S275121

IN THE SUPREME COURT OF CALIFORNIA

PETER QUACH,

Plaintiff-Appellant,

v.

CALIFORNIA COMMERCE CLUB, INC.,

Defendant-Appellee.

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

APPLICATION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF ON BEHALF OF THE CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION AND THE CONSUMER ATTORNEYS OF CALIFORNIA

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APPLICATION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF

Under California Rules of Court, rule 8.520(f), the California Employment Lawyers Association (CELA) and the Consumer Attorneys of California (CAOC) request leave to file the attached amicus curiae brief.[1]

The California Employment Lawyers Association ("CELA") is an organization of California attorneys whose members primarily represent employees in a wide range of employment cases, including individual, class, and representative actions, including cases arising under the California Fair Employment and Housing Act ("FEHA") and California Labor Code. CELA has a substantial interest in protecting the constitutional and statutory rights of California workers and ensuring the vindication of the public policies embodied in California employment laws. The organization has taken a leading role in advancing and protecting the rights of California workers, which has included submitting

[1] CELA and the CAOC certify that no person or entity other than CELA and CAOC and their counsel authored this proposed brief in whole or in part and that no person or entity other than CELA or CAOC, 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).)

amicus briefs and letters and appearing before the California Supreme Court in employment rights cases such as *Dynamex Operations v. Superior Court,* 4 Cal.5th 903 (2018), *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094 (2007), *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007), *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012), *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014), and +*Ayala v. Antelope Valley Newspapers, Inc.*, 59 Cal. 4th 522 (2014), and in cases before the Ninth Circuit Court of Appeals.

The Consumer Attorneys of California ("CAOC") is an organization of over 6,000 consumer attorneys who primarily represent individuals subjected to unlawful employment practices and civil rights violations, consumer fraud, personal injuries and insurance bad faith.

The attached Amicus Brief will be helpful in analyzing and correctly stating California's public policy with regard to arbitration agreements and the waiver of constitutional rights.

Dated: January 26, 2023

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AMICUS CURIAE BRIEF

INTRODUCTION AND SUMMARY OF ARGUMENT

Following the Supreme Court's unanimous decision in *Morgan v. Sundance* (2022) --- U.S.---, 142 S.Ct. 1708 ("*Morgan*"), there can be no doubt that the California Court of Appeal's decision in *Quach v. California Commerce Club,* 78 Cal.App.5th 470 (2022), must be reversed. Simply put, when courts are evaluating a potential "waiver" of arbitration rights, they are not permitted to deviate from normal contract waiver principles and create special rules that artificially "favor" arbitration. This issue has been thoroughly addressed in Appellant's brief, and *amici curiae* CELA and CAOC will not spend further time on that subject.

The sole purpose of this *amicus* brief is to stress that California public policy ***does not*** and ***cannot*** "favor" arbitration. To the contrary, California public policy—as expressed in both the California Constitution and in numerous statutes passed by the California Legislature—favors the right of its citizens to access the courts and to access the administrative forums specially created to help its citizens vindicate their statutory rights and remedies.

The *Morgan* decision presents the California Supreme Court with an opportunity to clarify that California public policy does not "favor" arbitration—a critical point which impacts *all* arbitration matters in California. As the linchpin of its decision in *Morgan*, the Supreme Court pointed out a repeated misinterpretation of arbitration law which had caused the lower court to erroneously approve a special rule that required a showing of "prejudice" in arbitration waiver cases. *Morgan* stressed that the lower court had essentially misunderstood the oft-repeated phrase regarding a purported "policy favoring arbitration".

As the Court noted, the Federal Arbitration Act (9 U.S.C. Section 1 *et seq*.) was passed in 1925 in order to overcome the *refusal* of courts to permit arbitration at all. The FAA was adopted in order to ensure that, if parties voluntarily and consensually agreed to arbitrate a dispute, the courts should enforce the agreement and so place arbitration on an "equal footing" with litigation in the courts. There was never an intent to "favor" arbitration in the sense of giving arbitration "preference" over the court process. Indeed, *Morgan* flatly held that courts are *not permitted* to create rules or make decisions that "favor" arbitration. There simply is no policy that "favors" arbitration over

a litigant's right to access the courts, and thus courts may not give "preference" to arbitration.

Decades after the FAA was enacted, courts began using the phrase "public policy favors arbitration", but that phrase was originally intended to convey simply that courts may no longer "disfavor" arbitration. Unfortunately, this phrase was misinterpreted and misapplied to mean that courts should adopt special rules to give a "preference" to arbitration over the court process and other constitutional rights.

In *Morgan*, the Supreme Court affirmatively repudiated the notion that public policy "favors" arbitration over the normal court process. Indeed, it is neither logical nor lawful that the courts could give "preference" to arbitration over an individual's access to the courts. Under both the United States and California Constitutions, citizens are guaranteed the right to a jury trial; the right of access to the courts for petition of grievances; and the right to due process. These are *constitutional rights* that express the highest public policies of the country and state. No statute—including the Federal Arbitration Act and the California Arbitration Act—can trump these rights, and thus the courts

cannot adopt a principle in which arbitration is somehow "favored" over (or burdens) these constitutional rights.

The California Supreme Court should use the present case as an opportunity to clarify and repudiate the mistaken idea that California has a public policy "favoring" arbitration. Indeed, with respect to employees and consumers, it is clear that California public policy does *not* favor arbitration, but instead seeks to fully protect and preserve the rights and remedies given to employees and consumers by the legislature.

The highest expression of California public policy is contained in the California Constitution---which guarantees its citizens the right of access to the courts and the right to a jury trial. The California Legislature has added further to this public policy by repeatedly passing statutes which provide that employees and consumers have the right to file actions in court or to use the administrative forums and procedures which the Legislature has created for them, and which do not permit the waiver of these rights. Indeed, there are multiple California statutes which specifically prohibit forcing employees and consumers into arbitration forums in a variety of contexts. See, e.g., Labor Code

Section 432.6; Civil Code Section 51.7; Civil Code Section 52.1; Labor Code Section 229.

It is simply incorrect to suggest that California public policy "favors" arbitration over its citizens' constitutional and statutory rights, and *amici curiae* urge this Court to clearly and unequivocally clarify this critical point because the evils produced by the misconception that California should "favor" arbitration infect far more than simply the issue of waiver presented in *Quach*. Every legal question that arises out of the operation of arbitration in California—including issues of fraud, unconscionability and duress—is potentially subverted by such a mistaken doctrine if adopted by the lower courts.

ARGUMENT

1. The FAA Was Not Intended to Give a "Preference" for Arbitration

Congress passed the FAA in 1925. Prior to that time, the judiciary had a longstanding refusal to enforce agreements to arbitrate. The FAA was an effort to ensure that courts would enforce such agreements (just as they would enforce any other contract) provided they were voluntary and consensual. This legislation necessarily caused a shift in the courts' attitude toward

arbitration, away from the longstanding belief that arbitration was "disfavored" and should never be upheld. The FAA ushered in a new philosophy—that the judiciary should not be "hostile" to arbitration. Some courts thereafter described this shift as indicating a new federal policy "favoring arbitration". However, it was never Congress's intent—nor could it have been—to affirmatively give a "preference" to arbitration over the rights of access to the courts and a jury trial guaranteed in the Constitution.

As the Supreme Court stated in *Morgan*, the frequently repeated phrase of an "FAA policy favoring arbitration" did "not authorize…courts to invent special, arbitration-preferring…rules. Our frequent use of that phrase connotes something different. The policy…is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts." *Morgan, supra*, 142 S.Ct. at 1713 [quoting *Granite Rock v. Teamsters* (2010) 561 U.S. 287, 302, 130 S.Ct., 2847, 177 L.Ed.2d 567.]

Morgan thus flatly repudiated any notion that courts should "favor" arbitration or that there was any policy giving arbitration a "preference" over the right of access to the courts. "The policy is

to make 'arbitration agreements as enforceable as other contracts, *but not more so'*." *Morgan*, *supra,* 142 S.Ct. at 1713 [quoting *Prima Paint Corp. v. Flood & Conklin* (1967) 388 U.S. 395, 404, n. 12, 87 S.Ct. 1801, 18 L.Ed.2d 1270] (emphasis added).

Morgan went on to state that "a court may not devise novel rules to favor arbitration over litigation"; that "the federal policy is about treating arbitration contracts like all others, not about fostering arbitration"; that "the Supreme Court has made clear that the FAA's policy is based upon the enforcement of contract, rather than a preference for arbitration as an alternative dispute mechanism"; and that the courts may not "tilt the playing field in favor of (or against) arbitration." *Morgan, supra,* 142 S.Ct. at 1713--14.[2]

2. California Adopts the CAA

Shortly after Congress passed the FAA in 1925 to allow enforcement of arbitration agreements, California followed suit and adopted the California Arbitration Agreement ("CAA") in

[2] Indeed, the reason that *Morgan* struck down the need to find "prejudice" to the plaintiff before finding that the defendant had waived arbitration was that such a requirement created a special rule that improperly "favored" arbitration over the litigation process.

1927. The language of the CAA closely tracked the language of the FAA and was passed for the same reason---to overcome the common law refusal to enforce arbitration agreements, and to place them on the same footing as other contracts.[3] There was no intent to give arbitration a "preference" over the constitutional right of California citizens to a jury trial and access to the courts.

As the California courts have noted, "in most important respects, the California statutory scheme on enforcement of private arbitration agreements is similar to the FAA…In similar language, both the FAA and the CAA provide that pre-dispute arbitration agreements are valid, enforceable and irrevocable save upon such grounds as exist for the revocation of any contract." *Tiri v. Lucky Chances, Inc.*, 226 Cal. App. 4th 231, 241(2014).

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[3] For example, compare the nearly identical language of 9 U.S.C. Section 1 (the FAA) and California Code of Civil Procedure Section 1281 (the CAA), which describe the circumstances under which agreements to arbitrate will be enforced. See also, California Law Revision Commission, *Recommendation and Study Relating to Arbitration* (1960) ("the enactment of this statute [the California Arbitration Act] in 1927 placed California among the small but growing group of states that have rejected the common law hostility to the enforcement of arbitration agreements and have provided a modern, expeditious method of enforcing such agreements and awards made pursuant to them").

Not surprisingly, "California courts often look to federal law when deciding arbitration issues under state law", including giving strong consideration to how the FAA has been interpreted. *Tiri, supra*, 226 Cal. App. 4th at 241. Consequently, the Supreme Court's decision in *Morgan*—including its reminder that arbitration is not to be "favored" or given "preference" over the court process—should be given appropriate weight by this Court when evaluating arbitration issues under the CAA.

3. The Constitution Contains the Highest Expression of Public Policy, and No Statute Can Contradict or Undermine Constitutional Rights

The highest level pronouncements of public policy are found in the United States and California Constitutions. Both of these instruments guarantee the Right to Petition (i.e., the right of access to the courts, including the right to file a lawsuit in court)[4];

[4] The right "to petition the government for a redress of grievances" is found in the First Amendment of the United States Constitution and in Article I, Section 3(a) of the California Constitution. Scholars and jurists agree that this right includes a right of court access, especially pertaining to the right to file a lawsuit in court. See, Benjamin Cover, *First Amendment Right to a Remedy*, 50 University of California Davis L. Rev. 1741 (2017).

the Right to Due Process[5]; and the Right to a Jury Trial in civil cases.[6] Indeed, Article I, Section 16 of the California Constitution states that, "Trial by jury is an inviolate right." It would be both illogical and *contrary* to public policy for arbitration to be "favored" over a citizen's constitutional rights, including the right of access to the courts and the right to a jury trial.

The Constitution is the supreme law of the land. No federal or state statute (including the FAA or CAA) can contradict or burden the exercise of these fundamental constitutional guarantees. The notion that the courts—or even a legislature—could pronounce a policy that "favors" or "gives preference" to arbitration over these constitutional rights is simply mistaken as a matter of constitutional law.

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[5] The right to due process is found in the Fifth and Fourteenth Amendment to the United States Constitution and in Article I, Section 7 of the California Constitution.

[6] The right to a jury trial is found in the Seventh Amendment of the United States Constitution and in Article I, Section 16 of the California Constitution.

4. California Public Policy Is Also Found in the Statutory Rights and Remedies the Legislature Has Created for its Employees and Consumers

The California Supreme Court has repeatedly said that California public policy must be derived from the Constitution or from statutory provisions enacted by the California Legislature. *Stevenson v. Superior Court,* 16 Cal.4th 880, 894 (1997); *Gantt v. Sentry Ins.*, 1 Cal.4th 1083, 1095 (1992); *City of Moorpark v. Superior Court,* 18 Cal.4th 1143, 1159 (1998). The courts do not simply 'create' public policy on their own. The California Legislature has explicitly stated that it is a priority of public policy to protect individual workers and preserve their rights, and the Legislature has enacted numerous statutes to accomplish this.

California has predicated the enactment of labor laws on the need to protect individual workers from the overwhelming inequality in bargaining power between them and employers. In California Labor Code Section 923, the legislature declared as "the public policy of this State" that "negotiations of terms and conditions of labor should result from voluntary agreement between employers and employees", based on the recognition that "in dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to

protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing…and that he shall be free from interference, restraint or coercion…in the designation of such representatives or in self-organization or in other concerted activities for the purpose of…mutual aid or protection."

In the employment context, the idea of "favoring" arbitration over employees' constitutional and statutory rights is especially alarming. California has adopted numerous laws under the Fair Employment and Housing Act ("FEHA") and the Labor Code which recognize the vulnerability of individual employees, and which have provided not only substantive rights and remedies, but also special administrative forums (in addition to access to the courts) to help employees vindicate those rights. See, e.g., California Government Code Section 12965 (giving victims of employment discrimination the ability to file claims with the Department of Fair Employment and Housing before proceeding to filing a lawsuit in court) and Labor Code Section 98 (giving employees the ability to file wage claims with the Labor Commission before (or as

an alternative to) filing a lawsuit in court). To further bolster the ability of employees to remedy violations of FEHA and the Labor Code, the Legislature has also empowered employees to bring class, collective or representative actions. See, e.g., Government Code Section 12965; Labor Code Section 2698.

With respect to protecting employee and consumer rights—especially rights under FEHA and the Labor Code—it is indisputable that California public policy does *not* favor arbitration over access to the courts or these administrative forums and procedures. To the contrary, California public policy favors protecting the right of individual workers and consumers to access the courts and these administrative forums. Indeed, the Labor Code has multiple provisions that are specifically designed to shield employees from being forced into arbitration, in order to protect the statutory rights and remedies granted to them by the legislature. For example, Labor Code Section 229 provides that "actions to enforce the provisions of [the Labor Code] for the collection of due and unpaid wages…may be maintained without regard to the existence of any private agreement to arbitrate".[7]

[7] In *Perry v. Thomas*, 482 U.S. 483, 107 S.Ct. 2520 (1987), the United States Supreme Court held that Labor Code Section 229 was pre-

More broadly, Labor Code Section 432.6 prevents employers from requiring applicants to sign (as a condition of employment) *any* agreement (including an arbitration agreement) that would waive an employee's right to file either a civil court action or a complaint with a state agency with respect to any violation or claim under FEHA or the Labor Code. Indeed, in passing the legislation creating Labor Code 432.6 (Assembly Bill 51), the California Legislature stated that it, "(a) finds and declares that it is the policy of this state to ensure that all persons have the full benefit of the rights, forums and procedures established in the Fair Employment and Housing Act…and the Labor Code….(b) It is the purpose of this act [Labor Code 432.6] to ensure that individuals are not retaliated against for refusing to consent to the waiver of those rights and procedures and to ensure that any contract relating to those rights and procedures be entered into as a matter of voluntary consent, not coercion." Assembly Bill 51, Section 1.[8]

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empted by the FAA, notwithstanding California's clear public policy to preserve the right of its wage earners to seek relief in the courts or with the Labor Commission. Despite *Perry*, Labor Code Section 229 still expresses the public policy of California.

[8] In addition to these Labor Code provisions, several statutes recently enacted under the Civil Code prohibit (and make unenforceable) agreements which would waive the right to pursue a civil action in court

Similarly, while the United States Supreme Court has held that class or collective actions are not generally available in arbitration (*AT & T Mobility v. Concepcion,* 563 U.S. 333, 131 S.Ct. 1740 (2011)), California public policy specifically provides for---and encourages—such actions in order to enable employees and consumers to effectively vindicate their rights. Indeed, as noted above, Labor Code Section 923 declares that it is the "public policy" of California that individual workers should have the right to act collectively and engage with other workers in "concerted activities for the purpose of…mutual aid or protection."

Consistent with this public policy, California employees have the statutory right to bring a class action in court for violations of FEHA (Government Code Section 12965); California employees are entitled to bring class actions for wage and hour violations of the Labor Code, and the California Supreme Court has held that arbitration agreements which seek to compel a

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in order to remedy statutory violations. See, Civil Code Section 51.7 (violence committed against an individual due to political affiliation) and Civil Code Section 52.1 (hate crimes involving violence against an individual due to the exercise of constitutional or statutory rights). Both of these statutes specifically bar the enforcement of arbitration agreements which would waive the rights and remedies provided in the statutes, including the statutory right to file a civil action in court. Civil Code Section 51.7(c)(1), (8); Civil Code Section 52.1(m).

waiver of this right violate California public policy and are unconscionable (*Gentry v. Superior Court*, 42 Cal.4th 443 (2007)); California employees are entitled to bring representative actions for violations of the Labor Code (Labor Code Section 2698, the Private Attorney General Act), and the California Supreme Court held that it was contrary to California public policy to require employees to waive such rights via an arbitration agreement (*Iskanian v. CLS Transportation*, 59 Cal.4th 348 (2014)); and California public policy dictated that an arbitration agreement could not be used to prohibit consumers from bringing a class action, since such a prohibition would violate California public policy and be unconscionable (*Discover Bank v. Superior Court*, 36 Cal.4th 148 (2005)).[9]

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[9] Subsequent decisions by the United States Supreme Court deprived California employees and consumers of certain of these rights, based on FAA pre-emption. See, *AT & T Mobility v. Concepcion,* 563 U.S. 333, 131 S.Ct. 1740 (2011); *Iskanian v. CLS Transportation,* 59 Cal.4th 348 (2014) (discussing the impact of those decisions on California). Regardless of these U.S. Supreme Court decisions, it remains a fact that California public policy favors employees and consumers having the ability to utilize class or collective actions to vindicate rights. The U.S. Supreme Court rulings have not "changed" California's public policy, and those rulings obviously have no impact on employees and consumers who have never signed an arbitration agreement. Furthermore, there are many employees who may have signed an arbitration agreement but are nevertheless exempt from FAA coverage, such as transportation workers involved in the flow of interstate goods.

The California Legislature has also given employees numerous rights and remedies with respect to using the Labor Commission for resolution of wage claims and other employment disputes, including the right to an administrative "Berman" hearing before the Labor Commissioner. Labor Code Section 98. The California Supreme Court ruled in 2011 that arbitration agreements could not deprive California wage earners of access to this administrative process and forum---yet another expression of California public policy. *Sonic-Calabasas v. Moreno*, 51 Cal.4th 659 (2011).[10]

The point of this recitation is not to persuade the California Supreme Court that the United States Supreme Court was "wrong" or that the FAA does not pre-empt certain California statutes. The point is that California has the right and obligation to declare its own public policy, and it is indisputable that

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See 9 U.S.C. Section 1; *Southwest Airlines v. Saxon*, 142 S.Ct. 1783 (2022) (explaining type of employees who are entirely exempt from FAA). It is estimated that there are more than one million such workers in California, and they remain fully entitled to the benefits of California's public policy regarding class and collective actions.

[10] Contravening California public policy, the United States Supreme Court later found that an employee's right to a Berman hearing could be displaced by an agreement under the FAA. *Sonic-Calabasas v. Moreno*, 565 U.S. 973, 132 S.Ct. 496 (2011).

California public policy does not "favor" arbitration—especially in the context of coerced or mandatory arbitration.

As the Supreme Court made plain in *Morgan*, there simply is no policy "favoring" arbitration. Nor could there be, since the highest public policies of the United States are its citizens' constitutional rights—including the right to a jury trial and access to the courts. This is especially true in California, which in addition to its Constitution, has made it clear through numerous statutes and state court rulings that California's public policy is to preserve and protect its citizens' right of access to judicial and administrative forums and procedures.

CONCLUSION

Amici curiae ask the California Supreme Court to confirm the primacy of the California Constitution and to repudiate any notion that the courts in California should "favor" arbitration by giving it "preference" over an individual's constitutional and statutory rights.

Dated: January 26, 2023

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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 Schoolbook type including footnotes and contains approximately 4,042 words, which is less than the total words permitted by the Rules of Court. Counsel relies on the word count of the Microsoft Word word processing program used to prepare this brief.

Dated: January 26, 2023

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STATE OF CALIFORNIA
Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S275121**
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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.

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