No. 19-1078

In the Supreme Court of the United States

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

v.

STEVEN MCARDLE,
Respondent.

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

REPLY BRIEF FOR PETITIONERS

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As the petition and five supporting *amicus* briefs explain, there are no meaningful differences between this case and *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011). In both, the Ninth Circuit upheld a California rule conditioning the enforcement of arbitration agreements on acquiescence to a procedure that is incompatible with arbitration's traditionally individualized and informal nature—thereby disrupting tens of millions of arbitration agreements. As in *Concepcion*, review is warranted because the Ninth Circuit decision is fundamentally incompatible with the FAA and this Court's precedents.[1]

McArdle does not dispute that *Concepcion* prohibits States from conditioning enforcement of arbitration agreements on the availability of class-wide injunctions through class-action procedures. Opp. 21. Nor does he dispute the many similarities between the process for adjudicating a public-injunction claim and the procedure for resolving a request for a class-wide injunction.

In suggesting that a public-injunction claim is nonetheless consistent with the "traditional individualized arbitration" protected by the FAA (*Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1621, 1623 (2018)), McArdle relies entirely on the Ninth Circuit's technical distinction—that the third parties for whom the public injunction is sought are not *formally* joined as parties.

That cramped reading of *Concepcion* elevates form, ignores substance, and defies this Court's directive that "like cases should generally be treated alike" under the FAA. *Epic*, 138 S. Ct. at 1623.

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[1] The Petition's Rule 29.6 Statement remains accurate.

Indeed, McArdle does not deny that the FAA would preempt a state law conditioning enforcement of arbitration agreements on inclusion of a provision permitting, at the claimant's request, joinder of five or ten similarly situated parties into a single arbitration proceeding. A public-injunction proceeding assessing the propriety of injunctive relief affecting 100,000 or 1,000,000 differently situated non-parties is much less individualized in any real-world sense. But to McArdle and the Ninth Circuit, that massive public-injunction proceeding is fully compatible with the individualized arbitration protected by the FAA, even though the proceeding with five parties is not.

McArdle takes a similar tack in downplaying the tremendous practical importance of the issue presented. Eight organizations representing a broad array of industries collectively filed five *amicus* briefs explaining the harmful consequences of allowing the *McGill* rule to stand, but McArdle barely mentions them.

He instead argues that the concerns expressed about the adverse effects of the *McGill* rule are insignificant because parties could agree to arbitrate public-injunction claims or carve them out for parallel proceedings in court. But the same was true in *Concepcion*: Under California's *Discover Bank* rule, parties could agree to class arbitration or to permit class actions to proceed in court. Yet this Court saw that as part of the problem, not a reason for denying review. So too here, each of the alternatives mandated by the regime McArdle advocates deprives the parties of the benefits of arbitration protected by the FAA.

The conflict between the decision below and this Court's FAA precedents—and the great importance of the issue—are clear. This Court should grant review.

A. The Decision Below Defies This Court's FAA Precedents.

California's insistence on the availability of a process for pursuing a public injunction is just as inconsistent with the FAA as the State's prior insistence on the availability of class-action proceedings. Pet. 14-20; see also Chamber Br. 19-22; American Bankers Br. 19-20.

McArdle responds that public-injunction claims should be treated differently than class actions for purposes of FAA preemption because (1) public injunctions do not require formal joinder of absent parties; (2) California describes the right to seek a public injunction as "substantive" not procedural; and (3) complex individualized claims are subject to arbitration.

These attempts to distinguish *Concepcion* are meritless.

1. McArdle insists that the FAA preempts only state-law rules that "would require multi-party or collective procedures." Opp. 20. For that reason, he asserts, the Ninth Circuit's preemption analysis does not depart from *Epic*'s holding that the FAA protects arbitration agreements "'providing for individualized *proceedings*.'" *Id.* at 19 (quoting *Epic*, 138 S. Ct. at 1619) (emphasis added by McArdle).

But the word "proceedings" cannot bear the weight McArdle places on it. He ignores that there is nothing "individualized" (*Epic*, 138 S. Ct. at 1619) about a public-injunction claim seeking relief for tens of thousands or millions of third parties *other than* the claimant (because public injunctions are solely for the benefit of third parties, see Pet. 5-6).

Could the FAA's protection for "individualized proceedings" be so formalistic that it preempts a state law requiring arbitration agreements to permit joinder in a single arbitration proceeding of up to five similar claims—but at the same time ignores the far more dramatic changes to an arbitral proceeding from a claim seeking wide-ranging injunctive relief for millions of third parties? Pet. 21; see also Chamber Br. 24.

Such a wooden reading of *Epic* ignores the Court's repeated warning that courts must guard against the "'great variety of devices and formulas'" infringing the FAA's protections, including being "alert to new devices and formulas that would achieve much the same result." *Epic*, 138 S. Ct. at 1623 (quoting *Concepcion*, 563 U.S. at 342). Requiring arbitration of a public-injunction claim, like a Rule 23(b)(2) class action, triggers the FAA's protections because it would cause "the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness, [to be] shorn away and arbitration * * * wind[ing] up looking like the litigation it was meant to displace." *Epic*, 138 S. Ct. at 1623.

McArdle also notes that adjudication of a public-injunction claim lacks preclusive effect on absent third parties. Opp. 21. But the claim's lack of preclusive effect says nothing about whether the proceeding is consistent with the individualized arbitration protected by the FAA.

To the extent it is relevant, the lack of preclusive effect "makes public-injunctions even *less* suited to arbitration than class actions" (CTIA Br. 6-7), because it permits different plaintiffs and their counsel to sub-

ject the arbitration agreement counter-party to multiple public injunction proceedings based on the same underlying conduct.

2. McArdle's assertion that the FAA has no preemptive effect with respect to state "substantive" rights (Opp. 20) misreads this Court's precedents.

For example, McArdle depicts this Court's statement that "States cannot require a *procedure* that is inconsistent with the FAA" as disavowing preemption of any state-law rules labeled as substantive. Opp. 20 (quoting *Concepcion*, 563 U.S. at 351) (emphasis is McArdle's). But *Concepcion* expressly rejected a substance/procedure distinction, reiterating that the FAA's policy favoring arbitration applies "notwithstanding *any state substantive or procedural* policies to the contrary." *Concepcion*, 563 U.S. at 346 (citation omitted).

McArdle is equally mistaken in invoking this Court's statement that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral forum." Opp. 13-14 (quoting *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

That "effective-vindication" exception to the enforcement of arbitration agreements applies at most to *federal* statutory rights, not to *state* ones—it is available only when "the FAA's mandate has been 'overridden by a contrary *congressional* command.'" *American Express Co.* v. *Italian Colors Restaurant*, 570 U.S. 228, 233 (2013) (emphasis added; citation omitted).

Indeed, even the dissent in *American Express*, which would have read the effective-vindication exception more broadly with respect to federal statutory claims, recognized that this exception does not apply to state-law claims: "a *state* law * * * could not possibly implicate the effective-vindication rule" because "[w]e have no earthly interest (quite the contrary) in vindicating [a state] law" that is inconsistent with the FAA. 570 U.S. at 252 (Kagan, J., dissenting).

McArdle is similarly mistaken in seeking refuge in the Court's observation in *Preston* v. *Ferrer*, 552 U.S. 346 (2008), that the plaintiff's arbitration agreement "relinquishe[d] no substantive rights the [California Talent Agencies Act] or other California law may accord him." *Id.* at 359. That comment merely described the nature of the question presented. See *ibid.* (the "petition presents precisely and only a question concerning the forum in which the parties' dispute will be heard"). The Court's decision—which predated the on-point holding in *American Express*—did not address whether the FAA requires the enforcement of arbitration agreements that waive certain state-law remedies, much less a remedy authorizing the claimant to seek relief for the benefit of third parties.[2]

Moreover, the cases on which McArdle relies all involve state-law remedies for a plaintiff's *own* individual claim. They give not the slightest hint that a

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[2] McArdle reads (Opp. 13) too much into *Booker* v. *Robert Half International, Inc.*, 413 F.3d 77 (D.C. Cir. 2005). In addition to pre-dating *American Express*, the D.C. Circuit's decision did not address whether the effective-vindication exception applies to state statutory claims, because the "parties [did] not dispute that the arbitration agreement's bar on punitive damages is unenforceable." *Id.* at 83. The sole issue on appeal was whether the concededly unenforceable provision was severable. *Id.* at 83-86.

State can avoid the FAA, and *Concepcion*, simply by declaring that individuals have an unwaivable "substantive statutory remedy" (Opp. 21) to seek relief on behalf of others.

This Court squarely rejected that contention in *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463 (2015). Rather than relying on the *Discover Bank* rule invalidated in *Concepcion*, the California Court of Appeal in that case deemed the class-action waiver unenforceable because of state laws giving plaintiffs "the right * * * to bring a class action for violations of that Act" (*id.* at 467 (citing Cal. Civ. Code § 1781(a))), and making that "right" unwaivable (*ibid.* (citing Cal. Civ. Code § 1751)). The Court found the statutory grant of a right to bring class claims irrelevant: "As far as those sections apply to class-arbitration waivers, they embody the *Discover Bank* rule." *Ibid.*

In short, whether characterized as "substantive" or "procedural," a rule conditioning arbitration on the ability to obtain relief for numerous third parties impermissibly "attack[s] (only) the individualized nature of the arbitration proceedings." *Epic*, 138 S. Ct. at 1622.

3. McArdle next observes that substantively complex antitrust, RICO, or securities claims are arbitrable despite requiring consideration of evidence relating to third parties and often involving high stakes. Opp. 22-24. But even in these factually complex one-on-one claims, the focus remains on the *individual's* claim. By contrast, McArdle concedes (Opp. 4) that the sole purpose of a public injunction is to benefit *third parties*—indeed, the "general public" as a whole. See Pet. 5-6.

This fundamental shift in the focus of the proceeding from the claimant to third parties is what interferes with the "traditional individualized arbitration" protected by the FAA—in precisely the same manner as the shift from bilateral to class or collective arbitration. *Epic*, 138 S. Ct. at 1623; see Pet. 14-20.[3]

B. The Issue Is Tremendously Important.

Just as McArdle cannot distinguish *Concepcion* on the merits, his attempts to downplay the importance of the issue consist primarily of arguments considered and rejected in *Concepcion*.

1. As *amici* detail, *McGill* and *Blair* will impact tens (or hundreds) of millions of consumer arbitration agreements in California across a wide variety of industries. Chamber Br. 4; CTIA Br. 2, 8-9; American Bankers Br. 2, 12; DRI Br. 4, 19-20.

Attempting to downplay this dramatic effect, McArdle contends that companies can simply "comply with *McGill*" by revising their arbitration agreements, either to "allow[] arbitration of public-injunction claims" or to carve out "such claims" for "judicial proceedings." Opp. 26.

But the same was true in *Concepcion*. As this Court observed, the *Discover Bank* rule did "not *require* classwide arbitration" because parties could agree instead to litigate class actions in court. 563 U.S. at 346, 351. The Court nonetheless held that such a result "is not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required

[3] McArdle's discussion of private injunctive relief (Opp. 23) ignores that the assessment and continuing supervision of a public injunction is far more complex. See Pet. 18.

by state law." *Id.* at 351. And in *Epic*, the Court reiterated that even though "in recent years some parties have sometimes chosen to arbitrate on a classwide basis," that fact does nothing to diminish "*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." 138 S. Ct. at 1623.

Nor is it any answer to the disruption caused by *McGill* and *Blair* that companies can carve out public-injunction claims from arbitration, as some companies have done by adding "severability provisions" to their arbitration clauses. Opp. 32. That is simply a stopgap measure to keep arbitration agreements enforceable until this Court resolves the issue—not a preference for excluding these claims from arbitration. Bifurcated proceedings—with either class-action or public-injunction claims proceeding in court and remaining claims proceeding in arbitration—impermissibly frustrate Congress's purpose "to promote arbitration." *Concepcion*, 563 U.S. at 345.

Contrary to McArdle's suggestion that it is difficult to "satisfy *McGill*'s detailed criteria" defining a public injunction (Opp. 28), it is easy to tack on a public-injunction claim in a consumer dispute. See DRI Br. 9-10; Chamber Br. 6-7. Plaintiffs have done so with increasing frequency in the wake of *Blair* and the decision below. Pet. 25. Indeed, in the short time since the petition was filed, plaintiffs have filed at least 21 additional complaints expressly alleging that they seek a public injunction.

Consequently, in virtually every consumer case, a company faces judicial litigation of a public-injunction claim—or an expensive and time-consuming fight

over whether the complaint truly seeks a public injunction—even if the parties arbitrate the damages claims. The company thus must endure the very burdens, expenses, and delays of judicial dispute-resolution that arbitration was intended to avoid—such as unrestricted discovery, plenary motion practice, and potentially multiple rounds of appeals. See *Concepcion*, 563 U.S. at 348.[4]

A regime mandating bifurcated proceedings as the alternative to arbitrating public-injunction claims thus deprives companies of the benefits of arbitration. Shorn of those benefits, companies lack the incentive to continue the heavy subsidies of individual arbitration that make it so accessible for consumers. Chamber Br. 8-9 (discussing subsidies for "arbitration costs" and "special inducements" for "consumers who arbitrate" available under consumer arbitration clauses); CTIA Br. 10-11; DRI Br. 19-20; Pet. 29-30.

In other words, what States cannot do directly—impede individual arbitration of consumer disputes—the *McGill* rule does indirectly by making consumer arbitration agreements cost prohibitive. Here, as in *Concepcion*, a regime in which parties must choose between arbitrating public-injunction claims and resolving those claims 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." 563 U.S. at 351.

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[4] There is no guarantee that, as McArdle assumes (Opp. 27), litigation of a public-injunction claim in court would proceed only if plaintiffs prevail in arbitration. The decision McArdle cites notes that whether to impose a stay of court proceedings is left to the court's discretion and was a "close call." *Eiess* v. *USAA Fed. Savings Bank*, 404 F. Supp. 3d 1240, 1260-61 (N.D. Cal. 2019).

2. *McGill* and *Blair* extend to the consumer context California's and the Ninth Circuit's misguided approach to FAA preemption of representative PAGA claims. Pet. 26-29; see also Chamber Br. 11-14; CTIA Br. 18-20. McArdle admits that "*Blair*'s preemption analysis is generally similar" to the Ninth Circuit's FAA analysis in *Sakkab* v. *Luxottica Retail North America*, 803 F.3d 425 (9th Cir. 2015). Opp. 8 n.1.

That admission further confirms the importance of the question presented—acknowledging that the Court's resolution of the issue here will provide important guidance regarding the permissibility under the FAA of California's rule requiring arbitration agreements to allow assertion of PAGA claims on behalf of thousands, or even millions, of employees. Given the frequency of such claims (Pet. 28), the Court's ruling will therefore affect not just consumer arbitration agreements but also millions of arbitration agreements in the employment context.

3. McArdle notes the absence of a "conflict among the lower courts." Opp. 2. But this Court has not hesitated to grant review in other arbitration cases in the absence of a conflict. CTIA Br. 14-17 (collecting examples).

Indeed, in *Concepcion* itself the Court did not indicate that it granted review in order to resolve a circuit split. See 563 U.S. at 338. It is far more likely that the Court granted certiorari because it was persuaded that AT&T's arbitration provision and others like it were "fully enforceable under the law of most States" but not in California, resulting in "the kind of Balkanization that Congress plainly intended to overcome when it enacted the FAA." Reply Brief for the Petitioner 10, *Concepcion*, 2010 WL 1787380 (U.S. May 3, 2010).

And McArdle does not dispute that the effects of *McGill* and *Blair* cannot be limited to California. As *amici* warn, the ripple effects of "*McGill* and *Blair* extend[] nationwide," because, as a practical matter, the rules in California, the Nation's most populous State, affect companies' standardized practices. Chamber Br. 10-11; see also CTIA Br. 17; DRI Br. 20-22.

Moreover, the likelihood of a conflict developing is diminished substantially by the "forum shopping" encouraged by *Blair* and the decision below. DRI Br. 21. Companies doing business nationwide, like AT&T, will inevitably find themselves the targets of consumer lawsuits in California whenever plaintiffs' counsel can find a single California plaintiff to assert a public-injunction claim. *Ibid.*; see American Bankers Br. 7 & n.4 (noting the financial incentives to bring public-injunction claims).

Finally, McArdle observes (Opp. 2) that the California Supreme Court and the court below are unanimous in their conclusion that the FAA does not preempt the *McGill* rule. That is no obstacle to review; it is yet another similarity with *Concepcion*, in which the Ninth Circuit and California Supreme Court were united in their (erroneous) view of FAA preemption. See 584 F.3d 849 (2009); *Discover Bank*, 113 P.3d 1100 (2005).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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