No. 19-

IN THE

Supreme Court of the United States

PENNYMAC FINANCIAL SERVICES, INC., PRIVATE NATIONAL MORTGAGE ACCEPTANCE COMPANY, LLC., AND PENNYMAC MORTGAGE INVESTMENT TRUST,

Petitioners,

v.

RICHARD SMIGELSKI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL THIRD APPELLATE DISTRICT

PETITION FOR A WRIT OF CERTIORARI

JAMES A. BOWLES
Counsel of Record
MICHAEL S. TURNER
E. SEAN MCLOUGHLIN
WARREN J. HIGGINS
HILL, FARRER & BURRILL LLP
One California Plaza
300 South Grand Avenue
Los Angeles, California 90071
(213) 620-0460
jbowles@hillfarrer.com

Counsel for Petitioners

289655

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the Federal Arbitration Act preempts a state-law rule that prohibits the enforcement of an arbitration agreement in a dispute covered by that agreement unless the State consents, based on the fiction that the State is a party to the lawsuit, when in fact it is not.

PARTIES TO THE PROCEEDING BELOW

The case caption contains the names of all parties who were parties in the California Court of Appeal and California Supreme Court. The State of California is not and never has been a party to this litigation.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, Petitioners state that PennyMac Financial Services, Inc. (NYSE: PFSI) and PennyMac Mortgage Investment Trust (NYSE: PMT) are publicly held. BlackRock, Inc. currently owns more than 10% of the shares of both PennyMac Financial Services, Inc. and PennyMac Mortgage Investment Trust. Private National Mortgage Acceptance Company, LLC has two parent companies that each own more than a 10% membership intererest: PNMAC Holdings, Inc. (not a party) and Petitioner PennyMac Financial Services, Inc.

RELATED CASES

1. *Erich Heidrich, et al v. Pennymac Financial Services, Inc., et al.*, 2:16-cv-02821-TLN-EFB (E.D. Cal) (FLSA claim compelled to arbitration and dismissed, and state law claims dismissed without prejudice on July 11, 2018) (slip opinion reported at 2018 WL 3388458).

2. *Erich Heidrich, et al v. Pennymac Financial Services, Inc., et al.*, 18-16494 (9th Cir.)(appeal pending, no judgment entered).

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Page

Page

Page

STATUTES AND OTHER AUTHORITIES

Cited Authorities

Petitioners Private National Mortgage Acceptance Company, LLC, PennyMac Financial Services, Inc. and PennyMac Mortgage Investment Trust respectfully petition for a writ of certiorari to review the judgment and opinion of the Court of Appeal of California, Third Appellate District, filed on December 19, 2018.

OPINIONS BELOW

The opinion of the California Court of Appeal, Third Appellate District, Appendix B at 2a – 37a, is unreported. The summary order of the California Supreme Court denying PennyMac's petition for review, Appendix A at 1a, is unreported. The Sacramento County Superior Court's orders denying PennyMac's petitions to compel arbitration and seeking reconsideration, Appendices C, D and E at 38a – 62a, are unreported.

JURISDICTION

The opinion of the California Court of Appeal was entered on December 19, 2018. Appendix B at 2a. PennyMac timely petitioned for review by the California Supreme Court on January 28, 2019, which was denied on April 10, 2019. Appendix A at 1a. Thus, the California Supreme Court entered its final judgment on April 10, 2019. Pursuant to Supreme Court Rule 13, this petition became due on July 9, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). *Perry v. Thomas*, 482 U.S. 483, 489 n. 7 (1987).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article VI, clause ii, of the United States Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Title 9, Section 2 of the United States Code provides:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

INTRODUCTION

State legislatures and courts have a history of attempting to evade the Federal Arbitration Act ("FAA"), and California has led the field. In this case, a California Court of Appeal again ignored this Court's decisions by creating a rule that an employee's arbitration agreement with his employer will not be enforced in an action by the

employee for penalties authorized under California Labor Code section 2699. This rule is based on the fiction that the State is the "real party in interest" and therefore must consent to arbitration. But this Court has repeatedly instructed that the FAA preempts state-law rules that prohibit or obstruct the enforcement of valid arbitration agreements, or that prohibit outright the arbitration of a particular type of claim. This case presents the straightforward question whether the FAA preempts such a state-law rule.

In stark contrast to the California Court of Appeal whose decision is the subject of this petition, a District Court in California applied this Court's recent decisions to the very same arbitration agreement in a related, substantially identical lawsuit filed against Petitioners by three other employees represented by Respondent's counsel. The District Court determined that the FAA and this Court's precedents required the agreement to be enforced as written, notwithstanding the arguments that the agreement contained a class and representative action waiver made illegal by California law and therefore was invalid in its entirety. The fundamental unfairness of identical facts leading to opposite outcomes depending solely upon the forum selected is self-evident. Left undisturbed, however, the State Court of Appeal decision now threatens to undo the District Court's decision, as Respondent's counsel seeks to invoke the collateral estoppel doctrine in that related case.

The Court of Appeal refused to enforce an arbitration agreement entered into by an employee who later filed a civil action against his former employer seeking monetary penalties under California's Labor Code for alleged wage

and hour violations. The statute under which the action was filed – the California Labor Code Private Attorney General Act, California Labor Code § 2699 *et seq.* ("PAGA") – does not expressly require a judicial forum, and does not give the State any role in the prosecution of the civil action once it is filed by an employee against his employer. It mandates only that if monetary penalties are recovered, they be shared with the State.

The Court of Appeal prohibited outright the arbitration of PAGA claims any time the agreement to arbitrate predates the lawsuit, stating: "any predispute agreement to arbitrate individual PAGA claims was ineffective." Appendix B at 27a. To justify its refusal to enforce the arbitration agreement, the Court of Appeal relied on the fiction that the State was a party to the lawsuit, even though the State plays no role in the filing or prosecution of the case. The Court of Appeal held that the employee's arbitration agreement could not be enforced, because at the time of the employee's agreement, the State had not authorized the employee to pursue the State's interest in any potential civil action, stating: "Smigelski executed the employee agreement as a condition of his employment in November 2014, before he satisfied the statutory requirements for bringing a PAGA claim, which occurred sometime in October 2015. [] Prior to the time he satisfied those requirements, Smigelski was not authorized to asssert a PAGA claim as an agent of the state, which retained control of the right underlying the claim. [] Because Smigelski entered the arbitration agreement as an individual, and not as an agent or representative of the state, the agreement cannot encompass the PAGA claim, which relies on the right to recover penalties then belonging to the state. [] It follows

that any predispute agreement to arbitrate individual PAGA claims was ineffective." Appendix B, 26a – 27a [internal citations omitted.]

Underpinning the Court of Appeal's refusal to enforce the employee's arbitration agreement is the utter fallacy that the State is the real party in the PAGA action and the equally false notion that the employee bringing the PAGA lawsuit is not really a party. By this transparent ruse, the Court of Appeal evaded the FAA's requirement that the employee's arbitration agreement should be enforced. This judicial shell game designed to avoid arbitration of PAGA claims should not be countenanced by this Court. The reality is that the State is not in any meaningful way a party in a PAGA action. The State plays no role in the prosecution, dismissal or settlement of the lawsuit. By contrast, the employee signatory to the arbitration agreement has all the attributes of a party-plaintiff: (1) the employee files the PAGA action as the named plaintiff; (2) the employee prosecutes the lawsuit; (3) the employee makes all decisions regarding the action; (4) the employee can settle the action; (5) the employee can dismiss the case; (6) the employee can decide not to file the PAGA action; (7) the employee obtains any monetary judgment and retains 25% of the penalties; and (8) the employee is awarded attorneys' fees if he prevails in the action.

The Court of Appeal's decision is directly contrary to the FAA and decisions of this Court that prohibit such state anti-arbitration rulemaking for the following reasons: First, the decision is contrary to the primary purpose of the FAA to ensure that private arbitration agreements are vigorously enforced according to their

terms. Second, the decision prohibits enforcement of and erects barriers to the enforcement of arbitration agreements covered by the FAA by transmuting standard administrative exhaustion requirements into special agency requirements that disfavor arbitration. Third, the decision places arbitration agreements on unequal footing with other contracts by requiring the State's consent as a condition for enforcing the arbitration agreement against the claim asserted by the signatory employee who is the only named plaintiff.

The Court of Appeal's decision is also contrary to the decisions of the Ninth Circuit Court of Appeals and numerous federal district courts in California, which have held that PAGA claims are not exempt from arbitration. Instead, the federal cases hold that PAGA claims are subject to arbitration, because an outright prohibition on arbitrating PAGA claims is preempted by the FAA. Thus, the enforceability of employment arbitration agreements in California PAGA cases depends entirely on whether the case is filed in, or can be removed to, federal court.

This is no hypothetical concern – the arbitration agreement at the heart of this case was refused enforcement and declared invalid in its entirety by a California Court of Appeal based solely on California's judicially created rule in PAGA cases, while the very same agreement was enforced by a District Court to compel bilateral arbitration of federal wage and hour claims in a related case alleging identical State law wage and hour claims (including PAGA). Different forums; opposite results. No law of the land can function in such an environment.

The question presented is immensely important, because employees and employers throughout California routinely agree to arbitrate their employment-related disputes at the outset of the employment relationship. The rule invoked by the Court of Appeal will invalidate countless arbitration agreements covered by the FAA as applied to PAGA claims in California. This Court's review is therefore essential.

Given the failure of the lower court to heed this Court's repeated instructions that the FAA does not permit states to prohibit arbitration of particular claims and requires arbitration agreements to be placed on equal footing with other contracts, the Court may wish to consider summary reversal or vacatur for reconsideration in light of *Epic Systems v. Lewis*, 138 S.Ct 1612, 1632, 200 L.Ed. 2d 889 (2018), *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1427, 197 L. Ed. 2d 806 (2017) and *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

STATEMENT OF THE CASE

California's Labor Code Private Attorney General Act.[1]

PAGA allows an employee to bring an action to recover civil penalties for violations of California's Labor Code on behalf of that employee and other current and former employees. Cal. Lab. Code § 2699 (a). PAGA claims may be filed either on their own or along with claims seeking

1. References and descriptions in this section are to the statutory provisions as they existed when Respondent filed his civil action. California amended the statute effective June 27, 2016, but the changes apply only to actions filed on or after July 1, 2016.

wages, damages and statutory penalties for the same alleged Labor Code violations. PAGA's default penalty per violation is $100 for each aggrieved employee per pay period for the first violation and $200 for each aggrieved employee per pay period for each subsequent violation. Cal. Lab. Code § 2699(f)(2). Of the penalties recovered, the employees retain 25% and remit 75% to the State. Cal. Lab. Code § 2699 (i). A prevailing plaintiff also recovers attorneys' fees. Cal. Lab. Code § 2699(g)(1).

Prior to filing a PAGA claim, the employee need only provide written notice of the alleged violations to the State and the employer. Cal. Lab. Code § 2699.3 (a). PAGA does not mandate a judicial forum. If the State chooses to investigate the alleged violations and finds them meritorious, then an administrative citation and hearing process follows, not a civil action in court. Lab. Code § 98. In practice, however, "review and investigations of PAGA claims are quite rare." Cal. Dept't Indus. Relations 2016/2017 Budget Change Proposal, Budget Request No. 7350-003-BCP-DP2016-GB, at 1. Indeed, only one employee is staffed to review PAGA notices, and the State investigates less than 1% of all PAGA claims. *Id.* at 1, n.1. Thus, virtually every employee who files a PAGA notice obtains the State's tacit consent to bring his or her own PAGA claim.

The employee is free to file a PAGA claim if, within 33 days of the written notice, the State either fails to respond or notifies the employee that it does not intend to investigate. Cal. Lab. Code § 2699.3(a)(2).[2] After that, the

2. In this respect, private plaintiff PAGA claims are like private plaintiff ADEA or Title VII claims in which notice of the

employee alone controls any PAGA claim, without State involvement. The State is not a named party and has no right to intervene.

FACTUAL BACKGROUND

The *Smigelski* State Court Action

Petitioners are multi-state companies headquarted in California and engaged in the business of mortgage origination and servicing throughout the United States. Smigelski was employed as an account executive at PennyMac's branch office in Sacramento for six months, beginning in November 2014 and ending in April 2015. At the commencement of his employment, Smigelski was given PennyMac's Mutual Arbitration Policy ("MAP") and signed an "Employee Agreement to Arbitrate" in which he agreed "to submit to final and binding arbitration any and all claims and disputes that are related in any way to my employment or the termination of my employment with [PennyMac], except as otherwise permitted by the MAP."

On September 11, 2015, Smigelski provided notice to the Labor Workforce and Development Agency (LWDA) and to PennyMac of his intent to pursue a claim for civil penalties under PAGA. On November 17, 2015, Smigelski filed an action asserting a single claim under PAGA seeking to recover civil penalties.

---

allegations must be filed with the agency, which then issues a "right to sue" letter permitting the employee to pursue the claim in the employee's own name, either in a civil action or, when the employee has agreed to arbitrate, in arbitration.

In response, PennyMac filed a petition to compel arbitration and stay the action. The trial court denied the petition. Appendix E, 51a.

Armed with the ruling that his arbitration agreement was unenforceable, Smigelski filed an amended complaint adding individual and putative class claims seeking unpaid wages, statutory penalties, restitution, and damages, in addition to civil penalties under PAGA. PennyMac responded to the amended complaint with a motion for reconsideration and a second petition to compel arbitration. The trial court denied the motion for reconsideration and the second petition. Appendix C, 38a; Appendix D, 48a.

PennyMac appealed. On December 19, 2018 the Court of Appeal affirmed. App. B, 2a. On April 10, 2019, the California Supreme Court summarily denied PennyMac's Petition for Review. App. A, 1a. This Petition follows.

The Related *Heidrich* Federal Court Action & Appeal

While the appeal in this case was pending before the California Court of Appeal, counsel for Respondent filed a substantially similar civil action in the United States District Court for the Eastern District of California, entitled *Heidrich, et al v. Pennymac Financial Services, Inc., et al.* The *Heidrich* action alleged California wage and hour claims against Petitioners substantially identical to those alleged in *Smigelski* (including a PAGA claim), but also alleged a single federal claim under the Fair Labor Standards Act ("FLSA"). In *Heidrich*, Petitioners moved to compel arbitration of the FLSA claim under arbitration agreements identical to the agreement at issue in *Smigelski*. The District Court granted the

motion, rejecting the argument that the representative waiver language within the agreement was illegal under California law and that the entire agreement was therefore invalid. Instead, the District Court read this Court's decision in *Epic Systems v. Lewis*, 138 S.Ct. 1612, 1632 (2018) to require enforcement of the arbitration agreement as written. *Heidrich v. PennyMac Financial Services, Inc.*, 2018 WL 3388458 (July 11, 2018). The District Court dismissed the State law claims. The *Heidrich* plaintiffs appealed to the Ninth Circuit Court of Appeals (case number 18-16494). The appeal is fully briefed and awaiting oral argument.

Recently, after the California Supreme Court denied review in this case and the *Smigelski* Court of Appeal decision became final, the *Heidrich* appellants filed requests for judicial notice with the Ninth Circuit Court of Appeals and filed a motion for an indicative ruling with the District Court. In these filings, counsel for the *Heidrich* appellants (who is also counsel for Respondent in this case) argues that the *Smigelski* Court of Appeal decision should be given collateral estoppel effect in the *Heidrich* appeal and any remand. This latest development in the related *Heidrich* case illustrates that what happens in State courts does not stay in State courts, and underscores the need for this Court to resolve the conflict between the FAA and California's latest device for avoiding arbitration.

REASONS FOR GRANTING REVIEW

This Court has declared that "State courts rather than federal courts are most frequently called upon to apply the Federal Arbitration Act ("FAA"), 9 U. S. C. §1 *et seq.*, including the Act's national policy favoring arbitration.

It is a matter of great importance, therefore, that state supreme courts adhere to a correct interpretation of the legislation." *Nitro-Lift Technologies, LLC v. Howard*, 568 U.S. 17–18, 20 (2012) (per curiam). How California's courts implement this Court's precedents and their interpretation of the FAA presents a greatly important question of law.

The decision below defies this Court's clear and repeated holdings that the FAA preempts state-law rules that discriminate against arbitration agreements. By prohibiting outright the enforcement of a plaintiff employee's pre-dispute agreement to arbitrate in all PAGA cases, the court below disregarded this Court's definitive interpretation of 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." *Concepcion, supra*, 563 U.S. at 341 (citing *Preston v. Ferrer*, 552 U.S. 346, 353 (2008)).

By requiring that the State expressly authorize the plaintiff-employee to consent to arbitration – even though California law does not impose that requirement for other types of contracts – the court below flatly violated the FAA's mandate that courts must "place [] arbitration agreements on equal footing with all other contracts." *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468, 193 L. Ed. 2d 365 (2015); *see also Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996); *Perry*, 482 U.S. at 492 n. 9.

Whether PAGA claims are arbitrable was the issue squarely presented to, and decided below by the trial court and the Court of Appeal. The Court of Appeal held:

> Smigelski executed the employee agreement as a condition of his employment in November 2014, before he satisfied the statutory requirements for bringing a PAGA claim, which occurred sometime in October 2015. [] Prior to the time he satisfied those requirements, Smigelski was not authorized to assert a PAGA claim as an agent of the state, which retained control of the right underlying the claim. [] Because Smigelski entered the arbitration agreement as an individual, and not as an agent or representative of the state, the agreement cannot encompass the PAGA claim, which relies on the right to recover penalties then belonging to the state. [] It follows that any predispute agreement to arbitrate individual PAGA claims was ineffective.

App. B, 26a – 27a. [emphasis added, internal citations omitted].

By drawing a red circle around PAGA claims and declaring them exempt from arbitration in all cases involving pre-dispute arbitration agreements, the Court of Appeal created a state law rule that is plainly in conflict with and therefore preempted by the FAA.

Indeed, an unbroken line of decisions by the *federal* appellate court for California and numerous decisions by *federal* District Courts in California have held exactly the opposite. These *federal* decisions hold that PAGA claims are subject to arbitration under pre-dispute agreements between the actual parties to the lawsuit, notwithstanding the State's interest in its share of any monetary penalties

recovered. *See Ridgeway v. Nabors Completion & Prod. Serv. Co.,* 725 F. Appx 472, 474 (9th Cir. 2018); *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 434 (9th Cir. 2015); *Wulfe v. Valero Ref. Co.-Cal.*, 641 Fed. Appx. 758, 760 (9th Cir. 2016); *Valdez v. Terminix Int'l Co. Ltd. P'ship*, 681 F. App'x 592, 594 (9th Cir. 2017); *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1273 (9th Cir. 2017); *Galvan v. Michael Kors USA Holdings, Inc.*, 2017 WL 253985, at *10 (C.D. Cal. 2017); *Bui v. Northrop Grumman Sys. Corp.*, No. 15-CV-1397-WQH-WVG, 2015 WL 8492502, at *7 (S.D. Cal. 2015); *Hernandez v. DMSI Staffing, LLC.*, 79 F. Supp. 3d 1054, 1067 (N.D. Cal. 2015) ("The fact that the waiver provisions of the arbitration clauses at issue cannot be enforced to bar PAGA representative claims does not necessarily dictate which forum is proper for their adjudication."*), aff'd sub nom. Hernandez v. DMSI Staffing, LLC,* 677 F. App'x 359 (9th Cir. 2017).

These federal courts are correct. In addition, this conflict between the state and federal courts of California means that a party's rights under the FAA currently turn entirely on whether the lawsuit is prosecuted in state or federal court. For PennyMac, this conflict is not just hypothetical. Instead, it is quite real. While the California Court of Appeal applied the "State must consent" rule to find the arbitration agreement "ineffective" as to the PAGA claim, and simultaneously (and contradictorily) found the class and representative action waiver to be unlawful under California law[3], the District Court in

3. If Smigelski was not authorized to consent on behalf of the State to arbitrate PAGA claims for representative penalties, how could he waive any right to pursue representative PAGA claims in arbitration? And if the waiver language was of no consequence to the State's rights or Smigelski's future ability to vindicate them, how could the waiver be "unlawful" or violate State public policy?

the related and virtually identical *Heidrich* case applied *Epic* and this Court's other FAA precedents to reject the very same arguments that the class and representative action waiver was illegal under California law. Whereas the Court of Appeal used the alleged invalidity of the representative waiver language to deny enforcement of the entire agreement (even as to arbitrable claims), the District Court enforced the whole agreement "as written." Now, however, Petitioners face the possibility that the doctrine of collateral estoppel will be invoked in the *Heidrich* case to force the District Court to invalidate the entire arbitration agreement based on the *Smigelski* Court of Appeal decision. This affront to the Supremacy Clause should not be allowed to fester.

Because the question is cleanly presented, this case is perfect vehicle to resolve the issue of arbitration of PAGA claims. The Court of Appeal did not fully address other issues raised by PennyMac, because it ruled that PAGA claims are never arbitrable based on a pre-dispute arbitration agreement entered into by the employee and his employer. Therefore, this single issue is squarely presented in this case.

The question presented in this case is fully ripe. California's Supreme Court now has refused to correct three separate Courts of Appeal that have defied this Court's precedents by holding PAGA claims are exempt from arbitration. Appendix A, 1a; *Julian v. Glenair, Inc.*, 17 Cal. App. 5th 583 (2017) (review denied February 14, 2018), *Betancourt v. Prudential Overall Supply*, 9 Cal. App. 5th 439 (2017) (review denied May 24, 2017), *Tanguilig v. Bloomingdales*, 5 Cal. App. 5th 665, 677-678 (2016) (*review denied* March 1, 2017). The Ninth Circuit has clearly and repeatedly rejected the California courts'

approach. Further percolation would serve no purpose. Only this Court can resolve the question presented, and that question is ripe for resolution now.

The decision below is yet another in a long line of state court decisions seeking to evade this Court's precedents on arbitration. *See*, *e.g., Kindred Nursing Centers Ltd. P'ship*, 137 S. Ct. at 1427*; Imburgia*, 136 S.Ct. 463; *CarMax Auto Superstores California, LLC v. Fowler*, 134 S.Ct. 1277, 188 L.Ed.2d 290 (2014); *Nitro-Lift Technologies, L.L.C. v. Howard*, 568 U.S. 17, 20 (2012) (per curiam); *Marmet*, 565 U.S. 530, 533 (2012)(per curiam). California leads the vanguard in such attempts to circumvent the FAA with state law rules disfavoring arbitration. *DIRECTV, Inc. v. Imburgia,* 136 S. Ct. 463, 468 (2015), *CarMax Auto Superstores California, LLC v. Fowler*, 134 S.Ct. 1277, 188 L.Ed.2d 290 (2014), *Sonic-Calabasas A, Inc. v. Moreno*, 565 U.S. 973 (2011) and *Perry, supra*, *482 U.S. at 489 n. 2*. Review and reversal or vacatur of the decision below is warranted to prevent the Court of Appeal's flouting of the FAA, to prevent the contagion of such disobedience from infecting the related federal case and to preserve the integrity of this Court's precedents.

A. The Decision Below Conflicts With The FAA And Defies This Court's Precedents.

The FAA "is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it." *Imburgia*, *supra*, 136 S.Ct. 463.

In *Concepcion, supra,* 563 U.S. at 341, this Court explained the most obvious type of state law rules that are preempted by the FAA. "When state law prohibits

outright the arbitration of a particular type of claim," it presents a "straightforward" analysis: "The conflicting rule is displaced by the FAA."

In this case, the Court of Appeal's holding prohibits outright the arbitration of a particular type of claim – PAGA claims for civil penalties – any time the agreement to arbitrate was entered into by the parties before the employee satisfied the minimal administrative notice requirements of PAGA. App. B, 26-27a.

Legislative and judicial attempts to preclude arbitration of California Labor Code claims have been held by this Court to be preempted by the FAA in numerous cases. *Perry v. Thomas*, 482 U.S. 483, 490 (1987)(Labor Code § 229, restricting arbitration of wage disputes, preempted and invalidated by FAA); *Preston*, *supra*, 522 U.S. at 359-360 (FAA supersedes the California Talent Agencies Act, which vests exclusive jurisdiction over disputes with Labor Commissioner); *Sonic-Calabasas*, *supra*, 565 U.S. 973 (2011)(vacating California rule requiring Labor Commissioner administrative hearing before arbitration of a wage dispute covered by arbitration agreement) .

The California Court of Appeal's rule prohibiting enforcement of pre-dispute arbitration agreements as applied to PAGA cases filed and prosecuted solely by the signatory employee against the signatory employer cannot be squared with the plain terms and manifest purpose of the FAA.[4]

---

4. The *Smigelski* rule, which singles out pre-dispute agreements to arbitrate PAGA claims for unequal treatment, contravenes the text of FAA § 2: "A written provision in * * * a

Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements," "to place [these] agreements upon the same footing as other contracts," and to "manifest a liberal federal policy favoring arbitration agreements." *EEOC v. Waffle House, Inc.,* 534 U.S. 279, 289 (2002)(quotation marks omitted). Section 2 of the FAA therefore commands that "[a]n agreement to arbitrate is valid, irrevocable, and *enforceable as a matter of federal law,* *** 'save upon such grounds as exist at law or in equity for the revocation of *any* contract.' " *Perry, supra,* 482 U.S. at 492, n. 9 (quoting 9 U.S.C. § 2).

This principle means that "Congress precluded States from singling out arbitration provisions for suspect status" (*Casarotto, supra,* 517 U.S. at 687) or from invalidating arbitration provisions through state-law rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion, supra,* 563 U.S. at 339; *see also Imburgia, supra*, 136 S. Ct. at 469; *Perry,* 482 U.S. at 492 n.9. Nor may States apply generally applicable state-law doctrines

---

contract evidencing a transaction involving commerce to settle by arbitration a controversy *thereafter arising* out of such contract * * * or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). By its terms, then, the FAA requires the enforcement of both pre-dispute and post-dispute arbitration agreements and mandates that they be treated equally. If Congress wanted to make only post-dispute arbitration agreements enforceable under the FAA, it would have done so. *See* 15 U.S.C. § 1226(a)(2).

"in a fashion that disfavors arbitration." *Concepcion,* 563 U.S. at 341; *see also Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1427, 197 L. Ed. 2d 806 (2017). Like California Labor Code section 229 prohibiting arbitration of any claim under the Labor Code for wages (which this Court held preempted by the FAA 30 years ago in *Perry*, *supra,* 482 U.S. at 492), the Court of Appeal's rule is an outright prohibition on arbitration of a particular type of Labor Code claim.

The Court of Appeal attempted to justify its anti-arbitration rule as one of general applicability based on the wrongheaded notion that because the State has an interest in Smigelski's PAGA claim for monetary penalties, it is the "party" to the PAGA action and Smigelski is not. Relying on this false premise, the Court of Appeal concluded, "Smigelski executed the employee agreement . . . before he satisfied the statutory requirements for bringing a PAGA claim, . . . Because Smigelski entered the arbitration agreement as an individual, and not as an agent or representative of the state, the agreement cannot encompass the PAGA claim, which relies on the right to recover penalties then belonging to the state . . . . It follows that any predispute agreement to arbitrate individual PAGA claims was ineffective." Appendix B, 26-27a [p. 19] This artifice is in direct conflict with the FAA, which required that Smigelski's arbitration agreement be enforced to compel arbitration of any action filed and prosecuted by Smigelski.

The *Smigelski* rationale relies on a double fiction: (1) that the State, despite being entirely absent from the proceeding and having no authority to intervene, is a party; and (2) that the plaintiff, despite statutory

authorization to sue in his own name and to prosecute or settle the PAGA claims without any State involvement, is nevertheless acting on the state's behalf and therefore his private agreement to arbitrate is inapplicable absent State consent.[5]

This case is in marked contrast to employment cases where a State or federal agency is a direct party to the lawsuit against the employer and directly controls the litigation, in which case the employee's arbitration agreement with the employer does not bar the government from pursuing the action in court. For example, this Court ruled in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002) held that an employee's arbitration agreement with his employer did not prevent the EEOC from suing the

5. The false analogy often drawn by California courts is that PAGA claims are "a kind of *qui tam*" claim. This Court has held that in a federal *qui tam* action the named plaintiff, not the government, is the party plaintiff and the government is not a party unless the government has intervened in the action. *United States ex rel. Einstein v. City of New York*, 556 U.S. 928, 933 (2009). Furthermore, comparison of California's actual *qui tam* statute, Government Code section 12652, to Labor Code section 2699, shows that PAGA claims bear no resemblance to *qui tam* actions, either in terms of the injured party whose rights were violated or the continuing right of the State or its subdivisions to control the litigation or any settlement, even in cases where they do not intervene at the outset. California Government Code §12652 authorizes *qui tam* actions in which the State has been defrauded and monetarily injured, and authorizes the State to intervene and control the litigation or its disposition at all stages. PAGA authorizes additional penalties that are derivative of and based solely upon Labor Code violations suffered by the employee, and once the employee obtains standing to assert a PAGA claim, the State lacks any ability to intervene or control the litigation.

employer on behalf of the employee for victim-specific relief. The Court simply concluded that the EEOC was not required to arbitrate, because the EEOC, not the employee was the actual party to the litigation. *See Preston, supra,* 552 U.S. at 359 (explaining "in *Waffle House* . . . the Court addressed the role of an agency . . . as prosecutor, pursuing an enforcement action in its own name.") But the Court's conclusion in *Waffle House* was based on the facts that: (1) the employee was not a party to the lawsuit; (2) the employee did not exercise control over the litigation; (3) the EEOC was not a proxy for the individual employee; and (4) the EEOC could prosecute the action without the employee's consent. The Court explained that the result would be different if "the EEOC could prosecute its claim only with [the employee's] consent" or "if its prayer for relief could be dictated by [the employee]." *Id. 534 U.S. at 291.*

The Court of Appeal's reasoning here that the State is the real party in the PAGA action and that Smigelski is not a party is contrary to holding of *Waffle House*, because Smigelski is the named party to the lawsuit and he controls the litigation in its entirety. Smigelski alone filed the lawsuit - he is a party to it and the State is not. This Court held in *United States ex rel. Einstein v. City of New York*, 556 U.S. 928, 933 (2009) that "A 'party' to litigation is '[o]ne by or against whom a lawsuit is brought'" the government's 'status as a 'real party in interest' in a *qui tam* action does not automatically convert it into a 'party'", and stated that when a real party in interest "has declined to bring the action or intervene, there is no basis for deeming it a 'party.'" This Court further stated: "A 'party' to litigation is '[o]ne by or against whom a lawsuit is brought.' *Black's Law Dictionary* 1154 (8th ed.2004).

An individual may also become a 'party' to a lawsuit by intervening in the action."

Generally applicable California law is similar. A California Court of Appeal in *Villacres v. ABM Indus. Inc.*, 189 Cal.App.4th 562, 591-592 (2010) held that the employee, not the State, is the plaintiff in a PAGA action when the State fails to pursue the matter itself, stating:

> "[plaintiff employee] contends the State of California is, as a legal matter, the actual plaintiff here. Not so. The PAGA authorized [the employee] to file this action 'on behalf of himself . . . and other current and former employees.' (§2699, subd.(a).) The act 'empowers or deputizes an aggrieved employee to sue for civil penalties . . . as an alternative to enforcement by the [State]." (emphasis added).

This case too involves PAGA. But the contrary rationale of the Court of Appeal here treats arbitration agreements more unfavorably than other types of agreements (e.g. settlement agreements as in *Villacres*). The "State must consent" rationale is a device employed only to evade FAA preemption.

The *Smigelski* rule is preempted by the FAA, because the reasoning does not apply to any agreement other than an agreement to arbitrate. For example, California law permits private plaintiffs to enter into agreements to settle and release allegations of Labor Code violations before any PAGA lawsuit is filed. Those agreements are enforced to preclude derivative PAGA claims for penalties entirely, without regard to whether the State signed the

settlement agreement or otherwise consented to the settlement and release. *Villacres v. ABM Indus. Inc.*, 189 Cal. App. 4th 562, 591(2010). Indeed, PAGA itself contemplates that private plaintiffs may choose to *never* pursue claims for PAGA penalties (in which case the State's interest is extinguished by the employee's inaction) or may settle or dismiss PAGA actions without obtaining the consent of the State. Cal. Lab. Code § 2699 (2015). The decision below selectively disfavors only agreements to submit PAGA claims to arbitration.

Another comparison illustrates the unequal treatment given to the arbitration agreement here. Unlike the anti-arbitration rule in this case, California courts have held enforceable other types of agreements, even where the private plaintiff filed the action in a private attorney general capacity authorized by statute. In *Net2Phone, Inc. v. Superior Court*, 109 Cal. App. 4th 583, 587-588 (2003), a California Court of Appeal held a forum selection clause in a consumer contract was enforceable against the private plaintiff suing in a private attorney general capacity under California's Unfair Competition Law, *even assuming the forum selection clause would not be enforceable against the California Attorney General making the same claims*. In so holding, the court rejected the argument that because the private plaintiff was suing in place of the State's Attorney General, that the forum selection clause therefore could not be enforced against the private plaintiff. As the court stated, "The filing of a UCL action by a private plaintiff does not confer on that plaintiff the stature of a prosecuting officer, and the fact that the plaintiff may be acting as a so-called private attorney general is irrelevant for purposes of the issue presented here." *Net2Phone, Inc. v. Superior Court*, *supra,* 109 Cal. App. 4th at 588.

Recently, California's Legislature made a distinct subset of contracts in California enforceable to waive PAGA penalty claims without requiring State consent – collective bargaining agreements in the construction industry that provide for binding arbitration of any underlying Labor Code violations. Cal. Labor Code § 2699.6 (2019).

Such obvious inconsistency has led this Court to conclude that similar judicial rules target arbitration agreements. *See, e.g. Kindred Nursing Centers* (holding that FAA preempted Kentucky Supreme Court's special rule requiring express authorization by principal of agent to enter into arbitration agreements but not other contracts) [137 S.Ct. at 1427]; *Imburgia* 136 S. Ct. at 470-71(holding that the FAA preempted the California Court of Appeal's interpretation of the term "law of your state" because "nothing in the [state court's] reasoning suggest[ed]" that a court in that state "would reach the same interpretation of 'law of your state' in any context other than arbitration.").

This Court should not countenance the Court of Appeal's decision, which is transparently incorrect and concocted solely to evade FAA preemption.

B. The Decision Below Is Exceptionally Important.

This Court's immediate intervention to prevent California courts from continuing to evade the dictates of the FAA is warranted for three basic reasons: (1) this issue arises with great and increasing frequency; (2) there is a square conflict between the State cour's decision below and decisions on the very same legal issue by the federal

court in California; and (3) this Court's intervention will make it clear that states may not invalidate arbitration agreements on grounds which contravene the FAA and this Court's precedents.

1. This issue arises with great frequency.

California is the most populous state, is a hub to numerous major U.S. and global industries, and is home to approximately 12% of all employees in the United States.[6] Many of those employees agree to arbitration of their employment-related disputes at the outset of their employment, before any dispute has arisen. As a result of *Smigelski*, employment arbitration agreements under which California employers and employees agreed to arbitrate PAGA claims cannot be enforced.

Enterprising plaintiffs and their attorneys are quickly taking advantage of this new loophole, using it to shirk their contractual obligation to arbitrate employment claims. California courts' refusal to enforce pre-dispute agreements to arbitrate PAGA claims has caused the number of PAGA actions to skyrocket. "Annual PAGA filings have increased over 200 percent in the last five years, and over 400 percent since 2004. The fact that PAGA claims cannot be waived by agreements to arbitrate contributes heavily to the prevalence of these suits." Matthew J. Goodman, *The Private Attorney General*

6. As of May 2019, California had an employed workforce of 18,653,000. Bureau of Labor Statistics, California, https://www.bls.gov/eag/eag.ca.htm. At that time, the United States employed workforce was 156,758,000. Bureau of Labor Statistics, Employment status of the civilian population by sex and age, https://www.bls.gov/news.release/empsit.t01.htm.

Act: How to Manage the Unmanageable, 56 Santa Clara L. Rev. 413, 415 (2016) (citation omitted). In California, as many as 635 new PAGA notices are now being filed every month with the State. Cal. Dep't of Indus. Relations 2016/2017 Budget Change Proposal, Budget Request No. 7350-003-BCP-DP-2016-GB, at 2. This trend will accelerate without this Court's intervention.

2. There is a square conflict between the ruling below and decisions on the very same legal issue by the federal courts in California - a conflict that produces significant unfairness to litigants, such as Petitioners, that are unable to remove cases from state to federal court.

The Court of Appeal below relied on selected and incomplete quotations from *Iskanian v. CLS Transp. Los Angeles, LLC,* 59 Cal.4th 348 (2014) to hold that PAGA claims are not arbitrable. App. B, at 16a – 24a. The precise holding of *Iskanian* is that where "an employment agreement compels the waiver of representative claims," whether or not the agreement specifically references PAGA, it "frustrates the PAGA's objectives" and "is contrary to public policy and unenforceable as a matter of state law." *Iskanian, supra*, 59 Cal. 4th at 384. The focus of *Iskanian* is not on preventing enforcement of arbitration agreements in cases involving PAGA claims, but on preventing waiver of substantive statutory remedies. *Iskanian* held that an employer "cannot compel the waiver of [the employee's] representative PAGA claim but that the agreement [to arbitrate] is otherwise enforceable according to its terms". *Iskanian*, *supra*, 59 Cal. 4th at 391.

Indeed, in *Iskanian* the court expressly remanded the PAGA claims in that case for determination of "a number

of questions: (1) Will the parties agree on a single forum for resolving the PAGA claim and the other claims? (2) If not, is it appropriate to bifurcate the claims, with individual claims going to arbitration and the representative PAGA claim to litigation?" *Iskanian*, *supra*, 59 Cal. 4th at 391-92. *Iskanian* did not rule out an arbitral forum for PAGA claims, but stated that the employer "must answer the representative PAGA claims in some forum." 59 Cal. 4th at 392. The parties in this case already agreed on a single forum for resolving the PAGA claim and all other employment claims – they agreed on arbitration. App. B, 3a – 5a.

The Ninth Circuit Court of Appeal has explained on several occasions that pursuant to *Iskanian's* interpretation of California law, PAGA claims are not exempt from arbitration, but instead are subject to arbitration if the parties' agreement allows pursuit of PAGA's civil penalties. "The California Supreme Court's decision in *Iskanian* expresses no preference regarding whether individual PAGA claims are litigated or arbitrated. It provides only that representative PAGA claims may not be waived outright. [] The *Iskanian* rule does not prohibit the arbitration of any type of claim." *Sakkab*, *supra*, 803 F.3d at 434 (internal citation omitted); *see also Ridgeway v. Nabors Completion & Products Serv. Co.*, 725 F. Appx 472, 474 (9th Cir. 2018); *Poublon*, *supra*, 846 F.3d at 1273 ("the waiver of representative claims is unenforceable to the extent it prevents an employee from bringing a PAGA action. This clause can be limited without affecting the remainder of the agreement."); *Valdez*, *supra*, 681 F. App'x at 594; *Wulfe*, *supra*, 641 Fed. Appx. at 760.

Accordingly, under the Ninth Circuit's interpretation of California law, "[n]othing prevents parties from agreeing

to use informal procedures to arbitrate representative PAGA claims." *Sakkab*, *supra*, 803 F.3d at 436. Since *Sakkab* determined that the narrow *Iskanian* rule was not in conflict with the FAA, numerous district courts in California have compelled arbitration of PAGA claims.[7]

As the Ninth Circuit noted, this limited state law rule does not conflict with and therefore is not preempted by the FAA. *Sakkab*, *supra*, 803 F.3d at 434 ("The *Iskanian* rule does not prohibit the arbitration of any type of claim."). The same cannot be said of the *per se* rule against arbitration of PAGA claims that the Court of Appeal in this case created.

Indeed, the Ninth Circuit rejected the exact rule proffered by the Court of Appeal below in this case. *Valdez v. Terminix Int'l Co. Ltd. P'ship*, *supra.* As the Ninth Circuit stated:

> *Iskanian* and *Sakkab* clearly contemplate that an individual employee can pursue a PAGA claim in arbitration, and thus that individual employees can bind the state to an arbitral forum. *** Accordingly, an individual employee,

7. *See e.g., Galvan v. Michael Kors USA Holdings, Inc.*, 2017 WL 253985, at *10 (C.D. Cal. 2017); *Bui v. Northrop Grumman Sys. Corp.*, No. 15-CV-1397-WQH-WVG, 2015 WL 8492502, at *7 (S.D. Cal. 2015) ("Neither *Iskanian* nor *Sakkab* suggest that PAGA claims cannot be arbitrated."); *Hernandez v. DMSI Staffing, LLC.,* 79 F. Supp. 3d 1054, 1067 (N.D. Cal. 2015) (" The fact that the waiver provisions of the arbitration clauses at issue cannot be enforced to bar PAGA representative claims does not necessarily dictate which forum is proper for their adjudication.*"), aff'd sub nom. Hernandez v. DMSI Staffing, LLC,* 677 F. App'x 359 (9th Cir. 2017).

> acting as an agent for the government, can agree to pursue a PAGA claim in arbitration. *Iskanian* does not require that a PAGA claim be pursued in the judicial forum; it holds only that a complete waiver of the right to bring a PAGA claim is invalid.

Valdez, *supra*, 681 F. App'x at 594 (internal citations omitted, emphasis added).

Here, the Court of Appeal below extracted the exact opposite rationale from *Iskanian*, to justify a *per se* rule that an employee's pre-dispute agreement to arbitrate may never be enforced against the employee's asserted PAGA claims.[8] This rule, if allowed to stand, will invalidate vast numbers of employment arbitration agreements when applied to PAGA cases.

The Ninth Circuit also has held that the FAA as interpreted by this Court in *Concepcion* preempts California's rule attempting to exempt from arbitration private attorney general actions seeking public injunctive

8. The rationale of *Julian, Betancourt and Tanguilig* adopted by the Court of Appeal is inconsistent with the holding of *Iskanian*. If an employee who signs a predispute arbitration agreement is incapable of agreeing to arbitrate PAGA claims, then logically the employee must also be incapable of waiving any rights with respect to PAGA claims. If that were so, the inclusion of representative waiver language within a predispute arbitration agreement could not offend California's public policy, because it would be a nullity with no potential application to any PAGA claim that might later be filed by the employee. In that case, surely, such a null term could not taint the entire agreement with an illegal purpose or render the entire agreement unenforceable as to arbitrable claims.

relief under California's consumer protection laws. *Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928, 934 (9th Cir. 2013) (holding that *Concepcion's* core holding "also resolves this case. By exempting from arbitration claims for public injunctive relief under the CLRA, UCL, and FAL, the *Broughton–Cruz* rule similarly prohibits outright arbitration of a particular type of claim.")

The Court of Appeal's decision in this case cannot be reconciled with the Ninth Circuit decisions discussed above. This conflict between California's state and federal courts will prejudice companies like PennyMac, who are headquartered in California and unable to remove PAGA cases to federal court. California state courts will not enforce pre-dispute arbitration agreements in those PAGA cases based on *Julian v. Glenair, Inc.*, 17 Cal. App. 5th 853 (2017)(refusing to enforce arbitration agreement against signatory employee's PAGA claim because State did not consent to arbitration); *Betancourt v. Prudential Overall Supply*, 9 Cal. App. 5th 439 (2017) (refusing to enforce a pre-dispute arbitration agreement against signatory employee's PAGA claim because State had not expressly consented to arbitrate), *Tanguilig v. Bloomingdales*, 5 Cal. App. 5th 665, 677-678 (2016) (same) and *Esparza v. KS Industries, L.P.* 13 Cal. App. 5th 1228, 1246 (2019)("The rule of nonarbitrability adopted in *Iskanian* is limited to representative claims for civil penalties in which the state has a direct financial interest.").

In contrast, companies headquartered or incorporated elsewhere will be able to remove such cases to federal court and enforce their arbitration agreements - thereby allowing those companies "to realize the benefits of private dispute resolution," including "lower costs" and "greater

efficiency and speed." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 559 U.S. 662, 685 (2010); *see also*, *e.g., Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, 123 (2001) ("Arbitration agreements allow parties to avoid the costs of litigation ***."). That dichotomy places California businesses like PennyMac at a distinct disadvantage.[9]

The circumstances here are therefore similar to those that warranted this Court's review in *Imburgia. See* 136 S. Ct. at 467-48 (observing that the petition granted "not[ed] that the Ninth Circuit had reached the opposite conclusion on precisely the same interpretive question decided by the California Court of Appeal"). This Court's intervention is needed in order to ensure that parties' rights in California under the FAA do not depend on the forum - state or federal court - in which they seek to enforce an arbitration agreement.

3. This Court's intervention also will make clear that lower courts may not invalidate arbitration agreements in contravention of the FAA and this Court's precedents.

This Court repeatedly has intervened by granting summary reversals when state courts have ignored or refused to apply controlling precedents interpreting the FAA. As the Court has explained, because "[s]tate courts rather than federal courts are most frequently called upon

9. The *Smigelski* Court of Appeal decision threatens to disadvantage Pennymac even in federal courts, as illustrated in the related *Heidrich* case, where Respondent's counsel is invoking collateral estoppel in an effort to have California law as articulated by the *Smigelski* Court of Appeal trump the FAA as interpreted by this Court in *Epic.*

to apply the *** FAA," "[i]t is a matter of great importance *** that state supreme courts adhere to a correct interpretation of the legislation." *Nitro-Lift, supra,* 568 U.S. 17 at 501; *accord Marmet Health Care Center, Inc. v. Brown,* 565 U.S. 530 at 532 (2012) (the Court summarily vacated and remanded the lower court's decision, because "The West Virginia court's interpretation of the FAA was both incorrect and inconsistent with clear instruction in the precedents of this Court."); *KPMG LLP v. Cocchi*, 565 U.S. 18, 22 (2011) (per curiam) (the Court summarily vacated the Florida District Court of Appeal's refusal to compel arbitration as "fail[ing] to give effect to the plain meaning of the [Federal Arbitration] Act and to the holding of *Dean Witter* [*Reynolds, Inc. v. Byrd,* 470 U.S. 213 (1985)]."); *Citizens Bank v. Alafabco, Inc.,* 539 U.S. 52, 56-58 (2003) (per curiam) (the Court summarily reversed the Alabama Supreme Court's refusal to apply the FAA based on an "improperly cramped view of Congress' Commerce Clause power" that was inconsistent with this Court's decision in *Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265 (1995)).

This Court also recently reversed the Kentucky Supreme Court, which had imposed a state law rule prohibiting authorized agents from binding their principals to arbitration agreements, despite broad authority under Kentucky law to enter into all manner of other contracts. *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1427, 197 L. Ed. 2d 806 (2017) ("Such a rule is too tailor-made to arbitration agreements—subjecting them, by virtue of their defining trait, to uncommon barriers—to survive the FAA's edict against singling out those contracts for disfavored treatment."). As this Court held in that case, "[a] rule selectively finding arbitration contracts

invalid because improperly formed fares no better under the Act than a rule selectively refusing to enforce those agreements once properly made." *Id.* at 1428. The rule imposed by the Court of Appeal below, selectively finding pre-dispute agreements invalid in PAGA cases should fare no better.

This Court in 2015 reversed a decision of the California Court of Appeal adopting an incorrect interpretation of an arbitration agreement in an attempt to find the agreement unenforceable. *Imburgia,* 136 S. Ct. at 468-71. This Court was once again compelled to remind the lower courts of their "undisputed obligation" to follow its precedents: "The Federal Arbitration Act is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it." *Id.* at 468.

The decision below indicates that California courts continue to defy this Court's instructions. Left to stand, the decision below could well prompt other state legislatures to "deputize" private plaintiffs in order to render their previously signed arbitration agreements unenforceable or could prompt state courts to manufacture interpretations of state agency law that single out arbitration for disfavored treatment in an effort to circumvent the FAA and this Court's precedents. This approach has already been recommended to anti-arbitration State legislatures. *See* Janet Cooper Alexander, *To Skin A Cat: Qui Tam Actions As A State Legislative Response to* Concepcion, 46 U. Mich. J.L. Reform 1203 (2013). New York and Vermont are considering PAGA-like measures for employment, consumer and nursing home lawsuits as an end-run around *Epic, Kindred* and *Concepcion*. *See* Ceilidh Gao, *What's*

Next for Forced Arbitration? Where We Go After SCOTUS Decision in Epic Systems, Nat'l Emp. L. Project (June 5, 2018), https://www.nelp.org/blog/whats-next-forced-arbitration-go-scotus-decision-epic-systems/ (discussing other state statutes similar to PAGA).

Just last term this Court observed in *Epic* that: "Just as judicial antagonism toward arbitration before the Arbitration Act's enactment "manifested itself in a great variety of devices and formulas declaring arbitration against public policy," *Concepcion* teaches that we must be alert to new devices and formulas that would achieve much the same result today." 138 S.Ct. at 1623. As this case demonstrates, States deputizing private plaintiffs as nominal "private attorneys general" and requiring State "consent" to arbitration agreements previously agreed to by those private parties is precisely such a device.

4. Summary reversal or remand would also be appropriate in this case.

Given the clear conflict between the decision below and this Court's precedents, the Court may wish to consider summarily reversing the decision below.

If the Court believes that neither plenary review nor summary reversal is warranted, it may wish to consider granting, vacating, and remanding the decision below in light of *Kindred Nursing Centers*, *Imburgia*, *Epic*, and *Concepcion*. This Court has already taken that course in other cases presenting state courts' refusal to adhere to this Court's precedents interpreting the FAA. *See Schumacher Homes of Circleville, Inc. v. Spencer*, 136 S. Ct. 1157 (2016); *Ritz-Carlton Development Co. v.*

Narayan, 136 S. Ct. 799 (2016); *CarMax Auto Superstores California, LLC v. Fowler*, 134 S.Ct. 1277, 188 L.Ed.2d 290 (2014). Doing the same here would remind the California courts that they may not prohibit arbitration of a particular type of state law claim or otherwise disfavor arbitration.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal, or vacatur for reconsideration in light of *Kindred Nursing Centers*, *Imburgia, Epic* and *Concepcion.*

Respectfully submitted,

James A. Bowles
Counsel of Record
Michael S. Turner
E. Sean McLoughlin
Warren J. Higgins
Hill, Farrer & Burrill LLP
One California Plaza
300 South Grand Avenue, 37th Floor
Los Angeles, California 90071
(213) 620-0460
jbowles@hillfarrer.com

Counsel for Petitioners

APPENDIX

APPENDIX A — DENIAL OF PETITION FOR REVIEW BY THE SUPREME COURT OF CALIFORNIA FILED APRIL 10, 2019

IN THE SUPREME COURT OF CALIFORNIA

S253796
En Banc

RICHARD SMIGELSKI,

Plaintiff and Respondent,

v.

PENNYMAC FINANCIAL SERVICES, INC. *et al.*,

Defendants and Appellants.

Court of Appeal, Third Appellate District
No. C081958

The petition for review is denied.

/s/_____
Chief Justice

APPENDIX B — OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT (SACRAMENTO), FILED DECEMBER 19, 2018

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

C081958

RICHARD SMIGELSKI,

Plaintiff and Respondent,

v.

PENNYMAC FINANCIAL SERVICES, INC. *et al.*,

Defendants and Appellants.

Superior Court of Sacramento County
No. 34201500186855CUOEGDS

December 19, 2018, Opinion Filed

Defendants and appellants Private National Mortgage Acceptance Company, LLC, PennyMac Financial Services, Inc., and PennyMac Mortgage Investment Trust (collectively, "PennyMac") appeal from orders denying successive petitions to compel arbitration of a dispute

with a former employee, plaintiff and respondent Richard Smigelski. PennyMac advances a number of arguments on appeal. Of greatest significance, PennyMac argues the trial court erred in finding the parties' arbitration agreement contains unenforceable waivers of the right to bring claims under the Private Attorneys General Act of 2004 (PAGA) (Lab. Code, § 2699 et seq.), and erred in declining to sever the waivers and enforce the remainder of the agreement.[1] We disagree and affirm.

I. BACKGROUND

PennyMac is engaged in the business of mortgage origination and servicing throughout the United States, including California. Smigelski was employed as an account executive at PennyMac's branch office in Sacramento for six months, beginning in November 2014 and ending in April 2015.

A. The Arbitration Agreement

On his first day of work, Smigelski signed a document entitled, "Employee Agreement to Arbitrate" (employee agreement). The employee agreement acknowledges receipt of another document entitled, "Mutual Arbitration Policy" (MAP), and provides, "I agree that it is my obligation to make use of the MAP and to submit to final and binding arbitration any and all claims and disputes that are related in any way to my employment or the termination of my employment with [PennyMac], except

1. Undesignated statutory references are to the Labor Code.

as otherwise permitted by the MAP." The employee agreement further provides, "by agreeing to use arbitration to resolve my dispute, both PennyMac and I agree to forego any right we each may have had to a jury trial on issues covered by the MAP, and forego any right to bring claims on a representative or class basis." The employee agreement further provides, "If any provision of the MAP is found unenforceable, that provision may be severed without affecting this agreement to arbitrate."

The MAP, which Smigelski denies having received, similarly requires "mandatory binding arbitration of disputes, for all employees, regardless of length of service." As relevant here, the MAP "covers all disputes relating to or arising out of an employee's employment with PennyMac," including "wage or overtime claims or other claims under the Labor Code." PennyMac adopted the MAP in 2008.

The MAP specifies that, "both you and PennyMac forego and waive any right to join or consolidate claims in arbitration with others or to make claims in arbitration as a representative or as a member of a class or in a private attorney general capacity, unless such procedures are agreed to by both you and PennyMac." The MAP further specifies that, "No remedies that otherwise would be available to you individually or to PennyMac in a court of law . . . will be forfeited by virtue of this agreement to use and be bound by the MAP."

The MAP incorporates the Employment Arbitration Rules and Mediation Procedures of the American

Arbitration Association (AAA Employment Rules). The MAP further provides, "PennyMac will not modify or change the agreement between you and PennyMac to use final and binding arbitration to resolve employment-related disputes without notifying you and obtaining your consent to such changes, although specific MAP procedures or AAA Employment Rules may be modified from time to time as required by applicable law." "Also," the MAP provides, "the Arbitrator or a court may sever any part of the MAP procedures that do not comport with the Federal Arbitration Act."

B. The Complaint

On September 11, 2015, Smigelski provided notice to the Labor Workforce and Development Agency (LWDA) and PennyMac of his intent to pursue a cause of action for civil penalties under PAGA. On November 17, 2015, Smigelski filed a complaint asserting a single cause of action under PAGA.[2] The complaint, which was styled as a "Representative Action," alleged that PennyMac miscalculated overtime for hourly employees and failed to provide accurate, itemized wage statements. The complaint did not assert any individual claims and only sought to recover civil penalties under PAGA.

2. LWDA had 33 days to notify Smigelski of its intent to investigate the violations alleged in the PAGA notice under the version of the statute in effect at the time. (Former § 2699.3, subd. (a)(2)(A).)

C. First Petition to Compel Arbitration

PennyMac filed a petition to compel arbitration of the complaint pursuant to the employee agreement and MAP (together, the arbitration agreement) in February 2016. Relying on *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 173 Cal. Rptr. 3d 289, 327 P.3d 129 (*Iskanian*), PennyMac argued, *inter alia*, that (1) employers and employees may agree to arbitrate PAGA claims (*id.* at p. 391), (2) the arbitration agreement reflects such an agreement, (3) the Federal Arbitration Act (FAA) requires enforcement of the purported agreement to arbitrate PAGA claims, and (4) any unenforceable provisions in the arbitration agreement should be severed, and the remaining provisions enforced.[3] PennyMac also argued that the question of arbitrability was for the arbitrator to decide, not the trial court.

Smigelski opposed the petition, arguing that the arbitration agreement contains unenforceable PAGA waivers within the meaning of *Iskanian*. Smigelski additionally argued that the terms of arbitration agreement preclude severance of the PAGA waivers, rendering the agreement as a whole unenforceable. Smigelski also argued that the arbitration agreement does not "clearly and unmistakably" demonstrate that the parties intended to delegate questions of arbitrability to the arbitrator, and therefore, any questions of arbitrability must be decided by the trial court. (See *Ajamian v. CantorCO2e* (2012) 203 Cal.App.4th 771, 781-782, 137 Cal. Rptr. 3d 773 (*Ajamian*).)

3. We discuss *Iskanian post.*

Appendix B

The trial court denied PennyMac's petition in a minute order dated March 3, 2016, which was incorporated into a formal order entered on March 11, 2016. The trial court rejected as "strained" PennyMac's argument that the arbitration agreement contemplates arbitration of PAGA claims, stating: "There is no ambiguity in the [employee agreement] or the MAP. PAGA claims are prohibited in arbitration given that the employee waives any right to make representative claims or claims in a private attorney general capacity. Such a prohibition violates public policy and is unenforceable." The trial court also rejected PennyMac's invitation to sever the PAGA waivers, finding that severance would be inconsistent with the parties' intent, as expressed in the arbitration agreement. The trial court explained: "[W]hile the [employee agreement] contains an offending provision requiring [Smigelski] to forego any representative claim, that [a]greement specifically states that if 'any provision of the MAP is found to be unenforceable, that provision may be severed without affecting this agreement to arbitrate.' [Citation.] The [employee agreement] itself does not contain a provision allowing for severance. This express language reflects an intent not to sever any portion of the [employee agreement] and striking the provision would conflict with the parties' intent. [Citation.] Further, the MAP itself only provides for severance of any provision that does not comport with the FAA. [Citation.] But here, the waiver provisions do not comport with State law, and thus severance of the provision in the MAP would also conflict with the parties' intent." Accordingly, the trial court determined that the arbitration agreement was entirely unenforceable.

The trial court also rejected PennyMac's argument that questions of arbitrability must be determined by the arbitrator, noting that the MAP provides, "the Arbitrator *or a court* may sever any part of the MAP procedures that do not comport with the [FAA]." (Italics added.) "Thus," the trial court explained, "the [arbitration] agreements themselves indicate an intent that the [c]ourt itself may decide questions of arbitrability, or at a minimum[,] create an ambiguity on that point." Accordingly, the trial court concluded that the question of arbitrability was appropriate for judicial determination.

D. First Amended Complaint

On March 10, 2016, Smigelski filed a first amended complaint adding several non-PAGA causes of action to the original complaint. The first amended complaint, which is the operative pleading, alleges individual and putative class claims for unpaid overtime under sections 510 and 1194, penalties for failure to provide accurate wage statements under section 226, waiting time penalties under section 203, and violations of the Business and Professions Code section 17200, et seq. The first amended complaint seeks unpaid wages, statutory penalties, restitution, and damages according to proof, in addition to civil penalties under PAGA.

E. Motion for Reconsideration and Second Petition to Compel Arbitration

PennyMac responded to the first amended complaint with a motion for reconsideration and a second petition to

compel arbitration. The motion sought reconsideration of the order denying the first petition to compel arbitration on the ground that the filing of the first amended complaint constituted a "new and different" fact or circumstance within the meaning of subdivision (a) of section 1008 of the Code of Civil Procedure. The petition sought to compel arbitration on the now familiar ground that the arbitration agreement requires arbitration of all claims, including PAGA claims, and any unenforceable PAGA waiver could be severed. The second petition to compel arbitration also argued, again, that the arbitration agreement delegates questions of arbitrability to the arbitrator.

Smigelski opposed the motion and petition, arguing that the filing of the first amended complaint was not a new and different fact or circumstance within the meaning of the reconsideration statute, and did not change the fact that the PAGA waivers were impermissible and the arbitration agreement unenforceable. Smigelski additionally argued that the second petition to compel arbitration was merely a repeat of the first, and should be rejected for the reasons stated in the trial court's order denying that petition.

The trial court denied the motion for reconsideration by written order dated April 22, 2016. The trial court explained: "[T]he [c]ourt finds that [Smigelski's] act of filing the [first amended complaint] containing new claims is not a new or different fact or circumstance which would allow the [c]ourt to reconsider its previous order denying [PennyMac's first] petition to compel arbitration. Indeed, to that end, it must be remembered that the [c]ourt in denying the petition found that the MAP and the

[employment agreement] contained provisions that violated public policy and could not be severed thus rendering the entire MAP and [employment agreement] unenforceable. It is true that the [c]ourt's ruling extensively discussed the fact that [Smigelski] was only asserting a PAGA claim at the time. But the [c]ourt specifically found that even so, provisions prohibiting arbitration of PAGA claims could not be severed from the agreements and the agreements as a whole were therefore unenforceable. This of course would preclude arbitration of not only PAGA claims, but any claims whatsoever, including the new individual and class claims set forth in the [first amended complaint]." "In any event," the trial court concluded, "even if the court were to find that the [first amended complaint] was a new or different fact or circumstance for purposes of [section 1008], it would simply affirm its previous order denying [PennyMac's first] petition to compel arbitration."

The trial court denied PennyMac's second petition to compel arbitration the same day, stating that, "Even if the [c]ourt were to find that a successive petition were permitted as a result of the [first amended complaint] being filed, the [c]ourt extensively addressed and rejected these arguments in denying the original petition and the [c]ourt simply rejects the arguments for the reasons previously discussed."

F. Notice of Appeal

PennyMac appeals from the orders denying its first and second petitions to compel arbitration. PennyMac does not appeal from the order denying its motion for reconsideration.

Appendix B

II. DISCUSSION

On appeal, PennyMac argues the trial court erred in denying the petitions to compel arbitration for a number of reasons, many of which appear to build upon one another in ways that are not always easy to discern. As near as we can tell, PennyMac's argument can be reduced to four principal contentions: (1) the arbitration agreement does not contain invalid PAGA waivers, (2) any illegal aspects of the arbitration agreement should be severed, and the rest of the agreement enforced, (3) the parties delegated the question of arbitrability to the arbitrator, and (4) the FAA preempts any state law precluding employers from requiring employees to waive their right to a judicial forum for PAGA claims as a condition of employment.

Before addressing the substance of PennyMac's contentions, we pause to review the applicable statutory scheme and standard of review. Because PennyMac's contentions require an understanding of PAGA, we will also review the characteristics of a PAGA representative action and the California Supreme Court's ruling in *Iskanian*. After we have reviewed the relevant statutory background, we will address the substance of the parties' contentions.

A. Statutory Scheme and Standard of Review

California's procedures for a petition to compel arbitration apply in California courts even if the arbitration agreement is governed by the FAA. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 409-

410, 58 Cal. Rptr. 2d 875, 926 P.2d 1061.) The party seeking arbitration bears the burden of proving the existence of an arbitration agreement by a preponderance of the evidence, and the party opposing arbitration bears the burden of proving any defense by a preponderance of the evidence. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236, 145 Cal. Rptr. 3d 514, 282 P.3d 1217; *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972, 64 Cal. Rptr. 2d 843, 938 P.2d 903.) In ruling on a petition to compel arbitration, "the court must determine whether the parties entered into an enforceable agreement to arbitrate that reaches the dispute in question, construing the agreement to the limited extent necessary to make this determination. [Citation.] If such an agreement exists, the court must order the parties to arbitration unless arbitration has been waived or grounds exist to revoke the agreement. [Citation.]" (*California Correctional Peace Officers Assn. v. State of California* (2006) 142 Cal.App.4th 198, 204-205, 47 Cal. Rptr. 3d 717.)

"'The scope of arbitration is a matter of agreement between the parties.' [Citation.] 'A party can be compelled to arbitrate only those issues it has agreed to arbitrate.' [Citation.] Thus, 'the terms of the specific arbitration clause under consideration must reasonably cover the dispute as to which arbitration is requested.' [Citation.] For that reason, 'the contractual terms themselves must be carefully examined before the parties to the contract can be ordered to arbitration' by the court. [Citation.]" (*Molecular Analytical Systems v. Ciphergen Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 705, 111 Cal. Rptr. 3d 876

(*Molecular*).) "Any doubts or ambiguities as to the scope of the arbitration clause itself should be resolved in favor of arbitration." (*Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 386, 25 Cal. Rptr. 3d 540, 107 P.3d 217; accord *Molecular, supra*, at p. 705.)

An order denying a petition to compel arbitration is an appealable order. (Code Civ. Proc., § 1294, subd. (a).) If the trial court's order denying a petition to compel arbitration is based on a decision of fact, then the substantial evidence standard applies; if the order is based on a decision of law, then the de novo standard applies. (*Ramos v. Westlake Services LLC* (2015) 242 Cal.App.4th 674, 686, 195 Cal. Rptr. 3d 34; *Robertson of Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419, 1425, 34 Cal. Rptr. 3d 547.) "'[W]e review the trial court's order, not its reasoning, and affirm an order if it is correct on any theory apparent from the record.'" (*Adajar v. RWR Homes, Inc.* (2008) 160 Cal.App.4th 563, 571, fn. 3, 73 Cal. Rptr. 3d 17.)

B. PAGA

PAGA was enacted to improve enforcement of our labor laws. (See *Caliber Bodyworks v. Superior Court* (2005) 134 Cal.App.4th 365, 370, 36 Cal. Rptr. 3d 31 [noting that the "stated goal" of the PAGA was "improving enforcement of existing Labor Code obligations"].) "The Legislature enacted PAGA to remedy systemic underenforcement of many worker protections. This underenforcement was a product of two related problems. First, many Labor Code provisions contained only criminal sanctions, and district attorneys often had higher priorities. Second, even when

civil sanctions were attached, the government agencies with existing authority to ensure compliance often lacked adequate staffing and resources to police labor practices throughout an economy the size of California's. [Citations.] The Legislature addressed these difficulties by adopting a schedule of civil penalties '"significant enough to deter violations"' for those provisions that lacked existing noncriminal sanctions, and by deputizing employees harmed by labor violations to sue on behalf of the state and collect penalties, to be shared with the state and other affected employees." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 545, 220 Cal. Rptr. 3d 472, 398 P.3d 69 (*Williams*).)

Under PAGA, "an 'aggrieved employee' may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations." (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 980, 95 Cal. Rptr. 3d 588, 209 P.3d 923 (*Arias*).) Before bringing a PAGA claim, "an aggrieved employee acting on behalf of the state and other current or former employees must provide notice to the employer and the responsible state agency 'of the specific provisions of [the Labor Code] alleged to have been violated, including the facts and theories to support the alleged violation.' [Citations.] If the agency elects not to investigate, or investigates without issuing a citation, the employee may then bring a PAGA action." (*Williams, supra*, 3 Cal.5th at p. 545.) "Of the civil penalties recovered, 75 percent goes to the Labor and Workforce Development Agency [LWDA], leaving the remaining 25 percent for the 'aggrieved employees.'" (*Arias, supra*, at pp. 980-981; see also *Iskanian, supra*, 59

Cal.4th at p. 360 [PAGA "authorizes an employee to bring an action for civil penalties on behalf of the state against his or her employer for Labor Code violations committed against the employee and fellow employees, with most of the proceeds of that litigation going to the state"].)

An action under PAGA """is fundamentally a law enforcement action designed to protect the public and not to benefit private parties."" (*Iskanian, supra*, 59 Cal.4th at p. 381.) As one court of appeal has explained: "The Legislature has made clear that an action under the PAGA is in the nature of an enforcement action, with the aggrieved employee acting as a private attorney general to collect penalties from employers who violate labor laws. Such an action is fundamentally a law enforcement action designed to protect the public and penalize the employer for past illegal conduct. Restitution is not the primary object of a PAGA action, as it is in most class actions." (*Franco v. Athens Disposal Co., Inc.* (2009) 171 Cal. App.4th 1277, 1300, 90 Cal. Rptr. 3d 539.) The aggrieved employee sues "as the proxy or agent of the state's labor law enforcement agencies." (*Arias, supra*, 46 Cal.4th at p. 986.) Thus, an action brought under the PAGA is "a type of qui tam action." (*Iskanian, supra*, at p. 382.)

Our Supreme Court examined the differences between representative PAGA actions and class actions in *Arias*. There, the court explained that PAGA actions and class actions are both forms of "representative action," in which "the plaintiff seeks recovery on behalf of other persons." (*Arias, supra*, 46 Cal.4th at p. 977, fn. 2.) While recognizing that PAGA actions and class actions

share common attributes as "representative actions," the court observed that PAGA actions are fundamentally different from class actions, in that the former seek to vindicate the public interest in enforcing the state's labor laws by imposing civil penalties, while the latter confer a private benefit on the plaintiff and similarly situated employees. (*Id.* at pp. 986-987; see also *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993, 1003, 95 Cal. Rptr. 3d 605, 209 P.3d 937 ["In bringing such an action, the aggrieved employee acts as the proxy or agent of state labor law enforcement agencies, representing the same legal right and interest as those agencies, in a proceeding that is designed to protect the public, not to benefit private parties"].) As such, the court concluded, PAGA plaintiffs need not satisfy class action requirements. (*Arias, supra*, at p. 975.) As we shall discuss, the differences between representative and class actions, which have been part of the legal landscape since *Arias*, inform our understanding of the parties' arbitration agreement.

C. Iskanian

Having reviewed the basic statutory scheme for PAGA claims, we now consider our Supreme Court's opinion in *Iskanian*. There, a driver for a transportation company signed an arbitration agreement providing that "any and all claims" arising out of his employment were to be submitted to binding arbitration. (*Iskanian, supra*, 59 Cal.4th at p. 360.) The agreement also contained a waiver of the employee's right to pursue class or representative claims against the defendant employer in any forum. (*Id.* at pp. 360-361.)

Appendix B

The employee filed a class action complaint against the employer for failure to pay overtime, failure to provide meal and rest periods, failure to reimburse business expenses, failure to provide accurate and complete wage statements, and failure to pay final wages in a timely manner. (*Iskanian, supra*, 59 Cal.4th at p. 361.) The employer moved to compel arbitration, and the trial court granted the motion. (*Ibid.*) Shortly thereafter, our Supreme Court issued its decision in *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 64 Cal. Rptr. 3d 773, 165 P.3d 556 (*Gentry*), invalidating class action waivers under certain circumstances. (*Iskanian, supra*, at p. 361; see also *Gentry, supra*, at pp. 463-464.) The court of appeal issued a writ of mandate directing the superior court to reconsider its ruling in light of *Gentry*. (*Iskanian, supra*, at p. 361.)

On remand, the employer voluntarily withdrew its motion to compel, and the parties proceeded to litigate in the trial court. (*Iskanian, supra*, 59 Cal.4th at p. 361.) Sometime later, the employee amended the complaint to add representative claims under PAGA. (*Ibid.*)

During the pendency of the litigation, the U.S. Supreme Court issued its opinion in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (*Concepcion*), raising doubts as to the continued viability of *Gentry*. (*Iskanian, supra*, 59 Cal.4th at pp. 361-362.) The employer renewed its motion to compel, arguing that *Concepcion* invalidated *Gentry*. (*Id.* at p. 361.) The trial court granted the motion, ordering arbitration of the employee's individual claims and dismissing the class

claims with prejudice. (*Ibid.*) The court of appeal affirmed, and the California Supreme Court granted review and reversed. (*Id.* at pp. 361-362.)

The court concluded that the arbitration agreement was valid and enforceable, despite the class action waiver. (*Iskanian, supra*, 59 Cal.4th at p. 362-378.) Under *Concepcion*, the court concluded, arbitration agreements may properly include class action waivers. (*Id.* at pp. 365-366.) However, the court, following *Arias*, reaffirmed that PAGA claims are fundamentally different from class actions claims. (*Id.* at pp. 379-382.) Unlike class actions, which are brought as a means of recovering damages suffered by individuals, representative actions under PAGA are brought as a means of recovering penalties for the state. (*Id.* at p. 379.) The court explained: "The PAGA was clearly established for a public reason, and agreements requiring the waiver of PAGA rights would harm the state's interests in enforcing the Labor Code and in receiving the proceeds of civil penalties used to deter violations." (*Id.* at p. 383.)

In recognition of PAGA's public purpose, the court concluded that, "an employee's right to bring a PAGA action is unwaivable." (*Iskanian, supra*, 59 Cal.4th at p. 383.) Consequently, "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." (*Id.* at p. 360.) Put another way, an arbitration agreement compelling the waiver of representative PAGA claims is "contrary to public policy and unenforceable as a matter of state law." (*Id.* at p. 384.)

The court did not examine the severability of the PAGA waiver, presumably because the issue was not raised on appeal. (*Id.* at pp. 360-361.)

Next, the court considered whether the rule prohibiting waiver of representative PAGA claims (the anti-waiver rule) was preempted by the FAA. (*Iskanian, supra*, 59 Cal.4th at pp. 384-389.) Relying on the fact that PAGA serves as a mechanism by which *the state* seeks to enforce its labor laws and collect monetary penalties, the court explained: "Simply put, a PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship. It is a dispute between an employer and the *state*, which alleges directly or through its agents—either the [Labor and Workforce Development] Agency or aggrieved employees—that the employer has violated the Labor Code." (*Id.* at pp. 386-387.) Accordingly, the court concluded, "California's public policy prohibiting waiver of PAGA claims, whose sole purpose is to vindicate the [Labor and Workforce Development] Agency's interest in enforcing the Labor Code, does not interfere with the FAA's goal of promoting arbitration as a forum for private dispute resolution." (*Id.* at pp. 388-389.)

Finally, the court made clear that the employer would have to answer the employee's representative PAGA claims on remand in some forum, whether arbitral or judicial. (*Iskanian, supra*, 59 Cal.4th at p. 391.) The court observed that the arbitration agreement "gives us no basis to assume that the parties would prefer to resolve a representative PAGA claim through arbitration," (*id.* at p. 391) thereby raising "a number of questions: (1)

Will the parties agree on a single forum for resolving the PAGA claim and the other claims? (2) If not, is it appropriate to bifurcate the claims, with individual claims going to arbitration and the representative PAGA claim to litigation? (3) If such bifurcation occurs, should the arbitration be stayed pursuant to Code of Civil Procedure section 1281.2?" (*Id.* at pp. 391-392.) The court concluded that the parties could address these questions on remand. (*Id.* at p. 392.)

D. The Arbitration Agreement Contains Invalid PAGA Waivers

PennyMac argues the arbitration agreement does not contain unenforceable PAGA waivers, but rather, reflects the parties' agreement to submit all employment disputes, including PAGA claims, to arbitration. According to PennyMac, the employee agreement, which contains an agreement to "forego any right to bring claims on a representative or class basis," is ambiguous as to the meaning of the term "representative," and should be narrowly interpreted as an enforceable waiver of the right to bring a class action only, rather than broadly interpreted as an enforceable waiver of the right to bring a class action *and* an unenforceable waiver of the right to bring a PAGA action. PennyMac argues (incorrectly) that PAGA "does not use the word 'representative' at all," and urges us to construe the purported ambiguity in a manner that renders the employee agreement enforceable, rather than void. (See § 2699, subd. (l)(1) [requiring that "aggrieved employee or representative" provide the LWDA with a file-stamped copy of a complaint alleging a PAGA cause of action].) We are not persuaded.

"The ordinary rules of contract interpretation apply to arbitration agreements. [Citation.] 'The court should attempt to give effect to the parties' intentions, in light of the usual and ordinary meaning of the contractual language and the circumstances under which the agreement was made. [Citations.]' 'The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.' [Citation.] '"A court must view the language in light of the instrument as a whole and not use a 'disjointed, single-paragraph, strict construction approach' [citation.]"' [Citation.] An interpretation that leaves part of a contract as surplusage is to be avoided." (*Rice v. Downs* (2016) 248 Cal.App.4th 175, 185-186, 203 Cal. Rptr. 3d 555.)

PennyMac begins by asking us to construe the waiver of "any right to bring claims on a representative or class basis" as a waiver of the right to bring claims on a class basis only, with the word "representative," operating as an illustration or amplification of the concept of a class action.[4] PennyMac's proposed interpretation ignores the differences between representative and class actions,

4. We note in passing that the *Iskanian* court uses the term "representative" in two distinct ways: (1) in the sense that an aggrieved employee brings a PAGA claim as a "representative"—i.e., a proxy or agent—of the state (*Iskanian, supra*, 59 Cal.4th at p. 387), and (2) in the sense that an aggrieved employee brings a PAGA claim on behalf of other employees (*id.* at pp. 383-384). (See also *Julian v. Glenair, Inc.* (2017) Cal.App.5th 853, 866, fn. 6 (*Julian*).) PennyMac does not argue that the double meaning of the term "representative," as used in the *Iskanian* court's discussion of PAGA claims, renders the term ambiguous in the context of the arbitration agreement. Accordingly, we decline to consider the issue further.

which were well established by the time the employee agreement was entered. Although a claim brought on a class basis is representative in the sense that it seeks recovery on behalf of other people (*Arias, supra*, 46 Cal.4th at p. 977, fn. 2), a claim brought on a representative basis need not seek recovery on behalf of a class. (*Id.* at p. 975; see also *Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal.App.5th 745, 757, 233 Cal. Rptr. 3d 502 ["[A] representative action under PAGA is not a class action"].) It follows that a claim brought on a representative basis is not coextensive with a claim brought on a class basis, an interpretation reinforced by the use of the conjunction "or," which indicates that the parties intended to give the terms different meanings, consistent with the established technical usage at the time of contracting. (See *Arias, supra*, at pp. 986-987; and see Civ. Code, § 1645 ["Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense"]; and cf. *United States v. Woods* (2013) 571 U.S. 31, 45, 134 S. Ct. 557, 187 L. Ed. 2d 472 [recognizing that while the connection of terms "by the conjunction 'or' . . . can sometimes introduce an appositive—a word or phrase that is synonymous with what precedes it ('Vienna or Wien,' 'Batman or the Caped Crusader')—its ordinary use is almost always disjunctive, that is, the words it connects are to 'be given separate meanings'"].)

Giving the terms of the employee agreement their settled legal meaning, and giving meaning to each term to avoid surplusage, we are convinced the waiver of the right to bring a "representative" claim entails something

more than a mere recapitulation of the waiver of the right to bring a claim on a "class basis." (See *Weinreich Estate Co. v. A.J. Johnston Co.* (1915) 28 Cal.App. 144, 146, 151 P. 667 ["legal terms are to be given their legal meaning unless obviously used in a different sense"]; and see *In re Marriage of Nassimi* (2016) 3 Cal. App. 5th 667, 683, 207 Cal. Rptr. 3d 764 ["'[c]ourts must interpret contractual language in a manner which gives force and effect to every provision' [citation], and avoid constructions which would render any of its provisions or words 'surplusage'"].) We therefore reject PennyMac's attempt to read an ambiguity into the terms of the waiver.

Having rejected PennyMac's contention that the waiver is ambiguous, we likewise reject the related contention that the purported ambiguity should be construed in a manner that renders the arbitration agreement enforceable. As a general proposition, *ambiguous* terms should be construed, where *reasonable*, in favor of arbitration. (*Pearson v. Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, 682, 108 Cal. Rptr. 3d 171, 229 P.3d 83; see also *Ajamian, supra*, 203 Cal. App.4th at p. 801.) But that rule does not apply where, as here, the terms of the agreement do not lend themselves to a lawful interpretation. (*Ajamian, supra*, at p. 801) We therefore conclude that the arbitration agreement must be construed as waiving *both* the right to bring class action claims *and* the right to bring representative PAGA claims.

As we have discussed, an employment agreement that compels the waiver of representative claims under PAGA is unenforceable under *Iskanian*. (*Iskanian,*

supra, 59 Cal.4th at p. 384 ["We conclude that where, as here, an employment agreement compels the waiver of representative claims under the PAGA, it is contrary to public policy and unenforceable as a matter of state law"].) Here, the arbitration agreement unambiguously requires employees to waive their rights to bring representative PAGA claims. We agree with the trial court that the PAGA waivers set forth in the arbitration agreement are invalid as against public policy and unenforceable under *Iskanian*.

In an attempt to avoid this result, PennyMac argues somewhat confusingly that (1) *Iskanian* leaves open the possibility that parties may agree to arbitrate PAGA claims (*Iskanian, supra*, 59 Cal.4th at pp. 391-392), (2) the arbitration agreement does not bar employees from bringing PAGA claims, and (3) the MAP and AAA Employment Rules empower the arbitrator to award any statutorily authorized civil penalty, including PAGA penalties. Connecting the dots, we understand PennyMac to argue that the arbitration agreement does not contain impermissible PAGA waivers because, though employees may waive their right to bring *representative* claims in any forum, they retain their right to bring *individual* PAGA claims in arbitration. To the extent we understand PennyMac's argument, we reject it.

Following *Iskanian*, several courts of appeal have considered—and rejected—similar arguments, reasoning that predispute agreements to arbitrate PAGA claims are unenforceable because the employee who signs the agreement is not then authorized to waive the state's right to a judicial forum. (*Tanguilig v. Bloomingdale's, Inc.*

(2016) 5 Cal.App.5th 665, 667-680, 210 Cal. Rptr. 3d 352 (*Tanguilig*) [PAGA claim cannot be arbitrated pursuant to predispute arbitration agreement without state's consent]; *Betancourt v. Prudential Overall Supply* (2017) 9 Cal. App.5th 439, 445-448, 215 Cal. Rptr. 3d 344 (*Betancourt*) [PAGA action not subject to arbitration, as state not bound by employee's predispute agreement]; *Julian, supra*, 17 Cal.App.5th at pp. 869-873 [same].) The *Julian* court, following *Tanguilig* and *Betancourt*, elaborated on its reasoning as follows: "In *Iskanian*, our Supreme Court explained that '"*every* PAGA action, whether seeking penalties for Labor Code violations as to only one aggrieved employee—the plaintiff bringing the action—or as to other employees as well, is a representative action on behalf of the state."' [Citation.] A PAGA action is thus ultimately founded on a right belonging to the state, which—though not named in the action—is the real party in interest. [Citation.] That is because PAGA does not create any new substantive rights or legal obligations, but 'is simply a procedural statute allowing an aggrieved employee to recover civil penalties—for Labor Code violations—that otherwise would be sought by state labor law enforcement agencies.' [Citation.]" (*Julian, supra*, at p. 871.)

The *Julian* court continued: "Ordinarily, when a person who may act in two legal capacities executes an arbitration agreement in one of those capacities, the agreement does not encompass claims the person is entitled to assert in the other capacity. [Citations.] That rule reflects general principles regarding the significance of legal capacities." (*Julian, supra*, 17 Cal.App.5th at pp. 871-872.)

Appendix B

The *Julian* court concluded: "Under the rule set forth above, an arbitration agreement executed before an employee meets the statutory requirements for commencing a PAGA action does not encompass that action. Prior to satisfying those requirements, an employee enters into the agreement as an individual, rather than as an agent or representative of the state. As an individual, the employee is not authorized to assert a PAGA claim; the state—through LWDA—retains control of the right underlying any PAGA claim by the employee. Thus, such a predispute agreement does not subject the PAGA claim to arbitration. [Citations.] For that reason, enforcing any such agreement would impair PAGA's enforcement mechanism." (*Julian, supra*, 17 Cal.App.5th at p. 872.)

We agree with the reasoning in *Julian* and adopt its analysis as our own. Following *Julian*, we conclude that the arbitration agreement does not encompass the PAGA claim. (*Julian, supra*, 17 Cal.App.5th at p. 871.) The record establishes that Smigelski executed the employee agreement as a condition of his employment in November 2014, before he satisfied the statutory requirements for bringing a PAGA claim, which occurred sometime in October 2015. (Former § 2699.3, subd. (a)(2)(A).) Prior to the time he satisfied those requirements, Smigelski was not authorized to assert a PAGA claim as an agent of the state, which retained control of the right underlying the claim. (See *Arias, supra*, 46 Cal.4th at pp. 980-981; *Julian, supra*, at p. 872.) Because Smigelski entered the arbitration agreement as an individual, and not as an agent or representative of the state, the agreement cannot encompass the PAGA claim, which relies on the

right to recover penalties then belonging to the state. (*Julian, supra*, at p. 872; see also *Betancourt, supra*, 9 Cal.App.5th at p. 448.) It follows that any predispute agreement to arbitrate individual PAGA claims was ineffective. (*Tanguilig, supra*, 5 Cal.App.5th at p. 680 ["the right to litigate a PAGA claim in court is not subject to predispute waiver—with respect to an 'individual' *or* a group claim—by an individual employee pursuant to a private employment arbitration agreement"].)

These authorities lead us to reject PennyMac's apparent argument that the arbitration agreement can or should be viewed as requiring a waiver of the right to bring a representative PAGA action in any forum, on the one hand, while preserving the right to bring an individual PAGA claim in arbitration, on the other. In the absence of any enforceable agreement to arbitrate individual PAGA claims, the arbitration agreement can only be viewed as requiring a complete waiver of the right to bring PAGA claims. As we have discussed, such waivers are invalid under *Iskanian*.

E. The PAGA Waivers Are Not Severable

Having concluded that the PAGA waiver is unenforceable, we must next determine whether the waiver is severable from the rest of the arbitration agreement. (*Securitas Security Services USA, Inc. v. Superior Court* (2015) 234 Cal.App.4th 1109, 1124, 184 Cal. Rptr. 3d 568 (*Securitas*).) PennyMac argues the waiver is severable; Smigelski maintains the waiver renders the entire arbitration agreement unenforceable. We agree with Smigelski.

Appendix B

The arbitration agreement contains two provisions dealing with severability. We begin with the employee agreement. The employee agreement, which contains a PAGA waiver, provides, "If any provision of the MAP is found unenforceable, that provision may be severed without affecting this agreement to arbitrate." The employee agreement does not authorize severance of unenforceable terms in the employee agreement itself. Thus, the employee agreement does not authorize severance of the PAGA waiver found within the employee agreement. The MAP, which contains a separate PAGA waiver, provides that "the Arbitrator or a court may sever any part of the MAP procedures that do not comport with the [FAA]." Here, however, the PAGA waivers fail to comport with state law, not the FAA. Reading the arbitration agreement as a whole, and applying the principle that specific language controls general language (Civ. Code, § 3534), we conclude that the parties only intended to sever unenforceable provisions from the MAP, and then only on the ground that the unenforceable provision fails to comport with the FAA. (*Kanno v. Marwit Capital Partners II, L.P.* (2017) 18 Cal.App.5th 987, 1017, 227 Cal. Rptr. 3d 334 ["a specific provision of a contract controls over a general provision to the extent there is an inconsistency"].) Applying the maxim *expressio unius est exclusio alterius*, we further conclude that the parties did *not* intend to sever any other unenforceable provisions from the arbitration agreement. (Cf. *Stephenson v. Drever* (1997) 16 Cal.4th 1167, 1175, 69 Cal. Rptr. 2d 764, 947 P.2d 1301 [under maxim *expressio unius est exclusio alterius*, where parties' contract expressly provided that certain consequences would flow from termination of plaintiff's

employment, this tended to negate inference that parties also intended another consequence to flow from the same event].)

PennyMac argues that other provisions of the arbitration agreement—specifically, the provision stating that "specific MAP procedures or AAA Rules may be modified from time to time as required by applicable law"—evince "an intention to have any unenforceable provisions or terms excised in order to maintain the enforceability of the heart of the arbitration agreement—i.e.[,] the mutual obligation to use arbitration as the exclusive forum in which to resolve any employment relate[d] disputes." But PennyMac's argument ignores the arbitration agreement's specific severability provisions, which are the clearest expression of the parties' intent with respect to severability. (*In re Tobacco Cases I* (2010) 186 Cal.App.4th 42, 47, 111 Cal. Rptr. 3d 313 [the parties' expressed objective intent, not their unexpressed subjective intent, governs].)

PennyMac also argues that a proper severability analysis would focus, not on the severability provisions in the arbitration agreement, but the objects of the contract. (See Civ. Code, § 1599 [contract with "several distinct objects" may be void as to an unlawful one and valid as to a lawful one].) We disagree. As the trial court appropriately recognized, "'the rule relating to severability of partially illegal contracts is that a contract is severable if the court can, *consistent with the intent of the parties*, reasonably relate the illegal consideration on one side to some specified or determinable portion of the consideration on the other

side.'" (*Securitas, supra*, 234 Cal.App.4th at p. 1126.) Here, as we have discussed, the terms of the arbitration agreement evince an intention to limit severability to circumstances not present here. Following *Securitas*, we conclude that the terms of the arbitration agreement—which we must rigorously enforce—preclude severance. (*Id.* at p. 1125; see also *American Exp. Co v. Italian Colors Restaurant* (2013) 570 U.S. 228, 233, 133 S. Ct. 2304, 186 L. Ed. 2d 417 ["courts must 'rigorously enforce' arbitration agreements according to their terms"].)

PennyMac argues *Franco v. Arakelian Enterprises, Inc.* (2015) 234 Cal.App.4th 947, 184 Cal. Rptr. 3d 501 (*Franco III*), is controlling and compels severance. *Franco III*, though factually similar, is distinguishable. There, the plaintiff, a truck driver, filed an initial complaint alleging a mix of PAGA and non-PAGA claims. (*Id.* at pp. 951-952.) The defendant filed a petition to compel arbitration pursuant to a "mutual arbitration policy" that appears to have contained the same provisions as the MAP in our case. (*Id.* at pp. 952-953.) The trial court granted the motion, and the appellate court reversed, holding that the class action waiver in the MAP was unenforceable. (*Franco v. Athens Disposal Co., Inc.* (2009) 171 Cal.App.4th 1277, 1282, 90 Cal. Rptr. 3d 539 (*Franco I*).) Following an unsuccessful petition for certiorari to the U.S. Supreme Court, the matter returned to the trial court, where the defendant filed a second petition to compel arbitration, relying, again, on the MAP. (*Franco III, supra*, at p. 954.) The second petition to compel arbitration argued that the authorities forming the basis for the appellate court's decision in *Franco I* had been overruled by the

U.S. Supreme Court in *Stolt-Nielsen S.A. v. Animal Feeds International Corp.* (2010) 559 U.S. 662, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (*Stolt-Nielsen*), rendering the MAP enforceable. (*Franco III, supra*, at p. 954.) The trial court denied the petition, and the defendant appealed again, arguing that *Stolt-Nielsen* and *Concepcion* overruled *Gentry*, on which *Franco I* relied. (*Id.* at p. 955.) The appellate court affirmed. (*Ibid.*) Our Supreme Court granted review and remanded for reconsideration in light of *Iskanian*. (*Franco, III, supra*, at p. 951.)

Following *Iskanian*, the *Franco III* court concluded, "the MAP's waivers of Franco's right to pursue non-PAGA claims as a class representative are enforceable, precluding the prosecution of those claims in any forum; however Franco's purported waiver of his right to prosecute the statutory claims afforded by the PAGA is unenforceable, and his PAGA claims are not subject to arbitration." (*Franco III, supra*, 234 Cal.App.4th at p. 957.) The plaintiff asked the court to find the MAP unenforceable on the ground of unconscionability. (*Id.* at p. 965.) The court declined, reasoning that the central purpose of the MAP was not tainted with illegality and could not be said to have been drafted with an intention to thwart the policy announced in *Iskanian*, which was decided some 10 years after the MAP was implemented. (*Ibid.*) *Franco III* does not help PennyMac.

Although the *Franco III* court appears to have considered the same MAP, the court does not appear to have considered the arbitration agreement's severability provisions, as the plaintiff in that case does not

appear to have relied on them. Instead, the plaintiff in *Franco III* argued that the arbitration agreement was *unconscionable*, an argument Smigelski does not advance. (*Franco III, supra*, 234 Cal.App.4th at p. 965.) Though *Franco III* may compel the conclusion that the MAP is not unconscionable, that question is not before us. As the trial court correctly recognized, *Franco III* does not address the severability provisions in the arbitration agreement, and cannot be viewed as controlling on the dispositive question of severance. (*Ulloa v. McMillin Real Estate &Mortgage, Inc.* (2007) 149 Cal.App4.th 333, 340 [""""It is axiomatic that cases are not authority for propositions not considered""""].) Nothing in *Franco III* causes us to doubt our conclusion that the severability provisions preclude enforcement of the arbitration agreement as a whole. If anything, *Franco III* supports our conclusion that the arbitration agreement requires employees to waive their PAGA claims, and therefore runs afoul of *Iskanian*. (*Franco III, supra*, at p. 963.)

Doubling down on *Franco III*, PennyMac argues the trial court ignored "controlling precedent" in refusing to compel arbitration of Smigelksi's non-PAGA claims. Again, *Franco III* is distinguishable. There, the appellate court reversed the order denying the petition to compel arbitration and remanded with directions to grant the petition with respect to the plaintiff's non-PAGA claims and stay the PAGA claims. (*Franco III, supra*, 234 Cal. App.4th at pp. 965-966.) That outcome was appropriate because the arbitration agreement as a whole was found to be enforceable. As we have discussed, that finding was limited to a conclusion that the MAP is not unconscionable. (*Id.* at p. 965.) Here, by contrast, we have concluded that

the arbitration agreement as a whole is unenforceable by virtue of the severability provisions. Because the arbitration agreement has been found to be unenforceable, PennyMac cannot compel arbitration of any of Smigelski's causes of action, including causes of action that would otherwise be arbitrable. That PennyMac must now litigate non-PAGA causes of action is the result, not of the trial court's error, but its own drafting decisions.

F. The Arbitration Agreement Does Not Delegate Questions of Arbitrability to the Arbitrator

Next, PennyMac argues the trial court erred in adjudicating the arbitrability of the parties' dispute because the arbitration agreement delegates such determinations to the arbitrator. We are not persuaded.

At the outset, we reiterate that a PAGA case "is not a dispute between an employer and an employee arising out of their contractual relationship. It is a dispute between an employer and the *state*." (*Iskanian, supra*, 59 Cal.4th at p. 386.) Unlike a usual employment case, "the state is the real party in interest." (*Id.* at p. 387.) As a result, the fact that Smigelski may have agreed to delegate questions of arbitrability to an arbitrator is irrelevant. (See *Betancourt, supra*, 9 Cal.App.5th at p. 448 ["The fact that Betancourt, in 2006, agreed to arbitrate his private employment disputes with Prudential is not relevant. Betancourt's lawsuit is a PAGA claim, on behalf of the state. The state is not bound by Betancourt's predispute arbitration agreement"].) It is therefore unnecessary for us determine whether the parties agreed to delegate questions of arbitrability to the arbitrator.

But even if we perceived a need to consider PennyMac's argument, we would reject it. "[C]ourts presume that the parties intend courts, not arbitrators, to decide . . . disputes about 'arbitrablity[,]' . . . such as 'whether the parties are bound by a given arbitration clause,' or 'whether an arbitration clause in a concededly binding contract applies to a particular type of controversy.'" (*BG Group, PLC v. Republic of Argentina* (2014) 572 U.S. 25, 34, 134 S. Ct. 1198, 188 L. Ed. 2d 220, quoting *Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, 84, 123 S. Ct. 588, 154 L. Ed. 2d 491.) However, "parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." (*Rent-A-Center, West, Inc. v. Jackson* (2010) 561 U.S. 63, 68-69, 130 S. Ct. 2772, 177 L. Ed. 2d 403.) "Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, . . . so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter." (*First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 943, 115 S. Ct. 1920, 131 L. Ed. 2d 985.) "Although threshold questions of arbitrability are ordinarily for courts to decide in the first instance under the FAA [citation], the '[p]arties to an arbitration agreement may agree to delegate to the arbitrator, instead of a court, questions regarding the enforceability of the agreement.'" (*Pinela v. Neiman Marcus Group* (2015) 238 Cal.App.4th 227, 239, 190 Cal. Rptr. 3d 159.)

"There are two prerequisites for a delegation clause to be effective. First, the language of the clause must be clear and unmistakable. [Citation.] Second, the delegation

must not be revocable under state contract defenses such as fraud, duress, or unconscionability." (*Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231, 242, 171 Cal. Rptr. 3d 621; see also *Rent-A-Center, West, Inc. v. Jackson, supra*, 561 U.S. at pp. 68, 69, fn. 1.) The "clear and unmistakable" test reflects a "*heightened* standard of proof" that reverses the typical presumption in favor of the arbitration of disputes. (*Ajamian, supra*, 203 Cal. App.4th at p. 787.)

Here, the arbitration agreement incorporates the AAA Employment Rules, which provide, in pertinent part, "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." PennyMac argues the incorporation of the AAA Employment Rules demonstrates the parties intended to submit questions of arbitrability to the arbitrator. Different courts have reached different conclusions as to whether the incorporation of arbitral rules serves as clear and unmistakable evidence of an intent to delegate questions of arbitrability to an arbitrator. (See, e.g., *Greenspan v. LADT, LLC* (2010) 185 Cal.App.4th 1413, 1442, 111 Cal. Rptr. 3d 468 [in a commercial dispute between a trust and affiliated companies, an arbitration agreement incorporating JAMS rules constituted clear and convincing evidence of the parties' intent to delegate power to the arbitrator to decide gateway issues of arbitrability]; *Dream Theater, Inc. v. Dream Theater* (2004) 124 Cal.App.4th 547, 557, 21 Cal. Rptr. 3d 322 [in a contract dispute, arbitration agreement incorporating AAA Commercial Arbitration Rules constituted "clear and unmistakable evidence of the

intent that the arbitrator will decide whether a Contested Claim is arbitrable"]; but see *Ajamian, supra*, 203 Cal. App.4th at p. 790 [expressing doubts as to whether mere reference to AAA Employment Rules constitutes clear and unmistakable evidence of intent in the employment context].) We need not resolve this difference of opinion, as the arbitration agreement indicates that questions of arbitrability may be decided by the arbitrator *or* a court.

As noted, the MAP provides, "the Arbitrator *or a court* may sever any part of the MAP procedures that do not comport with the [FAA]." (Italics added.) Faced with this language, the trial court concluded—and we agree—that the arbitration agreement reflects an intent that "the [c]ourt itself may decide questions of arbitrability, or at a minimum[,] create ambiguity on that point." We would therefore reject PennyMac's arbitrability argument, were we to address it.

G. The FAA Does Not Preempt State Law Rules Applicable To PAGA Claims

Finally, PennyMac argues the FAA requires us to enforce the parties' purported agreement to arbitrate PAGA claims. We assume for the sake of argument that PennyMac has carried its burden of establishing the existence of such an agreement. Even so assuming, PennyMac's argument lacks merit.

As previously discussed, the *Iskanian* court held that the state law rule against PAGA waivers does not frustrate the objectives of the FAA because "the FAA aims to ensure an efficient forum for the resolution of

private disputes, whereas a PAGA action is a dispute between an employer and the state Agency." (*Iskanian, supra*, 59 Cal.4th at p. 384, emphasis omitted.) "Read in its entirety, the *Iskanian* opinion clearly holds that the state is the real party in interest in a PAGA claim regardless of whether the claim is brought in an individual or representative capacity. . . . For this reason, the FAA, which is primarily concerned with private disputes, does not preempt the state law bar against a private predispute waiver of a PAGA claim." (*Tanguilig, supra*, 5 Cal.App.5th at p. 680; see also *Franco III, supra*, 234 Cal.App.4th at p. 964 ["the FAA does not preempt California's state law rule precluding predispute waivers of enforcement rights under the PAGA"].) Applying these authorities, we conclude that PennyMac's preemption argument, like much of its appeal, is foreclosed by *Iskanian*.

III. DISPOSITION

The orders denying PennyMac's petitions to compel arbitration are affirmed. Smigelski is awarded his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

/s/_____
RENNER, J.

We concur:

/s/_____
HULL, Acting P. J.

/s/_____
ROBIE, J.

APPENDIX C — MINUTE ORDER OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO, DATED APRIL 22, 2016

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE

MINUTE ORDER

DATE: 04/22/2016 TIME: 02:00:00 PM DEPT: 53

JUDICIAL OFFICER PRESIDING: David Brown
CLERK: E. Brown
REPORTER/ERM:
BAILIFF/COURT ATTENDANT

CASE NO: **34-2015-00186855-CU-OE-GDS**
CASE INIT.DATE: 11/17/2015

CASE TITLE: **Richard Smigelski in his representative capacity vs. Pennymac Financial Services Inc**

CASE CATEGORY: Civil - Unlimited

EVENT TYPE: Motion for Reconsideration - Civil Law and Motion

Nature of Proceeding: Ruling on Submitted Matter (Motion for Reconsideration Re: Compel Arbitration) taken under submission on 4/19/2016

Appendix C

TENTATIVE RULING

Defendants Private National Mortgage Acceptance Company, LLC, Penny Mac Financial Services, and PennyMac Mortgage Investment Trust's ("Defendants") motion for reconsideration "re: Defendants' Petition to Compel Arbitration and Stay Action" is denied.

In the instant action, Plaintiff Richard Smigelski initially asserted a single representative cause of action under the Private Attorney General Act ("PAGA"), Labor Code § 2699 on behalf of the State and other aggrieved employees for alleged Labor Code violations. Plaintiff did not assert any individual claims and only sought an award of penalties pursuant to PAGA. Defendants moved to compel arbitration pursuant to its Mutual Arbitration Policy ("MAP") and an Employee Agreement to Arbitrate ("Arbitration Agreement") and the FAA. On March 3, 2016, after having taken Defendants' petition to compel arbitration and stay action under submission, the Court affirmed its tentative ruling denying the petition. A formal order was entered on March 11, 2016. In denying the petition, the Court found that the Arbitration Agreement and the MAP contained provisions prohibiting PAGA claims in arbitration which violated public policy and was unenforceable. Critically, the Court found that neither the Arbitration Agreement nor the MAP can be saved through severance of any provision and that as a result, "**the entire Arbitration Agreement and MAP are unenforceable**.

On March 10, 2016, Plaintiff filed a first amended complaint adding individual and putative class claims for unpaid

overtime under Labor Code §§ 510 and 1194, penalties based on the failure to provide accurate wage statements under Labor Code § 226 and waiting time penalties under Labor Code § 203.

Defendants seek reconsideration on the basis that the Court was not able to consider these new claims in the FAC as part of the original ruling because the complaint only alleged the PAGA claim. It argues that these new claims fall squarely within the terms of the arbitration agreement and had the FAC been filed before the Court ruled, it should have granted the petition to compel. It argues that the Court should vacate its previous ruling and grant their petition, or alternatively, compel Plaintiff to arbitrate his new claims and stay the PAGA claim to the extent it is deemed inarbitrable.

When an application for an order has been made to a judge, or to a court, and refused in whole or in part, or granted, or granted conditionally, or on terms, any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order. The party making the application shall state by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown. (CCP § 1008.)

Here, the Court finds that Plaintiff's act of filing the FAC containing new claims is not a new or different fact or circumstance which would allow the Court to reconsider its previous order denying Defendants' petition to compel arbitration. Indeed, to that end, it must be remembered that the Court in denying the petition found that the MAP and the Arbitration Agreement contained provisions that violated public policy and could not be severed thus rendering the entire MAP and Arbitration Agreement unenforceable. It is true that the Court's ruling extensively discussed the fact that Plaintiff was only asserting a PAGA claim at the time. But the Court specifically found that even so, provisions prohibiting arbitration of PAGA claims could not be severed from the agreements and the agreements as a whole were therefore unenforceable. This of course would preclude arbitration of not only PAGA claims, but any claims whatsoever, including the new individual and class claims set forth in the FAC. Indeed, the FAC specifically alleges that "the Sacramento Superior Court has declared the arbitration agreement signed by Plaintiff unenforceable in its entirety." (FAC ¶ 13.)

In reality the FAC, filed in direct response to the Court's ruling on Defendants' petition to compel arbitration has no bearing on the Court's ruling. That is, while the claims asserted in this action have expanded, the MAP and the Arbitration Agreement themselves, which contained the provisions deemed to be invalid and which the Court found were unenforceable in their entirety have not changed. The FAC could not in any way alter the Court's analysis regarding the interpretation and/or the enforceability of

the MAP and the Arbitration Agreement. The FAC was specifically filed in reliance on the Court's order denying the petition to compel arbitration and is not a new fact or circumstance for purposes of CCP § 1008. Moreover, the motion argues that any invalid PAGA waiver cannot be the basis for refusing arbitration of the new class claims because the waiver cannot invalidate the entire agreements and thus prevent arbitration of the class claims. In this regard, Defendants essentially attempt to re-argue that the inclusion of the PAGA waiver does not invalidate the agreements and that the Court was essentially wrong in concluding otherwise. But a disagreement with the Court's analysis is not a new or different fact or circumstance. Absent such new or different facts or circumstances, the Court lacks jurisdiction to consider this motion. (*Gilberd v. AC Transit* (1995) 32 Cal. App.4th 1494, 1500.) The motion is denied on this basis alone.

In any event, even if the Court were to find that the FAC was a new or different fact or circumstance for purposes of CCP § 1008, it would simply affirm its previous order denying Defendants' petition to compel arbitration. Again, it bears repeating that when the Court denied Defendants' petition, it found that the MAP and Arbitration Agreements that "the entire Arbitration Agreement and MAP are unenforceable." Nothing has changed which could cause the Court to render any different finding. The language of the agreements is the same. It is of course true that if the invalid PAGA provision could be severed from the agreements, than Plaintiff's individual and class claims could be compelled to arbitration. (E.g. *Franco v. Arkelian Enterprises* (2015) 234 Cal.App.4th 947, 965.)

In making their argument Defendants essentially argue that the Court incorrectly determined that the PAGA provision could not be severed. In previously finding that the invalid PAGA waiver could not be severed from the agreements, the Court focused mainly on the language in the agreements given the parties' intent controls. The Court's reasoning was as follows:

"Finally, neither the Arbitration Agreement nor the MAP can be saved through severance of any provision. Indeed, "the rule of severability of partially illegal contracts is that a contract is severable if the court can, consistent with the intent of the parties, reasonably relate the illegal consideration on one side to some specified or determinable portion of consideration on the other side." (*Securitas Security Services USA, Inc., supra,* 234 Cal.App.4th at 1125.) Here while the Arbitration Agreement contains an offending provision requiring Plaintiff to forego any representative claims, that Agreement specifically states that if "any provision of the MAP is found to be unenforceable, that provision may be severed without affecting this agreement to arbitrate." (Defendants' Exhibit 3.) The Arbitration Agreement itself does not contain a provision allowing for severance. This express language reflects an intent not to sever any portion of the Arbitration Agreement and striking the provision would conflict with the parties' intent. (*Id*. at 1126.) Further the MAP itself only provides for severance of any provision that does not comport with the FAA. (Defendants' Exh. 1, p.3, ¶ 3.) But here the waiver provisions do not comport State law, and thus severance of the provision in the MAP would also conflict with the parties' intent. As a

result, the entire Arbitration Agreement and MAP are unenforceable." (March 11, 2016 order)

Defendants are correct that one of the basis on which the Court distinguished *Franco*, that Plaintiff only asserted PAGA claims, is no longer relevant given the FAC which now asserts non-PAGA claims. This does not affect the Court's decision regarding the enforceability given the main focus was on the express language of the agreements which reflected an intent not to sever the PAGA waiver. While the Court's previous ruling also extensively focused on the FAC that the complaint did not assert any other claims other than PAGA claims, the Court did not, as Defendants suggest in reply, only find that the arbitration agreements were unenforceable in their entirety only with respect to the PAGA claim asserted in the complaint. When the Court found that the MAP and the arbitration agreement were unenforceable, it found they were unenforceable in their entirety, with no limitations. That Plaintiff has now asserted new claims in the FAC does not somehow change the unenforceability of the agreements and render them enforceable. Again, that finding was premised on the express contractual language of the agreements which reflected an intent not to sever the invalid PAGA waiver.

Defendants are correct that one of the basis on which the Court distinguished *Franco*, that Plaintiff only asserted PAGA claims, is no longer relevant given the FAC which now asserts non-PAGA claims. This does not affect the Court's decision regarding the enforceability given the main focus was on the express language of the

agreements which reflected an intent not to sever the PAGA waiver. While the Court's previous ruling also extensively focused on the FAC that the complaint did not assert any other claims other than PAGA claims, the Court did not, as Defendants suggest in reply, only find that the arbitration agreements were unenforceable in their entirety only with respect to the PAGA claim asserted in the complaint. When the Court found that the MAP and the arbitration agreement were unenforceable, it found they were unenforceable in their entirety, with no limitations. That Plaintiff has now asserted new claims in the FAC does not somehow change the unenforceability of the agreements and render them enforceable. Again, that finding was premised on the express contractual language of the agreements which reflected an intent not to sever the invalid PAGA waiver.

Defendants also argue that this situation is akin to *Franco* in that there is no evidence that the agreements were drafted to thwart public policy because the MAP was drafted six years before *Iskanian* and *Iskanian* was not yet final because there was a petition for certiorari pending in the US Supreme Court until two months after Plaintiff signed the arbitration agreement. But again, the critical analysis with the specific language in the agreements which set forth when severance was permitted.

Perhaps realizing this, Defendants finally argue that severance is not necessary to enforce the MAP and the Arbitration Agreement as to the new individual and putative class claims in the FAC. Defendants argue that in *Iskanian* while the California Supreme Court found

that the parties arbitration agreement contained an unenforceable waiver of PAGA claims, it "enforced the parties' agreement as to the class claims alleged by the plaintiff, and it did so without requiring formal severance of the unenforceable term in the parties' agreement." (Mot. 11:16-18.) But *Iskanian* found that the Court of Appeal improperly enforced an arbitration agreement that the contained both class action and PAGA waiver. While the class action waiver was valid, the PAGA was not and that matter was remanded so that the lower courts could address how the arbitration should proceed in light of such finding. (*Iskanian*, supra, 59 Cal.4th at 391-392.) *Iskanian* did not appear to specifically address the question of severance, much less in the context of the specific contractual language at issue here, and find that an arbitration may proceed pursuant to an agreement that contains an invalid PAGA waiver and a valid class action waiver by simply ignoring, as opposed to severing the invalid provision. Moreover, case law following *Iskanian* makes clear that where it has been determined that a PAGA waiver is invalid in an arbitration agreement which also contains a valid class action waiver, the proper analysis is to determine whether the PAGA waiver can be severed so that the agreement can be enforced. (*E.g.*, *Securitas Security Services USA, Inc., supra,* 234 Cal. App.4th at 1124.). Here the Court has already concluded that it cannot be. Defendants make no argument which would show, contrary to what the Court found, that the plain language of the agreement would allow for severance in accordance with the parties' intent.

In sum the motion for reconsideration is denied on the basis that Defendants failed to establish any new or different facts or circumstances pursuant to CCP § 1008 based on the filing of the FAC and in any event, even if the FAC was such a fact or circumstances, the Court would simply affirm its original ruling denying the petition to compel arbitration.

The minute order is effective immediately. No formal order pursuant to CRC Rule 3.1312 or other notice is required.

COURT RULING

The matter was argued and submitted.

Having taken the matter under submission on 4/19/2016, the Court now rules as follows:

SUBMITTED MATTER RULING

The Court affirmed the tentative ruling.

APPENDIX D — MINUTE ORDER OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO, DATED APRIL 22, 2016

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE

MINUTE ORDER

DATE: 04/22/2016 TIME: 09:00:00 AM DEPT: 53

JUDICIAL OFFICER PRESIDING: David Brown
CLERK: E. Brown
REPORTER/ERM:
BAILIFF/COURT ATTENDANT:

CASE NO: **34-2015-00186855-CU-OE-GDS** CASE INIT. DATE: 11/17/2015

CASE TITLE: **Richard Smigelski in his representative capacity vs. Pennymac Financial Services Inc**

CASE CATEGORY: Civil - Unlimited

EVENT TYPE: Petition to Compel Arbitration - Civil Law and Motion

Nature of Proceeding: Ruling on Submitted Matter (Petition to Compel Arbitration) taken under submission on 4/19/2016

Appendix D

TENTATIVE RULING

Defendants Private National Mortgage Acceptance Company, LLC, Penny Mac Financial Services, and PennyMac Mortgage Investment Trust's ("Defendants") petition to compel arbitration is denied.

Defendants previously unsuccessfully sought to compel arbitration of Plaintiff's complaint. They now seek to compel arbitration of Plaintiffs' First Amended Complaint. The Court's ruling denying Defendants' motion for reconsideration "re: Defendants' Petition to Compel Arbitration and Stay Action" effectively disposes of the instant motion. Again, the Court noted in connection with that ruling that the FAC did not constitute new or different facts or circumstances which would allow the Court to reconsider the original ruling denying Defendants' first petition and in any event, the Court found the arbitration agreements invalid and unenforceable in their entirety. The inclusion of individual and putative class claims cannot change that result. Thus, even though a class action waiver is valid and could be subject to the arbitration agreements, the invalidity and unenforceability of the agreements precludes arbitration of any claims.

To the extent that Defendants argue, as they did in connection with the original petition, for example, that the arbitration agreements do not preclude arbitration of PAGA claims, or that the rule precluding the waiver of PAGA claims is not pre-empted by the FAA, or that the question or abritrability must be decided by the arbitrator, these arguments are rejected. Even if the Court were to

find that a successive petition were permitted as a result of the FAC being filed, the Court extensively addressed and rejected these arguments in denying the original petition and the Court simply rejects the arguments for the reasons previously discussed. The Court would also note that any new argument attempting to demonstrate that PAGA claims were not waived or that the Court could sever any PAGA waiver found in the agreements are inappropriate. Those arguments were fully addressed in the Court's original ruling and any attempt to reargue those specific points is nothing more than an inappropriate motion for reconsideration.

The minute order is effective immediately. No formal order pursuant to CRC Rule 3.1312 or other notice is required.

COURT RULING

The matter was argued and submitted.

Having taken the matter under submission on 4/19/2016, the Court now rules as follows:

SUBMITTED MATTER RULING

The Court affirmed the tentative ruling.

APPENDIX E — MINUTE ORDER OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO, DATED MARCH 3, 2016

CASE TITLE: Richard Smigelski in his representative capacity vs. Pennymac Financial Services Inc

CASE NO: **34-2015-00186855-CU-OE-GDS**

Having taken the matter under submission on 2/29/2016, the Court now rules as follows:

SUBMITTED MATTER RULING

The Court affirms the Tentative Ruling as follows:

Defendants Private National Mortgage Acceptance Company, LLC, PennyMac Financial Services, and PennyMac Mortgage Investment Trust's ("Defendants") petition to compel arbitration is denied.

In the instant action, Plaintiff Richard Smigelski asserts a single representative cause of action under the Private Attorney General Act ("PAGA"), Labor Code § 2699 on behalf of the State and other aggrieved employees for alleged Labor Code violations. Plaintiff does not assert any individual claims and only seeks an award of penalties pursuant to PAGA. Defendants move to compel arbitration pursuant to the FAA.

Defendants argue that Plaintiff must arbitrate this action pursuant to its Mutual Arbitration Policy ("MAP") and an Employee Agreement to Arbitrate ("Arbitration

Agreement") and the FAA. The Arbitration Agreement states that the employee agrees that "it is my obligation to make use of the MAP and to submit to final and binding arbitration any and all claims and disputes that are related in any way to my employment....I understand that final and binding arbitration will be the sole and exclusive remedy for any such claim or dispute ... and that by agreeing to use arbitration to resolve my dispute, both PennyMac and I agree to forego any right we may have had to a jury trial on issued covered by the MAP, and forego any right to bring claims on a representative or class basis." (Defendants' Exh. 3.) The Arbitration Agreement further states that "[i]f any provision of the MAP is found to be unenforceable, that provision may be severed without affecting this agreement to arbitrate." (Id.)

The MAP provides that "this mutual agreement to arbitrate claims also means that both you and PennyMac forego and waive any right to join or consolidate claims in arbitration with others, or to make claims in arbitration as a representative or as a member of a class or in a private attorney general capacity." (Id. Exh. 1, p. 1, ¶ 4, p. 2, ¶ 1.) The MAP also provided that "no remedies available to you individually ... will be forfeited." (ld. p.2, ¶ 1.) The MAP provides that "the Arbitrator or a court may sever any part of the MAP procedures that do not comport with the [FAA].) (Id. p. 3, ¶ 3.)

The Court first rejects the argument that Plaintiff's complaint alleges non-PAGA Labor Code claims which are properly subject to arbitration. In this regard, Defendants attempt to argue that Plaintiff has utilized artful pleading

to characterize his claim as simply a PAGA claim seeking civil penalties. They argue that part of the PAGA claim is premised on an alleged violation of Labor Code § 558 and that he is seeking to recover unpaid wages on behalf of the employees not simply penalties. They assert that a Labor Code § 558 violation is not one of the violations enumerated in PAGA (Labor Code § 2699.5.) But a PAGA claim is not limited to the Labor Code sections listed in Labor Code § 2699.5. Labor Code § 2699(a) specifically states that "notwithstanding any other provision of law, **any provision of this code** that provides for a civil penalty to be assessed and collected by the [LWDA] .... may, as an alternative, be recovered by an aggrieved employee on behalf of himself and herself and other current and former employees pursuant to the procedures specified in Labor Code § 2699.3." (Labor Code § 2699(a) [emphasis added].) Labor Code § 2699.3 specifically provides procedures for bringing PAGA claims not only for violations based on the statutes listed in Labor Code § 2699.5, but also for statutes that are not listed in § 2699.5. (Labor Code § 2699.3(a), (c).) Moreover, case law recognizes that civil penalties for a violation of Labor Code § 558 may be recovered in a PAGA action. "[P]ursuant to section 558, subdivision (a), 'any person acting on behalf of an employer who violates, or causes to be violated' a statute or wage order relating to working hours is subject to a civil penalty, payable to the affected employee, equal to the amount of any underpaid wages. As noted earlier, the Legislature has provided that aggrieved employees may under certain circumstances maintain civil actions to recover such penalties. (§ 2699, subd. (a).) *(Reynolds v. Bennet* (2005) 36 Cal.4th 1075, 1089.) "In our view the language of section

558, subdivision (a), is more reasonably construed as providing a civil penalty that consists of both the $50 or $100 penalty amount and any underpaid wages, with the underpaid wages going entirely to the affected employee or employees as an express exception to the general rule that civil penalties recovered in a PAGA action are distributed 75 percent to the [LWDA] and 25 percent to the aggrieved employees (§ 2699, subd. (i)). *(Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal. App.4th 1112, 1145.) It is clear that the complaint at issue here is solely a representative action under PAGA seeking civil penalties despite any inclusion of a claim premised on Labor Code § 558.

Moreover, it cannot be overlooked that Plaintiff's reference in the complaint to Labor Code § 558 which provides for civil penalties for an employer who "violates a section of this chapter or any provision regulating hours and days of work in any order of the Industrial Welfare Commission" is premised on violations of Labor Code § 510. (Comp. ¶ 18.) Section 510 is expressly identified in Labor Code § 2699.5. Thus the request for civil penalties under Labor Code § 558 is premised on substantive provisions enumerated in PAGA. "[I[t is the request for civil penalties for an alleged violation of a substantive statutory provision listed in section 2699.5" that triggers the employee's right to bring an action under PAGA. *(Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 379, fn, 15.)

This is not a suit by which Plaintiff is seeking to circumvent arbitration by raising a non-PAGA wage and hour claim under the guise of PAGA. The fact that Plaintiff's

complaint indicates that the statute of limitations for a Labor Code § 558 is three years while the statute of limitations for a PAGA claim is one year does not mean that Plaintiff has alleged no PAGA claims. It is of course true that Plaintiff cannot recover penalties on behalf of the State, himself, or other employees beyond the PAGA one year statute of limitations. But the pleading here only asserts a representative PAGA claim and the prayer for relief seeks only "an award of civil penalties pursuant to PAGA" in addition to fees and costs and interest.

Given that the entire complaint seeks only civil penalties under PAGA, the Court now examines whether arbitration can be compelled. The Arbitration Agreement at issue requires Plaintiff to "forego any right to bring claims on a representative or class basis." The MAP states that "this mutual agreement to arbitrate claims also means that both you and PennyMac ... waive any right to join or consolidate claims in arbitration with others or to make claims in arbitration **as a representative** or as a member of a class **or in a private attorney general capacity."** Such language certainly includes a PAGA representative action. "We conclude that where, as here, an employment agreement compels the waiver of representative claims under PAGA, it is contrary to public policy and unenforceable as a matter of state law." *(Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 384.) While Defendants attempt to argue that the language of the Arbitration Agreement and the MAP do not prohibit PAGA claims in arbitration, and at most "representative" is ambiguous, this is a strained argument at best. Indeed, the language clearly states that the parties waive any right

to make claims **"as a representative"** or **"in a private attorney general capacity."** There is no ambiguity in the Arbitration Agreement or the MAP. PAGA claims are prohibited in arbitration given that the employee waives any right to make representative claims or claims in a private attorney general capacity. Such a prohibition violates public policy and is unenforceable. To the extent any ambiguity exists, it is construed against Defendants who drafted the documents. *(Securitas Security Services USA, Inc. v. Superior Court* (2015) 234 Cal.App.4th 1109, 1126.)

While Defendants correctly argue that *Iskanian* is not a per se ban on the *arbitration* of PAGA claims, *Iskanian* is clear, that it is against public policy for an employment agreement to deprive employees of the ability to bring a PAGA action before any dispute arises. *(Iskanian, supra,* at 382-384, 387.) The instant Arbitration Agreement/ MAP does just that. While Defendants fault Plaintiff for failing to discuss the authority cited indicating that PAGA claims are not inherently unsuited for arbitration, even those cases held that a waiver of PAGA claims is invalid under *Iskanian.* (E.g., *Sakkab v. Luxottica Retail N. Amer., Inc.* (9th Cir. 2015) 803 F.3d 425, 440.) While *Sakkab* noted that *Iskanian* prohibits the waiver of representative PAGA claims but does not diminish the parties' freedom to select informal arbitration procedures with respect to such claims, it made no determination on that issue. Here, even if the Court were to properly sever the impermissible waiver of the PAGA claims, there is nothing in the subject arbitration agreements which indicate any intent by Plaintiff and Defendants to agree

to arbitrate representative PAGA claims. Indeed, the agreements are simply between Plaintiff and Defendants and there is nothing suggesting in any manner that the parties contemplated the claims of non-parties such as the LWDA on whose behalf the instant lawsuit is brought would be subject to arbitration. The waiver language in the agreements reflects the exact opposite. That is, the agreements make clear that both parties forego their rights to pursue representative actions in arbitration. Given such language the Court would be hard pressed to find that even severing the invalid waiver would allow Plaintiff's PAGA claim to proceed to arbitration, as doing so would contravene the expressed intent of the parties. Rather they have clearly agreed not to arbitrate such claims. The "arbitration agreement gives us no basis to assume that the parties would prefer to resolve a representative PAGA claim through arbitration." *(Iskanian,* supra, 59 Cal.4th at 391.) In any event, as discussed more fully below, severance of the illegal provision is not proper.

Further, and contrary to Defendants' arguments, the rule precluding waiver of PAGA claims is not pre-empted by the FAA. "Simply put, a PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship. It is a dispute between an employer and the *state,* which alleges directly or indirectly or through its agents-either the Agency or aggrieved employees-that the employer has violated the Labor Code .... 'every PAGA action, whether seeking penalties for Labor Code violations as to only one aggrieved employee-the plaintiff bringing the action-or as to other employees as well, is a

representative action on behalf of the state.'" *(Iskanian, supra,* 59 Cal.4th at 386-387 [emphasis in original].) "We conclude that California's public policy prohibiting waiver of PAGA claims, whose sole purpose is to vindicate the Agency's interest in enforcing the Labor Code, does not interfere with the FAA's goal of promoting arbitration as a forum for private dispute resolution." *(Id.* at 388-389.) The Court rejects Defendants' attempt to argue that California law is preempted by FAA. Indeed, while Defendants are of course correct that PAGA itself does not expressly state that such claims are exempt from arbitration, *Iskanian* has expressly found that waivers such as the one in the instant case are against public policy. Defendants' attempt to argue that the California Supreme Court's decision in *Iskanian* itself is preempted by FAA because that decision outright precludes the arbitration of a particular claim is rejected. This Court is clearly bound by *Iskanian* and is certainly not free to find that the decision is preempted by FAA. In any event, *Iskanian* does not preclude the arbitration of a particular claim but rather precludes the outright waiver of PAGA claim pre-dispute which is the situation in the instant case.

Finally, neither the Arbitration Agreement nor the MAP can be saved through severance of any provision. Indeed, "the rule of severability of partially illegal contracts is that a contract is severable if the court can, consistent with the intent of the parties, reasonably relate the illegal consideration on one side to some specified or determinable portion of consideration on the other side." *(Securitas Security Services USA, Inc., supra,* 234 Cal.App.4th at 1125.) Here while the Arbitration Agreement contains

an offending provision requiring Plaintiff to forego any representative claims, that Agreement specifically states that if "any provision of the MAP is found to be unenforceable, that provision may be severed without affecting this agreement to arbitrate." (Defendants' Exhibit 3.) The Arbitration Agreement itself does not contain a provision allowing for severance. This express language reflects an intent not to sever any portion of the Arbitration Agreement and striking the provision would conflict with the parties' intent. (*Id.* at 1126.) Further the MAP itself only provides for severance of any provision that does not comport with the FAA. (Defendants' Exh. 1, p.3, ¶ 3.) But here the waiver provisions do not comport State law, and thus severance of the provision in the MAP would also conflict with the parties' intent. As a result, the entire Arbitration Agreement and MAP are unenforceable. This is to be contrasted with what Defendants label in reply as the controlling case. *(Franco v. Arkelian Enterprises* (2015) 234 Cal.App.4th 947, 965.) That case does not help Defendants. Unlike the instant action, the plaintiff in *Franco* asserted both individual and class causes of action for Labor Code violations in addition to a representative PAGA cause of action. The arbitration agreement there contained similar language to the language here. The Court found that the waiver was valid with respect to the class claims but invalid as to his PAGA claim pursuant to *Iskanian. (Id.* at 960-965.) The Court declined to find that entire arbitration agreement invalid because there was no evidence that the agreement was found to have been drafted to thwart public policy. In this regard, the Court focused on the fact that the arbitration agreement had been drafted almost

ten years prior to *Iskanian* and was unable to conclude that the employer could have predicted the final outcome of *Iskanian. (Id.* at 965.) But here, there is no dispute that the Arbitration Agreement which specifically stated that the employee agrees to "forego any right to bring claims on a representative or class basis" was presented to Plaintiff on November 17, 2014. *Iskanian* was decided on June 23, 2014, almost five months earlier. Moreover, *Franco* did not deal with the language discussed above in connection with the agreements which specifically delineated the circumstances under which severance was permitted.

In any event, even if the Court were to sever the provisions, the PAGA action could not be ordered to arbitration because as already discussed above, there is no intent by the parties reflecting that PAGA actions should be submitted to arbitration. Nor are there any claims other than the single PAGA claim. Indeed, PAGA actions are representative actions, whether brought by the LWDA or by an individual employee. *(Iskanian, supra,* 59 Cal.4th at 387-388.) "In sum, the FAA aims to promote arbitration of claims belonging to private parties to an arbitration. It does not aim to promote arbitration of claims belonging to a government agency, and that is no less true when such a claim is brought by a statutorily designated proxy for the agency as when the claim is brought by the agency itself." *(Id.* at 388.) Again, there are no individual claims in this action, only a PAGA claim. This action is brought by Plaintiff as a proxy of the State and the State cannot be compelled to arbitrate any claim based on an arbitration agreement between Plaintiff and Defendants. Finally, the Court rejects any argument that Plaintiff

has an "individual" PAGA claim that can be compelled to arbitration while the "representative" portion of the PAGA claim is stayed. Indeed, a "single cause of action under PAGA cannot be spilt into an arbitrable 'individual claim' and a nonarbitrable representative claim." *(Williams v. Superior Court* (2015) 237 Cal.App.4th 642, 645.)

The Court also rejects Defendants' argument that the determination of arbitrability must be determined by the arbitrator. The enforceability of an arbitration agreement is ordinarily a question for the Court. However, the parties may *agree* that the enforceability issue will be delegated to the arbitrator. *(AT&T Technologies, Inc. v. Communications Workers* (1986) 475 U.S. 643, 649.) To establish this exception, it must be shown by "clear and unmistakable" evidence that the parties intended to delegate the issue to the arbitrator. *(Rent-A-Center, West, Inc. v. Jackson* (2010) 561 U.S. 63, 68, 70, fn.1; *Howsam v. Dean Witter Reynolds* (2002) 537 U.S. 79, 84; see, also *Peleg v. Neiman-Marcus Group, Inc.* (2012) 204 Cal. App. 4th 1425, 1439-1445.) Here Defendants argue that such evidence exists because the Arbitration Agreement/MAP incorporate the AAA rules which themselves provide that the arbitrator has the power to rule upon questions of arbitrability. It is true that many cases have found that the incorporation of AAA rules meets the heightened "clear and unmistakable" test. (E.g., *Rodriguez v. American Technologies, Inc.* (2006) 136 Cal.App.4th 1100, 1123.) Plaintiff cites a single case suggesting that incorporation is not necessarily sufficient in the employment context. *(Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 790-791.) However, the

Court need not here consider whether incorporation alone is sufficient. Indeed, even if the incorporation of AAA rules alone were sufficient, the language of the specific agreements here creates an ambiguity which renders Defendants unable to meet the "clear and unmistakable" standard. Indeed, the Arbitration Agreement states that "if any provision of the MAP is found unenforceable, the provision may be severed ... " (Defendants' Exh. 3.) The MAP states that "the Arbitrator **or a court** may sever any part of the MAP procedures that do not comport with the [FAA] ... " (Defendants' Exh. 1, p.3, ¶ 3 [emphasis added].) Thus, the agreements themselves indicate an intent that the Court itself may decide questions of arbitrability, or at a minimum create an ambiguity on that point. "As a general matter, where one contractual provision indicates that the enforceability of an arbitration provision is to be decided by the arbitrator, but another provision indicates that the court might also find provisions in the contract to be unenforceable, there is no clear and unmistakable delegation of authority to the arbitrator." *(Ajamian, supra,* 203 Cal.App.4th at 792.) As a result, the question of arbitrability has not been clearly and unmistakably delegated to the arbitrator.

The Court need not reach the separate argument of whether the Arbitration Agreement/MAP is unconscionable given the above.

The motion is denied.

Counsel for the prevailing party shall submit a formal order. C.R.C. Rule 3.1312.