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July 1, 2022

VIA ELECTRONIC FILING

The Honorable Chief Justice Tani Cantil-Sakauye
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: **Amicus Curiae Letter Supporting Limited Review**
(Cal. Rules of Court, Rule 8.500(g))
Adolph v. Uber Technologies, Inc.
Supreme Court Case No. S274671

Dear Chief Justice and Honorable Justices of the California Supreme Court:

On behalf of the California Employment Lawyers Association (“CELA”), we respectfully request that the Court grant review of the Fourth District Court of Appeal’s decision in *Adolph v. Uber Technologies, Inc.* on the limited issue whether an “aggrieved employee” who has been compelled to arbitrate the “individual” civil penalty component of their Private Attorneys General Act (“PAGA”) claim on behalf of the Labor and Workforce Development Agency (“LWDA”) thereby loses statutory standing to pursue the LWDA’s “non-individual,” representative claims for civil penalties.

Uncertain language by the United States Supreme Court (“SCOTUS”) in *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. ___, 142 S.Ct. 1906, 2022 U.S. LEXIS 2940 (“*Viking*”), provides a clear opening for clarification by this Court. After finding this Court’s ruling in *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 380 invalidating the waiver of PAGA claims is *not* preempted by the Federal Arbitration Act (“FAA”), SCOTUS nevertheless found “PAGA’s built-in mechanism of claim joinder” conflicts with the FAA and held “the FAA preempts the rule of *Iskanian* insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate.” *Viking* at 34-35. SCOTUS consequently ordered the non-individual claims dismissed based on a misapprehension of state law regarding standing:

as we see it, PAGA provides no mechanism to enable a court to adjudicate nonindividual PAGA claims once an individual claim has been committed to a separate proceeding. Under PAGA’s standing requirement, a plaintiff

can maintain non-individual PAGA claims in an action only by virtue of also maintaining an individual claim in that action. See Cal. Lab. Code Ann. §§2699(a), (c). ... As a result, Moriana lacks statutory standing to continue to maintain her non-individual claims in court, and the correct course is to dismiss her remaining claims.

Id. at 34-35, emphasis added.¹ That ruling is inconsistent with this Court’s precedent that resolution of individual claims does not extinguish PAGA standing to bring non-individual claims. *Kim v. Reins Int’l California, Inc.* (2020) 9 Cal.5th 73, 80, 459 P. 3d 1123, 1130 (2020) (“*Kim*”) [“Settlement of individual claims does not strip an aggrieved employee of standing, as the state’s authorized representative, to pursue PAGA remedies”].

SCOTUS’ brief analysis of statutory standing under PAGA in Labor Code section 2699, subdivisions (a) and (c)—that PAGA does not permit non-individual claims once an individual claim is committed to a “separate proceeding”—also appears to conflict with this Court’s careful analysis in *Kim*: “The plain language of section 2699(c) has only two requirements for PAGA standing. The plaintiff must be an aggrieved employee, that is, someone ‘who was employed by the alleged violator’ and ‘against whom one or more of the alleged violations was committed.’ (§ 2699(c).)” *Kim*, at 83-84.

It is well established that the analysis of state laws by this Court cannot be disturbed, even by SCOTUS. *Johnson v. Frankell* (1997) 520 U.S. 911, 916 [“Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the state.”]. This case presents the very opportunity for the Court to exercise that sacrosanct power: “[o]f course, if this Court’s understanding of state law is wrong, California courts, in an appropriate case, will have the last word.” *Viking*, at 36 (Sotomayor, J., concurring).

The undersigned is counsel of record in two Court of Appeal decisions on which this Court declined Review,² affirming the denial of petitions to compel individual arbitration in cases brought as representative PAGA actions. These cases, along with

¹ Because all claims for civil penalties brought pursuant to PAGA are actions *representing* the State of California, SCOTUS distinguishes between “individual” claim representative PAGA actions affecting a single employee’s action for civil penalties and “non-individual” representative PAGA actions seeking civil penalties for other aggrieved employees. For ease of reference, this letter will use the language advanced by SCOTUS, without expressly agreeing with that aspect of its analysis.

² *Mondragon v. Santa Ana Healthcare & Wellness Ctr., LP*, B307872 (Second Appellate District, Division One, September 28, 2021) 2021 Cal.App.Unpub. LEXIS 6157, review denied *Mondragon v. Santa Ana Healthcare & Wellness Centre, LP*, 2021 Cal. LEXIS 8554 (Cal., Dec. 15, 2021) (Response to Petition for Certiorari due in the United States Supreme Court on July 18, 2022); and *Herrera v. Doctors Medical Center of Modesto, Inc.* (2021) 67 Cal.App.5th 538.

hundreds of other cases pending in trial courts throughout California, are now directly impacted by *Viking*. Without this Court's clarification *now* of the purely California state law issues in *Adolph* regarding PAGA's claim-joinder mechanism and non-waivable standing to bring non-individual representative claims, the result will be a morass of unguided trial court decisions, unnecessary and inefficient statutory stays, and appeals of potentially erroneous dismissals of non-individual PAGA claims. These issues, which raise pure questions of statutory construction, *must* ultimately be decided by this Court, and this case presents the opportunity for the Court to address them promptly and avoid having to untangle them down the road after years of wasteful and burdensome litigation.

CELA urges the Court to order limited review of *Adolph*, or if the Court is inclined to vacate and transfer, that it provide specific instructions to the Court of Appeal, directing it to address whether, under PAGA and this Court's analysis in *Kim*, Mr. Adolph would lose his status as a PAGA "aggrieved employee" if Uber is entitled to require him to arbitrate the "individual" component of his and the LWDA's PAGA claim. Clarity on these issues affecting hundreds of actions will protect California employees, ensure clarity and consistency for employers, and prevent confusion for their attorneys, and trial and appellate courts.

Respectfully submitted,
COHELAN KHOURY & SINGER
CALIFORNIA EMPLOYMENT
LAWYERS ASSOCIATION (CELA)



Michael D. Singer, Esq.

cc: All counsel (see attached service list)

PROOF OF SERVICE

Adolph v. Uber Technologies, Inc.
Supreme Court Case No. S274671

I am a resident of the State of California, over the age of 18 years, and not a party to the within action. My business address is Cohelan Khoury & Singer, 605 C Street, Suite 200, San Diego, California 92101.

On July 1, 2022, I served the foregoing document(s) described as **AMICUS CURIAE LETTER SUPPORTING LIMITED REVIEW** on the interested parties in this action by placing a true copy thereof in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

I then served each document in the manner described below:

[XX] Via TrueFiling: I filed and served such document(s) via TrueFiling, thus sending an electronic copy of the filing and effecting service.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed July 1, 2022 at San Diego, California.

Amber Worden
Amber Worden

SERVICE LIST
Adolph v. Uber Technologies, Inc.
Supreme Court Case No. S274671

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