No. S274671

In the Supreme Court of the State of California

ERIK ADOLPH,
Plaintiff and Respondent,

v.

UBER TECHNOLOGIES, INC.,
Defendant and Appellant.

Fourth Appellate District, Case Nos. G059860, G060198
Orange County Superior Court, Case No. 30-2019-01103801
The Honorable Kirk H. Nakamura, Judge

AMICUS BRIEF OF THE ATTORNEY GENERAL OF CALIFORNIA IN SUPPORT OF PLAINTIFF AND RESPONDENT

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INTRODUCTION AND STATEMENT OF INTEREST

This Court granted review to decide "[w]hether 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 . . . maintains statutory standing to pursue 'PAGA claims arising out of events involving other employees' . . . in court or in any other forum the parties agree is suitable." (Issues ordered limited Aug. 1, 2022.) Defendant and appellant Uber Technologies, Inc. (Uber) contends that the Court should defer to the U.S. Supreme Court's reading of PAGA (Lab. Code, § 2698 et seq.), summarized in Justice Alito's majority opinion as follows: "When an employee's own dispute is pared away from a PAGA action, the employee is no different from a member of the general public, and PAGA does not allow such persons to maintain suit." (*Viking River Cruises, Inc. v. Moriana* (2022) 142 S.Ct. 1906, 1925.)[1] But as Justice Sotomayor noted in her concurrence, on this important issue of state labor law, "California courts . . . will have the last word." (*Id.* at p. 1925 (conc. opn. of Sotomayor, J.); see also *Montana v. Wyoming* (2011) 563 U.S. 368, 377, fn. 5 ["The highest court of each State . . . remains 'the final arbiter of what is state law.'"].)

The California Attorney General and the Labor and Workforce Development Agency (LWDA) are committed to the

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

full and fair enforcement of California's labor laws, ensuring among other things that workers are properly categorized as employees, that earned wages reach workers' pockets, and that there is a level playing field for law-abiding employers.[2] The LWDA is charged with the implementation of PAGA (see § 2699, subd. (n)) and is the real party in interest in any PAGA case, including this one (see *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 81). Having consulted with the LWDA and the Labor Commissioner, the Attorney General submits this brief to assist the Court in construing PAGA to effectuate the Legislature's intent.[3]

Respectfully, the *Viking River* Court—not having the benefit of briefing on the issue—misread this Court's decision in *Kim*, *supra*, 9 Cal.5th 73, and missed the mark in its construction of PAGA. As discussed below, PAGA was born out of a period of serious under-enforcement of the Labor Code that was disproportionately affecting some of the State's most vulnerable

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[2] See, e.g., Bonta, *Labor Day Report* (2022) <https://oag.ca.gov/system/files/attachments/press-docs/Labor%20Day%20Report%202022.pdf> (as of Dec. 1, 2022); Labor & Workforce Development Agency, *About the Labor and Workforce Development Agency* <https://www.labor.ca.gov/about/> (as of Dec. 1, 2022); Dept. of Industrial Relations, *Labor Commissioner's Office* <https://www.dir.ca.gov/dlse/> (as of Dec. 1, 2022); see also § 90.5 (stating that it is state policy to "vigorously enforce minimum labor standards").

[3] The Attorney General addresses only the question of statutory standing and takes no position on other issues briefed by the parties.

workers. The State, working through the LWDA, lacked the resources to close this enforcement gap. To remedy the situation, the Legislature enacted PAGA, deputizing every worker who has suffered at least one covered Labor Code violation—an "aggrieved employee"—to act as proxy for the State to enforce the law through civil penalty actions brought on behalf of that worker and fellow employees who have also suffered Labor Code violations. (§ 2699, subds. (a), (c).) For over two decades, PAGA actions have substantially augmented the State's limited direct-enforcement resources and improved conditions for California workers.

As evidenced by PAGA's text, statutory context, and legislative history, it is the plaintiff employee's status as one who has experienced a violation of law, and not the promise of financial recovery, that empowers the employee to serve as proxy for the State. Regardless of whether a plaintiff in a PAGA lawsuit may obtain 25 percent of a large civil penalty judgment, 25 percent of a small judgment (for example, 25 percent of a $100 penalty for a single violation), or no court recovery at all because her individual PAGA claims have been sent to arbitration, the plaintiff remains an "aggrieved employee" well positioned to stand in the shoes of the State to enforce the Labor Code. Particularly because this State has no constitutional counterpart to Article III's redressability requirements, the Court should decline Uber's request to read into PAGA additional statutory standing requirements that the Legislature chose not to impose.

An employee who files a complaint alleging at least one covered Labor Code violation committed by the defendant employer against that employee has statutory standing to pursue PAGA claims premised on violations against co-workers. That straightforward reading of PAGA vindicates the Legislature's "sovereign concern that [the State] cannot adequately enforce its Labor Code without assistance from private attorneys general." (*Viking River*, *supra*, 142 S.Ct. at p. 1925 (conc. opn. of Sotomayor, J.).)

PAGA'S ORIGINS AND OPERATION

The California Legislature enacted PAGA, Labor Code sections 2698, et seq., in 2003. (Sen. Bill No. 796 (2003-2004 Reg. Sess.); see also *Arias v. Superior Court* (2009) 46 Cal.4th 969, 980.)[4] The Act was a response to serious and widespread violations of California labor laws, and the problem of significant under-enforcement of those laws, as documented in the Act's legislative history.[5] At the time, the State's enforcement agencies were "responsible for protecting the legal rights of over 17 million California workers and regulating almost 800,000 private establishments, in addition to all the public sector workplaces in the state."[6] But "the resources available to the labor enforcement

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[4] All bill history and analyses for Senate Bill 796 are available at <https://tinyurl.com/2ka6zhbs> (as of Dec. 1, 2022).

[5] See Assem. Com. on Labor & Employment, Rep. on Sen. Bill No. 796 (2003-2004 Reg. Sess.) July 8, 2003, p. 3 (Assem. Com. on Labor & Employment Rep.).

[6] *Ibid.*

divisions remain[ed] below the levels of the mid-1980s."[7] "[B]etween 1980 and 2000 California's workforce grew 48 percent," but the relevant agency budgets and staffing failed to keep pace—in some cases actually decreasing over that time period.[8] Contemporaneous "[e]stimates of the size of California's 'underground economy'—businesses operating outside the state's tax and licensing requirements—ranged from 60 to 140 billion dollars a year, representing a tax loss to the state of three to six billion dollars annually."[9]

Enforcement tools were limited. Only the component departments of the LWDA had authority to assess and collect civil penalties for violations of the Labor Code, and civil penalties were not available for all types of violations.[10] Civil penalties were not available even for some serious violations, for example,

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[7] *Id.* at p. 4.

[8] *Ibid.*; see also Joseph L. Dunn, Sen. & Author of Sen. Bill No. 796, letter to Governor Gray Davis, Sept. 16, 2003, p. 1 (Dunn Letter) ("Despite increases made by your administration to staff for state labor law enforcement, there are only 14 more enforcement staff positions now than there were 15 years ago—while there are three million more workers. Unfortunately, further gains are unlikely because enforcement staff are being cut as a result of the budget crisis."). The letter is located at the California State Archives in the Governor's chaptered bill file for Senate Bill No. 796.

[9] Assem. Com. on Labor & Employment Rep., *supra*, at p. 3.

[10] Assem. Com. on Labor & Employment Rep., *supra*, at p. 2.

the failure to provide drinking water to farmworkers.[11] And while local prosecutors could bring misdemeanor charges for some Labor Code violations, "[s]ince district attorneys tend[ed] to direct their resources to violent crimes and other public priorities, Labor Code violations rarely result[ed] in criminal investigations and prosecutions."[12]

As a consequence of inadequate enforcement tools and resources, some of California's most vulnerable workers suffered serious and ongoing labor law violations. For example, advocates for agricultural and other workers noted "the resurgence of violations of Labor Code prohibitions against the 'company store.'"[13] "This [type of violation] occurs either when the employee is required to cash his check at a store owned by his employer and the employer charges a fee, or where the employer coerces the employee to purchase goods at that store."[14] Although such violations were misdemeanors, no civil penalty was available at the time, and "[a]dvocates [were] unaware of any misdemeanor prosecution having been undertaken in relation to these code sections."[15] Similarly, "a U.S. Department of Labor

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[11] See Dunn Letter, *supra*, at p. 1.

[12] Assem. Com. on Labor & Employment Rep., *supra*, at pp. 2, 4.

[13] Sen. Com. on Labor & Industrial Relations, Rep. on Sen. Bill No. 796 (2003-2004 Reg. Sess.) Apr. 8, 2003, p. 6 (Sen. Com. on Labor & Industrial Relations Rep.).

[14] *Ibid.*

[15] *Ibid.*

study of the garment industry in Los Angeles, which [then] employ[ed] over 100,000 workers, estimated the existence of over 33,000 serious and ongoing wage violations by the city's garment industry employers."[16] As the same study noted, the relevant state agency "was issuing fewer than 100 wage citations per year for all industries throughout the state."[17]

The Legislature enacted PAGA to address these enforcement shortcomings, augmenting the limited enforcement capability of the LWDA. (*Kim*, *supra*, 9 Cal.5th at p. 81.) The Act authorizes "employees, acting as private attorneys general, to recover civil penalties for Labor Code violations, with the understanding that labor law enforcement agencies were to retain primacy over private enforcement efforts." (*Arias*, *supra*, 46 Cal.4th at p. 980.) As a Senate committee acknowledged of PAGA, "[a]rguably, in a perfect world, there would be no need for the right to act as [a private attorney general], yet the fact remains that due to continuing budgetary and staffing constraints, full, appropriate and adequate Labor Code enforcement is unrealizable if done solely by the Agency."[18] The Legislature chose "to deputize and

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[16] *Id.* at p. 3.

[17] *Ibid.*

[18] Sen. Com. on Labor & Industrial Relations Rep., *supra*, at p. 4. The bill's author, Senator Dunn, was even more blunt in his letter to the Governor. He noted that "[w]e likely agree that government is best suited to enforce these laws," but he added that "none of us can say with certainty that there will be more money in the budget for enforcement any time soon." (Dunn Letter, *supra*, at p. 2.) "Given that reality," he continued, "do we

(continued…)

incentivize employees" because they are "uniquely positioned to detect and prosecute such violations." (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 390, overruled in part by *Viking River Cruises*, *supra*, 142 S.Ct. at p. 1924.)[19]

Mindful of "allegations of private plaintiff abuse of the" California Unfair Competition Law (UCL), PAGA's private right of action does "not permit private actions by persons who suffered no harm from the alleged wrongful act."[20] "[T]here is no provision in the bill allowing for private prosecution on behalf of the general public."[21] Rather, only an "aggrieved employee" may file a PAGA action, in which the employee may pursue civil penalties for specified Labor Code violations committed against

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(…continued)

tell injured workers that they have to wait 10 years until we have a better budget situation before they can expect their employer to follow the law? I hope not." (*Ibid.*)

[19] The *Viking River* Court held that the Federal Arbitration Act "preempts the rule of *Iskanian* [only] insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate." (142 S.Ct. at p. 1924.)

[20] Assem. Com. on Judiciary, Rep. on Sen. Bill No. 796 (2003-2004 Reg. Sess.) June 26, 2003, p. 6 (Assem. Com. on Judiciary Rep.). The UCL was amended by the voters in November 2004 by Proposition 64. A private plaintiff must now demonstrate injury in fact and lost money or property to bring a UCL claim. (Bus. & Prof. Code, § 17204; see *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 227 (discussed *post*, at pp. 25-26).)

[21] Assem. Com. on Judiciary Rep., *supra*, at p. 6.

that employee and other affected current or former employees. (§ 2699, subd. (a).)[22] As defined in PAGA, an "aggrieved employee" is "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." (§ 2699, subd. (c).)

PAGA claims are subject to a one-year statute of limitations (Code Civ. Proc., § 340, subd. (a)), which functions to limit civil penalties for past violations. In addition, PAGA's default penalties were set "'on the low end' of the range of existing civil penalties" but at an amount that was "significant enough to deter violations." (Assem. Com. on Judiciary Rep., *supra*, at p. 4.) "For Labor Code violations for which no penalty is provided, the PAGA provides that the penalties are generally $100 for each aggrieved employee per pay period for the initial violation and $200 per pay period for each subsequent violation." (*Iskanian*, 59 Cal.4th at p. 379, citing § 2699, subd. (f)(2).) Courts are authorized to "award a lesser amount than the maximum civil penalty amount specified" to avoid "an award that is unjust, arbitrary and oppressive, or confiscatory." (§ 2699, subd. (e)(2).)

Before bringing a PAGA action, an employee must notify the LWDA of the specific violations alleged and the facts and theories

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[22] Not all state labor law violations are subject to PAGA. The Act excludes workers' compensation violations (§ 2699, subd. (m)), and, in addition, violations involving "a posting, notice, agency reporting, or filing requirement of [the Labor Code], except where the filing or reporting requirement involves mandatory payroll or workplace injury reporting" (§ 2699, subd. (g)(2)).

supporting the claim, and may bring a lawsuit only if the agency declines to investigate the matter and issue a citation or bring suit. (§ 2699.3, subd. (a).) Where pre-filing requirements are met, the employee may proceed. The employee must provide the LWDA with a copy of the complaint within ten days of commencement of the PAGA action. (§ 2699, subd. (l)(1).) Where the employee prevails, 75 percent of civil penalties recovered goes to the LWDA, leaving the remaining 25 percent to be distributed among "the aggrieved employees." (§ 2699, subd. (i).) Penalties recovered are thus "dedicated in part to public use . . . instead of being awarded entirely to a private plaintiff."[23]

ARGUMENT

In determining whether a party bringing suit under a statute is in fact a proper plaintiff, this Court has observed that "[u]nlike the federal Constitution, our state Constitution has no case or controversy requirement imposing an independent jurisdictional limitation on our standing doctrine." (*Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1247-1248.) The statutory standing inquiry is thus primarily an exercise in statutory construction. (*Kim*, *supra*, 9 Cal.5th at p. 83.)

In construing statutory standing requirements, courts must "'ascertain the intent of the Legislature so as to effectuate the purpose of the enactment.'" (*Kim*, *supra*, 9 Cal.5th at p. 83, quoting *Cummins, Inc. v. Superior Court* (2005) 36 Cal.4th 478, 487.) To achieve that end, courts "'look first to the words of the

[23] Assem. Com. on Judiciary Rep., *supra*, at p. 5.

statute, which are the most reliable indications of the Legislature's intent.'" (*Ibid.*) They "'construe the words of a statute in context, and harmonize the various parts of an enactment by considering the provision at issue in the context of the statutory framework as a whole.'" (*Ibid.*) "'If the statutory language is unambiguous, then its plain meaning controls. If, however, the language supports more than one reasonable construction, then [courts] may look to extrinsic aids, including the ostensible objects to be achieved and the legislative history.'" (*Id.* at p. 83, quoting *Los Angeles County Metropolitan Transportation Authority v. Alameda Produce Market, LLC* (2011) 52 Cal.4th 1100, 1107.) In construing PAGA in particular, every step of the inquiry is informed by the Act's purpose: "Considering the remedial nature of legislation meant to protect employees, [courts] construe PAGA's provisions broadly, in favor of this protection." (*Id.* at p. 83.)

Here, PAGA's text, statutory context, legislative history, and purpose demonstrate that an aggrieved employee who has been compelled to arbitrate her individual PAGA claims—those premised on Labor Code violations sustained by the aggrieved employee—maintains statutory standing to pursue PAGA claims arising out of violations involving other employees of the defendant.

I. NOTHING IN PAGA'S TEXT AND STATUTORY CONTEXT SUGGESTS THAT STATUTORY STANDING IS LOST IF AN AGGRIEVED EMPLOYEE'S INDIVIDUAL PAGA CLAIMS ARE SENT TO ARBITRATION

PAGA deputizes employees to act as private attorneys general as proxy for the State, providing in relevant part that "as an alternative" to enforcement by the LWDA, civil penalties may "be recovered through a civil action brought by an *aggrieved employee* on behalf of himself or herself and other current or former employees pursuant to the procedures specified in [the Act]." (§ 2699, subd. (a), italics added.) This Court has already construed the text of the provision that largely governs the plaintiff's statutory standing in this case—section 2699, subdivision (c), defining "aggrieved employee."

As this Court noted in *Kim*, "[t]he plain language of section 2699(c) has only two requirements for PAGA standing." (9 Cal.5th at p. 83.) The plaintiff must properly allege that she "was employed by the alleged violator[.]" (*Ibid.*, quoting § 2699, subd. (c); see *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993, 1005 ["Because plaintiff unions were not employees of defendants, they cannot satisfy the express standing requirements of the act."].) And the plaintiff must be a person "'against whom one or more of the alleged violations was committed.'" (*Kim*, *supra*, 9 Cal.5th at pp. 83-84, quoting § 2699, subd. (c).)

The Act contains no other requirements that a plaintiff must meet to have statutory standing to pursue PAGA claims, and in *Kim*, the Court declined to add additional standing requirements

not found in the statute. There, an employee settled and dismissed his individual claims for damages under the Labor Code, but intended to continue pursuing a set of PAGA claims, including individual PAGA claims, for civil penalties. (*Kim*, *supra*, 9 Cal.5th at pp. 82-86.) The employer conceded that Kim had PAGA standing when he filed suit, but argued that due to the settlement, the employee no longer qualified as an "aggrieved employee," and thus lost his ability to pursue PAGA claims as proxy for the State. (*Id.* at pp. 82-84.)

The *Kim* Court held that the employer's argument was inconsistent with the statutory language in several respects. (9 Cal.5th at pp. 83-86.) First, "[t]he Legislature defined PAGA standing in terms of violations, not injury." (*Id.* at p. 84.) "Kim became an aggrieved employee, and had PAGA standing, when one or more Labor Code violations were committed against him" and the "[s]ettlement did not nullify these violations." (*Ibid.*) Second, there is nothing in the text defining "aggrieved" as requiring the employee to have "an unredressed injury," and any such reading would be "at odds with the statutory definition." (*Id.* at p. 85.) Third, allowing post-violation actions to strip an aggrieved employee of her ability to pursue PAGA claims "would add an expiration element to the statutory definition of standing"—which courts should decline to do. (*Ibid.*)

Kim's textual interpretation is equally applicable here. While this case involves the potential resolution through arbitration of individual PAGA claims for civil penalties, rather than resolution of individual damages claims through settlement,

that distinction is irrelevant to the proper construction of the term "aggrieved." Like the plaintiff in *Kim*, Adolph is an aggrieved employee because he alleges that Uber committed Labor Code violations against him. That Uber may be successful in compelling arbitration of Adolph's individual PAGA claims will not nullify those violations, any more than the settlement of the individual damages claims in *Kim* did. And the fact that the PAGA lawsuit may be stayed pending arbitration, and that civil penalties corresponding to Adolph's individual PAGA claim may be awarded in that forum, will not extinguish Adolph's status as an aggrieved employee, as there is no statutory requirement for a PAGA plaintiff to have an *unredressed* claim.

Uber's primary textual argument is that a plaintiff in Adolph's position cannot satisfy the requirement that a PAGA action must be "brought by an aggrieved employee *on behalf of himself or herself* and other current or former employees." (§ 2699, subd. (a), italics added; see OBM 19-20; see also OBM 24, 27-28, 31, 34; RBM 8-9, 17-21, 36.) Relatedly, Uber argues that a plaintiff whose individual PAGA claims are sent to arbitration cannot be a person "against whom one or more of the alleged violations was committed." (RBM 21-25, quoting § 2699, subd. (c).) But the requirements of section 2699, subdivisions (a) and (c) are met—and were met here—by the filing of a PAGA complaint containing well-pleaded allegations that the employer committed Labor Code violations against the plaintiff employee. The fact that the plaintiff's individual PAGA claims subsequently may be

sent to arbitration is irrelevant for purposes of statutory standing.[24]

Uber suggests that there is something improper about an aggrieved employee filing a PAGA action containing individual claims where that employee has signed an arbitration agreement. (See OBM 36-37.) Its assertions of impropriety are, however, baseless. There is nothing improper about putting a party seeking arbitration to its burden of "proving the existence of an arbitration agreement." (See *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236.) As in this case, there can be reasonable disputes about whether the parties' arbitration agreement covers individual PAGA claims, and an employee filing a PAGA action may believe that all PAGA claims fall outside the parties' agreement. (See ABM 47-52.)[25] Or a party may believe that an arbitration agreement is unenforceable based on a generally applicable contract defense (see *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57

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[24] Uber asserts that the act of sending individual PAGA claims to arbitration effectively "severs" those claims from the PAGA lawsuit. (OBM 32; RBM 33-34.) Uber's severance argument is beside the point, as it fails to address the question of legislative intent.

[25] Confusion about whether individual PAGA claims are subject to arbitration may be common in agreements entered into before the U.S. Supreme Court's decision in *Viking River*; pre-*Viking River*, parties to arbitration agreements would have reasonably believed that PAGA claims were *not* divisible into individual and non-individual components. (See *Viking River*, *supra*, 142 S.Ct. at pp. 1916-1917, 1924; *Iskanian*, *supra*, 59 Cal.4th at p. 383; see also *Kim*, *supra*, 9 Cal.5th at p. 87.)

Cal.4th 1109, 1171) or is subject to waiver (*Wagner Construction Co. v. Pacific Mechanical Corp*. (2007) 41 Cal.4th 19, 30). And even where a plaintiff agrees that individual PAGA claims must be sent to arbitration, alleging in a complaint that individual PAGA violations occurred for the limited purpose of meeting PAGA's statutory standing requirements is not a breach of an agreement to arbitrate individual PAGA claims.

Uber also contends that "[a]fter Adolph's claim is sent to arbitration, he will not be seeking in court any PAGA penalties for alleged Labor Code violations that he purportedly experienced"; at that point, Uber asserts, Adolph "simply 'is no different from a member of the general public, and PAGA does not allow such persons to maintain suit.' (*Viking River*, 142 S.Ct. at p. 1925.)" (OBM 20; see also RBM 9, 17-18, 26, 29-32.)[26] Stated another way, Uber's position is that a PAGA plaintiff acting as proxy for the State must have an ongoing, forward-looking financial "stake in the outcome" of the lawsuit to maintain statutory standing. (OBM 11; see also OBM 29, 35-37; RBM 9, 29-32.)

Again, that purported requirement finds no foothold in the text. The statutory standing language of section 2699, subdivision (c), focuses on the plaintiff's status as a person against whom a violation was committed—a backwards looking interest. As this Court observed in *Kim*, "[t]he *remedy* for a

[26] Uber's "general public" standing argument is discussed further at p. 31, *post*.

Labor Code violation . . . is distinct from the *fact* of the violation itself." (*Kim*, *supra*, 9 Cal.5th at p. 84, italics in original.)

PAGA's statutory standing requirements are not grounded in the plaintiff's "economic injury" (see *Kim*, *supra*, 9 Cal.5th at p. 84) or any financial stake in the litigation. This is apparent from the text of section 2699, subdivisions (a) and (c), which speaks only to "alleged violations" and not alleged economic injuries or expected recoveries. It is also shown by the broader statutory context. The civil penalty that might be recovered by a PAGA plaintiff whose individual PAGA claims are litigated can in theory be quite small—for example, 25 percent of a $100 civil penalty ($25), with the remainder going to the LWDA. (See § 2699, subds. (f)(2), (i).)[27] But Uber cannot credibly dispute that that hypothetical plaintiff would have standing to pursue any number of PAGA claims related to Labor Code violations committed against her fellow employees. As the *Kim* Court observed, "[a]n employee has PAGA standing if '*one or more* of the alleged violations was committed' against [that employee]." (*Kim*, *supra*, 9 Cal.5th at p. 85, italics in original, quoting § 2699, subd. (c).) There is no requirement that a PAGA plaintiff

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[27] An aggrieved employee may have an even smaller financial stake. Section 558, for example, provides a civil penalty of $50 for an initial violation, 25% of which is $12.50. (§ 558, subd. (a); *ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175, 187, 197.) PAGA's "civil penalties are relatively low" to "discourage any potential plaintiff from bringing suit over minor violations in order to collect a 'bounty' in civil penalties." (Assem. Com. on Labor & Employment Rep., *supra*, at pp. 7-8.)

"personally experience each and every alleged violation." (*Id.* at p. 85, citing § 2699, subd. (c).)

Thus, it is not the promise of economic recovery—in court or elsewhere—that gives an aggrieved employee standing to pursue PAGA claims based on violations committed against other workers. Rather, it is the employee's personal connection to the employer and to her fellow co-workers, and her knowledge and experience of at least one of the Labor Code violations alleged, that the Legislature decided should confer statutory standing. (Cf. *Iskanian*, *supra*, 59 Cal.4th at p. 390 [noting the "legislative choice to deputize and incentivize employees uniquely positioned to detect and prosecute such violations through the PAGA"].)

Uber further attempts to graft a forward-looking aspect to PAGA statutory standing by citing this Court's observation that "standing must exist at all times until judgment is entered and not just on the date the complaint is filed." (OBM 37, quoting *Mervyn's*, *supra*, 39 Cal.4th at pp. 232-233.) But that attempt is defective in two respects. First, Uber's argument relies on a construction of PAGA—that being "aggrieved" is synonymous with having an unredressed injury—that "is at odds with the statutory definition." (*Kim*, *supra*, 9 Cal.5th at pp. 84-85.)[28] Second, Uber erroneously implies that *Mervyn's* holds there is a "standing" requirement that exists apart and outside of the statute conferring a right to sue. But, read in context, the

[28] However "aggrieved" may be interpreted in other contexts, "'[a]ggrieved employee' is a term of art in PAGA." (*Id.* at p. 87.)

Mervyn's Court simply held that the requirements of any statute conferring a private right of action must be met throughout the litigation; what any given statute actually requires of the plaintiff, and at what point in the litigation, is question of statutory construction.

In *Mervyn's*, the Court considered the requirements of Proposition 64, which imposed a new money or property-loss requirement to bring suit under the UCL. (*Mervyn's*, *supra*, 39 Cal.4th at p. 227.) The Court was required to determine whether the new statutory standing requirements "apply to cases already pending." (*Ibid*.) The quotation cited by Uber is found in the Court's discussion of whether applying Proposition 64 to existing claims meant the law was impermissibly retroactive in its application. (*Id*. at p. 233.) The Court concluded the law did not have that effect, because Proposition 64 affected only the definition of who was a proper *plaintiff* and did "not change the legal consequences of past conduct by imposing new or different liabilities [on *defendants*] based on such conduct." (*Id*. at p. 232.)

The Court noted that the text of Proposition 64 did not "expressly declare whether the new standing provisions" applied "to pending cases," and thus turned to "the ordinary presumptions and rules of statutory construction commonly used to decide such matters when a statute is silent." (*Mervyn's*, *supra*, 39 Cal.4th at pp. 229, 230.) Among other considerations, the Court observed that the intent of the voters in enacting Proposition 64 "was to limit . . . abuses by 'prohibit[ing] private attorneys from filing lawsuits for unfair competition where they

have no client who has been injured in fact'"—a purpose met by imposing the injury requirements to pending cases. (*Id.* at p. 228, quoting Prop. 64, § 1, subd. (e).)

Here, by contrast, PAGA's statutory standing requirements, as originally enacted, include a limiting principle—that a PAGA plaintiff must be an "aggrieved employee"—but, as explained, that status does not require the employee to have suffered economic harm or to possess an unredressed injury. And, as noted, PAGA's provisions must be construed "broadly," in favor of employee protection. (*Kim*, *supra*, 9 Cal.5th at p. 83.) The Legislature decided in section 2699, subdivision (c) to confer standing on any plaintiff who brings a PAGA action against her current or former employer contending that one or more of the Labor Code violations alleged was committed against her. That requirement is satisfied on filing an adequate PAGA complaint and, by its terms, continues to be satisfied at all times during the litigation even if the plaintiff is compelled to arbitrate her individual PAGA claims.

II. PAGA'S PURPOSE AND LEGISLATIVE HISTORY COMPEL AN EMPLOYEE-PROTECTIVE READING OF THE ACT'S STATUTORY STANDING REQUIREMENTS

The plain, commonsense reading of section 2699, subdivision (c) allows an aggrieved employee to prosecute a PAGA lawsuit even where her individual PAGA claims are sent to arbitration. Uber's justifications for a narrower view of statutory standing were squarely rejected by the Court in *Kim* as inconsistent not only with the text, but also with the purpose of the statute and

the aims of the Legislature as clearly expressed in the legislative history.

Given the widespread nature of employment arbitration agreements, and the additional employer-side incentive to enter into such agreements that Uber's reading of the law would create, Uber's "view of standing would deprive many employees of the ability to prosecute PAGA claims, contrary to the statute's purpose to ensure effective code enforcement." (See *Kim*, *supra*, 9 Cal.5th at p. 87.)[29] Further, Uber's "interpretation . . . would seriously impair the state's ability to collect and distribute civil penalties under [PAGA]." (*Kim*, *supra*, 9 Cal.5th at p. 87.) Court-imposed "'[h]urdles that impede the effective prosecution of representative PAGA actions undermine the Legislature's objectives.'" (*Ibid.*, quoting *Williams v. Superior Court* (2017) 3 Cal.5th 531, 548.)

The divestment of private attorney general standing for all or most employees who sign arbitration agreements would have profound negative implications for enforcement of the Labor Code that cannot have been intended by the Legislature. In the 18-

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[29] Nationwide, over 50 percent of non-union private-sector employees are subject to arbitration agreements, which are "disproportionately used in low-wage industries, as well as those primarily comprised of female and Black workers." (Note, *An Epic Impact on Access to Justice? Saving Clause Challenges to Arbitration Agreements in Ninth Circuit District Courts Before and After* Epic Systems (2021) 30 So.Cal. Rev. of Law & Social J. 143, 146-147.) "California, Texas, and North Carolina have the highest percentages of arbitration use in workplaces." (*Id.* at p. 147, footnote omitted.)

plus years since PAGA's enactment, California's labor force has grown by about two million, now comprising some 19 million individuals.[30] The number of establishments subject to the State's labor laws has also grown, to over 1.6 million.[31] The State continues to use the resources available to it to enforce its labor laws though targeted inspections and audits.[32] For example, the Bureau of Field Enforcement within the Division of Labor Standards Enforcement "focuses on major underground economy industries in California in which labor law violations are the most rampant, including agriculture, garment, construction, car wash, and restaurants."[33] In recent years, "the Division has increased its focus in industries where wage theft has been particularly challenging to combat, such as janitorial work, residential care homes, and warehousing."[34] But the Bureau cannot visit every regulated business. In a recent, representative

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[30] U.S. Bur. of Labor Statistics, *Economic News Release: Table 1. Civilian Labor Force and Unemployment by State and Selected Area, Seasonally Adjusted* (2022) <https://tinyurl.com/2yzdcekj> (as of Dec. 1, 2022); see also Cal. Employment Development Dept., *California Demographic Labor Force: Summary Tables – October 2022* <https://tinyurl.com/ycksbs96> (as of Dec. 1, 2022).

[31] Cal. Employment Development Dept., *Quarterly Census of Employment and Wages* (2021) <https://tinyurl.com/4jxwwxcv> (as of Dec. 1, 2022).

[32] See, e.g., Cal. Div. of Labor Stds. Enforcement, *2018-2019 The Bureau of Field Enforcement Fiscal Year Report* (2019) p. 3 <https://tinyurl.com/2rffwxwj> (as of Dec. 1, 2022).

[33] *Id.* at p. 2.

[34] *Ibid.*

year, the Bureau was able to "conduct[] 1,734 inspections, which led to the issuance of citations for 3,586 violations."[35]

PAGA plays a critical, proven role in supplementing these traditional enforcement mechanisms. The alleged Labor Code violations that aggrieved employees pursue through PAGA are often serious, including wage theft and illegal working conditions. (See, e.g., *Iskanian*, *supra*, 59 Cal.4th at pp. 359-361 [failure to pay drivers for overtime, meal, and rest periods]; *Arias*, *supra*, 46 Cal.4th at p. 976 [various wage-related violations, including failure to pay wages when due and on termination]; *Home Depot U.S.A., Inc. v. Superior Court* (2010) 191 Cal.App.4th 210, 215 [failure to provide workers with required, suitable seating].) One report found that 89 percent of PAGA claims alleged wage theft.[36] Wage theft causes serious harm, especially to lower-wage workers, who may not have savings to cover for unpaid wages. And the significant sums recovered in PAGA actions suggest that there remains a considerable need for enforcement.[37] Any decrease in this private enforcement mechanism would result in

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[35] *Id.* at p. 4, footnote omitted.

[36] See Deutsch et al., UCLA Labor Center, *California's Hero Labor Law: The Private Attorneys General Act Fights Wage Theft and Recovers Millions from Lawbreaking Corporations* (2020) p. 10 <https://tinyurl.com/yckkdcpv> (California's Hero Labor Law).

[37] *Id.* at p. 8.

increased costs to the State to enforce labor laws—and decreased enforcement where state resources fall short.[38]

PAGA has also helped to remedy previous, longstanding agency funding deficiencies. "In 2019 alone, PAGA generated over $88 million in civil penalties for California's LWDA." (California's Hero Labor Law, *supra*, at p. 8, footnote and emphasis omitted.) From 2016 to 2019, the agency "recovered an annual average of $42 million in civil penalties and filing fees . . . all statutorily allocated to enhance education and compliance efforts." (*Ibid*., footnotes and emphasis omitted.) Civil penalties remitted to the LWDA exceeded $107 million in 2020, and exceeded $128 million in 2021.[39] Civil penalties recovered in PAGA actions help to fund the LWDA in carrying out its regulatory responsibilities related to covered employers, without passing those costs on to taxpayers generally or diverting funds from other priorities. A reading of PAGA that deputizes all aggrieved employees to serve as proxy for the State in enforcing the Labor Code and collecting civil penalties—regardless of whether the employee has signed an arbitration agreement governing individual claims—effectuates the legislative intent.

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[38] See Gabriel Petek, Leg. Analyst, Cal. Leg. Analyst's off., letter to Atty. Gen. Rob Bonta, Dec. 23, 2021, p. 4 <https://tinyurl.com/y89wtewz> (discussing the fiscal effects of a proposal that would repeal PAGA and, to compensate for such repeal, increase the responsibilities of the state Labor Commissioner).

[39] Data provided by the Division of Labor Standards Enforcement on January 31, 2022.

This reading of PAGA does not, as Uber contends, authorize standing for members of the "general public" (OBM 20, 24, 30-31, 33; RBM 17-18, 29-32)—a result that the Legislature in enacting PAGA expressly sought to avoid. While the State "can deputize anyone it likes" to pursue its enforcement claims (*Kim*, *supra*, 9 Cal.5th at p. 86), the Legislature in 2003 was concerned about abuses reported in the pre-reform UCL context, which at that time allowed suits by "'any person acting for the general public.'" (*Id.* at p. 90, quoting *Mervyn's*, *supra*, 39 Cal.4th at p. 227.) As discussed in *Kim*, "some private attorneys had 'exploited the generous standing requirement of the UCL' by filing "'shakedown" suits to extort money from small businesses' for minor or technical violations where no client had suffered an actual injury." (*Id.* at p. 90, quoting *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 316.) "In response to this practice and to ensure that PAGA suits could not be brought by 'persons who suffered no harm from the alleged wrongful act' (Sen. Judiciary Com. Analysis, p. 7), the sponsors added the definition of 'aggrieved employee' that now appears in section 2699(c)." (*Kim*, *supra*, 9 Cal.5th at p. 90 [listing additional citations to the legislative record].) This definition embodies the Legislature's considered "departure from the 'general public' . . . standing" then allowed under the UCL. (*Ibid.*) Further restricting PAGA statutory standing in ways not contemplated by the Legislature would "thwart the Legislature's clear intent to deputize employees to pursue sanctions on the state's behalf." (*Id.* at p. 91.)

Section 2699, subdivision (c) should be applied as written, conferring "broad [PAGA] standing on all plaintiffs who were employed by the violator and subjected to at least one alleged violation" (*Kim*, *supra*, 9 Cal.5th at p. 91)—standing that is not divested by any requirement to arbitrate individual PAGA claims. That result respects the Legislature's policy decision to require a PAGA plaintiff to have some connection to the dispute (through having experienced at least one Labor Code violation), while also ensuring an adequate force of private attorneys general to serve the State's enforcement needs.

CONCLUSION

This Court should hold that an aggrieved employee who has been compelled to arbitrate claims under PAGA that are premised on Labor Code violations actually sustained by the aggrieved employee maintains statutory standing to pursue PAGA claims arising out of events involving co-workers.

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December 5, 2022

CERTIFICATE OF COMPLIANCE

I certify that the attached AMICUS BRIEF OF THE ATTORNEY GENERAL OF CALIFORNIA IN SUPPORT OF PLAINTIFF AND RESPONDENT uses a 13-point Century Schoolbook font and contains 6,356 words.

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December 5, 2022

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Supreme Court of California

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