No. 20-1570

In the Supreme Court of the United States

HRB TAX GROUP, INC.; HRB DIGITAL LLC,

Petitioners,

v.

DEREK SNARR,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

The brief in opposition rests heavily on this Court's denial of review over a year ago in the two companion cases to *Blair* v. *Rent-A-Center, Inc.*, 928 F.3d 819 (9th Cir. 2019). But Snarr has no persuasive response to the two developments since that time that underscore the need for review.[1]

First, Snarr does not deny that a federal court has now reached the opposite outcome from the decision below on the "same arbitration clause." *Swanson* v. *H&R Block, Inc.*, 475 F. Supp. 3d 967, 978 (W.D. Mo. 2020). Snarr's protest that *Swanson* is not an appellate decision is a red herring. The decision demonstrates, at minimum, that there are serious questions about whether the Ninth Circuit's decisions are fundamentally incompatible with the FAA and this Court's precedents. This Court has repeatedly granted review in similar circumstances, including in *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011).

Snarr says little in response to petitioners' showing that a conflict is unlikely to deepen. Snarr responds that a party *could* appeal a district court order staying litigation after the arbitration is complete, pointing to a handful of appeals from the past two decades arising from final judgments after arbitration. Opp. 14. But that only proves that such appeals are vanishingly rare. And none of those cases involved the powerful incentives for forum-shopping present here, in which plaintiffs' lawyers can prevent the conflict from extending beyond *Swanson* by suing in courts within the Ninth Circuit. See Pet. 11-12. Snarr's failure to address these practical considerations is telling.

Snarr's attempt to defend the decision below on the merits is also unpersuasive. Snarr does not deny

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

that, under this Court's holdings in *Epic* and *Concepcion*, the FAA prohibits States from conditioning enforcement of arbitration agreements on the availability of class-wide injunctions through class-action procedures. Opp. 23. And Snarr identifies no functional difference between class-wide injunctions and injunctions "on behalf of the general public" under California law. Yet Snarr nonetheless asserts that arbitrations over whether to issue such a public injunction look just like the type of "traditional individualized arbitration" protected by the FAA. *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1621, 1623 (2018).

The primary basis for Snarr's argument is that the third parties for whom the public injunction is sought are not *formally* joined as parties. But that distinction makes no sense, which is why the *Swanson* court explained that "Plaintiff's individual retention of the suit does not vitiate *McGill's* interference with the FAA's protection of individualized arbitration just because other members of the putative class are not formally joined as parties." 475 F. Supp. 3d at 977-78. Snarr does not dispute that the FAA would preempt a state law conditioning enforcement of arbitration agreements on inclusion of a provision permitting a claimant to join five or ten similarly situated parties into a single arbitration proceeding. A public-injunction proceeding assessing the propriety of injunctive relief affecting thousands or millions of third parties is much less individualized in any real-world sense, and thus even more incompatible with the FAA.

Put simply, Snarr's cramped reading of *Epic* and *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.

Second, Snarr does not meaningfully confront the practical importance of the issue presented. He acknowledges that "large numbers of consumer plaintiffs" are including requests for injunctive relief under California consumer statutes (Opp. 29) and does not challenge petitioners' showing that, since *Blair*, hundreds of plaintiffs have expressly alleged that they are seeking public injunctive relief (Pet. 24 & App. D).

Snarr instead argues that the avalanche of such claims does not matter because parties could agree to arbitrate public-injunction claims or to 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 fact as part of the problem with California's rule, not a reason for denying review. Here, too, each of the alternatives mandated by the regime Snarr advocates deprives the parties of the benefits of individualized arbitration protected by the FAA. See American Bankers Br. 18-22.

Finally, Snarr's asserted vehicle problems are baseless. The FAA preemption question was squarely presented and decided below; there are no factual disputes bearing on the resolution of that question; and the jurisdiction of this Court and of the lower courts is uncontested. The fact that the parties are continuing to dispute additional arbitration-related issues below is no obstacle to review. This Court routinely grants certiorari to resolve important questions that controlled the lower court's decision notwithstanding a party's assertion that it may prevail on remand for a different reason. See, *e.g.*, *New Prime, Inc.* v. *Oliveira*, 139 S. Ct. 532, 543 (2019) ("[W]e granted review only to resolve existing confusion about the application of

the [Federal] Arbitration Act, not to explore other potential avenues" for compelling arbitration, such as under state law); *Department of Transp.* v. *Association of Am. R.R.s*, 575 U.S. 43, 55-56 (2015) (leaving for remand alternative grounds).

The conflict between the decision below and this Court's FAA precedents on this important issue is clear, and Snarr has not identified any sound reason why this Court should decline review.

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

California's insistence on the availability of a public injunction is just as inconsistent with the FAA as its prior insistence on the availability of class actions. Pet. 13-22; see American Bankers Br. 18-22.

Snarr responds that public injunctions 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.

Each of these attempts to distinguish *Epic* and *Concepcion* is meritless.

1. Snarr insists that the FAA preempts only state-law rules that "would require multi-party or collective procedures." Opp. 22. 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 21 (quoting *Epic*, 138 S. Ct. at 1619).

But the word "proceedings" cannot bear the weight Snarr places on it. There is nothing "individualized" about a public-injunction claim seeking relief for tens of thousands or millions of third parties *other than* the claimant.

Snarr and the Ninth Circuit reach the wrong answer on FAA preemption because they ask the wrong question. Under *Epic* and *Concepcion*, "the relevant inquiry is not whether the procedures at issue are exactly equivalent to class arbitration, but whether the contract defense in question interferes with the FAA's protection of individualized arbitration." *Swanson*, 475 F. Supp. 3d at 977.

Snarr also asserts that adjudication of a public-injunction request does not have preclusive effect on absent third parties. Opp. 23. But any lack of preclusive effect says nothing about whether the proceeding is consistent with individualized arbitration.

To the extent it is relevant, the asserted lack of preclusive effect makes public injunctions even *less* suited to arbitration than class actions. Different plaintiffs and their counsel could subject a defendant to multiple public-injunction proceedings based on the same underlying conduct, even if a defendant prevails on the first plaintiff's claim.

2. Snarr's repeated assertion that the FAA has no preemptive effect with respect to state "substantive" rights (Opp. 16-18, 22-23, 25-26) misreads this Court's precedents.

Snarr 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. 22 (quoting *Concep-*

cion, 563 U.S. at 351). But *Concepcion* rejected a substantive versus procedural distinction, reiterating that the FAA's policy favoring individual arbitration applies "notwithstanding *any state substantive or procedural* policies to the contrary." *Concepcion*, 563 U.S. at 346 (emphasis added).

Whether characterized as "substantive" or "procedural," a rule requiring that arbitration clauses permit a claimant to seek relief for large numbers of absent third parties "attack[s] (only) the individualized nature of the arbitration proceedings." *Epic*, 138 S. Ct. at 1622. In other words, because *McGill* "mandates reclassification of available relief from one individual to multiple (or in this case, millions) of people," it "impermissibly targets one-on-one arbitration by restructuring the entire inquiry." *Swanson*, 475 F. Supp. 3d at 977.

Snarr is mistaken in invoking this Court's precedents discussing an "effective-vindication" exception to the enforcement of arbitration agreements. Opp. 16. That exception 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).

Indeed, even the dissent in *American Express*, which would have read the exception more broadly with respect to federal statutory claims, recognized that "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). Snarr fails to

acknowledge either the majority or dissenting opinions in *American Express* on this point.

Snarr is similarly mistaken in seeking refuge (Opp. 18 n.1) 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 * * * California law may accord him." *Id.* at 359. That comment merely described the nature of the question presented. See *ibid.* The Court's decision—which predated *American Express*—did not address whether the FAA requires the enforcement of arbitration agreements that waive certain state-law remedies, particularly remedies authorizing the claimant to seek relief for the benefit of third parties.

Indeed, the cases on which Snarr relies involve remedies to address a plaintiff's *own* personal claim. They give no hint that States can avoid the FAA, and *Concepcion*, simply by declaring that individuals have an unwaivable "substantive statutory remedy" (Opp. 23) to seek relief on behalf of *others*.

3. Snarr observes that antitrust, RICO, or securities claims are arbitrable. Opp. 24-26. But even for these potentially complex one-on-one claims, the focus remains on the *individual's* claim. By contrast, Snarr concedes (Opp. 4) that the sole purpose of a public injunction is to benefit *third parties* (see Pet. 6-7).

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 arbitration. *Epic*, 138 S. Ct. at 1623; see *Swanson*, 475 F. Supp. 3d at 976-77.

B. The Issue Is Tremendously Important.

Just as Snarr cannot distinguish *Epic* and *Concepcion* on the merits, his attempts to downplay the importance of the issue only underscore that review is just as urgently needed as in *Concepcion*.

1. As *amici* detail, *McGill* and *Blair* have impacted millions of consumer arbitration agreements in California. American Bankers Br. 2, 5.

That is because, with increasing frequency, plaintiffs are tacking on public-injunction claims to consumer disputes. Hundreds of plaintiffs have expressly sought public injunctive relief since *Blair*, and thousands more have sought some form of injunctive relief for claims brought under California consumer law. Pet. 24 & App. D. Contrary to Snarr's suggestion that it is difficult to "satisfy *McGill*'s detailed criteria" for what counts as a public injunction (Opp. 28), the Ninth Circuit and California intermediate appellate courts have routinely applied *McGill* to avoid enforcing consumer arbitration agreements in whole or in part. See Pet. 23 & n.6.

As a fallback, Snarr contends that companies can "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. 27.

But the same alternatives were available in *Concepcion*. See Pet. 26. And in *Epic*, the Court reiterated that even though "in recent years some parties have sometimes chosen to arbitrate on a classwide basis," that occasional party choice did not 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.

Snarr's argument that companies can sever public-injunction requests for litigation in court fails to respond to petitioners' explanation that this is a stopgap measure to comply with *Blair* and *McGill*—not a preference for separate litigation that deprives the parties of the benefits of arbitration. Pet. 24-25; see American Bankers Br. 22 n.24.

Indeed, in virtually every consumer case in California, such a company faces judicial litigation of a public-injunction claim—or a 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 in court 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.

2. Snarr notes the absence of an appellate conflict. Opp. 12-14. But he unpersuasively attempts to minimize the significance of the *Swanson* decision and ignores the practical obstacles that substantially diminish the prospect of a further conflict. See page 1, *supra*; Pet. 11-12.

After all, *Blair* and the decision below strongly encourage forum shopping to avoid future decisions like *Swanson*. Companies doing business nationwide, like H&R Block, 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 request. See American Bankers Br. 7 & n.6 (noting the financial incentives to bring public-injunction claims).

In addition, this Court has not hesitated to grant review in other arbitration cases when there is a shallow split or no split at all. *E.g.*, *Kindred Nursing Ctrs. Ltd. P'Ship* v. *Clark*, 137 S. Ct. 1421 (2017); *Concepcion*, 563 U.S. 333; *Preston*, 552 U.S. 346.

Kindred, like this case, involved a conflict between the decision under review and federal district court decisions confirming that the decision defied this Court's precedents. Pet. for Writ of Certiorari at 18-19, *Kindred*, 2016 WL 3640709. And in *Concepcion* the Court did not indicate that it granted review to resolve a circuit split. See 563 U.S. at 338. It is far more likely that the Court 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 at 10, *Concepcion*, 2010 WL 1787380.

3. Finally, Snarr urges the Court to wait to review the question presented until after an arbitrator or a court awards a public injunction. Opp. 33. But the stakes of a public injunction, like those of a Rule 23(b)(2) class action, make it highly unlikely that a case will reach the Court in that posture. See Pet. 19. Notably, Snarr does not cite a single example of a public injunction awarded in a *litigated* case in the years since *McGill* was decided, and petitioners are aware of none.

C. Snarr's Asserted Vehicle Problems Are Illusory.

None of Snarr's scattershot vehicle attacks undermines the appropriateness of this Court's review.

First, Snarr notes that petitioners have also sought to enforce the more recent arbitration agreement that Snarr accepted in 2020. Opp. 3, 15. That agreement provides that to the extent *McGill* prevents enforcement of the agreement's prohibition on seeking relief affecting third parties, the public-injunction request is carved out for litigation in court (even though the FAA should prevent States from forcing H&R Block and other companies to create such carve-outs). Pet. 25.

But the dispute over whether Snarr is bound by his most recent arbitration agreement does not undermine the case for review. On the contrary, if the Court concludes that the FAA preempts *McGill*, then (under either agreement) any request for an injunction would have to be arbitrated on an individualized basis rather than litigated in court.

Second, Snarr observes that petitioners have moved in the district court to dismiss his request for injunctive relief as moot (Opp. 12, 15)—a motion he has vigorously resisted. But as he acknowledges, the court below saw no need to address the mootness issue, recognizing that "the issue did not go to Article III jurisdiction over the *case*" as a whole. *Id.* at 11; Pet. App. 6a. The same is true in this Court. The pending motion does not affect this Court's jurisdiction or present an obstacle to reviewing the preemption question that controls the decision below. Cf. *Lamps Plus, Inc.* v. *Varela*, 139 S. Ct. 1407, 1413 (2019) (granting review notwithstanding an objection to appellate jurisdiction). And a holding by this Court on FAA preemption would be binding precedent for all future cases, affecting millions of consumer arbitration agreements in California that similarly require individualized arbitration. See American Bankers Br. 2, 5.

Third, Snarr suggests that he might revive his argument that he is excused from arbitration because he opted out of a subsequent arbitration agreement that he entered into in 2019. Opp. 15. But the fact that Snarr may raise an alternative objection to arbitration on remand is not a reason to deny review. See page 1, *supra*. That is especially true here, including because the argument is inconsistent with the text of the opt-out provision.[2]

[2] The opt out provides that "[i]f you opt out of this Agreement, *any prior arbitration agreement will remain in force and effect*." Dkt. No. 27-19, § 11.1 (emphasis added). It is undisputed that Snarr had 60 days to opt out of the earlier arbitration agreement at issue in this appeal but did not do so. Pet. App. 26a; Dkt. No. 27-23.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2021