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

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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: _____

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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,