Nos. 19-1066, 19-1078

In The
Supreme Court of the United States

COMCAST CORPORATION, COMCAST CABLE COMMUNICATIONS, LLC, PETITIONERS,

v.

CHARLES TILLAGE, JOSEPH LOOMIS.

AT&T MOBILITY LLC, NEW CINGULAR WIRELESS PCS LLC, NEW CINGULAR WIRELESS SERVICES, INC., PETITIONERS,

v.

STEVEN MCARDLE.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AND NATIONAL RETAIL FEDERATION AS AMICI CURIAE SUPPORTING PETITIONERS

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AND NATIONAL RETAIL FEDERATION AS AMICI CURIAE SUPPORTING PETITIONERS

The Chamber of Commerce of the United States of America, the National Association of Manufacturers, and the National Retail Federation respectfully submit this brief as amici curiae in support of petitioners.[1]

INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct 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. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days before the due date of the intention of amici to file this brief. All parties have consented to the filing of this brief.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The National Retail Federation ("NRF") is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and internet retailers from the United States and more than 45 countries. Retail is the largest private-sector employer in the United States, supporting one in four U.S. jobs—approximately 42 million American workers—and contributing $2.6 trillion to the annual GDP. NRF periodically submits amicus curiae briefs in cases raising significant legal issues for the retail community.

INTRODUCTION AND SUMMARY OF ARGUMENT

Almost a century ago, Congress enacted the Federal Arbitration Act ("FAA") "in response to widespread judicial hostility to arbitration agreements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). That judicial hostility to arbitration continues today, at least in California and the Ninth Circuit. Those courts continue to conjure "new devices and formulas" that effectively "declar[e] arbitration against public policy." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018). This Court has repeatedly granted review to correct such end-runs around its FAA precedents. It should do so again here.

In *McGill v. Citibank, N.A.*, the California Supreme Court held that arbitration provisions preventing a consumer from seeking public-injunctive relief are "contrary to California public policy" and thus "unenforceable under California law." 393 P.3d 85, 86 (Cal. 2017). Then in *Blair v. Rent-A-Center, Inc.* and the decisions at issue here, the Ninth Circuit held that the FAA does not preempt the judge-made *McGill* rule on the theory that the rule "does not 'deprive parties of the benefits of arbitration.'" *Tillage* Pet. App. 20a (quoting *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 436 (9th Cir. 2015)). Those decisions defy this Court's repeated admonitions that the FAA protects "traditional *individualized* arbitration" from state policies that undermine it. *Epic*, 138 S. Ct. at 1623 (emphasis added).

Amici's members, affiliates, and their customers rely on bilateral arbitration agreements in their contractual relationships. Traditional bilateral arbitration allows them to resolve disputes promptly and efficiently while avoiding the high costs associated with litigation in court. If allowed to stand, *McGill* and *Blair* will negate those benefits, effectively nullifying millions of consumer arbitration agreements in California and beyond.

This is not speculation—plaintiffs' attorneys are already exploiting these decisions by adding claims for public-injunctive relief to evade arbitration agreements their clients agreed to. Faced with the prospect of public-injunction claims—regardless whether consumers agreed to individual arbitration of their disputes—companies may abandon traditional individualized consumer arbitration altogether. That would leave both consumers and companies worse off. This Court should grant review to ensure that arbitration remains available as a "quicker, more informal, and often cheaper" means of dispute resolution "for everyone involved." *Epic*, 138 S. Ct. at 1621.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISIONS THREATEN TO EVISCERATE CONSUMER ARBITRATION

The Ninth Circuit's end-run around this Court's FAA precedents threatens to undermine millions of arbitration agreements in California and beyond. The

consequences would hurt companies and consumers alike. The Ninth Circuit's rule frustrates the parties' intent, undermines their existing agreements, and erodes the benefits offered by arbitration as an alternative to litigation. This Court's review thus is urgently needed.

A. The Ninth Circuit's Decisions Effectively Invalidate Tens of Millions of Arbitration Agreements

Based on the policy embodied in the FAA, many of amici's members have structured millions of contractual relationships in California alone around the use of bilateral arbitration to resolve disputes. Many of those agreements prevent the arbitrator from awarding relief that would affect persons other than the parties to the arbitration. *See*, *e.g.*, *Tillage* Pet. App. 9a. Such provisions help the parties "achieve 'streamlined proceedings and expeditious results.'" *Concepcion*, 563 U.S. at 346. But *McGill* and *Blair* now allow plaintiffs and their lawyers to use these provisions "to evade arbitration in 'virtually every case' invoking California consumer protection statutes." Alison Frankel, *The 9th Circuit Just Blew Up Mandatory Arbitration in Consumer Cases*, Reuters (July 1, 2019), https://reut.rs/2RL5EXc.

California's Unfair Competition Law ("UCL"), one of the statutes under which plaintiffs can seek public-injunctive relief, "covers a wide range of conduct." *Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 943 (Cal. 2003). To start, the UCL "borrows

violations from other laws by making them independently actionable as unfair competitive practices." *Feitelberg v. Credit Suisse First Bos., LLC*, 134 Cal. App. 4th 997, 1009 (2005). But "a practice may be deemed unfair" in violation of the UCL "even if not specifically proscribed by some other law." *Ibid.* And UCL claims can be based on violations of a statute, including a federal statute, "that does not itself provide for a private right of action." *Rose v. Bank of Am., N.A.*, 304 P.3d 181, 184 & n.5 (Cal. 2013). In short, "[v]irtually any federal, state, or local law can serve as the predicate for a [UCL public-injunction] action." Mathieu Blackston, *California's Unfair Competition Law—Making Sure the Avenger Is Not Guilty of the Greater Crime*, 41 San Diego L. Rev. 1833, 1839 (2004).

Making matters worse, procedural checks on adding a public-injunction request to a UCL claim are even more "toothless and malleable" and lacking in "limiting effect" than the minimal requirements to authorize classwide arbitration that concerned this Court in *Concepcion*. 563 U.S. at 347. A public-injunction claimant need only "allege[] in her complaint" that the challenged conduct "is ongoing" and affects others. *McGill*, 393 P.3d at 91 (emphasis omitted); *see Concepcion*, 563 U.S. at 347 (noting that "all that is required" to invoke the *Discover Bank* rule "is an allegation" of "a scheme to cheat consumers"). At the stage of "a motion to compel arbitration," it is "premature to consider whether" the plaintiff has "established these allegations with proof or how her failure to do so would ultimately affect her request for

injunctive relief." *McGill*, 393 P.3d at 91. California has thus given plaintiffs a road map marked with an easy-to-follow path around their agreements to settle disputes through bilateral arbitration: simply tack on UCL public-injunction claims to their complaints and trigger full-scale litigation.

B. The Ninth Circuit's Decisions Harm Companies and Consumers Nationwide

Plaintiffs' newfound ability to escape arbitration by asserting public-injunction claims harms companies and consumers in California, but the impact extends well beyond that State.

1. Many of the advantages of arbitration would be lost in California if the Ninth Circuit's decisions stand. To start, in traditional individualized arbitration, any award "is limited to the size of individual disputes," and "[d]efendants are willing to accept the costs of" any "errors" because they are "presumably outweighed by savings from avoiding the courts." *Concepcion*, 563 U.S. at 350. Public-injunction proceedings, by contrast, present much greater "risks to defendants." *Ibid.* Public injunctions may force companies to alter their practices, products or services for all their California consumers. Complying with these injunctions can be enormously costly, and the risk of an erroneously imposed injunction "will often become unacceptable." *Ibid.* "Faced with even a small chance of" a burdensome injunction, "defendants will be pressured into settling questionable claims." *Ibid.* And aside from any public injunction actually imposed,

merely arbitrating a public-injunction claim is significantly more complex and expensive than arbitrating an individual dispute. *See infra* pp. 20-21.

As a result, companies faced with the prospect of arbitrating public-injunction claims may abandon traditional individualized arbitration altogether. Companies use individualized arbitration to "realize the benefits of private dispute resolution," including "lower costs" and "greater efficiency and speed." *Concepcion*, 563 U.S. at 348 (internal quotation marks omitted). As this Court explained, however, companies "faced with inevitable class arbitration" would have "less incentive to continue resolving potentially duplicative claims on an individual basis." *Id.* at 347; *see id.* at 351 n.8 ("It is not reasonably deniable that requiring consumer disputes to be arbitrated on a classwide basis will have a substantial deterrent effect on incentives to arbitrate."). That same logic applies to public injunctions. If companies face "inevitable" public-injunction claims, any cost savings from individual arbitration will be dwarfed by the additional expense of defending against a public injunction and the risks of an erroneous public injunction that cannot be corrected on appeal.

Given that possibility, companies will have little incentive to continue heavily subsidizing traditional individualized consumer arbitration. For instance, under AAA's Consumer Arbitration Rules, companies pay the vast majority of arbitration costs. Am. Arbitration Ass'n, Consumer Arbitration Rules, at 33 (2018) (capping consumer's share of arbitration costs

at $200). Many companies pay all the fees to make arbitration even more accessible for consumers. For instance, AT&T and Comcast—the petitioners in these cases—both commit to pay all arbitration costs for claims up to $75,000. *See* AT&T, *Resolve a Dispute with AT&T via Arbitration*, https://www.att.com/support/article/wireless/KM1045585 (last visited Mar. 24, 2020); Comcast, *Comcast Agreement for Residential Services*, https://www.xfinity.com/corporate/customers/policies/subscriberagreement (last visited Mar. 24, 2020).

Some companies also pay special inducements to consumers who arbitrate. Under AT&T's arbitration provision, for instance, if the arbitrator awards the consumer more relief than AT&T's last written settlement offer before the arbitrator's selection, AT&T agrees to pay the consumer $10,000 and double her attorney's fees in place of any smaller award. AT&T, *Resolve a Dispute*, *supra*; *see also Concepcion*, 563 U.S. at 338 (noting that AT&T's arbitration agreement was "likely to prompt full or even excess payment to the customer *without* the need to arbitrate or litigate" and that "consumers who were members of a class would likely be worse off" (alterations and internal quotation marks omitted)).

If companies abandon individualized arbitration as a result of *McGill* and *Blair*, consumers will be left worse off. As this Court has repeatedly recognized, arbitration provides consumers "a less expensive alternative to litigation." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995); *see also Stolt-Nielsen*

S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685 (2010); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009). Without the efficiencies of bilateral arbitration, "the typical consumer who has only a small damages claim" may be left "without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery." *Allied-Bruce*, 513 U.S. at 281. Indeed, consumers generally "fare better in arbitration, both in terms of the likelihood of success on the merits and the size of the award, than in litigation." Joshua S. Lipshutz, Note, *The Court's Implicit Roadmap: Charting the Prudent Course at the Juncture of Mandatory Arbitration Agreements and Class Action Lawsuits*, 57 Stan. L. Rev. 1677, 1712 (2005); *see also* Michael P. Daly et al., *Whither McGill? The Intersection of Federal Arbitration Act Preemption and Public Injunctions*, Am. Bar Ass'n (Sept. 23, 2019) (noting "extensive empirical evidence that consumers recover more quickly and more often in arbitration than they do in court").

2. These consequences would be significant enough to warrant this Court's review if they were limited to California, the nation's most populous state. But the effect of *McGill* and *Blair* extends nationwide.

To start, California public injunctions may have nationwide effect as a practical matter. Under California's capacious choice-of-law doctrine, plaintiffs can potentially assert UCL claims based on conduct occurring across the country. *See*, *e.g.*, *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914, 937, 939 (Cal. 2006) (holding that California privacy statute

and UCL applied to conduct by defendant's employees in Georgia). And even where the plaintiff seeks relief based on actions that occurred in California, it is often administratively infeasible for businesses that operate in multiple States to adopt special rules or practices for only California consumers. For instance, plaintiffs commonly seek public injunctions against nationwide advertising campaigns. Thus, if a public injunction—or more likely, a settlement extracted by plaintiffs' lawyers—forces a company to alter its practices, products or services for its California consumers, the company will often have to do so everywhere.

McGill and *Blair* may also lead companies to abandon individualized consumer arbitration even beyond California. Because many businesses have national consumer bases, they often use standardized consumer contracts to facilitate uniform contracting across the country. Companies thus may have no choice but to remove arbitration provisions from all their consumer contracts rather than bear the large expense of attempting to offer different contracts for customers in different States.

C. The Proliferation of California PAGA Claims Underscores These Concerns

McGill and *Blair* represent an extension of an earlier, similar evasion of *Concepcion* in the context of California's Private Attorneys General Act ("PAGA"). PAGA actions have become powerful tools plaintiffs and their lawyers can use to circumvent arbitration agreements and undermine federal policy. If *McGill*

and *Blair* are left uncorrected, public-injunction claims in the consumer context will follow the same trajectory as PAGA claims in employment cases.

PAGA authorizes an "aggrieved employee" to recover civil penalties on a representative basis by raising alleged violations of California's Labor Code as to "himself or herself" *and* "other current or former employees." Cal. Labor Code § 2699(a). In *Iskanian v. CLS Transportation L.A., LLC*, the California Supreme Court held that arbitration agreements are unenforceable as "contrary to public policy" unless they permit the award of representative monetary relief under PAGA. 327 P.3d 129, 133 (Cal. 2014). Then in *Sakkab*, a divided Ninth Circuit panel held that the FAA does not preempt California's *Iskanian* rule, largely because the procedures for representative PAGA actions are not identical to class-action procedures—much like the Ninth Circuit's rationale in *Blair*. *Sakkab*, 803 F.3d at 436.

The number of PAGA actions increased dramatically after *Sakkab* was decided in 2015. In 2005, only 759 PAGA cases were filed. Emily Green, *An Alternative to Employee Class Actions*, L.A. Daily Journal (Apr. 16, 2014). But in 2017—two years after *Sakkab*—plaintiffs filed 3,250 notices of intent to file PAGA actions. *McArdle* Pet. 28 & n.8.

PAGA claims previously were unattractive to plaintiffs because 75% of any recovery must be distributed to the State. Cal. Labor Code § 2699(i). After *Iskanian* and *Sakkab*, however, plaintiffs and

their lawyers have been willing to overlook this feature of PAGA claims, since they can be brought even when employees agreed to individual arbitration of their disputes. Matthew J. Goodman, Comment, *The Private Attorney General Act: How to Manage the Unmanageable*, 56 Santa Clara L. Rev. 413, 415 (2016) ("The fact that [representative] PAGA claims cannot be waived by agreements to arbitrate" under *Iskanian* and *Sakkab* "contributes heavily to the prevalence of these suits."). And the prevalence of PAGA suits will only increase going forward: the California Supreme Court recently held that plaintiffs may maintain a PAGA claim even if they settle and dismiss their individual claims and thus have no continuing "unredressed injury." *Kim v. Reins Int'l Cal., Inc.*, ___ P.3d ___, No. S246911, 2020 WL 1174294, at *6-7 (Cal. Mar. 12, 2020). That decision makes it even easier for plaintiffs' lawyers to abuse PAGA by continuing to pursue penalties and attorney's fees without any injured client.

Blair and *McGill* are likely to replicate this experience in the consumer context. Plaintiffs and their lawyers will use public-injunction claims to gain undue leverage over defendants, and California will likely acquiesce in those efforts. Indeed, in the short time since *McGill* was decided in April 2017, consumers have already filed thousands of complaints seeking injunctive relief under California's consumer-protection statutes. *McArdle* Pet. 24-25. And plaintiffs have increasingly specified that they are seeking public-injunctive relief, thereby attempting to invoke

the *McGill* rule and avoid arbitration. *McArdle* Pet. 25. This Court's intervention is essential to preserve the availability of consumer arbitration and prevent plaintiffs' lawyers from exploiting public-injunction claims to evade their clients' arbitration agreements.

II. THE *MCGILL* RULE IS YET ANOTHER IMPERMISSIBLE ATTEMPT TO UNDERMINE THE FAA'S POLICY FAVORING ARBITRATION

The Ninth Circuit's decision is as wrong as it is harmful. In fact, *McGill* and *Blair* are just the latest instances of California and the Ninth Circuit flaunting their hostility to arbitration. This Court should grant review to restore uniform application of the FAA and ensure compliance with this Court's precedents.

A. The Ninth Circuit and California Have Repeatedly Disregarded this Court's FAA Precedents

The FAA requires courts to "'rigorously enforce' arbitration agreements according to their terms." *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013). The statute embodies a "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

But in recent years, California has repeatedly sought to undermine that federal policy favoring arbitration agreements. Stephen A. Broome, *An Unconscionable Application of the Unconscionability*

Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act, 3 Hastings Bus. L.J. 39, 39 (2006) ("While in most jurisdictions the judiciary has long abandoned its historical hostility to arbitration as an alternative to litigation, * * * in California the courts continue to view arbitration agreements critically."). And the Ninth Circuit has followed suit, frequently holding that California's judge-made rules are not preempted by the FAA or fashioning its own rules to undermine arbitration. Time and again, these decisions elevate form over substance and abandon this Court's precedents by relying on distinctions without a difference. This Court has not hesitated to step in when necessary to correct these transgressions.

1. In *Concepcion*, this Court considered California's *Discover Bank* rule, under which "most collective-arbitration waivers in consumer contracts" were unenforceable as "unconscionable." 563 U.S. at 340 (citing *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005)). The Ninth Circuit held that the FAA did not preempt the *Discover Bank* rule "because that rule was simply 'a refinement of the unconscionability analysis applicable to contracts generally in California.'" *Id.* at 338.

This Court reversed. It observed that the FAA preempts even state-law doctrines "normally thought to be generally applicable," like unconscionability, if they "stand as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 341, 343. The Court held that California's *Discover Bank* rule fell into that category:

"[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 344. In particular, class arbitration "makes the process slower" and "more costly" because it "requires procedural formality." *Id.* at 348-49 (emphasis omitted). And class arbitration "greatly increases risks to defendants" due to "the absence of multilayered review" and "the higher stakes of class litigation." *Id.* at 350. The Court thus concluded that "the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." *Id.* at 336.

2. In *DIRECTV, Inc. v. Imburgia*, this Court examined an arbitration agreement including a waiver of class arbitration and a clause providing that "if the 'law of your state' makes the waiver of class arbitration unenforceable, then the entire arbitration provision 'is unenforceable.' " 136 S. Ct. 463, 466 (2015). The California Court of Appeal held the class-action waiver unenforceable "despite this Court's holding in *Concepcion*" by interpreting "the law of your state" to mean "California law as it would have been without this Court's holding invalidating the *Discover Bank* rule." *Id.* at 467.

This Court reversed. In doing so, it found it necessary to remind "lower courts" that they "must follow this Court's holding in *Concepcion*," since the "Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior

authority of its source." *Id.* at 468 (internal quotation marks omitted). The California Court of Appeal's strained contract interpretation, which would not apply "in any context other than arbitration," failed to "place arbitration contracts 'on equal footing with all other contracts' " and was thus preempted by the FAA. *Id.* at 469, 471.

3. In *Epic Systems*, this Court encountered an arbitration agreement between an employer and an employee that "specified individualized arbitration, with claims 'pertaining to different [e]mployees [to] be heard in separate proceedings.' " 138 S. Ct. at 1620. In one of the cases consolidated with *Epic Systems*, the Ninth Circuit refused to hold employees to the provision, positing that "an agreement requiring individualized arbitration proceedings violates" federal labor law by barring employees from "pursuing claims as a class or collective action." *Ibid.*

This Court reversed. It emphasized that the FAA "protect[s] pretty absolutely" parties' intention "to use individualized rather than class or collective action procedures." *Id.* at 1621. The Ninth Circuit had disregarded *Concepcion*'s "essential insight" that "courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent." *Id.* at 1623. A rule that "a contract is unenforceable *just because it requires bilateral arbitration*" is preempted by the FAA because such a rule "interfere[s] with a fundamental attribute of arbitration": its "traditionally individualized and informal

nature." *Id.* at 1622-23. "The law of precedent teaches that like cases should generally be treated alike," the Court explained, and "appropriate respect for that principle means the Arbitration Act's saving clause can no more save the defense at issue in these cases than it did the defense at issue in *Concepcion*." *Id.* at 1623.

4. Just last Term, in *Lamps Plus, Inc. v. Varela*, this Court reviewed a Ninth Circuit decision compelling classwide rather than individual arbitration after concluding that "the agreement was ambiguous on the issue of class arbitration" and applying "California law to construe the ambiguity against the drafter." 139 S. Ct. 1407, 1413 (2019). The Ninth Circuit dissent viewed the majority's holding as a "palpable evasion," *ibid.*, of this Court's decision in *Stolt-Nielsen*, which held that "the parties' mere silence on the issue of class-action arbitration" does not "constitute[] consent to resolve their disputes in class proceedings," 559 U.S. at 687.

This Court reversed yet again. It held that, "[l]ike silence, ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to 'sacrifice[] the principal advantage of arbitration.'" *Lamps Plus*, 139 S. Ct. at 1416 (quoting *Concepcion*, 563 U.S. at 348). That conclusion "follows directly from" this Court's "decision in *Stolt-Nielsen*" and the "foundational FAA principle" that "[a]rbitration is strictly a matter of consent," which this Court has emphasized "many times." *Id.* at 1415. And California's rule of construing ambiguities against the drafter could not justify a contrary result. Applying

"[t]he same reasoning" as in *Concepcion*, this Court concluded that California's doctrine "cannot be applied to impose class arbitration in the absence of the parties' consent." *Id.* at 1418.

B. The Ninth Circuit's Endorsement of the *McGill* Rule Likewise Contravenes this Court's FAA Precedents

The *McGill* rule and the Ninth Circuit decisions upholding it are the latest in this long line of cases embodying California's and the Ninth Circuit's hostility to arbitration. They disregard the "essential insight" of this Court's precedents: that the FAA envisions and protects conventional bilateral arbitration. *Epic Systems*, 138 S. Ct. at 1623. The *McGill* rule effectively conditions the enforceability of arbitration agreements on acquiescence to public-injunction proceedings. Just like the *Discover Bank* rule this Court held preempted in *Concepcion* and the Ninth Circuit's holding this Court rejected in *Epic Systems*, the *McGill* rule interferes with fundamental attributes of individualized arbitration. It thus "creates a scheme inconsistent with the FAA." *Concepcion*, 563 U.S. at 344.[2]

1. Arbitration of public-injunction claims is fundamentally incompatible with "traditional individualized arbitration." *Epic Systems*, 138 S. Ct. at 1623.

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[2] Amici also agree with petitioners that the *McGill* rule falls outside the FAA's saving clause because it is not a ground "for the *revocation* of any contract." 9 U.S.C. § 2 (emphasis added); *see Tillage* Pet. 13-22; *McArdle* Pet. 22-23.

Indeed, public-injunction proceedings share the same characteristics that led this Court to deem class actions and collective actions "inconsistent with the FAA." *Concepcion*, 563 U.S. at 348-51; *see Epic Systems*, 138 S. Ct. at 1622-23.

By definition, public-injunctive relief does not focus on the individual plaintiff and their claims. It is "injunctive relief that has the primary purpose and effect of prohibiting unlawful acts that threaten future injury to the general public." *McGill*, 393 P.3d at 86. Its "evident purpose" is to "remedy a public wrong," not to "resolve a private dispute." *Broughton v. Cigna Healthplans of Cal.*, 988 P.2d 67, 76 (Cal. 1999). Indeed, the individual plaintiff "benefit[s], if at all," only "incidental[ly]," "by virtue of being a member of the public." *Id.* at 76 n.5.

And in practice, attempting to arbitrate a public-injunction claim would trade the informality of traditional bilateral arbitration for much more costly, time-consuming procedures. For instance, 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." *Cisneros v. U.D. Registry, Inc.*, 39 Cal. App. 4th 548, 564 (1995). And public-injunction claimants must show not only similar practices affecting non-party members of the public but also evidence demonstrating that such practices are likely to cause future harm. *Feitelberg*, 134 Cal. App. 4th at 1012 (noting that public-injunctive remedy "should not be exercised 'in

the absence of any evidence that the acts are likely to be repeated in the future'"). These "additional and different procedures" "sacrifice[] the principal advantage of arbitration—its informality—and make[] the process slower, more costly, and more likely to generate procedural morass than final judgment." *Concepcion*, 563 U.S. at 348.

Moreover, arbitrating public-injunction claims, like class and collective arbitration, would "greatly increase[] risks to defendants" while depriving them of meaningful appellate review. *Concepcion*, 563 U.S. at 350. Just like a Rule 23(b)(2) class action in federal court, a public injunction can force a defendant to alter its practices, products, or services for all its California consumers, and as a practical matter, perhaps all its customers nationwide. *McArdle* Pet. 18-19. Unlike appellate review of a court's decision, however, the FAA provides only narrowly circumscribed grounds for vacatur of arbitrators' decisions, such as if "the award was procured by corruption, fraud, or undue means," or if "there was evident partiality or corruption in the arbitrator[]." 9 U.S.C. § 10(a). And parties to an arbitration agreement may not contractually expand the grounds or nature of judicial review. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008). This "absence of multilayered review" of arbitrators' decisions "makes it more likely that errors" such as overbroad or conflicting public injunctions "will go uncorrected." *Concepcion*, 563 U.S. at 350. With public-injunction arbitration no less than class arbitration, it is thus "hard to believe that defendants

would bet the company with no effective means of review and even harder to believe that Congress would have intended to allow state courts to force such a decision." *Id.* at 351.

2. The Ninth Circuit attempted to distinguish *Concepcion* on the ground that "arbitration of public injunctive relief" supposedly does not require the same "procedural formality" as classwide arbitration. *Tillage* Pet. App. 20a. Similarly, the Ninth Circuit thought it "[c]rucial[]" that, unlike the class and collective actions at issue in *Concepcion* and *Epic Systems*, a public-injunction claimant asserts that claim only "'on his or her own behalf' and retains sole control over the suit." *Tillage* Pet. App. 21a (quoting *McGill*, 393 P.3d at 92). Thus, the court of appeals believed, an arbitration involving a public-injunction claim remains a "bilateral arbitration" rather than a "multi-party action" because members of the general public are not formally brought into the litigation. *Ibid.*

Those distinctions are illusory. As *Epic Systems* made clear, the FAA protects "the traditionally individualized and informal nature of arbitration" in substance, not only in name. 138 S. Ct. at 1623; *see ibid.* ("*Concepcion* teaches that we must be alert to new devices and formulas that would achieve much the same result" as "judicial antagonism toward arbitration."). The inquiry focuses on whether a state-law rule "interfer[es] with fundamental attributes of arbitration," not whether it requires the precise

procedures of Rule 23 or the FLSA's collective-action provision. *Id.* at 1622.

Likewise, it is irrelevant whether third parties are formally brought into the proceeding, such that their "due process rights" are "implicated by the arbitration of a" public-injunction claim. *Tillage* Pet. App. 20a. Nothing in this Court's arbitration precedents attaches significance to the specific label given to "absent parties" or the effect of an arbitrator's judgment on them. *Ibid.* What matters is that the procedural complexities required to adjudicate a public-injunction claim greatly decrease the efficiency and increase the costs and risks of arbitration. *See supra* pp. 19-22. Public-injunction arbitration "is not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law." *Concepcion*, 563 U.S. at 351.

Indeed, while *Concepcion* and *Epic Systems* involved class and collective proceedings, their reasoning applies no less to "aggregation" of claims more generally. *Ibid.*; *see Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (noting that a "class action" is a "species" of "traditional joinder"). Consider a state-law rule requiring arbitration agreements to permit joinder of several similarly situated plaintiffs—seeking only individual relief—into a single arbitration proceeding. The FAA straightforwardly preempts such "a rule seeking to declare individualized arbitration proceedings off limits." *Epic Systems*, 138 S. Ct. at 1623; *cf. Concepcion*,

563 U.S. at 351 (observing that "States may not superimpose on arbitration" the "Federal Rules of Civil Procedure").

But under *McGill* and *Blair*, States may force defendants to allow plaintiffs to seek far broader relief on behalf of *millions* of individuals, merely because those individuals are not formally joined as parties. It would be "trivially easy for States to undermine the [FAA]—indeed, to wholly defeat it"—if preemption turned on such formalistic distinctions. *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1428 (2017).

* * *

The Court should grant certiorari to correct the Ninth Circuit's disregard of its FAA precedents and protect individualized arbitration as an efficient and inexpensive means for businesses and consumers to resolve their disputes.

CONCLUSION

For these reasons and those in the petitions for writs of certiorari, the petitions should be granted.

Respectfully submitted,

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