No. 20-

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.

ERICH HEIDRICH, ERIC KIDD, MARIA ANGELICA CASTRO, AND JUSTIN ROBERSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Arbitration Act requires enforcement of an arbitration agreement as applied to Fair Labor Standards Act claims where the parties' agreement requires individualized arbitration, and if so, whether 28 U.S.C. § 1738 requires a contrary result based on a state court decision finding an identical agreement unenforceable under a state law rule that is plainly invalid under the FAA and federal substantive law interpreting the FAA.

PARTIES TO THE PROCEEDING BELOW

The case caption contains the names of all parties who were parties in the Ninth Circuit and District 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

- *Erich Heidrich, et al v. Pennymac Financial Services, Inc., et al.*, 2:16-cv-02821-TLN-EFB, United States District Court for the Eastern District of California. Order compelling FLSA claims to arbitration and dismissing state law claims without prejudice entered July 11, 2018.

- *Erich Heidrich, et al v. Pennymac Financial Services, Inc., et al.*, 18-16494, United States Court of Appeals for the Ninth Circuit. Judgment entered February 7, 2020.

- *Richard Smigelski v. PennyMac Financial Services, Inc., et al.,* No. 34-2015-00186855-CU-OE-GDS, Superior Court of Sacramento County. Petitions to compel arbitration denied March 3, 2016 and April 22, 2016, motion for reconsideration denied April 22, 2016.

- *Richard Smigelski v. Pennymac Financial Services, Inc., et al.*, No. C081958, Court of Appeal of the State of California, Third Appellate District. Judgment entered December 19, 2018, rehearing denied January 9, 2019.

- *Richard Smigelski v. Pennymac Financial Services, Inc., et al.*, No. S253796, Supreme Court of California. Petition for review denied April 10, 2019.

- *PennyMac Financial Services, Inc., et al. v. Richard Smigelski*, No. 19-72, Supreme Court of

the United States. Petition for writ of certiorari denied October 7, 2019.

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STATUTES AND OTHER AUTHORITIES

Petitioners Private National Mortgage Acceptance Company, LLC ("PennyMac"), PennyMac Financial Services, Inc. and PennyMac Mortgage Investment Trust respectfully petition for a writ of certiorari to review the judgment and memorandum of disposition of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit, Appendix A at 1a – 4a, was not selected for publication but is available at 792 Fed. Appx. 540 and 2020 WL 601894. The order of the District Court granting PennyMac's motion to compel arbitration of the sole federal claim, Appendix B at 5a – 13a, is not published in the Federal Supplement, but is available at 2018 WL 3388458. The opinion of the California Court of Appeal in the related *Smigelski* state court action, Appendix C at 14a-49a, is not published but is available at 2018 WL 6629406.

JURISDICTION

The judgment and memorandum of disposition of the Court of Appeals was filed February 7, 2020. Appendix A at 1a. The time for filing this Petition was extended by this Court's March 19, 2020 order. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2 of the Federal Arbitration Act ("FAA") 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.

Section 4 of the FAA provides in relevant part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

Section 1738 of Title 28 of the United States Code provides in pertinent part:

> The records and judicial proceedings of any court of any such State, Territory or Possession,

> or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

INTRODUCTION

This case is about the enforceability of arbitration agreements under the FAA. As a matter of federal substantive law, the FAA establishes a presumption in favor of enforcing arbitration agreements as written. See 9 U.S.C. § 2. This presumption may be overcome by another federal statute, but only if that statute qualifies as a "congressional command" that is "contrary" to the FAA's enforcement mandate. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012). As this Court held in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1620 (2018), the FAA requires enforcement of an agreement to arbitrate putative collective action claims under the Fair Labor Standards Act ("FLSA"), even where the arbitration agreement "specified individualized arbitration." The Supremacy Clause mandates that this Court's definitive interpretation of the FAA in *Epic* cannot be subverted

by a judicially created state law rule that conflicts with the FAA. Art. VI, cl. 2; *Swift & Co. v. Wickham*, 382 U.S. 111, 120 (1965); *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984); *Perry v. Thomas*, 482 U.S. 483, 490 (1987).

In this case, the Ninth Circuit reversed a District Court order compelling arbitration of Respondents' FLSA claims. The District Court compelled arbitration of the FLSA claims based on a determination that *Epic* required enforcement of the parties' arbitration agreement, notwithstanding the agreement's specification of individualized arbitration ("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.") Appendix A, 2a; Appendix B, 7a-12a. The District Court properly applied the FAA and followed *Epic.* The Ninth Circuit was wrong to reverse.

The Ninth Circuit's error was to give preclusive effect to a California appellate court decision in a related case holding that the same agreement was unenforceable *in toto* as applied to state law claims, based upon a state law rule disfavoring waivers of class and representative claims in arbitration agreements. The Ninth Circuit incorrectly invoked the Full Faith and Credit Clause at the expense of (and without discussing) the Supremacy Clause, and disobeyed this Court's clear holding in *Epic* in favor of an invalid California rule of law that is contrary to both the FAA and existing Ninth Circuit precedent. This Court's intervention is required to correct the mistake in this case and to prevent California's judicial antagonism toward individualized arbitration from infecting the federal

courts within the Ninth Circuit and from affecting the arbitrability of federal FLSA claims in other cases.

State legislatures and courts have a history of attempting to evade the FAA, and California has led the field. This Court has repeatedly rebuffed California's anti-arbitration agenda and has rebuked other State courts who failed to heed this Court's interpretation of the FAA as required by the Supremacy Clause. The primacy of this Court's arbitration jurisprudence has been a bulwark against a rising tide of state law devices and doctrines intended to disfavor arbitration. And the obligation of federal courts to follow this Court's precedent has ensured uniform rejection of state law based attacks in federal courts on otherwise enforceable arbitration agreements.

In this case, however, the Ninth Circuit Court of Appeals improperly allowed California state law to subvert the FAA and the Supremacy Clause through an erroneous application of the Full Faith and Credit Clause and its enabling statute. But Section 1738 lacks the requisite indicia of Congressional intent to satisfy the *CompuCredit* test, and therefore the Ninth Circuit was wrong to give preclusive effect to an invalid state law rule that plainly conflicts with and is preempted by the FAA. The Ninth Circuit was wrong to rely on that invalid state law rule to reach a result that is the opposite of what this Court's decisions and the Ninth Circuit's own precedents require on the exact issues posed.

This case presents the straightforward question whether the FAA preempts a state-law rule that selectively disfavors arbitration agreements that require individualized arbitration and, assuming it does, whether

such an invalid state law rule can nevertheless trump this Court's specific holding in *Epic* that arbitration agreements precluding representative or collective proceedings must be enforced as written against FLSA claims.

The question presented is important, because employees and employers throughout California routinely agree to arbitrate their employment-related disputes at the outset of the employment relationship. The state law rule given effect by the Ninth Circuit in this case will invalidate countless arbitration agreements covered by the FAA in California, even when *Epic* dictates that those agreements must be enforced in FLSA cases. This Court's review is therefore essential.

Given the failure of the Ninth Circuit to heed this Court's clear and repeated instruction that the FAA does not permit state law 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), *DIRECTV, Inc. v. Imburgia,* 136 S.Ct. 463, 469-471 (2015) and *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

STATEMENT OF THE CASE

Petitioners are multi-state companies headquarted in California and engaged in the business of mortgage origination and servicing throughout the United States.

Respondents are three former California employees and one former Texas employee of Petitioner Private National Mortgage Acceptance Company, LLC ("PennyMac"). App. B, 5a-6a. Respondents each signed identical arbitration agreements during 2013 and 2014, agreeing that "final and binding arbitration will be the sole and exclusive remedy for any [employment] claim or dispute . . ." with PennyMac. App. B, 6a. The agreements included a waiver of "any right to bring claims on a representative or class basis" and a severance provision stating that if any provision of the accompanying arbitration policy "is found unenforceable, that provision may be severed without affecting this agreement to arbitrate." App. B, 7a; App. C, 16a.

On November 28, 2016, Respondents Heidrich, Kidd and Castro filed an action in the District Court against PennyMac and other Petitioners alleging putative collective action claims under the FLSA and alleging putative class action claims under California's Labor Code. On January 9, 2017 Respondents filed an amended complaint prematurely attempting to plead a claim for civil penalties under California Labor Code section 2699 (the Labor Code Private Attorney General Act ["PAGA"]).

In response, Petitioners moved to compel arbitration of the sole federal claim – the FLSA claim – and asked the District Court to dismiss the state law claims based on the resulting absence of federal jurisdiction. App. B, 5a-6a. While the motion was pending, Respondent Roberson filed a consent to join the FLSA claim.

The District Court granted Petitioners' motion to compel arbitration of the FLSA claim and declined to

exercise supplemental jurisdiction over Respondents' state law claims (including the PAGA claim), all of which it dismissed without prejudice. App. B, 13a. The District Court stated that this result was required by *Epic Systems Corp. v. Lewis*, 138 S. Sct. 1612, 1632 (2018), rejecting the argument that the entire agreement was unenforceable because the representative waiver language within the agreement was unlawful under California law.

Respondents appealed and the Ninth Circuit reversed the District Court. App. A, 2a-4a. This Petition followed.

The *Smigelski* State Court Action

On November 17, 2015, before the *Heidrich* federal action was filed, another former PennyMac employee, Richard Smigelski, filed a nearly identical action against Petitioners in Sacramento Superior Court, entitled *Richard Smigelski v. PennyMac Financial Services, Inc.*, et al., Case No. 34–2015–00186855 (*Smigelski*). ER 45-47, 49-58, 60-62, 64-66. The *Smigelski* case was filed by Respondents' counsel, Chris Baker, who remains counsel of record in both actions.

Smigelski originally alleged only a single claim for civil penalties under PAGA (Cal. Lab. Code § 2699). Smigelski did not allege an FLSA claim. In response, PennyMac filed a petition to compel arbitration and stay the action. The trial court denied the petition, finding that the arbitration agreement was not enforceable as applied to the PAGA claim. Armed with the ruling that his arbitration agreement was unenforceable, Smigelski filed an amended complaint adding additional individual and putative class claims under California's Labor Code

and 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.

PennyMac appealed. On December 19, 2018 the Court of Appeal affirmed. App. C, 14a-15a. On April 10, 2019, the California Supreme Court summarily denied PennyMac's Petition for Review and this Court subsequently denied PennyMac's Petition for Writ of Certiorari. *PennyMac Financial Services, Inc., et al. v. Richard Smigelski* , ––– U.S. ––––, 140 S. Ct. 223, 205 L.Ed.2d 126 (2019).

REASONS FOR GRANTING REVIEW

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S ARBITRATION PRECEDENTS AND WAS INCORRECT

This Court's intervention is needed because the Ninth Circuit's decision was wrong on the merits. The decision of the Ninth Circuit ignores the Supremacy Clause and defies this Court's clear and repeated instruction that the FAA preempts state-law rules that discriminate against arbitration agreements. By prohibiting outright the enforcement of Respondents' agreements to individually arbitrate their FLSA claims, the decision below disregarded this Court's definitive interpretation of the FAA. In doing so, the Ninth Circuit created a clear conflict between an invalid state law rule and substantive federal law under the FAA, and also created an unnecessary but implicit conflict between the Supremacy Clause and the Full Faith and Credit Clause.

A. The FAA Controls The Enforceability Of Arbitration Agreements Absent Contrary Congressional Command

The FAA is "[t]he background law governing" questions relating to the enforcement of an arbitration provision, even when other federal statutes are at issue. *CompuCredit,* 132 S. Ct. at 668. The type of arbitration "envisioned by the FAA" is "bilateral" (individual) arbitration. *Concepcion*, 563 U.S. at 348, 351.

Under the FAA, the default rule is enforceability: "A written provision *** to settle by arbitration a controversy *** 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. Accordingly, "[t]he burden is on the party opposing arbitration *** to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *Shearson / Am. Express Inc. v. McMahon*, 482 U.S. 220, 227 (1987). That is why, for decades, this Court has consistently upheld the FAA's policy favoring enforcement of arbitration agreements as written. *See, e.g., DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013) 133 S. Ct. 2304; *CompuCredit*, 132 S. Ct. 665; *Concepcion*, 563 U.S. 333; *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 559 U.S. 662 (2010); *Gilmer v. Interstate / Johnson Lane Corp.*, 500 U.S. 20 (1991); *McMahon*, 482 U.S. 220; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985).

Consistent with the strong federal policy favoring arbitration, the FAA "requires courts to enforce

agreements to arbitrate according to their terms [,] *** even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command.' " *CompuCredit*, 132 S. Ct. at 669 (quoting McMahon, 482 U.S. at 226). This contrary congressional command cannot be "obtuse," but rather must indicate Congress's contrary intent with some "clarity." *CompuCredit*, 132 S. Ct. at 672. And, as stated, the directive must be "congressional," *id.* at 669 - not administrative or judicial.

With respect to federal claims under the FLSA, the FAA requires enforcement of an employee's arbitration agreement even though it requires individualized proceedings and that prohibits class, collective or representative proceedings. *Epic,* 138 S. Ct. at 1621-1632.

B. The Court Below Was Wrong To Disregard This Court's *Epic* Decision And Its Own Precedents On Arbitration Agreements That Include Representative Action Waivers

The Ninth Circuit is obligated to follow the decisions of this Court, as well as its own precedents, when they have direct application to the relevant issues. *Rodriguez de Quijas v. Shearson/American Exp., Inc.* 490 U.S. 477, 484 (1989).

The Ninth Circuit reversed the District Court's order compelling Respondent's FLSA claim to arbitration because it found that the parties' arbitration agreement was wholly unenforceable, due to its inclusion of a class and representative action waiver that would be unlawful under California law if applied to a PAGA claim for civil

penalties, and based on a finding that the waiver was inseverable. Appendix A, 2a-3a. Both of these holdings, based exclusively on the *Smigelski* state court ruling, conflict directly with existing and controlling federal precedent.

First, assuming the parties agreement included a PAGA waiver and assuming that Petitioner sought to enforce that waiver against Respondents' PAGA claim in the District Court (which PennyMac did not do), existing Ninth Circuit precedent holds that PAGA waivers that would be unenforceable under California law cannot render the balance of an arbitration agreement unenforceable under the FAA. *See Wulfe v. Valero Ref. Co.-Cal.*, 641 Fed. Appx. 758, 760 (9th Cir. 2016); *Valdez v. Terminix Int'l Co. Ltd. P'ship*, 681 Fed. Appx. 592, 594 (9th Cir. 2017); *Poublon v. C.H. Robinson Co.,* 846 F.3d 1251, 1273 (9th Cir. 2017) ("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.") (emphasis added). Thus, the decision below was wrong to allow an invalid California rule to dictate a result directly contrary to existing Ninth Circuit precedent on the precise issue.

Second, the Ninth Circuit should simply have followed *Epic* and affirmed the District Court. The specification of individualized arbitration proceedings in the parties' agreement is, as applied to FLSA claims, precisely the type of arbitration agreement that this Court found enforceable under the FAA. *Epic, supra*, 138 S. Ct. at 1619-1620. And this Court's clear instruction is that attempting to contractually preserve the traditional,

bilateral nature of arbitration against the potential imposition of fundamentally incompatible class or collective action procedures is a lawful purpose. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416-1417 (2019) *Epic, supra; Concepcion, supra*, 563 U.S. at 336; *see also Poublon*, 846 F.3d at 1264.

C. The Supremacy Clause Nullifies Judicially Created State Law Rules That Conflict With The FAA And This Court's Interpretation Of the FAA

The Supremacy Clause provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... 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." Art. VI, cl. 2. Thus, a valid federal law is substantively superior to a state law; "if a state measure conflicts with a federal requirement, the state provision must give way." *Swift & Co. v. Wickham*, 382 U.S. 111, 120 (1965).

This Court's decisions and federal case law that has developed under the FAA constitute a body of substantive federal law on arbitration and the enforceability of particular types of arbitration agreements. *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984). The FAA and the federal substantive law thereunder preempt and displace contrary state law restrictions, whether imposed by state legislatures or state courts. *Id.* at 10; *Perry v. Thomas*, 482 U.S. 483, 490 (1987); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

As a result, state law rules attempting to preclude arbitration of California Labor Code claims have without exception been invalidated under the FAA. *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 same fate befell California's attempts to prohibit enforcement of class action waivers in arbitration agreements. *Concepcion*, *supra*, 563 U.S. at 352; *DIRECTV, Inc. v. Imburgia, supra*, 136 S.Ct. at 471.

"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. "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)). The state law rules by the *Smigelski* decision plainly contradict the FAA and are therefore invalid.

D. The Decision Below Relied Exclusively On Invalid State Law Anti-Arbitration Rules That Conflict With The FAA.

In this case, the state law rule that was given preclusive effect by the Ninth Circuit 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. C, 38a-39a.

By drawing a red circle around Labor Code section 2699 claims and declaring them exempt from arbitration in all cases involving pre-dispute arbitration agreements, the *Smigelski* decision stated a rule that is plainly in conflict with and therefore preempted by the FAA as interpreted by *Concepcion*. A state law rule flatly prohibiting enforcement of pre-dispute arbitration agreements involving California Labor Code claims 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.[1] Like California

1. 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 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

Labor Code section 229 prohibiting arbitration of any claim for wages (which this Court held preempted by the FAA 30 years ago in *Perry*, *supra,* 482 U.S. at 492), the *Smigelski* rule is an outright prohibition on arbitration of a particular type of Labor Code claim and is thus a nullity in any case governed by the FAA.

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 *Smigelski* decision also 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.

Indeed, an unbroken line of decisions by the Ninth Circuit itself holds that the FAA requires exactly the opposite result. These 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.*

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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).

C.H. Robinson Co., 846 F.3d 1251, 1273 (9th Cir. 2017); *Hernandez v. DMSI Staffing, LLC.,* 79 F. Supp. 3d 1054, 1067 (N.D. Cal. 2015)*, aff'd sub nom. Hernandez v. DMSI Staffing, LLC,* 677 F. App'x 359 (9th Cir. 2017).

The *Smigelski* decision 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 every PAGA claim for monetary penalties, it is the "party" to the PAGA action and the named plaintiff is not. This 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.[2]

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2. 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

But *Smigelski's* 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. The *Smigelski* rule and the decision below selectively disfavor only agreements to submit PAGA claims to arbitration.

Recently, California's Legislature made a distinct subset of contracts in California expressly 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.

Such obvious inconsistency has led this Court to conclude that similar judicial rules target arbitration agreements. *See, e.g. Kindred Nursing Centers,* 137 S.Ct. at 1427 (holding that FAA preempted Kentucky Supreme Court's special rule requiring express authorization by

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employee, and once the employee obtains standing to assert a PAGA claim, the State lacks any ability to intervene or control the litigation.

principal of agent to enter into arbitration agreements but not other contracts) ; *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.").

The *Smigelski* decision also impermissibly and uniquely disfavored arbitration in another way. Like the nonsensical interpretation of contractual language struck down by this Court in *Imburgia* (*Imburgia, supra,* 136 S.Ct. at 469) and *Lamps Plus* (*Lamps Plus, supra*, 139 S. Ct. at 1418-1419), the backward interpretation of the severance language within PennyMac's arbitration agreement employed by the *Smigelski* court in order to render the entire agreement unenforceable is plainly pre-empted by the FAA. App. C, 19a, 39a-45a.

The Ninth Circuit was wrong to rely on such plainly invalid state law rules in a case governed by the FAA, and should never have given them effect in violation of the Supremacy Clause and federal precedent under the FAA.

E. The Federal Statute Relied Upon By The Ninth Circuit Does Not Indicate A Congressional Intent To Permit Invalid State Law Judicial Rules To Override The Mandate Of The FAA.

The court of appeals below relied on 28 U.S.C. section 1738, the statute implementing the Full Faith and Credit Clause, to override the FAA's mandate and this Court's definitive interpretation in *Epic* of what that mandate

requires in an FLSA case where the employee has agreed to waive class, collective and representative proceedings in arbitration.

Section 1738, however, fails to manifest any Congressional intent to override the FAA, or to displace the normal operation of the Supremacy Clause when the FAA and this Court's interpretation of the FAA invalidate or displace contrary state law rules. Nor does this Court's jurisprudence under the Full Faith and Credit Clause support the Ninth Circuit's erroneous application of invalid state law to override *Epic*. Petitioners are unaware of any decision of this Court holding that the Full Faith and Credit Clause requires a federal court to refuse enforcement under the FAA of an arbitration agreement that is enforceable under this Court's precedent but that is unenforceable under a rule of state law that conflicts with the FAA and this Court's interpretation of the FAA. The Ninth Circuit itself, however, has recognized that in circumstances where substantive federal law governs, a federal court is not obligated to give preclusive effect to a state judicial decision that is contrary to what federal law requires. *See e.g., Los Altos El Granada Investors v. City of Capitola,* 583 F.3d 674 (2009).

The decision below incorrectly gave preclusive effect to the latest 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 pack in 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. While such plain disobedience may escape this Court's review when arises from state court proceedings, it should not be ignored when a federal Court of Appeals invokes the invalid state law rules to overturn a clear and correct application of this Court's interpretation of the FAA.

II. THE ISSUES IMPLICATED BY THE DECISION BELOW ARE EXCEPTIONALLY IMPORTANT.

A. The Individual Arbitration 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.[3] Many of those employees agree to arbitration of their employment-related disputes at the outset of their employment, before any dispute has arisen. If the *Smigelski* rule must be given effect by District Courts, then employment arbitration agreements under which California employers and employees agreed to individually arbitrate cannot be enforced in any case to which a PAGA claim is appended.

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3. 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.

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 Act: How to Manage the Unmanageable,* 56 Santa Clara L. Rev. 413, 415 (2016) (citation omitted).

B. There Is A Square Conflict Between The Ruling Below And Other Ninth Circuit Decisions.

As explained above, the Ninth Circuit has held in other cases that pursuant to the California Supreme Court'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, and also has held that the presence of an unenforceable PAGA waiver will not render an arbitration agreement wholly unenforceable. *Sakkab*, *supra*, 803 F.3d at 434; *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.

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 when California courts abdicate their responsibility to follow the FAA, such insubordination does not thwart the intention of Congress and the instructions of this Court through an inappropriate application of Section 1738.

C. 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. *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 *Smigelski* rule given effect by the Ninth Circuit, selectively finding pre-dispute agreements invalid in PAGA cases should fare no better.

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. 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. By reversing the Ninth Circuit decision in this case, the Court can restore the District Court's proper application of *Epic* and signal its disapproval of California's conflicting rule. This case is an ideal vehicle for doing so. It arises out of federal court, so it does not implicate the views expressed by one member of this Court that the FAA does not apply in state court proceedings.

D. 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 *Epic*, *Kindred Nursing Centers*, *Imburgia*, and *Concepcion*. This Court has already taken that course in other cases presenting a failure or 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 Ninth Circuit (and California courts) that *Epic* is the conclusive interpretation of the FAA and what it requires in FLSA cases that involve agreements to individually arbitrate, and it may not be ignored based on state law rules that 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 *Epic, Kindred Nursing Centers*, *Imburgia,* and *Concepcion.*

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED FEBRUARY 7, 2020

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-16494

D.C. No. 2:16-cv-02821-TLN-EFB

ERICH HEIDRICH; *et al.*,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of California.
Troy L. Nunley, District Judge, Presiding.

January 21, 2020, Argued and Submitted,
San Francisco, California;
February 7, 2020, Filed

Before: W. FLETCHER and R. NELSON, Circuit Judges, and MOLLOY,* District Judge.

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* The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

Appendix A

MEMORANDUM[**]

Former employees of PennyMac Financial Services, Inc., appeal the district court's order compelling arbitration of their claims under the Federal Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, and dismissing the action. We have jurisdiction under 28 U.S.C. § 1291 and 9 U.S.C. § 16(a)(3). *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000); *Interactive Flight Techs., Inc. v. Swissair Swiss Air Transp. Co.*, 249 F.3d 1177, 1179 (9th Cir. 2001). We hold that we are bound by a decision of the California Court of Appeal holding that PennyMac's arbitration agreement is unenforceable in its entirety, and we therefore reverse.[1]

The district court compelled arbitration of the employees' FLSA claims, declined to exercise supplemental jurisdiction over their state-law claims, dismissed all claims before it, and entered judgment. The district court reasoned that the employees' FLSA claims were arbitrable under *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 200 L. Ed. 2d 889 (2018), but it did not consider the employees' alternative argument that PennyMac's arbitration agreement was unenforceable because it contained an unlawful waiver of representative claims under the California Private Attorneys General Act, Cal. Lab. Code §§ 2698 *et seq.*, and that the waiver

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

1. PennyMac's motion for an order that the excerpts of record be supplemented (Dkt. 41) is DENIED as moot.

was inseverable from the remainder of the arbitration agreement. After the district court rendered its decision, the California Court of Appeal held in *Smigelski v. PennyMac Financial Services, Inc.*, No. C081958, 2018 Cal. App. Unpub. LEXIS 8582, 2018 WL 6629406, at *12 (Cal. Ct. App. Dec. 19, 2018) (unpublished), *reh'g denied* (Jan. 9, 2019), *review denied*, S253796, 2019 Cal. LEXIS 2417 (Cal. Apr. 10, 2019), *cert. denied*, 140 S. Ct. 223, 205 L. Ed. 2d 126 (2019), that PennyMac's arbitration agreement contains an unlawful and inseverable PAGA waiver and that therefore "PennyMac cannot compel arbitration of any of Smigelski's causes of action, including causes of action that would otherwise be arbitrable."

The Full Faith and Credit Clause and its implementing statute require that federal courts "give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984); *Rodriguez v. City of San Jose*, 930 F.3d 1123, 1130 (9th Cir. 2019); *see also* U.S. Const. art. IV, § 1; 28 U.S.C. § 1738. Under California law, issue preclusion applies against a party to a prior proceeding in which the issue to be precluded was actually litigated and necessarily decided in a final decision on the merits unless the application of issue preclusion would be inconsistent with public policy. *See White v. City of Pasadena*, 671 F.3d 918, 927 (9th Cir. 2012) (citing *Lucido v. Superior Court*, 51 Cal. 3d 335, 272 Cal. Rptr. 767, 795 P.2d 1223, 1225-27 (Cal. 1990)).

The requirements of issue preclusion under California law are met here. PennyMac was a party to the prior proceeding; identical arbitration agreements were at issue; the parties vigorously litigated whether the agreements contained unenforceable PAGA waivers and whether those waivers were severable; the Court of Appeal expressly decided those issues; and its decision is final on appeal.

PennyMac argues that the issues here differ from those decided in *Smigelski* because the employees here assert claims under federal law. We disagree. The Court of Appeal in *Smigelski* held that the severability provisions of PennyMac's arbitration agreement prohibited severance of provisions found to violate state law. *See* 2018 Cal. App. Unpub. LEXIS 8582, 2018 WL 6629406, at *11. For that reason, the court held that the agreements were unenforceable in their entirety, not only as to PAGA claims or to claims under state law. *See* 2018 Cal. App. Unpub. LEXIS 8582, [WL] at *12. That PennyMac disagrees with the Court of Appeal's application of federal law is not a valid basis for refusing that decision full faith and credit as required by § 1738. *See Allen v. McCurry*, 449 U.S. 90, 95-96, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980).

The district court declined to exercise supplemental jurisdiction over the employees' state-law claims for the sole reason that it had dismissed all federal claims before it. Because we reverse the district court's order dismissing the employees' federal claims, we also reverse as to their state-law claims.

REVERSED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, DATED JULY 11, 2018

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. 2:16-cv-02821-TLN-EFB

ERICH HEIDRICH, ERIC KIDD, MARIA ANGELICA CASTRO, AND JUSTIN ROBERSON, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

PENNYMAC FINANCIAL SERVICES, INC.; PENNYMAC MORTGAGE INVESTMENT TRUST; and PRIVATE NATIONAL MORTGAGE ACCEPTANCE CO.,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO COMPEL ARBITRATION OF FLSA CLAIM AND TO DISMISS

This matter is before the Court pursuant to Defendants PennyMac Financial Services, Inc., PennyMac Mortgage Investment Trust, and Private National Mortgage Acceptance Co.'s (collectively, "Defendants") Motion to Compel Arbitration of the Fair Labor Standards Act

claim ("FLSA"), Motion to Dismiss, or alternatively, Motion to Stay. (ECF No. 9.) Plaintiffs Erich Heidrich, Eric Kidd, and Maria Angelica Castro (collectively, "Plaintiffs") oppose. (ECF No. 10.) Defendants replied. (ECF No. 14.) For the reasons set forth below, the Court GRANTS Defendants' Motion to Compel Arbitration and DISMISSES the action.

I. Factual and Procedural Background

Plaintiffs allege Defendants did not include the full amount of their non-exempt employees' compensation when calculating the regular rate of pay for overtime purposes. (ECF No. 4 ¶ 1.) Plaintiffs allege Defendants do not pay employees their bonuses on a timely basis and do not pay employees all wages owed at the time of their termination. (ECF No. 4 ¶ 1.) Plaintiffs allege Defendants concealed violations of state and federal law by failing to include all required information in wage statements. (ECF No. 4 ¶ 14.) Plaintiffs allege the failures were part of company-wide policies and practices. (ECF No. 4 ¶ 17.) Plaintiffs seek to represent a class of similarly situated employees and former employees of Defendants. (ECF No. 4 ¶ 18.)

Defendants required employees, including Plaintiffs, to sign an "Employee Agreement to Arbitrate" as a part of a Mutual Arbitration Plan ("MAP") and as a condition of employment. (ECF No. 4 ¶ 2; ECF No. 9 at 6.) The MAP provides: "I understand that final and binding arbitration will be the sole and exclusive remedy for any [employment] claim or dispute...." (ECF No. 9-1, Exs. 5-7.) The MAP

includes a waiver which precludes Plaintiffs from engaging in concerted activity by requiring Plaintiffs to pursue work-related claims individually in arbitration. (ECF No. 9-1; Ex. 1 at 8; Exs. 5-7.) The MAP waiver includes the following language: "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 Mutual Arbitration Plan ("MAP"), and forego any right to bring claims on a representative or class basis." (ECF No. 9-1, Exs. 5-7.) The MAP further explains the agreement to arbitrate "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." (ECF No. 9-1, Ex. 1 at 8.)

Defendants move to compel arbitration, arguing the arbitration agreements are binding. (ECF No. 9 at 4.) Plaintiffs argue the waiver is illegal under California law and so the entire arbitration agreement is invalid under binding Ninth Circuit precedent in *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016). (ECF No. 10 at 15.) The Supreme Court granted *certiori* in *Morris* and reversed. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632, 200 L. Ed. 2d 889 (2018.)

II. Standard of Law

"[T]he federal law of arbitrability under the Federal Arbitration Act ("FAA") governs the allocation of authority between courts and arbitrators." *Cox v. Ocean View*

Hotel Corp., 533 F.3d 1114, 1119 (9th Cir. 2008). There is an "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 631, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985). As such, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id.* at 626 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)). "Because waiver of the right to arbitration is disfavored, 'any party arguing waiver of arbitration bears a heavy burden of proof.'" *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 694 (9th Cir. 1986) (quoting *Belke v. Merrill Lynch, Pierce, Fenner & Smith*, 693 F.2d 1023, 1025 (11th Cir. 1982)).

Generally, in deciding whether a dispute is subject to an arbitration agreement, the Court must determine: "(1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). As such, the Court's role "is limited to determining arbitrability and enforcing agreements to arbitrate, leaving the merits of the claim and any defenses to the arbitrator." *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 479 (9th Cir. 1991).

"In determining the existence of an agreement to arbitrate, the district court looks to 'general state-law principles of contract interpretation, while giving due regard to the federal policy in favor of arbitration.'"

Botorff v. Amerco, No. 2:12-CV-01286, 2012 U.S. Dist. LEXIS 179865, 2012 WL 6628952, at *3 (E.D. Cal. Dec. 19, 2012) (citing *Wagner v. Stratton*, 83 F.3d 1046, 1049 (9th Cir. 1996)). An arbitration agreement may only "be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, 1748, 179 L. Ed. 2d 742 (2011) (quoting *Doctor's Assocs. Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996)). Therefore, courts may not apply traditional contractual defenses, like duress and unconscionability, in a broader or more stringent manner to invalidate arbitration agreements and thereby undermine FAA's purpose to "ensur[e] that private arbitration agreements are enforced according to their terms." *Id.* at 1748 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989)).

If the Court "determines that an arbitration clause is enforceable, it has the discretion to either stay the case pending arbitration or to dismiss the case if all of the alleged claims are subject to arbitration." *Delgadillo v. James McKaone Enters., Inc.*, No. 1:12-CV-1149, 2012 U.S. Dist. LEXIS 130336, 2012 WL 4027019, at *3 (E.D. Cal. Sept. 12, 2012). The plain language of the FAA provides that the Court should "stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement..." 9 U.S.C. § 3. However, "9 U.S.C. § 3 gives a court authority, upon application by one of the parties,

to grant a stay pending arbitration, but does not preclude summary judgment when all claims are barred by an arbitration clause. Thus, the provision does not limit the court's authority to grant dismissal in the case." *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 638 (9th Cir. 1988).

III. Analysis

The parties agree Defendants required each plaintiff to sign an arbitration agreement and also agree that its provisions waive collective action and require "final and binding arbitration" as the "sole and exclusive" remedy for any employment claim or dispute between the parties. (ECF No. 9 at 6; ECF No. 10 at 14.) Defendants move to compel arbitration pursuant to the Federal Arbitration Act ("FAA") and to dismiss the suit. (ECF No. 9 at 4.) Defendants argue this Court lacks jurisdiction over the case because the arbitration agreements are binding so the suit should be compelled to arbitration and dismissed. (ECF No. 9 at 4.) Plaintiffs oppose the motions, arguing the waiver provision is illegal under California law and so the entire arbitration agreement is invalid under binding Ninth Circuit precedent in *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016). (ECF No. 10 at 15.)

After the parties filed their briefs, the Supreme Court granted *certiori* in *Morris. Epic Sys. Corp.*, 138 S. Ct. at 1612. The Court considered *Morris* along with Seventh Circuit and Fifth Circuit cases that addressed whether employees should be allowed to bring class or collective actions where they agreed to one-on-one arbitration and reversed *Morris*. *Id.* at 1632.

Appendix B

In *Morris*, the Ninth Circuit reversed a district court's grant of a motion to compel arbitration. *Epic Sys. Corp.*, 138 S. Ct. at 1620. The Ninth Circuit reasoned the FAA's "savings clause" does not require a court to compel arbitration if the arbitration agreement violates another federal law, such as violating sections of the National Labor Relations Act ("NLRB") by barring employees from pursuing collective action. *Id.*

The Supreme Court found that Congress, in enacting the FAA, not only required courts to "respect and enforce agreements to arbitrate," but "specifically directed them to respect and enforce the parties' chosen procedures." *Epic Sys. Corp.*, 138 S. Ct. at 1621. The Court found the FAA's "savings clause" does not apply to defenses that target arbitration, rather than defenses that would apply to all contracts such as duress. *Id.* at 1622. Further, the Court found, neither the NLRA (or its "precursor" the Norris-LaGuardia Act) nor the FSLA displace the FAA or prohibit individualized arbitration proceedings. *Id.* at 1626-27. The Court stated, "a contract defense 'conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures' is inconsistent with the Arbitration Act and its saving clause." *Id.* at 1631 (quoting *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 336, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011)).

Under the FAA, where an issue in a suit can be referred to arbitration pursuant to a written arbitration agreement, district courts are required to order arbitration of that issue. 9 U.S.C. §§ 3-4. The court's role

is "limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). Here, it is undisputed Plaintiffs signed arbitration agreements which covered all employment related claims. Plaintiffs' FSLA claim alleging improper calculation of rate of pay is a dispute relating to their employment. *Luchini v. Carmax, Inc.*, 2012 U.S. Dist. LEXIS 126230, 2012 WL 3862150, at *6 (E.D. Cal. Sept. 5, 2012) (citing *Albertson's, Inc. v. United Food & Commercial Workers Union, AFL-CIO & CLC*, 157 F.3d 758, 762 (9th Cir. 1998). The parties differed on whether the arbitration agreement was enforceable and valid given the inclusion of the waiver. "[T]he law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written." *Epic Sys. Corp.*, 138 S. Ct. at 1632. Accordingly, the Court must compel arbitration of the FSLA claim. *Id.*; 9 U.S.C. § 3.

Plaintiffs' FSLA claim is the sole basis for federal subject matter jurisdiction in this suit. Plaintiffs remaining claims are state law claims for violations of California's Labor Code and for Unfair Business Practices. (ECF No. 4 at 1.) A federal court may decline to exercise supplemental jurisdiction over state law claims where it "dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). "When, as here, the court dismisses the federal claim leaving only state claims for resolution, the court should decline jurisdiction over the state claims and dismiss them without prejudice." *Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n*, 884 F.2d

504, 509 (9th Cir. 1989) (citing *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 348, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988)). Accordingly, the Court declines to exercise supplemental jurisdiction over Plaintiffs' state law claims and dismisses the claims without prejudice.

IV. Conclusion

For the reasons set forth above, the Court hereby GRANTS Defendants' Motion to Compel Arbitration and to Dismiss the FLSA claim and declines to exercise supplemental jurisdiction over Plaintiffs' state law claims, which are dismissed without prejudice, (ECF No. 9). Plaintiffs' pending Motion to Toll the Statute of Limitations is DENIED as moot, (ECF No. 18). The Clerk of the Court is directed to close the case.

IT IS SO ORDERED.

Dated: July 9, 2018

/s/ Troy L. Nunley
Troy L. Nunley
United States District Judge

APPENDIX C — OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT, SACRAMENTO, FILED DEEMBER 19, 2018

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

C081958
(Super. Ct. No.
34201500186855CUOEGDS)

RICHARD SMIGELSKI,

Plaintiff and Respondent,

v.

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

Defendants and Appellants.

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 as otherwise permitted by the MAP." The employee agreement further provides, "by agreeing to use arbitration to resolve my dispute, both PennyMac and I

1. Undesignated statutory references are to the Labor Code.

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.

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

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).)

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*).)

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

3. We discuss *Iskanian post.*

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 C

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 C

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 C

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*, 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 C

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.