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Supreme Court of California
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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

RESPONDENT'S BRIEF ON THE MERITS

Aashish Y. Desai (SBN 187394)
Adrianne De Castro (SBN 238930)
DESAI LAW FIRM, P.C.
3200 Bristol Ave., Suite 650
Costa Mesa, CA 92626
Telephone: (949) 614-5830
Email: aashish@desai-law.com
adrianne@desai-law.com

*Michael Rubin (SBN 80618)
Robin S. Tholin (SBN 344845)
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, California 94108
Tel: (415) 421-7151
Email: mrubin@altber.com
rtholin@altber.com

Additional counsel on following page

Andrew P. Lee (SBN 245903)
David Borgen, Of Counsel (SBN 99354)
Mengfei Sun (SBN 328829)
GOLDSTEIN, BORGEN,
DARDARIAN & HO
155 Grand Ave., Suite 900
Oakland, CA 94612
Telephone: (510)763-9800
Email: alee@gbdhlegal.com

Attorneys for Plaintiff and Respondent Erik Adolph

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INTRODUCTION

The Court limited its grant of review to a single question: "Whether an aggrieved employee who has been compelled to arbitrate claims under the Private Attorneys General Act (PAGA) that are 'premised on Labor Code violations actually sustained by' the aggrieved employee (*Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. __, __ [142 S.Ct. 1906, 1916] (*Viking River Cruises*); see Lab. Code, §§ 2698, 2699, subd. (a)) maintains statutory standing to pursue 'PAGA claims arising out of events involving other employees' (*Viking River Cruises*, at p. __ [142 S.Ct. at p. 1916]) in court or in any other forum the parties agree is suitable." (Aug. 1, 2022 Order.)

Under California law, standing to assert a statutory claim (whether under PAGA or otherwise) turns exclusively upon the language and purpose of the statute. (See *Kim v. Reins Int'l Calif.* (2020) 9 Cal.5th 73, 83 ["When [a California] cause of action is based on statute, standing rests on the provision's language, its underlying purpose, and the legislative intent."].) PAGA's text makes clear that a plaintiff seeking to pursue civil penalties on behalf of the California Labor and Workforce Development Agency (LWDA) need only allege that she is an "aggrieved employee," which the statute defines to mean "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." (Lab. Code, § 2699, subd. (c).)[1] As this Court held in *Kim*, PAGA standing

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

thus imposes only two requirements: "The plaintiff must be an aggrieved employee, that is, [1] someone 'who was employed by the alleged violator' and [2] 'against whom one or more of the alleged violations was committed.'" (9 Cal.5th at pp. 83–84, quoting § 2699, subd. (c).)

Plaintiff Erik Adolph unquestionably had standing when he filed his PAGA claim against Uber Technologies, Inc. (Uber). On that there can be no dispute. His operative Second Amended Complaint alleged he was an "employee" of defendant Uber and that Uber had committed Labor Code violations against him, thereby causing him to be "aggrieved" within the meaning of PAGA. The present dispute over Adolph's dual-forum standing arises because the U.S. Supreme Court in *Viking River Cruises* held that even though PAGA actions are generally indivisible (meaning that the aggrieved employee's claim for civil penalties on behalf of the LWDA must be adjudicated in a single, unitary proceeding (see, e.g., *Kim*, 9 Cal.5th at p. 88)), a PAGA claim may be split between two forums, arbitration and court, ***if*** the parties so agreed in an arbitration agreement covered by the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 et seq. (See *Viking River Cruises*, 142 S.Ct. at p. 1924.)

After the Supreme Court held that the FAA allows California employers to require their employees to seek some PAGA remedies in court and others in arbitration, the five-member majority ventured further to decide two issues of California law, neither of which had been briefed or argued. First, the Court reviewed the language of the parties' arbitration

agreement (including its severability clause) and concluded that, although the parties' agreement expressly *prohibited* all "representative or private attorney general action[s]," they actually intended to *require* plaintiff Angie Moriana to pursue in arbitration the "individual" component of her PAGA representative action (for civil penalties on behalf of the LWDA based on the Labor Code violations committed against her alone) and to pursue in court the "non-individual" component of her PAGA representative action (for penalties on behalf of the LWDA based on Labor Code violations committed against other aggrieved employees). (*Id.* at pp. 1924–1925.)[2] The Court then applied what it understood to be California standing law, based upon a patent misreading of *Kim*, and concluded that once a PAGA plaintiff is required to split her PAGA claim in two pursuant to the parties' arbitration agreement, she is stripped of her statutory standing to pursue the "non-individual" component of the LWDA's claim for PAGA civil penalties in court (even though the parties had *agreed* she could pursue those remedies there)—thus effectively immunizing the employer from

[2] The Supreme Court seems to have misapplied California contract construction principles in construing the parties' arbitration agreement in *Viking River Cruises*. (See *ibid.*) Although that construction would not be controlling here in any event (including because the language of Uber's arbitration agreement is materially different than the language of Viking River's agreement), we explain in Part III why the Court of Appeal should be instructed on remand to determine as a threshold matter whether Uber's arbitration agreement, properly construed, actually requires plaintiff Adolph to pursue *any* component of his PAGA claim in arbitration.

meaningful liability, eviscerating the underlying purposes of the PAGA public enforcement action, and rendering illusory the supposed benefit of the plaintiff's arbitration bargain. (See *infra* at pp. 45–46 [explaining why an arbitration agreement, so construed, would violate California public policy and be unenforceable].)

For the reasons set forth below, the Supreme Court's understanding of PAGA standing under California law was completely wrong.

Adolph's operative complaint expressly pleaded the only two facts required for PAGA standing: that he was an "employee" and that he was "aggrieved." Even assuming that the parties' arbitration agreement required Adolph to pursue PAGA's statutory *remedy* in two forums (but see *infra* at Part III), Adolph therefore still had standing as an "aggrieved employee" to pursue those separate remedies in each contractually designated forum.

To be sure, either the arbitrator or the judge might eventually conclude, based upon an adjudication of the merits of a PAGA plaintiff's "individual" claim, that the plaintiff was not, in fact, an "aggrieved employee." Depending upon the circumstances, any such determination might, or might not, have later issue-preclusive effect on that plaintiff's ability to establish here "aggrieved employee" status in the other forum (another issue beyond the scope of this Court's limited review). But the mere fact that *Viking River Cruises* may require a PAGA plaintiff to assert one portion of his PAGA claim in arbitration and the other portion in court has no bearing on whether that plaintiff

has adequately alleged, or may subsequently prove, the only two elements required to establish "aggrieved employee" PAGA standing.

Uber's strained argument to the contrary rests upon an obvious error, which it repeats throughout its Opening Brief (AOB). Uber confuses the remedy that a plaintiff may be required to pursue in arbitration with that plaintiff's *status* as an "aggrieved employee." That conflation of remedy and status would impermissibly import Article III redressability requirements into PAGA, contrary to the non-compensatory nature of PAGA's remedial scheme and in direct conflict with PAGA's goal of maximizing the enforcement of workplace laws.

While a PAGA plaintiff may not seek the same civil penalties on behalf of the LWDA in two different forums, her *status* as an aggrieved employee should entitle her to proceed in whichever forum or forums have been designated for the adjudication of her PAGA claims. If the parties' FAA-covered arbitration agreement requires plaintiff to pursue some statutory *remedies* in arbitration and others in court, that requirement will be enforceable under *Viking River Cruises* and the FAA. Unless and until the plaintiff has been finally adjudicated *not* to be an "aggrieved employee," though, nothing in PAGA—or this Court's construction of PAGA in *Kim*, or the legislative purposes underlying PAGA—should preclude her from pursuing the separate portions of the available statutory remedies in both forums.

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STATEMENT OF THE CASE

Uber's Arbitration Agreement Expressly Prohibits the Arbitration of PAGA Claims.

Respondent Erik Adolph worked as an Uber driver beginning in March 2019, delivering food to Uber customers through the company's UberEATS app. (6-CT-1547, ¶ 12.) As a condition of his employment, Adolph was bound by Uber's Technology Services Agreement with Portier, LLC ("the Agreement"); and because Adolph did not timely opt out, he became bound by the "Arbitration Provision" in that Agreement. (*Ibid.*)

The Agreement's "Arbitration Provision" required Adolph (like all Uber drivers subject to that Agreement) to arbitrate, on an individual basis only, nearly all work-related claims he might have against Uber, with one critical exception relevant here. (1-CT-137–145, § 15.3.) That exception, described in the Agreement as the "PAGA Waiver," prohibited Adolph from arbitrating, litigating, or pursuing in any other forum, any representative action claim under PAGA:

> To the extent permitted by law, you and Company agree not to bring a representative action on behalf of others under the Private Attorneys General Act of 2004, California Labor Code § 2698 et seq. ("PAGA"), in any court or in arbitration ….

(1-CT-142, § 15.3, subd. (v).) As Uber acknowledges, this Arbitration Provision "contained a waiver of PAGA claims to the fullest extent permissible under law." (AOB at p. 13.)

Uber's PAGA Waiver also included a severability clause that described what would happen in the event its PAGA Waiver is held unenforceable:

> If the PAGA Waiver is found to be unenforceable or unlawful for any reason, (1) the unenforceable provision shall be severed from this Arbitration Provision; (2) severance of the unenforceable provision shall have no impact whatsoever on the Arbitration Provision or the Parties' attempts to arbitrate any remaining claims on an individual basis pursuant to the Arbitration Provision; and (3) any representative actions brought under the PAGA must be litigated in a civil court of competent jurisdiction.

(1-CT-142, § 15.3, subd. (v).)

Erik Adolph Brings a PAGA Claim Against Uber for Labor Code Violations.

Adolph initially filed this action in October 2019, alleging two claims for relief under Labor Code § 2802 and the Unfair Competition Law (UCL). (1-CT-47.) The gist of Adolph's claim was that Uber had misclassified him and other delivery drivers as independent contractors, rather than as employees, and that it had wrongfully failed to reimburse them for their necessary business expenses, including for the use of their cell phones.

Adolph subsequently added a claim for relief under PAGA based on the same theory of misclassification, in which he sought civil penalties based on Uber's alleged failure: to reimburse its drivers for their reasonable business expenses, to timely pay them all wages due during and upon termination, to pay required overtime premiums, to provide accurate itemized wage statements, and to maintain accurate payroll records. (1-CT-213–214). On January 21, 2021, with permission of the trial court, Adolph filed his operative Second Amended Complaint (SAC),

which eliminated his previous Labor Code and UCL claims and retained only his claims for civil penalties under PAGA. (5-CT-1484.)

Uber Unsuccessfully Seeks to Compel Arbitration.

Uber sought to compel Adolph's PAGA claims to arbitration in the trial court and again in the court of appeal. Both courts rejected Uber's arguments. In pertinent part, the court of appeal explained that it was bound to "follow the rule of" *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, which prohibits contractual waiver of statutory rights enacted for public purpose. (*Adolph v. Uber Technologies* (Cal. Ct. App. 2022) 2022 WL 1073583, at p. *5.). The court of appeal also rejected Uber's contention that an arbitrator, rather than a judge, should decide the threshold issue of whether Adolph was an "employee" (rather than as an independent contractor) and thus potentially an "aggrieved employee" within the meaning of PAGA. (*Id.* at p. *3, citing *Provost v. YourMechanic, Inc.* (2020) 55 Cal.App.5th 982, 996 and *Contreras v. Superior Court* (2021) 61 Cal.App.5th 461, 471–472.)

This Court Grants Limited Review After *Viking River Cruises.*

On May 20, 2022, Uber filed a petition for review, principally contending that the trial court should have compelled arbitration to enable an arbitrator in the first instance to determine all threshold issues of enforceability and arbitrability, including Adolph's status as an "employee." (See Pet. for Rev. at p. 10.)

Before Adolph could file his Answer, the United States Supreme Court decided *Viking River Cruises*. In Part II of its opinion, the Supreme Court held that the FAA did *not* preempt "*Iskanian*'s principal rule" (which prohibits the enforcement of contractual waivers of state statutory rights enacted for public purpose, pursuant to California public policy and Civil Code § 3513). (See 142 S.Ct. at pp. 1922–1923.) In Parts III and IV, the court held that: (1) FAA preemption requires enforcement of an arbitration clause that requires a PAGA plaintiff to adjudicate the "individual" component of her representative PAGA claim in arbitration and the "non-individual" component in court (*id.* at p. 1924); (2) Viking River's arbitration clause did in fact require such separate adjudication; and 3) under California law as construed by this Court in *Kim*, a PAGA plaintiff who has been compelled to arbitrate the "individual" component of her PAGA claim thereby loses standing to pursue the "non-individual" component in court, because she is no longer an "aggrieved employee" but is simply an undifferentiated member of the "general public" (*id.* at p. 1925, quoting *Kim*, 9 Cal.5th at p. 90).

Uber requested and obtained leave to file a supplemental brief in support of review to address the potential impacts of *Viking River Cruises*. (See June 16, 2022 Order.)

Uber's supplemental brief principally focused upon the final two sections of the Supreme Court's decision. Uber contended that the Supreme Court's analysis of FAA preemption in Part III of *Viking River Cruises* and its analysis of California law in Part IV required reversal of the court of appeal's decision

and should be applied to require Adolph to arbitrate the "individual" component of his PAGA claim against Uber and to dismiss the "non-individual" remainder of that claim. Uber asked this Court to grant review and to transfer this case to the court of appeal with instructions to reconsider its decision in light of *Viking River Cruises*. (Uber Supp. Letter Br. at p. 1.)

Adolph's supplemental letter brief construed the governing legal principles quite differently. Pointing to Justice Sotomayor's concurring opinion in *Viking River Cruises* and her status as the fifth, and thus decisive, member of the Court's majority, Adolph noted that this Court, not the U.S. Supreme Court, is the final arbiter of California standing law. Adolph therefore asked this Court to grant review to determine for itself and the lower California courts, as a matter of state law based on the plain language and established legislative purposes of PAGA, whether an aggrieved-employee plaintiff who is required (as a result of FAA preemption) to split a representative PAGA claim into "individual" and "non-individual" components, is thereby stripped of statutory standing to pursue, on behalf of the LWDA, the portion of that claim seeking civil penalties based on the number of Labor Code violations committed against other aggrieved employees. (Adolph Supp. Letter Br. at 2.)

This Court granted review, limited to that single question of PAGA statutory standing. (Aug. 1, 2022 Order.)[3]

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[3] Since then, many trial courts in California, state and federal, have addressed that question, with most (thus far) agreeing with the plaintiffs that an order compelling arbitration of the "individual" component of an aggrieved employee's PAGA

ARGUMENT

I. An Aggrieved Employee Who Has Been Compelled to Arbitrate the Portion of His Representative PAGA Claims Based on Labor Code Violations Personally Suffered Continues to Have Standing to Pursue the Remaining Portion of that Representative PAGA Claim in Court.

The question before this Court raises a pure issue of statutory construction. We therefore begin by summarizing PAGA's key language and underlying purposes, as set forth by the Legislature and as construed by this Court. We then turn to *Viking River Cruises* and the U.S. Supreme Court's application of the FAA—and its misapplication of California law—to the facts and issues in that case. After demonstrating why Uber's arguments in support of that misapplication of California law are wrong, we conclude by identifying the issues that remain for the court of appeal to address after this Court decides the issue of PAGA standing upon which review was granted.

A. PAGA Serves a Broad Enforcement Purpose by Allowing the State to Deputize Aggrieved Employees to Collect Civil Penalties in a Representative Action on its Behalf.

The California Legislature enacted PAGA in 2003 to address two structural problems that were significantly impeding the State's efforts "'to achieve maximum compliance with state labor laws.'" (*Iskanian*, 59 Cal.4th at p. 379, quoting *Arias v.*

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claim does not require dismissal of the remaining "non-individual" component. That question is also currently pending in several district courts of appeal, but none have yet decided the issue.

Superior Court (2009) 46 Cal.4th 969, 980.) First, many Labor Code provisions were only enforceable through criminal prosecution and not through the more easily prosecuted administrative actions for civil penalties. Second, because the State's workplace enforcement agencies were woefully understaffed and underfunded, they lacked the resources necessary to pursue relief against most Labor Code violators, even for the civil penalties that were previously available. (*Iskanian*, 59 Cal.4th at pp. 377–379; *Arias*, 46 Cal.4th at p. 986; see also 2003 Cal. Legis. Serv. Ch. 906 (S.B. 796) ["Staffing levels for state labor law enforcement agencies have, in general, declined over the last decade," and it is "in the public interest to provide that civil penalties for violations of the Labor Code may also be assessed and collected by aggrieved employees acting as private attorneys general."].)

To address those problems, and consistent with the State's overarching goal of facilitating increased Labor Code enforcement, the Legislature in PAGA: (1) established a "default" civil penalty for violations of nearly every provision of the Labor Code, including those that had not previously supported administrative actions for civil penalties, and (2) created a new private right of action, in which "aggrieved employees" acting as the State's "agent" or "proxy" were authorized to bring suit as private attorneys general to recover those civil penalties against Labor Code violators. (§ 2699, subds. (f), (g)(1); *Arias*, 46 Cal.4th at pp. 985–986.) "The Legislature's sole purpose in enacting [these provisions] was 'to augment the limited enforcement

capability of the [LWDA] by empowering employees to enforce the Labor Code as representatives of the Agency.' [Citation.]" (*Kim*, 9 Cal.5th at p. 86.)

PAGA defines an "aggrieved employee" as "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." (§ 2699, subd. (c).) It defines "violation" as "a failure to comply with any requirement of the [Labor] code." (§ 22.)

All PAGA claims are "representative." This is true in two distinct senses. First, they are representative because they may *only* be brought by a plaintiff as a representative of the State LWDA. As this Court has repeatedly stated and as the U.S. Supreme Court in *Viking River Cruises* recognized, in every PAGA action the aggrieved-employee plaintiff acts as "'the proxy or agent of the state's labor law enforcement agencies'" and "'represents the same legal right and interest as'" those agencies—"'namely, recovery of civil penalties that otherwise would have been assessed and collected by the Labor Workforce Development Agency.'" (*Iskanian*, 59 Cal.4th at p. 380, quoting *Arias*, 46 Cal.4th at p. 986; *ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175, 185 ["All PAGA claims are 'representative' actions in the sense that they are brought on the state's behalf."].) Second, PAGA claims are representative because PAGA permits an aggrieved-employee plaintiff suing on behalf of the State to seek civil penalties not only for Labor Code violations committed against the plaintiff personally, but also for Labor Code violations committed against the plaintiff's aggrieved-employee co-workers.

(§ 2699, subd. (a); *Huff v. Securitas Sec. Servs. USA, Inc.* (2018) 23 Cal.App.5th 745, 750–751; see *Viking River Cruises*, 142 S.Ct. at p. 1916 [recognizing the two senses in which all PAGA claims are "representative"].)

Under PAGA, 75% of all civil penalties recovered must be paid to the LWDA "for enforcement of labor laws … and for education of employers and employees," while the remaining 25% must be distributed "to the aggrieved employees." (§ 2699, subd. (i).)

Before *Viking River Cruises*, this Court had repeatedly held that all representative PAGA actions were indivisible, or unitary, meaning that a PAGA plaintiff could neither choose nor be required to split her claim for PAGA civil penalty remedies among multiple proceedings. (See *Kim*, 9 Cal.5th at p. 88; *Iskanian*, 59 Cal.4th at pp. 383–384; *Williams v. Superior Court* (2015) 237 Cal.App.4th 642, 649; *Perez v. U-Haul Co. of California* (2016) 3 Cal.App.5th 408, 420.) That remains the general rule (which the U.S. Supreme Court described as *Iskanian*'s "secondary rule.") (*Viking River Cruises*, 142 S.Ct. at p. 1923.) Under *Viking River Cruises*, however, in cases involving arbitration agreements covered by the FAA, courts must now give effect to the parties' agreement to split any representative PAGA action into its "individual" and "non-individual" components. (See *infra* at pp. 25–26.)[4]

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[4] Although millions of employees in California are subject to mandatory arbitration agreements, few if any of those agreements currently include express language requiring the employees to split their PAGA claims between court and

Although absent class members in a conventional class action under Code of Civil Procedure § 382 have due process rights in the underlying claim (and thus, for example, a right to class action notice, to opt out of the action, and to object to any settlement), aggrieved employees under PAGA (other than the duly authorized plaintiff) have no such rights. Those other aggrieved employees are entitled to share in the 25% of the civil penalties recovered by the PAGA plaintiff, but they are not parties to the PAGA action and have no legally protected interest in that action. (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 547 fn. 4; *Arias*, 46 Cal.4th at pp. 986–987.) For that reason, although all aggrieved employees (like the LWDA itself) are bound by a PAGA judgment as they would be "bound by a judgment in an action brought by the government" (*Arias*, 46 Cal.4th at p. 986), they remain entitled to pursue their own individualized backpay and other remedies in separate actions under the Labor Code, regardless of how any related PAGA action may be resolved. (*ZB,* 8 Cal.5th at pp. 194–195; *Iskanian*, 59 Cal.4th at pp. 380–382; *Kim*, 9 Cal.5th at p. 89.)

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arbitration (because such splitting was not permitted under any circumstances before *Viking River Cruises*). It is not known how many arbitration agreements that unlawfully prohibit representative PAGA actions include severability clause language that, *properly* construed, would require such claim-or-remedy splitting. (See *infra* Part III [explaining why Uber's Arbitration Provision should *not* be so construed].)

B. Under *Viking River Cruises*, Arbitration Agreements that Waive PAGA Rights are Unenforceable, but the Contracting Parties May Agree to Require Enforcement of Agreements to Arbitrate the "Individual" Portion of a Representative PAGA Claim.

In *Iskanian*, this Court held, *inter alia,* that pre-dispute employment arbitration agreements that prohibit aggrieved employees from pursing representative private attorney general claims under PAGA are void and unenforceable, because they violate California public policy and Civil Code § 3513 (which provides that "a law established for a public reason cannot be contravened by a private agreement"). (59 Cal.4th at p. 383.) The Court further held that this rule (which *Viking River Cruises* termed "*Iskanian*'s principal rule") was not preempted by the FAA. (*Id.* at p. 384; *Viking River Cruises*, 142 S.Ct. at p. 1916.) The Ninth Circuit reached the same result in *Sakkab v. Luxottica Retail N.A., Inc.* (9th Cir. 2015) 803 F.3d 425, 439. Although the U.S. Supreme Court repeatedly denied certiorari over the ensuing years in cases seeking to challenge *Iskanian*'s and *Sakkab*'s prohibition against contractual PAGA waivers, that changed in December 2021, when the Supreme Court granted certiorari in *Viking River Cruises.*

The defendant employer in *Viking River Cruises* had moved to dismiss a PAGA claim brought by one of its employees, Angie Moriana, under an arbitration agreement providing "[t]here will be no right or authority for any dispute to be brought, heard or arbitrated as a … representative or private attorney action …." (See Brief for Petitioner at p. *13, *Viking River*, 142 S.Ct. 1906,

2022 WL 327146.) The trial court and court of appeal denied the employer's motion to compel arbitration, based on the *Iskanian* rule precluding enforcement of contractual waivers of PAGA representative actions. (See 59 Cal.4th at p. 383.)

Viking River made three arguments in support of its FAA-preemption challenge. It contended that: (1) PAGA claims are functionally equivalent to class actions that may be waived in an arbitration agreement as a procedural mechanism that interferes with fundamental attributes of arbitration under *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333; (2) PAGA claims, which by definition are "representative," for that reason also interfere with the fundamental "bilaterality" attribute of arbitration; and (3) PAGA claims may be waived in an arbitration agreement because the FAA requires arbitration agreements to be enforced as written, even if they strip contracting parties of substantive state law rights. (142 S.Ct. at pp. 1919–1922.)

The five-member majority of the Supreme Court rejected all three arguments in Part II of its opinion. (*Ibid.*; Alito J., joined by Breyer, Kagan, Sotomayor, and Gorsuch, JJ.)

The Supreme Court did not end its analysis there, however. In the next part of its opinion the Court concluded that *Iskanian* had also created a "secondary rule," which required PAGA actions to be adjudicated on a unitary basis, with all civil penalties calculated in the same proceeding. (*Id.* at p. 1923.) The Court concluded that the FAA *did* preempt this "secondary" rule, which it described as a rule of mandatory "claim joinder," because the effect of such a rule was to require parties to arbitrate claims

they intended not to arbitrate. Enforcing the state's mandatory claim-joinder rule, the Court concluded, would be inconsistent with the FAA because it "would defeat the ability of parties to control which claims are subject to arbitration." (*Id.* at p. 1924.)

After having thereby resolved the only issues of federal law presented, the Court's majority proceeded to decide two quintessentially state law issues (which, like the challenge to PAGA as a mandatory claim-joinder statute, had not been briefed or argued): (1) whether Viking River's arbitration agreement—which did *not* split plaintiff's PAGA claims between court and arbitration but instead *prohibited* plaintiff from pursuing her claims in either forum—should nonetheless be construed as if it *required* such splitting; and (2) whether, if the agreement were construed as splitting plaintiff's PAGA claims between court and arbitration, plaintiff would lose standing to litigate her "non-individual" representative action claims in court upon being compelled to arbitrate her "individual" representative action claims. Citing *Kim*, the Court concluded that plaintiff *would* lose standing under those circumstances, because "[w]hen 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." (*Id.* at p. 1925, citing *Kim*, 9 Cal.5th at p. 90.)[5]

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[5] All eight Justices to address the merits agreed these were exclusively state law issues. (See *id.* at p. 1925; *id.* at p. 1925 [Sotomayor, J., concurring]; *id.* at p. 1926 [Justice Barrett, joined by Justice Kavanaugh and the Chief Justice, concurring in part and in the judgment].) Justice Thomas expressed no view on the

Justice Sotomayor, who provided the crucial fifth vote, separately concurred to explain that if the majority's characterization of state law were wrong, the state courts or state legislature could correct that non-binding mischaracterization. As she wrote, "Of course, if this Court's understanding of state law is wrong, California courts, in an appropriate case, will have the last word." (*Id.* at p. 1925 [Sotomayor, J., concurring].)

Now that this Court has granted review to decide the state law issue of PAGA standing issue addressed in Part IV of *Viking River Cruises*, it is poised to have that "last word" and thus to provide guidance to the lower courts throughout California that are currently facing this issue. (See *supra* fn. 3.)

C. This Court's Analysis of PAGA Standing Should Be Based on a De Novo Review of the Statutory Language and Legislative Intent, With No Deference to the Supreme Court's Mischaracterization of California Law.

Uber begins by urging this Court not to conduct an independent review of PAGA standing but instead to give "substantial deference" to the U.S. Supreme Court's characterization of the governing California law. (AOB at p. 24.) But it is fundamental that "a State's highest court is the final judicial arbiter of the meaning of state statutes." (*Gurley v. Rhoden* (1975) 421 U.S. 200, 208; see also *Hollingsworth v. Perry* (2013) 570 U.S. 693, 717–718; *Brown v. Ohio* (1977) 432 U.S. 161, 167; *Cole v. Richardson* (1972) 405 U.S. 676, 697; *Green v. Neal's*

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merits because of his long-held position that the FAA "does not apply to proceedings in state courts." (*Id.* at p. 1926 [Thomas, J., dissenting].)

Lessee (1832) 31 U.S. 291, 298.) That is why Justice Sotomayor made clear that she joined Part IV of *Viking River Cruises* only "with [the] understanding" that, because PAGA standing in state court is exclusively a state-law issue, "California courts, in an appropriate case, will have the last word," subject, of course, to any state legislative override. (*Viking River Cruises*, 142 S.Ct. at p. 1925 [Sotomayor, J., concurring].)

Nearly every "deference" case cited by Uber involved a state statute or constitutional provision that paralleled or was based upon its federal law counterpart. (See *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 353; *People v. Teresinski* (1982) 30 Cal.3d 822, 835–836 & fn.9.) While a policy of deference may be appropriate where the U.S. Supreme Court has definitively construed parallel federal language designed to accomplish parallel ends, that is not this case. Even if it were, this Court has rejected any "*mandate* [of] the state courts' blind obedience" to such decisions, and it has not infrequently rejected the U.S. Supreme Court's construction in such instances. (*Raven*, 52 Cal.3d at p. 353, emphasis in original; see also *Reynolds v. Superior Court* (1974) 12 Cal.3d 834, 842 [construction of the state Constitution "is left to this court, informed but untrammelled by the United States Supreme Court's reading of parallel federal provisions"]; *People v. Houston* (1986) 42 Cal.3d 595, 610; *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1137; *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 514.)

PAGA has no federal statutory counterpart. The closest analogue may be the federal False Claims Act, because PAGA

actions are a "type of *qui tam* action." (*Iskanian*, 59 Cal.4th at p. 382.) But the language of those statutes is entirely different, and the Supreme Court in *Viking River Cruises* expressly *rejected* the analogy between PAGA litigation and False Claims Act cases. (142 S.Ct. at p. 1914.) Nor are state and federal statutory standing principles parallel, because Article III has no counterpart in the California Constitution. (See *Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1247–1248 ["Unlike the federal Constitution, our state Constitution has no case or controversy requirement imposing an independent jurisdictional limitation on our standing doctrine."]; *Midpeninsula Citizens for Fair Hous. v. Westwood Invs.* (1990) 221 Cal.App.3d 1377, 1385, *reh'g denied and opinion modified* (July 31, 1990) ["Standing requirements will vary from statute to statute based upon the intent of the Legislature and the purpose for which the particular statute was enacted."].)

Uber argues that deference is nonetheless appropriate because the Supreme Court's analysis of PAGA standing was so persuasive. (AOB at p. 26.) But Justice Alito's terse, three-sentence analysis for the Court majority is skimpy at best and it rests upon an obvious misreading of *Kim*. (See 142 S.Ct. at p. 1925, citing *Kim,* 9 Cal.5th at p. 90.) Surely this Court is best positioned to understand what it did and did not hold in *Kim* and what a plaintiff must demonstrate to establish statutory standing under California's PAGA statute.

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D. Under California Law, an Aggrieved Plaintiff's Standing to Pursue PAGA Relief Does Not Disappear Upon Being Compelled to Pursue the Individual Component of His Representative PAGA Action in Arbitration.

Although the question presented by this case arises in a novel context—because the concept of a split PAGA action did not exist prior to *Viking River Cruises*—well-established principles governing PAGA standing, as set forth in the statutory language and this Court's construction of that language in *Kim*, necessarily control the answer to that question.

The plaintiff in *Kim* sued his employer for back wages under the Labor Code and civil penalties under PAGA, based on alleged overtime pay violations. (9 Cal.5th at p. 82.) After settling his "individual claims" under the Labor Code (without releasing his claims under PAGA), Kim sought to pursue those PAGA claims in court, only to have those claims dismissed on the ground that, because Kim's underlying Labor Code claims had been "completely redressed," he was no longer an "aggrieved employee." (*Id.* at pp. 82–83.)

This Court unanimously reversed, based on its construction of PAGA's statutory language and purpose. (*Id.* at p. 83.) Beginning with the text, the Court explained that "[t]he plain language of section 2699(c) has only two requirements for PAGA standing. The plaintiff must be an aggrieved employee, that is, someone 'who was employed by the alleged violator' and 'against whom one or more of the alleged violations was committed.'" (*Id.* at pp. 83–84.) The Court found those requirements fully satisfied, even though Kim no longer had a live Labor Code claim, because

the "readily ascertainable facts" demonstrate that "Kim was employed by [defendant] Reins and alleged that he personally suffered at least one Labor Code violation on which the PAGA claim is based." (*Id.* at p. 84.) Nothing more was required.

The Court rejected the defendant's argument that Kim's "standing somehow ended" once his Labor Code claims became no longer redressable, finding that argument contrary to the text, purpose, and legislative history of PAGA. As the Court wrote:

> The Legislature defined PAGA standing in terms of violations, not injury. Kim became an aggrieved employee, and had PAGA standing, when one or more Labor Code violations were committed against him. (See § 2699(c).) Settlement did not nullify these violations. The *remedy* for a Labor Code violation, through settlement or other means, is distinct from the *fact* of the violation itself.

(*Ibid.*, emphasis in original.) For PAGA standing, then, all that matters is whether plaintiff can allege, and eventually prove, that he was an employee of the defendant and that one or more Labor Code violations was committed against him, even if the existence of those violations had previously been adjudicated or otherwise resolved.

The Court found ample support for its construction of PAGA in the statute's underlying purpose—to expand Labor Code enforcement by deputizing "aggrieved employees" to pursue existing and newly created civil penalties on behalf of the State LWDA. As the Court explained in *Kim,* while PAGA standing is limited to those who allege such aggrieved-employee status, it does not impose any additional requirement of ongoing or unredressed injury. Any such requirement would be particularly inappropriate under PAGA given that 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 or others. (*Ibid.*, citation omitted.) Any other result would erect procedural "'[h]urdles that [would] impede the effective prosecution of representative PAGA actions [and thus] undermine the Legislature's objectives.' [Citation.]" (*Id.* at p. 87.)

The reference in *Kim* to "general public" standing, which the Supreme Court quoted in *Viking River Cruises,* was to pre-Proposition 64 standing under the Unfair Competition Law (UCL), Bus. & Prof. Code, § 17200. (*Kim*, 9 Cal.5th at p. 90.) When PAGA was enacted in 2003, UCL standing was available to anyone who chose to sue on behalf of the general public, leading to complaints of abuses. (See *Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 178 fn.10.) While Uber is correct that the Legislature did not authorize such untethered "general public" standing in PAGA, neither did it impose the type of strict redressability and other Article III-like requirements that Uber would have this Court impose. Rather, the Legislature in PAGA simply required the plaintiff to allege that she was an employee of the defendant and had been aggrieved by one or more of that defendant's Labor Code violations, thus limiting the universe of potential plaintiffs to those with personal exposure to at least one challenged workplace violation. (*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; compare *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior*

Court (2009) 46 Cal.4th 993 [labor union lacks PAGA standing because it is not itself an "aggrieved employee"].) Nothing more was required, other than compliance with PAGA's statutory notice requirement (§ 2699.3), before the LWDA as the real party in interest could authorize that aggrieved employee to sue for PAGA civil penalties on its behalf.

This same status-based approach to PAGA standing was central to the court of appeal's decision in *Johnson v. Maxim Healthcare Services, Inc.* (2021) 66 Cal.App.5th 924, *reh'g denied* (Aug. 9, 2021), *review denied* (Nov. 10, 2021). The plaintiff in *Johnson* filed a PAGA notice with the LWDA alleging that her employment agreement included an unlawful non-compete clause in violation of Labor Code § 432.5. The plaintiff sought PAGA civil penalties for herself and other aggrieved employees who had signed similar agreements. Even though the plaintiff's own Labor Code claim was time-barred (because she had signed her agreement more than three years earlier), the Court of Appeal held she could still pursue her PAGA claims because she had been "aggrieved" by her employer's imposition and continued maintenance of the unlawful non-compete clause. (*Id.* at p. 929.) Citing *Kim,* the court of appeal held that even without a currently actionable Labor Code claim, "Johnson is an 'aggrieved employee' with standing to pursue her PAGA claim" because she alleged she was employed by defendant and "personally suffered at least one Labor Code violation on which the PAGA claim is based." (*Id.* at p. 930.) The court concluded that "the fact that Johnson's individual claim may be time-barred does not nullify

the alleged Labor Code violations nor strip Johnson of her standing to pursue PAGA remedies." (*Ibid.*)[6]

For the same reason, even if Adolph is required to arbitrate the "individual" portion of his PAGA claim for himself and the LWDA, that should not preclude him from seeking to adjudicate the rest of that claim in court, where he may continue to assert his "aggrieved employee" status unless and until there has been a final and binding determination to the contrary.

Erik Adolph alleges that he was a misclassified employee of Uber and that he personally suffered one or more of the Labor Code violations underlying his claim for PAGA penalties. Those allegations, coupled with the fact that Adolph filed a timely, legally adequate notice with the LWDA and Uber (see § 2699.3) are sufficient to establish his PAGA standing. Even if Adolph

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[6] The Court of Appeal in *Johnson* distinguished *Robinson v. S. Counties Oil Co.* (2020) 53 Cal.App.5th 476, upon which Uber relies. (See *Johnson*, 66 Cal.App.5th at pp. 930–932; AOB at pp. 37–38.) The plaintiff in *Robinson* was a former employee who brought a claim for meal and rest break violations. (53 Cal.App.5th at p. 480.) Those claims were settled in a different PAGA case brought by a different plaintiff, which bound Robinson (and the LWDA). (*Id.* at p. 482.) Robinson then attempted to amend his complaint to bring a PAGA claim for post-settlement violations only. Because Robinson's own employment had terminated before any of those violations had occurred, however, he could neither allege nor prove that he had been "aggrieved" by the new violations. Consequently, Robinson lacked standing to pursue a PAGA claim based on those post-termination violations. (*Id.* at p. 484.) In sharp contrast, Adolph (like the plaintiff in *Johnson*) alleged he was personally aggrieved by one or more of the violations that he suffered during the limitations period applicable to his PAGA claim. *Robinson* is thus readily distinguishable.

were required to arbitrate a small portion of his representative PAGA claim for civil remedies (with 75% of those penalties based on Labor Code violations he personally suffered going to the LWDA), the only consequence would be that he could not then seek those same penalties when adjudicating the remainder of his representative PAGA claim in court. It certainly does not mean he was never "aggrieved" by the Labor Code violations giving rise to his PAGA claims. As this Court concluded in *Kim*, what matters for purposes of PAGA standing is the *fact* of the violation, not the continued availability of a personal remedy. (See *Kim*, 9 Cal.5th at p. 84.)

II. Uber's Interpretation of PAGA Standing Is Contrary to the Statutory Language and Inconsistent with its Purpose.

Uber does not contend that *Kim* was wrongly decided (and it does not mention *Johnson* at all). Instead, Uber seeks to distinguish *Kim* factually, on the ground that it involved a plaintiff who could no longer pursue his underlying Labor Code claim, while in this case plaintiff Adolph, once compelled to "individual" arbitration, can (according to Uber) no longer pursue in court his claim to be an "aggrieved employee." But Uber never explains *why* that should be, and there is no logical, let alone textual or contextual, reason why, even if Adolph is required to prove his aggrieved-employee status in arbitration in the first instance, he would thereafter be precluded from proceeding as an aggrieved-employee in court.

The absurdity of Uber's position is demonstrated by the scenario in which a plaintiff pursues her claim in arbitration and

prevails, thus establishing her "aggrieved employee" status. Under Uber's construction, the plaintiff in that common scenario would be barred from pursuing the remaining civil penalties available under PAGA, despite the contract language authorizing her to seek those remedies in court, even if the trial judge confirms the arbitration award in plaintiff's favor. That makes no sense.

Uber's argument that a PAGA plaintiff loses standing once she can no longer pursue a personal remedy, even if her aggrieved-employee status was adjudicated in her favor, would create a host of other anomalies as well. Imagine a case where an employee brings a PAGA claim in court based upon a series of Labor Code violations, some committed against her and some against others. (See, e.g., *Huff*, 23 Cal.App.5th at pp. 750–751.) Under Uber's approach, if the plaintiff seeks and obtains summary adjudication of the violations that only affected her, she would lose her statutory standing to pursue statutory remedies for those Labor Code violations committed against others. Similarly, if that plaintiff were to prevail at trial as to violations committed against her and lose as to violations committed only against others, she would have no standing to appeal the trial court's adverse ruling as to those other violations. These results—which would be the inevitable consequence if Uber's position were accepted—would effect a dramatic transformation of PAGA and significantly undercut its goal of encouraging heightened Labor Code enforcement throughout the State.

Uber's argument largely rests upon a fiction: that because a PAGA plaintiff has been compelled to pursue some remedies in arbitration and some in court, the two proceedings should be treated for PAGA standing purposes as two entirely separate and independent actions, i.e., as if the plaintiff had voluntarily chosen to file two separate claims, one denominated an "individual" PAGA action and the other denominated a "non-individual" action. But Adolph filed his PAGA claim as a single unitary action and he brought that action in his capacity as an aggrieved employee. The only reason his claims on behalf of the LWDA might potentially be split into two proceedings is because Uber, which initially sought to prohibit Adolph's PAGA claim altogether (pursuant to its contractual PAGA Waiver, 1-CT-142, § 15.3, subd. (v)), is now arguing that its arbitration agreement must be construed as requiring Adolph to pursue some PAGA remedies in court and some in arbitration. But whether the two portions of Adolph's PAGA claim proceed sequentially or in parallel (if arbitrable at all, see *infra* at Part III), they are still two parts of the same statutory claim as to which the LWDA remains the real party in interest. But for the U.S. Supreme Court's application of the FAA-preemption doctrine in *Viking River Cruises,* they would still be adjudicated in the same proceeding because, as this Court has repeatedly held, the California Legislature envisioned that PAGA claims would be unitary. (*Iskanian*, 59 Cal.4th at p. 387; *Kim*, 9 Cal.5th at p. 87.)[7]

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[7] Moreover, because arbitration awards must be judicially confirmed to be enforceable, even if a plaintiff's PAGA claim were

Uber's contention that two parts of a bifurcated PAGA proceeding must be treated as entirely independent rests upon cases interpreting the pre-1971 version of Code of Civil Procedure § 1048, which provided that "[a]n action may be severed … in the discretion of the court, whenever it can be done without prejudice to a substantial right." (*Bodine v. Superior Court* (1962) 209 Cal.App.2d 354, 361; see AOB at p. 32.) According to the principal case Uber now relies upon, severance under that superseded provision had the effect of dividing a single action into two separate actions "with consequent separate judgments." (*Bodine*, 209 Cal.App.2d at p. 361.) Even if this case had arisen under that superseded version of Section 1048, however, the existence of separate judgments has nothing to do with standing or whether a plaintiff may assert the same facts in support of standing in two parts of a severed action. More fundamentally, Uber never explains why an otherwise indivisible PAGA action, pursued in two forums as a result of FAA preemption, should be treated like an action severed under the pre-1971 version of § 1048. (Cf. *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 737 fn. 3 [distinguishing between "severance" under the pre-1971 version of § 1048 and "order[ing] a separate trial" under the current version].) Moreover, the previous version of § 1048 *precluded* severance where the consequence would be to

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split in two for remedial purposes, the two parts could eventually be re-joined in court in conjunction with the parties' motions to confirm or vacate the arbitrator's award.

"prejudice a substantial right," so it would not apply to this case in any event.

The *Bodine* and *Morehart* cases provide no insight into the Legislature's intended meaning of PAGA's statutory standing provisions, including in circumstances where the remedial component of a PAGA claim has been split in two as the result of a defendant's contractual authority under a non-negotiable, boilerplate arbitration agreement, covered by the FAA, to require the plaintiff to pursue relief in two related proceedings rather than one.

Uber's assertion that the Court should treat Adolph's standing as if his initial complaint had pleaded a standalone claim for "non-individual" PAGA remedies is also unhelpful. First, it is a false hypothetical, because Adolph's PAGA complaint sought the full range of statutory civil penalties, as did his September 2019 PAGA notice to the LWDA. Second, even if Adolph had done what Uber suggests—i.e., even if he had filed his PAGA notice and subsequent lawsuit in court as an "aggrieved employee," yet for some inexplicable reason had disclaimed any interest in any statutory penalty attributable to the Labor Code violations he personally suffered—there is no reason why he could not have done so. Just as a PAGA plaintiff may decide for herself (upon proper notice to the LWDA and her employer) how broadly or narrowly to plead *which* other "aggrieved employees" allegedly suffered Labor Code violations at the hands of defendant, so should a PAGA plaintiff be entitled to disclaim any personal interest in recovering a portion of her

“individual” PAGA penalties—although that would not excuse her from having to establish her aggrieved-employee standing like every other PAGA plaintiff.

Even if Uber were correct that an FAA-covered arbitration agreement that required PAGA plaintiffs to pursue some remedies in court and some in arbitration should be treated as two separate and independent actions, Uber’s challenge to Adolph’s standing would still fail. While such an agreement would limit which civil penalties the plaintiff could pursue in which forum, it could not affect plaintiff’s *status* as an aggrieved employee (unless and until a final judgment were entered to the contrary). As *Kim* made clear, it is plaintiff’s status as an aggrieved employee, not the redressability of any injury the plaintiff may have suffered, that determines the availability of PAGA standing. Any other result would decimate, rather than further, PAGA’s statutory purposes.

Uber never explains why a PAGA plaintiff could not assert his aggrieved-employee status in two different forums as a predicate for seeking statutory penalties if the parties’ arbitration agreement required plaintiff to pursue different portions of those penalties in different forums. Given the Legislature’s goal of achieving “maximum compliance with state labor laws”’ (*Arias*, 46 Cal.4th at p. 980), there should be no reason why a PAGA plaintiff could not allege (and if necessary, prove) the required elements of her claim for relief in both forums, as long as she does not seek duplicate penalties.

To the extent Uber's position has even superficial appeal, it is because throughout its brief, Uber quietly substitutes the term "pursuing civil penalties" for the term "aggrieved employee." Nearly every time Uber makes an argument about the unfairness or impropriety of giving a PAGA plaintiff two bites of the remedial apple, it is referring to the reasons a plaintiff should not be permitted to recover the same civil penalties in two different forums (not to a plaintiff's right to assert her aggrieved-employee status in those two forums). Uber's argument thus conflates two separate and distinct concepts: the PAGA plaintiff's right to recover PAGA civil penalties based on Labor Code violations personally suffered (which the plaintiff can only seek once, in arbitration, and cannot recover again in court), and that plaintiff's status as an "aggrieved employee" for the purpose of enforcing civil penalties for violations suffered by others.[8]

But Adolph has *never* contended that he is entitled to double-recover "individual" PAGA penalties in arbitration and court; and nothing in PAGA, either on its face or as construed in *Kim,* requires an aggrieved-employee plaintiff to pursue "individual" remedies in a particular forum as a condition of

[8] See, e.g., AOB at p. 23 ["a PAGA plaintiff lacks standing unless his action seeks civil penalties for violations that he allegedly suffered."]; *id.* at p. 27 ["the indispensable core of PAGA standing is *the request for civil penalties* for violations that allegedly occurred to the plaintiff," emphasis added]; *id.* at p. 30 [PAGA "makes clear that a plaintiff has standing under PAGA only when pursuing civil penalties for violations that he personally suffered,"]; *id.* at p. 35 ["PAGA standing depends on the plaintiff being able to assert an individual claim for PAGA penalties."].

establishing standing to pursue all other statutory remedies in that forum.

Uber's new requirement for PAGA standing does not appear anywhere in the statute. Uber frequently refers to Labor Code § 2699, subdivision (a), which provides, in relevant part, that "any provision of [the Labor Code] that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency … may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees." (§ 2699, subd. (a).) But that language simply states what a PAGA action *is*: a civil action to recover penalties owed to the LWDA, brought on behalf of employees who suffered violations, including the plaintiff. That is precisely the action that Adolph is seeking to prosecute.

Under the statute, *standing* requires a showing that plaintiff is an employee who has been aggrieved. Nothing in PAGA also requires plaintiff to seek a particular form of relief, such as the "individual" portion of the potentially available PAGA penalties. "In construing a statute, we are 'careful not to add requirements to those already supplied by the Legislature.' [Citation.]" (*Kim*, 9 Cal.5th at p. 85.) The only two requirements for PAGA standing are those set forth in the statutory definition of "aggrieved employee." (See *Williams*, 3 Cal.5th at p. 546; *Huff*, 23 Cal.App.5th at 761 ["[S]o long as [plaintiff] was affected by at

least one of the Labor Code violations alleged in the complaint, he can recover penalties for all the violations he proves."].)[9]

Even if PAGA's language were unclear, its purposes would surely foreclose Uber's interpretation. "In construing a statute, [this 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.) Although the Legislature may not have anticipated that FAA preemption would sometimes require dividing the remedial portions of a PAGA claim in two, there can be little question that, if faced with that prospect, the Legislature would not have imposed Uber's additional standing requirement on plaintiffs, because that would effectively eliminate the critical deterrent effect of PAGA civil penalties tied to *all* Labor Code violations committed by the employer, leaving the threat of PAGA enforcement toothless and ineffectual, and enabling employers to eliminate workplace-wide

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[9] Uber quotes two pre-*Iskanian* federal district cases that compelled a PAGA plaintiff to individual arbitration and held that the remainder of the claims could not be brought in court. (AOB at pp. 27–28, quoting *Quevedo v. Macy's, Inc.* (C.D.Cal. 2011) 798 F.Supp.2d 1122, 1141 and *Miguel v. JPMorgan Chase Bank, N.A.* (C.D.Cal., Feb. 5, 2013) 2013 WL 452418 at p. *9.) Not only do those cases have no precedential value, but they rest upon a theory that *Iskanian* and the Supreme Court in *Viking River Cruises* expressly rejected: that PAGA representative actions should be treated like class actions for purposes of applying the FAA-preemption doctrine. (See *Quevedo*, 798 F.Supp.2d at p. 1142; *Miguel*, 2013 WL 452418 at p. *10.) Those cases thus did not address whether, if the plaintiffs had enjoyed a contractual right to pursue their PAGA claims in two forums, they would have had standing to do so.

liability simply by offering the plaintiff her (and the LWDA's) small portion of the available statutory penalty for the violations she personally suffered—a tiny fraction of the civil penalty the Legislature found essential to effectively deter violations of the California Labor Code.

Uber's approach to PAGA standing seeks to impose an extra-statutory requirement of individualized redressability. In order to have PAGA standing, the plaintiff would have to be entitled to collect civil penalties based on her own particular injuries. Although redressability is required for federal Article III standing (see *Lujan v. Defs. of Wildlife* (1992) 504 U.S. 555, 560), Article III does not apply in California state courts and would be particularly inapposite under PAGA, which is a type of *qui tam* action designed to facilitate the state's efforts to achieve greater workplace compliance, not to provide compensation for harms suffered by the aggrieved employees. (*Iskanian*, 59 Cal.4th at p. 382; *ZB,* 8 Cal.5th at pp. 185–186.) "[C]ivil penalties recovered on the state's behalf are intended to 'remediate present violations and deter future ones,' *not to redress employees' injuries*. [Citation.]" (*Kim*, 9 Cal.5th at p. 86, emphasis added.)

Uber argues that a redressability requirement should be incorporated into PAGA because a plaintiff who "could not share in any recovery … would personally lack the financial incentive to litigate vigorously on behalf of the State." (AOB at p. 29.) That is the Legislature's call, not Uber's. As a practical matter, moreover, it is hard to believe that a plaintiff's incentive to vigorously pursue PAGA statutory remedies for workplace-wide

violations would be materially diminished once she proved that those violations had affected her personally, especially given that her individual recovery would only be 25% of the statute's per-pay-period penalty. (Cf. Assem. Com. on Judiciary, Analysis of Sen. Bill No. 796 (2003–2004 Reg. Sess.) June 26, 2003, p. 6 [noting that the "relatively low" penalties and 75%/25% allocation scheme may "discourage any potential plaintiff from bringing suit over minor violations in order to collect a 'bounty' in civil penalties."].)[10]

Uber's arguments, at their core, seek to eliminate PAGA as an effective enforcement tool by eliminating the centerpiece of the statutory scheme—the private right of actions for civil penalties tied to the volume of Labor Code violations committed against an employer's own workforce. Uber began its effort to contract out of PAGA liability by drafting arbitration language that expressly prohibited its delivery drivers from asserting representative PAGA claims in any forum. That contractual prohibition was held unenforceable in *Iskanian*, and that part of *Iskanian* was affirmed in *Viking River Cruises*. Uber now attempts to achieve indirectly what *Iskanian* and *Viking River Cruise* held it could

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[10] Uber relies on *Iskanian* to argue that a "critical aspect of PAGA is that the 'citizen bringing the suit' can recover a 'portion of the penalty.'" (AOB at p. 29.) But that language in *Iskanian* was merely describing the "traditional criteria" for *qui tam* actions, which are echoed in PAGA "except that 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.) Nowhere does *Iskanian* suggest that this portion of the penalty is "critical" to vigorous litigation on behalf of the state, as Uber suggests.

not achieve directly: to strip its delivery drivers of their statutory right to pursue claims for civil penalties based on the total number of Labor Code violations Uber committed, by construing its contract as requiring plaintiff to pursue those penalties in a forum that, according to Uber, lacks authority to adjudicate plaintiff's claim. PAGA should not be construed in a manner that permits that result; and if it did, the same *Iskanian* rule invalidating contract language that expressly waives the right to pursue PAGA claims should also invalidate contract language that, as so construed, has the effect of waiving a PAGA plaintiff's right to pursue the most substantial, "non-individual" component of her (and the LWDA's) statutory claim. Because the Legislature has concluded that "individual" penalties are insufficient to punish and deter Labor Code violations, Uber's construction of its Arbitration provision as indirectly prohibiting all "non-individual" PAGA penalties would impermissibly "frustrate[] the PAGA's objectives" no less than its direct prohibition on all PAGA representative actions would do. (*Iskanian*, 59 Cal.4th at p. 384).[11]

This Court should not construe the PAGA's standing requirement in a manner that would frustrate the Legislature's

[11] By seeking to block Adolph's right to seek "non-individual" PAGA penalties in this manner, Uber's construction of its statute and the doctrine of PAGA standing would also violate its implied covenant of good faith and fair dealing, which "requires each contracting party to refrain from doing anything to injure the right of the other to receive the benefits of the agreement." (*Egan v. Mut. of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 818.)

intent and statutory enforcement purposes by allowing the very waiver of representative PAGA actions that *Iskanian*'s principal rule prohibits. Instead, under a straightforward application of *Kim*, a PAGA plaintiff whose individual claim is compelled to arbitration should be found to remain an "aggrieved employee" for the purposes of PAGA standing.

III. The Court of Appeal Should be Instructed on Remand to Determine, as a Threshold Issue, Whether Uber's Arbitration Provision Requires Plaintiff to Arbitrate the "Individual" Component of His Representative PAGA Action.

Uber assumes throughout its briefing that however this Court decides the narrow standing question, once this case is returned to the lower courts Uber will be able to establish that its Arbitration Provision does in fact require plaintiff to pursue the "individual" component of his PAGA claim in arbitration. (See, e.g., AOB at pp. 8, 9–10, 20, 24, 32, 46).

Uber has gotten ahead of itself. The lower courts have not yet had the opportunity to consider whether Uber's construction of the language in its Arbitration Provision is correct. And the text of that provision, read in light of the applicable contract construction principles, demonstrates that Uber's construction is wrong.

Because this Court limited its review to a single legal issue, plaintiff is not asking the Court to decide that issue of contract construction now. However, for the reasons briefly summarized below, plaintiff disputes Uber's construction and requests that this Court instruct the court of appeal on remand—regardless of how the Court decides the question presented—that its first task

should be to determine whether, properly construed, Uber's Arbitration Provision requires plaintiff Adolph to arbitrate rather than litigate *any* portion of his PAGA claim for relief.[12]

Uber's Arbitration Provision on its face expressly prohibits *all* PAGA representative actions. (1-CT-142, § 15.3, subd. (v).) Uber contends that under *Viking River Cruises,* that sweeping contractual prohibition must be construed as requiring plaintiff Adolph to pursue the "individual" component of his PAGA claim in arbitration and the "non-individual" component of that claim in court (where Uber contends the claim should be dismissed for lack of statutory standing). (AOB at pp. 20–24.) While that was the result reached by the U.S. Supreme Court based on Viking River's agreement, the language in Uber's Arbitration Provision is materially different (although even if it were similar, established principles of contract construction under California law would still require the entirety of plaintiff Adolph's PAGA claim to be adjudicated in court, because that is what the contract language shows the parties intended).[13]

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[12] Several cases pending in California Courts of Appeal raise contract construction issues involving similar language, but the only such appeal to have been decided thus far resulted in an unpublished opinion.

[13] *See DIRECTV, Inc. v. Imburgia* (2015) 577 U.S. 47, 54 ["the interpretation of a contract is ordinarily a matter of state law to which we defer"]; *Valencia v. Smyth* (2010) 185 Cal.App.4th 153, 177 ["'[E]ven when the [FAA] applies, interpretation of the arbitration agreement is governed by state law principles . . . .' "]; see also *Morgan v. Sundance, Inc.* (2022) 142 S.Ct. 1708, 1714 [courts construing arbitration agreements under the FAA must apply generally applicable contract

Here is why.

Uber acknowledges that its Arbitration Provision "contained a waiver of PAGA claims to the fullest extent permissible under law ...." (AOB at p. 13). That prohibition is set forth in the first sentence of the PAGA Waiver, which states:

> To the extent permitted by law, you and Company agree not to bring a representative action on behalf of others under [PAGA], *in any court or in arbitration*.

(1-CT-142, § 15.3, subd. (v), emphasis added; see also 1-CT-140, § 15.3, subd. (i) ["[T]his Arbitration Provision requires all such disputes to be resolved only by an arbitrator through final and binding arbitration on an individual basis only and not by way of … representative action."]; *ZB,* 8 Cal.5th at p. 185 ["All PAGA claims are 'representative' actions in the sense that they are brought on the state's behalf."].) Under *Viking River Cruises,* just as under *Iskanian*, such sweeping prohibitory language is invalid and unenforceable because neither California law nor the FAA permit employers to enforce contractual waivers of the statutory right to assert PAGA claims in all forums. The Supreme Court's majority thus affirmed "*Iskanian*'s principal rule" that contractual waivers of California statutory rights violate Civil Code § 3513 and California public policy and are therefore unenforceable. (See 142 S.Ct. at pp. 1917, 1925.) Consequently, when the court of appeal on remand of this case is asked to construe the language in Uber's Arbitration Provision, its first

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construction principles, without regard to whether they favor or disfavor arbitration].)

conclusion must be that the sweeping contractual PAGA waiver is invalid and unenforceable.[14]

Once the "PAGA Waiver" set forth in the first sentence of Uber's Arbitration Provision is found to be unlawful and unenforceable under the principal *Iskanian* rule, the following paragraph of that agreement explains what happens next:

> If the PAGA Waiver is found to be unenforceable or unlawful for any reason, (1) *the unenforceable provision shall be severed* from this Arbitration Provision; (2) severance of the unenforceable provision shall have no impact whatsoever on the Arbitration Provision or the Parties' attempts to arbitrate any remaining claims on an individual basis pursuant to the Arbitration Provision; and (3) *any representative actions brought under the PAGA must be litigated in a civil court* of competent jurisdiction.

(1-CT-142, § 15.3, subd. (v), emphasis added.) That language (which has no counterpart in the Viking River arbitration agreement but would have to be construed de novo by the court of appeal applying basic principles of California contract law in any event, see *supra* at fn. 13) makes clear that if the PAGA waiver is found to be "unenforceable or unlawful for any reason," it must be "severed." In other words, because Uber's PAGA Waiver violates the principal *Iskanian* rule, it may not be given any force or effect.[15]

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[14] Although none of the PAGA Waiver language in Uber's Arbitration Provision is ambiguous, if there were any ambiguity it would have to be construed against Uber as the drafter. (See *Sandquist v. Lebo Automotive, Inc*. (2016) 1 Cal.5th 233, 248 [uncertainty in arbitration provision must be construed against drafter]; see also *Morgan*, 142 S.Ct. at pp. 1713–1714.)

[15] If the Arbitration Provision did not have a severability clause, that unlawful PAGA Waiver would cause the Arbitration

What happens next is governed by subsection (3) of the Arbitration Provision, which states that if the PAGA Waiver is found unenforceable and severed—i.e., if the prohibition against asserting PAGA claims in any forum is stricken—any PAGA claim asserted by the plaintiff must be litigated in court and cannot be adjudicated in arbitration. In the words of Uber's agreement, that PAGA claim "must be litigated in a civil court of competent jurisdiction." (1-CT-142, § 15.3, subd. (v).)[16]

For these reasons, the court of appeal should be instructed on remand to determine, as a threshold matter, whether *any*

Provision as a whole to be invalidated on unconscionability grounds. (*Securitas Sec. Services USA, Inc. v. Superior Court* (2015) 234 Cal.App.4th 1109, 1123 [arbitration agreement that does not permit severance of unlawful PAGA waiver is unconscionable].)

[16] The final sentence of the Arbitration Provision reinforces this requirement, as it states that the prosecution of plaintiff's PAGA claim *in court* must be stayed if the plaintiff has any other claims that remain to be arbitrated on an individual basis, for example, any individual Labor Code claims for back wages or other relief. (*Ibid.*, emphasis added ["If the PAGA Waiver is found to be unenforceable or unlawful for any reason, the Parties agree that the litigation of any representative PAGA *claims in a civil court of competent jurisdiction* shall be stayed, pending the outcome of any individual claims in arbitration."].) In this case, of course, there would be no basis for such a stay, because plaintiff's SAC asserts only a single PAGA claim and does not seek relief under any other statutory or common law provision. Consequently, even though plaintiff disagrees with Uber's argument in the last section of its brief that any litigation of his PAGA claim should be stayed while the arbitration of his individual claim proceeds (AOB at pp. 40–41), there is no need for the Court to reach that issue, which is also beyond the scope of the single question presented.

component of plaintiff's PAGA claim is arbitrable—a question the lower courts previously answered in the negative, but may revisit post-*Viking River Cruises*, based upon those courts' de novo construction of the applicable contract language. (Cf. *Adolph*, 2022 WL 1073583 at p. *4, [previous decision, construing the plain words of Uber's Arbitration Provision: "The arbitration provision in Uber's agreement with Adolph purports to waive all representative PAGA claims, gives the courts the exclusive jurisdiction to consider whether the waiver is valid, and requires that any PAGA claims be resolved in court and not in arbitration."].)

CONCLUSION

For the reasons stated above, 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, requires plaintiff Adolph to arbitrate any portion of his PAGA claims against defendant Uber.

Dated: October 19, 2022

Respectfully submitted,

Michael Rubin
Robin S. Tholin
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, California 94108

Aashish Y. Desai
Adrianne De Castro
DESAI LAW FIRM, P.C.
3200 Bristol Ave., Suite 650
Costa Mesa, CA 92626

Andrew P. Lee
David Borgen, Of Counsel
Mengfei Sun
GOLDSTEIN, BORGEN,
DARDARIAN & HO
155 Grand Ave., Suite 900
Oakland, CA 94612

By: _*/s/Michael Rubin*__________
Michael Rubin

Attorneys for Plaintiff-Respondent
Erik Adolph

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.520(c)(1) of the California Rules of Court, I hereby certify that this brief is produced using 13-point Century Schoolbook type, including footnotes, and contains 11,444 words, as counted by Microsoft Word, which is within the 14,000 words permitted.

By:_*/s/Michael Rubin*______
Michael Rubin

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	Theane D. Evangelis (243570) Blaine H. Evanson (254338) Bradley J. Hamburger (266916) GIBSON, DUNN & CRUTCHER LLP 333 South Grand Avenue Los Angeles, California 90071 Telephone: (213) 229-7000 Facsimile: (213) 229-7520 TEvangelis@gibsondunn.com	Attorneys for Defendant/Appellant

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Orange County Superior Court
751 W. Santa Ana Blvd.
Santa Ana, CA 92701

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Executed October 19, 2022, at San Francisco, California.

Isabella Kearns

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Supreme Court of California

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Theane Evangelis Gibson Dunn & Crutcher, LLP 243570	tevangelis@gibsondunn.com	e-Serve	10/19/2022 3:52:34 PM
Michael Rubin Altshuler Berzon, LLP 80618	mrubin@altshulerberzon.com	e-Serve	10/19/2022 3:52:34 PM
Sophia Behnia Littler Mendelson, P.C. 289318	sbehnia@littler.com	e-Serve	10/19/2022 3:52:34 PM
File Clerk Goldstein,Borgen,Dardarian, Ho	efile@gbdhlegal.com	e-Serve	10/19/2022 3:52:34 PM
Andrew Lee Goldstein, Borgen, Dardarian & Ho 245903	alee@gbdhlegal.com	e-Serve	10/19/2022 3:52:34 PM
Andrew Spurchise Littler Mendelson PC 245998	aspurchise@littler.com	e-Serve	10/19/2022 3:52:34 PM
Mengfei Sun Goldstein, Borgen, Dardarian & Ho	msun@gbdhlegal.com	e-Serve	10/19/2022 3:52:34 PM

328829			
Aashish Desai Desai Law Firm P.C.	aashish@desai-law.com	e-Serve	10/19/2022 3:52:34 PM
Michael Singer Cohelan Khoury & Singer 115301	msinger@ckslaw.com	e-Serve	10/19/2022 3:52:34 PM
Anthony Ly Littler Mendelson 228883	aly@littler.com	e-Serve	10/19/2022 3:52:34 PM
Aashish Desai Desai Law Firm PC 187394	sonia@desai-law.com	e-Serve	10/19/2022 3:52:34 PM
David Borgen Goldstein Borgen Dardarian & Ho 099354	dborgen@gbdhlegal.com	e-Serve	10/19/2022 3:52:34 PM
Robin Tholin 344845	rtholin@altber.com	e-Serve	10/19/2022 3:52:34 PM

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/s/Michael Rubin

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Rubin, Michael (80618)

Last Name, First Name (PNum)

Altshuler Berzon LLP

Law Firm