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In the

Supreme Court

of the

State of California

JUSTIN KIM,

Plaintiff and Appellant,

v.

REINS INTERNATIONAL CALIFORNIA,

Defendant and Respondent.

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

APPELLANT'S OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED FOR REVIEW

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

INTRODUCTION

The California Legislature enacted the Labor Code Private Attorneys General Act of 2004 ("PAGA") to address statewide under-enforcement of worker protections. Before PAGA, workers could sue on their own behalf for some Labor Code violations, but many violations could only be prosecuted by state agencies—such as the Labor & Workforce Development Agency ("LWDA")—and these agencies lacked the capacity to vigorously enforce minimum labor standards. Staffing levels could not keep pace with growth in the labor market, and although some violations were punishable as criminal misdemeanors, district attorneys devoted resources to other priorities.

PAGA responded to this "systemic underenforcement" by deputizing "aggrieved employees" to prosecute workplace violations on the state's behalf. (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 545.) Once the state deputizes an employee under PAGA, he or she may prosecute the state's claim for civil penalties to punish and deter workplace abuses, with recovery going largely to the state. (*Ibid.*)

In the present case, the state deputized Justin Kim to bring a PAGA action against Kim's former employer, Reins International California, Inc. ("Reins"), for unpaid wages and failure to provide lawful meal and rest periods. Kim brought the state's civil-penalty claim in addition to an individual claim for damages. The court ordered Kim to arbitrate his

individual claims and stayed the PAGA action. During arbitration, Kim accepted Reins's offer to compromise his individual claims and later dismissed those claims with prejudice pursuant to the conditions of Reins's offer. When Kim returned to court to prosecute the state's PAGA claim, the court held that Kim had lost standing as an "aggrieved employee" under PAGA because his individual claims were redressed.

The Court of Appeal affirmed. It held that an employer can secure a PAGA dismissal by settling the individual claims of the "aggrieved employee" representative because standing turns on being able 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 (hereafter *Kim*).)

This dangerous precedent misconstrues PAGA's "aggrieved employee" standing provision and undermines the important public policies that the Legislature intended PAGA to serve. It's true that PAGA only allows claims to be "brought by" an "aggrieved employee," but PAGA's "aggrieved employee" requirement rests on whether a violation was committed against the employee—not on whether she can maintain an individual damages claim for that violation. It would have made no sense for the Legislature to tie "aggrieved" status to individual claims because PAGA authorizes claims for which there is no private right to sue. In fact, the Legislature specifically identified many claims without a private right of action as under-enforced and in need of "aggrieved employee" prosecution under PAGA.

While the "aggrieved employee" definition's text, and PAGA as a whole, are sufficient to determine this issue, PAGA's history confirms that

"aggrieved" status does not turn on individual claims. The Legislature added the "aggrieved employee" provision to prevent suits by the "general public" and people who had never suffered harm—not to prevent employees who *do* suffer alleged harm from pursuing PAGA because they dismiss individual claims. Policymakers wanted PAGA's standing provision to prevent the kinds of abuses that existed under the Unfair Competition Law, which at the time conferred standing on members of the "general public." Although the Legislature could have departed from the "general public" standard with a harsh provision restricting PAGA only to those with the right to maintain individual claims, it did not. Instead, it limited standing to people like Kim, who allege to have suffered one or more of the violations giving rise to the PAGA claim, regardless of whether they settle or dismiss individual claims.

Indeed, if an employer can defeat PAGA merely by resolving the representative's individual claims, then the statute becomes illusory. All an employer needs to do is settle with the state's representative, instead of with the state. PAGA is supposed to serve as "one of the primary mechanisms for enforcing the Labor Code," not as a facilitator of individual settlements. (*Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 383.) Kim respectfully asks this Court to reverse the judgment and remand.

STATEMENT OF THE CASE

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

Reins operates a restaurant chain where Kim worked as a "training manager." (1 AA 49–50; *Kim, supra*, 18 Cal.App.5th at p. 1055.) Kim alleges that Reins misclassified him and other training managers as exempt

from overtime and certain wage requirements, failed to pay all wages owed, and failed to provide lawful meal and rest periods. (1 AA 45.) Kim filed a class action lawsuit. (1 AA 14.) After receiving authority from the Labor & Workforce Development Agency ("LWDA") to serve as a PAGA representative, he amended his complaint to assert a claim for civil penalties on the state's behalf pursuant to PAGA. (1 AA 45, 58 at ¶ 71; *Kim, supra*, 18 Cal.App.5th at p. 1055.)

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

Reins moved to compel arbitration of Kim's individual claims, dismiss his class claims, and stay PAGA pending arbitration. (1 AA 67; *Kim, supra*, 18 Cal.App.5th at p. 1055.) Kim opposed the motion, arguing that the PAGA action should proceed concurrently or prior to arbitration. (1 AA 115.) The court granted Reins's motion. It dismissed Kim's class claims, ordered arbitration of his individual claims, and stayed his PAGA claim while the arbitration moved forward.[1] (1 AA 249, 262.)

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

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

[1] The Court of Appeal's opinion erroneously states that the trial court reserved the issue of class arbitrability for the arbitrator. (*Kim, supra*, 18 Cal.App.5th at p. 1055.) In fact, the court dismissed class claims, finding that "the parties did not agree to class-wide arbitration, and accordingly, [the court] does not refer that issue to the arbitrator." (1 AA 262:1–7.)

individual claims," in exchange for a dismissal of Kim's "individual claims against Reins in their entirety." (2 AA 336–337.)

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

D. The Court Dismisses Kim's PAGA Claim on the Ground that Settling Removed His Standing as an "Aggrieved Employee," and the Court of Appeal Affirms.

After the arbitration concluded, Reins moved for summary adjudication on Kim's one remaining cause of action for PAGA penalties. (2 AA 298–304.) Reins argued that Kim no longer qualified as an "aggrieved employee" under PAGA because he "resolved his individual claims against Reins under the Labor Code." (2 AA 301–303.) The court granted Reins's motion and dismissed Kim's PAGA claim, holding that Kim lost "aggrieved employee" status because "[h]is rights have been completely redressed." (2 AA 444.) At the hearing, the court noted that this case presents a novel issue that is ripe for consideration by the higher courts.[2] (2 AA 441–447; 1 RT 13:13-16 ["I encourage you to take it up and educate us all on what we should do in the future."].)

The Court of Appeal issued a published opinion on December 29, 2017. The panel held that, by accepting Reins's settlement offer and

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[2] Following the summary judgment ruling, the trial court struck Reins's request for costs, finding that even though Reins won summary judgment, the overall result was mixed because Kim's $20,000 settlement made him the prevailing party in arbitration. (See Reply Appendix at 3–5.)

dismissing his individual claims, Kim "essentially acknowledged that he no longer maintained any viable Labor Code-based claims." (*Kim, supra*, 18 Cal.App.5th at p. 1058.) According to the Court of Appeal, Kim's settlement in arbitration stripped him of standing as an "aggrieved employee" and he therefore could no longer serve as a PAGA representative. (*Id.* at pp. 1058–1059.)

This Court granted review on March 28, 2018.

ARGUMENT

A. PAGA Strengthens Enforcement of the Labor Code and Deters Workplace Abuses.

PAGA serves as "one of the primary mechanisms for enforcing the Labor Code" in California. (*Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 383.) The statute deputizes "aggrieved employees" as private attorneys general to bring claims for workplace violations on the state's behalf. (*Ibid.*) These private law enforcement actions benefit workers and the public by deterring violations, penalizing employers that violate the law, and devoting civil penalties collected from PAGA actions to "educat[e] . . . employers and employees about their rights and responsibilities" under the Labor Code. (Lab. Code § 2699(i); *Iskanian,* at p. 387.)

The Legislature enacted PAGA in 2003 after observing that many workplace abuses were going unchecked. Despite California's public policy to vigorously enforce minimum labor standards, see Cal. Lab. Code, § 90.5; *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794, there was a shortage of government resources for enforcement, staffing levels at labor-law enforcement agencies could not keep pace with growth in the labor market, and many violations were punishable only as criminal

misdemeanors, yet district attorneys directed their resources to other priorities. (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 980; *Iskanian, supra*, 59 Cal.4th at p. 379.) In short, the state was experiencing "systemic underenforcement of many worker protections." (*Williams v. Superior Court (Marshalls of CA, LLC)* (2017) 3 Cal.5th 531, 545.)

PAGA addressed these concerns "by adopting a schedule of civil penalties 'significant enough to deter violations' for those provisions that lacked existing noncriminal sanctions, and by deputizing employees harmed by labor violations to sue on behalf of the state and collect penalties, to be shared with the state and other affected employees." (*Williams, supra*, 3 Cal.5th at p. 545, quoting *Iskanian, supra*, 59 Cal.4th at p. 379 [internal quotations omitted].) To become deputized as the state's representative, an "employee must first give written notice of the alleged Labor Code violation to both the employer and the Labor and Workforce Development Agency." (*Montano v. Wet Seal Retail, Inc.* (2015) 7 Cal.App.5th 1248, 1256.) "If the Agency does not respond within the allotted time, or provides notice of its intention not to investigate, the employee may then bring a civil action against the employer." (*Ibid.*)

The employee representative serves as a qui tam relator. (*Iskanian, supra,* 59 Cal.4th at p. 382.) Indeed, "[a] PAGA representative action is . . . a type of qui tam action" and "[t]he government entity on whose behalf the plaintiff files suit is always the real party in interest in the suit." (*Ibid.*; see also *Huff v. Securitas Security Services USA, Inc.* (May 23, 2018, No. H042852) __ Cal.App.5th __ [2018 WL 2328672, at *5].) Of course, not everyone is eligible to bring a PAGA action. As relevant here, the claim may only be "brought by an aggrieved employee" (Lab. Code § 2699(a)), defined 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); see *Huff*, at *3).

B. PAGA Confers Standing on Employees Against Whom a Violation Was Committed, Regardless of Their Ongoing Ability to Maintain Individual Claims.

Nothing in the text of PAGA's "aggrieved employee" definition suggests an obligation to maintain viable individual Labor Code claims. The definition's simple requirement that the employee suffer a Labor Code violation by the alleged violator can be met regardless of the right to redress that violation individually. PAGA's use of the term "aggrieved employee" supports this reading: the statute only uses the term to limit whom a PAGA suit may be "brought by" and to describe the procedure for litigating a PAGA case once the "aggrieved employee" brings it. (See Lab. Code §§ 2699, 2699.3.) If the Legislature wanted to restrict whom a PAGA action could be "maintained by" to only those with an ongoing right to pursue individual violations, it would have said so. It suggested the opposite by omitting any mention of "individual violations" within the "aggrieved employee" provision, and by enacting other provisions within PAGA that can't harmonize with a requirement for individual claims.

"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.) Courts construe words according to "their plain and commonsense meaning" (*ibid.*), and take care not to "add to or alter them,"

(*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 698 (hereafter *California Teachers Assn.*).) "We have also recognized that statutes governing conditions of employment are to be construed broadly in favor of protecting employees." (*Murphy,* at p. 1103.)

As noted, for purposes of standing, Labor Code section 2699 provides that a PAGA action may be "brought by an aggrieved employee on behalf of himself or herself and other current or former employees," with "aggrieved employee" defined 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(a), (c).) There is no dispute that alleging harm establishes standing at the outset, and that Kim met this requirement:

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

(*Kim, supra*, 18 Cal.App.5th at p. 1058; see *Williams, supra*, 3 Cal.5th at p. 546 ["Suit may be brought by any 'aggrieved employee' [citation] . . . If the Legislature intended to demand more than mere allegations as a condition to the filing of suit . . . it could have specified as much."].)

The only question, then, is whether PAGA imposes an additional requirement, of which Kim ran afoul, that the representative maintain viable individual claims to continue having standing during a pending case. PAGA's text leaves no doubt: The answer is "no." Kim's dismissal therefore had no impact on his PAGA standing, and this Court should reverse.

1. PAGA's "Aggrieved Employee" Definition Does Not Tie Standing to the Viability of Individual Claims.

PAGA's "aggrieved employee" provision has two criteria: First, the employee must be "any person who was employed by the alleged violator." (Lab. Code § 2699(c).) Second, the employee must be a person "against whom one or more of the alleged violations was committed." (*Ibid.*)

The first requirement, that the employee have been employed by the violator, is not impacted by the employee's dismissal or settlement of individual claims. Redress of individual harm has no bearing on the historical fact of whether an employee "was employed by the alleged violator." (Lab. Code § 2699(c); see *California Teachers Assn., supra,* 28 Cal.3d at p. 698.) Either she "was employed," or she wasn't.

Likewise, a settlement of individual claims has no impact on the "aggrieved employee" definition's second prong, that the employee be a person "against whom one or more of the alleged violations was committed." (Lab. Code § 2699(c).) Again, whether an alleged violation was committed is a fact. It can be proven or disproven without regard to whether an individual claim remains viable after settlement. Nothing about redressing or dismissing individual claims changes whether an alleged violation "was committed." (*Ibid.*)

Perhaps Reins will argue that a dismissal makes it impossible for an individual violation to be "alleged," and thus a representative's dismissal of individual claims means he is no longer a person against whom one or more of "the alleged violations" was committed. However, this interpretation presumes that the term "the alleged violations" refers to alleged *individual* violations for which the employee may seek damages. This can't be what the Legislature meant. Not only does this interpretation insert new words

into the provision, it runs afoul of the grammatical rules guiding this Court's analysis. (See *Pineda v. Bank of America, N.A.* (2010) 50 Cal.4th 1389, 1396.)

Read in its ordinary sense, the definite article "the" in the term "the alleged violations" denotes specific violations mentioned previously. (See *Pineda, supra*, 50 Cal.4th at p. 1396 ["[U]se of the definite article 'the' . . . refers to a specific person, place, or thing."].) Looking above to discern which violations "the alleged violations" refers to, it is clear that they are "violation[s] of this [labor] code" subject to civil penalties by the Labor Commissioner, which PAGA authorizes an employee to enforce on the state's behalf. (Lab. Code § 2699(a).) These are the only violations previously referenced. (See Lab. Code §§ 2699(a), (c).) Giving ordinary meaning to the statute's text, the "violations" that the aggrieved employee must allege for purposes of PAGA are violations giving rise to civil penalties, not ones for which she may seek damages in an individual capacity.[3]

The definition's "one or more" language provides additional support for this reading. The Court of Appeal in *Huff v. Securitas Security Services USA, Inc.* recently held that the requirement for an "aggrieved employee" to have suffered "one or more" of the alleged violations means what it says: that the PAGA representative must have been affected by "one, but not necessarily all, of the violations alleged in the action." (*Huff, supra*, __Cal.App.5th __ [2018 WL 2328672, at *7].) In order for the words "or

[3] The fact that PAGA allows an employee to pursue individual claims in a "separate[] action" lends further support to the conclusion that "the alleged violations" necessary for standing are not individual ones, but are the civil-penalty claims discussed in Section 2699(a). (Lab. Code § 2699(g)(1).)

more" to have meaning, an employee must be able to assert PAGA claims beyond the ones he personally suffered. (Cf. *Kim, supra*, 18 Cal.App.5th at p. 1059.) Authorizing the representative to sue for "more" violations than those that affected her personally suggests that the relevant violations are ones that could give rise to PAGA penalties, not ones the employee seeks to redress individually.

This is not to say that a PAGA representative retains standing even if he fails to meet the "aggrieved employee" requirements. If a court adjudicates that the representative was not "employed by the alleged violator" or is not someone against whom "one or more of the alleged violations was committed," then the representative cannot qualify as an "aggrieved employee." (See Lab. Code § 2699(c).) For example, in *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993, 1005 (hereafter *Amalgamated Transit Union*), this Court held that labor unions could not qualify as "aggrieved employees" under PAGA "[b]ecause plaintiff unions were not employees of defendants." Since the PAGA claim could not be assigned by employees to the unions, and the unions could not assert "associational standing," the unions could not move forward with PAGA claims on behalf of their members. (*Id.* at p. 1005.) Of course, nothing in *Amalgamated Transit Union* suggests that an employee like Kim, who alleges to have been harmed by Reins's workplace violations, loses "aggrieved employee" status merely by settling or dismissing individual claims.

2. PAGA as a Whole Does Not Tie Standing to the Viability of Individual Claims.

PAGA as a whole underscores that "aggrieved employee" status cannot rise and fall with the representative's individual claims. "[T]he

words of a statute [must be construed] in context, harmoniz[ing] the various parts of an enactment by considering the provision at issue in the context of the statutory framework as a whole." (*Cummins, Inc. v. Superior Court* (2005) 36 Cal.4th 478, 487; see also Code Civ. Proc., § 1858.)

Interpreting the "aggrieved employee" provision to require viable individual claims conflicts with PAGA's use of this term in other parts of the statute. "[W]ords or phrases given a particular meaning in one part of a statute must be given the same meaning in other parts of the statute." (*Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 979.) PAGA's first mention of the term "aggrieved employee" comes in section 2699(a), which states that a PAGA action may only be "brought by an aggrieved employee." The Legislature could have broadened this to limit whom a PAGA action may be "brought or maintained by" (or it could have used the term "prosecuted by," which was later incorporated into the Unfair Competition Law's standing provision, see Business and Professions Code § 17204) but it did not, and "[t]his court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed." (*California Teachers Assn., supra,* 14 Cal.4th at pp. 632–633.)

Beyond referring to "aggrieved employee" as a limitation on whom a PAGA action may be "brought by," PAGA only uses the term to establish procedures for litigating and settling a PAGA case.[4] Among these other

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[4] See Lab. Code § 2699(d) [describing "cure" process where employer can avoid penalties for certain violations by "abat[ing] each violation alleged by any aggrieved employee"]; § 2699(e)(2) [authorizing court to award less than the maximum penalty amount "[i]n any action by an aggrieved employee seeking recovery of a civil penalty available under subdivision (a) or (f)"; § 2699(f)(2) [setting forth a schedule of civil penalties "for each aggrieved employee per pay period"]; § 2699(h) [preventing an action from being "brought under this section by an

uses of "aggrieved employee," there is no requirement to maintain viable individual claims, nor any provision implying that the Legislature intended such a requirement. (Cf. *Kim, supra,* 18 Cal.App.5th at p. 1059.)

On the contrary, PAGA's other references to the term "aggrieved employee" dictate that "aggrieved" status cannot depend on individual violations. For example, PAGA's formula for calculating civil penalties is "one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation." (Lab. Code § 2699(f)(2).) Although this Court has held that these civil penalties "are distinct from the statutory damages to which employees may be entitled in their individual capacities" (*Iskanian, supra*, 59 Cal.4th at p. 381), defining "aggrieved employee" to include only employees with viable individual claims makes civil penalties and statutory damages practically indistinguishable. Under the Court of Appeal's reading, all an employer needs to do to avoid PAGA's civil penalties is to pay compensatory damages to affected employees, and these employees would then no longer count as "aggrieved employees" for PAGA's penalty calculation.[5] The

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aggrieved employee" if the LWDA issues a citation for the same violation during a pre-lawsuit investigation]; § 2699(*i*) [apportioning "civil penalties recovered by aggrieved employees" 75 percent to the LWDA and "25 percent to the aggrieved employees"]; § 2699(*l*) [requiring the "the aggrieved employee or representative" to provide the LWDA with a file-stamped copy of the complaint within 10 days of filing]. Additionally, PAGA's Section 2699.3 uses the term "aggrieved employee" to set forth the notice requirements that such an employee must meet prior to commencing a civil action for PAGA penalties.

[5] According to amicus curiae the Consumer Attorneys of California, in the wake of the Court of Appeal's opinion, some employers have actually tried to avoid PAGA penalties by offering individual damages settlements to

"aggrieved employee" provision thus defangs PAGA's entire penalty system, which could not have been the Legislature's intent. (See *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 [court "must keep[] in mind the nature and obvious purpose of the statute" in which a contested provision appears].)

Assessing penalties only for those employees with viable individual claims also leads to absurd results in situations where conduct is punishable under PAGA with a different quantum of proof than individually. For instance, Labor Code section 226(a) governs the information that must appear on wage statements. (*Lopez v. Friant & Associates, LLC* (2017) 15 Cal.App.5th 773, 781, review denied Jan. 10, 2018.) PAGA authorizes a civil penalty for a violation of that subsection, while Labor Code section 226(e) authorizes damages for the same conduct upon proof of a "knowing and intentional" violation. (*Ibid.*) Even if *Friant* could be harmonized with *Kim* to allow a PAGA-226(a) action to proceed in the absence of "knowing and intentional" violations (it can't), *Kim* suggests that penalties would only apply for those employees who can prove the "knowing and intentional" elements necessary for an individual claim. A more logical approach is to construe the term "aggrieved employee" as anyone who suffered a Labor Code violation punishable under PAGA, not as anyone who can prove the elements of an individual cause of action for the same conduct as a PAGA claim.

Further, allowing an employer to avoid civil penalties by resolving individual employees' damages claims does not comport with PAGA's limited "cure" provisions. PAGA specifies that claims for certain violations

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their entire workforce. (See Amicus Letter in Support of review, March 8, 2018.)

are curable by the employer under limited circumstances. If a violation is subject to cure, then the employer can avoid civil penalties by (1) "abat[ing] each violation alleged by any aggrieved employee," (2) being "in compliance with the underlying statutes as specified in the notice required by this part" and (3) making "any aggrieved employee . . . whole." (Lab. Code, § 2699(d).) Contrary to these express limitations, allowing an employer to defeat "aggrieved employee" status by redressing individual claims would let the employer cure *all* violations simply by "making any aggrieved employee whole."[6] (See Lab. Code, § 2699(d).) If the Legislature wanted to make all PAGA claims so easily curable, it would not have created such a narrow and specific cure process.

Finally, PAGA's guarantee that an "aggrieved employee" may pursue individual claims "either separately or concurrently with" a PAGA action suggests that PAGA standing does not depend on the viability of individual claims. (Lab. Code § 2699(g).) If a legal bar on the right to pursue individual claims strips an employee of PAGA standing, then the employee *must* bring a separate individual action concurrently with a PAGA action in order to toll the statute of limitations on individual claims. Otherwise, the individual limitations period could expire while the PAGA case is pending, at which point the employee would no longer be "aggrieved," and PAGA would be dismissed. But the fact that the Legislature preserved the right to bring a PAGA-only action and to bring PAGA separately or concurrently with individual claims, shows that it did not intend to force employees to bring separate individual claims or risk losing PAGA standing. (See *Williams v. Superior Court (Pinkerton*

[6] Or arguably, even by making an employee less than "whole" if paying a settlement for less than the total amount owed removes "aggrieved" status.

Governmental Services, Inc.) (2015) 237 Cal.App.4th 642, 647 [holding that stand-alone PAGA claim can proceed without any "underlying" individual controversy]; *Reyes v. Macy's, Inc.* (2011) 202 Cal.App.4th 1119, 1123 [finding that there is no "individual claim under PAGA"].)

As neither the definition of "aggrieved employee" nor the use of that term in the statute support hinging "aggrieved" status on the viability of individual claims, the trial court should have allowed Kim's PAGA claim to go forward after he settled his individual, non-PAGA causes of action in arbitration.

3. The Legislature Could Not Have Intended to Tie Standing to Individual Claims Because PAGA Authorizes Claims for Which No Private Right of Action Exists.

Finally, PAGA's authorization of claims for which no private right of action exists shows that the Legislature did not intend viable individual claims to serve as a predicate for PAGA standing. Indeed, the Legislature enacted PAGA to strengthen enforcement of many provisions without private rights of action, including those previously enforceable by state agencies only through civil penalties or as criminal misdemeanors. (*Iskanian, supra*, 59 Cal.4th at p. 378 [declaring that the Legislature enacted PAGA, in part, because provisions such as Labor Code sections 210 and 225.5 only authorized civil penalties, and others, such as Labor Code sections 215, 216, and 218, could only be punished as criminal misdemeanors].)

Accordingly, PAGA's section 2699.5 sets forth many Labor Code provisions that lack a private right to sue, but that give rise to non-curable

PAGA violations.[7] There are still other provisions with no private right of action that are not specifically mentioned within PAGA but that are made

[7] See, e.g., Lab. Code § 204 (late payment of wages subject to non-curable PAGA claim in Labor code section 2699.5 yet some federal courts, including in *Johnson v. Hewlett-Packard Co.* (N.D. Cal. 2011) 809 F.Supp.2d 1114, 1136, have suggested that there is no private right to sue for this violation); § 204b (same); § 204.1 (same); § 204.2 (same); § 205 (same); § 205.5 (same); § 212 (violation of requirement to pay by negotiable check subject to non-curable PAGA claim in Labor code section 2699.5, yet the district court for the Central District of California held in *Gunawan v. Howroyd-Wright Employment Agency* (C.D. Cal. Jan. 30, 2014) 997 F.Supp.2d 1058, 1068 that no private right of action exists because section 212 expressly authorizes only criminal sanctions and agency enforcement); § 213 (same); § 221(same); § 222 (same); § 222.5 (same); § 223 (same); § 351 (tip-pooling violation subject to non-curable PAGA claim in Labor code section 2699.5, yet this Court held in *Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592, 595 "that [Labor Code] section 351 does not contain a private right to sue."); § 450 (employer forcing employee to patronize the employer's business gives rise to non-curable PAGA claim yet held not to give rise to private right of action in *Harris v. Vector Marketing Corp.* (N.D. Cal., May 20, 2010, No. C-08-5198 EMC) 2010 WL 2077015, at *4); §§ 1174(c) and (d) (subject to non-curable PAGA claim in Labor code section 2699.5, yet *Chang v. Biosuccess Biotech Co., Ltd.* (C.D. Cal. 2014) 76 F.Supp.3d 1022, 1050 holds that no private right of action exists for violation of this provision); § 1290 (employment of minors listed as non-curable claim under PAGA's section 2699.5 yet only expressly punishable by civil penalty pursuant to Labor Code sections 1285 and 1288); § 1292 (same); § 1293 (same); § 1293.1 (same); § 1294 (same); § 1294.1 (same); § 1294.5 (subject to non-curable PAGA claim under Labor code section 2699.5, yet remedies contained in statute are limited to civil penalties); § 1297 (same); § 1298 (same); § 1308 (provision criminalizing employment of minors listed as non-curable PAGA violation in Section 2699.5 but not expressly subject to private right of action); § 1308.1 (same); § 1308.7 (same); § 1309 (same); § 1391(same); § 1392 (same); § 2651 (industrial homework violation subject to non-curable PAGA violation under Labor Code section 2699.5 yet the case of *Bureerong v. Uvawas* (C.D. Cal. Mar. 1996) 922 F.Supp. 1450, 1475 holds that there is no private right of action to enforce this section); § 2673 (violation of recordkeeping requirement for garment workers subject to non-curable PAGA claim under Labor Code section 2699.5, yet Labor

actionable under PAGA's sections 2699(a) or (f).[8] The Legislature would not have authorized these PAGA claims if it would be impossible to bring them.

C. Legislative History Shows That the "Aggrieved Employee" Provision Was Meant to Prevent Suits by the General Public, Not to Strip Employees of Standing When They Resolve Individual Claims.

Although the Court need not look to legislative history in light of the statute's plain meaning, PAGA's history "confirm[s] the interpretation already apparent from the plain language," that PAGA's "aggrieved employee" provision was never meant to allow employers to secure a dismissal by settling the named representative's individual claims. (*Huff, supra*, __ Cal.App.5th __ [2018 WL 2328672, at *4]; *see Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 ["the 'plain meaning' rule does not

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Code section 2674 states that "[t]he Division of Labor Standards Enforcement shall enforce Section 2673").

[8] See, e.g., Labor Code § 216 (PAGA establishes a civil penalty for this provision under Section 2699(f) yet the only specified remedy is for criminal sanctions, see *Trahan v. U.S. Bank National Assoc.* (N.D. Cal., Aug. 19, 2014, No. C 09-03111 JSW) 2014 WL 12788804, at *4); § 226.3 (wage statement penalty statute held enforceable under PAGA's section 2699(a) in the case of in *Raines v. Coastal Pacific Food Distributors, Inc.* (2018) 23 Cal.App.5th 667, but statute authorizes only civil-penalty claims and enforcement by the Labor Commissioner); § 226.8 (willful misclassification of an employee as an independent contractor is unenforceable as a private right of action pursuant to *Noe v. Superior Court* (2015) 237 Cal.App.4th 316, yet subject to civil penalties under PAGA's section 2699(a)); § 558 (statute authorizing civil penalties for certain wage violations lacks private right to sue but may be enforced by Labor Commissioner or PAGA representative. This Court recently granted review to decide whether a PAGA claim seeking 558 penalties falls under the preemptive scope of the Federal Arbitration Act. (See *Lawson v. ZB, N.A.* (2017) 18 Cal.App.5th 705, 723, as modified (Dec. 21, 2017), review granted March 21, 2018, S246711.))

prohibit a court from determining whether the literal meaning of a statute comports with its purpose . . . ."].)

The "aggrieved employee" provision's history shows that it was intended to prevent the general public and people who "suffered no harm" from filing PAGA actions. (Sen. Judiciary Com., Analysis of Sen. Bill No. 796 (2003–2004 Reg. Sess.) as amended, Apr. 29, 2003, p. 6, ¶ 5, Motion for Judicial Notice ("MJN") filed herewith, Ex. C.) The Legislature never meant to close off PAGA to employees who *do* suffer alleged harm but dismiss individual claims by way of a settlement.

Senator Joe Dunn introduced PAGA as Senate Bill 796 in 2003. (Sen. Bill No. 796 (2003–2004 Reg. Sess.), as introduced Feb. 21, 2003, MJN, Ex. A.) The bill's initial draft used the term "aggrieved employee" but did not define it. (*Ibid.*) The bill provided that any violation subject to civil penalties by the Labor Commissioner could, "as an alternative, be recovered through a civil action" brought by an "aggrieved employee" on a collective basis: "An aggrieved employee may recover the civil penalty described in subdivision (b) in a civil action filed on behalf of himself or herself or others." (*Id.* at proposed §§ 2699(a), (c).) The Senate amended the bill on May 1, 2003 to specify that a PAGA action may only be "brought by" an aggrieved employee and to include the definition of "aggrieved employee" appearing in the enacted statute.[9] (Sen. Amend. to Sen. Bill No. 796 (2003–2004 Reg. Sess.), May 1, 2003, MJN, Ex. A, at proposed §§ 2699(a), (c).)

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[9] The May 1 amendment also inserted a reference to PAGA's statute-of-limitations within the "aggrieved employee" definition, but this was later removed. (Sen. Amend. to Sen. Bill No. 796 (2003–2004 Reg. Sess.), May 1, 2003, MJN Ex. A, at proposed § 2699 (c).)

From the beginning, the committee analyses describe PAGA as authorizing a civil-penalty claim by an "aggrieved employee," but also suggest that this employee might not have the right to sue individually for all conduct giving rise to a PAGA claim.[10] While the April 29, 2003 Senate Judiciary Analysis discusses the "aggrieved employee" as someone "employed by the alleged violator . . . against whom one or more of the violations alleged in the action was committed," that analysis also states that the employee can pursue claims under PAGA that, at the time, were "punishable only as criminal misdemeanors" (i.e., could not be pursued individually). (Sen. Judiciary Com., Analysis of Sen. Bill No. 796 (2003–2004 Reg. Sess.) as amended, Apr. 29, 2003, MJN, Ex. C, at p. 4, § 2.)

It's true that the Legislature ultimately defined the term "aggrieved employee" in response to concerns about the kinds of "private plaintiff abuse" that then existed under the Unfair Competition Law ("UCL"), but it consistently acknowledged that the violation that must be suffered by an "aggrieved employee" under PAGA does not necessitate a viable individual claim. "Historically, the UCL authorized any person acting for the interests of the general public to sue for relief notwithstanding any lack of injury or damages." (*Hale v. Sharp Healthcare* (2010) 183 Cal.App.4th 1373, 1381.)

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[10] The committee analyses take care to distinguish the role of the "aggrieved employee" under PAGA from that of a so-called private attorney general suing for public relief under the Unfair Competition Law: "Th[e] PAG rights afforded individuals under this bill are separate and distinct from those afforded individuals under the UCA." (Sen. Com. on Lab. and Ind. Relations, Analysis of Sen. Bill No. 796 (2003–2004 Reg. Sess.) Apr. 9, 2003, MJN, Ex. B, at p. 3, § 5.) While the UCA has "broad applicability," "the right to act as a PAG under this bill is available to further the purposes of protecting the rights of workers under the Labor Code." (Sen. Com. on Lab. and Ind. Relations, Analysis of Sen. Bill No. 796 (2003–2004 Reg. Sess.) Apr. 9, 2003, MJN, Ex. B, at p. 3, § 5.)

PAGA's sponsors noted that conferring standing on someone who was *never* harmed by the alleged violation had led to "well-publicized allegations of private plaintiff abuse of the UCL." (Sen. Judiciary Com., Analysis of Sen. Bill No. 796 (2003–2004 Reg. Sess.) as amended, Apr. 29, 2003, MJN, Ex. C, at p. 6, § 5,.) Thus, in committee, the sponsors defined the term "aggrieved employee" to assure opponents that "this bill would not open private actions up to persons who suffered no harm from the alleged wrongful act."[11] (Sen. Judiciary Com., Analysis of Sen. Bill No. 796 (2003–2004 Reg. Sess.) as amended, Apr. 29, 2003, MJN, Ex. C at p. 6, § 5 and p. 7, § 6.) "Instead, private suits for Labor Code violations could be brought only by an 'aggrieved employee' – an employee of the alleged violator against whom the alleged violation was committed." (Sen. Judiciary Com., Analysis of Sen. Bill No. 796 (2003–2004 Reg. Sess.) as amended Apr. 29, 2003, MJN, Ex. C, at p. 6, § 5.)

As these committee notes suggest, the sponsors wanted PAGA's standing requirement to go beyond the UCL's "general public" standard, but not to be so restrictive as to hamstring PAGA's civil-penalty enforcement mechanism. While the Legislature could have departed from the UCL's "general public" standard by limiting PAGA claims only to those with "viable individual damages claims" for the alleged conduct underlying a PAGA action, it did not go so far. As discussed, limiting standing in this way would have undermined PAGA's purpose of allowing

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[11] Similarly, to "address concerns that the bill might . . . impose excessive penalties," the sponsors accepted an amendment "to reflect that penalties will be determined 'for each aggrieved employee,'" "as opposed to the total number of an alleged violator's employees." (Sen. Judiciary Com., Analysis of Sen. Bill No. 796 (2003–2004 Reg. Sess.) as amended, Apr. 29, 2003, MJN, Ex. C at p. 7, § 6.)

private civil-penalty claims for many violations previously enforceable only by state agencies.[12] (Sen. Judiciary Com., Analysis of Sen. Bill No. 796 (2003–2004 Reg. Sess.) as amended Apr. 29, 2003, MJN, Ex. C, at p. 4, ¶ 2; see *Arias, supra*, 46 Cal.4th at p. 980.) To avoid a result so incongruous with the statute's purpose, the sponsors designed a limited standing requirement that turns only on whether "one or more" of the alleged PAGA violations "was committed" against the employee. (Assemb. Com. on Judiciary, Analysis of Sen. Bill No. 796 (2003–2004 Reg. Sess.), MJN, Ex. F, at pp. 4–6.)

The Legislature's decision not to rest standing on the right to bring individual claims is consistent with the traditional rule that qui tam relators—such as PAGA representatives—are assigned the injuries of the entities that they represent. As this Court noted in *Iskanian*, "[t]he qui tam plaintiff under the Federal False Claims Act has standing in federal court under article III of the United States Constitution, even though the plaintiff has suffered no injury in fact, because that statute 'can reasonably be regarded as effecting a partial assignment of the Government's damages claim.'" (*Iskanian, supra*, 59 Cal.4th at p. 382.)

The Court of Appeal in *Huff* recently applied this qui tam analysis to PAGA's "aggrieved employee" provision, finding that "not being injured by a particular statutory violation presents no bar to a plaintiff pursuing penalties for that violation." (*Huff, supra*, __ Cal.App.5th __ [2018 WL 2328672 at *5].) "Although a PAGA suit differs from a pure qui tam action (such as under the Federal False Claims Act) in that PAGA's standing

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[12] Plus, because the bill used the term "aggrieved employee" before the definition was added, the Legislature would not have defined this term in a way that conflicts with its meaning in previous versions of the bill.

requirement prevents the general public from bringing an action," PAGA's standing provision "strikes a reasonable balance, requiring a plaintiff to have some connection to the employer's unlawful practices, while also advancing the state's interest in vigorous enforcement." (*Ibid.*) But "[t]he idea that a plaintiff must be aggrieved of all the violations alleged in a PAGA case does not flow logically from the fact that a plaintiff is standing in for government authorities to collect penalties paid (in large part) to the state." (*Ibid.*) "In that sense, it would be arbitrary to limit the plaintiff's pursuit of penalties to only those Labor Code violations that affected him or her personally." (*Ibid.*)

As the Legislature merely meant to limit the universe of potential qui tam relators to those who suffered alleged harm by an employer, it's clear that it did not intend to strip an employee like Kim of standing where he alleged harm, sued for that harm, and the employer paid significant compensation to resolve his claim. Kim's settlement and dismissal did not transform him into merely a member of the "general public" with no connection to Reins, or into someone "who suffered no harm from the alleged wrongful act." (Sen. Judiciary Com., Analysis of Sen. Bill No. 796 (2003–2004 Reg. Sess.) as amended, Apr. 29, 2003, MJN, Ex. p. 6, § 5.) On the contrary, even after Kim's settlement, the Legislature's purpose of narrowing the universe of potential PAGA plaintiffs remains satisfied because Kim alleges to have been employed by Reins and that the company committed Labor Code violations against him.

D. The Fact that Reins's 998 Offer Required a Dismissal Does Change the Standing Analysis.

There is nothing unique about a dismissal that changes the standing analysis. As noted, Kim dismissed his individual claims with prejudice

according to the conditions of Reins's offer to compromise. (2 AA 285–287.) Kim's request for dismissal carves out his PAGA claim as "the only cause of action remaining" after the dismissal. (2 AA 287, ¶ 12; *see also* 2 AA 286, ¶ 3 [the PAGA claim "shall remain"].) Reins has made the argument, both to this Court and the Court of Appeal, that Kim's dismissal ended his PAGA standing because it bars re-litigation of Kim's individual claims and can be construed as an adjudication on the merits in Reins's favor. (See Respondent's Answering Brief at 12; Answer to Petition for Review at 7.) Both points are misguided. Kim does not seek to re-litigate individual claims merely by continuing to serve as a PAGA representative, and Kim's dismissal does not constitute a factual finding that Reins never committed Labor Code violations against him.

First, it should be noted that the Court of Appeal's opinion did not turn on the effect of Kim's dismissal, but on the court's view that Kim's settlement resolved "any viable Labor Code claims" that Kim had against Reins: "Kim's acknowledgement that he no longer has any viable Labor Code claims against Reins . . . is the fact that undermines Kim's standing." (*Kim, supra*, 18 Cal.App.5th at p. 1058, 1059.) Whether the dismissal operated as an adjudication in either party's favor was beside the point: "To the extent Reins suggests that Kim's dismissal may operate as a finding on the merits regarding any alleged Labor Code violations under the PAGA, or that a PAGA claim by any other employee is somehow barred as a result of Kim's dismissal, we reject any such argument." (*Kim, supra*, 18 Cal.App.5th at p. 1059, fn. 2.) There were no issues adjudicated in Kim's arbitration, and the request for dismissal did not contain any factual conclusions relevant to standing. (2 AA 285–287.)

Even if the Court reaches the question of whether the dismissal resulted in a factual adjudication, if anything, that adjudication should be construed in Kim's favor because the dismissal was entered pursuant to Kim's acceptance of a $20,000 offer to compromise. (2 AA 336–337.) Generally, a judgment entered pursuant to a 998 offer is in the plaintiff's favor. (*See Rappenecker v. Sea-Land Service, Inc.* (1979) 93 Cal.App.3d 256, 263.) Although a 998 can specify for dismissal to be entered instead of judgment, the plaintiff remains the party in whose favor the 998 dismissal is entered:

> [A]s between the parties thereto and for purposes of enforcement of settlement agreements, a compromise agreement contemplating payment by defendant and dismissal of the action by plaintiff is the legal equivalent of a judgment in plaintiff's favor.

(*American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1055, quoting *Goodstein v. Bank of San Pedro* (1994) 27 Cal.App.4th 899, 907.) As the *Goodstein* court stated with regard to a 998 offer calling for a dismissal with prejudice: "We also reject appellant's claim that had he accepted the instant offer, calling for dismissal, such dismissal would have been tantamount to 'a judgment on the merits in favor of defendant.'" (*Goodstein, supra,* 27 Cal.App.4th at p. 908.) Accordingly, here the trial court rejected Reins's cost bill, finding that overall results were mixed since Kim won a monetary recovery in the arbitration, whereas Reins won summary judgment on Kim's PAGA claim. (See Reply Appendix at 3–5.) Thus, if anything, an employee such as Kim, who dismisses individual claims in exchange for money, should be deemed "aggrieved" under PAGA, not deemed to lack "aggrieved" status because

the employer made the strategic choice to condition its settlement offer on a dismissal.

Finally, putting aside the "aggrieved employee" provision, the dismissal of Kim's individual claims is not res judicata as to the state's civil-penalty claim. A dismissal with prejudice bars relitigation of "identical causes of action" to those that are dismissed. (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797; see *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896.) To determine whether a dismissed claim and an active one involve identical causes of action, courts look to whether the same primary rights are at stake. (*Boeken, supra,* 48 Cal.4th at p. 797.) For example, in *Boeken*, this Court held that "the primary right at issue in plaintiff's current wrongful death action for loss of consortium is the same as the primary right at issue in her previous common law action for loss of consortium." (*Id.* at p. 804.) Because the plaintiff's "dismissal [of her common law action] is the equivalent of a final judgment on the merits ([citation]), plaintiff may not now litigate the same primary right a second time." (*Ibid.*)

As discussed above, Kim serves as a qui tam relator in the PAGA suit to enforce the state's right to civil penalties, and thus the dismissal of his separate individual damages claim does not bar the PAGA action. A PAGA suit "'is fundamentally a law enforcement action designed to protect the public and not to benefit private parties.'" (*Iskanian, supra*, 59 Cal.4th at p. 381, quoting *People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 17; see also *Villacres v. ABM Industries Inc.* (2010) 189 Cal.App.4th 562, 578.) At all times, "the employee plaintiff represents the same legal right and interest as state labor law enforcement agencies." (*Arias, supra*, 46 Cal.4th at p. 986.) "The government entity on whose behalf the plaintiff

files suit is always the real party in interest in the suit," see *Iskanian, supra*, 59 Cal.4th at p. 382, and "the employee does not own an assignable interest," *Amalgamated Transit Union, supra,* 46 Cal.4th at p. 1003. By contrast, an individual claim for wage violations involves a "part[y's] own rights and obligations, not the rights of a public enforcement agency." (*Iskanian, supra*, 59 Cal.4th at p. 385.) As the right at issue in a PAGA case is not the employee's right to damages but the state's right to civil penalties, an employee's dismissal of individual claims has no res judicata effect on a PAGA claim.

It's true that courts interpreting PAGA have not squarely decided whether "every Labor Code violation and PAGA penalty involves a separate primary right," *Villacres, supra,* 189 Cal.App.4th at p. 581, but in a related context, the Court of Appeal for the Fourth Appellate District held that qui tam claims under the California False Claims Act ("FCA") don't involve the same rights as individual claims predicated on the same unlawful conduct. (*Rothschild v. Tyco Internat. (US), Inc.* (2000) 83 Cal.App.4th 488, 492.) In *Rothschild*, two consumers brought separate actions against a hardware supplier, each alleging that the supplier falsely represented the quality of plumbing hardware used in municipal water systems. (*Ibid.*) The two actions were "based on virtually identical factual allegations," but one consumer sued on behalf of the government under the FCA and the other "on behalf of herself and all others similarly situated" under the UCL. (*Id.* at p. 492.) The court rejected the supplier's argument that "there is but one 'primary right' underlying claims under both statutory schemes." (*Id.* at p. 499.) The FCA plaintiff "is not asserting a right held by herself or other individuals, but is acting on behalf of the government." (*Id.* at pp. 499–500.) "By contrast, [the UCL

plaintiff] asserts a wholly separate and distinct injury to herself and other individuals similarly situated resulting from the defendants' [alleged unlawful conduct]." (*Id.* at p. 500.) Although both claims arose from the same facts, the government's interest in the qui tam action gave rise to a different primary right than the individuals' interest in the UCL action, and each could proceed simultaneously. (*Ibid.*)

The same can be said here of Kim's individual and PAGA claims. As a PAGA representative, Kim stands in the Labor Commissioner's shoes. Before PAGA, "the Labor Commissioner could bring an action to obtain [civil] penalties, with the money going into the general fund or into a fund created by the Labor and Workforce Development Agency (Agency) for educating employers." (*Iskanian, supra*, 59 Cal.4th at p. 378.) PAGA simply provides a procedural mechanism for aggrieved employees, like Kim, to assert the same enforcement rights as the agency. A dismissal of Kim's individual claim for damages or statutory penalties does not preclude the state from further litigating its claim for civil penalties meant to deter and punish violations.

E. The Court of Appeal's Rule Would Vitiate PAGA as an Enforcement Mechanism for Labor Code Violations.

As discussed, the Legislature intended "aggrieved employees" under PAGA to stand in the state's shoes to enforce civil penalties for workplace abuses. Not only do PAGA's text and legislative history militate against deeming an employee's dismissal of individual claims to wipe away standing as the state's representative, but as argued below, hinging standing on the viability of individual claims also undermines the important worker protections that the Legislature intended PAGA to promote. Such a rule lets employers pay a small sum to a single employee to avoid paying more

substantial civil penalties meant to be "'significant enough to deter violations'." (*Williams,* 3 Cal.5th at p. 545, quoting *Iskanian*, 59 Cal.4th at p. 379.)

The Court of Appeal's rule also creates a loophole to this Court's rule against PAGA waivers, announced in *Iskanian, supra*, 59 Cal.4th at pp. 383. Where, as here, a court stays PAGA while private arbitration goes forward, the PAGA claim can never be resurrected because arbitration resolves the employee's individual claims necessary for PAGA standing. This rule threatens PAGA enforcement of Labor Code violations whenever an arbitration agreement is present.

1. The Court of Appeal's Rule Lets Employers Evade PAGA By Paying Off the State's Representative.

Pinning standing on an employee's ability to maintain viable individual claims makes PAGA illusory. If individual claims are necessary for standing, then an employer can secure a PAGA dismissal by settling with the state's authorized representative, instead of with the state. In fact, if the Court of Appeal's rule stands, 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(f).)

Beyond avoiding PAGA by settling with the named representative, the Court of Appeal's rule would also let employers secure PAGA dismissals by (1) obtaining an arbitration award resolving the representative's individual claims; (2) waiting out the statute of limitations on the representative's individual claims if she brought a PAGA-only action; or (3) 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), (c), (f)(2).) 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.)

Adopting the Court of Appeal's rule would also drive a wedge between the PAGA representative and the state, eroding PAGA's qui tam enforcement system. The Legislature drafted PAGA so that, "[p]ractically, the interests of plaintiff, counsel, and other potentially aggrieved employees are largely aligned." (*Williams, supra*, 3 Cal.5th at pp. 548–549, citing Lab. Code, § 2699, subds. (g)(1), (i).) As the aggrieved employee represents the state's interests, shares in the state's recovery, and may collect attorneys' fees and costs, he has an incentive to litigate as many claims on the state's behalf as the evidence supports. (*Ibid.*) The statute also lets employees pursue individual claims "separately or concurrently" with PAGA, so the vulnerable workers whom the Legislature envisioned stepping forward as "aggrieved employees" would not have to choose between compensation for lost wages and helping the state deter abusive practices. (See *Iskanian, supra*, 59 Cal.4th at p. 348, citing Assembly Com. on Labor and Employment, Analysis of Sen. Bill No. 796 (Reg. Sess. 2003–2004) as amended July 2, 2003, p. 4 [noting that the Legislature had in mind low-wage garment industry workers, among others, as the people who could step forward as "aggrieved employees" under PAGA].) Conditioning PAGA standing on individual claims forces employees into a bind that the Legislature never intended—either give up a potentially sizeable amount of money (in this case, $20,000 plus attorneys' fees) or take the money but give up the state's claim.

The viability of PAGA's collective enforcement system is also at stake. PAGA authorizes a collective action as the optimal way to strengthen Labor Code enforcement. (Lab. Code, § 2699(a) [permitting claims "on behalf of [the representative] and other current or former employees"]; see *Reyes v. Macy's, Inc.* (2011) 202 Cal.App.4th 1119, 1123 ["[T]he claim is not an individual one"].) This Court has said that the collective nature of the action is essential for effective enforcement. An action

> "for individual penalties will not result in the penalties contemplated under the PAGA to punish and deter employer practices that violate the rights of numerous employees under the Labor Code. 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 . . . . ([Citation].) Other employees would still have to assert their claims in individual proceedings."

(*Iskanian, supra*, 59 Cal.4th at p. 384, quoting *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 502.) Letting an employer secure a PAGA dismissal by settling with the named plaintiff does not foster collective enforcement, but forces a line of employees to come forward, one at a time, until one eventually refuses to settle individual claims. This is far from the robust collective enforcement scheme that PAGA envisions.

2. The Court of Appeal's Rule Prevents Employees from Continuing with PAGA After Private Arbitration, Contrary to *Iskanian*.

Finally, the Court should reverse because the Court of Appeal's rule lets employers secure a PAGA dismissal merely by enforcing an agreement to arbitrate individual claims, in violation of this Court's holding in *Iskanian, supra*, 59 Cal.4th at p. 384. Under *Kim*, once an employee's claims are resolved in arbitration, she no longer has standing to proceed with PAGA: "Kim's acknowledgement that he no longer has any viable

Labor Code claims against Reins . . . is the fact that undermines Kim's standing." (*Kim, supra*, 18 Cal.App.5th at p. 1059.) Accordingly, *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.*) Contrary to this rationale, here the Court of Appeal created a de facto PAGA waiver in *all* arbitration agreements by treating resolution of an employee's individual claims in arbitration as grounds for dismissing her PAGA claim.

The threat to PAGA is significant where an employee asserts arbitrable individual claims and non-arbitrable PAGA claims. Code of Civil Procedure section 1281.4 may require 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 *Kim*, by following this procedure

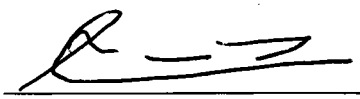
and keeping PAGA stayed pending arbitration, PAGA withers on the vine. After arbitration, the Court of Appeal's rule would bar the state's authorized representative from taking up the PAGA case again because arbitration resolved the "viable" individual Labor Code grievances necessary for standing. (*Kim, supra*, 18 Cal.App.5th at p. 1059.)

CONCLUSION

The Court of Appeal expanded PAGA's "aggrieved employee" provision beyond the Legislature's intent. Rather than focusing on whether "one or more of the alleged violations was committed" against Kim, the court hinged its analysis on whether Kim had the ability to assert viable individual Labor Code claims after his settlement. This analysis defies PAGA's straightforward standing provision, and defeats the statute's overall purpose of strengthening Labor Code enforcement. Kim respectfully asks this Court to reverse the judgment and remand.

June 25, 2018

KINGSLEY & KINGSLEY, APC

By: 

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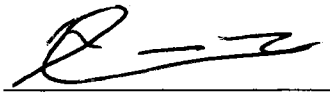
CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.520(c)(l), I hereby certify that this Petition for Review contains 10,075 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.

June 25, 2018

KINGSLEY & KINGSLEY, APC

By: 

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Attorneys for Plaintiffs-Appellants

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 June 25, 2018, I served the foregoing document described as **APPELLANT'S OPENING BRIEF** 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 June 25, 2018, following the ordinary business practice. As indicated in the service list attached, each listed individual or court is served as indicated.

[X] I electronically served a copy of the foregoing document via the court's TrueFiling portal on June 25, 2018, 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.

ERIC F WRIGHT
NOTARY PUBLIC, STATE OF NEW YORK
NO. 01WR6362222
KINGS COUNTY
COMM. EXP. 7/31/21

Executed on 25th day of June, 2018, at New York. New York

Eric Wright

SERVICE LIST

Justin Kim v. Reins International California
Supreme Court of the State California Case No. S246911
Second Appellate District, Division Four, Case No. B278642
Superior Court of Los Angeles County, Case No. BC539194

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