Case No. S246711

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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)

PETITIONERS' REPLY BRIEF

RUTAN & TUCKER, LLP
JAMES L. MORRIS (SBN 109674)
jmorris@rutan.com
*BRIAN C. SINCLAIR (SBN 180145)
bsinclair@rutan.com
GERARD M. MOONEY (SBN 222137)
gmooney@rutan.com
611 Anton Boulevard, Suite 1400
Costa Mesa, California 92626-1931
Telephone: 714-641-5100
Facsimile: 714-546-9035

Attorneys for Petitioners
ZB, N.A. and ZIONS BANCORPORATION

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Attorneys for Petitioners
ZB, N.A. and ZIONS BANCORPORATION

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I. INTRODUCTION

Lawson's Answering Brief focuses primarily on the legislative history and public policy underlying Labor Code § 558 and the PAGA (Labor Code §§ 2698 *et seq.*). The public policy and legislative intent of these two statutes are largely irrelevant, because, under settled preemptive ***federal*** law, a State cannot pass laws – and courts cannot adopt rules – invalidating class action waivers in arbitration agreements. (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 351 ["States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."].) This Court in *Iskanian* recognized that the Federal Arbitration Act (the "FAA") limits the Legislature's ability to pass laws invalidating class waivers when an employee seeks individualized, victim-specific relief for herself and other employees. (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 387-88 [*referencing Concepcion*], *cert. denied* (2015) 135 S.Ct. 1155.)[1]

California's public policy in enforcing worker protection statutes does not and cannot override the preemptive scope of the FAA. The United States Supreme Court reinforced this point in *Epic Systems Corp. v. Lewis* (2018) 138 S.Ct. 1612, holding that the strong public policy allowing "concerted activities" under the National Labor Relations Act and collective actions under the federal Fair Labor Standards Act must yield to the FAA's requirement that arbitration agreements be enforced according to their terms: "The policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written." (*Id.* at 1632.) The *Lawson* decision cannot be reconciled with *Epic Systems*.[2]

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[1] As in the Opening Brief, we refer to the *Iskanian* court's limitation as the "*Iskanian* exception."

[2] *Epic Systems* was decided on May 25, 2018, but Lawson did not mention the case in her Answering Brief filed July 9, 2018.

The practical effect of the *Lawson* decision is significant in its reach. The decision would allow employees throughout California to evade their arbitration agreements and instead pursue their own individual wage claims in court under the fiction of a PAGA claim. This outcome is not hypothetical. The "Labor and Workforce Development Agency receives notices for approximately 6,000 [PAGA] cases per year." (Governor's Budget Summary, at p. 136, found at: http://www.ebudget.ca.gov/2016-17/pdf/BudgetSummary/FullBudgetSummary.pdf.) Little doubt exists that this surge in PAGA cases will expand if the *Lawson* decision is not overruled and employees are allowed to pursue their own unpaid wages claims in representative actions under the PAGA despite their arbitration agreements.

The *Iskanian* court recognized the tightrope it must walk by limiting its PAGA holding to "a state law rule barring predispute waiver of an employee's right to bring an action that can only be brought by the state or its representatives, where any resulting judgment is binding on the state and any **monetary penalties largely go to state coffers**." (*Iskanian*, 59 Cal.4th at 388; emphasis added; see also *Esparza v. KS Industries, L.P.* (2017) 13 Cal.App.5th 1228, 1246 ["The rule of nonarbitrability adopted in *Iskanian* is limited to representative claims for civil penalties in which the state has a direct financial interest."].)

Here, Lawson could pursue her unpaid wages claim independently of the State, and ***none*** of the unpaid wages recovery would go to the State. Hence, regardless how the Legislature characterizes wages recovered under Labor Code § 558(a), Lawson's individual wages claim falls squarely within the *Iskanian* exception for claims seeking recovery to the employee rather than the State, as well as the preemptive effect of the FAA. To hold otherwise and affirm the *Lawson* decision would result in adoption of a state law rule that frustrates the FAA's "principal purpose of ensuring that private

arbitration agreements are enforced according to their terms." (*Volt Info. Sciences, Inc. v. Board of Trustees* (1989) 489 U.S. 468, 478.)

II. LEGAL ARGUMENT

A. Lawson's reliance on legislative history and public policy is misplaced, as the United States Supreme Court reinforced in *Epic Systems*.

Lawson's focus on the legislative history and public policy underlying the PAGA is irrelevant to the issue before this Court – whether the FAA requires an employee to individually arbitrate claims seeking individualized lost wages under Labor Code § 558 when the employee entered into an arbitration agreement requiring individual arbitration. Focusing on state legislative history and public policy, and "parsing the language in the California statutes[,] does not determine the scope of the federal statute, which ultimately is the legislation that controls whether a particular claim by Employee is subject to arbitration." (*Esparza*, 13 Cal.App.5th at 1245-46.)

The *Epic Systems* decision recently reiterated that legislative history and public policy are irrelevant to determining whether the FAA applies. The primary statutes at issue in *Epic Systems* were the National Labor Relations Act ("NLRA") (protecting employees' "concerted activities") and the federal Fair Labor Standards Act ("FLSA") (permitting employees' federal wage claims on a collective basis). The minority argued that the legislative history and public policy underlying the NLRA and FLSA justified an exception to enforcement of predispute arbitration agreements that included class waivers. The majority rejected this argument, explaining that "legislative history is not the law," and courts should not consider it when determining whether the FAA applies. (*Epic Systems*, 138 S.Ct. at 1631.)

Epic Systems reinforces a long line of cases requiring the "enforcement of arbitration agreements according to their terms," regardless

of legislative history or public policy. (*Concepcion*, 563 U.S. at 344.) Significantly, in rejecting public policy arguments similar to Lawson's, *Concepcion* held that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." (*Id.*) Hence, this Court's duty is not to decide the legislative history of Labor Code § 558 or the PAGA, or whether an arbitration agreement contravenes California's public policy, but rather whether "state law is consistent with the Federal Arbitration Act." (*DIRECTV, Inc. v. Imburgia* (2015) 136 S.Ct. 463, 468.)

Moreover, even if this Court were to consider legislative history or public policy, the PAGA evinces no intention to preclude an employee's voluntary choice to arbitrate wage claims on an individual basis. (See *Epic Systems*, 138 S.Ct. at 1631-32 ["it's the Arbitration Act that speaks directly to the enforceability of arbitration agreements, while the NLRA doesn't mention arbitration at all"].) For this reason, the *Lawson* decision adopts a judicially created rule that is at odds with California and federal law. (*See, e.g., Perry v. Thomas* (1987) 482 U.S. 483, 489 [FAA is "a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary"]; *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195 ["State law, like the FAA, reflects a strong policy favoring arbitration agreements . . . ."].)

Lawson's attempt to recover her individual wages under PAGA cannot survive applicable United States Supreme Court precedent, including *Epic Systems* and *Concepcion*. Significantly, in *Concepcion*, which overruled California's judicially-created rule prohibiting predispute arbitration agreements with class waivers, the Supreme Court emphasized that "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration – its informality – and makes the process slower, more costly, and more likely to generate procedural morass than final

judgment." (*Concepcion*, 563 U.S. at 348.) Similarly, the rule adopted by the *Lawson* court – which converts bilateral arbitration of Lawson's individual wage claim to a representative action in court – makes the litigation of her individual wage claims "slower, more costly, and more likely to generate procedural morass than final judgment." (*Id.*) Therefore, the *Lawson* decision must be overruled.

B. The *Lawson* decision contravenes the Federal Arbitration Act and United States Supreme Court precedent.

Lawson argues in her Answering Brief that nothing in "the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. ('FAA'), supports the Bank's efforts to rewrite California's workplace protection statutes." (Brief, at 11.) This argument fails for two reasons.

First, California Bank & Trust ("CB&T")[3] is not seeking to rewrite any of California's workplace protection statutes. As explained above, nothing in the PAGA speaks to whether individual employees who bring PAGA claims can avoid arbitration altogether when they have signed predispute arbitration agreements. In fact, any such rule would contravene the FAA, since it would single out arbitration agreements for discriminatory treatment. (*Kindred Nursing Centers Limited Partnership v. Clark* (2017) 137 S.Ct. 1421, 1426 [FAA "preempts any state rule discriminating on its face against arbitration – for example, a 'law prohibit[ing] outright the arbitration of a particular type of claim'"]; quoting *Concepcion*, 563 U.S. at 341.)

Second, the FAA does in fact support CB&T's efforts to compel arbitration of Lawson's claim to recover her individual wages, even if the FAA clashes with California's workplace protection statutes. (*Epic Systems*,

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[3] As explained in the Opening Brief, Lawson worked for CB&T, which is now a division of petitioner ZB, N.A. (AA I:07, 040.)

138 S.Ct. at 1632; *see also, Marmet Health Care Ctr., Inc. v. Brown* (2012) 565 U.S. 530, 530-31 [vacating Virginia Supreme Court's refusal to enforce arbitration agreements on grounds of state public policy concerns, and noting that "State and federal courts must enforce the [FAA], with respect to all arbitration agreements covered by that statute"].)

Here, no principled distinction exists between the facts in *Epic Systems* and the facts in this case. In *Epic Systems*, the plaintiff-employees argued that the class waivers in their arbitration agreements violated the NLRA. (*Epic Systems*, 138 S.Ct. at 1619-20.) Specifically, the employees argued that the FAA conflicted with the NLRA's statutory provisions allowing employees "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection." (*Id.* at 1624, quoting 29 U.S.C. § 157.) Therefore, the employees contended they should be permitted to proceed in court on a class and collective basis, despite having entered into predispute arbitration agreements with class waivers. (*Id.* at 1620.)

The dissent agreed, arguing that the NLRA bestowed upon employees the right to join lawsuits to enforce workplace rights. (*Epic Systems*, 138 S.Ct. at 1636-38.) According to the dissent, the public policy underlying the NLRA trumped the FAA. The majority rejected this reasoning, concluding that despite the NLRA's strong public policy allowing employees to act collectively, and Section 16(b) of the FLSA allowing "similarly situated" employees to join together in collective actions, the FAA's plain text required enforcing the arbitration agreement, including the class waiver provision: "The policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written." (*Id.* at 1632.)

The PAGA statute at issue in this case – particularly as applied to Lawson's claim to recover individualized lost wages paid 100% to employees – is indistinguishable from the NLRA and FLSA provisions

allowing employees the right to join collectively. Section 2699(a) provides, in pertinent part:

> any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency . . . . 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*** . . . .

(LABOR CODE § 2699(a); emphasis added.)

By its plain text, an aggrieved employee – not the LWDA or the State of California – brings a civil action on ***behalf of himself or herself*** and "other current or former employees." (LABOR CODE § 2699(a), emphasis added.) The aggrieved employee's right to bring an action for her own and other employees' benefit is even more pronounced when the PAGA claim seeks to recover unpaid wages under Labor Code § 558(a)(3), which provides that 100% of the "[w]ages recovered pursuant to this section shall be paid to the affected employee." (LABOR CODE § 558(a)(3).)

Significantly, the collective action procedures of the FLSA, which the employees in *Epic Systems* sought to utilize, are nearly indistinguishable from those in the PAGA:

> An action to recover the liability prescribed in the preceding sentences may be maintained against any employer . . . **by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.**

(29 U.S.C. § 216, emphasis added.) The United States Supreme Court "held decades ago that an identical collective action scheme (in fact, one borrowed from the FLSA) does *not* displace the Arbitration Act or prohibit individualized arbitration proceedings." (*Epic Systems*, 138 S.Ct. at 1626.)

The *Lawson* decision cannot be reconciled with the holding in *Epic Systems*. Here, Lawson brought a civil action to recover unpaid wages under

Labor Code § 558, both on her own behalf and on behalf of all other non-exempt employees in California. (AA I:009, 014 at ¶¶ 13, 49.) Lawson is, however, subject to an arbitration agreement that includes a waiver of class and representative claims. (AA I:051, 053, 064, 066.) Similarly, in *Epic Systems,* the employee-plaintiffs brought claims to recover unpaid wages despite being subject to class waiver provisions. Both the *Lawson* decision and the dissent's opinion in *Epic Systems* sought to invalidate the class waiver provisions in the arbitration agreements on grounds of "public policy" and legislative history. (*See Lawson v. ZB, N.A.* (2017) 18 Cal.App.5th 705, 720; *Epic Systems*, 138 S.Ct. at 1635-42 and n.9.) As the United States Supreme Court explained:

> The parties before us contracted for arbitration. They proceeded to specify the rules that would govern their arbitrations, indicating their intention to use individualized rather than class or collective action procedures. And this much the Arbitration Act seems to protect pretty absolutely.

(*Epic Systems*, 138 S.Ct. at 1621, *citing Concepcion*, 563 U.S. 333, *Am. Express Co. v. Italian Colors Rest.* (2013) 570 U.S. 228, and *DIRECTV, Inc. v. Imburgia* (2015) 577 U.S. ___, 136 S.Ct. 463.)

Putting aside whether the *Iskanian* decision itself was abrogated by the *Epic Systems* holding, the *Lawson* decision cannot stand. The *Iskanian* court recognized this much when it adopted the *Iskanian* exception:

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

(*Iskanian*, 59 Cal.4th at pp. 387-88; emphasis added.)

The *Iskanian* exception – which recognizes that a private party cannot seek individualized relief on a representative basis in the face of a class waiver – has been adopted by the only other courts to consider the issue. (*See Esparza v. KS Indus., L.P.* (2017) 13 Cal.App.5th 1228, 1246 ["The rule of nonarbitrability adopted in *Iskanian* is limited to representative claims for civil penalties in which the state has a direct financial interest."]; *Mandviwala v. Five Star Quality Care, Inc.* (9th Cir., Feb. 2, 2018) 723 Fed.App'x 415, 417-18, *cert. denied* (June 25, 2018) 2018 U.S. LEXIS 3910; *Cabrera v. CVS Rx Services* (N.D. Cal., March 16, 2018) 2018 U.S. Dist. LEXIS 43681, at *14-15.) The *Esparza* decision is "more consistent with *Iskanian* and reduces the likelihood that *Iskanian* will create FAA preemption issues." (*Mandviwala*, 723 Fed.App'x, at 417-18.)

Accordingly, to avoid FAA preemption, this Court should reverse the *Lawson* decision and adopt the reasoning of *Esparza*.

C. The *Lawson* decision discriminates against arbitration agreements in contravention of the FAA.

The *Lawson* decision also contravenes United States Supreme Court precedent because it discriminates against arbitration agreements. (*Kindred Nursing*, 137 S.Ct. at 1426.) Contrary to Lawson's arguments, the *Kindred Nursing* decision is directly on point. Both *Lawson* and *Kindred Nursing* involve a situation in which third parties were designated as agents of others (in *Lawson*, Plaintiff is acting as an agent of the State of California, and in *Kindred Nursing*, a third party was designated as agent to act on behalf of a nursing home resident). In both *Lawson* and *Kindred Nursing*, the state courts invalidated arbitration agreements, holding that the agents did not have specific authority to bind those who granted them broad authority to act on their behalves. (*Lawson*, 18 Cal.App.5th at 725; *Kindred Nursing*, 137 S.Ct. at 1425-26.)

The *Kindred Nursing* decision overruled the Kentucky Supreme Court, explaining that the FAA "preempts any state rule discriminating on its face against arbitration" and also "displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." (*Kindred Nursing*, 137 S.Ct. at 1426.) The *Lawson* rule disfavors, and discriminates against, predispute arbitration agreements.

Specifically, the *Lawson* rule prohibits an employee from entering into a predispute arbitration agreement waiving a representative PAGA claim seeking to recover individualized lost wages, but not other agreements waiving PAGA claims. (*See, e.g., Villacres v. ABM Industries Inc.* (2010) 189 Cal.App.4th 562, 587-91 [holding that employee may release PAGA claims, even though the State of California did not consent and no money was allocated to PAGA penalties]; citing *Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576, 589 [allowing employee to settle wage action in which the parties "allocate[d] $0 to any Private Attorneys General Act penalty claim"].) In other words, although California law grants employees the right to waive PAGA claims in their entirety, the *Lawson* decision prohibits employees from entering into much more narrow predispute arbitration agreements that require employees to pursue their own unpaid wages claims under PAGA on an individual basis. This ruling disfavors and discriminates against arbitration agreements and, therefore, is preempted by the FAA. (*Kindred Nursing*, 137 S.Ct. at 1423.)

D. The State's purported financial interest in Lawson's and other employees' unpaid wages claims does not convert the relief to public relief.

Lawson argues that the *Iskanian* exception does not apply because some employees might not be located, giving the State a "contingent

financial interest" in the recovery of the unpaid wages. (Brief at 29-30.) This argument lacks merit for two reasons.

First, the *Iskanian* rule applies only when the "monetary penalties largely go to state coffers." (*Iskanian*, 59 Cal.4th at 388; see also, *Esparza*, 13 Cal.App.5th at 1246 ["The rule of nonarbitrability adopted in *Iskanian* is limited to representative claims for civil penalties in which the state has a direct financial interest."]; *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1084 [explaining that claims are subject to individual arbitration if the relief sought is "primarily for the benefit of a party to the arbitration, even if the action incidentally vindicates important public interests"].) Hence, some indirect, contingent state financial interest is insufficient to circumvent the FAA.

Second, CB&T has moved to compel Lawson to arbitrate *her individual claim to recover unpaid wages*. There is no evidence that Lawson is missing and, therefore, it is indisputable the State of California has no financial interest in her individual claim for unpaid wages. Moreover, arbitration of individual wage disputes under Labor Code § 558 could proceed only if an employee (perforce, identifiable and not missing) brings her own claim, and 100% of the recovery would necessarily go to the employee, not the State of California. Therefore, the State has no contingent financial interest here. This argument is a red herring.

E. Lawson incorrectly argues she could have brought her unpaid wages claim only under PAGA.

Throughout her Answering Brief, Lawson argues she could have brought her Labor Code § 558 claim seeking unpaid wages only under the PAGA, because Section 558 does not provide for a private right of action. (Brief at 11.) This argument is illusory.

Lawson indisputably could have pursued her individual wage claims under various Labor Code provisions. Lawson chose not to, because she has

an enforceable arbitration agreement that requires her to arbitrate her wage claims on an individual basis. Instead, Lawson is attempting to circumvent her agreement by asserting her *individual* unpaid wages claim under the PAGA. Hence, Lawson should not be heard to complain that Section 558 provides no private right of action, when she always had the right to pursue such claims independently of Section 558 but chose not to do so.

F. Compelling Lawson to arbitrate her underpaid wages claim under Labor Code § 558 does not restrict her from pursuing non-waivable PAGA claims.

Lawson argues in her Answering Brief that *Iskanian* and *McGill* prohibit the compelled forfeiture of any portion of Lawson's PAGA claim. (Brief at 36-55.) This argument misinterprets the law and the facts.

1. *Iskanian* does not prohibit compelled arbitration of unpaid wages claims under the PAGA.

Lawson argues that *Iskanian* prohibits the compelled arbitration of any PAGA dispute. This argument stretches the holding of *Iskanian* not only beyond its acceptable bounds, but also beyond the acceptable bounds of the FAA. In *Iskanian*, the employee was "seeking to recover civil penalties, 75 percent of which will go to the state's coffers." (*Iskanian*, 59 Cal.4th at 387.) Based on these facts, the *Iskanian* court found that a predispute arbitration agreement waiving the right to seek "monetary penalties [that] largely go to state coffers" was unenforceable. (*Id.* at 387-388.)

But, "*Iskanian's* prohibition on representative action waivers applies only to a representative action under PAGA seeking recovery of civil penalties ('an action that can only be brought by the state or its representatives') **where the state is the real party in interest**." (*Tanguilig v. Bloomingdale's, Inc.* (2016) 5 Cal.App.5th 665, 676 n.4, *cert. denied* (Oct. 16, 2017) 138 S.Ct. 356 [emphasis added]; *Esparza*, 13 Cal.App.5th at 1246

["The rule of nonarbitrability adopted in *Iskanian* is limited to representative claims for civil penalties in which the state has a direct financial interest."].)

More importantly, unlike the facts in *Iskanian*, CB&T has not deprived Lawson of the option to bring a PAGA claim altogether. Rather, Lawson would have the right to continue to pursue in the Superior Court her representative PAGA action seeking traditional civil penalties ($50/$100 per pay period) on behalf of the State of California, and her unpaid wages claim on an individual basis in arbitration. Hence, what CB&T requests here falls squarely within the holding of *Iskanian*, since Lawson is not waiving any right she may have to recover the civil penalties that "largely go to state coffers," or any right she has to seek her individual, victim-specific wages. (*Iskanian*, 59 Cal.4th at 388.)

2. *McGill* supports CB&T's argument that Lawson's individual wage claims should be compelled to arbitration under the FAA.

Like *Iskanian*, the *McGill* case relied upon by Lawson also supports compelling arbitration of Lawson's claim for underpaid wages. (*McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945.) Lawson asserts that *McGill* prohibits compelling arbitration of her unpaid wages claim because it would result in her forfeiting this portion of her claim. This argument lacks merit.

In *McGill*, this Court addressed the enforceability under California law of a provision in a predispute arbitration agreement that waived the plaintiff's right to pursue ***in any forum*** injunctive relief on behalf of the general public under the Consumer Legal Remedies Act (CLRA), the unfair competition law (UCL), and false advertising laws. (*McGill*, 2 Cal.5th at 953.) The *McGill* court concluded that because public injunctive relief primarily benefits the public, an arbitration agreement waiving a party's right to pursue such claims in any forum is unenforceable. (*Id.* at 963.)

Here, in contrast to *McGill*, the Arbitration Agreement entered into by Lawson does not mandate that she waive any right to recover unpaid wages or any other substantive rights or remedies, all of which may be pursued in arbitration. (AA I:050-53, 063-66.) Hence, *McGill's* prohibition on arbitration agreements that forfeit parties' rights to bring claims in any forum is inapplicable to Lawson's individual unpaid wages claim. Also in contrast to *McGill*, in this case, CB&T is not seeking to require Lawson to forfeit any claims, but instead is simply asking that she honor her arbitration agreement, which requires her to arbitrate her individual unpaid wages claim with CB&T:

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

(*Esparza*, 13 Cal.App.5th at 1246, emphasis added.)

Moreover, unlike in *McGill*, Lawson has always maintained the right to bring her individual wage claims under other provisions of the Labor Code, including Labor Code § 226.7 (meal periods and rest breaks) and §§ 510 and 1198 (overtime). Lawson chose to forego her rights under these

statutes to try to avoid arbitrating her claims with CB&T, as the FAA required her to do. Hence, her strategic effort to evade arbitrating her *individual, victim-specific* unpaid wages claim under Labor Code § 558(a) is quite different from the *McGill* fact pattern, in which the plaintiff's agreement waived her right to seek certain relief.

To hold otherwise would not only elevate form over substance, but also circumvent the FAA:

> In *Iskanian*, our Supreme Court clearly expressed the need to avoid semantics and analyze substance in determining the scope of representative claims that could be pursued outside arbitration without violating the Federal Arbitration Act. (See *Iskanian*, supra, 59 Cal.4th at p. 388) . . . .
>
> Employee's attempt to recover unpaid wages under Labor Code section 558 is, for purposes of the Federal Arbitration Act, a private dispute arising out of his employment contract with KS Industries.

(*Esparza*, 13 Cal.App.5th at 1245-46.)

Although *McGill's* arbitration-forfeiture discussion does not support Lawson's argument, it helps explain why the *Lawson* decision must be overruled. Specifically, in *McGill*, this Court concluded that because public injunctive relief primarily benefits the public, an arbitration agreement waiving a party's right to pursue such claims is unenforceable. (*McGill*, 2 Cal.5th at 963.) In its discussion, however, this Court made an important distinction between relief sought on behalf of the general public and relief sought on behalf of other individuals:

> Relief that has the primary purpose or effect of redressing or preventing injury to an individual plaintiff – or to a group of individuals similarly situated to the plaintiff – does not constitute public injunctive relief.

(*Id.* at 955.)

The *McGill* court's discussion of the public-private dichotomy built upon two prior California Supreme Court decisions, *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, and *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303,[4] both of which distinguished between relief sought on behalf of the public (and thus not subject to arbitration), and relief sought primarily for the benefit of individual claimants (and thus arbitrable).

In *Broughton*, this Court recognized an exception to the FAA's general rule requiring arbitration of disputes between parties when a plaintiff seeks public injunctive relief under the CLRA. (*Broughton*, 21 Cal.4th at 1082.) As the *McGill* court explained, the *Broughton* exception derived from the fact that injunctive relief is "for the benefit of the general public rather than the party bringing the action." (*Ibid.*) The *Broughton* court explained, however, that the portion of the CLRA claim seeking to recover damages payable to the plaintiff, not the general public, would be arbitrable under the FAA because it was "primarily for the benefit of a party to the arbitration, even if the action incidentally vindicates important public interests." (*Id.* at 1084.) In other words, this Court distinguished between injunctive relief sought under the CLRA, which was non-arbitrable because it primarily benefited the public, and damages sought under the CLRA, which was arbitrable because such relief was "primarily for the benefit" of the plaintiffs, even if there were incidental benefits to the public. The same is true under

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[4] After *Concepcion*, some courts have questioned the continued validity of the *Broughton* and *Cruz* cases. (See, e.g., *Nelsen v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th 1115, 1135-36 [holding that *Concepcion* abrogates the *Broughton-Cruz* rule].) Despite discussing the *Broughton-Cruz* rule in detail in *McGill*, this Court concluded that it "need not consider the rule's vitality in light of the high court's post-*Cruz* FAA decisions." (*McGill*, 2 Cal.5th at 956.) Regardless of how the Court would rule on this issue, the public-private dichotomy discussed in the *McGill*, *Broughton*, and *Cruz* cases is important to the issue currently before the Court.

the *Iskanian* exception: Although the relief seeking penalties paid primarily to the State of California is non-arbitrable, the relief seeking unpaid wages payable 100% to employees is arbitrable on an individual basis under the parties' Arbitration Agreement and the FAA.

The *Cruz* court followed the public-private distinction articulated in *Broughton*, holding that consumer claims seeking injunctive relief under the UCL were not subject to arbitration because such relief "is designed to prevent further harm to the public at large rather than to redress or prevent injury to a plaintiff." (*Cruz*, 30 Cal.4th at 316.) Although recognizing that claims for restitution and disgorgement under the UCL have a "public benefit," the *Cruz* court ruled that such claims are "fully arbitrable under the FAA" because the public benefit is "incidental to the private benefits obtained from those bringing the restitutionary or damages action." (*Ibid.*)

The reasoning in *Broughton*, *Cruz*, and *McGill* applies equally to PAGA actions, as recognized by the *Iskanian* decision, in which this Court explained that an employee pursuing "victim-specific relief" cannot do so on behalf of others if he is subject to an arbitration agreement containing a class-action waiver. (*Iskanian*, 59 Cal.4th at 387-88.) Significantly, in *Iskanian* the plaintiff was "seeking to recover civil penalties, 75 percent of which will go to the state's coffers," which made the action "'fundamentally a law enforcement action designed to protect the public and not to benefit private parties . . . .'" (*Id.* at 387 [quoting *Arias v. Superior Court* (2009) 46 Cal.4th 969, 986].) In fact, the *Iskanian* court described the dispute as a "case involv[ing] an employee bound by an arbitration agreement bringing suit on behalf of the government to obtain remedies **other than victim-specific relief, i.e., civil penalties paid largely into the state treasury**." (*Id.* at 386, emphasis added.)

The *Iskanian* court appears to have adopted the *Iskanian* exception to distinguish between relief sought on behalf of the State of California and

victim-specific relief sought for individual employees. (*Id.* at 387.) This exception is the same one the *McGill, Broughton*, and *Cruz* courts recognized when the public benefit is only "incidental to the private benefits," and in such cases, class action waiver provisions are enforceable.

Lawson alleges in her Complaint that she is seeking "unpaid wages and premium wages per California Labor Code section 558." (AA I:014 at ¶ 49.) These wages constitute victim-specific relief that is 100% payable to Lawson and other "affected employees." (LABOR CODE § 558(a)(3).) The State of California has no interest in this recovery. Hence, this claim constitutes nothing more than a private dispute between CB&T and Lawson – a dispute Lawson agreed to arbitrate on an individual basis. Therefore, the FAA controls and requires Lawson to submit her claims for victim-specific unpaid wages to individual arbitration.

Lawson nonetheless argues that her individual wage claim is on behalf of the public because "[t]he Legislature unquestionably enacted PAGA for a public purpose . . . ." (Brief at 47.) The question, however, is not whether the PAGA was enacted for a public purpose or serves a public interest, but whether the relief sought "has the primary purpose or effect of redressing . . . injury to an individual plaintiff – or to a group of individuals similarly situated to the plaintiff," which does not constitute public relief. (*McGill*, 2 Cal.5th at 955.) Here, the Court need look no further than Lawson's own Complaint, in which she seeks unpaid wages as redress on behalf of herself and all other non-exempt employees in the State of California. (AA I:009, 014 at ¶¶ 13, 49.)

Hence, *McGill* supports CB&T's demand to compel Lawson to arbitrate her unpaid wages claim on an individual basis.

G. The *Waffle House* case is not applicable.

Lawson argues that her lawsuit to recover her own unpaid wages under the PAGA is no different from *EEOC v. Waffle House, Inc.* (2002) 534

U.S. 279. The difference is obvious. In EEOC suits such as *Waffle House*, "the EEOC brings and controls the litigation, whereas, in PAGA claims, the employee is the named plaintiff and controls the litigation." (*Langston v. 20/20 Cos.* (C.D. Cal. Oct. 17, 2014) 2014 U.S. Dist. LEXIS 151477, *19.) Here, no state agency has filed a lawsuit and, in fact, the agency elected *not* to pursue legal action against CB&T. (LABOR CODE § 2699.3(a)(2)(B) [providing that LWDA may investigate and issue citations for civil penalties].)

Hence, Lawson's pursuit of a lawsuit to recover her own individual wages, and the wages of other employees also subject to arbitration agreements, bears no equivalence to an EEOC (or a California state agency) directly-initiated lawsuit against an employer.

H. Arbitration of Lawson's unpaid wages claim must proceed on an individual basis, not a representative basis.

Recognizing that FAA preemption may require her to arbitrate the unpaid wages claim, Lawson argues that such arbitration must proceed on a representative basis, not an individual basis. Lawson reasons that the arbitration should proceed on a representative basis because the Arbitration Agreement does not prohibit "representative" actions or permit only "individual" arbitrations. (Brief at 56.) This argument ignores the plain language of the Arbitration Agreement, as well as applicable law.

1. The plain language of the parties' arbitration agreement requires individual arbitration.

The Arbitration Agreement permits arbitration only on an individual basis. Specifically, the Arbitration Agreement precludes an employee from seeking "to represent the legal interests of or obtain relief for a larger group":

> A single arbitration may proceed **between an employee, former employee or applicant and the Company** to resolve as many claims **as they may have against each other. Claims 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 [emphasis added].)

Further expressing the parties' intent to arbitrate any disputes only on an individual basis, the Arbitration Agreement states:

> I agree that the arbitrator shall not consolidate claims of different employees or have power to hear arbitration as a class action.

(AA I:053, 066.)

This language clearly expresses the parties' intent to proceed on an individual basis, not on a representative basis, even if it does not expressly refer to representative actions. (See *Tanguilig*, 5 Cal.App.5th at 672 n.2 [reasoning that arbitration agreement barring "collective arbitration reasonably could be construed" as barring arbitration of PAGA actions][*citing Concepcion*, 563 U.S. at 336-38].) There is no reasonable interpretation of these provisions other than that Lawson agreed any arbitration would be limited to her own claims against CB&T, not the claims of other employees. The Arbitration Agreement not only prohibits the parties from arbitrating the claims on behalf of "different claimants," but also precludes the arbitrator from hearing claims involving other employees' claims. (AA I:051, 053, 064, 066.)

Lawson indisputably attempts to pursue claims of "different claimants" and to "represent the legal interests of or obtain relief for a larger group." Lawson's Complaint expressly states that she is seeking unpaid wages on behalf of all current and former non-exempt employees in the State

of California. (AA I:009-15 at ¶¶ 9-49 [seeking relief on behalf of other allegedly "aggrieved employees" in California].) As explained below, there is simply no legitimate argument under federal or California law that the language of the Arbitration Agreement allows the arbitration to proceed on a representative basis.

2. California and federal law require arbitration on an individual basis only.

Never before has a California appellate court held that an employer can be forced to arbitrate PAGA claims on a representative basis when the arbitration agreement prohibits arbitrating claims other than on an individual basis. Such a finding contravenes black letter federal and California law, both of which provide that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." (*United Steelworkers of America v. Warrior & Gulf Navigation Co.* (1960) 363 U.S. 574, 582; *Ajida Technologies, Inc. v. Roos Instruments, Inc.* (2001) 87 Cal.App.4th 534, 541 ["a party cannot be compelled to arbitrate without its consent"].) Ordering arbitration of PAGA claims on a representative basis when the arbitration agreement requires arbitration on an individual basis would be a dramatic departure from existing law. (See, e.g., *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* (2010) 559 U.S. 662, 684 [holding that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so"].)

Lawson asserts that because the Arbitration Agreement does not use the word "representative," the parties somehow agreed that arbitration could proceed on a representative basis. Even if the Arbitration Agreement does not explicitly refer to representative actions, its class waiver provisions necessarily include representative claims. (*See Tanguilig*, 5 Cal.App.5th at 672 n.2 [reasoning that arbitration agreement barring "collective arbitration

reasonably could be construed" as barring arbitration of PAGA actions][*citing Concepcion*, 563 U.S. at 336-38].) More importantly, *Stolt-Nielsen* clearly held that a court cannot compel arbitration of claims on a classwide basis when the parties have not contracted to submit to class arbitration. (*Stolt-Nielsen*, 559 U.S. at 684; *see also Nelsen*, 207 Cal.App.4th at 1128 ["consent to class arbitration cannot be inferred solely from the agreement to arbitrate, . . . but must be discernible in the contract itself"].)

The same reasoning applies equally to representative claims under PAGA – a court cannot compel arbitration of claims on a representative basis when the parties have not contracted to submit to representative arbitration. (*Chico v. Hilton Worldwide, Inc.* (C.D. Cal. Oct. 7, 2014) 2014 U.S. Dist. LEXIS 147752, at *32 ["Because arbitration of representative PAGA claims would fundamentally change the nature of arbitration, it cannot be presumed that the parties consented to arbitration of representative PAGA claims simply because they agreed to submit their disputes to an arbitrator."][*citing Stolt-Nielsen*, 559 U.S. at 685].)

Here, the Arbitration Agreement is not silent on the issue of whether Lawson can seek relief on behalf of others on a representative basis. Instead, the agreement explicitly precludes her from doing so. (AA I:051, 053, 064, 066.) Therefore, the language of the Arbitration Agreement unambiguously conveys that CB&T did not consent to arbitration on a representative basis. (*See, e.g., Concepcion*, 563 U.S. at 344 [explaining that "[r]equiring the availability of classwide arbitration" in the face of an express waiver "interferes" with the FAA's "principal purpose," which is to "'ensure that private arbitration agreements are enforced according to their terms'"], quoting *Volt Info.*, 489 U.S. at 478.)

Therefore, if this Court agrees with CB&T that Lawson must arbitrate her claim for unpaid wages, the Arbitration Agreement requires that the arbitration proceed on an individual basis.

I. Both the FAA and the California Arbitration Act require the action to be stayed pending the arbitration.

Lawson asserts that if this Court concludes her individual wage claims under Labor Code § 558(a)(3) must be arbitrated, the Court should order the trial court to lift the stay of the remainder of the action under Code of Civil Procedure § 1281.2. This argument lacks merit for at least four reasons.

1. The FAA requires the action to be stayed pending the arbitration.

Code of Civil Procedure § 1281.2 is not applicable to the current action. Rather, Section 3 of the FAA applies. The parties' Arbitration Agreement could not be more clear about adopting the FAA's procedures:

> Because employment with the Company involves interstate commerce, this binding arbitration agreement is made pursuant to, and governed by, the Federal Arbitration Act.

(AA I:051, 064.)

This language requires a stay of the action under the FAA. (*See Rodriguez v. American Technologies, Inc.* (2006) 136 Cal.App.4th 1110, 1121-1123 [holding that arbitration agreement entered into "pursuant to the FAA" meant the parties "adopted the FAA – all of it – to govern their arbitration"]; *Aviation Data, Inc. v. American Express Travel Related Services Co., Inc.* (2007) 152 Cal.App.4th 1522, 1534 [holding that arbitration provision providing that it "*shall be governed by the Federal Arbitration Act*" required application of the FAA's procedural rules].)

Moreover, in this action, as in *Rodriguez*, "[t]here is *no* other contract provision suggesting the parties intended to incorporate California arbitration law, nor is there any language suggesting the parties intended to arbitrate 'in conformance to' some provisions of the FAA." (*Rodriguez*, 136 Cal.App.4th at 1122.) Rather, the Arbitration Agreement is clear that the parties intended the FAA, including its procedural provisions, to govern their disputes.

Because the "phrase 'pursuant to the FAA' is broad and unconditional," a California court must defer to the FAA's stay provisions, not to Code of Civil Procedure § 1281.2. (*Id.* at pp. 1121-1123.)

The cases upon which Lawson relies to argue otherwise are readily distinguishable. First, in *Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, the arbitration agreement called for the application of the FAA "if it would be applicable," and further stated that it would "be construed and enforced in accordance with and governed by the laws of the State of California . . . ." (*Id.* at 387, 394.) In light of these two provisions, the *Cronus* court held that the FAA does not preempt the application of section 1281.2(c). (*Id.* at 380.)

Second, in *Los Angeles Unified School Dist. v. Safety National Casualty Corp.* (2017) 13 Cal.App.5th 471, the agreement at issue was "completely silent" whether the FAA applied, "with no terms mentioning or alluding to the FAA, California law, or any other state law or rules of procedure." (*Id.* at 479.) Third, in *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, "both parties proceeded on the theory that the CAA was controlling." (*Id.* at 1350 n.12.) The court rejected respondents' attempt to apply the FAA on appeal, explaining that "[a] party is not permitted to change his position and adopt a new and different theory on appeal." (*Ibid.*) The arbitration provision at issue in *Cable Connection* also was much more narrow, providing only that "the arbitration" would be conducted pursuant to the FAA. The *Cable Connection* court concluded that this narrow provision "calls only for the arbitration itself to be governed by the federal statute, not postarbitration proceedings in court." (*Id.*) Unlike the narrow provision in *Cable Connection*, the FAA choice-of-law provision in the Arbitration Agreement is very broad. (AA I:051, 064.)

Plainly, the broad "pursuant to" and "governed by" language in the Arbitration Agreement between Lawson and CB&T requires the Court to

apply Section 3 of the FAA. (See *Rodriguez*, 136 Cal.App.4th at 1122 [explaining that "the phrase 'pursuant to' means 'in conformance to or agreement with' and 'according to'; *quoting* Webster's 3d NEW INTERNAT. DICT. (2002) p. 1848; see also Merriam-Webster.com, MERRIAM-WEBSTER, N.D. WEB. 17 July 2018 [defining the phrase "governed" to mean "to serve as a precedent or deciding principle for"]; BLACK'S LAW DICTIONARY (10th ed. 2014) [defining the term "govern" to mean "to control a point in issue"].)

2. Lawson's argument was not advanced below and, therefore, has been waived.

Lawson's argument that this Court should order the trial court to exercise its discretion under Code of Civil Procedure § 1281.2 to decide the non-arbitrable issues before the arbitrable issues has been waived. Specifically, Lawson did not argue in the trial court or appellate court that the trial court should exercise its discretion to decide the non-arbitrable issues first. (See AA I:104-125.) "[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court. . . . Generally, issues raised for the first time on appeal which were not litigated in the trial court are waived." (*Newton v. Clemons* (2003) 110 Cal.App.4th 1, 11 [internal quotations omitted].)

This rule is especially applicable here, because Section 1281.2 requires a trial court to exercise its discretion: "the court may delay its order to arbitrate . . . ." (CODE CIV. PROC. § 1281.2, emphasis added.) This Court is not in a position to determine if the trial court has abused its discretion when the trial court has not yet exercised its discretion. The trial court, not this Court, should decide in the first instance whether the stay should be lifted.

3. Code of Civil Procedure § 1281.2 is inapplicable because there are no issues between Lawson and CB&T that are not subject to arbitration.

Code of Civil Procedure § 1281.2 provides:

> If the court determines that there are other issues between the petitioner [CB&T] and the respondent [Lawson] which are not subject to arbitration and which are the subject of a pending action or special proceeding between the petitioner [CB&T] and the respondent [Lawson] 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.

(CODE CIV. PROC. § 1281.2)

Section 1281.2 is inapplicable because the arbitration would be between CB&T and Lawson, while the PAGA action in court "is a dispute between an employer [CB&T] and the state, ..." (*Iskanian*, 59 Cal.4th at 386-87.) If this Court finds that Lawson is required to arbitrate her unpaid wages claim under Labor Code § 558, it necessarily means that Lawson's unpaid wages claim is a "private dispute" between CB&T and Lawson, not between CB&T and the State. (*Esparza*, 13 Cal.App.5th at 1246.) Therefore, other than the claims that are subject to arbitration, no other claims between Lawson and Defendants "are the subject of a pending action" as required by Section 1281.2. (*Iskanian*, 59 Cal.4th at pp. 386-88.)[5]

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[5] In footnote 16 of her Answering Brief, Lawson argues that the trial court should defer the arbitration under Code of Civil Procedure § 1281(c), which allows a trial court to stay arbitration proceedings if a party to the arbitration is also involved in a pending court action that involves related issues. As discussed above, this issue is not properly before the Court since it was not raised in the trial court in response to CB&T's motion to compel arbitration. (*Newton*, 110 Cal.App.4th at 11.) Therefore, the trial court has not exercised its discretion for this Court to review for abuse of discretion.

4. Even if the FAA stay provisions did not control, California law requires continuing the stay.

Code of Civil Procedure § 1281.4 provides:

> If an application has been made to a court of competent jurisdiction . . . for an order to arbitrate a controversy which is an issue involved in an action or proceeding pending before a court of this State . . . the court in which such action or proceeding is pending **shall . . . stay the action or proceeding until . . . an arbitration is had** in accordance with the order to arbitrate . . . ."

(CODE CIV. PROC. § 1281.4 [emphasis added].)

Section 1281.4 is a **mandatory**, rather than a permissive, statute. (See *Heritage Provider Network, Inc. v. Superior Court* (2008) 158 Cal.App.4th 1146, 1152-53.) As the Second Appellate District explained in staying the litigation of PAGA claims pending arbitration of the plaintiff-employee's related wage claims:

> Because the issues subject to litigation under the PAGA might overlap those that are subject to arbitration of Franco's individual claims, the trial court must order an appropriate stay of trial court proceedings. (Code Civ. Proc., § 1281.4.)

(*Franco v. Arakelian Enterprises, Inc.* (2015) 234 Cal.App.4th 947, 966; *see also Marcus v. Superior Court* (1977) 75 Cal.App.3d 204, 209 ["The clear language of the statute compels the conclusion that any party to a judicial proceeding . . . is entitled to a stay of those proceedings whenever (1) the arbitration of a controversy has been ordered, and (2) that controversy is also an issue involved in the pending judicial action."]

"The purpose of the statutory stay is to protect the jurisdiction of the arbitrator by preserving the status quo until arbitration is resolved." (*Federal Ins. Co. v. Superior Court*, (1998) 60 Cal.App.4th 1370 at 1374-75.) In fact, "ensuring that litigation will be stayed is essential to the enforceability of

arbitration agreements generally." (*MKJA, Inc. v. 123 Fit Franchising, LLC* (2011) 191 Cal.App.4th 643, 661.) "In the absence of a stay, the continuation of the proceedings in the trial court disrupts the arbitration proceedings and can render them ineffective." (*Fed. Ins. Co.*, 60 Cal.App.4th at 1375.)

Here, not continuing the stay would undermine the jurisdiction of the arbitrator to decide the issues. Lawson admits this in her Answering Brief, arguing that a determination by the trial court could result in the arbitration being unnecessary. (Brief at 61-62.) Such result would violate not only Section 1281.4, but also the FAA, which requires courts to "rigorously enforce" arbitration agreements. (*Italian Colors Rest.*, 570 U.S. at 233.)

Therefore, even if the mandatory stay provisions in Section 3 were inapplicable, a stay is nonetheless required by C.C.P. § 1281.4 as well as the Court's duty to "rigorously enforce" arbitration agreements.

III. CONCLUSION

Lawson should be compelled under the FAA to arbitrate her wages claims under Labor Code § 558 on an individual basis. Moreover, under the FAA and California law, the portion of the action remaining in the trial court should be stayed pending the completion of the arbitration.

Respectfully submitted,

Dated: July 30, 2018

RUTAN & TUCKER, LLP

By: Brian C. Sinclair

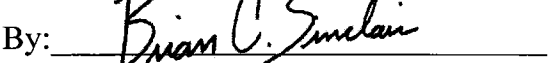
Brian C. Sinclair
Counsel for Petitioners ZB, N.A.
and ZIONS BANCORPORATION

CERTIFICATION OF WORD COUNT UNDER RULE 8.520(c)

The undersigned certifies that according to the word processing program used to prepare this brief, it consists of 8,384 words, exclusive of the matters that may be omitted under Rule 8.520(c) of the California Rules of Court.

Dated: July 30, 2018

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

By: 
Brian C. Sinclair
Counsel for Petitioners ZB, N.A.
and ZIONS BANCORPORATION

PROOF OF SERVICE

KALETHIA LAWSON v. CALIFORNIA BANK & TRUST, et al.
Supreme Court of California Case No. S246711
San Diego Superior Court Case No. 37-2016-00005578-CU-OE-CTL
Court of Appeal Fourth Appellate District, Div. One, Case Nos. D071376 & D071279

STATE OF CALIFORNIA, COUNTY OF ORANGE

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

On July 30, 2018, I served on the interested parties in said action the within:

PETITIONERS' REPLY BRIEF

as stated below:

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

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

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

Executed on July 30, 2018, at Costa Mesa, California.

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

Marie Lee
(Type or print name)

Marie Lee
(Signature)

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Supreme Court of California Case No. S246711
San Diego Superior Court Case No. 37-2016-00005578-CU-OE-CTL
Court of Appeal Fourth Appellate District, Div. One, Case Nos. D071376 & D071279

Edwin Aiwazian
Arby Aiwazian
Joanna Ghosh
LAWYERS *for* JUSTICE, PC
410 West Arden Avenue, Suite 203
Glendale, CA 91203
Tel: (818) 265-1020
Fax: (818) 265-1021
E-mail: edwin@lfjpc.com; arby@lfjpc.com; joanna@lfjpc.com
Counsel for Plaintiff and Real Party in Interest, KALETHIA LAWSON

Michael Rubin
Kristin M. Garcia
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Tel: (415) 421-7151
Fax: (415) 362-8064
Email: mrubin@altber.com; kgarcia@altber.com
Counsel for Plaintiff and Real Party in Interest, KALETHIA LAWSON

Office of the Attorney General
for the State of California
600 West Broadway, Suite 1800
San Diego, CA 92101-3702

Clerk of the Court
Court of Appeal, Fourth District,
Division 1
750 B Street, Suite 300
San Diego, CA 92101

*****Via TrueFiling***

Clerk of the Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

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