No. S274671

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

ERIK ADOLPH,

Plaintiff and Respondent,

v.

UBER TECHNOLOGIES, INC.,

Defendant and Appellant.

California Court of Appeal, Fourth Appellate District, Division Three
Case Nos. G059860, G060198
Appeal from Orange County Superior Court
Case No. 30-2019-01103801
Honorable Kirk H. Nakamura, Judge Presiding

APPLICATION TO FILE AMICUS BRIEF AND BRIEF OF AMICI CURIAE CALIFORNIANS FOR FAIR PAY AND EMPLOYER ACCOUNTABILITY

GREINES, MARTIN, STEIN & RICHLAND LLP
Jeffrey E. Raskin, SBN 223608
jraskin@gmsr.com
6420 Wilshire Boulevard, Suite 1100
Los Angeles, California 90048
Telephone: (310) 859-7811 | Facsimile: (310) 276-5261

Attorneys for Amicus Curiae
CALIFORNIANS FOR FAIR PAY AND EMPLOYER ACCOUNTABILITY

APPLICATION TO FILE AMICI CURIAE BRIEF

Pursuant to California Rules of Court, rule 8.520(f), Californians for Fair Pay and Employer Accountability (CFPEA) seeks permission to file the attached amicus curiae brief.

Interest Of Amicus Curiae

CFPEA is a 501(c)(4) organization that represents a broad spectrum of industries that are deeply concerned about and deeply impacted by abuses of the Private Attorney General Act (PAGA) and the effect of those abuses on California businesses. CFPEA is engaged in efforts to reform PAGA through both legislative action and ballot measures. Pending that reform, CFPEA is committed to encouraging sound judicial interpretation of PAGA.

The industry groups involved in CFPEA include the California Chamber of Commerce, California New Car Dealers Association, Western Growers Association, California Restaurants Association, California Grocers Association, California Retailers Association, California Manufacturers and Technology Association, and California Hospitals Association. Like CFPEA, these organizations have made combating the widespread abuse of PAGA a priority: to stop its misuse by plaintiffs' lawyers as a tool to shakedown businesses, rather than to ensure Labor Code compliance.

Assistance To The Court

CFPEA's amicus curiae brief will assist the Court in multiple ways.

First, the brief provides the Court with the relevant legal standard and framework this Court should use to examine the issues presented by the parties—a standard and framework not raised by the parties. Specifically, in *State ex rel. Harris v. PricewaterhouseCoopers, LLP* (2006) 39 Cal.4th 1220 (*Pricewaterhouse*), this Court explained the lens through which it examines questions about the intended scope of a legislative grant of standing in qui tam cases. Under that standard, the Court declines—due to policy reasons—to interpret standing broadly absent *clear* statutory language or legislative history supporting that broad interpretation. (*Id.* at p. 1232.) That standard applies here because this Court has already acknowledged that an aggrieved employee's PAGA case is a form of qui tam.

Second, CFPEA brings to the Court CFPEA's considerable experience with PAGA abuses and demonstrates how Adolph's overly broad interpretation of the statute will lead to further abuses that undermine the State's policy and the Legislative intent behind PAGA.

Third, CFPEA applies the *Pricewaterhouse* standard to the case, including by providing textual, legislative history, and policy arguments not made by the parties.

Authorship Of Amicus Curiae Brief

The industry groups listed on the first page of this application were involved in funding the preparation of CFPEA's amicus curiae brief. (Cal. Rules of Court, rule 8.520(f)(4)(B).)

No party or counsel for any party to the pending appeal authored any portion of CFPEA's amicus curiae brief. Nor did they make any monetary contribution to fund the preparation of CFPEA's amicus curiae brief. (Cal. Rules of Court, rule 8.520(f)(4)(A).)

Dated: December 29, 2022

Respectfully submitted,

GREINES, MARTIN, STEIN & RICHLAND LLP
Jeffrey E. Raskin

By: /s/ *Jeffrey E. Raskin*
Jeffrey E. Raskin

Attorneys for Amicus Curiae
CALIFORNIANS FOR FAIR PAY AND EMPLOYER ACCOUNTABILITY

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INTRODUCTION

Although not mentioned by the parties, this Court has already established the standard by which it adjudicates questions about the scope of standing for a qui tam statute—a standard rooted in concerns that an over-reading of the Legislature's intent may cause significant policy problems with unintended, negative, real-world consequences. That standard applies here, and Adolph's argument easily fails under it.

This Court has already held that PAGA is a "type of qui tam action." (*Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 81.) In a slightly different context, this Court has explained that it will *not* broadly construe statutory grants of qui tam standing *absent a clear expression* that the Legislature intended qui tam standing to extend as far as the plaintiff urges. (*State ex rel. Harris v. PricewaterhouseCoopers, LLP* (2006) 39 Cal.4th 1220, 1232, 1238 (*Pricewaterhouse*).) Instead, the Court will stay its hand because the "issue is best left to the Legislature's specific attention, at its discretion." (*Ibid.*) That is particularly true where the statute's text or legislative history include indicia that the Legislature might have balanced competing policy concerns in favor of an interpretation narrower than the one the plaintiff suggests.

There is no principled basis for applying a different standard to the interpretation of the qui tam statute here. Just as in *Pricewaterhouse*, Adolph's expansive reading of PAGA standing poses a myriad of serious policy concerns. Just as in *Pricewaterhouse*, the Legislature did *not clearly* express its intent

to go as far as Adolph urges—a fact underscored not just by the statutory text, but also from the United States Supreme Court's unanimous inability to discern any such intent. And just as in *Pricewaterhouse*, indicia in the statute and its legislative history suggest that the Legislature might have balanced the competing policies against Adolph's approach.

When it enacted PAGA, the Legislature was acutely aware that broad standing under the Unfair Competition Law had led to abuses by plaintiffs' attorneys which had detrimental effects on business and, in turn, on the ability of some businesses to remain open and employ Californians. PAGA's legislative history shows that the Legislature studied these problems in detail and took those policies concerns to heart when the Legislature *narrowed the original wording* of the bill: They deleted the language from the original bill, which would have allowed an employee to maintain a PAGA case on behalf of themselves "or" other employees. Instead, the Legislature permitted an employee only to bring "a civil action"—singular—"on behalf of" both the employee "and" other employees. Numerous PAGA provisions similarly indicate an intent to not extend standing as far as Adolph urges.

What's more, expansion of PAGA standing in the manner urged by Adolph risks serious real-world problems and undermines the State's own policies in enacting PAGA. PAGA has often been used as a tool to shake down businesses and obtain massive attorney fee awards, rather than to ensure Labor Code compliance. In fact, plaintiffs' attorneys have coupled

PAGA actions with non-PAGA claims in order to drive settlements that are characterized to decrease the amount attributable to penalties and increase the amount attributable to claims paid solely to the plaintiff (and not the State). The rule that Adolph urges multiplies and exacerbates those policy problems and introduces new variants of them. It harms businesses, the State, other employees not represented by counsel, and Californians as a whole.

Amicus CFPEA does not believe that any mode of statutory interpretation can properly lead to Adolph's interpretation. But at very least, Adolph cannot hope to meet the *Pricewaterhouse* standard that should apply here. The Court should reject the invitation to broadly interpret PAGA standing. The issue should be left to the Legislature.

ARGUMENT

I. The Applicable Standard: This Court's Guiding Rules Regarding The Analysis Of California's Qui Tam Statute Are The Proper Methodology For The Court To Consider PAGA Standing.

With good reason, California law ordinarily "require[s] a plaintiff to have a personal interest in the litigation's outcome"; a requirement that stems from "prudential" concerns when a plaintiff lacks sufficient skin in the civil action. (*Bilafer v. Bilafer* (2008) 161 Cal.App.4th 363, 370, internal quotation marks omitted; see, e.g., *Common Cause v. Board of Supervisors* (1989)

49 Cal.3d 432, 439 [standing ensures "sufficient interest in the subject matter of the dispute to press (plaintiff's) case with vigor"].) The Legislature somewhat departed from that rule in authorizing qui tam actions under both the California False Claims Act (CFCA) and PAGA, which both partially assign the state's right to sue. (*Kim, supra*, 9 Cal.5th at p. 81 [recognizing that PAGA is a "type of qui tam action"].)

But as this Court recognized with regard to the CFCA, understanding the intended scope of qui tam standing must be approached with care. It always carries the very real risk of creating prudential problems that harm other policy concerns—a balance that should be left to the Legislature, in its discretion.

Cognizant of these serious policy concerns, this Court resisted calls to "liberally construe[]" the scope of qui tam standing under the CFCA. (*Pricewaterhouse, supra,* 39 Cal.4th at p. 1238.) Instead, the Court explained that it would not adopt the plaintiff's broad interpretation of the scope of qui tam standing absent "clearer" evidence in the text or legislative history that the Legislature actually "intended to create" a standing rule that goes as far as the appellant urged. (*Id.* at pp. 1232, 1238.)

This is the same methodology that the Court should use in interpreting the scope of qui tam standing under PAGA.

For one thing, this Court has itself described PAGA as a "type of qui tam action." (*Kim, supra,* 9 Cal.5th at p. 81.) There is no principled reasoned that the breadth of standing for one qui

tam statute (CFCA) should be analyzed any differently than the breadth of standing for another qui tam statute (PAGA). Both statutory schemes partially assign the State's right to sue with the aim of supplementing State enforcement resources. Both statutory schemes involve legislative balancing of that interest against the very real risk that expanding standing too far is itself detrimental to the State's other policy interests. The Court should be equally reluctant to broadly interpret the extent of those statutory grants of standing absent clear Legislative expression of intent favoring the plaintiff's interpretation.

What's more, as will be demonstrated later in this brief, the over-expansion of PAGA standing urged by Adolph will create the same sort of real-world prudential problems that it is difficult to imagine the Legislature intended to create. Adolph would expand standing to maintain a civil suit by a person who is completely disinterested in the civil action and unable to share in any of the penalties awarded in it—something far beyond *Kim, supra*, and far beyond the CFCA. Because the result will be binding on the State and other employees, Adolph's approach puts a disinterested party in the driver's seat to control the fate of everyone. Absent a clear expression from the Legislature and given the contrary indicia in the statute and legislative history, the Court should not entertain Adolph's broad interpretation. The issue should be left to the Legislature to resolve. (§§ II.-III., *post*).

A. *Pricewaterhouse* Analysis.

Because the Court's analytical framework in *Pricewaterhouse* creates a specific analysis for understanding the scope of a statutory grant of qui tam standing, we summarize how *Pricewaterhouse* reached its conclusions—so that that analysis can inform this Court's analysis of Adolph's standing-expansion arguments here.

Arguments offered in favor of broad standing in Pricewaterhouse. Under the CFCA, a "person" with knowledge of the facts has standing to bring a qui tam action. (*Pricewaterhouse, supra,* 39 Cal.4th at p. 1223.) Numerous cases had interpreted the term "person" in other statutes to include public entities. (*Id.* at pp. 1236-1237.) CFCA's own plain language defined "person" to include "corporations," which arguably encompassed "municipal corporations." (*Id.* at p. 1232.) What's more, CFCA was modeled on the federal false claims statute, which had long been assumed to allow states to bring qui tam claims on behalf of the federal government, so perhaps the California legislature similarly intended governmental entities to act as qui tam plaintiffs to recover for a defendant's false claims against other governmental entities. (*Id.* at pp. 1234-1237.) Arguing that CFCA must be "liberally construed to promote the public interest," the City maintained that these features should lead to the interpretation that public entities are "persons" with standing to bring a qui tam claim under CFCA. (*Id.* at p. 1238.)

This Court's rejection of liberal construction for qui tam standing. Despite these arguments in favor of a broad construction of the term "person," the Court took a circumspect approach. The Court expressed concern that affording CFCA qui tam standing to municipalities could create significant, real-world policy problems that "*we see no evidence that [the Legislature] intended to create*." (*Pricewaterhouse, supra,* 39 Cal.4th at p. 1238, italics added.) Further, the Court saw some indicia in the statutory text that the Legislature did not intend such a broad reading. (*Id.* at pp. 1237-1238.) Absent something *explicit and unambiguous* in the statutory text or legislative history supporting broad standing—"a clearer expression"— the Court refused to create these real-world problems through statutory interpretation. (*Id.* at p. 1232.) Instead, the Court unanimously recognized that "[t]he issue is best left to the Legislature's specific attention, at its discretion." (*Ibid.*)

The Court observed that the "Legislature could reasonably conclude that [the purposes of a CFCA qui tam action] are undermined by allowing a local government entity to step outside the specified jurisdictional boundaries, and to bring qui tam actions *exclusively* on behalf of *other* units of government. Such a system raises concerns that scarce government resources might be wasted on duplicative, overlapping, and competitive investigations of possible false claims. Though a qui tam action brought by one government entity exclusively on behalf of another might succeed, thus enriching the coffers of both, it might also fail, resulting in the irretrievable loss of taxpayer

dollars and public resources expended by the 'qui tam' agency in its effort to recover funds owed exclusively to a *different* agency." (*Id.* at p. 1231, original italics.) The Court viewed the Legislature's delegation of qui tam standing as part of a "carefully balanced scheme," while expansion of qui tam standing to public entities created other policy problems, including that some agencies, seeking risky paydays, [might] employ taxpayer funds, and [might] divert time and resources from their usual public duties, in order to speculate in qui tam litigation on the sole behalf of other agencies." (*Id.* at p. 1232.)

The Court concluded: "These significant policy concerns counsel against a conclusion, absent a clearer expression of purpose, that the Legislature meant to authorize quit tam suits by public entities. The issue is best left to the Legislature's specific attention, at its discretion." (*Ibid.*, italics added.)

In other words, although the term "corporation" might be liberally construed to encompass "municipal corporations"—as the City argued in *Pricewaterhouse*—the Court would not liberally interpret statutory standing this way absent clarity: Absent "words or phrases most commonly used to signify . . . public entities or governmental agencies." (*Id.* at pp. 1229, 1232.) "[L]egislators know how to include such entities directly when they intend to do so," and the absence of this specific language was "indicia that public agencies were not intended as qui tam relators under the statute." (*Id.* at pp. 1229, 1237-1238.)

The Court also gave pause to the interpretive task because of two other such indicia. *First*, a different part of the statutory scheme indicated that the Legislature might not have intended "person" to include public entities. (*Id.* at p. 1230.) In providing that a qui tam claim should be filed under seal, the statutory scheme described such complaints as being "'filed by a *private* person.'" (*Ibid.*, original italics.) *Second*, as originally introduced, the bill that would become CFCA included "'district, county, [and] city'" within the definition of "persons," but those terms were later omitted in subsequent amendments. (*Ibid.*, italics omitted.)

***Kim* does not dictate a different analytical framework.** In *Kim*, *supra*, 9 Cal.5th 73, this Court analyzed PAGA standing without reference to *Pricewaterhouse*'s analytical framework. But that is hardly surprising. *Pricewaterhouse*'s analysis requires a "clear[]" expression from the Legislature to defeat the Court's policy-based reluctance to expansively interpreting qui tam standing. (*Pricewaterhouse, supra,* 39 Cal.4th at p. 1232.) That was not a problem in *Kim* because—as the Court put it—the relevant "words of the statute are clear" that the plaintiff in *Kim* did have standing. (*Kim*, *supra*, 9 Cal.5th at p. 85.)

In *Kim*, the plaintiff unquestionably fell within the clear and unequivocal grant of standing to represent the State in his action to obtain PAGA penalties on behalf of both himself and others. Under the plain language of the statute, the plaintiff's settlement of his related, *non-PAGA claims for damages* did not

eliminate his standing to bring PAGA *penalty claims* (representing the State in seeking *penalties for himself and others*) that were not settled. As *Kim* held, PAGA's "statutory language" *unambiguously* conferred such standing. (*Id.* at pp. 83-86 [under plain language, employee seeking to recover penalties on his own behalf, who suffered one of the alleged "violations" has standing regardless of whether she suffered any economic injury or whether any economic injury was redressed through payment of damages].) The clarity of the legislative intent in *Kim* was the motivating factor that properly avoids *Pricewaterhouse*-type analysis. As the Court put it, "we may not add to or alter" that "clear" statutory language to diminish the breadth of standing that the Legislature expressly codified. (*Id.* at p. 85, internal quotation marks omitted.)

The present case, unlike *Kim*, implicates huge policy concerns and neither the statutory text nor the legislative history clearly supports Adolph's broad interpretation; indeed, the indicia are that the Legislature never contemplated what Adolph urges. Accordingly, this case calls for a *Pricewaterhouse*-type analysis.

B. Similar Analysis In PAGA Cases.

Pricewaterhouse is not alone. Its analysis is echoed in another opinion interpreting PAGA. There, the Court of Appeal explained that a "statute will be construed in light of common law decisions, unless its language *clearly and unequivocally* discloses an intention to depart from, alter, or abrogate the common-law rule concerning the particular subject

matter." (*Shaw v. Superior Court of Contra Costs County* (2022) 78 Cal.App.5th 245, 258, italics added, internal quotation marks omitted [interpreting PAGA].) "There is a presumption that a statute does not, by implication, repeal the common law. Repeal by implication is recognized only where there is no rational basis for harmonizing two potentially conflicting laws." (*Ibid.*, internal quotation marks and citations omitted.) The legislative intent must be "manifest." (*Ibid.*)

This *Pricewaterhouse*-esque analysis makes sense. In PAGA, the Legislature certainly manifested its intent to expand common law standing by authorizing a qui tam suit "by an aggrieved employee on behalf of himself or herself *and* other current or former employees." (Lab. Code, § 2699, subds. (a), (g)(1), italics added.) But it is another matter entirely to say that the Legislature "clearly and unequivocally" expanded that standing to persons—like Adolph—who are bringing the action in civil court *solely on behalf of others*, while that plaintiff's individual claim for PAGA penalties is pending in a separate action, in a separate venue, before a private decisionmaker, that proceeds under its own timeline and under its own substantive and procedural rules. Like the analysis in *Pricewaterhouse*, "liberal constru[ction]" cannot be used as a bridge. The issue should be left to the Legislature.

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As will be demonstrated in sections II and III below, a *Pricewaterhouse* analysis strongly counsels in favor of leaving the issue to the Legislature's specific attention. PAGA does not

clearly extend qui tam standing to Adolph's circumstances. Nor does its legislative history clearly indicate such an intent. Indeed, numerous textual clues in the statute and the evolution of the bill indicate that the Legislature did *not* intend PAGA to be as expansive as Adolph urges. Given the very real policy concerns that arise from Adolph's overly broad reading of the statute, the Court should do as it did in *Pricewaterhouse*: Refuse to read that level of expansiveness into the statute and leave the issue to the Legislature to weigh.

II. In Enacting PAGA, The Legislature Made Clear That It Was Concerned About Prudential Problems That Would Inevitably Flow From Extending Standing Too Far.

Concerns about the careful balance of policy concerns that counsel against broad interpretations of qui tam standing are not limited to the particular policies considered in *Pricewaterhouse*. They are present *every time* the Legislature expands standing. Indeed, the legislative history of PAGA makes clear that the Legislature was specifically concerned about not reaching the wrong balance in enacting PAGA. Just as in *Pricewaterhouse*, "absent a clearer expression" from the Legislature, the "issue is best left to the Legislature's specific attention," rather than to liberal construction by the courts. (39 Cal.4th at pp. 1231-1232.)

A. Hard Lessons From California's Unfair Competition Law.

Prior to Proposition 64, the Unfair Competition Law (UCL) explicitly conferred standing on any person to bring suit in the interest of the general public. The result of this intentional grant of broad standing was mischief—real-world, prudential and policy problems—that the Legislature had not imagined. This has been alluded to in the parties' brief. The details, however, bring the policy problem into specific relief.

A wide range of highly-publicized abuses by attorneys demonstrated the weaponization of the UCL to file "'frivolous lawsuits as a means of generating attorney's fees without creating a corresponding public benefit'"—"'lawsuits where no client has been injured in fact,' 'lawsuits for clients who have not used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant . . . .'" (*Kiwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 342-343 (dis. opn. of Chin, J, italics omitted quoting Prop. 64.) These abusive suits were filed "'on behalf of the general public without any accountability to the public and without adequate court supervision.'" (*Ibid.*, quoting Prop. 64.)

For instance, in one commonly-used tactic, the plaintiff would (1) "parlay the low cost of filing numerous claims under the UCL's broad standing provisions" against hundreds upon hundreds of defendants and then (2) contact each defendant individually "with threats of expensive litigation and restitution exposure" if they did not quickly settle the claims. (Blackston,

California's Unfair Competition Law—Making Sure The Avenger Is Not Guilty Of The Greater Crime (2004) 41 San Diego L.Rev. 1833, 1849-1850.) "Offering low settlement demands that were likely to be accepted by each individual defendant" yielded "substantive rewards by merely playing the numbers." (*Id.* at p. 1850.)

Other attorneys would use the UCL's broad standing rules to prey upon businesses that had received notices of regulatory violations—violations that the regulatory agency had determined did not merit formal disciplinary action and that could be simply resolved through voluntary compliance. (*Ibid.*) Unscrupulous attorneys would invest the minimal effort to peruse the agency's website for such notices before filing a UCL action on behalf of an unharmed plaintiff against a business that was in the midst of complying with the regulatory process. (*Ibid.*) The result was extreme pressure for a quick settlement that benefitted the plaintiff and her counsel, but nothing that can be described as benefiting the general public. (*Ibid.*)

"A third common area of abuse under the UCL was the practice of 'taking on' section 17200 claims in an effort to broaden a plaintiff's scope of discovery and increase settlement leverage." (*Id.* at p. 1851.) "A plaintiff merely needed to find an alleged 'unfair' practice of the defendant that affects a number of people, and the plaintiff was transformed from a private party suing on one's own behalf into a private attorney general suing on behalf of the public. The transformation gave unscrupulous plaintiffs a

powerful artifice for broadening discovery and extorting settlements." (*Ibid.*)

Though paved with good intentions, the UCL created a pathway to abuse that harmed commerce—particularly smaller businesses. Ultimately, the voters needed to fix the statutory problem through Proposition 64.[1]

B. In Enacting PAGA, The Legislature Took To Heart The Prudential And Policy Lessons Learned From California's Experience With Broad UCL Standing.

The Legislature again departed from ordinary standing rules when it enacted PAGA. But it did so with caution and open eyes.

Textual changes to the bill. As introduced and throughout several subsequent amendments, Senate Bill 796 permitted an employee to maintain a civil action "on behalf of himself or herself *or others*." (Sen. Bill No. 796 (2003-2004 Reg. Sess) as introduced Feb. 21, 2003, italics added; Sen. Bill No. 796 (2003-2004 Reg. Sess) as amended Mar. 26, 2003, italics added;

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[1] The UCL needed to be reformed by the Legislature or the voters because its excessively-broad standing was explicit and unambiguous on the face of the statute. Courts had no power—under *Pricewaterhouse*'s framework or any other doctrine—to read the UCL any other way. But the *Pricewaterhouse* framework does apply to the PAGA issue before this Court and to all statutes when the plaintiff asserts an expansive interpretation of qui tam standing that is not so clearly intended by the Legislature.

Sen. Bill No. 796 (2003-2004 Reg. Sess) as amended Apr. 22, 2003, italics added; see Sen. Bill No. 796 (2003-2004 Reg. Sess) as amended May 1, 2003 ["on behalf of himself or herself *or other current or former employees*, italics added]; Sen. Bill No. 796 (2003-2004 Reg. Sess) as amended May 12, 2003 [same].)[2]

In other words, early versions of the statute would have allowed Adolph to bring his civil action for PAGA penalties *solely* on behalf of other employees—as he now attempts. That is narrower than the UCL's any-person-standing. But it allows for representational actions by an employee who has no skin in the actual civil action.

The Legislature, however, later amended the bill to ensure that employees who had no stake in the civil action could not represent others. Under the amended version of the bill and as enacted, Labor Code section 2699, subdivision (a) authorized a civil action "on behalf of [the plaintiff] *and* other current or former employees." (Sen. Bill No. 796 (2003-2004 Reg. Sess) as amended July 2, 2003, italics added; Lab. Code, § 2699, subd. (a), italics added.) "And." Not "or." The change was seemingly intended to narrow the scope of qui tam standing so that an employee (even one aggrieved by the same sort of violation alleged in the complaint) could not sue solely to recover penalties on behalf of others.

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[2] Original and amended versions of SB 796 can be found at <https://leginfo.legislature.ca.gov/faces/billVersionsCompareClient.xhtml?bill_id=200320040SB796>.

Awareness of UCL problems. The legislative history makes clear the reason for the amendment. It explains that press accounts of abuses of UCL standing had become so prevalent that the Senate and Assembly Committees on the Judiciary held a joint legislative hearing on the matter. (Assem. Com. on Labor and Employment, Analysis of Sen. Bill No. 796 (2003-2004 Reg. Sess.) July 9, 2003, p. 6.)[3] Based on the information "illuminated" by those joint hearings, the "sponsors [of the bill that would become PAGA] are mindful of private plaintiffs [*sic*] abuse of the UCL, and have attempted to craft a private right of action that will not be subject to such abuse, pointing to amendments taken in the Senate to clarify the bill's intended scope." (*Id.* at pp. 6-7.) Particularly, the amended bill required that the action be brought "'on behalf of [the plaintiff] *and* other current or former employees." (*Id.* at p. 7, italics added.)

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In short, the Legislature that enacted PAGA was aware of the need to create what *Pricewaterhouse* called a "carefully balanced scheme" that (1) enlarged qui tam standing to compensate for a lack of State enforcement (2) without expanding standing so far as to create "significant policy concerns" that impact business and harm other State interests. (39 Cal.4th at p. 1232.) As in *Pricewaterhouse* and as will be demonstrated in

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[3] All legislative bill analysis cited in this brief can be found at <https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200320040SB796>.

section III., the Legislature did not clearly manifest an intent that that expansion should cover anything like Adolph's circumstances and several legislative indicia are to the contrary. Absent a clear expression from the Legislature, courts should not intervene; the "issue is best left to the Legislature's specific attention, at its discretion." (*Ibid.*)

C. PAGA Abuses Thrive Even Under The Accepted Interpretation Of Standing. Tipping The Balance Toward Even More Expansive Standing Would Only Worsen The Problems.

Despite the Legislature's efforts to find a balance, PAGA has already been abused and weaponized by opportunistic attorneys who use PAGA's breadth to bludgeon businesses—large and small—into massive settlements that largely fill the attorneys' pocketbooks with relatively little in penalties going to the aggrieved employees or the State. Indeed, amicus curiae CFPEA exists, in large part, to reform PAGA so that it reins in abuse and better addresses the full range of policy concerns.

These real-world policy problems would only be exacerbated and multiplied by reading into PAGA what Adolph requests.

The amicus brief filed by The Chamber of Commerce of the United States of America details and documents much of this abuse and risk. (Chambers Amicus Brief pp. 13-29.) This brief will not repeat The Chambers' points or the authorities that it

relies on (studies, calls for legislative changes, etc.). But we will add some additional concerns:

Manageability. Courts and commentators have recognized that PAGA claims present "significant manageability concerns." (*Wesson v. Staples the Office Superstore, LLC* (2021) 68 Cal.App.5th 746, 766; see also *Estrada v. Royalty Carpet Mills, Inc.* (2022) 76 Cal.App.5th 685, 713, review granted (Cal. 2022) 511 P.3d 191; Goodman, Comment, *The Private Attorney General Act: How to Manage the Unmanageable* (2016) 56 Santa Clara L.Rev. 413, 437-440 (hereafter *How to Manage the Unmanageable*).) Unlike class actions, PAGA plaintiffs need not show commonality and can add "unrelated violations" to their PAGA action. (E.g., *Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal.App.5th 745, 753-761.) "Some PAGA claims involve hundreds or thousands of alleged aggrieved employees, each with unique factual circumstances," resulting in "unduly expensive, impractical" trials that place "too great a burden on our already busy trial courts" (*Estrada*, *supra*, 76 Cal.App.5th at p. 713) and absurd costs and settlement pressures on employers who understandably don't want (or can't afford) to litigate unmanageable cases.

Indeed, attorneys' ability to structure cases to be unmanageable is one of the well-known means they use to bludgeon employers into settlement. (*How to Manage the Unmanageable*, *supra*, 56 Santa Clara L.Rev. at pp. 439-440.) Such suits are sometimes referred to as "strike suits" that lead to "'blackmail' settlements." (*Id.* at p. 439 & fn. 184 ["'Any device

which is workable only because it utilizes the threat of unmanageable and expensive litigation to compel settlement is not a rule of procedure—it is a form of legalized blackmail," quoting Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review* (1971) 71 Colum. L.Rev. 1, 9].)

While the unmanageability and detriment of PAGA claims is universally recognized, California courts disagree about whether, at some point, they have the power to dismiss unmanageable PAGA claims. One Court of Appeal has held that courts have inherent power to do so. (*Wesson, supra,* 68 Cal.App.5th at pp. 765-769.) Another Court of Appeal has held that courts have no such power, but has warned that a plaintiff attempting to bring a seriously unmanageable claim may find it difficult to prove violations—particularly to prove violations impacting other aggrieved employees. (*Estrada, supra,* 76 Cal.App.5th at pp. 712-713.)

Whichever way that split is ultimately resolved, the policy problems are made worse by expanding standing to a plaintiff who has no interest in the unmanageable PAGA civil action while his own PAGA claims are decided in a separate arbitration:

1. If courts have no power to dismiss unmanageable PAGA claims (as *Estrada* held), Adolph's approach creates horrible policy. Employers and the Legislature might at least hope that a party with an interest in the civil action would be less inclined to fashion an unmanageable civil action; that they might heed *Estrada*'s warning that brining unmanageable claims will reduce

their chance of proving their claims. (See 76 Cal.App.5th at p. 713.) But Adolph has no skin in the civil action, so *he won't suffer* from any such proof problem in the civil action. Only the State and other aggrieved employees will be harmed by a disinterested plaintiff's choice to bring an unmanageable PAGA claim; as this Court has already held, *they* will be bound by the plaintiff's tactic. (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 985 [judgment is binding on the "government agencies and any aggrieved employee not a party to the proceeding"].) *From the perspective of a plaintiff with a separate arbitration*, bringing a wholly unmanageable civil action coupled with his arbitration only has an upside: Attempting to bludgeon employers into settling everything in order to avoid the expense of litigating the unmanageable civil case.

That is bad for the State and other aggrieved employees who are bound by the plaintiff's tactic and the resulting proof-problems.

It is bad for an overburdened court system that is dragged through a unmanageable case by a disinterested plaintiff.

It is bad for employers, who are put to the choice of paying a ransom to avoid the massive expense of litigating an unmanageable case.

And it is bad for the California public, who will ultimately bear the costs—through higher prices—when employers pass on the expense.

2. Those sort of policy concerns do not disappear even if courts do retain some discretion to dismiss a PAGA claim at some threshold of unmanageability. Plaintiffs who are disinterested in the civil action still have every incentive to push the envelope on unmanageability, hoping that the threat that the litigation goes forward (at some unmanageable level) will scare employers into settling where it is not truly warranted. This harms businesses large and small and, in turn, the California economy. To the extent that somewhat unmanageable claims are still permitted to proceed, plaintiffs who are disinterested in the civil action still hold in their hands the fate of the State and aggrieved employees. And plaintiffs who are disinterested in the civil action still drag the overburdened court system through the mess—even if only for a court to decide unmanageability questions and discovery and summary judgment issues prior to determining unmanageability. Again, Adolph's approach creates policy concerns all around.

Undermining of PAGA's purposes. The Legislature intended PAGA qui tam cases, in part, to help fund the State's ability to afford prosecuting the Labor Code violations that the State deems worthy of its own attention. The Legislature dictated that seventy-five percent of penalties awarded in PAGA qui tam cases must be distributed "to the Labor and Workforce Development Agency *for enforcement of labor laws*, including the administration of this part, and for education of employers and employees about their rights and responsibilities . . . ." (Lab. Code, § 2699, subd. (i), italics added.) In enacting PAGA, the

Legislature repeatedly recognized this important fiscal benefit. (Assem. Com. on Appropriations, Analysis of Sen. Bill No. 796 (2003-2004 Reg. Sess.) Aug. 20, 2003, p. 2; Assem. Floor Analysis of Sen. Bill No. 796 (2003-2004 Reg. Sess.) Aug. 27, 2003, p.2; Sen. Floor Analysis of Sen. Bill No. 796 (2003-2004 Reg. Sess.) September 11, 2003, p. 5.)

But abuse of PAGA has substantially undermines that purpose. For instance, attorneys will often (1) combine a PAGA claim with a class action for Labor Code damages and then (2) use the PAGA claim as leverage to settle the class action. (*How to Manage the Unmanageable, supra*, 56 Santa Clara L.Rev. at pp. 439-440, 448-449.) It is then a simple matter of structuring the settlement so that the funds are allocated primarily toward the class action claim rather than to the PAGA claim. (*Ibid.*) The result is a drastic reduction in PAGA penalties allocated to the State and further diminution of the State's ability to enforce its labor laws. (*Id.* at pp. 448-449.)

Adolph's approach to PAGA standing raises a related policy problem that is doubly troubling: Adolph admits that he cannot personally recover any share of the PAGA penalties from the civil action because that would amount to a "double-recover[y]" when combined with the penalties he is awarded in arbitration. (Respondent's Br. on the Merits 41.) So, his personal interest is to settle both his individual PAGA claim (from arbitration) and the representative PAGA claim (from the civil action) in a way that *allocates more of the total settlement dollars to his individual PAGA claim than to the representational claim*—maximizing his

own share of penalties at the expense of the representational action. Employers, who are just interested in obtaining a release of the claims, have no interest in quibbling with the plaintiff about how he wants to allocate the settlement funds.

That defeats PAGA's purpose in two ways:

First, a plaintiff can use this method to increase the settlement value of his own PAGA claim by agreeing to reduce the settlement value of the representational PAGA claims. Doing so decreases the total amount of penalties and therefore, the amount recovered by the Labor and Workforce Development Agency.

Second, doing so also means that other aggrieved employees lose out on recovery of penalties that they would otherwise be entitled to—a result that is binding on those other unrepresented employees (*Arias*, *supra*, 46 Cal.4th at p. 986).

That can't be what the Legislature had in mind. The Court should not presume that the Legislature intended to balance policies this way absent a clear expression in the statute or legislative history. (See § I., *ante*.)

III. Under The *Pricewaterhouse* Standard, The Court Should Not Interpret PAGA To Confer Standing On Adolph To Maintain His Civil Action Solely On Behalf Of Others.

Just as in *Pricewaterhouse, supra*, the scope of expanded standing for PAGA claims poses "significant policy concerns"—concerns that are for the Legislature to "carefully balance[]."

(39 Cal.4th at p. 1232.) "[A]bsent a *clearer expression*" in the statutory text or legislative history, those policy concerns "counsel against a conclusion" that the Legislature intended to broaden PAGA standing to the extent that Adolph claims. (*Ibid.*, italics added.) "The issue is best left to the Legislature's specific attention, at its discretion." (*Ibid.*)

That was this Court's analysis in *Pricewaterhouse*. (§ I., *ante*.) There is no principled reason to apply a different approach here. (*Ibid.*) As next demonstrated, the result should be the same as in *Pricewaterhouse*.

No clear expression favoring Adolph's interpretation. Nothing in the statutory text *clearly* expresses an intent that a plaintiff possesses standing to prosecute a PAGA civil action *exclusively on behalf of others* merely because that plaintiff has a separate action or arbitration seeking PAGA penalties on his own behalf. Indeed, nothing even vaguely suggests such an intent.

At the time that it enacted PAGA, the Legislature was well aware that arbitration agreements were commonplace between employers and employees. A Westlaw search reveals nearly 700 published California cases involving employment arbitration before the Legislature enacted PAGA. Similarly, the Legislature was presumably well aware of the strong federal policy in favor of arbitration and the State's own strong public policy in favor of arbitration. (E.g., *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9; *Dean Witter Reynolds, Inc. v. Byrd* (1985) 470 U.S. 213, 217; see *Estate of McDill* (1975) 14 Cal.3d 831, 839

["'It is a generally accepted principle that in adopting legislation the Legislature is presumed to have had knowledge of existing domestic judicial decisions'"]; *Jones v. Sorenson* (2018) 25 Cal.App.5th 933, 943 ["We presume our Legislature is aware of judicial decisions"].)

If the Legislature had intended to permit standing in a civil action when the plaintiff's PAGA claims are being adjudicated in a separate arbitration, the Legislature easily could have said so. That it remained silent on the subject necessarily means that the Legislature did not clearly and unambiguously express an intent to confer standing in those situations. In the same vein, *Pricewaterhouse* noted that "'legislators know how to include'" words or phrases covering public entities "'when they intend to do so'" and the absence of such specific language was "indicia that public agencies were not intended as qui tam relators under the statute." (39 Cal.4th at pp. 1229, 1237-1238.) So too here, the absence of specific language concerning simultaneously pending arbitrations and civil actions is an indicia that the Legislature did not intend to strike the policy balance in the way that Adolph urges.

Indicia in the legislative history. In rejecting the expansive interpretation of CFCA standing, *Pricewaterhouse* further relied on indicia in the legislative history that suggested that the Legislature might have considered and rejected the extent of standing urged by the appellant. (*Pricewaterhouse, supra*, 39 Cal.4th at p. 1230, 1237-1238.) As originally introduced, the bill that became CFCA specifically provided for

cities and counties to have standing, but the bill was later amended to omit this. (*Id.* at p. 1230.)

The equivalent is true here. As introduced, Senate Bill 796 permitted an employee to maintain a civil action "on behalf of himself or herself *or others*" and it provided no definition of aggrieved employee. (Sen. Bill No. 796 (2003-2004 Reg. Sess.) as introduced Feb. 21, 2003, italics added.) That bill would have allowed Adolph to maintain his civil action *exclusively* on behalf of others, while his separate PAGA claim was adjudicated in arbitration. But the Legislature amended the bill to change "or" to "and," authorizing Adolph only to maintain a PAGA civil action "on behalf of himself or herself *and* other current or former employees." (Sen. Bill No. 796 (2003-2004 Reg. Sess) as amended July 2, 2003, italics added.)

Indeed, the legislative history indicates that this amendment was made specifically to narrow the scope of standing in light of the Legislature's concerns about how expanded standing had plagued California UCL claims. (Assem. Com. on Labor and Employment, Analysis of Sen. Bill No. 796 (2003-2004 Reg. Sess.) July 9, 2003, pp. 6-7.)

Indicia in the statutory scheme. *Pricewaterhouse* also noted that another part of the statutory scheme—concerning the process for filing qui tam claims under seal—suggested that the Legislature might have intended to limit the definition of "persons" with standing to "private" individuals. (39 Cal.4th at pp. 1230, 1237-1238.) Likewise, here, multiple aspects of PAGA's text indicate that the Legislature did not intend to confer

standing on plaintiffs such as Adolph. In fact, there are far more such indicia in PAGA than existed in *Pricewaterhouse*.

First, the statutory scheme repeatedly states that it authorizes "*a civil action*"—singular—"brought by an aggrieved employee on behalf of himself or herself and other current or former employees." (Lab. Code, § 2699, subd. (a).) *Not multiple civil actions* across which the plaintiff's individual claims for PAGA penalties would be separately adjudicated from those where the plaintiff seeks to represent other employees. *Not "a civil action plus an arbitration"* among which the claims would be separately adjudicated. "*A [single] civil action*" brought "on behalf of [the plaintiff] *and* other current or former employees." (*Ibid*., italics added.)

Indeed, multiple subdivisions of both Labor Code section 2699 and 2699.3 emphasize this. (Lab. Code, § 2699, subd. (a); *id.*, subd. (g)(1) [penalties may be recovered "in *a civil action* pursuant to the procedures specified in Section 2699.3," italics added]; *id.*, subd. (l)(1) [procedure regarding "commencement of *a civil action* pursuant to this part," italics added]; Lab. Code, § 2669.3, subds. (a), (a)(2)(A), (a)(2)(B), (b), (b)(2)(A)(ii), (b)(3)(B), (c), (c)(2)(A) [procedural requirements for "a civil action" under PAGA].) As demonstrated above, PAGA claim splitting poses significant policy concerns regarding both the State and the allegedly aggrieved employees—all of whom are unrepresented by counsel and all of whom will be bound by the litigation. (§ II.D., *ante*.)

Second, the statutory scheme repeatedly states that this single civil action must be brought "on behalf of himself or herself *and* other current or former employees"—not on behalf of *either* himself *or* the other employees. (Lab. Code, § 2699, subds. (a), (g)(1), italics added.) It does not matter merely that a plaintiff is an "aggrieved employee" in the sense that he is a person against whom a violation was committed that is the same in kind as one alleged in the complaint. An "aggrieved employee" still cannot bring his civil action *exclusively* "on behalf of . . . other current or former employees" because section 2699 only authorizes qui tam PAGA claims that are *both* "on behalf of [the plaintiff] *and* [the other employees]." (*Id.*, subds. (a), (g)(1).)

Third, the statutory scheme specifically contemplates that the plaintiff have skin in the civil action. The amount of the penalties awarded is based on the number of "aggrieved employee[s]" and twenty-five percent of those penalties "shall" be allocated among the "aggrieved employees." (Lab. Code, § 2699, subds. (g)(1), (i).)

But as Adolph concedes, he should not be able to recover any portion of the penalties from his civil action because that would constitute a "double recover[y]" of penalties when combined with penalties awarded in arbitration. (Answer Br. 41.) He responds that he does not want that double recovery. (*Ibid.*) But that misses the point: The statutory language is indicia that the Legislature contemplated that an "aggrieved employee" means one who can—indeed "shall"—receive penalties through the civil action. That means that Adolph is not an

"aggrieved employee" within the meaning of the statute. Adolph cannot avoid that legislative-intent problem by simply saying that he won't accept a share of the penalties.

Similarly, there is a serious problem if what Adolph means is that (a) the total amount of penalties in the civil action will be reduced by the amount awarded in the arbitration, but (b) he will share equally in the penalty awarded to the other aggrieved employees. The Legislature could not have intended that Adolph receives the full 25 percent of the penalty awarded in the arbitration and a share of the other employee's 25 percent of the penalty awarded in the civil action. Nothing in the statute or legislative history suggests that the Legislature contemplated reducing the penalties awarded to the other aggrieved employees in that way.

———♦———

Adolph's argument easily fails the analysis set forth in *Pricewaterhouse*. Absent a "clearer" expression that the Legislature intended to extend standing to the circumstances presented here, the Court should not wade into these waters and risk creating real-world policy problems that the Legislature did not consider. (*Pricewaterhouse, supra*, 39 Cal.4th at p. 1242.)

What's more, the statutory text and legislative history at very least provide "indicia" of the contrary interpretation. This is precisely the circumstance in which this Court avoids meddling with a qui tam standing statute out of concern for the "significant policy concerns" that might result. (*Id.* at p. 1232.) "The issue is best left to the Legislature's specific attention, at its discretion."

(*Ibid.*) It is therefore to the Legislature that Adolph and his amici must turn.

CONCLUSION

Pricewaterhouse, supra, 39 Cal.4th 1220 sets forth the established lens through which this Court reviews the issues posed here—interpretations of the extent of standing afforded by a qui tam-type statute.

The Court should hold that Adolph—and similarly situated plaintiffs—lack standing to pursue their civil action exclusively on behalf of other employees. If the Legislature views the policy-balance differently, it is up to the Legislature to remedy. The Court should not create practical and policy problems by interceding.

Dated: December 29, 2022

Respectfully submitted,

GREINES, MARTIN, STEIN & RICHLAND LLP
Jeffrey E. Raskin

By: /s/ *Jeffrey E. Raskin*
Jeffrey E. Raskin

Attorneys for Amicus Curiae
CALIFORNIANS FOR FAIR PAY AND EMPLOYER ACCOUNTABILITY

CERTIFICATION

Pursuant to California Rules of Court, rule 8.520(c), I certify that this **APPLICATION TO FILE AMICUS BRIEF AND BRIEF OF AMICI CURIAE CALIFORNIANS FOR FAIR PAY AND EMPLOYER ACCOUNTABILITY** contains 7,264 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: December 29, 2022 /s/ *Jeffrey E. Raskin*
Jeffrey E. Raskin

PROOF OF SERVICE

I am employed in the County of Los Angeles, California. I am over the age of 18 years and not a party to the within action. My business address is 6420 Wilshire Boulevard, Suite 1100, Los Angeles, California 90048; my electronic service address is pherndon@gmsr.com.

On December 29, 2022, I served the foregoing document(s) described as: **APPLICATION TO FILE AMICUS BRIEF AND BRIEF OF AMICI CURIAE CALIFORNIANS FOR FAIR PAY AND EMPLOYER ACCOUNTABILITY** on the interested party(ies) in this action, addressed as follows:

(X) I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system.

Executed December 29, 2022 at Los Angeles, California.

(X) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Pauletta L. Herndon

Pauletta L. Herndon

Erik Adolph v. Uber Technologies, Inc.
California Supreme Court Case No. S274671
California Court of Appeal Case Nos. G059860, G060198
Orange County Superior Court Case No. 30-2019-01103801

SERVICE LIST

LITTLER MENDELSON, P.C.
Anthony G. Ly, Esq.
ALy@littler.com
Sophia B. Collins, Esq.
Andrew M. Spurchise, Esq.
2049 Century Park East
Fifth Floor
Los Angeles, California 90067

GIBSON, DUNN & CRUTCHER LLP
Theane D. Evangelis, Esq.
TEvangelis@gibsondunn.com
Blaine H. Evanson, Esq.
Bradley J. Hamburger, Esq.
333 South Grand Avenue
Los Angeles, California 90071

LITTLER MENDELSON, P.C.
Sophia Behnia, Esq.
333 Bush Street, Floor 34
San Francisco, CA 94104-2842

LITTLER MENDELSON PC
Andrew Spurchise, Esq.
900 3rd Avenue, Floor 8
New York, NY 10022-3298

Attorneys for Defendant and Appellant Uber Technologies, Inc.

DESAI LAW FIRM, P.C.
Aashish Y. Desai, Esq.
Adrianne De Castro, Esq.
3200 Bristol Ave., Suite 650
Costa Mesa, CA 92626

GOLDSTEIN, BORGEN,
DARDARIAN & HO
Andrew P. Lee, Esq.
David Borgen, Esq.
Mengfei Sun, Esq.
155 Grand Ave., Suite 900
Oakland, CA 94612

ALTSHULER BERZON LLP
Michael Rubin, Esq.
177 Post St., Suite 300
San Francisco, CA 94108
Attorneys for Plaintiff and Respondent Erik Adolph

OFFICE OF THE ATTORNEY GENERAL
Nicole Welindt, Esq.
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102
Amicus Curiae *Attorney General of California*

SODERSTROM LAW PC
Jamin S. Soderstrom, Esq.
jamin@soderstromlawfirm.com
1 Park Plaza, Suite 600
Irvine, CA 92614
Amicus Curiae *Lionel Harper*

BENBROOK LAW GROUP, PC
Stephen M. Duvernay, Esq.
701 University Ave., Ste. 106
Sacramento, CA 95825
Amicus Curiae *The National Federation of Independent Business Small Business Legal Center*

CALIFORNIA RURAL LEGAL ASSISTANCE, INC.
Cynthia L. Rice, Esq.
crice@crla.org
Reina Canale, Esq.
rcanale@crla.org
1430 Franklin Street, Suite 103
Oakland, CA 94612
Amicus Curiae *California Rural Legal Assistance, Inc.*

CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION
Verónica Meléndez
2210 K Street, Suite 201
Sacramento, CA 95816
Amicus Curiae *California Rural Legal Assistance Foundation*

FISHER PHILLIPS
Alden J. Parker, Esq.
aparker@fisherphillips.com
Erin J. Price, Esq.
eprice@fisherphillips.com
621 Capitol Mall, Suite 1400
Sacramento, CA 95814

RESTAURANT LAW CENTER
Angelo I. Amador, Esq.
aamador@restaurant.org
2055 L Street, NW, Suite 700
Washington, DC 20036
Amici Curiae *California Restaurant Association and Restaurant Law Center*

AKIN GUMP STRAUSS HAUER & FELD LLP
Aileen M. McGrath, Esq.
amcgrath@akingump.com
100 Pine Street, Suite 3200
San Francisco, CA 94111

AKIN GUMP STRAUSS HAUER & FELD LLP
Jonathan P. Slowik, Esq.
jpslowik@akingump.com
1999 Avenue Of The Stars, Suite 600
Los Angeles, CA 90067
Amici Curiae *The National Retail Federation and The Retail Litigation Center, Inc.*

MAYER BROWN LLP
Archis A. Parasharami, Esq.
aparasharami@mayerbrown.com
575 Market Street, Suite 2500
San Francisco, CA 94105

MAYER BROWN LLP
Andrew J. Pincus (*pro hac vice* application pending)
apincus@mayerbrown.com
Kevin Ranlett (*pro hac vice* application pending)
Carmen Longoria-Green (*pro hac vice* application pending)
1999 K Street, N.W.
Washington, DC 20006
Amicus Curiae *The Chamber of Commerce of the United States of America*

ATTORNEY AT LAW
Fred J. Hiestand, Esq.
fred@fjh-law.com
3418 Third Avenue, Suite 1
Sacramento, CA 95817

MANATT PHILPS & PHILLIPS, LLP
Benjamin G. Shatz, Esq.
BShatz@manatt.com
2049 Century Park East, Suite 1700
Los Angeles, CA 90067
Amicus Curiae *The Civil Justice Association of California*

Fourth Appellate District, Division Three
601 W. Santa Ana Blvd.
Santa Ana, CA 92701
[Electronic Service under Rules 8.44(b)(1); 8.78(g)(2) and 8.1125(a)(5)]

Hon. Kirk Nakamura
Judge Presiding
Orange County Superior Court
751 W. Santa Ana Blvd.
Santa Ana, CA 92701
EServiceDCAbriefs@occourts.org