No. 09-16703

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MATTHEW C. KILGORE, individually and on behalf of all others similarly situated; WILLIAM BRUCE FULLER, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

KEYBANK, NATIONAL ASSOCIATION, successor in interest to KeyBank USA, N.A.; KEY EDUCATION RESOURCES, a division of KeyBank National Association; GREAT LAKES EDUCATION LOAN SERVICES, INC., a Wisconsin corporation,

Defendants-Appellants.

On Appeal from the U.S. District Court
for the Northern District of California
Case No. 3:08-cv-02958-THE (Henderson, J.)

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

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a non-profit 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.

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every 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 curiae* briefs in cases that raise issues of vital concern to the nation's business community, including cases involving the enforceability of arbitration agreements.[2]

Many of the Chamber's members and affiliates regularly employ arbitration agreements in their contracts because arbitration allows

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[1] Pursuant to 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 *amicus*, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief. Counsel of record for all parties have consented to the filing of this brief.

[2] A collection of the Chamber's most recent briefs in arbitration cases is available at http://www.chamberlitigation.com/cases/issue/arbitration-alternative-dispute-resolution.

them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court. Based on the legislative policy reflected in the Federal Arbitration Act ("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 are threatened by state-law rules that require certain claims—in this case, claims for so-called "public injunctions"—to be resolved by courts, not arbitrators. Accordingly, the Chamber has a strong interest in explaining why the FAA preempts such rules.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case presents a straightforward question: whether the FAA 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 claims for so-called "public" injunctive relief 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, which requires enforcement of arbitration agreements according to their terms "notwithstanding any state substantive or procedural policies to the contrary." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011) (internal quotation marks omitted) (holding that California may not refuse to enforce arbitration agreements on the ground that they require claims to be arbitrated on an individual basis).

The *Broughton*/*Cruz* rule conflicts with the FAA in three respects. First, the FAA flatly forbids States from "prohibiting arbitration of a particular type of claim" (*Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1204 (2012) (per curiam) (citing *Concepcion*, 131 S. Ct. at 1747)), which is precisely what the *Broughton*/*Cruz* rule does. Second, the *Broughton*/*Cruz* rule is premised on the impermissible assumption that arbitrators are not competent to enter or administer injunctive relief. That assumption reflects the same unfounded suspicions of and judicial hostility to arbitration that the FAA was enacted to override. Third, 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.

Although Plaintiffs argue that the *Broughton*/*Cruz* rule is necessary because individuals might not be able to vindicate their statutory right to pursue a public injunction via the arbitral process, ***state*** public policies—whether of legislative or judicial origin—cannot override ***federal*** law. Even the cases relied on by Plaintiffs recognize that only "***Congress itself***" can craft exceptions to the FAA. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (emphasis added); *see also, e.g.*, *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226-27 (1987). Moreover, the Supreme Court has expressly rejected the notion that courts may refuse to enforce arbitration agreements simply because an arbitrator might not be able to award the broadest form of relief authorized by the statute. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991).

Finally, because there is no question that Plaintiffs can obtain full redress for their ***own*** alleged injuries in arbitration, embracing their "vindication-of-rights" rationale and permitting them to avoid arbitration on that basis would allow all California plaintiffs to do an

end-run around *Concepcion* by dressing up an ordinary lawsuit in the language of a public-injunction claim. Such an artifice is every bit as preempted as the rule in *Concepcion* was.

ARGUMENT

I. THE FAA PREEMPTS CALIFORNIA'S *BROUGHTON/CRUZ* RULE.

California's *Broughton/Cruz* rule is preempted by the FAA for three reasons. First, this rule impermissibly declares a particular type of claim—one for a so-called "public injunction"—categorically off-limits to arbitration. Second, the California Supreme Court's asserted justification for the rule rests on nothing more than suspicions and assumptions that reflect impermissible hostility to arbitration. Third, the rule manifestly conflicts with the FAA's purposes and objectives.

A. The FAA Forbids States From Declaring Particular Types Of Claims Categorically Off-Limits To Arbitration.

This case should be neither close nor difficult. California has sought to put claims for so-called public injunctions off-limits to arbitration. Yet, as the Supreme Court consistently has held, "[w]hen state law prohibits outright the arbitration of a particular type of claim,

the analysis is straightforward: The conflicting rule is displaced by the FAA." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011).

The Supreme Court has applied this principle in case after case. For example, the Court held 28 years ago that the FAA preempted a California law prohibiting arbitration of disputes under California's Franchise Investment Law. *Southland Corp. v. Keating*, 465 U.S. 1, 10-16 (1984). In broad terms, the Court 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. Three years later, the Court overturned another California law requiring a judicial forum for wage disputes. *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. More recently, 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. *Preston v. Ferrer*, 552 U.S. 346, 352-63 (2008).

Finally, earlier this year, the Court once more underscored that the FAA preempts any state-law rule that declares an entire category of claims off-limits to arbitration. *See Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012) (per curiam). In *Marmet*, the Court—relying on *Concepcion*—summarily reversed a West Virginia Supreme Court decision that declared arbitration unsuitable as a forum for certain claims against nursing homes. *Id.* at 1203. That state-law impediment to arbitration was preempted, the 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." *Id.* at 1204.

The *Broughton/Cruz* rule likewise is "a categorical rule prohibiting the arbitration of a particular type of claim"—one for a "public" injunction—and therefore it is preempted by the FAA every bit as much as the rules invalidated in *Southland*, *Perry*, *Preston*, and *Marmet*. The Court need go no further to resolve this case.[3]

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[3] The vast majority of district courts in this Circuit to consider the issue have reached exactly this conclusion. *See, e.g.*, *Meyer v. T-Mobile USA Inc.*, 836 F. Supp. 2d 994, 1005-06 (N.D. Cal. 2011) (Breyer, J.); *Hendricks v. AT&T Mobility LLC*, 823 F. Supp. 2d 1015, 1024 (N.D. Cal. 2011) (Breyer, J.); *Kaltwasser v. AT&T Mobility LLC*, 812 F. Supp.

B. The FAA Forbids States From Presuming That Arbitrators Are Incapable Of Administering Certain Claims.

The *Broughton/Cruz* rule is preempted by the FAA for the additional reason that it rests on impermissible hostility to arbitration.

1. Congress enacted the FAA in 1925 as "a response to hostility of American courts to the enforcement of arbitration agreements, a judicial disposition inherited from then-longstanding English practice." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001). By passing the FAA, Congress sought "to reverse the longstanding judicial hostility to arbitration agreements" (*Gilmer v. Interstate/Johnson Lane Corp.*,

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2d 1042, 1050-51 (N.D. Cal. 2011) (Fogel, J.); *In re Gateway LX6810 Computer Prods. Litig.*, 2011 WL 3099862, at *1-3 (C.D. Cal. 2011) (Tucker, J.); *In re Apple & AT&T iPad Unlimited Data Plan Litig.*, 2011 WL 2886407, at *4 (N.D. Cal. 2011) (Whyte, J.); *Arellano v. T-Mobile USA, Inc.*, 2011 WL 1842712, at *1-3 (N.D. Cal. 2011) (Alsup, J.); *see also Cardenas v. AmeriCredit Fin. Servs. Inc.*, 2011 WL 2884980, at *3 (N.D. Cal. 2011) (Armstrong, J.) (staying litigation because "the application of *Concepcion*'s 'straightforward' analysis arguably compels the conclusion that the FAA preempts" *Cruz* and *Broughton*). Indeed, even the district judge who originally denied the motion to compel arbitration in this case has since held, in a case decided after *Concepcion*, that the FAA preempts the *Broughton/Cruz* rule. *Nelson v. AT&T Mobility LLC*, 2011 WL 3651153, at *1-4 (N.D. Cal. 2011) (Henderson, J.). Numerous other courts agree. *See, e.g.*, *Nelsen v. Legacy Partners Residential, Inc.*, 144 Cal. Rptr. 3d 198, 214-15 (Ct. App. 2012), *pet for rev. filed*, No. S204953 (Aug. 27, 2012); *In re Sprint Premium Data Plan Mktg. & Sales Prac. Litig.*, 2012 WL 847431, at *12 (D.N.J. 2012).

500 U.S. 20, 24 (1991)) and to declare "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)).

Nevertheless, judicial hostility to arbitration has persisted—"manifest[ing] itself in a great variety of devices and formulas declaring arbitration against public policy." *Concepcion*, 131 S. Ct. at 1747 (internal quotation marks omitted). One particularly common "device"—exemplified in *Broughton* and *Cruz*—is to declare that arbitrators are not capable of adjudicating certain kinds of disputes. As a result, the Supreme Court repeatedly has had to intervene to overturn lower-court decisions deeming arbitrators unfit to decide certain claims.

For example, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), the Court held that arbitrators are fully capable of resolving antitrust claims under the Sherman Act. In *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987), it held that arbitrators can adjudicate claims under the Securities Exchange Act and the Racketeer Influenced and Corrupt Organizations Act. In *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79

(2000), the Court held that arbitrators may decide various statutory claims against lenders—claims not unlike those alleged by Plaintiffs in this case. And earlier this year, the Court concluded that claims under the Credit Repair Organizations Act are fully arbitrable as well. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012).

The Supreme Court has likewise rejected the notion that arbitrators are not fit to award certain types of remedies. For example, the Court has held that the FAA empowers arbitrators to decide claims for punitive damages, preempting 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). More closely related to this case, the Supreme Court has rejected the argument that arbitrators are unable to award the "broad equitable relief" that federal law makes available in age-discrimination cases. *Gilmer*, 500 U.S. at 32. Following *Gilmer* to its logical conclusion, this Court sitting en banc held that arbitrators can hear employment-discrimination claims under Title VII, which 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).

2. Contrary to this long and unbroken line of cases, the California Supreme Court in *Broughton* and *Cruz* declared claims for public injunctions non-arbitrable based on nothing more than assumption that arbitrators are not as well suited as courts to administer such injunctions. *See Broughton v. Cigna Healthplans of Cal.*, 988 P.2d 67, 77-78 (Cal. 1999); *Cruz v. PacifiCare Health Sys.*, 66 P.3d 1157, 1165 (Cal. 2003). The FAA rejects that assumption. As the Supreme Court has stated, "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 arbitration as an alternative means of dispute resolution," and "potential complexity should not suffice to ward off arbitration." *Mitsubishi Motors*, 473 U.S. at 626-27, 633.

Not only are California's assumptions about arbitration forbidden by the FAA, they are contradicted by the experience of other States that have long allowed "public injunction" claims to be arbitrated when the parties' agreement provides for that. For example, as the district court noted, Ohio permits claims for injunctive relief under its Consumer Sales Practices Act to be decided by arbitrators. *See Kilgore v.*

KeyBank, Nat'l Ass'n, 2009 WL 1975271, at *7 (N.D. Cal. 2009) (citing *Hawkins v. O'Brien*, 2009 WL 50616, at *6 (Ohio Ct. App. 2009)). Florida likewise allows injunctions under its deceptive practices act to be awarded by arbitrators. *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.") (citation and emphasis omitted); *Stewart Agency, Inc. v. Robinson*, 855 So. 2d 726, 728 (Fla. Dist. Ct. App. 2003) ("the arbitrators are free to enter an award having an injunctive or declaratory component to it"). Indeed, we are not aware of ***any*** state other than California that forbids arbitrators from hearing such claims.

In short, the *Broughton/Cruz* rule categorically forbids arbitrators from hearing an entire category of claims based on nothing more than assumption about purported shortcomings of arbitration. As many commentators have observed, that rule reflects the very judicial

hostility to arbitration that the FAA was enacted to eliminate.[4] As a consequence, it is preempted by the FAA.

C. The *Broughton/Cruz* Rule Conflicts With The FAA's Purposes And Objectives.

The *Broughton/Cruz* rule also is preempted "[b]ecause 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). The FAA is "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. In short, 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 congressional policy determination rests on two grounds.

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[4] *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."); Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. Disp. Resol. 61, 84 ("notwithstanding the dictates of the FAA, the California Supreme Court has explicitly acknowledged its suspicion of arbitration agreements" in cases such as *Cruz* and *Broughton*).

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 Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1773 (2010); *Mastrobuono*, 514 U.S. at 57-58. In providing that arbitration agreements are "valid, irrevocable, and enforceable" (9 U.S.C. § 2), Congress sought to "ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms and according to the intentions of the parties." *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 947 (1995) (citations and internal quotation marks omitted). The FAA therefore "requires that [courts] rigorously enforce agreements to arbitrate" according to their express terms. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985). "[C]ourts and arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties." *Stolt-Nielsen*, 130 S. Ct. at 1774-75.

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 litigation. 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.").[5]

Taken together, the FAA's twin goals dictate that courts support the ability of parties to "trade the procedures * * * of the courtroom for

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[5] Moreover, it is not just the subset of consumers with disputes who benefit from arbitration; the many consumers who never have a dispute of any kind also benefit because arbitration "lower[s] [businesses'] dispute-resolution costs," and "whatever lowers costs to businesses tends over time to lower prices to consumers." Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. Am. Arb. 251, 254-55 (2006); *cf. Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594 (1991) (customers who accept contracts with forum-selection clauses "benefit in the form of reduced fares representing the savings that the [company] enjoys by limiting the fora in which it may be sued").

the simplicity, informality, and expedition of arbitration" (*Gilmer*, 500 U.S. at 31 (internal quotation marks omitted)) by "ensur[ing] the enforcement of arbitration agreements according to their terms" (*Concepcion*, 131 S. Ct. at 1748). It is not for the States (or the courts) 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 id.* at 1749 (quoting *Dean Witter*, 470 U.S. at 221). State-law rules that purport to exempt certain claims from arbitration—whether of judicial or legislative origin—flatly conflict with both of Congress's objectives.

By definition, such rules conflict with Congress's goal of ensuring that arbitration agreements are "enforced according to their terms and according to the intentions of the parties." *First Options*, 514 U.S. at 947 (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 Motors*, 473 U.S. at 628 (emphasis added). At the same time, by requiring that the same underlying legal theory be considered by both an arbitrator and a court, California's rule that

public-injunction claims are non-arbitrable eliminates the "simplicity, informality, and expedition of arbitration" guaranteed by the FAA. *Id.* After all, the rule in California is that arbitral awards have no collateral estoppel effect (*Vandenberg v. Superior Court*, 982 P.2d 229, 240 (Cal. 1999)), so it is clear 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 UCL or CLRA claim. That is neither simple nor informal nor expeditious.[6]

II. STATE PUBLIC POLICY—WHETHER OF STATUTORY OR JUDICIAL ORIGIN—IS NOT A VALID BASIS ON WHICH TO DECLARE PARTICULAR STATE-LAW CLAIMS NON-ARBITRABLE.

The district court reasoned that "the arbitration clause's mandatory arbitration of the Plaintiffs' injunctive relief claims * * * is in conflict with [the] fundamental policy of California" as expressed in

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[6] Of course, separate judicial and arbitral proceedings are not barred ***if the parties provide for them***. *Cf. Dean Witter*, 470 U.S. at 221 ("The preeminent concern of Congress in passing the Act 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, as they have here, States may not require that some claims be brought in court, while others remain in arbitration.

Broughton and *Cruz*. 2009 WL 1975271, at *6. Before this Court, some of Plaintiffs' *amici* take the same position.

By contrast, Plaintiffs do not defend the district court's decision on these terms. Instead, they contend that the Supreme Court has authorized courts to refuse to enforce arbitration agreements if they are persuaded that the plaintiffs would be unable to vindicate their statutory rights in arbitration. As we discuss in Part III below, Plaintiffs' vindication argument is erroneous as a matter of law.

More fundamentally, however, no matter what ground a State gives for refusing to require arbitration of particular statutory claims, that state-law ground is necessarily preempted by the FAA. That is because, as *Concepcion* explains, state preferences must yield to the FAA's overriding federal policy in favor of enforcing arbitration agreements. *See* 131 S. Ct. at 1748-49, 1753 (state common-law limitation on enforcement of arbitration provisions was preempted "[b]ecause it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" embodied in the FAA) (internal quotation marks omitted).

Under the Supremacy Clause, federal law ***always*** prevails over state law, not the other way around. Neither state public policy announced by a court nor rights purportedly created by state statute afford a valid basis for declaring particular claims off-limits to arbitration.

1. There is by now no question that the FAA broadly preempts state public policies that prohibit or restrict the enforcement of arbitration agreements. After all, as *Concepcion* recounts, 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).

Accordingly, States may not insist on the availability of a specific procedure or a judicial forum "***even if it is desirable for unrelated reasons***." *Concepcion*, 131 S. Ct. at 1753 (emphasis added). As Judge Graber has put it, "policy concerns, however worthwhile, cannot undermine the FAA." *Coneff v. AT&T Corp.* 673 F.3d 1155, 1159 (9th Cir. 2012); *accord* Panel Op. 2650 ("policy arguments * * * however worthy they may be, can no longer invalidate an otherwise enforceable

arbitration agreement").[7] The Missouri Supreme Court has likewise concluded 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." *Robinson v. Title Lenders, Inc.*, 364 S.W.3d 505, 515-16 (Mo. 2012) (en banc). Indeed, even one of Plaintiffs' law professor *amici*—when writing as an academic rather than an advocate—has concluded that "employing state public policy to invalidate an arbitration provision * * * appears not to have survived the Court's recent opinion in" *Concepcion*. David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 Geo. L.J. (forthcoming 2013), manuscript at 23, *available at* http://ssrn.com/abstract=2158882.

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[7] That said, the assumption that it is "desirable" to deputize private class-action lawyers to pursue relief on behalf of the "general public" is deeply mistaken. The abuses of the class-action device are well-known: Most class-action lawsuits are lawyer-driven, aimed at forcing blackmail settlements, and provide class members themselves with minimal benefits. *See, e.g.*, Lester Brickman, *Lawyers' Ethics and Fiduciary Obligations in the Brave New World of Aggregate Litigation*, 26 Wm. & Mary Envtl. L. & Pol'y Rev. 243 (2001). Claims for public-injunctive relief brought by private-class-action lawyers are essentially class actions by another name, and therefore are subject to the same abuses.

Because the FAA was meant to end the use of state public policy to erect obstacles to the full enforcement of arbitration agreements, California may not invoke such a policy to require a judicial forum for so-called public-injunction claims.

2. The FAA likewise preempts any attempt to evade arbitration on the ground that arbitration undermines vindication of state statutory rights. Even if Plaintiffs were correct that they are unable to vindicate their ***state*** rights under the UCL (*but see* Part III, *infra*), that contention is not a permissible basis for disregarding the FAA's command that, as a matter of ***federal*** law, their arbitration agreements must be enforced as written. The Supreme Court has 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. And a court's determination that Plaintiffs must have a judicial forum in order to vindicate their state statutory rights is no more permissible under the FAA than a state legislature's declaration that the claim should be non-arbitrable as a matter of state public policy. *Id.* at 492 n.9.

Plaintiffs cite various Supreme Court cases in support of their vindication-of-rights argument. But as both the panel in this case (*see* Panel Op. 2651-53) and another panel of this Court (*see Coneff*, 673 F.3d at 1158 n.2) have recognized, each of these cases addresses the vindication of claims arising under ***federal*** law, not state law. *See 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") (emphasis added; internal quotation marks omitted); *McMahon*, 482 U.S. at 227-42 ("The burden is on the party opposing arbitration, however, to show that ***Congress intended*** to preclude a waiver of judicial remedies for the statutory rights at issue.") (emphasis added); *Mitsubishi Motors*, 473 U.S. at 624-29 (the FAA may be overridden if "***Congress itself*** has evinced an intention" to do so) (emphasis added); *Dean Witter*, 470 U.S. at 221 (the FAA "requires that [courts] rigorously enforce agreements to arbitrate * * * absent a countervailing policy manifested in another ***federal statute***") (emphasis added); *see also Pyett*, 556 U.S. at 260; *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295 n.10 (2002); *Randolph*, 531 U.S. at 90; *Gilmer*, 500 U.S. at 30.

And 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," those cases "simply do not apply." *Stutler v. T.K. Constructors Inc.*, 448 F.3d 343, 346 (6th Cir. 2006) (emphasis added). Numerous courts have so recognized. *See, e.g.*, *Pro Tech Indus. v. URS Corp.*, 377 F.3d 868, 873 (8th Cir. 2004) (rejecting application of *Randolph* to claims not arising under federal statutes and explaining that in *Randolph* "the Supreme Court addressed arbitration of federal statutory claims, and did not analyze the unconscionability of an arbitration agreement under state law"); *Brown v. Wheat First Secs., Inc.*, 257 F.3d 821, 826 (D.C. Cir. 2001) (*Randolph* and *Gilmer* concerned only "whether dispute resolution under the FAA was consistent with the ***federal*** right-creating statute in question") (emphasis added); *Eaves-Leonos v. Assurant, Inc.*, 2008 WL 80173, at *8 (W.D. Ky. 2008) (holding that *Randolph* was inapplicable because plaintiff "does not assert a ***federal*** statutory claim") (emphasis added); *Rosenberg v. BlueCross BlueShield of Tenn., Inc.*, 219 S.W.3d 892, 908

(Tenn. Ct. App. 2006) (rejecting application of *Randolph* where "no federally protected interest is at stake"); *see also In re Am. Express Merchs.' Litig.*, 681 F.3d 139, 140 (2d Cir. 2012) (Pooler, J., concurring in denial of rehearing en banc) ("While *Concepcion* addresses state contract rights, *Amex III* deals with federal statutory rights—a significant distinction."), *petition for cert. filed*, No. 12-133 (U.S. July 30, 2012).[8] In short, as one of Plaintiffs' law professor *amici* acknowledges in a soon-to-be-published article, "th[e] vindication of statutory rights doctrine only applie[s] to federal statutory claims." Horton, *supra*, manuscript at 19.

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[8] Plaintiffs' reliance on *Booker v. Robert Half International, Inc.*, 413 F.3d 77 (D.C. Cir. 2005), is misplaced. *Booker* involved a motion to compel arbitration of a claim under the D.C. Human Rights Act ("DCHRA"). The arbitration provision, however, barred punitive damages. The parties agreed that the punitive-damages prohibition was unenforceable as applied to the DCHRA claim. *Id.* at 83. The question, accordingly, was simply whether to sever the punitive-damages prohibition and compel arbitration, or to deny arbitration outright. *Id.* at 79. The court concluded that severing the punitive-damages prohibition would be "faithful to the federal policy which requires that we rigorously enforce agreements to arbitrate." *Id.* at 85-86 (internal quotation marks omitted). To be sure, in the course of deciding that issue, the D.C. Circuit ***assumed*** that the vindication-of-rights theory applies to state-law claims, but the defendant never contended otherwise (instead conceding that the punitive-damages prohibition was unenforceable), so the court's assumption is merely that—and not a holding.

Indeed, even if the Supreme Court had been less clear about the reach of its decisions, the vindication-of-rights theory ***could not*** apply to state-created rights. That is because the FAA is a ***federal*** statute that cannot be overridden or limited by conflicting state law or policy. Thus, although "Congress [may] evince[] an intention to preclude a waiver of judicial remedies for the statutory rights at issue" (*Randolph*, 531 U.S. at 90), the Supremacy Clause of the Constitution prevents States from doing the same. Because under the Supremacy Clause the FAA's "federal substantive law requiring parties to honor arbitration agreements" (*Southland*, 465 U.S. at 15 n.9) necessarily prevails over conflicting state law, Plaintiffs' purported inability to vindicate state statutory rights is a legally insufficient basis on which to invalidate their arbitration agreements.

III. EVEN IF IT APPLIED TO STATE CLAIMS, THE VINDICATION THEORY WOULD NOT INVALIDATE PLAINTIFFS' ARBITRATION AGREEMENTS.

KeyBank represents that under its arbitration clause "Plaintiffs *can* pursue the relief they seek [*i.e.*, a so-called public injunction] in arbitration." Resp. to Pet. for Reh'g *En Banc* at 11. But even if that were not so, and even if the vindication-of-statutory-rights exception

were applicable to ***state*** statutory rights, the mere unavailability of public injunctions is not a valid basis under Supreme Court precedent for refusing to enforce an arbitration agreement.

1. To begin with, the Supreme Court has never so much as hinted, let alone held, that the vindication-of-rights exception applies whenever an arbitrator might not be able to award the very broadest form of relief authorized by a statute. To the contrary, in *Gilmer* the Supreme Court expressly rejected the notion that the unavailability of broad injunctive relief is a basis for refusing to enforce an agreement to arbitrate. Much like Plaintiffs here, the plaintiff in *Gilmer* argued that arbitration could not "adequately further the purposes of the ADEA" because arbitral procedures "do not provide for broad equitable relief and class actions." 500 U.S. at 32. The Court responded that, "even if" the broad injunctive relief requested could not "be granted by the arbitrator," that was no reason for refusing to enforce the arbitration agreement. *Id.*

Plaintiffs' principal case—*Mitsubishi Motors*—lends no support whatever to their contention that courts may refuse to enforce arbitration clauses merely because broad injunctive relief may be

unavailable in arbitration. In *Mitsubishi Motors*, the Supreme Court indicated in "dictum in a footnote about antitrust law" (*Richards v. Lloyd's of London*, 135 F.3d 1289, 1295 (9th Cir. 1998) (en banc)) that courts can refuse to enforce an arbitration provision when a choice-of-law or choice-of-forum clause in the provision would preclude a plaintiff from presenting a federal antitrust claim ***at all***. *Mitsubishi Motors*, 473 U.S. at 637 n.19; *see Richards*, 135 F.3d at 1296 (*Mitsubishi Motors*' dictum is not implicated unless arbitration rules are "so deficient that [Plaintiffs] would be deprived of any reasonable recourse").[9] But that is a far cry from saying that a plaintiff who is able to obtain full compensation in arbitration nonetheless can avoid arbitration on the ground that he or she cannot also obtain broad injunctive relief.

Plaintiffs' other key case—*Randolph*—likewise equated "vindication" with whether a plaintiff could pursue a claim ***at all*** in arbitration. The plaintiff in *Randolph* contended that she was "unable

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[9] This Court expressed grave doubt in *Richards* that the *Mitsubishi Motors* dictum is reconcilable with the Supreme Court's earlier decision in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), which held "that parties to an international securities transaction may choose law other than that of the United States, yet * * * never suggested that this affected the validity of a forum selection clause." *Richards*, 135 F.3d at 1295-96.

to vindicate her statutory rights in arbitration" because her "arbitration agreement's silence with respect to costs and fees create[d] a 'risk' that she [would] be required to bear prohibitive arbitration costs if she pursue[d] her claims in an arbitral forum, and thereby force[d] her to forgo any claims she may have against petitioners." 531 U.S. at 90. The Supreme Court acknowledged that "[i]t may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum." *Id.*[10] It rejected her vindication argument, however, because "the record does not show that Randolph will bear such costs if she goes to arbitration." *Id.*

In short, the "vindication" exception applies only when the terms of an arbitration agreement would bar the plaintiff from the arbitrator's door ***entirely***. Here, Plaintiffs do not contend, much less meet their burden of proving, that KeyBank's arbitration provision precludes their access to the arbitral forum. Indeed, as we discuss further below (at pp.

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10 As the Court's references to "***arbitration*** costs" (*id.* (emphasis added)) and "***arbitration*** expenses" (*id.* at 84 (emphasis added)) and the two examples of such costs it offered—"filing fees" and "arbitrators' costs" (*id.*)—reflects, only costs ***unique to arbitration*** may be considered in determining whether the costs of arbitration may have the effect of preventing vindication of a federal claim.

30-31), nothing would prevent Plaintiffs from seeking a monetary remedy for their alleged injuries in arbitration.

2. Plaintiffs' vindication-of-rights theory also fails because their public-injunction claim is neither necessary nor intended to vindicate ***their own*** rights; rather, a public injunction is premised upon the rights of third parties who could bring their own legal actions but have not done so.[11] *Broughton* candidly acknowledges that the purpose of a public injunction "is not to compensate for an individual wrong," which could be addressed through damages or an individualized injunction, "but to prohibit and enjoin conduct injurious to the general public." 988

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[11] None of the claims at issue in this case affects the rights of third parties who are unable to bring their own legal actions to vindicate their rights. For this reason, the concerns raised by Plaintiffs' *amici* about children's rights in child-custody proceedings and similar scenarios are misplaced. Third-party rights could not be determined by arbitration in those scenarios because it is axiomatic that arbitration may adjudicate the rights only of those who have consented to it, either expressly or under agency, equitable estoppel, or third-party beneficiary doctrines. *Cf. Stolt-Nielsen*, 130 S. Ct. at 1763 ("The FAA imposes rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'") (quoting *Volt*, 489 U.S. at 479); *see also Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009) ("traditional principles of state law allow [an arbitration] contract to be enforced by or against nonparties to the contract through assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel") (internal quotation marks omitted).

P.2d at 74. In essence, the *Broughton/Cruz* rule prohibiting arbitration of public-injunction claims is a state-law policy designed to supplement public enforcement of state statutes.

This is precisely the same state policy that *Concepcion* held to be trumped by the FAA. Like the *Broughton/Cruz* rule, the *Discover Bank* rule invalidated by *Concepcion* exalted the class-action procedure in order to supplement public enforcement of consumer rights. *See Concepcion*, 131 S. Ct. at 1746, 1753. The Supreme Court rejected that rationale when it held that "States cannot require a procedure that is inconsistent with the FAA, ***even if it is desirable for unrelated reasons***." *Id.* at 1753 (emphasis added). As a panel of this Court observed in *Coneff*, the majority opinion in *Concepcion* "expressly rejected the dissent's argument regarding the possible exculpatory effect of class-action waivers." 673 F.3d at 1158; *accord* Panel Op. 2644 ("Neither was the Court persuaded by the dissent's policy argument that requiring the availability of class proceedings allows for vindication of small-dollar claims that otherwise might not be prosecuted"). Other courts have made the same point. *See, e.g.*, *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1214 (11th Cir. 2011) (noting

that *Concepcion* “expressly rejected” the “very public policy arguments * * * that the class action waiver will be exculpatory, because * * * small-value claims will go undetected and unprosecuted”). Here, just as in *Concepcion*, a state’s interest in the vindication of third-party rights—whether under the rubric of the *Discover Bank* rule or under that of the *Broughton/Cruz* rule—is not a permissible reason to refuse to enforce contractual arbitration agreements under the FAA.

Plaintiffs have not shown any reason why they would be unable to fully redress ***their own*** injuries through other remedies routinely awarded in arbitration. For one thing, the arbitrator could undoubtedly award each plaintiff an individualized injunction that would fully remedy the plaintiff’s injury while averting any need for continuing oversight of a public injunction. For another, it would appear that Plaintiffs’ alleged injuries in this case could be fully redressed through an ordinary damages action. Although Plaintiffs claim to be seeking injunctive relief in lieu of damages, in this case the difference is wholly illusory: Plaintiffs are seeking the equivalent of monetary damages in the guise of ***an injunction against the collection of a debt***. *See* Panel Op. 2637. The requested debt relief could be fully redressed

through private remedies. *See* Appellants' Opening Br. 23-26; *see also id.* at 21-22.

3. The *Broughton/Cruz* rule, if upheld, would enable plaintiffs in virtually every case to do an end-run around *Concepcion* merely by tacking on a demand for injunctive relief at the end of their complaint; it is therefore every bit as preempted as the rule in *Concepcion* was. Plaintiffs cannot evade *Concepcion* by recharacterizing an ordinary damages action as a claim for injunctive relief or by demanding a public injunction when an individualized injunction would more than suffice to remedy their own alleged injuries. Allowing these claims to be dragged into court through mere pleading tricks would deprive contracting parties of the simplicity, informality, and expedition promised by arbitral dispute resolution. The chief effect would be to destroy the very benefits of arbitration (for consumers and businesses alike (*see* pp. 14-15 & n.5, *supra*)) that the FAA was enacted to protect.

This problem is not cured by the California Supreme Court's practice of severing the public-injunction claim from other relief and permitting arbitration of the remaining claims. As in large class actions, the burden and expense of litigating a public-injunction claim

may frequently be so great that a defendant is compelled to settle even though it has done nothing wrong. And because a public injunction can force a defendant to alter its business practices for every one of its individual customers, potentially at great cost, the stakes of a public-injunction action are often just as great as those of a massive class action. *Cf. Concepcion*, 131 S. Ct. at 1752 ("class arbitration greatly increases risks to defendants * * * when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once"). This problem is multiplied by professional plaintiffs who sue over trifles to demand payment of greenmail rather than to remedy any true harms. As *Concepcion* makes clear, the FAA cannot and does not allow unscrupulous plaintiffs to force defendants into aggregate litigation when their contractual agreements clearly and unmistakably require all disputes to be resolved through arbitration.

4. Even if (unlike here) a plaintiff could not obtain a public injunction in arbitration, the State is always capable of pursuing that relief through public enforcement actions. Nothing precludes the state attorney general or other public agencies from bringing enforcement actions in the interest of the general public. *See EEOC v. Waffle House,*

Inc., 534 U.S. 279 (2002) (private arbitration agreements do not limit public enforcement actions); *accord Luce*, 345 F.3d at 750 ("Despite the presence of an employee-employer arbitration agreement, the EEOC can still pursue judicial remedies because it is not a party to such agreements."). Thus, *Gilmer* emphasizes, "it should be remembered that arbitration agreements will not preclude the *EEOC* from bringing actions seeking class-wide and equitable relief." 500 U.S. at 32. A State's desire to spare public authorities from enforcing the State's laws by deputizing its citizens—more precisely, its class-action lawyers—as private attorneys general does not empower it to supplant private parties' federally protected agreements to arbitrate under the FAA.

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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