No. S274671

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ERIK ADOLPH,

Plaintiff and Respondent,

v.

UBER TECHNOLOGIES, INC.,

Defendant and Appellant.

REPLY BRIEF ON THE MERITS

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 must pursue his individual claim in arbitration, yet insists he has standing to pursue this non-individual action under the Labor Code Private Attorneys General Act. The Supreme Court of the United States expressly rejected this view of PAGA's standing requirement, and this Court should follow the High Court's lead.

Under PAGA's plain text, 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)). The Supreme Court in *Viking River Cruises, Inc. v. Moriana* (2022) 142 S.Ct. 1906 recognized that under these provisions "a plaintiff can maintain non-individual PAGA claims in an action only by virtue of also maintaining an individual claim in that action." (*Id*. at p. 1925.)

Adolph criticizes the Supreme Court for resolving this question and implores this Court to adopt an interpretation of PAGA that the *Viking River* majority rejected and not one justice supported. That would be a substantial ask under any circumstances, given this Court's historical deference to federal-court decisions, even on issues of California law. And it is baseless here, where Adolph's reading contradicts PAGA's text, precedent, and history.

To start, Adolph ignores that subdivision (a) specifically instructs a plaintiff to bring PAGA claims, at least in part, on behalf of himself. He also overlooks that this Court has read

subdivision (c) to require that the plaintiff have "personally suffered at least one Labor Code violation *on which the PAGA claim is based*." (*Kim v. Reins Internat. Cal., Inc.* (2020) 9 Cal.5th 73, 84, italics added.) He seeks to usher in an era of "general public" standing for financially disinterested plaintiffs, even though the legislative record leaves no doubt that the Legislature intentionally rejected such an expansive approach to standing when it enacted PAGA and crafted section 2699's language to avoid private plaintiff abuse.

Nor can Adolph rely on his individual PAGA claim in arbitration to support a novel theory of "dual-forum standing." (Resp. Br., at p. 10.) He has not cited any case suggesting he could fix a standing defect in court by pointing to another proceeding. And his argument runs head first into *Viking River*, which held that the Federal Arbitration Act *requires* that parties be able to sever individual PAGA claims from non-individual ones. Adolph argues that, notwithstanding *Viking River*, it is permissible for him to litigate the same issues relating to purported Labor Code violations he suffered in both arbitration *and* in court, even though forcing Uber to relitigate an issue the parties agreed to arbitrate would violate the FAA. All this confirms that PAGA has "no mechanism" that would "enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding." (*Viking River*, 142 S.Ct. at p. 1925.)

Adolph's interpretation of PAGA is bad law and bad policy. But if there is any merit to his argument that effective deterrence

requires actions by plaintiffs with only a superficial connection to the claims, only the Legislature could rework PAGA standing in that fundamental way. Under the plain language of the statute as it presently stands, this Court should reverse the denial of Uber's petition to compel arbitration as to the individual PAGA claim and remand to the trial court with instructions to dismiss the non-individual PAGA claims for lack of statutory standing.

ARGUMENT

I. The FAA Requires Enforcement of the Parties' Agreement to Arbitrate Individual PAGA Claims.

Viking River established that the FAA preempts the California-law rule against severing individual PAGA claims and requires that agreements to arbitrate such claims be enforced. The parties have agreed to do so here, and Adolph has waived any argument to the contrary.

A. Adolph Has Waived Any Challenge to the Arbitrability of His Individual PAGA Claim.

Adolph argues that the Arbitration Provision does not require arbitration of "*any* component of [his] PAGA claim." (Resp. Br., at pp. 50–51.) But he waived this issue by failing to raise it in response to Uber's petition for review and supplemental letter brief. (See, e.g., *American Nurses Assn. v. Torlakson* (2013) 57 Cal.4th 570, 591 [party forfeited an issue "by failing to file, in response to the petition for review, an answer raising it"]; *People v. Villa* (2009) 45 Cal.4th 1063, 1076 [same].)

Before now, Adolph assured the Court that this case was an appropriate vehicle to resolve "a pure question of *statutory* interpretation" on "how to apply PAGA's standing principles post-

Viking River." (Pl.'s Supp. Letter Br., at p. 4, italics added.) He requested that this Court "limit[]" its review to the "critically important and exclusively state-law issue of PAGA standing." (*Id.* at p. 2.) And he urged the Court to "expedite[] briefing" to provide "critical guidance" for lower courts "fac[ing] this *statutory construction* issue." (*Id.* at p. 5, italics added.) Time was of the essence, he warned, given "the hundreds of similar PAGA arbitration cases now flooding the California judicial system" in the wake of *Viking River*. (*Id.* at p. 1; see also *id.* at p. 2 [describing how the "judicial system is being inundated with new and renewed post-*Viking River* petitions to compel arbitration"]; Pl.'s Appl. for Calendar Preference at p. 7 ["California lower courts have recently been flooded with motions seeking to apply *Viking* [*River*] to the PAGA claims of California plaintiffs … ."].)

But after the Court granted review on this "pure question" of statutory standing (Pl.'s Supp. Letter Br., at p. 4), Adolph changed course, arguing that the case actually involves a "[t]hreshold [i]ssue" of "*contract* construction" as to whether the parties agreed to arbitrate "*any* portion of his PAGA claim." (Resp. Br., at pp. 46–47, first italics added.) And contrary to his earlier representation, Adolph suggests the PAGA-standing question is "narrow" and implicates "few if any" cases—in fact, not even this one. (*Id.* at pp. 22, fn. 4, 47). Adolph insists that neither the "arbitration agreement in *Viking River*" nor the one here requires arbitration of individual PAGA claims, notwithstanding that five Justices of the U.S. Supreme Court held otherwise. (*Id.* at p. 11, fn. 2.)

The Court should not reward such bait-and-switch tactics. Because Adolph never raised the contract-construction issue in response to Uber's petition—but rather asked the Court to limit its review to the question whether a plaintiff may pursue others' PAGA claims when he must arbitrate his individual PAGA claim—he has waived the right to contest the arbitrability of his individual PAGA claim. (See *Title Ins. & Trust Co. v. County of Riverside* (1989) 48 Cal.3d 84, 98 [declining to consider argument that plaintiff "not only failed to raise … in its answer" to defendants' petition for review, but "specifically renounced[] as a question before this court"].)

Nor may Adolph belatedly request that the Court of Appeal decide this issue on remand only *after* this Court issues what may be an impermissible advisory opinion on the standing question he urged the Court to review (but now suggests is *not even presented* in this case). As Adolph recognizes, whether the Arbitration Provision severs his individual PAGA claim is a "threshold matter" to whether he has standing to bring standalone non-individual PAGA claims. (Resp. Br., at p. 51.) If the answer to the first question is "no"—as Adolph now contends—then the second question never arises. This Court, however, "do[es] not issue advisory opinions indicating what the law would be upon a hypothetical state of facts." (*People v. Slayton* (2001) 26 Cal.4th 1076, 1084, cleaned up; see also, e.g., *Brennon B. v. Superior Court* (2022) 13 Cal.5th 662, 693 ["The rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court."], citation omitted.) That is true

"even … when an issue involves significant public interest." (*City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 69.)

Having sought immediate review in this Court only of the standing question, Adolph therefore may not reserve the predicate issue of contract interpretation for remand. Rather, his challenge to the arbitrability of his individual PAGA claim is waived here and in the courts below. (See *People v. Jordan* (2018) 21 Cal.App.5th 1136, 1143 ["Waiver precludes successive appeals based on issues ripe for consideration in the prior appeal and not brought in that proceeding."].) If the Court finds otherwise, it should transfer the entire case to the Court of Appeal to construe the Arbitration Provision in the first instance—as Uber initially proposed. (See Def.'s Supp. Letter Br., at p. 1.)

B. The Parties Agreed to Arbitrate Individual PAGA Claims.

Adolph's late-breaking contract argument is also wrong. The Arbitration Provision here is on all fours with the one in *Viking River* and likewise requires that Adolph's individual PAGA claim be sent to arbitration.

There, as here, the parties agreed "to arbitrate any dispute arising out of [the plaintiff's] employment" and to waive the right to bring a "representative PAGA action" "in any arbitral proceeding." (*Viking River*, 142 S.Ct. at p. 1916.) While the Supreme Court concluded that the waiver "was invalid if construed as a wholesale waiver of PAGA claims" (*id.* at p. 1924), the agreement contained a severability clause (1) requiring

"enforcement of any 'portion' of the waiver that remained valid" (*id.* at p. 1917); and (2) directing that the PAGA action otherwise "be litigated in court" (*id.* at p. 1916). Because the FAA allows parties to split a PAGA action in this manner, the Court concluded that Viking River was "entitled to compel arbitration of Moriana's individual claim." (*Id.* at p. 1925.)

As in *Viking River*, there is no doubt that the parties agreed to arbitrate any PAGA claim on an individual basis. The Arbitration Provision plainly requires Adolph "to resolve any claim that [he] may have against … Uber on an individual basis" (6-CT-1570, § 15.3), including "any disputes arising out of or related to th[e] Agreement" or his "relationship with … Uber" (6-CT-1572, § 15.3(i); see also, e.g., *ibid.* ["[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 court or jury trial, or by way of class, collective, or representative action."]; *ibid.* ["This Arbitration Provision is intended to require arbitration of every claim or dispute that lawfully can be arbitrated … ."]). Determining whether Adolph was an independent contractor or an employee clearly relates to the Agreement and his relationship with Uber.

Though the Arbitration Provision purports to waive PAGA claims "in any court or in arbitration," it does so only "[t]o the extent permitted by law." (6-CT-1574, § 15.3(v).) It also includes the proviso that severance of the unenforceable waiver "shall have no impact whatsoever on the Arbitration Provision or the Parties' attempts to arbitrate any remaining claims on an

individual basis." (*Ibid.*, italics added.) And just like the severability clause in *Viking River*, the Arbitration Provision clarifies that "any *representative* actions brought under the PAGA must be litigated in a civil court of competent jurisdiction." (*Ibid.*, italics added; see also 6-CT-1573, § 15.3(ii).) So the same outcome should obtain: Adolph's individual PAGA claim should be arbitrated, while his non-individual PAGA claims should remain in court (where they fail for lack of statutory standing).

Adolph insists that all PAGA claims must be litigated in court because all such claims "are 'representative' actions in the sense that they are brought on the state's behalf." (Resp. Br., at pp. 49, 51, citation omitted.) But *Viking River* rejected this precise reasoning, concluding that PAGA claims are not exempt from arbitration under the FAA even if they are "in some sense also a dispute between an employer and the State." (142 S.Ct. at p. 1919, fn. 4.) Given the agreement's severability clause, the U.S. Supreme Court refused to construe the waiver of "'representative' PAGA claims" as an invalid "wholesale waiver," but rather enforced the provision "insofar as it mandated arbitration of Moriana's individual PAGA claim." (*Id.* at pp. 1924–1925.) This case is no different. Because the parties agreed "to arbitrate any remaining claims on an *individual* basis" should the PAGA waiver be deemed unenforceable (6-CT-1574, § 15.3(v), italics added), the Court should compel Adolph's individual PAGA claim to arbitration.

The presumption in favor of arbitration clinches the interpretation in Uber's favor. Because the FAA applies to PAGA

claims under *Viking River*, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration" where, as here, the plaintiff challenges "the construction of the contract language itself." (*Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24–25.) And where, as here, an arbitration provision "broad[ly]" encompasses any dispute relating to the parties' agreement, "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." (*AT&T Technologies, Inc. v. Communications Workers of America* (1986) 475 U.S. 643, 650, citation omitted.) The rule that courts "resolve all doubts in favor of arbitration" is the same "under state law as under federal law," as Adolph's own cited authority teaches. (*Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 247.)

The California rule that ambiguities should be construed against the drafter must bow to the federal policy favoring arbitration. (See *Lamps Plus, Inc. v. Varela* (2019) 139 S.Ct. 1407, 1418–1419 [FAA preempts the state doctrine of *contra proferentem*]; *Huffman v. Hilltop Cos., LLC* (6th Cir. 2014) 747 F.3d 391, 396–397 ["where ambiguity in agreements involving arbitration exists, … the strong presumption in favor of arbitration applies instead" of "the *contra proferent[e]m* doctrine"]; *Erickson v. Aetna Health Plans of California, Inc.* (1999) 71 Cal.App.4th 646, 656 ["where an FAA contract is involved, ambiguities in an arbitration clause are to be resolved in favor of arbitration, notwithstanding the California rule that a

contract is construed most strongly against the drafter"], cleaned up.)

Accordingly, to the extent the severability clause is ambiguous, the FAA requires the Court to construe it in favor of arbitration and compel Adolph's individual PAGA claim thereto.

II. To Have Standing Under PAGA, a Plaintiff Must Be Able to Assert in Court at Least One Violation He Allegedly Suffered.

PAGA sets forth two explicit textual limits on who can raise what claims on behalf of the State. First, a PAGA claim must be "brought by an aggrieved employee on behalf of himself or herself and other current or former employees." (Lab. Code, § 2699, subd. (a).) Second, the plaintiff must be a "person who was employed by the alleged violator and against whom one or more of the alleged violations was committed" to count as an "aggrieved employee" for purposes of subdivision (a). (*Id.*, subd. (c).)

Adolph's non-individual claims—the only claims that can potentially remain in court—satisfy neither requirement. They are brought only on behalf of other employees, not on behalf of himself. And they concern only violations allegedly committed against other employees, not one or more violations allegedly committed against him. Under the plain text of subdivisions (a) and (c), Adolph thus lacks statutory standing twice over—as the U.S. Supreme Court correctly held in *Viking River*. Adolph's arguments to the contrary would create a form of "general public" standing that the Legislature has refused to adopt for PAGA, and

would put this Court's PAGA jurisprudence once again on a collision course with the FAA.

A. Adolph Does Not Bring the Non-individual Claims "on Behalf of Himself."

Adolph's non-individual PAGA claims fall short of the statutory prerequisite for standing under subdivision (a). As the text of the statute makes clear, a PAGA claim must be "brought" not only "by an aggrieved employee," but also "*on behalf of himself or herself* and other current or former employees." (Lab. Code, § 2699, subd. (a), italics added.) Or as this Court has put it, "an 'aggrieved employee' may bring a civil action *personally* and on behalf of other current or former employees to recover civil penalties for Labor Code violations." (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 980, italics added.)

Adolph has little to say about subdivision (a). The text of PAGA's lead provision makes its first appearance three-quarters of the way into his brief. (Resp. Br., at p. 42.) And once he gets around to addressing this statutory provision, he argues that subdivision (a) is not part of the standing analysis at all. (See *ibid.*) Yet this Court has cited subdivision (a) as the source of PAGA's standing requirement: "Not every private citizen can serve as the state's representative. Only an *aggrieved employee* has PAGA standing." (*Kim*, 9 Cal.5th at p. 81, original italics, citing Lab. Code, § 2699, subd. (a).) By limiting standing to (i) aggrieved employees (ii) who seek civil penalties on behalf of themselves and other employees, subdivision (a) establishes PAGA's "express standing requirements." (*Amalgamated Transit*

Union, Local 1756, AFL-CIO v. Superior Court (2009) 46 Cal.4th 993, 1005.)

Adolph next attempts to excise half of subdivision (a). Although a plaintiff must bring a PAGA claim "on behalf of himself or herself and other current or former employees" (Lab. Code, § 2699, subd. (a)), Adolph contends that PAGA does not require plaintiffs to seek "the 'individual' portion of the potentially available PAGA penalties" (Resp. Br., at p. 42). But subdivision (a) expressly links the delegation of the State's PAGA claim to the request for civil penalties for violations suffered by the plaintiff: Labor Code civil penalties "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." (Lab. Code, § 2699, subd. (a).) Here, the non-individual claims do not seek to recover civil penalties on behalf of Adolph.

Even Adolph cannot muster an argument that he brings the non-individual claims "on behalf of himself." He instead paraphrases subdivision (a) as defining a PAGA action to be "a civil action to recover penalties owed to the LWDA, brought on behalf of employees who suffered violations, including the plaintiff," adding that this "is precisely the action that Adolph is seeking to prosecute." (Resp. Br., at p. 42.) But it is not clear if Adolph believes that the plaintiff *must* (rather than *may*) be one of the employees who suffered the alleged violations supporting the request for civil penalties. The answer is that he must.

Under PAGA, the plaintiff "*is* a member of the group being represented." (*Arias*, 46 Cal.4th at p. 987, fn. 7, original italics.) Subdivision (a) makes this requirement clear by specifying that the plaintiff can "bring a civil action 'on behalf of himself or herself *and* other current or former employees,' not on behalf of himself *or* other employees." (*Quevedo v. Macy's, Inc.* (C.D.Cal. 2011) 798 F.Supp.2d 1122, 1141, original italics, quoting Lab. Code, § 2699, subd. (a).) While the plaintiff may sue "*also* on behalf of other employees," suing on behalf of oneself is a non-negotiable requirement. (*Tanguilig v. Bloomingdale's, Inc.* (2016) 5 Cal.App.5th 665, 678, italics added.) Adolph cannot seek penalties only on behalf of the State and other employees. (See *Quevedo*, 798 F.Supp.2d at p. 1141; *Miguel v. JPMorgan Chase Bank, N.A.* (C.D.Cal., Feb. 5, 2013) 2013 WL 452418, at *10.) But that is exactly what he wants to do: He concedes that he would not be able to recover a single cent on the non-individual claims. (Resp. Br., at p. 44; see *post*, at pp. 29–30.)

If Adolph does not seek a portion of the penalty in court, and if the violations at issue concern only other employees, the PAGA action is in no sense brought *on behalf of himself*. This Court rejected this sort of only-other-employees claim in *Amalgamated Transit Union* as running afoul of PAGA's "express standing requirements." (46 Cal.4th at p. 1005.) Because the union there was not the defendant's employee and did not "bring an action on behalf of himself or herself," but solely on "behalf of its members," subdivisions (a) and (c) precluded the claims. (*Id.* at pp. 1004–1005.)

This Court understood PAGA the same way in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348. A plaintiff can represent the State in "seeking penalties for Labor Code violations as to only one aggrieved employee—*the plaintiff bringing the action*—or as to other employees as well." (*Id.* at p. 387, italics added and quotation marks omitted.) Under the statutory text and this Court's cases, the baseline for statutory standing is a request for civil penalties on behalf of the plaintiff.

For the statute to support Adolph, it would have to be a *different* statute—one that amends subdivision (a) to authorize claims "brought by an aggrieved employee on behalf of ~~himself or herself and~~ other current or former employees." But this Court "may not broaden or narrow the scope of the provision by reading into it language that does not appear in it or reading out of it language that does." (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 545.) Only the Legislature can delete the language ignored by Adolph. Unless it does, plaintiffs lack statutory standing to pursue non-individual PAGA claims.

B. The Non-individual PAGA Claims Do Not Include "One or More" Alleged Violations Committed Against Adolph.

Adolph also seeks to rewrite subdivision (c) to expand statutory standing under PAGA well beyond its current scope. PAGA defines aggrieved employees by reference to two characteristics. The first is a relationship with the defendant: The plaintiff must be or have been "employed by the alleged violator." (Lab. Code, § 2699, subd. (c).) The second is a relationship with the claim: The plaintiff must be a person

"against whom one or more of the alleged violations was committed." (*Ibid.*) Uber maintains that it never employed Adolph, and the claim should and will fail on that basis alone. (Op. Br., at p. 36.) But for purposes of the issue presented here, Adolph lacks standing to bring non-individual PAGA claims for another fundamental reason—the claims he can pursue in court do not involve one or more alleged violations committed against him.

Subdivision (c) requires the plaintiff to have suffered "one or more of the alleged violations." (Lab. Code, § 2699, subd. (c).) In Uber's view, the term "alleged violations" refers to the violations that support the plaintiff's request for civil penalties under subdivision (a). (Op. Br., at pp. 27–30.) The non-individual PAGA claims here flunk that requirement. Adolph cannot allege any personally sustained violations because his individual PAGA claim must be severed and compelled to arbitration. (*Id.* at pp. 31–32.)

Adolph seeks to satisfy this requirement in a bizarre way. According to Adolph, he can allege a personally experienced violation solely for purposes of standing. (Resp. Br., at p. 40.) That allegation, he continues, would unlock the door to bring non-individual PAGA claims against Uber that concern only violations suffered by others—i.e., the violation that is the hook for standing disappears from the case. (*Id.* at pp. 40–41.) But Adolph does not identify any other statutory-standing requirement that works in this unusual way.

Kim shows why Adolph is wrong. Adolph describes the "aggrieved employee" requirement as a "status" 15 times in his brief. (Resp. Br., at pp. 12–13, 31, 33–36, 40–41.) But the word "status" never appears in *Kim*—the purported source of Adolph's "status-based approach to PAGA standing." (*Id.* at p. 33.) On the contrary, *Kim* makes clear that standing is claim specific, not a permanent, immutable status. PAGA defines "standing in terms of violations, not injury." (*Kim*, 9 Cal.5th at p. 84.) For this reason, a plaintiff must have "personally suffered at least one Labor Code violation *on which the PAGA claim is based*." (*Ibid.*, italics added.) The claim in *Kim* was based on a personally suffered violation because the plaintiff had "specifically carved" the whole PAGA claim—including his request for civil penalties for violations he suffered—"out of the settlement" of his Labor Code damages claims with his employer. (*Id.* at p. 92, fn. 7, italics omitted.) And so, the Court reasoned, the plaintiff's settlement of his individual claims for damages did not deprive him of standing to assert a PAGA claim based on a personally sustained violation. (*Id.* at p. 80.)

Robinson v. Southern Counties Oil Company (2020) 53 Cal.App.5th 476 likewise debunks Adolph's novel "status-based" theory of PAGA standing. There, the plaintiff alleged he was an aggrieved employee who had suffered various Labor Code violations. (See *id.* at p. 479.) But that was not enough to invest him with standing to bring a PAGA claim for all time. (See *id.* at p. 484 ["A change in facts or law can deprive a plaintiff of standing."].) As the Court of Appeal explained, a settlement in

another case precluded the plaintiff from pursuing penalties before a certain date, and the only PAGA claims that remained in litigation "ar[ose] exclusively after he was … employed." (*Id.* at pp. 483–484.) Because the plaintiff "was not affected by any of the alleged violations" remaining in court, he lacked "standing to pursue claims based solely on violations alleged to have occurred" to others. (*Id.* at pp. 484–485.) That same reasoning applies here because, after the individual claim is compelled to arbitration, the only PAGA claims left in court will be based on violations that others allegedly sustained. (See Op. Br., at p. 38.) While Adolph may have once been able to prove that he "personally suffered at least one Labor Code violation on which the PAGA claim is based" (*Kim*, 9 Cal.5th at p. 84), he no longer may do so in court and thus lacks standing to pursue claims affecting only other drivers.

Johnson v. Maxim Healthcare Services, Inc. (2021) 66 Cal.App.5th 924 is not to the contrary. The court held that the argument that the statute of limitations barred the plaintiff's individual PAGA claim would not strip her of standing to bring non-individual claims. (*Id.* at p. 930.) That is unsurprising. "[T]he procedural requirement of standing … has nothing to do with the bar of the statute of limitations." (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1279; see also, e.g., *Quarry v. Doe I* (2012) 53 Cal.4th 945, 977 [distinguishing between "standing" and "a statute of limitations"]; *Borissoff v. Taylor & Faust* (2004) 33 Cal.4th 523, 528–529 & fn. 3 [finding that plaintiff had standing, while remanding for determination

whether action was time-barred].) While "[s]tanding is a threshold issue necessary to maintain a cause of action" and on which "the plaintiff bears the burden of proof" (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 327; *Mendoza v. JPMorgan Chase Bank, N.A.* (2016) 6 Cal.App.5th 802, 810), the "statute of limitations operates … as an affirmative defense" (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 396).

All *Johnson* held was that a plaintiff has standing to assert non-individual PAGA claims even though his individual claim may ultimately prove meritless (there, as untimely). Whether that is right or wrong, it is irrelevant to the question presented here and in *Robinson*, which is whether a plaintiff may pursue penalties solely on behalf of others when he cannot allege any personally sustained violations asserted in the action.

For this reason, the supposed "anomalies" of PAGA standing are easily reconciled. (Resp. Br., at p. 36.) Contrary to Adolph's mistaken caricature of Uber's position, a plaintiff who prevails on summary adjudication or at trial as to personally sustained violations would have standing to seek penalties on behalf of others *in that same proceeding*. But what a plaintiff cannot do is bring a PAGA action "based solely on violations alleged to have occurred" to others. (*Robinson*, 53 Cal.App.5th at pp. 484–485.) To deem such a plaintiff to have standing would be to effectively eliminate PAGA's standing requirement.

C. The U.S. Supreme Court Correctly Interpreted PAGA.

The Supreme Court in *Viking River* held what Uber argues here: that "a plaintiff can maintain non-individual PAGA claims in an action only by virtue of also maintaining an individual claim in that action." (142 S.Ct. at p. 1925.) As the Court explained, "[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." (*Ibid.*) The "correct course is to dismiss [the] remaining claims" after compelling the individual claim to arbitration. (*Ibid.*)

Adolph derides *Viking River*'s reasoning as "skimpy" and a "terse three-sentence analysis" of statutory standing. (Resp. Br., at p. 29.) But straightforward questions have straightforward answers. The Supreme Court needed only to read the text of PAGA and this Court's case law construing it to reach the correct result. (See 142 S.Ct. at p. 1925, citing Lab. Code § 2699, subds. (a), (c), and *Kim*, 9 Cal.5th at p. 90.) This reasonable interpretation of PAGA's standing requirement, by a majority of the U.S. Supreme Court, deserves substantial deference.

Adolph nonetheless appears skeptical that the nation's high court is capable of interpreting a California statute that lacks a "federal statutory counterpart." (Resp. Br., at p. 28.) But there is no support for his crabbed view that deference applies only when a federal court interprets federal law and a California court thereafter decides whether to incorporate that reading into a

parallel "state statute or constitutional provision." (*Ibid.*) In *Garcia v. Wetzel* (1984) 159 Cal.App.3d 1093, for example, the Court of Appeal deferred to the Ninth Circuit's "persuasive" and "compelling" interpretation of Civil Code section 1916.1 even though federal law contains no parallel usury exception for real estate brokers. (*Id.* at pp. 1097–1098.)

What matters is that the Supreme Court interpreted and applied the very provision at issue in this case to the exact scenario Adolph faces. The considered judgment of Justices Breyer, Alito, Sotomayor, Kagan, and Gorsuch should be persuasive on this point. Indeed, *not one justice* voiced a contrary view. As Adolph sees it, a majority of the justices unnecessarily reached out to decide a question of California law, only to get it wrong. That is not how California courts typically treat their federal judicial peers, even when federal law has no direct analog to a California statute. (See, e.g., *McCann v. Lucky Money, Inc.* (2005) 129 Cal.App.4th 1382 [relying on "federal court opinions for their cogent reasoning and persuasive value" in interpreting Financial Code section 1815].) In fact, this Court even defers to "federal circuit and district court decisions" that "predict[] [how] this court would eventually" decide an issue. (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 69.)

Nor did *Viking River*'s interpretation come out of left field. In *Quevedo* and *Miguel*, federal district courts held that subdivision (a) does not allow plaintiffs to litigate PAGA claims in court only on behalf of others after the individual claim has been compelled to arbitration. (See *Quevedo*, 798 F.Supp.2d at

p. 1141; *Miguel*, 2013 WL 452418, at p. *10.) These decisions reinforce that deference is due to the Supreme Court's plain-meaning interpretation of PAGA.

Adolph responds that this Court should ignore *Quevedo* and *Miguel* because they analogized representative PAGA actions to class actions—a comparison not accepted in one respect by the Supreme Court. (Resp. Br., at p. 43, fn. 9; see *Viking River*, 142 S.Ct. at p. 1922 [PAGA is not merely a procedural vehicle for aggregating claims].) But that is no response at all. Uber relied on the California-law interpretation in *Quevedo* and *Miguel*—not on the federal-law preemption discussion—to reinforce that deference is due to the Supreme Court's plain-meaning interpretation of PAGA. (Op. Br., at pp. 26–28.)

Regardless, *Quevedo* and *Miguel* reached the right conclusion on FAA preemption for largely the right reasons. Both held that California law could not require the parties to *arbitrate* non-individual PAGA claims because arbitration is "poorly suited to the higher stakes of a collective PAGA action," just like a class action. (*Quevedo*, 798 F.Supp.2d at p. 1142; *accord Miguel*, 2013 WL 452418, at *10 [parties "would sacrifice the advantages achieved by arbitration"].) *Viking River* likewise held that "'[a]rbitration is poorly suited to the higher stakes' of massive-scale disputes" like non-individual PAGA claims. (142 S.Ct. at p. 1924, quoting *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 350.)

Viking River's interpretation of California law also warrants deference because it is correct. As already discussed,

its holding honored the textual limits in subdivisions (a) and (c). And as explained next, the Supreme Court correctly observed that a non-individual claim embodies the same "general public" standing that the Legislature specifically repudiated in enacting PAGA. (142 S.Ct. at p. 1925.) The statute's text, precedent, and history thus offer "persuasive reasons" to stand by *Viking River*—and no good reason to depart from the U.S. Supreme Court's interpretation. (*People v. Teresinski* (1982) 30 Cal.3d 822, 836.)

D. Adolph's Interpretation of PAGA Cannot Be Reconciled with the Legislature's Intent to Foreclose "General Public" Standing.

The statute's legislative history shows that the Legislature consciously rejected the concept of "general public" standing for PAGA actions. PAGA standing instead depends on a request for civil penalties for violations that allegedly occurred to the plaintiff—a request that, under *Viking River*, Adolph can make only in arbitration, not in court.

Adolph concedes that he cannot recover on behalf of himself any portion of the penalties for the non-individual PAGA claims. (Resp. Br., at p. 44.) The reason is that PAGA allocates 75 percent of civil penalties to the State and 25 percent to "the aggrieved employees." (Lab. Code, § 2699, subd. (i).) Because Adolph has not been aggrieved by any of the violations permissibly brought in court, he will not share in any potential recovery for violations allegedly occurring only to other employees. (See Op. Br., at p. 29.) This creates a mismatch between subdivision (i) and the non-individual claims, which only confirms that Adolph is not aggrieved within the meaning of

subdivisions (a) and (c). As this Court explained in *Kim*, "aggrieved employee" is a "term of art" with a consistent meaning across PAGA. (9 Cal.5th at p. 87.)

Adolph nevertheless insists that the absence of any financial interest in the case is no big deal. By his account, PAGA's 25%-75% split of civil penalties is already so low that plaintiffs who cannot recover *anything* will have no less of an "incentive to vigorously pursue PAGA statutory remedies for workplace-wide violations." (Resp. Br., at pp. 44–45.) This cavalier dismissal of PAGA penalties ignores the facts—after all, a 25% share in $200 penalties that could accrue every pay period adds up quickly. (Lab. Code, § 2699, subd. (f)(2).)

But putting that aside, PAGA exists only because the Legislature made its own judgment that "prosecution by a *financially interested* private citizen" would help fill the enforcement gap for Labor Code violations. (*Iskanian*, 59 Cal.4th at p. 390, italics added.) The Legislature did not conclude that lawsuits by financially uninterested plaintiffs were worth the risk of binding the State to indifferent representation on its claims. (See *Arias*, 46 Cal.4th at p. 986.) Adolph is in no position to second guess PAGA's model of statutory standing on the theory that the Legislature chose the wrong split or size for civil penalties.

Although Adolph may be willing to litigate the non-individual PAGA claims with no chance of recovery, there is a term for people who want to sue about violations experienced only by others: "general public" standing. The legislative history

and this Court's precedent leave no doubt about the "apparent" legislative decision to squelch "the 'general public' standing originally allowed under the UCL." (*Kim*, 9 Cal.5th at p. 90, cleaned up; see Op. Br., at pp. 29–30 [collecting legislative statements].)

Kim summarized the concern: The Legislature designed PAGA standing "[i]n response to th[e] practice" of attorney-driven, injury-free litigation that plagued the pre-Prop 64 UCL, wherein "some private attorneys had exploited the [statute's] generous standing requirement … by filing 'shakedown' suits to extort money from small businesses for minor or technical violations where no client had suffered an actual injury." (9 Cal.5th at p. 90, cleaned up.) Yet if Adolph prevails, that will be the result—litigation will be brought in the name of "plaintiffs" who cannot recover a dime even if they win, but driven by "private attorneys" seeking to line their own pockets. (See *ibid.*)

Adolph lastly argues that requiring a plaintiff to seek civil penalties for an individual violation would impermissibly import Article III concepts into PAGA. (Resp. Br., at pp. 32, 44–45.) But the choice in this case is not between Article III redressability and a "general public" free-for-all. (Contra *id.* at p. 32.) True, both subdivision (c) and Article III predicate standing on the plaintiff's request for a portion of the penalties belonging to the government. (See *Vt. Agency of Natural Resources v. United States ex rel. Stevens* (2000) 529 U.S. 765, 772.) That does not make subdivision (c) a junior-varsity redressability requirement. The reason for the overlap is that the Legislature modeled

statutory standing under PAGA on traditional qui tam elements, just as the U.S. Supreme Court grounded federal constitutional standing in the bounty awarded to the successful plaintiff who prevails on the State's claim. (See *Iskanian*, 59 Cal.4th at p. 382, citing *Stevens*, 529 U.S. at p. 773.)

E. The Existence of an Individual PAGA Claim in Arbitration Cannot Support Non-individual PAGA Claims in Court.

Adolph suggests that an individual PAGA claim that can be asserted only in arbitration—and not in court—could somehow provide him with standing to pursue non-individual PAGA claims in court. To adopt this proposal would be to endorse the unprecedented and novel concept of "dual-forum standing." (Resp. Br., at p. 10.)

Uber is not aware of any authority, in any context, where a plaintiff is permitted to point to a separate proceeding in a different forum to establish standing to pursue an action in court. Apparently neither does Adolph, for he cites no examples. Such standing would be not just unprecedented, but also contrary to precedent in the PAGA context. Dual-forum standing would defy the holding in *Viking River* that the FAA requires a PAGA action combining individual and non-individual violations to be treated as separate actions. (See *Viking River*, 142 S.Ct. at p. 1924.)

Adolph rejects as "fiction" the notion that the individual claim in arbitration and the non-individual claims in court "should be treated for PAGA standing purposes as two entirely separate and independent actions." (Resp. Br., at p. 37.) But this is law, not fiction. Under the Supreme Court's binding

interpretation of the FAA, state law cannot "allow[] plaintiffs to unite a massive number of claims in a single-package suit" when the parties agreed to arbitrate individual claims. (*Viking River*, 142 S.Ct. at p. 1924.)

Adolph also wrongly describes *Viking River* as severing only the "remedies" available in an otherwise "single unitary action." (Resp. Br., at p. 37; see, e.g., *id.* at pp. 40–41.) *Viking River* clearly severed sets of *claims*, with those based on "personally sustained violations" sent to arbitration and those "arising out of events involving other employees" remaining in court. (142 S.Ct. at pp. 1916, 1924.) As a result, the PAGA action remaining in court is no different than if Adolph had initially filed a complaint raising only alleged violations experienced by other employees. (Op. Br., at pp. 35–36; see Resp. Br., at p. 39.) Any attempt to yoke the individual and non-individual violations together as "two parts of the same statutory claim" (Resp. Br., at p. 37) would revive the compulsory joinder rule preempted by the FAA under *Viking River*.

Adolph has no fallback explanation as to how the pursuit of an individual PAGA claim in arbitration could supply standing to bring non-individual PAGA claims in court once the two have been severed. Instead, he replies that "the pre-1971 version of Code of Civil Procedure § 1048" does "not apply to this case." (Resp. Br., at pp. 38–39.) That goes without saying. It is the FAA, not section 1048, that requires severance in this case.

The question here is the *effect* of the severance required by the FAA. Under longstanding California law, a severance creates

"two or more separate actions." (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 737, fn. 3; accord, e.g., *Bodine v. Superior Court in and for Santa Barbara County* (1962) 209 Cal.App.2d 354, 361.) Federal law likewise recognizes that, "[w]hen a claim is severed, it becomes an entirely new and independent case." (*Herklotz v. Parkinson* (9th Cir. 2017) 848 F.3d 894, 898; accord *DeMartini v. DeMartini* (9th Cir. 2020) 964 F.3d 813, 821.) This is not some archaic principle that went out the window upon the amendment of section 1048. Both before 1971 and today, severance has been "a distinct procedure whereby two separate actions are created where there was previously one." (Pringle et al., California Antitrust and Unfair Competition Law (2021) Bifurcation and Severance, § 24.09; see, e.g., *Van Slyke v. Gibson* (2007) 146 Cal.App.4th 1296, 1299 ["severance … results in two actions pending"]; *Omni Aviation Managers, Inc. v. Municipal Court* (1976) 60 Cal.App.3d 682, 684 ["As a result of the severance, two actions were then pending in the superior court … ."].)

Once severed, the individual claim goes to arbitration, and the non-individual claims stay in court. Adolph fights this premise, arguing that the individual claim both goes to arbitration *and* stays in court. He posits that a PAGA plaintiff should be free to "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." (Resp. Br., at p. 40.)

There is a good reason why Adolph cannot litigate his individual violation in both arbitration and court, and it has

nothing to do with double recovery of the same penalties. (Contra Resp. Br., at pp. 41–42.) As Uber has explained, allowing Adolph to litigate his individual violation in court would violate the parties' agreement to arbitrate the individual claim. (Op. Br., at pp. 38–39.) A right to arbitrate implies a right *not* to litigate because an arbitration agreement selects a "'forum *other than a court*'" for a given dispute. (*Laver v. Credit Suisse Securities (USA), LLC* (9th Cir. 2020) 976 F.3d 841, 846, original italics, quoting *Cohen v. UBS Financial Services, Inc.* (2d Cir. 2015) 799 F.3d 174, 179.) The parties' right under the FAA "to determine 'the issues subject to arbitration'" therefore cannot be circumvented by allowing Adolph to both arbitrate *and* litigate his claimed individual Labor Code violations. (*Viking River*, 142 S.Ct. at p. 1923, citation omitted.) Put another way, "under the contract he signed, he cannot escape resolution of those rights in an arbitral forum" by relitigating the same issues in court. (*Preston v. Ferrer* (2008) 552 U.S. 346, 359.)

The other suggestion—sequenced proceedings—fares no better. Adolph argues that a plaintiff who prevails in arbitration on an individual claim should be able to establish PAGA standing for the non-individual claims using the arbitral award. (Resp. Br., at pp. 35–36.) But Adolph is cagey on why that would be so. He gestures at issue preclusion but is willing to say only that arbitral adjudication of the individual violation "might, or might not, have later issue-preclusive effect on that plaintiff's ability to establish her[] 'aggrieved employee' status in the other forum." (*Id.* at p. 12.) He also hints at a wait-and-see approach, under

which the non-individual claims could proceed only if the individual claim is "re-joined in court in conjunction with the parties' motions to confirm or vacate the arbitrator's award." (*Id.* at pp. 37–38, fn. 7.) Whatever Adolph means to argue, he misses the point. Collateral proceedings on an arbitral award cannot change the conclusion that he does not bring the non-individual claims "on behalf of himself" to recover penalties for "one or more" personally suffered violations. (Lab. Code, § 2699, subds. (a), (c).)

Nor can Adolph rewrite PAGA in the guise of hypothesizing the statute the Legislature might have enacted had it "anticipated that FAA preemption would sometimes require dividing the remedial portions of a PAGA claim in two." (Resp. Br., at p. 43.) He contends that a ruling that he lacks standing to bring non-individual claims "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." (*Ibid.*) This is cheap hyperbole: There are thousands of drivers who, unlike Adolph, have exercised their right to opt out of Uber's arbitration agreement (Op. Br., at p. 14), and the threat of enforcement by public officials deters as well (Lab. Code, § 2699, subd. (a)). But just as important, PAGA did not adopt a more-is-always-better approach to standing—if it had, this Court would have allowed the unions in *Amalgamated Transit Union* to sue under a theory of associational standing. (46 Cal.4th at pp. 1004–1005.)

Adolph concludes with a transparent attempt to relitigate the preemption holding of *Viking River*. He contends that the no-waiver rule from *Iskanian* would "invalidate contract language" that severs individual from non-individual PAGA claims if the "effect" is the dismissal of the non-individual claim for lack of statutory standing. (Resp. Br., at p. 46.) But that is the opposite of what happened in *Viking River*: The U.S. Supreme Court held that the FAA required the enforcement of an agreement to arbitrate only an individual claim even though the non-individual claims were dismissed as a result. (142 S.Ct. at pp. 1924–1925.) Adolph's unwillingness to accept even the preemption ruling is a sure sign that his interpretation of PAGA promises future trouble under the FAA.

At bottom, there is "no mechanism" that would "enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding." (*Viking River*, 142 S.Ct. at p. 1925.) This Court cannot treat the individual and non-individual claims as a unitary whole after the severance mandated by *Viking River*. And the mechanism suggested by Adolph—litigate the individual violation in both forums—would violate the FAA by forcing Uber to litigate an issue the parties agreed to arbitrate. These difficulties make clear that Uber, not Adolph, has the better reading of subdivisions (a) and (c).

III. In the Alternative, Adolph's Non-individual PAGA Claims Should Be Stayed.

If this Court departs from *Viking River* and holds that Adolph has standing to pursue the non-individual claims, the case should at minimum be stayed pending arbitration of the individual PAGA claim. (See Op. Br., at pp. 40–41.) Adolph admits that, on his understanding of statutory standing, the parties would have to litigate whether he is an aggrieved employee in both forums. (Resp. Br., at p. 40.) And his only objection to a stay is that the parties did not agree to arbitrate his individual PAGA claim in the first place (*id.* at 51, fn. 16)—a meritless argument that contradicts his prior representations to this Court (see Part I, *ante*). A stay is thus required under the parties' agreement (6-CT-1598, § 15.3(v)) and Code of Civil Procedure section 1281.4.

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: November 8, 2022

Respectfully Submitted,

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CERTIFICATION OF WORD COUNT

Pursuant to rule 8.520(c)(1) of the California Rules of Court, the undersigned hereby certifies that the Reply Brief on the Merits contains 7,933 words, excluding tables and this certificate, according to the word count generated by the computer program used to produce the brief.

Dated: November 8, 2022

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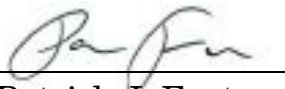

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