YBARRA v. APARTMENT INV. & MGMT. CO.

S217994
Supreme Court of California
April 22, 2014

Reporter: 2014 CA S. Ct. Briefs LEXIS 355
REYNA MARIE YBARRA, ET AL., Petitioner, v. APARTMENT INVESTMENT AND MANAGEMENT COMPANY, Respondent.

Type: Petition for Appeal

Prior History: AFTER DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION TWO. CASE B245901. FROM THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, CASE NO. BC480377, ASSIGNED FOR ALL PURPOSES TO JUDGE YVETTE M. PALAZUELOS, DEPARTMENT 28.

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Title

Petition For Review

Text

ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeal err in upholding a representative action waiver requiring the aggrieved employee bringing a Private Attorneys General Act of 2004 (″PAGA″) action to forfeit his or her substantive statutory right to represent ″current and former employees″ or to seek statutory penalties as a private attorney general?

2. Does the Federal Arbitration Act compel individual arbitration of claims under the Labor Code Private Attorneys General Act of 2004 (″PAGA″), as found in the since depublished opinion of *Iskanian v. CLS Transportation of Los Angeles LLC*, or are PAGA waivers unenforceable, as found in *Brown v. Ralph's Grocery Co. (2011) 197 Cal.App.4th 489,* rev. den., *2011 Cal.Lexis 10809* (Oct. 19, 2011), **[*2]** cert. den., *2012 U.S.Lexis 2934* (April 16, 2012) (No. 11-880.)?

3. Can the State of California, the real party in interest in a PAGA action, be forced to forfeit its right to PAGA penalties via a private agreement to which it was not a party?

4. Does the Federal Arbitration Act (″FAA″) impliedly preempt the California legislature's exercise of its police power to enforce the state's employment laws through arbitration-neutral statutes?

INTRODUCTION

Relying on its since depublished opinion in *Iskanian v. CLS Transportation of Los Angeles LLC(2012) 142 Cal.Rptr.3d 372* (″*Iskanian*″), the Court of Appeal issued a decision directly contravening years of firmly established California case law declining to enforce arbitration agreements that forfeit substantive statutory rights.

The Court of Appeal committed a number of errors in holding that an arbitration agreement facially waiving statutory rights should be enforced. In reaching its decision, the Court of Appeal relied on *Iskanian*, a case decided

by the same Division and which has since been depublished. Just three weeks after the Court of Appeal issued its decision, this Court held **[*3]** oral arguments in *Iskanian*, and this Court's decision in that case is eagerly anticipated. *Iskanian* directly conflicts with both Supreme Court as well as California state law precedent holding that a party may not prospectively waive its statutory rights by contract. The Court of Appeal erred in upholding the arbitration agreement at issue which eliminated the right to bring a statutory claim *in any forum*.

The Court of Appeal further erred in finding that a party may arbitrate a Private Attorney General Act (″PAGA″) claim on an exclusively individual basis, despite the inherently representative nature of PAGA claims. The Court of Appeal's ruling also erroneously rejects binding Supreme Court precedent by forcing the State of California to waive its statutory rights pursuant to a contract to which it is not a party.

The Court of Appeal found that a prospective waiver of statutory rights to arbitrate should be enforced as any other result would be incompatible with the Federal Arbitration Act (″FAA″). However, the decision below does not take heed of the nuances between compelling arbitration pursuant to the FAA and eliminating the right to arbitrate altogether. Moreover, **[*4]** the Court of Appeal erred in finding that the FAA may serve to eliminate statutory rights, such as those provided by PAGA.

Allowing the Court of Appeal's holding to stand has broad and dangerous implications. The Court of Appeal's decision will create doctrinal confusion among the courts, and will engender conflicting interpretations of both state law as well as long-standing federal doctrines. For these reasons, this Court should grant review of the Court of Appeal's decision to resolve the multiple conflicts of law and doctrine that the decision below creates. Indeed, the issues presented in this case are likely to be resolved by this Court's decision in *Iskanian*, and therefore granting review and holding this case pending the outcome of *Iskanian* would be particularly appropriate.

In the alternative, this Court should grant review and ″order action in the matter deferred until the court disposes of another matter.″ *Cal. R. Ct. 8.512(d)(2)*. This Petition raises an identical issue to one already before this Court in *Iskanian. Iskanian*, like this case, is a wage-and-hour case that directly addresses whether arbitration agreements may provide **[*5]** for the waiver of the statutory right to bring representative claims under PAGA.

Thus, if the Court does not grant full review of the decision below, at a minimum, it should grant this Petition and defer further action until it resolves the related issues presented in *Iskanian*. This will ensure a uniformity of decision on the important questions of law presented in both cases.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Defendant-Respondent Apartment Investment and Management Company (″AIMCO″) is a corporation that owns and/or manages apartment communities. (Slip Op. at 3) On January 18, 2011, AIMCO hired Plaintiff-Petitioner Reyna Marie Ybarra (″Ybarra″) as a Community Manager to manage one of AIMCO's properties in the County of Los Angeles. (*Id.*) That same day, AIMCO imposed a predispute arbitration agreement on Ybarra as a condition of employment. (*Id.* at 3)

AIMCO's ″arbitration″ agreement contains a waiver of the right of employees to pursue any claims in a representative capacity:

> Under this Agreement, any class action, collective action, and/or other procedure for consolidation or joinder of Claims of multiple parties is prohibited. **[*6]** No arbitrator acting hereunder shall have the power to decide any class, collective, joined or consolidated claims. No Party to this Agreement may attempt to proceed hereunder as a member or representative of any class, putative class, or group purporting to have similar Claims.

(1 CT*120 P 6*(c).) AIMCO concedes that this waiver extends to representative claims brought under PAGA. (*Id.*)

On December 20, 2011, AIMCO terminated Ybarra's employment, and on March 8, 2012, Ybarra commenced an action against AIMCO. (*Id.*) Ybarra asserts a single claim: violation of *Labor Code § 2698*, *et seq.*, brought pursuant

to PAGA. (*Id.*) Ybarra seeks to recover, on behalf of herself and other aggrieved current or former employees of AIMCO, civil penalties owed to the Labor and Workforce Development Agency (″LWDA″).

On April 12, 2012, and again on July 5, 2012, AIMCO attempted to remove the underlying action to federal court. In both instances, the case was remanded back to state court. (1 CT 149 - 2 CT 200) AIMCO then filed a motion to compel arbitration. On November 16, 2012, the trial court held a hearing on AIMCO's motion **[*7]** and, on the same day, entered an order denying the motion. (2 CT 327 - 338) The trial court determined that a waiver of PAGA claims is unconscionable and unenforceable. (*Id.*)

On December 19, 2012, AIMCO filed an appeal of the Trial Court's order denying its motion. (Slip Op. at 4) Ybarra filed a motion to dismiss AIMCO's appeal which was denied on the grounds that the Court of Appeal's holding in *Iskanian* was controlling. However, *Iskanian* is no longer good law as it has since been depublished by this Court. The Court of Appeal issued a decision on March 13, 2014, reversing the trial court's decision. Petitioner appeals from the final decision of the Court of Appeal.

II. THE COURT OF APPEAL'S DECISION

The Court of Appeal held that the arbitration agreement at issue was enforceable under the Federal Arbitration Act (*9 U.S.C. 1et seq.*) even though on its face it eliminated petitioner's right to bring a representative arbitration claim under the California Private Attorney General Act. The court reached its holding on the grounds that arbitration waivers, even those which completely and facially extinguish substantive statutory rights, **[*8]** further the principle purpose of the FAA that arbitration agreements should be enforced according to their terms. However, the purpose of the FAA is to enforce agreements to arbitrate, not agreements to preclude both arbitration and litigation such as the agreement at issue here. Neither the terms of the FAA nor any United States Supreme Court case has held that the FAA requires enforcement of a private agreement that wholly prevents the exercise of a statutory right intended for a predominantly public purpose.

The arbitration agreement at issue does not simply require that employees arbitrate their PAGA claims, it requires that its employees prospectively waive the right to pursue such claims at all. The Court of Appeal's decision blurs the significant distinction between whether a PAGA claim can be arbitrated, and whether a PAGA claim can be waived prospectively such that it may not be brought in any forum.

The Court of Appeal premised its holding on its own depublished decision in *Iskanian*. The Court of Appeal noted that the *Iskanian* decision was founded on the holding in *AT&T Mobility v. Concepcion (2011) 131 S.Ct 1740.* The decision below relied heavily **[*9]** on *Concepcion* without grappling with the inherent disparities in the facts between that case and Petitioner's. In *Concepcion*, the Court found that the ″aggrieved customers would be 'essentially guaranteed' to be made whole,″ a finding that demonstrated that the plaintiff's statutory rights would be vindicated. (131 S.Ct. at 1753.) Nothing in *Concepcion* suggests that California cannot prevent the waiver of the right to bring PAGA representative claims in some forum. *Concepcion* held that a state may not adopt a rule that forecloses individual arbitration when class proceedings are unnecessary to vindicate substantive rights, not that arbitration agreements may waive the right to bring particular claims if state law otherwise forbids waiver.

Here, the Court of Appeal ignored the fact that, according to the terms of the arbitration agreement, Ybarra would be foreclosed from bringing a PAGA action under any circumstances and in any forum. In fact, the Court of Appeal's analysis appears to begin and end with the premise that the FAA's purpose is to ensure the enforcement of arbitration agreements ″according to their terms,″ regardless of whether they are unenforceable **[*10]** for reasons generally applicable to all contracts. (Slip Op. at 5 [quoting *Concepcion*, at 1745-46].) But the Supreme Court has never sponsored a reading of the FAA that would enforce an arbitration agreement according to its terms *regardless* of whether enforcement would eviscerate a party's substantive rights, as the Court of Appeal did here.

In fact, the FAA operates to make ″arbitration agreements as enforceable as other agreements, *but not more so.*″ *EEOC v. Waffle House (2002) 534 U.S. 279, 294.* However, the rule adopted by the decision below actually elevates arbitration agreements *over* other contracts. Under the Court of Appeal's reading, substantive statutory rights that cannot be waived in an ordinary agreement due to generally applicable contract defenses *can be* waived in an arbitration agreement. This reasoning takes the FAA too far. Instead of placing arbitration agreements ″on an equal footing with other contracts″ (*Conception*, at 1745) the Court of Appeal's decision places arbitration agreements on a pedestal,

shielded from traditional contract defenses. (*Compare*9 U.S.C. § 2 [arbitration agreements are enforceable **[*11]** ″save upon such grounds as exist at law or in equity for the revocation of any contract.″])

The Court of Appeal's analysis of PAGA further illustrates its erroneous application of the FAA to state law. The Court of Appeal's assertion that Petitioner could pursue an individual PAGA claim or an individual wage claim under the Labor Code undermines the very purpose of PAGA and this Court's prior decisions. A PAGA claim is by its own terms an inherently representative action, and any reading to the contrary is orthogonal to the undisturbed holding of *Brown v. Ralph's Grocery Co*. (″*Brown*″) and its lineage. (*Brown v. Ralph's Grocery Co. (2011) 197 Cal.App.4th 489,* rev. den., *2011 Cal.Lexis 10809* (Oct. 19, 2011), cert. den., *2012 U.S.Lexis 2934* (April 16, 2012) (No. 11-880); *Franco v. Athens Disposal, Inc. (2009) 171 Cal.App.4th 1277, 1300-03* (″*Franco*″).) In *Brown,* the court invalidated a representative action waiver because enforcing it would have eviscerated a substantive right and forced a party to arbitrate her ″individual PAGA claim″-the same result as here and one that is wholly at odds with the PAGA statute. **[*12]** *Brown* correctly emphasized that PAGA was enacted as a ″statutory representative action″ designed to enforce the Labor Code through private attorneys general. By holding that PAGA claims can be individually arbitrated, the Court of Appeal's decision directly conflicts with the PAGA statute, the intent of Congress, and the holdings of its sister courts. (*See Reyes v. Macy's, Inc. (2011) 202 Cal. App. 4th 1119;Brown*; *Franco*.)

Additionally, the Court of Appeal's decision fails to address the fact that, in a PAGA action, the real party in interest is the state of California. Under the Supreme Court's decision in *Waffle House*, the state cannot waive an enforcement right based on a private contract to which it was not a party. (*See generally Waffle House, 534 U.S. 279.)* In a PAGA action, the aggrieved employee proceeds as a proxy of the state, collects penalties for the state, and the state is bound by a judgment in the action. (*Arias v. Super. Ct. (2009) 46 Cal.4th 969, 980.)* It is precisely because of the inherently public nature of PAGA claims that the *Brown* court refused to force a PAGA claim to arbitration because **[*13]** no arbitration agreement existed between Defendant and the State of California. Because the state is the true holder of the claim, it cannot be forced to waive its claims by proxy.

The Court of Appeal's findings deviate entirely from prevailing preemption principles. PAGA is an arbitration-neutral exercise of the state's police power to regulate employer-employee relationships. In order for this statute to be preempted, there must be a ″clear and manifest intent of Congress″ to occupy a field traditionally reserved for the states. (*Wyeth v. Levine (2009) 555 U.S. 555, 565.)* The Court of Appeal's analysis provides no evidence, explicit or implicit, that Congress intended to preempt the state's police power in this field. By enforcing a waiver that effectively exempts the employer from PAGA liability, the Court of Appeal has authorized the nullification of a state law enforcement action without identifying any evidence that Congress intended this result.

Further, the FAA does not require enforcement of agreements waiving otherwise unwaivable claims. Under binding U.S. Supreme Court authority, as well as that of California's state courts, California's rule barring the **[*14]** outright waiver of PAGA claims does not interfere with the objectives of the FAA and thus is not preempted by the FAA. (Concepcion, 131 S.Ct. at 1747.) Indeed, the savings clause of the FAA specifically contemplates that even arbitration agreements will not be enforced if they violate a state law applicable to all contracts, such as *California Civil Code Section 3513*. Here, because AIMCO's ″arbitration″ agreement contractually forecloses all representative claims under federal and state law, including PAGA claims in any forum, it is unenforceable *even by the terms of the FAA*.

None of the United States Supreme Court cases on which the Court of Appeals relies support enforcement of arbitration agreements where they *eliminate* statutory rights. On the contrary, binding Supreme Court precedent holds that a complete prospective waiver of statutory remedies is not permissible, regardless of whether such a waiver is part of an arbitration agreement: *American Express Co. v. Italian Colors Restaurant, (2013) 133 S.Ct. 2304* (″*Italian Colors*″).

The Court of Appeal's decision upends longstanding California arbitration law and **[*15]** ″overrules″ a lineage of California precedent prohibiting the wholesale waiver of statutory claims that are for the public benefit. However, such a sea change in California employment and arbitration law has been rejected and foiled by this Court when it depublished *Iskanian* and set it for review, and is further undermined by subsequent case law. In fact, as of this court's decision, *Iskanian* is the only decision to comport with the decision below and was decided by this very same Division, before it was (correctly) depublished by this Court. The inconsistencies among the courts of appeal that will result from this decision require this Court's guidance. The decision below will only serve to prevent aggrieved

employees from exercising their rights under PAGA and will allow California employers to exempt themselves from civil liability and court scrutiny by using arbitration agreements to shield their unlawful employment practices from being addressed in any forum at all. If this decision stands, California employers will have at their hands the ability to demand arbitration without subjecting themselves to liability for violations of California law. For these reasons, plenary **[*16]** review under Rule of Court 8.500(b)(1) is urgently needed to resolve these conflicts and settle vital questions of law.

ARGUMENT

I. THE COURT OF APPEAL ERRED BY ALLOWING THE PROSPECTIVE WAIVER OF STATUTORY RIGHTS AND COMPELLING PAGA CLAIMS TO INDIVIDUAL ARBITRATION

A. The Court of Appeal's Ruling Relied on Case Law Which Is No Longer Good Law

The Court of Appeal's decision relied primarily on *Iskanian* to diverge from the existing employment and arbitration law upheld in such cases as *Brown. Iskanian*, however, is currently pending review in this Court and has been depublished. *Iskanian* is no longer competent authority, and as such should be provided no weight, particularly in light of the fact that *Brown*, the case directly conflicting with the holding in *Iskanian*, remains good law despite multiple and repeated challenges to its authority -challenges that culminated with the U.S. Supreme Court denying certiorari. That *Iskanian* was granted review by this Court and *Brown* was left undisturbed demonstrates that the Court of Appeal's attempt to upend longstanding California case law does not reflect the type of jurisprudential sea change **[*17]** supported by this Court.

B. The Court Of Appeal's Ruling Directly Contravenes The Rule That A Party Cannot Prospectively Waive Its Right to Arbitrate PAGA Claims

The Court of Appeal's decision directly contravenes the rule that a party cannot prospectively waive her rights to arbitrate PAGA claims. In enforcing the arbitration waiver at issue, the decision below directly rejects the holdings of *Brown v. Ralph's Grocery Co*. and its supporting case law. The court below departed from *Brown* and in so doing reached a holding that this Court and the U.S. Supreme Court both rejected when presented with this very issue: that the Federal Arbitration Act preempts PAGA's representative right of action. (*See* Slip Op. at 7-8.)

Before *Brown* was decided, the court in *Franco v. Athens Disposal, Incd*. (2009) 171 Cal.App.3th 1277 (″Franco″) refused to enforce a representative action waiver that would prevent an employee ″from seeking penalties on behalf of current and former employees, that is, from performing the core function of a private attorney general.″ (171 Cal.App.4th at 1303.) Although the *Brown* court declined to hold that PAGA claims are *per* **[*18]** *se* inarbitrable, *Brown* found that a PAGA action cannot be prospectively waived by an arbitration agreement. (Brown, 197 Cal.App.4th at 503) Based in part on *Franco's* reasoning, the *Brown* court rejected the waiver at issue, distinguishing *Concepcion* because PAGA is a public law enforcement action that must be brought on behalf of the public. The *Brown* holding has been tested through post-decision petitions to the Court of Appeals, the California Supreme Court, and the U.S. Supreme Court-and has remained undisturbed.

Although the decision below relied heavily on *Concepcion* to enforce the prospective waiver of statutory rights, nothing in *Concepcion* indicates that the Court intended to overturn decades of FAA jurisprudence, including the seminal *Mitsubishi* decision (*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth (1985) 473 U.S. 614.)Mitsubishi* was the first Supreme Court decision to hold that the FAA can compel statutory claims to arbitration. However, central to the *Mitsubishi* holding is the principle that, ″by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded **[*19]** by statute; it only submits to their resolution in an arbitral...forum.″ (473 U.S. at 628.)*Mitsubishi* thus judiciously recognized the appropriately narrow scope of the FAA, ensuring a ″standard by which arbitration agreements and practices are to be measured, and [to] disallow[] forms of arbitration that in fact compel claimants to forfeit certain statutory rights.″ (*Armendariz v. Foundation Health Psychare Services, Inc. (2000) 24 Cal.4th 83, 99-100.)* The Court of Appeal fails to address *Mitsubishi's* holding, and instead divorces *Concepcion* from its facts to support its decision. *Mitsubishi's* explicit protection of substantive rights undergirds key decisions of this Court, such as *Armendariz*.

Under *Armendariz*, parties may not enter into a private agreement waiving the right to bring a claim under PAGA in any forum. *Cal. Civ. Code § 3513*; Armendariz, 24 Cal.4th at 99-101. Moreover, *Mitsubishi* requires that *Concepcion*

be read to allow arbitration agreements only where statutory rights will be protected. In fact, the Supreme Court has gone so far as to ″condemn [] … as against **[*20]** public policy″ an arbitration agreement that operated ″as a prospective waiver of a party's right to pursue statutory remedies.″ (Mitsubishi, 473 U.S. at 637, fn.19;*also see Italian Colors* at 2310-11 [″As we have described, the exception finds its origin in the desire to prevent 'prospective waiver of a party's right to pursue statutory remedies.' ***That would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights***. And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable.″] (emphasis added).)

Yet the Court of Appeal failed to grapple with *Mitsubishi, Brown*, or any of the other critical Supreme Court cases concerning the vindication of rights. In fact, the one case the Court of Appeal cites to justify its contention that the enforceability of arbitration agreements cannot be conditioned on the availability of class-wide procedures, *Concepcion*, is premised entirely on the fact that substantive statutory rights remained available despite the arbitration agreement. *Concepcion* is thus inapplicable because **[*21]** there was no prospective waiver of representative actions at issue.

Furthermore, AIMCO's representative action waiver also necessarily acts to limit the statutory remedy available to aggrieved employees in direct conflict with *Armendariz's* mandate ″that an arbitration agreement may not limit statutorily imposed penalties.″ (24 Cal.4th at 103.) Under PAGA, an ″aggrieved employee may recover civil penalties ...filed on behalf of himself or herself and other current and former employees against whom one or more of the alleged violations was committed.″ (*Labor Code § 2699(g)(1)*.) The civil penalties to which a PAGA litigant is entitled to recover are measured in the aggregate by the violations committed against *all* aggrieved employees. The Court of Appeal's decision in effect caps a statutory remedy in violation of *Armendariz*.

The multiple conflicts with existing case law created by the Court of Appeal's decision merits plenary review.

C. The Court of Appeal's Ruling Disregards The Rule That A PAGA Claim Is An Inherently Representative Action

In order to uphold AIMCO's representative action waiver, the Court of Appeal necessarily **[*22]** decided that a PAGA claim could exist as an individual claim. On this point, the First Appellate District in *Reyes* concluded that a plaintiff asserting a PAGA claim may not bring the claim simply on his or her own behalf but *is required to* bring the claim as a representative action including ″other current or former employees.″ (*Reyes v. Macy's Inc. (2012) 202 Cal.App.4th 1119, 1123* [citing *Machado v. M.A:T..& Sons Landscape, Inc. (E.D.Cal. July 23, 2009) 2009 U.S.Dist.Lexis 63414,* *6].) ″[B]ecause the PAGA claim is not an individual claim, [the] individual claims [cannot] be submitted to arbitration.″ (*Id*. at 1124.)

Reyes relied on *Machado's* detailed analysis of the statutory language to arrive at its holding:

> The word ″and″ commonly connotes conjunction and is used ″as a function word to indicate connection or addition.″ Merriam-Webster's Collegiate Dictionary 43 (10th ed. 2002). Giving effect to the ″common Acceptation″ of the word ″and,″ the statute's language indicates that a PAGA claim must be **brought on behalf of other employees.**″

(2009 U.S.Dist.Lexis 63414 at **6-7.) A contrary **[*23]** reading directly contravenes the ordinary meaning of the language and the Court of Appeal has not presented any evidence whatsoever that the Legislature intended for the word ″and″ to assume an uncommon meaning. Indeed, the Legislature could have explicitly allowed ″individual″ PAGA claims had this been its intention-but it did not. The Court of Appeal's mere rejection of *Reyes* in order to find that Ybarra could pursue individual PAGA claims contrary to otherwise established law, does not sufficiently address this and is an attempt to simply do away with legal authority that does not suit its ends.

The principal purpose of the PAGA is the public purpose of deterrence. It is beyond question that when the LWDA is acting upon alleged violations it is acting on behalf of the public, and when an aggrieved employee pursues a PAGA claim, she does so on behalf of the LWDA. It is this public purpose of the law that suggests that it is necessarily a representative action. A number of district courts support *Reyes'* finding and hold that aggrieved employees' PAGA

claims are ″common and undivided″ because in a PAGA action, ″aggrieved employees are not united in a representative suit merely **[*24]** for convenience as Section 2699 requires that PAGA actions be brought in a representative form on behalf of all aggrieved employees.″ *Thomas v. Aetna Health of Calif (ED.Cal. June 2, 2011) 2011 U.S.Dist.Lexis 59377,* *50; *see also Urbino v. Orkin Services of California, Inc. (C.D.Cal. Oct. 5, 2011), 2011 U.S.Dist.Lexis 114746,* at *27-29.

The representative action mechanism of PAGA is critical to California's objective in creating this right of action to enforce labor laws, and without this mechanism the purpose of PAGA ″would be nullified.″ (Brown, 197 Cal.App.4th at 502.) However, that is precisely the result of the Court of Appeal's decision below.

The Court of Appeal must abide by the longstanding edict that a court ″must take a statute as they find it″ and exercise judicial restraint in their interpretation. (*Sierra Club v. Department of Parks & Recreation (2012) 202 Cal.App.4th 735, 744.)* In opting to reject the interpretation of PAGA set forth by its very terms as well as case law, this decision will cause substantial and unnecessary confusion regarding whether PAGA is inherently representative or subject to **[*25]** individualized proceedings. This Court's guidance is needed to settle the interpretative disparities raised by the Court of Appeal's decision.

D. The Court Of Appeal's Ruling Ignores The Significant Substantive Rights Afforded By PAGA

The Court of Appeal apparently believes that an aggrieved employee may pursue an individual PAGA claim, and therefore the arbitration agreement is enforceable. However, the Court of Appeal misses the crux of the issue. It is not that one may bring an individual PAGA claim (though as demonstrated herein, the law enforcement purposes of PAGA does not take place on an individual basis, and both the precedential authority and the language of the PAGA dictate otherwise); but, rather, that PAGA is inherently a representative action which by the terms of the waiver may not be brought in any forum. PAGA is an enforcement mechanism designed to achieve compliance with labor laws and to deter and penalize employers. A PAGA claim serves a purpose very different from that of individual claims or even class action claims generally brought under the state's labor laws. (Arias, 46 Cal.4th at 980). Moreover, PAGA provides an additional financial **[*26]** benefit to aggrieved employees-the recovery of a bounty on civil penalties that would otherwise be unavailable. *Lab. Code, § 2699*, subds. (f), (i). In fact, PAGA itself provides that employees may ″pursue or recover other remedies available under state or federal law, either separately or concurrently with [a PAGA action].″ *Lab. Code § 2699(g)(1)*. If PAGA did not confer any new rights or entitlements, or did not further some purpose other than to remedy a single employee's harm, bringing both a PAGA claim and an ordinary claim under the Labor Code would not make sense. While PAGA may not create new substantive duties upon which additional violations of labor laws can be found, PAGA does confer on aggrieved employees a substantive right to pursue and recover statutory civil remedies-a right which, absent PAGA, would be available only to the LWDA.

E. The Court of Appeal's Ruling Forces The Non-Party, The State of California, To Waive Its PAGA Rights In Direct Contravention of Binding Supreme Court Precedent

It is well-settled that in a PAGA action, ″the employee plaintiff represents the same legal right and interest as state labor **[*27]** law enforcement agencies.″ (Arias, 46 Cal.4th at 986.) A PAGA litigant acts as an agent or proxy for the state's labor law enforcement agencies. (*Ibid.*) A PAGA claim may only proceed once the LWDA has declined to pursue the claim. By allowing an aggrieved employee to bring a claim, the PAGA action substitutes for an action brought by the government itself. (*Ibid.*) The State of California is therefore the real party in interest, and is the entity which recovers the lion's share of penalties on a judgment.

The Court of Appeal's decision forces the state to forfeit its right to pursue a proxy representative action in direct contravention of the Supreme Court's ruling in Waffle House. (534 U.S. at 294.) In *Waffle House*, the Supreme Court held that an arbitration agreement cannot act as a binding waiver on a governmental enforcement agency situated as the State of California is here. (534 U.S. at 294.) As in *Waffle House*, the decision below ″turns what is effectively a forum selection clause into a waiver of a nonparty's statutory remedies.″ (*Id. at 295.)* The Supreme Court went so far as to eliminate the possibility **[*28]** that PAGA could be subject to an agreement such as the one at issue here, stating that the ″proarbitration policy goals of the FAA do not require the agency to relinquish its statutory authority if it has not agreed to do so.″ (*Id. at 294.)* Here, the State of California was not a party to any private agreement which would waive its statutory authority to prosecute this action, either on its own or by proxy. The Court of Appeal's

decision rejects the Supreme Court's controlling precedent in *Waffle House*, necessitating plenary review by this Court.

F. The Court of Appeal's Ruling Ignores The Strong Presumption Against Implied Preemption Of A State's Exercise of Its Police Powers

States may regulate exclusively those areas where they exercise their police power, absent *clear* Congressional intent to occupy those fields. In the context of employment regulation, ″states possess broad authority under their police powers to regulate the employment relationship to protect workers within the State...minimum wage and other wage laws [are] examples.″ (*Sullivan v. Oracle Corp. (2011) 51 Cal.4th 1191, 1198.)* PAGA is one such statute ″validly adopted **[*29]** under the police power.″ (*Home Depot U.S.A., Inc. v. Super. Ct. (2010) 191 Cal.App.4th 210, 225.)*

The ability of a federal statute to preempt a state's exercise of its police power is predicated on a clear federal intent to do so. Where a statute implicates the state's police power, courts assume that ″the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.″ (*Wyeth v. Levine (2009) 555 U.S. 555, 565.)*

In fact, the U.S Supreme Court has adopted a strong presumption against implied preemption even in those fields traditionally occupied by federal law. This Court has followed the U.S. Supreme Court's lead to consistently require a showing of ″clear and manifest purpose of Congress″ to preempt an exercise of the state's police powers. (*See, e.g., Farm Raised Salmon Cases (2008) 42 Cal.4th 1077, 1088).*

There is no indication that Congress intended to occupy the field of employment regulation and displace PAGA entirely. Congress enacted the FAA with the intent to ensure that arbitration agreements would be considered as enforceable as other contracts, **[*30]** not more so. (*Southland Corp. v. Keating (1984) 465 U.S. 1, 16 fn.11* [quoting H.R.Rep. No. 96, 68th Cong., 1st Sess., 1 (1924)].) PAGA was enacted to incentivize private litigants to more effectively enforce labor laws as proxies of the State of California. The Court of Appeal misconstrues the difference between the arbitrability of PAGA, which Petitioner does not dispute, and the waiver of arbitration at issue here. The purpose of PAGA aligns directly with the federal policy favoring arbitral dispute resolution under the FAA.

Because neither the FAA's text nor its underlying policies require enforcement of agreements waiving particular claims - as opposed to agreements requiring arbitration of claims - state laws prohibiting waiver of claims that serve public purposes do not conflict with the FAA or obstruct achievement of its purposes, and are therefore not preempted.

Here, AIMCO's ″arbitration″ agreement does not require Ybarra to assert her rights under PAGA in arbitration. Rather, by prospectively waiving them entirely, it seeks to do exactly that which the U.S. Supreme Court has expressly prohibited. (See Italian Colors, 133 S.Ct. at 2310-11). **[*31]** Indeed, if the Court of Appeal's preemption argument were accepted, AIMCO would be permitted to extract similar agreements from all its employees, as it has done, and immunize itself completely from liability for penalties and fees under PAGA. Allowing employers to opt out of liability for PAGA penalties would effectively overturn California's legislative decision that it is ″in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations.″ (Arias, 46 Cal.4th at 980.) The FAA's requirement that states enforce agreements to resolve disputes by arbitration does not allow a party to excuse itself from liability by *forbidding* its employees to arbitrate *or* litigate claims.

If the Court of Appeal's decision stands, the result would be to disrupt federal preemption law. The consequence of the decision would be to lower the standard for demonstrating Congressional intent to enter a field traditionally occupied by the State. Implied preemption of this sort could gravely cripple the California Legislature's ability to enact arbitration-neutral statutes to enforce its own labor laws and would **[*32]** undermine the ability to enforce legislation in any of those fields it traditionally occupies. Not only could the decision below knell the end of PAGA as it was originally designed, but it could have alarming effects on the State's police power and federal preemption law.

II. THE COURT OF APPEAL ERRED BY INGORING THE DOCTRINE PROTECTING THE VINDICATION OF STATUTORY RIGHTS WHICH IS INTEGRAL TO ENFORCEMENT OF THE FAA

The Court of Appeal's reasoning begins and ends with the premise that the FAA's purpose is to ensure the enforcement of arbitration agreements ″according to their terms.″ (Slip Op. at 5 [quoting *Concepcion*, at 1745-46].) But the Supreme Court has never sponsored a reading of the FAA that would enforce an arbitration agreement according to its terms *regardless* of whether enforcement would eviscerate a party's substantive rights, as the Court of Appeal did here. Indeed, the Supreme Court established in *Mitsubishi* that statutory claims are arbitrable *only* ″so long as the prospective litigant effectively may vindicate its statutory right of action in the arbitral forum.″ (*Mitsubishi*, 473 U.S.at 637.) This seminal doctrine remains the ″standard by **[*33]** which arbitration agreements and practices are to be measured.″ (Armendariz, 24 Cal.4th at 99-100.)

The Court in *Italian Colors* recently reaffirmed this seemingly commonsense rule. Justice Scalia, writing for the majority, confirmed that the complete prospective waiver of statutory remedies is not permissible, regardless of whether such a waiver is part of an arbitration agreement:

> As we have described, the exception finds its origin in the desire to prevent 'prospective waiver of a party's right to pursue statutory remedies.' That would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable.

(*Italian Colors* at 2310-11 (emphasis added) [quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637, n. 19 (1985)]).* Indeed, reconciling the FAA with prospective waivers of statutory remedies, as in the instant case, is simple, because the FAA does not apply at all. The FAA applies only to agreements to arbitrate **[*34]** claims - not agreements to prospectively waive claims altogether. Specifically, Section 2 of the 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.

(*9 U.S.C. § 2*).

Nothing in the language of the FAA suggests that an agreement *to settle by* ***neither*** *litigation nor arbitration*, or an agreement *to* ***not*** *submit to arbitration or any judicial forum*, is enforceable. Indeed, such agreements are not enforceable. If there was any doubt as to this commonsense conclusion, Justice Scalia removed that doubt with a single sentence in *Italian Colors*.

The ″vindication of rights″ doctrine is fundamental to the FAA because the FAA is itself concerned **[*35]** with preserving a party's substantive rights. That much is apparent in the FAA's savings clause. The savings clause provides that an arbitration agreement, like any other ordinary contract, is enforceable subject to the general contract defenses protecting the rights of parties. (*9 U.S.C. § 2*; Concepcion, 131 S.Ct. at 1746.) Moreover, the Supreme Court has continued to uphold the vindication of rights doctrine in its application of the FAA to an array of arbitration agreements. (*See Preston v. Ferrer (2008) 552 U.S. 346;see also* Gilmer, 500 U.S. 20, 28; Randolph, 531 U.S. at 91-92 [holding that if the plaintiff were forced to bear prohibitive arbitration costs the arbitration agreement would be set aside.]; see *Italian Colors* at 2310-11). Quite simply, the FAA promotes enforcement of agreements to arbitrate disputes rather than litigate them, not agreements to neither litigate nor arbitrate.

III. THE COURT OF APPEAL ERRED IN HOLDING THAT THE FAA WAS INTENDED TO, AND MAY BE USED TO, ELIMINATE UNWAIVABLE STATUTORY RIGHTS

The FAA was promulgated to incentivize arbitration; it was **[*36]** not intended to eviscerate a petitioner's unwaivable statutory rights. Nothing in the FAA's language can be construed to demand the result that would be achieved by the Court of Appeal's decision.

The Court of Appeal relies heavily on *Concepcion's* interpretation of the FAA. *Concepcion* does not stand for the proposition that all class-action waivers, let alone PAGA waivers, be deemed *per se* enforceable. Indeed, as

demonstrated herein, this is not how *Concepcion* has been since interpreted. Although *Concepcion* retains its authority where applicable, there is no indication in *Concepcion* the Supreme Court intended to overturn *Mitsubishi* and thus *Mitsubishi* remains binding authority. Indeed, while portions of the U.S. Supreme Court's opinion in *Italian Colors* indicates that a class action waiver may be enforced even if certain claims become economically impractical as a result, the U.S. Supreme Court was careful in that case to reaffirm what was expressed in *Mitsubishi* - that the wholesale prospective waiver of a statutory claim, as AIMCO seeks here, is not enforceable. (*Italian Colors* at 2310-11.)

Mitsubishi continues to empower courts to **[*37]** invalidate an arbitration clause if enforcement would extinguish unwaivable statutory rights. (*Mitsubishi* at 1319.) The result of *Mitsubishi* is entirely consistent with *Concepcion*, which held that because the individual arbitration agreement did not eliminate the plaintiff's statutory rights the arbitration agreement was enforceable. Notably, the arbitration agreement at issue in *Concepcion* was exceedingly generous, providing double attorneys' fees and a $ 7,500 premium if the award exceeded AT&T's ultimate offer. [1]*Concepcion* did not grapple with the vindication of rights doctrine as it expressly found that the plaintiffs' rights would be safeguarded by the arbitration agreement. (*Concepcion*, at 1745, 1753.) In addition, *Concepcion* did not involve a statute such as PAGA which is inherently representative in nature. Because defendant's ″terms...ensured [plaintiffs] could bring their claim… on an individual basis,″ the agreement was upheld as enforceable. (*Sutherland v. Ernst & Young* (S.D.N.Y. Jan 17, 2012, no. 10 Civ. 3332 (KMW)) *2012 U.S.Dist.Lexis 5024,* at *21.) *Concepcion* must be read to apply only where upholding a class waiver **[*38]** would *not* forfeit substantive rights and would not interfere with a statutory scheme premised on representative action.

The Court of Appeal stated that although PAGA is purposed to serve the public and the FAA would necessarily undercut its application, the *Concepcion* court had spoken on the issue. But the Court of Appeal divorced *Concepcion* from the key facts in that case to reach its conclusion in the decision below. Here, under AIMCO's interpretation **[*39]** of its arbitration agreement, Petitioner *would* forfeit statutory rights in arbitration, as she would not be permitted to pursue a PAGA claim at all. The arbitration agreement eradicates Petitioner's ability to bring a representative action in any forum.

The statutory rights forfeited pursuant to the PAGA waiver are many. First, as discussed above, a PAGA plaintiff is always a representative or ″proxy agent″ of the State, and the State is entitled to enforce the law as to all of its citizens. (*See* Arias, 46 Cal.4th at 986;*see also Franco*, 149 Cal.Rptr.3d at 538, fn.2). Second, a PAGA plaintiff cannot seek recovery solely for herself. The statute gives 75% of penalties recovered in any PAGA action to the State. (*Lab. Code, § 2699(i)*.) PAGA also requires that a plaintiff seek recovery ″on behalf of himself or herself and other current or former employees.″ (*Cal. Lab. Code § 2699(a)*.) Courts have held that PAGA's plain language does not permit a plaintiff to seek penalties only for himself when other employees are similarly situated (just as the LWDA would not bring an action solely to benefit a single **[*40]** employee when others suffered identical wrongs). (*See, e.g.* Reyes, 202 Cal.App.4th at 1123.) Third, allowing Ybarra to bring a truncated PAGA action seeking to recover only for herself while enforcing the representative-action ban to bar the rest of the relief she seeks would give effect to a waiver of much of what PAGA authorizes her to pursue: penalties on behalf of the State and other employees. Such a waiver would significantly impair PAGA's public purpose: ″maximum compliance with state labor laws,″ a goal that the Legislature believed necessitated a statute permitting individuals to bring suit not merely on their own behalf, but as ″private attorneys general″ to supplement limited state enforcement. (Arias, 46 Cal.4th at 980.) Thus, even if Ybarra could pursue a purely individual PAGA claim under the arbitration agreement, enforcing the representative-action ban would still constitute a prohibited waiver of public rights.

Though Ybarra is not asserting any claims other than her PAGA claim here, it is important to note that the representative action waiver in AIMCO's ″arbitration″ agreement purports to waive much more than just PAGA claims. Claims **[*41]** under the federal False Claims Act (*31 U.S.C. § 3729*) and the California False Claims Act (*Cal. Govt. Code § 12650*) are also representative in nature. (*See Cunningham v. Leslie's Poolmart, Inc., 2013 WL 3233211* at *7-8)[PAGA claims are qui tam actions like claims under the False Claims Act.] Under the terms of AIMCO's ″arbitration″ agreement, Ybarra would not be permitted to act as a relator in an action to recover money fraudulently

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[1] This analysis has been applied in other circuit courts in the context of state statutory rights. For instance, one circuit court held that a party may ″resist[] arbitration [if] the terms of an arbitration agreement interfere with the effective vindication of statutory rights″ conferred by a state statute. (Booker v. Robert Half Int'l, Inc. (D.C.Cir. 2005) 413 F.3d 77, 81 [ensuring the vindication of rights under D.C. Code § 2-1401 *et seq*.]; see also Anderson v. Comcast Corp. (1st Cir. 2007) 500 F.3d 66, 71.)

obtained by AIMCO from more than one governmental agency or political subdivision. Thus, if AIMCO's representative action waiver were enforceable, it would be permitted to silence the most likely whistleblowers by means of its arbitration agreement. This result cannot possibly comply with the spirit or the substance of the law.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant plenary review of the decision of Division Two, Second Appellate District, of the Court of Appeal to uphold the representative action waiver. The issues raised by the Court of Appeal's decision are likely to be resolved in connection with this Court's review **[*42]** of that same Court of Appeal's decision in *Iskanian v. CLS Transportation of Los Angeles LLC*, *(2012) 142 Cal.Rptr.3d 372.* Therefore, at a minimum, this Court should at least grant review and hold this matter pending the resolution of *Iskanian*, as this Court did with *Brown v. Superior Court, (2013) 216 Cal. App. 4th 1302* (depublished).

Respectfully submitted,

LAWYERS *for* JUSTICE, PC

By: /s/ Edwin Aiwazian
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REYNA MARIE YBARRA

DATED: April 21, 2014

CERTIFICATE OF WORD COUNT

Counsel of Record hereby certifies that pursuant to *Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court*, the enclosed brief of Plaintiff-Petitioner Reyna Marie Ybarra is produced using 13-point Roman type including footnotes and contains approximately 7,450 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: April 21, 2013

By: /s/ Edwin Aiwazian
Edwin Aiwazian

Attorneys for Plaintiff-Petitioner
REYNA MARIE YBARRA **[*43]**

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 410 Arden Avenue, Suite 203, Glendale, California 91203.

On April 21, 2014, I served the foregoing document(s) described as follows: **PETITION FOR REVIEW** on the interested parties in this action as follows:

California Supreme Court

[X] BY ELECTRONIC SUBMISSION

Appellate Coordinator
Office of the Attorney General
Consumer Law Section
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[X] BY PERSONAL DELIVERY

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Los Angeles Superior Court
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on April 21, 2014, at Glendale, California.

/s/ Suzana Solis
Suzana Solis

[SEE EXHIBIT A IN ORIGINAL]