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

APPELLANT'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

Justin Kim ("Kim") alleges that Reins International California, Inc. ("Reins") deprived him and other employees of their earned wages and overtime, and failed to provide them with lawful meal and rest periods. These violations give rise to a claim for civil penalties by the California Labor Commissioner, but instead of bringing its own action, the Labor Commissioner deputized Kim to sue on its behalf under the California Labor Code's Private Attorneys General Act ("PAGA"). Kim brought the state's enforcement action as an "aggrieved employee"—someone who claims to have suffered one or more of "the alleged violations" the state could have otherwise prosecuted. Kim sued concurrently with an action for damages in his individual capacity. Reins offered Kim $20,000 to dismiss his "individual claims" with prejudice. Kim accepted, and filed a request for dismissal that specifically preserved the state's PAGA action.

Under these circumstances, Kim did not lose standing as an "aggrieved employee." The Legislature wanted "aggrieved employees" to bring claims under PAGA that they are barred from pursuing individually—such as for Labor Code violations previously punishable only through government enforcement actions. (See *Arias v. Superior Court* (2009) 46 Cal.4th 969, 980.) It's true that the Legislature enacted a standing clause in PAGA to prevent abusive lawsuits by the "general public" and people with no connection to the alleged violator, but Justin Kim is not such a person. He not only alleges to have been harmed by Reins's Labor Code violations, but he maintains a continued stake in the PAGA case by standing to share in the state's recovery of civil penalties.

Reins's main counterpoint is that PAGA's standing provision is supposed to function like standing requirements in non-qui-tam statutes, such

as the Unfair Competition Law ("UCL") and the Federal Labor Standards Act ("FLSA"), where standing depends on "having a viable injury to redress through judgment." (ABM at 15–19.)[1] But standing to serve as a qui tam relator is strictly a creature of statute, and there is no statutory support for Reins's interpretation. Indeed, many provisions within PAGA would become nonsensical or run counter to the statute's purpose if the term "aggrieved employee" were interpreted in the way Reins advocates.

Reins is also wrong that PAGA serves as a "procedural statute" for employees to seek penalties for their own "underlying Labor Code violations." Reins would have a stronger argument that standing is lost upon dismissal of an employee's underlying claims if that were the case. But the Legislature did not intend PAGA merely to help employees "*find a remedy*" for their own claims; it intended it to enhance enforcement of the state's claims for civil penalties. (ABM at 21, emphasis in original.) For this reason, Reins's argument that Kim's dismissal had a res judicata effect on his "own PAGA claim" is unpersuasive. Kim does not have his "own PAGA claim." He asserts the PAGA claim in a representative capacity on behalf of the state. There is thus no identity of issues or parties between Kim's individual claims and the PAGA action.

Finally, Reins fails to meaningfully address the public policy concerns identified in Kim's opening brief. Significantly, Reins's rule lets employers evade PAGA merely by resolving the individual claims of an "aggrieved employee." Reins is wrong that stripping employees of standing still leaves the state's interests intact. If Kim loses standing, the state loses its statute of limitations secured by Kim's action. By eliminating Kim as a PAGA

[1] References to Reins's Answer Brief on the Merits are abbreviated herein as "ABM."

representative, Reins stands to cut off civil penalties going back for years. (See 1 AA 124.) Even if another employee came forward now, Reins could always do away with that employee's standing in the same way that it did Kim's. As long as Reins can offer to compromise individual claims for less than what it stands to pay the state, it makes economic sense to pay off the employee representative and opt out of the civil penalty action. Kim respectfully asks this Court to reverse the judgment and remand.

ARGUMENT

A. PAGA's Standing Provision Must Allow Qui Tam Relators To Bring Claims They are "Barred" from Pursuing Individually.

Kim's opening brief explains why PAGA's text, history, and purpose all compel the conclusion that resolving individual claims has no impact on "aggrieved employee" standing. As "a type of qui tam action," PAGA lets employees bring claims for civil penalties on the state's behalf. (ABM at 14, quoting *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 382 (*Iskanian*).) "[A] PAGA action is a dispute between an employer and the state," with the employee, at all times, representing the state's interests. (*Iskanian, supra*, at p. 384.) "[B]y enlisting willing employees in qui tam actions[,]" PAGA enhances the state's enforcement capacity for a broad range of Labor Code violations, including those that employees lack the right to pursue individually. (*Iskanian, supra*, at p. 387; see ABM at 24.)

Mindful that PAGA authorizes claims that an employee cannot bring in his or her own right, but wary of opening the doors to claims by the "general public," the Legislature enacted a standing provision in PAGA that strikes a "reasonable balance." (*Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal.App.5th 745, 757 (*Huff*).) While preventing claims by individuals with no connection to the employer, the standing requirement still

allows claims that "aggrieved employees" are barred from bringing on their own—like those previously punishable only through criminal misdemeanors and government-enforced civil penalties. (See *Arias v. Superior Court* (2009) 46 Cal.4th 969, 980; see OBM at 26–31.)[2]

Sidestepping much of Kim's statutory analysis, Reins argues—with no support—that the Legislature meant for PAGA's standing provision to function exactly like standing requirements in non-qui-tam statutes, such as the Unfair Competition Law ("UCL") and the Federal Labor Standards Act ("FLSA"), where standing depends on "having a viable injury to redress through judgment." (ABM at 15–19.) PAGA cannot be read so broadly. Letting an alleged Labor Code violator defeat "aggrieved employee" standing by resolving individual claims would cause PAGA's standing provision to swallow the entire statute. Employers could cut off years of liability for civil penalties, or avoid such penalties altogether, merely by paying off individual employees—a tactic that, if upheld, would undermine the important worker protections the Legislature intended PAGA to promote.

1. Standing to Bring a Qui Tam Action is Statutory.

Reins's attempt to analogize PAGA's "aggrieved employee" provision to standing requirements in non-qui-tam statutes is unpersuasive. "[T]raditional standing requirements do not necessarily apply to *qui tam* actions since the plaintiff is acting on behalf of the government." (*Huff, supra*, 23 Cal.App.5th at p. 757.) The government can authorize as its agent whomever it would like, not only those with personal claims at stake. It can let any "person" bring or "conduct" an action on its behalf, as in the California False Claims Act (see Gov. Code § 1652; *State ex rel. Harris v.*

[2] References to Kim's Opening Brief on the Merits are abbreviated herein as "OBM."

PricewaterhouseCoopers, LLP (2006) 39 Cal.4th 1220, 1229); it can authorize claims by any "resident of a jurisdiction where violation of the act occurs" as in the California Political Reform Act of 1974 (see *Sanders v. Pacific Gas & Elec. Co.* (1975) 53 Cal.App.3d 661, 671); it can restrict claims where the government has previous knowledge of the information on which the claim is predicated, as the federal False Claims Act did from 1943 to 1986 (see *U.S. ex rel. State of Wis. (Dept. of Health and Social Services) v. Dean* (7th Cir. 1984) 729 F.2d 1100, 1102; see Broderick, *Qui Tam Provisions and the Public Interest: An Empirical Analysis* (2007) 107 Columbia L.Rev. 949, 954); or it can limit standing to individuals against whom an alleged violation was committed, as it did here (Lab. Code § 2699(c)).

As qui tam statutes partially assign the government's claim to the authorized representative, "not being injured by a particular statutory violation presents no bar to a plaintiff pursuing penalties for that violation." (*Huff, supra*, 23 Cal.App.5th at p. 757; see also *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens* (2000) 529 U.S. 765, 773.) A qui tam relator also stands to share in the government's recovery, and thus maintains a personal stake in the case even though the government serves as the real party in interest. (See *Iskanian, supra,* 59 Cal.4th at p. 382.) PAGA conforms to the "traditional criteria" for qui tam actions, "except that a portion of the penalty goes not only to the citizen bringing the suit but to all employees affected by the Labor Code violation." (*Id.* at p. 382.)

Granted, PAGA contains a standing provision, but that provision must be read in line with PAGA's authorizing a "type of qui tam action" where employees may pursue the full panoply of Labor Code claims available to

the state—even those which they are barred from bringing individually. (*Iskanian, supra,* 59 Cal.4th at p. 382.)

2. Reins's Cases Analyzing Standing Outside of the Qui Tam Context Are Inapposite.

Reins is correct that, as a general proposition, standing can be lost while a case is pending (see ABM at 15), but that didn't happen here because nothing about Kim's resolution and dismissal of individual claims stripped him of "aggrieved employee" status. PAGA is not simply a "procedural statute" that lets employees seek penalties for their own "underlying Labor Code violations." (ABM at 17, citing *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993.) If it were, then Reins would have a stronger argument that Kim—like the class plaintiff in *Watkins*—"possesse[d] only a single claim for relief" and lost the right to litigate that claim once it had been resolved. (See *Watkins v. Wachovia Corporation* (2009) 172 Cal.App.4th 1576, 1589 (*Watkins*).) As PAGA's standing provision must be read "in the context of the statutory framework as a whole" and to further the statute's overall purpose (*Cummins, Inc. v. Superior Court* (2005) 36 Cal.4th 478, 487), the "aggrieved employee" requirement must be distinguished from other non-qui-tam standing requirements. (See ABM at 16.)

For example, this Court in *Mervyn's* only analyzed the "injury" requirement for UCL standing, enacted through Proposition 64, finding that the requirement applies retroactively to cases pending when the measure took effect. (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 232 (*Mervyn's*).) *Mervyn's* did not discuss PAGA. The plaintiff in that case, a non-profit corporation, "did not claim to have suffered any harm as a result of Mervyn's conduct. Instead, [the non-profit] purported to

sue on behalf of the general public under former section 17204." (*Id.* at p. 228.) There was no dispute, like here, whether the plaintiff fell within the scope of the statute's standing provision. (*Ibid.*) The only issue was whether the uninjured non-profit could continue to litigate, since it had filed suit before enactment of the UCL's injury requirement. (*Ibid.*) This Court held that it could not, because "standing must exist at all times until judgment is entered and not just on the date the complaint is filed." (*Id.* at pp. 232–233.) Kim does not dispute that standing can be lost once a case is pending. (See OBM at 19.) However, here, the issue is not whether a plaintiff who undisputedly lacks standing may continue to litigate. It's whether Kim lost PAGA standing *at all* merely by dismissing his individual claims pursuant to Reins's offer to compromise.

Similarly, *Watkins* does not mention PAGA or its standing provision. (*Watkins, supra,* 172 Cal.App.4th at p. 1589.) It addresses only whether the named plaintiff can settle her individual wage claims and still retain the right to appeal "class claims" for the exact same relief. (*Ibid.*; ABM at 16.) Unlike in a PAGA action, the plaintiff in *Watkins* "possesse[d] only a single claim for relief—the plaintiff's own." (*Watkins*, at p. 1589.) She could not simultaneously settle her "individual claim" and appeal her "class claim" for the same relief. (*Ibid.*) "That the plaintiff has undertaken to also sue 'for the benefit of all' does not mean that the plaintiff has somehow obtained a 'class claim' for relief that can be asserted independent of the plaintiff's own claim." (*Ibid.*) The class claim was merely a "procedural device by which she pursued her substantive claim for overtime wages. Having settled her substantive claim, the class claim disappears," mooting her appeal. (*Id.* at p. 1592.)

PAGA is not the same. Unlike the *Watkins* plaintiff's class claim, Kim's PAGA claim can (and must) be asserted "independent of [his] own claim" for relief. (*Watkins*, at p. 1589; cf. *Reyes v. Macy's, Inc.* (2011) 202 Cal.App.4th 1119, 1123 [A PAGA "claim is not an individual one"]; *Tanguilig v. Bloomingdale's, Inc.* (2016) 5 Cal.App.5th 665, 679.) PAGA itself guarantees employees the right to pursue their own claims "separately or concurrently" with a PAGA action, or not to assert any individual claims at all. (Lab. Code, § 2699(g); *Williams v. Superior Court (Pinkerton Governmental Services, Inc.)* (2015) 237 Cal.App.4th 642, 647 [holding that stand-alone PAGA claim can proceed without any "underlying" individual controversy].) Moreover, unlike the *Watkins* plaintiff who, even if a class recovery were obtained, could not "share in it, having already received complete recovery[,]" (*Watkins, supra*, at p. 1592), Kim stands to share in the state's civil penalties, which are distributed "25 percent to the aggrieved employees," Lab. Code § 2699(i). (See *Amey v. Cinemark USA Inc.* (N.D. Cal., Aug. 17, 2018, No. 13-CV-05669-WHO) 2018 WL 3956326, at *6 [employee who released individual claims maintained standing for PAGA because she retained a "personal stake and continued financial interest in the advancement of" the PAGA claims].)

The same distinction pertains to actions under the FLSA. (See ABM at 16, citing *Camesi v. University of Pittsburgh Medical Center* (3d Cir. 2013) 729 F.3d 239, 247.) The FLSA is not a qui tam statute, and has no standing provision akin to PAGA's. Thus, *Camesi* did not address whether the plaintiff employees maintained "aggrieved employee" status following dismissal of individual claims, or whether they lost standing under a provision comparable to PAGA's section 2699(c). The only issue was whether the employees' voluntary dismissal had created an "appealable final

order." (*Camesi, supra*, at p. 244.) The Third Circuit held that it had not, but only because the dismissal was a "procedural sleight-of-hand" meant to manufacture finality, and it would go against public policy to confer appellate standing in such circumstances. (*Id.* at p. 245.)

3. Reins Wants PAGA's Standing Clause to Swallow the Entire Statute.

a. Kim still seeks PAGA penalties "on behalf of himself *and* others."

As Kim's opening brief points out, Section 2699(c) confers standing on employees "against whom one or more of the alleged violations was committed" with "the alleged violations" referring to previously referenced Labor Code violations *subject to civil penalties*, not those which an employee can pursue individually.[3] (OBM at 18.) Additionally, Kim notes that the "aggrieved employee" only needs to have suffered "one or more" of the alleged violations, meaning he can assert "more" claims under PAGA than the ones he personally suffered. (OBM at 18–19, citing Lab. Code § 2699(c).)

Finally, Kim identifies inconsistencies within PAGA that would result from interpreting the statute's standing provision to require viable individual claims through judgment: first, as PAGA measures civil penalties in terms of pay periods worked by "aggrieved employees," interpreting the term "aggrieved employee" to require viable individual claims would allow employers to avoid civil penalties merely by paying damages to injured employees (OBM at 21–22); second, Reins's rule would make PAGA's

[3] Reins is correct that the definition's use of the past tense *alone* is not dispositive, but read in the context of the statute as a whole—as this Court must—the use of past tense lends further support to Kim's argument that the Legislature did not want to make standing depend on ongoing individual violations. (See ABM at 21–24.)

limited "cure" provision nonsensical, because employers could effectively cure violations that give rise to civil penalties by redressing employees' individual damages (OBM at 22–23); third, Reins's interpretation would abrogate the right to pursue a PAGA-only action, because employees would be forced to sue for individual claims concurrently with PAGA or risk losing standing once the statute of limitations runs on their "underlying" individual claims (OBM at 23–24); and fourth, PAGA's section 2699.5 specifically authorizes claims for which no private right of action exists, but such claims would be impossible to bring if standing rests on the viability of individual claims.[4] (OBM at 24–26, and fns. 7–8.)

Section 2699(a)'s use of the word "and" does not overcome these strong indicators of legislative intent. (See ABM at 17.) As Reins notes, PAGA authorizes an "aggrieved employee" to recover civil penalties "on behalf of himself or herself and other current or former employees." (Lab. Code § 2699(a); ABM at 17.) The fact that the action is brought on behalf of the "aggrieved employee" *and* others does not suggest anything about the meaning of the term "aggrieved employee." An employee who has redressed an individual claim still alleges to have suffered a violation that would give rise to a civil penalty by the Labor Commissioner, and still stands to share in the state's recovery under PAGA. Such an employee is, therefore, proceeding in a civil-penalty claim on behalf of himself or herself *and* other employees, not "solely on behalf of others." (See ABM at 17.)

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[4] Reins states that "Kim never raised this argument before the trial court or Court of Appeal." (ABM at 34.) This is incorrect. (See AA 410:7, 17; Appellant's Opening Brief at 16, 22; Appellant's Reply Brief at 7, 9–10, 23.)

For this reason, one federal court recently held that an employee who had released "'any and all individual claims'" against the defendant employer still maintained standing under PAGA, because her settlement carved out "'her personal stake and continued financial interest in the advancement of [her] Private Attorneys General Act ("PAGA") claims.'" (*Amey v. Cinemark USA Inc.* (N.D. Cal., Aug. 17, 2018, No. 13-CV-05669-WHO) 2018 WL 3956326, at *1, *4, *6.) Kim's 998 offer and dismissal did the same: Reins made an offer for $20,000 plus costs and reasonable attorneys' fees spent "in the prosecution of Plaintiff's individual claims," in exchange for a dismissal of Kim's "individual claims against Reins in their entirety." (2 AA 336–337.) Pursuant to these terms, Kim only dismissed his individual claims and carved out PAGA: "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"].) It's true, as Reins states, that *Amey* involved a procedural issue unique to federal courts. (See ABM at 35.) But the federal court's decision of that procedural issue required it to grapple with the same issue on which this Court granted review—whether an employee who settles and resolves individual claims loses standing to serve as a PAGA representative. (See Petition for Review at 7.) *Amey* answered the question as this Court should: "no."

b. Reins concedes that an individual claim "might not" be necessary for standing.

Reins also has no good answer to the conflict Kim identifies between PAGA's authorization of claims with no private right of action, and the notion that standing depends on the right to maintain individual claims. Even though Reins argues extensively in pages 15 through 24 of its brief that any

"bar" on the right to proceed individually strips an employee of standing, on page 35, Reins writes:

> Whether a private right of action exists for all Labor Code penalties recoverable under PAGA is irrelevant to the issue before this Court . . . . An injury could give rise to a private right of action under the Labor Code. It might not. But even where there is no private right of action, one must have suffered a violation of the Labor Code to proceed under PAGA's "aggrieved employee" requirement.

(ABM at 35.) The contradiction is self-evident. Reins can't argue that "[r]epresentative standing ceases to exist under PAGA once the representative's individual Labor Code claims are barred[,]" yet that standing could still exist in the face of such a bar arising from the lack of a right to sue. (ABM at 9–10.) Reins's contradictory argument on this point exposes the conflict between hinging standing on the viability of individual claims, and the statute's specific authorization of claims that can't be pursued individually. (See OBM at 19–24.) In order to effectuate the statute's purpose of enforcing Labor Code violations that don't give rise to individual damages, standing must rest on whether the employee experienced an alleged violation in the past, not whether he has the right to redress that violation on an individual basis in the future.

In the same vein, Reins misses Kim's point regarding *Huff* and *Lopez*. The *Lopez* case holds that a PAGA claim for wage statement violations does not require proof of the "knowing and intentional" element that applies to an individual wage-statement claim. (*Lopez v. Friant & Associates, LLC* (2017) 15 Cal.App.5th 773, 781.) That element pertains to claims for statutory penalties, but a PAGA action seeks civil penalties. (*Id.* at p. 784.) Reins argues that this case "hurts Kim and helps Reins" because in *Lopez*, "[t]he plaintiff still had an unredressed injury as individual claims arising from the defective wage statements had never been settled or dismissed with

prejudice." (ABM at 33.) What Reins doesn't mention is that the trial court in *Lopez* had granted summary judgment in the employer's favor because the employee could not prove the elements of an individual claim. (*Lopez*, *supra*, at p. 777.) Any individual claim would have been "barred," yet the Court of Appeal allowed PAGA to continue. (*Id.* at p. 786.) In doing so, it rejected the employer's argument that "a 'derivative' PAGA claim must fail where a Labor Code claim lacks merit." (*Ibid.*) No case that the employer had cited suggested that "a PAGA cause of action for violation of section 226(a) is derivative of, or dependent on, an individual claim for violation of section 226(e)(1)." (*Ibid.*) Granted, *Lopez* did not address PAGA's standing provision, but its holding conflicts with interpreting that provision in the way Reins advocates. (See OBM at 33.)

Another recent Court of Appeal opinion, *Raines v. Coastal Pacific Food Distributors, Inc.* (2018) 23 Cal.App.5th 667, followed *Lopez*, holding that "[t]he trial court did not err in granting summary adjudication in favor of [the employer] on [the employee]'s individual claim for statutory penalties under section 226(e)[,]" yet the trial court had erred in granting summary judgment on the employee's PAGA claim predicated on the same conduct because it "incorrectly found an employee must suffer an injury in order to bring a PAGA claim." (*Id.* at p. 682.) "We disagree that 'no injury' amounts to 'no violation.'" (*Id.* at p. 680.)

Finally, Reins focuses on the wrong part of the *Huff* case. (See ABM at 34.) Reins correctly notes that *Huff* answered a slightly different question than the one presented here: "This case presents the question of whether a plaintiff who brings a [PAGA action] may seek penalties not only for the Labor Code violation that affected him or her, but also for different violations that affected other employees." (*Huff, supra*, 23 Cal.App.5th at p. 750.) The

court's reasoning in answering that question sheds light on the issue at bar. The *Huff* court held that PAGA standing does not depend on the plaintiff "hav[ing] personally experienced the same violations pursued in the action." (*Id.* at p. 757.) In other words, the named plaintiff could be barred entirely from proceeding with at least some of the claims that he has standing to prosecute under PAGA. This disposes of Reins's argument that PAGA is merely a procedural statute allowing employees to recover civil penalties for their own "underlying Labor Code violations" or that it is merely intended to "help aggrieved employees *find a remedy* for Labor Code violations" they suffered. (ABM at 21, emphasis in original.) As *Huff* makes clear, the statute is intended to deputize employees to enforce the Labor Code on the state's behalf, and PAGA's standing provision must be read as consistent with that purpose. (*Id.* at pp. 17, 21.)

4. Reins's Cases Dismissing Unmeritorious PAGA Claims Don't Support Making "Aggrieved Employee" Standing Contingent on Viable Individual Claims.

Reins is right that one pre-*Iskanian* Court of Appeal opinion and several unpublished federal rulings have found a lack of standing under section 2699(c), but not based on any general rule that PAGA standing turns on having a viable individual injury to redress through judgment. (See ABM at 19.) Most of Reins's cases deal with a PAGA claim lacking merit or becoming moot—situations that Kim agrees would give rise to a loss of standing or to a complete defense. For example, 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.) This is not to say that the employee must possess a "viable individual claim" through judgment. In fact, the *Holak* court did not look to the limitations period for the employee's individual claim—only to the applicable period under PAGA. (*Id.* at p. *4.)

Reins's other cases do not support its broad interpretation of PAGA's standing provision. (See *Shook v. Indian River Transport Co.* (9th Cir. 2018) 716 Fed.Appx. 589, 590 [mem. dispo.] [PAGA failed because the employee could not prove that the employer had committed Labor Code violations, and standing was lost for the same reason]; *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 or that the plaintiff was never employed by the alleged

violator—only that an employer cannot defeat standing simply by resolving the individual, non-PAGA claims of the state's representative.[5]

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."].)

Finally, *Villacres v. ABM Industries, Inc.* (2010) 189 Cal.App.4th 562, 572, did not find a lack of standing following a dismissal of individual claims. In that case, the PAGA action was barred because the plaintiff had released Labor Code claims *for civil penalties* as part of a prior class action settlement. The court held that the employee could not turn around and bring a second lawsuit for the same civil penalties he had agreed to release in the prior case. (*Id.* at p. 569.) Unlike in *Villacres*, Kim did not sign away any

[5] For this reason, Reins's "perpetual standing" argument is overblown. (See ABM at 21.) In Kim's view, any employee who can't prove that she experienced a violation or that she was employed by the alleged violator cannot establish standing, and an employer can assert standing as a defense at any time.

right to civil penalties. In fact, he attempted to preserve such 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; cf. ABM at 18.)

Moreover, several recent cases call *Villacres*'s holding into question by suggesting that a release in a class-action settlement of "all claims . . . of any kind for . . . penalties" would not bar a subsequent PAGA action, where the employee in the first case never had authority to pursue or release PAGA penalties, and no consideration was paid to the state. (See *Betancourt v. Prudential Overall Supply* (2017) 9 Cal.App.5th 439, 449; *Julian v. Glenair, Inc.* (2017) 17 Cal.App.5th 853, 870.) In *Julian*, the court held that an employee may only agree to arbitrate PAGA once the state has given him authority to pursue a PAGA claim on its behalf. Until that point, "the state—through LWDA—retains control of the right underlying the employee's PAGA claim" and enforcing a pre-dispute agreement purporting to cover PAGA "would contravene the state's control over that right." (*Id.* at pp. 870–871.) By the same token, a release of civil penalties in a class settlement entered into by an employee with no authority to speak for the state can't bind the state in a subsequent proceeding (to say nothing of the fact that the prior settlement would not result in the state receiving compensation). (Cf. *Villacres, supra*, 189 Cal.App.4th at p. 587 ["the Augustus settlement agreement released 'PAGA claims' without mentioning the PAGA by name. It is immaterial that Augustus did not include a PAGA cause of action."], with *Julian, supra*, 17 Cal.App.5th at p. 872 ["As an individual, the employee is not authorized to assert a PAGA claim; the state—through LWDA—retains control of the right underlying any PAGA claim by the employee."].)

B. Reins Fails to Explain Why Depriving Employees Like Kim of Standing Serves the Legislature's Goal of Preventing Abusive Lawsuits.

Reins can't explain why stripping employees like Kim of standing serves the Legislature's purpose in enacting the "aggrieved employee" mandate. (See ABM at 19–20.) Both sides agree that the purpose was to prevent abusive lawsuits. As this Court has held: "The Legislature . . . chose to limit qui tam plaintiffs to willing employees who had been aggrieved by the employer in order to avoid 'private plaintiff abuse.'" (*Iskanian, supra*, 59 Cal.4th at p. 387, citing Sen. Com. on Judiciary, Analysis of Sen. Bill No. 796 (Reg. Sess. 2003-2004) as amended Apr. 22, 2003, p. 7.) When PAGA was passed, such abuses occurred under the UCL because individuals with no connection to the alleged violator could file claims on behalf of the general public. (*Mervyn's, supra*, 39 Cal.4th at p. 228.) This led overzealous attorneys to file "'frivolous lawsuits as a means of generating attorneys' fees without creating a corresponding public benefit,'" and to "'[f]ile lawsuits on behalf of the general public without any accountability to the public and without adequate court supervision.'" (*Ibid.*, quoting Prop. 64, § 1, subd. (b)(1)-(4).)

Reading PAGA's standing provision to allow employees like Kim to continue representing the state after dismissing damages claims would not lead to such abusive practices. Kim alleges that, while working as a "training manager" for Reins, the company failed to pay him and other employees all wages owed, and to provide lawful meal and rest periods. (OBM at 10–11; ABM at 11.) He is not a strawman plaintiff without a connection to the employer. As an "aggrieved employee," even after a settlement and dismissal of individual claims, he stands to share in the state's recovery of civil penalties for the violations he alleges to have personally suffered. (See *Amey,*

supra, 2018 WL 3956326, at *4 [PAGA representative who released individual claims could still "'retain her personal stake and continued financial interest in the advancement of . . . the Private Attorneys General Act ("PAGA") claims.'"].) Removing Kim's standing would not eliminate a frivolous suit with no public benefit, but would actually achieve the opposite result—it would stop "a law enforcement action designed to protect the public" and enforce the Labor Code. (*Iskanian, supra*, 59 Cal.4th at p. 387.)

Additionally, allowing employees like Kim to retain standing would keep intact PAGA's restriction against claims by individuals who cannot allege or prove a violation or who were not employed by the alleged violator. (See *Amalgamated, supra*, 46 Cal.4th at p. 1005; OBM at 19.) Kim simply does not fall into either category. The Legislature did not intend to disqualify people like Kim from serving as an "aggrieved employee" simply because they dismiss "individual claims" not encompassed within the "aggrieved employee" definition. (2 AA 286, ¶ 3 [the PAGA claim "shall remain"]; 2 AA 336–337.)

C. Kim's Dismissal of Individual Claims Did Not Have a Res Judicata Effect on the State's Civil-Penalty Claim.

Kim continuing to serve as a PAGA representative is not akin to "re-litigating" the individual claims that he dismissed. (See ABM at 24.) The doctrine of res judicata gives preclusive effect to a former judgment in subsequent litigation "between the same parties on the same cause of action." (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797.) Although a dismissal by the consent of both parties can have preclusive effect, "the distinction between individual capacity and representative capacity portends a meaningful legal difference." (*Benasra v. Marciano* (2001) 92 Cal.App.4th 987, 990, citing *McCarthy v. Azure* (1st Cir.1994) 22 F.3d 351, 360.)

As Kim's opening brief argues, Kim's dismissal of "individual claims" cannot preclude his qui tam action for civil penalties because the dismissal covered different claims and different parties. As a qui tam relator in the PAGA case, Kim "represents the same legal right and interest as state labor law enforcement agencies," (*Arias, supra*, 46 Cal.4th at p. 986), whereas his individual case covered his "own rights and obligations, not the rights of a public enforcement agency," (*Iskanian, supra*, 59 Cal.4th at p. 385). This is to be distinguished from the cases Reins cites, such as *Goddard v. Security Title Insurance & Guarantee Co.* (1939) 14 Cal.2d 47, *Rangel v. PLS Check Cashers of California, Inc.* (9th Cir. 2018) 899 F.3d 1106, *Camesi, supra*, 729 F.3d at p. 247, and *Watkins, supra*, 172 Cal.App.4th at p. 1581, which all involved a plaintiff attempting to relitigate his own individual claims. (See ABM at 26.) "The doctrine of res judicata does not . . . bar subsequent suit by the same person when the plaintiff brings the later suit in a different legal capacity." (*St. Jude Medical S.C., Inc. v. Cormier* (8th Cir. 2014) 745 F.3d 325, 330.)

Not to mention, Kim's dismissal cannot be construed to include PAGA because Reins only offered to compromise Kim's "individual claims" and Kim only dismissed "individual claims," while expressly preserving the PAGA claim. (2 AA 285–287, 336–337.) PAGA was not at issue in the arbitration where the offer to compromise was made, and was not within the scope of the post-arbitration dismissal. (See *Neil Norman, Ltd. v. William Kasper & Co.* (1983) 149 Cal.App.3d 942, 948–949 [dismissal with prejudice pursuant to settlement agreement did not operate as retraxit where subsequent proceeding involved issues that went beyond the scope of the prior settlement].)

Conceding that the state's civil penalty claims are not barred, Reins argues that Kim's "own PAGA claim" is barred because it involves the same subject matter and parties as the individual claims he dismissed. (ABM at 27–28.) This argument flows from Reins's misunderstanding about the nature of a PAGA action. According to Reins, "PAGA is 'simply a procedural statute' allowing an aggrieved employee to seek penalties 'for underlying Labor Code violations.'" (ABM at 27, quoting *Amalgamated Transit Union, supra*, 46 Cal.4th at pp. 1003–1004.) Accordingly, in Reins's view, Kim's settlement of his "underlying Labor Code violations" precludes relitigating the same violations through the "PAGA procedural mechanism." (ABM at 27.)

But the "underlying" violations in PAGA are not ones committed against Kim in his individual capacity; they are violations "that otherwise would be sought by state labor law enforcement agencies." (*Amalgamated, supra*, at p. 1003.) Kim "may not and does not bring the PAGA claim as an individual claim, but 'as the proxy or agent of the state . . . .'" (*Reyes v. Macy's, Inc.* (2011) 202 Cal.App.4th 1119, 1123.) It is this qui tam aspect of PAGA that makes Kim's discussion of *Rothschild v. Tyco Internat. (US), Inc.* (2000) 83 Cal.App.4th 488, 492 relevant, because in that case, like here, a plaintiff's qui tam claims were held not to involve the same primary rights as individual claims predicated on the same unlawful conduct. (Cf. ABM at p. 32.) Just as in *Rothschild*, the claims that Kim brought on his own behalf and those that he intends to pursue on the government's behalf do not give rise to the "same cause of action," making res judicata inapplicable. (See *ibid.*)

D. Reins Fails to Present Compelling Public Policy Justifications for Pinning Standing on Viable Individual Claims.

The public policy concerns engendered by Reins's rule are obvious: As Kim's opening brief notes, hinging standing on the viability of individual claims lets employers pay a relatively small sum to a single employee to avoid paying more substantial civil penalties to the state. (OBM a pp. 37–39; *Williams,* 3 Cal.5th at p. 545, quoting *Iskanian*, 59 Cal.4th 3.) The rule also creates a loophole to *Iskanian*, *supra*, 59 Cal.4th 348, because individual arbitration, however it turns out, resolves the viable claims that Reins argues are necessary for standing. Reins fails to adequately address these concerns, or to raise other meaningful public policy justifications for its rule.

1. Stripping Employees Like Kim of Standing Would Not Encourage Settlements or Finality of Judgments.

Reins incorrectly suggests that depriving employees like Kim of standing would serve the public policy in favor of settlement and "finality of judgments." (ABM at 29.) Reins would have a stronger argument had the parties settled PAGA together with Kim's individual claims. Then all causes of action would have been resolved subject to court approval. (See Lab. Code § 2699(*l*)(2).)

But here, all sides knew that Reins's 998 offer would not finally resolve Kim's PAGA claim. Offers made under Section 998 must be self-executing and are interpreted strictly according to their terms. (*Barella v. Exchange Bank* (2000) 84 Cal.App.4th 793, 799.) Reins offered $20,000 in exchange for Kim "dismiss[ing], with prejudice, his individual claims against Reins in their entirety, as stated in his Complaint." (2 AA 337:8–9.) Reins offered to pay fees for time Kim's counsel spent "in the prosecution of [his] individual claims." (2 AA 337:10–12.) The PAGA claim was stayed (pursuant to Reins's request) when Reins made its offer, so it cannot argue

that it intended the offer to finally resolve the PAGA claim, which was not in dispute. (See *Chen v. Interinsurance Exchange of the Automobile Club* (2008) 164 Cal.App.4th 117, 121 [998 offer must not dispose of any claims beyond those at issue in the pending lawsuit].)

Interpreting the "aggrieved employee" requirement according to its terms and in line with the employee-protective purpose of the Labor Code would not create a disincentive for employers "to utilize Section 998 offers in the wage and hour context." (See OBM at 30.) The rule might prevent opportunistic employers from using 998 offers as a means of avoiding PAGA penalties, but that's not a bad thing. While Section 998 was intended to encourage resolution and finality, it was not intended to help a party avoid claims outside the scope of its settlement offer. (See OBM at 37; ABM at 30.)

2. Removing Standing from Employees Like Kim Would Prejudice the State's Interests.

Reins attempts to assuage fears over employers using individual settlements to evade civil penalties by arguing that, even after a dismissal of PAGA due to a loss of standing, "the State's settlement rights are still protected" and the "State's PAGA claim remain[s] viable." (ABM at 37–38.) Reins ignores Kim's point on this issue, which is that, if Kim loses standing, the state loses its statute of limitations secured by Kim's action. (OBM at 39.) Under PAGA, an employee's submission of a notice letter to the Labor & Workforce Development Agency and the alleged violator tolls the statute of limitations. (Lab. Code § 2699.3(d); *Brown v. Ralphs Grocery Company* (2018) 239 Cal.Rptr.3d 519, 531.) Although it's possible another employee could come forward to bring a PAGA action after one employee loses standing, the second employee (and the state) would not benefit from the first employee's limitations period. The state's claim would either be truncated,

or lost altogether if the employer corrects the violation identified in the first employee's PAGA notice before the second employee comes forward. This is all assuming the employer does not cut off the second employee's standing with another offer to compromise. (See OBM at 39.)

Of course, often there will be no second employee, and dismissal will result in the state's claim being lost forever, like in the present case, where "the record is devoid of any evidence that other employees made the same allegations that Kim made." (OBM at 39.)

3. Reins's Rule Violates Iskanian.

Finally, Reins fails to meaningfully address Kim's concern that tying standing to the viability of individual claims lets an employer secure a PAGA dismissal merely by compelling arbitration. That's what happened here: Reins stayed Kim's PAGA case while arbitration proceeded, and then used the resolution of Kim's "viable individual claims" in arbitration to secure a PAGA dismissal. (See OBM at 39–41.) This procedure creates a de facto PAGA waiver in *all* arbitration agreements, as long as the arbitration proceeds before PAGA.

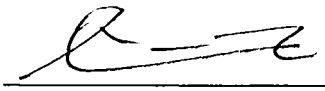
Reins suggests that an employee compelled to individual arbitration can always preserve standing by "litigat[ing] instead of settling"—an outcome that Reins agrees would be contrary to public policy. (See ABM at 29 [Reins arguing that "public policy '*strongly favors* and encourages settlements'"] [emphasis in original].) Not to mention, rejecting an offer to compromise comes with significant risk to the employee, and all the more so when the offer exceeds his potential recovery. (See Code Civ. Proc., § 998.) Reins then suggests that, "[i]f the plaintiff prevails in arbitration, the employee would establish aggrieved status for purposes of PAGA." (ABM at 40.) But how can that be? Once the employee prevails in arbitration and

the court affirms his arbitration award, he has been fully redressed and no longer has "viable individual Labor Code claims to pursue." (ABM at 17.) Reins's contorted arguments confirm that the Legislature must have meant for the "aggrieved employee" provision to confer standing on people like Kim, who allege to have suffered a violation of the Labor Code and stand to share in the state's recovery, regardless of whether their individual claims have been redressed.

CONCLUSION

By enacting PAGA, the Legislature envisioned that people like Justin Kim would take the mantle and help enforce the Labor Code on behalf of the state. With an enforcement proceeding pending, Reins offered Kim $20,000 in exchange for a dismissal of his "individual claims," which Kim accepted. If this procedure strips Kim of standing, then Reins will have successfully avoided civil penalties meant to deter unlawful labor practices, and will have provided a roadmap to other employers looking to do the same. The Court should reverse the judgment and preserve the Legislature's intent for PAGA to serve as one of the primary mechanisms for enforcing the Labor Code.

December 13, 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 7,402 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.

December 13, 2018 **KINGSLEY & KINGSLEY, APC**

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PROOF OF SERVICE

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

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

On December 14, 2018, I served the foregoing document described as **APPELLANT'S REPLY BRIEF ON THE MERITS** 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 December 14, 2018, following the ordinary business practice. As indicated in the service list attached, each listed individual or court is served as indicated.

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Executed on 14th day of December, 2018, at New York. New York

s/Alina Tsesarsky

Alina Tsesarsky

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