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* LAW PROFESSORS ON REHEARING *EN BANC* IN SUPPORT OF PLAINTIFFS-APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FOREIGN CASES

STATUTES

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*

Amici Curiae represent a group of more than sixty law professors from across the nation with expertise in either arbitration law, contract law, or civil procedure. We are particularly interested in the development of the Federal Arbitration Act ("FAA") after the U.S. Supreme Court's opinion in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). We believe this brief—which does not duplicate any argument advanced by the parties—provides an essential perspective for resolving the question presented in this appeal.

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

In *Broughton v. CIGNA Healthplans of California*, 988 P.2d 67, 77-78 (Cal. 1999) and *Cruz v. Pacificare Health Sys., Inc.*, 66 P.3d 1157, 1166 (Cal. 2003), the California Supreme Court exempted claims for public injunctions under the Consumer Legal Remedies Act ("CLRA") and Unfair Competition Law ("UCL") from the Federal Arbitration Act ("FAA"). The state high court's logic was simple: because of undeniable differences between arbitration and litigation—including the fact that arbitrators can neither enforce, modify, nor vacate far-reaching injunctive relief—the mere existence of an arbitration clause was tantamount to a waiver of statutory rights. *See Broughton*, 988 P.2d at 77; *Cruz*, 66 P.3d at 1163; *see also Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1082 (9th Cir. 2007) (holding that to "require arbitration of[] judicial actions seeking . . . public injunctive relief" is, by definition, to "prohibit" them).

Nevertheless, the Panel in this case read *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) to eclipse *Broughton* and *Cruz*. The Panel acknowledged that *Broughton* and *Cruz* likely reflect "the sound public policy judgment of the California legislature." *Kilgore v. KeyBank Nat.* Ass'n, 673 F.3d 947, 963 (9th Cir. 2012). Nevertheless, it read *Concepcion* to stand for two bold propositions. First, it concluded that *Concepcion* barred courts from refusing "to enforce

arbitration agreements because of a state public policy." *Id.* at 961 (quoting *Concepcion*, 131 S. Ct. at 1753 (Thomas, J., concurring)). Second, and more specifically, the Panel held that, after *Concepcion*, states cannot "prohibit outright the arbitration of a particular type of claim." *Id.* at 963 (quotation omitted).

The Panel's decision should be reversed. The FAA does not immunize arbitration provisions from all state interests. Instead, Congress sought only to overturn the law's naked distrust of the arbitral forum in order to place arbitration agreements "upon the same footing as other contracts." H.R. REP. NO. 68-96, at 1 (1924). The statute's text, legislative history, and the U.S. Supreme Court's FAA jurisprudence stand for the principle that state law is preempted if it prohibits arbitration for reasons that are *arbitrary or unjustified*—redolent of the "old common law hostility toward arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 13-14 (1984). Thus, the fact that state law imperils an arbitration clause or bars the arbitration of a specific claim is the beginning, not the end, of the analysis. When states seek to further legitimate objectives such as ensuring that an arbitration provision "does not require the claimant to forgo substantive rights," *Booker v. Robert Half Intern., Inc.*, 413 F.3d 77, 79 (D.C. Cir. 2005), any restriction on arbitration clauses to further those objectives does not offend the FAA. Because that is exactly what *Broughton* and *Cruz* do, they are not preempted.

ARGUMENT

I. THE FAA ONLY PREEMPTS STATE LAWS THAT THWART CONGRESS' "PURPOSES AND OBJECTIVES"

"[T]he purpose of Congress is the ultimate touchstone in every pre-emption case." *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008). Congress can override state law explicitly ("express preemption") or by regulating so broadly that it occupies a particular sphere ("field preemption"). However, neither is the case with the FAA, which "contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt Inf. Sciences, Inc. v. Bd. of Trustees*, 489 U.S. 468, 477 (1989).

Thus, the FAA can only trump state rules through the mechanism of obstacle preemption. Under that doctrine, state law must yield only when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Whether state law thwarts Congress' goals "is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373 (2000). In the context of the FAA, though, courts must place a heavy thumb on the scale against preemption. Because the statute governs contract law—a matter traditionally regulated by states—each jurisdiction's traditional police

powers are "not to be superseded . . . unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

II. SECTION 2 PERMITS COURTS TO STRIKE DOWN ARBITRATION CLAUSES FOR VIOLATING PUBLIC POLICY, AND *CONCEPCION* DOES NOT CHANGE THAT

The Panel reasoned that *Broughton* and *Cruz* "improperly give[] weight to state public policy rationales to contravene the parties' choice to arbitrate." *Kilgore v. KeyBank Nat.* Ass'n, 673 F.3d 947, 963 (9th Cir. 2012). As the Panel saw it, after *Concepcion*, "the policy arguments justifying the *Broughton-Cruz* rule, however worthy they may be, can no longer invalidate an otherwise enforceable arbitration agreement." *Id.* at 961.

The Panel was mistaken. First, the FAA expressly permits judges to strike down arbitration clauses under traditional contract defenses, including the venerable principle that a "term of an agreement [can be] unenforceable on grounds of public policy." RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (1981). By refusing to allow companies to use arbitration as a shield against public injunction claims, *Broughton* and *Cruz* employ the "settled doctrine" that terms exempting powerful drafters from liability are "contrary to public policy, and therefore void." *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U.S. 312, 322-23 (1886). Second, *Concepcion* did not banish state public policy from the arbitration

arena. To the contrary, the Court threw its weight behind a holistic, context-specific test for FAA preemption that does not lend itself to the blunt and bright lines that the Panel drew.

A. Violation of Public Policy is a "Ground[] . . . for the Revocation of Any Contract"

The Panel's expansive reading of *Concepcion* cannot be squared with the text of the FAA. Section 2, the statute's centerpiece, makes arbitration provisions specifically enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2010). "This savings clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses.'" *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011) (quoting *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

There can be little doubt that Congress intended violation of public policy to be a "ground[] . . . for the revocation of any contract."[1] Indeed, the public policy defense has long been "a rule of the common law of universal application." *Trist*

[1] *See also* Hiro Aragaki, *Arbitration's Suspect Status*, 159 U. PA. L. REV. 1233, 1281 (2011) ("[T]he well-established public policy defense to contract formation constitutes a ground for the revocation of 'any contract.' It follows that courts should be entitled to apply this defense without offending the FAA."); David S. Schwartz, *The Federal Arbitration Act and the Power of Congress over State Courts*, 83 OR. L. REV. 541, 557 (2004) ("State legislatures' sovereign prerogative to declare public policy has always provided a basis 'at law' for 'the revocation of any contract.'").

v. Child, 88 U.S. (21 Wall.) 441, 448 (1874). Critically, lawmakers debated and passed the FAA during the "the golden age of the public policy defense." David Horton, *Federal Arbitration Act Preemption, Purposivism and State Public Policy*, 101 GEO. L.J. – (forthcoming 2013), at *5, *43-*46, *available at* http://ssrn.com/abstract=2158882 (finding that in the early 1920s, courts applied the public policy defense *more often* than doctrinal staples such as mistake, duress, lack of consideration, and the statute of frauds); G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 433, 449 n.82 (1993) ("the public policy exception had surprising vitality in many jurisdictions during the *Lochner* era"). Because the public policy defense was such a workhorse during the period of the FAA's enactment, Congress would have seen it as falling squarely within the plain language of section 2.

The FAA's legislative history drives this point home. Rather than adopting contract law piecemeal, lawmakers intended the savings clause to encompass "*all* defenses, equitable and legal." *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 5 (1923) (statement of Senator Walsh) (emphasis added); *accord* H.R. REP. No. 68-96, *supra*, at 1 (explaining that the FAA simply places arbitration clauses "upon the

same footing as other contracts"). Consider the famous "Cohen brief," which was written by the FAA's author, Julius Henry Cohen, and inserted in the congressional record.[2] Cohen took pains to point out that because the statute merely made arbitration clauses specifically enforceable, it was "no infringement upon the right of each State to decide for itself what contracts shall or shall not exist under its laws." *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 37 (1924)[hereinafter "Joint Hearings"]; *see also id.* at 40 ("There is no disposition . . . by means of the Federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement.").[3] A muscular FAA that supersedes the public policy defense would have been completely alien to Congress.

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[2] Commentators from across the ideological spectrum consider the Cohen brief to be "one of the most important aspects of the [statute's] legislative history." IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 97 (1992); *accord* Christopher R. Drahozal, *In Defense of* Southland*: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 131 (2002).

[3] Cohen's testimony during the 1924 joint hearing on the FAA also acknowledged the possibility of state regulation of arbitration. In response to a question about whether the FAA might lead to exploitation, Cohen replied that governmental oversight would keep drafters in check. In particular, he noted that "insurance departments"—which at the time were state agencies—could police arbitration provisions for fairness. *See Joint Hearings*, *supra*, at 15 ("You cannot get a provision into an insurance contract to-day unless it is approved by the insurance department.").

Indeed, many courts have recognized that "the tenet that a contract may be invalidated on grounds that it violates public policy is a principle of [s]tate contract law that 'arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.'" *Feeney v. Dell Inc.*, 908 N.E.2d 753, 768 (Mass. 2009) ((quoting *Perry v. Thomas*, 482 U.S. 483, 492 n. 9 (1987)).[4] For instance, it is state public policy that ensures that arbitration provisions "do[] not require the claimant to forgo substantive rights" under state statutes. *Booker v. Robert Half Intern., Inc.*, 413 F.3d 77, 79 (D.C. Cir. 2005); *Kristian v. Comcast Corp.*, 446 F.3d 25, 29 (1st Cir. 2006) (noting that an arbitration clause cannot "prevent the vindication of statutory rights under state . . . law"); *Armendariz v. Foundation Health Psychcare Services, Inc.*, 6 P.3d 669, 681 (Cal. 2000) ("an arbitration agreement cannot be made to serve as a vehicle for the waiver of [state] statutory rights"); *Picardi v. Eighth Judicial District*, 251 P.3d 723, 726 (Nev. 2011) ("courts may refuse to enforce a[n arbitration] provision . . . that contravenes the state's public policy").

In addition to toppling this pillar of FAA jurisprudence, the Panel's holding would have several negative, far-reaching consequences. First, it would artificially

[4] *See also Feeney v. Dell, Inc.*, No. MICV 2003–01158, 2011 WL 5127806, at *8-*10 (Mass. Super. Ct., Oct. 4, 2011) (finding that *Concepcion* does not alter this principle).

bifurcate the unconscionability defense. Unconscionability is a "generally applicable" contract doctrine that satisfies the savings clause, *see, e.g.*, *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010), and no rule has done more to maintain the fairness and integrity of dispute resolution under the FAA. *See, e.g.*, *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1178 (9th Cir. 2003). But if courts now "cannot refuse to enforce arbitration agreements because of a state public policy," *Kilgore*, 673 F.3d at 961 (quotation omitted), they cannot deem even brutally unfair arbitration clauses to be substantively unconscionable. After all, the very point of substantive unconscionability is to weed out terms that are "contrary to public policy." *Cordova v. World Finance Corp.*, 208 P.3d 901, 907 (N.M. 2009). The Panel's rubric would gut this indispensible check on drafting overreaching.[5]

Second, if states may not "prohibit[] outright the arbitration of a particular type of claim," *Kilgore*, 673 F.3d at 960, private dispute resolution would infiltrate numerous contexts where it is regarded as unsuitable. For instance, states could not stop parties from settling child custody disputes outside of the court system,

[5] Likewise, courts routinely invalidate choice-of-law clauses linked to arbitration clauses in order to protect "fundamental policies" of the state in which they sit. *See, e.g.*, *Bridge Fund Cap. Corp. v. Fastbucks Fran. Corp.*, 622 F.3d 996, 1003 (9th Cir. 2010). The Panel's holding jeopardizes this practice as well.

even though this would jeopardize the best interests of their children. *See, e.g.*, *Glauber v. Glauber*, 192 A.D.2d 94, 98 (N.Y. App. Div. 1993) ("We strongly reaffirm our disapproval of arbitration in this area.").[6] Likewise, states could not bar the arbitration of foreclosure proceedings, even though this uniquely judicial remedy presupposes the power to exercise jurisdiction over third parties with an interest in the property, to monitor the sale, to enforce statutory bonding requirements, and to appoint and supervise receivers. *See* Foreclosure Purchasers Act, ch. 596, 2007 Me. Laws 1st Spec. Sess. 1979, 1982 (codified at Me. Rev. Stat. Ann. tit. 32, §6197 (2009)); Property Conveyances Act, ch. 278, 2008 Wash. Sess. Laws 1460 (codified at Rev. Code Wash. Ann. §61.34.045 (West 2008)). And states could not preclude the arbitration of *in rem* probate disputes, even though arbitral tribunals cannot make determinations that affect unknown heirs or taxing authorities. *See, e.g.*, *Pray v. Belt*, 60 P. 162, 163 (Cal. 1900) (invalidating

[6] If state public policy does not fall within the savings clause of section 2, then the only check on arbitration in these contexts is that they relate to a transaction that "involve[es] commerce." 9 U.S.C. § 2. Yet that is no check at all. *See, e.g.*, *Citizens' Bank v. Alafabco*, 539 U.S. 52, 56-58 (2003) (interpreting "involving commerce" as broadly as possible).

agreement to arbitrate a will contest); *Campbell v. Detroit Trust Co.*, 266 N.W. 351, 352-53 (Mich. 1936) (same).[7]

In sum, the Panel's broad-stroked view of FAA preemption gives short shrift to the statute's text and history, and would overturn a wealth of authority. Nevertheless, the Panel reads *Concepcion* to immunize arbitration clauses from state public policy. As we discuss next, *Concepcion* works no such sea change.

B. *Concepcion* is Not to the Contrary

Concepcion does not compel the result the Panel reached. First, because *Concepcion* did not involve a rights-stripping arbitration clause, the passages on which the Panel relied are *dicta*. The class arbitration waiver before the Court was extraordinary: it lavished a $7,500 bounty and double attorneys' fees upon any customer who recovered more in individual arbitration than AT&T offered as settlement. *Concepcion*, 131 S. Ct. at 1744. That is why the Court's grant of certiorari framed the "question presented" as whether the FAA preempts states from requiring class arbitration "when those procedures *are not necessary to*

[7] Rather than expressing knee-jerk distrust of arbitrators or the arbitral forum, these rules acknowledge that arbitration is structurally unable to handle certain kinds of disputes—typically, but not exclusively, those that directly implicate the rights of third parties. As we will discuss, the same rationale animates the holdings in *Broughton* and *Cruz* that public injunction claims are non-arbitrable. *See infra* Part III(B); Hiro Aragaki, *Equal Opportunity for Arbitration*, 58 UCLA L. REV. 1189, 1250-54 (2011).

ensure that the parties to the arbitration agreement are able to vindicate their claims." 130 S. Ct. 3322 (2010) (emphasis added). Moreover, the Court emphasized that the clause's unique features "provide incentive[s] for the individual prosecution of meritorious claims," and that the grievance "here was most unlikely to go unresolved." *Concepcion*, 131 S. Ct. at 1753. Given the fact that *Concepcion* featured a class arbitration waiver that "guarantee[d]" that plaintiffs would "be made whole," *id.* (quoting *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 856 n.9 (9th Cir. 2009)), it simply does not speak to the issue of whether states retain the power to annul arbitration clauses to safeguard substantive rights.

Second, *Concepcion*'s reasoning is at war with the Panel's categorical approach to FAA preemption. In the heart of the opinion, the Court explained that a "doctrine normally thought to be generally applicable" could contravene the FAA if it was "applied in a fashion that disfavors arbitration":

> An obvious illustration of this point would be a case finding unconscionable or *unenforceable as against public policy* consumer arbitration agreements that fail to provide for judicially monitored discovery. The rationalizations for such a holding . . . [might include the fact that b]ecause such a rule applies the *general principle* of unconscionability or *public-policy disapproval of exculpatory agreements*, it is applicable to 'any' contract and thus preserved by § 2 of the FAA . . . . [But a]lthough § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives.

Id. at 1747 (emphasis added). The thrust of this passage is emphatically *not* that the FAA excludes state "public-policy disapproval of exculpatory agreements" wholesale; to the contrary, the Court acknowledges that state "public policy" is a "general [contract] principle" that satisfies the text of section 2. *Id.* Instead, in the Court's hypothetical, a *particular application* of state public policy—a fanciful rule mandating invasive discovery in consumer arbitration—is preempted because it does violence to Congress' goals. *Concepcion*'s view of FAA preemption does not revolve around doctrinal labels, but rather the fine-grained question of whether a specific invocation of state law complies with the FAA.[8]

To be clear, we do not dispute that *some* manifestations of state public policy undermine Congress' goals and are thus preempted. *See infra* Part III; *see*

[8] This kind of nuanced determination is exactly how obstacle preemption works: it is not "capable of being resolved 'in the abstract' based on the form rather than the substance of the state law at issue; instead, it requires a careful consideration of 'the relationship between state and federal laws as they are interpreted and applied.' Aragaki, *Suspect Status*, *supra* at 1280 (quoting *Time Warner Entm't Co. v. FCC*, 56 F.3d 151, 195 (D.C. Cir. 1995) and *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977)). By contrast, the Panel's holding that *no* state public policy may affect the enforceability of arbitration agreements leads to *de facto* field preemption. Indeed, the Panel's logic leaves no room even for benign state rules such as those that impose ethical and disclosure standards on arbitrators. *See* CAL. CIV. PROC. CODE §§1281.85; 1286.2 (West 2009). This is furthermore impossible to square with the fact that obstacle preemption presupposes that states and the federal government have *concurrent* lawmaking power; state law is displaced only when it obstructs the federal law's purposes and objectives. *See* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 770-72 (1994).

also Southland v. Keating, 465 U.S. 1, 16 n.11 (1984) (noting that an overly-broad public policy defense would allow states to "eviscerate Congressional intent to place arbitration agreements upon the same footing as other contracts" (quotation marks omitted)). Our point here is simply that there is no warrant for the Panel's *complete exclusion* of state policies from the arbitration arena.

III. *BROUGHTON* AND *CRUZ* ARE CONSISTENT WITH THE FAA'S "PURPOSES AND OBJECTIVES" BECAUSE THEY DO NOT IMPERMISSIBLY DISCRIMINATE AGAINST ARBITRATION

As noted, *Concepcion* reaffirms that FAA preemption boils down to whether a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). A searching examination of the FAA's context and legislative record reveals that the statute's primary goal was to eliminate the ouster and revocability doctrines: rules that expressed *unfounded* suspicion of arbitration. In turn, because *Broughton* and *Cruz* invalidate arbitration clauses for well-founded reasons, they dovetail with the FAA's ambitions.

A. The FAA's Purposes and Objectives Were to Abolish Unjustified Hostility to Arbitration

The circumstances surrounding the FAA's enactment are well known. In seventeenth century England, judges invented special rules to stunt arbitration's

development. Under the ouster doctrine, they invalidated agreements to arbitrate for divesting courts of jurisdiction. *See, e.g., Kill v. Hollister*, (1746) 95 Eng. Rep. 532 (K.B.) 532. Likewise, the revocability principle allowed either party to retract their assent to arbitrate until the arbitrator ruled. *See, e.g., Vynior's Case*, (1609) 77 Eng. Rep. 597 (K.B.) 599 (holding that arbitration contracts "were of their own nature countermandable"). Although American courts absorbed these tenets along with the common law, they invoked them "with frequent protest." *Berkovitz v. Arbib & Houlberg*, 130 N.E. 288, 292 (N.Y. 1921). By the dawn of the twentieth century, there was consensus that these anti-arbitration measures were "anomalous and unjust," *id.*, and had taken root due to their "antiquity" rather than their "excellence." *U.S. Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1007 (D.C. N.Y. 1915).

In 1925, Congress passed the FAA to abolish this "anachronism of our American law." H.R. REP. No. 68-96, *supra*, at 1. Congress recognized that the ouster and revocability doctrines were flawed not simply because they allowed judges to annul arbitration clauses—after all, so too could the black-letter contract principles that the FAA expressly incorporated. *See* 9 U.S.C. § 2 (2010). Instead, lawmakers understood that the ouster and revocability doctrines were problematic because they thwarted arbitration provisions *for no good reason*. *See* H.R. REP.

No. 68-96, *supra*, at 1-2 (linking these "illogical" anti-arbitration rules to the "jealousy of the English courts for their own jurisdiction"); S. REP. NO. 68-536, at 2-3 (1924) (courts' "jealousy" of arbitration led them to "inspir[e] the fear that arbitration tribunals could not do justice between the parties"). For instance, the purported rationale for the ouster doctrine—that private parties could not displace the judicial prerogative—made no sense given common practices that did precisely the same thing, such as settlements, releases, and covenants not to sue. *See Joint Hearings*, *supra*, at 15 ("[w]e oust the courts of jurisdiction every day") (testimony of Julius Henry Cohen). Similarly, there was no apparent justification for the revocability doctrine, which treated promises to arbitrate so differently than "other contractual obligations" that a party reneging on such a promise did not even "realize that he [wa]s violating his plighted word." Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 270 (1926). Thus, as the Supreme Court has recognized time and again, Congress' overarching "purpose was to reverse the longstanding judicial hostility to arbitration agreements . . . and to place [them] upon the same footing as other contracts." *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002).[9]

[9] *Accord Granite Rock Co. v. Int'l Broth. of Teamsters*, 130 S. Ct. 2847, 2859 (2010); *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 458 (2003); *Green Tree Fin. Corp.-Alabama v.*

Given Congress' perception that the ouster and revocability doctrines were based on "sheer anti-arbitration bias rather than on legitimate considerations about jurisdiction or procedure," Aragaki, *Suspect Status*, *supra* at 1252, it is not surprising that the Court, other judges, litigants, and scholars have described FAA preemption as revolving around whether state law *discriminates* against arbitration. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011) (listing hypothetical state rules that would be preempted for improperly "disfavor[ing] arbitration"); *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 281 (1995) ("[States may not] decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause."); *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) ("A court may not . . . construe [an arbitration] agreement in a manner different from that in which it otherwise construes nonarbitration agreements."); *Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional de Venez.*, 991 F.2d 42, 46 (2d Cir. 1993) ("[The FAA

Randolph, 531 U.S. 79, 89 (2000); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 271 (1995); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); *Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989); *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974).

bars] discriminatory treatment of arbitration agreements").[10] This view makes eminent sense: it links the FAA's preemptive sweep to its core ambition of eradicating rules that were widely seen as "absurd[]," "irrational," and "without reason." JULIUS H. COHEN, COMMERCIAL ARBITRATION AND THE LAW 51 (1918).

Accordingly, FAA preemption hinges not merely on *whether* a state rule nullifies an agreement to arbitrate, but *why* it does so. Aragaki, *Suspect Status*, *supra*, at 1275. The statute eclipses state laws that—like the ouster and revocability doctrines—"*unjustifiably* disfavor arbitration" by indulging in "negative assumptions about the quality of justice available" in the extrajudicial

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[10] *See also Allen v. World Inspection Network Int'l, Inc.*, 911 A.2d 484, 493 (N.J. Super. Ct. App. Div. 2006); *Banc One Acceptance Corp. v. Hill*, 367 F.3d 426, 432 (5th Cir. 2004); *Wells v. Chevy Chase Bank, F.S.B.*, 768 A.2d 620, 629 (Md. 2001); 2 IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW §16.2.4 (Supp. 1999) ("state law that limits federal arbitration law in a discriminatory manner . . . [is] preempted"); Aragaki, *Suspect Status*, *supra*, at 1237 ("the Court's FAA preemption jurisprudence reflects a core principle of nondiscrimination in enforcement"); David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 454 (2011) (the Court has "described the FAA as a kind of equal protection clause that bar[s] state courts from applying contract principles in a manner that discriminate[] against arbitration"); Alan Scott Rau, *Does State Arbitration Law Matter at All? Part I: Federal Preemption*, ADR CURRENTS, June 1998, at 19, 19 (arguing that the FAA prevents states from "discriminat[ing] against [arbitration agreements]"); Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 799 (2004) (noting that the FAA preempts state rules that "discriminat[e] against arbitration").

forum. Horton, *Purposivism and State Public Policy*, *supra*, at *50.[11] Thus, the assertion that states cannot "prohibit outright the arbitration of a particular type of claim," *Kilgore*, 673 F.3d at 963 (quoting *Concepcion*, 131 S. Ct. at 1747) is true only in the following, limited sense: states cannot target arbitration based on a "general suspicion of the desirability of arbitration and the competence of arbitral tribunals." *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220, 231 (1987); *see also Concepcion*, 131 S. Ct. at 1747 (holding the *Discover Bank* rule preempted because it amounted to a law "aimed at destroying arbitration" for no defensible reason other than sheer "hostility"). Such a categorical prohibition is problematic because it is tantamount to "singling out arbitration for suspect status." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). Without exception, the Court has preempted state laws that operate from the premise that *the bare fact that the parties must resolve disputes outside of the court system* is a problem in need of regulation. *See Southland v. Keating*, 465 U.S. 1, 16 n.11 (1984); *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987); *Marmet Health Care Cntr., Inc. v. Brown*, 132 S. Ct. 1201, 1204 (2012) (per curiam); *cf. Preston v. Ferrer*, 552 U.S. 346, 356

[11] *Accord* Aragaki, *Suspect Status*, *supra*, at 1268 (FAA's purpose is to "displac[e] only state laws that *unjustifiably* discriminate against arbitration agreements—that is, laws motivated by arbitrary hostility, mistrust, or suspicious generalizations about arbitration itself").

(2008) (states cannot "impose[] prerequisites to enforcement of an arbitration agreement" for talent agent claims). Like the ouster and revocability doctrines, these state rules rest on nothing more than rank "suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989).[12]

B. *Broughton* and *Cruz* Are Consistent With The FAA's Purposes and Objectives

But not all state oversight of arbitration stems from such generalizations. As noted, courts often strike down arbitration clauses to further state interests. *See supra* Part II(A). These cases do not rest on hollow conjectures about arbitration's inferiority to litigation. Instead, they recognize that some specific aspect of the arbitral process is incompatible with the fundamental principle that "by agreeing to arbitrate[,] . . . a party does not forgo [any] substantive rights." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Therefore, they are not "tainted by the type of unjustified discrimination that the FAA was designed to remedy." Aragaki, *Suspect Status*, *supra*, at 1278.

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[12] For precisely the same reason, states can neither bar specific enforcement of all arbitration clauses, *see Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 269 (1995), nor invalidate arbitration clauses unless they are conspicuous. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687-88 (1996).

Broughton and *Cruz* fit within this paradigm. There, the California Supreme Court held that the FAA does not require parties to arbitrate claims for public injunctive relief under the CLRA and UCL notwithstanding an arbitration agreement covering such claims. *Broughton* and *Cruz* do not rely on the type of "outmoded presumptions," *Rodriguez*, 490 U.S. at 481, and "generalized attacks" on arbitration that the Court has repeatedly found to undermine the FAA's "strong endorsement" of extrajudicial dispute resolution. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991). For example, they do not *assume* that arbitrators are inherently biased or that arbitration is an inadequate forum simply because the claims involved affect the public interest. Instead, they reflect the clear-eyed reality that, as compared with litigation, arbitration is functionally ill-equipped to administer public injunctions in certain key respects.[13]

First, public injunctions require more intensive oversight than their private counterparts because they can be in place for decades and be issued for the benefit

[13] The Court has recently emphasized that there are indeed certain basic architectural differences between arbitration and litigation, such as in their ability to afford class-wide relief. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) (class-wide relief "interferes with fundamental attributes of arbitration"); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1776 (2010) (introduction of class-wide relief "fundamental[ly] change[s]" nature of arbitration).

of thousands of absent parties.[14] *See*, *e.g.*, *U.S. v. United Shoe Machinery Corp.*, 391 U.S. 244, 251 (1968) (modification of permanent injunction after ten years); *United Steelworkers of Am. v. U.S.*, 361 U.S. 39, 56 (1959) (public injunction affecting "hundreds of thousands of employees"). Courts are well suited to overseeing such injunctions because they may exercise continuing jurisdiction after the injunction has been issued, *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1030 (9th Cir. 1985), and because they have inherent power to modify or dissolve permanent injunctions as changing circumstances dictate. *See SEC v. Worthen*, 98 F.3d 480, 482 (9th Cir. 1996); *Broughton*, 988 P.2d at 77.

By contrast, arbitrators derive their power from the parties' contract rather than from their inherent authority; they therefore lose jurisdiction over a case shortly after the final award has issued.[15] Thus, when one party later seeks to modify the injunction due to changed facts or law, the other party may force it to commence an entirely new arbitration, *Broughton*, 988 P.2d at 77; WARREN KNIGHT ET AL., CALIFORNIA PRACTICE GUIDE: ALTERNATIVE DISPUTE RESOLUTION

[14] The sole purpose of the injunction in *Broughton* and *Cruz* was not to compensate the plaintiff but to prevent future deceptive and unfair practices against the public. *See Broughton*, 988 P.2d at 76-77 & n.5; *Cruz*, 66 P.3d at 1159 (public injunction sought on behalf of a putative class of approximately 1.6 million persons).

[15] In California, arbitrators may not modify their awards more than thirty days after issuance. CAL. CIV. PROC. CODE § 1284.

§5:442.10 (Rutter Group 2012), which involves paying filing fees anew and submitting duplicative pleadings just in order to get a hearing on the modification.

Second, unlike in a court of law, arbitral awards do not have collateral estoppel effect in favor of a nonparty to the arbitration. *Vandenberg v. Superior Court*, 982 P.2d 229, 240 (Cal. 1999). Thus, if the original plaintiffs had crafted the injunction too narrowly or failed to enforce it vigorously, members of the public benefitted by the injunction would be required not just to commence a new arbitration but to re-argue the merits from scratch simply in order to make necessary modifications. *Broughton*, 988 P.2d at 77.

Third, in a court of law the availability of judicial review is an important check that helps to protect public interests regarding the issuance, denial, and scope of injunctive relief. *See eBay, Inc. v. MercExchange*, 547 U.S. 388, 391 (2006) (public interest an essential consideration for injunctive relief). By contrast, there is no judicial review of the merits of arbitral awards and courts have "no power to modify or dissolve an injunction awarded in arbitration." CALIFORNIA PRACTICE GUIDE, *supra*, § 5:442.12 (citation omitted); *cf. Broughton*, 988 P.2d at 75-76. Although there are limited grounds on which a court may modify or vacate arbitral awards, *see* 9 U.S.C. §§ 9, 10; CAL. CIV. PROC. CODE §§1286.2, 1286.6, none of these grounds includes material changes in fact or law, the traditional

equitable basis for tailoring public injunctions. *Agostini v. Felton*, 521 U.S. 203, 215 (1997); CAL. CIV. PROC. CODE § 533. Moreover, none allows courts to consider the public's interest in vacatur or modification—only whether the arbitrators properly discharged their duties as between the contracting parties.[16]

Broughton and *Cruz* do not betray a reflexive hostility toward arbitration. Indeed, rather than withholding *all* CLRA or UCL claims from arbitration, the court ordered the plaintiffs to *proceed to arbitration* on everything other than the claim for injunctive relief. *See Broughton*, 988 P.2d at 79-80; *Cruz*, 66 P.3d at 1168. Thus, the *Broughton* court roundly rejected the plaintiff's arguments that her CLRA damage claim was non-arbitrable simply because of the streamlined discovery, lack of jury trial rights, and limited judicial review in arbitration. 988 P.2d at 80-82. Citing the policy favoring arbitration, it held that these differences between arbitration and litigation did not make arbitration an inadequate forum for the recovery of statutory damages. *Id*. And in *Cruz*, the court declined to extend *Broughton* to claims for disgorgement and restitution under the UCL even though, like a public injunction, such claims are brought "primarily for the public benefit."

[16] *See* 9 U.S.C. §§9, 10; CAL. CIV. PROC. CODE §§1286.2, 1286.6; *cf. Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1769, 1774 (2010) (arbitral tribunals "'ha[ve] no general charter to administer justice for a community which transcends the parties'" and may not favor of their "own conception of sound policy" over the intent of the parties (citation omitted)).

66 P.3d at 1166. As the court explained, the distribution of restitution or disgorgement to a plaintiff class "does not present the same order of institutional difficulty as does the maintenance of a permanent statewide injunction" because "[o]nce the profits to be disgorged and the recipients of those funds are identified, there is no need for long term modification and correction necessitating judicial supervision." *Id*.

In sum, *Broughton* and *Cruz* are based on particularized determinations about real, unavoidable differences between arbitration and litigation.[17] These differences make arbitration functionally incapable of supervising public injunctions and therefore of vindicating the substantive right behind CLRA and UCL public injunction claims. Because they do not arbitrarily discriminate against arbitration, they are not preempted by the FAA.

CONCLUSION

For the foregoing reasons, the Panel's decision should be reversed.

[17] Most supporters of arbitration would not only agree about the existence of such differences, they would insist that these differences are what make arbitration such a desirable alternative to litigation in the first place. *Accord 14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1471 (2009) ("[P]arties trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.").

Dated: October 12, 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 29-2(c)(3) of the Circuit Rules of the U.S. Court of Appeals for the Ninth Circuit. The brief contains 6,098 words prepared in Microsoft Word 2007 format.

/s/ Hiro Aragaki

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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

MOTION LEAVE TO FILE BRIEF OF *AMICI CURIAE* LAW PROFESSORS ON REHEARING *EN BANC* IN SUPPORT OF PLAINTIFFS-APPELLEES

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Pursuant to Circuit Rules 29-2(a) and 29-2(e)(2) of this Court, *Amici* law professors respectfully move for leave to file the accompanying brief as *Amici Curiae* in support of Plaintiffs-Appellees.

This case involves novel and particularly complex issues of FAA preemption that have not been adequately addressed by any party. We believe that this brief will provide a unique and vitally important perspective on those issues.

The more than *sixty* law professors from across the nation who have joined in the filing of this brief have significant expertise in matters relating to the Federal Arbitration Act ("FAA") and its preemptive power over state law. Several *Amici* have spent years studying and debating the FAA, its legislative history and context, and the vast body of case law interpreting it. Whether through their scholarship, teaching, and/or practice experience, many are nationally recognized authorities in the field.

Amici are also deeply familiar with the U.S. Supreme Court's opinion in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), which was critical to the Panel's decision to overturn *Davis v. O'Melveny & Myers*, 485 F.3d 1066 (9th Cir. 2007). Several have commented extensively about, and/or participated as *Amici* in, *Concepcion*. Collectively, we are concerned that the Panel's published decision extends *Concepcion* far beyond its proper limits, thereby creating

confusion for lower courts and other circuit courts that have been, and that will be, faced with similar questions.

Plaintiffs-Appellees have consented to the filing of this brief. Consent was requested of the Defendants-Appellants but permission was not forthcoming.

Dated: October 12, 2012

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CERTIFICATE OF SERVICE

I, Ruth Busch, hereby certify that I electronically filed the foregoing Motion for Leave to File *Amicus Curiae* Brief Supporting Plaintiffs-Appellees, with the proposed Brief of *Amicus Curiae* attached, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 12, 2012.

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.

Date: October, 2012

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