Case No. S238941

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SHARMALEE GOONEWARDENE, an individual,

Plaintiff and Appellant,

v.

ADP, LLC; ADP PAYROLL SERVICES, INC.; AD PROCESSING, LLC,

Defendants and Respondents.

On Review of a Decision of the California Court of Appeal,
Second Appellate District, Division Four, Case No. B267010

On Appeal from the Los Angeles County Superior Court,
Case No. TC026406
Honorable William Barry, Judge Presiding

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND BRIEF OF AMICI CURIAE NATIONAL PAYROLL REPORTING CONSORTIUM AND AMERICAN PAYROLL ASSOCIATION IN SUPPORT OF DEFENDANTS AND RESPONDENTS ADP, LLC; ADP PAYROLL SERVICES, INC.; AD PROCESSING, LLC

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APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF

The National Payroll Reporting Consortium (NPRC) and the American Payroll Association (APA) apply for permission to file the attached Amici Curiae Brief pursuant to California Rule of Court 8.520(f).

Description of Amici. NPRC is a non-profit association of payroll processing companies. Its member companies provide services to more than 1.4 million employers, which in turn have more than 50 million employees—more than one-third of the private sector workforce in the United States. APA is a non-profit association serving the interests of more than 20,000 payroll professionals in the United States. Two thousand three hundred of its members physically work in California, and more than double that number conduct business in the state. APA's primary mission is to educate members and the payroll industry about the best practices associated with paying America's workers while complying with all applicable federal, state, and local laws. APA's members perform payroll processing services for more than 17,000 employers and payroll service providers, who in turn process the payrolls of an additional 1.5 million employers.

Amici's Position. Counsel for NPRC and APA carefully reviewed the briefing before this Court and the Court of Appeal, and thus are familiar with the arguments raised by the parties. This brief does not repeat arguments already made, but instead presents NPRC's and APA's own perspectives on the issues under review. The attached brief will assist the

Court in deciding the issues by providing a broader factual context within which to analyze and develop California law, i.e., from the perspective of the payroll service provider industry, which forms an important sector of California's economy.

Amici Disclosure Statement. Pursuant to rule 8.520(f)(4), NPRC and APA state that no party or counsel for a party has authored the proposed amici brief in whole or in part. Further, no party or counsel for a party has made any monetary contribution to fund the preparation or submission of this proposed amici brief. Petitioner ADP is a member of NPRC, and some of ADP's employees are members of APA, but this brief reflects amici's members' collective interests.

Accordingly, NPRC and APA respectfully requests that the Court consider their views in evaluating the arguments raised in this action by accepting the attached brief.

AMICI CURIAE BRIEF OF THE NATIONAL PAYROLL REPORTING CONSORTIUM AND THE AMERICAN PAYROLL ASSOCIATION

INTRODUCTION

Amici curiae National Payroll Reporting Consortium (NPRC) and American Payroll Association (APA) are non-profit associations dedicated to serving the payroll processing service industry. NPRC's member companies, and the APA's members, collectively provide payroll and related services for more than 1.5 million employers, which in turn have more than 50 million employees—more than one-third of the private sector workforce in the United States. These services are vital to the efficient production of goods and services and payment of taxes.

We have reviewed the briefs filed by the parties. We believe we can materially assist the Court in deciding this appeal in three respects:

First, we will emphasize that the facts alleged by the plaintiff in her proposed sixth amended complaint are far afield from the actual practices of responsible payroll service providers nationwide. We urge the Court not to paint with too broad a liability brush in deciding the issues presented by the appeal.

Second, we will focus attention on the Court of Appeal's ruling that an independent payroll processing service may be liable for an employer's

alleged violation of wage-and-hour laws based on plaintiff's theory that employees are third-party beneficiaries of a contract for payroll services between employer and the payroll service. Even the anomalous facts alleged in this case should not support such liability. It would open a liability door that the Legislature intentionally closed.

Third, we will address ADP's recent request for judicial notice of plaintiff's employer's successful defense of almost all of plaintiff's wage-and-hour claims. If plaintiff's direct employer is not liable, ADP surely would not be liable on a third-party beneficiary theory for the claims. There is no need to decide issues that are now almost entirely hypothetical. We will urge the Court to dismiss review and order that the poorly-reasoned Court of Appeal decision is not citable.

FACTS PERTINENT TO THIS AMICI CURIAE BRIEF

As pertinent to plaintiff's claim that she has standing to pursue a wage-and-hour claim as a third-party contract beneficiary, her proposed sixth amended complaint alleges that her employer, Altour, and Altour's payroll service provider, ADP, had an oral contract for ADP to calculate payrolls, maintain employee records, offer legal advice, and provide other wage-related services for the benefit of Altour and its employees.

The Court of Appeal ruled that plaintiff's allegations state a claim for unpaid wages against ADP under Civil Code section 1559. That statute provides in pertinent part that a "contract, made expressly for the benefit of a third person, may be enforced by him."

LEGAL DISCUSSION

I. THE COURT SHOULD NOT ASSUME THAT PLAINTIFF'S ALLEGATIONS REFLECT HOW RESPONSIBLE PAYROLL SERVICE PROVIDERS ACTUALLY CONDUCT BUSINESS.

We urge the Court not to allow the odd facts of one case to make bad law for all cases. On a demurrer, of course, the Court must assume that the facts alleged in the complaint are true. But, speaking on behalf of payroll service providers nationwide, we represent to the Court that the reality of the payroll service industry is quite different from what plaintiff has alleged here:

- Payroll service providers do not operate on oral agreements. They enter into written contracts that specify the mutual obligations of the employer and the payroll service. These agreements typically place limitations on the contractual relationship between employers and providers, and do not include obligations to employees. Moreover, many of these contracts expressly disclaim an intent to create third party beneficiaries.[1]

- Payroll service providers do not pay wages to the employers' employees. Payroll service providers are not payday lenders or insurers of

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[1] Sample written agreements are easily found on the Internet. One such example is ADP's contract with the Judicial Council for payroll services to the California superior court, which is posted on the Judicial Council's website and which includes a provision titled "No Third Party Beneficiaries." (See www.courts.ca.gov/documents/lpa-ADP.pdf.)

their clients' legal obligations. If an employer lacks the resources to pay what is due, its employees have remedies provided by state labor laws and regulations and by Private Attorneys General Act (PAGA) representative actions.

- Payroll service providers do not evaluate employee performance or hire and fire employees.

- Payroll service providers do not determine what hours an employee has worked, or authorize, suffer, or permit employees to work certain hours. Many service providers offer employee timekeeping systems to facilitate collection of hours of service, but do not oversee employee practices in the workplace. They depend on employers and the information that employers provide to perform their services.

- Payroll service providers do not assume responsibility for compliance with wage-and-hour laws. Nor could they, because they are not at the worksite, and thus not in a position to determine whether employees are accurately recording their time or whether workers should be classified as employees versus independent contractors. Again, they must rely on employers to provide appropriate input.

- If problems arise in the preparation of payrolls, employees do not look first to the payroll service. Employees look to their employer and, subject to the terms of the employer-payroll service provider contract, the employer then looks to the payroll service provider.

A judicial restructuring of these long-established relationships would disrupt the multi-billion-dollar payroll service industry without positive benefits. In most cases, even if the payroll services provider were found liable on the Court of Appeal's new third-party beneficiary theory, the employee's measure of recovery would be the same as is already available in a Labor Code suit against the employer—the unpaid wages for which the employer is ultimately responsible. (*Martinez v. Combs* (2010) 49 Cal.4th 35, 49; *Futrell v. Payday California, Inc.* (2010) 190 Cal.App.4th 1419, 1432.) The enforcement mechanisms available against employers thus already protect employees and put the incentive for compliance where it belongs: on employers.

Moreover, this redundancy would come at great systemic cost: Wage-and-hour litigation is already prolific in California. Currently, those suits are between employees and their employer. But under the Court of Appeal's new rule, employees would inevitably sue their employer's payroll service along with the employer, seeking the same unpaid wages in the guise of contract or tort damages. Indeed, amici are already aware of at least one such suit. Wage-and-hour lawsuits would routinely implicate not only the employee's relationship with the employer, but also the employer's relationship with its payroll service provider. That means an additional party, an extra area for discovery, additional motion practice, and longer trials. There would also be a secondary layer of litigation burdening the already-crowded courts, with payroll service providers seeking indemnification from the employers that are ultimately responsible for

paying employees as required by the Labor Code. It is counterproductive to impose such burdens when there are already numerous well-functioning mechanisms for enforcing employers' Labor Code obligations.

II. IMPOSING THIRD-PARTY BENEFICIARY CONTRACT LIABILITY ON PAYROLL SERVICE PROVIDERS WOULD BE AN IMPERMISSIBLE END-RUN AROUND THE LEGISLATURE'S EXPRESSED INTENT THAT ONLY EMPLOYERS ARE LIABLE FOR WAGE-AND-HOUR VIOLATIONS.

A. Only Employers Are Liable For Wage-And-Hour Violations.

Labor Code section 558 authorizes civil penalties for wage and hour violations. But section 558 is reserved for administrative actions; it does not create a private cause of action. (*Robles v. Agreserves, Inc.* (E.D.Cal. 2016) 158 F.Supp.3d 952, 1006.) Likewise, Labor Code section 1194 authorizes employees to recover in a civil action unpaid wages, interest, and attorney fees and costs. It too limits liability to employers, not third parties such as payroll service providers. (See *Futrell v. Payday California, Inc.*, *supra*, 190 Cal.App.4th at p. 1428.) In short, "no generally applicable rule of law imposes on anyone other than an employer a duty to pay wages." (*Martinez v. Combs*, *supra*, 49 Cal.4th at p. 49.)

In 2016, after the conduct underlying this case, the Legislature authorized a limited private cause of action for wage and hour violations.

Labor Code section 558.1, subdivision (a), provides that an employer "or other person" acting on behalf of an employer who causes a violation of wage-and-hour laws may be liable for the violation. However, "other person" has a particular meaning. Subdivision (b) specifies that "other person" is "limited to a natural person who is an owner, director, officer, or managing agent of the employer, and the term 'managing agent' has the same meaning as in subdivision (b) of Section 3294 of the Civil Code."

B. Independent Payroll Service Providers Are Not Employers.

A payroll service provider is not an employer of the employer's employees. Payroll services do not control the day-to-day activities of employment, and plaintiff does not allege that they do in this case. (*Futrell v. Payday California, Inc.*, *supra*, 190 Cal.App.4th at pp. 1430-1437.)

Assuming Labor Code section 558.1 applied retrospectively to this case, payroll service providers still would not qualify as employers because they are not "natural persons," much less owners, officers, or managing agents of the employers they serve.

In short, the Legislature has not authorized an employee's private cause of action for wage-and-hour violations against non-employers. The employee's remedy is against the employer through established administrative means and authorized PAGA lawsuits.

C. Courts Should Not Permit A Claim To Proceed Through The Back Door Where, As Here, The Legislature Has Closed The Front Door.

Since, by statute, the Legislature has expressly limited liability for an employer's violation of wage-and-hour laws to employers and natural persons who are among the employer's management, surely the Legislature did not intend that independent payroll service providers—who are neither natural persons nor employer management—could nevertheless be liable. By endorsing a third-party beneficiary theory of liability, the courts would be permitting exactly that.

But it is not the courts' purview to pass laws that the Legislature has not. It is an "elemental canon" of statutory construction that where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies. (*Transamerica Mortgage Advisors, Inc. v. Lewis* (1979) 444 U.S. 11, 19.) To permit a litigant to proceed in such circumstances "would be to judicially admit at the back door that which has been legislatively turned away at the front door." (*Stencel Aero Engineering Corp. v. U. S.* (1977) 431 U.S. 666, 673.)

The Supreme Court reiterated this point in a case analogous to this one, *Astra USA, Inc. v. Santa Clara Cnty., Cal.* (2011) 563 U.S. 110. In *Astra*, drug manufacturers entered into ceiling-price contracts with the federal government as a condition of eligibility to receive payments under state Medicaid programs. Federal law provided administrative procedures

for remedying overcharges but allowed no private cause of action to enforce the price ceilings. Healthcare facilities nevertheless sued drug manufacturers, alleging the manufacturers had overcharged for drugs in violation of the manufacturers' contracts with the federal government. The facilities contended that they could sue as third-party beneficiaries of those contracts. The Supreme Court disagreed. It dismissed the suit, recognizing it for what it was: an attempted end-run around the lack of a private right of action. The Court observed that the suit was "in essence a suit to enforce the statute itself," and that allowing it would "render[] meaningless" the absence of a statutory private right of action. (*Id.* at p. 118 ["The absence of a private right to enforce the statutory ceiling price obligations would be rendered meaningless if [the facilities] could overcome that obstacle by suing to enforce the contract's ceiling price obligations instead"].)

Astra relied on *Grochowski v. Phoenix Const.* (2d Cir. 2003) 318 F.3d 80, where employees asserted claims against their employer for failing to pay prevailing wages as required by the Davis-Bacon Act (DBA) and in violation of the employer's agreement to pay prevailing wages as a condition of procuring federal construction contracts. The Second Circuit ruled there is no statutory private cause of action to enforce the DBA, and that the courts should not create one:

> [P]laintiffs' state-law claims are indirect attempts at privately enforcing the prevailing wage schedules contained in the DBA. To allow a third-party private contract action aimed at enforcing those wage schedules would be "inconsistent with the underlying purpose of the legislative scheme and would interfere with the implementation of that scheme to the same extent as would a cause of action directly under the statute."

(*Id.* at p. 86.)

So too here. An employee's third-party beneficiary claim against the employer's payroll service is an indirect attempt to enforce wage-and-hour laws contrary to the Legislative scheme. The absence of statutory liability for payroll service providers under the Labor Code would be meaningless if employees could sue payroll service providers to enforce their employer's alleged oral contract with the service provider.

Among other things, by litigating wage-and-hour claims against payroll service providers instead of against actual employers, employees could short-circuit Labor Code provisions designed to let the State monitor and oversee employers accused of wage theft. For example, Labor Code section 238 requires an employer (not a payroll services provider) with an unpaid final judgment for nonpayment of wages to file a surety-backed bond with the Labor Commissioner as a condition of doing business in the State. A judgment against only the payroll services provider would allow such an employer to continue to do business with impunity.

Or, consider the Labor Code Private Attorneys General Act of 2004. The Act's purpose is to aid the State in enforcing the Labor Code by allowing employees to sue their employer on the State's behalf, and collect

a percentage of the civil penalties for, e.g., wage-and-hour violations—provided the employees first give notice of the violations to the Labor and Workforce Development Agency. (Lab. Code, § 2699.3; see *Arias v. Superior Court* (2009) 46 Cal.4th 969, 980-981 [Legislature recognized State's impending inability to enforce its labor laws effectively, and so incentivized employees to aid in enforcement].) That purpose is defeated if employees can sue the employer's payroll services provider on a contract theory instead of suing the employer under the Private Attorneys General Act.

The Court should not open a door to such unnecessary and expensive third-party claims where the Legislature has closed it.

III. GIVEN THE TRIAL COURT'S RECENT FINDING THAT PLAINTIFF DID NOT PROVE THAT SHE WAS UNDERPAID, THIS COURT SHOULD DISMISS REVIEW AND ORDER THAT THE COURT OF APPEAL'S OPINION IS NOT CITABLE.

The appeal in this case was from an order sustaining a demurrer. The Court of Appeal's opinion thus assumed that the complaint's allegations were true. Recent developments, however, belie that assumption: The trial court recently ruled (in the context of deciding plaintiff's claims against her employer, Altour) that plaintiff failed to prove most of her allegations that she was underpaid. (ADP's Request for Judicial Notice filed June 20, 2017.) The court found that plaintiff worked

remotely and was responsible for reporting her own hours, that she regularly did not report her overtime until weeks or months after the fact, creating an "administrative nightmare," that "errors in payment" amounted to only $6,143.76, and that the failure to pay was not willful or intentional. (*Ibid.*)

Plaintiff's claims against ADP are based on the same alleged underpayments as her claims against her employer. The trial court's finding that *plaintiff* did not timely report her own overtime, and that the resulting underpayment was minimal and unintentional therefore presages that plaintiff's claims against ADP will fail on their merits, or result in at most a de minimis recovery even if employees were deemed to have standing to enforce their employer's alleged contract with a payroll service provider. The trial court's finding that plaintiff failed to prove the bulk of her underpayment allegations also casts doubt on the complaint's other allegations, including the improbable allegations about the nature of ADP's relationship with her employer.

Far-fetched complaint allegations, and a plaintiff who failed to accurately report her own time and could prove at best a minimal, unintentional underpayment, are no basis for creating a new cause of action that will drag payroll service providers into wage-and-hour litigation that until now has been limited to employees and their employer. In light of the trial court's recent ruling, this Court should dismiss review and order the Court of Appeal's opinion non-citable before it causes further mischief. (Cal. Rules of Court, rule 8.1115(e)(3).)

July 18, 2017

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CERTIFICATION

Pursuant to California Rules of Court, rule 8.204(c)(1), (c)(4), I certify that this **APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND BRIEF OF AMICI CURIAE** contains **3,060** words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: July 18, 2017

Marc J. Poster

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On July 19, 2017, I served the foregoing document described as: Application For Leave To File Amici Curiae Brief And Brief Of Amici Curiae National Payroll Reporting Consortium And American Payroll Association In Support Of Defendants And Respondents ADP, LLC; ADP Payroll Services, Inc.; AD Processing, LLC on the parties in this action by serving:

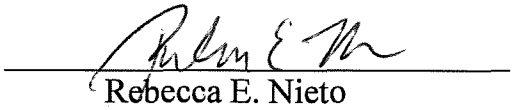
SEE ATTACHED SERVICE LIST

By placing a true copy thereof enclosed in sealed envelopes addressed as above and delivering such envelopes:

By Mail: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on July 19, 2017, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



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