No. S224086

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

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SUPREME COURT
FILED

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Deputy

SHARON MCGILL, an individual,
Plaintiff and Respondent,

v.

CITIBANK, N.A.,
Defendant and Appellant.

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

RESPONDENT'S OPENING BRIEF ON THE MERITS

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STATEMENT OF ISSUES PRESENTED

1. Does the FAA require enforcement of a private arbitration agreement that completely prohibits a consumer claimant from pursuing a statutory remedy that the California Legislature provided for the purpose of protecting public rights, such as a public injunction to protect California consumers?

2. Does the Federal Arbitration Act, 9 U.S.C. §§1 *et seq.* ("FAA") impliedly preempt the rule announced in *Broughton v. Cigna Healthplans of California* (1999) 21 Cal.4th 1066 and *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, especially under the circumstances in this case, where Citibank's arbitration agreement prohibits the award of public injunctive relief against it in any forum?

INTRODUCTION

California's robust consumer protection regime empowers those harmed by an unlawful business practice not only to seek damages for themselves, but to serve as private attorneys general to protect the public. Among the host of remedies available to a plaintiff is the right to enjoin a defendant from further unlawful, unfair or fraudulent practices directed at the general public. This Court has repeatedly recognized the importance of such public-interest enforcement actions to supplement the actions of law enforcement and regulatory agencies in protecting Californians from deceptive consumer practices.

Asserting claims on behalf of herself and the general public, Plaintiff and Respondent Sharon McGill filed suit, in part, to enjoin Defendant and Appellant Citibank, N.A. ("Citibank") from continuing its deceptive marketing of its Credit Protector program and its practice of charging a fee to applicants who later fail to qualify for enrollment in the program. However, within a unilateral amendment to its cardholder agreement, Citibank inserted a mandatory arbitration provision (the "Agreement") that not only forced all future claims into arbitration, but also precluded any arbitrator from awarding injunctive relief to benefit the public. Citibank's Agreement further banned all private attorney general actions or other representative suits. Enforcing this provision, as authorized by the court below, would essentially insulate Citibank from private enforcement actions altogether.

On a strikingly similar set of facts, this Court in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348

invalidated a ban on representative actions as applied to actions under the Private Attorneys General Act ("PAGA," Labor Code sections 2698 *et seq.*). *Iskanian* held that waivers of actions for the public's benefit violate California law, and that this California law is not preempted by the Federal Arbitration Act ("FAA"), which covers private disputes, not public law enforcement actions. *Iskanian*'s reasoning dictates that this Court invalidate Citibank's ban on private attorney general and representative actions, to the extent it bars McGill from seeking injunctive relief for the public's benefit in *any* forum.

Moreover, this Court in *Broughton* and *Cruz* preserved the right of California consumers to seek injunctive relief in court. Creating what has become known as the "*Broughton-Cruz* rule," this pair of decisions provided that, in the narrow area of public injunctions, the institutional shortcomings of arbitration—namely, the inability of arbitrators to supervise conduct and modify injunctions after the award has been confirmed or to bind third parties—render these remedies ineffective in arbitration. The fundamental premise of the *Broughton-Cruz* rule is that claims for public injunctive relief may not be forced into arbitration where an arbitrator cannot grant the remedy sought. Where, as here, the arbitration agreement itself explicitly denies the arbitrator that authority, application of *Broughton-Cruz* to deny enforcement of the agreement as to claims for public injunctive relief is not preempted, as the FAA itself incorporates the principle that arbitration agreements may not waive substantive rights, such as the right to seek public injunctive

relief under California law.

Indeed, U.S. Supreme Court precedent, including *American Express Co. v. Italian Colors Restaurants* (2013) 133 S.Ct. 2304 ("*Italian Colors*"), strongly reinforces that an arbitration agreement that precludes pursuit of public injunctive relief is unenforceable. The Court in *Italian Colors* held that, though arbitration agreements should generally be enforced according to their terms, an agreement is not enforceable to the extent it seeks prospectively to waive a claimant's right to assert statutory rights or to pursue statutory remedies. As Citibank's Agreement requires arbitration of all claims, yet precludes the arbitrator from awarding relief that would benefit any non-party to the arbitration, it effectively forbids signatories like McGill from pursuing the remedy of public injunctive relief under California's consumer protection statutes in any forum. Citibank's Agreement therefore violates one of the key limits placed on the enforcement of arbitration agreements by the U.S. Supreme Court.

Even absent such an agreement that explicitly bans public injunctive relief, the *Broughton-Cruz* principle that institutional limits on arbitrators' power render claims for public injunctive relief nonarbitrable remains valid and escapes FAA preemption for the reasons given in *Broughton* and *Cruz* themselves as well as because of the limits on FAA preemption recognized in subsequent opinions such as *Iskanian* and *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109. However, the Court need not reach the continued validity of the full extent of the

Broughton-Cruz rule to reverse the Court of Appeal's holding.

Indeed, Citibank's ban on McGill's right to pursue public injunctive relief in *any* forum should be invalidated solely on the principles articulated by this Court in *Iskanian* and by the U.S. Supreme Court in *Italian Colors*. Alternatively, based on the fundamental proposition that the claim for public injunctive relief must remain available in *some* forum, this Court may remand the matter so that the trial court, or the arbitrator, if appropriate, can decide whether McGill's proposed injunctive relief would be within the arbitrator's powers to grant. In any case, the decision below should be reversed.

STATEMENT OF THE CASE

I. CITIBANK HAD A PRACTICE OF SELLING ITS "CREDIT PROTECTOR" SERVICE TO INELIGIBLE CONSUMERS

Citibank markets and sells to its cardholders an insurance service called Credit Protector.[1] (1 Clerk's Transcript ["CT"] 2 [¶¶2-4].) A cardholder who purchases the Credit Protector service pays a monthly premium calculated as a *pro rata* portion of his credit card balance. (1 CT 2 [¶5]; 1 CT 4 [¶18]; 1 CT 5 [¶19].) Citibank advertises that, should a cardholder with Credit Protector face certain types of financial hardship, the service will protect him from becoming delinquent on his account. (1 CT 2 [¶4]; 1 CT 5 [¶¶19-20].) Citibank represents, for example, that it will defer or credit certain amounts or even cancel new balances for qualifying events. (*Id.*)

However, the Credit Protector's limitations, exclusions and conditions are so numerous and complex that it is extremely difficult or impossible for the cardholder to obtain its benefits. (1 CT 5-7 [¶¶21-24].) Before marketing the Credit Protector service to a given cardholder or accepting the cardholder's monthly premium payment, Citibank makes no effort to determine whether that cardholder ever could be eligible to receive benefits under the service. (*Id.*) Citibank does not disclose all limitations and conditions to prospective customers at or before the time of sale. (*Id.*) Citibank also systematically processes claims in such a way as to delay or deny benefits under the service despite the

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[1] These facts are based on the allegations stated in the complaint. Due to Citibank's prompt filing of the motion to compel arbitration, no discovery has yet been conducted.

cardholder's eligibility for them—for example, by purporting to lose documents provided by cardholders required to evaluate a claim for benefits. (1 CT 7-8 [¶¶27-30].)

McGill was a Citibank cardholder who purchased the Credit Protector service from Citibank and paid a monthly premium for that coverage. (1 CT 8-9 [¶¶33-36, 42].) Shortly after McGill became unemployed, she applied for benefits under the Credit Protector service, providing documents and filling out forms as Citibank requested. (1 CT 8-9 [¶¶37-39].) However, Citibank then told her the documents were insufficient and claimed to have lost some of the documents she had provided. (1 CT 9 [¶39].)

Due to Citibank's delays in providing her with the benefits of the service she had purchased, McGill incurred late fees and interest charges on her Citibank credit card account and her credit score was damaged. (1 CT 9 [¶44-45].)

II. MCGILL SOUGHT A PUBLIC INJUNCTION, ALONG WITH OTHER REMEDIES, AGAINST CITIBANK'S UNLAWFUL BUSINESS PRACTICE

McGill filed suit on May 27, 2011, asserting four causes of action arising from Citibank's marketing, sale, and implementation of its Credit Protector service. (1 CT 1-3 [¶¶2-6].) She brought claims both on her own behalf and on behalf of a proposed class under California's Unfair Competition Law (the "UCL," Business & Professions Code sections 17200, *et seq.*), the False Advertising Law (the "FAL," Business & Professions Code sections 17500, *et seq.*), the Consumer Legal Remedies Act ("CLRA," California Civil Code sections 1750, *et seq.*) and

Insurance Code section 1758.9, *et seq.* (Improper Sale of Insurance). (1 CT 1.) Through these claims, McGill sought to enjoin Citibank from continuing to improperly market and sell the Credit Protector insurance program to the public at large, and for failing to implement the program lawfully by charging applicants who do not qualify for the program a fee, as well as for monetary damages and restitution. (1 CT 23-24 [¶¶1-13].)

On August 26, 2011, Citibank filed a petition to compel McGill to arbitrate her claims on an individual basis, which McGill opposed. (1 CT 31-57; 3 CT 859-881.) Citibank relied on arbitration terms provided to McGill through a "Notice of Change of Terms" to her Citibank card, which read in relevant part:

> Effective on the day after the Statement/Closing Date indicated on your November 2001 billing statement, we are amending your existing Citibank Card Agreement to include the following provision regarding binding arbitration.
> ...
> 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").
> ...
> All Claims relating to your account or a prior related account, or our relationship are subject to arbitration... A party who initiates a proceeding in court may elect arbitration with respect to any Claim advanced in that proceeding by any other party. 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.
>
> ...
>
> 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 Claims 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.

(1 CT 109-10.)

The trial court compelled individual arbitration of all claims for restitution or damages under all four causes of action. (6 CT 1409-15; 6 CT 1481-88.) However, the trial court denied the petition to compel arbitration only as to McGill's claims for public injunctive relief under the UCL, the FAL and the CLRA, staying those claims pending arbitration. (*Id.*) In partially denying the petition to compel arbitration as to the claims for injunctive relief, the trial court relied on the *Broughton-Cruz* rule. (6 CT 1436, 1439 [lines 19-21].)

III. THE TRIAL COURT'S ORDER PARTIALLY DENYING CITIBANK'S PETITION TO COMPEL ARBITRATION BASED ON THE *BROUGHTON-CRUZ* RULE WAS REVERSED ON APPEAL

Citibank appealed the trial court's order partially denying the petition to compel arbitration as to McGill's injunctive relief

claims. In a court-ordered supplemental letter addressing the impact of *Iskanian v. CLS Transportation Los Angeles LLC* (2014) 59 Cal.4th 348, McGill argued that *Iskanian*, which held that the FAA did not mandate enforcement of a waiver of the right to pursue a representative action under PAGA, preserves the right to pursue an analogous private attorney general action for public injunctive relief in court under California's consumer protection statutes. (McGill's Letter Brief of July 23, 2014.) Separately, McGill argued that even if the FAA preempted *Broughton-Cruz*, forcing her claims into arbitration would be tantamount to extinguishing her substantive state-law claims. (*Id.*)

At oral argument, McGill responded to the Court's questions and Citibank's arguments, and argued that even if the *Broughton-Cruz* rule were preempted, Citibank's Agreement would be unenforceable to the extent that it expressly bars the arbitrator from awarding public injunctive relief, thereby foreclosing McGill from obtaining that relief in any forum.

On December 18, 2014, the Court of Appeal issued a published decision reversing the trial court's order and remanding with instructions for "the trial court to order all claims to arbitration," including the injunction claims. (Slip op. at p.23.) In so holding, the Court of Appeal concluded that "the Federal Arbitration Act ... preempts the *Broughton-Cruz* rule" under a broad reading of *AT&T Mobility v. Concepcion* (2011) 131 S.Ct. 1740, which preempted a California rule that invalidated class action waivers in consumer agreements. (*Id.* at p.14.) The

Court of Appeal further reasoned that the "effective vindication" exception to FAA preemption does not apply to state statutory claims (*id.* at pp.15-17), and that public injunctive relief claims are too dissimilar from PAGA claims to fit under the limitations of FAA preemption recognized in *Iskanian*. (*Id.* at p.22.) The Court of Appeal did not address whether Citibank's express ban on the award of public injunctive relief is enforceable.

McGill timely filed a Petition for Rehearing in the Court of Appeal on January 2, 2015. She argued that the Court of Appeal should have addressed and accepted her argument that, even if the *Broughton-Cruz* rule were preempted, the trial court's order should be affirmed because the contractual provisions prohibiting awards of public injunctive relief amount to a total bar on McGill's right to pursue statutory remedies provided for under the UCL, the FAL, and the CLRA, running afoul of binding case law. However, the Court of Appeal denied the Petition for Rehearing, stating that this argument had been waived and declining to reach it.

McGill then filed a petition for review, which this Court granted on April 1, 2015.

ARGUMENT

I. INJUNCTIVE RELIEF UNDER THE CLRA, UCL, AND FAL IS A POWERFUL REMEDY THAT PROTECTS THE PUBLIC

A. The UCL And The CLRA Were Enacted To Protect The Public

As this Court has recognized, the "[p]rotection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society." (*Vasquez v. Super. Ct.* (1971) 4 Cal.3d 800, 808.) To protect California's consumers from deceptive business practices, the legislature enacted three important laws, each with an injunctive relief component: the UCL, the FAL, and the narrower CLRA.

1. The UCL and FAL

The UCL provides that "unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by" the FAL. (Bus. & Prof. Code § 17200.) The FAL, in turn, prohibits a person or corporation from making, or causing to be made, any statement that is untrue or likely to mislead consumers regarding the nature of a product or service. (Bus. & Prof. Code § 17500.) One distinctive attribute of the UCL is that it "'borrows' violations of other laws and treats them as unlawful practices that the [statute] makes independently actionable." (*Cel-Tech Communications v. Los Angeles Cellular Telephone* (1999) 20 Cal.4th 163, 180.)

The FAL is thus a component of the UCL, and "any violation of the false advertising law necessarily violates the UCL." (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 950-51

[internal citations and punctuation omitted].) The FAL prohibits "not only advertising which is false, but also advertising which, although true, is actually misleading or which has a capacity, likelihood, or tendency to mislead the public." (*Ibid.* [citation omitted].)

Sections 17204 and 17535 of the Business and Professions Code authorize a private party to enforce the UCL and FAL:

> Through the UCL, a plaintiff may obtain restitution and/or injunctive relief against unfair or unlawful practices in order to protect the public and restore to the parties in interest money or property taken by means of unfair competition. These actions supplement the efforts of law enforcement and regulatory agencies. This Court has repeatedly recognized the importance of these private enforcement actions.

(*Kraus v. Trinity Management Svcs.* (2000) 23 Cal.4th 116, 126 [citations omitted]; see also *Trafficante v. Metropolitan Life Ins. Co.* (1972) 409 U.S. 205, 211 [creation of private attorney general action "is not uncommon in modern legislative programs" to augment the limited resources of government agencies in implementing important legislative policy].)

2. The CLRA

The CLRA proscribes a wide array of "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person" with the intent to "result or which results in the sale or lease of goods or services to any consumer..." (Civ. Code § 1770.) The CLRA's scope is narrower than the UCL's, is expressly limited to transactions involving a "consumer" as

defined by the CLRA, proscribes 22 specific acts or practices, and is "confined largely to deceptive representations." (*Vasquez, supra*, 4 Cal.3d at p.818.) The CLRA expressly provides: "Any waiver by a consumer of this title is contrary to public policy and shall be unenforceable and void." (Civ. Code § 1751.)

The legislature intended the CLRA to be "liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection." (Civ. Code § 1760.) As part of these economical procedures, the CLRA requires a consumer first to notify the person alleged to have committed acts in violation of §1770 of the alleged violations and "[d]emand that such person correct, repair, replace or otherwise rectify the goods or services alleged to be in violation of Section 1770." (Civ. Code § 1780, subd.(a)(1).) If the person to whom notice has been given has not provided the appropriate correction or remedy, or has not agreed to do so, within 30 days, the consumer may then file a court action. (*Id.*) Thus, under the CLRA, the prospective defendant may avoid the filing of the court action by remedying or agreeing to remedy the problem. (*Id.*)

These and other heightened protections[2] for California consumers embody the vital importance of protecting consumers from fraud and misrepresentations in California's statutory scheme.

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[2] The CLRA also authorizes a more permissive procedure for certifying a CLRA class than is set forth under Code of Civil Procedure § 382.

B. Californians Benefit From The Availability of Public Injunctions

Injunctive relief is a critical tool in protecting California citizens, and is widely available for consumers pursuing private attorney general actions under the UCL, the FAL, and/or the CLRA.

The focus of the UCL is "on the defendant's conduct, rather than the plaintiff's damage, in service of the statute's larger purpose of protecting the general public against unscrupulous business practices." (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 312.) To that end, the UCL vests a trial court with broad power to "enjoin on-going wrongful business conduct in whatever context such activity might occur." (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 111.)

Likewise, the CLRA expressly provides for the issuance of "an order enjoining such methods, acts or practices." (Civ. Code § 1780 subd.(a)(2).) Issuance of injunctive relief is particularly important because unlawful practices utilized against one consumer will often evidence a broader, continuing course of conduct. The availability of public injunctive relief permits courts to prohibit such unlawful conduct to protect all consumers subject to the same or similar practices and the public interest. Thus, the statutory authorization of injunctive relief is an explicit example of the "efficient and economical procedures to secure [] protection" from the unlawful actions enumerated in the CLRA. (*Id.* § 1760.) Injunctive relief, like other remedies authorized by the CLRA, is not exclusive, and may be issued with other remedies. (*Id.* § 1752.)

To obtain injunctive relief, the plaintiff must show that the wrongful conduct alleged in the complaint is ongoing or is likely to recur. (*Madrid v. Perot Systems Corp.* (2005) 130 Cal.App.4th 440, 464-466.) The plaintiff must proffer "actual evidence that there is a realistic prospect that the party enjoined intends to engage in the prohibited activity." (*Korea Philadelphia Presbyterian Church v. Calif. Presbytery* (2000) 77 Cal.App.4th 1069, 1084.) For instance, in a case involving unlawful practices relating to a dealer's automotive purchase agreements, the court affirmed a mandatory injunction against defendant for backdating contracts, finding that over 228 contracts had been backdated during the relevant period. (*Nelson v. Pearson Ford. Co.* (2010) 186 Cal.App.4th 983, 1021.) However, the court reversed a mandatory injunction to prevent the defendant from adding insurance costs to the cash price of vehicles because the evidence did not support the implication that the practice "is ongoing or likely to recur." (*Id.*) Injunctive relief that bars a party from continuing to engage in an unlawful business practice may be issued so long as substantial evidence supports such relief.

While there are different kinds of injunctive relief, a public injunction "benefits the public directly by the elimination of the deceptive practices, and the plaintiff benefit[ting], if at all, only by virtue of being a member of the public." (*Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1081, fn.5.) As *Broughton* explained, an order that enjoins a defendant's "deceptive methods, acts and practices" would "obviously not benefit [the

plaintiffs] directly, since they have already been injured." (*Id.*)

Case law demonstrates the need for public injunctions to prevent a wide array of harmful practices. (See *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553 [enjoining sale of cigarettes to minors]; *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163 [enjoining unlawful wage and hour/overtime practices]; *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939 [enjoining false advertising regarding inhumane factory conditions]; *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197 [enjoining false advertising of children's breakfast cereal]; *Fletcher v. Sec. Pac. Nat'l Bank* (1979) 23 Cal.3d 442 [enjoining a business from misrepresenting a finance charge]; *Chern v. Bank of America* (1976) 15 Cal.3d 866 [enjoining a business from misrepresenting interest rate calculations]; *Schnall v. Hertz Corp.* (2000) 78 Cal.App.4th 1144 [enjoining deceptive fuel charges for rental cars]; *Brockey v. Moore* (2003) 107 Cal.App.4th 86 [enjoining false advertising of unlicensed practice of legal services]; *Ticconi v. Blue Shield of California Life & Health Ins. Co.* (2008) 160 Cal.App.4th 528 [enjoining post-claims underwriting]; *Colgan v. Leatherman Tool Group, Inc.* (2006) 135 Cal.App.4th 663 [enjoining false statement of origin of product].)

Thus, in furtherance of its strong policy protecting the public from harmful business practices, California deputized consumers with the legal right to obtain and enforce injunctions against businesses. The state and its citizens have a strong interest in preserving the efficacy of this powerful tool.

II. CITIBANK'S CONTRACTUAL BAN ON A CONSUMER'S RIGHT TO PURSUE A PUBLIC INJUNCTION IN ANY FORUM IS UNENFORCEABLE

Citibank's Agreement expressly prohibits claimants from asserting claims for public injunctive relief in *any forum* and therefore runs afoul of binding law. In relevant part, the Agreement states 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.) Separately, Citibank's Agreement provides that "[t]he arbitrator will not award relief for or against anyone who is not a party." (1 CT 110.) And Citibank's Agreement provides that "the arbitrator may award relief only on an individual (non-class, non-representative) basis." (1 CT 109.) Finally, the Agreement disallows a plaintiff from pursuing public injunctive relief, or any other private attorney general action, in *any* forum:

> If you or we require arbitration of a Claim, neither you, we, nor any other person may pursue the Claims 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.

(1 CT 110.)

Because these provisions prohibit a consumer from obtaining relief for anyone who is not a party, they foreclose public injunction claims, which by definition are brought for the

benefit of non-parties,[3] in arbitration *or* in court.

Citibank's absolute ban on the pursuit of public injunctive relief contravenes California law. This Court stated that, "unlike private suits for damages, in a public injunction action a plaintiff acts in the purest sense as a private attorney general." (*Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, 312.) That right to pursue public injunctive relief as a private attorney general is unwaivable under three separate statutes. First, the CLRA expressly provides that its protections may not be waived by the consumer. (Civ. Code § 1751.) Second, under Civil Code section 1668, agreements "whose object, directly or indirectly, is to exempt [their] parties from violation of the law are against public policy and may not be enforced." (*In re Marriage of Fell* (1997) 55 Cal.App.4th 1058, 1065.) Third, Civil Code section 3515 provides that "a law established for a public reason cannot be contravened by a private agreement."

In *Iskanian v. CLS Transportation Los Angeles LLC* (2014) 59 Cal.4th 348, this Court invoked the latter two provisions to hold that an agreement cannot force the waiver of the right to pursue a representative action under PAGA. (*Id.* at pp.382-83.) PAGA's purpose was "to augment the limited enforcement capability of the Agency by empowering employees to enforce the Labor Code as representatives of the Agency," and was therefore "clearly established for a public reason." (*Id.* at p.383.) *Iskanian*

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[3] See *Broughton*, at p. 1080 ["[T]he benefits of granting injunctive relief by and large do not accrue to [the plaintiff], but to the general public in danger of being victimized by the same deceptive practices as the plaintiff suffered"].

held that the FAA does not mandate enforcement of a waiver of the right to pursue a private attorney general action for the public benefit. (*Id.* at pp.387-88.) That the "fundamental character" of PAGA is that of a "public enforcement action" distinguishes it from other types of representative actions (such as class actions) where a suit is brought by "employee A to bring a suit for the individual damages claims of employees B, C, and D." (*Id.* at p.387.) The latter type of representative action, for "victim-specific relief" such as money damages, *may* be waived by agreement. (*Id.* at pp.387-388.)

Iskanian's reasoning applies with equal force to Citibank's Agreement's waiver of public remedies—including public injunctions. As with PAGA, the statutes providing for public injunction relief have a "public statutory purpose that transcends private interests." (*Broughton*, at p.1083.) Citibank's waiver, like the one in *Iskanian*, prohibits any relief for the benefit of non-named parties, which directly forecloses public injunctions brought for the public's benefit. (Compare *Iskanian*, supra, 59 Cal.4th at p.360 with 1 CT 109-110.) Citibank's Agreement also specifically prohibits "private attorney general actions" along with "other representative actions." (1 CT 110.) More broadly, Citibank's waiver expressly precludes any covered claim from "be[ing] pursued on your or our behalf in any litigation in any court." (1 CT 110) This means that not only can McGill not pursue injunctive relief for anyone else in court *or* in arbitration, she is banned even from being a *beneficiary* of any representative

action.[4]

That the Agreement operates to ban a claimant from pursuing public injunctive relief under California consumer laws is not in dispute, as Citibank has avowedly sought to enforce its Agreement to preclude public injunctive relief. (See 1 CT 31-57.) Like the waiver invalidated in *Iskanian*, Citibank's waiver expressly prohibits the plaintiff from pursuing *any* private attorney general action whatsoever in any forum and must fall on the same ground.

Moreover, any argument that the Agreement is enforceable because it conceivably permits "individual" injunctive relief to be awarded in arbitration should be rejected. This Court in *Iskanian* rejected the similar argument that the pre-dispute waiver at issue in that case was enforceable because it might permit single-claimant PAGA arbitration, reasoning that reducing a PAGA action to a single claimant "w[ould] not result in the penalties contemplated under the PAGA to punish and

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[4] Citibank's ban thus prohibits any consumer from pursuing any type of private attorney general action, and deprives any of its customers from obtaining any benefits—even as a third party—from any representative action taken against Citibank. So under the Agreement, for instance, McGill would be unable to submit a claim from a class action settlement against Citibank to which she is an absent class member. More significantly, McGill would be unable to benefit from any of the protections provided by a public injunction. Thus, hypothetically, if Citibank were enjoined from engaging in an unlawful overcharge practice, under this Agreement, Citibank arguably would still be permitted to engage in the otherwise enjoined practice with respect to the signatories of this Agreement, such as McGill. This provision is therefore more pernicious and broader than the waiver invalidated in *Iskanian*.

deter employer practices that violate the rights of numerous employees under the Labor Code." (*Ibid.* [quoting *Brown v. Ralphs* Grocery Co. (2011) 197 Cal.App.4th 489, 502].) Likewise, public injunctive relief—the kind that McGill is pursuing here—is necessarily for the benefit of third parties and cannot be extinguished by a pre-dispute contractual waiver. (*Broughton*, at p.1080, fn.5 [defining public injunctions as where "the public is generally benefitted directly... and the plaintiff benefitted, if at all, only by virtue of being a member of the public."].) To do otherwise and enforce Citibank's ban would cripple what this Court has repeatedly stated were "importan[t]... private enforcement actions" (*Kraus*, *supra*, 23 Cal.4th at p.126) that protect California consumers from unscrupulous business practices.

Citibank's Agreement is also unenforceable under binding U.S. Supreme Court case law, most recently *American Express Co. v. Italian Colors Rest.* (2013) 133 S.Ct. 2304 ("*Italian Colors*"). While *Italian Colors* held that the class-action ban in the defendant's arbitration agreement was enforceable under section 2 of the FAA even though it had the practical effect of making the pursuit of particular claims too costly for the plaintiffs (*id.* at p.2312), *Italian Colors* reiterated the long-established principle that arbitration agreements may not prospectively waive the right to pursue statutory claims and remedies. As *Italian Colors* explained, the principle that an arbitration agreement may not foreclose the assertion of particular types of claims or statutory remedies "finds its origins in the desire to prevent 'prospective

waiver of a party's right to pursue statutory remedies.'" (*Id.* at p.2310 [quoting *Mitsubishi Motors v. Soler Chyrsler-Plymouth* (1985) 473 U.S. 614, 637 fn.19 ("*Mitsubishi*")].) The *Italian Colors* 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." (*Ibid.*)

Justice Chin's concurring opinion in *Iskanian*, joined by Justice Baxter, relied on *Italian Colors* to reach the same conclusion as the majority that representative action waivers are unenforceable against a PAGA plaintiff. According to Justice Chin, although the FAA "generally requires enforcement of arbitration agreements according to their terms," the U.S. Supreme Court has recognized an exception to that requirement for "a provision in an arbitration agreement forbidding the assertion of certain statutory rights." (*Iskanian, supra,* 59 Cal.4th at p.395 (conc. opn. of Chin, J.) [citing *Italian Colors, supra,* 133 S.Ct. at p. 2310].) Justice Chin concluded that because the defendant's mandatory arbitration agreement barred its employees from seeking PAGA penalties in any forum, it fell within the exception stated in *Italian Colors.* (*Ibid.*)

Here, Citibank's Agreement prospectively forbids the assertion of any claim for public injunctive relief, in any forum. Like the right to pursue PAGA civil penalties on a representative basis in *Iskanian*, the right to pursue public injunctive relief for the public's benefit under the UCL, FAL, and CLRA cannot be prospectively waived and must remain available in *some* forum under *Italian Colors.*

Moreover, the savings clause of FAA section 2, which provides that arbitration agreements are enforceable "save upon such ground as exist in law or equity for the revocation of any contract" (9 U.S.C. § 2), includes illegal agreements under Civil Code section 1668, which exempts the parties from a violation of the law, and those that "would force a party to forgo unwaivable public rights." (*Little v. Auto Stiegler* (2003) 29 Cal.4th 1064, 1079.)

An illegal contract that prohibits the assertion of public rights falls within the savings clause because it applies equally to arbitration agreements and other contracts. It does not "take its meaning precisely from the fact that a contract to arbitrate is at issue," but is a "generally applicable contract defens[e]." (*Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681. 685, 687.) Nor does such a principle "stand as an obstacle to the accomplishment of the FAA's objectives." (*AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740, 1748 ("*Concepcion*").) Rather, application of this principle only prevents arbitration in a limited set of cases where arbitration would amount to a waiver of substantive rights, and the FAA's objectives do not include requiring a party to relinquish "any substantive right... [state] law may afford him." (*Preston v. Ferrer* (2009) 552 U.S. 346, 359.)

Citibank's ban on public injunctive relief must be invalidated, and the Court should remand the matter to determine whether McGill's proposed public injunction can be issued by an arbitrator.

III. THE *BROUGHTON-CRUZ* RULE REMAINS GOOD LAW

In *Broughton* and *Cruz*, decided four years apart, this Court held that claims for public injunctive relief may not be forced into arbitration where an arbitrator cannot grant the remedy sought. As applied here, where the arbitration agreement itself explicitly denies *the arbitrator* that authority, the *Broughton-Cruz* rule simply preserves the right of the party to seek public injunctive relief in *some* forum—in this case, the Court. Under these circumstances, where *Broughton* and *Cruz* simply incorporate the FAA principle that arbitration agreements may not waive substantive rights, the validity of their holding is not in doubt, and this Court need not reach any determination into any broader application of the *Broughton-Cruz* rule.

A. *Broughton* and *Cruz* Held That A Claim Seeking a Mandatory Injunction For The Public's Benefit Is Incompatible With Arbitration

In *Broughton*, the Court considered whether plaintiff's claims under the CLRA—including for damages and an order enjoining the deceptive practices against a defendant who allegedly misrepresented the quality of medical services provided under its health care plan in its advertisements—should be compelled to arbitration. (*Broughton*, at pp.1072-1073.) In *Cruz*, the Court considered whether the claims brought under the UCL and FAL for restitution, disgorgement, and injunctive relief relating to the defendant's sale, marketing, and rendering of medical services should be compelled to arbitration. (*Cruz*, at p.307.)

The Court in both cases highlighted the federal statutory

mandate and strong public policy in favor of enforcing arbitration agreements. (*Broughton*, at p.1073; *Cruz*, at pp.311-312.) This Court in both cases then enforced the at-issue arbitration agreements for plaintiffs' claims of damages, restitution, and disgorgement. *Broughton* found that the malpractice claim, as well as the statutory damages claims under the CLRA, may be sent to arbitration. (*Id.* at p.1078.) Similarly, *Cruz* affirmed the order compelling the arbitration of the plaintiff's restitution and disgorgement claims under the UCL. (*Cruz*, at pp.317, 320.)

However, while it refused to hold that an arbitrator may never issue a permanent injunction under the CLRA, the *Broughton* Court "conclude[d] on narrower grounds that the injunction plaintiffs seek in the present case is indeed beyond the arbitrator's power to grant." (*Broughton*, at p.1079.) Under *Broughton*, a specific type of injunction pursued by a plaintiff "functioning as a private attorney general [to] enjoin[] future deceptive practices on behalf of the general public" is not subject to arbitration. (*Id.* at pp.1079-80.) Notably, *Broughton* did not extend its ruling to other types of injunctions that have "effect beyond the parties themselves," such as to prevent copyright infringement or prohibit a labor strike where the benefits to the public "were incidental to the primary purpose of resolving a conflict between the parties and rectifying private individual wrongs." (*Id.*)

In exempting public injunctive relief from forced arbitration, this Court invoked a cardinal principle of the FAA—that, by agreeing to arbitration, "the parties do not forego

substantive rights, but merely agree to resolve them in a different forum." (*Broughton*, at p.1075 [citing *Mitsubishi, supra,* 473 U.S. at p. 614 and *Shearson/American Express, Inc. v. McMahon* (1987) 482 U.S. 220].) The *Broughton* Court then applied the U.S. Supreme Court's "inherent conflict" test under which a claim's unsuitability for the arbitral forum may be found in an "inherent conflict between arbitration and the [statute's] underlying purposes." (*Id.* [citing *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 26.].) Under this test, this Court found that public injunctive relief is fundamentally incompatible with arbitration due to the confluence of two issues.

"First, that relief is for the benefit of the general public rather than the party bringing the action." (*Broughton*, at p.1082.) The *Broughton* Court emphasized that the public—not the private party—reaps all of the benefits of the injunctive relief. (*Id.*) Thus, *Broughton* distinguished public injunctions from remedies where the public benefit "was merely incidental to private compensation" such as treble damages in federal antitrust law. (*Id.* [distinguishing *Mitsubishi, supra,* 482 U.S. at pp.635-636].) Both *Broughton* and *Cruz* expressly stated that the holding does not extend to injunctive relief "designed primarily to rectify individual wrongs." (*Cruz*, at p.315.) Because the at-issue injunctive relief involves a "public statutory purpose that transcends private interests" (*Broughton*, at p.1082), it falls outside the ambit of the FAA, which facilitates arbitration to "voluntarily resolve private disputes in an expeditious and efficient manner." (*Id.* at p.1080 [citing *Dean Witter Reynolds,*

Inc. v. Byrd (1985) 470 U.S. 213, 221].)

Second, the *Broughton* and *Cruz* Court found that "institutional shortcomings of private arbitration in the field of such public injunctions" rendered the statutory remedy of a pubic injunction unavailable in arbitration. (*Broughton*, at p. 1081.) To be sure, this finding does not reflect any "judicial hostility" towards the arbitral forum. (*Id.* at p.1083.) The Court in *Broughton* and *Cruz* did not cast doubt on the effectiveness of private arbitration to resolve claims for damages, even for claims involving California consumer protection statutes. (See *Broughton*, at pp.1085-86; *Cruz*, at pp.317-318.) Rather, in this narrow area of injunctive relief for the public benefit, the Court recognized that specific institutional limitations of the arbitral forum would render the remedy ineffective.

For a permanent injunction for the public's benefit to be effective, judicial monitoring is required. This is to "ensure the efficacy" of a public injunction, where a court must have the capacity to "reassess the balance between the public interest and the private rights as changing circumstances dictate." (*Broughton*, at p.1081.) In certain cases, supervising such an injunction is so complex that judges "may assume quasi-executive functions of public administration that expand far beyond the resolution of private disputes."[5] (*Id.* at p.1081.)

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[5] For instance, following a ten-year permanent injunction against anti-trust practices of a shoe machinery manufacturer, the district court was ordered by the U.S. Supreme Court to investigate the efficacy of the injunction to determine whether it should be modified. (*United States v. United Shoe Machinery*

Conversely, "an arbitrator lack[s] the institutional continuity and the appropriate jurisdiction to sufficiently enforce and, if needed, modify a public injunction." (*Cruz*, at p.312.) Arbitrators do not exercise powers over third parties, and they do not have continuing jurisdiction to enforce a mandatory injunction. (*Broughton*, at p.1081.) Moreover, because arbitration awards do not have preclusive effect, other parties are not bound by the award. If an injunction were "imperfectly enforced," another party would have to relitigate the matter. (*Id.*) "Thus, a superior court that retains its jurisdiction over a public injunction until it is dissolved provides a necessary continuity and consistency for which a series of arbitrators is an inadequate substitute." (*Id.*)

Aside from *Broughton*'s explanations, many other cases demonstrate the necessity of lengthy court supervision over public injunctions. (See *United Shoe Machinery, supra,* at fn. 5, 391 U.S. at p.251 [modifying a permanent injunction after ten years]; *United Steelworkers of Am. v. United States* (1959) 361 U.S. 39, 56 [issuing public injunction affecting "hundreds of thousands of employees"].) Only courts may exercise continuing jurisdiction after the injunction is issued, see *Transgo Inc. v. Ajac Transmission Parts Corp.* (9th Cir. 1985) 768 F.2d 1001, 1030, and only courts have the inherent power to modify or dissolve permanent injunctions as changing circumstances dictate.[6] (See

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Corp. (1968) 391 U.S. 244, 251.) This type of long-term supervisory role would be impossible for an arbitrator.

[6] While the FAA and the California Arbitration Act ("CAA") provide limited powers for a court to modify or vacate arbitral

SEC v. Worthen (9th Cir. 1996) 98 F.3d 480, 482.)

Further, a court may well vacate an arbitration award of mandatory injunctive relief that binds third parties based on the arbitrator having "exceed[ed] his powers" in rendering that award. (See, e.g., *Comedy Club, Inc. v. Improv West Assocs.* (9th Cir. 2009) 553 F.3d 1277, 1287-88 [vacating an award that enjoined licensee's affiliates and other non-parties to the operative trademark agreement from opening or operating improv businesses].) The transfer of such claims to arbitration would therefore likely result in court challenges to the final arbitral award.

Thus, arbitration's speediness, efficiency, and "finality"—the very fundamental attributes that make it an attractive forum for resolving certain disputes—impair its effectiveness regarding broad injunctive relief, which requires protracted supervision, public accountability, and, most importantly, authority over third parties.

Due to institutional inability of arbitrators to enforce the remedy as well as the injunction's statutory purpose to protect the public, *Broughton* held that the FAA does not override law preserving the right to pursue public injunctive relief for CLRA claims in court. (*Broughton*, at p.1082.)

To be sure, the *Broughton-Cruz* rule "applies only when

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awards, see 9 U.S.C. §§ 9, 10; Civ. Proc. Code §§ 1286.2, 1286.6, none of these grounds includes material changes in fact or law, which is the traditional equitable basis for tailoring public injunctions. (See *Agostini v. Felton* (1997) 521 U.S. 203, 215 [overruling prior precedent and dissolving permanent injunction on that basis].)

'the benefits of granting injunctive relief by and large do not accrue to that party, but to the general public in danger of being victimized by the same deceptive practices as the plaintiff suffered.'" (*Kilgore v. Keybank, N.A.* (9th Cir. 2013) 718 F.3d 1052, 1060 [en banc, quoting *Broughton*, at p.1080].) In *Kilgore*, the plaintiff's requested prohibitions would not redound to the benefit of a large number of consumers, but only a small portion of the putative class, and therefore did not implicate *Broughton-Cruz*. (*Id.* at pp.1060-61.) As the *Kilgore* en banc decision confirms, *Broughton-Cruz* comes into play only where an injunction benefiting non-parties would clearly not be effective if rendered by an arbitrator.

B. The FAA Does Not Preempt The *Broughton-Cruz* Rule As Applied Here

1. *Broughton* and *Cruz* Followed The Nonwaiver Principle Applicable to Both State and Federal Claims

The Court of Appeal erred in finding that the *Broughton-Cruz* rule violates the longstanding rule that the FAA preempts a state law that "prohibits outright the arbitration of a particular type of claim." (Slip op. at p.14 [quoting *Concepcion, supra*, 131 S.Ct. at p.1747].) In fact, as applied here, that rule must give way to the FAA's non-waiver principle, incorporated by *Broughton-Cruz*, which prevents enforcement of any agreement that operates to extinguish a substantive claim upon its transfer to arbitration.

The FAA's primary purpose is to authorize a choice of forum for resolving disputes, not to provide a mechanism for preventing assertion of claims. Section 2 of the FAA provides

that: "[a] written provision in any ... contract evidencing a transaction involving commerce *to settle by arbitration a controversy* thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist in law or in equity for the revocation of any contract." (9 U.S.C. § 2 [emphasis added].) Section 2 specifically requires enforcement of agreements to resolve disputes by arbitration, not agreements that foreclose assertion and resolution of claims.

In *Scherk v. Alberto-Culver Co.* (1974) 417 U.S. 506, 519, the U.S. Supreme Court, in enforcing an agreement to arbitrate federal securities claims, described arbitration agreements as a "specialized kind of forum-selection clause." The Court has repeated its characterization of arbitration agreements under the FAA as "forum selection" or "choice-of-forum" clauses regularly in the decades since *Scherk*. (See, e.g., *CompuCredit v. Greenwood* (2012) 132 S.Ct. 665, 671; *14 Penn Plaza LLC v. Pyett* (2009) 556 U.S. 247, 269; *EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279, 295 & fn.10; *Gilmer, supra*, 500 U.S. at p.29; *Mitsubishi, supra*, 473 U.S. at pp. 629-31.)

A forum-selection clause determines where a claim will be decided, not *whether* it may be pursued. Thus, the Supreme Court has emphasized that under the FAA an arbitration agreement "*only* determines the choice of forum." (*Waffle House, supra*, 534 U.S. at p.295, fn.10 [emphasis added].) As the Court emphasized in *Mitsubishi*, "[b]y 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." (473 U.S. at p.628.) Not only does the FAA not *require* enforcement of agreements that deprive parties of substantive rights in the guise of arbitration; it prohibits their enforcement. *Mitsubishi* stated that if an arbitration agreement "operated as a prospective waiver of a party's right to pursue statutory remedies, we would have little hesitation condemning the agreement as against public policy." (473 U.S. at p.637, fn.19.) This point has been repeated numerous times in subsequent cases. (See, e.g., *Pyett, supra,* 556 U.S. at p.266; *Preston, supra,* 552 U.S. at p.359; *Waffle House, supra,* 534 U.S. at p.295, fn.10; *Circuit City Stores, Inc. v. Adams* (2001) 532 U.S. 105, 123; *Gilmer, supra,* 500 U.S. at p.26; *McMahon, supra,* 482 U.S. at pp.229-30.)

This non-waiver principle was most recently stated in *Italian Colors,* where the Court confirmed that an arbitration agreement cannot be enforced if it "forbid[s] the assertion of... statutory rights." (133 S.Ct. at p.2310.) As explained, because Citibank's Agreement bans all remedies benefitting non-parties as well as all private attorney general actions to be brought in arbitration or in court, the *Broughton-Cruz* rule operates to invalidate that term.

Broughton itself expressly followed the principle that a party cannot forgo substantive rights when claims are transferred to arbitration. *Broughton* observed that *Mitsubishi* and *McMahon* invoked the nonwaiver principle but permitted arbitration of statutory claims due to the "private nature of the

damages remedy at issue" that made "'the private attorney general role' for such plaintiffs relatively 'implausible.'" (*Broughton*, at p.1076.) *Broughton* then reasoned that *Mitsubishi* and *McMahon*'s analyses "imply... that when the primary purpose and effect of a statutory remedy is not to compensate for an individual wrong but to prohibit and enjoin conduct injurious to the general public, i.e., when the plaintiff is acting authentically as a private attorney general, such a remedy may be inherently incompatible with arbitration." (*Id.*) *Broughton* thus followed the *Mitsubishi* line of case law in stating that the FAA does not "compel states to permit the vitiation through arbitration of the substantive rights afforded" by such statutes. (*Id.* at p.1083.) Only for this particular type of remedy, "which is beyond the arbitrator's power to grant," is the FAA's mandate withdrawn. (*Id.* at p.1079.)

Likewise, the U.S. Supreme Court has stated that arbitration may not be precluded "so long as. . . the *guarantee of the legal power to impose liability*—is preserved." (*CompuCredit v. Greenwood* (2012) 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 discussed.[7] Again, the Courts in *Broughton* and *Cruz* did not find a categorical exemption from arbitration based on a mere policy

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[7] And, as discussed above, the Agreement here expressly prohibits the arbitrator from awarding any relief that would benefit non-parties to the arbitration, ensuring that the "the legal power to impose liability" not only is not guaranteed, but it is conclusively foreclosed. (1 CT 109-10.)

preference for litigation.

Some decisions, including *Ferguson v. Corinthian Colleges, Inc.* (9th Cir. 2013) 733 F.3d 928, have questioned whether public injunctions would actually be nullified in arbitration without addressing the specific "institutional shortcomings" detailed by *Broughton.* That issue should not be reached here. *Broughton-Cruz,* as applied to an agreement prohibiting the assertion of public injunctive relief in *any* forum, is fully consistent with the FAA's non-waiver principle and is not preempted.

The fact that remedies under state statutes (rather than federal statutes) are at issue does not change the FAA's preemption analysis.[8] This Court has, on numerous occasions, expressly rejected the argument that the FAA requires enforcement of arbitration agreements that waive otherwise unwaivable state law rights. (See *Little, supra,* 29 Cal.4th at pp.1078-79.) Similarly, this Court in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, applied the *Mitsubishi* principle that the FAA "disallows forms of arbitration that in fact compel claimants to forfeit certain statutory rights" to rights created by a state statute, and held that the FAA does not require arbitration of state statutory claims unless the agreement

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[8] *Ferguson* relied on *dicta* from Justice Kagan's dissent in *Italian Colors* for this point, even though the majority did not so limit its analysis regarding prospective waivers only to federal statutes. (See *Italian Colors, supra,* 133 S.Ct. at p. 2320 [dis. opn. of Kagan, J].) Justice Kagan asserted only that procedures incompatible with arbitration cannot be justified by the need to make it more practical to pursue state-law claims (see *id.*), but did not state that an arbitration clause may *waive* a state-law claim.

permits a party to "fully 'vindicate [his or her] statutory cause of action in the arbitral forum.'" (*Id.* at pp.99-101 [citation omitted]; see also *Iskanian, supra,* 59 Cal.4th at p.395 (conc. opn. of Chin, J.) [finding that "a provision in an arbitration agreement forbidding the assertion of certain [state] statutory rights" will be invalidated under the FAA].)

The *Cruz* Court also observed that the U.S. 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,* at p.313.) Extending the FAA in such a manner to extinguish a remedy enacted for a wholly public purpose, simply because it was a state rather than federal law, would be "perverse." (*Broughton,* at p.1083.)

This Court is not alone in concluding that an enforceable arbitration agreement must permit effective vindication of state-created rights. The U.S. Supreme Court expressed the same view in *Preston.* There, while holding that the FAA requires arbitration of a claim under the California Talent Agencies Act, the Court observed that the issue was "only a question concerning the forum in which the parties' dispute will be heard," because "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits their resolution to an arbitral forum." (*Preston v. Ferrer, supra,* 552 U.S. at p.359 [quoting *Mitsubishi, supra,* 473 U.S. at p.628].) Underscoring that *Mitsubishi* applies equally to state and federal claims, the Court in *Preston* stated that under the FAA, a party to an arbitration agreement "relinquishes no

substantive rights... California law may accord him." (*Ibid.* [emphasis added; see also *Circuit City*, *supra*, 532 U.S. at p.123 [quoting *Mitsubishi*'s statement in a case involving state-law claims].

Similarly, in *Kristian v. Comcast Corp.* (1st Cir. 2006) 446 F.3d 25, the court invalidated arbitration provisions that would "prevent the vindication of statutory rights under state and federal law." (*Id.* at p.29.) The court explained that "[u]nless the arbitral forum provided by a given agreement provides for the fair and adequate enforcement of a party's statutory rights, the arbitral forum... loses its claim as a valid alternative to traditional litigation." (*Id.* at p.37.) Finding this principle equally applicable to state and federal claims (see *id.* at p.63), the court separately analyzed the plaintiffs' state and federal antitrust claims before determining that certain provisions of the arbitration agreements could not be applied to either. (See *id.* at pp.44-60, 64.)

Likewise, in *Booker v. Robert Half International* (D.C. Cir. 2005) 413 F.3d 77, the D.C. Circuit, in an opinion by then-Judge John Roberts, recognized that the FAA permitted arbitration of claims under the District of Columbia law only if arbitration allowed for the assertion of those claims without limitation on a party's substantive rights. Judge Roberts began with the unqualified statement that "statutory claims may be subject to agreements to arbitrate, so long as the agreement does not require the claimant to forgo substantive rights afforded under the statute." (*Id.* at p.79.) The court therefore refused to enforce

a provision in the arbitration agreement foreclosing punitive damages available under D.C. law. (*Id.* at pp.79-83.)

The Court of Appeal dismissed these cases, finding that *Kristian* and *Booker* "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.) The Court in *Ferguson* did likewise. (733 F.3d at p.936.) In categorically rejecting the principle that state substantive rights are preserved in arbitration, the Court of Appeal implied that the FAA's preemptive power would mandate the enforcement of terms of any arbitration agreement and override any state law to the contrary. (Slip op. at p.16.) Under this reading, the FAA would mandate enforcement of an arbitration agreement that would, for instance, simply force employees to waive their right to pursue overtime claims under the Labor Code. The notion that the FAA authorizes nullification of such substantive state-law claims is badly mistaken.

Of course, the FAA displaces contrary state law under the Supremacy Clause, but the non-waiver principle is not based on the idea that substantive rights *displace* the FAA; it rests on the recognition that the FAA *itself* does not provide for waiver of substantive rights. As explained above, Section 2 of the FAA provides for enforcement only of agreements to *resolve* claims by arbitration, not agreements that *waive* claims and preclude their resolution by arbitration. Put another way, when an arbitration clause imposes terms requiring a party to forgo substantive rights, it exceeds what the FAA requires courts to enforce. A

state-law doctrine that likewise prohibits enforcement of arbitration agreements that effectively waive substantive rights does not improperly attempt to override federal law, but is fully consistent with the FAA and implements the FAA's own policy.

That is, the *Mitsubishi* non-waiver principle is "part of the body of federal substantive law of arbitration" (*Kristian, supra,* 446 F.3d at p.63), and therefore a corresponding state law doctrine does not conflict with federal law. The Court of Appeal's suggestion that it would violate the Supremacy Clause to apply *Mitsubishi*'s non-waiver principle to state-law rights "confuse[s] an agreement to arbitrate"—which is protected by the FAA and, hence, the Supremacy Clause—"with a prospective waiver of the statutory right"—which the FAA does not authorize. (*Pyett, supra,* 566 U.S. at p. 265.)

2. *Concepcion* Does Not Abrogate *Broughton* and *Cruz*

Aside from mistakenly holding that the non-waiver principle applies only to state rights, the Court of Appeal incorrectly held that the *Broughton-Cruz* rule cannot survive *Concepcion*'s sweeping "directive." (Slip op. at p.14.) The Court of Appeal's apparently limitless view of *Concepcion*'s holding—construing *Concepcion* to "dramatically broaden the FAA's permissive scope" (slip op. at p.14)—is at odds with this Court's reading of the same case.

In *Concepcion*, the United States Supreme Court overruled the *Discover Bank* rule because it "interferes with arbitration." (131 S.Ct. at p.1750.) According to *Concepcion*, the principal problem with *Discover Bank* was that it "allowed any party to a

consumer arbitration to demand [classwide arbitration] *ex post.*" (*Ibid.*) By allowing consumers in most cases to avoid arbitration unless classwide arbitration were offered, *Discover Bank* "interfere[d] with fundamental attributes of arbitration and thus create[d] a scheme inconsistent with the FAA." (*Id.* at p.1748.)

According to this Court, "what is new is that *Concepcion* clarifies the limits the FAA places on state unconscionability rules as they pertain to arbitration agreements." (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1143 ("*Sonic II*").) *Concepcion* held that even "facially nondiscriminatory rules[] must not disfavor arbitration *as applied* by imposing procedural requirements that 'interfere[] with the fundamental attributes of arbitration,' especially its 'lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.'" (*Ibid.* [quoting *Concepcion, supra*, 131 S.Ct. at pp.1748, 1751; emphasis in original]) *Sonic II* concluded that while *Concepcion* preempts such rules, "[i]mportantly, state-law rules that do not 'interfere with the fundamental attributes' of arbitration' [citation] ***do not*** implicate *Concepcion*'s limits on state unconscionability rules." (*Ibid* [emphasis added])

Applying this understanding of *Concepcion*, this Court in *Sonic II* overruled an earlier decision that required a "Berman hearing" prior to a wage arbitration, which it held to impermissibly engraft a procedure that "significantly delays the commencement of arbitration." (57 Cal.4th at p.1126.) And in *Iskanian*, the Court overruled an earlier decision invalidating

class waivers under certain circumstances because it permitted the availability of class proceedings that "*Concepcion* held [to] interfere with the fundamental attributes of arbitration." (59 Cal.4th at p.364.)

However, as explained above, *Iskanian* separately held that *Concepcion* does not preempt state law that invalidates a waiver of the right to pursue a representative PAGA action, regardless of whether the waiver appears in an arbitration agreement. (59 Cal.4th at pp.384-388.) And *Sonic II* instructed courts to rigorously examine arbitration agreements for substantive unconscionability in cases where parties surrender statutory benefits. (57 Cal.4th at pp.1149-50.) These decisions confirm that the FAA does not override just *any* state law touching on arbitration; rather, *Concepcion* operates to specifically displace laws in conflict with the fundamental attributes of arbitration.

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. *Broughton-Cruz* is, at bottom, not a rule of procedure, but a rule that preserves a right to pursue a statutory remedy, public injunction, that would be rendered ineffective in arbitration.

Moreover, *Broughton* and *Cruz* explicitly addressed the authority discussing the rule that displaces any state law that "prohibits outright the arbitration of a certain type of claim" (*Concepcion, supra,* 131 S.Ct. at p.1747), which the Court of Appeal stated was dispositive in abrogating *Broughton* and *Cruz.*

In fact, the case on which *Concepcion* relied for this rule,

Preston, summarized a body of FAA jurisprudence establishing this rule (See 552 U.S. at pp.353 [citing *Southland Corp. v. Keating* (1984) 465 U.S. 1 [preempting a California statute exempting franchise law claims from arbitration]; *Perry v. Thomas* (1987) 482 U.S. 483 [preempting California Labor Code section 229 insulating wage suits from arbitration], and *Doctor's Assocs., supra*, 517 U.S. at p.687 [striking down state law requiring special notice for arbitration provisions in contracts].)[9] *Broughton* and *Cruz* expressly considered these cases.

In reviewing these precedents, *Broughton* and *Cruz* recognized that the U.S. 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*, at p.311-13; *Broughton*, at pp.1074-75.) Devoting a lengthy opening section to the consideration of Supreme Court case law on Section 2 of the FAA "over the past 15 years," *Broughton* and *Cruz* recognized that *Southland* and its progeny withdrew the state's power to prevent parties from arbitrating statutory claims as well as those purely contractual if the parties so intend. (*Cruz*, at pp.313; *Broughton*, at pp.1073-78.) As *Broughton* noted, *Southland*, *Perry*, *Doctor's Associates*, among other cases, stand for the proposition that any rule that disfavors arbitration agreements—that treats arbitration with suspicion—

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[9] Notably, the Court of Appeal initially recognized that the rule that the FAA preempts state rules that prohibit outright arbitration of a private claim is "well-established and has been repeated reaffirmed." (Slip op. at p. 8 [citing *Preston, supra*, 552 U.S. at p. 353].)

is preempted by Section 2 of the FAA. (*Id.* at pp.1073-75, 1078.)

At the same time, the FAA does not permit the "vitiation through arbitration of the substantive rights" afforded by statute. (*Broughton*, at p.1083.) Relying on a separate line of cases, including *Mitsubishi*, *Gilmer*, and *McMahon*, *Broughton* held that "in a narrow class" of "private attorney general actions" where the protections of substantive law would be eviscerated by the transfer of such claims to arbitration, the matter is resolved in court. (*Id.*) *Broughton* harmonized the competing lines of case law, and cannot be found to have been preempted by a doctrine deriving from cases it already incorporated into its decision. (See *Agostini*, *supra*, 521 U.S. at p.237 [admonishing that lower courts should refrain from concluding that the Supreme Court's "more recent cases have, by implication, overruled an earlier precedent"].)

Other errors afflict *Ferguson* and the decision below. First, *Broughton* and *Cruz* applied the FAA's "outright prohibition" mandate correctly, by sending *private* claims to arbitration. (See, e.g., *Cruz*, at pp.317-319 [overruling a lower court decision exempting disgorgement and restitution claims in class actions from arbitration]; *Broughton*, at pp.1085-1087 [sending damages claims under CLRA to arbitration].)

Second, contrary to the decision below, *Concepcion* broke *no* new ground on this issue. (See slip op. at p.14.) *Concepcion* did not itself implicate the "straightforward" rule displacing state laws that prohibit outright claims from arbitration. (131 S.Ct. at p.1747.) Rather, the case called for the Court to engage in a

"more complex" inquiry regarding generally applicable contract rules, such as unconscionability, "that [are] alleged to have been applied in a fashion that disfavors arbitration." (*Id.*) *Concepcion*'s passing invocation of a previously established rule adds nothing new that would abrogate California Supreme Court case law.

In short, the relevant legal principles have not changed since the issuance of *Broughton* and *Cruz*. Rather, cases cited by *Ferguson*, such as *Marmet Health Care Center v. Brown* (2012) 132 S.Ct. 1201, simply applied long-established law to preempt state laws that purported to exempt private claims from arbitration. They do not cast doubt on the application of the *Broughton-Cruz* rule to an agreement that expressly prohibits a statutory remedy from being asserted in any forum.

3. The FAA Does Not Mandate The Waiver of A Claim Entirely For The Public's Benefit

The *Broughton-Cruz* rule, as applied to this case, also cannot be preempted because the FAA does not mandate enforcement of a waiver of claims brought solely for the public's benefit. Rather, the FAA governs private claims by "aim[ing] to ensure an efficient forum for the resolution of *private* disputes." (*Iskanian, supra*, 59 Cal.4th at p. 384 [emphasis in original].)

The FAA's focus on private disputes is embodied in the statutory language of Section 2, which enforces "a contract evidencing a transaction involving commerce *to settle by arbitration a controversy thereafter arising out of such contract or transaction.*" (*Iskanian, supra*, 59 Cal.4th at p.384 [emphasis in original, quoting 9 U.S.C. § 2].) As this Court explained, this

phrase is "most naturally read to mean a dispute about the respective rights and obligations of parties in a contractual relationship." (*Id.* at p.385.) Moreover, the FAA's legislative history shows that "the FAA's primary objective was the settlement of ordinary commercial disputes." (*Id.*) The Court concluded that "there is no indication that the FAA was intended to govern disputes between the government in its law enforcement capacity and private individuals." (*Id.*) Consistent with the understanding that the FAA applied to private claims, the Court observed that every U.S. Supreme Court decision save one involved a dispute involving a private party's *own* rights. (See *id.* at pp.385-386 [citing all FAA cases since *Moses H. Cone Hospital v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 6-7, where the Court first announced a liberal policy favoring the enforcement of arbitration agreements].)

In a separate portion of the opinion, *Iskanian* held that the FAA preempts a state rule that invalidates a class action waiver in an arbitration agreement under certain circumstances. (59 Cal.4th at p.364.) The split decision in *Iskanian* illustrates the FAA's scope: where private disputes are at issue, a rule that requires the availability of class actions, which is a "procedural device that interferes with the fundamental attributes of arbitration" of "streamlined proceedings and expeditious results," cannot survive FAA preemption. (*Id.* at p.365.) Conversely, the FAA does not preempt a rule that preserves a public right—that of employees to pursue civil penalties by bringing a "law enforcement action designed to protect the public and not benefit

private parties." (*Id.* at pp.387-388 [quoting *Arias v. Super. Ct.* (2009) 46 Cal.4th 969, 986].)

It follows from *Iskanian*'s reasoning that the FAA does not preempt a rule preserving the right to seek public injunctive relief under California's consumer protection statutes. 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*, at pp.1079-80.) As in *Iskanian*, both *Broughton* and *Cruz* drew a sharp distinction between claims seeking specific relief for victims and public injunctions, which is "designed to prevent further harm to the public at large rather than to redress or prevent injury to plaintiff." (*Cruz*, at p.1165; *Broughton*, at p.1084.) Based on the reasoning of these decisions, the FAA does not override rules protecting a party's right to pursue non-victim specific relief—relief that either directly benefits the public at large or the state.

The Court of Appeal differed, agreeing with *Iskanian*'s reasoning but limiting the scope of its holding to the unique attributes of PAGA. (Slip op. at pp.17-23.) According to the decision below, *Iskanian*'s invalidation of PAGA representative action waivers has no bearing on the continued validity of *Broughton* and *Cruz* because the "state retains 'primacy over private enforcement efforts" in a PAGA action. The court below also noted that the initiation of a PAGA suit necessitates a pre-litigation notice to the state, which is not required for in UCL, FAL and CLRA actions, and a judgment in a PAGA action, unlike

in consumer law actions, binds the state itself. (*Id.* at pp.22-23.)

This cramped reading of *Iskanian* limits this Court's holding to just one type of action, a PAGA suit, even though the Court's reasoning is not so limited.[10] Only a PAGA suit—or at most, a qui tam action—has the precise attributes that the Court of Appeal identified as falling outside of the FAA's mandate. But this inverts the logic of *Iskanian*: *Iskanian* concluded that while FAA mandated enforcement of arbitration agreements for private disputes, it did not similarly *require* enforcement of a waiver of the right to bring a representative law enforcement actions on behalf of the public. Nothing in *Iskanian* precludes its application to another type of private attorney general action, regardless of whether it binds the state, or whether it requires pre-litigation notice to the state. No single attribute unique to the PAGA action itself is necessary to *Iskanian*'s holding.

Left out of the analysis below are the central pillars of the *Iskanian* decision. First, as explained above, *Iskanian* established that the right to bring a representative PAGA suit is an unwaivable public right because a "law established for a public reason cannot be contravened by private agreement." (59 Cal.4th at p.383 [quoting Civ. Code § 3513].) Second, the Court held that this unwaivable right to pursue PAGA claims is not preempted because it does not stand "as an obstacle to the

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[10] Although *Iskanian* stated that its FAA holding applies specifically to the facts before it, that the Court, undoubtedly familiar with the holdings of *Broughton* and *Cruz*, ***did not*** identify either of those cases as being precluded from *Iskanian*'s holding, is telling—particularly since *Iskanian*'s reasoning would naturally extend to cover public injunctive relief.

accomplishment of the FAA's objectives." (*Id.* at p.384 [citation omitted]). This is because the FAA primarily covers disputes involving "the parties own rights and obligations," and not public disputes such as those that involve a state enforcement agency. (*Id.* at p. 385.)

Similarly, in pursuing a public injunction, the plaintiff is acting as a law enforcer in preventing further harm; she is not vindicating a private right or resolving a private dispute that would be covered by the FAA. A permanent public injunction against Citibank in this case would spare the public from deceptive or misleading marketing practices, and potentially require reformation of Citibank's Credit Protector service itself, thereby benefitting Citibank's customers. Such an injunction would only incidentally benefit McGill as a member of the public. Indeed, another court expressly connected public injunctive relief to PAGA in a decision that pre-figured *Iskanian*:

> Here, the relief [of civil penalties provided by PAGA] is in large part "for the benefit of the general public rather than the party bringing the action" (*Broughton, supra,* 21 Cal.4th at p. 1082), just as the claims for public injunctive relief in *Broughton* and *Cruz, supra,* 30 Cal.4th 303.

(*Brown v. Ralphs, supra,* 197 Cal.App.4th at p.501.) Under *Iskanian,* the FAA does not override a rule preserving the right to pursue private attorney general actions for public injunctive relief under the California consumer protection statutes.

Broughton and *Cruz* are also fully consistent with U.S.

Supreme Court case law. While *Broughton* observed that, at the time of its holding, the Supreme Court had never "directly considered" a claim involving "a public statutory purpose that transcends private interests" (21 Cal.4th at p.1083), one subsequent case did address precisely that issue.

In *EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279 ("*Waffle House*"), identified by *Iskanian* as the sole Supreme Court case addressing public enforcement actions (59 Cal.4th at p.386), a six-member majority concluded that the Equal Employment Opportunity Commission (EEOC) may sue to enjoin discriminatory employment practices and for victim-specific relief, notwithstanding an arbitration agreement to which EEOC was not party. In so holding, the Court also emphasized that the EEOC's statutory function as an enforcer of public rights would be undermined if such agreements were enforced. (*Id.* at p.295.) Indeed, this Court in *Cruz* observed that, in *Waffle House*, "the three-person dissent agreed with the majority that the EEOC was not bound by employee arbitration agreements when it pursued non-victim-specific relief" but disagreed only on whether "victim-specific relief" should be sent to arbitration. (*Id.* at p.319 [citing *Waffle House, supra,* 534 U.S. at p.298 (dis. opn. of Thomas, J.)].) The implication of this observation is that the U.S. Supreme Court unanimously agreed that the EEOC's pursuit of claims strictly for the public's benefit is not covered by the FAA—drawing a stark distinction beween public enforcement actions and victim-specific relief.

Expanding on its observation, *Cruz* found that "*Waffle*

House suggests that the Supreme Court's agreement that a person acting entirely on behalf of the public—in the EEOC's case in all of its actions and in Cruz's case when he pursues a public injunction—acts beyond the scope of any arbitration agreement."[11] (*Cruz*, at p.320, fn.6.) In other words, *Waffle House*, as interpreted by this Court, supports McGill's position that the FAA does not cover injunctive relief brought entirely for the public's benefit.

There have been no Supreme Court decisions since *Waffle House* addressing the enforceability of an arbitration agreement relating to a party pursuing purely public rights. Thus, in light of *Waffle House* and *Iskanian*'s reasoning, this Court should reverse the erroneous decision below and confirm the continued validity of the *Broughton-Cruz* rule as applied here.

C. A State's Exercise Of Its Police Powers To Preserve The Availability Of Public Injunctive Relief Cannot Be Preempted Except By A Clear And Manifest Purpose Of Congress Wholly Absent Here

The Court of Appeal also erred in failing to apply settled Supremacy Clause principles. The Court of Appeal described *Concepcion* as having broadened the FAA to have preemptive

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[11] Both *Cruz* and *Iskanian* expressly stated that *Waffle House* does not support the position that the FAA operates to preempt public claims. (See *Cruz*, at p. 320, fn. 6 ["Nothing in *Waffle House* contradicts or calls into question that conclusion [that public injunctions are withdrawn from arbitration]."]; *Iskanian, supra*, 59 Cal.4th at p. 386 ["Nothing in *Waffle House* suggests that the FAA preempts a rule prohibiting the waiver of this kind of qui tam action on behalf of the state for such remedies."].)

effects without regard to the purpose of the underlying state statute or rule. (Slip op. at pp.8, 16.) But if that were the case, the FAA would operate like no other federal statute, exempt from rules governing federal preemption that undergird our federalist system of government. (See *Printz v. United States* (1997) 521 U.S. 898, 928 ["It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority."].) The Court of Appeal is mistaken.

In assessing a potential conflict between federal and state law, courts must examine the purpose of both the state rule and the federal law in conflict. If the "federal law is said to preempt a traditional area of state regulation" (*Lollard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, 541), then courts start "with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (*Arizona v. United States* (2012) 132 S.Ct. 2492, 2501.) "[A] high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal act." (*Chamber of Commerce of the United States of America v. Whiting* (2011) 131 S.Ct. 1968, 1985.) It is "well established that the party who asserts that a state law is preempted bears the burden of so demonstrating." (*Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1088.)

Consumer protection laws are part of the "historic police powers of the States." (*Smiley v. Citibank* (1995) 11 Cal.4th 138, 148; see *California v. ARC America Corp.* (1989) 490 U.S. 93, 101

[finding unfair business practices claims under state law not preempted because there was no clear and manifest intent for Congress to do so].) This Court has expressly held that "[c]onsumer protection laws such as the [UCL], false advertising law, and CLRA, are within the states' historic police powers and therefore are subject to the presumption against preemption." (*Farm Raised Salmon Cases, supra,* 42 Cal.4th at p.1088.) This presumption against preemption "applies with particular force" to a state's efforts to protect its consumers. (*Id.*) Thus, a presumption against preemption applies to the *Broughton-Cruz* rule, which seeks to preserve public injunctive relief under the state's consumer protection laws from being nullified in arbitration.

Furthermore, to determine whether a state law is preempted, the Court must ascertain whether Congress had a "clear and manifest purpose" to preempt the conflicting state law. (*Id.*) While the FAA displaces law that facially discriminates against arbitration or interferes with the "fundamental attributes of the arbitration," state rules that do neither fall within the presumption against implied preemption. (See *Sonic II, supra,* 57 Cal.4th at p.1154 [finding that the unconscionability analysis relating to "prompt payment of wages" falls within the state's police powers and is not preempted].) The state's right to "structure its own law enforcement authority lies at the heart of state sovereignty." (*Iskanian, supra,* 59 Cal.4th at p.388.) *Iskanian* found "no purpose, much less a clear or manifest purpose, to curtail the ability of states" to enact a private

enforcement scheme for wage laws under PAGA. (*Id.*)

Likewise, as explained above, the *Broughton-Cruz* rule preserves a substantive statutory remedy from being nullified by being transferred to a forum unequipped to issue or enforce the remedy. The rule neither facially discriminates against arbitration nor requires, *ex post*, the availability of procedures that interfere with the fundamental attributes of arbitration, like *Discover Bank*. There is no indication that the 1925 Congress sought to displace state rules that preserve the availability of a substantive state remedy, such as the *Broughton-Cruz* rule.[12] Indeed, *Broughton* delved into the legislative history of the FAA in finding that there was no "clear and manifest" intent of Congress to strip a state from deputizing its citizens with the right to enjoin unfair business practices. (See *Broughton*, at pp.1083-84 [finding that nothing "in the legislative history of the FAA suggest that Congress contemplated 'public injunction' arbitration to be within the universe of arbitration agreements that it was attempting to enforce."].) Rather, in enacting the FAA, Congress's overarching "purpose was to reverse the longstanding judicial hostility to arbitration agreements... and to place [them] upon the same footing as other contracts.'" [13] (*Waffle*

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[12] See Cohen & Dayton, *The New Federal Arbitration Law*, 12 Va. L.Rev. 265 (1926) [describing the intent and purpose of the 1925 Congress in passing the FAA using contemporaneous sources].

[13] The Supreme Court has repeatedly described the congressional intent in enacting the FAA in those words. (See, e.g., *Granite Rock Co. v. Int'l Broth. of Teamsters* (2010) 561 U.S. 267, 302; *Arthur Andersen LLP v. Carlisle* (2009) 556 U.S. 624,

House, supra, 534 U.S. at p.289 [quoting H.R.Rep. No. 96, 68th Cong., 1st Sess., 1 (1924)].)

Therefore, the *Broughton-Cruz* rule, which neither facially discriminates against arbitration nor creates procedures that interfere with the fundamental attributes of arbitration, is not preempted.

IV. ALTERNATIVELY, THIS CASE SHOULD BE REMANDED FOR A DETERMINATION AS TO WHETHER CITIBANK'S AGREEMENT IS UNCONSCIONABLE

Alternatively, the decision below must be reversed because Citibank's Agreement expressly bans consumers from pursuing a public injunction and is thus unconscionable. The matter should be remanded for further factual development based on *Sonic II,* and potentially, this Court's upcoming decision in *Sanchez v. Valencia Holdings,* No. S199119 (submitted for decision).

The savings clause of FAA section 2 permits arbitration agreements to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2.) Recently, this Court reaffirmed that unconscionability is a viable defense under the savings clause, post-*Concepcion.* (See *Sonic II, supra,* 57 Cal.4th at pp.1143-45.) As *Sonic II* clarified, states may develop particular rules on a general unconscionability defense so long as their application does not pose an obstacle to the fundamental attributes of

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630; *Green Tree Fin. Corp. v. Bazzle* (2003) 539 U.S. 444, 458; *Randolph, supra,* 531 U.S. at p. 89; *Doctor's Assocs., supra,* 517 U.S. at p. 687; *Gilmer, supra,* 500 U.S. at p. 24; *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.* (1989) 489 U.S. 468,478.)

arbitration, such as speed, efficiency and lack of expense. (*Id.* at p.1149.)

Sonic II further clarified that an arbitration agreement may be unenforceable on unconscionability grounds if it entails the loss of substantive statutory benefits. (57 Cal.4th at p. 1152.) This Agreement is almost certainly unconscionable. The Agreement forecloses McGill or other consumers from pursuing any kind of private attorney general action or other representative action provided by statute. This ban requires McGill to surrender an important substantive right to pursue public claims and thus cannot be enforced on that basis alone. Indeed, a term that operates as a waiver of "California substantive law and the right to statutory and punitive damages and thus forces a [party] to waive her unwaivable statutory rights and remedies" is substantively unconscionable and cannot be enforced. (*Ajamian v. CANTORCO2E, L.P.* (2012) 203 Cal.App.4th 771, 799; *Armendariz, supra,* 24 Cal.4th at pp.103-104 [arbitration agreement's waiver of statutory remedies is unlawful].)

Moreover, under Citibank's Agreement, McGill is barred from benefiting from relief obtained by a third party against Citibank for the covered claims. This provision bars her from recovering any settlement proceeds as an absent class member, or from enjoying injunctive relief against Citibank obtained by another plaintiff. This and other unconscionable provisions render Citibank's Agreement so tainted with illegality as to be unenforceable. (See *Armendariz, supra,* 24 Cal.4th at p.124.)

However, because *Sonic II* announced a new test regarding unconscionability previously unavailable to McGill, this issue should not be decided here. Rather, McGill should be afforded an opportunity to raise the unconscionability defense upon remand to the trial court if the Court does not accept her other grounds for reversing the decision below.

Any argument that the matter has been waived is belied by the timing of the intervening *Sonic II* decision, issued in 2013, two years after the trial court proceedings on the motion to compel to compel arbitration. In *Sonic II*, this Court permitted the plaintiff to raise, for the first time, an unconscionability defense on remand (57 Cal.4th at pp. 1158-59) after the law upon which she relied was held to have been abrogated. McGill should be permitted to do so as well, if this Court does not grant reversal based on her other arguments.

V. ALTERNATIVELY, THE COURT SHOULD PERMIT THE ARBITRATOR TO DECIDE IF HE OR SHE HAS THE POWER TO ISSUE THE PROPOSED INJUNCTIVE RELIEF

Assuming that this Court holds that a contractual ban on the right to pursue injunctive relief for the public's benefit is unenforceable, the Court should at a minimum hold that California consumers must be allowed to pursue public injunctive relief *in some forum.*

Generally, the court, not the arbitrator, decides questions of arbitrability in the first instance unless the parties "clearly and unmistakably" empower the arbitrator to do so. (See *Rent-A-Center, West, Inc. v. Jackson* (2010) 130 S.Ct. 2772, 2775, 2777, fn.1.) Here, the Agreement clearly delegates issues of

"application, enforceability or interpretation of this Agreement and this arbitration provision" to the arbitrator. (1 CT 109.)

Thus, assuming the arbitrator should decide the question of whether he or she can issue the proposed injunctive relief, a few conditions should be imposed. First, if the arbitrator subsequently determines that the proposed injunctive relief is outside the scope of his powers, he or she should be able to issue an interim ruling that transfers the matter back to the trial court—the claim cannot be dismissed.

Second, upon confirmation of an arbitral award for public injunctive relief (Civ.Proc.Code § 1286; 9 U.S.C. § 9), the court would be authorized to supervise the enforcement of the injunctive relief, including any modification thereof. This is consistent with both the trial court's power to "retain jurisdiction to monitor the enforcement of the injunction" (*Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141, 1161), and its power to enforce an arbitral award reduced to judgment, which has the same force as any other civil judgment. (Civ.Proc.Code § 1287.4; 9 U.S.C. § 13.)

Another approach was taken by the court in *Swan Magnetics v. Super. Ct.* (1997) 56 Cal.App.4th 1504. There, the court held that a permanent injunction issued by an arbitrator may be modified only by an arbitrator via a new arbitration proceeding initiated by one of the parties. (*Id.* at p.1512.) While the procedure presented in *Swan* is burdensome to the parties and prejudices non-parties, it likewise preserves the right of parties to pursue injunctive relief in arbitration that implicates

the rights of non-parties.

Under any approach, however, contractual bans on public injunctive relief, such as Citibank's, cannot be held to be enforceable. Otherwise, any award issued by an arbitrator will be subject to vacatur, even under the extremely deferential standards governing review of arbitral awards.

Ultimately, McGill must be permitted to seek public injunctive relief to protect the public in *some* forum.

CONCLUSION

For the foregoing reasons, McGill respectfully requests that this Court reverse the Court of Appeal's decision and invalidate Citibank's Agreement and order further proceedings consistent with that ruling.

Dated: July 30, 2015

Respectfully submitted,

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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 Respondent Opening Brief on the Merits was produced using 13-point Century Schoolbook type style and contains 13,390 words. In arriving at that number, counsel has used Microsoft Word's "Word Count" function.

Dated: July 30, 2015

Respectfully submitted,

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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 **July 30, 2015**, I served the document described as: **RESPONDENT'S OPENING BRIEF ON THE MERITS** 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.

[☒] **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.

[☐] **BY E-MAIL:** I hereby certify that this document was served from Los Angeles, California, by e-mail delivery on the parties listed herein at their most recent known e-mail address or e-mail of record in this action.

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

[☐] **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 on **July 30, 2015**, at Los Angeles, California.

Natalie Torbati
Type or Print Name

Signature

SERVICE LIST

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Office of the District Attorney County of Riverside Appellate Division 3960 Orange Street Riverside, CA 92501 *via US mail*	**Office of the District Attorney** Per Cal. Rules of Court 8.29; Business & Professions Code § 17209
Appellate Coordinator Office of the Attorney General Consumer Law Section 300 South Spring Street Los Angeles, CA 90013 *Via US mail*	**Office of the Attorney General** Per Cal. Rules of Court 8.29; Business & Professions Code§ 17209