Case No. S246711

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)

REPLY TO ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This Petition presents the quintessential case for Supreme Court review because the opinion in *Kalethia Lawson v. ZB N.A., et al.*, Consolidated Case Nos. 071279 & D071376 (the "Opinion"), creates an express and irreconcilable split of authority on an important issue that affects employers throughout California regarding the intersection of oft-pursued PAGA claims for victim-specific unpaid wages and the Federal Arbitration Act ("FAA"). Significantly, the Opinion itself expressly states that it creates a split of authority with the Fifth District Court of Appeal's opinion in *Esparza v. KS Indus., L.P.* (2017) 13 Cal.App.5th 1228 ("*Esparza*"):

> 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*).
>
> [¶¶]
>
> 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.
>
> [¶¶]
>
> **We also disagree** with *Esparza's* treatment of our opinion in *Thurman*.

(Ex. "A" to Petition, at pp. 19-21; emphasis added.)

Despite the clear divergence between the two decisions, Respondent nonetheless argues that "[t]here is no irreconcilable conflict between the Court of Appeal's Opinion and the opinion in [*Esparza*]." (Answer, at p.1.)

Respondent's argument that the *Lawson* and *Esparza* decisions do not conflict is unavailing.

II. LEGAL ARGUMENT

A. Conflicting Published Opinions From Two Different State Appellate Courts Create Confusion Among Trial Courts And Other Appellate Courts, Warranting Supreme Court Review.

Supreme Court review is warranted when necessary to secure uniformity of decision among appellate courts or to settle an important question of law. (Cal. Rule of Court, Rule 8.500(b)(1).) Here, both the *Lawson* and *Esparza* opinions are binding on the superior courts of this State, which "must accept the law declared by courts of superior jurisdiction." (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Although trial courts ordinarily follow appellate court decisions from their own respective districts, "[s]uperior courts in other appellate districts may pick and choose between conflicting lines of authority. This dilemma will endure until the Supreme Court resolves the conflict, or the Legislature clears up the uncertainty by legislation." (*McCallum v. McCallum* (1987) 190 Ca1.App.3d 308, 315, fn. 4.)

The Opinion in *Lawson* was published only two months ago; nevertheless, the conflict between the *Esparza* and *Lawson* decisions is already creating uncertainty, as evidenced by a recent decision from the U.S. Court of Appeals for the Ninth Circuit, in which that court acknowledged the

split in authority and the Ninth Circuit's need to divine "how the California Supreme Court might decide the issue":

> While Mandviwala's claims for PAGA civil penalties are not subject to arbitration, Mandviwala's claims for unpaid wages under California Labor Code § 558 are subject to arbitration. *Esparza v. KS Indus., L.P.*, 13 Cal. App. 5th 1228, 1234, 221 Cal. Rptr. 3d 594 (2017). . . .
>
> Recovery of unpaid wages is a private dispute, particularly because it could be pursued individually by the employee. *Id*. at 1246. *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." *Id*. (quoting Iskanian, 59 Cal. 4th at 388, 173 Cal.Rptr.3d 289, 327 P.3d 129).
>
> We recognize that there is conflict between *Esparza* and the California Court of Appeal's recent holding in *Lawson v. ZB, N.A.*, 18 Cal.App.5th 705, ___ Cal.Rptr.3d ____ (2017), *as modified* (Dec. 21, 2017). *Lawson* held that claims for unpaid wages under California Labor Code § 558 are not private because "prior to enactment of PAGA there was no private remedy under section 558." 18 Cal.App.5th 705. Thus, under *Lawson*, unpaid wages claims pursuant to § 558 are not subject to arbitration under a pre-dispute waiver of representative claims.
>
> As such, we "must attempt to determine how the California Supreme Court might decide the issue." *Ileto v. Glock Inc.*, 349 F.3d 1191, 1200 (9th Cir. 2003). We find *Esparza* to be more consistent with the ruling of *Iskanian*. *Esparza* specifically distinguished between individual claims for compensatory damages (such as unpaid wages) and PAGA claims for civil penalties, which is more consistent with *Iskanian* and reduces the likelihood that *Iskanian* will create FAA preemption issues. *See Esparza*, 13 Cal. App. 5th at 1246 ("Employees claims for unpaid wages are subject to arbitration pursuant to the terms of the parties' arbitration agreement and the [FAA]. The rule of nonarbitrability

> adopted in *Iskanian* is limited to representative claims for civil penalties in which the state has a direct financial interest.").
>
> Thus, based on *Esparza*, we reverse the district court's order and remand to the district court to order arbitration of the victim-specific relief sought by Mandviwala.

(*Mandviwala v. Five Star Quality Care, Inc*. (9th Cir., Feb. 2, 2018) 2018 WL 671138, at *2, 2018 U.S. App. LEXIS 2770 , at *3-5.)[1]

The *Mandviwala* court's rejection of the *Lawson* Opinion further justifies California Supreme Court review, since there now exists not only a split between California appellate courts, but also a California-federal split regarding whether the FAA preempts wage claims seeking victim-specific relief under Labor Code section 558(a). (*See Jankey v. Lee* (2012) 55 Cal.4th 1038, 1043 [granting review to address conflict between Ninth Circuit decision and California Court of Appeal's decision].)

Superior courts of this state, United States District Courts applying California law, the Ninth Circuit Court of Appeals, and employers and employees should not be left guessing how the law should be interpreted and applied on an important issue that regularly arises in employee-employer disputes. Accordingly, to secure uniformity of decision among the appellate

[1] Petitioners do not cite *Mandviwala* as authority that the Opinion in *Lawson* is wrong, but rather to show that (i) other appellate courts have already recognized the conflict between *Lawson* and *Esparza*; and (ii) uncertainty will continue in both the trial courts and appellate courts until the issue is resolved by this Court.

courts, Petitioners respectfully urge this Court to resolve the conflict between the *Esparza* and *Lawson* decisions, so that trial courts and other appellate courts may have clear guidance from the Supreme Court on this frequently-recurring and important issue.

B. Petitioners Did Not Concede That They Desired To Proceed In Court.

Lawson argues that Petitioners conceded that they wanted to proceed in Court. This is certainly not what the Court of Appeal held, and it is precisely the opposite of what Petitioners argued below. Respondent misstates the record in attempting to claim that Petitioners invited error.

First, the Court of Appeal expressly recognized that Petitioners contested proceeding before the Court, holding that "the scope of the arbitration ordered by the trial court is broader than ZB requested and arguably frustrated the purposes of arbitration." (Ex. "A," at p. 6.)

Second, Petitioners did not argue or concede that they desired to proceed in the trial court. To the contrary, Petitioners moved to compel Respondent to arbitrate her claim for victim-specific unpaid wages on an *individual* basis. (AA I:050, 063.) The trial court denied Petitioners' motion to compel arbitration on an individual basis, and instead compelled arbitration on a representative, quasi-class basis. (AA II:381.)

Petitioners filed an appeal and writ petition challenging the Superior Court's order compelling arbitration on a representative basis. In its

appellate brief, Petitioners asked the Court of Appeal to "reverse the Superior Court's September 30, 2016 Order compelling arbitration on a representative basis, . . . [and], order the Superior Court to enter a new Order granting Appellants' motion to compel Respondent to arbitrate her unpaid wages claim asserted under Labor Code § 558(a) on an ***individual*** basis, as required by the parties' arbitration agreement." (Opening Appellate Brief, at p.39; emphasis added.) Moreover, Petitioners submitted supplemental briefing to the Court of Appeal addressing the impact of *Esparza* on the appeal, arguing:

> As the *Esparza* and *Ramirez* decisions make clear, the reality is that the State is not a real party-in-interest to PAGA claims seeking unpaid wages, since the State does not receive any of the recovery, which is paid 100% to each "affected employee." (Labor Code § 558(a)(3).) The State does not receive any portion of these funds and, therefore, has no financial interest in the outcome. Therefore, Respondent's attempt to recover unpaid wages is purely a private dispute, which is "subject to arbitration pursuant to the terms of the parties' arbitration agreement." (*Esparza*, 13 Cal. App. 5th at 1246.)
>
> Because Respondent attempts to recover unpaid wages for herself and other employees, her claim constitutes a private dispute between the parties that "continue[s] to be covered by the Federal Arbitration Act." (*Esparza*, 13 Cal.App.5th, at 1246; Iskanian, 59 Cal.4th at 387-88.) As explained in Section C, below, the parties' arbitration agreement requires that Respondent arbitrate her claims on an individual basis.

(Petitioners' Supplemental Brief, filed Sept. 11, 2017 at p.3.)

Throughout the proceedings in both the Superior Court and Court of Appeal, Petitioners consistently argued that Lawson's claim seeking victim-

specific unpaid wages should be arbitrated on an individual basis. Hence, it is misleading for Respondent to argue that Petitioners conceded they desired to proceed in the trial court instead of arbitration. Instead, Petitioners simply resisted being forced to arbitrate a quasi-class representative claim, when applicable law requires Lawson to arbitrate her victim-specific wage claim on an individual basis. Petitioners did not invite the error committed by the Court of Appeal.

C. Petitioners Did Not Misrepresent The *Lawson* Opinion.

Lawson argues review is not warranted because Petitioners somehow misconstrue the Opinion in *Lawson* in two ways: (1) by stating the Court of Appeal concluded that none of Lawson's claims under PAGA is subject to arbitration; and (2) discussing the Court of Appeal's sliding-scale rule for arbitration of PAGA claims. Both of these arguments lack merit.

First, while Petitioners' motion to compel arbitration and subsequent appeal focused on the victim-specific wages Lawson seeks in the action, the Opinion is not so narrow.

> 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.

(Ex. "A," at p. 24.)

As Lawson makes clear, she "only asserts a representative PAGA claim . . . ." Hence, Petitioners did not misrepresent the record.

Second, Lawson asserts Petitioners misconstrue the Opinion by claiming that the Court of Appeal adopted a sliding-scale evidentiary burden with respect to motions to compel arbitration of PAGA claims. (Answer, at p. 11.) It is Lawson, however, who misconstrues the record. In fact, the Court of Appeal expressly stated in the Opinion that its "conclusion with respect to preemption is without prejudice to ZB's right to show, on a fuller factual record, that preemption should apply here." (Ex. "A," at p. 23, n.5.) This invitation to file another motion to compel on a fuller factual record followed the Court of Appeal's discussion 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." (Ex. "A," at p. 22.) Therefore, the Court of Appeal held that "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." (Ex. "A," at pp. 22-23 (emphasis added).)

Hence, the Court of Appeal did, in fact, adopt a sliding-scale 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. At this point, neither trial courts, nor employers, nor employees can know when the FAA threshold is met.

More importantly, the Court of Appeal's approach 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. As Petitioners explained in the Petition for Review, the United States Supreme Court has rejected this approach. (*Am. Express Co. v. Italian Colors Rest.* (2013) 570 U.S. 228, 238-239 [rejecting regime adopted by Court of Appeals that required developing evidence regarding damages to be recovered before ordering individual arbitration, and noting that the "FAA does not sanction such a judicially created superstructure"].)

Lawson's argument that Petitioners misconstrue the Opinion is not only wrong, but also attempts to deflect from the obvious reason for granting review – there is an irreconcilable split between the holdings in *Lawson* and *Esparza* that will not be resolved until this Court resolves the split.

D. The *Lawson* Opinion Conflicts With United States Supreme Court And California Supreme Court Precedent.

In addition to the Opinion being irreconcilable with *Esparza*, the Opinion also conflicts with 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*"). Lawson incorrectly argues otherwise.

This Court's decision in *Iskanian* recognizes a distinction between a PAGA dispute seeking penalties solely on behalf of the State of California and a PAGA dispute in which an employee attempts to recover victim-specific unpaid wages. (*Id.* at 387-388.) The *Iskanian* court explained that it had to recognize this distinction because of the Supreme Court's holding in *Concepcion*, explaining:

> 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*, 563 U.S. 333].)

The *Esparza* court recognized the distinction, agreeing with the defendant that *Iskanian* "prevents the arbitration of claims only in representative actions that seek 'civil penalties,' a term of art that is limited to monetary relief allocated 75 percent to the Labor and Workforce Development Agency and 25 percent to the aggrieved employees." (*Esparza*, 13 Cal.App.5th at 1233-34.) Thus, as the *Esparza* court explained, *Iskanian* recognized two types of relief under PAGA – relief seeking civil penalties

paid primarily to the State of California and victim-specific relief (i.e., individual damages) paid to employees. The *Iskanian* court held that the victim-specific claims must be compelled to individual arbitration to avoid running afoul of the FAA.

As Petitioners explained in their Petition for Review, and in the appellate court proceedings, Lawson is "employee A," who seeks to recover unpaid wages on behalf of "employees B, C, and D" under Labor Code section 558. The California Legislature cannot "deputize" Lawson as a private attorney general to pursue this victim-specific relief in the face of an arbitration agreement requiring individual arbitration. The FAA, as interpreted by *Concepcion*, requires claims seeking individualized recovery of wages to be arbitrated on an individual basis. (*Id.* at 387-388; *Concepcion*, 563 U.S. 333 [holding that FAA preempts California law, and California courts must enforce arbitration agreements even if the agreement requires that complaints be arbitrated individually, not on a class-wide basis].)

E. The Issue Presented For Review Has Statewide Importance To Both Employers And Employees, As Well As Trial And Appellate Courts.

In addition to securing uniformity of decision among appellate courts, the Court should grant review to settle an important question of law. (Cal. Rule of Court, Rule 8.500(b)(1).) As is clear from the Petition for Review and Lawson's Answer, the issue presented has statewide importance to employers, employees, and the trial court judges who must resolve motions

to compel arbitration of claims seeking victim-specific unpaid wages under the PAGA. As even a casual observer of California litigation cases can see, lawsuits asserting PAGA claims are filed on a daily basis throughout California.

In fact, according to the Governor's Budget Summary for 2016-2017, the "Labor and Workforce Development Agency receives [PAGA] notices for approximately 6,000 cases per year." (Governor's Budget Summary, at p. 136, which can be found at: http://www.ebudget.ca.gov/2016-17/pdf/BudgetSummary/FullBudgetSummary.pdf.) Of course, given the LWDA's limited resources, a large percentage of these cases are filed in court each year. Hence, the split between the *Esparza* and *Lawson* decisions will continue to vex employers trying to decide whether to move to compel arbitration, as well as superior and appellate courts trying to divine how this Court will resolve the split. This Court will ultimately be called upon to decide the issue, and Petitioners respectfully suggest the various interests would greatly benefit from having this Court's input as soon as possible.

The Opinion in *Lawson* provides this Court with an opportunity to clarify whether the *Iskanian* decision (1) allows an employee seeking victim-specific wages recovery under PAGA, as opposed to civil penalties payable primarily to the State, to circumvent an arbitration agreement, as held by *Lawson*; or (2) requires the employee to arbitrate such claim, as held by *Esparza*.

III. CONCLUSION

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

Dated: February 26, 2018

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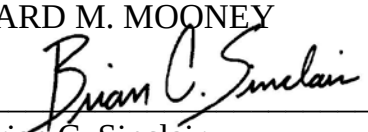
By: 
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The text of this Petition for Review consists of 2,954 words, as counted by the Microsoft Word word-processing program used to generate the brief.

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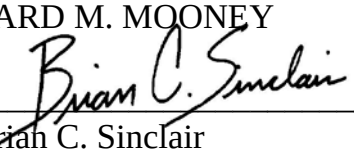
By: 

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San Diego Superior Court Case No. 37-2016-00005578-CU-OE-CTL
Court of Appeal Fourth Appellate District, Div. One, Case No. D071376

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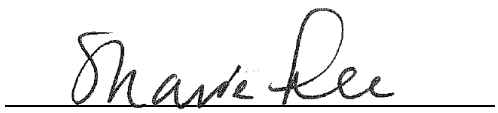
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