CASE NO. S274671

IN THE SUPREME COURT OF CALIFORNIA

ERIK ADOLPH,
Plaintiff and Respondent,
v.

UBER TECHNOLOGIES, INC.,
Defendant and Appellant.

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 FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND PROPOSED BRIEF OF *AMICI CURIAE* THE EMPLOYERS GROUP AND CALIFORNIA EMPLOYMENT LAW COUNCIL

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to California Rule of Court 8.208(e), *Amici Curiae* the Employers Group and California Employment Law Council certify that no entities or persons have either an ownership interest of 10% or more in either the Employers Group or California Employment Law Council, or a financial or other interest in the outcome of the proceeding that the Justices should consider in determining whether to disqualify themselves.

Dated: December 29, 2022

By: */s/ Apalla U. Chopra*
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APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

Pursuant to Cal. R. Ct. 8.520(f), the Employers Group and the California Employment Law Council respectfully request permission to file this *Amici Curiae* brief in support of Defendant-Appellant Uber Technologies, Inc. The brief will assist the Court in deciding this matter in two respects.

First, *Amici* have substantial knowledge of and insight into the question presented, having participated as *Amici* in the U.S. Supreme Court in *Viking River Cruises, Inc. v. Moriana* (2022) 142 S.Ct. 1906. That decision held that the Federal Arbitration Act ("FAA") preempted a California rule prohibiting employees from agreeing to arbitrate California Labor Code Private Attorneys General Act ("PAGA") claims based on alleged statutory violations that they personally suffered. As a consequence of *Viking River*, a plaintiff's "individual" PAGA claim—i.e., a claim for penalties based on violations allegedly suffered by the plaintiff herself—can be compelled to arbitration. The question here is whether a plaintiff who has agreed to arbitrate an "individual" PAGA claim can nonetheless maintain an action in court for violations suffered only by other employees. *Amici*'s participation in *Viking River*, including *Amici*'s detailed study of California law, will assist the Court in resolving that question.

Second, *Amici* draw on this knowledge and experience, as well as their insight into the interests of employers, to demonstrate that the Legislature did not intend to allow a plaintiff who cannot litigate an "individual" PAGA claim in court nonetheless to litigate

a "non-individual" PAGA claim. This conclusion flows directly from the text of PAGA, which requires that the employee be the subject of one of the alleged violations that is litigated in the suit. It also flows from PAGA's structure. PAGA has been described by this Court as a type of *qui tam* statute through which private citizens represent the State's interest in the enforcement of the labor laws. The quintessential feature of *qui tam* actions is that the relator has a financial interest in the outcome of the litigation, which gives her an incentive to litigate vigorously to protect the government's interests. The Legislature could not have intended to deputize an individual with *no* financial interest in the outcome of the litigation to litigate on behalf of the State. This conclusion forecloses Plaintiff's "non-individual" PAGA claim, because a plaintiff who does not assert an "individual" PAGA claim has no financial interest in the litigation. *Amici* will also explain why this Court's decision in *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, is entirely consistent with this conclusion.

No party or counsel for a party in this pending appeal either authored any part of the *Amici Curiae* brief nor made any monetary contribution intended to fund the preparation or submission of the brief. Further, no person or entity, other than *Amici*, made a monetary contribution intended to fund the preparation or submission of this brief.

THE *AMICI CURIAE*

The Employers Group is the nation's oldest and largest human resources management organization for employers. It represents California employers of all sizes in every industry. The

Employers Group has a vital interest in seeking clarification and guidance from this Court for the benefit of its employer members and the millions of individuals they employ. As part of this effort, The Employers Group seeks to enhance the predictability and fairness of the laws and decisions regulating employment relationships. Because of its collective experience in employment matters, including its appearance as *amicus curiae* in state and federal forums over many decades, The Employers Group is uniquely positioned to assess both the impact and implications of the legal issues presented in employment cases such as this one.

The same is true of The California Employment Law Council, a voluntary, nonprofit organization that promotes the common interests of employers and the general public in fostering development in California of reasonable, equitable, and progressive rules of employment law. The California Employment Law Council's membership includes approximately 70 private sector employers in the State of California, who collectively employ hundreds of thousands of Californians.

Both organizations have repeatedly been granted leave to appear as *amici* in important employment cases.[1]

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[1] See, e.g., *Viking River Cruises, Inc. v. Moriana* (2022) _U.S._ [142 S.Ct. 1906]; *Donohue v. AMN Servs., LLC* (2021) 11 Cal.5th 58; *Kim v. Reins International California, Inc., supra*, 9 Cal.5th 73; *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858; *Vazquez v. Jan-Pro Franchising Int'l, Inc.* (2021) 10 Cal.5th 944; *Oman v. Delta Air Lines, Inc.* (2020) 9 Cal.5th 762; *Frlekin v. Apple Inc.* (2020) 8 Cal.5th 1038; *Voris v. Lampert* (2019) 7 Cal.5th 1141; *ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175; *Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829; *Dynamex Operations W., Inc.*

INTEREST OF *AMICI CURIAE*

In recent years, PAGA has been used by the plaintiff's bar in a manner not intended by the Legislature, and *Amici*'s members have been at the center of that misuse. While the Legislature intended to promote compliance with California's labor laws by deputizing private attorneys general, it specifically limited the types of plaintiffs who would have standing. It did so to avoid abuses and to ensure that the State's interests would be represented by plaintiffs who have a stake in the outcome of the litigation and are thus incentivized to litigate vigorously on behalf of the State.

Plaintiff's argument in this case would subvert those goals and harm *Amici*'s members. His position is that an employee can bring a PAGA claim on behalf of the State even where that employee has no financial incentive to litigate vigorously because his own claim for a share of PAGA penalties is subject to arbitration. Plaintiff is wrong, as PAGA's text and structure conclusively demonstrate. But he is also wrong for a more basic

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v. Superior Court (2018) 4 Cal.5th 903; *Alvarado v. Dart Container Corp. of California* (2018) 4 Cal.5th 542; *Mendoza v. Nordstrom, Inc.* (2017) 2 Cal.5th 1074; *Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257; *Johnmohammadi v. Bloomingdale's, Inc.* (9th Cir. 2014) 755 F.3d 1072; *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, abrogated by *Viking River*; *Duran v. US. Bank Nat'l Ass'n* (2014) 59 Cal.4th 1; *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203; *Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004; *Harris v. Superior Court* (2011) 53 Cal.4th 170; *Jones v. Lodge at Torrey Pines P'ship* (2008) 42 Cal.4th 1158; *Murphy v. Kenneth Cole Prods., Inc.* (2007) 40 Cal.4th 1094.

reason: the Legislature could not have intended to deputize a plaintiff to protect the State's interests when that plaintiff has no personal stake in the litigation.

Amici have a strong interest in ensuring that PAGA's limits are enforced, as its members are regularly the subject of PAGA litigation. *Amici* also seek to ensure that the integrity of arbitration agreements are upheld, as its members regularly enter into such agreements. And *Amici*'s experience litigating *Viking River* will aid this Court in understanding the question presented here.

CONCLUSION

For all of the foregoing reasons, *Amici Curiae* respectfully request that the Court accept the accompanying brief for filing in this case.

Dated: December 29, 2022. Respectfully submitted,

By: */s/ Apalla U. Chopra*
Apalla U. Chopra

Attorneys for *Amici Curiae*

AMICI CURIAE BRIEF

INTRODUCTION

The Legislature did not enact PAGA, the California Labor Code Private Attorneys General Act, to authorize a plaintiff to sue on behalf of everyone but herself.

The Legislature enacted PAGA to create a *qui tam* action, deputizing "aggrieved employees" to represent the State's interest in enforcement of the labor laws in exchange for a bounty. The Legislature deliberately chose *not* to deputize any member of the public at large to bring such a claim. Rather, the Legislature chose to impose two critical and unambiguous limits in PAGA. First, the Legislature required a plaintiff to sue "on behalf of himself or herself." (Lab. Code § 2699(a).) Second, it authorized suit only by an "aggrieved employee"—i.e., an employee "against whom one or more of the alleged violations was committed." (*Id.* § 2699(c).) These limits work in tandem to ensure that the plaintiff has an actual interest in the outcome of the case and thus will adequately represent the State, because they allow only employees who seek a share of PAGA penalties to bring suit.

Plaintiff would turn this scheme on its head. Plaintiff recognizes that a PAGA plaintiff must, to have standing, allege a claim for penalties based on a violation she personally suffered. But in Plaintiff's view, an allegation is all the plaintiff needs. It does not matter whether the plaintiff will ever be able to *litigate* that allegation in court, much less collect a share of PAGA penalties if the litigation succeeds. Nor does it matter that the

plaintiff contractually agreed *not* to bring suit in court under PAGA for violations she personally suffered.

Plaintiff is forced to make this counter-intuitive argument because the U.S. Supreme Court held in *Viking River Cruises, Inc. v. Moriana* (2022) 142 S.Ct. 1906, that a plaintiff must be able to agree to arbitrate an "individual" PAGA claim—i.e., a claim for PAGA penalties based on alleged violations that the plaintiff personally suffered. Plaintiff entered into such an agreement, so his "individual" PAGA claim must be compelled to arbitration. But he nonetheless wants to litigate a "non-individual" PAGA claim in court—i.e., a claim based entirely on violations allegedly suffered by others, where Plaintiff has no prospect of collecting a share of PAGA penalties. The U.S. Supreme Court recognized in *Viking River* that California law does not countenance this bizarre result: "Under PAGA's standing requirement, a plaintiff can maintain non-individual PAGA claims in an action only by virtue of also maintaining an individual claim in that action." (*Id.* at 1925.) The U.S. Supreme Court got it right. As to Plaintiff's "non-individual" claim, Plaintiff is not an "aggrieved employee" because that claim—which is all that can be litigated in court—by definition is *not* a claim for PAGA penalties based on a violation that was committed against him. (Lab. Code § 2699(c).)

Plaintiff's contrary argument conflicts with PAGA's text and structure, and would result in implausible consequences that the Legislature could not have intended. Those consequences are described in detail herein, but one bears mentioning at the outset: the real costs that lawyer-driven PAGA litigation imposes on

employers both large and small. Because "non-individual" PAGA claims can be brought on behalf of an entire workforce for virtually any violation of the Labor Code, there is a massive incentive to maximize the scope of PAGA suits and of *in terrorem* settlements as a consequence. This concern is not merely theoretical—it has in fact materialized in recent years. PAGA claims seeking millions of dollars in penalties have multiplied exponentially. These lawsuits exert enormous settlement pressure on employers, forcing them to pay up or take a bet-the-business gamble. Under *Viking River*, litigation is at least limited to cases involving plaintiffs with an actual interest in the outcome of the case. But under Plaintiff's view, that interest would no longer be required—opening the door to ever-more-abusive litigation with only nominal clients. Based on real-world experience, the Legislature enacted PAGA's standing provision to preclude this result, and this Court should enforce that provision as the Legislature intended.

For this reason, and those that follow, the judgment below should be reversed.

ARGUMENT

The Legislature enacted PAGA in 2004 "to augment the limited enforcement capability of the Labor and Workforce Development Agency." (*Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 383.) To that end, the Legislature created a "type of *qui tam* action" (*id.* at 382), where a PAGA plaintiff represents the State's interest in the enforcement of the labor laws in exchange for a share of the recovery. But the Legislature did not choose "to deputize" anyone and everyone to represent that

interest; it instead limited standing under PAGA to avoid abuses that were prevalent under other statutes. (*Id*. at 387; see also Uber Br. 29–30.) This case concerns the contours of those limits.

In Labor Code Section 2699(a), the Legislature authorized an "aggrieved employee" to sue "*on behalf of himself or herself* and other current or former employees." And in Section 2699(c), the Legislature defined an aggrieved employee as "any person who was employed by the alleged violator and *against whom one or more of the alleged violations was committed*." This Court held in *Iskanian* that an employee could not waive her right to represent "other current and former employees" in arbitration. (*Supra*, 59 Cal.4th at p. 383.) But in *Viking River*, the Supreme Court held that this aspect of *Iskanian*—prohibiting employees from agreeing to arbitrate "individual" PAGA claims—violates the FAA. (*Supra*, 142 S.Ct. at p. 1923.) *Viking River* held "that the FAA preempts the rule of *Iskanian* insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate." (*Id*. at 1924.)

The U.S. Supreme Court also held that a plaintiff's "non-individual" PAGA claims—i.e., those based on Labor Code violations allegedly suffered by others—must be dismissed once the plaintiff's "individual" PAGA claim is compelled to arbitration. That is because "PAGA provides no mechanism to enable a court to adjudicate non-individual PAGA claims once an individual PAGA claim has been committed to a separate proceeding." (*Id.* at 1925.) "Under PAGA's standing requirement" (Lab. Code § 2699(a), (c)), "a plaintiff can maintain non-individual PAGA

claims in an action only by virtue of also maintaining an individual claim in that action." (*Viking River Cruises, Inc. v. Moriana*, *supra*, 142 S.Ct. at p. 1925.)

Plaintiff's basic contention in this case is that the U.S. Supreme Court was wrong. In his view, a plaintiff can litigate a PAGA claim on behalf of other employees even when she has no personal stake in the outcome of the litigation once her "individual" PAGA claim has been compelled to arbitration. Plaintiff, not the U.S. Supreme Court, is wrong. The Legislature obviously did not authorize an employee to sue on behalf of everyone except for herself—that type of standing provision would be contrary to multiple aspects of PAGA's text and structure. And contrary to Plaintiff's argument, the Legislature did not intend to extend PAGA standing to plaintiffs, like Plaintiff here, who can assert an "individual" PAGA claim in court only by breaching their arbitration agreements. Even if Plaintiff were right, however, standing would be limited to plaintiffs who prevail in arbitration. Any broader rule would countenance abusive litigation that the Legislature meant to foreclose. Yet shakedown litigation with no connection to real-life plaintiffs is exactly what would follow if Plaintiff's argument were adopted.

I. A PAGA PLAINTIFF MUST SUE ON HER OWN BEHALF

Uber persuasively demonstrates that a plaintiff may not bring suit under PAGA unless she asserts an "individual" PAGA claim. (See Uber Br. Part II.) *Amici* write to emphasize three features of the statute that require this conclusion.

First, PAGA provides that "a civil action [may] be brought by an aggrieved employee on behalf of himself or herself *and* other current or former employees." (Lab. Code § 2699(a), emphasis added.) "The ordinary and usual usage of the statutory term 'and' is as a conjunctive, meaning 'an additional thing,' 'also,' or 'plus.'" (58 Cal. Jur. 3d Statutes § 144.) Here, for instance, the ordinary meaning of Section 2699(a) is that an employee may bring a "non-individual" PAGA claim on behalf of "other current or former employees" *in addition to*—not as an alternative to—an "individual" PAGA claim on the plaintiff's own behalf. (See, e.g., *Iskanian v. CLS Transp. Los Angeles, LLC*, *supra*, 59 Cal.4th at p. 394 (Chin, J., concurring) [PAGA actions may "seek[] penalties for Labor Code violations as to only one aggrieved employee—the plaintiff bringing the action—or as to other employees *as well*," emphasis added]; *Tanguilig v. Bloomingale's, Inc.* (2016) 5 Cal.App.5th 665, 678 [PAGA plaintiff may sue "solely on behalf of himself or herself or also on behalf of other employees"].) Thus, under PAGA's plain text, a plaintiff may sue on behalf of herself, or on behalf of herself and others. But nothing in Section 2699(a) authorizes a plaintiff to sue on behalf of others only.

Had the Legislature intended that result, it would have written a different statute. Specifically, it would have replaced the conjunctive "and" with "and/or." (See *Powers Farms v. Consol. Irr. Dist.* (1941) 19 Cal.2d 123, 128 ["The term 'and/or' is commonly defined to mean either 'and' or 'or.'"].) Here, use of the term "and/or" would have meant that an employee could sue (i) on behalf of himself or herself, (ii) on behalf of himself or herself and other

current or former employees, or (iii) on behalf of other current or former employees only. But that is not the statute the Legislature enacted. The Legislature did not allow employees to choose to sue only on behalf of others and forgo claims for alleged violations that the employee personally suffered. That type of statute would be illogical: what purpose would be served by authorizing a plaintiff to sue for harm suffered by everyone but herself? And it would conflict with the Legislature's intent, as explained below. But the important point for present purposes is that the plain text of PAGA is to the contrary, which should be the beginning and the end of the inquiry here. (See, e.g., *Tract 19051 Homeowners Ass'n v. Kemp* (2015) 60 Cal.4th 1135, 1143.)

Second, Section 2699(c) confirms this interpretation. Section 2699(c) provides that an aggrieved employee authorized to sue is "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." This is "a clear expression that the Legislature intended that a PAGA plaintiff be affected by at least one . . . of the violations alleged in the action." (*Huff v. Securitas Security Servs. USA, Inc.* (2018) 23 Cal.App.5th 745, 761.) When an employee asserts an "individual claim," at least one of the violations alleged in the suit will have been committed against the plaintiff. Indeed, that is the defining feature of an "individual" claim. (*Viking River Cruises, Inc. v. Moriana*, *supra*, 142 S.Ct. at p. 1916 ["'individual' PAGA claims . . . are premised on Labor Code violations actually sustained by the plaintiff"].) But when an employee does not assert an individual claim, Section 2699(c) will

never be satisfied: by definition, none of the alleged violations for which the employee seeks penalties will have been committed against that employee.

Third, "the structure of the statutory scheme" further underscores the Legislature's intent to require an "individual" PAGA claim as a basic element of the suit. (*Gund v. Cnty. of Trinity* (2020) 10 Cal.5th 503, 511.) As this Court has explained, PAGA creates "a type of *qui tam* action" (*Iskanian v. CLS Transp. Los Angeles, LLC*, *supra*, 59 Cal.4th at p. 382), where the Legislature authorized individual plaintiffs to represent the State's interest in the enforcement of the labor laws in exchange for a share of the penalties—namely, 25% of penalties, to be shared among "aggrieved employees." (Lab. Code § 2699(i).) An employee who does not assert an "individual" claim cannot personally partake in any recovery because she is not an "aggrieved employee." (*Ibid*.) With respect to the litigation, such an individual is no different than any other member of the general public. She has no reason to litigate vigorously on the State's behalf because no matter what she does in the litigation, she will recover nothing. Win, lose, or settle for pennies on the dollar, it is all the same to her.[2]

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[2] To be sure, plaintiff's attorneys have a strong financial interest in litigating PAGA claims. But if the Legislature wanted to allow them to drive PAGA litigation, it would not have limited PAGA standing at all. As this Court has observed, "the Legislature could have chosen to deputize citizens who were not employees of the defendant employer to prosecute" PAGA claims, but instead chose to limit PAGA standing to avoid abuse and mandate that attorneys

But because PAGA is a type of *qui tam* statute, it is not all the same to *the State*. For one thing, the State will be bound by the judgment (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 989), so it is critically important to the State (and would have been critically important to the Legislature) that the State be represented by someone with an actual interest in the outcome of the litigation. For another, the State has a strong financial interest in ensuring that any plaintiff will vigorously pursue its claims; after all, 75% of PAGA penalties go directly to State coffers. (Lab. Code § 2699(i).) All of this is why the Legislature made a "choice to deputize and incentivize employees uniquely positioned to detect and prosecute [Labor Code] violations through the PAGA." (*Iskanian v. CLS Transp. Los Angeles, LLC*, *supra*, 59 Cal.4th at p. 390.) A plaintiff who asserts no "individual" PAGA claim does not fit that description because she has no incentive to prosecute the State's case. (See *Kim v. Reins Int'l Cal., Inc.* (2020) 9 Cal.5th 73, 83 ["A standing requirement ensures that courts will decide only actual controversies between parties with a sufficient interest in the subject matter of the dispute to press their case with vigor," internal quotation marks omitted].) As this Court has observed, "plaintiffs who have nothing at stake often will not devote sufficient energy to the prosecution of the action." (*La Sala v. Am. Sav. & Loan Ass'n* (1971) 5 Cal.3d 864, 872.)

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solicit plaintiffs with the right incentives. (*Iskanian v. CLS Transp. Los Angeles, LLC*, *supra*, 59 Cal.4th at p. 387.)

II. PLAINTIFF DID NOT GAIN STANDING MERELY BY ALLEGING AN "INDIVIDUAL" PAGA CLAIM THAT HE AGREED NOT TO LITIGATE IN COURT

Plaintiff does not dispute that a PAGA plaintiff must assert an "individual" claim to have standing. In fact, Plaintiff agrees that "[f]or PAGA standing" the plaintiff must "allege, and eventually prove, . . . that one or more Labor Code violations was committed against him." (Adolph Br. 31.) Instead, the entirety of his argument is that he "had standing when he filed his PAGA claim" because he did allege an "individual" PAGA claim (*id.* at 10), and that a later order compelling him to arbitrate that claim could not divest him of standing under this Court's decision in *Kim v. Reins*. (See *id.* Part I.D.) Plaintiff misunderstands *Kim* and in the process misinterprets PAGA. Neither *Kim* nor the text and structure of PAGA support standing for a plaintiff who can allege an "individual" PAGA claim *only* by breaching an arbitration agreement and who will not actually be able to litigate that claim in court.

A. *Kim* Does Not Support Plaintiff

In *Kim*, the question was whether an employee who properly asserted a claim for penalties under PAGA on behalf of himself and others lost standing when he settled his underlying Labor Code claim. The employer argued that the plaintiff was no longer "aggrieved . . . because he accepted compensation for his injury," apparently invoking the colloquial definition of the term "aggrieved." (*Supra*, 9 Cal.5th at p. 84.) The Court rejected that argument because the Plaintiff satisfied the statutory definition under Section 2699(c). (See, e.g., *Curle v. Superior Court* (2001) 24

Cal.4th 1057, 1063 ["If the Legislature has provided an express definition of a term, that definition ordinarily is binding on the courts."].) The plaintiff was an "aggrieved employee" under Section 2699(c) for the simple reason that "'*one or more* of the alleged violations was committed' against him." (*Kim v. Reins Int'l Cal., Inc.*, *supra*, 9 Cal.5th at p. 85 [quoting Lab. Code § 2699(c)]; *id.* at 84 ["[Kim] alleged that he personally suffered at least one Labor Code violation on which the PAGA claim is based."].) And that was true because the plaintiff did not settle his "individual" PAGA claim. The parties had "specifically carved out of the settlement" the plaintiff's PAGA claim (*id.* at 92 fn.7 [italics omitted]), so the plaintiff *was* an employee who suffered one or more of the violations forming the basis for his PAGA claim, thus satisfying Section 2699(c) (*supra* Part I).

But it does not follow that a plaintiff who cannot allege that "he personally suffered at least one Labor Code violation on which the PAGA claim is based" (*Kim v. Reins Int'l Cal., Inc.*, *supra*, 9 Cal.5th at p. 84) has standing. As explained, the statutory text is to the contrary. (*Supra* Part I.) And when only a "non-individual" PAGA claim can be litigated because of an arbitration agreement, those are precisely the circumstances: by definition, the plaintiff will not have suffered one of the Labor Code violations on which that "non-individual" PAGA claim is based. (See *Robinson v. S. Counties Oil Co.* (2020) 53 Cal.App.5th 476, 484–85 [rejecting Plaintiff's overbroad reading of *Kim* and correctly recognizing that "[a] change in facts or law can deprive a plaintiff of standing"].)

B. Plaintiff Did Not Gain Standing Merely By Alleging An "Individual" PAGA Claim That He Cannot Litigate In Court

Contrary to Plaintiff's argument, the result cannot be different simply because he breached his arbitration agreement and alleged his "individual" PAGA claim in court. This is so for three reasons. First, PAGA's text forecloses that interpretation. A plaintiff whose "individual" claim has been compelled to arbitration is not one against whom one of the violations alleged in the "non-individual" claim has been committed. (Lab. Code § 2699(c).) By definition, a "non-individual" PAGA claim is not brought on the plaintiff's "behalf." (*Id.* § 2699(a).) Second, authorizing suit by an individual who agreed to arbitrate is even less compatible with the *qui tam* nature of a PAGA claim than authorizing suit by an individual who elects not to pursue an "individual" claim, and clearly the latter plaintiff would lack standing. Third, the Legislature could not have intended to grant standing to plaintiffs who can come to court only by breaching a contract to arbitrate; any such statute would be preempted by the FAA for interfering with parties' agreements to arbitrate.

1. *Plaintiff's position is foreclosed by PAGA's text*

Just as the Legislature did not grant standing to plaintiffs who do not allege "individual" claims (*supra* Part I), it did not grant standing to plaintiffs who cannot litigate those claims in court because they agreed to arbitration. The clearest sign comes from PAGA's text.

In Section 2699(c), the Legislature granted standing to employees "against whom one or more of the alleged violations was

committed." "[O]nce an individual claim has been committed to a separate proceeding," however, that will not be true. (*Viking River Cruises, Inc. v. Moriana*, *supra*, 142 S.Ct. at p. 1925.) As to the "non-individual" claims that remain in court, the plaintiff will *not* be an employee against whom one of the alleged violations was committed because the violations allegedly committed against the plaintiff are, by definition, not part of a "non-individual" claim. Put differently, once the plaintiff's "individual" claim is separated from the "non-individual" claims and sent to arbitration, the plaintiff will not have "personally suffered at least one Labor Code violation on which the [remaining "non-individual"] PAGA claim is based." (*Kim v. Reins Int'l Cal., Inc.*, *supra*, 9 Cal.5th at p. 84; see *Robinson v. S. Counties Oil Co.*, *supra*, 53 Cal.App.5th at pp. 484–85 [plaintiff lost standing after preclusion left him only with "non-individual" claims—there, "claims arising exclusively after he was . . . employed"].) Nor is the "non-individual" PAGA claim brought by the plaintiff "on behalf of himself or herself." (Lab. Code § 2699(a).) Again by definition, the opposite is true. Under PAGA's plain text, a plaintiff whose "individual" claim is (or will be) compelled to arbitration lacks standing to assert a "non-individual" claim.

2. *Plaintiff's position is incompatible with the* qui tam *nature of a PAGA claim*

Plaintiff's position is equally incompatible with PAGA's structure. His argument is that he has standing because he technically alleged an "individual" PAGA claim when he filed suit; at least when the suit began, Plaintiff had an interest in its outcome. In his view, it does not matter that he cannot *litigate*

that claim in court or that his interest in the litigation will evaporate once his personal claim is compelled to arbitration. Plaintiff has it backwards. It is critical that the plaintiff have a non-fleeting interest in the outcome of the litigation, and that this interest be apparent at the time the plaintiff serves notice on the Labor and Workforce Development Agency ("LWDA") (Lab. Code § 2699.3), so the Agency can make an informed judgment about whether to intervene.

a. As an initial matter, Plaintiff's position is contrary to the *qui tam* nature of a PAGA claim for the reasons explained above. (*Supra* at pp. 17–19.) A plaintiff whose "individual" claim is compelled to arbitration has no more interest in the outcome of "non-individual" claims than a plaintiff who asserted no "individual" claim to begin with. Either way, the plaintiff cannot recover anything by litigating the "non-individual" claim and thus has no incentive to zealously represent the State.

b. Granting standing to a plaintiff who has agreed not to litigate an "individual" claim is even more incompatible with PAGA's structure because the LWDA cannot effectively exercise its oversight authority when it does not know whether the plaintiff will be able to recover penalties and thus vigorously represent the State.

Although "[a] PAGA representative action is . . . a type of *qui tam* action" (*Iskanian v. CLS Transp. Los Angeles, LLC*, *supra*, 59 Cal.4th at p. 382), it differs from a traditional *qui tam* action in several respects. Most important for present purposes, "PAGA thus lacks the procedural controls necessary to ensure that

California—not the aggrieved employee (the named party in PAGA suits)—retains substantial authority over the case." (*Magadia v. Wal-Mart Assocs., Inc.* (9th Cir. 2021) 999 F.3d 668, 677 [internal quotation marks omitted].) Unlike, for example, the federal False Claims Act, under which the federal government "retains a significant role in the way the action is conducted" (*ibid.*, internal quotation marks omitted; see also 31 U.S.C. § 3730(b)–(f)), once private PAGA litigation begins, the plaintiff litigates "without governmental supervision." (*Iskanian v. CLS Transp. Los Angeles, LLC*, *supra*, 59 Cal.4th at pp. 389–90.) The State cannot intervene, dismiss the case, or settle it. (Contra 31 U.S.C. § 3730(b)-(f); *Magadia v. Wal-Mart Assocs., Inc.*, *supra*, 999 F.3d at p. 677 [explaining that "[t]hese significant procedural controls ensure that the [federal] government maintains substantial authority over the action"], internal quotation marks omitted.) A PAGA plaintiff can even settle the State's claim without its input. (Compare Lab. Code § 2699(*l*)(2) [no right for state to comment on settlement], with *id.* § 2699.3(b)(4) [expressly granting the state the right to comment on OSHA settlements].) The State's only tool to protect its interests is an *ante litem* notice provision (Lab. Code § 2699.3(a)(1)(A)) coupled with a "right of first refusal." (*Magadia v. Wal-Mart Assocs., Inc.*, *supra*, 999 F.3d at p. 677 [citing Lab. Code §§ 2699(h), 2699(b)(2)(A)(i)].)

The State's inability to control the litigation on the back end makes its review on the front end critically important. Plaintiff's theory here would impede this review, hindering LWDA's ability to make an informed decision about whether to "allocate scarce

resources to an investigation" and possibly litigation. (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 546.) That is because the plaintiff's evaporating interest in the suit will not be apparent when she provides pre-suit notice. Nothing in PAGA requires a plaintiff to inform LWDA that she agreed to arbitrate her "individual" PAGA claim. (Lab. Code § 2699.3(a)(1)(A).) From LWDA's perspective, then, a putative plaintiff who agreed to arbitrate will appear no different than a plaintiff who did not. But that appearance is not reality. Once the defendant compels arbitration of the plaintiff's "individual" PAGA claim, her interest in the outcome of the litigation—and incentive to litigate vigorously on the State's behalf—disappears. (*Supra* at pp. 17–19.) Granting standing to such an individual would make it impossible for LWDA to make an informed decision about whether the plaintiff will adequately protect the State's interests. The fact that a plaintiff will not have a personal interest in the outcome of the litigation is obviously material to the whether she will litigate the action vigorously. By enacting a *qui tam* statute that concentrates government oversight at the outset of litigation, the Legislature made clear that it did not intend to grant standing to would-be plaintiffs whose interest in the litigation will disappear as the case proceeds.

3. *Plaintiff's position is inequitable and contrary to the purpose of PAGA's standing provision*

Plaintiff's argument that he has standing simply because he alleged an "individual" PAGA claim when he filed suit is also based on a fundamental inequity: he could allege an "individual" PAGA claim only by breaching his arbitration agreement. The

Legislature did not intend to authorize suit by putative plaintiffs who come to court only by breaching a valid contract, especially a contract to arbitrate.

a. California law has long reflected "a strong policy favoring arbitration agreements." (*St. Agnes Med. Ctr. v. PacifiCare of Cal.* (2003) 31 Cal.4th 1187, 1195.) "Because arbitration is a highly favored means of settling . . . disputes, the courts have been admonished to closely scrutinize any allegation of waiver of such favored right, and to indulge every reasonable intendment to give effect to such proceedings." (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 189, internal quotation marks and citation omitted.)

Given this policy, it is clear that the Legislature would want to encourage parties to honor their arbitration agreements, not breach them. Yet Plaintiff's theory would create the opposite incentive. The only way for a plaintiff who agreed to arbitrate to gain standing would be to be breach her agreement to bring her "individual" claim in arbitration. And not only is encouraging parties to breach their arbitration agreements contrary to public policy, but it imposes real costs as well. Employers will have to spend time and money filing motions to compel arbitration. And our already-overworked judiciary will have to decide them.

b. For substantially similar reasons, adopting Plaintiff's argument that an employee who breaches her arbitration agreement should be rewarded with standing would violate the FAA. The FAA preempts "state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." (*AT&T Mobility*

LLC v. Concepcion (2011) 563 U.S. 333, 343.) One of the purposes of the FAA was to end the widespread "hostility" to arbitration (*id.* at 339), whether judicial or legislative (see, e.g., *Preston v. Ferrer* (2008) 552 U.S. 346). Plaintiff's rule evinces a clear hostility toward arbitration because it would encourage parties to breach their arbitration agreements. And that regime would clearly frustrate Congress' objective of promoting arbitration as an efficient and inexpensive method for dispute resolution. Courts "must be alert to new devices and formulas that would achieve" impermissible ends under the FAA (*Epic Sys. Corp. v. Lewis* (2018) 138 S.Ct. 1612, 1623), and Plaintiff's interpretation of PAGA as rewarding parties for breaching their arbitration agreements is just such a device.

c. More broadly, Plaintiff's position is inequitable—and artificial. He contends that he should be allowed to represent the State in litigation even though his standing would rest entirely on a breach of contract. But it is exceedingly unlikely that the Legislature would want the State to be represented by plaintiffs with unclean hands. And it is even less likely that the Legislature would base standing on an employee's ability to allege a claim irrespective of whether the employee could ever *litigate* it in court.

d. Finally, Plaintiff's position is contrary to the Legislature's purpose in enacting PAGA's standing provision. Plaintiff emphasizes repeatedly that the Legislature's overall purpose in enacting PAGA was to encourage compliance with the labor laws, and that this purpose would be diminished somewhat if plaintiffs who agreed to arbitrate "individual" PAGA claims

could not litigate on behalf of an employer's entire workforce. But "no legislation pursues its purposes at all costs." (*In re Friend,* (2021) 11 Cal.5th 720, 740, internal quotation marks omitted.) PAGA is no exception. If the Legislature wanted to maximize litigation, it would have granted standing to the general public. (*Iskanian v. CLS Transp. Los Angeles, LLC*, *supra*, 59 Cal.4th at p. 387.) But it did not. Instead, the Legislature's purpose in enacting PAGA's standing provisions—the purpose that matters here—was the opposite. The Legislature enacted these provisions to prevent abuse and to ensure that a PAGA plaintiff's interests aligned with the State's. (*Supra* at pp. 17–19.) For the reasons stated, Plaintiff's interpretation would subvert that very purpose.

III. AT A MINIMUM, PAGA PLAINTIFFS RETAIN STANDING TO LITIGATE "NON-INDIVIDUAL" CLAIMS ONLY WHEN THEY PREVAIL ON THEIR "INDIVIDUAL" CLAIM IN ARBITRATION

The analysis above proceeded on the premise that when an "individual" PAGA claim is sent to arbitration, it is "pared away" from the "non-individual" PAGA claim that remains in court such that the plaintiff is no longer asserting in the litigation that a violation was committed against her personally. (*Viking River Cruises, Inc. v. Moriana*, *supra*, 142 S.Ct. at p. 1925.) But even if the arbitrable "individual" PAGA claim were not pared away from the "non-individual" claim, a plaintiff would only maintain standing to litigate a "non-individual" PAGA claim if she won on her "individual" claim in arbitration; if she dismisses her "individual" PAGA claim or loses on that claim in arbitration, she would lack standing. All of these permutations illustrate,

moreover, that, at least under Plaintiff's conception of standing, the question presented here is not ripe for this Court's review. The Court should wait until arbitration has been compelled and completed to determine the effect of that arbitration on Plaintiff's standing. Right now, Plaintiff asks this Court to issue an advisory opinion, when it is not even clear (in Plaintiff's view) that he is bound to arbitrate at all.

a. If the plaintiff does not lose standing when her "individual" PAGA claim is compelled to arbitration, the "non-individual" PAGA claims would have to be stayed pending arbitration of the "individual" claim under Code of Civil Procedure § 1281.4. (See *McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945, 966 ["[C]ase law establishes that a stay of proceedings as to any inarbitrable claims is appropriate until arbitration of any arbitrable claims is concluded."]; see also *Franco v. Arakelian Enters., Inc.* (2015) 234 Cal.App.4th 947, 966 [where "issues subject to litigation . . . might overlap those that are subject to arbitration . . . the trial court must order an appropriate stay of trial court proceedings" to prevent litigation "from disrupting and rendering ineffective the arbitrator's jurisdiction"].) What happens in that arbitration should, on Plaintiff's conception of standing, determine whether the plaintiff maintains standing to pursue the "non-individual" claims in court.

There are three possible outcomes in arbitration: (i) the plaintiff could dismiss her "individual" claim; (ii) the plaintiff could lose in arbitration on the "individual" claim; or (iii) the plaintiff could win. Only in the last scenario could the plaintiff have

standing to litigate in court after arbitration. If the plaintiff wins on her "individual" PAGA claim in arbitration, the arbitrator will have determined that the plaintiff was in fact an employee against whom a violation of the Labor Code was committed (i.e., an "aggrieved employee"). So the plaintiff would satisfy Section 2699(c), setting aside the defect discussed at length above.

But the former two scenarios could not give rise to standing. In the first—where the plaintiff dismisses her "individual" claim—the plaintiff clearly would lack standing. The plaintiff would no longer be bringing suit on her own behalf alleging a violation that she personally suffered. (*Supra* Part I.) In the second—where the plaintiff loses in arbitration—she also would lack standing to litigate the "non-individual" claims. That is because the plaintiff would be determined in arbitration *not* to be an employee against whom one of the alleged violations was committed—either because she was not an employee or because the employer did not commit a violation of the Labor Code as to her. (Cf. Adolph Br. 34 [arguing that Plaintiff should be able to litigate as an "aggrieved employee" "unless and until there has been a final and binding determination to the contrary"].) Either way, the plaintiff would lack standing under the plain text of Sections 2699(a) and (c). Conceptually, this is similar to a putative representative plaintiff in a class action who has no individual claim and thus lacks standing to litigate on behalf of a class. (Cf. *Arias v. Superior Court*, *supra*, 46 Cal.4th at p. 987 fn.7 [under PAGA, plaintiff must be "a member of the group being represented"].) Just as there can be no "headless" class action, Section 2699(a) and (c) preclude "headless" PAGA actions.

b. That the plaintiff's standing would turn, in Plaintiff's conception, on the outcome of arbitration shows that the standing question here is not ripe for this Court's review. As a threshold matter, this Court granted review to determine "[w]hether an aggrieved employee who has been compelled to arbitrate" an "individual" PAGA claim maintains standing to litigate "non-individual" PAGA claims in court. But Plaintiff here has not been "compelled to arbitrate" his individual PAGA claim; indeed, he vigorously disputes that he is bound to arbitrate at all. And if a court were to determine that Plaintiff agreed to arbitrate, his standing would still turn on the outcome of that arbitration. Plaintiff's argument for standing "is [thus] entirely theoretical at this juncture." (*Brennon B. v. Superior Court* (2022) 13 Cal.5th 662, 693.) Only *if* Plaintiff is compelled to arbitrate, and only *if* he prevails in that arbitration, would Plaintiff have standing. If this Court does not conclude that a plaintiff who has agreed to arbitrate her "individual" PAGA claim lacks standing under the text and structure of PAGA (see Parts I & II), then it should dismiss this case and review the question presented only after arbitration has been compelled and concluded. Right now, the Court would be issuing an advisory opinion, which "falls within neither the functions nor the jurisdiction of this court." (*People ex rel. Lynch v. Superior Court* (1970) 1 Cal.3d 910, 912.)

IV. GRANTING STANDING TO PLAINTIFFS WHO AGREED TO ARBITRATE WOULD HARM CALIFORNIA EMPLOYERS

If this Court adopts Plaintiff's interpretation—allowing him and other plaintiffs to pursue "non-individual" PAGA claims in

court, notwithstanding their obligations to resolve their "individual" PAGA claims in arbitration—it will cause real-world harms for *Amici*'s members and other California employers.

After PAGA was enacted, PAGA claims were brought, if at all, on "the coattails of traditional class claims," because the requirement that plaintiffs turn over 75% of their recovery to the state made PAGA less attractive. (Robyn Ridler Aoyagi & Christopher J. Pallanch, *The PAGA Problem: The Unsettled State of PAGA Law Isn't Good for Anyone* (2013) 7 Bender's California Labor & Employment Bulletin 1-2.) But PAGA actions seeking penalties on behalf of other employees skyrocketed in the wake of *Iskanian* as employees sought to evade their agreements to arbitrate. (See, e.g., Maureen A. Weston, *The Clash: Squaring Mandatory Arbitration with Administrative Agency and Representative Recourse* (2015) 89 S. Cal. L. Rev. 103, 127–28 [plaintiffs have turned to PAGA as "a means . . . to avoid arbitration"].) Data on the volume of PAGA litigation proves the point. In 2005, the year after PAGA was enacted, plaintiffs filed 759 PAGA notices. (See Emily Green, *State Law May Serve As Substitute for Employee Class Actions*, Daily Journal (Apr. 17, 2014).) In the wake of *Iskanian*, the number of PAGA notices increased six-fold: from 1,051 in fiscal year 2013–2014 to 6,942 in fiscal year 2019–2020. (See CABIA Foundation, California Private Attorneys General Act of 2004: Outcomes and Recommendations at 8 (Oct. 2021), https://cabiafoundation.org/paga-cases-in-california-by-county/ (select "Download the Report") (hereinafter CABIA Foundation Report).) The LWDA itself projected that more

than 7,700 notices would be filed with the agency in fiscal year 2022–2023—that is 21 notices *per day*. (See Cal. Department of Industrial Relations, Budget Change Proposal – PAGA Unit Staffing Alignment at 7 (April 2, 2019), https://bit.ly/3ca0NLn.)

The danger is not just in the volume of litigation: in each PAGA action, the amount of potential civil penalties is enormous. If a PAGA plaintiff is successful in proving that her employer violated the Labor Code, civil penalties are assessed against the employer in many circumstances in the amount of "one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation." (Lab. Code § 2699(f)(2).) Because of the exponential calculation of potential civil penalties under PAGA, the amount of PAGA penalties can quickly jump into the tens of millions of dollars even for a small employer, and it has been estimated that employers pay many billions a year to settle PAGA lawsuits. (See CABIA Foundation Report, *supra*, at p. 8.)

Indeed, PAGA suits asserting "non-individual" claims often exert "unacceptable" pressure on employers to settle due to the "small chance of a devastating loss," creating a massive "risk of 'in terrorem' settlements." (Cf. *AT&T Mobility LLC v. Concepcion*, *supra*, 563 U.S. at p. 350.) This concern is not merely theoretical—it has in fact materialized in recent years. PAGA claims seeking millions of dollars in penalties have skyrocketed, as enterprising plaintiffs use PAGA actions as a procedural sleight of hand to avoid agreements to arbitrate bilaterally. These lawsuits, like class

actions, exert enormous settlement pressure against businesses large and small—many relying on aggregate penalties for technical Labor Code violations—forcing them to pay up or take a bet-the-business gamble. A number of PAGA settlements and judgments illustrate this point. (See, e.g., *O'Connor v. Uber Techs., Inc.* (N.D.Cal. 2016) 201 F.Supp.3d 1110, 1128.) In *O'Connor*, Uber eventually settled for $84 million, with $1 million allocated to PAGA penalties. Other examples abound: *Gunther v. Alaska Airlines, Inc.* (2021) 72 Cal.App.5th 334, 348 (awarding $25 million in PAGA penalties (reversed on appeal)); *Bernstein v. Virgin Am., Inc.* (9th Cir. 2021) 3 F.4th 1127, 1145 (affirming $24.9 million PAGA civil penalties, as stated in *Bernstein v. Virgin Am., Inc.* (N.D.Cal. Jan. 21, 2020) 2020 WL 10618569, at *2); *Brown v. Wal-Mart Inc.*, (N.D.Cal.) 5:09-cv-03339-EJD (approving $65 million settlement in a PAGA suitable-seating action); *Reed v. CVS Pharmacy, Inc.* (Alameda Cnty. Sup. Ct. Oct. 30, 2019) 2019 WL 12314054 (approving $19.5 million settlement in a PAGA suitable-seating action).

The devastating effect of PAGA suits is also salient for small businesses—especially so, because a far smaller litigation risk would be sufficient to coerce defendants into settlement. Three examples illustrate the point.

California Assembly Member and small business owner Shannon Grove was subject to a PAGA suit claiming $30 million in penalties, which she ultimately settled for just under half a million dollars. The $30 million price tag came from Grove's purported failure to issue paychecks with inclusive dates—for

instance, the paycheck would list the date the check was issued, instead of the dates the check covered (i.e., 9/6/16 instead of 9/1/16–9/6/16). The violation: trivial; the potential penalties: massive. (See Ken Mashinchi, *Grove and Salas contend that PAGA lawsuits are killing Kern County businesses*, ABC 23 News (Sep. 6, 2016), https://www.turnto23.com/news/local-news/grove-and-salas-contend-that-paga-lawsuits-are-killing-kern-county-businesses.)

Ken Monroe, the owner of a family-owned business that sells construction equipment, described being subject to a PAGA suit for allowing employees to decide when to take their lunch breaks, instead of adhering to state law requiring that hourly employees take a half-hour meal period after five hours of work. "As I learned the hard way," Monroe wrote, "these penalties can add up fast, easily reaching hundreds of thousands of dollars for a small company like ours (and millions for larger businesses)." And "[l]ike virtually all companies that find themselves the target of a PAGA or class-action lawsuit," Monroe's business "negotiated a settlement rather than take the risk of losing in court and facing the onerous maximum penalties prescribed by the law." (See Ken Monroe, *Frivolous PAGA lawsuits are making some lawyers rich, but they aren't helping workers or employers*, L.A. Times (Dec. 6, 2018), https://www.latimes.com/opinion/op-ed/la-oe-monroe-pagasmall-businesses-20181206-story.html.)

Another small business owner had received a letter asserting various PAGA violations from a law firm that has filed over 800 similar claims. "They throw those accusations at you and expect you to defend yourself and just bury you in paperwork.

We've already spent well north of $100,000 in attorney fees and that doesn't include all the staff time to audit all the payroll records and time sheets," the business owner said. (See Ken Monroe, *Another Voice: It's time to repeal PAGA now. The fate of small businesses hinges on it.*, Sacramento Bus. J. (Oct. 14, 2021), https://www.bizjournals.com/sacramento/news/2021/10/14/paga-family-business-association.html.) Small businesses cannot withstand the sort of pressure imposed by even the threat of these kinds of suits, given the draconian penalties that are possible because PAGA plaintiffs are allowed to represent all employees, not just themselves.

No one benefits from this shakedown litigation—including the State. Although 75% of any recovery in a PAGA action goes to the State (see Lab. Code § 2699(i)), plaintiff's attorneys routinely receive a third of PAGA settlements, and can elect to allocate a smaller amount as PAGA penalties. Consider, for example, a $10 million settlement in a PAGA case. One might think that the State would recover $7.5 million, but that is hardly how it works in practice. Immediately, the plaintiffs' attorneys will take $3.3 million off the top. Of the remaining $6.7 million, attorneys will generally allocate only a small portion, say $500,000, to the PAGA claim, while the rest may be allocated to a class-action settlement for the underlying Labor Code violations (even if the plaintiffs have signed enforceable class-action waivers). The result of these procedural machinations is that of a $10 million settlement, the State will receive only a pittance: $375,000. And this is exactly how PAGA litigation plays out in real-life. (See, e.g., *Viceral v.*

Mistras Grp., Inc. (N.D.Cal. Oct. 11, 2016) 2016 WL 5907869, at *2 (allocating $20,000 of a $6 million settlement to the PAGA claim); *Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576, 580 (affirming a settlement allocating $0 of an approximately $9 million settlement to the PAGA claim).) Threatened with crippling penalties, employers acquiesce in settlements like these where the primary beneficiary is not the State, directly contrary to what the Legislature intended.

These are the harms posed by the current regime, where plaintiffs at least had to have a nominal interest in the outcome of their litigation. Unmoored from even that minimal requirement, however, these harms will only escalate. To bring a shakedown PAGA suit, attorneys need only find an employee who can *allege* a violation of the Labor Code—after that box is checked, the litigation can proceed without any meaningful oversight from the State or any real prospect that the State will meaningfully benefit. The Legislature did not intend this result and this Court should not condone it. This Court should ensure that PAGA litigation is driven by real plaintiffs with a real interest in the litigation.

CONCLUSION

For all of these reasons, the Court should reverse.

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CERTIFICATE OF WORD COUNT

In accordance with California Rules of Court Rule 8.504(d)(1), I certify that, exclusive of this certification and the other exclusions referenced in Rule of Court 8.504(d)(3), this AMICI CURIAE BRIEF contains 7,437 words, including footnotes, as determined by the word count of the computer used to prepare this brief.

Dated: December 29, 2022

/s/ Apalla U. Chopra
Apalla U. Chopra

PROOF OF SERVICE

I, Apalla Chopra, a member of the bar of this Court, hereby certify that, on this 29th day of December 2022, all parties required by the Rules of this Court to be served have been served. Five copies of the APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND PROPOSED BRIEF OF AMICI CURIAE THE EMPLOYERS GROUP AND CALIFORNIA EMPLOYMENT LAW COUNCIL were deposited with the U.S. Postal Service, for delivery to counsel on the attached service list. An electronic copy was also emailed to counsel at the email address on the service list.

Dated: December 29, 2022

/s/ Apalla U. Chopra
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STATE OF CALIFORNIA
Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

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

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12/29/2022

Date

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