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CLASS ACTIONS: 2021 UPDATE

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INTRODUCTION

The last year was an active one for class, mass, and representative litigation, portending further developments in 2022. This article covers some of these recent developments, including questions addressing arbitration preemption, standing, and settlement fairness.[1]

ARBITRATION: AB 51, SB 707, AND PAGA DO NOT CONFLICT WITH THE FAA.

Arbitration is a quickly evolving area of law that has critically impacted class, collective, and mass litigation since the United States Supreme Court started taking an expansive view of the preemptive scope of the Federal Arbitration Act (FAA) with respect to consumer and employment contracts.[2] The pandemic years have been no different.[3] In 2019, the state legislature passed two laws—AB 51 and SB 707—that curtail the circumstances under which arbitration agreements may be entered into and enforced. These laws have mostly survived legal challenges that they conflict with the purposes of the FAA. The year 2021 ended with the United States Supreme Court granting certiorari to consider whether an individual's right to bring representative actions in court, including under the Labor Code Private Attorneys General Act of 2004 (PAGA), conflicts with the FAA. Expect further developments in this important area of law.

AB 51 & *CHAMBER OF COMMERCE V. BONTA*

In late-2019, Governor Gavin Newsom signed into law Assembly Bill 51 (AB 51),[4] codified at Labor Code section 432.6 and Government Code section 12953. The law prohibits employers from requiring workers to sign waivers pertaining to rights under the Fair Employment and Housing Act (FEHA) or the Labor Code, including arbitration agreements, "as a condition of employment, continued employment, or the receipt of any employment-related benefit."[5] Labor Code section 432.6 also prohibits employer retaliation for an applicant's or employee's refusal to enter into such an agreement.[6] Any agreement requiring the employee to "opt out of a waiver or take any affirmative action" in order to reserve their FEHA or Labor Code rights is considered to place an impermissible condition on employment.[7] To enforce their rights to employment, continued employment, or non-

retaliation after refusing to sign a waiver, a worker may seek injunctive relief and other remedies, as well as attorneys' fees.[8] However, once a worker signs an arbitration agreement, the arbitration provision may only be invalidated if it is otherwise unenforceable under the FAA.[9] The law applies only to contracts for employment entered into, modified, or extended on or after January 1, 2020,[10] and it does not apply to post-dispute settlement or negotiated severance agreements.[11]

In advance of AB 51's January 1, 2020 effective date, the Chamber of Commerce and other business interests sought declaratory relief and an injunction to stop government enforcement of the law. The U.S. District Court of the Eastern District of California issued a preliminary injunction, enjoining the law to the extent that it touches on issues of arbitration. The court found a likelihood of success on the merits that the FAA preempted AB 51 because the latter bill placed arbitration on unequal footing with other laws and interfered with the purpose and objectives of the FAA.[12] The government appealed.

In *Chamber of Commerce of United States v. Bonta*,[13] the Ninth Circuit reversed, in part, the lower court's preliminary injunction, thereby partially reviving AB 51. In the 2-1 decision, the majority held that the FAA does not preempt Labor Code section 432.6 because the two statutes do not conflict.[14] Section 432.6 regulates contract formation, whereas the FAA ensures the enforcement of already-executed arbitration agreements. The court reasoned that Section 432.6 does not make enforcement of the FAA impossible because it does not discriminate on its face against the enforcement of arbitration agreements and creates no contract defense allowing the invalidation or nonenforcement of an arbitration agreement.[15] Further, the court reasoned that Section 432.6 does not stand as an indirect obstacle to accomplishing the FAA's purposes and objectives.[16]

The Ninth Circuit affirmed the district court's ruling that the FAA preempts the AB 51 provisions that permit civil and criminal sanctions on employers as applied to executed arbitration agreements.[17]

The appellate court reasoned that such penalties necessarily punish employers for entering into arbitration agreements, thereby creating impermissible obstacles to the purposes and objectives of the FAA.[18]

Judge Sandra Segal Ikuta's dissent reads like a clarion call to those who might provide future review:

> The majority holds that if the employer successfully "forced" employees "into arbitration against their will," . . . the employer is safe, but if the employer's efforts fail, the employer is a criminal. . . . This tortuous ruling is analogous to holding that a statute can make it unlawful for a dealer to attempt to sell illegal drugs, but if the dealer succeeds in completing the drug transaction, the dealer cannot be prosecuted."[19]

In October 2021, the Chamber petitioned for reconsideration en banc by the Ninth Circuit[20] and may eventually petition for certiorari.

For now, the Ninth Circuit's decision is the law of the land. While the Ninth Circuit vacated the lower court's injunction,[21] the appellate court's mandate has not yet issued due to the Chamber's request for en banc review, so for now, the district court's injunction against government enforcement remains in place.[22]

Any California employer that still utilizes arbitration agreements should carefully evaluate whether its practice for entering into such agreements complies with Labor Code section 432.6.

The language of the district court's injunction was addressed to government officials.[23] While reasonable minds can disagree, bold private litigants may interpret the injunction as inapplicable to non-government actors, and seek to enforce their rights under the law without waiting for a mandate to issue.

SB 707 & *TEQUILLA TOLBERT V. SISYPHIAN, LLC*

In 2019, Governor Newsom signed Senate Bill 707, a law that makes it harder for employers and sellers to delay arbitration by not paying their required arbitration fees. The law, which amends sections 1280 and 1281.96 of the Code of Civil Procedure and adds sections 1281.97, 1281.98, and 1281.99, provides individuals with procedural options and remedies when a company fails to pay arbitration fees on time. The framework for SB 707 was based on case law holding that companies that delay or refuse to submit payment in arbitration are in default and can no longer compel the claimant back to arbitration.[24] Similarly, under SB 707, if the drafting party (i.e. the party that wrote the agreement) does not pay the costs required to initiate or proceed with arbitration within 30 days after the due date, it has breached the arbitration agreement and thereby waives its right to compel arbitration.[25] Employee and consumer plaintiffs can then withdraw the claim from arbitration and proceed in a court of appropriate jurisdiction or compel arbitration, and the drafting party must pay reasonable attorneys' fees and costs related to the abandoned arbitration.[26] Additionally, the court or the arbitrator is empowered to impose sanctions on the drafting party, including monetary, evidentiary, and terminating sanctions.[27]

SB 707 was a response to concerns about companies delaying arbitration. Before the law went into effect on January 1, 2020, companies sometimes compelled employees and consumers into arbitration and then strategically withheld arbitration fees, putting the proceedings on hold.[28] This was a tactic used by some companies—including Chipotle,[29] Lyft,[30] Uber,[31] and Postmates[32]—in response to mass arbitration campaigns in which many individuals filed arbitration claims against employers at the same time.[33] Avoidance tactics often worked. For example, after delaying payment in response to a mass of individual arbitrations filed against Postmates, the company eventually convinced the AAA to permit just fifty randomly selected arbitrations to move forward.[34]

After the passage of SB 707, Postmates sought to block 10,356 separate arbitrations filed by couriers against the company.[35] Postmates filed an application for a temporary restraining order. The court denied the request.[36] Postmates then sought, among other things, declaratory judgments that Postmates cannot be compelled to arbitrate on a "de facto class basis" and that SB 707 is preempted and unconstitutional under the contracts clauses of the United States and California Constitutions.[37] The court denied the motions, finding that: SB 707 is not preempted by the FAA because the former does not invalidate arbitration agreements; SB 707 is not unconstitutional because it fosters rather than impairs contract compliance; and couriers without factual disputes regarding the existence of arbitration agreements were able to commence arbitration.[38]

Currently before the Ninth Circuit is another case challenging SB 707 on preemption grounds. In *Tequilla Tolbert v. Sisyphian, LLC*, appellants argue that the FAA preempts SB 707 because the California law penalizes companies for refusing to pay arbitration fees.[39] Appellees contend there is no conflict between SB 707 and the FAA, instead arguing that SB 707 promotes arbitration by "penalizing bad actors and incentivizing timely payment of required arbitration fees."[40] They cite Ninth Circuit precedent that a party's "failure to pay required costs of arbitration" qualifies as a "default" under the FAA.[41]

Effective January 1, 2022, another statute now bolsters Senate Bill 707. Senate Bill 762 amends sections 1281.97 and 1281.98 of the Code of Civil Procedure to require arbitration providers to distribute invoices for the fees and costs to commence litigation to all parties to the arbitration on the same day and by the same means. All parties must agree to any extension of time for the fee due dates.[42] The law also adds section 1657.1, requiring that the time to perform an act under a contract of adhesion (which would include the amount of time to pay fees under an arbitration contract) must be reasonable.[43]

PAGA & *VIKING RIVER CRUISES INC. V. MORIANA*

In *Iskanian v. CLS Transportation Los Angeles, LLC* (2014), the California Supreme Court held that the FAA does not preempt the state rule precluding an employee from waiving their right to bring a representative action under PAGA, a state law that authorizes an aggrieved employee to recover penalties for Labor Code violations on behalf of the government and other employees.[44] Later, in *Epic Systems Corporation v. Lewis* (2018), the United States Supreme Court held that the FAA's "saving clause" did not provide a basis for refusing to enforce arbitration agreements waiving collective action procedures for Fair Labor Standards Act (FLSA) and class action claims.[45] Since then, many employer-defendants have sought to compel arbitration of PAGA claims on the basis that *Epic* abrogates *Iskanian*. California's courts of appeal have rejected this argument, holding repeatedly that the intervening *Epic* decision did not conflict with the holding in *Iskanian* that a ban on bringing PAGA actions violates public policy.[46] Until recently, the United States Supreme Court had declined to consider this dispute.[47]

On December 15, 2021, the Supreme Court of the United States granted certiorari to review the California court of appeal decision in *Viking River Cruises, Inc. v. Moriana*.[48] The issue in the case is whether the FAA requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise representative claims, including under PAGA.

The plaintiff worked as a sales representative for Viking River Cruises and signed a binding arbitration agreement that required her to waive any right to bring a class, collective, representative, or PAGA action.[49] The agreement also included a delegation provision, giving the arbitrator authority to resolve any disputes over the formation, existence, validity, interpretation, or scope of the agreement. Despite the agreement, Moriana brought a PAGA lawsuit on behalf of the state and all other similarly situated aggrieved employees, alleging various Labor Code violations in a single cause of action under PAGA.[50] Viking River Cruises sought to compel arbitration.

The superior court ruled that the waiver was unenforceable as a matter of public policy.[51] The court of appeal affirmed, holding that because Moriana was not acting as an agent of the state when she agreed to arbitrate any claim arising from her employment, "there is no agreement that would bind the state to arbitration, even on the question of arbitrability."[52]

While the Supreme Court of California denied review,[53] the Supreme Court of the United States granted certiorari. The outcome of *Viking River Cruises, Inc. v. Moriana* could have major effects on the future of representative actions. If the Court were to hold that the PAGA waiver is enforceable, many companies would undoubtedly choose to include such waivers in arbitration agreements, severely impeding the enforcement of PAGA.

ARTICLE III: FEDERAL COURTS NARROW STANDING FOR CLASS ACTIONS AND PAGA.

Article III of the U.S. Constitution endows federal courts with the power to hear cases and controversies.[54] Standing is a doctrine that limits who may maintain a lawsuit or seek a remedy or right in court. In the 2016 decision *Spokeo, Inc. v. Robins*, the United States Supreme Court held that not every statutory violation gives rise to Article III standing.[55] In two cases decided in 2021, the United States Supreme Court and Ninth Circuit narrowed the scope of Article III standing in class actions and PAGA actions, respectively.

ARTICLE III, STATUTORY DAMAGES IN CLASS ACTIONS, AND *TRANSUNION*

In *TransUnion LLC v. Ramirez*, the U.S. Supreme Court reversed the Ninth Circuit and trial court judgments after a class action trial and remanded for further proceedings.[56] The plaintiff brought a class action under the Fair Credit Reporting Act (FCRA) on behalf of more than eight thousand consumers

whom the credit reporting agency had listed as "potential" matches to individuals listed as terrorists by the federal government without using reasonable procedures to check the veracity of the matches.[57] After trial, the jury awarded each class member roughly $1,000 in statutory damages for FCRA violations.[58] The Ninth Circuit affirmed.[59]

The Supreme Court then reversed in a decision opening with the holding from *Spokeo*:

> To have Article III standing to sue in federal court, plaintiffs must demonstrate, among other things, that they suffered a concrete harm. No concrete harm, no standing. Central to assessing concreteness is whether the asserted harm has a "close relationship" to a harm traditionally recognized as providing a basis for a lawsuit in American courts—such as physical harm, monetary harm, or various intangible harms including (as relevant here) reputational harm. *Spokeo, Inc.* v. *Robins*, 578 U. S. 330, 340–341 [] (2016).[60]

The *TransUnion* decision goes further in holding that: "Every class member must have Article III standing in order to recover individual damages."[61] Therefore, "uninjured" class members cannot recover damages at trial.[62] *TransUnion* has been described as "*Spokeo* on steroids"[63] because it applies the standing doctrine articulated in *Spokeo*—a case decided at the pleading stage—to overturn a class action award of statutory damages following a jury trial.

The Court recognized the concrete harm suffered by class members whose misleading reports TransUnion shared with third-party businesses: the reputational harm associated with the tort of defamation.[64] For a majority of class members, though, TransUnion kept misleading internal credit records but did not disseminate misleading reports. The Court ruled that these individuals did not demonstrate concrete harm or the need for a remedy and therefore lacked standing.[65]

The Court remanded, leaving it to the Ninth Circuit's discretion to consider the effect of the ruling on the district court proceedings, including class certification.[66]

Justice Clarence Thomas, the lone conservative to dissent, wrote that statutory damages often represent harms recognized as intangible by the legislating bodies of government:

> Who could possibly think that a person is harmed when he requests and is sent an incomplete credit report, or is sent a suspicious notice informing him that he may be a designated drug trafficker or terrorist, or is *not* sent anything informing him of how to remove this inaccurate red flag? The answer is, of course, legion: Congress, the President, the jury, the District Court, the Ninth Circuit, and four Members of this Court.[67]

Justice Elena Kagan joined Thomas's dissent and, writing separately, accused the majority of judicial aggrandizement and usurpation of the legislature's role: "[The majority] holds, for the first time, that a specific class of plaintiffs whom Congress allowed to bring a lawsuit cannot do so under Article III. [. . .] Congress is better suited than courts to determine when something causes a harm or risk of harm in the real world. For that reason, courts should give deference to those congressional judgments."[68]

TransUnion may encourage plaintiff-side practitioners to file more class actions that rely on statutory damages in state courts where Article III jurisdictional limitations do not apply.[69]

ARTICLE III, PAGA, AND *MAGADIA*

In a decision issued a month before *TransUnion*, the Ninth Circuit in *Magadia v. Wal-Mart Associates, Inc.* vacated and remanded a district court's judgment awarding $70,000 in PAGA penalties for missed meal breaks.[70] The Ninth Circuit held that because the PAGA representative plaintiff did not personally suffer any meal-break violation, he lacked standing

to bring a PAGA claim for aggrieved employees who missed meal breaks.[71]

The Ninth Circuit reasoned that PAGA differs significantly from *qui tam* statutes, which allow private plaintiffs to prosecute civil claims on the government's behalf, and which enjoy a narrow exemption from the Article III requirement that a plaintiff suffer an "injury in fact."[72] While acknowledging that PAGA shares features of *qui tam* actions,[73] the court explained that PAGA conflicts with *qui tam*'s tradition of the government maintaining supervisory authority during the litigation. In contrast, PAGA creates an interest in penalty awards not just for the plaintiff and the state, but also for other non-party employees, and the state retains fewer procedural controls over litigation.[74] The court pointed to analogous federal case law supporting its position.[75]

As with *TransUnion*, *Magadia* may encourage PAGA plaintiffs to avoid federal court in favor of state court where PAGA receives more favorable treatment. Indeed, *Magadia* creates a split between federal and state interpretations of PAGA. The California Supreme Court in *Iskanian*, for example, described PAGA as "a type of *qui tam* action."[76] More recently, in *Huff v. Securitas Security Services USA, Inc.*, the Sixth District Court of Appeal held that PAGA is a *qui tam* law, permitting an employee who suffered one Labor Code violation to pursue penalties for aggrieved employees who experienced violations of different Labor Code provisions.[77]

RULE 23(B)(3) PREDOMINANCE AND *OLEAN*

Federal courts have demonstrated a recent preoccupation with uninjured class members. *TransUnion* and *Magadia* reflect a concern with claims of individuals who are not injured enough. Similarly, courts have demonstrated concern with whether a class contains enough injured members.

For example, in *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, a recently vacated decision, the Ninth Circuit held that in order to satisfy Rule 23(b)(3)'s predominance requirement, plaintiffs must show there is no more than a "*de minimis*" number of uninjured class members in a proposed class.[78] The *de minimis* requirement injected a novel, unwritten requirement into Rule 23. *Olean* involved an antitrust class action alleging a price-fixing conspiracy among producers of packaged tuna,[79] but the ruling had implications for consumer, employment, and other class actions. One of the Ninth Circuit judges later called, *sua sponte*, for a vote on whether the court should rehear the case en banc.[80] In August 2021, the Ninth Circuit vacated the panel opinion and ordered the rehearing.[81]

MANAGEABILITY, PAGA, AND *WESSON*

In a matter of first impression for a California appellate court, the Second District Court of Appeal, in *Wesson v. Staples the Office Superstore, LLC*, considered whether trial courts possess inherent authority to ensure claims brought under PAGA will be manageable at trial.[82] Federal district courts have split on this issue.[83]

The trial court in *Wesson* granted the defendant's motion to strike plaintiff's PAGA claims as unmanageable at trial.[84] The Court of Appeal affirmed, holding that: (1) the trial court did have inherent authority to consider the manageability of PAGA claims; (2) the court's manageability assessment should account for the defendant's affirmative defense; and (3) based on the record before it, the trial court did not abuse its discretion in dismissing the plaintiff's PAGA claims.[85]

Wesson began as a class and PAGA action alleging Staples illegally misclassified 346 store general managers as exempt executives.[86] After the trial court denied plaintiff's motion for class certification, the defendant moved to strike the plaintiff's PAGA claims. The defendant invoked the court's inherent authority to manage complex litigation and argued that the plaintiff failed to show the PAGA claims could be fairly and efficiently tried in light of the individualized proof required for the defendant's exemption defense.[87]

The plaintiff argued that the court lacked inherent authority to ensure the manageability of PAGA claims. The trial court invited the plaintiff to submit a trial plan for a manageable trial. The plaintiff laid out a plan to prove his prima facie case using common proof but declined to offer a plan for the parties to litigate the defendant's affirmative defenses using common proof. The plaintiff maintained that it would be improper to dictate how the defendant should prove its exemption defense.[88]

Emphasizing the plaintiff's choice not to address how the parties might litigate affirmative defense according to common proof, and faced with what both parties agreed would be a years-long trial under defendant's plan, the court struck the PAGA claims as unmanageable.[89]

The appellate court affirmed.[90] It held that courts have inherent authority to ensure that PAGA actions will be manageable at trial. That authority includes the discretion to strike a PAGA claim under appropriate circumstances. The court noted that PAGA claims may present more significant manageability issues than class actions because plaintiffs need not show that common questions predominate over individual ones, PAGA actions do not require a showing of a uniform policy, and PAGA actions may cover a wide variety of employees and legal violations.[91]

Manageability may become a popular argument in defending PAGA actions, but practitioners should keep in mind *Wesson*'s particularities, including: (1) an executive exemption defense based on individualized, fact-specific inquiries regarding employees' job duties; (2) a plaintiff declining the court's invitation to propose a trial plan; (3) apparent agreement by all parties that the trial could last for years; and (4) a challenge to manageability that came at a mature stage of the proceedings.

The *Wesson* decision does not set forth clear standards for demonstrating manageability in a PAGA action. But, in light of the decision, PAGA plaintiffs should: (1) prepare to present a trial plan addressing not only the prima facie case, but also the defendant's affirmative defenses; and (2) prepare a strategy for resolving the case in a reasonable amount of time. Plaintiffs may look for inspiration from class and UCL representative actions that have survived previous manageability challenges.

SETTLEMENT FAIRNESS IN CLASS AND PAGA ACTIONS AND *AMARO*.

In *Amaro v. Anaheim Arena Management, LLC*,[92] the Fourth District Court of Appeal lamented a lack of published state court guidance on the class action settlement approval process and published its opinion on the subject. The decision is worth a full read, but important pieces of guidance relating to class and PAGA settlements are summarized below.

First, the decision instructs that a class action settlement should be limited to the complaint's factual allegations.[93] The court suggested appropriate language for a class action release would be: *potential claims reasonably arising out of or reasonably related to the same set of operative facts pled in the complaint*.[94]

Second, the court held that FLSA claims may be released in state-law wage-and-hour class-action settlements without requiring an opt-in procedure.[95] If followed by other courts, this holding has the potential to streamline settlement administration and provide a sense of finality to employers.

Third, the court held that a plaintiff may, in the trial court's discretion, release PAGA claims outside of the one-year limitations period of their own claims.[96] The court reasoned that the statute of limitations is an affirmative defense to PAGA claims that a defendant may waive.[97] While the court explained that a trial court may still refuse to approve such a release if it deems the release unfair within the context of the case before it,[98] the court's holding in *Amaro* is concerning to plaintiffs' practitioners because the approved settlement precluded PAGA claims alleged in two earlier-filed lawsuits.

Fourth, the appellate court ruled that enough evidence existed to support the trial court's

finding that the settlement was not the product of a collusive reverse auction.[99] A reverse auction "occurs when a defendant sued in multiple class actions picks the most ineffectual class counsel to negotiate a weak settlement that precludes all other class action claims."[100] The decision was case-specific and tied to the abuse of discretion standard to which an appellate court is bound in reviewing a trial court's determination of a class action settlement's fairness.[101]

REVERSE AUCTIONS, INTERVENTION, *TURRIETA*, AND *MONIZ*

On January 5, 2022, the California Supreme Court certified the following question for review, addressing who has standing to intervene in PAGA settlement proceedings:

> Does a [PAGA] plaintiff [] have the right to intervene, or object to, or move to vacate, a judgment in a related action that purports to settle the claims that plaintiff has brought on behalf of the State?[102]

This question has produced divergent decisions by California appellate courts in the last year. The Second District Court of Appeal's decision in *Turrieta v. Lyft, Inc.*—which the California Supreme Court will review—held that a PAGA plaintiff in one action did not have standing either to move to vacate a judgment following the settlement of another PAGA action containing overlapping claims or to appeal that judgment.[103] The First District Court of Appeal in *Moniz v. Adecco, Inc.*,[104] and the Fourth District Court of Appeal in *Uribe v. Crown Building Maintenance Co.*[105] found otherwise, holding that a PAGA plaintiff in one action has standing to appeal a judgment on final approval of the settlement of another PAGA action containing overlapping claims.

CONCLUSION

There are currently a lot of moving pieces in the areas of law discussed above. This year promises important developments, especially in relation to PAGA, with anticipated decisions from United States Supreme Court in *Viking* and the California Supreme Court in *Turrieta*. Stay tuned.

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1. Recent developments not otherwise covered in this article include, for instance: *Franklin v. Community Regional Medical Center* (9th Cir. 2021) 998. F.3d 867 (affirming lower court's order enforcing arbitration agreement to protect non-signatory defendant); *Betancourt v. Transportation Brokerage Specialists* (2021) 62 Cal.App.5th 552 (Amazon last-mile delivery drivers exempt from FAA as workers "engaged in interstate commerce" because their "transportation of goods wholly within a state are still a part of a continuous interstate transportation"); *Santos v. El Guapos Tacos, LLC* (2021) 72 Cal.App.5th 363 (employee's notice to Labor and Workforce Development Agency (LWDA) was sufficient under PAGA's administrative exhaustion requirements despite vagueness of reference to other aggrieved employees implicated by representative action). On February 10, 2022, Congress passed HR 4445, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, a bipartisan bill that bars the use of forced arbitration in workplace sexual assault and harassment claims.

2. See, e.g., *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333 (FAA preempts California's judicial rule regarding unconscionability of class waivers in consumer contracts); *Epic Systems Corp. v. Lewis* (2018) S. Ct. 1612 (FAA saving clause was not a basis for refusing to enforce arbitration agreements waiving

collective action procedures for FLSA and class claims); *Lamps Plus, Inc. v. Varela* (2019) 139 S. Ct. 1407 (employee's ambiguous arbitration agreement did not provide the necessary contractual basis to compel class arbitration).

3. See, e.g., *Forced Arbitration in a Pandemic: Corporations Double Down* (Oct. 27, 2021) Am. Assoc. for J., <https://www.justice.org/resources/research/forced-arbitration-in-a-pandemic> (as of Feb. 1, 2022).

4. Added by Stats. 2019, ch. 711.

5. Lab. Code § 432.6, subd. (a).

6. Lab. Code § 432.6, subd. (b).

7. Lab. Code § 432.6, subd. (c).

8. Lab. Code § 432.6, subd. (d).

9. Lab. Code § 432.6, subd. (f).

10. Lab. Code § 432.6, subd. (h).

11. Lab. Code § 432.6, subd. (g).

12. *Chamber of Commerce of United States v. Becerra* (E.D. Cal. 2020) 438 F.Supp.3d 1078, 1095-1100, affd. in part, vacated in part, revd. in part *sub nom. Chamber of Commerce of United States v. Bonta* (9th Cir. 2021) 13 F.4th 766.

13. (9th Cir. 2021) 13 F.4th 766.

14. *Id.* at p. 775.

15. *Id.* at pp. 775–778.

16. *Id.* at p. 780.

17. *Id.* at p. 781 (citing Lab. Code § 433 and Gov. Code § 12953).

18. *Id.* at pp. 780–781.

19. *Id.* at pp. 790–791 (Ikuta, J., dissenting).

20. *Chamber of Commerce of United States v. Bonta* (9th Cir. 2021 No. 21-15291) Appellee's petn. for rehg. en banc, ECF. No. 41. *Id.* Ord. ECF. No. 63 (deferring consideration of appellees' petition for rehearing en banc until the United States Supreme Court decides *Viking River Cruises, Inc. v. Moriana* (U.S., Dec. 15, 2021, No. 20-1573) 142 S.Ct. 734).

21. *Chamber of Commerce of United States v. Bonta*, *supra*, 13 F.4th at p. 781.

22. Fed. Rules App.Proc., rule 41.

23. *Chamber of Commerce of United States v. Becerra*, *supra*, 438 F.Supp.3d at p. 1108 ("Defendant Xavier Becerra, in his official capacity as the Attorney General of the State of California, Lilia Garcia Brower, in her official capacity as the Labor Commissioner of the State of California, Julia A. Su, in her official capacity as the Secretary of the California Labor and Workforce Development Agency, and Kevin Kish, in his official capacity as Director of the California Department of Fair Employment and Housing are: . . . Enjoined . . . .")

24. *Sink v. Aden Enterprises, Inc.* (2003) 352 F.3d 1197 and *Brown v. Dillard's, Inc.* (2005) 430 F.3d 1004.

25. Cal. Code Civ. Proc. § 1281.97, subd. (a).

26. Cal. Code Civ. Proc. § 1281.97, subd. (b).

27. Cal. Code Civ. Proc. §§ 1281.98, subds. (c)–(d), 1281.99.

28. See Sen. Com. on the Judiciary, Analysis of Sen. Bill No. 707 (2019-2020 Reg. Sess.) Apr. 11, 2019, pp. 6-9, <https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200SB707>.

29. *Turner et al v. Chipotle Mexican Grill, Inc.* (D. Colo. No. 1:14-cv-02612-JLK) (thousands of individuals filed wage-theft claims in arbitration, but proceedings were stalled by Chipotle's refusal to pay filing fees); Hiltzik, *Column: Chipotle May Have Outsmarted Itself by Blocking Thousands of Employee Lawsuits Over Wage Theft*, L.A. Times (Jan. 4, 2019) <https://www.latimes.com/business/hiltzik/la-fi-hiltzik-chipotle-20190104-story.html>.

30. *Abarca v. Lyft* (N.D. Cal., Dec. 13, 2018, No. 3:18-cv-7502) petn. for order compelling arb., ECF No. 1 <https://static.reuters.com/resources/media/editorial/20181214/arbarcovlyft—petition.pdf>; Frankel, *Forced Into Arbitration, 12,500 Drivers Claim Uber Won't Pay Fees to Launch Cases*, Reuters (Dec. 8, 2016) <https://www.reuters.com/article/legal-us-otc-uber/forced-into-arbitration-12500-drivers-claim-uber-wont-pay-fees-to-launch-cases-idUSKBN1O52C6>.

31. *Abadilla v. Uber Technologies, Inc.* (N.D. Cal., Dec. 5, 2018, No. 4:18-cv-07343-KAW) Motion to Compel Arbitration, ECF No. 3.

32. *Adams v. Postmates, Inc.* (N.D. Cal. 2019) 414 F.Supp.3d 1246.

33. Mass arbitration is a trend Justice Anthony Kennedy seemed to predict during the oral arguments for *Epic*: "[M]any of the advantages of concerted action can be obtained by going to the same attorney [and filing

individual arbitrations]. Sure, the cases are considered individually, but you see if—if you prevail, it seems to me quite rational for many employers to say forget it, we don't want arbitration at all. [. . .] [E]mployers are now constrained in the kind of arbitration agreements they have." Official Trans. No. 16-285 (Oct. 2, 2017) <https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-285_q8l1.pdf>.

34. See *Postmates Inc. v. 10,356 Individuals* (C.D. Cal., Apr. 15, 2020, No. CV 20-2783 PSG (JEMx)) 2020 WL 1908302, at *3.

35. *Id.* at *4.

36. *Ibid.*

37. *Postmates Inc. v. 10,356 Individuals* (C.D. Cal., Jan. 19, 2021, No. CV202783PSGJEMX) 2021 WL 540155 at *3.

38. *Id.* at **10–13.

39. *Tolbert, et al. v. Sisyphian, LLC, et al.* (9th Cir. No. 21-55484).

40. *Tolbert, et al. v. Sisyphian, LLC, et al.* (9th Cir. No. 21-55484), Appellee brief at p. 3, ECF No. 46-1.

41. *Id.* (citing *Sink v. Aden Enterprises* (9th Cir. 2003) 352 F.3d 1197, 1201–1202).

42. Code Civ. Proc. § 1281.98 subd. (a)(2).

43. The Senate chose not to define "reasonable" in the statute "[d]ue to the myriad of contexts in which the timeliness of performance would be deemed reasonable," but the Senate Judiciary Committee hearing analysis indicates that "the billing timelines prescribed by the bill should serve as an approximation of what reasonable would be in the arbitration context." Sen. Floor, Senate Third Reading, Analysis of Sen. Bill No. 762 (2021-2022 Reg. Sess.) as amended June 14, 2021, pp. 3-4 <https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220SB762>.

44. 59 Cal.4th 348.

45. *Supra*, 138 S.Ct. 1612.

46. See, e.g., *Williams v. RGIS, LLC* (3d Dist. Oct. 18, 2021) 70 Cal.App.5th 445 (*Epic* did not abrogate *Iskanian* because the FAA does not preempt PAGA; rather, the former regulates disputes between private parties and the latter is an enforcement action designated to protect the public); *Olson v. Lyft Inc.* (1st Dist. Oct. 29, 2020) 56 Cal.App.5th 862 (*Iskanian* survives *Epic* because PAGA cases involve *qui tam* claims on behalf of the government, rather than representative actions on behalf of fellow workers); *Correia v. NB Banker Electric, Inc.* (Fourth Dist. Feb. 25, 2019) 32 Cal. App.5th 602, 620 (same). See *also Contreras v. Superior Court* (2d Dist., Mar. 1, 2021) 61 Cal.App.5th 461 (FAA does not apply to PAGA claims, and delegation to arbitrator of the question of whether workers were "aggrieved employees" frustrates the purpose of PAGA and is therefore prohibited under California law).

47. See, e.g., *Provost v. YourMechanic, Inc.* (2020) 55 Cal. App. 5th 982, review den. (Aug. 11, 2021) 141 S.Ct. 2891 (company could not compel mechanic to arbitrate whether he was an "aggrieved employee" with standing to bring a PAGA representative action).

48. *supra*, 142 S.Ct. 734.

49. See *Moriana v. Viking River Cruises, Inc.* (Cal. Ct. App., Sept. 18, 2020, No. B297327) 2020 WL 5584508, at *2, review den. (Dec. 9, 2020), cert. granted (2021) 142 S.Ct. 734).

50. See *ibid.*

51. *Moriana v. Viking River Cruises, Inc.*, (Super. Ct. L.A. County Mar. 6, 2019, No. BC687325).

52. *Moriana v. Viking River Cruises, Inc.*, *supra*, No. B297327, 2020 WL 5584508, at *2.

53. *Moriana v. Viking River Cruises, Inc.*, review den. (Dec. 9, 2020, No. S265257).

54. U.S. Const. art. III.

55. (2016) 578 U.S. 330.

56. (2021) 141 S.Ct. 2190, 2214.

57. *Id.* at p. 2201.

58. *Ibid.*

59. *Ramirez v. TransUnion LLC* (9th Cir. 2020) 951 F.3d 1008, revd. and remanded (2021) 141 S.Ct. 2190.

60. *TransUnion*, *supra*, 141 S.Ct. at p. 2200.

61. *Id.* at p. 2208.

62. *Ibid.*

63. Grande, *Justices Reinforce Spokeo Injury Bar With TransUnion Ruling*, (June 25, 2021), Law360, <https://www.law360.com>.

64. *TransUnion*, *supra*, 141 S.Ct. at p. 2208.

65. *Id.* at p. 2209.

66. *Id.* at p. 2204.

67. *Id.* at pp. 2224–2225 (Thomas, J., dissenting). See also *id.* at p. 2225.

68. *Id.* at pp. 2225–2226 (Kagan, J., dissenting).

69. *Id.* at pp. 2224, n.9 (Thomas, J., dissenting) (observing that the decision does not prohibit the U.S. Congress from creating statutory rights that state courts–but not federal courts–have jurisdiction to hear); *Article III Standing–Separation of Powers–Class Actions–TransUnion LLC v. Ramirez* (2021) 135 Harv.L.Rev. 333, 342.

70. (9th Cir. 2021) 999 F.3d 668, 672–673 (quoting *Spokeo*, *supra*, 135 S.Ct. at 1548; *id.* at 1552 n. (Thomas, J., concurring)).

71. *Ibid.*

72. *Id.* at pp. 673–674

73. *Id.* at pp. 675–676.

74. *Id.* at pp.676–677.

75. *Id.*at pp. 677–678.

76. *Iskanian*, *supra*, 59 Cal.4th at p. 382.

77. (2018) 23 Cal.App.5th 745, 760.

78. (9th Cir. 2021) 993 F.3d 774, rehg. en banc granted (9th Cir. 2021) 5 F.4th 950.

79. *Id.* at pp. 781–82.

80. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC* (9th Cir., Apr. 28, 2021, No. 19-56514), Order, ECF No. 101.

81. (9th Cir. 2021) 5 F.4th 950, 951.

82. (2021) 68 Cal.App.5th 746, rehg. den. (Sept. 27, 2021), review den. (Dec. 22, 2021).

83. *Id.* at p. 857 n. 10 (collecting Northern District decisions that have recognized the court's ability to strike unmanageable PAGA claims and Central District decisions holding that a manageability requirement would conflict with PAGA's purpose).

84. *Id.* at p. 851.

85. *Id.* at p. 852.

86. *Ibid.*

87. *Id.* at pp. 852–853.

88. *Id.* at pp. 853–854.

89. *Id.* at p. 854.

90. *Id.* at p. 867.

91. *Id.* at pp. 859–860.

92. (2021) 69 Cal.App.5th 521.

93. *Id.* at pp. 535–539.

94. *Id.* at p. 538.

95. *Id.* at p. 539.

96. *Id.* at p. 541.

97. *Id.* at pp. 541–542.

98. *Id.* at p. 543.

99. *Id.* at pp. 544–547.

100. *Id.* at pp. 528, 544.

101. *Id.* at p. 535.

102. *Turrieta v. Lyft* (Cal., Jan. 5, 2022, No. S271721) 2022 WL 57711, at *1.

103. (2021) 69 Cal.App.5th 955.

104. (2021) 72 Cal.App.5th 56.

105. (2021) 70 Cal.App.5th 986.