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Viking River Cruises v. Moriana:***California Courts are Not Bound by the U.S. Supreme Court's Misconstruction of PAGA Standing*****Catherine L. Fisk**Barbara Nachtrieb Armstrong Distinguished Professor of Law
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The U.S. Supreme Court June 2022 decision in *Viking River Cruises, Inc. v. Moriana* held that the Federal Arbitration Act (FAA) does not preempt a rule of California law that invalidates contractual waivers of the right to assert representative claims under the California Private Attorneys General Act (PAGA) in any forum.¹ However, in a portion of the majority opinion that four justices refused to join, the Court created confusion about whether plaintiffs subject to arbitration lose standing under state law to maintain representative PAGA claims in court. In this Note, we explain that *Viking River Cruises* does not compel courts to dismiss or to order arbitration of a plaintiff's representative PAGA claims on behalf of other employees when an arbitration agreement purports to waive the right to assert representative actions.

A groundbreaking law enacted by the California Legislature in 2003, PAGA empowers employees, on behalf of themselves and other employees, to act as representatives of the state labor agency in prosecuting private actions for civil penalties when their employers have committed violations of the California Labor Code.² In 2014, the California Supreme Court, in *Iskanian v. CLS Transportation Los Angeles*, ruled that an arbitration agreement waiving the right to bring representative PAGA actions in any forum may not be enforced, and that the FAA did not preempt this rule.³

Employers repeatedly sought to persuade California and federal courts that the FAA preempts the *Iskanian* prohibition on PAGA waivers.⁴ At first reading, the majority opinion in *Viking River*

¹ *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 2022 WL 2135491 (June 15, 2022).

² See Cal. Lab. Code § 2699 (a); *Kim v. Reins Int'l Cal. Inc.*, 9 Cal.5th 73, 81 (Cal. 2020).

³ *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal.4th 348, 384, 388-389 (Cal. 2014).

⁴ See, e.g., *Sakkab v. Luxottica Retail North Am., Inc.*, 803 F.3d 425 (9th Cir. 2015); *Rivas v. Coverall North Am., Inc.*, 842 Fed. Appx. 55 (9th Cir. 2021), vacated, 2022 WL 2295081 (June 27, 2022); *Julian v. Glenair, Inc.*, 17 Cal.App.5th 853 (2017); *Betancourt v. Prudential Overall Supply*, 9 Cal.App.5th 439 (2017), cert.

Cruises appears to be the win that employers have sought; the Court held the *Iskanian* rule was preempted to the extent that it prohibits splitting PAGA claims into “individual” and “non-individual” components, and employers may require “individual” PAGA claims to be arbitrated if the parties have consented to such arbitration.⁵ However, the Court upheld *Iskanian*’s prohibition against “a wholesale waiver of PAGA claims,” notably, a waiver of representative standing altogether to assert PAGA actions.⁶ For the reasons we explain below, this is the more significant holding.

Nonetheless, in a portion of the Court’s opinion that garnered the votes of only four other justices,⁷ Justice Alito interpreted California law as denying standing to litigate PAGA claims on behalf of other employees to a PAGA plaintiff bound to arbitrate an “individual” PAGA claim.⁸ The Court simply misunderstood California law on PAGA standing; California law is clear that a plaintiff may litigate a PAGA action as a representative of the state for the labor law violations suffered by others regardless of whether the plaintiff must arbitrate her own claim.

This Note discusses PAGA in light of *Viking River Cruises* for the aid of courts and litigants. Part 1 explains relevant California law and the U.S. Supreme Court’s decision in *Viking River Cruises*. Part 2 demonstrates that the majority’s view of PAGA standing in *Viking River Cruises* clashes with the California Supreme Court’s authoritative approach to PAGA standing, announced two years ago in *Kim v. Reins International California, Inc.*⁹ We conclude that California courts are not bound by the portion of *Viking River Cruises* that posits the loss of representative standing to litigate PAGA claims on behalf of other employees, and instead must follow *Kim*.¹⁰

PART 1

Arbitration Agreements Cannot Waive the Right to Assert Representative PAGA Claims: *Iskanian* and *Viking River Cruises*

In Section A, we explain the California Private Attorneys General Act. Section B discusses the California Supreme Court’s decision in *Iskanian*, which prohibits PAGA waivers and articulates

denied, 138 S. Ct. 556 (2017); *Tanguilig v. Bloomingdale’s, Inc.*, 5 Cal.App.5th 665 (2016), *cert. denied*, 138 S. Ct. 356 (2017).

⁵ *Viking River Cruises*, 2022 WL 2135491, at *11.

⁶ *Id.* at *6, 11.

⁷ *Id.* at *3, 11-12. Part IV of Justice Alito’s opinion was joined by Justices Breyer, Sotomayor, Kagan, and Gorsuch. However, Justice Sotomayor concurred in the opinion with the understanding that the discussion of California law could be disavowed by California courts or changed by the California Legislature. *See id.* at *12. Justice Barrett, joined by the Chief Justice and Justice Kavanaugh, declined to join the opinion’s analysis of California law on the ground that it addressed “disputed state-law questions as well as arguments not pressed or passed upon in this case.” *Id.* (Barrett, J., concurring in part and concurring in the judgment). Justice Thomas dissented from the holding based on his view that the FAA does not apply to state court. *Id.* As the concurring opinions point out, and as we discuss *infra* in Part 3, the U.S. Supreme Court does not have the authority to issue binding statements about the nature and limits of state law when there is no federal question involved.

⁸ *Id.* at *11.

⁹ *See Kim*, 9 Cal.5th at 80, 83-91.

¹⁰ We confine our discussion throughout this Note to PAGA standing in California courts.

the rule the U.S. Supreme Court examined in *Viking River Cruises*. Section C describes *Viking River Cruises*, which held that federal arbitration law does not preempt California’s prohibition on the waiver of representative standing to assert PAGA claims in any forum.

A. California’s Private Attorneys General Act

Under the California Labor Code, employers who violate labor standards may be liable to employees for damages (e.g., unpaid wages¹¹) and statutory penalties (e.g., waiting time penalties¹²); employers may also be liable to the *state* for additional civil penalties.¹³ In 2003, the California Legislature enacted the Private Attorneys General Act (PAGA), which authorizes employees, on behalf of themselves and other current or former employees, to pursue civil penalties on the state’s behalf.¹⁴ Before PAGA was enacted, only the state could sue for civil penalties against an employer.¹⁵ The Legislature enacted PAGA with the goal of enhancing the limited labor law enforcement resources of the state labor agency, by empowering employees to enforce the Labor Code as private attorneys general, or representatives of the state.¹⁶

PAGA confers a cause of action on “aggrieved employees” to bring representative PAGA claims.¹⁷ An aggrieved employee is “any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed.”¹⁸ This has been termed a requirement of statutory standing.¹⁹ An employee may file a PAGA claim only after notifying the employer and the state labor agency of the Labor Code violations that form the basis of the PAGA claim, along with facts and theories supporting the claim.²⁰ If the agency does not investigate the alleged violations, does not issue a citation, or fails to respond to the notice within 65 days, the employee may sue the employer in court.²¹ Seventy-five percent of any civil penalties recovered are paid to the state labor agency; aggrieved employees receive twenty-five percent.²²

Because an employee suing under PAGA seeks to recover civil penalties on the state’s behalf, as a “proxy or agent” of the state labor agency, a PAGA representative action is a “type of *qui tam* action.”²³ As such, a PAGA claim is distinct from an individual claim for statutory damages or penalties that are available to employees under the Labor Code.²⁴ Civil penalties under PAGA

¹¹ See, e.g., Cal. Lab. Code § 1194 (private right of action for unpaid minimum and overtime wages).

¹² Cal. Lab. Code § 203 (penalties for failure to pay wages of an employee who is discharged or quits).

¹³ *Kim*, 9 Cal.5th at 80.

¹⁴ *Arias v. Superior Court*, 46 Cal.4th 969, 980-981 (Cal. 2009); Cal. Lab. Code § 2699 (a).

¹⁵ *Kim*, 9 Cal.5th at 80.

¹⁶ *Arias*, 46 Cal.4th at 980.

¹⁷ See Cal. Lab. Code § 2699 (a); *Arias*, 46 Cal.4th at 980.

¹⁸ Cal. Lab. Code § 2699 (c); *Kim*, 9 Cal.5th at 83-84.

¹⁹ See *Kim*, 9 Cal.5th at 83-84.

²⁰ Cal. Lab. Code § 2699.3 (a)(1)(A); *Kim*, 9 Cal.5th at 81 (citations omitted).

²¹ Cal. Lab. Code § 2699.3 (a)(2); *Kim*, 9 Cal.5th at 81 (citation omitted).

²² Cal. Lab. Code § 2699 (i); *Kim*, 9 Cal.5th at 81 (citation omitted).

²³ *Kim*, 9 Cal.5th at 81 (citations omitted).

²⁴ *Id.*

are intended to “remediate present violations and deter future ones, *not* to redress employees’ injuries.”²⁵

B. *Iskanian v. CLS Transportation Los Angeles*

In *Iskanian v. CLS Transportation Los Angeles*, the California Supreme Court addressed whether the Federal Arbitration Act (FAA) preempts California law prohibiting an arbitration agreement from requiring an employee to give up the right to bring a representative PAGA action in any forum.

Arshavir Iskanian signed an arbitration agreement providing that “any and all claims” arising out of his employment were to be submitted to binding arbitration rather than litigated in court. The arbitration agreement also contained a representative action waiver that covered PAGA actions.²⁶ The plaintiff later sued his employer for Labor Code violations; he sought damages as an individual and putative class representative, as well as civil penalties in his representative capacity under PAGA.²⁷

The California Supreme Court held that because an arbitration agreement waiving the right to bring representative PAGA actions in any forum “serves to disable one of the primary mechanisms for enforcing the Labor Code” and is indirectly aimed at exempting an employer from responsibility for violating the law, it is contrary to public policy and may not be enforced.²⁸ The Court also held that the FAA does not preempt a state law that prohibits arbitration agreements waiving PAGA representative actions because there is no indication that the FAA was intended to govern disputes over “an action [against private employers] that can only be brought by the state or its representatives, where any resulting judgment is binding on the state and any monetary penalties largely go to state coffers.”²⁹

The Court noted, however, that the arbitration agreement between the parties was otherwise enforceable according to its terms, and that it “can be read as requiring arbitration of individual claims but not of representative PAGA claims, [although] neither party contemplated such a bifurcation.”³⁰ The employer argued that the arbitration agreement prohibited only representative claims, “not individual PAGA claims for Labor Code violations that an employee suffered”; the employer sought to force the employee to arbitrate the individual claims and to prohibit the PAGA representative claim from proceeding in any forum.³¹ Iskanian countered that such an individual claim under PAGA was not permissible, and sought to litigate all claims in court.³²

²⁵ *Id.* at 86 (internal quotations and citations omitted) (emphasis in original).

²⁶ *Iskanian*, 59 Cal.4th at 360, 378.

²⁷ *Id.* at 361.

²⁸ *Id.* at 383 (citing Cal. Civ. Code § 1668).

²⁹ *Id.* at 388.

³⁰ *Id.* at 391.

³¹ *Id.* at 383, 391.

³² *Id.*

The Court concluded that “neither party can get all that it wants.”³³ It determined that the plaintiff was required to arbitrate his individual damages claims. But, the Court held, the employer “must answer the representative PAGA claims in some forum.”³⁴ Noting that the arbitration agreement “gives us no basis to assume that the parties would prefer to resolve a representative PAGA claim through arbitration,” the Court remanded to the lower court to determine whether the parties would agree to a single forum for resolving the PAGA claim and other claims, and if not, whether it was appropriate to bifurcate the claims, with individual claims going to arbitration and the representative PAGA claim to litigation.³⁵

C. *Viking River Cruises, Inc. v. Moriana*

Angie Moriana filed a PAGA action against her former employer Viking River Cruises, in which she alleged that Viking failed to pay her final wages as required under the California Labor Code, and engaged in various Labor Code violations allegedly suffered by other employees.³⁶ In hiring Moriana, Viking imposed an arbitration agreement that waived employee rights to arbitrate a class, collective, or representative PAGA action.³⁷ The arbitration agreement also contained a severability clause specifying that if the waiver was found invalid, any class, collective, representative, or PAGA action would presumptively be litigated in court, but if any “portion” of the waiver remained valid, it would be “enforced in arbitration.”³⁸ After Moriana brought her PAGA action, Viking moved to compel arbitration of Moriana's “individual” PAGA claim, i.e., the part of her PAGA claim based on the Labor Code violation she personally suffered. Viking also moved to dismiss her PAGA claims for the violations suffered by other employees.³⁹ The trial court denied Viking’s motion, and the Court of Appeal affirmed, holding that categorical waivers of PAGA claims are contrary to state policy and that PAGA claims cannot be split into arbitrable “individual” claims and nonarbitrable “representative” claims.⁴⁰ The Court of Appeal ruled that “there are no individual PAGA claims. All PAGA claims are representative actions in the sense that they are brought on the state’s behalf.”⁴¹

The U.S. Supreme Court granted certiorari to decide whether the FAA preempted the rule under *Iskanian* invalidating contractual waivers of the right to assert representative claims under PAGA.⁴² The Court voted 8 to 1 in favor of Viking River Cruises.⁴³ Crucial aspects of the

³³ *Id.* at 391.

³⁴ *Id.*

³⁵ *Id.* at 391-392.

³⁶ *Viking River Cruises*, 2022 WL 2135491, at *5. We generally note the allegations as described by the U.S. Supreme Court. Moriana’s complaint actually listed several Labor Code violations, all of which she alleged were committed against her *and* others.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Moriana v. Viking River Cruises, Inc.*, No. B297327, 2020 WL 5584508, at *2 (Cal. App. 2020) (unpublished) (internal quotations and citations omitted).

⁴² *Viking River Cruises*, 2022 WL 2135491, at *3.

⁴³ *Id.*

reasoning in the majority opinion by Justice Alito, however, divided the Court further, with only four other justices joining Justice Alito's convoluted discussion of California law under PAGA.⁴⁴

Justice Alito expressed the view that a PAGA claim is "representative" in two senses. In the first sense, the opinion noted, a PAGA action is "representative" in that it is brought by an employee acting as an agent or proxy of the state.⁴⁵ In the second sense, PAGA claims are representative when they are "predicated on code violations sustained by other employees" in addition to the plaintiff employee.⁴⁶ In this latter sense, Justice Alito stated that "it makes sense to distinguish 'individual' PAGA claims, which are premised on Labor Code violations actually sustained by the plaintiff, from 'representative' (or perhaps quasi-representative) PAGA claims arising out of events involving other employees."⁴⁷

Based on this framework, Justice Alito examined two rules from *Iskanian*. First, the opinion looked at *Iskanian's* "principal rule," providing that parties may not waive representative PAGA claims in the first sense, that is, their "*representative standing* to bring PAGA claims in a judicial or arbitral forum."⁴⁸ Significantly, the Court ruled the FAA does not preempt the *Iskanian* rule prohibiting "wholesale" waivers of representative standing to bring PAGA claims altogether.⁴⁹ This is the Court's primary holding.

The Court's second holding addressed the *Iskanian* rule that PAGA plaintiffs cannot be forced to sever their "individual PAGA claim" (for penalties arising from Labor Code violations they personally suffered) from their representative PAGA claim (for penalties arising from violations suffered by other employees). Justice Alito characterized this as a claim joinder rule adopted by the California Supreme Court "on the theory that resolving victim-specific claims in separate arbitrations does not serve the deterrent purpose of PAGA."⁵⁰ Reasoning that this "expansive rule of joinder in the arbitral context would defeat the ability of parties to control which claims are subject to arbitration," Justice Alito found it preempted by the FAA "insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate."⁵¹ Therefore, based on the agreement's severability clause, the Court found that Viking was entitled to enforce the agreement to the extent it mandated arbitration of Moriana's "individual PAGA claim."⁵²

In the final part of the opinion, which was joined by four other justices, Justice Alito considered what to do about Moriana's representative PAGA claims on behalf of other employees. Justice Alito said these "non-individual" PAGA claims "may not be dismissed simply because they are

⁴⁴ See *supra* note 7.

⁴⁵ *Viking River Cruises*, 2022 WL 2135491, at *5.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* (emphasis in original).

⁴⁹ *Id.* at *6, 11.

⁵⁰ *Id.* at *5, 10-11 (citations omitted).

⁵¹ *Id.* at *10-11.

⁵² *Id.* at *11. It is not within the scope of this Note to address potential issues with the Court's ruling on this point.

‘representative.’”⁵³ However, he then said that “PAGA provides no mechanism to enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding.”⁵⁴ This is because, according to Justice Alito, “[u]nder 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.”⁵⁵ Thus, “[w]hen an employee’s own dispute is pared away from a PAGA action, the employee is no different from a member of the general public, and PAGA does not allow such persons to maintain suit.”⁵⁶ As a result, Justice Alito concluded that Moriana “lacks statutory standing to continue to maintain her non-individual claims in court, and the correct course is to dismiss her remaining claims.”⁵⁷ This portion of the opinion, as we explain below, is a fundamental misunderstanding of California law as interpreted by the California Supreme Court, and is not binding on California courts.

PART 2

Viking River’s Misunderstanding of *Kim v. Reins* and the California Supreme Court’s Interpretation of PAGA Standing

In section A, we discuss the California Supreme Court’s broad interpretation of PAGA standing, as analyzed in *Kim v. Reins*. Section B explains why the U.S. Supreme Court was wrong in *Viking River Cruises* about PAGA standing. Moriana did not lose standing to prosecute her representative PAGA claims in court even if she must arbitrate her “individual” claim.

A. PAGA standing as interpreted by the California Supreme Court is expansive, not limited.

PAGA has two statutory provisions governing who may bring a PAGA claim and in what capacity. Labor Code Section 2699 (a) establishes a cause of action under PAGA and Labor Code Section 2699 (c) defines who has standing to assert the cause of action. Section 2699 (a) states civil penalties may be “recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees.”⁵⁸ Section 2699 (c), in turn, defines an “aggrieved employee” under PAGA as “any person who was employed by the alleged violator” and “against whom one or more of the alleged violations was committed.”⁵⁹

In *Kim v. Reins*, the California Supreme Court interpreted Labor Code Section 2699 (c) to address whether a plaintiff who was ordered to arbitrate his individual claims for damages, and subsequently accepted a settlement and dismissed the individual claims, lost standing to assert representative PAGA claims in court.⁶⁰ The Court of Appeal in *Kim* had held that because the

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Cal. Lab. Code § 2699 (a).

⁵⁹ Cal. Lab. Code § 2699 (c).

⁶⁰ *Kim*, 9 Cal.5th at 82-83, 87 (stating that “aggrieved employee” under Section 2699 (c) is a term of art that “governs...who has standing to bring a PAGA claim”).

plaintiff's rights had been "completely redressed" by the settlement and dismissal of his individual claims, the plaintiff was no longer an "aggrieved employee" under PAGA.⁶¹ The California Supreme Court reversed, based on the plain language of the PAGA statute, its underlying purpose, and legislative intent.⁶²

The Court held that the "plain language" of PAGA is "explicit" and "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.'"⁶³ The Court found that Kim met both requirements.⁶⁴

The Court explained that the "Legislature defined PAGA standing in terms of violations, not injury."⁶⁵ Thus, the Court held that Kim "became an aggrieved employee, and had PAGA standing, when one or more Labor Code violations were committed against him."⁶⁶ Emphasizing that what matters for PAGA standing is the "*fact* of the violation itself,"⁶⁷ the Court concluded that settlement, or other means to remediate a violation, did not "nullify" the fact of the violation.⁶⁸ Accordingly, the Court held that Kim retained PAGA standing even after his individual damages claims were resolved.⁶⁹ Furthermore, the Court noted that the employer's notion that standing "somehow ended" after Kim settled his individual claims "would add an expiration element to the statutory definition of standing" when the Legislature "said no such thing."⁷⁰

Setting forth its "expansive approach" to PAGA standing, the Court underscored that "[t]he statutory language reflects that the Legislature did not intend to link PAGA standing to the maintenance of individual claims when such claims have been alleged. An employee has PAGA standing if '*one or more* of the alleged violations was committed' against him."⁷¹ And this is so, the Court further explained, because PAGA claims for civil penalties serve a different purpose from individual claims for damages; while damages are compensatory, intended to make the plaintiff whole, civil penalties are intended to punish the violator and to deter future violations.⁷² Therefore, civil penalties may be triggered under PAGA even if the wrongful act does not result in individual injury.⁷³

⁶¹ *Id.* at 82-83.

⁶² *Id.* at 80, 83-91.

⁶³ *Id.* at 83-84 (quoting Cal. Lab. Code § 2699 (c)).

⁶⁴ *Kim*, 9 Cal.5th at 84.

⁶⁵ *Id.*

⁶⁶ *Id.* (citing Cal. Lab. Code § 2699 (c)).

⁶⁷ *Id.* (emphasis in original).

⁶⁸ *Id.*

⁶⁹ *Id.* at 80.

⁷⁰ *Id.* at 84-85.

⁷¹ *Id.* at 85 (quoting Cal. Lab. Code § 2699 (c)) (emphasis in original).

⁷² *Id.* at 86.

⁷³ *Id.* (citation omitted).

Second, the Court also discussed the statutory purpose of PAGA—which is “to augment the limited enforcement capability of the [state Labor Agency] by empowering employees to enforce the Labor Code as representatives of the Agency,” and thereby recover civil penalties on the state’s behalf in order to “remediate present violations and deter future ones.”⁷⁴ The Court distinguished PAGA actions from class actions, in which the representative plaintiff possesses a single claim for relief—the plaintiff’s own—and hence upon voluntary settlement of her claim, no longer has an interest in the class action and may lose the ability to represent the class.⁷⁵ In contrast, a PAGA action is not a class action because a PAGA plaintiff represents *the state*.⁷⁶

Thus, the Court found the defendant’s narrow construction of PAGA standing was “contrary to the statute’s purpose to ensure effective code enforcement”⁷⁷ and “runs counter to the broader statutory scheme,” including the express authority under PAGA to bring a PAGA suit separately from an individual claim for relief.⁷⁸ Finally, the Court noted the legislative history of PAGA further supported the Court’s conclusion that PAGA standing is not lost when the aggrieved employee settles claims for individual relief.⁷⁹

B. *Viking River Cruises* rests on a misunderstanding of the California Supreme Court’s broad interpretation of PAGA standing.

In a portion of the opinion which garnered the votes of only five justices, Justice Alito ignored the reasoning of *Kim* and stated that Moriana’s representative PAGA claims for the violations sustained by other employees should be dismissed for lack of standing because her individual PAGA claim must be arbitrated. According to Justice Alito, “[u]nder 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*.”⁸⁰ This statement rests on a misreading of PAGA. Based on the California Supreme Court’s definitive interpretation of the plain meaning of the PAGA standing provision and the statute’s purpose, Moriana—and any other employee subject to an arbitration agreement with a representative action waiver—has standing to litigate representative PAGA claims on behalf of other employees even if she must arbitrate her individual PAGA claim.⁸¹

Like the plaintiff in *Kim*, under the plain language of Labor Code Section 2699 (c), Moriana “became an aggrieved employee, and had PAGA standing, *when one or more Labor Code violations were committed against [her]*.”⁸² Based on *Kim*, nothing more was required to confer

⁷⁴ *Id.* (citing *Iskanian*, 59 Cal.4th at 383, and *Williams v. Superior Court*, 3 Cal.5th 531, 546 (Cal. 2017)).

⁷⁵ *Kim*, 9 Cal.5th at 86-87 (citations omitted).

⁷⁶ *Id.* at 87.

⁷⁷ *Id.*

⁷⁸ *Id.* at 87-88.

⁷⁹ *Id.* at 90-91.

⁸⁰ *Viking River Cruises*, 2022 WL 2135491, at *11 (emphasis added).

⁸¹ *See supra* note 10.

⁸² *See Kim*, 9 Cal.5th at 84 (emphasis added).

on Moriana standing to sue.⁸³ That Viking compelled arbitration of Moriana’s “individual” PAGA claim does not change the fact that Moriana was an aggrieved employee who initially brought a representative suit under PAGA, on behalf of herself and other employees, as authorized under Labor Code Section 2699 (a).⁸⁴ Justice Alito was simply mistaken about California law when he opined that Moriana is *no longer* “aggrieved” and loses representative standing to litigate PAGA claims on behalf of others once her claim is sent to arbitration.⁸⁵

Neither the representative cause of action created by Labor Code Section 2699(a) nor the standing conferred by Labor Code Section 2699 (c) vanishes when a PAGA plaintiff settles or arbitrates her individual claims for damages or for PAGA civil penalties.⁸⁶ The California Supreme Court’s ruling in *Kim* prohibits imposing conditions on PAGA standing that do not appear on the face of the statute.⁸⁷ Justice Alito’s view that Moriana lost her PAGA standing and cause of action to litigate her representative PAGA claims on behalf of other workers when she was compelled to arbitrate the “individual” component of her PAGA claim impermissibly injects an “expiration element” into the statute.⁸⁸

⁸³ See *Kim*, 9 Cal.5th at 83, 90 (noting that if a statute is unambiguous, its plain meaning controls, and stating that “the meaning of PAGA’s standing requirement is plain”).

⁸⁴ See Cal. Lab. Code § 2699 (a); *Viking River Cruises*, 2022 WL 2135491, at *5 (setting forth procedural history of case).

⁸⁵ See *Viking River Cruises*, 2022 WL 2135491, at *11 (stating that “[w]hen an employee’s own dispute is pared away from a PAGA action, the employee is no different from a member of the general public” and concluding that Moriana “lacks statutory standing to continue to maintain her non-individual claims in court”).

⁸⁶ Although the plaintiff in *Kim* asserted both claims for damages and a PAGA claim for penalties for the same Labor Code violations as the damages claims, and Moriana asserted only a PAGA claim for penalties, this difference is irrelevant to standing under PAGA. In *Kim*, the California Supreme Court held that the plaintiff’s PAGA standing was not extinguished because he was still an “aggrieved employee” under the statute; settlement and dismissal of his damages claims did not “nullify” the *fact* of the Labor Code violations which formed the basis of both his damages and PAGA claims. *Kim*, 9 Cal.5th at 82, 84. The same reasoning holds for Moriana. Her individual PAGA claim has not even been resolved or adjudicated in any manner, and only the “situs of suit” has changed. See *Viking River Cruises*, 2022 WL 2135491, at *7 (noting that arbitration “merely changes how [substantive] rights will be processed” and the “situs of suit”). Neither splitting the PAGA claim into constituent parts nor arbitrating her individual claim nullifies the Labor Code violation which gives Moriana—and any other PAGA plaintiff—standing to bring, and maintain, a representative PAGA claim in state court.

⁸⁷ See *Kim*, 9 Cal.5th at 85 (stating that courts “may not add to or alter [the statute] to accomplish a purpose that does not appear on the face of the statute or from its legislative history”) (internal quotations and citations omitted).

⁸⁸ See *id.* (rejecting the employer’s interpretation that would add an expiration element to PAGA standing). Justice Alito cited not only Labor Code Section 2699 (c), but also Labor Code Section 2699 (a). *Viking River Cruises*, 2022 WL 2135491, at *11. *Kim* is clear that Section 2699 (c), PAGA’s standing provision, has only two requirements, and no expiration element. *Kim*, 9 Cal. 5th at 83-85. Employers may nonetheless attempt to argue that *Viking River* stands for the notion that once the individual PAGA claim is severed from a PAGA case, the suit is *no longer* a civil action that is “brought by an aggrieved employee” under Section 2699 (a) “on behalf of himself or herself *and* other...employees.” See Cal. Lab. Code § 2699 (a) (emphasis added). This argument passes over the fact that Moriana initially did bring an action on behalf of herself *and* other employees, and had standing to bring it as an “aggrieved employee”

While neglecting the holding of *Kim*, Justice Alito nonetheless cited *Kim* to support the proposition that “[w]hen an employee’s own dispute is pared away from a PAGA action, the employee is no different from a member of the general public.”⁸⁹ *Kim* holds no such thing. On the contrary, *Kim* makes clear that Moriana was not a member of the general public; she was an “aggrieved employee” who suffered an alleged violation of the Labor Code.⁹⁰ *Kim* held that a plaintiff whose own damages claims are sent to arbitration and settled retains standing to litigate representative PAGA claims in court.⁹¹ *Kim*’s reasoning dictates the same retention of standing for Moriana—and any other PAGA plaintiff subject to an arbitration agreement with a representative action waiver.

Justice Alito’s reading of California law is contrary to what the California Supreme Court found to be PAGA’s “explicit” language directing an “expansive approach” to standing.⁹² Such a narrow view of standing not only lacks grounding in the plain language of the statute, it is also inconsistent with how California’s high court has described the California Legislature’s “sole purpose” in enacting PAGA: to “ensure effective code enforcement” by enabling employees as *representatives of the state* to seek civil penalties on behalf of themselves and other employees.⁹³ Indeed, the fact that standing was not extinguished in *Kim* precisely because a PAGA claim is a *representative action* is a significant aspect of the California Supreme Court’s decision that Justice Alito brushed aside. While ruling that PAGA representative standing cannot be waived wholesale,⁹⁴ Justice Alito essentially accomplished the same result as a waiver of PAGA rights, through his determination that an employee subject to arbitration loses standing to litigate a representative PAGA claim on behalf of other employees. Depriving employees of the ability to prosecute representative PAGA actions would “undermine the Legislature’s objectives”⁹⁵ and “thwart the Legislature’s clear intent to deputize employees to pursue sanctions on the state’s behalf.”⁹⁶

under Section 2699 (c). Furthermore, reading Section 2699 (a) to cut off PAGA representative standing after a PAGA suit has been brought imposes an expiration element on PAGA standing. Even *assuming arguendo* that Section 2699 (a) can be reasonably read in more than one way, an interpretation that destroys the statute’s purpose as a representative action should be avoided. *See Kim*, 9 Cal.5th at 83, 86-87 (discussing PAGA’s statutory purpose and that its provisions are to be construed broadly in favor of protecting employees).

⁸⁹ *Viking River Cruises*, 2022 WL 2135491, at *11. Justice Alito cited *Kim* for its statement that the Legislature meant to ensure PAGA suits could only be brought by persons (“aggrieved employees”) who suffered some violation under the Labor Code. *See id.* (quoting *Kim*, 9 Cal.5th at 90).

⁹⁰ *See Kim*, 9 Cal.5th at 83-84 (discussing plain language of PAGA’s standing provision and its “explicit” definition of “aggrieved employee”).

⁹¹ *Id.* at 80, 82-84; *see also supra* note 86.

⁹² *See Kim*, 9 Cal.5th at 84-85.

⁹³ *See id.* at 86-87 (emphasizing that “every” PAGA action is a representative action “on behalf of the state,” and enables suit “on behalf of *all* affected employees”).

⁹⁴ *Viking River Cruises*, 2022 WL 2135491, at *6, 11.

⁹⁵ *Kim*, 9 Cal.5th at 87 (quoting *Williams*, 3 Cal.5th at 548).

⁹⁶ *Kim*, 9 Cal.5th at 91; *see also Iskanian*, 59 Cal.4th at 384 (noting that a “prohibition of *representative* claims frustrates the PAGA’s objectives”). Indeed, in *Kim*, the Court underscored that a limited view of standing would impede effective prosecution of representative PAGA actions, and rejected an approach that would “seriously impair the state’s ability to collect and distribute civil penalties under [its]

PART 3

Conclusion: The California Supreme Court's Broad Approach to PAGA Standing Remains Legally Binding in all PAGA Cases

In *Viking River Cruises*, the U.S. Supreme Court correctly looked to California law to determine the issue of PAGA standing. The Court misunderstood California law when it concluded that “PAGA provides no mechanism to enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding.”⁹⁷ California Supreme Court precedent, as articulated in *Kim v. Reins*, makes clear that an order compelling a plaintiff to arbitrate her “individual PAGA claim” does not extinguish her standing as an “aggrieved employee” to litigate a representative PAGA action on behalf of other employees.

Federal courts, including the United States Supreme Court, are bound by the state supreme court’s interpretation of state law.⁹⁸ Neither the U.S. Supreme Court nor any other federal court “has any authority to place a construction on a state statute different from the one rendered by the highest court of the State.”⁹⁹ This principle is “fundamental to our system of federalism” and applies to procedural as well as substantive rules.¹⁰⁰

By concluding in *Viking River Cruises* that Moriana has no standing to maintain her representative PAGA action in court, the U.S. Supreme Court disregarded this fundamental principle. Justice Alito’s majority opinion sets forth its own interpretation of PAGA standing at odds with California Supreme Court precedent. As Justice Sotomayor observed in her concurring opinion in *Viking River Cruises*, “[I]f this Court’s understanding of state law is wrong, California courts, in an appropriate case, will have the last word.”¹⁰¹

Because the U.S. Supreme Court had no authority to substitute its own interpretation of this issue of state law, its discussion in *Viking River Cruises* as to Moriana’s lack of PAGA standing should not be followed by California courts. Instead, courts must apply the principles on PAGA standing that the California Supreme Court set forth in *Kim*.

provisions.” See *Kim*, 9 Cal.5th at 87-88. Justice Alito’s view of PAGA standing, which extinguishes the ability to litigate civil penalty claims on behalf of other employees, would do just that.

⁹⁷ *Viking River Cruises*, 2022 WL 2135491, at *11.

⁹⁸ *Johnson v. U.S.*, 559 U.S. 133, 138 (2010) (citation omitted).

⁹⁹ *Johnson v. Fankell*, 520 U.S. 911, 916 (1997) (citations omitted).

¹⁰⁰ *Id.* (citation omitted).

¹⁰¹ *Viking River Cruises*, 2022 WL 2135491, at *12 (Sotomayor, J., concurring).