Nos. 10-17292, 10-17435

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUAN A. CARDENAS and FLORENCIA HERRERA DE CARDENAS,

Plaintiffs-Appellees,

vs.

AMERICREDIT FINANCIAL SERVICES, INC.,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California
No. 4:09-cv-04978-SBA
The Honorable Saundra Brown Armstrong

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for the Chamber of Commerce of the United States of America ("Chamber") certifies that it has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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INTEREST OF THE *AMICUS CURIAE*

The Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing more than 3,000,000 businesses and organizations of every size and in every sector of the nation's economy. As part of that representation, the Chamber frequently files *amicus curiae* briefs in cases involving issues of concern to its members, including issues relating to interpretation of the Federal Arbitration Act ("FAA") and/or enforceability of arbitration agreements.[1] *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, No. 09-893 (U.S.); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, No. 08-1198 (U.S.); *Rent-A-Center, West, Inc. v. Jackson*, No. 09-497 (U.S.); *Masters v. DirecTV, Inc.*, Nos. 08-55825 & 08-55830 (9th Cir.); *Cruz v. Cingular Wireless LLC*, No. 08-16080-CC (11th Cir.); *Litman v. Cellco P'ship*, No. 08-4103 (3d Cir.); *McKenzie Check Advance v. Betts*, No. SC-11-514 (Fla.).

Many of the Chamber's members have adopted contract provisions that require the parties to pursue disputes in arbitration rather than courts of general jurisdiction. Chamber members use arbitration because—in its traditional, bilateral form—it is a quick, fair, inexpensive, and less adversarial method of resolving

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[1] Both parties have consented to the filing of this brief. Fed. R. App. P. 29(a). No counsel for either party authored this brief in whole or in part, and no party, party's counsel, or person other than the *amicus*, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief. Fed. R. App. P. 29(c)(5).

disputes between the parties. But those advantages would be lost if parties could escape their obligations to arbitrate their disputes on an individual basis simply by packaging them as claims for injunctive relief on behalf of the general public and bringing them in California, whose state courts have declared such claims inarbitrable. The Chamber thus has a strong interest in participating in this case in which the Court may decide—for purposes of all future cases in this Circuit—whether the FAA bars states from declaring that agreements to arbitrate claims on an individual basis are unenforceable whenever the plaintiff purports to be seeking a "public" injunction.

SUMMARY OF ARGUMENT

In *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), the Supreme Court held in no uncertain terms that states may not refuse to enforce arbitration agreements on the ground that they require that claims be pursued on an individual basis. Rejecting concerns that such an interpretation of the FAA would enable companies to escape liability for conduct that causes small amounts of damages to large numbers of people, the Court held that "States may not require a procedure that is inconsistent with the FAA"—*i.e.*, class-wide proceedings when the arbitration agreement calls for individualized ones—"even if it is desirable for unrelated reasons." *Id.* at 1753. In other words, the federal policy favoring arbitration trumps any competing state policy in favor of allowing individuals to

serve as private attorneys general by bringing claims on behalf of a class or, a fortiori, the general public.

Despite the unequivocal holding of *Concepcion*, Plaintiffs Juan A. Cardenas and Florencia Herrera de Cardenas contend that they need not honor their agreement to arbitrate their disputes with defendant AmeriCredit on an individual basis, because they have brought claims for public injunctive relief under California's Unfair Competition Law ("UCL") and Consumers Legal Remedies Act ("CLRA"). Plaintiffs rely on *Cruz v. PacifiCare Health Systems, Inc.*, 66 P.3d 1157 (Cal. 2003) and *Broughton v. CIGNA Healthplans*, 988 P.2d 67 (Cal. 1999), in which the California Supreme Court declared such claims off-limits to arbitration.

Yet time and time again, the Supreme Court has explained that the FAA forbids states from creating a cause of action that is not subject to arbitration. As the Supreme Court has most recently put it, "[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) (emphasis added). California's *Cruz* and *Broughton* rules are an attempt to do just that, and accordingly must give way to the FAA's policy favoring enforcement of arbitration agreements. Numerous courts have so held, both before and especially after *Concepcion*.

Plaintiffs contend that it is not possible to pursue a public injunction in arbitration, and conclude from that premise that California public policy demands that they be afforded the opportunity to pursue claims for public injunctive relief in court. Ans. Br. 16-18. But whether California may have a policy favoring enforcement of its consumer-protection statutes by means of claims for public injunctions is beside the point, because the FAA requires that plaintiffs' arbitration agreement be enforced even if that results in limiting them to pursuing remedies on behalf of themselves alone. This is so for at least two reasons.

First, a plaintiff is not prevented from vindicating his or her statutory rights simply because an arbitration agreement prevents him or her from obtaining the broadest possible relief otherwise available under a statute. As the Supreme Court has explained, the fact that a statute makes available a broad injunctive remedy "does not mean that individual attempts at conciliation were intended to be barred." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991). Thus, even if a statute ordinarily allows parties to bring actions seeking relief on behalf of others in order to promote the public policy behind the statute, parties may trade the right to pursue such relief in favor of the opportunity to vindicate their ***individual*** rights quickly and efficiently in arbitration.

Second, when the ***federal*** policy favoring enforcement of arbitration agreements according to their terms conflicts with a ***state*** public policy favoring

non-individualized remedies as a means of promoting enforcement of state laws, the federal policy prevails. Plaintiffs' argument to the contrary is foreclosed by the Supreme Court's decision in *Concepcion*, which held that the FAA bars states from conditioning the enforceability of arbitration agreements on the availability of the class-action device, even if the state considers that device "desirable" as a means to incentivize claims and deter alleged wrongdoing. 131 S. Ct. at 1753. The logic of that holding applies with full force to state policies favoring the availability of public injunctions as a means of complementing public enforcement of consumer-protection statutes. Indeed, if California could authorize parties to avoid their agreements to arbitrate on an individual basis simply by bringing claims for public injunctions with class-wide effect, plaintiffs easily could evade *Concepcion* simply by recharacterizing their class actions as claims for public injunctive relief under the ubiquitous UCL and CLRA.

ARGUMENT

I. THE FAA PROHIBITS STATES FROM DECLARING CLAIMS FOR PUBLIC INJUNCTIONS NON-ARBITRABLE.

Plaintiffs argue the FAA does not preempt the holdings in *Cruz v. PacifiCare Health Systems, Inc.*, 66 P.3d 1157 (Cal. 2003) and *Broughton v. CIGNA Healthplans*, 988 P.2d 67 (Cal. 1999), which held that claims for injunctive relief under California's UCL and CLRA are non-arbitrable. *See* Ans. Br. of Plaintiffs-Appellees ("Ans. Br.") at 22-32; *see also* Opp. to Mot. for

Summary Reversal ("Opp. Summ. Rev.") at 7-16. But as the Supreme Court has explained time and time again—most recently in *Concepcion*—the FAA does not permit California to exclude a particular type of claim from arbitration, no matter what public-policy reasons it may have for doing so.[2]

In *Cruz* and *Broughton*, the California Supreme Court declared that claims for public injunctive relief under the UCL and CLRA are non-arbitrable—meaning that while claims for individual relief may be arbitrated, claims for injunctive relief on behalf of the public in general must be resolved in court. But as the Supreme Court explained in *Concepcion*, "[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." 131 S. Ct. at 1747 (emphasis added). *Cruz* and *Broughton* undeniably "prohibit[] outright" the arbitration of certain claims—namely, claims for public injunctions against conduct that allegedly violates either the CLRA or the UCL. Accordingly, under *Concepcion*, they are preempted by the FAA.

The "straightforward" analysis succinctly articulated in *Concepcion* (131 S.

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[2] In a case pre-dating *Concepcion*, this Court observed that in *Broughton* and *Cruz* the California Supreme Court rejected the contention that the FAA precluded it from declaring claims for public injunctions non-arbitrable. *See Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1080 (9th Cir. 2007). However, in neither *Davis* nor any other case has this Court itself affirmatively embraced that view. In any event, *Concepcion* is an intervening authority that would compel addressing the preemption issue anew.

Ct. at 1747) in turn is founded upon an unbroken line of Supreme Court decisions holding that states (usually California, as it happens) may not declare particular disputes to be non-arbitrable. *See Preston v. Ferrer*, 552 U.S. 346, 356 (2008) (FAA preempted California statute that "grants the Labor Commissioner exclusive jurisdiction to decide an issue that the parties agreed to arbitrate"); *Perry v. Thomas*, 482 U.S. 483, 491 (1987) (the "clear federal policy" underlying the FAA "places § 2 of the [FAA] in unmistakable conflict with California's [Labor Code] § 229 requirement that litigants be provided a judicial forum for resolving wage disputes," and "[t]herefore, under the Supremacy Clause, the state statute must give way"); *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (FAA preempted provision of the California Franchise Investment Law that precluded arbitration of claims under that law). *See also* Appellant's First Br. at 18-19.

As the Supreme Court put it over a quarter-century ago, "[i]n enacting § 2 of the federal Act, Congress 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." *Southland*, 465 U.S. at 10. Accordingly, because the California Supreme Court had "interpreted" California law "to require judicial consideration of claims brought under the State statute," that law, "[s]o interpreted, * * * directly conflicts with § 2 of the Federal Arbitration Act and violates the Supremacy Clause." *Id.*; *see also*

Perry, 482 U.S. at 489 (quoting *Southland*, 465 U.S. at 10, 16); *Preston*, 552 U.S. at 353 (quoting *Southland*, 465 U.S. at 16).[3]

Since *Concepcion*, in which the Supreme Court described the rule articulated in *Preston*, *Perry*, and *Southland* as entailing a "straightforward" analysis, federal courts in California repeatedly have held that *Cruz* and *Broughton* are preempted by the FAA. *See Hendricks v. AT&T Mobility LLC*, 2011 WL 5104421, at *7

[3] Indeed, even before *Concepcion* was decided, courts and commentators widely recognized that *Cruz* and *Broughton* could not be squared with the Supreme Court's precedents. *See, e.g.*, *Arriaga v. Cross Country Bank*, 163 F. Supp. 2d 1189, 1199 (S.D. Cal. 2001) ("If it were enough for a state legislature to declare, through the nature of the remedies it offers in a statute, that it did not wish to have certain claims subjected to arbitration, states would essentially be allowed to undercut the FAA in an area in which Congress is supreme (*i.e.*, interstate commerce)."), *overruled on other grounds by Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003); *Lozano v. AT&T Wireless*, 216 F. Supp. 2d 1071, 1076 (C.D. Cal. 2002) (following *Arriaga*), *overruled on other grounds by Ingle*, 328 F.3d 1165. *See also, e.g.*, Thomas A. Manakides, *Arbitration of "Public Injunctions": Clash Between State Statutory Remedies and the Federal Arbitration Act*, 76 S. CAL. L. REV. 433, 461-463 (2003) (explaining that *Broughton* was wrongly decided because existing U.S. Supreme Court precedent established that under the FAA, "[s]tate legislatures cannot legislate around arbitration clauses by claiming that a strong public policy exists"); 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*); Alan S. Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT'L L.J. 449, 452 n.11 (2005) ("I can't even begin to understand the California Supreme Court's decision in *Broughton*," in light of existing Supreme Court precedent).

(N.D. Cal. Oct 26, 2011) (holding that *Cruz* and *Broughton* are preempted because *Concepcion* "preempts state law to the extent the state law would preclude 'enforcement of arbitration agreements according to their terms so as to create streamlined proceedings,' even if the state law is based on public policy") (quoting *Concepcion*, 131 S. Ct. at 1748); *Meyer v. T-Mobile USA Inc.*, 2011 WL 4434810, at *7-*9 (N.D. Cal. Sept. 23, 2011) (rejecting the argument that an "arbitration agreement [was] unenforceable because it would deny [plainitiff] from exercising her statutory right to seek injunctive relief under the UCL and CLRA, rights affirmed by the California Supreme Court" in *Cruz* and *Broughton*); *Kaltwasser v. AT&T Mobility LLC*, __ F. Supp. 2d __, 2011 WL 4381748, at *6-*7 (N.D. Cal. Sept. 20, 2011) ("*Cruz* and *Broughton*, even more patently than *Discover Bank*, apply public policy contract principles to disfavor and indeed prohibit arbitration of entire categories of claims" and therefore are preempted under *Concepcion*); *Nelson v. AT&T Mobility LLC*, 2011 WL 3651153, at *2 (N.D. Cal. Aug. 18, 2011) (*Concepcion* "compels preemption" of *Cruz* and *Broughton*'s "blanket bans under state law"); *In re Gateway LX6810 Computer Prods. Litig.*, 2011 WL 3099862, at *3 (C.D. Cal. July 21, 2011) (rejecting the argument that "claims for injunctive relief under the CLRA and UCL are nonarbitrable under California law" under *Concepcion*'s "straightforward" analysis); *In re Apple & AT&T iPad Unlimited Data Plan Litig.*, 2011 WL 2886407, at *4 (N.D. Cal. July 19, 2011) (rejecting

plaintiffs' argument "that despite *Concepcion*, their claims for public injunctive relief under the CLRA or UCL are still exempt from arbitration" under *Cruz* and *Broughton*); *Arellano v. T-Mobile USA, Inc.*, 2011 WL 1842712, at *1-*2 (N.D. Cal. May 16, 2011) ("[t]he recent *Concepcion* decision compels preemption" of *Cruz* and *Broughton*); *Zarandi v. Alliance Data Sys. Corp.*, 2011 WL 1827228, at *2 (C.D. Cal. May 9, 2011) (rejecting "request[] that the Court bifurcate Plaintiff's claims that seek injunctive relief because such relief is not subject to arbitration under California law," and holding that "the FAA preempts state law to the extent it prohibits arbitration of a particular type of claim").[4]

[4] To our knowledge, only two federal courts have concluded otherwise. *See In re DirecTV Early Cancellation Fee Mktg. & Sales Practices Litig.*, __ F. Supp. 2d. __, 2011 WL 4090774 (C.D. Cal. Sept. 6, 2011); *Ferguson v. Corinthian Colls.*, 2011 WL 4852339 (C.D. Cal. Oct. 6, 2011). In *DirecTV*, the district court was "not convinced that *Cruz* and *Broughton* [were] overruled by *Concep*[*c*]*ion*," because, in its view, the prohibition on arbitration of claims for *public* injunctive relief (as opposed to claims for injunctive relief generally) did not amount to the "outright" prohibition that the Supreme Court had in mind when it held that state law is preempted if it "'prohibits outright the arbitration of a particular type of claim.'" 2011 WL 4090774, at *9-*10 (quoting *Concepcion*, 131 S. Ct. at 1747). And in *Ferguson*, the district court similarly held that *Broughton* and *Cruz* were not preempted because, "[w]hile state law cannot prohibit outright the arbitration of a particular type of claim under *Concepcion*," they "do not prohibit arbitration of all injunctive relief claims. Instead, they provide a framework for analyzing whether injunctive relief claims are arbitrable." 2011 WL 4852339, at *9. But as the district court in *Meyer* explained, the reasoning in *DirecTV* (and, by the same token, in *Ferguson*) is untenable: *Cruz* and *Broughton*'s prohibition of the arbitration of claims for public injunctive relief may amount to "a more narrow 'particular type of claim'" than a prohibition on ***all*** claims for injunctive relief, but "it is still a state court application of public policy to prohibit an entire category of (cont'd)

In view of the overwhelming weight of authority holding generally that states may not declare particular claims off limits to arbitration and specifically that *Cruz* and *Broughton* are preempted, plaintiffs' contention that the question "must be considered against the backdrop of the presumption against preemption" (Ans. Br. at 23) is a red herring. The Supreme Court's consistent line of FAA decisions establishes that, when it comes to conflicts between the FAA and state law, whatever presumption against preemption may be said to exist as a general matter, has been overcome. Every time the Court has considered whether the FAA preempts state law, it has concluded that it does. *See Concepcion*, 131 S. Ct. at 1753; *Preston*, 552 U.S. at 356; *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) (FAA preempted Montana statute requiring special notice for arbitration provisions); *Perry*, 482 U.S. at 491; *Southland*, 465 U.S. at 16. In not one of these cases did the Court start from the premise that the state law in question should presumptively prevail. Indeed, the Supreme Court most recently explained that when a state law and the FAA are in conflict—as when the state law excludes a particular type of claim from arbitration—"the analysis is ***straightforward***: The conflicting [state-law] rule is displaced by the FAA." *Concepcion*, 131 S. Ct. at 1747 (emphasis added). That "straightforward" approach—and the consistent line of Supreme Court cases finding FAA

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claims" from being subject to arbitration agreements, and thus is preempted by the FAA. *Meyer*, 2011 WL 4434810, at *9.

preemption—is irreconcilable with the presumption ***against*** preemption urged by plaintiffs.[5]

In short, *Concepcion*, *Preston*, and the decisions on which they are based all compel the conclusion that the FAA preempts the California Supreme Court's decisions in *Cruz* and *Broughton*, and precludes courts from refusing to enforce an arbitration agreement in accordance with its terms simply because a plaintiff seeks to bring a claim for so-called public injunctive relief under the UCL or CLRA.

II. THE FAA REQUIRES THE ENFORCEMENT OF AGREEMENTS TO ARBITRATE ON AN INDIVIDUAL BASIS, INCLUDING WHEN THEIR EFFECT IS TO PRECLUDE CLAIMS FOR PUBLIC INJUNCTIONS WITH CLASS-WIDE EFFECT.

If the Court agrees with plaintiffs that they cannot obtain a public injunction in arbitration, it will need to decide whether California may insist that they be afforded the opportunity to seek one in court. Accordingly, the Chamber will explain why the FAA preempts California's rule that the policies underlying the

[5] Even if this Court were writing on a blank slate, the Supreme Court has expressly rejected attempts "to impose a 'special burden'" on "'frustration-of-purpos[e]' conflict pre-emption." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 874 (2000). That, of course, is precisely the strand of preemption doctrine upon which *Concepcion* rests. *See* 131 S. Ct. at 1747-48. And though plaintiffs attempt to portray their case as being wholly within an area "traditionally regulated by states" (Ans. Br. at 24)—that is, consumer-protection law—in fact they are challenging the enforceability of an arbitration agreement, an area that Congress has expressly made first and foremost a matter of federal law. *See*, *e.g.*, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) ("Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.").

UCL and CLRA require that parties to arbitration agreements be able to pursue public injunction claims in court.

A. Plaintiffs' Vindication-of-Statutory-Rights Theory Does Not Apply To State-Law Causes Of Action.

Plaintiffs assert that they cannot pursue the full remedies provided under California's UCL and CLRA in arbitration, and thus that their arbitration agreement is unenforceable in light of "the Supreme Court's clear mandate that arbitration must permit parties to vindicate their statutory rights." Opp. Summ. Rev. at 11. But their argument runs headlong into *Concepcion*'s holding that "***States*** cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." 131 S. Ct. at 1753 (emphasis added). Plaintiffs contend that an arbitration agreement may not be enforced if it has the effect of depriving them of the ability to vindicate a state statutory right—here, California's authorization of "public injunction" claims under the CLRA and UCL—but the Supreme Court cases from which they divine this principle involved the vindication of claims arising under ***federal*** law, not state law. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000); *Gilmer*, 500 U.S. at 30; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). Those cases "are limited by their plain language to the question of whether an arbitration clause is enforceable where ***federal statutorily provided*** rights are affected"; by contrast, 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).

Thus, in a case rejecting the argument that plaintiffs could avoid their arbitration agreements by bringing public injunction claims under California law, one court recently explained that "*Green Tree* speaks to the vindication of *federal* statutory rights," but "Plaintiff's rights under the CLRA and UCL—the basis for his argument that he is entitled to broad injunctive relief—are state rights." *Hendricks*, 2011 WL 5104421, at *3 n.1. *See also, e.g., Pro Tech Indus., Inc. v. URS Corp.*, 377 F.3d 868, 873 (8th Cir. 2004) (rejecting application of *Green Tree* to claims not arising under federal statutes and explaining that, "[i]n *Green Tree*, 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) (*Green Tree* 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. Jan. 8, 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").[6]

The reason that this principle does not extend to state-created claims is simple: The existence of a federal statute such as the FAA does not preclude ***Congress*** from enacting an exception to the statute's scope. "Like any statutory directive, the [Federal] Arbitration Act's mandate may be overridden by a contrary ***congressional*** command." *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (emphasis added). But while "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 U.S. Constitution prevents states from doing the same.[7] Plaintiffs' contention that a court may refuse

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[6] Plaintiffs cite two cases in support of their contention that their proposed vindication-of-state-statutory-rights test is "controlling." Opp. Summ. Rev. at 10 (citing *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 81 (D.C. Cir. 2005) and *Davis*, 485 F.3d at 1082). But as discussed above (*see* note 2, *supra*), *Davis* merely acknowledged the California Supreme Court's conclusion that the FAA did not preempt the *Cruz* and *Broughton* rules; it did not independently reach that conclusion itself, and the intervening decision in *Concepcion* makes clear that California's position is untenable. And in *Booker*, the defendant did not contend that the vindication-of-rights theory is applicable only to federal claims, and hence the D.C. Circuit's assumption that this theory applied to the plaintiff's D.C.-law claims is merely that, and not a reasoned holding.

[7] Notably, in the more than two decades since the Supreme Court announced in *McMahon* that a federal statutory claim might be non-arbitrable if a party could "show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue" (482 U.S. at 227), it has ***never*** found a federal statutory claim to be non-arbitrable. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009) (holding claims under the Age Discrimination in Employment Act arbitrable); *Gilmer*, 500 U.S. 20 (same); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) (Securities Act of 1933); *McMahon*, 482 U.S. 220 (Securities (cont'd)

to enforce an arbitration agreement because a ***state-law*** claim cannot be vindicated is not supported by the cases they cite, and overlooks the fundamental difference in the relationships between two federal statutes on the one hand and a federal statute and a state statute on the other.

B. Regardless Of Whether The Vindication-Of-Statutory-Rights Theory Applies To State Claims, The FAA Requires Enforcement Of Agreements To Arbitrate Disputes On An Individual Basis.

Plaintiffs' core argument that the vindication-of-statutory-rights theory requires that they be allowed to pursue public injunction claims in court since they cannot do so in arbitration is wrong, for at least two reasons. First, the Supreme Court has already held that the vindication-of-statutory-rights theory is limited to ensuring that the plaintiff is able to obtain full individualized relief and is not violated simply because an arbitration agreement precludes the plaintiff from obtaining the broadest possible injunctive relief contemplated by a statute. Second, as *Concepcion* makes clear, when an arbitration agreement's requirement that dispute resolution take place on an individual basis conflicts with a plaintiff's ability to seek non-individualized relief, it is the policy favoring class-wide relief that must give way—not the federal policy in favor of enforcing arbitration

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Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act); *Mitsubishi Motors*, 473 U.S. 614 (Sherman Act). Currently pending before the Supreme Court is a case presenting the question whether claims arising under the Credit Repair Organizations Act are subject to arbitration. *See CompuCredit Corp. v. Greenwood*, No. 10-948 (U.S. argued Oct. 11, 2011).

agreements according to their terms.

1. The vindication-of-statutory-rights theory is limited to ensuring that the plaintiff is able to obtain full individualized relief for his or her injury.

Plaintiffs' argument is premised on the assumption that, if they cannot obtain every form of relief contemplated by California law, they cannot vindicate their statutory rights. But even in the context of ***federal*** statutory rights, an arbitration agreement is not unenforceable simply because it may prevent a plaintiff from obtaining the broadest form of relief authorized by a statute. This is so because, under the FAA, parties may elect to resolve disputes on an individual basis, even if a statute otherwise would provide an opportunity for non-individual relief to further its public-policy objectives.

The Supreme Court already has so held in *Gilmer*. Much like the plaintiffs here, the plaintiffs in *Gilmer* argued that the applicable "arbitration procedures" could not "adequately further the purposes of the ADEA because they do not provide for ***broad equitable relief*** and class actions." 500 U.S. at 32 (emphasis added). The Court responded that, "even if" the broad injunctive relief requested by the plaintiff could not "be granted by the arbitrator," the mere fact that the ADEA makes such relief available "does not mean that individual attempts at conciliation were intended to be barred." *Id.* (internal quotation marks omitted). The Court further noted that the arbitration agreement involved in that case did not

"preclude the EEOC from bringing actions seeking class-wide and equitable relief" of any kind. *Id.*[8]

The same is true here. As in *Gilmer*, that a statute may authorize "broad equitable relief" does not mean that "individual attempts at conciliation" without such relief "were intended to be barred." *Id.* (internal quotation marks omitted). In short, even when the vindication-of-statutory rights theory does apply, it does not follow that a plaintiff must be permitted to bring a claim for a "public" injunction in court notwithstanding his or her agreement to arbitrate all claims. Instead, the FAA requires that the agreement be enforced, even when that means that the plaintiff is limited to vindicating only his or her ***own*** rights by seeking individualized injunctive relief.

2. *Concepcion* establishes that the FAA trumps state policies favoring the availability of class-wide relief as a means of supplementing public enforcement.

Plaintiffs' argument also runs head-long into *Concepcion*. The Supreme Court made clear in *Concepcion* that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." 131 S. Ct. at 1753. That holding applies to a requirement that consumers be able to seek public injunctions to supplement public enforcement of the UCL and CLRA every

[8] And the Court subsequently held that a private arbitration agreement ***can't*** preclude the EEOC from doing so. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 287-88 (2002).

bit as much as it does to a requirement that consumers be allowed to bring class actions to ensure adequate deterrence of alleged corporate malfeasance.

If the rule were otherwise, the right to arbitrate that the FAA guarantees would be narrowly confined by the "great variety of devices and formulas declaring arbitration against public policy" (*Concepcion*, 131 S. Ct. at 1747 (internal quotation marks omitted))—by, for example, simply bringing an otherwise arbitrable dispute in the form of a request for relief that a state has declared non-arbitrable. But "[a]rbitration is a matter of contract, and the FAA requires courts to honor parties' expectations" even in the face of purportedly contrary state policy interests. *Id.* 131 S. Ct. at 1752.

One federal district court has recently recognized as much, explaining that the argument that a state may create a statutory claim for relief on behalf of others, and then bar individuals from waiving the ability to pursue that claim by agreeing to resolve disputes on an individual basis in arbitration "is no longer tenable in light of the Supreme Court's recent decision in * * * *Concepcion*." *Quevedo v. Macy's, Inc.*, __ F. Supp. 2d __, 2011 WL 3135052, at *17 (C.D. Cal. June 16, 2011). *Quevedo* concerned a plaintiff's attempt to avoid arbitration of a claim seeking to recover civil penalties under California's Private Attorney General Act ("PAGA") on behalf of fellow employees for alleged California Labor Code violations. *Id.* at *15. The arbitration agreement in *Quevedo* expressly barred the

plaintiff from bringing a claim that "involves representative members of a large group," thus precluding his attempt to seek relief on behalf of other employees. *Id.* at *16. Like plaintiffs here argue with respect to the UCL and CLRA, the plaintiff in *Quevedo* argued that, because PAGA permitted him to obtain such relief in court, "sending the PAGA claim to arbitration would irreparably frustrate the purpose of PAGA and prevent [him] from fulfilling the [California] Legislature's mandate." *Id.* at *15 (internal quotation marks omitted). The court rejected that argument, concluding instead that "requiring arbitration agreements to allow for representative PAGA claims on behalf of other employees would be inconsistent with the FAA." *Id.* at *17. As the *Quevedo* court explained, for a state to mandate the availability of representative PAGA relief in arbitration is the functional equivalent of requiring that class procedures be available in arbitration—something that *Concepcion* forbids. The court acknowledged that, as a policy matter, "a state might reasonably wish to require arbitration agreements to allow for collective PAGA actions," but explained that "*Concepcion* makes clear, however, that the state cannot impose such a requirement because it would be inconsistent with the FAA." *Id.*[9]

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[9] A divided panel of the California Court of Appeal has held that the FAA does not mandate the enforcement of arbitration agreements that would prevent a plaintiff's ability to vindicate the rights of others under PAGA. *Brown v. Ralphs Grocery Co.*, 128 Cal. Rptr. 3d 854 (Ct. App. 2011). But as the dissenting Justice observed in *Brown*, the majority's decision is irreconcilable with "the consistent (cont'd)

In short, just as the FAA mandates enforcing arbitration agreements that require parties to waive the right to pursue class-wide relief under Rule 23, so too does it necessitate enforcing arbitration agreements under which parties forgo the ability to bring claims for public injunctive relief under the UCL and CLRA. That is so "even though plaintiffs may argue that 'preclusion of injunctive relief on behalf of the class equates to preclusion of the ability to obtain effective [relief] enjoining deceptive practices on behalf of the public in general,' and in spite of 'public policy arguments thought to be persuasive in California.'" *Nelson*, 2011 WL 3651153, at *2 (quoting *Arellano*, 2011 WL 1842712, at *2) (alteration in *Nelson*).

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.

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line of [U.S.] Supreme Court cases mandating enforcement of arbitration clauses under the FAA, even in the face of California statutory or decisional law requiring court or administrative action rather than arbitration." *Id*. at 867 (Kriegler, J., dissenting). Thus, it is hardly surprising that, when confronted with the choice between the majority decision in *Brown* and Judge Feess' reasoning in *Quevedo*, Judge Henderson sided with "the *Quevedo* court's reasoning," noting that "[c]uriously, the *Brown* majority cited *Quevedo* only in a footnote" and "did not otherwise attempt to refute the *Quevedo* court's conclusions." *Nelson*, 2011 WL 3651153, at *4 & n.1.

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Respectfully submitted,

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I hereby certify that on this 31st day of October 2011, I electronically filed the foregoing brief with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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