No. S246911

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JUSTIN KIM,
Plaintiff and Appellant

vs.

REINS INTERNATIONAL CALIFORNIA, INC.
Defendant and Respondent

Appeal Upon a Decision of the Court of Appeal
Second Appellate District, Division Four
Case No. B278642

Appeal from a Judgment of the Superior Court of Los Angeles County
Case No. BC539194

Honorable Kenneth R. Freeman, Judge Presiding

CONSOLIDATED ANSWER TO BRIEF OF *AMICI CURIAE* CALIFORNIA RURAL LEGAL ASSISTANCE, INC.; CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION; CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION; CONSUMER ATTORNEYS OF CALIFORNIA AND ASIAN AMERICANS ADVANCING JUSTICE – LA; AND BET TZEDEK

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Cal. Rules of Court, Rule 8.208)

Under California Rules of Court Rule 8.208, Defendant-Respondent Reins International California, Inc. certifies Reins International USA Co. Ltd. owns 100% of Defendant Reins International California, Inc. There is no other person with a financial or other interest in the outcome of the proceeding the justices should consider in determining whether to disqualify themselves, as defined in Rule 8.208(e)(2).

Dated: March 4, 2019

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

By: _____

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Defendant-Respondent Reins International California, Inc. ("Reins") submits this Consolidated Answer to the Amici Briefs of California Rural Legal Assistance, Inc.; California Rural Legal Assistance Foundation; California Employment Lawyers Association; Consumer Attorneys of California and Asian Americans Advancing Justice – Los Angeles ("CRLA"); and Bet Tzedek (collectively, "Amici").

The Court of Appeal correctly held an employee who settles and dismisses his underlying Labor Code claims has no standing to pursue penalties for the same alleged violations under the Private Attorneys General Act ("PAGA"). In urging this Court to reverse, Amici argue standing is perpetual and can never be lost, even if a plaintiff dismisses their claim with prejudice as part of a settlement. Amici cite public interest standing principles that only apply to taxpayer and writ of mandate lawsuits. They advance arguments based on improper hypotheticals with facts directly contrary to the record on appeal. They repackage the flawed arguments advanced by Kim. And, they misstate the Court of Appeal's holding.

Amici's arguments should be rejected for several reasons. *First*, Amici's perpetual and taxpayer standing arguments ignore PAGA's express language, legislative intent, and this Court's own decisions. PAGA has a clear and direct standing requirement. The Court's standing precedent requires it to affirm the Court of Appeal's decision. "PAGA imposes a

standing requirement; to bring an action, one must have suffered harm." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 558.) The Court also ruled there is no such thing as perpetual standing. A party can lose standing after the complaint is filed. (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 233.) Amici's perpetual and taxpayer standing arguments should be rejected. They directly contradict PAGA, its legislative history and this Court's precedent.

Second, Amici advance inapplicable hypotheticals and misleading doomsday scenarios. Amici contend Kim's ruling would affect countless agricultural workers and cause hundreds of thousands of unpaid Labor Code penalties. Not so. Kim was a salaried manager in a restaurant. Kim voluntarily accepted a settlement offer and dismissed his individual and class action claims. In so doing, Kim and his counsel represented to the trial court: "***Plaintiff and his counsel are not aware of anyone who is relying on the pendency of this action to protect their interests***." (2 AA 289 [emphasis added].)[1] The Court should rely upon shaky and disingenuous conjecture about future harm. (*See Reno v. Baird* (1998) 18 Cal.4th 640, 654 [rejecting parade of horribles arguments as "Chicken Little-esque"].) It should follow its own precedent and affirm the Court of Appeal's decision.

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[1] "AA" refers to Kim's Appendix of Record filed with the Court of Appeal. The citation format refers to the volume number and then the page number in the Appendix.

Third, even though Amici re-packaged Kim's flawed arguments, they remain flawed when unpacked. Amici contend the Court of Appeal endorsed a forced pre-dispute waiver of PAGA rights in violation of *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348. It did not. Kim's settlement and dismissal was voluntary *post-dispute* waiver of *his claims* which affected only his standing to pursue PAGA claims. It did not affect the rights of other employees to pursue PAGA claims. Amici claim PAGA allows for recovery of penalties on Labor Code claims that do not provide for a private right of action. This does not change the result for Kim. His PAGA claim was based ***solely on*** the individual Labor Code claims he dismissed. He did not advance separate PAGA theories that did not have a corresponding private right of action. Thus, when Kim dismissed his underlying Labor Code claims, he was no longer aggrieved as to those Labor Code violations. Finally, Amici claim the Court of Appeal ruling improperly bifurcated a PAGA claim into standing and penalty components. It did not. It simply ruled that when one hundred percent (100%) of Kim's underlying Labor Code claims were no longer viable, Kim lacked standing to pursue a PAGA claim.

For these reasons and those that follow, the Court should affirm the Court of Appeal's decision and the trial court's judgment for Reins.

II. PAGA'S STANDING REQUIREMENT WAS INTENDED TO AVOID HEADLESS LITIGATION

A. PAGA Has a Direct Standing Requirement

"PAGA imposes a standing requirement; to bring an action, one must have suffered harm." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 558.) PAGA mandates the person suing be "aggrieved employee." (Lab. Code, § 2699, subd. (c) [emphasis added].) This means the plaintiff "suffered injury resulting from an unlawful action ... under the act, by violations of the Labor Code." (*Amalgamated Transit Union, Local 1756, ALF-CIO v. Superior Court* (2009) 46 Cal.4th 993, 1001.)

PAGA also mandates the plaintiff directly suffer this injury, not that the plaintiff simply seek to represent others who did. (Lab. Code § 2699, subd. (a) [civil penalties "may be recovered through a civil action brought by an aggrieved employee *on behalf of himself or herself and* other current or former employees"] [emphasis added].) The Legislature used the conjunctive term "and," not the disjunctive term "or," to ensure the person suing suffer his or her own injury. (Bet Tzedek Brief, p. 12, n. 4.)

In seeking reversal, Amici claim there is no direct standing requirement. CRLA states PAGA's cure provisions and its administrative filing requirements "are the only standing limitations included in the PAGA." (CRLA Brief, p. 27.) This is untrue. In any lawsuit, a litigant's standing to sue is a "threshold issue to be resolved before the matter can be reached on

the merits." (*Hernandez v. Atlantic Finance Co.* (1980) 105 Cal.App.3d 65, 71.) California courts "will not address the merits of litigation when the plaintiff lacks standing, because California courts have no power ... to render advisory opinions or give declaratory relief." (*Boorstein v. CBS Interactive, Inc.* (2013) 222 Cal.App.4th 456, 465 [quoting *Municipal Court v. Superior Court (Gonzalez)* (1993) 5 Cal.4th 1126, 1132].) Standing "requires an actual justiciable controversy as to which the complainant has a real interest in the ultimate adjudication because he or she has either suffered or is about to suffer an injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented to the adjudicator." (*Boorstein, supra*, 222 Cal.App.4th at 465 [citing *Pacific Legal Found. v. Cal. Coastal Com.* (1982) 33 Cal.3d 158, 169–172].)

The prerequisites for standing are determined from a statute's language and legislative intent. (*Surrey v. TrueBeginnings, LLC* (2008) 168 Cal.App.4th 414, 417–418.) "[E]mployment creates a status involving relative rights and obligations, and it is proper for the legislature, acting within the bounds of fairness and reason, to determine the nature, extent, and application of those rights and obligations." (*Moore v. Indian Spring Channel Gold Mining Co.* (1918) 37 Cal.App. 370, 376.) The Legislature created a direct standing requirement when it drafted PAGA. It designed PAGA so lawsuits could only be pursued by an "aggrieved employee" who suffered harm in the form of violations of the Labor Code. (Lab. Code, §

2699, subd. (c); *Williams, supra,* 3 Cal.5th at 558; *Amalgamated Transit, supra*, 46 Cal.4th at 1001.)

PAGA's standing requirement is tied closely to California's Unfair Competition Law ("UCL"). The Legislature amended PAGA to add a standing requirement to "protect[] businesses from shakedown lawsuits...." The concerns arose from frivolous lawsuits filed under the prior version of the UCL, which originally had *no* injury requirement. (Answer Brief, pp. 19-20; Reins' Motion for Judicial Notice, Ex. C [Assem. Comm. on Judiciary, Rep. on Sen. Bill No. 796 [2003-2004 Reg. Sess.] as amended May 12, 2003, p. 4].) To combat this abuse with the UCL, the voters (through Proposition 64) created an injury requirement for a representative bringing claims. Now, UCL plaintiffs must first establish ***injury-in-fact*** within the meaning of Article III of the United States Constitution. (See Cal. Bus. & Prof Code § 17204 ["Actions for relief pursuant to this chapter shall be prosecuted ... by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition"]; see also, 2004 Cal. Legis. Serv. Prop. 64, Sec. 1(e) ["It is the intent of the California voters in enacting this act to prohibit private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact under the standing requirements of the United States Constitution."].) To establish injury in fact, one must suffer an actual "invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural."

(*Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 560 [internal citations and punctuation omitted].) Although the UCL uses the past tense in describing the injury the plaintiff must have "suffered," UCL standing "must exist at all times until judgment is entered." (*Mervyn's, supra,* 39 Cal.4th at 233.)

Since PAGA's standing requirement arose from the exact same concerns, it is construed with these constructs in mind. "Both the unfair competition law and the Labor Code Private Attorneys General Act of 2004 require a plaintiff to have suffered injury resulting from an unlawful action: under the unfair competition law by unfair acts or practices; under the act, by violations of the Labor Code." (*Amalgamated Transit Union, supra,* 46 Cal. 4th at 1001.) The injury requirement does not vanish merely because PAGA is a remedial statute like the UCL. In *In Re Tobacco II Cases* (2009) 46 Cal.4th 298, this Court noted Proposition 64's standing requirement did not "curb the broad remedial purpose of the UCL." (*Id.* at 317, 321.) The Court harmonized the remedial purpose and the standing requirements under the UCL, and held a UCL representative plaintiff needs to have suffered a redressable injury. It did not simply disregard standing altogether.

The Court should reach the same result here. Under the statute's express language and the clear legislative intent, PAGA has a direct standing and injury requirement. A PAGA representative action must be pursued by someone with redressable injury, who is aggrieved. It cannot be pursued by

an employee simply suing on behalf of other employees. The focus is on the standing of the *lead plaintiff,* just like that under the UCL. (See *In Re Tobacco II Cases, supra,* 46 Cal.4th at 321.) The injury requirement does not cheapen the remedial purpose of PAGA. The "aggrieved employee" requirement prevents headless litigation brought by attorneys with no real client interested in the outcome of the litigation. It prevents the exact abuse the Legislature was concerned with under the UCL; an attorney suing on behalf of someone who no longer is suffering actual injury from his employer. (Reins' Answer Brief, pp. 19-21.) For these reasons, the Court should apply and enforce PAGA's direct standing requirement and reject Amici's requests to apply a lesser standard.

B. PAGA's Aggrieved Employee Requirement Does Not Confer Perpetual Standing on Kim

Amici contend the Court of Appeal misapprehended the "aggrieved employee" requirement under PAGA. They argue PAGA does not require an employee to "maintain" his or her aggrieved status throughout the litigation. They rely on PAGA's use of the past tense in defining an aggrieved employee as "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." (CRLA Brief, pp. 24-25; Bet Tzedek Brief, pp. 8-12 [citing Lab. Code § 2699, subd. (c)].) Bet Tzedek claims a violation of the Labor Code gives rise to a continued right to pursue a PAGA action, regardless of whether that violation is later

remedied. (Bet Tzedek Brief, pp. 16-20.) Amici's perpetual standing argument undermines standing law and the Legislature's intent in drafting PAGA. (Answer Brief, pp. 21-24.)

Amici's argument cannot prevail because "it is contrary to the legislative intent apparent in the statute." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735; see also, *County of San Bernardino v. City of San Bernardino* (1997) 15 Cal. 4th 909, 943.) PAGA's standing requirement arose from the same concerns of "frivolous lawsuits generated by shakedown lawyers" who had no plaintiff with a real and actual injury. The UCL and PAGA's standing requirements were intended to curb this abuse. The UCL also uses the past tense to confer standing on any "person who *has suffered injury* in fact and *has lost* money or property as a result thereof." (Bus & Prof. Code, § 17204 [emphasis added].) Interpreting this language, this Court held "*standing must exist at all times until judgment is entered.*" (*Mervyn's, supra*, 39 Cal. 4th at 233 [emphasis added]; see also, *Branick v. Downey Savings & Loan Ass'n* (2006) 39 Cal.4th 235, 242-243 [plaintiff who lost standing to pursue Section 17200 claim during pendency of lawsuit should have been replaced by plaintiff with standing].) The same result is appropriate under PAGA, given that the legislature had the same concerns about lawsuits filed by those not suffering from an injury under the Labor Code. (MJN, Ex. C [Assem. Comm. on Judiciary, Rep. on Sen. Bill No. 796 [2003-2004 Reg. Sess.] as amended May 12, 2003, p. 4].)

Bet Tzedek claims, "[i]t is irrelevant whether [Kim] can show any damages" or "otherwise maintain a viable individual claim" because PAGA is based upon past Labor Code violations. (Bet Tzedek Brief, p. 18.) Bet Tzedek incorrectly assumes a Labor Code violation was proven. When Reins made its 998 offer, it expressly denied any Labor Code liability. (2 AA 344.) Even assuming an employee suffered a Labor Code violation at one point in time, that violation cannot confer a perpetual right to pursue a PAGA claim. An employee may fail to exhaust his or her administrative remedies under Labor Code § 2699.3. That claim would be barred, since administrative exhaustion under PAGA is mandatory. (*Williams, supra*, 3 Cal.5th at 545.) An employee may claim a violation of the Labor Code that is time-barred. That plaintiff also lacks standing to pursue a PAGA claim. (*Holak v. K Mart Corporation* (E.D. Cal. May 19, 2015) No. 1:12-cv-00304 AWI-MJS, 2015 WL 2384895, at *5, *motion to certify appeal denied* (E.D. Cal. Aug. 11, 2015) 2015 WL 4756000.) Another similar defense is the release or waiver of claims. (*Pagel v. Dairy Farmers of Am.* (C.D. Cal. July 9, 2013) No. 2:13-cv-02382 SVW VBK, 2013 WL 12166177, at *6 [releases of Labor Code claims "constitute an affirmative defense" to liability].) These defenses apply equally in UCL representative actions. (*In Re Tobacco II Cases, supra,* 46 Cal.4th at 317, 321; *Mervyn's, supra,* 39 Cal.4th at 233.) Importantly, Labor Code claims can give rise both to representative actions under PAGA and claims under the UCL. (*Cortez v. Purolator Air Filtration Prods. Co.* (2000)

23 Cal.4th 163, 177 [claim for unpaid overtime under can give rise to UCL claim for restitution].) But where the underlying Labor Code claims are barred, *both* the resulting PAGA and UCL representative claims are barred. (*Shook v. Indian River Transport Company* (9th Cir. 2018) 756 F App'x 589, 590.) Thus, standing does not exist in perpetuity simply because an employee claims to have been aggrieved at one point in time.

Numerous courts have rejected the concept of perpetual standing under PAGA both before and after the Court of Appeal's ruling in Kim. (Reins' Answer Brief, pp. 18-19 [collecting cases].) The Central District of California contemplated this exact result: "***If some of Plaintiff's individual claims were dismissed during arbitration, a different representative would need to bring the dismissed claims under PAGA because Plaintiff could not assert to be an 'aggrieved employee' with respect to those claims as required by the statue.***" (*Alvarez v. AutoZone, Inc.*, (C.D. Cal. July 8, 2015) No. cv-14-02471-VAP (SPx), 2015 U.S. Dist. LEXIS 190210, at *6 [emphasis added].) In another case, it wrote "[i]f Plaintiff is determined not to be an aggrieved employee under PAGA, because ***either he settles his individual claims during the pendency of the arbitration or Defendant's policies and practices are found to comply with the law, then the PAGA claim should be dismissed.***" (*Romo v. CBRE Group, Inc.* (C.D. Cal. Oct. 2018) No. 8:18-cv-00237-JLS-KES, 2018 WL 4802152, at *11 [emphasis added].) Because Kim dismissed his individual Labor Code claims with

prejudice, he lost standing to pursue PAGA claims. His PAGA claim had to be dismissed.

C. Amici's Exceptions to The Standing Rules Do Not Apply to PAGA

Because Kim no longer had a justiciable injury after he resolved and dismissed all of his individual claims, Amici resort to exceptions to the general rule of standing. They have no application here.

Amici reference taxpayer standing discussed in *Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241. (CRLA Brief, pp. 29-30; Bet Tzedek Brief, p. 7.) But they ignore its limited application.

Taxpayer standing under Code of Civil Procedure § 526(a) pertains to an action brought *against officers of a government agency*. (*Weatherford, supra,* 2 Cal.5th at 1251 ["Section 526a provides a mechanism for controlling illegal, injurious, or wasteful actions by those [public] officials;" "The statute allows for suit *against governmental entities*...."] [emphasis added].) Taxpayer standing requires "an allegation that the plaintiff has paid an assessed tax to the defendant locality." (*Id.*; see also, *Reynolds v. City of Calistoga* (2014) 223 Cal.App.4th 865, 873 ["Because Reynolds has not established that he was a taxpayer in the City or in Napa County, we affirm the trial court's ruling that he lacks standing under section 526a."])

Kim is not suing an officer of a government agency.[2] The Court should summarily reject this argument.

Amici also argue the rules of standing are relaxed in matters involving the public interest. (CRLA Brief, pp. 30-33; Bet Tzedek Brief, pp. 7-8.) CRLA discusses public interest standing in writ of mandamus actions under Code of Civil Procedure § 1086. This argument fares no better because it is a unique construct of mandamus law:

> "[W]here the question is one of public right and ***the object of the mandamus is to procure the enforcement of a public duty***, the relator need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced. ***[Public interest standing] promotes the policy of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right.***"

(*Green v. Obledo* (1981) 29 Cal.3d 126, 144 [emphasis supplied].)

"Public-interest standing, however, is available ***only in a mandate proceeding, not in an ordinary civil action***." (*People ex rel. Becerra v.*

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[2] Kim never argued for taxpayer standing at lower court or Court of Appeal based on payment of an assessed tax. Kim waived this argument by failing to make it before this Court and any lower court. CRLA should not be permitted to make it for him.

The same law applies to the numerous new arguments made by Amici that were never advanced or factually developed by Kim. "[A]n amicus curiae accepts the case as he finds it and may not 'launch out upon a juridicial expedition of its own unrelated to the actual appellate record. Under this rule, 'California courts will not consider issues raised for the first time by an amicus curiae'" (*California Bldg. Indus. Ass'n v. State Water Res. Control Bd.* (2018) 4 Cal.5th 1032, 1049 n. 12 [internal citations omitted].)

Superior Court (2018) 29 Cal.App.5th 486, 503, *as modified* (Nov. 28, 2018), *review denied* (Feb. 27, 2019).) "[T]his public interest standing exception ***has been consistently applied only in the context of mandamus proceedings***." (*Reynolds*, 223 Cal.App.4th at 874 [emphasis added]; see also, *Green, supra*, 29 Cal.3d at 131–132, 144–145 [writ of mandate compelling state officials to comply with federal law in their implementation of public assistance]; *Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1236–1237 [corporation could have public interest standing to seek writ of mandate compelling county to comply with environmental laws].) Similar requests to invoke the public interest exception outside of this context have been rejected. "A general 'public interest' exception to standing requirements would turn [the courts] into a super-legislature, able to overturn a statute enacted by the People's duly elected representatives, despite the absence of any parties who can show that they are being harmed." (*People ex rel. Becerra*, *supra,* 29 Cal.App.5th at 497.) It would render other standing requirements imposed by statute "meaningless." (*Reynolds*, *supra,* 223 Cal.App.4th at 874.)

The Court should reject any proposal to extend the public interest exception beyond its established reach. Reins is not the government. It is a private employer. And PAGA's legislative history clarifies it was not intended to have a public interest standing component. (Answer Brief, pp. 19-21.) Quite the opposite. "***Only Persons Who Have Actually Been***

Harmed May Bring An Action to Enforce The Civil Penalties." (MJN, Ex. C [Assem. Comm. on Judiciary, Rep. on Sen. Bill No. 796 [2003-2004 Reg. Sess.] as amended May 12, 2003, p. 4] [emphasis added].) For this reason, this Court has rejected related concepts like associational standing in PAGA actions. (*Amalgamated Transit, supra*, 46 Cal.4th at 1005.)

The Legislature sought to strike a balance to prevent the type of litigation abuse under the UCL when it had no standing requirement. The Legislature did not want headless litigation. Amici's proposal to eradicate the standing requirement from PAGA should be rejected.

D. *Williams, Huff*, and Labor Code § 2699, subd. (f)(1) Do Not Confer Standing on Kim

Bet Tzedek argues an employee only must "allege" Labor Code violations to have standing. (Bet Tzedek Brief, pp. 9-10.) Bet Tzedek notes that under *Williams*, a PAGA plaintiff need only make "mere allegations" of harm to file a complaint and initiate discovery. (*Williams, supra*, 3 Cal.5th at 546.) But the standard to file suit is different than what is required to maintain a suit when standing is challenged by way of a dispositive motion. (*Id.* at 558.) As noted by *Williams*, PAGA unambiguously imposes a standing requirement and "[t]he way to raise lack of standing is ... to bring a motion for summary adjudication." (*Id.*) That is precisely what Reins did here. When Reins filed its motion, Kim had to demonstrate standing to maintain his PAGA claims. He failed to do so.

More important, an aggrieved employee under PAGA is a person against whom one or more violations "*was committed.*" (Lab. Code § 2699, subd. (c) [emphasis added].) Bet Tzedek's suggestion that standing can be based on mere allegations reads the word "committed" right out of the statute. In fact, it would allow a plaintiff to continue to pursue PAGA claims by alleging violations, even after the underlying Labor Code claims are adjudicated against the employee. Courts uniformly reject this premise. (Reins' Answer Brief, pp. 18-19.)

Bet Tzedek also attacks PAGA's standing requirement altogether. Relying on *Huff v. Securitas Svcs. USA, Inc.* (2018) 23 Cal.App.5th 745, it contends that imposing a standing requirement on Kim "undercuts PAGA's purpose." (Bet Tzedek Brief, p. 14.) In *Huff*, the Court of Appeal held that employees who had allegedly suffered "at least one Labor Code violation" could maintain standing to pursue PAGA civil penalties, even for other Labor Code violations. (*Huff, supra*, 23 Cal.App.5th at 753-754.) The *Huff* court declined to impose a further requirement that the PAGA representative suffer all Labor Code violations alleged in the complaint. (*Id.*)

Huff hurts Kim. The *Huff* court acknowledged PAGA's "standing requirement" and found that the plaintiff must suffer at least one violation of the Labor Code to pursue PAGA claims. (*Id.* at 757.) But Bet Tzedek claims a plaintiff can pursue PAGA claims even where he or she can no longer "obtain individual relief" on any Labor Code claim. (Bet Tzedek Brief, p.

15.) That is not what *Huff* held, and if the Court accepts this argument, the "aggrieved employee" requirement would be rendered meaningless. Adopting Bet Tzedek's proposed rule would "undercut[] PAGA's purpose" by reading the standing language right out the statute. (*People v. Arias* (2008) 45 Cal.4th 169, 180 [Courts "must follow the fundamental rule of statutory construction that requires [that] every part of a statute be presumed to have some effect and not be treated as meaningless...."].)

Finally, Bet Tzedek argues PAGA has no injury requirement because Labor Code § 2699, subd. (f)(1) provides for a default penalty of $500 if "at the time of the alleged violation," the employer no longer employs any employees. (Bet Tzedek Brief, p. 19.) This argument does not apply to Kim. It does not even address standing. It addressed the methodology for counting the penalty owed when a case is brought by someone who has standing against an employer that has no employees at the time of an alleged violation. For example, Labor Code § 1174, subd. (c)-(d) (required maintenance of employee payroll records) can give rise to civil penalties under PAGA. (Lab. Code § 2699.5 [referencing this provision].) A prior employee could seek personnel or wage records long after his or her termination and after an employer closes its doors, and such requests are contemplated under the Labor Code. (Lab. Code §§ 1198.5, 226, subd. (c.).) The employee would have a potential claim for civil penalties of $500 *based on his or her underlying Labor Code violation*, despite the fact the employer has no

employees at the time of the violation. Labor Code § 2699, subd. (f)(1) would provide the default penalty. Bet Tzedek's argument about how penalties are calculated in these rare circumstances does not speak to or cure Kim's lack of standing.

III. AMICI'S HYPOTHETICAL ARGUMENTS IGNORE THE FACTS OF THIS CASE

Anyone can make predictions and create hypotheticals. And there is no risk in making false predictions. Courts do not hold people liable for making false predictions. (See *Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1469 [false statements or predictions regarding future events are deemed mere opinions which are not actionable].) This Court should not make a finding for Kim based on the creative imaginings of Amici. This case involves real litigants and real consequences.

The facts, law, and record on appeal all support affirming the Court of Appeal's judgment. Kim was a former restaurant manager who made two times the State's minimum wage. (1 AA 49 at ¶ 19.) He alleged he was misclassified as exempt from overtime because he performed non-exempt work during a limited, 60-day period he trained to be a manager. (*Id.*) He filed class and representative claims under PAGA on behalf of himself and other exempt training managers. (1 AA 16-29, 44-62.)

The trial court compelled Kim's individual claims to arbitration, but did not compel arbitration of the PAGA claim. (1 AA 247-262.) Kim then

accepted an offer to compromise under Code of Civil Procedure § 998 for $20,000 plus attorney fees in exchange for dismissal of his individual claims with prejudice. (2 AA 343-347.)[3] Kim's attorney formally requested dismissal of his individual claims with prejudice and class claims without prejudice. (2 AA 285-287.) Kim's proposed order claimed "***Plaintiff and his counsel are not aware of anyone who is relying on the pendency of this action to protect their interests***." (2 AA 289 [emphasis added].) Kim and his counsel did not give notice to absent class members because nobody else was interested in the case. (*Id.*) The Court approved the request for dismissal. (2 AA 292.)

At this point, the entire case should have been over. Kim's PAGA claim was based ***entirely*** on the underlying individual Labor Code violations he alleged. His operative complaint made this clear: "As a result of the acts alleged above," Kim sought civil penalties for the Labor Code violations previously alleged in the complaint and no others. (1 AA 58 ¶ 68.) His PAGA letter also made this clear. The PAGA letter attached his original class action complaint and made it clear that the PAGA claims were based on the individual and class claims. It invoked the same Labor Code provisions and attached the complaint "setting forth the alleged causes of action." (1 AA

[3] Contrary to Kim's assertions, the 998 offer itself did not make any representation as to PAGA. It did not represent that Kim's PAGA claim would remain viable after dismissal of his individual claims. (2 AA 343-44.)

124.) The letter alleged no new violations of the Labor Code. (*Id.*)[4] Because 100% of Kim's misclassification claims were barred because they were dismissed with prejudice, he could not pursue PAGA claims based on those same dismissed alleged violations.

Amici does not want this Court to focus on what happened, which was a fair and just result where an employee received $20,000 in a small case concerning a 60-day window of alleged liability. Rather, it wants this Court to focus on hypothetical horrors that might happen in other cases, where the facts, circumstances, and results should be different.

A. False Hypothetical Number 1: This is Not a Fight Against the Underground Economy for Rural Workers

CRLA discusses hypothetical harm to low wage earners from the rural economy, which is not at issue here. (CRLA Brief, pp. 16-19.) CRLA claims the Court of Appeal's ruling "threatens to frustrate" the purpose of PAGA to deter unlawful employment practices in the "underground economy ... in rural areas and industries like agriculture where amicus curiae CRLA has used PAGA to recover penalties and underpaid workers for thousands of employees." (*Id.*, pp. 18-19.)

But this case concerned an executive manager who claims he was misclassified. It centered on an analysis of whether Kim primarily performed

[4] The PAGA letter erroneously referenced a proposed group of "freight inspectors inspecting break bulk cargo."

exempt tasks, and "customarily and regularly" exercised "discretion and independent judgment" in performing those duties. (Cal. Code Regs., tit. 8, § 11050, subd. 1(A)(1)(e); *Heyen v. Safeway Inc.* (2013) 216 Cal.App.4th 795, 809-10 [discussing central inquiry of whether a manager "primarily engaged" (i.e., spent more than 50% of her time) in managerial duties during a workweek].) This is a unique situation to Kim, at his restaurants. "To determine which employees are entitled to overtime because of improper classification is an 'individual, fact-specific analysis' of each general manager's performance of the managerial and non-managerial tasks." (*Jimenez v. Domino's Pizza, Inc.* (C.D. Cal. 2006) 238 F.R.D. 241, 251.) Numerous courts have denied certification of store managers on this basis. (*Id.* at 254; *Keller v. Tuesday Morning, Inc.* (2010) 179 Cal.App.4th 1389, 1399; *Arenas v. El Torito Restaurants, Inc.* (1998) 183 Cal.App.4th 723, 734-36; *Mora v. Big Lots Stores, Inc.* (2011) 194 Cal.App.4th 496, 510, 516.) The restaurants in which Kim worked were in Pasadena and Sherman Oaks, two industrialized areas. (1 AA 87 ¶ 4.) Kim was a salaried, managerial employee. And his counsel—who owed a fiduciary duty to the putative class—affirmatively represented nobody else was relying on the action to protect their interests. (2 AA 289.) Amici's suggestion the Court of Appeal's ruling implicates the unpaid wages of thousands of workers in the rural economy is patently untrue.

The fact that Kim cannot bring a PAGA claim stops no one else from coming forward to advance his particular theory of liability, assuming anyone else shared his view. (*Reins, supra,* 18 Cal.App.5th at 1059 ["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.'"]) The Court of Appeal ruled that because Kim was not aggrieved, he no longer had standing to pursue the PAGA claim. It did not hold that all PAGA claims against Reins are barred. To the extent Amici suggest otherwise, that is also false.[5]

This case did not involve hundreds of rural, low-wage agricultural workers, who lost out on their cases because a summary judgment was granted against Kim. It involves one salaried professional who took a deal with assistance of counsel because it made sense to him.

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[5] For the same reasons, CRLA's argument about PAGA's cure provisions are nonsensical. CRLA argues the Court of Appeal's ruling "empowers an employer to 'cure'" a PAGA violation by resolving claims with one employee. (CRLA Brief, pp. 27-28.) But Kim's dismissal of his claims does not cure any PAGA *violations*. Settlement and dismissal of contested claims simply results in Kim's lack of standing to pursue PAGA claims. Anyone else could have stepped forward and pursued similar claims on behalf of aggrieved employees if there was anyone else interested or concerned that such violations actually occurred.

B. False Hypothetical Number 2: This is Not a Case of Proven Violations Affecting 150 Workers

CRLA also begins with an imagined scenario of a plaintiff who brings claims before the Labor Commissioner, who proves Labor Code violations of hundreds of thousands of dollars suffered by 150 employees. (CRLA Brief, pp. 7-8.) In the hypothetical, the defendant tries to avoid Labor Commissioner fines by settling one plaintiff. That result would not be fair, CRLA contends, so this Court should reverse the fair result reached here. Amici's argument is not based in reality and misstates Reins' argument.

Reins never said an employer should escape fines when there are proven violations to 150 employees. Neither did the Court of Appeal. Here, one restaurant manager made a limited claim. When that manager accepted a payment of $20,000, plus attorney fees, that manager's attorney should not be able hold the restaurant hostage by continuing to pursue a headless PAGA representative action.

C. False Hypothetical Number 3: This is Not a Case of Proven Violations Against Kim, Where Others Were Coerced or Threatened Not to Advance Claims

Bet Tzedek also advances similar improper hypotheticals and conjecture that do not affect this case. It boldly asserts "Kim worked between 50 to 70 hours per week at a restaurant but was wrongfully denied overtime pay by his employer." (Bet Tzedek Brief, p. 23.) Bet Tzedek cites no support in the record for this assertion other than mere allegations in the complaint.

In reality, the case was settled and dismissed by Kim, through a 998 offer made "with the express understanding that [Reins] denies any liability in this action." (2 AA 344.) There is no evidence that Kim, or others, were victims of Labor Code violations. If there were, Kim would be an "aggrieved employee" with standing to pursue his PAGA claim.

Bet Tzedek further argues the Court of Appeal's ruling is "disconnected from the practical and economic realities that low-wage workers face." (Bet Tzedek Brief, p. 25.) It argues that many low-wage workers face wage theft, and are pressured not to file a complaint at the risk of retaliation. It cites studies claiming that Los Angeles is the "wage theft capital of the nation." (*Id.*, pp. 25-26.) Bet Tzedek also notes workers who are immigrants may be afraid to raise complaints due to concerns of deportation. (*Id.*)

Reins does not mean to diminish these potential issues, but they are not present here. Kim was a managerial employee. He asserted no retaliation claim and there is no evidence Reins discouraged him from raising his complaints. And shortly after he accepted the 998 offer, Kim *and his counsel* affirmatively represented nobody else had an interest in these claims on a class-wide basis. (2 AA 289.) There is no evidence of rampant wage theft, that Kim felt pressured to drop his claims, or that others even had similar claims. The evidence suggests the opposite.

Bet Tzedek also suggests the Court of Appeal's result encourages an employer to "pick off" and "circumvent liability under PAGA." But the *voluntary* settlement of class or representative actions has been approved by both California and federal courts. (*Watkins, supra*, 172 Cal.App.4th at 1588-89 ["Should these substantive claims become moot ..., by settlement of all personal claims for example, the court retains no jurisdiction over the controversy of the individual plaintiffs."]; *Camesi v. Univ. of Pittsburgh Med. Ctr.* (3d Cir. 2013) 729 F.3d 239, 247 ["[Plaintiffs'] voluntary dismissal of their [FLSA] claims with prejudice—has not only extinguished Appellants' individual claims, but also any residual representational interest that they may have once had."]) This is not a case of a forced attempted "pick off" offer where the plaintiff rejects the offer, and an employer nevertheless asks the court to find the plaintiff lacks standing to pursue the claims. This is a case where Kim voluntarily accepted a 998 offer assisted by his counsel. Kim's settlement furthers the strong public policies supporting settlement and finality of judgments.

IV. KIM'S VOLUNTARY WAIVER DID NOT RUN AFOUL OF *ISKANIAN* OR PAGA'S SETTLEMENT PROVISION

A. Kim's Waiver Was Voluntary, Not Forced and Did Not Violate *Iskanian*

CRLA argues Kim's post-dispute, voluntary decision to dismiss his Labor Code claims violates the prohibition on forced, pre-dispute waivers of

PAGA rights discussed in *Iskanian*. (CRLA Brief, pp. 19-23.)[6] This argument fails.

Iskanian only held pre-dispute waivers of PAGA claims violated public policy. (59 Cal. 4th at p. 383 ["[I]t is contrary to public policy for an employment agreement to eliminate this choice altogether by requiring employees to waive the right to bring a PAGA action before any dispute arises."] [internal citations omitted].) *Iskanian* also held that "... employees are free to choose whether or not to bring PAGA actions when they are aware of Labor Code violations." (*Id.*) This case concerns no mandatory pre-dispute PAGA waiver that Kim had to sign. It involves a post-dispute, voluntary settlement with one employee.

CRLA argues Kim effectively had to accept the 998 offer or suffer the risk of paying costs, leaving him with a "Hobson's Choice." (CRLA, p. 23.) CRLA overreaches. *First,* with no foundation, CRLA suggests Kim's PAGA claim was worth hundreds of thousands of dollars. *Second,* Reins' 998 offer was for $20,000 plus fees. Kim alleged in his complaint that the amount in controversy exceeded $25,000. (1 AA 47 ¶ 9.) CRLA fails to explain why Kim had to accept $20,000 if he thought his case was worth more. *Third,* CRLA ignores this was a settlement negotiated with assistance of counsel. It was not a waiver. Kim and his counsel reviewed the 998 offer and signed the

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[6] Bet Tzedek makes a similar argument. (Bet Tzedek Brief, pp. 21-23.)

acceptance, aware of prior precedent regarding representative standing. Kim and his counsel could have rejected the 998 offer, litigated Kim's individual claims, and maintained standing as a PAGA representative. Kim chose not to do so.

CRLA's argument is one against 998 offers altogether. But the Legislature, not the courts, declares the public policy of the state. (*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 71-72.) The Legislature authorized 998 offers "to encourage the settlement of lawsuits prior to trial" and "avoid the time delays and economic waste associated with trials." (*Martinez v. Brownco Constr. Co.* (2013) 56 Cal.4th 1014, 1019; *T. M. Cobb Co. v. Superior Court* (1984) 36 Cal.3d 273, 280 ["the clear purpose of section 998 and its predecessor, former section 997, is to encourage the settlement of lawsuits prior to trial"].) Courts have also found that 998 offers and their federal equivalent (Rule 68 offers) made to an individual plaintiff are permissible in class and collective actions. (*Genesis Healthcare Corp. v. Symczyk* (2013) 569 U.S. 66, 78 [acceptance of Rule 68 offer left respondents with "no personal interest in representing putative, unnamed claimants"].) The decision Kim faced with his 998 offer is one that an individual would face in any lawsuit.

B. Kim's Voluntary Settlement Did Not Run Afoul of PAGA's Settlement Provision

Bet Tzedek also argues Kim's voluntary settlement and dismissal of his individual claims violated Labor Code § 2699, subd. (l)(2), which provides that "[t]he superior court shall review and approve any settlement of any civil action filed pursuant to this part." But the parties settled no PAGA action. While in arbitration, Kim settled and dismissed his individual Labor Code claims with prejudice. The issue here is whether because of the dismissal of his individual claims, Kim could continue to pursue representative PAGA claims. The issue raises questions of Kim's standing, which were resolved by a summary judgment motion. (2 AA 439-445.) There is no rule requiring trial courts to conduct the PAGA settlement approval analysis in conjunction with ruling on a dispositive motion. This case does not implicate Labor Code § 2699, subd. (l)(2) because there was no settlement of a PAGA action.[7]

V. AMICI'S PRIVATE RIGHT OF ACTION ANALOGY FAILS

CRLA also argues that PAGA creates penalties for Labor Code provisions that otherwise have no private right of action. CRLA cites Labor

[7] Relatedly, CRLA contends the 998 offer improperly forced Kim to release PAGA claims outside of its scope. (CRLA Brief, pp. 19-20.) This is false. The 998 offer did not release the State's right to pursue civil penalties or the rights of other aggrieved employees to pursue them for the State. It simply provided for the dismissal of all of Kim's individual Labor Code claims with prejudice. When Kim accepted this offer, the effect of this dismissal was that Kim lost standing to pursue his PAGA claims.

Code § 204 and suitable seating regulations, which provide for no private right of action but can support a PAGA cause of action. (CRLA Brief, pp. 26-27.) According to CRLA, these claims prove you need not have a viable Labor Code claim to have a PAGA claim. (*Id.*) These claims prove nothing of the sort.

Even where there is no private right of action, one must have standing to proceed under PAGA's "aggrieved employee" requirement. (Reins' Answer Brief, pp. 34-35.) That certain Labor Code provisions do not have a private right of action does not change the injury requirement. Recovery would still depend on whether the employee is "aggrieved" under PAGA, which requires an underlying Labor Code violation. CRLA ignores this point.

CRLA's argument fails for another reason. It has no bearing on this case. ***Kim never alleged unique PAGA violations based on Labor Code § 204 or suitable seating regulations***. This case originally started as a class action. (1 AA 16-29). Kim sued for unpaid wages and overtime, failure to provide meal and rest periods, failure to provide accurate wage statements, and failure to timely pay wages upon termination. (1 AA 16.) Then, on March 13, 2014, Kim then filed an LWDA Notice. (1 AA 124-125.) In it, Kim indicated the causes of action were set forth in the original class action complaint. (1 AA 124.) In his FAC, Kim pursued PAGA claims based on these ***very same violations.*** (1 AA 58 ¶¶ 67-68.) There were no separate

Labor Code violations alleged under PAGA other than those alleged in his initial complaint. Kim also admitted in court filings he had no PAGA claims outside of his Labor Code violations. (1 AA 117 ["Plaintiff's PAGA claim for civil penalties arises from the ***same allegations of violations of the Labor Code that form the basis for Plaintiff's claims for damages*** ... If Plaintiff were unsuccessful in establishing his status as an 'aggrieved employee' in Court, any arbitration of his claims would be rendered moot."] [emphasis supplied].). Thus, when Kim dismissed all of his claims for individual Labor Code violations, he had no claims upon which to base a claim for PAGA penalties.

The issue here is whether PAGA claims based on alleged Labor Code violations can be brought, after all of those underlying allegations are barred and dismissed the prejudice. The answer to that question is no.

VI. THE COURT DID NOT "BIFURCATE" KIM'S CLAIMS

Bet Tzedek also claims the Court of Appeal's ruling improperly "carv[ed] out standing" as an individual component that can be "adjudicated separately" from PAGA. It argues this undermines the rule that PAGA must be a "representative action," and prior cases that do not permit splitting an individual and representative component of a single PAGA claim. (Bet Tzedek Brief, pp. 12-14.) Bet Tzedek badly confuses the concept of standing and bifurcation of a PAGA claim.

The mere fact that PAGA is a representative claim does not mean that individuals bringing a PAGA claim need not satisfy the "aggrieved employee" requirement. (*Amalgamated Transit Union, supra,* 46 Cal. 4th at 1001.) This comports with PAGA's language, which provides "civil penalties may be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself *and* other current or former employees." (Lab. Code § 2699, subd. (a) [emphasis added].) This means that PAGA representatives must have their own underlying Labor Code claims and sue on behalf of others.

Bet Tzedek cites *Williams v. Superior Court* (2015) 237 Cal.App.4th 642 and *Perez v. U-Haul of California* (2016) 3 Cal.App.5th 408. These cases do not deal with the aggrieved employee requirement. They simply state viable PAGA claims cannot be split into individual and representative components. But the Court of Appeal did not improperly split Kim's PAGA claim. It simply ruled that when all of the individual claims giving rise to Kim's PAGA claims were no longer viable, neither was the PAGA claim.

Bet Tzedek takes the argument a step further by arguing it would be "absurd to require a plaintiff to be able to 'maintain a viable individual claim' for suitable seating or other claims where no individual right of action is available." (Bet Tzedek Brief, p. 14.) Bet Tzedek is simply attacking a straw man argument. Reins never argued nor did the Court of Appeal hold that as a prerequisite to bringing a PAGA claim, one must have a viable private right

of action for claims where no private right of action exists. Reins never argued dismissal with prejudice of one Labor Code theory resolves PAGA claims based on entirely different theories. Instead, the result here involved a finding there were no viable PAGA claims after *all of the individual claims* giving rise to them were dismissed. Had Kim alleged a new and different theory—like suitable seating—in his PAGA letter, the result might be different. He did not. Bet Tzedek's hypothetical argument ignores these realities.

VII. CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Court of Appeal.

Respectfully submitted,

Dated: March 4, 2019

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

By: _____

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CERTIFICATE OF COMPLIANCE

Pursuant to Cal. Rules of Court 8.520, I, Jesse C. Ferrantella, certify that I prepared Respondent's Answer Brief on the Merits and that the "word count" on the Microsoft Word program used to prepare the brief determined the text of the brief consists of 7,262 words, exclusive of the title page, tables of contents and authorities, this certificate, and the proof of service.

Dated: March 4, 2019

Jesse C. Ferrantella

PROOF OF SERVICE

JUSTIN KIM VS. REINS INTERNATIONAL CALIFORNIA, INC.
Supreme Court Case No. S246911

I am and was at all times herein mentioned over the age of 18 years and not a party to the action in which this service is made. At all times herein mentioned I have been employed in the County of San Diego in the office of a member of the bar of this court at whose direction the service was made. My business address is 4370 La Jolla Village Drive, Suite 990, San Diego, California 92122.

On March 4, 2019, I served the following document(s):

CONSOLIDATED ANSWER TO BRIEF OF *AMICI CURIAE* CALIFORNIA RURAL LEGAL ASSISTANCE, INC.; CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION; CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION; CONSUMER ATTORNEYS OF CALIFORNIA AND ASIAN AMERICANS ADVANCING JUSTICE – LA; AND BET TZEDEK

by placing ☐ (the original) ☒ (a true copy thereof) in a sealed envelope addressed as stated on the attached mailing list.

☒ **BY MAIL:** I placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Ogletree, Deakins, Nash, Smoak & Stewart P.C.'s practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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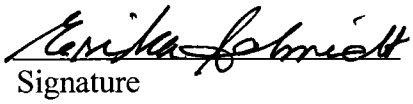
☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 4, 2019, San Diego, California.

Erika Schmidt
Type or Print Name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