Case No. S246711

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ZB, N.A. and ZIONS BANCORPORATION,

Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO,

Respondent;

KALETHIA LAWSON,

Real Party in Interest.

After a Decision by the Court of Appeal
Fourth Appellate District, Division One

Case Nos. D071279 & D071376 (Consolidated)

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

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INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

which the employee was underpaid[].

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

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

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

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

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

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

Or even:

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

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

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

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

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

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

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

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

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

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

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

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