S275121

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETER QUACH,

Plaintiff and Respondent,

v.

CALIFORNIA COMMERCE CLUB, INC.,

Defendant and Appellant.

After A Decision By The Court Of Appeal
Second Appellate District, Division One
Appellate Court Case No. B310458

Appeal From Los Angeles Superior Court
Hon. Michael L. Stern
Superior Court No. 19STCV42445

ANSWER TO AMICI CURIAE BRIEF OF CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION AND CONSUMER ATTORNEYS OF CALIFORNIA

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INTRODUCTION

Amici Curiae California Employment Lawyers Association and Consumer Attorneys of California (amici curiae) explain the "sole purpose" of their brief is "to stress that California public policy ***does not*** and ***cannot*** 'favor' arbitration." (Amici Curiae Brief (ACB) 9.) While their goal is limited, amici curiae fall short for a very simple reason: they're wrong.

California's Legislature has expressed a public policy encouraging the use of arbitration as a means of settling disputes. Based upon this stated policy, our Legislature created a statutory scheme that gives preference to arbitration over court access. In turn, this Court too has repeatedly found that public policy favors arbitration over court access as an expeditious and economical method of relieving overburdened civil calendars.

For these reasons, now addressed below, the Court should reaffirm that California's public policy can and does favor arbitration over court access.

LEGAL DISCUSSION

AS ACKNOWLEDGED BY THIS COURT, CALIFORNIA'S LEGISLATURE HAS DECLARED A PUBLIC POLICY FAVORING ARBITRATION AND STRUCTURED ITS STATUTORY SCHEME TO GIVE PREFERENCE TO ARBITRATION OVER COURT ACCESS.

In *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083 (*Gantt*), overruled on another basis in *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66 (*Green*), the Court explained that "absent some prior legislative expression on the subject," courts "'should proceed cautiously' if called upon to declare public policy." (*Gantt*, at p. 1095; see also, e.g., *Green,* at p. 71 [Legislature "vested with the responsibility to declare the public policy of the state"].) As explained below, our Legislature did exactly that and declared California's public policy favors arbitration over court access. California's courts properly have followed suit.

As the California Law Revision Commission detailed in its December 1960 Recommendation and Study relating to Arbitration:

> California . . . seek[s] to preserve and encourage the use of arbitration to settle disputes. For example, as Presiding Justice Peters stated in *Crofoot v. Blair Holdings Corp.,* [(1953) 119 Cal.App.2d 156, 184] there is [¶] a strong public policy in favor of arbitrations, which policy has frequently been approved and enforced by the courts. [¶] A public policy favorable to arbitration is one that keeps the

> law from prohibiting, interfering with or discouraging arbitration when the parties have voluntarily chosen to resort to this method for the settlement of their disputes. It is a policy which directs the law to facilitate carrying out the process of arbitration, to enforce agreements to arbitrate when the parties have made such an agreement and to enforce arbitration awards. [¶] California, since the adoption of a modern arbitration statute in 1927, has consistently reflected a friendly policy toward the arbitration process. Any analysis of the present law of arbitration in California and proposal for its revision must use this established policy as a frame of reference."

(Recommendation and Study relating to Arbitration (Dec. 1960) 3 Cal. Law Revision Com. Rep. (1960) p. G-26, footnotes omitted; see *Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1132 ["'Because the official comments of the California Law Revision Commission "are declarative of the intent not only of the draftsman of the code but also of the legislators who subsequently enacted it" [citation], the comments are persuasive, albeit not conclusive, evidence of that intent [citation]'"].)

Consistent with California's public policy favoring arbitration, our Legislature structured a statutory scheme that gives preference to arbitration over court access. Thus, for example, under Code of Civil Procedure section 1294, subdivision (a), an aggrieved party may appeal from an order dismissing or denying a petition to compel arbitration. By contrast, no direct

appeal lies from an order granting a motion to compel arbitration; the order is reviewable on appeal from the subsequent judgment entered on the award. (Code Civ. Proc., § 1294.2; see, e.g., *Ashburn v. AIG Financial Advisors, Inc.* (2015) 234 Cal.App.4th 79, 94.) Only in """unusual circumstances""" or """exceptional situations""" will an appellate court grant writ review on an order compelling arbitration. (*Ramos v. Superior Court* (2018) 28 Cal.App.5th 1042, 1050.)

Because mandatory appellate review is available where an order dismisses or denies a petition to compel arbitration, but not where arbitration is compelled, California's Legislature's "philosophy" favoring arbitration over court access is laid bare. (See *Long Beach Iron Works, Inc. v. International Molders etc. of North America, Local 3* (1972) 26 Cal.App.3d 657, 659.)

Based on our Legislature's pronouncements, this Court too has recognized public policy favors arbitration. "[A]rbitration has become an accepted and favored method of resolving disputes . . . praised by the courts as an expeditious and economical method of relieving overburdened civil calendars." (*Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 706-707 (*Madden*); see also, e.g., *OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 125 ["'[T]he Legislature has expressed a "strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution"'"]; *Richey v. AutoNation, Inc.* (2015)

60 Cal.4th 909, 916 ["California law favors alternative dispute resolution as a viable means of resolving legal conflicts. 'Because the decision to arbitrate grievances evinces the parties' intent to bypass the judicial system and thus avoid potential delays at the trial and appellate levels, arbitral finality is a core component of the parties' agreement to submit to arbitration'"]; *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 115 (*Armendariz*) ["Arbitration is favored in this state as a voluntary means of resolving disputes. . ."]; *Rodriguez v. Superior Court* (2009) 176 Cal.App.4th 1461, 1467 ["California has a strong public policy, however, favoring arbitration over a jury trial or other litigation, in that arbitration is a speedy and relatively inexpensive means of resolving disputes and eases court congestion"].)

Despite our Legislature's expressed and demonstrated preference for arbitration over court access, and the Court's recognition of that preference, amici curiae maintain the opposite is true.[1] Amici curiae's arguments lack merit. First, amici curiae repeatedly invoke reference to *Morgan v. Sundance, Inc.* (2022)

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[1] Regardless of whether the California Legislature has stated a public policy favoring arbitration, the issue of when a party loses its contractual right to arbitrate based on its litigation conduct necessarily incorporates contractual principles of waiver, estoppel and forfeiture that inherently consider prejudice. (See Answer Brief on the Merits 36-39.)

__ U.S. __ [142 S.Ct. 1708] (*Morgan*) and recount that "courts are *not permitted* to create rules or make decisions that 'favor' arbitration." (ACB 10; see also, e.g., ACB 11, 14-15, 17.) As an initial matter, amici curiae's argument is disingenuous because it fails to acknowledge that *Morgan* only spoke to and binds ***federal*** courts. (*Morgan*, at p. 1713 [FAA "does not authorize ***federal*** courts to invent special, arbitration-preferring procedural rules" (emphasis added).)

Even if *Morgan* applied to California courts, amici curiae's argument still must fail because California's courts have not created the rules or made decisions that favor arbitration; rather, California's Legislature expressed an intent to favor arbitration and established a statutory scheme which implemented that intent.

Second, amici curiae argue that California's public policy favors the right of citizens to access the courts. (ACB 9, 17-18.) According to amici curiae, "[u]nder 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." (ACB 11-12, emphasis original; see also ACB 17-18.)

Amici curiae's argument suffers from an obvious flaw: parties can choose to waive their constitutional and statutory rights. "When parties agree to submit their disputes to arbitration they select a forum that is alternative to, and independent of, the judicial – a forum in which, as they well know, disputes are not resolved by juries." (*Madden supra,* 17 Cal.3d at p. 714; see also Cal. Const., art. I, § 16 ["In a civil cause a jury may be waived by the consent of the parties. . ."].) "In other words, waiver of the right to a jury trial is inherent in the decision to resolve disputes in a non-judicial forum." (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 804.) Likewise, statutory rights can be waived. (*Armendariz, supra,* 24 Cal.4th at p. 100; see also, e.g., Civ. Code, § 3513 ["Any one may waive the advantage of a law intended solely for his benefit. . ."].)

Third, amici curiae identify "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." (ACB 12-13; see also ACB 19-26.) On the basis of these specific statutes, amici curiae generalize that our Legislature could not have demonstrated a preference for

arbitration over court access, especially with respect to protecting employee and consumer rights. (ACB 21.)

The error in amici curiae's analysis is patent. Despite the strong public policy favoring arbitration, the California Arbitration Act "does not prevent our Legislature from selectively prohibiting arbitration in certain areas." (*Armendariz, supra*, 24 Cal.4th at p. 98.) As such, our Legislature's resolution that specific statutory claims are not subject to arbitration by no means establishes a general rule that "California's public policy is to preserve and protect its citizens' right of access to judicial and administrative forums and procedures." (ACB 26.)

CONCLUSION

For the reasons set forth above, the Court should reaffirm that California's Legislature can favor and has expressed a preference for arbitration over court access.

Dated: March 10, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.520(c)(1), I certify that the total word count of this Answer to Amici Curiae Brief of California Employment Lawyers Association and Consumer Attorneys of California, excluding covers, signature blocks, table of contents, table of authorities, signature blocks and certificate of compliance, is 1,604.

Dated: March 10, 2023

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Supreme Court of California

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