No. S274671

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ERIK ADOLPH,

Plaintiff and Respondent,

v.

UBER TECHNOLOGIES, INC.,

Defendant and Appellant.

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND [PROPOSED] BRIEF OF *AMICI CURIAE* CALIFORNIA RURAL LEGAL ASSISTANCE, INC. AND CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION IN SUPPORT OF PLAINTIFF AND RESPONDENT ERIK ADOLPH

After a Decision by the Court of Appeal
Fourth Appellate District, Division Three,
Case Nos. G059860, G060198

Orange County Superior Court
Case No. 30-2019-01103801
The Honorable Kirk H. Nakamura, Presiding

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APPLICATION OF AMICI FOR PERMISSION TO FILE BRIEF OF AMICI CURIAE

Pursuant to rule 8.520(f) of the California Rules of Court, proposed amici curiae California Rural Legal Assistance Foundation and California Rural Legal Assistance, Inc. ("Amici Curiae") seek permission to file the accompanying Brief of Amici Curiae in Support of Respondent Erik Adolph on the issue of whether employees lose standing under the California Private Attorney General Act ("PAGA") to litigate on behalf of the State non-individual PAGA claims if they agree to arbitrate their individual claims. As demonstrated below, Amici Curiae's accompanying brief provides focused assistance to this Court. The brief expands on several points in Adolph's merits briefing that are important to this Court's consideration.

Thus, in accordance with California Rules of Court, rule 8.250(f)(4), no party or counsel for any party, other than counsel for Amici Curiae, has authored any part of the proposed brief or funded the preparation of the brief.

STATEMENT OF APPLICANTS' INTEREST

Amici Curiae consist of two non-profit organizations dedicated to, among other things, safeguarding and expanding legal protections

to low-wage workers in California and improving their working conditions.

California Rural Legal Assistance, Inc. ("CRLA"), a non-profit legal services organization, has provided services to rural communities since 1966. Through its 16 field offices, which serve 19 counties throughout California, CRLA has represented tens of thousands of low-wage workers, many of whom have legitimate fears of retaliation that prevent them from personally filing or reporting a labor law violation. While many cases are brought individually, representative actions, such as PAGA, provide redress for our clients and their co-workers, whose wages were stolen and working conditions compromised by employers who break the law. CRLA has recovered tens of millions of dollars in wages, damages and penalties for violations of California's basic labor law protections and, put money back into the pockets of the workers who raise or serve our food, clean our businesses and care for our aged. PAGA has proved an effective, and often the only mechanism for bringing these claims.

California Rural Legal Assistance Foundation ("CRLAF") is a legal nonprofit that for over three decades has represented California's immigrant farmworkers and other low-wage workers in class,

representative, and PAGA actions and engaged in regulatory and legislative advocacy on their behalf. CRLAF works with California state agencies to address the most pressing needs of the farmworker community in labor, housing, safety, and health by bringing complaints that prompt state action. Because of the widespread incidence of worker exploitation, wage theft, health and safety violations, and the ineffectiveness of individual actions and limited state enforcement resources, CRLAF sponsored PAGA in 2003, and provided testimony on the dire need for the bill.

CRLA and CRLAF regularly file PAGA lawsuits involving unpaid wages and workplace health and safety violations. Agricultural workers are seasonal, and fear termination or being passed over for recall if they complain or participate in a complaint. With the dramatic increase of the H-2A program,[1] we have seen a dramatic increase in labor violations. For these workers to come forward and voice their individual claims could mean, no job, no home, and the immediate loss of the right to work in the United States. Using PAGA, millions of dollars have been recovered for

[1] The H-2A program allows agricultural employers to recruit and hire foreign workers who are admitted to the U.S. solely to perform work for that employer. *See* 8 U.S.C. § 1101(a)(h)(ii)(a).

workers and the State of California in egregious cases involving agricultural workers. Most of these workers speak little English and have low literacy in any language.

These cases include, *inter alia*, a case alleging off-the-clock work and minimum wage and overtime violations suffered by some 2,200 H-2A lettuce workers resolved for $2.2 million, with $1.7 million distributed to plaintiffs, the State, and other aggrieved employees.[2] Tomato workers denied rest and meal breaks and alleged health and safety violations related to production standards, ergonomics, and heat illness, recovered $635,000.00 for other aggrieved employees and the state.[3] Vineyard and orchard workers paid nothing for the last weeks of work and regularly denied meal periods settled their case against the grower for $300,000.00, with $200,000.00 distributed to workers and the state.[4] An H-2A sheepherder recruited from Peru was forced to work in haying operations while being paid the significantly lower sub-minimum

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[2] *Lopez-Gutierrez v. Foothill Packing* (2017) Monterey County Superior Court, Case No. 17CV001629.
[3] *Espinoza v. West Coast Tomato Growers*, *LLC* (2014) U.S.D.C. Southern District of California, Case No.: 3:14-cv-02984-JLS-KSC.
[4] *Tenorio v. Gallardo* (2016) U.S.D.C., Eastern District of California, Case No. 1:16-CV-00283-DAD JLT.

wage allowed for sheepherders. He sued and recovered $250,000.00 in underpaid wages and penalties for himself, 30 other workers, and the State.[5]

After the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, we encountered for the first time arbitration clauses signed by our low-income clients. The clauses were buried in multi-page documents signed under the understanding it was a condition of employment. Until this Court's decision in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 (*Iskanian*), we were forced to challenged arbitration agreements purporting to waive the right to bring a representative action under situations where our clients genuinely had no idea they had waived any right. The clear intent of these provisions was to destroy the ability to pursue a representative action. The *Iskanian* decision restored that critical means of redress.

The U.S. Supreme Court in *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. ___, ___ [142 S.Ct. 1906, 1924-1925] (*Viking*), did not disturb *Iskanian*'s holding that employees cannot

[5] *Vilcapoma v. Western Range* (2012) Imperial County Superior Court Case No.: ECU07266.

waive their right to bring PAGA actions in arbitration agreements and neither does the Federal Arbitration Act ("FAA") preclude California "from deputizing employees to prosecute Labor Code violations on its behalf." (*Iskanian*, *supra*, 59 Cal.4th at p. 360). As noted by Justice Sotomayor, California has "the last word" on whether an employee who agreed to arbitrate their individual PAGA claim continues to have standing to litigate the "non-individual" PAGA claims. (*Viking*, *supra*, 142 S.Ct. at p. 1925 (conc. opn. of Sotomayor, S.).) A decision finding employees lose standing to bring non-individual PAGA claims when they sign an arbitration agreement would likely prompt another surge in arbitration agreements waiving employees' right to serve as a proxy of the State of California under PAGA. This will severely and negatively impact CRLA's and CRLAF's work to combat rampant violations of the wage and hour and workplace health and safety rights and improve the working conditions for low-wage workers in rural California.

Respectfully submitted,

Dated: December 8, 2022

By: /s/ Veronica Melendez
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California Rural Legal
Assistance Foundation

No. S274671

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BRIEF OF AMICI CURIAE

INTRODUCTION

Appellant Uber Technologies, Inc. ("Uber") frames its argument using the false paradigm that Respondent Erick Adolph ("Adolph"), and by extension, other PAGA plaintiffs, are bringing actions solely on behalf of other aggrieved employees, whenever the personal PAGA claim included in the action may be subject to arbitration. In fact, Uber all but says that if an arbitration clause exists, an employee may not even commence a PAGA action that seeks penalties for other aggrieved employees. (Appellant's Opening Brief ("AOB") at p. 36 ["Adolph cannot acquire standing to bring a standalone non-individual PAGA claim simply by joining that claim with an individual PAGA claim in violation of an enforceable arbitration agreement"]; see also *id*. at p. 37 ["And the fact that Adolph violated his enforceable agreement to arbitrate his individual claim PAGA claim does not mean that the remaining non-individual claims are an action "brought by an aggrieved employee *on behalf of himself or herself*"], original italics.)

But Adolph did not bring an action solely on behalf of other aggrieved employees. As a former worker of Uber, personally aggrieved by one or more labor law violations, Adolph brought a

single action on behalf of himself and other aggrieved employees to address both the violations he personally suffered, and those suffered upon other aggrieved coworkers. To the extent that one or more of the claims included in his action were encompassed in an enforceable arbitration clause,[6] he waived his right to arbitrate his claims. Uber had not, and *Viking* says that it has the right to demand arbitration right as to any individual PAGA claim encompassed in the terms of the arbitration agreement. (*Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. ___, ___ [142 S.Ct. 1906, 1925] (*Viking*).) However, *Viking* also says that that Adolph, cannot be forced to waive his right to bring a representative PAGA action on behalf of other aggrieved employees. (*Id.* at p. 1925.) Neither Uber nor Adolph can be forced to arbitrate the representative claims on behalf of other aggrieved employees, unless they expressly agreed to do so.[7] (*Ibid*.) But those non-arbitrable substantive representative claims remain an unsevered part of the action that Adolph, as an aggrieved employee filed. (*Ibid*.)

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[6] As argued in Respondent's brief, at pp. 47-52, it does not appear that ANY party agreed to arbitrate ANY PAGA claim.

[7] "Nothing in the FAA establishes a categorical rule mandating enforcement of waivers of standing to assert claims on behalf of absent principals." (*Viking*, *supra*, 142 at p. 1912.)

Uber's reframing of this as some form of standalone action ignores both the procedural reality of this case, under California law, and the U.S. Supreme Court's acknowledgment of the substantive and non-waivable nature of the Adolph's representative claims on behalf of other aggrieved employees.

Once Adolph filed this action, Uber had a choice. It could invoke arbitration – as to the arbitrable claims only – or like Adolph, waive its right to pursue those claims in an arbitration forum.[8] Here, Uber opted for arbitration, and *Viking* says the individual personal claims, including the individual PAGA claim, if covered by the arbitration agreement, are severed, and referred to arbitration. (*Viking*, *supra*, 142 S.Ct. at p. 1925; see also (*Dean Witter Reynolds Inc. v. Byrd* (1985) 470 U.S. 213, 221 [cited with approval by *Viking, supra*, 142 S.Ct. at p. 1923]; *Blair v. Rent-A-Center, Inc*. (9th Cir. 2019) 928 F.3d 819, 832 [affirming lower court's decision severing plaintiff's claims under the Arnette Rental-Purchase Act, Unfair

[8] "A rule prohibiting waivers of representative standing would not invalidate any agreements that contracted for "bilateral arbitration" in Viking's sense—it would simply require parties to choose whether to litigate those claims or arbitrate them in a proceeding that is not bilateral in every conceivable sense." (*Viking*, *supra*, 142 S.Ct. at p. 1922-1923.)

Competition Law, and Consumer Legal Remedies Act from the scope of arbitration, sending to arbitration usury claims, and denying motion to stay non-arbitrable claims].) But those claims that are not arbitrable, including the representative claim on behalf of other aggrieved employees, remain part of the original action that was filed. This leaves the question of whether Adolph continues to have standing, not to file, but to proceed with that part of the action, in superior court. That question, as Justice Sotomayor points out, is a question of state law. (*Viking*, *supra*, 142 S.Ct. at pp. 1925-1926 (conc. opn. of Sotomayor, S.).)

California law generally, and specifically under PAGA, defines standing in a way that allows the representative action to continue in superior court, notwithstanding a referral to arbitration of the individual PAGA claim. While this may mean that the action proceeds on dual tracks, that is not inconsistent with the FAA. (See 9 U.S.C. § 3.) Such a construction is the only construction that, honors the terms of an enforceable arbitration agreement, conforms with California standing law, and promotes, indeed preserves the purpose and intent of PAGA to ensure that workforce wide violations of California labor laws do not go unredressed.

ARGUMENT

The State of California is one of the largest economies in the world. However, the budgetary funding for labor law enforcement is inadequate to ensure that it can step up to adequately protect and advocate on behalf of the 39.24 million California residents. Therefore, PAGA is a means in which a former worker, who themselves have been wronged by an employer, can step up as a proxy of the Labor and Workforce Development Agency ("LWDA") and hold employers accountable for breaking labor laws.

This is precisely what this Court in *Iskanian* concluded, "[w]e conclude that an arbitration agreement requiring an employee as a condition of employment to give up the right to bring representative PAGA actions in any forum is contrary to public policy. In addition, we conclude that the FAA's goal of promoting arbitration as a means of private dispute resolution does not preclude our Legislature from deputizing employees to prosecute Labor Code violations on the state's behalf. Therefore, the FAA does not preempt a state law that prohibits waiver of PAGA representative actions in an employment contract." (*Iskanian, supra*, 59 Cal.4th at p. 360.) *Viking* did not disturb that aspect of this Court's ruling. (*Viking*, *supra*, 142 S.Ct. at

p. 1921 [”Under this Courts holding, *Iskanian's* prohibition on wholesale waivers of PAGA claims is not preempted by the FAA.”].)

The importance of the Court's ultimate decision in this case warrants a review of the both the purpose of PAGA and California standing law as that purpose must be considered when construing both the PAGA standing requirements, and application under general standing principles. The circumstances leading up to the enactment of PAGA make clear that a construction of California standing law, that would extinguish the right of an aggrieved employee to enforce penalties arising from labor law violations visited upon others, would gut the statute and be contrary to the careful drafting of the standing requirements undertaken by the Legislature.

I. 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 v. Superior Court* (2009) 46 Cal.4th 969, 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(i)). [9]

A. 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 manifested 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

[9] All statutory references are to the California Labor Code, unless otherwise provided.

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 citing *Western Indemnity Co. v. Pillsbury* (1915) 170 Cal. 686, 694.)

California has acknowledged in statutes 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."].) Labor Code section 206.5 makes a 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 to 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. 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, citations and internal quotations omitted.)

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. (*Iskanian*, *supra*, 59 Cal.4th at p. 384.) The same fundamental public policy that the Courts relied upon in *Iskanian* and *Viking*[10] to conclude that a waiver of PAGA rights may not be forced by means of an arbitration clause, equally compels the conclusion that, an aggrieved employee's representative claim on behalf of other aggrieved employees survives. It continues either as part of the arbitration or as the part of an original action which remains in the judicial forum, after severance of arbitrable claims.

B. PAGA Continues to Be a Critical Element of California's Efforts to Address Systemic Underenforcement of Workplace Protections, Which Harms Workers in the Underground Economy Most Profoundly.

The Legislature created PAGA to respond to the staggering lack of enforcement of basic labor laws in low-wage industries. Although California public policy strongly supported the vigorous enforcement of minimum labor standards,[11] there was a shortage of government resources to pursue enforcement, staffing levels of labor law

[10] See *Iskanian*, *supra*, 59 Cal.4th at p. 384; *Viking*, *supra*, 142 S.Ct. at p. 1925.
[11] See Lab. Code, § 90.5(a).

enforcement agencies could not keep pace with the 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.) As this Court noted in *Iskanian*, the Assembly Committee on Labor and Employment concluded that the Department of Industrial Relations

> "was failing to effectively enforce labor law violations. Estimates of the size of California's 'underground economy'—businesses operating outside the state's tax and licensing requirements—ranged from 60 to 140 billion dollars a year, representing a tax loss to the state of three to six billion dollars annually. Further, a U.S. Department of Labor study of the garment industry in Los Angeles, which employs over 100,000 workers, estimated the existence of over 33,000 serious and ongoing wage violations by the city's garment industry employers, but that DIR was issuing fewer than 100 wage citations per year for all industries throughout the state. Moreover, evidence demonstrates that the resources dedicated to labor law enforcement have not kept pace with the growth of the economy in California."

(*Iskanian, supra*, 59 Cal.4th at p. 379, citing Assem. Com. on Labor and Employment, Analysis of Sen. Bill No. 796 (Reg. Sess. 2003–2004) as amended July 2, 2003, p. 3.) The State wanted to remedy the "systemic underenforcement of many worker protections." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 545.)

As such, the Legislature enacted 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." (*Ibid*.) 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.)

In short, PAGA was passed to address the rampant widespread violations that the State is unable to pursue on its own. "That plaintiff and other employees might be able to bring individual claims for Labor Code violations in separate arbitrations does not serve the purpose of the PAGA, even if an individual claim has collateral estoppel effects." (*Iskanian*, *supra*, 59 Cal.4th at 384, citing *Arias*, *supra*, 46 Cal.4th at pp. 985–987.)

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 <https://www.dir.ca.gov/letf/> [as of Dec. 7, 2022].) 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 LWDA 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.[12]

According to the U.S. Department of Labor, minimum wage violations in California occur approximately 372,000 times each week.[13] This single type of violation robs employees of almost $2 billion per year, while the cost is an estimated $15 billion per year across the country.[14] This number is higher than the estimated total yearly value of all robberies, burglaries, larceny, and motor vehicle theft in the United States.[15] However, while those criminal violations are enforced by various law enforcement agencies, the Division of

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[12] According to the 2017-2018 Fiscal Year Report on the Effectiveness of the Bureau of Field Enforcement issued by the State Labor Commissioner has over 1.5 million businesses. (See 2017-2018 Fiscal Year Report on the Effectiveness of the Bureau of Field Enforcement, at p. 2 <https://www.dir.ca.gov/dlse/BOFE_LegReport2018.pdf> [as of Dec. 7, 2022].) In fiscal year 2017–2018, DLSE through its various arms conducted 2,058 inspections. (*Id*. at p. 4.) But only 87 of these were conducted in agriculture. (*Id*. at p. 5.)

[13] Eli Wolfe, W*e're Being Robbed': Wage Theft in California Often Goes Unpunished by State*, KQED (Oct. 16, 2019) <https://www.kqed.org/news/11780059/were-being-robbed-california-employers-who-cheat-workers-often-not-held-accountable-by-state%3e> [as of Dec. 7, 2022].

[14] David Cooper & Teresa Kroeger, *Employers Steal Billions from Workers' Paychecks Each Year*, Economic Policy Institute (May 10, 2017), at p. 10 <https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year/> [as of Dec. 7, 2022].

[15] Cooper, *supra*, at p. 28.

Labor Standards Enforcement was able to conduct only 792 inspections in 2017 and 751 in 2018.[16] That figure went down in 2019 to 691 inspections and in 2020 to 118 inspections.[17] Imagine how different our communities would be if, statewide, the police only investigated 118, or even 792 instances of robberies, burglaries, larceny and motor vehicle theft.

Wage theft is concentrated in the low-wage worker sector, with the highest rates of citations by the California Labor Commissioner in the agriculture, restaurant, construction, retail, and warehouse sectors, totaling more than $77.4 million in stolen wages in a single fiscal year.[18] Reports show that more than a quarter of workers experience minimum wage violations and regularly work "off the clock" without pay.[19]

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[16] See Victoria Hassid, *Labor Enforcement Task Force Report to the Legislature*(Mar. 2019), at p. 5 https://www.dir.ca.gov/letf/LETF-Legislative-Report-2019.pdf> [as of Dec. 7, 2022].
[17] See Katrina S. Hagen, *Labor Enforcement Task Force Report to the Legislature* (Mar. 2021) <https://www.dir.ca.gov/letf/LETF-Legislative-Report-2021.pdf> [as of Dec. 7, 2022].
[18] Nadia Lopez, *Wage Theft Is a Serious Issue in California. Here's who it impacts most, how to get help*, Fresno Bee (Feb. 10, 2022) <https://www.mercedsunstar.com/profile/243181181> [as of Dec. 7, 2022].
[19] See generally, Annette Bernhardt, et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's*

In 2017 and 2018, the California Labor Enforcement Task Force, charged with combating the underground economy,[20] found that an average 93% of businesses inspected each month were found to be out of compliance by at least one agency.[21] In 2017 and 2018, DLSE cited 52% of businesses inspected[22] while in 2019 and 2020, the citation rate remained at 52%.[23] As of May 2022, nearly a third of the Labor Commissioner's positions were vacant.[24] While California has tackled this persistent problem in various ways, violations of minimum wage, overtime, meal and rest periods, and other basic worker protections persist. The State may never have the resources

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Cities, at p. 20 (Sept. 21, 2009) <https://www.nelp.org/publication/broken-laws-unprotected-workers-violations-of-employment-and-labor-laws-in-americas-cities/> [as of Dec. 7, 2022]. See also, Ruth Milkman, et al., *"Wage Theft and Workplace Violations in Los Angeles: The Failure of Employment and Labor Law for Low-Wage Workers*", UCLA Labor Center (2010) <https://www.labor.ucla.edu/wp-content/uploads/2018/06/LAwagetheft.pdf > [as of Dec. 7, 2022].

[20] *See generally* Hassid LETF Report, *supra,* fn. 16.

[21] See Hassid LETF Report, *supra*, fn. 16, p. 3.

[22] See Hassid LETF Report, *supra,* fn. 16, p. 5.

[23] See Hagen LETF Report, *supra,* fn. 17, p. 5.

[24] Jeanne Kuang and Alejandro Lazo, *California Wage Theft Whack-a-Mole: Workers Win Judgments Against Bosses But Still Don't Get Paid* (Sept. 15, 2022) <https://calmatters.org/california-divide/2022/09/california-wage-theft-cases/> [as of Dec. 7, 2022].

necessary to address the problem solely with direct State enforcement activity.

Clearly, the "public interest" is directly served by allowing individual workers to stand in the shoes of the Labor Commissioner and undertake the enforcement actions the State lacks the capacity to do. It is this "public interest" along with the express language of PAGA that must drive the analysis of whether a worker may continue to prosecute the representative action on behalf of other aggrieved workers, after the individual PAGA claim is referred to arbitration.

II. *VIKING* RECOGNIZES THE RIGHT OF THE STATE TO CREATE A NON-WAIVABLE REPRESENTATIVE ACTION.

While the *Viking* court may have split the PAGA baby, it did not throw the baby out with the bathwater. The court recognized that California may, as part of its labor laws enforcement mechanism, create a representative action where an individual stands in the shoes of the Labor Commissioner and the FAA does not interfere with that. "Nothing in the FAA establishes a categorical rule mandating enforcement of waivers of standing to assert claims on behalf of absent principals." (*Viking*, *supra*, 142 S.Ct. at p. 1921.) Justice Sotomayor, in her concurrence summarizes the impact of the court's

majority decision, unequivocally. "As a whole, the Court's opinion makes clear that California is not powerless to address its sovereign concern that it cannot adequately enforce its Labor Code without assistance from private attorneys general. The Court concludes that the FAA poses no bar to the adjudication of respondent Angie Moriana's 'non-individual' PAGA claims[.]" (*Viking*, *supra*, 142 S.Ct. at p 1925 (conc. opn. of Sotomayor, S.).)

As pointed out by Respondent, where the court went wrong is in its construction of California standing and joinder law, and erroneous conclusion that it deprived an aggrieved employee of standing once the individual PAGA claim is referred to arbitration. (Respondent's Brief at p. 11.) Justice Sotomayor anticipated this, acknowledging the limited guidance the court had on California law and making clear that this Court has the "last word" on that issue. (*Viking*, *supra*, 142 S.Ct. at p 1925 (conc. opn. of Sotomayor, S.).)

III. PAGA STANDING IS CONSISTENT WITH CALIFORNIA'S RECOGNITION OF LIBERAL STANDING TO ASSERT CLAIMS IN THE PUBLIC INTEREST, BUT PROTECTS FROM ABUSE BY REQUIRING EMPLOYMENT STATUS AND IMPACT FROM AT LEAST ONE VIOLATION.

Uber argues that once Adolph's individual representative claim is referred to arbitration the State's right to enforce Labor Law violations, through him, as a deputized aggrieved employee is extinguished. But this specter of a headless horseman at the helm of an action in which he no longer has a personal stake, is inaccurate. Adolph continues to be aggrieved, and his status as a former employee does not change by operation of referral to arbitration. Both as a PAGA representative plaintiff, and as an individual with standing to enforce laws designed to promote the public interest, Adolph maintains his status as a deputy of the LWDA to prosecute both parts of his action – those involving violations committed against him may proceed in arbitration, and those committed against others in court. All of the violations occurred, all of the penalties remain yet to be collected, and Adolph's right as an aggrieved employee to collect them continues, as does the right of the LWDA and the State of California to rely on him to do so. Whether they proceed in court, or

(if allowed under the express terms of the arbitration agreement) in arbitration they are extant, and do not evaporate.

A. Adolph Has Met the Two Prongs of PAGA Standing and Referral of His Individual PAGA Claims to Arbitration Does Not Change His Standing to Enforce PAGA Penalties Arising from Violations Committed Against Other Aggrieved Employees.

Not every private citizen can serve as the state's Representative. Only an aggrieved employee has PAGA standing. Not everyone in the general public meets the two prongs required for standing under PAGA. The Legislature added these two criteria to the broader "public" type of standing recognized under California law – nothing more. There is no injury requirement, and certainly no "continued" injury requirement. The mere fact that he has alleged that he and others are aggrieved by labor law violations inflicted on them by Uber, establishes his standing, until and unless it is established that he is not aggrieved.

Under PAGA, Labor Code section 2699(c), an "aggrieved employee means any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." Adolph met both prongs, *viz*, that he: (1) **was** personally employed by the alleged violator employer, AND (2) one or more of

the alleged violations **was** committed against him. Nothing more is required but satisfaction of these two prongs.

Uber repeatedly cites to *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993 in both its opening brief and reply without properly applying what it stood for. In *Amalgamated*, the union lacked standing because it did not meet either of the standing prongs above. First, the union was never personally employed by the alleged violator employer. (*Id*. at p. 1005.) A union is a membership of workers. (*Ibid*.) A union entity is not a worker who performed any work for the employer directly. (*Ibid*.) Second, the union never personally suffered any alleged violations because again, a union entity is not a person, nor an employee. (*Ibid*.) Thus, the union lacked associational standing because it failed to meet both prongs. (*Id*. at pp. 1004-1005.)

Uber also cites to *Robinson v. Southern Counties Oil* Co. (2020) 53 Cal.App.5th 476 and once again misinterprets the case. In *Robinson*, a former worker filed a case against an employer for wrongs that occurred after the former worker had already departed the employment. (*Id*. at p. 484.) Therefore, the worker never themselves personally suffered one or more of the violations alleged in the

amended complaint. (*Id*.) Under the court's ruling he never had "standing to pursue claims based solely on violations alleged to have occurred" to others because he himself had no claims to assert. (*Id*. at p. 485).

In this case, Adolph personally suffered the violations and alleged those violations in the complaint. As recognized in *Robinson*, he does not have to show an injury or entitlement to any payment to maintain a PAGA action, because "[t]he Legislature defined PAGA standing in terms of violations, not injury so that a person's receipt of compensation for his injury does not defeat his standing to assert a PAGA claim." (*Robinson, supra,* 53 Cal.App.5th at p. 484, quotations omitted, citing *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 84–85 (*Kim*), citing *Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244, 1256 [payment of statutory remedy does not excuse Labor Code violation] and *Raines v. Coastal Pacific Food Distributors, Inc.* (2018) 23 Cal.App.5th 667, 678–680 [plaintiff is not required to show a quantifiable injury in PAGA action for civil penalties].)

Once a plaintiff obtains standing by meeting both Prong 1 and Prong 2, the settlement of their plaintiff's personal claims does not

revoke plaintiff's standing to remain as the LWDA proxy for the non-personal claims. Even without a currently actionable Labor Code claim, a person "is an 'aggrieved employee' with standing to pursue her PAGA claim" because she alleged she was employed by defendant and "personally suffer**ed** at least one Labor Code violation on which the PAGA claim is based." (*Johnson v. Maxim Healthcare Services, Inc.* (2021) 66 Cal.App.5th 924, 930, emphasis added.)

Herein is the defining clarification regarding why Adolph's LWDA proxy standing remains. Prong Two standing requires a showing that the worker had "suffer**ed**"[25] a wrong by the employer, not that the worker is "suffer**ing**" an on-going wrong and seeks a remedy. In fact, PAGA does not even require the worker to be seeking a remedy. (*Kim*, *supra*, 9 Cal.5th at p. 85.) Again, in

[25] The U.S. Supreme Court in *Viking* repeatedly refers to the injury to the worker in past tense "suffer**ed**" and never once uses a term implying an on-going injury in need of redress. "An employee who alleges he or she suffer**ed** a single violation is entitled to use that violation as a gateway to assert a potentially limitless number of other violations as predicates for liability. (*Viking*, *supra*, 142 S.Ct. at p. 1915, emphasis added.) "But *Iskanian* also adopted a secondary rule that invalidates agreements to separately arbitrate or litigate "individual PAGA claims for Labor Code violations that an employee suffer**ed**," on the theory that resolving victim-specific claims in separate arbitrations does not serve the deterrent purpose of PAGA. (*Id*. at p. 1916-1917, emphasis added.)

Johnson, *supra*, 66 Cal.App.5th 924, the former worker maintained standing despite no longer seeking a remedy for himself. *Kim* and its progeny make clear that settlement does not change the fact that a worker who suffer**ed** a wrongful act against them by the employer, satisfies Prong 2.

This analysis is even more compelling when applied to the facts here. Referral of the active individual representative PAGA action does not change the fact that Adolph suffered a violation and meets the standing requirements necessary to pursue the representative claim on behalf of other aggrieved employees in court. Indeed, his personal interest in aggressively enforcing the action – even if limited to the specific violations only he suffered – is superior to that of an employee who has settled those claims, irrespective of forum.

Justice Alito and Uber misconstrue this Court's discussion of standing in *Kim,* producing exactly the opposite result intended by the Legislature, and this Court. The proper construction must begin with a full consideration of the court's reliance on the *Kim* case.

> It is apparent that PAGA's standing requirement was meant to be a departure from the "general public" (*Californians for Disab*ility *Rights*, *supra*, 39 Cal.4th at p. 227) standing originally allowed under the UCL. However, Reins reads too much into this objective. **Nothing in the legislative history suggests the Legislature intended to make PAGA standing**

> **dependent on the existence of an unredressed injury, or the maintenance of a separate, unresolved claim.**

(*Kim*, *supra*, 9 Cal.5th at pp. 90-91, emphasis added.) Justice Alito and Uber make too much of this Court's reference to *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 224. The *Kim* court there referred to the fact that prior to amendment of the Unfair Competition Law ("UCL") by Proposition 64, there was no personal interest or standing requirement whatsoever under the UCL. (*Kim*, *supra*, 9 Cal. 5th at p. 90.) The UCL prohibited "any unlawful, unfair or fraudulent business act or practice" (Business and Professional Code § 17200) and did not require that a plaintiff show an actual injury or require that a representative action be brought as a class action. (*Ibid*.) The court contrasted that to the express language of section 2699's requirement that a plaintiff must be both a current or former employee and be aggrieved by a labor law violation. (*Id.* at p. 91.) Those were the only requirements imposed by the Legislature.

This Court made that clear in *Kim*. "Reins's assertion that a PAGA plaintiff is no longer 'aggrieved' once individual claims are resolved is at odds with the Legislature's explicit definition. Section 2699(c)…does not require the employee to claim that *any* economic injury resulted from the alleged violations." (*Id.* at 84, original

italics.) The court there, as it must here, recognize that "[w]hen a statute prescribes the meaning to be given to particular terms used by it, that meaning is generally binding on the courts." (*Id*. at p. 85, citations omitted.) "Reins's use of 'aggrieved' as synonymous with having an unredressed injury is at odds with the statutory definition." (*Id.* at p. 85.) Reins' interpretation "would expand section 2699(c) to provide that an employee who accepts a settlement for individual damage claims is no longer aggrieved. Of course, the Legislature said no such thing." (*Ibid*.) Courts in construing statutes are "careful not to add requirements to those already supplied by the Legislature." (*Ibid.*, citation and internal quotations omitted.) "Where the words of the statute are clear," courts "may not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history." (*Ibid*, citation and internal quotations omitted.) If the Legislature intended to limit PAGA standing to employees with unresolved compensatory claims when such claims have been alleged, it could have worded the statute accordingly. (*Ibid*.)

Uber urges this court to expand Labor Code section 2699(a) to say that an employee loses standing – after the fact – if their

individual claims are referred to arbitration. Of course, the Legislature did no such thing. Every aspect of the *Kim* decision promotes the notion that the Legislature's deputization of an aggrieved employee to act on behalf of the LWDA cannot be extinguished by subsequent acts of the very employer who broke the law and committed those violations, either by settlement or through exercise of its right to arbitrate the individual representative claim of the Plaintiff.

Californians for Disability Rights does not drive a contrary construction. That case addressed whether the amendment of a statute by initiative to add an "injury" standing requirement could be applied to pending cases. (*Californians for Disability Rights*, *supra*, 39 Cal.4th 223.) The court ruled that broad standing previously available in a UCL action under Business and Professions Code section 17200, *et seq.*, could be changed to add the injury requirement because the measure did not change substantive rights or eliminate any right to recover. (*Id.* at p. 232.)[26] Here, there has been no change to the

[26] Notably, the court there relies on *Common Cause v. Bd. of Supervisors* (1989) 49 Cal.3d 432. That case both recognizes California's broad standing laws do not require a personal interest in the outcome of the case "when it is an issue of public right and the

statute, or the right of an aggrieved employee to bring a PAGA action on behalf of himself and others.

In *Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1119, the court ruled that the plaintiff lost standing to bring the derivative action because he was no longer a stockowner – he had no continuing interest whatsoever in the outcome of the action. That is not the case here, Adolph continues to be aggrieved by the fact that he suffered from one or more of the labor law violations alleged. *Grosset* recognizes the importance of considering the purpose of the statute when construing standing requirements, and held there that the interest of the corporation was best served by applying a continuous standing requirement, consistent with what is done in other states. Here the interest of the State and the public at large in enforcing basic labor law protections drove the Legislature to deputize aggrieved employees, like Adolph, who had both the knowledge and interest in enforcing labor laws as to the employer. But the overarching purpose

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object is to procure the enforcement of a public duty." (*Id*. at p. 439.) It also recognizes that there is no difference in the standing requirement depending on the procedural posture of the case, there holding that a higher showing injury need not be made to obtain injunctive relief, if the statute provides general standing based on the public interest. (*Id.* at pp. 439-440.)

was to increase enforcement resources. (*Iskanian, supra*, 59 Cal.4th at p. 379.)

B. California's Broad Public Interest Standing Compels a Construction that Adolph Continues to Have Standing Even if He Has No Personal Claim Before the Court.

Uber and employers around the state are desperately clinging to Justice Alito's view that once the individual PAGA claim is referred to arbitration, there is no mechanism by which the representative claim for other aggrieved employees can be pursued. (*Viking*, *supra*, 142 S.Ct. at p. 1925.) This observation (and Appellant's reliance on it) is made without the benefit of argument or briefing by the parties about the impact of *Kim* on standing under these circumstances and an analysis of California's recognition of public interest standing. Justice Alito's error is perhaps the product of the fundamental difference in the Article III, constitutional standing requirements imposed on litigants bringing actions in federal court, and those applicable under less restrictive standing requirements under California law. As Justice Sotomayor implicitly recognized, states have the authority to determine for themselves who has standing to pursue state statutory claims in state court. (*Viking*, *supra*, 142 S.Ct. at p. 1925-1926 (conc.

opn. of Sotomayor, S.); *Hollingsworth v. Perr*y (2013) 570 U.S. 693, 717-718; *Cole v. Richardson* (1972) 405 U.S. 676, 697.)

California courts consistently have recognized the Legislature's power to imbue private plaintiffs with standing that does not require a personalized interest in the outcome of the action. (See *Barquis v. Merchants Collection* Assn. (1972) 7 Cal.3d 94, 110, fn.11 [construing the unfair competition provisions of Civil Code § 3369 and recognizing the broad standing to challenge the pattern of improperly filing unlawful detainer actions without the need to comply with more restrictive federal standards.].) Civil Code section 3369 was the precursor to Business and Professions Code sections 17200, *et seq.*, and this Court had no difficulty acknowledging the broad standing afforded to any "person acting for the interest of...the general public" to challenge unfair competition meant that no personal harm had to be shown. (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 561 ["a private plaintiff who has himself suffered no injury at all may sue to obtain relief for others"], citations omitted, overruled on other grounds by constitutional amendment.) The consistent construction of those sections based on the statute's and the Legislature's clear intent to address acts inconsistent with the

public interest by providing broad standing to private individuals to challenge them.[27]

California recognizes public interest standing under circumstances where the public interest will benefit from vigorous enforcement of government duties. The California Supreme Court has repeatedly affirmed its long-standing approval of citizen actions to require governmental officials to follow the law. (See *Save the Plastic Bag Coalition v. City of Manhattan* (2011) 52 Cal. 4th 155 [ban on plastic bags]; *Common Cause v. Board of Supervisors*, *supra,* 49 Cal.3d 432 [deputizing county of employees as voting registrars]; *Green v. Obledo* (1981) 29 Cal.3d 126 [allowance of expenses]; *Bd. of Soc. Welfare v. County of L.A.* (1945) 27 Cal.2d 98, 100-101 [payment of warrants]; *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899 [environmental impacts on development]; (*Venice Town Council v. City of L.A.* (1996) 47 Cal.App.4th 1547) [preservation of affordable housing]; (*Brown v.*

[27] As we know, what can be granted by the Legislature can be revoked by legislative act or initiative. That is what occurred in November 2004 when Proposition 64 replaced the broad standing afforded under the UCL with an express injury requirement. Cal. Sec'y Of State, Text Of Proposed Laws, Proposition 64 § 1 (2004), available at p. 9. <https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2236&context=ca_ballot_props> [as of Dec. 7, 2022].

Crandall (2011) 198 Cal.App.4th 1 [medical care for indigent persons].)

This exception to the general rule that a petitioner must have more than a general interest in the outcome promotes the public policy of citizens ensuring that a government entity does not impair or defeat a legislatively created public right. (See *Save the Plastic Bag Coalition*, *supra*, 52 Cal. 4th at p. 166; *California Hosp. Ass'n v. Maxwell-Jolly* (2010) 188 Cal.App.4th 559, 569, quoting *Mission Hosp. Reg'l Med. Ctr. v. Shwery* (2008) 168 Cal.App.4th 460, 480.) These cases allow a private individual to step in, to act to preserve the public interest when the government agency fails to do so. This is analogous to the Legislature's express grant of standing to private persons under PAGA when the agency charged with that enforcement lacks the resources to do so and is entitled to equal deference. The Legislature chose to qualify that broad public interest standing by requiring status as a current or former employee who suffered one or more Labor law violations but imposed no other requirements.

C. Adolph's Action Was Properly Filed and Is Pending Based on the Standing of Adolph as an Aggrieved Employee.

Uber attempts to dodge both clear legislative intent and California standing law by creating the legal fiction that referral of the

individual PAGA representative claim, results ex post facto in his failure to have filed an action that includes his personal claim. (AOB at pp. 44-45.) Imbued in this argument is the characterization of Adolph's very act of filing the lawsuit as a "violation" of the agreement.[28] This rewriting of the history of this case has no basis in law or fact.

Consistent with Labor Code section 2699(a), Adolph "brought" his civil action "on behalf of himself" and "other aggrieved employees" alleging that Uber violated both his and other aggrieved employees' rights under the Labor Code. His standing to bring that action existed and exists without regard to the existence of an arbitration agreement – or any other contract.[29] He did not violate the arbitration agreement by initiating the action on behalf of himself and other aggrieved employees. "[E]ven where a party has entered into an arbitration agreement, that party may file a complaint in superior court seeking resolution of a dispute potentially subject to the arbitration

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[28] "Adolph cannot acquire standing to bring a standalone non-individual PAGA claim simply by joining that claim with an individual PAGA claim in violation of an enforceable arbitration agreement, as he has attempted to do here." (AOB at p. 36.)

[29] *Viking*, *supra*, 142 S.Ct. at p. 1924; *Iskanian*, *supra*, 59 Cal.4th at p. 384; see also Code Civ. Proc., §§ 1668 and 3513.

agreement." (*Sargon Enterprises, Inc. v. Browne George Ross LLP* (2017) 15 Cal.App.5th 749, 768.) His filing of the action was an initial waiver of his right to arbitrate. This was his prerogative. "A provision for arbitration does not divest the court of jurisdiction to hear the controversy. It merely means that if one of the parties chooses arbitration, he may so petition the court and the court will stay proceedings, order arbitration, then confirm the award." (*Id.* at pp. 768-769, citing S*pence v. Omnibus Industries* (1975) 44 Cal.App.3d 970, 975, and construing Code Civ. Proc., § 1280, *et seq*.)

Adolph was an aggrieved employee when he filed his action, he remains an aggrieved employee even if his Superior Court action is stayed pending arbitration of his individual claim. *Viking* makes clear that his right to pursue both his individual PAGA claims as well as those on behalf of other aggrieved employees cannot be extinguished by an arbitration clause. (*Viking, supra*, 142 S.Ct. at p. 1924.) While an arbitration clause, if enforceable and applicable, allows Uber, or any employer to pull part of that action into an arbitration setting, it does not allow – much the less compel – the retroactive extinction of the action, or an employee's standing to bring it, as to the remaining aspects of the PAGA action. (Code Civ. Proc., § 1281.4.) This is

consistent with the FAA, which also provides that the action is stayed, not dismissed. (9 U.S.C. § 3.)[30]

Severance of some claims, and sending them to arbitration, while leaving others in court is a reality acknowledged by the FAA, as well California law. (Code Civ. Proc., § 1281.4; 9 U.S.C. § 3.) While this may mean that the action proceeds "piecemeal" on dual tracks, that is not inconsistent with the FAA. (*Dean Witter Reynolds*, *supra*, 470 U.S. at 221 [cited with approval by *Viking, supra*, 142 S.Ct. at p. 1923]; see also *Blair*, *supra*, 928 F.3d at 832 [affirming lower court's decision severing plaintiff's claims under the Arnette Rental-Purchase Act, UCL, and Consumer Legal Remedies Act from the scope of arbitration, sending to arbitration usury claims, and denying motion to stay non-arbitrable claims]; *Lag Shot LLC v. Facebook, Inc*. (N.D. Cal. 2021) 545 F.Supp.3d 770, 786 [severing plaintiff's claims under the UCL sending to arbitration liability claims and reserving for judicial determination the availability of public injunction following the arbitrator's determination of liability]; *Stout v. GrubHub Inc*. (N.D. Cal. Dec. 3, 2021) No. 21-cv-04745-EMC, 2021 U.S. Dist.

[30] Justice Alito's erroneous view that the action should be dismissed was based on his misunderstanding of California standing and joinder laws, not the FAA.

LEXIS 232378, at *31 [severing Plaintiffs' claim sending to arbitration liability claims and question of private injunctive relief and reserving for judicial determination the availability of public injunction following the arbitrator's determination of liability].)[31]

Uber then argues that the FAA requires "severance" of the PAGA individual representative action, from the PAGA representative action and argues that which under California law creates "separate actions" relying on contextually inaccurate cites.[32] First, the FAA does not use the term "sever" in Section 3. (9 U.S.C. § 3.) It uses the term "refer" and in no way suggests that new actions are created by that referral. To the contrary it explicitly provides that

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[31] Here, a stay is not mandatory, since *Viking* provides that the individual representative action claims will be severed and sent to arbitration, while the representative action claims on behalf of other aggrieved employees are not. (*Viking, supra*, 142 S.Ct. at p. 1924). "If the issue which is the controversy subject to arbitration is severable, the stay may be with respect to that issue only." (Code Civ. Proc., § 1281.4.)

[32] For example, in *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 737, fn.3, in a case construing the appealability of judgments entered into separate trials of a cause of action, the court dismissed an argument made regarding the impact based on former Code of Civil Procedure section 1048. "It is doubtful whether the pre-1971 version of the section authorized orders for separate trial of issues of causes of action, as distinct from severance of an action into two or more separate actions." (*Id*. at 737, fn. 3.) The court then went on to say resolution of the question was not necessary because the issue was otherwise resolved. (*Id*. at p. 767.)

the court shall "stay the trial of the action until such arbitration has been had." (*Ibid.*) Similarly, Code of Civil Procedure section 1281.4 does not provide that arbitrable and non-arbitrable claims are "severed" into separate actions. It states that the action or proceeding (singular) is stayed but provides that "[i]f the issue which is the controversy subject to arbitration is severable, the stay may be with respect to that issue only." (*Ibid*.) These provisions make clear that the cause remains one action, some or all of which may be stayed pending completion of the arbitration.

None of the other cases cited by Uber suggest otherwise, or even discuss the impact of referral of part of a cause of action to arbitration. First, *Bodine v. Superior Court of Santa Barbara County* (1962) 209 Cal.App.2d 354 is a probate case discussing the impact and appealability of an interlocutory decree. Second, *Van Slyke v. Gibson* (2007) 146 Cal.App.4th 1296, 1298, addressed the question of whether attorneys' fees could be awarded for work done prior to severance of a cross-complaint of a different party under Civil Code section 1717. Third, in *Omni Aviation Managers, Inc. v. Municipal Court* (1960) 60 Cal.App.3d 682, the court addresses the respective roles of municipal and superior court after a Civil Code section 1048

severance of a cross-complaint in an action based on lack of jurisdiction in the municipal court. Fourth, *Herklotz v. Parkinson* (9th Cir. 2017) 848 F.3d 894, 898, involves a severance of a cross-claim against a different party under Federal Rules of Civil Procedure, rule 21. Finally, *Demartini v. Demartini* (9th Cir. 2020) 964 F.3d 813, 817, also involved a cross-complaint that was severed and remanded to state court to avoid destruction of diversity jurisdiction in the U.S. District Court.

Uber's argument is nothing more than an attempt to cobble together a procedural fiction based on irrelevant, sometimes arcane procedural rules and inapt case law to compel the very result that *Viking* says it cannot accomplish: to force a waiver of the right to bring a PAGA representative action by operation of an arbitration clause. This pretense must be rejected.

CONCLUSION

It is Uber that engages in hyperbole, lamenting that without applying Justice Alito's misconstruction of standing "litigation will be brought in the name of 'plaintiffs' who cannot recover a dime even if they win, but driven by "private attorneys" seeking to line their own pockets." (Appellant's Reply Brief at p. 31.) This argument

disregards the fact that the Legislature did not impose any monetary injury requirement or set a minimum amount of penalties that an aggrieved employee must be eligible for as a condition of bringing the action.

A plaintiff could work a single workweek and suffer one violation of Labor Code section 558, which would generate a penalty of $50.00. That employee would net an award of only $12.50, whether in arbitration of her individual claim, or in a court action encompassing the full breadth of her PAGA cause of action. She nonetheless was an employee "against whom one or more violations was committed." (Lab. Code, § 2699(c).) The Legislature required nothing more. The Legislature trusted these workers to act as deputies of the State, and acknowledged that in doing so, they would have to retain counsel to do so. (*Id*., § 2699(g)(1).) Uber and its fellow employers do not like that. They attempt to end run the will of the Legislature through adhesive agreements and procedural manipulation.

This disdain for the Legislature, like the disdain for basic labor law protections that drives these lawsuits, is symptomatic of a fundamental disrespect for workers. It is not driven by the desire to

protect "innocent" employers from frivolous lawsuits, but by the desire to keep accountability at a minimum. As long as employers need only worry about piecemeal enforcement of labor rights, there is a financial incentive to break the law.

Typically, low-wage workers are too fearful while employed to complain about minimum wage, overtime or meal and rest period violations. Retaliation is real, and the common response to such complaints is termination. Many of the workers who do make it into see *Amici,* have suffered violations that might mean just a few hundred dollars recovery for their personal claims, or even a few thousand with statutory penalties such as those available under Labor Code section 203. Contrast that to the amount saved annually by an employer who subjects hundreds or thousands of employees to the same violations, pay period after pay period, where liability – in other words cost savings – runs to the hundreds of thousands, or millions of dollars.

Employers have figured out that an arbitration clause can shield them from class action enforcement. If they can eliminate the threat of workforce wide PAGA enforcement through the same arbitration agreement, then they need only worry about whether they might be

the subject of claim by a few individual workers. The only threat to their on-going money-saving scheme is an inspection by the LWDA. Based on past performance, the odds of that are 1.5 million[33] to 792,[34] against that happening, in a good year. Those are odds that a lawbreaking employer would not likely pass up.

Respectfully submitted.

December 8, 2022

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[33] See, *supra*, fn. 12.
[34] *See* Hassid LETF Report, *supra,* fn. 16, p. 5.

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.520(c)(1), I hereby certify that this brief contains 8,726 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.

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PROOF OF SERVICE

I, Claudia Bogusz, declare as follows:

I am employed in the County of Sacramento, State of California. I am over the age of 18 years, and I am not a party to this action. My business address 2210 K Street, Suite 201, Sacramento, California 95833. On December 8, 2022, I served:

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND [PROPOSED] BRIEF OF AMICI CURIAE CALIFORNIA RURAL LEGAL ASSISTANCE, INC. AND CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION IN SUPPORT OF PLAINTIFF AND RESPONDENT ERIK ADOLPH

on the parties below, by the following means of service:

☒ **BY ELECTRONIC SERVICE,** ***as to those parties so designated*****:** The above-referenced document(s) were transmitted electronically via TrueFiling eservice to the parties listed on the attached service list.

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

Executed on December 8, 2022.

/s/ Claudia Bogusz
Claudia Bogusz

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **ADOLPH v. UBER TECHNOLOGIES**
Case Number: **S274671**
Lower Court Case Number: **G059860**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

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

12/8/2022

Date

/s/Veronica Melendez Lopez

Signature

Melendez Lopez, Veronica (294106)

Last Name, First Name (PNum)

CRLA Foundation

Law Firm