S246911

In the Supreme Court of the State of California

JUSTIN KIM,

Plaintiff and Appellant,

v.

REINS INTERNATIONAL CALIFORNIA,

Defendant and Respondent.

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

REPLY TO ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

Reins's Answer to Petition for Review ("Answer") minimizes the breadth of the *Reins* opinion and downplays the threat that it poses to Labor Code enforcement under the California Labor Code's Private Attorneys General Act ("PAGA").

First, Reins misreads the opinion as hinging only on the effect of Kim's dismissal with prejudice, when it actually turns on Kim's inability to maintain "viable" individual Labor Code claims: "Kim's acknowledgement that he no longer has any viable Labor Code claims against Reins . . . is the fact that undermines Kim's standing." (*Kim v. Reins International California, Inc.* (2017) 18 Cal.App.5th 1052, 1059.) This dangerous precedent lets employers avoid PAGA by resolving the individual, non-PAGA claims of the state's representative. Thus, rather than simply apply established standing principles to PAGA (*see* Answer at 6), the panel interprets PAGA's "aggrieved employee" provision in a way that undermines the important public policies that the Legislature intended PAGA to serve. (*See* Cal. Rules of Court, rule 8.500(b)(1) [review warranted where necessary to settle an important question of law].)

The case for review becomes even stronger in light of the conflict between *Reins* and *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 383. While *Iskanian* invalidates PAGA waivers in arbitration agreements, *Reins* lets employers use arbitration to defeat PAGA because arbitration—no matter the outcome—resolves the individual "grievance[s] against [an] employer for Labor Code violations" that *Reins* says are necessary for standing. (*Reins, supra,* 18 Cal.App.5th at p. 1058.) This rule presents a major obstacle to PAGA because arbitration often proceeds prior to litigation of any non-arbitrable (PAGA) claims in the action. (*See* Code

of Civil Procedure section 1281.4; 1 AA 75.) Reins's focus on pre-dispute waivers misses the point because the de facto PAGA waiver that *Reins* authorizes is accomplished by a pre-dispute agreement, just as in *Iskanian*. (*See* Answer at 14–15; *Iskanian, supra*, 59 Cal.4th at p. 360; *Reins, supra*, 18 Cal.App.5th at p. 1055.) As noted in the Petition, there is an additional conflict between *Reins*'s requirement for viable individual claims and PAGA's authorization of claims that lack an individual right to sue. These conflicts further compel review. (*See* Cal. Rules of Court, rule 8.500(b)(1) [review warranted to secure uniformity of decision].)

ARGUMENT

A. Review is Necessary to Settle an Important Question of Law.

1. *Reins* Strips a PAGA Representative of Standing After A Resolution of Individual Claims—Not Just After a Settlement Conditioned on a Dismissal with Prejudice.

Reins glosses over the Court of Appeal's logic to downplay the impact of its decision. The *Reins* opinion represents more than a simple application of "bedrock" standing principles to PAGA. (Answer at 6.) As Reins agrees, the Court of Appeal held that a PAGA representative's standing is removed whenever he "no longer maintain[s] any viable Labor Code-based claims" against an employer. (Answer at 8, quoting *Reins, supra*, 18 Cal.App.5th at p. 1058.) Kim's Petition points out that a loss of "viable" Labor Code claims occurs any time an aggrieved employee resolves his individual claims—whether through a settlement (as in the present case), or through prevailing at trial or in arbitration. (Petition at 7, 17–20.) Thus, under *Reins*, any resolution of individual Labor Code

claims—even in the employee's favor—results in a loss of standing and dismissal of claims under PAGA.

Contrary to Reins's argument, nothing about the Court of Appeal's rationale rests on the fact that Kim's settlement involved a dismissal of his individual claims with prejudice. The panel does not cite any of the cases that, according to Reins, establish the "principles of law" governing the effect of such a dismissal, even though Reins brought these cases to the court's attention. (*See* Respondent's Answering Brief at 1, 12, 21–22, citing *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 793, *Watkins v. Wachovia Corporation* (2009) 172 Cal.App.4th 1576; Answer at 7.) Moreover, as Kim notes in his Petition, the Court of Appeal stated that Kim's standing was not lost because his dismissal operated as an adjudication in Reins's favor. (*Reins, supra*, 18 Cal.App.5th at p. 1059, fn. 2.) Rather, Kim lost standing because he settled and no longer had an individual grievance for the same violations on which he sought PAGA penalties. (*Id.* at p. 1058.)

The opinion thus turns on an unprecedented interpretation of PAGA's "aggrieved employee" provision as requiring a "viable" and ongoing individual "grievance against [an] employer for Labor Code violations." (*Reins, supra*, 18 Cal.App.5th at p. 1058.) As the opinion states: "Kim's acknowledgement that he no longer has any viable Labor Code claims against Reins . . . is the fact that undermines Kim's standing." (*Id.* at p. 1059.) Or as Reins puts it: so long as a PAGA representative's individual Labor Code claims "cannot be advanced," he cannot qualify as an "aggrieved employee" under PAGA. (Answer at 12.) Following this line of reasoning, the Court of Appeal cited the trial court's order that Kim lost standing because "his rights have been completely redressed" and stating

that he "ceased being an aggrieved employee by virtue of his settlement." (*Id.* at p. 1056.)

The problem with the Court's reasoning—and the critical reason for review—is that pinning standing on an employee's ability to maintain viable individual claims makes PAGA illusory. Under *Reins*, an employer can secure dismissal of PAGA merely by settling the individual claims of the PAGA representative.[1] After *Reins*, it is hard to imagine an employer that would not simply settle the representative's claims—even at a premium—rather than pay PAGA's civil penalties, which are aggregated among all affected employees. (*See* Lab. Code § 2699.)

It's true, as Reins notes, that the Court of Appeal made assurances that its opinion is "confined to the specific circumstances at issue in this case," but merely saying that the opinion should be read narrowly does not undo its rationale. (Answer at 9, quoting *Reins, supra,* 18 Cal.App.5th at p. 1059.) Following the Court of Appeal's logic, *Reins* stands to vitiate PAGA as an enforcement mechanism for Labor Code claims by letting employers settle with the state's authorized representative instead of with the state. (*Cf. Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 383.)

B. Review is Necessary to Secure Uniformity of Opinion.

1. *Reins* Does Not Square With *Iskanian* Because It Gives Arbitration Agreements the Power to Waive PAGA.

Reins's Answer fails to address the conflict between *Reins* and *Iskanian* discussed in the Petition. As Kim argues, the Court of Appeal's opinion violates *Iskanian* because it lets employers secure a PAGA

[1] Alternatively, *Reins* could allow employers to secure dismissal of PAGA by waiting out the statute of limitations on individual claims if the representative brings a PAGA-only action, or by paying a judgment or award entered after trial or arbitration.

dismissal merely by enforcing an agreement to arbitrate individual, non-PAGA claims. (Petition at 19, citing *Iskanian, supra*, 59 Cal.4th at pp. 386–387.) Once an employee's claims are resolved in arbitration, *Reins* holds that she no longer has standing to proceed with PAGA claims predicated on the same conduct at issue in the arbitration: "Kim's acknowledgement that he no longer has any viable Labor Code claims against Reins . . . is the fact that undermines Kim's standing." (*Reins, supra*, 18 Cal.App.5th at p. 1059.) Accordingly, under *Reins*, *Iskanian* becomes meaningless. It doesn't matter if an arbitration agreement's PAGA waiver is unenforceable. (*See Iskanian, supra*, 59 Cal.4th at p. 384.) All an employer needs to do is compel arbitration of individual claims, and the PAGA dismissal will follow.

Allowing arbitration to preclude PAGA claims undermines *Iskanian*'s logic. In *Iskanian*, an employee brought a PAGA claim for the same types of wage violations at issue in the present case. (*Iskanian, supra*, 59 Cal.4th at p. 361.) The employee had signed an arbitration agreement purporting to waive his right to bring PAGA. (*Id.* at p. 360.) This Court refused to enforce the PAGA waiver as against public policy. First, it found that "an agreement by employees to waive their right to bring a PAGA action serves to disable one of the primary mechanisms for enforcing the Labor Code." (*Id.* at p. 383.) Second, it found that "the waiver of PAGA rights would harm the state's interests in enforcing the Labor Code and in receiving the proceeds of civil penalties used to deter violations." (*Ibid.*) Reins is correct that the enforceability of the direct PAGA waiver in Kim's arbitration agreement is not at issue (*see* Answer at pp. 14–15), but the interpretation of PAGA's "aggrieved employee" provision in a manner that creates a de facto PAGA waiver is squarely before the Court.

Unless this Court steps in, Labor Code violators will continue using *Reins* as a loophole to *Iskanian*. Code of Civil Procedure section 1281.4 requires arbitration to go forward prior to any non-arbitrable claims in the action. As Reins argued to the trial court: "Both the CAA and FAA require the Court to stay the litigation until arbitration is concluded." (1 AA 75.) However, under *Reins*, by following this procedure and keeping PAGA stayed pending arbitration, PAGA withers on the vine. After arbitration, *Reins* bars the state's authorized representative from taking up the PAGA case again because arbitration resolved the "viable" individual Labor Code grievances that are necessary for PAGA standing. (*Reins, supra*, 18 Cal.App.5th at p. 1059.)

Reins's Answer does not address this conflict and only attempts to distinguish *Iskanian* as involving a pre-dispute waiver. (Answer at 14–15.) Reins's focus on pre-dispute waivers misses the point. The waiver here is accomplished by a pre-dispute agreement, just as in *Iskanian*. (*Iskanian, supra*, 59 Cal.4th at p. 360; *Reins, supra*, 18 Cal.App.5th at p. 1055.) The representative-action waiver in Kim's arbitration agreement with Reins could not be enforced pursuant to *Iskanian*, but Reins used the agreement to secure dismissal of Kim's PAGA claim anyway. (*See* 1 AA 260–261; *Reins, supra*, 18 Cal.App.5th at p. 1059.)

The Court of Appeal's attempts to minimize its opinion's inconsistencies with *Iskanian* are likewise unavailing. Although the Court said that it would reach the same conclusion even if arbitration were not involved, this does not change the implications of its opinion where arbitration *is* involved. (*See Reins, supra*, 18 Cal.App.5th at p. 1059; Answer at 15.) As arbitration agreements have become common following the United States Supreme Court's ruling in *AT&T Mobility LLC v.*

Concepcion (2011) 563 U.S. 333, employers will continue to exploit the *Reins* loophole to *Iskanian* if this Court does not grant review.

2. Reins's Analysis of *Lu* and *Friant* Underscore the Confusion that Will Ensue if *Reins* Becomes Controlling Law.

Reins's analysis of *Lu* and *Friant* underscore the conflict pointed out in the Petition between *Reins*'s requirement for viable individual claims and PAGA's authorization of claims where there is no private right to sue. With regard to *Lu*, Reins concedes that PAGA authorizes an employee to "step *into the shoes* of the LWDA" to pursue a wage claim under Labor Code section 351, yet an employee cannot pursue such a claim in his own right. (Answer at 16, emphasis in original; *see Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592, 595.) Reins never addresses Kim's argument on this point—that PAGA's authorization of claims for which a viable individual claim is impossible conflicts with *Reins*'s requirement of viable individual claims as a prerequisite for PAGA standing. (*See* Petition at 15–17; *Reins, supra*, 18 Cal.App.5th at p. 1058.) Since *Reins* strips employees of standing to pursue PAGA where they cannot pursue a viable individual claim, the case removes from PAGA's reach a broad swath of Labor Code violations for which there is no private right to sue.

Reins, likewise, fails to appreciate the inconsistency between the Court of Appeal's opinion and *Lopez v. Friant & Associates, LLC* (2017) 15 Cal.App.5th 773, 781, review denied (Jan. 10, 2018). Reins is correct that *Friant* focuses on the difference between statutory and civil penalties for wage statement violations. (Answer at 18 ["the 'knowing and intentional' and 'injury' requirements were only found in Labor Code Section 226's provisions relating to *statutory* penalties . . . ."] [emphasis in

original].) But Reins never addresses the holding in *Friant* that conflicts with the opinion here—that a PAGA wage-statement claim may proceed without proof of the elements necessary for an individual violation. (*Friant, supra*, 15 Cal.App.5th at p. 784.) This holding cannot coexist with *Reins*'s requirement that an employee maintain viable individual claims for all conduct on which a PAGA claim rests. (*Reins, supra*, 18 Cal.App.5th at p. 1059.) Kim does not argue that *Friant* "eradicate[s] the standing requirement under PAGA," Answer at 19, only that *Friant*'s authorization of PAGA claims for which there is insufficient proof to establish an individual violation conflicts with *Reins*'s requirement that an employee maintain "viable" individual claims to satisfy PAGA's "aggrieved employee" provision. (See Petition at 16.)

3. Reins's "Consistent" Cases Do Not Address the Issue in Kim's Petition.

Reins cites to one pre-*Iskanian* Court of Appeal opinion and six district court opinions that it maintains are "uniform" and consistent with the Court of Appeal. (Answer at 10–12.) None of these decisions addresses the issue presented by this case, which is likely why the Court of Appeal did not cite a single one of them.

Reins's cases deal with situations where a PAGA claim lacks merit or becomes moot, not where a PAGA representative loses standing because his separate individual claim is settled or dismissed. For example, in *Villacres v. ABM Industries, Inc.* (2010) 189 Cal.App.4th 562, 572, the PAGA action was barred because the plaintiff had agreed to release Labor Code claims for civil penalties as part of a prior class action settlement. The court held that he could not turn around and bring a second lawsuit for the same civil penalties. (*Id.* at p. 569.) Unlike in *Villacres*, Kim did not sign

away any right to civil penalties. In fact, he attempted to preserve his right to PAGA penalties by carving PAGA out of his settlement and request for dismissal. (2 AA 286, ¶ 3 [the PAGA claim "shall remain"]; 2 AA 287, 336–337.)

Similarly, the court in *Holak* found that the plaintiff was not an "aggrieved employee" because none of the violations that the employer committed were within PAGA's statute of limitations. (*Holak v. Kmart Corp.* (E.D. Cal., May 19, 2015, No. 1:12-CV-00304-AWI-MJ) 2015 WL 2384895, at *4.) The court reasoned, unsurprisingly, that the alleged illegal act must occur within the limitations period. (*Id.* at *4.)

Reins's other "consistent" cases do not focus on or analyze PAGA's standing provision. (*See Pinder v. Employment Dev. Department* (E.D. Cal. Jan. 5, 2017) No. 2:13-CV-00817 TLN-DB, 2017 WL 56863, at *22 [PAGA failed as a matter of law because the Labor Code provisions allegedly violated did not provide a cause of action to a public employee]; *Gofron v. Picsel Technologies, Incorporated* (N.D. Cal. 2011) 804 F. Supp. 2d 1030, 1043 [Court granted summary judgment, finding no violation of the Labor code occurred]; *Molina v. Dollar Tree Stores, Incorporated* (C.D. Cal. May 19, 2014), No. 12-cv-01428- BRO FFMX, 2014 WL 2048171, at *14 [employee could not prove that his employer committed any Labor Code violations]; *Wentz v. Taco Bell Corporation* (E.D. Cal. Dec. 4, 2012) No. 12-cv-1813 LJO DLB, 2012 WL 6021367, at *3 [PAGA remanded to state court to be decided in same forum as employee's individual Labor Code claims].) Kim is not arguing that a PAGA claim can continue when a court or arbitrator finds that there is no Labor Code violation, only that an employer cannot defeat PAGA simply by settling the individual, non-PAGA claims of the PAGA representative.

Additionally, to the extent that *Boon* and *Gofron* construe PAGA as a mechanism for enforcing underlying *individual* claims, this Court and others have since held that such a notion is incorrect. (*Cf. Boon v. Canon Business Solutions, Incorporated* (C.D. Cal. May 21, 2012) No. 11-cv-08206 R (CWX), 2012 WL 12848589, at *1, rev'd and remanded on other grounds (9th Cir. 2015) 592 F. App'x 631 [Hon. Judge Real granted summary judgment on PAGA after granting motion to dismiss Plaintiff's "underlying" claims]; *Williams v. Superior Court* (2015) 237 Cal.App.4th 642, 647[rejecting employer attempt to split PAGA into arbitrable and non-arbitrable components because PAGA does not rest on an "underlying controversy" or separate "individual claim"]; *Iskanian, supra*, 59 Cal.4th at p. 381 ["The civil penalties recovered on behalf of the state under the PAGA are distinct from the statutory damages to which employees may be entitled in their individual capacities."].)

C. Future Opportunities for Review Will Prove Elusive.

Finally, not only is review necessary to settle an important question of law and to secure uniformity of opinion, but it is particularly important here because future opportunities for review will prove elusive, and in the meantime thousands of employees will likely be harmed.

Because *Reins* pins "aggrieved employee" status on the ability to maintain "viable" individual claims, employers will likely use *Reins* to secure PAGA dismissals by 1) settling individual claims of the PAGA representative; 2) securing an arbitration award resolving the representative's individual claims; 3) waiting out the statute of limitations on the representative's individual claims if she brought a PAGA-only action; or 4) settling individual claims of people who would otherwise be represented in a PAGA action so that they no longer qualify as "aggrieved

employees" on whose behalf civil penalties may be sought. (See Cal. Lab. Code § 2699(a).) These maneuvers stand to "disable one of the primary mechanisms for enforcing the Labor Code" and "harm the state's interests in . . . receiving the proceeds of civil penalties used to deter violations." (*Iskanian, supra*, 59 Cal.4th at pp. 383.)

If the Court does not grant review, it could take years for cases applying *Reins* to percolate through the Courts of Appeal, and many dismissed PAGA cases will not be appealed at all. (*Williams, supra,* 3 Cal.5th at p. 545.) In the meantime, not only will the state fail to collect civil penalties for many workplace abuses, but the threat of PAGA as a deterrent to such abuses will vanish. (*See Williams v. Superior Court* (2017) 3 Cal.5th 531, 545 [Legislature intended PAGA's civil penalties to be "significant enough to deter violations."] [internal quotations omitted].) This Court should step in now and set forth a definitive rule that protects workers as the Legislature intended.

CONCLUSION

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

March 8, 2018 **KINGSLEY & KINGSLEY, APC**

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.504(d)(l), I hereby certify that this Petition for Review contains 3,081 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.

March 8, 2018 **KINGSLEY & KINGSLEY, APC**

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

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s/Alina Tsesarsky

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