No. S274671

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ERIK ADOLPH,
Plaintiff and Appellant,

v.

UBER TECHNOLOGIES,
Defendant and Respondent.

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

APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT AND RESPONDENT

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APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT AND RESPONDENT

To the Honorable Tani Gorre Cantil-Sakauye, Chief Justice:

The Chamber of Commerce of the United States of America (the "Chamber") respectfully moves for leave to file a brief as *amicus curiae* in this matter in support of the defendant and respondent.[*] The Chamber is the world's largest business federation. It represents approximately 300,000 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.

An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community, including cases involving the Private Attorneys General Act (PAGA), Lab. Code § 2698 *et seq.*, and the enforceability of arbitration agreements. Other PAGA and arbitration cases in which the Chamber has participated include *Viking River Cruises, Inc. v. Moriana* (2022) 142 S. Ct. 1906; *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal. 4th 348; and *California Business & Industrial Alliance v. Becerra* (4th Dist., Div. 3 2022) 80 Cal. App. 5th 734.

Many of the Chamber's members regularly use arbitration agreements. Arbitration allows them to resolve disputes promptly and efficiently

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[*] Pursuant to Rule 8.520(f)(4), *amicus* affirms that no party or counsel for a party in the pending appeal authored the proposed *amicus* brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity made a monetary contribution intended to fund the preparation or submission of this brief, other than the *amicus curiae* and its members.

while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court. Arbitration agreements in the workplace context also typically require that disputes be resolved on an individual basis, without class or representative proceedings. The simplicity of individual arbitration ensures that dispute-resolution costs remain low. And that savings is passed on to workers in the form of higher wages and to consumers in the form of lower prices.

The Chamber and its members have a strong interest in this case. *Viking River* held that the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, requires plaintiffs who have agreed to individual arbitration to resolve their own PAGA disputes in that forum. Workplace arbitration agreements would be frustrated if those individuals nonetheless could also bring a separate representative PAGA action involving only alleged violations of the Labor Code experienced by other workers. That is because courts would be deciding claims that those other workers had agreed to resolve through arbitration, nullifying arbitration agreements that are protected under federal law.

But the loss of the benefits of arbitration would not be the only adverse consequence if this Court were to adopt plaintiff's proposed rule that would permit PAGA actions to be filed and prosecuted in the names of plaintiffs who have no personal stake in the court action. These suits would be purely lawyer-driven—the plaintiff, whose claims would be resolved in arbitration pursuant to *Viking River*, would have no reason to supervise the prosecution of a lawsuit that could not provide him or her any benefit. Abusive PAGA actions, which already are endemic, would multiply exponentially with unsupervised lawyers at the helm. And those burdens would be especially harmful to small businesses, which already have been overwhelmed by PAGA claims.

CONCLUSION

The Court should grant this application and permit the Chamber to file an *amicus curiae* brief.

s/ *Archis A. Parasharami*

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 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 and its members have a strong interest in this case. Many of the Chamber's members regularly use arbitration agreements in contracts with workers. Arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court. Arbitration agreements in the workplace context also typically require that disputes be resolved on an individual basis, without class or representative proceedings. The simplicity of individual arbitration ensures that dispute-resolution costs remain low. And that savings is passed on to workers in the form of higher wages and to consumers in the form of lower prices.

Viking River held that the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, requires plaintiffs who have agreed to individual arbitration to resolve their own disputes under the Private Attorneys General Act (PAGA), Lab. Code § 2698 *et seq.* in that forum. Workplace arbitration agreements would be frustrated if those individuals nonetheless could also bring a separate representative PAGA action involving only alleged violations of the Labor Code experienced by other workers. That is because courts would be deciding claims that those other workers had agreed to resolve through arbitration, nullifying arbitration agreements that are protected under federal law.

But the loss of the benefits of arbitration would not be the only adverse consequence if this Court were to adopt plaintiff's proposed rule that

would permit PAGA actions to be filed and prosecuted in the names of plaintiffs who have no personal stake in the court action. These suits would be purely lawyer-driven—the plaintiff, whose claims would be resolved in arbitration pursuant to *Viking River*, would have no reason to supervise the prosecution of a lawsuit that could not provide him or her any benefit. Abusive PAGA actions, which already are endemic, would multiply exponentially with unsupervised lawyers at the helm. And those burdens would be especially harmful to small businesses, which already have been overwhelmed by PAGA claims.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Viking River*, the U.S. Supreme Court reaffirmed, in the PAGA context, that the FAA requires that agreements to arbitrate be enforced according to their terms. Plaintiff-appellant Erik Adolph proposes a new state-law rule to circumvent the Supreme Court's decision. This Court should reject that rule and hold that a PAGA action may proceed in court only if the judicial action includes a claimed labor law violation affecting the plaintiff. That interpretation is compelled by the statute's express text authorizing a plaintiff to bring a PAGA "action . . . *on behalf of himself or herself and* other current or former employees" (Lab. Code § 2699(a)) (emphasis added).

Adolph's argument is wrong for additional reasons. The FAA would preempt the state-law rule that he advances. In addition, such a rule would trigger a new, even greater flood of abusive PAGA claims particularly harmful to small businesses—inflicting even more damage than the unjustified PAGA claims currently plaguing the judicial system, and mirroring the torrent of litigation abuse that led voters to approve limits on the Unfair Competition Law through the adoption of Proposition 64.

1. PAGA allows workers to seek civil penalties for Labor Code violations experienced by themselves and by other workers who are not

parties to the PAGA action. This Court decided in *Iskanian* that a representative PAGA action (seeking penalties for violations experienced by nonparty workers and not by the plaintiff) cannot be waived by an agreement to arbitrate on an individual basis. 59 Cal. 4th at 384.

Viking River held that the FAA preempts *Iskanian* because *Iskanian* treated a plaintiff's own personal PAGA claim as indivisible from the representative components of the PAGA claim. 142 S. Ct. at 1923-24. As the Supreme Court explained, the FAA required enforcement of the plaintiff's agreement to arbitrate her own claim involving alleged violations that she herself experienced, and it required severance of the representative claim alleging violations experienced by others. *Id.* The Court went on to conclude that, as it understood California law, a standalone representative PAGA claim cannot proceed. "When an employee's own dispute is pared away from a PAGA action," the Court explained, "the employee is no different from a member of the general public, and PAGA does not allow such persons to maintain suit." *Id.* at 1925.

Adolph asks this Court to read California law very differently, and instead announce a new rule that a plaintiff may bring a representative PAGA claim asserting alleged violations involving only *other* workers and no violations affecting the plaintiff. This Court should reject that invitation.

For the reasons discussed in Uber's opening and reply briefs, California law does not permit the headless representative actions that Adolph advocates—*i.e.*, a PAGA action where the representative plaintiff is solely pursuing claims on behalf of others. *See* Opening Br. 23-39; Reply Br. 17-37. If a plaintiff has been compelled to arbitrate his or her own individual PAGA claim, that plaintiff cannot bring "a civil action . . . *on behalf of himself or herself and* other current or former employees" (Lab. Code § 2699(a) (emphasis added))—and therefore does not qualify as an individual entitled to bring a PAGA claim.

Adolph reads the critical conjunction "and" out of the statute. That interpretation disregards this Court's admonition that "[i]n analyzing statutory language, we seek to give meaning to every word and phrase in the statute," *Cal. Teachers Ass'n v. Governing Bd. of Rialto Unified Sch. Dist.* (1997) 14 Cal. 4th 627, 634 (internal quotation marks omitted).

Nor is Adolph's or the State's extensive reliance on *Kim v. Reins International California, Inc.* (2020) 9 Cal. 5th 73, persuasive. *See* Adolph Br. 30-33; *Amicus* Br. of Cal. Att'y Gen. 19-20. That case involved a plaintiff who sought to maintain a PAGA representative claim in court after he had settled all of his personal claims *except for* his PAGA claim. 9 Cal. 5th at 91. It simply does not address the situation here, where Adolph seeks to be a plaintiff with no stake in the litigation because his own PAGA claim will be in arbitration.[1]

2. The Court should reject Adolph's interpretation for a second reason: it conflicts with the FAA and therefore would be preempted. As this Court has recognized, under U.S. Supreme Court precedent, "the 'overarching purpose of the FAA'" is "'ensur[ing] the enforcement of arbitration agreements according to their terms.'" *OTO, L.L.C. v. Kho* (2019) 8 Cal. 5th 111, 123 (quoting *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S.

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[1] Adolph's and the State's interpretation also leads to an absurd result. Consider an employee with an arbitration agreement who intends to file a PAGA claim in court. If her lawsuit asserts only a representative PAGA claim and she separately brings her individual claim in arbitration, her lawsuit should be dismissed under Section 2699(a) of the Labor Code. But if she breaches her arbitration agreement and brings both her individual and representative claims in court, then under Adolph's and the State's view, her representative claim can proceed in court—even though her individual claim will be compelled to arbitration and she has no interest in the result of that lawsuit. *See Amicus* Br. of Cal. Att'y Gen. 21. The Court should not adopt a statutory interpretation that encourages parties to breach arbitration agreements and forces the lower courts to adjudicate unnecessary motions to compel arbitration.

333, 341), *cert. denied* (2020) 141 S. Ct. 85. And "states 'cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.'" *Id.* (quoting *Concepcion*, 563 U.S. at 351). For that reason, the FAA preempts a "'great variety' of 'devices and formulas' declaring arbitration against public policy." *Concepcion*, 563 U.S. at 342 (quoting *Robert Lawrence Co. v. Devonshire Fabrics, Inc.* (2d Cir. 1959) 271 F.2d 402, 406).

Adolph's proposed state-law rule is just such a device. If a plaintiff may bring a PAGA claim solely to redress alleged Labor Code violations experienced by others who have agreed to resolve their PAGA disputes in individual arbitration, then that plaintiff would be circumventing, and effectively nullifying, those third parties' agreements to arbitrate their individual PAGA claims. That wholesale invalidation of parties' arbitration agreements could not be more at odds with the FAA, which disallows any state-law rule that "unduly circumscribes the freedom of parties to determine the issues subject to arbitration and the rules by which they will arbitrate." *Viking River*, 142 S. Ct. at 1923 (internal quotation marks omitted).

3. Moreover, the practical consequences of Adolph's proposal would be severe. PAGA lawsuits already have become a vehicle for abusive strike suits against businesses. The significant statutory penalties available under PAGA combined with the large costs of mounting a legal defense mean that companies—especially small and medium-sized businesses—are routinely forced to settle regardless of the merits of the underlying PAGA claim.

Allowing PAGA claims to proceed in court with a plaintiff who no longer has a stake in the litigation would compound the problem. Currently, the lead plaintiffs in PAGA actions have at least some interest in monitoring the conduct of their counsel and in the payments received by workers because of the named plaintiffs' own interest in receiving compensation.

But without an aggrieved named plaintiff, plaintiff's counsel alone will be driving the litigation—with little check on their motivation to increase attorney's fees at the expense of the workers who allegedly suffered the Labor Code violations.

Indeed, California has previously experimented with headless representative actions—and regretted it. Until 2004, representative actions under the Unfair Competition Law (UCL), Bus. & Prof. Code §§ 17200 *et seq.*, could be brought in the name of a figurehead plaintiff with no stake in the outcome. These headless lawsuits resulted in a torrent of vexatious litigation against businesses. To end those abuses, California voters in 2004 approved Proposition 64 to impose standing requirements on UCL lawsuits and ensure that plaintiffs could only pursue representative claims if they had a personal stake in the outcome of the litigation. It is no small matter that the legislature passed PAGA in the shadow of Proposition 64 and intentionally chose language that disallowed headless lawsuits.

The mistakes of the pre-Proposition 64 UCL era should not be repeated. The Court should reject Adolph's proposal and instead hold that PAGA does not allow a plaintiff who must arbitrate his or her personal PAGA claim on an individual basis to bring a representative PAGA claim in court.

ARGUMENT

I. The FAA Preempts Any Interpretation Of PAGA That Nullifies The Arbitration Agreements Of Other Workers.

A. The FAA prohibits state-law devices and formulas that have the effect of nullifying arbitration agreements.

For nearly a century, the FAA has embodied Congress's strong commitment to enforcing arbitration agreements. Congress enacted the FAA in 1925 to "reverse the longstanding judicial hostility to arbitration agreements" and to "manifest a liberal federal policy favoring arbitration." *EEOC v. Waffle House, Inc*. (2002) 534 U.S. 279, 289 (internal quotation

marks omitted). Consistent with those congressional goals, the U.S. Supreme Court has repeatedly made clear that the FAA "protect[s] pretty absolutely" arbitration agreements that require "one-on-one arbitration" using "individualized . . . procedures." *Epic Sys*, 138 S. Ct. at 1619, 1621; *see also Concepcion*, 563 U.S. at 344; *Stolt-Nielsen v. AnimalFeeds Int'l Corp.* (2010) 559 U.S. 662, 686-87. State laws contravening the FAA's protections for arbitration agreements are preempted.

Two core principles flow from these bedrock precedents.

First, states cannot declare particular claims arising under state law off-limits from arbitration. For example, when this Court previously interpreted the State's Franchise Investment Law "to require judicial consideration of claims" brought under that statute, the U.S. Supreme Court held that state-law rule preempted, explaining that Congress had "withdr[awn] the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp. v. Keating* (1984) 465 U.S. 1, 10, 16 (the FAA "foreclose[s] state legislative attempts to undercut the enforceability of arbitration agreements"); *see also, e.g., Concepcion*, 563 U.S. at 341; *Preston v. Ferrer* (2008) 552 U.S. 346, 359.

Second, the FAA's preemptive reach extends broadly to invalidate any state-law principles that infringe on the federal protection of arbitration agreements. "Just as judicial antagonism toward arbitration before the Arbitration Act's enactment 'manifested itself in a great variety of devices and formulas declaring arbitration against public policy,' . . . [courts] must be alert to new devices and formulas that would achieve much the same result today." *Epic Sys.*, 138 S. Ct. at 1623 (quoting *Concepcion*, 563 U.S. at 342).

That principle was affirmed most recently in *Viking River*, in which the U.S. Supreme Court considered the FAA's effect on this Court's

Iskanian decision. *Iskanian* concluded that state law prohibited parties from contractually dividing PAGA actions into individual and representative claims—and agreeing to arbitrate only the claimant's own, individual PAGA claim. 59 Cal. 4th at 384.

Viking River held that state-law rule preempted because it "defeat[ed] the ability of parties to control which claims are subject to arbitration," thereby "compel[ling] parties to either go along with an arbitration in which the range of issues under consideration is determined by coercion rather than consent, or else forgo arbitration altogether." 142 S. Ct. at 1923-24. The result was that parties were impermissibly "coerced into giving up a right they enjoy under the FAA." *Id*. at 1924. As the Supreme Court explained, *Iskanian*'s "compulsory . . . joinder rule" would force parties to agree to arbitrate not only a worker's own PAGA claims but also "arbitrate *all other* PAGA claims"—and this would "coerce parties into withholding PAGA claims from arbitration" because requiring arbitration of "a massive number of claims in a single-package suit" is "incompatible with the FAA." *Id.* at 1924.

These two settled FAA principles—that a state may not bar resolution of a claim through arbitration and must abide by parties' decisions to arbitrate their own individual claims—preempt Adolph's proposed revision of PAGA standing principles, as we next explain.

B. The FAA preempts Adolph's interpretation of PAGA because it would effectively nullify agreements to arbitrate individual PAGA claims.

Under Adolph's view of PAGA, a plaintiff whose individual claim has been compelled to arbitration under *Viking River*, and who therefore has no continuing interest in a PAGA action in court, can nevertheless serve as the plaintiff for a lawsuit alleging Labor Code violations experienced by many other workers not parties to the action. But that individual is

a "plaintiff" in name only because she has no interest in the outcome of the litigation (her PAGA claim has been or will be resolved in arbitration); she is merely a figurehead, a prop in a lawsuit that has become effectively "headless," with plaintiffs' lawyers in full control.

If this Court were to adopt that state-law rule, the FAA would preempt it. That is because Adolph's interpretation of PAGA would allow the figurehead plaintiff—really, the lawyers bringing (and controlling) the lawsuit—to effectively nullify the arbitration agreements of all of the other workers whose individual PAGA claims were encompassed within the lawsuit.

Had each of those workers brought a PAGA action in court, *Viking River* would require that the workers' individual claims be arbitrated. Allowing litigation of those claims in court through a representative PAGA claim with a figurehead plaintiff would prevent the resolution of those workers' claims in accordance with their arbitration agreements—circumventing the arbitration agreements of those non-party workers.

That consequence would flow from the preclusive effect of a PAGA judgment on later-asserted PAGA claims. A "judgment" in a PAGA action "binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government." *Arias v. Super. Ct.* (2009) 46 Cal. 4th 969, 986. As a result, the nonparty workers whose PAGA claims are encompassed by an action brought by someone else would be precluded from arbitrating their own claims in two scenarios.

First, all nonparty workers who suffered, or claim to suffer, the same violations named in the complaint would have their PAGA claims precluded by the resolution of the earlier PAGA action. That is because PAGA actions are framed as covering Labor Code violations suffered by "all current and former" workers for a company within the action's one-year limitations period. *See, e.g., Munoz v. Chipotle Mexican Grill, Inc.* (2d Dist., Div. 1

2015) 238 Cal. App. 4th 291, 294 ("all current and former employees"); *Pickett v. Super. Ct.* (2d Dist., Div. 5 2012) 203 Cal. App. 4th 887, 890 (same).

Second, the preclusive effect of the PAGA action also extends to *other* potential Labor Code violations beyond those alleged in the complaint. Because of rules against claim-splitting, any claim based on vindicating the "same primary right" litigated in the first action are precluded. *See Moniz v. Adecco USA, Inc.* (1st Dist., Div. 4 2021) 72 Cal. App. 5th 56, 83. Even if two claims involve "different theories of recovery, seek[] different forms of relief[,] and/or add[] new facts," *Eichman v. Fotomat Corp.* (4th Dist., Div. 1 1983) 147 Cal. App. 3d 1170, 1174, they involve the same "primary right" whenever they pertain to the "same injury," *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal. 4th 788, 798 (internal quotation marks omitted).

Thus, for example, a wide variety of "wage-related claims under the Labor Code—including overtime, noncompliant wage statements, untimely payment of wages, and meal-and-rest period claims—involve the same primary right," *Magana v. Zara USA, Inc.* (9th Cir. 2021) 856 F. App'x 83, 86, and therefore a PAGA action involving one type of wage claim would preclude later individual PAGA claims regarding other unasserted types of wage claims.

Finally, unlike most class actions, "there is no mechanism for opting out of the judgment entered on [a] PAGA claim," so workers cannot avoid this preclusive effect. *Robinson v. Southern Counties Oil Co.* (1st Dist., Div. 4 2020) 53 Cal. App. 5th 476, 482.

Under Adolph's interpretation, therefore, plaintiffs' lawyers who bring representative PAGA lawsuits in the name of a figurehead worker would effectively exclude from arbitration the similar individual PAGA claims of all other workers who are party to arbitration agreements—

nullifying those workers' agreements to resolve those claims in arbitration and depriving them of the very benefits of arbitration that the FAA is meant to protect.[2]

Viking River itself confirms that Adolph's new PAGA rule is preempted. There, the U.S. Supreme Court emphasized that FAA protects "the freedom of parties to determine 'the issues subject to arbitration[.]'" 142 S. Ct. at 1923 (quoting *Lamps Plus, Inc. v. Varela* (2019) 139 S. Ct. 1407, 1416). If the FAA bars states from infringing upon that freedom by *expanding* the arbitrable issues beyond "those issues [an individual has] specifically has agreed to submit to arbitration," *id.* (internal quotation marks omitted), then *a fortiorari* it bars the state-law rule proposed by Adolph that would *invalidate* nonparty workers' agreement to arbitrate their PAGA claims.

The U.S. Supreme Court's decision in *Preston* applied a similar principle. In *Preston*, the Court held that the FAA preempted a California law regarding the arbitration of claims under the Talent Agencies Act. 552 U.S. at 357. The plaintiff argued that the law gave only "primary jurisdiction" to the Labor Commissioner to hear the claims, after which the parties could arbitrate. *Id.* at 356. Although the parties disputed whether that jurisdiction was exclusive (usurping arbitration entirely) or primary (merely delaying arbitration), the U.S. Supreme Court held that the law was preempted either way—because states cannot deprive the arbitrator of "jurisdiction

[2] To be sure, a plaintiff who has opted out of an arbitration agreement (or otherwise is not bound to arbitrate) may bring both an individual PAGA claim and a representative PAGA claim in court. But in order to comply with the FAA's mandate that arbitration agreements be enforced according to their terms, that plaintiff can only represent those workers who similarly did not agree to arbitration. Otherwise, precisely the same sort of improper circumvention of workers' arbitration agreements would occur—conflicting with the FAA.

to decide an issue that the parties agreed to arbitrate." *Id.* Nor can they disrupt and delay arbitration by "[r]equiring initial reference of the parties' dispute to the Labor Commissioner," because it "would, at the least, hinder speedy resolution of the controversy"—which is a "prime objective of an agreement to arbitrate." *Id.* at 357-58.

Adolph's proposed headless representative PAGA lawsuits would intrude even more deeply into the FAA's protection of arbitration agreements than the law held preempted in *Preston*. The Talent Agencies Act claim could still conceivably have been arbitrated after the Labor Commissioner proceeding. But once Adolph's standalone representative PAGA claim has been litigated, the other workers' arbitration agreements would be meaningless and their individual PAGA claims extinguished.

To be sure, the *Viking River* Court did not have to address this preemption issue because it held that state law required dismissal of the representative PAGA claim. *See* 142 S. Ct. at 1925. But if it had not, the U.S. Supreme Court would have been required to decide whether, under the FAA, a representative PAGA claim can be allowed to proceed in court, effectively invalidating other workers' agreements to resolve their individual PAGA claims in arbitration.

The answer to that question is that it cannot: states cannot adopt rules that effectively nullify agreements to arbitrate particular state-law claims. But that is exactly what Adolph's proposed interpretation of the statute would accomplish. And such a state-law rule would plainly "stand as an obstacle to the accomplishment of the FAA's objectives" and therefore be preempted. *Concepcion*, 563 U.S. at 343, 351.

II. Allowing Headless PAGA Lawsuits Would Exacerbate The Harms Already Caused By Plaintiffs' Lawyers Who Have Weaponized PAGA Claims.

Adolph's interpretation of PAGA is troubling for a second reason: it would produce a tidal wave of litigation filed essentially at the whim of—and controlled solely by—plaintiffs' lawyers. The Court should "construe the statutory language in a manner that . . . avoid[s] an interpretation that would lead to" such "absurd consequences." *Lopez v. Ledesma* (2022) 12 Cal. 5th 848, 858-59 (internal quotation marks omitted).

PAGA claims were once an afterthought tacked onto putative employment class actions. But since the 2014 *Iskanian* decision, PAGA filings have skyrocketed as plaintiffs' counsel sought to evade their clients' arbitration agreements, and the Supreme Court's *Concepcion* decision, by using PAGA to assert what formerly would have been class-action claims. Indeed, in March 2021, 647 PAGA notices were filed in a single month.[3] Even the COVID-19 pandemic has not slowed the growth in PAGA filings.[4]

California businesses—especially small businesses—do not have the wherewithal to defend against this onslaught of litigation, and have been forced to settle even entirely meritless PAGA claims. These abuses, and the burden on small businesses, would multiply significantly if headless PAGA lawsuits were allowed.

A. PAGA lawsuits are already prone to abuse.

Since PAGA was enacted, more than 75 law firms have each filed 100 or more PAGA suits, with the dozen most prolific firms filing more than 500 each. *See* CABIA Foundation, *PAGA Lawsuit Data*,

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[3] Michael J. Nader & Zachary V. Zagger, *No COVID-19 Slowdown for California PAGA Filings: The Data Is In*, Ogletree Deakins (July 17, 2022), https://bit.ly/3OQKTad.

[4] *Id.*

https://www.cabia.org/firm/. The explosion in PAGA litigation can be traced to 2014, when *Iskanian* made PAGA actions a vehicle for evading agreements for individual arbitration. *See* 59 Cal. 4th at 384. Indeed, the number of PAGA lawsuits filed each year has exploded since that decision, from only around 1,000 in the 2013-2014 fiscal year, to nearly 7,000 in 2019-2020. *See* CABIA Foundation, *California Private Attorneys General Act of 2004: Outcomes and Recommendations*, at 8 (2021), http://bit.ly/32BKchm.

This rise in PAGA actions is no accident. The plaintiffs' bar has developed techniques to use these cases to transform PAGA into a powerful vehicle for obtaining massive fee awards. Those fee awards, however, do not necessarily translate into benefits for workers or into money paid to the state Labor and Workforce Development Agency (LWDA). That is because, while PAGA is a powerful tool for compelling settlements, there are few protections to ensure that the money paid out by businesses reaches workers or the LWDA, as opposed to plaintiff's lawyers.

To begin with, PAGA lawsuits are extremely effective vehicles for imposing settlement pressure without regard to the merits of the asserted claims.

First, the civil penalties available in a representative PAGA action add up quickly, even for businesses with few workers. The statute provides that the civil penalty is $100 "for each aggrieved employee per pay period for the initial violation" and then $200 "for each aggrieved employee per pay period for each subsequent violation." Lab. Code § 2699(f)(2). Given the significant number of pay periods per year, these penalties quickly reach the millions of dollars when hundreds or thousands of potentially affected workers are involved, and even greater amounts when multiple types of alleged violations are combined in a single lawsuit. "Even a conservative estimate would put the potential penalties in [PAGA] cases in the tens of

millions of dollars." *Kilby v. CVS Pharmacy, Inc.* (9th Cir. 2013) 739 F.3d 1192, 1196.

Indeed, in some PAGA cases, the potential civil penalties are substantially *higher* than the actual damages that would have been awarded had the suit been brought as a class action, because PAGA can be used to seek penalties for Labor Code violations that result in no real-world harm. As some employment lawyers have put it, "the potential civil penalties for violations can be staggering and often greatly outweigh any actual damages." *See* Robyn Ridler Aoyagi & Christopher J. Pallanch, *The PAGA Problem: The Unsettled State of PAGA Law Isn't Good for Anyone*, 2013-7 Bender's Cal. Labor & Employment Bulletin 01, at 1 (2013).

Second, PAGA provides a mechanism for seeking penalties for technical violations of the Labor Code, many of which do not in themselves have a private right of action. *See* Lab. Code § 2699(a). Plaintiffs' lawyers thus seek out easily made mistakes by businesses, particularly errors that recur frequently—such as every pay period—so that the violations can be stacked to increase liability.

Among the flood of PAGA suits are claims seeking massive statutory penalties for alleged technical errors in workers' pay stubs—errors that in no way affect their pay. For example, a wave of PAGA claims have been brought over minor discrepancies in how an employer identifies itself—as when Wal-Mart allegedly printed "Wal-Mart Associates, Inc." instead of "Wal-Mart Stores, Inc." on pay stubs. *Mays v. Wal-Mart Stores, Inc.* (C.D. Cal. 2019) 330 F.R.D. 562, 572, *aff'd in part and rev'd in part* (9th Cir. 2020) 804 F. App'x 641. Abusive lawsuits have been filed against many other businesses for similarly immaterial discrepancies on pay stubs:

- DNC Parks & Resorts at King Canyon, Inc. was sued because it shortened "Parks & Resorts" in its name to "P&R" on pay stubs.

- Farmland Mutual Insurance Company was sued because it shortened "Company" to "Co."
- Starbucks was sued for writing "Starbucks Coffee Company" instead of "Starbucks Corporation."
- YRC Inc., which does business as YRC Freight, was sued for writing that trade name on pay stubs.
- Similarly, First Transit Transportation, LLC was sued over shortening its name to "First Transit."
- And Longs Drug Stores California, Inc. was likewise sued for shortening its name to the more common "Longs Drug Stores" on pay stubs.[5]

Third, the cost to defend against a PAGA representative action can be staggering, and even large corporations—let alone smaller businesses—understandably recoil at the expense of litigating in court to refute even baseless PAGA claims. These massive costs are intrinsic to PAGA representative actions, because they necessarily involve questions of fact as to *each* worker during *every* pay period.

Thus, the discovery for a PAGA case is extensive—and falls asymmetrically on the employer. This Court has confirmed that extensive discovery is required to adjudicate a representative PAGA claim and has held that California public policy "support[s] extending PAGA discovery *as broadly as class action discovery has been extended*." *Williams v. Super. Ct.* (2017) 3 Cal. 5th 531, 548 (emphasis added); *see also Sakkab v. Lux-*

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[5] *See Perez v. DNC Parks & Resorts at Sequoia* (E.D. Cal. July 29, 2020) 2020 WL 4344911, at *9; *Mejia v. Farmland Mut. Ins.* (E.D. Cal. June 26, 2018) 2018 WL 3198006, at *6; *York v. Starbucks Corp.* (C.D. Cal. Dec. 3, 2009) 2009 WL 8617536, at *7-8; *Savea v. YRC Inc.* (1st Dist., Div. 3 2019) 34 Cal. App. 5th 173, 176; *Clarke v. First Transit, Inc.* (C.D. Cal. Aug. 11, 2010) 2010 WL 11459322, at *2; *Jones v. Longs Drug Stores Cal., Inc.* (S.D. Cal. Sept. 13, 2010) 2010 WL 11508656, at *1.

ottica Retail N. Am., Inc. (9th Cir. 2015) 803 F.3d 425, 446-47 (N.R. Smith, J., dissenting) (in a representative PAGA action, "the individual employee does not have access to any of th[e] information" for "the other potentially aggrieved employees," and the "discovery necessary to obtain these documents from the employer would be significant and substantially more complex than discovery regarding only the employee's individual claims").

Moreover, unlike class actions, PAGA claims do not require a plaintiff to overcome a hurdle such as class certification before launching this massive discovery and imposing significant litigation costs on the defendant employer. Small and medium-sized businesses, especially, are cowed by these sudden and overwhelming expenses.

PAGA representative claims also result in massive trials. For example, in *Wesson v. Staples the Office Superstore, LLC* (2021) 68 Cal. App. 5th 746, the Second District Court of Appeal affirmed the trial court's conclusion that litigating the alleged Labor Code violations in that case—involving merely "346" workers—"would require a trial spanning *several years* with *many hundreds* of witnesses." *Id.* at 773 (emphasis added).

In *Driscoll v. Granite Rock Co.* (Cal. Super. Ct., Santa Clara Cnty. Sept. 20, 2011) 2011 WL 10366147, the parties proceeded to a bench trial on representative PAGA claims asserted on behalf of only 200 workers. That bench trial lasted 14 days and involved 55 witnesses and 285 exhibits, including expert witnesses to prove violations as to each worker. *Id.* at *1; *see also Feltz v. Cox Commc'ns Cal., LLC* (C.D. Cal. 2021) 562 F. Supp. 3d 535, 542 (PAGA claim that approximately 500 employees had not received appropriate meal periods would result in "unmanageable individualized analysis" over whether each worker had experienced a violation).

If anything, *Wesson* and *Driscoll* understate the complexity of most PAGA actions, because those cases involved relatively small groups of 346 and 200 current and former workers, respectively. *See Wesson*, 68 Cal.

App. 5th at 773; *Driscoll*, 2011 WL 10366147, at *1. The burdens multiply exponentially for larger PAGA actions, which often include alleged violations involving thousands, if not tens of thousands, of absent workers, "each of whom may have markedly different experiences relevant to the alleged [Labor Code] violations." *Wesson*, 68 Cal. App. 5th at 765-66.[6]

A case highlighted by Assemblymember Blanca Rubio before the Senate Judiciary Committee in a report regarding amendments to PAGA is instructive. The Assemblymember described *Shields v. Security Paving Company* (Los Angeles Superior Court) Case No. BC492828, a PAGA claim filed in 2012 that resulted in years of litigation. *See* SENATE JUD. COMM., AB 1654 (RUBIO), 2017-2018, at 7 (June 25, 2018), https://bit.ly/3GTDFjK. After trial, the PAGA plaintiff received a nominal $50 award and no attorney's fees. The result was, as the Assemblymember explained, that the defendant had "spent inordinate amounts of attorneys[']fees in defending against this $50 case, and will spend more in defending against an appeal the plaintiff has filed." *Id*.

Fourth, there are no limitations on the size of the business that may face a PAGA claim. Small, family-owned businesses that may have had no more than a few dozen workers during PAGA's one-year limitations period, Civ. Code § 340(a), may be targeted. But these are the very businesses that are least equipped to fight a baseless PAGA claim. The problem is compounded by the fact that a single disgruntled worker—who may have

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[6] *See, e.g.*, *Amey v. Cinemark USA Inc.* (N.D. Cal. May 13, 2015) 2015 WL 2251504, at *17 (PAGA claim with "more than 10,000" workers); *see also* Compl., *O'Bosky v. Starbucks Corp.* (Cal. Super. Ct. May 4, 2015) 2015 WL 2254889, at *2 (approximately 65,000 workers); Defs.' Mot. to Strike, *Ortiz v. CVS Caremark Corp.* (N.D. Cal. Jan. 28, 2014) 2014 WL 2445114, at *4 (more than 50,000 workers across 850 stores); Def.'s Opp. to Class Certification, *Cline v. Kmart Corp.* (N.D. Cal. May 13, 2013) 2013 WL 2391711, at *1-2 (13,000 cashiers at 101 stores statewide).

been fired for cause or otherwise have personal reasons for inflicting financial ruin on the employer—may bring a representative PAGA action on behalf of all of the workers who have worked at the establishment for the past year for technical violations of the Labor Code that inflicted no real-world injury—or for violations that are purely imagined. This leaves small and mid-sized businesses particularly vulnerable to abusive PAGA lawsuits.

Indeed, precisely because smaller businesses are easier prey for a blackmail settlement, they are increasingly being targeted by PAGA lawsuits. Illustrating that point, the share of PAGA filings targeting businesses with over 1,000 workers has declined from 27% in January 2018 to 19.4% in December 2021.[7]

Plaintiffs' lawyers can use this coercive pressure to their advantage, because there are few practical impediments to the negotiation of a settlement under which they get the lion's share of the benefits, and workers and the LWDA get little. Once a business chooses to settle rather than bear the costs of litigation or risk having to pay the full PAGA penalties laid out in the statute, there are few protections to ensure that the settlement benefits workers or that the proceeds reach the LWDA, as opposed to plaintiff's counsel.

Although plaintiff's counsel must submit a notice to the LWDA before filing a PAGA action, if the LWDA declines to take any action in response to the notice, then the plaintiff's counsel has free rein over the litigation. The LWDA is relegated to nothing more than (at most) commenter status when plaintiff's counsel settles a PAGA claim. *See* Lab. Code § 2699(l)(1)(2) ("The proposed settlement shall be submitted to the agency at the same time that it is submitted to the court.").

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[7] Michael J. Nader & Zachary V. Zagger, *No COVID-19 Slowdown for California PAGA Filings: The Data Is In*, Ogletree Deakins (July 17, 2022), https://bit.ly/3OQKTad.

And while courts must approve any PAGA settlement, there is little guidance on the allowable parameters for those settlements. Courts therefore routinely accept settlements where the PAGA penalties—the threat of which was used to bring the defendant to its knees—were reduced "by roughly 30%-80%" and where the attorney's fees take more than 30% of the total settlement amount. *See, e.g., Viceral v. Mistras Grp., Inc.* (N.D. Cal. Oct. 11, 2016) 2016 WL 5907869, at *8.

The result is that PAGA settlements routinely benefit the lawyers who file them much more than the workers. Lawyers will receive hundreds of thousands or millions of dollars, while each worker receives a comparative pittance.

For instance, in an earlier PAGA claim against Uber, the parties reached a $7.75 million settlement where the plaintiffs' counsel received $2.3 million and the Uber drivers received $1.08 each. *See Price v. Uber Techs., Inc.*, Order Granting Approval of PAGA Settlement and Judgment Thereon (Cal. Sup. Ct., Los Angeles Cnty. Jan. 31, 2018) Case No. BC554512 (out of $7.75 million settlement, $2.3 million to plaintiffs' attorneys); Melissa Daniels, *Calif. Judge Oks $7.75M Uber Driver Deal Over Objections*, Law360 (Jan. 16, 2018), http://bit.ly/3i93aDi (describing 1.5 million Uber drivers affected by settlement).

In one case, lawyers collected $3.9 million—40% of the settlement amount, which caused the judge to quip "just don't tell anyone" at the approval hearing—and the plaintiff cashiers received about $13 each. Dorothy Atkins, *Target's $9M PAGA Deal Ending Seating Suits OK'd*, Law360 (July 24, 2018), https://bit.ly/34fXdxV.

And in a case against Walmart for not providing chairs for its cashiers, under the settlement the plaintiffs' attorneys got $21 million, and the workers received an average of approximately $110 each. *See* Order and Final Judgment Approving Settlement, *Brown v. Wal-Mart Stores, Inc.*

(N.D. Cal. Mar. 29, 2019) No. 09-cv-03339; Daniel Wiessner, *Walmart to pay $65 million to settle lawsuit over seating for cashiers*, Reuters (Oct. 11, 2018) http://bit.ly/3XxFNUl; Dorothy Atkins, *Walmart's Revised $65M PAGA Seating Deal Gets Green Light*, Law360 (Dec. 7, 2018), https://bit.ly/3Ur40Jd.

These cases are not anomalies. *See* Dorothy Atkins, *Safeway's $1.45M PAGA Deal Over Pay Stubs Gets Initial OK*, Law360 (Aug. 16, 2019), https://bit.ly/34fWNaP (counsel would recover up to $483,333 and workers would receive an average of $23.19); Cara Bayles, *Google Workers Seek OK of $1M 'Adult Content' PAGA Deal*, Law360 (June 25, 2018), https://bit.ly/3UmSr5O (lawyers collected $330,000, leaving approximately $16 per employee).

Not surprisingly, a study on PAGA lawsuits found that workers fare much worse when plaintiffs' counsel litigate a representative PAGA claim than when the LWDA brings a PAGA claim itself. The study found that, on average, businesses pay $1.1 million to settle a representative PAGA suit brought by plaintiff's counsel. *See* CABIA Foundation, *California Private Attorneys General Act of 2004: Outcomes and Recommendations*, at 8 tbl.1 (2021), http://bit.ly/32BKchm. Of that amount, an average of $372,000 goes to attorney's fees, while each worker receives on average $1,264. *Id.* In comparison, when the LWDA brings a PAGA suit directly, the average individual award is $5,673. *Id.*

Given the very large attorneys' fees at stake, it is no surprise that representative PAGA suits are largely being driven by a relatively small number of opportunistic plaintiff-side law firms. According to state records, since PAGA's adoption, twelve law firms have each filed more than 500 PAGA suits, and one law firm has filed *over 1,000* suits. *See* CABIA Foundation, *PAGA Lawsuit Data*, https://www.cabia.org/firm/.

Because PAGA lawsuits can seek millions of dollars in penalties for technical violations of the Labor Code, it also is commonplace that a PAGA settlement makes no real-world improvement to the lives of workers. For instance, one family-owned business faced massive potential liability after a "disgruntled former employee" filed a PAGA lawsuit asserting that the business did not force workers to take their lunch break after five hours of work. Instead, the business allegedly had allowed workers the flexibility to choose "to work through their lunch so that they can go home early" or, for those workers who had earlier start times, to wait to take their break so they could "eat with fellow employees." Ken Monroe, *Frivolous PAGA lawsuits are making some lawyers rich, but they aren't helping workers or employers*, L.A. Times (Dec. 6, 2018), http://bit.ly/3ikslml.

The fact that the workers at the family business had enjoyed the flexibility in their work day was irrelevant—they had no ability to opt out of the PAGA suit. In the settlement that followed, "the [plaintiff's] attorneys received 35% of the settlement" and workers received as little as $23 each—and lost the prior flexibility in how to allocate their lunch break. Monroe, *supra*; *see also* Rich Peters, *SoCal Company Hit with PAGA Lawsuit: 'Purely a shakedown on businesses'*, S. CAL. REC. (Feb. 18, 2020), https://bit.ly/3H2OlN3 (after a "disgruntled worker who had been employed . . . for eight months" brought a PAGA claim because workers voluntarily chose to take their break after 5.5 hours of working instead of 5 hours, the defendant company could not afford to give its workers a holiday bonus because it was forced to pay a large PAGA settlement).

Indeed, PAGA litigation may leave workers *worse* off than they were before—they sometimes lose their jobs as businesses absorb the costs of these lawsuits. The state Employment Development Department (EDD) requires large employers to file Worker Adjustment and Retraining Notifi-

cations at least 60 days before conducting mass layoffs or closures. Between 2014 and 2020, over a hundred California businesses filed these notices within eighteen months of receiving a PAGA notice. *See* CABIA Foundation, *PAGA Claims Contribute to Employee Layoffs in California*, http://bit.ly/3gJ3WXg. And because only companies with 75 or more workers must file these notices, "this analysis overlooks the layoff and closure consequences of PAGA filings at small businesses," which are much less able to survive the costs of PAGA litigation. *Id*.

Even the LWDA recognizes that PAGA lawsuits are not achieving good results for workers. The LWDA has reported that "[t]he substantial majority of proposed private court settlements in PAGA cases reviewed by the [PAGA] Unit fell short of protecting the interests of the state and workers." *See* State of California, Budget Change Proposal, Fiscal Year 2019-20, Analysis of Problem 7 (submitted May 10, 2019), http://bit.ly/3XFeszl. The LWDA also determined that "[s]eventy-five percent of the 1,546 settlement agreements reviewed by the PAGA Unit . . . received a grade of fail or marginal pass, *reflecting the failure of many private plaintiffs' attorneys to fully protect the interests of the aggrieved employees and the state.*" *Id.* at 12 (emphasis added).

In light of these abuses, calls to amend PAGA are increasing. Senator Robert M. Hertzberg, for instance, has stated that PAGA "lawsuits remain a costly and time-intensive process[,]" and "generally an action under PAGA means a costly battle for both the employee and employer with little upside." SEN. COMM. ON LAB., Pub. Emp. & Ret. Rep. on S.B. 646 (Sept. 7, 2021), https://bit.ly/3ukgibM. *See also* SENATE JUD. COMM., AB 1654 (RUBIO), 2017-2018, at 2 (June 25, 2018), http://bit.ly/3GTDFjK (PAGA "can easily be abused, especially by . . . unscrupulous plaintiffs' attorneys" who file "'gotcha' lawsuits in which employers find themselves tied up in expensive litigation and confronting significant penalties and

attorney's fees awards for what they feel are very technical or trivial violations."); ASSEMB. COMM. LAB. & EMP., AB 1654 ANALYSIS, at 2 (Aug. 31, 2018), http://bit.ly/3GTDFjK (PAGA "has led to the unintended consequence of significant legal abuse" because it places "enormous pressure on employers to settle claims regardless of the validity of those claims.").

In fact, the question whether to repeal PAGA entirely will be a ballot initiative in November 2024. California Secretary of State, *November 2024 Eligible Statewide Ballot Measures*, http://bit.ly/3VtW0Zn.

B. Headless PAGA lawsuits would significantly worsen the pattern of abusive PAGA litigation.

A decision by this Court allowing lawyers to prosecute PAGA claims in the names of plaintiffs whose individual claims have been compelled to arbitration, and thereby leaving plaintiff's counsel alone at the wheel, would magnify the potential for abuse. And that result would directly undermine the legislature's intent when it enacted PAGA.

At the time PAGA was introduced, California's Unfair Competition Law (UCL) allowed plaintiffs to bring a consumer-protection claim even if they had not experienced an injury from the violation that formed the basis for the lawsuit. *See, e.g.*, *People v. Cappuccio, Inc.* (1988) 204 Cal. App. 3d 750, 760. The result was a private cause of action that was "unique in the nation . . . allow[ing] any Californian to sue a business for wrongdoing on behalf of the general public even if no one, including the plaintiff, ha[d] been personally injured." Michael Hiltzik, *Consumer-Protection Law Abused in Legal Shakedown*, L.A. TIMES, July 21, 2003, at B1.

Permitting these headless UCL lawsuits produced a system "riddled with loopholes that unprincipled lawyers use[d] to shake down small businesses." Editorial, *A Remedy for Shakedowns*, L.A. TIMES, Feb. 27, 2004, at B14. As this Court put it, "some private attorneys had exploited

the generous standing requirement of the UCL by filing 'shakedown' suits to extort money from small businesses for minor or technical violations where no client had suffered an actual injury." *Kim*, 9 Cal. 5th at 90 (internal quotation marks omitted). This Court explained that "[u]nscrupulous lawyers . . . scour[ed] public records on the Internet for what [were] often ridiculously minor violations of some regulation or law by a small business, and sue[d] that business in the name of" a figurehead plaintiff, such as "a front 'watchdog' or 'consumer' organization." *In re Tobacco II Cases* (2009) 46 Cal. 4th 298, 316 (quoting *People ex rel. Lockyer v. Brar* (2004) 115 Cal. App. 4th 1315, 1317) (internal quotation marks omitted; alterations in original).

Because "even frivolous lawsuits can have economic nuisance value," the UCL was routinely misused. *In re Tobacco II Cases*, 46 Cal. 4th at 316 (quoting *Brar*, 115 Cal. App. 4th at 1317). The attorneys behind these claims would "'contact[] the business (often owned by immigrants for whom English is a second language) and point[] out that a quick settlement . . . would be in the business's long-term interest.'" *Id.* "Since most of their victims didn't have the wherewithal to hire their own lawyers, and had little experience responding to formal legal complaints, this scam began to look like a new frontier in legal extortion." Hiltzik, *supra*, at B1. Even businesses that refused to settle and successfully defended themselves in court lost out: for one business, the legal fees alone "cost the auto body shop $10,000—roughly $8,000 more than the law firm had wanted for a settlement." David Reyes, *Business Owners Rally Around Initiative to Limit Lawsuits*, L.A. TIMES, Sept. 16, 2004, at B3.

This Court has explained that, when PAGA was introduced, "[e]mployer groups objected that PAGA would be vulnerable to the same abuses recently exposed under the Unfair Competition Law." *Kim*, 9 Cal. 5th at 90.

To avoid that result, legislators included language in the statute—specifically, the requirement that a PAGA representative claim be brought by an "*aggrieved* employee"—to ensure that the UCL problem of headless lawsuits would not repeat itself in PAGA. *Kim*, 9 Cal. 5th at 90 (emphasis added).

Meanwhile, on the UCL front, the disastrous consequences of unrestricted consumer-protection lawsuits led the consuming public itself to vote overwhelmingly for Proposition 64—which prohibited headless lawsuits in the consumer-protection context. *See Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal. 4th 223, 228-29.

It is hard enough to prevent certain segments of the plaintiffs' bar from bringing abusive lawsuits in the names of figurehead plaintiffs even when the law imposes a real standing requirement. Consider, for example, the Unruh Act, Civ. Code § 51, which provides a cause of action only to plaintiffs who personally have suffered discrimination. *See*, *e.g.*, *Midpeninsula Citizens for Fair Housing v. Westwood Investors* (6th Dist. 1990) 221 Cal. App. 3d 1377, 1384 (Unruh Act plaintiff's rights must have "been personally violated"). Yet earlier this year, prosecutors in San Francisco and Los Angeles sued a California law firm for bringing "thousands of fraudulent lawsuits against small businesses" across the state, alleging claims under the Unruh Act on behalf of "serial plaintiffs with no regard" to whether the plaintiff had actually visited the business or been injured or affected in any way. Meghann M. Cuniff, *"Human Cost" to Serial ADA Filings: SF, LA Prosecutors Sue Law Firm Potter Handy Over Disability Lawsuits*, Law.com (Apr. 11, 2022), http://bit.ly/3EGjp2c.[8] The cases "amounted to

[8] Although the trial court dismissed the case as barred by the litigation privilege, the San Francisco DA has appealed. *See* Order, *People v. Potter Handy LLP* (Cal. Super. Ct., San Francisco Cnty. Aug. 29, 2022), *appeal*

shakedowns of small businesses," which could not afford to defend themselves against these claims. *Id.*

Headless PAGA lawsuits would result in the same abuses, for the reasons already explained.

C. Workers and businesses alike would be deprived of the benefits of arbitration.

Adolph's interpretation of PAGA will have another negative effect: it will prevent workers and businesses from obtaining the benefits of arbitration.

Claimants achieve outcomes in arbitration equal to—if not better than—the outcomes in litigation. An empirical study examining arbitrations from 2014 through 2021 determined that consumers won in arbitration 41.7% of the time, compared to 29.3% in litigation. Nam D. Pham & Mary Donovan, *Fairer, Faster, Better III: An Empirical Assessment of Consumer & Employment Arbitration*, U.S. Chamber of Commerce Institute for Legal Reform 11 (Mar. 2022), https://bit.ly/3SK7QwA ("*Fairer, Faster, Better III*"). Workers, meanwhile, succeeded 37.7% of the time in arbitration and only 10.8% in litigation. *Id*. at 11-12.

Claimants received higher awards in arbitration as well. The median award received by consumers in arbitration "was more than three times the dollar amount in litigation." *Id*. at 14. For workers, meanwhile, "the median award in arbitration was more than double the dollar amount in litigation." *Id*.

As another scholar found, "there is no evidence that plaintiffs fare significantly better in litigation [than in arbitration]." Theodore J. St. Antoine, *Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?*, 32 Ohio St. J. on Disp. Resol. 1, 16 (2017) (internal quota-

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pending (1st Dist., Div. 3) No. A166490 (notice of appeal filed Oct. 20, 2022).

tion marks omitted; alterations in original). Rather, arbitration is generally "favorable to employees as compared with court litigation." *Id*.; *see also* Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 46 (1998).

Other studies have similarly found that claimants fare better in arbitration. *See, e.g.*, Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843, 896-904 (2010) (consumers won relief 53.3% of the time in arbitration); *see also* Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court*, 7 Hastings Bus. L.J. 77, 80 (2011) (in a study of debt-collection cases, "consumers prevailed more often in arbitration than in court").

Arbitration also typically is more efficient than litigation, allowing workers to resolve their claims (and therefore receive their compensation, if any) more quickly than they would in court. An empirical study determined that "it took consumer-claimants an average of 321 days . . . to prevail in arbitration," compared with an average of 439 days in litigation, making arbitration 27% faster. *Fairer, Faster, Better III* 15-16. For employment-claimants, the average time to prevail was 659 days, while the average time in litigation was 715 days. *Id*.; *see also* Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 Cal. L. Rev. 1, 51 (2019) (awarded arbitrations took an average of just 11 months to decision, versus an average of 26.6 months to verdict in state court jury trial cases); Maltby, 30 Colum. Hum. Rts. L. Rev. at 55 (average resolution time for workplace arbitration was 8.6 months—approximately half the average resolution time in court); Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58 Disp. Resol. J. 56, 58 (Nov. 2003–Jan. 2004) (reporting findings that arbitration was 33% faster than analogous

litigation); David Sherwyn, Samuel Estreicher, & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1573 (2005) (collecting studies reaching similar conclusions).

Under Adolph's interpretation of the FAA, however, these benefits of arbitration of PAGA claims would be lost.

CONCLUSION

The Court should reverse the Court of Appeal and order Adolph's individual claim to be compelled to arbitration and his non-individual claims to be dismissed.

Respectfully Submitted,

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CERTIFICATE OF WORD COUNT

(California Rule of Court 8.520(c)(1))

According to the word count facility in Word for Microsoft 365, this brief, including footnotes but excluding those portions excludable pursuant to Rule 8.520(c)(3), contains 8,575 words, and therefore complies with the 14,000-word limit contained in Rule 8.520(c)(1).

Dated: December 20, 2022

Respectfully submitted.

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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.

12/20/2022

Date

/s/Archis Parasharami

Signature

Parasharami, Archis (321661)

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