IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-16703

MATTHEW C. KILGORE and WILLIAM BRUCE FULLER
Plaintiffs/Appellees,
v.
KEYBANK, NATIONAL ASSOCIATION and
GREAT LAKES EDUCATION LOAN SERVICES, INC.

Defendants/Appellants.

On Appeal from the United States District Court
For the Northern District of California
Case No. 3:08-CV-02958-TEH

BRIEF OF *AMICI CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, THE EMPLOYEE RIGHTS ADVOCACY INSTITUTE FOR LAW & POLICY, AND CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITION FOR REHEARING AND REHEARING *EN BANC*

Ellen Lake
Counsel of Record
Law Offices of Ellen Lake
4230 Lakeshore Avenue
Oakland CA 94610
Tel. (510) 272-9393

Rebecca M. Hamburg
National Employment Lawyers Association
417 Montgomery Street
Fourth Floor
San Francisco, CA 94104
Tel. (415) 296-7629

Terisa E. Chaw
The Employee Rights Advocacy
Institute For Law & Policy
417 Montgomery Street, Fourth Floor
San Francisco, CA 94104
Tel. (415) 296-7629

Cliff Palefsky
McGuinn, Hillsman & Palefsky
535 Pacific Avenue, 1st Floor
San Francisco, CA 94133
Tel. (415) 421-9292
Counsel for California Employment Lawyers Association

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal and State Cases

Federal Statutes

California Statutes

Miscellaneous

FRAP RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The National Employment Lawyers Association (NELA) does not have a parent company or issue stock, and no publicly held company owns 10 percent or more of its stock.

The Employee Rights Advocacy Institute for Law & Policy is NELA's related charitable and educational organization under section 501(c)(3) of the Internal Revenue Code. It does not have a parent company or issue stock., and no publicly held company owns 10 percent or more of its stock.

The California Employments Lawyers Association (CELA) does not have a parent company or issue stock, and no publicly held company owns 10 percent or more of its stock.

INTEREST OF *AMICI CURIAE*

The **National Employment Lawyers Association (NELA)** is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

The Employee Rights Advocacy Institute for Law & Policy (The Institute) is a charitable non-profit organization whose mission is to advocate for employee rights by advancing equality and justice in the American workplace. The Institute achieves its mission through a multi-disciplinary approach combining innovative legal strategies, policy development, grassroots advocacy, and public education. In particular, The Institute has sought to eliminate mandatory pre-dispute arbitration of employment claims through its public education work.

The **California Employment Lawyers Association (CELA)** is a voluntary membership of more than 1,000 attorneys in California who represent individual workers in employment, labor, and civil rights disputes. As part of its advocacy efforts, CELA regularly supports litigation affecting the rights of individuals in the workplace. CELA has filed numerous *amicus curiae* briefs before the California Supreme Court and the California Courts of Appeal regarding the proper interpretation and application of labor and employment laws to ensure that those laws are fully enforced and that the statutory rights of workers are fully protected.

STATEMENT IN COMPLIANCE WITH FRAP RULE 29(c)(5)

No party or its counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief. No person – other than the amicus curiae, its members or its counsel – contributed money that was intended to fund preparing or submitting the brief.

__/s/_____
Ellen Lake

INTRODUCTION

The panel decision makes new – and unprecedented – law which, *amici curiae* believe, is in fundamental conflict with a host of U.S. Supreme Court decisions. Those cases hold that, by agreeing to arbitrate a statutory claim, including a state statutory claim, a party does not waive the substantive rights afforded by the statute but simply agrees to resolve them in the arbitral forum.

In this case, plaintiffs are seeking *only* a public injunction to prohibit defendant from continuing to break state law. In *Broughton v. Cigna Healthplans of California*, 21 Cal.4th 1066 (1999) and *Cruz v. Pacificare Health Systems, Inc.*, 30 Cal.4th 303 (2003), the California Supreme Court held that such public injunctions must be litigated in court because arbitrators lack the institutional structure to grant and enforce a public injunction. The considerations discussed in *Broughton* and *Cruz* about the essential nature of arbitration are very similar to those recently expressed in *AT & T Mobility, Inc. v. Concepcion*, __ U.S. __, 131 S.Ct. 1740 (2011) – namely, that arbitration is a bilateral process with streamlined procedures that adjudicates only the rights of the parties to the proceeding.

The panel decision, by insisting that public injunctions must be arbitrated, effectively deprives plaintiffs and the general public of the critically important California substantive statutory rights that simply cannot be enforced in arbitration

and were never intended to be covered by the Federal Arbitration Act, 9 U.S.C. 1. Moreover, the panel decision's mistaken assertion that the FAA protects only *federal,* not *state*, statutory rights threatens to allow employers (and other defendants) to force their employees into arbitration agreements that undercut unwaivable state statutory protections.

The second argument advanced by *amici* herein is that the panel decision has seriously misinterpreted the significance of the opt-out provision in the instant arbitration agreement. Relying on a Ninth Circuit decision, *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198 (9th Cir. 2002), the panel concluded that the opt-out clause meant there was no procedural unconscionability. However, unconscionability analysis is based on state law and the California Supreme Court has completely rejected *Ahmed*'s reasoning. Under California precedent, there is ample evidence here of procedural unconscionability because it is undisputed that students were pressured into signing the agreement "on the spot," "immediately," and without reading it.

In addition to these substantive arguments, there is a compelling procedural reason why rehearing should be granted. The panel's decision turns entirely on the U.S. Supreme Court's 2011 decision in *AT & T Mobility LLC v. Concepcion.* However, all the briefing in this case occurred several years before *Concepcion* was

decided. Consequently, the panel essentially decided this case without any briefing on the merits. Rehearing should be granted to permit such briefing now.

ARGUMENT

I. THE PANEL'S DECISION RESULTS IN A DEPRIVATION OF SUBSTANTIVE STATUTORY RIGHTS AND THUS CONFLICTS WITH SUPREME COURT PRECEDENTS HOLDING THAT, BY AGREEING TO ARBITRATE A STATUTORY CLAIM, A PARTY DOES NOT FOREGO THE SUBSTANTIVE RIGHTS AFFORDED BY THE STATUTE.

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) and subsequent cases[1], the Supreme Court, interpreting the FAA, has repeatedly enunciated the fundamental principle that "[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral forum." *Mitsubishi, supra*, at 628. If there was ever any doubt that this principle applied to state, as well as federal, statutory rights, it was laid to rest in *Preston v. Ferrer*, *supra*, 522 U.S. 346. There, the Supreme Court declared:

> "Finally, it bears repeating that Preston's petition presents precisely and only a question concerning the forum in which the parties' dispute will be heard.... 'By agreeing to

---

[1] E.g., *Preston v. Ferrer*, 522 U.S. 346 (2008); *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20 (1991); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

> arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral ... forum.' *Mitsubishi Motors....* **So here, Ferrer relinquishes no substantive rights the TAA or other California law may accord him.** But under the contract he signed, he cannot escape resolution of those rights in an arbitral forum." *Preston, supra*, 552 U.S. at 359, bold added.

The Supreme Court's arbitration decisions are fully consistent with these principles. The state policies that have been held preempted are those that are hostile to arbitration or inconsistent with the requirements and purposes of the FAA. *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Perry v. Thomas*, 482 U.S. 483 (1987).

Nothing in *AT& T Mobility LLC v. Concepcion* undercuts that longstanding and fundamental principle about protecting underlying substantive rights. The Supreme Court in *Concepcion* overruled California's *Discovery Bank* class arbitration principle only after concluding that the plaintiffs' substantive rights were fully protected by the arbitration agreement – indeed, more protected than they would have been under classwide arbitration. "The District Court concluded that the Concepcions were *better off* under their arbitration agreement with AT & T than they would have been as participants in a class action," and "the Ninth Circuit admitted that aggrieved customers who filed claims would be 'essentially guarantee[d]' to be made whole." *Id.* at 1753, ital. by the court.

Here, however, plaintiffs and members of their class are effectively barred from vindicating their underlying substantive statutory rights, which was never the intention or purpose of the FAA. The only remedy they are seeking is a public injunction under the California Unfair Competition Law, Bus. & Prof. Code, § 17200 et seq. ("UCL"), to enjoin defendant KeyBank from violating the law and their rights. The California Supreme Court properly held in *Broughton v. Cigna Healthplans of California*, 21 Cal.4th 1066 (1999) and *Cruz v. Pacificare Health Systems, Inc.,* 30 Cal.4th 303 (2003), that such public injunctions were not subject to arbitration because arbitrators simply lack the institutional structure to grant and enforce a public injunction. As the California court declared:

> "[W]e believe there is such an inherent conflict between arbitration and a statutory injunctive relief remedy designed for the protection of the general public. Although both California and federal law recognize the important policy of enforcing arbitration agreements, it would be perverse to extend the policy so far as to preclude states from passing legislation the purposes of which make it incompatible with arbitration, or to compel states to permit the vitiation through arbitration of the substantive rights afforded by such legislation." *Broughton, supra*, 21 Cal.4th at 1083.

The California high court made crystal clear in *Broughton* and *Cruz* that the statutes involved in those cases, the Consumers Legal Remedies Act, Cal. Civil Code § 1750, (CLRA) and the UCL, are not hostile to arbitration. Under the CLRA, the

Broughton court said, a plaintiff's claim for money damages is fully arbitrable. Under the UCL, the *Cruz* court repeated, a plaintiff's monetary claims for restitution, disgorgement or unjust enrichment are also fully arbitrable. *Broughton, supra*, 21 Cal.4th at1084; *Cruz, supra*, 30 Cal.4th at 321. The court held that the only instance in which these statutes preclude arbitration is when plaintiffs request a public injunction against illegal business practices, not on their own individual behalf but on behalf of the general public. The reason that such injunctions are not arbitrable is simply because arbitration is not equipped to handle them.

There is a fundamental inconsistency between the traditional bilateral arbitration process and the structural requirements for a public injunction. As Justice Scalia pointed out in *Concepcion, supra,* at 1749, arbitration is a bilateral process with "efficient, streamlined procedures" that adjudicates the rights only of the parties to the proceeding. An arbitrator is paid by the parties to hear the particular dispute and his/her jurisdiction terminates when the case is over – or when one of the parties fails or simply refuses to pay the required fees.[2] An arbitrator has no continuing

---

[2] Rule 47 of the American Arbitration Association rules provides:

"Suspension for Non-Payment

"If arbitrator compensation or administrative charges have not been paid in full, the AAA may so inform the parties in order that one of them may advance the required payment. If such payments are not made, the arbitrator may order the

(continued...)

jurisdiction that would permit the necessary ongoing supervision required for a public injunction. By contrast, "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." *Broughton, supra,* at 1081.[3]

---

[2](...continued)
suspension or termination of the proceedings. If no arbitrator has yet been appointed, the AAA may suspend or terminate the proceedings."

[3] The *Broughton* court carefully explained "the evident institutional shortcomings of private arbitration in the field of such public injunctions" as follows:

> "Even those courts that have generally affirmed the ability of arbitrators to issue injunctions acknowledge that the modification or vacation of such injunctions involves the cumbersome process of initiating a new arbitration proceeding. [Citation.] While these procedures may be acceptable when all that is at stake is a private dispute by parties who voluntarily embarked on arbitration aware of the trade-offs to be made, in the case of a public injunction, the situation is far more problematic. The continuing jurisdiction of the superior court over public injunctions, and its ongoing capacity to reassess the balance between the public interest and private rights as changing circumstances dictate, are important to ensuring the efficacy of such injunctions. In some cases, the continuing supervision of an injunction is a matter of considerable complexity. [Citation.] Indeed, in such cases, judges may assume quasi-executive functions of public administration that expand far beyond the resolution of private disputes. [citation.] Arbitrators, on the other hand, in addition to being unconstrained by judicial review, are not necessarily

(continued...)

To insist, as the panel has, that plaintiffs must arbitrate claims that simply cannot be arbitrated is to impermissibly strip plaintiffs of their underlying statutory rights – even though the *Broughton-Cruz* doctrine is not animated by the judicial hostility toward arbitration which the FAA was designed to combat. As one scholar of arbitration recently put it, the *Broughton-Cruz* doctrine

> "demonstrate[d] that certain structural features of the arbitral process were in unavoidable tension with the CLRA's goal of providing a nonwaivable public injunction remedy. This, in turn, showed that the California legislature had legitimate, nondiscriminatory reasons for withdrawing that remedy from arbitration." Aragaki, "Equal Opportunity for Arbitration,"58 UCLA L. Rev. 1189, 1254 (2011).

Moreover, the bold and sweeping language of the panel decision is likely to lead to further mischief. The panel mistakenly concludes that the FAA protects only *federal* statutory rights and provides no protection for *state* substantive statutory rights. ["But the very nature of federal preemption *requires* that state law bend to conflicting federal law – no matter the purpose of the state law." Slip op. 2652, ital. by the court.] This analysis threatens to validate arbitration agreements that

---

[3](...continued)

> bound by earlier decisions of other arbitrators in the same case. 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.* at 1081.

eviscerate California statutory rights.

In *Armendariz v. Foundation Health Psychcare Services*, 24 Cal.4th 83 (2000), the California Supreme Court relied on *Mitsubishi*'s promise that arbitration does not require a waiver of substantive rights when it held that arbitration agreements cannot be made to serve as a vehicle for the waiver or de facto deprivation of unwaivable state statutory rights and that, where such unwaivable state rights are involved, arbitration agreements must meet certain minimum standards. *Id.* at 99-101. *Armendariz* held that an arbitration agreement cannot require an employee to waive damage and attorneys' fees remedies that are otherwise available under the California Fair Employment and Housing Act ("FEHA"). Such statutory protections must be considered "implicitly incorporate[d]" into the arbitration agreement. *Id.* at 103. Similarly, an arbitration agreement cannot prohibit discovery sufficient to vindicate the statutory claims subject to the agreement. "[T]he employer, by agreeing to arbitrate the FEHA claim, has already impliedly consented to such discovery." *Id.* at 106. *Armendariz* also held that employees cannot be made to pay unreasonable arbitration costs and fees beyond those that would be imposed in court.

These *Armendariz* standards have now been in effect for a dozen years and have worked well to preserve the fundamental characteristics of arbitration while also protecting unwaivable state statutory rights. Unfortunately, the over-broad language

in the panel decision appears to threaten this well-reasoned reconciliation of state and federal law, which is fully consistent with *Mitsubishi* and *Preston*. Rehearing should be granted to address the serious effects that the panel decision could have on the underlying state statutory and substantive rights, which are not preempted by the FAA.

II. THE PANEL'S ANALYSIS OF THE "OPT-OUT" PROVISION IS INCONSISTENT WITH CONTROLLING CALIFORNIA LAW, WITH ANOTHER NINTH CIRCUIT DECISION, AND WITH THE FACTS.

The panel decision holds there is no procedural unconscionability because the opt-out provision in KeyBank's promissory note means that "[t]he arbitration agreement was not forced upon the Plaintiffs ...." Slip op. 2656. In so holding, the court relied on *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1199-1200 (9th Cir. 2002). However, *Ahmed* is fundamentally at odds with the California Supreme Court decision in *Gentry v. Superior Court*, 42 Cal.4th 443(2007), cert. denied 552 U.S. 1296 (2008). Because unconscionability analysis is based on state law (*Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1072 (9th Cir. 2007)), the panel's failure to consider *Gentry* is particularly serious. Moreover, the panel ignored a later Ninth Circuit decision, *Hoffman v. Citibank (South Dakota), N.A.*, 546 F.3d 1078 (2008).

In *Ahmed*, this Court determined that an arbitration agreement was not

procedurally unconscionably because it contained an opt-out provision allowing the plaintiff to reject the arbitration program of his employer, Circuit City, within 30 days of signing the contract. The court concluded that the plaintiff was given "ample opportunity" to decide whether to opt out based on the following facts: the plaintiff's employer provided him with a simple one-page opt-out form; the terms of arbitration agreement were clearly spelled out in written materials and in a video-tape presentation; and the employer encouraged the plaintiff to contact employer representatives or to consult an attorney before deciding whether to participate in the program. *Id*. at 1199-1200.

The California Supreme Court expressly rejected *Ahmed*'s reasoning in *Gentry v. Superior Court*, 42 Cal.4th 443, an employment case that involved the same Circuit City opt- out form as in *Ahmed.* The *Gentry* court found that the opt-out provision did not preclude a finding of procedural unconscionability because it was unlikely that low level employees would hire an attorney to review what appeared to be a routine personnel document and because an employee would have felt at least some employer pressure not to opt out of the arbitration agreement because of Circuit City's evident preference for arbitration. *Id.* at 471-472.

The Ninth Circuit also took a critical approach to opt-out provisions in *Hoffman v. Citibank (South Dakota), N.A.*, *supra*, 546 F.3d 1078. There, defendant

Citibank notified its cardholders in a "bill stuffer" that it was introducing a mandatory arbitration program but that they could avoid the arbitration program until the expiration date of their card if they notified the bank in writing of their "non-acceptance" of arbitration within 26 days after a date indicated on their next billing statement. This Court reversed the district court's order compelling arbitration and remanded to the district court to conduct additional fact finding to determine whether the defendant had provided a "meaningful opportunity to opt out" such that the arbitration waiver was not procedurally unconscionable. *Id.* at 1085. Among the factors to be considered were how many customers exercised their ability to opt out and whether other banks used similar provisions.

None of the factors emphasized in *Ahmed* is present in this case. The undisputed evidence here revealed that the arbitration agreement and its opt-out provision were part of a single-spaced, five-page Master Promissory Note ("MPN") printed in a very small font (ER 293-297) and that students were pressured to sign the note with no opportunity to read it or to consult with anyone.

The Silver State Helicopters ("SSH") Student Finance Manager, Jody Pidruzny, whose job it was to get students to sign the note, did not even know it included an arbitration agreement or an opt-out provision and she never suggested that any student contact an attorney regarding the arbitration provision. In her frank

declaration, Student Finance Manager Pidruzny, admitted that, at the direction of her SSH superiors, she directed SSH managers to "pressure" students to sign the note "as soon as possible." If the students were available, SSH would have them sign the note "on the spot." ER 36-37. Ms. Pidruzny stated:

> "KeyBank offered no guidance on what to do in the event a Silver State Student had a question about the MPN and indicated they did not want the students to contact the bank directly with questions regarding the MPNs. On Silver State's end, the school wanted the funds to be disbursed as soon as possible and accordingly directed its sales and marketing personnel to expedite the loan application process and *pressure* students to sign the MPNs upon receiving them. At the direction of my superiors I conveyed KeyBank's and Silver State's directives to expedite the loan application process and *pressure* the students to sign the MPNs *as soon as possible* to the general managers of the various Silver State campuses throughout the country." ER 37, ital. added.

The two plaintiffs declared that they felt pressured to sign the promissory note immediately, they received no notice or explanation about the arbitration provision, and they were not advised to consult an attorney. They believed that if they did not sign the note immediately, they would lose their positions at the school. ER 40-41, 290-291.[4] (Significantly, the note contained no assurance that opting-out would not

[4] "Based on Silver State's words and actions I believed that the Promissory Note had to be signed immediately and I felt pressured to do so. I believed that if I did not sign the Promissory Note I would lose my spot at Silver State. Accordingly, (continued...)

affect a student's loan or school status.) KeyBank conceded that no SSH student borrower in California had ever opted out of the arbitration agreement. ER 122.

Thus, the relevant facts here are very different from those in *Ahmed*. Because the panel's decision ignored these crucial facts and disregarded the governing California Supreme Court analysis in *Gentry* (as well as the *Hoffman* decision), the panel erroneously concluded as a matter of law that the opt-out provision precluded a finding of procedural unconscionability. The panel did not proceed to the second step of California's unconscionability test – whether the arbitration agreement contained substantively unconscionable provisions.

Under governing California law, unconscionability has both a procedural and a substantive element and is evaluated on a sliding scale; the more substantively oppressive the contract terms, the less evidence of procedural unconscionability is required to conclude that the terms are unenforceable. *Gentry, supra,* 42 Cal.4th at 468-469. Here, there is sufficient evidence of procedural unconscionability (adhesive contract that students were pressured to sign without reading) that the Court should have found procedural unconscionability and then should have evaluated substantive unconscionability under the appropriate state standard. Rehearing should be granted

---

[4](...continued)
I did not read the Promissory Note and signed and submitted the Promissory Note to Silver State right away." ER 291, 41.

to correct these errors.

CONCLUSION

Amici curiae respectfully urge that the Court grant rehearing because of the critically important issues involved in this case.

Dated: April 2, 2012

Respectfully submitted,

_/s/_____
Ellen Lake
Counsel of Record for *Amici Curiae*

Rebecca M. Hamburg
Terisa E. Chaw
Cliff Palefsky

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 29-2

The attached brief is 15 pages long. It is proportionately spaced, has a typeface of 14 points and contains 3320 words. In preparing this certificate, I relied on the word count feature of Corel Word Perfect.

_____/s/_____
Ellen Lake