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)

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF REAL PARTY IN INTEREST

[PROPOSED] BRIEF OF *AMICUS CURIAE* CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION

CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION
BY BRYAN SCHWARTZ LAW
*Bryan J. Schwartz (SBN 209903)
Logan T. Talbot (SBN 300591)
Eduard R. Meleshinsky (SBN 300547)
DeCarol A. Davis (SBN 316849)
1330 Broadway, Suite 1630
Oakland, California 94612
Telephone: (510) 444-9300
Facsimile: (510) 444-9301

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APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION

Pursuant to California Rule of Court 8.520(f), the California Employment Lawyers Association ("CELA") respectfully requests leave to file the attached amicus curiae brief in support of plaintiff and respondent Kalethia Lawson.

CELA is an organization of California attorneys whose members primarily represent employees in a wide range of employment cases, including wage and hour actions and PAGA actions. CELA has a substantial interest in protecting the statutory and common law rights of California workers and ensuring the vindication of the important public policies underlying California employment laws, including the fundamental, non-waivable rights at issue in this case. CELA and its members have taken a leading role in protecting the rights of California workers, including by submitting amicus briefs and oral argument in such groundbreaking employment rights cases such as *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, *Gentry v. Superior Court* (2007) 42 Cal.4th 443, *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, and *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903.

CELA's proposed amicus brief will assist the Court by presenting additional perspectives on the historical development of California's PAGA and demonstrating how that history informs the issues of statutory construction before this Court. As CELA's proposed brief shows, all PAGA actions are representative actions, not individual actions. The language, legislative history, and purposes of PAGA and Labor Code Section 558 demonstrate the Legislature's clear intent to permit PAGA plaintiffs to recover the full measure of relief that would be available to the State in a public enforcement action. The Legislature made Section 558's civil penalty provisions enforceable both by the State in a public enforcement action and by aggrieved employees in a PAGA representative action

like this. Although Defendant ZB Bank ("the Bank") contends that PAGA and Labor Code Section 558, as so construed, would be preempted by the Federal Arbitration Act, 9 U.S.C. §§1 et seq., this Court's analysis in *Iskanian* and *McGill v. Citibank, N.A.* (2017) 2 Cal. 5th 945 dictates otherwise. The FAA simply places arbitration agreements on equal footing with other contracts, and neither binds the State of California to private, pre-dispute arbitration agreements between an employer and its employees, nor strips employees of their non-waivable state law right to pursue certain fundamental workplace protections in at least one reasonably accessible forum.

CELA agrees completely with the thoughtful legal analysis presented by plaintiff-respondent Kalethia Lawson in her Opposition Brief. Recognizing that the Court's opinion in this case may affect California's broader PAGA jurisprudence, however, CELA's brief will not reiterate that analysis or focus on the particular facts and circumstances of Ms. Lawson's case, but will instead provide a wider-ranging and historical perspective on the important issues under review.

Pursuant to Rule of Court 8.520(f)(4), CELA affirms that no party or counsel for a party to this appeal authored any part of this amicus brief. No person other than the amicus curiae, its members, and its counsel made any monetary contribution to the preparation or submission of this brief.

For the reasons stated above, CELA requests the Court's leave to file this amicus brief.

Respectfully submitted,

Dated: August 29, 2018

BRYAN SCHWARTZ LAW

By: _____

Bryan J. Schwartz
Logan T. Talbot
DeCarol A. Davis
Eduard R. Meleshinsky

AMICUS CURIAE BRIEF OF CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION

I. INTRODUCTION

Defendant ZB Bank largely ignores the threshold issues of state law raised by this case. Instead it focuses almost exclusively on whether that state law, as construed by plaintiff (in light of its plain language, the clear legislative intent, and the underlying statutory policies) is impliedly preempted by the FAA. But the doctrine of federal "obstacle" preemption cannot be analyzed in the abstract, and critical to any application of that doctrine is a thorough understanding of the scope and purpose of the underlying state law: here, PAGA and Labor Code Section 558.

The core *state law* issue in this case is whether the California Legislature intended the designated "civil penalties" recoverable by the State in a public enforcement action under Labor Code Section 558 to be recoverable in a private, *qui tam*-like representative enforcement action under PAGA. As Lawson correctly argues, the Legislature expressly designated both forms of relief made available by Labor Code Section 558 as civil penalties, and empowered state labor enforcement officials to recover those penalties (and to distribute the underpaid wages portion to the aggrieved employees it could locate) in furtherance of its police power authority to prosecute violators of California's workplace and fair competition laws. PAGA claims exist *only* as representative claims, brought by individuals prosecuting certain Labor Code claims on behalf of the State, to achieve benefits extending beyond mere compensation for victims of wage theft. The Bank cannot immunize itself from liability for the remedies the Legislature made available to the State under Section 558 by imposing pre-dispute, individual-claims-only arbitration agreements on the very employees whom the Legislature deputized to pursue representative PAGA actions for such remedies on the State's behalf.[1]

[1] It is increasingly common for employers that include class-action waivers in their mandatory, pre-dispute employment arbitration agreements also to prohibit any form of

CELA's members are, by design, a critical component of the State's comprehensive enforcement scheme for deterring violations and enforcing compliance with the core workplace protections established by the California Labor Code and Industrial Welfare Commission Wage Orders. By deputizing aggrieved employees (with the assistance of their attorneys) to fill the enforcement gap resulting from inadequate DLSE staffing and funding, the Legislature in PAGA enabled the State to protect law-abiding employers and enforce the full range of workplace protections without a direct increase in staffing and funding. Criminalizing violations of the Labor Code did not achieve that purpose, because criminal enforcement actions were few and far between. Expanding the remedial scope of Section 558 helped, but the DLSE was still hampered by its limited enforcement capabilities. Only by enacting PAGA in 2004 and thereby expanding the use of quasi-*qui tam* actions to vindicate the Labor Code's previously under-enforced protections—including under Section 558 itself, which before PAGA could *only* be enforced by the State DLSE—was the Legislature finally able to begin achieving its goal of effective workplace enforcement. Ultimately, the question before this Court is whether employers throughout the state can unilaterally exempt themselves from the Legislature's carefully constructed enforcement scheme by imposing new workplace rules that forbid their employees from exercising their PAGA-protected rights.

This Court already held in *Iskanian* that employers cannot eliminate PAGA enforcement actions by imposing pre-dispute arbitration agreements on their employees, because those arbitration agreements do not bind the state. (*Iskanian*, 59 Cal.4th at 387-88.) This Court in *McGill* further held (consistent with Justice Chin's concurrence in

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representative action, such as a PAGA or other private attorney general action. We note that the Bank did *not* prohibit representative actions in this case, only class actions. Nonetheless, because bans on all forms of non-individual adjudication are so pervasive, especially after *Epic Systems Corp. v. Lewis* (2018) 138 S. Ct. 1612, CELA does not rest its analysis on that alternative factual ground. (*See* AA-I:116-120 [Pl. Opp. Br. at pp. 8-12].)

Iskanian), that employers cannot deprive Californians of non-waivable public law rights (there, the right to a prospective public injunction under the Unfair Competition Law, False Advertising Law, and California Consumers Legal Remedies Act) either directly (by banning the exercise of those rights) or indirectly (by shunting them into an arbitration forum that bans the exercise of those rights). (*McGill*, 2 Cal.5th at 952.) Those rulings, in which *every* member of this Court concurred, control the outcome in this case.

The Bank expresses concern about the "surge" in Labor Code enforcement resulting from the enactment of PAGA in 2004. (Reply at p. 9.) That surge, however, is precisely what the Legislature sought; and it will continue until employers like the Bank get the message that wage and hour violations skew the market, hurt workers, undermine the economy, and will not be countenanced, even if the wage loss for any individual employee is relatively small. (*See, e.g., Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829 [recognizing that "$102.67 at a wage of $8 per hour … is not de minimis at all to many ordinary people who work for hourly wages"].) The Court should continue to construe the Labor Code, including PAGA, consistent with the Legislature's worker-protective purposes and should permit CELA's members to continue to advance workers' rights protected by California law.

II. ARGUMENT

A. A Private Arbitration Agreement Cannot Be Used to Strip the State of its Substantive Statutory Authority to Recover Civil Penalties, including Unpaid Wages, under Labor Code Section 558

The parties' briefs show there is no real dispute about the Legislature's intended construction of PAGA and Labor Code Section 558 as applied to this case. PAGA authorizes an "aggrieved employee," like Lawson to bring a "representative" action in court on behalf of the State and other aggrieved employees. As this Court in *Iskanian* made clear, "every PAGA action, whether seeking penalties for Labor Code violations as to only one aggrieved employee—the plaintiff bringing the action—or as to other employees as

well, is a representative action on behalf of the state." (59 Cal.4th at 387.) The question is whether, in such a "representative" action on behalf of the State to enforce Labor Code Section 558, the PAGA plaintiff can recover the same underpaid wages that the State itself could have recovered in a public enforcement action under Section 558 (which, before PAGA, could *only* have been brought by the State). The text of Section 558 and PAGA, and the supporting legislative history and public policies, require the answer to be "Yes."

1. Statutory Damages and Civil Penalties are Distinct Remedies.

California's wage and hours laws establish a comprehensive, well-integrated scheme to protect employees throughout the state, particularly those with limited means. The Labor Code and Wage Orders are incorporated into the Labor Code as minimum workplace standards. (*Home Depot U.S.A., Inc. v. Superior Court* (2010) 191 Cal.App.4th 210, 220, *as modified on denial of reh'g* (Jan. 10, 2011)). They not only help to ensure the health, safety, and fundamental economic protection of California's workers (*see, e.g., Murphy*, 40 Cal.4th at 1113), but, as this Court has repeatedly held, they also help ensure fair competition for the state's law-abiding businesses that do not cut corners by reducing labor costs below the statutory floor. (*See, e.g., Iskanian*, 59 Cal.4th at 379; *Dynamex*, 4 Cal.5th at 952 [IWC Wage Orders are "clearly intended for the benefit of those law-abiding businesses that comply with the obligations imposed by the wage orders, ensuring that such responsible companies are not hurt by unfair competition from competitor businesses that utilize substandard employment practices."].)

Full payment of statutory wages and full recovery of any unpaid or underpaid wages is crucial to the effective enforcement of California's minimum workplace protections and to the State's ability to achieve its fundamental remedial goals of protecting workers and deterring—and punishing—wrongdoing employers. The State Legislature recognized in 2004 that it could not achieve these goals simply by authorizing victims of certain Labor Code violations to pursue a private right of action for statutory damages. Nor could it

achieve those goals by relying on state labor enforcement officials to bridge the compliance gap, given the limited funding and staffing available to the DLSE. That is why the Legislature enacted PAGA, to enable private attorneys and state officials to work in tandem in the effort to eradicate wage theft and other workplace violations. The State authorized aggrieved employees to bring a new type of private action on behalf of the State, similar to a *qui tam* action, for the full range of relief that previously only the State was authorized to seek. This was to increase compliance and strengthen deterrence under the newly combined enforcement program. (*See Raines v. Coastal Pac. Food Distributors, Inc.* (2018) 23 Cal. App.5th 667, 681 ["'Civil penalties, like punitive damages, are intended to punish the wrongdoer and to deter future misconduct.'"] [quoting (*People v. First Federal Credit Corp.* (2002) 104 Cal.App.4th 721, 732]; *Home Depot*, 191 Cal.App.4th at 225 ["'Civil penalties are inherently regulatory, not remedial,' and are intended to secure obedience 'to statutes and regulations validly adopted under the police power.'"] [quoting *People v. Union Pacific Railroad* (2006) 141 Cal.App.4th 1228, 1257–1258]; *Iskanian*, 59 Cal.4th at 387 ["Representative actions under the PAGA, unlike class action suits for damages, do not displace the bilateral arbitration of private disputes between employers and employees over their respective rights and obligations toward each other. Instead, they directly enforce *the state's* interest in penalizing and deterring employers who violate California's labor laws."] [ital. in original].)

2. Private Individuals May Pursue Civil Penalties for Labor Code Violations as Proxies or Agents of the State.

No party disputes that a deputy labor commissioner is authorized to assess the Section 558 civil penalties at issue here, including in the amount of underpaid wages. Except as permitted by PAGA, private individuals are not authorized to bring a private right of action to recover any civil penalty made available under the Labor Code. (*See Noe v. Superior Court* (2015) 237 Cal.App.4th 316, 339 [if "a Labor Code provision provides

for a 'civil penalty' and contains no language suggesting the penalty is recoverable directly by employees, no private right of action is available other than through a PAGA claim."]; *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 371 [dismissing claims for "civil penalties" because plaintiff failed to comply with PAGA's administrative exhaustion requirement].) But, since PAGA's enactment, aggrieved individuals who comply with PAGA procedural requirements, like Lawson, have the same authorization to assess Section 558 penalties. (*See* Cal. Lab. 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 Labor and Workforce Development Agency or any of its … employees, for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3."] [ital. added].)

PAGA contains few exceptions to the general proposition that an aggrieved employee may recover civil penalties in a representative action on behalf of the State. (*See, e.g.,* Cal. Lab. Code § 2699(g)(2) ["No action shall be brought under this part for any violation of a posting, notice, agency reporting, or filing requirement of this code, except where the filing or reporting requirement involves mandatory payroll or workplace injury reporting."].) Such express limitations on a PAGA plaintiff's authority to represent the State in the collection of Labor Code civil penalties support Lawson's position that she is entitled to collect from defendant all civil penalties provided by Section 558, including in the amount of underpaid wages owed, as a proxy for the State, because nothing in the text of Section 558 nor PAGA distinguishes Section 558 underpaid wages from other civil penalties. (*See also Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal.App.5th 745, 756, *petition for review denied* (Aug. 8, 2018) [noting the lack of any statutory constraint limiting a PAGA plaintiff' action only to Labor Code violations personally

suffered by that plaintiff; distinguishing Section 2699(h), which prohibits PAGA plaintiffs from bringing a PAGA claim when the State has already taken enforcement action].)

The Bank is correct that Lawson could have sought some of the relief she currently seeks by bringing a claim under sections of the Labor Code that permit private rights of action for purely private relief (which Section 558 does not). But the Legislature expressly chose not to limit private employees to pursuing private relief in a private cause of action. Instead, by enacting PAGA, the Legislature expanded public enforcement authority by allowing aggrieved employees to sue for *greater* relief, and thereby to further the broader public policies underlying PAGA. PAGA was never envisioned as an exclusive source of rights. By its terms, PAGA allows additional, supplemental recoveries than are otherwise available to an employee in a private right of action. (Cal. Lab. Code § 2699(g)(1) ["Nothing in this part shall operate to limit an employee's right to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part"].) PAGA gives employees the choice in how to proceed: solely on their own behalf in a private action for damages; or also on behalf of the state, subject to PAGA's procedural requirements, in furtherance of PAGA's broader public policy goals. The latter is the approach that Lawson chose to pursue here, as the plain language and strong worker-protection purposes of PAGA clearly permit. (Answering Brief, at pp. 24-31.)

That Lawson is one of the employees aggrieved by the Bank's alleged Labor Code violations does not alter the fundamental representative nature of this, and every other PAGA action. (*See Huff*, 23 Cal.App.5th 745.) In *Huff*, a security guard brought a PAGA law enforcement action against his former employer for allegedly failing to timely pay all wages due under the Labor Code. (*Id*. at 751-52.) After the parties tried the first phase of the case, the defendant moved for judgment as a matter of law, arguing that the representative plaintiff lacked standing to bring a PAGA action to collect civil penalties for one of the Labor Code violations at issue because he failed to show at trial that he was

harmed by that particular violation. (*Id*. at 752.) The trial court initially granted the defendant's motion for judgment, but subsequently reversed itself because it determined that, "so long as [the representative PAGA plaintiff] could prove he was affected by at least one Labor Code violation, he could pursue penalties on behalf of other employees for additional violations." (*Id.* at 761.)

The Court of Appeal affirmed, in part based on the critical law enforcement role the Legislature empowered PAGA plaintiffs to play in policing Labor Code violators:

> [A] representative action under PAGA … is a law enforcement action where the plaintiff acts on behalf of the state, not on behalf of other employees. The idea that a plaintiff must be aggrieved of all the violations alleged in a PAGA case does not flow logically from the fact that a plaintiff is standing in for government authorities to collect penalties paid (in large part) to the state. The plaintiff is not even the real party in interest in the action—the government is. In that sense, it would be arbitrary to limit the plaintiff's pursuit of penalties to only those Labor Code violations that affected him or her personally.

(*Id.* at 757 [internal citations omitted].) Like the security guard in *Huff*, Lawson is acting here not as the real party in interest but as an agent of the state seeking to punish the Bank and deter future violations of the Labor Code through a law enforcement action to collect civil penalties. (*See Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 501, *as modified* (July 20, 2011) ["The purpose of the PAGA is not to recover damages or restitution, but to create a means of 'deputizing' citizens as private attorneys general to enforce the Labor Code."].)

3. Labor Code Section 558 Authorizes a Suit to Recover Civil Penalties, Including in the Amount of Underpaid Wages.

The exclusive remedy for a violation of Labor Code Section 558 is an assessment of a civil penalty. (*See* Cal. Lab. Code § 558; *Thurman v. Bayshore Transit Mgmt., Inc.* (2012) 203 Cal.App.4th 1112, 1147 ["the entire remedy provided by section 558, including

the recovery of underpaid wages, is a civil penalty"].) The measure of the "civil penalty" to be assessed for violations of Section 558 is found in that section's plain text:

> *(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.*

(Cal. Lab. Code § 558(a)(1)-(2) [ital. added]).

The Bank contends that Lawson would retain all of her "substantive rights or remedies" if she were compelled to arbitrate her PAGA representative action as an individual claim for statutory damages under *different* sections of the Labor Code. (*See* Reply, at p. 21 ["the Arbitration Agreement entered into by Lawson does not mandate that she waive any right to recover unpaid wages or any other substantive rights or remedies, all of which may be pursued in arbitration."].) But we would not be here if Lawson's rights and remedies (including public remedies) under PAGA were identical to the rights and remedies available to her under other Labor Code provisions. The Bank has pursued its position so aggressively over the past several years only because it hopes to eliminate Lawson's altogether, by forcing her into a forum where she can only pursue an "individual" claim, not a representative PAGA claim (and not a direct claim under Section 558 either, because outside of PAGA no private right of action exists to enforce Section 558). There is no such thing as an "individual" PAGA claim, because the whole point of the statute (and the relevant statutory language, Labor Code Section 2699(a)) is to allow private individuals to stand in the enforcement shoes of the State, and a single-claimant action for individual relief would "not result in the penalties contemplated under the PAGA to punish and deter employer practices that violate the rights of numerous employees under the Labor

Code." (*Brown*, 197 Cal.App.4th at 502; *see Huff*, 23 Cal.App.5th at 757 [discussing PAGA's deterrence objective].)

B. The Legislature Enacted Section 558 and PAGA to Close Gaps in the State's Enforcement of Labor Code Overtime Provisions and to Address the State's Inadequate Economic Resources for Essential Labor Code Enforcement.

The disgorgement of unpaid wages as a component of the "civil penalties" that the State could collect against a law-violating employer furthers the law-enforcement purposes behind Labor Code section 558 and PAGA.

1. The State of Labor Code Enforcement Prior to Section 558 and PAGA

The Legislature enacted Labor Code section 558 (in 1999) and later PAGA (in 2004, with subsequent amendments) to address a statewide crisis resulting from widespread violations of the baseline protections supposedly guaranteed by California's wage and hour laws. According to the California Department of Industrial Relations 1998-1999 Biennial Report, the institutional goals of California's Division of Labor Standard Enforcement ("DLSE") were twofold: "to vigorously enforce labor standards with special emphasis on payment of minimum and overtime wages in low paying industries; and to work with employer groups, expanding their knowledge of labor law requirements, with the aim of creating an environment in which law-abiding employers no longer suffer unfair competition from employers who follow unlawful practices." (Request for Judicial Notice In Support of Amicus Curiae Brief in Support of Real Party in Interest [hereafter "Amicus RFJN"], Exhibit A, at p. 6.) However, the DLSE was hamstrung in its ability to secure these goals, because it had only two procedural mechanisms available for remedying wage violations, neither of which was adequate: wage claim adjudication, and Bureau of Field Enforcement ("BOFE") enforcement actions. (*Id.*; Amicus RFJN, Exhibit C, Letter from State Senator Joseph Dunn to Governor Gray Davis (Sept. 16, 2003), Cal. Governor's Ch.

Bill File SB 796 ("Dunn Letter"), at p. 1; Amicus RFJN, Exhibit E, Memo from State Labor Commissioner to IWC Executive Secretary, DIR, DLSE (Dec. 23, 1999) ("Labor Commissioner Memo"), at p. 2.)

Before the enactment of Section 558, the Labor Code did not provide any civil penalty mechanism by which the BOFE could enforce overtime laws. (*Id.*) The only way the State could pursue claims for Labor Code overtime violations on behalf of the public was by having a district attorney prosecute the violation as a criminal misdemeanor offense. (*See id.*; Amicus RFJN, Exhibit B, AB 60 Enrolled Bill Memo, Cal. Governor's Ch. Bill File (amended July 1, 1999) ("AB 60 Report"), at p. 8.) However, as noted by PAGA's author, Senator Joseph Dunn, Labor Code violations were rarely the subject of criminal prosecution, even though the Labor Code repeatedly made violations of its provisions a misdemeanor. (*See* Dunn Letter at p. 1.) Senator Dunn emphasized that the addition of civil penalties to the statute's public enforcement capability was critical to the public welfare because such penalties (and a simplified mechanism for enforcing them, with only a preponderance standard of proof required) would supplement the limited and under-enforced criminal sanctions contained in the Labor Code. (*Id.*) He explained, "[l]ocal district attorneys are likely to prosecute only the most heinous of Labor Code violations, which leaves injured workers without redress for many code provisions." (*Id.*)

Agency enforcement of Labor Code violations was similarly spotty, as the BOFE lacked nearly enough resources to meaningfully or effectively enforce overtime laws and to secure future compliance. Between 1980 and 2000 California's workforce grew 48 percent, while DLSE's budgetary resources increased only 27 percent. (Amicus RFJN, Exhibit D, Bar-Cohen and Carillo, "Labor Law Enforcement in California, 1970-2000," THE STATE OF CALIFORNIA LABOR (2002) at p. 136 [citing Cleeland and Dickerson, "Davis Cuts Requested Labor Law Funding; Workplace: Budget Would Still Grow by $2 Million, but Advocates Say Far More Is Needed," *Los Angeles Times*, Business section (July 27,

2001) at p. 1]). During the same two decades, the DLSE's staffing level decreased 7.6 percent. (*Id.* at p. 136.)

2. The Enactment of Section 558

Against this backdrop, the Legislature in 1999 enacted AB 60, which created Section 558. (Cal. Lab. Code § 558 (added by Stats. 1999, Ch. 134 (AB 60), § 14)). The Legislature enacted Section 558 because it recognized the need for far stronger civil penalties to encourage enhanced enforcement and to deter pervasive non-compliance among emboldened employers (and those that struggled to compete with them). (*See* Labor Commissioner Memo, at p. 2; Amicus RFJN, Exhibit F, Labor Commissioner, *2015–2016 Fiscal Year Report on the Effectiveness of the Bureau of Field Enforcement*, CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, https://www.dir.ca.gov/dlse/BOFE_LegReport2016.pdf (last visited August 19, 2018) ("2016 BOFE Report"), at p. 2; Dunn Letter at p. 1.)

California's Labor Commissioner recognized that the new civil penalties authorized by AB 60 greatly enhanced her agency's ability to enforce the law. (Labor Commissioner Memo at p. 2.) She recognized that the ability to collect civil penalties and issue citations would enhance the Labor Code's deterrent effect and give the State an ownership interest in the recovery. (*See id.*; *see also* AB 60 Report at pp. 8-9.)

More specifically, the Labor Commissioner saw the ability to recover *unpaid wages as part of the civil penalties* for overtime violations as key to her agency's new authority under Section 558:

> [F]or DLSE, in its function as an enforcement agency, perhaps the most important change brought about by [AB 60] is creation of a new method for enforcing overtime obligations. Under section 14 of the bill, section 558 is added to the Labor Code, under which the DLSE may issue a civil penalty citation to an employer that violates the provisions of AB 60 or any provision regulating hours and days of work in any IWC order…This unpaid overtime wage component of the assessment provides DLSE with a significant enforcement mechanism….

(Labor Commissioner Memo at p. 1.)

The Labor Commissioner Memo explained that before the enactment of Section 558, the DLSE could not seek penalties against employers for overtime violations, and the only way the State could pursue claims for overtime violations on behalf of the public was through the prosecution of the misdemeanor sanctions under Labor Code § 553 in a criminal action brought by a district attorney. (*Id.* at 2.) The Labor Commissioner emphasized that, aside from adjudicating individual wage claims, an inefficient and inadequate procedure where violations are widespread, DLSE previously could only compel employers to comply with overtime provisions by filing, and prevailing in, a civil action under Labor Code §1193.6. (*Id*.) Although the DLSE could recover costs and attorneys' fees under that provision, there was no way for the Labor Commissioner to collect fines or penalties on behalf of the public at large or otherwise to obtain a significant deterrent effect. *See* Cal. Lab. Code § 1193. The Labor Commissioner explained that the new range of civil penalties made available by Section 558 (including both the unpaid overtime wage component, and the $100/violation assessments), would enhance the State's ability to enforce the law and increase deterrence, and ultimately obtain far greater compliance. (Labor Commissioner Memo at p. 3.)

3. <u>The Enactment of PAGA</u>

In 2003, the Legislature further strengthened the enforcement capabilities of California's wage and hour laws by enacting SB 796 to create PAGA. As an alternative to allowing only the state to pursue civil penalties for Labor Code violations, PAGA provided that any existing civil penalty (and a range of new penalties) could "be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3." (Cal Lab. Code § 2699(a) [added by Stats. 2003, Ch. 906 (SB 796), § 2]). PAGA "[s]pecifies that when an individual acts as a 'private attorney general' and sues a company for a

violation of the Labor Code, the court hearing the suit will have the same degree of discretion that the Labor and Workforce Development Agency would have if it were prosecuting the alleged violation." (Amicus RFJN, Exhibit G, Assembly Republican Bill Analysis (Sept. 2, 2003), SB 796, at p. 46 of bill analysis.)

The enactment of PAGA reflects the Legislature's considered judgment that under-enforcement of Labor Code protections was significantly undermining its efforts to enact minimum workplace standards that would apply across the State. The enactment of Section 558 in 1999 helped, but State labor enforcement was still inadequate and the Legislature determined that a *qui tam*-like procedure was essential if the goal of obtaining more complete compliance were ever to be achieved. Senator Dunn explained that while civil penalties were critical for the public welfare, "imposing a fine is not enough. A civil penalty is meaningless to an injured worker if there is not one to collect it." (Dunn Letter at p. 1.) Thus, the Legislature enacted PAGA "[t]o compensate for the lack of '[a]dequate financing of essential labor law enforcement functions,'" (Cal. Stat. ch. 906 § 1(d)) and correct flaws in California's Labor Code enforcement scheme (Assembly Com. on Labor and Employment, Analysis of SB 796 (Reg. Sess. 2003–2004)).

The backdrop for PAGA's passage was as follows: Governor Gray Davis's administration had been providing additional funding to labor enforcement divisions since 1998, when Section 558 was being developed in the Legislature. Yet even by 2002, resources remained below the levels of the mid-1980s. Bar-Cohen & Carillo, *supra* at 136. Noncompliance rates remained inordinately high in many industries. (*Id*.) In 2001 alone, the DLSE fined employers over $20 million in back wages for noncompliance with California's labor standards, but that was only a small fraction of the billions of dollars of violations that it knew were occurring each year. (*Id*.) As this Court explained in *Iskanian*:

> Estimates of the size of California's 'underground economy'—businesses operating outside the state's tax and licensing requirements—ranged from 60 to 140 billion dollars a year, representing a tax loss to the state of three to six billion dollars annually. Further, a U.S. Department of Labor study of the

> garment industry in Los Angeles, which employs over 100,000 workers, estimated the existence of over 33,000 serious and ongoing wage violations by the city's garment industry employers, but that DIR was issuing fewer than 100 wage citations per year for all industries throughout the state. [] Moreover, evidence demonstrates that the resources dedicated to labor law enforcement have not kept pace with the growth of the economy in California.

(*Iskanian*, 59 Cal.4th at 378–79.)

Because of the State's limited resource, the Legislature enacted PAGA to enlist the help of private citizens to vindicate the State's objectives.

4. Enactments Subsequent to Section 558 and PAGA Show That Civil Penalties, including the State's Recovery of Unpaid Wages, Continue to Promote State Objectives to Protect Workers.

The California Legislature continues to enact legislation designed to enhance Labor Code enforcement and to increase the likelihood that law-violating employers will be caught, prosecuted (civilly, if not criminally), forced to disgorge their unlawfully obtained gains, and subjected to additional penalties. These new bills further the Legislature's longstanding goals of achieving full compliance with existing law. There would be no reason for the Legislature to enact these increasingly strong statutory remedies and increasingly simplified enforcement mechanisms if employers were in compliance with basic wage and hour protections. The Bank's complaints about "abusive" PAGA actions reflect the sad reality that Labor Code violations continue to be pervasive, and until employers acknowledge the inevitability of public enforcement (whether directly or through a representative action), there will be a continued need for PAGA prosecutions.

The post-PAGA history of the California Labor Code confirms the Legislature's consistent effort to strengthen enforcement and deterrence. For example, in 2011, the Legislature enacted SB 459, adding Labor Code section 226.8, which makes it unlawful to willfully misclassify an individual as an independent contractor. (Lab. Code, § 226.8 (added by Stats. 2011, c. 706 (SB 459), § 1).) The bill addressed "independent contractor"

misclassification, a practice that continued to be widespread even after the Legislature had taken other efforts to bolster Labor Code enforcement. (*See* Amicus RFJN, Exhibit H at 2490-91.) SB 459 created new civil and administrative penalties "to punish and deter violations" of Section 226.8. (*Id.*) Similar to the purpose of Section 558 and PAGA, Section 226.8 was enacted to enhance the State's enforcement authority and to impose meaningful economic liability on miscreant employers.

In 2015, the Legislature enacted SB 588, creating Labor Code section 558.1, which extended civil liability to those who act on behalf of an employer that violates Labor Code provisions regulating minimum wages or hours and days of work. (Lab. Code § 558.1 (added by Stats. 2015, c. 803 (SB 588), § 10).) That law created special provisions for the enforcement of judgments against an employer arising from the employer's nonpayment of wages. (2015 Cal. Legis. Serv. Ch. 803(1) (S.B. 588).) The Legislature intended Section 558.1 to create civil enforcement authority parallel to the State's existing criminal law enforcement authority. (2015 Cal. Legis. Serv. Ch. 803(2).)

Also in 2015, the Legislature enacted AB 1897, which created Labor Code section 2810.3 and codified "client employer" liability for businesses that employ workers obtained through temporary worker or staffing agencies and other similar entities. (Lab. Code § 2810.3 (added by Stats. 2014, c. 728 (AB 1897), § 1).) In addition to imposing liability on those who were complicit in wage and hour violations and empowering the Labor Commissioner to adopt regulations and rules to administer and enforce the law's provisions, the Legislature made clear that "waiver of its provisions is contrary to public policy, void, and unenforceable." (Legislative Counsel's Digest, 2014 Cal. Legis. Serv. Ch. 728 (AB 1897).)

In sum, the Legislature's enactment of Section 558 and PAGA are part of a longstanding, consistent, and continuing trend to make the worker protections set forth in the Labor Code a practical reality, and not simply a set of empty promises that are rarely enforced. It was not by accident that the Legislature empowered the state in Section 558 to

recover underpaid wages as well as per-pay-period penalties (often in substantial amounts) for violations of state overtime law (and now, meal-and-rest-break law as well). Nor was it by accident that the Legislature empowered aggrieved employees to pursue those same remedies on behalf of the state under PAGA, because that is the full-enforcement mechanism that the Legislature has consistently sought to achieve throughout most of the history of Labor Code enactment and amendment.

5. Enforcement of Section 558 through PAGA Enhances the State's Ability to Achieve Broad the Labor Code Compliance.

In part because of the increased resources that have become available through PAGA enforcement actions, DLSE has been able to add staffing and to become more targeted in its enforcement of wage and hour laws, "priz[ing] quality over quantity and in-depth investigations over quick in-and-out inspections." (*See* Amicus RFJN, Exhibit F, p. 3.) However, DLSE's enforcement framework leaves thousands of cases uninspected and uninvestigated. (*Id*.) Labor Commissioner Julie Su acknowledges, "the Division has performed fewer inspections overall compared to the years before this administration." (*Id*.)

According to the Workload History of the DIR Budget Change Proposal for FY2017 submitted to the Legislature, the LWDA is still tremendously hampered in its ability to investigate and prosecute Labor Code violations. (*See* Amicus RFJN, Exhibit I, pp. 2, 4.) The DLSE received 5,172 PAGA notices in FY2016, for example, and without the additional resources provided by the aggrieved employees and their counsel, the overwhelming number of those cases could never have been prosecuted, let alone prosecuted effectively. (*Id.*; *see also* PAGA Case Search, DIR, DLSE, https://cadir.secure.force.com/PagaSearch/ (last visited August 23, 2018).) According to LWDA records, "[t]he volume of PAGA notices is as high as 635 notices per month and each requires review from staff with appropriate training/expertise in order to review the

case in the time frame required, and make a determination whether to investigate." (Amicus RFJN, Exhibit I, p. 4.) In the DLSE's 2017 Budget Proposal, it asked that the Legislature provide the LWDA with "10 positions and $1.6 million in resources from the Labor and Workforce Development Fund for the 2016/17 fiscal year and $1.5 million ongoing to stabilize and improve the handling of PAGA cases, largely to the benefit of workers, employers, and the state." (*Id.* at 1.) However, even with those budget increases, DIR projected that only 45 PAGA-related cases were likely to be retained for investigation. (*Id.* at 4.)

The Labor Commissioner's 2016 BOFE Report revealed that DLSE had collected approximately $200,000 that year from citations for overtime and meal and rest break violations, the highest it ever has collected for matters pursued through the agency's citation procedure. (Amicus RFJN, Exhibit F, p. 5.) This is in sharp contrast to the *millions* of dollars CELA attorneys obtain on behalf of the State as civil penalties for PAGA and PAGA-related cases brought each year. (*See, e.g.*, *Garrett v. Bank of America* (Super. Ct. Alameda County, 2016) No. RG13699027 (LWDA received PAGA penalties of $7.5 million from $15 million settlement); *Dutt v. Lowe's HIW, Inc.* (Super. Ct. L.A., 2016) No. BC553191 (LWDA received PAGA penalties of $2,979,422.13 from a $6.25 million settlement); *Padilla v. Staffmark Investment LLC* (Super. Ct. San Bernadino Cnty, 2015) No. CIVDS1408641 (LWDA received PAGA penalties of $975,930.75 from a $2 million settlement).) An increasing proportion of the Labor Commissioner's enforcement budget is the result of aggrieved employees taking action on behalf of the State—which is exactly what the Legislature intended and anticipated when it enacted PAGA with the vision of jump-starting Labor Code enforcement. (*See* Amicus RFJN, Exhibit I, Attachment IV.)

The State needs aggrieved employees to act on its behalf to enforce overtime violations. Barring Lawson from recovering the back-wages portion of the civil penalties on behalf of the state and other aggrieved employees would dramatically undermine the

State's ability to enforce Section 558 and collect the full civil penalties authorized under that provision.

C. The State's Creation of Section 558 Civil Penalties Was an Exercise of Its Police Power.

The legislative history of Section 558 and PAGA demonstrate the State's intent to exercise its police power authority to enact minimum workplace standards that are subject to meaningful enforcement remedies. The Legislature's regulatory framework to combat wage theft clearly furthers its goal of improving health, safety, morals, and general welfare of its residents. "We are persuaded that the public has an interest in the prevention of wrongs of this character, just as much as it is interested in the prevention of some other of those wrongs against property or wrongs against persons which are commonly regarded as being properly within the scope of operation of criminal law." (*In re Oswald* (1926) 76 Cal.App. 347, 350. *See also Ex parte Trombley* (1948) 31 Cal.2d 801, 807-08 [employer's willful refusal to pay wages is a crime; definition of willful comes from the Penal Code]); *De Haviland v. Warner Bros. Pictures* (1944) 67 Cal.App.2d 225, 235–236 ("Penal statutes, within constitutional limitations, are conclusive evidence that the prohibited acts would be against the public interest."] [citing generally, *inter alia*, *In re Twing* (1922) 188 Cal. 261.])

The fact that Section 558 authorizes the State (and private employees under PAGA) to recover civil penalties that include underpaid wages does not change Section 558's enforcement character. The "underpaid wages" language of Section 558 is similar to provisions in the Penal Code. (*See, e.g.*, Penal Code § 1202.4(b) ("[i]n every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so".) Indeed, the State can order criminals to reimburse their victims for a variety of economic harms, including but not limited to lost wages. (Penal Code §§ 1202.4(f)(3)(D), (E).)

Here, because Section 558 and PAGA were enacted as part of an ongoing effort to secure vigorous and uniform enforcement of the State's labor laws, their enactment is a valid exercise of the State's police powers to provide for the public welfare of employees and law-abiding employers.

1. The State's Objective of Preserving Government Resources Advances A Public Interest and Justifies the Exercise of Its Police Powers.

"States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety ... are only a few examples." (*DeCanas v. Bica* (1976) 424 U.S. 351, 356; *see, e.g., Metropolitan Life Ins. Co. v. Massachusetts* (1985) 471 U.S. 724, 756) [state laws requiring that employers contribute to unemployment and workmen's compensation funds, laws prescribing mandatory state holidays, and those dictating payment to employees for time spent at the polls or on jury duty have all withstood scrutiny]; *see also Californians For Safe and Competitive Dump Truck Transp. v. Mendonca* (N.D. Cal. 1997) 957 F.Supp. 1121, 1124 *aff'd* (9th Cir. 1998) 152 F.3d 1184 (holding that minimum and other wage laws fall within states' broad authority under their police powers to regulate employment relationship).) The States have traditionally had great latitude under their police powers to legislate as "'to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" (*Slaughter-House Cases* (1873) 16 Wall. 36, 62, 21 L.Ed. 394, quoting *Thorpe v. Rutland & Burlington R. Co.* (1855) 27 Vt. 140, 149.)

In California, "several statutes…were enacted for the benefit of employees and also to regulate the employer-employee relationship in the interest of the public at large. The code sections we are considering are no less closely identified with public interest." (*De Haviland*, 67 Cal.App.2d at 235-36.) "The power to restrict the right of private contract is one which does not exist independently of the power to legislate for the purpose of

preserving the public comfort, health, safety, morals and welfare. The power to provide for the comfort, health, safety and general welfare of any or all employees is granted to the Legislature." (*Id*.) Employment terms (such as Lawson's) "fall squarely within the prohibition of section 3513 of the Civil Code, that rights created in the public interest may not be contravened by private agreement." (*Id*.)

Section 3513 of the California Civil Code states: "Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement." (Cal. Civ. Code § 3513 (current with urgency legislation through Ch. 119 of 2018 Reg. Sess.); *see also* Cal. Const., Art. 3 ("The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.").) The remedial purposes of the State's workplace laws require they begiven liberal effect to promote the general object sought to be accomplished. (*Mendoza v. Nordstrom, Inc.* (2017) 216 Cal.Rptr.3d 889.) California has declared its state policy is to vigorously and uniformly enforce minimum workplace standards (Lab. Code § 90.5.)—and PAGA plays a central role in the State's enforcement policy. (*Sakkab v. Luxottica Retail N. Am., Inc.* (2015) 803 F.3d at 439.)

PAGA reaffirms the State's deliberate decision to implement an integrated enforcement scheme designed to maximize the public benefit at a minimal cost to the State. By incentivizing workers to report violations to the LWDA—and allowing individuals to take private action on the State's behalf. The State enhances the deterrence effect of Labor Code enforcement, mitigating the need for public expenditures for future public enforcement actions. Thus, PAGA preserves the State's authority to provide injunctive relief, including the restitution of unpaid wages, that benefits the State's interests and the interests of the general public.

D. The Federal Arbitration Act Does Not Preempt PAGA

Under PAGA, an "aggrieved employee" can bring PAGA claims as a proxy for the State's labor law enforcement agencies acting on behalf of any aggrieved employee not a party to the proceeding. (*Iskanian*, 59 Cal.4th at 380-381.) The employee's PAGA action functions as a substitute for an action brought by the government itself. (*Id.*) Because a PAGA action is thus "representative" by its nature, the right to bring such action cannot be waived by private agreement. Nothing in the FAA is to the contrary, as this Court has previously made clear in *Iskanian* and *McGill*.

1. PAGA Actions Cannot be Compelled to Arbitration Under *Iskanian.*

This Court in *Iskanian* declared arbitration clauses unenforceable to the extent they compel employees to waive their right to pursue the State's claims in a representative action under PAGA. (59 Cal.4th at 386-388.) Due to PAGA's structure and public purpose, the State is always a real party in interest in PAGA actions, because the plaintiffs are suing on behalf of the State, as in a *qui tam* action. (*Id.* at 387.) Because PAGA actions are necessarily *public* disputes between the State and an employer, an employer cannot force its employees to waive their right to pursue PAGA actions on behalf of the state by requiring them to accept a *private* mandatory pre-employment dispute arbitration agreement. (*Id.* at 384-95.) The scope of the FAA does not reach a PAGA action because the government cannot be bound by an arbitration agreement between two private parties and because a PAGA action "is not a dispute between an employer and employee arising out of their contractual relationship. It is a dispute between an employer and the state." (*Id.* at 386.)

The U.S. Supreme Court, too, has held that arbitration agreements between private parties cannot be construed as waiving government enforcement actions for statutory remedies. (*See EEOC v. Waffle House* (2002) 534 U.S. 279.) The equal-footing goals of the FAA do not require the government to waive its statutory enforcement rights in cases

where it never agreed to do so. (*Id.* at 289-296.) While a private individual's recovery may limit (or be offset from) any recovery sought by the government, the individual's private case and the government's public case are conceptually two different actions; thus, the government's enforcement action is not merely derivative of the charging party—it is a substantive right of action granted by statute. (*Id.* at 296-298.)

Likewise, Lawson's agreement to arbitrate does not require the State to waive any remedies authorized by PAGA and Section 558, because the State has not agreed to do so. (*See Iskanian*, 59 Cal.4th at p. 381. AA I: 050-051, 063-064.) Like the EEOC's action in *Waffle House*, Lawson's PAGA action is binding on the State under ordinary principles of res judicata, mootness, or mitigation—and the PAGA claims brought by Lawson on behalf of the state are stand-alone civil penalty enforcement actions authorized by statute. (*See Iskanian*, at pp. 381-382 ("the act authorizes a representative action…. as a substitute for an action brought by the government itself, a judgment in that action binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government"); *cf. Waffle House*, 534 U.S. at 296-298 ("the statute specifically grants the EEOC exclusive authority over the choice of forum and the prayer for relief once a charge has been filed").)

2. ***McGill* Prohibits Enforcing Lawson's Arbitration Clause Because It Would Eliminate Her Right to Pursue PAGA in any Forum.**

The Bank takes the position that Lawson's arbitration agreement required her to arbitrate any workplace claims she might have against the Bank on an *individual* basis. (Opening Brief, pp. 41-43; *but see supra* at _ n._.) Lawson's arbitration agreement makes no reference to "representative" or "*qui tam*" actions. (*See* AA I:050-051, 063-064.) But if the Bank is correct that its agreement prohibits representative actions as well as class actions, and that Lawson may only pursue her PAGA claims on an individual basis, then it is effectively saying she has no PAGA claim at all. Its arbitration agreement is for that reason unenforceable under *McGill*, 2 Cal.5th at 961.

In *McGill*, this Court unanimously held that California law prohibits the enforcement of any contract provision, whether an arbitration agreement or otherwise, that eliminates a non-waivable public right. (*Id*.) The Court invalidated the arbitration agreement because it eliminated the right to pursue a "public injunction" – a remedy provided under the Consumer Legal Remedies Act, Unfair Competition Law, and False Advertising Law. (*Id*.) To invalidate the arbitration agreement, the Court relied on generally applicable contract law, because any agreement in California is unenforceable if it eliminates a statutory right and compromises the public policy purpose the statutory right was intended to serve. (*Id.*, at 961-962.)

PAGA was unquestionably enacted by the Legislature for a public purpose, as evident by the legislative history discussed above and recognized by this Court. (*Iskanian*, 54 Cal.4th at 383.) A PAGA action is "fundamentally a law enforcement action." (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 986.) The Labor Code and Wage Order rights it protects are themselves fundamental, non-waivable public law rights. (*Gentry*, 42 Cal.4th at 455, *overruled on other grounds by Iskanian*, 59 Cal.4th at 362-67; *Trombley*, 31 Cal.2d at 809; *see also* Labor Code §90.5 ("It is the policy of the state to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work . . . for employers that have not secured the payment of compensation . . . .").)

PAGA does not provide any right to pursue Labor Code claims for civil penalties on an *individual* basis. PAGA *only* provides employees the statutory right to bring a representative action on behalf of the state that seeks to protect the rights of other current or former "aggrieved employees." (*Reyes v Macy's Inc.* (2011) 202 Cal.App.4th 1119, 1123.) PAGA "does *not* enable a single aggrieved employee to litigate his or her claims." (*Id.* at 1123-24 (emphasis added).) "[E]very PAGA action, whether seeking penalties for Labor Code violations solely as to only one aggrieved employee - the plaintiff bringing the action - or as to other employees as well, is a representative action on behalf of the state." (*Iskanian*, 59 Cal.4th at 394 (Chin, J. concurring).)

If Lawson's arbitration agreement only permits her to adjudicate her PAGA claims on an individual basis, it does not permit her to adjudicate them at all. Instead, it strips her, and the public, of a non-waivable, fundamental right and it is therefore invalid and unenforceable under *McGill* (2 Cal.5th at 961) and the analysis in the concurring opinion in *Iskanian* (59 Cal.4th at 379-381). (*See also* Civ. Code § 3513 ("a law established for a public reason cannot be contravened by a private agreement").)

3. Because Lawson's Arbitration Clause Eliminates the Right to Pursue PAGA, the FAA's Savings Clause Invalidates It.

While the FAA embodies a "liberal policy favoring arbitration," the U.S. Supreme Court has explained that the FAA is fundamentally principled in contract law so "courts must place arbitration agreements on an equal footing with other contracts." (*AT&T v. Concepcion* (2011) 563 U.S. 333, 339.) Congress's purpose in enacting the FAA "was to make arbitration agreements as enforceable as other contracts, but not more so." (*Prima Paint v. Flood & Conklin* (1967) 388 U.S. 395, 404, fn. 12.)

The FAA states an arbitration agreement may be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2.) The FAA looks to state contract law to determine if an agreement to arbitrate is enforceable. (*Arthur Andersen LLP v. Carlisle* (2009) 556 U.S. 624, 630.) Thus, arbitration agreements, "[l]ike other contracts….may be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'" (*Rent-A-Center, West, Inc. v. Jackson* (2010) 561 U.S. 63, 68 [internal citations omitted].))

PAGA provides an aggrieved employee a statutory right to assert Labor Code violations as a representative action on behalf of the State and others similarly aggrieved to vindicate the Labor Code's objectives. (*Iskanian*, 59 Cal.4th at 379-381.) California law prohibits enforcement of any agreement that contravenes a law established for a public purpose. (Civ. Code § 3513.) An arbitration agreement construed to eliminate the statutory

right to a representative action under PAGA is invalid under the FAA because it contravenes PAGA's public purpose—rigorous and uniform application of the State's wage and hour laws. (*See McGill*, 2 Cal.5th at 961-962; Lab. Code § 90.5(a).)

The Ninth Circuit agreed with the "*Iskanian* rule," finding that the FAA permits invalidation of arbitration agreements waiving statutory rights provided by PAGA on generally applicable state contract grounds. (*Sakkab*, 803 F.3d at 438-441.) The FAA does not conflict with PAGA because PAGA only "prohibits waiving the central feature of the PAGA private enforcement scheme—the right to act as a private attorney general to recover the full measure of penalties." (*Id.* at 439.)

This Ninth Circuit's "conclusion that the FAA does not preempt the *Iskanian* rule is bolstered by PAGA's central role in enforcing California's labor laws." (*Id.*, 803 F.3d at 439.) In determining issues of federal preemption, courts must "'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" (*Id.* (internal citations omitted).) "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State." (*Metropolitan Life Ins. Co.*, 471 U.S. at 756.) The Ninth Circuit explained that the FAA was not intended to require courts to enforce agreements that eliminate a statutory enforcement scheme chosen by states as an optimal method for enforcing its wage and hour laws. (*Sakkab*, 803 F.3d at 439-440.)

The Bank's position that the FAA requires strict enforcement of all terms in an arbitration agreement is untenable because it would place arbitration agreements on higher footing than other agreements—rendering the FAA's Section 2 savings clause wholly ineffectual. (*Id.* at 434-435.) If Congress intended the FAA to preempt representative *qui tam* actions on behalf of the government, Congress would have said so, because *qui tam* statutes similar to PAGA were a part of the nation's legal landscape when the FAA was proposed in 1924. (*See Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens* (2000) 529 U.S.

765, 776-77 n. 5 (noting that "the First Congress passed one statute allowing injured parties to sue for damages on both their own and the United States' behalf").)

Prohibiting the waiver of PAGA claims for civil penalties accords with the State's policy of uniformity in the application of the state's workplace standards—protecting employers in compliance and punishing those who attempt to gain competitive advantage by subjecting workers to substandard labor conditions. (*See* Lab. Code § 90.5(a); *Dynamex,* 4 Cal.5th 903; *cf. Brooklyn Sav. Bank. V. O'Neil* (1945) 324 U.S. 697, 702-710 (statutory right to liquidated damages under the Fair Labor Standards Act cannot be waived because it would compromise the public purpose "which it was designed to effectuate" by allowing an employer "to gain a competitive advantage").)

The FAA does not preempt Lawson's PAGA claims. Instead, the FAA permits invalidation of Lawson's arbitration agreement insofar as it unlawfully eliminates Lawson's statutory right to pursue PAGA as a representative action on behalf of the State—contravening PAGA's public purpose of rigorous and uniform application of state labor standards.

III. CONCLUSION

For the foregoing reasons, the *Lawson* decision should be affirmed.

Respectfully submitted,

Dated: August 29, 2018

BRYAN SCHWARTZ LAW

By: _____

Bryan J. Schwartz
Eduard R. Meleshinsky
Logan T. Talbot
DeCarol A. Davis

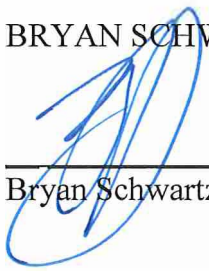
CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.520(c), and in reliance upon the word count feature of the Microsoft Word processing program used, I certify that the foregoing Amicus Curiae Brief, contains 9,489 words, exclusive of those materials not required to be counted under Rule 8.504(d)(3).

Respectfully submitted,

Dated: August 29, 2018

BRYAN SCHWARTZ LAW



Bryan Schwartz

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PROOF OF SERVICE

Case: LAWSON v. ZB, N.A.
Court of Appeal Case Nos. D071279 & D071376 (Consolidated)
San Diego County Superior Court, No. 37-2016-00005578-CU-OE-CTL

I am over the age of 18 years and not a party to the within entitled action; my business address is 1330 Broadway, Suite 1630, Oakland, California 94612. On August 29, 2018 I served the foregoing documents described as:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF REAL PARTY IN INTEREST

[PROPOSED] BRIEF OF AMICUS CURIAE CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION

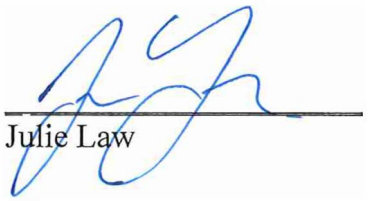
on the interested parties to said action by the following means:

[X] (By FedEx) By placing a true copy thereof, enclosed in a sealed envelope or package provided by FedEx and addressed to the persons at the addresses shown below. I am readily familiar with this business's practice for collection and processing of correspondence with FedEx, and deposited the sealed envelope, with postage thereon fully prepaid on account, at an office or a regularly utilized drop box for collection and delivery the same day following ordinary business practices with FedEx.

ADDRESSEE	
James L. Morris Brian C. Sinclair Gerard M. Mooney RUTAN & TUCKER, LLP 611 Anton Boulevard, Suite 1400 Costa Mesa, California 92626-1931 *Attorneys for Petitioners and Defendants ZB, N.A. and Zions Bancorporation*	
Michael Rubin Kristin Marie Garcia ALTSHULER BERZON, LLP 177 Post Street, Suite 300 San Francisco, CA 94108	Edwin Aiwazian Arby Aiwazian Joanna Ghosh LAWYERS FOR JUSTICE, PC 410 Arden Avenue, Suite 203 Glendale, CA 91203
Attorneys for Plaintiff and Real Party in Interest Kalethia Lawson	

Clerk of the Court Supreme Court of California 350 McAllister Street San Francisco, California 94102	Electronically Submitted *(with Original + 8 copies)*
Office of the Attorney General, State of California 600 West Broadway, Suite 1800 San Diego, California 92101-3702	
Clerk of the Court California Court of Appeal, Fourth Appellate Dist., Div. 1 750 B Street, Suite 300 San Diego, California 92101	
Office of the Clerk San Diego County Superior Court 330 West Broadway San Diego, CA 92101	

I declare under penalty of perjury that the foregoing is true and correct, and that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. Executed on August 29, 2018 at Oakland, California.



Julie Law