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SUMMARIES

Class Actions

Rule 23(f)’s 14-day deadline to appeal order denying class certification not subject to equitable tolling (Sotomayor, J.)

_Nutraceutical Corporation v. Lambert_

U.S.Sup.Ct.; February 26, 2019; 17–1094

Respondent Troy Lambert filed a class action in federal court alleging that petitioner Nutraceutical Corporation’s marketing of a dietary supplement ran afoul of California consumer-protection law. On February 20, 2015, the District Court ordered the class decertified. Pursuant to Federal Rule of Civil Procedure 23(f), Lambert had 14 days from that point to ask the Court of Appeals for permission to appeal the order. Instead, he filed a motion for reconsideration on March 12, which the District Court denied on June 24. Fourteen days later, Lambert petitioned the Court of Appeals for permission to appeal the decertification order. Nutraceutical objected that Lambert’s petition was untimely because it was filed far more than 14 days from the February 20 decertification order. The Ninth Circuit held, however, that Rule 23(f)’s deadline should be tolled under the circumstances because Lambert had “acted diligently.” On the merits, the court reversed the decertification order.

_Held:_ Rule 23(f) is not subject to equitable tolling. Pp. 3–10.

(a) Rule 23(f) is properly classified as a nonjurisdictional claim-processing rule, but that does not render it malleable in every respect. Whether a rule precludes equitable tolling turns not on its jurisdictional character but rather on whether its text leaves room for such flexibility. See _Carlisle v. United States_, 517 U. S. 416, 421. Here, the governing rules speak directly to the issue of Rule 23(f)’s flexibility and make clear that its deadline is not subject to equitable tolling. While Federal Rule of Appellate Procedure 2 authorizes a court of appeals for good cause to “suspend any provision … in a particular case,” it does so with a caveat: “except as otherwise provided in Rule 26(b).” Rule 26(b), which generally authorizes extensions of time, in turn includes the carveout that a court of appeals “may not extend the time to file … a petition for permission to appeal”—the precise type of filing at issue here. The Rules thus express a clear intent to compel rigorous enforcement of Rule 23(f)’s deadline, even where good cause for equitable tolling might otherwise exist. Precedent confirms this understanding. See _Carlisle_, 517 U. S. 416, and _United States v. Robinson_, 361 U. S. 220. Pp. 3–6.

(b) Lambert’s counterarguments do not withstand scrutiny. Lambert argues that Rule 26(b)’s prohibition on extending the time to file a petition for permission to appeal should be understood to foreclose only formal extensions granted _ex ante_ and to leave courts free to excuse late filings on equitable grounds after the fact. But this Court has already rejected an indistinguishable argument concerning Federal Rule of Criminal Procedure 45(b) in _Robinson_, and Lambert offers no sound basis for reading Rule 26(b) differently. Further, the 1998 Advisory Committee Notes to Rule 23(f) speak to a court of appeals’ discretion to decide whether a particular certification decision warrants review in an interlocutory posture, not to its determination whether a petition is timely. Finally, Lambert notes that every Court of Appeals to have considered the question would accept a Rule 23(f) petition filed within 14 days of the resolution of a motion for reconsideration that was itself filed within 14 days of the original order. Although his own reconsideration motion was not filed until after the initial 14 days had run, he cites the lower courts’ handling of such cases as evidence that Rule 23(f) is amenable to tolling. However, a timely motion for reconsideration affects the antecedent issue of when the 14-day limit begins to run, not the availability of tolling. See _United States v. Ibarra_, 502 U. S. 1, 4, n. 2. Pp. 6–9.

(c) On remand, the Court of Appeals can address other preserved arguments about whether Lambert’s Rule 23(f) petition was timely even without resort to tolling. Pp. 9–10.

870 F. 3d 1170, reversed and remanded.

SOTOMAYOR, J., delivered the opinion for a unanimous Court.

Contractual Disputes

Challenges to terms of insurance companies’ contracts with agents without merit (Bigelow, P.J.)

_United Farmers Agents Association, Inc. v. Farmers Group, Inc._

C.A. 2nd; February 22, 2019; B282541

The Second Appellate District affirmed a judgment. The court held that insurance agents’ challenges to the terms of their contracts with insurers were without merit.

United Farmers Agents Association, Inc. (UFAA), a trade association of insurance agents, filed a declaratory relief action against Farmers Group, Inc. and other insurance companies, raising multiple issues with regard to the agent appointment agreements used by the companies. UFAA sought declarations that (1) the agreements’ no-cause termination provisions were unconscionable; (2) the agreements precluded the companies’ use of performance programs and imposition of discipline based on an agent’s failure to meet performance standards; (3) the agreements precluded the companies from taking adverse action against agents based on the “location, nature, hours, and types of offices maintained” by the agents; and (4) the agreements precluded the companies from sharing customer information acquired by agents with competitors.
The trial court rendered judgment in favor of the companies, finding both that USAA lacked standing and that its claims were without merit.

The court of appeal affirmed, holding that USAA had standing to pursue two of its four claims, but those two claims lacked merit. UFAA had associational standing to pursue its claims related to performance and office standards because it was possible to establish those claims without individualized factual inquiries related to each agent. With respect to these claims, UFAA essentially sought declarations that the agreements categorically forbid Farmers from terminating an agency based, in whole or in part, on its dissatisfaction with the agent’s office location or failure to meet performance standards. Therefore, the only issue before the court was whether the agreements permitted Farmers to terminate agencies for such reasons. To decide that issue, the court needed only interpret and construe the terms of the agreements; it did not need to consider evidence related to individual agents or the specific circumstances under which their agencies were terminated. UFAA thus had standing to pursue those claims on behalf of its members. The claims, however, were without merit. Although the agent agreements do not expressly prohibit specific office locations or require agents meet performance standards, a no-cause termination provision in the agreements nonetheless permits the companies to terminate agencies for such reasons. UFAA’s interpretation—that the companies were permitted to terminate agencies only for reasons specifically listed in the agreements—was unreasonable, as it rendered the no-cause termination provision superfluous.

**Employment Litigation**

*Correia v. NB Electric, Inc.*

C.A. 4th; February 25, 2019; D073798

The Fourth Appellate District affirmed a trial court order. The court held that the trial court properly found that employees’ waiver of their right to bring a “representative action” was not binding.

Mark Correia and Richard Stow sued former employer NB Baker Electric, Inc., alleging wage and hour violations and seeking civil penalties under the Private Attorney General Act of 2004 (PAGA). Baker responded by petitioning for arbitration under the parties’ arbitration agreement. The agreement provided for arbitration to be the exclusive forum for any dispute and prohibited employees from bringing a “representative action.”

The trial court granted the arbitration petition as to all causes of action except the PAGA claim, finding the representative-action waiver unenforceable. Baker appealed, arguing (1) plaintiffs’ response to its arbitration petition was untimely; (2) *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 was no longer binding due to inconsistency with the recently decided *Epic Systems Corp. v. Lewis* (2018) 138 S.Ct. 1612; and (3) the parties’ arbitration agreement should be interpreted to mean that if the representative-action waiver was unenforceable, the PAGA claim for statutory penalties remained subject to arbitration.

The court of appeal affirmed, holding that the trial court acted within its discretion in considering plaintiffs’ response to the arbitration petition. Even if plaintiffs’ response was untimely, Code Civ. Proc. §1290.6 specifically allows a court to extend the time for filing an opposition for good cause, and reviewing courts have long held trial courts are authorized to consider late-filed opposition papers for good cause absent a showing of undue prejudice to the moving party. The court further found that *Iskanian* remained binding. Although the *Epic* court reaffirmed the broad preemptive scope of the Federal Arbitration Act (FAA), it did not address the specific issues before the *Iskanian* court. The trial court thus properly found the representative-action waiver to be unenforceable. Finally, the court rejected Baker’s contention that the court erred in failing to order plaintiffs’ PAGA claim to arbitration. Although *Iskanian* did not decide the issue of whether courts have the authority to order a PAGA representative action into arbitration, several California Courts of Appeal have held a PAGA arbitration requirement in a predispute arbitration agreement is unenforceable because the state, and not the plaintiff, is the real party in interest in a PAGA claim, and the plaintiff’s execution of a waiver is not binding on the state. The court agreed with this analysis.

**Family Law**

*In re L.D.*

C.A. 6th; January 24, 2019; H045544

The Sixth Appellate District dismissed an appeal for lack of jurisdiction. The court held that a parent’s appeal from a dependency court order finding compliance with the Indian Child Welfare Act (ICWA) was untimely.

After the Santa Clara County Department of Family and Children’s Services initiated dependency proceedings as to nine-year-old L.D, mother M.J. informed the dependency court of Native Alaskan ancestry. In November 2017, the county sent notice of the proceedings to various entities. At the jurisdictional and dispositional hearing on December 5, the court found the notice satisfied ICWA. The court found
true the county’s allegations of abuse and declared L.D. a dependent of the court. Mother waived her right to reunification services, and the court set the case for hearing under Welf. & Inst. Code §366.26. The court also issued a three-year juvenile restraining order protecting L.D. from mother. The restraining order prohibited mother from having a gun and required mother to sell or surrender any gun within her immediate possession or control. Having found that mother had possessed or had access to a handgun, the court set a gun surrender hearing. At that hearing on January 12, 2018, the court found that mother owned or had access to a gun and failed to show the gun had been surrendered or confiscated, in violation of the restraining order.

Mother filed a timely notice of appeal from the order following the gun surrender hearing. Her appellate briefing, however, did not address the restraining order or its conditions. Instead, mother challenged the sufficiency of the dependency court’s December 5, 2017 finding of ICWA compliance.

The court dismissed mother’s appeal for lack of jurisdiction, finding that her appeal from the dependency court’s December 5, 2017 ICWA ruling was untimely. Mother’s reliance on In re Isaiah W. (2016) 1 Cal.5th 1, in support of her claim of timeliness, was unavailing. The Isaiah court held that a parent who does not timely appeal a dependency court order that includes a finding of ICWA inapplicability may still challenge that finding on appeal from a later order terminating parental rights. Explaining why the parent’s challenge was timely, the Isaiah court emphasized that the parent was not challenging the dependency court’s ICWA finding from the jurisdiction and disposition hearing, but was challenging a finding of ICWA inapplicability foundational to the order terminating parental rights. Because the termination order “necessarily subsumed a present determination of ICWA’s inapplicability,” and the validity of the order was “necessarily premised on a current finding by the dependency court regarding compliance with ICWA’s notice requirement,” the Supreme Court found the ICWA challenge to be timely. Here, in contrast, the order made at the gun surrender hearing here is not premised on any ICWA finding. ICWA notice is required “for hearings that may culminate in an order for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement.” Because the gun surrender hearing resulted in no such order, Isaiah did not apply.

C.A. 2nd; February 25, 2019; B282270

The Second Appellate District reversed a judgment and remanded. The court held that charter cities are bound by state minimum wage laws.

Wendy Marquez and Jasmine Smith filed a putative class action lawsuit against the City of Long Beach, alleging violations of the Labor Code and Industrial Welfare Commission’s (IWC) wage orders based on the city’s alleged failure to pay wages at or above the statewide minimum wage to some 200 employees employed by the city’s library services and parks, recreation, and marine departments.

The city demurred, arguing plaintiffs’ claims were barred under the home rule doctrine because wages set by charter cities are municipal affairs, not subject to state regulation. The trial court sustained the demurrer without leave to amend.

The court of appeal reversed, holding that the trial court erred in sustaining the city’s demurrer. The trial court found the authority to determine employee compensation was reserved to Long Beach as a charter city under Cal. Const. art. XI, §§5, and the state could not impose a minimum wage for Long Beach employees because the city’s compensation of its employees was not a matter of statewide concern. On appeal, plaintiffs argued the Legislature’s interest in the provision of a living wage to all workers was a matter of statewide concern, and the minimum wage requirement was appropriately tailored to address that concern. This case thus pitted art. XI, §5, which grants charter cities “plenary authority” to provide for the compensation of city employees, against article XIV, §1, which grants the Legislature the authority to “provide for minimum wages and for the general welfare of employees...” The court concluded that legislation setting a statewide minimum wage, generally applicable to both private and public employees, addresses the state’s interest in protecting the health and welfare of workers by ensuring they can afford the necessities of life for themselves and their families. The Legislature may thus constitutionally exercise authority over minimum wages, despite the constitutional reservation of authority in charter cities to legislate as to their municipal affairs.

Native American Law

Public Law 280 does not bar enforcement of UCL as to Indian-owned business operated on tribal land (Streeter, Acting P.J.)

People ex rel. Becerra v. Huber

C.A. 1st; February 25, 2019; A144214

The First Appellate District affirmed a judgment. The court held that the trial court had jurisdiction over claims for enforcement of the Directory Act, the Fire Safety Act, and the
Unfair Competition Law (UCL) as to a business owned by a tribal member and operated on tribal land.

Attorney General Xavier Becerra, acting on behalf of the People, brought an enforcement action against Ardith Huber, a member of the Wiyot Band of Indians, with regard to her operation of a tobacco smokeshop on tribal land. The complaint alleged violations of the Directory Act, the Fire Safety Act, and the UCL. As to the UCL violation, the complaint cited as predicate “unlawful acts” violations of the Tax Stamp Act, the Directory Act, and the Fire Safety Act.

The trial court granted summary adjudication to the People and entered a permanent injunction on all three claims.

The court of appeal affirmed, holding that the trial court had subject matter jurisdiction as to all three claims. Under Public Law 280, Congress granted California and five other states plenary criminal jurisdiction over “offenses committed by or against Indians” within Indian country, and limited civil jurisdiction over “causes of action between Indians or to which Indians are parties” in cases arising in Indian country. That limited adjudicative jurisdiction, Huber argued, did not encompass the Attorney General’s enforcement action. That analysis, however, contravenes well-established law, as enunciated in Williams v. Lee (1959) 358 U.S. 217, specifically barring the exercise of state jurisdiction where such exercise “would infringe on the right of the Indians to govern themselves.” Absent infringement under Williams, there is no need to consider Public Law 280, and the general jurisdiction of state courts is the default rule. Under that default rule, this case falls within the jurisdiction conferred on state courts by Cal. Const. art. VI, §10, a grant of jurisdiction that long predates Public Law 280. Because nothing in the language or legislative history of Public Law 280 indicates the statute was meant to divest states of pre-existing jurisdiction, federal statutory authorization is not required. Because the exercise of jurisdiction here does not infringe tribal sovereignty, the trial court had subject matter jurisdiction.
February 27, 2019

United States Supreme Court

Cite as 19 C.D.O.S. 1664

NUTRACEUTICAL CORPORATION, PETITIONER

v.

TROY LAMBERT

No. 17–1094
In the Supreme Court of the United States
On Writ Of Certiorari To The United States Court Of Appeals
For The Ninth Circuit
Argued November 27, 2018
Filed February 26, 2019

JUSTICE SOTOMAYOR delivered the opinion of the Court.

To take an immediate appeal from a federal district court’s order granting or denying class certification, a party must first seek permission from the relevant court of appeals “within 14 days after the order is entered.” Fed. Rule Civ. Proc. 23(f). This case poses the question whether a court of appeals may forgive on equitable tolling grounds a failure to adhere to that deadline when the opposing party objects that the appeal was untimely. The applicable rules of procedure make clear that the answer is no.

I

In March 2013, respondent Troy Lambert sued petitioner Nutraceutical Corporation in federal court, alleging that its marketing of a dietary supplement ran afoul of California consumer-protection law. The District Court for the Central District of California initially permitted Lambert to litigate on behalf of a class of similarly situated consumers. On February 20, 2015, however, the District Court revisited that decision and ordered the class decertified. From that point, Lambert had 14 days to ask the Court of Appeals for the Ninth Circuit for permission to appeal the decertification order. See Fed. Rule Civ. Proc. 23(f).

Instead of filing a petition for permission to appeal, Lambert informed the District Court at a status conference on March 2 (10 days after the decertification order) that he would “want to file a motion for reconsideration” in the near future. App. to Pet. for Cert. 74. The court told Lambert to file any such motion “no later than” March 12. Id., at 76. Neither Lambert nor the District Court mentioned the possibility of an appeal.

Lambert filed his motion for reconsideration, in compliance with the District Court’s schedule, on March 12 (20 days after the decertification order). The District Court denied the motion on June 24, 2015. Fourteen days later, on July 8, Lambert petitioned the Court of Appeals for permission to appeal the decertification order. Nutraceutical’s response argued that Lambert’s petition was untimely because more than four months had elapsed since the District Court’s February 20 order decertifying the class, far more than the 14 days that Federal Rule of Civil Procedure 23(f) allows. App. 41.

Notwithstanding the petition’s apparent untimeliness, the Court of Appeals “deem[ed] Lambert’s petition timely” because, in its view, the Rule 23(f) deadline should be “tolled” under the circumstances. 870 F. 3d 1170, 1176 (CA9 2017). The Court of Appeals reasoned that Rule 23(f)’s time limit is “non-jurisdictional, and that equitable remedies softening the deadline are therefore generally available.” Ibid. Tolling was warranted, the court concluded, because Lambert “informed the [District Court] orally of his intention to seek reconsideration” within Rule 23(f)’s 14-day window, complied with the District Court’s March 12 deadline, and “otherwise acted diligently.” Id., at 1179. On the merits, the Court of Appeals held that the District Court abused its discretion in decertifying the class. Id., at 1182–1184. It reversed the decertification order. Id., at 1184.

In accepting Lambert’s petition, the Court of Appeals “recognize[d] that other circuits would likely not toll the Rule 23(f) deadline in Lambert’s case.” Id., at 1179. We granted certiorari. 585 U. S. ___ (2018).

II

When Lambert filed his petition, Federal Rule of Civil Procedure 23(f) authorized courts of appeals to “permit an appeal from an order granting or denying class-action certification … if a petition for permission to appeal is filed … within 14 days after the order is entered.” 3 The Court of Appeals held that Rule 23(f)’s time limitation is nonjurisdictional and thus, necessarily, subject to equitable tolling. While we agree that Rule 23(f) is nonjurisdictional, we conclude that it is not subject to equitable tolling.

Because Rule 23(f)’s time limitation is found in a procedural rule, not a statute, it is properly classified as a nonjurisdictional claim-processing rule. See Hamer v. Neighborhood Housing Servs. of Chicago, 583 U. S. ___ (2017) (slip op., at 8). It therefore can be waived or forfeited by an op-


2. Rule 23(f) has since been amended and now reads, in relevant part: “A court of appeals may permit an appeal from an order granting or denying class-action certification … A party must file a petition for permission to appeal … within 14 days after the order is entered … .” The difference is immaterial for purposes of this case.

3. To be sure, this Court has previously suggested that time limits for taking an appeal are “mandatory and jurisdictional.” Budnich v. Becton Dickinson & Co., 486 U. S. 196, 203 (1988). As our more
posing party. See Kontrick v. Ryan, 540 U. S. 443, 456 (2004). The mere fact that a time limit lacks jurisdictional force, however, does not make it malleable in every respect. Though subject to waiver and forfeiture, some claim-processing rules are “mandatory”—that is, they are “unalterable” if properly raised by an opposing party. Manrique v. United States, 581 U. S. ___ (2017) (slip op., at 4) (quoting Eberhart v. United States, 546 U. S. 12, 15 (2005) (per curiam)); see also Kontrick, 540 U. S., at 456. Rules in this mandatorily camp are not susceptible of the equitable approach that the Court of Appeals applied here. Cf. Manrique, 581 U. S., at ___ (slip op., at 8) (“By definition, mandatory claim-processing rules … are not subject to harmless-error analysis”). Whether a rule precludes equitable tolling turns not on its jurisdictional character but rather on whether the text of the rule leaves room for such flexibility. See Carlisle v. United States, 517 U. S. 416, 421 (1996). Where the pertinent rule or rules invoked show a clear intent to preclude tolling, courts are without authority to make exceptions merely because a litigant appears to have been diligent, reasonably mistaken, or otherwise deserving. Ibid.; see Kontrick, 540 U. S., at 458; United States v. Robinson, 361 U. S. 220, 229 (1960). Courts may not disregard a properly raised procedural rule’s plain import any more than they may a statute’s. See Bank of Nova Scotia v. United States, 487 U. S. 250, 255 (1988).

Here, the governing rules speak directly to the issue of Rule 23(f ’s) flexibility and make clear that its deadline is not subject to equitable tolling. To begin with, Rule 23(f) itself conditions the possibility of an appeal on the filing of a petition “within 14 days” of “an order granting or denying class-action certification.” Federal Rule of Appellate Procedure 5(a)(2) likewise says that a petition for permission to appeal “must be filed within the time specified.” To be sure, the simple fact that a deadline is phrased in an unqualified manner does not necessarily establish that tolling is unavailable. See Fed. Rule App. Proc. 2 (allowing suspension of other Rules for “good cause”); Fed. Rule App. Proc. 26(b) (similar); Fed. Rule Civ. Proc. 45(b)(similar); Fed. Rule App. Proc. 26(b)(1). Here, however, the Federal Rules of Appellate Procedure single out Civil Rule 23(f) for inflexible treatment. While Appellate Rule 2 authorizes a court of appeals for good cause to “suspend any provision of these rules in a particular case,” it does so with a conspicuous caveat: “except as otherwise provided in Rule 26(b).” Appellate Rule 26(b), which generally authorizes extensions of time, in turn includes this express caveat: A court of appeals “may not extend the time to file … a petition for permission to appeal.” Fed. Rule App. Proc. 26(b)(1). In other words, Appellate Rule 26(b) says that the deadline for the precise type of filing at issue here may not be extended. The Rules thus express a clear intent to compel rigorous enforcement of Rule 23(f’)s deadline, even where good cause for equitable tolling might otherwise exist.

Precedent confirms this understanding. Carlisle, 517 U. S. 416, and Robinson, 361 U. S. 220, both centered on Federal Rule of Criminal Procedure 45(b), an extension-of-time provision that parallels Appellate Rule 26(b). Carlisle addressed Rule 45(b)’s interaction with the time limit in Criminal Rule 29 for filing a postverdict motion for judgment of acquittal. See 517 U. S., at 419–423. Rule 45(b), as it was then written, made clear that “‘the court may not extend the time for taking any action’” under Rule 29, “‘except to the extent and under the conditions’” stated therein. Id., at 421. Because the Court found the text’s purpose to foreclose acceptance of untimely motions “plain and unambiguous,” the Court held that the District Court lacked that authority. Ibid. Likewise, in Robinson, the Court held that an earlier iteration of Rule 45(b) that said “‘the court may not enlarge … the period for taking an appeal’” prohibited a court from accepting a notice of appeal that was untimely filed. 361 U. S., at 224 (quoting Fed. Rule Crim. Proc. 45(b)).

Because Rule 23(f) is not amenable to equitable tolling, the Court of Appeals erred in accepting Lambert’s petition on those grounds.

III

Lambert resists the foregoing conclusion on a variety of grounds. None withstands scrutiny.

Most pertinently, Lambert argues that the above-mentioned Rules are less emphatic than they first appear. Rule 26(b)’s general grant of authority to relax time limits, he notes, refers both to “extend[ing]” the time to file a petition for permission to appeal and “permit[ting]” a petition to be filed after the deadline. See Fed. Rule App. Proc. 26(b) (“For good cause, the court may extend the time prescribed by these rules … to perform any act, or may permit an act to be done after that time expires” (emphasis added)). Rule 26(b) (1) then prohibits courts only from “extend[ing] the time to file,” while making no further mention of “permit[ting]” an act to be done after that time expires.” In Lambert’s view, Rule 26(b)(1)’s prohibition on “extend[ing] the time to file” a petition for permission to appeal therefore should be understood to foreclose only formal extensions granted ex ante, and to leave courts free to excuse late filings on equitable grounds after the fact.

Whatever we would make of this contention were we writing on a blank slate, this Court has already rejected an indistinguishable argument in Robinson. There, Rule 45(b) generally authorized both “‘enlarge[ing]’” a filing period and “‘permit[ting]’ the act to be done after [its] expiration,” then specifically forbade “‘enlarge[ing]’ … the period for taking an appeal.” 361 U. S., at 223. The lower court had accepted

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recent precedents have made clear, however, this Court once used that phrase in a “‘less than meticulous’” manner. Hamer, 583 U. S., at ___ (slip op., at 9); Kontrick v. Ryan, 540 U. S. 443, 454 (2004). Those earlier statements did not necessarily signify that the rules at issue were formally “jurisdictional” as we use that term today.
a late filing on the ground that to do so “would not be to ‘enlarge’ the period for taking an appeal, but rather would be only to ‘permit the act to be done’ after the expiration of the specified period.” Ibid.; see also id., at 230 (Black and Douglas, JJ., dissenting). This Court reversed, explaining that acceptance of the late filing did, in fact, “enlarge” the relevant filing period. Id., at 224. Lambert offers no sound basis for reading Rule 26(b) differently, and none is apparent. Cf. Torres v. Oakland Scavenger Co., 487 U. S. 312, 315 (1988) (“Permitting courts to exercise jurisdiction over unnamed parties after the time for filing a notice of appeal has passed is equivalent to permitting courts to extend the time for filing a notice of appeal”).

Likewise unavailing is Lambert’s reliance on the 1998 Advisory Committee Notes to Rule 23(f), which say that a petition “may be granted or denied on the basis of any consideration that the court of appeals finds persuasive.” Advisory Committee’s Notes on 1998 Amendments to Fed. Rule Civ. Proc. 23, 28 U. S. C. App., p. 815; see also Microsoft Corp. v. Baker, 582 U. S. ___, ___–___ (2017) (slip op., at 6–8). That comment, however, speaks to a court of appeals’ discretion to decide whether a particular certification decision warrants review in an interlocutory posture, not its determination whether a petition is timely. If anything, the comment serves as a reminder that interlocutory appeal is an exception to the general rule that appellate review must await final judgment—which is fully consistent with a conclusion that Rule 23(f)’s time limit is purposefully unforgiving. See Mohawk Industries, Inc. v. Carpenter, 558 U. S. 100, 106 (2009) (“The justification for immediate appeal must … be sufficiently strong to overcome the usual benefits of deferring appeal until litigation concludes”); cf. Baker, 582 U. S., at ___ (slip op., at 6) (describing Rule 23(f) as “the product of careful calibration”).

Finally, Lambert notes that every Court of Appeals to have considered the question would accept a Rule 23(f) petition filed within 14 days of the resolution of a motion for reconsideration that was itself filed within 14 days of the original order. See 870 F. 3d, at 1177–1178, n. 3 (collecting cases). Although Lambert’s own reconsideration motion was not filed until after the initial 14 days had run, he cites the lower courts’ handling of such cases as evidence that Rule 23(f) is indeed amenable to tolling. He further suggests that there is no basis for relaxing the 14-day limit in one situation but not the other.

Lambert’s argument relies on a mistaken premise. A timely motion for reconsideration filed within a window to appeal does not toll anything; it “renders an otherwise final decision of a district court not final” for purposes of appeal. United States v. Ibarra, 502 U. S. 1, 6 (1991) (per curiam). In other words, it affects the antecedent issue of when the 14-day limit begins to run, not the availability of tolling. See id., at 4, n. 2 (noting that this practice is not “a matter of tolling”).

IV

Lambert devotes much of his merits brief to arguing the distinct question whether his Rule 23(f) petition was timely even without resort to tolling. First, he argues that, even if his motion for reconsideration was not filed within 14 days of the decertification order, it was filed within the time allowed (either by the Federal Rules or by the District Court at the March 2 hearing). The timeliness of that motion, Lambert contends, “cause[d] the time to appeal to run from the disposition of the reconsideration motion, not from the original order.” Brief for Respondent 8; see id., at 9–18. Alternatively, he argues that the District Court’s order denying reconsideration was itself “an order granting or denying class-action certification” under Rule 23(f). Id., at 8–9, 19–20. The Court of Appeals did not rule on these alternative grounds, which are beyond the scope of the question presented. Mindful of our role, we will not offer the first word. See United States v. Stitt, 586 U. S. ___, ___–___ (2018) (slip op., at 9); Pacific Bell Telephone Co. v. linkLine Communications, Inc., 555 U. S. 438, 457 (2009). If the Court of Appeals concludes that these arguments have been preserved, it can address them in the first instance on remand.

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The relevant Rules of Civil and Appellate Procedure clearly foreclose the flexible tolling approach on which the Court of Appeals relied to deem Lambert’s petition timely. The judgment of the Court of Appeals is therefore reversed.

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4. Lambert’s other textual arguments center on rules addressed to appeals as of right. See Brief for Respondent 9–12, 17–18, 36–38 (discussing, e.g., Fed. Rules App. Proc. 3 and 4). As noted above, Rules 5 and 26 specifically address petitions for permission to appeal from nonfinal orders such as the one at issue here. Lambert’s attempts to reason by implication from other, inapposite Rules therefore bear little weight. See Manrique v. United States, 581 U. S. ___, ___–___ (2017) (slip op., at 6–7).

5. Lambert also argues that interpreting Rule 23(f) flexibly would be consistent with the Rules’ generally equitable approach. Brief for Respondent 21–27. But that simply fails to engage with the dispositional point here: Any such background preference for flexibility has been overcome by the clear text of the relevant rules. See, e.g., Young v. United States, 535 U. S. 43, 49 (2002).

6. Lambert argues that his counsel’s statements 10 days after the District Court’s decertification order constituted an oral motion for reconsideration, but the transcript belies any such claim. See App. to Pet. for Cert. 71 (requesting only “leave to file”); id., at 74 (informing the District Court that Lambert “will want to file” a reconsideration motion).

7. We therefore have no occasion to address the effect of a motion for reconsideration filed within the 14-day window. Moreover, because nothing the District Court did misled Lambert about the appeal filing deadline, see supra, at 1–2, we similarly have no occasion to address the question whether his motion would be timely if that had occurred. See Carlisle v. United States, 517 U. S. 416, 428 (1996); id., at 435–436 (GINSBURG, J., concurring) (discussing Thompson v. INS, 375 U. S. 384, 386–387 (1964) (per curiam), and Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U. S. 215, 216–217 (1962) (per curiam)). We also have no occasion to address whether an insurmountable impediment to filing timely might compel a different result. Cf. Fed. Rule App. Proc. 26(a)(3) (addressing computation of time when “the clerk’s office is inaccessible”).
and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.
California Courts of Appeal

Cite as 19 C.D.O.S. 1668

THE PEOPLE ex rel. XAVIER BECERRA, as Attorney General, etc., Plaintiff and Respondent,
v.
ARDITH HUBER, Defendant and Appellant.

No. A144214
In The Court of Appeal of the State of California
First Appellate District
Division Four
(Humboldt County Super. Ct. No. DR110232)
Filed February 25, 2019

COUNSEL

Counsel for Appellant: Law Office of Dario Navarro, Dario F. Navarro; Fredericks Peebles & Morgan, Michael A. Robinson, for defendant and appellant.


OPINION

I. INTRODUCTION

This appeal is from a summary adjudication order and permanent injunction entered in an enforcement action by the Attorney General on behalf of the People of the State of California against Ardith Huber, a member of the Wiyot Band of Indians. Huber owns and operates a tobacco smokeshop on the Table Bluff Rancheria, an area where the Wiyots live just outside of Crescent City, in Humboldt County.

The Attorney General’s complaint alleges a claim for violation of the Unfair Competition Law, Business and Professions Code section 17200 et seq. (the UCL) and cites as predicate “unlawful acts” violations of three statutes applicable to cigarette sales and marketing, the Tax Stamp Act (Rev. & Tax. Code, § 30161), the Directory Act (Rev. & Tax. Code, § 30165.1, subd. (e)(2)), and the Fire Safety Act (Health & Saf. Code, § 14951, subd. (a)). He also pleads, as separate claims, violations of the Directory Act and the Fire Safety Act. The trial court granted summary adjudication to the claims, violations of the Directory Act and the Fire Safety Act (He

There is no dispute in this case that today the Wiyot Band of Indians is a federally recognized tribe and that the Table Bluff Rancheria falls within the broad definition of “Indian country” under federal law, as do individual allotments of land to enrolled tribe members such as Huber. (18 U.S.C. §

limited civil jurisdiction over cases arising on Indian reservations, the trial court lacked power to proceed on any of the three claims in this case. She also argues that, under the doctrine of Indian preemption, which limits the reach of state law to conduct by Indians on Indian reservations, all the statutes the Attorney General seeks to enforce here are preempted by paramount federal authority.

We affirm.

II. BACKGROUND

A. Huber Enterprises and the Table Bluff Rancheria

Huber runs a sole proprietorship out of her home called Huber Enterprises, selling cigarettes at retail and wholesale. Although Huber once sold other brands of cigarettes, after 2007 she has sold exclusively Native American brands, which she describes as “cigarettes manufactured by Indians on Indian lands, . . . shipped and sold through Indian and tribally-owned distributors to Indian and tribally-owned retail smokeshops located on Indian lands.”

The retail component of Huber’s enterprise is onsite business. Customers include tribe members and nonmembers who come to the Table Bluff Rancheria to make purchases there. The wholesale component of the enterprise is with “over two dozen Indian smokeshops owned either by Indian tribes or [i]ndividual tribal members and operated within [other] . . . recognized Indian reservation[s].” Deliveries are made to these “inter-tribal” customers by truck, using California highways.

Huber Enterprises is licensed to do business pursuant to the Wiyot Tribal Business Code and the Wiyot Tribal Tobacco Licensing Ordinance (Ordinance No. 01-10). Ordinance No. 01-10 was promulgated June 14, 2010, for purposes of, inter alia, “promot[ing] tribal economic development,” “regulat[ing] and licens[ing] the manufacture, distribution, wholesaling, and retailing of tobacco products,” “complement[ing] and enforc[ing] federal standards relating to or prohibiting the sale, distribution, possession, exposure to, access to, advertising and promotion of, and use of tobacco products,” and “encourag[ing] and foster[ing] traditions and culture of the Tribe.”

Ordinance No. 01-10 requires licensees to pay—and Huber Enterprises does pay—a quarterly excise tax administered through a tribal tax stamp system. Taxes collected in this manner are deposited into a dedicated Tribal Tobacco Fund, earmarked solely for the expenses of “[t]obacco-related school and community health education programs,” “[s]moking and tobacco-use prevention measures,” and “[a]ssistance to tribal and community members for cessation of smoking and tobacco use.”

There is no dispute in this case that today the Wiyot Band of Indians is a federally recognized tribe and that the Table Bluff Rancheria falls within the broad definition of “Indian country” under federal law, as do individual allotments of land to enrolled tribe members such as Huber. (18 U.S.C. §
1. Federally protected territory in California falling within the federal definition of “Indian country” has a unique history that differs in some respects from the history of federally protected Indian lands in other states, where in many cases treaties with tribes determined the boundaries of tribal territory. (See Cohen, Handbook of Federal Indian Law (2012 ed.) § 3.04[2][a], p. 185 (Cohen).) Early in the 20th century, the United States sought to improve “the landless, homeless or penurious state of many California Indians” by purchasing numerous Indian allotments, whether restricted or held in trust by the United States.” (Williams v. Gover (9th Cir. 2007) 490 F.3d 785, 787.) The United States holds these ranchería lands in trust for resident Native Americans, controlling the land pursuant to a “special fiduciary duty owed by the United States to the Indian people.” (Table Bluff Band of Indians v. Andrus (N.D.Cal. 1981) 532 F.Supp. 255, 258.) A federal statute passed in 1958 known as the California Rancheria Act (Pub.L. No. 85-671 (Aug. 18, 1958) 72 Stat. 619-621), amended in 1964 (Pub.L. No. 88-419 (Aug. 11, 1964) 78 Stat. 390-391) (the Rancheria Act) established a process for terminating the trust relationship between the United States and Native Americans residing on 41 enumerated California rancherias and reservations. (Table Bluff, at p. 258.) A plan of termination for the Table Bluff Rancheria was prepared under the Rancheria Act, but because federal authorities failed to carry out various prerequisites to termination, the plan never took effect. (Id. at p. 259.) Throughout this opinion, we will occasionally use the term “reservation,” equating it with rancheria, since there is no dispute that the Table Bluff Rancheria qualifies as “Indian country,” and since many of the pertinent United States Supreme Court cases arose in states where tribes live on reservations.  


B. The Directory Act, the Fire Safety Act, and the Tax Stamp Act

At the center of the appeal are three sets of statutes governing different aspects of the sale and distribution of cigarettes in California. In order to provide some general legal context and set the stage for the specific issues framed by the appeal, we begin by summarizing these statutes.

First, California, along with many other states, has enacted legislation designed to implement the provisions of the 1998 Tobacco Master Settlement Agreement (the MSA). Under the pertinent California statutes, cigarettes sold in this state must be produced by manufacturers who either (a) have signed the MSA and agreed to pay substantial sums to the state to cover, among other things, health care costs generated by tobacco use among Californians, or (b) in lieu of signing the MSA, have agreed to pay sufficient funds into a reserve fund in escrow to guarantee a source of compensation should liability arise. (Health & Saf. Code, §§ 104555–104557.) Under the Directory Act, the Attorney General maintains a published list of all cigarette manufacturers who have annually certified their compliance with the requirements of the MSA or the alternative escrow funding requirements. (Rev. & Tax. Code, § 30165.1, subds. (c) & (d).) It is categorically illegal for any “person” to “sell, offer, or possess for sale in this state, ships or otherwise distribute into or within this state” cigarettes that are not in compliance with the Directory Act. (Id., § 30165.1, subd. (e)(2); see Health & Saf. Code, § 104555.)

Second, under the Fire Safety Act, any manufacturer of cigarettes sold in California must meet specified testing, performance, and packaging standards established for the purpose of minimizing the fire hazards caused by cigarettes. (Health & Saf. Code, §§ 14951, subd. (a)(1)–(3), 14952–14954.) This statute provides that all cigarettes sold in this state must, among other things, be packaged in a specified manner and certified with the State Fire Marshal as compliant with these safety standards. (Id., § 14951, subd. (a).) It is categorically illegal for any “person” to “sell, offer, or possess for sale in this state cigarettes” that do not comply with the Fire Safety Act. (Ibid.)

Third, to reduce smoking and fund healthcare research related to diseases caused by smoking (Rev. & Tax. Code, §§ 30131 & 30121 et seq.), California imposes excise taxes that “shall be paid by the user or consumer” (id., § 30107) but that must be collected by distributors at the time of sale and remitted by them to the state (id., § 30108). Compliance with this remittance obligation is administered under the Tax Stamp Act, which requires all cigarette packages sold in California to have tax stamps affixed to them. (Rev. & Tax. Code, § 30161.) Subject to exceptions, it is illegal for any “person” to “knowingly possess[,] or keep[,] store[,] or retain[,] for the purpose of sale, or sell[,] or offer[,] to sell, any package of cigarettes to which there is not affixed” a tax stamp required by the Tax Stamp Act. (Rev. & Tax. Code, § 30474, subd. (a).)

C. Procedural History

After sending two cease-and-desist letters charging Huber with violating various provisions of state law governing distribution and sales of cigarettes, the Attorney General filed this action in Humboldt County in March 2011. The complaint pleaded three causes of action. The first alleged violation of the Directory Act. The second alleged violation of the Fire Safety Act. And the third alleged violation of the UCL, specifying violations of the Tax Stamp Act, the Directory Act, and the Fire Safety Act as predicate “unlawful acts” warranting entry of a permanent injunction and an award of civil penalties.

Specifically, it was alleged that Huber Enterprises sold cigarettes in packages without an affixed tax stamp and failed to collect and remit excise taxes, all in violation of the Tax Stamp Act (Rev. & Tax. Code, § 30161); sold cigarettes purchased from manufacturers not listed by the Attorney General on the statewide tobacco directory, in violation of the Directory Act (id., § 30165.1, subd. (e)(2)); and sold cigarettes in packaging that does not meet required safety standards,
in violation of the Fire Safety Act (Health & Saf. Code, § 14951, subd. (a)).

On cross motions for summary adjudication, the trial court denied Huber’s motion; granted the Attorney General’s motion in part, leaving open triable issues concerning civil penalties; and entered a permanent injunction. By its terms, the injunction applies only to sales to nonmembers of the Wiyot Tribe and permits Huber to continue operating so long as she complies with the Directory Act, the Fire Safety Act, and the Tax Stamp Act. This appeal followed.

III. DISCUSSION

Only the grant of the permanent injunction is on appeal. “A permanent injunction is a determination on the merits that a plaintiff has prevailed on a cause of action . . . against a defendant and that equitable relief is appropriate. A permanent injunction . . . is a final judgment on the merits.’ ” (Dawson v. East Side Union High School Dist. (1994) 28 Cal.App.4th 998, 1041.) Normally, “[t]he trial court’s decision to grant a permanent injunction rests within its sound discretion and will not be disturbed on appeal absent a showing of a clear abuse of discretion.” (Shapiro v. San Diego City Council (2002) 96 Cal.App.4th 904, 912.) But where an appeal attacks the legal premises of a permanent injunction on undisputed ultimate facts—as is the case here—our review is de novo. (Dawson, at p. 1041.)

Because the order granting summary adjudication in favor of the Attorney General and denying it to Huber supplies the basis for the permanent injunction, we must in turn review whether summary adjudication was correctly granted as to each of the three causes of action. We review de novo an order granting summary judgment or summary adjudication. (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 860.) “As a practical matter, ‘we assume the role of a trial court and apply the same rules and standards which govern a trial court’s determination of a motion for summary judgment.” ’ (Swigart v. Bruno (2017) 13 Cal.App.5th 529, 536.) A summary adjudication motion “proceed[s] in all procedural respects as a motion for summary judgment.” (Code Civ. Proc., § 437c, subd. (f)(2).)

A. Subject Matter Jurisdiction

The United States Supreme Court “first addressed the sovereign status of [Indian] tribes in three opinions known today as the Marshall Trilogy after their author, Chief Justice John Marshall. (See Worcester v. The State of Georgia (1832) 31 U.S. 515 . . . ; Cherokee Nation v. Georgia (1831) 30 U.S. 1 . . . (Cherokee Nation); Johnson v. M’Intosh (1823) 21 U.S. 543 . . .) Broadly speaking, these cases established that ‘states lack jurisdiction in Indian country, that tribes are “domestic dependent nations” to whom the United States owes a fiduciary obligation, and that Indian affairs are the exclusive province of the federal government.” ” (People v. Miami Nation Enterprises (2016) 2 Cal.5th 222, 233–234.)

Within this dependency relationship as Chief Justice Marshall conceived of it, relations between tribes and individual states are governed exclusively by the United States, and thus, absent express congressional authorization by treaty or legislation, state law does not extend to Indian territory. (See Worcester v. The State of Georgia, supra, 31 U.S. at p. 561.) From this basic principle evolved a closely related corollary—that absent congressional authorization, the jurisdiction of state courts to adjudicate cases arising on Indian lands is limited by the right of reservation Indians to govern themselves. (See Williams v. Lee (1959) 358 U.S. 217, 220, 222–223 (Williams).)

Huber’s legal position in the course of this appeal has been a bit of a moving target. Her main argument below, and here on appeal—until she retained new counsel and began shifting ground—is that California courts have no subject matter jurisdiction over this case because it involves her on-reservation activities as a member of the Wiyot Tribe. Central to that argument is a federal statute known as Public Law 280. (Pub.L. No. 83-280 (Aug. 15, 1953) 67 Stat. 588-590. Under Public Law 280, Congress granted California and five other states5 plenary criminal jurisdiction over “offenses committed by or against Indians” within Indian country (18 U.S.C. § 1162(a); see People v. McCovey (1980) 36 Cal.3d 517, 535), and limited civil jurisdiction over “causes of action between Indians or to which Indians are parties” in cases arising in Indian country (28 U.S.C. § 1360(a); see Boisclair v. Superior Court (1990) 51 Cal.3d 1140, 1147, fn. 4). Construing the statute

5. Besides California, the other listed Public Law 280 states, as the statute was originally enacted in 1953, were Minnesota, Nebraska, Oregon, and Wisconsin. Alaska was added by Act of August 8, 1958, Public Law No. 85-615, section 1, 72 Statutes 545 (codified at 18 U.S.C. § 1162(a), 28 U.S.C. § 1360(a)). These six states are sometimes known as “mandatory” Public Law 280 states. (See Cohen, supra, § 6.04[3][a], p. 538, fn. 50.) Public Law 280 offered the option to other states to accept the same jurisdiction, and eventually 10 additional states, sometimes known as “optional” Public Law 280 states (Arizona, Idaho, Florida, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington), accepted jurisdiction under its terms, in whole or in part. (See Cohen, supra, § 6.04[3][a], pp. 537–538 & fn. 47.)

5. Section 4 of Public Law 280, 28 U.S.C. § 1360, provides in part as follows:

“(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

“State of Indian country affected

[¶ . . . ¶]
“California........................................All Indian country within the State.

[¶ . . . ¶]
“(b) Nothing in this section shall authorize the alien-
narrowly so that it does not grant these states general civil regulatory control over Indian tribes, the high court held in *Bryan v. Itasca County* (1976) 426 U.S. 373, 385 (*Bryan*) that section 4 of Public Law 280 confers limited adjudicative jurisdiction to resolve private civil disputes. A public enforcement action by the Attorney General does not fall within that limited jurisdictional grant, Huber argued.

But in her reply brief, Huber began to change tack. While still citing *Bryan* and Public Law 280, she made no mention of adjudicative jurisdiction and instead argued the case can and should be decided in her favor on preemption grounds, a secondary line of argument in her opening brief. Because Ordinance No. 01-10 authorized her to operate as she did, she claimed, the Attorney General seeks to “nullify” tribal law in derogation of tribal sovereignty. The thrust of Huber’s argument, as reframed in reply, is that the People “seek[] to inflict upon [her] a comprehensive civil regulatory regime that egregiously violates the letter and spirit of Public Law 280” and violates the right of the Wiyots to “‘make their own laws and be governed by them.’” So thoroughgoing is the intrusion on Wiyot sovereignty, Huber tells us, it is difficult to imagine a “more invasive and coercive regulatory regime . . . short of military occupation.”

Huber’s position shifted again at oral argument, where she announced her agreement with the People that “Public Law 280 is irrelevant,” stated “we’re . . . assuming for the sake of argument there is jurisdiction,” and urged that the appeal should rise or fall on the question of preemption. We initially declined to accept this concession—subject matter jurisdiction, of course, is not a matter for litigants to control by consent or waiver—and we filed an opinion agreeing in part with the jurisdictional position advanced in Huber’s opening brief. Given the narrow construction placed on the scope of state court adjudicatory jurisdiction in *Bryan*, *supra*, 426 U.S. 373, we held that the trial court lacked jurisdiction to proceed on the People’s first cause of action for violation of the UCL, and that it had jurisdiction to proceed on the other two causes of action under the grant of criminal/prohibitory jurisdiction in Public Law 280. (18 U.S.C. § 1162(a).)

Following a grant of rehearing, the Attorney General supplied additional authority addressing the threshold issue of adjudicative jurisdiction. Based on that authority, we are now persuaded that the key United States Supreme Court case here is not *Bryan*, but *Williams*.

At issue in *Williams* was whether a state court had jurisdiction to adjudicate a debt collection action brought by a non-Indian against a Navajo Reservation Indian for debts the Indian incurred at the non-Indian’s on-reservation store. (*Williams*, *supra*, 358 U.S. at p. 218.) The Supreme Court there articulated the long-standing general rule controlling state court jurisdiction in actions involving Indians, i.e., “‘absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.’” (*Id.* at p. 220.) Applying that rule to the facts before it—where the debt collection claim at issue arose entirely on the Navajo Reservation, the Navajo Reservation had a well-developed court system, and Arizona’s Enabling Act and Constitution expressly disclaimed jurisdiction over those Indian lands—the court held: “There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.” (*Williams, supra*, 358 U.S. at p. 223; see also *id.* at p. 222, fn. 10.)

If Public Law 280 is viewed through the prism of *Williams*, what Section 4 of the statute did was authorize state court adjudicative jurisdiction in specified civil cases where the exercise of such jurisdiction would infringe Indian sovereignty, unless authorized by Congress. But absent infringement under *Williams*, there is no need to consider Public Law 280 and the general jurisdiction of state courts is the default rule. (See *Powell v. Farris* (Wash. 1980) 620 P.2d 525, 527–528 [*Williams* test applied to support finding of state court jurisdiction in partnership dissolution action against tribe member operating smokeshop under business license issued by tribal council]; *State Securities, Inc. v. Anderson* (N.M. 1973) 506 P.2d 786, 788–789 (*Anderson* [*Williams* test applied to support finding of state court jurisdiction in breach of contract action against tribe member based on contract entered off reservation].) Under that default rule, this case falls within the jurisdiction conferred on the superior courts of this state by article VI, section 10 of the California Constitution, a grant of jurisdiction that long predates Public Law 280. (Cal. Const., art. VI, § 10, former art. VI, § 5.) Because nothing in the language or legislative history of Public Law 280 indicates the statute was meant to divest states of pre-existing jurisdiction, federal statutory authorization is not required. (*Three Affiliated Tribes v. Wold Engineering* (1984) 467 U.S. 138, 150 (*Three Affiliated Tribes I*).)

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6. *Three Affiliated Tribes I* arose in North Dakota, an optional Public Law 280 state that, by statute in 1963, elected to assume jurisdiction over civil cases arising in Indian country. (*Three Affiliated Tribes I, supra*, at p. 144.) At issue there was a lawsuit by an Indian tribe alleging negligence and breach of contract against a contractor for poor workmanship in the construction of a water supply system on its reservation. (*Id.* at p. 141.) There was a counterclaim by the contractor for failure to pay. (*Id.* at p. 142.) The tribe took the position it was entitled to sue in state court, but the trial court granted the contractor’s motion to dismiss the suit for lack of jurisdiction. (*Id.* at pp. 142,
There are no California cases applying *Williams* in this way, but there does appear to be a deep vein of out-of-state case law doing so. (C’Hair v. Court of Ninth Judicial District (Wyo. 2015) 357 P.3d 723, 730 (C’Hair) [citing illustrative cases from various states; “[w]hen considering the limitations on state court jurisdiction over matters potentially implicating both state and tribal interests, it is clear that the governing analysis has long been and continues to be the *Williams* test”].) These cases turn on a careful delineation of the “tribal status of the parties, . . . the on and off-reservation contacts associated with the involved controversy, and the specific governmental interest militating for and against state court jurisdiction.” Whether a tribe member is being sued in state court for conduct that took place entirely within the boundaries of his or her reservation is of central importance, but is not always dispositive. The cases finding no jurisdiction tend to focus on such things as whether the claims implicate tribal self-governance or membership, interests in real property owned by the tribe members within reservation boundaries or matters of domestic relations among tribe members. The cases upholding jurisdiction, on the other hand, tend to focus on such things as whether a tribe member is seeking access to state court (as in *Three Affiliated Tribes I*), agreed to be sued in state court, or—especially pertinent here—engaged in conduct that occurred entirely or in part off-reservation.

The Attorney General argues that the claims he asserts arose off-reservation, while Huber argues the opposite. To resolve the jurisdictional issue presented here, we see no need for binary analysis of where the claims arose. Under the *Williams* test, “[t]he activity in question moves off the reservation the state’s governmental and regulatory interest increases dramatically, and federal protectiveness of Indian sovereignty lessens.” (Begay v. Roberts (Ariz.Ct.App. 1990) 807 P.2d 1111, 1115 (Begay); see Smith Plumbing Co. v. Aetna Casualty & Surety Co. (Ariz. 1986) 720 P.2d 499 (Smith) “[T]he Tribe’s reaching out outside the confines of the reservation to engage in commercial activity—without the concomitant reaching in by non-Indians—makes this a proper instance of nondiscriminatory adjudication of a contract claim by the courts of this state.”) Because so much of Huber’s activity was directed to off-reservation business, this case, in our view, comfortably aligns with such cases as Anderson, Begay and Smith, where the extent of the off-reservation conduct at issue tipped the scale in favor of exercising state court jurisdiction.

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10. *Healy Lake Village v. Mt. McKinley Bank* (Alaska 2014) 322 P.3d 866, 875 (dismissal affirmed where issues presented would “require the state court to apply tribal law to determine the outcome of a tribal election dispute and issues of tribal membership” and thus would ignore precedent “emphasiz[ing] the need to respect tribal self-governance”).


12. *McKenzie County Social Service Bd. v. C.G.* (N.D. 2001) 633 N.W.2d 157, 161 (declining to exercise jurisdiction over action seeking paternal and child support order for child conceived on reservation); see *Montana v. United States* (1981) 450 U.S. 544, 564 (“in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members”).

13. *Outsource Services Management, LLC v. Nooksack Business Corp.* (Wash. 2014) 333 P.3d 380, 384 (upholding state court jurisdiction in contract suit against tribal business enterprise where contract contained consent to jurisdiction clause and explaining “[w]hile [enterprises] is correct that parties cannot confer subject matter jurisdiction by agreement or consent, that does not mean we cannot take [its] consent into account when determining whether jurisdiction would infringe on the tribe’s right to self-rule”).

Applying Williams to the facts presented on this record, the exercise of jurisdiction here does not infringe tribal sovereignty. The case implicates no issues of tribal self-governance, tribal membership, ownership of any tribe member’s real property, or domestic relations among tribe members. Huber’s business is located on the Wiyot reservation, but all the claims at issue are directed to her sales of contraband cigarettes to non-members of the Wiyot tribe, both at the retail level (based on promotions directed to off-reservation customers enticing them to visit her on-reservation business) and at the wholesale level (based on deliveries by truck off the reservation to other tribes). While these claims involve a Native American residing and doing business in Indian country, they cannot be said to have arisen entirely there. Nor does the Wiyot tribe have a court system that might be undermined by a California court’s assertion of jurisdiction involving a Wiyot tribe member and a business she operates on Wiyot tribal lands. Unlike the situation in Williams with Navajos in Arizona, there has never been any disclaimer by the state of California of any aspect of its jurisdiction over Indian country within the territorial boundaries of this state.

Notably, state courts around the country in a line of cases involving public enforcement actions against Native American cigarette sellers operating smoke shops on their reservations while offering tobacco products for sale off-reservation, have all rejected challenges to subject matter jurisdiction. In State v. Maybee (Or.Ct.App. 2010) 232 P.3d 970 (Maybee), for example, the Oregon Court of Appeals considered a factual situation very similar to the one we have here. There, Maybee, a Native American operating a smoke shop business on a reservation in New York, purchased cigarettes from a variety of sources and resold them to internet buyers elsewhere in the country. (Id. at p. 972.) Oregon sued Maybee in state court, charging him with violating its Directory Statute with respect to his sales of contraband cigarettes to Oregonians. (Maybee, supra, at p. 972.) Maybee argued that the Oregon courts lacked subject matter jurisdiction, contending that because he ran his business without leaving his reservation, the state’s claims all arose in Indian country, and thus Oregon courts lacked jurisdiction because asserting it over him would infringe on tribal rights. (See id. at pp. 972–973.) Rejecting this challenge to subject matter jurisdiction, the Court of Appeals first noted that, “[i]n contrast to the rule articulated in Williams . . . . state courts may exercise jurisdiction in civil cases involving Native Americans and relating to conduct that extends beyond the reservation’s boundaries.” (Id. at p. 973.) Then the appellate panel explained that, while Maybee did not leave his reservation in New York, his websites were accessible to customers in Oregon and he received orders by telephone and the internet from customers located in Oregon. (Ibid.) Thus, the panel concluded that Oregon state courts had jurisdiction to adjudicate. (Id. at pp. 973–974.)

Maybee confirms that where there is no infringement of tribal sovereignty, Public Law 280 does not figure into the jurisdictional analysis. Oregon, like California, is a mandatory Public Law 280 state. But similar cases involving Native American smoke shops “exporting” tobacco products off-reservation have arisen in optional Public Law 280 states and in non-Public Law 280 states. Appellate courts in several of these cases have reached the same conclusion that the Oregon Court of Appeals did in Maybee, adopting similar reasoning. (See Health and Human Services v. Maybee (Maine 2009) 965 A.2d 55, 56–57 [non-Public Law 280 state]; State ex rel. Wasden v. Native Wholesale Supply Co. (Idaho 2013) 312 P.3d 1257, 1261–1263 [optional Public Law 280 state].) Other smoke shop cases, including the recent opinion from our Third District colleagues in People ex rel. Becerra v. Rose (2017) 16 Cal.App.5th 317, 329–331 (Rose), reach the same result without exploring the basis for subject matter jurisdiction. (See State v. Native Wholesale Supply (Okla. 2010) 237 P.3d 199.) None of the courts in any of these various smoke shop cases saw an obstacle to proceeding in the absence of an express congressional grant. In accord with them, we conclude that the trial court here correctly ruled it had subject matter jurisdiction to entertain this case.

B. Preemption

1. Applicable Principles

“The relation between the Indians and the states has by no means remained constant since the days of John Marshall.” (Organized Village of Kake v. Egan (1962) 369 U.S. 50, 71 (Village of Kake).) Over the many years since that time, “Congress has to a substantial degree opened the doors of reservations to state laws” (id. at p. 74) to such a degree that “‘[o]rdinarily,’ . . . ‘an Indian reservation is considered part of the territory of the State.’ ” (Nevada v. Hicks (2001) 533 U.S. 353, 361–362; see also Village of Kake, supra, at p. 72; Acosta v. County of San Diego (1954) 126 Cal.App.2d 455, 463.) Although as of the early 1960s, it was still true that the “[d]ecisions of [the United States Supreme Court were] few as to the power of the states when not granted Congressional authority to regulate matters affecting Indians” (Village of Kake, supra, at p. 74), a substantial body of high court case law has now developed concerning when, in the absence of an express congressional grant of power, state law may be applied to reservation Indians.

The high court summarized the applicable principles in White Mountain Apache Tribe v. Bracker (1980) 448 U.S. 136 (Bracker) as follows: “Congress has broad power to regulate tribal affairs under the Indian Commerce Clause, Art. 1, § 8, cl. 3. [Citation.] This congressional authority and the ‘semi-independent position’ of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be preempted by federal law. [Citations.] Second, it may unlawfully infringe ‘on the right of reservation Indians to make their own laws and be ruled by them.’ [Citations.] The two barriers are independent because either, standing alone, can be a
sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. They are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important ‘backdrop,’ [citation] against which vague or ambiguous federal enactments must always be measured.[19]

“The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of pre-emption that have emerged in other areas of the law. Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other. The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law. [Citation.] . . . [T]his tradition is reflected and encouraged in a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development. Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence. [Citation.] We have thus rejected the proposition that in order to find a particular state law to have been pre-empted by operation of federal law, an express congressional statement to that effect is required. [Citation.] At the same time any applicable regulatory interest of the State must be given weight [citation], and ‘automatic exemptions “as a matter of constitutional law” ’ are unusual. [Citation.]

“When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State’s regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest.[18] . . . More difficult questions arise where . . . a State asserts authority over the conduct of non-Indians engaging in activity on the reservation. In such cases we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not depen-

[15. United States Supreme Court cases decided after Bracker have restated the idea that infringement of Indian sovereignty is an “independent” barrier to the application of state law, emphasizing the language in the Bracker opinion that it is a consideration to be taken into account as part of the “backdrop” in determining congressional intent and, as such, simply part of a highly context-sensitive balancing of interests inquiry. (Three Affiliated Tribes v. Wold Engineering (1986) 476 U.S. 877, 884 (Three Affiliated Tribes II); see Rice v. Rehner (1983) 463 U.S. 713, 720–725 (Rice.).


2. Moe, Colville, and Milhelm

Bracker, supra, 448 U.S. 136 summed up an area of law in which Moe v. Confederated Salish & Kootenai Tribes, Etc. (1976) 465 U.S. 463 (Moe), Washington v. Confederated Tribes of Colville (1980) 447 U.S. 134 (Colville), and Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc. (1994) 512 U.S. 61 (Milhelm)—each involving cigarette sales on Indian reservations and the extent to which state taxation and regulation schemes may be applied to those sales—are leading decisions. Thus, the parties rightly devote a great deal of attention to these three cases in their briefs. Although ultimately disagreeing about how the Moe-Colville-Milhelm line of precedent should be applied here, they largely agree about what each case held.

Moe, supra, 425 U.S. 463 involved consolidated appeals in two cases that arose on the Flathead reservation in Montana, where a member of the Confederated Salish and Kootenai Tribes operated retail smokeshops. (Moe, at pp. 465–466.) A Montana statute required all tobacco vendors to hold state-issued licenses, and all licensed vendors to collect an excise tax on retail sales of cigarettes by affixing tax stamps on cigarettes sold at retail. (Id. at p. 467.) When two tribe members were arrested by Montana authorities for the misdemeanor offenses of operating without a license and selling cigarettes without tax stamps affixed to them, they sued in federal district court to enjoin enforcement. (Id. at pp. 467–468.) And in a second, related case, the tribe and some of its members sued to enjoin enforcement of a statute imposing a personal property tax on vehicles owned by tribe members living on the reservation. (Id. at pp. 468–469.)

Citing cases barring states from directly taxing Indian-owned property or income earned by Indians on a reservation, the district court held Montana could not apply its tax on vehicles, its vendor licensing scheme, or its cigarette taxing scheme, with one significant exception: Montana “may require a pre-collection of the tax imposed by law upon the non-Indian purchaser of the cigarettes.” (Moe, supra, 425 U.S. at pp. 468–469.) The high court affirmed, and the last element of its opinion—upholding the requirement of pre-collection of excise tax owed by non-tribal purchasers of cigarettes (id. at pp. 481–483)—is the anchor for the later decisions in Colville, supra, 447 U.S. 134 and Milhelm, supra, 512 U.S. 61 building on it.

Essentially, what the court held is that, to prevent tax evasion by non-Indians who purchase cigarettes, Montana may enlist tribal sellers in an effort to collect tax owed by these shoppers. (Moe, supra, 425 U.S. at pp. 481–483.) The court explained, “Since nonpayment of the tax is a misdemeanor
as to the retail purchaser, the competitive advantage which the Indian seller doing business on tribal land enjoys over all other cigarette retailers, within and without the reservation, is dependent on the extent to which the non-Indian purchaser is willing to flout his legal obligation to pay the tax.” (Id. at p. 482.) Noting that the burden imposed on Indian sellers “is not, strictly speaking, a tax at all” because the ultimate tax burden falls on purchasers—which is why cases invalidating direct taxation of reservation Indians did not apply—the court held that the precollection requirement was nothing more than an expedient “minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax.” (Id. at p. 483.)

Colville expands the core holding in Moe in a number of ways. The appeal there was from a district court judgment in consolidated cases, both involving cigarette sales by Indian smokeshops on reservation land in the State of Washington. (Colville, supra, 447 U.S. at p. 139.) One case involved the Colville, Lummi, and Makah reservations, and the other involved the Yakima reservation. (Id. at pp. 139, 143–144.) These tribes, like the Wiyots, had their own scheme of taxing sales of cigarettes under tribal law. (Id. at pp. 144–145.) Washington had a tax stamp system that required precollection of an excise tax, similar to the one involved in Moe, but the Washington scheme went beyond Montana’s by imposing on sellers detailed recordkeeping requirements. (Colville, at pp. 143, 151.) Also presented for decision in Colville were enforcement issues concerning whether Washington had the power to seize unstamped cigarettes as contraband and whether Indians living on a reservation who were not members of the reservation tribe could be taxed directly. (Id. at pp. 160–161.)

The holdings in Colville on this complex array of issues are noteworthy in three respects. First, Washington’s scheme of taxing nonmembers who make on-reservation purchases was found to be valid and not preempted. (Colville, supra, 447 U.S. at pp. 154–155.) Here, the court observed that “the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest.” (Id. at p. 155.) “What the smokeshops offer these customers,” the court said, “is solely an exemption from state taxation.” (Ibid.) The court rejected the proposition that “principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, . . . authorize Indian tribes to market an exemption from state taxation to persons who would normally do their business elsewhere.” (Ibid.)

The tribes’ reliance on their own local schemes of taxing and regulating cigarette sales failed. (Colville, supra, 447 U.S. at pp. 158–159.) “There is no direct conflict between the state and tribal schemes, since each government is free to impose its taxes without ousting the other,” the court concluded, and “the State does not interfere with the Tribes’ power to regulate tribal enterprises when it simply imposes its tax on sales to nonmembers.” (Ibid.) After weighing the federal, tribal, and state interests involved, the court found no preemption, pointing out that the “simple collection burden imposed by Washington’s cigarette tax on tribal smokeshops is legally indistinguishable from the collection burden upheld in Moe.” (Id. at p. 159.) For the most part, this portion of the opinion—comprising its primary holding—is a straightforward application of Moe; it plows new ground only to the extent it upholds Washington’s recordkeeping requirement, an added administrative burden on tribal sellers that was not present in Moe. (Colville, at pp. 151, 159–160.) The tribes had the burden of showing that the recordkeeping requirements were “not reasonably necessary as a means of preventing fraudulent transactions,” and they failed to meet it. (Id. at p. 160.)

Second, the court found that Washington was empowered “to apply its sales and cigarette taxes to Indians resident on the reservation but not enrolled in the governing Tribe.” (Colville, supra, 447 U.S. at p. 160.) The court held that, although such persons fell within the federal statutory definition of “Indian,” that fact did not demonstrate a congressional intent to exempt non-tribe members from taxation. (Id. at p. 161.) The court focused instead on whether taxing nonmembers “contravene[s] the principle of tribal self-government.” (Ibid.) It did not, the court explained, “for the simple reason that nonmembers are not constituents of the governing Tribe.” (Ibid.) Third, and finally, the court found Washington had “power to seize unstamped cigarettes” off-reservation, where the “state power over Indian affairs is considerably more expansive than it is within reservation boundaries.” (Id. at pp. 161–162.) Having so held, however, the court declined to reach the question whether Washington “may enter onto the reservations, seize stocks of cigarettes which are intended for sale to nonmembers, and sell these stocks in order to obtain payment of the taxes due.” (Id. at p. 162.)

Milhelm picked up where Moe and Colville left off, but specifically addressed the wholesale level of distribution. Historically, under federal legislation known as the Indian Trader Statutes, enacted pursuant to the Indian Commerce Clause and designed to protect against exploitation of tribes by Indian traders, and under prior Supreme Court case law, federally licensed trading agents have been exempt from state taxation, just as tribe members are exempt from state taxation. (Milhelm, supra, 512 U.S. at pp. 68, 70.) Responding to reports of huge quantities of unstamped cigarettes being shipped into Indian reservations at the wholesale level by Indian traders—volumes that were far in excess of the amounts tribe members would be expected to consume—New York attempted to cut off the supply of what appeared to be a black market in untaxed cigarettes on Indian reservations by adopting regulations that imposed strict recordkeeping requirements and quantity limitations on wholesalers. (Id. at pp. 64–67.) The question presented was whether federal statutes governing trade with Indians preempted New York’s program. (Id. at p. 64.)
Reviewing a decision of the New York Court of Appeals that held New York’s regulations preempted by the Indian Trader Statutes, the high court framed the issue as follows. “Because New York lacks authority to tax cigarettes sold to tribal members for their own consumption, see Moe, supra, 425 U.S. 463, 475–481 . . . , cigarettes to be consumed on the reservation by enrolled tribal members are tax exempt and need not be stamped. On-reservation cigarette sales to persons other than reservation Indians, however, are legitimately subject to state taxation. See . . . Colville . . . 447 U.S. 134, 160–161 . . . . [¶] To ensure that nonexempt purchasers do not likewise escape taxation, the regulations limit the quantity of untaxed cigarettes that wholesalers may sell to tribes and tribal retailers.” (Milhelm, supra, 512 U.S. at pp. 64–65, 68–69.)

The court reversed, extending Moe and Colville with the following explanation: “The specific kind of state tax obligation that New York’s regulations are designed to enforce—which falls on non-Indian purchasers of goods that are merely retailed on a reservation—stands on a markedly different footing from a tax imposed directly on Indian traders, on enrolled tribal members or tribal organizations, or on ‘value generated on the reservation by activities involving the Tribes,’ Colville, 447 U.S., at 156–157. Moe [and] Colville . . . make clear that the States have a valid interest in ensuring compliance with lawful taxes that might easily be evaded through purchases of tax-exempt cigarettes on reservations; that interest outweighs tribes’ modest interest in offering a tax exemption to customers who would ordinarily shop elsewhere. The ‘balance of state, federal, and tribal interests,’ [citation], in this area thus leaves more room for state regulation than in others. In particular, these cases have decided that States may impose on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from non-Indians.

“Although Moe and Colville dealt most directly with claims of interference with tribal sovereignty, the reasoning of those decisions requires rejection of the submission that a provision of the Indian Trader Statutes bars any and all state-imposed burdens on Indian traders. . . . [¶] . . . [¶] . . . . [¶] We are persuaded . . . that New York’s decision to stanch the illicit flow of tax-free cigarettes early in the distribution stream is a ‘reasonably necessary’ method of ‘preventing fraudulent transactions,’ one that ‘polices against wholesale evasion of [New York’s] own valid taxes without unnecessarily intruding on core tribal interests.’ Colville, 447 U.S., at 160 [.].

The sole purpose and justification for the quotas on untaxed cigarettes is the state’s legitimate interest in avoiding tax evasion by non-Indian consumers. . . . [¶] . . . [¶] . . . . [¶] And by requiring wholesalers to precollect taxes on, and affix stamps to, cigarettes destined for nonexempt consumers, New York has simply imposed on the wholesaler the same precollection obligation that, under Moe and Colville, may be imposed on reservation retailers.” (Milhelm, supra, 512 U.S. at pp. 73–76, fn. omitted.)

3. Preemption Analysis

Arguing for preemption, Huber emphasizes that this case involves solely on-reservation conduct among Indians, and, to the extent her operations extended beyond the border of the Table Bluff Rancheria, her business was with other tribes on other reservations. In her account of the facts, all she did was make wholesale deliveries to other tribes on their reservations “as a courtesy,” while contractually taking and accepting every order at the only store location she had, in her house on the Table Bluff Rancheria. She insists the trial court made no finding that she conducted business off-reservation. What the trial court actually found, she says, is that her business involved extensive “off-reservation contacts,” a concept she contends might be relevant to an issue of personal jurisdiction, but that has no legal significance here.

Huber relies heavily on our Supreme Court’s decision in People ex rel. Dept. of Transportation v. Naegele Outdoor Advertising Co. (1985) 38 Cal.3d 509, 520 (Naegele), a case involving an attempt by the California Department of Transportation to use California’s Outdoor Advertising Act (Bus. & Prof. Code, § 5200 et seq.) to regulate billboard signage on an Indian reservation that was visible from a state highway running through the reservation. (Naegele, at pp. 513–514.)

The Naegele court found this enforcement effort preempted. (Id. at p. 522.) If “off-reservation safety and aesthetic effects were insufficient to justify state regulation . . . ” of on-reservation activities in Naegele, Huber argues, the off-reservation effects relied upon by the trial court are insufficient to avoid preemption here as well. This argument misses the thrust of the analysis in Naegele, where there was a detailed federal statutory scheme and the court found Congress did not intend to permit state regulation of billboards on Indian reservations. (Id. at pp. 515, 522.) The opinion thus turned on principles of federal obstacle preemption. (Id. at p. 522; see Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc. (2007) 41 Cal.4th 929, 935–936 [summarizing types of federal preemption; “obstacle preemption arises when ‘ . . . under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress’ ’ ”].) There is no pervasive federal statutory scheme here.

The Attorney General bases his argument against preemption on the general idea that Indian reservations are not legal islands unto themselves and that whatever vestiges of sovereignty they still enjoy must give way in matters of commerce affecting the welfare of state citizens outside their borders. “Absent express federal law to the contrary,” he points out, “Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.” (Mescalero Apache Tribe v. Jones (1973) 411 U.S. 145, 148–149 (New Mexico I.).) He argues there is no need to engage in Bracker balancing because, in his view, the claim at issue arises off-reservation. (Wagnon v. Prairie Band Potawatomi Nation (2005).
546 U.S. 95, 99 (Wagnon) ("Bracker interest-balancing test applies only where ‘a State asserts authority over the conduct of non-Indians engaging in activity on the reservation’ "). To the extent Huber operated on-reservation, the Attorney General contends, much of her business was with non-tribe members who were enticed onto the Table Bluff Rancheria by her promotions. He points out that Huber "maintained websites that advertised ‘tax free’ and ‘cheaper cigarette[s]’ and encouraged customers to ‘come see us!,’ sold cigarettes via mail order, and had a toll-free phone number. [She] did not check for tribal identification and admits she sold cigarettes to the general public.”

The Attorney General also draws our attention to the scale of Huber’s enterprise. What she portrays as a "small storefront" operation run out of her house is not, in fact, some tiny, exclusively on-reservation business, he points out. Huber “sold huge quantities of noncompliant cigarettes. Between November 23, 2009 and October 1, 2013, she sold, distributed, and transported at least 14,727,290 packs of Seneca, Opal, King Mountain, Couture, and Sands brand cigarettes to other stores within the state but beyond her reservation. [She] invoiced over $30 million for these sales. Several days a week her employees delivered these cigarettes using her own vehicles on state roads and highways. Between March 8, 2007 and October 1, 2013, [Huber] also sold at least 1,969,279 packs of Seneca, Opal, King Mountain, Couture, and Sands brand cigarettes at her retail store. [Huber’s] tribe has about 600 members of all ages.” (Fns. omitted.)

All in all, we conclude that the Attorney General has the better of the argument on the issue of preemption. While we do not agree that Bracker preemption analysis may be short-circuited under Wagnon by characterizing the conduct involved at issue as off-reservation — what we have here is a mix of on-reservation and off-reservation activity — we are nonetheless persuaded that the Bracker test tips in favor of the People on this record. In circumstances involving conduct that is partially on-reservation and partially off-reservation, “a State may validly assert authority over the activities of nonmembers on a reservation” if a balancing of interests under Bracker, supra, 448 U.S. 136 calls for it. (New Mexico II, supra, 462 U.S. at p. 331.) And in this balancing process, the “State’s regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate State intervention.” (Id. at p. 336; see Rice, supra, 463 U.S. at p. 724 [‘[T]ribe member’s] distribution of liquor has a significant impact beyond the limits of the Pala Reservation.

The state has an unquestionable interest in the liquor traffic that occurs within its borders, and this interest is independent of the authority conferred on the States by the Twenty-first Amendment”). Here in particular, Moe, Colville, and Milhelm, as cigarette sales cases, provide the framework for the appropriate balancing analysis.

A key teaching of Moe, Colville, and Milhelm is that the high court views the issue of state regulation of cigarette sales on Native American reservations through an economic lens, looking not only at the cost advantages of selling noncomplying cigarettes, but to the incentives to lawbreaking that such sales create and the impact of upstream purchasing in the wholesale market for illicit cigarettes. (Moe, supra, 425 U.S. at pp. 481–483; Colville, supra, 447 U.S. at pp. 154–155; Milhelm, supra, 512 U.S. at pp. 73–76.) Looking at this case in the same way, Huber’s cigarette sales on the Table Bluff Rancheria in violation of the UCL, the Directory Act and the Fire Safety Act were no different in kind from the sales of non-tax stamped cigarettes at issue in Moe, Colville, and Milhelm; by flouting those statutes, she gained a cost advantage over retail sellers who bought at wholesale from complying manufacturers. Indeed, that cost advantage appears to have been the foundation of her enterprise, serving as an inducement to nonmembers to visit the Table Bluff Rancheria to avail themselves of prices made possible by this cost advantage, and creating a downstream market for wholesalers who distribute noncompliant cigarettes.

Huber argues that Moe, Colville, and Milhelm are merely “tax” cases that have no application outside the “special area of State taxation.” (See California v. Cabazon Band of Mission Indians (1987) 480 U.S. 202, 215, fn. 17.) We are not persuaded. What the phrase “special area” of taxation refers to is the rule that enrolled members of Native American tribes are exempt from state taxation. (McCleahan v. Arizona State Tax Commission (1973) 411 U.S. 164, 171 (McCleahan.) Huber overlooks the fact that in Moe the court deports from this “special area,” and it does so because in that case the state law obligation the Native American smokeshops attacked (precollection of excise taxes) was not a tax at all, but rather was an incidental tax enforcement measure directed at ensuring collection from nonmembers (Moe, supra, 425 U.S. at pp. 481–483); the same was true in Colville (precollection and recordkeeping requirements on retailers) (Colville, supra, 447 U.S. at pp. 159–160); and in Milhelm (recordkeeping requirements and quantity restrictions on wholesalers) (Milhelm, supra, 512 U.S. at pp. 64–67, 73–76). Thus, we reject Huber’s argument that Moe, Colville, and Milhelm may be cast aside as oddball tax cases having no significance outside the specialized arena of taxation. Indeed, we view this trio of cases as integral to the entire body of Indian preemption law that has evolved over the last 50 years.

17. Wagnon involved an effort by the State of Kansas to impose a tax on motor fuel that was ultimately delivered to a gas station owned and operated by a Native American tribe on its reservation. (Wagnon, supra, 546 U.S. at pp. 99–101.) Because the Court was able to pinpoint exactly where and on whom the legal incidence of the tax fell — by state statute, the tax was imposed on the non-Indian distributor of gas, off-reservation — it was possible to say, in a binary way, that the case involved wholly off-reservation activity, so no weighing of interests was needed and the state’s power to tax was not preempted. (Id. at pp. 102–105.) This case does not lend itself to that kind of binary analysis.

18. See Cohen, supra, § 6.02[1], p. 504 ("Where activities occur partially within and partially outside Indian country, and a substantial part of the activity takes place outside, courts have generally upheld nondiscriminatory applications of state jurisdiction").
The trial court correctly concluded that the balance of federal, tribal, and state interests weighs in favor of California.\textsuperscript{19} Huber points to no federal interest, expressed by statute or regulation, in promoting reservation sales of cigarettes, and makes no claim that Congress, by statute or regulation, delegated to the Wiyots some form of authority that might oust the authority of the state in this area. To the extent the Wiyot Tribe, independently, has an interest in carving out a domain for its members in the cigarette sales business—Ordinance No. 01-10 appears to evidence just such an interest—the holding in \textit{Colville} tells us that does not matter, absent a direct conflict. Huber insists that there is such a conflict, and that it is irreconcilable, but we do not agree. None of the California statutes the Attorney General seeks to enforce in this case blocks Huber outright from engaging in that which Ordinance No. 01-10 licenses her to do. Nothing in these statutes prevents her from selling tobacco products on any basis Ordinance No. 01-10 permits, solely to members of the Wiyot tribe, and solely on the Table Bluff Rancheria. California did not “impose” added burdens on her. Rather, by her choice of business strategy, she elected a path that triggered compliance obligations beyond those required by Ordinance No. 01-10.

To extent Huber wishes to sell tobacco products to non-tribe members on the Rancheria, or to ship products to customers off the Rancheria, she must comply with California law as well as Ordinance No. 01-10. That may make it more expensive for her to pursue the business strategy she chose, but it does not place her in a dilemma between warring legal imperatives. \textit{Colville} is directly on point in this respect. The court there rejected an invitation to use tribal cigarette tax and marketing regulations as a consideration weighing in favor of preemption. (\textit{Colville, supra}, 447 U.S. at pp. 158–159.) Against a nonexistent federal interest and a limited tribal interest, California has a strong health and safety interest in policing cigarette sales. In the end, therefore, we arrive at the same conclusion the courts in \textit{People ex rel. Harris v. Black Hawk Tobacco, Inc.} (2011) 197 Cal.App.4th 1561 (\textit{Black Hawk}) and \textit{Rose} did with respect to interest balancing: “The California tobacco directory law promotes public health by increasing the costs of cigarettes and discouraging smoking. [Citations.] The California Cigarette Fire Safety and Firefighter Protection Act law—providing ignition-propensity requirements—serves the public interest in reducing fires caused by cigarettes. . . . [And n]o federal or tribal interest outweighs the state’s interest in . . . enforcing the California tobacco directory and cigarette fire safety laws.” (\textit{Black Hawk, supra}, 197 Cal.App.4th at p. 1571; see also \textit{Rose}, 16 Cal.App.5th at p. 328 [agreeing with \textit{Black Hawk’s} preemption balancing analysis].)

Huber argues that, by obtaining an injunction, which carries with it the threat of contempt, the enforcement steps the Attorney General has taken here—causing the shutdown of her business—go far beyond the “minimal” burdens the \textit{Moe, Colville}, and \textit{Milhmel} courts approved. We cannot agree. The burden of complying with the Directory Act and the Fire Safety Act, as the Attorney General points out, falls on manufacturers. Huber’s only “burden,” if it can even be called that, is to choose product sourcing from manufacturers who comply with those statutes. Huber points out that the court’s injunction left her no choice but to shutter her business, but if that is the case the decision to close her business rather than offer cigarettes that comply with California law was her election, apparently looking at the economics of continued operation in compliance with state law. \textit{Colville} is quite clear that the burden was on her to show that enforcement of the Directory Act and the Fire Safety Act against her, directly and through the UCL, is “not reasonably necessary as a means of preventing fraudulent transactions.” (\textit{Colville, supra}, 447 U.S. at p. 160.) She failed to do so.

Finally, returning full circle to \textit{Williams}, since the test for infringement of Indian sovereignty is embedded within the \textit{Bracker} preemption test as a “backdrop” consideration (\textit{Three Affiliated Tribes II, supra}, 476 U.S. at p. 884), we have held that the exercise of adjudicative jurisdiction in this case does not infringe Wiyot sovereignty. We see no such infringement in the enforcement of the injunction either. To be sure, although we agree with the balancing of interests analysis adopted in \textit{Black Hawk} and \textit{Rose}, and although we reach the same conclusion those courts did, we note that Huber has a stronger argument for preemption than the defendants were able to mount in \textit{Black Hawk} and \textit{Rose}, because here, unlike in those cases, the trial court enjoined an enrolled tribe member’s business activities on her own reservation. That puts the issue of possible infringement of tribal self-government more sharply here than in either \textit{Black Hawk} or \textit{Rose}. (See \textit{Black Hawk, supra}, 197 U.S. at pp. 1564–1565, 1566–1556; \textit{Rose, supra}, 16 Cal.App.5th at p. 321.) Indeed, while Huber’s position has shifted in the course of this appeal on the threshold question of adjudicative jurisdiction, on the issue of preemption she has been consistent throughout. As she puts it in a supplemental brief submitted following our grant of rehearing, “it is not the mere fact that adjudica-
tory state court jurisdiction exists or was asserted that runs afoul of Williams," but rather “that the resulting state judicial proceedings constituted an integral part of an impermissibly invasive regulatory regime the state has sought to enforce against [her] and the Wiyot tribe in an effort to nullify tribal law and policy.”

Putting aside the overstatement—the People make no attempt to enforce any laws against the Wiyot tribe itself—we are not persuaded that this case presents the “invasive” threat to “tribal law and policy” that Huber decries. She has pointed to no on-reservation enforcement activity of any kind, at least not so far. In Colville, the high court upheld the State of Washington’s power to seize illegal cigarettes by off-reservation interdiction but saw no need to address whether the state had power to “enter onto the reservations, seize stocks of cigarettes which are intended for sale to nongen members, and sell those stocks in order to obtain payment of the taxes due.” (Colville, supra, 447 U.S. at p. 162.) The Court held the question of on-reservation seizure and sale was not presented for decision, characterizing it as “considerably different from” the issue of off-reservation interdiction. (Ibid.)

We, too, see no need to address the question of on-reservation enforcement. And we decline to speculate about what issues might arise in hypothetical future circumstances. Although Nevada v. Hicks, supra, 533 U.S. 353, which involved the on-reservation search of a tribe member’s residence in a criminal investigation for violation of a game conservation statute (id. at pp. 355–356), can be read to suggest that on-reservation enforcement might be permissible where the activity involved presents some risk of harm to state citizens off the reservation, it is premature to apply that case here, since any issue raised by on-reservation enforcement is not yet ripe for decision, and on that ground, we need not address it. All we need say at this point is that, to the extent enforcement occurs off-reservation, the Wiyot right to self-governance is not implicated.

IV. DISPOSITION

Affirmed.

Streeter, Acting P.J.

We concur: Reardon, J.*, Smith, J.**

* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

** Judge of the Superior Court of California, County of Alameda, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Cite as 19 C.D.O.S. 1679

WENDY MARQUEZ et al., Plaintiffs and Appellants,
v.

CITY OF LONG BEACH, Defendant and Respondent.

No. B282270
In The Court of Appeal of the State of California
Second Appellate District
Division Seven
(Los Angeles County Super. Ct. No. BC623334)
APPEAL from a judgment of the Superior Court of Los Angeles County, William F. Highberger, Judge. Reversed and remanded with directions.

Filed February 25, 2019

COUNSEL

Weinberg, Roger & Rosenfeld, David A. Rosenfeld, Lisl R. Soto and Alejandro Delgado for Plaintiffs and Appellants.

Rutan & Tucker and George W. Skaeffer, Jr., for Defendant and Respondent.

OPINION

Plaintiffs Wendy Marquez and Jasmine Smith appeal from a judgment of dismissal entered after the trial court sustained without leave to amend the demurrer filed by the City of Long Beach (City) to plaintiffs’ class action complaint. Plaintiffs alleged causes of action for violations of the Labor Code and the Industrial Welfare Commission’s (IWC) wage orders based on the City’s alleged failure to pay workers employed as pages and recreation leader specialists wages at or above the statewide minimum wage.

The trial court found the authority to determine employee compensation was reserved to the City as a charter city under article XI, section 5 of the California Constitution, which grants to charter cities authority over municipal affairs, including “plenary authority” to provide for the compensation of city employees, against article XIV, section 1 of the state Constitution, which provides “[t]he Legislature may provide for minimum wages and for the general welfare of employees . . . .” Despite the century-long history of the

No. B282270
In The Court of Appeal of the State of California
Second Appellate District
Division Seven
(Los Angeles County Super. Ct. No. BC623334)
APPEAL from a judgment of the Superior Court of Los Angeles County, William F. Highberger, Judge. Reversed and remanded with directions.

Filed February 25, 2019

COUNSEL

Weinberg, Roger & Rosenfeld, David A. Rosenfeld, Lisl R. Soto and Alejandro Delgado for Plaintiffs and Appellants.

Rutan & Tucker and George W. Skaeffer, Jr., for Defendant and Respondent.

OPINION

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The trial court found the authority to determine employee compensation was reserved to the City as a charter city under article XI, section 5 of the California Constitution, and the state could not impose a minimum wage for the City’s employees because the City’s compensation of its employees was not a matter of statewide concern. On appeal, plaintiffs contend the Legislature’s interest in the provision of a living wage to all workers is a matter of statewide concern, and the minimum wage requirement is appropriately tailored to address that concern.

This case pits article XI, section 5 of the state Constitution, which grants to charter cities authority over municipal affairs, including “plenary authority” to provide for the compensation of city employees, against article XIV, section 1 of the state Constitution, which provides “[t]he Legislature may provide for minimum wages and for the general welfare of employees . . . .” Despite the century-long history of the
home rule doctrine (see Popper v. Broderick (1899) 123 Cal. 456 (Popper)) and the state’s regulation of the minimum wage (see Stats. 1913, ch. 324, pp. 632-637), the Supreme Court has not squarely resolved whether charter cities must comply with state law minimum wage requirements.

We conclude legislation setting a statewide minimum wage, generally applicable to both private and public employees, addresses the state’s interest in protecting the health and welfare of workers by ensuring they can afford the necessities of life for themselves and their families. Thus, the Legislature may constitutionally exercise authority over minimum wages, despite the constitutional reservation of authority in charter cities to legislate as to their municipal affairs. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Complaint

On June 9, 2016 plaintiffs filed their putative class action complaint asserting causes of action under Labor Code sections 1182.12 and 1194,1 as well as under section 4 of IWC Wage Order Nos. 4-2001 and 10-2001 (Cal. Code Regs., tit. 8, §§ 11040, 11100)2 for the failure to pay the state minimum wage. The complaint alleged the City is a charter city, and Marquez, Smith, and approximately 200 employees have been employed by the City’s Library Services Department and Parks, Recreation, and Marine Department during the relevant period. The City employed Marquez as a page and Smith as a recreation leader specialist. The complaint further alleged plaintiffs and the putative class are classified as non-exempt, hourly employees, and from January 1, 2016 until approximately April 18, 2016 the City paid the class members less than the legally mandated state minimum wage of $10.00 per hour. The complaint sought damages, civil penalties, and equitable relief.

B. The City’s Demurrer

In its demurrer, the City argued the plaintiffs’ claims were barred under the home rule doctrine because wages set by charter cities are municipal affairs, not subject to state regulation. The City also asserted in its reply that charter cities did not come within the statutory definition of employers subject to the minimum wage requirement. Further, the wages to be paid to the City’s pages and recreation leadership specialists were set by a memorandum of understanding (MOU) between the union representing those employees and the City, ratified by the City Council.3 According to the City, application of the minimum wage to its employees would unlawfully impair the MOU.

After sustaining the City’s demurrer without leave to amend, on March 2, 2017 the trial court entered a judgment dismissing the action with prejudice. Plaintiffs timely appealed.

DISCUSSION

A. Standard of Review

“In reviewing an order sustaining a demurrer, we examine the operative complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory. [Citation.] Where the demurrer was sustained without leave to amend, we consider whether the plaintiff could cure the defect by an amendment.” (T.H. v. Novartis Pharmaceuticals Corp. (2017) 4 Cal.5th 145, 162; accord, Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc. (2016) 1 Cal.5th 994, 1010.) When evaluating the complaint, “we assume the truth of the allegations . . .” (Lee v. Hanley (2015) 61 Cal.4th 1225, 1230; accord, McCall v. PacifiCare of Cal., Inc. (2001) 25 Cal.4th 412, 415.)

In our analysis of whether a state law applies to a charter city, we “accord great weight to the factual record that the Legislature has compiled,” but these factual findings “are not controlling.” (State Building & Construction Trades Council of California v. City of Vista (2012) 54 Cal.4th 547, 558 (City of Vista); accord, County of Riverside v. Superior Court (2003) 30 Cal.4th 278, 286 (County of Riverside).) “[T]he question whether in a particular case the home rule provisions of the California Constitution bar the application of state law to charter cities turns ultimately on the meaning and scope of the state law in question and the relevant state constitutional provisions. Interpreting that law and those provisions presents a legal question, not a factual one.” (City of Vista, at p. 558; accord, County of Riverside, at p. 286 [“The judicial branch, not the legislative, is the final arbiter of this question.”].)

“We independently review the construction of statutes [citation] and begin with the text. If it ‘is clear and unambiguous our inquiry ends.’ [Citation.] Wage and hour laws are ‘to be construed so as to promote employee protection.’ [Citations.]

These principles apply equally to the construction of wage orders.” (Mendiola v. CPS Security Solutions, Inc. (2015) 60 Cal.4th 833, 840; accord, Kilby v. CVS Pharmacy, Inc. (2016) 63 Cal.4th 1, 11 [“IWC regulations are liberally construed to protect and benefit employees.”].)

1. All further undesignated references are to the Labor Code.
2. Section 1182.12 establishes the applicable state minimum wage effective in each calendar year. Wage Order No. 4-2001 governs employees in the professional, technical, clerical, mechanical, and “similar” occupations; Wage Order No. 10-2001 governs employees in the amusement and recreation industry. The City does not dispute that section 1182.12 and Wage Order Nos. 4-2001 and 10-2001 apply to plaintiffs’ work classifications. Section 1194, subdivision (a), provides that “any employee receiving less than the legal minimum wage . . . applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney’s fees, and costs of suit.”
3. On February 25, 2018 we granted the City’s request for judicial notice of the relevant MOU and related City Council resolutions.
B. The Trial Court Erred in Sustaining the City’s Demurrer

1. California’s minimum wage law

“Over a century ago, the Legislature responded to the problem of inadequate wages and poor working conditions by establishing the IWC, giving it authority to investigate various industries and promulgate wage orders establishing minimum wages, maximum work hours, and conditions of labor.” (Kilby v. CVS Pharmacy, Inc., supra, 63 Cal.4th at p. 10.) The Legislature created the IWC in 1913, and delegated to it the power to set minimum wages and working conditions for women and children. (Martinez v. Combs (2010) 49 Cal.4th 35, 50 (Martinez), citing Stats. 1913, ch. 324, § 13, p. 637.) The 1913 act charged the IWC with setting labor conditions in accordance with “‘the comfort, health, safety and welfare of such women and minors’” and setting “‘for each industry [a] minimum wage to be paid to women and minors . . . adequate to supply . . . the necessary cost of proper living and to maintain [their] health and welfare.’” (Martinez, at pp. 54-55, quoting Stats. 1913, ch. 324, §§ 3, subd. (a), & 6, subd. (a), par. 1, pp. 633-634.)

The same year, the Legislature “prop[osed] to the voters a successful constitutional amendment conferring the Legislature’s authority to regulate the minimum wage and to delegate authority to the IWC, which the voters enacted as former article XX, section 17 ½ of the California Constitution. (Martinez, supra, 49 Cal.4th at p. 54 & fn. 20; accord, Pacific G. & E. Co. v. Industrial Acc. Com. (1919) 180 Cal. 497, 500.) The argument in support of the constitutional amendment was that protected employees ‘should be certain of a living wage—a wage that insures for them the necessary shelter, wholesome food and sufficient clothing,’” and “‘that substandard wages frequently led to ill health and moral degeneracy.” (Martinez, at p. 54, quoting Ballot Pamp., Gen. Elec. (Nov. 3, 1914) argument in favor of Assem. Const. Amend. No. 90, p. 29.)

The IWC set the first statewide minimum wage in 1916 by issuing industry- and occupation-wide wage orders, applicable to women and children. (Brinker Restaurant Corp. v. Superior Court (2012) 53 Cal.4th 1004, 1026 (Brinker); Industrial Welfare Com. v. Superior Court (1980) 27 Cal.3d 690, 700.) The minimum wage for women and children was raised from time to time. In 1972 the Legislature extended the protections of the minimum wage to all employees, and “expanded the IWC’s jurisdiction to include all employees, male and female, in response to federal legislation barring employment discrimination because of sex.” (Martinez, supra, 49 Cal.4th at p. 55, citing Stats. 1972, ch. 1122, § 13, p. 2156.) In the following year, the Legislature “restated the commission’s responsibility in even broader terms,” including an ongoing duty to review the adequacy of the minimum wage. (Martinez, at p. 55.)

Following this enlarged mandate, the voters “amended the state Constitution to confirm the Legislature’s authority to confer on the IWC ‘legislative, executive, and judicial powers.’” (Martinez, supra, 49 Cal.4th at p. 55, quoting Cal. Const., art. XIV, § 1 [added by Assem. Const. Amend. No. 40 (1975–1976 Reg. Sess.), as approved by voters (Prop. 14), Primary Elec. (June 8, 1976)], italics omitted.) The 1976 constitutional amendment further provided “[t]he Legislature may provide for minimum wages and for the general welfare of employees . . . .” (Cal. Const., art. XIV, § 1.)

“The IWC’s wage orders are to be accorded the same dignity as statutes. They are ‘presumptively valid’ legislative regulations of the employment relationship [citation], regulations that must be given ‘independent effect’ separate and apart from any statutory enactments [citation]. To the extent a wage order and a statute overlap, we will seek to harmonize them, as we would with any two statutes.” (Mendoza v. Nordstrom, Inc. (2017) 2 Cal.5th 1074, 1082, quoting Brinker, supra, 53 Cal.4th at p. 1027.)

The IWC continued periodically to raise the minimum wage by amendments to its wage orders. On October 23, 2000 the IWC promulgated a wage order setting the minimum wage as of January 1, 2001 ($6.25 per hour) and January 1, 2002 ($6.75 per hour). (Wage Order No. MW-2001; Cal. Code Regs., tit. 8, § 11000.) That order also made the minimum wage provisions in wage orders regulating certain industries applicable for the first time to “employees directly employed by the State or any political subdivision thereof, including any city, county, or special district.” (Cal. Code Regs., tit. 8, §§ 11040, subd. 1(B) [Wage Order No. 4-2001 governing employees in professional, technical, clerical, mechanical, and “similar” occupations] & 11100, subd. 1(C) [Wage Order No. 10-2001 governing employees in the amusement and recreation industry]).

“The Legislature defunded the IWC in 2004, however its wage orders remain in effect.” (Murphy v. Kenneth Cole Productions, Inc. (2007) 40 Cal.4th 1094, 1102, fn. 4; accord, Flowers v. Los Angeles County Metropolitan Transportation Authority (2015) 243 Cal.App.4th 66, 74, fn. 2 (Flowers).) After defunding the IWC, the Legislature began in 2006 to set a statutory minimum wage, made applicable to employees through amendment and republication of the IWC wage orders to be consistent with the statutory minimum wage. (Stats. 2006, ch. 230, § 2, pp. 2078-2079 [Assem. Bill No. 1835]; see § 1182.13, subd. (b) (“The Department of Industrial Relations shall amend and republish the [IWC’s] wage orders to be consistent with . . . Section 1182.12.”).)

In 2013 the Legislature again enacted graduated increases in the minimum wage, effective July 1, 2014 ($9.00 per hour) and January 1, 2016 ($10.00 per hour). (Stats. 2013, ch. 351, § 1 [Assem. Bill No. 10].) Most recently, effective January 1, 2017 the Legislature set a series of graduated increases in the minimum wage to take effect each year on
January 1, culminating in a $15.00 per hour minimum wage for all covered employees effective January 1, 2023, with limited exceptions. (See § 1182.12, subd. (b)(1)-(2).) Section 1182.12, subdivision (b)(3), also provides that “[f]or purposes of this subdivision [setting the minimum wage], ‘employer’ includes the state, political subdivisions of the state, and municipalities.”

2. The home rule doctrine and state regulation of charter city and county wages and other employment relations

The Government Code classifies cities as either charter cities, organized under a charter (Gov. Code, § 34101), or general law cities, organized under the general law of California (Gov. Code, § 34102). (City of Vista, supra, 54 Cal.4th at p. 552, fn. 1; People v. Chacon (2007) 40 Cal.4th 558, 571, fn. 13; Jauregui v. City of Palmdale (2014) 226 Cal. App.4th 781, 794-795 (Jauregui).) The parties agree the City is a charter city.

“Charter cities are specifically authorized by our state Constitution to govern themselves, free of state legislative intrusion, as to those matters deemed municipal affairs.” (City of Vista, supra, 54 Cal.4th at p. 555; accord, Jauregui, supra, 226 Cal.App.4th at p. 795.) Article XI, section 5, subdivision (a), of the California Constitution “represents an ‘affirmative constitutional grant to charter cities of ‘all powers appropriate for a municipality to possess . . .’ and [includes] the important corollary that ‘so far as ‘municipal affairs’ are concerned,’ charter cities are ‘supreme and beyond the reach of legislative enactment.’” (City of Vista, at p. 556.)

“However, a charter city’s authority to enact legislation is not unlimited.” (Jauregui, supra, 226 Cal.App.4th at p. 795.) “[T]he Legislature may regulate as to matters of statewide concern even if the regulation impinges ‘to a limited extent’ [citation] on powers the Constitution specifically reserves to counties ([Cal. Const., art. XI.] § 1) or charter cities ([Cal. Const., art. XI.] § 5).” (County of Riverside, supra, 30 Cal.4th at p. 287; accord, Professional Fire Fighters, Inc. v. City of Los Angeles (1963) 60 Cal.2d 276, 295 (Professional Fire Fighters) (“legislation may impinge upon local control to a limited extent, but it is nonetheless a matter of state concern”).) “Some portions of a local matter may ultimately become of general state interest.” (Lippman v. City of Oakland (2017) 19 Cal.App.5th 750, 763 [uniformity in building code is statewide concern]; accord, City of Vista, supra, 54 Cal.4th at p. 557 [“‘the constitutional concept of municipal affairs is not a fixed or static quantity . . . [but one of]’ changes with the changing conditions upon which it is to operate’” (italics omitted)].)

In areas considered “municipal affairs,” the general law of the state prevails over local law only where the general law is “reasonably related” and “narrowly tailored” to resolution of an issue of statewide concern. (City of Vista, supra, 54 Cal.4th at p. 556; accord, California Fed. Savings & Loan Assn. v. City of Los Angeles (1991) 54 Cal.3d 1, 7 (California Fed. Savings) “[I]n the event of a true conflict between a state statute reasonably tailored to the resolution of a subject of statewide concern and a charter city [ordinance], the latter ceases to be a ‘municipal affair’ to the extent of the conflict and must yield.”)

The Supreme Court has considered the extent to which the state may regulate charter city employee compensation and other employment issues many times. In Popper, the Supreme Court addressed the constitutionality of two 1897 state statutes specifying the salaries for various ranks of police officers and firefighters employed by municipalities of the first class. (Popper, supra, 123 Cal. at pp. 456-457, 459.) The court invalidated the statutes, concluding “the pay of firemen and policemen clearly falls within the term ‘municipal affairs.’” (Id. at p. 462.)

In City of Pasadena v. Charleville (1932) 215 Cal. 384 (Charleville), the Supreme Court held the City of Pasadena, as a charter city, was not required to comply with the Public Works Wage Rate Act of 1931, which required that any contract for public works pay the prevailing wage for the type of work in the locality in which the work was to be performed. (Charleville, at pp. 389-390, 400.) The court concluded the Legislature lacked the authority to bind the city to the statutory scheme because the construction of public works projects was a municipal affair. (Id. at p. 389; see San Francisco Labor Council v. Regents of University of California (1980) 26 Cal.3d 785, 790 (San Francisco Labor Council) [state could not compel the Regents of the University of California to pay prevailing wages to university employees because the requirement was ‘not a matter of statewide concern’].)

In Healy v. Industrial Acc. Com. (1953) 41 Cal.2d 118 (Healy), the Supreme Court held the statewide system of workers’ compensation was a subject of statewide concern, and superseded the City of Los Angeles’s charter provision requiring an injured employee’s workers’ compensation award be offset by the worker’s pension. (Id. at p. 122.) The Labor Code “prohibit[ed] an employer from directly or indirectly taking any contribution from the earnings of an employee to cover any part of the cost of compensation,” but a conflicting provision of the city charter mandated an
employee’s pension be subtracted from the award. (Id. at pp. 121-122.) Finding the workers’ compensation scheme to be of “state-wide concern,” the Supreme Court held the provision of the Labor Code was “paramount” to the inconsistent local law, and remanded for the trial court to make factual findings as to the employee’s contributions to the pension fund. (Id. at p. 122.)

The Supreme Court again considered the home rule doctrine in *Professional Fire Fighters*. There, a union representing firefighters working for the City of Los Angeles sued to establish members’ right to join a labor union under the Labor and Government Codes. (*Professional Fire Fighters*, *supra*, 60 Cal.2d at pp. 279-280 & fn. 1.) The court concluded that because the legislation was designed to “create uniform fair labor practices throughout the state,” it “may impinge upon local control to a limited extent, but it is nonetheless a matter of state concern.” (Id. at p. 295.) The court reasoned that while “management and control of [fire] department[s], in the general sense of that phrase, is a municipal affair,” the “general law prevails over local enactments of a chartered city, even in regard to matters which would otherwise be deemed to be strictly municipal affairs, where the subject matter of the general law is of statewide concern.” (Id. at p. 292.) The court noted the legislation did not “deprive local government (chartered city or otherwise) of the right to manage and control its fire departments.” (Id. at p. 294; see *Baggett v. Gates* (1982) 32 Cal.3d 128, 139-140 (*Baggett*) [upholding imposition of state procedural protections for peace officers before they could be removed or punished, finding the maintenance of stable employment relations between police officers and their public employers was a matter of statewide concern given the impact a breakdown in relations would have on delivery of the police’s essential public service]; see also *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, 600-601 & fn. 11 (*Seal Beach*) [upholding state requirements that cities “meet and confer” with employee representatives before modifying employment terms and conditions for employees, but concluding the requirements did not conflict with the charter city’s authority].)

The Supreme Court returned to the question of state regulation of public employee wages in *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296 (*Sonoma County*). There, the court invalidated a state law prohibiting the distribution of state surplus or loan funds to any local public agency granting to its employees a cost-of-living wage or salary increase that exceeded the increase the state provided to its employees for the fiscal year. (Id. at p. 302.) Relying on *Popper and Charlevoix*, the court concluded the state law was an impermissible infringement on municipal affairs, rejecting the Legislature’s express statutory finding that a statewide fiscal emergency warranted the infringement. (*Sonoma County*, at pp. 317-318.)

In *County of Riverside*, the Supreme Court invalidated a statute requiring certain public entities to submit disputes over firefighter and law enforcement officer wages to binding arbitration, rejecting the legislative findings that avoidance of strikes in these sectors was a matter of statewide concern. (*County of Riverside, supra*, 30 Cal.4th at pp. 282, 286.) The court distinguished *Professional Fire Fighters, Baggett*, and *Seal Beach* as involving the procedural regulation of labor relations, whereas the state law at issue involved a substantive regulation with the effect of “depriving the county entirely of its authority to set employee salaries” by outsourcing that function to a private arbitrator. (*County of Riverside*, at pp. 287-289.)

Most recently, the Supreme Court in *City of Vista* revisited the issue of the constitutionality of state prevailing wage laws for public works projects. (*City of Vista, supra*, 54 Cal.4th at p. 552.) There, a federation of labor unions sought to compel the City of Vista to pay the prevailing wage in the local construction industry, as required by state law. (Ibid.) The court applied the four-part test set forth in *California Fed. Savings* for determining whether a matter falls within the home rule authority of a charter city. Under this “analytical framework,” the court must consider (1) “whether the city ordinance at issue regulates an activity that can be characterized as a ‘municipal affair’”; (2) whether there is “an actual conflict between [local and state law]”; (3) “whether the state law addresses a matter of ‘statewide concern’”; and (4) “whether the law is ‘reasonably related to . . . resolution’ of that concern [citation] and ‘narrowly tailored’ to avoid unnecessary interference in local governance.” (*City of Vista*, at p. 556, quoting *California Fed. Savings*, supra, 54 Cal.3d at pp. 16-17, 24.)

“If . . . the court is persuaded that the subject of the state statute is one of statewide concern and that the statute is reasonably related to its resolution [and not unduly broad in its sweep], then the conflicting charter city measure ceases to be a “municipal affair” pro tanto and the Legislature is not prohibited by article XI, section 5(a), from addressing the statewide dimension by its own tailored enactments.” (*City of Vista, supra*, 54 Cal.4th at p. 556, quoting *California Fed. Savings*, supra, 54 Cal.3d at p. 17.)

Applying this analysis, the court reaffirmed its holdings in *Charlevoix and Sonoma County*, finding “the wage levels of contract workers constructing locally funded public works are a municipal affair . . . , and that these wage levels are not a statewide concern . . . subject to state legislative control . . . .” (*City of Vista, supra*, 54 Cal.4th at p. 556.) However, the court cautioned, “[C]ourts should avoid the error of “compartamentalization,” that is, of cordonning off an entire area of governmental activity as either a “municipal affair” or one of statewide concern.” (Id. at p. 557.) The court added, “When a court invalidates a charter city measure in favor of a conflicting state statute, the result does not necessarily rest

7. The *Sonoma County* court also invalidated the legislation as an unconstitutional impairment of public agencies’ binding contracts with their employees. (*Sonoma County, supra*, 23 Cal.3d at p. 314.)
on the conclusion that the subject matter of the former is not appropriate for municipal regulation. It means, rather, that under the historical circumstances presented, the state has a more substantial interest in the subject than the charter city.” (Id. at pp. 557-558.)

After finding an actual conflict between the state statute and the city’s prohibition on payment of prevailing wages in public works contracts, the court turned to the issue of whether the construction of public works was a statewide concern, considering whether there was “a convincing basis for the state’s action—a basis that ‘justifies’ the state’s interference in what would otherwise be a merely local affair.” (City of Vista, supra, 54 Cal.4th at p. 560.) The court rejected the unions’ arguments that the benefit to the economic health of the construction industry was a statewide concern sufficient to justify state infringement on local authority over wages. (Id. at p. 561.) Reasoning that “[a]utonomy with regard to the expenditure of public funds lies at the heart of what it means to be an independent governmental entity,” the court found the unions could not “justify state regulation of the spending practices of charter cities merely by identifying some indirect effect on the regional and state economies.” (Id. at p. 562.)

The City of Vista court added, “our cases have suggested that a state law of broad general application is more likely to address a statewide concern than one that is narrow and particularized in its application.” (City of Vista, supra, 54 Cal.4th at p. 564.) On this basis, the Supreme Court distinguished its prior holdings in Seal Beach and Professional Fire Fighters, in which it found generally applicable procedural standards “impinging less on local autonomy than if they had imposed substantive obligations.” (City of Vista, at p. 564.)

The court concluded, “Here, the state law at issue is not a minimum wage law of broad general application; rather, the law at issue here has a far narrower application, as it pertains only to the public works projects of public agencies. In addition, it imposes substantive obligations on charter cities, not merely generally applicable procedural standards. These distinctions further undermine the Union’s assertion that the matter here presents a statewide concern and therefore requires Vista, a charter city, to comply with the state’s prevailing wage law on the city’s locally funded public works projects.” (City of Vista, supra, 54 Cal.4th at pp. 564-565.)

We take from these cases that article XI, section 5, of the state Constitution limits the Legislature’s authority to determine the wages of charter city employees, to cap those wages, and to outsource to a third party the authority to determine employee wages. However, the Legislature may enact laws of broad general application that impact charter city compensation where the state’s infringement on local authority is reasonably related to an important statewide concern.

3. The state minimum wage law is designed to address a statewide concern for the health and welfare of workers and is reasonably related to its purpose

To determine whether the state’s minimum wage law may be applied to the City, as a charter city, we apply the four-part analysis set forth by the Supreme Court in City of Vista, supra, 54 Cal.4th at page 556.

a. Compensation of charter city employees is a municipal affair under section 5 of article XI of the California Constitution

“[T]here is no question that “salaries of local employees of a charter city constitute municipal affairs . . . .”” (City of Vista, supra, 54 Cal.4th at p. 564.) Article XI, section 5, subdivision (b)(4), of the state Constitution, confers to charter cities “plenary authority . . . , subject only to the restrictions of this article, to provide . . . for the compensation . . . of [their] deputies, clerks and other employees.” However, our inquiry does not end there. A “general law prevails over local enactments of a chartered city, even in regard to matters which would otherwise be deemed to be strictly municipal affairs, where the subject matter of the general law is of statewide concern.” (Seal Beach, supra, 36 Cal.3d at p. 600, quoting Professional Fire Fighters, supra, 60 Cal.2d at p. 292; accord, Jauregui, supra, 226 Cal.App.4th at p. 803 [Even “[t]he plenary authority identified in [the California Constitution,] article XI, section 5, subdivision (b) can be preempted by a statewide law after engaging in the four-step evaluation process specified by our Supreme Court.”].)

b. The minimum wage requirement is in conflict with the City’s resolution and MOU setting wages

We must first determine the existence of an actual conflict between the state and local laws at issue “before proceeding to the difficult state constitutional question of which law governs a particular matter.” (City of Vista, supra, 54 Cal.4th at p. 559; accord, California Fed. Savings, supra, 54 Cal.3d at pp. 16-17 [“To the extent difficult choices between competing claims of municipal and state governments can be foreclosed in this sensitive area of constitutional law, they ought to be; courts can avoid making such unnecessary choices by carefully insuring that the purported conflict is in fact a genuine one, unresolvable short of choosing between one enactment and the other.”].)

Plaintiffs and the City contend there is no conflict, but for different reasons. They are both incorrect.

i) The wage orders’ minimum wage provisions apply to the City

The City contends sections 1182.12 and 1194 do not by their terms apply to charter cities, thus obviating any conflict. We disagree. “[W]age and hour laws are today governed by two complementary and occasionally overlapping sources
of authority: the provisions of the Labor Code, enacted by the Legislature, and a series of 18 wage orders, adopted by the IWC.” (Brinker, supra, 53 Cal.4th at p. 1026; accord, Vaquero v. Stoneledge Furniture, LLC (2017) 9 Cal.App.5th 98, 105-106 [same].) Thus the City is correct that during the relevant period in 2016 former sections 1182.12 and 1194 were silent as to whether they applied to state and local governments, the relevant IWC wage orders were not. 8

“In actions under section 1194 to recover unpaid minimum wages, the IWC’s wage orders do generally define the employment relationship, and thus who may be liable.” (Martinez, supra, 49 Cal.4th at p. 52; accord, Flowers, supra, 243 Cal.App.4th at p. 74 [“Specific employers and employees become subject to the minimum wage requirements only through and under the terms of wage orders . . . . [Citation.] Accordingly, ‘an employee who sues to recover unpaid minimum wages actually and necessarily sues to enforce the wage order.’”].) As noted above, “[t]he IWC’s wage orders are to be accorded the same dignity as statutes,” and “[t]hey are ‘presumptively valid’ legislative regulations of the employment relationship . . . .” (Brinker, supra, 53 Cal.4th at p. 1027.)

Here, the express terms of IWC Wage Order Nos. 4-2001, section 1(B), and 10-2001, section 1(C), make their minimum wage provisions applicable to “any city.” (See Cal. Code Regs., tit. 8, § 11040, subd. 1(B) [“Except as provided in Sections 1, 2, 4 [minimum wage], 10, and 20, the provisions of this order shall not apply to any employees directly employed by the State or any political subdivision thereof, including any city, county, or special district.” (Italics added.)); Cal. Code Regs., tit. 8, § 11100, subd. 1(C) [same].) Section 4 of both applicable wage orders requires “[e]very employer” to pay a specified minimum wage to its employees. And neither wage order contains an exception from the minimum wage requirements for public entity employers such as the City.

As the court explained in Sheppard v. North Orange County Regional Occupational Program (2010) 191 Cal.App.4th 289 (Sheppard) in concluding IWC Wage Order No. 4-2001 applied to public school district employees, “[W]e interpret the language of Wage Order No. 4-2001, by its terms, to impose the minimum wage provision as to all employees in the occupations described therein, including employees directly employed by the state or any political subdivision of the state.” (Sheppard, at pp. 300-301; accord, Stoetzl v. State of California (2017) 14 Cal.App.5th 1256, 1271 [concluding minimum wage provision of IWC Wage Order No. 4-2001 applied to state employees absent superseding state legislative enactment], review granted Nov. 29, 2017, S244751.)

The City seeks to distinguish Sheppard by noting it predates the amendment to section 1197, effective January 1, 2016, which the City asserts altered the applicability of the wage orders. However, that amendment had no effect on the applicability of the wage orders, but instead confirms their continuing operation. (See § 1197 [“The minimum wage for employees fixed by the commission or by any applicable state or local law, is the minimum wage to be paid to employees . . . .” (Italics added.)] The amendment to section 1197 was intended to authorize the Labor Commissioner to investigate and enforce violations of local minimum wage laws, not to abrogate the applicability of IWC wage orders to specific entities. (See Legis. Counsel’s Dig., Assem. Bill No. 970 (2015-2016 Reg. Sess.) Stats. 2015, ch. 783, Summary Dig. [“This bill . . . authorize[s] the Labor Commissioner to investigate and, upon a request from the local entity, to enforce local laws regarding overtime hours or minimum wage provisions . . . .”].)

We agree with Sheppard and Stoetzl, and likewise conclude the minimum wage provisions of IWC Wage Order Nos. 4-2001 and 10-2001 apply to public employees. Further, their application to “any city” under section 1 necessarily includes both charter and general law cities.

**ii) The minimum wage requirement cannot be reconciled with the City’s charter and the enactments of its council**

Plaintiffs contend there is no conflict between the state minimum wage law and the City Charter because the City is free to determine the wages of its employees, so long as those wages are at or above the state minimum. However, the City’s charter provides that wages for the City’s employees are to be set by the City Council. (Long Beach City Charter, art. V, § 503.) And the MOU setting plaintiffs’ wages was adopted by a City Council resolution.

Thus, the City’s enactment setting subminimum wages conflicts with the state’s minimum wage requirements. (See City of Vista, supra, 54 Cal.4th at pp. 553, 559-560 [state law requiring payment of prevailing wage on public works contracts conflicted with city ordinance prohibiting any city contract from requiring payment of prevailing wages unless authorized by city council]; Dimon v. County of Los Angeles (2008) 166 Cal.App.4th 1276, 1284 (Dimon) [finding conflict between state meal period requirements and county charter where “MOU specifically covers meal periods” in a different manner from state requirements]; Curtin v. County of Alameda (2008) 164 Cal.App.4th 629, 648 (Curtin) [finding conflict between state overtime and meal and rest period regulations and county regulations, ordinances, and MOU’s addressing employee compensation].)

Because there is an actual conflict between the state minimum wage law and the City Charter, we consider whether the minimum wage is a matter of statewide concern.

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8. Addressing plaintiffs’ claims for prospective relief, the City also argues we should not rely on the 2016 amendments to section 1182.12, effective January 1, 2017, that define “employer[s]” subject to the section to include “the state, political subdivisions of the state, and municipalities,” to conclude the minimum wage law applies to charter cities. (§ 1182.12, subd. (b)(3).) Because we conclude IWC Wage Order Nos. 4-2001 and 10-2001 make the state minimum wage applicable to charter cities, we do not reach this contention.
c. The minimum wage for California workers is a matter of statewide concern

“When, as here, state law and the ordinances of a charter city actually conflict and we must decide which controls, ‘the hinge of the decision is the identification of a convincing basis for legislative action originating in extramunicipal concerns, one justifying legislative supersession based on sensible, pragmatic considerations.’ [Citation.] In other words, for state law to control there must be something more than an abstract state interest, as it is always possible to articulate some state interest in even the most local of matters.” (City of Vista, supra, 54 Cal.4th at p. 560, quoting California Fed. Savings, supra, 54 Cal.3d at p. 18.) We therefore consider the concerns the Legislature sought to address by setting a statewide minimum wage.

“The minimum wage represents the Legislature’s and the [IWC’s] best estimate of the minimum an employee working a full-time job must be paid to sustain such employee as a resident of this state and pay for the necessities of life.” (Vasquez v. Franklin Management Real Estate Fund, Inc. (2013) 222 Cal.App.4th 819, 831 [concluding state minimum wage law was fundamental policy for purposes of claims for wrongful termination and constructive discharge in violation of public policy]; accord, Flowers, supra, 243 Cal.App.4th at p. 82 [“State wage and hour laws ‘reflect the strong public policy favoring protection of workers’ general welfare and society’s interest in a stable job market.’”].) Indeed, the Labor Code vests authority in the IWC to investigate whether “in any occupation, trade, or industry, the wages paid to employees may be inadequate to supply the cost of proper living” (§ 1178) and, if it finds the wages are inadequate, to select a wage board to “report to the commission its recommendation of a minimum wage adequate to supply the necessary cost of proper living . . . . and maintain the health and welfare of employees in this state” (§ 1178.5, subd. (a)).

As discussed above, in 1913 the Legislature proposed a constitutional amendment, later adopted by the voters, confirming the Legislature’s authority to regulate the minimum wage and to delegate authority to the IWC. The amendment reflected the concern that workers “should be certain of a living wage—a wage that insures for them the necessary shelter, wholesome food and sufficient clothing,” and “that substandard wages frequently led to ill health and moral degeneracy.” (Martinez, supra, 49 Cal.4th at p. 54, quoting Ballot Pamp., Gen. Elec. (Nov. 3, 1914) argument in favor of Assem. Const. Amend. No. 90, p. 29.)

Reported legislative activities accompanying the Legislature’s statutory increases to the minimum wage in recent years have consistently stated the purpose to provide California workers with a living wage to address poverty in the state. (See, e.g., Assem. Com. on Labor and Employment, Off. of Assem. Floor Analyses, 3d reading analysis of Assem. Bill No. 1835 (2005-2006 Reg. Sess.) as amended April 5, 2006, p. 3 [minimum wage increase was part of the “solution to the growing problem of poverty-level wages in our state”]; Assem. Com. on Labor and Employment, Analysis on Assem. Bill No. 10 (2013-2014 Reg. Sess.) September 12, 2013, p. 1 [legislation setting the $9.00 and $10.00 per hour minimum wages reflects a concern that workers “at the bottom of the wage scale [are] mired in poverty, [and] over recent decades the real value of their earnings has collapsed”]; Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 10 (2013-2014 Reg. Sess.) Sept. 12, 2013, p. 5 [legislation was designed to provide relief “to millions of struggling Californians”]). The 2016 amendment to the law reflects similar concerns. (Sen. Com. on Labor and Industrial Relations, com. on Sen. Bill No. 3 (2015-2016 Reg. Sess.) Mar. 31, 2016, p. 5 [“Proponents argue that the existing minimum wage is simply too little for a family to survive on . . . . [Sen. Bill No.] 3 will ensure that the minimum wage is sufficient to keep families above the poverty line . . . . ”]).

The Legislature’s interest in the provision of a living wage also directly implicates the state’s own coffers because employees receiving wages below the statewide minimum are more likely to receive state-funded public assistance. The legislative history accompanying the 2013 statute setting the $10.00 per hour minimum wage notes projected savings on state public assistance spending. (See Sen. Appropriations Com., Fiscal Summary on Assem. Bill No. 10 (2013-2014 Reg. Sess.) Aug. 30, 2013, p. 3 [“By raising the earnings of some public assistance recipients, this measure would result in reduced state costs.”].) The 2016 amendments reflect a similar concern. (Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis on Sen. Bill No. 3 (2015-2016 Reg. Sess.) March 31, 2016, p. 6 [projecting “offsetting savings to MediCal and CalWORKS programs”].)

As the Supreme Court observed in Johnson v. Bradley (1992) 4 Cal.4th 389, 407, “We do not doubt that conservation of the state’s limited funds is a statewide concern.” The court concluded, however, that a state law ban on public funding of political campaigns was not justified by a statewide interest because the ban would impact the local funding of campaigns, not state funding. (Ibid.)

While the views of the Legislature are not binding on this court, they are relevant and entitled to “great weight.” (City of Vista, supra, 54 Cal.4th at p. 565; accord, County of Riverside, supra, 30 Cal.4th at pp. 286-287 [“[I]t may well occur that in some cases the factors which influenced the Legislature to adopt the general laws may likewise lead the courts to the conclusion that the matter is of statewide rather than merely local concern.”].) In this case, the concerns that led the Legislature to adopt and increase the statewide minimum wage justify application of the minimum wage to all employees, including those of charter cities. Beginning in 1913, the Legislature has consistently acted, whether directly or through the IWC, to ensure those employed in California are paid a wage sufficient to provide for their health and well-being.

Our conclusion is bolstered by the scope of the state’s minimum wage mandate. “[A] state law of broad general ap-
plication is more likely to address a statewide concern than one that is narrow and particularized in its application.” (City of Vista, supra, 54 Cal.4th at p. 564.) Here, the state’s minimum wage requirement is of broad general application, applying to every industry regulated by the IWC wage orders, and to the private and public sectors alike. This is in contrast to the state compensation laws the Supreme Court has invalidated under the home rule doctrine. (See, e.g., ibid. [prevailing wage law applied only to contracts for public works projects]; County of Riverside, supra, 30 Cal.4th at p. 282 [statute requiring binding arbitration of wage disputes with firefighter and police unions]; San Francisco Labor Council, supra, 26 Cal.3d at p. 790 [law requiring Regents of the University of California to pay prevailing wages]; Sonoma County, supra, 23 Cal.3d at p. 302 [law nullifying agreements between localities and their public employees for cost-of-living wage increases]; Charleville, supra, 215 Cal. at pp. 389-390, 400 [prevailing wage law applied only to municipal contracts for public works projects]; Popper, supra, 123 Cal. at pp. 456-457, 459 [laws specifying salaries for police officers and firefighters in municipalities with populations over 100,000].)

As pointed out by the City, it is true the Supreme Court has countenanced procedural laws encroaching on local authority more readily than substantive measures like the minimum wage law at issue here. (See Seal Beach, supra, 36 Cal.3d at pp. 600-601 & fn. 11; Baggett, supra, 32 Cal.3d at pp. 139-140; Professional Fire Fighters, supra, 60 Cal.2d at pp. 294-295.) However, the distinction between substantive and procedural measures is not determinative, and substantive laws displacing local authority over municipal affairs have been upheld by the courts. (See Healy, supra, 41 Cal.2d at p. 122 [upholding Legislature’s “complete system of workmen’s compensation which obviously is a subject of state-wide concern”]; Jauregui, supra, 226 Cal.App.4th at pp. 788, 799-801 [upholding application of California Voting Rights Act of 2001 to enjoin certification of at-large city council election results on basis of statewide concerns of race-based vote dilution and local election integrity].)

Like the workers’ compensation law in Healy, minimum wage requirements are substantive regulations that directly implicate municipal interests in compensation of their employees. But also like the statewide workers’ compensation scheme, the statewide minimum wage requirement serves the fundamental purpose of protecting the health and welfare of workers. (See § 3202 [Workers’ compensation provisions of the Labor Code “shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment.”]; Andersen v. Workers’ Comp. Appeals Bd. (2007) 149 Cal. App.4th 1369, 1375-1376 [“The purpose of workers’ compensation is to extend its benefits for the protection of persons injured on the job.”].)

The City attempts to distinguish Healy by reference to the constitutional provision granting the Legislature its workers’ compensation authority. (Cal. Const., art. XIV, § 4 [“The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers’ compensation . . . .”].) However, the Constitution also provides express authority to the Legislature to set a minimum wage. (Id., § 1 [“The Legislature may provide for minimum wages and for the general welfare of employees . . . .”].)

The City also contends the Supreme Court’s opinions invalidating the prevailing wage laws in City of Vista, San Francisco Labor Council, and Charleville mandate the same result here because prevailing wage laws are a form of minimum wage laws, pointing to the language in our opinion in Reyes v. Van Elk, Ltd. (2007) 148 Cal.App.4th 604, 612, that “[i]t is well established that California’s prevailing wage law is a minimum wage law.” But this statement in Reyes was in the context of whether an employee has a private right to recover unpaid prevailing wages from an employer under section 1194, not the home rule doctrine.9 (Reyes, at p. 612.) We distinguished the statement in San Francisco Labor Council to the contrary as inapplicable to the issue in Reyes. (Id. at p. 612, fn. 6.) As the Supreme Court observed in San Francisco Labor Council, “Prevailing wage regulations are substantially different from minimum wage statutes.” (San Francisco Labor Council, supra, 26 Cal.3d at p. 790.)

Indeed, a prevailing wage law has a greater impact on local control than the minimum wage law because by requiring payment of wages prevailing in an industry locally, the law is “effectively a salary setting statute.” (San Francisco Labor Council, supra, 26 Cal.3d at p. 790.) By contrast, the minimum wage requirement does not effectively determine the wage for all employment relationships it regulates, but rather, sets as a floor the lowest permissible hourly rate of compensation.10 Thus, the impact of the minimum wage law is consistent with the Supreme Court’s conclusion “the Legislature may regulate as to matters of statewide concern even if the regulation impinges ‘to a limited extent’” on local control of municipal affairs. (County of Riverside, supra, 30 Cal.4th at p. 287; accord, Professional Fire Fighters, supra, 60 Cal.2d at pp. 294-295.)
The Court of Appeal opinions relied on by the trial court, analyzing whether counties are required to comply with state labor laws governing overtime pay and meal and rest periods, do not address whether the minimum wage law relates to a matter of statewide concern. In Curcini, the First District considered whether provisions of the Labor Code and IWC wage orders requiring payment of overtime wages and compensation for missed meal and rest periods were issues of “compensation” reserved to county control. (Curcini, supra, 164 Cal.App.4th at pp. 642-645.) Although the plaintiffs (former jail chaplains) alleged the County of Alameda denied them meal breaks and rest periods, which they argued related to their working conditions, the court observed the plaintiffs were “actually seeking monetary compensation for having been required to work through meal and rest breaks.” (Id. at p. 644.) On this basis the court concluded the plaintiffs’ claims for overtime and premium wages for missed meal and rest periods were “compensation matters . . . of local rather than statewide concern.” (Id. at pp. 643, 645.) The court did not reach whether there was a statewide interest in the regulation of worker meal and rest periods, as opposed to the payment of premium wages.

In Dimon, our colleagues in Division Four addressed a deputy probation officer’s claim against the County of Los Angeles for failure to provide her meal periods or premium pay for missed meals, as required by state labor laws. (Dimon, supra, 166 Cal.App.4th at p. 1279.) The court adopted the reasoning of Curcini that the plaintiff’s claim was “‘actually seeking monetary compensation,’” and therefore was a matter of local, rather than statewide concern. (Dimon, at pp. 1282-1283.) The court then analyzed whether the Legislature could regulate meal breaks as a matter of statewide concern on the asserted basis that meal breaks “‘increase worker safety.’” (Id. at p. 1289.) The court rejected this argument because the complaint did not allege a state interest in worker safety, nor did the plaintiff offer any evidence to support her claim. (Ibid.) Further, the court observed, “there clearly is a material distinction between a manual laborer denied rest and meal periods and a deputy probation officer denied a meal period.” (Ibid.) Thus, neither Curcini nor Dimon considered the statewide interest in a living wage addressed by the state minimum wage law.

Finally, any doubt in this area “‘must be resolved in favor of the legislative authority of the state.’” (City of Vista, supra, 54 Cal.4th at p. 582; accord, California Fed. Savings, supra, 54 Cal.3d at p. 24 [“we defer to legislative estimates regarding the significance of a given problem and the responsive measures that should be taken toward its resolution”].) Considered in light of the Legislature’s goal of ensuring workers earn a sufficient wage to provide the necessities of life and raise them above the poverty level, we conclude the minimum wage law addresses a statewide concern “that justify[es] the state’s interference in what would otherwise be a merely local affair.” (City of Vista, at p. 560; accord, California Fed. Savings, at p. 18.)

d. The minimum wage is appropriately tailored to address the statewide concern in the health and welfare of workers

Under the fourth and final inquiry, we “determine whether the law is ‘reasonably related to . . . resolution’ of [the state-wide] concern [citation] and ‘narrowly tailored’ to avoid unnecessary interference in local governance [citation].” (City of Vista, supra, 54 Cal.4th at p. 556; accord, California Fed. Savings, supra, 54 Cal.3d at pp. 17, 24.) “[T]he state law must be reasonably related to the issue at hand and limit the incursion into a city’s municipal interest.” (Lippman v. City of Oakland, supra, 19 Cal.App.5th at p. 765; California Fed. Savings, at p. 25 [“the sweep of the state’s protective measures may be no broader than its interest”].)

Here, the statewide concern in worker health and welfare is reasonably related to the imposition of a minimum wage. As discussed above, the minimum wage law does not deprive the City completely of its authority to determine wages. Rather, the law sets a floor based on the Legislature’s judgment as to the minimum income necessary for a living wage within this state. The City retains authority to provide wages for its employees above that minimum as it sees fit. The minimum wage requirement therefore intrudes less on local authority than the prevailing wage laws, mandatory binding arbitration requirements, and prohibitions on cost-of-living pay increases held invalid by the Supreme Court. (See City of Vista, supra, 54 Cal.4th at p. 564; County of Riverside, supra, 30 Cal.4th at p. 282; Sonoma County, supra, 23 Cal.3d at p. 302.) As such, the balance struck is “‘sensible and appropriate fashion as between local and state legislative bodies.’” (California Fed. Savings, supra, 54 Cal.3d at p. 17.) This “limited interference . . . is substantially coextensive with the state’s underlying regulatory interest.” (Id. at p. 25.)

The City contends the minimum wage requirement is not tailored to the state’s interest because it does not exclude charter cities from its ambit. But this merely restates the City’s argument that the state interest in the minimum wage should not prevail over the City’s local interest in setting its own employees’ wages. Further, the statewide concern that workers earn a living wage implicates the wages of the City’s employees, who, like other employees in the state, must provide sustenance for themselves and their families. The City has not offered any alternative regulation that would address this statewide concern without applying the minimum wage to its employees.

11. Dimon was decided four years before the Supreme Court in City of Vista clarified the analysis under the home rule doctrine is a legal, not a factual determination. (City of Vista, supra, 54 Cal.4th at p. 558.)
4. Application of the minimum wage requirement does not unconstitutionally impair the MOU between plaintiffs and the City

The City contends in the alternative that enforcement of the state minimum wage against it would unconstitutionally impair the negotiated MOU between the City and plaintiffs. This argument lacks merit. Both the United States and California Constitutions prohibit laws impairing the obligation of contracts under certain circumstances. (See U.S. Const., art. I, § 10, cl. 1 ["No State shall . . . pass any . . . Law impairing the obligation of Contracts . . . "]; Cal. Const., art. I, § 9 ["A . . . law impairing the obligation of contracts may not be passed."]). "It has long been settled, however, that the contract clause does not absolutely bar all impairments." (Chorn v. Workers’ Comp. Appeals Bd. (2016) 245 Cal.App.4th 1370, 1392; accord, Deputy Sheriffs’ Assn. of San Diego County v. County of San Diego (2015) 233 Cal.App.4th 573, 578-581 [contract clause did not bar Public Employees’ Pension Reform Act of 2013 from subjecting new members of union to less favorable benefit formula].) "As is particularly relevant here, the contract clause protects only vested contractual rights." (Chorn, at pp. 1392-1393 [statute prospectively restricting payment of lien awards to assignees did not unconstitutionally impair existing contractual obligations].)

The City’s claim fails because it has identified no valid contract existing at the time of the legislative action at issue. When the relevant MOU was enacted by resolution of the City Council in September 2015, the statute setting the minimum wage at $10.00 per hour effective January 1, 2016 had already been enacted by the Legislature two years earlier. (SeeStats. 2013, ch. 351 [Assem. Bill No. 10 filed with the Secretary of State on Sept. 25, 2013].) In short, the legislation could not impair the contract because at the time of the legislation’s enactment the contract had not yet been entered into by the parties.

The City relies solely on Sonoma County, which invalidated a state law that "declared null and void any provision of ‘a contract, agreement, or [MOU] between a local public agency and an employee organization or an individual employee which provides for a cost of living wage or salary increase’ in excess of the increase provided for state employees.” (Sonoma County, supra, 23 Cal.3d at pp. 305, 314.) Sonoma County is distinguishable—the law there expressly retroactively voided the specified contract provision. Here, the law has no retroactive application, and instead sets a schedule for minimum wage increases in the future. (SeeStats. 2013, ch. 351, § 1 [increasing minimum wage to $9.00 on July 1, 2014 and $10.00 on January 1, 2016].)

We recognize the MOU between plaintiffs and the City is a binding contract. Nonetheless, as plaintiffs contend, they are entitled to be paid at or above the minimum wage regardless of any agreement to work for less, because their right to the minimum wage cannot be waived by contract. Under California law, “employees may not agree to waive their entitlement to the minimum wage [citations], nor may a collective bargaining agreement waive that right.” (Flowers, supra, 243 Cal.App.4th at p. 82 [concluding Los Angeles County Metropolitan Transportation Authority must comply with minimum wage law notwithstanding operative collective bargaining agreement]; accord, § 1194 [“Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action . . . ”]; Gentry v. Superior Court (2007) 42 Cal.4th 443, 455 [“By its terms, the rights to the legal minimum wage . . . conferred by [the statute] are unwaivable.”], disapproved on another ground in Iskanian v. CLS Transportation Los Angeles, LLC (2014) 59 Cal.4th 348, 360; Hoover v. American Income Life Ins. Co. (2012) 206 Cal.App.4th 1193, 1208 [rights accorded by § 1194 “may not be subject to negotiation or waiver”].) Thus, any agreement by plaintiffs to work for less than the minimum wage does not relieve the City of its duty to pay plaintiffs at or above the minimum wage.

DISPOSITION

The judgment is reversed. The trial court is directed to vacate the order sustaining the City’s demurrer and to enter an order overruling the demurrer. Appellants are to recover their costs on appeal.

FEUER, J.

WE CONCUR: PERLUSS, P. J., SEGAL, J.
UNITED FARMERS AGENTS ASSOCIATION, INC., Plaintiff and Appellant,
v. FARMERS GROUP, INC. et al., Defendants and Respondents.

No. B282541
In The Court of Appeal of the State of California
Second Appellate District
Division Eight
(Los Angeles County Super. Ct. No. BC497447)
Appeal from a judgment of the Superior Court of Los Angeles County. Gregory W. Alarcon, Judge. Affirmed.
Filed February 22, 2019

COUNSEL
Mahoney & Soll, Paul M. Mahoney and Richard A. Soll for Plaintiff and Appellant.
Tharpe & Howell, Christopher S. Maile, Eric B. Kunkel and William A. Brenner for Defendant and Respondent Farmers Group, Inc.

OPINION
Plaintiff United Farmers Agents Association, Inc. (UFAA) is a trade association whose members are insurance agents. It brought this declaratory relief action against Farmers Insurance Exchange, Truck Insurance Exchange, Fire Insurance Exchange, Mid-Century Insurance Company, and Farmers New World Life Insurance Company (the Companies) as well as Farmers Group, Inc. (FGI). After a bench trial, the court found UFAA lacked standing to pursue its claims and failed to demonstrate it was entitled to declaratory relief. The court entered judgment in favor of the defendants, and UFAA appealed. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Parties
The Companies are a group of insurers that mutually contract to sell insurance products through independent-contractor insurance agents.1 FGI provides the Companies non-claim related administrative and management services. It is the attorney-in-fact of Farmers Insurance Exchange, and the parent company of the attorneys-in-fact of Fire Insurance Exchange and Truck Insurance Exchange.

UFAA is a nonprofit professional trade association whose members are insurance agents that sell the Companies’ insurance products. It has approximately 1,900 members, 600 of whom are located in California.

Agent Appointment Agreements
In order to sell the Companies’ insurance products, an agent must enter into a form “Agent Appointment Agreement,” which defines the terms and conditions of the agent’s relationship to the Companies. This case concerns several contractual terms common to Agent Appointment Agreements signed prior to 2009 (the Agreements), some of which date back to the 1970s.

Under the Agreements, agents must extend the right of first refusal to the Companies to bind insurance coverage on behalf of applicants solicited and procured by the agents. In exchange, the Companies pay commissions and provide agents advertising assistance, educational and training programs, and necessary manuals, forms, and policyholder records.

The Agreements require agents “provide the facilities necessary to furnish insurance services to all policyholders of the Companies including … servicing all policyholders of the Companies in such a manner as to advance the interests of the policyholders, the Agent, and the Companies.” The Agreements further state that an agent “shall, as an independent contractor, exercise sole right to determine the time, place and manner in which the objectives of this Agreement are carried out, provided only that the Agent conform to normal good business practice, and to all State and Federal laws governing the conduct of the Companies and their Agents.”

The Agreements allow any party to terminate the contract by giving three months’ written notice (the no-cause termination provision). However, if a party breaches the Agreement, the other party may terminate the Agreement on 30 days’ written notice. The Companies may also terminate the Agreement immediately if the agent embezzles funds, switches insurance to another carrier, abandons the agency, is convicted of a felony, or makes willful misrepresentations material to the operation of the agency.

If the Agreement is terminated by any party, the agent generally is entitled to “contract value,” which amounts to approximately one year’s worth of commissions. In exchange, the agent must agree not to solicit, accept, or service his or her customers for a period of one year.

Complaint
On December 17, 2012, UFAA filed a complaint alleging the Companies and FGI (collectively, Farmers)2 engage

1. We use the terms “agent” and “agency” in their colloquial senses.

2. We refer to the defendants collectively only for the sake of simplicity. We do not mean to imply they are a single entity or enterprise.
in numerous practices that violate the terms of the Agreements. In relief, UFAA sought four declarations from the court: (1) the Agreements’ no-cause termination provisions are unconscionable; (2) the Agreements preclude Farmers’s use of performance programs and imposition of discipline based on an agent’s failure to meet performance standards; (3) the Agreements preclude Farmers from taking adverse action against agents based on the “location, nature, hours, and types of offices maintained” by the agents; and (4) the Agreements preclude Farmers from sharing customer information acquired by agents with competitors, such as 21st Century Insurance (21st Century).

**Trial**

The court conducted a bench trial over the course of three weeks. We summarize the relevant evidence related to each claim.

**Unconscionability of the No-Cause Termination Provisions**

On the unconscionability issue, the court heard testimony from numerous Farmers representatives that it was Farmers’s policy to read an Agreement to an agent line-by-line before the agent signed the Agreement. The Agreements were presented on a take-it-or-leave-it basis, meaning the agents were not allowed to change any language.

Several agents testified that, before signing the Agreements, Farmers representatives made additional representations about the termination provisions. Multiple agents, for example, said they were told Farmers would only terminate an agency if the agent engaged in one of the behaviors expressly prohibited by the Agreements. Another agent said she was told Farmers would never terminate an Agreement under the no-cause termination provision because it would constitute discrimination. Others said they were simply told Farmers does not enforce the no-cause termination provision.

In response, Farmers presented testimony from representatives who were present while hundreds of agents signed their Agreements. The representatives said they had never witnessed an agent being told an agency would be terminated only for reasons specifically listed in the Agreements. Farmers also introduced testimony from three agents who said they did not discuss the no-cause termination provisions with a Farmers representative prior to signing their Agreements.

**Performance Standards**

Numerous agents testified that they had meetings with Farmers representatives to discuss their poor sales of new policies and retention of existing policies. After the meetings, each agent received a letter with the following language: “[Y] ou have been experiencing a loss of policies in force, insuf-
Sharing of Customer Information

The court heard testimony that 21st Century is owned by some of the Companies and managed by FGI. Unlike the Companies, 21st Century is a direct writer of insurance, meaning it markets directly to consumers for the acquisition of new business. As a result, it is able to offer lower premiums than insurance companies that sell through agents. Customers can contact 21st Century and purchase insurance from it over the phone and the internet.

The court heard testimony that agents are required to enter their customers’ information into Farmers’s electronic database. Several Farmers representatives testified that Farmers does not share such information with 21st Century.

Farmers agent Thana Robinson, however, suspected Farmers shared her customers’ information with 21st Century. According to Robinson, she wrote an insurance policy for two customers, which was in effect for a year. Robinson expected the customers would renew the policy, but they did not. Instead, the customers were issued a new policy, which had a “J-code” in Farmers’s database. Robinson was not certain precisely what the J-code signified, but she believed it meant the customers obtained the new policy through 21st Century. Robinson admitted she did not know if 21st Century obtained the customers’ information through the database.

Farmers agent Jose Soberanes also suspected Farmers was sharing customer information with 21st Century. According to Soberanes, he would frequently provide quotes to prospective customers and enter their information into Farmers’s database. A few months later, he would call the customers, only to be told they had obtained insurance from 21st Century.

Statement of Decision and Judgment

After trial, the court issued a detailed statement of decision, in which it found in Farmers’s favor on each claim. At the outset—and as discussed more fully below—the court determined that UFAA lacked standing to pursue its claims. Although this finding was sufficient to warrant dismissal, the court nonetheless proceeded to consider the merits of UFAA’s claims.

The court first determined that UFAA failed to demonstrate the no-cause termination provision is unconscionable. The court explained: “UFAA’s members reported having varying experiences as to what, if anything, was said about the three-month written termination provision, and what was said to them about the contract in general. UFAA’s procedural unconscionability theory rests on the premise all of its California member agents were orally told the same thing at the time of signing the [Agreements]. . . . The evidence did not support this.”

The court next determined that, because UFAA failed to show the no-cause termination provisions are unconscionable, its claims related to Farmers’s performance and office standards necessarily fail as well. The court explained: “If, as the [Agreement] permits, [Farmers] can terminate the [Agreement] on three-months’ notice, for no reason at all, the fact that they have or even let others know, some criteria (e.g., performance results, business practices) that they consider in the exercise of their unbridled discretion does not make those factors improper. To the contrary, it protects [the] use of such factors as wholly within their unconstrained discretion.”

Even without the no-cause termination provisions, the court found Farmers’s alleged use of performance and office standards does not violate the Agreements. It explained that, as the principal, Farmers has “the right to set expectations about how much insurance is to be sold for the relationship to continue, even if the contract allows the agent to determine the time, place and manner in meeting those expectations. [Farmers has] the right to expect positive business results and to determine what constitutes adequate results.” The court further explained that the Agreements require agents to comply with “normal good business practices, and to all State and Federal laws governing the conduct of [Farmers] and their Agents.” The court found the evidence on what constitutes a “normal good business practice” demonstrated that it encompasses an appropriate business location and normal business hours. Accordingly, “[a]sking the agent to maintain an office outside the home and to maintain normal business hours is not at variance with the agreement.”

With respect to the claim that Farmers improperly shared customer information with 21st Century, the court found UFAA presented “no admissible or credible evidence of any instance where customer information was disseminated to 21st Century” by Farmers.

Finally, the court declined UFAA’s invitation to find that FGI and the Companies are a single enterprise.

Judgment, Motion for New Trial, and Appeal

On February 14, 2017, the court entered judgment in favor of Farmers and against UFAA. UFAA moved for a new trial, which the court denied on April 19, 2017. UFAA timely appealed.

DISCUSSION

I. UFAA HAD STANDING TO PURSUE SOME OF ITS CLAIMS

Before considering the merits of UFAA’s claims, we must first determine whether it had standing to assert them. We find UFAA had associational standing to pursue its claims related to performance and office standards, but did not have standing to pursue its other claims.

A. Standard of Review

Standing is a question of law that we review independently. (San Luis Rey Racing, Inc. v. California Horse Racing Bd. (2017) 15 Cal.App.5th 67, 73.) “However, where the superior court makes underlying factual findings relevant to the question of standing, we defer to the superior court and review the findings for substantial evidence.” (Ibid.)
B. Associational Standing

“A litigant’s standing to sue is a threshold issue to be resolved before the matter can be reached on its merits. [Citation.] Standing goes to the existence of a cause of action [citation], and the lack of standing may be raised at any time in the proceedings.” (Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles (2006) 136 Cal.App.4th 119, 128, italics omitted.)

“[A] plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.” (Independent Roofing Contractors v. California Apprenticeship Council (2003) 114 Cal.App.4th 1330, 1341.) The doctrine of associational standing is an exception to this general rule. It provides that, even in the absence of injury to itself, “an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” (Hunt v. Washington Apple Advertising Comm’n (1977) 432 U.S. 333, 343 (Hunt).) These are often referred to as the Hunt requirements.


C. Analysis

The trial court determined that UFAA lacked standing because it failed to satisfy the third Hunt requirement, that “neither the claim asserted nor the relief requested requires the participation of individual members of the lawsuit.” Although the court gave multiple reasons for its decision, it seemed to be motivated in large part by a belief that associational standing is lacking if the participation of any association member is necessary to adjudication of the claim. This interpretation of the third Hunt requirement was too restrictive.

The United States Supreme Court has explained that the third Hunt requirement “is best seen as focusing on . . . matters of administrative convenience and efficiency.” (Food and Commercial Workers v. Brown Group, Inc. (1996) 517 U.S. 544, 557.) Although it could be read as foreclosing associational standing if any individual member participates in the lawsuit, federal courts have found associational standing despite the need for participation of some individual members. (See, e.g., Hospital Council v. City of Pittsburgh (3d Cir. 1991) 949 F.2d 83 (Hospital Council); Pennsylvania Psychiatric v. Green Spring Health (3d Cir. 2002) 280 F.3d 278 (Pennsylvania Psychiatric); Retired Chicago Police Ass’n v. City of Chicago (7th Cir. 1993) 7 F.3d 584 (Retired Chicago Police Ass’n); Association of Amer. Physicians v. Texas Medical (5th Cir. 2010) 627 F.3d 547 (Amer. Physicians).)

In Hospital Council, supra, 949 F.2d 83, for example, the Third Circuit held that an association of hospitals had standing to pursue claims that governmental entities were forcing its members to make payments in lieu of taxes, despite the fact that adjudication of the claims would likely require trial testimony from the member hospitals’ officers and employees. The court explained that the third Hunt requirement is a paraphrase of a prior statement by the Supreme Court that associational standing is appropriate unless “the individual participation of each injured party [is] indispensable to proper resolution of the cause.” (Warth v. Seldin (1975) 422 U.S. 490, 511, italics added.) Therefore, the court reasoned, the participation of some members is not fatal to associational standing, so long as the participation of each member is not required. (Hospital Council, supra, 949 F.2d at pp. 89–90.) In a subsequent decision, the Third Circuit further clarified that associational standing may be appropriate where the plaintiff alleges “systemic policy violations that will make extensive individual participation unnecessary.” (Pennsylvania Psychiatric, supra, 280 F.3d at p. 286.)

The Seventh Circuit adopted the Third Circuit’s interpretation of the third Hunt requirement in Retired Chicago Police Ass’n, supra, 7 F.3d 584. In that case, the court found an association had standing to pursue its claim that a city breached certain binding representations made to its members, despite the fact that it might need to rely on evidentiary submissions of some of its members to establish the breach. (Id. at p. 603.) The court explained: “We can discern no indication . . . that the Supreme Court intended to limit representational standing to cases in which it would not be necessary to take any evidence from individual members of an association. Such a stringent limitation on representational standing cannot be squared with the Court’s assessment in Brock[5] of the efficiencies for both the litigant and the judicial system from the use of representational standing. Rather, the third prong of Hunt is more plausibly read as dealing with situations in which it is necessary to establish ‘individualized proof,’ [citation], for litigants not before the court in order to support the cause of action.” (Retired Chicago Police Ass’n, supra, 7 F.3d at pp. 601–602, fn. omitted.)

The Fifth Circuit considered the issue more recently in *Amer. Physicians*, supra, 627 F.3d 547. In that case, an association of physicians sought declaratory and injunctive relief related to a medical board’s alleged improper use of anonymous complaints and retaliatory actions against its member physicians. After looking to *Hospital Council and Retired Chicago Police Association*, the court concluded the association had standing. The court explained: “If practiced systemically, such abuses may have violated or chilled [the association’s] members’ constitutional rights. Proof of these misdeeds could establish a pattern with evidence from the Board’s witnesses and files and from a small but significant sample of physicians. Because [the association] also seeks only equitable relief from these alleged violations, both the claims and relief appear to support judicially efficient management if associational standing is granted.” (*Amer. Physicians*, supra, 627 F.3d at p. 553.)

We find the federal courts’ reasoning in these cases persuasive and adopt their interpretation of the third *Hunt* requirement. Accordingly, the fact that UFAA relied on testimony from some of its members to support its claims is not dispositive. Instead, we must determine whether UFAA's claims and requested relief required extensive participation from, or individualized proof related to, its agent members, keeping in mind the focus of the requirement is administrative convenience and efficiency.

1. **UFAA Had Standing to Pursue its Claims Related to Office Locations and Performance Standards**

UFAA argues it had standing to pursue its claims related to office locations and performance standards because it was possible to establish the claims without individualized factual inquiries related to each agent.6 We agree.

With respect to these claims, UFAA essentially sought declarations that the Agreements categorically forbid Farmers from terminating an agency based, in whole or in part, on its dissatisfaction with the agent’s office location or failure to meet performance standards. Farmers did not dispute that it considers such factors when deciding whether to terminate an Agreement, and has, in fact, terminated Agreements for such reasons. The only issue before the court, therefore, was whether the Agreements permit Farmers to terminate agencies for such reasons. To decide that issue, the court needed only interpret and construe the terms of the Agreements; it did not need to consider evidence related to individual agents or the specific circumstances under which their agencies were terminated. The claims, therefore, satisfied the third *Hunt* requirement, and UFAA had standing to pursue them.7

2. **UFAA Lacked Standing to Pursue its Unconscionability Claim**

UFAA lacked associational standing to pursue its claim seeking a declaration that the no-cause termination provisions are unconscionable.8

A court may refuse to enforce contracts or clauses in contracts that are unconscionable. (Civ. Code, § 1670.5, subd. (a)) “[U]nconscionability has both a ‘procedural’ and a ‘substantive’ element,” the former focusing on “‘oppression’” or “‘surprise’” due to unequal bargaining power, the latter on “‘overly harsh’” or “‘one-sided’” results. [*Citation.*] “The prevailing view is that [procedural and substantive unconscionability] must *both* be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability.” [*Citation.*] But they need not be present in the same degree. ‘Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves.’ [*Citations.*] In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.” (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114, abrogated on other grounds by *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333.)

An unconscionability claim typically cannot be resolved simply by examining the face of the contract. (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1147.) This is because “[u]nconscionability is a flexible standard in which the court looks not only at the complained-of term but also at the process by which the contractual parties arrived at the agreement and the larger context surrounding the contract, including its ‘commercial setting, purpose, and effect.’” [*Citations.*] “(De La Torre v. CashCall, Inc. (2018) 5 Cal.5th 966, 976.) An unconscionability determination is “highly dependent on context,” (*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 911) and “requires a court to examine the totality of the agreement’s substantive terms as well as the circumstances of its formation to determine whether the

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6. Farmers does not address this issue in its respondent’s brief.
7. The parties do not dispute that these claims satisfied the other *Hunt* requirements.
8. Though UFAA generally argues that the court erred in finding it lacked associational standing, it does not specifically address why it had standing to pursue its unconscionability claim. Even though standing is an issue we review independently, we are not required to develop UFAA’s arguments for it, and its failure to provide reasoned argument and citations to authority has forfeited the point. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6 “[although our review of a summary judgment is de novo, it is limited to issues which have been adequately raised and supported in plaintiffs’ brief”]; *Niko v. Foreman* (2006) 144 Cal.App.4th 344, 368 “[‘This court is not inclined to act as counsel for … any appellant and furnish a legal argument as to how the trial court’s rulings in this regard constituted an abuse of discretion’ [citation], or a mistake of law.”].) Nonetheless, we will exercise our discretion to consider the issue, as its resolution impacts UFAA’s other claims.
overall bargain was unreasonably one-sided.” (Sonic-Calabasas A, Inc. v. Moreno, supra, 57 Cal.4th at p. 1146.)

Given the nature of an unconscionability determination—particularly the focus on the circumstances of the contract’s formation and sliding scale approach—in most cases it will be difficult, if not impossible, for an association to establish its members’ contracts are unconscionable without individualized proof and the participation of each member. While there may be limited circumstances under which it is possible, this is plainly not one of those cases.

Although UFAA provided multiple reasons why the no-cause termination provisions are unconscionable—among them, that agents lacked bargaining power, the provisions are contained in contracts of adhesion, and the provisions are “extremely one-sided”—the focus of its claim was an allegation that Farmers had a uniform practice of informing its agents, prior to signing the Agreements, that it terminates contracts only for cause. In its closing argument, UFAA stressed the centrality of this alleged practice to its claim: “We are asking the court to declare that the three-month termination clause is unconscionable because agents are being told don’t worry, Farmers never enforces it.” According to UFAA, this practice rendered every no-cause termination provision unconscionable because Farmers’ representations constituted “substantive procedural deception,” “negate[d] the reasonable expectations of the agent,” and caused “unfair surprise.”

To prove its claim at trial, UFAA presented representative testimonial from several agents who said they were told something to the effect that Farmers terminates agencies only for cause. Farmers, however, maintained it did not have a practice of making such representations, and presented testimony from numerous representatives to support that assertion. After weighing this conflicting evidence, the trial court concluded UFAA failed to establish that Farmers had a uniform practice of informing agents that it terminates Agreements only for cause, a finding UFAA does not challenge on appeal.

This factual finding was fatal to UFAA’s associational standing. Absent a showing of a uniform practice, it was impossible for UFAA to establish its claim—that every no-cause termination provision is unconscionable—without presenting evidence regarding the specific representations made to each agent before he or she signed an Agreement. Given the need for individualized proof and participation of each agent, UFAA failed to satisfy the third Hunt requirement and lacked standing to pursue its claim.

9. On appeal, UFAA continues to maintain this alleged practice is the crux of its unconscionability claim.

10. We acknowledge it may have been possible for UFAA to establish its unconscionability claim without evidence of Farmers’ representations to agents. UFAA, however, does not argue that point, and we consider it forfeited.

11. Even if UFAA had standing, its unconscionability claim failed on the merits for a similar reason. As discussed above, UFAA sought a declaration that every no-cause termination provision is unconscionable, which was premised on an allegation that Farmers informed each agent that it terminates contracts only for cause. UFAA, however, does not dispute that it failed to present sufficient evidence that Farmers made such representations to each agent. Without such evidence, UFAA could not establish that every no-cause termination provision is unconscionable. Accordingly, it was not entitled to its requested relief.

12. UFAA again failed to specifically address this issue in its appellate briefing, which has forfeited the point. Nonetheless, we will exercise our discretion to consider the merits of the issue.

13. Even if UFAA had standing, it has not shown the trial court erred in denying its claim on the merits. The trial court rejected UFAA’s claim after finding it presented “no admissible or credible evidence of any instance where customer information was disseminated to 21st Century” by Farmers. UFAA suggests this was error because Robinson’s testimony established that Farmers shared her customers’ information with 21st Century. According to UFAA, there is no possible way the customers could have failed to renew their policy with Robinson, and then obtained a new policy through 21st Century, unless Farmers shared their information. We disagree. The court could have reasonably inferred from the evidence that 21st Century independently solicited Robinson’s customers, or the customers independently reached out to 21st Century. Accordingly, Robinson’s testimony did not compel a finding in UFAA’s favor. (See Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc. (2011) 196 Cal.App.4th 456, 466 [where an issue on appeal turns on failure of proof, appellant’s evidence must be of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding].)

3. UFAA Lacked Standing to Pursue its Claim Related to Sharing of Customer Information

UFAA also lacked associational standing to pursue its claim that the Agreements preclude Farmers from sharing with competitors customer information acquired by agents. UFAA’s claim was premised on an allegation that Farmers “systematically” shares such information with 21st Century, thereby interfering with the agents’ business expectations and violating the covenants of good faith and fair dealing contained in each Agreement. UFAA sought to establish its claim primarily through representative testimony from two agents, Robinson and Soberanes.

The trial court, however, found the agents’ testimony showed, at most, “isolated incidents” of Farmers sharing information with 21st Century. Given this finding, which UFAA does not contest, UFAA could establish its claim—that Farmers is interfering with and violating each agent’s business expectations and contractual agreements—only by presenting, for each individual agent, evidence that Farmers improperly shares customer information procured by that agent. Because of the need for individualized proof and extensive participation from each agent, the court properly determined that UFAA lacked associational standing to pursue this claim.

II. UFAA WAS NOT ENTITLED TO DECLARATORY RELIEF ON ITS CLAIMS RELATED TO OFFICE LOCATIONS AND PERFORMANCE STANDARDS

UFAA contends the trial court erred in refusing to declare that the Agreements preclude Farmers from terminating an
agency based on its dissatisfaction with the agent’s office location or failure to meet performance standards. As best we can tell, UFAA’s primary argument is that consideration of such factors is improper because the Agreements do not expressly prohibit specific office locations or mandate performance standards. We are not persuaded.

‘‘The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties.’’ [Citations.] ‘‘Such intent is to be inferred, if possible, solely from the written provisions of the contract.’’ [Citations.] ‘‘If contractual language is clear and explicit, it governs.’’ [Citation.]’’ (State of California v. Continental Ins. Co. (2012) 55 Cal.4th 186, 195.) We strive to “give effect to all of a contract’s terms, and to avoid interpretations that render any portion superfluous, void or inexplicable.” (Brandwein v. Butler (2013) 218 Cal. App.4th 1485, 1507.)

UFAA is correct that Agreements do not expressly prohibit specific office locations or require agents to meet performance standards. Nonetheless, Farmers may terminate agencies for such reasons pursuant to the no-cause termination provision. Unlike the 30-day termination provision (which may be invoked only after a breach of the Agreement) and the no-notice termination provision (which may be invoked only if the agent engages in enumerated conduct), the no-cause termination provision does not require any conditions precedent. The parties may invoke the provision and terminate the Agreement at any time, and for any or no reason, so long as they provide sufficient notice. It follows that Farmers may terminate an agency under the no-cause termination provision for reasons not specifically listed in the Agreement, including dissatisfaction with the agent’s office location or failure to meet performance standards.

UFAA’s interpretation—that Farmers may terminate agencies only for reasons specifically listed in the Agreements—is unreasonable, as it renders the no-cause termination provision superfluous. The 30-day termination provision already allows the parties to terminate an Agreement for a breach. UFAA fails to explain how, under its interpretation, the no-cause termination provision would operate any differently, or why a party would ever invoke it rather than the 30-day termination provision.

UFAA suggests that allowing Farmers to terminate an agency for reasons other than those specifically listed in an Agreement would constitute a unilateral amendment to the Agreement. In support, it relies on the Nevada Supreme Court’s decision in MacKenzie Ins. v. National Ins. (Nev. 1994) 110 Nev. 503. In that case, an insurance agency sued an insurer after the insurer unilaterally reduced the commission the agency would be paid from fifteen percent (pursuant to the terms of the agency agreement) to five percent. The trial court granted the insurer’s motion for summary judgment, reasoning that, “since the relationship between [the agency] and [the insurer] was terminable by either party, with or without cause, the right of termination by written notice included the lesser right of imposing prospectively, changes in the conditions of the contract, including the terms of compensation.” (Id. at p. 505.) The Nevada Supreme Court reversed, holding: “The trial court incorrectly ruled that either party to the written contract had the ‘privilege of imposing prospectively, changes in the conditions of the contract.’” (If this were true, and either party had actually had the ‘privilege’ of imposing unwanted changes in the contract on the other, then there would be no point in having a written contract which set the commission percentage agreed to be paid. The contract gives the parties an option to terminate by giving written notice; it does not give either party the ‘privilege of imposing’ unilateral changes ‘in the conditions of the contract.’” (The agency) had the right to receive the fifteen percent commission rate agreed-upon by the parties until the contract was terminated in accordance with its terms, unless, of course, [the agency] waived the required written notice or agreed expressly or impliedly to accept less than was provided for in the written contract.” (Id. at p. 506.)

MacKenzie is readily distinguishable. Unlike the insurance company’s attempt to reduce the agency’s commission in MacKenzie—which was contrary to the express terms of the parties’ contract—Farmers has an explicit right under the Agreements to terminate an agency without cause. Further, there is nothing in the Agreements that precludes Farmers from exercising that authority in the event it is dissatisfied with an agent’s office location or failure to meet performance standards. It is absurd to argue that Farmers’s exercise of a specifically enumerated contractual right amounts to an attempt to unilaterally rewrite the contract.

UFAA also suggests, in perfunctory fashion, that an agent’s office location may never be a basis for termination because the Agreements designate agents independent contractors and give them the right to determine the time, place, and manner in which the objectives of the Agreements are to be carried out. UFAA does not specifically address, in any meaningful way, how these provisions constrain Farmers’s authority under the no-cause termination provisions.14 Consequently, we consider the point forfeited. (See Badie v. Bank of America (1998) 67 Cal.App.4th 779, 784–785; People v. DeSantis (1992) 2 Cal.4th 1198, 1240, fn. 18.)

Even if we overlook the forfeiture, we do not agree that these provisions preclude Farmers from ever terminating an Agreement because of the agent’s office location. An agent’s authority to determine the time, place, and manner in which the objectives of the Agreement are to be carried out is expressly qualified by the requirement that the agent “conform to normal good business practice, and to all State and Federal laws governing the conduct of the Companies and their Agents.” Therefore, even setting aside the no-cause termination provisions, Farmers may terminate an Agreement if the

14. UFAA suggested in its complaint that Farmer’s termination authority is limited by the implied covenant of good faith and fair dealing. UFAA, however, makes only passing reference to the implied covenant in its reply brief, and provides no meaningful analysis or authority on the issue.
agent’s office location violates state or federal law or does not conform to “normal good business practice.”

UFAA maintains that the phrase “normal good business practice” is ambiguous, and therefore should be interpreted against Farmers, which drafted the contract. UFAA, however, does not provide even a hint as to what we should interpret the phrase to mean. Instead, it merely points to evidence that operating an agency out of a personal residence may constitute a “normal good business practice” under certain circumstances. While that may be true, it does not help UFAA, as it implies there are circumstances under which operating an agency out of a personal residence is not a “normal good business practice.” If so, the Agreements cannot be said to categorically forbid Farmers from terminating an agency based on an agent’s office location, as UFAA contends.

Nor are we persuaded that Farmers’s authority to terminate an agency if dissatisfied with the agent’s office location is necessarily inconsistent with the agents’ designation as independent contractors. As UFAA correctly points out, an employer generally may exercise control over an independent contractor’s results, but not the means by which the results are accomplished. (S.A. Gerrard Co. v. Industrial Acc. Com. (1941) 17 Cal.2d 411, 413; accord Varisco v. Gateway Science & Engineering, Inc. (2008) 166 Cal.App.4th 1099, 1103.) Nonetheless, an employer of an independent contractor may “retain some interest in the manner in which the work is done” without altering the relationship. (Millsap v. Federal Express Corp. (1991) 227 Cal.App.3d 425, 432; see Bates v. Industrial Acc. Com. (1958) 156 Cal.App.2d 713, 718 [“Complete abnegation of control is not essential to the establishment of the status of independent contractor.”].) Accordingly, the fact that Farmers may have some limited control over the agents’ office locations does not necessarily render the agents something other than independent contractors.¹⁵

III. UFAA’S SINGLE ENTERPRISE ARGUMENTS ARE MOOT

UFAA contends the trial court erred in finding it failed to establish that FGI and the Companies are a single enterprise. It also contends the court erroneously excluded expert testimony on the issue. Because we conclude UFAA failed to establish its entitlement to relief on any of its claims, these arguments are moot and we need not consider them.

¹⁵ To determine whether our interpretation of the Agreements actually alters the agents’ purported status as independent contractors would require consideration of numerous additional factors. (See S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341, 351.) Because UFAA failed to discuss, or even acknowledge, any of those factors, we decline to consider the issue any further.
Cite as 19 C.D.O.S. 1698

MARK CORREIA et al., Plaintiffs and Respondents,
v.
NB BAKER ELECTRIC, INC., Defendant and Appellant.

No. D073798
In The Court of Appeal of the State of California
Fourth Appellate District
Division One
(Super. Ct. No. 37-2017-00019945-CU-0E-NC)
Appeal from an order of the Superior Court of San Diego County, Earl H. Maas III, Judge. Affirmed.
Filed February 25, 2019

COUNSEL

Finch, Thornton & Baird, Chad T. Wishchuk, Kathleen A. Donahue and Marlene C. Nowlin for Defendant and Appellant.

Baker Law Group, Michelle Baker; Law Office of Alan S. Yockelson and Alan S. Yockelson for Plaintiffs and Respondents.

OPINION

Plaintiffs Mark Correia and Richard Stow sued their former employer, NB Baker Electric, Inc. (Baker), alleging wage and hour violations and seeking civil penalties under the Private Attorney General Act of 2004 (PAGA). (Lab. Code, § 2699 et seq.) Baker responded by petitioning for arbitration under the parties’ arbitration agreement. The agreement provided that arbitration shall be the exclusive forum for any dispute and prohibited employees from bringing a “representative action.”

The trial court granted the arbitration petition on all causes of action except for the PAGA claim. On the PAGA claim, the court followed the California Supreme Court decision in Iskanian v. CLS Transportation Los Angeles, LLC (2014) 59 Cal.4th 348 (Iskanian), which held unenforceable agreements to waive the right to bring PAGA representative actions in any forum, and the California Court of Appeal decision in Tanguilig v. Bloomingdale’s, Inc. (2016) 5 Cal. App.5th 665 (Tanguilig), which held a PAGA claim cannot be compelled to arbitration without the state’s consent. The trial court stayed the PAGA claim pending the conclusion of the arbitration.

Baker contends the court erred because: (1) plaintiffs’ response to its arbitration petition was untimely; (2) Iskanian is no longer binding as it is inconsistent with a recent United States Supreme Court decision, Epic Systems Corp. v. Lewis (2018) ___U.S. ___ [138 S.Ct. 1612] (Epic); and (3) the parties’ arbitration agreement should be interpreted to mean that if the representative-action waiver is unenforceable, the PAGA claim for statutory penalties remains subject to arbitration.

We determine the court acted within its discretion in considering plaintiffs’ response to the arbitration petition despite that plaintiffs filed the response after the statutory deadline. We additionally determine we remain bound by Iskanian. Although the Epic court reaffirmed the broad preemptive scope of the Federal Arbitration Act (FAA), Epic did not address the specific issues before the Iskanian court involving a claim for civil penalties brought on behalf of the government and the enforceability of an agreement barring a PAGA representative action in any forum. We thus conclude the trial court properly ruled the waiver of representative claims in any forum is unenforceable.

We also reject Baker’s contention that the court erred in failing to order plaintiffs’ PAGA claim to arbitration. Although Iskanian did not decide the issue of whether courts have the authority to order a PAGA representative action into arbitration, several California Courts of Appeal have held a PAGA arbitration requirement in a predispute arbitration agreement is unenforceable based on Iskanian’s view that the state is the real party in interest in a PAGA claim. These courts reasoned the state must have consented to the agreement to effectively waive the right to bring the PAGA claim into court. We agree with this analysis as applied to the circumstances before us.

We are aware the federal courts have reached a different conclusion regarding the arbitrability of a PAGA representative claim, but find these decisions unpersuasive because the courts did not fully consider the implications of the qui tam nature of a PAGA claim on the enforceability of an employer-employee arbitration agreement. Moreover, although we provided Baker the specific opportunity to do so, it failed to identify a sound basis for this court to apply the federal decisions on this issue.

FACTUAL AND PROCEDURAL BACKGROUND

In 2014 and 2015, plaintiffs began working for Baker. At the outset, each employee signed an identical arbitration agreement (Arbitration Agreement). This agreement provided in relevant part:

“Section 4

“The Company and Employee agree that Employee’s employment . . . involves interstate commerce and thus the [FAA] applies.”

“Section 5

1. Undesignated statutory references are to the Labor Code.
“Employee and the Company agree that in the event any dispute arises between Employee and the Company relating to Employee’s employment with the Company, including without limitation, any claim(s) based on common law, any express or implied contract, any federal or state statute, any statute or provision relating to employment discrimination and/or employment rights, any wage and hour claims, the federal or any state constitution and/or any public policy, will be determined by binding arbitration and not by a lawsuit or resort to court process. [¶] . . . [¶]

“The arbitration provided for in this Agreement shall be the exclusive forum for any dispute between Employee and the Company related to the claims set forth above. . . . [¶] . . . [¶]

“Section 6

“No claims covered by this Agreement shall be permitted by the arbitrator or a court to proceed or be maintained as a class action or representative action by an Employee on behalf of other Employees.

“Section 7

“NOTICE: BY SIGNING THIS AGREEMENT, YOU ARE GIVING UP YOUR RIGHT TO MAINTAIN ANY CLASS ACTION OR REPRESENTATIVE ACTION IN ARBITRATION OR ANY COURT CONCERNING ANY DISPUTE SPECIFIED IN SECTION 5 ABOVE.

“Section 8

“NOTICE: BY SIGNING THIS AGREEMENT, YOU ARE AGREEING TO HAVE ANY ISSUE RELATING TO YOUR EMPLOYMENT OR OTHER DISPUTE SPECIFIED IN SECTION 5 ABOVE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL.”

The Arbitration Agreement also contained a severance clause stating that if any provision or part of a provision is found to be invalid, the finding shall not “invalidate[e]” the remaining portions of the provision or any other part of the agreement.

In December 2016, the employment ended for both plaintiffs.

Six months later, in June 2017, plaintiffs filed a complaint against Baker. As amended, the complaint asserted breach of contract, statutory unfair competition, and wage and hour violations.2 Plaintiffs sought damages for these violations and requested penalties under PAGA. On their PAGA claim, plaintiffs alleged they were bringing the action “on their own behalf, and in their representative capacity on behalf of other current or former aggrieved employees, for penalties pursuant to [section] 2699 for [Baker’s] violations of the enumerated . . . Labor Code sections . . . .” (Italics omitted.) They sought 25 percent of all penalties for the employees and the remaining 75 percent for the state. They alleged they previously notified the California Labor Workforce Development Agency (Agency) of their intention to bring the PAGA claims.

On September 7, 2017, Baker petitioned for an order compelling plaintiffs to submit their causes of action to separate, individual arbitrations under the Arbitration Agreement. Baker scheduled the hearing for January 12, 2018.

On December 29, 2017, plaintiffs filed an opposition to Baker’s petition. They argued: (1) the Arbitration Agreement was procedurally and substantively unconscionable; (2) the agreement was void because it contains an unenforceable waiver of PAGA representative actions; (3) PAGA representative actions cannot be compelled to arbitration; and (4) judicial economy would not be served by severing the remaining claims from the PAGA claim that must be litigated in court.

In reply, Baker argued plaintiffs’ response must be stricken because it was untimely filed, and alternatively the Arbitration Agreement should be enforced because it was not procedurally or substantively unconscionable. On the PAGA claim, Baker did not seek to enforce the representative-action waiver, but urged the court to order this claim into arbitration, asserting that Iskanian and a more recent Ninth Circuit decision (Sakkab v. Luxottica Retail North America, Inc. (9th Cir. 2015) 803 F.3d 425 (Sakkab)) both contemplated that PAGA claims can be arbitrated, even if they could not be completely barred. Baker argued that at the very least the PAGA “individual” claims should be ordered to arbitration. Baker also asserted that the PAGA claims were asserted in bad faith merely “as a means to gain additional damages unrelated to their own individual claims” and that by failing to intervene, the state “waiv[ed] any interest” in plaintiffs’ claims.

At the hearing on the motion, Baker’s counsel reiterated that she agreed plaintiffs’ PAGA representative-action waiver was not enforceable under Iskanian, but argued Iskanian did not hold that PAGA claims could not be compelled to arbitration. The court responded that it would adhere to its tentative ruling that all claims would be ordered to arbitration except for the PAGA claim. The court also remarked: “It will be nice when we get some firm direction on this . . . because the [state and federal courts] seem[] to be all over the place on it. [¶] . . . Right now, I think that the [law is] . . . I can’t order a PAGA claim to arbitration. [¶] . . . To me, you can make a fair
argument that it will be much more efficient for everybody to do them all in one place. . . . [f]or practical purposes a petition is a motion."

In its written order, the court explained its rejection of plaintiffs’ substantive unconscionability arguments, and ordered all claims to arbitration except for the PAGA claim. On the PAGA claim, the order stated: "A PAGA claim (whether individual or representative) cannot be ordered to arbitration without the state’s consent," citing Tanguilig, supra, 5 Cal. App.5th 665.

**DISCUSSION**

Baker contends the court erred in refusing to enforce the Arbitration Agreement provision barring plaintiffs from bringing representative claims in any forum. Baker alternatively contends the court erred in refusing to order the PAGA representative and/or individual claims to arbitration.

**I. TIMELINESS OF PLAINTIFFS’ OPPOSITION PAPERS**

Before reaching plaintiffs’ substantive arguments, we consider Baker’s contention the court erred in considering plaintiffs’ response to the arbitration petition because plaintiffs did not file the opposition by the statutory deadline date.

Code of Civil Procedure section 1290 authorizes a party to seek to compel arbitration by filing a petition in court, and states the petition allegations “are deemed to be admitted . . . unless a response is duly served and filed.” Code of Civil Procedure section 1290.6 provides: “A response shall be served and filed within 10 days after service of the petition [with an exception not applicable here] . . . . The time provided in this section for serving and filing a response may be extended by an agreement in writing between the parties to the court proceeding or, for good cause, by order of the court.”

Baker filed its petition to compel arbitration on September 7, 2017. The motion identified the hearing date as January 12, 2018. Plaintiffs filed their opposition on December 29, 2017. The opposition was untimely under Code of Civil Procedure section 1290.6’s deadline. Plaintiffs apparently calculated their time from the general motions deadline, which is nine court days before the hearing (Code Civ. Proc., § 1005, subd. (b)), rather than 10 days after the arbitration moving papers are served (Code Civ. Proc., § 1290.6). (See Ruiz v. Moss Bros. Auto Group, Inc. (2014) 232 Cal.App.4th 836, 847 (Ruiz).)

Baker contends the court had no jurisdiction to consider this untimely response. We disagree. First, it is not clear that the arbitration petition statute—rather than the general motions statute—governs the timing requirements when a complaint has been filed in court. (See Mercury Ins. Group v. Superior Court (1998) 19 Cal.4th 332, 349; see also Younger on California Motions (2d ed. 2017) § 9:11 ["when a party has already commenced a lawsuit in a dispute subject to an arbitration agreement, . . . a motion is . . . the proper procedure” and “[f]or practical purposes a petition is a motion"]) Even if the petition timeline applied here, Code of Civil Procedure section 1290.6 specifically allows a court to extend the time for filing an opposition for good cause, and reviewing courts have long held trial courts are authorized to consider late-filed opposition papers for good cause if there is no undue prejudice to the moving party. (Juarez v. Wash Depot Holdings, Inc. (2018) 24 Cal.App.5th 1197, 1201-1202; Ruiz, supra. 232 Cal.App.4th at p. 847.)

The circumstances surrounding an untimely opposition to a petition or motion to compel arbitration should be viewed under “the strong policy of the law favoring the disposition of cases on the merits . . . .” (Juarez, at p. 1202.)

As the appellant, Baker has the burden to show the court had no good cause to consider plaintiffs’ opposition papers and/or that it suffered undue prejudice. Baker has not met this burden. Baker had ample opportunity to oppose plaintiffs’ arguments in its reply brief and at the hearing, and does not identify any factual ground for finding plaintiffs acted in bad faith. Baker’s citation to several older authorities does not convince us the court abused its discretion in considering plaintiffs’ opposition papers, as those cases are distinguishable. (See A.D. Hoppe Co. v. Fred Katz Construction Co. (1967) 249 Cal.App.2d 154, 158 [no response to arbitration petition ever filed]; see also Evans Products Co. v. Millmen’s Union No. 550 (1984) 159 Cal.App.3d 815, 819.)

**II. ISKANIAN REMAINS GOOD LAW ON NONENFORCEABILITY OF BLANKET PAGA WAIVERS**

In the Arbitration Agreement, plaintiffs agreed to waive their rights to “maintain any . . . representative action in arbitration or any court concerning any dispute specified in Section 5 . . . .” (Capitalization and boldface omitted.) Section 5 identifies “any dispute arising between Employee and [Baker] relating to Employee’s employment with [Baker]. . . .

In the court below, the parties agreed a “representative action” included a PAGA claim and that the Arbitration Agreement purported to ban these claims in any forum—arbitration or court. Baker conceded that this complete ban was unenforceable under Iskanian. On appeal, it has changed its position. Baker now asserts that the ban is enforceable because Iskanian is no longer good law after the United States Supreme Court’s recent decision in Epic. Baker argues Epic’s interpretation of the FAA preemption clause undermines Iskanian’s reasoning and requires that California courts enforce PAGA representative-action waivers. We reject these arguments. Because Epic did not rule on the precise issue before Iskanian, we remain bound by Iskanian’s holding. Moreover, Iskanian’s holding and reasoning are not necessarily incompatible with Epic.

**A. Applicable Law**

Congress enacted the FAA in response to judicial hostility to arbitration and to ensure that private arbitration agreements are enforced according to their terms. (American Ex-
press Co. v. Italian Colors Restaurant (2013) 570 U.S. 228, 232 (Italian Colors.) Under section 2 of the FAA, state laws inconsistent with the federal act’s provisions and objectives are preempted. (AT&T Mobility LLC v. Concepcion (2011) 563 U.S. 333, 343 (Concepcion.) Under this rule, a state law contract defense is unenforceable if it applies only to arbitration contracts, derives its meaning from the fact an arbitration agreement is at issue, or interferes with the fundamental attributes of arbitration. (Id. at pp. 341-344; see Epic v. Epic, 138 S.Ct. at p. 1622.) But state laws applying to arbitration contracts are enforceable to the extent they are not in conflict with the FAA. (Concepcion, at pp. 339, 343.)

In Concepcion, the United States Supreme Court held the FAA preempted a California Supreme Court decision (Discover Bank v. Superior Court (2005) 36 Cal.4th 148) holding that class action waivers are unenforceable in consumer contracts as against public policy. (Concepcion, supra, 563 U.S. 333.) The Concepcion court found the California Supreme Court’s holding interfered with the “fundamental attributes of arbitration” (id. at p. 344) because arbitration is “poorly suited” to resolve class actions (id. at p. 350), emphasizing a class action’s strict procedural formalities, complex notice requirements, and potential severe consequences to a defendant (id. at pp. 346-352).

In Iskanian, the California Supreme Court considered Concepcion’s impact on arbitration agreements in the employment context. (Iskanian, supra, 59 Cal.4th at pp. 362-363.) The Iskanian plaintiffs (who had signed arbitration agreements with class action and representative action waivers as part of their employment) asserted wage-and-hour class action claims and PAGA claims seeking statutory penalties for Labor Code violations. (Id. at p. 361.) The Iskanian court first addressed the issue whether the FAA preempts the state law rule, embodied in Gentry v. Superior Court (2007) 42 Cal.4th 443, providing class-action waivers in employment contracts generally violate public policy. (Iskanian, at pp. 362-366.) The Iskanian court determined Concepcion’s holding and reasoning applied to class action waivers in employment contracts and overruled Gentry. (Iskanian, at pp. 362-366.) The Iskanian court specifically recognized that—as in Concepcion—the refusal to enforce the employment arbitration agreement class action waivers interfered with the fundamental attributes of arbitration. (Iskanian, at p. 364.) In so ruling, the Iskanian court rejected the employees’ arguments that the class action waiver was unlawful under the National Labor Relations Act (NLRA), finding the NLRA did not override FAA’s preemption provision. (Iskanian, at pp. 366-374.)

The Iskanian court, however, reached a different conclusion on the waiver of the employee’s PAGA cause of action, holding a complete ban on PAGA actions is unenforceable. (Iskanian, supra, 59 Cal.4th at pp. 378-391.) The court’s conclusion was predicated on its view that a PAGA claim functions as a law enforcement mechanism to implement state labor laws. (Id. at pp. 382, 386-387.) As explained by Iskanian, the Legislature enacted PAGA to address the lack of civil penalties and the dearth of available resources to enforce state labor laws in California’s vast economy. (Id. at p. 379; see Williams v. Superior Court (2017) 3 Cal.5th 531, 545.) The Legislature sought to remedy these problems by deputizing employees to bring civil penalty actions on behalf of the state. (Iskanian, at p. 379.) To maintain some oversight, the Legislature required the employee to provide the state labor agency with written notice of the alleged violations and permitted an employee to pursue the PAGA claim in court only if the agency did not intervene. (Id. at p. 380; see § 2699.3, subd. (a)(2)(A).) A successful PAGA claimant is entitled to collect 25 percent of the civil penalties for the employees, with the remainder going to the government. (§ 2699, subd. (i).) Although the agency does not have supervisory authority over the employee in the litigation (see Iskanian, at pp. 390-391), the agency must be provided with prior notice of any proposed settlement, and the superior court must approve the final settlement (§ 2699, subd. (j)(2)).

After describing the statutory scheme and explaining the scheme’s vital role in ensuring worker protections, the Iskanian court found that a predispute employment agreement in which an employee agrees to waive his or her right to bring representative claims under PAGA in any forum is contrary to public policy and thus unenforceable under state law. (Iskanian, supra, 59 Cal.4th at pp. 360, 382-384.) The court then determined this conclusion was not preempted by the FAA because it found the FAA was intended to govern the resolution of “private disputes, whereas a PAGA action is a dispute between an employer and the state Agency.” (Id. at p. 384.) Based on the FAA’s language, its legislative history, and prior United States Supreme Court decisions (id. at pp. 384-386), the Iskanian court stated: “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….” (id. at p. 386). The court stressed the nature of a PAGA claim as “fundamentally a law enforcement action designed to protect the public and not to benefit private parties” (id. at p. 387) and that “an aggrieved employee’s action under the [PAGA] functions as a substitute for an action brought by the government itself” (id. at pp. 387, 381). The court further observed that the government entity in a PAGA action “is always the real party in interest” (id. at p. 382), and this is confirmed by “[t]he fact that any judgment in a PAGA action is binding on the government” (id. at p. 387).

In reaching these conclusions, the court analogized a PAGA claim to a qui tam action (Iskanian, supra, 59 Cal.4th at p. 382), and stated such actions generally fall outside the FAA’s purview:

“Nothing in the text or legislative history of the FAA nor in the Supreme Court’s construction of the statute suggests that the FAA was intended to limit the ability of
states to enhance their public enforcement capabilities by enlisting willing employees in qui tam actions. Representative actions under the PAGA, unlike class action suits for damages, do not displace the bilateral arbitration of private disputes between employers and employees over their respective rights and obligations toward each other. Instead, they directly enforce the state’s interest in penalizing and deterring employers who violate California’s labor laws.

“In sum, the FAA aims to promote arbitration of claims belonging to the private parties to an arbitration agreement. It does not aim to promote arbitration of claims belonging to a government agency, and that is no less true when such a claim is brought by a statutorily designated proxy for the agency as when the claim is brought by the agency itself. The fundamental character of the claim as a public enforcement action is the same in both instances.” (Id. at pp. 387-388.)

At the conclusion of the Iskanian opinion, the court cautioned that its determinations left open procedural issues and remanded for the parties and court to address those issues. (Iskanian, supra, 59 Cal.4th at pp. 391-392.) In discussing these issues, the high court noted:

“Although the arbitration agreement can be read as requiring arbitration of individual claims but not of representative PAGA claims, neither party contemplated such a bifurcation. [The plaintiff] has sought to litigate all claims in court, while [the employer] has sought to arbitrate the individual claims while barring the PAGA representative claim altogether. In light of the principles above, neither party can get all that it wants. [The plaintiff] must proceed with bilateral arbitration on his individual damages claims, and [the employer] must answer the representative PAGA claims in some forum. 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.)

Fifteen months after the California Supreme Court filed Iskanian, the Ninth Circuit considered the issue whether Iskanian’s holding regarding the unenforceability of predispute PAGA waivers in any forum (which it called the “Iskanian rule”) was preempted by the FAA. (Sakkab, supra, 803 F.3d at p. 427.) The Ninth Circuit concluded Iskanian’s rule was not preempted, although on somewhat different grounds than the Iskanian court. (Sakkab, at pp. 431-440.)

The Sakkab court began its analysis with its view that the Iskanian court “expressed no preference regarding whether individual PAGA claims are litigated or arbitrated.” (Sakkab, supra, 803 F.3d at p. 434.) The court stated that Iskanian held “only that representative PAGA claims may not be waived outright” and “[t]he Iskanian rule does not prohibit the arbitration of any type of claim.” (Sakkab, at p. 434.) The court then engaged in a lengthy examination of the nature of PAGA representative claims, and considered whether requiring such claims to be resolved in arbitration would interfere with the fundamental attributes of arbitration and thus preempt the Iskanian rule under the Concepcion rationale. (Sakkab, at pp. 435-439.)

Comparing PAGA claims with the class action procedure, the Sakkab court concluded that PAGA claims do not interfere with the fundamental attributes of arbitration because they do not diminish the parties’ freedom to select informal arbitration procedures. (Sakkab, supra, 803 F.3d at p. 436.) The court stated: “Because representative PAGA claims do not require any special procedures, prohibiting waiver of such claims does not diminish parties’ freedom to select the arbitration procedures that best suit their needs. Nothing prevents parties from agreeing to use informal procedures to arbitrate representative PAGA claims. This is a critically important distinction between the Iskanian rule and the rule at issue in Concepcion.” (Ibid.) The court added that its conclusion was “bolstered by the PAGA’s central role in enforcing California’s labor laws” and observed that “[a]s the California Supreme Court has explained, a PAGA action is a form of qui tam action . . . . The FAA was not intended to preclude states from authorizing qui tam actions to enforce state law.” (Id. at pp. 439-440.)

At the conclusion of the opinion, the Sakkab court noted that although the “waiver of [the plaintiff’s] representative PAGA claims may not be enforced,” it is “unclear . . . whether the parties have agreed to arbitrate such surviving claims or whether they must be litigated instead.” (Sakkab, supra, 803 F.3d at p. 440.) The court thus remanded the matter to the “district court and the parties to decide in the first instance where [the plaintiff’s] representative PAGA claims should be resolved . . . .” (Ibid.)

More than two years later, the United States Supreme Court decided Epic. (Epic, supra, 138 S.Ct. 1612.) In Epic, an accountant sued his employer for violations of the federal Fair Labor Standards Act (FLSA) and California overtime law. (Id. at p. 1620.) The accountant sought to litigate the FLSA claim on behalf of a nationwide class under FLSA’s collective action procedures (see 29 U.S.C. § 216(b)), and to pursue the state law claim as a class action. (Epic, at p. 1620.) The FLSA authorizes an employee to maintain an action on behalf of himself and other “employees similarly situated” if the other employees sign written consent notices. (29 U.S.C. § 216(b).)

The Epic employer moved to compel arbitration under a provision in the parties’ arbitration agreement requiring individualized arbitration. (Epic, supra, 138 S.Ct. at pp. 1619-1620.) The Ninth Circuit held this provision was unenforceable because it violates the NLRA by barring employees from engaging in “‘concerted activit[y].’” (Epic, at p. 1620.) In Epic, the United States Supreme Court disagreed. The court reaffirmed Concepcion’s holding that the FAA requires en-
forcement of class action waivers, and—as did the Iskanian court—determined the NLRA does not take precedence over the FAA on this issue. (Epic, at pp. 1623-1630.) Although most of the Epic opinion concerned an analysis of the NLRA as it relates to the FAA, the court also strongly reiterated the settled principles regarding the breadth of FAA preemption, and made clear that the FAA requires courts “rigorously” to ‘enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes and the rules under which that arbitration will be conducted.’ (Id. at p. 1621.) The court observed: “The parties … contracted for arbitration. They proceeded to specify the rules that would govern their arbitrations, indicating their intention to use individualized rather than class or collective action procedures. And this much the [FAA] seems to protect pretty absolutely” (Epic, at p. 1621, italics added), citing Concepcion, supra, 563 U.S. 333; Italian Colors, supra, 570 U.S. 228; and DIRECTV, Inc. v. Imburgia (2015) ___ U.S. ___ [136 S.Ct. 463], each of which involved disputes between private parties.

B. Analysis

Relying on Epic’s reiteration of the FAA’s broad preemptive scope barring state laws interfering with arbitration provisions requiring individual arbitrations, Baker urges us to disavow Iskanian’s continuing validity on PAGA claims. We decline to do so.

On federal questions, intermediate appellate courts in California must follow the decisions of the California Supreme Court, unless the United States Supreme Court has decided the same question differently. (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455 (Auto Equity); see Tanguilig, supra, 5 Cal.App.5th at p. 673; Truly Nolen of America v. Superior Court (2012) 208 Cal.App.4th 487, 507.) Iskanian held a ban on bringing PAGA actions in any forum violates public policy and that this rule is not preempted by the FAA because the claim is a governmental claim. (Iskanian, supra, 59 Cal.4th at pp. 384-389.) Epic did not consider this issue and thus did not decide the same question differently. (See Whitworth v. Solarcity Corp (N.D. Cal. 2018) 336 F.Supp.3d 1119, 1122-1123 [Epic is not irreconcilable with Sakkab].) Epic addressed a different issue pertaining to the enforceability of an individualized arbitration requirement against challenges that such enforcement violated the NLRA. (Epic, supra, 138 S.Ct. at pp. 1619, 1623-1630.)

Moreover, the cause of action at issue in Epic differs fundamentally from a PAGA claim. Epic held an employee who agrees to individualized arbitration cannot avoid this agreement by asserting claims on behalf of other employees under the FLSA or federal class action procedures. (Epic, supra, 138 S.Ct. at pp. 1619-1632.) The Iskanian court distinguished this type of factual scenario from the PAGA context. Forecasting Epic’s outcome, the Iskanian court said: “Our opinion today would not permit a state to circumvent the FAA by, for example, deputizing employee A to bring a suit for the individual damages claims of employees B, C, and D. This pursuit of victim-specific relief by a party to an arbitration agreement on behalf of other parties to an arbitration agreement would be tantamount to a private class action, whatever the designation given by the Legislature. Under Concepcion, such an action could not be maintained in the face of a class waiver.” (Iskanian, supra, 59 Cal.4th at pp. 387-388.) The Iskanian court found the PAGA claim was outside this rule because the employee had been deputized by the state to bring the qui tam claim on behalf of the state, not on behalf of other employees. (Id. at pp. 384-389.) Although on somewhat different grounds, the Sakkab court also found a refusal to enforce a total ban on the PAGA claim was not preempted by the FAA. (Sakkab, supra, 803 F.3d at pp. 431-440.) Epic’s interpretation of the FAA’s preemptive scope does not defeat Iskanian’s holding or reasoning for purposes of an intermediate appellate court applying the law. The Iskanian court reached a different conclusion from Concepcion on the enforceability of the contractual waiver—not because the Iskanian court interpreted the FAA differently from Concepcion on the preemption issue, but based on the unique nature of a PAGA claim as a qui tam type action, and the “PAGA litigant’s status as ‘the proxy or agent’ of the state” and his or her “substantive role in enforcing our labor laws on behalf of state law enforcement agencies.” (Iskanian, supra, 59 Cal.4th at pp. 388, italics added.)

Because the California Supreme Court found a PAGA claim involved a dispute not governed by the FAA, and the waiver would have precluded the PAGA action in any forum, it held its PAGA-waiver unenforceability determination was not preempted. Epic did not reach the issue regarding whether a governmental claim of this nature is governed by the FAA, or consider the implications of a complete ban on a state law enforcement action. Because Epic did not overrule Iskanian’s holding, we remain bound by the California Supreme Court’s decision. (See Auto Equity, supra, 57 Cal.2d at p. 555.)

III. DID COURT ERR IN REFUSING TO ORDER PAGA CLAIM TO ARBITRATION

Baker contends that even if it cannot enforce the contractual provision barring a representative action in any forum, the court erred in refusing to order the PAGA action to arbitration (as a representative action and/or an individual action). Plaintiffs counter that they cannot be required to litigate the PAGA claims in arbitration because the state is the real party in interest in a PAGA claim and the state never consented or waived its right to bring its claim to court.

Before addressing these issues, we consider the threshold issue of whether the parties agreed to arbitrate PAGA representative claims in the event the bar on representative claims in any forum is unenforceable. If they did not, we need not
reach the issue of whether such arbitration agreement is enforceable with respect to a PAGA claim. (See California Correctional Peace Officers Assn. v. State of California (2006) 142 Cal.App.4th 198, 204 [“in ruling on a petition to compel, the court must determine whether the parties entered into an enforceable agreement to arbitrate that reaches the dispute in question].) Without an agreement to arbitrate a claim, a court has no authority to order the claim to arbitration.

Based on our review of the Arbitration Agreement and the parties’ briefs and supplemental briefs, we are satisfied the parties agreed (through the agreement’s severance clause) that if any provision (such as the representative claim waiver in all forums) is found to be invalid, the finding does not preclude the enforcement of any remaining portion of the agreement. We are also satisfied that the scope of the parties’ arbitration agreement encompasses PAGA representative actions (neither party has suggested otherwise). Thus, the issue before us is whether the agreement to arbitrate a PAGA representative action is enforceable in this case.

As discussed above, this precise issue was not addressed in Iskanian or Sakkab. Iskanian held a waiver of an employee’s right to bring a representative action in any forum violated public policy and that this rule was not preempted by the FAA. (Iskanian, supra, 59 Cal.4th at pp. 378-389.) It did not address the question whether an employee’s predispute agreement to arbitrate PAGA actions is enforceable by requiring arbitration of the claim. It noted only that the parties’ particular arbitration agreement appeared to “read as requiring arbitration of individual claims but not of representative PAGA claims,” and therefore the plaintiff “must proceed with bilateral arbitration on his individual damages claims, and [the employer] must answer the representative PAGA claims in some forum.” (Id. at p. 391.) The Sakkab court assumed PAGA claims could be arbitrated, but did not address the nature of an enforceable arbitration agreement. (Sakkab, supra, 803 F.3d at p. 440.) The court specifically stated that “it is unclear . . . whether the parties have agreed to arbitrate such surviving claims or whether they must be litigated instead,” and thus remanded “for the district court and the parties to decide in the first instance where [the plaintiff’s] representa- tive PAGA claims should be resolved . . . .” (Ibid.)

Although neither Iskanian nor Sakkab decided this issue, several California Courts of Appeal have done so. These courts have uniformly held that an employee’s predispute agreement to arbitrate PAGA claims is not enforceable without the state’s consent. (Julian v. Glenair, Inc. (2017) 17 Cal. App.5th 853, 869-872 (Julian); Betancourt v. Prudential Overall Supply (2017) 9 Cal.App.5th 439, 445-449 (Betancourt); Tanguilig, supra, 5 Cal.App.5th at pp. 677-680.) Relying on the rationale underlying Iskanian’s PAGA waiver—enforceability and FAA-preemption conclusions, these courts reasoned that because the state is the real party in interest in a PAGA action and a PAGA plaintiff asserts the claim solely on behalf of, and as the proxy for, the state, the employee’s predispute arbitration agreement does not subject the claim to arbitration because the state never agreed to arbitrate the claim. (Julian, at pp. 871-872; Betancourt, at pp. 448-449; Tanguilig, at pp. 677-680.)

Under these decisions, predispute arbitration agreements generally do not support the compelled arbitration of PAGA claims because the state retains control of the right underlying the employee’s PAGA claim at least until the state has provided the employee with implicit or explicit authority to bring the claim. (See Julian, supra, 17 Cal.App.5th at pp. 870-872.) At that point, an employee’s waiver of the trial right and an agreement to arbitrate may be enforceable. (Ibid.) But before that time, the employee has no authority or authorization to waive the state’s rights to bring the state’s claims in court.

Under the logic of Iskanian’s PAGA rulings, we agree with these conclusions. Without the state’s consent, a predispute agreement between an employee and an employer cannot be the basis for compelling arbitration of a representative PAGA claim because the state is the owner of the claim and the real party in interest, and the state was not a party to the arbitration agreement. Under state and federal law, an arbitration agreement applies only to the parties who agreed to its terms and a party cannot be compelled to arbitrate a dispute that it has not elected to submit to arbitration. (County of Contra Costa v. Kaiser Foundation Health Plan, Inc. (1996) 47 Cal. App.4th 237, 245.) In this case, plaintiffs signed the Arbitration Agreement, agreeing to bring all employment-related claims to arbitration. The state did not sign the agreement, nor did it consent to its terms. Even assuming that in some circumstances an agent can waive a party’s jury trial right, plaintiffs were not acting as the state’s agent or assignee at the time they signed the arbitration agreement. They signed the agreements in 2014 and 2015, before they were “ag-grieved employees” entitled to bring the PAGA action on the state’s behalf. (See § 2699, subd. (c) [“agrieved employee” means any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed,” italics added].)

This determination is consistent with conclusions reached by courts addressing qui tam actions brought under the federal False Claims Act (31 U.S.C. § 3729 et seq.) that an employee’s arbitration agreement is not enforceable because the government was not a party to the agreement. (See Mikes v. Strauss (S.D.N.Y. 1995) 889 F.Supp. 746, 755 [dicta]; United States ex rel. Welch v. My Left Foot Children’s Therapy, LLC (D. Nev. 2016) 2016 U.S. Dist. LEXIS 76490.) The determination is also supported by California law providing that a person who signs an agreement in a particular capacity is not the real party in interest in that case. (See Goliger v. AMS Properties, Inc. (2004) 123 Cal.App.4th 374, 377; Benasra v. Marciano (2001) 92 Cal.App.4th 987, 990; Fitzugh v. Granada Healthcare & Rehabilitation Center, LLC (2007) 150 Cal.App.4th 469, 474-475.)

We recognize that several federal courts have reached a different conclusion on this issue regarding the enforceability
of a PAGA arbitration requirement contained in a predispute arbitration agreement. (Valdez v. Terminix International Co. Ltd. P’ship (9th Cir. 2017) 681 Fed. Appx. 592 (Valdez); Wulfe v. Valero Ref. Co.-Cal. (9th Cir. 2016) 641 Fed. Appx. 758, 760; Cabrera v. CVS Rx Services, Inc. (N.D. Cal. 2018) __ F.Supp.3d __ [2018 U.S. Dist. LEXIS 43681 at p. *12] [compelling arbitration of PAGA claims because, while “the law is clear” that PAGA claims cannot be waived, “nothing prevents them from being arbitrated.”].) The Valdez district court had found (similar to the Tanguilig and Betancourt courts) that a PAGA claim “‘belongs to the state, and the state has not waived the judicial forum,’” “and therefore the PAGA claims could not be compelled to arbitration. (Valdez, at p. 594.) The Ninth Circuit rejected this analysis and declined to create a rule that PAGA claims “categorically cannot proceed to arbitration,” explaining: “Iskanian and Sakkab clearly contemplate that an individual employee can pursue a PAGA claim in arbitration, and thus that individual employees can bind the state to an arbitral forum. . . . Iskanian recognized that although ‘[t]he government entity on whose behalf the plaintiff files suit is always the real party in interest in the suit,’ [citation], ‘the judgment in a PAGA representative action is binding not only on the named employee plaintiff but also on government agencies and any aggrieved employee not a party to the proceeding’ [citation]. Employ- ees can bind government agencies because they ‘represent[] the same legal right and interest’ as the government in PAGA proceedings. [Citations.] Indeed, ‘[a]n employee plaintiff suing . . . under the PAGA does so as the proxy or agent of the state’s labor law enforcement agencies.’ [Citations.] Accordingly, an individual employee, acting as an agent for the government, can agree to pursue a PAGA claim in arbitration. Iskanian does not require that a PAGA claim be pursued in the judicial forum; it holds only that a complete waiver of the right to bring a PAGA claim is invalid. [Citation.]” (Valdez, supra, 59 Cal.4th at p. 387, quoting id. at p. 394 (Chin, J., concurring), italics added.) Thus, a single representative claim cannot be split into an arbitrable individual claim and a nonarbitrable arbitration overstates the court’s holding. (Valdez, supra, 681 Fed. Appx. at p. 594.) Although Sakkab did assume PAGA claims can be arbitrated, the Sakkab court did not consider the issue whether a private party can waive the state’s right to litigate its PAGA claims in court before any dispute has arisen. Instead, the court remanded for a determination on the foundational question as to the nature of the parties’ arbitration agreement regarding the PAGA claim. (Sakkab, supra, 803 F.3d at p. 440.)

We recognize there are different ways of viewing a qui tam lawsuit regarding the true claim owner and whether the state and the employee can both be considered to be real parties in interest in the lawsuit for purposes of evaluating an employee’s authority to waive rights to bring claims in court. (See generally Andrews, Whistling in Silence: The Implications of Arbitration on Qui Tam Claims under the False Claims Act (2015) 15 Pepp. Disp. Resol. L.J. 203, 210-230.) But we are not writing on a clean slate and are compelled to follow our high court’s views regarding a California statute. Moreover, when we provided the parties the opportunity to submit supplemental briefs on the issue of the propriety of Valdez’s holding, Baker did not provide any analysis supporting its position, other than to say that neither Iskanian nor Sakkab held that representative actions cannot be compelled to arbitration. This comment is true, but unhelpful. Because the Iskanian court believed the parties’ particular arbitration contract did not contain the parties’ agreement to arbitrate PAGA representative actions, it had no need to consider the issue before us in this case. The Sakkab court assumed the arbitrability of a PAGA claim, but remanded the matter for a determination regarding the meaning of the parties’ arbitration agreement.

In sum, we agree with the California Courts of Appeal that have held Iskanian’s view of a PAGA representative action necessarily means that this claim cannot be compelled to arbitration based on an employee’s predispute arbitration agreement absent some evidence that the state consented to the waiver of the right to bring the PAGA claim in court. There was no such evidence produced in this case.

Finally, we reject Baker’s claim that the court erred in failing to order plaintiffs’ individual PAGA claims to arbitration. Generally, every PAGA action seeking penalties “is a representative action on behalf of the state.” (Iskanian, supra, 59 Cal.4th at p. 387, quoting id. at p. 394 (Chin, J., concurring), italics added.) Thus, a single representative claim cannot be split into an arbitrable individual claim and a nonarbitrable claim.

3. Baker does not contend, nor do we find, this determination conflicts with the FAA. Because PAGA actions are public enforcement actions, they generally fall outside the scope of the FAA. (Iskanian, supra, 59 Cal.4th at pp. 386-387, 388-389; accord, Tanguilig, supra, 5 Cal.App.5th at p. 679 [“Iskanian holds that qui tam actions were never intended to be within the ambit of the FAA.”].) “Representative actions under the PAGA . . . do not displace the bilateral arbitration of private disputes between employers and employees . . . , they directly enforce the state’s interest in penalizing and deterring employers who violate California’s labor laws.” (Iskanian, at p. 387.)

DISPOSITION

Order affirmed. Appellant to bear respondents’ costs on appeal.

HALLEH, J.

WE CONCUR: McCONNELL, P. J., NARES, J.

In re L.D., a Person Coming Under the Juvenile Court Law.

SANTA CLARA COUNTY DEPARTMENT OF FAMILY AND CHILDREN’S SERVICES, Plaintiff and Respondent,

v. M. J., Defendant and Appellant.

No. H045544
In The Court of Appeal of the State of California Sixth Appellate District
(Santa Clara County Super. Ct. No. 17JD024833)
Filed January 24, 2019
Certified for Publication February 25, 2019

COUNSEL

Counsel for Plaintiff/Respondent: Santa Clara County Department of Family and Children’s Services, James R. Williams, County Counsel, Laura Underwood, Deputy County Counsel, Office of the County Counsel.
Counsel for Minor: L.D., Under appointment by the Court of Appeal, Anna L. Stuart, Esq.
Counsel for Defendant/Appellant: M.J., Under appointment by the Court of Appeal, Jamie A. Moran, Esq.

ORDER GRANTING REQUEST FOR PUBLICATION

BY THE COURT:

Pursuant to California Rules of Court, rule 8.1105(b), the request for publication is hereby granted. It is ordered that the opinion in this matter, filed on January 24, 2019.

Grover, J.

Greenwood, P. J., Elia, J.

OPINION

The Indian Child Welfare Act (ICWA; 25 U.S.C. § 1901 et seq.) gives Indian tribes the right to intervene in dependency proceedings “where the court knows or has reason to know that an Indian child is involved,” and foster care placement or termination of parental rights for the Indian child is being sought. (Id., at § 1912(a).) To that end, the party initiating dependency proceedings must provide the Indian child’s tribe with notice of the proceedings and the right to intervene. (Ibid.) In this dependency action, the mother of L.D. belatedly challenges the juvenile court’s finding made at the jurisdictional and dispositional hearing regarding com-
pliance with ICWA. We will dismiss the appeal for lack of jurisdiction.

I. BACKGROUND

The Santa Clara County Department of Family and Children’s Services filed a juvenile dependency petition on behalf of nine-year-old L.D. at the initial detention hearing mother informed the court of Native Alaskan ancestry. She identified a possible affiliation with “Doyon—Alaska,” and related that her mother (L.D.’s maternal grandmother) knew more about the ancestry.

At the jurisdictional and dispositional hearing, the Department reported that it had investigated the ICWA matter and sent notice of the dependency proceedings to a tribe in Alaska. According to the social worker’s report, L.D.’s maternal grandmother reported having Eskimo heritage, mentioning “the Doyon tribe as well as Tanachief.” The notice, identifying L.D. as possibly Athabascan Indian, was sent in November 2017 to the Native Village of Tanana in Alaska, the Bureau of Indian Affairs in Sacramento, and the Secretary of the Interior in Washington, D.C. Receiving no objections from the parties, the court found the notice satisfied ICWA.

The court found true the allegations in the petition that mother had sexually abused L.D.; had failed to protect L.D. from sexual abuse by mother’s boyfriend; had physically attacked her father (L.D.’s maternal grandfather) in the presence of L.D., and during that altercation mother’s boyfriend had brandished and threatened the maternal grandfather with a handgun.

L.D. was declared a dependent of the court. She was removed from mother’s custody and ordered into the custody of the Department, with the expectation she would be placed with the maternal grandfather who had been caring for her informally for several years. Mother waived her right to reunification services, and the court set a selection and implementation hearing under Welfare and Institutions Code section 366.26. The juvenile court advised mother, who was in custody facing criminal charges related to the circumstances alleged in the dependency petition, that the right to appellate review was by extraordinary writ to be filed within seven days, and personally served mother with a copy of the writ advisement.

Following the hearing, the court issued a three-year juvenile restraining order protecting L.D. from mother. The court found that mother had intentionally or recklessly caused or attempted to cause bodily injury and sexual assault on L.D., and had caused L.D. reasonable apprehension of imminent serious bodily injury. The restraining order prohibited mother from having a gun and required mother to sell or surrender any gun within her immediate possession or control. Having found that mother had possessed or had access to a handgun before her arrest, the court set a gun surrender hearing. At that hearing held on January 12, 2018, the court found that mother owned or had access to a gun and failed to show the gun had been surrendered or confiscated, in violation of the juvenile restraining order. Given mother’s custody status, the court noted its willingness to revisit the matter after mother’s release if she were to provide evidence of the gun’s surrender.

Mother filed a timely notice of appeal from the order following the gun surrender hearing, identifying the court’s finding that she had access to a firearm in violation of the restraining order as the basis for her appeal. But her briefing in this court does not address the restraining order or ICWA compliance. Instead mother challenges the juvenile court’s December 5, 2017 finding regarding ICWA compliance, and the Department concedes (without giving reasons) that its November 2017 notice was insufficient. Mother argues in supplemental briefing that her ICWA challenge is timely. L.D. views mother’s ICWA challenge as timely, but argues that the Department’s November 2017 notice was proper. L.D. also has requested judicial notice of three ICWA notices (sent in August, September, and October 2018) for the selection and implementation hearing, and contends mother’s appeal is moot in light of those notices.

II. DISCUSSION

A. Timeliness

Relying on In re Isaiah W. (2016) 1 Cal.5th 1 (Isaiah), mother argues that an appellate challenge to the juvenile court’s ICWA finding may be raised at any time during a dependency proceeding because error under ICWA is of a continuing nature given the juvenile court’s duty to comply with ICWA’s notice requirement. L.D. takes a narrower position, also based on Isaiah, that the ICWA challenge is proper because it is from an appealable post-disposition order.

In Isaiah our Supreme Court addressed whether a parent who does not timely appeal a juvenile court order that includes a finding of ICWA inapplicability may still challenge that finding on appeal from a later order terminating parental rights. (Isaiah, supra, 1 Cal.5th at p. 6.) As here, the ICWA finding in Isaiah was made at the jurisdictional and dispositional hearing, and appellate review was not sought at that time. (Ibid.) But unlike mother’s appeal from a proceeding on compliance with a juvenile restraining order, the Isaiah appeal was taken from an order terminating parental rights. (Id. at p. 7.)

Explaining why the parent’s challenge was timely, the Isaiah court emphasized that the parent was not challenging the juvenile court’s ICWA finding from the jurisdiction and disposition hearing, but was challenging a finding of ICWA inapplicability foundational to the order terminating parental rights. (Isaiah, supra, 1 Cal. 5th at p. 10.) Because the termination order “necessarily subsumed a present determination of ICWA’s inapplicability,” and the validity of the order “is necessarily premised on a current finding by the juvenile court regarding compliance with ICWA’s notice requirement,” the challenge based on ICWA in an appeal from the order terminating parental rights was proper and timely. (Id. at pp. 11, 15.)
In contrast, the order made at the gun surrender hearing here is not premised on any ICWA finding. Although we are mindful of the juvenile court’s continuing duty to comply with ICWA (Welf. & Inst. Code, § 224.2, subd. (a); Isaiah, supra, 1 Cal.5th at pp. 10–11), ICWA notice is required “for hearings that may culminate in an order for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement.” (Welf. & Inst. Code, § 224.3, subd. (a).) The gun surrender hearing resulted in no such order. As the reasoning of Isaiah does not extend to the facts presented here, the appeal is untimely. (Welf. & Inst. Code, § 366.26, subd. (l)(1)–(2); Cal Rules of Court, rules 8.450(e)(4)(a), 8.452; Sara M. v. Superior Court (2005) 36 Cal.4th 998, 1018.)

Dwayne P. v. Superior Court (2002) 103 Cal.App.4th 247, cited by mother (and the Isaiah court), is distinguishable in that the appeal in that case was taken from an order terminating reunification services and scheduling a selection and implementation hearing. (Id. at p. 251.) The ICWA issue was cognizable in the context of that order because the error under review was the failure to provide ICWA notice of the 12-month review hearing, which led directly to the challenged setting of a selection and implementation hearing. (Id. at p. 261.) Here, mother does not appeal from an order scheduling a selection and implementation hearing. She appeals from a gun surrender order unrelated to the purposes of ICWA notice.

B. Mootness

L.D. argues that mother’s appeal is moot because the Department sent amended ICWA notices based on new information concerning her possible Indian ancestry. (L.D. has asked us to take judicial notice of the second, third, and fourth amended ICWA notices of the selection and implementation hearing which were sent in August, September, and October 2018. We will grant the request, which is unopposed.) Relying on In re Louis S. (2004) 117 Cal.App.4th 622, in which the appellate court concluded that a deficient initial notice was not cured by a later notice (id. at p. 631), mother counters that the Department has not met its burden of establishing harmless error, and therefore her appeal is not moot.

Given our determination that the appeal is untimely, we need not decide whether it is also moot. But the Department’s concession that its November 2017 notice was deficient and its apparently ongoing efforts to provide additional tribal notice will require the juvenile court to revisit its ICWA finding before proceeding with the selection and implementation hearing (set for February 22, 2019 according to the register of actions in this matter, of which we take judicial notice on our own motion [Evid. Code, §§452, subd. (d), 459]). (In re Louis S., supra, 117 Cal.App.4th at p. 634, fn. 9 [“The permanency planning hearing should not occur until the Agency properly serves notice on the tribe or tribes and the BIA.”].) The juvenile court must determine whether sufficient notice has been sent to “[a]ll tribes of which the child may be a member or citizen, or eligible for membership.” (Welf. & Inst. Code, § 224.3, subd. (a)(3)(A); see also In re Louis S., supra, 117 Cal.App.4th at p. 630 [meaningful notice requires sufficient information for a tribe to determine whether the minor is an Indian child].)

III. DISPOSITION

L.D.’s request for judicial notice is granted. The appeal is dismissed.

Grover, J.

WE CONCUR: GREENWOOD, P. J., ELIA, J.