No. 20-1570

IN THE

Supreme Court of the United States

HRB TAX GROUP, INC.; HRB DIGITAL LLC,

Petitioners,

v.

DEREK SNARR,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN BANKERS ASSOCIATION AND CONSUMER BANKERS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTRODUCTION

Amici Curiae American Bankers Association and Consumer Bankers Association respectfully submit this brief in support of Petitioners HRB Tax Group, Inc. and HRB Digital LLC ("Petitioners").[1]

AMICI CURIAE'S INTEREST IN THIS CASE

The American Bankers Association is the voice of the nation's $22.5 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $18 trillion in deposits and extend nearly $11 trillion in loans.

Founded in 1919, the Consumer Bankers Association (CBA) is the trade association for today's leaders in retail banking—banking services geared toward consumers and small businesses. The nation's largest financial institutions, as well as many regional banks, are CBA corporate members, collectively holding well over half of the industry's total assets. CBA's mission is to preserve and promote the retail banking industry as it strives to fulfill the financial needs of the American consumer and small business.

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[1] No counsel for any party authored this brief in whole or in part. No counsel, party or person other than *Amici Curiae* and their members made a monetary contribution intended to fund the preparation or submission of the brief. All counsel of record received written notice on June 2, 2021 (the date counsel for *Amici* were retained) of *Amici*'s intent to file this brief on June 11, 2021. Counsel for Petitioners granted written consent to the filing of this brief. Counsel for Respondent also granted written consent but noted that only nine days' notice was provided. Counsel for Respondent subsequently requested and was granted a 30-day extension of time, to July 12, 2021, to file his response.

These cases are of the utmost importance to *Amici* members, constituent organizations and affiliates (collectively, "Members") because the "*McGill* rule" threatens to eliminate millions of consumer arbitration agreements that exist between *Amici* Members and their customers. Those agreements, governed by the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 1 *et seq.*, call for individual (bilateral) arbitration of disputes, a procedure first authorized by this Court a decade ago in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). Individual arbitration provides a fast, inexpensive, consumer-friendly, convenient and efficient means of resolving customer disputes precisely because it is *not* intended to adjudge claims of non-parties, whether they be putative class members or the more amorphous "general public." As this Court emphasized in *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010):

> [P]arties are 'generally free to structure their arbitration agreements as they see fit.' . . . [P]arties may specify *with whom* they choose to arbitrate their disputes . . . . '[N]othing in the [FAA] authorizes a court to compel arbitration of any issues, *or by any parties*, that are not already covered in the agreement' . . . . '[A]n arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement' . . . . "'Arbitration is simply a matter of contract *between the parties*; it is a way to resolve those disputes—but *only* those disputes—that the *parties* have agreed to submit to arbitration.'"

Id. at 683-84 (emphasis added) (citations omitted). *See also United Steelworkers v. Warrior & Gulf Nav. Co.*,

363 U.S. 574, 581 (1960) (an arbitrator "has no general charter to administer justice for a community which transcends the parties" but rather is "part of a system of self-government created by and confined to the parties") (internal quotation marks omitted)). The FAA protects this "individualized form of arbitration" against inconsistent state laws and public policies. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019). *Amici*, who participated in *Concepcion*,[2] were confident that *Concepcion* and its progeny would protect the enforceability of arbitration agreements that call for "traditional, individualized arbitration" because the FAA "protect[s] pretty absolutely" agreements calling for "one-on-one arbitration" using "individualized . . . procedures." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619, 1621, 1623 (2018).

That confidence has been shattered by California's "*McGill* rule." In *McGill v. Citibank, N.A.*, 393 P.3d 85 (Cal. 2017), the California Supreme Court held on public policy grounds that claims for "public injunctive relief"—relief that has "the primary purpose and effect of prohibiting unlawful acts that threaten future injury to the general public"—cannot be waived by parties to private arbitration agreements and that the FAA does not preempt that rule. *Id.* at 87, 90. The

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[2] *See* Brief of *Amici Curiae* American Bankers Association, Consumer Bankers Association, *et al.*, *AT&T Mobility LLC v. Concepcion*, No. 09-893 (Aug. 9. 2010). *Amici* also supported the petitioners in *Tillage* and *McArdle*. *See* Brief of *Amici Curiae* American Bankers Association and Consumer Bankers Association in support of petitioners, *Comcast Corp. v. Tillage*, No. 19-1066 (March 26, 2020); Brief of *Amici Curiae* American Bankers Association and Consumer Bankers Association in support of petitioners, *AT&T Mobility LLC v. McArdle*, No. 19-1078 (March 26, 2020).

McGill rule requires either that public injunctive relief claims be tried in court, nullifying the parties' choice of arbitration as the venue for resolving disputes, or that such claims be tried in arbitration, overriding the parties' choice of bilateral arbitration and exposing companies to virtually the same risk of "bet the ranch" class arbitration that *Concepcion* extinguished because it effectively forces them to arbitrate rights and interests of countless non-parties to the arbitration agreement. Both the *McGill* court, and the Ninth Circuit in *Blair v. Rent-A-Center, Inc*., 928 F.3d 819 (9th Cir. 2019),[3] further concluded that the FAA does not preempt the *McGill* rule, opening a floodgate of public injunctive relief lawsuits in the California courts. *See* Pet., App. D (App. 29a) (identifying 372 post-*McGill* lawsuits brought against businesses, including *Amici* Members, seeking public injunctive relief). The *McGill* rule is an ill-disguised attempt by the California state and federal courts to circumvent the fundamental premise of *Concepcion* and its progeny that agreements to arbitrate on an individual basis are valid and enforceable under the FAA, notwithstanding contrary state law and public policy. Members who have implemented arbitration programs did so in order to resolve business disputes with particular customers, not to benefit the "general public" in expensive and protracted litigation that is fraught with the same risks as a suit for class-wide injunctive relief under Fed. R. Civ. P. 23(b)(2).

Amici Members view arbitration as a viable and predictable mechanism for resolving disputes arising from consumer transactions, and they rely heavily on this Court's prior decisions validating individual

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[3] The Ninth Circuit in this case followed *Blair* as "binding precedent." (App. 5a).

arbitration in transacting business nationwide. *McGill* and *Blair* make predictability impossible since "whether the FAA, a national statute, requires enforcement of . . . standard form arbitration agreement[s] [will] depend[] upon where a plaintiff chooses to file suit." (Pet., p. 3). Millions of California arbitration agreements which disallow relief that extends beyond the individual consumer's claims have been effectively nullified by the *McGill* rule. Yet, the very same arbitration agreements would be enforceable in the Western District of Missouri, which has properly held that the FAA preempts the *McGill* rule because it "mandates reclassification of available relief from one individual to multiple . . . people" and "interfere[s] with the FAA's protection of individualized arbitration." *Swanson v. H&R Block*, 475 F. Supp. 3d 967, 977-78 (W.D. Mo. 2020). As Petitioners state, "[t]his is the kind of Balkanization that Congress plainly intended to overcome when it enacted the FAA." (Pet., p. 11). Only this Court can resolve this conflict and restore the overriding "*national* policy favoring arbitration" embodied in the FAA. *See Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (emphasis added).

Review should be granted in this case because the *McGill* rule eviscerates both the letter and the spirit of the FAA and casts an ominous cloud over the ability of *Amici* Members to resolve consumer disputes in a rational, predictable, consumer-friendly and cost-effective manner nationwide. A vast number of consumer arbitration programs established by *Amici* Members are, literally, on the line since courts in California, the nation's largest state with almost 40

million residents (one-eighth of the U.S. population),[4] have chosen to flout the FAA and this Court's precedents interpreting the FAA, thus far with impunity.

Therefore, *Amici* and their Members desire to be heard on the critically important question presented by Petitioners[5] and have a strong interest in the outcome of this case.

SUMMARY OF ARGUMENT

Section 2 of the FAA, 9 U.S.C. § 2, provides that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." As this Court has repeatedly held, the FAA preempts state laws, both judicial and legislative, that are inconsistent with the fundamental attributes of arbitration, that purport to carve out particular disputes from the scope of the FAA or that single out arbitration for special treatment. Indeed, all state and federal courts "must abide by the FAA, which is 'the supreme Law of the Land,' U.S. Const., Art. VI, cl. 2, and by the opinions of this Court interpreting that law." *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 18 (2012) (citations omitted).

Amici Members who utilize bilateral arbitration agreements in their consumer banking and lending

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[4] Public Policy Institute of California, "Just the Facts," *available at* https://www.ppic.org/publication/californias-population/#:~:text=With%20almost%2040%20million%20people%20%28according%20to%202019,projected%20to%20reach%2045%20million%20people%20by%202050 (last visited June 8, 2021).

[5] "[W]hether California's public-policy rule declining to enforce agreements for individualized arbitration whenever a plaintiff seeks a public injunction is preempted by the FAA." (Pet., p. i, "Question Presented").

contracts rely upon the consistent and uniform application of these fundamental FAA principles. Regrettably, the *McGill* rule creates great uncertainty and confusion because it creates a gaping "public injunctive relief" exception to the FAA in California. Under that rule, arbitration agreements calling for individual resolution of disputes are unenforceable because they interfere with the allegedly non-waivable right to public injunctive relief. The *McGill* rule, a creature of California public policy, now also binds Ninth Circuit federal courts by virtue of *Blair* and its progeny, including the opinion herein. *See, e.g., Roberts v. AT&T Mobility LLC*, 801 F. App'x 492, 496 (9th Cir. 2020) ("The arbitration clause here, like the one in *Blair*, prohibits public injunctive relief in any forum, including arbitration. As discussed previously, such a clause is unenforceable in California under the *McGill* rule. Because we are bound by our decision in *Blair*, we hold that AT&T's arbitration agreement is unenforceable."). The *McGill* rule—and the promise of attorneys' fees to a successful plaintiff[6]—has unleashed a torrent of public injunctive relief litigation against companies (including many *Amici* Members) that could drive at least some companies to abandon arbitration altogether since they are faced with the prospect of having to maintain dual dispute resolution platforms: one to manage litigation of public injunctive relief claims in court *in addition to*

[6] California trial lawyers are incentivized to bring such litigation because under California law, plaintiff's attorneys are entitled to obtain attorneys' fees from the defendant if they are successful in obtaining "a significant benefit, whether pecuniary or nonpecuniary" on behalf of the "general public or a large class of persons." *See* Cal. Code of Civil Procedure § 1021.5.

one for consumer arbitration.[7] That would be most unfortunate, since the public—the body supposedly protected by the *McGill* rule—would be deprived of the many benefits of individual arbitration, as documented by a host of recent empirical studies. Individual arbitration benefits consumers with equitable claims, not just those with damages claims. Litigating an arbitrable claim in court causes irreparable harm, because the parties are "deprived of the inexpensive and expeditious means by which the parties had agreed to resolve their disputes." *Alascom, Inc. v. ITT N. Elec. Co.*, 727 F.2d 1419, 1422 (9th Cir. 1984).

Review by this Court is necessary because the *McGill* rule impairs the public interest by threatening to eliminate bilateral arbitration as a method for resolving consumer disputes. Review should also be granted so that this Court can reinforce that "[s]tate . . . courts must enforce the [FAA] . . . with respect to all arbitration agreements covered by that statute." *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 531 (2012); *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995) (state-law principles must be applied with "'due regard . . . to the federal policy favoring arbitration'") (citation omitted). In the absence of review, the *McGill* rule and the Ninth Circuit's opinions in *Blair*

[7] Under the rules of the two most widely used consumer arbitration administrators, the American Arbitration Association and JAMS, the consumer's share of the filing, administrative and arbitrator fees is capped at $200 and $250, respectively, and the company is required to pay the remainder of the fees, which typically amounts to several thousand dollars or more. *See* https://adr.org/sites/default/files/Consumer_Fee_Schedule_2.pdf; www.jamsadr.com/arbitration-fees.

and this case will send a strong signal to other state courts and legislatures that continue to harbor distrust of arbitration[8] that they, too, can disregard the FAA without consequence. *See Concepcion*, 563 U.S. at 342 (judicial hostility towards arbitration manifests itself in "'a great variety' of 'devices and formulas . . .'") (citation omitted). The *McGill* rule is quintessentially the type of "device" or "formula" described in *Concepcion*. It rests on the faulty premise that California can evade the FAA simply by enacting a statute which it declares to be a "non-waivable" substantive right because it benefits the "public."[9]

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[8] The FAA was designed specifically "'to reverse the longstanding judicial hostility to arbitration agreements . . . .'" *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (citation omitted); *accord*, *Concepcion*, 563 U.S. at 339 (the FAA was enacted by Congress to reverse the "widespread judicial hostility to arbitration agreements"). It embodies a liberal federal policy favoring arbitration agreements. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). The FAA creates federal substantive law of arbitrability that is binding on state as well as federal courts. *Southland Corp. v. Keating*, 465 U.S. at 12. States are not permitted to discriminate against arbitration or single out arbitration agreements for special treatment. *See, e.g.*, *Doctors' Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (state could not require special notice requirements for arbitration agreements but not for other contracts).

[9] *McGill* was premised on California Civil Code section 3513, which provides that "[a]ny one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement." 393 P.3d at 93 (quoting Cal. Civ. Code § 3513). By that logic, *McGill*'s public injunctive relief exception could swallow the FAA, since many if not most statutes can be argued to benefit the public. *See* U.S. National Archives and Records Administration, "Public Laws" (Dec. 28, 2017) ("Most laws passed by Congress are public laws. Public laws affect society as a whole."), *available at* https://www.archives.gov/federal-register/laws.

However, rhetorical window-dressing cannot disguise the fact that the *McGill* rule is an attempt to keep public injunctive relief claims in court and out of arbitration every bit as much as if California had expressly carved out such claims from the operation of the FAA, which clearly is preempted.[10]

ARGUMENT

I. Review Should Be Granted Because the *McGill* Rule and the Ninth Circuit's Opinion Threaten to Eliminate the Proven Benefits of Individual Arbitration to Consumers

Amici Members and other businesses that utilize arbitration agreements in their contracts do so because it is a faster, more efficient, more cost-effective method of resolving disputes than court litigation, it minimizes the disruption and loss of good will that often results from litigation and it substantially reduces litigation costs. Moreover, it is more convenient for both *Amici* Members and their con-

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[10] *See, e.g.*, *Marmet*, 565 U.S. at 533 (FAA preempted state supreme court decision prohibiting arbitration of personal injury or wrongful death claims against nursing homes); *Concepcion*, 563 U.S. at 340 ("[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA"). Because the FAA's text includes no exception for public injunctive relief claims, bilateral arbitration agreements permitting an arbitrator to award individual injunctive relief must be enforced as written. *See Stolt-Nielsen*, 559 U.S. at 682 ("the central or 'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced according to their terms'") (citation omitted); *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012) (the FAA "requires courts to enforce agreements to arbitrate according to their terms").

sumer customers. This Court has often acknowledged the many benefits of arbitration. *See, e.g.*, *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) ("[T]he Act [FAA], by avoiding 'the delay and expense of litigation,' will appeal 'to big business and little business alike, corporate interests [and] individuals'") (citations omitted); *Stolt-Nielsen*, 559 U.S. at 685 ("[i]n bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes"); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) ("by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration'") (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

The *McGill* rule, which effectively precludes bilateral arbitration of consumer disputes in California, causes harm to the very "public" that it purports to protect. In addition to the *McGill* rule driving companies to abandon their consumer arbitration programs, courts are using the *McGill* rule as a pretext for invalidating arbitration agreements altogether, denying arbitration even as to claims for monetary damages. *See, e.g., Delisle v. Speedy Cash*, No. 3:18-CV-2042-GPC-RBB, 2019 U.S. Dist. LEXIS 96981, at *36-37 (S.D. Cal. June 10, 2019), *rev'd on other grounds*, No. 19-55794, 2020 U.S. App. LEXIS 18059 (9th Cir. June 9, 2020) (in a class action for damages that also asserted claims for public injunctive relief, the court found that the arbitration agreement contravened the *McGill* rule but refused to sever the

public injunctive relief claims and instead invalidated the entire arbitration agreement).

The elimination of individualized arbitration agreements—either because the *McGill* rule is forcing companies to abandon their arbitration programs, or because courts are using the *McGill* rule as a pretext for denying arbitration of any claims—deprives consumers, including customers of many *Amici* Members, of the many proven benefits of individual arbitration—speed, economy, convenience and efficiency—and forces them into court systems that are chronically overburdened and underfunded and that are slower, more expensive, more intimidating and far less accommodating than arbitration. More than 30 years ago, Chief Justice Burger urged greater use of arbitration to reduce "the backlog of cases in the overburdened federal and state courts." "Protracted cases," he emphasized, "not only deny parties the benefits of a speedy resolution of their conflicts, but also enlarge the costs, tensions and delays facing all other litigants waiting in line." "In terms of cost, time and human wear and tear, arbitration is better by far," he concluded.[11] Contrary to its supposed mission, the *McGill* rule ends up disserving the public interest.

Statistics compiled by the Consumer Financial Protection Bureau ("CFPB") over the course of four years of research confirm the tangible benefits of individual arbitration to consumers, particularly when compared to non-bilateral procedures such as class action litigation. In 2015, the CFPB released

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[11] *See* Giles Hudson, "Burger Urges Greater Use of Arbitration to Reduce Court Backlog" (Aug. 21, 1985), *available at* http://www.apnewsarchive.com/1985/Burger-Urges-Greater-Use-of-Arbitration-to-Reduce-Court-Backlog/id-a294b2e9e054f20b9c5b0ec9dc39dd73.

a 728-page Arbitration Study,[12] which then-Chairman Richard Corday described as "the most comprehensive empirical study of consumer financial arbitration ever conducted . . . ."[13] Among the Study's findings were the following:

- Individual consumer arbitration is up to 12 times faster than consumer class action litigation. The CFPB's data found that: (i) the median desk arbitration (just documents) was resolved in four months; (ii) the median telephone arbitration was resolved in five months; (iii) the median in-person hearing was resolved in seven months; and (iv) when the arbitration settled, the median arbitration proceeding lasted two to five months.[14] By contrast, the average class action settlement received final court approval in 1.89 years, and federal court multi-district litigation class actions filed in 2010 closed in a median of 2.07 years.[15]
- Arbitration is far less expensive than litigation. For example, under the American Arbitration Association's Consumer Rules, the consumer's share of the administrative and arbitrator fees is capped at $200, with the

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[12] Consumer Financial Protection Bureau, Arbitration Study: Report to Congress, pursuant to Dodd Frank Wall Street Reform and Consumer Protection Act 1028(a) (Mar. 2015), *available at* https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

[13] Prepared Remarks of CFPB Director Cordray at the Arbitration Field Hearing (Mar. 10, 2015), *available at* http://www.consumerfinance.gov/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-arbitration-field-hearing/.

[14] Study, *supra* note 12, § 6, p. 71.

[15] *Id.*, § 6, pp. 9, 43.

company paying the remainder.[16] That is only one-half of the $400 it typically costs to file a new complaint in federal court.[17]

- Because many courts are also using the *McGill* rule as a pretext for denying arbitration of consumer claims for monetary damages, it is important to emphasize that the CFPB found that consumers recover far more in individual arbitrations than in class action settlements. In 87% of the 562 class actions the CFPB studied, the putative class members received no benefits whatsoever.[18] In the remaining 13%, the average class member's recovery was a mere $32.35.[19] By contrast, in arbitrations where consumers obtained relief on affirmative claims, the consumer's average recovery was $5,389 (an average of 57 cents for every dollar claimed and 166 times as much as the average putative class member's recovery).[20]

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[16] *Id.*, § 1, p. 13; § 4, pp. 10-11. Moreover, consumers are permitted to apply for a hardship waiver if they cannot pay these modest amounts, and many arbitration provisions offer to pay them for the consumer if requested or unconditionally. *Id.*, § 2, pp. 58-59; § 5, pp. 12, 76-77.

[17] *Id.*, § 4, p. 10.

[18] *Id.*, § 1, pp. 13-14; § 6, p. 37.

[19] *See* Consumer Financial Protection Bureau, Arbitration Agreements, Proposed Rule, 81 Fed. Reg. 32,830, p. 73 n. 305 (May 24, 2016) (CFPB acknowledged that the number is "approximately $32").

[20] Study, *supra* note 12, § 5, pp. 13, 41.

These are only some of the well-documented benefits to consumers of individualized arbitration. They could be irretrievably lost unless review is granted.[21]

A. Individual Arbitration Is More Beneficial to Consumers with Equitable Claims than Public Injunctive Relief

The many benefits of individual arbitration, summarized above, apply to consumers who have claims for injunctive relief, and those benefits will be irretrievably lost if individual arbitration agreements are eliminated because of the *McGill* rule.[22] Indeed, individual arbitration benefits consumers more than claims for public injunctive relief.

By its very definition, a claim for public injunctive relief is not intended to benefit the person asserting the claim. In *McGill*, the California Supreme Court distinguished between public injunctive relief and non-public injunctive relief, explaining that "public injunctive relief . . . is relief that has 'the primary purpose and effect of' prohibiting unlawful acts that threaten future injury to the general public," whereas

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[21] There are also important intangibles associated with arbitration. For example, in arbitration, consumers can speak directly to an arbitrator sitting at a conference table, unencumbered by the cold formalities of a courtroom and the rigid court rules governing procedure and evidence. They can also choose arbitrators with expertise in the subject matter of the dispute. Consumers can even participate by telephone or Skype while thousands of miles away. Such conveniences and efficiencies do not exist in court, which can be intimidating and frustrating to non-lawyers and fraught with unpleasantries and delays.

[22] Plaintiffs in California consumer litigation often assert injunctive relief claims. *See* Pet., p. 24 (noting that 3,677 complaints seeking injunctive relief under California consumer protection statutes were filed since April 2017).

"[r]elief that has the primary purpose or effect of redressing or preventing injury to an individual plaintiff . . . does not constitute public injunctive relief." *McGill*, 393 P.3d 89-90 (citation and internal quotations omitted). The "evident purpose" of public injunctive relief is "to remedy a public wrong" and "not to resolve a private dispute." *Id*. at 94.

By contrast, in an individual arbitration, a consumer can obtain equitable relief that actually benefits the consumer. In *Gilmer v. Interstate/Johnson Lane Corp.*, the plaintiff contended that claims under the Age Discrimination in Employment Act ("ADEA") could not be subject to arbitration because, among other reasons, "arbitration procedures cannot adequately further the purposes of the ADEA because they do not provide for federal class actions." 500 U.S. at 32. This Court rejected that argument, explaining that:

> It is also argued that arbitration procedures cannot adequately further the purposes of the ADEA because they do not provide for broad equitable relief and class actions. As the court below noted, however, arbitrators do have the power to fashion equitable relief. *See Gilmer*, 895 F. 2d, at 199-200. Indeed, the NYSE rules applicable here do not restrict the types of relief an arbitrator may award, but merely refer to "damages and/or other relief." 2 N. Y. S. E. Guide ¶ 2627(e), p. 4321 (Rule 627(e)). The NYSE rules also provide for collective proceedings. Id., ¶ 2612(d), at 4317 (Rule 612(d)). But "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the

> possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred." *Nicholson v. CPC Int'l Inc.*, 877 F. 2d 221, 241 (CA3 1989) (Becker, J., dissenting).

500 U.S. at 32.

In *Gilmer*, the Court of Appeals for the Fourth Circuit explained that even though arbitrators may lack the full breadth of equitable discretion possessed by the courts to go beyond the relief accorded to individuals, "so long as arbitrators possess the equitable power to redress individual claims of discrimination, there is no reason to reject their role in the resolution of ADEA disputes." 895 F.2d 195, 199 (4th Cir. 1990), *aff'd*, 500 U.S. 20 (1991). *Accord*, *Marsh v. First USA Bank, N.A.*, 103 F. Supp. 2d 909, 924 (N.D. Tex. 2000) ("Contrary to Plaintiff's contention, an arbitrator may order injunctive relief if allowed to do so under the terms of the arbitration agreement. Clearly, then, Plaintiffs may obtain injunctive relief along with statutory damages if they are successful on their claims. Accordingly, Plaintiffs' statutory rights will be adequately preserved in arbitration, even in the absence of a class action."); *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 366 (Tenn. App. 2001) (rejecting argument that plaintiff could not effectively vindicate his right to injunctive relief under state consumer protection statute without being able to pursue class relief in court because plaintiff could obtain injunctive relief in arbitration to address his individual statutory claim).

An online data base of individual arbitrations maintained by the AAA pursuant to California law shows that in hundreds of arbitrations real-world equitable relief such as rescission, reinstatement, a

declaratory judgment, an accounting, and a release of lien was awarded to consumers or achieved through settlement. *See* American Arbitration Association, AAA Consumer and Employment Arbitration Statistics, https://www.adr.org/consumer (last visited June 8, 2021). Accordingly, if bilateral arbitration agreements are abandoned by companies or invalidated by courts as a result of the *McGill* rule, consumers will lose a fast, convenient and inexpensive way of obtaining injunctive and other equitable relief that is relevant and meaningful to *them*.

II. Review Should Be Granted Because the *McGill* Rule and the Ninth Circuit's Opinion Threaten to Eliminate the Proven Benefits of Individual Arbitration to Businesses

There are also very real practical consequences to businesses that result from having an arbitration agreement that calls for individual resolution of equitable claims, rather than resolving public injunctive relief claims in arbitration. Those differences affect a company's risk tolerance in dispute resolution as well as its pricing of goods and services.

This Court has written extensively on the differences between bilateral and class arbitration. *See, e.g., Concepcion*, 563 U.S. at 348 ("[T]he switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its formality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment . . . . [C]lass arbitration [also] greatly increases risks to companies . . . . Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."); *Stolt-Nielsen*, 559 U.S. at 685 ("class-action arbitration changes the nature

of arbitration to such a degree that it cannot be presumed the parties consented to it simply by agreeing to submit their disputes to an arbitrator"); *Epic Systems*, 138 S. Ct. at 1623 (in a class arbitration, "the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness, would be shorn away and arbitration would wind up looking like the litigation it was meant to displace").

To be sure, there are procedural differences between public injunctive relief claims and class claims. In a class action, a named plaintiff seeks to represent a class of similarly situated putative class members. A public injunctive relief claim is prosecuted by a single plaintiff for the benefit of the public. But in other important respects, insofar as the impact on defendant companies is concerned, public injunctive relief claims and Rule 23(b)(2) class action claims are more alike than they are different. Much like a class action, "a public injunction request focuses on a large group of third parties—the 'general public'—and *not* the claimant; involves much higher stakes; and necessitates more extensive discovery and more complex dispute resolution." (Pet., p. 4). Therefore, this Court's observations in *Concepcion*, *Stolt-Nielsen* and *Epic Systems* are highly relevant and equally persuasive here. *See also Swanson*, 475 F.3d at 977 (a public injunction request "has the same practical effect as a Rule 23(b)(2) class action" seeking class-wide injunctive relief).

Arbitrating a public injunctive relief claim poses virtually the same risk to companies as a Rule 23(b)(2) class arbitration. There is a risk in both proceedings that a company will be ordered to alter its business practices, products or services, which can affect a company's operations nationwide. *See, e.g.*, *McGill*,

393 P.3d at 91 (plaintiff sought an order requiring Citibank "to immediately cease such acts of unfair competition and enjoining [Citibank] from continuing to conduct business via the unlawful, fraudulent or unfair business acts and practices complained of herein and from failing to fully disclose the true nature of its misrepresentations"). Moreover, the risks inherent in a public injunctive relief arbitration, like the risks inherent in a class arbitration, are magnified by the narrow scope of review of an arbitrator's award. *See Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013). *See also Concepcion*, 563 U.S. at 360 ("[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims").

In addition, as Petitioners explain, public injunctive relief arbitrations, much like class arbitrations, involve procedural complexities and discovery costs that far exceed those in an individual arbitration. (*See* Pet., pp. 16-19). That is because "[p]ublic-injunction requests focus on persons *other than* the claimant who institutes the arbitration" and seek to prevent "injury to the general public." (*Id.*, pp. 16-17). *See also Cisneros v. U.D. Registry, Inc.*, 39 Cal. App. 4th 548, 564 (Ct. App. 1995) (trial court erred in restricting the scope of the evidence introduced at trial to that directly relevant to each individual plaintiff because public injunction "claimants are entitled to introduce evidence not only of practices which affect them individually, but also similar practices involving other members of the public who are not parties to the action"); *id.* at 574 (an injunction should not be granted as punishment for past acts and requires evidence that the acts are likely to be repeated in the future). Public injunction litigation, like class

litigation, is the polar opposite of the individualized arbitration proceedings contemplated by the FAA.

For *Amici* Members who utilize arbitration, the ability to save substantial legal fees and costs by resolving consumer disputes on an individual basis is a substantial incentive to maintain an arbitration program. Individual arbitration leads to greater predictability and control over legal budgets and, consequently, to more competitive pricing for goods and services (which also benefits consumers).[23] Arbitration is viewed as an integral component of a sound compliance program. Conversely, public injunctive relief claims ratchet up the costs of dispute resolution because, even though there is a single plaintiff, any injunctive relief that is issued must benefit third parties who are never identified and who are never made parties. The discovery required in public injunctive relief cases extends far beyond

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[23] As a matter of basic economics, consumers ultimately pay for increased litigation costs in the form of higher prices or impact on services as such expenses have to be funded. Conversely, individual arbitration helps reduce a company's litigation costs and those savings are passed along in the form of lower costs or increased services to consumers. *See, e.g.*, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) ("it stands to reason that passengers containing a forum clause . . . benefit in the form of reduced fares . . ."); *Metro E. Ctr. for Conditioning & Health v. Quest Communications Int'l*, 294 F.3d 294, 297 (7th Cir.), *cert. denied*, 537 U.S. 1090 (2002) (The "benefits of arbitration are reflected in a lower cost of doing business that is passed along to customers. That is because by limiting discovery and dealing with individual rather than class claims it "curtails the cost of the proceedings and allows swift resolution of small disputes."); *Provencher v. Dell*, 409 F. Supp. 2d 1196, 1203 n. 9 (C.D. Cal. 2006) ("it is likely that consumers actually benefit in the form of less expensive computers reflecting Dell's savings from inclusion of the arbitration clause in its contracts").

the discovery in a typical individual arbitration or even court case. Public injunctive relief litigation resembles class arbitration far more than it resembles an individual arbitration. It foists on companies the very complexities, high expenses and greater litigation risks that individual arbitration was designed to avoid. Accordingly, the elimination of arbitration caused by the *McGill* rule adversely impacts companies in addition to consumers.[24]

[24] The fact that some companies have revised their arbitration agreements to carve out public injunctive relief claims from the scope of those agreements while awaiting definitive guidance from this Court (*see* Pet., pp. 25-26) does not ameliorate the practical harms caused by the *McGill* rule or lessen the need for review. That is simply a "stopgap measure to keep arbitration agreements enforceable until this Court resolves the issue—not a preference for creating parallel proceedings by excluding public-injunction requests from arbitration . . . . A regime in which parties must choose between arbitrating public-injunction requests and resolving those requests in a parallel litigation proceeding is a poor substitute for 'arbitration as envisioned by the FAA' and 'therefore may not be required by state law.'" (*Id*.) (quoting *Concepcion*, 563 U.S. at 351). As held in *Epic Systems*, "*Concepcion's* essential insight remains: courts may not allow a contract defense to reshape traditional individualized arbitration . . . ." 138 S. Ct. at 1623.

CONCLUSION

For the foregoing reasons and the reasons set forth by Petitioners, *Amici Curiae* respectfully request that the Petition be granted.

Respectfully submitted,

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