Case No. S246711

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ZB, N.A. and LIONS 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
SEP 06 2018
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Deputy

After a Decision by the Court of Appeal
Fourth Appellate District, Division One
Case Nos. D071279 & D071376 (Consolidated)

APPLICATION FOR LEAVE TO FILE *AMICI* BRIEF AND PROPOSED BRIEF OF *AMICI CURIAE* THE EMPLOYERS GROUP AND CALIFORNIA EMPLOYMENT LAW COUNCIL

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APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

Pursuant to Cal. R. Ct. 8.520(f), the Employers Group and the California Employment Law Council respectfully request permission to file this *Amici Curiae* brief in support of Petitioners ZB, N.A. and Lions Bancorporation. The *Amici Curiae* brief will assist the Court in deciding this matter in two respects.

First, *Amici Curiae* address U.S. Supreme Court authorities not discussed in detail by the parties or the Court of Appeal below that are relevant to the question on which this Court granted review regarding the scope of the Federal Arbitration Act. In *Perry v. Thomas*, 482 U.S. 483, 484 (1987), the Supreme Court held that the Federal Arbitration Act preempts a California statute that would require litigation, rather than arbitration, of wage claims. *Amici Curiae* discuss how *Perry* and its progeny govern resolution of this case, in which the Court of Appeal has held that California Labor Code Private Attorneys General Act ("PAGA") claims for underpaid wages under California Labor Code § 558 are inarbitrable.

Second, *Amici Curiae* address the logical error in the Court of Appeal's decision that PAGA claims seeking underpaid wages under California Labor Code § 558 need not be arbitrated. The Court of Appeal found such claims to be inarbitrable by classifying the remedy of underpaid wages as a "penalty," and PAGA claims for penalties may not be compelled to arbitration by a pre-dispute arbitration agreement under this Court's decision in *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 366 (2014). But this Court has never held that individual compensatory remedies for underpaid wages can be characterized as a "penalty." As a matter of state law, they should not be. As a matter of federal law, they cannot be—or, if they are, that characterization cannot

defeat the arbitrability of the claims under *Perry* and its progeny.

The Court of Appeal's decision below cannot be reconciled with controlling decisions under the Federal Arbitration Act, and it poses a significant threat to the orderly resolution of disputes between employees and the employers represented by *Amici*. Because of these interests, *Amici* respectfully request that this Court allow them to submit this brief addressing the reasons why a PAGA claim for underpaid wages under California Labor Code § 558 must be compelled to arbitration in accordance with the parties' agreement under the Federal Arbitration Act.

No party or counsel for a party in this pending appeal either authored any part of the *Amici Curiae* brief nor made any monetary contribution intended to fund the preparation or submission of the brief. Further, no person or entity, other than *Amici*, made a monetary contribution intended to fund the preparation or submission of this brief.

THE *AMICI CURIAE*

The Employers Group is the nation's oldest and largest human resources management organization for employers. It represents California employers of all sizes and every industry. The Employers Group has a vital interest in seeking clarification and guidance from this Court for the benefit of its employer members and the millions of individuals they employ. As part of this effort, the Employers Group seeks to enhance the predictability and fairness of the laws and decisions regulating employment relationships. Because of its collective experience in employment matters, including its appearance as *amicus curiae* in state and federal forums over many decades, the Employers Group is uniquely positioned to assess both the impact and implications of the legal issues presented in employment cases such as this one. The Employers Group has been involved in many significant employment cases.

The California Employment Law Council is a voluntary, nonprofit

organization that promotes the common interests of employers and the general public in fostering development in California of reasonable, equitable, and progressive rules of employment law. The California Employment Law Council's membership includes approximately 70 private sector employers in the State of California, who collectively employ hundreds of thousands of Californians. The California Employment Law Council has been granted leave to participate as *amicus curiae* in many of California's leading employment cases.

INTEREST OF *AMICI CURIAE*

PAGA is quickly becoming the centerpiece of wage and hour litigation in California. Members of the two *amici* routinely are sued in wage hour actions alleging violations of California's multifaceted wage and hour laws; most of those cases are either based entirely on PAGA or contain PAGA penalty claims along with wage claims.

This Court's opinions in *Arias v. Superior Court*, 46 Cal. 4th 969 (2009) that representative PAGA claims need not be certified as class actions, and *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 366 (2014) that claims for penalties under PAGA may not be compelled to arbitration under pre-dispute agreements, permit plaintiffs' attorneys to avoid the rules that ordinarily apply to workplace-wide actions for compensatory relief. Those decisions are both premised on the theory that PAGA actions are actions only for penalties—PAGA claims do not seek individual-specific compensatory remedies (and thus do not require class certification) and the penalties sought are paid mostly to the state (and thus are not subject to individual arbitration agreements). The limiting principles of those decisions, however, is eviscerated by the Court of Appeal's decision below, which holds that PAGA claims for underpaid wages under Labor Code § 558—a victim-specific compensatory remedy that is paid entirely to employees and not at all to the state—can be treated

as claims for "penalties," thereby avoiding the procedural safeguards of class certification and negating an otherwise valid arbitration agreement. Such an interpretation of Section 558 makes PAGA susceptible to abuse by litigants. It subjects the members of *Amici Curiae* to a new form of hybrid action having all of the burdens of a class action (the potential for workforce-wide compensatory damages in the form of unpaid wages) subject only the minimal procedural safeguards of a claim for penalties.

CONCLUSION

For all of the foregoing reasons, *Amici Curiae* respectfully request that the Court accept the accompanying brief for filing in this case.

Dated: August 29, 2018.

Respectfully submitted,

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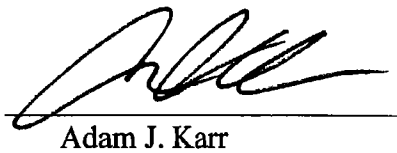
By: 

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

Statutes

Other Authorities

INTRODUCTION

The Court of Appeal's decision below establishes a formula to exempt any and all claims from the mandatory sweep of the Federal Arbitration Act ("FAA"). First, enact a statute providing a compensatory remedy. Then re-label the compensatory remedy as a "penalty." Next, authorize the aggrieved party to pursue the "penalty," in the form of the compensatory remedy, on behalf of the State. Finally, redirect 100 percent of the penalty from the State to the aggrieved party(ies) pursing the claim. In four easy steps, any private claim for damages can masquerade as a public claim for penalties so as to sidestep any agreement to arbitrate it.

But the Court of Appeal's decision plainly violates the FAA. "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011) (citation omitted). That is what the Court of Appeal has attempted to do. At issue is a PAGA claim for underpaid wages under California Labor Code § 558. Section 558 provides, as a remedy, a penalty of $50 or $100 (75 percent of which is paid to the State, and 25 percent of which is paid to employees) *plus* the amount of underpaid wages (100 percent of which is paid to the employees). By declaring both aspects of that remedy to be inarbitrable, the Court of Appeal prohibits entirely the arbitration of a particular type of claim for underpaid wages. That it cannot do. *See Perry v. Thomas*, 482 U.S. 483, 484 (1987) ***(holding that the FAA preempts a*** California statute that would require litigation, rather than arbitration, of wage claims).

While the Court of Appeal's conclusion cannot be reconciled with the FAA, it does follow a logical syllogism. The first premise is that claims for penalties under PAGA are not subject to arbitration. That premise is grounded in this Court's decision in *Iskanian v. CLS Transp. Los Angeles,*

LLC, 59 Cal. 4th 348, 366 (2014). The second premise is that claims for underpaid wages under Section 558 are claims for "penalties." No decision of this Court supports that premise, though it is supported by the decision of the Court of Appeal in *Thurman v. Bayshore Transit Mgmt, Inc.*, 203 Cal. App. 4th 1112 (2012). If claims for penalties under PAGA are not subject to arbitration, and claims for underpaid wages under Section 558 are claims for penalties, then it logically follows that claims for underpaid wages under Section 558 are not subject to arbitration. That is what the Court of Appeal holds.

Despite the facial appeal of the Court of Appeal's syllogism, the decision has no limiting point: it would exempt from the scope of arbitration *any* claim denominated as "penalty," notwithstanding the FAA. Any compensatory remedy labeled as a "penalty" would be exempt from arbitration. Yet this Court has recognized that, under controlling Supreme Court authority, "the FAA clearly preempts"—not just preempts, but *clearly* preempts—any state law "rule that establishes an unwaivable right to litigate particular claims by categorically deeming agreements to arbitrate such claims unenforceable." *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1170 (2013).

Under this Court's precedent, the Court of Appeal's conclusion that claims for underpaid wages cannot be compelled to arbitration is wrong. Still, it does follow logically from the premises on which it relies. When that occurs, there is only one explanation: one of the premises is false. And the false premise is the second one: that claims for underpaid wages under Section 558 are actually "penalties." In fact, underpaid wages that are recoverable under Section 558 are not public penalties—they are private damages. And as private claims for damages, they are subject to arbitration.

Accordingly, this Court should abrogate *Thurman*. Ordinary principles of statutory interpretation compel the conclusion that *Thurman* was wrongly decided:

- First, contrary to *Thurman's* holding, the plain language of the statute does not support the conclusion that underpaid wages are a penalty. Section 558 provides for a $50 or $100 penalty "in addition to" the amount of underpaid wages. The underpaid wages are in addition to the penalty, not a part of it.
- Second, wages are amounts earned for performing labor, not amounts granted as a penalty. Wages are not fixed amounts, like the $50 or $100 penalties, but rather are measured by the amount that has been underpaid, just like any other claim for compensatory damages. And they are not paid mostly to the State, like a civil penalty, but instead are paid entirely to the employees, like damages.
- Third, treating underpaid wages as penalties rather than compensatory remedies prejudices employees and employers by depriving them of procedural protections that are available in class claims seeking compensatory remedies, but not in claims for PAGA penalties. It is one thing to limit those protections for penalties payable to the State, but quite another in the case of a claim for underpaid wages—where employees' claims may be wiped out without due process by treating them as penalties.
- Fourth, if *Thurman's* holding that any compensatory remedy can be classified as a "penalty" is correct, then it threatens to bring down *Iskanian* itself. It is doubtful that the United States Supreme Court would permit California to exempt claims for "penalties" from arbitration if California interprets its own law to permit any and all compensatory remedies to be classified as "penalties" in name only.

Once it is clear that *Thurman* was wrongly-decided and that a claim for underpaid wages that are awarded to employees is a claim for compensation—not a penalty—it necessarily follows that the Court of Appeal's decision below must be reversed. Under the FAA, if employees agree to arbitrate claims for wages, then those claims must be arbitrated. That plainly includes PAGA claims for underpaid wages under Section 558—amounts earned by employees and awarded to them as compensation. Accordingly, this Court should reverse the decision below and hold that claims for underpaid wages under Section 558 must be arbitrated.

ARGUMENT

I. The FAA Requires Arbitration Of Disputes Regarding Underpaid Wages (And Any Other Claims For Compensatory Damages) In Accordance With The Parties' Agreements, Regardless Of Any State Law That Purports To Exempt Such Claims From Arbitration.

It is well-settled that state law rules prohibiting the arbitration of particular types of claims are displaced by the FAA. *Concepcion*, 563 U.S. at 341. This Court and the Supreme Court of the United States have considered numerous provisions of California law that, for reasons of public policy, have created exclusive non-arbitral forums for the resolution of various wage-related disputes. In each case, the result has been the same: employees are required to arbitrate their wage claims against their employers, notwithstanding any state law to the contrary. The result must be the same here. Employees' PAGA claims for underpaid wages under Section 558 of the Labor Code must be arbitrated.

The Supreme Court first held that the FAA preempts provisions of California's Labor Code that purport to create an exclusive judicial forum for the resolution of wage disputes more than 30 years ago in *Perry*, 482 U.S. 483. At issue in *Perry* was Section 229 of the Labor Code, which provided that actions for the collection of wages may be maintained in

court "without regard to the existence of any private agreement to arbitrate." In that case, just like the procedural posture here, the California Court of Appeal had "held that a claim for unpaid wages brought under § 229 was not subject to compulsory arbitration, notwithstanding the existence of an arbitration agreement." *Id.* at 488. This Court denied review of that decision, and the Supreme Court granted certiorari.

The Supreme Court in *Perry* explained that, "[i]n enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Id.* at 489 (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 11-12 (1984)). The Court further explained that there is "nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under state law." *Id.* at 489-90 (quoting *Southland*, 465 U.S. at 11). The Supreme Court held: "This clear federal policy places § 2 of the Act in unmistakable conflict with California's § 229 requirement that litigants be provided a judicial forum for resolving wage disputes. Therefore, under the Supremacy Clause, the state statute must give way." *Id.* at 491.

Two decades later, the Supreme Court reaffirmed and expanded upon its holding in *Perry* in *Preston v. Ferrer*, 552 U.S. 346 (2008). At issue in *Preston* was California Labor Code § 1700 *et seq.*, which vested "'exclusive original jurisdiction' over the dispute in the Labor Commissioner." *Id.* at 351. Just like in *Perry*, the Court of Appeal refused to enforce an arbitration agreement because of the Labor Code's provision, this Court denied review, and the Supreme Court granted certiorari.

In *Preston*, the Supreme Court held that, "when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are

superseded by the FAA." *Id.* at 349-50. In reaching that conclusion, the Court explained that "[t]he FAA's displacement of conflicting state law is 'now well-established,' and has been repeatedly reaffirmed." *Id.* at 353 (citations omitted). The plaintiff in *Preston* argued that the Court should "overlook the apparent conflict between the arbitration clause and § 1700.44(a) because proceedings before the Labor Commissioner are administrative rather than judicial." *Id.* at 358. The Supreme Court rejected that argument, holding that "[t]he mere involvement of an administrative agency in the enforcement of a statute . . . does not limit private parties' obligation to comply with their arbitration agreements." *Id.* (citation and internal quotation marks omitted). "In sum, we disapprove the distinction between judicial and administrative proceedings drawn by Ferrer and adopted by the appeals court. When parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative." *Id.* at 359.

The Supreme Court expanded upon and strengthened this preemption again in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011), in which the Supreme Court held that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Concepcion* was not itself an employment-law case, but it is significant because it formed the basis of this Court's decision in *Sonic-Calabasas*.

In *Sonic-Calabasas A, Inc. v. Moreno*, 51 Cal. 4th 659, 669 (2011) ("*Sonic I*"), issued two months *before Concepcion*, this Court held as a categorical rule that it is contrary to public policy and unconscionable for an employer to require an employee, as a condition of employment, to waive the right to a Berman hearing, a dispute resolution forum established by the Legislature to assist employees in recovering wages owed. The

Court further concluded that its rule prohibiting waiver of a Berman hearing was not preempted by the FAA. *Id.* The Court distinguished *Preston* because it did not deal with a challenge to a portion of the arbitration provision (the Berman waiver) which was contrary to public policy and unconscionable. When the U.S. Supreme Court issued its decision in *Concepcion*, however, it vacated the judgment in *Sonic I* and remanded the case to this Court for further consideration in light of *Concepcion*.

In *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1124 (2013) ("*Sonic II*"), this Court held, "contrary to *Sonic I*, that the FAA preempts our state-law rule categorically prohibiting waiver of a Berman hearing in a predispute arbitration agreement imposed on an employee as a condition of employment." Following *Concepcion*, this Court recognized that portions of arbitration provisions (such as Berman waivers) cannot be denied enforcement under the FAA on the grounds that they are inherently contrary to public policy because "*Concepcion*, unlike *Preston*, did address unconscionability, and the high court made clear that courts cannot impose unconscionability rules that interfere with arbitral efficiency." *Sonic II*, 57 Cal. 4th at 1141. This Court held: "Under *Perry* and *Southland*, the FAA clearly preempts a state unconscionability rule that establishes an unwaivable right to litigate particular claims by categorically deeming agreements to arbitrate such claims unenforceable." *Id.* at 1170.

Importantly, "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Concepcion*, 563 U.S. at 351. In *Sonic II*, for example, this Court emphasized that "the Berman statutes provide important benefits to employees by reducing the costs and risks of pursuing a wage claim in several ways." *Sonic II*, 57 Cal. 4th at 1129. The Court further explained that "an employee going directly to arbitration will lose a number of benefits and advantages." *Id.* at 1132.

But the Court nevertheless held that a rule that would exempt employees from arbitration because of the public policy in favor of Berman hearings was preempted by the FAA: "the unwaivability of such a hearing, even if desirable as a matter of contractual fairness or public policy, interferes with a fundamental attribute of arbitration." *Id.* at 1141.

Taken together, *Perry, Preston,* and *Sonic II* hold that the FAA preempts California laws that would purport to vest exclusive jurisdiction in either a judicial or administrative forum—or that would invalidate portions of arbitration provisions on grounds of unconscionability where the asserted unconscionability is simply that the provisions require arbitration. *See also Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018) ("[A]n argument that a contract is unenforceable *just because it requires bilateral arbitration* is a different creature. A defense of that kind, *Concepcion* tells us, is one that impermissibly disfavors arbitration . . .") (emphasis in original).

Nevertheless, the Court of Appeal below held that the plaintiff could pursue PAGA claims for underpaid wages under Labor Code § 558 in court, notwithstanding the employees' agreement to arbitrate. It does so on the basis of a state law, PAGA, that the Court of Appeal concludes gives the employees the right to pursue such claims in court. But it does so without any consideration of *Perry, Preston*, and *Sonic II*, all of which stand in opposition to the concept of a wage claim that is not subject to arbitration. Although not considered by the Court of Appeal, these decisions compel the conclusion that PAGA claims for underpaid wages under Section 588 must be arbitrated. Even if the public policy embodied in PAGA purports to create an exclusive judicial forum for the resolution of wage claims under Section 558, it is preempted by the FAA. As *Perry, Preston*, and *Sonic II* hold, the FAA simply does not allow states to enact

laws requiring that wage claims be resolved in court—even for reasons of public policy.

II. The Court Of Appeal's Decision Purports To Do Indirectly What It Cannot Do Directly: Exempt Claims For Underpaid Wages From The Scope Of The FAA.

Perry, Preston, and *Sonic II* make clear that the Legislature could not enact a statute that created an exclusive judicial forum for the resolution of wage claims. Indeed, the Legislature previously did exactly that, and the Supreme Court in *Perry* held that the resulting statute was preempted by the FAA. Yet the Court of Appeal in this case holds that a claim for underpaid wages under Section 558 provides for an exclusive judicial forum. The Court of Appeal's questionable conclusion is based on two premises; if either premise is incorrect, then so too is the Court of Appeal's conclusion.

First, the Court of Appeal relies on this Court's ruling in *Iskanian* that claims for civil penalties under PAGA are not subject to mandatory arbitration. In *Iskanian*, this Court held that "an 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." *Iskanian*, 59 Cal. 4th at 360. The Court's holding was based on the distinction between private and public claims, finding that "the FAA's goal of promoting arbitration as a means of private dispute resolution does not preclude our Legislature from deputizing employees to prosecute Labor Code violations on the state's behalf. Therefore, the FAA does not preempt a state law that prohibits waiver of PAGA representative actions in an employment contract." *Id.*

Second, the Court of Appeal relies on its own prior decision in *Thurman* that claims for underpaid wages under Section 558 are claims for "penalties" under PAGA. *Thurman* rejected the argument "that the recovery of unpaid (or 'underpaid') wages is not part of the civil penalty of

$50 or $100 per violation but, rather, is a remedy in addition to that civil penalty." *Thurman*, 203 Cal. App. 4th at 1144-45 (emphasis in original). *Thurman* held that "the entire remedy provided by section 558, including the recovery of underpaid wages, is a civil penalty." *Id.* at 1147.

The Court of Appeal in this case concludes as a matter of formal logic that: (1) claims for civil penalties under PAGA are inarbitrable under *Iskanian*; and (2) claims for underpaid wages under Section 558 are claims for civil penalties under *Thurman*, so (therefore) claims for underpaid wages under Section 558 are inarbitrable. That the Court of Appeal's conclusion logically follows from its premises, however, does not exclude its decision from the preemptive scope of the FAA. Under *Perry, Preston,* and *Sonic II*, states cannot declare claims for unpaid wages to be inarbitrable—and the Court of Appeal's failure to address those decisions cannot avoid them.

The flaw in the Court of Appeal's reasoning is that its second premise is false: claims for underpaid wages are not claims for "penalties." Wages are *earned* by employees for performing labor and, as such, are claims for a compensatory—not punitive—remedy: they are damages in the amount of the wages by which employees were underpaid. The logical syllogism that the Court of Appeal should have applied is: (1) the FAA preempts wage claims notwithstanding any state law to the contrary under *Perry* and its progeny; and (2) claims for underpaid wages under Section 558 are wage claims, so (therefore) claims for underpaid wages under Section 558 are arbitrable.

Both syllogisms are logically valid, but only one can be true—the latter. The flaw in the Court of Appeal's reasoning is its assumption, not grounded in this Court's jurisprudence, that claims for underpaid wages are claims for penalties. They are not. *Thurman's* holding is erroneous and should be abrogated. Once it is, it is immediately apparent what the

outcome of this case must be: plaintiffs' PAGA claims for underpaid wages under Section 558, like all wage claims, must be arbitrated under the FAA.

A. The Plain Language Of Section 558 Is Contrary To *Thurman's* Holding That Underpaid Wages Are A "Penalty" Rather Than Simply "Damages."

Thurman holds, as a matter of first impression, that the "plain language" of Section 558 compels the conclusion that underpaid wages are a "penalty," and not a form of compensatory remedy such as damages or restitution. Contrary to that holding, the language of Section 558 does not compel such a conclusion. Section 558(a) states:

> 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.

There is a commonsense way to read Section 558 by which the $50 and $100 amounts constitute the civil penalty provided by Section 558, which is "in addition to" the compensatory remedy consisting of the underpaid wages. *Thurman* and the Court of Appeal below eschew that commonsense reading and classify both the enumerated fines and the compensatory remedies together as a supposed penalty: "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." *Lawson v. ZB, N.A.*, 18 Cal. App. 5th 705, 722 (2017) (citing *Thurman*, 203 Cal. App. 4th 1112).

Thurman's tortured interpretation of Section 558 has never been adopted by this Court—nor should it be. Section 558 states that employers shall be subject to civil penalties of $50 or $100 "*in addition to* an amount sufficient to recover underpaid wages." Cal. Lab. Code § 558(a)(1) and (2) (emphasis added). The compensatory remedy of underpaid wages is not part of the penalty, but is "in addition to" it.

In interpreting a statute, this Court "begin[s] [its] inquiry by examining the statute's words, giving them a plain and commonsense meaning." *People v. Mendoza*, 23 Cal. 4th 896, 907 (2000). The phrase "in addition to" means "[o]ver and above; besides." *Heritage Farms, Inc. v. Markel Ins. Co.*, 762 N.W.2d 652, 660 (Wis. 2009) (quoting The American Heritage Dictionary of the English Language 20 (3d ed.1992)). Section 558's provision for underpaid wages is over and above, or besides, the enumerated $50 or $100 penalty. Those wages are not a part of the penalty.

Even if Section 558 is capable of being interpreted the way that *Thurman* does, the statute is ambiguous at best, being susceptible of two possible interpretations. And in such circumstances, as this Court has emphasized, "[w]e must also avoid a construction that would produce absurd consequences, which we presume the Legislature did not intend." *Mendoza*, 23 Cal. 4th at 908. As discussed further below, interpreting a compensatory remedy of underpaid wages as part of a "civil penalty" leads to absurd results. It is immediately absurd because wages are *earned* by performing labor and as such, claims for underpaid wages are claims for compensatory remedies—not penalties. It is problematically absurd

because classifying individuals' wages as mere penalties deprives workers of important protections that only apply to compensatory remedies, not penalties. And is unnecessarily absurd in that it invites federal preemption under the FAA of all claims for penalties if state law does not draw a clear line between true civil penalties and compensatory remedies masquerading as civil penalties.

B. Even If The Language Of Section 558 Is Ambiguous, It Should Be Interpreted To Give Effect To The Fact That Wages Are Earned, Not Granted As Penalties.

Thurman's conclusion that the compensatory remedy of underpaid wages is somehow a "civil penalty" is not required by the language of Section 558, but it is even more problematic as a legal proposition than a linguistic one. As a legal matter, wages are earned by employees and "underpaid wages" are far more characteristic of compensatory damages or restitution than they are of a penalty.

This Court has previously addressed the distinction between a wage and a penalty. In *Murphy v. Kenneth Cole Prod., Inc.*, 40 Cal. 4th 1094 (2007), this Court addressed that distinction under Labor Code section 226.7, which provides for an "hour of pay" for employees who are required to work through meal or rest periods. The Court noted that "[t]he Labor Code defines 'wages' as 'all amounts for labor performed by employees of every description.'" *Id.* at 1103 (quoting Cal. Lab. Code § 200(a)). "A 'penalty,' on the other hand, is that which an individual is allowed to recover against a wrong-doer, as a satisfaction for the wrong or injury suffered, and without reference to the actual damage sustained." *Id.* at 1104 (citation and internal quotation marks omitted). Finding that "the Legislature intended section 226.7 first and foremost to compensate employees for their injuries," the Court concluded that the hour of pay was a wage, not a penalty. *Id.* at 1111.