No. S224086

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SHARON MCGILL,
Plaintiff and Appellant,

v.

CITIBANK, N.A.,
Defendant and Respondent.

After a Decision by the Court of Appeal,
Fourth Appellate District, Division Three,
Case No. G049838

From the Superior Court, Riverside County
Case No. RIC1109398, Assigned for All Purposes to
Judge John W. Vineyard, Department 12

APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT AND RESPONDENT

Andrew J. Pincus
(*pro hac vice* application pending)
Archis A. Parasharami
(*pro hac vice* application pending)
MAYER BROWN LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000

Donald M. Falk (SBN 150256)
MAYER BROWN LLP
Two Palo Alto Square
3000 El Camino Real
Palo Alto, CA 94306
(650) 331-2000

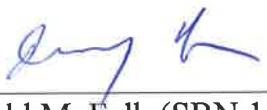
Attorney for Amicus Curiae *the Chamber of Commerce of the United States of America*

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Attorneys for Amicus Curiae Chamber of Commerce of The United States of America certifies that there are no interested entities or persons that must be listed in this certificate under Cal.R. Ct. 8.208

Dated: January 21, 2016

Respectfully submitted,



Donald M. Falk (SBN 150256)
Mayer Brown LLP

Attorney for Amicus Curiae

APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT AND RESPONDENT

To the Honorable Tani Cantil-Sakauye, Chief Justice:

The Chamber of Commerce of the United States of America (the "Chamber") respectfully moves for leave to file a brief as *amicus curiae* in this matter in support of the defendant and respondent.[1] 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.

One of the Chamber's most important responsibilities 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. Recent arbitration cases in which the Chamber has participated include *DIRECTV, Inc. v. Imburgia* (2015) 136 S.Ct. 463; *American Express Co. v. Italian Colors Rest.* (2013) 133 S.Ct. 2304; *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333; *Sanchez v. Valencia*

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[1] No party or counsel for a party in the pending appeal authored the proposed *amicus brief* in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity made a monetary contribution intended to fund the preparation or submission of this brief, other than the *amicus curiae*, its members, and its counsel.

Holding Co. (2015) 61 Cal.4th 899; and *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348.[2]

Many of the Chamber's members and affiliates regularly use arbitration agreements in their contracts because arbitration allows 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"), 9 U.S.C. §§ 1-16, and the U.S. Supreme Court's consistent endorsement of arbitration for the past half century, Chamber members have structured millions of contractual relationships around arbitration agreements.

The Chamber therefore has a valuable perspective to provide to the Court. As we discuss in the accompanying *amicus* brief, the benefits of arbitration agreements—available to businesses, consumers, and employees alike—are imperiled by state-law rules that require certain claims or requests for relief to be resolved by the courts rather than by arbitrators. The U.S. Supreme Court explained in *Concepcion* that state law cannot prohibit outright the arbitration of particular types of claims. Nor may a State condition the enforceability of arbitration agreements on the availability of broad injunctive relief reaching beyond the individual parties to the arbitration agreement. If the decision below—which correctly held that the *Broughton-Cruz* rule is preempted by the FAA—were overturned, it would frustrate the intent of contracting parties, undermine their existing agreements, and erode the benefits offered by arbitration as an alternative to litigation.

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

CONCLUSION

The Court should grant this application and permit the Chamber to file an *amicus curiae* brief.

Dated: January 21, 2016

Respectfully submitted.

Of Counsel:

Andrew J. Pincus
(*pro hac vice* application pending)
Archis A. Parasharami
(*pro hac vice* application pending)
Daniel E. Jones
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Donald M. Falk (SBN 150256)
MAYER BROWN LLP
Two Palo Alto Square
3000 El Camino Real
Palo Alto, CA 94306
(650) 331-2000

Attorney for Amicus Curiae *the Chamber of Commerce of the United States of America*

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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.

One of the Chamber's most important responsibilities 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. Recent arbitration cases in which the Chamber has participated include *DIRECTV, Inc. v. Imburgia* (2015) 136 S.Ct. 463; *American Express Co. v. Italian Colors Rest.* (2013) 133 S.Ct. 2304; *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333; *Sanchez v. Valencia Holding Co.* (2015) 61 Cal.4th 899; and *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348.[1]

Many of the Chamber's members and affiliates choose to include arbitration agreements in their contracts because arbitration allows 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"), 9 U.S.C. §§ 1-16, 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.

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

The benefits of these agreements to businesses, consumers, and employees are imperiled by state-law rules, such as the *Broughton-Cruz* rule at issue in this case, that require certain claims or requests for relief to be resolved by the courts rather than by arbitrators. As the U.S. Supreme Court explained in *Concepcion*, state-law rules cannot prohibit outright the arbitration of particular types of claims. Nor may a State condition the enforceability of arbitration agreements on the availability of broad injunctive relief reaching beyond the individual parties to the arbitration agreement. If the decision below—which correctly held that the *Broughton-Cruz* rule is preempted by the FAA and that agreements to arbitrate on an individual basis must be enforced—were overturned, it would frustrate the intent of contracting parties, undermine their existing agreements, and erode the benefits offered by arbitration as an alternative to litigation.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents a straightforward question: whether the FAA preempts California's rule—adopted in *Broughton v. Cigna Healthplans of California* (1999) 21 Cal.4th 1066, and reaffirmed in *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303—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 on two grounds, each of which precludes enforcement of that rule.

First, the rule impermissibly attempts to ban the use of traditional arbitration to decide the availability of a particular remedy. It is well established that the FAA forbids States to "prohibit[] arbitration of a particular type of claim" (*Marmet Health Care Ctr., Inc. v. Brown* (2012) 132 S.Ct. 1201, 1204 (per curiam) (citing *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333)). And if particular types of claims cannot

be cordoned off from arbitration, then neither can particular remedies for those claims. Yet that is precisely what the *Broughton-Cruz* rule does.

Second, to the extent that the *Broughton–Cruz* rule is interpreted to condition the enforcement of arbitration agreements on the availability of broad, class-wide injunctive relief, it would violate the Supreme Court's holdings in *Concepcion* and *American Express Co. v. Italian Colors Restaurant* (2013) 133 S.Ct. 2304, by interfering with the benefits of simplicity, informality, and efficiency that flow from individual arbitration—the type of arbitration "envisioned by the FAA." *Concepcion*, 563 U.S. at 351.

The court below correctly recognized these basic principles, as has the Ninth Circuit in part (see *Ferguson v. Corinthian Colleges* (9th Cir. 2013) 733 F.3d 928), and numerous federal district judges in this State.

In the face of this authority, plaintiff urges this Court to adhere to its pre-*Concepcion* view that requests for public injunctions under the State's consumer-protection statutes are "inherently incompatible" with arbitration. (*Broughton*, 21 Cal.4th at 1077.) Plaintiff contends that she would be unable to vindicate her statutory rights under the Consumer Legal Remedies Act, Unfair Competition Law, and False Advertising Law in arbitration, and the statutory purposes of those laws should therefore override the FAA and afford her the right to litigate her request for a public injunction in court (while litigating her requests for other forms of relief for the very same claims in arbitration) notwithstanding her otherwise valid and enforceable arbitration agreement.

Plaintiff's argument has things exactly backwards: ***State*** public policies—whether of legislative origin (like the CLRA, UCL, and FAL) or of judicial origin (like this Court's *Broughton–Cruz* rule)—cannot override ***federal*** law. The U.S. Supreme Court has made clear that only "Congress itself" can craft exceptions to the FAA. (*Mitsubishi Motors Corp. v. Soler*

Chrysler-Plymouth, Inc. (1985) 473 U.S. 614, 628 (1985); *accord, e.g.*, *CompuCredit Corp. v. Greenwood* (2012) 132 S.Ct. 665, 669; *Shearson/Am. Express Inc. v. McMahon* (1987) 482 U.S. 220, 226-27.) Plaintiff does not even try to argue that ***Congress*** has crafted a "public injunction" exception to the FAA.

As the Ninth Circuit 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.* (9th Cir. 2012) 673 F.3d 1155, 1159.) The rejection of that premise was made even clearer by the Supreme Court's decision in *American Express*, in which all eight participating justices agreed that any "effective-vindication rule comes into play only when the FAA is alleged to conflict with another *federal* law." (133 S.Ct. at 2320 (Kagan, J., dissenting).) Where, as here, a "state law frustrates the FAA's purposes and objectives," the courts "have no earthly interest (quite the contrary) in vindicating that law." (*Ibid.*) The upshot of the high court's recent precedents is that state "policy concerns, however worthwhile, cannot undermine the FAA." (*Coneff*, 673 F.3d at 1159.) That is precisely what the *Broughton–Cruz* rule does.

Finally, plaintiff is mistaken in asserting that this Court's recent decision in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348—which held that the FAA does not preempt a state-law rule forbidding waivers of representative claims under the Private Attorney General Act (PAGA)—shields the *Broughton-Cruz* rule from preemption. *Iskanian* is quite different from this case. Claims for public injunctive relief share none of "the unique attributes of PAGA" (Op. Br. 47) that drove what plaintiff describes as the "carefully couched" holding in *Iskanian* (Reply Br. 20). In particular, *Iskanian*'s preemption holding rested on the premise

that a PAGA action is not a dispute between the employer and the aggrieved employee, but rather "between an employer and the ***state***." *Iskanian*, 59 Cal.4th at 384 (emphasis added).[2]

That premise does not apply to claims for class-wide, "public" injunctions brought by private plaintiffs under the CLRA and UCL. There is no legitimate argument that plaintiff is acting as the "agent or proxy" of the State of California (*id.* at 387) in this litigation, which is neither binding on nor controlled by the State. Instead, claims for so-called public injunctions function just like claims for injunctive relief in other putative class actions. And there is no basis to conclude that, when the Supreme Court held in *Concepcion* and *American Express* that the FAA bars states from conditioning the enforcement of arbitration agreements on class-wide procedures, it meant to allow states to condition enforcement on the availability of class-wide injunctive relief at the behest of a single plaintiff. Nothing in *Concepcion* or *American Express* suggests that those holdings are silently limited to damages claims.

ARGUMENT

"Congress enacted the FAA in response to widespread judicial hostility to arbitration" (*American Express*, 133 S.Ct. at 2308-09). Congress sought "to reverse th[is] longstanding judicial hostility to arbitration agreements" (*Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 24) by declaring "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the

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[2] As the Chamber has explained elsewhere, the holding in *Iskanian* is inconsistent with U.S. Supreme Court precedent and is preempted by the FAA. (See Amicus Br., *Sakkab v. Luxottica Retail N. Am., Inc.*, No. 13-55184 (9th Cir. Oct. 28, 2014), available at 2014 WL 7040048; Amicus Br. in Supp. of Pet. for Rehearing *En Banc*, Dkt. No. 98, *Sakkab v. Luxottica Retail N. Am., Inc.*, No. 13-55184 (9th Cir. Nov. 23, 2015).)

contrary" (*Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24).

The *Broughton-Cruz* rule rests on the very denigration of arbitration that the FAA forbids. It violates the FAA because it declares certain statutory remedies non-arbitrable. For that reason, it is clearly preempted. The alternative that plaintiff proposes—insisting that arbitration agreements cannot be enforced unless claims for "public injunctive relief" are available in arbitration—fares no better, because it flatly violates *Concepcion* and *American Express* by frustrating the objectives of Congress in enacting the FAA. This conflict between state public policy goals and the FAA can be resolved in only one way under the Supremacy Clause—state policy goals must give way to federal law. And this Court's holding in *Iskanian* does not call for a different result, as that decision rested on the premise that a PAGA action is not a dispute between the employer and the aggrieved employee, but rather "between an employer and the ***state***" (59 Cal.4th at 384 (emphasis added)).

I. THE FAA PREEMPTS THE *BROUGHTON-CRUZ* RULE.

The *Broughton–Cruz* rule is preempted by the FAA because it impermissibly declares a cause of action seeking a particular remedy categorically off limits to arbitration. *Broughton*'s holding is simple: "a CLRA action for damages is amenable to arbitration but an action for injunctive relief is not." (21 Cal.4th at 1085.) *Cruz* draws a similar line, carving out from the reach of the FAA most, and possibly all, claims for injunctive relief under the UCL. Since the *Broughton-Cruz* rule by its terms forbids arbitration of particular remedy "the [preemption] analysis is straightforward" under *Concepcion*, 563 U.S. at 341.

Efforts to reformulate *Broughton-Cruz* would fare no better. It is no answer to say that arbitration agreements can be enforced so long as claims for public injunctions can be arbitrated: That is just another way of

conditioning the enforcement of arbitration agreements on the availability of class-wide arbitration (this time, in the form of a class-wide injunction) and therefore is just as invalid under *Concepcion* and its progeny.

A. The FAA Forbids States To Declare Particular Claims—Or Aspects Of Claims—Categorically Off Limits to Arbitration.

"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*, 563 U.S. at 341. 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 decisions from the Supreme Court of the United States compel this conclusion. For example, the Court held over 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* (1984) 465 U.S. 1, 10-16.) 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.

Three years later, the U.S. Supreme Court overturned another California law requiring a judicial forum—this time for wage disputes. (See *Perry v. Thomas* (1987) 482 U.S. 483, 489-92.) 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.)

Less than a decade 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* (2008) 552 U.S. 346, 352-63.)

A few years ago, in the face of what it found to be continuing judicial hostility to arbitration after *Concepcion*, 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* (2012) 133 S.Ct. 500 (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.* (1994) 511 U.S. 298, 312).) 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." (*Ibid.* (quoting *Concepcion*, 563 U.S. at 342).)

Contrary to *Broughton* and *Cruz*, which declared claims for public injunctions non-arbitrable based on the assumption that arbitrators are not as well suited as courts to administer such injunctions (*Broughton*, 21 Cal.4th at 1081-82; *Cruz*, 30 Cal.4th at 316), the Supreme Court of the United States has made clear that the type of remedy sought does not affect whether a dispute is subject to arbitration. For example, the Court held that the FAA preempted a New York rule providing that punitive damages may be awarded only by courts. (*Mastrobuono v. Shearson Lehman Hutton, Inc.* (1995) 514 U.S. 52; see also *Ferguson*, 733 F.3d at 928 (holding that *Mastrobuono* "foreclosed" the plaintiff's attempt to distinguish the *Broughton-Cruz* rule from the state-law rules invalidated in *Marmet* and *Concepcion*).) 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. (*Gilmer*, 500 U.S. at 32.) And following *Gilmer*, the Ninth Circuit, 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* (9th Cir. 2003) 345 F.3d 742 (en banc).)

In short, 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 injunctions under two statutes on the grounds that those statutes provide relief that benefits the public. The rule is therefore preempted by the FAA, just like the state-law rules in *Southland*, *Perry*, *Preston*, *Marmet*, *Nitro-Lift*, and *Mastrobuono*. The Ninth Circuit recently reached that exact conclusion, holding—as did the court below—that "[b]y exempting from arbitration claims for public injunctive relief under the CLRA, UCL, and FAL, the *Broughton-Cruz* rule similarly

prohibits outright arbitration of a particular type of claim." (*Ferguson*, 733 F.3d at 934.)

B. Under *Concepcion* and *American Express*, The FAA Prohibits States From Insisting On The Availability of Broad "Public" Injunctions In Arbitration.

Perhaps recognizing that the categorical rule of *Broughton-Cruz* is untenable in light of the long line of contrary precedent, plaintiff seeks to prop up *Broughton-Cruz* by reconfiguring the doctrine. She argues that, even if California cannot prohibit outright the arbitration of claims for a public injunction, the arbitration agreement here is nevertheless unenforceable because it requires arbitration on an individual basis and therefore precludes injunctive relief on behalf of a broader class or the general public. (Op. Br. 18-25; Reply Br. 5-27.)

If California law conditioned the enforceability of an arbitration agreement on the availability of public injunctive relief, it would be preempted because such a state-law rule would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Concepcion*, 563 U.S. at 352 (quotation marks omitted).)

Concepcion held that the FAA preempts a state-law rule purporting to condition arbitration on the availability of procedures that are incompatible with the inherent characteristics of arbitration. Likewise, this Court—although expressly declining to "address the continued viability of *Broughton* and *Cruz*"—recently affirmed that "states may not require a procedure that interferes with fundamental attributes of arbitration, even if it is desirable for unrelated reasons." (*Sanchez v. Valencia Holding Co.* (2015) 61 Cal.4th 899, 917, 924 (citation and quotation marks omitted).)

State-law policies conditioning arbitration on the availability of a remedy or procedure that is fundamentally at odds with "arbitration as envisioned by the FAA" (*Concepcion*, 563 U.S. at 351) 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 *Shearson/American Express, Inc. v. McMahon* (1987) 482 U.S. 220, 226).)

And this federal rule applies, as this Court recognized in *Sanchez*, "equally to requirements imposed by statute or judicial rule." (61 Cal.4th 899 at 924; see also *DIRECTV, Inc. v. Imburgia* (2015) 136 S.Ct. 463, 467 (holding that there is no meaningful distinction between relying on the CLRA's anti-waiver provision "rather than *Discover Bank* itself," and that this Court "has recognized as much" in *Sanchez*); *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).)

Claims for broadly-applicable "public" injunctions are indistinguishable from other class-wide claims that fall within the heartland of *Concepcion*'s holding, because they transform arbitration from a simple, informal, and efficient method of resolving individual disputes into a complex, formal, and inefficient method of adjudicating remedies on behalf of a group. Plaintiff's public-injunction claim is neither necessary nor intended to protect ***her own*** rights; rather, a public injunction is designed to protect third parties ***other than*** the individual participating in the arbitration.

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." (21 Cal.4th at 1077 (emphasis added).) It is indistinguishable from the class-wide injunctive relief available in class actions.

Such class-wide "public" injunctions are therefore every bit as inconsistent with the FAA's conception of arbitration as the class actions discussed in *Concepcion*. They transform arbitration from a procedure to resolve a dispute between two parties into a procedure that involves the claims of numerous other individuals. Moreover, 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*, 563 U.S. at 350 ("class arbitration greatly increases risks to defendants . . . when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once").)

A "public" injunction is not materially different from a class injunction. In this context, and in the face of *Concepcion*, the term "public" at most provides a "merely semantic" distinction (*Iskanian*, 59 Cal.4th at 388) that cannot extend the reach of state power to require the availability of procedures inconsistent with arbitration under the FAA.

Concepcion thus squarely forecloses any argument that the enforcement of an arbitration agreement can be conditioned on the availability of relief extending extends beyond the individual who agreed to arbitrate his or her claims. This Court recognized as much in *Sanchez*,

holding that the CLRA anti-waiver provision, while it might prevent a litigant from contracting away class remedies in court, provided no basis to deny enforcement to an arbitration agreement that limited claims to individual procedures and individual relief. (See *Sanchez*, 61 Cal.4th at 917, 924.)

The same principle prevents a state court from refusing to enforce an arbitration agreement that does not provide class-wide injunctive relief. The adjective "public" adds nothing to the analysis; arbitration that encompasses class-wide injunctive relief addressing injuries of absent parties or the general public is "not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law." (*Concepcion*, 563 U.S. at 351. See also *id.* at 348 (class-wide injunctive relief in "arbitration, to the extent it is manufactured by [*Broughton* and *Cruz*] rather than consensual, is inconsistent with the FAA").)

Because it would condition enforcement of arbitration agreements on the availability of procedures that are inconsistent with the fundamental attributes of arbitration, plaintiff's reformulated *Broughton-Cruz* rule is irreconcilable with the FAA's purposes and objectives.[3]

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[3] As one California federal judge succinctly put it, "*Concepcion* . . . decided that states cannot refuse to enforce arbitration agreements based on public policy." (*Arellano v. T-Mobile USA, Inc.* (N.D. Cal. May 16, 2011) 2011 WL 1842712, at *1-2.) The vast majority of federal district courts in California to consider the issue have likewise held the *Broughton-Cruz* rule preempted in the wake of *Concepcion* and compelled arbitration on an individual basis under arbitration clauses that authorized only individualized injunctive relief in cases where the plaintiffs had sought to pursue a claim for a "public" injunction. (See, *e.g.*, *Brown v. DIRECTV, LLC* (C.D. Cal. June 26, 2013) 2013 WL 3273811, at *11; *Miguel v. JPMorgan Chase Bank, N.A.* (C.D. Cal. Feb. 5, 2013) 2013 WL 452418, at *10; *Meyer v. T-Mobile USA Inc.* (N.D. Cal. 2011) 836 F. Supp. 2d 994, 1005-06; *Hendricks v. AT&T Mobility LLC* (N.D. Cal. 2011) 823 F. Supp. 2d 1015, 1024; *Kaltwasser v. AT&T Mobility LLC* (N.D. Cal. 2011) 812 F. Supp. 2d 1042, 1050-51; *Nelson v. AT&T Mobility* LLC (N.D. Cal. Aug.

II. THE SUPREMACY CLAUSE PRECLUDES STATE PUBLIC POLICY OBJECTIVES FROM OVERRIDING FEDERAL LAW.

Plaintiff cannot salvage *Broughton-Cruz* by arguing that it is necessary to effectively vindicate a state-law policy of permitting individuals to obtain class-wide relief. That is the precise state policy that *Concepcion* held insufficient to override the FAA, and conflicts between state policy and federal law must be resolved in favor of the latter.

Like the *Broughton-Cruz* rule, the *Discover Bank* rule invalidated by *Concepcion* required the availability of class-action procedures in order to supplement public enforcement of consumer rights. (See *Concepcion*, 563 U.S. at 340, 352.) 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***." (*Ibid.* (emphasis added).) As the Ninth Circuit 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.) Other courts have reached the same conclusion. (See, *e.g.*, *Cruz v. Cingular Wireless, LLC* (11th Cir. 2011) 648 F.3d 1205, 1214 (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").)

Plaintiff maintains that the *Broughton-Cruz* rule trumps the FAA. But under the Supremacy Clause, federal law ***always*** prevails over state law, not the other way around. Neither state public policy announced by a

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18, 2011) 2011 WL 3651153, at *1-4; *In re Gateway LX6810 Computer Prods. Litig.* (C.D. Cal. July 21, 2011) 2011 WL 3099862, at *1-3; *In re Apple & AT&T iPad Unlimited Data Plan Litig.* (N.D. Cal. July 19, 2011) 2011 WL 2886407, at *4; *see also, e.g.*, *In re Sprint Premium Data Plan Mktg. & Sales Prac. Litig.* (D.N.J. Mar. 13, 2012) 2012 WL 847431, at *12.)

court nor rights purportedly created by a state statute afford a valid basis for declaring particular claims off-limits to arbitration or for conditioning the enforceability of an arbitration agreement on the availability of a remedy in arbitration.

There can be no weighing or balancing of state interests against federal ones—though that is just what *Broughton* and *Cruz* 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* (2009) 556 U.S. 729, 751 (quoting *Swift & Co. v. Wickham* (1965) 382 U.S. 111, 120).)

As *Concepcion* recounts, the FAA was enacted specifically to overcome the "great variety of devices and formulas declaring arbitration against public policy." (563 U.S. at 342 (quotation marks omitted).) States therefore may not insist on the availability of specific procedures that are incompatible with "arbitration as envisioned by the FAA," "even if [they are] desirable for unrelated reasons." (*Id.* at 351; see also, *e.g.*, *Coneff*, 673 F.3d at 1159 (holding that state "policy concerns, however worthwhile, cannot undermine the FAA").)

Accordingly, 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 trumps any interest" that is "'unrelated' to the FAA." (*American Express*, 133 S.Ct. at 2312 n.5 (citation omitted); accord *Concepcion*, 563 U.S. at 351.) 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.)

That is particularly true with respect to assertions—like plaintiff's here—that an arbitration agreement "must permit effective vindication of

state-created rights," such as her supposed right to bring a claim for a public injunction reaching others as well as herself, or the supposed rights of absent third parties to be the beneficiaries of injunctive relief sought by UCL or CLRA plaintiffs. (Op. Br. 36 (emphasis added).) 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.[4] As the Ninth Circuit explained in the wake of *Concepcion*, "*Mitsubishi, Gilmer,* [*Randolph*], and similar decisions are limited to federal statutory rights." (*Coneff*, 673 F.3d at 1158 n.2.)[5]

The Supreme Court's decision in *American Express* leaves no doubt that any effective-vindication exception cannot extend to state-law claims. The Court made clear that even with respect to claims under ***federal*** law, an "effective vindication" challenge to enforcement of an arbitration

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[4] See, *e.g.*, *Mitsubishi*, 473 U.S. at 627 ("it is the ***congressional*** intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable") (emphasis added); *Dean Witter Reynolds, Inc. v. Byrd* (1985) 470 U.S. 213, 221 (FAA applies "absent a countervailing policy manifested in another ***federal*** statute") (emphasis added); *Shearson*, 482 U.S. at 226 ("the Arbitration Act's mandate may be overridden by a contrary ***congressional*** command") (emphasis added); *Gilmer*, 500 U.S. at 26 ("the burden is on Gilmer to show that ***Congress*** intended to preclude a waiver of a judicial forum") (emphasis added); *Green Tree Fin. Corporation-Alabama v. Randolph* (2000) 531 U.S. 79, 90 (question is "whether ***Congress*** has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue") (emphasis added).

[5] The same limitation was widely recognized before *Concepcion* as well. (See, *e.g.*, *Stutler v. T.K. Constructors Inc.* (6th Cir. 2006) 448 F.3d 343, 346; *Pro Tech Indus., Inc. v. URS Corp.* (8th Cir. 2004) 377 F.3d 868, 873; *Brown v. Wheat First Secs., Inc.* (D.C. Cir. 2001) 257 F.3d 821, 826; *Eaves-Leonos v. Assurant, Inc.* (W.D. Ky. Jan. 8, 2008) 2008 WL 80173, at *8; *Rosenberg v. BlueCross BlueShield of Tenn., Inc.* (Tenn. Ct. App. 2006) 219 S.W.3d 892, 908.)

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." (*Ibid.* (emphasis in original).)

Thus, 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. As the Ninth Circuit has held in light of *American Express*, "[t]he effective vindication and inherent conflict exceptions are two sides of the same coin" and "[b]oth exceptions are reserved for claims brought under federal statutes." (*Ferguson*, 733 F.3d at 936.)

A federal court in the Northern District of California reached the same conclusion even before *Ferguson*, rejecting the argument that, "even if *Concepcion* permits [a company] to compel arbitration of his CLRA and UCL claims, [the company's arbitration agreement] cannot preclude the arbitrator from awarding public injunctive relief." (*McArdle v. AT&T Mobility LLC* (N.D. Cal. Sept. 25, 2013) 2013 WL 5372338, at *4 (Wilken,

J.).) That argument, the court pointed out, "relies on . . . this 'effective vindication' rule"; and in *American Express* "the majority strongly suggested that the effective vindication rule applies only to federal statutory rights, repeatedly referring to federal rights or the pursuit of federal remedies," while "[t]he dissenting justices in *American Express* stated the point even more clearly in their effort to distinguish the case they were considering from *Concepcion*." (*Ibid.*)

In short, *American Express*, *Concepcion*, and these other decisions all support the view taken by Justice Chin in his dissent in *Broughton*:

> [B]inding federal authority forecloses the majority's attempt to base an FAA exception for *state* laws limiting enforcement of arbitration agreements on the 'inherent conflict' analysis applicable to *congressional* action. . . . [T]he high court's pronouncements regarding the preemptive effect of the FAA on such state laws have been broad and emphatic. They do not appear to permit any exception. . . . The Supreme Court's view could hardly be clearer.

(*Broughton*, 21 Cal.4th at 1091-92 (Chin, J., dissenting).) That view has become clearer still in the 17 years since *Broughton* was decided. Plaintiff's contention that the FAA contains an unwritten exception that extends the vindication-of-rights argument to state-law claims should be rejected as contrary to binding precedent.[6]

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[6] Even if the Supreme Court of the United States had been less clear about the reach of its decisions and the vindication-of-statutory-rights exception were applicable to ***state*** statutory rights, the mere unavailability of public injunctions would not be a valid basis under Supreme Court precedent for refusing to enforce an arbitration agreement. 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 plaintiff here, the plaintiff in *Gilmer* argued that arbitration could not "adequately further the

III. *ISKANIAN* DOES NOT SAVE THE *BROUGHTON-CRUZ* RULE FROM PREEMPTION.

Finally, as the court below correctly concluded (Slip Op. 17-23), plaintiff reads this Court's recent decision in *Iskanian* far too broadly in asserting that it shields the *Broughton-Cruz* rule from FAA preemption (Op. Br. 44-50; Reply Br. 20-23).

1. This Court's PAGA-related holding in *Iskanian* rested on the conclusion that a representative PAGA claim belongs to the State. The Court reasoned that "a PAGA claim lies outside the FAA's coverage" because, according to this Court, "it is not a dispute between an employer and an employee arising out of their contractual relationship" (59 Cal.4th at 386). Instead, in this Court's view, an employee who brings a PAGA claim represents the "legal right and interest" of the state government as its "proxy or agent"—and on that reading of PAGA, which this Court adopted, the dispute is really between the employer and the State (*Id.* at 387-88).

The conclusion that PAGA claims belong to the State rested on what plaintiff characterizes as the "unique attributes of PAGA" (Op. Br. 46). Among these unique attributes relied upon by this Court in *Iskanian*:

- The outcome of a PAGA claim is "binding on the [state] government" (as well as "nonparty employees"). (*Iskanian*, 59 Cal.4th at 381, 387.)
- An employee can bring a representative PAGA claim only after giving "written notice by certified mail to the Labor and Workforce Development Agency" and receiving notice from the Agency that it does not intend to either investigate the

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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. (*Ibid.*)

violation or issue a citation itself (see Labor Code § 2699.3(a)). (*Iskanian*, 59 Cal.4th at 380.)[7]

- "75 percent" of any recovery obtained "will go to the State's coffers." (*Iskanian*, 59 Cal.4th at 387; Labor Code § 2699(i).)
- PAGA claims enforce the labor laws "on behalf of state law enforcement agencies"; indeed, such claims "can only be brought by the state or its representatives." (*Iskanian*, 59 Cal.4th at 388.)

These detailed descriptions of the mechanics of PAGA claims were central to the Court's holding and place important and dispositive limits on *Iskanian*'s reach. This Court stated that its "FAA holding applies specifically to a state law rule barring predispute waiver of an employee's right to bring an action that can only be brought by the state or its representatives, where any resulting judgment is binding on the state and any monetary penalties largely go to state coffers." (*Iskanian*, 59 Cal.4th at 388.) To expand that holding, the Court cautioned, would invite "a state to circumvent the FAA" by "merely semantic" assignments of a private claim to the public or to the State government. (*Ibid.*)

None of the features relied upon in *Iskanian* are present here: when private plaintiffs bring claims for injunctions, the results are not binding on the State; there is no pre-filing requirement under the UCL or CLRA that requires private plaintiffs to give the State notice of their requests for an injunction; no monetary relief flows to the State's coffers; and there has

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[7] In other words, in addition to prohibiting the State from taking a second bite at the apple after private litigation has finished, PAGA also creates an "either/or" structure at the front end—either the State will bring a claim itself, or a private employee will be allowed to bring a claim on the State's behalf, but not both.

never been a suggestion that private plaintiffs bringing UCL or CLRA claims are "proxies" for the State.

There is no colorable argument here that claims under the UCL or CLRA belong to the State. As the court below noted, there is no authority "that designates the state as the real party in interest on an injunctive relief claim" under those statutes, nor any authority "that binds the state to any judgment on [such] claims." (Slip Op. 23.)

Quite the contrary. Nothing precludes the attorney general or other public agencies from bringing enforcement actions in the interest of the general public. (See *EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279 (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."); see also *Gilmer*, 500 U.S. at 32 ("it should be remembered that arbitration agreements will not preclude the *EEOC* from bringing actions seeking class-wide and equitable relief").)

Plaintiff's argument thus commits the very error that this Court warned about in outlining the limits to its holding in *Iskanian*. Her claims—or the claims of any other private plaintiff for injunctive relief under the CLRA, UCL, or FAL—share none of the characteristics of PAGA claims that drove the Court's holding in *Iskanian*. A State's desire to deputize its class-action lawyers as private attorneys general does not empower it to supplant private parties' federally protected agreements to arbitrate under the FAA.

2. Plaintiff's contention that *Iskanian* announces a broad rule placing all claims seeking remedies declared to be "public" outside the reach of the FAA is not only inconsistent with *Iskanian* itself, but is also irreconcilable with U.S. Supreme Court precedent.

As explained above, the Supreme Court has held that states cannot exclude claims for punitive damages from arbitration. (See *Mastrobuono*, 514 U.S. at 58.) Yet punitive damages are a quintessential public-purpose remedy, because they "by definition are not intended to compensate the injured party," instead aiming to "deter [the] tortfeasor and others from similar extreme conduct." (*City of Newport v. Fact Concerts, Inc.* (1981) 453 U.S. 247, 266-67.)

Additionally, in *Waffle House*—the very case relied on in *Iskanian* (59 Cal.4th at 386)—the Supreme Court specifically ***rejected*** the Fourth Circuit's attempt, like plaintiff's here, to draw a line between "victim-specific" and "injunctive" relief. (534 U.S. at 294.) The Court instead held that punitive damages and injunctive relief should be treated the same under the FAA. As the Court explained, punitive damages "by definition are not intended to compensate the injured party" and "may often have a greater impact on the behavior of other employers than the threat of an injunction"; while "injunctive relief, although seemingly not 'victim-specific,' can be seen as more closely tied to the employees' injury than to any public interest." (*Id.* at 295.) Taken together, these holdings compel the conclusion that whether a state-law injunctive claim has a public purpose rather than a compensatory one is irrelevant; states may not declare such claims outside the coverage of arbitration agreements.

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Dated: January 21, 2016

Respectfully submitted.

Donald M. Falk (SBN 150256)
MAYER BROWN LLP
Two Palo Alto Square
3000 El Camino Real
Palo Alto, CA 94306
(650) 331-2000

Attorney for Amicus Curiae *the Chamber of Commerce of the United States of America*

Of Counsel:

Andrew J. Pincus
(*pro hac vice application pending*)
Archis A. Parasharami
(*pro hac vice application pending*)
Daniel E. Jones
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3000

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Dated: January 21, 2016

Respectfully submitted.

Donald M. Falk (SBN 150256)
MAYER BROWN LLP

Attorney for Amicus Curiae

I, Kristine Neale, declare as follows:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is: Two Palo Alto Square, Suite 300, 3000 El Camino Real, Palo Alto, California 94306-2112. On January 21, 2016, I served the foregoing document(s) described as:

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Glenn A. Danas
glenn.danas@capstonelawyers.com
Ryan H. Wu
ryan.wu@capstonelawyers.com
Liana Carter
liana.carter@capstonelawyers.com
Capstone Law APC
1840 Century Park East, Suite 450
Los Angeles, CA 90067
(310) 556-4811
(310) 943-0396

Attorneys for Plaintiff-Respondent Sharon McGill

Julia B. Strickland
lacalendar@stroock.com
Stephen J. Newman
David W. Moon
Marcos D. Sasso
Stroock & Stroock & Lavan LLP
2029 Century Park East, Suite 1800
Los Angeles, CA 90067
(310) 556-5800
(31) 556-5959

Attorneys for Defendant-Appellant Citibank, N.A.

Judge John W. Vineyard, Dept. 12
Superior Court, Riverside County
4050 Main Street
Riverside, CA 92501

Fourth Appellate District, Div. 3
601 W. Santa Ana Blvd.
Santa Ana, CA 92701

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Kristine Neale

Kristine Neale