S275121

IN THE SUPREME COURT OF CALIFORNIA

PETER QUACH,

Plaintiff and Appellant,

v.

CALIFORNIA COMMERCE CLUB, INC.

Defendant and Appellee.

After a Decision by the Court of Appeal,
Second Appellate District, Division One
Case No. B310458

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF OF ASIAN AMERICANS ADVANCING JUSTICE SOUTHERN CALIFORNIA, THAI COMMUNITY DEVELOPMENT CENTER, AND COUNCIL ON AMERICAN-ISLAMIC RELATIONS, CALIFORNIA IN SUPPORT OF PLAINTIFF AND APPELLANT PETER QUACH

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF ASIAN AMERICANS ADVANCING JUSTICE SOUTHERN CALIFORNIA; THAI COMMUNITY DEVELOPMENT CENTER; AND COUNCIL ON AMERICAN-ISLAMIC RELATIONS, CALIFORNIA

Under California Rules of Court, rule 8.520(f), Asian Americans Advancing Justice Southern California ("AAAJ-SC"), Thai Community Development Center ("THAI-CDC"), and Council on American-Islamic Relations, California ("CAIR-LA") request leave to file the attached amicus curiae brief.[1]

[1] AAAJ-SC, THAI-CDC, and CAIR-LA certify that no person or entity other than AAAJ-SC, THAI-CDC, CAIR-LA, and their counsel authored this proposed brief in whole or in part and that no person or entity other than AAAJ-SC, THAI-CDC, CAIR-LA, their members, or their counsel made any monetary contribution intended to fund the preparation or submission of the proposed brief. (See Cal. Rules of Court, rule 8.520(f)(4).)

Asian Americans Advancing Justice Southern California (formerly Asian Americans Advancing Justice – Los Angeles) ("AAAJ-SC") is the nation's largest non-profit organization dedicated to advancing the civil and human rights for Asian Americans. AAAJ-SC acts as the voice for the local Asian American community through education, litigation, and public policy advocacy. The Asian Americans Advancing Justice affiliates regularly file amicus letters and briefs supporting their goals of protecting the Asian American community and achieving equal opportunity for all.

AAAJ-SC regularly assists its clients with employment arbitration agreements or arbitration clauses in employment contracts. The organizations finds that these arbitration provisions unduly benefit employers, because employers have many available tools for delay, which frequently results in employee plaintiffs' disillusionment. One of those tools—at issue in this appeal—is the ability to potentially force a case into arbitration even if the case has already been litigated for months or even years. If this happens, there is great cost to the organization and its largely volunteer workforce, as well as the economically and socially disadvantaged workers themselves –

who are often still reeling from a wrongful termination rooted in discriminatory animus.

The mission of THAI-CDC is to advance the social and economic well-being of low- and moderate-income Thais and certain other communities in the greater Los Angeles area through a broad and comprehensive community development strategy including human rights advocacy, affordable housing, access to healthcare, promotion of small businesses, neighborhood empowerment, and social enterprises.

The CAIR-CA is a chapter of the nation's largest American Muslim civil rights and advocacy organization. CAIR-CA's mission is to enhance understanding of Islam, protect civil rights, promote justice, and empower American Muslims. Through its offices in the Greater Los Angeles Area, Sacramento Valley, San Diego, and the San Francisco Bay Area, CAIR-CA provides direct legal services to California's estimated one million American Muslims, including representing individuals facing discrimination in the workplace. CAIR-CA also works with the media, facilitates community education as it relates to civil rights and civic participation, as well as engages in policy advocacy to advance civil rights and immigrants' rights.

All three amici serve and are therefore uniquely positioned to speak for low wage workers. The amici regularly serve low wage workers in their myriad employment challenges, and through those efforts have familiarity with their everyday experiences in California workplaces. These workers' experiences are common to many other disadvantaged individuals, providing the amici with a broad perspective on the plights of a wide range of California employees.

The attached Amicus Brief will assist this Court in resolving the issues in this appeal by (1) elucidating how the decision the Court makes here will impact low wage workers in terms of access to justice, as well as these individuals' mindset, trust, and confidence in our legal system; and (2) proposing that the Court provide instruction as to when an employer should move to compel arbitration in order to create a fair system, and explaining the importance of the same.

DATED: January 25, 2023 BOSKO, P.C.

By: */s/ David Bosko*
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AMICUS CURIAE BRIEF

INTRODUCTION

Amicus Curiae Asian Americans Advancing Justice Southern California (formerly Asian Americans Advancing Justice – Los Angeles) ("AAAJ-SC"), Thai Community Development Center ("THAI-CDC") and Council on American-Islamic Relations, California ("CAIR-CA," and together with AAAJ-SC and THAI-CDC, the *"Amici*") respectfully submit that this Court should eliminate "prejudice" as a component of waiver of a right to contractual arbitration. The prejudice standard is unnecessarily complicated, elevates arbitration agreements to an undue pedestal relative to other California contracts where waiver does not require prejudice, and further dilates the already wide-open gates for California employers to delay lawsuits against them and disillusion their often-disadvantaged counterparty. This case presents an opportunity for this Court to solve a problem, and in doing so, to make a statement on behalf of more vulnerable low wage California workers—including Asian Americans such as Mr. Quach—whose predicaments are so often ignored.

Further, in addressing this case, the *Amici* request that the Court take the further step of ensuring that motions to compel arbitration will not be unnecessarily delayed. In deciding this appeal, this Court can

announce a standard for when an employer must move to compel arbitrate. Doing so would be immensely helpful to employee plaintiffs, not unduly prejudicial to employers, and is well supported by legislative precedent requiring defendants to investigate the facts and law relating to cases against them within a month of service.

LEGAL ARGUMENT

I. THE COURT SHOULD REVERSE AND ELIMINATE THE "PREJUDICE" REQUIREMENT FOR WAIVER OF A PURPORTED RIGHT TO ARBITRATE

A. THE INCLUSION OF "PREJUDICE" IN THE WAIVER INQUIRY UNDULY AND UNFAIRLY IMPACTS LOW WAGE WORKERS

1. The "prejudice" standard, by its nature, is amorphous and unclear

Requiring prejudice to the non-waiving party in order to find a waiver of the right to arbitrate perpetuates uncertainty in the law. Indeed, prejudice, by its nature, is a weak legal standard. It can vary widely by context and circumstance, and trial courts and Courts of Appeals can and do interpret it differently even on identical facts. This very case is an example of that – the trial court denied the motion to compel arbitration on waiver grounds, but the Court of Appeal found no waiver because of lack of prejudice. And there is a substantial history of case law applying the standard differently in scenarios that were arguably similar in how law should apply to facts. *See, e.g. Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1479 (no prejudice despite the party

having served objections to discovery, opposed a demurrer, and opposed a motion to compel); *Groom v. Health Net* (2000) 82 Cal.App.4th 1189, 1196 (no prejudice despite eleven month delay where party had to articulate its legal theory in response to a demurrer); *Burton v. Cruise* (2010) 190 Cal.App.4th 939, 949 (prejudice following an eleven-month delay); *Sobremonte v. Superior Court (Bank of Am. Nat. Trust and Sav. Ass'n)* (1998) 61 Cal.App.4th 980, 993-94 (prejudice following a ten-month delay and conduct inconsistent with an intent to arbitrate).

Where an employer uses the prejudice standard to attempt to avoid a finding of waiver in a motion to compel arbitration, the result is a lose-lose. If the motion is denied, the result is one kind of costly delay: a delay in which justice waits for years while an employer litigates and then tries to arbitrate, arguing prejudice, and trial is finally scheduled some three or four years after filing. And if the motion is successful, the result is a different kind of costly delay: an arbitration that begins from scratch years after filing, and after a lengthy waste of time, money, and personal energy on the part of the disadvantaged employee plaintiff. Neither result makes any sense at all.

2. Eliminating the "prejudice" standard will provide clarity and simplicity

This case presents this Court with an opportunity to bring about real change. Eliminating the "prejudice" standard as a component of arbitration waiver alone will clarify the law and promise dozens of low wage workers better access to justice.

At the very least, there will be one less amorphous way for employers to attack a litigant's right to his or her day in Court. Greater certainty will result because the normal contractual defenses—including standard contractual waiver without prejudice (as it exists in other areas of California law, as described in Appellant's Opening Brief)—are better known to lawyers and trial court judges and are better and longer established in case law. Litigants consequently will be more likely to expect and obtain clearer results. Low wage California employees pursuing justice will less likely face lengthy proceedings over questionable standards. And it will be more difficult and riskier for an employer to, in effect, gamble by strategically holding off on compelling arbitration.

B. THE COURT SYSTEM IS OVERWHELMED, COMPROMISING ACCESS TO JUSTICE

Unfortunately, an employment plaintiff's typical and reasonable wish for a speedy trial is usually a pipe dream. In the 2020-21 year, California's court system processed 222,381 unlimited civil cases, 351,685 limited civil cases, and 15,781 contested matters in the Courts of Appeal – numbers which were almost certainly lower than they would have been if not for the pandemic. [2]

In Southern California, AAAJ-SC's experience is that in cases without a motion to compel arbitration, initial trial dates are typically set 18-24 months from the time of filing, with the initial case management conference often 4-7 months after filing. Where a motion to compel arbitration is involved, and an employer predictably takes advantage of Section 1294's right to an interlocutory appeal, the trial date is often 30-48 months after the time of filing.

It is also the *Amici* experience, unfortunately, that in employment cases, a trial date is needed to facilitate forward

[2] Judicial Council of California 2022 Court Statistics Report, Statewide Caseload Trends, 2011-12 Through 2020-21, p. 1 & 3.

progress in the litigation. Without a trial date in sight, employers delay endlessly and have no incentive to take the written discovery and depositions even they need for their own defense or dispositive motions. If a trial date looms, by contrast, employers count the days for their prospective summary judgment motions and start seriously engaging with the discovery process. The upshot of this reality is that recovery for low wage workers typically does not come until either there is a trial—or at the very least—the pressure of a trial.

Routine postponement of setting of trial dates (or setting of trial dates in the distant future) also discourages effective attorneys from taking employment cases on behalf of low wage workers. Experienced plaintiff-side employment attorneys know that employers drag their feet when a trial date is years away. These attorneys are disinclined to invest their time, effort, and energy into what are almost always contingency cases with a prospective payoff far in the future. This results in a greater challenge for low wage workers to obtain justice: more often it is less skilled, less busy, and less demanded attorneys that are willing to take their cases – while employers typically turn to

institutional large employment defense firms with great skill and expertise in this kind of case.

Distant trial dates also discourage low wage workers from pursuing justice in the first instance. Asian American, Thai American, and Muslim California employees who consider engaging our court system face an unfamiliar process which will impact their lives and the lives of their families for many months at great personal and financial expense. When the temporal cost becomes years—rather than months—there is even more weight on the side of these disadvantaged individuals just "letting it go," or "pushing it under the rug," and foregoing any chance for justice.

C. ASIAN AMERICANS SUFFER DISPROPORTIONATELY (ALONG WITH OTHER MINORITIES AND VULNERABLE POPULATIONS) FROM EMPLOYER TOOLS TO MANIPULATE AND DELAY THE REDRESS PROCESS

1. Asian Americans Already Experience Distress Relating to Seeking Redress for their Claims

For low wage Asian American (and other minority) workers, seeking redress for legitimate claims is a scary and uncertain process. The process is lengthy even when fast by litigation standards; it involves emotional upheaval; it requires psychological risks such as being found "wrong," and being embarrassed in front of family or community; it may include financial risk for clients who must pay costs or who risk a judgment against them.

Making matters worse, language barriers and unfamiliarity with American-style judicial processes create additional opportunities for employers to pounce and take advantage of institutional unfairness. The aspects of our judicial system

themselves—without any exacerbation—are scary enough. A deposition, for example, which is unpleasant enough for the native English-speaking low wage employee, can be terrifying for an Asian American with limited English proficiency. A plaintiff who speaks little or no English often has a difficult time explaining his or her facts to an attorney – while employers generally have no such difficulties.

2. An Increase in Hate Incidents Directed Toward Asian Americans During the COVID Pandemic Impacts Employment Situations

Hate crimes and race discrimination have always affected low wage Asian American workers in California. But the COVID pandemic has brought about a new wave of bias against Asian Americans – with many unfortunately and irrationally blaming anyone of Asian descent for the events of recent years. For example, between March 19, 2020 and June 2021 alone, more than 9,000 racially motivated anti-Asian incidents were reported in the

United States.[3] According to the President, Anti-Asian hate crimes in the United States increased 339 percent from 2020 to 2021.[4] The LA Times recently reported that the number of hate crimes in California rose for the third year in a row in 2021, including a more than 177% increase in hate crimes against Asian-Americans from the previous year.[5] The news is similar outside California. In New York City, for example, there has been a seven-fold increase in reports of Anti-Asian harassment, discrimination, and violence since February 2020, especially against Asian elders.[6] These alarming trends underscore the need for this Court to emphasize and vindicate the predicament of individuals such as Mr. Quach.

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[3] https://www.npr.org/2021/08/12/1027236499/anti-asian-hate-crimes-assaults-pandemic-incidents-aapi, retrieved Nov. 22, 2022.

[4] https://www.whitehouse.gov/briefing-room/presidential-actions/2022/04/29/a-proclamation-on-asian-american-native-hawaiian-and-pacific-islander-heritage-month-2022/, retrieved Nov. 22, 2022.

[5] https://www.latimes.com/california/story/2022-06-28/anti-asian-hate-crimes-in-california-jumped-177-in-2021, retrieved Nov. 22, 2022.

[6] https://www.nyc.gov/site/cchr/community/stop-asian-hate.page, retrieved Nov. 22, 2022.

3. All Forms of Discrimination are Condoned when Fairness and Justice are Missing from the Judicial Process

Mr. Quach's case is an example of age discrimination. Age discrimination is becoming more commonplace in California's workplaces because Californians are living longer, and economic conditions are forcing them to retire later (if at all). Many of the *Amici* clients are over 40 and a good deal are over 60 – so Mr. Quach is by no means alone.

The *Amici* clients routinely suffer from race discrimination or race-based harassment, as do many other low wage California employees of all backgrounds. And, as consistently reported by the *Amici* constituents—despite society's and the California legislature's apparent best efforts to combat unequal treatment—discrimination based on all of the protected characteristics identified by United States and California courts remains ubiquitous, and may even be increasing.

Where this sad reality turns back into the facts and law of this appeal is straightforward: the more an employer knows there are avenues to delay and manipulate during litigation, the more an employer can perpetuate the discrimination that forced the low

wage employee into our judicial system in the first place. While the nuances of the law can be debated, there can be little debate that the existence of the prejudice standard is an avenue for delay and for increasing expenses to low wage employee litigants (and their representatives such as the *Amici*). When the case itself derives from discrimination or a discriminatory motive, as long as justice is postponed, the discriminatory practice survives and is perpetuated.

The *Amici* respectfully submit that the courts of California, and this Court possibly most of all, have a duty to advance society's goal of eliminating—or at least limiting—race, age, and other forms of discrimination. That duty involves acting where it is feasible and reasonable to do so. And here, the Court can take simple steps—in synch with the United States Supreme Court and decades of existing California law—to eliminate one of many signposts of unfairness in the system.

4. The Supreme Court can make Important Statements to Lessen the Institutional Unfairness Inherent in the Existing Standard

For more than twenty years, this Court and California Courts of Appeal have been taking steps to lessen that unfairness. An employer's ability to delay a motion to compel arbitration—which in and of itself typically begets another 12 to 24 months of delay because of Code of Civil Procedure Section 1294—is a prominent component of the institutional unfairness of employment arbitration.

Each time this high Court is presented with an opportunity for making a significant change—such as announcing a new legal standard—there is an opportunity to make a meaningful statement. When the California Supreme Court speaks, more than 40 million people listen. This Court does not review cases in a vacuum, but in the context of the status and progress of all of California society.

With a case like this, there is no avoiding that preserving the status quo is a statement of support by this Court for institutional employer manipulation and coercion. Changing or developing

legal standards and/or providing new instruction, on the other hand, is an unequivocal bolster to the ideals of diversity, equity, and inclusion.

Considering this context, the *Amici* believe that any statements the Court makes in this case will provide impact – perhaps even immediate impact on low wage Asian American employees and others similarly situated. This Court can make several meaningful "statements" in deciding this appeal. A few examples, among others:

- Statements that provide clear instruction on the law and relevant legal standards;
- Statements that provide this Court's view on what happened to Mr. Quach from humanistic, justice, and similar perspectives;
- Statements that provide this Court's view on the ethics and propriety of how Commerce Casino—a very well-known institution in Southern California—treated an older Asian American employee;
- Statements that stress the importance of fairness in the adjudication of motions to compel arbitration generally;
- Statements that address the plight of low-wage California employee litigants generally; and
- Statements that emphasize the significance of access to justice for those in protected classes.

The *Amici* respectfully encourage this Court to speak and speak thoroughly in its decision on this appeal: to say more rather than less. The more this Court speaks, the more clarity litigants

and lower courts will find in the law, providing for faster, fairer, and smoother employment litigation. And equally importantly, this Court should speak and speak thoroughly – because Mr. Quach's experience is similar to that of so many Californians, and what this Court says truly matters to them.

II. THE COURT SHOULD PROVIDE GUIDANCE ON WHEN AN EMPLOYER MUST MOVE TO COMPEL ARBITRATION

This Court can reach a variety of different outcomes in this case – in part informed by how much this Court is willing to speak. At one extreme, this Court could say very little, and remand the case for a review of all contractual defenses at the trial court level. A second option—which would have a better result for Mr. Quach but little impact on future cases—would be to find prejudice based on this record but avoid addressing the law. A better option for the Court is to change the law on prejudice, which would effectuate positive change in combating institutional unfairness. And finally, in the view of the *Amici* the best option is: this Court can, in addition to eliminating the prejudice standard, facilitate more impactful and universal change by providing a new legal standard

for when an employer must move to compel arbitration in order to avoid losing that right.

A. THIS CASE IS THE PERFECT VEHICLE FOR PROVIDING A STANDARD FOR WHEN AN EMPLOYER MUST MOVE TO COMPEL ARBITRATION

The facts of this case suggest the need for new instruction from this Court on the critical issue of when an employer must move to compel arbitration. Here, Appellant filed suit on November 22, 2019, but Appellee did not move to compel arbitration until December 23, 2020, more than thirteen months later. In the interim time, the parties had propounded and responded to substantial written discovery and met and conferred for months, and Mr. Quach had sat for a full day of deposition. The parties had also had a Case Management Conference. In its Case Management Statement, Commerce checked the box requesting a jury trial, did not check the box for private arbitration, and proposed a plan for completing discovery.

After Commerce finally moved to compel arbitration, the trial court denied the motion, but Commerce took advantage of its

right to an interlocutory appeal, the Court of Appeals reversed, and ultimately, this Court granted review.

At the time of the writing of this amicus brief, more than three years have been passed since Mr. Quach's filing. While not all cases go to the Supreme Court, even the initial appeal would have put any chance of justice for Mr. Quach some five years from his 2019 filing date (AAAJ-SC's experience, for example, is that trials are now being set well into in 2024 by most Southern California trial courts). For Mr. Quach and many others like him, the best-case scenario is justice very much delayed – delay which is even more consequential for victims of age discrimination such as Mr. Quach, now in his mid 70s. And some cases, of course, involve starting all over in arbitration years after filing, or a potential ultimate loss after several years of heartache.

The risk of future low wage workers experiencing most of what Mr. Quach did cannot be changed with the ruling on this appeal. But this Court can use its ruling in this case to ensure California employers will never again take thirteen months to move to compel arbitration. And if this Court does so, the lion's share of those thirteen months will be shaved off of the time it

takes future low wage California employees like Mr. Quach to pursue justice.

The specific facts of this case require a new standard for when an employer must compel arbitration. Even if this Court eliminates prejudice as a component of waiver, employers can still delay a motion to compel arbitration and attack common law waiver in future cases like this one. In other words, eliminating "prejudice" as a factor in waiver will reduce, not prevent, the chance that Mr. Quach and others like him will be unjustly forced into arbitration after many months of litigation. There are circumstances where there may be no common law waiver, even without the prejudice standard, despite a long delay in the bringing of the motion. Such a delay, as discussed herein, is a detriment in and of itself. The *Amici* respectfully submit that this Court should take the bull by the horns and address the true problem here – employers unnecessarily waiting on bringing a motion to compel arbitration.

B. THE COURT SHOULD PROVIDE AS SPECIFIC AND WELL-DEFINED A STANDARD AS IT CONSIDERS PRACTICABLE

1. This Court Could Promulgate a Bright-Line Standard

This Court could, and the *Amici* propose that it does, promulgate a bright-line standard as to when a motion to compel arbitration must be filed. Specifically, AAAJ-SC respectfully submits that an employer defendant should be required to move to compel arbitration at the time of its responsive pleading. As detailed below, such a requirement makes sense, is well justified, and has no significant downside.

Alternatively, the Court could set less stringent bright line standard: perhaps a certain number of days (e.g., 60 or 90 days) after the responsive pleading is due; or a certain number of days (e.g., 120 days) after service; or by the time of the initial Case Management Conference; a certain number of days before or after the initial Case Management Conference; or before the due date of the first response to written discovery. A standard relating to the Case Management Conference—such as by the date of the conference—would have the additional benefit of avoiding a

meaningless Case Management Statement as what happened in Mr. Quach's case when Commerce sought a jury trial.

A bright line standard would be an appropriate and reasonable thing to do in response to the injustice experienced by Mr. Quach in this case, the *Amici* clients, and many others throughout California who have had similar experiences. The experience of the *Amici* uniformly suggests that a bright line standard for when an employer must move to compel arbitration would predictably and reliably lessen the average and expected amount of time from when a low wage employee plaintiff files suit to the time a case is finally adjudicated or settled.

2. In the Alternative, This Court Could Provide or Clarify Factors Relevant to the Standard

Though the *Amici* hope that this Court will set up a bright line standard, even if it does not, any standard this Court is willing to provide is bound to advance the goal of lessening employer gamesmanship and manipulation.

St. Agnes cited *Sobremonte v. Superior Court* (1998) 61 Cal. App. 4th 980, 992 in announcing six factors that inform the arbitration waiver analysis: (1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether 'the litigation

machinery has been substantially invoked' and the parties 'were well into preparation of a lawsuit' before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) 'whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place'; and (6) whether the delay 'affected, misled, or prejudiced' the opposing party.' *St. Agnes Medical Center v. PacificCare of CA* (CA S.Ct. 2003) 31 Cal. 4th 1187, 1196.

The *Amici* respectfully submit that the twenty years since *St. Agnes* have demonstrated these factors (with the exception of the fourth) are too vague and too open to interpretation by lower courts. As Mr. Quach's reply brief points out, certain courts of appeal (including in this case) and district courts have dubbed these factors the "St. Agnes Test" – possibly contrary to the intent of *St. Agnes* itself, which expressly instructed that "no single test" governs arbitration waiver. *Id.*, at 1195; Quach Reply Brief, at 30-31. The entire "St. Agnes Test," just like the prejudice standard that composes one of its factors, has been applied without

uniformity. *See, e.g., Kokubu v. Sudo* (Ct. App. 2022) 76 Cal. App. 5th 1074, 1085-91 (providing detailed analysis of all six factors and effectively deemphasizing prejudice in affirming a finding of waiver – despite quoting *St. Agnes'* language stressing the prejudice factor); *Brown v. Superior Court* (Ct. App. 2013) 157 Cal. Rptr. 779, 787, review granted and superseded *sub nom Brown v. S.C.* (Cal. 2013) 161 Cal. Rptr. 3d 699 (emphasizing lack of prejudice over other factors in finding no waiver despite a 10-month delay); *Cox v. Ocean View Hotel Corp.* (9th Cir. 2008) 533 F. 3d 1114, 1124-25 (applying California law to waiver analysis and reversing finding of waiver based on balanced analysis of *St. Agnes* factors, while confirming that "waiver focuses on the actions of the party charged with waiver.").

Quach asks this Court to clarify, at least, that the *St. Agnes* factors are not an exhaustive list. Quach Reply Brief, at 32. This Court should do so. But this Court has the opportunity to further improve the situation by further clarifying *St. Agnes'* instructions. This Court could, for example, set out more specific factors that either replace or inform the *St. Agnes* factors.

Possible new factors could include whether a defendant has filed any kind of motion; whether a plaintiff has opposed a motion

(or a certain kind of motion); whether discovery (or certain kinds of discovery) has been served; whether discovery has been answered; whether one deposition has been taken; whether a defendant requested a jury trial on its case management statement; whether more than a certain set time period (e.g., 60 or 90 days) has passed.

The *Amici* respectfully suggest the Court set a standard, and as specific one as the Court is comfortable with. Any standard—one of those the *Amici* suggest or another the Court determines—would eliminate the prejudice inquiry and simplify and clarify the required timing of a motion to compel arbitration. The predictable result of a more defined standard will be quicker and better access to justice for disadvantaged California workers such as clients of the *Amici*.

At the very least, this Court should strongly encourage employers to promptly move to compel arbitration when they intend to do so. The *Amici* hope that this Court will directly identify and describe the real and tangible harms that result from unnecessarily delaying that motion.

C. PROVIDING A STANDARD FOR WHEN AN EMPLOYER MUST MOVE TO COMPEL ARBITRATION WOULD BRING GREAT BENEFIT TO LOW WAGE ASIAN AMERICAN WORKERS

This Court's specific instruction on when an employer must move to compel arbitration will eliminate a serious means for an employer to delay litigation. There will be a great strengthening of the guarantee to a trial. There will be a significantly greater chance for obtaining a fair result before and without having to go to trial – as a more solidified trial date will increase the incentive to settle. There will be a meaningful increase in the certainty of the justice system. There will consequently be an increase in the appeal to strong and skilled lawyers of representing Asian American low wage employees and other protected employee plaintiffs. All of these consequences will in turn lead to these low wage Asian American workers not only having better access to justice, but an increased chance of actually obtaining justice.

And, on top of all the tangible benefits, there will be the psychological benefit of one less basis for Asian Americans and other *Amici* clients to become disillusioned with an already

frightening system. This Court will be standing up for their plights and predicaments and providing change that they can read in this opinion and feel in their lives.

D. PROVIDING A STANDARD FOR WHEN AN EMPLOYER MUST MOVE TO COMPEL ARBITRATION IS REASONABLE AND WOULD NOT UNDULY PREJUDICE EMPLOYERS

Requiring an employer to move to compel arbitration by a certain set time or based on a defined set of circumstances would not be novel, unusual, or unfair.

California statute requires Defendants to respond to a complaint within 30 days of service. Code Civ. Pro. § 412.20. Where a complaint is verified, a defendant must within 30 days file a verified answer which responds to each and every specific allegation in the complaint – even if there are dozens or hundreds of them. Code Civ. Pro. § 431.30(d). A defendant must therefore have something meaningful to say about every detailed claim in a verified complaint within just a month of its filing. The legislature further requires California defendants to raise grounds for special demurrer—for example, uncertainty, lack of capacity, defect of parties—in their first responsive pleading, or else lose them. Code

Civ. Pro. § 430.80. And motions to quash service of summons based on lack of personal jurisdictions and motions to dismiss or stay an action on the ground of an inconvenient forum are also required by the time of responsive pleading (absent a court finding of good cause for delay). Code Civ. Pro. § 418.10.

It is therefore apparent that the legislature is comfortable expecting a defendant to review the specific factual allegations in a case and complicated issues of applicable law within the first 30 days after service. Burdening defendants in this way makes sense because of important public policy rationales. A verified pleading, for example, which brings about the requirement for a verified answer, rewards a plaintiff and his or her counsel for investigating thoroughly before filing. This streamlines the judicial process and saves resources.

The fact that personal jurisdiction is waived if a defendant generally appears before raising the issue also makes sense. While the law may be nuanced, all of the facts necessary for a defendant to investigate personal jurisdiction are available the moment the defendant sees a complaint. Consequently, permitting a personal jurisdiction defense months later would waste judicial resources and encourage gamesmanship.

So too with a motion to quash service of summons. It would be costly and detrimental to our court system and confidence in our court system if a defendant could pocket a potential attack on service; try its luck at litigation for a year; and then, once litigation is going badly, move to quash service of summons – essentially pressing a "do over" button.

The *Amici* respectfully submit that public policy, logic, and common sense similarly suggest that the decision whether to move to compel arbitration should likewise be required at the time of the responsive pleading (or, in the alternative, as early as this Court is comfortable deciding it is required).

First, the question of whether an employer believes it has the contractual right to arbitration is straightforward – indeed much plainer than the question of whether certain defendants, for example, are subject to personal jurisdiction in California. An employer virtually always knows immediately (and in any case should know immediately) whether it executed an arbitration agreement with a particular employee plaintiff. An employer virtually always knows immediately whether it wants to move to compel arbitration (the answer is almost always yes, but if there is any doubt, it can be resolved easily through a discussion with

counsel). And a typical motion to compel arbitration based on an arbitration contract is one of the easier motions that can be brought in California courts – particularly by the experienced employment defense counsel who routinely prepare and file these motions. In sum, it does not take long for an employer to decide to prepare and proceed with a motion to compel arbitration.

Second, requiring an employer to move to compel arbitration at the time of its responsive pleading (or however early the Court is comfortable requiring) benefits judicial economy, efficiency, and access to justice – in the same way as, for example, requiring a motion to quash service of summons at that time. Even if a late motion to compel arbitration fails, the fact that it is brought and considered deep into a litigation can unduly frustrate a disadvantaged plaintiff – and may result in lost resources because an employer likely will not seriously consider settlement until it has tried its luck at that motion. And if a delayed motion to compel arbitration is ultimately to be successful, any delay in bringing the motion beyond the time of the responsive pleading results in lost time, lost effort, and wasted judicial resources. In this very case, for example, if Mr. Quach were ultimately forced to arbitrate, the thirteen months he spent litigating will be rendered a total loss.

An arbitrator likely will set entirely different parameters for discovery, voiding much if not all of the discovery that occurred during litigation. Motion practice that occurred in court likely never would have been permitted in arbitration, rendering that also lost time and money. And hearings that occurred during litigation, including Case Management Conferences, Status Conferences, and all motion hearings, amount to lost time and judicial engagement. Simply put, late motions to compel arbitration cause harm no matter their outcome.

And third, the *Amici* respectfully submit that there is simply no legitimate reason that an employer needs a free hand to delay a motion to compel arbitration. The *Amici* can conceive of no argument for undue prejudice to an employer from a prospective inability to move to compel arbitration six months or a year into a lawsuit. The only reason an employer would move to compel arbitration after many months of litigation is if it is regretting its intentional decision to forego arbitration in favor of litigation. That is not a legitimate reason to permit a late motion to compel arbitration. In every instance the *Amici* have seen a delayed motion to compel arbitration—including the present case—the only purpose for the delay was transparent and unfair

gamesmanship designed to delay and disillusion the employee plaintiff.[7]

At bottom, no employer will be harmed in any cognizable way by this Court requiring a motion to compel arbitration to be timely made or else waived.

CONCLUSION

The Appellant in this case has established the legal basis to eliminate the prejudice requirement based on the combination of new United States Supreme Court precedent and nearly a century's precedent of California waiver law. As a practical matter, this Court knows that the prejudice standard invites abuse by employers seeking opportunistic delay or other undue leverage.

With this case, the Court can eliminate the prejudice standard and hasten justice in at least one impactful way. This appeal is a vehicle to stop one of many avenues for employers to

[7] In the event the Court or any party to this proceeding presents some exceptional circumstance in which it might be reasonable for there to be a delay in a motion to compel arbitration, this Court could simply carve such an exceptional circumstance or circumstances out of the timing requirement. Or, if such a circumstance is not identified but the Court has lingering concerns it might exist, the Court can carve out "truly exceptional circumstances," using that language or something comparable.

make an unfair system more unfair. The Court should not hesitate to do so.

And in ruling, the Court should not hesitate to speak. To speak about Mr. Quach; about age discrimination; about what older California employees experience; about what Asian American and other protected California employees experience because of their race or national origin; and about what employers should and should not do to lessen injustice.

And this Court should also speak about when an employer must – or at the very least when an employer should move to compel arbitration.

The Court's words will bolster equal treatment under the law. And it will increase the chance of a fair shot for those who do not have the resources to game our system the way their former employers inevitably do. Because the unavoidable and unfortunate fact remains that our system, unchanged, continues to unduly advantage employers over low wage employee plaintiffs. And it is also unavoidable that this fact disproportionately hurts Asian Americans like Mr. Quach and the many other Californians who are similarly vulnerable.

DATED: January 25, 2023 BOSKO, P.C.

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.520(c)(1) of the California Rules of Court, the enclosed brief of Amicus Curiae is produced using 13-point Century type including footnotes and contains approximately 5,748 words, which is less than the total words permitted by the Rules of Court. Counsel relies on the word count of the Microsoft Word version 2021 word processing program used to prepare this brief.

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CERTIFICATE OF SERVICE

I certify that the foregoing APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF OF ASIAN AMERICANS ADVANCING JUSTICE SOUTHERN CALIFORNIA IN SUPPORT OF PLAINTIFF AND APPELLANT PETER QUACH was electronically served on the following interested parties on January 25, 2023, in the manner described.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 25, 2023, at Los Angeles, California.

/s/ David Bosko
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1/25/2023

Date

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