart is wrong on all points.

I. The plaintiffs have standing.

A. The fact that the plaintiffs brought their claims under state law does not deprive them of standing.

Walmart begins its attack with the sweeping assertion (at 15) that "state legislatures do not" have "the power to define injuries that may rise to Article III standing." If that were right, it would revolutionize the law of standing in federal courts. As the Supreme Court has said, a state legislature "has the power to create new interests, the invasion of which may confer standing." *Diamond v. Charles*, 476 U.S. 54, 66 n.17 (1986). This Court has also held that "state law can create interests that support standing in federal courts," and that "[s]tate statutes constitute state law that can create such interests." *Cantrell v. City of Long Beach*, 241 F.3d 674, 684 (9th Cir. 2001). This rule underpins a broad swath of the federal judiciary's docket: If state-law-based injuries were insufficient, "there would not be Article III

standing in most diversity cases, including run-of-the-mill contract and property disputes." *Id.*

No reasonable reading of the Supreme Court's decisions in *Spokeo*, 136 S. Ct. 1540, or *Hollingsworth v. Perry*, 570 U.S. 693 (2013), supports Walmart's argument (at 17-18) that these cases implicitly overruled centuries of federal-court practice and cast the basis for diversity jurisdiction into doubt. *Perry* refers to cases involving "generalized grievances" under state law as unable to create "a ticket to the federal courthouse" because state law was the asserted basis for standing in that case, 570 U.S. at 706, 715; *Spokeo* refers to Congress (rather than state legislatures) because federal law was at issue there. Neither remotely suggests that federal law is privileged over state law with respect to Article III standing. The Supreme Court does not "hide elephants in mouseholes." *Cf. Cyan v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1072 (2018).

B. Magadia suffered concrete injuries sufficient for standing.

Next, Walmart argues that Magadia has suffered only a "procedural" injury that is not sufficiently concrete to confer Article III standing. Walmart misquotes the district court as holding broadly that "a statutorily-defined injury … is sufficient" for Article III. Walmart Br. 21-22 (citing ER51). In reality, the court held that "*the* statutorily-defined injury" suffered in *this case* confers standing. ER51 (emphasis added). And the court was correct: When a company fails to provide a

legally mandated disclosure such that its employees cannot "promptly and easily determine from the wage statement alone" whether they have adequately been paid, those employees have suffered a concrete injury. Cal. Labor Code § 226(e)(2)(B).

As this Court held on remand from the Supreme Court in *Spokeo*, a statutory violation is sufficient for Article III standing where (1) "the statutory provisions at issue were established to protect [a plaintiff's] concrete interests (as opposed to purely procedural rights)," and (2) "the specific procedural violations alleged in [the] case actually harm, or present a material risk of harm to, such interests." *Robins v. Spokeo*, 867 F.3d 1108, 1113 (9th Cir. 2017) (*Spokeo II*). Both prongs are met here.

First, the California statutes at issue here protect a concrete interest: an employee's interest in being "adequately informed of [the] compensation received" during a pay period. *Soto*, 208 Cal. Rptr. 3d at 623 (quoting legislative history). This interest in wage transparency is "real and not abstract." *Spokeo II*, 867 F.3d at 1112. Where a statute requires that certain information be disclosed to those it would help, "[t]he law is settled that a denial of access to [that] information qualifies as an injury in fact." *Envtl. Def. Fund v. EPA*, 922 F.3d 446, 452 (D.C. Cir. 2019). Disclosure is a "pervasive and important regulatory tool" that undergirds a large swath of foundational economic, health, and safety regulations. Cass Sunstein,

Informational Regulation and Informational Standing, 147 U. Penn. L. Rev. 613 (1999). As *Spokeo* itself reaffirms, the "inability to obtain information" that is statutorily subject to disclosure "constitutes a sufficiently distinct injury to provide standing to sue." 136 S. Ct. at 1549-50.

Whether class members suffered some *other* statutory violation, such as wage theft, is irrelevant for standing purposes. *Spokeo* made clear that the "distinct injury" caused by a denial of information does not require a showing of "any *additional* harm." *Id.* Thus, for example, a government contractor seeking to confirm that it has been paid in full would have standing to challenge the denial of a Freedom of Information Act request even if turns out that there was no underpayment. *Pub. Citizen v. DOJ*, 491 U.S. 440, 449 (1989) ("Our decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records."). As this Court has noted, a FOIA requestor denied the statutorily required information "is injured-in-fact for standing purposes because he did not get what the statute entitled him to receive." *A Better Way for BPA v. DOE Bonneville Power Admin.*, 890 F.3d 1183, 1186 (9th Cir. 2018). A consumer likewise has a right to review their credit report before an adverse action "whether the report is accurate or not," and regardless of "whether having the report would allow [them] to stave off" the adverse action. *Long v. Se. Pa. Transp. Auth.*, 903 F.3d 312, 319-24 (3d Cir.

2018). Similarly, Magadia's interest exists whether or not he was, in fact, paid enough—the law protects his interest in receiving the information that shows *whether* he has been adequately paid.

Once this interest is properly identified, the second prong of the *Spokeo II* analysis—whether the interest protected by the statute was in fact violated here—is straightforward. *See Spokeo II*, 867 F.3d at 1113. Walmart's own witness confirmed that employees examining their paystubs would be unable to tell how their pay was calculated with respect to adjusted overtime, ER208, or what pay period they were being paid for on their statement of final pay. ER211; ER45-46. Magadia thus suffered the exact injury that the California paystub laws were designed to prevent: the inability of employees to determine easily from their paystub "whether they were being paid for all hours worked at the appropriate rates of pay." *Morgan*, 113 Cal. Rptr. 3d at 19.

Walmart makes much of several statements made by Magadia, including that he said "no" when asked if the paystubs he received had "injured" him and that he did not find any miscalculations. Walmart Br. 20-24. But whether a given set of facts creates a sufficient injury for Article III purposes is a question of law—the very question the *Spokeo* line of cases sets out to clarify. *See, e.g*, *Spokeo II*, 867 F.3d at 1113; *cf. In re ATM Fee Antitrust Litig*, 686 F.3d 741, 747 (9th Cir. 2012). The law is clear that an Article III injury may be intangible, even if lay witnesses like

Magadia might assume that "injury" means some sort of tangible harm. *See Spokeo I*, 136 S. Ct. at 1549. And whether Magadia actively found misstatements or confusing representations on his paystub is not determinative of his standing here. Magadia's injury was not the receipt of false or confusing paystubs; it was the receipt of paystubs that did not permit him to *determine* whether he was paid adequately. He is not required to show confusion or any other "*additional* harm beyond the one" identified by law. *Spokeo I*, 136 S. Ct. at 1549.

The same analysis applies for the absent class members. This Court does "not require that each member of a class submit evidence of personal standing." *Torres v. Mercer Canyons*, 835 F.3d 1125, 1137 n.6 (9th Cir. 2016). Instead, a "class must be defined in such a way that anyone within it would have standing." *Id.* Here, all class members were denied information to which they were entitled, so all suffered the same injury as Magadia. No additional showing is required. *Id.* at 1135 (affirming class certification based on informational injury, which "need not result in direct pecuniary loss").

C. Magadia has standing to bring claims under PAGA.

Walmart is also wrong (at 25-26) that Magadia lacks standing under the Private Attorneys General Act. A PAGA action is "a type of *qui tam* action," in which "[t]he government entity on whose behalf the plaintiff files suit is always the real party in interest." *Iskanian*, 327 P.3d at 148. A PAGA plaintiff alleging

violations of state labor law (like Magadia here) is the "proxy or agent" of state enforcement agencies, "representing the same legal right and interest as those agencies, in a proceeding that is designed to protect the public, not to benefit private parties." *Amalgamated Transit Union, Local 1756 v. Superior Court*, 209 P.3d 937, 943 (Cal. 2009). The Supreme Court and this Court have held that private individuals in *qui tam* actions have Article III standing where they assert claims on behalf of a government entity whose interests have been assigned to them via statute. *See Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 774 (2000); *U.S. ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 748 (9th Cir. 1993).

Walmart argues (at 25) that Magadia has no standing with respect to the meal-period claims brought under PAGA because he "did not suffer any meal-break violation" and cannot "represent third parties who suffered a harm that he did not." But *qui tam* claims *always* allow a plaintiff to represent an entity that "suffered a harm that he did not"—the government entity who is "the real party in interest in the suit." *Iskanian*, 327 P.3d at 148. The government has a concrete interest in the money that it is owed by Walmart for violations of California law, and has assigned that interest to Magadia. That is sufficient for standing.[1]

[1] It is also irrelevant as a matter of state law that the district court rejected Magadia's individual meal-break claim. "The idea that a plaintiff must be aggrieved of all the violations alleged in a PAGA case does not flow logically from the fact that a plaintiff is standing in for government authorities to collect penalties

Walmart's final assertion regarding Magadia's PAGA standing also fails. Walmart again cites *Perry* for a proposition not found anywhere in the opinion—that the Supreme Court has "rejected the premise" that a state can statutorily assign the right to assert its interest to private *qui tam* plaintiffs. Walmart Br. 26. *Perry* explicitly held that *qui tam* actions such as this one "are readily distinguishable" from the facts of that case, because *qui tam* actions involve the "assignment of the Government's damages claim and a well nigh conclusive tradition of such actions … dating back to the 13th century." *Perry*, 570 U.S. at 711. Walmart's attempt to apply *Perry* to a *qui tam* action runs squarely afoul of this holding.

II. The district court correctly found Walmart liable for violating California's labor laws.

Walmart argues that the district court misinterpreted California law on each of the three violations for which it found Walmart liable. But it is Walmart's interpretation, not the district court's, that fails to account either for the Labor Code's plain language or for the California Supreme Court's "overarching interpretive principle[]" for construing that language—that the law be "liberally construed in favor of worker protection." *Alvarado*, 411 P.3d at 539.

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paid (in large part) to the state. The plaintiff is not even the real party in interest in the action—the government is." *Huff*, 233 Cal. Rptr. 3d at 510.

A. Walmart fails to itemize the rates and hours of adjusted overtime under § 226(a)(9).

1. Walmart's adjusted-overtime payments are based on specific hours and rates.

Walmart begins its argument on the merits by sowing confusion about both the decision below and the nature of the plaintiffs' claims. Walmart claims (at 27) that the district court wrongly considered the company's quarterly MyShare bonuses to be a "category of overtime" because the payment "results in a pay increase based in part on overtime worked." But, Walmart argues, "MyShare pay is not 'overtime pay'; it is *incentive* pay, and such bonuses have no corresponding 'hourly rate' or 'hours worked'" for the company to report. *Id.* at 27-28.

The district court suffered from no such misunderstanding. The court never characterized Walmart's quarterly incentive bonuses as "overtime." Rather, it recognized them as "incentive plan payments"—"a type of bonus." ER7. More importantly, the district court did not hold Walmart liable for failing to itemize the hours and rates of the quarterly incentive bonuses themselves. The payments at issue are not the incentive bonuses (the "MYSHARE/INCT" payments), but the resulting adjusted overtime that California law requires Walmart to pay *based on* those bonuses (the "OVERTIME/INCT" payments). *See Alvarado*, 411 P.3d at 530; DLSE Manual § 5.2.4.

Walmart claims that even its "OVERTIME/INCT" payments "cannot be reduced to an hourly rate," asserting that the district court "ignored trial testimony" to that effect. Walmart Br. 29. But that is simply wrong, as Walmart's own witness conceded below. ER467. Walmart computes the payments, as California law requires, based on a specific number of hours (an employee's total overtime hours during a quarter) and a specific rate (the employee's adjusted overtime rate for that quarter). ER721-22. The testimony on which Walmart relies reveals only that, after making the overtime calculation, the company does not currently *store* the component hours and rates in its database. ER481-42. But whether or not Walmart chooses to store those numbers, they are still the *basis* for its overtime calculations.

2. California law requires Walmart to disclose the hours and rates of adjusted overtime at the time of payment.

Walmart's disclosure obligation under § 226(a)(9) is straightforward: It must include on employee paystubs "all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate." Walmart, however, adopts a convoluted reading of that language to require disclosure only of hourly rates "for *work done* in the pay period for which the statement is provided—the immediate two weeks prior." Walmart Br. 28 (emphasis

changed). Because its bonuses "appl[y] to overtime worked in *prior* pay periods" during the quarter, it argues, there is "nothing to list on the wage statement." *Id.*

Walmart reaches that conclusion only by changing the statute's language. As the statute is written, the rates and hours that must be disclosed are not those for "*work done* in the pay period," as Walmart says, but those "*in effect* during the pay period." Cal. Labor Code § 226(a)(9) (emphasis added). Courts have "no power to rewrite [a] statute" but are "limited to … the language used." *Seaboard Acceptance Corp. v. Shay*, 214 Cal. 361, 365 (Cal. 1931). Walmart's interpretation, however, effectively reverses the statute's language: Where the statute requires disclosure of "all applicable hourly rates in effect during the pay period and the corresponding number of hours worked," Walmart reads "the number of hours worked during the pay period and the corresponding hourly rates in effect."

That change makes all the difference. Because Walmart focuses its argument on whether work is done in the pay period, it hardly addresses the only relevant question: whether the hourly rate is "in effect" during that period. The plain language, structure, and purpose of § 226(a) confirm that it is.

a. The plain meaning of "in effect" requires disclosure of rates and hours at the time of payment.

Under California law, words in a statute "should be given the meaning they bear in ordinary use." *See Lungren v. Deukmejian*, 45 Cal.3d 727, 735 (Cal. 1988).

Under the ordinary meaning of "in effect," an hourly rate is necessarily in effect during a pay period in which it is paid. "In effect" means "operative." *Effect*, Merriam-Webster.com. An hourly rate on which an employer actually pays wages during a pay period is always "operative" during that period because, along with corresponding hours, the rate *determines* the wages paid.

In the case of Walmart's adjusted overtime rate, the period when the rate is paid is the *only* time the rate could be "in effect." Employee benefits that vest over time—like bonuses and vacation time—become "wages" that an employer must include on a paystub only when the value of those benefits is determined and given to the employee. *See Soto,* 208 Cal. Rptr. 3d at 623. In Walmart's case, the amount of an incentive bonus, and the corresponding value of overtime adjustments, are not determined until they are paid at the end of each quarter. Only then do they become "wages" under § 226(a), and only at that time can the hourly rates on which those wages are based be considered "in effect." The alternative—that the rates on which Walmart pays adjusted overtime are *never* in effect—is absurd.

b. The context and structure of the statute confirm its plain meaning.

In interpreting statutes, California courts do not "focus solely on a single word or sentence; the words must be construed in context." *Soto*, 208 Cal. Rptr. 3d at 622. Here, the context of § 226(a)(9) demonstrates the legislature's purpose of

requiring disclosure when wages are paid—regardless of the dates of the underlying work.

Section 226(a)'s entire focus is on disclosures related to the "specific wages being paid at the time of the payment." *Id.* at 623. Thus, an employer's duty to provide a paystub is triggered at "the time of each *payment of wages*" and is tied to the check or other method by which those "wages are *paid*." Cal. Labor Code § 226(a) (emphasis added). And the information that the employer must itemize in the paystub—gross and net wages earned, total hours worked, and deductions—are all the underlying values on which the total payment is based. *Id.* § 226(a)(1), (2), (4), (5); *see Soto*, 208 Cal. Rptr. 3d at 623 (explaining that § 226(a) "requires the employer to 'itemize[]' the constituent parts of the total amount to be *paid to the employee*" (emphasis added)). Considered in that context, the "applicable hourly rates" and "corresponding number of hours" for which § 226(a)(9) requires disclosure can only mean the rates and hours that form the basis of the wages reported on the paystub—that is, the rates and hours "applicable" to the wages being paid. *Id.* § 226(a)(9). That is the only "reasonable construction which conforms to the apparent purpose and intention of the lawmakers." *Webster v. Superior Court*, 758 P.2d 596, 599 (1988).

Under Walmart's interpretation, in contrast, disclosure of rates and hours under § 226(a)(9) turns not on whether the wages are *paid* during the pay period,

but on whether the wages are for "work done" during that period. That reading creates a disconnect in the statute, under which payment of wages triggers all of § 226(a)'s disclosures for those wages *except* for § 226(a)(9)'s disclosure of underlying rates and hours. For § 226(a)(9) alone, disclosure would be required only for wages based on hours that the employee happens to have worked during the prior two weeks. And Walmart's position does not just mean that the rates and hours of work done outside the current pay period must be reported in a different period—it means that an employer is *never* required to disclose that information. There is no conceivable reason why California's legislature would have intended that result.

c. Disclosure at the time of payment is the only reading consistent with the statute's purpose.

That § 226(a)(9) requires disclosure for payments reflected on the paystub, no matter when the underlying hours were worked, is confirmed by the purpose of the section—the touchstone of statutory interpretation under California law. *See Soto*, 208 Cal. Rptr. 3d at 621. "The purpose of requiring greater wage stub information" under § 226(a) is to ensure that "employees are adequately informed of *compensation received* and are not shortchanged." *Id.* at 623 (quoting legislative history). The disclosures, in other words document "*paid wages* to ensure the employee is fully informed regarding the calculation of *those wages*." *Id.*

Section 229(a)(9)'s requirement that employers disclose rates and hours is in line with that purpose. Until 2000, the statute required employers to disclose *total*

"wages earned" and "hours worked." Even with those requirements, however, the legislature faced concerns that workers were "often provided little information about their wages." Cal. Senate, Judiciary Comm., Bill Analysis, A.B. 2509 (Aug. 8, 2000). As a result, employers had been able to "cheat workers out of billions of dollars in wages owed to them." Cal. Assembly, Comm. on Labor & Employment, Bill Analysis, A.B. 2509 (Apr. 12, 2000). The legislature addressed those problems with § 226(a)(9) by "expand[ing] the scope of information" in paystubs to include the specific hourly rates and corresponding hours underlying the wages reported. *Morgan*, 113 Cal. Rptr. 3d at 18. By adding that "more specific requirement," the legislature sought to make it "easier for employees to determine whether they were being paid for all hours worked at the appropriate rates of pay." *Id.* at 19.

Walmart's reading would have far-reaching effects. It would deny the benefits of § 226(a)(9), for example, to the many employees who depend on bonuses, commissions, and other non-hourly wages that are "owed only when they have been earned, even if it is on a monthly, quarterly, or less frequent basis." *Peabody v. Time Warner Cable*, 328 P.3d 1028, 1032 (Cal. 2014). Moreover, a key purpose of the section is to require employers to disclose the hourly rate and corresponding hours of overtime pay separately from regular hourly wages. *See Morgan*, 113 Cal. Rptr. 3d at 18-19. But the Labor Code does not require employers to provide a paystub for overtime work until "the paystub for the *next* regular pay period." Cal. Labor Code

§ 204(b)(2) (emphasis added). By that time, the overtime payment would reflect work done in a "prior pay period" for which, in Walmart's view, disclosure of rates and hours would no longer be required. Likewise, employers who pay wages late—inadvertently or otherwise—would be excused from the disclosure requirement for work done in prior pay periods, though the employee's interest in correct computation of those wages would remain undiminished.

3. This Court should decline to follow the single, unpublished California decision on which Walmart relies.

The only relevant California authority that Walmart identifies in support of its reading of § 226(a)(9) is *Canales v. Wells Fargo Bank, N.A.*, 234 Cal. Rptr. 3d 816 (2018). The portion of the opinion on which Walmart relies, however, is unpublished. Under California rules, the decision thus "must not be cited or relied on by a court or a party in any other action." Cal. Rules of Court R. 8.1115. Although this Court is "not precluded from considering unpublished state court opinions" in interpreting state law, it is "not bound by them either." *Nunez v. City of San Diego*, 114 F.3d 935, 942 n.4 (9th Cir. 1997). Rather, given the absence of an on-point decision by the California Supreme Court, this Court is "solely guided by" the law as it believes "the California Supreme Court would apply it." *In re K F Dairies, Inc. & Affiliates*, 224 F.3d 922, 924 (9th Cir. 2000).

As the district court correctly concluded, there is no reason to believe that the California Supreme Court would adopt the unpublished holding in *Canales*. The Court's "overarching interpretive principle[]" in construing the wage laws is that the laws must be "liberally construed in favor of worker protection." *Alvarado*, 411 P.3d at 539. "Time and again," the Court has stressed that the purpose of the laws is the "protection of employees—particularly given the extent of legislative concern about working conditions, wages, and hours." *Augustus v. ABM Sec. Servs.*, 385 P.3d 823, 827 (Cal. 2016). Accordingly, courts are "obligated to prefer an interpretation that … favors the protection of the employee's interests." *Alvarado*, 411 P.3d at 539.

The decision in *Canales* does not even acknowledge that overarching principle. Nor does it signal understanding of the consequences its decision would have for workers—that employers would *never* need to disclose, for example, hourly rates for quarterly or yearly bonuses, overtime, or late wages. As the district court explained, *Canales* is thus "difficult to reconcile with a California labor statute whose avowed goal is to 'insure that employees are adequately informed of compensation received and are not shortchanged.'" ER42 (quoting *Soto*, 208 Cal. Rptr. 3d at 623).

To be sure, the liberal-construction rule does not mean that employees' interests always prevail. Other considerations, like the statute's plain language, may

show a contrary legislative intent in particular cases. Nevertheless, a decision that simply ignores what the California Supreme Court considers the single most important rule of construction cannot be considered persuasive authority on the course the Court would likely take. *See K F Dairies*, 224 F.3d at 927 (declining to follow decision that "conflict[ed] with generally established principles of … construction as articulated by the California Supreme Court").

Nor does *Canales* provide any reasons why the Court might set aside the liberal-construction rule. The court's key holding is that "pay period" under § 226(a)(9) "refer[s] to the two-week period covered by the wage statement"—a conclusion that nobody disputes here. ER892. But the decision just assumes, without even articulating the assumption, that hourly rates for work done in previous pay periods are not "in effect" during the period the wages are paid. ER893. That is wrong—as explained, an employer cannot pay a rate that is not "in effect." *See Am. Tower Corp. v. City of San Diego*, 763 F.3d 1035, 1047 (9th Cir. 2014) (relying on statutory text as persuasive data that a California Court of Appeal misinterpreted the statute).

In addition, the district court correctly recognized that *Canales* conflicts with the earlier published decision in *Soto*, which held that § 226(a)'s disclosure requirements are triggered "at the time wages are paid instead of when wages are accrued." ER35. Two other decisions by federal district courts have, for the same

reasons, also declined to rely on *Canales* as a predictor of the California Supreme Court's likely approach. *See Mitchell v. Corelogic*, 2019 WL 7172978, at *5 (C.D. Cal. 2019); *Hamilton v. Wal-Mart Stores*, 2019 WL 1949456, at *7 (C.D. Cal. 2019). This Court should do the same.

4. Walmart's "hypothetical" paystub is confusing by design.

Based on its misreading of the decision below and of § 226(a)'s requirements, Walmart presents (at 29) a "hypothetical" paystub that purports to show "how the court's rule, if applied," would create confusion. Any confusion, however, is of Walmart's own making.

Walmart first complains that the district court's decision forces it to "confusingly report all of the overtime hours worked over the past quarter … as if they were worked in that pay period." *Id.* at 30. That is wrong. All the district court held that Walmart should have done was to report the rates and hours required by § 226(a)(9). Neither the decision below nor the statute prohibit Walmart from stating the dates on which the hours were worked. To the contrary, § 226 *requires* Walmart to include on paystubs the "dates of the period for which the employee is paid." Cal. Labor Code § 226(a)(6); *see also* DLSE Opinion Letter 2002.05.17 (May 17, 2002), https://perma.cc/SET6-5A24 (paystubs correcting prior pay periods must state the corrected dates).

Walmart also suggests that, because its hypothetical paystub "already includes a separate entry for overtime worked" in the pay period, the inclusion of additional overtime hours would be confusing. Walmart Br. 30-31. But even assuming that is a problem, it is not a problem unique to overtime adjustments. An employee's pay can change at any time, leading to multiple hourly rates—and thus multiple overtime rates—during the same pay period. In such cases, Walmart has no problem listing multiple overtime rates on the same paystub. ER1258.

Finally, Walmart claims (at 31) that the decision below forces it to list an "after-the-fact fictitious average" of rates in effect throughout the quarter. But the statute requires employers to report "*all* applicable hourly rates in effect," not an average of those rates. Cal. Labor Code § 226(a)(9) (emphasis added). If an overtime adjustment were really based on more than one hourly rate, Walmart would thus have to disclose *each* of those rates and corresponding hours. In any event, the rate of overtime adjustments does not, as Walmart claims (at 28-29), "change throughout the quarter." Both California and federal law require employers to compute a bonus's "regular rate" by dividing the total amount of the bonus by the number of hours worked during the bonus period. *See* DLSE Manual § 49.2.4.1. And the time-and-a-half overtime adjustment due on the bonus is just half that regular rate—a rate that is constant across all the quarter's pay periods.

See id. There is thus only one rate for Walmart to report per quarter, and no need to average.

Based on those principles, there are countless ways the company could produce a sensible disclosure that complies with § 226(a)(9). For example:

MyShare Bonus and Overtime Adjustment for 12/5/2012 - 3/8/2013
Your MyShare Bonus was $500.00

Overtime hours worked	Overtime rate increase due to MyShare Bonus	Net overtime adjustment for 12/5/2012 - 3/8/2013
10 hours	$0.50/hour	$5.00

The difficulty that Walmart has in understanding how overtime adjustments work only reinforces the importance of the required disclosures. If Walmart—the largest employer in the world—cannot understand the basis for adjusted overtime, there is no reason to expect employees in the absence of the required disclosures to understand it either.

B. Walmart fails to issue a compliant paystub under § 226(a)(6) at time of termination.

Section 226(a) provides that "[a]n employer, semimonthly *or* at the time of each payment of wages, shall furnish" a paystub to employees. Cal. Labor Code § 226(a). Walmart reads the disjunctive "or" to give it the option of *either* furnishing the paystub semimonthly *or* furnishing it at the time of each wage payment. Walmart Br. 39. Thus, although Walmart does not dispute that the paystubs it provides to employees with their final paychecks fail to include the dates of

payment required by § 226(a)(6), it contends that the subsequent on-cycle paystub satisfies its statutory obligations. *Id.* at 38.

But there is a better reading—one that gives effect to the statutory scheme as a whole. *See Morgan*, 113 Cal. Rptr. 3d at 14 ("A statute is not to be read in isolation, but construed in context and with reference to the whole system of law of which it is a part."). The Labor Code provides that earned wages are "due and payable" semimonthly, "on days designated in advance by the employer as the regular paydays." Cal. Labor Code § 204. The law, however, does not prohibit employers from paying wages more frequently than that minimum semimonthly schedule. In particular, when "an employer discharges an employee," unpaid wages are due "immediately," even if the termination falls between regular paydays. *Id.* § 201(a). Given that, the most reasonable way to understand § 226(a) is to simply track those requirements. The section provides that an employer "shall" provide paystubs "semimonthly," corresponding to the minimum payday frequency under § 204. But if the employer pays wages outside that schedule, such as at termination, then the employer "shall" provide a paystub "at the time of each payment." Thus, whether an employer pays wages semimonthly "or" at some other time, the employer "shall" issue a paystub. The employer's obligation, in other words, is triggered by whichever condition is met first.

That is precisely the reading of § 226(a) that the DLSE has adopted. The agency long stated in its policy manual that employers must provide paystubs "at the time of payment of wages (or at least semimonthly, whichever occurs first)." DLSE Manual § 14.1.1 (2002). As the manual explains, § 226(a) "sets out the employer's responsibilities in connection with the wage statement which *must accompany* the … payment to the employee." *Id.* § 14.1.2 (emphasis added); *see also* DLSE Opinion Letter 2006.07.06 (July 6, 2006), https://perma.cc/37X8-5ACY (stating that an employer complies with § 226(a) by providing a paystub "no later than pay day").[2] And the California Supreme Court, albeit in dicta, has read § 226(a) the same way. *See*, *e.g.*, *Peabody*, 328 P.3d at 1033 (section 226 "requires that the paychecks be *accompanied by*" a paystub (emphasis added)); *see also Zavala v. Scott Bros. Dairy*, 49 Cal. Rptr. 3d 503, 507 (2006) (paystub required "*at the time wages are paid*" (emphasis added)). Those interpretations may not authoritatively establish the meaning of section 226(a), but they at least demonstrate that the district court's

[2] The manual continues to provide that a "wage statement … must accompany the check or cash payment to the employee." DLSE Manual § 14.1.2. After *Canales*, the agency removed the statement that paystubs must be provided "at the time of payment of wages (or at least semimonthly, whichever occurs first." *See id.* § 14.1.1 (2002). That change reflects a shift in the agency's use of the manual—in the wake of the California Supreme Court's holding that the manual lacks the force of a binding regulation—from a statement of its interpretations of law to a record of relevant decisions. *See Alvarado*, 411 P.3d at 536-37; DLSE Manual §§ 1.1-1.1.6.2.

reading is a plausible one—one, in fact, that courts and the statute's administering agency have for many years accepted as correct.

Once again, Walmart's only authority for its contrary interpretation is *Canales*, 234 Cal. Rptr. 3d 816. The *Canales* court, however, failed to even recognize the DLSE's reading of section 226(a)(6) as plausible, and, for that reason, again failed to acknowledge or apply the California Supreme Court's rule that the labor laws be "liberally construed in favor of worker protection." *Alvarado*, 411 P.3d at 539. Although this Court may look to decisions of intermediate appellate courts as "data for determining how the highest California court would rule," *Scandinavian Airlines System v. United Aircraft Corp.*, 601 F.2d 425, 427 (9th Cir. 1979), this Court is "not bound by them" if it "believe[s] that the California Supreme Court would decide otherwise." *K F Dairies*, 224 F.3d at 924. A decision that ignores the California Supreme Court's "overarching interpretive principle[]," *Alvarado*, 411 P.3d at 539, provides only very weak data on how that Court would interpret the law. *See K F Dairies*, 224 F.3d 922.

Given the existence of two plausible readings, the *Canales* court was "obligated to prefer an interpretation that … favors the protection of the employee's interests." *Alvarado*, 411 P.3d at 539. As the district court found here, those interests require a paystub at the time of final payment. The court found that a Walmart employee's final on-cycle paystub "could be delayed by up to 14 days

after an employee is terminated," which "exacerbates the problems an employee faces in determining whether or not his or her final wages are correct." ER35. By that time, the employee will have likely lost access to a Walmart "supervisor to discuss or dispute … the accuracy of the wages received." *Id.* Moreover, employees after termination lose access to computer terminals that Walmart provides them to access and print their paystubs. ER35-36. For those reasons, the court concluded that a paystub at termination is "critical … to allow an employee to evaluate whether he or she has been correctly paid." ER35.

There are other strong reasons to follow the DLSE's reading of section 226(a) over *Canales*. For one, only under the DLSE's reading do the law's wage-payment requirements work together with its paystub requirements as a consistent scheme. For example, Walmart chooses to pay its employees biweekly—slightly more frequently than the maximum semimonthly period. ER7. If a paystub is required "at the time of each wage payment," as the DLSE has concluded, then Walmart must provide paystubs on the same biweekly schedule. But if a paystub at the time of payment were *optional*, as Walmart contends, then the company could issue paychecks biweekly and paystubs semimonthly—a confusing and unlikely result.

The DLSE's interpretation also takes into account section 226(a)'s focus on the time of payment. The statute requires that, unless payment is by cash or

personal check, the paystub must be issued "as a detachable part of the check, draft, or voucher paying the employee's wages." Cal. Labor Code § 226(a). Moreover, as discussed in the previous section, the purpose of the required disclosures "is to *document* the *paid wages* to ensure the employee is fully informed regarding the calculation of *those wages*." *Soto*, 208 Cal. Rptr. 3d at 623. Walmart's reading, however, disconnects the timing of paystubs from their associated payments, making it unclear what the paystubs are even supposed to document. The statute, for example, requires paystubs to include the "dates of the period for which the employee *is paid*"—a requirement that makes sense only if the employee is in fact being paid at the time the paystub is issued. Cal. Labor Code § 226(a)(6) (emphasis added).

For all those reasons, this Court should, like the district court below, follow the DLSE's reading rather than *Canales* as the best predictor of the California Supreme Court's likely course.

C. Walmart fails to fully compensate employees for missed meal breaks under § 226.7(c).

1. Walmart's argues that the district court erred in relying on the company's own records to determine that it underpaid employees for missed meal breaks under section 226.7(c). The court's rejection of Walmart's "attempt to discredit its own process for investigating and classifying meal exceptions," however, was not an abuse of discretion. ER23. The court found Walmart's records to be "reliable

indicators" of the reasons employees miss breaks because Walmart "conducts an investigation" of missed meal breaks, "assigns a code to each meal period exception as a result of [the] investigation, and relies upon the results" to make business decisions. ER23-24. Even if Walmart is right that the records do not establish the reason employees missed breaks for a *certainty*, they at least raise a reasonable inference that the breaks were directed by management. The district court, as the finder of fact here, was entitled to draw that inference. *See Ridgeway v. Walmart*, 946 F.3d at 1088. And the court's reliance on the evidence was especially reasonable given that the class "had no other practicable way to prove" the reasons for missed breaks. *Id.* at 1089.

2. Walmart's remaining argument on meal breaks depends on a single dubious proposition: that the words "pay" and "compensation," as used in Labor Code, mean two fundamentally different things. Walmart acknowledges (at 5) that "regular rate of *pay*" includes nondiscretionary pay such as bonuses. But it argues that the "regular rate of *compensation*," to which employees are entitled for missed meal breaks under § 226.7(c), is limited to an employee's *base* hourly rate.

This argument does not even get off the ground. When sitting in diversity, this Court "must begin with the pronouncements of the state's highest court," which are binding on it. *McKown v. Simon Prop. Grp.*, 689 F.3d 1086, 1091 (9th Cir. 2012). And the California Supreme Court held in *Murphy v. Kenneth Cole Prods.* that

the California Legislature uses "the words 'pay' or 'compensation' in the Labor Code as synonyms for 'wages.'" 155 P.3d 284, 290 n.6 (Cal. 2007). That is not surprising, given that the words mean the same thing. *Compare Pay*, Merriam-Webster.com ("something paid for a purpose"; "remuneration") *with Compensation*, *id.* ("payment, remuneration").

The California Court of Appeal's decision in *Ferra v. Loews Hollywood Hotel*, on which Walmart relies, fails to recognize *Murphy*'s holding, and this Court should decline to follow it for that reason. Indeed, after Walmart's brief was filed, the California Supreme Court granted review of *Ferra* on the issue that Walmart raises here. *See* 2020 WL 373049, at *1 (Cal. 2020). The decision therefore no longer has "binding or precedential effect." Cal. Rules of Court R. 8.1115(e)(1).

III. There is no basis for altering the district court's damages award.

Finally, Walmart contends that, even if it violated California law and inflicted a concrete injury on tens of thousands of its employees, the remedy imposed by the district court is impermissible. None of Walmart's objections provides any basis for disturbing the court's award of damages and penalties.

A. Walmart's paystub violations were knowing and intentional.

Employees are entitled to statutory damages for violations of section 226(a)'s paystub requirements if the employer's violation was "knowing and intentional." Cal. Labor Code § 226(e)(1). The district court adopted an interpretation of that

standard that was highly favorable to Walmart, holding that the company's violations could be "knowing and intentional" only if it knew that its practices violated the law. ER26. Walmart argues that the district court was too harsh in rejecting its reliance on claimed "good-faith" legal interpretations. But the opposite is true—the district court was overly lenient in allowing Walmart to assert the defense in the first place.

1. A mistake of law is not a defense under section 226(a).

A "knowing and intentional" violation under section 226(a), as California courts have interpreted that language, requires only that an employer was "aware of the factual predicate underlying the violation." *Kao v. Holiday*, 219 Cal. Rptr. 3d 580, 592 (2017); *see also Furry v. E. Bay Publ'g*, 242 Cal. Rptr. 3d 144, 154 (2018). As a consequence, to recover under section 226(a), an "employee is not required to demonstrate that the employer knew its conduct was unlawful." *Id*.

As the California Supreme Court has recognized, it is "an emphatic postulate of both civil and penal law that ignorance of a law is no excuse for a violation." *Stark v. Superior Court*, 257 P.3d 41, 58 (Cal. 2011). "Numerous … courts," relying on that principle, "have rejected a good faith defense to Labor Code section 226." *Furry*, 242 Cal. Rptr. 3d at 154; *see Kao*, 219 Cal. Rptr. 3d at 593 ("[M]istake of law … is not excused under the statute mandating itemized wage statements."); *see also Heritage Residential Care v. DLSE*, 120 Cal. Rptr. 3d 363, 373 (2011). Were it

otherwise, employers "could obtain blanket immunity" for violating the law "simply by seeking the advice of legal counsel." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 602 (2010). That result cannot be squared with the California Legislature's paramount concern under the labor laws for protecting workers.

The district court nevertheless held that the "knowing and intentional requirement of § 226 is akin to a willfulness requirement," under which Walmart could be liable only if it "willfully intended" to violate the law. ER26. But even if the statute required a "willful" violation, that would not excuse mistakes of law. In many contexts, including under the Labor Code, "willfulness simply denotes an employer's failure to perform a required act." *Heritage Residential Care*, 120 Cal. Rptr. 3d at 370.

The district court relied for its definition of "willful" on section 203 of the Labor Code. ER29. But the California legislature defined "willful" as used in that section to exclude "a good faith dispute that any wages are due … *based in law or fact*." Cal. Code Regs. tit. 8, § 13520 (emphasis added). The section is thus an express exception to the traditional rule against the mistake-of-law defense, limited by its terms to "waiting time penalties under Section 203." *Id.* A court cannot "engraft" a statutory standard of liability onto "a separate and discrete section"

when the legislature itself has not done so. *Patarak v. Williams*, 111 Cal. Rptr. 2d 381, 385 (2001).

The district court also relied on *Ex parte Trombley*, in which the California Supreme Court held that a good-faith *factual* dispute about whether wages are due is a defense to criminal liability under the Labor Code for failure to pay those wages. 193 P.2d 734 (Cal. 1948). But far from adopting a mistake-of-law defense, *Trombley* holds that willfulness "does not require an evil intent," but only "a purpose or willingness to commit the act." *Id.* at 739. And the California Supreme Court, citing *Trombley*, has subsequently reaffirmed that the term "willful," even in the criminal context, is applied "without regard to motive or ignorance of the act's prohibited character." *Hale v. Morgan*, 584 P.2d 512, 517 (Cal. 1978); *see also* Cal. Penal Code § 7 (the "word 'willfully' does not require any intent to violate law"). Walmart's mistaken belief about what the law requires is thus not a defense under *Trombley*.

2. The district court did not clearly err in holding that Walmart was not entitled to a good-faith defense.

Because a mistake of law is no excuse for a section 226(a) violation, this Court can affirm the district court's judgment without reaching Walmart's arguments about the reasonableness of its legal position. If the Court does reach those arguments, however, it should still affirm on the ground that the district court did not clearly err in finding that Walmart did not show a good-faith mistake here.

Section 226(a)(9). As the court recognized, there is no uncertainty about the plain meaning of section 226(a)(9)'s required disclosure of rates and hours on which Walmart could have reasonably relied. ER43. Walmart's interpretation of that provision, as explained above, finds no support in the statute's language, but is based instead on the company's rewriting of that language. And even if there were doubt about the section's meaning, the California Supreme Court has repeatedly warned employers that it resolves uncertainties in the labor laws in the manner most protective of workers. *See*, *e.g.*, *Alvarado*, 411 P.3d at 546. If Walmart relied on perceived uncertainty to withhold wage information from its employees, it should have known that it did so at its peril. *See id.* at 572 (relying on the rule of liberal construction in rejecting a defendant's argument that it "could never have predicted" the Court's interpretation of the wage laws).

Nor does *Canales* give Walmart cover. Again, the part of that decision on which Walmart relies is unpublished and may not be "cited or relied on by a court or a party." Cal. Rules of Court R. 8.1115. And, in any event, *Canales* was not issued until after Walmart had already lost on summary judgment. Thus, as Walmart admits (at 34-35), *Canales* is relevant to its good-faith defense only to the extent that the decision sets forth a reasonable reading of section 226(a)(9) that it could have reached and relied on independently. But *Canales* does not present such a reasonable reading, for the reasons already explained. The district court thus

correctly concluded that *Canales* "could not have provided support" for Walmart's practices. ER41.

Finally, section 226(e)(3) allows courts to consider evidence that an employer has adopted "policies, procedures, and practices that fully comply" with the law. Cal. Labor Code § 226(e)(3). Walmart presented no such evidence here. ER42-43. Based on that lack of evidence alone, the court did not clearly err in finding that Walmart's violation of section 226(a)(9) was not based on a good-faith dispute about the law's meaning.

Section 226(a)(6). The district court held that Walmart, at least initially, had a good-faith basis for concluding that section 226(a)(6) did not require it to issue a paystub with every payment of wages. ER37. Walmart vigorously disputes, however, the court's finding that Walmart lost that good-faith basis once the court entered summary judgment against it, calling the court's rationale "civil contempt in disguise." Walmart Br. 36.

Walmart's argument is misplaced. Although the district court did find that Walmart's violation of section 226(a)(6) was "knowing and intentional" beginning on the date of summary judgment, it also found that the plaintiffs had not submitted damages calculations running from that date and thus awarded no damages on those claims. ER58-59. And although the court did award civil penalties under PAGA, those penalties—unlike statutory damages—are not limited

to "knowing and intentional" violations under section 226(e). *See Raines,* 234 Cal. Rptr. 3d at 11.

The court, in any case, was correct that an order directly resolving the legality of Walmart's *own policy*—much more than a decision interpreting the law in an unrelated case—should have "placed Wal-Mart on notice" that its policy violates the law. ER42. Unlike a contempt case, Walmart's liability turns not on whether it violated the district court's order, but on whether it violated the law as interpreted by the court—subject to review by this Court. There is nothing improper, or even unusual, about that.

B. The district court relied on the correct statute to compute PAGA penalties on Walmart's paystub violations.

Walmart next argues that the district court erred in awarding PAGA penalties based on the wrong statute. PAGA provides a default civil penalty of $100 for violations of any Labor Code provision "except those for which a civil penalty is specifically provided." Cal. Labor Code § 2699(f). Section 226.3 specifically provides a "civil penalty" of $250 for any violation of section 226(a) for which "the employer fails to provide the employee a wage deduction statement … required in subdivision (a) of Section 226." According to Walmart, that language applies only to an employer's *complete* failure to provide a paystub—not to the employer's failure to omit the particular information that section 226(a) requires the paystub to include.

Walmart's position makes no sense. Section 226(a) does not require just any paystub, but "an accurate itemized statement in writing showing" each of nine required items. If an employer does not furnish a paystub containing that information, it has failed to provide the paystub "required in subdivision (a) of Section 226." A contrary holding would lead to absurd results. For example, a "wage statement" that included just the employer's name and address as required by section 226(a)(8)—or even a blank page titled "wage statement"—would escape civil penalties under this theory because the employer would not have *entirely* failed to provide a paystub. *See Raines*, 234 Cal. Rptr. 3d at 7 ("[T]o limit civil penalties to only those instances where the employer failed to provide *any* wage statement" would rule out "civil penalties for a grossly inadequate wage statement simply because the employer did provide a statement.").

Regardless, the district court's choice of statute made no difference to the penalties awarded. The plaintiff's expert calculated $131,427,750 in PAGA penalties based on 525,711 violations of section 226(a)(9) and $28,928,500 in PAGA penalties based on 115,714 violations of section 226(a)(6). ER13–14. The court then reduced the award to only $48,046,000 for the section 226(a)(9) violations—"approximately 36% of the original amount" requested, or $91.40 per violation. ER50. And it awarded only $5,785,700 in penalties for the (a)(6) violation, or $50 per violation. ER56–57. So even if the statutory maximum were

$100 per violation and not $250, as Walmart contends, the district court's award still falls within that limit.

C. The court did not abuse its discretion in finding the plaintiffs' damages calculations reliable.

Walmart next lobs a brief objection to the sufficiency of the evidence for the court's damages award. It claims (at 53) that the plaintiffs' expert report is "unreliable" because "it fails to identify the number of violations" used to calculate damages. But, as the district court noted, the expert "testified at length as to how his computational code was programmed to arrive at his damages calculations." ER69. That testimony established that the expert used the code to simply count the total number of violations during the limitations period, as reflected in Walmart's own employee data. The resulting damages calculations were not based on sampling or estimates, but on exact counts and the amount of damages and penalties set by statute. ER553. The district court's finding that the plaintiffs' expert had "sufficiently demonstrated the reliability of his calculations," ER69, was thus well within its "broad discretion," *Reno-W. Coast Distrib. Co. v. Mead Corp.*, 613 F.2d 722, 726 (9th Cir. 1979).

Moreover, Walmart suffered no prejudice from the expert's report. *See Tritchler*, 358 F.3d at 1155 (requiring prejudice). Walmart has access to its payroll records and surely knows how many violations it committed. And all the expert's code and work papers were turned over to Walmart, which cross-examined him

about his methods and the numbers on which he relied. ER549, 563-64; *see Ridgeway*, 946 F.3d at 1088 (upholding admission of expert testimony where Walmart "had ample opportunity to cross-examine [the expert], call its own expert, or present other evidence"). Nevertheless, the company "did not call its own rebuttal damages expert," ER69, and even now does not identify any flaws in the expert's method or propose a better way to calculate damages. For that reason, a reversal by this Court would, once again, serve no purpose.

D. The United States Constitution does not provide any basis for altering the district court's damages award.

Finally, Walmart makes an appeal to the U.S. Constitution, claiming that the Eighth Amendment's Excessive Fines Clause and substantive-due-process principles require revision of the district court's judgment. They do no such thing.

1. Walmart spends six pages arguing (at 54-59) that the $54 million in PAGA penalties violates the Excessive Fines Clause because it is "grossly disproportionate" to the severity of Walmart's violations. For starters, this argument is waived because Walmart did not adequately present it below, even though it had "the burden of proving a violation of the Excessive Fines Clause," *U.S. v. Lot Numbered One (1) of Lavaland Annex*, 256 F.3d 949, 958 (10th Cir. 2001), which entails a "fact-intensive inquiry," *United States v. Mackby*, 261 F.3d 821, 830 (9th Cir. 2001). In the district court, Walmart devoted only a single conclusory sentence to its entire constitutional argument. That sentence read: "Awarding PAGA penalties here would violate due

process and the Excessive Fines Clause because the penalty does not have 'a nexus to the specific harm suffered by' Magadia." ER1103. Walmart made no developed argument for why the Clause would be violated here, much less "fully develop" such an argument. *Cisneros v. UNUM Life Ins. Co. of Am.*, 134 F.3d 939, 948 n.4 (9th Cir. 1998).

In any event, there is no Excessive Fines Clause problem here. In reviewing a civil penalty, this Court recognizes that "judgments about the appropriate punishment for an offense belong in the first instance to the legislature," *Balice v. USDA*, 203 F.3d 684, 699 (9th Cir. 2000), and thus gives significant weight to the "maximum penalty faced." *United States v. Bourseau*, 531 F.3d 1159, 1173 (9th Cir. 2008). As a general matter, "[c]ivil penalty awards in which the amount of the award is less than the statutory maximum do not run afoul of the Excessive Fines Clause." *United States v. Eghbal*, 475 F. Supp. 2d 1008, 1017 (C.D. Cal. 2007); *see Bourseau*, 531 F.3d at 1173 ("[W]e have found no law requiring a district court to award less than … the maximum amount of allowable civil penalties … to satisfy the Excessive Fines Clause.").

Walmart identifies no case invalidating a civil penalty of less than the statutory maximum under the Excessive Fines Clause, and this case should not become the first. Although "[t]here is no rigid set of factors in deciding whether an award is grossly disproportional to the gravity of a defendant's offense," this Court

considers "(1) the severity of the offense and its relation to other criminal activity; (2) the maximum penalty faced; (3) the harm caused and (4) whether the defendant falls within the class of persons targeted by the applicable law." *Bourseau*, 531 F.3d at 1173. The "maximum penalty faced" here is several times more than the actual penalties imposed, and Walmart "falls within the class of persons targeted by the applicable law." As for the "severity of the offense" and the "harm caused," these too are quintessentially legislative judgments. Walmart's attempt, even now, to downplay the seriousness of its violations of California law—and to second-guess the California legislature's judgment of the harm caused by those violations—suffers from the same flaws as its Article III and state-law arguments. And it only underscores the need for penalties that will deter Walmart from future violations.

Moreover, there is nothing constitutionally problematic about imposing a civil penalty of less than $100 for a violation of a statutory requirement to provide workers with important information about their own wages—regardless of whether there was out-of-pocket loss. *See Balice*, 203 F.3d at 497 (upholding a $225,500 fine where the maximum fine was $528,000, notwithstanding the lack of monetary loss); *Pharaon v. Bd. of Governors of the Fed. Reserve Sys.*, 135 F.3d 148, 157 (D.C. Cir. 1998) (upholding a $37 million penalty because "the penalty is proportional to his violation and well below the statutory maximum"); *United States v. Emerson*, 107 F.3d

77 (1st Cir. 1997) (upholding a $185,000 fine for a pilot who made 37 unlawful flights where the maximum penalty was $10,000 per flight).

The only thing that makes the aggregate award so large here is Walmart's size: it is the largest employer in history, with tens of thousands of employees in California alone. But that doesn't change the *proportionality* of the penalty, which is the relevant constitutional question. Although Walmart suggests (at 57) that it really committed only one violation because it made "only a *single* decision" to violate the law—without citing to any case or pointing to any record evidence—that is not so. Just as in any wage-and-hour case, a single decision to devise and implement a policy can give rise to thousands of violations as to individual workers. There is nothing disproportionate about imposing a penalty that takes into account each of these violations, nor is there anything in the Excessive Fines Clause that requires a legislature to disregard them.

2. Finally, on the last two pages of its brief (at 59-61), Walmart invokes substantive due process to argue that the *entire* award, both the statutory damages and PAGA penalties, violates due process because it is excessive in light of the severity of the offense. But here, too, it failed to present this argument below.

Even if the argument were preserved, it would fare no better than Walmart's Excessive Fines Clause argument. States "possess a wide latitude of discretion in" setting penalties and damages, and "their enactments transcend the limitation only

where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919). To our knowledge, this Court has never applied *Williams* to invalidate a statutorily authorized award in the 101 years since it was decided. This is for good reason: The *Williams* standard is "extraordinarily deferential—even more so than in cases applying abuse-of-discretion review." *Zomba Enters. v. Panorama Records*, 491 F.3d 574, 587 (6th Cir. 2007).[3]

"The Supreme Court in *Williams*," moreover, "disagreed that the constitutional inquiry calls for a comparison of an award of statutory damages to actual damages caused by the violation." *Capitol Records v. Thomas-Rasset*, 692 F.3d 899, 909-10 (8th Cir. 2012). It is true that some courts have stated that "the absolute amount of the award, not just the amount per violation, is relevant to whether the award is … obviously unreasonable." *Id.* But again, the reason there were so many violations here is because of Walmart's size. California's regime sensibly recognizes that, the more employees a company has, the more it must pay in damages for companywide violations. Applying that statutory regime to the world's largest employer does not offend substantive due process.

[3] To our knowledge, the only circuit decision to have ever applied *Williams* to invalidate a statutory-damages award is *Golan v. FreeEats.com*, 930 F.3d 950 (8th Cir. 2019). But *Golan* involved statutory damages of $1.6 billion against a small company for making telephone calls over a single week. *Golan* provides no license to reduce a $48 million statutory-damages award against the world's largest employer for continuous, systemic labor violations.

CONCLUSION

This Court should affirm district court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 13,985 words excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14 point Baskerville font.

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CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the CM/ECF system. All participants are registered CM/ECF users and will be served by the CM/ECF system.

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