NO. 09-16703

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MATTHEW C. KILGORE and WILLIAM BRUCE FULLER,

Plaintiffs-Appellees

v.

KEYBANK, NATIONAL ASSOCIATION and
GREAT LAKES EDUCATION LOAN SERVICES, INC.,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
NO. 3:08-CV-02958-TEH

BRIEF OF *AMICI CURIAE* ARBITRATION PROFESSORS IN SUPPORT OF PLAINTIFFS-APPELLEES' PETITION FOR REHEARING AND REHEARING *EN BANC*

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INTEREST OF *AMICI CURIAE*

Professor Hiro N. Aragaki, together with the *amici* listed in Appendix, *infra*, are arbitration law professors with considerable expertise in arbitration law, including the law of Federal Arbitration Act ("FAA") preemption and the U.S. Supreme Court's controversial opinion in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). *Concepcion* is the sole asserted ground upon which the Panel in this case overturned a prior, precedential decision of this Court.

Amici have an interest in the thoughtful and accurate vetting of significant FAA preemption issues, something that has become alarmingly important in the recent wake of *Concepcion*. We believe the matter is of exceptional national importance as to merit, at minimum, a rehearing. *See* Fed. R. App. Proc. 35(a)(2).

The views expressed in this brief are our own and do not reflect the beliefs of the institutions with which we are affiliated. No counsel of a party to this case authored this brief in whole or in part, and no person other than *amici* contributed money to fund this brief.

INTRODUCTION

The Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), was a game-changer that disrupted the settled contours of FAA preemption law. But it brings no new considerations to bear on this Court's prior, well-reasoned decision in *Davis v. O'Melveny & Myers*, 485 F.3d 1066 (9th Cir. 2007) (King, J. *by designation*, McKeown, J., Berzon, J.). Like many lower courts that have understandably struggled to discern the proper implications of *Concepcion*[1]—a confusing case in its own right—we submit that the Panel in this case overestimated *Concepcion*'s import in a way that is deeply problematic for the future development of FAA preemption law. Because the Panel's decision extends *Concepcion* beyond its proper limits and creates unnecessary doubt about this Court's prior pronouncements on the issue, it warrants careful reconsideration.

ARGUMENT

I. *CONCEPCION* FURNISHES ABSOLUTELY NO BASIS ON WHICH TO REVERSE THE PRECEDENT SET BY *DAVIS v. O'MELVENY*

A three-judge panel of this Court may not reconsider a prior panel's decision unless, *inter alia*, an intervening U.S. Supreme Court opinion undermines the prior decision's precedential value. *See Kilgore v. KeyBank*, Nos. 09–16703, 10–15934,

[1] A cursory search through WESTLAW will reveal that, almost *every business day*, at least one state or federal court is called upon to interpret *Concepcion*.

2012 WL 718344, at *8 (9th Cir. Mar. 7, 2012) (quoting *United States v. Rodriguez-Lara*, 421 F.3d 932, 943 (9th Cir. 2005)). To even reconsider—much less overturn—this Court's prior decision in *Davis* on this ground, the Panel was required first to find that the decision so "undercut[s] the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable," *Miller v. Gammie*, 335 F3d 889, 899-900 (9th Cir. 2003) (en banc), or so "undermines an existing precedent of the Ninth Circuit . . . [that is] closely on point." *Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002) . As explained below, the Panel made this determination in error. It thereby created further confusion about the meaning and scope of *Concepcion*, and needlessly called into question this Court's settled and accurate FAA preemption precedents.

A. The Proposition In *Concepcion* Relied On By The Panel To Overturn *Davis* Was Well Established Prior To *Davis*

The Panel held that the *Broughton-Cruz* rule "does not survive *Concepcion* because the rule 'prohibits outright the arbitration of a particular type of claim'"—namely, public (not private) injunction claims.[2] *Kilgore*, 2012 WL 718344, at *10 (citing *Concepcion*, 131 S. Ct. at 1747); *see also id*. at *6 (same). But the

[2] The district court opinions on which the Panel relied also used this same proposition to find the *Broughton-Cruz* rule preempted. *See Nelson v. AT&T Mobility LLC*, No. C10–4802 THE, 2011 WL 3651153, at *2 (N.D. Cal. Aug. 18, 2011); *Arrellano v. T-Mobile USA, Inc.*, No. C 10–05663, 2011 WL 1842712, at *1-*2 (N.D. Cal. May 16, 2011). Like the Panel's opinion, therefore, those opinions are also mistaken about *Concepcion*'s import for *Broughton* and *Cruz*.

proposition in *Concepcion* that a state law may not categorically require a judicial forum for the resolution of certain types of claims—or deny an arbitral forum despite a valid arbitration agreement covering such claims—had already been well settled long beforehand.

For example, to support the proposition for which it was cited by the Panel, the *Concepcion* Court relied on *Preston v. Ferrer*, 552 U.S. 346, 353 (2008). *See Concepcion*, 131 S. Ct. at 1747. *Preston*, in turn, cited a litany of prior Supreme Court precedents—all of which preceded *Davis*—for the proposition that "[t]he FAA's displacement of conflicting state law is 'now well-established,' and has been repeatedly affirmed." *Id*. (quotation omitted). Indeed, for the past thirty years, the Court has taken the clear position that FAA § 2 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 Mem. Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 24 (1983) (emphasis added), and that, "[i]n enacting § 2 of the [FAA], Congress . . . 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." *Southland v. Keating*, 465 U.S. 1, 10 (1984) (quoted in *Volt Info. Scis. v. Stanford Univ.*, 489 U.S. 468, 478 (1989)); *see also id*. at 10-11, 16. Were it not for the constraints of

space, we could cite countless other Supreme Court and Ninth Circuit cases predating *Davis* that stand for exactly the same proposition.

To be sure, *Broughton* and *Cruz* appear at first blush to offend these well-established principles because they required the plaintiffs to bring their public injunction claims in court.[3] If so, was *Davis* correct to endorse *Broughton* and *Cruz* in the first place? This is a legitimate but extremely complex question, which is precisely why this Court should grant the petition in order to consider it anew.[4] But it is not a question whose answer changed in the slightest after *Concepcion*.

B. The Remaining Propositions In *Concepcion* Cited By The Panel, Even If New, Are At Best Irrelevant To, Or At Worst Support, *Broughton* and *Cruz*

Concepcion broke ground because it held that generally applicable contract defenses such as unconscionability are preempted by the FAA in certain circumstances, even though such defenses had widely been considered safe harbors for state regulation. *See Kilgore*, 2012 WL 718344, at *6 (quoting *Concepcion*, 131 S. Ct. at 1747). *Concepcion* was arguably also novel because it preempted a

[3] It is often overlooked that both *Broughton* and *Cruz* nonetheless ordered all remaining claims to arbitration. *See Broughton v. CIGNA Healthplans of Cal.*, 988 P.2d 67, 79-80, 82 (Cal. 1999); *Cruz v. Pacificare Health Sys., Inc.*, 66 P.3d 1157, 1168 (Cal. 2003).

[4] Lest there be any doubt, we are convinced that *Davis* was, in fact, correct about *Broughton* and *Cruz* and are prepared to explain this fully should the Court grant the Petitioner's request for rehearing *en banc*. For some background, see Hiro N. Aragaki, *A Plea to the Ninth Circuit: Reconcile* Cardenas *with* Broughton *and* Cruz (Oct. 31, 2011, 10:49AM), http://www.scotusblog.com/community/the-supreme-court-and-arbitration/.

state law that defeated a promise about the *manner* of arbitration, not the promise to arbitrate itself. But neither of these holdings affects *Broughton* or *Cruz*.

First, the contested holdings in *Broughton* and *Cruz* did not involve common law contract defenses; instead, they addressed whether certain California statutes (*e.g.*, the Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.* (West 2009)) were preempted by the FAA. *Concepcion* did not change the law in any way relevant to this issue.

Second, the statutes at issue in *Broughton* and *Cruz* were construed to require a judicial forum for public injunction claims despite a broadly worded arbitration agreement covering such claims; they had nothing to do with class arbitration waivers. By contrast, the *Discover Bank* rule[5] at issue in *Concepcion* merely invalidated collective action waivers (whether in arbitration or litigation); it did not invalidate the agreement to arbitrate a particular claim. By preempting *Discover Bank*, therefore, *Concepcion* only affected a promise regarding *how* to arbitrate, not the promise to arbitrate itself. The dispute would have been arbitrated regardless of how *Concepcion* was decided.

[5] The rule comes from the California Supreme Court's decision in *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).

If anything, *Concepcion*'s pronouncement that classwide relief may not be imposed in arbitration because it "interferes with fundamental attributes of arbitration," *Kilgore*, 2012 WL 718344, at *7 (quoting *Concepcion*, 131 S. Ct. at 1748) supports rather than detracts from *Broughton*, *Cruz*, and *Davis*. Not unlike *Concepcion*, Justice Mosk's painstakingly crafted opinion in *Broughton* holds that the public injunction remedy is also in fundamental tension with certain basic and unavoidable structural features of the arbitral forum. *See* Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 U.C.L.A. L. Rev. 1189, 1250-54 (2011).

II. THE PANEL'S INTERPRETATION OF *CONCEPCION* HAS NO SENSIBLE LIMITS AND IS PRONE TO ABUSE

Even if the Panel had been correct to reconsider *Davis*, it was incorrect to overturn *Davis*. *See* *Kilgore*, 2012 WL 718344, at *10 (describing *Davis* as "no longer good law"). The Panel's opinion stands for the sweeping proposition that rules such as *Broughton* and *Cruz* are preempted by the FAA simply because they "'prohibit[] outright the arbitration of a particular type of claim.'" *Id*. at *6, *10 (quotation omitted). This leads to absurd results.

It implies, for instance, that a state may not prohibit a prosecutor and a charged defendant from agreeing to arbitration, even though it has long been recognized that criminal matters are not amenable to arbitration because of the significant third party and public interests at stake. *See, e.g.*, *Harris v. Shearson*

Hayden Stone, Inc., 441 N.Y.S.2d 70, 74 (N.Y. App. Div. 1981).[6]

It implies that divorcing parents may now agree to arbitrate child custody disputes privately and outside the supervision of courts, even though their decision may completely overlook the best interests of their children. For such agreements must now be "'enforced according to [their] terms *even if a rule of state law would exclude such claims from arbitration*,'" *Kilgore*, 2012 WL 718344, at *5 (quotation omitted), as they typically do, for good reasons. *See, e.g.*, *Glauber v. Glauber*, 600 N.Y.S.2d 740, 743 (N.Y. App. Div. 1993); *Masters v. Masters*, 513 A.2d 104, 113 (Conn. 1986); *Stone v. Stone*, 292 So. 2d 686, 691 (La. 1974).

It implies that a lienor and a lienee may not only use arbitration to settle issues such as the amount due on a lien (as they always have), but also to conduct foreclosure proceedings in private, even though this uniquely judicial remedy presupposes the power to exercise jurisdiction over third parties with an interest in the foreclosed property, to monitor the sale, to enforce statutory bonding requirements, and to appoint and supervise rent receivers. *See Salley v. Option One Mortgage Corp.*, 925 A.2d 115, 128 (Pa. 2007); *B & M Const., Inc. v. Mueller*, 790 P.2d 750, 752 (Ariz. Ct. App. 1989); *see also Walther v. Sovereign*

[6] The proposition is so well-settled that the issue is rarely ever raised in published opinions. For further authority, see Thomas H. Oehmke, *Commercial Arbitration* § 29:9 (3d ed. 2011); David St. John Sutton et al., *Russell on Arbitration* § 1-035 (23d ed. 2007) (discussing English law).

Bank, 872 A.2d 735, 748 (Md. 2005); Donald Lee Rome & David M.S. Shaiken, *Arbitration Carve-Out Clauses in Commercial and Consumer Secured Loan Transactions*, 61 Disp. Resol. J. 43, 44 (2006). For these same reasons, state law prohibits the arbitration of most types of *in rem* proceedings. *See, e.g.*, Thomas H. Oehmke, *Commercial Arbitration* § 24:8 (3d ed. 2011) (noting that, unlike probate courts, arbitral tribunals cannot make determinations that affect unknown heirs or local taxing authorities); *cf. id*. § 39:13 (3d ed. 2011) (noting that although the FAA requires parties to arbitrate *in personam* claims, associated *in rem* claims must be brought in a court of law).

The grounds for these and other sensible limitations has nothing to do with "policy," *Kilgore* , 2012 WL 718344, at *10-11, or with a distrust of arbitrators or the arbitration process.[7] Rather, it has to do with the unavoidable fact that arbitration is structurally unable to handle certain kinds of disputes—typically, but not exclusively, those that directly implicate the rights of third parties. The same rationale animates the holdings in *Broughton* and *Cruz* that public injunction claims are non-arbitrable. *See* Aragaki, *Equal Opportunity*, *supra*, at 1250-54. They also inform the state arbitration statutes on which the FAA was originally

[7] Only state policies and laws animated by this distrust or "hostility" toward arbitration, not just any state policy that adversely affects the enforcement of arbitration agreements, stand as an obstacle to the purposes and objectives of the FAA. *See* Aragaki, *Arbitration's Suspect Status*, *supra*, at 1248-63.

modeled, all of which clearly recognized that certain types of disputes were not amenable to arbitration. *See* Hiro N. Aragaki, *Arbitration's Suspect Status*, 159 U. Pa. L. Rev. 1233 (2011); *cf.* Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 126 Va. L. Rev. 265, 281 (1926).

CONCLUSION

The Panel's interpretation of *Concepcion* knows no bounds. Because a great majority of novel and complex state law preemption issues have arisen with respect to the laws of California, the Ninth Circuit plays a crucial role in shaping the law of FAA preemption. As of the filing of this brief, four courts have already cited *Kilgore* with approval,[8] and many more are waiting in the wings to do so. *See, e.g.*, *Cardenas v. Americredit Financial Services, Inc.*, No. 10-17292 (9th Cir. argued Dec. 9, 2011). If allowed to stand, the Panel opinion will set the first federal circuit precedent nationwide for a proposition that simply cannot be correct. And even if it could ultimately be proven correct, it demands, at minimum, a rehearing.

[8] *See Coneff v. AT&T Corp.*, No. 09–35563, 2012 WL 887598, at *3 n.2 (9th Cir. Mar. 16, 2012); *Captain Bounce, Inc. v. Business Fin. Servs., Inc.*, No. 11–CV–858 JLS (WMC), 2012 WL 928412, at *3 (S.D. Cal. Mar. 19, 2012); *James v. Conceptus, Inc.*, No. H–11–1183, 2012 WL 845122, at *3 (S.D. Tex. Mar. 12, 2012); *Smith v. Americredit Fin. Servs., Inc.*, No. 09cv1076 DMS (BLM), 2012 WL 834784, at *2 (S.D. Cal. Mar 12, 2012).

Dated: March 27, 2012

Respectfully submitted,

_____

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7) of the Federal Rules of Appellate Procedure. The brief contains 2,237 words prepared in Microsoft Word 2007 format.

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APPENDIX

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