Case No. S141502

IN THE SUPREME COURT OF CALIFORNIA

ROBERT GENTRY,
Plaintiff and Petitioner,

vs.

SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent,

CIRCUIT CITY STORES, INC.
Real Party in Interest.

After a Decision by the California Court of Appeal,
Second Appellate District, Division 5, No. B169805

Superior Court for the County of Los Angeles
Honorable Thomas L. Wilhite, Jr., Presiding
Case No. BC280631

[PROPOSED] BRIEF OF *AMICI CURIAE* TRIAL LAWYERS FOR PUBLIC JUSTICE, ASIAN LAW CAUCUS, ASIAN PACIFIC AMERICAN LEGAL CENTER, CALIFORNIA RURAL ASSISTANCE FOUNDATION, HASTINGS CIVIL JUSTICE CLINIC, IMPACT FUND, THE KATHERINE AND GEORGE ALEXANDER COMMUNITY LAW CENTER, LA RAZA CENTRO LEGAL, INC., LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA, THE LEGAL AID SOCIETY OF SAN FRANCISCO – EMPLOYMENT LAW CENTER, AND MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND IN SUPPORT OF PETITIONER ROBERT GENTRY

Laura L. Ho, Bar No. 173179
Joseph E. Jaramillo, Bar No. 178566
GOLDSTEIN, DEMCHAK, BALLER, BORGEN & DARDARIAN
300 Lakeside Drive, Suite 1000
Oakland, CA 94612
(510) 763-9800
(510) 835-1417 (Fax)

Attorneys for Amici Curiae

Leslie A. Bailey, #232690
Trial Lawyers for Public Justice
555 12th Street, Suite 1620
Oakland, CA 94607
(510) 622-8150
(510) 622-8155 (Fax)
Attorney for Amicus Curiae
Trial Lawyers for Public Justice

Gen Fujioka, #116727
Asian Law Caucus
720 Market Street, Suite 500
San Francisco, CA 94102
(415) 896-1701
(415) 896-1702 (Fax)
Attorney for Amicus Curiae
Asian Law Caucus

Julie Su, #174279
Asian Pacific American Legal Center
1145 Wilshire Blvd., 2nd Floor
Los Angeles, CA 90017
(213) 977-7500 ext. 240
(213) 977-7595 (Fax)
Attorney for Amicus Curiae
Asian Pacific American Legal Center

Cynthia Rice, #87630
California Rural Assistance Foundation
405 14th Street, Suite 300
Oakland, CA 94612
(510) 835-2478
(510) 446-3057 (Fax)
Attorneys for Amicus Curiae
California Rural Assistance Foundation

Donna Ryu, #124923
Hastings Civil Justice Clinic
100 McAllister Street, Suite 300
San Francisco, CA 94102
(415) 557-7887
Attorney for Amicus Curiae
Hastings Civil Justice Clinic

Jocelyn Larkin
Impact Fund
125 University Avenue
Berkeley, CA 94710-1616
(510) 845-3473
(510) 845-3654 (Fax)
Attorney for Amicus Curiae
Impact Fund

Margarita Prado Alvarez, #80546
Katharine and George Alexander Community Law Center
1030 The Alameda
San Jose, CA 95126
(408) 288-7030, ext. 245
(408) 288-3581 (Fax)
Attorney for Amicus Curiae
Katharine and George Alexander Community Law Center

Anamaria Loya, #151584
Hillary Ronen, #228606
La Raza Centro Legal
474 Valencia Street, Suite 295
San Francisco, CA 94103
(415) 575-3500
(415) 255-7593 (Fax)
Attorneys for Amicus Curiae
La Raza Centro Legal

Robert Rubin, #85084
Philip Hwang, #185070
Lawyers' Committee for Civil Rights of the San Francisco Bay Area
131 Steuart Street, Suite 400
San Francisco, CA 94105
(415) 543-9444
(415) 543-0296 (Fax)
Attorneys for Amicus Curiae
Lawyers' Committee for Civil Rights of the San Francisco Bay Area

Michael Gaitley, #141248
Legal Aid Society – Employment Law Center
600 Harrison Street, Suite 120
San Francisco, CA 94107
(415) 864-8848
(415) 864-8199 (Fax)
Attorney for Amicus Curiae Legal Aid Society-Employment Law Center

Cynthia Valenzuela, #186804
Mexican-American Legal Defense & Educational Fund
634 S. Spring Street, 11th Floor
Los Angeles, CA 90014
(213) 629-2512
(213) 629-0266 (Fax)
Attorney for Amicus Curiae
Mexican-American Legal Defense & Educational Fund

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I. INTRODUCTION

Amici curiae are organizations representing low income individuals who often cannot safeguard their fundamental wage and hour and civil rights without the class action device. *Amici* increasingly encounter low-wage workers whose ability to pursue class-wide relief is curtailed by arbitration agreements that prohibit the pursuit of a class action. *Amici* submit this brief to explain how contract provisions that prohibit class action, such as the one embedded in the arbitration agreement of Real Party in Interest Circuit City, Inc. ("Circuit City"), would dramatically impact the ability of low-wage workers to vindicate their rights under California law if they are enforced.

The Court of Appeal below, in *Gentry v. Super. Ct.* (2006) 37 Cal.Rptr.3d 790, erred in upholding Circuit City's prohibition on class actions. *Amici* are particularly concerned about the blatant deficiencies in the Court of Appeal's substantive unconscionability analysis, and the argument of this brief is focused on that aspect of the decision.[1] The Court of Appeal erroneously suggested that wage and hour cases such as the present one fall outside the reach of this Court's landmark holding in *Discover Bank v. Super. Ct.* (2005) 36 Cal.4th 148 [30 Cal.Rptr.3d 76], because they purportedly involve larger damage awards that provide more incentive for individual suits than in consumer cases. However, the Court of Appeal neglected to consider other factors not present in the consumer context that could render bans on employment-related class actions exculpatory, and therefore substantively unconscionable, by insulating

[1] *Amici* join in Petitioner's argument that the arbitration agreement and class action ban are procedurally unconscionable.

employers from liability. Unlike consumers, workers depend on their employment to provide for their livelihood and thus legitimately fear retaliation by their employers that could have severe economic consequences. In addition, the Court of Appeal did not take into account the woefully inadequate state of public enforcement of California's wage and hour laws, which highlights the need for private enforcement through class actions. These factors, when combined with the relatively small size of most wage and hour claims, imbue class action bans such as Circuit City's with an exculpatory effect because they create significant barriers to employees' pursuit of individual litigation.

The exculpatory effect of these factors is particularly acute when low-wage workers are prevented from seeking class-wide relief. Low-wage workers who depend on each paycheck to make ends meet, and undocumented workers who not only fear losing their jobs, but also are susceptible to criminal sanction and deportation, are particularly unlikely to file individual litigation. Limited or non-English speaking workers face language barriers that may deter them from pursuing relief, prevent them from understanding the consequences of a class action ban, or do not allow them to understand that their rights are being violated in the first place. Low-wage workers who work vast amounts of overtime will not have the time or the resources to pursue individual litigation even when they realize they are being exploited. Thus, the class action ban not only deprives the most vulnerable workers of what may be their only viable means of relief, it also removes any incentive for employers to comply with the wage and hour laws.

Moreover, the black letter law of California is that a contract is substantively unconscionable where its terms are unfairly one-sided, and

this Court recently held, in *Discover Bank, supra*, 36 Cal.4th at p. 161, that a prohibition on class actions in a contract between parties of unequal bargaining power is "indisputably one-sided" where it works exclusively to the stronger party's advantage. Yet, the Court of Appeal completely failed to examine this aspect of Circuit City's class action ban.

If affirmed, the Court of Appeal's decision will embolden other employers to adopt similar class action bans that will prevent workers from vindicating their rights, which will in turn undermine this state's fundamental public policy of protecting workers from oppressive conditions. Low-wage workers, who are the most in need of their unpaid wages, will be the group most severely impacted by class action bans because they are the group most unable to secure adequate individual relief. *Amici* thus urge this Court to reverse the Court of Appeal's decision.

II. STATEMENT OF THE CASE

Petitioner Robert Gentry ("Petitioner") was employed as a customer service manager for Circuit City. Circuit City classifies its customer service managers as exempt managerial or executive employees who are not entitled to overtime compensation. Petitioner brought a class action suit, alleging that Circuit City misclassified himself and other salaried customer service representatives as exempt, when their actual job duties made them non-exempt employees entitled to overtime pay. (*Gentry*, *supra*, 37 Cal.Rptr.3d at p. 791.)

Circuit City moved to compel arbitration, and Petitioner argued that various provisions of the arbitration agreement were unconscionable, including the class action ban. The class action ban specifically provides that "[t]he Arbitrator shall not consolidate claims of different [employees] into one proceeding, nor shall the Arbitrator have the power to hear the

arbitration as a class action." (*Gentry*, *supra*, 37 Cal.Rptr.3d at pp. 791-92.) At the time, the Courts of Appeal were split on the enforceability of class action bans, and *Discover Bank v. Super. Ct.* (2002) 105 Cal.App.4th 326 [129 Cal.Rptr.2d 393], rev'd (2005) 36 Cal.4th 148, held that the Federal Arbitration Act ("FAA") preempted the trial court from applying state contract law to find such a prohibition unconscionable. (*Gentry*, *supra*, 37 Cal.Rptr.3d at p. 792.) The trial court elected to follow the Court of Appeal's now-overruled decision and ordered Petitioner to arbitrate his claims on an individual basis. Petitioner sought review, but the Court of Appeal denied the petition, noting that the issue of the enforceability of class action bans was before this Court. (*Ibid.*)

In a landmark decision, this Court resolved the appellate split in *Discover Bank, supra,* 36 Cal.4th at p. 171, holding that the FAA does not preempt the application of state substantive law to arbitration agreements. In addition, it found the class action prohibition at issue in *Discover Bank* to be unconscionable as a one-sided, exculpatory contract that operated to insulate the credit card company from liability. (*Id.* at p. 161.) This Court remanded the present case for reconsideration in light of that decision.

On reconsideration, the Court of Appeal narrowly applied selected language from *Discover Bank* to find that Circuit City's class action ban was not unconscionable. The Court of Appeal construed the holding of *Discover Bank* to apply only to a *consumer* contract of adhesion involving small amounts of damages, or "a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." (*Gentry*, *supra*, 37 Cal.Rptr.3d at p. 794.) Rather than engage in a complete legal analysis of unconscionability, the Court of Appeal's narrow and truncated review of Circuit City's arbitration agreement essentially distinguished

Discover Bank on its facts and mechanically concluded that "[t]he infirmities that plagued the *Discover Bank* class action [ban] are not present here." (*Ibid.*)

As set forth below, Circuit City's class action ban, if enforced, would serve as an exculpatory clause immunizing the corporation from liability under California's worker protection laws. The Court of Appeal's decision was therefore in error and must be reversed.

III. ARGUMENT

A. The Class Action Ban Embedded In Circuit City's Arbitration Clause Is Substantively Unconscionable Because It Is Effectively An Exculpatory Clause.

1. The Court of Appeal Erred By Focusing Only On The Size Of The Damages To The Exclusion Of Other Factors That Render Circuit City's Class Action Ban Exculpatory.

Discover Bank explained that class action bans may be found substantively unconscionable when they "operate effectively as exculpatory contract clauses that are contrary to public policy." (*supra*, 36 Cal.4th at p. 161 [citing Civ. Code § 1668].) Although class action bans "are not in the abstract, exculpatory clauses," they may have an exculpatory effect where "„the class action is . . . the only effective way to halt and redress [a company's] exploitation.'" (*Ibid.* [quoting *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 446 (97 Cal.Rptr.2d 179)].) Although the Court in *Discover Bank* went on to analyze the specific consumer contract and the small size of damages at issue, it did not in any way foreclose the application of the public policy against exculpatory contract clauses to employment contracts.

Indeed, the underlying policy of preventing parties from insulating themselves from liability clearly applies to the wage and hour context. While a primary factor contributing to the exculpatory nature of class action bans in the consumer context is the small amount of damages, other factors allow employers to insulate themselves from liability with a class action ban.[2] Unlike consumers, employees depend on their jobs to earn a living and are subject to economically harmful retaliation. (See, e.g., *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 745 [9 Cal.Rptr.3d 544] ["a lawsuit means challenging an employer in a context that may be perceived as jeopardizing job security and prospects for promotion"].) As set forth more fully below in Sections III.A.2, the threat of retaliation is a significant impediment to an employee's pursuit of an individual lawsuit, which works in combination with inadequate government enforcement of the wage and hour laws and the relatively small size of most claims to prevent employees, and particularly low-wage workers, from seeking

[2] In *Discover Bank,* this Court considered the views of other jurisdictions in finding the class action ban in that case unconscionable. (See 36 Cal.4th at p. 161 [citing *Leonard v. Terminix Intern. Co. L.P.* (Ala. 2002) 854 So.2d 529 (class action ban and limitation of damages terms unconscionable]; *State v. Berger* (2002) 211 W.Va. 549 [limitation on class action rights unconscionable]; *Powertel, Inc. v. Bexley* (Fla. Dist. Ct. App. 1999) 743 So.2d 570 [same].) Courts in other jurisdictions recognize that factors other than the size of damages can contribute to the exculpatory nature of a class action ban. For example, in *Muhammad v. County Bank of Rehoboth Beach* (N.J. Aug. 9, 2006) __A.2d__, 2006 WL 2273448, *10, the New Jersey Supreme Court found that "the public interest at stake" in the ability of plaintiff and those similarly situated to pursue their statutory rights overrode enforcement of the class action bar at issue. In addition to the small amount of damages per class member at stake, the court considered other factors that impeded the pursuit of individual relief, including the complicated financial arrangements and multiple out-of-state entities involved. (*Ibid*. cf. *Kristian v. Comcast Corp.* (1st Cir. 2006) 446 F.3d 25, 58 [class action ban unenforceable because of the complexity involved in pursuing individual anti-trust actions].)

redress for violations in the absence of a class action. Thus, as one court has noted, employees require even more protection than "[c]onsumers, who face significantly less economic pressure. . . ." (*Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 97 [7 Cal.Rptr.3d 267].)

Other recent decisions confirm that the Court of Appeal's myopic focus on the size of the claims to the exclusion of other considerations was in error. These decisions recognize that class action bans "may be found unconscionable in a variety of circumstances, some of them not confined to small sums of money." (*Cohen v. DirecTV, Inc.* (2006) 142 Cal.App. 4th 1442, 1455 [48 Cal.Rptr.3d 813].) For example, in *Independent Assn. of Mailbox Center Owners, Inc. v. Super. Ct.* (2005) 133 Cal.App.4th 396 [34 Cal.Rptr.3d 659], the court found a ban on class actions in the arbitration clauses of franchise agreements was unconscionable without regard to the size of the claims due to important public policy implications. The 35 named plaintiffs sought "extensive monetary and injunctive relief," including "over $470,000 [in] lost investment. . . ." (*Id.* at p. 404, fn. 4.) The court found it significant that the franchise agreements "resemble employment agreements to the extent that the franchisees' livelihoods are involved and subject to contractual arbitration for dispute resolution," and thus implicated "broad statutory arguments" and "the public interest." (*Id.* at p. 410.) The court also relied on the "clear disparity in the bargaining power of franchisors versus franchisees," similar to the employer-employee relationship, in reaching its decision. (*Id.* at p. 407.)

Similarly, a federal court applying Massachusetts law found a class action ban in an employer's dispute resolution program to be unconscionable without regard to the size of claims in an overtime case brought under federal and state law. (See *Skirchak v. Dynamics Research*

Corp. Inc. (D. Mass. 2006) 432 F.Supp.2d 175, 177, 180-81.) The court found the class action ban inconsistent with the federal Fair Labor Standard Act's "purpose of protecting the class of employees that possesses the least bargaining power in the workforce: „the unprotected, unorganized and lowest paid of the nation's working population.'" (*Id.* at p. 181 [quoting *Brooklyn Sav. Bank v. O'Neill* (1945) 342 U.S. 697, 707, fn. 18 (72 S. Ct. 512)].) The court also noted that the class action prohibition "may effectively prevent . . . employees from seeking redress of [wage and hour] violations." (*Ibid.*)

The Court of Appeal's unduly narrow substantive unconscionability analysis here failed to take into consideration these factors that operate to substantially limit the ability of Circuit City's employees to obtain relief for violations of their wage and hour rights, thereby giving the class action ban an exculpatory effect that is contrary to public policy. Indeed, Circuit City's attempt to ban such cases strikes at the heart of California's strong public policy of protecting workers' rights, and significantly impairs the ability of workers to obtain both retrospective and injunctive relief that could improve their overall economic status. (See Section III.D. *infra*.) The Court of Appeal's failure to consider these important factors constitutes fatal legal error.

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2. Circuit City's Class Action Ban Is Exculpatory Because The Threat Of Employer Retaliation, The Inadequacy Of Public Agency Enforcement, And The Relatively Small Size Of Wage And Hour Claims, In Combination, Make The Pursuit of Individual Relief Difficult And Unlikely.

a. Employees May Be Too Fearful Of Retaliation To Pursue Individual Litigation Against Their Employers.

The Court of Appeal failed to consider the propensity of employers to insulate themselves from liability by the implied threat of retaliation against their employees. The experience of *amici* is that named plaintiffs in workers' rights class actions are routinely subjected to inordinate scrutiny and discipline in the workplace, which will often include termination. Class actions protect the rights of workers who are reluctant to pursue individual actions against their employer with whom they must continue a necessary economic relationship. (Conte & Newberg, *Newberg On Class Actions* (4th ed. 2002) § 24:61.) However, an employer might well decide that an individual retaliation case is a far more manageable risk than a certified class action; especially if there is case law approving the one-sided, class action ban.

Courts recognize that current employees often face retaliation and may be unlikely to bring an individual action. (See *Bell*, *supra*, 115 Cal.App.4th at p. 745; *Olympic Club v. Super. Ct.* (1991) 229 Cal.App.3d 358, 363-64 [282 Cal.Rptr.1]; *Smellie v. Mount Sinai Hospital* (S.D. N.Y.) 2004 WL 2725124 *4.) Employers, "by virtue of the employment relationship, may exercise intense leverage." (*National Labor Relations Bd. v. Robbins Tire and Rubber Co.* (1978) 437 U.S. 214, 240 [98 S.Ct. 2311].) "Not only can the employer fire the employee, but job assignments

can be switched, hours can be adjusted, wage and salary increases can be held up, and other more subtle forms of influence exerted." (*Ibid.*) Judicial recognition of such intimidation is confirmed by studies that suggest that, despite explicit retaliation protections under wage and hour law, "being fired is widely perceived to be a consequence of exercising certain workplace rights." (Weil & Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace* (Fall 2005) 27 Comp. Lab. L & Pol'y J. 59, 83.) Thus, many employees with legitimate claims for back overtime wages may not pursue their remedies for the very real fear of retaliation and coercion.

Although the risks and difficulties of pursuing workers' rights violations on an individual basis confront employees throughout multiple industries and income brackets, they remain especially poignant for the workers *amici* represent – low-wage workers who are often monolingual or limited English speakers and may be unfamiliar with their legal rights. (See *Wang v. Chinese Daily News, Inc.* (C.D. Cal. 2005) 231 F.R.D. 602, 614 [noting the risks faced by non-English speaking immigrant class members if they had to proceed individually].) They are particularly vulnerable to retaliation due to their dependence on each pay check and their tendency to work in low-skilled jobs where employers consider them expendable. These workers, who disproportionately include women and minorities, are all too often victims of minimum wage and overtime violations. (See, e.g., Foo, *The Informal Economy: The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation* (1994) 103 Yale L.J. 2179, 2182 (Foo); Lobel, *Class and Care: The Roles of Private Intermediaries in the In-Home Care Industry in the United States and Israel* (2001) 24 Harv. Women's L.J. 89,

91.) They are also victims of workplace discrimination who "may well be reluctant to become involved in [individual discrimination] actions for reasons that spring from the very practice of discrimination." (*Olympic Club, supra*, 229 Cal.App.3d at pp. 363-64.)

Undocumented workers, whose right to wages is specifically protected by California law (see Lab. Code § 1171.5), are also particularly susceptible to exploitation by unscrupulous employers due to their reluctance to complain for fear of retaliation. (Lung, *Overwork and Overtime* (2005) 39 Ind. L.Rev. 51, 66-67 (Lung); Foo, *supra*, at p. 2182.) Such workers "confront the harsh[] reality that, in addition to possible discharge, their employer will likely report them to [Immigration and Customs Enforcement] and they will be subject to deportation proceedings or criminal prosecution. . . ." (*Rivera v. NIBCO, Inc.* (9th Cir. 2004) 364 F.3d 1057, 1064.) Most undocumented workers would rather refrain from bringing an action than disclose their immigration status. (See *Flores v. Amigon* (E.D.N.Y. 2002) 233 F.Supp.2d 462, 465, fn. 2; *see also Ansoumana v. Gristede's Operating Corp.* (S.D.N.Y. 2001) 201 F.R.D. 81, 86.) Undocumented workers' "fear of deportation exacerbates the usual fear of reprisals that silences many low-wage employees." (Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulations* (Mar. 2005) 105 Colum. L.Rev. 319, 348 (Estlund).)[3] Thus, employers often prefer to hire undocumented rather than documented workers because their

[3] Those courageous enough to seek individual relief have faced severe consequences, including termination and deportation. (See, e.g., Hendricks, *Worker wins her rights but loses hope; Someone told feds she's here illegally*, S.F. Chron. (May 11, 2006) [undocumented worker won claim for payment of San Francisco's minimum wage, but was terminated by her employer and reported to U.S. Immigration and Customs Enforcement].)

circumstances require them to tolerate a greater level of abuse. (Williams, *Model Enforcement of Wage and Hour Laws for Undocumented Workers: One Step Closer to Equal Protection Under the Law* (Spring 2006) 37 Colum. Hum. Rts. L.Rev. 755, 756; Berman, *The Needle and the Damage Done: How* Hoffman Plastics *Promotes Sweatshops and Illegal Immigration and What to do About it* (2004) 13-S Kan. J. L. & Pub. Pol'y 585, 588.)[4]

Circuit City's class action ban has an exculpatory effect because the unequal nature of the employment relationship deters employees from pursuing individual actions for violations of their rights. In the employment context, "individual suits as an alternative to a class action are not practical" precisely because of workers' legitimate fear of reprisal. (*Ansoumana*, *supra*, 201 F.R.D. at p. 85-86.) Indeed, absent a class action, no action whatsoever may be brought. (*Ste. Marie v. Eastern Railroad Assn.* (S.D.N.Y. 1976) 72 F.R.D. 443, 449.) Class actions are designed to ensure that those who cannot reasonably be expected to confront their employer can nevertheless have their rights protected. (See *Does I v. GAP Inc.* (D. N. Mar. I. May 10, 2002) 2002 WL 1000073 *8 ["The putative class members' . . . alleged fear of retaliation by the defendants make it improbable that the putative class members would even pursue individual actions"]; *Ingram v. Coca-Cola Co.*, (N.D. Ga. 2001) 200 F.R.D. 685, 701 [in certifying a settlement class on behalf of workers alleging discrimination, the court recognized that many employees could not bear

[4] For example, janitorial service is a low-wage sector that, in California and elsewhere, "relies heavily upon undocumented immigrant labor and often operates as a virtual outlaw in violation of immigration laws, tax laws, wage and hour laws, and other labor protections." (Estlund, *supra*, at p. 352.)

risk of retaliation of individual litigation].) Victims of unlawful wage and hour practices and discrimination are thus more likely to step forward when they can do so with the support of their co-workers through the auspices of a class action.

b. Agency Enforcement Is Not Adequate To Fully Vindicate Workers' Rights.

Another factor contributing to the exculpatory effect of Circuit City's class action ban is the inadequacy of agency enforcement of California's wage and hour laws. Wage and hour violations are widespread throughout California, and in low-wage industries the majority of violations often go without redress. (See, e.g., Asian Pacific American Legal Center Of Southern California (APALC), *Reinforcing The Seams: Guaranteeing The Promise Of California's Landmark Anti-Sweatshop Law, An Evaluation Of Assembly Bill 633 Six Years Later* (2005) p. 31;[5] Bar-Cohen & Carrillo, University of California Institute for Labor and Employment, *Labor Law Enforcement in California*, 1970-2000 (2002) p. 135 (Bar-Cohen & Carrillo);[6] Weil, *Compliance with the Minimum Wage: Can Government Make a Difference?* (Jan. 2003) pp. 9-13, 45;[7] Walsh, *The FLSA Comp Time Controversy: Fostering Flexibility or Diminishing Worker Rights?* (1999) 20 Berkeley J. Emp. & Lab. L. 74, 106.)

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[5] <http://www.sweatshopwatch.org/media/pdf/ AB633Report.pdf ?%20PHPSESSID=db99612b80eb06fd14b75b6771eccd61> [as of Dec. 7, 2006].

[6] <http://repositories.cdlib.org/ile/scl2002/Bar-CohenCarrillo/> [as of Dec. 7, 2006].

[7] Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=368340 [as of Dec. 7, 2006].

Members of this Court have recognized the dismal situation of "diminished public resources for the enforcement of the state's labor laws." (*Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1094 [32 Cal.Rptr.3d 483] (conc. opn. of Moreno, J.).) California's wage and hour enforcement agency, the Department of Industrial Relations' Division of Labor Standards Enforcement ("DLSE"), simply does not have the staff or resources to file workforce-wide enforcement actions in the hundreds of cases referred there every year.[8] DLSE's budget and staffing allocations have simply not kept pace with the agency's increased responsibilities and the growth in the size of the state's workforce. (Bar-Cohen & Carrillo, *supra*, at p. 135.) In 2000, there were only 27 staff members for 26.78 million workers. (Ong & Rickles, *Analysis of the California Labor and Workforce Development Agency's Enforcement of Wage and Hour Laws* (UCLA 2004) pp. 48-49.[9]) In addition, several key activity measures, such as the number of investigations, citations, and penalties assessed, have failed to increase in proportion to the expansion of funding and staffing that has occurred. (Bar-Cohen & Carrillo, *supra*, at p. 135.) Even though a growing number of non-profits and stakeholders now work to identify and report non-compliance to the DLSE, including *amici*, "DLSE's staffing levels are still not adequate to address the overwhelming caseload." (*Id.* at

[8] In California, the Industrial Welfare Commission ("IWC") is empowered to issue "wage orders" regulating wages, work hours, and working conditions with respect to several industries and occupations. (See Lab. Code, §§ 70-74, 1173, 1178, 1178.5, 1182.) The DLSE enforces the state's labor laws, including the IWC orders. (See *id.*, §§ 61, 95, 98-98.8, 1193.5.) DLSE enforces the labor laws through its Bureau of Field Enforcement, and through adjudication of claims filed by workers with the Labor Commissioner.

[9] <http://repositories.cdlib.org/lewis/cspp/17> [as of Dec. 7, 2006].

pp. 143-44.) Indeed, the DLSE does not even "attempt to investigate the majority of the complaints it receives."[10] (Schloss & Cohorn, *Assessing the Amended Labor Code Private Attorney General Act*, L.A. Lawyer (Feb. 2006) p. 5.) Months and even years go by before complaints are reviewed, and the DLSE files only a handful of cases each year.

Similarly, "[i]nadequate enforcement of existing anti-discrimination laws due to underfunding of federal and state civil rights agencies is among [the] reasons cited for the 'subtle' forms of discrimination against minority individuals and groups that exist in American society." (See *Race Discrimination: Report to U.N. Panel Lauds Recent Changes at EEOC for Improved Attacks on Race Bias*, 185 Daily Lab. Rep. (BNA) (Sept. 22, 2000) p. A-8.) Since 2001, the federal Equal Employment Opportunity Commission (EEOC) has lost more than 20% of its workforce and is facing severe budget cuts despite a backlog of complaints that is expected to rise to over 47,000 by next year. (Pulliam, *Proposed Budget Cuts Draw Congressional Scrutiny*, Daily Briefing: American Management Assn. (Mar. 24, 2006).)[11] In 2005 alone, the EEOC received 75,428 discrimination charges, but it filed only 383 lawsuits nationwide. (United Nations Human Rights Committee, Report On Women's Human Rights In The United States Under The International Covenant On Civil And

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[10] While DLSE issues less than 200 overtime and minimum wage citations each year (see DLSE, *Annual Report on the Effectiveness of Bureau of Field Enforcement* (March 1, 2005), a single class action case can secure relief for hundreds of thousands of California workers. (See, e.g., Final Statement of Decision Regarding Injunctive Relief, *Savaglio v. Wal-Mart Stores, Inc.*, No. C-835687 (Sup. Ct. of Cal., Alameda County, Sept. 27, 2005) [injunctive relief and $172,000,000 in damages for a class of 115,000 workers].)

[11] <http:// govexec.com/dailyfed/0306/032406p1.htm> [as of Dec. 7, 2006].

Political Rights (July 2006) p. 8.)[12] Likewise, the California Department of Fair Housing and Employment ("DFEH") received 16,119 discrimination complaints in Fiscal Year 2003-04, but reached an administrative decision or filed suit on only a small fraction of that amount. (See DFEH, Fiscal Year: 2003-2004, Cases Filed: by Law and District,[13] and DFEH, Fiscal Year: 2003-2004, Cases Closed: Count of Closing Category (Employment Cases).[14])

Nor can individual complaints before the California Labor Commissioner adequately address the vast number of wage and hour violations, particularly those experienced by low-wage and immigrant workers. Employees who turn to the Labor Commissioner often find long delays both in the resolution of their claims and the collection of any unpaid wages. (See Ha, *An Analysis and Critique of KIWA's Reform Efforts in the Los Angeles Korean American Restaurant Industry* (2001) 8 Asian L.J. 111, 124 (Ha).)[15] Many immigrant workers who file wage claims abandon them along the way because they cannot endure the long delay, cannot understand the letters they receive, or are unable to travel to attend the hearings. (*Ibid.*) Studies reveal that nearly a third of the

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[12] <http://www.nowfoundation.org/issues/economic/GenderShadowReport.pdf> [as of Dec. 7, 2006].

[13] <http://www.dfeh.ca.gov/Reports/ViewStats.asp?D1=FY200304&D2=LawsAll&B1=Submit> [as of Dec. 7, 2006].

[14] <http://www.dfeh.ca.gov/Reports/ViewStats.asp?D1= FY200304&D2=CategoryEmployment&B1 =Submit> [as of Dec. 7, 2006].

[15] In fact, farm worker plaintiffs are challenging the State Labor Commissioner's statewide practice of failing to process wage claims in a timely manner. (See First Amended Petition for Writ of Mandate, and Complaint for Declaratory Relief, *Corrales, et al v. Donna Dell, Labor Comm'r for the State of California*, No. 05 CS 00421, Super. Court of Cal., Sacramento County, April 14, 2005.)

immigrants who have filed wage claims have become discouraged and given up their claims. (Lee, *Easy Prey: Exploiting Immigrants*, L.A. Times (Jan. 13, 1997) p. A1.)

Moreover, if an employer's arbitration agreement and class action ban are both enforced, the individual wage claim before the Labor Commissioner and class arbitration may both be unavailable to the worker. (See McIlwee, *Circuit City Meets the California Labor Commissioner: Does the FAA Preempt Administrative Claims?* (2004) 40 Cal. W. L.Rev. 383, 401.) "Employers should not be able to insulate themselves from such claims by imposing mandatory arbitration and precluding class actions within arbitration." (Estlund, *supra*, at p. 400.)

c. Wage And Hour Claims Predictably Involve Damages Claims That Are Too Small To Be Litigated On An Individual Basis.

The relatively small size of wage and hour claims also contributes to the exculpatory effect of Circuit City's class action ban. Courts recognize that these small-sized claims are an impediment to individual litigation, especially since employers are likely to marshal their resources in defending any action by an employee. (See, e.g., *Chase v. AIMCO Properties, L.P.* (D.D.C. 2005) 374 F.Supp.2d 196, 198 [recognizing that "individual wage and hour claims might be too small in dollar terms to support a litigation effort"]; *Scholtisek v. The Eldre Corp.* (W.D.N.Y. 2005) 229 F.R.D. 381, 394 [class members not likely to file individual suits because of the small size of their claims]; *Frank v. Eastman Kodak Co.* (W.D.N.Y. 2005) 228 F.R.D. 174, 183-184 [same]; *Taylor v. United States* (Ct. Fed. Cl. 1998) 41 Fed. Cl. 440, 447 [same]; *Hannon v. United States* (Ct. Fed. Cl. 1994) 31 Fed. Cl. 98, 103-104 [same]; *Scott v. Aetna Services,*

Inc. (D. Conn. 2002) 210 F.R.D. 261, 268 ["the cost of individual [wage and hour] litigation is prohibitive"]; *cf. Earley v. Super. Ct.* (2000) 79 Cal.App.4th 1420, 1435 [95 Cal.Rptr.2d 57] [noting that fees and costs could dwarf potential overtime recoveries of individual plaintiffs].)

Low-wage workers' claims are particularly small and their recoveries are relatively low. (See, e.g., APALC, *supra*, at p. 2 [average wage claim submitted by garment workers to DLSE ranged from approximately $5,000 to $7,000, with settlement amounts ranging from approximately $500 to $1,500]; Senate Bill Report, SB 5240, Wash. Senate Committee on Labor, Commerce, Research and Dev't (Mar. 1, 2005) (Wash. S.B. 5420 Report) [noting that the average wage claim received by Washington's enforcement agency is $200-$400].)

Workers may lack the time or resources to retain competent counsel and incur the expense of individually pursuing their claims, particularly when they are compelled to work overtime. (See *Skirchak*, *supra*, 432 F.Supp.2d at p. 181; *Ansoumana*, *supra*, 201 F.R.D. at p. 86; *Wang*, *supra*, 231 F.R.D. at p. 614 [noting that class members "would face an enormous imbalance of resources if they were to take on the largest Chinese language newspaper in North America on an individual basis"].) Indeed, as one legal services clinic professor notes, "the wage and hour cases of the working poor . . . tend to involve relatively small dollar figures, prohibitively small for a private attorney." (Brodie, *Post-Welfare Lawyering: Clinical Education and a New Poverty Law Agenda* (2006) 20 Wash.U. J.L. & Pol'y 201, 248-49.) In the absence of a class action, "a significant number of individuals are deprived of their day in court because they are otherwise unable to afford independent representation." (*Jarvaise v. Rand Corp.* (D.D.C. 2002) 212 F.R.D. 1, 4.) Thus, without the economic benefit of

class representation many workers are simply forced to forego compensation to which they are entitled. (See *Earley*, *supra*, 79 Cal.App.4th at p. 1435; *Skirchak*, *supra*, 432 F.Supp.2d at p. 181.) Similarly, "[e]mployment discrimination claims, like civil rights violations, generally need nonmonetary remedies, or damage recoveries too small individually to support separate litigation without a class action." (Conte & Newberg, *supra*, at § 24:61 [citing authorities].)

This Court's resolution of the present dispute will undoubtedly shape lower courts' consideration of class action bans that involve other small-sized wage and hour claims. In addition to misclassifying employees and requiring them to work overtime without overtime compensation, employers in low-wage industries may also deprive their employees of individually small but cumulatively substantial wages through a plethora of unlawful practices, including tip-pooling (see *Jameson v. Five Feet Restaurant, Inc.* (2003) 107 Cal.App.4th 138 [131 Cal.Rptr.2d 771] [unlawful to require employee to share tip with manager]), failing to provide meal and rest breaks (see *Cicairos v. Summit Logistics, Inc*. (2005) 133 Cal.App.4th 949 [35 Cal.Rptr.3d 243]), unlawful deductions from wages (see, e.g., *Harris v. Investor's Business Daily, Inc.* (2006) 138 Cal.App.4th 28 [41 Cal.Rptr.3d 108]), failing to compensate for mandatory pre- and post-shift work and/or travel time (see, e.g., *IBP, Inc. v. Alvarez* (2005) 546 U.S. 21 [126 S. Ct. 514] [12-14 minutes spent changing clothes and showering and few minutes spent walking between locker rooms and production area are compensable under federal law]), and failing to pay all wages due upon discharge (see, e.g., Order Granting Motion for Remand, *Yarbrough v. Labor Ready, Inc*, No. C-01-1086 (N.D. Cal. June 14, 2001) at p. 8 [noting that temporary day laborer plaintiff's claim for 30 days of

wages under Labor Code § 203 was only $1,800].) Class action bans in these instances would likely insulate employers from liability based on the small size of the claims alone.

B. Low-Wage Workers Face Other Barriers That Prevent Them From Pursuing Individual Claims.

The Court of Appeal's erroneous substantive unconscionability analysis, if upheld, could have particularly catastrophic consequences for the low-wage workers that *amici* serve. The threat of retaliation, inadequate public enforcement of the state's wage and hour laws, the relatively small size of their claims, and the language and financial barriers they face make it extremely difficult for low-wage workers to obtain relief in the absence of class actions. These barriers are compounded by the fact that low-wage, immigrant, and limited or non-English-speaking workers are often unfamiliar with their entitlement to minimum wage and overtime pay. (See Ha, *supra*, at p. 122.) Others, who may be aware of their rights generally, remain unsure how to pursue their complaints. (See *ibid.*) Some, due to the transient nature of their work, may lack the stability necessary to pursue a claim in one location that could be time-consuming. (See *Ansoumana*, *supra*, 201 F.R.D. at p. 86.)

Even those who wish to pursue their claims for unpaid wages find few places to turn for support and assistance. They are unlikely to be represented by labor unions and unable to afford or identify private counsel willing to represent clients with wage claims amounting to a couple of thousand dollars at the most. (See Ha, *supra*, at p. 123.) Some individuals who find themselves in this situation have the option of turning to *amici* for assistance. However, due to limited resources and the high demand for their services, *amici* can only hope to represent a fraction of the workers

who are faced with wage and hour violations. Thus, the only effective avenue for relief for most low-wage workers is the class action vehicle that employers like Circuit City seek to prohibit through unconscionable and exculpatory employment agreements.

C. The Court Of Appeal Erred In Not Considering The One-Sided Nature Of Circuit City's Class Action Ban.

The Court of Appeal ignored the one-sidedness of Circuit City's class action prohibition. As this Court explained in *Discover Bank*, "„[s]ubstantively unconscionable terms may take various forms, but may generally be described as unfairly one-sided.'" (*supra*, 36 Cal.4th at p. 160 [quoting *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071 (130 Cal.Rptr.2d 892)]; see also *Nagrampa v. Mailcoups, Inc.* (9th Cir. Dec. 4, 2006, No. 03-15955) __ F.3d __, 2006 WL 3478345 *17.) Contract terms that are unfairly one-sided must be presumed substantively unconscionable unless the employer can demonstrate that they are actually bilateral. (*Armendariz v. Found. Health Psychare Servs., Inc.* (2000) 24 Cal.4th 83, 115-18 [99 Cal.Rptr.2d 745].) In determining whether an arbitration term is sufficiently bilateral, California courts look beyond facial neutrality and examine the actual effect of the challenged provision. (*Ting v. AT&T* (9th Cir. 2003) 319 F.3d 1126, 1149 [citing *ACORN v. Household Internat., Inc.* (N.D. Cal. 2002) 211 F.Supp.2d 1160, and *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094 (118 Cal.Rptr.2d 862)].)

In *Ingle v. Circuit City Stores, Inc.* (9th Cir. 2003) 328 F.3d 1165, the Ninth Circuit Court of Appeals applied California law to find Circuit City's class action ban substantively unconscionable in an employment

discrimination case because it operated as a unilateral bar in favor of the employer.[16] As the Ninth Circuit explained:

> We cannot conceive of any circumstances under which an employer would bring a class proceeding against an employee. Circuit City, through its bar on class-wide arbitration, seeks to insulate itself from class proceedings while conferring no corresponding benefit to its employees in return. This one-sided provision proscribing an employee's ability to initiate class-wide arbitration operates solely to the advantage of Circuit City. Therefore, because Circuit City's prohibition of class action proceedings in its arbitral forum is manifestly and shockingly one-sided, it is substantively unconscionable.

(*Id.* at p. 1176.) Similarly, the court in *Skirchak, supra*, concluded that a class action ban contained in an employer's dispute resolution program was "so one-sided as to be oppressive." (432 F.Supp.2d at p. 180.)[17]

This Court in *Discover Bank* also found the one-sided nature of the class action prohibition significant in its substantive unconscionability

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[16] The Court of Appeal in the present case distinguished *Ingle* on procedural unconscionability grounds (see *Gentry*, *supra*, 37 Cal.Rptr.3d at p. 794, fn. 2), but failed to consider *Ingle*'s substantive unconscionability analysis, which is directly applicable here, especially because "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term[s] is unenforceable[.]" (*Armendariz*, *supra*, 24 Cal.4th at p. 114.)

[17] Recent decisions of other courts reinforce the principle, ignored by the Court of Appeal in the present case, that a nominally mutual class action ban is effectively one-sided and substantively unconscionable where there is no reasonable possibility that the corporate entity will institute a class action against the weaker bargaining parties. (See *Lowden v. T-Mobile, USA, Inc.* (W.D. Wash. Apr. 13, 2006, No. C05-1482P) 2006 WL 1009279, *6; *Kinkel v. Cingular Wireless, LLC* (Ill. App. 2005) 357 Ill.App.3d 556, 565 [828 N.E.2d 812]; *Luna v. Household Financial Corp. III* (W.D. Wash. 2002) 236 F.Supp.2d 1166, 1179.)

analysis: "such class action [bans] are indisputably one-sided. Although styled as a mutual prohibition on representative or class actions, it is difficult to envision the circumstances under which the provision would negatively impact Discover [Bank]. . . ." (36 Cal.4th at p. 161.)

By contrast, the Court of Appeal completely ignored this fundamental element of substantive unconscionability in examining the class action prohibition in Circuit City's arbitration agreement. Although it noted in reciting the standard that substantive unconscionability "'may generally be described as unfairly one-sided,'" (*Gentry, supra*, 37 Cal.Rptr.3d at p. 793 [citation omitted]), the Court of Appeal completely failed to apply this fundamental precept in its substantive unconscionability analysis. Instead, it focused its analysis narrowly on whether "individually small sums of money" were involved, which is relevant to the exculpatory effect of a class action ban. (*Id.* at pp. 794-95.) However, the one-sided nature of a contract is a completely independent basis for finding its terms substantively unconscionable. (See *Discover Bank*, *supra*, 36 Cal.4th at p. 161 [first noting that the class ban is exculpatory, then explaining "[m]oreover, such class action or arbitration [bans] are indisputably one-sided"].)

Circuit City's class action ban is unfairly one-sided and therefore substantively unconscionable because "by barring class [actions] in a contract of its own drafting, the defendant 'sought to create for itself virtual immunity from class or representative actions despite their potential merit, while suffering no similar detriment to its own rights.'" (*Ingle*, *supra*, 328 F.3d at p. 1175 [citing *Szetela*, *supra*, 97 Cal.App.4th at pp. 1100-02].) The Court of Appeal's wholesale failure to consider the one-sided nature of Circuit City's class action prohibition constitutes fatal legal error.

D. Class Actions Remain Necessary To Enforce California Workplace Protection Laws And To Remedy Epidemic Wage And Hour Violations.

Circuit City's unconscionable and exculpatory class action ban undermines fundamental public policies of this state. California has a "public policy in favor of full and prompt payment of [] wages [that] is fundamental and well established. . . ." (*Smith v. Super. Ct.* (2006) 39 Cal.4th 77, 82 [45 Cal.Rptr.3d 394].) California's state courts and Legislature have repeatedly affirmed that the wage and hour laws must be enforced broadly to effectuate their remedial purposes. (See, e.g., *Earley*, *supra*, 79 Cal.App.4th at pp. 1427, 1429-30; *Ramirez v. Yosemite Water Co. Inc.* (1999) 20 Cal.4th 785, 794 [85 Cal.Rptr.2d 844]; *California Grape and Tree Fruit League v. Industrial Welfare Com.* (1969) 268 Cal.App.2d 692, 703 [74 Cal.Rptr. 313]; see also Lab. Code § 90.5(a); *Eight Hour Day Restoration and Workplace Flexibility Act of 1999*, 1999 ch. 134, § 2(g).) This Court recently reaffirmed that California's public policy of enforcing wage and hour protections works in tandem with its "public policy which encourages the use of the class action device." (*Sav-on v. Super. Ct.* (2004) 34 Cal.4th 319, 340 [17 Cal.Rptr.3d 906] [quoting *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 469 (174 Cal.Rptr. 515)].). Thus, "wage and hour disputes (and others in the same general class) routinely proceed as class actions." (*Prince v. CLS Transportation, Inc.* (2004) 118 Cal.App.4th 1320, 1328 [13 Cal.Rptr.3d 725].)[18]

[18] California courts have recognized that the pursuit of class-wide relief for violation of statutory protections is a substantive right. (See, e.g., *Cable Connection, Inc. v. DirecTV* (2006) 143 Cal.App.4th 207, 226 [49 Cal.Rptr.3d 187]; *Klussman v. Cross Country Bank* (2005) 134 Cal.App.4th 1283, 1296 [36 Cal.Rptr.3d 728].) Recent decisions of other jurisdictions recognize the importance of class action relief in the employment context in finding class action bans unconscionable. For example, the West Virginia

Public policy also supports the availability of the class action device to enforce workers' civil rights. As the United States Supreme Court recognized in 1977, "suits alleging racial or ethnic discrimination are often by their nature class suits, involving classwide wrongs." (*E. Tex. Motor Freight Sys., Inc. v. Rodriguez* (1977) 431 U.S. 395, 405 [97 S.Ct. 1891].) When Federal Rule of Civil Procedure 23, which governs private class litigation in federal court, was amended in 1966, the Federal Rules advisory committee observed that civil rights actions were particularly appropriate for resolution under one of its provisions. (See Fed. R. Civ. P. 23(b), Advisory Committee Notes ["Illustrative [of a (b)(2) class] are various actions in the civil rights field where a party is charged with discriminating unlawfully against a class. . . ."].) Likewise, the California Court of Appeal recently affirmed that, in enacting the Fair Employment and Housing Act, Government Code section 12940, *et. seq.,* the California Legislature intended to empower both the state enforcement agency and private citizens to prosecute pattern or practice claims:

> [S]ection 12961 of the statute explicitly authorizes either an aggrieved person or the Director of Fair Employment and Housing to file a complaint on behalf of a group or class where an unlawful practice adversely affects a group or class in a similar manner.

(*Alch v. Superior Court* (2004) 122 Cal.App.4th 339, 379-80 [19 Cal.Rptr.3d 29].)

(continued …)
Supreme Court noted that "[c]lass action relief – including the remedies of damages, rescission, restitution, penalties, and injunction – is often at the core of the effective prosecution of consumer, employment, housing, environmental, and similar cases." (*Berger, supra*, 211 W.Va. at p. 562; see also *Skirchak*, *supra*, 432 F.Supp.2d at pp. 180-81.)

The alternative to class actions – leaving workers to pursue relief individually – contravenes the important public policies set forth above because it results in "random and fragmentary enforcement" of the employer's wage obligations. (*Bell*, *supra*, 115 Cal.App.4th at p. 745.) It also prevents courts from enjoining future violations of multiple individuals' rights in one action. (*Paige v. California* (9th Cir. 1996) 102 F.3d 1035, 1039 [injunction providing class-wide relief requires a certified class]); *Zepeda v. United States Immig. & Naturalization Serv.* (9th Cir. 1985) 753 F.2d 719, 727-28 [same].) Even where workers are able to secure representation and pursue individual relief, they may not be able to obtain or use evidence suggesting a pattern and practice of unlawful behavior by their employer. (See *Celestine v. Petroleos de Venezuella SA* (5th Cir. 2001) 266 F.3d 343, 355 [pattern and practice method of proof not appropriate for an individual discrimination case].) As a result, employers can resolve individual claims on a piecemeal basis, while maintaining their unlawful practices and policies.

If employers like Circuit City are able to stifle the enforcement of wage and hour protections through class action bans, workers and the public may experience a significant decline in quality of life in contravention of California public policy. Wage and hour laws represent the Legislature's acknowledgement of the profound impact of overtime on workers and their families. Employees who regularly work large amounts of overtime experience a diminution in their overall quality of life. (See Livingston, *Overdosing on Overtime; Workers See Companies Increase Their Hours Instead of Workforce*, Cleveland Plain Dealer (Oct. 2, 1994) p. 1A.) Family life suffers when either or both parents are kept away from home for an extended period of time on a daily basis. (See *Eight Hour Day*

Restoration and Workplace Flexibility Act of 1999, 1999 ch. 134, § 2(e); A.B. 60, 1999 Cal. Leg., Reg. Sess. 3rd Reading, (May 27, 1999); Golden & Jorgensen, Econ. Pol. Inst., *Time after Time: Mandatory Overtime in the U.S.* Economy (2002) p. 1 (Golden & Jorgensen).[19]) The power of employers to require overtime at the expense of workers' private time undermines the ability of workers to spend more time with their families and to participate in civic activities that help create healthy communities. (See Lung, *supra*, at p. 56.)

Another goal of California wage and hour law is to increase employment by spreading the amount of available work. (*Huntington Memorial Hosp. v. Super. Ct.* (2005) 131 Cal.App.4th 893, 902 [32 Cal.Rptr.3d 373].) By requiring 150% of the regular wage, overtime laws apply financial pressure upon employers to reduce the overtime hours of individual worker and hire more workers. (See Hamermesh & Trejo, *The Demand for Hours of Labor: Direct Evidence from California, Nat'l Bureau of Econ. Research*, Working Paper No. 5973 (1997) at pp. 13-14 [premium pay requirements for overtime serve as a financial deterrent for employers to impose overtime hours].)[20] "Thus, overtime wages are another example of a public policy fostering society's interest in a stable job market." (*Gould v. Md. Sound Indus., Inc.* (1995) 31 Cal.App.4th 1137, 1148 [37 Cal.Rptr.2d 718] [citation omitted].)[21]

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[19] <http://www.epinet.org/content/cfm/briefing papers_bp120> [as of Dec. 7, 2006].

[20] <http://ssrn.com/abstract=120668> [as of Dec. 8, 2006].

[21] Between March 1991 and January 1998, if "employers had hired new workers instead of increasing overtime, nearly twice as many production workers would have been hired." (Hetrick, *Analyzing the Recent Upward Surge in Overtime Hours* (2000) 123 Monthly Lab. Rev. 30, 32.) This would have translated into 571,000 full-time jobs. *Ibid.*

In addition, the wage and hour laws "protect not only the health and welfare of the workers themselves, but also the public health and general welfare." (*California Grape etc. League*, *supra*, 268 Cal.App.2d at p. 703.) Not only do the workers themselves and their families suffer when they are deprived of wages earned and due to them, but utilities, landlords, credit card companies suffer by not getting paid by these workers. (See Wash. SB 5420 Report, *supra*.) Moreover, co-workers and bystanders may be harmed, as excessive overtime is linked with increased work-related injuries, stress, depression, fatigue, repetitive motion injuries, illness, and increased mortality. (See *Eight Hour Day Restoration and Workplace Flexibility Act of 1999*, 1999 ch. 134, § 2(d); U.S. Dep't of Health & Human Servs., *Overtime and Extended Work Shifts: Recent Findings on Illnesses, Injuries and Health Behaviors* (2004) p. 27;[22] see also Schor, *Worktime in Contemporary Context: Amending the Fair Labor Standards Act*, 70 Chi.-Kent L.R. 157, 161 (1994); Golden & Jorgensen, *supra*, at p. 3; Schwarz, *Always on the Job, Employees Pay with Health*, N.Y. Times (Sept. 5, 2004) p. 1.) In "California, courts have recognized that wages are highly significant to . . . society in general which will be burdened with supporting [an individual who] is denied his or her wages." (*Phillips v. Gemini Moving Specialists* (1998) 63 Cal.App.4th 563, 574 [74 Cal.Rptr.2d 29].)

The class action device also remains critical for remedying wrongs that might otherwise escape redress if individual workers were required to bring their own claims. (*Earley*, *supra*, 79 Cal.App.4th at pp. 1434-35.) As in other areas of law where an entity can unjustly enrich itself by wrongfully

[22] <http://www.cdc.gov/niosh/docs/2004-143/pdfs/2004-143.pdf> [as of Dec. 7, 2006].

charging or withholding money from large numbers of vulnerable people, the class action is often the only effective way to halt and redress such exploitation. (*Linder*, *supra* 23 Cal.4th at p. 446; see also *Blue Chip Stamps v. Super. Ct.* (1976) 18 Cal.3d 381, 385 [134 Cal.Rptr. 393] [class actions appropriate "when denial of class relief would result in unjust advantage to the wrongdoer."].) Class action bans chill "„the effective protection of interests common to a group'" (*Ingle*, *supra*, 328 F.3d at p. 1176, fn. 13 [quoting *Keating v. Super. Ct.* (1982) 31 Cal.3d 584, 609 (183 Cal.Rptr. 360)]), and "prevent the cost effective use of class action litigation that can end abusive practices by large corporations in those instances in which individual claims are ineffective." (*Schwartz v. Alltel Corp*. (Ohio App. June 29, 2006, No. 86810) 2006 WL 2243649 *5.)[23]

[23] California class actions have been effective in addressing these harms and achieving significant results for vulnerable, low-wage workers, who otherwise may not have been able to vindicate their rights on an individual basis. These include workers in low-wage industries often earning little more than the minimum wage, if that, including farm workers, temporary day laborers, janitors, and laundry workers. (See, e.g., Plaintiffs' Judgment and Plan of Distribution, *Amaral v. Cintas Corp.*, No. HG 03-103046 (Super. Ct. of Cal., Alameda County, May 11, 2006) [judgment for over 200 laundry workers for payment of City of Hayward's living wage]; Civil Minute Order Re Final Approval of Class Action Settlements, *Flores, et al., supra*, at p. 4 [approval of settlement for overtime compensation denied supermarket janitors]; *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 587 [94 Cal.Rptr.2d 3] [recognizing the right to compensation for mandatory travel and waiting time in a class action on behalf of agricultural workers]; *Medrano v. D'Arrigo Brothers Company* (N.D. Cal. 2004) 336 F.Supp.2d 1053, 1055, 1061 [summary judgment in favor of farm workers for denial of compensation, including travel and waiting time]; Order Approving Class Action Settlement; Dismissing With Prejudice and Judgment Thereon, *Ramirez v. Labor Ready, Inc.*, No. 836186-2 (Super. Ct. of Cal., Alameda County, Aug. 2, 2004) [approving settlement for class of temporary day laborers for denial of wages and unreimbursed business expenses].) These cases probably would not have been viable as individual lawsuits in the absence of the class action device because of the barriers low-wage workers face in pursuing individual relief.

Circuit City's class action ban, if upheld, would work just such an injustice, in contravention of California public policy.

IV. CONCLUSION

For the reasons stated above, *amici* respectfully request this Court to reverse the decision of the Court of Appeal.

Dated: December __, 2006 Respectfully submitted,

Laura L. Ho, Bar No. 173179
Joseph E. Jaramillo, Bar No. 178566
GOLDSTEIN, DEMCHAK, BALLER, BORGEN & DARDARIAN
300 Lakeside Drive, Suite 1000
Oakland, CA 94612
(510) 763-9800; (510) 835-1417 (Fax)
Attornevs for Amici Curiae

BRIEF FORMAT CERTIFICATION PURSUANT
TO RULE 14(c)(1) OF THE CALIFORNIA RULES OF COURT

Pursuant to Rule 14(c)(1) of the California Rules of Court I certify that Amici's [PROPOSED] BRIEF OF *AMICI CURIAE* TRIAL LAWYERS FOR PUBLIC JUSTICE, ET AL., IN SUPPORT OF PETITIONER ROBERT GENTRY is proportionately spaced, has a typeface of 13 points and contains 8,442 words.

Dated: December __, 2006

_____
Laura L. Ho

PROOF OF DELIVERY

Case: Gentry v. Superior Court
Case No. S141502

STATE OF CALIFORNIA)
) SS
COUNTY OF ALAMEDA)

I have an office in the county aforesaid. I am over the age of eighteen years and not a party to the within entitled action. My business address is 300 Lakeside Drive, Suite 1000, Oakland, California 94612.

I declare that on the date hereof I served a copy of

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* TRIAL LAWYERS FOR PUBLIC JUSTICE, ET AL. IN SUPPORT OF PETITIONER ROBERT GENTRY;

[PROPOSED] BRIEF OF AMICI CURIAE TRIAL LAWYERS FOR PUBLIC JUSTICE, ET AL., IN SUPPORT OF PETITIONER ROBERT GENTRY

by causing a true copy thereof to be mailed by depositing the same in a sealed envelope in the U.S. mail with postage prepaid and addressed to:

Clerk, California Court of Appeal
Second Appellate District, Division 5
300 South Spring Street, 2nd Floor
Los Angeles, CA 90013

Rex Darrell Berry
Berry & Block, LLP
2150 River Plaza Drive, Suite 415
Sacramento, CA 95833
Counsel for Real Party in Interest

Office of the Attorney General
Consumer Law Section
300 South Spring Street
Los Angeles, CA 90013

Office of the District Attorney
210 West Temple Street, 18th Floor
Los Angeles, CA 90012

Clerk, Los Angeles Superior Court
111 North Hill Street
Los Angeles, CA 90012

Dennis P. Riordan
Riordan & Horgan
523 Octavia Street
San Francisco, CA 94102
Counsel for Petitioner

Ellen Lake
Law Offices of Ellen Lake
4230 Lakeshore Avenue
Oakland, CA 94610-1136
Counsel for Petitioner

Matthew Righetti
John Glugoski
Righetti Law Firm, P.C.
466 Montgomery Street, 14th Floor
San Francisco, CA 94104
Counsel for Petitioner

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

Executed at Oakland, California on December __, 2006.

Printed Name	Signature