S289305

IN THE SUPREME COURT OF CALIFORNIA

CHRISTINA LEEPER, Plaintiff and Respondent, v. SHIPT, INC., TARGET CORPORATION, Defendants and Appellants.	S289305 Ct.App. No. B339670 L.A. Super. Ct. No. 24STCV06485

APPLICATION FOR PERMISSION TO FILE AMICUS BRIEF and BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA AS AMICUS CURIAE SUPPORTING APPELLANTS

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APPLICATION FOR PERMISSION TO FILE AMICUS BRIEF

The Civil Justice Association of California (CJAC) seeks permission to file an amicus brief supporting Defendants and Appellants Shipt, Inc. and Target Corporation pursuant to California Rules of Court, rule 8.520 (f).

CJAC is a nonprofit organization whose members are businesses from a broad cross section of industries. CJAC's principal purpose is to educate the public and its governing bodies about how to make laws determining who gets paid, how much, and by whom when the conduct of some causes harm to others—more fair, certain, and economical. Toward this end, CJAC regularly appears as amicus curiae in numerous cases of interest to its members, including those that concern enforceability of arbitration agreements.

CJAC's members collectively employ many thousands of people in California and hundreds of thousands nationally to provide various products and services. Most of CJAC's members have elected, as have many employers throughout the country, to resolve disputes with their employees over employment matters through binding arbitration. CJAC supports the Federal Arbitration Act's protective umbrella for voluntary, binding arbitration and believes that arbitration is preferable to litigation for maintenance of a viable economy.

This amicus brief will assist the Court by providing a broader perspective on the issues before the Court than that provided by the individual parties to this proceeding.

No party to this appeal nor any counsel for a party authored the proposed amicus brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief.

No person or entity made a monetary contribution intended to fund the preparation or submission of the brief, other than the organizations and their members.

AMICUS CURIAE BRIEF

1. Statement of the Case

In granting review, the Court asked two questions: "(1) Does every Private Attorneys General Act (Lab. Code, § 2698 et seq.) (PAGA) action necessarily include both individual and non-individual PAGA claims, regardless of whether the complaint specifically alleges individual claims? (2) Can a plaintiff choose to bring only a non-individual PAGA action?" The answers to those questions depend upon (A) the text of PAGA, (B) the legislative policy behind the limitation on standing to "an aggrieved employee," and (C) the requirement imposed by the Federal Arbitration Act (FAA) that "courts must place arbitration agreements on an equal footing with other contracts [citation omitted], and enforce them according to their terms." (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 339 [131 S. Ct. 1740, 179 L. Ed. 2d 742].)

Employers enter into arbitration agreements with their employees because arbitration is, as the state and federal courts have recognized, "a speedy and relatively inexpensive means of dispute resolution." (*Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 322. See also *Epic Systems Corp. v. Lewis* (2018) 584 U.S. 497, 505 [138 S.Ct. 1612, 200 L.Ed.2d 889] (acknowledging Congress's judgment that arbitration offers "the promise of quicker, more informal, and often cheaper resolutions for everyone involved").) Unlike judicial proceedings, which may involve new trials, appeals or retrials, "the arbitrator's award

will almost certainly mean an end to the dispute." (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 10, quoting Oehmke, Commercial Arbitration (1987) § 6:10, p. 140.) Both employees and employers "can benefit from the relative simplicity and informality of resolving claims before arbitrators." (*Epic Systems*, *supra*, 584 U.S. at p. 504 (quoting from a memorandum by the General Counsel of the National Labor Relations Board).) To carry out the national policy favoring this means of dispute resolution, the FAA "displaces" any rule that covertly or on its face disfavors arbitration. (*Kindred Nursing Centers Ltd. Partnership v. Clark* (2017) 581 U.S. 246, 251 [137 S.Ct. 1421, 197 L.Ed.2d 806].)

The interaction of PAGA with the FAA has resulted in the following understanding of the nature of a PAGA lawsuit:

> After *Viking* [*River Cruises, Inc. v. Moriana* (2022) 596 U.S. 639 [213 L. Ed. 2d 179, 142 S.Ct. 1906]], every PAGA action is properly understood as a combination of two claims: an "individual" claim, arising from the Labor Code violations suffered by the plaintiff or plaintiffs themselves, and a "representative" claim, arising from violations suffered by other employees. By virtue of FAA preemption, these claims are severable from one another, and the "individual" claim is arbitrable, even if the state, which holds a 75 percent interest in any civil penalties recovered, does not consent to or participate in the arbitration.

(*Piplack v. In-N-Out Burgers* (2023) 88 Cal.App.5th 1281, 1288.)

Here, Leeper is trying to avoid her contractual obligation to arbitrate disputes with Shipt by pursuing a "headless" PAGA action, in which she would seek penalties for violations

against other employees but not for violations against herself.[1] Leeper agreed to "'resolve[]through mandatory, binding arbitration' 'any and all disputes, claims, or controversies of any kind and nature between [Shipt and her].'" (*Leeper v. Shipt, Inc.* (2024) 107 Cal.App.5th 1001, 1001, review granted April 16, 2025, S289305.) But when the current dispute arose, she filed the present lawsuit and alleged: "Because [Leeper] alleges only non-individual PAGA claims on a representative basis, Shipt cannot compel them to arbitrat[ion]." (107 Cal.App.5th at p. 1006.)

The language of PAGA, the policy behind PAGA's standing requirement, and the FAA's requirement that courts enforce arbitration agreements require the Court to reject that contention.

2. Argument

A. The text of PAGA requires the plaintiff to assert an individual PAGA claim.

PAGA provides that civil penalties "may, as an alternative [to enforcement by the LWDA], be recovered

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[1] "This type of PAGA action is referred to as 'headless' because the employee prosecuting the action has abandoned the claims for civil penalties imposed for violations the employee suffered personally. The reason an employee would abandon the so-called 'individual PAGA claims' is to avoid arbitrating them under the Federal Arbitration Act (FAA; 9 U.S.C. § 1 et seq.), as interpreted by *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. 639 [213 L. Ed. 2d 179, 142 S. Ct. 1906]." (*CRST Expedited, Inc. v. Superior Court* (2025) 112 Cal.App.5th 872, 882.)

through a civil action brought by an aggrieved employee *on behalf of the employee and other current or former employees* against whom a violation of the same provision was committed." (Lab. Code, § 2699, subd. (a) (emphasis supplied).) The statute is clear. A PAGA action must be brought on behalf of the plaintiff employee *and* other employees, not just on behalf of the other employees. "If the language [of a statute] is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend." (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737. See also *Preston v. State Bd. of Equalization* (2001) 25 Cal.4th 197, 213 ("If the ordinary meaning of the language 'is clear and unambiguous,' then we need look no further").)

"An ordinary usage of 'and' is to condition one of two conjoined requirements by the other, thereby causally linking them. If, for example, it is said: 'If you leave the gate unlatched and the dog gets out you will be punished,' it likely means that no punishment attaches if the gate is left open but the dog escapes by digging a hole under the fence.'" (*Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 861, quoting *People v. Butcher* (1986) 185 Cal.App.3d 929, 940.) In other words, "[t]he ordinary and usual usage of 'and' is as a conjunctive, meaning '"an additional thing,"' 'also' or 'plus.'" (*In re C.H.* (2011) 53 Cal.4th 94, 101-

102, quoting *Amerigraphics, Inc. v. Mercury Casualty Co.* (2010) 182 Cal.App.4th 1538, 1551-1552.)[2]

Although courts "will sometimes substitute 'or' for 'and,' and vice versa, when necessary to accomplish the evident intent of the statute, [] doing so is an exceptional rule of construction." (*C.H.*, *supra*, 53 Cal.4th at pp. 102-103.) There are no exceptional circumstances in this case that would justify departure from the ordinary and usual usage. Indeed, the fact that the Legislature used "or" to convey the disjunctive in the same sentence ("current *or* former employees") confirms that "and" should be interpreted as conjunctive. (*Reynoza*, *supra*, 15 Cal.5th at p. 991 ("this argument [that "and" is conjunctive] is bolstered by the Legislatures use of the word 'or' in other parts of [the statute]," which suggests "the Legislature understood the difference between the typically conjunctive 'and' and the typically disjunctive 'or'").)

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[2] Decision after decision has confirmed that the ordinary meaning of "and" when used in a statute is conjunctive. *People v. Reynoza* (2024) 15 Cal.5th 982, 990-991 ("On its face, [the statute] is reasonably susceptible to the conjunctive reading, which rests largely on the presence of the connecting 'and'"); *Dr. Leevil, LLC v. Westlake Health Care Center* (2018) 6 Cal.5th 474, 479 ("the use of the conjunctive word 'and' to connect the three conditions can only mean that all three conditions must be satisfied"); *Frank L. Ricker, Inc. v. City of Colton* (2003) 106 Cal.App.4th 190, 192 ("The use of the word 'and' shows the Legislature intended to construe conjunctively the two requirements of the statute"); *Melamed v. City of Long Beach* (1993) 15 Cal.App.4th 70, 79 ("Ordinarily, the word 'and' connotes a conjunctive meaning, while the word 'or' implies a disjunctive or alternative meaning").

The plain language of section 2699 provides that a civil action under PAGA must include both an individual claim and a representative claim. This Court recognized as much in *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 87, where it said: "Plaintiffs may bring a PAGA claim *only* as the state's designated proxy, suing on behalf of *all* affected employees." (Emphasis original.) A PAGA plaintiff who purports to assert representative claims only on behalf of other employees cannot pursue a PAGA lawsuit. If the present lawsuit is to proceed it must be deemed to include an individual PAGA claim on behalf of Leeper.

B. The policy behind PAGA's standing requirement requires the plaintiff to assert an individual PAGA claim.

When the Legislature enacted PAGA in 2004, it was concerned that the statute not provide a vehicle for private attorneys to exploit a generous standing requirement like the one originally incorporated into the Unfair Competition Law. That provision, which allowed any person acting for the general public to sue, led to "'shakedown' suits to extort money from small businesses" where no client had suffered an actual injury. To ensure that PAGA suits could not be brought by those who had not suffered harm from an unlawful act, the sponsors added the definition of "aggrieved employee" that now appears in section 2699, subdivision (c). (*Kim*, *supra*, 9 Cal.5th at p. 90.) Under that definition, only an employee "who was employed by the alleged violator and personally suffered each

of the violations alleged" has standing. (Lab. Code, § 2699, subd. (c)(1).)[3]

That requirement "evince[s] the Legislature's intent that the private individual pursuing a PAGA claim have some proverbial 'skin in the game' at the time the lawsuit is filed." (*Williams v. Alacrity Solutions Group, LLC* (2025) 110 Cal.App.5th 932, 943.) Allowing an employee to seek penalties only on behalf of other employees would take that skin out of the game and risk the problem that the standing requirement was intended to prevent—lawsuits prosecuted by private attorneys on behalf of persons with no interest in proving their own right to recover penalties under the Labor Code.

C. The FAA requires the courts to enforce agreements to arbitrate a PAGA plaintiff's status as an aggrieved employee.

As this Court has recognized, "*Viking River* requires enforcement of agreements to arbitrate a PAGA plaintiff's individual claims if the agreement is covered by the FAA." (*Adolph v. Uber Technologies, Inc.* (2023) 14 Cal.5th 1104, 1119.) To qualify as an "aggrieved employee" with standing to pursue a PAGA lawsuit, a plaintiff must have an individual PAGA claim, that is, there must be proof that he or she "personally suffered" each of the violations for which recovery

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[3] Before it was amended by AB 2288 effective June 1, 2024, the provision read "against whom one or more of the alleged violations was committed." Section 2699 was amended again effective January 1, 2026, by AB 1170, which made nonsubstantive changes.

of a penalty is sought. Even if the plaintiff disclaims any intent to recover penalties for violations he or she personally suffered, there is still a dispute between the employer and its employee as to whether the plaintiff suffered a violation.

When a worker enters into an arbitration agreement with the person who engaged his or her services, the agreement determines which disputes between the two are to be resolved in arbitration.[4] Any rule that would allow Leeper to avoid her obligation to arbitrate disputes with Shipt by pursuing a "headless" PAGA lawsuit is displaced by the FAA. There is nothing in this Court's PAGA jurisprudence (as constrained by United States Supreme Court decisions) that permits a different conclusion:

1. PAGA itself says nothing about the authority of an arbitrator to determine whether an employee is "aggrieved." Although it provides for recovery of civil penalties through a civil action by an aggrieved employee, providing a judicial remedy does not prevent parties from agreeing to resolve their disputes in arbitration. (*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth* (1985) 473 U.S. 614, 628 [105 S.Ct. 3346, 87 L.Ed.2d 444] ("Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the

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[4] For example, the arbitration agreement at issue in this case "obligates Leeper and appellants [footnote omitted] to 'resolve[] through mandatory, binding arbitration' 'any and all disputes, claims, or controversies of any kind and nature between [them].'" (107 Cal.App.5th at p. 1005.)

statutory rights at issue"), quoted with approval in *McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945, 962.) Any attempt to bar arbitration of a dispute arising under a state statute would be invalid under the FAA. (*AT&T Mobility*, *supra*, 563 U.S. at p. 341 ("When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.").)

2. In *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 388-389, this Court "conclude[d] that California's public policy prohibiting waiver of PAGA claims, whose sole purpose is to vindicate the Agency's interest in enforcing the Labor Code, does not interfere with the FAA's goal of promoting arbitration as a forum for private dispute resolution." The Court did not decide which forum the representative claims would be litigated in. (59 Cal.4th at pp. 391-392.) This case does not involve a claim that Leeper waived her right to bring a PAGA lawsuit.

3. In *Kim*, *supra*, this Court determined that a plaintiff who had settled his individual damages claims still retained his status as an "aggrieved employee," because he *alleged* that Labor Code violations had been committed against him. There was no discussion of whether an arbitrator should determine whether that allegation was true.

4. In *Viking River*, *supra*, the United States Supreme Court let stand this Court's rule that barred wholesale waiver of PAGA claims but held that the FAA required California courts to enforce arbitration agreements that could be

construed to apply to individual PAGA claims. In the wake of *Viking River*, it has become customary practice in PAGA cases where the plaintiff has agreed to arbitration to order the plaintiff's individual PAGA claims to arbitration and stay proceedings on the non-individual claims.

5. In *Adolph*, *supra*, 14 Cal.5th at p. 1114, the question was "whether an aggrieved employee who has been compelled to arbitrate claims under PAGA that are 'premised on Labor Code violations actually sustained by' the plaintiff (*Viking River*, *supra*, 596 U.S. at p. 648; see §§ 2698, 2699, subd. (a)) maintains statutory standing to pursue 'PAGA claims arising out of events involving other employees' (*Viking River*, at pp. 648–649) in court." Although the answer to that question was "yes," the Court did not rule that the standing issue should be decided in the judicial proceeding. On the contrary, it accepted the employee's explanation of the procedure to be followed:

> Adolph explains that his PAGA action could proceed in the following manner if he were ordered to arbitrate his individual PAGA claim: First, the trial court may exercise its discretion to stay the non-individual claims pending the outcome of the arbitration pursuant to section 1281.4 of the Code of Civil Procedure. Following the arbitrator's decision, any party may petition the court to confirm or vacate the arbitration award under section 1285 of the Code of Civil Procedure. If the arbitrator determines that Adolph is an aggrieved employee in the process of adjudicating his individual PAGA claim, that determination, if confirmed and reduced to a final judgment (Code Civ. Proc., § 1287.4), would be binding on the court, and Adolph would continue to have standing to litigate his non-individual claims. *If the arbitrator*

> *determines that Adolph is not an aggrieved employee and the court confirms that determination and reduces it to a final judgment, the court would give effect to that finding, and Adolph could no longer prosecute his non-individual claims due to lack of standing*.

(14 Cal.5th at pp. 1123-1124 (emphasis supplied).) Leeper's dispute with Shipt over whether she is an "aggrieved employee" should be resolved in the same way.

3. Conclusion

The FAA requires courts to enforce arbitration agreements "according to their terms." (*AT&T Mobility*, *supra*, 563 U.S. at p. 339.) The terms of Leeper's arbitration agreement required her to resolve any disputes between her and Shipt through arbitration, including any disputes over her status as an "aggrieved employee." The FAA displaces any rule that would allow Leeper to escape that requirement by pursuing a headless PAGA lawsuit. This Court should affirm the Court of Appeal's decision directing the trial court to order Leeper's dispute with SHIPT to arbitration.

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CERTIFICATE OF WORD COUNT

Counsel of Record hereby certifies that pursuant to Rule 8.520 (c)(1) of the California Rules of Court, the enclosed APPLICATION FOR PERMISSION TO FILE AMICUS BRIEF and BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA AS AMICUS CURIAE SUPPORTING APPELLANTS is produced using 13-point Roman type including footnotes and contains approximately 3,665 words, which is less than the total words permitted by the Rules of Court. Counsel relies on the word count of the computer program used to prepare this brief.

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