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In the

Supreme Court

of the

State of California

SUPREME COURT
FILED

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Deputy

JUSTIN KIM,

Plaintiff and Appellant,

v.

REINS INTERNATIONAL CALIFORNIA,

Defendant and Respondent.

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

ANSWER TO BRIEFS OF AMICI CURIAE

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INTRODUCTION

During individual arbitration, Reins International California, Inc. ("Reins") offered to compromise Justin Kim's "individual claims" in exchange for $20,000 plus attorneys' fees and costs. Reins made this offer under Code of Civil Procedure section 998, so that turning it down could have exposed Kim to penalties, such as relinquishing costs and paying Reins's costs and expert witness fees. (See Code Civ. Proc., § 998(c).) Neither Reins nor its amici[1] explain why Reins offered to pay so much for what it saw as a small claim stemming from 60 days of underpaid wages. (See ABM at 11.)[2] The reason later became clear: Reins intended to use the offer to eliminate Kim's "aggrieved employee" status and avoid a larger claim for civil penalties under PAGA. In Reins's view, to maintain "aggrieved employee" standing, a low-wage worker like Kim must reject an offer for tens of thousands of dollars, risk losing his entire recovery, and risk owing costs to an employer. This was not what the Legislature intended.

According to PAGA's plain meaning, Kim retained "aggrieved employee" status after accepting Reins's offer and dismissing his individual claims. 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).) Reins and its amici advocate reading an "ongoing injury" element into this text, so that Kim would lose standing once he no longer had a viable individual injury to

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[1] The following organizations filed briefs in support of Reins: Employers Group; Association of Southern California Defense Counsel ("ASCDC"); California New Car Dealers Association ("CNCDA"); and Restaurant Law Center, California Restaurant Association, and Chamber of Commerce of the United States of America ("RLC").

[2] Reins's Answer Brief on the Merits is abbreviated herein as "ABM."

pursue. (ASCDC Brief at 14; CNCDA Brief at 16.) Several amici even suggest that the statute contains an "express" injury element, which is patently false. (ASCDC Brief at 14; CNCDA Brief at 16.) In fact, PAGA's drafters wrote the "aggrieved employee" provision in terms of "violations" and *not* "injuries" so that employees like Kim, who allege a violation, can bring PAGA claims in the absence of individual causes of action—whether individual claims are non-existent for lack of a private right to sue, resolved, or left unlitigated for any other reason.

Finding no help from PAGA's text, Reins's amici turn to misconceived public policy concerns. Several wrongly suggest that employers would not want to settle individual Labor Code claims knowing that the settling employee could still serve as a PAGA representative. (See ASCDC Brief at 17; Employers Group Brief at 12; RLC Brief at 11, 29.) These concerns over "buying finality" are unjustified since employers have never been able to use individual settlements to buy finality as to state enforcement actions. Further, this case does not pose the question of whether an employer can pay an "enhanced amount" to buy finality as to a potential representative's "aggrieved employee" status, since here Reins offered consideration in exchange for a dismissal of Kim's "individual claims" only, and Kim's dismissal specifically excluded PAGA. (See Employers Group Brief at 14; RLC Brief at 11.)

Finally, there is no merit to amici's suggestion that allowing employees like Kim to retain standing would lead to abusive lawsuits. The parties agree that concerns over potential abuse led the Legislature to enact PAGA's "aggrieved employee" clause. Reins's amici take great liberties in suggesting that the Legislature addressed these concerns by requiring "ongoing injuries," akin to the Unfair Competition Law's ("UCL") "injury

in fact" standing requirement. (See Bus. & Prof. Code § 17204.) Legislative history shows that lawmakers addressed concerns over potentially abusive lawsuits by limiting the pool of potential plaintiffs to people like Kim, who allege to have experienced a violation, regardless of the status of any individual causes of action. Restricting standing to those with individual claims would have interfered with PAGA's purpose of encouraging "aggrieved employees" to pursue state enforcement actions for "any" and "all" provisions of the Labor Code, including those that don't give rise to private rights of action. (Lab. Code §§ 2699(a), (f).) As employees have always been free to bring a PAGA action without ever pursuing individual claims, there is no merit to suggesting that a PAGA case suddenly becomes "attorney driven" upon the dismissal or settlement of separately litigated individual causes of action. (See ASCDC Brief at 14; RLC Brief at 20.) For these reasons and those provided in Kim's opening and reply briefs, Kim respectfully asks this Court to reverse the Court of Appeal's judgment.

ARGUMENT

A. Reins's Amici Ignore PAGA's Text.

1. The Court Should Not Read an "Ongoing Injury" Requirement Into PAGA.

Kim's briefs focus on PAGA's text, which must be the starting point for this Court's inquiry. (See OBM at 17–26; RBM at 14–15.) "To determine legislative intent, a court begins with the words of the statute . . . . " (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 871.) "If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs [citations]." (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103, internal quotations omitted.) The only relevant

caveat is that "statutes governing conditions of employment are to be construed broadly in favor of protecting employees." (*Ibid.*)

Reins's amici fail to offer a meaningful response to Kim's textual arguments. As Kim notes, PAGA's "aggrieved employee" provision contains two straightforward criteria: the employee must be (1) "any person who was employed by the alleged violator" and (2) a person "against whom one or more of the alleged violations was committed." (Lab. Code § 2699(c); see OBM at 17.) The term "the alleged violations" refers to "violation[s] of this [Labor] [C]ode" subject to civil penalties by the state, which PAGA authorizes employees to prosecute on the state's behalf. (Lab. Code § 2699(a); see OBM at 22.) The term "violation" is defined elsewhere in the Labor Code as a "failure to comply with any requirement of the code." (Lab. Code § 22; see Bet Tzedek Brief at 16.)

The analytical framework for this case is thus quite simple: Kim undisputedly was employed by Reins and is someone "against whom one or more alleged violations was committed." (ABM at 11; *Kim v. Reins Internat. California, Inc.* (2017) 18 Cal.App.5th 1052, 1058.) There has been no adjudication to the contrary. Therefore, under the plain meaning of the statute, Kim qualifies as an "aggrieved employee," regardless of the status of his individual claims.

Reins's amici invite this Court to read an unspoken "ongoing injury" requirement into the "aggrieved employee" mandate. (RLC Brief at 19; CNCDA Brief at 16; ASCDC Brief at 9, 12.) One amicus goes so far as to state that "the Legislature expressly drafted PAGA with an actual injury requirement." (CNCDA Brief at 16.) Another states that the case of *Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal.App.5th 745, 757,

"eroded the 'injury' requirement from the definition of 'aggrieved.'" (ASCDC Brief at 14.) These arguments abandon PAGA's text.

"Aggrieved employee" is a defined term in the statute. (See Lab. Code § 2699(c).) The phrase is defined in terms of "alleged violations," *not* "injuries." (Lab. Code § 2699(c); cf. ASCDC Brief at 12.) This drafting choice preserves the right of employees to pursue PAGA claims for Labor Code violations that do not give rise to individual injuries. (See *Raines v. Coastal Pacific Food Distributors, Inc.* (2018) 23 Cal.App.5th 667, 680 ["We disagree that 'no injury' amounts to 'no violation.'"].) The Court must interpret PAGA "in accordance with the expressed intention of the Legislature" and cannot insert an unwritten "ongoing injury" requirement into the statute where none exists. (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 633.)

2. The Court Must Read the Term "Aggrieved Employee" In Harmony with PAGA's Qui Tam Provisions.

Reins's amici wrongly assume that a traditional "injury" element must apply even though "aggrieved employees" like Kim serve in a representative capacity. While in non-qui-tam cases, the plaintiff possesses a single claim for relief—her own—and cannot continue litigating that claim after it has been resolved, (*Watkins v. Wachovia Corporation* (2009) 172 Cal.App.4th 1576, 1589), where the plaintiff serves in a representative capacity on behalf of the state, the claim at issue is the state's, and "traditional standing requirements do not necessarily apply." (*Huff, supra*, 23 Cal.App.5th at p. 757.)

PAGA authorizes "a type of qui tam action." (*Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 387.) "*[E]very* PAGA action . . . is a representative action on behalf of the state," with the "aggrieved employee"

representative serving as "the proxy or agent' of the state." (*Id.* at pp. 387–388, internal quotations omitted.) The employee's representative capacity "is not merely semantic; it reflects a PAGA litigant's substantive role in enforcing our labor laws on behalf of state law enforcement agencies." (*Id.* at p. 388; cf. ASCDC Brief at 12–13 [characterizing the claim as "individual" since it can be "prosecuted, settled, or abandoned at any time."].)

Since the claim at issue is the government's, the standing inquiry depends on whether the employee satisfies the criteria for standing that the government has put in place, which are not necessarily tied to the plaintiff's individual injuries. "[N]ot being injured by a particular statutory violation presents no bar to a plaintiff pursuing penalties for that violation." (*Huff, supra,* 23 Cal.App.5th at p. 757.) If amici were correct that PAGA penalizes "underlying individual claims," then they could more readily analogize PAGA to the UCL or other "derivative-claim" statutes. (CNCDA Brief at 18; ASCDC Brief at 11 [arguing that Kim settled his "underlying Labor Code claims"].) However, as PAGA claims are the government's and not derivative of individual injuries, standing is not necessarily linked to viable individual claims.

Without question, PAGA differs in some respects from other qui tam statutes, but these differences are immaterial. Kim acknowledges that PAGA contains an "aggrieved employee" provision and provides for direct government involvement differently than statutes like the Federal False Claims Act. (See ASCDC Brief at 7–11; RLC Brief at 21.) However, PAGA's salient feature here is that it authorizes employees to serve in a representative capacity on behalf of the government. This means that standing depends strictly on whether the employee meets the statutory

criteria to serve as a representative, and not necessarily on the viability of her individual claims.

3. Reading an "Ongoing Injury" Requirement Into the "Aggrieved Employee" Provision Renders Other Provisions Nonsensical.

Not only do Reins's amici sidestep the "aggrieved employee" provision's text itself, but only one amicus, the Association of Southern California Defense Counsel, even attempts to addresses Kim's points about an "ongoing injury" requirement leading to inconsistencies within PAGA as a whole. ASCDC's arguments are unconvincing:

- ASCDC misses Kim's point about PAGA's "cure" provision. PAGA lets employers avoid civil penalties for certain curable violations by, among other actions, making "any aggrieved employee . . . whole." (Lab. Code, § 2699(d); see OBM at 23.) Kim argues that the "cure" criteria become meaningless if employers can avoid civil penalties for *any* violation merely by making employees whole. Employers could effectively "cure" uncurable violations by redressing individual damages claims (OBM at 22–23; see also CRLA Brief at 27–28). ASCDC responds that PAGA's "cure" provision is irrelevant because this case involves a settlement, not a "cure," and "any employee can settle any claim at any time." (ASCDC Brief at 17.) The point is non-responsive. Kim does not argue that this case involves a "cure," only that the "aggrieved employee" provision must be read in harmony with the "cure" provision. (*Cummins, Inc. v. Superior Court* (2005) 36 Cal.4th 478, 487 [courts must "harmonize the various parts of an enactment by considering the provision at issue in the context of the statutory framework as a whole."].) Letting employers avoid civil penalties for any violation by making "aggrieved employees" whole renders the "cure" criteria

superfluous. (See *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 ["'a construction making some words surplusage is to be avoided.' [Citation.]"].)

- ASCDC also misses Kim's point about PAGA assessing civil penalties based on pay periods worked by "aggrieved employees." PAGA assesses penalties "for each aggrieved employee per pay period." (Lab. Code § 2699(f)(2); OBM at 21–22.) Under Reins's interpretation, redressing an employee's individual claim removes her "aggrieved employee" status. (ABM at 19.) Thus, Reins's rule would let employers zero out PAGA penalties "for each aggrieved employee per pay period" by redressing aggrieved employees' individual claims. (OBM at 21–22; RBM at 15–16.) ASCDC responds that PAGA's measuring "civil penalties by way of pay periods" does not prevent an employee from settling individual claims on which PAGA is predicated. (ASCDC Brief at 16.) Again, non-responsive. Kim's point is not that PAGA's measurement of penalties on a pay-period basis bears on the meaning of "aggrieved employee" or that the penalty scheme prevents employers from offering to settle individual claims. The point is that, if "aggrieved employee" status is removed when individual claims are redressed, then all an employer needs to do is pay damages to its workforce and the penalty for each pay period worked by an "aggrieved employee" would be zero. (Lab. Code § 2699(f)(2), emphasis added.) This interpretation makes damages and civil penalties indistinguishable, contrary to legislative intent.

- Finally, Kim argues that tying standing to the viability of individual claims disregards PAGA's guarantee that employees may pursue such claims "separately or concurrently" with a PAGA action (or bring a PAGA-only action with no individual claim at all). (Lab. Code § 2699(g);

Williams v. Superior Court (Pinkerton Governmental Services, Inc.) (2015) 237 Cal.App.4th 642, 647.) Imagine an employee who comes forward with a PAGA claim seeking penalties for overtime violations, but chooses not to pursue an individual claim for unpaid wages. The parties could litigate the PAGA claim for years, only for the employer to win summary judgment once the employee's individual wage claim loses viability upon expiration of the three-year limitations period. (See Code Civ. Proc., § 338.) Employees would be forced to sue for individual claims concurrently with PAGA or risk losing standing once the individual statute of limitations expires. (See OBM at 23–24; CNCDA Brief at 24 [suggesting that PAGA standing "does not rest on the concurrent pursuit of the employee's individual claims" but failing to address an employee's loss of standing upon expiration of the statute of limitations for individual claim he does not bring.].) The Court must avoid construing PAGA to produce such "absurd consequences." (*In re Greg F.* (2012) 55 Cal.4th 393, 406.)

4. Requiring Individual Claims Conflicts with PAGA's Authorizing Claims Employees are Barred from Bringing Individually.

Reins's amici fail to offer a persuasive answer to the conflict Kim identifies between interpreting section 2699(c) to require "ongoing injuries," and sections 2699(a), 2699(f), and 2699.5 permitting PAGA claims for violations that do not give rise to a private right to sue. PAGA was intended to encourage enforcement of Labor Code provisions for which employees are barred from suing individually. The only hope for enforcing these provisions before PAGA lied with the state, yet the state's lack of adequate enforcement capacity compelled the Legislature to authorize representative suits under PAGA. (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 980; see

OBM at 24.) Accordingly, PAGA authorizes claims for "any provision of this code that provides for a civil penalty to be assessed" by the state, and establishes a new civil penalty for "all provisions of this code" that do not specifically provide for civil penalties. (Lab. Code §§ 2699(a), (f).) Pinning "aggrieved employee" status on the ability to maintain viable individual injuries would thus stymie PAGA's purpose of increasing enforcement of previously under-enforced provisions that don't give rise to viable individual causes of action.

Employers Group amici respond with a non-sequitur: that "[b]y accepting a monetary settlement an employee redresses all grievances, not just those carrying a private right of action or potential for damages." (Employers Group Brief at 7.) It argues, for example, that employees have no individual right to sue for failing to provide suitable seats, yet an employer could still pay an employee to waive his right to sue under PAGA for that claim. (Employers Group Brief at 6.)

Of course, nobody argues that Reins offered to resolve Kim's PAGA standing for any claim, and Kim has not alleged claims without a private right to sue. This case is about whether Kim retained "aggrieved employee" status after settling only his "individual claims" pursuant to Reins's offer to compromise. (2 AA 336–337.) The answer to that question rests on whether PAGA's "aggrieved employee" provision requires Kim to maintain viable individual claims at all points in the litigation, as the Court of Appeal held it did. (See *Kim v. Reins Internat. California, Inc.* (2017) 18 Cal.App.5th 1052, 1059 ["Kim's acknowledgement that he no longer has any viable Labor Code claims against Reins . . . is the fact that undermines Kim's standing."].) Kim discussed PAGA claims predicated on violations without a private right to sue only to show that the Legislature could not have intended to hinge

"aggrieved employee" status on "viable Labor Code claims." (OBM at 24-26.) Whether an employer can eliminate an employee's PAGA standing by paying him to settle claims that do not exist, or to settle his procedural right to serve as a representative, is not germane to this point.

On a related note, the Association of Southern California Defense Counsel argues, with no analysis, that "[w]hether one has a private right of action or not, the ability to recover penalties is always based on an employee's injury." (ASCDC Brief at 18.) This argument doesn't address the meaning of "aggrieved employee" in light of PAGA's authorization of claims for violations without a private right of action; it simply hearkens back to the arguments addressed above, where amici assume, with no textual support, that the "aggrieved employee" definition contains an unspoken "ongoing injury" element. (See ante, Argument §§ A.1–2.)

B. Standing Should Not Depend on Turning Down a Reasonable Offer to Compromise.

1. Low-Wage Workers Like Kim Risk Penalties Under Code of Civil Procedure Section 998 for Turning Down Offers to Compromise.

Reins and its amici wrongly portray Kim's decision to accept Reins's offer as purely "voluntary" without mentioning the risks that Kim would have faced if he rejected the offer. (ASCDC Brief at 11, 17; CNCDA Brief at 22; Employers Group Brief at 13.) Even though, according to Reins, "the crux of Kim's lawsuit was that Reins misclassified him and other Training Managers as exempt during a 60-day training period," Reins offered Kim the sum of $20,000 plus fees and costs to resolve his individual claims. (ABM at 11; 2 AA 336–347.) Reins chose to make this offer under Code of Civil Procedure section 998, so that turning it down would have exposed Kim to

penalties, including relinquishing his postoffer costs, and paying Reins's postoffer costs and expert witness fees. (Code Civ. Proc., § 998(c).) Even if Kim turned down the offer and won in arbitration, his recovery could have been wiped out if he failed to obtain a more favorable award. (Code Civ. Proc., § 998(c); see CRLA Brief at 20–21.)

Reins would have thus forced Kim, a low-wage worker, to say no to $20,000, risk losing his entire recovery, and risk owing costs to Reins, to continue maintaining "aggrieved employee" standing under PAGA. This was not a choice the Legislature intended to foist upon brave workers who step forward to help the state prosecute Labor Code violations. Under these circumstances, characterizing Kim's acceptance of Reins's offer as "self-serving" is hardly warranted. (CNCDA Brief at 22; see also Employers Group Brief at 13.) Neither Reins nor its amici explain why Reins offered to pay so much to resolve what it saw as a small claim for 60 days of underpaid wages. The reason, of course, is that Reins used the 998 offer offensively—not as a "good faith" offer based on its assessment of the case, but to test its standing theory and try to avoid PAGA penalties. (See *Najah v. Scottsdale Ins. Co.* (2014) 230 Cal.App.4th 125, 143 [a "good faith" offer must be "realistically reasonable under the circumstances of the particular case"].)

Reins's strategy does not serve the purpose of either PAGA or section 998. "The policy behind section 998 is 'to encourage the settlement of lawsuits prior to trial.'" (*Martinez v. Brownco Construction Co.* (2013) 56 Cal.4th 1014, 1019, internal quotations omitted.) To effectuate this policy, section 998 provides "a strong financial disincentive to a party—whether it be a plaintiff or a defendant—who fails to achieve a better result than that party could have achieved by accepting his or her opponent's settlement offer." (*Ibid.*, quoting *Bank of San Pedro v. Superior Court* (1992) 3 Cal.4th

797, 804.) As applied here, the statute's "effect is to punish the plaintiff who fails to accept a reasonable offer from a defendant." (*Najah, supra,* 230 Cal.App.4th at p. 143, citing *Culbertson v. R. D. Werner Co., Inc.* (1987) 190 Cal.App.3d 704, 711.)

Kim faced possible "punishment" unless he accepted Reins's offer, and in Reins and its amici's view, gave up his PAGA standing. While section 998 was intended to encourage reasonable, good faith settlements, it was not intended to let one party compel another to relinquish claims not encompassed within its settlement offer.

2. Making PAGA Depend on a Line of Employee Representatives Undermines Its Enforcement Scheme and Prejudices the State's Interests.

Employers Group amici, like Reins, suggest that the state's interests aren't prejudiced by letting employers pay off representatives because others could come forward after the first employee settles. According to Employers Group, "if an alleged violation is systemic, one would expect that many employees" would want to serve as a PAGA representative. (Employers Group Brief at 16–17.) This is far from true. As Kim's amici note, many employees fear retaliation or being blacklisted in their industry, and it is often a single employee's decision to step forward that forces employers to change illegal practices:

> For low-wage workers, it is not realistic to expect that another aggrieved worker will bring a PAGA claim. Many workers suffer ongoing wage theft and Labor Code violations because they do not want to risk losing their job by filing a complaint, even if they could later prove unlawful retaliation on that basis.

(Bet Tzedek Brief at 25.) Not to mention, "many workers are terrified of deportation or employers reporting them to ICE if they speak up." (Bet Tzedek Brief at 25.)

Aside from being grounded on an unsupportable premise, the "others will come forward" argument conflicts with the process outlined in the statute itself, in which a single employee can prosecute violations on behalf of the state and other workers. PAGA authorizes any single employee to sue "on behalf of himself or herself and other current or former employees" once administrative prerequisites are met. (Lab. Code § 2699(a).) "That plaintiff and other employees might be able to bring individual claims for Labor Code violations in separate [actions] does not serve the purpose of the PAGA . . . ." (*Iskanian, supra*, 59 Cal.4th at p. 384, quoting *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 502.)

As Kim argued in his opening brief, a collective action is essential for effective enforcement. (AOB at 39.) If PAGA depended on a line of employees coming forward until one eventually refused to settle individually, most PAGA cases would disappear without any payment of civil penalties to the state. (See AOB at 39.) A prudent employer would simply pay the employee representative to get rid of the PAGA action. Even if the payoff was for ten or twenty times the value of the employee's individual claim, it would make good business sense to pay off the representative and avoid the prospect of civil penalties aggregated among all affected employees, even if another representative could still surface. (See Lab. Code § 2699(f).)

Of course, in many instances, employers know that it would be impossible for another representative to come forward and that the PAGA claim will dissolve once the original representative loses standing. PAGA contains a one-year statute of limitations. (See Cal. Civ. Code § 340.) Thus, an employer that corrects a violation upon receiving notice of a PAGA suit knows that no new PAGA claims can be brought for that violation after one

year. If no other employees come forward after one year, then the PAGA action can only be prosecuted by a single person—the original "aggrieved employee." By paying off that employee after the one-year period expires, the employer avoids paying so much as a penny of the civil penalties established under PAGA—even if the PAGA claim sought penalties for hundreds or thousands of violations.

Employers Group also wrongly suggests that, to the extent a Labor Code violation is not "systemic" and involves only one or a handful of employees, the state's interests would not be prejudiced by paying off the representative because violations with a small reach aren't appropriate for "protracted representative litigation." (Employers Group Brief at 16.) Employers Group gives the example of an employer that misclassifies employees as exempt and fails to pay overtime. (Employers Group Brief at 16.) However, PAGA provides for penalties for the violation in that example, no matter the employer's size. (Lab. Code § 2699(f).) The statute contains a specific penalty amount for employers that "do[] not employ one or more employees" at the time of the violation, and another for employers with "one or more employees" when a violation occurs. (Lab. Code § 2699(f).) Even if the violation affects a handful of employees and not hundreds or thousands, an employer should not be able to avoid civil penalties by settling individual claims of the affected employees. Moreover, it remains an open question whether a violation affecting only one employee gives rise to a PAGA claim at all. (See *Reyes v. Macy's, Inc.* (2011) 202 Cal.App.4th 1119, 1123 ["A plaintiff asserting a PAGA claim may not bring the claim simply on his or her own behalf but must bring it as a representative action and include 'other current or former employees.'"]; see also CNCDA Brief at 13; Reins ABM at 17 ["PAGA representatives cannot bring cases on their own behalf."].)

C. Allowing Employees Like Kim to Continue Representing the State Would Not Discourage Individual Settlements.

Several of Reins's amici wrongly suggest that employers would not want to settle individual Labor Code claims knowing that the settling employee could still serve as a PAGA representative. (See ASCDC Brief at 17; Employers Group Brief at 12 [employers "do not pay money to an employee to continue litigation"]; RLC Brief at 11 [arguing that employers should be able to pay "an *enhanced* amount of damages in exchange for a release of the employee's right to pursue any claims, including penalties that may be available under PAGA."] [emphasis added].) Reins made a similar point in its Answer Brief on the Merits, arguing that "the employer would have little incentive to utilize Section 998 offers in the wage and hour context[]" if an employee could continue representing the state in a claim for civil penalties after resolving individual claims.[3] (ABM at 30.)

These fears are unfounded since employers have never been able to use individual settlements to buy finality as to state enforcement actions. Any employer settling an individual claim must still contend with the possibility of a civil-penalty action by the California Division of Labor

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[3] One extreme example of this argument is the Restaurant Law Center amici's suggestion that a "responsible employer" that realizes it failed to pay wages would not want to do what's right and pay employees what they're owed as not to "tip them off" about the violation and risk a PAGA action. (RLC Brief at 29.) Restaurant Law Center amici think that employers would keep employees' money and "avoid any discussion" of the nonpayment unless they could be sure that employees would waive their right to serve as a PAGA representative in exchange for receiving wages they're undisputedly owed. (RLC Brief at 29.) California law does not recognize a release signed in exchange for payment of wages undisputedly owed, and the type of willful nonpayment that Restaurant Law Center amici envision could subject employers to penalties outside of PAGA. (See Lab. Code §§ 203, 206.5 1194.2.)

Standards Enforcement ("DLSE"). The punitive purpose of the state action isn't satisfied by an employer's payment of damages to a single employee—even if the employer pays an "enhanced amount." (See RLC Brief at p. 11.)

The same applies for PAGA. A PAGA action "functions as a substitute for an action brought by the government itself." (*Id.* at p. 987.) An employer's payment to release "individual employee Labor Code grievances," (see Employers Group Brief at 6) or "an employee's alleged wrong" (see RLC Brief at 9), would not serve PAGA's purpose "to punish and deter employer practices that violate the rights of numerous employees under the Labor Code." (*Iskanian, supra*, 59 Cal.4th at p. 384, quoting *Brown, supra,* 197 Cal.App.4th at p. 502.)

Allowing individual settlements to extinguish PAGA standing would handicap employee-prosecuted enforcement actions compared to those brought by the state, which is the opposite of what the Legislature intended. As noted, it was precisely because of the state's inability to prosecute Labor Code enforcement actions itself, and resulting "systemic underenforcement of many worker protections," that California authorized employees "to sue on behalf of the state and collect penalties." (*Williams v. Superior Court (Marshalls of CA, LLC)* (2017) 3 Cal.5th 531, 545.)

In any event, the question of whether a general release or "enhanced" settlement payment can result in a waiver of PAGA standing is not squarely before the Court, since the present case involves an offer to compromise that *excluded* PAGA and never offered compensation for Kim to relinquish "aggrieved employee" status. (See Employers Group Brief at 14 ["nothing should prevent the employee from releasing his individual procedural right to act as a private attorney general by entering into" a general release]; RLC Brief at 11; but see *Iskanian, supra*, 59 Cal.4th at p. 383 ["an employee's

right to bring a PAGA action is unwaivable."].) Kim never signed a general release or dismissed his PAGA claim, with or without prejudice. Reins never offered to compromise Kim's PAGA claim, never offered to compensate him in exchange for waiving his right to serve as a PAGA representative, and never offered to pay consideration to the state. (See 2 AA 336–347.) The PAGA claim was stayed pursuant to Reins's request when Reins made its offer during individual arbitration, (1 AA 249, 262), and the offer stated that it was in exchange for a dismissal of Kim's "individual claims against Reins." (2 AA 336–337.)

Pursuant to these terms, Kim's request for dismissal provided 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"].) Reins never challenged the dismissal as inconsistent with the parties' agreement. It's clear that the parties never intended Kim's dismissal to constitute a "final resolution of all litigation," including PAGA or of Kim's "aggrieved employee" standing. (Employers Group Brief at 12.) No doubt, California maintains a public policy encouraging settlement (see Employers Group Brief at 10-11, citing Code Civ. Proc., §§ 664.6, 877, and 998; Evid. Code § 1152; and *Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, 495), but there is no policy favoring settlement of claims or rights outside the scope of the parties' agreement.

D. Allowing Employees Like Kim to Continue Representing the State Would Not Lead to Abusive Lawsuits.

1. The Legislature Curtailed Abuse by Restricting the Pool of Potential Representatives to People Like Kim, Who Allege Labor Code Violations.

Restaurant Law Center amici offer an unsupported spin on PAGA's legislative history, suggesting that the Legislature "expressly incorporated the protections from Proposition 64 into PAGA" and, in enacting PAGA, "expressly heeded the electorate's decision in enacting Proposition 64." (RLC Brief at 19.) Never mind that the Legislature enacted PAGA on October 12, 2003—one year *prior* to when voters approved Proposition 64 on November 2, 2004. (Cf. Kim's MJN, Ex. A, at 42–45; RLC RJN, Ex. B, at ER019.) Never mind that the Legislature added the "aggrieved employee" provision to the proposed PAGA legislation on May 1, 2003 and amended it to its current form on July 2, 2003—both more than one year *prior* to when the Secretary of State issued the official Voter Information Guide informing the public about the proposed text of Proposition 64. (Cf. Kim's MJN, Ex. A, at 21-24, 29-32; RLC RJN, Ex. B, at ER019.) Simply put, while concerns over abusive lawsuits animated the Legislature's decision to define the term "aggrieved employee" within PAGA, there is no evidence that lawmakers incorporated the exact same standing requirement that voters later approved for UCL lawsuits. (Cf., ASCDC Brief at 15.)

In fact, the Legislature chose *not* to define PAGA's "aggrieved employee" clause in the same way as Proposition 64's "injury in fact" provision. (Cf. CNCDA Brief at 16 [incorrectly stating that, "as all parties agree, the Legislature expressly drafted PAGA with an actual injury requirement"].) Proposition 64 amended the UCL to restrict standing to those who have "suffered injury in fact and ha[ve] lost money or property."

(*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 227; RLC RJN, Ex. B, at ER129.) "'Injury in fact' is a legal term of art" under federal law, and "the drafters and voters intended to incorporate the established federal meaning." (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 322; Prop. 64, § 1(e); RLC RJN, Ex. B, at ER129.) The Legislature could have chosen to define "aggrieved employee" the same way—as someone who suffered an "injury in fact" and lost money or property due to an employer's Labor Code violations—but that would have interfered with PAGA's operating provisions authorizing enforcement actions for "any provision of this [Labor] [C]ode that provides for a civil penalty to be assessed" by the state, which includes violations that don't give rise to legally cognizable "injuries" and that don't cause an employee's loss of money or property. (See Kim's OBM, fns. 7, 8 [listing Labor Code provisions enforceable under PAGA that employees are barred from pursuing individually].)

With this in mind, the Legislature adopted a broad definition of "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).) As discussed, the focus has always been on "violations" instead of "injuries." (See *Raines, supra,* 23 Cal.App.5th at p. 680 ["We disagree that 'no injury' amounts to 'no violation.'"]; Bet Tzedek Brief at 16–18.) This Court must interpret the "aggrieved employee" provision "in accordance with the expressed intention of the Legislature." (*California Teachers Assn., supra,* 14 Cal.4th at p. 633.) It should not accept amici's invitation to write an "injury in fact" requirement into the statute where the Legislature chose to speak only about "violations." "This court has

no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed." (*Ibid.*)

As the legislative history shows, the intent was to prevent PAGA suits by the general public and individuals with no connection to the alleged violator. (See OBM at 26–31.) By narrowing the universe of plaintiffs to those against whom an alleged "violation" was committed, the "aggrieved employee" requirement accomplished the Legislature's goal of offering more protection against abusive lawsuits than the UCL's then-operative "general public" standard—although, some time later, the UCL became more restrictive than PAGA. (See Bus. & Prof. Code § 17204.) Kim does not promote reading the "aggrieved employee" requirement out of the statute or, as one amicus contends, extending the provision to "employees who no longer meet the 'aggrieved employee' definition." (CNCDA Brief at 22.) Kim only advocates reading the definition by its terms and in line with PAGA's purpose.

2. Resolving Individual Claims Does Not Result in "Headless Litigation" Any More So Than If the Representative Never Brought Individual Claims in the First Place.

As employees could always serve as qui tam relators under PAGA without suffering individual injury, there is no merit to the Restaurant Law Center amici's suggestion that once employees resolve individual claims, they "step aside while their attorneys pursue the PAGA claim." (RLC Brief at 20; see also ASCDC Brief at 14.) An employee is free to bring a PAGA action without ever pursuing individual claims. (*Williams v. Superior Court (Pinkerton Governmental Services, Inc.), supra,* 237 Cal.App.4th at p. 647 [holding that stand-alone PAGA claim can proceed without any "underlying" individual controversy]; *Reyes, supra,* 202 Cal.App.4th at p. 1123 [finding

that there is no "individual claim under PAGA"]; *Bright v. 99¢ Only Stores* (2010) 189 Cal.App.4th 1472, 1481 [authorizing PAGA claims for "suitable seating" requirement that does not give rise to a private right of action].) When an employee who alleges a violation choses to take the mantle and represent the state in the absence of individual claims—whether those claims are non-existent, resolved, or left unlitigated for any other reason—the deputized employee, rather than her attorney, is the driving force behind the lawsuit. (RLC Brief at 20.)

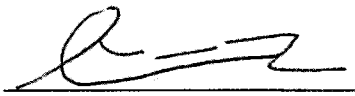
Here, Justin Kim brought a PAGA lawsuit for unpaid overtime and minimum wages, and unpaid meal- and rest-period premiums. (1 AA 49–50, 58.) He alleges that Reins committed wage violations against him and other current and former employees. (1 AA 49–50, 58.) He notified the state of his claims and intent to proceed as a representative under PAGA, and the state expressly authorized him to prosecute these violations on its behalf. (1 AAA 124–125; 2 AA 333.) Kim never agreed to walk away from his PAGA action and in fact, returned to court after arbitration and requested that the court allow his PAGA claim to proceed. (2 AA 294, 300:24–25.) The fact that he resolved his individual claims in arbitration did not transform his PAGA case into "headless litigation," any more so than if he had chosen not to pursue individual claims in the first place or proceeded on violations that do not give rise to individual causes of action. (Cf. RLC Brief at 20.)

CONCLUSION

For these reasons and those provided in Kim's opening and reply briefs, Kim respectfully asks this Court to reverse the Court of Appeal's judgment.

February 28, 2019

KINGSLEY & KINGSLEY, APC

By: 

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.520, I hereby certify that this Consolidated Answer to Amici Curiae contains 6,466 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.

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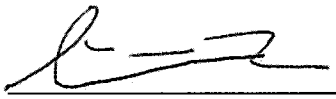
By: 

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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 28, 2019, I served the foregoing document described as **ANSWER TO BRIEFS OF AMICI CURIAE** 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 28, 2019, 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 28, 2019, following the ordinary business practice. As indicated in the service list attached, each listed individual or court is served as indicated.

I am readily familiar with my firm's practice for collection and processing of correspondence for delivery in the manner indicated above, to wit, that correspondence will be deposited for collection in the above-described manner this same day in the ordinary course of business. I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on 28th day of February, 2019, at New York. New York

s/Bryant D. Lee

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