No. S246711

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

Kalethia Lawson,
Plaintiff and Appellant

v.

ZB, N.A. et al.,
Defendants and Respondents

Application To File Amicus Curiae Brief And Proposed Brief Of The California New Car Dealers Association In Support Of Defendants And Respondents ZB N.A. et el.

After a Decision by the Court of Appeal, Fourth Appellate District, Division One
Nos. D071279, D071376
Published at 18 Cal.App.5th 705

San Diego County Superior Court
The Honorable Joel M. Pressman, Judge
Case No. 37-2016-00005578

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Application For Leave To File Amicus Curiae Brief

Pursuant to California Rules of Court, rule 8.520(f), the California New Car Dealers Association (CNCDA) respectfully requests leave to file the attached amicus curiae brief in support of defendants and respondents ZB, N.A. and Zions Bancorporation.

CNCDA is a nonprofit corporation organized to protect and advance the interests of franchised new vehicle dealers in California. CNCDA has roughly 1,100 dealer-members. These members sell and lease new vehicles; they also engage in automotive service, repair and part sales. CNCDA frequently files amicus curiae briefs in cases such as this that implicate the important concerns of its dealer-members.

California's franchised new vehicle dealers have about 140,000 employees—i.e., over 100 employees per dealership on average. Their total payroll is over $8.5 billion annually. (*CNCDA 2018 Economic Impact Report* <https://www.cncda.org/wp-content/uploads/2018-Economic-Impact-Report.pdf> [as of Aug. 9, 2018].)

Disputes regarding enforcement of arbitration provisions in employment agreements are a common drag on dealer-members' businesses. (E.g. *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109 [vehicle dealer petition to compel arbitration in employment agreement].) As major California employers, CNCDA's dealer-members have a direct interest in ensuring that California's employment laws are fairly and properly construed,

including that arbitration provisions in employment agreements are properly enforced.

For many CNCDA member-dealers unwarranted employment claims, especially where they can be unilaterally multiplied through PAGA, are a serious threat to their continuing viability as businesses.

CNCDA's counsel have reviewed the briefing in this matter and believe that CNCDA can provide an important broader perspective regarding the proper operation of the Private Attorneys General Act, Labor Code, § 2699.

CNCDA has entirely funded the preparation and submission of its brief without any monetary contribution from any other person or entity. This brief is solely the work of counsel representing CNCDA. (See Cal. Rules of Court, rule 8.520(f)(4).)

For all of these reasons, CNCDA respectfully requests leave to file the accompanying Amicus Curiae Brief of the California New Car Dealers Association in support of defendants and respondents ZB, N.A. and Zions Bancorporation.

Dated: August 14, 2018

Respectfully submitted,

GREINES, MARTIN, STEIN & RICHLAND LLP
Robert A. Olson
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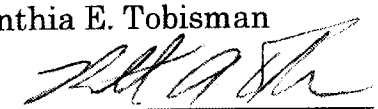
By: 
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Amicus Curiae Brief Of
The California New Car Dealers Association
Introduction

The parties' briefing only lightly touches on a critical assumption underlying the issue before this Court: that in a Private Attorneys General Act (PAGA), Labor Code, section 2699 action, a plaintiff may recover his own and others' unpaid wages as a "civil penalty." But this Court has never so held, nor should it. The Courts of Appeal are in conflict on the issue. (Compare *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112 [followed here by the same Court of Appeal division] with *Esparza v. KS Industries, L.P.* (2017) 13 Cal.App.5th 1228.) The better view is that unpaid wages are *not* civil penalties—and thus cannot be pursued under PAGA.

PAGA was intended to allow plaintiffs to pursue claims for civil penalties that the State did not have the time or resources to pursue. PAGA was not intended to convert individual unpaid wage claims into some sort of State-possessed penalty claim. Nor was it intended to create a quasi-class action for unpaid wages by private individuals standing in the State's shoes, but without due process class action protections and stripped of any binding arbitration agreements.

Recognizing that individual unpaid wage claims cannot be litigated under a PAGA process is consistent with this Court's holding in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 381 (*Iskanian*) that the Federal Arbitration Act (FAA) does not apply to true State-function civil penalty PAGA claims. *Iskanian* proceeded no further than that. It reached the boundary of PAGA.

If PAGA does not extend to individual unpaid wage claims, as this brief demonstrates, there is no need to address the FAA. But if PAGA does encompass individual unpaid wage claims, then the FAA must apply to those claims. The FAA's directive that arbitration provisions are to be honored as written cannot be defeated by the simple expedient of assigning those claims to the State and then having the State, through PAGA, reassign the claims back to their original holders. The FAA does not permit parties or states to launder arbitration clauses out of existence.

With the overly broad interpretation promoted by the plaintiff here and adopted by the Court of Appeal, PAGA poses the same threat to small businesses that an overly broad interpretation of Business and Professions Code section 17200 did. The Legislature expressly sought to avoid such a result. PAGA must be confined to the boundaries that the Legislature

understood and intended—boundaries that are consistent with, rather than violative of, federal law.

Argument

I. The Private Attorneys General Act (PAGA) does not deputize individuals to recover their own or other individuals' unpaid wages under the guise of "civil penalties."

Labor Code section 558 (section 558) allows the State, as an ancillary part of a civil-penalties enforcement action, to collect employees' unpaid wages. Plaintiff takes the position that by doing so, section 558 relabels unpaid wages as civil penalties. She reasons that when a plaintiff steps into the State's shoes under PAGA, she may seek her unpaid wages, as well as those of others as transubstantiated penalties. Her syllogism is: (a) section 558 labels unpaid wages as, and thereby transforms them into, civil penalties; (b) PAGA allows individuals to pursue civil penalties in the State's stead; (c) therefore, PAGA allows individual plaintiffs to seek unpaid wages (their own and co-workers') under its auspices.

Neither section 558 nor PAGA supports plaintiff's syllogism. There is no indication that the Legislature intended to breach the clear distinction between civil penalties (which can be pursued under PAGA) and an individual's claim to unpaid wages (which cannot be pursued under PAGA). The present case, which involves individual unpaid wages, thus falls outside of PAGA.

A. Labor Code section 558 does not transform individuals' unpaid wages claims into "civil penalties."

In enacting section 558, the Legislature did not contemplate that unpaid wage claims would constitute "civil penalties" that could be enforced by private individuals under PAGA. That is apparent from section 558's plain language, which directs that any employer who violates a statutory or Industrial Welfare Commission mandate "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.

(Lab. Code, § 558, subd. (a), italics added.)

Thus, on its face, the statute draws a distinction between the civil penalty of a specific amount ($50 or $100, as applicable) and the employee's non-civil-penalty recovery (unpaid wages).

The civil penalty is the amount "in addition to," that is, on top of, unpaid wages, not unpaid wages themselves.

Lest there be any doubt that the unpaid wages are not part of the civil penalty, section 558 mandates that a claim to unpaid wages is not the *State*'s claim but the individual employee's claim: "(3) Wages recovered pursuant to this section shall be paid *to the affected employee*." (Lab. Code, § 558, subd. (a)(3), italics added.) That unpaid wages go to the employee, not the State, is a clear indication that those amounts are not civil penalties because civil penalties are payments *to the State*.

Esparza v. KS Industries, L.P., supra, recognized the difference between civil penalties and unpaid wages. Because unpaid wages belong to and are paid to the employee, they are *not* a civil penalty. (13 Cal.App 5th at pp. 1241-1243.) "Civil penalties are paid largely into the state treasury. Thus, the state receives proceeds when civil penalties are imposed. In contrast, civil penalties do not include recoveries that could have been obtained by individual employees suing in their individual capacities—that is, victim-specific relief." (*Id.* at pp. 1242-1243; citations omitted; see *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103-1104, 1108-1109 [additional pay *due to employee* for missed meal or rest break under Lab. Code,

§ 226.7 is wages, *not a penalty* subject to a shorter one-year statute of limitations]; *Raines v. Coastal Pacific Food Distributors, Inc.* (2018) 23 Cal.App.5th 667, 679 [because a civil penalty is distinct from damages, PAGA plaintiff need not show his own injury from a willful and knowing violation of Labor Code section 226, as would be required for damages]; *Lopez v. Friant & Associates, LLC* (2017) 15 Cal.App.5th 773, 780 [same]; cf. Bus. & Prof. Code, § 17206 [civil penalties are amounts recoverable only by governmental entities].)

Iskanian, supra, 59 Cal.4th at p. 381 draws the same distinction: "The civil penalties recovered *on behalf of the state* under the PAGA are distinct from the *statutory damages to which employees may be entitled in their individual capacities.*" (Italics added.)

Section 558's legislative history confirms that the $50 or $100 was the only civil penalty contemplated. It contains no mention of collected unpaid wages being part of the civil penalty amount.[1] Rather, *every* time the legislative history discusses what constitutes the new civil penalty, the *sole* reference is to

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[1] The legislative history of section 558 is available at <http://leginfo.legislature.ca.gov/faces/billSearchClient.xhtml> (A.B. 60, session year 1999-2000).

"new civil penalties of $50 per employee for each pay period for a first violation, and $100 per employee for each per pay period for subsequent violations of the Chapter." (Assem. Com. on Labor & Employment, Rep. on Assem. Bill No. 60 (1999-2000 Reg. Sess.) Mar. 17, 1999, p. 5; Assem. Com. on Appropriations, Rep. on Assem. Bill No. 60 (1999-2000 Reg. Sess.) Apr. 21, 1999, p. 3.)[2] There is *no* mention of unpaid wage amounts. Thus, in enacting section 558, the Legislature did not contemplate that it was transforming unpaid wage amounts into a civil penalty.

That unpaid wages are not a "civil penalty" is also buttressed by the many statutes defining a "civil penalty" as a specified dollar sum, not an amount that is measurable by a particular individual's damages. (E.g, Bus. & Prof. Code, §§ 17206 [civil penalty of $2,500], 17536 [same]; Civ. Code, §§ 52 [civil penalty of $25,000], 56.36 [individual may recover damages; public officer acting in the name of the people may recover civil penalties ranging from $1,000 to $250,000]; Gov. Code, § 12651 [civil penalties from $5,500 to $11,000]; Health & Saf. Code, § 25249.7 [up to $2,500]; Lab. Code, §§ 225.5 [$100 to $200], 226.3

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[2] Attached at the end of this brief, per Cal. Rules Court, rule 8.204(d).

[$250 to $1,000], 226.8 [$5,000 to $25,000], 1021 [$200 per day], 1288 [$5,000 to $10,000], 1403 [$500], 6428 [up to $25,000].)

There are, of course, exceptions and outliers. Any statutory compilation as massive as California's Codes is bound to have the occasional inconsistency. But the general rule, proved by the exceptions, is that civil penalties are dollar-denominated amounts, just like the $50 and $100 amounts in section 558. The pervasive use in the Codes of "civil penalty" to refer to a dollar amount, collectible by a governmental officer, means that such was by far the most likely understanding that the Legislature had in enacting section 558.

Finally, that unpaid wages are not part of a "civil penalty" is also supported by an analogous statute: Labor Code section 225.5, which directs the Labor Commission to recover $100 (first violation) or $200 plus 25 percent of any amount unlawfully withheld (subsequent violations) as part of a hearing to recover unpaid wages. Under section 225.5, the civil penalty (a dollar amount or a dollar amount plus an additional amount measured by, but on top of, unpaid wages) is the amount *over and above* the unpaid wages being sought. Again, this is the most likely concept that the Legislature had in mind in enacting section 558.

There is no indication that the Legislature in enacting section 558 intended to transmute unpaid wages from damages to civil penalties.

B. Nothing in PAGA suggests that it was intended to reach individual claims for unpaid wages.

As just shown, plaintiff's syllogism falls apart because section 558's mere mention of unpaid wages does not magically turn such unpaid wages into civil penalties. But plaintiff's syllogism falls apart for another reason too: Nothing in PAGA or its legislative history suggests that it was intended to convert an individual's claims for unpaid wages into a "civil penalty" enforceable by a current or former co-worker.

PAGA is not a vehicle for bringing representative claims for unpaid wages. There is such a vehicle: *class actions*. Class actions are designed to permit a group of employees to pursue unpaid wage damages claims where stringent standards of commonality and representation are met. Class actions are the proper vehicle for pursuing such claims because class actions are constrained by a body of case law ensuring due process when an individual seeks to champion the potentially factually divergent claims of numerous other individuals who may have differing interests. By contrast, PAGA simply allows an individual to act as a private attorney general as to *civil penalties*. It stands

outside of due process concerns because it is pursuing the State's claims, not individuals' and contains none of the class action procedural protections.

PAGA does create its own, gap-filling civil penalties. It piggybacks on existing statutory civil penalties when such are defined and available under other Labor Code sections. But when no such civil penalty has been specified for a violation, PAGA imposes "civil penalties" *defined as* dollar-denominated amounts, $100, $200, or $500. (Lab. Code, § 2699, subds. (f)(1) & (2).) So PAGA itself recognizes that civil penalties are dollar-denominated sums. There is no hint that PAGA has anything to do with unpaid wages themselves, whether under section 558 (section 558 is not mentioned in PAGA's legislative history) or otherwise. And there is no hint that the Legislature meant for PAGA to be a backdoor method for pursuing what would otherwise be class action damages claims for unpaid wages. PAGA's legislative history nowhere mentions collecting unpaid wages.

Plaintiff's semantic theory of PAGA liability for unpaid wages boils down to an assertion of an unintended consequence of potentially loose language in section 558 coupled with broad language in PAGA. But neither statute was intended to

transmute unpaid wage claims into a State-owned right that could then be transferred to individuals standing in the State's shoes.

Plaintiff argues that the statutory language could be so construed if read in the abstract. But that is not how statutes are interpreted. Indeed, plaintiff's theory runs afoul of the established rules of statutory construction.

First, the purpose of statutory construction is to effectuate what the Legislature intended, not what it did not intend or did not foresee. "[I]t is settled that the language of a statute should not be given a literal meaning if doing so would result in absurd consequences that the Legislature did not intend. To this extent, therefore, intent prevails over the letter of the law and the letter will be read in accordance with the spirit of the enactment. [Citation.]" (*In re Michele D.* (2002) 29 Cal.4th 600, 606.) Although statutory enactments do, inevitably, sometimes have unintended consequences, such not-thought-through consequences should be limited and avoided as much as possible, not sought out or multiplied, as plaintiff's theory would do here.

Second, plaintiff's construct creates a statutory conflict as to what happens to any unpaid wages that are collected in the action. Section 558 sensibly directs that any unpaid wages "shall

be paid *to the affected employee.*" (Subd. (a)(3), italics added.) But PAGA directs that under its scheme "civil penalties recovered by aggrieved employees shall be distributed ... 75 percent to the Labor and Workforce Development Agency" and "25 percent to the aggrieved employees." (Lab. Code, § 2699, subd. (i); see *id.* subd. (j) [in circumstance not applicable here, Labor and Workforce Development Agency receives entire civil penalty amount].) The legislators were told 25 percent of the civil penalties "would be divided between all identified employees aggrieved by the violation, instead of being retained by a single plaintiff." (Sen. Judiciary Com., Rep. on Sen. Bill No. 796 (2003-2004 Reg. Sess.) Apr. 29, 2003, p. 8.)[3]

So, which is it? Does the affected employee receive all of her unpaid wages or only 25 percent, escheating the other 75 percent to the State and sharing the remaining 25 percent with all other affected employees? The latter scenario is what PAGA dictates should occur if plaintiff is correct that unpaid wages are PAGA "civil penalties." Yet, that cannot be what the Legislature intended. Depriving aggrieved employees of

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[3] Found at <http://leginfo.legislature.ca.gov/faces /billSearchClient.xhtml> (S.B. 796, session year 2003-2004). Again, a copy is attached at the end of this brief.

75 percent of their unpaid wages and requiring them to split the other 25 percent with co-workers would offend due process, depriving the aggrieved employee of a property interest without notice or opportunity to be heard.

Employees have a property interest in their unpaid wages. (See *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 178 ["earned wages that are due and payable pursuant to section 200 et seq. of the Labor Code are as much the property of the employee who has given his or her labor to the employer in exchange for that property as is property a person surrenders through an unfair business practice"].) Due process requires notice and an opportunity to be heard, as is the case in class actions, before an employee is deprived of such a property interest in unpaid wages. (See *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 811-812 [due process notice and opportunity to be heard requirements apply to class actions].)

The whole reason that an absent employee is bound, without notice and an opportunity to be heard, by the result of a PAGA action is because the PAGA plaintiff is limited to seeking only what *the State* has the right to recover. (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 986.) Due process does not allow giving 75 percent of an absent employee's individual property

interest in unpaid wages to the State and distributing the remaining 25 percent among other employees just because someone beat the absent employee to the punch in filing suit. But that is what PAGA requires if unpaid wages are PAGA "civil penalties."

It is no answer to say that unpaid wages can be civil penalties under PAGA for one purpose but not for another. "It is an established rule of judicial construction that when a term appears in different parts of the same act, or in related sections of the same code, the term should be construed as having the same meaning in each instance." (*People v. Ruiz* (2018) 4 Cal.5th 1100, 1113, citation and internal quotation marks omitted.) This means that if unpaid wages are deemed a "civil penalty" for one purpose (PAGA enforcement), they must also be for another purpose (distribution). Unpaid wages cannot be both a "civil penalty" and *not* "civil penalties" in the same statute. (Compare Lab. Code, § 2699 subds. (a) & (i).) They must be one or the other.[4]

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[4] Treating unpaid wages as a true civil penalty further creates a statute of limitations conundrum. A wage claim has a three-year statute of limitations, but a civil penalty has a one-year statute of limitations. (See *Murphy v. Kenneth Cole Productions, Inc.*, *supra*, 40 Cal.4th 1094 [treating additional pay for missed meal

There is an easy way to reconcile the tension between PAGA and section 558 as to what happens to collected amounts: Unpaid wages are not PAGA civil penalties for *either* purpose, enforcement or distribution. That reconciliation is entirely consistent with the more limited meaning generally given to the term "civil penalties" and with the legislative history of section 558, in which only the $50 and $100 specific amounts are identified as newly added "civil penalties."

In sum, neither section 558 nor PAGA ever intended to treat individual employees' unpaid wages as a "civil penalty." Unpaid wages may not be pursued in a PAGA action.

II. To the extent PAGA allows individuals to pursue an unpaid wages remedy, the Federal Arbitration Act applies.

The simple answer in this case is that, as just discussed, PAGA does not reach individuals' unpaid wages. To the extent

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or rest break under Lab. Code, § 226.7 as wages subject to three-year statute, not a penalty subject to a one-year statute]; *Shamsian v. Atlantic Richfield Co.* (2003) 107 Cal.App.4th 967, 978 [one-year statute of limitations applies to civil penalty enforceable by private individual].) As to an individual's wage claim, a three-year statute would apply. If the State sought to collect those same unpaid wages as a "civil penalty" under section 558, a one-year statute would apply. When the individual takes back her wage claim as a PAGA claim, would a one-year or three-year statute apply?

that PAGA is construed otherwise and then used to strip away otherwise valid and enforceable arbitration provisions from individuals' unpaid wages claims, such a construction of PAGA would run afoul of the FAA. Individual employees (and employers) may desire an expedient resolution of wage claims as provided by arbitration. PAGA (which has no class opt-out option) could deprive them of that option. That is a result that the FAA does not countenance.

The reach and supremacy of the FAA is well established. The United States Supreme Court has repeatedly struck down state attempts (either legislative or judicial) to evade the federal command that arbitration provisions in contracts (at least contracts affecting interstate commerce) be enforced as written. (E.g., *Kindred Nursing Centers Ltd. Partnership v. Clark* (2017) 137 S.Ct. 1421 [state statute requiring powers of attorney to expressly grant right to waive jury trial, effectively to enter into an arbitration agreement, invalid under FAA]; *DIRECTV, Inc. v. Imburgia* (2015) 136 S.Ct. 463 [under FAA, California law invalidating class arbitration waivers ineffective even though arbitration provision included proviso that it was inoperable if "law of your state" made class arbitration waiver unenforceable]; *Marmet Health Care Center, Inc. v. Brown* (2012) 565 U.S. 530 [FAA preempts state law barring predispute agreements to