No. S224086

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SHARON MCGILL, an individual,
Petitioner,

v.

CITIBANK, N.A.,
Respondent.

AFTER DECISION BY THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIVISION THREE
CASE G049838

FROM THE SUPERIOR COURT,
COUNTY OF RIVERSIDE,
CASE NO. RIC1109398, ASSIGNED FOR ALL PURPOSES
TO JUDGE PRO TEM JOHN W. VINEYARD,
DEPARTMENT 12

PETITION FOR REVIEW OR, IN THE ALTERNATIVE, FOR A GRANT AND TRANSFER ORDER

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ISSUES PRESENTED FOR REVIEW

1. Does the Federal Arbitration Act, 9 U.S.C. §§1 et seq. ("FAA") impliedly preempt this Court's longstanding *Broughton-Cruz* rule?

2. Does the FAA require enforcement of a private arbitration agreement that completely prohibits a consumer claimant from obtaining a statutory remedy that the California Legislature provided for the purpose of furthering important public policies – a public injunction?

INTRODUCTION

In two cases decided well over a decade ago, *Broughton v. Cigna Healthplans of California* (1999) 21 Cal.4th 1066 and *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 30, this Court held that consumer claims seeking a "public injunction" under the Unfair Competition Law, Cal. Bus. & Prof. Code §§17200 et seq. ("UCL"), False Advertising Law, Cal. Bus. & Prof. Code §§17500 et seq. ("FAL"), and Consumer Legal Remedies Act, Cal. Civ. Code §§1750 et seq. ("CLRA"), cannot be compelled to arbitration. *Broughton* and *Cruz* set forth two reasons why the FAA did not preempt this state court rule. First, the Legislature had provided for public injunctive relief under those statutes in order to benefit the general public rather than the party bringing the action. Second, private arbitrators generally lack the institutional authority to issue and enforce public injunctions. (*Broughton, supra*, 21 Cal.4th at p. 1082; *Cruz, supra*, 30 Cal.4th at pp. 312, 316.)

Although this Court has never overruled the *Broughton-Cruz* rule, the Court of Appeal below questioned the viability of these cases and refused to apply their holdings based on an overly expansive view of FAA preemption under *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. __ [131 S.Ct. 1740]. The Court of Appeal relied on misguided federal court decisions that conflict with *Broughton* and *Cruz* in concluding that all of

Petitioner Sharon McGill's claims under the CLRA, UCL, and FAL, including her injunctive relief claims, must be arbitrated, even though defendant's mandatory arbitration agreement expressly prohibited McGill from seeking the public injunctive remedy that the UCL, FAL, and CLRA provide. This contractual bar of a statutory remedy that the Legislature created to further important public purposes plainly violates the *Broughton-Cruz* rule, and is no more preempted by the FAA now than it was in 1999 and 2003 when those cases were decided.

The Court of Appeal rejected this Court's prior decisions in holding that, under *Concepcion*, a State cannot carve out particular claims or remedies from mandatory arbitration. Not only has this Court held otherwise in *Broughton* and *Cruz*, but in a series of more recent cases such as *Iskanian v. CLS Transportation Los Angeles LLC* (2014) 59 Cal.4th 348 and *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, this Court held that certain claims cannot be subject to a forced waiver and confirmed that a state rule that does not interfere with "fundamental attributes" of arbitration is not preempted, invoking a new unconscionability analysis based on statutory benefits. The more nuanced analysis in these more recent cases was completely disregarded by the Court of Appeal below, which ignored that Citibank's mandatory arbitration agreement in this case precludes Petitioner from obtaining a public injunction in *any* forum to remedy the alleged violations of the UCL, FAL, and CLRA, and that the right to obtain that critically important public remedy can be preserved in this case without interfering with any of the fundamental attributes of arbitration, simply by allowing the Superior Court to determine, at the appropriate time, whether a public injunction is warranted and how it is to be enforced.

If *Broughton* and *Cruz* are no longer good law, despite this Court's careful consideration of the applicable FAA preemption principles, that

conclusion must be reached by this Court and not by an intermediate court. But those cases *are* still good law; and as long as the California Legislature continues to provide public injunctions as a core remedy for violations of these important consumer statutes, the courts of this state cannot allow companies doing business in California simply to opt out of the law by adopting exculpatory arbitration agreements that strip their customers of the right to pursue public injunctive relief upon an adequate threshold showing of statutory violation, irreparable harm, and important public interest.

The United States Supreme Court has itself made clear that when a private party imposes a mandatory arbitration agreement that strips its customers (or employees) of their right to pursue specific statutory rights and remedies, that agreement runs afoul of Section 2 of the FAA, 9 U.S.C. §2, and the principle that arbitration is "just another forum" for the adjudication of substantive rights – not a mechanism for stripping the weaker party of those rights. In *Broughton* and *Cruz*, this Court found an implied conflict between the mandatory arbitration agreements at issue and the public law rights provided by statute. In this case an even greater conflict exists, because Citibank's arbitration agreement expressly strips Petitioner and other consumers of their statutory right to seek a public injunction for statutory violations.

The Court of Appeal held that it had no choice but to countenance Defendant's exculpatory contract language based on its reading of a couple of recent federal court FAA preemption cases. But the United States Supreme Court has not itself decided whether the FAA preempts state rules precluding the arbitration of statutorily-based public injunction claims and the federal cases cited by the Court of Appeal are not well-reasoned – and are unquestionably contrary to existing California Supreme Court authority as set forth in *Broughton* and *Cruz*. Indeed, the decision below provides this Court the opportunity to resolve the standing conflict between the

Ninth Circuit and this Court on an important issue of California law.

Plenary review under California Rule of Court 8.500(b)(1) is required to resolve these conflicts and to settle vital questions of law. In the alternative, the Court should grant review and transfer the case back to the Court of Appeal with instructions to apply *Broughton* and *Cruz* and affirm the trial court's ruling that found McGill's claims for a public injunction under the UCL, the FAL and the CLRA should not be compelled to arbitration. Finally, even if the Court finds the *Broughton-Cruz* rule abrogated, it should issue a grant and transfer order based on the unconscionability analysis in *Sonic-Calabasas II*.

STATEMENT OF THE CASE

Citibank marketed a type of credit insurance called "Credit Protector" to its credit card holders in California, representing that this plan permits its cardholders facing hardship to avoid becoming delinquent and protect their financial well-being. (1 Clerk's Transcript ["CT"] 2 [¶4]; 1 CT 4 [¶17]; 1 CT 8 [¶ 30].) McGill is a cardholder who purchased and paid a monthly premium for the Credit Protector plan. (1 CT 4 [¶ 18]; 1 CT 8 [¶¶ 33, 36].) However, the plan's limitations and conditions of coverage are so numerous and complex that obtaining benefits is extremely difficult or impossible. (1 CT 5-8 [¶¶ 21-30].) McGill would not have purchased the plan had Citibank informed her of these limitations and conditions. (1 CT 8 [¶ 36].) In marketing the plan to her, Citibank failed to make any effort to determine whether she would actually be eligible to receive benefits. (1 CT 35 [¶ 8].) In addition, McGill alleged that Citibank systematically processes claims in such a way as to delay or deny benefits despite the consumer's eligibility for them. (1 CT 7-9 [¶¶ 29-32, 43].)

McGill filed a class action complaint against Citibank on May 27, 2011, arising out of Citibank's performance under and marketing of the Credit Protector plan to its credit card holders in California, including herself. (1 CT 1-2 [¶¶ 2-3].) She sued on her own behalf and on behalf of a proposed class of California residents who are or were enrolled in the plan at any time from four years prior to the filing of the complaint until class certification. (1 CT 9-10 [¶¶ 46-47].) She alleges causes of action for violations of the following: (1) the UCL; (2) the FAL; (3) the CLRA; and (4) Insurance Code sections 1758.9 *et seq.* (improper sale of insurance). (1 CT 1.) She seeks monetary damages, restitution, and injunctive relief to prevent Citibank from continuing improperly to market and execute the plan. (1 CT 23-24 [¶¶ 1-13].)

Citibank filed a petition to compel McGill to arbitrate her claims on

an individual basis on August 26, 2011. (1 CT 31.) McGill opposed the petition, arguing, *inter alia*, that the claims for injunctive relief under the UCL, the FAL, and the CLRA are not arbitrable. (See generally 3 CT 870-73.) The trial court granted the petition in part and denied it in part. (Slip op. at 5.) It severed and stayed the claims for injunctive relief under the UCL, FAL, and CLRA, but ordered all other claims to arbitration, including the claims for restitution and damages under the UCL, FAL, CLRA, and Insurance Code. (*Id.*) Based on the *Broughton-Cruz* rule, the trial court refused to order arbitration of the injunctive relief claims. (*Id.*) Citibank appealed this portion of the ruling.

Soon after the hearing on the appeal, the Court of Appeal issued a published decision on December 18, 2014, reversing the trial court's order and remanding for the trial court to order all claims to arbitration. The Court of Appeal concluded that the FAA preempts the *Broughton-Cruz* rule. (Slip op. at 2.)

McGill filed a timely Petition for Rehearing on January 2, 2015. Petitioner argued that, even if *Broughton-Cruz* rule were preempted, the trial court's order denying in part Citibank's motion to compel arbitration should be affirmed because the at-issue agreement completely prohibits an arbitrator from awarding public injunctive relief. Specifically, the agreement provides that "[a]n award in arbitration shall determine the rights and obligations between the named parties only . . . and shall not have any bearing on the rights and obligations of any other person, or on the resolution of any other dispute." (1 CT 109.) It further provides that "[t]he arbitrator will not award relief for or against anyone who is not a party," and the arbitrator "may award relief only on an individual (non-class, non-representative) basis." (1 CT 109, 110.) These provisions, which amount to a total bar on McGill's right to pursue statutory remedies—public injunctive relief under the UCL, FAL, or CLRA—runs afoul of one of the

chief limitations on FAA preemption, as announced by the United States Supreme Court: that an arbitration agreement may not force a "prospective waiver of a party's *right to pursue* statutory remedies." (*American Express Co. v. Italian Colors Restaurant* (2013) 570 U.S. __ [133 S.Ct. 2304, 2310] [citations and quotations omitted, emphasis in original].). The Court of Appeal denied the Petition, stating that this argument had been waived, and declined to reach it. (Order Denying Petition For Rehearing, Jan. 7, 2015.)

ARGUMENT

I. THE COURT OF APPEAL'S RULING THAT THIS COURT'S DECISIONS IN *BROUGHTON* AND *CRUZ* HAVE BEEN ABROGATED REQUIRES REVIEW

A. Consistent With United States Supreme Court Precedent, *Broughton* and *Cruz* Hold That Claims Seeking Public Injunctive Relief Under the UCL, FAL and CLRA Are Not Arbitrable Based on an Inherent Conflict with Arbitration

Both *Broughton* and *Cruz* found that a narrow exception to FAA preemption applies to public injunctions brought under California's consumer laws. In *Broughton*, the Court considered the arbitrability of claims brought under the CLRA against a defendant who allegedly misrepresented the quality of medical services provided under its health care plan in its advertisements. The plaintiffs sought damages and an order enjoining the deceptive practices, arguing that their claims under the CLRA were not subject to arbitration. (*Broughton, supra*, 21 Cal.4th at p. 1072-1073.) In *Cruz*, the plaintiffs brought claims under the UCL and FAL seeking restitution, disgorgement, and injunctive relief for unfair competition and false advertising in the defendant's sale, marketing, and rendering of medical services. (*Cruz, supra*, 30 Cal.4th at p. 307.) The plaintiffs in *Cruz* argued that their UCL and FAL claims were inarbitrable. (*Id.* at p. 310.)

The Court in both cases highlighted the federal statutory mandate

and strong public policy in favor of enforcing arbitration agreements. (*Broughton, supra*, 21 Cal.4th at p. 1073; *Cruz, supra*, 30 Cal.4th at pp. 311-312.) The *Broughton* and *Cruz* Courts enforced the arbitration agreements in both cases for the claims of damages, restitution, and disgorgement. The *Broughton* Court found that statutory damages claims under the CLRA are fully arbitrable. (*Id.* at p. 1084.) Similarly in *Cruz*, the Court found that the restitution and disgorgement claims under the UCL were arbitrable. (*Cruz, supra*, 30 Cal.4th at pp.317, 320.) The Courts thus invalidated the lower court decisions to the extent they exempted certain private claims, such as those for damages and restitution, from arbitration.

However, the Court in each case distinguished the right to pursue the statutory remedy of public injunctive relief from private statutory remedies. *Broughton* found that claims for injunctive relief under the CLRA designed to protect the public from deceptive business practices were not subject to arbitration. (*Broughton supra*, 21 Cal.4th at p. 1080.) The Court extended this holding in *Cruz* to claims for injunctive relief under the UCL and FAL. (*Cruz, supra*, 30 Cal.4th at p. 307.)

To be sure, the *Broughton-Cruz* rule is not simply a generic rule that all injunction claims are inarbitrable. The *Broughton-Cruz* rule is more nuanced and reflects a narrow exception to the FAA based on the inherent conflict between arbitration and the statutes' purposes. The *Broughton-Cruz* Courts found two factors combined to lead to an inherent conflict. "First, that relief is for the benefit of the general public rather than the party bringing the action." (*Broughton, supra*, 21 Cal.4th at p. 1082.) In *Cruz*, the request for injunctive relief was for the benefit of health care consumers and the general public to enjoin the defendant's alleged deceptive advertising practices, which was "virtually indistinguishable from the CLRA claim that was at issue in *Broughton*." (*Cruz, supra*, 30 Cal.4th at p. 315.) Second, the "institutional shortcomings of private arbitration in the

field of such public injunctions" rendered the statutory remedy of a pubic injunction unavailable in arbitration. (*Id.* at 1081.) Given the limitations regarding enforcement and maintenance of a public injunction, "an arbitrator lack[s] the institutional continuity and the appropriate jurisdiction to sufficiently enforce and, if needed, modify a public injunction." (*Cruz, supra*, 30 Cal.4th at p. 312.) Unlike courts, which have continuing jurisdiction over a public injunction and can enforce such a public remedy, arbitrators do not retain continuing jurisdiction over a claim in arbitration and arbitration awards do not affect and cannot be enforced by non-parties. (*Broughton, supra*, 21 Cal.4th at pp. 1081-1082. This defeats a primary purpose of the public injunction when "only the parties to the injunction would be able to enforce it, although the injunction is public in scope." (*Id.* at p. 1081.)

In this narrow area, where the statutory remedy serves a purely public purpose and would be unavailable in arbitration, relief must proceed in the court forum. These two critical factors distinguish public injunctions from private remedies.

Importantly, the *Broughton* and *Cruz* Courts carefully harmonized their holding with the principles of the FAA stated in U.S. Supreme Court case law. The *Broughton* and *Cruz* Courts specifically recognized that "the United States Supreme Court has on numerous occasions invalidated laws and judicial decisions that disfavored arbitration." (*Broughton, supra*, 21 Cal.4th at p 1074.) Both *Broughton* and *Cruz* underscored that since the seminal arbitration case of *Southland Corp. v. Keating* (1984) 465 U.S. 1, which rejected a rule that certain claims under California's Franchise Investment Law were not subject to arbitration, the United States Supreme Court "has rejected numerous efforts and arguments by state courts, federal courts and litigants to declare certain classes of cases not subject to arbitration." (*Cruz, supra*,30 Cal.4th at p. 311; *Broughton, supra*, 21

Cal.4th at pp. 1074-1075; see, e.g., *Perry v. Thomas* (1987) 482 U.S. 483 [finding that section 2 of the FAA preempted provisions of the California Labor Code that insulated claims concerning the collection of wages from agreements to arbitrate].) The *Broughton* Court noted that the United States Supreme Court made clear in various cases after *Southland* "that arbitration may resolve statutory claims as well as those purely contractual if the parties so intend, and that in doing so, the parties do not forego substantive rights, but merely agree to resolve them in a different forum." (*Broughton, supra*, 21 Cal.4th at p. 1075 [citing *Mitsubishi Motors v. Soler Chrysler-Plymouth* (1985) 473 U.S. 614 and *Shearson/American Express, Inc. v. McMahon* (1987) 482 U.S. 220].) Yet, the United States Supreme Court also has found that not all controversies implicating statutory rights are suitable for arbitration, with such unsuitability evident when there is an "inherent conflict" between arbitration and the statute's purpose. (*Broughton, supra*, 21 Cal.4th at p.1075 [citing *Mitsubishi Motors* and *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20].)

Finding an inherent conflict in the case before it, *Broughton* concluded that its holding was not preempted by the FAA because the FAA does not "compel states to permit the vitiation through arbitration of the substantive rights afforded" by such statutes. (*Broughton, supra*, 21 Cal.4th at p. 1083.) Indeed, the United States Supreme Court has emphasized that it would "condemn[] . . . as against public policy" an arbitration agreement that operated "as a prospective waiver of a party's right to pursue statutory remedies." (*Mitsubishi, supra*, 473 U.S. at p. 637, fn. 19.)

The United States Supreme Court has also emphasized that arbitration may not be precluded "so long as. . . the *guarantee of the legal power to impose liability*—is preserved." (*CompuCredit v. Greenwood* (2012) 565 U.S. __ [132 S.Ct. 665, 671] [emphasis in original].) That

guarantee is not available here because the arbitral forum lacks the ability to issue and enforce public injunctions, as recognized by the California Supreme Court. The Courts in *Broughton* and *Cruz* did not find a categorical exemption from arbitration based on a mere policy preference for litigation. These decisions are rooted in a concise analysis of the nature of public injunctions and the "institutional shortcomings" of arbitration in enforcing public injunctions.

Further, the fact that remedies under state statutes (rather than federal statutes) are at issue does not change *Broughton* and *Cruz*'s preemption analysis. While the United States Supreme Court has applied the "inherent conflict" exception to the arbitrability of federal statutory claims, it "has never directly decided whether a legislature may restrict a private arbitration agreement when it inherently conflicts with a public statutory purpose that transcends private interests." (*Broughton, supra*, 21 Cal.4th at p. 1083; see *Cruz, supra*, 30 Cal.4th at p. 313.) The *Cruz* Court observed that the United States Supreme Court has never prohibited a state from restricting a private arbitration agreement that inherently conflicts with a law primarily serving a public purpose. (*Cruz, supra*, 30 Cal.4th at p. 313.) Extending the FAA in such a manner to extinguish a remedy enacted for a wholly public purpose would be "perverse." (*Broughton, supra*, 21 Cal.4th at p. 1083.) Given the legislative history of the FAA and the drafters of the FAA's primary focus on the utility of arbitration in resolving ordinary commercial disputes, the *Broughton-Cruz* Courts found that "it is doubtful Congress would have envisioned the extensions of the FAA to enforce arbitral jurisdiction over a public injunction." (*Id.* at 1084.)

Broughton and *Cruz*'s reasoning prefigured Justice Chin's concurrence in *Iskanian*, which provided that state statutory claims or remedies cannot be extinguished prospectively. (*Iskanian, supra*, 59 Cal.4th at p. 395 [noting that the Court's holding invalidating a waiver of

the right to bring a PAGA, state statutory, claim in any forum "does not run afoul of the FAA"].) Likewise, a number of federal courts, including the U.S. Supreme Court, have held that state statutory rights may not be vitiated by a total waiver in an arbitration agreement. (See e.g., *Preston v. Ferrer* (2008) 552 U.S. 346, 359 [substantive rights provided by the California Talent Agencies Act cannot be extinguished by arbitration agreement]; *Kristian v. Comcast Corp.* (1st Cir. 2006) 446 F.3d 25, 44-60, 64 [invalidating provisions of an arbitration agreement that prevent the vindication of statutory rights under state and federal law]; *Booker v. Robert Half International* (D.C. Cir. 2005) 413 F.3d 77, 79-83 [finding an arbitration clause unenforceable because it precluded an award of punitive damages that are available under District of Columbia law].) The Court of Appeal dismissed these cases, finding that for *Kristian* and *Booker*, those courts "applied the exception to state statutory rights without considering whether the exception's underlying rationale supported its application to state statutory rights." (Slip op. at p. 17.) Nonetheless, those courts dealt with the vindication of rights as applied to state statutory rights, which is directly at issue here, necessarily finding that the effective vindication of statutory claims encompasses *state* claims. The Court of Appeal decision conflicts with these clear rulings, necessitating a resolution by this Court.

In short, the Court of Appeal sent all of McGill's claims under the CLRA, the UCL, and the FAL to arbitration in contravention of *Broughton* and *Cruz*. The effect of the Court of Appeal's decision is to preclude McGill from obtaining a public injunction altogether, despite the *Broughton-Cruz* rule. Given the real consequences of the Court of Appeal's ruling, it is crucial that this Court weigh in on the continued viability of the *Broughton-Cruz* rule.

B. The Court of Appeal's Refusal to Follow Controlling California Supreme Court Cases Has Now Created a Split In Authority

1. The Court of Appeal Cannot Flout Controlling California Supreme Court Authority

By holding that two California Supreme Court cases, *Broughton* and *Cruz*, have both been abrogated, the Court of Appeal has caused disarray in the law that can only be resolved by this Court. At the outset, the Court of Appeal concluded on its own that "the *Broughton-Cruz* rule falls prey to *AT&T Mobility's* sweeping directive." (Slip op. at 3.) Yet *Concepcion* addressed only the *Discover Bank* rule and whether class action waivers in arbitration agreements are enforceable. *Concepcion* concluded that a state law "cannot require a *procedure* that is inconsistent with the FAA, even if it is desirable for unrelated reasons." (*Concepcion*, 131 S.Ct. at p. 1753 [emphasis added].) Here, the availability of the class action "procedure" for resolving underlying substantive claims is not at issue. What is at stake is the availability of a *substantive statutory right*. Neither *Concepcion* nor any other Supreme Court case has held that an actual right to pursue statutory remedies can be completely foreclosed by use of an arbitration agreement, and the Court of Appeal's misreading of *Concepcion* to abrogate binding authority must be corrected.

Review is necessary because only the California Supreme Court can overrule its own decisions. "Although the California Supreme Court is free to overrule its own prior decisions, the doctrine of stare decisis compels lower court tribunals to follow the Supreme Court whatever reason the intermediate tribunals might have for not wishing to do so." (*Mehr v. Super. Ct.* (1983) 139 Cal.App.3d 1044, 1049, fn. 3.) Under such longstanding principles of stare decisis, the California Supreme court has explained that the Court of Appeal was not free simply to "overrule" the higher court's decisions here. (*Auto Equity Sales, Inc. v. Super. Ct.* (1962)

57 Cal.2d 450, 455.)

2. The Court of Appeal's Decision Conflicts With This Court's Recent Jurisprudence And Must Be Reviewed

By holding that an arbitration agreement must be enforced even where enforcement would eliminate a statutory remedy for the public's benefit, such as the public injunction under the UCL, CLRA, and FAL, the Court of Appeal contravenes this Court's jurisprudence protecting statutory rights from forfeiture—a principle reaffirmed in two significant post-*Concepcion* cases, *Sonic II* and *Iskanian*. The conflict is particularly stark because the Court of Appeal does not appear to have considered whether the *Broughton-Cruz* rule conflicts with the fundamental attributes of arbitration—namely "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes" (*Sonic II*, *supra*, 57 Cal.4th at p. 1143)—that is necessary to finding FAA preemption.

This Court has long held that "parties agreeing to arbitrate statutory claims must be deemed to consent to abide by the substantive and remedial provisions of that statute. Otherwise a party would not be able to fully 'vindicate his or her statutory rights in the arbitral form." (*Armendariz v. Foundation Health Psychcare Svcs., Inc.* (2000) 24 Cal.4th 83, 101 [internal citations and quotations omitted].) This principle is not altered by *Concepcion*, which, as this Court found in *Sonic II*, expanded the scope of FAA preemption to cover state rules that interfere with the "fundamental attributes" of arbitration. In *Sonic II*, the employer-defendant sought to bypass the Berman hearing initiated by the plaintiff's filing a claim under the Labor Code with the Labor Commissioner, and enter arbitration immediately. (*Sonic II*, *supra*, 57 Cal.4th at p. 1126.)

Reconsidering its earlier decision, which held that a state rule

preserving a litigant's right to conduct a Berman hearing before arbitration commences is not preempted, the Court in *Sonic II* found that requiring a Berman hearing in all cases would cause substantial delay, interfering with a "fundamental attribute" of arbitration as defined by *Concepcion*, and is thus preempted by the FAA. (57 Cal.4th at p. 1141.) However, the Court also held that unconscionability "remains a valid defense to a petition to compel arbitration," and that, even after *Concepcion*, courts may apply a state rule on unconscionability as long as that rule does not "mandate procedural rules that are inconsistent with fundamental attributes of arbitration" of speed, efficiency, informality and lower costs. (*Id.* at pp. 1142 & 1145.)

Sonic II confirms that a state rule that does not interfere with fundamental attributes of arbitration is not preempted. Here, the Court of Appeal did not find that the *Broughton-Cruz* rule interfered with the fundamental attributes of arbitration of speed, efficiency, or lower costs. And it could not; a public injunction is merely a remedy to be issued after a finding on the merits. A public injunction does not require litigants to undertake the cumbersome and expensive class procedure that requires a certification motion, notice, and opt-outs that this Court in *Iskanian* held to interfere with the fundamental attributes of arbitration. (See *Iskanian*, *supra*, 59 Cal.4th at pp. 562-564.) The Court of Appeal's decision is inconsistent with the reasoning of *Sonic II*.

However, *Sonic II* did not address an unwaivable statutory right, but merely a statutory protection for a low-wage litigant pursuing his or her wage claims. This Court's subsequent opinion in *Iskanian* makes clear that an ***unwaivable right for the public's benefit*** is not preempted by the FAA so long as that right does not interfere with the fundamental attributes of arbitration. *Iskanian* confirms that the *Broughton-Cruz* rule has not been preempted.

In analyzing the waivability of the right to pursue civil penalties under the Attorneys General Act of 2004 ("PAGA"), *Iskanian* recognized that the FAA applies only to private disputes, such as a suit by "employee A to bring a suit for the individual damages claims of employees B, C, and D." (*Iskanian*, 59 Cal.4th at p. 387.) *Iskanian* distinguished such a scenario from a PAGA claim, the "fundamental character" of which is as a "public enforcement action." (*Id.* at p. 388.)

This limitation to the FAA applies to claims seeking public injunctive relief under California's consumer protection statutes. First, as the California Supreme Court has recognized, a plaintiff pursuing public injunctive relief under the UCL, CLRA and FAL on behalf of the general public does so as a *bona fide* private attorney general, as she is seeking not "to resolve a private dispute but to remedy a public wrong." (*Broughton, supra*, 21 Cal.4th at pp. 1079-80.) Thus, the pursuit of public injunctive relief under the California consumer protection statutes falls squarely within the "public enforcement action" exception to FAA coverage recognized by the Supreme Court in *Iskanian*. Indeed, California courts have expressly noted the similar public nature of both suits seeking PAGA penalties and those seeking public injunctive relief under the UCL, CLRA, and FAL. (See *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 501.) Thus, under *Iskanian*, the FAA simply does not cover such a remedy, to the extent that public injunctive relief is sought. (*Iskanian, supra, 59 Cal.4th* at pp. 387-388.)

In other words, the limitation to the FAA recognized in *Iskanian* applies with equal force to claims for injunctive relief under California's consumer protections statutes. Plaintiffs pursuing public injunctive relief under the UCL, CLRA, and FAL on behalf of the general public do so as private attorneys general not to "to resolve a private dispute but to 'remedy a public wrong.'" (*Broughton, supra*, 21 Cal.4th at pp.1079-1080.)

Pursuing public injunctive relief under the California consumer protection statutes comes within the "public enforcement action" exception to FAA coverage recognized in *Iskanian*. As another court expressly noted, there is a similar public nature to suits seeking PAGA penalties and those seeking public injunctive relief under the UCL, CLRA, and FAL. (*Brown, supra*, 197 Cal.App.4th at p. 501 ["Here, the relief is in large part 'for the benefit of the general public rather than the party bringing the action' . . . , just as the claims for public injunctive relief in *Broughton* and *Cruz*."].) To the extent that public injunctive relief is being pursued, under *Iskanian* the FAA does not preempt a state law holding that the pursuit of such claims is unwaivable.

Thus, the *Broughton-Cruz* rule falls outside the scope of FAA preemption as defined by *Sonic II* and *Iskanian*. If the decision below stands and the *Broughton-Cruz* rule is preempted, the result would not be an arbitrator (rather than a judge) issuing and enforcing the public injunction remedy; rather, it would result in the loss of that claim based on the institutional shortcomings of the arbitral forum as explained by *Broughton* and *Cruz*, a consequence not countenanced by this Court's recent decisions. Review is therefore necessary to ensure that any decision regarding the viability of the *Broughton-Cruz* rule is in line with this Court's jurisprudence in *Sonic II* and *Iskanian*.

Further, although Petitioner believes that the *Broughton-Cruz* rule should remain intact, there are several alterative procedures that could be implemented that will preserve the public injunction remedy from forfeiture while remaining consistent with the FAA's liberal policy favoring enforcement of arbitration agreements. One alternative might be to authorize the arbitrator to make certain preliminary findings and then have a trial court maintain jurisdiction to issue a public injunction based on the arbitrator's findings. This would leave the merits determination to the

arbitrator while preserving the ability of the plaintiff to obtain a public injunction against a defendant if the arbitrator's findings so warrant. Such a procedure—or other procedures that may be contemplated by this Court—would honor the parties' agreement to arbitrate the dispute, while *not* forcing the plaintiff to give up the statutory right to a public injunction, which is what the Court of Appeal required and would become law if not reviewed by this Court.

Moreover, even assuming that the *Broughton-Cruz* rule is abrogated, where enforcing the arbitration agreement would entail the loss of statutory benefits, the party resisting arbitration is entitled to an unconscionability defense as set forth in *Sonic II*:

> [W]here, as here, a particular class has been legislatively afforded specific protections in order to mitigate the risks and costs of pursuing certain types of claims, and to the extent that these protections do not interfere with fundamental attributes of arbitration, an arbitration agreement requiring a party to forgo those protections may properly be understood not only to substitute one dispute forum for another, but also to compel the loss of a benefit. The benefit lost is not dispositive but may be one factor in an unconscionability analysis.

(*Sonic II*, *supra*, 57 Cal.4th at p. 1152.) Here, McGill relied on this Court's opinions in *Broughton* and *Cruz* at the trial court without the benefit of *Sonic II*. If there is an intervening change in law, and the *Broughton-Cruz* rule is found to be abrogated in whole or in part, McGill should be afforded the opportunity to present an unconscionability defense, which was not forfeited by her "given the state of the law at the time." (See *Sonic II*, *supra*, 57 Cal.4th at p. 1158 [finding that plaintiff did not waive his right to invoke an unconscionability defense by initially pursuing, in the trial court, a public policy argument that was viable at the time].) Under the reasoning

of *Sonic II*, the inability to pursue a benefit conferred by statute—such as the public injunction remedy—would be an integral part of a new test. At a minimum, this Court should issue a grant and transfer order for further consideration in light of *Sonic II*.

3. The Court of Appeal's Ruling Also Conflicts With Decisions From Its Sister Courts

If left undisturbed, the Court of Appeal's decision would leave standing a conflict with other intermediate courts that have affirmed *Broughton* and *Cruz* or continued to follow the reasoning of those cases.

First, numerous Courts of Appeal have applied the *Broughton-Cruz* rule in various opinions following their issuance. (See, e.g., *Clark v. First Union Securities, Inc.* (2007) 153 Cal.App.4th 1595, 1607 ["The parties agree that the eight cause of action [under the UCL] for injunctive relief is not subject to arbitration," citing *Broughton* and *Cruz*]; *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 95 fn. 14 ["The CLRA was enacted for a public purpose and provides unwaivable rights."]; *Coast Plaza Doctors Hospital v. Blue Cross of California*, (2000) 83 Cal.App.4th 677, 692 [finding the plaintiff's "requests for injunctive relief for the benefit of the public at large . . . are the *only* requests for relief that are inarbitable," citing *Broughton*].)

Second, because the Court of Appeal's decision is not binding on sister courts, plaintiffs will continue to invoke the *Broughton-Cruz* rule, and intermediate courts will continue to struggle with this conflicting authority, as was the case prior to the decision below. (See, e.g., *Ramos v. Fry's Electronics, Inc.* (Nov. 17, 2014, No. B246404) 2014 Cal.App.Unpub. LEXIS 8210, * 45 ["[W]e consider [the plaintiff's] assertion that, under *Cruz* . . . his claim of injunctive relief under section 17200 is not arbitrable."]; *Brown v. Automobile Club of Southern California* (July 31, 2013 No. B241995) 2013 Cal.App.Unpub. LEXIS 5410, * 2 ["[I]n

accordance with *Cruz* . . . any request by plaintiff for 'public injunctive' relief is not subject to arbitration."]; *Tri-City Healthcare District v. Scripps* (March 29, 2012, No. D057878) 2012 Cal.App. Unpub. LEXIS 2445, *25 ["To the extent [the plaintiff] is pleading that the public interest is involved . . . the injunctive relief claims under the UCL would not be arbitrable."].)[1]

Third, the decision below lends further confusion regarding the viability of the *Broughton*-Cruz rule examined in dicta by intermediate courts in the wake of *Concepcion.* For instance, in the one California appellate court case identified by the Court of Appeal that addresses whether *Broughton* and *Cruz* are preempted by the FAA, *Nelson v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th 1115, the appellant had forfeited the issue and the appellate court based its conclusion on a federal opinion *Kilgore v. KeyBank, N.A.* (9th Cir. 2012) 673 F.3d 947 ("*Kilgore I*") that was eventually vacated by the en banc court in *Kilgore v. KeyBank, N.A.* (9th Cir. 2013) 718 F.3d 1052 ("*Kilgore II*"). *Kilgore II* refused to even consider if the *Broughton-Cruz* rule was preempted and instead concluded that the plaintiff's claims at issue did not fall within the purview of the *Broughton-Cruz* rule. (*Kilgore II, supra,* 718 F.3d at p. 1060-1061.) *Kilgore II* expressly discussed when the *Broughton-Cruz* rule applied, which included when the benefits of injunctive relief accrue to the general public. (*Id.* at p. 1060.) It noted that any of the concerns *Broughton* had over the institutional shortcomings of private arbitration in the field of public injunctions were not present, as the defendant's alleged statutory violations had ceased and the injunctive relief sought would only benefit the putative class members with no real benefit to the public at large. (*Id.*

[1] Although these are unpublished cases, they are not cited for any precedential value or the validity of their rulings, and are only raised to demonstrate that the rule in *Broughton-Cruz* has been applied in recent court cases.

at p. 1061.) *Nelson*'s reliance on a vacated opinion not only renders the reasoning suspect, neither *Nelson* nor *Kilgore* applies to the facts of this case, where McGill alleges that Citibank's wrongful conduct continues and impacts the public interest. (1 CT 13 [¶ 66]; 14 [¶ 71-74]; 1 CT 20 [¶ 107].)[2]

Additionally, the confusion is exacerbated by the Court of Appeal's notable omission of cases that continue to cite *Broughton* and *Cruz* favorably post *Concepcion.* (See, e.g., *Brown v. Ralphs*, *supra*, 197 Cal.App.4th 489, 501.) *Brown* itself draws from the reasoning of *Broughton* and *Cruz* to find that representative actions under the PAGA do not conflict with the purposes of the FAA, as "the relief is in large part 'for the benefit of the general public rather than the party bringing the action' . . . just as the claims for public injunctive relief in *Broughton* and *Cruz*." (*Id.* [quoting *Broughton*, *supra*, 21 Cal.4th at p. 1082].) *Brown* underscores the close connection between the right to pursue public injunctions under California's consumer protection statutes and the right to pursue civil penalties under the PAGA on a representative basis, adopting the rationale of *Broughton* and *Cruz* with respect to remedies for the public benefit.

In short, the Court of Appeals decision leaves many open questions and has created a split of authority requiring plenary review.

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[2] McGill alleges that Citibank fails to disclose all the terms and limitations of its Credit Protector plan and engages in deceptive and misleading advertising, including preventing consumers who purchase the plan from obtaining the services or continuing to charge consumers who do not even qualify for the benefits under the plan. (1 CT 12 [¶¶ 56-60].) Such conduct offends public policy and causes substantial injury to consumers. (1 CT 13 [¶67].) Further, McGill alleges that such conduct continues "[t]o this day." (See, e.g., 1 CT 20 [¶ 107]; 1 CT 14 [¶¶ 71-74].)

4. Plenary Review Would Also Resolve a Conflict Between State and Federal Authority Regarding the Viability of the *Broughton-Cruz* Rule

The Court of Appeal announced that it is "join[ing] several federal court decisions in concluding the Federal Arbitration Act . . . preempts the *Broughton-Cruz* rule." (Slip op. at 2.) It noted that federal district courts were split on the issue and then found that *Ferguson v. Corinthian Colleges, Inc.* (9th Cir. 2013) 733 F.3d 928, 934-937, resolved this conflict by finding the *Broughton-Cruz* rule preempted. (Slip op. at 13.) *Ferguson* and the federal district court cases in accord with it generally base their conclusion on a broad construction of *Concepcion*. However, that the Court of Appeal found support for its position in *Ferguson* only bolsters the case for review for several reasons.

First, *Ferguson* failed to reconcile the dictum in *Concepcion* that "state law may not prohibit outright the arbitration of a particular type of claim," with other Supreme Court precedent finding unequivocally that an arbitration agreement may not force a "prospective waiver of a party's *right to pursue* statutory remedies." (*American Express*, *supra*, 133 S.Ct. at p. 2310] [citations and quotations omitted, emphasis in original].) The *American Express* Court found that the desire to prevent such waiver would "certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights." (*Id.*) Forcing UCL, CLRA, and FAL claims seeking solely public injunctive relief to arbitration would affect such a waiver, creating a conflict with *American Express*.

Second, while *Ferguson* questioned *Broughton's* discussion that public injunctions are beyond arbitrators' powers, it failed to address any of the specific "institutional shortcomings" the *Broughton* Court detailed, including the limitations that arbitrators are not able to maintain supervision over public injunctions or modify or vacate them. (*Broughton*, *supra*, 21

Cal.4th at p. 1081.)

Third, *Ferguson* failed to consider that the "outright prohibition" principle (the rule against states prohibiting outright the arbitration of a particular type of claim, *Concepcion, supra,* 131 S.Ct. at p. 1747) stems from pre-*Broughton* United States Supreme Court precedent, such as *Southland* and *Perry*, which rejected any efforts to declare certain classes of cases not subject to arbitration. Both *Broughton* and *Cruz* discuss the principles espoused by this precedent, which was not new to *Concepcion.* In fact, *Broughton* and *Cruz* were able to bring their holdings in line with *Perry* and Supreme Court precedent, as discussed in more detail above. Because the Court of Appeal simply looked to *Concepcion's* recitation of a preexisting law, a law that *Broughton* and *Cruz* fully considered, to find that those two higher court decisions were abrogated, the Court of Appeal decision merits review.

Fourth, *Ferguson* predates *Iskanian*, which is controlling and viewed *Concepcion* more narrowly, holding that the FAA does not cover "public enforcement actions," such as suits seeking civil penalties under the PAGA. This reasoning also applies to public enforcement actions such as suits seeking public injunctive relief. Further, the court in *Ferguson* did not have the benefit of Justice Chin's concurrence in *Iskanian*, which also reasoned that state statutory claims or remedies cannot be extinguished prospectively, while *Ferguson* mistakenly held that the "effective vindication exception" applies only to federal statutory claims. (See *Ferguson, supra,* 733 F.3d at p. 936.) *Ferguson* instead relied on dicta from Justice Kagan's dissent in *American Express* for this point, even though the majority did not so limit its analysis on prospective waivers to only federal statutes. (See *American Express, supra,* 133 S.Ct. at p. 2320 [dissenting opn. of Kagan, J].)

Moreover, *Ferguson* is not controlling on this Court. "[D]ecisions by

the federal courts of appeal are not binding on us." (*People v. Williams* (2013) 56 Cal.4th 630, 688.) The decisions of this Court "are binding upon and must be followed by all the state courts of California." (*Auto Equity Sales, supra*, 57 Cal.2d at p. 455; *People v. Super. Ct. (Moore)* (1996) 50 Cal.App.4th 1202, 1211 [same].) It is not the function of the Court of Appeal "to attempt to overrule decisions of a higher court." (*Id.*) The Court of Appeal here completely sidestepped this rule, finding that *Broughton* and *Cruz* are no longer viable based on conflicting federal authority. The Court of Appeals' reliance on non-binding contrary federal authority merely demonstrates that this Court's guidance is necessary to settle this issue.

Ultimately, this Court must be accorded an opportunity to decide the fate of its own prior decisions. *Ferguson* purports to invalidate two decisions from this Court without inviting this Court's input. The decision below provides this Court with a critical opportunity to review *Ferguson*'s reasoning and settle a standing conflict between the Ninth Circuit and this Court on an important issue of California law.

II. THE ARBITRATION AGREEMENT HERE PROHIBITS PUBLIC INJUNCTIONS FROM BEING AWARDED IN ANY FORUM, IN VIOLATION OF FEDERAL AND STATE SUPREME COURT PRECEDENT

Even if *Broughton* and *Cruz* were abrogated, and the institutional shortcomings of the arbitral forum did not effectively prevent Petitioner from obtaining a public injunction in arbitration, here Citibank's arbitration agreement also expressly prohibits an arbitrator from awarding a public injunction. Enforcement of this agreement, which expressly precludes McGill from pursuing the statutory remedy of a pubic injunction either in court or in arbitration, conflicts with the non-waiver principle stated in *Armendariz v. Found. Health Psychcare Svcs.* (2000) 24 Cal.4th 83, 103 and *American Express*.

The Court of Appeal mistakenly found that this issue had been waived. (Order Denying Rehearing, Jan. 7, 2015.) However, there is no waiver when there is an issue of public importance pertaining only to questions of law on undisputed evidence. (See *Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, 244, *overruled on other grounds by People v. Freeman* (2010) 47 Cal.4th 993.) Here, the express language of Citibank's arbitration agreement is undisputed. Taken together, the following language from Citibank's arbitration agreement bars an arbitrator from awarding a public injunction, which is a matter of public interest. The agreement provides that "[a]n award in arbitration shall determine the rights and obligations between the named parties only, and only in respect of the Claims in arbitration, and shall not have any bearing on the rights and obligations of any other person, or on the resolution of any other dispute." (1 CT 109.) The agreement also states that "[t]he arbitrator will not award relief for or against anyone who is not a party." (1 CT 110.) In addition, the agreement provides that "the arbitrator may award relief only on an individual (non-class, non-representative) basis." (1 CT 109.) *Broughton* describes a public injunction under the CLRA as one that benefits the general public in danger of being victimized by the same deceptive practices that the plaintiff suffered. (*Broughton, supra*, 21 Cal.4th at p. 1080. The injunction thus primarily benefits persons *other than the party who brought the suit* because that party is already aware of the deception. The provision here, barring an arbitrator from awarding an injunction that may be enforced by consumers or the general public other than the person who brought the arbitration proceeding, therefore bars an arbitrator from awarding public injunctive relief.

Moreover, this clearly violates established principles that arbitration agreements, which may not simply waive a substantive claim, also may not preclude a claimant from pursuing a statutory remedy. The California

Supreme Court has found that an adhesion arbitration agreement "cannot limit statutorily imposed remedies, such as punitive damages and attorneys' fees." (*Armendariz*, *supra*, 24 Cal.4th at p. 103 [invalidating a term limiting statutory remedies].)[3] If employers were able to exempt themselves from one-way fee-shifting on employment claims—which protects public rights through deterrence—they could circumvent themselves from liability by the introduction of an arbitration agreement. (*Ibid.*) California law, consistent with the FAA, has long held that the "full range" of statutory remedies must be made available to preserve the "substantive and remedial provisions of the statute." (*Ibid.*) Precluding McGill from pursuing a public injunction fails to preserve the substantive and remedial provisions of the statutes at issue, the CLRA, the UCL, and the FAL, which aim to curb deceptive practices affecting consumers, with the CLRA itself explicitly noting its intent to "protect consumers." (Cal. Civ. Code § 1760.)

Moreover, the FAA itself embodies a non-waiver principle, established by decades of United States Supreme Court case law, holding that arbitration agreements merely involve the forum in which claims may be heard, but may not be used to eliminate claims from being heard anywhere. The United States Supreme Court recently reaffirmed this principle in *American Express*, holding that courts cannot enforce terms in any agreement, arbitration or otherwise, that would eliminate the right to pursue a statutory claim or force the prospective waiver of a party's "right to pursue statutory remedies." (*American Express*, *supra*, 133 S.Ct. at p.

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[3] This rule has been reaffirmed by *Sonic-Calabasas II*, *supra*, 57 Cal.4th at p. 1151, by affirming rules preserving one-way fee-shifting statutes from evisceration through an arbitration waiver.

2310.)[4] Such a principle is at stake here when the terms of the arbitration agreement preclude an arbitrator from awarding public injunctions, thereby prospectively forcing claimants like McGill to give up such remedies. These provisions in the agreement are clearly unenforceable under established precedent warranting review by this Court.

III. IN THE ALTERNATIVE, THE COURT OF APPEAL'S RULING THAT *BROUGHTON* AND *CRUZ* ARE PREEMPTED AND NO LONGER VIABLE MERITS A GRANT AND TRANSFER ORDER

The Court of Appeal refused to follow binding California Supreme Court precedent and instead relied on mistaken federal court authority to find that public injunctive relief claims under the CLRA, UCL, and FAL are arbitrable. In so ruling, the Court of Appeal "disregard[ed] the California Supreme Court's decision[s] without specific guidance from [the] high court." (*Truly Nolen of America v. Super. Ct.* (2012) 208 Cal.App.4th 487, 507.) The Court of Appeals ruling contravenes direct, applicable California Supreme Court case law and warrants review.

This Court may order review of a Court of Appeal decision for the purpose of transferring the matter to the Court of Appeal for such proceedings as this Court may order. (Cal. Rules of Court, rule 8.500(b)(4); *Id.* at rule 8.528(d).) While this Court's guidance is necessary to settle the conflict over whether such public injunctive relief is arbitrable, in the alternative, the Court should grant review and transfer the case back to the Court of Appeals with instructions to apply *Broughton* and *Cruz* and affirm the trial court. Should the Court find that the *Broughton-Cruz* rule is abrogated in some manner, it should issue a grant and transfer order based

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[4] Justice Chin applied this principle to PAGA, finding that the right to pursue state statutory remedies afforded under PAGA may not be foreclosed by an arbitration agreement. (*Iskanian, supra*, 59 Cal.4th at p. 395.)

on the unconscionability analysis in *Sonic-Calabasas II*.

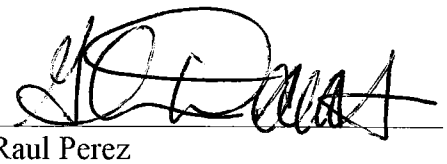
CONCLUSION

For the foregoing reasons, McGill respectfully requests that this Court grant plenary review of the Court of Appeal's decision. In the alternative, McGill requests that this Court issue a grant and transfer order, granting review of the Court of Appeal decision and transferring the case back to that court with instructions to apply *Broughton* and *Cruz* and affirm the trial court. If *Broughton* and *Cruz* are found to be abrogated, this Court should issue a grant and transfer order based on *Sonic-Calabasas II's* unconscionability analysis.

Dated: January 27, 2015

Respectfully submitted,

Capstone Law APC

By: 

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CERTIFICATE OF WORD COUNT

Counsel of record hereby certifies that, pursuant to the California Rules of Court, Rule 8.504(d)(1) and 8.490, the enclosed Petition for Review was produced using 13-point Times New Roman type style and contains 8,253 words. In arriving at that number, counsel has used Microsoft Word's "Word Count" function.

Dated: January 27, 2015

Respectfully submitted,

Capstone Law APC

By: _____

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SHARON MCGILL

Filed 12/18/14

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SHARON McGILL, Plaintiff and Respondent, v. CITIBANK, N.A., Defendant and Appellant.	G049838 (Super. Ct. No. RIC1109398) O P I N I O N

Appeal from an order of the Superior Court of Riverside County, John W. Vineyard, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed and remanded.

Stroock & Stroock & Lavan, Julia B. Strickland and Marcos D. Sasso for Defendant and Appellant.

Capstone Law, Raul Perez, Melissa Grant, Glenn A. Danas and Katherine W. Kehr for Plaintiff and Respondent.

* * *

Plaintiff and respondent Sharon McGill sued defendant and appellant Citibank, N.A. (Citibank) for unfair competition and false advertising in offering a credit insurance plan she purchased to protect her Citibank credit card account. Alleging claims under California's unfair competition law (Bus. & Prof. Code, § 17200 et seq.; hereinafter UCL), false advertising law (Bus. & Prof. Code, § 17500 et seq.; hereinafter FAL), and Consumer Legal Remedies Act (Civ. Code, § 1750 et seq.; hereinafter CLRA), McGill seeks monetary damages, restitution, and injunctive relief to prevent Citibank from engaging in its allegedly unlawful and deceptive business practices.

Citibank petitioned to compel McGill to arbitrate her claims based on an arbitration provision in her account agreement. The trial court granted the petition on McGill's claims for monetary damages and restitution, but denied the petition on the injunctive relief claims. In doing so, the court relied on the "*Broughton-Cruz* rule" the California Supreme Court established in *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066 (*Broughton*), and *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303 (*Cruz*). Under that state-law rule, arbitration provisions are unenforceable as against public policy if they require arbitration of UCL, FAL, or CLRA injunctive relief claims brought for the public's benefit. Citibank appeals the trial court's order on the injunctive relief claims; McGill does not challenge the order on the claims for monetary damages and restitution.

We reverse and remand for the trial court to order all of McGill's claims to arbitration. As explained below, we join several federal court decisions in concluding the Federal Arbitration Act (9 U.S.C. § 1 et seq.; hereinafter FAA) preempts the *Broughton-Cruz* rule. In *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. ___ [131 S.Ct. 1740] (*AT&T Mobility*), the United States Supreme Court unmistakably declared the FAA preempts all state-law rules that prohibit arbitration of a particular type of claim because an outright ban, no matter how laudable the purpose, interferes with the FAA's objective of enforcing arbitration agreements according to their terms. The

Broughton-Cruz rule falls prey to *AT&T Mobility*'s sweeping directive because it is a state-law rule that prohibits arbitration of UCL, FAL, and CLRA injunctive relief claims brought for the public's benefit.

We must reject McGill's contention the California Supreme Court's recent decision in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 (*Iskanian*), "reaffirmed" the *Broughton-Cruz* rule. To the contrary, *Iskanian* confirmed the expansive scope of the FAA's preemption and overturned another state-law rule invalidating class action waivers on claims for arbitration of unpaid wages. *Iskanian* also established a new rule invalidating predispute waivers of an employee's right to bring a representative action under the Labor Code Private Attorneys General Act of 2004 (Lab. Code, § 2698 et seq.; hereinafter PAGA) to recover civil penalties for an employer's Labor Code violations. The *Iskanian* court concluded the FAA did not preempt this new rule because a PAGA representative claim belongs to the state, and an aggrieved employee simply brings the claim as an agent or proxy of the state. Accordingly, a PAGA representative claim is not subject to a private arbitration agreement between an employer and an employee or the FAA. As explained below, a PAGA representative claim is not comparable to an injunctive relief claim under the UCL, FAL, or CLRA, and therefore *Iskanian*'s narrow exclusion does not save the *Broughton-Cruz* rule from preemption.

I

FACTS AND PROCEDURAL HISTORY

Citibank is a national banking association that offers consumers a variety of financial services, including credit card accounts and credit insurance plans. Under its "Credit Protector" plan, Citibank defers or credits certain amounts on a consumer's Citibank credit card account when one or more qualifying events occur, such as long-term disability, unemployment, divorce, military service, and hospitalization.

Citibank charges consumers who purchase the Credit Protector plan a monthly premium based on the consumer's credit card balance.

McGill opened a Citibank credit card account and purchased the Credit Protector plan. The operative "Citibank Card Agreement" (Agreement) when McGill opened her account did not include an arbitration provision. Citibank, however, later sent McGill a "Notice of Change in Terms Regarding Binding Arbitration to Your Citibank Card Agreement" (Change in Terms Notice) that amended the Agreement to add an arbitration provision. The provision stated, "Either you or we may, without the other's consent, elect mandatory, binding arbitration for any claim, dispute, or controversy between you and us (called 'Claims')."

The provision further provided, "All Claims relating to your account or a prior related account, or our relationship are subject to arbitration, including Claims regarding the application, enforceability, or interpretation of this Agreement and this arbitration provision. All Claims are subject to arbitration, no matter what legal theory they are based on or what remedy (damages, or injunctive or declaratory relief) they seek. This includes Claims based on contract, tort (including intentional tort), fraud, agency, your or our negligence, statutory or regulatory provisions, or any other sources of law; . . . and Claims made independently or with other claims. . . . Claims and remedies sought as part of a class action, private attorney general or other representative action are subject to arbitration on an individual (non-class, non-representative) basis, and the arbitrator may award relief only on an individual (non-class, non-representative) basis. [¶] . . . [¶] . . . This arbitration provision is governed by the Federal Arbitration Act (the 'FAA'). [¶] . . . [¶] . . . Claims must be brought in the name of an individual person or entity and must proceed on an individual (non-class, non-representative) basis. The arbitrator will not award relief for or against anyone who is not a party. If you or we require arbitration of a Claim, neither you, we, nor any other person may pursue the Claim in arbitration as a class action, private attorney general action or other

representative action, nor may such Claim be pursued on your or our behalf in any litigation in any court."

Under the Change in Terms Notice, McGill could have refused to accept the arbitration provision by sending Citibank written notice within 26 days of the closing date for her next account statement. If McGill opted out, she could have continued to use her credit card under the existing terms "until the end of [her] current membership year or the expiration date on [her] card(s), whichever is later." McGill did not opt out of the arbitration provision.

In 2011, McGill filed this class action based on Citibank's marketing of the Credit Protector plan and the manner in which Citibank administered McGill's claim under the plan when she lost her job in 2008. The operative complaint alleges claims against Citibank for (1) violation of the UCL; (2) violation of the FAL; (3) violation of the CLRA; and (4) improper sale of insurance (Ins. Code, § 1758.9). The relief McGill seeks includes restitution, monetary and punitive damages, attorney fees and costs, and injunctive relief enjoining Citibank from continuing to engage in its allegedly illegal and deceptive practices.

Citibank filed a petition to compel McGill to arbitrate her claims on an individual basis as required by the Agreement's arbitration provision. The trial court granted the petition in part and denied it in part. Specifically, the court severed and stayed the claims for injunctive relief under the UCL, FAL, and CLRA, and ordered McGill to arbitrate all her other claims, including claims for restitution and damages under the UCL, FAL, CLRA, and Insurance Code. Despite finding the Agreement's arbitration provision applied to all of McGill's claims, the trial court refused to order arbitration of the injunctive relief claims based on the California Supreme Court's *Broughton-Cruz* rule. Citibank timely appealed the trial court's decision refusing to require McGill to arbitrate her injunctive relief claims.

II

DISCUSSION

A. *Standard of Review*

"'"There is no uniform standard of review for evaluating an order denying a motion to compel arbitration. [Citation.] If the court's order is based on a decision of fact, then we adopt a substantial evidence standard. [Citations.] Alternatively, if the court's denial rests solely on a decision of law, then a de novo standard of review is employed. [Citations.]" [Citation.]' [Citation.]" (*Network Capital Funding Corp. v. Papke* (2014) 230 Cal.App.4th 503, 508-509.) Here, the trial court denied Citibank's petition to compel arbitration of McGill's injunctive relief claims because the FAA did not preempt the *Broughton-Cruz* rule, which rendered those claims inarbitrable. We review these legal questions de novo.

B. *Governing FAA Preemption Principles*

The FAA "was designed 'to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate' [citation], and place such agreements '"upon the same footing as other contracts"' [citations]." (*Volt Info. Sciences v. Leland Stanford Jr. U.* (1989) 489 U.S. 468, 474 (*Volt*).) Toward that end, the FAA declares that a written agreement to arbitrate in any contract involving interstate commerce or a maritime transaction "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2.)

"'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. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.' [Citation.] . . . [T]his body of substantive law is enforceable in both state and federal courts . . . [and] 'withdr[a]w[s] the power of the states to require a

judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.' [Citation.]" (*Perry v. Thomas* (1987) 482 U.S. 483, 489 (*Perry*); see *American Express Co. v. Italian Colors Restaurant* (2013) 570 U.S. ___, ___ [133 S.Ct. 2304, 2309] (*Italian Colors*) ["consistent with [section 2 of the FAA], courts must 'rigorously enforce' arbitration agreements according to their terms"].)

"The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration. [Citation.] But even when Congress has not completely displaced state regulation in an area, state law may nonetheless be pre-empted to the extent that it actually conflicts with federal law — that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' [Citation.]"[1] (*Volt, supra*, 489 U.S. at p. 477.) "The 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.' [Citations.]" (*AT&T Mobility, supra*, 131 S.Ct. at p. 1748; *Volt, supra*, 489 U.S. at p. 478 [FAA's "passage 'was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered'"].)

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[1] The California Supreme Court recognizes "'four species of federal preemption: express, conflict, obstacle, and field.' [Citation.] 'First, express preemption arises when Congress "define[s] explicitly the extent to which its enactments pre-empt state law. [Citation.] . . . ." [Citations.] Second, conflict preemption will be found when simultaneous compliance with both state and federal directives is impossible. [Citations.] Third, obstacle preemption arises when "'under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" [Citations.] Finally, field preemption, i.e., "Congress' intent to pre-empt all state law in a particular area," applies "where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." [Citation.]' [Citations.]" (*Parks v. MBNA America Bank, N.A.* (2012) 54 Cal.4th 376, 383.) As stated above, this case presents an obstacle preemption issue.

The FAA's displacement of state laws that interfere with its purpose "is 'now well-established,' [citation], and has been repeatedly reaffirmed [citations]." (*Preston v. Ferrer* (2008) 552 U.S. 346, 353 (*Preston*).) Indeed, the FAA preempts state statutes that expressly invalidate arbitration agreements (see, e.g., *Perry*, *supra*, 482 U.S. at pp. 484, 490 [FAA preempts California Labor Code provision requiring judicial resolution of certain wage claims despite arbitration agreement]), state statutes that do not expressly invalidate arbitration agreements but have been judicially interpreted to do so (see, e.g., *Southland Corp. v. Keating* (1984) 465 U.S. 1, 10 [FAA preempts state statute interpreted by California Supreme Court to require judicial resolution of claims brought under the California Franchise Investment Law]), and any other "state-law rules that stand as an obstacle to the accomplishment of the FAA's objective[]" of enforcing arbitration agreements according to their specific terms (*AT&T Mobility*, *supra*, 131 S.Ct. at p. 1748).

The purpose underlying a state statute or rule is irrelevant. According to *AT&T Mobility*, if the state law interferes with the FAA's purpose of enforcing arbitration agreements according to their terms, the state law is preempted no matter how laudable its objective. (*AT&T Mobility*, *supra*, 131 S.Ct. at p. 1753; *Iskanian*, *supra*, 59 Cal.4th at p. 384 ["a state law rule, however laudable, may not be enforced if it is preempted by the FAA"].) For example, in *AT&T Mobility*, the Supreme Court held the FAA preempted a state-law rule invalidating class-action waivers in certain consumer adhesion contracts that required consumers to arbitrate their claims on an individual basis. The California Supreme Court had created the "*Discover Bank* rule" because it found class-action waivers in adhesion contracts allowed companies to effectively exonerate themselves from liability for cheating large numbers of consumers out of money individually too small for a consumer to bring an individual action. (*AT&T Mobility*, at p. 1746.)

In finding the FAA preempted the *Discover Bank* rule, the United States Supreme Court rejected the argument "class proceedings are necessary to prosecute

small-dollar claims that might otherwise slip through the legal system" by declaring "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." (*AT&T Mobility*, *supra*, 131 S.Ct. at p. 1753.) Simply stated, if a state law conflicts with the FAA, the supremacy clause in the United States Constitution (U.S. Const., art. VI, cl. 2) requires the state law to give way. (*Nitro-Lift Technologies, LLC v. Howard* (2012) ___ U.S. ___, ___ [133 S.Ct. 500, 504]; *Italian Colors*, *supra*, 133 S.Ct. at p. 2320 (dissenting opn., of Kagan, J.); *Perry*, *supra*, 482 U.S. at p. 491.)

Based on *AT&T Mobility*, the California Supreme Court has begun revisiting other rules it established in the arbitration context to protect consumers and employees from companies with superior bargaining power. For example, in *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109 (*Sonic II*), the court reconsidered its earlier decision in *Sonic-Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659 (*Sonic I*), where it examined the enforceability of an employer's arbitration agreement that required employees to waive the right to participate in a nonbinding administrative hearing process the California Legislature created to protect employees and assist them in recovering unpaid wages. The *Sonic I* court established a categorical rule declaring it against public policy and unconscionable for an employer to require its employees to waive the right to a so-called "Berman hearing." The court, however, did not invalidate the entire arbitration agreement, but rather held the employer and employee must first engage in the Berman hearing process, and then arbitrate their dispute according to their arbitration agreement if they are not satisfied with the outcome. (*Sonic II*, *supra*, 57 Cal.4th at p. 1124.)

In *Sonic II*, the California Supreme Court overturned *Sonic I*'s categorical prohibition against Berman hearing waivers based on *AT&T Mobility*'s "precept that 'efficient streamlined procedures' is a fundamental attribute of arbitration with which state law may not interfere." (*Sonic II*, *supra*, 57 Cal.4th at p. 1140.) The *Sonic II* court

explained, "Because a Berman hearing causes arbitration to be substantially delayed, the unwaivability of such a hearing, even if desirable as a matter of contractual fairness or public policy, interferes with a fundamental attribute of arbitration—namely, its objective '"to achieve 'streamlined proceedings and expeditious results,"'" . . . [and therefore the FAA preempts] *Sonic I*'s rule."[2] (*Id.* at p. 1141.)

Similarly, in *Iskanian*, the California Supreme Court recently revisited its earlier decision in *Gentry v. Superior Court* (2007) 42 Cal.4th 443 (*Gentry*), where the court examined whether a class action waiver that required employees to arbitrate overtime wage disputes on an individual basis was unenforceable as against public policy. (*Iskanian, supra*, 59 Cal.4th at pp. 359-360.) The *Gentry* court held, "If [the trial court] concludes . . . a class arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration, and finds that the disallowance of the class action will likely lead to a less comprehensive enforcement of overtime laws for the employees alleged to be affected by the employer's violations, *it must invalidate the class arbitration waiver* to ensure that these employees can 'vindicate [their] unwaivable rights in an arbitration forum.' [Citation.]" (*Gentry*, at p. 463, italics added.)

In *Iskanian*, the California Supreme Court overturned *Gentry* because the FAA preempts *Gentry*'s rule against employment class action waivers. The *Iskanian* court explained *AT&T Mobility* rendered any state-law rule against class action waivers invalid, even if the waiver has an undesirable exculpatory effect, because requiring the parties to an arbitration agreement to engage in class arbitration or litigation when they

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[2] The *Sonic II* court held the arbitration agreement with the Berman hearing waiver still could be unenforceable if the agreement was unreasonably one-sided and unconscionable for reasons that did not single out arbitration. The court remanded the case to the trial court to determine whether the agreement was unconscionable based on rules equally applicable to all contracts, not just arbitration agreements. (*Sonic II, supra*, 57 Cal.4th at pp. 1124-1125.)

agreed to bilateral arbitration interferes with the fundamental attributes of arbitration as a streamlined, efficient, and less expensive dispute resolution mechanism, and thereby interferes with the FAA's primary purpose of enforcing arbitration agreements according to their terms. (*Iskanian, supra*, 59 Cal.4th at pp. 362-364.)

C. *McGill's UCL, FAL, and CLRA Injunctive Relief Claims Are Arbitrable*

1. The *Broughton-Cruz* Rule

The trial court refused to require McGill to arbitrate her injunctive relief claims under the UCL, FAL, and CLRA based on another arbitration rule the California Supreme Court created to protect consumers—the *Broughton-Cruz* rule. That rule categorically prohibits arbitration of certain injunctive relief claims brought for the public's benefit.

Broughton involved an individual plaintiff's CLRA claims seeking damages and injunctive relief based on a health insurer's deceptive business practices. (*Broughton, supra*, 21 Cal.4th at pp. 1072-1073.) The court held the plaintiff's CLRA claims for damages were subject to the parties' arbitration agreement because settled precedent established "statutory damages claims are fully arbitrable." (*Id.* at p. 1084.) "'By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.' [Citation.]" (*Ibid.*) The *Broughton* court, however, determined the plaintiff's CLRA claims for injunctive relief were not arbitrable because the California Legislature never intended to allow arbitration of these claims. (*Id.* at pp. 1080-1082.)

The *Broughton* court based its conclusion on an "'inherent conflict'" between arbitration and the underlying purpose of the CLRA's injunctive relief remedy. (*Broughton, supra*, 21 Cal.4th at p. 1082.) The court found this inherent conflict arose from two factors. First, injunctive relief under the CLRA was for the benefit of the general public rather than the individual plaintiff who brought the action. The individual

plaintiff already had been deceived by the defendant's deceptive business practices, and therefore an injunction preventing those practices in the future would benefit the general public, not the individual plaintiff. "Second, the judicial forum has significant institutional advantages over arbitration in administering a public injunctive remedy, which as a consequence will likely lead to the diminution or frustration of the public benefit if the remedy is entrusted to arbitrators." (*Ibid.*)

In *Broughton*, the Supreme Court also concluded its interpretation of the CLRA did not contravene the FAA, and therefore the FAA did not preempt *Broughton*'s prohibition against arbitration of injunctive relief claims. (*Broughton, supra*, 21 Cal.4th at pp. 1082-1083.) In reaching this conclusion, the court relied on earlier United States Supreme Court cases holding statutory claims are subject to arbitration unless arbitration would prevent the effective vindication of the statutory rights at issue. Those cases explain a statutory claim is not arbitrable when the text of the statute creating the claim, the statute's legislative history, or an inherent conflict between arbitration and the statute's purpose demonstrate Congress did not intend the claim to be arbitrated. (*Id.* at p. 1075.) The *Broughton* court acknowledged this exception to the general rule of arbitrability only had been applied to federal statutory rights—not state statutory rights—but nonetheless applied it to the CLRA's injunctive relief provision because "it would be perverse to extend the [federal] policy [of enforcing arbitration agreements] so far as to preclude states from passing legislation the purposes of which make it incompatible with arbitration, or to compel states to permit the vitiation through arbitration of the substantive rights afforded by such legislation." (*Id.* at p. 1083.)

In *Cruz*, the California Supreme Court extended *Broughton* to injunctive relief claims under the UCL and FAL. (*Cruz, supra*, 30 Cal.4th at p. 307.) As with CLRA injunctive relief claims, the court concluded UCL and FAL injunctive relief claims are not arbitrable because they are brought for the public's benefit and the

California Legislature never intended for these claims to be arbitrated. (*Id.* at pp. 315-316.)

2. The FAA Preempts the *Broughton-Cruz* Rule

Following *AT&T Mobility*, several federal district courts concluded the FAA preempted the *Broughton-Cruz* rule based on *AT&T Mobility*'s holding that displaced any state-law rule that interfered with arbitration, but at least two courts concluded the rule was not preempted based on the public benefit rationale the California Supreme Court employed in establishing the *Broughton-Cruz* rule. (Compare *Meyer v. T-Mobile USA, Inc.* (N.D.Cal. 2011) 836 F.Supp.2d 994, 1005-1006 [FAA preempts *Broughton-Cruz* rule] and *Kaltwasser v. AT&T Mobility LLC* (N.D.Cal. 2011) 812 F.Supp.2d 1042, 1050-1051 [same] with *Ferguson v. Corinthian Colleges* (C.D.Cal. 2011) 823 F.Supp.2d 1025, 1032-1036 [FAA does not preempt *Broughton-Cruz* rule] and *In re DirecTV Early Cancellation Fee Marketing and Sales Practices Litigation* (C.D.Cal. 2011) 810 F.Supp.2d 1060, 1071-1073 [same].) The Ninth Circuit Court of Appeals resolved this conflict by declaring the *Broughton-Cruz* rule preempted and overturning the two lower court decisions reaching the opposition conclusion. (*Ferguson v. Corinthian Colleges, Inc.* (9th Cir. 2013) 733 F.3d 928, 934-937 (*Ferguson*); *Lombardi v. DirecTV, Inc.* (9th Cir. 2013) 546 Fed.Appx. 715, 716.)

Only one reported California case has addressed whether the FAA preempts the *Broughton-Cruz* rule. In *Nelson v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th 1115, the Court of Appeal concluded the FAA preempts the rule based on the same rationale relied on by the federal courts. (*Id.* at p. 1136.) That conclusion, however, was arguably dicta and the *Nelson* court relied on a Ninth Circuit decision that

was vacated later based on a rehearing en banc. (See *Kilgore v. KeyBank, N.A.* (9th Cir. 2012) 697 F.3d 1191, 1192.)[3]

We conclude the Supreme Court's directive in *AT&T Mobility* requires us to find the FAA preempts the *Broughton-Cruz* rule. In *AT&T Mobility*, the Supreme Court dramatically broadened the FAA's preemptive scope. This in turn requires a reevaluation of all state statutes and rules that allowed courts to deny enforcement of arbitration agreements. (See *Phillips v. Sprint PCS* (2012) 209 Cal.App.4th 758, 769 (*Phillips*).) As the Supreme Court explained, "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." (*AT&T Mobility, supra*, 131 S.Ct. at p. 1747.) "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." (*Id.* at p. 1753.)

The *Broughton-Cruz* rule is a state law that categorically prohibits arbitration of all injunctive relief claims under the UCL, FAL, and CLRA that are brought for the public's benefit. The FAA therefore preempts the rule. Whatever views we may hold regarding the relative wisdom of the *Broughton-Cruz* rule and *AT&T Mobility*, "we are all bound to follow the law as it has been interpreted by our highest court." (*Phillips, supra*, 209 Cal.App.4th at p. 769.) Indeed, in *Sonic II* and *Iskanian*, the California Supreme Court acknowledged state-law rules it announced to protect consumers and employees from arbitration agreements that may have an exculpatory effect cannot survive in the face of the FAA's broad preemptive scope announced in *AT&T Mobility*. (*Iskanian, supra*, 59 Cal.4th at p. 364; *Sonic II, supra*, 57 Cal.4th at p. 1141.)

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[3] *Nelson* relied on *Kilgore v. KeyBank, N.A.* (9th Cir. 2012) 673 F.3d 947. On rehearing in that case, the Ninth Circuit concluded the *Broughton-Cruz* rule did not apply because the claims at issue did not seek public injunctive relief. (*Kilgore v. KeyBank, N.A.* (9th Cir. 2013) 718 F.3d 1052, 1060-1061.)

Moreover, the rationale the *Broughton* court adopted to support its conclusion the FAA did not preempt its rule declaring public injunctive relief claims inarbitrable no longer withstands scrutiny. As explained above, *Broughton* concluded the FAA did not preempt its rule based on earlier United States Supreme Court precedent holding statutory claims are not subject to arbitration if it would prevent the effective vindication of the underlying statutory right. (*Broughton, supra*, 21 Cal.4th at pp. 1082-1083.) Subsequent cases, however, refute *Broughton*'s conclusion the effective vindication exception applies to state statutory claims. For example, in concluding the FAA preempted the *Broughton-Cruz* rule, the *Ferguson* court explained the effective vindication exception is "reserved for claims brought under federal statutes." (*Ferguson, supra*, 733 F.3d at p. 936; see *Italian Colors, supra*, 133 S.Ct. at p. 2320 (dissenting opn. of Kagan, J.) ["We have no earthly interest (quite the contrary) in vindicating [a state] law. Our effective-vindication rule comes into play only when the FAA is alleged to conflict with another *federal* law" (original italics)].)

The rationale for the effective vindication exception confirms the exception only applies to federal statutory claims, and therefore may not justify the state-law *Broughton-Cruz* rule. The effective vindication exception arises from the principle Congress may exclude a federal statutory claim from the FAA's coverage because it enacted the statutes establishing both the FAA and the federal statutory claim. Under this exception to the FAA's broad scope, a federal statutory claim is not arbitrable when the text of the statute creating the claim, its legislative history, or its operation reveals a *congressional* intent to exclude the statutory claim from arbitration. (See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 26 ["Although all statutory claims may not be appropriate for arbitration, 'having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue'"]; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985) 473 U.S. 614, 628 ["We must assume that if Congress

intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history"].)

Based on the United States Constitution's supremacy clause only Congress may exclude a statute from the FAA's coverage; a state legislature lacks authority to do so. (U.S. Const., art. VI, cl. 2 ["the Laws of the United States . . . shall be the supreme Law of the Land"]; see, e.g., *Volt, supra*, 489 U.S. at p. 477 ["to the extent [a state law] 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress[, it is preempted]'"].) Accordingly, the California Legislature's intent in enacting the UCL, FAL, and CLRA is irrelevant in determining whether the FAA preempts a state-law rule prohibiting arbitration of injunctive relief claims under those statutes.

McGill nonetheless contends the United States Supreme Court applied the effective vindication exception to state statutory rights in *Preston*. She is mistaken. In *Preston*, the Supreme Court enforced the parties' arbitration agreement and held the FAA preempted a state statute that otherwise required the parties to submit their dispute to the state labor commissioner for resolution. (*Preston, supra*, 552 U.S. at pp. 349-350, 358-359.) The *Preston* court noted the parties' arbitration agreement merely changed the forum in which their dispute would be resolved—an arbitral forum rather than an administrative one—but did not affect the parties' substantive state law rights. (*Id.* at p. 359.) Contrary to McGill's contention, the simple acknowledgment the parties did not relinquish any substantive state law rights is not an application of the effective vindication exception.

McGill also cites two circuit court decisions that applied the effective vindication exception to sever portions of arbitration agreements that required the parties to forego certain state statutory rights. (See *Kristian v. Comcast Corp.* (1st Cir. 2006) 446 F.3d 25, 29, 64; *Booker v. Robert Half Intern., Inc.* (D.C. Cir. 2005) 413 F.3d 77,

79.) Both of these cases, however, applied the exception to state statutory rights without considering whether the exception's underlying rationale supported its application to state statutory rights. "An opinion is not authority for a point not raised, considered, or resolved therein" (*Styne v. Stevens* (2001) 26 Cal.4th 42, 57; *Dameron Hospital Assn. v. AAA Northern California, Nevada & Utah Ins. Exchange* (2014) 229 Cal.App.4th 549, 564), and "we are not bound by decisions of lower federal courts on issues of federal law" (*California Assn. for Health Services at Home v. State Dept. of Health Care Services* (2012) 204 Cal.App.4th 676, 684; see *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 58). As explained above, we conclude the United States Constitution's supremacy clause prevents courts from applying the effective vindication exception to state statutory rights, and therefore we decline to follow these circuit court decisions.

3. *Iskanian* Does Not Reaffirm the *Broughton-Cruz* Rule or Otherwise Save It From FAA Preemption

McGill contends the California Supreme Court's *Iskanian* decision reaffirmed *Broughton*'s conclusion the FAA does not preempt the *Broughton-Cruz* rule and its prohibition against arbitrating UCL, FAL, and CLRA injunctive relief claims. McGill misreads *Iskanian*.

In *Iskanian*, the California Supreme Court examined whether the FAA preempts state-law rules restricting the enforceability of arbitration agreements that include a waiver of an employee's right to bring class or representative actions based on an employer's failure to pay wages and provide meal and rest periods. (*Iskanian, supra*, 59 Cal.4th at pp. 359-360.) As explained above, *Iskanian* overturned *Gentry*'s state-law rule invalidating class action waivers that required employees to pursue their Labor Code claims on an individual basis only. Even if an individual proceeding is an ineffective means to prosecute wage and hour claims, the *Iskanian* court concluded the FAA preempts *Gentry*'s rule because it interferes with the FAA's objective of enforcing arbitration agreements according to their terms. (*Iskanian*, at pp. 363-364.)

The *Iskanian* court, however, distinguished an employee's class action to recover unpaid wages from an employee's representative action to recover civil penalties under the PAGA. In the former, an employee seeks to recover wages an employer failed to pay the employee and all other similarly situated employees, plus all statutory penalties the Labor Code awards to employees for their employer's failure to pay all wages and provide all required breaks. (See, e.g., Lab. Code, § 1194, subd. (a) ["any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit"]; see also *id.* at § 203, subd. (a) ["If an employer willfully fails to pay . . . any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days"].)

In a representative action under the PAGA, however, an aggrieved employee may bring a civil action personally and on behalf of other current or former employees to recover civil penalties from the employer that only the state's labor law enforcement agencies previously could recover. (*Iskanian, supra*, 59 Cal.4th at pp. 380-381; Lab. Code, § 2699, subd. (a) ["any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency . . . for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees"].)

As the *Iskanian* court explained, before the PAGA's enactment in 2004, several statutes imposed civil penalties on employers for certain Labor Code violations and also made some violations criminal misdemeanors. The Labor Commissioner could bring an action to recover the civil penalties, with all funds collected going to the state's

general fund or the Labor and Workforce Development Agency, and local district attorneys could prosecute criminal violations. (*Iskanian, supra*, 59 Cal.4th at p. 378.) These enforcement mechanisms proved ineffective, however. State labor enforcement agencies lacked the necessary resources to investigate employers who may have violated the Labor Code, and district attorneys rarely investigated and prosecuted misdemeanor Labor Code violations because they used their limited resources to focus on more serious offenses. The California Legislature therefore enacted the PAGA "'to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations, *with the understanding that labor law enforcement agencies were to retain primacy over private enforcement efforts.*'" (*Iskanian*, at p. 379, italics added.)

Before an aggrieved employee may file a representative PAGA action, he or she must give written notice of the alleged Labor Code violations to both the employer and the Labor and Workforce Development Agency. The employee may not file the action unless the agency declines to investigate, declines to issue a citation after investigating, or fails to initiate and complete its investigation within the time periods the Labor Code specifies. (Lab. Code, § 2699.3; *Iskanian, supra*, 59 Cal.4th at p. 380.) The employee brings the action as a "'proxy or agent of the state's labor enforcement agencies,'" and those agencies are "always the real part[ies] in interest in the suit." (*Iskanian*, at pp. 380, 382.) "'In a lawsuit brought under the [PAGA], the employee plaintiff represents the same legal right and interest as state labor law enforcement agencies—namely, recovery of civil penalties that otherwise would have been assessed and collected by the Labor and Workforce Development Agency.'" (*Id.* at p. 380.)

"'Because an aggrieved employee's action under the [PAGA] functions as a substitute for an action brought by the government itself, a judgment in that action binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government.'" (*Iskanian, supra*, 59 Cal.4th at p. 381.) "The civil penalties recovered on behalf of the state under the PAGA are distinct from the

statutory damages to which employees may be entitled in their individual capacities."[4] (*Ibid.*) Seventy-five percent of the civil penalties recovered in a representative PAGA action go to the Labor and Workforce Development Agency, with the remainder paid to the aggrieved employees as an incentive to bring the action. (*Id.* at p. 380.)

The *Iskanian* court held these characteristics make an employee's waiver of the right to bring a representative PAGA action unenforceable as against public policy because a predispute waiver of that right would allow an employer to exculpate itself for its own wrongdoing in violation of Civil Code section 1668, and also would allow a private agreement to contravene a law established for a public purpose in violation of Civil Code section 3513.[5] (*Iskanian, supra*, 59 Cal.4th at pp. 382-383.) Unlike *Gentry*'s

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[4] "Case law has clarified the distinction 'between a request for statutory penalties provided by the Labor Code for employer wage-and-hour violations, which were recoverable directly by employees well before the [PAGA] became part of the Labor Code, and a demand for "civil penalties," previously enforceable only by the state's labor law enforcement agencies. An example of the former is [Labor Code] section 203, which obligates an employer that willfully fails to pay wages due an employee who is discharged or quits to pay the employee, in addition to the unpaid wages, a penalty equal to the employee's daily wages for each day, not exceeding 30 days, that the wages are unpaid. [Citation.] Examples of the latter are [Labor Code] section 225.5, which provides, in addition to any other penalty that may be assessed, an employer that unlawfully withholds wages in violation of certain specified provisions of the Labor Code is subject to a civil penalty in an enforcement action initiated by the Labor Commissioner in the sum of $100 per employee for the initial violation and $200 per employee for subsequent or willful violations, and [Labor Code] section 256, which authorizes the Labor Commissioner to "impose a civil penalty in an amount not exceeding 30 days [*sic*] pay as waiting time under the terms of [Labor Code] Section 203."' [Citations.]" (*Iskanian, supra*, 59 Cal.4th at p. 381.)

[5] Civil Code section 1668 provides, "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."

Civil Code section 3513 provides, "Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement."

rule against waiver of an employee's right to bring a class action for unpaid wages, the *Iskanian* court held the FAA did not preempt its rule against waiver of an employee's right to bring a representative PAGA action to recover civil penalties because the latter rule "does not frustrate the FAA's objectives." (*Iskanian*, at p. 384.)

Based on its review of the FAA's legislative history and the United States Supreme Court precedent interpreting the FAA, the *Iskanian* court concluded the FAA "aims to ensure an efficient forum for the resolution of *private* disputes" by requiring the parties to an arbitration agreement to arbitrate their disputes in the manner to which they agreed. (*Iskanian, supra*, 59 Cal.4th at p. 384, original italics.) "There is no indication[, however,] that the FAA was intended to govern disputes between the government in its law enforcement capacity and private individuals." (*Iskanian*, at p. 385.)

"Simply put, a PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship. It is a dispute between an employer and the *state*, which alleges directly or through its agents—either the [Labor and Workforce Development] Agency or aggrieved employees—that the employer has violated the Labor Code. . . . [¶] . . . Nothing in the text or legislative history of the FAA nor in the Supreme Court's construction of the statute suggests that the FAA was intended to limit the ability of states to enhance their public enforcement capabilities by enlisting willing employees in qui tam actions. Representative actions under the PAGA, unlike class action suits for damages, do not displace the bilateral arbitration of private disputes between employers and employees over their respective rights and obligations toward each other. Instead, they directly enforce *the state's* interest in penalizing and deterring employers who violate California's labor laws." (*Iskanian, supra*, 59 Cal.4th at pp. 386-387, original italics.)

Contrary to McGill's contention, *Iskanian* did not "reaffirm" *Broughton-Cruz*'s prohibition against arbitrating public injunctive relief claims or the rationale the *Broughton* court adopted to support its conclusion the FAA did not preempt

that rule. Indeed, *Iskanian* does not even mention *Broughton* or *Cruz*. As explained above, *Broughton* found the right to seek public injunctive relief could not be vindicated effectively through arbitration and the California Legislature never intended to allow arbitration of these claims. Not only is *Broughton*'s rationale no longer viable for the reasons discussed above, *Iskanian* relies on a different rationale to support its conclusion the FAA does not preempt its rule prohibiting PAGA representative action waivers. *Iskanian* concludes a PAGA action poses no obstacle to FAA purposes because the FAA only applies to private agreements between parties to arbitrate their disputes. A PAGA representative action is not subject to a private arbitration agreement between an employer and employee because the action is a dispute between the state and an employer to recover civil penalties for Labor Code violations. An aggrieved employee simply brings the action as a "'proxy or agent of the state's labor law enforcement agencies'"; the state at all times remains the real party in interest and the lion's share of the recovery goes to the state. (*Iskanian, supra*, 59 Cal.4th at pp. 380, 382, 387-388.)

Moreover, the *Iskanian* court emphasized, "Our FAA holding applies specifically to a state law rule barring predispute waiver of an employee's right to bring an action that can only be brought by the state or its representatives, where any resulting judgment is binding on the state and any monetary penalties largely go to state coffers." (*Iskanian, supra*, 59 Cal.4th at p. 388.) The PAGA is unique in comparison to the UCL, FAL, and CLRA because the state retains "primacy over private enforcement efforts." (*Iskanian*, at p. 379.) An employee may not file a PAGA action unless and until he or she gives the state notice of the specific Labor Code violations on which the action will be based, and the state declines to investigate, declines to issue a citation after investigating, or fails to take action within certain statutory time periods.

A plaintiff seeking injunctive relief under the UCL, FAL, or CLRA, however, is not required to give advance notice to the state and await state action (or inaction) before filing a lawsuit. McGill cites no authority, and we have found none, that

designates the state as the real party in interest on an injunctive relief claim under the UCL, FAL, or CLRA. Similarly, McGill cites no authority that binds the state to any judgment on a citizen's injunctive relief claims under the UCL, FAL, or CLRA. Although a plaintiff in both a PAGA representative action and an action seeking injunctive relief under the UCL, FAL, and CLRA generally acts as a private attorney general, the PAGA representative action is fundamentally different than the injunctive relief action under the other statutes. Accordingly, nothing in *Iskanian*'s analysis of PAGA representative action waivers prevents the conclusion the FAA preempts the *Broughton-Cruz* rule.

III

DISPOSITION

The order is reversed and the matter remanded for the trial court to order all claims to arbitration. Citibank shall recover its costs on appeal.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

THOMPSON, J.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the State of California, County of Los Angeles. I am over the age of 18 and not a party to the within suit; my business address is 1840 Century Park East, Suite 450, Los Angeles, California 90067.

On **January 27, 2015**, I served the document described as:

PETITION FOR REVIEW

on the interested parties in this action by sending on the interested parties in this action by sending [ ] the original [or] [✓] a true copy thereof [✓] to interested parties as follows [or] as stated on the attached service list:

See attached service list

[X] **BY MAIL (ENCLOSED IN A SEALED ENVELOPE):** I deposited the envelope(s) for mailing in the ordinary course of business at Los Angeles, California. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, sealed envelopes are deposited with the U.S. Postal Service that same day in the ordinary course of business with postage thereon fully prepaid at Los Angeles, California.

[X] **BY E-SUBMISSION:** I hereby certify that an electronic copy of this document was served from Los Angeles, California, by delivery on the parties listed herein through submission of the electronic copy via the interested parties listed website.

[ ] **BY FAX:** I hereby certify that this document was served from Los Angeles, California, by facsimile delivery on the parties listed herein at their most recent fax number of record in this action.

[ ] **BY PERSONAL SERVICE:** I personally delivered the document, enclosed in a sealed envelope, by hand to the offices of the addressee(s) named herein.

[X] **BY OVERNIGHT DELIVERY:** I am "readily familiar" with this firm's practice of collection and processing correspondence for overnight delivery. Under that practice, overnight packages are enclosed in a sealed envelope with a packing slip attached thereto fully prepaid. The packages are picked up by the carrier at our offices or delivered by our office to a designated collection site.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this **January 27, 2015,** at Los Angeles, California.

Matthew Krout
Type or Print Name


Signature

SERVICE LIST

Julia B. Strickland Marcos D. Sasso STROOCK & STROOCK & LAVAN 2029 Century Park East, #1800 Los Angeles, CA 90067 Telephone: (310) 556-5800 Facsimile: (310) 556-5959 Email: Jstrickland@stroock.com Msasso@stroock.com *via overnight delivery*	**Attorneys for Citibank, N.A. : Defendant and Appellant**
Appellate Coordinator Office of the Attorney General Consumer Law Section 300 South Spring Street Los Angeles, CA 90013 *via e-submission* *https://oag.ca.gov/services-info/17209-brief/add*	**Office of the Attorney General** Per Cal. Rules of Court 8.29; Business & Professions Code § 17209
Honorable John W. Vineyard Department 12 c/o Clerk of the Court Riverside Superior Court Civil Department 4050 Main Street Riverside, CA 92501 *via U.S. mail*	**Trial Court** Pursuant to CRC 8.212 (c)
The Honorable Richard M Aronson The Honorable William F. Rylaarsdam The Honorable David F. Thompson c/o Clerk of the Court California Court of Appeal 4th Appellate District Division 3 601 W. Santa Ana Blvd. Santa Ana, California 92701 *via U.S. mail*	**Court of Appeals**
Office of the District Attorney County of Riverside Appellate Division 3960 Orange Street Riverside, CA 92501 (951) 955-5400 *via U.S. mail*	**Office of the District Attorney** Per Cal. Rules of Court 8.29; Business & Professions Code § 17209
California Supreme Court Clerk of the Court 350 McAllister Street San Francisco, CA 94102 *via overnight delivery &* *via e-submission* *http://www.courts.ca.gov/9280.htm*	**Supreme Court of California** Pursuant to CRC 8.25 (b)(3)(B) Pursuant to CRC 8.212 (c)