No. 11-56965

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEVIN FERGUSON AND SANDRA MUÑIZ,
Plaintiffs–Appellees,

v.

CORINTHIAN COLLEGES, INC., ET AL.,
Defendants–Appellants.

Appeal from an Order of the United States District Court
for the Central District of California
Nos. 8:11-cv-00127-DOC-AJW, 8:11-cv-00259-DOC-AJW
Hon. David O. Carter, United States District Judge

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTION, STATUTES, AND RULES

OTHER AUTHORITIES

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country.[1]

An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community, including cases involving the enforceability of arbitration agreements under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16.[2]

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[1] In accordance with Federal Rule of Appellate Procedure 29(c)(5), *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than the *amicus*, its members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission. A motion for leave to file accompanies this brief.

[2] Among other FAA cases, the Chamber filed *amicus* briefs in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010), *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 130 S.

Arbitration is speedy, inexpensive, fair, and less adversarial than litigation in court. Many of the Chamber's members and affiliates regularly include arbitration agreements in their contracts because arbitration allows parties to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Based on the legislative policy reflected in the FAA and the Supreme Court's consistent endorsement of arbitration for the past half century, Chamber members have structured millions of contractual relationships around arbitration agreements.

The benefits of these agreements to businesses, consumers, and employees are imperiled by state-law rules that require certain claims or requests for relief—in this case, requests for so-called public injunctions—to be resolved by the courts rather than by arbitrators. For that reason, the Chamber filed an *amicus* brief and participated in oral argument in the en banc proceedings in *Kilgore v. KeyBank, National Ass'n*, __ F.3d __, 2013 WL 1458876 (9th Cir. Apr. 11, 2013) (en banc), in which this Court considered, but ultimately did not

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Ct. 1758 (2010), and *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). The Chamber's most recent briefs in arbitration cases are available at http://www.chamberlitigation.com/cases/issue/arbitration-alternative-dispute-resolution.

decide, whether the FAA as interpreted by the Supreme Court in *AT&T Mobility LLP v. Concepcion*, 131 S. Ct. 1740 (2011), preempts California's *Broughton–Cruz* rule, which purports to make requests for public injunctions non-arbitrable.

As the motion accompanying this brief explains, that issue has now returned to this Court. Because the simplicity, informality, and expedition of arbitration depend on the courts' consistent recognition and application of the principles underlying the FAA, the Chamber and its members have a strong continuing interest in the issue, and therefore the Chamber is requesting leave to file this *amicus* brief to assist the Court in addressing the *Broughton–Cruz* rule.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents a straightforward question: whether the Federal Arbitration Act preempts California's rule—adopted in *Broughton v. Cigna Healthplans of California*, 988 P.2d 67 (Cal. 1999), and reaffirmed in *Cruz v. PacifiCare Health Systems, Inc.*, 66 P.3d 1157 (Cal. 2003)—that requests for so-called public injunctions are non-arbitrable as a matter of state policy. The answer is equally straightforward: The *Broughton–Cruz* rule conflicts with, and is

therefore preempted by, the FAA on two separate grounds, each of which independently precludes enforcement of that rule.

First, the FAA flatly forbids States to "prohibit[] arbitration of a particular type of claim" (*Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1204 (2012) (per curiam) (citing *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011)). If particular types of claims cannot be cordoned off from arbitration, then neither can particular types of remedies for those claims. Yet that is precisely what *Broughton*, *Cruz*, and the decision below do.

Second, the *Broughton–Cruz* rule impedes the accomplishment of the two fundamental purposes of the FAA: ensuring enforcement of arbitration agreements according to their terms, and fostering the benefits of simplicity, informality, and expedition that flow from use of the arbitral process.

The district court here acknowledged *Concepcion*'s "mandate that state law cannot prohibit arbitration of certain types of claims." ER10. It also acknowledged the "numerous other district court decisions" (ER9) holding that the FAA and *Concepcion* require enforcement of arbitration agreements according to their terms—even when the plaintiffs seek injunctive relief under California's Consumer

Legal Remedies Act, Unfair Competition Law, and False Advertising Law.

After recognizing what the FAA dictates, however, the court below immediately turned its back on those principles, adopting instead the California Supreme Court's pre-*Concepcion* view that requests for public injunctions under the state's consumer-protection statutes are "'inherently incompatible'" with arbitration. ER11 (quoting *Broughton*, 998 P.2d at 342). Accepting Plaintiffs' argument that they would be "unable to vindicate their statutory rights" under California's CLRA, UCL, and FAL in arbitration (ER9), the court then ruled that the statutory purposes of those laws override the FAA and afford Plaintiffs the right to litigate their request for a public injunction in court (while litigating their requests for other forms of relief for the very same claims in arbitration) notwithstanding Plaintiffs' otherwise valid and fully enforceable agreements to arbitrate. ER12-13.

The court below thus got things exactly backwards: ***State*** public policies—whether of legislative origin (like the CLRA, UCL, and FAL) or of judicial origin (like the California Supreme Court's *Broughton–Cruz* rule)—cannot override ***federal*** law. The Supreme Court made

clear—in the very cases on which the district court below and Plaintiffs in this appeal rely for their "inherent incompatibility" theory—that only "Congress itself" can craft exceptions to the FAA. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *accord, e.g.*, *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012); *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226-27 (1987). And Plaintiffs do not even try to argue that ***Congress*** has crafted a "public injunctions" exception to the FAA.

As this Court has explained, the Supreme Court's decision in *Concepcion* "rejected th[e] premise" that plaintiffs can avoid their agreements to arbitrate on the ground that their state-law claims "cannot be vindicated effectively" in arbitration, because state law cannot override federal law. *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1159 (9th Cir. 2012). Accordingly, state "policy concerns, however worthwhile, cannot undermine the FAA." *Id.* Yet that is precisely what the *Broughton–Cruz* rule and the decision below do. *Coneff* is controlling Circuit precedent, and it precludes affirmance of the district court's ruling.

ARGUMENT

"Congress enacted the FAA in response to widespread judicial hostility to arbitration." *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308-09 (2013). In passing the FAA, Congress sought "to reverse th[is] longstanding judicial hostility to arbitration agreements" (*Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)) by declaring "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary" (*Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

California's *Broughton–Cruz* rule exemplifies the very hostility to arbitration that the FAA forbids. *See, e.g.*, Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 Ind. L.J. 393, 416 (2004) ("*Broughton* and its progeny exhibit the exact same hostility to arbitration that the U.S. Supreme Court has found objectionable in its FAA preemption cases to date."). Because that rule makes one particular stick in the bundle of statutory remedies non-arbitrable and frustrates the objectives of Congress in enacting the FAA, it is preempted and may not be applied, regardless of the state policies that underlie it.

I. The FAA Preempts California's *Broughton–Cruz* Rule.

California's *Broughton–Cruz* rule is preempted by the FAA for two reasons. First, the rule impermissibly declares a particular remedy categorically off limits to arbitration. Second, the rule rests on impermissible judicial hostility to arbitration, manifestly conflicting with and standing as an obstacle to the FAA's purposes and objectives.[3]

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[3] This case involves the question whether requests for public injunctions are arbitrable. The parties do not address the separate question whether California may invalidate an arbitration agreement that permits individualized injunctive relief but precludes issuance of a public injunction that provides the equivalent of class-wide relief. The Supreme Court in *Concepcion* addressed the closely related question whether an arbitration clause authorizing an individual to assert only his or her own claim for relief, and barring class and other representative proceedings seeking class relief, could be invalidated under a California rule that conditioned enforcement of arbitration agreements on the availability of class-action procedures. In holding that the FAA preempted California's rule, the Court explained that class arbitration "is not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law." 131 S. Ct. at 1753.

Numerous district courts have held that *Concepcion* requires compelling arbitration of cases seeking public injunctions under arbitration clauses that authorize only individualized injunctive relief. *See* note 5, *infra* (collecting cases). The Chamber addressed that issue in *Kilgore* (*see Amicus* Brief of Chamber of Commerce of the United States, *Kilgore v. KeyBank, Nat'l Ass'n*, __ F.3d __, 2013 WL 1458876 (9th Cir. Apr. 11, 2013) (en banc) (No. 09-16703),

A. The FAA forbids States to declare particular claims—or aspects of claims—categorically off limits to arbitration.

This case is neither close nor difficult. "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Concepcion*, 131 S. Ct. at 1747. If a State cannot lawfully exclude an entire type of claim from arbitration, then neither can it exclude part of that claim—or a single form of relief that may be granted for the claim. The *Broughton–Cruz* rule does precisely that, by declaring requests for public injunctions non-arbitrable—and is therefore invalid.

Decades of Supreme Court precedent compel this conclusion. For example, the Court held nearly thirty years ago that the FAA preempted a California law prohibiting arbitration of disputes under the State's Franchise Investment Law. *See Southland Corp. v. Keating*, 465 U.S. 1, 10-16 (1984). It explained that the FAA "declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Id.* at 10.

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available at 2012 WL 5387260), but the en banc Court did not reach it.

Three years later, the Court overturned another California law requiring a judicial forum—this time for wage disputes. *See Perry v. Thomas*, 482 U.S. 483, 489-92 (1987). The Court again instructed that "[a] state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue" is preempted by the FAA. *Id.* at 492 n.9.

Just five years ago, the Court held that California may not undercut contractual agreements to arbitrate by requiring certain disputes to be submitted to an administrative hearing instead of (or as a prerequisite to) arbitration. *See Preston v. Ferrer*, 552 U.S. 346, 352-63 (2008).

Last year, in the face of what it found to be continuing judicial hostility to arbitration after *Concepcion*—which invalidated yet another California rule that interfered with the enforcement of arbitration agreements—the Supreme Court twice summarily reversed decisions of state supreme courts that purported to make categories of claims off limits to arbitration.

First, in *Marmet*, the Court addressed a decision of the West Virginia Supreme Court of Appeals that had declared arbitration unsuitable as a forum for certain claims against nursing homes. This

state-law impediment to arbitration was preempted, the Supreme Court explained, because it amounted to "a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA." 132 S. Ct. at 1204.

Then, in *Nitro-Lift Technologies, L.L.C. v. Howard*, 133 S. Ct. 500 (2012) (per curiam), the Court relied on *Concepcion* to reverse an Oklahoma Supreme Court decision holding that state law guarantees a judicial forum for determining the validity of noncompetition agreements in employment contracts. The Court admonished:

> [T]he Oklahoma Supreme Court must abide by the FAA, which is "the supreme Law of the Land," and by the opinions of this Court interpreting that law. "It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law."

Id. at 503 (quoting U.S. CONST. art. VI, cl. 2; *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312 (1994)). To carve out a category of non-arbitrable claims under state law is, the Court explained, "precisely th[e] type of 'judicial hostility towards arbitration'" that "the FAA forecloses." *Id.* (quoting *Concepcion*, 131 S. Ct. at 1747).

The Supreme Court has also made clear that arbitrability does not depend on the type of remedy sought. For example, the Court has held that the FAA preempted a New York rule that provided that punitive damages may be awarded only by courts. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). The Court has also rejected the contention that arbitrators are unable to award the "equitable relief" that federal law makes available in age-discrimination cases—an argument similar to the one that Plaintiffs made and the district court accepted here. *Gilmer*, 500 U.S. at 32. And indeed, following *Gilmer*, this Court, sitting en banc, held that arbitrators can hear employment-discrimination claims under Title VII—claims that frequently entail equitable remedies such as front pay and reinstatement. *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742 (9th Cir. 2003) (en banc).[4]

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[4] To be sure, an arbitrator called upon to issue a public injunction would face challenges similar to those of an arbitrator administering a class arbitration. *Concepcion*, 131 S. Ct. at 1752 ("[a]rbitration is poorly suited to the higher stakes of class litigation"); *id.* at 1751-52 (describing difficulties posed by class arbitration). Just as the FAA preempts a state-law rule requiring the availability of class procedures because class arbitration "is not arbitration as envisioned by the FAA" (*id.* at 1753), a state-law rule ***requiring*** the availability of class-wide injunctive relief as a prerequisite for enforcement of an arbitration agreement would be preempted by the FAA for the very

The *Broughton–Cruz* rule is yet another state-law rule that categorically prohibits arbitration of certain portions of a plaintiff's legal claims—namely, requests for public injunctions. The rule is therefore preempted by the FAA, just like the state-law rules in *Southland*, *Perry*, *Preston*, *Marmet*, *Nitro-Lift*, and *Mastrobuono*. This Court need go no further to resolve this case.[5]

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same reason. If, however, parties to an arbitration contract agreed that class-wide injunctive relief could be awarded, the arbitrator would not be disqualified from awarding it—just as an arbitrator is not legally disabled from presiding over a class arbitration. 131 S. Ct. at 1752 (recognizing that "parties may and sometimes do agree to" class arbitration); *id.* at 1751 ("class arbitration, ***to the extent it is [mandated] . . . rather than consensual***, is inconsistent with the FAA") (emphasis added). Indeed, courts of other States have recognized that arbitrators are not legally disqualified from awarding injunctive relief. *Hawkins v. O'Brien*, 2009 WL 50616, at *6 (Ohio Ct. App. Jan. 9, 2009); *Brasington v. EMC Corp.*, 855 So. 2d 1212, 1217 (Fla. Dist. Ct. App. 2003) ("Arbitrators regularly award injunctive relief on behalf of claimants, and * * * there is nothing in the arbitration policy to suggest an arbitrator lacks authority to enjoin illegal practices or procedures.") (emphasis and citation omitted); *Stewart Agency, Inc. v. Robinson*, 855 So. 2d 726, 728 (Fla. Dist. Ct. App. 2003).

[5] The vast majority of district courts in this Circuit to consider the issue have reached exactly this conclusion—as the court below acknowledged (ER9-10). *See, e.g.*, *Brown v. DIRECTV, LLC*, 2013 WL 3273811, at *11 (C.D. Cal. June 26, 2013) (Gee, J.); *Miguel v. JPMorgan Chase Bank, N.A.*, 2013 WL 452418, at *10 (C.D. Cal. Feb. 5, 2013) (Gutierrez, J.); *Meyer v. T-Mobile USA Inc.*, 836 F. Supp. 2d 994, 1005-06 (N.D. Cal. 2011) (Breyer, J.); *Hendricks v. AT&T*

Turning its back on all that authority, the district court here asserted that *Broughton* and *Cruz* "do not prohibit arbitration of all injunctive relief claims" but instead merely "provide a framework for analyzing whether injunctive relief claims are arbitrable." ER12. Then, musing that "it is not clear that Congress intended the FAA to sweep public injunction arbitration within its purview," the court applied *Broughton* to conclude that "[b]ecause Plaintiffs' injunctive relief claims seek to enforce a public right, there is an inherent conflict with sending these claims to an arbitrator." *Id.*

That conclusion rests on at least three fundamental errors.

Mobility LLC, 823 F. Supp. 2d 1015, 1024 (N.D. Cal. 2011) (Breyer, J.); *Kaltwasser v. AT&T Mobility LLC*, 812 F. Supp. 2d 1042, 1050-51 (N.D. Cal. 2011) (Fogel, J.); *Nelson v. AT&T Mobility LLC*, 2011 WL 3651153, at *1-4 (N.D. Cal. Aug. 18, 2011) (Henderson, J.); *In re Gateway LX6810 Computer Prods. Litig.*, 2011 WL 3099862, at *1-3 (C.D. Cal. July 21, 2011) (Tucker, J.); *In re Apple & AT&T iPad Unlimited Data Plan Litig.*, 2011 WL 2886407, at *4 (N.D. Cal. July 19, 2011) (Whyte, J.); *Arellano v. T-Mobile USA, Inc.*, 2011 WL 1842712, at *1-2 (N.D. Cal. May 16, 2011) (Alsup, J.); *see also, e.g.*, *In re Sprint Premium Data Plan Mktg. & Sales Prac. Litig.*, 2012 WL 847431, at *12 (D.N.J. Mar. 13, 2012); *Nelsen v. Legacy Partners Residential, Inc.*, 144 Cal. Rptr. 3d 198, 214-15 (Ct. App. 2012); *cf. Cardenas v. AmeriCredit Fin. Servs. Inc.*, 2011 WL 2884980, at *3 (N.D. Cal. July 19, 2011) (Armstrong, J.) (staying litigation because "the application of *Concepcion*'s 'straightforward' analysis arguably compels the conclusion that the FAA preempts" *Broughton* and *Cruz*).

First, as the ruling below itself demonstrates, the supposed analytical framework of *Broughton* and *Cruz* is in reality a bright-line rule: Requests for public injunctions are categorically excluded from arbitration as a matter of California policy, even if requests for other sorts of injunctive relief or damages for the very same legal claims are arbitrable. This bright-line rule violates the Supreme Court's clear command that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Concepcion*, 131 S. Ct. at 1753; *accord Coneff*, 673 F.3d at 1159.

Second, the premise for the district court's ruling—that the FAA does not cover public injunctions because "it is not clear that Congress intended the FAA to sweep public injunction arbitration within its purview"—stands the Supreme Court's settled FAA jurisprudence on its head. The Supreme Court has repeatedly rejected attempts to exclude from the FAA's command specific categories of claims or remedies under state law. *See* pages 9-12, *supra*.[6]

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[6] Even ***federal*** claims—and requests for specific forms of relief for federal claims—must be arbitrated "unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *CompuCredit*, 132 S. Ct. at 669. For example, the Court has held that arbitrators are fully capable of resolving antitrust claims under the

Finally, *Broughton* and *Cruz* declared requests for public injunctions non-arbitrable based on their conclusion that arbitrators could not issue or administer such injunctions. *See Broughton*, 988 P.2d at 77-78; *Cruz*, 66 P.3d at 1165. The court below echoed that sentiment in elevating *Broughton* and *Cruz* over the FAA's mandate that arbitration agreements be enforced as written. *See* ER13 ("Legal constraints such as the inability of arbitrators to enter an injunction affecting non-parties, as well as the inability to oversee injunctive remedies designed to protect the public as a whole create an inherent conflict and make arbitration unsuitable in this case.").

But arbitrators are not legally disabled from issuing or administering such injunctions, and "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of

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Sherman Act (*Mitsubishi*, 473 U.S. at 628); claims under the Securities Exchange Act and the Racketeer Influenced and Corrupt Organizations Act (*McMahon*, 482 U.S. at 226-42); claims under the federal Credit Repair Organizations Act (*CompuCredit*, 132 S. Ct. at 665); various federal statutory claims against lenders—federal claims that are functionally the same as the state-law ones alleged by Plaintiffs here (*Green Tree Fin. Corp.–Ala. v. Randolph*, 531 U.S. 79 (2000)); and, as explained above, requests for equitable relief under Title VII (*Gilmer*, 500 U.S. at 32).

arbitration as an alternative means of dispute resolution." *Mitsubishi*, 473 U.S. at 626-27. "[P]otential complexity should not suffice to ward off arbitration." *Id.* at 633; *see also* note 4, *supra*.

B. The FAA preempts state laws that conflict with Congress's purposes and objectives.

The *Broughton–Cruz* rule is preempted for a second, independent reason: "it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Concepcion*, 131 S. Ct. at 1753 (internal quotation marks omitted).

1. Congress sought to ensure that arbitration agreements are enforced as written and that parties can avail themselves of the benefits of arbitration.

The FAA stands as "a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone*, 460 U.S. at 24. It "'reflects an emphatic federal policy in favor of arbitral dispute resolution.'" *Marmet*, 132 S. Ct. at 1203 (quoting *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 25 (2011) (per curiam)). That policy embodies two fundamental objectives of Congress, both of which are frustrated by *Broughton*, *Cruz*, and the decision below.

First, the "primary purpose" of the FAA is to "ensur[e] that private agreements to arbitrate are enforced according to their terms." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989); *see also American Express*, 133 S. Ct. at 2309 ("courts must 'rigorously enforce' arbitration agreements according to their terms"); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 130 S. Ct. 1758, 1773 (2010); *Mastrobuono*, 514 U.S. at 57-58.

Second, the FAA reflects Congress's recognition that arbitration benefits consumers and businesses alike by providing an informal, inexpensive, and expedient forum for resolving their disputes without incurring the costs and delays of full-fledged, in-court litigation. In particular, the Supreme Court has repeatedly observed that "arbitration's advantages often would seem helpful to individuals * * * who need a less expensive alternative to litigation." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995); *see also*, *e.g.*, *Concepcion*, 131 S. Ct. at 1749 ("the informality of arbitral proceedings * * * reduc[es] the cost and increas[es] the speed of dispute resolution"); *Stolt-Nielsen*, 130 S. Ct. at 1775 ("the benefits of private dispute resolution" include "lower costs" and "greater

efficiency and speed"); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution.").

Taken together, the FAA's twin goals evince Congress's purpose and objective to remove from the States—and the courts—the prerogative to decide on a case-by-case, claim-by-claim, or remedy-by-remedy basis whether arbitration is the most efficient means of resolving a particular dispute that is covered by an arbitration agreement. *See Concepcion*, 131 S. Ct. at 1749 (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

2. The *Broughton–Cruz* rule conflicts with the FAA's purposes and objectives.

A state-law rule that purports to exempt certain remedies from arbitration conflicts with both objectives of the FAA. That is true whether the state-law rule is legislative (like California's CLRA, UCL, and FAL) or judicial (like the California Supreme Court's *Broughton–Cruz* rule). *See Perry*, 482 U.S. at 492 n.9 ("state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and

enforceability of contracts generally," but not if it singles out arbitration for unfavorable treatment) (emphasis in original).

By definition, state-law policies disfavoring arbitration—such as the *Broughton–Cruz* rule—conflict with Congress's goal of ensuring that courts "rigorously enforce arbitration agreements according to their terms." *American Express*, 133 S. Ct. at 2309 (internal quotation marks and citation omitted). "Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies." *Mitsubishi*, 473 U.S. at 628; *see also, e.g.*, *CompuCredit*, 132 S. Ct. at 669 (the FAA "requires courts to enforce agreements to arbitrate according to their terms * * * unless the FAA's mandate has been 'overridden by a contrary congressional command'") (quoting *McMahon*, 482 U.S. at 226).

And by requiring that the same underlying facts and legal theories be considered by both an arbitrator and a court (as the district court did here when it retained Plaintiffs' request for a public injunction while sending to arbitration Plaintiffs' requests for other forms of relief for the same alleged statutory violations), California's rule that requests for public injunctions are non-arbitrable eliminates

the "simplicity, informality, and expedition of arbitration" guaranteed by the FAA. *Mitsubishi*, 473 U.S. at 628. After all, the rule in California is that arbitral awards have no collateral estoppel effect (*Vandenberg v. Super. Ct.*, 982 P.2d 229, 240 (Cal. 1999)), meaning that there would have to be a second soup-to-nuts proceeding in court regardless of how an arbitrator resolves the non-injunctive aspects of a plaintiff's claims. This multiplicative litigation is the opposite of simple, informal, and expeditious.[7] The *Broughton–Cruz* rule is thus irreconcilable with the FAA's purposes and objections. Accordingly, it is preempted.

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[7] Separate judicial and arbitral proceedings would not be barred, of course, if the parties contract for them in an arbitration agreement. *Cf. Dean Witter*, 470 U.S. at 221 ("The preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation * * *."). But when the parties have entered into a broad arbitration agreement designed to shift all disputes into arbitration, as the parties have here, States may not ***require*** inefficient, piecemeal litigation by insisting that requests for some forms of relief be adjudicated in court even as the rest go to arbitration.

II. The Supremacy Clause Commands That State Policy Concerns Are Not Valid Grounds For Declaring Particular Claims—Or Particular Remedies For Particular Claims—To Be Non-Arbitrable.

Dismissing (or simply ignoring) the FAA's mandate, controlling Supreme Court and Ninth Circuit precedent, and the views of many other district judges in California, the court below reasoned that "[b]ecause Plaintiffs' injunctive relief claims seek to enforce a public right, there is an inherent conflict with sending these claims to an arbitrator." ER12; *see also* ER13 (opining that "the statutory purpose of the injunctive relief provisions of the UCL, FAL, and CLRA and the public interest concerns in this case cannot likely be met through arbitration"). The court thus adopted the California Supreme Court's view in *Broughton* that the remedy of a public injunction is "'inherently incompatible with arbitration'" (ER11 (quoting *Broughton*, 998 P.2d at 342)) and that the FAA and Plaintiffs' arbitration agreement therefore do not apply (ER13).

That reasoning is misguided. The district court's ad hoc determination that requests for public injunctions "conflict" and are "inherently incompatible" with arbitration provides no legitimate basis for denying arbitration.

Under the Supremacy Clause, there can be no weighing or balancing of state interests against federal ones—though that is just what *Broughton*, *Cruz*, and the court below purported to do. "[A] valid federal law is substantively superior to a state law; 'if a state measure conflicts with a federal requirement, the state provision must give way.'" *Haywood v. Drown*, 556 U.S. 729, 751 (2009) (quoting *Swift & Co. v. Wickham*, 382 U.S. 111, 120 (1965)).

The district court's inherent-incompatibility theory simply rephrases, in language borrowed from *Broughton*, Plaintiffs' contention that they would be "unable to vindicate their statutory rights * * * if they are forced to arbitrate." ER9 (describing Plaintiffs' claims). But in the arbitration context, the Supreme Court has repeatedly and flatly rejected "the proposition that the State's interest in protecting [a particular class of plaintiffs] outweighs the federal interest in uniform dispute resolution." *Perry*, 482 U.S. at 486.[8] And a ***court's*** determination that plaintiffs must have a judicial

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[8] *See also Marmet*, 132 S. Ct. at 1203 ("The [FAA's] text includes no exception for personal-injury or wrongful-death claims. It 'requires courts to enforce the bargain of the parties to arbitrate.'"); *Preston*, 552 U.S. at 356 (FAA preempts California law committing litigation of disputes between talent agencies and their clients to state Labor Commission); *Southland*, 465 U.S. at 10 (FAA preempts California

forum in order to vindicate their state statutory rights is no more permissible under the FAA than is a ***state legislature's*** declaration that the claim should be non-arbitrable. *See id.* at 492 n.9.

Concepcion explains that the FAA was enacted specifically to overcome the "great variety of devices and formulas declaring arbitration against public policy." 131 S. Ct. at 1747 (internal quotation marks omitted). States may not insist on the availability of a specific procedure or judicial forum "even if it is desirable for unrelated reasons." *Id.* at 1753. As this Court recently held, state "policy concerns, however worthwhile, cannot undermine the FAA." *Coneff*, 673 F.3d at 1159; *accord, e.g.*, *Robinson v. Title Lenders, Inc.*, 364 S.W.3d 505, 515 (Mo. 2012) (en banc) (holding that, "post-*Concepcion*, courts may not apply state public policy concerns to invalidate an arbitration agreement even if the public policy at issue aims to prevent undesirable results to consumers").

No matter what policy rationale a State may offer for refusing to enforce arbitration agreements, the State's preferences must yield because "the FAA's command to enforce arbitration agreements

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law requiring that disputes between franchisors and franchisees be litigated in court).

trumps any interest" that is "'unrelated' to the FAA." *American Express*, 133 S. Ct. at 2312 n.5 (citation omitted); *accord Concepcion*, 131 S. Ct. at 1753 ("States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.").

That is particularly true with respect to assertions—like Plaintiffs' contention here—that an arbitration agreement should not be enforced because a party supposedly cannot "effectively vindicate" a claim in arbitration. This Court has already explained that the only cases in which the Supreme Court has recognized even the ***possibility*** of an exception to the FAA for claims that could not be vindicated in arbitration have all involved ***federal*** statutory claims, not state-law claims. *Coneff*, 673 F.3d at 1158 n.2. Because those Supreme Court decisions "are limited by their plain language to the question of whether an arbitration clause is enforceable where federal statutorily provided rights are affected," when (as here) a plaintiff "seek[s] to enforce * * * rights provided by state law," the cases "simply do not apply." *Stutler v. T.K. Constructors Inc.*, 448 F.3d 343, 346 (6th Cir. 2006); *accord, e.g.*, *Pro Tech Indus., Inc. v. URS Corp.*, 377 F.3d 868, 873 (8th Cir. 2004); *Brown v. Wheat First Secs., Inc.*,

257 F.3d 821, 826 (D.C. Cir. 2001); *Eaves-Leonos v. Assurant, Inc.*, 2008 WL 80173, at *8 (W.D. Ky. Jan. 8, 2008); *Rosenberg v. BlueCross BlueShield of Tenn., Inc.*, 219 S.W.3d 892, 908 (Tenn. Ct. App. 2006).

Moreover, the Supreme Court's recent decision in *American Express* makes clear that even with respect to claims under ***federal*** law, an "effective vindication" challenge to enforcement of an arbitration agreement can succeed only if "the FAA's mandate has been 'overridden by a contrary congressional command.'" 133 S. Ct. at 2309-10.

Although the dissent in *American Express* would have recognized a broader effective-vindication exemption from the FAA for federal statutory claims, it too expressly recognized that this rationale for avoiding an arbitration agreement does not apply to state-law claims: "[A] *state* law * * * could not possibly implicate the effective-vindication rule," the dissent declared, because "[w]hen a state rule allegedly conflicts with the FAA, we apply standard preemption principles, asking whether the state law frustrates the FAA's purposes and objectives." *Id.* at 2320 (Kagan, J., dissenting). The federal courts "have no earthly interest (quite the contrary) in vindicating [a state] law" that is inconsistent with the FAA, the

dissent continued, so the state law must "automatically bow" to federal law; and any effective-vindication exception that might possibly exist would "come[] into play only when the FAA is alleged to conflict with another *federal* law." *Id.* (emphasis in original). The upshot is that, in *American Express*, all eight participating Justices agreed that—to the extent that it exists at all—the effective-vindication doctrine is unavailable in the context of state-law claims like the ones here.

CONCLUSION

The order of the district court should be reversed, and the case should be remanded with instructions to enter an order compelling arbitration in accordance with the parties' agreement.

Respectfully submitted,

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July 12, 2013

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