cjac
3418 Third Avenue, Suite 1 | Sacramento, CA 95817 | www.cjac.org | T 916-448-5100 F 916-442-8644 E fhiestand@aol.com

CIVIL JUSTICE ASSOCIATION OF CALIFORNIA

February 9, 2017

Hon. Tani G. Cantil-Sakauye, Chief Justice
and Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *Amici* Letter in Support of Review in *Tanguilig v. Bloomingdale's, Inc.*, S239170. CRC 8.500(g).

Dear Chief Justice Cantil-Sakauye and Associate Justices:

IMPORTANCE OF ISSUE AND INTEREST OF *AMICI*

The Civil Justice Association of California (CJAC) and the California Chamber of Commerce (CalChamber) as *amici curiae* support review of this case to resolve an important issue the petition presents:

> **Does the Federal Arbitration Act (FAA) preempt the holding of *Iskanian v. CLS Transportaion Services, LLC* (2014) 59 Cal.4th 348 that conditions enforcement of a pre-dispute arbitration agreement on the availability of a procedure to pursue collective relief under the California Private Attorneys General Act (PAGA; Labor Code § 2699 *et seq.*)?**

The appellate opinion answered "no" to this question on the ground that *stare decisis* compelled it to follow *Iskanian*'s holding that "representative action waivers are unenforceable under state law and . . . this rule is not preempted by the FAA." (Slip Opinion, p. 6.) This understandable "asked and answered" response to the question assumes *Iskanian* addressed all important facets of the issue necessary to its holding and that the Court is sufficiently satisfied with it to decline giving it a second look. But, the closeness of this Court's split (4 to 3) opinion in *Iskanian* not only "evidences a deep cleavage as to the 'desired'

result,"[1] but underscores the importance of the Court's recognition that the doctrine of *stare decisis* does not "shield court-created error from correction, " and "is a flexible one" that permits it "to reconsider, and ultimately to depart from, our own prior precedent in an appropriate case." (*Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 296.)

That this case presents an appropriate opportunity for the Court to reconsider and clarify important issues not adequately addressed by *Iskanian* is clear. The petition challenges two questionable analogies central to *Iskanian*'s holding: (1) the equation of the private plaintiff's role in a PAGA claim with that of the governmental agency plaintiff in *EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279 (*Waffle House*); and (2) the equation of PAGA with the *qui tam* action authorized by the False Claims Act (FCA; Gov't Code § 12651 *et seq.*). What's more, key differences between *qui tam* and PAGA actions implicate a significant constitutional issue as to the "separation of powers" that is deserving of the Court's consideration.

CJAC and CalChamber are vitally interested in and affected by PAGA and the appellate opinion's whole-hog reliance on *Iskanian* in its dismissal of the FAA preemption claim by petitioner Bloomingdale's. As a law review article reported about PAGA and the effects on employers of this Court's gloss on it in *Iskanian*:

> Since its enactment in 2004, "it has become common practice for plaintiffs in employment actions to assert a PAGA claim, as the potential civil penalties for violations can be staggering and often greatly outweigh any actual damages." Annual PAGA filings have increased over 200 percent in the last five years, and over 400 percent since 2004. The fact that PAGA claims cannot be waived by agreements to arbitrate contributes heavily to the prevalence of these suits. Its popularity also comes from PAGA's nature as a representative action, permitting aggrieved employees to sue on behalf of other employees; this can often make for a very large group of employees as plaintiffs, not unlike a class-action suit.

(M. Goodman (Comment), *The Private Attorneys General Act: How to Manage the Unmanageable* (2016) 56 *SANTA CLARA L. REV.* 413, 414; footnotes omitted.)

CJAC is a longstanding, non-profit corporation representing businesses, professional associations and financial institutions. CJAC's principal purpose is to

---

[1] R. Berger, *Government by Judiciary* (1977) 323.

educate the public about ways to make our civil liability laws more fair, economical, efficient and clear. Toward this end, CJAC regularly petitions our co-ordinate and co-equal branches of government for redress when it comes to determining who gets, how much, and from whom when the conduct of some occasions harm to others. This opinion implicates CJAC's primary purpose.

CalChamber is a nonprofit business association with over 13,000 members, both individual and corporate, representing virtually every economic interest in the state. For more than a century, CalChamber has been the voice of California business. While CalChamber represents several of the largest corporations in California, 75% of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and employment climate by representing business on a broad range of legislative, regulatory, and legal issues. CalChamber participates as amicus curiae only in cases, like this one, that have a significant impact on businesses.

REASONS WARRANTING REVIEW

The Opinion in this Case and *Iskanian* are Premised on Questionable Analogies Equating PAGA with the False Claims Act and the High Court's *Waffle House* Opinion with a PAGA Enforcement Action.

"The importance of legal reasoning from analogy cannot be overstated." (R. Aldisert, *LOGIC FOR LAWYERS* (1997) 96.) Indeed, "the method of analogy goes to the fundamentals of the common-law tradition." (*Id.*) When, however, there are important differences or dissimilarities between the circumstances or laws being compared for the purpose of inferring an analogous conclusion, the fallacy of questionable analogy occurs and the conclusion drawn is infirm. That has, *amici* submit, happened in this case and *Iskanian* with respect to two key but inapt analogies.

First, the opinion here – echoing the majority opinion in *Iskanian* – equates the enforcement action brought by a government agency, the Equal Employment Opportunity Commission (EEOC) in *Waffle House*, with an action brought by a private plaintiff to enforce the statute against employment discrimination that confers upon both individuals and the EEOC standing to do so. Second, the opinion here and the majority opinion in *Iskanian* analogize a PAGA action brought by an individual plaintiff with a *qui tam* action enforced by a private plaintiff pursuant to the FCA. Neither analogy is apt, thus making dubious the holdings in this case and *Iskanian*. (R. Bork, *THE TEMPTING OF AMERICA* (1990) 169 ("Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom.").)

As the petition and the dissent in *Iskanian* point out, *Waffle House*, unlike this case and *Iskanian*, involved a government agency not a party to the arbitration agreement, not a private party who did sign the arbitration agreement. Obviously, FAA preemption cannot apply to one not a party to litigation. The *Iskanian* majority fudges this important distinction by asserting that, as in a *qui tam* action under the FCA, the private party plaintiff "stands in the shoes" of the "real party in interest" – the government. But this averment overlooks a critical difference between *qui tam* actions prosecuted by private parties under the FCA and PAGA actions prosecuted by private plaintiffs – under the FCA "the government has robust powers to control or intervene" in a private party's lawsuit "at any juncture of the proceedings," including limiting the private plaintiff's participation, staying discovery by the plaintiff, seeking alternative remedies and dismissing the lawsuit. The government lacks any such powers under PAGA. (S. Katz, *Doubts on PAGA Passing Muster*, *S.F. DAILY J.*, Feb. 25, 2016, p. 1, 8.) In sharp contrast to both California's FCA and the federal counterpart on which it is modeled, "government attorneys retain no control whatsoever over any aspect of PAGA litigation." (*Id.*)

Tying the government's hands under PAGA claims other than by initially allowing an opportunity for the government to bring the claim or instead allow the private party to do so – while preserving the right of government under the FCA to control the litigation *at any point* even if initiated by a private party – is more than a difference of degree; it is a difference of kind that goes to the heart of the separation of powers doctrine. (Cal. Const., Art. III, § 3.) The "primary purpose" of the separation of powers provision is "to prevent the combination in the hands of a single person or group of the basic or fundamental powers of government." (*Parker v. Riley* (1941) 18 Cal.2d 83, 89.) *Iskanian* did reject an "unrelated separation of powers argument based on . . . the judiciary's ability to regulate the conduct of lawyers" who contract to represent government in the prosecution of public enforcement actions, but otherwise ignored this key element, the "fly in the ointment" to the asserted *qui tam*/PAGA analogy upon which *Iskanian* and the appellate opinion here rests. (Katz, *supra*, at 8.)

In short, "PAGA includes virtually none of the provisions for ongoing government oversight of PAGA actions that the FCAs contain." (*Id.*) Accordingly, it runs afoul of the very object of separation of powers doctrine: to "limit the authority of one of the three branches of government to aggregate to itself the core functions of another branch." (*Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 297.)

CONCLUSION

For the aforementioned reasons and authorities, *amici* asks the Court to grant review of this case and address the important issue it presents by clarifying the scope and application of its *Iskanian* opinion.

Respectfully submitted,

Fred J. Hiestand, General Counsel
Civil Justice Association of California

Proof of service attached

PROOF OF SERVICE

I, David Cooper, am employed in the city and county of Sacramento, State of California. I am over the age of 18 years and not a party to the within action. My business address is 3418 3rd Avenue, Suite 1, Sacramento, CA 95817.

On February 9, 2017, I served the foregoing document(s) described as: *Amici Curiae* Letter Brief of the Civil Justice Association of California and the California Chamber of Commerce in Support of Review in *Tanguilig v. Bloomingdale's, Inc.*, S239170 on all interested parties in this action by placing a true copy thereof in a sealed envelope(s) addressed as follows:

David S. Bradshaw, Esq.
Nathan W. Austin, Esq.
JACKSON LEWIS P.C.
400 Capitol Mall, Suite 1600
Sacramento, CA 95814
Attorneys for Petitioner

Patrick C. Mullin, Esq.
JACKSON LEWIS P.C.
50 California Street, 9th Floor
San Francisco, CA 94111
Attorneys for Petitioner

Gordon W. Renneisen, Esq.
Harry G. Lewis, Esq.
CORNERSTONE LAW GROUP
575 Market Street, Suite 3050
San Francisco, CA 94105
Attorneys for Plaintiff and Respondent

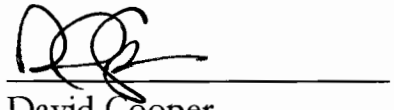
The Honorable Ernest H. Goldsmith
Department 302
SAN FRANCISCO SUPERIOR COURT
400 McAllister Street
San Francisco, CA 94102

Clerk, Court of Appeal
FIRST APPELLATE DISTRICT, DIV. 5
350 McAllister Street
San Francisco, CA 94102

[X](BY MAIL) I am readily familiar with our practice for the collection and processing of correspondence for mailing with the U.S. Postal Service and such envelope(s) was placed for collection and mailing on the above date according to the ordinary practice of the law firm of Fred J. Hiestand, A.P.C.

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

Executed this 9th day of February 2017 at Sacramento, California.



David Cooper