No. 19-56240

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HELEN LOTSOFF; ASHLEIGH HARTMAN, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

WELLS FARGO BANK, N.A,

Defendant-Appellant,

FCTI, INC.; DOES, 1-50, inclusive,

Defendants.

On Appeal from the U.S. District Court for the Southern District of California, No. 18-cv-2033-AJB-MDD (Hon. Anthony J. Battaglia)

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

Steven P. Lehotsky
Jonathan D. Urick
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Evan M. Tager
Archis A. Parasharami
Daniel E. Jones
MAYER BROWN LLP
1999 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for Amicus Curiae

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

The Chamber of Commerce of the United States of America ("the Chamber") respectfully moves for leave to file the accompanying *amicus curiae* brief in support of defendant-appellant. Defendant-appellant has consented to the filing of the brief. Counsel for the Chamber contacted counsel for plaintiffs-appellees by email and telephone to inquire about consent, but was unable to obtain a response, necessitating the filing of this motion. In support of this motion, the Chamber states as follows.

1. The Chamber is the world's largest business federation. It directly represents approximately 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community, including cases involving the enforceability of arbitration agreements.

2. The Chamber's members regularly employ arbitration agreements in their contracts. Arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated

with traditional litigation. Based on the legislative policies reflected in the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, the Chamber's members have structured millions of contractual relationships around arbitration agreements.

3. The Chamber has a strong interest in this appeal and in reversal of the decision below. This appeal involves the rule articulated by the California Supreme Court in *McGill v. Citibank, N.A.*, 393 P.3d 85 (Cal. 2017), that waiver of the right to seek public injunctive relief in any forum violates California public policy. Invoking *McGill*, the district court denied Wells Fargo's motion to compel arbitration after finding that Wells Fargo's arbitration provision contains such a waiver. But the district court never determined whether the plaintiffs were actually seeking a public injunction that would trigger the *McGill* rule. Instead, the court reasoned that an arbitration agreement waiving public injunctive relief is unenforceable in *all* cases—regardless of whether the plaintiff actually seeks a public injunction. Then, relying on a non-severability clause in the arbitration agreement, the court invalidated the agreement in its entirety.

4. As the proposed brief explains, that approach, resting on a hypothetical claim that had not been made, threatens to stretch *McGill* beyond its contours, eviscerate the line drawn in *McGill* between public and private injunctive relief, and deprive many of the Chamber's members of the benefits of arbitration even when the plaintiff has not requested a public injunction.

Accordingly, the Chamber respectfully requests that the Court grant this motion and accept for filing its brief as *amicus curiae* in support of defendant-appellant.

Dated: June 15, 2020

Respectfully submitted,

/s/ Evan M. Tager

Steven P. Lehotsky
Jonathan D. Urick
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Evan M. Tager
Archis A. Parasharami
Daniel E. Jones
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Attorneys for Amicus Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 27(d) and 32(g), undersigned counsel certifies that this motion:

(i) complies with the type-volume limitation of Rule 27(d)(2)(A) and Circuit Rule 27-1 because it contains 436 words, including footnotes and excluding the parts of the motion exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: June 15, 2020 /s/ Evan M. Tager

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 15, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Evan M. Tager

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MAYER BROWN LLP
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(202) 263-3000

Counsel for Amicus Curiae

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a non-profit corporation organized under the laws of the District of Columbia. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It directly represents approximately 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community, including cases involving the enforceability of arbitration agreements.[1]

The Chamber's members regularly employ arbitration agreements in their contracts. Arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Based on the legislative policies reflected in the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, the Chamber's members have structured millions of contractual relationships around arbitration agreements.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

This appeal involves the rule articulated by the California Supreme Court in *McGill v. Citibank, N.A.*, 393 P.3d 85 (Cal. 2017), that waiver of the right to seek public injunctive relief in any forum violates California public policy. Invoking *McGill*, the district court denied Wells Fargo's motion to compel arbitration after finding that Wells Fargo's arbitration provision contains such a waiver. But the district court never determined whether the plaintiffs were actually seeking a public injunction that would trigger the *McGill* rule. Instead, the court reasoned that an arbitration agreement waiving public injunctive relief is unenforceable in *all* cases—regardless of whether the plaintiff actually seeks a public injunction. Then, relying on a non-severability clause in the arbitration agreement, the court invalidated the agreement in its entirety. That approach, resting on a hypothetical claim that had not been made, threatens to stretch *McGill* beyond its contours, eviscerate the line drawn in *McGill* between public and private injunctive relief, and deprive many of the Chamber's members of the benefits of arbitration even when the plaintiff has not requested a public injunction. The Chamber therefore has a strong interest in reversal of the decision below.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case raises a fundamentally important question about the *McGill* rule: Can a court, consistent with both California law and the Federal Arbitration Act ("FAA"), invoke the *McGill* rule to invalidate an arbitration agreement even when the plaintiff is not seeking a public injunction?

The answer to that question is no. *McGill* itself and the overwhelming weight of cases following *McGill* confirm that, under California law, the "first" step in applying the rule is to determine whether the "complaint does, in fact, appear to seek the type of public injunctive relief" that implicates the rule. *McGill*, 393 P.3d at 90. Yet the district court skipped this crucial first step. It instead declared that "the entire Arbitration Agreement is unenforceable" under *McGill* because the agreement "bars public injunctive relief" *in the abstract* and, in the court's view, Wells Fargo had made the waiver of public injunctive relief non-severable. EOR 7-9.

As Wells Fargo's brief details, there are a number of reasons specific to its arbitration provision why the district court's ruling was incorrect—including that the provision in fact permits the adjudication

of public injunction requests in court and therefore does not run afoul of *McGill*. The Chamber submits this *amicus* brief, however, to highlight broader concerns with the district court's decision to apply *McGill* without regard to whether the plaintiff had actually sought a public injunction under California law.

The California Supreme Court itself provided the answer in *McGill*, structuring its opinion on the implicit premise that a waiver of public injunctions may potentially render an arbitration provision unenforceable only when the plaintiff is actually seeking *public* injunctive relief rather than private injunctive relief. Specifically, before answering the question whether "the arbitration provision is valid and enforceable insofar as it purports to waive [the plaintiff's] right to seek public injunctive relief *in any forum*," the California Supreme Court "first conclude[d] that [the plaintiff's] complaint does, in fact, appear to seek * * * public injunctive relief." 393 P.3d at 90. There would have been no need to undertake that inquiry if it didn't matter whether the plaintiff in a particular case was actually seeking a public injunction.

The California Supreme Court's implicit premise that the enforceability of an arbitration provision containing a waiver of public injunctions turns on whether the plaintiff is actually seeking a public injunction aligns with this Court's explicit holding in *Kilgore v. KeyBank National Association*, 718 F.3d 1052 (9th Cir. 2013). In *Kilgore*, this Court held *en banc* that it was unnecessary to apply a then-extant California rule prohibiting arbitration of public injunction claims because the plaintiffs had not sought public injunctive relief in the first place. *Id.* at 1060.

Following the California Supreme Court's and this Court's lead, virtually every other court to decide the issue has held that the *McGill* rule applies, if at all, only when a plaintiff seeks public injunctive relief. That result accords with courts' repeated holdings outside of the public-injunction context that a plaintiff lacks standing to challenge the inclusion of an allegedly unlawful contractual provision unless the plaintiff can show that the provision applies to him. The district court's approach thus represents an extreme departure from this near-consensus view.

The district court's adventurous application of *McGill* also runs afoul of the FAA, which embodies an "'emphatic federal policy in favor of arbitral dispute resolution.'" *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012) (quoting *KPMG LLP v. Cocchi*, 565 U.S. 18, 21 (2011)). Using an ostensibly impermissible waiver of relief as a basis for refusing to enforce an arbitration agreement even in cases in which that relief is not sought is just another example of the "'great variety' of 'devices and formulas' declaring arbitration against public policy" that the FAA was enacted to prevent. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342 (2011) (quoting *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir. 1959)).

Finally, the district court's failure to conduct the requisite analysis into whether plaintiffs are seeking a public injunction fails to give effect to the line drawn in *McGill* between public and private injunctive relief. As the *McGill* Court itself explained, "[r]elief that has the *primary purpose or effect* of redressing or preventing injury to an individual plaintiff—*or to a group of individuals similarly situated to the plaintiff*—does not constitute public injunctive relief," but rather a "private" injunction. 393 P.3d at 90 (emphasis added).

Enforcing the distinction drawn in *McGill* is especially important here because the relief plaintiffs seek falls squarely on the private side of the line. Specifically, plaintiffs seek relief on behalf of a limited subset of Wells Fargo account holders who have incurred certain types of fees, not the general public at large.

For all of these reasons, the Court should reverse the decision of the district court.

ARGUMENT

I. The *McGill* Rule Applies Only When A Plaintiff Is Seeking A Public Injunction

A significant body of authority contradicts the district court's conclusion that an arbitration provision can be invalidated under *McGill* even when a plaintiff is not seeking public injunctive relief.

A. The District Court's Approach Conflicts With *McGill* Itself

In *McGill* itself—which is binding on issues of California law—the California Supreme Court described "the question before" the Court as "whether the arbitration provision is valid and enforceable insofar as it purports to waive McGill's right to seek public injunctive relief in any forum." 393 P.3d at 90 (emphasis omitted). The court then explained that, "[i]n answering this question, we *first* conclude that McGill's

complaint does, in fact, appear to seek the type of public injunctive relief" described in the court's earlier cases. *Id.* (emphasis added). The court then went on to examine at length the allegations in the complaint and its "prayer for relief"—focusing, for example, on the fact that the plaintiff was challenging the defendant's "'advertising and marketing'" directed at the public (a type of challenge not brought by plaintiffs here). *Id.* at 90-91 (quoting the complaint). Because of these "allegations and requests for relief," the court rejected the defendant's argument "that McGill has failed adequately to specify the actual nature of the injunctive relief she seeks or to explain how the public at large would benefit from" that relief." *Id.* at 91 (quotation marks omitted); *see also id.* at 98 (reiterating that "McGill's injunctive relief request constitutes a request for public injunctive relief").

Clearly, the California Supreme Court had a reason for providing a lengthy analysis of whether McGill was seeking a public injunction. Yet under the district court's approach, the entire "first" part of the analysis in *McGill* would have been unnecessary. If the fact that an arbitration agreement waives public injunctive relief suffices to invalidate the agreement across the board, as the district court

concluded here, then the California Supreme Court would have had no cause to first examine the nature of the relief sought by the plaintiff before turning to the validity of the agreement.

Moreover, in jettisoning the initial inquiry into whether the plaintiff is seeking a public injunction, the district court ignored the rationale that led the California Supreme Court to adopt the *McGill* rule in the first place. The *McGill* court's rationale for adopting its rule was that "the waiver in a predispute arbitration agreement of the right to seek public injunctive relief under [certain California] statutes would seriously compromise the public purposes the statutes were intended to serve." 393 P.3d at 94. That concern does not exist in the many cases in which the plaintiff is seeking only private relief.

Finally, since *McGill*, the California Court of Appeal has reiterated the need to conduct an initial inquiry into whether the plaintiff seeks a public injunction. *Clifford v. Quest Software Inc.*, 38 Cal. App. 5th 745 (2019). In *Clifford*, the trial court denied arbitration by relying on the *Broughton-Cruz* rule, which exempted public injunctions from arbitration wholesale. *Id.* at 752. But the Court of Appeal reversed, explaining that "Clifford's claim for injunctive relief

under the UCL falls outside the *Broughton-Cruz* restriction on arbitrability because Clifford only seeks private injunctive relief, not 'public' injunctive relief as defined in *Broughton*, *Cruz*, and *McGill*." *Clifford v. Quest Software Inc.*, 38 Cal. App. 5th 745, 755 (2019). For purposes of this Court's *Erie* prediction, that recent holding of the California Court of Appeal dictates rejecting the district court's strained reading of *McGill*. *See Edgerly v. City & County of San Francisco*, 713 F.3d 976, 982 (9th Cir. 2013).

B. The District Court's Approach Also Conflicts With Decisions Of This Court And Numerous District Courts

This Court has already confirmed on multiple occasions that a plaintiff must actually be seeking a public injunction in order to invoke the *McGill* rule or rules that similarly turn on the presence of a public-injunction request.

For example, in *Kilgore* the district court held that the plaintiffs' arbitration agreements were unenforceable under California's *Broughton-Cruz* rule. 718 F.3d at 1057. The defendants appealed, arguing that the rule conflicted with the FAA. Sitting *en banc*, this Court reversed without reaching the preemption argument, instead

concluding that "[e]ven assuming the viability of the *Broughton-Cruz* rule, Plaintiffs' claims do not fall within its purview" because the relief they were seeking did not qualify as a public injunction. *Id.* at 1060; *see also id.* at 1060-61 (examining the requested injunctive relief in reaching that conclusion).

This Court has taken the same approach in cases involving the *McGill* rule. In *Blair v. Rent-A-Center, Inc.*, for example, the Court acknowledged the defendant's argument that "the *McGill* rule does not apply because Blair's relief does not amount to a public injunction." 928 F.3d 819, 831 n.3 (9th Cir. 2019). Far from declaring that argument irrelevant to the enforceability of an arbitration agreement, as the district court here did, the Court rejected it on the merits (albeit very briefly). *Id.*; *see also* Wells Fargo Br. 26-27 & n.5 (explaining why *Blair*'s discussion on the merits of this issue does not control the outcome here).[2]

[2] In other cases decided at the same time as or shortly after *Blair*, this Court did not address the issue because the defendants had not contested whether the plaintiffs were seeking public injunctive relief. *See Roberts v. AT&T Mobility LLC*, 801 F. App'x 492 (9th Cir. 2020); *Tillage v. Comcast Corp.*, 772 F. App'x 569 (9th Cir. 2019); *McArdle v. AT&T Mobility LLC*, 772 F. App'x 575 (9th Cir. 2019).

And earlier this month, in reviewing a district court's denial of a motion to compel arbitration based on *McGill*, this Court—like the *McGill* court itself—first addressed whether the plaintiffs had sought a public injunction. *Delisle v. Speedy Cash*, --- F. App'x ----, 2020 WL 3057464, at *1 (9th Cir. June 9, 2020). The Court agreed with the district court that the plaintiff had sought a public injunction under the law as it existed at the time of the district court's order. *Id.* But the Court then vacated the district court's order and remanded for the district court to consider the impact of a change in California law that made it "questionable" whether the requested injunction still "would prevent a threat of future harm" to the general public. *Id.* Again, that analysis, and the resulting remand, would have been unnecessary if plaintiffs were not required to seek a public injunction in order to invoke the *McGill* rule.

Given the clarity of *McGill* and *Kilgore* on this point, it is no surprise that the vast majority of district courts have held that the *McGill* rule applies only when the plaintiff actually seeks public injunctive relief. *See, e.g.*, *M Resorts, Ltd. v. New England Life Ins.*, 2019 WL 6840396, at *5 (S.D. Cal. Dec. 16, 2019); *Eiess v. USAA Fed.*

Savings Bank, 404 F. Supp. 3d 1240, 1257-58 (N.D. Cal. 2019); *Delisle v. Speedy Cash*, 2019 WL 2423090, at *7 (S.D. Cal. June 10, 2019), *vacated and remanded on other grounds*, 2020 WL 3057464; *Sponheim v. Citibank, N.A.*, 2019 WL 2498938, at *5 (C.D. Cal. June 10, 2019); *Bell-Sparrow v. SFG*Proschoicebeauty*, 2019 WL 1201835, at *5 n.9 (N.D. Cal. Mar. 14, 2019); *Johnson v. JP Morgan Chase Bank, N.A.*, 2018 WL 4726042, at *6-8 (C.D. Cal. Sept. 18, 2018); *Vasquez v. Libre by Nexus, Inc.*, 2018 WL 5623791, at *5 (N.D. Cal. Aug. 20, 2018); *Croucier v. Credit One Bank, N.A.*, 2018 WL 2836889, at *4 (S.D. Cal. June 11, 2018); *Rappley v. Portfolio Recovery Assocs., LLC*, 2017 WL 3835259, at *5-6 (C.D. Cal. Aug. 24, 2017); *Wright v. Sirius XM Radio Inc.*, 2017 WL 4676580, at *9-10 (C.D. Cal. June 1, 2017).

In reaching its conclusion that it "need not decide" whether the plaintiffs seek a public injunction (EOR 7), the district court here did not so much as acknowledge—much less distinguish—any of the cases just discussed. Indeed, it offered virtually no analysis at all, instead simply breaking ranks with *McGill*, *Blair*, *Kilgore*, and virtually every other district court decision in this Circuit. This Court should correct that act of judicial adventurism.

C. The District Court's Approach Ignores That Plaintiffs Lack Standing To Challenge Contractual Provisions That Do Not Apply To Them

The district court's approach is also irreconcilable with the holdings from this and other courts that plaintiffs lack Article III standing to challenge the inclusion of provisions in a contract that do not apply to them.

In the consolidated appeals in *Lee v. American Express Travel Related Services*, this Court affirmed multiple dismissals for lack of Article III standing. 348 F. App'x 205 (9th Cir. 2009). The plaintiffs in *Lee* sued defendants over their "inclusion of allegedly unconscionable arbitration and other provisions in their credit card agreements," pointing to, among other provisions, the agreements' class-action waivers, which at the time were unenforceable under California law. *Id.* at 206; *see also Lee v. American Express Travel Related Servs.*, 2007 WL 4287557, at *1-2 (N.D. Cal. Dec. 6, 2007) (describing the claims in greater detail). But the plaintiffs lacked standing because they had not brought any underlying claims to which these provisions might apply; as this Court held, "Plaintiffs cannot satisfy the requirements of Article III because they have not yet been injured by the *mere inclusion* of

these provisions in their agreements, nor is the threat of future harm from such provisions sufficiently imminent to confer standing." 348 F. App'x at 207 (emphasis added); *see also, e.g.*, *Arellano v. T-Mobile USA, Inc.*, 2011 WL 1362165, at *5 (N.D. Cal. Apr. 11, 2011) (citing *Lee* in holding that a plaintiff lacked standing to challenge a change-in-terms provision "because it has never been applied to her"; the defendant had not changed its terms since the plaintiff signed up as a customer).

Similarly, in the context of waivers of representative claims under California's Private Attorneys General Act ("PAGA"), at least one California district court has "raised a concern" about whether plaintiffs "have standing to challenge the enforceability of the arbitration agreement based on [an] invalid PAGA waiver given that they do not bring PAGA claims." *Whitworth v. SolarCity Corp.*, 336 F. Supp. 3d 1119, 1129 (N.D. Cal. 2018).[3]

Outside of the arbitration context, federal courts have likewise held that plaintiffs lack standing to assert claims based on the inclusion

[3] The court deemed it unnecessary to decide this issue because it had concluded that the allegedly invalid PAGA waiver was severable in the absence of any PAGA claim. *Id.* at 1129-30; *see also* pages 21-23, *infra* (explaining why the district court's approach here violated general California severability principles).

of contractual provisions that do not apply to them. For example, a New Jersey statute, the Truth in Consumer Contract, Warranty and Notice Act ("TCCWNA"), N.J.S.A. §§ 56:12-14 *et seq.*, generally "prohibits a seller from entering into a contract with a consumer that includes any provision that violates a federal or state law." *Rubin v. J. Crew Grp.*, 2017 WL 1170854, at *5 (D.N.J. Mar. 29, 2017) (quotation marks omitted). TCCWNA's enactment unfortunately led a number of "litigation-seeking plaintiffs and/or their counsel to troll the internet to find potential violations" in online terms of service, even when the allegedly unlawful provision had not affected the plaintiffs in any way. *Id.* at *8. Yet federal courts have repeatedly dismissed such lawsuits for lack of Article III injury-in-fact, because, for example, "there is no indication that Plaintiff had a claim against Defendant which the Terms and Conditions prevented her from bringing." *Id.* at *6; *see also, e.g.*, *Hecht v. Hertz Corp.*, 2016 WL 6139911, at *3-4 (D.N.J. Oct. 20, 2016); *Candelario v. Rip Curl, Inc.*, 2016 WL 6820403, at *2 (C.D. Cal. Sept. 7, 2016).

Finally, the contextual approach that courts have taken when other terms in arbitration provisions have been challenged by plaintiffs

with standing supports the requirement that a plaintiff must show that an allegedly unlawful term applies to his own case. For example, the Fifth Circuit has held that a "restriction of the arbitrator's power proscribing any award of exemplary and punitive damages" was "unlawful *in the context of [plaintiff's] Title VII claim*" because Title VII "provides for statutory punitive damages." *Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478 & n.14 (5th Cir. 2003); *see also, e.g.*, *Parisi v. Goldman, Sachs & Co.*, 710 F.3d 483, 487 (2d Cir. 2013) (citing *Hadnot* and other examples of courts declining to enforce provisions of arbitration agreements that "interfere[] with the recovery of statutorily authorized damages" in the context of claims brought under the relevant statutes). It follows that a plaintiff who is not asserting a Title VII claim or asserting a claim for punitive damages may not challenge the same provision on the ground that it could interfere with hypothetical claims that are not before the court.

D. The Existence Of A Non-Severability Clause Does Not Justify Declaring An Arbitration Agreement That Contains A Waiver Of Public Injunctions Unenforceable Across The Board

Although the district court's decision is not entirely clear, it appears that the court believed that the non-severability provision in

Wells Fargo's arbitration agreement causes the agreement to be unenforceable in all cases as soon as one court holds that the waiver of public injunctions violates public policy. That perception is fundamentally mistaken.

Again, *McGill* itself supports that conclusion. *McGill* involved multiple arbitration agreements, and near the end of its opinion, the California Supreme Court noted that the most recent arbitration agreements at issue contained a non-severability clause, which specified: "If any portion of the arbitration provision is deemed invalid or unenforceable, the entire arbitration provision shall *not* remain in force." 393 P.3d at 98.[4] While the California Supreme Court left issues of severability to the lower courts on remand because the parties had not addressed them (*id.*), it never suggested that the non-severability clause would have altered the "first" step in its analysis—determining whether the "complaint does, in fact, appear to seek the type of public injunctive relief" that triggers the rule under California law. *Id.* at 90 (emphasis added); *see* pages 7-9, *supra*.

[4] As Wells Fargo points out in its brief (at 33-35), the non-severability clause in its arbitration agreement is narrower than the non-severability provisions in other cases and was not triggered by the district court's application of *McGill*.

Other courts have also first examined whether the plaintiff seeks a public injunction that triggers *McGill* even when, as here, the arbitration provision contains a non-severability clause. The arbitration provision in *Delisle*, for example, contained a non-severability clause, which this Court recognized would "invalidate[] the arbitration provision in full" *only if* the district court continued to conclude on remand that the plaintiffs in that case were seeking a public injunction. 2020 WL 3057464, at *1 n.1. And in *Croucier*, the plaintiff "point[ed] to a 'poison pill' clause that renders the entire Arbitration Agreement unenforceable if the clause precluding claims for public injunctive relief is found unenforceable." 2018 WL 2836889, at *3. But the court determined that the non-severability clause was irrelevant after concluding that *McGill* was "inapplicable on other grounds"—namely, "that Plaintiff's requested relief * * * does not constitute public injunctive relief under *McGill*." *Id.* at *4; *see also Rappley*, 2017 WL 3835259, at *5-6 (compelling arbitration under an agreement containing a non-severability clause and concluding that *McGill* did not apply). That analysis should have applied here and led the district court to the same result as in *Croucier*. *See* pages 29-33,

infra (discussing why the relief sought in this case does not qualify as a public injunction under *McGill*).

The district court's approach also does not accord with how courts apply non-severability clauses in any other contexts. For example, before the Supreme Court's decision in *Concepcion*, class-action waivers in arbitration provisions were unenforceable under California law. But even though many arbitration provisions contained non-severability clauses—including the AT&T clause at issue in *Concepcion* itself—no court ever suggested that the arbitration provision was void *ab initio* and hence unenforceable even when a plaintiff was not pursuing a class action. Instead, courts enforced arbitration provisions containing class waivers in individual actions. *See, e.g.*, *Makarowski v. AT&T Mobility LLC*, 2009 WL 1765661 (C.D. Cal. June 18, 2009).

That result makes sense, because, as explained above (at 14-17), plaintiffs lack standing to challenge an allegedly unlawful contractual term that does not apply *to them*. It follows that a plaintiff cannot rely on a non-severability clause to invalidate an agreement in its entirety without first showing that the alleged legal defect required to trigger the non-severability clause applies in his case. The court in *Whitworth*

held as much, explaining that, notwithstanding a non-severability clause in the arbitration agreement's class and representative action waiver, "the PAGA waiver is severable" under general California severability principles "if no PAGA claim is brought." 336 F. Supp. 3d at 1129-30. As the court observed, "[i]t makes no sense to read the arbitration agreements as precluding the severability of the PAGA waiver" when the plaintiffs never asserted a PAGA claim. *Id.* at 1130. The court further noted that the plaintiffs had not cited "any case that holds an entire arbitration agreement is void *ab initio* merely because it includes a PAGA waiver." *Id.* at 1129.

The *Whitworth* court therefore disregarded the non-severability clause and instead relied on California Civil Code § 1599, which codifies California's general common law on severability. 336 F. Supp. 3d at 1129; *accord Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1272 (9th Cir. 2017) ("Civil Code section 1599 codifies the common law doctrine of severability of contracts.") (quotation marks omitted).[5] The California Supreme Court has explained that "[n]otwithstanding any * * *

[5] Section 1599 provides that "[w]here a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest." Cal. Civ. Code § 1599.

illegal[]" contract provision, Section 1599 "preserves and enforces any lawful portion of a parties' contract that *feasibly* may be severed." *Marathon Entm't, Inc. v. Blasi*, 174 P.3d 741, 750-51 (Cal. 2008) (emphasis added). In construing this provision, California courts have recognized that severance has two purposes: "to prevent parties from gaining undeserved benefit or suffering undeserved detriment * * * [and] more generally, * * * to *conserve a contractual relationship* if to do so would not be condoning an illegal scheme." *MKB Mgmt., Inc. v. Melikian*, 184 Cal. App. 4th 796, 803-04 (2010) (emphasis added; quotation marks omitted). Accordingly, California law generally "take[s] a very liberal view of severability, enforcing valid parts of an apparently indivisible contract where the interests of justice or the policy of the law would be furthered." *In re Marriage of Facter*, 212 Cal. App. 4th 967, 987 (2013) (quoting *Adair v. Stockton Unified Sch. Dist.*, 162 Cal. App. 4th 1436, 1450 (2008)).

The district court's approach here reflects the opposite of the "very liberal view of severability" required under California law. Far from being "tainted with illegality" (*Marathon*, 174 P.3d at 743), the central purpose of the agreement—to resolve the parties' disputes by binding

individual arbitration—is fully valid and enforceable as applied to every claim in this lawsuit. Therefore, even "assuming * * * that [plaintiffs] can argue that the arbitration agreement in its entirety is unenforceable because it contains a [public-injunction] waiver that does not apply to their claims"—which they cannot for the reasons discussed above—the correct result would have been to treat that waiver as "severable" and enforce the remainder of the agreement according to its terms. *Whitworth*, 336 F. Supp. 3d at 1129.

E. The District Court's Approach Violates The FAA

Construing an arbitration provision to be invalid in all settings because of *McGill*—even, for example, if a plaintiff is bringing an individual breach-of-contract action for damages only—runs afoul of the FAA. Under the district court's interpretation, a court may refuse to enforce the parties' agreement to arbitrate even if every claim in the case is fully arbitrable.

It is hard to view that result as reflecting anything other than the kind of improper hostility to arbitration that the Supreme Court has rejected time and time again. As the Court has admonished, "suspicion of arbitration as a method of weakening the protections afforded in the

substantive law to would-be complainants" is "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 481 (1989); *see also, e.g.*, *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 266 (2009).

Congress enacted the FAA in 1925 to "reverse longstanding judicial hostility to arbitration agreements" and to "manifest a liberal federal policy favoring arbitration agreements." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (quotation marks omitted); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995) (the FAA "seeks broadly to overcome judicial hostility to arbitration agreements"). Invalidating an arbitration agreement just because it prohibits relief that might be sought only in *other* cases not before the court frustrates that purpose. Indeed, it represents yet another one of the "great variety of devices and formulas declaring arbitration against public policy" that the FAA was enacted to foreclose. *Concepcion*, 563 U.S. at 342 (quotation marks omitted); *see also Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018) ("Just as judicial antagonism toward arbitration before the Arbitration Act's enactment manifested itself in a great

variety of devices and formulas declaring arbitration against public policy, *Concepcion* teaches that we must be alert to new devices and formulas that would achieve much the same result today.") (quotation marks omitted).

Moreover, the FAA mandates, as a matter of substantive law, that any uncertainties about the interpretation of the agreement "must be resolved in favor of arbitration." *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1418-19 (2019) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)). As the Court put it nearly four decades ago, "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration," and the FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the *construction of the contract language itself* or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone*, 460 U.S. at 24-25.

Accordingly, the FAA required the district court to interpret the non-severability clause and the other terms in the Wells Fargo

arbitration agreement with a thumb on the scale in favor of arbitration. As this Court has recognized, "[a]ny doubts about the scope of arbitrable issues, *including applicable contract defenses*, are to be resolved *in favor of arbitration*." *Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1022 (9th Cir. 2016) (emphasis added) (citing *Moses H. Cone*, 463 U.S. at 24-25). At a minimum, one reasonable reading of the phrase "is found to be illegal or unenforceable" in the non-severability clause refers to a court finding the provision unenforceable *in the context of a specific case—i.e.*, because the plaintiff requests a public injunction that triggers the *McGill* rule as a defense to the provision's enforcement. And because the phrase *can* reasonably be interpreted that way, the FAA dictates that it *must* be interpreted that way—rather than in a way that deprives the parties of their federally protected right to arbitration altogether.

II. The Injunctive Relief Sought Here Is Quintessentially Private Relief

The district court's failure to decide whether plaintiffs are seeking a public injunction was far from harmless. On the contrary, had the district court conducted the required first step in the *McGill* inquiry, it

would have been clear that the plaintiffs seek only private injunctive relief.

A. California Law Distinguishes Public Injunctions From Injunctions Benefiting An Individual Plaintiff Or A Class Of Similarly Situated Individuals

As a matter of California law, not all requests for injunctive relief under California's UCL, CLRA, and FAL amount to a request for *public* injunctive relief.

Instead, the California Supreme Court has drawn a line based on who "benefits" from the requested injunction. *McGill*, 393 P.3d at 89. As *McGill* itself states, "[r]elief that has the primary purpose or effect of redressing or preventing injury to an individual plaintiff—*or to a group of individuals similarly situated to the plaintiff*—does *not* constitute public injunctive relief." *Id.* at 90 (emphasis added); *accord Clifford*, 38 Cal. App. 5th at 754. And for that reason, relief that inures to the benefit of "putative class members" is private, not public, injunctive relief. *Kilgore*, 718 F.3d at 1061. Instead, public injunctive relief is "relief that 'by and large' *benefits* the general public." *McGill*, 393 P.3d at 89 (emphasis added). To qualify as a "public injunction," the relief sought must have "the primary purpose and effect of prohibiting

unlawful acts that threaten future injury to the general public." *Id.* at 90 (quotation marks omitted).

Accordingly, a public injunction "will . . . not benefit the plaintiff directly, because the plaintiff has already been injured, allegedly, by such practices and [is] aware of them." *McGill*, 393 P.3d at 90 (quotation marks omitted; alterations in original). Instead, the individual plaintiff "benefits * * *, 'if at all,' only 'incidentally' and/or as 'a member of the general public.'" *Id.* at 89 (quoting *Broughton v. Cigna Healthplans*, 988 P.2d 67, 76 n.5 (Cal. 1999)) (alterations omitted).

The California Court of Appeal recently recognized the same distinction, observing that "injunctive relief that primarily resolves a private dispute between the parties and rectifies individual wrongs is private, not public relief." *Clifford*, 38 Cal. App. 5th at 753 (quotation marks omitted; citing *McGill*, 393 P.3d at 90).[6]

[6] The court in *Clifford* held that the relief sought in that case—"an injunction requiring [plaintiff's] employer to comply with the Labor Code"—is "indisputably private in nature," because it benefited the company's employees rather than the public at large. *Id.* at 755. As discussed below, numerous courts have reached the same conclusion with respect to relief, like the relief sought in this case, that would benefit only the defendant's customers (or a subset of those customers).

B. The Requested Injunction In This Case Would Not Benefit The General Public

Consistent with the distinction between public and private injunctive relief drawn by California courts, numerous courts in this Circuit have held *McGill* inapplicable when—as here—plaintiffs seek what amounts to private injunctive relief on behalf of a class, rather than an injunction benefitting the public in general. And in particular, courts have characterized as "private" those injunctions *that seek principally to benefit a defendant's customers* rather than the public at large.

For example, as Wells Fargo's brief details (at 27-30), the claims in this case are virtually indistinguishable from those in *Johnson v. JP Morgan Chase Bank*. In *Johnson*, the court held that *McGill* did not bar individual arbitration of claims brought on behalf of five putative classes of Chase Bank customers regarding overdraft and insufficient-funds fees despite the plaintiffs' characterization of that relief as a "public" injunction. 2018 WL 4726042, at *7. The court held that, irrespective of how the claims were pleaded, "the relief Plaintiffs seek does not constitute public injunctive relief"; rather, "a closer inspection reveals that the relief sought is actually intended to redress and prevent further injury to a [defined] group of plaintiffs * * * who have

already incurred the allegedly unlawful fees"—not "the general public." *Id.* And the court distinguished *McGill* because "[p]laintiffs' claims arise from breaches of bilateral contracts between [p]laintiffs and JPMorgan, whereas the claims in *McGill* arose from representations in advertising and marketing materials." *Id.* Just as in *Johnson*, the relief plaintiffs seek here "is primarily intended to redress prior injury to a specific group of putative plaintiffs who have checking accounts with [Wells Fargo] and have incurred overdraft and insufficient funds fees under a narrow set of circumstances." *Id.* at *8.

Sponheim v. Citibank is also instructive. The court in *Sponheim* compelled individual arbitration of claims challenging Citibank's foreign-transaction-fee practices, despite the plaintiff's invocation of the *McGill* rule. 2019 WL 2498938, at *5. The court held that the injunction sought was fundamentally "private" in nature because the "primary aim" of the plaintiff's suit was to "gain[] compensation for injury for himself and others similarly situated" (there, all "California plaintiffs that have held Citibank checking accounts within the applicable statute of limitations"). *Id.* at *5. The court noted that the plaintiff's claims "ar[ose] out of the contractual rights and obligations between Citibank and its customers, not deceptive advertising or

marketing to the general public as in *McGill*." *Id.* The same is true here, and the same result is warranted.

Similarly, the court in *Wright* compelled arbitration of claims alleging that Sirius failed to honor "lifetime" subscriptions for satellite radio service. Notwithstanding the plaintiff's characterization of the requested injunction as "public," the specific relief sought—injunctions barring Sirius from terminating lifetime subscriptions, failing to honor lifetime subscriptions previously purchased, and charging any additional monies for such services—all "solely benefit the putative class members" who had purchased lifetime subscriptions. 2017 WL 4676580, at *9. The court thus concluded that the plaintiff "only seeks private relief" and that the *McGill* rule therefore did not apply. *Id.* at *9-10.

Other cases are in accord. In *Croucier*, the court held that a request to enjoin a bank from making automated collection calls to its customers was not a public injunction, because even assuming that the bank had a policy of making calls to customers who had revoked consent to receive such calls, "the putative class affected by the alleged conduct would be limited to a small group of individuals similarly situated to the plaintiff." 2018 WL 2836889, at *5. And in *M Resorts*,

the court held that relief seeking to enjoin the defendant's "unlawful or unfair business practice[s]" with respect to purchasers of its life insurance policies was not public injunctive relief, because "the class of people who stand to benefit from [the plaintiff's] requested relief is not the general public but rather is limited to a class of people who are well-defined and have a similar interest: people who have or had variable life insurance policies with Defendants." 2019 WL 6840396, at *5.

In short, "[m]erely declaring that a claim seeks a public injunction * * * is not sufficient to bring that claim within the bounds of the rule set forth in *McGill*." *Sponheim*, 2019 WL 2498938, at *4 (quotation marks omitted). The decisions above confirm that relief that principally seeks to benefit a defined "group of plaintiffs" (*Johnson*, 2018 WL 4726042, at *7), such as a subset of the defendant's existing customers or the putative class of similarly situated individuals that the plaintiff seeks to represent, qualifies as private, not public.

As in *Johnson, Sponheim*, *Wright*, and like cases, the relief sought by plaintiffs here is private. Wells Fargo's brief details why the injunctive relief requested here—regarding certain overdraft and other account fees Wells Fargo assesses pursuant to the contract between it and its account holders—seeks primarily to benefit "the subset of Wells

Fargo account holders" who have incurred those fees. Wells Fargo Br. 23-30. And the requested injunction does not challenge any marketing or other conduct by Wells Fargo directed at the general public. Therefore, "*McGill* does not apply and cannot be the basis for Plaintiffs to evade arbitration." *Johnson*, 2018 WL 4726042, at *8.

CONCLUSION

The district court's decision should be reversed.

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Respectfully submitted,

/s/ Evan M. Tager

Steven P. Lehotsky
Jonathan D. Urick
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Evan M. Tager
Archis A. Parasharami
Daniel E. Jones
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Attorneys for Amicus Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g) and Circuit Rule 32-1(e), undersigned counsel certifies that this brief:

(i) complies with the type-volume limitation of Rule 29(5) and Circuit Rule 32-1(a) because it contains 6,483 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: June 15, 2020 /s/ Evan M. Tager

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 15, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Evan M. Tager