Case No. _____

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ZB, N.A. and ZIONS BANCORPORATION,

Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO,

Respondent;

KALETHIA LAWSON,

Real Party In Interest.

After a Decision by the Court of Appeal
Fourth Appellate District, Division One
Case Nos. D071279 & D071376 (Consolidated)

PETITION FOR REVIEW

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TO THE HONORABLE CHIEF JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Petitioners ZB, N.A. ("ZB") and Zions Bancorporation ("Zions") (collectively, "Petitioners") respectfully offer this Petition for Review of the published decision of the Court of Appeal, Fourth Appellate District, Division One, filed on December 19, 2017, and modified on December 21, 2017, entitled *Kalethia Lawson v. ZB N.A., et al.*, Consolidated Case Nos. 071279 & D071376 (the "Opinion"), attached hereto as Exhibit A.

I. QUESTION PRESENTED FOR REVIEW.

Does the Court of Appeal's published Opinion contravene the United States Supreme Court's holding in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333 ("*Concepcion*"), and this Court's holding in *Iskanian v. CLS Transportation Los Angeles LLC* (2014) 59 Cal.4th 348 ("*Iskanian*"), and violate the Federal Arbitration Act, by permitting real party in interest Kalethia Lawson ("Lawson") to pursue in the Superior Court a mass, quasi-class claim for payment of underpaid wages ("victim-specific relief") directly to Lawson and other employees throughout California under Labor Code section 558(a)(3), in disregard of Lawson's individual arbitration agreement (including a class claims waiver) with her former employer?

II. REASONS FOR GRANTING REVIEW.

This Court "may order review of a Court of Appeal decision," *inter alia*, "when necessary to secure uniformity of decision or to settle an

important question of law." (Cal. Rules of Court, rule 8.500(b)(1).) The instant Petition for Review presents an irreconcilable conflict between the Opinion in this case and the earlier published opinion in *Esparza v. KS Indus., L.P.* (2017) 13 Cal.App.5th 1228 ("*Esparza*"), which reached a directly contrary conclusion regarding the effect of class action waivers in arbitration agreements as applied to claims seeking unpaid wages under the Labor Code Private Attorneys General Act ("PAGA"), where the award of such wages is paid directly to the employee, rather than 75% to the State as is the case with the traditional per-pay-period civil penalties ($50 or $100 per pay period) available under Labor Code section 558 ("Section 558").

In 2011, in *Concepcion*, the United States Supreme Court held that the Federal Arbitration Act ("FAA") requires California courts to enforce arbitration agreements even where those agreements preclude arbitration of consumer complaints on a class-wide basis. (563 U.S. at 354.) Three years later, in *Iskanian*, this Court held that pre-dispute class action waivers in arbitration agreements cannot waive the right to bring representative claims under PAGA. (59 Cal.4th at 386-388.)

To avoid running afoul of *Concepcion*, this Court included an important exception to its holding in *Iskanian*:

> Our opinion today would not permit a state to circumvent the FAA by, for example, deputizing employee A to bring a suit for the individual damages claims of employees B, C, and D. This pursuit of victim-specific relief by a party to an

> arbitration agreement on behalf of other parties to an arbitration agreement would be tantamount to a private class action, whatever the designation given by the Legislature. Under *Concepcion*, such an action could not be maintained in the face of a class waiver.

(*Id.* at 387-388 [referencing *Concepcion, supra,* 563 U.S. 333].)[1]

Lawson and California Bank & Trust ("CB&T") – a division of ZB[2] – are parties to an arbitration agreement that obligates Lawson to arbitrate her claims against CB&T individually. (AA I:050, 063.) The parties' arbitration agreement precludes an employee or former employee – including Lawson – from seeking "to represent the legal interests of or obtain relief for a larger group." (AA I:051, 064.)

In this action, Lawson seeks to recover victim-specific relief in the form of "unpaid wages and premium wages" under Section 558, which provides that unpaid wages "recovered pursuant to this section shall be paid to affected employees." (AA I:014 at ¶ 49 [emphasis added]; Labor Code § 558(a)(3).) Lawson seeks such "unpaid wages and premium wages" not only on her own behalf, but also on behalf of all other aggrieved hourly-paid or non-exempt employees. (AA I:009, 014 at ¶¶ 13, 49.) Significantly,

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[1] The Court's above-quoted limitation is referred to herein as the "*Iskanian* exception."

[2] On December 31, 2015, CB&T merged its banking charter with other banks owned by its parent company, Zions, to form ZB. (AA I:040.) At that time, CB&T became a division of ZB. (AA I:040.)

although Lawson purports to assert a PAGA claim, she does not seek to recover the "unpaid wages and premium wages" on behalf of the State of California, which would not share in the recovery of these wages under Section 558. (AA I:009, 014 at ¶¶ 13, 49.)

Despite the class-action waiver provision of the parties' arbitration agreement, the Superior Court ordered the parties to arbitrate Lawson's victim-specific claims on a representative, quasi-class basis. (AA II:381.) The Court of Appeal reversed the Superior Court's Order in its entirety, holding that unpaid wages available under Section 558 constitute an additional part of the civil penalties (per employee, per pay period) set forth in the statute, and that monetary penalties under PAGA (of which the employee receives 25%, while the State receives 75%) cannot be separated from unpaid wages claims, even though the affected employees retain all unpaid wages recovered in the action. (Exhibit A hereto ["Opn."] at pp. 8, 10-12, 18-21.) Relying on its decision in a pre-*Iskanian* case, the Court of Appeal held that "in bringing a PAGA action an employee is not acting on his or her own behalf, but on behalf of the state and the state is not bound by the employee's prior agreement, including any waiver of his or right to bring a representative action." (Opn. at p. 23.) Thus, the Court of Appeal held, because the employee effectively acts on behalf of the State, which is not a party to any arbitration agreement, the Superior Court erred in ordering Lawson to arbitrate any part of her claims. (Opn. at p. 23.)

The Court of Appeal's published Opinion would thus permit Lawson – "Employee A" in *Iskanian*'s parlance – to seek recovery of unpaid wages on behalf of other employees – "Employees B, C, and D" as described in *Iskanian* – in the face of an undisputed class action waiver and thus in contravention of the United States Supreme Court's holding in *Concepcion* and the *Iskanian* exception articulated by this Court, based on the fiction that Lawson stands in the shoes of the State, even though none of the unpaid wages recovered under Section 558 would be paid to the State.

In addition to contravening *Concepcion* and the *Iskanian* exception, the Court of Appeal's holding is contrary to the published Opinion of the Fifth Appellate District Court of Appeal in *Esparza*, 13 Cal.App.5th 1228. *Esparza* holds that when a plaintiff-employee pursues "claims for unpaid wages and other types of victim-specific relief" under Section 558 that are payable directly to the employee instead of the State, such claims are "private disputes" that must be arbitrated pursuant to the terms of the parties' arbitration agreement. (*Id.* at 1234, 1246.) Specifically, the *Esparza* court explained this Court's holding in *Iskanian* as follows:

> We conclude that, for purposes of the *Iskanian* rule, PAGA representative claims for civil penalties are limited to those where a portion of the recovery is allocated to the Labor and Workforce Development Agency. Claims for unpaid wages based on *Labor Code section 558* are not allocated in this manner and, therefore, the *Iskanian* rule does not exempt such claims from arbitration . . . .

> [T]he employee intended to pursue private claims for victim-specific relief, such as claims to recover wages under *Labor Code section 558*. The *Iskanian* rule does not exempt such claims from arbitration.

(*Id.* at 1234.) This Court denied review and depublication of *Esparza* on November 15, 2017.

The Court of Appeal in the instant case rejected the *Esparza* court's reasoning, holding that (1) while Section 558 does permit individual recovery by a plaintiff, the plaintiff must first satisfy PAGA procedural requirements and acts "in the place of and for the [Labor and Workforce Development Agency ("LWDA")]," such that the claim is not purely private; and (2) *Iskanian* permits the "enforce[ment]" of "civil penalties" under Section 558 "even when an employee is subject to a class waiver agreement." (Opn. at p. 21.)

The Court of Appeal's Opinion in the instant case would permit employees to pursue representative, quasi-class claims for unpaid wages under PAGA in the trial courts despite arbitration agreements that permissibly preclude class-wide claims, in direct contravention of the United States Supreme Court's decision in *Concepcion* – the very circumstance this Court sought to avoid in articulating the *Iskanian* exception. In addition, the Opinion and *Esparza* are irreconcilable, and diverge on a matter of significant importance to thousands of employers and untold numbers of

employees across the State. Petitioners respectfully request that this Court resolve this unmistakable and significant conflict in California law and provide much-needed guidance to the lower courts.

III. FACTUAL AND PROCEDURAL BACKGROUND.

A. Lawson Agreed To Arbitrate Her Disputes With Petitioners On An Individual, Bilateral Basis.

Lawson began working for CB&T on June 3, 2013. (AA I:037.) Prior to commencing employment with CB&T, Lawson received an e-mail with a hyperlink to CB&T's "Statement of Compliance with Employee Handbook and Code of Ethics" (the "Statement of Compliance"). (AA II:229, 233-234.) The Statement of Compliance included hyperlinks to several documents, including the full Employee Handbook and the "Mandatory Binding Arbitration Policy and Agreement" (the "Arbitration Agreement") of the Employee Handbook. (AA II:230, 233-234.)

On May 31, 2013, Lawson acknowledged receipt of the Statement of Compliance. (AA II:229-230, 234, 237, 240-241, 244, 261, 263-268.) By acknowledging receipt of the Statement of Compliance, Lawson confirmed that she had "read and [would] comply with the policies and standards contained in the Handbook," and also confirmed that she had "read particularly . . . Section 4.4 of the Handbook, which contains the Mandatory Binding Arbitration Agreement." (AA II:230-231, 233-234, 240-241, 244.)

On Lawson's first day of work (June 3, 2013), Lawson again agreed to be bound by the Arbitration Agreement. (AA I:037-038, 050-061; AA II:230-231, 234-235, 245-257.) On February 14, 2014, Lawson also acknowledged receipt of, and her agreement to be bound by, an updated version of the Arbitration Agreement. (AA I:038-039, 062-072; AA II:231-232, 233-236, 259-261.) The first paragraph of the Arbitration Agreement specifies that all employment-related claims are subject to arbitration:

> Any legal controversy or claim arising out of your employment with the Company or with Zions or Zions Entities, which is not otherwise governed by an arbitration provision, and that cannot be satisfactorily resolved through negotiation or mediation, shall be resolved, upon election by you or the Company, Zions or Zions Entities, by binding arbitration pursuant to this arbitration provision and the code of procedures of the American Arbitration Association (AAA).

(AA I:050, 063.)

The Arbitration Agreement contains a provision precluding an employee or former employee from seeking "to represent the legal interests of or obtain relief for a larger group":

> [C]laims by different claimants against the Company, Zions and Zions Entities or by the Company against different employees, former employees, or applicants, **may not be combined in a single arbitration**. Unless specific state law states otherwise, **no arbitration can be brought as a class action (in which a claimant seeks to represent the legal interests of or obtain relief for a larger group)**, and the parties recognize

> that the arbitrator has no authority to hear an arbitration either against or on behalf of a class.

(AA I:051, 064 [emphasis added].)

Further expressing the parties' intent to arbitrate any disputes on an individual basis only, the Arbitration Agreement states that the arbitrator "shall not consolidate claims of different employees or have power to hear arbitration as a class action." (AA I:053, 066.) A "class action" is defined in the Arbitration Agreement as an action "in which a claimant seeks to represent the legal interests of or obtain relief for a larger group." (AA I:051, 064.)

Significantly, the acknowledgment forms Lawson was asked to accept on each of these occasions specifically referred to the mandatory arbitration policy in bold, uppercase text:

> I have read particularly the *Handbook Overview* and *General Management Practices* sections of the Handbook which contain the **EMPLOYMENT AT-WILL POLICY**, *Section 4.4* of the Handbook, which contains the **MANDATORY BINDING ARBITRATION POLICY AND AGREEMENT**, and *Section 5.5* of the Handbook, ... I understand that by accepting or continuing employment with the Company I agree to use binding arbitration to resolve certain legal claims or controversies with the Company, Zions or Zions Entities, including federal Title VII and state civil rights claims, pursuant to the mandatory binding arbitration policy. . . .

(AA I:055, 068; AA II:240-241; emphasis in original.)

Lawson acknowledged receipt of the Arbitration Agreement on all three occasions. (AA I:038-039, 062-072; AA II:230-236, 244, 245-261.) In acknowledging receipt of the employee handbook and Arbitration Agreement, Lawson agreed that "by accepting or continuing employment with the Company," she would use "binding arbitration to resolve" her claims against Petitioners. (AA I:055, 068; AA II:240-241.)

B. Lawson Filed A PAGA Action Seeking Victim-Specific, Unpaid Wages On Behalf Of Herself And Other Employees.

On February 19, 2016, Lawson filed her Complaint with the respondent Superior Court. In her Complaint, Lawson alleged a single cause of action for violation of PAGA, on behalf of herself and other aggrieved employees. (AA I:006-019.)

In her Complaint, Lawson seeks not only the normal PAGA civil penalties that go primarily to the State of California, but also individual, employee-specific relief in the form of "unpaid wages and premium wages" under Section 558. (AA I:014 at ¶ 49.) Lawson seeks such "unpaid wages and premium wages" not just on her own behalf, but also on behalf of all other hourly-paid or non-exempt employees in California. (AA I:009, 014 at ¶¶ 13, 49.)

C. Petitioners Moved To Compel Lawson To Submit Her Claim For Victim-Specific Relief Under Labor Code § 558 To Individual Binding Arbitration.

On August 3, 2016, Petitioners moved the Superior Court for an Order "compelling plaintiff Kalethia Lawson to submit her claim for victim-specific relief under Labor Code § 558 to individual binding arbitration and to stay the action." (AA I:021.) On September 28, 2016, the Superior Court issued its tentative ruling granting Petitioners' motion, although the Court included in its tentative ruling advisory language suggesting that the arbitrator could hear the matter on a representative basis. (Ex. AA II:378.)

At the hearing on September 30, 2016, Petitioners addressed the potential of the arbitration being ordered to proceed on a representative basis, noting that both state law and the arbitration agreement preclude arbitration of claims between the parties on a class or representative basis:

> The motion we brought was a very narrow motion asking the Court to compel the plaintiff's individual claim under Labor Code Section 558(a)(3) to individual arbitration. And the tentative ruling in the first sentence says that the Court grants that motion to compel individual arbitration, but this language at the end [of the tentative ruling], I think, creates confusion regarding that. Under both state law, the *Iskanian* decision, and the arbitration [agreement] itself, they both prohibit the arbitration of claims on a class or representative basis.

(Reporter's Transcript, at p.16:3-12.)

Petitioners further argued that the parties had made no agreement to arbitrate on any basis other than on an individual basis.

> Here the defendants have no agreement to arbitrate other than on an individual basis. And, in fact, the portion of the *Iskanian* decision the Court relies upon in its tentative ruling as well as the Arbitration Agreement both say the exact opposite, that if it's victim specific relief, these class action waiver provisions are enforceable under the Federal Arbitration Act and the matter should be sent to individual arbitration, and so that's why I think that language in the Court's – at the end of the Court's ruling is superfluous.

(Reporter's Transcript, at p.17:9-19.)

At the conclusion of the hearing, the Superior Court took the matter under submission. (Reporter's Transcript, at p.20:19-21.) By Minute Order dated September 30, 2016, the Superior Court purported to grant Petitioners' motion to compel arbitration, but the Order did not compel arbitration on an individual basis as requested by Petitioners in their motion. (AA II:379-382.) Instead, the Superior Court denied the relief requested by Petitioners, and compelled the claim for victim-specific, unpaid wages and premium wages under Section 558 to arbitration "as a representative action." (AA II:381.)

The Superior Court served notice of the Order on October 3, 2016. (AA II:382.)

D. Appeal Of The Superior Court's Order.

On October 27, 2016, after the Superior Court made its Order, Petitioners filed their notice of appeal (the "Appeal"). (AA II:383-390.) On

November 29, 2016, Petitioners also filed a petition for a writ of mandate (the "Petition"), requesting that the Court of Appeal direct the Superior Court to vacate its Order compelling arbitration on a representative basis, and enter a new and different Order granting Petitioners' motion to compel Lawson to arbitrate her PAGA claim for unpaid wages under Section 558 on an individual basis, as required by the parties' arbitration agreement. (Ex. B.) The Court of Appeal subsequently consolidated the Appeal and writ proceeding. (Opn. at p. 24.)

On December 19, 2017, the Court of Appeal filed its Opinion, dismissing the Appeal on the grounds the Superior Court's Order is non-appealable, but purporting to "grant" ZB's Petition, and issuing a peremptory writ of mandate requiring the Superior Court to vacate its Order that a portion of Lawson's claims be arbitrated, and enter a new order denying ZB's motion to arbitrate in its entirety. (Opn. at p. 24.)

The Court of Appeal reasoned that a pre-*Iskanian* decision, *Thurman v. Bayshore Transit Management* (2012) 203 Cal.App.4th 1112 ("*Thurman*"), held that representative PAGA plaintiffs could collect unpaid wages under Section 558 because those unpaid wages are, in effect, civil penalties. (Opn. at pp. 10-15.) The *Lawson* court held that *Thurman* continued to apply, even after *Iskanian*, because the *Iskanian* court's distinction between PAGA claims and class claims was based "in large measure on whether, prior to enactment of the PAGA, [the relief sought]

could only be recovered by way of regulatory enforcement or whether they supported a private right of action." (Opn. at p. 21.) The Court of Appeal held that the unpaid wages provisions of Section 558 posed no danger of preemption because "the authority that has come to our attention has consistently found that there is no private right of action under section 558." (Opn. at p. 20.)

Rather, the Court held, PAGA plaintiffs suing under Section 558 do not ask for individual relief, because "there is no express right of private enforcement and instead a regulatory agency has expressly been given the right to enforce the statute." (Opn. at pp. 20-21.) The Court thus held that an aggrieved employee seeking unpaid wages under Section 558 does not seek individual relief obtainable in an individual action, but only the relief an enforcing agency could obtain in an enforcement action. (Opn. at pp. 18-22.) The Court of Appeal concluded that because an employee such as Lawson effectively acts on behalf of the State, which is not a party to any arbitration agreement, the Superior Court erred in ordering Lawson to arbitrate any part of her claims. (Opn. at p. 23.)

On December 21, 2017, the Court of Appeal modified its Opinion (and the judgment), altering its award of costs. (Modified Opn. at p. 2.) No petition for rehearing was filed.

IV. THE COURT OF APPEAL'S OPINION CONTRAVENES THE UNITED STATES SUPREME COURT'S DECISION IN *CONCEPCION* AND THIS COURT'S HOLDING IN *ISKANIAN*, AND IS IRRECONCILABLE WITH THE PREVIOUSLY-PUBLISHED DECISION OF THE FIFTH APPELLATE DISTRICT IN *ESPARZA*.

Relying heavily upon its pre-*Iskanian* decision in *Thurman* – which did not address the interplay of the FAA and PAGA when an employee is seeking victim-specific relief – the Court of Appeal held that the Superior Court should have denied Petitioners' motion to compel arbitration in its entirety, because Section 558 provides "no private right of action" and Lawson was in effect acting on behalf of the State, which is not a party to the Lawson-CBT Arbitration Agreement. (Opn. at p. 23.) The Court of Appeal's Opinion fundamentally misconstrues well-settled federal and California law – including this Court's holding in *Iskanian*, which this Court carefully tailored to avoid running afoul of *Concepcion* – and would erroneously undermine the enforcement of arbitration agreements across the State with regard to claims seeking unpaid wages on behalf of individual employees under PAGA.

Moreover, the Court of Appeal's Opinion cannot be reconciled with *Esparza*, and creates a divergence of law in published decisions on an issue of significant importance to employers and employees across the State.

A. The Court Of Appeal's Opinion Fails To Heed This Court's Decision In *Iskanian* And Thus Flouts The United States Supreme Court's Holding In *Concepcion*.

In 2014, this Court held in *Iskanian* that a class action waiver provision in an arbitration agreement cannot waive an employee's right to bring a representative PAGA action. (59 Cal.4th at 387-88.) Despite holding the FAA does not preempt California's rule that PAGA waivers in arbitration agreements are unenforceable, *Iskanian* nevertheless imposed an important limitation on the type of relief an employee bound by a pre-dispute arbitration agreement can seek in a representative PAGA action:

> Our opinion today would not permit a state to circumvent the FAA by, for example, deputizing employee A to bring a suit for the individual damages claims of employees B, C, and D. This pursuit of victim-specific relief by a party to an arbitration agreement on behalf of other parties to an arbitration agreement would be tantamount to a private class action, whatever the designation given by the Legislature. Under *Concepcion*, such an action could not be maintained in the face of a class waiver.

(*Id.* at 387-88 [referencing *Concepcion, supra*, 563 U.S. 333].)

With this *Iskanian* exception, this Court made clear that under the United States Supreme Court's *Concepcion* decision, an action seeking victim-specific unpaid wages, even if asserted under PAGA, "could not be maintained in the face of a class waiver." (*Iskanian, supra*, 59 Cal.4th at 388.) This Court had to impose this limitation on victim-specific relief to avoid undermining its rationale against FAA preemption, *viz*., that a PAGA

action is fundamentally an action between the State and the employer, designed to recover civil penalties primarily on behalf of the State. (*Id*. at 386-87.) The Court explained that its FAA holding applies only "where any resulting judgment is binding on the state and any monetary penalties largely go to state coffers." (*Id*. at 388 [emphasis added].)

A recent case from the First Appellate District recognizes this important limitation, explaining:

> *Iskanian's* prohibition on representative action waivers applies only to a representative action under PAGA seeking recovery of civil penalties ("an action that can only be brought by the state or its representatives") where the state is the real party in interest. (*Iskanian, supra*, 59 Cal.4th at p. 388.)

(*Tanguilig v. Bloomingdale's, Inc.* (2017) 5 Cal.App.5th 665, 676 n.4, review denied (Mar. 1, 2017), *cert. denied* (2017) 138 S. Ct. 356, 199 L. Ed. 2d 262 [emphasis added].) As explained below, Respondent, and not the State, is the real party in interest for her claim seeking unpaid wages payable only to her under Section 558, subdivision (a)(3).

1. Lawson, Not The State Of California, Is The Real Party In Interest For The Claim Seeking Unpaid Wages Under Labor Code § 558(a).

In her action, Lawson seeks two types of recovery: (1) civil penalties of $50 for the initial violation and $100 per pay period for each subsequent violation, payable 75% to the State of California; and (2) unpaid wages recoverable individually by Lawson and other employees – amounts which

would go 100% to the employees, not to the State. The State of California is the real party in interest for the $50/$100 civil penalties that "largely go to state coffers." (*Iskanian*, *supra*, 59 Cal.4th at 388.) The State is not, however, "the real party in interest" for the unpaid wages Respondent seeks to recover under Section 558. The State would not share in any of that recovery. (Labor Code § 558(a)(3).)

Specifically, Section 558 allows for the recovery of "an amount sufficient to recover underpaid wages," which amount "shall be paid to the affected employee." (Labor Code § 558.) The Superior Court correctly recognized that the real party in interest for the underpaid wages Respondent seeks under Section 558 is Lawson herself: "The 'penalty' under 558(a)(3) is paid entirely to the employee – not the state." (AA II:380.) The Superior Court reasoned that a "significant part of the relief plaintiff is seeking in this case is under Section 558(a) and (3) which would not meet the traditional definition of a true qui tam action." (AA II:379.) The Superior Court explained that "claims brought for recovery under Labor Code 558(a)(3) [are] qualitatively different from PAGA claims brought where civil penalties go to the state [and] would still be arbitrable." (AA II:380.) Therefore, the Superior Court stayed the "civil penalties aspect of this case (traditional qui tam action)" pending the arbitration of the unpaid wages portion of the action. (AA II:381.)

Lawson's individual claim for unpaid wages under Section 558 is the only claim on which Petitioners moved to compel arbitration. Petitioners limited their motion to that claim, recognizing that under current jurisprudence, *Iskanian* does not permit arbitration of the remainder of the action because the State of California is the real party in interest with respect to the remaining claims. In distinguishing (and staying) the remaining claims, the Superior Court likewise recognized that the State of California is not the real party in interest on the unpaid wages claim. Rather, Lawson is.

Lawson is the real party in interest because she has asserted a claim for victim-specific, unpaid wages in her Complaint. Specifically, in addition to seeking the usual PAGA penalties under Section 558 of $50 for the initial violation and $100 per pay period for each subsequent violation, Lawson also seeks to recover victim-specific "unpaid wages and premium wages per California Labor Code section 558 . . . ." (AA I:014 at ¶ 49.) This relief is not paid to the State of California, but to each "affected employee." (Labor Code § 558(a)(3).)

2. Lawson Admitted That She, Not The State Of California, Is The Real Party In Interest For The Claim Seeking Unpaid Wages.

In response to the Superior Court's questioning during oral argument about who recovers unpaid wages, Lawson conceded that the individual employee, not the State of California, receives all unpaid wages under

Section 558 – *i.e.*, there is no 75/25 split of the usual PAGA civil penalties, which go primarily to the State of California.

> THE COURT: Who gets the penalty?
>
> MS. GHOSH: I'm sorry?
>
> THE COURT: Who gets the penalty?
>
> MS. GHOSH: The employee gets the penalty.
>
> THE COURT: Okay, this is a PAGA representative claim and the employee gets the penalty, right?
>
> MR. SINCLAIR: Yes.
>
> THE COURT: That's what you are saying?
>
> MS. GHOSH: Yes.

(Reporter's Transcript, at pp. 11:27-12:8.)[3]

The Superior Court's questioning of Lawson's counsel at the hearing appears to have informed the Superior Court's distinction between (i) claims brought to recover underpaid wages under Section 558, and (ii) the "qualitatively different . . . PAGA claims brought where civil penalties go to the state . . . ." (AA II:380.) The Superior Court understood the distinction between PAGA-based penalties payable to the State of California and unpaid wages penalties payable to individual employees, explaining in its Order:

[3] Attorney Joanna Ghosh appeared on behalf of Lawson at the hearing on the motion to compel arbitration. Attorney Brian Sinclair appeared on behalf of Petitioners.

"the monetary 'penalty' for the violation of Labor Code 558(a)(3) is going to the employees – not the state." (AA II:380.)

The Superior Court further explained in its Order that "[a] significant part of the relief [Lawson] is seeking in this case is under 558(a) and (3) which would not meet the traditional definition of a true qui tam action." (AA II:379.) Hence, as the Superior Court recognized in issuing its arbitration Order, the State of California is not the real party in interest for the unpaid wages Lawson seeks for herself under Section 558(a)(3).

3. Despite Concluding That Lawson Was The Real Party In Interest For Her Individual Wage Claim Under § 558(a), The Superior Court Nonetheless Denied Petitioner's Motion To Compel Arbitration On An Individual Basis.

In its Order compelling arbitration, the Superior Court agreed with Petitioners that the *Iskanian* decision created an exception to the general rule that PAGA claims are not subject to arbitration. (AA II:380-381.) The Superior Court also agreed that Lawson's claim seeking unpaid wages under Section 558(a) fell within the *Iskanian* exception. (AA II:380-381.) The Superior Court, however, failed to recognize the key *Iskanian* exception.

Specifically, the *Iskanian* court reasoned that it would be improper under *Concepcion* to permit a party subject to a class action waiver provision to pursue relief "on behalf of other parties to an arbitration agreement," a process which would be "tantamount to a private class action" irrespective

of whatever designation the Legislature gave it. (*Iskanian*, *supra*, 59 Cal.4th at 387-388.)

This portion of the *Iskanian* decision provided the basis for Petitioners' motion to compel arbitration on an individual, bilateral basis. Petitioners contend the *Iskanian* exception precludes Lawson from pursuing the recovery of allegedly unpaid wages on behalf of other employees, and instead requires her to arbitrate her individual, victim-specific claim for unpaid wages.

Despite the Superior Court having accepted Petitioners' argument that Lawson is the real party in interest for the unpaid wages claim under Section 558 and that the *Iskanian* exception applies to such a claim, the Superior Court nonetheless compelled this claim to arbitration "as a representative action." (AA II:381.) This was an error of law, which the Court of Appeal compounded by way of its Opinion.

4. The Court Of Appeal's Reversal Of The Superior Court's Order Relies Upon A Misinterpretation Of *Concepcion* And *Iskanian*.

The Court of Appeal reversed the Superior Court's Order, holding that unpaid wages available under Section 558 constitute an additional part of the civil penalties (per employee, per pay period) set forth in the statute, and that monetary penalties under PAGA (of which the employee receives 25%, while the State receives 75%) cannot be separated from unpaid wages claims, even though the affected employees retain all unpaid wages recovered in the

action. (Opn. at pp. 10-12, 18-21.) The Court of Appeal held that because the employee effectively acts on behalf of the State, the Superior Court erred in ordering Lawson to arbitrate any part of her claims, because the State is not a party to any arbitration agreement. (Opn. at p. 23.)

The Opinion of the Court of Appeal in *Esparza* – with which the Court of Appeal's Opinion in this action necessarily conflicts, and which Petitioners excerpt in relevant part below – makes clear that the Opinion in this action rests upon a fundamental misconception of applicable law:

> In *Iskanian*, our Supreme Court explained why a representative action under PAGA that sought only civil penalties was not subject to arbitration and why this rule of nonarbitrability was not preempted by the Federal Arbitration Act. (*Iskanian*, *supra*, 59 Cal.4th at pp. 378-389.) That explanation is summarized here.
>
> Our Supreme Court reviewed the text of the Federal Arbitration Act and concluded the act's focus was on private disputes, not disputes between an employer and a state agency – parties with no contractual relationship. (*Iskanian*, *supra*, 59 Cal.4th at p. 384.) As to United States Supreme Court cases applying the Federal Arbitration Act, our high court stated that, with one exception, those cases consisted "entirely of disputes involving the parties' own rights and obligations, not the rights of a public enforcement agency." (*Iskanian*, *supra*, 59 Cal.4th at p. 385.) Our high court then stated:
>
> > "[A] PAGA claim lies outside the [Federal Arbitration Act's] coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship. It is a

> dispute between an employer and the state, which alleges directly or through its agents – either the [Labor and Workforce Development] Agency or aggrieved employees – that the employer has violated the Labor Code." (*Id.* at pp. 386-387.)

The court emphasized the distinction between a dispute between the state and an employer, which was not covered by the Federal Arbitration Act, and a private dispute between the employer and one or more employees by stating: "Our opinion today would not permit a state to circumvent the [Federal Arbitration Act] by, for example, deputizing employee A to bring a suit for the individual damages claims of employees B, C, and D." (*Iskanian*, *supra*, 59 Cal.4th at p. 387.) Thus, an employee's status as the proxy or agent of the state while pursuing a PAGA representative action is not merely semantic, but reflects the substantive role of the employee in enforcing California labor law on behalf of state agencies and producing (1) a judgment binding on the state and (2) monetary penalties that largely would go to state coffers. (*Iskanian*, *supra*, at p. 388.) Our high court closed its analysis of the Federal Arbitration Act and its preemptive effect as follows:

> "In sum, the [Federal Arbitration Act] aims to promote arbitration of claims belonging to the private parties to an arbitration agreement. It does not aim to promote arbitration of claims belonging to a government agency, and that is no less true when such a claim is brought by a statutorily designated proxy for the agency as when the claim is brought by the agency itself. The fundamental character of the claim as a public enforcement action is the same in both instances. We conclude that California's

> public policy prohibiting waiver of PAGA claims, whose sole purpose is to vindicate the [Labor and Workforce Development] Agency's interest in enforcing the Labor Code, does not interfere with the [Federal Arbitration Act's] goal of promoting arbitration as a forum for private dispute resolution." (*Iskanian*, *supra*, at pp. 388-389.)
>
> * * *

Employee's contention that his claim for unpaid wages constitutes a civil penalty is based on Labor Code section 558, subdivision (a), which provides in full:

> "(a) Any employer or other person acting on behalf of an employer who violates, or causes to be violated, a section of this chapter or any provision regulating hours and days of work in any order of the Industrial Welfare Commission shall be subject to a *civil penalty* as follows:
>
> "(1) For any initial violation, fifty dollars ($50) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages.
>
> "(2) For each subsequent violation, one hundred dollars ($100) for each underpaid employee for each pay period for which the employee was underpaid *in addition to an amount sufficient to recover underpaid wages*.
>
> "(3) *Wages recovered pursuant to this section shall be paid to the affected employee*." (Italics added.)

Employee argues this text clearly states that an award "an amount sufficient to recover

underpaid wages" is a civil penalty. Employee further argues that this "civil penalty" under Labor Code section 558 constitutes a "civil penalty" within the meaning of Labor Code section 2699, subdivision (a) and a "civil penalty" for purposes of the rule adopted in *Iskanian*. We disagree. Employee's argument is based on semantics and not substance. One substantive aspect of the claim is the financial reality that 100 percent of the "amount sufficient to recover underpaid wages" is paid to the affected employee. (Lab. Code, § 558, subd. (a)(3).) In *Iskanian*, our Supreme Court clearly expressed the need to avoid semantics and analyze substance in determining the scope of representative claims that could be pursued outside arbitration without violating the Federal Arbitration Act. (*See Iskanian*, *supra*, 59 Cal.4th at p. 388.) In short, parsing the language in the California statutes does not determine the scope of the federal statute, which ultimately is the legislation that controls whether a particular claim by Employee is subject to arbitration.

Employee's attempt to recover unpaid wages under Labor Code section 558 is, for purposes of the Federal Arbitration Act, a private dispute arising out of his employment contract with KS Industries. In statutory terms, the wage claim is covered by "[a] written provision in ... a contract ... to settle by arbitration a controversy arising out of such contract." (9 U.S.C. § 2.) The dispute over wages is a private dispute because, among other things, it could be pursued by Employee in his own right. We recognize that private disputes can overlap with the claims that could be pursued by state labor law enforcement agencies. When there is overlap, the claims retain their private nature and continue to be covered by the Federal Arbitration Act. To hold otherwise would allow a rule of state law to erode or restrict the scope of the Federal Arbitration Act – a result that cannot withstand scrutiny under federal

> preemption doctrine. Therefore, we conclude preventing arbitration of a claim for unpaid wages would interfere with the Federal Arbitration Act's goal of promoting arbitration as a forum for private dispute resolution. (*See Iskanian*, *supra*, 59 Cal.4th at p. 389.)
>
> Similarly, Employee's attempt to recover wages on behalf of *other aggrieved employees* involve victim-specific relief and private disputes. The rule of nonarbitrability adopted in *Iskanian* is limited to claims "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." (*Iskanian*, *supra*, 59 Cal.4th at p. 388, italics added.) These limitations are not met by the claims for unpaid wages owed to other aggrieved employees because (1) those employees could pursue recovery of the unpaid wages in their own right and (2) the unpaid wages recovered would not go to state coffers.
>
> In sum, Employee's claims for unpaid wages are subject to arbitration pursuant to the terms of the parties' arbitration agreement and the Federal Arbitration Act. The rule of nonarbitrability adopted in *Iskanian* is limited to representative claims for civil penalties in which the state has a direct financial interest.

(*Esparza*, *supra*, 13 Cal.App.5th at 1243–1246.)

In sum, the Court of Appeal's Opinion in this matter elevates form over substance, drawing upon the fiction of a State interest in Lawson's claims for victim-specific relief to hold that none of Lawson's claims is subject to arbitration.

In addition, the Court of Appeal's reliance upon its pre-*Iskanian* decision in *Thurman* is misplaced. As the Court of Appeal held, "[t]he defendant in *Thurman* argued the underpaid wages portions of relief provided by section 558 subdivisions (a)(1) and (a)(2) were severable from the $50 and $100 amounts imposed for each violation and those portions could not be collected in a PAGA action." (Opn. at p. 10 [citing *Thurman*, 203 Cal.App.4th at 1144–1145].) The Court of Appeal in *Thurman* "rejected the defendants' contention," holding that "'the language of section 558, subdivision (a) is more reasonably construed as providing a civil penalty that consists of *both* the $50 or $100 penalty amount *and* any underpaid wages, with the underpaid wages going entirely to the affected employee or employees as an express exception to the general rule that civil penalties recovered in a PAGA action are distributed 75 percent to the [LWDA] . . . and 25 percent to the aggrieved employees,'" citing Labor Code section 2699, subdivision (i). (Opn. at pp. 10-11 [emphasis added] [quoting *Thurman*, 203 Cal.App.4th at 1145].)

The Court of Appeal's quotation of *Thurman* makes clear its misinterpretation of the law: the underpaid wages "go[] entirely to the affected employee or employees as an express exception to[] the general rule" in a PAGA action that civil penalties go 75% to the State. (Opn. at p. 11.) Because the underpaid wages go to the employee(s), the action for such wages is legally and practically a private action, and thus, under *Concepcion*

and the *Iskanian* exception, subject to an otherwise applicable arbitration agreement. (*Esparza*, *supra*, 13 Cal.App.5th at 1243–1246.) The Court of Appeal's holding to the contrary is fundamentally incorrect, and in diverging from *Esparza*, will sow confusion among the trial courts and for employers and employees across the State.

The Court of Appeal's holding further sows confusion by opining that the *Iskanian* exception may apply if an employer can prove that the predominant recovery in a PAGA action will be paid to employees instead of to the State. Specifically, the Court of Appeal observed that "there is nothing in the record which suggests the predominate amounts recovered under section 558 will be in the form of underpaid wages payable to employees." (Opn. at p. 22) Therefore, the Court of Appeal explained, its "conclusion with respect to preemption [under the FAA] is without prejudice to ZB's right to show, on a fuller factual record, that preemption should apply here." (Opn. at p. 23, n.5.)

As shown above, Petitioners moved to compel arbitration of Lawson's claims for underpaid wages to be recovered 100% to Lawson, with none going to the State, and to stay the remainder of the action. (AA I:021.) Whether those "underpaid wages" would ultimately form the predominant amount of the total recovery – something that cannot be known at this preliminary stage of the action before a judgment is entered – is irrelevant.

In addition, the evidentiary burden the Court of Appeal has adopted presents an unworkable standard for several reasons. First, when a motion to compel arbitration is brought at the outset of an action, trial courts will not have made any rulings regarding what, if any, civil penalties should be awarded. (*See*, *Law Offices of Dixon R. Howell v. Valley* (2005) 129 Cal.App.4th 1076, 1101 [explaining that motion to compel arbitration "should be brought at the earliest opportunity"].) Second, in order for employers to obtain an order for arbitration, the Court of Appeal's reasoning would effectively require employers to concede that the liability for underpaid wages exceeds the liability for civil penalties. This approach would effectively preclude an employer from moving to compel arbitration of the underpaid wages portion of the action without admitting substantial liability. Moreover, under this standard, how would an employer who denies liability altogether ever move to compel arbitration, since the employer would be unable to establish that any underpaid wages recovery would predominate over any civil penalties recovery?

The Court of Appeal decision also creates an anomalous situation in which the FAA preempts some PAGA claims seeking "underpaid wages" under Labor Code section 558, while not preempting other such claims, with the distinction being dependent upon whether the underpaid wages recovery or the civil penalties recovery will predominate. In other words, the Court of Appeal has adopted a sliding-scale standard for application of the FAA.

This standard would require an employer to develop a record that the predominant relief would be underpaid wages instead of civil penalties, necessitating extensive discovery before a motion to compel arbitration could even be filed. The United States Supreme Court has rejected such sliding-scale approaches to enforcing arbitration agreements under the FAA:

> The regime established by the Court of Appeals' decision would require – before a plaintiff can be held to contractually agreed bilateral arbitration – that a federal court determine (and the parties litigate) the legal requirements for success on the merits claim-by-claim and theory-by-theory, the evidence necessary to meet those requirements, the cost of developing that evidence, and the damages that would be recovered in the event of success. Such a preliminary litigating hurdle would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure. The FAA does not sanction such a judicially created superstructure.

(*Am. Express Co. v. Italian Colors Rest.* (2013) 570 U.S. 228, 238-239.)

Indeed, this sliding-scale approach would likely result in a two-tiered application of the FAA, in which higher-paid workers are required to arbitrate their disputes, while lower-paid workers are not. For example, if a non-exempt computer programmer makes $43.00 per hour,[4] he or she would have to have an average of 2½ meal period violations per pay period for the

[4] The minimum hourly wage for the computer software exemption under Labor Code section 515.5 is $43.58 per hour in 2018. (*See, https://www.dir.ca.gov/oprl/ComputerSoftware.pdf.*)

underpaid wages portion of the Section 558 claim to predominate over the $100 per-pay-period civil penalty. On the other hand, a low-wage earner making only $11 per hour would need to have more than nine violations per pay period for the underpaid wages portion of the Section 558 claim to predominate.

Using this standard, application of the FAA would depend in significant part on the plaintiff's wage rate. This simply cannot be the law. Just as in the *American Express* decision, the procedure established by the Court of Appeal's decision here would require – before an employer could compel arbitration – that the "court determine (and the parties litigate) the legal requirements for success on the merits claim-by-claim and theory-by-theory . . . and the damages that would be recovered in the event of success." (*Am. Express Co.*, 570 U.S. at 238-239.) "The FAA does not sanction such a judicially created superstructure." (*Id.*)

Moreover, what dividing line does the Court of Appeal expect trial courts to apply in determining when FAA preemption is inapplicable? Is it when 51% of the recovery is payable to the State, or when 60% is payable to the State, or when 75% is payable to the State? Furthermore, when deciding whether to compel arbitration, how are the trial courts expected to balance their ability to "award lesser" penalties under Labor Code section 2699(d)(2), which allows the trial courts to "award a lesser amount [of PAGA penalties] if, based on the facts and circumstances of the particular case, to do otherwise

would result in an award that is unjust, arbitrary and oppressive, or confiscatory"? (Labor Code § 2699(d)(2).) This amount cannot be known until the trial court renders a judgment in the action. Is the employer supposed to move to compel arbitration of the underpaid wages portion of the claim *after* entry of judgment, with the judgment then being subject to *res judicata* in the arbitral forum, effectively eviscerating the arbitration, in contravention of the FAA? (*See, e.g., Federal Ins. Co. v. Superior Court* (1998) 60 Cal.App.4th 1370, 1374 [explaining that "[t]he purpose of the statutory stay is to protect the jurisdiction of the arbitrator by preserving the status quo until arbitration is resolved"]; *Franco v. Arakelian Enterprises, Inc.* (2015) 234 Cal.App.4th 947, 966 ["The stay's purpose is to preserve the status quo until the arbitration is resolved, preventing any continuing trial court proceedings from disrupting and rendering ineffective the arbitrator's jurisdiction to decide the issues that are subject to arbitration."].)

Here, the Court of Appeal has imposed an effectively insurmountable burden an employer must satisfy before moving to compel arbitration, by requiring proof that "the predominate amounts recovered under section 558 will be in the form of underpaid wages payable to employees" instead of payable to the State as traditional PAGA civil penalties. This procedural superstructure cannot withstand preemption under the FAA.

V. CONCLUSION.

The Court of Appeal's Opinion in this action fundamentally undermines this Court's careful analysis in *Iskanian*, irreconcilably conflicts with *Esparza*, and contravenes the United States Supreme Court's decision in *Concepcion*, as well as the broader FAA. Petitioners respectfully request that this Court grant review to address this important legal issue, as to which the Courts of Appeal are irreconcilably split by virtue of the *Esparza* decision.

Dated: January 26, 2018

RUTAN & TUCKER, LLP
JAMES L. MORRIS
BRIAN C. SINCLAIR
GERARD M. MOONEY

By: _____
Brian C. Sinclair
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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.204(c)(1), 8.504)

The text of this Petition for Review consists of 7,910 words, as counted by the Microsoft Word word-processing program used to generate the brief.

Dated: January 26, 2018

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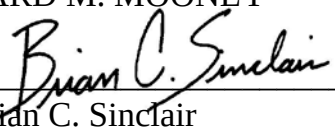
By: 

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EXHIBIT A

Filed 12/19/17

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

KALETHIA LAWSON, Plaintiff and Respondent, v. ZB, N.A. et al., Defendants and Appellants.	D071279 (Super. Ct. No. 37-2016-00005578-CU-OE-CTL)
ZB, N.A. et al., Petitioners, v. THE SUPERIOR COURT OF SAN DIEGO COUNTY, Respondent; KALETHIA LAWSON, Real Party in Interest.	D071376

APPEAL from a judgment of the Superior Court of San Diego County, Joel M. Pressman, Judge, and petition for writ of mandate. Appeal dismissed; petition granted.

Rutan & Tucker, James L. Morris and Brian C. Sinclair, for Defendants and Appellants.

Lawyers for Justice, Edwin Aiwazian, Arby Aiwazian and Joanna Ghosh, for Plaintiff and Respondent.

An order granting a motion to arbitrate is not appealable. Here, the trial court granted appellant ZB, N.A.'s (ZB)[1] motion to arbitrate respondent Kalethia Lawson's wage and hour claim, which was brought under the provisions of the Private Attorneys General Act (the PAGA), Labor Code[2] section 2698 et seq. The fact Lawson's PAGA claim, of necessity, included not only Labor Code violations committed with respect to her employment, but violations with respect to other employees, and that the arbitration ordered by the trial court included those violations, does not alter the fact the trial court ordered that Lawson's claim be arbitrated. Hence, we have no appellate jurisdiction over the trial court's order compelling arbitration.

However, apparently recognizing the potential defect in its appeal, shortly after ZB filed its notice of appeal, ZB filed a petition for a writ of mandate challenging the trial court's order. We thereafter ordered that the appeal and petition be considered together and issued an order to show cause. By separate order we have now consolidated the

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1 All references to ZB include defendant and appellant Zions Bancorporation.

2 All further statutory references are to the Labor Code, unless otherwise indicated.

appeal and the writ proceeding and reach the merits of ZB's contentions with respect to the trial court's order in our disposition of ZB's petition for extraordinary relief.

In our disposition on the merits, we find the trial court erred in bifurcating the underpaid wages portion of Lawson's PAGA claim and ordering arbitration of that portion of the claim. Accordingly, we issue a writ directing the trial court to vacate its order bifurcating and compelling arbitration of the underpaid wages portion of Lawson's PAGA claim.

FACTUAL AND PROCEDURAL BACKGROUND

According to the allegations of her complaint Lawson began working for California Bank & Trust (CBT) as an hourly employee in 2013. CBT is a wholly owned subsidiary of ZB. In February 2016, Lawson filed a complaint against CBT and ZB, in which she alleged that CBT and ZB violated a host of labor laws and regulations including required: overtime compensation, meal and rest periods, minimum wages, payment upon discharge or resignation, timely wage payments, accurate age statements, payroll records, and reimbursement for work-related expenses. Lawson alleged she was acting as a representative under PAGA and was entitled to recover from the defendant the

penalties imposed under section 558 subdivisions (a)(1) and (a)(2), including in particular underpaid wages owed to her and other CBT employees.[3]

In response to Lawson's complaint, and relying on an arbitration provision in her employment agreement, ZB filed a motion to compel Lawson to arbitrate the underpaid wages she asserted she, *as an individual*, was owed. ZB noted that Lawson had waived the right to bring either a class action or representative action against it. ZB argued that

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[3] Section 558 provides: "(a) Any employer or other person acting on behalf of an employer who violates, or causes to be violated, a section of this chapter or any provision regulating hours and days of work in any order of the Industrial Welfare Commission shall be subject to a civil penalty as follows:

"(1) For any initial violation, fifty dollars ($50) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages.

"(2) For each subsequent violation, one hundred dollars ($100) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages.

"(3) Wages recovered pursuant to this section shall be paid to the affected employee.

"(b) If upon inspection or investigation the Labor Commissioner determines that a person had paid or caused to be paid a wage for overtime work in violation of any provision of this chapter, any provision regulating hours and days of work in any order of the Industrial Welfare Commission, or any applicable local overtime law, the Labor Commissioner may issue a citation. The procedures for issuing, contesting, and enforcing judgments for citations or civil penalties issued by the Labor Commissioner for a violation of this chapter shall be the same as those set out in Section 1197.1.

"(c) In a jurisdiction where a local entity has the legal authority to issue a citation against an employer for a violation of any applicable local overtime law, the Labor Commissioner, pursuant to a request from the local entity, may issue a citation against an employer for a violation of any applicable local overtime law if the local entity has not cited the employer for the same violation. If the Labor Commissioner issues a citation, the local entity shall not cite the employer for the same violation."

"(d) The civil penalties provided for in this section are in addition to any other civil or criminal penalty provided by law.

"(e) This section does not change the applicability of local overtime wage laws to any entity."

in light of that waiver, in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 387–388 (*Iskanian*), our Supreme Court prevented her from asserting lost wage claims on behalf of other CBT employees. ZB did not ask the trial court to order arbitration of the specific $50 and $100 amounts set forth in section 558 subdivisions (a)(1) and (a)(2), as part of the civil penalties the statute imposes for violations of the Labor Code and orders of the Industrial Welfare Commission. The trial court granted ZB's motion. The trial court bifurcated Lawson's underpaid wage claims from her claim to the specific $50 and $100 amounts imposed by section 558. However, because Lawson was acting as a PAGA representative, the trial court ordered that the underpaid wage portion of her claim would be arbitrated as a representative claim. The trial court's order states in pertinent part: "[T]he Court bifurcates this issue of unpaid wages and premium wages per California Labor Code section 558 against Defendants and compels that issue to arbitration. This is a representative action. PAGA, by its very nature, is a representative statute. Therefore, the court sends the claim under Labor Code Section 558 to arbitration as a representative action."

ZB filed a timely notice of appeal, as well as a petition for a writ of mandate.

DISCUSSION

ZB's Appeal

I.

Code of Civil Procedure section 1294 provides in pertinent part: "An aggrieved party may appeal from: (a) An order *dismissing or denying* a petition to compel arbitration." (Italics added.) The right to appeal is solely statutory and no statute permits

an appeal from an order compelling arbitration. (*Porter v. United Services Automobile Assn.* (2001) 90 Cal.App.4th 838, 839–840 [appeal wholly statutory] (*Porter*); *Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638, 648–649; *Gordon v. G.R.O.U.P., Inc.* (1996) 49 Cal.App.4th 998, 1004, fn. 8. [no appeal from order granting arbitration].)[4]

We of course agree that when an order delays or otherwise interferes with arbitration, it is the functional equivalent of an order denying arbitration and appealable under section 1294, subdivision (a). (See *Sanders v. Kinko* (2002) 99 Cal.App.4th 1106, 1109-1110; *Porter, supra*, 90 Cal.App.4th at p. 840; *Henry v. Alcove Investment, Inc.* (1991) 233 Cal.App.3d 94, 99.) Here, admittedly, the scope of the arbitration ordered by the trial court is broader than ZB requested and arguably frustrated the purposes of arbitration. (See *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 346 (*Concepcion*).) Nonetheless, we are not willing to agree that an order, which on its face *compels* arbitration, albeit an arbitration which is so broad that it may undermine the benefits usually provided by arbitral forums, may be treated as an order which, as a practical matter, *denies* arbitration.

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4 The rationale for this disparate treatment of orders denying motions to compel and orders granting such motions is fairly straightforward: the utility and efficiency of arbitration would be entirely lost if a litigant attempting to enforce an arbitration provision were required to litigate a claim on the merits in a judicial forum before challenging an improper order denying a motion to compel; conversely if, in general, orders compelling arbitration were appealable, the prompt resolution of claims by way of arbitration would be substantially undermined. (*Wheeler v. St. Joseph Hospital* (1976) 63 Cal.App.3d 345, 353 (*Wheeler*).)

Our unwillingness to find appellate jurisdiction here is, in some measure, informed by ZB's petition for a writ of mandate by which it raises the same arguments on the merits it asserts on appeal and our conclusion those issues are the appropriate subject of writ review. "California courts had held that writ review of orders compelling arbitration is proper in at least two circumstances: (1) if the matters ordered arbitrated fall clearly outside the scope of the arbitration agreement or (2) if the arbitration would appear to be unduly time consuming or expensive. [Citations.]" (*Zembsch v. Superior Court* (2006) 146 Cal.App.4th 153, 160; see also *Wheeler, supra*, 63 Cal.App.3d at p. 353.) As we discuss more fully below, in bringing her PAGA claim Lawson was acting on behalf of the state and the state has not agreed to arbitrate its claim. Hence, it is clear Lawson's claim is outside the scope of the arbitration agreement she signed and that writ relief is appropriate. In considering whether extraordinary relief is appropriate, we must recognize also the express public interest, which we discuss more fully below, embraced in the PAGA and the consequent public interest in assuring that PAGA claims are enforced under the circumstances contemplated by the Legislature. (See *Babb v. Superior Court* (1971) 3 Cal.3d 841, 851.)

II.

A. PAGA

The court summarized the Legislature's enactment of PAGA in *Arias v. Superior Court* (2009) 46 Cal.4th 969, 980–981 (*Arias*): "In September 2003, the Legislature enacted the Labor Code Private Attorneys General Act of 2004 [citations]. The Legislature declared that adequate financing of labor law enforcement was necessary to

achieve maximum compliance with state labor laws, that staffing levels for labor law enforcement agencies had declined and were unlikely to keep pace with the future growth of the labor market, and that it was therefore in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations, with the understanding that labor law enforcement agencies were to retain primacy over private enforcement efforts. (Stats. 2003, ch. 906, § 1.)

"Under this legislation, an 'aggrieved employee' may bring a civil action personally and on behalf of other current or former employees to recover *civil penalties* for Labor Code violations. (Lab. Code, § 2699, subd. (a).) Of the civil penalties recovered, 75 percent goes to the Labor and Workforce Development Agency, leaving the remaining 25 percent for the 'aggrieved employees.' (Lab. Code, § 2699, subd. (i).)

"Before bringing a civil action for statutory penalties, an employee must comply with Labor Code section 2699.3. (Lab. Code, § 2699, subd. (a).) That statute requires the employee to give written notice of the alleged Labor Code violation to both the employer and the Labor and Workforce Development Agency, and the notice must describe facts and theories supporting the violation. (*Id.*, § 2699.3, subd. (a).) If the agency notifies the employee and the employer that it does not intend to investigate . . . , or if the agency fails to respond within 33 days, the employee may then bring a civil action against the employer. (*Id.*, § 2699.3, subd. (a)(2)(A).) If the agency decides to investigate, it then has 120 days to do so. If the agency decides not to issue a citation, or does not issue a citation within 158 days after the postmark date of the employee's notice, the employee may

commence a civil action. (*Id*., § 2699.3, subd. (a)(2)(B).)" (*Arias, supra*, 46 Cal.4th at pp. 980–981, fn. omitted.)

In *Arias*, the defendants argued that due process required that PAGA actions be brought as class actions because otherwise a defendant would be subject to lawsuits by multiple plaintiffs raising a common claim and none of them would be bound by a prior PAGA judgment in the defendant's favor. (*Arias, supra*, 46 Cal.4th at p. 985.) The Supreme Court rejected this due process argument and stated: "the judgment in [a PAGA representative] action is binding not only on the named employee plaintiff but also on government agencies and any aggrieved employee not a party to the proceeding." (*Ibid*.) Significantly, in reaching this conclusion the court described the legal characteristics of a PAGA representative action: "An employee plaintiff suing . . . under the [PAGA] does so as the proxy or agent of the state's labor law enforcement agencies. . . . In a lawsuit brought under the act, the employee plaintiff represents the same legal right and interest as state labor law enforcement agencies—namely, recovery of civil penalties that otherwise would have been assessed and collected by the Labor Workforce Development Agency. [Citations.]. . . . Because collateral estoppel applies not only against a party to the prior action in which the issue was determined, but also against those for whom the party acted as an agent or proxy [citations], a judgment in an employee's action under the act binds not only that employee but also the state labor law enforcement agencies.

"Because an aggrieved employee's action under the [PAGA] functions as a substitute for an action brought by the government itself, a judgment in that action binds all those, including nonparty aggrieved employees, who would be bound by a judgment

in an action brought by the government. The act authorizes a representative action only for the purpose of seeking statutory penalties for Labor Code violations (Lab. Code, § 2699, subds. (a), (g)), and an action to recover civil penalties 'is fundamentally a law enforcement action designed to protect the public and not to benefit private parties' [Citation.] When a government agency is authorized to bring an action on behalf of an individual or in the public interest, and a private person lacks an independent legal right to bring the action, a person who is not a party but who is represented by the agency is bound by the judgment as though the person were a party. (Rest.2d Judgments, § 41, subd. (1)(d), com. d, p. 397.) Accordingly, with respect to the recovery of civil penalties, nonparty employees as well as the government are bound by the judgment in an action brought under the act, and therefore defendants' due process concerns are to that extent unfounded." (*Arias, supra*, 46 Cal.4th at p. 986.)

B. *Thurman*

Following *Arias,* in *Thurman v. Bayshore Transit Management* (2012) 203 Cal.App.4th 1112 (*Thurman*), we considered the impact of the PAGA on a claim, like Lawson's, brought for alleged violations of section 558 subdivision (a). The defendant in *Thurman* argued the underpaid wages portions of relief provided by section 558 subdivisions (a)(1) and (a)(2) were severable from the $50 and $100 amounts imposed for each violation and those portions could not be collected in a PAGA action. (*Thurman,* at pp. 1144–1145.) We rejected the defendants' contention: "In our view, the language of section 558, subdivision (a) is more reasonably construed as providing a civil penalty that consists of *both* the $50 or $100 penalty amount *and* any underpaid wages,

with the underpaid wages going entirely to the affected employee or employees as an express exception to, the general rule that civil penalties recovered in a PAGA action are distributed 75 percent to the Labor and Workforce Development Agency (LWDA) and 25 percent to the aggrieved employees (§ 2699, subd. (i).)" (*Thurman,* at p. 1145.) In doing so we relied on Supreme Court, Court of Appeal and federal district court cases, which in other contexts found that the underpaid wages provided for under section 558 are part of the $50 and $100 penalties set forth in the statute. (*Thurman,* at pp. 1145–1147, citing *Reynolds v. Bement* (2005) 36 Cal. 4th 1075, 1087–1089 (*Reynolds*), *Jones v. Gregory* (2006) 137 Cal.App.4th 798, 809, fn. 11 (*Jones*), *Bradstreet v. Wong* (2008) 161 Cal.App.4th 1440, 1451 (*Bradstreet*), and *Yadira v. Fernandez* (N.D. Cal., June 14, 2011, No. C-08-05721 RMW) 2011 WL 2434043 (*Yadira*). We stated: "We agree with the *Yadira* court that the entire remedy provided by section 558, including the recovery of underpaid wages, is a civil penalty, as noted by the California Supreme Court in *Reynolds* and by the Courts of Appeal in *Jones* and *Bradstreet*. Defendants characterize the statement in *Reynolds* that section 558 provides a 'civil penalty, payable to the affected employee, equal to the amount of any underpaid wages' as dictum based solely on the text of section 558, without analysis. Even assuming that this is so, we conclude that it is a correct construction of section 558, subdivision (a), and note that statements of the California Supreme Court should be considered persuasive even if properly characterized as dictum. [Citation.] The *Reynolds* court's reading of section 558 reflects that the plain meaning of the statute is that the civil penalty it specifies consists of *both* an assessment

of $50 for initial violations or $100 for subsequent violations *and* an amount sufficient to recover underpaid wages." (*Thurman,* at p. 1147.)

In directly rejecting the defendant's efforts to separate the assessments expressly denominated in section 558 from the underpaid wages provided by the statute in PAGA actions, we noted that in PAGA actions a plaintiff is acting on behalf of the state and that in an action brought by the state there was no question the state could recover both the denominated assessments and underpaid wages: "Because an aggrieved employee who brings a PAGA action sues 'as the proxy or agent of the state's labor law enforcement agencies' [citation], the logical extension of defendants' argument that wages cannot be recovered as a civil penalty is that the LWDA could not seek underpaid wages on behalf of employees under section 558. However, nothing in *Arias* suggests that the Legislature did not intend that the LWDA be able to recover 'underpaid wages' on behalf of employees under section 558 as part of a civil penalty for Labor Code and [Industrial Welfare Commission] order violations that result in underpayment of wages. The Legislature has authorized labor law enforcement agencies to prosecute actions for wages on behalf of employees elsewhere in the Labor Code. For example, under section 1193.6, the Department of Industrial Relations or DLSE may prosecute a civil action to recover unpaid wages on behalf of employees, with or without their consent. We conclude that the Legislature similarly authorized the LWDA to recover underpaid wages on behalf employees in the form of a civil penalty under section 558. Accordingly, an aggrieved employee acting as the LWDA's proxy or agent by bringing a PAGA action may likewise

recover underpaid wages as a civil penalty under section 558." (*Thurman, supra*, 203 Cal.App.4th at pp. 1147–1148.)

C. *Concepcion*

In *Concepcion, supra*, 563 U.S. 333, the court held that class actions were inconsistent with the fundamental nature of arbitration and imposed practical burdens which undermined the efficacy of arbitration. Hence, the court held class action waivers in arbitration agreements were enforceable under the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.), and any contrary state statutes or rules of law which interfered with the enforceability of those waivers were preempted by the FAA. (*Concepcion, supra*, 563 U.S. at pp. 351–352.) In concluding the arbitration of class claims is inconsistent with the nature of arbitration, the court found the procedures required for class actions deprived the parties of the informality which is the principal advantage of arbitration and posed great risks to defendants in that in arbitration the defendants have limited or no ability to challenge interim but nonetheless substantial errors in the class certification process or rulings on the merit. (*Concepcion, supra*, 563 U.S. at pp. 349–350.) "Arbitration is poorly suited to the higher stakes of class litigation. In litigation, a defendant may appeal a certification decision on an interlocutory basis and, if unsuccessful, may appeal from a final judgment as well. Questions of law are reviewed *de novo* and questions of fact for clear error. In contrast, [the FAA] allows a court to vacate an arbitral award *only* where the award 'was procured by corruption, fraud, or undue means'; 'there was evident partiality or corruption in the arbitrators'; 'the arbitrators were guilty of misconduct in refusing to postpone the hearing . . . or in refusing to hear

evidence pertinent and material to the controversy[,] or of any other misbehavior by which the rights of any party have been prejudiced'; or if the 'arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award . . . was not made.' The AAA rules do authorize judicial review of certification decisions, but this review is unlikely to have much effect given these limitations; review under [the FAA] focuses on misconduct rather than mistake." (*Ibid*.)

D. *Iskanian*

Shortly after *Concepcion* was decided, in *Iskanian,* the court found that an employee's prior agreement to waive the right to bring a " 'representative action' " does not prevent an employee from bringing a PAGA action. (*Iskanian, supra*, 59 Cal.4th at pp. 387–388.) The court found that an employee's right to bring a PAGA claim was not waivable and that in preventing any waiver the PAGA did not conflict with and was not preempted by the FAA. The court analogized a PAGA action to qui tam actions, in which a private party brings an action on behalf of a governmental agency. "A PAGA representative action is therefore a type of *qui tam* action. 'Traditionally, the requirements for enforcement by a citizen in a qui tam action have been (1) that the statute exacts a penalty; (2) that part of the penalty be paid to the informer; and (3) that, in some way, the informer be authorized to bring suit to recover the penalty.' [Citation.] The PAGA conforms to these traditional criteria, except that a portion of the penalty goes not only to the citizen bringing the suit but to all employees affected by the Labor Code violation.

The government entity on whose behalf the plaintiff files suit is always the real party in interest in the suit. [Citation.]" (*Id*. at p. 382.)

Given its fundamental nature as a means of enforcing claims which belong to the the state, the court found that the right to bring a PAGA claim was not limited by the FAA. "The FAA aims to promote arbitration of claims belonging to the private parties to an arbitration agreement. It does not aim to promote arbitration of claims belonging to a government agency, and that is no less true when such a claim is brought by a statutorily designated proxy for the agency as when the claim is brought by the agency itself. The fundamental character of the claim as a public enforcement action is the same in both instances. We conclude that California's public policy prohibiting waiver of PAGA claims, whose sole purpose is to vindicate the [Labor and Workforce Development] 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.*" (*Iskanian, supra*, 59 Cal.4th at p. 388 [italics added].)

The court in *Iskanian* was very cognizant of the United States Supreme Court's holding in *Concepcion*. Thus, the court in *Iskanian* took some pains to illustrate how a PAGA claim did not interfere with arbitration and hence was not preempted by the FAA. The court first set forth the critical distinction between *civil penalties* recoverable in a PAGA action and *victim specific* relief recoverable by individual employees. "The civil penalties recovered on behalf of the state under the PAGA are distinct from the statutory damages to which employees may be entitled in their individual capacities. Case law has clarified the distinction 'between a request for statutory penalties provided by the Labor

Code for employer wage-and-hour violations, which were recoverable directly by employees well before the [PAGA] became part of the Labor Code, and a demand for "civil penalties," previously enforceable only by the state's labor law enforcement agencies. An example of the former is section 203, which obligates an employer that willfully fails to pay wages due an employee who is discharged or quits to pay the employee, in addition to the unpaid wages, a penalty equal to the employee's daily wages for each day, not exceeding 30 days, that the wages are unpaid. [Citation.] Examples of the latter are section 225.5, which provides, in addition to any other penalty that may be assessed, an employer that unlawfully withholds wages in violation of certain specified provisions of the Labor Code is subject to a civil penalty in an enforcement action initiated by the Labor Commissioner in the sum of $100 per employee for the initial violation and $200 per employee for subsequent or willful violations, and section 256, which authorizes the Labor Commissioner to "impose a civil penalty in an amount not exceeding 30 days [*sic*] pay as waiting time under the terms of Section 203." ' [Citations.]" (*Iskanian, supra*, 59 Cal.4th at p. 381.)

The court then, in a later portion of its opinion, stated: "Our opinion today would not permit a state to circumvent the FAA by, for example, deputizing employee A to bring a suit for the individual damages claims of employees B, C, and D. This pursuit of victim-specific relief by a party to an arbitration agreement on behalf of other parties to an arbitration agreement would be tantamount to a private class action, whatever the designation given by the Legislature. Under *Concepcion*, such an action could not be maintained in the face of a class waiver. Here, importantly, a PAGA litigant's status as

'the proxy or agent' of the state [citation] is not merely semantic; it reflects a PAGA litigant's substantive role in enforcing our labor laws on behalf of state law enforcement agencies. Our FAA holding applies specifically to a state law rule barring predispute waiver of an employee's right to bring an action 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." (*Iskanian, supra*, 59 Cal.4th at pp. 387–388.)

Following *Iskanian,* the court in *Williams v. Superior Court (Pinkerton)* (2015) 237 Cal.App.4th 642, 648–649 (*Williams*), rejected a defendant's attempt to compel arbitration of an employee's individual claim: "[A] single representative PAGA claim *cannot* be split into an arbitrable individual claim and a nonarbitrable representative claim . . . a PAGA claim may not be brought solely on the employee's behalf, but must be brought in a representative capacity. 'Because the PAGA claim *is not an individual claim*, it was not within the scope of [the employer's] request that individual claims be submitted to arbitration. . . . [Citation.] Here . . . petitioner 'does not bring the PAGA claim as an individual claim, but "as the proxy or agent of the state's labor law enforcement agencies." ' [Citations.]" (*Id.* at p. 649, citing *Reyes v. Macy's, Inc.* (2011) 202 Cal.App.4th 1119, 1124 (*Reyes*) [italics added].)

Recently, the court in *Lopez v. Friant* (2017) 15 Cal.App.5th 773, 780 (*Lopez*) consistent with the principles discussed in *Iskanian*, distinguished between the statutory damages individual employees may directly recover from employers under section 226 subdivision (e) for failure to provide an accurate pay stub as required by section 226

subdivision (a), and the civil penalties the Labor Commissioner and PAGA plaintiffs may separately recover for such conduct under section 226 subdivision (b). The court found that the scienter required for recovery under section 226 subdivision (e) does not apply to the separate relief provided to the Labor Commissioner under section 226 subdivision (b); hence, the court held that scienter requirement has no application in a PAGA claim for violation of section 226 subdivision (a). (*Lopez,* at pp. 781-785.)

E. Analysis

1. Section 558 Claims are PAGA Claims

Section 2699 subdivision (a) provides: "Notwithstanding any other provision of law, any provision of this code that provides for a *civil penalty* to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3."

Section 558, by its terms and as we interpreted it in *Thurman*, expressly provides for *civil penalties* and hence claims under section 558, *including* claims for underpaid wages, are cognizable under the PAGA. As our holding in *Thurman* makes clear, the $50 and $100 assessments as well as the compensation for underpaid wages provided for by

section 558 subdivisions (a) and (b) are, together, the *civil penalties* provided by the statute.

In this regard, we respectfully part company with the views recently expressed by our colleagues in the Fifth District in *Esparza v. KS Industries* (2027) 13 Cal.App.5th 1228 (*Esparza*). In *Esparza,* the plaintiff, like Lawson, alleged a PAGA claim against his employer and sought civil penalties under section 558. Relying on *Iskanian*, the trial court denied the employer's motion to arbitrate. On appeal, the Court of Appeal reversed and remanded. Like the trial court here, the Court of Appeal found the underpaid wages portion of a claim under section 558 is subject to arbitration. (*Esparza,* at p. 1246.) The court stated: "Employee's attempt to recover unpaid wages under Labor Code section 558 is, for purposes of the Federal Arbitration Act, a private dispute arising out of his employment contract with KS Industries. In statutory terms, the wage claim is covered by '[a] written provision in . . . a contract . . . to settle by arbitration a controversy arising out of such contract.' (9 U.S.C. § 2.) *The dispute over wages is a private dispute because, among other things, it could be pursued by Employee in his own right.* We recognize that private disputes can overlap with the claims that could be pursued by state labor law enforcement agencies. When there is overlap, the claims retain their private nature and continue to be covered by the Federal Arbitration Act. To hold otherwise would allow a rule of state law to erode or restrict the scope of the Federal Arbitration Act—a result that cannot withstand scrutiny under federal preemption doctrine. Therefore, we conclude preventing arbitration of a claim for unpaid wages would interfere with the Federal Arbitration Act's goal of promoting arbitration as a forum for private dispute resolution.

(See *Iskanian, supra*, 59 Cal.4th at p. 389.)." (*Ibid*. (italics added).) Because the record was not clear that the plaintiff in Esparza was seeking underpaid wages under section 558, the court remanded so that the plaintiff could clarify the scope of his claims. If the plaintiff was seeking unpaid wages, the court directed they be arbitrated; if, on remand, the plaintiff waived any claim to unpaid wages under section 558, the court ordered that litigation of those limited claims proceed. (*Esparza,* at p. 1247.)

The court in *Esparza* also found that in light of *Iskanian*, our opinion in *Thurman* was no longer an impediment to severance of underpaid wage claims brought under section 558. (*Esparza, supra*, 13 Cal.App.4th at p. 1243.)

Our initial point of departure from *Esparza* is the opinion's apparent conclusion that the plaintiff could pursue relief under section 558 in his own right. (*Esparza, supra*, 13 Cal.App.4th at p. 1246.) The court in *Esparza* cited no authority to support this conclusion and the authority that has come to our attention has consistently found there is no private right of action under section 558. (See *Robles v. Agreserves, Inc*., (2016 E.D. Cal.) 158 F.Supp. 3d 952, 1066; *Chang v. Biosuccess Biotech., Ltd.* (2014 C.D. 2014) 76 F.Supp.3d 1022, 1049.) Rather, an individual may recover under section 558, only when the individual has satisfied the procedural requirements set forth in the PAGA and is acting in the place of and for the LWDA. (*Robles,* at p. 1066; *Chang,* at p. 1049.) In this regard section 558 is distinguishable from the wage penalties provided by section 203, and discussed in *Iskanian*; section 203, subdivision (b) expressly provides that "suit may be filed" for those penalties. In general, where, as under section 558, there is no express right of private enforcement and instead a regulatory agency has expressly been given the

right to enforce the statute, no private right of action will be implied. (See *Vicko Ins. Services, Inc. v. Ohio Indem. Co.* (1999) 70 Cal.App.4th 55, 63–64.)

We also disagree with *Esparza's* treatment of our opinion in *Thurman*. While we agree *Thurman* was decided before *Iskanian,* and that in *Thurman* we had no occasion to address the preemption issues discussed in *Iskanian*, those circumstances in no sense undermine the continuing validity of our holding in *Thurman,* to wit: in enacting section 558, the Legislature intended the underpaid wages recoverable under the statute, as well as the $50 and $100 assessments provided by the statute, be treated as civil penalties and that as civil penalties, neither type of recovery is severable for purposes of applying the PAGA. (See *Thurman, supra*, 203 Cal.App.4th at pp. 1147–1148.) In *Thurman*, in interpreting the intent of our Legislature in enacting section 558, we plainly did not purport to consider the separate question of whether FAA preemption, which was only *later* set forth in *Concepcion,* barred enforcement of the statute under the qui tam procedures set forth in the PAGA. That separate preemption question was however answered in *Iskanian* in its discussion of the distinction between civil penalties, which can be enforced even when an employee is subject to a class waiver agreement and statutory damages, which are preempted by such an agreement. (See *Iskanian, supra*, 59 Cal.4th at p. 381.)

The court in *Iskanian* made it clear that the distinction between civil penalties and victim specific statutory damages hinges in large measure on whether, prior to enactment of the PAGA, they could only be recovered by way of regulatory enforcement or whether they supported a private right of action. (See *Iskanian, supra*, 59 Cal.4th at p. 381.) As

we have seen, section 558 provides no private right of action and by its terms is only enforceable by the LWDA. (See *Robles v. Agreserves, Inc*., *supra*, 158 F.Supp. 3d at p. 1066; *Chang v. Biosuccess Biotech., Ltd.*, *supra*, 76 F.Supp.3d at p. 1049.)

We of course recognize that in finding no FAA preemption, the court in *Iskanian* also relied on the fact the penalties it was considering were "largely" payable to the state. (*Iskanian, supra*, 59 Cal.4th at pp. 887–888.) In *Iskanian,* 75 percent of the civil penalties were payable to the LWDA and 25 percent were payable to employees. (*Id*. at p. 380; § 2699, subd. (i).) Here, there is nothing in the record which suggests the predominate amounts recovered under section 558 will be in the form of underpaid wages payable to employees; indeed, we note that with respect to the meal break and rest break violations alleged by Lawson, while section 558 provides either a $50 or $100 assessment for each violation during a pay period, Lawson only alleges an underpaid wage loss of one hour's wages for each violation. Thus, depending upon how many violations occurred during a pay period and the effected employees' rate of pay, it is quite possible that, at least as to the rest break and meal break allegations, the underpaid wage portion of any recovery will fall within the 25 percent range implicitly approved by the court in *Iskanian*.

In sum, because, prior to enactment of PAGA there was no private remedy under section 558 and because there is no basis upon which to conclude that recovery under the

statute will largely go to individual employees, at this point, as in *Iskanian*, FAA preemption does not apply.[5]

2. The Trial Court Erred

Because claims under section 558 are indivisible claims for civil penalties, the trial court's order bifurcating Lawson's PAGA claim between the denominated assessments and underpaid wages was erroneous, as was its further order directing that the underpaid wages be arbitrated as a representative action. As we have discussed, the courts in *Iskanian, Williams* and *Reyes* have held that an individual employee's prior arbitration agreement is no impediment to the employee's right to bring a distinct civil enforcement action under the PAGA, notwithstanding the fact that the employee may have waived his or her right to bring class or representative claims against his or her employer. As those cases make clear, in bringing a PAGA action an employee is not acting on his or her own behalf, but on behalf of the state and the state is not bound by the employee's prior agreement, including any waiver of his or right to bring a representative action.

PAGA claims are not only outside the scope of a plaintiff's prior arbitration agreement under the terms of the statute itself and *Iskanian*, arbitration of such a representative claim also appears to run afoul of the principles set forth in *Concepcion*. In particular, arbitration of a PAGA claim, which as the trial court noted, is always a representative claim, would deprive defendants of the ability to challenge rulings on the

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5 Our conclusion with respect to preemption is without prejudice to ZB's right to show, on a fuller factual record, that preemption should apply here.

merits and de novo, posing for defendants considerable and unexpected risks. (See *Concepcion, supra*, 563 U.S. at pp. 350–352.)

Accordingly, we must direct that the trial court vacate its order and enter a new order denying Z.B.'s motion to arbitrate. Contrary to ZB's contention we have no power to direct that the trial court modify its order so that Lawson be compelled to arbitrate an individual underpaid wage claim. As the cases emphasize, under the PAGA Lawson is acting as a representative of the state, which has not agreed to arbitrate its claim for civil penalties. (*Williams, supra*, 237 Cal.App.4th at p. 649, citing *Reyes, supra*, 202 Cal.App.4th at p. 1124.)

DISPOSITION

The appeal is dismissed. Let a peremptory writ of mandate issue commanding the trial court to vacate its order bifurcating Lawson's claims and ordering a portion of those claims be arbitrated and enter a new order denying Z.B.'s motion to arbitrate. Respondent to recover costs on appeal.

BENKE, Acting P. J.

WE CONCUR:

HUFFMAN, J.

HALLER, J.

KEVIN J. LANE, Clerk of the Court of Appeal, Fourth Appellate District, State of California, does hereby Certify that the preceding is a true and correct copy of the Original of this document/order/opinion filed in this Court, as shown by the records of my office.

WITNESS, my hand and the Seal of this Court.

12/19/2017

KEVIN J. LANE, CLERK

By A. Galvez
Deputy Clerk

Filed 12/21/17

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

KALETHIA LAWSON, Plaintiff and Respondent, v. ZB, N.A. et al., Defendants and Appellants.	D071279 (Super. Ct. No. 37-2016-00005578-CU-OE-CTL)
ZB, N.A. et al., Petitioners, v. THE SUPERIOR COURT OF SAN DIEGO COUNTY, Respondent; KALETHIA LAWSON, Real Party in Interest.	D071376 ORDER MODIFYING OPINION CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed herein on December 19, 2017, be modified as follows:

On page 24, the last sentence under the heading Disposition should be deleted and a new sentence added so that the sentence now reads:

Each party to bear its own costs on appeal.

This modification changes the judgment. In all other respects the opinion remains the same.

BENKE, Acting P. J.

Copies to: All parties

EXHIBIT B

Calif. Ct. Appeal 4th Dist., Div. One, Case No. ___

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

ZB, N.A. and ZIONS BANCORPORATION,

Defendants and Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

Respondent;

KALETHIA LAWSON,

Real Party In Interest

From the Superior Court of the State of California, County of San Diego
Superior Court Case No. 37-2016-00005578-CU-OE-CTL
Honorable Joel M. Pressman, Judge Presiding

PETITION FOR WRIT OF MANDATE; SUPPORTING MEMORANDUM

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PROOF OF SERVICE

KALETHIA LAWSON v. CALIFORNIA BANK & TRUST, et al.
San Diego Superior Court Case No. 37-2016-00005578-CU-OE-CTL
Court of Appeal Fourth Appellate District, Div. One, Case No. D071376

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed by the law office of Rutan & Tucker, LLP in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 611 Anton Boulevard, Suite 1400, Costa Mesa, California 92626-1931.

On January 26, 2018, I served on the interested parties in said action the within:

PETITION FOR REVIEW

as stated below:

SEE ATTACHED SERVICE LIST

[✓] **(BY OVERNIGHT DELIVERY)** by depositing in a box or other facility regularly maintained by FedEx, an express service carrier, or delivering to a courier or driver authorized by said express service carrier to receive documents, a true copy of the foregoing document in sealed envelopes or packages designated by the express service carrier, addressed as shown above, with fees for overnight delivery provided for or paid.

[✓] ****VIA TRUEFILING ELECTRONIC E-SERVICE SYSTEM:** I transmitted via the Internet a true copy(s) of the above-entitled document(s) through the Court's Mandatory Electronic Filing System via the TrueFiling Portal and concurrently caused the above-entitled document(s) to be sent to the recipients listed above pursuant to the E-Service List maintained by and as it exists on that database. This will constitute service of the above-listed document(s).

[✓] **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 26, 2018, at Costa Mesa, California.

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

Marie Lee
(Type or print name)

Marie Lee
(Signature)

SERVICE LIST

KALETHIA LAWSON v. CALIFORNIA BANK & TRUST, et al.
San Diego Superior Court Case No. 37-2016-00005578-CU-OE-CTL
Court of Appeal Fourth Appellate District, Division One, Case No. D071376

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for the County of San Diego
Attn: Honorable Kenneth J. Medel
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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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Lower Court Case Number:

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Date

/s/Brian Sinclair
Signature

Sinclair, Brian (180145)
Last Name, First Name (PNum)

Rutan & Tucker, LLP
Law Firm