

S274671

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

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ERIK ADOLPH,

Plaintiff and Respondent,

v.

UBER TECHNOLOGIES, INC.,

Defendant and Appellant.

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**APPLICATION TO FILE AMICUS CURIAE BRIEF;  
BRIEF OF AMICUS CURIAE LIONEL HARPER  
IN SUPPORT OF RESPONDENT**

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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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## APPLICATION TO FILE AMICUS CURIAE BRIEF

Under rule 8.520(f) of the California Rules of Court, Lionel Harper (Amicus) requests permission to file the attached amicus curiae brief in support of Respondent Erik Adolph.

Amicus is the plaintiff in a civil action brought under the Private Attorneys General Act (PAGA) against his former employer. (*Harper v. Charter Communications, LLC*; Case No. 2:19-cv-00902 (E.D. Cal.)) His PAGA action has been pending in court since May 2019, and alleges a host of past and ongoing Labor Code violations committed against himself and thousands of other employees in California. His former employer has argued, unsuccessfully, that the so-called “individual” component of the PAGA action must be submitted to arbitration, and the “non-individual” component must be dismissed for lack of statutory standing. (*Harper v. Charter Communications, LLC* (E.D. Cal. Sept. 7, 2022) --- F.Supp.3d ---, 2022 WL 4095889.) As a plaintiff in a pending PAGA action that is allegedly subject to arbitration and dismissal, he has a significant interest in the Court’s resolution of the statutory standing issue.

The attached amicus curiae brief will assist the Court in deciding the matter by showing that: (1) the plaintiff in a PAGA action shares the same rights and interests as the state, including rights and interests that do not involve a personal financial interest in civil penalties; (2) an arbitration agreement that requires “piecemeal” litigation of a PAGA action does not change the plaintiff’s status as an aggrieved employee who is authorized by the state to prosecute alleged violations in whatever forums the agreement may designate; and (3) PAGA’s requirement that the plaintiff be an employee who suffered “one or more” of the alleged violations supports a broad view of statutory standing, and refutes Appellant’s “financial interest” and “general public” arguments.

Neither Amicus nor his counsel represents a party to this action, has any financial or other stake in the outcome, or has received compensation for this brief. No party, or counsel for a party, participated in drafting this brief.

## AMICUS CURIAE BRIEF

### **I. The Plaintiff In A PAGA Action Has The Same Rights And Interests As The State In Prosecuting All Alleged Violations For All Affected Employees.**

Based on PAGA’s language, underlying purpose, and legislative intent, the plaintiff in a PAGA action has “a sufficient interest in the subject matter of the dispute to press their case with vigor,” even if a private agreement requires that the “individual” component of the action be submitted to arbitration. (*Kim v. Reins International California, Inc.* (2020) 9 Cal. 5th 73, 83, quoting *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 439.)

The plaintiff in a PAGA action only acts as a proxy or agent, with the state as the principal and real party in interest. (*Id.* at p. 81; *Cal. Bus. & Indus. Alliance v. Becerra* (2022) 80 Cal.App.5th 734, 743–749.) As the state’s agent, the plaintiff has “the same legal right and interest as state law enforcement agencies.” (*Viking River Cruises, Inc. v. Moriana* (2022) 142 S.Ct. 1906, 1915, quoting *Arias v. Superior Court* (2009) 46 Cal.4th 969, 986.) Like the state, if it was prosecuting the violations itself, the plaintiff serves all of PAGA’s purposes and the state’s public policy interests, which include: protecting employee rights; incentivizing employers to cure alleged violations; punishing past violations; deterring future violations; and furthering the state’s law enforcement capabilities and goals. A private agreement between an employee and employer cannot interfere with these purposes or interests. (Cal. Civ. Code, § 3513 “[A] law established for a public reason cannot be contravened by a private agreement.”); *Kim*, 9 Cal.5th at p. 87 [“Hurdles that impede the effective prosecution of representative PAGA actions undermine the Legislature’s objectives.”], quoting *Williams v. Superior Court* (2017) 3 Cal.5th 531, 548.)



First, the plaintiff serves the Labor Code’s fundamental remedial purpose of protecting employees and causing employers to “cure” or “abate” the alleged violations. (*Kim*, 9 Cal.5th at p. 80 [“California’s Labor Code contains a number of provisions designed to protect the health, safety, and compensation of workers.”]; Cal. Lab. Code, §§ 2699, subd. (d), 2699.3, subd. (c).) To these ends, PAGA must be interpreted broadly. (*Kim*, 9 Cal.5th at p. 83 [“Considering the remedial nature of legislation meant to protect employees, we construe PAGA’s provisions broadly, in favor of this protection.”]. Construing PAGA’s standing requirements narrowly would conflict with these core remedial purposes. (*Id.* at p. 91 [“[T]rue to PAGA’s remedial purpose, the Legislature conferred fairly broad standing on all plaintiffs who were employed by the violator and subjected to at least one alleged violation.”].) The plaintiff’s ability to cause employers to cure alleged violations, and the employer’s incentive to try to cure such violations, would be destroyed if the plaintiff could, as a practical matter, only request a cure of the specific violations that he or she personally suffered.

Second, the plaintiff has an interest in seeking an award of civil penalties for all alleged violations and all affected employees. (Cal. Lab. Code, § 2699, subd. (a), (f); *Kim*, 9 Cal.5th at p. 87.) “Relief under PAGA is designed primarily to benefit the general public, not the party bringing the action.” (*Kim*, 9 Cal. 5th at p. 81.) Any civil penalties awarded for past violations are distributed 75 percent to the state and 25 percent among the affected employees. (*Moorer v. Noble L.A. Events, Inc.* (2019) 32 Cal.App.5th 736, 741–742, citing *Mendoza v. Nodstrom, Inc.* (2017) 2 Cal.5th 1074, 1075, fn. 5, *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 382, and *Williams*, 3 Cal.5th at p. 545.) Such penalties serve PAGA’s punishment and deterrence purposes; they are not compensatory, either for the state, the plaintiff, or other employees. (*Kim*, 9 Cal. 5th at p. 81.)

Third, the plaintiff has an interest in proving that the alleged violations occurred, even if the action does not result in a “tangible” or “concrete” gain in the form of civil penalties.<sup>1</sup> (*Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 939.) A successful prosecution that does not result in an award of civil penalties still serves PAGA’s deterrence and law enforcement purposes by putting the employer on notice of the violations, and authorizing heightened civil penalties for any subsequent violations. (*Gunther v. Alaska Airlines, Inc.* (2021) 72 Cal.App.5th 334, 356.)

Fourth, the plaintiff has an interest in “an award of reasonable attorney’s fees and costs” for a successful prosecution. (Cal. Lab. Code, § 2699, subd. (g)(1).) PAGA’s one-way fee-shifting provision encourages aggrieved employees and qualified counsel to act as the state’s agent and prosecute PAGA actions for all alleged violations committed against all affected employees, including violations that do not provide a private right of action or would not be economical to prosecute. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1133–1134 [“the purpose behind statutory fee authorizations” is “encouraging attorneys to act as private attorneys general and to vindicate important rights affecting the public interest”]; *Covenant Mutual Ins. Co. v. Young* (1986) 179 Cal.App.3d 318, 324–325 [one-way fee-shifting statutes “are created by legislators as a deliberate stratagem for advancing some public purpose, usually by encouraging more effective enforcement of some important public policy” by “offer[ing] a bounty for plaintiffs who sue to enforce a right the Legislature has chosen to favor . . . in situations where they otherwise would not find it economical to sue”].) Authorizing cost and attorney fee awards for employees and counsel who are

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<sup>1</sup> PAGA sets a maximum civil penalty amount that may be awarded for each proven violation, and authorizes a lesser amount “based on the facts and circumstances of the particular case.” (Cal. Lab. Code, § 2699, subd. (e)(2).)

willing to act as the state’s agent in prosecuting all alleged violations incentivizes competent representation and furthers the state’s law enforcement capabilities and interests.

The plaintiff’s purposes and interests in bringing a PAGA action are not diminished if an agreement between the plaintiff and the employer commits the “individual” component of a PAGA action to arbitration and the “non-individual” component to court. The purposes and interests remain the same regardless of the forum(s) in which a PAGA action must be brought. (*Viking River*, 142 S.Ct. at p. 1919 [an arbitration agreement is a type of forum-selection clause that “does not alter or abridge substantive rights”].)

The Court should reject Appellant’s narrow view of the purposes and interests served by a PAGA action, and confirm that the plaintiff serves all of the same purposes and interests as the state even if an agreement commits different components of a PAGA action to different forums.

## **II. The Plaintiff In A PAGA Action Does Not Lose Statutory Standing Simply Because An Arbitration Agreement Requires Piecemeal Litigation.**

An arbitration agreement that requires a PAGA action to proceed piecemeal in multiple forums does not affect the plaintiff’s statutory standing to prosecute all of the alleged violations in the designated forums.

An agreement that commits different components of a dispute to different forums necessarily results in piecemeal litigation. But “‘piecemeal’ litigation’ of claims the parties have agreed to arbitrate and claims they have not agreed to arbitrate is *consistent* with the FAA.” (*McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945, 966, quoting *Dean Witter Reynolds Inc. v. Byrd* (1985) 470 U.S. 213, 221.) This includes “piecemeal litigation of ‘arbitrable and inarbitrable remedies derived from the same statutory claim.’” (*Ibid.*, quoting *Broughton v. Cigna Healthplans of California* (1999) 21 Cal.4th 1066, 1088.)

An agreement that requires the plaintiff to submit the “individual” component of a PAGA action to arbitration, and the “non-individual” component to court, requires piecemeal litigation of the state’s dispute with the employer over the alleged violations.<sup>2</sup> Such an agreement does not, however, change the plaintiff’s status as an employee against whom “one or more” alleged violations was committed, or PAGA’s “fairly broad standing” requirements that reflect the legislature’s clear intent to further the state’s law enforcement capabilities by deputizing employees to prosecute alleged violations on the state’s behalf. (§ 2699, subd. (a); *Kim*, 9 Cal.5th at p. 91.)

“The State can deputize anyone it likes to pursue its claim” for Labor Code violations, including a plaintiff who may have agreed to submit the “individual” component of a PAGA action to arbitration. (*Kim*, 9 Cal.5th at p. 86.) An arbitration agreement that requires a PAGA action to proceed piecemeal in multiple forums does not change the plaintiff’s right or interest to act as the state’s authorized representative and prosecute all of the alleged violations in the designated forums.

### **III. The Plaintiff In A PAGA Action Only Needs To Suffer “One Or More” Of The Alleged Violations To Have Statutory Standing To Prosecute All Of The Alleged Violations.**

The plaintiff in a PAGA action only needs to suffer “one or more” of the alleged violations to have statutory standing to prosecute all alleged violations for all affected employees. (§ 2699, subd. (c); *Kim*, 9 Cal.5th at pp. 83–84.)

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<sup>2</sup> The FAA does not speak in terms of claims, remedies, severance, or separate actions. The FAA simply requires a written agreement to “submit” to arbitration an “issue” that is “referable to arbitration under such an agreement.” (9 U.S.C., §§ 2–3.) None of the cases on which Appellant relies for its “severance” and “completely separate action” arguments refers to the FAA or involves arbitrable and non-arbitrable issues, claims, or remedies.

The legislature could have used restrictive language (e.g., suffered “each” of the alleged violations) when defining the class of persons who have statutory standing to prosecute the violations alleged in a PAGA action. But more restrictive language would have been contrary to PAGA’s purposes, failed to satisfy the state’s public policy interests, and impeded the effective prosecution of violations. (*Kim*, 9 Cal. 5th at p. 91 [PAGA requires that the plaintiff have been “subjected to at least one” of the alleged violations].)

Appellant’s personal financial interest argument ignores PAGA’s “one or more” violations language. The argument is based on the mistaken notion that the plaintiff’s *only* purpose and interest in prosecuting a PAGA action is to receive a share of any civil penalties that may be awarded for the violations he or she personally suffered. PAGA’s standing requirements are not tied to the existence of an unredressed injury, or the plaintiff’s personal interest in receiving a share of any civil penalties that may be awarded. (*Id.* at p. 90–91; *Vermont Agency of Natural Resources v. United States ex rel. Stevens* (2000) 529 U.S. 765, 773 [The “right” to a share of the proceeds of a *qui tam* action “does not even fully materialize until the litigation is completed and the relator prevails.”]; *Turrieta v. Lyft, Inc.* (2021) 69 Cal.App.5th 955, 972 [employees’ “ability to file PAGA claims on behalf of the state does not convert the state’s interest into their own or render them real parties in interest”].)

PAGA’s statutory standing requirements anticipate that the plaintiff will *not* have a personal financial interest in prosecuting many of the alleged violations, or any of the violations suffered by other employees. This makes sense, because a PAGA action serves the state’s purposes and interests, not the plaintiff’s personal purposes and interests. PAGA’s text and structure require that the plaintiff not place his or her personal financial interests above the state’s interest in prosecuting all alleged violations for all affected employees. (Cal. Lab. Code, § 2699, subd. (1)(2) [LWDA must receive notice

of a proposed settlement of a PAGA action]; Cal. Lab. Code, § 2699, subd. (1)(3) [LWDA must receive notice of any judgment that “either provides for or denies an award of civil penalties”]; *Williams*, 3 Cal. 5th at p. 549 [courts must “ensur[e] that any negotiated resolution is fair to those affected”]; *Turrieta*, 69 Cal.App.5th at p. 973 [LWDA has a right to object to or comment on proposed settlement of PAGA action].) Nothing in PAGA’s text or structure suggests that the plaintiff must have a personal financial interest in prosecuting all alleged violations.<sup>3</sup>

Appellant’s “member of the general public” argument also misses the mark. An arbitration agreement that commits the “individual” component of a PAGA action to arbitration does not turn the plaintiff into a mere member of the general public. The plaintiff still is a current or former employee who was subjected to at least one of the alleged violations. And the plaintiff still is authorized to prosecute the alleged violations on the state’s behalf, and to serve the same purposes, rights, and interests as the state.

A private agreement that commits different components of a PAGA action to different forums does not change PAGA’s statutory standing requirements or cause the plaintiff to lose standing if one of the components must be submitted to arbitration.

### CONCLUSION

The Court should hold that the plaintiff in a PAGA action maintains statutory standing to prosecute all alleged Labor Code violations for all affected employees even if a private agreement commits the “individual” component of the action to arbitration.

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<sup>3</sup> A “personal financial interest” standing requirement would let an employer “pick off” the plaintiff in a PAGA action by voluntarily paying civil penalties in an amount that is equal to or greater than the maximum amount the plaintiff could have obtained for violations that he or she personally suffered.

Dated: December 7, 2022

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## CERTIFICATE OF WORD COUNT

Pursuant to rule 8.520(c)(1) of the California Rules of Court, the undersigned hereby certifies that the amicus curiae brief contains 2,204 words, excluding the tables, application, signature block, and this certificate, according to the word count generated by the computer program used to produce the brief.

Dated: December 7, 2022

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