No. 20-1570

IN THE

Supreme Court of the United States

HRB TAX GROUP, INC., *ET AL.*,

Petitioners,

v.

DEREK SNARR,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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July 2021

QUESTION PRESENTED

Whether the Federal Arbitration Act preempts California decisional law applying general principles of contract law to hold that, when a party has a substantive statutory right to seek "public injunctive relief"—that is, injunctive relief obtained by an individual that benefits the public generally—contractual agreements, including arbitration agreements, that purport to forbid the plaintiff from seeking and obtaining such relief in any forum are invalid.

RULE 14.1(b)(iii) STATEMENT

In addition to the proceedings listed in the petition, the following proceedings are directly related to this case:

- *Snarr v. HRB Tax Group, et al.*, No. 20-16001 (9th Cir., appeal docketed June 11, 2021)

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INTRODUCTION

Petitioners HRB Tax Group and HRB Digital, affiliates of H&R Block, participated in the IRS's "Free File" program to provide taxpayers with free on-line filing. When taxpayers were lured to HRB's website by the promise of free filing, HRB steered them to fee-for-service e-filing products. Respondent Derek Snarr filed this action under California's Consumer Legal Remedies Act (CLRA), False Advertising Law (FAL), and Unfair Competition Law (UCL) seeking injunctive relief against HRB's bait-and-switch practices.

Longstanding California contract-law principles preclude waiver of rights under laws that protect the public. Accordingly, California's Supreme Court held in *McGill v. Citibank, N.A.*, 393 P.3d 85 (2017), that an individual's right to bring claims for "public injunctive relief" may not be prospectively waived by any contract, including an arbitration agreement. An agreement that precludes a consumer from requesting such relief *in any forum at all*—even in arbitration—is therefore unenforceable to that extent. In 2019, the Ninth Circuit held in *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819, that the Federal Arbitration Act (FAA) does not preempt the *McGill* rule. Defendants in two companion cases to *Blair*—*McArdle v. AT&T Mobility LLC*, 772 F. App'x 575 (9th Cir. 2019), and *Tillage v. Comcast Corp.*, 772 F. App'x 569 (9th Cir. 2019)—filed petitions for certiorari contending that *Blair*'s holding was erroneous. This Court denied the petitions. 140 S. Ct. 2827 (2020).

In this case, HRB moved to compel arbitration of Snarr's claims, invoking an arbitration agreement that, as HRB acknowledged, purported to bar public

injunctions. The district court held that *Blair* precluded enforcement of the public-injunction waiver.

HRB appealed, arguing that *Blair* was wrongly decided but citing no intervening authority that would allow the court of appeals to disregard its precedent. The Ninth Circuit applied *Blair* and ruled that the waiver of public injunctive relief was unenforceable, and that the arbitration agreement's severability provision required that the entirety of Snarr's CLRA, FAL, and UCL claims be adjudicated in court. HRB also argued for the first time on appeal that the public-injunction claims were moot because HRB no longer participated in the Free File program. The Ninth Circuit held that the mootness argument raised issues about the voluntary-cessation doctrine that could not be resolved on the existing factual record, and it left the issue for the district court to consider.

HRB now seeks review of the question this Court declined to consider just last year in *McArdle* and *Tillage*. HRB relies principally on repetition of the *McArdle* petition's argument that *Blair* was wrongly decided—an argument that remains unconvincing for the reasons explained in the briefs in opposition in *McArdle* and *Tillage*: This Court's precedents do not require enforcement of an agreement that, in violation of state law, waives an individual's right to seek relief.

HRB claims the issue now merits review because of a "direct disagreement between lower courts over whether *McGill* is preempted by the FAA." Pet. 3. It points, however, to only a single *district court* decision that is not binding precedent anywhere, even in that district. A conflict between a federal court of appeals and a single district court does not merit review by this Court. While HRB asserts that it is unlikely that

a court of appeals will have an opportunity to review a district court decision that disagrees with *Blair* and compels arbitration, it ignores that such decisions are regularly appealed after arbitration has concluded and the district court has ruled on an application to confirm or vacate the award. Review by this Court of whether *Blair* was correctly decided is thus no more important now than it was last year.

In addition, this case's procedural posture makes it an exceptionally poor choice for review. HRB fails to mention that the lower courts are still considering its efforts to compel arbitration. After the Ninth Circuit's decision, HRB filed *another* motion to compel arbitration, citing a *new* arbitration agreement that it claimed Snarr signed while HRB's appeal was pending. HRB claimed that the new agreement requires immediate arbitration of Snarr's statutory claims and leaves only the availability of a public injunction for later judicial resolution. The district court denied the new motion because HRB procured the alleged new agreement through litigation misconduct. That ruling is limited to the specific claims in this case, and HRB does not argue that *McGill* and *Blair* will prevent HRB from enforcing its new agreement in the future. Moreover, HRB has again appealed the district court's ruling and continues to seek to apply the new arbitration language even to this case. Meanwhile, HRB moved to dismiss Snarr's request for an injunction as moot, and the district court is considering that motion. Thus, the lower courts have not definitively resolved what arbitration agreement governs, whether arbitration will be required, and whether the claim for an injunction is a live one. This Court should not address this case while those issues remain unresolved.

STATEMENT

A. The *McGill* Rule

California's CLRA, Cal. Civ. Code §§ 1750 *et seq.*, together with the UCL, Cal. Bus. & Prof. Code §§ 17200 *et seq.*, and FAL, *id.* § 17500, provide substantive rights and remedies to protect California consumers from unfair and deceptive business practices. Section 1751 of the CLRA, enacted in 1970, provides that any agreement purporting to waive its protections is void and unenforceable. Another California statute, enacted in 1872, prohibits private contracts that waive rights that exist to protect the public. Cal. Civ. Code § 3513.

Among the substantive rights that California's consumer-protection laws afford is the entitlement to obtain an injunction for the benefit of the public against unlawful acts or practices such as false advertising. Unlike private injunctive relief, which is principally intended to benefit individual plaintiffs or discrete classes, public injunctive relief is intended primarily to benefit the general public and only incidentally to benefit individual plaintiffs as members of the public. *See McGill*, 393 P.3d at 89. A plaintiff who has suffered a personal injury-in-fact may seek a public injunction in purely bilateral proceedings against the defendant; a class or representative action is not required. *Id.* at 92–93.

In a pair of decisions preceding this Court's decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), the California Supreme Court held that agreements requiring parties to arbitrate claims for public injunctions were unenforceable. *See Broughton v. Cigna Healthplans*, 988 P.2d 67 (1999); *Cruz v. PacifiCare Health Systems, Inc.*, 66 P.3d 1157 (2003).

Following *Concepcion,* the Ninth Circuit held that the FAA preempted the *Broughton-Cruz* rule because the rule "prohibit[ed] outright the arbitration of a particular type of claim." *Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928, 932 (2013) (quoting *Concepcion*, 563 U.S. at 341).

Later, in *McGill*, the California Supreme Court considered a contract that, instead of requiring arbitration of public-injunction claims, prohibited them altogether. In a unanimous opinion, the court held that the case did not present the *Broughton-Cruz* issue whether an agreement to arbitrate public-injunction claims is enforceable, because the parties had, as the FAA permits, excluded such claims from arbitration. *See McGill*, 393 P.3d at 90, 97. Instead, the issue presented was whether the agreement was "valid and enforceable insofar as it purports to waive McGill's right to seek public injunctive relief *in any forum*." *Id.* at 90.

McGill held that because California contract law prohibits private agreements from waiving statutory rights that protect the public, an agreement that prospectively waives the right to seek public injunctions is "invalid and unenforceable." *Id.* at 93. *McGill* further held that the FAA does not require enforcement of public-injunction waivers. The court invoked this Court's repeated statements that the FAA requires courts to "place arbitration agreements on an equal footing with other contracts" and thus permits them "to be declared unenforceable upon such grounds as exist at law and equity for the revocation of any contract." *Id.* at 94 (quoting *Concepcion*, 563 U.S. at 339). The rule against waivers of substantive rights created for public protection, *McGill* explained, is a generally applicable principle of California contract law that applies to "*any* contract—even a contract that has no

arbitration provision." *Id*. *McGill* also pointed out that this Court has consistently stated that the arbitration provisions that the FAA enforces do not encompass waivers of substantive statutory rights. *See id*. at 95.

McGill rejected the argument that applying general California contract-law principles to invalidate a waiver of the right to obtain public injunctive relief would "disfavor[] arbitration" or "interfere[] with fundamental attributes of arbitration." *Id*. at 96. The court reasoned that waiver of substantive statutory remedies is not a fundamental attribute of arbitration. *Id*. at 97. Moreover, it pointed out that its holding would not require parties to arbitrate claims for public injunctions. Rather, the parties could exclude those claims from arbitration and require arbitration of other issues, including liability, leaving the issue of public injunctive remedies for later litigation in court if the plaintiff showed entitlement to relief. *Id*. at 97.

B. The *Blair* decision

In *Blair*, the Ninth Circuit considered an appeal from a district court's ruling that a provision in an arbitration clause waiving the right to public injunctive relief was unenforceable under *McGill*. A unanimous panel held that the FAA does not preempt the *McGill* rule. *See* 928 F.3d 819.

The court began its preemption analysis by recognizing that the *McGill* rule "is a generally applicable contract defense" that governs both arbitration and non-arbitration agreements. *Id.* at 827. Unlike the *Broughton-Cruz* rule that the Ninth Circuit held preempted in *Ferguson*, the *McGill* rule "shows no hostility to, and does not prohibit, the arbitration of public injunctions," but "merely prohibits the waiver

of the right to pursue public injunctive relief in any forum." *Id.*

Blair observed that the *McGill* rule was unlike the rule that this Court held preempted in *Kindred Nursing Centers Limited Partnership v. Clark*, 137 S. Ct. 1421 (2017), which "hing[ed] on the primary characteristic of an arbitration agreement—namely a waiver of the right to go to court and receive a jury trial." 928 F.3d at 827 (quoting *Kindred*, 137 S. Ct. at 1427). The *McGill* rule does not turn on any attribute inherent to arbitration. And, unlike in *Kindred*, the underlying contract-law principle has repeatedly been applied to contracts other than arbitration agreements: It "derives from a general and long-standing prohibition on the private contractual waiver of public rights" that "California courts have repeatedly invoked … to invalidate waivers unrelated to arbitration." *Id.* (citing cases).

Recognizing this Court's holdings that even generally applicable contract-law principles may be preempted if they present an obstacle to accomplishing the FAA's objectives, *id.* at 828 (citing *Concepcion*, 563 U.S. at 341), *Blair* concluded that *McGill* does not deprive parties of arbitration's benefits. *Blair* explained that, because public injunctions may be obtained in wholly bilateral proceedings, *McGill* does not require the procedural formalities of multiparty or collective proceedings if parties choose to arbitrate claims for public injunctive relief rather than leave them for judicial resolution. *See id.* Moreover, *McGill*'s non-waiver principle does not require parties to change arbitral procedural rules such as those involving discovery. *Id.* at 830. And issuing or implementing public injunctions would not exceed the competency of arbitrators or involve "procedural complexities not

already common to the arbitration of private injunctions." *Id.*

Blair acknowledged that claims for public injunctive relief may involve some "substantive … complexity," but held that "[a] state-law rule that preserves the right to pursue a substantively complex claim in arbitration without mandating procedural complexity does not frustrate the FAA's objectives." *Id.* at 829. Similarly, the court noted that some claims for public injunctions—like other arbitrable claims including antitrust, civil RICO, and securities claims—may involve "high stakes" for the defendant. *Id.* at 830. However, absent "interfere[nce] with the informal, bilateral nature of traditional consumer arbitration," the court concluded that "high stakes alone do not warrant FAA preemption" of a rule aimed only at preserving substantive rights. *Id.*

Finally, *Blair* emphasized that parties are free to write severance clauses that allow enforcement of the remainder of their arbitration agreements while precluding only enforcement of invalid provisions. The defendant in *Blair*, however, had written its clause to require judicial resolution of an entire claim if the agreement was unenforceable in whole or in part as to that claim. *Id.* at 831.

Simultaneously with the published opinion in *Blair*, the same panel released unpublished decisions in two other cases that were argued together with *Blair* and disposed of based on its precedential holding. *See McArdle*, 772 F. Appx. 575; *Tillage*, 772 F. Appx. 569. Although the defendant in *Blair* did not seek further review, the defendants in *McArdle* and *Tillage* petitioned for rehearing en banc. The court denied rehearing with no judge requesting a vote on en

banc review. Both defendants filed petitions for certiorari, which this Court denied in June 2020. 140 S. Ct. 2827 (2020).

C. This case

Derek Snarr, together with a co-plaintiff who is no longer a party, filed this action in the U.S. District Court for the Northern District of California in June 2019. When Snarr had sought to use the Free File service to file his 2018 tax return, he was steered to an HRB site that told him—falsely—that he was not eligible for free filing and charged him fees for filing his return. Snarr's lawsuit invoked the CLRA, UCL and FAL and sought, among other relief, a public injunction against HRB's practices that mislead taxpayers into thinking that they are accessing the Free File program when they are in fact using a service for which they will be charged a fee. Snarr also sought to represent a class of similarly situated consumers.

Although Snarr had opted out of HRB's arbitration agreement when filing his 2018 return, HRB moved to compel arbitration, invoking an arbitration agreement it claimed Snarr signed in 2018 when filing his 2017 tax returns. Snarr argued that the prior arbitration agreement did not, by its terms, apply to the separate filing transactions in 2019. Citing *McGill* and *Blair*, he also contended that the agreement HRB invoked was unenforceable because it waived his right to obtain public injunctive relief by providing that "any relief must be individualized to you and shall not affect any other client." Pet. App. 27a.

HRB conceded that the agreement included a public-injunction waiver within the meaning of *McGill* and *Blair*, but it argued that *Blair* was wrongly decided and that Snarr was not really seeking a public

injunction anyway. The district court denied HRB's motion, ruling that it was bound by *Blair* and that the injunction Snarr requested was aimed primarily at protecting the general public rather than the individual plaintiffs or the putative class. Pet. App. 16a.

HRB appealed the denial of its motion to compel arbitration, raising the same arguments about *Blair* and *McGill* that it had asserted in the district court. A Ninth Circuit panel unanimously rejected those arguments in an unpublished opinion, holding that it was bound by the holding of *Blair*, *id.* at 5a, and that Snarr sought public injunctive relief within the meaning of *McGill* because he sought to "enjoin[] deceptive practices directed at the public," *id.* at 3a.

HRB also contended that even under *McGill*, its agreement's severability clause required arbitration of all aspects of Snarr's CLRA, UCL, and FAL claims, other than whether a public injunction should issue. The clause, however, states that if "applicable law precludes enforcement of any of this paragraph's limitations as to a particular claim for relief, then that claim for relief (and only that claim for relief) must remain in court and be severed from any arbitration." *Id.* at 27a. *Blair* had construed "claim for relief" in a similar severability clause to mean the entirety of a cause of action. *See* 928 F.3d at 83–32. The panel held that *Blair*'s construction of "very similar severability language" required reading HRB's severability clause to provide that "the entire claim … must be severed from arbitration, rather than just the public injunctive remedy." Pet. App. 5a.

Finally, HRB argued that Snarr's request for a public injunction (but not for other potential remedies) was moot because it had stopped participating in the

Free File program. Noting that the issue did not go to Article III jurisdiction over the *case*, the court exercised discretion not to address it because claims of voluntary cessation of wrongful conduct are "fact-intensive," and there was "no factual record" on the point. *Id*. at 6a. The court also observed that even if HRB had ceased participation in the IRS program, "some part of the public injunction sought by Snarr may still be available." *Id*. The court left the argument for later consideration by the district court.

Back in the district court, HRB then filed a renewed motion to compel arbitration. It contended that, while the case was on appeal, Snarr had agreed to a new arbitration agreement when he signed on to its site in July 2020 to retrieve copies of tax returns needed for discovery responses. The purported new agreement had different severability language, providing: "If a court decides that applicable law precludes enforcement of any of this paragraph's limitations as to a particular claim or any particular remedy for a claim (such as a request for public injunctive relief), then that particular claim or particular remedy (and only that particular claim or particular remedy) must remain in court and be severed from any arbitration." Dist. Ct. D.E. 140, at 8. HRB contended that this language, unlike the former language, required arbitration of all aspects of Snarr's statutory claims except the request for a public injunction. Separately, HRB moved to dismiss the public-injunction claim as moot because of HRB's claimed withdrawal from the Free File program.

As to the claimed new arbitration agreement, Snarr argued that HRB's delay in invoking it waived reliance on it, that it was unenforceable on numerous state-law contract grounds, and that HRB had

obtained it through improper communications with a represented party during litigation. Snarr cross-moved for an order preventing HRB from engaging in such improper communications with him and all members of the prospective class. As to mootness, Snarr argued that his public-injunction request presents a live controversy because HRB still engages in deceptive marketing and because HRB had not carried its heavy burden of showing that its claimed voluntary cessation mooted the claim.

On May 13, 2021, the district court rejected HRB's renewed motion to compel on the ground that the purported new agreement was unenforceable as to the claims in the case because it was an improper attempt to interfere with the rights of Snarr and other putative class members during litigation. The court noted that HRB had been "forced to sign the Revised Agreement in order to respond to [HRB's] discovery." *Id*. at 14. On June 1, 2021, HRB appealed the denial of its renewed motion to compel. Briefing in the appeal has not yet begun.

Meanwhile, HRB's mootness motion was argued to the district court on June 21, 2021. The court has not yet decided the motion.

REASONS FOR DENYING THE WRIT

I. A single district court's disagreement with *Blair* does not justify review by this Court.

HRB acknowledges that this Court declined to address the exact question its petition presents just last year in *McArdle* and *Tillage*. HRB does not contend that the petitions in those cases overlooked any decisional conflict among courts of appeals or state supreme courts. And HRB does not contend that any

conflict among the circuits has arisen since last year. HRB's merits argument that *Blair* was wrongly decided under this Court's FAA precedents—which constitutes the bulk of its case for review by this Court—is virtually identical to that presented in the petition in *McArdle* and cites no new decisions of this Court not discussed in that petition.

HRB aseerts, however, that the arguments that did not merit review last year do so now because a single district court decision has now held, contrary to *Blair*, that the FAA preempts California's *McGill* rule. *See Swanson v. H&R Block, Inc.*, 475 F. Supp. 3d 967 (W.D. Mo. 2020). One district court's disagreement with a precedent of a court of appeals, however, does not necessitate review by this Court. Such a disagreement can be addressed by the court of appeals for the circuit where the district court is located. Although the district court in *Swanson* predicted that the Eighth Circuit might disagree with *Blair*, *see id*. at 978, unless and until the Eighth Circuit addresses the issue, it is premature to speculate that its decision would create an inter-circuit conflict. Meanwhile, the district court's ruling does not subject persons in different jurisdictions to differing legal regimes because *Swanson* is not binding precedent, not even within the district that issued it. *See Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011). For such reasons, this Court's rules specify that conflicts between decisions of federal courts of appeals and/or state courts of last resort—which only this Court can resolve—are a ground for issuance of a writ of certiorari. *See* S. Ct. R. 10. The Court's rules and practices do not call for resolution of disagreements between a trial court and a court of appeals.

HRB argues that this Court should not await a circuit conflict because decisions of district courts that disagree with *Blair* will likely not reach the courts of appeals, given that interlocutory orders compelling arbitration are not appealable under 9 U.S.C. § 16. HRB overlooks that the FAA bars only *immediate* appeal of *interlocutory* orders compelling arbitration. Such orders are routinely reviewed by courts of appeals after arbitration has concluded and the district court has entered an order confirming or vacating the award, or when the action in which arbitration was compelled is otherwise terminated by a final order. See 15B Cooper, *Federal Practice & Procedure (Wright & Miller)* § 3914.17 (2d ed. updated 2021) ("An order compelling arbitration becomes reviewable on appeal from a subsequent final judgment."); *Kong v. Allied Prof. Ins. Co.*, 750 F.3d 1295, 1301 (11th Cir. 2014); *Sanford v. MemberWorks, Inc.*, 483 F.3d 956, 962 (9th Cir. 2007); *F.C. Schaffer & Assocs. v. Demech Contractors, Ltd.*, 101 F.3d 40, 43 (5th Cir. 1996); *see*, *e.g.*, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) (reviewing order compelling arbitration following confirmation of award); *see also Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000) (holding order compelling arbitration appealable when action is dismissed). HRB's assertion that there will be no occasion for a circuit split to emerge—or to be obviated by correction of district-court errors—ignores these black-letter principles of appellate jurisdiction.

II. This case is an unsuitable vehicle for addressing the issue.

While *Swanson* does not make this case a more worthy candidate for review than were *Tillage* or *McArdle*, the case's unusual posture makes it a *worse*

candidate. The lower courts have not completed their consideration of key issues, including: what arbitration agreement governs the parties' obligations; whether and to what extent Snarr's claims would have to be arbitrated if the Ninth Circuit were to accept HRB's argument that the district court erred in concluding that its purported 2020 arbitration agreement is the unenforceable product of litigation misconduct; and whether Snarr's public-injunction claim continues to present a live case or controversy. Moreover, no court has yet addressed Snarr's argument that he opted out of the only arbitration agreement that could apply to this case—an argument that, if accepted, would make it unnecessary to decide HRB's question presented.

HRB continues to argue below that Snarr is subject to a new arbitration agreement entered into while this appeal was pending. And it asserts that, even under *McGill* and *Blair*, that agreement requires Snarr to arbitrate all other aspects of his CLRA, FAL and UCL claims before a court may decide whether to issue a public injunction. Those issues are pending, but not yet briefed, in the Ninth Circuit. Meanwhile, HRB's motion to dismiss Snarr's public-injunction request as moot awaits decision by the district court.

Resolution of either issue in HRB's favor, or both in combination, could reduce *McGill*'s impact on this case or obviate the need to address it. Snarr believes those results are unlikely, but HRB considers its position meritorious enough to justify motions practice and a new appeal. And even assuming the lower courts ultimately rule against HRB on both issues, resolution of those questions would provide a clearer factual and legal context for evaluating whether HRB's challenge to *Blair* and *McGill* merits review.

For now, as HRB continues to dispute issues that bear on *McGill*'s consequences for this case and whether there is a live dispute over its applicability, HRB's request that this Court consider wading into the issue is premature.

III. *Blair* was correctly decided.

A. This Court's decisions do not permit arbitration agreements to waive substantive claims.

1. *Blair* and *McGill* are fully consistent with this Court's decisions. This Court has never held that the FAA requires enforcement of a waiver of a substantive claim, and HRB does not suggest otherwise. This Court's decisions enforcing arbitration provisions repeatedly emphasize that arbitration involves a choice of forum, not a waiver of claims: "By 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, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *accord EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295, n.10 (2002); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 229–30 (1987). An agreement to arbitrate is not "a prospective waiver of the substantive right." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 265 (2009). Indeed, an arbitration clause containing "a prospective waiver of a party's right to pursue statutory remedies" would be "against public policy." *Mitsubishi*, 473 U.S. at 637, n.19.

In *American Express Co. v. Italian Colors Restaurant*, this Court held that a class-action ban in an arbitration provision was enforceable even though its *practical* effects might make particular claims too costly for the plaintiffs; at the same time, the Court reiterated that the FAA does not require enforcement of arbitration provisions that expressly *waive* statutory claims and remedies. 570 U.S. 228, 236–39 (2013). The Court explained that the principle that an arbitration provision may not foreclose assertion of substantive claims "finds its origin in the desire to prevent 'prospective waiver of a party's *right to pursue* statutory remedies.'" *Id.* at 236 (quoting *Mitsubishi*, 473 U.S. at 637 n.19). The Court added: "That [principle] would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights." *Id*. Similarly, courts addressing arbitration provisions in other contexts have held that the FAA does not require enforcement of waivers of substantive claims for relief. *See*, *e.g.*, *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 83 (D.C. Cir. 2005) (Roberts, J.) (holding an arbitration provision's prohibition on attorney's fees to be invalid and unenforceable, but severable).

The Court's decisions reflect the language of section 2 of the FAA, which makes an agreement to "settle by arbitration a controversy" valid, irrevocable, and enforceable. 9 U.S.C. § 2. The FAA thus provides for enforcement of an agreement "to arbitrate," *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*,489 U.S. 468, 474 (1989), and "withdr[aws] the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration," *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). Section 2, however,

says nothing about the enforcement of an agreement that does *not* provide for arbitration of a substantive claim, but instead purports to waive the claim altogether. Nothing in section 2 withdraws the states' power to require some forum for the presentation of claims that parties have *not* agreed to resolve by arbitration.[1]

The *McGill* rule does not implicate section 2 as this Court has construed it because it does not render unenforceable an agreement to arbitrate a controversy over the availability of public injunctive relief. It also does not prevent enforcement of agreements to arbitrate matters *other* than the availability of public injunctive relief. And it does not prevent arbitration over such matters from proceeding in accordance with the parties' agreement, as the FAA requires. *See Volt*, 489 U.S. at 475. Rather, the rule *honors* the parties' decision to exclude the availability of public injunctive relief from the scope of their arbitration.

The only agreements that *McGill* holds unenforceable are those that waive *altogether* the parties' right to obtain public injunctions *in some forum*. Such agreements are not within section 2's enforcement mandate to begin with because they are not contractual provisions requiring that a matter be settled by arbitration. Nor are they transformed into arbitration agreements when embedded in sections of contracts that otherwise provide for arbitration. This Court's

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[1] For this reason, the principle that the FAA does not require enforcement of agreements *forbidding* assertion of claims applies equally to state and federal claims. Indeed, in *Preston v. Ferrer*, this Court held that an arbitration provision was enforceable in part because the signatory "relinquishe[d] no substantive rights … California law may accord him." 552 U.S. 346, 359 (2008).

FAA jurisprudence establishes that the enforcement of an agreement to arbitrate is an entirely separate matter from the enforcement of a contract's substantive terms. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402 (1967) ("[E]xcept where the parties otherwise intend[,] arbitration clauses as a matter of federal law are 'separable' from the contracts in which they are embedded."). Only where, as here, a contract's severability provisions require other issues to be resolved by a court if the waiver of public injunctive remedies is unenforceable does the *McGill* rule have the indirect consequence of preventing arbitration of matters the parties otherwise agreed to arbitrate. And even that consequence results from *enforcing* the terms of the agreement to arbitrate, not denying enforcement.

2. *Blair* and *McGill* are also consistent with this Court's repeated recognition that section 2 of the FAA makes "arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint*, 388 U.S. at 404 n.12. By providing that arbitration provisions "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, the FAA "establishes an equal-treatment principle: A court may invalidate an arbitration agreement based on 'generally applicable contract defenses' like fraud or unconscionability, but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Kindred*, 137 S. Ct. at 1426 (quoting *Concepcion*, 563 U.S. at 339); *accord Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018).

The Court has repeatedly recognized that generally applicable state-law defenses to "[t]he *validity* of

a written agreement to arbitrate (whether it is legally binding, as opposed to whether it was in fact agreed to—including, of course, whether it was void for unconscionability)" are preserved by section 2's saving clause. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 69 n.1 (2011); *see also*, *e.g.*, *Epic*, 138 S. Ct. at 1622; *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006). Thus, "the text of § 2 declares that state law may be applied '*if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.'" *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686–87 (1996) (quoting *Perry v. Thomas*, 482 U.S. 483, 492–93 n.9 (1987)); *accord Arthur Andersen LLP v. Carlisle*, 556 U.S. 630–31 (2009). "States may regulate contracts, including arbitration clauses, under general contact law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.'" *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) (quoting 9 U.S.C. § 2).

Blair and *McGill* conscientiously apply these precedents, and their results are fully consistent with this Court's insistence that state laws "place[] arbitration contracts 'on equal footing with all other contracts.'" *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 54 (2015) (quoting *Buckeye*, 546 U.S. at 443). As *Blair* and *McGill* explain, California law neither discriminates against arbitration "on its face" nor does so "covertly." *Kindred*, 137 S. Ct. at 1426. Rather, California has for more than a century applied its general prohibition against private agreements that waive public rights "to invalidate waivers unrelated to arbitration." *Blair*, 928 F.3d at 827–28 (citing cases decided from 1896 to 2002). The California contract-law principle at issue is

not one applicable only "to arbitration agreements and black swans"; it "in fact appl[ies] generally, rather than singl[ing] out arbitration." *Kindred*, 137 S. Ct. at 1428 & n.2. Indeed, although HRB quotes a dissenting Ninth Circuit judge's criticism of the circuit's application of the FAA's saving clause in a different context, Pet. 4, 26–27, it does *not* argue that the court erred in holding that the *McGill* rule is a generally applicable contract defense within the meaning of the clause.

B. The *McGill* rule is consistent with the FAA's purposes and objectives.

HRB asserts that the FAA impliedly preempts the *McGill* rule because, in HRB's view, the rule is incompatible with the individualized proceedings characteristic of arbitration and thus interferes with the achievement of the FAA's purposes and objectives. According to HRB, the court of appeals wrongly "treated *Concepcion* as preempting only state-law rules that impose procedures exactly equivalent to class arbitration." Pet. 20. The court of appeals, however, did no such thing. In fact, both *Blair* and *McGill* recognized that, under *Concepcion*, even a generally applicable state-law contract doctrine "is nonetheless preempted by the FAA if it 'stand[s] as an obstacle to the accomplishment of the FAA's objectives.'" *Blair*, 928 F.3d at 828 (quoting *Concepcion*, 563 U.S. at 341); *see McGill*, 393 P.3d at 96–97. *Blair* further acknowledged that the imposition of procedures incompatible with the bilateral nature of arbitration would create such an obstacle. 928 F.3d at 829.

HRB's contrary argument reflects its mistaken view that the FAA's command that arbitration provisions be enforced extends beyond "terms providing for individualized *proceedings*," *Epic*, 138 S. Ct. at 1619

(emphasis added), and imposes a check on the substantive rights that may be at stake in such proceedings. But the implied preemptive effect of the FAA, as this Court has construed it, is more limited: "States cannot require a *procedure* that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Concepcion*, 563 U.S. at 351 (emphasis added). Thus, the court of appeals was correct to focus on whether public injunctive relief would require multi-party or collective procedures or other procedural formalities incompatible with individualized arbitration, not on whether the *substance* of a claim for such relief may involve consideration of matters beyond the individual circumstances of the plaintiff.

As *Blair* explains, the contention that the *McGill* rule is inconsistent with the individualized nature of arbitration *procedures* and the advantages Congress sought to achieve by allowing parties to choose such procedures is unconvincing. A claim for public injunctive relief requires neither the participation of nonparties nor procedural formalities to protect their interests, and it requires no alteration of agreed-to arbitral mechanisms involving discovery and other procedural matters. *See* 928 F.3d at 829–30. Thus, even if parties choose to arbitrate claims for public injunctive relief rather than leaving them to judicial resolution, they need not forgo "arbitration as envisioned by the FAA" or resort to "a procedure that is inconsistent with the FAA." *Concepcion*, 563 U.S. at 351. The *McGill* rule in no way provides "that a contract is unenforceable *just because it requires bilateral arbitration*." *Epic*, 138 S. Ct. at 1623.

HRB's arguments consistently miss the mark in failing to appreciate that prohibiting a waiver of the right to obtain public injunctive relief does not entail

a change in the nature of arbitration procedures. For example, HRB asserts that requests for public injunctions have the "same practical effect as a Rule 23(b)(2) class action." Pet. 11. A Rule 23(b)(2) injunctive action, however, asserts claims for relief "respecting the class," not the general public, and Rule 23 imposes procedures regulating how that collective proceeding may be prosecuted in federal court by the named plaintiffs who represent the class. Such procedures are not implicated when an individual plaintiff seeks a public injunction in arbitration or state court, because California law explicitly states that public injunctions do not require any class, representative, or collective proceedings. *See McGill*, 393 P.3d at 93.[2] Moreover, a judgment on an individual plaintiff's claim for a public injunction under state consumer protection law is preclusive only as to that plaintiff, just as is a judgment on an individual plaintiff's claim for an injunction under antitrust law, so the claim implicates no due-process concerns requiring collective procedures. *Cf. Concepcion*, 563 U.S. at 349 (stating that procedural formalities would be "required for absent parties to be bound by the results of [class] arbitration"). Nothing in *Concepcion*, *Epic*, or this Court's other decisions suggests that, absent a requirement of procedural formalities, an individual plaintiff's ability to obtain a substantive statutory remedy transforms the procedural nature of arbitration.

That public-injunction claims, as a substantive matter, may involve consideration of the public interest and evidence of the impact of the defendant's

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[2] Here, although Snarr seeks certain relief on behalf a class, his public-injunction request itself would not require class proceedings if it were subject to arbitration.

conduct on the public likewise does not alter the fundamental attributes of arbitration, or transform an individualized, bilateral proceeding into something more. Many arbitrable claims require consideration of such evidence, and consideration of whatever evidence is needed to resolve a claim is a fundamental attribute of arbitration. *See* 9 U.S.C. § 10(a)(3). An antitrust claim pursued in arbitration, for example, typically requires evidence of the anticompetitive effect of the defendant's conduct and any procompetitive justifications for it—matters that extend far beyond the individual circumstances of the parties. But no one would suggest that arbitration of an antitrust claim "is not arbitration as envisioned by the FAA." *Concepcion*, 563 U.S. at 351. In *Italian Colors*, this Court held that the FAA *requires* enforcement of agreements to arbitrate antitrust claims despite the cost of developing such evidence. 570 U.S. at 238–39. This Court has likewise held that many claims requiring consideration of evidence beyond the individual parties are arbitrable. *See, e.g., Mitsubishi*, 473 U.S. at 637 (antitrust); *McMahon*, 482 U.S. at 229–33 (Securities Exchange Act claims); *id.* at 238–42 (civil RICO claims); *Pyett*, 556 U.S. at 258 (employment discrimination claims); *Gilmer*, 500 U.S. at 33–35 (federal civil rights claims). The FAA would not permit, let alone require, enforcement of an arbitration provision that purported to waive altogether a party's right to bring such statutory claims in any forum. *See Mitsubishi*, 473 U.S. at 637 n.19.

Similarly, consideration of even private injunctive relief requires consideration of the public interest and possible effects on nonparties. *See Blair*, 928 F.3d at 830. Yet HRB does not claim that the public-interest considerations necessarily involved in issuing such

relief require a departure from individualized arbitration proceedings or that an arbitration provision could permissibly require a party to waive entitlement to any form of injunctive relief.

HRB's comparison between the stakes of class arbitration and the stakes of public injunctive relief likewise fails. *Concepcion*'s holding that requiring collective *procedures* that dramatically alter the stakes of arbitration is incompatible with the FAA's purposes, *see* 563 U.S. at 350–51 & n.8, does not imply that the FAA grants parties a license to contract out of all high-stakes *substantive* rights and remedies. Of course, some companies may choose, as *McGill* permits, not to require consumers to arbitrate claims seeking public injunctive relief because of their assessment of the stakes of such litigation. Similarly, a company might consider antitrust cases or other high-stakes commercial cases unsuitable for arbitration. But HRB does not suggest that state antitrust laws are by nature inconsistent with bilateral arbitration procedures and preempted by the FAA for that reason, or that the FAA would require enforcement of contracts providing for waiver of such claims. Public-injunction claims are no different in that respect.

The FAA does not preempt state laws that create substantive claims for relief just because some parties might view those claims as poor candidates for arbitration, and it does not require states to allow companies to force consumers to waive altogether any substantive claims that companies would prefer not to arbitrate. Such substantive state laws neither disfavor contracts that "have the defining features of arbitration agreements" nor "hing[e] on the primary characteristic of an arbitration agreement." *Kindred*, 137 S. Ct. at 1426, 1427. Individualized procedures may be

one of those defining features, but waiver of substantive entitlements to relief—even high-stakes ones—is not. Not even HRB suggests that facilitating otherwise impermissible waivers of substantive rights was one of the objectives that Congress sought to achieve in enacting the FAA. Indeed, such waivers are antithetical to the FAA's purposes. *See Mitsubishi*, 473 U.S. at 628, 637 n.19.

Moreover, even if it were true, as HRB argues, that arbitration of high-stakes, *substantively* complex claims is not "arbitration as envisioned by the FAA," Pet. 22 (quoting *Concepcion*, 563 U.S. at 355), the consequence would not be that the FAA requires enforcement of agreements waiving such claims. At most, the implication of such a view might be that it would take a particularly plain statement of intent to arbitrate such claims before the FAA would require or permit their arbitration. *See Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415 (2019). But nothing in the FAA would authorize enforcement of the waiver of such substantive claims in the face of contrary state law.

In sum, a state law that seeks only to preserve substantive rights while giving full scope to parties' choices about whether to arbitrate those rights does not conflict with the FAA. There is no disagreement among the lower courts over that proposition and thus no need for this Court's intervention.

IV. *McGill* and *Blair* do not "blow up" consumer arbitration in California.

HRB argues that review is needed to prevent "enterprising plaintiffs" from "circumventing this Court's holdings in *Epic* and *Concepcion*" in order "to evade arbitration in 'virtually every case' invoking California consumer protection statutes." Pet. 22. While

purporting to suggest that experience over the past year suggests that such widespread evasion is now occurring, HRB continues to rely primarily on statements made in articles at the time of *Blair* that the decision "blew up" consumer arbitration in California. Pet. 5. Those assertions, then and now, rest on a misunderstanding. *McGill* does not allow evasion of arbitration: In accordance with the FAA, it allows companies to require consumers to agree to broad arbitration provisions covering disputes arising out of their contractual relationships. Many well-known companies have already crafted arbitration agreements that comply with *McGill* either by allowing arbitration of public-injunction claims or by deferring such claims to judicial proceedings that would follow arbitration of other issues. *McGill* only prohibits a company from eliminating claims for such relief altogether.

A. Many arbitration agreements are not subject to *McGill* because they do not purport to bar public injunctive relief. The Ninth Circuit has held, for example, that typical arbitration agreements that bar class or representative actions but at the same time provide that the arbitrator may award claimants all the relief to which they are entitled in an individual lawsuit do not bar public injunctions and are therefore not subject to *McGill*. *See DiCarlo v. MoneyLion, Inc.*, 988 F.3d 1148, 1156-57 (9th Cir. 2021). That is, *McGill* does not bar enforcement of an arbitration provision that allows an arbitrator to issue public injunctive relief. *See Greenley v. Avis Budget Group Inc.*, 2020 WL 1493618, at *8 (S.D. Cal. March 27, 2020); *Gonzalez-Torres v. Zumper, Inc.*, 2019 WL 6465283, at *8 (N.D. Cal. Dec. 2, 2019). Similarly, under *McGill*, courts have held that an arbitration provision that is silent as to the availability of public injunctive relief will be

enforced. *See Rivera v. Uniqlo Calif., LLC*, 2017 WL 6539016 (C.D. Cal. Sept. 8, 2017); *see also Aanderud v. Super. Ct.*, 221 Cal. Rptr. 3d 225, 239 (Cal. Ct. App. 2017). The agreement in this case, by contrast, fell under *McGill* because of its distinctive language that forecloses any relief that would benefit individuals other than the plaintiff.

McGill also allows a defendant to exclude public injunctive relief from arbitration while requiring arbitration of the rest of a consumer's claims, as long as the consumer eventually has the ability to seek public injunctive relief in court. *See*, *e.g.*, *Eiess v. USAA Fed. Sav. Bank*, 404 F. Supp. 3d 1240 (N.D. Cal. 2019). Indeed, the defendant can write its agreement to require that arbitration (including on liability and other forms of relief on the claims that underlie the request for public injunctive relief) precede any judicial proceedings on public injunctive relief. *See id*. at 1260 (staying litigation of public-injunction claims pending arbitration pursuant to 9 U.S.C. § 3); *see also McGill*, 393 P.3d at 97 (noting appropriateness of such stays); *Blair*, 928 F.3d at 831 ("Parties are welcome to agree to split decisionmaking between a court and an arbitrator in this manner."). Thus, the defendant will receive the full benefits of arbitration, subject only to the requirement that, at some point, it litigate over possible public injunctive relief if the plaintiff succeeds in proving liability.

Indeed, a defendant can achieve this result even if its arbitration provision contains an invalid waiver of public injunctive relief, as long as the agreement permits severance of the public-injunction waiver from the agreement to arbitrate other issues. A company that does not wish to arbitrate public-injunction issues but otherwise wants to compel arbitration may

tailor its severance provision to determine the extent to which claims involving public injunctive relief are or are not arbitrated. It may, as HRB did in the agreement that is the subject of this appeal, provide that any cause of action involving public injunctive relief must be litigated in its entirety; or, as HRB attempted to do in the new agreement that it is continuing to try to enforce in its new appeal, it may seek to split off the remedial issue alone for resolution in court while otherwise providing for arbitration of the remainder of a plaintiff's claims. With all these options available, a company would lose its ability to arbitrate consumer claims completely only if it chose to make its public-injunction waiver *inseverable* from the rest of its arbitration agreement rather than taking the more typical approach of requiring severance of invalid or unenforceable provisions.

B. That large numbers of consumer plaintiffs may include claims for injunctive relief in their complaints does not mean that they will "side-step" arbitration. Pet. 23. Claims for injunctive relief in consumer cases do not trigger the *McGill* rule unless they satisfy *McGill*'s detailed criteria defining what qualifies as "public injunctive relief." *See McGill*, 393 P.3d at 89–90. The Ninth Circuit, for example, has ruled that claims for injunctive relief that could be crafted to benefit the plaintiff or a plaintiff class rather than serving principally to benefit the public and only incidentally benefiting the plaintiff are not claims for public injunctive relief within the meaning of *McGill*. *See Kramer v. Ent. Holdings, Inc.*, 829 F. Appx. 259 (9th Cir. 2020).

HRB acknowledges that 90 percent of the complaints it has tallied seeking injunctive relief under the CLRA, UCL and FAL do not specify that they seek

public injunctive relief. *See* Pet. 24. And even complaints that expressly refer to public injunctive relief do not necessarily bring the *McGill* rule into play. "Merely 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*." *Colopy v. Uber Techs. Inc.*, 2019 WL 6841218 (N.D. Cal. Dec. 16, 2019). HRB's figures about the number of complaints that have sought public injunctive relief—besides not being a tremendously large number for a state the size of California during the more than five years since *McGill*—say little about about how many cases truly implicate *McGill* and what its actual effects on arbitration may be.

In any event, plaintiffs who plead proper claims for public injunctive relief do not thereby "evade" arbitration. Pet. 22. An arbitration provision will remain enforceable unless it precludes public injunctive relief in any forum and is written to prevent severance of that invalid waiver from otherwise enforceable arbitration provisions. Thus, a plaintiff whose arbitration agreement excludes public injunctive relief from the scope of arbitration is still likely to be required to arbitrate liability and other forms of relief before being able—if she can establish liability—to request public injunctive relief from the court.

The possibility that, at the end of the day, an individual who otherwise succeeds in proving liability in individual proceedings will be able to present a claim for public injunctive relief either to an arbitrator or a court thus hardly amounts to the revival of class proceedings under another name, as HRB suggests. *See* Pet. 24. In particular, such cases present no possibility of aggregated damages awards (and associated common-fund class fee awards), which was the principal

feature of class proceedings of concern to the Court in *Concepcion*. *See* 563 U.S. at 350.

C. For all these reasons, HRB's assertions that *Blair* and *McGill* have disrupted settled contractual expectations and prevented companies from reaping the benefits they perceive in arbitration are unsupported. All indications are that companies have responded to *McGill* in varying ways that reflect their choices about how to use the broad flexibility they retain under *McGill* to structure arbitration agreements to their liking without using them impermissibly to effect waivers of nonwaivable substantive rights.

Even before *McGill*, not all arbitration provisions precluded arbitration of public-injunction claims, and many companies continue to use broad arbitration agreements that allow any form of relief available to an individual in court. Ticketmaster's terms, for example, provide that all customer claims are subject to individual arbitration, in which the arbitrator may award any relief provided by law, specifically including "public injunctive relief."[3] Other companies, such as Williams-Sonoma, have created provisions permitting customers to seek public injunctive relief in court, but requiring that any such proceedings happen only if, and after, the customer arbitrates liability and other requested relief.[4] Still others, including Discover and Bank of the West, continue to include public-injunction waivers but make them severable if invalid or unenforceable, thus permitting a plaintiff to seek

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[3] https://help.ticketmaster.com/s/article/Terms-of-Use?language=en_US#section17, ¶ 17 (visited July 9, 2021).

[4] https://www.williams-sonoma.com/customer-service/legal-statement.html#terms (visited July 9, 2021).

such relief in court but otherwise requiring arbitration to the extent specified by the agreement.[5]

HRB itself has made similar adaptations. The clause at issue in this appeal reflected HRB's choice to sever and litigate, rather than arbitrate, claims for relief involving public injunctive remedies if the public-injunction waiver is unenforceable. When HRB decided it was unsatisfied with the language it drafted requiring litigation of entire causes of action, HRB rewrote it to narrow the issues to be decided in court and broaden the scope of arbitration. The district court found the new language unenforceable against Snarr because HRB improperly obtained his "agreement" to it mid-litigation, but the revision shows that HRB can tailor its agreement to maximize its ability to arbitrate while achieving its objective of not arbitrating future public-injunction requests.

HRB's protest that *McGill*'s flexibility does not allow defendants to choose arbitration "as envisioned by the FAA," Pet. 26, rings hollow. A company that does not believe arbitration of public-injunction claims comports with the FAA's—or the company's—vision of arbitration is free to craft its consumer contracts to exclude public injunctions from arbitration. It is prohibited only from forcing a plaintiff to waive the substantive right to a form of relief authorized by state law. And this Court has never held that the FAA "envisions" that companies can force plaintiffs to waive substantive rights protected by state law.

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[5] https://www.discover.com/content/dam/dfs/credit-cards/cardmember-agreement/EBZ_21_823701_01_Cardmember+Agreement_Prime_Release.pdf, p.4 (visited July 9, 2021); https://www.bankofthewest.com/-/media/pdf/deposits/personal-account-disclosure.pdf, p.57 (visited July 9, 2021).

D. For these reasons, HRB's assertion that *Blair*'s holding has led or will lead to widespread avoidance of arbitration remains unsupported. Indeed, while HRB cites several cases in which lower courts have applied *Blair* and *McGill*, it does not demonstrate that there are large numbers of cases in which doing so has led to avoidance of arbitration altogether, as opposed to the carving out of one issue that the defendant wishes to exclude from arbitration. Cases where the *McGill* rule precludes arbitration will likely become increasingly rare as companies abandon the self-defeating tactic of writing "blow-up" clauses (such as the ones in *McArdle* and *Tillage*) that foreclose arbitration if the public-injunction waiver is held unenforceable.

Again, consideration of the issue would be particularly inappropriate here, where the impact of *McGill* rule is undetermined because of unresolved issues about what, if any, arbitration agreement applies and whether the public-injunction claim is moot. If review were otherwise justified, a case where invalidation of a public-injunction waiver resulted in either an arbitrator's issuance of such an injunction or a court's issuance of an injunction following the arbitration of other issues would allow a more informed assessment of *McGill*'s impact on arbitration. In this case, the lower courts should be allowed to complete their resolution of the many issues posed by HRB's attempts to avoid the merits.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

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July 2021