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)

REAL PARTY IN INTEREST KALETHIA LAWSON'S ANSWER TO AMICUS BRIEFS

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INTRODUCTION

Plaintiff/Real Party in Interest Kalethia Lawson's Answering Brief analyzed the issues raised by the Petition in logical order and explained why those issues should be resolved in accordance with the plain statutory language of Labor Code section 558 and PAGA, the Legislature's intent in enacting both statutes, and the governing California Supreme Court and U.S. Supreme Court case law. Because Defendant/Petitioner Z.B., N.A. and Zions Bancorporation (the "Bank") and its amici—California New Car Dealers Association ("Car Dealers"), Employers Group, and California Employment Law Council (collectively "EG/CELC")—each respond to only *some* parts of that analysis, we begin by placing amici's arguments in the broader context of the issues presented.

Lawson filed a single-count complaint under California's Labor Code Private Attorney General Act ("PAGA"), Labor Code §§2698 et seq., on a representative-action basis as an agent of the state Labor and Workforce Development Agency ("LWDA"). (AA I:006-019.) She alleged that her employer, defendant Bank, violated several Labor Code sections that can be enforced through a PAGA representative action for civil penalties, including provisions requiring California employers to: (1) pay overtime premiums, (2) provide compliant meal periods and rest breaks or the required premium wage, (3) pay timely wages during and upon termination of employment, (4) provide accurate and complete wage statements, (5) maintain required payroll records, (6) pay at least the minimum wage for all hours worked, and (7) reimburse employees for their

necessary business-related expenses. (AA I:015-17 [Compl. ¶¶50-62].)

The Bank acknowledged that under *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, Lawson could pursue all of her PAGA claims and almost all of her requested PAGA remedies in court on a representative-action basis. (AA I:034.) However, the Bank took the position that because of its mandatory pre-dispute employment arbitration agreement, Lawson must split the remedies available through PAGA under Labor Code section 558 (which authorizes the Labor Commissioner, but not a private party, to pursue civil penalties for violations of California overtime, meal period, and rest break protections[1]) by pursuing some elements of Section 558(a)'s designated remedy in court and some in arbitration, on the theory that the Federal Arbitration Act, 9 U.S.C. §§1 et seq. ("FAA") preempts PAGA and requires enforcement of an employer's pre-dispute arbitration agreement to the extent an aggrieved-employee plaintiff seeks "victim-specific" relief.

According to the Bank and its amici, although an aggrieved employee with a mandatory employment arbitration agreement can pursue a PAGA representative action in court for the $50 or $100 per-pay-period civil penalty authorized by Section 558(a) for violations of California overtime, meal period, and rest break requirements, that employee must

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[1] *See* Labor Code § 558(a) [civil penalty for violation of "a section of this chapter or any provision regulating hours and days of work in any order of the Industrial Welfare Commission"]; Labor Code §§ 500-588.1; Wage Order No. 4-2001 § 3 ["Hours and Days of Work"]; *cf.* Wage Order No. 4-2001, § 4 ["Minimum Wages"] § 12 ["Rest Periods"]; *Thurman v. Bayshore Transit Management, Inc.*, 203 Cal.App.4th 1112, 1152 [penalties for meal period and rest break violations recoverable under Section 558(a)].)

arbitrate her claim for the "underpaid wages" portion of the Section 558(a) remedy—even though that statutory remedy necessarily rests on proof of the identical violations that trigger Section 558(a)'s per-pay-period remedy. According to the Bank and its amici, when an employee like Lawson seeks to recover through PAGA the underpaid-wages portion of the remedy provided by Section 558(a), she is acting in her own self-interest and is no longer pursuing that claim as a "proxy" or "agent" of the state as the "real party in interest" under PAGA. (AA I:034-36.)

The Bank then goes one step further, contending that because its mandatory, pre-dispute arbitration agreement with Lawson prohibits "class action" arbitrations and does not permit "claims by different claimants [to be] combined in a single arbitration," Lawson is contractually barred from pursuing her underpaid-wages claim in *any* forum on a PAGA "representative action" basis, but must arbitrate that portion of her PAGA/Section 558 claim in an "individual" arbitration (Opening Br. 42-43; Reply Br. 26-28, 29), notwithstanding the absence of any reference in the Bank's agreement to PAGA (enacted in 2004) or to prohibiting representative arbitration, and despite many cases holding that PAGA claims may be pursued *only* on a representative-action basis. (*See* Answering Br. 46-55; Amicus Brief of California Employment Lawyers Association ["CELA Br."] 18-19.)

The principal question raised by the Bank is whether an employee pursuing a PAGA claim under Labor Code section 558(a) may be compelled to arbitrate on an "individual" basis the portion of her claim

seeking an underpaid-wages remedy: (1) notwithstanding this Court's holding in *Iskanian* that a private, pre-dispute arbitration agreement between a worker and her employer cannot be used to compel arbitration of a PAGA representative action (because PAGA claims belong to the state rather than to the parties to the bilateral arbitration agreement), and (2) notwithstanding this Court's holding in *McGill v. CitiBank* (2017) 2 Cal.5th 945 and *Iskanian* that a private agreement (of *any* kind) cannot compel the forfeiture of a statutory right created for a public purpose. (*McGill*, 2 Cal.5th at p. 961; *Iskanian*, 59 Cal.4th at p. 360 ["[A]n arbitration agreement requiring an employee as a condition of employment to give up the right to bring representative PAGA actions in any forum is contrary to public policy."].)

The Bank's amici ignore that the Bank's arbitration agreement does *not* prohibit employees from pursuing PAGA claims on a representative-action basis, and that if it did, that prohibition would violate *McGill* and *Iskanian* by stripping plaintiff and the state of the non-waivable, public policy rights established by PAGA. (Answering Br. 46-53, 56-57.)

Amici also make several new arguments that the Bank itself never advanced, and therefore waived.

Amicus Car Dealers argue that the Legislature did not intend to allow PAGA claimants to recover the underpaid-wages portion of the remedy provided by Section 558(a) (even though the state Labor Commissioner routinely recovers back wages in her own public enforcement actions under Section 558) because "true" civil penalties

cannot be compensatory and must be paid to the state rather than to any victims. (*See* Car Dealers Br. 12-14, 20, 24.) Car Dealers acknowledge that the Court of Appeal rejected that argument in this case and in *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, and that the Court of Appeal's analysis is supported by what Car Dealers dismissively characterize as "potentially loose language in section 558 coupled with broad language in PAGA" (Car Dealers Br. 19)—i.e., by the actual statutory text of Section 558 and PAGA.

In an effort to overcome that plain language, Car Dealers argue that the Legislature did not intend Section 558 and PAGA to be read literally (*id.* 20) and that as a policy matter, the Court of Appeal's construction should be rejected because of the "*in terrorem* effect" on employers that would result if aggrieved employees, acting on behalf of the state, could obtain the same Section 558 remedies that the state itself could obtain in a public enforcement action. (*Id.* 29.)[2]

We address the Car Dealer's statutory construction argument *infra* at pp. 16-27, but note as a threshold matter that *the Bank* has not contested plaintiff's showing that Section 558's plain statutory language and legislative history demonstrate that the Legislature deliberately designated

[2] Of course, Car Dealers' argument ignores that: (1) the only reason PAGA might be perceived as having any *in terrorem* effect is because it accomplishes the Legislature's goal of achieving greater Labor Code enforcement; and (2) the only employers that could feel threatened by the Court of Appeal's ruling are those that violate their employees' statutory right to overtime premiums and/or meal periods and rest breaks, *and* that seek to avoid the consequences of their wrongdoing by imposing an individual-claims-only mandatory arbitration agreement on their employees to prevent them from obtaining the same remedies under PAGA that the Labor Commissioner routinely obtains under Section 558.

both elements of Section 558(a)'s integrated remedy as a "civil penalty," and that it did so for the legitimate purpose of strengthening enforcement of the underlying statutory rights. (*Compare* Answering Br. 22-31 *and* CELA Br. 19-22 *with* Reply Br. 10-12; *see also* Opening Br. 17-19, 22-24.)

The Bank has never disputed in this case that the "civil penalty" authorized by Labor Code section 558 includes the underpaid-wages component. Nor has it disputed that an aggrieved employee could seek the complete civil penalty authorized by Section 558 under PAGA. (*See* Writ Petition (filed Nov. 29, 2016) 44-47; Ct. of Appeal Opening Br. (filed Feb. 21, 2017) 29-31; Reply Br. Re: Writ Petition (filed Aug. 4, 2017) 8-9.) To the contrary, the Bank consistently sought to compel plaintiff to arbitrate that portion of her statutory civil-penalty remedy under PAGA, necessarily conceding that her Section 558(a) underpaid-wages claim *was* actionable under PAGA. (*See, e.g.*, AA:I 025 ["[A]ny claim for victim-specific relief . . . is subject to individual arbitration under the [FAA] even if brought as a PAGA action. . . ."]; *id.* 026 ["[D]efendants . . . ask this Court to compel Plaintiff . . . to arbitrate her claim for victim-specific relief."]; *id.* 032; *id.* 034-036.)

Consequently, even if there were some basis for Car Dealers' attempted re-writing of the statutory language, the Bank has forfeited the argument that Section 558(a)'s civil penalty remedy does not include underpaid wages by failing to raise that construction below and by repeatedly conceding—indeed, resting its argument on the premise—that the underpaid-wages portion of the Section 558(a) remedy could be

recovered by an aggrieved employee in a PAGA action. (*See Tiernan v. Trustees of Cal. State Univ. & Colleges* (1982) 33 Cal.3d 211, 216 n.4; *People v. Saunders* (1993) 5 Cal.4th 580, 590; *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 865 n.4; *see also Mescher v. Cnty of San Diego* (1992) 9 Cal.App.4th 1677, 1685-87 ["[W]here a deliberate trial strategy results in an outcome disappointing to the advocate, the lawyer many not use that tactical decision as the basis to claim prejudicial error."]) Further, the Bank is judicially estopped from contending otherwise, because the trial court *accepted* the Bank's argument that Lawson could pursue the underpaid wages portion of her Section 558/PAGA claim in arbitration (although on a representative-action, not individual basis). (*See, e.g., Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 943.)

Amici EG/CELC present a broader set of challenges to the Court of Appeal's decision, but they, too, ignore most of the analysis in plaintiff's Answering Brief. Like Car Dealers, EG/CELC contend that the Court of Appeal erred in this case and in *Thurman* by concluding that the Legislature intended Section 558(a)'s entire remedy to be considered a civil penalty rather than "private damages." (EG/CELC Br. 2-3, 10-14). EG/CELC's principal argument, though, is that even if the Court of Appeal were correct that the Legislature intended Labor Code section 558(a) to provide integrated civil penalties that could be pursued in a PAGA action (*see Lawson v. ZB, N.A.* (2017) 18 Cal.App.5th 705, 722), the Bank's agreement requiring Lawson to arbitrate her PAGA/Section 558 claims for underpaid wages *on an individual-action* basis (*i.e.*, not a representative-action basis)

must be enforced as a matter of FAA preemption. (EG/CELC Br. 16-19.)

EG/CELC seek to distinguish *Iskanian*, *Sakkab v. Luxottica Retail N.A., Inc.* (9th Cir. 2015) 803 F.3d 425, and *EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279 (as well as PAGA cases involving Labor Code sections 210 and 225.5, which calculate civil penalties for willful violations as "25% of the amount unlawfully withheld"), by asserting that if a portion of a civil penalty is measured by the economic harm to a victim and is intended to provide compensation to that victim, that remedy can never be pursued as a PAGA claim in court if an employer requires arbitration of all workplace disputes. (*Id.* 17-21.)

We explain *infra* at pp. 28, 32-35, why EG/CELC's FAA preemption argument misreads *Iskanian*, *Sakkab*, and *Waffle House* and their underlying principles. But first we place that argument in context.

As a threshold matter, amici's FAA preemption argument largely rests on their mistaken assumption that the Bank's arbitration agreement prohibits representative-action arbitrations and therefore requires Lawson to pursue her PAGA/Section 558 claims in arbitration on an individual basis. There is no basis for that assumption. As Lawson has demonstrated, the arbitration agreement she was required to sign made no reference to "PAGA" or "representative actions." It simply stated that "claims by different claimants . . . may not be combined in a single arbitration," that "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 that "the arbitrator has no authority to hear an arbitration either against or

on behalf of a class." (AA I: 051, 064; *see* Answering Br. 55-57). Because any ambiguity in that contract language must be construed against the Bank as its drafter (*Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 248; Civil Code § 1654), and because there is no evidence that the Bank and Lawson reached a meeting of the minds to prohibit representative-action PAGA arbitration, amici's conclusion that Lawson must arbitrate her PAGA/Section 558 claim for underpaid wages on an individual-only basis is twice flawed: first, because the arbitration agreement does not prohibit representative-action arbitration (*see* Answering Br. 55-57); and second, because if the agreement did prohibit PAGA representative actions, it would be unenforceable under *McGill* and *Iskanian* (because it would strip plaintiff and the state of the non-waivable statutory right to pursue civil penalties under PAGA for the public purpose of enforcing California's overtime, meal period, and rest break protections). (*See* Answering Br. 36-53; CELA Br. 31-36.)

Second, even though amici also assume that Lawson would have the statutory right to pursue her individual claim for "victim-specific" relief in arbitration under PAGA/Section 558, they cannot identify any statutory or other basis for such a claim. Lawson's single-count complaint alleges a violation of PAGA—and only PAGA. As plaintiff has shown, an employee like Lawson has no private right of action under Section 558 (whose remedies can only be pursued directly by the Labor Commissioner in a civil proceeding pursuant to the requirements of Labor Code section 1197.1). (Answering Br. 23.) Moreover, the text of PAGA, its legislative history,

and the consistent case law establish that PAGA claims may *only* be pursued on a representative-action basis and cannot be the subject of an individual-only claim. (Answering Br. 48-50 [citing and quoting Labor Code § 2699(a); *Reyes v. Macy's Inc.* (2011) 202 Cal.App.4th 1119, 1123-24; *Huff v. Securitas Security Serv. USA, Inc.* (2018) 23 Cal.App.5th 745, 755-56; *Williams v. Superior Court* (2015) 237 Cal.App.4th 642, 649; *Iskanian*, 59 Cal.4th at p. 394 [Chin, J. concurring]]; *see also* CELA Br. 18-19.)

Consequently, if the Bank's arbitration agreement were construed to prohibit Lawson from pursuing her PAGA/Section 558 claim on a representative-action basis, it would necessarily prohibit her from pursuing that claim on *any* basis, because there is no such thing as an individual-only PAGA claim (and because there is no private right of action under Section 558). It necessarily follows, under *McGill* and the other authorities cited in plaintiff's Answering Brief at pp. 49-53, that if the Bank's agreements are construed as prohibiting plaintiff from pursuing her Section 558 underpaid-wages claim on a PAGA representative-action basis, the agreement would be unenforceable under California law and Section 2 of the FAA, 9 U.S.C. §2.

Third, and finally, the Bank's amici are completely silent as to how the lower courts should proceed *if* plaintiff is required to split her *representative-action* PAGA/Section 558 claim between a court action and an arbitration, and whether the trial court would have discretion under Code of Civil Procedure section 1281.2 to stay any arbitration of that portion of

her PAGA/Section 558 claim pending its adjudication of the overtime and meal-and-rest-break claims underlying Lawson's request for PAGA pay-period remedies (and its adjudication of plaintiff's other PAGA claims that the Bank concedes she may litigate on a representative-action basis.) (*See* Answering Br. 57-62 [explaining why the trial court has such discretion].)

ARGUMENT

I. Underpaid Wages Are an Integral Component of the Civil Penalties Remedy Authorized by Section 558

The Bank's amici begin by raising two questions of statutory construction: Did the Legislature intend the remedies authorized by Section 558 to be considered "civil penalties" that the state could pursue in a public enforcement action; and if so, did the Legislature intend to permit aggrieved employees to pursue those civil penalties on behalf of the state under PAGA? Both questions are resolved by the plain statutory language. (*See* Answering Br. 22-36.)

The text of Labor Code section 558 makes clear that the Legislature *intended* the "civil penalty" it authorized in Section 558(a) to include both (1) an amount sufficient to recover the affected employees' underpaid wages, and (2) either $50 or $100 per pay period, per employee, for each pay period in which the employee was underpaid. Subsection (a) expressly states that an employer that violates the applicable IWC Wage Order provisions "shall be subject to a civil penalty as follows," and it then sets forth those civil-penalty remedies in subdivision (a)(1) (for initial violations) and again in subdivision (a)(2) (for subsequent violations):

> (a) Any employer or other person acting on behalf of an employer who violates, or causes to be violated, a

> section of this chapter or any provision regulating hours and days of work in any order of the Industrial Welfare Commission shall be subject to a civil penalty as follows:
>
> (1) For any initial violation, fifty dollars ($50) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages.
>
> (2) For each subsequent violation, one hundred dollars ($100) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages.

(Labor Code § 558(a); *see also id.* § 558(d) [referring to "[t]he civil penalties provided for in this section," without distinguishing between per-pay-period remedies and underpaid wages].)

Amici contend that the Legislature used the phrase "in addition to" in order to distinguish the "civil penalty" remedy of $50/$100 per pay period from what amici describe as the "private damages" remedy of underpaid wages. (EG/CELC Br. 11-12; Car Dealers Br. 13-14.) But if that were the Legislature's intent, it would have drafted Section 558(a) very differently.

If the Legislature intended the underpaid-wages portion of the remedy *not* to be a civil penalty, it could have written Section 558(a) to state:

> (a) Any employer or other person acting on behalf of an employer who violates, or causes to be violated, a section of this chapter or any provision regulating hours and days of work in any order of the Industrial Welfare Commission shall *pay the affected employees' underpaid wages plus* a civil penalty as follows:
>
> (1) For any initial violation, fifty dollars ($50) for each underpaid employee for each pay period for

which the employee was underpaid[].

(2) For each subsequent violation, one hundred dollars ($100) for each underpaid employee for each pay period for which the employee was underpaid[].

(*Compare* 2011 Cal. Legis. Serv. c.655 (A.B. 469) § 9 (West) (codified as amended at Labor Code § 1197.1) [amending Section 1197.1 to read "shall be subject to a civil penalty *and restitution of wages payable to the employee,* as follows" and permitting the Labor Commissioner to recover the underpaid wages].)

Or it could have written Section 558(a) to state:

(a) Any employer or other person acting on behalf of an employer who violates, or causes to be violated, a section of this chapter or any provision regulating hours and days of work in any order of the Industrial Welfare Commission shall be subject to *the following*[]:

(1) For any initial violation, *a civil penalty of* fifty dollars ($50) for each underpaid employee for each pay period for which the employee was underpaid, *plus damages in* an amount sufficient to recover underpaid wages.

(2) For each subsequent violation, *a civil penalty of* one hundred dollars ($100) for each underpaid employee for each pay period for which the employee was underpaid, *plus damages in* an amount sufficient to recover underpaid wages.

Or even:

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

(1) For any initial violation, fifty dollars ($50) for each underpaid employee for each pay period for which the employee was underpaid[].

> (2) For each subsequent violation, one hundred dollars ($100) for each underpaid employee for each pay period for which the employee was underpaid[].
>
> (b) *In addition to the designated civil penalty, such employer or other person shall also compensate each affected employee for all underpaid wages*.

Finally, as plaintiff noted in her Answering Brief, the Legislature could have simply included commas in subdivisions (1) and (2) before the phrase, "in addition to an amount sufficient to recover underpaid wages" (*see* Answering Br. 25)—although that would not have been as clear as any of these alternatives. (*Compare, e.g.*, Labor Code § 226.8(b) ["the person or employer shall be subject to a civil penalty of not less than five thousand dollars ($5,000) and not more than fifteen thousand dollars ($15,000) for each violation, in addition to any other penalties or fines permitted by law"]; *id.* § 273(b)(2) ["shall be subject to a civil penalty of no less than one thousand dollars ($1,000) and no more than twenty-five thousand dollars ($25,000), in addition to any civil remedies available to the Labor Commissioner"].)

The Legislature chose *not* to draft Section 558(a) in any of these ways. Instead, when it enacted Section 558 in 1999 (which is the time at which its intent must be determined (*see, e.g., Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1171)), the Legislature used statutory language that clearly and directly conveyed its intent to create a civil penalty that included both the $50/$100 per-pay-period amount *and* an amount equal to underpaid wages. As many courts have concluded, the plain language of section 558 is dispositive. (*See* Answering Br. 24 [citing *Reynolds v. Bement,* 36 Cal.4th 1075, 1089, *abrogated on other grounds by*

Martinez v. Combs (2010) 49 Cal.4th 35; *id.* at p. 1094 (Moreno J. concurring); *Thurman,* 203 Cal.App.4th at p. 1145; *Bradstreet v. Wong* (2008) 161 Cal.App.4th 1440, 1451, *abrogated on other grounds by Martinez*, 49 Cal.4th 35; *Jones v. Gregory* (2006) 137 Cal.App.4th 798, 809 n.11; *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 378-79, 381]; *see also Mendoza v. Nordstrom, Inc.* (2017) 2 Cal.5th 1074, 1083; *Lawson*, 18 Cal.App.5th at p. 722 [citing *Thurman*, 203 Cal.App.4th at 1144-45] ["As our holding in *Thurman* makes clear, the $50 and $100 assessments as well as the compensation for underpaid wages provided for by section 558, subdivisions (a) and (b) are, together, the "civil penalties" provided by the statute."].)[3]

Amici contend that "[t]he 'designation given' to underpaid wages as a 'penalty,' whether by the Legislature in Section 558 or by the Court of Appeal interpreting Section 558 in *Thurman*, is irrelevant." (EG/CELC Br. 19). They contend that regardless of the Legislature's chosen language or stated intent, a remedy measured by the "amount sufficient to recover

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[3] While Car Dealers contend that nothing in the legislative history of Section 558 supports the Court of Appeal's construction of the integrated statutory remedies as civil penalties (Car Dealers Br. 15-16), they ignore the legislative history analysis in plaintiff's Answering Brief at pp. 25-29. They also ignore the Labor Commissioner's contemporaneous statement that the Legislature deliberately expanded the scope of the civil penalties available for overtime violations under Section 558 from what had been available for minimum wage violations under Labor Code section 1197.1 in order to strengthen and expedite state overtime enforcement by providing that "the manner in which civil penalties are calculated" is by adding "$50 or $100 per *underpaid employee* per pay period in which the employee was underpaid, plus the amount of the *underpaid wages*." (Memorandum from Labor Commissioner and Chief Counsel to Labor Commissioner to DLSE staff, Understanding AB 60 (Dec. 23, 1999) https://www.dir.ca.gov/dlse /AB60update.htm (RJN, García Decl. Ex. 4 at p. 26) [emphasis in original].)

underpaid wages" can never be a civil penalty because the only purpose it furthers is compensatory. (EG/CELC Br. 13-14; Car Dealers Br. 14.) Aside from the fact that the Bank never raised this argument and, indeed, insisted that plaintiff *could* pursue her underpaid-wages remedy under PAGA in arbitration, *see supra* at pp. 11-12, that argument is wrong. Statutes that provide for civil penalties that are partially restitutionary in purpose or measured in terms of a party's loss are commonplace. (*See, e.g.*, Labor Code § 210 ["two hundred dollars ($200) for each failure to pay each employee, plus 25 percent of the amount unlawfully withheld"]; Labor Code § 225.5 [same]; Labor Code § 230.8 [civil penalty "in an amount equal to three times the amount of the employee's lost wages and work benefits"]; *see also* 31 U.S.C. § 3729(a)(1)(A) [False Claims Act's "restitutionary penalty provisions" require payment of between $5,000 and $10,000 per violation plus three times the amount of damages sustained].)

Amici's assertion that the purpose of Section 558 "first and foremost, is to compensate employees for being underpaid the wages that they earned" (EG/CELC Br. 14) is belied by, among other things: (1) the integrated nature of the Section 558 remedy; (2) the Legislature's designation of that remedy as a civil penalty; (3) the Legislature's practice of measuring civil penalties in terms of the injured party's loss in other provisions of the Labor Code; (4) the Legislature's decision not to establish a private right of action when it enacted Section 558; and (5) the public purposes identified in the legislative history of Section 558 and PAGA. (*See* Answering Br. 25-31, 32-36, 47-48; CELA Br. 19-30.)

Moreover, the cases amici cite, like *Murphy v. Kenneth Cole Prod., Inc.* (2007) 40 Cal.4th 1094, involved statutes that were completely silent as to the Legislature's intent, where the courts had to determine whether a particular remedy that the Legislature had *not* characterized one way or the other was a civil penalty or a form of damages. For example, Labor Code section 226.7, at issue in *Murphy*, does not use the word "penalty" at all, which is why the Court stated that "had the Legislature intended section 226.7 to be governed by a one-year statute of limitations, the Legislature knew it could have so indicated by unambiguously labeling it a 'penalty.'" (*Id.* at p. 1109; *see also id.* at p. 1108 ["Legislature chose to eliminate penalty language in section 226.7"]). The issue in *Cortez v. Purolator Air Filtration Prods.* (2000) 23 Cal.4th 163, the other case cited by amici, was whether unpaid wages could be recovered as restitution under Bus. & Prof. Code section 17203, not whether the Legislature had designated that remedy as a civil penalty. (*Id.* at pp. 167-68.) Here, by contrast, the Legislature expressly designated the entire remedy provided by Section 558(a) as a "civil penalty," and it acted well within its constitutional authority in doing so.

The Legislature has the authority to designate as a civil penalty any statutory recovery that furthers a public purpose pursuant to the state's broad police powers, particularly where, as here, the statute at issue can only be enforced by the state, or on behalf of the state, and not through a private right of action. (*See* Answering Br. 52-53; CELA Br. 28-30 [discussing the state's broad police power to enact civil penalties].) The

Labor Commissioner routinely seeks Section 558's remedies in public enforcement actions for overtime, meal period, and rest break violations, recovers some funds for itself and some in trust for the aggrieved workers, and retains control over any funds that it cannot distribute after undertaking diligent efforts to locate the underpaid workers—all of which supports the Legislature's characterization of the integrated civil penalty remedy provided by Section 558(a). (*See* Answering Br. 30-31.) Car Dealers also acknowledge that Section 558 is just one of several statutes that measure the amount of civil penalties owed by reference to the amount of an injured person's economic loss—although they try to avoid the impact of those statutes by describing them as mere "exceptions and outliers." (Car Dealers Br. 17.)[4]

Amici's assertion that, to constitute a civil penalty, an economic recovery must belong entirely to the state, proves too much. (*See* Car Dealers Br. 16-18, 23; EG/CELC Br. 13-15.) After all, amici do not dispute that PAGA's per-pay-period recoveries are "civil penalties," notwithstanding that 25% of those penalties must be paid to the aggrieved employees rather than the state and even though the Legislature earmarked the remaining 75% of those penalties. (Answering Br. 34, 39; *see* Labor Code § 2699(i).) Nor do amici dispute that the California qui tam statute permits a relator to receive a bounty of up to 50% of the amount recovered

[4] *See, e.g.*, Labor Code § 210 [civil penalty of $200 plus "25 percent of the amount unlawfully withheld"]; § 225.5 [same]; § 230.8(d) [penalty equal to "three times the amount of the employee's lost wages and work benefits"]; § 7915 ["penalty fee equal to 100 percent of the [unpaid] required fee"].

(Govt. Code § 12652), or that under PAGA, a plaintiff who worked only briefly during the applicable limitations period, or whose PAGA complaint alleged multiple Labor Code violations but sought Section 558 remedies only for others (*see Huff*, 23 Cal.App.5th at pp. 753-60) would personally receive only a tiny fraction of the potential PAGA recovery. (Answering Br. 42.)

Amici are also unable to identify (let alone justify) the point at which the comparative size of an individual plaintiff's statutory recovery in relation to the total recovery transforms a civil penalty into something else (*see* Answering Br. 42-43); and they do not dispute plaintiff's showing—and the Court of Appeal's conclusion—that every PAGA/Section 558 claim necessarily results in a different comparative allocation, and that it is impossible at the outset of the litigation to predict what that eventual allocation might be. (*See* Answering Br. 39-40, 43 & n.10.) The fact that the underpaid-wages portion of the Section 558(a) remedy may be dwarfed by the per-pay-period portion in a given case, or that some employees may be unlocatable and never receive their shares, provides further support for the conclusion that the Legislature had ample authority to designate the Section 558(a) remedies as a civil penalty.

Amici's final statutory construction argument is that even if the Legislature intended and was authorized to designate the underpaid-wages portion of the Section 558(a) remedy as a civil penalty in an enforcement action by the Labor Commissioner, it did not intend that penalty to be recoverable under PAGA (again, asserting an argument that directly

contradicts the position asserted by the Bank throughout this case). The statutory text precludes amici's argument here as well, and PAGA's legislative purposes fully support plaintiff's plain meaning construction.

Setting aside amici's FAA-preemption argument for the moment (which we address *infra* at pp. 29-35), amici's threshold contention is that the Legislature never intended PAGA to encompass both components of the Section 558(a) remedy, even in cases where the defendant employer has *not* required its employees to arbitrate workplace claims. (Car Dealers Br. 18-24.) That contention is entirely without textual or logical support. Nothing in PAGA distinguishes among the types of Labor Code civil penalties that an aggrieved employee may pursue on behalf of the state. What matters is whether, absent PAGA, only the state had the authority to pursue those denominated penalties. (*See* Labor Code § 2699(a) [PAGA civil action may be pursued for "any provision of this code that provides for a civil penalty"]; *Iskanian*, 59 Cal.4th at p. 388.)

PAGA was enacted to expand Labor Code enforcement by authorizing private employees to pursue claims for Labor Code penalties that, before PAGA, only the Labor Commissioner could pursue. Amici do not dispute that the Labor Commissioner routinely seeks underpaid wages, in addition to fixed per-pay-period amounts for initial and subsequent violations, in Section 558 public enforcement actions. Although amici argue, as a matter of statutory construction, that an aggrieved employee acting on behalf of the state under PAGA cannot pursue the same civil penalty remedies under Section 558 that the state could—and does—

pursue, they never point to any language in Section 558 or PAGA to explain why that must be. Nor do they explain how such a construction would further PAGA's purposes.

Amici suggest (without expressly arguing) that the Legislature could not have intended the underpaid portion of the Section 558(a) remedy to be recovered as a "civil penalty" under PAGA, because PAGA provides that aggrieved employees are only entitled to 25% of the civil penalties recovered while Section 558(a)(3) provides that "[w]ages recovered pursuant to this section shall be paid to the affected employee." (Car Dealers Br. 20-21.) Amici never explain *why* that purported difference in allocation demonstrates the Legislature's intent to preclude *any* recovery of underpaid wages under PAGA, especially in the face of Section 558's plain language designating that portion of the statutory remedy as a "civil penalty" (*see id.*) and the similarly plain language and legislative history of PAGA, authorizing aggrieved employees to pursue representative actions on behalf of the state to recover the same civil penalties the state previously could have recovered in a public enforcement action (including public enforcement actions under Section 558). (*See* Answering Br. 32-36; CELA Br. 22-28.)

At most, amici's argument identifies the need for this Court—whether in this case or in a later case more squarely raising the issue—to address whether 100% of the underpaid-wages portion of the Section 558(a) remedy recovered in a PAGA action should be allocated to aggrieved employees (to the extent they can be located, as in a public

enforcement action), or whether instead only 25% of that recovery should be allocated to the aggrieved employees. The former allocation is supported by the language of Section 558(a)(3) and the principal purpose of PAGA, which is to enable aggrieved employees to pursue the same civil-penalty remedies the Labor Commissioner is authorized to recover, including underpaid wages on behalf of aggrieved employees. (Answering Br. 24-31; CELA Br. 22-28). The latter allocation is supported by the doctrine that in the event of an apparent conflict between two statutory provisions, the later-in-time enactment controls (*see, e.g., State Dep't of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 960)—a construction supported by two recent decisions, *Atempa v. Pedrazzani* (Cal. Ct. App. Sept. 28, 2018) No. D069001, 2018 WL 4657860, at *11-12; *Whitworth v. SolarCity Corp.* (N.D. Cal. Aug. 21, 2018) No. 16-01540, 2018 WL 3995937, at *5, which explain why the underpaid-wages portion of a PAGA/Section 558 civil-penalty remedy might appropriately be allocated 75%/25% like other PAGA penalties.

Amici's final challenge to the Court of Appeal's construction of PAGA and Section 558 rests upon another argument the Bank never made: due process. (*See* Car Dealers Br. 21-22; EG/CELC Br. 15-17.) Amici contend that if a PAGA plaintiff could pursue a Section 558 claim for underpaid overtime and meal period and rest break premiums under PAGA—as the Labor Commissioner has done since the effective date of Section 558 in 2000 — all other aggrieved employees' "claims for [underpaid] wages [could] be resolved without their knowledge or consent"

and their "ability to recover underpaid wages [would be] significantly impaired," in violation of the due process clause. (EG/CELC Br. 16-17.)

Because the Bank never asserted this due process argument below (or in its briefs to this Court) and, in any event, lacked standing to raise a due process argument on behalf of the employees whose rights it violated, this due process argument has also been waived. (*See Tiernan*, 33 Cal.3d at p. 216 n.4.) Besides, amici cannot explain why non-party employees in a PAGA action would have greater due process rights than identical employees with the identical losses for whom the Labor Commissioner seeks relief in a public enforcement action under Section 558, or greater due process rights than the employees for whom the EEOC seeks relief under Title VII in a public enforcement action as in *Waffle House*, 534 U.S. at pp. 284, 296. (*See also* Answering Br. 41 [citing state court cases permitting states to recover victim-specific relief].) Nor do amici explain why their argument is not precluded by *Arias v. Superior Court* (2009) 46 Cal.4th 969, 987 [noting limited impact of adverse PAGA ruling on non-party employees].)

The fact that a portion of the Section 558(a) remedy may be "victim-specific" does not change the result. After all, before the 2004 amendments to the Unfair Competition Law (which required plaintiffs to satisfy the requirements of class certification before they could seek restitution under the UCL on a representative-action basis), this Court upheld the UCL against a due process challenge to its provisions allowing a plaintiff to obtain restitution (a victim-specific remedy) on a representative-action-

wide basis. (*Kraus v. Trinity Mgmt. Servs. Inc.* (2000) 23 Cal.4th 116, 138-39.) The same principles necessarily apply here.

In short, there should be little doubt that in circumstances where there is *no* mandatory pre-dispute employment arbitration agreement, the Legislature intended to allow aggrieved employees, as proxy or agent of the state, to bring a PAGA action to recover the full range of civil penalties authorized by Labor Code section 558 (regardless of how they may be allocated), just as the Labor Commissioner could seek those penalties in a public enforcement action. Therefore, because plaintiff Lawson fully complied with PAGA's notice, exhaustion, and other procedural requirements, she should be entitled to pursue her PAGA/Section 558 claims on behalf of the state. (*See* Answering Br. 12-13, 44-46.)

We turn to amici's FAA preemption arguments next, to demonstrate why it makes no difference to the result that the Bank imposed a mandatory, pre-dispute employment arbitration agreement on Lawson as a condition of her employment.

II. The Federal Arbitration Act Does Not Preempt PAGA

Amici argue that, notwithstanding this Court's holding in *Iskanian* that a private, pre-dispute, mandatory arbitration agreement between an employer and employee cannot bind the state (as a non-contracting party) and therefore cannot require an employee to arbitrate a PAGA claim brought as a statutory "proxy" or "agent" of the state (59 Cal.4th at pp. 384, 386-87), the Court should carve out an exception to *Iskanian* for PAGA claims that seek victim-specific relief, in order to avoid FAA preemption.

Although amici (like the Bank) begin with the premise that the

Bank's arbitration agreement prohibits representative-action arbitration, that premise is wrong as a matter of contract interpretation; and if it were right, the Bank's agreement would be unenforceable because it would strip plaintiff and the state of a non-waivable public-purpose right. (*See supra* at pp. 21-23.) For that reason, in addressing FAA preemption below we treat the issue not as whether the Bank can contractually prohibit Lawson from pursuing her PAGA claim at all (it plainly cannot, and the Bank does not contend otherwise), but whether the FAA requires a plaintiff who signed a mandatory pre-dispute arbitration agreement to pursue a portion of her *representative-action* under PAGA/Section 558 in arbitration rather than in court.[5]

The basic principle underlying the majority's analysis in *Iskanian* is well-established: arbitration is a matter of contract, and except in narrow circumstances not present here (such as agency, privity, and third-party beneficiary status), a non-party (the state) cannot be bound by a bilateral arbitration agreement between two parties (the Bank and Lawson). That is why a relator's qui tam claims on behalf of the government cannot be compelled to arbitration, why an ERISA plan beneficiary's claims on behalf of the plan cannot be compelled to arbitration, and why a PAGA claim on behalf of the state cannot be compelled to arbitration. (*See* Answering Br. 37; *see also Munro v. University of S. Calif.* (9th Cir. 2018) 896 F.3d 1088 [ERISA]; *U.S. ex rel. Welch v. My Left Foot Children's*

[5] Amici ignore plaintiff's showing that if she is required to pursue a portion of her PAGA/Section 558 claim on a representative-action basis *in arbitration*, the trial court may stay that arbitration and proceed first with her PAGA representative-action claims in court. (Answering Br. 57-62.)

Therapy, LLC (9th Cir. 2017) 871 F.3d 791, 797-98, 800 & n.3 [qui tam case belongs to government even if relator has an "interest in the outcome"].)

Amici parrot the Bank's argument that to the extent a PAGA/Section 558 claim seeks victim-specific relief, even as part of an integrated remedy that includes a per-pay period penalty, it cannot truly be considered a claim that belongs to the state as the real party in interest. But Lawson seeks the identical remedy in her PAGA/Section 558 claim as the state would be seeking had it issued a citation under Section 558 directly, and Lawson has fully complied with every procedural requirement imposed by PAGA, thus protecting the state's ultimate interests and binding the state to the eventual outcome. (*See Arias*, 46 Cal.4th at pp. 982-86 [describing procedural requirements for PAGA action and their significance].)

Amici posit a hypothetical statute that takes an existing compensatory damages claim, assigns it to the state, authorizes a private actor to prosecute the assigned claim in place of the state, and then requires the claim to be re-assigned to the plaintiff and other similarly situated individuals if the plaintiff prevails, without imposing any procedural restrictions or requirements on that plaintiff to protect the state's interests and without either binding or benefitting the state. (EG/CELC Br. 1, 19; Car Dealers Br. 10, 26-27.) Amici contend that any such statute would be a "subterfuge" and would be preempted by the FAA as a deliberate effort to bypass arbitration by channeling individual damages claims that would otherwise be arbitrable into a procedure that exists only to avoid arbitration.

(*See* EG/CELC Br. 4-5 [citing *Perry v. Thomas* (1987) 482 U.S. 483, 484; *Preston v. Ferrer* (2008) 552 U.S. 346].)

That is not how PAGA operates, as this Court in *Iskanian* and the Ninth Circuit in *Sakkab* have held. PAGA does not prohibit arbitration of statutory claims for civil penalties; and the cases applying PAGA in the arbitration context simply confirm that pre-dispute agreement to arbitrate future disputes between *private parties* cannot be enforced against the *state*. Moreover, nothing in PAGA causes any rights to be "assigned" from aggrieved employees to the state in order to "launder[]" those claims out of the employees' arbitration agreements. (Car Dealers Br. 26). PAGA simply creates an alternative procedural mechanism that allows private individuals, acting on behalf of the state, to pursue the *state*'s broad interests in Labor Code enforcement, elimination of anti-competitive activity, deterrence, and worker protection. *Sakkab*, 803 F.3d at pp. 435-36. Those crucial public policy goals belong, first and foremost, to the state itself.[6]

The key question raised by amici's FAA-preemption argument is whether it makes any difference, for purpose of applying the majority's analysis in *Iskanian*, that plaintiff's PAGA/Section 558 claim seeks a civil-penalty remedy that is measured in part by underpaid wages. Amici do not dispute that all *other* civil-penalty remedies authorized by PAGA may be

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[6] Moreover, if the under-paid wages portion of the PAGA/Section 558 remedy is allocated 75% to the state and 25% to the workers as some courts have suggested (*see supra* at p. 27), there would be *no* difference between a PAGA/Section 558 claim and any other claim for civil penalties under PAGA.

prosecuted by aggrieved employees on behalf of the state. Amici also do not dispute that absent PAGA, aggrieved employees have no right to pursue the underpaid-wages remedy authorized by Section 558 (because Section 558 does not create a private right of action).

What amici seem to be saying is that because an aggrieved employee could pursue a portion of the relief available to the state under Section 558 (underpaid wages) by filing a claim under *different* sections of the Labor Code (*e.g.*, for overtime premiums under section 1194 and meal period and rest break premiums under section 226.7), and because those *different* Labor Code claims, if brought by an individual employee, would be subject to a mandatory pre-dispute employment arbitration agreement (*see also* Reply Br. 18), the aggrieved employees should be required to arbitrate the state's independent claim for such remedies under Section 558(a).

But amici never explain *why* that should be. Once amici accept that the Legislature intended to permit the state to pursue the integrated civil-penalty remedies provided by Section 558(a) in a public enforcement action and that the Legislature intended to permit aggrieved plaintiffs to pursue those same remedies under PAGA as a proxy or agent for the state (whether the underpaid wages go entirely to the employee or only in part to the employee), they have no room left to argue that employees' only available remedy is a private right of action under the state overtime and meal-and-rest-break laws, especially because PAGA by its terms states that its protections are in addition all other protections provided by law. (Labor Code § 2699(g)(1)).

In *Iskanian*, this Court held as a matter of basic contract law and agency law that an arbitration agreement is only binding on the parties to that agreement and cannot be used to compel a PAGA plaintiff to arbitrate claims that belong to the state (assuming the state has not consented to arbitration). (*See Iskanian*, 59 Cal.4th at pp. 386-87 ["a PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship. It is a dispute between an employer and the *state*, which alleges directly or through its agents—either the Labor and Workforce Development Agency or aggrieved employees—that the employer has violated the Labor Code."] [emphasis in original]; *Waffle House*, 534 U.S. at p. 296.) This general principle of law precludes amici's arguments, just as it would preclude any contracting party's pre-dispute effort to bind a principal to an agent's mandatory arbitration agreement or to bind any third party to a pre-dispute arbitration agreement signed by an entity not in privity.

Far from being a "subterfuge," then, PAGA is a longstanding, historically proven mechanism for enforcing critical workplace protections by employees acting as agents of the state, for the benefit of the state *and* themselves and other aggrieved employees, the public at large, and the defendant's law-abiding competitors—all of whom benefit from the increased Labor Code enforcement that the Legislature sought to achieve by enacting PAGA. That is what the Legislature intended. That is what PAGA accomplishes. And nothing in the FAA precludes that result or requires a plaintiff to pursue some elements of the integrated Section 558

remedy in court and some in arbitration, even if both may be pursued on a PAGA representative-action basis.

CONCLUSION

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

Dated: October 11, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.520(c), and in reliance upon the word count feature of the software used, I certify that the foregoing Real Party in Interest Kalethia Lawson's Response to Amicus Briefs contains 7,436 words, exclusive of those materials not required to be counted under Rule 8.504(d)(3).

Dated: October 11, 2018 Respectfully submitted,

Michael Rubin
ALTSHULER BERZON LLP

/s/Michael Rubin
Michael Rubin

PROOF OF SERVICE

Case: LAWSON v. ZB, N.A., Case No. S246711
Fourth App. Dist., Division One, Nos. D071279 & D071376 (Consolidated)
San Diego County Superior Court; 37-2016-00005578-CU-OE-CTL

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. On October 11, 2018, I served the following document(s):

REAL PARTY IN INTEREST KALETHIA LAWSON'S RESPONSE TO AMICUS BRIEFS

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

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

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this October 11, 2018 at San Francisco, California.

/s/Jean Perley
Jean Perley