S274671

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ERIK ADOLPH,

Plaintiff and Respondent,

v.

UBER TECHNOLOGIES, INC.,

Defendant and Appellant.

After a Decision by the Court of Appeal,
Fourth Appellate District, Division Three
Case Nos. G059860, G060198

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF THE RETAIL LITIGATION CENTER, INC. AND THE NATIONAL RETAIL FEDERATION IN SUPPORT OF APPELLANT

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT

Pursuant to California Rule of Court 8.520(f), the Retail Litigation Center, Inc. and the National Retail Federation hereby request permission to file the attached brief as amici curiae supporting Appellant Uber Technologies, Inc. This application is timely made within 30 days of the filing of the last party brief.

The Retail Litigation Center, Inc. (RLC) is a unique public policy organization that identifies and contributes to legal proceedings affecting the retail industry. The RLC's members include many of the country's most innovative retailers, ranging in size from some of the largest retailers in the country to smaller businesses. Since its founding in 2010, the RLC has filed well over 200 amicus briefs in a variety of courts, including the California Supreme Court and the U.S. Supreme Court, in order to provide the retail industry's perspectives on important legal issues and highlight the potential industry-wide consequences of significant pending cases, such as this one.

The National Retail Federation (NRF) is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and internet retailers from the United States and more than 45 countries. NRF empowers the industry that powers the economy. Retail is the nation's largest private-sector employer, contributing $3.9 trillion to annual GDP and supporting one in four U.S. jobs—52 million working Americans. For over a century, NRF has been a voice for every retailer and every retail job, educating and communicating

the powerful impact retail has on local communities and global economies. NRF regularly submits amicus curiae briefs in cases raising significant legal issues for the retail community, including the multiple and serious impacts of COVID-19.

No party or counsel for a party has authored any part of the attached brief. Likewise, no party or counsel for any party has made a monetary contribution intended to fund the preparation or submission of this brief.

Dated: December 20, 2022

Respectfully submitted,

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INTEREST OF AMICI CURIAE

The Retail Litigation Center, Inc. (RLC) is the only public policy organization dedicated to representing the retail industry before our nation's courts. The RLC's members include many of the country's most innovative retailers, ranging in size from some of the largest retailers in the country to smaller businesses. They employ millions of workers throughout the United States and in California, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales.

The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members and to highlight the potential industry-wide consequences of significant pending cases. Since its founding in 2010, the RLC has filed over 200 amicus briefs in a variety of courts, including this Court and the U.S. Supreme Court.

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economies. NRF regularly submits amicus curiae briefs in cases raising significant legal issues for the retail community, including the multiple and serious impacts of COVID-19.

Amici's members have an important interest in the Court's resolution of the question presented. As described in Uber's Opening Brief (at pp. 8-9), for many years California courts treated Private Attorneys General Act (PAGA) claims as falling outside the scope of the Federal Arbitration Act (FAA). This approach prevented both employers and employees in California from obtaining the streamlining and predictability benefits that bilateral arbitration agreements are designed to provide.

In *Viking River Cruises, Inc. v. Moriana* (2022) 142 S.Ct. 1906, the U.S. Supreme Court held that the FAA requires the enforcement of bilateral arbitration agreements when the parties have agreed to arbitrate individual claims, including claims brought under PAGA. The high court, interpreting California law, concluded that an employee no longer has statutory standing to keep litigating PAGA representative claims in court once his or her individual PAGA claims are found to be arbitrable. (*Id.* at p. 1925.)

This Court, of course, has the authority to interpret PAGA for itself. When it does so, amici's members have a strong interest in this Court similarly holding that a PAGA plaintiff must maintain an individual PAGA claim in court to have standing under the PAGA statute. That holding is correct as a matter of statutory interpretation as well as deeply rooted background principles showing the importance of a plaintiff with

a stake in the court action. And it will lead to the sensible enforcement of agreements to engage in one-on-one arbitration, to the benefit of amici's members and their employees, as well as the California public.

INTRODUCTION

Under California law, a PAGA plaintiff seeking civil penalties must be "an aggrieved employee" who sues "on behalf of himself or herself *and* other current or former employees." (Lab. Code, § 2699, subd. (a), italics added.)[1] Under the plain meaning of this language, a plaintiff does not have standing to pursue a representative claim once his or her individual claim is found to be arbitrable and is no longer part of the court action. The high court in *Viking River* concluded as much, holding that after individual claims brought under PAGA are found to be arbitrable, the remaining PAGA claims raised on behalf of other employees must be dismissed for lack of statutory standing because, at that point, the employee is "no different from a member of the general public." (142 S.Ct. at p. 1925.) Without a doubt, this Court has the authority to interpret the PAGA statute for itself. (See *id*. at pp. 1925-1926 (conc. opn. of Sotomayor, J.).) But there is no reason for this Court to reach a different result. Under basic principles of statutory interpretation and background legal rules, an employee lacks standing to prosecute a representative PAGA claim without an individual claim remaining in court.

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[1] All further statutory references are to the Labor Code unless otherwise indicated.

As Uber ably demonstrates, that interpretation is faithful to the text, structure, history, and court interpretations of Labor Code section 2699. Additional statutory clues confirm that interpretation is correct. Only an "aggrieved employee"—i.e., an employee against whom "one or more of the alleged violations was committed," and who seeks civil penalties "on behalf of himself or herself and other current or former employees"—has standing to pursue a PAGA claim. (§ 2699, subds. (a), (c).) The plain meaning, and best interpretation, of this language is that an employee whose individual PAGA claim is arbitrable lacks standing. Adolph's contrary reading would conflict with the larger structure of PAGA, its legislative history, and background legal principles about how representative actions are supposed to work.

Allowing PAGA representative claims to proceed without a personally aggrieved plaintiff at the helm would also have pernicious effects. It would hurt employees and employers alike by allowing lawyers (not injured employees) to control PAGA litigation, and by creating incentives for suits that focus on hyper-technical violations to swell attorneys' fees, often at the expense of compensating employees who are actually harmed. That result would not further the Legislature's underlying purpose of protecting employees—instead, it would undermine it.

This Court should reject Adolph's invitation to misread section 2699, and reverse and remand with instructions to compel arbitration of Adolph's individual claim and dismiss the remaining, non-individual claims for lack of statutory standing.

ARGUMENT

I. A PLAINTIFF WITH NO PERSONAL STAKE IN THE PAGA ACTION LACKS STATUTORY STANDING

Once a PAGA plaintiff's individual claim is found to be properly resolved in arbitration, he or she has no personal stake in the PAGA lawsuit remaining in court. That plaintiff therefore cannot be an "aggrieved employee" for purposes of section 2699 and has no standing to maintain the suit. This interpretation of PAGA's standing requirement is correct for the reasons stated in Uber's briefs. (See Opening Br. 26-33; Reply Br. 17-25.) It is also correct for other reasons stemming from the statutory text, structure, and background.

Construing PAGA to require plaintiffs to have a stake in the litigation is the only interpretation that is faithful to the text and harmonizes all uses of the phrase "aggrieved employee" in the statute. Adolph's reading, by contrast, would introduce critical statutory inconsistencies that the Legislature could not have intended. In particular, Adolph's "status-based" reading of "aggrieved employee" (Resp. Br. 33) would offend the Legislature's intent to allow employers to "cure" violations and would create irrational results with respect to both calculating and awarding penalty amounts.

PAGA's background and context also suggest that a plaintiff lacks statutory standing to maintain non-individual PAGA claims once an individual claim is found to be arbitrable. The legislative history shows that the Legislature intended to avoid opening the courthouse doors too widely, and thus aimed to

prohibit general public standing. Construing PAGA to require plaintiffs to have a personal claim for civil penalties also harmonizes PAGA with other forms of representative litigation, such as the federal qui tam statute and California class action practice. Taken together, these background principles reinforce that PAGA can sensibly be read to confer standing only on a plaintiff who may proceed with an individual PAGA claim in court.

A. PAGA's Text Shows That A Plaintiff May Not Maintain A Representative Claim Solely On Behalf Of Other Employees

In interpreting a statute, this Court must "'begin with the plain language of the statute, affording the words of the provision their ordinary and usual meaning and viewing them in their statutory context, because the language employed in the Legislature's enactment generally is the most reliable indicator of legislative intent.'" (*People v. Cornett* (2012) 53 Cal.4th 1261, 1265, quoting *People v. Watson* (2007) 42 Cal.4th 822, 828; see also *Kwikset Corp. v. Super. Ct.* (2011) 51 Cal.4th 310, 321 ["[W]e begin with the text as the first and best indicator of intent."]; *Nahrstedt v. Lakeside Vill. Condo. Assn.* (1994) 8 Cal.4th 361, 378-379 [when construing a statute, "[t]he words . . . must be read in context, considering the nature and purpose of the statutory enactment"]; *Presbyterian Camp & Conference Centers, Inc. v. Super. Ct.* (2021) 12 Cal.5th 493, 504 [directing that legislation should be construed against relevant background principles—for example, in the tort context, "[e]ven when a

statute does not expressly mention relevant common law principles, where the Legislature creates new tort liability, background tort principles will often be incorporated"].) The ordinary background principle in California is that standing requires a plaintiff to "have a 'personal interest in the outcome of the litigation.'" (*Stocks v. City of Irvine* (1981) 114 Cal.App.3d 520, 531, quoting *Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 798.) While the Legislature may deviate from that default rule, courts must be careful not to "endorse a more expansive interpretation" of standing unless the statutory text demonstrates that the Legislature so intended. (*Midpeninsula Citizens for Fair Housing v. Westwood Investors* (1990) 221 Cal.App.3d 1377, 1386.)

PAGA's plain language shows that the Legislature did not intend to deviate from traditional standing requirements. The PAGA statute provides that a plaintiff may bring a PAGA action "on behalf of himself or herself *and* other current or former employees." (§ 2699, subd. (a), italics added.) The "and" in this clause plays a key statutory role: It makes clear that a plaintiff bringing a PAGA action has standing to bring a claim on behalf of "other current and former employees" (a representative claim) *only* if the action includes *both* such a representative claim *and* a claim "on behalf of himself or herself" (the individual claim). This "and" was no accident—the original version of the bill used "or" instead. (See Sen. Bill No. 796 (2003-2004 Reg. Sess.) as amended May 12, 2003; see *Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 922-923 [holding that legislative

amendments shed light on a statute's intended purpose].) That "and" comes into play when the individual claim is no longer part of the suit and is arbitrated instead; at that point, only one of the two necessary requirements is met, so there is no standing. (See *Quevedo v. Macy's, Inc.* (C.D.Cal. 2011) 798 F.Supp.2d 1122, 1141 ["[T]he PAGA statute indicates that [an] employee can pursue claims on behalf of others only if he also pursues claims on behalf of himself: the statute allows an aggrieved employee to bring a civil action 'on behalf of himself or herself *and* other current or former employees,' not on behalf of himself *or* other employees."], quoting § 2699, subd. (a), italics added by *Quevedo*.)

PAGA's "express standing requirements" also make clear that a plaintiff must seek penalties on behalf of himself or herself in order to also seek penalties on behalf of other employees. (*Amalgamated Transit Union, Local 1756, AFL-CIO v. Super. Ct.* (2009) 46 Cal.4th 993, 1005.) Only an "aggrieved employee" has standing to prosecute a PAGA action. (§ 2699, subd. (a).) The statute defines "aggrieved employee" as "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." (*Id.*, subd. (c).) Under this plain language, the plaintiff must have a personal stake—that is, "one or more of the alleged violations" must have happened to them—to pursue a PAGA action in court. (*Ibid.*) If the "alleged violations" for which the plaintiff seeks penalties in court concern solely other employees, then the plaintiff is not an aggrieved employee and lacks standing. (*Ibid.*)

B. Construing "Aggrieved Employee" To Require A Personal Stake In The Litigation Is The Only Interpretation That Harmonizes All Parts Of The Statute

For the reasons above and in Uber's brief, PAGA's express standing language alone confirms that Adolph's "status-based" reading of "aggrieved employee" is overbroad. (See Opening Br. 27-28; Reply Br. 18-21.) But other aspects of PAGA's text and structure offer additional clues about statutory standing under PAGA. The broader statutory scheme confirms that "aggrieved employee" must mean a plaintiff who maintains a personal stake in the PAGA suit in court, and cannot include a plaintiff raising alleged violations that concern other employees exclusively. This is the only interpretation that "harmonizes . . . the definition of 'aggrieved employees' in section 2699, subdivision (c)" with "other provisions of the statute" using the same term. (See *Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal.App.5th 745, 759 [examining competing interpretations of "aggrieved employee" by looking to other provisions of the statute to ensure harmonious results]; see also *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 87 [considering "broader statutory scheme" in interpreting PAGA standing requirements]; *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 979 ["words or phrases given a particular meaning in one part of a statute must be given the same meaning in other parts of the statute"]; *Horwich v. Super. Ct.* (1999) 21 Cal.4th 272, 276 ["'we do not construe statutes in isolation, but rather read every statute "with reference to the entire scheme of law of which it is part so that

the whole may be harmonized and retain effectiveness.""], citation omitted.) Adolph's proposed definition of "aggrieved employee" would create disharmony in the PAGA statute in at least three ways.

First, Adolph's broad definition of "aggrieved employee" would muddle the provisions allowing employers to "cure" alleged PAGA violations. Before bringing a PAGA action, an aggrieved employee must give "written notice . . . to the employer of the specific provisions of this code alleged to have been violated[.]" (§ 2699.3, subd. (a)(1)(A).) For many types of alleged violations, the employer may then "cure the alleged violation within 33 calendar days," and if it does so, "no civil action pursuant to Section 2699 may commence." (*Id.*, subd. (c)(2)(A); § 2699.5.) But an employer "cures" only if it "abates each violation," such that "*any aggrieved employee* is made whole." (§ 2699, subd. (d), italics added.)

The plain purpose of these provisions is to encourage employers to remedy the violations for which the claimant seeks relief by preventing a lawsuit where the employer has done so. Construing "aggrieved employee" as Uber does is consistent with this purpose. Suppose, for example, that an employee at a particular retail store location notifies their employer of a potential Labor Code violation affecting employees at that store—such as the omission of required information from the employees' paychecks. The employer could "cure" that violation by abating it and taking the necessary steps to make that claimant (and the other employees at that store) whole (§ 2699, subd. (d)), and thus

avoid a PAGA lawsuit (*id.* subd. (c)(2)(A)). The result benefits employers (who avoid a lawsuit) as well as employees (whose alleged Labor Code violations are promptly resolved).

But under Adolph's interpretation of "aggrieved employee," the "cure" provisions would operate very differently. If "aggrieved employee[s]" include those without a personal stake in the case, a claimant could still pursue a PAGA action even if the employer has made the claimant whole. This would mean that in the example above, the employee who identified a Labor Code violation at his store, and which the retailer-employer has abated and cured consistent with PAGA's requirements, could *still* bring a PAGA suit by identifying *other* employees at *another* retail location (§ 2699.3, subd. (a)(1)(A)) who allegedly experienced the same Labor Code violation. Under Adolph's reading, that the employer cured any violation occurring at the claimant's store would not matter—that employee could still pursue a PAGA claim on behalf of other, far-flung employees.

Interpreting "aggrieved employee" as Adolph asks would thus destroy the obvious purpose of the "cure" provisions. Curing violations, and avoiding a later lawsuit, would become much more difficult for employers. An employer seeking to make "any aggrieved employee . . . whole" (§ 2699, subd. (d)) would have to cure not only those violations alleged by the claimant, but also any other violation against any potential plaintiff, including those with no personal stake in the case. Creating such a steep (if not insurmountable) barrier for employers to avoid PAGA suits will diminish (if not eliminate) any incentive they have to cure a

claimant's alleged violation. The result would effectively gut PAGA's "cure" provision, to the disadvantage of employers and employees alike.

Second, Adolph's proposed definition of "aggrieved employee" would cause unwarranted problems in calculating PAGA penalties. Under Section 2699, the maximum default penalty for PAGA violations is based on the number of "aggrieved employee[s]." (§ 2699, subd. (f) [providing statutory penalty of $100 "for each aggrieved employee per pay period for the initial violation" and $200 "for each aggrieved employee per pay period for each subsequent violation"].) This provision makes sense only if "aggrieved employee" means an employee on whose behalf the plaintiff has sought relief, excluding those who have no personal stake in the suit. Otherwise, an employer could be made to pay penalties for employees who are not even at issue in the lawsuit. For example, an employee already made whole through arbitration could claim cumulative penalties from the representative suit, even though he or she has no remaining personal stake in it. Or, employees whose violations have been cured could similarly claim penalties from the representative PAGA suit—further compounding the problems described above. (See pp. 20-21, *supra*.) There is no logical reason that the Legislature would have intended to expand the availability of penalties in this way.

Third, as Uber explains (Opening Br. 29), section 2699, subdivision (i) requires distributing 25 percent of penalties to "aggrieved employees." This provision, too, would not work if the

definition of "aggrieved employee" includes those with no personal stake in the case. The plain purpose of subdivision (i) is to permit employees impacted by the claims at issue in the PAGA suit to share in the recovery. But under Adolph's broad definition of "aggrieved employee," the 25 percent recovery would have to be divided with employees not at issue in the PAGA suit at all. This is not an abstract concern. Take, once again, a group of workers at one store location of a retail chain who bring a PAGA action against their employer limited to alleged Labor Code violations at that location. Suppose that the only violations the claimant alleges and proves concern the employees at that store location. Yet under Adolph's definition, workers from *other* locations could claim a share of the 25 percent recovery as "aggrieved employees" if they could also claim to have suffered the type of violation litigated in the PAGA action. This result would dramatically expand the pool of workers who could claim a share of penalties, and in turn could significantly decrease the amount each individual worker would receive. It is difficult to imagine why the Legislature would have intended for penalties to be divided in this way.

Construing PAGA's definition of "aggrieved employee" to require a personal stake in the litigation—and to exclude plaintiffs seeking penalties in court solely for violations affecting other employees—avoids these illogical and counterintuitive scenarios. When interpreting a statute, this Court endeavors to "'avoid a construction that would lead to unreasonable, impractical, or arbitrary results.'" (*Poole v. Orange County Fire*

Authority (2015) 61 Cal.4th 1378, 1385, quoting *Copley Press, Inc. v. Super. Ct.* (2006) 39 Cal.4th 1272, 1291.) Here, that interpretive principle refutes Adolph's overly expansive definition, and instead requires "aggrieved employee" to mean the ordinary personal interest in the outcome of the case.

C. The Legislative History Supports Interpreting "Aggrieved Employee" To Include Only Plaintiffs Seeking Penalties For Individual Violations In Court

This Court "need not look to extrinsic sources to discern legislative intent" where, as here, "the statutory language is susceptible of only one reasonable interpretation[.]" (*Miller v. Bank of America* (2009) 46 Cal.4th 630, 642.) But "an examination of the legislative history" or other extrinsic sources is appropriate to confirm the meaning of the text (*ibid.*), or if this Court were to determine that "the relevant statutory language is ambiguous" (*McHugh v. Protective Life Ins. Co.* (2021) 12 Cal.5th 213, 227). Here, other clues beyond text and structure support construing "aggrieved employee" to require a plaintiff to have a personal stake in the litigation. The legislative history further illustrates that the Legislature intended to limit the definition of "aggrieved employee" to those with a personal stake in the case. (See Opening Br. 29-30; Reply Br. 29-31.)

It is "apparent" based on the legislative history "that PAGA's standing requirement was meant to be a departure from the 'general public' standing originally allowed under the [Unfair Competition Law (UCL)]." (*Kim*, *supra*, 9 Cal.5th at p. 90, citation omitted.) Originally, the "general public" had standing to

prosecute actions under the UCL. (See *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 227.) But in 2004 the voters approved Proposition 64, which eliminated "general public" standing. (*Ibid.*) The voters found that "general public" standing "had encouraged frivolous unfair competition lawsuits that clog our courts, cost taxpayers and threaten the survival of small businesses." (*Id.* at p. 228 [cleaned up]; see also Opening Br. 29-31.)

The "aggrieved employee" standing requirement in the PAGA statute, also enacted in 2004, followed from the same concern. At first, the PAGA bill did not define "aggrieved employee." (Sen. Bill No. 796 (2003-2004 Reg. Sess.) as introduced Feb. 21, 2003.) But opponents argued that the bill as written would "result in abuse similar to that alleged involving the UCL," including "an excessive amount of meritless, fee-motivated lawsuits." (Assem. Com. on Lab. and Employment, Analysis of Sen. Bill No. 796 (2003-2004 Reg. Sess.) as amended July 2, 2003, p. 7.) The bill sponsors stated they were "mindful of the recent, well-publicized allegations of private plaintiffs' abuse of the UCL, and have attempted to craft a private right of action that will not be subject to such abuse[.]" (*Ibid.*) They pointed to the amendment defining "aggrieved employee" and claimed it would "not open up private actions to persons who suffered no harm from the alleged wrongful act." (*Ibid.*) Adolph's proposed interpretation runs headlong into this history suggesting that the Legislature intended PAGA to require plaintiffs to have a personal stake in the case, as his proffered definition of

"aggrieved employee" would allow actions by persons who had nothing to gain from litigation and thus would effectively revive general public standing.

D. Interpreting "Aggrieved Employee" To Require An Individual PAGA Claim Aligns PAGA With Other Forms Of Representative Litigation

Along with the legislative history, analogous statutory schemes and contexts can be useful extrinsic sources, as they often set forth background principles against which the Legislature typically legislates. (See *People v. Woodhead* (1987) 43 Cal.3d 1002, 1008 ["The interpretation of an ambiguous statutory phrase may be aided by reference to other statutes which apply to similar or analogous subjects."]; *Meza v. Portfolio Recovery Assocs., LLC* (2019) 6 Cal.5th 844, 853 [beginning statutory analysis with "a review of pertinent background principles concerning the statutory scheme"].) Here, both the federal qui tam statute and California class action procedural requirements constitute such background principles. These principles support construing the term "aggrieved employee" to require a plaintiff to have a personal stake in the litigation, and to not allow plaintiffs to seek penalties for violations that allegedly affected only other employees. (Opening Br. 27.)

Because this Court and the high court have described PAGA as a type of qui tam statute, the federal qui tam statute can provide useful guidance on PAGA's reach. (See *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 382, abrogated on other grounds by *Viking River*, *supra*, 142 S.Ct. 1906 [characterizing PAGA as "a type of *qui tam* action"]; *Viking*

River, at p. 1914 [same].) The federal qui tam statute, set forth in section 3730 of title 31 of the United States Code (the False Claims Act), permits private individuals to bring civil actions on behalf of the federal government. The federal government may intervene in the suit or decline to do so. (31 U.S.C. § 3730(b)(2), (c)(3).)[2] In either circumstance, the qui tam plaintiff (called a "relator") lacks the typical injury-in-fact required of federal-court plaintiffs, because the federal government (and not the named plaintiff personally) has suffered the alleged statutory injury. (See *Vt. Agency of Natural Resources v. U.S. ex rel. Stevens* (2000) 529 U.S. 765, 771-772 [observing that a qui tam complaint asserts an injury "to the United States"].) That scenario creates the risk that qui tam suits might lack the "adversarial context" that helps ensure "federal courts maintain their properly limited role" and are not "converted into 'judicial versions of college debating forums' issuing abstract opinions." (*U.S. ex rel. Kelly v. Boeing Co.* (9th Cir. 1993) 9 F.3d 743, 749, quoting *Valley Forge*

[2] Although the federal qui tam statute does not apply directly in state court, there is no reason to think the Legislature intended an analogous California statutory scheme to function very differently. To the contrary, when the Legislature intends a state law to deviate from a similar federal law, it generally makes that intent clear through express language. (See *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1026 [describing express indications that Legislature intended the phrase "physical disability" to have a broader meaning under the California Fair Employment and Housing Act than as used in the federal Americans with Disabilities Act].)

Christian College v. Americans United for the Separation of Church and State, Inc. (1982) 454 U.S. 464, 473.)

The federal courts, including the high court, have concluded that these concerns are addressed by the qui tam relator's "personal stake in the outcome of the case" that "gives the relator himself an interest in the lawsuit." (*Stevens*, *supra*, 529 U.S. at p. 772.) Federal courts have identified three features of qui tam litigation that ensure the relator's "personal stake" in the case: "(1) the qui tam plaintiff must fund the prosecution of the [False Claims Act] suit; (2) the qui tam plaintiff receives a sizable bounty if he prevails in the action; and (3) the qui tam plaintiff may be liable for costs if the suit is frivolous." (*Kelly*, *supra*, 9 F.3d at p. 749; see also *U.S. ex rel. Kreindler & Kreindler v. United Technologies Corp.* (2d Cir. 1993) 985 F.2d 1148, 1154.) This "personal stake" helps "to ensure that the issues are presented sharply and that more than 'the vindication of the value interests of concerned bystanders' is at issue." (*Kelly*, at p. 749, quoting *Valley Forge, supra*, 454 U.S. at p. 43.)

Adolph's interpretation of PAGA standing strays from this principle of qui tam standing. In his view, PAGA plaintiffs need not seek civil penalties—or any other form of monetary relief that approximates the "bounty" qui tam plaintiffs receive—in order to pursue the litigation. And nothing in the PAGA statute provides the other statutory checks that create a personal stake in the qui tam context. (See pp. 17-18, *supra*.) The result would be lawsuits helmed by plaintiffs with no personal stake or interest in the particular violations alleged and litigated. This outcome

would risk turning California courts into "judicial versions of college debating forums," with cases that vindicate only the "value interests of concerned bystanders." (*Kelly*, *supra*, 9 F.3d at p. 749.) The Legislature presumably could decide to create this kind of unique qui tam action that does not require a personal stake at all. But if it had wanted to do so, it would have made that intention clear in the statutory language. (See p. 27, fn. 2, *supra*.)

Class action procedures also provide a useful parallel to PAGA, and further suggest that the Legislature did not intend to depart from accepted practices and norms in representative actions. Although "PAGA claims need not qualify as class actions," "consideration[s] relevant to class action certification" can provide relevant guidance "in the context of PAGA." (*Wesson v. Staples the Office Superstore, LLC* (2021) 68 Cal.App.5th 746, 767, rehg. den. Sept. 27, 2021 and review den. Dec. 22, 2021.)[3] In the class action context, "California law is clear that a representative plaintiff must be a member of the class he seeks to represent." (*First American Title Ins. Co. v. Super. Ct.* (2007) 146 Cal.App.4th 1564, 1577; see also, e.g., *Audio Visual Services Group, Inc. v. Super. Ct.* (2015) 233 Cal.App.4th 481, 494 [class representative could not bring class action for violation of

[3] Amici acknowledge this Court has made clear that PAGA actions are not directly subject to class action requirements. (*Arias v. Super. Ct.* (2009) 46 Cal.4th 969, 981.) The point remains, however, that PAGA actions share features with other representative actions that suggest PAGA plaintiffs must have a stake in the litigation.

ordinance requiring additional compensation for hotel workers because he was not "among the class of hotel workers covered by the Ordinance"]; *La Sala v. American Savings & Loan Assn.* (1971) 5 Cal.3d 864, 871-872 [noting that "plaintiffs who have nothing at stake often will not devote sufficient energy to the prosecution of the [class] action"].)

Far from departing from that norm on its face, the textual description of an "aggrieved employee" under PAGA mirrors the traditional class action requirement that a representative plaintiff be a member of the population on whose behalf the lawsuit seeks relief. Given that class action cases have consistently emphasized the importance of a named plaintiff who shares a common interest with the rest of the putative class (see, e.g., *Richmond v. Dart Indus., Inc.* (1981) 29 Cal.3d 462, 471; *Hataishi v. First American Home Buyers Protection Corp.* (2014) 223 Cal.App.4th 1454, 1462-1463), it would be unusual for the Legislature to have silently departed from that framework in the PAGA context.

E. Neither *Kim v. Reins* Nor Any Other Case Supports Adolph's Interpretation Of "Aggrieved Employee"

Adolph's atextual interpretation of "aggrieved employee" finds no support in the case law, either. Neither this Court's decision in *Kim*, nor any other case, suggests that a plaintiff with no individual PAGA claim can pursue non-individual PAGA claims on behalf of other employees in court. As Uber also explains (e.g., Opening Br. 33-40), the existing case law merely holds that a PAGA plaintiff's standing does not depend on the

fate of the plaintiff's other claims that do not arise under PAGA. But no case suggests that a PAGA plaintiff with no remaining personal stake in the PAGA suit, who seeks penalties on behalf of other employees exclusively, has standing to keep prosecuting it.

Kim not only differs from this case, but also confirms that Adolph lacks statutory standing to pursue his non-individual PAGA claims in court. *Kim* addressed whether a plaintiff who had settled his "own suit for damages and statutory penalties" was still an "aggrieved employee" with standing to bring a PAGA claim on behalf of himself *and* others. (*Kim*, *supra*, 9 Cal.5th at p. 81.) But critically, the *Kim* plaintiff's settlement did not cover his PAGA claims (either individual or representative), and rather disposed of his *non-PAGA* damages suit for Labor Code violations. (*Id.* at pp. 82-83; cf. Resp. Br. 30 [recognizing that "the concept of a split PAGA action did not exist prior to *Viking River Cruises*"].)[4] This Court emphasized that those two types of suits (PAGA and non-PAGA) are separate, primarily because "the civil penalties a PAGA plaintiff may recover on the state's behalf are distinct from the statutory damages or penalties that may be available to employees suing for individual violations." (*Kim*, at

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[4] As Uber describes, California law previously prohibited "claim-splitting" under PAGA. (Opening Br. 9.) Thus, before *Viking River*, the question of standing to pursue representative PAGA claims did not arise because of this "prohibition on contractual division of PAGA actions into constituent claims." (*Viking River*, *supra*, 142 S.Ct. at pp. 1923-1924.) *Viking River* held that this "joinder" rule is incompatible with the FAA. (*Id.* at p. 1924.) For this reason, until now California courts have not needed to confront the question (see pp. 16-24, *supra*) of standing to pursue representative PAGA claims alone.

p. 81.) Relying on that significant distinction, this Court held that a plaintiff who settles his own suit for damages does not lose his standing to prosecute his PAGA claim for penalties to punish and deter violations that employees *including the plaintiff himself* had experienced. (*Id.* at pp. 84-91). But *Kim* does not suggest that a plaintiff can maintain a representative PAGA claim in court on behalf of a group of employees that excludes himself.

Johnson v. Maxim Healthcare Services, Inc. (2021) 66 Cal.App.5th 924, is similarly inapposite. (See Reply Br. 24-25; contra, Resp. Br. 33-34.) There, the plaintiff brought a PAGA claim on behalf of herself and others alleging that they were required to sign an unenforceable non-compete agreement. (*Johnson*, at p. 927.) Had she attempted to bring a separate, non-PAGA Labor Code claim on behalf of only herself for that violation, that claim would have been time-barred. (*Ibid.*) But the Court of Appeal held that she still had standing to bring the PAGA claim because PAGA standing does not depend on whether the plaintiff aggrieved employee "maintains a separate Labor Code claim." (*Id.* at p. 930.) The court also emphasized that the plaintiff had a personal stake in the outcome because she "remaine[d] an employee of Maxim and continue[d] to be governed by the terms of the [allegedly unlawful] Agreement" during that time. (*Id.* at p. 932.) This is unlike the situation here, where Adolph has no personal stake in the PAGA claim in court because his individual PAGA claim has been separated from the representative PAGA claim and sent to arbitration.

Adolph's construction of PAGA standing is also inconsistent with *Robinson v. Southern Counties Oil Company* (2020) 53 Cal.App.5th 476. In that case, the plaintiff brought a PAGA action for meal and rest break claims that were also the subject of a separate class action that settled while the PAGA action was pending. (*Id.* at p. 480.) The Court of Appeal held that claim preclusion barred the PAGA claims that overlapped with claims settled in the class action. (*Id.* at pp. 482-483.) The PAGA plaintiff also alleged violations occurring outside the class action liability period. (*Id.* at p. 484.) The court held that the plaintiff lacked standing to prosecute the violations not covered by the class action because, when those violations allegedly occurred, he "was no longer employed by Southern Counties and thus was not affected by any of the alleged violations." (*Ibid.*) Because he had no personal stake in the remaining parts of the PAGA lawsuit, he had no standing to prosecute them. (*Ibid.*; see Opening Br. 37-38; Reply Br. 23-25.) The same is true here: Adolph no longer has a personal stake in the representative PAGA claim because his individual PAGA claim has been sent to arbitration. He therefore lacks standing.

For all these reasons, as well as those stated in Uber's briefs, California statutory interpretation principles lead to only one conclusion: a PAGA plaintiff must maintain a personal stake in the case to have standing, and cannot seek penalties in court for alleged violations that concern solely other employees. When a plaintiff's individual PAGA claim is sent to arbitration, that

stake no longer exists, and the representative claims must be dismissed.

II. MISREADING PAGA TO ALLOW SUITS BY PLAINTIFFS WITH NO PERSONAL STAKE WILL HAVE PERNICIOUS EFFECTS

Adolph's reading of "aggrieved employee" is not only wrong as a matter of statutory interpretation—it is also ill-advised. Putting PAGA claims in the hands of plaintiffs without a personal stake in the suit (and thus, practically speaking, in the control of their lawyers) will have negative consequences for both employees and employers (large and small).

Under Adolph's reading of PAGA standing, plaintiffs may pursue PAGA claims in court even if they have no individual PAGA claim in the case and are pursuing penalties solely on behalf of other employees. If true, this reading opens the door for professional plaintiffs to hire themselves out to pursue PAGA claims solely on behalf of others. The result would be an explosion of PAGA lawsuits driven not by injured plaintiffs, but by enterprising plaintiffs' lawyers.

Once again, this is not an abstract concern. California businesses already struggle with abusive litigation at the hands of serial plaintiffs—some of whom have filed hundreds of cases—working in partnership with lawyers looking for quick and profitable settlements. (See, e.g., Order Declining Supplemental Jurisdiction Over Plaintiff's Unruh Act Claim, *Whitaker v. La Conq, LLC* (C.D.Cal., Sept. 20, 2019, No. 2:19-cv-07404) ECF No. 11 [declining to exercise jurisdiction over abusive litigation

claim]; Markham, *The Man Who Filed More Than 180 Disability Lawsuits*, N.Y. Times (Aug. 29, 2021)[5] [describing plaintiffs' firm "Potter Handy[, which] files thousands of cases each year, many with repeat plaintiffs"]; see also *Johnson v. Ocaris Management Group, Inc.* (S.D.Fla., Aug. 23, 2019, No. 18-CV24586-PCH) 2019 WL 13235834, at *1 [sanctioning prolific plaintiff and attorney for "fil[ing] numerous frivolous claims" in order "to dishonestly line their pockets with attorney's fees from hapless defendants under the sanctimonious guise of serving the interests of the disabled community"], affd. in relevant part by *Johnson v. 27th Avenue Caraf, Inc.* (11th Cir. 2021) 9 F.4th 1300.) As the pre-Proposition 64 version of the UCL illustrated (see pp. 24-25, *supra*), expanding representative standing to plaintiffs with no personal stake, who can pursue statutory penalties for conduct that exclusively affected others, spawns these abusive tactics. Adopting Adolph's definition of "aggrieved employee" will continue the transformation of PAGA from a statute that protects the rights of injured employees to one that simply lines the pockets of plaintiffs' lawyers at the expense of California's job creators.

Putting plaintiffs' attorneys even more firmly in the driver's seat will combine with other aspects of the statutory scheme to exacerbate these negative effects. PAGA's structure already encourages plaintiffs' lawyers to pursue suits for hyper-

[5] Available at https://www.nytimes.com/2021/07/21/magazine/americans-with-disabilities-act.html.

technical violations of Labor Code provisions, in part because those violations can be systematized, making it easy to claim that they affected large numbers of employees. Take, for example, a PAGA claim against an employer for using a truncated or altered version of its business name on employee wage statements; such a claim could easily apply to every single employee at a company. (See, e.g., *Noori v. Countrywide Payroll & HR Solutions, Inc.* (2019) 43 Cal.App.5th 957, 965 [collecting cases of this type].) And because PAGA penalties depend on the number of violations (see § 2699, subd. (f)(2)), total recovery amounts increase when suits include high numbers of individual violations. Technical suits are thus already more lucrative for plaintiffs' lawyers to pursue because they increase the total "verdict value" of a PAGA lawsuit, which in turn can arm twist defendants to settle while generating inflated attorneys' fees. (See, e.g., *O'Connor v. Uber Technologies, Inc.* (N.D.Cal. 2016) 201 F.Supp.3d 1110, 1117, 1129 [describing settlement agreement permitting recovery of attorneys' fees of "25% of the Settlement Fund ($21 to $25 million)"]; *Basiliali v. Allegiant Air LLC* (C.D.Cal., July 1, 2019, No. 2:18-cv-03888) 2019 WL 8107885, at *2 [describing PAGA settlement providing that plaintiff's counsel will receive "attorneys' fees not to exceed 33 1/3 percent of the Gross Settlement Amount"].)

These suits will only continue to proliferate if no plaintiff with an actual interest in the claims for civil penalties is steering the ship. With no plaintiff affected by the violations alleged, and no party with an interest in the civil penalties at stake, there will

be no incentives driving the litigation (or any settlement) in a direction that aims to benefit workers and deter violations. Instead, plaintiffs' lawyers can litigate the case with an eye on the prospect of a large attorneys' fees award. Hyper-technical lawsuits, now steered virtually entirely by the lawyers themselves, will therefore be even more enticing vehicles for the California plaintiffs' bar.

The result will be to exacerbate the negative effects from lawsuits focusing on technical violations of the Labor Code. Such suits can ensnare employers for years and cost exorbitant amounts of money, even when companies have complied with the Labor Code. Recent lawsuits demonstrate the negative impact on employers. For instance, Walmart recently faced $100 million in damages premised on two alleged technical errors on its employee wage statements. (*Magadia v. Wal-Mart Assocs., Inc.* (9th Cir. 2021) 999 F.3d 668, 671-673 [PAGA action alleged Walmart failed to "provide adequate pay rate information on its wage statements" and to "furnish the pay-period dates with [an employee's] last paycheck"].) While the Ninth Circuit held that Walmart had actually complied with California law, Walmart still had to pay to defend itself for five years to reach that result. (*Id.* at pp. 673, 680-682.)

These suits also hurt employees. The Chairman of the Family Business Association of California recently wrote that the threat of PAGA actions requires him to prohibit flexibility in his family business that many of his employees would prefer, such as taking their meal breaks later in the day. (See Monroe, *Frivolous*

PAGA lawsuits are making some lawyers rich, but they aren't helping workers or employers, L.A. Times (Dec. 6, 2018)[6] ["Now employees who want to work through their lunch so that they can go home early or eat with fellow employees are simply out of luck."].) Employees also suffer because PAGA suits over technical matters can encourage companies to reduce pay. In *Magadia*, *supra*, for example, one of the technical violations alleged was that the company gave its employees bonuses but failed to provide sufficient detail about its bonus and overtime calculations. (999 F.3d at pp. 680-681.) The obvious response to these types of suits is for businesses to stop giving bonuses. (See Crumpley, *PAGA Hurts Our Employees, Too*, San Fernando Valley Business Journal (June 20, 2021) ["Thanks to PAGA, businesses in California are now incentivized not to give bonuses to workers."].)[7]

The prospect of hyper-technical lawsuits also threatens small businesses. (See Froment, *NFIB attorney: PAGA reform 'priority concern' when it comes to small business*, Northern Cal. Record (July 27, 2019).)[8] The penalties imposed under PAGA for technical violations are often massive. (See, e.g., Monroe, *supra* ["As I learned the hard way, [PAGA] penalties can add up fast, easily reaching hundreds of thousands of dollars for a small

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[6] Available at https://www.latimes.com/opinion/op-ed/la-oe-monroe-paga-small-businesses-20181206-story.html.

[7] Available at https://www.sfvbj.com/news/weekly-news/paga-hurts-our-employees-too/.

[8] Available at https://norcalrecord.com/stories/512782631-nfib-attorney-paga-reform-priority-concern-when-it-comes-to-small-business.

company like ours (and millions for larger businesses)."]; *Magadia*, *supra*, 999 F.3d at p. 673 [$48 million in PAGA penalties initially awarded for adjusted-overtime-rate technical violation alone].) And given the complexity of the Labor Code, small businesses may not even know they are in violation. (See Muñoz, *Has PAGA Met Its Final Match? Continued Expansion of California's Private Attorneys General Act Leads to Trade Group's Constitutional Challenge* (2020) 60 Santa Clara L.Rev. 397, 426 ["The ambiguity and technical language in the labor code adds to the complexity of achieving compliance—many employers believe they are complying, when in fact, technical violations expose them to devastating penalties."].)

PAGA itself already places these burdens on California employers and employees. Expanding PAGA's reach, allowing for professional plaintiffs, and putting control of PAGA lawsuits out of the hands of injured workers and into the grips of the plaintiffs' bar, will only exacerbate these negative outcomes as the incentives to file technical (and even abusive) PAGA lawsuits increase.

Given all this, there is no reason for this Court to expand PAGA standing to reach those whose individual claims have been entrusted to agreed-upon, bilateral arbitration. If the Legislature disagrees, it may amend PAGA, as it has shown willingness to do in the past. (See, e.g., Assem. Bill No. 1654 (2017-2018 Reg. Sess.) [exempting construction industry].) A legislative debate would allow for a full weighing of the costs of any expansion of PAGA liability, as opposed to imposing such costs by judicial fiat.

But, in any event, there is no reason for this Court to enter that debate, because under current California law, Uber's proposed interpretation of "aggrieved employee" should prevail.

CONCLUSION

For all of the foregoing reasons, amici respectfully request that this Court reverse the judgment of the Court of Appeal.

Dated: December 20, 2022 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief consists of 7,373 words as counted by the Microsoft Word version 2016 word processing program used to generate the brief.

December 20, 2022

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STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is: 100 Pine Street, Suite 3200, San Francisco, California 94111. On December 20, 2022, I served the foregoing document described as: **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND [PROPOSED] BRIEF OF RETAIL LITIGATION CENTER, INC. and THE NATIONAL RETAIL FEDERATION** on the interested parties below, using the following means:

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