**SUPREME COURT OF NEW JERSEY**

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| ANNEMARIE MORGAN and TIFFANY DEVER,<br><br>Plaintiffs/Petitioners,<br><br>v.<br><br>SANFORD BROWN INSTITUTE, CAREER EDUCATION CORP., INC. MATTHEW DIACONT, GREG LNU, SALVATORE COSTA, JANET YOUNG, KRISTA HOLDEN, AND JOHN DOE 1-5,<br><br>Defendants/Respondents. | Docket No. 075074<br><br>On Petition for Certification of Appeal from Order of the Superior Court of New Jersey, Appellate Division, Granting the Defendants' Motion to Compel Arbitration and Dismissing Petitioners' Complaint<br><br>Docket No. A-000452-13T4<br><br>Civil Action |

# BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF DEFENDANTS/RESPONDENTS

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## PRELIMINARY STATEMENT

Plaintiffs Annemarie Morgan and Tiffany Dever, residents of New Jersey, enrolled at Defendant Sanford Brown Institute's Trevose, Pennsylvania, location in November 2009. *See Morgan v. Sanford Brown Institute*, No. L-1898-13, __ A.3d __, 2014 WL 4388343 at *1 (N.J. Super. Ct. App. Div. Sept. 8, 2014). Sanford Brown, a division of Defendant Career Education Corp., Inc. (CEC), provides career training programs in healthcare, business, legal administration, and computer-related fields at thirty campuses nationwide. CEC is a for-profit higher education organization. *Id.* Both plaintiffs signed the same Enrollment Agreement. *Id.*

This agreement contained a section entitled "Agreement to Arbitrate," providing that the parties would resolve any disputes arising out of or relating to their relationship through arbitration, including the question of whether they had agreed to arbitrate any particular claim. *Id.* Despite these provisions, Morgan and Dever sued Sanford Brown in court when they became dissatisfied with the education they received from the school. *Id.* at *2. Sanford Brown moved to compel arbitration. The trial court denied the motion; the lower appellate court reversed.

This Court accepted the case for review to decide whether the terms of this arbitration agreement compel the plaintiffs to arbitrate all claims related to their enrollment agreements, including their Consumer Fraud Act claims. *See Morgan v. Sanford Brown Institute*, 220 N.J. 265 (2015).

## PROCEDURAL AND FACTUAL BACKGROUND

The opinion by the Appellate Division below, unpublished but available at *Morgan v. Sanford Brown Institute*, No. L-1898-13, __ A.3d __, 2014 WL 4388343 (N.J. Super. Ct. App. Div. Sept. 8, 2014), sets forth the background information needed to understand the issues presented in

this case. Pursuant to New Jersey Court Rule 2:6-8, this brief cites to the appendix prepared by Sanford Brown for the lower appellate court as "Da" followed by the specific page number in the appendix that supports the point made.

## ARGUMENT

## I

## THE FEDERAL ARBITRATION ACT REQUIRES COURTS TO INTERPRET ARBITRATION AGREEMENTS LIKE ANY OTHER CONTRACTUAL AGREEMENT

The Federal Arbitration Act (FAA) provides that a written arbitration agreement in certain contracts "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. Congress enacted the FAA to embody the "national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). The FAA reflects the fundamental principle that arbitration is a matter of contract. New Jersey accepts this national policy. *See Atalese v. U.S. Legal Services Group, L.P.*, 219 N.J. 430, 441 (2014) ("The FAA requires courts to 'place arbitration agreements on an equal footing with other contracts and enforce them according to their terms' . . . 'a state cannot subject an arbitration agreement to more burdensome requirements than' other contractual provisions.") (citations omitted).

The interpretation of an arbitration agreement is generally a matter of state law, *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 628-31 (2009), unless application of state-law rules would "stand as an obstacle to the accomplishment of the FAA's objectives," *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011). Any doubts concerning the scope of arbitrable issues are

resolved in favor of arbitration. *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); *Alfano v. BDO Seidman, LLP*, 393 N.J. Super. 560, 576 (App. Div. 2007).

The FAA requires liberal interpretation of arbitration contracts because competent adults have the freedom to make their own decisions as to how to resolve disputes. In *Marcinczyk v. State Police Training Commission*, 203 N.J. 586, 592-93 (2010), this Court set forth the importance of freedom of contract in New Jersey law:

> A basic tenet of our law is the doctrine of freedom of contract. Pursuant to that doctrine, parties bargaining at arms-length may generally contract as they wish, subject only to traditional defenses such as fraud, duress, illegality or mistake. In the absence of those defenses, such a contract is fully binding because the parties are "conclusively presumed" to understand and assent to its legal effect.

(Citations omitted). *See also Maimone v. Liberty Mutual Ins. Co.*, 302 N.J. Super. 299, 306 (App. Div. 1997) ("While a court must be cautious in its enforcement of a highly technical contract generally not subject to bargaining over its terms . . . it may, nevertheless, not lightly interfere with freedom of contract . . . ."); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985) (the Arbitration Act manifested "congressional desire to enforce agreements into which parties had entered"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) ("The 'liberal federal policy favoring arbitration agreements' . . . is at bottom a policy guaranteeing the enforcement of private contractual arrangements . . . .").

Consumers who enter into contracts, including those containing arbitration provisions, are presumed competent and to understand the contents to which they express their consent by their signature. *Rudbart v. North Jersey District Water Supply Commission*, 127 N.J. 344, 353 (1992) ("A party who enters into a contract in writing, without any fraud or imposition being practiced upon

him, is conclusively presumed to understand and assent to its terms and legal effect.").[1] New Jersey law says simply that anyone aged 18 or older has reached the age of majority, N.J.S.A. 9:17B-3, and is presumed competent to enter into contracts. *New Jersey State Policemen's Benev. Ass'n of N.J., Inc. v. Town of Morristown*, 65 N.J. 160, 162 (1974) (statute lowering age of majority to 18 extends to those individuals "the basic civil and contractual rights and obligations" formerly available only to those over the age of 21). That parties who sign contracts consenting to arbitration should be held to their agreement is consistent with black-letter contract law. *See, e.g., Janiga v. Questar Capital Corp.*, 615 F.3d 735, 743 (7th Cir. 2010) ("The problem for Janiga is that he signed a contract, and that the paper he signed refers to arbitration. Janiga's signature—which he admits was given voluntarily—objectively demonstrated his assent to the contract.").

This Court must presume the plaintiffs to be competent even if their attorney does not. Throughout the pleadings below and in his brief before this Court, counsel argued that his clients equaled minors who did not understand what they signed when they agreed to arbitrate any disputes arising from the relationship entered into by the parties. *See e.g.*, Da47a ("plaintiffs are young women who are not experienced in commercial matters"); Da58a (comparing the plaintiffs to "students" under 18 in his argument at the trial court below); Pet.'s Br. at 5 (suggesting plaintiffs are

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[1] *Rudbart* relied on *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 386 (1960) ("the basic tenet of freedom of competent parties to contract is a factor of importance"), and Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 Colum. L. Rev. 629, 630 (1943) (traditional contract principle is that "once the objective manifestations of assent are present, the author is bound").

hardly different from children "whose parents would scrutinize the[ir] education").[2] In fact, in their Complaint, counsel submits that the plaintiffs were "misled" by the very name "Sanford Brown," which, counsel remarkably suggested, was "prone to confusion with Stanford and Brown." Da13a ¶ 27. Apparently, counsel takes such a dim view of his clients that he believes they cannot tell the difference between a private college in California, another private college in Rhode Island, and a post-secondary career-training institution in Pennsylvania.

The Court should not indulge any of these presumptions of incompetence. Moreover, counsel improperly casts aspersions on Sanford Brown simply because it is a profit-making enterprise that provides a sought-after service for a fee. Da45a ("Defendants' school is a 'for-profit' business, and not a charitable organization"). New Jersey supports enterprise that drives the economic engines of the state. *See Kugler v. Koscot Interplanetary, Inc.*, 120 N.J. Super. 216, 247 (Ch. Div. 1972) ("[T]he freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster."). This includes educational institutions. *See A. P. Smith Mfg. Co. v. Barlow*, 13 N.J. 145, 161 (1953) ("[F]ree and vigorous non-governmental institutions of learning are vital to our democracy and the system of free enterprise[.]").

The plaintiffs were not children. They were adults who voluntarily sought an education from Sanford Brown. *See Rothermel v. Int'l Paper Co.*, 163 N.J. Super. 235 (App. Div. 1978), *certif.*

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[2] *But see* Margaret M. Smith, Note, *Adhesion Contracts Don't Stick in Michigan: Why* Rory *Got it Right*, 5 Ave Maria L. Rev. 237, 268 (2007) ("There are many examples of difficult reading material—state statutes, prescription drug pamphlets, federal tax forms—but no one can file a claim for relief from any of these based on the fact that 'no one ever reads them' or that the language is complicated.").

*denied*, 79 N.J. 487 (1979) ("Basic to our free enterprise system is the right to enter or to refrain from entering or continuing a contractual relationship."). If Sanford Brown "defrauded" them, then the contract they signed compels them to prove that in arbitration.[3] As other courts have held when confronted with very similar arbitration clauses involving Sanford Brown, the plaintiffs' signatures are compelling evidence that the plaintiffs consented to arbitration of their disputes with Sanford Brown. *See Barkl v. Career Educ. Corp.*, No. 10-3565 ADM/JJG, 2010 WL 4979231, at *3 (D. Minn. Dec. 2, 2010) (objections to arbitration under same or virtually the same arbitration clause "should be decided by the arbitrator"); *Hubbard v. Career Educ. Corp.*, No. 4:11 CV 995 CDP, 2011 WL 5976070 (E.D. Mo. Nov. 30, 2011) (same); *Mitchell v. Career Educ. Corp.*, No. 4:11cv1581 TCM, 2011 WL 6009658 (E.D. Mo. Dec. 1, 2011) (same); *Parks v. Career Educ. Corp.*, No. 4:11 CV 999 CDP, 2011 WL 5975936 (E.D. Mo. Nov. 30, 2011) (same); *Wilson v. Career Educ. Corp.*, No. 4:11 CV 1583 RWS, 2011 WL 6012172 (E.D. Mo. Dec. 2, 2011) (same); *Womack v. Career Educ. Corp.*, No. 4:11 CV 1003 RWS, 2011 WL 6010912 (E.D. Mo. Dec. 2, 2011) (same). The court below properly came to the same conclusion, and this Court should affirm.

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[3] Counsel for the plaintiffs explained at the hearing on the motion to compel arbitration that he did not present evidence regarding whether the plaintiffs reviewed all the pages of the arbitration agreement because "[he didn't] believe it's necessary to hear from the two students[.]" Da59A. Therefore, this Court—like the courts below—must accept as true what Sanford Brown presented by way of evidence (Da30a-42a)—that the plaintiffs reviewed and approved all four pages of their enrollment agreement with Sanford Brown, including the arbitration clause and the choice of law section included within that arbitration clause.

## II

## PARTIES MAY FREELY AGREE TO HAVE AN ARBITRATOR DECIDE WHETHER THEIR CLAIMS ARE ARBITRABLE

In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995), the Supreme Court of the United States developed a simple test to determine whether a court or the arbitrator should determine the arbitrability of the dispute: Does the contract send the issue to the arbitrator? 514 U.S. at 943. If the "clear and unmistakable" language of the contract states that the arbitrator has authority to determine arbitrability, then the court's only function is to send the matter to arbitration for resolution. *Id.* at 944.

The Agreement here contains a straightforward, well-identified section titled "Agreement to Arbitrate" which provides for arbitration of "any claims" arising out of the plaintiffs' education at Sanford Brown. Da36a, 41a. It then goes on to provide in a choice of law subsection:

> The arbitrator shall apply federal law to the fullest extent possible, and the substantive and procedural provisions of the Federal Arbitration Act (9 U.S.C. §§ 1-16) shall govern this Arbitration Agreement and any and all issues relating to the enforcement of the Arbitration Agreement and the arbitrability of claims between the parties.

Da36a, 41a.

*Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68 (2010), describes a clause which assigns arbitrability of claims to an arbitrator as a "delegation" provision. Here, as in *Rent-A-Center*, the delegation provision provides that the parties agree to arbitrate threshold issues concerning the arbitrability of "any claims," including but not limited to statutory claims. *See Morgan v. Sanford Brown Institute*, 2014 WL 4388343, at *4-5.

The Supreme Court of the United States has held that parties can agree to arbitrate "gateway" questions of "arbitrability," such as whether the parties agreed to arbitrate or whether their agreement covers a particular controversy. *See, e.g.*, *Rent-A-Center*, 561 U.S. at 67-76; *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-85 (2002); *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452 (2003) (plurality opinion). This line of cases simply reflects the principle that arbitration is a matter of contract. *See First Options*, 514 U.S. at 943. As the Court explained in *Rent-A-Center*:

> An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other. The additional agreement is valid under § 2 "save upon such grounds as exist at law or in equity for the revocation of any contract," and courts can enforce the agreement by staying federal litigation under § 3 and compelling arbitration under § 4.

561 U.S. at 70.

Here, the "written provision . . . to settle by arbitration a controversy," 9 U.S.C. § 2, that Sanford Brown asked the trial court to enforce includes the delegation provision that gave the arbitrator full authority to resolve "all issues relating to the enforcement of the Arbitration Agreement and the arbitrability of claims between the parties." Da36a, 41a. Accordingly, just like in *Rent-A-Center*, the Court must treat the delegation provision here as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenges about the arbitrability of certain claims to the arbitrator. The lower court correctly reached this conclusion, explaining that "[w]hen an arbitration agreement contains a delegation clause, unless a party challenges 'the delegation provision specifically,' the court must 'treat it as valid . . . and . . . leav[e] any challenge to the validity of the Agreement as a whole for the arbitrator." *Morgan v. Sanford Brown Institute*, 2014 WL 4388343, at *4-5 (quoting *Rent-A-Center*, 561 U.S. at 72).

The key here, as it was in *Rent-A-Center*, is that the plaintiffs did not specifically challenge the validity of the delegation clause. Da45a-53a. In fact, Plaintiffs have yet to engage this argument even up to and including in their brief asking this Court to review the case. To the contrary, from the beginning, they simply attacked the agreement *in toto*. In their opposition to the motion to compel arbitration, they argued that: (i) enrollment agreements are "presumptively voidable"; (ii) the contract was simply a contract of adhesion and signed "under the influence of fraud, imposition, or mistake" (without record evidence to support any of those three alternatives); (iii) the defendants violated fiduciary duties to the plaintiffs by asking them to sign a contract for services; and (iv) the agreement to arbitrate was generally "unconscionable." Da46a-52a. Plaintiffs made this same argument at the trial court hearing on the motion—never *mentioning* the delegation clause, let alone *challenging* it. Da58a-60a.

Plaintiffs further failed to challenge the delegation clause before the intermediate appellate court, or in their brief submitted to this Court. Instead, they continued to argue against the agreement in general. *Rent-A-Center* holds that without a successful challenge to the delegation clause specifically, the case must proceed to arbitration so as to allow the arbitrator to resolve the question of which claims are arbitrable. The court below correctly held that *Rent-A-Center* controls the case's outcome. *Morgan v. Sanford Brown Institute*, 2014 WL 4388343, at *4-5 (citing *Rent-A-Center*, 561 U.S. at 72). This Court should affirm.[4]

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[4] In the *Atalese* decision, this Court created a rule that no arbitration contract can be valid absent particular phrasing that reflects the parties' agreement to resolve disputes in arbitration rather than in court, and describes the differences between the two methods of dispute resolution. *Cf. NAACP of Camden Cnty. East v. Foulke Mgmt. Corp.*, 421 N.J. Super. 404, 425 (App. Div. 2011) ("By its very nature, an agreement to arbitrate involves a waiver of a party's right to have her claims and defenses litigated in court."). In doing so, it treats arbitration contracts differently—adversely—than (continued...)

## III

## THE CONSUMER FRAUD ACT DOES NOT PRECLUDE ARBITRATION

At Count I of their complaint, the plaintiffs allege that Sanford Brown violated the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1, *et seq*. Da16a. Nothing in the text of the act prohibits claims made under the act from resolution by an arbitrator. *Id.* In light of that silence, New Jersey courts have repeatedly recognized that the Consumer Fraud Act does not preclude a case from arbitration should the parties agree to arbitration. *See Curtis v. Cellco Partnership*, 413 N.J. Super. 26, 37 (App. Div. 2010) ("[I]t is well-established that CFA claims may be the subject of arbitration and need not be exclusively presented in a judicial forum.") (citing *Rockel v. Cherry Hill Dodge*, 368 N.J. Super. 577, 580 (App. Div.), *certif. denied*, 181 N.J. 545 (2004); *Gras v. Assocs. First Capital Corp.*, 357 N.J. Super. 42, 53 (App. Div. 2001), *certif. denied*, 171 N.J. 445 (2002)). The *Curtis* court made it plain: "nothing precludes [a] plaintiff's presentation of his CFA claims in arbitration if the parties' agreement so provides." *Id.*

Further, the Legislature does not have the power to prohibit arbitration for statutory causes of action even it if wanted to—federal law preempts such a prohibition. *See Kilgore v. KeyBank, Nat'l Ass'n*, 673 F.3d 947, 955 (9th Cir. 2012) (explaining that the Federal Arbitration Act allows

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[4] (...continued)
other contracts containing waivers. But be that as it may, the bottom line as applied to this case is that *Atalese* does not affect it.

In *Atalese*, this Court held that statutory claims cannot be consigned to arbitration unless the arbitration agreement contains specific language stating that the parties understand that arbitration constitutes a waiver of the right to sue in court. *Atalese*, 219 N.J. at 448. But *Atalese* did not speak to the issue in this case because here the arbitration agreement contained a delegation clause, whereas there was no delegation clause issue in *Atalese*. This factual distinction—based on *Rent-A-Center*—makes all the difference.

parties to agree to arbitrate statutory causes of action, and state law cannot override federal law). "Causes of action premised on statutory rights are subject to contractual arbitration agreements just as are claims under the common law." *Id.* This follows because

> the very nature of federal preemption requires that state law bend to conflicting federal law—no matter the purpose of the state law. It is not possible for a state legislature to avoid preemption simply because it intends to do so. The analysis of whether a particular statute precludes waiver of the right to a judicial forum—and thus whether that statutory claim falls outside the FAA's reach—applies only to federal, not state, statutes.

*Id.* at 962. *See also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (arbitration required of claims arising out of California's Fair Employment and Housing Act and state common law tort claims).

The Supreme Court of the United States further emphasized that arbitration can vindicate statutory rights in *CompuCredit v. Greenwood*, 132 S. Ct. 665 (2012). There the Court considered whether the Credit Repair Organizations Act, 15 U.S.C. § 1679, *et seq.*, precludes enforcement of an arbitration agreement in a lawsuit alleging violations of that Act. *CompuCredit*, 132 S. Ct. at 668. Despite the Act's repeated use of the terms "action," "class action," and "court," the Court declared that "contractually required arbitration of claims *satisfies the statutory prescription* of civil liability in court." *Id.* at 671 (emphasis added; citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 240 (1987); *Mitsubishi Motors Corp.*, 473 U.S. at 637).

The Supreme Court has thus interpreted the FAA to preempt state statutory claims that would defeat the purpose of that act and, by extension, undermine the freedom of contract. The Court elaborated on why this is so in *American Express v. Italian Colors Restaurant*, 133 S. Ct. 2304

(2013). There, the Justices confronted an arbitration agreement that required the parties to arbitrate statutory claims brought via class action. 133 S. Ct. at 2309. The plaintiffs contended that arbitration could not vindicate their federal Sherman Act causes of action for antitrust violations, but the Court disagreed. *Id.* The Court explained that arbitration can provide "effective vindication" for statutory rights just as well as the courts can. *Id.* at 2311.

Courts have correctly interpreted *Italian Colors* to require arbitration of state consumer protection statutory causes of action where the parties agreed to arbitration to resolve their differences. *See, e.g., Torres v. CleanNet, U.S.A., Inc.*, No. 14-2818, __ F. Supp. 3d __, 2015 WL 500163, at *1, *6 (E.D. Pa. Feb. 5, 2015) (relying on *Italian Colors* and holding that Pennsylvania Unfair Trade Practices and Consumer Protection Law cause of action is properly sent to arbitration where arbitration agreement provided for arbitration); *Ekin v. Amazon Services, LLC*, No. C14-0244-JCC, __F. Supp. 3d __, 2014 WL 7741772, at *1, *2-*5 (W.D. Wash. Dec. 10, 2014) (noting the rule of *Italian Colors* and sending Washington Consumer Protection Act claim to arbitration based on arbitration agreement between the parties); *MQDC, Inc. v. Steadfast Ins. Co.*, No. 12-CV-1424 (ERK) (MDG), 2013 WL 6388624, at *1, *13-14 (E.D.N.Y. Dec. 6, 2013) (holding that federal law requires arbitration of Massachusetts Consumer Protection Act claim, based on *Italian Colors*); *McInnes v. LPL Financial, LLC*, 994 N.E.2d 790, 798-99 (Mass. 2013) (holding that arbitration can vindicate Massachusetts unfair trade practices act claim based on *Italian Colors*).

Simply put, the parties agreed to arbitrate any claims, and agreed that an arbitrator would resolve which claims were arbitrable should a party object to arbitration. In the context of this agreement, *Rent-A-Center*, the text of New Jersey's Consumer Fraud Act, federal preemption, and

in light of the plaintiffs' failure to challenge the delegation clause at issue, the lower court correctly concluded that the law required it to remand the case with directions to submit it to arbitration.

## CONCLUSION

The decision of the court below should be affirmed.

DATED: April 6, 2015.

Respectfully submitted,

MARK MILLER

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**CERTIFICATE OF SERVICE**

I hereby certify that on this date, an original and eight (8) copies of the BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF DEFENDANTS/ RESPONDENTS, were sent via Federal Express to be filed with the following:

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I further certify that on this date, two (2) copies of the BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF DEFENDANTS/RESPONDENTS, were sent via the United States Postal Service to the following:

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DATED: April 6, 2015.

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