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In the

Supreme Court

of the

State of California

JUSTIN KIM,

Plaintiff and Appellant,

v.

REINS INTERNATIONAL CALIFORNIA,

Defendant and Respondent.

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

APPELLANT'S OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED FOR REVIEW

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

INTRODUCTION

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

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

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

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

The Court of Appeal affirmed. It held that an employer can secure a PAGA dismissal by settling the individual claims of the "aggrieved employee" representative because standing turns on being able to maintain viable individual Labor Code claims: "Kim's acknowledgement that he no longer has any viable Labor Code claims against Reins . . . is the fact that undermines Kim's standing." (*Kim v. Reins International California, Inc.* (2017) 18 Cal.App.5th 1052, 1059 (hereafter *Kim*).)

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

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

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

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

STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This Court granted review on March 28, 2018.

ARGUMENT

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

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

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

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

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

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

against whom one or more of the alleged violations was committed," (Lab. Code § 2699(c); see *Huff*, at *3).

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

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

"To determine legislative intent, a court begins with the words of the statute . . . . " (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 871.) "If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs [citations]." (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103, internal quotations omitted.) Courts construe words according to "their plain and commonsense meaning" (*ibid.*), and take care not to "add to or alter them,"

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

As noted, for purposes of standing, Labor Code section 2699 provides that a PAGA action may be "brought by an aggrieved employee on behalf of himself or herself and other current or former employees," with "aggrieved employee" defined as "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." (Lab. Code § 2699(a), (c).) There is no dispute that alleging harm establishes standing at the outset, and that Kim met this requirement:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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