No. S246911

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JUSTIN KIM,
Plaintiff and Petitioner,

vs.

REINS INTERNATIONAL CALIFORNIA, INC.,
Defendant and Respondent.

Appeal Upon a Decision of the Court of Appeal, Second Appellate District,
Division Four Case No. B278642
Superior Court of Los Angeles County, Case No. BC539194
Hon. Kenneth R. Freeman, Judge Presiding

BRIEF FOR *AMICUS CURIAE* THE EMPLOYERS GROUP IN SUPPORT OF RESPONDENT REINS INTERNATIONAL CALIFORNIA, INC.

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I. INTRODUCTION

For over one hundred years, this Court has recognized the important public policy favoring settlement of legal disputes. (*Neary v. Regents of Univ. of California* (1992) 3 Cal.4th 273, 277.) This Court has also long-recognized the common law doctrine of *retraxit*, which in modern times is referred to as the dismissal of a legal action with prejudice, precluding a dismissing party from relitigating dismissed claims. (*Torrey Pines Bank v. Superior Court* (1989) 216 Cal.App.3d 813, 820; *Merritt v. Campbell* (1874) 47 Cal. 542, 545.) Taken together, these important policies and doctrines ensure the speedy resolution of disputes, the compensation of injured parties, and the finality of settlements. Contrary to these principles, Petitioner advances a "perpetual standing" interpretation of PAGA. He argues that once an employee is aggrieved, he or she is forever aggrieved regardless of an agreement to complete redress of the grievance through settlement. This unsupported interpretation of PAGA's "aggrieved employee" requirement, which expressly establishes a current standing requirement, would disrupt these long-standing, fundamental policies and undermine the ability of litigants to resolve disputes short of trial.

Employers and employees routinely resolve Labor Code disputes through negotiated settlements. If such settlements do not, as always assumed, constitute a final resolution of all disputes and claims between the parties, the motive to

negotiate such settlements significantly diminishes. The circumstances that would motivate an employer to pay monetary compensation to resolve only part of a claim while remaining subject to litigation by the same employee on the same or similar issues are limited, if they exist at all. Settlement of individual employee Labor Code grievances, however, offers significant benefit to employees. In the settlement bargain, employees receive redress for their grievances in the form of monetary compensation and employers obtain a final resolution of all litigation by that employee. Without finality, the settlement bargain collapses, thereby undermining both the doctrine of *retraxit* and the public policy favoring settlement of disputes.

Petitioner's argument rests on the faulty assumptions that an individual settlement does not redress alleged Labor Code violations lacking a private right of action and that the State's interest is somehow compromised. Neither assertion withstands scrutiny. First, the compensation received by a settling employee redresses all Labor Code violations, not just those with a private right of action or those carrying potential damages. Negotiated settlement numbers embrace value for claims carrying no potential damage. For example, a monetary settlement with an employee claiming that she did not receive a suitable seat redresses a claim for which neither a private right of action nor damages exists. (See *Bright v. 99¢ Only Stores* (2010) 189 Cal.App.4th 1472, 1477-80 [PAGA allows private actions to

enforce provisions of the Wage Orders, where no private right of action otherwise exists].) By accepting a monetary settlement an employee redresses all grievances, not just those carrying a private right of action or potential for damages. Thus, after settlement, the employee is no longer aggrieved, and cannot continue litigation against the employer as an injured party. Second, the State's interest in enforcing its laws on behalf of others who were not parties to the settlement is not prejudiced. By releasing the individual right to act as a representative of the State, a claimant in no way prejudices or negatively impacts the State's interest in redressing Labor Code violations. PAGA enables any employee with a grievance to bring a claim; courts have held that nothing limits the number of aggrieved employees who can bring claims. (*Julian v. Glenair, Inc.* (2017) 17 Cal. App. 5th 853, 866.) Thus, if more than one employee is aggrieved, any aggrieved person other than the settling claimant can bring a claim on behalf of the State. As a result, the State's interest in ensuring that laws are enforced is not adversely impacted by the decision of the first employee to settle.

Finally, Petitioner's perpetual standing argument would severely undermine and discourage settlements and place even more burden on our already overburdened courts. In fiscal year 2015-16, over 6.2 million new cases were filed in California Superior Courts, and the Judicial Council of California found that an additional 189 judges are needed to meet this growing demand. Adopting

Petitioner's perpetual standing interpretation would discourage settlements and severance agreements. This would place even more burden on California's already overburdened courts.

The ruling of the lower court correctly balances the public policy favoring settlement of disputes and the enforcement of those settlements against the public policy to enforce the State's labor laws. For each of these reasons, the ruling of the Court of Appeal should be affirmed.

II. INTEREST OF AMICUS

Amicus the Employers Group is one of the nation's oldest and largest human resource management organizations for employers. It represents nearly 3,000 California employers of all sizes and a wide range of industries, which collectively employ nearly three million employees. As part of its mission, Employers Group maintains an advocacy group designed to represent employer interest in governmental and agency policy decisions and in the courts. Employers Group has appeared as *amicus curiae* in many significant employment cases, including most recently cases such as *Alvarado v. Dart Container Corporation of California* (2018) 4 Cal.5th 542; *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903; *Troester v. Starbucks Corporation* (2018) 5 Cal.5th 829; *Augustus v. ABM Security Services* (2016) 2 Cal.5th 257; *Hernandez v. Pacific Bell Telephone Company* (2018) 29 Cal.App.5th 131, and many others. In furtherance of this

mission, the Employers Group and its members desire to resolve employment disputes promptly, fairly, and with far less expense and delay than required for a court trial of such matters. The Employers Group thus has a direct interest in the correct interpretation and application of PAGA as it applies to settlements of employment disputes.

III. THE APPELLATE COURT CORRECTLY INTERPRETED PAGA'S AGGRIEVED EMPLOYEE STANDING REQUIREMENT

The Court of Appeal correctly interpreted PAGA's express standing requirement as requiring "aggrieved" status during prosecution of the claim. A settlement of a claimant's claims followed by dismissal with prejudice fully redresses all of a claimant's claims; the claimant has no further standing to pursue them, including claims made as a representative of the State. An individual settlement that forever ends the claimant's procedural right to represent the State, however, has no impact on the substantive rights of the State or of other aggrieved employees, if any, to pursue claims on their own behalf or on behalf of the State. The Court of Appeal correctly balanced the public policy favoring settlement with the public policy to enforce the provisions of California's Labor Code.

A. Public Policy Favors the Settlement of Disputes and Discourages the Continued Litigation of Settled Claims

This Court has long-recognized the important public policy favoring settlement of legal disputes. (*Neary v. Regents of Univ. of California* (1992) 3

Cal.4th 273, 277.) As this Court has noted, "[t]his court recognized a century ago that settlement agreements are highly favored as productive of peace and good will in the community, as well as reducing the expense and persistency of litigation....Without them our system of civil adjudication would quickly break down." (*Ibid.*) (internal quotations and citations omitted).

The public policy favoring settlement can be found throughout the opinions of this Court and is codified in the laws of this State. For instance, the public policy encouraging settlement of litigation is embodied in Code of Civil Procedure sections 877 *et seq.*, which provide for good faith settlements in otherwise complex, multi-party litigation. (*Tech-Bilt, Inc. v. Woodward-Clyde & Assocs.* (1985) 38 Cal.3d 488, 495; *American Motorcycle Ass'n v. Superior Court* (1978) 20 Cal.3d 578, 603 ["section 877 reflects a strong public policy in favor of settlement"].)

Evidence Code section 1152, which protects settlement communications, also illustrates the public policy favoring settlement of disputes. As the Law Revision Commission comment to this section makes clear, "[t]he rule excluding offers is based on the public policy in favor of the settlement of disputes without litigation." (*Ibid.; White v. W. Title Ins. Co.* (1985) 40 Cal.3d 870, 887; *C & K Eng'g Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 13 [the court properly excluded evidence of admission made during compromise negotiations].)

California's codified framework encouraging litigants to accept reasonable settlement offers further demonstrates the importance of settlement to the judicial process. For example, offers of judgment pursuant to Code of Civil Procedure section 998 strongly encourage resolution of claims on a reasonable basis. (*Martinez v. Brownco Constr. Co.* (2013) 56 Cal.4th 1014, 1019 [Section 998 offers are intended to "to encourage the settlement of lawsuits prior to trial" and "avoid the time delays and economic waste associated with trials"]; *Poster v. S. Cal. Rapid Transit Dist.* (1990) 52 Cal.3d 266, 270 ["Section 998 clearly reflects this state's policy of encouraging settlements"]; *T. M. Cobb Co. v. Superior Court* (1984) 36 Cal.3d 273, 280 ["the clear purpose of section 998 and its predecessor, former section 997, is to encourage the settlement of lawsuits prior to trial"].)

Further illustrating the importance of settlement to a manageable judicial process is Code of Civil Procedure section 664.6, which enables streamlined enforcement of settlement agreements.

The public policy favoring settlement, however, could not fulfill the important objective of obtaining "peace and good will," nor reduce the "expense and persistency of litigation," without the related common law doctrine of *retraxit.* Now referred to in modern times as a dismissal with prejudice, this long-enforced common law doctrine "precludes the dismissing party from litigating those issues again." (*Torrey Pines Bank v. Superior Court* (1989) 216 Cal.App.3d 813, 820

["A *retraxit* has always been deemed a judgment on the merits against the plaintiff, estopping him from subsequently maintaining an action for the cause renounced"]; *Merritt v. Campbell* (1874) 47 Cal. 542, 545 [common law *retraxit* is "an open and voluntary renunciation of his suit in Court"].)

The public policy favoring settlement would be rendered meaningless if settlements – particularly those accompanied with dismissals with prejudice – could be undone or are not a final resolution of all litigation between settling parties. As this Court explained in *In re Marriage of Assemi* (1994) 7 Cal. 4th 896, 924, "[b]ecause litigation is enormously expensive, and court resources are strained to the limit, pressure to settle is intense." However, "[t]here is also a substantial public interest in avoiding unnecessary litigation. Nothing is gained if the price of settling a lawsuit is a new round of litigation about the meaning or enforceability of the settlement agreement." (*Ibid.*)

Petitioner's proposed interpretation of PAGA in these proceedings would turn these long-held and important public policies on their head. Without finality, employers have no motive to settle disputes with individual employees. Employers settle to end all litigation with an individual employee; they do not pay money to an employee to continue litigation with that same employee on the same factual claims framed as a PAGA claim.

Petitioner voluntarily settled and dismissed with prejudice his individual claims. Despite the dismissal with prejudice, Petitioner seeks to continue litigating *the same* underlying claims under PAGA. This perpetual standing interpretation of PAGA could significantly discourage or even effectively eliminate settlements of Labor Code claims on an individual basis. This, in turn, would encourage litigation as the only means of resolving disputes and lead to court clogging from claimants or their attorneys, even where, as is the case with Petitioner, they have no injury left to redress. Such a scenario is completely at odds with the public policy favoring settlement of disputes, and would only increase the "expense and persistency of litigation." (*Neary*, *supra*, 3 Cal. 4th at p. 277.)

While Petitioner does not dispute that an individual employee can release his or her employment claims in a settlement agreement or exit agreement, Petitioner contends that an employee cannot bind the State to such agreements (to arbitrate or to release claims) without first being "deputized" by the state. (See Reply at p. 23, citing *Julian v. Glenair, Inc.* (2017) 17 Cal. App. 5th 853, 870, *review denied* (Feb. 14, 2018) [an "agreement to arbitrate PAGA claims entered into with former employees before they met statutory requirements for bringing such claims on behalf of state constituted unenforceable predispute waiver of right to bring PAGA action in judicial forum"]; but see *Valdez v. Terminix* (9th Cir. Mar. 3, 2017) 681

F. App'x 592, 594 (unpub.) [properly deputized PAGA plaintiff is an agent of the state and "can agree to pursue a PAGA claim in arbitration"].)

By Petitioner's logic, unless a departing employee is deputized by the State prior to termination, any release of claims in a good faith severance agreement could never release that employee's own procedural right to pursue a PAGA claim and, therefore, could never be a truly "general" release of claims. Even if an employee cannot release the State's substantive rights prior to deputization, nothing prevents an employee from releasing his or her individual Labor Code claims. Since PAGA "does not create. . .substantive rights," but is a "simply a procedural statute" allowing an aggrieved employee to recover civil penalties solely for underlying Labor Code violations, nothing should prevent the employee from releasing his individual procedural right to act as a private attorney general by entering into such agreements. (*Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993, 1003.) That procedural right is held uniquely by the employee, and not the State. By waiving that procedural right through the settlement and dismissal of claims, the State is in no way prejudiced; any other employee can come forward and proceed as a private attorney general, if PAGA's prerequisites are met.

If employers cannot "buy peace" from employees, then there is little incentive to settle or provide severance benefits to employees – all to the detriment

of the employees. That simply cannot be the law, given the public policy favoring settlement of disputes and the conservation of judicial resources.

B. Petitioner Wrongly Presumes that All Labor Code Violations Must Be Systemic in Nature

Petitioner contends that removing standing from claimants who voluntarily settle and dismiss their individual claims would somehow prejudice that State's interests. (Reply at p. 29.) That position, however, assumes that all alleged Labor Code violations must somehow be systemic in nature, affecting more than just the single employee. In reality, employees commonly allege isolated and individual Labor Code violations that impact only one or a small handful of employees. Such disputes are routinely resolved without protracted litigation, much less threatened representative litigation on behalf of "similarly aggrieved" employees that would be wholly inappropriate in such circumstances.

For example, California recognizes an "outside sales" exemption to overtime requirements, which can apply to an employee "who customarily and regularly works more than half the working time away from the employer's place of business selling tangible or intangible items or obtaining orders or contracts for products, services, or use of facilities." (Cal. Code Regs. tit. 8, §§ 11040(1)(C), (2)(M).) As this Court held in *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 802, a court evaluating the applicability of the outside salesperson exemption must conduct an individualized analysis of the way each

employee actually spends his or her time, and not simply review the employer's job description. (*Ibid.*; *Vinole v. Countrywide Home Loans, Inc.* (9th Cir. 2009) 571 F.3d 935, 945.) Such an individualized analysis is important, because "an employee who is supposed to be engaged in sales activities during most of his working hours and falls below the 50 percent mark due to his own substandard performance should not thereby be able to evade a valid exemption." (*Ramirez, supra,* 20 Cal.4th at p. 802.) Thus, the fact that one employee may not meet the requirements of an overtime exemption, for whatever reason, does not necessarily show that all employees do not meet the test for the exemption. When such individualized disputes occur, employers often choose to resolve them on an individual basis – even if liability is disputed – rather than face litigation. Resolving such individual disputes on an individual basis benefits the employee through speedy access to compensation, and does not adversely impact the State. Petitioner's policy arguments ignore these realities and assume that protracted representative litigation is the only way to resolve disputes.

On the other side, if an alleged violation is more systemic, one employee's individual settlement of all of his/her claims, including the right to proceed as a PAGA representative, will have no impact on another employee's right to pursue claims on behalf of the State as a PAGA representative plaintiff. In fact, if an alleged violation is systemic, one would expect that many employees could or

would be "deputized" by the State and any one of them could protect the State's interest. Nothing in the PAGA mechanism prevents such concurrent lawsuits.

In short, the State's interest in redressing Labor Code violations through PAGA is not threatened by giving finality to individual settlements of Labor Code claims that redress a claimant's own individual grievances and finally end that claimant's procedural right to pursue claims on behalf of the State. Without such finality, however, the strong public policy favoring settlement to resolve claims is severely threatened.

C. Adopting Petitioner's Perpetual Standing Argument Would Further Burden the State's Already Overburdened Courts and Judges

Petitioner's perpetual standing interpretation would place even more burden on our already overburdened courts and judges. According to the Judicial Council of California, in fiscal year 2015-16, over 6.2 million new cases were filed in California Superior Courts. (Judicial Council of California, *2017 Court Statistics Report, Statewide Caseload Trends, 2006-2007 through 2015-2016*, at Preface, p. 2 ["In FY 2015-16, over 6.2 million cases were filed statewide in the Superior Courts"] and App'x F, available at http://www.courts.ca.gov/documents/2017-Court-Statistics-Report.pdf.) The Judicial Council found that an additional 189 judges would be needed to meet this ever growing demand. (Judicial Council of California, *Judicial Workload*

Assessment, at p. 3 (Mar. 2017) [recognizing that "[n]ew judges are required in 31 courts, totalling 189 FTE more than the current number of authorized and funded positions statewide"], available at http://www.courts.ca.gov/documents/cjwa.pdf.)

Federal courts are also overburdened. In June 2018, federal district judges from the Eastern District of California issued a plea to Congress to rectify the "caseload crisis" in their district. (See *An Important Letter to Congress from the Judges of the Eastern District of California Regarding Our Caseload Crisis*, available at http://www.caed.uscourts.gov/caednew/index.cfm/news/important-letter-re-caseload-crisis.) The federal judges described their overburdened courts as a "crisis" that will have "catastrophic consequences if left unaddressed," the most serious of which will be "the inaccessibility to the Federal Courts...." (*Ibid.*)

Of the 6.2 million newly-filed cases in California state courts, 201,390 were unlimited civil cases, 352,562 were limited civil cases, and 158,347 were civil small claims cases. (*2017 Court Statistics Report*, *supra*, at Preface, p. 2 and App'x F.) Of the unlimited civil cases, 80% were resolved before trial. (*Id.* at Fig. 21 and App'x F.)

Although not reflected in the Judicial Council's data for FY 2015-16, a review of data available through West Publishing shows more than 50,000

employment-related cases were litigated in California state courts during that time frame. (See https://monitorsuite.thomsonreuters.com [subscription required].) By discouraging settlement and severance releases, more and more of these employment lawsuits would need to be adjudicated through trial, further overburdening our judiciary.

IV. CONCLUSION

The ruling of the lower courts correctly balances the public policy favoring settlement of disputes against the public policy to enforce the State's labor laws. For each of these reasons, the ruling of the Court of Appeal should be affirmed.

Dated: January 14, 2019

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS LLP

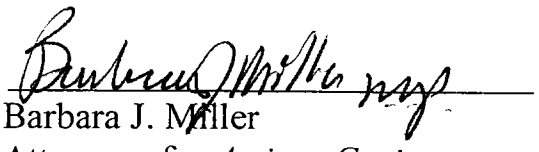
By: _____
Barbara J. Miller
Attorneys for *Amicus Curiae*
THE EMPLOYERS GROUP

CERTIFICATE OF COMPLIANCE

In accordance with California Rule of Court 8.520(c)(1), counsel for the California Employment Law Council hereby certifies that the **BRIEF FOR *AMICUS CURIAE* THE EMPLOYERS GROUP IN SUPPORT OF RESPONDENT REINS INTERNATIONAL CALIFORNIA, INC.** is proportionately spaced, uses Times New Roman 14-point typeface, and contains 3,238 words, including footnotes but excluding the Table of Contents, Table of Authorities, and this Certificate, as determined by our law firm's word processing system used to prepare this brief.

Dated: January 14, 2019

MORGAN, LEWIS & BOCKIUS LLP

By: 

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CERTIFICATE OF SERVICE

I, Davace Chin, declare that I am a resident of the State of California. I am over the age of eighteen years and not a party to the within action; my business address is Morgan, Lewis & Bockius LLP, One Market Street, Spear Tower, San Francisco, California 94105.

On January 14, 2019, I caused the following document to be served:

BRIEF FOR *AMICUS CURIAE* THE EMPLOYERS GROUP IN SUPPORT OF RESPONDENT REINS INTERNATIONAL CALIFORNIA, INC.

via U.S. Postal Service – by placing the document listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below:

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I declare under penalty of perjury, under the laws of the United States of America and the State of California, that the above is true and correct. Executed on January 14, 2019, at San Francisco, California.

By: _____
Davace Chin