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)

ANSWERING BRIEF OF REAL PARTY IN INTEREST KALETHIA LAWSON

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

California Cases

Other State Cases

Federal Cases

Federal Statutes

California Statutes

Other Legislative Authorities

Agency Authorities

I. INTRODUCTION

Kalethia Lawson ("Lawson") filed this action against her employer, Z.B., N.A. and Zions Bancorporation (the "Bank"), under California's Labor Code Private Attorney General Act ("PAGA"), Labor Code §§2698 et seq. In addition to the other relief she requested under PAGA, see *infra* at p. 9 n.1, Lawson sought to recover, on behalf of the State's Labor and Workforce Development Agency ("LWDA") and other "aggrieved employees," the "civil penalties" that the Legislature had authorized in Labor Code §558 – which authorizes the Labor Commissioner to recover underpaid wages and other penalties for an employer's violation of the state's overtime and meal-and-rest break laws. Until the Legislature enacted PAGA in 2004, only the Labor Commissioner had statutory authority to enforce Labor Code §558.

Lawson complied with each of the procedural requirements of PAGA before filing suit. She gave advance written notice to the LWDA and her employer of her intent to file, as required by Labor Code §§2699.3(a)(1)(A) and 2699.3(c)(1). Her notice identified the factual and legal bases for each of her PAGA claims, including her claim under Section 558. (AAI:014 [Compl. ¶48]).) And, she waited the prescribed statutory period to enable the LWDA to investigate her claims and decide whether to pursue them directly (which would preclude her from proceeding, see Labor Code §2699(h)), or for the Bank to "cure" the violations she alleged (which PAGA allows employers to do with respect to claims under Section 558, without incurring civil penalties). (See Labor Code §2699.3(c)(2)(A).)

After the prescribed waiting period, Lawson filed her single-count

PAGA complaint. (AA I:006-019.) With respect to her claim for PAGA relief based on Section 558, Lawson sought the "civil penalties" that the Legislature had designated under that section: $50 "[f]or any initial violation" and $100 "[f]or each subsequent violation . . . for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages." (AA I:019 [citing Labor Code §558(a)(1), (2)].)

The Bank did not dispute that under *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, Lawson was entitled to litigate in court, on a representative action basis on behalf of the state, each of her other claims for PAGA civil penalties, as well as her claim under Section 558 for the $50/$100 per pay period per aggrieved employee penalty.[1] However, the Bank contended that because Lawson was subject to a mandatory pre-dispute arbitration agreement that prohibited "class actions," Lawson was required to arbitrate what the Bank characterized as her "individual" PAGA claim for the other portion of the "civil penalty" remedy under Labor Code §558, her underpaid back wages.

The Court of Appeal correctly rejected the Bank's argument that Lawson was required to split her PAGA claim under Labor Code §558 into

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[1] Lawson's PAGA Complaint also sought civil penalties under PAGA for the Bank's violations of its aggrieved employees' rights to timely wage payments, including upon termination of employment (Labor Code §§201-04), accurate and complete wage statements and payroll records (Labor Code §§226(a), §1174(d)), minimum wage for all hours worked (Labor Code §1197), and reimbursement of business expenses (Labor Code §2802). (AA I:016-17 [Compl. ¶¶57-62].) The Bank did *not* seek to compel arbitration of Lawson's claim for PAGA penalties based on any of these violations, *see* AA I:034, which are currently pending in the Superior Court and are not at issue before this Court.

two proceedings, a representative action in court and an individual action in arbitration. There are several reasons why this was correct.

First, Lawson's claim for civil penalties under Labor Code §558 was a valid PAGA claim. Indeed, she could *only* have brought her Section 558 claim under PAGA, because Section 558 does not create an independent private right of action and because Section 558 is covered by PAGA as a section of the Labor Code "that provides for a civil penalty to be assessed and collected by the [LWDA] for a violation of this code . . . ." (See Labor Code §2699(a).)

The Bank nonetheless contends that a PAGA claim cannot encompass the "underpaid wages" portion of the civil penalties designated by Section 558 because the State LWDA is not the "real party in interest" with respect to that particular remedy. The Court of Appeal correctly found no support for that contention in the text, legislative history, or stated purposes of either PAGA *or* Section 558, neither of which permits employees to bring an individual action under Section 558, either in court or arbitration.

Second, nothing in *Iskanian* or the Federal Arbitration Act, 9 U.S.C. §§1 et seq. ("FAA"), supports the Bank's efforts to rewrite California's workplace protection statutes. This Court held in *Iskanian* that a private, predispute arbitration agreement between a worker and her employer cannot be used to compel arbitration of a PAGA representative action, because PAGA claims belong to the state rather than to the parties to the private, bilateral arbitration agreement. This Court further held in *McGill v.*

CitiBank (2017) 2 Cal.5th 945, that a private arbitration agreement cannot be used to compel the forfeiture of a non-waivable statutory right created for a public purpose.

Here, the Bank seeks to accomplish precisely what this Court prohibited in both *Iskanian* and *McGill*: first, to compel plaintiff, as proxy for the State LWDA, to arbitrate a PAGA claim that the state has never agreed to arbitrate, and second to compel plaintiff to forfeit that non-waivable public law claim – because if Lawson cannot pursue her claim for underpaid wages under Section 558 on a representative-action basis under PAGA, she cannot pursue that Section 558 claim at all.

II. FACTS AND PROCEDURAL HISTORY

Lawson began her employment as an hourly, non-exempt employee of the Bank in June 2013. (AA I:009.)[2] In November 2015, she sent written notice to the LWDA and the Bank under PAGA, Labor Code §2699.3(c), informing them of the Bank's alleged violations of the Labor Code, based on its failure to pay its hourly, non-exempt employees the minimum wages and overtime premiums required by law, to reimburse their business expenses, to provide timely meal period and rest breaks, to timely pay all wages during employment and at termination, to provide complete and accurate wage statements, and to keep accurate payroll records. (AA I:011, 014.)

After waiting the prescribed statutory period to allow the LWDA to

[2] Lawson initially worked for California Bank & Trust, which was a subsidiary of Zions Bancorporation until December 31, 2015 when it merged with other banks owned by Zions Bancorporation into a single bank named ZB, N.A. (AA I:031, 040.)

investigate and pursue these claims on its own and to allow the Bank to cure the alleged violations pursuant to Labor Code §2699.3(c), Lawson filed a single-count PAGA representative action in the San Diego Superior Court to recover the civil penalties provided by PAGA, including those authorized by Labor Code §558, which provides, in pertinent part:

> (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.

(AA I:014, 109 [emphasis added].) Plaintiff based her claim for PAGA relief with respect to Section 558 on Labor Code §2699(a), PAGA's coverage provision, which states:

> Notwithstanding any other provision of law, and 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.

(Labor Code §2699(a) [emphases added].)

In August 2016, the Bank moved to compel arbitration of *one portion* of Lawson's PAGA claim for civil penalties under Section 558. (See *supra* at p. 9 n.1.) Recognizing that this Court in *Iskanian* had held that an employer cannot compel its employees' PAGA claims to arbitration unless the state, as the real party in interest under PAGA, has itself agreed to arbitrate, the Bank contended that the state was the real party in interest *only* for the portion of Lawson's PAGA claim brought to enforce Labor Code §558's $50/$100 per pay period remedy, but was *not* the real party in interest with respect to Section 558's underpaid wages remedy (even though Section 558 designates both remedies as "civil penalties") because any underpaid-wages recovery must be distributed to the aggrieved workers. (AA I:034-36.)

The Bank also contended in its motion to compel arbitration that Lawson should be required to arbitrate the underpaid-wages portion of her claim under PAGA and Section 558 on an *individual* rather than representative action basis. It based that contention on its mandatory predispute employment arbitration agreement, which Lawson had signed in mid-February 2014, which stated in pertinent part:

> [C]laims by different claimants . . . *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:050-051, 063-064 [first emphasis in original; second and third emphases added].)[3] Thus, while the Bank agreed that Lawson could continue to pursue all of her other PAGA fixed-civil-penalty claims in court on a representative action basis, it contended that she must arbitrate as an "individual" PAGA claim her request for the underpaid-wages portion of the civil penalties provided by Section 558 and, further, that Lawson's PAGA representative action in court should be stayed in its entirety pending that individual arbitration. (AA I:20-103; see also *id.* I:21, 36.)

Lawson opposed the Bank's motion to compel arbitration and its request for a stay pending arbitration. (AA I:104-207.) She pointed out that the underpaid-wages portion of the civil penalty remedy provided by Section 558 can only be recovered by the state, in a public enforcement action, or by an aggrieved employee on behalf of the state under PAGA, and that no private right of action under Section 558 otherwise exists. Lawson also explained why the state is the real party in interest with respect to all PAGA claims, why *Iskanian* is controlling, and why (as *Iskanian* held) the FAA does not preempt California law regarding PAGA actions brought on behalf of the state. (AA I:112-15.) Lawson also argued in the alternative that although the Bank's arbitration agreement prohibited class actions, it did not prohibit PAGA representative actions, and that if the Superior Court ultimately decided that a portion of Lawson's request for relief un her PAGA claim should be arbitrated, she should be entitled to

[3] In its Superior Court briefing, the Bank did not address the fact that although its arbitration agreement prohibited "class actions," it made no reference to "representative" actions (even though PAGA had been in effect since 2004, a decade earlier). (*See infra* Part III.C.)

pursue that relief in arbitration on a representative-action basis. (AA I:119.)

The Superior Court agreed with plaintiff, as a threshold matter, that the plain statutory language and the Legislature's clear intent was to allow the underpaid wages available under Section 558 to be recoverable as "civil penalties" under PAGA. (AA II:379 [citing *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1148].) Nonetheless, the court concluded that because Section 558(a)(3) required the state to distribute the recovered wages to the aggrieved employees, *Iskanian* was not controlling and Lawson must arbitrate that portion of her claim for PAGA relief – although she could do so under PAGA on a representative-action basis. (AA II:380.) The court then bifurcated Lawson's PAGA action, stayed further court proceedings for 90 days (a stay that has been periodically extended), and ordered the parties to arbitrate the underpaid-wages portion of plaintiff's PAGA claim for civil penalties under Section 558 on a representative basis. (AA II:381.)

Although orders compelling arbitration are non-appealable, the Bank filed a notice of appeal, followed one month later by a Petition for Writ of Mandate. (*Lawson v. ZB, N.A.* (2017) 18 Cal.App.5th 705, 712; see also Def's Pet. for Writ of Mandate (Nov. 29, 2016).) The Court of Appeal consolidated the two proceedings, and after concluding that it lacked appellate jurisdiction, reached the merits of the Bank's arguments in the context of the writ petition. (*Lawson*, 18 Cal.App.5th at p. 712.)

The Court of Appeal began by agreeing with plaintiff and the trial

court that the Legislature intended the "civil penalties" authorized by Labor Code §558 to include the per-pay period amounts *and* the underpaid wages amounts, for "[a]s 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.*" (18 Cal.App.5th at p. 722 [emphasis added].) The Court of Appeal then concluded, after a detailed analysis, that plaintiff's entire claim for Section 558 remedies was actionable under PAGA, *id.*, that under *Iskanian* that PAGA claim could not be compelled to arbitration pursuant to a private, predispute arbitration agreement, *id.* at p. 723, and that the FAA had no preemptive effect for the reasons stated in *Iskanian*, *id.* at pp. 723-24.

The Court of Appeal recognized that the Fifth Appellate District had come to a different conclusion in *Esparza v. KS Industries* (2017) 13 Cal.App.5th 1228, but it disagreed with the reasoning of *Esparza* in several respects.

First, the Court of Appeal pointed out that the court in *Esparza* had rested its analysis on the mistaken belief that Section 558 gave employees a private right of action to pursue its underpaid-wages remedy themselves, making that remedy a form of "statutory damages" rather than "civil penalties." (*Esparza,* 13 Cal.App.5th at p. 1246 [characterizing a claim for underpaid wages under Section 558 as "a private dispute because, among other things, it could be pursued by Employee in his own right."].) But Section 558 does not create a private right of action, for damages or

otherwise, which makes PAGA claims under Section 558 materially distinguishable from PAGA claims under other Labor Code provisions that provide a private right of action for statutory damages (like the waiting time remedies under Labor Code §203). (See *Lawson*, 18 Cal.App.5th at p. 723.)

Second, the Court of Appeal below disagreed with the *Esparza* court's conclusion that *Thurman* was no longer good law after *Iskanian.* Although *Thurman* was decided before *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, nothing in *Concepcion* or *Iskanian* undermined the analysis that led to *Thurman*'s conclusion that "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, to be treated as civil penalties" or that "as civil penalties, neither type of recovery is severable for purposes of applying the PAGA." (*Lawson*, 18 Cal.App.5th at pp. 723-24 [citing *Thurman*, 203 Cal.App.4th at pp. 1147-48]; see also *id.,* 18 Cal.App.5th at p. 717 [citing *Thurman*, 203 Cal.App.4th at pp. 1145-47 and *Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1087-89].) Because Section 558 authorizes civil penalties to be recovered by the state and does not authorize a private right of action, those civil penalties are not "statutory damages" and are therefore recoverable in a representative action under PAGA. (*Id.*; see also *Iskanian*, 59 Cal.4th at p. 381.)

While the Court of Appeal in *Lawson* acknowledged that the state may end up with a smaller percentage of the overall civil penalties in a case under Section 558 than under other Labor Code sections encompassed by

PAGA (including those that provide a fixed 75% for the state under Labor Code §2699(i) and those that provide the state a fixed 75% plus 25% of the unpaid wages such as Labor Code §§210(a)(2) and 225.5(b)), the Court found that distinction immaterial because a substantial portion of the designated penalties could still be paid to the state. (*Lawson*, 18 Cal.App.5th at p. 724 [citing *Iskanian*, 59 Cal.4th at pp. 377-78].) The Court also noted that because a trial court's ruling on arbitrability would necessarily precede any calculation or allocation of penalties, in any given PAGA case based on Section 558 the state's share of the penalties may be significantly greater than the aggrieved employees' share (and certainly greater than any individual employee's share). (*Id.* at p. 724; see also *infra* at pp. 28-30 [explaining that the state collects and holds any underpaid wages recovered under Section 558 in trust for the aggrieved employees].)

In short, the Court of Appeal concluded that Lawson properly brought her lawsuit under PAGA as a representative of the state, that her lawsuit sought civil penalties that were recoverable under PAGA, and that because the state is the real party in interest under PAGA and was not a party to the Bank's private arbitration agreement with Lawson, the case as a whole should proceed in court. (*Lawson*, 18 Cal.App.5th at pp. 725-26.)

The Bank's Petition for Review followed.

III. ARGUMENT

The Legislature enacted PAGA, the Labor Code Private Attorneys General Act of 2004 (Labor Code §2698 et seq., Stats. 2003, ch. 906, §2, eff. Jan. 1, 2004), to address its concern that because the state's labor

enforcement agencies were understaffed and inadequately funded, they were "failing to effectively enforce labor law violations." (Sen. Rules Comm. Floor Analysis, S.B. 796, 2003-04 Reg. Sess. (Sept. 11, 2003); see Stats. 2003, S.B. No. 796, §1; *Arias v. Superior Court* (2009) 46 Ca1.4th 969, 986.) In PAGA, the Legislature created a private right of action, allowing aggrieved employees to sue on behalf of themselves, the state, and other aggrieved current and former employees, to recover civil penalties for Labor Code violations that, before PAGA, only the Labor Commissioner could recover. (See Labor Code §2699(a) [encompassing Labor Code sections that already "provide[d] for a civil penalty to be assessed and collected by the [Labor Commissioner]"], §2699(f) [encompassing Labor Code sections that did not already "specifically provide[]" a civil penalty].)

A PAGA action is "a representative action on behalf of the state," not "a dispute between an employer and an employee . . . ." (*Iskanian*, 59 Cal.4th at p. 386; see also *id.* at p. 382 ["The government entity on whose behalf the plaintiff files suit is always the real party in interest in the suit."].) Because "[a]n employee plaintiff suing . . . under the Labor Code Private Attorneys General Act of 2004, does so as the proxy or agent of the state's labor law enforcement agencies," an action to recover civil penalties under PAGA "'is fundamentally a law enforcement action designed to protect the public and not to benefit private parties.'" (*Arias*, 46 Cal.4th at p. 986 [quoting *People v. Pac. Land Research Co.* (1977) 20 Cal.3d 10, 17].)

PAGA rights are public law rights that belong to the state, not to the

plaintiff or other aggrieved employees. As a result, the right to pursue PAGA claims on a representative action basis cannot be waived by a private predispute arbitration agreement between an employer and an employee. (*Iskanian*, 59 Cal.4th at p. 362; see also *Betancourt v. Prudential Overall Supply* (2017) 9 Cal.App.5th 439, 445, *cert. denied* (Dec. 11, 2017) 138 S.Ct. 556 [affirming denial of motion to compel arbitration "because a defendant cannot rely on a predispute waiver by a private employee to compel arbitration in a PAGA case, which is brought on behalf of the state"]; *Tanguilig v. Bloomingdale's Inc.* (2016) 5 Cal.App.5th 665, 675, *cert denied* (Oct. 16, 2017) 138 S.Ct. 356 [employment agreement's prohibition of representative actions cannot preclude PAGA civil action].)

The Court of Appeal was correct to allow Lawson's entire PAGA action to proceed in court on a representative-action basis, because, as further explained below: (1) the California Legislature intended both types of relief made available by Labor Code §558 to constitute "civil penalties"; (2) the Legislature intended those civil penalties to be recoverable by an aggrieved employee suing on behalf of the state under PAGA; (3) under *Iskanian*, an aggrieved employee suing to recover civil penalties under PAGA on behalf of the state cannot be compelled to arbitrate her PAGA claim for civil penalties; (4) under *McGill*, an aggrieved employee also cannot be forced to forfeit her right to pursue PAGA civil penalties on a representative-action basis because PAGA creates a fundamental, non-waivable public law right to pursue those remedies in some forum; and

finally (5) for the reasons stated in *Iskanian* and *McGill*, nothing in the FAA requires otherwise.

While the Court has no need to go beyond these issues to decide this case, we also demonstrate below, in the alternative, that *if* the Court concludes that the underpaid-wages portion of Lawson's claim must be arbitrated (either on a representative-action basis under PAGA, or on an individual basis under some theory the Bank has never articulated, because Section 558 does not allow direct private actions and PAGA does not allow individual, non-representative actions), the trial court should be directed to adjudicate Lawson's representative PAGA action claims first, under California Code of Civil Procedure §1281.2, before any arbitration of the remaining claims can proceed. (See *infra* Part III.D.)

A. The Legislature Authorized the Labor Commissioner to Pursue Two Types of Relief as "Civil Penalties" in Labor Code §558.

Section 558 was added to the Labor Code in 1999 as part of AB 60, which restored and codified the eight-hour daily overtime requirement and expanded the Labor Commissioner's workplace enforcement authority. (*Small v. Superior Court* (2007) 148 Cal.App.4th 222, 226.) Section 558 applies to all violations of Labor Code §§500-558.1 (which are the provisions in "this chapter," Division 2, Part 2, ch. 1 of the Labor Code, which include the Labor Code sections requiring overtime pay and premium pay for meal period and rest break violations) and all Wage Order provisions "regulating hours and days of work." (Labor Code §558(a).) The first subsection of Section 558 authorizes the Labor Commissioner to

recover for any violation of those provisions a "civil penalty" calculated "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" and (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." (Labor Code §558(a)(1), (2).)[4]

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[4] Section 558(a)(3) further provides that the "[w]ages recovered pursuant to this section shall be paid to the affected employee," while Section 558(d) states that "[t]he civil penalties provided for in this section are in addition to any other civil or criminal penalty provided by law."

In addition, Section 558 provides, with respect to Labor Commissioner enforcement:

> (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.

(Labor Code §558(b), (c).)

The Bank's threshold argument is that despite the plain language of Section 558, the Legislature did not intend the "underpaid wages" portion of the Labor Commissioner's recovery to constitute "civil penalties" because they are more in the nature of "statutory damages" under *Iskanian*, 59 Cal.4th at p. 381. That argument fails both as a matter of statutory construction and under a correct reading of *Iskanian*.

1. Underpaid wages are civil penalties under a plain reading of Section 558.

First, the Bank has never disputed that, as a matter of plain language (always the starting point, and often the end point, of an inquiry into legislative intent), Section 558 expressly designates each form of relief authorized by subsections (a)(1) and (a)(2) as "a civil penalty" and refers to them collectively as "civil penalties." (See Labor Code §558(a) ["shall be subject to a civil penalty as follows"]; *id.* §558(d) ["[t]he civil penalties provided for in this section"].) That designation should be dispositive, as every California court other than *Esparza* has concluded. (See, e.g., *Reynolds,* 36 Cal.4th at p. 1089; *id.* at p. 1094 (Moreno J. concurring); *Thurman,* 203 Cal.App.4th at p. 1145; *Bradstreet v. Wong* (2008) 161 Cal.App.4th 1440, 1451; *Jones v. Gregory* (2006) 137 Cal.App.4th 798, 809 n.11; *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 378-79, 381; see also *Yadira v. Fernandez* (N.D. Cal. June 14, 2011) 2011 WL 2434043, at p. *5.)[5]

Had the Legislature intended the underpaid-wages portion of the

[5] *Reynolds, Jones*, and *Bradstreet* were abrogated on other grounds by *Martinez v. Combs* (2010) 49 Cal.4th 35.

Section 558 remedy to be treated as something other than a civil penalty, it could easily have created a separate subsection authorizing the Labor Commissioner to collect underpaid wages, while omitting the "civil penalty" label. Instead, it chose to apply the label "civil penalty" to everything following the colon in subsection (a), including the "underpaid wages," and it reaffirmed in subsection (d) that the amounts listed in the provision are "civil penalties."

The grammar and structure of Section 558 permit no other construction. No comma separates the $50 and $100 portion of the civil penalty from the underpaid wages portion of the civil penalty in subsections (a)(1) and (a)(2). Because no comma separates the $50 and $100 components from the underpaid wages components in paragraphs (1) and (2), the Legislature must have intended the phrases "for any initial violation" and "for each subsequent violation" to modify the remainder of each paragraph and to denote that the underpaid wages are an integrated component of the civil penalty for each of the two types of violations ("initial" and "subsequent"). (See *Board of Trustees v. Judge* (1975) 50 Cal.App.3d 920, 928 n.4 ["Presence or absence [of commas] in a statute is a factor to be considered in its interpretation."].)

Second, the legislative history confirms that the Legislature enacted Section 558 to provide additional authority to the Labor Commissioner to enforce the state's existing and newly enhanced overtime protections and to deter employer violations of those protections. In 1999, in the wake of the Industrial Welfare Commission's ("IWC's") repeal of daily overtime

protections in several of its Wage Orders, the Legislature enacted AB 60, a comprehensive bill that restored and codified the eight-hour-day and bolstered overall overtime protections. (See *Bearden v. U.S. Borax, Inc.* (2006) 138 Cal.App.4th 429, 434.) As part of that bill, the Legislature added the public enforcement mechanism and civil penalty provisions codified in Section 558. (AB 60 §558, 1999–2000 Reg. Sess. (1999).) That bill authorized the Labor Commissioner to issue citations against non-compliant employers that included civil penalties of $50/$100 dollars per employee per pay period *plus* the amount of underpaid wages. (Dep't of Finance, AB 60 Enrolled Bill Report 3 (July 1, 1999) *in* Bill File (RJN, García Decl. Ex. 1); accord Dep't of Industrial Relations, AB 60 Enrolled Bill Report 1 (July 1, 1999) *in* Bill File ["[AB 60] also provides for the imposition of civil penalties to be assessed by the Labor Commissioner against employers who would violate these provisions."] (RJN, García Decl. Ex. 2).)

This was no accident. Rather, it was a deliberate effort to bolster the enforcement power of the Labor Commissioner by creating greater remedial protections and an efficient, integrated enforcement mechanism that would have a significant deterrent effect on non-compliant and potentially non-compliant employers.

"Imposition of civil penalties has, increasingly in modern times, become a means by which legislatures implement statutory policy." (*Hale v. Morgan* (1978) 22 Cal.3d 388, 398.) "'Civil penalties are inherently regulatory, not remedial,' and are intended to secure obedience 'to statutes

and regulations validly adopted under the police power.'" (*Home Depot U.S.A., Inc. v. Superior Court* (2010) 191 Cal.App.4th 210, 225 [citing *People v. Union Pac. Railroad* (2006) 141 Cal.App.4th 1228] [affirming constitutionality of PAGA civil penalty provisions].) That is why statutes like PAGA that provide for the recovery of civil penalties "for the protection of the public are . . . broadly construed in favor of the protective purpose," absent exceptional circumstances. (*People ex rel Lundgren v. Superior Court* (1996) 14 Cal.4th 294, 313; see also *Heritage Residential Care, Inc. v. DLSE* (2011) 192 Cal.App.4th 75, 81 [applying this principle to DLSE enforcement of civil penalties].)

The Labor Commissioner fully understood that the new law would increase its enforcement authority by creating an additional mechanism for holding employers liable for failing to provide legally compliant meal periods and rest breaks and for failing to pay the daily and weekly overtime wages required by California law. Shortly after AB 60 was signed into law, the Labor Commissioner and his Chief Counsel sent a memorandum to the staff of the Department of Labor Standards Enforcement ("DLSE") to describe the new law's impacts on public workplace enforcement. The memorandum explained that Section 558 "establishes a civil penalty citation system" that supplements the Labor Commissioner's existing authority to prosecute violations of California overtime law through court action (under Labor Code §1193.6) and the Berman hearing process (under Labor Code §98). (Memorandum from Miles E. Locker, Chief Counsel for Labor Comm'r, and Marcy V. Saunders, State Labor Comm'r to DLSE

staff, Understanding AB 60 (Dec. 23, 1999) https://www.dir.ca.gov/dlse /AB60update.htm (RJN, García Decl. Ex. 4 at p. 26).) As the memorandum explained:

> By allowing for inclusion of unpaid wages as a component of the amount assessed, overtime citations differ from minimum wage civil penalty citations under Labor Code §1197.1, which do not include an unpaid wages component. This unpaid overtime wage component of the assessment provides DLSE with a significant enforcement mechanism, and a means of expeditiously pursuing the collection of unpaid overtime wages.

(*Id.*)[6] According to the Labor Commissioner, the civil penalty was to be calculated by adding the "$50 or $100 per *underpaid employee* per pay period in which the employee was underpaid, plus the amount of the *underpaid wages*." (*Id.* [emphasis in original].)

The Labor Commissioner's contemporaneous understanding of Section 558 highlights the integrated nature of the two civil penalty provisions and the underlying purpose of enhanced public enforcement. By authorizing the Labor Commissioner to issue administrative citations for civil penalties that include underpaid wages plus $50/$100 per employee

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[6] At the time AB 60 was enacted, Section 1197.1 provided for civil penalties as follows:

> (1) For any initial violation that is intentionally committed, fifty dollars ($50) for each underpaid employee for each pay period for which the employee is underpaid.
>
> (2) For each subsequent violation for the same specific offense, two hundred fifty dollars ($250) for each underpaid employee for each pay period for which the employee is underpaid regardless of whether the initial violation is intentionally committed.

(1997 Cal. Legis. Serv. c.35 (A.B. 1448) §1 (West) [codified as amended at Labor Code §1197.1].)

per pay period, the Legislature streamlined and strengthened public enforcement and gave the Labor Commissioner a powerful new mechanism for compelling employer compliance (although, as the Legislature concluded five years later when it enacted PAGA, even that was not enough). As the Labor Commissioner explained in his AB 60 memorandum, the ability to issue citations for the collection of a set amount in addition to underpaid wages provides the state with "a significant enforcement mechanism, and a means of expeditiously pursuing the collection of unpaid overtime wages." (Locker Memorandum, *supra* (RJN, García Decl. Ex. 4 at p. 26).)

Although the Bank contends that the state has no interest in the underpaid-wages portion of the Section 558 civil penalty (which is the sole basis for its central argument that the state is not the real party in interest in an enforcement action under Section 558, see Opening Br. 31), that contention is doubly wrong.

First, as stated above, the Legislature deliberately included both elements of Section 558's civil penalties in the Labor Commissioner's enforcement arsenal, recognizing that the state's ability to obtain full compliance with the newly expanded overtime protections would thereby be significantly enhanced. Thus, even if the underpaid-wages portion of those penalties did not directly benefit the state *financially,* the power vested in the Labor Commissioner to enforce both elements of the Section 558 remedy in a single proceeding was unquestionably designed to strengthen the state's overall enforcement abilities.

Second, the Bank's argument ignores that the Labor Commissioner has a significant oversight interest and at least a contingent financial interest in obtaining the full range of remedies authorized by Section 558, because the Labor Code requires the Labor Commissioner to act as the public trustee, on behalf of the aggrieved workers, to collect and distribute all underpaid wages under Section 558 and to maintain control over any funds that cannot be distributed after reasonable efforts to locate the underpaid workers. (See Labor Code §96.7; see also *Dep't of Indus. Relations v. UI Video Stores, Inc.* (1997) 55 Cal.App.4th 1084, 1091 [citing *Millan v. Rest. Enterp. Grp., Inc.* (1993) 14 Cal.App.4th 477, 487].)

Section 558(a) provides that the civil penalties it authorizes must be paid "for *each* underpaid employee" [emphasis added] and that the "[w]ages recovered pursuant to this section [on behalf of each such employee by the Labor Commissioner] shall be paid to the affected employee [by the Labor Commissioner, in accordance with established procedures]." It does *not* say that the Labor Commissioner may only seek penalties for those employees it knows it will be able to locate, or that the Labor Commissioner must return to the employer any recovered wages for an underpaid employee who cannot be found (which is a frequent occurrence, especially in low-wage industries where overtime violations are common, see *Reynolds*, 36 Cal.4th at p. 1093 [Moreno, J. concurring].)

Once the Labor Commissioner collects the underpaid wages from a non-compliant employer in a proceeding covered by Section 558, she is required to use "diligent" efforts to locate the affected workers and

distribute their share of the recovered funds. (See Labor Code §96.7(b)-(c); §558(a)(3).) If the Labor Commissioner is unable to locate some of those workers, their recovered wages are retained in the Industrial Relations Unpaid Wage Fund ("IRUWF"), either to distribute to the missing workers if they can be located or for use in the Targeted Industries Partnership Program and the Underground Economy Enforcement Program. (See Dep't of Finance, State of Calif., Manual of State Funds, Fund: 0913, *available at* http://www.dof.ca.gov/budget/Manual_State_Funds/Find_a_Fund/documents/0913.pdf. (RJN, García Decl. Ex. 6).) Any wages that have remained unclaimed for three years escheat to the state; they are never repaid to the non-compliant employer. (C.C.P. §1521; see also DLSE Enforcement Manual §9.1.12. (RJN, García Decl. Ex. 5 at p. 41).) Thus, the Labor Commissioner *does* have an interest, as well as ongoing fiduciary obligations, with respect to all funds recovered under Labor Code §558. (See *UI Video Stores*, 55 Cal.App.4th at p. 1093 [employer's failure to remit unpaid wages of workers who could not be located in settlement with DLSE "resulted in damages (in the amount of the unpaid checks) to the agency in its capacity as an agent of the state and as trustee for the employees"]; see also *Iskanian*, 59 Cal.4th at p. 383 ("[A]greements requiring the waiver of PAGA rights would harm the state's interests in enforcing the Labor Code and in receiving the proceeds of civil penalties used to deter violations.")

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2. Under Iskanian, underpaid wages are civil penalties available in a PAGA action.

The distinction drawn between "civil penalties" and "statutory" damages in *Iskanian* fully supports the Court of Appeal's conclusion that what the Legislature denominated as "civil penalties" in Section 558 are in fact "civil penalties" for purposes of determining the state's interest in private enforcement through PAGA of the public remedies provided by Section 558.

In *Iskanian*, this Court held that a PAGA claim is a type of qui tam action in which an aggrieved employee, acting as a "proxy or agent of the state's labor law enforcement agencies," is authorized as a representative of the state to pursue violations of the Labor Code that, before PAGA, could only be prosecuted by state labor enforcement authorities. (59 Cal.4th at p. 380 [quoting *Arias*, 46 Cal.4th at p. 986].) The Court emphasized that "an action to recover civil penalties [under PAGA] 'is fundamentally a law enforcement action designed to protect the public and not to benefit private parties'" and that '"[b]ecause 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.'" (59 Cal.4th at p. 381 [quoting *Pac. Land Research Co.*, 20 Cal.3d at p. 17].) Thus, in contrast to claims brought by employees under Labor Code provisions that (unlike Section 558) create a private right of action, PAGA "authorizes a representative action *only* for the purpose of seeking statutory penalties for Labor Code violations," *id.*

[citing Labor Code §2699(f)] [emphasis added], and *only* in the circumstance "[w]hen 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 . . . ." (*Id.*)

The distinction drawn in *Iskanian* between "civil penalties" and "statutory damages" mirrors the distinction between remedies that a statute permits only state officials or the state's proxies to seek in the first instance and remedies that are available to injured individuals to pursue through a direct private right of action. The reason the state is the "real party in interest" in a PAGA action is not just because PAGA authorizes a private action to pursue claims that before PAGA only the state could pursue, but also because the judgment in a PAGA action is *binding* on the state – which is as true for a judgment for underpaid wages under Section 558 as for a judgment for the $50/$100 per pay period amounts. (See *Iskanian*, 59 Cal.4th at p. 387 [citing *Arias*, 46 Cal.4th at p. 986] ["The fact that any judgment in a PAGA action is binding on the government confirms that the state is the real party in interest."].) As this Court explained in *Iskanian*:

> 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."

(*Id.* at p. 381 [quoting *Caliber Bodyworks,* 134 Cal.App.4th at pp. 377-78].)

The civil penalties available to the state – and only the state, before PAGA – under Section 558 are therefore civil penalties within the meaning of *Iskanian* as well.

The Court in *Iskanian* recognized that a portion of the civil penalties recovered in a PAGA action must, by statute, be allocated in part to the aggrieved employees. But that is almost always true in qui tam-like actions where individuals are authorized to pursue claims on behalf of the state. (*Id.* at p. 382 [quoting *Sanders v. Pacific Gas & Elec. Co.* (1975) 53 Cal.App.3d 661, 671 ["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."]].) As the Court concluded, "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. [Yet the] government entity on whose behalf the plaintiff files suit is always the real party in interest in the suit." (*Id.* at p. 382.)

The Legislature has made clear its understanding that the State has a strong public policy interest in obtaining full enforcement of California's worker-protection laws, separate and apart from any workers' interest in receiving compensation for their losses. Labor Code §90.5, for example, states the applicable public policy as follows:

> It is the policy of this state to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions or for employers that have not

> secured the payment of compensation, and to protect employers who comply with the law from those who attempt to gain a competitive advantage at the expense of their workers by failing to comply with minimum labor standards.

Thus, both before and after the enactment of PAGA, the state has had a compelling interest in obtaining robust labor-law enforcement, not only to make employees whole but also to deter employer violations, to prevent unfair competition by companies that do not comply with their legal obligations, and to ensure respect for and compliance with the State's workplace laws. (See, e.g., *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, 960.) The fact that aggrieved employees benefit from PAGA enforcement actions does not diminish the law's fundamental public purpose. (See *Eddleman v. U.S. Dep't of Labor* (10th Cir. 1991) 923 F.2d 782, 791, *rev'd on other grounds by Temex Energy, Inc. v. Underwood, Wilson, Berry, Stein & Johnson* (10th Cir. 1992) 968 F.2d 1003 ["Despite the fact that DOL sought liquidation of back-pay claims for specific individuals, we do not characterize the use of that remedy as an assertion of private rights. We conclude instead that the request for liquidation of back-pay claims was but another method of enforcing the policies underlying the SCA [Service Contract Act]."]

Thus, under *Iskanian*, *Arias*, and the plain text of Section 558, both portions of the designated "civil penalty" remedy under Section 558 are actionable under PAGA because they are "civil penalties" within the meaning of Labor Code §2699(a) and because before PAGA, those integrated penalties could be recovered only by the Labor Commissioner

and not by an aggrieved employee in a private right of action under Section 558.

B. The Federal Arbitration Act Does Not Preempt California Law, As Set Forth in *Iskanian* and *McGill*, Prohibiting the Enforcement of Private Arbitration Agreements that Strip Private Individuals of the Right to Pursue Non-Waivable Public Law Claims in All Fora.

The Bank next makes a series of alternative arguments, contending that to the extent PAGA is construed to permit private parties as "agents" or "proxies" of the state to pursue the underpaid-wages portion of the remedies that formerly only the state could pursue under Labor Code §558, PAGA is preempted by the Federal Arbitration Act because it "singles out arbitration agreements for disfavored treatment." (Opening Br. 40 [quoting *Kindred Nursing Centers Ltd. Partnership v. Clark* (2017) 581 U.S. __, 137 S.Ct. 1421, 1425].) The Bank further contends that not only must Lawson arbitrate the portion of her PAGA action that seeks underpaid wages under Section 558, but she must do so on an individual, not a representative basis, because the Bank's predispute arbitration agreement prohibits class actions. (*Id.* at pp. 41-43.)

Both arguments fail: the first because of *Iskanian* and the second because of *McGill.*

1. Iskanian prohibits the compelled arbitration of any portion of Lawson's PAGA claim.

The Court in *Iskanian* held that the public law rights established by PAGA cannot be the subject of a mandatory predispute employment arbitration agreement because the FAA applies only to private agreements to arbitrate while PAGA enforcement actions are brought on behalf of the

state. (59 Cal.4th at pp. 384-95.) That remains as true today as it was in 2014. As this Court explained:

> . . . [T]he rule against PAGA waivers does not frustrate the FAA's objectives because . . . the FAA aims to ensure an efficient forum for the resolution of *private* disputes, whereas a PAGA action is a dispute between an employer and the state Labor and Workforce Development Agency. . . .
>
> Simply put, a PAGA claim lies outside the FAA'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 [LWDA] or aggrieved employees – that the employer has violated the Labor Code.

(59 Cal.4th at pp. 384, 386-87 [emphases in original].) Thus, as many courts since *Iskanian* have recognized, see *supra* at p. 20, and as the Bank itself conceded in not seeking to compel arbitration of *any* of Lawson's other PAGA claims, PAGA claims are not arbitrable pursuant to a private arbitration agreement between employer and employee. (Cf. *Comer v. Micor, Inc.* (9th Cir. 2006) 436 F.3d 1098, 1103 [plan participant bringing ERISA action was not bound by arbitration agreement between employer and investment manager even if relief recovered would go to the plan]; *United States ex rel. Welch v. My Left Foot Children's Therapy* (9th Cir. 2017) 871 F.3d 791, 800 [action under the False Claims Act belongs to government even if relator has an "interest in the outcome of the lawsuit" and is not subject to employment arbitration agreement].)[7]

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[7] The United States Supreme Court has denied certiorari in at least six cases challenging this Court's FAA preemption analysis in *Iskanian* (or the Ninth

The Bank tries to distinguish the FAA preemption analysis in *Iskanian* from this case by pointing to a statement later in the opinion, in which this Court wrote:

> 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.

(59 Cal.4th at pp. 387-88.)

But that is not what PAGA does, either with respect to Section 558 or otherwise. As the Court explained in the sentences immediately following the language quoted by the Bank:

> [A] PAGA litigant's status as "the proxy or agent" of the state 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

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Circuit's similar analysis in *Sakkab v. Luxottica Retail N. Am., Inc.* (9th Cir. 2015) 803 F.3d 425). In addition to *Iskanian* itself, 135 S.Ct. 1155, those cases include: *Brown v. Superior Court (Morgan Tire & Auto, LLC)* (2013) 216 Cal. App. 4th 1302, *cert. denied* (June 1, 2015) 135 S.Ct. 2377; *Areso v. CarMax, Inc.* (2011) 195 Cal.App.4th 996, *cert. denied* (Dec. 14, 2015) 136 S.Ct. 689; *Vitolo v. Bloomingdale's, Inc.* (9th Cir. 2016) 669 Fed. App'x 890, *cert. denied* (June 19, 2017) 137 S.Ct. 2267; *Tanguilig*, 5 Cal.App.5th 665, *cert denied* (Oct. 16, 2017) 138 S.Ct. 356, and *Betancourt v. Prudential Overall Supply* (2017) 9 Cal.App.5th 439, *cert. denied* (Dec. 11, 2017) 138 S.Ct. 556.

state coffers.

(*Id.* at p. 388 [quoting *Arias*, 46 Cal.4th at p. 986].)

Here, as in *Iskanian*, the part of plaintiff's PAGA claim that seeks relief under Section 558 "can only be brought by the state or its representatives" because there is no private right of action under Section 558. Moreover, "any resulting judgment [in a PAGA representative action] is binding on the state" for the reasons stated in *Arias*. (46 Cal.4th at p. 986.) And although the percentage of monetary penalties that will remain in state coffers in a PAGA representative action under Section 558 will vary based on the nature of the violations (which can include failure to pay overtime and/or failure to provide legally compliant meal periods and rest breaks), the frequency of those violations, the number of pay periods affected, and which violations are "subsequent" rather than "initial," all Section 558 penalties flow through the state and are paid initially in trust to the state, see *supra* at pp. 28-30, and at least 75% of the $50/$100 portion of those penalties must be paid to the state for Labor Code enforcement and education (Labor Code §2699(i).)

The fact that a Section 558 public enforcement action may result in some employee-specific relief (in amounts that will necessarily vary case by case) cannot be dispositive for purposes of FAA preemption. After all, in *EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279, the Supreme Court *reversed* the Fourth Circuit's holding that a private employment arbitration agreement between an employer and the charging party precluded the EEOC from seeking victim-specific relief for that charging party in a public enforcement action. (*Id.* at p. 284.) As the Court concluded, in the absence

of an arbitration agreement between the employer and the EEOC, the Commission retained full authority to enforce Title VII's anti-retaliation provisions, because its enforcement actions "seek[] to vindicate a public interest . . . even when it pursues entirely victim-specific relief." (*Id.* at p. 296.)

Other courts have applied the reasoning of *Waffle House* and have similarly rejected the assertion that public enforcement of statutory rights may be limited by private arbitration agreement just because the relief sought by the public entity includes "victim-specific relief."

In *State ex rel. Hatch v. Cross Country Bank, Inc.* (Minn. Ct. App. 2005) 703 N.W.2d 562, the Minnesota Court of Appeals held that the state could pursue a tort claim of invasion of privacy against a bank on behalf of the state's citizens under the parens patriae doctrine. Citing *Waffle House*, the Court rejected the bank's argument that because the state sought victim-specific relief, the claim must arbitrated:

> It is not dispositive that the attorney general seeks victim-specific relief or that the claim is based on the facts that could permit an individual to obtain relief through a private tort claim. That was the situation in *Waffle House* as well. The state's purpose in bringing the claim is to secure protection of a public interest. The United States Supreme Court specifically recognized that future violations may be best deterred by seeking victim-specific monetary relief, rather than non-victim-specific injunctive relief. *See Waffle House,* 534 U.S. at 295, 122 S.Ct. at 765 (noting that "[p]unitive damages may often have a greater impact . . . than the threat of an injunction.").

(*Cross Country Bank, Inc.*, 703 N.W.2d at p. 570.)

Similarly, the New York Court of Appeals, the Massachusetts Supreme Judicial Court, and the Iowa Supreme Court have all held that state enforcement actions are not subject to arbitration merely because they seek "victim-specific relief." (*People ex rel. Cuomo v. Coventry First LLC* (N.Y. 2009) 13 N.Y.3d 108, 114 ["We therefore hold that the arbitration agreement between defendants and their alleged victims does not bar the Attorney General from pursuing victim-specific judicial relief in his enforcement action."]; *Joule, Inc. v. Simmons* (2011) 459 Mass. 88, 95 ["Accordingly, assuming the validity of the agreement's arbitration provision, nothing in it precludes the [Massachusetts Commission Against Discrimination] from proceeding with its investigation and resolution of [the employee's] discrimination complaint – including, if the evidence warrants, granting relief specific to [the employee]."]; *Rent-A-Ctr., Inc. v. Iowa Civil Rights Comm'n*, (Iowa 2014) 843 N.W.2d 727, 736 [holding that Iowa Civil Rights Commission's claim regarding pregnancy discrimination could not be compelled to arbitration despite the fact that it sought "victim-specific relief"] .)[8]

[8] Although the Bank asserts that Lawson *could* have pursued her claims for underpaid overtime and unpaid meal-and-rest-break premiums under other sections of the Labor Code that permit a private right of action, it acknowledges that Lawson could not have pursued that relief under Section 558 directly (or under PAGA, other than through Section 558). Nothing in Section 558 or PAGA states that a claim may only proceed if no other statute or Wage Order permits the same or similar relief. To the contrary, Labor Code §558(d) states that the civil penalties it provides are "in addition to any other civil or criminal penalty provided by law," and Labor Code §2699(a) states that PAGA's protections are "[n]otwithstanding any other provision of law."

Moreover, *Waffle House* makes clear that the potential for obtaining the same or similar relief under a different cause of action makes no

In any qui tam-like enforcement scheme, an individual pursuing relief on behalf of the state will be entitled to a share of the recovery. While the amounts of that recovery will vary on a statute-by-statute and cases-by-case basis, a lawsuit brought pursuant to statutory authorization to pursue public law claims that otherwise only the state could pursue is no less a claim on behalf of the state because a portion of the recovery is shared, or dedicated to other public purposes. (See, e.g., Gov. Code §12652 [California False Claims Act permits qui tam relator to retain up to 50% of the recovery].)[9]

One reason the Bank's arguments fail is because it is unable to articulate the point at which the availability of restitutionary relief or an incentivizing percentage of recovery transforms a qui tam-like enforcement action on behalf of the state into an action in which the state is no longer the real party in interest. The Bank concedes that *Iskanian* fully applies to

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difference for purposes of FAA preemption. In *Waffle House*, after all, the charging party could have pursued his own claim for damages under the *same* provision of Title VII that the EEOC sought to enforce (not a different statutory provision, as here). Yet that did not stop the U.S. Supreme Court from holding that the EEOC was entitled to pursue its public law Title VII claim to recover those damages. (See also *EEOC v. Sidley Austin LLP* (7th Cir. 2006) 437 F.3d 695 [rejecting argument that the EEOC cannot pursue monetary relief under the ADEA when employees would have been barred from bringing their own suits]; *EEOC v. Circuit City Stores, Inc.* (6th Cir. 2002) 285 F.3d 404 [permitting EEOC to proceed with Title VII suit on behalf of an individual for backpay, compensatory damages, and punitive damages].)

[9] Although PAGA claims may only be pursued by individuals who are themselves "aggrieved employees," *see* Labor Code §2699(a), the analysis would be the same if it authorized *any* private party to pursue Labor Code private enforcement actions on behalf of the state. In such a case, the inapplicability of the employer's private arbitration agreements would be even clearer, because the plaintiff in such a case might not even have an arbitration agreement.

Lawson's PAGA claims that designate 25% of the recovery to aggrieved workers. Presumably, the Bank would also concede that a qui tam case under the California False Claims Act would not be subject to the whistleblowing relator's private arbitration agreement, even though the statute allows the relator to recover up to half of the qui tam recovery. While the Bank contends that Section 558 is somehow different, it offers no justification, let alone a conceptually sound reason, for distinguishing a 25% recovery from a 25%-plus-restitution recovery, or a 50-50 or 60-40 allocation, or a full-restitution-plus-another-10%-to-the-state allocation. What matters for purposes of *Iskanian* is not how the Legislature decided to allocate civil penalties, but whether in the absence of PAGA, the state had statutory authority to seek those penalties itself – and whether, if it had, the state would be bound by a private arbitration agreement it had never signed.

In the case of a PAGA action for the recovery of civil penalties under Section 558, the state has merely chosen to allow one or more aggrieved employees to stand in its shoes by filing a lawsuit, after giving appropriate notice to the state and the employer, seeking the identical relief the state could have sought itself, if it had sufficient staffing and resources. The Bank offers no reasoned rationale for carving out from PAGA a category of public law claims simply because the underlying statute permits the state to obtain a civil penalty that includes a restitutionary component.[10]

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[10] The Bank concedes that there is no way to tell, at the point a motion to compel arbitration might be filed, what percentage of the recovery the state would keep and what percentage it would be required to distribute to the employees it can locate in a PAGA action for civil penalties under Section 558. (Opening Br. 38.) When PAGA was enacted, moreover, the only wages recoverable by the Labor Commissioner under Section 558

Just as the State LWDA could not be bound by a private arbitration agreement to which it was not a party if the state sought to pursue victim-specific relief in a public enforcement action (through a citation or a civil action in court), neither can a PAGA plaintiff be bound by such an agreement when pursuing that same relief as "proxy or agent" of that underfunded and understaffed state agency. In both cases the claim belongs to the state, and is being prosecuted to further non-waivable public law rights. And in both cases, the state would be legally bound by the resulting judgment.

To the extent this Court's "A for B, C, and D" example in *Iskanian* hypothesized a statute that would vest all rights of prosecution and recovery in private individuals as a subterfuge to avoid FAA preemption, neither Section 558 nor PAGA comes close. Section 558 itself does not give private individuals any enforcement rights, while the procedures required under PAGA for prosecuting a violation of Labor Code §558 provide even greater restrictions on plaintiffs (and greater protections for employers) than the Labor Commissioner would face herself in a direct action for public enforcement. (See *Arias*, 46 Cal.4th at pp. 982-85 [describing procedural requirements for PAGA action].)

First, any action under PAGA, including a PAGA action based on

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were: (1) underpaid overtime wages, which in most cases involving underpayment would be only half the employee's regular rate of pay, or (2) any regular wages that the employer had failed to pay an employee who was required to work through a meal period or a rest break (because Labor Code §226.7, providing an additional one-hour wage penalty, had not yet been enacted). (*See* Locker Memorandum, *supra* (RJN, García Decl. Ex. 4 at p. 26); see also *Lawson*, 18 Cal.App.5th at p. 724.)

Section 558, requires the aggrieved employee to provide notice of the violation, "including the facts and theories to support the alleged violation," to the LWDA and to her employer. (Labor Code §2699.3(c)(1)(A).) That notice requirement gives the LWDA the opportunity to decide whether to investigate the allegations and permits the employer to submit a response to the LWDA, "thereby promoting an informed agency decision as to whether to allocate resources toward an investigation." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 546.) For claims based on Section 558, PAGA's requirement of pre-filing notice also gives the employer the opportunity to "cure" its violations without incurring further liability. (Labor Code §2699.3(c)(2)(A).)

Second, if the Labor Commissioner chooses to pursue the Section 558 claim itself (allowing it to seek *both* elements of the integrated "civil penalty"), the aggrieved employees are prohibited from pursuing any PAGA action based on that claim. (Labor Code §2699(h).) Although "an aggrieved employee's action under [PAGA] functions as a substitute for an action brought by the government itself," once the government has instituted an action the aggrieved employees can no longer proceed on the state's behalf. (*Arias*, 46 Cal.4th at p. 933.)

Third, once a PAGA action has been filed, the plaintiff must inform LWDA of various milestones in the litigation, including by submitting the complaint within 10 days of filing, submitting any proposed settlement at the time it is filed with the court, and submitting any court order that awards or denies PAGA penalties. (Labor Code §2699(l).)

These requirements, especially when coupled with the binding legal effect of a PAGA judgment on the state, are more than sufficient to preserve the public enforcement nature of a PAGA action. (See *Iskanian*, 59 Cal.4th at p. 381.) A PAGA action does not "deputiz[e] employee A to bring a suit for the individual damages claims of employees B, C, and D." It deputizes an aggrieved employee to act on behalf of the state in a public enforcement capacity. (*Iskanian*, 59 Cal.4th at pp. 387-88.)

For these reasons, this Court has no basis for reconsidering *Iskanian* or its analysis of FAA preemption. A PAGA enforcement action that seeks the integrated civil penalties available to the state under Section 558 should be treated no differently than any other PAGA claim – including the other PAGA claims in this case that the Bank concedes may be pursued on a representative basis in San Diego Superior Court.

2. *McGill* prohibits the compelled forfeiture of any portion of Lawson's PAGA claim.

There is also a separate and entirely independent reason why the FAA cannot preempt Lawson's PAGA claim for Section 558 relief in this case. According to the Bank, the arbitration agreement that it required Lawson to sign in February 2014 required her to arbitrate on an *individual* basis any workplace claim that she may have against the Bank. (Opening Br. 41-43.) The arbitration agreement made no reference to "representative" actions or private attorney general actions. Nonetheless, the Bank contends that its prohibition against "class actions" should be construed to prohibit any form of non-individual action, including PAGA representative actions. Lawson disagrees with that construction, see *infra*

Part III.C, but if the Bank is correct that the only claim Lawson may pursue in arbitration is an individual claim, its arbitration agreement must be held unenforceable under *McGill.* (See also *Sakkab*, 803 F.3d at pp. 433-36 [barring enforcement of employer's mandatory predispute arbitration agreement that prohibited PAGA representative-action claims].)

This Court in *McGill* unanimously held that California law prohibits the enforcement of any contract, whether an arbitration agreement or otherwise, that strips a party of a non-waivable public law right – in *McGill,* the right to pursue a "public injunction" under the Consumer Legal Remedies Act, Unfair Competition Law, and False Advertising Law. (2 Cal.5th at p. 961.) The Court relied on California Civil Code §3513 (as both the majority and concurrence had in *Iskanian*, 59 Cal.4th at pp. 382-383; *id.* at pp. 394-95 [Chin, J., concurring]), which states: "Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement."

The Legislature unquestionably enacted PAGA for a public purpose, to "augment the limited enforcement capability of the Labor and Workforce Development Agency by empowering employees to enforce the Labor Code as representatives of the Agency." (*Iskanian*, 54 Cal.App.4th at p. 383.) A PAGA action is "fundamentally a law enforcement action," *Arias*, 46 Cal.4th at p. 986, and the Labor Code and Wage Order rights it protects are themselves fundamental, non-waivable public law rights. (*Gentry v. Superior Court* (2007) 42 Cal.4th 443, 455, *overruled on other grounds by*

Iskanian, 59 Cal.4th at pp. 362-67; *In re Trombley* (1948) 31 Cal.2d 801, 809; see also Labor Code §90.5 ["It is the policy of this state to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work . . . for employers that have not secured the payment of compensation . . . ."].)

To require an employee to pursue a PAGA claim on an "individual" rather than a "representative" basis is to deny that employee (and the state) the right to pursue the PAGA claim at all. There is no such thing as an individual, non-representative PAGA action. Every California appellate court to consider this issue, pre- and post-*Iskanian,* has held that PAGA claims may only be brought on a representative-action basis.[11]

"A plaintiff asserting a PAGA claim may not bring the claim simply on his or her own behalf but *must* bring it as a representative action and include 'other current or former employees.'" (*Reyes v. Macy's Inc.* (2011) 202 Cal.App.4th 1119, 1123 [emphasis added].) PAGA "does *not* enable a single aggrieved employee to litigate his or her claims." (*Id.* at pp. 1123-24 [emphasis added]; accord *Huff v. Securitas Security Serv. USA, Inc.* (2018) 233 Cal.Rptr.3d 502, 508-09 ["[A]n employee seeking to recover Labor Code penalties that would otherwise be recoverable only by state authorities cannot do so in a purely individual capacity."]; *Williams v. Superior Court* (2015) 237 Cal.App.4th 642, 649 ["case law suggests that a single representative PAGA claim *cannot* be split into an arbitrable

[11] This Court in *Iskanian* had no need to reach the question of whether the Legislature intended to permit individual-only PAGA claims. (59 Cal.4th at pp. 384, 387.)

individual claim and a nonarbitrable representative claim"]; see also *Monaghan v. Telecom Italia Sparke of N. Am.* (9th Cir. 2016) 647 Fed. App'x 763, 770 ["Yet courts have time and again reiterated that the PAGA creates only a *representative* right of action."].) Two of the concurring Justices in *Iskanian* similarly concluded that "*every* PAGA action, whether seeking penalties for Labor Code violations solely as to only one aggrieved employee – the plaintiff bringing the action – or as to other employees as well, is a representative action on behalf of the state." (59 Cal.4th at p. 394 [Chin, J. concurring].) Thus, requiring a PAGA action to be arbitrated on an individual basis or not at all does not just "seriously compromise" the public purpose the law was intended to serve; it destroys that purpose because it leaves plaintiff without a claim to be arbitrated and it leaves the public without any claim at all. (See *McGill*, 2 Cal.5th at p. 961.)

The conclusion that PAGA claims may only be pursued on a representative rather than individual basis is underscored by PAGA's statutory language. Section 2699(a) provides that an aggrieved employee may bring a representative action "on behalf of himself or herself *and* other current or former employees." [Emphasis added.] As several courts have noted, the use of the conjunctive word "and" signifies that the aggrieved employee must bring the action on her own behalf and on behalf of other aggrieved employees. (See, e.g., *Reyes*, 202 Cal.App.4th at pp. 1123-24.) Moreover, a previous version of the bill used the disjunctive "or," but was later amended. The enacted version uses "and," rather than "or," and as the Court of Appeal in *Huff* explained, "the effect of that change is simply to

require that a PAGA claim be representative." (*Huff*, 233 Cal.Rptr.3d at p. 508.)

PAGA's purpose is to "advance the state's public policy of affording employees workplaces free of Labor Code violations." (*Williams*, 3 Cal.5th at p. 546.) That purpose is best achieved through a representative action that has broad deterrent effect and protects the rights of all aggrieved employees. (See, e.g., *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 502; cf. *Huff*, 233 Cal.Rptr.3d at p. 508 ["Given the goal of achieving maximum compliance with state labor laws, it would make little sense to prevent a PAGA plaintiff . . . from seeking penalties for all the violations an employer committed."].) Requiring an aggrieved employee acting on behalf of the state to proceed on an individual basis would effectively defeat the state's ability to enforce its labor laws through PAGA.

The FAA (even if it applied to actions brought on behalf of the state) does not require enforcement of a clause in a private arbitration agreement that would be unenforceable under general principles of state contract law. Lawson's claim here, like the plaintiff's claim for public injunctive relief in *McGill*, is (1) a non-waivable claim created for a public purpose that (2) cannot by its nature be pursued on an individual-only basis. Consequently, any contract provision that strips a plaintiff of the ability to pursue that public law right is unenforceable under *McGill* and California Civil Code §3513, which for more than 150 years has prohibited the enforcement of contracts that forfeit the right to pursue non-waivable public law rights in

all fora.

Nothing in the FAA precludes this Court from applying that settled principle of California law in this case. To the contrary, the FAA's "savings clause," 9 U.S.C. §2, expressly provides that courts should *not* enforce any clause in a private arbitration agreement covered by the FAA if that clause would be unlawful and unenforceable on "such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. §2; see *McGill*, 2 Cal.5th at pp. 961-62; *Iskanian*, 59 Cal.4th at p. 395 [Chin, J. concurring in part] [citing *American Exp. Co. v. Italian Colors Rest.* (2013) 570 U.S. 228, 236]; see also *Sakkab*, 803 F.3d at pp. 432-33.)

The fact that a PAGA claim must be adjudicated on a representative basis (whether in court or in arbitration) also does not create preemption problems under *Concepcion*, because the Legislature's determination that PAGA actions must be representative does not interfere with any "fundamental attributes of arbitration" or impose any procedural burdens on the arbitrating parties or the arbitral process. (*Concepcion*, 563 U.S. at p. 344.)

Unlike a class action, in a PAGA representative action there are no due process or statutory requirements for notice to the class, no opportunity for aggrieved employees to opt out, and no requirements that the plaintiff demonstrate typicality and adequacy. (*Williams*, 3 Cal.5th at pp. 546-47 & n.4; *Sakkab*, 803 F.3d at pp. 435-39; see also *Baumann v. Chase Investment Services Corp.* (9th Cir. 2014) 747 F.3d 1117, *cert denied* (2014) 135 S.Ct. 870 (holding that CAFA jurisdiction did not apply to PAGA action because

a PAGA action [is not "similar to" a class action for purposes of 28 U.S.C. §1332(d)(1)(B)]; compare *Concepcion*, 563 U.S. at pp. 346-52 (analyzing procedural requirements of class actions.) A PAGA action can proceed on a "bilateral" basis no less than any public enforcement proceeding initiated by the Labor Commissioner, because the representative plaintiff in a PAGA action merely stands in the shoes of the Labor Commissioner upon satisfying PAGA's preliminary procedural requirements. (See, e.g., *Sakkab*, 803 F.3d at pp. 435, 437-39 [allowing PAGA actions to proceed as representative actions in arbitration, and holding that arbitration on a representative basis is not contrary to the purposes of the FAA].)

The Bank never tries to explain what kind of claim it expects this Court to require Lawson to pursue in an individual arbitration. She has no direct-action claim under Labor Code §558, because only the Labor Commissioner can enforce Section 558 directly. She has no individual PAGA claim, because PAGA claims can only proceed on a representative basis. And she has no other claims, because the PAGA claim for relief was the only claim she pleaded in her complaint. So, while the Bank has repeatedly argued that Lawson must pursue her claim for underpaid wages on an individual basis in arbitration, it ignores that the claim she pleaded in her complaint cannot be pursued by a private party on an individual basis. That is why the legal and practical effect of permitting the Bank to compel arbitration would be to strip Lawson altogether of her right to pursue the civil penalties provided by Section 558 in a PAGA representative action on behalf of the state – which Justice Chin's concurrence in *Iskanian*, the

Ninth Circuit decision in *Sakkab*, and the unanimous majority opinion in *McGill* make clear the Bank cannot do.[12]

In short, requiring a PAGA plaintiff to arbitrate a portion of the civil penalties available in a PAGA action on an individual basis would result in a compelled forfeiture of a non-waivable statutory right created for a public purpose. Under *McGill*, such a forfeiture is unenforceable under Civil Code §3513. (2 Cal.5th at p. 961.) That is a general principle of state law that does *not* discriminate against arbitration agreements for purposes of the FAA savings clause, 9 U.S.C. §2. (*Id.* at pp. 961-62.)[13]

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[12] Even if the Court decides that the portion of the civil penalties that would be paid to Lawson must be arbitrated, the State still retains its interest in ridding Lawson's workplace of Labor Code violations through PAGA. If the FAA does not permit her to pursue her own underpaid wages, Lawson, as an aggrieved employee on behalf of the State, should at a minimum be permitted to pursue an action in court to recover the integrated penalties available under Section 558 for all other aggrieved employees, just as the State would have been permitted to do had it possessed sufficient resources to issue a citation under Section 558. (See *Iskanian*, 59 Cal.4th at pp. 383-84; see also *supra* Part III.A.)

[13] The Bank's assertion that Lawson's PAGA claim under Section 558 must be divided into two actions, in two separate fora, seeking different remedies for the same underlying violations (even though the Labor Commissioner has historically pursued such remedies in a single proceeding) creates many practical problems as well. For example, if the Court splits Lawson's PAGA claim into two parts, with her claim for the $50/$100 per pay period penalties proceeding in court (which the Bank concedes it should) and her claim for the underpaid-wages penalties proceeding in arbitration (as the Bank urges), Lawson – like any other aggrieved employee pursuing a PAGA claim for Section 558 remedies on behalf of the state – might face potential standing or res judicata problems under *Kim v. Reins Int'l Calif., Inc.* (2017) 18 Cal.App.5th 1052, *review granted* No. S246911 (Mar. 28, 2018) 413 P.3d 1132.

In *Kim*, the Court of Appeal held that an aggrieved employee can no longer pursue a PAGA claim against her employer once her underlying Labor Code claims are resolved (in that case, by settlement). (*Kim*, 18 Cal.App.5th at pp. 1058-59.) Although we do not expect this Court to affirm the Court of Appeal's decision in *Kim,* let alone to expand it, that

The Bank's final attempt to demonstrate that the recovery of the underpaid-wages portion of the Section 558 civil penalties under PAGA is preempted by the FAA is to rely on *Kindred Nursing*, 137 S.Ct. 1421, but that decision is irrelevant. In *Kindred Nursing*, the Supreme Court examined a Kentucky rule of law that required specific, express language before authority could be granted to waive a person's right to trial by jury. At issue were two power-of-attorney forms, which seemed to authorize the holders to enter into nursing home contracts with an arbitration clause. The Kentucky courts invalidated the arbitration agreements because there was no express language in the powers-of-attorney that permitted the holders to waive the right to a jury trial. The Supreme Court reversed, holding that the Kentucky law was preempted by the FAA because it imposed a greater burden on arbitration agreements (which waive the right to trial by jury) than other types of agreements. (*Id.* at pp. 1425-27.)

The Bank tries to analogize between the power-of-attorney forms in *Kindred Nursing* and the statutory relationship between a PAGA plaintiff and the State LWDA, but that analogy does not work. The only similarity

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same analysis might preclude anyone with a "split" PAGA claim from pursuing one portion of that split claim (in court or arbitration) once the other portion is adjudicated (in arbitration or in court), because that adjudication would, as in *Kim*, arguably resolve the underlying Labor Code claim. (Cf. *Perez v. U-Haul Co. of Calif.* (2016) 3 Cal.App.5th 408, 421 ("[W]e do not believe an employer may force an employee to split a PAGA claim into 'individual' and 'representative' components, with each being litigated in a different forum."]; *Williams*, 237 Cal.App.4th at p. 649 [same].) In addition, although the Bank purports to limit its analysis to PAGA claims that encompass the integrated remedies of Labor Code §558, it never explains why that same analysis would not require bifurcation and arbitration of any claim to recover the 25% of all other PAGA penalties that the Legislature intended to be distributed to aggrieved employees – which was the precise situation in *Iskanian.*

between this case and *Kindred Nursing* is that defendants in both cases made an FAA preemption argument. The State of California never gave Lawson any authority to enter into an arbitration agreement on its behalf (as this Court explained in *Iskanian*), in contrast to the elderly family members in *Kindred Nursing* who arguably did give such authority to their younger relatives. (See *Kindred Nursing*, 137 S.Ct. at pp. 1428-29 [remanding for factfinding into scope of that authority].) *Kindred Nursing* does not in any way contradict the established principle that an arbitration agreement cannot bind a non-party who has not consented to be bound. (*Waffle House*, 534 U.S. at p. 293; *Iskanian*, 59 Cal.4th at p. 385 [FAA applies to "dispute[s] about the respective rights and obligations of parties in a contractual relationship."]; accord *Mandviwala v. Five Star Quality Care, Inc.* (9th Cir. 2018) 723 Fed.App'x 415, 417, *cert. denied* (June 25, 2018) __S.Ct.__, 2018 WL 1509649 [*Kindred Nursing* does not abrogate *Iskanian* rule].)[14]

C. Any Arbitration Must Proceed on a Representative Basis.

For the foregoing reasons, this Court should affirm the Court of Appeal's decision, thereby allowing Lawson to pursue her entire PAGA claim in court on a representative-action basis, rather than forcing her to split her PAGA cause of action into: 1) a court proceeding encompassing

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[14] The Supreme Court's holding in *Kindred Nursing* is a straightforward application of the rule that the FAA preempts state laws of contract interpretation that "single[] out arbitration agreements for disfavored treatment." (137 S.Ct. at p. 1425.) By contrast, the *Iskanian* rule that a PAGA claim may not be waived under Civil Code Section 3513 is "a generally applicable contract defense." (*McGill*, 2 Cal.5th at p. 962.)

the $50/$100 portion of her Section 558 civil penalties claim and all of her other underlying claims; and 2) an arbitration proceeding encompassing only the "underpaid wages" portion of her Section 558 civil penalties claim.

If the Court were to order a portion of Lawson's PAGA claim to arbitration, however, it should order it to arbitration on a representative-action basis. Not only is there no such thing as an individual-only PAGA action for the reasons stated in Part III.B.2, but even if there were, Lawson pleaded her Section 558 PAGA claim as a representative-action claim, and nothing in the Bank's arbitration agreement prohibits Lawson on behalf of the state from pursuing her claim on that basis in arbitration.

Although the Bank *could have* included language in its February 2014 arbitration agreement prohibiting "representative" actions and *could have* included language permitting "individual" arbitration only, it did neither. The text of its agreement, which must be construed against the Bank as the drafter, Cal. Civil Code, §1654; *Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 248, merely states:

> [C]laims by different claimants . . . 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 [emphases added].)

Lawson did not bring her PAGA claim as a class action (which would have required materially different procedures). (*Arias*, 46 Cal.4th at pp. 980-87.) She did not seek to "combine[]" claims of "different

claimants" in her PAGA action, which she brought as a single plaintiff on behalf of the state as the real party in interest. And she did not ask the arbitrator "to hear [her] arbitration either against or on behalf of a class." The contract restriction simply does not apply.

The Bank has never presented any justification for its position that the language in its arbitration agreement prohibits "representative" actions (which may be one reason the Superior Court ordered the parties to arbitrate the underpaid-wages portion of Lawson's claim on a representative action basis). (AA II:381.) The only possible basis for the Bank's construction is the parenthetical phrase, "(in which a claimant seeks to represent the legal interests of or obtain relief for a larger group)." (AA I:051, 064.) But in context, that parenthetical was clearly meant to be descriptive, not to expand beyond existing boundaries the settled definition of what constitutes a "class action" under state and federal law. There is no indication that the parties mutually intended that brief parenthetical description to prohibit non-class representative actions, particularly *PAGA* representative actions in which the claimant seeks to represent the legal interests and obtain relief for *the state*, which was not a party to the agreement. (Compare *Iskanian*, 59 Cal.4th at p. 360 [agreement included complete prohibition of representative claims in all forums].)

D. If the Court Compels the Unpaid Wages Portion of Plaintiff's Section 558 Civil Penalties Claim to Arbitration, It Should Instruct the Trial Court to Exercise its Discretion Under C.C.P. §1281.2 to Decide the Non-Arbitrable Issues First.

In *Iskanian*, this Court concluded its opinion by instructing the trial court on remand to determine whether to stay the arbitration of plaintiff's

individual Labor Code claims under the California Arbitration Act ("CAA"), California Code of Civil Procedure §1281.2, *if* the parties decided to bifurcate plaintiff's PAGA claims and individual claims. (*Iskanian*, 59 Cal.4th at pp. 391-92.) In the present case, a stay of arbitration would be appropriate under Section 1281.2 if the Court splits Lawson's PAGA claim under Section 558 into arbitrable and non-arbitrable remedial claims, because such a stay would enable Lawson to prosecute the state's claims for $50/$100 penalties under Labor Code §558 *as well as* the state's claims for the civil penalties available under every other Labor Code provision she alleged, which the Bank concedes may be litigated in court on a PAGA representative action basis, see *supra* at p. 9 n.1.

Plaintiff's complaint alleged a single cause of action under PAGA, based on the Bank's violations of her (and other aggrieved employees') rights to minimum wage, to reimbursement of business expenses, to timely wage payments, and to complete and accurate wage statements and payroll records, not just her right to overtime and meal and rest breaks. (AA I:006-19.) Those other PAGA penalty claims have nothing to do with Lawson's Section 558 claims for unpaid overtime premiums and unpaid premiums for meal-and-rest-break violations. Consequently, there is no reason to require any arbitration of a portion of Lawson's Section 558 claim to be completed before she can prosecute those other claims, which comprise the overwhelming majority of her claims.

There is also no need to defer resolution of the $50/$100 portion of plaintiffs' Section 558 claim pending arbitration (if required) of the

remaining underpaid-wages portion. Both elements of relief rest on the identical underlying Labor Code violations. Consequently, it would be inefficient and unjust either: (1) to require both proceedings to go forward at once; or (2) to allow the arbitrator effectively to determine the state's non-waivable right to $50/$100 civil penalties under PAGA (based on the collateral estoppel principles articulated in *Arias*, 46 Cal.4th at p. 978) by deciding in the context of the arbitration the merits of the same Labor Code allegations at issue in both portions of the bifurcated proceedings.

Section 1281.2 gives the courts discretion to stay arbitration when the parties' dispute includes non-arbitrable as well as arbitrable issues. The pertinent subparagraph provides:

> If the court determines that there are other issues between the petitioner and the respondent which are not subject to arbitration and which are the subject of a pending action or special proceeding between the petitioner and the respondent and that a determination of such issues may make the arbitration unnecessary, the court may delay its order to arbitrate until the determination of such other issues or until such earlier time as the court specifies.

(C.C.P. §1281.2.)

The CAA governs arbitration procedure in California state courts unless the parties expressly agree to operate under the FAA's procedural provisions. (See *Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 394; see also *Los Angeles Unified School Dist. v. Safety Nat'l Casualty Corp.* (2017) 13 Cal.App.5th 471, 479.) That is because Sections 3 and 4 of the FAA – its procedural sections – apply only in "courts of the United States" and in "any United States district court," not in state court.

(9 U.S.C. §§3, 4.)

Thus, for example, in *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, this Court examined whether California or federal post-arbitration procedures should apply when the arbitration agreement stated only that "any arbitration" would be "governed by the United States Arbitration Act." (*Id.* at p. 1341 n.12.) The Court concluded that because the post-arbitration procedures of the FAA referred to review by the "United States court" while the parties' contract "did not specify whether [post-arbitration] proceedings were to be brought in state or federal court," the CAA would apply. (*Id.*) Here, as in *Cable Connection*, the Bank's arbitration agreement provides that the FAA governs the arbitration, but it is entirely silent as to whether state or federal procedures apply. Because Lawson and the Bank never agreed to use the FAA's procedural rules, the CAA's procedural rules must apply. (*Cronus*, 35 Cal.4th at p. 383.)[15]

Applying the CAA here, the applicable subparagraph of Section 1281.2 directs the trial court how to proceed when portions of a civil action are compelled to arbitration while other portions remain for court adjudication. (See Opening Br. 23 [conceding that the state is the real party in interest for a portion of the civil penalties claimed in Lawson's PAGA action].) If this Court determines that the underpaid-wages portion of Lawson's PAGA action must be compelled to arbitration, the trial court

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[15] As the Supreme Court has recognized, California's arbitration procedures under the CAA "generally foster the federal policy favoring arbitration," so there is no concern that the CAA's procedural provisions are preempted. (*Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.* (1989) 489 U.S. 468, 476 n.5; see also *Cronus*, 35 Cal.4th at p. 392.)

may – and here, should – "delay its order to arbitrate the arbitrable claims" because that court's resolution of the $50/$100 per pay period portion of plaintiffs' Section 558 claims and other claims under PAGA "might make the arbitration unnecessary" (because if the trier of fact determines that the Bank did *not* violate Lawson's overtime and meal-and-rest-break rights, that determination would be binding on the arbitrator, and the arbitrator would have no obligation to calculate the unpaid-wages portion of Lawson's Section 558 claim based on those same violations. (See *RN Solution, Inc. v. Catholic Healthcare West* (2008) 165 Cal.App.4th 1511, 1521-22.)[16]

The public policies underlying PAGA strongly weigh against staying *any* PAGA representative action, whether in court or in arbitration. If the Court concludes that a portion of the relief sought by Lawson in this case should *not* be treated as a PAGA claim (contrary to *Thurman,* the Court of Appeal in this case, and all of the preceding analysis), it will effectively have characterized that portion of Lawson's PAGA claim as somehow not a PAGA claim. In that unlikely (and conceptually inexplicable) event, the

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[16] The trial court could also be required to defer the arbitration under California Code of Civil Procedure §1281(c) paragraph 4, which applies when there is a pending court action between a party to the arbitration agreement (the Bank) and a third party (here, the state). (*RN Solution, Inc.*, 165 Cal.App.4th at p. 1521.) A stay of arbitration is within the trial court's discretion under that scenario as well, *if* the Court's analysis leads it to conclude that the underpaid-wages portion of the civil penalties under Section 558 is actionable and arbitrable, but is actionable as something *other than* a PAGA claim brought by an aggrieved employee on behalf of the state (even though there is no such claim, for the reasons explained in Part III.B.2).

Legislature's expressly stated goal of increasing workplace enforcement and enhancing worker protections through PAGA would best be served by requiring the indisputably PAGA-covered portion of plaintiffs' claims to be litigated before the disputed portion is arbitrated, since the Court will have concluded, at a minimum, that the State's statutory interests are greater as to the portion of plaintiff's PAGA action that has not been compelled to arbitration.

IV. CONCLUSION

For the foregoing reasons, Lawson should be permitted to pursue her representative PAGA claim for the underpaid wages component of the civil penalties arising under Section 558 in the trial court. In the alternative, the Court should affirm the trial court's order requiring Lawson to arbitrate the underpaid wages component of the civil penalties arising under Section 558 on a PAGA representative action basis.

Dated: July 9, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.520(c), and in reliance upon the word count feature of the software used, I certify that the foregoing Answering Brief of Real Party in Interest Kalethia Lawson, contains 13,123 words, exclusive of those materials not required to be counted under Rule 8.504(d)(3).

Dated: July 9, 2018

Respectfully submitted,

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PROOF OF SERVICE

Case: LAWSON v. ZB, N.A.
Fourth App. Dist., Division One, Nos. D071279 & D071376 (Consolidated)
San Diego County Superior Court; 37-2016-00005578-CU-OE-CTL

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. On July 9, 2018, I served the following document(s):

ANSWERING BRIEF ON BEHALF OF REAL PARTY IN INTEREST KALETHIA LAWSON

on the parties, through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

By First Class Mail: I am readily familiar with the practice of Altshuler Berzon LLP for the collection and processing of correspondence for mailing with the United States Postal Service. I placed the envelope, sealed and with first-class postage fully prepaid, for collection and mailing following our ordinary business practices. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Mail Postal Service in San Francisco, California, for collection and mailing to the office of the addressee on the date shown herein.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this July 9, 2018 at San Francisco, California.

/s/Jean Perley
Jean Perley