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Supreme Court of California
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No. S274671

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

ERIK ADOLPH,

Plaintiff and Respondent,

v.

UBER TECHNOLOGIES, INC.,

Defendant and Appellant.

UBER'S CONSOLIDATED ANSWER TO AMICUS BRIEFS

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

The plain text of the Labor Code Private Attorneys General Act imposes two fundamental requirements for standing: To recover civil penalties, a plaintiff must bring the claim "on behalf of himself or herself" (Lab. Code, § 2699, subd. (a)) and as an "aggrieved employee … against whom one or more of the alleged violations was committed" (*id.*, subd. (c)). A straightforward reading of these provisions led the U.S. Supreme Court in *Viking River Cruises, Inc. v. Moriana* (2022) 142 S.Ct. 1906 to order the dismissal of the plaintiff's non-individual PAGA claims for lack of standing once she could no longer bring a claim on behalf of herself for her own alleged violations in court. That decision was correct, and neither Adolph nor his amici offer any persuasive reasons for this Court to break with that sound conclusion.

The amici who support Adolph's contrary reading do so only by ignoring subdivision (a) of section 2699 and misconstruing subdivision (c). Neither Adolph nor his amici have offered any persuasive explanation of how Adolph can possibly bring his non-individual PAGA claims "on behalf of himself" in court once his individual PAGA claim is sent to arbitration. Rather, Adolph's amici assume that a PAGA plaintiff need only have at some point in the past suffered a Labor Code violation to forever gain the status of "aggrieved employee"—whether or not she can bring a claim on behalf of herself in court. This status-based approach to standing is unknown in the law and conflicts with this Court's prior interpretation of subdivision (c) as requiring a PAGA plaintiff to have "personally suffered at least one Labor Code

violation on which the PAGA claim *is* based." (*Kim v. Reins Internat. Cal., Inc.* (2020) 9 Cal.5th 73, 84, italics added.)

Like Adolph, the amici who support him also fail to explain how a plaintiff could pursue his non-individual PAGA claims in court without running afoul of the Federal Arbitration Act. As they concede, a plaintiff must prove he is an "aggrieved employee" to have standing. But a plaintiff cannot do so without litigating this individualized issue in court in violation of the parties' express agreement to arbitrate such disputes. Adolph's amici's alternative suggestion—that a plaintiff can fill in the gap by pointing to her individual PAGA claim in arbitration—overlooks that a claim that has been sent to arbitration has been "committed to a separate proceeding." (*Viking River*, 142 S.Ct. at p. 1925.)

Where, as here, PAGA's "statutory language, purpose, and context all point to the same interpretation," the Court need not consider amici's "policy arguments that the statute should have been written differently." (*Kim*, 9 Cal.5th at p. 90, fn. 6.) Adolph's amici fear that fewer PAGA actions may be pursued in court if workers are held to the terms of their arbitration agreements. But workers who opt out of their arbitration agreements—as Adolph was free to do but elected not to—always may pursue their actions in court. And the Legislature specifically declined to adopt a model of "general public" standing for PAGA that would have permitted attorneys to bring "meritless, fee-motivated lawsuits" that can harm businesses and workers. (Assem. Com. on Lab. and Employment, Analysis of

Sen. Bill No. 796 (2003–2004 Reg. Sess.) July 2, 2003, p. 7.) The Legislature instead required PAGA plaintiffs to have a financial stake in the outcome of a case—that they be among the aggrieved employees entitled to recover 25% of the judgment—if they are to be permitted to represent the State and other aggrieved employees.

Under the plain language of the statute "as written" (*Kim*, 9 Cal.5th at p. 90, fn. 6), the Court should reverse the denial of Uber's petition to compel arbitration as to the individual PAGA claim and remand with instructions to dismiss the non-individual PAGA claims for lack of standing.

ARGUMENT

I. PAGA Standing Requires a Plaintiff to Pursue in Court at Least One Personally Experienced Labor Code Violation.

PAGA establishes two essential requirements for standing. First, a plaintiff can enforce "any provision of [the Labor Code] that provides for a civil penalty" that can be collected by the State, but only in a "civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees." (Lab. Code, § 2699, subd. (a).) Second, the plaintiff counts as an "aggrieved employee" under subdivision (a) only if the plaintiff "was employed by the alleged violator" and experienced "one or more of the alleged violations." (*Id.*, subd. (c).)

The question here is what happens when a plaintiff's individual PAGA claim is compelled to arbitration. In *Viking*

River Cruises, Inc. v. Moriana (2022) 142 S.Ct. 1906, the U.S. Supreme Court held that such a plaintiff "lacks statutory standing to continue to maintain her non-individual claims in court, and the correct course is to dismiss her remaining claims." (*Id.* at p. 1925.) That conclusion flows directly from the text of subdivisions (a) and (c) of Labor Code section 2699. A plaintiff does not seek civil penalties "on behalf of himself or herself" if the individual violation is no longer—and never was supposed to be—part of the court proceeding. (Lab. Code, § 2699, subd. (a).) And a plaintiff is not an aggrieved employee where she did not suffer "one or more of the alleged violations" at issue in the non-individual-only action. (*Id.*, subd. (c).)

The amici supporting Adolph have no answer to the text, context, and history of subdivisions (a) and (c). Nor do they acknowledge that the FAA would preempt PAGA if it allowed plaintiffs to litigate an individual Labor Code violation, even if only for standing purposes, that the parties had agreed to arbitrate.

A. A Plaintiff Whose Individual PAGA Claim Has Been Sent to Arbitration Cannot Pursue a PAGA Claim "on Behalf of Himself" in Court.

PAGA's standing provision requires claims to be "brought by an aggrieved employee on behalf of himself or herself and other current or former employees." (Lab. Code, § 2699, subd. (a).) By using the word "and," the Legislature commanded that a PAGA claim must be brought on behalf of the named plaintiff, not merely on behalf of others. (E.g., Civil Justice

Association Br., at pp. 34–36; Employers Br., at pp. 20–21; Restaurants Br., at pp. 12–13.) This word choice was intentional. In fact, earlier drafts had used the conjunction "or" before legislators switched to "and." (Californians for Fair Pay Br., at pp. 24–25; Retailers Br., at p. 17.)

Neither Adolph nor the amici supporting him explain how Adolph can be deemed to have brought his non-individual PAGA claims "on behalf of himself," as subdivision (a) expressly requires, after his individual PAGA claim is sent to arbitration. (See Reply Br., at pp. 18–21.) The Attorney General notes that "Uber's primary textual argument is that a plaintiff in Adolph's position cannot satisfy the requirement that a PAGA action must be 'brought by an aggrieved employee *on behalf of himself or herself* and other current or former employees.'" (AG Br., at p. 20, italics added, quoting Lab. Code, § 2699, subd. (a).) But the Attorney General then fails to address the "on behalf of" language. (*Id.* at pp. 20–33.) California Rural Legal Assistance argues that Adolph "meets the standing requirements necessary to pursue the representative claim on behalf of other aggrieved employees in court," but it too ignores the statutory requirement that Adolph bring claims on behalf of himself. (Rural Amici Br., at p. 33; see also *id.* at p. 45, fn. 31.) And the amicus who himself has filed a PAGA claim likewise does not discuss the text of subdivision (a). (Harper Br., at pp. 8–14.)

This defect is fatal to Adolph's non-individual PAGA claims because all plaintiffs must satisfy subdivision (a) in addition to subdivision (c). This Court made that clear in *Amalgamated*

Transit Union, Local 1756, AFL-CIO v. Superior Court (2009) 46 Cal.4th 993, which rejected a representational theory of standing for unions that sued on behalf of their members. (*Id.* at pp. 1004–1005.) As *Amalgamated Transit Union* shows, plaintiffs cannot bring claims only on behalf of others under PAGA's "express statutory standing requirements." (*Id.* at p. 1005, citing Lab. Code, § 2699, subds. (a), (c); see Reply Br., at p. 20.) PAGA standing instead requires that plaintiffs seek civil penalties for themselves in the court action based on violations they prove in that litigation they suffered. (Retailers Br., at p. 18.)

California Rural Legal Assistance seeks to pigeonhole *Amalgamated Transit Union* as a case only about unions. (Rural Amici Br., at p. 30.) But this Court rejected associational standing there because PAGA required the union to "bring an action on behalf of himself or herself," not merely on "behalf of its members" who were aggrieved employees. (*Amalgamated Transit Union*, 46 Cal.4th at pp. 1004–1005.) Adolph's amici nonetheless want to revive that same erroneous view of PAGA's standing requirement.

The Attorney General, for example, says that all PAGA requires is a "personal connection to the employer and to [his] fellow co-workers, and [his] knowledge and experience of at least one of the Labor Code violations alleged." (AG Br., at p. 24.) California Rural Legal Assistance similarly emphasizes that Adolph has "the knowledge and interest in enforcing labor laws as to the employer." (Rural Amici Br., at p. 37.) But the unions

in *Amalgamated Transit Union* had these same things—connections to the employer and employees, along with knowledge of purported Labor Code violations—in spades. Nevertheless, this Court held that was not enough to permit them to pursue a PAGA claim, and there is no reason to treat a plaintiff like Adolph—who lacks the ability to bring in court a PAGA action on behalf of himself—any differently.

In further tension with this Court's precedent, Adolph's amici also assert that a PAGA plaintiff need not have "any financial stake in the litigation." (AG Br., at p. 23; Harper Br., at p. 14.) Accepting that argument would cut PAGA's standing requirement loose from its historical moorings. This Court has described PAGA as "a type of *qui tam* action." (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 382.) For centuries, the prospect of "the bounty he will receive if the suit is successful" has been the only thing that separates a qui tam plaintiff from any other person who comes into court off the street. (*Vt. Agency of Natural Resources v. United States ex rel. Stevens* (2000) 529 U.S. 765, 772; see Retailers Br., at pp. 27–29.) PAGA deviates in part from a true qui tam action because "a portion of the penalty goes not only to the citizen bringing the suit but to all employees affected by the Labor Code violation." (*Iskanian*, 59 Cal.4th at p. 382.) But Adolph's and his amici's desire to erase "on behalf of himself or herself" from subdivision (a)—to allow non-individual claims where no portion of the penalty goes to the plaintiff at all—promises a complete break from the historical qui tam model described in *Iskanian*.

(See Californians for Fair Pay Br., at p. 20; Employers Br., at pp. 22–23.)

The Attorney General, like Adolph, suggests that plaintiffs will litigate for the chance of "no recovery at all" with the same fervor that they would for "quite small" individual penalties. (AG Br., at pp. 9, 23; see Resp. Br., at pp. 44–45.) But the Legislature chose a standing model of "prosecution by a financially interested private citizen." (*Iskanian*, 59 Cal.4th at p. 390.) As this Court has observed, PAGA reflects a "legislative choice to deputize and *incentivize* employees uniquely positioned to detect and prosecute such violations." (*Ibid*., italics added.) In doing so, the Legislature refused to go down the path of delegating Labor Code enforcement to financially interested *attorneys*. (Californians for Fair Pay Br., at pp. 22–26; Employers Br., at p. 22, fn. 2.) Only a statutory amendment could allow Adolph to serve as a "figurehead plaintiff" for a "headless" PAGA action where counsel pursues civil penalties only on behalf of other employees. (Chamber Br., at p. 9.)

In short, the amici supporting Adolph seem to argue that whether a PAGA plaintiff has standing to pursue a PAGA action turns solely on whether the plaintiff is an "aggrieved employee." (E.g., AG Br., at p. 32.) Adolph cannot establish that he is an "aggrieved employee" in court (as explained below), but even if he were, that would not be enough: The action must be brought not only "by an aggrieved employee," but also "*on behalf of himself or herself* and other current or former employees." (Lab. Code, § 2699, subd. (a), italics added; see also Californians for Fair Pay

Br., at p. 38.) That express statutory requirement—that any PAGA action must be brought "on behalf of" the named plaintiff—precludes Adolph's interpretation, as his amici tacitly admit by failing to seriously grapple with it.

B. A Status-Based Interpretation of the "Aggrieved Employee" Requirement Conflicts with *Kim*.

Adolph cannot prove in court that he is a person "against whom one or more of the alleged violations was committed." (Lab. Code, § 2699, subd. (c).) To do so, Adolph would need to be able to pursue an individual PAGA claim—i.e., one that asserts "Labor Code violations actually sustained by the plaintiff." (*Viking River*, 142 S.Ct. at p. 1916.) A plaintiff who cannot assert such an individual claim in court "by definition" cannot satisfy subdivision (c) because "none of the alleged violations for which the employee seeks penalties will have been committed against that employee." (Employers Br., at p. 22.)

This conclusion follows from *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73. There, this Court held that the settlement of an individual claim for damages did not deprive the plaintiff of PAGA standing. (*Id.* at p. 80.) But that was only because the plaintiff had "specifically carved" the PAGA claim, comprising both individual and non-individual violations, "out of the settlement." (*Id.* at p. 92, fn. 7.) The dispositive difference between *Kim* and this case is that the plaintiff in *Kim* still sought civil penalties for "one or more" violations committed against

him, whereas Adolph no longer can do that in court. (See, e.g., Civil Justice Association Br., at pp. 31–32.)

Resisting this conclusion, Adolph attempted to recast *Kim* as holding that "aggrieved employee" is a status that a plaintiff can never lose based on subsequent events in litigation. (Resp. Br., at pp. 33–36, 40–41.) All of the amici supporting Adolph line up behind his status-based reading of subdivision (c). (AG Br., at p. 20; Rural Amici Br., at p. 28; Harper Br., at p. 12.) In their view, the harm of having once suffered a Labor Code violation allows a plaintiff to keep suing even after the individual violation exits the case. (E.g., Rural Amici Br., at pp. 32–33 & fn. 25.)

Although Adolph and his amici hail *Kim* as the source of their status-based approach, their interpretation conflicts with its reasoning. (E.g., Civil Justice Association Br., at pp. 41–43; Employers Br., at p. 25; Restaurants Br., at pp. 27–28.) This Court held in *Kim* that PAGA defines "standing in terms of violations, not injury." (9 Cal.5th at p. 84.) This test asks whether "the PAGA claim *is* based" on an individual violation—not whether a prior iteration of the PAGA action *used to be* based on an individual violation. (*Ibid.*, italics added; see, e.g., *Johnson v. Maxim Healthcare Services, Inc.* (2021) 66 Cal.App.5th 924, 930 [plaintiff must have "personally suffered at least one Labor Code violation on which the PAGA claim *is* based"], italics added.) In other words, "it is the employee's personal interest in the litigation—redressing a Labor Code violation suffered at the hands of the employer—that is a necessary predicate" under

subdivision (c). (*Lewis v. Simplified Labor Staffing Solutions, Inc.* (2022) 85 Cal.App.5th 983, 997.)

The status-based view not only conflicts with *Kim*, but also would lead to inconsistent outcomes based on whether a plaintiff decides to ignore her agreement to arbitrate. The Attorney General, for example, argues that a plaintiff can forever satisfy the standing requirement simply "by the filing of a PAGA complaint containing well-pleaded allegations that the employer committed Labor Code violations against the plaintiff employee." (AG Br., at p. 20.) Pegging standing to an initial allegation of Labor Code violations, rather than the violations that make up the PAGA claims that will actually be litigated in court, creates a perverse incentive. As the Chamber points out, the status-based interpretation would mean that plaintiffs who abide by their arbitration agreements won't have standing, but plaintiffs who violate their agreements by pleading a violation they can't litigate would have standing. (Chamber Br., at p. 4, fn. 1.)

Nor do the amici supporting Adolph have any adequate response to *Robinson v. Southern Counties Oil Company* (2020) 53 Cal.App.5th 476. The plaintiff there had initiated a lawsuit based on individual violations, but a settlement in another case covered the dates of the plaintiff's employment with the defendant. (*Id.* at p. 480.) The Court of Appeal held that, after a demurrer was granted as to the individual PAGA violations, the plaintiff lacked "standing to pursue claims based solely on violations alleged to have occurred" to others. (*Id.* at pp. 484–485.)

Only California Rural Legal Assistance even addresses *Robinson*. Although it accuses Uber of "misinterpret[ing] the case," it does so by inaccurately describing the case as involving "a former worker [who] filed a case against an employer for wrongs that occurred after the former worker had already departed the employment." (Rural Amici Br., at pp. 30–31.) That is incorrect: At the outset of the case, the plaintiff asserted individual violations from the time he was employed. (*Robinson*, 53 Cal.App.5th at pp. 480–481.) California Rural Legal Assistance does not attempt to explain why a plaintiff would lose standing if the individual violation drops out of the case via a demurrer (the situation in *Robinson*) but maintain standing if the individual violation drops out of the case via a motion to compel arbitration (the situation here).

Moreover, as this Court has held, "aggrieved employee" is a "term of art" that bears a consistent meaning across PAGA. (*Kim*, 9 Cal.5th at p. 87.) But several PAGA provisions would function nonsensically under a status-based reading of the term:

- Section 2699.3, subdivision (c)(2) allows employers to "cure" PAGA violations. Under Uber's violation-based reading, the employer can identify each "aggrieved employee" who must be "made whole" by looking at the violations alleged in the PAGA notice. (Lab. Code, § 2699, subd. (d).) But under Adolph's status-based reading, the universe of aggrieved employees would include anyone who ever suffered a Labor Code

violation, whether or not alleged in the notice. (Retailers Br., at pp. 20–22.)

- Section 2699, subdivision (f)(2) prescribes penalties of $100 "for each aggrieved employee per pay period for the initial violation" and $200 "for each aggrieved employee per pay period for each subsequent violation." Under Uber's violation-based reading, the court would calculate penalties by tallying up the number of violations proved and the number of employees affected. But under Adolph's status-based reading, the plaintiff could be an aggrieved employee even though he doesn't fit anywhere in the penalty formula and even though his individual PAGA claim has been resolved in arbitration. (See Restaurants Br., at p. 30; Retailers Br., at p. 22.)
- Section 2699, subdivision (i) then allocates 25% of these penalties "to the aggrieved employees." Under Uber's violation-based reading, the court divvies up a quarter share for each violation that employee suffered, following the statutory scheme where "'a percentage share of penalties [will] go *directly to the aggrieved worker*.'" (Restaurants Br., at p. 14, quoting Sen. Judiciary Com., Analysis of Sen. Bill No. 796 (2003–2004 Reg. Sess.) Mar. 26, 2003, p. 3.) But under Adolph's status-based reading, the plaintiff would be an "aggrieved employee" under subdivision (c) yet sit on the sidelines at the penalty phase. (See Restaurants Br., at p. 30; Retailers Br., at pp. 22–23.)

The problem is not just that the statutory scheme would be internally incoherent. To read "aggrieved employee" differently in some provisions than in others would violate the FAA by creating a special rule "that disfavors arbitration." (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 341.)

In addition to setting PAGA at war with itself, the notion that "aggrieved employee" is a permanent status would make PAGA a statutory outlier, as the Attorney General acknowledges. (AG Br., at p. 24.) In the context of the Unfair Competition Law, for example, "standing must exist at all times until judgment is entered and not just on the date the complaint is filed." (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 232–233.) This means that a plaintiff must prove standing "in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of litigation." (*Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1345, citation omitted.) So as the Attorney General later concedes, "the requirements of any statute conferring a private right of action must be met throughout the litigation." (AG Br., at p. 25.) The question then is not whether the violation remains "unredressed" in an Article III sense (*id.* at p. 24), but whether there remains an individual violation "on which the PAGA claim is based" (*Kim*, 9 Cal.5th at p. 84). Simply put, a plaintiff lacks standing if (as here) his PAGA claim is no longer based on any such personally suffered violation. (See Reply Br., at pp. 31–32.)

C. Amici's Arguments Against Severance Misunderstand California Law and Violate Federal Law.

Perhaps recognizing that PAGA means what it says and requires a plaintiff to seek penalties "on behalf of himself or herself," Adolph's amici alternatively argue that he satisfies that requirement in a roundabout way. As they see it, Adolph may *allege* an individual PAGA claim—even if he can't *litigate* it in court—and that allegation remains a part of the action even after the claim is compelled to arbitration. (AG Br., at pp. 20–21; Rural Amici Br., at p. 32; Harper Br., at p. 14.) But Adolph's PAGA action cannot encompass any personally sustained violations because the FAA requires that his individual claim be severed and sent to arbitration. (Reply Br., at pp. 13–17.) As the U.S. Supreme Court recognized in *Viking River*, the effect of that federal rule of severability is to "commit[]" the individual PAGA claim "to a separate proceeding"—namely, arbitration. (142 S.Ct. at p. 1925.) And once Adolph's "own dispute is pared away from a PAGA action, [he] is no different from a member of the general public, and PAGA does not allow such persons to maintain suit." (*Ibid.*)

Adolph's amici try to escape this straightforward conclusion by highlighting that Adolph "did not violate the arbitration agreement by *initiating* the action on behalf of himself and other aggrieved employees." (Rural Amici. Br., at pp. 42–43, italics added; see also AG Br., at pp. 21–22.) This argument misconstrues California law and flouts federal law.

The first hurdle is California law. As this Court has repeatedly held, a "contract is breached … when one party refuses to submit to arbitration." (*Wagner Construction Co. v. Pacific Mechanical Corp.* (2007) 41 Cal.4th 19, 29, citation omitted; see also *Spear v. California State Auto. Assn.* (1992) 2 Cal.4th 1035, 1042 [explaining that "an action to compel arbitration is in essence a suit to compel specific performance of a contractual term, i.e., the arbitration agreement," and "[a] contract cause of action does not accrue until the contract has been breached"]; *Transportation Handlers Air Truck Service in U.S., Inc. v. Team Air Freight, Inc.* (9th Cir. 1991) 934 F.2d 325 [table] [plaintiff "violated the arbitration agreement by initiating this action"].) Similarly, a case cited by California Rural Legal Assistance acknowledges that "an arbitration agreement requires a party to submit a dispute to arbitration *if ordered by a court to do so*." (*Sargon Enterprises, Inc. v. Browne George Ross LLP* (2017) 15 Cal.App.5th 749, 769.)

No one disputes that Adolph would have lacked standing had he filed a standalone non-individual PAGA action. (See Opening Br., at pp. 35–36.) So he should not be permitted to manufacture standing by artfully pleading an individual violation that he cannot pursue in court. To rule otherwise would enable Adolph to "do indirectly … what the Legislature has clearly shown it does not intend [him] to do directly." (*Gerawan Farming, Inc. v. Agricultural Labor Relations Bd.* (2017) 3 Cal.5th 1118, 1158.)

The next hurdle is federal law. Even if Adolph did not breach the arbitration provision at the start of this litigation, *Viking River* prevents him from litigating the merits of an individual PAGA dispute that he promised to resolve in arbitration. (See, e.g., *Epic Systems Corp. v. Lewis* (2018) 138 S.Ct. 1612, 1621 [FAA "requires courts rigorously to enforce arbitration agreements according to their terms"], cleaned up; *Laver v. Credit Suisse Securities (USA), LLC* (9th Cir. 2020) 976 F.3d 841, 846 ["[A]n agreement to arbitrate 'is a promise to have a dispute heard in some forum *other than a court*.'"].)

Yet that is exactly what Adolph seeks to do here. (See Resp. Br., at p. 40 [urging that he should be free to "allege (and if necessary prove) the required elements of h[is] claim for relief in both forums"].) After all, to establish standing to bring non-individual PAGA claims in court, Adolph must prove he is an aggrieved employee—that is, someone who "was employed by" Uber and who "personally suffered at least one Labor Code violation." (*Kim*, 9 Cal.5th at p. 84.) But he cannot make that showing without litigating the "Labor Code violations [he] personally suffered," an issue the parties agreed to arbitrate. (*Viking River*, 142 S.Ct. at p. 1923; see also Opening Br., at pp. 38–40; Reply Br., at pp. 34–35.) As the NFIB Legal Center correctly notes, "[w]hether an individual is an 'aggrieved employee' with standing to bring a PAGA claim is clearly an individual inquiry subject to the arbitration." (NFIB Br., at p. 4; see also Restaurants Br., at pp. 18–19.)

Adolph's amici counter that a plaintiff's individual PAGA claim always remains part of the litigation—even after it is sent to arbitration—because the "FAA does not speak in terms of claims, remedies, severance, or separate actions." (Harper Br., at p. 12, fn. 2; see also Rural Amici Br., at pp. 10, 45 ["non-arbitrable substantive representative claims remain an unsevered part of the action" because "the FAA does not use the term 'sever'"].) But the FAA requires the enforcement of the parties' arbitration agreement, and this agreement requires arbitration on an individual basis in a separate proceeding. (See Opening Br., at pp. 22–23; Reply Br., at pp. 13–17.) In other words, because the agreement requires individual arbitration in a separate, individual proceeding, so does the FAA. (*Viking River*, 142 S.Ct. at pp. 1924–1925.) A contrary conclusion would resurrect *Iskanian*'s preempted anti-severability rule and deny the parties the right to "determine 'the issues subject to arbitration.'" (*Id.* at p. 1923, citation omitted.)

Where, as here, "a complaint contains both arbitrable and nonarbitrable claims," the FAA "requires courts to 'compel arbitration of [the] arbitrable claims,'" resulting in "'*separate* proceedings in *different* forums.'" (*KPMG LLP v. Cocchi* (2011) 565 U.S. 18, 22 [per curiam], italics added; see also *Viking River*, 142 S.Ct. at 1925 [individual PAGA claim must "be[] committed to a *separate* proceeding," italics added]; *Roderick v. Mazzetti & Associates, Inc.* (N.D.Cal., Nov. 9, 2004) 2004 WL 2554453, at *12 [FAA "mandate[s] arbitration of pendent arbitrable claims, even where doing so would fracture a dispute into two proceedings in

separate forums"].) Federal law is no different from California law in this respect. As this Court has put it, "severance of an action" creates "two or more separate actions." (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 737, fn. 3; see also Reply Br., at pp. 33–34.)

The Attorney General says—without elaboration—that "severance … is beside the point, as it fails to address the question of legislative intent." (AG Br., at p. 21, fn. 24.) But the Legislature fully intended that PAGA actions be brought only by plaintiffs who could pursue penalties "on behalf of himself or herself" in that action. (Lab. Code, § 2699, subd. (a).) Statutory text has always "afford[ed] the best guide to the Legislature's intent." (*Villanueva v. Fidelity Nat. Title Co.* (2021) 11 Cal.5th 104, 114.) Because Adolph's individual PAGA claim has thus been "pared away," he may not pursue penalties solely on behalf of others in court. (*Viking River*, 142 S.Ct. at p. 1925.)

The amici supporting Adolph also suggest that this case simply involves the "piecemeal litigation of claims the parties have agreed to arbitrate and claims they have not agreed to arbitrate." (Harper Br., at p. 11, cleaned up; see also AG Br., at p. 22.) But allowing Adolph to litigate his individual claim in court, even if only for purposes of PAGA standing, would force the parties to litigate the very issue they agreed to arbitrate—in defiance of *Viking River* and the FAA. (See *Viking River*, 142 S.Ct. at p. 1923 [FAA guarantees "the freedom of parties to determine 'the issues subject to arbitration,'" citation omitted].) It would also revive the "judicial hostility" against arbitration

that Congress sought to end through the FAA (*Concepcion*, 563 U.S. at p. 339) by "encourag[ing] employees and their attorneys to knowingly violate their agreement to arbitrate, filing in Court simply to try to establish standing" (Restaurants Br., at p. 31). Courts "must be alert to new devices and formulas that would" undermine the FAA's pro-arbitration policy (*Epic Systems*, 138 S.Ct. at p. 1623), and Adolph's "interpretation of PAGA as rewarding parties for breaching their arbitration agreements is just such a device" (Employers Br., at p. 32).

The amici supporting Adolph also join in his effort to relitigate the federal-law aspects of *Viking River*. They argue that his individual PAGA claim cannot be severed if the effect would be to deprive him of standing to maintain non-individual claims. (Resp. Br., at p. 46; Rural Amici Br., at p. 47.) But that result is quite literally what the U.S. Supreme Court in *Viking River* held the FAA *requires*—the enforcement of contractual severability clauses even where the remaining non-individual claims cannot proceed on their own. (142 S.Ct. at pp. 1924–1925.) That holding turned on federal preemption, not California law, and may not be revised by this Court. (Reply Br., at p. 37.)

II. Amici's Policy Arguments Cannot Justify Rewriting PAGA's Standing Requirements.

As the foregoing demonstrates, "the statutory language, purpose, and context all point to the same interpretation." (*Kim*, 9 Cal.5th at p. 90, fn. 6.) So the Court need not consider amici's "policy arguments that the statute should have been written

differently," which "are more appropriately addressed to the Legislature." (*Ibid.*)

In any event, the Legislature sensibly rejected a model of Labor Code enforcement through lawyer-driven litigation without any check from an employee who stands to gain a share of penalties recovered. That outcome binds the State and other employees, and the Legislature had good reason for ensuring that a PAGA plaintiff—not just his or her lawyers—would be tangibly affected by the judgment. Amici's concerns about this legislative choice are unfounded. Labor Code violations will continue to be enforced by employees either in individual arbitrations, or in court for those employees who have not agreed to arbitration.

A. The Legislature Had Good Reason to Reject General Public Standing under PAGA.

The Legislature reasonably adopted a standing rule that requires plaintiffs to have a real stake in a PAGA action. The background rule is that only the State's own lawyers can represent the State. As Californians for Fair Pay and Employer Accountability explains, courts typically require a clear statement from the Legislature that private parties can represent the State. (Californians for Fair Pay Br., at pp. 12–40.) And as numerous amici explain, the Legislature made a narrowly cabined exception to this background rule, allowing a PAGA plaintiff to represent the State only when he or she brings a claim *on behalf of himself or herself*, not just others. (See *id.* at pp. 22–26, 35–36; Restaurants Br., at pp. 13–15; Retailers Br., at pp. 24–

25; Chamber Br., at pp. 24–26; Civil Justice Association Br., at pp. 39–40.)

The Legislature had good reason to guard against an overly expansive PAGA standing requirement. In the years preceding PAGA's enactment, the Unfair Competition Law authorized anyone to sue on behalf of the State. Whatever the merits of this approach in theory, it proved problematic in practice. The Legislature—and the voters—soon learned that general public standing led to "the legal community's abuse of [the UCL] when it sued thousands of small businesses for minor violations and demanded settlements in order to avoid costly litigation." (Sen. Judiciary Com., Analysis of Sen. Bill No. 796 (2003–2004 Reg. Sess.) Apr. 22, 2003, pp. 6–7.) In 2004, the electorate ended this practice by enacting Proposition 64, which limited UCL standing to individuals "who ha[ve] suffered injury in fact and ha[ve] lost money or property as a result of the unfair competition." (Bus. & Prof. Code, § 17204.)

The lessons of the UCL's experiment in general public standing were not lost on the Legislature, which did not want to repeat the same mistakes in PAGA. (See Retailers Br., at p. 25.) Legislators recognized that the original draft bill would "result in abuse similar to that alleged involving the UCL," including "an excessive amount of meritless, fee-motivated lawsuits." (Assem. Com. on Lab. and Employment, Analysis of Sen. Bill No. 796 (2003–2004 Reg. Sess.) July 2, 2003, p. 7.) So, "mindful of the recent, well-publicized allegations of private plaintiffs['] abuse of

the UCL," the drafters of PAGA "attempted to craft a private right of action that w[ould] not be subject to such abuse." (*Ibid.*)

Specifically, they amended the draft legislation to require a plaintiff to sue on behalf of himself *and*—not or—other aggrieved employees. And the Legislature defined "aggrieved employee" so as to prevent PAGA actions from being filed by "persons who suffered no harm from the alleged wrongful act." (Sen. Judiciary Com., Analysis of Sen. Bill No. 796 (2003–2004 Reg. Sess.) Apr. 22, 2003, p. 7.) These changes were designed to ensure plaintiffs' attorneys could not "'act as vigilantes' pursuing frivolous violations on behalf of different employees" with nothing at stake in the lawsuit. (Assem. Floor Analysis of Sen. Bill No. 796 (2003–2004 Reg. Sess.) July 16, 2003, p. 3; see also Sen. Judiciary Com., Analysis of Sen. Bill No. 796 (2003–2004 Reg. Sess.) Apr. 22, 2003, p. 6.)

California Rural Legal Assistance admits that, under its view, PAGA "standing [would] not require a personalized interest in the outcome of the action." (Rural Amici Br., at p. 39.) It explains that its conception of "public interest standing" under PAGA is akin to "the broad standing afforded to any 'person acting for the interest of … the general public' to challenge unfair competition" under the UCL *before* Prop 64. (*Id.* at pp. 39–40, quoting *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 561, abrogated by Bus. & Prof. Code, § 17204.) The candor is admirable. But if we know anything about PAGA, it is that the Legislature specifically rejected this model of "general

public" standing when it enacted the statute. (See *Kim*, 9 Cal.5th at p. 90.)

B. The Policy Arguments for Expanding PAGA Standing Are Misguided and Irrelevant.

Here, as in *Kim*, the "amici curiae … assert numerous policy arguments." (9 Cal.5th at p. 90, fn. 6.) But the Court is once again "called upon to interpret section 2699(c)"—and now also section 2699(a)—"as written." (*Ibid.*) "Rather than interpret a statutory provision based upon an assumption about the Legislature's intent, courts must analyze a statute's plain language, and may look to the legislative history underlying a statute's enactment only if the plain language is ambiguous." (*Olson v. Automobile Club of Southern Cal.* (2008) 42 Cal.4th 1142, 1151.) Amici's "policy arguments that the statute should have been written differently are more appropriately addressed to the Legislature." (*Kim*, 9 Cal.5th at p. 90, fn. 6.)

In addition to airing their complaints before the wrong body, the amici supporting Adolph overlook that "no legislation pursues its purposes at all costs." (*In re Friend* (2021) 11 Cal.5th 720, 740.) Adolph's amici cite *some* purposes of PAGA—such as remedying gaps in funding and enforcement. (See AG Br., at pp. 28, 30; Rural Amici Br., at pp. 18–22, 25–26.) But the Legislature balanced those purposes against the goal of preventing abusive lawsuits akin to those that had plagued the UCL before Proposition 64. (See, e.g., Employers Br., at p. 33.) The Legislature thus did not choose a more-is-always-better approach when it came to PAGA actions.

At any rate, nothing about Uber's position would imperil the goal of Labor Code enforcement through PAGA. Uber asks only that this Court enforce the statutory limits on PAGA standing and place agreements requiring arbitration of individual PAGA claims "upon the same footing as other contracts." (*Morgan v. Sundance, Inc.* (2022) 142 S.Ct. 1708, 1713.) If a party agrees to individual arbitration, that is how his PAGA claim will be resolved. It does not mean that PAGA claims will no longer be pursued.

Adolph's amici argue that requiring a PAGA plaintiff to bring the claim on behalf of himself would hinder PAGA's efficacy in redressing serious Labor Code violations. (AG Br., at pp. 29–30; Harper Br., at p. 9; Rural Amici Br., at pp. 21–26.) But requiring parties to abide by their agreements to arbitrate penalty claims for Labor Code violations wouldn't "destroy[]" "the employer's incentive to try to cure such violations." (Harper Br., at p. 9.) Adolph can seek (in arbitration) penalties for violations he suffered; other workers (even those who, like Adolph, decided not to opt out of the arbitration provisions) can do likewise. In other words, the same total amount of penalties can be recovered—just in individual arbitration, rather than a difficult-to-manage court action.

The implicit premise of the arguments of the amici supporting Adolph is that arbitration is less favorable to employees. Just the opposite is true. Studies show that "arbitration provide[s] consumers and employees with a better chance to win, higher awards, and quicker outcomes." (NFIB Br.,

at p. 6; see Chamber Br., at pp. 27–29.) Arbitration's benefits for workers and businesses alike may explain why many agreements feature arbitration clauses. (See AG Br., at p. 27, fn. 29.) And there are other benefits to allowing parties to agree to individual arbitration of PAGA claims. Arbitration is cheaper for the parties and reduces burdens on the judicial system. (NFIB Br., at pp. 7–10; Chamber Br., at pp. 16–18, 28–29.) Bilateral arbitration—one worker plaintiff, with her own claim, against one company defendant—enables parties to avoid the burden and expense of complex and risky litigation. (See *Viking River*, 142 S.Ct. at p. 1924.)

While Uber's interpretation aligns incentives across proceedings, Adolph's interpretation allows court actions where the plaintiff serves as a mere "figurehead." (Chamber Br., at p. 9.) Several amici warn that a plaintiff whose individual PAGA claim has been committed to arbitration will not have the same incentive to litigate the non-individual claims that remain in court as she has no prospect of recovery. "Win, lose, or settle for pennies on the dollar, it is all the same to" Adolph, who cannot receive a nickel of the recovery. (Employers Br., at p. 22; see also, e.g., Californians for Fair Pay Br., at pp. 29–30.) California Rural Legal Assistance responds that because PAGA awards for each worker's violation are already fairly small, it should not matter if this amount drops to $0. (Rural Amici Br., at pp. 47–50.) But that simply is not true. Because PAGA penalties can reach $100 to $200 per violation per employee per pay period, the

potential liability for an individual PAGA claim can swiftly accrue to the thousands of dollars for a single employee.

One amicus posits that PAGA plaintiffs have interests—ones that are not "'tangible' or 'concrete'"—in seeing their employer punished and their lawyers get paid. (Harper Br., at p. 10.) But this is exactly the sort of "concerned bystander" interest long held too inchoate and tangential for standing. (Retailers Br., at p. 29, citation omitted.) If workers could hire themselves out to lawyers as professional plaintiffs, PAGA would recreate the UCL abuse that led to Proposition 64. (See Californians for Fair Pay Br., at pp. 22–26; Chamber Br., at pp. 24–26; Retailers Br., at pp. 34–35; Civil Justice Association Br., at pp. 39–40.) Requiring a plaintiff to bring her own claim, and be bound by any judgment recovered, helps prevent serial litigants-for-hire from abusing the system.

This requirement that a PAGA plaintiff sue on behalf of himself or herself exists not only to prevent abusive lawsuits against defendants, but also to protect the State and other aggrieved employees from plaintiffs who lack a financial incentive to vigorously pursue a PAGA action. A PAGA judgment binds both the State and the aggrieved employees on whose behalf the plaintiff sues. (Chamber Br., at pp. 9–10.) And as multiple amici point out, Adolph's expansive conception of standing would actually *undermine* the amount the Labor Commissioner receives by encouraging settling plaintiffs to allocate more of the settlement value to their individual claims and attorneys' fees than to the claims based on violations others

experienced. (Californians for Fair Pay Br., at pp. 31–33; Employers Br., at pp. 41–42.) The Labor Commissioner has no way to determine at the outset of the case that the plaintiff (like Adolph here) will have only a fleeting interest in the proceeding because the plaintiff need not mention the arbitration agreement in the pre-suit notice. (See Employers Br., at pp. 28–30.)

In any event, Adolph's amici's policy arguments are beside the point. As this Court has explained in its standing cases, such "significant policy concerns" are "best left to the Legislature's specific attention, at its discretion." (*State ex rel. Harris v. PricewaterhouseCoopers, LLP* (2006) 39 Cal.4th 1220, 1232.) The concerns voiced by some amici about the effect of *Viking River* on PAGA do not justify a judicial rewrite of subdivisions (a) and (c).

Text, precedent, and deference—not policy preferences expressed by amici on either side—resolve this case in Uber's favor. When all has been said and done, neither Adolph nor any of his amici have identified "good cause for departure" from *Viking River* given the text of subdivisions (a) and (c), as well as the violation-based reasoning in *Kim*. (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 353.)

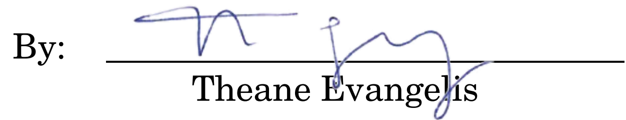
CONCLUSION

The Court should reverse the Court of Appeal and order that Adolph's individual claim be compelled to arbitration and that his non-individual claims be dismissed. In the alternative, this Court should order a stay of the non-individual claims pending the arbitration of the individual PAGA claim and the threshold classification issue.

Dated: February 13, 2023

Respectfully Submitted,

GIBSON, DUNN & CRUTCHER LLP

By: 
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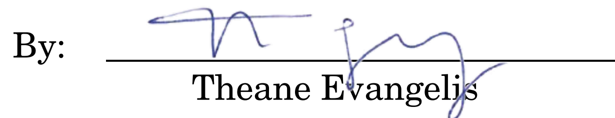
By: 
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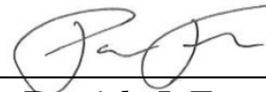

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