

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.

**SUPREME COURT
FILED**

JUL 9 2018

George Navarrete Clerk

Deputy

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

Case Nos. D071279 & D071376 (Consolidated)

ANSWERING BRIEF OF REAL PARTY IN INTEREST KALETHIA LAWSON

*Michael Rubin (SBN 80618)
mrubin@altber.com
Kristin M. García (SBN
302291)
kgarcia@altber.com
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, California 94108
Telephone: (415) 421-7151
Facsimile: (415) 362-8064

Edwin Aiwazian (SBN 232943)
edwin@lfjpc.com
Arby Aiwazian (SBN 269827)
arby@lfjpc.com
Joanna Ghosh (SBN 272479)
joanna@lfjpc.com
LAWYERS for JUSTICE PC
410 West Arden Avenue, Suite 203
Glendale, California 91203
Telephone: (818) 265-1020
Facsimile: (818) 265-1021

Attorneys for Plaintiff and Real Party in Interest
KALETHIA LAWSON

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)

ANSWERING BRIEF OF REAL PARTY IN INTEREST KALETHIA LAWSON

*Michael Rubin (SBN 80618)
mrubin@altber.com
Kristin M. Garcia (SBN
302291)
kgarcia@altber.com
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, California 94108
Telephone: (415) 421-7151
Facsimile: (415) 362-8064

Edwin Aiwazian (SBN 232943)
edwin@lfjpc.com
Arby Aiwazian (SBN 269827)
arby@lfjpc.com
Joanna Ghosh (SBN 272479)
joanna@lfjpc.com
LAWYERS for JUSTICE PC
410 West Arden Avenue, Suite 203
Glendale, California 91203
Telephone: (818) 265-1020
Facsimile: (818) 265-1021

Attorneys for Plaintiff and Real Party in Interest
KALETHIA LAWSON

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	1
I. INTRODUCTION.....	9
II. FACTS AND PROCEDURAL HISTORY.....	12
III. ARGUMENT	19
A. The Legislature Authorized the Labor Commissioner to Pursue Two Types of Relief as “Civil Penalties” in Labor Code §558.....	22
1. Underpaid wages are civil penalties under a plain reading of Section 558.	24
2. Under <i>Iskanian</i> , underpaid wages are civil penalties available in a PAGA action.	32
B. The Federal Arbitration Act Does Not Preempt California Law, As Set Forth in <i>Iskanian</i> and <i>McGill</i> , Prohibiting the Enforcement of Private Arbitration Agreements that Strip Private Individuals of the Right to Pursue Non-Waivable Public Law Claims in All Fora.	36
1. <i>Iskanian</i> prohibits the compelled arbitration of any portion of Lawson's PAGA claim.	36
2. <i>McGill</i> prohibits the compelled forfeiture of any portion of Lawson's PAGA claim.	46
C. Any Arbitration Must Proceed on a Representative Basis....	55
D. If the Court Compels the Unpaid Wages Portion of Plaintiff's Section 558 Civil Penalties Claim to Arbitration, It Should Instruct the Trial Court to Exercise its Discretion Under C.C.P. §1281.2 to Decide the Non-Arbitrable Issues First.....	57
IV. CONCLUSION	62

CERTIFICATE OF COMPLIANCE 63
PROOF OF SERVICE 64

TABLE OF AUTHORITIES

California Cases

<i>Areso v. CarMax, Inc.</i> (2011) 195 Cal.App.4th 996	38
<i>Arias v. Superior Court</i> (2009) 46 Cal.4th 969	<i>passim</i>
<i>Betancourt v. Prudential Overall Supply</i> (2017) 9 Cal.App.5th 439	21, 38
<i>Bearden v. U.S. Borax, Inc.</i> , (2006) 138 Cal.App.4th 429	26
<i>Board of Trustees v. Judge</i> (1975) 50 Cal.App.3d 920	25
<i>Bradstreet v. Wong</i> (2008) 161 Cal.App.4th 1440	24
<i>Brown v. Ralphs Grocery Co.</i> (2011) 197 Cal.App.4th 489	50
<i>Brown v. Superior Court (Morgan Tire & Auto, LLC)</i> (2013) 216 Cal. App. 4th 1302	38
<i>Cable Connection, Inc. v. DIRECTV, Inc.</i> (2008) 44 Cal.4th 1334	59
<i>Caliber Bodyworks, Inc. v. Superior Court</i> (2005) 134 Cal.App.4th 365	24, 33
<i>Cronus Investments, Inc. v. Concierge Services</i> (2005) 35 Cal.4th 376	59, 60
<i>Dep't of Indus. Relations v. UI Video Stores, Inc.</i> (1997) 55 Cal.App.4th 1084	30, 31
<i>Dynamex Operations West, Inc. v. Superior Court</i> (2018) 4 Cal.5th 903	35
<i>Esparza v. KS Industries</i> (2017) 13 Cal.App.5th 1228	17, 18, 34
<i>Gentry v. Superior Court</i> (2007) 42 Cal.4th 443	47
<i>Hale v. Morgan</i> (1978) 22 Cal.3d 388	26
<i>Heritage Residential Care, Inc. v. DLSE</i> (2011) 192 Cal.App.4th 75	27
<i>Home Depot U.S.A., Inc. v. Superior Court</i> (2010) 191 Cal.App.4th 210	27

<i>Huff v. Securitas Security Serv. USA, Inc.</i> (2018) 233 Cal.Rptr.3d 502.....	48, 49, 50
<i>In re Trombley</i> (1948) 31 Cal.2d 801.....	48
<i>Iskanian v. CLS Transp. Los Angeles, LLC</i> (2014) 59 Cal.4th 348.....	<i>passim</i>
<i>Jones v. Gregory</i> (2006) 137 Cal.App.4th 798.....	24
<i>Kim v. Reins Int'l Calif., Inc.</i> (2017) 18 Cal.App.5th 1052.....	53, 54
<i>Lawson v. ZB, N.A.</i> (2017) 18 Cal.App.5th 705.....	<i>passim</i>
<i>Los Angeles Unified School Dist. v. Safety Nat'l Casualty Corp.</i> (2017) 13 Cal.App.5th 471.....	57, 59
<i>Martinez v. Combs</i> (2010) 49 Cal.4th 35.....	24
<i>McGill v. CitiBank</i> (2017) 2 Cal.5th 945.....	<i>passim</i>
<i>Millan v. Rest. Enterp. Grp., Inc.</i> (1993) 14 Cal.App.4th 477.....	30
<i>People ex rel. Lundgren v. Superior Court</i> (1996) 14 Cal.4th 294.....	27
<i>People v. Pac. Land Research Co.</i> (1977) 20 Cal.3d 10.....	20, 32
<i>People v. Union Pac. Railroad</i> (2006) 141 Cal.App.4th 1228.....	27
<i>Perez v. U-Haul Co. of Calif.</i> (2016) 3 Cal.App.5th 408.....	53
<i>Reyes v. Macy's Inc.</i> (2011) 202 Cal.App.4th 1119.....	48, 49
<i>Reynolds v. Bement</i> (2005) 36 Cal.4th 1075.....	18, 24, 30
<i>RN Solution, Inc. v. Catholic Healthcare West</i> (2008) 165 Cal.App.4th 1511.....	61
<i>Sanders v. Pacific Gas & Elec. Co.</i> (1975) 53 Cal.App.3d 661.....	34
<i>Sandquist v. Lebo Automotive, Inc.</i> (2016) 1 Cal.5th 233.....	56
<i>Small v. Superior Court</i> (2007) 148 Cal.App.4th 222.....	22

<i>Tanguilig v. Bloomingdale's Inc.</i> (2016) 5 Cal.App.5th 665	21, 38
<i>Thurman v. Bayshore Transit Management, Inc.</i> (2012) 203 Cal.App.4th 1112	<i>passim</i>
<i>Williams v. Superior Court</i> (2015) 237 Cal.App.4th 642	48, 54
<i>Williams v. Superior Court</i> (2017) 3 Cal.5th 531	46, 50, 51

Other State Cases

<i>Joule, Inc. v. Simmons</i> (2011) 459 Mass. 88	41
<i>People ex rel. Cuomo v. Coventry First LLC</i> (N.Y. 2009) 13 N.Y.3d 108	41
<i>Rent-A-Ctr., Inc. v. Iowa Civil Rights Comm'n,</i> (Iowa 2014) 843 N.W.2d 727	41
<i>State ex rel. Hatch v. Cross Country Bank, Inc.</i> (Minn. Ct. App. 2005) 703 N.W.2d 562	39

Federal Cases

<i>AT&T Mobility LLC v. Concepcion</i> (2011) 563 U.S. 333	18, 51, 52
<i>American Exp. Co. v. Italian Colors Rest.</i> (2013) 570 U.S. 228	51
<i>Baumann v. Chase Inc. Services Corp.</i> (9th Cir. 2014) 747 F.3d 1117	51
<i>Comer v. Micor, Inc.</i> (9th Cir. 2006) 436 F.3d 1098	37
<i>Eddleman v. U.S. Dep't of Labor</i> (10th Cir. 1991) 923 F.2d 782	35
<i>EEOC v. Circuit City Stores, Inc.</i> (6th Cir. 2002) 285 F.3d 404	42
<i>EEOC v. Sidley Austin LLP</i> (7th Cir. 2006) 437 F.3d 695	42
<i>EEOC v. Waffle House, Inc.</i> (2002) 534 U.S. 279	<i>passim</i>
<i>Kindred Nursing Centers Ltd. Partnership v. Clark</i> (2017) 581 U.S. ___	36, 54, 55
<i>Mandviwala v. Five Star Quality Care, Inc.</i> (9th Cir. 2018) 723 Fed.App'x 415	55

<i>Monaghan v. Telecom Italia Sparke of N. Am.</i> (9th Cir. 2016) 647 Fed.App'x 763	49
<i>Sakkab v. Luxottica Retail N. Am., Inc.</i> (9th Cir. 2015) 803 F.3d 425	<i>passim</i>
<i>United States ex rel. Welch v. My Left Foot Children's Therapy</i> (9th Cir. 2017) 871 F.3d 791	37
<i>Vitolo v. Bloomingdale's, Inc.</i> (9th Cir. 2016) 669 Fed.App'x 890	38
<i>Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.</i> (1989) 489 U.S. 468	60
<i>Yadira v. Fernandez</i> (N.D. Cal. June 4, 2011) 2011 WL 2434043	24

Federal Statutes

9 U.S.C.	
§1	11
§2	51, 53
§3	60
§4	60
28 U.S.C. 1332(d)(1)	52

California Statutes

Civ. Code	
§1654	56
§3513	47, 50, 53, 55
Code Civ. Proc.	
§1281	61
§1281.2	22, 58, 59, 60
§1521	31
Gov. Code §12652	42
Lab. Code	
§90.5	34, 48
§96.7	30, 31
§98	27
§201	10
§202	10
§203	10, 16
§204	10
§210	19
§225.5	19

§226(a).....	10
§226.7	44
§558	<i>passim</i>
§1174(d)	10
§1193.6	27
§1197	10
§1197.1	23, 28
§2699	<i>passim</i>
§2699.3	<i>passim</i>
§2802	10

Other Legislative Authorities

1997 Cal. Legis. Serv. c.35 (A.B. 1448) §1 (West) [codified as amended at Labor Code §1197.1]	28
AB 60 §558, 1999–2000 Reg. Sess. (1999)	26
Dep’t of Finance, AB 60 Enrolled Bill Report 3 (July 1, 1999)	26
Dep’t of Finance, State of Calif., Manual of State Funds, Fund: 0913, <i>available at</i> http://www.dof.ca.gov/budget/-Manual_State_Funds/Find_a_Fund/documents/0913.pdf	31
Dep’t of Industrial Relations, AB 60 Enrolled Bill Report 1 (July 1, 1999).....	26
Sen. Rules Comm. Floor Analysis, S.B. 796, 2003-04 Reg. Sess. (Sept. 11, 2003)	20
Stats. 2003, ch. 906, §2, eff. Jan. 1, 2004.....	19
Stats. 2003, S.B. No. 796, §1	20

Agency Authorities

DLSE Enforcement Manual §9.1.12	31
Memorandum from Miles E. Locker, Chief Counsel for Labor Comm’r, and Marcy V. Saunders, State Labor Comm’r to DLSE staff, Understanding AB 60 (Dec. 23, 1999) https://www.dir.ca.gov/dlse/AB60update.htm	27, 29, 44

I. INTRODUCTION

Kalethia Lawson (“Lawson”) filed this action against her employer, Z.B., N.A. and Zions Bancorporation (the “Bank”), under California’s Labor Code Private Attorney General Act (“PAGA”), Labor Code §§2698 et seq. In addition to the other relief she requested under PAGA, see *infra* at p. 9 n.1, Lawson sought to recover, on behalf of the State’s Labor and Workforce Development Agency (“LWDA”) and other “aggrieved employees,” the “civil penalties” that the Legislature had authorized in Labor Code §558 – which authorizes the Labor Commissioner to recover underpaid wages and other penalties for an employer’s violation of the state’s overtime and meal-and-rest break laws. Until the Legislature enacted PAGA in 2004, only the Labor Commissioner had statutory authority to enforce Labor Code §558.

Lawson complied with each of the procedural requirements of PAGA before filing suit. She gave advance written notice to the LWDA and her employer of her intent to file, as required by Labor Code §§2699.3(a)(1)(A) and 2699.3(c)(1). Her notice identified the factual and legal bases for each of her PAGA claims, including her claim under Section 558. (AAI:014 [Compl. ¶48].) And, she waited the prescribed statutory period to enable the LWDA to investigate her claims and decide whether to pursue them directly (which would preclude her from proceeding, see Labor Code §2699(h)), or for the Bank to “cure” the violations she alleged (which PAGA allows employers to do with respect to claims under Section 558, without incurring civil penalties). (See Labor Code §2699.3(c)(2)(A).)

After the prescribed waiting period, Lawson filed her single-count

PAGA complaint. (AA I:006-019.) With respect to her claim for PAGA relief based on Section 558, Lawson sought the “civil penalties” that the Legislature had designated under that section: \$50 “[f]or any initial violation” and \$100 “[f]or each subsequent violation . . . for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages.” (AA I:019 [citing Labor Code §558(a)(1), (2)].)

The Bank did not dispute that under *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, Lawson was entitled to litigate in court, on a representative action basis on behalf of the state, each of her other claims for PAGA civil penalties, as well as her claim under Section 558 for the \$50/\$100 per pay period per aggrieved employee penalty.¹ However, the Bank contended that because Lawson was subject to a mandatory pre-dispute arbitration agreement that prohibited “class actions,” Lawson was required to arbitrate what the Bank characterized as her “individual” PAGA claim for the other portion of the “civil penalty” remedy under Labor Code §558, her underpaid back wages.

The Court of Appeal correctly rejected the Bank’s argument that Lawson was required to split her PAGA claim under Labor Code §558 into

¹ Lawson’s PAGA Complaint also sought civil penalties under PAGA for the Bank’s violations of its aggrieved employees’ rights to timely wage payments, including upon termination of employment (Labor Code §§201-04), accurate and complete wage statements and payroll records (Labor Code §§226(a), §1174(d)), minimum wage for all hours worked (Labor Code §1197), and reimbursement of business expenses (Labor Code §2802). (AA I:016-17 [Compl. ¶¶57-62].) The Bank did *not* seek to compel arbitration of Lawson’s claim for PAGA penalties based on any of these violations, *see* AA I:034, which are currently pending in the Superior Court and are not at issue before this Court.

two proceedings, a representative action in court and an individual action in arbitration. There are several reasons why this was correct.

First, Lawson's claim for civil penalties under Labor Code §558 was a valid PAGA claim. Indeed, she could *only* have brought her Section 558 claim under PAGA, because Section 558 does not create an independent private right of action and because Section 558 is covered by PAGA as a section of the Labor Code "that provides for a civil penalty to be assessed and collected by the [LWDA] for a violation of this code" (See Labor Code §2699(a).)

The Bank nonetheless contends that a PAGA claim cannot encompass the "underpaid wages" portion of the civil penalties designated by Section 558 because the State LWDA is not the "real party in interest" with respect to that particular remedy. The Court of Appeal correctly found no support for that contention in the text, legislative history, or stated purposes of either PAGA *or* Section 558, neither of which permits employees to bring an individual action under Section 558, either in court or arbitration.

Second, nothing in *Iskanian* or the Federal Arbitration Act, 9 U.S.C. §§1 et seq. ("FAA"), supports the Bank's efforts to rewrite California's workplace protection statutes. This Court held in *Iskanian* that a private, predispute 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 private, bilateral arbitration agreement. This Court further held in *McGill v.*

CitiBank (2017) 2 Cal.5th 945, that a private arbitration agreement cannot be used to compel the forfeiture of a non-waivable statutory right created for a public purpose.

Here, the Bank seeks to accomplish precisely what this Court prohibited in both *Iskanian* and *McGill*: first, to compel plaintiff, as proxy for the State LWDA, to arbitrate a PAGA claim that the state has never agreed to arbitrate, and second to compel plaintiff to forfeit that non-waivable public law claim – because if Lawson cannot pursue her claim for underpaid wages under Section 558 on a representative-action basis under PAGA, she cannot pursue that Section 558 claim at all.

II. FACTS AND PROCEDURAL HISTORY

Lawson began her employment as an hourly, non-exempt employee of the Bank in June 2013. (AA I:009.)² In November 2015, she sent written notice to the LWDA and the Bank under PAGA, Labor Code §2699.3(c), informing them of the Bank’s alleged violations of the Labor Code, based on its failure to pay its hourly, non-exempt employees the minimum wages and overtime premiums required by law, to reimburse their business expenses, to provide timely meal period and rest breaks, to timely pay all wages during employment and at termination, to provide complete and accurate wage statements, and to keep accurate payroll records. (AA I:011, 014.)

After waiting the prescribed statutory period to allow the LWDA to

² Lawson initially worked for California Bank & Trust, which was a subsidiary of Zions Bancorporation until December 31, 2015 when it merged with other banks owned by Zions Bancorporation into a single bank named ZB, N.A. (AA I:031, 040.)

investigate and pursue these claims on its own and to allow the Bank to cure the alleged violations pursuant to Labor Code §2699.3(c), Lawson filed a single-count PAGA representative action in the San Diego Superior Court to recover the civil penalties provided by PAGA, including those authorized by Labor Code §558, which provides, in pertinent part:

(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.

(3) Wages recovered pursuant to this section shall be paid to the affected employee.

(AA I:014, 109 [emphasis added].) Plaintiff based her claim for PAGA relief with respect to Section 558 on Labor Code §2699(a), PAGA's coverage provision, which states:

Notwithstanding any other provision of law, and 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 departments, divisions, commissions, boards, agencies, or 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.

(Labor Code §2699(a) [emphases added].)

In August 2016, the Bank moved to compel arbitration of *one portion* of Lawson's PAGA claim for civil penalties under Section 558. (See *supra* at p. 9 n.1.) Recognizing that this Court in *Iskanian* had held that an employer cannot compel its employees' PAGA claims to arbitration unless the state, as the real party in interest under PAGA, has itself agreed to arbitrate, the Bank contended that the state was the real party in interest *only* for the portion of Lawson's PAGA claim brought to enforce Labor Code §558's \$50/\$100 per pay period remedy, but was *not* the real party in interest with respect to Section 558's underpaid wages remedy (even though Section 558 designates both remedies as "civil penalties") because any underpaid-wages recovery must be distributed to the aggrieved workers. (AA I:034-36.)

The Bank also contended in its motion to compel arbitration that Lawson should be required to arbitrate the underpaid-wages portion of her claim under PAGA and Section 558 on an *individual* rather than representative action basis. It based that contention on its mandatory predispute employment arbitration agreement, which Lawson had signed in mid-February 2014, which stated in pertinent part:

[C]laims by different claimants . . . *may not be combined* in a single arbitration. Unless specific state law states otherwise, *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 the parties recognize that the *arbitrator has no authority to hear an arbitration* either against or *on behalf of a class*.

(AA I:050-051, 063-064 [first emphasis in original; second and third emphases added].)³ Thus, while the Bank agreed that Lawson could continue to pursue all of her other PAGA fixed-civil-penalty claims in court on a representative action basis, it contended that she must arbitrate as an “individual” PAGA claim her request for the underpaid-wages portion of the civil penalties provided by Section 558 and, further, that Lawson’s PAGA representative action in court should be stayed in its entirety pending that individual arbitration. (AA I:20-103; see also *id.* I:21, 36.)

Lawson opposed the Bank’s motion to compel arbitration and its request for a stay pending arbitration. (AA I:104-207.) She pointed out that the underpaid-wages portion of the civil penalty remedy provided by Section 558 can only be recovered by the state, in a public enforcement action, or by an aggrieved employee on behalf of the state under PAGA, and that no private right of action under Section 558 otherwise exists. Lawson also explained why the state is the real party in interest with respect to all PAGA claims, why *Iskanian* is controlling, and why (as *Iskanian* held) the FAA does not preempt California law regarding PAGA actions brought on behalf of the state. (AA I:112-15.) Lawson also argued in the alternative that although the Bank’s arbitration agreement prohibited class actions, it did not prohibit PAGA representative actions, and that if the Superior Court ultimately decided that a portion of Lawson’s request for relief on her PAGA claim should be arbitrated, she should be entitled to

³ In its Superior Court briefing, the Bank did not address the fact that although its arbitration agreement prohibited “class actions,” it made no reference to “representative” actions (even though PAGA had been in effect since 2004, a decade earlier). (*See infra* Part III.C.)

pursue that relief in arbitration on a representative-action basis. (AA I:119.)

The Superior Court agreed with plaintiff, as a threshold matter, that the plain statutory language and the Legislature's clear intent was to allow the underpaid wages available under Section 558 to be recoverable as "civil penalties" under PAGA. (AA II:379 [citing *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1148].) Nonetheless, the court concluded that because Section 558(a)(3) required the state to distribute the recovered wages to the aggrieved employees, *Iskanian* was not controlling and Lawson must arbitrate that portion of her claim for PAGA relief – although she could do so under PAGA on a representative-action basis. (AA II:380.) The court then bifurcated Lawson's PAGA action, stayed further court proceedings for 90 days (a stay that has been periodically extended), and ordered the parties to arbitrate the underpaid-wages portion of plaintiff's PAGA claim for civil penalties under Section 558 on a representative basis. (AA II:381.)

Although orders compelling arbitration are non-appealable, the Bank filed a notice of appeal, followed one month later by a Petition for Writ of Mandate. (*Lawson v. ZB, N.A.* (2017) 18 Cal.App.5th 705, 712; see also Def's Pet. for Writ of Mandate (Nov. 29, 2016).) The Court of Appeal consolidated the two proceedings, and after concluding that it lacked appellate jurisdiction, reached the merits of the Bank's arguments in the context of the writ petition. (*Lawson*, 18 Cal.App.5th at p. 712.)

The Court of Appeal began by agreeing with plaintiff and the trial

court that the Legislature intended the “civil penalties” authorized by Labor Code §558 to include the per-pay period amounts *and* the underpaid wages amounts, for “[a]s 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.*” (18 Cal.App.5th at p. 722 [emphasis added].) The Court of Appeal then concluded, after a detailed analysis, that plaintiff’s entire claim for Section 558 remedies was actionable under PAGA, *id.*, that under *Iskanian* that PAGA claim could not be compelled to arbitration pursuant to a private, predispute arbitration agreement, *id.* at p. 723, and that the FAA had no preemptive effect for the reasons stated in *Iskanian*, *id.* at pp. 723-24.

The Court of Appeal recognized that the Fifth Appellate District had come to a different conclusion in *Esparza v. KS Industries* (2017) 13 Cal.App.5th 1228, but it disagreed with the reasoning of *Esparza* in several respects.

First, the Court of Appeal pointed out that the court in *Esparza* had rested its analysis on the mistaken belief that Section 558 gave employees a private right of action to pursue its underpaid-wages remedy themselves, making that remedy a form of “statutory damages” rather than “civil penalties.” (*Esparza*, 13 Cal.App.5th at p. 1246 [characterizing a claim for underpaid wages under Section 558 as “a private dispute because, among other things, it could be pursued by Employee in his own right.”].) But Section 558 does not create a private right of action, for damages or

otherwise, which makes PAGA claims under Section 558 materially distinguishable from PAGA claims under other Labor Code provisions that provide a private right of action for statutory damages (like the waiting time remedies under Labor Code §203). (See *Lawson*, 18 Cal.App.5th at p. 723.)

Second, the Court of Appeal below disagreed with the *Esparza* court's conclusion that *Thurman* was no longer good law after *Iskanian*. Although *Thurman* was decided before *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, nothing in *Concepcion* or *Iskanian* undermined the analysis that led to *Thurman*'s conclusion that "in enacting section 558, the Legislature intended the underpaid wages recoverable under the statute, as well as the \$50 and \$100 assessments provided by the statute, to be treated as civil penalties" or that "as civil penalties, neither type of recovery is severable for purposes of applying the PAGA." (*Lawson*, 18 Cal.App.5th at pp. 723-24 [citing *Thurman*, 203 Cal.App.4th at pp. 1147-48]; see also *id.*, 18 Cal.App.5th at p. 717 [citing *Thurman*, 203 Cal.App.4th at pp. 1145-47 and *Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1087-89].) Because Section 558 authorizes civil penalties to be recovered by the state and does not authorize a private right of action, those civil penalties are not "statutory damages" and are therefore recoverable in a representative action under PAGA. (*Id.*; see also *Iskanian*, 59 Cal.4th at p. 381.)

While the Court of Appeal in *Lawson* acknowledged that the state may end up with a smaller percentage of the overall civil penalties in a case under Section 558 than under other Labor Code sections encompassed by

PAGA (including those that provide a fixed 75% for the state under Labor Code §2699(i) and those that provide the state a fixed 75% plus 25% of the unpaid wages such as Labor Code §§210(a)(2) and 225.5(b)), the Court found that distinction immaterial because a substantial portion of the designated penalties could still be paid to the state. (*Lawson*, 18 Cal.App.5th at p. 724 [citing *Iskanian*, 59 Cal.4th at pp. 377-78].) The Court also noted that because a trial court's ruling on arbitrability would necessarily precede any calculation or allocation of penalties, in any given PAGA case based on Section 558 the state's share of the penalties may be significantly greater than the aggrieved employees' share (and certainly greater than any individual employee's share). (*Id.* at p. 724; see also *infra* at pp. 28-30 [explaining that the state collects and holds any underpaid wages recovered under Section 558 in trust for the aggrieved employees].)

In short, the Court of Appeal concluded that Lawson properly brought her lawsuit under PAGA as a representative of the state, that her lawsuit sought civil penalties that were recoverable under PAGA, and that because the state is the real party in interest under PAGA and was not a party to the Bank's private arbitration agreement with Lawson, the case as a whole should proceed in court. (*Lawson*, 18 Cal.App.5th at pp. 725-26.)

The Bank's Petition for Review followed.

III. ARGUMENT

The Legislature enacted PAGA, the Labor Code Private Attorneys General Act of 2004 (Labor Code §2698 et seq., Stats. 2003, ch. 906, §2, eff. Jan. 1, 2004), to address its concern that because the state's labor

enforcement agencies were understaffed and inadequately funded, they were “failing to effectively enforce labor law violations.” (Sen. Rules Comm. Floor Analysis, S.B. 796, 2003-04 Reg. Sess. (Sept. 11, 2003); see Stats. 2003, S.B. No. 796, §1; *Arias v. Superior Court* (2009) 46 Cal.4th 969, 986.) In PAGA, the Legislature created a private right of action, allowing aggrieved employees to sue on behalf of themselves, the state, and other aggrieved current and former employees, to recover civil penalties for Labor Code violations that, before PAGA, only the Labor Commissioner could recover. (See Labor Code §2699(a) [encompassing Labor Code sections that already “provide[d] for a civil penalty to be assessed and collected by the [Labor Commissioner]”, §2699(f) [encompassing Labor Code sections that did not already “specifically provide[.]” a civil penalty].)

A PAGA action is “a representative action on behalf of the state,” not “a dispute between an employer and an employee” (*Iskanian*, 59 Cal.4th at p. 386; see also *id.* at p. 382 [“The government entity on whose behalf the plaintiff files suit is always the real party in interest in the suit.”].) Because “[a]n employee plaintiff suing . . . under the Labor Code Private Attorneys General Act of 2004, does so as the proxy or agent of the state’s labor law enforcement agencies,” an action to recover civil penalties under PAGA “is fundamentally a law enforcement action designed to protect the public and not to benefit private parties.” (*Arias*, 46 Cal.4th at p. 986 [quoting *People v. Pac. Land Research Co.* (1977) 20 Cal.3d 10, 17].)

PAGA rights are public law rights that belong to the state, not to the

plaintiff or other aggrieved employees. As a result, the right to pursue PAGA claims on a representative action basis cannot be waived by a private predispute arbitration agreement between an employer and an employee. (*Iskanian*, 59 Cal.4th at p. 362; see also *Betancourt v. Prudential Overall Supply* (2017) 9 Cal.App.5th 439, 445, *cert. denied* (Dec. 11, 2017) 138 S.Ct. 556 [affirming denial of motion to compel arbitration “because a defendant cannot rely on a predispute waiver by a private employee to compel arbitration in a PAGA case, which is brought on behalf of the state”]; *Tanguilig v. Bloomingdale’s Inc.* (2016) 5 Cal.App.5th 665, 675, *cert denied* (Oct. 16, 2017) 138 S.Ct. 356 [employment agreement’s prohibition of representative actions cannot preclude PAGA civil action].)

The Court of Appeal was correct to allow Lawson’s entire PAGA action to proceed in court on a representative-action basis, because, as further explained below: (1) the California Legislature intended both types of relief made available by Labor Code §558 to constitute “civil penalties”; (2) the Legislature intended those civil penalties to be recoverable by an aggrieved employee suing on behalf of the state under PAGA; (3) under *Iskanian*, an aggrieved employee suing to recover civil penalties under PAGA on behalf of the state cannot be compelled to arbitrate her PAGA claim for civil penalties; (4) under *McGill*, an aggrieved employee also cannot be forced to forfeit her right to pursue PAGA civil penalties on a representative-action basis because PAGA creates a fundamental, non-waivable public law right to pursue those remedies in some forum; and

finally (5) for the reasons stated in *Iskanian* and *McGill*, nothing in the FAA requires otherwise.

While the Court has no need to go beyond these issues to decide this case, we also demonstrate below, in the alternative, that *if* the Court concludes that the underpaid-wages portion of Lawson’s claim must be arbitrated (either on a representative-action basis under PAGA, or on an individual basis under some theory the Bank has never articulated, because Section 558 does not allow direct private actions and PAGA does not allow individual, non-representative actions), the trial court should be directed to adjudicate Lawson’s representative PAGA action claims first, under California Code of Civil Procedure §1281.2, before any arbitration of the remaining claims can proceed. (See *infra* Part III.D.)

A. The Legislature Authorized the Labor Commissioner to Pursue Two Types of Relief as “Civil Penalties” in Labor Code §558.

Section 558 was added to the Labor Code in 1999 as part of AB 60, which restored and codified the eight-hour daily overtime requirement and expanded the Labor Commissioner’s workplace enforcement authority. (*Small v. Superior Court* (2007) 148 Cal.App.4th 222, 226.) Section 558 applies to all violations of Labor Code §§500-558.1 (which are the provisions in “this chapter,” Division 2, Part 2, ch. 1 of the Labor Code, which include the Labor Code sections requiring overtime pay and premium pay for meal period and rest break violations) and all Wage Order provisions “regulating hours and days of work.” (Labor Code §558(a).) The first subsection of Section 558 authorizes the Labor Commissioner to

recover for any violation of those provisions a “civil penalty” calculated “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” and (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)(1), (2).)⁴

⁴ Section 558(a)(3) further provides that the “[w]ages recovered pursuant to this section shall be paid to the affected employee,” while Section 558(d) states that “[t]he civil penalties provided for in this section are in addition to any other civil or criminal penalty provided by law.”

In addition, Section 558 provides, with respect to Labor Commissioner enforcement:

(b) If upon inspection or investigation the Labor Commissioner determines that a person had paid or caused to be paid a wage for overtime work in violation of any provision of this chapter, any provision regulating hours and days of work in any order of the Industrial Welfare Commission, or any applicable local overtime law, the Labor Commissioner may issue a citation. The procedures for issuing, contesting, and enforcing judgments for citations or civil penalties issued by the Labor Commissioner for a violation of this chapter shall be the same as those set out in Section 1197.1.

(c) In a jurisdiction where a local entity has the legal authority to issue a citation against an employer for a violation of any applicable local overtime law, the Labor Commissioner, pursuant to a request from the local entity, may issue a citation against an employer for a violation of any applicable local overtime law if the local entity has not cited the employer for the same violation. If the Labor Commissioner issues a citation, the local entity shall not cite the employer for the same violation.

(Labor Code §558(b), (c).)