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## VIA OVERNIGHT DELIVERY

The Honorable Tani Cantil-Sakauye, Chief Justice, and Associate Justices  
Supreme Court of California  
350 McAllister Street  
San Francisco, CA 94102

Re: **Amicus Curiae Supporting Review** (Cal. Rules of Court, rule 8.500(g))  
*Villacres v. ABM Industries, Inc.* (2010) 189 Cal.App.4<sup>th</sup> 562  
Supreme Court Case No. S188659  
B219584 Court of Appeal, Second Appellate District, Division One

Dear Honorable Justices:

California Employment Lawyers Association (CELA), as *amicus curiae*, respectfully requests that this Court grant the pending Petition for Review in *Villacres v. ABM Industries, Inc.* ("*Villacres*").

## I. CELA'S INTEREST

CELA is an organization of California attorneys whose members represent employees in a wide range of employment cases, including wage and hour class actions similar to *Villacres*. CELA has a substantial interest in protecting the statutory and common law rights of California workers and ensuring the vindication of public policies set forth in the California Labor Code, including by advocating for effective labor law enforcement procedures such as class actions in appropriate cases. Opinions such as *Villacres* that diminish absent class member's claims are those which CELA maintains require strict scrutiny. CELA has taken a leading role in advancing and protecting the rights of employees by, among other things, submitting amicus briefs and letters on issues affecting the rights of California employees, including recent Supreme Court amicus briefs in *Murphy v. Kenneth Cole Productions, Inc.* and *Gentry v. Superior Court*.

## II. REASONS FOR REVIEW

CELA asks this Court to grant plenary review of *Villacres* for the following reasons: (1) *Villacres* raises the issue of the validity of a release of penalty claims under the Private Attorney General Act (PAGA) in a class action settlement in which such claims were not alleged nor administrative prerequisites exhausted, a question upon which this Court previously granted review and held in *DeLeon v. Verizon Wireless (DeLeon)*, previously reported at 170 Cal.App.4<sup>th</sup> 519 (2008) pending its decision in *Arias v. Superior Court (Arias)* but which *Arias*

ultimately did not address; (2) *Villacres* creates considerable confusion and uncertainty in the finality of class action settlements by holding that principles of res judicata release unpled and unrelated class action claims and bar prosecution in future actions on the basis that they “could have” been raised by absent class members in the prior action.

### III. PROCEDURAL HISTORY

In a prior class action, employees sued their employer for overtime and split shift premiums, as well as civil wage underpayment penalties under Labor Code section 558. No specific allegations were pressed under PAGA, and PAGA prerequisites were not exhausted. The action settled, with the employer agreeing to pay up to \$2.5 million, allocating up to \$730,000 for penalties. The employees released “all claims ... of any kind for ... penalties ... arising from the alleged violation of any provision of common law, California law and/or Federal law which [were] or could have been raised as part of the Plaintiffs' claims.” The release specifically excluded claims for rest and period and other violations asserted in four separate lawsuits.

Two days later, a member of the settlement class, filed a second action against the same employer, seeking civil penalties under PAGA for alleged violations of the Labor Code with respect to overtime, wage statements, meal and rest periods, indemnifying employees for business expenses and losses, and paying wages on a timely basis. The overtime-related penalties were duplicative of those released in the prior action. The prior action did not include meal and rest claims, expense reimbursement claims, or waiting time penalties; thus, the prior release of penalties did not encompass these claims.

The trial court granted the employer’s motion for summary judgment on the grounds of res judicata. The Court of Appeal affirmed. The Court applied the principle that “[r]es judicata bars not only issues that were raised in the prior suit but related issues that could have been raised.” According to the Court, by accepting his share of the settlement and failing to expand the scope of the prior action include his additional penalty claims through intervention or objection, or by opting out of the class, plaintiff was barred from asserting claims a “second time.” The Court inferred somewhat speculatively that by raising the additional, non-duplicative penalty claims in the prior action, the settlement could have been increased to cover those claims or express provisions made for their exclusion.

The Court found Villacres's PAGA claims could have been raised in the prior action for purposes of res judicata. Thus, Villacres could not partake of the Augustus settlement proceeds, which included an amount for penalties, and then bring an action for additional penalties.

A dissenting justice would have reversed. The dissent noted that the rest and meal, expense reimbursement, and wage statement claims were not litigated in the prior action, and the settlement agreement was ambiguous as to whether the parties intended to release unrelated penalties.

### IV. ARGUMENT

#### **(1) Review Should Be Granted to Determine Whether a General Release Encompasses PAGA Claims that were Not Pled and for which Administrative Prerequisites for Filing were not Observed**

The threshold issue in *Villacres*, whether it a party can release PAGA claims that were not pled and which the Labor Workforce Development Agency (LWDA) had not been provided notice as a prerequisite to filing suit, was an issue previously before this court in *Deleon* (review granted and held pending the decision in *Arias*). Unfortunately, this issue was left undecided in the *Arias* decision. The fact that the Court previously

granted review on this issue establishes its institutional impact. ABM erroneously contends in its Reply to the Petition for Review (p. 16) that the dismissal of review in *Deleon* constituted an affirmative decision by this Court to decline review of the substantive issue presented. As a matter of appellate procedure this is incorrect; review was dismissed and the matter remanded for further proceedings consistent with *Arias*, and no ruling was made on any other matters.

The issue remains an appropriate one for the Court's review. Class action releases of PAGA penalty claims affecting hundreds, thousands, or even hundreds of thousands of absent class members must be strictly circumscribed and found applicable to bar only those claims which the class had standing to pursue. Without having served appropriate notice on the LWDA and received notice the LWDA will not be pursuing the matter on behalf of the State of California, no standing obtains. Consequently, any effort by a party to release claims for thousands of employees but for which they have no standing themselves to release must not be permitted. CELA therefore asks the Court to grant review of *Villacres* to address this issue of statewide concern.

**(2) Review Should Also Be Granted To Assess The Scope of Res Judicata in Class Actions as Precluding Unpled Claims by Absent Class Members**

Stretching the principles of res judicata, a divided Court of Appeal in *Villacres* found that a previous action had released PAGA penalty claims attendant to Labor Code section 226.7 rest and meal claims, and section 2802 expense reimbursement claims *even though these claims or causes of action were not asserted in the prior action*. Such a broad ruling is unprecedented. The basis for the court's ruling—that absent class members could have intervened or otherwise interfered with the settlement and thereby “could have” asserted such claims in the prior action—threatens all class action settlement. The decision could be interpreted to release all claims and causes of action of any type whatsoever regardless of whether they are specifically delineated in a class action release. The result would also be that absent class members would be behooved to hold up class action settlements through intervention and objection, upsetting the orderly processing and dismissal of otherwise valid settlements. CELA therefore asks the Court to grant review of *Villacres* to address the proper scope of res judicata as to the release of unpled claims in class actions.

Thank you for your consideration of this request.

Very truly yours,  
COHELAN KHOURY & SINGER and  
CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION

Michael D. Singer

cc: Service List on All Counsel  
California Employment Lawyers Association  
Court of Appeal, Second Appellate District, Division One