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September 21, 2011

Hon. Chief Justice and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: *Brown v. Ralphs Grocery Co.*, No. S195850

Dear Chief Justice Cantil-Sakauye and Associate Justices:

We represent the Chamber of Commerce of the United States of America and write in support of the petition for review in this matter. The decision of the Court of Appeal cannot be reconciled with the decision of the Supreme Court of the United States in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). In addition, if left in place as precedent, the decision below will have significant adverse effects on businesses in California and on the uniform enforcement of arbitration agreements under the Federal Arbitration Act ("FAA"). Accordingly, review should be granted and the decision below reversed.

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. The Chamber represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in important matters before the courts, legislatures, and executive agencies. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

Many members of the Chamber have found that arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Accordingly, these businesses routinely include arbitration provisions as standard features of their business and employment contracts. Based on the legislative policy reflected in the Federal Arbitration Act and this Court's consistent endorsement of arbitration for the past half-century, Chamber members have structured millions of contractual relationships around arbitration agreements. For this reason, the Chamber has

a strong interest in ensuring that the federal law of arbitration is appropriately applied and that businesses can rely upon stable arbitration precedent.

The decision of the Court of Appeal warrants review for several significant reasons. First, that decision fundamentally conflicts with precedent of the Supreme Court of the United States, which has repeatedly struck down efforts by the California Legislature and courts to devise exceptions to the enforceability of arbitration agreements that come within the scope of the FAA. Second, the issue is important and recurring, given the frequency of Labor Code actions invoking the Private Attorney General Act of 2004 (PAGA), Labor Code § 2698–2699.5. Third, unless and until it is corrected by this Court or the U.S. Supreme Court, this published decision is likely to have wide-ranging deleterious consequences, not only for businesses with California employees, but for all businesses operating in California that wish to take advantage of the efficiencies of arbitration to resolve disputes with their customers, suppliers, and business partners. The importance of the decision transcends its setting because its rationale invites the Legislature and the courts to find public purposes sufficient to except any number of statutory claims from the FAA's mandate to enforce arbitration agreements as written. And this case provides the Court with the opportunity to recognize that its 4–3 decision *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303 (holding intervening U.S. Supreme Court decisions did not require overruling of *Broughton v. Cigna Healthplans of California* (1999) 21 Cal.4th 1066 (1999)), cannot be squared with current law because it improperly accorded state legislative policies equal stature with those expressed in federal statutes, in square conflict with the Supremacy Clause in Article VI of the U.S. Constitution, and with U.S. Supreme Court decisions .

1. The U.S. Supreme Court recently reiterated the broad preemptive force of the FAA in *AT&T Mobility LLC v. Concepcion* (2011) 131 S. Ct. 1740, holding that the FAA preempted the rule laid down by this Court in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148. *Discover Bank* had effectively denied enforcement to all agreements by consumers to arbitrate their claims individually and to waive access to classwide procedures and relief. In particular, the Court held that "class arbitration, to the extent it is manufactured" by state courts or legislatures "rather than consensual, is *inconsistent* with the FAA." 131 S. Ct. at 1751 (emphasis added). More directly, the Court held that class arbitration is "*not arbitration* as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law." *Id.* at 1753 (emphasis added). Accordingly, the enforcement of an arbitration agreement could not be conditioned on the availability of class arbitration procedures.

By contrast, in the decision below, the Court of Appeal held that an arbitration agreement requiring that the plaintiffs arbitrate their claims individually must yield before the state

public policy expressed in the PAGA. The PAGA, of course, authorizes any "'aggrieved employee' to bring an action on behalf of himself or herself and other current or former employees to recover civil penalties for Labor Code violations." *Amalgamated Transit Union, Local 1756, AFL–CIO v. Superior Court* (2009) 46 Cal.4th 993, 1004 (quoting Labor Code § 2699(a)). The private plaintiff can recover not only her attorneys' fees (*id.* § 2699(g)(1)), but she and the other "aggrieved employees" also retain 25% of any "civil penalties" awarded (*id.* § 2699(j)).

The arbitration agreement below appears to permit Brown to recover for any Labor Code violations and associated civil penalties that would be payable to *her*, but does not permit her to arbitrate the merits of *other* employees' claims as their class representative. The Court of Appeal identified no basis apart from this limit to deny enforcement to Brown's arbitration agreement, and in fact held that the conflict between the individual-arbitration provision and the policies of PAGA provided the only basis for denying enforcement.

Thus, the Court of Appeal held that an employee and employer cannot enforceably agree to arbitrate claims under the PAGA on an individual basis, but must agree to arbitrate on a class basis or lose access to arbitration altogether. The decision below did not acknowledge the holding in *Concepcion* that, in the absence of an agreement to arbitrate on a collective basis, the FAA requires enforcement of an agreement to arbitrate on an individual basis notwithstanding any state public policies that would render classwide resolution "desirable" (*see* 131 S. Ct. at 1753). Rather, the Court of Appeal held that *Concepcion* should be limited to its precise factual setting because the Supreme Court's opinion "does not purport to deal with the FAA's possible preemption of contractual efforts to eliminate representative private attorney general actions to enforce the Labor Code." Maj. Op. 9.

To the contrary, the Court in *Concepcion* restated the most fundamental rule of FAA preemption: "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Concepcion*, 131 S. Ct. at 1747 (citing *Preston v. Ferrer* (2008) 552 U.S. 346, 353). Because only individual arbitration is "arbitration as envisioned by the FAA" (*id.* at 1753), the practical effect of the decision below is to "prohibit[] outright the arbitration of a particular type of claim" (*id.* at 1747)—any PAGA claim in which the plaintiff also seeks to recover for others as well as herself. The U.S. Supreme Court already rejected the Legislature's explicit effort to exclude wage claims from arbitration, holding that the FAA preempted the pertinent provision of the California Labor Code. *See Perry v. Thomas* (1987) 482 U.S. 483; Cf. *Preston*, *supra* (holding that FAA preempted procedural provision of the Labor Code). Yet the decision below treats the PAGA as a successful end-run around *Perry*.

The Court of Appeal suggested that "[t]he purpose of the PAGA is not to recover damages or restitution, but to create a means of 'deputizing' citizens as private attorneys general to enforce the Labor Code." Maj. Op. 11 (citation omitted). "This purpose," the Court of Appeal held, "contrasts with the private individual right of a consumer to pursue class action remedies in court or arbitration, which right, according to [*Concepcion*] may be waived by agreement so as not to frustrate the FAA—a law governing private arbitrations." Maj. Op. 9. That analysis turns *Concepcion* on its head. The question is not which state-law procedural "rights" may be "waived" in order "not to frustrate the FAA," but when state law—whether or not "waivable"—may intrude upon an agreement to arbitrate disputes individually by invoking public policy, public rights, or some other principle. The *Concepcion* Court rejected the use of those state-law bases to deny enforcement to an agreement to arbitrate claims individually.

Nor can *Concepcion* be limited to assertions of the unconscionability doctrine, leaving other expressions of state public policies with the force to override an agreement to arbitrate individually. The Court's reasoning plainly covered doctrines finding certain terms "unenforceable as against public policy," a concept the Court treated as interchangeable with unconscionability (131 S. Ct. at 1747) when it made clear that a single set of rules applied to "the general principle of unconscionability or public-policy disapproval." *Id.* at 1748.

Just as state-law doctrines cannot alter a valid agreement to arbitrate all claims individually by "allow[ing] any party ... demand [classwide arbitration] *ex post*," *Concepcion*, 131 S. Ct. at 1750, so too are state courts and legislatures precluded from deeming every such agreement to contain exceptions for particular forms or causes of action favored by state public policy, no matter how "desirable" those exceptions might be. *Id.* at 1753. The FAA "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp. v. Keating* (1984) 465 U.S. 1, 10.

2. Review is also warranted to preserve uniformity of decision within the state and federal courts in California. The first federal district court to address the issue has held that the PAGA provides no basis to deny enforcement to an agreement to arbitrate individually. *See Quevedo v. Macy's, Inc.* (C.D. Cal. June 16, 2011) __ F. Supp. 2d __, 2011 WL 3135052. The plaintiff in *Quevedo* tried to avoid his arbitration agreement on the ground that, because PAGA permits him to obtain relief for other employees, "sending the PAGA claim to arbitration would irreparably frustrate the purpose of PAGA and prevent [him] from fulfilling the [California] Legislature's mandate." *Id.* at *15 (internal quotation marks omitted). The district court disagreed, concluding that "requiring arbitration agreements to allow for representative PAGA claims on behalf of

other employees would be inconsistent with the FAA." *Id.* at *17. As Judge Feess recognized, the argument that states may create a representative claim and then bar individuals from waiving that claim by agreeing to arbitrate disputes only on an individual basis "is no longer tenable in light of the Supreme Court's recent decision in ... *Concepcion*." *Id.* Analogizing to *Concepcion*, the court explained:

> A claim brought on behalf of others would, like class claims, make for a slower, more costly process. In addition, representative PAGA claims "increase[ ] risks to defendants" by aggregating the claims of many employees. ... Defendants would run the risk that an erroneous decision on a PAGA claim on behalf of many employees would "go uncorrected" given the "absence of multilayered review." ... Just as "[a]rbitration is poorly suited to the higher stakes of class litigation," it is also poorly suited to the higher stakes of a collective PAGA action.

Id. (quoting *Concepcion*, 131 S. Ct. at 1752) (alterations in *Quevedo*).

As Justice Kriegler pointed out in his dissenting opinion in the decision below, "In a series of cases, the United States Supreme Court has found California statutory and decisional law that impedes contractual arbitration agreements to be preempted by the FAA." Dis. Op. 3. Indeed, the Court has repeatedly held that the FAA precludes California from creating causes of action and then requiring them to be brought in court (*see Perry*, 482 U.S. at 492 (California law barring arbitration of certain employment claims); *Southland Corp. v. Keating* (1984) 465 U.S. 1, 16 (1984) (California law barring arbitration of certain franchise disputes)), or initially referred to a Labor Commissioner (*see Preston*, 552 U.S. at 356–359). This Court should grant review to bring California jurisprudence into accord with controlling federal law.[1]

3. Reinforcing the need for further review of the issue wrongly decided below is its recurring importance in light of the high and increasing volume of PAGA litigation. As this Court is well aware, litigation—and especially class-action litigation—to enforce the wage-and-hour provisions of the Labor Code has become increasingly common over the past decade, and now consumes a substantial portion of the civil litigation resources of the lower California courts. And virtually every complaint asserting a Labor Code wage-

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[1] In addition, as the Petition points out, the U.S. Supreme Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* (2010) 130 S. Ct. 1758 squarely forecloses one of the alternatives that the Court of Appeal presented to the trial court on remand—ordering the parties to conduct a collective, representative arbitration even though they explicitly agreed *not* to do so.

and-hour violation includes a claim under PAGA. Because employee arbitration agreements often require individual dispute resolution, the question of FAA preemption will recur in the run of cases. While the decision below remains the sole published authority on the issue, every trial court in the state will have to deny enforcement to otherwise-enforceable employee arbitration agreement, imposing unnecessary litigation costs on California employers and unnecessarily delaying recovery in arbitration by those employees who have valid individual claims.

4. The issue is still more deeply important—and thus warrants review still more clearly—because of the implications of the reasoning in the decision below. In the majority's view, all a state has to do to avoid *Perry* and *Concepcion* alike is to relabel any action to recover damages or restitution as one to enforce "a public right ... created under" state law. Maj. Op. 9. Followed to its logical consequence, that reasoning would render the FAA ineffective whenever the Legislature enacts (or a court construes) a statute to declare that its enforcement through private class actions serves a public purpose, or to label private class-action plaintiffs as private attorneys general, or to provide that the public fisc must share in any payment the private plaintiffs receive. This relabeling or reallocation of proceeds does not change the fact that the action is brought by a private party seeking a remedy for her own injury.

Permitting state policies regarding the *private* enforcement of "public" rights to override the parties' agreement to arbitrate their disputes on an individual basis would present a serious obstacle to the accomplishment of the FAA's purpose. It is not difficult to discern "public" rights in most any statute that has made it through the public political process, much less to discern public policies supporting the broadest enforcement of those public rights. And without guidance from this Court, further efforts like the one reflected in the decision below are likely. As the U.S. Supreme Court observed, "the judicial hostility towards arbitration that prompted the FAA had manifested itself in 'a great variety' of 'devices and formulas' declaring arbitration against public policy." *Concepcion*, 131 S. Ct. at 1747 (quoting *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir. 1959)).

This case also presents an opportunity for this Court to reconsider, in light of intervening U.S. Supreme Court authority, the deeply divided decisions in *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303 (excluding from arbitration any action for a "public" injunction under the Unfair Competition Law), and *Broughton v. Cigna Healthplans of California* (1999) 21 Cal.4th 1066 (1999) (same under Consumers Legal Remedies Act),. The decision below relied on *Cruz* and *Broughton*, and assumed that they remain good law because the *Concepcion* opinion did not mention "representative private attorney general actions to enforce" state laws. Maj. Op. 9. But that assumption overlooks the

square holding of *Concepcion* that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." 131 S. Ct. at 1753. If, as the Supreme Court declared in *Concepcion*, California cannot require that parties to arbitration agreements agree to class procedures in order to maximize enforcement of state consumer-protection laws, it follows that California cannot preclude parties from agreeing to limit the injunctive relief available in arbitrable disputes to the scope necessary to vindicate the individual's own claims.

Underscoring the inconsistency of *Cruz* and *Broughton* with *Concepcion*, four federal judges in California have held that the FAA preempts *Cruz* and *Broughton*. *See Nelson v. AT&T Mobility LLC* (N.D. Cal. Aug. 18, 2011) 2011 WL 3651153, at *2, 4 (Henderson, J.); *In re Apple & AT&T iPad Unlimited Data Plan Litig.* (N.D. Cal. July 19, 2011) 2011 WL 2886407, at *4 (Whyte, J.); *Arellano v. T-Mobile USA, Inc.* (N.D. Cal. May 16, 2011) 2011 WL 1842712, at *1-2 (Alsup, J.); *Zarandi v. Alliance Data Sys. Corp.* (C.D. Cal. May 9, 2011) 2011 WL 1827228, at *2 (Fischer, J.). That provides an additional reason for granting review and recognizing that *Cruz* and *Broughton* cannot survive the intervening, inconsistent decisions of the U.S. Supreme Court.

Sincerely,

Donald M. Falk

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cc: Counsel on attached proof of service

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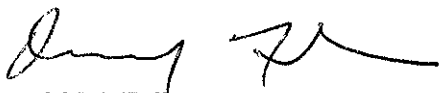
Sincerely,



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CERTIFICATE OF SERVICE
S195850

I, Kristine Neale, declare as follows:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is: Two Palo Alto Square, Suite 300, 3000 El Camino Real, Palo Alto, California 94306-2112. On September 21, 2011, I served the foregoing document(s) described as:

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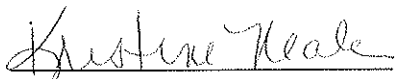
I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 21, 2011, at Palo Alto, California.



Kristine Neale