No. S246911

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JUSTIN KIM, *et al.*,
Petitioner and Appellant,

v.

REINS INTERNATIONAL CALIFORNIA,
Defendant and Respondents

AFTER DECISION BY THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT,
CASE B278642

FROM THE SUPERIOR COURT,
COUNTY OF LOS ANGELES, CASE NO. BC539194
PRESIDING JUDGE KENNETH FREEMAN

[PROPOSED] AMICUS CURIAE BRIEF OF BET TZEDEK

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AMICUS CURIAE BRIEF

INTRODUCTION

The Labor Code Private Attorneys General Act of 2004, enacted when California faced fiscal calamity, aimed to bolster the cash-strapped labor law enforcement agencies by allowing "aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code *violations*." (*Iskanian v. CLS Transp. Los Angeles* (2014) 59 Cal. 4th 348, 379 [emphasis added].) Over time, particularly as the use of class action waivers proliferated, PAGA has become "one of the primary mechanisms for enforcing the Labor Code." (*Id.* at p. 382.) Unhappy with PAGA's effectiveness, California employers have looked to chip away at PAGA in court, occasionally convincing lower courts to impose restrictions not supported by PAGA's text or purpose. The decision below is the product of one such effort, and if affirmed, would erode PAGA's effectiveness and undermine its statutory language and purpose.

In the action below, Appellant Justin Kim maintained an individual claim (after his class claims were dismissed) alongside a PAGA enforcement action. According to the court below, when Mr. Kim accepted an offer to resolve his individual claims, he also forfeited his right to represent the state in the separate and distinct PAGA action. (*Kim v. Reins Int'l Calif. Inc.* (2017) 18 Cal.App.5th 1052, 1057-58.) The intermediate court's ruling is premised on the misguided notion that an aggrieved employee must be able to maintain a "viable Labor Code claim" against an employer or forfeit his right to serve as a PAGA plaintiff. (*Id.* at p. 1058.) As Mr. Kim persuasively argues, the decision below is at

odds with PAGA's text, including PAGA's standing provision, Labor Code section 2699(c), which does not require that a plaintiff maintain a "viable claim." (Appellant's Opening Brief, at pp. 17-24.)

Proposed Amicus joins in Mr. Kim's arguments and expands on several key points. First, The Court of Appeal erred in conflating the individual action, which proceeded separately, with the PAGA action, which does not have an individual component. This confusion is premised on a misunderstanding of how the unique PAGA mechanism operates, which Proposed Amicus clarifies below.

Second, consistent with its law enforcement purpose, PAGA is built around assessing Labor Code "violations" without any consideration for individual redress. This design is reinforced by the standing provision, which authorizes suit when an employee alleges that "one or more alleged violations" were committed against him or her. Nothing else is required. PAGA's text, read in conjunction with the Labor Code's definition of "violation" and this Court's precedents distinguishing a "violation" from a "remedy," cannot support the Court of Appeal's holding that PAGA standing requires the ability to maintain a "viable claim."

Third, the intermediate court's decision amounts to a de facto waiver. If affirmed, employers would be authorized to resolve a PAGA action through private agreement, outside of the LWDA and the court's purview. That would contravene PAGA's purpose and text. Allowing PAGA plaintiffs to be "picked off" would cripple PAGA's effectiveness, thwarting California's public

policy objectives. For all these reasons, the decision below should be reversed.

ARGUMENT

I. PAGA STANDING CANNOT BE FORFEITED BY RESOLUTION OF THE PAGA PLAINTIFF'S SEPARATE INDIVIDUAL ACTION

A. The Decision Below Cannot be Reconciled With PAGA's Text and Purpose

1. For Standing, an Employee Must Only Have Alleged That the Employer Committed Violations to Which He or She was Affected

In interpreting the meaning of PAGA's standing provision, this Court must "begin by considering the statute's language and structure, bearing in mind that [its] fundamental task in statutory interpretation is to ascertain and effectuate the law's intended purpose." (*Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1246.) Standing is typically examined based on whether the plaintiff is "sufficiently interested" in the outcome of the litigation. (*Id.* at p. 1247.) But this beneficial interest requirement is not required when public interest and public rights are at stake. (See *id.* at p. 1248.) For public interest standing, the Court must construe the statute's language "liberally... in light of the statute's remedial purposes." (*Ibid.* [discussing how Code of Civil Procedure section 526a expands standing in taxpayer lawsuits].)

In its decision, the Court of Appeal acknowledged that PAGA is "fundamentally a law enforcement action designed to protect the public and not to benefit private parties." (*Kim*, *supra*, at p. 1057 [quoting *Iskanian*, *supra*, 59 Cal.4th at p. 381].) Yet

the court proceeded to ignore PAGA's operation and public purpose, finding instead that the Act requires a plaintiff to "maintain a viable Labor Code claim" before he or she can seek to recover penalties on behalf of the state.

The intermediate court's conclusion on standing cannot be reconciled with the nature and operation of PAGA.[1] At its core, PAGA is a "law enforcement action" where the plaintiff acts "as the proxy or agent of the state's labor law enforcement agencies." (See *Arias v. Superior Court* (2009) 46 Cal.4th 969, 986.) The PAGA plaintiff "steps into the shoes" of the state enforcement agency, and thus "represents" the state itself. (*Ibid.*)

There are several important prerequisites before an employee is "deputized." An employee filing suit must be "aggrieved" within the meaning of the PAGA, which is defined as a "person who was employed by the *alleged* violator and against whom one or more of the *alleged* violations was committed." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 546 [quoting Labor Code § 2699, subd. (c); emphasis in original].) And that employee must first serve a notice to the Labor Workforce and Development Agency ("LWDA") and the employer that satisfies the requirements of Section 2699.3(a). A PAGA action may only "commence" if the LWDA decides not to investigate the alleged

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[1] Mr. Kim emphasizes PAGA's roots as a "type of qui tam action," with statutory standing. (See Appellant's Reply on the Merits, at pp. 9-17.) Although this brief focuses on other aspects of PAGA, Proposed Amicus agrees with Mr. Kim's arguments that this Court should also be guided by statutory standing in qui tam actions in analyzing PAGA's standing provision.

violations, either through silence or expressly declining to do so.[2] (Lab. Code § 2699.3.)

The statute also defines an aggrieved employee as one who has *alleged* violations. Given this language, this Court found that nothing more than "mere allegations" are needed to file suit or initiate discovery.[3] (See *Williams, supra*, 3 Cal.5th at p. 546.) *Williams* stated that if the statute required more for standing, it would have so stated. (*Ibid.*) *Williams* is consistent with this Court's standing jurisprudence, which hold that, unless the statute explicitly specifies, allegations are sufficient to confer standing. (See *Weatherford, supra*, 2 Cal.5th at p. 1252 ["it is sufficient for a plaintiff to allege she or he has paid, or is liable to pay" the applicable tax to achieve standing].)

Nothing in the PAGA text indicates that an aggrieved employee can lose his or her "deputized" status after satisfying the administrative prerequisites and filing a PAGA action. Rather, once a PAGA action is filed, the PAGA plaintiffs are

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[2] Under Section 2699.3, the plaintiff serves a notice of the alleged Labor Code violations on the employer and if the LWDA elects not to investigate the violations alleged by sending a notice to that effect or does not respond to the notice within 65 days, "the employee may then bring a civil action against the employer." (Cal. Lab. Code § 2699.3 (a)(2)(A).)

[3] This Court implicitly recognized the difference between a PAGA plaintiff's standing to prosecute a PAGA law enforcement action with the defendant's right to prove by dispositive motion or at trial that Plaintiff never had standing. (*Williams, supra*, 3 Cal.5th at p. 558-559.) In light of the text and purpose of the PAGA, this defense would be limited to showing that the plaintiff never fulfilled the administrative prerequisites, or that he or she was never an "employee" within the statutory period.

"deputized... as private attorneys general to enforce the Labor Code." (*Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 501.) As a deputized law enforcer, "[t]he employee plaintiff represents the same legal right and interest as state labor law enforcement agencies—namely, recovery of civil penalties that otherwise would have been assessed and collected by the [LWDA]." (*Arias, supra*, 46 Cal.4th at 986 [citing Lab.Code, § 2699, subds. (a), (f)].)

Rather, a simple plain-meaning reading of the statutory language demonstrates that standing is ongoing. (See *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476 ["we look to the language of the statute" by scrutinizing the actual words of the statute, giving them their usual, ordinary meaning].) Labor Code section 2699, subsection (a), allows for civil penalties to "be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employee." Under subsection (c), an "aggrieved employee" is first defined as "any person who *was* employed by the alleged violator..." (*Id.*, emphasis added.) This is in the past tense. There is no requirement that the plaintiff remain employed. If the employee "*was* employed" by the alleged violator, he or she meets the first prong.

Moreover, the aggrieved employee must be a person "against whom one or more of the alleged violations *was* committed." (*Id.*, emphasis added.) This is also in the past tense. There is no requirement the employee's individual claims remain at issue. Thus, if at least one of the "alleged violation *was*

committed" against the employee, he or she meets the second prong.

"The legislative use of the past tense ... indicates that the court looks back in time" to when the event described occurred. (*In re Valerie A.* (2007) 152 Cal.App.4th 987, 1008.) Here, the event the statute is looking back to is when the alleged violations occurred. This reinforces the idea that if the person "*was* employed" when the alleged "violation *was* committed" they are aggrieved. There are no other qualifiers and no other conditions imposed by the Labor Code. If the person meets both tests, they have the standing to bring a PAGA action under section 2699(a). This should be the end of the analysis. The statute is unambiguous. Only when the words of the statute fail to provide an unambiguous answer should the court "resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history." (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.)

Here, Mr. Kim was employed when the alleged violation was committed, therefore, he is an "aggrieved employee" under Labor Code section 2699(c). Yet, the Court of Appeal redefined the "aggrieved employee" definition by requiring that Mr. Kim maintain an ongoing Labor Code-based individual claim for damages. (*Kim*, *supra*, at pp. 1058-59.) Without an ongoing Labor Code-based claim, the Court found Mr. Kim "no longer met the definition of 'aggrieved employee' under PAGA." (*Ibid.*) This holding impermissibly adds a continuous standing element to the definition of "aggrieved employee" that is contrary to the plain

language of the statute – as well as the legislative intent and the public policy behind the PAGA.

2. The Decision Below Cannot Be Reconciled With PAGA's Statutory Scheme as a Representative Action

By carving out standing as an individual component that can be adjudicated separately, the Court of Appeal runs afoul of PAGA's statutory design. "Suits brought under PAGA *must* be representative actions." (*Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 651, fn.7 [emphasis added].) The PAGA statute describes the private action as one brought by an aggrieved employee "on behalf of himself and other employees." (Lab. Code § 2699(a) & (g)(1)). Thus, a plaintiff asserting a PAGA claim may not bring the claim simply on his or her own behalf but ***must*** bring it as a representative action and include "other current or former employees."[4] (*Reyes v. Macy's, Inc.* (2011) 202 Cal.App.4th 1119, 1123 [citation omitted].) The PAGA claim will be dismissed if the plaintiff fails to allege that she represents other employees. (See *Rope v. Auto-Chlor, supra,* 220 Cal.App.4th at p. 651, fn. 7 [dismissing PAGA claim in part because the plaintiff "does not claim he serves as a representative for one or more current or former employees" suffering a Labor Code violation].)

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[4] In a previous version of the bill, aggrieved employees "could recover penalties 'on behalf of themselves or other current and former employee,' and the language was changed to the conjunctive in the enacted version." (*Huff v. Securitas Sec. Servs. USA, Inc.* (2018) 23 Cal.App.5th 745, 756.) But as the *Huff* court observed, this change was "simply to require that a PAGA claim be representative." (*Ibid.*)

Courts have thus repeatedly rejected efforts to bifurcate PAGA into individual and representative components.[5] In *Williams v. Super. Ct. (Pinkerton)* (2015) 237 Cal. App. 4th 642, 649, the appellate court prohibited the splitting of a PAGA claim into an "individual" component that could be arbitrated. "Because the PAGA claim is not an individual claim, it was not within the scope of [the employer's] request that individual claims be submitted to arbitration." (*Ibid.* [quoting *Reyes, supra,* 202 Cal.App.4th at p. 1124].)

And in *Perez v. U-Haul Co. of California* (2016) 3 Cal.App.5th 408, 420, the court agreed with *Williams* and held that "an employer may [not] force an employee to split a PAGA claim into 'individual' and 'representative components." In so holding, the court cited *Iskanian's* holding that "requiring an employee to bring a PAGA claim in his or her 'individual' capacity, rather than in a 'representative' capacity, would undermine the purposes of the statute." (*Id.* at p. 421.) Indeed, that the action must proceed on a representative basis is central to PAGA's purpose to maintain "a schedule of civil penalties 'significant enough to deter violations.'" (*Williams, supra,* 3 Cal.5th at p. 545 [quoting *Iskanian, supra,* at p. 379].)

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[5] See e.g., *Hernandez v. Ross Stores, Inc.* (2016) 7 Cal.App.5th 171, 178 [a representative PAGA claim does not involve an individual claim, it is an action brought for civil penalties under PAGA and there are no disputes between the employer and employee; *Tanguilig v. Bloomingdale's, Inc.* (2016) 5 Cal.App.5th 665, 676 ["It is less than clear whether an 'individual' PAGA cause of action is cognizable, even in a judicial forum" and that the "pursuit of only individual penalties appears inconsistent with PAGA's objectives."].

PAGA also authorizes a right of action for which there is no individual relief available, such as civil penalties for noncompliance with the suitable seating wage order (violating Section 1198). (See *Bright v. 99¢ Only Stores* (2010) 189 Cal.App.4th 1472, 1481.) It would be absurd to require a plaintiff to be able "maintain a viable [individual] claim" for suitable seating or other claims where no individual right of action is available. Yet the same absurd result would follow from this decision. (See *California Sch. Employees Assn. v. Governing Bd.* (1994) 8 Cal. 4th 333, 340 [statutes must be interpreted to avoid absurd results].)

While Mr. Kim brings both a PAGA action and a separate individual claim, the decisions above, which cover a PAGA action with no companion individual claims, remain instructive. Contrary to the case law above, the Court of Appeal in effect bifurcated the PAGA action by treating standing as a kind of individual component. It then conflates standing with Mr. Kim's companion individual claim, finding that if cannot maintain the latter, he also cannot maintain standing. (*Kim*, *supra*, at p. 1059.) But the PAGA, including PAGA standing, cannot be individually adjudicated in this fashion. The Court of Appeal therefore impermissibly eviscerated Mr. Kim's PAGA representative action by isolating and dismissing a non-existent "individual component" that it labelled as "standing."

3. The Decision Below Undercuts PAGA's Purpose

The decision below, if affirmed, would also undercut PAGA's purpose in "expanding the universe of those who might

enforce the law and the sanctions violators might be subject to [in order] to remediate present violations and deter future ones." (*Williams, supra,* 3 Cal.5th at p. 546.) The "right to act as a private attorney general to recover the full measure of penalties the state could recover" is the "central feature of the PAGA's private enforcement scheme." (*Sakkab v. Luxottica Ret. N.A.* (9th Cir. 2015) 803 F.3d 425, 439.) Under this scheme, a PAGA plaintiff "may seek penalties not only for the Labor Code violations that affected him or her, but also for different violations that affected other employees." (*Huff, supra,* 23 Cal.App.5th at p. 750.)

The "state's interest in [an enforcement] action is to enforce its laws, not to recover damages on behalf of a particular individual." (*Id.* at p. 760.) In *Huff,* the court rejected a Rule 23-type "typicality" requirement for PAGA plaintiffs, finding that such a requirement is neither in the statutory text nor imposed on the Labor Commissioner, to whom the PAGA plaintiff serves as proxy. (*Id.* at pp. 758-60.) The same reasoning extends to standing. Indeed, it makes no sense for a rule that forces the aggrieved employee, who is "standing in the shoes of the Labor Commissioner," to abandon the PAGA action simply because he or she cannot obtain individual relief. By holding that a PAGA plaintiff must be able to maintain a viable claim (by having damages) to serve as the state's proxy, the intermediate court has erected "hurdles that impede [on] the effective prosecution of representative PAGA actions[,] undermi[ning] the Legislature's objectives." (*Williams, supra,* 3 Cal.5th at p. 548.)

B. Because PAGA is Focused on Punishing and Deterring Labor Code Violations, Not on Individual Redress, An Individual Settlement Cannot Operate to Eviscerate the PAGA Action

The intermediate court's conclusion—that a PAGA plaintiff forfeits his right to serve as a proxy for the state by resolving his companion individual claims—is inconsistent with the text and purpose of the Act. The PAGA is aimed at furthering the legislative command to "punish and deter employers' practices that violate" the Labor Code. (*Iskanian, supra,* 59 Cal.4th at p. 384 [quoting *Brown, supra,* 197 Cal.App.4th at p. 502.]) To achieve that purpose, the legislature structured the statute to emphasize "violations" with no regard to redressing an employee's injury. (See *infra.*) This extends to the PAGA's limited standing provision, section 2699, subdivision (c), which requires only that the person bringing suit be a former or current employee of the "alleged violator" and someone "against whom one or more alleged violations were committed." (Lab. Code §2699, subd. (c).)

This Court must "give significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose." (*Smith v. Super. Ct.* (2006) 39 Cal.4th 77, 83.) Labor Code section 22 defines a "violation" as "a failure to comply with any requirement of the code." (Lab. Code § 22; see *Heritage Residential Care, Inc. v. D.L.S.E.* (2011) 192 Cal.App.4th 75, 80 [under §22, "noncompliance with any Labor Code provision constitutes a violation"].) Significantly, section 22 does ***not*** define a Labor Code violation in terms of whether it caused employee injury, or even whether it affected an employer's employees;

rather, it focuses only on whether the employer's conduct failed to comply with "any requirement of the code." (Lab. Code § 22.)

This Court has expressly distinguished a "violation" of the Labor Code from its remedy or redress. In *Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244, 1256, the Court held that payment of a premium "does not excuse a section 226.7 violation" of the provision mandating that employers provide employees with an uninterrupted 30-minute break. As Justice Liu, writing for a unanimous court, explained: "subdivision (a) of section 226.7 defines a legal violation solely by reference to an employer's obligation to provide meal and rest breaks." (*Ibid.*) By contrast, the "'additional hour of pay' provided for in *subdivision (b)* is the legal remedy for a violation of *subdivision (a)*, but ***whether or not it has been paid is irrelevant to whether section 226.7 was violated.***" (*Ibid.* [emphasis added].) The meal break statute, in other words, "does not give employers a lawful choice between providing either meal or rest breaks or an additional hour of pay. (*Ibid.*) Rather, *Kirby* concludes that "[t]he failure to provide required meal and rest breaks is what triggers violation of section 226.7." (*Id.* at pp. 1256-57.)

Kirby's reasoning, if followed, strongly supports reversal, since it reaffirms the principle that an action for violating a Labor Code provision may be maintained even if the plaintiff's harm was "remedied." Under *Kirby*, an employer *violates* Labor Code section 226.7 by *failing to comply* with its obligation to provide an uninterrupted 30-minute meal break. (*Ibid.*) As a practical matter, the remedy—the meal break premium

payment—would result in no damages, which would discourage the plaintiff from "[bringing] the action at all." (*Id.* at p. 1257.) But *Kirby* emphasized that the premium payment does not eliminate or "excuse" the violation. (*Id.* at p. 1256.)

Under the same logic, an aggrieved employee who alleges that an employer failed to comply with, for example, section 226.7, depriving her of a full 30-minute meal break, would have successfully "alleged that a [Labor Code] violation was committed against" her under the PAGA's standing provision. Even if the employer were to provide a "remedy," paying the meal break premium or some other sum to compensate the plaintiff, the "violation" is not excused or eliminated. It follows that a person with no individual damages, because she has been made compensated in some way, may still assert that a Labor Code *violation* was committed against her and maintain standing to pursue civil penalties under the PAGA. In this case, consistent with *Kirby* and the text of Section 2699, subdivision (c), so long as Mr. Kim can continue to demonstrate that: (1) he was currently or formerly employed by Reins; (2) an alleged Labor Code violation was committed; and (3) he was "affected" by that violation. (*Iskanian, supra*, 59 Cal.4th at p. 363.) It is irrelevant whether he can show any damages for that violation or otherwise "maintain a viable individual claim." This makes sense. For example, if Mr. Kim is one of hundreds of Reins employees subject to an unlawful meal break policy or practice, there is no reason why he would be deprived of standing to serve as a private attorney general merely because he cannot pursue a meal break

claim individually.

Other sections of PAGA support Proposed Amicus's reading of the standing provision.[6] For example, Section 2699, subdivision (f)(1) provides that: "If, at the time of the alleged violation, the person does not employ one or more employees, the civil penalty is five hundred dollars ($500)." By providing a default civil penalty for violations that occur when an employer has no employees—and thus no showing of injury to employees—demonstrates that the focus of PAGA is strictly on whether employer's policies/practices violated the Labor Code, without regard to individual redress.

Courts have not had a problem distinguishing between violations and injury/remedies. The few courts that have adjudicated the merits of a PAGA case have uniformly recognized that an employer is liable for civil penalties under PAGA if the employer *violated* any requirement of the Labor Code, irrespective of whether an injury occurred or remedy provided. (See *Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157, 1195, 1206-07 (2008) ["When proven, Labor Code violations give rise to civil penalties" recoverable under PAGA]; *Solis v. The Regis Corp.* (N.D. Cal. 2007) 612 F.Supp.2d 1085, 1087, 1089-90 ["Regardless

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[6] PAGA is replete with references to "violations." For example, Section 2699(a) of the PAGA provides that "a civil penalty . . . for ***a violation of this code*** may, as an alternative [to the Labor Workforce Development Agency ("LWDA")] be recovered through a civil action brought by an aggrieved employee . . . ." (Lab. Code § 2699 subd. (a).) The pre-litigation notice must identify "the specific provisions of [the Labor Code] alleged to have been ***violated***..." (Lab. Code § 2699.3, subds. (a)(1)(A) & (c)(1(A).)

of whether [an employee] was injured, defendants violated [a requirement of Labor Code section 212] by paying employees with checks that did not provide the name and address of a California business that would cash the checks on demand and without discount," therefore PAGA penalties are recoverable]; *McKenzie v. Fed. Exp. Corp.* (C.D. Cal. 2011) 765 F.Supp.2d 1222, 1232, 1235-36 [granting plaintiff summary judgment on PAGA claim and noting PAGA "does not contain any language indicating that injury within the meaning of section 226(e) must be shown"]; *Alcantar v. Hobart Serv.* (C.D.Cal. Jan. 14, 2013) 2013 WL 146323, at *4 [PAGA claims require only a showing that a Labor Code violation occurred," "an individualized determination of the particular restitution" or damages due each employee is not required].)These decisions recognize that the "harm" or "injury" at issue in a PAGA action is the harm to the public interest in "*maximum compliance with the state labor laws.*" (*Arias,* 46 Cal.4th at 980, emphasis added; *see also Huff,* 23 Cal. App. 5th at 753 ["The relief provided by the statute is designed to benefit the general public, not the party bringing the suit"]). PAGA's public purpose would not be furthered if standing is restricted to a party with an actionable individual claim or injury.

In sum, imposing a "maintaining a viable claim" requirement on PAGA standing is inconsistent with PAGA's text, design and purpose, all of which support Mr. Kim's construction that he only needs to show that he was subject to a Labor Code violation to maintain PAGA standing.

II. A PAGA ACTION CANNOT BE FORFEITED BY PRIVATE AGREEMENT

It is undisputed that the relief offered under the PAGA is "designed to protect the public and not to benefit private parties." (*Iskanian, supra,* 59 Cal.4th at p. 381.) As such, this Court found the right to bring a PAGA claim is unwaivable and if "an employment agreement compels the waiver of representative claims under the PAGA, it is contrary to public policy and unenforceable as a matter of state law." (*Id.* at pp. 382-83.)

As *Iskanian* found, the unwaivability of PAGA rests on two core foundational principles of public policy. Civil Code section 1668 prohibits exculpatory contracts—that is, agreements that "exempts anyone from responsibility for... violation of law..."—as against public policy. (*Id.* at p. 383.) And Civil Code section 3513 prohibits the enforcement of private agreements that contravene "a law established for a public reason." (*Ibid.*) In *Iskanian,* the Court found that a predispute waiver of representative PAGA claims is unenforceable as a matter of public policy. (*Ibid.*) The Labor Code also expressly prohibits the waiver of statutory rights via a private agreement. (Lab. Code § 219, subd. (a),)

As enforced by the Court of Appeal, the subject agreement would strip Mr. Kim of PAGA standing and therefore operate as a waiver of the PAGA. The agreement should not be enforced as a matter of public policy. The agreement both "exempts" Reins from responsibility for potential violation of law and contravenes PAGA by harming "the state's interests in receiving the proceeds of civil penalties used to deter violations." (*Iskanian, supra,* 59 Cal.4th at p. 383.) Mr. Kim would be forced to relinquish the

authority to collect penalties for years of potential violations. Even if another aggrieved employee picks up the baton, she is unlikely to be able to assess penalties for violations outside of her one-year statute limitations period.

And affirming the decision below, which would allow such Code of Civil Procedure section 998 offers to proliferate to eliminate PAGA penalties without adjudication, would "frustrate[] PAGA's objectives." (*Iskanian,* at p. 384.) Although a section 998 offer is extended post-dispute, in circumstances like the action below, a defendant's section 998 offer compels the employee to accept.[7] In PAGA actions, the employer's potential liability generally would dramatically outstrip a plaintiff's individual recovery. An offer of $20,000, like Reins's offer here, may be well above the employee's "soaking wet" damages, exposing that employee to potentially considerable costs to the defendant if he does not accept the offer. By sanctioning this kind of "pick off maneuver," the Court of Appeal would reduce the effectiveness of PAGA suits.

Enforcing such agreements would also allow defendants to evade judicial review, which is required for a "settlement of any civil action filed" pursuant to PAGA. (Lab. Code § 2699 subd.(l)(2).) The 2016 Amendment (S.B. 836) expanded the scope

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[7] None of public policy reasons for enforcing section 998 offers, such as encouraging settlements and compensating injured parties (see *Martinez v. Brownco Constr. Co.* (2013) 56 Cal.4th 1014, 1021), is present here. The 998 offer is not aimed at settling the PAGA action, but a companion individual claim. And since PAGA actions are not meant to benefit private parties, the section 998's compensation policy is also not furthered.

of judicial approval so that any settlement—even an individual settlement of a PAGA action—requires court approval and notice to the LWDA. The procedure authorized by the Court of Appeal would keep the court from reviewing the individual settlement, since it would result in the settlement of an individual claim and the dismissal of the PAGA action for lack of standing. This contravenes the Legislature's express delegation to courts to evaluate and approve all settlements of any action initiated under PAGA to ensure that the agreement is "genuine and meaningful" (*O'Connor v. Uber Techs., Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110, 1133) and not "unjust, arbitrary and oppressive, or confiscatory." (Lab. Code § 2699, subd.(e)(2).) Indeed, following the statute as it is written would not be unfair to employers because trial courts are empowered to protect defendants from unfair judgments.

The Court should thus reject the Court of Appeal's rule permitting the enforcement of section 998 offers that strip PAGA plaintiffs of standing.

III. AUTHORIZING THE USE OF PAGA "PICK-OFFS" WILL UNDERMINE CALIFORNIA'S POLICY OBJECTIVES IN ENACTING PAGA

A. In Undermining the Legislature's Intent, the Court of Appeal's Holding will Harm Millions of Low-wage Workers in California

The harm to low-wage workers of the Court of Appeal's holding is evident by looking at what happened to Mr. Kim in this case. Mr. Kim worked between 50 to 70 hours per week at a restaurant but was wrongfully denied overtime pay by his employer. (*Kim, supra,* at p. 1055.) He sued seeking individual

damages for unpaid overtime, meal and rest breaks, *etc.*, and for civil penalties under the PAGA on behalf of himself and other aggrieved coworkers. Kim's employer was successful in compelling arbitration of his individual claims and his PAGA action was stayed pending resolution of the arbitration. (*Id.* at pp. 1055-56.) Prior to arbitration, Kim settled, as the vast majority of employees do, and dismissed his individual claims for damages. The settlement did not include civil penalties nor did the dismissal include the PAGA cause of action. (*Id.* at p. 1056.) After the stay was lifted, his employer moved for summary judgment on his PAGA action claiming he was no longer an "aggrieved employee" and the trial court agreed. (*Ibid.*) The Court of Appeal affirmed, holding "that Kim's dismissal of his individual Labor Code claims with prejudice foreclosed his standing under PAGA...." (*Id.* at p. 1055.)

The Court of Appeal's holding essentially encourages defendants to "pick-off" aggrieved employees to circumvent liability under PAGA. By the simple expedient of paying a relatively small sum to an individual employee to settle his wage claims, an employer can avoid the much more substantial penalties recoverable under PAGA – penalties that were designed to serve a deterrent and remedial public purpose, as discussed above, including to achieve maximum compliance with the Labor Code. Sanctioning this "picking-off" is plainly a method of "disabling one of the primary mechanisms for enforcing the Labor Code," not unlike the express waiver that this Court rejected in *Iskanian*. (See *Iskanian, supra,* 59 Cal.4th at p. 383.)

The Court of Appeal's dicta that "Kim's dismissal affects only *Kim's* standing as PAGA representative" and does not reflect the "ability of any aggrieved employee in a position substantially similar to Kim's to assert such PAGA claims" is disconnected from the practical and economic realities that low-wage workers face. (*Kim*, *supra*, at p. 1059.) For low-wage workers, it is not realistic to expect that another aggrieved worker will bring a PAGA claim. Many workers suffer ongoing wage theft and Labor Code violations because they do not want to risk losing their job by filing a complaint, even if they could later prove unlawful retaliation on that basis. And though immigration status is technically irrelevant under California labor law, the truth on the ground is that many workers are terrified of deportation or employers reporting them to ICE if they speak up, and rightfully so.[8]

As discussed above, relying on "other" aggrieved employees to pick up a PAGA claim after one employee settles is also a poor solution as applied to the PAGA because of the one-year statute of limitations. In Mr. Kim's case, even if a new plaintiff were to come forward to file a new action against Reins, it is quite likely that civil penalties for several years' worth of Labor Code violations would be lost forever, as the one-year statute of limitations would have run on any penalties for violations more than one year old.[9] Again, this undermines the Legislature's

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[8] See http://www.latimes.com/business/la-fi-immigration-*retaliation*-20180102-story.html

9 Relation-back, while available under certain limited circumstances, is difficult to establish. (See, e.g., *Brown v. Ralphs*

intent that PAGA penalties be meaningful deterrents.

The Court of Appeal's decision therefore jeopardizes wage theft enforcement in industries where wage theft is most prevalent and workers are most vulnerable. According to a 2010 study conducted by the Institute for Research on Labor and Employment at the University of California, in Los Angeles, an estimated 654,914 workers in L.A. County alone each week suffer at least one pay-based violation. (Milkman, Gonzalez, and Narro, *Wage Theft and Workplace Violations in Los Angeles* (2010) pgs. 53-54.) These violations amount to $26.2 million in wages stolen from low-wage earners every week – making Los Angeles the wage theft capital of the nation. The largest portion of these lost wages is the result of minimum wage violations (54.8 percent), followed by rest break violations (21.7 percent). (*Ibid.*) Additionally, nearly 80% of low-wage workers that work overtime hours do not receive overtime pay. *(Ibid.)* Assuming a full-year work schedule, workplace violations cost these workers an average of $2,070 out of total annual earnings of $16,536. (*Ibid.*)

Grocery Co. (2018) 28 Cal.App.4th 824 [limiting circumstances for which a PAGA plaintiff can relate back a claim]; *Temple v. Guardsmark LLC* (N.D. Cal. 2011) 2011 U.S. Dist. LEXIS 21100, *29 [holding that new PAGA claims do not relate back to original exhausted claims and timely-filed LWDA notice if the new claims do not "come within the scope of" the original claims]; *Mazzei v. Regal Entm't Grp.* (C.D. Cal. 2013) 2013 WL 6633079 [filing of original non-PAGA complaint did not toll the statute of limitations for amended complaint asserting PAGA claims where there was no administrative exhaustion for the PAGA claims at the time of filing]; but see *Amaral, supra,* 63 Cal.App.4th at p. 1200 [applying relation-back to a representative simply amending her complaint to add PAGA].)

If affirmed, the Court of Appeal's decision will close off one of the few remaining mechanisms for workplace-wide reform for low-wage workers that desperately need it. This outcome clearly undercuts the Legislature's intent that the PAGA "expand[] the universe of those who might enforce the law... ." (*Williams, supra,* 3 Cal.5th at p. 546.)

B. The Court of Appeal's Focus on the Legislature's Concern of Abusive Lawsuits is Misplaced

Rather than focusing on the Legislature's clear purpose in enacting PAGA to ensure broader enforcement of California's labor code, the Court of Appeal spoke of its own misplaced concern for abuse. It stated, "[t]he legislative history makes clear that the PAGA was not intended to allow an action to be prosecuted by any person who did not have a grievance against his or her employer for Labor Code violations." (*Kim, supra,* at p. 1058.)

The actual issue raised in the legislative history by opponents of the bill was their concern that people would "act as vigilantes" and abuse the statute. (See AOB, pp. 26-30.) A parallel was drawn to the abuse that occurred when the Unfair Competition Law codified as Business and Professions Code section 17200 *et seq.* (UCL) was first introduced. Initially, the UCL allowed anyone to bring a claim on behalf of the general public. This gave rise to "professional plaintiffs" bringing UCL claims even though they were never directly injured by the illegal conduct.[10] Employers were worried that the PAGA would have

[10] In the UCL context, this issue was resolved in 2004 by the

similar results.

In response to these concerns, the sponsors of the PAGA "attempted to craft a private right of action that [would] not be subjected to such abuse" as the UCL when it was initially enacted. (See App.'s Mot. for Jud. Not., Ex. C.) First, "Labor Code violations could be brought only by an 'aggrieved employee' – an employee of the alleged violator against whom the alleged violation was committed." (*Ibid.*) Second, the action is brought by the employee "on behalf of himself or herself and other current and former employees" instead of the "general public" so it had res judicata effects as to the violations. (*Ibid.*) Third, most of the civil penalties were going to the state, which discourages bringing suit over minor violations in order to collect a "bounty" in civil penalties. (*Ibid.*) Finally, no private right of action exists if the state decides to pursue the same code violations. (*Ibid.*)

The Court's concern about abuse misunderstands the legislative history and the UCL context in which any member of the general public could sue, however attenuated her connection with the harm. Here, the PAGA already addresses that concern by limiting plaintiffs to those who were employed by the alleged violator and who allegedly committed violations against them. The post-Proposition 64 UCL standing provision provides no guidance to this Court. Instead, the Court should construe the standing provision in light of PAGA's text, statutory scheme and

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passing of Proposition 64, which amended the UCL to limit standing a "person who has suffered injury in fact and has lost money or property as a result of unfair competition." (Bus. & Prof. Code §17204 [as amended].)

purpose, as discussed above.

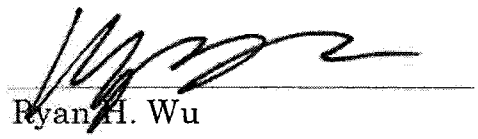
CONCLUSION

For the foregoing reasons, the Court of Appeal's decision should be reversed.

Dated: January 16, 2019

Respectfully submitted,

Capstone Law APC

By: 

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CERTIFICATE OF WORD COUNT

Counsel of record hereby certifies that, pursuant to the California Rules of Court, Rule 8.504(d)(1) and 8.490, the enclosed Amicus Brief was produced using 13-point Century Schoolbook type style and contains 6,342 words. In arriving at that number, counsel has used Microsoft Word's "Word Count" function.

Dated: January 16, 2019

Respectfully submitted,

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STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the State of California, County of Los Angeles. I am over the age of 18 and not a party to the within suit; my business address is 1875 Century Park East, Suite 1000, Los Angeles, California 90067.

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