IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S224086

SHARON McGILL,
Plaintiff and Respondent,

v.

CITIBANK, N.A.,
Defendant and Appellant.

After an Opinion by the Court of Appeal,
Fourth Appellate District, Division Three
(Case No. G049838)

On Appeal from the Superior Court of Riverside County
(Case No. RIC1109398, Honorable John W. Vineyard, Temporary Judge)

APPLICATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF DEFENDANT-APPELLANT

DEBORAH J. LA FETRA
Cal. Bar No. 148875
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
Email: dlafetra@pacificlegal.org

Attorney for Amicus Curiae Pacific Legal Foundation

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

APPLICATION TO FILE BRIEF AMICUS CURIAE 1

IDENTITY AND INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE *BROUGHTON-CRUZ* DOCTRINE VIOLATES THE SUPREMACY CLAUSE 4

A. *Broughton* and *Cruz* Improperly Disdain Arbitration 4

B. *Concepcion* and *Italian Colors* Abrogate *Broughton-Cruz* 8

II. STATE STATUTES CANNOT EVADE FEDERAL LAW 12

CONCLUSION 18

CERTIFICATE OF COMPLIANCE 19

DECLARATION OF SERVICE BY MAIL

TABLE OF AUTHORITIES

Page

Cases

14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009) 6

Adams v. MHC Colony Park Ltd. P'ship,
224 Cal. App. 4th 601 (2014) 16

American Express Co. v. Italian Colors Restaurant,
133 S. Ct. 2304 (2013) 2, 8-10

Aryeh v. Canon Bus. Solutions, Inc., 55 Cal. 4th 1185 (2013) 13

AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) 2, 5, 8-11

Azure Ltd. v. I-Flow Corp., 46 Cal. 4th 1323 (2009) 15

Baltazar v. Forever 21, docket no. S208345 (pending) 1

Bank of the West v. Superior Court, 2 Cal. 4th 1254 (1992) 13

Boschma v. Home Loan Ctr., Inc., 198 Cal. App. 4th 230 (2011) 14

Broughton v. Cigna Healthplans, 21 Cal. 4th 1066 (1999) 3-5

Cable Connection, Inc. v. DIRECTV, Inc., 44 Cal. 4th 1334 (2008) 5

California v. IntelliGender, LLC, 771 F.3d 1169 (9th Cir. 2014) 6-7

Comm. on Children's Television, Inc. v. Gen. Foods Corp.,
35 Cal. 3d 197 (1983) 13

CompuCredit Corp. v. Greenwood, 132 S. Ct. 665 (2012) 7

Cruz v. PacifiCare Health Sys., Inc., 30 Cal. 4th 303 (2003) 3-5

DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015) 2, 10-12, 17-18

Discover Bank v. Superior Court, 36 Cal. 4th 148 (2005) 11

Page

Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996) 11

Evans v. Superior Court, 67 Cal. App. 3d 162 (1977) 16

Ferguson v. Corinthian Colls., Inc., 733 F.3d 928 (9th Cir. 2013) 9

Gentry v. Superior Court (Circuit City Stores, Inc.),
42 Cal. 4th 443 (2007) 1-2

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 8

Green Tree Fin. Corp. v. Randolph, 531 U.S. 79 (2000) 7, 14

Hall Street Assocs., LLC v. Mattel, Inc., 552 U.S. 576 (2008) 5

Harris v. Verizon Commc'ns, 141 Cal. App. 4th 573 (2006) 15

Indep. Ass'n of Mailbox Ctr. Owners, Inc. v. Superior Court,
133 Cal. App. 4th 396 (2005) 14

Iskanian v. CLS Transp. Los Angeles LLC, 59 Cal. 4th 348 (2014) 1

Kasky v. Nike, Inc., 27 Cal. 4th 939 (2002) 13

Knutsson v. KTLA, LLC, 228 Cal. App. 4th 1118 (2014) 15

Lehman v. Superior Court, 145 Cal. App. 4th 109 (2006) 16

Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012) 12

McGill v. Citibank, N.A.,
232 Cal. App. 4th 753, 181 Cal. Rptr. 3d 494 (2014) 2-3

McKell v. Washington Mut., Inc., 142 Cal. App. 4th 1457 (2006) 15

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,
473 U.S. 614 (1985) 7

Perry v. Thomas, 482 U.S. 483 (1987) 13

Page

Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev. (US), LLC, 55 Cal. 4th 223 (2012) 5

Preston v. Ferrer, 552 U.S. 346 (2008) 2, 15

Quarry v. Doe I, 53 Cal. 4th 945 (2012) 16

Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63 (2010) 2

Ribeiro v. County of El Dorado, 195 Cal. App. 4th 354 (2011) 16

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) 14

Roskind v. Morgan Stanley Dean Witter & Co., 80 Cal. App. 4th 345 (2000) 15

Rossman v. Fleet Bank (R.I.) Nat'l Ass'n, 280 F.3d 384 (3d Cir. 2002) 7

Ruelas v. Costco Wholesale Corp., 67 F. Supp. 3d 1137 (N.D. Cal. 2014) 17

Sanchez v. Valencia Holding Co., 61 Cal. 4th 899 (2015) 1

Screen Extras Guild, Inc. v. Superior Court, 51 Cal. 3d 1017 (1990) 10

Shirk v. Vista Unified Sch. Dist., 42 Cal. 4th 201 (2007) 16

Southland Corp. v. Keating, 465 U.S. 1 (1984) 9, 14

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010) 2

Trivedi v. Curexo Tech. Corp., 189 Cal. App. 4th 387 (2010) 15

U.S. Hertz, Inc. v. Niobrara Farms, 41 Cal. App. 3d 68 (1974) 17

Venegas v. County of Los Angeles, 32 Cal. 4th 820 (2004) 17

Page

VL Sys., Inc. v. Unisen, Inc., 152 Cal. App. 4th 708 (2007) 17

Williams v. Pub. Fin. Corp., 598 F.2d 349 (5th Cir. 1979) 7

Winter v. Window Fashions Prof'ls, Inc.,
166 Cal. App. 4th 943 (2008) 14

Constitution

U.S. Const., art. VI, cl. 2 8

Rules

Cal. R. Ct. 8.520 1

Cal. R. Ct. 8.520(f) 1

Miscellaneous

Bonaccorso, Salvatore U., *State Court Resistance to Federal Arbitration Law*, 67 Stan. L. Rev. 1145 (2015) 12

Brown, Edmund G., Jr., AB 465 Veto Message,
http://www.gov..ca.gov/docs/AB_465_Veto-Message.pdf 16

Haas, Lyra, Note, *The Endless Battleground: California's Continued Opposition to the Supreme Court's Federal Arbitration Act Jurisprudence*, 94 B.U. L. Rev. 1419 (2014) 10

Lee, Josephine, *California Consumer Contracts After AT&T Mobility v. Concepcion*, 15 U.C. Davis Bus. L.J. 219 (2015) 4

Manakides, Thomas A., Note, *Arbitration of "Public Injunctions": Clash Between State Statutory Remedies and the Federal Arbitration Act*, 76 S. Cal. L. Rev. 433 (2003) 6, 12

Spitko, E. Gary, *Federal Arbitration Act Preemption of State Public-Policy-Based Employment Arbitration Doctrine: An Autopsy and an Argument for Federal Agency Oversight*,
20 Harv. Negot. L. Rev. 1 (2015) 9-10

Page

Yelnosky, Michael J., *Fully Federalizing the Federal Arbitration Act*, 90 Or. L. Rev. 729 (2012) 8

APPLICATION TO FILE BRIEF AMICUS CURIAE

Pursuant to California Rule of Court 8.520(f),[1] Pacific Legal Foundation requests leave to file the attached brief amicus curiae in support of Defendant-Appellant Citibank, N.A. Amicus is familiar with the issues and scope of their representation, and believes the attached brief will aid the Court in its consideration of the issues presented in this case.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) was founded more than 40 years ago and is widely recognized as the most experienced nonprofit legal foundation of its kind. PLF's Free Enterprise Project defends the freedom of contract, including the right of parties to agree by contract to the process for resolving disputes that might arise between them. To that end, PLF has participated as amicus curiae in many important cases involving the Federal Arbitration Act (FAA) and contractual arbitration in general, in this Court and the United States Supreme Court. *See, e.g.*, *Baltazar v. Forever 21*, docket no. S208345 (pending); *Sanchez v. Valencia Holding Co.*, 61 Cal. 4th 899 (2015), *Iskanian v. CLS Transp. Los Angeles LLC*, 59 Cal. 4th 348 (2014); *Gentry v. Superior*

---

[1] Pursuant to California Rule of Court 8.520, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Court (Circuit City Stores, Inc.), 42 Cal. 4th 443 (2007); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63 (2010); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); *Preston v. Ferrer*, 552 U.S. 346 (2008).

Amicus Curiae argues that the *Broughton-Cruz* doctrine, which categorically forbids arbitration of statutory claims that authorize a public injunction remedy, cannot be squared with the United States Supreme Court's interpretation of the Federal Arbitration Act in *Concepcion*, *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), and other cases.

INTRODUCTION AND SUMMARY OF ARGUMENT

Sharon McGill sued 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. *McGill v. Citibank, N.A.*, 232 Cal. App. 4th 753, 181 Cal. Rptr. 3d 494, 496 (2014). The contract contained an arbitration provision and allowed McGill to opt-out if she chose not to accept that provision. McGill did not opt-out. *Id.* at 498. Therefore, when a dispute later arose, Citibank moved to compel McGill to arbitrate her claims, which fell within the purview of the arbitration provision. *Id*. at 497. The trial court held that her claims for monetary damages and restitution must be arbitrated, but refused to compel arbitration of her injunctive relief claims. *Id*.

In doing so, the court relied on the doctrine established by this Court in *Broughton v. Cigna Healthplans*, 21 Cal. 4th 1066, 1080-82 (1999), and *Cruz v. PacifiCare Health Sys., Inc.*, 30 Cal. 4th 303, 315-16 (2003), according to which arbitration provisions are unenforceable as against public policy if they require arbitration of injunctive relief claims brought for the public's benefit under the Unfair Competition Law (UCL), California Legal Remedies Act (CLRA), or False Advertising Law (FAL).

The court below reversed, holding that the FAA effectively preempts the *Broughton-Cruz* doctrine, just as it 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." *McGill*, 181 Cal. Rptr. 3d at 497. That decision was correct.

The *Broughton-Cruz* doctrine stands only as a relic of this Court's earlier approach to arbitration contracts—an approach disapproved by the United States Supreme Court as incompatible with and preempted by the FAA and the federal substantive law of arbitration. Both *Broughton* and *Cruz* were based on predicates that the High Court has since squarely rejected, and both presume to allow a state legislature to create exemptions from federal law for the state's own purposes. This, the Supremacy Clause forbids. This Court should affirm the decision below.

ARGUMENT

I

THE *BROUGHTON-CRUZ* DOCTRINE VIOLATES THE SUPREMACY CLAUSE

A. *Broughton* and *Cruz* Improperly Disdain Arbitration

In *Broughton*, 21 Cal. 4th at 1083, this Court held that a plaintiff cannot be required to arbitrate claims brought under the Consumers Legal Remedies Act. The holding was extended in *Cruz*, 30 Cal. 4th at 307, where this Court refused to compel arbitration of lawsuits seeking public injunctive relief under the UCL and FAL. The doctrine created by these two cases—which allows courts to disregard a private arbitration agreement that "inherently conflicts with a public statutory purpose that transcends private interests," *Broughton*, 21 Cal. 4th at 1083—can no longer be considered good law.

As an initial matter, both cases were based on the untenable notion that arbitral resolution of disputes is inferior to judicial resolution. Both cases insinuated that arbitrators are not as trustworthy as judges and accordingly do not deserve the dignity of being entrusted with public injunction claims. *See* Josephine Lee, *California Consumer Contracts After AT&T Mobility v. Concepcion*, 15 U.C. Davis Bus. L.J. 219, 231 (2015) (*Broughton* and *Cruz* stand for the notions that because the judicial forum has significant institutional advantages over arbitration in administered a public injunctive remedy, if the remedy is entrusted to arbitrators it will lead to the diminution

or frustration of the public benefit). Such presumptions and insinuations typify a hostility to arbitration that the FAA was designed to prevent. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011); *Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 581 (2008).

Even if the *Broughton* and *Cruz* decisions were correct in their assumptions that an arbitrator may not be able to supervise an injunction as efficiently as a court, the fact remains that the parties agreed as part of their contract that an arbitrator would handle the dispute, should one arise. Refusing to allow arbitral resolution frustrates the parties' expectations and their fairly bargained-for agreement. *See Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev. (US), LLC*, 55 Cal. 4th 223, 241 (2012) (under the Davis-Stirling Act, a homeowners' association cannot frustrate expectations that disputes will be resolved in binding arbitration by "shunning their choice of a speedy and relatively inexpensive means of dispute resolution.").

It bears emphasizing, as it does in every FAA case, that in the absence of fraud or procedural unconscionability, the parties to an arbitration agreement, like the parties to any other contract, have both the duty to comply with their agreement and a right to have the courts enforce their agreement. "[T]he freedom of contract . . . is fundamental to arbitration." *Cable Connection, Inc. v. DIRECTV, Inc.*, 44 Cal. 4th 1334, 1361 (2008). *See also*

14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution . . . . Courts generally may not interfere in this bargained-for exchange.").

A dispute-resolution agreement that waives the availability of a public injunction is not contrary to public policy. The UCL, CLRA, and FAL *permit* public injunctive relief, but do not *mandate* such relief. This means that the parties retain the option to resolve their dispute on terms that do not include a public injunction and the state has no authority to intrude. Just as a party may decide to settle a CLRA claim, or may simply choose not to ask for injunctive relief, so a party may choose to forego adjudication of injunctive relief and opt for a streamlined, but possibly inefficient, arbitration, instead. *See* Thomas A. Manakides, Note, *Arbitration of "Public Injunctions": Clash Between State Statutory Remedies and the Federal Arbitration Act*, 76 S. Cal. L. Rev. 433, 479 (2003).

In *California v. IntelliGender, LLC*, 771 F.3d 1169, 1174 (9th Cir. 2014), the Ninth Circuit further noted the distinctions between private lawsuits and public enforcement actions that rely on the same consumer protection statutes. There, the court explained that "private suits [brought under the UCL and FAL] do not and cannot substitute for public enforcement actions, which serve as a far greater deterrent and thus a greater protection." For that reason, private class action settlements will not bar the State from pursuing UCL or

FAL claims for injunctive relief on behalf of the general public. *Id.* at 1177-79.

The United States Supreme Court generally has no problem with parties agreeing to resolve statutory claims by arbitration. For example, in *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 668 (2012), the Court considered whether the federal Credit Repair Organizations Act precludes enforcement of an arbitration agreement in a lawsuit alleging violations of that Act. Despite the Act's repeated use of the terms "action," "class action," and "court," the Court ruled that "contractually required arbitration of claims *satisfies the statutory prescription* of civil liability in court." *Id.* at 671.

Claims arising under many statutes are arbitrable. The Truth in Lending Act (TILA) provides consumers with credit protection by mandating various disclosures of credit terms and by prohibiting unfair credit billing. *Rossman v. Fleet Bank (R.I.) Nat'l Ass'n*, 280 F.3d 384, 389 (3d Cir. 2002). Claims made alleging violations of the statute (which aims to deter future violations, *Williams v. Pub. Fin. Corp.*, 598 F.2d 349, 355 (5th Cir. 1979)), are arbitrable. *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 89-91 (2000). Similarly, the Sherman Antitrust Act reflects the public interest in a competitive economy, and a plaintiff asserting a claim becomes a private attorney general protecting the public interest. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 635 (1985). Nevertheless, Sherman Act claims are arbitrable. *Id.* at 635-39. The Age Discrimination Employment Act (ADEA) authorizes individuals to file age discrimination

claims against employers, which also reflects a public policy (non-discrimination) and these claims are also arbitrable. *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 23 (1991). The mere fact that a statute restricts or governs private contracts so as to advance a public policy does not mean that the statute also forbids parties to a contract from agreeing to arbitrate their disputes.

B. *Concepcion* and *Italian Colors* Abrogate *Broughton-Cruz*

As a matter of fundamental constitutional law, a state legislature has no power to enact exceptions to federal law, even if its purpose is a laudable one. U.S. Const., art. VI, cl. 2. It makes no difference whether a state legislature intends to exempt certain claims from the scope of the FAA for the purpose of effectively vindicating public or private rights arising under a state statute. *Concepcion* held that "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons" and, thus, it was irrelevant to FAA preemption that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system." 563 U.S. at 351. *See also* Michael J. Yelnosky, *Fully Federalizing the Federal Arbitration Act*, 90 Or. L. Rev. 729, 767-68, n.192 (2012) (An "inquiry, determining whether the state legislature that created a state-law cause of action intended to guarantee a judicial forum for resolution of claims, is prohibited under the Court's FAA jurisprudence").

A state effective-vindication exception does not and never did exist. *See Southland Corp. v. Keating*, 465 U.S. 1, 16, n.11 (1984) (labeling "unpersuasive" the analogy between Congress enacting an exception to Section 2 of the FAA and a state legislature doing so); E. Gary Spitko, *Federal Arbitration Act Preemption of State Public-Policy-Based Employment Arbitration Doctrine: An Autopsy and an Argument for Federal Agency Oversight*, 20 Harv. Negot. L. Rev. 1, 18 (2015). The only statutes that might carve out exceptions to the FAA are *federal*. *Italian Colors*, 133 S. Ct. at 2309 (The "vindication of rights" doctrine, at its core, requires application of the FAA "unless the FAA's mandate has been 'overridden by a contrary *congressional* command.'" (emphasis added)). As Justice Kagan emphasized:

> When a state rule allegedly conflicts with the FAA, we apply standard preemption principles, asking whether the state law frustrates the FAA's purposes and objectives. If the state rule does so—as the Court found in [*Concepcion*]—the Supremacy Clause requires its invalidation. We have no earthly interest (quite the contrary) in vindicating that law. Our effective-vindication rule comes into play only when the FAA is alleged to conflict with another *federal* law[.]

Italian Colors, 133 S. Ct. at 2320 (Kagan, J., dissenting); *see also Ferguson v. Corinthian Colls., Inc.*, 733 F.3d 928, 935-36 (9th Cir. 2013) ("[t]he 'effective vindication' exception, which permits the invalidation of an arbitration agreement when arbitration would prevent the 'effective vindication' of a federal statute, does not extend to state statutes").

One law professor phrases the point simply: the combination of *Concepcion* and *Italian Colors* "obliterates" the *Broughton-Cruz* doctrine. Spitko, 20 Harv. Negot. L. Rev. at 7.

The FAA preempts state statutory or common law claims that would defeat the purpose of that act and, by extension, undermine the freedom of contract. Notwithstanding the California courts' notorious aversion to arbitration contracts,[2] the Supremacy Clause of the United States Constitution compels the courts of this state to uphold contracts containing arbitration clauses, except where those contracts are invalid for reasons that apply evenly to all contracts. *Concepcion*, 563 U.S. at 339. This is so even when a contract mandates resolution of statutory claims in an arbitral forum. As this Court recognizes, when a specific state law conflicts with a federal law, "[t]he relative importance to the State of its own law is not material . . . for the framers of the Constitution provided that the federal law must prevail." *Screen Extras Guild, Inc. v. Superior Court*, 51 Cal. 3d 1017, 1022-23 (1990).

The latest in what has been a series of rebukes from the U.S. Supreme Court for the California judiciary's propensity to ignore the FAA came in *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015). There, the Court

---

[2] Lyra Haas, Note, *The Endless Battleground: California's Continued Opposition to the Supreme Court's Federal Arbitration Act Jurisprudence*, 94 B.U. L. Rev. 1419, 1455 (2014) ("The [California] courts consistently reach results [in cases involving the FAA] that the Supreme Court takes the time to overturn.").

reviewed a California Court of Appeal decision which held an arbitration agreement invalid because it provided that the entire arbitration agreement would automatically become void if "the law of your state" made class-arbitration waivers unenforceable. California courts declared class-arbitration waivers unenforceable in *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), until the Supreme Court in *Concepcion* overruled that holding on the grounds that it was preempted by the FAA. The *DIRECTV* opinion notes that parties to a contract *could*, in theory, freely choose to have their contract governed by even an invalid state law. 136 S. Ct. at 468. Given this theoretical possibility and the Court's ordinary deference to state court interpretations of state law, the only question was whether the state law, whether valid or not, was consistent with the FAA. This means, that whatever the validity of the state law, the FAA required that the state law treat arbitration contracts the same as—place them on an "equal footing" with—all other types of contracts. *Id.* The Court laid out half a dozen reasons why the California approach treated the arbitration contract differently than any other type of contract—to the detriment of arbitration agreements. *Id.* at 469-70. As a result, the prior California rule was invalid under the FAA, not because it was an improper interpretation of state contract law, but because it treated arbitration agreements differently from other contracts. 136 S. Ct. at 471. *See also Doctor's Assocs., Inc. v. Casarotto,* 517 U.S. 681, 687 (1996) ("Courts

may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions.”).

The *DIRECTV* Court concluded that the case was governed by “present well-established law.” 136 S. Ct. at 471. This comment stands as a cautionary note that California courts must not continue to ignore, evade, and otherwise purport to distinguish away the FAA and the federal substantive law of arbitration, both of which serve to protect the freedom of contract.

II

STATE STATUTES CANNOT EVADE FEDERAL LAW

State legislatures cannot accomplish through implicit means what the Supreme Court and the FAA forbid them to do explicitly. States are explicitly forbidden to enact laws that “prohibit[] outright the arbitration of a particular type of claim.” *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012) (citation omitted). If states could circumvent the FAA through the nature of the remedies it provides in a statute, by setting aside a particular class of claims for judicial resolution instead of allowing parties to agree to arbitral resolution of those claims, the result would be just what the Supreme Court has made clear is unacceptable: states could easily undercut the FAA in violation of the Supremacy Clause. *See* Manakides, 76 S. Cal. L. Rev. at 460; Salvatore U. Bonaccorso, *State Court Resistance to Federal Arbitration Law*, 67 Stan. L. Rev. 1145, 1170 (2015) (“[I]f state courts freely disregarded

Supreme Court decisions, the Supremacy Clause would be rendered meaningless.”). That, in fact, was precisely the holding of *Perry v. Thomas*, 482 U.S. 483, 491 (1987), which found that a section of the California Labor Code which required a judicial forum for the resolution of wage disputes was in “unmistakable conflict” with the FAA and, “under the Supremacy Clause, . . . must give way.”.

Perpetual add-on claims under the UCL (not to mention the CLRA and FAL) would render innumerable disputes which might otherwise be resolved by mutually acceptable arbitration contracts categorically inarbitrable. *See Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1266 (1992) (noting UCL’s “sweeping language” and courts’ “broad equitable powers to remedy violations”). In essence, “the UCL is a chameleon,” *Aryeh v. Canon Bus. Solutions, Inc.*, 55 Cal. 4th 1185, 1196 (2013), linking itself to an endless array of federal and state statutes, common law, and regulations. Were California law to carve out an exception to the FAA for infractions of the state UCL, that exception would create not just an end-run around the FAA, but a highway to evade it.[3] How easy would it be for any plaintiff’s counsel to tack on a statutory claim that includes such a remedy? And how easy would it be for

[3] The FAL is equally comprehensive within the narrower field of false and misleading advertising. *See generally Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 950-51 (2002); *Comm. on Children’s Television, Inc. v. Gen. Foods Corp.*, 35 Cal. 3d 197, 210-11 (1983).

California's legislature to pass new statutes or amend existing statutes to add a public injunction remedy?

A plaintiff's invocation of the UCL would even bootstrap claims based on federal statutes that the U.S. Supreme Court has already explicitly held to be arbitrable. For example, in *Southland*, 465 U.S. at 16, the Supreme Court held that claims brought under the California Franchise Investment Law are arbitrable, notwithstanding that statute's provision voiding arbitration contracts. Franchisees in California state courts asserting Franchise Investment Law claims also may add on a UCL claim. *See Winter v. Window Fashions Prof'ls, Inc.*, 166 Cal. App. 4th 943, 946 (2008) (franchisee sued for violation of FIL and UCL); *Indep. Ass'n of Mailbox Ctr. Owners, Inc. v. Superior Court*, 133 Cal. App. 4th 396, 411 (2005) (same). Similarly, *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 89-90 (2000), upheld the arbitrability of federal Truth in Lending Act claims. In California, the Truth in Lending Act provides an "adequate tether" for a UCL claim even when the plaintiffs do not directly rely on federal law to make their claims. *Boschma v. Home Loan Ctr., Inc.*, 198 Cal. App. 4th 230, 254 (2011). In federal court, parties may agree to arbitrate TILA claims; in California, a UCL claim alleged in conjunction with the TILA claim will operate to defeat the arbitration contract. The same situation arises in the securities context. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484-85 (1989), held that parties can agree to resolve claims alleging violations of the Securities Act

of 1933 and Securities Exchange Act of 1934 in arbitration. Forbidding arbitration in cases that include a UCL claim would strike down arbitration contracts containing the same types of claims alleging violation of federal securities laws. *See Harris v. Verizon Commc'ns*, 141 Cal. App. 4th 573, 577 (2006) (alleging violation of Securities Act of 1933 and UCL), *disapproved on other grounds by Azure Ltd. v. I-Flow Corp.*, 46 Cal. 4th 1323 (2009); *Roskind v. Morgan Stanley Dean Witter & Co.*, 80 Cal. App. 4th 345, 352 (2000) (alleging violation of Securities Exchange Act of 1934 and UCL).

In short, litigants tie UCL claims to violation of virtually any statute, since any statute—federal or state—can serve as a predicate for an independent UCL claim. *See, e.g.*, *McKell v. Washington Mut., Inc.*, 142 Cal. App. 4th 1457, 1487 (2006) (alleging violation of federal Home Owners' Loan Act, Real Estate Settlement Procedures Act, and UCL); *Knutsson v. KTLA, LLC*, 228 Cal. App. 4th 1118, 1123 (2014) (alleging age discrimination in violation of California Fair Employment and Housing Act and UCL); *Trivedi v. Curexo Tech. Corp.*, 189 Cal. App. 4th 387, 390 (2010) (alleging age, race, color, national origin discrimination in violation of FEHA and UCL). It is plainly an incorrect application of the law to fashion a rule that creates so vast a loophole in the FAA's "national policy favoring arbitration." *Preston v. Ferrer*, 552 U.S. 346, 349 (2008).

Were this Court to hold that the presence of a state statute authorizing a public injunction remedy suffices to invalidate an arbitration contract, the

California Legislature could see that as an invitation to amend any statute to include an injunction remedy, and by that means exclude claims brought under that statute from arbitral resolution.[4] The Legislature has not been reticent to expand remedies in other contexts. *See, e.g.*, *Evans v. Superior Court*, 67 Cal. App. 3d 162, 167 (1977) (statute expanded remedy for unlawful detainer action to encompass additional categories of plaintiffs and defendants); *Lehman v. Superior Court*, 145 Cal. App. 4th 109, 119 (2006) (statutes can expand remedies available for common law torts); *Shirk v. Vista Unified Sch. Dist.*, 42 Cal. 4th 201, 207-08 (2007) (reviewing 16-year history of statute providing a cause of action for childhood abuse to demonstrate its "continual expansion and enlargement"); *Quarry v. Doe I*, 53 Cal. 4th 945, 994 (2012) (Corrigan, J., dissenting) (statute "*did* revive lapsed claims, in unmistakable terms."); *Adams v. MHC Colony Park Ltd. P'ship*, 224 Cal. App. 4th 601, 612 (2014) (Legislature can expand remedies available for public nuisance in the context of mobilehome parks); *Ribeiro v. County of El Dorado*, 195 Cal. App. 4th 354, 366 (2011) (legislative intent to "carve exceptions into the caveat

---

[4] The California Legislature passed anti-arbitration legislation as recently as last year. *See* AB 465 (outlawing mandatory arbitration agreements as a condition of employment). The Governor vetoed the bill on Oct. 11, 2015, noting that "a blanket ban on mandatory arbitration agreements is a far-reaching approach that has been consistently struck down in other states as violating the Federal Arbitration Act." http://www.gov.ca.gov/ docs/ AB_465_Veto_Message.pdf. The Legislature might welcome the opportunities presented by the end-run created by *Broughton-Cruz* doctrine's refusal to permit UCL, CLRA, and FAL claims to be arbitrated if they contain a request for injunctive relief.

emptor doctrine by “granting new remedies”); *Venegas v. County of Los Angeles*, 32 Cal. 4th 820, 848 (2004) (Baxter, J., concurring) (noting “hate crime provision’s greatly expanded remedies.”). The enactment of the Private Attorney General Act “expanded the penalties for labor code violations and authorized private enforcement of these expanded penalties.” *Ruelas v. Costco Wholesale Corp.*, 67 F. Supp. 3d 1137, 1138 (N.D. Cal. 2014).

Not only does a state legislature’s general attempt to create exemptions to federal law run afoul of the Supremacy Clause, but the specific exemptions sought in this case have the potential for considerable mischief, all to the detriment of the freedom of contract. *VL Sys., Inc. v. Unisen, Inc.*, 152 Cal. App. 4th 708, 713 (2007) (“Freedom of contract is an important principle, and courts should not blithely apply public policy reasons to void contract provisions.”); *U.S. Hertz, Inc. v. Niobrara Farms*, 41 Cal. App. 3d 68, 84 (1974) (“[P]ublic policy requires and encourages the making of contracts by competent parties upon all valid and lawful considerations, and courts so recognizing have allowed parties the widest latitude in this regard . . . .”) (emphasis omitted).

The U.S. Supreme Court has made clear that such efforts to undermine the FAA’s protections for the right to agree to arbitration of disputes run afoul of binding federal law. “The Federal Arbitration Act is a law of the United States, and . . . the judges of every State must follow it.” *DIRECTV*, 136 S. Ct.

at 468. The *Broughton-Cruz* doctrine simply is not consistent with that rule, and must be abandoned.

CONCLUSION

The decision below should be affirmed.

DATED: January 19, 2016.

Respectfully submitted,

/s/ DEBORAH J. LA FETRA
DEBORAH J. LA FETRA
Cal. Bar No. 148875
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
Email: dlafetra@pacificlegal.org

Attorney for Amicus Curiae
Pacific Legal Foundation

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF DEFENDANT-APPELLANT is proportionately spaced, has a typeface of 13 points or more, and contains 4,070 words.

DATED: January 20, 2016.

/s/ DEBORAH J. LA FETRA
DEBORAH J. LA FETRA

DECLARATION OF SERVICE BY MAIL

I, SUZANNE M. MacDONALD, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California.

I am over the age of 18 years and am not a party to the above-entitled action.

My business address is 930 G Street, Sacramento, California 95814.

On January 20, 2016, true copies of the foregoing BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF DEFENDANT-APPELLANT were placed in envelopes addressed to:

Stroock & Stroock & Lavan LLP
Julia B. Strickland
Marcos D. Sasso
Stephen J. Newman
David W. Moon
2029 Century Park East, Suite 1800
Los Angeles, California 90067

Honorable John W. Vineyard
Department 12
c/o Clerk of the Court Riverside
Superior Court Civil Department
4050 Main Street
Riverside, CA 92501

Office of the District Attorney
County of Riverside Appellate Division
3960 Orange Street
Riverside, CA 92501

Capstone Law APC
Glenn A. Danas, Esq.
Ryan H. Wu, Esq.
Liana Carter, Esq.
1840 Century Park East, Suite 450
Los Angeles, California 90067

Hon. Richard M. Aronson
Hon. William F. Rylaarsdam
Hon. 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

Appellate Coordinator
Office of the Attorney General
Consumer Law Section
300 South Spring Street
Los Angeles, CA 90013

which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 20th day of January, 2016, at Sacramento, California.

/s/ SUZANNE M. MacDONALD
SUZANNE M. MacDONALD