Supreme Court of California
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Supreme Court of California
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No. S274671

In the Supreme Court of the State of California

ERIK ADOLPH,
Plaintiff and Respondent,
v.
UBER TECHNOLOGIES, INC.,
Defendant and Appellant.

Fourth Appellate District, Case Nos. G059860, G060198
Orange County Superior Court, Case No. 30-2019-01103801
The Honorable Kirk H. Nakamura, Presiding

AMICI CURIAE BRIEF OF RESTAURANT LAW CENTER AND CALIFORNIA RESTAURANT ASSOCIATION

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APPLICATION FOR PERMISSION TO FILE

Amici Curiae Restaurant Law Center ("Law Center") and California Restaurant Association ("CRA"), jointly referred to as "*Amici*," respectfully request to file the accompanying brief in support of Defendant and Appellant Uber Technologies, Inc. ("Appellant" or "Uber"). (Cal. Rules of Court, rule 8.520, subd. (f)(1).) This application and proposed brief are timely filed in accordance with California Rules of Court, rule 8.200(c)(1).

The Law Center is the only independent public policy organization created specifically to represent the interests of the food service industry in the courts. The foodservice industry is a labor-intensive industry comprised of over one million restaurants and other foodservice outlets employing about 15 million people across the Nation—approximately 10 percent of the U.S. workforce. Restaurants and other foodservice providers are the Nation's second largest private-sector employers. The restaurant industry is also the most diverse industry in the nation, with 47% of the industry's employees being minorities, compared to 36% across the rest of the economy. Further, 40% of restaurant businesses are primarily owned by minorities, compared to 29% of businesses across the rest of the United States economy. Supporting these businesses is *Amicus*'s primary purpose.

The Law Center has participated as *amicus curiae* in precedent-setting decisions shaping the issue disputed here, and others. (*See*, *e.g. Viking River Cruises, Inc. v. Angie Moriana* (2022)

142 S.Ct. 1906; *Robyn Morgan v. Sundance, Inc.* (2022) 142 S.Ct 1708.)

The CRA is a nonprofit mutual benefit corporation organized under the laws of California with its principal office in the County of Sacramento, California. CRA is one of the largest and longest-serving nonprofit trade associations in the Nation. Representing the restaurant and hospitality industries in California since 1906. The CRA is made up of nearly 22,000 establishments in California. The restaurant industry is one of the largest private employers in California, representing approximately 1.4 million jobs. As an association of members in the restaurant industry, it has a substantial interest in laws relating to workforce claims and disputes, as our members are directly affected by their interpretation.

The Law Center and CRA are familiar with the issues before the Court and the scope of the parties' presentation in their briefing. The Law Center and CRA seek to bring to the Court's attention the injury that will be suffered by the restauranteurs, the Californian's they employ, and the public at large because decisions preventing parties from enforcing bi-lateral arbitration agreements of claims pursuant to the California Private Attorneys General Act of 2004, Labor Code sections 2698, et seq. ("PAGA") in accordance with the standing requirements enacted by the California Legislature that also threaten to undermine this Court's and the United States Supreme Court's precedents in *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73 and

Viking River Cruises, Inc. v. Angie Moriana (2022) 142 S.Ct 1906, and subvert PAGA's clear statutory text. *Amici*'s members have learned through experience that even small issues that commonly arise in day-to-day interactions with the workforce are exploited by some employees through a PAGA action, even when many of those same employees have agreed to arbitrate their claims. Even unfounded accusations threaten these businesses with, at worst, their very survival, and at best, tens or hundreds of thousands of dollars in legal fees. Hence, *Amici* and their members have a vital interest in these proceedings.[1]

I. SUMMARY OF ARGUMENT

In 2004, the Legislature created the California Private Attorneys General Act ("PAGA") by conferring standing to bring a claim for civil penalties based on violations of the state's Labor Code provisions. The Legislature limited standing to those individuals who could assert in that action that they were employed by the alleged violator and suffered at least one of the alleged violations. The Legislature crafted the statutory text and detailed its intent to provide that once an employee meets those requirements, then the employee may also bring the claim on

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[1] No party or its counsel authored any part of this brief. Except for Law Center, CRA, and their counsel here, no one made a monetary contribution or other contribution of any kind, to fund its preparation or submission. (Cal. Rules of Ct., rule 8.520, subd. (f)(4).)

behalf of other employees of the same employer who allegedly suffered the same and separate violations under the Labor Code.

Consistent with its decisions in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333 and *Epic Systems Corp. v. Lewis* (2018) 138 S.Ct.1612, the U.S. Supreme Court recently affirmed in *Viking River Cruises, Inc. v. Angie Moriana* (2022) 142 S.Ct. 1906 that pursuant to the Federal Arbitration Act ("FAA"), courts must enforce individual arbitration agreements according to their terms. This includes actions under PAGA, to the extent the arbitration agreements require arbitration of an employee's individual PAGA claim, *i.e.*, a claim alleging a violation the employee personally suffered. In so holding, the U.S. Supreme Court closed the door on the ability for employees to evade their contractual agreements to arbitrate by asserting a claim under PAGA—a door opened by the California Supreme Court's decision in *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348. Instead, employees are now required to arbitrate their individual PAGA claims in accordance with their contractual obligations. Relying on this Court's decision in *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, the U.S. Supreme Court further held that when an employee's individual claim is relegated to a separate proceeding, he has no standing under PAGA to continue adjudicating non-individual claims (those asserted on behalf of others only) in court and those claims must be dismissed.

The case before this Court now seeks to judicially rewrite PAGA to reopen the door to evade arbitration agreements and provide standing for a plaintiff to pursue non-individual PAGA claims when his individual PAGA claim must be arbitrated. However, such a result is directly foreclosed by PAGA's clear statutory text, runs afoul Legislative intent to further facilitate existing abuses of PAGA, and erodes established precedent and federal law.

This issue is of utmost importance to restaurants and other foodservice employers in California. These employers employ approximately 10% of the nation's workforce and are entitled to enforce the benefit of their bargains with employees who enter into valid contractual agreements to arbitrate their individual claims under PAGA. This Court should preclude the ability for these employees to reopen the door foreclosed by *Viking River* so that arbitration agreements remain enforceable to the fullest extent under the law of the land and PAGA retains its standing requirement as written and intended by the Legislature.

II. ARGUMENT

A. PAGA's Standing is Limited by Statute.

Standing rules for statues must be viewed in light of the intent of the Legislature and the purpose of the enactment. (*Midpeninsula Citizens for Fair Housing v. Westwood Investors* (1990) 221 Cal.App.3d 1377, 1385, *reh'g denied and opinion modified* (July 31, 1990).) California courts are "bound by statutory limitations on standing where they plainly apply." (*Id*. at

p. 1389.) Indeed, "[i]f the Legislature has specifically provided by statute for [] review under certain circumstances, the inquiry as to standing *must begin and end with a determination whether the statute in question authorizes an action by a particular plaintiff*." (*Ibid.*, emphasis added.)

In the opening provision, PAGA's statutory language specifically authorizes an action "brought by an aggrieved employee on behalf of himself or herself and other current or former employees." (Lab. Code § 2699, subd. (a).) In interpreting this statutory language, courts must first consider its usual and ordinary meaning, *i.e.*, plain meaning. (*Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 165.) The statute specifically defines "aggrieved employee" to provide its meaning—"any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." (Lab. Code, § 2699, subd. (c).) The remainder of the statutory language is clear and unambiguous and has a commonsense meaning.

First, an individual bringing the action must have been employed by the alleged violator and suffered at least one of the alleged violations. Second, the individual must bring the action on behalf of himself or herself and others. These two components are explicitly phrased in conjunctive terms using the word "and" and must be interpreted accordingly to conclude that both conditions must be present in the same action in order to satisfy PAGA's standing requirement. Where the meaning of PAGA's standing

requirement is plain, the analysis ends there. Nonetheless, further analysis only solidifies the plain meaning.

To begin with, Adolph's contention that these words have a disjunctive meaning would lead to an absurd result in that it would confer "general public" standing which was directly rejected by the Legislature. (Sen. Judiciary Com., Analysis of Sen. Bill No. 796 (2003-2004 Reg. Sess.) as amended Apr. 22, 2003, p. 3.) Ordinarily, courts will not follow the plain meaning if it leads to an absurd result. To the contrary, here, the absurd result flows from not following the plain meaning. Yet, the absurdity doctrine requires the court to select a meaning as close as possible to the literal meaning and that "does the least violence to the text." (*Green v. Bock Laundry Mach. Co.* (1989) 490 U.S. 504, 529.) Here, the literal meaning of PAGA's standing provision does the least violence to the text.

Adolph continues his blatantly false reading of the statute by effectively arguing that the word "and" should be construed as interchangeable with "or" to effectuate legislative intent. However, the legislative intent aligns with the plain meaning. From PAGA's inception, the Legislature differentiated PAGA actions from actions under Unfair Competition Law ("UCL"), Business & Professions Code section 17200. In contrast to the broad applicability under the UCL, PAGA "entitles an individual to act in the capacity of PAG [Private Attorneys General] to seek remedy of a labor law violation *solely because they have been aggrieved by that violation*." (Sen. Com. on Lab. & Industrial Relations,

Analysis of Sen. Bill No. 796 (2003-2004 Reg. Sess.) as amended Mar. 26, 2003, p. 3 (emphasis added).) The Legislature also envisioned that "a percentage share of penalties [will] go *directly to the aggrieved worker*." (*Ibid.*, emphasis added.)

At the time PAGA was enacted, California law previously authorized anyone acting for the general public to sue for relief for unfair competition, which led to "the legal community's abuse of [the UCL] when it sued thousands of small businesses for minor violations and demanded settlements in order to avoid costly litigation." (Sen. Judiciary Com., Analysis of Sen. Bill No. 796 (2003-2004 Reg. Sess.) as amended Apr. 22, 2003, pp. 6-7.) The Legislature specifically crafted a private right of action under PAGA to avoid the abuses that resulted from the general public standing conferred under the UCL. In doing so, the Legislature defined "aggrieved employee" to clarify that PAGA actions are not available "to persons who suffered no harm from the alleged wrongful act." (Sen. Judiciary Com., Analysis of Sen. Bill No. 796 (2003-2004 Reg. Sess.) as amended Apr. 22, 2003, pp. 6-7.) In fact, private suits under PAGA "could be brought only by an employee or former employee of the alleged violator against whom the alleged violation was committed," and "could *also* include fellow employees also harmed by the alleged violation." (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 796 (2003-2004 Reg. Sess.) as amended May 12, 2003, p. 6 (emphasis added).) Adolph's interpretation would have us return to the days of UCL abuse;

actions the legislative history shows was being curtailed through the legislature's standing requirements.

The purpose of PAGA further reinforces the absurdity of Adolph's position. PAGA was enacted to: (1) address the inadequacies in labor law enforcement by enacting civil penalties to many Labor Code provisions that previously carried only criminal penalties; and (2) due to the shortage of government resources to pursue enforcement, the statute authorized aggrieved employees to seek monetary awards on a representative basis on behalf of themselves and other past or present employees of that employer. (Assem. Floor Analysis of Sen. Bill No. 796 (2003-2004 Reg. Sess.) as amended July 16, 2003, p. 3.) To facilitate this purpose, the Legislature enacted three procedural protections on an individual's standing to bring a PAGA action: (1) the action could only be brought by an "aggrieved employee," *i.e.*, someone who suffered harm from the alleged wrongful act; (2) the action could be brought "by the aggrieved employee" on behalf of himself or herself and fellow employees also harmed by the alleged violation instead of on behalf of the general public; and (3) the civil penalties recovered would be divided between "all identified employees." (Assem. Com. on Lab. & Emp., Analysis of Sen. Bill No. 769 (2003-2004 Reg. Sess.) as amended July 2, 2003, p. 7.)

If Adolph prevails and is permitted to litigate the non-individual claims in court while his individual PAGA claim is arbitrated, he would prosecute an action in court in which he has not asserted that he suffered an alleged violation and on behalf of

others only, and would not receive any portion of the penalties recovered. Such a result blatantly runs afoul of the statute's plain meaning, legislative intent, and its purpose, as well as directly contradicts the elements of standing required to bring a PAGA claim.

B. *Viking River's* Interpretation of PAGA Standing is Correct.

Under PAGA's existing statutory scheme, an employee fails to meet the standing requirements if he or she brings an action in court on behalf of others only. Indeed, an "employee who alleges he or she suffered 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 River Cruises v. Angie Moriana* (2022) 142 S.Ct. 1906, 1915.) Absent an allegation that the employee suffered a violation, he or she cannot assert violations on behalf of others only. This is precisely why the U.S. Supreme Court held in *Viking River Cruises v. Angie Moriana* (2022) 142 S.Ct. 1906 that an individual lacks statutory standing when his or her "own dispute is pared away from a PAGA action." (*Id*. at p. 1925.)

The Supreme Court identified the pivotal limiting component to PAGA standing—a plaintiff must be an "aggrieved employee" in that he or she "can maintain non-individual PAGA claims in an action only by virtue of also maintaining an individual claim in that action." (142 S.Ct. at p. 1925; *see* Lab. Code, §§ 2699

(a), (c).) The Supreme Court's analysis is straightforward for the simple reason that any contrary interpretation produces an absurd result. If an employee is unable to allege he or she suffered at least one of the alleged violations, due to an agreement to arbitrate his or her individual PAGA claim or otherwise, he or she cannot meet the definition of an "aggrieved employee." (Lab. Code, § 2699(c).) Thus, the Supreme Court's interpretation of PAGA standing squares completely with the statute's plain meaning.

Standing under PAGA rests on a plaintiff's qualification as an "aggrieved employee" precisely because that definition was explicitly added by the Legislature to differentiate it from UCL actions brought on behalf of the general public. (Assem. Com. on Lab. & Emp., Analysis of Sen. Bill No. 769 (2003-2004 Reg. Sess.) as amended July 2, 2003, p. 7; *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 90.) In fact, the marker of a PAGA action is one in which the plaintiff suffered harm from the alleged wrongful act and his or her fellow employees were also harmed. (*Ibid.*) There is no conceivable support in PAGA's text or legislative history to support that a PAGA action can be brought for violations suffered only by other employees. Indeed, that mechanism was expressly foreclosed during the legislative process. (Sen. Judiciary Com., Analysis of Sen. Bill No. 796 (2003-2004 Reg. Sess.) as amended Apr. 22, 2003, pp. 6-7; *Kim*, 9 Cal.5th at p. 90.)

Viking River requires that a plaintiff with an arbitration agreement in which he has agreed to submit his individual PAGA claim to arbitration must be enforced according to its terms. (142

S.Ct. at pp. 1913, 1925.) As such, once a plaintiff executes said arbitration agreement, he is unable to open the door to bringing non-individual PAGA claims on behalf of others in court because pursuant to the FAA and *Viking River*, he has agreed to and must bring his individual PAGA claim in a separate proceeding.

Viking River reinforced three concepts crucial to the standing analysis: (1) the FAA's mandate is to enforce arbitration agreements; (2) an arbitration agreement is "a specialized kind of forum-selection clause that posits not only the situs of the suit but also the procedure to be used in resolving the dispute;" and (3) PAGA permits employees to use "Labor Code violations they personally suffered as a basis to join to the action" claims on behalf of others. (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 344; *Viking River*, 142 S.Ct. at pp. 1919, 1923, internal quotations omitted.)

Accordingly, where an employee cannot assert in court the sole basis needed in order to join claims on behalf of others because he has agreed to bring his claims for violations he personally suffered in an arbitration forum, he does not have standing to bring a PAGA action in court. (*Viking River*, 142 S.Ct. at p. 1923.) *Viking River* expressly closed the backdoor to avoiding bi-lateral agreements to arbitrate under PAGA, insofar as the agreement requires an employee to arbitrate his individual PAGA claim. (142 S.Ct. at p. 1918.) To hold that an employee meets the standing requirements under PAGA because he has violated his valid and enforceable arbitration agreement, the U.S. Supreme Court in

Viking River would have needed to overturn years of precedent interpreting the FAA and ignore PAGA's statutory scheme intentionally crafted by the California Legislature. The Court did not do so. Instead, it correctly interpreted standing under PAGA.

C. ***Adolph's*** **Position Will Facilitate Further Abuses of PAGA.**

Adolph's reading of PAGA not only contravenes its standing requirements but would also advance the abuses the Legislature intended to avoid. PAGA was specifically revised to address concerns it would fall victim to similar abusive practices that occurred under the UCL, including "an excessive amount of meritless, fee-motivated lawsuits" resulting in "increase[d] costs to businesses of all sizes" and the addition of "thousands of new cases to California's already over-burdened civil court system." (Assem. Com. on Lab. & Emp., Analysis of Sen. Bill No. 769 (2003-2004 Reg. Sess.) as amended July 2, 2003, p. 7.) Yet, due in large part to the faulty holding in *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348—which precluded the division of PAGA claims through an agreement to arbitrate and thus coerced parties into withholding PAGA claims from arbitration—plaintiffs' attorneys have used PAGA actions to engage in those exact abusive practices. The U.S. Supreme Court's recent holding in *Viking River* that *Iskanian*'s "indivisibility rule" was preempted by the FAA endeavors to stem one cause of that abuse—an unfettered path to filing PAGA actions in court even when a valid, enforceable

arbitration agreement exists whereby a plaintiff has agreed to individually arbitrate his or her PAGA claim. (*Viking River*, 142 S.Ct. at pp. 1912, 1924.)

However, the resulting damage to date is plainly evident. Before filing an action in court, Plaintiffs' attorneys have only had to satisfy a low pre-litigation hurdle by filing a sparse letter with the Labor and Workforce Development Agency (LWDA) then waiting for the requisite amount of time to expire without action by the LWDA. (*See* Lab. Code, § 2699.3(a)(1) [requiring the employee to give written notice to the LWDA and employer of the code provisions alleged to have been violated, including the facts and theories in support]; Lab. Code, § 2699.3 (a)(2) [authorizing an employee to commence a civil action if the LWDA provides notice that it does not intend to investigate the alleged violation or fails to provide any notice within 65 days of the employee's written notice].) At that point, the LWDA rarely investigates the claims. A March 25, 2016 report from the Legislative Analyst's Office stated that "LWDA estimates that less than 1 percent of PAGA notices have been reviewed or investigated since PAGA was implemented." (Legislative Analyst's Office, *The 2016-17 Budget: Labor Code Private Attorneys General Act Resources*, Budget and Policy Post (Mar. 25, 2016) <https://lao.ca.gov/Publications/Report/3403> [as of Dec. 12, 2022].)

Since 2016, the LWDA administered and decided only 12 PAGA cases from fiscal years 2016-2017 to 2019-2020. (CABIA

Foundation, *California Private Attorneys General Act of 2004 Outcomes and Recommendations* (Mar. 2021) p. 4 <https://www.cabia.org/app/uploads/CABIA-PAGA-Study-Final.pdf> [as of Dec. 12, 2022].) With an estimated 15 PAGA notices filed every day, the LWDA's action is paltry. (Jathan Janove, *More California Employers Are Getting Hit with PAGA Claims*, Society for Human Resources Management (Mar. 26, 2019) <https://www.shrm.org/resourcesandtools/hr-topics/pages/more-california-employers-are-getting-hit-with-paga-claims.aspx> [as of Dec. 12, 2022].)

As of 2016, over 30,000 PAGA lawsuits were filed due to the lack of agency enforcement. (Assem. Com. on Lab. & Emp., Analysis of Assem. Bill No. 2464 (2005-2006 Reg. Sess.) as amended Apr. 27, 2016, p. 7.) A recently published report analyzing several public records requests indicates that an employer's average settlement payout is 41 percent more than cases pending before the LWDA, even though employees receive nearly twice as much money in the latter compared to the former. (CABIA Foundation, *California Private Attorneys General Act of 2004 Outcomes and Recommendations* (Mar. 2021) p. 4 <https://www.cabia.org/app/uploads/CABIA-PAGA-Study-Final.pdf> [as of Dec. 12, 2022].) Despite the increased settlement payouts for PAGA actions, the State of California receives an average of $27,000 less from PAGA actions prosecuted in court rather than those before the LWDA. (*Id.* at p. 9.) Cases also last

approximately 220 more days in court than those retained by the LWDA. (*Ibid.*)

Since 2010, over 65,000 PAGA Notices have been filed with California's LWDA.[2] (State of Cal. Dept. of Fin., Budget Change Proposal, Private Attorneys General Act (PAGA) Resources, 2016/17

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[2] PAGA Notices filed with the LWDA by year:

2010	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**
4,430	5,064	6,047	7,626	6,307	5,510	3,707
2017	**2018**	**2019**	**2020**	**2021**		
5,383	5,732	6,431	6,515	2,690		

(State of Cal. Dept. of Fin., Budget Change Proposal, Private Attorneys General Act (PAGA) Resources, 2016/17 Fiscal Year (Jan. 7, 2016) p. 1 <http://web1a.esd.dof.ca.gov/Documents/bcp/1617/FY1617_ORG7350_BCP474.pdf> [hereinafter Brown 2016/17 Budget Proposal]; State of Cal. Dept. of Fin., Budget Change Proposal, PAGA Unit Staffing Alignment (May 10, 2019) p. 2 < https://esd.dof.ca.gov/Documents/bcp/1920/FY1920_ORG7350_BCP3230.pdf>; CABIA Foundation, *California Private Attorneys General Act of 2004 Outcomes and Recommendations* (Mar. 2021) p. 4 <https://www.cabia.org/app/uploads/CABIA-PAGA-Study-Final.pdf> [as of Dec. 12, 2022]; *see also* Cal. Dept. of Industrial Relations, Private Attorneys General Act (PAGA) Case Search <https://cadir.secure.force.com/PagaSearch/PAGASearch> [as of Dec. 12, 2022].). And, since 2013 9,208 PAGA cases have been filed. *see also* CABIA Foundation, *PAGA Cases in California by County* <https://cabiafoundation.org/paga-cases-in-california-by-county/> [as of Dec. 12, 2022].)

Fiscal Year (Jan. 7, 2016) p. 1 <http://web1a.esd.dof.ca.gov/Documents/bcp/1617/FY1617_ORG7350_BCP474.pdf> [hereinafter Brown 2016/17 Budget Proposal]; State of Cal. Dept. of Fin., Budget Change Proposal, PAGA Unit Staffing Alignment (May 10, 2019) p. 2 <https://esd.dof.ca.gov/Documents/bcp/1920/FY1920_ORG7350_BCP3230.pdf>; CABIA Foundation, *California Private Attorneys General Act of 2004 Outcomes and Recommendations* (Mar. 2021) <https://www.cabia.org/app/uploads/CABIA-PAGA-Study-Final.pdf> [as of Dec. 12, 2022].) The average settlement paid by California employers to resolve PAGA lawsuits since 2013 is $1,231,620 (exclusive of any attorneys' fees or litigation costs). (CABIA Foundation, *California Private Attorneys General Act of 2004 Outcomes and Recommendations* (Mar. 2021) p. 10 <https://www.cabia.org/app/uploads/CABIA-PAGA-Study-Final.pdf> [as of Dec. 12, 2022].)[3] Accordingly, California employers have paid at least $1,424,984,340 to resolve PAGA lawsuits since 2013 (and most likely substantially more as dozens upon dozens of notices were resolved before a lawsuit was filed). (*Ibid.*) If one were to apply the average settlement amount to even half of the PAGA

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[3] The average settlement is only based on the 1,157 settlements published since 2013. (CABIA Foundation, *California Private Attorneys General Act of 2004 Outcomes and Recommendations* (Mar. 2021) p. 10 <https://www.cabia.org/app/uploads/CABIA-PAGA-Study-Final.pdf> [as of Dec. 12, 2022].)

lawsuits filed since 2013 California employers have incurred losses of over $10,000,000,000 to settle PAGA lawsuits in the past eight years alone.[4]

The hospitality industry has been hit especially hard by PAGA lawsuits. For example, during Fiscal Year 2016-2017, 16.1% of the PAGA cases filed in courts throughout California targeted restaurants and other hospitality related entities, which translates into over $500,000,000 in potential settlement costs (exclusive of attorneys' fees and litigation costs) just in 2016. (Brown 2016/17 Budget Proposal, *supra*, Attachment II.)

Certainly, PAGA was enacted to reduce the administrative burden of enforcement by deputizing employees to pursue civil penalties on behalf of the State. (Assem. Floor Analysis of Sen. Bill No. 796 (2003-2004 Reg. Sess.) as amended July 16, 2003, p. 3.) Nonetheless, *Iskanian* and its progeny effectively created a mechanism by which employees skirt their contractual obligations. Consequently, PAGA as originated, has been an ineffective farce. The LWDA is once again ill-equipped to investigate the plethora of claims within timeframes proscribed. Cases amassed in court

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[4] The actual cost to employers to resolve PAGA lawsuits in California is potentially much higher given that often times the PAGA portion of a settlement is miniscule compared to the total settlement amount. For example, in *Viceral v. Mistras Group, Inc.* (N.D. Cal. Feb. 17, 2017) No. 15-cv-02198-EMC, 2017 WL 661352, the Court approved a $6,000,000 settlement, of which only $20,000 was allocated to the PAGA claim, even though it was valued at $12,900,000.

resolve for considerably less amounts paid to the State and aggrieved employees, yet they prolong ultimate resolution, increase attorney involvement and fees, and reduce recovery for workers. (CABIA Foundation, *California Private Attorneys General Act of 2004 Outcomes and Recommendations* (Mar. 2021) pp. 1-4 <https://www.cabia.org/app/uploads/CABIA-PAGA-Study-Final.pdf> [as of Dec. 12, 2022].). The U.S. Supreme Court's holding in *Viking River* abrogating *Iskanian*'s indivisibility rule closed the backdoor for employees to avoid their valid arbitration agreements simply by asserting a representative PAGA claim. Now, pursuant to *Viking River*, an employee's agreement to arbitrate his or her individual claims under PAGA is enforceable. Rather than accept the U.S. Supreme Court's decision, Adolph now seeks to work around the ruling to re-open the door to bring a PAGA action in court despite there being a valid agreement to arbitrate it. As Adolph would have it, an employee's non-individual claims could proceed in court despite the employee's inability to meet the critical standing requirements in that action—that he or she is "aggrieved" and brings the action on behalf of himself or herself and others—because the employee's individual PAGA claim must be arbitrated.

Permitting dual actions, one in arbitration and the other in court, would only result in the same abuses PAGA has seen to date. Plaintiffs' attorneys will continue to file PAGA actions in court on behalf of their clients, even when their clients have agreed to arbitrate their individual PAGA claims, knowing the individual

claim would simply be ordered to arbitration while the non-individual claim could proceed in court. Plaintiffs' attorneys will thus be encouraged to "'act as vigilantes' pursuing frivolous violations on behalf of different employees" thus defying the compulsory joinder rule preempted by the FAA under *Viking River*. (Assem. Floor Analysis of Sen. Bill No. 796 (2003-2004 Reg. Sess.) as amended July 16, 2003, p. 3.) Consequently, PAGA's abuses will remain and inevitably worsen as if the ruling in *Viking River* never existed. PAGA actions will continue to flood California courts without any recourse to temper the fee-motivated lawsuits in direct contravention of Legislative intent.

D. ***Kim v. Reins* and *Viking River* Support that a PAGA Action Cannot Be Maintained in Court Absent an Individual Claim.**

In *Viking River*, the U.S. Supreme Court held that when an employee's individual PAGA claim is ordered to arbitration, the employee "lacks statutory standing to continue to maintain her non-individual claims in court, and the correct course is to dismiss her remaining claims." (142 S.Ct. at p. 1925.) In analyzing PAGA's standing requirement, the Supreme Court expressly relied on this Court's opinion in *Kim v. Reins International California* (2020) 9 Cal.5th 73 for the position that PAGA standing requirement "was meant to be a departure from the 'general public' … standing allowed under [the UCL]." (142 S.Ct. at p. 1925, quoting *Kim*, 9 Cal. 5th at p. 90.) Adolph now disputes the U.S. Supreme Court's

reliance on *Kim* and the parties have diametrically opposed readings of *Kim*.

Adolph contends *Kim* provides a "status-based approach" to PAGA standing, where an employee establishes and meets the requirements of an "aggrieved employee" once he or she brings an action alleging that he was an employee of the defendant and personally suffered at least one of that defendant's alleged violations. Even if the employee's individual PAGA claim is ultimately ordered to arbitration based on a valid arbitration agreement, Adolph argues that nothing in *Kim* supports that the employee would lose his status as an "aggrieved employee" such that he cannot adjudicate the remainder of his representative PAGA claim in court. (Resp. Br. at pp. 33-34.) Thus, Adolph contends PAGA standing is based on the "*fact* of the violation, not the continued availability of a personal remedy." (Resp. Br. at p. 35.) On the other hand, Uber contends that pursuant to *Kim*, PAGA standing deals in terms of violations. Thus, once a plaintiff's individual PAGA claim is sent to arbitration, he can no longer establish for the non-individual claims remaining in court that he suffered at least one alleged violation. (App. Br. at p. 36.)

In truth, this Court's decision in *Kim* expressly establishes that standing under PAGA rests on an employee's ability to bring a claim in an action that he personally suffered at least one violation giving rise to civil penalties, *i.e.,* his individual PAGA claim. The facts of *Kim* are straightforward. The plaintiff, Kim, executed an arbitration agreement with his former employer

wherein he agreed to individually arbitrate any claims against the employer. (*Kim*, 9 Cal.5th at p. 82.) Kim later filed a class action alleging various labor code violations, as well as sought civil penalties under PAGA. Pursuant to the arbitration agreement, the lower court dismissed the class claims and ordered Kim's individual labor code claims to arbitration. Pursuant to then existing law under *Iskanian*, the PAGA claim could not be waived and thus, was stayed pending completion of arbitration. (*Ibid*.) Kim settled his individual claims in arbitration and expressly excluded his PAGA claim from the settlement. The employer, Reins, moved for summary judgment on the remaining PAGA claim on the grounds that Kim lacked statutory standing under PAGA as he was no longer an "aggrieved employee" due to redressing his individual Labor Code claims in the settlement. (*Ibid*.) This Court ultimately held that "settlement of individual claims does not strip an aggrieved employee of standing . . . to pursue PAGA penalties." (*Id*. at p. 80.)

This Court's holding in *Kim* rests on three premises: (1) claims for individual relief for violations of the Labor Code are distinct from civil penalties under PAGA and the plaintiff settled only his individual Labor Code claims; (2) the parties expressly carved out the PAGA claim from the individual settlement thus allowing that claim to proceed in court; and (3) the plaintiff had PAGA standing when he filed suit because based on then existing law, the PAGA claim could not be arbitrated pursuant to the arbitration agreement. (*Kim*, 9 Cal.5th at pp. 84, 86, 91.) Each of

these premises led to this Court's conclusion that the plaintiff did not lose his standing to bring a PAGA claim in court.

The issue before the Court here is very different than the one addressed in *Kim*. Here, the question is whether an employee maintains standing to pursue his non-individual PAGA claims in court when his individual PAGA claim must be arbitrated. Nevertheless, this Court's analysis of PAGA standing in *Kim* supports that an employee who, by virtue of a valid arbitration agreement, must arbitrate the individual PAGA claim does not have standing to bring a PAGA action in court to begin with and standing cannot be conferred by that employee violating their contractual agreement.

Kim first identified PAGA's standing requirement centers on a plaintiff being an "aggrieved employee," as defined. In this Court's view, the meaning of that definition is plain in that it requires a plaintiff to establish both that he was employed by the alleged violator and one or more of the alleged violations was committed against him. (*Kim*, 9 Cal.5th at pp. 83-84, 90, quotations omitted.) This Court found both elements satisfied because Kim could assert both elements when he filed suit and thus had standing at that time. (*Id.* at p. 84.)

While the standing requirements are unambiguous, this Court continued on to analyze PAGA's legislative history. In that analysis, this Court found that "[i]t is apparent that PAGA's standing requirement was meant to be a departure from the 'general public'" by conferring standing on those "who were

employed by the violator and subjected to at least one alleged violation." (*Id*. at pp. 90-91.) Recognizing that "aggrieved employee" is a term of art in PAGA, this Court addressed the effect that the meaning would have on who may recover penalties and how those are calculated. In order for the term "aggrieved employee" to make cohesive sense throughout the statutory scheme, violations against the plaintiff must be included in the calculation for penalties and the plaintiff must be eligible to receive his share. (*Id*. at p. 88.) Neither can be true if an employee arbitrates his individual claim yet continues the non-individual PAGA claim in court. Adolph concedes this point.

Therefore, this Court's analysis in *Kim* makes clear that an employee's standing to bring a PAGA claim is determined at the time the employee brings the action. The action must allege both that the plaintiff was employed and the employer committed at least one violation against him, and he must be included in the calculation for penalties and eligible to receive his share for him to be an "aggrieved employee." When an employee executes an arbitration agreement wherein he agrees to arbitrate his individual PAGA claim, he has no ability to assert in court that at least one violation was committed against him. Even if he makes that assertion, due to the arbitration of his individual claim, he could not be included in, nor receive any portion of penalties recovered in court. As such, the employee cannot meet the standing requirements for PAGA as he does not qualify as an "aggrieved employee." Accordingly, the U.S. Supreme Court

properly interpreted *Kim* to conclude that under law, non-individual PAGA claims cannot be maintained in court unless an individual claim is also maintained in that action. (*Viking River*, 142 S.Ct. at p. 195.)

Adolph would have standing judged solely on whether the employee was aggrieved at the time they file their complaint. The potential for abuse here is obvious. The adoption of Adolph's position would encourage employees and their attorneys to knowingly violate their agreement to arbitrate, filing in Court simply to try to establish standing. This Court should not be a party to this abuse and instead should focus on the legislative history and language of PAGA.

E. Adolph's Position Could Eviscerate the Central Holding of *Viking River*.

Viking River's central holding is undisputed—parties can arbitrate an employee's individual PAGA claim. (142 S.Ct. at p. 1925.) Thus, even if this Court finds for Adolph, the result may be less impactful than expected. When an employee's individual claim is ordered to arbitration, and if the employee is permitted to continue pursuing the non-individual claims in court, other potential "aggrieved employees" on whose behalf the non-individual claims are brought may also have enforceable arbitration agreements requiring them to submit their individual PAGA claims to arbitration. As a result, only those employees who have not previously executed arbitration agreements would be

part of any remaining action in court. Therefore, the potential "representative group" of aggrieved employees would be limited to individuals who did not sign arbitration agreements and as a result are still eligible to participate in representative actions. In the case of an employer where the entire workforce executes arbitration agreements, then, no representative action may remain because everyone will have agreed to arbitrate their own individual PAGA penalties.

We see this situation clearly illustrated in the class action context. The U.S. Supreme Court has made clear that courts must enforce a valid arbitration agreement in accordance with the agreed upon terms contained in the agreement and cannot impose class-wide arbitration unless agreed to by the parties. The Supreme Court explained that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." (*Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* (2010) 559 U.S. 662, 684-685, emphasis in original.)

Subsequently, in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 348, the U.S. Supreme Court reiterated that arbitration agreements are a matter of consent and must be enforced in accordance with the agreed upon terms of the parties. Specifically, in addressing the enforceability of class action waivers, the *AT&T* Court held that states may not use state contract law principles as a means to impose limitations or requirements that "stand as an obstacle" to the unfettered use of

arbitration agreements. (*Id.* at p. 334.) As a result, the Court concluded that this Court's ruling in *Discover Bank v. Superior Court* (2005) 36 Cal. 4th 148, which held that any party to an arbitration agreement could demand class wide, as opposed to individual, arbitration, was an obstacle to the strong public policy in favor of unfettered use of arbitration and the speedy resolution of disputes. (*AT&T Mobility LLC v. Concepcion*, 563 U.S. at pp. 348-349.) Consequently, the Court disallowed *Discover Bank's* rule authorizing class arbitration in lieu of individual arbitration calling it an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Id.* at p. 352.)

Similarly, the U.S. Supreme Court held that class action waivers in employment arbitration agreements are enforceable under the FAA. (See *Epic Systems Corp. v. Lewis* (2018) 138 S.Ct. 1612, 1616 ["Congress has instructed in the Arbitration Act that arbitration agreements providing for individualized proceedings must be enforced, and neither the Arbitration Act's saving clause nor the NLRA suggests otherwise."]; see also *Iskanian v. CLS Transportation Los Angeles, LLC*, (2014) 59 Cal.4th 348, 367.) The U.S. Supreme Court emphasized that "Congress has instructed that arbitration agreements like those before us must be enforced as written." (*Epic Systems Corp.*,138 S.Ct. at p. 1632.)

When applying the foregoing U.S. Supreme Court precedent, this Court and California's appellate courts have consistently held that, when a binding arbitration agreement exists and does not permit class arbitration, the court must compel individual

arbitration. (See *AT&T Mobility LLC v. Concepcion*, 563 U.S. at p. 352; *Iskanian*, 59 Cal.4th at p. 384; *Nelson v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th 1115, 1130-1131 [holding class arbitration cannot be compelled when the plain language of an arbitration agreement reflects a "two-party intention" and provides no contractual basis for authorizing class arbitration].)

As a result, when a plaintiff brings class action claims on behalf of himself and others similarly situated, provided the plaintiff does not have their own arbitration agreement requiring individualized arbitration of the claims, courts have authority to exclude from any proposed class of similarly aggrieved employees those employees who signed arbitration agreements. (See *Sherman v. CLP Resources, Inc.* (C.D. Cal. Mar. 19, 2015) No. CV 12-8080-GW (PLAx), 2015 WL 13542759, at * 2 ["While the Court [agrees] with Defendants that any class must be defined . . . to exclude employees who signed enforceable arbitration agreements, Defendants' suggestion that the mere existence of some agreements precludes class certification oversteps the mark."], quoting court's prior order on class certification in same action; *Balasanyan v. Nordstrom, Inc.* (S.D. Cal. 2013) 294 F.R.D 550, 573-574 ["new employees who signed the [arbitration agreement] upon becoming employed . . . may be properly excluded from the class."].)

Take for example an employee who brings an action against his former employer, a single location restaurant, for class claims on behalf of himself and all current and former non-exempt

employees for minimum wage and overtime violations under the Labor Code, covering a time period of three years. The employee did not execute an arbitration agreement during his employment. For the single location restaurant, the potential class of similarly situated persons may include 100 people. However, the employer and its workforce executed arbitration agreements with class action waivers upon hire throughout the relevant three-year time period covered by the claims, but not before that time. Thus, any new employees hired during that three-year time period would have executed arbitration agreements requiring individual arbitration of any potential claims arising from their employment at the restaurant. Consequently, those employees would be excluded as part of the class of persons on whose behalf the plaintiff brings the claims. Only those employees who were hired before that time period, but worked during that time period, and did not sign an arbitration agreement with a class action waiver would be included in the putative class. (See *AT&T Mobility LLC v. Concepcion*, 563 U.S. at p. 352; *Sherman v. CLP Resources, Inc.* (C.D. Cal. Mar. 19, 2015) No. CV 12-8080-GW (PLAx), 2015 WL 13542759, at * 2; *Balasanyan v. Nordstrom, Inc.* (S.D. Cal. 2013) 294 F.R.D 550, 573-574.)

With the U.S. Supreme Court's holding in *Viking River*, representative action wavers in employment arbitration agreements requiring an employee to arbitrate individual claims under PAGA, join class action waivers as enforceable under the FAA. (142 S.Ct. at pp. 1913, 1925.) Similar to class actions where

an employee brings claims on behalf of himself and other employees, a plaintiff may bring an action for civil penalties under PAGA for Labor Code violations committed against the plaintiff personally and also for Labor Code violations committed against other coworkers with that same employer. (Lab. Code § 2699, subd. (a); *Huff v. Securitas Sec. Servs. USA, Inc.* (2018) 23 Cal.App.5th 745, 750-751.)

If a plaintiff brings an action in court for civil penalties under PAGA on behalf of himself and other aggrieved employees, but has an arbitration agreement requiring his individual PAGA claim subject to binding arbitration, if Adolph prevails here, the plaintiff could continue his non-individual claims in court. However, just as in class actions, the class of potential aggrieved employees on whose behalf those non-individual claims continue to be pursued, would be limited to those who themselves do not have arbitration agreements requiring them to arbitrate their personal claim for civil penalties under PAGA. *Viking River*'s central holding requires such a result.

However, Adolph appears to advance the opposite conclusion. Allowing a plaintiff who has a valid, enforceable arbitration agreement requiring arbitration of his individual PAGA claim to continue pursuing non-individual PAGA claims in court on behalf of others, who themselves have their own arbitration agreement covering their individual PAGA penalties, would eviscerate the central holding of *Viking River* by creating another backdoor around the FAA. This Court must reject Adolph's

attempt to create another backdoor to avoid bilateral agreements to arbitrate individual PAGA claims pursuant to the FAA and the U.S. Supreme Court's holding in *Viking River*.

III. CONCLUSION

For all of the reasons discussed in Uber's Opening and Reply Brief and above, *Amici* respectfully request that the Court reject Adolph's attempt to eviscerate the central holding in *Viking River* and follow the U.S. Supreme Court's determination of PAGA standing in alignment with PAGA's plain text and legislative history. The Court should reverse the Court of Appeal's ruling to compel Adolph's individual PAGA claim to arbitration and dismiss his non-individual claims.

Date: December 13, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.520(c)(1), I certify that the AMICI CURIAE BRIEF OF RESTAURANT LAW CENTER AND CALIFORNIA RESTAURANT ASSOCIATION contains 6971 words.

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Supreme Court of California

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