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 SUPPLEMENTAL BRIEF

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 Erik Adolph's supplemental brief refers this Court to a series of recent Court of Appeal decisions that have declined to follow the U.S. Supreme Court's interpretation of PAGA in *Viking River Cruises, Inc. v. Moriana* (2022) 142 S.Ct. 1906. The justification these courts have provided for departing from *Viking River* is unpersuasive, misunderstands this Court's decision in *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, and, if accepted, would once again put PAGA jurisprudence on a collision course with the FAA. The Court should follow *Viking River* and hold that once Adolph's individual PAGA claim is sent to arbitration, he no longer can pursue in court any non-individual PAGA claims.

Nonetheless, the recent decisions did reach the correct conclusion on two other issues. *First*, each held that individual PAGA claims had to be arbitrated under a variety of different agreements, including Uber's arbitration agreement. *Second*, one of the cases specifically enforced the provision in Uber's arbitration agreement requiring a stay of any claims remaining once the individual claim has been compelled to arbitration. To the extent the Court goes beyond the issue presented and reaches these arguments, it should do the same.

ARGUMENT

I. The Courts of Appeal's Analysis of Statutory Standing Misconstrues State Law and Violates Federal Law.

PAGA has not one, but two, "express standing" provisions. (*Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior*

Court (2009) 46 Cal.4th 993, 1004–1005.) 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)). Once his individual claim is sent to arbitration, Adolph's non-individual claims satisfy neither requirement, as the claims are brought only on behalf of *other* drivers and only for violations *they* allegedly sustained.

A. In holding otherwise, two of the Court of Appeal decisions did not grapple with subdivision (a), which plainly requires a plaintiff to bring a claim "on behalf of himself … *and* other current or former employees." (Lab. Code, § 2699, subd. (a), italics added; see *Nickson v. Shemran, Inc.* (Cal.Ct.App., Apr. 7, 2023, No. D080914) 2023 WL 2820860, at pp. *6–7; *Galarsa v. Dolgen California, LLC* (2023) 88 Cal.App.5th 639, 653.) Ignoring that critical provision does not make it go away. As this Court has explained, "every PAGA action" must "seek[] penalties for Labor Code violations as to … the plaintiff bringing the action[]" and may seek penalties "as to other employees *as well*." (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 387, italics altered.)

The decisions that *did* address subdivision (a) agreed that a plaintiff must seek recovery "for the violations he or she suffered in addition to penalties for violations suffered by other employees." (*Gregg v. Uber Technologies, Inc.* (2023) 89 Cal.App.5th 786, 306 Cal.Rptr.3d 332, 344; see *Seifu v. Lyft, Inc.* (Cal.Ct.App., Mar. 30, 2023, No. B301774) 2023 WL 2705285, at

p. *6; *Piplack v. In-N-Out Burgers* (2023) 88 Cal.App.5th 1281, 1292.) Yet they nonetheless held that the plaintiffs had satisfied this requirement because the FAA supposedly does not require the "individual claim [to] be 'severed' from [the] nonindividual claims" once it is sent to arbitration. (*Gregg*, 306 Cal.Rptr.3d at p. 345; see *Seifu*, 2023 WL 2705285, at pp. *6–7; *Piplack*, 88 Cal.App.5th at p. 1292 ["plaintiffs are pursuing a single PAGA action 'on behalf of [themselves] and other current or former employees,' albeit across two fora"].)

These decisions run headlong into the U.S. Supreme Court's decision in *Viking River*, which held otherwise in its core *federal* ruling interpreting the FAA—not a ruling of "state law" that the Court of Appeal could choose not to follow. (*Gregg*, 306 Cal.Rptr.3d at p. 345; see *Seifu*, 2023 WL 2705285, at p. *5; *Piplack*, 88 Cal.App.5th at p. 1292.) *Viking River* held that the FAA preempts *Iskanian* "insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate." (142 S.Ct. at p. 1924.) The effect of that federal rule of severability is to "commit[]" the individual PAGA claim "to a *separate* proceeding"—namely, arbitration. (*Id.* at p. 1925, italics added.) 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.) That is why the U.S. Supreme Court ordered the dismissal of the non-individual PAGA claims for lack of standing once they were

severed from the individual claim—because the *standalone* non-individual claims were not brought on behalf of the plaintiff, as *Gregg*, *Seifu*, and *Piplack* all recognized is required by PAGA. (See *Viking River*, 142 S.Ct. at p. 1925 ["When an employee's own dispute is pared away from a PAGA action, the employee is no different from a member of the general public, and PAGA does not allow such persons to maintain suit."].)

Permitting Adolph's individual PAGA claim to remain part of this action even after it is sent to arbitration would put this Court on a collision course with the U.S. Supreme Court by resurrecting *Iskanian*'s preempted anti-severability rule and denying the parties the right to "determine the issues subject to arbitration." (*Viking River*, 142 S.Ct. at p. 1923, cleaned up.) As a result, Adolph's standalone non-individual PAGA claims should be dismissed because he can no longer seek penalties on his own behalf in the *same* proceeding for one or more violations he allegedly sustained. (See Lab. Code, § 2699, subds. (a), (c); *Viking River*, 142 S.Ct. at p. 1925.)

B. Each of the Court of Appeal decisions also misinterpreted subdivision (c), which defines who is an "aggrieved employee" that may bring a claim on behalf of himself and others. Each decision erroneously held that subdivision (c) requires only that the plaintiff have been an employee and suffered a Labor Code violation at *one* time in the past. (*Galarsa*, 88 Cal.App.5th at p. 653; *Piplack*, 88 Cal.App.5th at pp. 1291–1292; *Gregg*, 306 Cal.Rptr.3d at pp. 343–345; *Seifu*, 2023 WL 2705285, at pp. *5–6; *Nickson*, 2023 WL 2820860, at p. *7.) They

located their status-based reading in a passage from *Kim* stating that "section 2699(c) has only two requirements for PAGA standing"—that the plaintiff be "someone 'who was employed by the alleged violator' and 'against whom one or more of the alleged violations was committed.'" (*Kim*, 9 Cal.5th at pp. 83–84.) But *Kim* went on to explain that subdivision (c) asks whether "the PAGA claim *is* based" on an individual violation—not whether (as these courts thought) a prior iteration of the PAGA action *used to be* based on an individual violation. (*Id.* at p. 84, italics added.)

An example of the proper reading of *Kim* comes from *Robinson v. Southern Counties Oil Company* (2020) 53 Cal.App.5th 476. The plaintiff there *had* alleged he suffered individual violations, but subsequent events—a settlement in another case covering the time when the plaintiff was employed—meant that he could no longer pursue his claims in court. (*Id.* at pp. 480–483.) As a result, he lacked "standing to pursue claims based solely on violations alleged to have occurred" to others. (*Id.* at pp. 484–485.) That is consistent with the general rule that "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.) *Robinson* thus shows that if a plaintiff settles his individual PAGA claim, he loses standing to pursue claims on behalf of others. (53 Cal.App.5th at p. 483.) The same is true here. Adjudicating Adolph's individual PAGA claim in arbitration is akin to settling it and therefore extinguishes his standing.

In short, the Court of Appeal decisions cited by Adolph neglected a core requirement in PAGA, as explained in *Kim*: A plaintiff is "aggrieved" only if his *claim* is based on an individual violation. A past alleged violation that forms no part of the claim in court cannot serve as a hook for standing.

II. The FAA Requires Enforcement of the Parties' Agreement to Arbitrate Individual PAGA Claims and Stay the Rest.

Viking River makes clear that individual PAGA claims must be arbitrated under the FAA where, as here, the parties have so agreed. (142 S.Ct. at pp. 1924–1925.) This Court granted review only to address what happens to non-individual PAGA claims once the individual claims are compelled to arbitration. (See Reply Br., at pp. 10–13.) If the Court nonetheless reaches this issue, the cases Adolph cites confirm that he is required to arbitrate his individual PAGA claim.

All five decisions held that the FAA required arbitration of individual PAGA claims, notwithstanding differences among the arbitration provisions or severability clauses in each case. (See *Nickson*, 2023 WL 2820860, at p. *3; *Seifu*, 2023 WL 2705285, at p. *2; *Gregg*, 306 Cal.Rptr.3d at pp. 335–336; *Piplack*, 88 Cal.App.5th at p. 1285; *Galarsa*, 88 Cal.App.5th at p. 645.) In fact, *Gregg* involved an earlier version of Uber's arbitration agreement that is virtually identical to the one here. (Compare *Gregg*, 306 Cal.Rptr.3d at pp. 335–336, with 6-CT-1570–1574.) Adolph insists that a different result should obtain here because his severability clause states that "representative actions brought

under the PAGA must be litigated in a civil court of competent jurisdiction." (Adolph Supp. Br., at p. 11; 6-CT-1574, § 15.3(v).) But at least two courts have rejected that precise argument.

In *Piplack*, the court found that the arbitration agreement "follow[ed] *Viking*'s structure" where the severance clause provided that "any private attorney general claim must be litigated in a civil court of competent jurisdiction." (88 Cal.App.5th at p. 1288.) "After *Viking* [*River*]," the court explained "only the 'representative' claim is a true qui tam, or 'private attorney general,' action." (*Id.* at p. 1289.) And only that non-individual claim could remain in court, while the rest had to proceed in arbitration. (*Ibid.*)

Similarly, the court in *Gregg* compelled the plaintiff to arbitrate his individual PAGA claim against Uber even though the severance clause directed that "any representative action brought under PAGA" should be litigated in court. (306 Cal.Rptr.3d at p. 339.) As the court underscored, the plaintiff "overlook[ed]" that the arbitration agreement broadly "applie[d] to 'disputes arising out of or related to [his] relationship with [Uber]" and clarified that severance of the PAGA waiver "shall have no impact whatsoever on the Arbitration Provision or the [p]arties' attempt to arbitrate any remaining claims on an individual basis." (*Id.* at p. 341.) Adolph ignores the same provisions (6-CT-1572, § 15.3(i); 6-CT-1573, § 15.3(ii)), and his belated attempt to save his individual claim from arbitration fails for the same reasons (even if he could overcome his waiver of this issue, see Reply Br. at pp. 10–13).

The Arbitration Provision likewise requires that, if the Court does not order Adolph's non-individual claims dismissed for lack of standing, it should stay litigation on those claims while the parties arbitrate his individual claim. (See Op. Br., at pp. 40–41; Reply Br., at p. 38.) The court in *Gregg* correctly ruled that Uber's arbitration agreement required as much. (306 Cal.Rptr.3d at p. 346.) This Court should do the same.

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: May 1, 2023

Respectfully Submitted,

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Pursuant to rule 8.520(d)(2) of the California Rules of Court, the undersigned hereby certifies that the Supplemental Brief contains 1,948 words, excluding tables and this certificate, according to the word count generated by the computer program used to produce the brief.

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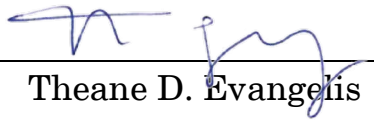
By: 

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UBER'S SUPPLEMENTAL BRIEF

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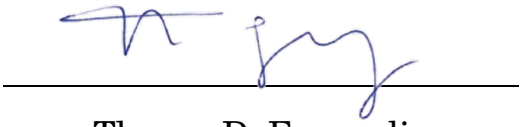

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