S246911

IN THE
SUPREME COURT
OF THE
STATE OF CALIFORNIA

JUSTIN KIM,
Plaintiff and Appellant,

v.

REINS INTERNATIONAL CALIFORNIA, INC.
Defendant and Respondent.

Appeal from the Court of Appeal, Second Appellate District, Division Four,
Case No. B278642
Superior Court of California, County of Los Angeles,
Case No. BC539194
Hon. Kenneth R. Freeman

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND [PROPOSED] BRIEF OF *AMICI CURIAE* CALIFORNIA RURAL LEGAL ASSISTANCE, INC., CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION, CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION, CONSUMER ATTORNEYS OF CALIFORNIA AND ASIAN AMERICANS ADVANCING JUSTICE – LA IN SUPPORT OF PLAINTIFF AND APPELLANT JUSTIN KIM

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TO THE COURT, THE PARTIES, AND THEIR ATTORNEYS OF RECORD:

Pursuant to California Rules of Court 8.520(f), California Rural Legal Assistance, Inc., California Employment Lawyers Association, Advancing Justice – LA and the Consumer Attorneys of California respectfully request leave to file the accompanying *amicus curiae* brief in support of Plaintiff-Appellant JUSTIN KIM.

I. STATEMENTS OF INTEREST

A. California Rural Legal Assistance, Inc.

California Rural Legal Assistance, Inc. ("CRLA") is a nonprofit legal service provider funded in part by grants from the Legal Services Corporation. CRLA provides legal advice and representation to low-income individuals across California. Since founding in 1966, CRLA has represented low-wage workers in judicial and administrative proceedings and has advocated on their behalf in formal rulemaking and legislative proceedings. CRLA has represented low-wage workers in individual actions and has recovered millions of

dollars in underpaid wages and penalties for farmworkers, dairy workers, nursery workers, wait staff, janitors, landscapers, and others under the California Private Attorneys General Act ("PAGA"), Labor Code § 2698, *et seq*. CRLA was counsel for the Plaintiffs in *Arias v. Superior Court* (2009) 46 Cal.4th 969, and has been granted leave to submit briefing as *amicus curiae* in numerous other cases involving labor and employment rights.

B. California Rural Legal Assistance Foundation

California Rural Legal Assistance Foundation ("CRLAF") is a nonprofit legal services provider that represents low-income individuals across California and engages in regulatory and legislative advocacy which promote the interests of low-wage workers, particularly farm workers. Since 1986, CRLAF has recovered wages and other compensation for thousands of farm workers, nearly all of whom are seasonal workers. These workers have been subjected to a variety of schemes intended to defraud them of the minimum wages, contract wages and overtime wages,

due them; and been forced to endure working conditions which expose them to pesticides, heat stress, and acute and sustained ergonomic stress. CRLAF has been granted leave to submit briefs as *amicus curiae* in a variety of cases before the California Courts of Appeal and the California Supreme Court on issues relating to PAGA and construction and enforcement of state labor protections including: *Arias v. Superior Court* (2009) 46 Cal.4th 969, *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993, *Arias v. Superior Court* (2009) 46 Cal.4th 969, *Mendoza v. Ruesga* (2008) 169 Cal.App.4th 270, *Brinker Restaurant Corp. v. Superior Court* (2008) 80 Cal.Rptr.3d 781 (Review Granted Previously published at: 165 Cal.App.4th 25), *Fernandez v. California Dept. of Pesticide Regulation* (2008)164 Cal.App.4th 1214, *Gentry v. Superior Court* (2007) 42 Cal.4th 443, *Reyes v. Van Elk, Ltd.* (2007)148 Cal.App.4th 604, *Smith v. Superior Court* (2006) 39 Cal.4th 77, *Sav-on Drug Stores, Inc. v. Superior Court* (2004)34 Cal.4th 319.

C. California Employment Lawyers Association

The California Employment Lawyers Association (CELA) is an organization of California attorneys whose members primarily represent employees in a wide range of employment cases, including individual, class, and representative actions enforcing California's wage and hour laws. CELA has a substantial interest in protecting the statutory and common law rights of California workers and ensuring the vindication of the public policies embodied in California employment laws. Many members have relied on the California Labor Code Private Attorney General Act to enforce wage and hour rights on behalf of the state and the workers the state it has promised to protect. The organization has taken a leading role in advancing and protecting the rights of California workers, which has included submitting amicus briefs and letters and appearing before the California Supreme Court in employment rights cases such as *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal. 4th 1094, *Gentry v. Superior Court* (2007) 42

Cal. 4th 443, *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014), and *Ayala v. Antelope Valley Newspapers, Inc.*, 59 Cal. 4th 522 (2014), and in cases before the Ninth Circuit.

D. Asian Americans Advancing Justice – LA

Asian Americans Advancing Justice- Los Angeles ("Advancing Justice – LA") is the nation's largest legal and civil rights organization for Asian Americans, Native Hawaiians, and Pacific Islanders (NHPI). Founded in 1983 as the Asian Pacific American Legal Center, Advancing Justice - LA serves more than 15,000 individuals and organizations every year. Through direct services, impact litigation, policy advocacy, leadership development, and capacity building, Advancing Justice - LA focuses on the most vulnerable members of Asian American and NHPI communities, including immigrant workers who face wage and hour violations, while also building a strong voice for civil rights and social justice. Advancing Justice - LA is

based in downtown Los Angeles, with satellite offices in Orange County and Sacramento.

E. Consumer Attorneys of California

Consumer Attorneys of California ("Consumer Attorneys") is a voluntary membership organization representing approximately 6,000 associated attorneys practicing throughout California. The organization was founded in 1962. Its membership consists primarily of attorneys who represent individuals subjected in a variety of ways to personal injury, employment discrimination, and other harmful business and governmental practices. Consumer Attorneys has taken a leading role in advancing and protecting the rights of consumers, employees, and injured victims in both the courts and the Legislature

No party or counsel for any party have made a monetary contribution toward or funded, or intend to fund, the preparation of this brief. (Cal. Rules of Court, rule 8.520(f)(4).)

II. BASIS FOR ADDITIONAL BRIEFING

Amici Curiae submit this brief for the purpose of addressing the central purpose of the PAGA statute and its primary application as an instrument for discouraging and penalizing violations of the Labor Code. *Amici's* brief argues that the lower courts' decisions subvert PAGA's underlying rationale—to strengthen enforcement of California labor laws by permitting aggrieved employees to sue their employer for workplace abuses on behalf of the Labor and Workforce Development Agency—which supports Plaintiff-Appellant's position that he does not lose standing as an "aggrieved employee" under PAGA by settling his individual claims in arbitration.

Amici have effectively used the PAGA as a streamlined and effective means of ensuring that employers, particularly those in the underground economy, may not profit from wage theft and from subjecting low-wage workers to unlawful working conditions. PAGA was intended to be, and has since been, a vehicle for deterring unlawful employment practices and enhancing state agency enforcement of basic

labor law protections. Reversal of the lower court's decision is necessary to ensure that *Amici* can continue to use the PAGA as the powerful tool against workplace misconduct that the Legislature intended. The decisions of the lower courts impede PAGA's effectiveness, undermine the fundamental purposes of the statute, and compromise *Amici's* ability to fully vindicate the rights of the workers who rely on us for representation and advocacy.

Respectfully submitted,

Dated: January 16, 2019

California Rural Legal Assistance, Inc.

California Rural Legal Assistance Foundation

California Employment Lawyers Association

Asian Americans Advancing Justice – LA

Consumer Attorneys of California

By: /s/Cynthia L. Rice
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AMICI CURIAE BRIEF

I. INTRODUCTION

Amici respectfully request that the Court consider the following hypothetical: Alicia, a nursery worker, summons the courage to file a claim against her employer who has failed to pay her overtime compensation for three years. She files a complaint with the Division of Labor Standards Enforcement ("DLSE") and reports that another 150 workers—mostly immigrants too afraid to come forward—have been deprived of their wages.

DLSE conducts an investigation and finds evidence to support Alicia's claim, prove that the other 150 workers are owed over $150,000.00 in overtime compensation, and demonstrate that the employer denied its piece-rate workers rest breaks. Alicia alone is entitled to $10,000.00 in unpaid wages, and statutory penalties—nearly half of her annual earnings.

While DLSE prepares a citation, the employer calculates the amount he owes Alicia and offers her $15,000.00 on the condition that she release him of all claims. Alicia, who has been cooperating with the DLSE and plans to testify against her

employer, informs the agency of the offer. She then accepts the employer's offer.

A year after Alicia reports the violations, DLSE issues a citation providing for underpaid wages and civil penalties for violations suffered by all 151 employees. The employer subsequently seeks to dismiss the citation because the original complainant, Alicia, has been made whole.

Is there any public policy that supports dismissal of this citation based on the payment of one worker?

Is there any public policy advanced by requiring that Alicia refuse the employer's offer if she and DLSE wish to pursue the civil penalties against the employer arising from the violations committed against her and other workers?

Is the employer denied due process or subjected to any greater risks that he may not be able to adequately identify or defend the claims brought against him?

The answer to each these questions is clearly no. Yet, when faced with a comparable scenario, the lower court dismissed the workforce-wide enforcement claims. In doing so, the court ignored

the fact that Mr. Kim was standing in the shoes of DLSE and the Labor Commissioner; ignored the principle that enforcement of penalties is designed "to punish and deter employer practices that violate the rights of numerous employees under the Labor Code"[1]; and frustrated the very purpose of the PAGA statute as recognized by this Court in *Arias v. Superior Court* (2009) 46 Cal.4th 969, 980, *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 383-384, and *Williams v. Superior Court* (2017) 3 Cal.5th 531, 545.

Indeed, the only purpose served by the Court of Appeal's construction of PAGA is to further the interests of law-breaking employers who make payments to buy off a single complaining worker to avoid penalties for similar violations suffered by scores or hundreds of other workers. The lower court's decision sanctions that practice, thereby threatening the rights of low-wage workers and crippling the capacity of state agencies to enforce the law.

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[1] *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 384, citing *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 502, fn. omitted.)

The decision should be reversed because of its impact not only on Kim's coworkers but also on the State, which should have had the opportunity to claim its share of the PAGA award. Further, if applied in other cases, the decision threatens the effectiveness of the PAGA as a deterrent to workforce wide violations.

II. ARGUMENT

Critical to understanding the lower court's decision impact on low-wage workers is an analysis of the underlying intent behind the PAGA statutory scheme.

A. PAGA Serves Primarily As an Enforcement Mechanism, Empowering Workers to Sue for Labor Code Violations on Behalf of the State.

PAGA is "one of the primary mechanisms for enforcing the Labor Code" in California. (*Iskanian*, *supra*, 59 Cal.4th at p. 383.) The statute empowers, or deputizes, aggrieved employees as private attorneys general to bring claims for Labor Code violations on the State's behalf and to recover civil penalties for bringing those claims. (See *Arias*, *supra*, 46 Cal.4th at p. 980.) In doing so, these private law enforcement actions benefit workers and the public by deterring violations, penalizing employers that violate

the law, and allocating civil penalties recovered from PAGA actions toward compensating injured workers and the "education of employers and employees [regarding] their rights and responsibilities" under the Labor Code. (Lab. Code § 2699, subd. (i); see also OBM, at pp. 13-15.)

1. The Labor Protections Enforced Through PAGA Have Their Genesis in the Constitutionally Recognized Need for General Labor Protections.

PAGA advances this State's long tradition of protecting its workers from workplace abuses. California law has historically recognized that, as a society, we benefit from the establishment of basic labor protections. This is manifest in the California Constitution, which expressly empowers the state to "… provide for minimum wages and for the general welfare of employees …" (Cal. Const., Art. XIV § 1.) Although there is a well-recognized tension between the exercise of police powers and certain fundamental rights (e.g., the right to contract), "[i]n the field of regulation of wages and hours by legislative authority, constitutional guarantees relating to freedom of contract must give way to reasonable police regulations. (*Cal. Drive-in*

Restaurant Assn. v. Clark (1946) 22 Cal.2d 287, 295.) In *California Drive-in*, this Court recognized the pressures that could be placed on employees when they alone are responsible for ensuring compliance with the law. (*Id.,* at pp. 298-299 [rejecting the argument that employee self-reporting of tips to be credited toward the minimum wage was an adequate method for ensuring that workers were not cheated given the inevitable pressures that that policy would put on workers to over-report so as not to risk discharge because they did not garner enough tips to meet the minimum wage].)

In fact, since the advent of California labor law, courts in this state have considered constitutional challenges to various statutory and regulatory protections. The overriding public interest in establishing and promoting minimum working standards trumped those arguments:

> "[I]f a given piece of legislation may fairly be regarded as necessary or proper for the protection of furthering of a legitimate public interest, the mere fact that it hampers private action in a matter which had therefore been free from interference is not a sufficient ground for nullifying the act." . . . [E]mployment creates a status involving relative rights and obligations, and it is proper for the legislature, acting within the bounds of fairness and reason, to

> determine the nature, extent, and application of those rights and obligations."

(*Moore v. Indian Spring Channel Gold Mining Co.* (1918) 37 Cal. App. 370, 376 (1918), citing *Western Indemnity Co. v. Pillsbury* (1915) 170 Cal. 686, 694.)

California has acknowledged in statute and case law that fundamental worker protections cannot be waived by employees because they promote public policy interests. (Civ. Code § 3513 ["a law established for a public reason cannot be contravened by a private agreement"].) Lab. Code section 206.5 makes release of the right to wages due, without the actual payment of those wages, null and void. Further, Labor Code section 2804 prohibits waiver of the indemnification rights guaranteed workers under sections 2800 and 2802. (*See Liberio v. Vidal* (1966) 240 Cal.App.2d 273, 276, fn. 1.) Labor Code section 1194 likewise makes minimum wage and overtime wages fixed by the Industrial Welfare Commission ("IWC") Wage Orders recoverable notwithstanding any agreement otherwise. (*Sav-On Drug Stores v. Sup. Ct.*, 34 Cal.4th 319, 340 [noting that Labor Code section 1194 confirms "a clear public policy . . . that is specifically directed

at the enforcement of California's minimum wage and overtime laws for the benefit of workers"]).

This Court has long recognized that "the statutory right to receive overtime pay embodied in [Labor Code] section 1194 is unwaivable." (*Gentry v. Superior Court* (2007) 42 Cal.4th 443, 456, abrogated on other grounds by *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, as construed by *Iskanian*, *supra*, 59 Cal.4th at p. 366.) Hence, employees who expressly waive their right to minimum wage or overtime may nonetheless recover and are not considered *in pari delicto* with the employer in violating the law. (*Bartholomew v. Heyman Properties*, *Inc.* (Cal. App. Dep't Super. Ct. 1955) 281 P.2d 921, 925.) Further, given "'the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees,'" this Court pronounced that "'the statutory provisions are to be liberally construed with an eye to promoting such protection.'" (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1027, citing *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 702; see also *Murphy v.*

Kenneth Cole Productions, Inc. (2007) 40 Cal.4th 1094, 1103 [given the Legislature's remedial purpose, "statutes governing conditions of employment are to be construed broadly in favor of protecting employees"].)

Despite the consistent and longstanding recognition that basic labor protections were in the public interest, state agency resources were inadequate and, as a result, labor law violations went unchecked. In 2003, the legislature enacted PAGA as a means of extending the arm of the law by creating a new right to enforce and recover civil penalties due the state that would otherwise go uncollected. PAGA was designed as a public enforcement mechanism, not an individual right of action. The same fundamental public policy that this Court relied upon in *Iskanian* to conclude that a waiver of PAGA rights may not be forced by means of an arbitration clause equally compels the conclusion that such a waiver may not be forced by means of an offer made pursuant to Code Civil Procedure section 998 ("998 offer"). The lower court, ignoring this important public interest, failed to construe the PAGA statute broadly in favor of protecting

the interests of Mr. Kim and the rights of the other aggrieved employees who worked alongside him.

2. PAGA Is Critical for Addressing Systemic Underenforcement of Workplace Protections, Which Harms Workers in the Underground Economy Most Profoundly.

The Legislature created PAGA to respond to low levels of regulation within low-wage industries. Although California public policy strongly supported the vigorous enforcement of minimum labor standards, see Cal. Lab. Code § 90.5(a), there was a shortage of government resources to pursue enforcement, staffing levels for labor law enforcement agencies could not keep pace with the future growth of the labor market, and many violations were punishable only as misdemeanors, with no civil penalty or other sanction attached. (*Arias, supra*, 46 Cal.4th at 980; *Iskanian, supra*, 59 Cal.4th at 379.) The State wanted to remedy the "systemic underenforcement of many worker protections." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 545; see also OBM, at pp. 13–14.)

The legislature passed PAGA "to achieve maximum compliance with state labor laws" and "to ensure an effective

disincentive for employers to engage in unlawful and anticompetitive business practices." (Stats. 2003, ch. 906, § 1.) The legislature further found that "the only meaningful deterrent to unlawful conduct is the vigorous assessment and collection of civil penalties as provided in the Labor Code." (*Id.*) As a result, the legislature concluded that it was "in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations," since the State had not been able to fully or adequately enforce its labor laws. (*Arias, supra*, 46 Cal.4th at p. 980.)

Nowhere is the underenforcement of workplace standards more apparent than in the underground economy. While the actual impact of wage theft in the underground economy is difficult to measure, the effects are costly and evident. In fact, "[a]n estimated $8.5 million in corporate, personal, and sales and use taxes go uncollected in California each year," largely as a result of businesses operating in the shadow economy. (Labor Enforcement Task Force (LETF) Home (Nov. 2008), p. 2, at <https://www.dir.ca.gov/letf> [as of Jan. 16, 2019].) Workers

employed in the underground economy are routinely denied accurate compensation, compelled to work in unsafe environments, and excluded from social insurance programs, such as workers' compensation, disability insurance, and social security. Prior to PAGA's enactment, the State did not have the capacity to monitor, select, and prosecute wage theft and other labor law violations. Consequently, many workplace violations went unchecked, becoming a prevalent feature of the underground economy. Unfortunately, there currently is no real indication that the Labor and Workforce Development Agency is in any better position to undertake the full-scale enforcement of California labor laws, particularly in rural areas and industries like agriculture where *amicus curiae* CRLA has used PAGA to recover penalties and underpaid workers for thousands of employees from hundreds of employers.[2]

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[2] According to the 2015–2016 Fiscal Year Report on the Effectiveness of the Bureau of Field Enforcement issued by State Labor Commissioner Julie Su, California has over 711,000 businesses. In fiscal year 2015–2016, DLSE through its various arms conducted 2,424 inspections. (See *Amici Curiae* Request for Judicial Notice, Exhibit 1.) While these inspections were targeted

In sum, the lower court's decision threatens to frustrate the central purposes of PAGA—to enhance the enforcement of minimum labor standards and deter unlawful employment practices—and therefore should be reversed.

B. By Causing Appellant Kim to Waive His Right to Enforce His PAGA Claim in Order to Recover His Earned Wages, the Court of Appeal's Decision Is Inconsistent with This Court's Ruling in Iskanian.

It is undisputed that Mr. Kim did not intend to waive his right to proceed with a PAGA claim. Moreover, under the express language of Code of Civil Procedure section 998, the offer is made with respect to "a dispute to be resolved by arbitration" and, by definition, has no impact on other disputes, unless included in the "terms and conditions" of the offer. Reins did not include an express waiver of the PAGA claim in the offer. This was no doubt an intentional omission since a 998 offer conditioned upon waiving rights under causes not before the court or arbitrator is invalid and grounds for the court to refuse to enforce the section 998 cost-

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and highly successful, only 112 were conducted in the fields and at other agricultural workplaces. (*Id.*, at pp. 1, 4.)

shifting remedies. (*Ignacio v. Caracciolo* (2016) 2 Cal.App.5th 81, 86-87 ["It is well established that a purported section 998 offer 'requiring the release of claims and parties not involved in the litigation is invalid.'"]; see also *McKenzie v. Ford Motor Co.* (2015) 238 Cal.App.4th 695, 706 ["If the settlement offer includes 'terms or conditions, apart from the termination of the pending action in exchange for monetary consideration, that make it exceedingly difficult or impossible to determine the value of the offer to the plaintiff,' the offer is invalid under section 998."].)

Mr. Kim accepted the offer with no voluntary waiver of his right to proceed with the PAGA action. However, that waiver has been forced upon him by the lower court's construction of the PAGA "standing" requirements. There is no more justification for enforcing this waiver than there is to enforce the waiver of the right to bring a PAGA representative claim via an arbitration clause. This case did not involve a "knowing" waiver. What Mr. Kim did know is that if he refused to accept the offer to settle his individual claims he ran the risk of a cost-shifting award under

section 998(c)(1) that could have wiped out his personal award of underpaid wages, interest, and statutory penalties.

The Court of Appeal's decision has provided employers with an extraordinary settlement advantage in cases where PAGA claims are brought in the same action as individual claims. As this Court has recognized, "individual awards in wage and-hour cases tend to be modest. In addition to the fact that litigation over minimum wage by definition involves the lowest-wage workers, overtime litigation also usually involves workers at the lower end of the pay scale." (*Gentry v. Superior Court*, *supra,* 42 Cal.4th at pp. 457-458.) The *Gentry* Court considered information provided by *Amici* showing that settlements and judgments of $400 to $7,000 were common in wage and hour cases. (*Gentry*, *supra*, at p. 458.) That is consistent with recoveries the *Amici* obtain for their clients, and with the results obtained by the Labor Commissioner's Office in recent enforcement actions.[3] For

[3] *See* Request for Judicial Notice, Exhibits 2, 3, and 4, judgments and settlement agreements received from the Office of the Labor Commissioner in response to a request under the California Public Records Act.

example, one citation, which went to judgment after the employer challenged the citation, resulted in judgment for $62,342.95, or an average of $2,493.72 per worker for twenty-five workers (Request for Judicial Notice, Exhibit 2.) While in another citation settlement, the employer agreed to pay $100,000.00 to resolve a citation finding violations for improper wage statements, minimum wage and overtime violations against 51 workers and the individual recovery per worker ranged from $20.00 to $3,746.63. (Request for Judicial Notice, Exhibit 3.) In a third, a total settlement of $388,047.77 with worker distributions ranging from $70.49 to $6,293.76 (Request for Judicial Notice, Exhibit 4.) These individual awards are exemplary of the judgments and settlements that Amici Curiae obtain for their low wage worker clients, in administrative and judicial proceedings.

Individual recoveries this low create a situation where it is cost-effective for an employer-defendant to make a 998 offer that is double or even triple the anticipated award in an individual wage and hour claim and that is prohibitively expensive for an employee-plaintiff to reject. Applying the lower courts'

construction of PAGA standing, the employer is presented with the opportunity to pay off a PAGA claim, worth hundreds of thousands of dollars (as illustrated by the DLSE awards), for a tiny fraction of that amount. Meanwhile, the worker, who turns down that offer, cannot recover her post-offer costs (even if she wins) and must pay the employer's costs from the time of the offer. (Code Civ. Proc. § 998, subd. (c).) In the case of a low-wage worker with a $10,000 maximum claim, a 998 offer of $20,000 could not only cancel out her potential recovery but also subject her to a judgment for all the costs of arbitration that exceed that recovery. Thus, a statute designed to encourage prompt and fair settlements becomes a weapon for defendants, forcing a Hobson's Choice upon the low-wage PAGA plaintiff and nullifying the PAGA action. This, in turn, eliminates the deterrent value of the PAGA action and deprives the aggrieved employees—and the State—of the opportunity to recover what is due under the law.

C. Dismissal of the PAGA Claim Was Not Required by Any Construction of the Statute or California Standing Law Applicable to PAGA Actions.

1. The Lower Court's Construction of the PAGA Standing Requirement Is Inconsistent with the Express Language of PAGA and Undermines Its Fundamental Purpose.

The Court of Appeal's analysis falters on a mis-reading of the committee analysis of SB 796. As the court noted, "[t]he bill was amended [t]o clarify who would qualify as an 'aggrieved employee' entitled to *bring* a private action under this section, defining 'aggrieved employee' to be 'any person employed by the alleged violator . . . against whom one or more of the violations alleged in the action *was* committed.'" (*Kim v. Reins International of California, Inc.* (2017) 18 Cal.App.5th 1052, 1058, citing Sen. Judiciary Com., Analysis of Sen. Bill No. 796 (2003–2004 Reg. Sess.) as amended Apr. 22, 2003, p. 8,some internal quotations omitted, italics added.) The court then concluded that this additional language means that a Plaintiff must maintain his or her status as someone currently suffering from an uncompensated labor law violation to proceed with a PAGA action.

PAGA's amended language, however, states differently. If the Legislature had intended that aggrieved employee status must be maintained, then it would have inserted that requirement into

the statute. Instead, the Legislature added the language "may be recovered in a civil action *brought* by an aggrieved employee" and defines an "aggrieved employee" as "any person who was employed by the alleged violation and against whom one or more of the alleged violations was committed." (Lab. Code § 2699, subds. (a), (c), italics added.) The lower court, in essence, inserted the language "and continues to have an individually actionable claim for damages or penalties against the employer" into the statute. This is contrary to fundamental principles of statutory construction. As this court observed when construing the express standing provisions under former Business & Professions Code section 17202:

> Our office, of course, "is simply to ascertain and declare" what is in the relevant statutes, "*not to insert* what has been omitted, or to omit what has been inserted." (Code Civ. Proc., § 1858.) We are not authorized to insert qualifying provisions not included, and may not rewrite the statute to conform to an assumed intention which does not appear from its language . . . .

Stop Youth Addiction, Inc. v. Lucky Stores, Inc. (1998) 17 Cal.4th 553, 573, overruled on other grounds by constitutional amendment.)

The Court of Appeal's analysis also fails to consider that many of the penalties sought by Mr. Kim in his PAGA action could not have been raised by him in and of "his individual Labor Code claims" that he dismissed with prejudice as a condition of the 998 offer. (*Kim v. Reins*, *supra*, 18 Cal.App.5th at p. 1059.) Under this construction of PAGA, Mr. Kim and other potential plaintiffs could not pursue any of the myriad penalties that cannot be sought in an employees' individual Labor Code claims." (See OBM, at pp. 24-26.)

Amici observe these types of violations frequently in the underground economy. Employers routinely fail to pay on time, and employees have to wait weeks or even longer for the full wages. While these late payments are expressly prohibited by Labor Code sections 204, 205, and 205.5, and a penalty for these violations is established in Labor Code section 210, no employee has an "individual Labor Code claim" except through a PAGA action. It is an absurd construction of the statute to reach the conclusion that a right expressly conferred by PAGA—to enforce penalty provisions that an employee may not otherwise enforce—

is extinguished because he does not have a separate, individual, cognizable claim to pursue. The only standing requirement is that the plaintiff is an employee against whom one or more of the alleged violations was committed." (Lab. Code § 2699, subd. (a).) Mr. Kim met that requirement when he filed the action, when his individual claims were referred to arbitration and after he settled those claims. He was still a victim of those violations and entitled to pursue the PAGA penalties independent of his individual claims for damages.

As Appellants show, the legislature did identify some circumstances when a right to pursue penalties could be extinguished based upon the subsequent actions of the employer. Labor Code section 2699.3, subdivision (b), allows an employer to avoid a PAGA action by allowing it to "cure" many but not all of the Labor Code violations that give rise to civil penalties. This and the administrative filing requirements in that section are the only standing limitations included in the PAGA.[4] Moreover, an

[4] Notably, minimum wage (Lab. Code § 1197), overtime (Lab. Code § 1198), and meal and rest period (Lab. Code § 226.7) violations

employer may only avoid liability if "the employer abates each violation alleged by any aggrieved employee . . . and any aggrieved employee is made whole." (Lab. Code § 2699, subd. (d).) Paying one worker is not enough to invoke the cure provisions.

The lower court's decision subverts this express legislative restriction and empowers an employer to "cure" any of these violations by tendering a 998 offer for the full amount of wages and penalties due a single plaintiff employee.[5] This is at odds with the enforcement scheme established by the legislature. The legislature deliberately assessed penalties on employers who violate the law notwithstanding any wages, damages, or penalties owed to the individual employee. In doing so, the legislature

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are included in Labor Code section 2699.5, which exempts those violations from the cure provisions.

[5] The appellate court reasoned that "Kim's acknowledgement that he no longer has any viable Labor Code claims against Reins—not the order relating to arbitration—is the fact that undermines Kim's standing." (*Kim v. Reins*, *supra*, 18 Cal.App.5th at p. 1059.) Under the broadest construction of this test, an employee would not even have to dismiss his or her claims with prejudice. The employer's payment of all potential damages, wages, and penalties would mean that the individual claim would no longer be viable, no matter that it was excluded from the cure provisions, or that other PAGA penalties could be recovered only through the PAGA action.

acknowledged the overriding public interest in enforcing basic labor protections separately and apart from the individual interests of the workers. These penalties are aimed at deterring workplace abuses. Allowing an employer to circumvent those penalties, merely by doing what he was required to do in the first place, undermines the deterrent value of those Labor Code penalties and, in this instance, frustrates the purpose of the PAGA. (*O'Brien v. Dudenhoeffer* (1993) 16 Cal.App.4th 327 [a statute "must be construed in the context of the entire statutory [scheme] of which it is a part, in order to achieve harmony among [its] parts"], citing *Unzueta v. Ocean View School District* (1992) 6 Cal.App.4th 1689.) The Court of Appeal erred by construing the PAGA standing requirement in a manner that allows an employer to "cure" violations that the statute itself deems incurable.

2. Standing Principles Under California Law Are Broadly Construed When Considering Actions Brought in the Public Interest.

California jurisprudence construing standing requirements recognizes that the legislature may confer broad standing rights in enforcing the public interest. "At its core, standing concerns a

specific party's interest in the outcome of a lawsuit." (*Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1247 (rejecting a narrow construction of the types of taxes that could be the basis for taxpayer standing under Code of Civil Procedure section 526, subdivision (a)).) Furthermore, standing is not jurisdictional, though administrative pre-filing requirements imposed by the legislature may be. (*Weatherford v. City of San Rafael, supra*, at pp. 1247-1248, citing *Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1117, fn. 13) ("Unlike the federal Constitution, our state Constitution has no case or controversy requirement imposing an independent jurisdictional limitation on our standing doctrine.") Instead, courts require a litigant to show that he or she is sufficiently interested as a prerequisite to deciding, on the merits, whether a party's challenge to legislative or executive action independently has merit. (*Weatherford v. City of San Rafael*, *supra*, at p. 1247.)

In the absence of a constitutional limit on standing, the legislature has recognized that broader standing, particularly when serving the public interest may be afforded litigants. Broad

taxpayer standing under Code of Civil Procedure section 526a, and the right to bring a writ action under Code of Civil Procedure section 1085 have been recognized when the underlying objective of the action is to enforce the obligations owed by public officials or others that serve the public interest. (*Bd. of Soc. Welfare v. County of Los Angeles* (1945) 27 Cal.2d 98, 101 [concluding that a party's interest "'in having the laws executed and the duty in question enforced'" is sufficient even absent a "'legal or special interest'"].)

Even when not expressly provided for in statute, this broader "public interest standing" has been recognized as providing the basis for standing for an individual who has not personally suffered from the legal violation being challenged. *Bd. of Soc. Welfare v. County of Los Angeles*, *supra*, 27 Cal.2d.at p. 101 [a party's interest in having the laws executed and the duty in question enforced is sufficient even absent a legal or special interest rising to the level of an injury].) "The exception promotes the policy of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation

establishing a public right." (*Green v. Obledo* (1981) 29 Cal.3d 126, 144.)

Both Code of Civil Procedure sections 526a and 1085 provide a mechanism for private parties to enforce mandatory obligations imposed by the legislature. PAGA performs the same function, thereby serving the public interest in favor of deterring labor law violations. PAGA's provisions ensure that there are additional resources, in the form of aggrieved employee plaintiffs, who can ensure that no employer impairs or defeats the purpose of the labor protections afforded California workers. The underlying purpose of standing requirements—to ensure that a litigant has an interest in the outcome of the lawsuit—is fulfilled by the limited PAGA standing requirement. A PAGA plaintiff's personal interest in the outcome of a PAGA case is demonstrated both by the aggrieved employee's entitlement to PAGA penalties not otherwise available in an individual action, and by his right as a worker and agent of the State to ensure compliance with California labor protections. The trial court's dismissal of Mr.

Kim's PAGA claims, and the appellate court's affirmance of that dismissal, disregard both of these vital interests.

III. CONCLUSION

PAGA has proven to be an effective mechanism for expanding the enforcement of basic worker protection laws. The legislature in the first iteration of the Act made sure it was not a "bounty hunter" statute by limiting the recovery of employees to a small percentage of the penalties recovered. As the legislation evolved, more provisions were added to ensure that professional plaintiffs, who had no contact with the employer in question and suffered no violations, could not bring an action. Complaining of lawsuit abuses, employers were provided with an opportunity to avoid some, but *not* all penalties by curing the underlying violations for *all* workers. However, PAGA as first passed and subsequently amended retained its fundamental purpose: to allow workforce-wide enforcement of labor laws through an action filed by an individual employee who suffered a violation of one or more of those laws. It is an enforcement mechanism independent of the individual right of the aggrieved employee to recover damages or

proceed with a personal cause of action. The decisions of the trial court and the Court of Appeal undermine this carefully crafted statutory scheme and accordingly should be reversed.

Respectfully submitted,

January 16, 2019 **California Rural Legal Assistance, Inc.**

By: /s/ Cynthia L. Rice
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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.520(c)(1), I hereby certify that this brief contains 5,082 words, not including the tables of contents and authorities, the caption page, signature blocks, the verification or this certificate page, as counted by the word processing program used to generate it.

January 16, 2019 **California Rural Legal Assistance, Inc.**

By: /s/Cynthia L. Rice
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DECLARATION OF SERVICE

I am employed in San Joaquin County; I am over the age of eighteen years of age, and not a party to the within entitled action; my business address is: 145 E. Weber Avenue, Stockton, CA 95202.

On January 16, 2019, I served the within:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND [PROPOSED] BRIEF OF AMICI CURIAE CALIFORNIA RURAL LEGAL ASSISTANCE, INC., CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION, CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION, CONSUMER ATTORNEYS OF CALIFORNIA AND ASIAN AMERICANS ADVANCING JUSTICE – LA IN SUPPORT OF PLAINTIFF AND APPELLANT JUSTIN KIM

on the interested parties in this action by placing a true and correct copy thereof in a sealed envelope with postage fully prepaid, in the United States mail at Stockton. or by electronic service via true filing as indicated in the attached service list

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on January 16, 2019, at Stockton, California.

Service List

Justin Kim v. Reins International California
Supreme Court of the State of California Case No. S24611
Second Appellate District, Division Four, Case No.: B278642
Superior Court of Los Angeles County, Case No.: BC539194

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