Case No. S246911

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

JUSTIN KIM,
Plaintiff and Appellant,

v.

REINS INTERNATIONAL CALIFORNIA,
Defendant and Respondent.

After Decision by the Court of Appeal,
Second Appellate District, Division Four
Case No. B278642

AMICUS CURIAE BRIEF OF RESTAURANT LAW CENTER, CALIFORNIA RESTAURANT ASSOCIATION, AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT AND RESPONDENT REINS INTERNATIONAL CALIFORNIA

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TO THE HONORABLE CHIEF JUSTICE OF THE STATE OF CALIFORNIA, AND THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Amici Curiae Restaurant Law Center (the Law Center), California Restaurant Association (CRA) and the Chamber of Commerce of the United States of America (the Chamber) (collectively Amici) respectfully submit this Amicus Curiae Brief in support of Defendant-Respondent Reins International California (Reins or Defendant).

As described in Amici's Application, the Law Center is a public policy organization affiliated with the National Restaurant Association, the largest foodservice trade association in the world. This labor-intensive industry is comprised of over one million restaurants and other foodservice outlets employing almost 14.7 million people across the Nation – approximately 10 percent of the U.S. workforce. Restaurants and other foodservice providers are the Nation's second largest private-sector employers.

CRA is one of the largest and longest-serving nonprofit trade associations in the Nation. Representing the restaurant and hospitality industries since 1906, the CRA is made up of nearly 22,000 establishments

in California. The restaurant industry is one of the largest private employers in California, representing approximately 1.4 million jobs.

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber represents the interests of its members in matters before the courts, Congress, and the Executive Branch.

Amici routinely file amicus curiae briefs to provide courts with industry perspectives on important legal issues and to highlight the potential industry-wide consequences of pending cases such as this one. They request permission to submit a brief in this matter because recent decisions expanding the reach and impact of California's Private Attorney General Act of 2004, Labor Code §§ 2698, *et seq*. (PAGA), threaten to undermine the Legislature's goal of improving compliance with the State's Labor Code. Amici's members have learned the hard way that any problems that may arise in their interactions with employees – whether they are at fault or not – can be exploited by an employee through the threat of a PAGA action. Even unfounded accusations can cost tens or hundreds of thousands of dollars in legal fees, with the threat of a disabling judgment if

discovery reveals that the employer has fallen short of perfection in any way, no matter how small.

Until now, Amici's members have been aided in managing these risks by the rule that plaintiffs may not continue to pursue PAGA claims after they have settled and dismissed all of their individual claims. But if the position taken by Plaintiff Justin Kim (Plaintiff) in this case prevails, it will remove even this form of dispute resolution and erode bedrock principles of standing that the Legislature intended to apply to PAGA actions. Hence, Amici and their members have a vital interest in these proceedings.

I.

SUMMARY OF ARGUMENT

In 2003 the California Legislature created the Private Attorneys General Act (PAGA) to give injured employees the ability to pursue penalties on behalf of similarly aggrieved employees and the State of California for the employer's alleged violation of any one of the hundreds of laws and regulations that govern employers. PAGA advanced the Legislature's goals without significant abuse for several years. But over the last decade, the representative standing requirement that the Legislature added to prevent PAGA abuse has been distorted, pushing PAGA further

and further away from the Legislature's lofty goals.[1] The increasing erosion of PAGA's "representative" requirement threatens to do what the Legislature expressly intended to avoid: turn a statute adopted to advance and protect employees into little more than a fee generator for the plaintiffs' bar.

Until now, where a single employee has stood alone in his or her accusations against the employer, joined by nobody else in the workforce, businesses have been able to resolve their disputes with the disgruntled employee through a mutually beneficial settlement or severance agreement. Plaintiff asks this Court to remove even this option and grant employees perpetual standing to pursue a PAGA claim even after they have *voluntarily* settled and dismissed their individual claims with prejudice. There would be significant damage to California's businesses if this Court were to deprive employers of the ability to reach a final resolution of an employee's alleged wrong.

PAGA's legislative history reflects a clear intent to prevent litigation abuse, as Defendant's Answer Brief in this matter cogently explains. Answer Brief (A.B.) 19-21. The Legislature learned the lessons of

[1] *See Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal.App.5th 745.

California's original Unfair Competition Law. That law gave free reign to attorneys to engage in harassing litigation practices and headless litigation, extorting settlements and enormous attorney fee payouts without any injured client participating in the action. Concerned that PAGA would follow the same path – and be pursued by plaintiffs with no injury to redress – the Legislature enacted a strict standing requirement in PAGA. PAGA claims may only be pursued by employees who are aggrieved by Labor Code violations. *Id.* at 17.

Plaintiff, however, hopes to sidestep that requirement and sanction a different kind of abuse. Under Plaintiff's theory, employees would be allowed to resolve their Labor Code claims, eliminating their statutory basis for pursuing the litigation. Their attorneys would then be allowed to proceed with the PAGA action without an injured client, purportedly as a representative of the State. Neither the language of the statute nor its legislative history supports Plaintiff's approach. An aggrieved employee – not the plaintiffs' bar – must represent the State. Sections II.A, II.B, *infra*.

Plaintiff tries to sidestep this problem – encouraging this Court to allow headless PAGA litigation – by analogizing PAGA to ordinary *qui tam* statutes. Although PAGA may have characteristics of a *qui tam* action, it differs in the only respect that matters for this case. Unlike other *qui tam* statutes, which can be used by anyone to assert a claim on behalf of the

government, PAGA claims can be pursued only by injured employees. Plaintiff asks this Court to write the "aggrieved employee" requirement out of the statute, although the Legislature adopted it specifically to prevent abuse by the plaintiffs' bar. His argument finds no support in California law and should be flatly rejected. Section II.C, *infra*.

As this Court made clear in *Arias v. Superior Court* (2009) 46 Cal.4th 969, 980, PAGA was adopted to "achieve maximum compliance with state labor laws." But PAGA also has the potential, if misused, to skew employment dispute resolution in a way the Legislature could not have intended. Employers should be encouraged to attempt to fully resolve disputes with employees by offering an enhanced amount of damages in exchange for a release of the employee's right to pursue any claims, including penalties that may be available under PAGA. If such a release were unenforceable, however, those settlements would not occur.

Any decision by this Court removing the employer's ability to resolve an individual suit – where a lone employee claims to have been wronged and nobody else comes forward to join in that claim – while preserving any rights held by the State, would create upside-down incentives for employers. Beyond that, accepting Plaintiff's arguments would undermine the Legislature's goal, creating risk for employers who act promptly to fully resolve any alleged violations that may have occurred,

by denying them the ability to manage that risk through pre-litigation settlement. This Court should reject Plaintiff's claims, and thereby ensure that PAGA works as the Legislature intended it, by limiting standing to those employees who are *and remain* aggrieved by the employer's alleged wrong. Section III, *infra*.

II.

THE LEGISLATURE'S STANDING REQUIREMENT IS SUPPOSED TO PREVENT ATTORNEYS FROM PURSUING LITIGATION WITHOUT AN INJURED CLIENT

A. Nothing in PAGA Alters the Well-Established Rule that Standing Must Exist at all Times During the Litigation.

Standing is an essential prerequisite in any case and no less so in a representative suit. A.B. 15-16.[2] A representative plaintiff must have standing to proceed on her own claims if she purports to represent a class or other allegedly-aggrieved individuals. *General Tel. Co. of Southwest v. Falcon* (1982) 457 U.S. 147, 156; *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 233. A named plaintiff may not establish standing by borrowing it from absent class members. *Lierboe v. State Farm Mut. Auto. Ins. Co.* (9th Cir. 2003) 350 F.3d 1018, 1022. Named plaintiffs "must allege and show that they personally have been

[2] As the Court explained in *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 378, PAGA claims are representative actions.

injured, not that injury has been suffered by ... members of the class ... they purport to represent." *Simon v. Eastern Ky. Welfare Rights Org.* (1976) 426 U.S. 26, 40, n.20 (quoting *Warth v. Seldin* (1975) 422 U.S. 490, 502).

This principle – embedded in federal and state jurisprudence – derives from the "fundamental" principle "that an action must be prosecuted by one who has a beneficial interest in the outcome." *Municipal Court v. Superior Court (Gonzalez)* (1993) 5 Cal.4th 1126, 1129; *see* Cal. Code Civ. Proc. § 367 ("every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute"). Thus, it long has been the law that where the plaintiff's beneficial interest in the dispute disappears while the case is pending, that plaintiff generally loses his or her right to pursue the case, and another plaintiff must be substituted into the case. *E.g.*, *Mervyn's*, 39 Cal.4th at 233.

California courts consistently have applied this rule to actions brought under California's Unfair Competition Law, Business & Professions Code § 17200, *et seq.*, making clear that a plaintiff who loses standing may no longer pursue the action. A.B. 22 & n.5; *see also, e.g.*, *Branick v. Downey Savings & Loan Ass'n* (2006) 39 Cal.4th 235, 242-243 (plaintiff who lost standing to pursue Section 17200 claim during pendency of lawsuit should have been replaced by plaintiff with standing); *cf. Torres v. City of Yorba Linda* (1993) 13 Cal.App.4th 1035, 1046 ("California

decisions, like the federal courts, generally require a plaintiff to have a personal interest in the litigation's outcome").

The Legislature expressly incorporated this requirement into PAGA by mandating that the plaintiff in a PAGA action be an "aggrieved employee." Lab. Code § 2699(a); *see* Defendant's RJN Exs. B at 15, C at 20, F at 39. As the court recently held in *Donohue v. AMN Srvcs., LLC* (2018) 29 Cal.App.5th 1068, there can be no dispute that PAGA claims are derivative of underlying Labor Code claims. *Id.* at 1100. By including this predicate requirement, the Legislature made clear that only those affected by a Labor Code violation would be permitted to sue on behalf of themselves and others so affected. *Id.* at 1100-03. As this Court has explained:

> [PAGA] does not create property rights or any other substantive rights. Nor does it impose any legal obligations. It is simply a procedural statute allowing *an aggrieved employee* to recover civil penalties – for Labor Code violations – that otherwise would be sought by state labor law enforcement agencies. … [U]nder [PAGA] an aggrieved employee cannot assign a claim for statutory penalties because the employee does not own an assignable interest.

Amalgamated Transit Union Local 1756, AFL-CIO v. Superior Court (2009) 46 Cal.4th 993, 1003 (citations omitted; emphasis added). Thus, the necessary predicate for every PAGA claim – that plaintiff be "aggrieved" – is a statutory element of the plaintiff's burden to pursue a PAGA claim.

Lab. Code § 2699(a). If this element disappears, under the plain language of the statute and the cases interpreting it, the employee no longer has a right to pursue statutory penalties on behalf of the State. A.B. 21-24.

This requirement also is reflected in the Legislature's decision to allow a PAGA suit "by an aggrieved employee on behalf of himself or herself *and* other current or former employees …." Lab. Code § 2699(a) (emphasis added). The court drew this critical distinction in *Reyes v. Macy's Inc.* (2011) 202 Cal.App.4th 1119, where it appropriately focused on the language of the statute to hold that an aggrieved employee may not bring an individual PAGA case. *Id.* at 1123-24. As the court explained:

> A plaintiff asserting a PAGA claim may not bring the claim simply on his or her own behalf but must bring it as a representative action and include other current or former employees. … [T]he PAGA statute does not enable a single aggrieved employee to litigate his or her claims, but requires an aggrieved employee on behalf of herself or himself and other current or former employees to enforce violations of the Labor Code by their employers.

Id. (citations, internal quotes omitted). The court's reasoning fully applies here. Plaintiff is no longer aggrieved. He has been fully compensated, yet he insists that he can pursue a PAGA claim on behalf of other employees, alone. He is wrong. The Legislature's use of the conjunctive "and" requires that his claim be rejected.

Plaintiff's interpretation of PAGA would erode PAGA's injury requirement and rewrite bedrock principles of standing. But to change the "default" standing principles under California law, the Legislature must do so expressly. *Blumhorst v. Jewish Family Services of Los Angeles* (2005) 126 Cal.App.4th 993, 1002. In *Blumhorst,* the plaintiff's claims failed because the court concluded that "[t]here is nothing in the plain language of [Government Code] sections 11135 and 11139, as amended, or in the legislative history, to warrant deviation from the rule that standing requires a plaintiff to allege that he or she was personally damaged." *Id.*

So too here. PAGA's statutory language and its legislative history demonstrate that the Legislature chose to include a typical standing requirement in PAGA, which, as discussed above, requires standing at each stage of the litigation. *See also* A.B. 21-24. This *ongoing interest in the dispute* is vital because, as this Court held in *Arias*, 46 Cal.4th at 986-987, a judgment on a PAGA claim is binding as to everyone implicated – the State and other employees, although the latter will have received no notice that their rights are being resolved – increasing the importance of ensuring that plaintiff's counsel truly is acting in the best interests of the State and the employees whose rights may be implicated.

The Legislature's decision to *not* alter the "default" standing principles for PAGA claims, combined with its decision to expressly permit

only aggrieved employees to pursue PAGA litigation, demonstrate that the Legislature did not expect or intend a PAGA representative's claim to survive settlement of his or her individual claim. Thus, because Plaintiff chose to settle and dismiss his claims, he gave up the right to pursue PAGA claims. Because Plaintiff's counsel no longer has an aggrieved client, any standing that once existed to pursue a PAGA claim no longer exists.

B. The Legislature Learned Its Lesson with the Abuses of Business & Professions Code § 17200.

Although Amici believe that the language of the statute clearly supports Defendant's arguments, to the extent any doubt exists, the history surrounding the Legislature's decision to incorporate a standing requirement bolsters Defendant's claims. On November 2, 2004, California voters approved Proposition 64 by an overwhelming margin – 59% in favor, and 41% opposed. *See* Amici Request for Judicial Notice (Amici RJN) Ex. A at 9.[3] Proposition 64 significantly amended the Unfair Competition Law in a number of respects – most importantly, by restricting standing to pursue claims to those with an injury.

Before Proposition 64, Business & Professions Code § 17204 allowed any person to bring an action under the UCL, without regard to

[3] Vote Summary, "State Ballot Measures," available at https://elections.cdn.sos.ca.gov/sov/2004-general/formatted_ballot_measures_detail.pdf [Page 9 of PDF].

whether that person had been injured by the defendant's alleged acts or practices. *See Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 561. As amended by Proposition 64, Section 17204 now provides that UCL claims "shall be prosecuted exclusively" by a designated public official or by a private party "who has suffered injury in fact and has lost money or property as a result of" the alleged UCL violation. Prop. 64, § 3. In addition, Proposition 64 deleted language in Section 17204 that had previously granted standing to any person "acting for the interests of itself, its members or the general public." Prop. 64, §§ 3, 5.

The need for Proposition 64 – and its strict standing requirement – was succinctly explained in California's 2004 Voter Information Guide:

> PROTECT SMALL BUSINESSES FROM FRIVOLOUS LAWSUITS—CLOSE THE SHAKEDOWN LOOPHOLE
>
> There's a LOOPHOLE IN CALIFORNIA LAW that allows *private lawyers* to file frivolous lawsuits against small businesses even though they have no client or evidence that anyone was damaged or misled. *Shakedown lawyers* "appoint" themselves to act like the Attorney General and file lawsuits on behalf of the people of the State of California, demanding thousands of dollars from small businesses that can't afford to fight in court.
>
> Here's the little secret these lawyers don't want you to know:
>
> *MOST OF THE TIME, THE LAWYERS OR THEIR FRONT GROUPS KEEP ALL THE MONEY!*

See Amici RJN Ex. B at 60 (capitalization and italics in original, bold added).[4] As this Court explained in *Mervyn's*, Proposition 64 was intended, in part, to stop attorneys who "[f]ile lawsuits on behalf of the general public *without any accountability to the public and without adequate court supervision*." 39 Cal.4th at 228 (citing Prop. 64, § 1, subd. (b)(1)–(4) (emphasis added).)

The Legislature expressly incorporated the protections from Proposition 64 into PAGA. A.B. 19-21, citing Defendant's RJN Exs. A, B at 7, C at 4, D at 4, F at 5. As PAGA's author, Senator Joseph L. Dunn, explained, "mindful of the recent, well-publicized allegations of private plaintiff abuse of the UCL," the Legislature amended the Bill that would become PAGA to add language clarifying that PAGA "would not permit private actions by persons who suffered no harm from the alleged wrongful act." A.B. 12, citing Defendant's RJN, Ex. C at 4. Thus, as this Court has explained, the as-amended Unfair Competition Law and PAGA impose parallel requirements, with both "requir[ing] a plaintiff to have suffered injury resulting from an unlawful action: under the unfair competition law by unfair acts or practices; under [PAGA], by violations of the Labor Code." *Amalgamated Transit Union*, 46 Cal.4th at 1001. The Legislature's

[4] "Argument in Favor of Proposition 64," Official Voter Information Guide, available at https://vig.cdn.sos.ca.gov/2004/general/english.pdf [40].

goal was to prevent the kind of headless litigation that had caused so much damage to businesses in the Unfair Competition context, because lawyers without clients had no fiduciary obligation to anyone.

Plaintiff's argument would open the door to the exact same kind of abuse Californians rejected when they adopted Proposition 64, and the Legislature expressly rejected when it adopted PAGA. Plaintiffs would be free to completely resolve their own claims, dismiss them, and step aside while their attorneys pursue the PAGA claim – despite the Legislature's clear mandate that PAGA claims can only be brought by aggrieved representatives. Plaintiff's attorneys would be the true representatives and litigation abuse would abound. This Court should reject Plaintiff's attempt to rewrite the statute and eliminate the standing requirement that the Legislature added precisely to prevent such abuse.

C. PAGA's Standing Requirement – a Critical Safeguard to Prevent the Pre-Proposition 64 Abuses – Distinguishes this Case from the *Qui Tam* Cases Plaintiff Invokes.

In enacting PAGA, the Legislature expressly heeded the electorate's decision in enacting Proposition 64. As the Answer Brief explains, the legislative history reflects a keen understanding of the harms caused by the original version of Business & Professions Code § 17200. A.B. 19-21. In his Reply Brief, Plaintiff tries to sidestep this clear legislative intent by

claiming that he is actually a *qui tam* relator, and therefore standing is largely irrelevant. Again, he is wrong.

Although PAGA has many characteristics of a *qui tam* action, it is markedly different from a true *qui tam* action in the only respect that matters: standing to sue. PAGA has a strict standing requirement and *qui tam* actions do not. Instead, *qui tam* actions uniformly give the government a much more meaningful role to play in the litigation, which, along with other statutory requirements, helps to prevent abuse and the attorney-driven litigation that prevailed under the original Unfair Competition Law.

As one California court explained, "the *qui tam* action is a type of private attorney general lawsuit; it allows an individual to sue to enforce a public statutory right and to retain a portion of any monies recovered thereby." *In re Marriage of Biddle* (1997) 52 Cal.App.4th 396, 398. There – typical of *qui tam* actions – the statute gave the government complete control over the litigation to the extent it chose, including absolute authority to settle or dismiss and the right to intervene at any time and take over the case. *Id.* at 399; *see also, e.g.*, Ins. Code § 1871.7 (adopting similar provisions in *qui tam* action designed to prevent insurance fraud).

Similarly, in *People ex rel. Alzayat v. Hebb* (2017) 18 Cal.App.5th 801, the court held that workers' compensation exclusivity did not bar an

action under the Insurance Frauds Prevention Act (IFPA) because the exclusivity rule "only limits liability 'against an employer for any injury sustained *by his or her employees* arising out of and in the course of the employment ….'" *Id.* at 830 (citing Lab. Code § 3600(a); emphasis in original). The court explained that because the injury there was "allegedly suffered by the People of the State of California, and was not filed for the purpose of remedying an injury suffered by Alzayat, the exclusivity rule simply does not apply." *Id.*

The court elaborated that "a *qui tam* lawsuit vindicates *an injury to the government, not an injury to the relator*." *Id.* (emphasis added). Thus, "[t]he relator has no personal stake in the damages sought – all of which, by definition, were suffered by the government," and "the Government remains the real party in interest in any such action." *Id.* at 830-31 (citations omitted). Indeed, "[a]s a true *qui tam* provision, Insurance Code section 1871.7 does not mandate that the relator has suffered his or her own injury," but instead allows "any interested persons" to bring a lawsuit alleging insurance fraud. *Id.* at 831. Any attempt to import an individual injury requirement, therefore, made no sense because the statute did not include any such standing requirement. *Id.*

This Court made clear in *Iskanian* that PAGA does not function as a traditional *qui tam* action. 59 Cal.4th at 387. Instead, injury to the plaintiff

is a requirement for every PAGA action. This is because "[i]n crafting the PAGA, the Legislature could have chosen to deputize citizens who were not employees of the defendant employer to prosecute *qui tam* actions. *The Legislature instead chose to limit qui tam plaintiffs to willing employees who had been aggrieved by the employer in order to avoid 'private plaintiff abuse.'"* *Id.* (emphasis added). Thus, as this Court made clear, under PAGA's plain language, only an "aggrieved employee" may bring an action "on behalf of himself or herself *and* other current or former employees." Lab. Code § 2699(a) (emphasis added).

This requirement that an "aggrieved employee" pursue the claim also drove the Court's decision in *Amalgamated Transit Union*. There, labor unions joined numerous individuals in filing suit alleging meal and rest period violations, seeking PAGA relief, among other things. 46 Cal.4th at 998-1000. Construing PAGA's standing requirement, the Court held that the labor unions that had not suffered actual injury were not "aggrieved employees" under PAGA and could not bring a representative action either as an assignee of aggrieved employees or as an association whose members were aggrieved. *Id.* at 998, 1003-05.

Plaintiff ignores the lesson from this Court's decisions and instead invokes *qui tam* cases such as *Rothschild v. Tyco Int'l (US) Inc.* (2002) 83 Cal.App.4th 488. Reply Brief on the Merits (R.B.) 27. But *Rothschild*

does not support Plaintiff's argument. There, the court considered whether a claim brought under California's Unfair Competition Law was barred because an earlier lawsuit had been brought under the California False Claims Act (CFCA) based on the same facts. *Id.* at 491-92. The court evaluated the primary rights involved in both cases, distinguishing the CFCA and the Unfair Competition Law because a CFCA plaintiff "is not asserting a right held by herself or other individuals" – *i.e.*, need not herself be injured – "but is acting on behalf of the government." *Id.* at 499-500. In contrast, the plaintiff in an Unfair Competition action must establish a "separate and distinct injury to herself and other individuals." *Id.* at 500. As a result, the later-filed Unfair Competition action involved a separate right to the individual, and was not barred by the prior CFCA action.

The *qui tam* structure under the CFCA is fundamentally different from PAGA in the only respect that matters here: standing. A PAGA claim exists only so long as an employee has an underlying Labor Code claim. When the employee can no longer assert any injury, his or her right to pursue a PAGA claim also is extinguished. Plaintiff's attempt to sweep these key distinctions under the rug should be flatly rejected.

III.

PLAINTIFF'S INTERPRETATION OF PAGA WOULD INVITE THE MISCHIEF AND ABUSE THE LEGISLATURE INTENDED TO PREVENT

The abuses feared by the Legislature already are playing out across the State, causing damage and just as importantly undermining the Legislature's goal of protecting California's employees. One employer recently wrote about the problems created by PAGA in his small business. *See* Amici RJN Ex. C.[5] As the author explains, despite the Legislature's good intentions, "PAGA lawsuits have made it more difficult for family-owned businesses like mine to be flexible with employees." *Id.* For example, the author explains that he must *require* his employees to take a lunch break early – even if they would rather delay and eat with co-workers with a later start time – on the threat of massive penalties if he abides by an employee's request.

[5] Ken Monroe, "Frivolous PAGA lawsuits are making some lawyers rich, but they aren't helping workers or employers," LOS ANGELES TIMES (Dec. 6, 2018), available at https://www.latimes.com/opinion/op-ed/la-oe-monroe-paga-small-businesses-20181206-story.html. Amici recognize that the Court cannot take judicial notice of the facts asserted in the Article. However, as the Court recently explained, "formal notice is unnecessary to recognize the basic point being made." *Hassell v. Bird* (2018) 5 Cal.5th 522, 545 n.16. Here too, Amici request judicial notice of this and other articles simply to highlight the breadth of concerns raised by PAGA, the increasing abuse of the statute, and the damage being done to businesses across California.

The California Legislature has adopted hundreds of statutes imposing obligations and liabilities on California employers. Those statutes, and their interpretation by the courts, change and evolve, increasing the burden on employers as they try to comply with every requirement. Yet, California courts also are expanding PAGA's reach and increasing its already heavy burden. For example, in *Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal.App.5th 745, the court held that a plaintiff is deputized to pursue *every* alleged Labor Code violation the employer may arguably have committed, so long as the plaintiff is allegedly affected by at least one Labor Code violation. *Id.* at 753-54. In doing so, the court rejected defendant's standing argument while refusing to follow this Court's narrow construction of PAGA standing in *Amalgamated Transit*. *Id.* at 757-58 (citing *Amalgamated Transit*, 46 Cal.4th at 1003).

Amici submit that *Huff* was incorrectly decided. Regardless, *Huff* does not help Plaintiff's argument because the *Huff* court made clear that employees must be "aggrieved" in order to have PAGA standing. 23 Cal.App.5th at 753-54. Here, however, even if Plaintiff was an aggrieved employee at one point, he no longer is. His alleged injury has been fully remedied.

The recent expansion of PAGA in decisions like these will invite further fishing expeditions into every aspect of the employer's relationship

with its employees – with the threat of heavy penalties for any deviation from perfection. This unintended burden on California's employers will only be increased if this Court adopts Plaintiff's perpetual standing argument here. This problem is particularly acute in the restaurant industry. In most of the 72,000 restaurants across the State – which, as mentioned above, employ 10% of California's employees, more than 1.7 million people[6] – the hours vary with demand, and employee shifts are phased to address the ever-changing needs and schedules of customers. Employees who make most of their money from tips often would prefer not to take breaks, particularly during busy periods, and many would ignore the mandated meal and rest breaks if allowed, or work an extra few minutes to earn as much as possible. Although *Brinker v. Superior Court* (2012) 53 Cal.4th 1004, 1040, makes clear that once duty-free meal and rest periods are provided, an employer has no duty to "police meal breaks," the same employee decisions can later give rise to a threatened PAGA action.

If Plaintiff's theory of the case prevails, a single aggrieved employee pursuing a scattershot of claims against the employer could settle her individual claims in full while her attorney retains the right to continue to

[6] *See* Amici RJN Ex. C (California, Restaurant Industry at a Glance, "National Restaurant Association" (2018) available at https://restaurant.org/Downloads/PDFs/State-Statistics/California.pdf).

pursue PAGA penalties (and the fees that come along with them), without any injured client. In pursuing these penalties, there are few checks on the Plaintiff's attorney. Under PAGA, the trial court does little more than decide whether to approve a settlement. Even the California Labor Workplace & Development Agency (LWDA) is relegated to nothing more than observer status when a private plaintiff settles a PAGA claim. *See* Labor Code § 2699(l)(2) ("The proposed settlement shall be submitted to the agency at the same time that it is submitted to the court"). If the LWDA declines to take any action on the case, then the plaintiff's counsel alone is managing the litigation, purportedly on behalf of the government but with only one real incentive: maximizing their own attorneys' fees. The likelihood of that outcome is particularly acute in a case like this, where Plaintiff voluntarily accepted $20,000 to fully resolve his claims (based on two months' work), and his counsel was fully compensated for fees incurred through the point of that voluntary settlement. A.A. 87.

The unintended consequences of a decision for Plaintiff in this case will amplify all of these problems. Under Plaintiff's theory, PAGA claims could never be resolved without litigation, limiting the employer's incentive to offer a severance or voluntarily remedy even disputes about alleged Labor Code violations.

Take, for example, an employer who discovers that during a single pay period, a clerical error resulted in failure to include all time worked or alleged off-the-clock work of which the employer previously had no knowledge. A responsible employer, upon learning of the issue, may seek to correct it by promptly paying the full amount allegedly owed plus any interest to the employees and even offering to pay an additional amount to the employees in exchange for a release of contested claims. Encouraging this good-faith action would help to avoid needless litigation and advance California's public policy of resolving disputes without litigation.

But if this Court accepts Plaintiff's perpetual standing theory, employers would have less incentive to do what the law and public policy should encourage them to do, and pursue a mutually-agreeable settlement that eliminates the possibility of future litigation. Indeed, employers would face the perverse incentive to avoid any discussion of such issues, much less address them by resolving disputed claims. This is flatly contrary to PAGA's key goal of "achiev[ing] maximum compliance with state labor laws." *Arias*, 46 Cal.4th at 980. Under Plaintiff's theory, even employees who have been fully compensated and voluntarily resolved their claims – including an amount intended to address potential PAGA penalties – would have perpetual standing to pursue a PAGA representative action.

Plaintiff's arguments would invite all of the abuse the Legislature intended to avoid when it enacted PAGA. Already, PAGA is imposing heavy burdens on employers, which are increased by decisions like *Huff* (if they are interpreted as Plaintiff contends). Employers are held to a demanding standard and are subject to stifling, suffocating liability for any alleged deviation, no matter how minor. A decision from this Court removing the individual plaintiff from the process, thus leaving plaintiff's counsel as the representative in charge of the case, magnifies the potential for abuse exponentially.

IV.

CONCLUSION

For all of the reasons discussed in Reins' Answering Brief and above, Amici respectfully request that the Court reject Kim's arguments and affirm the Court of Appeal's conclusion that a plaintiff who voluntarily dismisses his claims against his employer loses standing to continue to pursue those same claims under the Private Attorney General Act.

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CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.204(c), the text of this brief, including footnotes and excluding the caption page, table of contents, table of authorities, the signature blocks and this Certificate, consists of 5,462 words in 13-point Times New Roman type as counted by the Microsoft Word word-processing program used to generate the text.

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PROOF OF SERVICE

I declare that I am over the age of 18 years, employed in the City and County of San Francisco, and not a party to the within action. I am an employee of DAVIS WRIGHT TREMAINE LLP, and my business address is 505 Montgomery Street, Suite 800, San Francisco, California 94111. On January 16, 2019, I served the following document(s):

AMICUS CURIAE BRIEF OF RESTAURANT LAW CENTER, CALIFORNIA RESTAURANT ASSOCIATION, AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT AND RESPONDENT REINS INTERNATIONAL CALIFORNIA

☑ U.S. MAIL – I enclosed a true and correct copy of said document in an envelope and placed it for collection and mailing with the United States Post Office on January 16, 2019, following the ordinary business practice. As indicated in the service list attached, each listed individual or court is served as indicated.

I am readily familiar with my firm's practice for collection and processing of correspondence for delivery in the manner indicated above, to wit, that correspondence will be deposited for collection in the above-described manner this same day in the ordinary course of business.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on January 16, 2019, at San Francisco, California.

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