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)

PETITIONERS' ANSWER TO *AMICUS CURIAE* BRIEF FILED BY CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF REAL PARTY IN INTEREST

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

CALIFORNIA CASES

Page(s)

CALIFORNIA CASES (CONT.)

CALIFORNIA STATUTES

Page(s)

OTHER AUTHORITIES

I. INTRODUCTION

The three amicus briefs filed in this action, including the amicus brief filed by the California Employment Lawyers Association ("CELA"), focus in large part on whether the "underpaid wages" component of Labor Code § 558 constitutes (i) a "civil penalty" recoverable under PAGA, or (ii) wage restitution to individual employees that is not recoverable in a PAGA action. Petitioners have argued that when a dispute seeking underpaid wages is subject to an arbitration agreement governed by the Federal Arbitration Act ("FAA"), whether the underpaid wages constitute a penalty or damages is a distraction, and that the focus instead should be on whether the recovery – however labeled – will go 100% to Lawson and other employees or primarily (75%) to the State of California. (*See Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 387, *cert. denied* (2015) 135 S.Ct. 1155 ["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"]; *Esparza v. KS Industries, L.P.* (2017) 13 Cal.App.5th 1228, 1245 ["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."].) Given the importance the amicus briefs have placed on whether underpaid wages constitute a civil penalty or wages, ZB explains below that the California Legislature, the California Labor Commissioner, and the Bureau of Field Enforcement all have made clear that the underpaid wages recoverable under Labor Code § 558 are wage restitution to individual employees, not a measure of the civil penalty under Section 558 or a civil penalty recoverable under PAGA.

CELA argues in its amicus brief that California's wage laws should be enforced, that the Legislature wants penalties to create an incentive to encourage compliance and enforcement of the State's wage laws, and

employees (and their counsel) need to enforce these laws to recover penalties since the LWDA is understaffed. CELA fails, however, to explain satisfactorily why underpaid wages sought by an individual employee under Labor Code § 558 should be deemed part of the "civil penalty" recoverable *under PAGA*, why an individual employee needs to be deputized to recover his or her own unpaid wages, or why employees should be able to evade bilateral arbitration agreements governed by the FAA by seeking recovery of their own unpaid wages under PAGA. CELA's argument that Lawson (and other employees) can recover their own unpaid wages under PAGA, despite bilateral arbitration agreements, fails for several reasons, including:

1. CELA misconstrues Labor Code § 558, which provides that underpaid wages are *in addition to* the civil penalties payable to the State of California, not part of the civil penalty. As ZB explains in Section II.A, below, the California Legislature has made clear that the underpaid wages under Labor Code § 558 are wages, ***not*** part of the civil penalty recovery. Likewise, the California Labor Commissioner and Bureau of Field Enforcement have also made clear that underpaid wages are not part of the civil penalty recovery under Section 558, but wage restitution to employees. Once it is determined that the underpaid wages component of Section 558 actually constitutes wages, not civil penalties, the Fourth Appellate District's decision below must be overruled.

2. CELA ignores the anomalous result that would occur if the "underpaid wages" under Labor Code § 558 are recoverable under PAGA. Specifically, PAGA provides that 75% of any penalties are payable to the State of California. (LABOR CODE § 2699(i).) If the underpaid wages are part of the PAGA penalty, 75% of the wages that are supposed to constitute wage restitution instead would go to California, a result that would (a) contravene the provisions of

Section 558, which requires that payment of underpaid wages go to affected employees; and (b) leave employers subject not only to paying 75% of the underpaid wages to the State of California under PAGA, but also having to pay 100% of the same wages to affected employees in non-PAGA lawsuits (because the 25% recovered by individual employees would be civil penalties under PAGA, not the actual underpaid wages due to employees). In other words, employers could be stuck paying underpaid wages twice, once under PAGA and once in direct actions by employees under separate provisions of the Labor Code. This would create unintended and absurd results. (*See In re Lana S.* (2012) 207 Cal.App.4th 94, 108 [explaining that a statute "should not be given a literal meaning if to do so would create unintended, absurd consequences][internal quotations and citation omitted].)

Hence, CELA's and Lawson's argument that employees can recover underpaid wages under Section 558 through a PAGA action must fail. The underpaid wages are not part of the civil penalty under either Section 558 or PAGA, but rather restitution to individual employees that the Labor Commissioner is authorized to recover "in addition" to the denominated civil penalties of $50/$100 allowed by Section 558.

Moreover, as ZB has previously explained, whether the underpaid wages under Section 558 are wages or a penalty is largely a distraction. The focus is whether the recovery of underpaid wages will go 100% to individual employees or primarily (75%) to the State of California. If the underpaid wages recovered under Section 558 are paid 100% to affected employees, as Section 558 requires, the FAA requires Lawson to arbitrate her wage claims on an individual basis pursuant to the terms of her Arbitration Agreement.

II. LEGAL ARGUMENT

A. The California Legislature and Labor Commissioner have made clear that underpaid wages under Labor Code § 558 are wages, *not* a part of the civil penalty.

The amicus brief filed by the California New Car Dealers Association (CNCDA) cogently explains why the "underpaid wages" under Section 558 are not part of the "civil penalty" contemplated by the Legislature when it adopted Section 558. (CNCDA Amicus Brief, at pp. 13-18.) Specifically, Section 558 "draws a distinction between the civil penalty of a specific amount ($50 or $100, as applicable) and the employee's non-civil-penalty recovery (unpaid wages)." (*Id.* at p. 13.)

Despite the clear language of Section 558, Lawson and CELA seek to circumvent Lawson's arbitration agreement by arguing that the underpaid wages are merely a "measure of the 'civil penalty'" allowed by Section 558. (CELA Amicus Brief, at p. 18.) While Petitioners believe this is a misreading of the plain language of Section 558, it is the same interpretation adopted by the Fourth Appellate District in *Lawson*, which is the subject of this Petition. (*Lawson v. ZB, N.A.* (2017) 18 Cal.App.5th 705, 717 [holding that "the entire remedy provided by section 558, including the recovery of underpaid wages, is a civil penalty"], *quoting Thurman v. Bayshore Transit Mgmt., Inc.* (2012) 203 Cal.App.4th 1112, 1147.)

Fortunately, this Court need not guess whether the Legislature considered the underpaid wages in Section 558 to be part of the measure of the civil penalty or a non-civil-penalty recovery of wages. The California Legislature has repeatedly spoken to the issue, as has the California Labor Commissioner and its field enforcement unit, the Bureau Of Field Enforcement ("BOFE"), all of which have confirmed that the civil penalty under Section 558 is limited to the $50/$100 penalty, and does not include the underpaid wages component of Section 558.

1. The California Legislature interprets the underpaid wages under Labor Code § 558 to constitute wage restitution, *not* part of the civil penalty.

CELA's and Lawson's interpretation of Section 558 – that the wage recovery is part of the civil penalty – contradicts the Legislature's own interpretation of Section 558. The Legislature addressed the distinction between civil penalties and wages recoverable under Section 558 when it amended Labor Code § 1197.1 in 2016, expressly stating that the wage recovery under Section 558 is not part of the civil penalties. Specifically, in describing the process for challenging a civil penalty citation issued by the Labor Commissioner under Section 558, the Legislature distinguished between civil penalties and underpaid wages:

> As a condition to filing a petition for a writ of mandate, the petitioner seeking the writ shall first post a bond with the Labor Commissioner equal to the total amount of any minimum wages, liquidated damages, and **overtime compensation that are due and owing as determined pursuant to subdivision (b) of Section 558**, as specified in the citation being challenged. **The bond amount shall not include amounts for *penalties***.

(LABOR CODE § 1197.1(c)(3) [emphasis added]; *see also* RJN,[1] Ex. 1, Third Reading, Senate Rules Committee, AB 2899 (2015-2016 Reg. Sess.), August 3, 2016, at p. 2 [explaining that bond required by amended Labor Code § 1197.1 "must be filed with the LC and include the total amount of any minimum wages, liquidated damages, and overtime compensation owed as specified in the citation being challenged. The bond amount would not include amounts for penalties."].)

[1] "RJN" is the Petitioners' Motion Requesting Judicial Notice filed with this Answer.

The amendments to Section 1197.1 show the Legislature understood that Section 558 provided for two distinct types of recovery – underpaid wages and civil penalties.[2] If the entire recovery under Section 558 constitutes civil penalties, there would be no need for Section 1197.1(c)(3) to distinguish between the wages recovery, for which a bond must be posted, and civil penalties, for which no bond is required. The portion of Section 1197.1(c)(3) stating that unpaid wages, including unpaid "overtime compensation," must be included in the bond and excluding "amounts for penalties" would be meaningless if CELA's and Lawson's construction of Section 558 were accepted – *viz.*, that the overtime wages recoverable under Section 558 are part of the penalty.

"Well-established canons of statutory construction preclude a construction which renders a part of a statute meaningless or inoperative." (*Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 274.) Section 1197.1(c)(3) leaves only one reasonable interpretation – the civil penalties under Section 558 of $50/$100 is a separate and distinct form of relief than the underpaid wages, which is a form of restitution to individual employees.

The interplay between Section 558 and 1197.1 provides additional evidence regarding the Legislature's understanding that the "underpaid wages" in Section 558 are not part of the civil penalty. Specifically, Section 558(b) provides that the "procedures for . . . citations or civil penalties issued by the Labor Commissioner for a violation of this chapter shall be the same

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[2] Labor Code § 558(b) provides that if the Labor Commissioner finds that employees were not paid for all "overtime work," it may issue a citation. (LABOR CODE § 558(b).) For this reason, Section 1197.1(c)(3) refers to "overtime compensation . . . due and owing as determined by subdivision (b) of Section 558." This portion of Section 1197.1 became effective on January 1, 2017. Hence, the Fourth Appellate District did not have the benefit of the Legislature's interpretation of Section 558 when it decided *Thurman*.

as those set out in Section 1197.1." (LABOR CODE § 558(b).) In turn, Section 1197.1 states that the "Labor Commissioner shall promptly take all appropriate action . . . to enforce the citation and to recover the **civil penalty assessed**, **wages**, liquidated damages, and any applicable penalties pursuant to Section 203 in connection with the citation." (LABOR CODE § 1197.1(b) [emphasis added].) Again, if unpaid wages were part of the civil penalty, it would make no sense for the statute to distinguish between the two.

Significantly, the structure and history of amendments to Section 1197.1 further evidence that unpaid wages are not part of the "civil penalty" imposed by Section 558. Prior to 2012, Section 1197.1 provided for a civil penalty for violation of the minimum wage provisions of the Labor Code in the amount of $100 for an initial violation and $250 for each subsequent violation. The Legislature enacted AB 469 in October 2011 to amend Section 1197.1, authorizing the Labor Commissioner to recover wages "in addition to" civil penalties. (RJN, Ex. 2, Legislative Counsel's Digest, AB No. 469, at p. 1.) The Legislative Counsel's Digest explaining the amendment to Section 1197.1 states that the "bill would provide that ***in addition*** to being subject to a civil penalty, any employer who pays or causes to be paid to any employee a wage less than that fixed by an order of the commission shall be subject to ***paying restitution of wages to the employee***." (RJN, Ex. 2, at p. 1 [emphasis added].)

These 2011 amendments to Section 1197.1 track the structure and scheme of Section 558 by providing for an initial civil penalty for the first violation and a higher civil penalty for subsequent violations, with the civil penalty in both statutes described as being "in addition to an amount sufficient to recover underpaid wages." (*Compare* RJN, Ex. 2, at p. 8 [reflecting amended Section 1197.1, effective January 1, 2012 *with* LABOR CODE § 558(a)(1)-(a)(2)].) Consistent with Section 558, Section 1197.1 also stated that "[w]ages recovered pursuant to this section shall be paid to the

affected employees." (*Compare* RJN, Ex. 2, at p. 8 [reflecting amended Section 1197.1, effective January 1, 2012 *with* LABOR CODE § 558(a)(3).]) The 2016 amendment to Section 1197.1, which requires a bond for unpaid wages recovered under Section 558(b), but not for the civil "penalties" confirms that the wages recovered under both Section 1197.1 and 558 are considered "restitution of wages to the employees," not part of the civil penalty remedy. (RJN, Ex. 2, at p. 1 [emphasis added].)

It would not be reasonable to conclude that the Legislature intended the minimum wage recovery in Section 1197.1 to constitute "wage restitution" instead of a civil penalty, while at the same time providing that the overtime recovery in Section 558 would be part of the civil penalty, particularly when Section 1197.1(c)(3) expressly recognizes the wage/penalty dichotomy of Section 558. Hence, the underpaid wages in Section 558 are "in addition" to the civil penalty, not a measure of the civil penalty.

The legislative history of Section 558 also provides unequivocal evidence that the Legislature intended only the $50/$100 denominated penalties, not the unpaid overtime wages, to constitute the entire civil penalty:

> [AB 60] [a]dds new civil penalties of $50 per employee for each pay period for a first violation, and $100 per employee for each per [sic] pay period for subsequent violations of the Chapter.
>
> [¶¶]
>
> [AB 60] [a]uthorizes new civil penalties of $50 per employee for each period for a first violation of the overtime pay requirements of the bill, and $100 per employee for each subsequent violation. The bill assigns enforcement responsibilities to the Labor Commissioner.

(RJN, Ex. 3, Assembly Com. on Labor & Employment, Report on Assembly Bill No. 60 (1999-2000 Reg. Sess.), March 17, 1999, at p. 5; RJN, Ex. 4, Assembly Com. on Appropriations, Report on Assembly Bill No. 60 (1999-2000 Reg. Sess.), April 21, 1999, at p. 3.) Underpaid wages are not mentioned in the legislative history as being part of the "new civil penalties" authorized under Section 558 or as being a measure of the civil penalties.

Further evidence that underpaid wages were not intended to be part of the civil penalty is found in the legislative analysis of AB 60, which states:

> **In addition to recovery of underpaid wages**, [AB 60] subjects employer or person acting on behalf of an employer (supervisor, bookkeeper?) **to pay civil penalties** for violating any provisions (inc. complex elections) of $50 initially for each period in which an employee was underpaid and $100 for each subsequent violation, and establishes the procedures for contesting a citation or penalty. **Pays recovered wages to employee, but *penalties* are not paid to employee** . . . .

(RJN, Ex. 5, Assembly Republican Bill Analysis, AB No. 60 (1999-2000 Reg. Sess.), March 15, 1999, Item 7 p. 15 [emphasis added].)

The Legislature's understanding is also evidenced in its 2015 amendments to Section 558, in which the Legislature again identified the civil penalties as the $50 and $100 denominated amounts, not the unpaid wages that constitute wage restitution under the statute. Specifically, in the "Existing law" section of the Third Reading of AB 970 to the Senate Rules Committee, the civil penalty under Section 558 is described as follows:

> Sets **civil penalties** for 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 **ranging from $50 upon first violation for each underpaid employee for each**

> **pay period to $100 for subsequent violations**.
> (Labor Code §558)

(RJN, Ex. 6, Third Reading, Senate Rules Committee, on AB 970 (2015-2016 Reg. Sess.), August 26, 2015, at p. 2 [emphasis added].)

The legislative history of AB 60, and amendments to Sections 558 and 1197.1, demonstrate that the Legislature intended the civil penalty in Section 558 to be limited to the $50/$100 denominated amounts payable to the State of California, not the wage restitution component payable to individual employees. (*See In re John S.* (2001) 88 Cal.App.4th 1140, 1144, fn. 2 ["In construing a statute, legislative committee reports, bill reports, and other legislative records are appropriate sources from which legislative intent may be ascertained."]; *Valley Vista Services, Inc. v. City of Monterey Park* (2004) 118 Cal.App.4th 881, 889 ["When construing a statute, we may consider its legislative history, including committee and bill reports, and other legislative records"].)

Because the wage component of Section 558 is not part of the civil penalty, it cannot be recovered under PAGA. (LABOR CODE § 2699(a) [limiting PAGA recovery to the "civil penalty" that can be assessed by the LWDA or its departments].) In addition, because the wage recovery is wage restitution (i.e., compensatory damages) paid to employees and *not* to the State of California, the *Iskanian* exception requires employees who agreed to bilateral arbitration, like Lawson, to pursue these wage claims on an individual basis in arbitration as required by her Arbitration Agreement:

> 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. 387-388 [*referencing AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333].)

2. The California Labor Commissioner, and its field enforcement unit, interpret the underpaid wages under Labor Code § 558 to constitute wage restitution, *not* part of the civil penalty.

The Legislature's understanding that underpaid wages under Section 558 are distinct from penalties comports with the California Labor Commissioner's longstanding interpretation dating back to the enactment of Section 558 in 1999. After Section 558 was enacted in 1999, the Labor Commissioner's office sent a memo explaining the impact of the new statute to its staff. In the memo, the Labor Commissioner explained:

> [S]ection 14 of AB 60 adds section 558 to the Labor Code, which establishes a civil penalty citation system as a mechanism for enforcing the overtime provisions of both AB 60 and the IWC orders. The citation may include: 1) **a *civil penalty* that is payable to the State** (set for an initial violation, which we interpret as a first citation, at $50 per employee per pay period for which the employee was underpaid; and for a subsequent violation, at $100 per employee per pay period in which the employee was underpaid), ***and*** 2) an additional amount representing the unpaid overtime wages owed to the employees, ...

(Ex. E to CELA's Request For Judicial Notice, at p. 9/10 [emphasis added].)

Just as the Legislature distinguished between civil penalties and wages when it enacted Section 1197.1(c)(3), nearly 20 years ago the Labor Commissioner distinguished between the "civil penalty" of $50/$100 payable to the State of California and the separate assessment for "unpaid

overtime wages owed to the employees." (*Id.*) While Sections 558 and 1197.1 provide a civil penalty citation procedure for the Labor Commissioner to recover the unpaid overtime wages on behalf of employees, the unpaid wages do not thereby transform into civil penalties.

The Labor Commissioner also has distinguished elsewhere between the civil penalties and wages recovered pursuant to its civil citation authority. For example, on the "Investigation Procedures Overview" section of the Department of Industrial Relations website, the Labor Commissioner describes the citation process as follows:

> When investigators determine that an employer did not follow required labor laws, **they issue citations for civil penalties *and* wages** that the employer owes the workers.

(RJN, Ex. 7, DIR Website, Investigation Procedures Overview section, last reviewed on October 3, 2018 [emphasis added].)

The Investigative Procedures Overview site includes a link to a pamphlet entitled *Report A Labor Violation To The California Labor Commissioner's Bureau Of Field Enforcement*, in which the Labor Commissioner describes its civil-penalty citation process as follows:

> If BOFE finds certain labor law violations, such as unpaid wages, it can issue citations against the employer. Citations can require the employer to correct violations, **pay all workers *unpaid wages***, and **pay *civil penalties* to the Labor Commissioner**.

(RJN, Ex. 8, *Report A Labor Violation To The California Labor Commissioner's Bureau Of Field Enforcement*, Rev. 06/2014, at p. 6 [emphasis added].)

As part of its enforcement efforts, the Labor Commissioner is required to report annually to the Legislature regarding the effectiveness of the BOFE. (LABOR CODE § 90.5(d).) In its most recent annual report, for the

2015-2016 fiscal year, the BOFE distinguished between the civil penalties it recovers under the Labor Code and wages it recovers for employees, including overtime wages recovered under Labor Code § 558.

> As a key component of our renewed effort to fight wage theft, BOFE investigators **not only focus on civil penalties** but conduct detailed audits for **unpaid wages**, in particular, minimum and **overtime wages** owed to workers.

(Ex. F to CELA's Request For Judicial Notice, 2015-2016 Fiscal Year Report on the Effectiveness of the Bureau of Field Enforcement, at p. 2 [emphasis added].)

Significantly, the Labor Commissioner's 2015-2016 report explains that the Labor Code provisions allowing it to issue civil citations to recover unpaid wages "do not expand liability for employers breaking the law but streamline the Division's ability to crack down on perpetrators . . . ." (*Ibid.*) If the streamlined procedures for recovering wages "do not expand liability for employers," the wages recovered by the Labor Commissioner must constitute wages, not civil penalties. Otherwise, employers' liability would be expanded significantly, by allowing the recovery of both (i) an amount equal to unpaid wages as civil penalties in a PAGA action and (ii) the actual unpaid wages by private litigants in a direct, non-PAGA action under the Labor Code. In contrast, CELA argues that the Labor Commissioner's interpretation is wrong and the Legislature, in fact, intended to expand liability for employers. (CELA Amicus Brief, at p. 16 ["by enacting PAGA, the Legislature expanded public enforcement authority by allowing aggrieved employees to sue for *greater* relief"].)

The Legislature's interpretation, the Labor Commissioner's interpretation, and the BOFE's interpretation of Labor Code § 558 all recognize that underpaid wages recoverable under Section 558 do not constitute part of the civil penalty, but rather are wages that the Labor

Commissioner is allowed to "recover" for employees through its civil citation process. This interpretation is consistent with a plain reading of Section 558, which allows for the recovery of civil penalties of $50 or $100 per pay period in which an employee is underpaid "*in addition* to an amount sufficient to *recover* underpaid wages." (LABOR CODE § 558 [emphasis added].) If the Legislature had intended the underpaid wages to be a measure of the civil penalty, it would have stated that the civil penalty is the $50/$100 denominated amount "in addition to an amount ***equal to*** the underpaid wages," instead of stating that the Labor Commissioner would "***recover*** underpaid wages." The term "recover" means to "get back or regain," while a civil penalty is a "fine assessed for a violation of a statute or regulation." (*See* BLACK'S LAW DICTIONARY (10th ed. 2014).) Imposing a penalty is not the same as recovering underpaid wages on behalf of employees, which is the purpose of the wage restitution provisions of Section 558.

This plain reading of Section 558 was summarized by the Honorable Barry Ted Moskowitz in *Beebe v. Mobility, Inc.* (S.D. Cal. Feb. 20, 2008) 2008 U.S. Dist. LEXIS 12400:

> Both parties agree that the PAGA permits a Plaintiff to collect only penalties and not wages on behalf of other employees. Labor Code § 2699. The parties dispute, however, whether the "amount sufficient to recover underpaid wages" specified in Labor Code § 558 constitutes wages or a penalty calculated based on unpaid wages.
>
> The Court agrees with Defendant that Plaintiff's claims for amounts in addition to the flat sums specified in Labor Code § 558 should be stricken because they represent wages rather than a penalty. The plain language of Labor Code § 558 allows the Labor Commissioner to perform two separate functions: (1) to collect penalties in the $50 and $100 amounts specified on its own behalf; and (2) to recover "an amount sufficient to recover underpaid *wages*" and pay the "*wages* recovered"

> to affected or underpaid employees. (Emphasis added.) **Contrary to the Plaintiff's position, the "amounts sufficient to recover underpaid wages" is not included in the penalty to be collected by the Labor Commissioner but rather constitutes wages which the Commissioner collects on behalf of previously underpaid employees.**
>
> Plaintiff argues that the additional amounts specified in Labor Code § 558 are not wages but rather a penalty that is calculated in terms of unpaid wages. In support of this argument, Plaintiff analogizes to Labor Code § 210 which sets a penalty of $ 50 dollars for initial violations and $100 plus "25 percent of the amount unlawfully withheld" for subsequent violations. Unlike § 558, however, § 210 does not refer to the additional 25 percent amount as wages nor mandate that they be returned to the employees who were underpaid. Plaintiff's argument that Labor Code § 558 similarly provides a penalty which is measured by the amount of unpaid wages would be convincing if the statute itself did not refer to these amounts as "wages" and require that they be paid to the employees who earned them, rather than collected by the Labor Commissioner as a penalty. As is, the plain language of Labor Code §558 clearly indicates that the additional amounts are underpaid wages rather than a penalty which can be recovered by Plaintiff in lieu of the Labor Commissioner.

(*Id.* at *17-18 [emphasis added]; *rejected by Thurman*, 203 Cal.App.4th at pp. 1146-47.)

Although the Fourth Appellate District rejected this reasoning in *Thurman*, and by extension in *Lawson*, the *Beebe* court's interpretation of the language of Section 558 comports with the interpretation by the Legislature, the Labor Commissioner, and the BOFE, all of which recognize that the $50/$100 penalty is the civil penalty imposed by Section 558, and the unpaid wages paid to employees is not part of the civil penalty. Put simply, the

underpaid wages are nothing more than restitution of wages that the Labor Commissioner is allowed to collect, *in addition* to the $50/$100 civil penalty. (LABOR CODE § 558.) "That unpaid wages go to the employees, not the State, is a clear indication that those amounts are not civil penalties because civil penalties are payments *to the State*." (CNCDA Amicus Brief, at p. 14.)

B. CELA's and Lawson's interpretation of Labor Code § 558 would result in absurd results.

CELA's and Lawson's argument that the wage restitution provision of Section 558 constitutes part of the civil penalty fails for the additional reason that it "would create unintended, absurd consequences." *In re Lana S.*, 207 Cal.App.4th at p.108 (explaining that a statute "should not be given a literal meaning if to do so would create unintended, absurd consequences" [internal quotations and citation omitted]; *Ornelas v. Randolph* (1993) 4 Cal. 4th 1095, 1105 ["Courts may, of course, disregard even plain language which leads to absurd results or contravenes clear evidence of a contrary legislative intent."].) As the amicus brief filed by CNCDA explains, Section 558 requires that the wages be paid "to the affected employee," while PAGA requires that civil penalties be paid 75% to the State of California and 25% to "aggrieved employees." (*Compare* LABOR CODE § 558 *with* LABOR CODE § 2699(i).) The Legislature could not have intended that employees' wages be paid 75% to the State, a result which would be absurd since wages under Section 558 are intended to go to affected employees.

This absurd result is not theoretical, given that several courts have interpreted PAGA as requiring this exact outcome. In *Atempa v. Pedrazzani* (Sept. 28, 2018) 2018 Cal. App. LEXIS 872, *30-32, the Fourth Appellate District held that, in a PAGA action, wages recovered under Section 558 are not payable to the "affected employee[s] as expressly required by Section 558, but instead are payable 75% to the State of California and 25% to the affected employees, which is consistent with "'the general rule that civil

penalties recovered in a PAGA action are distributed 75 percent to the [LWDA] and 25 percent to the aggrieved employees.'" (*Ibid.*, *quoting Thurman*, 203 Cal.App.4th at p. 1145.) Likewise, in a recent federal district court case, the court similarly reasoned that 75% of the *wages* recovered under Labor Code § 558 are payable to the State of California:

> Moreover, while both *Esparaza* [sic] and *Lawson* assume without analysis that in a PAGA action the unpaid wages portion of the section 558(a) civil penalty will go entirely to the aggrieved employees, this Court is not so certain. The PAGA was enacted *after* section 558, and provides that 75 percent of the civil penalties recovered by an aggrieved employee are allocated to the state. If the entire section 558 recovery is considered the penalty, including the unpaid wages portion, then pursuant to a PAGA claim 75 percent of that penalty, including 75 percent of the unpaid wages, are allocated to the state. To put it another way, when the State enforces section 558, the $50 or $100 per violation portion of the penalty goes to the state, and all of the unpaid wages portion goes to the aggrieved employees. On the other hand, when an employee brings a PAGA claim based on a section 558 violation, 75 percent of the penalty goes to the state and 25 percent to the employee, including 25 percent of the portion that in a state-enforcement action would go entirely to the state.

(*Whitworth v. SolarCity Corp.* (N.D. Cal. Aug. 21, 2018) 2018 U.S. Dist. LEXIS 142070, *13-14.)

This result is illogical, and does not comport with what the Legislature intended, but the outcome set forth in *Atempa* and *Whitworth* is exactly what PAGA requires if CELA's and Lawson's interpretation of Section 558 were accepted. The Legislature could not have intended that either (1) employees forfeit 75% of their unpaid wages to the State of California; or (2) employers would be subject to paying unpaid overtime wages twice – once as civil

penalties under PAGA, with 75% going to the State of California, and a second time through a direct, non-PAGA action brought by individual employees. This result is inconsistent with the plain language of Section 558, the legislative intent that wages and civil penalties be treated as two distinct forms of relief, as reflected in Section 1197.1 and the legislative history of Section 558, and the Labor Commissioner's and BOFE's interpretations that the wage component of Section 558 is meant as restitution and *not* part of the civil penalty.

The absurd result of interpreting the "underpaid wages" as part of the civil penalty under Section 558 is exemplified by the conflict between the *Atempa* and *Thurman* decisions, both of which were decided by the Fourth Appellate District. Although *Atempa* and *Thurman* both conclude that unpaid wages are part of the civil penalty component of Section 558, the two cases adopt different approaches for how the "wages" under Section 558 should be allocated when recovered as part of a PAGA action. Despite the fact that PAGA expressly requires that civil penalties be paid 75% to the State, the *Thurman* court concluded that "the underpaid wages go[ ] entirely to the affected employee or employees as an express exception to the general rule that civil penalties recovered in a PAGA action are distributed 75 percent to the Labor and Workforce Development Agency (LWDA) and 25 percent to the aggrieved employees (§ 2699, subd. (i))." (*Thurman*, 203 Cal.App.4th at 1145.)

This "exception" is not, however, found anywhere in PAGA, but was judicially created by the *Thurman* court. The *Atempa* court quotes the "general rule" language from *Thurman*, but comes to the exact opposite conclusion that the wages must be paid 75% to the State of California: "we consider both of the section 558(a) awards in the judgment to be *civil penalties* subject to 'the general rule that civil penalties recovered in a PAGA action are distributed 75 percent to the [LWDA] and 25 percent to the

aggrieved employees (§ 2699, subd. (i)).'" (*Atempa*, 2018 Cal. App. LEXIS 872, at *31-32.)[3]

Both of these analyses demonstrate the absurdity of treating wage restitution as part of the civil penalty. Either the express language of PAGA requiring 75% of the recovery to be paid to the State of California must be ignored (as the *Thurman* court did), or 75% of the wage recovery must be paid to the State of California instead of affected employees in contravention of Section 558 (as the *Atempa* court did). Neither of these incongruous results can stand. (*People v. Mendoza* (2000) 23 Cal.4th 896, 908 [explaining that courts "must also avoid a construction that would produce absurd consequences, which we presume the Legislature did not intend"].)

The only construction of Section 558 that would avoid these absurd consequences would be to adopt "the more limited meaning generally given to the term 'civil penalties' . . . , in which only the $50 and $100 specific amounts are" the civil penalty recoverable under Section 558, while wages are not part of the civil penalty and "may not be pursued in a PAGA action." (CNCDA Amicus Brief, at p. 24.)

C. Treating wages under Labor Code § 558 as part of the civil penalty recovery is inconsistent with PAGA.

CELA and Lawson argue that "since PAGA's enactment, aggrieved individuals who comply with PAGA procedural requirements, like Lawson, have the same authorization to assess Section 558 penalties." (CELA Amicus Brief, at p.15, *citing* Labor Code § 2699(a) ["Notwithstanding any other provision of law, any provision of this code that provides for a civil penalty to be assessed and collected by the [LWDA], for a violation of this code, may, as an alternative, be recovered through a civil action by an

[3] As of the filing of this Answer, the official reporter citation for *Atempa* was not available.

aggrieved employee . . . pursuant to the procedures specified in Section 2699.3."].) Petitioners do not dispute this point, but as explained above, the civil penalty assessed and collected by the LWDA does not include the unpaid wages. (RJN, Ex. 8, at p. 6 [civil penalty citation includes assessment of "unpaid wages" to employees and "civil penalties to the Labor Commissioner"].)

This interpretation is consistent with the structure and purpose of PAGA, which is to recover penalties that would otherwise be recovered by, and for the benefit of, the State of California. First, PAGA imposes a denominated civil penalty structure ($100 for initial violation, and $200 for subsequent violations), similar to the $50/$100 civil penalty structure in Section 558. Second, PAGA does not refer to the recovery of "underpaid wages" or suggest in any way that employees pursuing PAGA claims may recover their *own* wages through a PAGA action. Third, if the Legislature intended for civil penalties under PAGA to include the recovery of underpaid wages, it would have provided a mechanism for paying those wages to the affected employees, instead of allocating 75% to the State of California with the other 25% being split among aggrieved employees.

It would be nonsensical for the Legislature to require wages recovered directly by the Labor Commissioner under Section 558 (and 1197.1) to "be paid to the affected employee[s]," while providing that 75% would be paid to the State of California if the claim were brought by a "deputized" individual under PAGA. If wages recovered under Section 558 are, in fact, included as civil penalties, PAGA contains no exception that would allow these amounts to be diverted entirely to affected employees instead 75% going to the LWDA (even though the *Thurman* decision purports to create such an exception judicially).

Nothing in PAGA or its legislative history evinces an intent by the Legislature to allow employees to recover their own unpaid wages through a

PAGA action. Rather, PAGA confirms the legislative intent to provide for recovery of only those civil penalties payable to the State of California, which penalties are paid primarily (75%) to the State of California when pursued under PAGA. As the *Esparza* court recognized, "[c]ivil penalties are paid largely into the state treasury [and] the state receives proceeds when civil penalties are imposed." (*Esparza*, 13 Cal.App.5th at pp. 1242-1243.)

D. Even if the "underpaid wages" are part of the civil penalty under Labor Code § 558, the Federal Arbitration Act requires arbitration of this portion of the dispute.

CELA takes the position that even though the unpaid wages are part of the civil penalty recoverable under Section 558, the wages are payable to individual employees. (CELA Amicus Brief, at p.13) The *Lawson* court agreed with this position. (*Lawson*, 18 Cal.App.5th at 717 [adopting reasoning in *Thurman* that underpaid wages recovered under Section 558 are paid to the affected employees, as an "express exception" to the general rule that 75% of PAGA penalties are payable to the LWDA].) Regardless of the label attached to the underpaid wages – civil penalties or wages – the claim must be arbitrated under the FAA.

Petitioners' prior filings, and the amicus brief filed by the Employers Group, explain in detail why the FAA requires Lawson to arbitrate her claim for individualized, victim-specific unpaid wages. In short, whether the unpaid wages are labeled civil penalties or wages is purely a semantic distraction. (*Esparza*, 13 Cal.App.5th at p. 1245 ["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."].)

Here, Lawson indisputably seeks to recover unpaid wages for *herself* under Section 558. (AA I:014 at ¶ 49.) Hence, pursuant to the FAA, she must arbitrate the wage recovery portion of her PAGA claim on an individual

basis under the terms of her Arbitration Agreement. (*See Perry v. Thomas* (1987) 482 U.S. 483, 484 [holding that FAA preempts California Labor Code § 229, which provides that "actions for the collection of wages may be maintained 'without regard to the existence of any private agreement to arbitrate"]; *Preston v. Ferrer* (2008) 552 U.S. 346, 359 [reversing California Court of Appeal and holding that "[w]hen parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative"]; *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1170 [holding that "the FAA clearly preempts" state law rules that create "an unwaivable right to litigate particular claims by categorically deeming agreements to arbitrate such claims unenforceable"]; *Concepcion*, 563 U.S. 333 [holding that FAA preempts California law prohibiting arbitration agreements with class waivers, and California courts must enforce arbitration agreements even if the agreement requires that complaints be arbitrated individually]; *Iskanian*, 59 Cal.4th at 388 [holding that an action seeking "victim-specific relief," even if asserted under PAGA, "could not be maintained in the face of a class waiver"]; *Mandviwala v. Five Star Quality Care, Inc.* (9th Cir. 2018), 723 F. Appx. 415, 417-418 ["*Esparza* specifically distinguished between individual claims for compensatory damages (such as unpaid wages) and PAGA claims for civil penalties, which is more consistent with *Iskanian* and reduces the likelihood that *Iskanian* will create FAA preemption issues."][*cert. denied Five Star Senior Living, Inc. v. Mandviwala* (2018) 138 S. Ct. 2680].)

By attempting to recover unpaid wages on behalf of herself and all other non-exempt employees in the State of California, Lawson is for all intents and purposes pursuing a class action masquerading as a PAGA representative action. This contravenes the FAA, which requires arbitration of individual wage claims when a party is subject to such an arbitration

agreement. (See *Iskanian*, 59 Cal.4th at p. 387 ["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"]; *Sakkab v. Luxottica Retail N. Am., Inc.* (9th Cir. 2015) 803 F.3d 425, 442-443 ["Class actions and PAGA actions both allow an individual (who can normally only raise his or her own individual claims) to bring an action on behalf of other people or entities."][N.R. Smith, dissenting]; *Concepcion*, 563 U.S. at p. 348 [explaining that requiring parties to follow class procedures "sacrifices the principal advantage of arbitration – its informality – and makes the process slower, more costly, and more likely to generate procedural morass"].)

Because the FAA requires courts to enforce arbitration agreements as written, CELA and Lawson rely heavily on the Legislature's public policy reasons for adopting Section 558 and PAGA. (*See, e.g.*, CELA Amicus Brief, at pp. 19-30 [arguing that the recovery of wages under Section 558 promotes the State's objectives to protect workers, achieves Labor Code compliance, and preserves government resources].) Although the public policy requiring Lawson to individually arbitrate her unpaid wage claims may be debatable, the scope of the FAA is not, and it requires enforcement of her Arbitration Agreement in this action. (*Epic Systems Corp. v. Lewis* (2018) 138 S.Ct. 1612, 1632 ["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."].)

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III. CONCLUSION

The underpaid wages recoverable under Labor Code § 558 are not part of the civil penalty imposed by the statute. Therefore, the underpaid wages are not recoverable under PAGA. Even if the underpaid wages are considered part of the civil penalty under Section 558, Lawson should be compelled under the FAA to arbitrate these wages claims, since she is seeking to recover victim-specific, unpaid wages.

Respectfully submitted,

Dated: October 9, 2018

RUTAN & TUCKER, LLP

By: Brian C. Sinclair

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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 7,133 words, exclusive of the matters that may be omitted under Rule 8.520(c) of the California Rules of Court.

Dated: October 9, 2018

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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 October 9, 2018, I served on the interested parties in said action the within:

PETITIONERS' ANSWER TO AMICUS CURIAE BRIEF FILED BY CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF REAL PARTY IN INTEREST

as stated below:

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

Executed on October 9, 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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