Case No. S274671

IN THE SUPREME COURT OF THE STATE 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

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INTRODUCTION

Plaintiff-Respondent Erik Adolph agrees in every respect with the analysis presented by amici Attorney General of California ("California") and California Rural Legal Assistance, Inc. and California Rural Legal Assistance Foundation (collectively, "CRLA"). Those amici persuasively demonstrate, based on the statutory text and legislative purposes and history of the Labor Code Private Attorney General Act, Labor Code § 2698 et seq. ("PAGA"),[1] that an "aggrieved employee" does *not* lose standing to pursue the principal component of her claim for PAGA statutory relief (civil penalties calculated on the basis of defendant's Labor Code violations committed against her co-workers) upon being compelled to arbitrate the "individual" component of her claim for statutory relief.

As California and CRLA explain, it is plaintiff's status as an employee who experienced one or more Labor Code violations, regardless of any ongoing right to recover statutory penalties, that determines whether she has standing to pursue PAGA civil penalties as proxy for the Labor and Workforce Development Agency ("LWDA"). (See California Br. 9, 22-23; CRLA Br. 28-29; see also Lionel Harper Br. 8-9, 12; Respondent Adolph's Brief on the Merits ("RB") 33-36, 40.) That conclusion is required by *Kim v. Reins Int'l Calif., Inc.* (2020) 9 Cal.5th 73, in which this Court unanimously held that PAGA establishes only two prerequisites for statutory standing: the plaintiff must allege that she (1) "was

[1] All statutory references are to the Labor Code unless otherwise noted.

employed by the alleged violator," and (2) is a person "against whom one or more of the alleged violations was committed." (*Id.* at pp. 83-84, quoting § 2699, subd. (c); see California Br. 18-19; CRLA Br. 29-33.) Unless and until a defendant employer obtains a binding final judgment conclusively establishing that the PAGA plaintiff failed to satisfy one or both of those standing requirements, the plaintiff continues to have standing as an alleged "aggrieved employee" and is entitled to pursue the full range of available PAGA penalties. (See RB 9-10, 12, 34; cf. Employers Group Br. 19, 33-36 [acknowledging that PAGA standing might appropriately "be limited to plaintiffs who prevail in arbitration" while ignoring that, until a final adjudication on the merits, standing requires only a valid allegation that the required elements are satisfied].)

Uber Technologies, Inc. ("Uber") and its amici seek to add a third requirement for PAGA standing: a "redressability" requirement that the plaintiff must be able to recover *in court* 25% of the civil penalties attributable to the violations she personally experienced. But this Court has repeatedly cautioned that "[i]n construing a statute, we are 'careful not to add requirements to those already supplied by the Legislature'" (*Kim*, 9 Cal.5th at p. 85), and there is no basis for adding a redressability requirement to PAGA. California state law has no counterpart to Article III's redressability requirement. Neither does PAGA. (See California Br. 9-10, 16; CRLA Br. 38-39; see also RB 13, 44.) As the State of California explains in its amicus brief:

> [I]t is not the promise of economic recovery – in court or elsewhere – that gives an aggrieved

> employee standing to pursue PAGA claims based on violations committed against other workers. Rather, it is the employee's personal connection to the employer and to her fellow co-workers, and her knowledge and experience of at least one of the Labor Code violations alleged, that the Legislature decided should confer statutory standing.

(California Br. 24; see also CRLA Br. 33-38.)[2]

The seven amicus briefs submitted in support of Uber do little more than parrot Uber's arguments – while devoting much of their attention to such extraneous issues as whether PAGA has lived up to the Legislature's expectations (Uber's amici say no) and whether mandatory, pre-dispute employment arbitration is more beneficial to workers than those workers and their advocates seem to realize (they say yes). Those collateral arguments have nothing to do with the statutory construction issue before the Court and do not warrant extended discussion.[3]

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[2] Several of Uber's amici contend that *Kim* is factually distinguishable because the plaintiff in *Kim* resolved his underlying Labor Code claims but not his PAGA claim. That factual distinction has nothing to do with how this Court in *Kim* analyzed the issue of PAGA standing based on the statutory text, history, and purposes.

[3] As to the first point, see in particular the amicus briefs of Restaurant Law Center and California Restaurant Association ("Restaurants") at pp. 19-26; Chamber of Commerce of the United States of America ("Chamber") at pp. 5-6, 13-27; and Retail Litigation Center, Inc. and National Retail Federation ("Retailers") at pp. 34-40. As to the second point, see the amicus briefs of National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") at pp. 2, 6-10; and Chamber at pp. 27-29.

This Court has previously explained how PAGA accomplishes the Legislature's goal of achieving expanded Labor Code

Even more striking than amici's efforts to divert the Court's attention from the issue at hand is their failure to address plaintiff's core arguments, including plaintiff's showing that the real-world consequences of Uber's position could not have been what the Legislature intended. (See RB 35-36.)

Statutes must be construed to avoid "unreasonable, impractical, or arbitrary results." (*Poole v. Orange County Fire Authority* (2015) 61 Cal.4th 1378, 1385.) Yet Uber and its amici

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enforcement (which not only benefits workers and the general public but also protects law-abiding employers from unlawful cost-cutting competitors); and amici California and CRLA have persuasively demonstrated the many ways PAGA has lived up to those legislative expectations, not only in accomplishing the twins goals of deterrence and punishment, but also by contributing tens of millions of dollars to the LWDA in civil penalties earmarked (by statute) for Labor Code enforcement and education. (See *Arias v. Superior Court* (2009) 46 Cal.4th 969, 980; *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 390; California Br. 8, 10-16, 27-32 & fns. 2, 36; CRLA Br. 13-26 and authorities cited; § 2699, subd. (i).)

As to the relative benefits of arbitration and litigation, the studies cited by NFIB and the Chamber compare (or actually, cherry-pick) the results of certain fully adjudicated arbitration and court cases, ignoring that because employment arbitration agreements often impose significant limitations on a plaintiff's ability to exercise protected rights (as here, where Uber's agreement prohibits all class and representative actions and, according to Uber, limits plaintiff to his "individual" PAGA claims only), the vast majority of covered employees are chilled from pursuing their statutory rights at all – which is, of course, the reason so many employers impose such rights-stripping agreements. (See C. Estlund, *The Black Hole of Mandatory Arbitration* (2018) 96 N.C. L. Rev. 679.)

provide no responses to plaintiff's showing that Uber's construction would lead to absurd consequences.

For example, Uber and its amici make no effort to dispute that under their analysis, an aggrieved-employee plaintiff would be precluded from pursuing a PAGA claim for non-individual civil penalties in court *even if she prevailed* on the merits after having been compelled to individual arbitration, thereby establishing her status as an "aggrieved employee" to the satisfaction of a neutral decisionmaker (and perhaps having that status conclusively determined through a court order confirming the arbitrator's award under 9 U.S.C. § 9 or Cal. Code Civ. Proc. § 1287.4). (See RB 35-36.) That result makes no sense logically or textually and is completely contrary to the Legislature's stated purposes. (See *Arias*, 46 Cal.4th at p. 980 [emphasizing that the purpose of PAGA is to achieve "maximum compliance with state labor laws"].) "Hurdles that impede the effective prosecution of representative PAGA actions undermine the Legislature's objectives." (*Kim*, 9 Cal.5th at p. 87, quoting *Williams v. Superior Court* (2017) 3 Cal.5th 531, 548.)

Uber's amici also ignore the easily imagined scenario in which a plaintiff with no arbitration agreement (or an unenforceable agreement) obtains summary adjudication or otherwise prevails on the merits of her PAGA claim based on Labor Code violations she personally suffered before there has been a final adjudication of the violations allegedly committed against her co-workers. (See *Kim*, 9 Cal.5th at p. 85 [recognizing that PAGA permits plaintiffs who suffered one or more violations

also to seek relief for other violations committed against co-workers]; *Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal.App.5th 745, 761 [same]; see RB 21-22.) According to Uber and its amici, even though the plaintiff in that scenario unquestionably had standing when she filed her court action and even though she *proved* her status as an "aggrieved employee," she nonetheless lost her statutory standing to pursue civil penalties for violations committed against others once the court found her entitled to a 25% penalty on her "individual" claim (because, according to Uber's amici, she could no longer "maintain" a claim on which she prevailed). (Cf. Retailers Br. 15 [PAGA plaintiff who "properly resolved" her individual claim in arbitration "has no standing to maintain the suit"].) Once again, that irrational construction is impossible to reconcile with PAGA's statutory text and the Legislature's goal of encouraging heightened Labor Code enforcement throughout the state.

Third, Uber and its amici still have no response to plaintiff's showing that any arbitration agreement that has the effect of stripping a PAGA plaintiff of her right to pursue the full range of statutory remedies – the inevitable and intended result of Uber and its amici's construction of PAGA standing – would violate California public policy and thus be unenforceable under both *Iskanian* and *Viking River*. (See RB 45-47.) Under "*Iskanian*'s principal rule," contractual waivers of state statutory rights – including the right to pursue PAGA civil penalties on a representative action basis – are void and unenforceable. (*Iskanian*, 59 Cal.4th at p. 383; *Viking River Cruises, Inc. v.*

Moriana (2022) 142 S.Ct. 1906, 1917, 1925.) In *Iskanian,* the Court invalidated an arbitration agreement's prohibition against pursuing PAGA claims in their entirety. That same principle also precludes enforcement of arbitration agreements that have the effect of prohibiting plaintiffs from pursuing PAGA claims in principal part, i.e., statutory remedy of civil penalties based on Labor Code violations committed against plaintiff's co-workers. If Uber's and its amici's narrow construction of statutory standing were correct, any arbitration agreement that split a PAGA claim between two forums would violate *Iskanian*'s principal rule because it would effect an unenforceable contractual waiver of non-waivable statutory rights. (See *Iskanian*, 59 Cal.4th at pp. 382-383, quoting Civ. Code § 1668 [prohibiting contractual waivers, whether "direct[] or indirect[]," that "exempt anyone from responsibility for his own … violation of law"] and Civ. Code § 3513 ["a law established for a public reason cannot be contravened by a private agreement"]; see also *id.* at p. 384, quoting *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 502 ["That plaintiff and other employees might be able to bring individual claims for Labor Code violations in separate arbitrations does not serve the purpose of the PAGA, even if an individual claim has collateral estoppel effects"]; *DeBerard Properties, Ltd. v. Lim* (1999) 20 Cal.4th 659, 668-669, quoting *Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1049-1050 ["a party may waive a statutory provision if . . . 'waiver does not seriously compromise any public purpose that [the statute was] intended to serve.'"]; RB 45-46 & fn.11 [explaining why any

attempt by Uber to assert the non-jurisdictional defense of statutory standing after agreeing that all non-individual remedies may only be pursued in court would violate its covenant of good faith and fair dealing].)[4]

Uber's amici, like Uber itself, fail to address any of these scenarios and arguments. Instead, they mostly recycle Uber's previous arguments, offering only an occasional new argument of their own. (See *infra* pp. 25-30.) None of those new or recycled arguments are sufficient to overcome plaintiff's showing (or California's, CRLA's, or Harper's) that a PAGA plaintiff retains her status as an "aggrieved employee," even if compelled to

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[4] As plaintiff has shown, Uber's arbitration agreement does not, in fact, require plaintiff to split his PAGA claim between two forums. Rather, the plain text of Uber's agreement requires the parties to litigate plaintiff's *entire* PAGA claim in court, as it states in pertinent part: "If the PAGA Waiver is found to be unenforceable or unlawful for any reason, … (3) any representative actions brought under the PAGA must be limited in a civil court of competent jurisdiction." (RB 15, 47-52, quoting 1-CT-142, § 15.3, subd. (v).) That is why the Court of Appeal should be instructed on remand to determine whether, or to what extent, *any* component of Adolph's PAGA claim should be compelled to arbitration. (RB 47-52; see also CRLA Br. 10, fn. 6.)

Uber objects to plaintiff pursuing that construction on remand, but an appellate court has plenary authority to affirm a trial court's order (here, denying Uber's motion to compel arbitration) on any ground, including a ground that the appellate court initially had no reason to reach (and the parties had no reason to argue) prior to *Viking River*. Plaintiff's acquiescence in Uber's Petition for Review as limited to the question of PAGA standing in light of *Viking River*, did not constitute a waiver of any merits arguments or defenses to arbitrability that would support affirmance of the trial court's ruling below, including on grounds of unconscionability and violation of public policy.

arbitrate the individual component of her claim for civil penalties, unless there has been a final binding determination that she is *not* an aggrieved employee within the meaning of PAGA.

ARGUMENT

I. An Aggrieved Employee is Not Stripped of Statutory Standing Under PAGA Upon Being Compelled to Arbitrate the Individual Component of His Representative PAGA Action.

The parties and their amici all agree that the issue of PAGA standing before this Court raises an issue of statutory construction exclusively. (See, e.g., RB 44-45; CRLA Br. 39-41; Restaurants Br. 11-12; Uber's Reply Brief on the Merits ("Reply Br.") 31; *Kim*, 9 Cal.5th at p. 83 [when "a cause of action is based on statute, standing rests on the provision's language, its underlying purpose, and the legislative intent."]; see also *Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1246.)

"In construing a statute, [a court's] task is to ascertain the intent of the Legislature so as to effectuate the purpose of the enactment." (*Cummins, Inc. v. Superior Court* (2005) 36 Cal.4th 478, 487; see RB 43-44.) In *Kim*, this Court began its inquiry into legislative intent with a detailed analysis of the statutory text, followed by an extended discussion of the applicable legislative history and stated purposes. Based on that analysis, the Court unanimously concluded that "[t]he plain language of [PAGA's] section 2699(c) has only two requirements for PAGA standing": the plaintiff must have been employed by the alleged violator and subjected to one or more of the alleged violations. (9 Cal.5th at

pp. 83-84.) The Court further concluded that having only those two textual requirements for PAGA standing fully served the underlying statutory purposes – "'to achieve maximum compliance with state labor laws'" (*Iskanian*, 59 Cal.4th at p. 379, quoting *Arias*, 46 Cal.4th at p. 980) and to remedy "the 'systemic underenforcement of many worker protections'" (CRLA Br. 20, quoting *Williams*, 3 Cal.5th at p. 545) by deputizing "aggrieved employees" to pursue existing and newly created civil penalties on behalf of the State LWDA. (*Kim*, 9 Cal.5th at p. 86; see also California Br. 8-10.)

None of the arguments presented by Uber or its amici detract from the Court's analysis in *Kim* or undermine its well-considered conclusions. As this Court made clear, the plaintiff in *Kim* "*became an aggrieved employee*, and had PAGA standing, when one or more Labor Code violations were committed against him." (*Kim*, 9 Cal.5th at p. 84, emphasis added.) Put another way, a worker becomes an "aggrieved employee" within the meaning of PAGA upon experiencing a Labor Code violation committed by her employer, and she retains that status unless and until final determination on the merits to the contrary.[5]

[5] While Adolph agrees that a PAGA plaintiff may not recover the same penalties in two separate forums – i.e., while she must comply with an arbitration agreement that (unlike Uber's) actually limits her to seeking "individual" penalties in arbitration and "non-individual" penalties in court – there is no statutory reason why she cannot pursue those separate remedies in separate forums if that is what her employer's FAA-covered arbitration agreement requires her to do.

A. The word "and" in Labor Code § 2699(a) does not alter the only requirements for PAGA standing: being an employee who was aggrieved.

Uber's amici's textual arguments rest almost exclusively on the single word "and" in Labor Code § 2699, subd. (a), which states that PAGA claims may be "brought by an aggrieved employee on behalf of himself or herself and other current or former employees." (§ 2699, subd. (a); see, e.g., Chamber Br. 4; Retailers Br. 13, 17-18; Civil Justice Association of California Brief ("CJAC Br.") 34-36; Californians for Fair Pay and Employer Accountability Brief ("CFPEA Br.") 11; Restaurants Br. 12-14.) But as Adolph has shown, he *did* bring his PAGA claim on behalf of himself and others, and he is continuing to do so. (See *supra* fn. 4; CRLA Br. 42). While Uber and its amici contend that Adolph will no longer have standing to pursue full statutory relief for himself "and" others once his PAGA claim has been compelled to individual arbitration (if it is, see *supra* fn. 4), that argument suffers from at least three obvious flaws.

First, the quoted language from Section 2699, subd. (a) merely describes the potential scope of a PAGA claim. It does not prescribe any limitations on statutory standing, which as this Court held in *Kim* are set forth in Section 2699, subd. (c), which defines the term "aggrieved employee." (*Kim*, 9 Cal.5th at pp. 83-84; see RB 30-33, 42-43; see also California Br. 20-21.)

Second, Uber and its amici are wrong in stating that when an FAA-covered arbitration agreement requires plaintiff to split her PAGA claim between arbitration and court, it thereby severs the claim into two independent claims that each require separate,

non-overlapping proof of standing. That assertion is directly contrary to the Legislature's understanding that PAGA claims should be treated as a unitary whole. (See, e.g., *Iskanian*, 59 Cal.4th at pp. 383-384; CRLA Br. 10-12, 44-47; RB 37-42 & fn. 7.) While the Legislature could not have anticipated in 2003 that the U.S. Supreme Court would subsequently hold as a matter of FAA preemption that courts must enforce arbitration agreements that split PAGA claims into their "individual" and "non-individual" components, nothing in the FAA preemption doctrine or PAGA's text or purposes requires courts to construe the resulting two-part procedure as having stripped an aggrieved-employee plaintiff of her statutory right to pursue civil penalties for violations committed against herself "and" other employees. (§ 2699, subd. (a).)[6]

None of Uber's amici cite any new case authority to support Uber's position that enforcement of an individual arbitration requirement severs a PAGA claim into two unrelated proceedings

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[6] If the word "and" in Labor Code § 2699, subd. (a) serves any purpose other than to describe the permissible scope of a PAGA claim, it is to establish the principle, set forth in *Iskanian*, 59 Cal.4th at pp. 383-384, that the Legislature generally intended all PAGA claims to be unitary or indivisible – a principle that continues to govern the proper construction of PAGA, even though *Viking River* requires some claims to be prosecuted partly in arbitration and partly in court. (See *Viking River*, 142 S.Ct. at p. 1923.) To construe a PAGA claim that is split between arbitration and court by operation of an FAA-covered contract as comprising two separate, entirely unrelated claims for standing purposes would undermine the Legislature's intent to authorize PAGA plaintiffs to pursue both components of the statutorily prescribed civil penalty.

that each require separate proof of standing. (See RB 37-40; see also CRLA 45-47 & fn. 32 [explaining that neither the Federal Arbitration Act nor the California Arbitration Act use the term "sever," but instead refer to partial or complete "stays" of an action or proceeding pending arbitration].)[7] Moreover, although the Legislature's intent in enacting PAGA is what ultimately matters, there are many cases outside the PAGA context in which this Court and others have expressly authorized plaintiffs subject to an arbitration agreement to seek some statutory remedies in arbitration and others in court without requiring that the resulting split proceedings must be treated as two entirely separate claims for standing or other purposes.[8] A PAGA plaintiff whose claim has been partly referred to arbitration is still pursuing a single PAGA claim, with some remedies available only in arbitration and some remedies available only in court.

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[7] CJAC is the only Uber amicus that cites *any* authority on this point, but it cites only an inapposite case that plaintiff already distinguished: *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725. (CJAC Br. 31-33; see RB 38-39.)

[8] See, e.g., *McGill v CitiBank, N.A.* (2017) 2 Cal.5th 945, 966 [reaffirming that California law permits "piecemeal litigation of 'arbitrable and inarbitrable remedies derived from the same statutory claim.'"]; *Vaughn v. Tesla, Inc.* (2023) 303 Cal.Rptr.3d 457, 479 [allowing plaintiff to litigate "public injunction" remedies for same FEHA violations that require arbitration of damages remedies]; see also *Lag Shot LLC v. Facebook, Inc.* (N.D. Cal. 2021) 545 F.Supp.3d 770, 786; *Stout v. Grubhub Inc.* (N.D. Cal. Dec. 3, 2021) 2021 WL 5758889, at *9-11 [same]; Harper Br. 11 [citing cases holding that piecemeal litigation of arbitrable and inarbitrable claims is not precluded by the FAA].

The principal problem with Uber's amici's undue reliance on the single word "and" in Labor Code § 2699, subd. (a) is that it proves too much. If their construction were correct, *no plaintiff subject to an arbitration agreement that required employees to split their PAGA remedies between arbitration and court would ever have PAGA standing in either forum*. That is because, if a PAGA claim could only be prosecuted in a forum where the plaintiff is pursuing civil penalties "on behalf of himself or herself *and* other current or former employees" [emphasis added], the plaintiff would be precluded from pursuing her "individual" claim in arbitration (because she would not be seeking relief for others) and would also be precluded from pursuing her "non-individual" claim in court (because she would not be seeking relief for herself). If that were how PAGA standing worked, any arbitration agreement that mandated such claim-splitting would be invalid and unenforceable under *Iskanian* and *Viking River*, because it would preclude the plaintiff from prosecuting *any* component of her PAGA claim in *any* forum. That cannot be what the Legislature intended.

B. Uber's amici disregard the text of the statute and urge an interpretation that would frustrate the Legislature's express intent.

Many of Uber's amici also reassert Uber's argument (without analytical development or elaboration) that once a plaintiff has been compelled to arbitrate the individual component of her PAGA claim, she becomes no different than any other member of the "general public." (See, e.g., CJAC Br. 35-36; Retailers Br. 24-26.) But a PAGA plaintiff who has been

"aggrieved" by a Labor Code violation committed by her "employe[r]" within the meaning of Section 2699, subd. (c) is *not* an undifferentiated member of the "general public" with no ties to defendant or particularized connection to the issues. Instead, she is an individual who alleges she had an employer-employee relationship and personally suffered at least one Labor Code violation during the PAGA limitations period. That PAGA plaintiff's *status* as an employee aggrieved by defendant's workplace violations readily distinguishes her from all other members of the "general public." (See *Kim*, 9 Cal.5th at p. 90, quoting Sen. Judiciary Com., Analysis of Sen. Bill No. 796 (2003–2004 Reg. Sess.) as amended Apr. 22, 2003, p. 7; RB 32-33; California Br. 31-32 [explaining why the "aggrieved employee" requirement in § 2699, subd. (c) distinguishes PAGA plaintiffs from members of the general public whose Labor Code rights were never violated by the defendant employer]; CRLA Br. 29-38 [same].)[9]

Uber and its amici urge this Court to expand the statutory definition of "aggrieved employee," arguing that the difference between a member of the general public and a plaintiff with

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[9] Uber's argument that Adolph is no different than the plaintiff union in *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993, fares no better. (See Reply Br. 20.) As Uber acknowledges, the union "was not the defendant's employee" and did not suffer any violation itself, instead seeking to represent aggrieved employee members. (*Ibid.*) Here, by contrast, Adolph was employed by Uber, did suffer violations, and is alleging that he is an aggrieved employee, not seeking to stand in the shoes of others.

PAGA standing should depend on redressability – i.e., whether the plaintiff can recover in court her individual share of the civil penalties owed to the government (See Retailers Br. 23 [advocating "[c]onstruing PAGA's definition of 'aggrieved employee' to require a personal stake in the litigation"]; Chamber Br. 4 & fn. 1; Reply Br. 31.) But California has no constitutional counterpart to Article III requiring redressability, and PAGA's standing provision requires only "aggrieved employee" status. (See California Br. 9-10, 16; CRLA Br. 38-39; RB 44-45.) "In construing a statute, we are 'careful not to add requirements to those already supplied by the Legislature.'" (*Kim*, 9 Cal.5th at pp. 85.)

Despite the absence of statutory textual support, Uber's amici contend that requiring PAGA plaintiffs to prove redressability would be good policy. (See, e.g., Employers Group Br. 13; Chamber Br. 3-4. But policy choices are the province of the Legislature, not Uber's amici. Besides, as this Court explained in *Kim* and other cases, the Legislature never conceived of PAGA as a mechanism for obtaining individual redress. Rather, the "civil penalties recovered on the state's behalf are intended to 'remediate present violations and deter future ones,' not to redress employees' injuries'" or otherwise compensate the plaintiff. (*Kim*, 9 Cal.5th at p. 87.)

Next, several of Uber's amici reiterate Uber's argument that a PAGA plaintiff cannot bring a claim in court on behalf of herself and others if she is bound by an arbitration agreement that requires "individual" arbitration, because that would

improperly reward a plaintiff for "breaching" her arbitration agreement. (See, e.g., Chamber Br. 4, fn. 1.) Even if that were true, it would be irrelevant to the issue of statutory construction before the Court. (See California Br. 20-21 & fn. 24; CRLA Br. 42.) But it is not true. California law has never held that a person arguably bound by an arbitration contract breaches that agreement by initially pursuing her claims in court and putting the defendant to its burden of proving the existence, scope, and enforceability of that agreement. (See California Br. 21-22; CRLA Br. 41-43; *Pinnacle Museum Tower Assoc. v. Pinnacle Market Develop. (US), LLC* (2012) 55 Cal.4th 223, 236.) As the Court of Appeal explained in *Sargon Enterps., Inc. v. Browne George Ross LLP* (2017) 15 Cal.App.5th 749, "the constitutional right to petition includes the basic act of filing litigation." (*Id.* at 766 [alterations omitted].) Because the California Arbitration Act "recognizes that a party to an arbitration agreement may elect to initiate a civil action, rather than an arbitration proceeding, and … specifically protects the party's right to do so, … even where a party has entered into an arbitration agreement, that party may file a complaint in superior court seeking resolution of a dispute potentially subject to the arbitration agreement." (*Id.* at pp. 767-768 [citations omitted]; see also *Spence v. Omnibus Indus.* (1975) 44 Cal.App.3d 970, 975; *Leger v. R.A.C. Rolling Hills L.P.* (2022) 84 Cal.App.5th 240, 247-248, fn. 8.) Amici cannot identify *any* case that treats filing a claim in court – even if eventually compelled to arbitration – as a "breach" of the arbitration agreement.

Moreover, as the law stood at the time, Erik Adolph had every right to file this lawsuit in court on behalf of himself, the LWDA, and other aggrieved workers. Even today, Adolph's filing could not be considered a breach of the arbitration agreement. After all, the language in Uber's arbitration agreement expressly requires "any representative actions brought under the PAGA [to be filed] in a civil court of competent jurisdiction" rather than arbitration, if the agreement's "PAGA Waiver is found to be unenforceable or unlawful for any reason," as it must be, because that "waiver" clause unlawfully bans PAGA representative actions in any forum. (See *supra* fn. 4; RB 50.)

Uber's amici also advance a series of policy arguments that reflect little more than their antagonism toward PAGA. For example, NFIB contends that "[w]hen deciding the standing question, this court should do so in the manner most friendly to small businesses," citing nothing to support that approach other than its own policy preferences. (NFIB Br. 8.) Those arguments have nothing to do with the narrow issue of statutory construction before the Court.

The only public policy inquiry even potentially relevant to the PAGA standing issue is whether, *if* there were any ambiguity in PAGA's two requirements for statutory standing, the Legislature's *stated* statutory purposes would be furthered rather than undermined by the parties' respective constructions of the statute. (*McHugh v. Protective Life Ins. Co.* (2021) 12 Cal.5th 213, 227.) Based on these considerations, there can be only one possible outcome, because the Legislature's stated purpose in

enacting PAGA – to increase Labor Code enforcement in workplaces throughout California – is unquestionably furthered by plaintiff's construction and eviscerated by Uber's and its amici's, which would "deprive many employees of the ability to prosecute PAGA claims, contrary to the statute's purpose to ensure effective code enforcement." (*Kim*, 9 Cal.5th at p. 87; see also California Br. 23 & fn. 27; CRLA Br. 48-50.)

C. Uber's amici raise several new arguments—waived by Uber—that mischaracterize PAGA and misapply other statutory and case law.

In addition to joining Uber's previously asserted arguments, several of Uber's amici offer various "one-off" arguments, each of which fail on the merits and, besides, are waived because Uber did not itself raise them.

Amicus Retailers argues that if PAGA standing were based solely upon a plaintiff's status as an alleged "aggrieved employee," an employer who "cured" a Labor Code violation as permitted by Section 2699, subd. (d) and Section 2699.3, subd. (c)(2)(A) (which allow employers to cure certain Labor Code violations upon receiving statutory notice and thereby avoid liability) would remain liable for that violation. Not at all. PAGA expressly precludes plaintiffs from pursuing claims that have been cured, whether they were aggrieved by those violations or not. (See § 2699.3, subd. (c)(2)(A) [if the challenged conduct involves one of the Labor Code violations that the Legislature concluded in PAGA could be cured, as to that violation "no civil action pursuant to Section 2699 may commence"]; § 2699.5

[identifying Labor Code violations that cannot be cured for purposes of PAGA liability].)

Indeed, Retailers' "cure" argument cuts against Uber by exposing yet another anomaly in Uber's construction of the statute. The fact that the Legislature designated a small number of non-economic Labor Code violations as curable necessarily reflects its intention and belief that all *other* Labor Code violations, economic and non-economic alike, are *not* curable. Under Uber's construction, though, if an employer made a PAGA plaintiff whole by paying that employee's 25% share of civil penalties attributable to an alleged Labor Code violation (plus back wages, if any were due for the particular violation at issue), the employer would thereby escape all liability for Labor Code violations committed against every other member of the workforce. (See also Harper Br. 9 [the benefits of PAGA's cure provisions would be eliminated if an aggrieved employee plaintiff could only seek a cure of violations she personally suffered]; *id.* 14 [Uber's construction would enable employers improperly to pick off PAGA plaintiffs].)

Amicus CJAC contends that the U.S. Supreme Court's ruling on PAGA standing in Part IV of *Viking River* was a binding federal law determination rather than a speculative assertion about how California law should be applied. Even aside from Uber having forfeited this argument, it is obviously incorrect. Eight of the nine Justices in *Viking River* recognized that the majority's discussion of PAGA standing was based on state law and the ninth (Justice Thomas) had no need to reach

the issue. (RB 26-27, fn. 5.) While CJAC cites *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, in which the U.S. Supreme Court developed a standard of "actual malice" to ensure that state defamation law would not deprive defendants of their First Amendment rights, the *Viking River* majority's discussion of PAGA standing in Part IV of its opinion had nothing to do with the majority's preemption analysis, which was set forth in Parts II and III (and which concluded in Part II that the FAA did *not* preempt *Iskanian*'s "principal rule," 142 S.Ct. at p. 1922-1923.) No federal interests, under the FAA or otherwise, are served by depriving PAGA plaintiffs of standing to pursue statutory rights that the parties' arbitration agreement *requires* to be adjudicated in court.

Amicus CJAC, along with amici Restaurants and Chamber, also contends that to allow a PAGA plaintiff to pursue non-individual PAGA remedies in court would somehow violate her employer's right to compel *her co-workers* to arbitrate their claims individually. (CJAC Br. 33; Restaurants Br. 31-37; Chamber Br. 4-5, 8-12.) That argument completely mischaracterizes the nature of the aggrieved employees' interests under PAGA. As this Court has repeatedly held, and as the U.S. Supreme Court in *Viking River* confirmed, the interests of aggrieved employees in a PAGA case are materially different than the interests of absent class members in a class action. Unlike absent class members, for example, PAGA aggrieved employees have no due process right to notice, to opt out, to intervene, etc. (*Arias*, 46 Cal.4th at pp. 985-987; *Viking River*,

142 S.Ct. at p. 1921; *Kim*, 9 Cal.5th at p. 81 ["Relief under PAGA is designed primarily to benefit the general public, not the party bringing the action."].)[10] Consequentially, whether or not any aggrieved employees may have their own individual-only arbitration agreements has no effect on a PAGA plaintiff's right to recover civil penalties for the LWDA, measured by the number of pay periods in which each aggrieved employee suffered a covered Labor Code violation (any more than individual arbitration agreements would prevent the LWDA from itself recovering the full measure of civil penalties authorized by statute if it had the staff and resources to pursue the claim itself).

Amicus Retailers also attempts to engraft class action standards into the PAGA context by arguing that standing under PAGA should be interpreted to "align" with federal qui tam actions and state class actions. (Retailers Br. 26-30.) But references to the supposed "background principles" of two different statutes cannot be a basis for contradicting the clear legislative text and straightforward statutory purpose of PAGA itself. (See also CFPEA Br. 15-19 [proposing to apply the *Pricewaterhouse* standard for qui tam actions to PAGA standing].) Even if PAGA were ambiguous, moreover, Retailers' argument is simply another impermissible attempt to import an

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[10] In its discussion, amicus Restaurants relies entirely on Supreme Court case law "in the class action context" (Restaurants Br. 32), despite *Viking River*'s holding that "important structural differences between PAGA actions and class actions . . . preclude any straightforward application of our precedents invalidating prohibitions on class-action waivers." (*Viking River*, 142 S.Ct. at p. 1920.)

Article III-like redressability requirement into PAGA. (See Retailers Br. 27-29, quoting *U.S. ex rel. Kelly v. Boeing Co.* (9th Cir. 1993) 9 F.3d 743, 749 [discussing the importance of a recovering a bounty in qui tam suits to "ensure 'federal courts maintain their properly limited role'"].) That requirement has no direct application in state court and is particularly inapposite given PAGA's purpose and structure, including the relatively low "bounty" collected by plaintiffs. (See *supra* pp. 21-22; RB 44-45.)

Finally, Employers Group asserts that even if the Court agrees with plaintiff concerning the proper construction of PAGA's standing requirement, the underlying litigation should be stayed until the parties arbitrate Adolph's individual claim. (Employers Group Br. 34-35.) That is not an issue before this Court and it will never arise if plaintiff is correct as to the proper construction of Uber's arbitration agreement. Nonetheless, it bears noting that Code Civ. Proc. § 1281.4 gives trial courts discretion *not* to stay trial proceedings pending arbitration where the issues to be arbitrated and the issues to be litigated are sufficiently distinct. (See CRLA Br. 45, fn. 31; Code Civ. Proc. § 1281.4 ["If the issue which is the controversy subject to arbitration is severable, the stay may be with respect to that issue only."]; *Leenay v. Superior Court* (2022) 81 Cal.App.5th 553, 564-565 [analyzing the text and history of section 1281.4 and concluding that it "authorizes a stay only if a court has ordered arbitration of a question between the parties to an agreement, and the same question and the same parties are involved in the pending action"].) In this case, for example, there should be no

reason for the trial court to stay plaintiff's PAGA claims based on violations of Labor Code provisions as to which the legal standards are settled (e.g., under Labor Code § 201 and § 2802) where no significant factual overlap exists between the violations Uber committed against plaintiff individually and against other UberEats drivers.

CONCLUSION

Uber and its amici have not been shy about what they are trying to accomplish through this case. Uber is seeking to immunize itself, and its amici are trying to immunize employers throughout California, from PAGA's principal mechanism for obtaining enhanced workplace enforcement: the deterrent and punitive threat of substantial civil penalty liability corresponding to the scope of the employers' Labor Code violations. That is why they seek a judicial construction of PAGA "standing" that would have the practical effect of stripping all PAGA plaintiffs of their statutory right to pursue the full measure of remedies guaranteed by the Legislature.

If accepted, Uber's construction would eviscerate PAGA, transforming it from an effective mechanism for achieving the Legislature's goal of punishment and deterrence through threat of substantial civil penalties into a weak and ineffectual statute where the individual plaintiff's statutory recovery could be as little as $12.50 per covered pay period. (See California Br. 23; CRLA Br. 48.)

What Uber and its amici are seeking to accomplish in this case has already been found impermissible by this Court in

Iskanian and, necessarily, by the U.S. Supreme Court in *Viking River*: using a pre-dispute employment arbitration agreement to prevent aggrieved employees from pursuing the largest and thus potentially most effective component of her statutory remedy, although in this case, they are trying to accomplish that result indirectly rather than directly, by requiring plaintiff to pursue that substantive statutory remedy in a forum in which they insist he has no "standing" to proceed.

Adolph explained in his merits brief why Uber's statutory construction fail by their own terms. Nothing in the amicus briefs filed by Uber's industry supporters requires a different result or analysis. For the reasons stated above and in plaintiff's prior brief, this Court should conclude that an aggrieved employee who has been compelled to arbitrate PAGA claims premised on Labor Code violations actually sustained by that individual does not thereby lose statutory standing to pursue PAGA claims arising out of events involving other employees. The Court should also instruct the Court of Appeal on remand to determine, as a threshold matter, whether Uber's Arbitration Provision, properly construed, does in fact require plaintiff Adolph to arbitrate any portion of his PAGA claims against defendant Uber.

Dated: February 13, 2023

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Date: February 13, 2023

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Jean Perley

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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2/13/2023

Date

/s/Michael Rubin

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