No. S282521

IN THE
SUPREME COURT OF CALIFORNIA

EPICENTRx, INC., et al.
Petitioners,

v.

THE SUPERIOR COURT OF
SAN DIEGO COUNTY,
Respondent,

EPIRx, L.P.
Real Party in Interest

Court of Appeal, Fourth Appellate District, Division 1
Case No. D081670

San Diego County Superior Court
Case No. 37-2022-00015228, Hon. Timothy B. Taylor

APPLICATION TO FILE BRIEF OF AMICI CURIAE BERKELEY CENTER FOR CONSUMER LAW AND ECONOMIC JUSTICE, CONSUMERS FOR AUTO RELIABILITY AND SAFETY, CALIFORNIA ASSOCIATION FOR MICROENTERPRISE OPPORTUNITY, EAST BAY COMMUNITY LAW CENTER, IMPACT FUND, LEGAL AID AT WORK, PRIVACY RIGHTS CLEARINGHOUSE, AND PUBLIC JUSTICE IN SUPPORT OF PLAINTIFF/REAL PARTY IN INTEREST AND AFFIRMANCE

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APPLICATION TO FILE BRIEF AS AMICI CURIAE

Pursuant to California Rules of Court, rule 8.520(f), the organizations described below respectfully request permission to file the attached brief as amici curiae in support of Plaintiff/Real Party in Interest EpiRx and Affirmance.

This application is timely made within 30 days of the filing of the reply brief on the merits. No party or counsel for any party in the pending appeal authored the proposed amicus brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief, and no person or entity made a monetary contribution intended to fund the preparation or submission of the brief other than the amici curiae, their members, or their counsel in the pending appeal.

I. INTEREST OF AMICI CURIAE

Amici curiae are nonprofit organizations that represent and advocate for economic justice on behalf of consumers, workers, and vulnerable communities in California and nationwide. The people that amici represent regularly seek to enforce rights provided under California's consumer protection and workplace laws, some of which expressly prohibit waiver by contract. These individuals and entities risk losing their ability to exercise important legislatively guaranteed rights if courts in California apply forum selection clauses that routinely appear in contracts with merchants and employers and require consumers and workers to litigate disputes in states

that do not guarantee the same or comparable rights. Amici curiae therefore have a significant interest in ensuring that these expressions of deeply held California public policy enacted by the Legislature remain available to the people they are designed to protect.

The **Center for Consumer Law and Economic Justice** is a research and advocacy center housed at the UC Berkeley School of Law. Through participation as amicus in this Court, in the U.S. Supreme Court, and in other major cases around the state and throughout the nation, the Center seeks to develop and enhance protections for consumers and to foster economic justice. The Center appears in this proceeding to ensure that forum selection clauses – particularly those in adhesion contracts or other non-negotiated pre-dispute documents – cannot be used to circumvent state law and deny California consumers the ability to access their state's nonwaivable consumer protection laws.

California Association for Microenterprise Opportunity (CAMEO) is California's statewide micro-business network, made up of over 405 organizations, agencies, and individuals dedicated to furthering micro-business development in California with small and micro-business financing such as loans and credit, technical assistance, and business management training. CAMEO has a strong interest in ensuring that forum selection clauses do not deprive California's small businesses of important protections available under California law.

Consumers for Auto Reliability and Safety (CARS) is a national non-profit auto safety and consumer advocacy organization based in Sacramento dedicated to preventing motor vehicle-related fatalities, injuries, and economic losses through legislative and regulatory advocacy, public education, outreach, aid to victims, and related activities. CARS has been the official sponsor of multiple laws enacted in California to expand and improve protections under the Song-Beverly Consumer Warranty Act, a nonwaivable statute, for tens of millions of consumers – including individual entrepreneurs, small business owners, and members of the U.S. Armed Forces – from seriously defective and unsafe vehicles, predatory auto sales and financing practices, and other harmful scams. CARS has a strong interest in ensuring that Californians actually benefit from those laws, rather than allowing them to be circumvented by out-of-state corporations that violate them and exploit California's vast and robust market through specious venue clauses.

The **East Bay Community Law Center** (EBCLC) is a woman of color led and woman of color centered organization and a provider of direct legal services and clinical education. We offer eight distinct practice areas, which are holistically focused on advancing systemic solutions to end racial inequities. We believe that when we invest in the vision, strategies, and solutions of women of color, we center dignity, uplift families, and advance systems-change work that transforms all communities. As part of our

practice, we bring forth impact cases to challenge the unjust acts of large institutions. In one such case, our elderly, disabled, and indigent client was subject to the boilerplate terms of use imposed by a large multinational bank as a requirement to access her public benefits. The bank attempted to transfer the case to Detroit and use Michigan choice of law, where the client has no dealings, based on the fine print in the terms of use that were unilaterally set by the bank. In doing do, the bank would have stripped the client of the rights she is entitled to in California.

The **Impact Fund** is a non-profit legal foundation that provides strategic leadership and support for impact litigation to achieve economic, environmental, racial, and social justice. The Impact Fund provides funding, offers innovative training and support, and serves as counsel for impact litigation across the country. The Impact Fund has served as party or amicus counsel in major civil rights class actions, including cases enforcing protections of essential rights guaranteed under California law on behalf of underrepresented and vulnerable communities.

Legal Aid at Work is a nonprofit legal advocacy organization that partners with people to help them understand and assert their workplace rights, and advocates for employment laws and systems that empower low-paid workers and marginalized communities. Legal Aid at Work has appeared numerous times in federal and state courts, both as counsel for plaintiffs and in an amicus curiae capacity. Legal Aid at Work has a strong

interest in ensuring that private employment contracts cannot strip workers of their fundamental workplace rights under California law.

Public Justice is a national public interest advocacy organization that specializes in precedent-setting, socially significant civil litigation, with a focus on fighting to preserve access to justice for victims of corporate and governmental misconduct and preserving the civil justice system as an effective tool for holding the powerful accountable. To further its goal of defending access to justice for workers, consumers, and others harmed by corporate wrongdoing, Public Justice has long used impact litigation to fight abuses of contractual provisions forced on consumers and workers, including arbitration provisions and forum-selection clauses.

Privacy Rights Clearinghouse (PRC) is a nonprofit organization focused on increasing access to information, policy discussions, and meaningful rights so that data privacy can be a reality for everyone. Because PRC's advocacy calls for the continued development of state law to regulate data privacy, the organization has a strong interest in ensuring that forum selection clauses do not strip Californians of their rights guaranteed under California law.

II. NEED FOR FURTHER BRIEFING

The proposed amici curiae believe that further briefing will assist the Court by situating this case—premised on a provision in unilaterally drafted articles of incorporation—within the broader panoply of private contracts

that contain forum selection clauses that, if enforced, would implicate public rights. The brief will also benefit the Court by detailing the many statutory protections that the Legislature has enacted to benefit Californians and made unwaivable in order that they not be stripped away by clauses in private contracts. The brief also explains and recommends a useful framework, adopted by many courts of appeal including the court below, to assess whether transfer to a contractually designated forum would in fact violate the state's public policy and deny Californians their legislatively granted rights.

III. CONCLUSION

For the foregoing reasons, the proposed amici curiae respectfully request that the Court accept the accompanying brief for filing in this case.

Dated: April 3, 2024

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

RULES

REGULATIONS

OTHER AUTHORITIES

INTERESTS OF AMICI CURIAE

Amici curiae are nonprofit organizations that represent and advocate for economic justice on behalf of consumers, workers, and vulnerable communities in California. Many of the individuals that amici represent are constrained by forum selection clauses in contracts with merchants and employers that require them to litigate disputes in other states that may not afford them the same rights guaranteed by California. Enforcement of these clauses, especially those that were not freely or voluntarily negotiated, thus may strip individuals of critical state law protections. Many of these rights are established in important consumer protection, employment, and public interest statutes that expressly may not be waived, including by private contract. Amici curiae—which regularly invoke these laws in their advocacy before this Court and other California courts—have an interest in ensuring that these expressions of deeply held California public policy remain available to the people they are intended to protect.

Statements of interest of individual amici curiae are available in the accompanying application. (Cal. Rules of Court, rule 8.520(f).)

INTRODUCTION AND SUMMARY OF ARGUMENT

This case arises at the intersection of two powerful legal currents: the general enforceability of forum selection clauses, and the ability of a state to legislate for the protection of its residents. Where, as here, the freedom to contract and the state's police power collide, the rule accepted

by the nation's courts for more than a century applies: the former must give way to the latter. (See *Lochner v. New York* (1905) 198 U.S. 45 [holding that liberty of contract prevents states from limiting the number of hours an employee may work in a day]; *West Coast Hotel v. Parrish* (1937) 300 U.S. 379, 391 [abrogating the rule of *Lochner* and holding that freedom of contract requires only that a state economic regulation be "reasonable in relation to its subject and . . . adopted in the interests of the community"].) This Court, too, has long recognized that parties' freedom to determine the terms of their relationship by contract must, in the event of a conflict, yield to public policy as determined by the duly elected representatives of the people of the state. (See *Beeman v. Anthem Prescription Management, LLC* (2013) 58 Cal.4th 329, 363 [acknowledging rejection of *Lochner* and noting "we have long repudiated judicial second-guessing of legislative judgments concerning economic means and ends under principles of due process of law"]; *Kremer v. Earl* (1891) 91 Cal. 112, 117 ["If, upon a review of all the state legislation upon the subject, . . . a contract appears to contravene the design and policy of the laws, a court . . . will not enforce it"].) Forum selection clauses warrant no deviation from this rule.

In practice, California courts have recognized that such conflicts arise in only a minority of cases, and they grant requests for enforcement of forum selection clauses in the great majority of cases in which it is sought. Indeed, courts in this state enforce forum selection clauses approximately

eighty percent of the time, the third-highest rate among all state-court systems with a significant volume of decisions on the topic.[1]

The rule in this state is therefore straightforward. As a general matter, a court will enforce a contractual provision that designates another state as the site of any lawsuit between the parties. But where a critical, deeply held, or explicitly stated public policy is at stake—for example, when the Legislature has determined that a waiver of any right enacted for the benefit of the public is "contrary to public policy and shall be unenforceable and void" (Civ. Code, § 1751 [California Legal Remedies Act (CLRA)]; accord Bus. & Prof. Code, § 20010 [California Franchise Relations Act (CFRA)]—that determination cannot be overcome by private agreement. Therefore, only where the party favoring the pre-selected forum can establish that that state's law can guarantee a comparable right may the forum selection clause be enforced. Otherwise, the case must stay in California.

This practice accords with fundamental tenets of public policy in the Golden State. Laws protecting consumers, workers, and particularly vulnerable communities reflect the firmly held principles of millions of Californians and their elected representatives. It would contravene deep-

[1] See, e.g., Coyle, *"Contractually Valid Forum" Selection Clauses* (2022) 108 Iowa L. Rev. 127, 161 (finding that federal courts in California enforce forum selection clauses 80 percent of the time).

rooted public policy in the state to allow these protections to be wiped away by the click of a box in an online contract.

Similarly, the California Constitution protects the right to a trial by jury (Cal. Const., art. I, § 16), as both parties to this case acknowledge. (Pet. Br. at p. 17; Resp. Br. at p. 2.) Though the jury right may be waived "as prescribed by statute," the Legislature has determined that it may only be waived in one of six specific ways. (Code Civ. Proc., § 631, subd. (f); see *Grafton Partners v. Super. Ct.* (2005) 36 Cal.4th 944, 952 (*Grafton*) [holding the six methods are exclusive]; *Exline v. Smith* (1855) 5 Cal. 112 [deciding methods for waiving a jury trial must be prescribed by the Legislature, not the courts].) Those methods do not include the use of a forum selection clause in a business's letters of incorporation.

In a case involving only sophisticated players—unlike consumers and employees, for example—the inclination to permit transfer where the agreement has been reached voluntarily and negotiated at arm's length is considerable. But two obstacles remain to creating such an exception in this case. First, there was no meeting of the minds here: EpicentRx unilaterally adopted the forum selection clause as part of its certificates of incorporation after the transactions at issue her arose. (Resp. Br. at pp. 4-5.) Second, even if the parties had secured an arm's-length agreement, it is difficult to find authority for this Court—rather than the Legislature—to shape the state's public policy in the context. (See *Grafton*, *supra*, 36 Cal. 4th at p. 955

["California constitutional history reflects an unwavering commitment to the principle that the right to a civil jury trial may be waived only as the Legislature prescribes, even in the face of concerns that the interests of the parties and the courts would benefit from a relaxation of this requirement"].)

Those principles dictate the outcome of this proceeding. Unless the party seeking to litigate in the designated forum can show that the right to a civil jury trial will be preserved there, the Constitution and Legislature—and Supreme Court—of this state have all made clear that transfer is not an option. Since EpicentRx has made no such showing, the decision of the court of appeal should be affirmed.

ARGUMENT

I. FORUM SELECTION CLAUSES SHOULD BE ENFORCED ONLY WHEN THEY REPRESENT THE COLLECTIVE DECISION OF THE PARTIES AND DO NOT VIOLATE THE PUBLIC POLICY OF THE STATE.

As a rule, forum selection clauses should be enforced as the expression of the parties' decision to resolve their disputes in the courts of a particular state. California law and practice hew to this principle: unless there is doubt that the designated state represents a forum freely chosen by the parties, or concern that enforcement of the measure would contravene a bedrock or expressly stated public policy of California, the case should be moved to the designated state's courts.

A. California Courts Enforce Forum Selection Clauses In The Great Majority Of Cases.

Recognizing the general validity of agreements to litigate disputes in a designated state, California courts regularly enforce forum selection clauses that are "freely and voluntarily . . . negotiated at arm's length." (*Smith, Valentino & Smith, Inc. v. Super. Ct.* (1976) 17 Cal.3d 491, 496 (*Smith*).) Courts will stop the transfer only when enforcement would be "unreasonable." (*Ibid*.; see also *Olinick v. BMG Entertainment* (2006) 138 Cal.App.4th 1286, 1292, 1305 [enforcing clause in employment agreement negotiated by sophisticated parties with counsel where the selected forum offered adequate remedies].) California courts routinely and generally enforce forum selection clauses—indeed, eight of every ten times they are asked to do so.[2] That is a rate higher than all but two other states with a significant volume of litigation.[3] That is, in both state and federal courts in California, enforcement of forum selection clauses is granted in all but a limited subset of cases.[4]

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[2] Coyle & Richardson, *Enforcing Outbound Forum Selection Clauses in State Court* (2021) 96 Ind. L.J. 1089, 1100-1102.

[3] *Ibid*.

[4] See, e.g., Coyle, *"Contractually Valid Forum" Selection Clauses*, *supra* note 1, at 161 (finding that federal courts in California enforce forum selection clauses 80 percent of the time); Coyle & Richardson, *supra* note 2, at pp. 1100-1102.

That California courts favor enforcement of forum selection clauses reflects key interests embodied in those contractual provisions: the "important role" such clauses play in facilitating commerce (*America Online, Inc. v. Super. Ct.* (2001) 90 Cal.App.4th 1, 11-12 (*AOL*)); respect for commercial parties' mutual decision to designate the most appropriate forum to handle their disputes (*ibid*.); and the principle of comity, by which "the laws of one state are frequently permitted by the courtesy of another to operate in the latter for the promotion of justice, where neither that state nor its citizens will suffer any inconvenience from the application of the foreign law." (*Advanced Bionics Corp. v. Medtronic, Inc.* (2002) 29 Cal.4th 697, 707.)

B. Courts Do Not Enforce Forum Selection Clauses When Enforcement Would Violate a Clearly Articulated Public Policy of the State.

In certain circumstances, public policy may supersede privately negotiated forum selection agreements. Courts in California will not enforce contracts made between private parties that supplant rights guaranteed by the state. (*Sheppard, Mullin, Richter Hampton, LLP v. J-M Mfg. Co.* (2018) 6 Cal.5th 59, 73 ["[A] contract is unlawful, and therefore unenforceable, if it is 'contrary to an express provision of law' or 'contrary to the policy of express law,'" quoting Civ. Code, § 1667.) In fact, one "long-standing ground for refusing to enforce a contractual term is that it would force a party to forgo unwaivable public rights." (*McGill v. Citibank,*

N.A. (2017) 2 Cal.5th 945, 962; see Civ. Code, § 3513 ["a law established for a public reason cannot be contravened by a private agreement"].) California has articulated a foundational public policy interest in protecting the rights of its residents and maintaining a forum for their disputes. (See, e.g., *Hall v. Univ. of Nev.* (1972) 8 Cal.3d 522, 525-526 [noting California's "substantial interest in providing a forum where a resident may seek whatever redress is due"]; *Thompson v. Continental Insurance Co.* (1967) 66 Cal.2d 738, 742-43 ["Th[e] limitation on the Forum non conveniens doctrine reflects a state policy that California residents ought to be able to obtain redress for grievances in California courts, which are maintained by the state for their benefit"].)

Even when enforcing a freely negotiated forum selection clause, this Court has recognized that a "satisfying reason of public policy" could merit denying enforcement. (*Smith*, *supra*, 17 Cal.3d at p. 495; see also *id.* at pp. 497-498 (dis. opn. of Mosk, J.) [declaring that "while the private interests of litigants may be considered, the public interest is paramount," and that "California has an overriding public policy favoring access to its courts"].)

II. THE TOUCHSTONE IN DETERMINING PUBLIC POLICY IS THE INTENT OF THE LEGISLATURE.

Although a state's public policy may be derived from other sources, the key wellspring is the intent of the Legislature. (*Safeway Stores, Inc. v. Retail Clerks Intern. Assn.* (1953) 41 Cal.2d 567, 574.) Once a law is

enrolled and chaptered, the policymaking arms of the state have expressed the collective view of the public through its elected officials. (See *Super. Ct. v. County of Mendocino* (1996) 13 Cal.4th 45, 52-53 [recognizing that the "legislative function" includes "the choice among competing policy considerations in enacting laws" and "the Governor . . . participates in the legislative process through the veto power"].) Statutory rights created or enhanced through that process may supersede contrary provisions in private contracts, including forum selection clauses. (See, e.g., *City of Santa Barbara v. Super. Ct.* (2007) 41 Cal.4th 747, 755-756, 777 [courts may not enforce a private release of liability for future gross negligence in light of public policy expressed in Civil Code section 1668 voiding contracts that exempt responsibility for one's own fraud]; *Cal. State Auto. Assn. Inter-Ins. Bur. v. Super. Ct.* (1990) 50 Cal.3d 658, 664 [courts may reject stipulated judgments that are contrary to public policy].) If a privately negotiated contractual term obligates a party to litigate in a forum that is unlikely to apply California law, the forum selection provision runs counter to the express intent of the Legislature to establish important public protections for all Californians. That intent is particularly salient when the Legislature has explicitly prohibited the waiver of certain rights that it has created or recognized by statute.

A. The Legislature May Articulate Public Policy By Statute.

This Court long ago recognized that the Legislature retains a "wide

field of discretion" to enact laws to protect the public that may override the "freedom of contract." (*Cal. Drive-In Restaurant Ass'n v. Clark* (1943) 22 Cal.2d 287, 295, 296.) This Court therefore appropriately defers to the Legislature when interpreting laws that safeguard public welfare and regulate the economy. (See, e.g., *De La Torre v. CashCall, Inc.* (2018) 5 Cal.5th 966, 991 [respecting "the Legislature's prerogative to shape economic policy through legislation . . . ."]; *Wholesale Tobacco Dealers Bur. of S. Cal. v. Nat. Candy & Tobacco Co.* (1938) 11 Cal.2d 634, 646 ["It is not for the courts . . . to determine whether or not the policy of a statute is economically sound or beneficial. That is a matter solely for the legislature"].) By the same token, because statutes are enacted by the Legislature, they merit special weight when they define the existence and scope of public policy. (See *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 185 ["Public policy as a concept is notoriously resistant to precise definition, and courts should venture into this area, if at all, with great care and due deference to the judgment of the legislative branch, lest they mistake their own predilections for public policy which deserves recognition at law"].)[5]

[5] Statutory enactments, of course, are not the sole mechanism for establishing public policy that can render a contract unenforceable, and this

California's wide-ranging regime of remedial statutes evinces the Legislature's intent to establish public policy protecting consumers, workers, and other groups subject to power imbalances. Consumer protection laws like the Consumer Legal Remedies Act (CLRA), for example, set forth a public policy "against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection." (Civ. Code, § 1760 [stating the purposes of the CLRA].) The Song-Beverly Consumer Warranty Act was similarly enacted to "protect[] purchasers of consumer goods" and "address the difficulties faced by consumers in enforcing express warranties"—i.e., private businesses' promises to fix defective goods. (*Cummins, Inc. v. Super. Ct.* (2005) 36 Cal.4th 478, 484.) Likewise, the Legislature has enacted wage-and-hour laws "to protect the workers' health and welfare" (*Dynamex Operations W. v. Super. Ct.* (2018) 4 Cal.5th 903, 952), and civil rights laws to protect vulnerable communities from discrimination. (*White v. Square, Inc.* (2019) 7 Cal.5th 1019, 1025 [interpreting the Unruh Act].)

Court has ruled that a contract or transaction may be found contrary to public policy even if the Legislature has not yet spoken to the issue. (*Sheppard, Mullin, Richter & Hampton, LLP v. J-M Mfg. Co*., *supra*, (6 Cal.5th at pp. 73, 79). Nevertheless, legislative pronouncements of public policy are afforded particular weight.

B. Antiwaiver Provisions Evince The Legislature's Intent To Outlaw Contractual Terms, Including Forum Selection Clauses, That Result In Curtailment of Public Policy Rights.

One principal method through which the Legislature may emphasize the signal importance of particular statutory protections is by expressly barring their waiver by private agreement. These legislative enactments, which either prescribe or altogether bar waiver of certain rights established in the public interest, take legal precedence over private agreements. (*Rheinhart v. Nissan North America, Inc.* (2023) 92 Cal.App.5th 1016, 1029 ["Statutory antiwaiver provisions intended to promote consumer and other public protections . . . reflect competing important public policies that can impact the enforceability of a contractual provision"], *review den.* Oct. 18, 2023.) The Legislature's intent to set public policy by establishing statutory rights and expressly prohibiting their waiver is a crucial factor militating for or against enforcement of a given forum selection clause. When a party seeking enforcement can guarantee that California's policy as articulated by the Legislature will not be surrendered by litigating outside of California, the general norm controls: the forum selection clause will be enforced. Yet when a court enforces a contractual term that results in a loss or waiver of unwaivable rights, it is fundamentally—and incorrectly—prioritizing private agreements over the clear mandates of the Legislature. (See *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 71 [explaining

that "the Legislature, and not the courts, is vested with the responsibility to declare the public policy of the state"].)

Laws containing statutory antiwaiver provisions govern all manner of transactions—from securities to franchises to home improvements to credit and debit cards. (Corp. Code, § 25701; Bus. & Prof. Code, § 7163, subd. (g); Bus. & Prof. Code, § 20010; Civ. Code, §§ 1748.14, 1748.20, 1748.32, 1749.66.) The CLRA, for example, expressly declares that waiver of any of its provisions addressing sales of tangible goods and services "is contrary to public policy and shall be unenforceable and void." (Civ. Code, § 1751; *McGill v. Citibank, N.A.*, *supra*, 2 Cal.5th at p. 954.) The Legislature has also provided that a range of remedial measures protecting consumers may not be waived by private contract, such as those dealing with consumer warranties (Civ. Code, § 1790.1 [Song-Beverly Consumer Warranty Act]); data privacy (Civ. Code, § 1789.192) [California Consumer Privacy Act]); manufactured and mobile home sales (Health & Saf. Code, § 18035, subd. (k) [Manufactured Housing Act]; Civ. Code, § 798.77 [Mobilehome Residency Law]); credit reports (Civ. Code, § 1785.36 [Consumer Credit Reporting Agencies Act]); consumer debt collection (Civ. Code, § 1788.33 [Rosenthal Fair Debt Collection Practices Act]), and certain consumer loans (Fin. Code, §§ 22066, subd. (c)(12), 22370, subd. (k)(1) [California Financing Law].)

Similarly, the Legislature has provided that certain remedial measures protecting workers cannot be waived by private agreement. The Labor Code contains a broad prohibition against waiver by private agreement of its many wage-and-hour protections for workers—even if the purported waiver is executed voluntarily. (See Lab. Code, § 219; *Schachter v. Citigroup, Inc.* (2009) 47 Cal.4th 610, 620.) Moreover, any contract that waives statutory obligations of employers to their employees is "null and void." (Lab. Code, § 2804; *Edwards v. Arthur Anderson LLP* (2008) 44 Cal.4th 937, 951-952 [declaring that employees' indemnity rights are "nonwaivable" and any agreement that does so is "against public policy"].) Recently, the Legislature enacted Senate Bill No. 1300, which bars any employer from requiring employees to sign release of claims or nondisparagement agreements that deny the employee the right to disclose information about unlawful workplace behavior such as harassment and discrimination. (Gov. Code, § 12964.5, subd. (a)(2), as amended [rendering such documents as "contrary to public policy and . . . unenforceable"].)

In addition, the Legislature has provided that protections for populations with particular vulnerabilities may not be waived. For example, healthcare providers and insurers cannot force patients to waive their medical and genetic privacy rights under the Confidentiality of Medical Information Act as a condition of receiving medical care unless through express circumstances. (Civ. Code, § 56.37, subd. (b) [declaring such

waivers "contrary to public policy and . . . unenforceable"].) Nor may students at public and charter schools—or their parents—be required to waive their rights to full and equal access to education because they have incurred educational fees. (Educ. Code, § 49014.) Finally, contracts entered by residents of nursing facilities that waive their right to sue under the Patient's Bill of Rights are "void as contrary to public policy." (Health & Saf. Code, § 1403, subd. (b)(1)(C).)

Enforcement of forum selection clauses—when they result in transfer to states that cannot guarantee litigants their California rights—contravenes the Legislature's intent to prohibit waiver of these rights. As a result, the courts of appeal have declined to enforce mandatory forum selection clauses that would force the parties to "waive or evade the application of California law to the transaction by private agreement" (*Hall v. Super. Ct.* (1983) 150 Cal.App.3d 411, 417-418 (*Hall*)), and that could instead result in "effectively circumvent[ing] California's antiwaiver statute[s]." (*Wimsatt v. Beverly Hills Weight etc. Internat.* (1995) 32 Cal.App.4th 1511, 1520-1521 (*Wimsatt*)) Those cases represent a limited but consistent exception to the default rule favoring enforcement of forum selection clauses. (See, e.g., *Verdugo v. Alliantgroup, L.P.* (2015) 237 Cal.App.4th 141, 151 (*Verdugo*) [denying enforcement of a forum selection clause delegating disputes to Texas under Texas law that "has the potential to contravene an antiwaiver statute" in the Labor Code]; *AOL*, *supra*, 90 Cal.App.4th at p. 15 (*AOL*)

[denying enforcement of a clause that "necessitate[s] a waiver of the statutory remedies of the CLRA, in violation of that law's antiwaiver provision [citation] and California public policy" in favor of Virginia law and a Virginia forum]; *Wimsatt*, *supra*, at p. 1522 [placing the burden on franchisors to show that litigation in the contract forum will not diminish in any way the substantive rights afforded franchisees under California law].)

By contrast, when California public policy does not prohibit waiver, or comparable rights are available in the designated forum state, courts regularly enforce forum selection clauses. (See, e.g., *Olinick v. BMG Entertainment*, *supra*, 138 Cal.App.4th at pp. 1303-1305 [enforcing forum selection clause and noting that FEHA did not contain an antiwaiver provision]; *CQL Original Products, Inc. v. Nat. Hockey League Player's Assn.* (1995) 39 Cal.App.4th 1347, 1356-1357 [finding "no compelling policy reasons" to deny enforcement of a forum selection clause where California's anti-forfeiture laws did not prohibit parties from agreeing to litigate in Canada and waive California law].)

C. Parties Seeking To Enforce Forum Selection Clauses That May Violate A Statutory Non-Waiver Provision Bear The Burden To Prove Enforcement Would Not Curtail An Unwaivable Right.

The signal importance of furthering the public policy of the state requires that the party favoring enforcement of a forum selection clause carry the burden of establishing that transfer would not diminish the

statutory rights of the party opposing transfer. (See *AOL*, *supra*, 90 Cal.App.4th at pp. 11-12 ["Where the effect of transfer to a different forum has the potential of stripping California [plaintiffs] of their legal rights deemed by the Legislature to be unwaivable, the burden must be placed on the party asserting the contractual forum selection clause to prove that the [statute's] antiwaiver provisions are not violated"; the proponent of transfer must show the change does not "substantially diminish the rights of California residents."].)[6]

1. The Framework Adopted by the Courts of Appeal Balances Public Policy and Private Interests.

The primacy of nonwaivable rights justifies a departure from the ordinary rules governing enforcement of forum selection clauses, which place the burden of proving why a forum section clause "should *not* be enforced" on "the party opposing enforcement of a forum selection clause." (*Verdugo*, *supra*, 237 Cal.App.4th at p. 147 ["That burden, however, is reversed when the claims at issue are based on unwaivable rights created by California statutes"].) Given the Legislature's clear intent to grant certain unwaivable rights to California litigants, it makes little sense to place the

[6] Multiple courts of appeal, including the court below, have applied formulations of this test. (See, e.g., *EpicentRx v. Super. Ct.* (2023) 95 Cal.App.5th 890, 904-907; *G Companies Management, LLC v. LREP Ariz., LLC* (2023) 88 Cal.App.5th 342, 350; *Handoush v. Lease Finance Group* (2019) 41 Cal.App.5th 729, 739; *Verdugo*, *supra*, 237 Cal.App.4th at pp. 156-157; *AOL*, *supra*, 90 Cal.App.4th at pp. 10-11; *Wimsatt*, *supra*, 32 Cal.App.4th at pp. 1521-1524.)

burden on the beneficiaries of those rights. (See *Wimsatt*, *supra*, 32 Cal.App.4th at p. 1522 [explaining that "a heavy burden on the [plaintiff] to make a strong showing that enforcement of the forum selection clause would deprive the [plaintiff] of his or her day in court . . . [and] is incompatible with the logic of the antiwaiver statute"].)

This standard adopted by the courts of appeal is carefully calibrated to ensure that contracting parties remain free to specify the forum for their disputes while safeguarding California's fundamental public policy in the relatively unusual instance that it is implicated. The standard is both balanced and practical. First, it does not mandate invalidation of forum selection clauses even when the Legislature has declared a right unwaivable. A clause may still be enforced if the proponent of transfer meets its burden to show that enforcement of a forum selection clause "would not diminish . . . unwaivable statutory rights" by proving that "the foreign forum provides the same or greater rights than California, or the foreign forum will apply California law [to] the claims at issue." (*Verdugo*, *supra*, 237 Cal.App.4th at pp. 154, 157.) In such circumstances, the court may enforce the clause. And where unwaivable statutory rights are not at issue, the ordinary presumption that forum selection clauses are enforceable reigns. Second, by placing the burden on the party seeking to litigate outside of California, the test safeguards the state's interests in ensuring that its residents are able to exercise their legislatively guaranteed rights.

2. The Framework Contemplates a Lack of Arm's-Length Negotiations in Many Contracts.

Assigning the burden according to this framework also takes account of instances when forum selection clauses in contracts are not "freely and voluntarily . . . negotiated at arm's length." (*Smith*, *supra*, 17 Cal.3d at pp. 495-496; cf. *The Bremen v. Zapata Off-Shore Co.* (1972) 407 U.S. 1, 12 & fn. 14 [holding that a forum selection clause "made in an arms-length negotiation by experienced and sophisticated businessmen" without "overweening bargaining power" should control].) These days, mandatory forum selection clauses generally fall within the now "ubiquitous" class of boilerplate terms and conditions buried in adhesive, take-it-or-leave-it contracts. (*AOL*, *supra*, 90 Cal.App.4th at p. 12.) Studies show that between forty to fifty percent of all contracts issued by publicly traded entities now contain forum selection clauses.[7]

The proliferation of forum selection clauses in form contracts has resulted in significant restraints on the ability of consumers and workers to

[7] Nyarko, *We'll See You In . . . Court! The Lack of Arbitration Clauses in International Commercial Contracts* (2018) 58 Int'l Rev. L. & Econ. 6, 12 (2019) (examining nearly a million contracts filed with the SEC and finding that almost half of all domestic contracts contained forum selection clauses); Eisenberg & Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts* (2009) 30 Cardozo L.Rev. 1475, 1506 tbl. 13 (reporting 40 percent of all contracts filed with the SEC in the study sample.)

challenge unlawful behavior in the courts of their home states.[8] Last year, the federal Consumer Financial Protection Bureau proposed a rule that would require non-bank financial institutions to register particular terms and conditions like forum selection clauses in their consumer contracts.[9] The Bureau found that these clauses specifically may "pose risks to consumers" because they designate a forum that is "so inconvenient as to eliminate the viability of pursuing legal action."[10] The Bureau brought and settled a $2.5 million lawsuit against a debt collection company that had invoked a forum selection clause in retail sales financing contracts to file over 3,500 lawsuits against military servicemembers in a state where none of the servicemembers lived or had signed the contract.[11]

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[8] Hines, *Fine Print Traps: Terms in Corporate Form Contracts That Cause the Most Harm to Consumer Rights and Protections* (2024) pp. 3-4, https://perma.cc/7TVA-XBGW. (emphasizing that forum selection and choice-of-law clauses "deprive consumers of the most applicable legal remedies" including to challenge usurious loan schemes or to file as a class action).

[9] Consumer Financial Protection Bureau, *Registry of Supervised Nonbanks That Use Form Contracts To Impose Terms and Conditions That Seek To Waive or Limit Consumer Legal Protections* (Feb. 1, 2023) 88 Fed. Reg. 6906, 6966 (to be codified at 12 C.F.R. § 1092.300(d)) (defining a "covered limitation on consumer legal protections" to include terms "specifying a forum or venue where a consumer must bring a legal action in court").

[10] *Id.* at p. 6914.

[11] Consumer Financial Protection Bureau, *CFPB and States Take Action Against Freedom Stores for Illegal Debt Collection Practices Against Servicemembers* (Dec. 18, 2014), https://perma.cc/UDQ7-UEB4.

The fact that a forum selection clause is contained in a contract of adhesion does not by itself render the clause unenforceable. (See *Cal-State Business Products & Services, Inc. v. Ricoh* (1993) 12 Cal.App.4th 1666, 1679 [holding a forum selection clause may be enforced as long as "there is no evidence of unfair use of superior power . . . . and where the covenant is within the reasonable expectations of the part[ies]"].) Nevertheless, contracts that are not the product of arm's-length negotiation do warrant judicial scrutiny, especially when their enforcement would result in a waiver of rights guaranteed by the Legislature. (See *Rockefeller Technology Investments (Asia) VII v. Changzhou SinoType Technology Co., Ltd.* (2020) 9 Cal.5th 125, 140-141 [explaining that waiver must be "voluntary, knowing, and intelligently made," and that courts must not "presume acquiescence in the loss of fundamental rights"]; Rest.2d Conf. of Laws, § 80 com. c (1988 revision) [suggesting that one relevant factor militating against enforcement of a choice-of-forum provision is "if it was contained in an adhesion or take-it-or-leave-it contract"].)

The burden-shifting standard applied by the courts of appeal takes account of these principles. Under the standard, the proponent of the clause, who also likely drafted the clause and presented it to the other party without negotiation, must demonstrate that litigating the dispute in the selected forum would not result in a diminution of any rights guaranteed by public policy. (See, e.g., *Verdugo*, *supra*, 237 Cal.App.4th at pp. 150-151

[applying the test where enforcing a standard employment agreement's clause would likely cause the employees to give up rights under the Labor Code].)

3. The Framework Hews to Analogous Choice-of-Law Principles.

Finally, the burden-shifting standard adopted by the courts of appeal is consistent with the "closely related" choice-of-law analysis in California. (*Nedlloyd Lines B.V. v. Super. Ct.* (1992) 3 Cal.4th 459, 464 (*Nedlloyd*).) In that inquiry, a court must scrutinize "whether the chosen state's law is contrary to a fundamental policy of California." (*Id.* at pp. 464-466; see, e.g., *Hall*, *supra*, 150 Cal.App.3d at p. 419 [expressing concern that a court in Nevada would apply that state's securities law "in the face of a California choice of law provision"].) Where California has a "materially greater interest . . . in the determination of the particular issue," the choice-of-law clause will not be enforced because it is "contrary to this state's fundamental policy." (*Nedlloyd*, *supra*, at pp. 464-466, citing Rest.2d Conf. of Laws, § 187, subd. (2).) Fundamental policies may be established by statute or constitution, or simply "when (1) they cannot be contractually waived; (2) they protect against otherwise inequitable results; and (3) they promote the public interest." (*Pitzer College v. Indian Harbor Insurance Co.* (2019) 8 Cal.5th 93, 103 (*Pitzer*); see also Rest.2d Conf. of Laws, §

187, com. g [explaining that the "a fundamental policy may be embodied in a statute which makes one or more kinds of contracts illegal"].)[12]

The state-to-state comparison in the courts of appeal's forum selection burden-shifting framework applies a similar foundational rule to ensure that enforcement would not result in a violation of California's public policy. (See, e.g., *Verdugo*, *supra*, 237 Cal.App.4th at p. 157 ["a comparison is necessary to determine whether enforcing a forum selection and choice-of-law clause would violate California's public policy embodied in its governing statutes"].) California has a material interest in the enforcement of its fundamental policy. By requiring the proponent of transfer to demonstrate that litigation in the contract forum will not circumvent California law, the burden-shifting test effectively assesses whether there is a conflict between California law and the other state's less protective laws. If a true conflict exists, the burden-shifting test—much like this Court's choice-of-law analysis—assures that the party seeking to avoid

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[12] This Court in *Nedlloyd* qualified its analysis (see 3 Cal.4th, *supra*, at p. 465), just as it did in *Smith* (see 17 Cal.3d, *supra*, at pp. 495-496), as applying to "arm's-length contractual choice-of-law provisions." This analysis "contains safeguards to protect contracting parties, including consumers, against choice-of-law agreements that are unreasonable or in contravention of a fundamental California policy." (*Washington Mutual Bank, F.A. v. Super. Ct.* (2001) 24 Cal.4th 906, 917-918.) Additionally, "the forum will scrutinize such contracts with care and will refuse to apply any choice-of-law provision they may contain if to do so would result in substantial injustice to the adherent." (*Id.* at p. 918, fn. 6, quoting Rest.2d Conf. of Laws, § 187, com. b.)

litigating in California is not evading its fundamental policies, including those deemed unwaivable by the Legislature. (Cf. *Pitzer*, *supra*, 8 Cal.5th at p. 103; *Nedlloyd*, *supra*, 3 Cal.4th at p. 466.)

III. APPLYING THE STANDARD FOR FORUM SELECTION CLAUSES TO THIS CASE YIELDS THE CONCLUSION THAT THE CLAUSE AT ISSUE SHOULD NOT BE ENFORCED.

The foregoing analysis provides the standard to apply to EpicentRx's invocation in this matter of the forum selection clause contained in its letters of incorporation. The result of that application is that, whatever the merits of transfer to Delaware in general, *this* case must remain in a California courtroom.

The steps of the analysis are straightforward. A freely negotiated forum selection clause should ordinarily be enforced if it does not diminish the well-established statutory rights of the party opposing transfer. Here, the California Constitution establishes the right to a trial by jury as "inviolate" and provides it may be waived only "as prescribed by statute." (Cal. Const., art. I, § 16; see *Grafton*, *supra*, 36 Cal.4th at pp. 956-957 [explaining that the California Constitution has guaranteed the "sacred" right to a civil jury trial since statehood].) The Constitution empowers the Legislature "alone" to establish the procedures through which the civil jury right may be waived. (*TriCoast Builders, Inc. v. Fonnegra* (2024) 543 P.3d 243, 248-49, fn. 3 [15 Cal.5th 766]; see Cal. Const., art. I, § 16 [allowing

waiver "by the consent of the parties expressed as prescribed by statute"].) Pursuant to that authority, the Legislature has enumerated an exclusive list of the six ways that waiver may be effected; that list does not include "by operation of a certificate of incorporation." (See Code Civ. Proc., § 631, subd. (a); *Grafton*, *supra*, at p. 958.) The forum selection clause at issue in this case was not freely negotiated at arm's length. Because Delaware law does not provide for the right to a civil trial by jury, particularly in the Court of Chancery, transferring the case to Delaware would effectuate a prima facie waiver of a statutory right in a way that violates an express statement by the California Legislature. And EpicentRx has failed to prove that EpiRx's statutorily guaranteed right to a civil jury trial would not be diminished by transferring the matter to Delaware. As a result, the forum selection clause should not be enforced.

In this case, requiring EpiRx to litigate its dispute in Delaware—a state that does not guarantee the civil jury right as California does—would cause EpiRx to relinquish a right guaranteed by the Legislature. (See *TriCoast Builders, Inc. v. Fonnegra*, *supra*, 543 P.3d at p. 256 [recognizing that a deprivation of a constitutional right occurs "where a party has properly invoked its jury trial right and had that right wrongly denied"].) Code of Civil Procedure section 631, sub-division (f) manifests the Legislature's intent to permit waiver of the jury right in only six prescribed ways, "even in the face of concerns that the interests of the parties and the

courts would benefit from a relaxation of this requirement." (*Grafton*, *supra*, 36 Cal.4th at p. 955.) EpiRx did not consent to any of those methods by acceding to the forum selection clause in EpicentRx's incorporation documents. It is highly unlikely that the exclusive forum named in those documents, the Delaware Chancery Court, would uphold a California jury right when a jury in that forum is akin to a "vestigial structure" only. (*EpicentRx, Inc. v. Super. Ct.*, *supra*, 95 Cal.App.5th at pp. 904-905, quoting *Preston Hollow Capital LLC v. Nuveen LLC* (Del. Ch. 2019) 216 A.3d 1, 11, fn. 64.) Accordingly, absent guarantees provided by EpicentRx—which bears the burden of proof—that EpiRx's California jury trial right will be preserved in Delaware, enforcement of the forum selection clause would substantially diminish EpiRx's rights in violation of California public policy. The provision cannot, therefore, be enforced.

That California is one of only a few states with provisions that limit a right to a pre-dispute jury trial waiver does not reduce the significance of that right as a matter of public policy. (See Pet. Br. at p. 37.) To the contrary, California's willingness to stand its ground reflects a *heightened* commitment to the right. The fact that the California Constitution and the Legislature have unequivocally stated that the jury trial right is unwaivable—outside the six statutory methods—indicates the paramount public policy interests implicated by the right. EpicentRx's repeated entreaties to this Court to add forum selection clauses to the prescribed

methods of waiver (see, e.g., Pet. Br. at p. 35; Reply at p. 20) would be better addressed to the Legislature. (See *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, *supra*, 20 Cal.4th at p. 185 [observing that determination of public policy is generally the province of the legislative, rather than judicial, branch].)

Finally, it is Delaware's own recent inventions taken to attract further corporate litigation to that state's courts that are driving EpicentRx's interest in sending this case there. Over the past several years, corporations—including many headquartered in California—increasingly have designated Delaware courts in their contracts to handle disputes.[13] After dicta in a decision by the Delaware Chancery Court called on corporations to select a single jurisdiction to hear shareholder disputes in their articles and by-laws (*In re Revlon Inc. Shareholders Litigation* (Del. Ch. 2010) 990 A.2d 940, 960-961), entities incorporated in Delaware

[13] See, e.g., Cain & Davidoff Solomon, *Delaware's Competitive Reach* (2012) 9 J. Empirical Legal Studies 92, 94 (finding that, between 2004 and 2008, 60 percent of public company merger agreements—virtually all of those filed during those years—chose Delaware as their choice of forum); Eisenberg & Miller, *supra* note 7, at p. 1506 tbl. 13 (finding 40 percent of forum selection clauses in sample delegated disputes to Delaware); see also Grundfest & Savelle, *The Brouhaha Over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis* (2013) 68 Business Lawyer 325, 332 (summarizing data finding that "the overwhelming majority of [intra-corporate forum selection] provisions adopted to date have been adopted by Delaware-chartered entities designating Delaware as the forum in which disputes are to be resolved" and "that corporations headquartered in California most frequently adopt ICFS provisions").

rapidly began to add forum selection clauses to their charters.[14] Then, in 2015, the Delaware Legislature expressly provided in the state's General Corporations Law that certificates of incorporation or corporate bylaws may select Delaware courts as the "sole[] and exclusive[]" forum for shareholder lawsuits. (Del. Code tit. 8, § 115; *Salzberg v. Sciabacucchi* (Del. 2020) 227 A.3d 102 [examining synopsis of the bill].) Since then, "forum provisions have become a common feature in corporate bylaws and charters,"[15] including in the bylaws at issue in this case.

It is unsurprising that EpicentRx urges the Court to enforce the forum selection clause in its unilaterally drafted articles of incorporation, although it—like so many other corporations—only recently adopted that provision to stave off impending shareholder litigation. (See Resp. Br. at pp. 4-5.) Yet the desire to control or manage litigation in Delaware cannot supersede statutory obligations enacted by the California Legislature and

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[14] See Jorgenson, *Drafting Effective Delaware Forum Selection Clauses in the Shadow of Uncertainty* (2016) 102 Iowa L.Rev. 353, 354-357 (finding that the popularity of forum selection clauses "in certificates of incorporation and corporate bylaws is of a more recent vintage"); Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis* (2012) 37 Del. J. Corp. L. 333, 338-339 (surmising that "*Revlon* can be viewed as an invitation for corporations whose shares are already publicly traded to adopt intra-corporate forum selection bylaw amendments without prior shareholder action").

[15] Manesh & Grundfest, *Abandoned and Split, But Never Revered:* Borak *and Federal Derivative Litigation* (2023) 78 Business Lawyer 1047, 1055, 1057.

public policy articulated in the California Constitution. The primacy of California public policy is a cost of doing business in this state.

In sum, with respect to this case, the express public policy of California prevents implementation of the forum selection clause. The California Constitution vests in the Legislature the exclusive ability to determine waiver of an inviolate right; the Legislature has not included the method of waiver claimed by the Petitioner; the party seeking enforcement has failed to establish that transfer will not diminish the rights of the nonmoving party; and the clause was not freely negotiated in an arm's-length transaction. In these circumstances, the forum selection clause may not be enforced.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeal should be affirmed.

Dated: April 3, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface and volume limitations set forth in California Rules of Court, rule 8.204(c)(1). The brief has been prepared in 13-point Times New Roman font. The word count is 6,942 words based on the word count of the program used to prepare the brief.

Dated: April 3, 2024

By: /s/ *David S. Nahmias*
David S. Nahmias

CERTIFICATE OF SERVICE

I, the undersigned, declare that I am a citizen of the United States, over the age of 18 years, reside in Oakland, California, and not a party to the within action. My business address is the University of California, Berkeley, School of Law, 308 Berkeley Law, Berkeley, CA 94720-7200.

On the date set forth below, I caused a copy of the following to be served:

APPLICATION TO FILE BRIEF AND BRIEF OF AMICI CURIAE OF CONSUMER, EMPLOYMENT, AND ECONOMIC JUSTICE ORGANIZATIONS IN SUPPORT OF APPELLANT

on the following interested parties in this action via the **TrueFiling portal:**

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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on April 3, 2024, in Oakland, CA.

By: /s/ *David S. Nahmias*
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