CASE #: S246911

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In the
Supreme Court
of the
State of California

JUSTIN KIM,

Plaintiff and Appellant,

v.

REINS INTERNATIONAL CALIFORNIA,

Defendant and Respondent.

APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT CASE NO. B278642
SUPERIOR COURT OF LOS ANGELES COUNTY, NO. BC539194,
HON. KENNETH FREEMAN

PETITION FOR REVIEW

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no interested entities or persons who must be listed in this certificate under Cal. Rules of Court, rule 8.208(e)(3.)

February 6, 2018 **KINGSLEY & KINGSLEY, APC**

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ISSUE PRESENTED FOR REVIEW

1. Whether an employee who is authorized to pursue a claim under the California Labor Code's Private Attorneys General Act ("PAGA") loses standing as an "aggrieved employee" under PAGA by dismissing his individual claims against an employer.

INTRODUCTION

This case could spell the end of litigation under the California Labor Code's Private Attorneys General Act ("PAGA"). PAGA is "one of the primary mechanisms for enforcing the Labor Code" in California. (*Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 383.) The statute deputizes "aggrieved employees" as private attorneys general to prosecute workplace violations on the state's behalf. (*Ibid.*) In the present case, the Court of Appeal held that an employer can secure dismissal of a PAGA action by settling the individual claims of the state's authorized representative. Once an employee settles her individual claims—or prevails on such claims such that they are fully redressed—the employee no longer qualifies as an "aggrieved employee" under PAGA and loses standing to continue prosecuting the action.

This cannot be what the Legislature had in mind when it enacted PAGA's "aggrieved employee" provision. As the Court of Appeal itself acknowledged, the clause is intended to prevent "members of the general public" from filing PAGA actions. (Slip op. at 7; Lab. Code § 2699(a), (c) [PAGA claims may only be "brought by" a person "who was employed by the alleged violator and against whom one or more of the alleged violations was committed."].) The Legislature meant to limit the universe of potential PAGA plaintiffs to those suffering alleged harm, not to prevent employees who *do* suffer alleged harm from maintaining PAGA actions because they settle or prevail on individual claims.

Interpreting the "aggrieved employee" clause as the court did also leads to inconsistencies within PAGA. For example, PAGA authorizes "aggrieved employees" to bring claims for which no private right of action exists. (*Cf.*, *Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592, 595 ["section 351 [of the Labor Code] does not contain a private right to sue"]; Lab. Code § 2699.5 [section 351 provides the basis for a non-curable PAGA claim]; *Lopez v. Friant & Associates, LLC* (2017) 15 Cal.App.5th 773, 781, review denied (Jan. 10, 2018) [PAGA authorizes claims for wage statement violations for which an employee lacks the right to sue on an individual basis].) The Legislature would not have authorized such claims if it would be impossible to bring them, yet *Reins* forecloses such claims by pinning standing on an employee's ability to maintain "viable Labor Code claims" in an individual capacity. (Slip op. at 9.)

Finally, *Reins* conflicts with this Court's *Iskanian* rule barring private arbitration agreements from waiving PAGA. (*Iskanian, supra*, 59 Cal.4th at pp. 386–387.) In the present case, the court ordered Justin Kim ("Kim") to private arbitration and stayed his PAGA action while the arbitration went forward. (1 AA 249.) When the arbitration concluded, the court held that Kim had lost PAGA standing because his individual claims were redressed through the arbitration proceeding. (2 AA 444.) Although the State of California never agreed to a PAGA waiver, *Reins*'s interpretation of the "aggrieved employee" clause let the employer defeat PAGA by compelling private arbitration.

Now is the time for the Court to set forth a definitive position on the meaning of PAGA's standing requirement. This Court has never addressed the requirements for maintaining "aggrieved employee" status once a PAGA suit is filed. Its only comment on this issue came recently in *Williams*, where it noted that PAGA's standing requirement does not compel a PAGA representative to present proof of a violation prior to

discovering employee contact information. (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 546.) If the Court does not step in now, *Reins* will become the law of the land and employers will simply walk away from PAGA liability by settling the individual claims of the state's authorized representative.

STATEMENT OF THE CASE

A. Kim Brings a Class and PAGA Action for Wage and Hour Violations.

Reins International California, Inc. ("Reins") operates a restaurant chain where Kim worked as a "training manager." (1 AA 49–50; slip op. at 2–3.) Kim alleges that Reins misclassified him and other training managers as exempt from overtime and certain wage requirements, failed to pay all wages owed, and failed to provide lawful meal and rest periods. (1 AA 45.) Kim filed a class action lawsuit. (1 AA 14.) After receiving authority from the Labor & Workforce Development Agency ("LWDA") to serve as a PAGA representative, he amended his complaint to assert a claim for civil penalties pursuant to PAGA on behalf of himself and other aggrieved employees. (1 AA 45, 58 at ¶ 71; slip op. at 3.)

B. The Court Dismisses Kim's Class Claims, Orders Arbitration of His Individual Claims, and Stays His PAGA Action.

Reins moved to compel arbitration of Kim's individual claims, dismiss his class claims, and stay his PAGA action pending arbitration. (1 AA 67; slip op. at 3.) Kim opposed the motion, arguing that the PAGA action should proceed concurrently or prior to arbitration. (1 AA 115.) The court granted Reins's motion. It dismissed Kim's class claims, ordered

arbitration of Kim's individual claims, and stayed his PAGA claim while the arbitration moved forward.[1] (1 AA 249, 262.)

C. In Arbitration, Reins Serves an Offer to Compromise for $20,000 in Exchange for a Dismissal of Kim's Individual Claims with Prejudice.

With the arbitration in progress, Reins served Kim with an offer to compromise his "individual claims" pursuant to Code of Civil Procedure section 998. (2 AA 313, ¶ 8; 1 AA 336-337.) Reins offered $20,000 plus costs and reasonable attorneys' fees spent "in the prosecution of Plaintiff's individual claims," in exchange for a dismissal of Kim's "individual claims against Reins in their entirety." (2 AA 336–337.)

D. Kim Accepts.

Kim accepted Reins's offer. (2 AA 345–346.) Pursuant to the 998, Kim dismissed his individual claims with prejudice. (2 AA 285–287.) The request for dismissal states that "the only cause of action remaining in the First Amended Complaint is Cause of Action Number Seven for PAGA Penalties." (2 AA 287, ¶ 12; *see also* 2 AA 286, ¶ 3 [the PAGA claim "shall remain"].)

E. The Court Dismisses Kim's PAGA Claim, Finding that Settling Removed His Standing as an "Aggrieved Employee."

After the arbitration concluded, Reins moved for summary adjudication on Kim's one remaining cause of action for PAGA penalties. (2 AA 298–304.) Reins argued that Kim no longer qualified as an "aggrieved employee" under PAGA because he "resolved his individual claims against Reins under the Labor Code." (2 AA 301–303.) The court granted Reins's motion and dismissed Kim's PAGA claim, holding that

[1] The Court of Appeal's opinion erroneously states that the trial court reserved the issue of class arbitrability for the arbitrator. (Slip op. at 3.) In fact, the court dismissed class claims, finding that "the parties did not agree to class-wide arbitration, and accordingly, [the court] does not refer that issue to the arbitrator." (1 AA 262:1–7.)

Kim lost his "aggrieved employee" status because "[h]is rights have been completely redressed." (2 AA 444.) At the hearing, the court noted that this case presents a novel issue that is ripe for consideration by the higher courts. (2 AA 441–447; 1 RT 13:13-16 ["I encourage you to take it up and educate us all on what we should do in the future."].)

F. The Court of Appeal Affirms.

The Court of Appeal issued a published opinion on December 29, 2017. The panel held that, by accepting Reins's settlement offer and dismissing his individual claims, Kim "essentially acknowledged that he no longer maintained any viable Labor Code-based claims." (Slip op. at 8.) According to the Court of Appeal, Kim's settlement in arbitration stripped him of standing as an "aggrieved employee" and he therefore could no longer serve as a PAGA representative. (Slip op. at 7–8.) Kim did not file a petition for rehearing and now seeks review from this Court. (*See* Cal. Rules of Court, rule 8.500(b)(3).)

GROUNDS FOR REVIEW

The Court should grant review to settle an important question of law going to the heart of the Legislature's intent in enacting PAGA—whether PAGA's standing provision prevents an employee from continuing to serve as a PAGA representative once his individual claims for Labor Code violations are redressed. (Cal. Rules of Court, rule 8.500(b)(1).)

"The Legislature enacted PAGA to remedy systemic underenforcement of many worker protections." (*Williams, supra,* 3 Cal.5th at p. 545.) To enhance enforcement of the Labor Code, PAGA "deputiz[es] employees harmed by labor violations to sue on behalf of the state and collect penalties, to be shared with the state and other affected employees." (*Ibid.*) As the Court of Appeal correctly notes, PAGA contains a standing requirement meant to prevent "members of the general public" from filing PAGA actions. (Slip op. at 7.) To narrow the universe of potential

plaintiffs, PAGA provides that only an "aggrieved employee" may bring a claim. (Lab. Code § 2699(c).) PAGA defines "aggrieved employee" as "'any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." (Lab. Code § 2699(c).)

There is no dispute that merely alleging harm suffices to establish standing at the outset. (*See Williams, supra*, 3 Cal.5th at p. 546.) However, *Reins* imposes an additional requirement that a PAGA representative maintain the ability to sue in an individual capacity at all times in order to continue serving as a PAGA representative during litigation. (*See* slip op. at 7–8 [Kim stripped of standing because he "essentially acknowledged that he no longer maintained any viable Labor Code-based claims against Reins."].)

The *Reins* court's expansion of PAGA's standing requirement compels this Court's review. Not only does *Reins*'s holding find no support in PAGA's text or legislative history, its interpretation of the term "aggrieved employee" conflicts with other of PAGA's provisions. (*Cf.* Lab. Code §§ 2699(c), 2699(g), 2699.5.) If left unresolved, inconsistencies between the "aggrieved employee" provision and PAGA's other provisions will sow confusion in the law. More fundamentally, *Reins* undermines PAGA's purpose by letting employers "pick off" the state's authorized representative to evade the robust enforcement of Labor Code violations that PAGA was intended to promote.

Additionally, where an employee has signed an arbitration agreement, the *Reins* rule lets employers dispose of PAGA liability by securing arbitration of individual claims, contrary to this Court's holding in *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348. *Iskanian* invalidates PAGA waivers in arbitration agreements. (*Id*. at p. 384.) *Reins* creates a loophole to *Iskanian* because it deems an employee to have been

made whole by an arbitration proceeding, and thus to have lost the ability to maintain the "viable" individual Labor Code claims after arbitration that *Reins* says are necessary for PAGA standing. (*See* slip op. at 8.) This creates a backdoor PAGA waiver. The Court should grant review.

A. The *Reins* Rule Conflicts with the Legislature's Intent in Enacting PAGA's "Aggrieved Employee" Provision.

1. The Legislature Intended to Narrow the Universe of Employees Eligible To Bring PAGA Claims, Not to Restrict Eligible Employees from Maintaining PAGA Actions After Filing.

Reins conflicts with the text and legislative history of PAGA. "To determine legislative intent, a court begins with the words of the statute . . . . " (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 871.) If the language of the statute is clear, the inquiry into legislative intent ends. (*Olson v. Automobile Club of Southern California* (2008) 42 Cal.4th 1142, 1147.)

PAGA's "aggrieved employee" definition is clear. Labor Code section 2699(c) defines "aggrieved employee" as "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." (Lab. Code § 2699(c).) There is no dispute that Kim satisfied these criteria when he filed suit:

> The parties do not dispute that Kim was employed by Reins. Kim alleged in his first amended complaint that he was a person against whom Labor Code violations were committed. Pursuant to his allegations, therefore, it appears that Kim was an aggrieved employee at the time his complaint was filed.

(Slip op. at 6–7.) This should have ended the Court of Appeal's inquiry because PAGA's "aggrieved employee" provision is only concerned with limiting whom a PAGA claim may be "brought by." (Labor Code § 2699(a) [PAGA suit may only be "brought by" an aggrieved employee].) As there is no dispute that Kim qualified as an "aggrieved employee" when he "brought" suit and no adjudication after filing that he was uninjured, there

was no basis to dismiss his PAGA claim merely because he settled his individual, non-PAGA causes of action during the litigation. (*See* Appellant's Opening Brief at 21; Reply Brief at 22.)

Nothing in the text of the "aggrieved employee" definition suggests an ongoing obligation to maintain viable individual Labor Code claims during litigation in order to preserve PAGA standing. In fact, the Court of Appeal's analysis suggests the opposite—that the point of the "aggrieved employee" requirement was to prevent the general public and people who "suffered no harm" from filing PAGA actions. (Slip op. at p. 7, citing Judiciary Com., Analysis of Sen. Bill No. 796 (2003–2004 Reg. Sess.) as amended Apr. 29, 2003, p. 6, ¶ 5; Respondent's Renewed Motion for Judicial Notice and Exhibit Filed Concurrently Therewith at p. 15, ¶ 5.) The intent was not to prevent employees who *do* suffer alleged harm from pursuing a PAGA claim simply because they dismiss their separate individual claims by way of a settlement. (*See* slip op. at 7.)

Interpreting PAGA's "aggrieved employee" provision narrowly is consistent with the traditional understanding that qui tam relators—such as PAGA representatives—are assigned the injuries of the entity that they represent. For example, as this Court noted in *Iskanian*, "[t]he qui tam plaintiff under the Federal False Claims Act has standing in federal court under article III of the United States Constitution, even though the plaintiff has suffered no injury in fact, because that statute 'can reasonably be

regarded as effecting a partial assignment of the Government's damages claim.'"[2] (*Iskanian, supra,* 59 Cal.4th at p. 382.)

The *Reins* court expanded the "aggrieved employee" provision beyond what it determined was the Legislature's intent. Rather than focusing on whether Kim satisfied the criteria for bringing suit, it held that he became ineligible to continue with his PAGA claim because his individual claims were redressed. (Slip op. at 8.) In the court's view, Kim's settlement made it as if he were a "member of the general public" and had never alleged that he was harmed by Reins's Labor Code violations in the first place.[3] (Slip op. at 7–8.) There is nothing supporting this logic in PAGA's text or legislative history. This Court should grant review to correct the Court of Appeal's faulty interpretation.

2. The Legislature Could Not Have Intended the *Reins* Rule Because PAGA Authorizes Claims for Which No Private Right of Action Exists.

Other indicators of legislative intent conflict with *Reins*'s interpretation of the "aggrieved employee" provision. Significantly, PAGA's authorization of claims for which no private right of action exists shows that the Legislature did not intend viable individual claims to serve

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[2] Similarly, California courts have held that paying a representative under the Unfair Competition Law ("UCL") the full value of her claim does not necessarily dispose of her standing as one who has suffered "injury in fact" because "[t]he voter[s'] focus was instead on the *filing* of lawsuits by attorneys who did not have clients impacted by the defendant's conduct." (*Wallace v. GEICO General Ins. Co.* (2010) 183 Cal.App.4th 1390, 1402, emphasis in original, citing *Californians For Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 228.)

[3] This conclusion did not result from a finding that Kim's dismissal of individual claims with prejudice caused an adjudication in Reins's favor. The Court of Appeal "reject[ed] any such argument," slip op. at 8, fn. 2, and the trial court found that Kim was the prevailing party in arbitration because he received a $20,000 settlement. (*See* Reply Appendix at 3–5.)

as a predicate for maintaining standing under PAGA. (*See ibid.*) For example, this Court has held "that section 351 [of the Labor Code] does not contain a private right to sue." (*Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592, 595.) That section provides that tips are the sole property of the employee for whom they are left. (*Id.* at p. 594.) Notwithstanding that there is no private right of action for a violation of that section, PAGA states that an alleged violation of section 351 provides the basis for a non-curable PAGA claim. (*See* Lab. Code § 2699.5.) The Legislature would not have explicitly authorized such claims if it would be impossible to bring them. *Reins*'s interpretation of the "aggrieved employee" provision thus fails to harmonize with PAGA as a whole, and must be corrected by this Court. (*See McCarther v. Pac. Telesis Grp.* (2010) 48 Cal.4th 104, 110 ["statutes or statutory sections relating to the same subject must be harmonized. . . ."].)

Similarly, *Reins* conflicts with a recent opinion providing that a PAGA claim for wage statement violations can proceed without the evidence necessary to prove an individual violation. (*Lopez v. Friant & Associates, LLC* (2017) 15 Cal.App.5th 773, 781, review denied (Jan. 10, 2018).) In *Friant*, the Court of Appeal held that a PAGA claim for wage statement violations does not require proof of the "knowing and intentional" element that applies to an individual wage-statement claim. (*Ibid.*) That element applies to claims for statutory penalties, whereas a PAGA action seeks only civil penalties. (*Id.* at p. 784.) *Reins* conflicts with *Friant* because, under *Friant*, an employee may pursue a PAGA action for civil penalties even if he lacks proof of the elements necessary to proceed on a claim in his own right, whereas under *Reins*, an employee cannot proceed with PAGA unless he maintains viable individual Labor Code claims for all violations on which the PAGA action is predicated. (Slip op. at 9.) The Court should grant review to resolve this conflict.

3. The Legislature Did Not Intend to Force Employees to Bring Individual Claims Concurrently with PAGA Claims In Order to Maintain PAGA Standing.

Reins also conflicts with PAGA's guarantee that an "aggrieved employee" may pursue individual claims "either separately or concurrently with" a PAGA action. (Lab. Code § 2699(g).) Under *Reins*, an employee *must* bring a separate individual action concurrently with a PAGA action in order to toll the statute of limitations on his individual claims. Otherwise, the statute of limitations on individual claims could expire during the pendency of the PAGA case, at which point the employee will no longer be "aggrieved" and PAGA will be dismissed. (*See* slip op. at 8.) The fact that the Legislature preserved the right to bring a PAGA action on its own without any individual claim, or separately or concurrently with individual claims, shows that it did not intend for the "aggrieved employee" provision to force employees to bring separate individual claims or risk losing PAGA standing. (*See Williams v. Superior Court* (2015) 237 Cal.App.4th 642, 647 [stand-alone PAGA claim can proceed without any "underlying" individual controversy; *Reyes v. Macy's, Inc.* (2011) 202 Cal.App.4th 1119, 1123 [finding that there is no "individual claim under PAGA"].) This additional inconsistency compels review.

B. *Reins* Undermines PAGA By Letting Employers "Pick Off" the State's Authorized Representative.

Perhaps the most significant risk of letting *Reins* become law is its potential to undermine the very Labor Code enforcement that PAGA was designed to promote. As this Court recently held, the Legislature enacted PAGA "to augment the limited enforcement capability of the Labor and Workforce Development Agency." (*Iskanian, supra*, 59 Cal.4th at p. 383.) To effect this purpose, the statute "adopt[s] a schedule of civil penalties 'significant enough to deter violations'" and "deputiz[es] employees harmed by labor violations to sue on behalf of the state and collect

penalties, to be shared with the state and other affected employees." (*Williams, supra*, 3 Cal.5th at p. 545.)

Contrary to PAGA's purpose, *Reins* allows employers to evade civil penalties by settling a PAGA representative's individual claims. (*See* slip op. at 7–8.) Under *Reins*, an employer can make a sweetheart offer to settle a PAGA representative's individual claims rather than face the potentially high exposure of PAGA penalties. That's exactly what happened here. By securing a $20,000 individual settlement, Reins absolved itself of PAGA liability. Allowing employers to pick off PAGA representatives contravenes PAGA's purpose of "empowering employees to enforce the Labor Code as representatives of the Agency." (*Iskanian, supra*, 59 Cal.4th at p. 383.)

The Court of Appeal's assurance that other employees "in a position substantially similar to Kim's" can still come forward offers little solace because PAGA's statute of limitations runs from the initiation of the first PAGA representative's action. (*See* slip op. at 8; Code Civ. Proc., § 340(b).) If an employer settles with the first PAGA representative and fixes its violations, then the entire PAGA claim will be wiped out even if a new "aggrieved employee" comes forward.

Moreover, PAGA is intended to allow one employee to represent others. (Lab. Code § 2699(a).) The Legislature chose this method as the optimal way to strengthen Labor Code enforcement. Relying on a line of employees to come forward until one eventually refuses to settle his individual claims would not serve as an efficient method of protecting employees from workplace violations. (*See Iskanian, supra*, 59 Cal.4th at p. 384 [disapproving interpration of PAGA that would require "[o]ther employees [to] still have to assert their claims in individual proceedings."].)

C. *Reins* Flouts *Iskanian* by Preventing Employees from Continuing with PAGA After Private Arbitration.

Reins conflicts with this Court's *Iskanian* rule barring private arbitration agreements from waiving PAGA claims. Where, as here, a court stays PAGA while private arbitration goes forward, ordering an employee to arbitration serves as the death sentence of her PAGA claim. (Slip op. at 9.) Since redressing individual claims is enough to remove PAGA standing, any result in arbitration—win, lose, or settle—accomplishes a de facto PAGA waiver under *Reins*. Even if Kim had prevailed in arbitration, he would have lost standing because he would no longer have "any viable Labor Code-based claims against Reins" after the arbitration proceeding. (Slip op. at 8.)

Reins thus creates an end run around *Iskanian*. (*See Iskanian, supra*, 59 Cal.4th at pp. 386–387.) In *Iskanian*, this Court held that "an agreement by employees to waive their right to bring a PAGA action serves to disable one of the primary mechanisms for enforcing the Labor Code." (*Id.* at p. 383.) "[A]greements requiring the waiver of PAGA rights would harm the state's interests in enforcing the Labor Code and in receiving the proceeds of civil penalties used to deter violations." (*Id.* at p. 383.) Accordingly, "where . . . an employment agreement compels the waiver of representative claims under the PAGA, it is contrary to public policy and unenforceable as a matter of state law." (*Id.* at p. 384.)

Reins imbues ordinary arbitration agreements with the power to effectively "waive the[] right to bring a PAGA action." (*Id.* at p. 383.) Here, Reins used its arbitration agreement to force Kim's individual claims to arbitration. (1 AA 249.) Then, it used Kim's settlement in arbitration to bar his right to continue with PAGA. (2 AA 298.) This procedure effected a dismissal of the PAGA claim. (2 AA 441.) If left unaddressed, *Reins* will continue to offer employers an end run around *Iskanian*, whereas granting

review will ensure that PAGA's "aggrieved employee" provision is interpreted consistently with this Court's prior opinions.

D. A Decision by this Court Will Have a Significant Impact on Workers and Employers.

Reins will have significant statewide impact, chilling PAGA litigation and allowing workplace violations to go unchecked. (*See* Cal. Rules of Court, rule 8.500(b)(1).)

This Court has characterized PAGA as "one of the primary mechanisms for enforcing the Labor Code." (*See Iskanian*, *supra*, 59 Cal.4th at pp. 383.) When the Legislature enacted PAGA in 2004, it identified an acute need for employees to come forward as private attorneys general to curtail workplace violations: "Evidence gathered by the Assembly Committee on Labor and Employment indicated that the Department of Industrial Relations (DIR) 'was failing to effectively enforce labor law violations.'" (*Iskanian*, *supra*, 59 Cal.4th at p. 348.) The DIR issued "fewer than 100 wage citations per year for all industries throughout the state" even though one study estimated that there were 33,000 "serious and ongoing wage violations" in Los Angeles's garment industry alone. (*Ibid.*, citing Assembly Com. on Labor and Employment, Analysis of Sen. Bill No. 796 (Reg. Sess. 2003–2004) as amended July 2, 2003, p. 4.)

Since its enactment, PAGA has bolstered employee protections and improved education on workplace rights. Between 2010 and 2015, PAGA suits resulted in over $25 million being deposited into the Labor and Workforce Development Fund "for education of employers and employees about their rights and responsibilities" under the Labor Code. (Lab. Code § 2699(*i*); "The 2016–17 Budget: Labor Code Private Attorneys General Act Resources" (March 25, 2016) California Legislative Analyst's Office, available at http://www.lao.ca.gov/Publications/Report/3403.)

Reins defeats PAGA's purpose. As discussed, the rule allows employers to extinguish claims for civil penalties brought on behalf of the Labor Commissioner by settling the individual claims of the employee whom the Commissioner has authorized as its representative. (*See* ante, §§ B, C.) It also creates a loophole in *Iskanian* whereby arbitration agreements can be used to crush PAGA liability. This could not have been the Legislature's intent when it enacted PAGA's "aggrieved employee" provision. Allowing *Reins*'s misguided holding to become the law of the land will cause significant harm to California workers.

CONCLUSION

For the foregoing reasons, Kim respectfully requests that this Court grant review.

February 6, 2018

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.504(d)(l), I hereby certify that this Petition for Review contains 4,319 words, not including the tables of contents and authorities, the caption page, signature blocks, the verification or this certification page, as counted by the word processing program used to generate it.

February 6, 2018 **KINGSLEY & KINGSLEY, APC**

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COURT OF APPEAL OPINION

Filed 12/29/17

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JUSTIN KIM, Plaintiff and Appellant, v. REINS INTERNATIONAL CALIFORNIA, INC., Defendant and Respondent.	B278642 (Los Angeles County Super. Ct. No. BC539194)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kenneth R. Freeman, Judge. Affirmed.

Kingsley & Kingsley, Eric B. Kingsley, Ari J. Stiller and Lyubov Lerner for Plaintiff and Appellant.

Ogletree, Deakins, Nash, Smoak & Stewart, Spencer C. Skeen, Tim L. Johnson, Jesse C. Ferrantella and Jonathan H. Liu for Defendant and Respondent.

INTRODUCTION

Appellant Justin Kim sued his former employer, Reins International California, Inc., alleging individual and class claims for wage and hour violations, and seeking civil penalties on behalf of the State of California and aggrieved employees under Labor Code section 2698 et seq., the Labor Code Private Attorneys General Act of 2004 (PAGA). Reins successfully moved to compel arbitration of Kim's individual claims. While arbitration was pending, Kim accepted an offer to settle his individual claims and dismiss those claims with prejudice. Reins then moved for summary adjudication on the PAGA claim, asserting that Kim was no longer an "aggrieved employee" because he had dismissed his individual claims against Reins, and therefore he no longer had standing to assert a claim under the PAGA. The trial court granted Reins's motion and entered judgment.

According to the PAGA, "'aggrieved employee' means any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." (Lab. Code, § 2699, subd. (c).[1]) The question on appeal is whether Kim, after settling and dismissing his individual claims against Reins with prejudice, continued to have standing under the PAGA as an "aggrieved employee." We hold that Kim's dismissal of his individual Labor Code claims with prejudice foreclosed his standing under PAGA, and therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The facts are largely undisputed. Reins operates one or more restaurants in California. Kim was employed by Reins as a

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[1] All further statutory references are to the Labor Code unless otherwise indicated.

"training manager," a position Reins classified as exempt from overtime requirements. Kim sued Reins in a putative class action, alleging that training managers were salaried employees who worked between 50 and 70 hours per week, and should not have been classified as managers because they never performed any managerial tasks. In his first amended complaint (the operative complaint for purposes of appeal), Kim alleged causes of action for failure to pay wages and overtime; failure to allow meal and rest periods; failure to provide adequate wage statements pursuant to section 226, subdivision (a); waiting time penalties under section 203; unfair competition under Business and Professions Code, section 17200 et seq. (section 17200); and civil penalties under the PAGA pursuant to section 2699.

Kim signed an arbitration agreement when he began working for Reins in 2013. Based on this agreement, Reins moved to compel arbitration of Kim's individual claims, dismiss the class claims, and stay the PAGA cause of action until arbitration was complete. The trial court granted the motion to compel arbitration, reserved the issue of class arbitrability for the arbitrator, and stayed litigation on the PAGA claim and the claim for injunctive relief under section 17200.

While arbitration was pending, Reins served Kim with an offer to compromise under Code of Civil Procedure section 998. Kim accepted the offer. Pursuant to the parties' agreement, Kim dismissed his individual claims with prejudice and dismissed the class claims without prejudice, leaving only the PAGA cause of action intact. The court lifted the stay on the PAGA cause of action and set a date for trial.

Reins filed a motion for summary adjudication of Kim's PAGA cause of action. Reins argued that because Kim had

dismissed his individual causes of action against Reins, he was no longer an "aggrieved employee" under the PAGA and therefore could not maintain the PAGA cause of action. Kim opposed the motion, asserting that he did not lose PAGA standing by settling his individual claims against Reins.

The court granted the motion for summary adjudication, and then granted Reins's oral motion to dismiss the case. In its tentative ruling, which the court adopted as its final ruling, the court reasoned, "Plaintiff, once he dismissed his claims with prejudice pursuant to the [Code of Civil Procedure] §998 offer, was no longer suffering from an infringement or denial of his legal rights. His rights have been completely redressed. He no longer is aggrieved." The court also stated that Kim "ceased being an aggrieved employee by virtue of his settlement. Under these circumstances, he no longer has standing to bring a PAGA claim." At the hearing, as the court dismissed the case, it encouraged the parties to appeal: "The case is dismissed, and I encourage you to take it up and educate us all on what we should do in the future."

The court entered judgment in favor of Reins. Kim timely appealed.

DISCUSSION

The issue in this case is straightforward: After an employee plaintiff has settled and dismissed individual Labor Code causes of action against the employer defendant, does the plaintiff remain an "aggrieved employee" with standing to maintain a PAGA cause of action? We hold that where an employee has brought both individual claims and a PAGA claim in a single lawsuit, and then settles and dismisses the individual employment causes of action with prejudice, the employee is no

longer an "aggrieved employee" as that term is defined in the PAGA, and therefore that particular plaintiff no longer maintains standing under PAGA.

The proper interpretation of a statute and the application of the statute to undisputed facts are questions of law, which we review de novo. (See, e.g., *Smith v. Superior Court* (2006) 39 Cal.4th 77, 83; *Lazarin v. Superior Court* (2010) 188 Cal.App.4th 1560, 1569.)

A. PAGA background

The Legislature enacted the PAGA in 2003. (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 980 (*Arias*).) In doing so, "[t]he Legislature declared that . . . it was . . . in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations, with the understanding that labor law enforcement agencies were to retain primacy over private enforcement efforts." (*Ibid.*) "[T]he Legislature's purpose in enacting the PAGA was to augment the limited enforcement capability of the [Labor and Workforce Development] Agency by empowering employees to enforce the Labor Code as representatives of the Agency." (*Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 383 (*Iskanian*).)

The PAGA therefore "authorizes a representative action only for the purpose of seeking statutory penalties for Labor Code violations (Lab.Code, § 2699, subds. (a), (g)), and an action to recover civil penalties 'is fundamentally a law enforcement action designed to protect the public and not to benefit private parties' [citation]." (*Arias*, *supra*, 46 Cal.4th at p. 986.) "A PAGA representative action is therefore a type of *qui tam* action. . . . The government entity on whose behalf the plaintiff files suit is always the real party in interest in the suit." (*Iskanian, supra,*

59 Cal.4th at p. 382.) "Of the civil penalties recovered, 75 percent goes to the Labor and Workforce Development Agency, leaving the remaining 25 percent for the 'aggrieved employees.' ([Lab. Code] § 2699, subd. (i).)" (*Arias, supra*, 46 Cal.4th at pp. 980-981.)

B. PAGA's standing requirement

"PAGA imposes a standing requirement; to bring an action, one must have suffered harm. [Citations.]" (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 558.) An action may be brought "by an aggrieved employee on behalf of himself or herself and other current or former employees." (§ 2699, subd. (a).) "'[A]ggrieved employee' means any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." (*Id.*, subd. (c).)

To determine whether Kim fits the definition of "aggrieved employee" in section 2699, we look to the language of the statute. "Our fundamental task in interpreting a statute is to determine the Legislature's intent so as to effectuate the law's purpose. We first examine the statutory language, giving it a plain and commonsense meaning. . . . If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend. If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy." (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.)

The parties do not dispute that Kim was employed by Reins. Kim alleged in his first amended complaint that he was a person against whom Labor Code violations were committed. Pursuant to his allegations, therefore, it appears that Kim was

an aggrieved employee at the time his complaint was filed. What is less clear, however, is whether Kim continued to be "aggrieved" once his individual Labor Code claims had been settled and dismissed.

The legislative history demonstrates that the term "aggrieved employee" was not initially defined in the original proposed language of section 2699. (Sen. Bill 796, introduced Feb. 21, 2003.) Employer groups opposing the bill expressed concerns that this type of statute could be abused by the filing of thousands of lawsuits against small businesses by members of the general public. (Judiciary Com., Analysis of Sen. Bill No. 796 (2003–2004 Reg. Sess. as amended Apr. 29, 2003, p. 6.) To address these concerns, the bill sponsors stated that "private suits for Labor Code violations could be brought only by an 'aggrieved employee'" and the bill "would not open private actions up to persons who suffered no harm from the alleged wrongful act." (Judiciary Com., Analysis of Sen. Bill No. 796 (2003–2004 Reg. Sess.) as amended Apr. 29, 2003, p. 7.) The bill was amended "[t]o clarify who would qualify as an 'aggrieved employee' entitled to bring a private action under this section," defining "aggrieved employee" to be "any person employed by the alleged violator . . . against whom one or more of the violations alleged in the action was committed." (Judiciary Com., Analysis of Sen. Bill No. 796 (2003–2004 Reg. Sess.) as amended Apr. 29, 2003, p. 8.)

C. Kim did not maintain PAGA standing following his dismissal with prejudice

The legislative history makes clear that the PAGA was not intended to allow an action to be prosecuted by any person who did not have a grievance against his or her employer for Labor

Code violations. Here, Kim initially asserted that he had been harmed by Reins's alleged violations of the Labor Code. But by accepting the settlement and dismissing his individual claims against Reins with prejudice, Kim essentially acknowledged that he no longer maintained any viable Labor Code-based claims against Reins. As a result, following the dismissal with prejudice Kim no longer met the definition of "aggrieved employee" under PAGA. Kim therefore did not have standing to maintain a PAGA action against Reins, and Reins's motion to dismiss was properly granted.

Reins acknowledges that "Kim's voluntary dismissal of his Labor Code claims with prejudice impacts his PAGA standing only. It does not affect other employees." Kim states in his opening brief, "Settling with the individual employee for his separate individual [L]abor [C]ode claims does not prevent the state's claims from moving forward." We agree with both of these statements, and note that Kim's dismissal affects only *Kim's* standing as PAGA representative—it does not reflect on the veracity of the PAGA allegations asserted in Kim's complaint, nor the ability of any aggrieved employee in a position substantially similar to Kim's to assert such PAGA claims.[2]

We note that our holding is confined to the specific circumstances at issue in this case: Kim asserted both individual Labor Code claims and a PAGA claim in the same lawsuit, and he

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[2] Reins also suggests in its brief that "dismissal with prejudice is a conclusive adjudication of the dismissed causes of action in the defendant's favor." To the extent Reins suggests that Kim's dismissal may operate as a finding on the merits regarding any alleged Labor Code violations under the PAGA, or that a PAGA claim by any other employee is somehow barred as a result of Kim's dismissal, we reject any such argument.

voluntarily chose to settle and dismiss his individual Labor Code claims with prejudice. Kim argues that affirming the trial court's dismissal of his PAGA claim accomplishes a "backdoor PAGA waiver" in violation of *Iskanian*. *Iskanian* held that "an employee's right to bring a PAGA action is unwaivable," and an employer defendant may not compel a plaintiff employee to arbitrate PAGA claims. (*Iskanian, supra,* 59 Cal.4th at p. 383.) Because the court here ordered the parties to arbitrate Kim's individual claims, and then dismissed the PAGA action after Kim and Reins settled the individual claims, Kim asserts that the court "essentially allowed Kim's arbitration agreement to waive his right to pursue a PAGA claim by keeping Kim's claim stayed during the compelled arbitration and then using Kim's settlement in arbitration as a bar to his right to continue with his PAGA claim."

We disagree. Kim's lack of PAGA standing is unrelated to the court's order to arbitrate the individual claims. Moreover, no findings were made by an arbitrator. Had Kim chosen to dismiss his individual claims with prejudice in the absence of any arbitration agreement, we would reach the same conclusion. Kim's acknowledgement that he no longer has any viable Labor Code claims against Reins—not the order relating to arbitration—is the fact that undermines Kim's standing. The effect of arbitration on PAGA standing is not presented in this case, and we do not decide any such issue here.

DISPOSITION

The judgment is affirmed. Reins is entitled to costs on appeal.

CERTIFIED FOR PUBLICATION

COLLINS, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.

PROOF OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of California that the following is true and correct:

I am employed in the State of New York, County of New York. I am over the age of 18 and not a party to the within action. My business address is 7 West 36th Street, New York, New York 10018.

On February 6, 2018, I served the foregoing document described as **PETITION FOR REVIEW** on the interested parties in this action.

I caused the above document(s) to be served on each person on the attached list by the following means:

[X] I enclosed a true and correct copy of said document in an envelope and placed it for collection and mailing with the United States Post Office on February 6, 2018, following the ordinary business practice. As indicated in the service list attached, each listed individual or court is served as indicated.

[X] I electronically served a copy of the foregoing document via the court's TrueFiling portal on February 6, 2018, following the ordinary business practice. As indicated in the service list attached, each listed individual or court is served as indicated.

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Executed on the 6th day of February, 2018, at New York. New York

s/Alina Tsesarsky

Alina Tsesarsky

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