Nos. 19-1066; 19-1078

IN THE

Supreme Court of the United States

COMCAST CORPORATION,
COMCAST CABLE COMMUNICATIONS, LLC,
Petitioners,

v.

CHARLES TILLAGE, JOSEPH LOOMIS,
Respondents.

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

v.

STEVEN MCARDLE,
Respondent.

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

BRIEF OF *AMICI CURIAE* AMERICAN BANKERS ASSOCIATION AND CONSUMER BANKERS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTRODUCTION

Amici Curiae American Bankers Association and Consumer Bankers Association respectfully submit this brief in support of Petitioners Comcast Corporation and Comcast Cable Communications, LLC in No. 19-1066, and Petitioners AT&T Mobility LLC, New Cingular Wireless PCS LLC and New Cingular Wireless Services, Inc. in No. 19-1078 (collectively, "Petitioners").[1]

AMICI CURIAE'S INTEREST IN THIS CASE

The American Bankers Association (ABA) is the voice of the nation's $15 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $11 trillion in deposits, and extend more than $8 trillion in loans

Founded in 1919, the Consumer Bankers Association (CBA) is the trade association for today's leaders in retail banking – banking services geared toward consumers and small businesses. The nation's largest financial institutions, as well as many regional banks, are CBA corporate members, collectively holding well over half of the industry's total assets. CBA's mission is to preserve and promote the retail banking industry as it strives to fulfill the financial needs of the American consumer and small business.

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[1] No counsel for any party authored this brief in whole or in part. No counsel, party or person other than *Amici Curiae* and their members made a monetary contribution intended to fund the preparation or submission of the brief. All counsel of record received timely notice on March 9, 2020 of *Amici*'s intent to file this brief and all counsel of record granted written consent to the filing of this brief.

These cases are of the utmost importance to *Amici* members, constituent organizations and affiliates (collectively, "Members") because the "*McGill* rule" threatens to eliminate millions of consumer arbitration agreements that exist between *Amici* Members and their customers. Those agreements, governed by the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 1 *et seq.*, call for individual (bilateral) arbitration of disputes, a procedure authorized by this Court nearly a decade ago in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). Individual arbitration provides a fast, inexpensive, consumer-friendly and efficient means of resolving customer disputes precisely because it is *not* intended to adjudge claims of non-parties, whether they be putative class members or the more amorphous "general public." As this Court emphasized in *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010):

> [P]arties are 'generally free to structure their arbitration agreements as they see fit.' . . . . [P]arties may specify *with whom* they choose to arbitrate their disputes . . . . '[N]othing in the [FAA] authorizes a court to compel arbitration of any issues, *or by any parties*, that are not already covered in the agreement' . . . . '[A]n arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement' . . . . '"Arbitration is simply a matter of contract *between the parties*; it is a way to resolve those disputes – but *only* those disputes – that the *parties* have agreed to submit to arbitration."'

Id. at 683-84 (emphasis added) (citations omitted). *See also United Steelworkers v. Warrior & Gulf Nav. Co.,*

363 U.S. 574, 581 (1960) (an arbitrator "has no general charter to administer justice for a community which transcends the parties" but rather is "part of a system of self-government created by and confined to the parties") (internal quotation marks omitted). The FAA protects this "individualized form of arbitration" against inconsistent state laws and public policies. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019). *Amici*, who participated in *Concepcion*,[2] were confident that *Concepcion* and its progeny would protect the enforceability of arbitration agreements that call for "traditional, individualized arbitration" because the FAA "protect[s] pretty absolutely" agreements calling for "one-on-one arbitration" using "individualized . . . procedures." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619, 1621, 1623 (2018).

That confidence has been shattered by California's "*McGill* rule." In *McGill v. Citibank, N.A.*, 393 P.3d 85 (Cal. 2017), the California Supreme Court held on public policy grounds that claims for "public injunctive relief" – relief that has "the primary purpose and effect of prohibiting unlawful acts that threaten future injury to the general public" – cannot be waived by parties to private arbitration agreements and that the FAA does not preempt that rule. *Id.* at 87, 90. The *McGill* rule requires either that public injunctive relief claims be tried in court, nullifying the parties' choice of arbitration as the venue for resolving disputes, or that such claims be tried in arbitration, overriding the parties' choice of bilateral arbitration and exposing companies to virtually the same risk of "bet the ranch" class arbitration that *Concepcion* extinguished because

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[2] *See Concepcion*, Docket No. 09-893, Brief of *Amici Curiae* American Bankers Association, Consumer Bankers Association, *et al.*, filed Aug. 9. 2010.

it "effectively forces them to arbitrate rights and interests of scores of consumers who have not even entered into an arbitration agreement . . . ." (Tillage Pet., p. 29). In the present cases, the Ninth Circuit also concluded that the FAA does not preempt the *McGill* rule, opening a floodgate of public injunctive relief lawsuits in the California federal courts. (*See McArdle* Pet., App. G (identifying 144 post-*McGill* lawsuits brought against businesses, including *Amici* Members, seeking public injunctive relief). The *McGill* rule is an ill-disguised attempt by the California state and federal courts to circumvent the fundamental premise of *Concepcion* and its progeny that agreements to arbitrate on an individual basis are valid and enforceable under the FAA, notwithstanding contrary state law. Members who have implemented arbitration programs did so in order to resolve business disputes with particular customers, not to benefit the "general public" in expensive and protracted litigation that is fraught with the same risks as a suit for class-wide injunctive relief under Fed. R. Civ. P. 23(b)(2).

Amici Members view arbitration as a viable and predictable mechanism for resolving disputes arising from consumer transactions, and they rely heavily on this Court's prior decisions validating individual arbitration. If allowed to stand, the Ninth Circuit's decisions will effectively nullify millions of California arbitration agreements which disallow relief that extends beyond the individual consumer's claims. According to the Petitioners in *McArdle*, "California today is home to over 12% of the nation's population, meaning that approximately 1 out of 8 Americans is directly affected by the [*McGill*] rule." *McArdle* Pet., p. 20. And, the *McGill* rule may only be the tip of the iceberg. "[A] number of other states are now on the verge of . . . granting public injunction remedies like

those provided by [California law]." Myriam Gilles & Gary Friedman, *Unwaivable: Public Enforcement Claims and Mandatory Arbitration*, p. 4, 26th Annual ILEP Symposium (Draft, Feb. 14, 2020).[3] *See also McArdle* Pet., p. 5 ("*McGill* and *Blair* provide a roadmap for other States and litigants to circumvent this Court's decisions interpreting and applying the FAA"). Thus, the questions presented by Petitioners are not confined to California, but are potentially nationwide in scope, affecting *Amici* Members across the country and hundreds of millions of consumer arbitration agreements.

Review should be granted in these cases because the *McGill* rule eviscerates both the letter and the spirit of the FAA and casts an ominous cloud over the ability of *Amici* Members to resolve consumer disputes in a rational, predictable, consumer-friendly and cost-effective manner. Scores of consumer arbitration programs established by *Amici* Members are, literally, on the line. Therefore, *Amici* and its Members desire to be

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[3] Moreover, "[w]hile California is in the forefront in enacting statutes providing for public injunctive relief, there are a . . . number of such statutes in other states. For example, state statutes prohibiting unfair or deceptive acts and practices (UDAP statutes) in Alaska, the District of Columbia, Florida, Iowa, New York, and Ohio either explicitly provide or have been interpreted as allowing individual consumers to seek broad-based injunctive relief. *See* Alaska Stat. § 45.50.535(a); D.C. Code § 28-3905(k); *Davis v. Powertel, Inc.*, 776 So. 2d 971 (Fla. Dist. Ct. App. 2000); Iowa Code § 714H.5(1); *McDonald v. North Shore Yacht Sales, Inc.*, 513 N.Y.S.2d 590 (N.Y. Sup. Ct. 1987); *Johnson v. Jos. A Bank Clothiers, Inc.*, 2015 WL 1476451 (S.D. Ohio Mar. 31, 2015)." D. Seligman, *Three June State Law Actions Helping Consumers Fight Arbitration Requirements*, NCLC Digital Library (July 31, 2019), available at https://library.nclc.org/three-june-state-law-actions-helping-consumers-fight-arbitration-requirements#content-2.

heard on the critically important issues raised by Petitioners and have a strong interest in the outcome of these cases.

SUMMARY OF ARGUMENT

Section 2 of the FAA, 9 U.S.C. § 2, provides that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." As this Court has repeatedly held, the FAA preempts state laws, both judicial and legislative, that are inconsistent with the fundamental attributes of arbitration, that purport to carve out particular disputes from the scope of the FAA or that single out arbitration for special treatment. Indeed, all state and federal courts "must abide by the FAA, which is 'the supreme Law of the Land,' U.S. Const., Art. VI, cl. 2, and by the opinions of this Court interpreting that law." *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 18 (2012) (citations omitted).

Amici Members who utilize bilateral arbitration agreements in their consumer banking and lending contracts rely upon the consistent and uniform application of these fundamental FAA principles. Regrettably, the *McGill* rule creates great uncertainty and confusion because it creates a gaping "public injunctive relief" exception to the FAA which thus far has survived judicial scrutiny. Under that rule, arbitration agreements calling for individual resolution of disputes are unenforceable because they collide with the allegedly unwaivable statutory remedy of public injunctive relief. The *McGill* rule, a creature of California public policy, now also binds Ninth Circuit federal courts by virtue of the opinions herein and the *Blair v. Rent-A-Center, Inc.* companion case. *See, e.g., Roberts v. AT&T Mobility LLC*, No. 18-15593, 2020 U.S. App.

LEXIS 5146, at *8 (9th Cir. Feb. 18, 2020) ("The arbitration clause here, like the one in *Blair*, prohibits public injunctive relief in any forum, including arbitration. As discussed previously, such a clause is unenforceable in California under the *McGill* rule. Because we are bound by our decision in *Blair*, we hold that AT&T's arbitration agreement is unenforceable."). The *McGill* rule – and the promise of plaintiff's attorneys' fees – has unleashed a torrent of public injunctive relief litigation against companies (including many *Amici* Members) that could drive at least some companies to abandon arbitration altogether.[4] *See* Tillage Pet., pp. 23-24 ("faced with that choice [between litigation or non-bilateral arbitration], compa-

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[4] California trial lawyers are incentivized to bring such litigation because under California law, plaintiff's attorneys are entitled to obtain attorneys' fees from the defendant if they are successful in obtaining "a significant benefit, whether pecuniary or nonpecuniary" on behalf of the "general public or a large class of persons." *See* Cal. Code of Civil Procedure § 1021.5. The prospect of an attorney's fee recovery has resulted in the filing of scores of spurious "public injunctive relief" cases in circumstances where such relief in not even pertinent. *See, e.g.*, *Sponheim v. Citibank, N.A.*, No. SACV 19-264 JVS (ADSx), 2019 U.S. Dist. LEXIS 100857, at *11 (C.D. Cal. June 10, 2019) ("[m]erely declaring that a claim seeks a public injunction . . . is not sufficient to bring that claim within the bounds of the rule set forth in *McGill*") (citation omitted); *M. Resorts, LTD. v. New Eng. Life Ins. Co*., No. 19-cv-1545, 2019 U.S. Dist. LEXIS 216053, at *14-15 (S.D. Cal. Dec. 16, 2019) (UCL claim alleging that defendant insurance company collected very large premiums during early stages of policies and then manufactured grounds for lapse, cancellation or termination did not seek public injunctive relief; "the class of people who stand to benefit from [plaintiff's] requested relief is not the general public but rather is limited to a class of people who are well-defined and have similar interest: people who have or had variable life insurance policies with Defendants.").

nies will have little incentive to arbitrate at all . . ."); *McArdle* Pet., p. 29 ("if companies must face public-injunction claims in court, it is not rational for them to continue to heavily subsidize traditional individualized consumer arbitration"). That would be most unfortunate, since the public – the body supposedly protected by the *McGill* rule – would be deprived of the many benefits of individual arbitration, as documented by a host of recent empirical studies. Individual arbitration benefits consumers with equitable claims, not just those with damages claims. Litigating an arbitrable claim in court causes irreparable harm, because the parties are "deprived of the inexpensive and expeditious means by which the parties had agreed to resolve their disputes." *Alascom, Inc. v. ITT N. Elec. Co.*, 727 F.2d 1419, 1422 (9th Cir. 1984). Review by this Court is necessary because the *McGill* rule impairs the public interest by threatening to eliminate bilateral arbitration as a method for resolving consumer disputes.

Review should also be granted so that this Court can reinforce that "[s]tate . . . courts must enforce the [FAA] . . . with respect to all arbitration agreements covered by that statute." *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 531 (2012); *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995) (state-law principles must be applied with "'due regard . . . to the federal policy favoring arbitration'") (citation omitted). In the absence of review, the *McGill* rule and the Ninth Circuit's opinions herein will encourage other state courts and legislatures that still harbor distrust of arbitration[5] to enact

[5] The FAA was designed specifically "'to reverse the longstanding judicial hostility to arbitration agreements . . . .'" *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (citation omitted);

new, or resuscitate existing, "public injunctive relief" laws (*see* discussion at p. 5 & n. 3, *supra*) in order to sidestep *Concepcion* and *Epic Systems* and displace the FAA. *See also Concepcion*, 563 U.S. at 342 (judicial hostility towards arbitration manifests itself in "'a great variety' of 'devices and formulas . . .'") (citation omitted). The *McGill* rule is quintessentially the type of "device" or "formula" described in *Concepcion*. It rests on the faulty premise that a state can evade the FAA simply by enacting a statute which it declares to be a "non-waivable" substantive right because it benefits the "public."[6] However, rhetorical window-dressing cannot disguise the fact that the *McGill* rule is an attempt to keep public injunctive relief claims in court and out of arbitration every bit as much as if

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accord, *Concepcion*, 563 U.S. at 339 (the FAA was enacted by Congress to reverse the "widespread judicial hostility to arbitration agreements"). It embodies a liberal federal policy favoring arbitration agreements. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). The FAA creates federal substantive law of arbitrability that is binding on state as well as federal courts. *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984). States are not permitted to discriminate against arbitration or single out arbitration agreements for special treatment. *See, e.g.*, *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (state could not require special notice requirements for arbitration agreements but not for other contracts).

[6] *McGill* was premised on California Civil Code section 3513, which provides that "[a]ny one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement." 393 P. 3d at 93 (quoting Cal. Civ. Code § 3513). By that logic, *McGill*'s public injunctive relief exception could swallow the FAA, since many if not most statutes can be argued to benefit the public. *See* U.S. National Archives and Records Administration, "Public Laws" (2020) ("Most laws passed by Congress are public laws. Public laws affect society as a whole."), available at https://www.archives.gov/federal-register/laws.

California had expressly carved out such claims from the operation of the FAA, which clearly is preempted.[7]

ARGUMENT

I. Review Should Be Granted Because the Ninth Circuit's Opinions Threaten to Eliminate the Proven Benefits of Individual Arbitration to Consumers

Amici Members and other businesses that utilize arbitration agreements in their contracts do so because it is a faster, more efficient, more cost-effective method of resolving disputes than court litigation, it minimizes the disruption and loss of good will that often results from litigation and it substantially reduces litigation costs. Moreover, it is more convenient for both *Amici* Members and their consumer customers. This Court has often acknowledged the many benefits of arbitration. *See, e.g.*, *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) ("[T]he Act [FAA], by avoiding 'the delay and expense of litigation,' will appeal 'to big business and little business alike,

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[7] *See, e.g.*, *Marmet*, 565 U.S. at 533 (FAA preempted state supreme court decision prohibiting arbitration of personal injury or wrongful death claims against nursing homes); *Concepcion*, 563 U.S. at 340 ("[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA"). Because the FAA's text includes no exception for public injunctive relief claims, bilateral arbitration agreements permitting an arbitrator to award individual injunctive relief must be enforced as written. *See Stolt-Nielsen*, 559 U.S. at 682 ("the central or 'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced according to their terms'") (citation omitted); *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012) (the FAA "requires courts to enforce agreements to arbitrate according to their terms").

corporate interests [and] individuals'") (citations omitted); *Stolt-Nielsen*, 559 U.S. at 685 ("[i]n bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes"); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) ("by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration'") (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

The *McGill* rule, which "effectively precludes bilateral arbitration of consumer disputes in California" and potentially nationwide (*see* Tillage Pet., p. i, "Questions Presented") causes harm to the very "public" that it purports to protect. *See also id.*, p. 29 ("The adverse consequences of *Blair* and *McGill* are sure to ripple beyond California as well . . . . The *McGill* rule will not only necessitate changes to standard contracts used nationwide, but may lead companies to abandon consumer arbitration elsewhere."). In addition to the *McGill* rule driving companies to abandon their consumer arbitration programs, courts are using the *McGill* rule as a pretext for invalidating arbitration agreements altogether, denying arbitration even as to claims for monetary damages. *See, e.g., Delisle v. Speedy Cash*, No. 3:18-CV-2042-GPC-RBB, 2019 U.S. Dist. LEXIS 96981, at *36-37 (S.D. Cal. June 10, 2019), *appeal filed*, No. 19-55794 (9th Cir. July 10, 2019) (in a class action for damages that also asserted claims for public injunctive relief, the court found that the arbitration agreement contravened the *McGill* rule but refused to sever the public injunctive relief

claims and instead invalidated the entire arbitration agreement).

The elimination of individualized arbitration agreements – either because the *McGill* rule is forcing companies to abandon their arbitration programs, or because courts are using the *McGill* rule as a pretext for denying arbitration of any claims – deprives consumers, including customers of many *Amici* Members, of the many proven benefits of individual arbitration – speed, economy, convenience and efficiency – and forces them into court systems that are chronically overburdened and underfunded and that are slower, more expensive, more intimidating and far less accommodating than arbitration. More than 30 years ago, Chief Justice Burger urged greater use of arbitration to reduce "the backlog of cases in the overburdened federal and state courts." "Protracted cases," he emphasized, "not only deny parties the benefits of a speedy resolution of their conflicts, but also enlarge the costs, tensions and delays facing all other litigants waiting in line." "In terms of cost, time and human wear and tear, arbitration is better by far," he concluded.[8] Contrary to its supposed mission, the *McGill* rule ends up disserving the public interest.

Statistics compiled by the Consumer Financial Protection Bureau ("CFPB") over the course of four years of research confirm the tangible benefits of individual arbitration to consumers, particularly when compared to non-bilateral procedures such as class action litigation. In 2015, the CFPB released a 728-

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[8] *See* Giles Hudson, "Burger Urges Greater Use of Arbitration to Reduce Court Backlog" (Aug. 21, 1985), available at http://www.apnewsarchive.com/1985/Burger-Urges-Greater-Use-of-Arbitration-to-Reduce-Court-Backlog/id-a294b2e9e054f20b9c5b0ec9dc39dd73.

page Arbitration Study,[9] which then-Chairman Richard Corday described as "the most comprehensive empirical study of consumer financial arbitration ever conducted . . . ."[10] Among the Study's findings were the following:

- Individual consumer arbitration is up to 12 times faster than consumer class action litigation. The CFPB's data found that: (i) the median desk arbitration (just documents) was resolved in four months; (ii) the median telephone arbitration was resolved in five months; (iii) the median in-person hearing was resolved in seven months; and (iv) when the arbitration settled, the median arbitration proceeding lasted two-five months.[11] By contrast, the average class action settlement received final court approval in 1.89 years, and federal court multi-district litigation class actions filed in 2010 closed in a median of 2.07 years.[12]
- Arbitration is far less expensive than litigation. For example, under the American Arbitration Association's ("AAA") Consumer Rules, the consumer's share of the administrative and arbitrator fees is capped at $200, with the company

[9] Consumer Financial Protection Bureau, Arbitration Study, Report to Congress (Mar. 2015) ("Study"), available at http://www.consumerfinance.gov/data-research/research-reports/arbitration-study-report-to-congress-2015/.

[10] Director Cordray's Published Remarks, March 10, 2015 Field Hearing in Newark, New Jersey, available at http://www.consumerfinance.gov/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-arbitration-field-hearing/.

[11] Study, § 1, p. 13.

[12] *Id.*, § 6, pp. 9, 43.

paying the remainder.[13] That is only one-half of the $400 it costs to file a new complaint in federal court.[14]

- Because many courts are also using the *McGill* rule as a pretext for denying arbitration of consumer claims for monetary damages, it is important to emphasize that the CFPB found that consumers recover far more in individual arbitrations than in class action settlements. In 87% of the 562 class actions the CFPB studied, the putative class members received no benefits whatsoever.[15] In the remaining 13%, the average class member's recovery was a mere $32.35.[16] By contrast, in arbitrations where consumers obtained relief on affirmative claims, the consumer's average recovery was $5,389 (an average of 57 cents for every dollar claimed and 166 times as much as the average putative class member's recovery).[17]

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[13] *Id.*, § 1, p. 13; § 4, pp. 10-11. Moreover, consumers are permitted to apply for a hardship waiver if they cannot pay these modest amounts, and many arbitration provisions offer to pay them for the consumer if requested or unconditionally. *Id.*, § 2, pp. 58-59; § 5, pp. 12, 76-77.

[14] *Id.*, § 4, p. 10.

[15] *Id.*, § 1, pp. 13-14; § 6, p. 37.

[16] *See* Consumer Financial Protection Bureau, Arbitration Agreements, Proposed Rule, 81 Fed. Reg. 32,830, p. 73 n. 305 (CFPB acknowledged that the number is "approximately $32").

[17] Study, § 5, pp. 13, 41.

These are only some of the well-documented benefits to consumers of individualized arbitration. They could be irretrievably lost unless review is granted.[18]

A. Individual Arbitration Is More Beneficial to Consumers with Equitable Claims than Public Injunctive Relief

The many benefits of individual arbitration, summarized above, apply to consumers who have claims for injunctive relief, and those benefits will be irretrievably lost if individual arbitration agreements are eliminated because of the *McGill* rule. Indeed, individual arbitration benefits consumers more than claims for public injunctive relief.

By its very definition, a claim for public injunctive relief is not intended to benefit the person asserting the claim. In *McGill*, the California Supreme Court distinguished between public injunctive relief and non-public injunctive relief, explaining that "public injunctive relief . . . is relief that has 'the primary purpose and effect of' prohibiting unlawful acts that threaten future injury to the general public," whereas "[r]elief that has the primary purpose or effect of redressing or preventing injury to an individual plaintiff . . . does not constitute public injunctive relief." *McGill*, 393 P.3d at 90 (citation and internal

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[18] There are also important intangibles associated with arbitration. For example, in arbitration, consumers can speak directly to an arbitrator sitting at a conference table, unencumbered by the cold formalities of a courtroom and the rigid court rules governing procedure and evidence. They can also choose arbitrators with expertise in the subject matter of the dispute. Consumers can even participate by telephone or Skype while thousands of miles away. Such conveniences and efficiencies do not exist in court, which can be intimidating and frustrating to non-lawyers and fraught with unpleasantries and delays.

quotations omitted). The "evident purpose" of public injunctive relief is "to remedy a public wrong" and "not to resolve a private dispute." *Id*. at 94.

By contrast, in an individual arbitration, a consumer can obtain equitable relief that actually benefits the consumer. In *Gilmer v. Interstate/Johnson Lane Corp.*, *supra*, the plaintiff contended that claims under the Age Discrimination in Employment Act ("ADEA") could not be subject to arbitration because, among other reasons, "arbitration procedures cannot adequately further the purposes of the ADEA because they do not provide for federal class actions." 500 U.S. at 32. This Court rejected that argument, explaining that:

> It is also argued that arbitration procedures cannot adequately further the purposes of the ADEA because they do not provide for broad equitable relief and class actions. As the court below noted, however, arbitrators do have the power to fashion equitable relief. *See Gilmer*, 895 F. 2d, at 199-200. Indeed, the NYSE rules applicable here do not restrict the types of relief an arbitrator may award, but merely refer to "damages and/or other relief." 2 N. Y. S. E. Guide ¶ 2627(e), p. 4321 (Rule 627(e)). The NYSE rules also provide for collective proceedings. Id., ¶ 2612(d), at 4317 (Rule 612(d)). But "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred."

> *Nicholson v. CPC Int'l Inc.*, 877 F. 2d 221, 241 (CA3 1989) (Becker, J., dissenting).

500 U.S. at 32.

In *Gilmer*, the Court of Appeals for the Fourth Circuit explained that even though arbitrators may lack the full breadth of equitable discretion possessed by the courts to go beyond the relief accorded to individuals, "so long as arbitrators possess the equitable power to redress individual claims of discrimination, there is no reason to reject their role in the resolution of ADEA disputes." 895 F.2d 195, 199 (4th Cir. 1990), *aff'd*, 500 U.S. 20 (1991). *Accord*, *Marsh v. First USA Bank, N.A.*, 103 F. Supp. 2d 909, 924 (N.D. Tex. 2000) ("Contrary to Plaintiff's contention, an arbitrator may order injunctive relief if allowed to do so under the terms of the arbitration agreement . . . . Clearly, then, Plaintiffs may obtain injunctive relief along with statutory damages if they are successful on their claims. Accordingly, Plaintiffs' statutory rights will be adequately preserved in arbitration, even in the absence of a class action."); *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 366 (Tenn. App. 2001) (rejecting argument that plaintiff could not effectively vindicate his right to injunctive relief under state consumer protection statute without being able to pursue class relief in court because plaintiff could obtain injunctive relief in arbitration to address his individual statutory claim).

An online data base of individual arbitrations maintained by the AAA pursuant to California law shows that in hundreds of arbitrations real-world equitable relief such as rescission, reinstatement, a declaratory judgment, an accounting, and a release of lien was awarded to consumers or achieved through settlement. *See* AAA Consumer and Employment

Arbitration Statistics, available at https://www.adr.org/consumer. Accordingly, if bilateral arbitration agreements are abandoned by companies or invalidated by courts as a result of the *McGill* rule, consumers will lose a fast, convenient and inexpensive way of obtaining injunctive and other equitable relief that is relevant and meaningful to *them*.

II. Review Should Be Granted Because the Ninth Circuit's Opinions Threaten to Eliminate the Proven Benefits of Individual Arbitration to Businesses

There are also very real practical consequences to businesses that result from having an arbitration agreement that calls for individual resolution of equitable claims, rather than resolving public injunctive relief claims in arbitration. Those differences affect a company's risk tolerance in dispute resolution as well as its pricing of goods and services.

This Court has written extensively on the differences between bilateral and class arbitration. *See, e.g., Concepcion*, 563 U.S. at 348 ("[T]he switch from bilateral to class arbitration sacrifices the principal advantage of arbitration – its formality – and makes the process slower, more costly, and more likely to generate procedural morass than final judgment . . . . [C]lass arbitration [also] greatly increases risks to companies . . . . Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."); *Stolt-Nielsen*, 559 U.S. at 685 ("class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it simply by agreeing to submit their disputes to an arbitrator"); *Epic Systems*, 138 S. Ct. at 1623 (in a class arbitration, "the virtues Congress originally saw in arbitration, its speed and

simplicity and inexpensiveness, would be shorn away and arbitration would wind up looking like the litigation it was meant to displace").

To be sure, there are procedural differences between public injunctive relief claims and class claims. In a class action, a named plaintiff seeks to represent a class of similarly situated putative class members. A public injunctive relief claim is prosecuted by a single plaintiff for the benefit of the public. But in other important respects, insofar as the impact on defendant companies is concerned, public injunctive relief claims and Rule 23(b)(2) class action claims are more alike than they are different. Therefore, this Court's observations in *Concepcion*, *Stolt-Nielsen* and *Epic Systems* are highly relevant and persuasive here.

Arbitrating a public injunctive relief claim poses virtually the same risk to companies as a Rule 23(b)(2) class arbitration. There is a risk in both proceedings that a company will be ordered to alter its business practices, products or services, which can affect a company's operations nationwide. *See, e.g.*, *McGill*, 393 P.3d at 91 (plaintiff sought an order requiring Citibank "to immediately cease such acts of unfair competition and enjoining [Citibank] from continuing to conduct business via the unlawful, fraudulent or unfair business acts and practices complained of herein and from failing to fully disclose the true nature of its misrepresentations"). Moreover, the risks inherent in a public injunctive relief arbitration, like the risks inherent in a class arbitration, are magnified by the narrow scope of review of an arbitrator's award. *See Oxford Health Plans LLC, v. Sutter,* 569 U.S. 564 (2013). *See Concepcion*, 563 U.S. at 360 ("[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims");

see also McArdle Pet., p. 19 ("Weighing the risks of a public-injunction proceeding versus the nonexistent offsetting benefits, no reasonable defendant would willingly subject itself to the worst-of-both-worlds scenario of arbitrating a public-injunction claim. Accordingly, California's insistence on the availability of a public-injunction remedy is just as inconsistent with the FAA as the State's prior insistence on the availability of class arbitration.").

In addition, both public injunctive relief arbitrations and class arbitrations involve procedural complexities and discovery costs that far exceed those in an individual arbitration. "Whether and how members of the 'general public' might be adversely affected in the future by the challenged conduct – and how injunctive relief should be crafted to protect them – are necessarily broad-ranging inquiries that focus on third parties." *McArdle* Pet., p. 15. *See, e.g.*, *Cisneros v. U.D. Registry, Inc.*, 39 Cal. App. 4th 548, 564 (Ct. App. 1995) (trial court erred in restricting the scope of the evidence introduced at trial to that directly relevant to each individual plaintiff because public injunction "claimants are entitled to introduce evidence not only of practices which affect them individually, but also similar practices involving other members of the public who are not parties to the action"); *id.* at 574 (an injunction should not be granted as punishment for past acts and requires evidence that the acts are likely to be repeated in the future).

For *Amici* Members who utilize arbitration, the ability to save substantial legal fees and costs by resolving consumer disputes on an individual basis is a substantial incentive to maintain an arbitration program. Individual arbitration leads to greater predictability and control over legal budgets and, conse-

quently, to more competitive pricing for goods and services (which also benefits consumers).[19] Arbitration is viewed as an integral component of a sound compliance program. Conversely, public injunctive relief claims ratchet up the costs of dispute resolution because, even though there is a single plaintiff, any injunctive relief that is issued must benefit third parties who are never identified and who are never made parties. The discovery required in public injunctive relief cases extends far beyond the discovery in a typical individual arbitration or even court case. Public injunctive relief litigation resembles class arbitration far more than it resembles an individual arbitration. It foists on companies the very complexities, high expenses and greater litigation risks that individual arbitration was designed to avoid. Accordingly, the elimination of arbitration caused by

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[19] As a matter of basic economics, consumers ultimately pay for increased litigation costs in the form of higher prices or impact on services as such expenses have to be funded. Conversely, individual arbitration helps reduce a company's litigation costs and those savings are passed along in the form of lower costs or increased services to consumers. *See, e.g.*, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) ("it stands to reason that passengers containing a forum clause . . . benefit in the form of reduced fares . . ."); *Metro E. Ctr. for Conditioning & Health v. Quest Communications Int'l*, 294 F.3d 294, 297 (7th Cir.), *cert. denied*, 537 U.S. 1090 (2002) (The "benefits of arbitration are reflected in a lower cost of doing business that is passed along to customers. That is because by limiting discovery and dealing with individual rather than class claims it "curtails the cost of the proceedings and allows swift resolution of small disputes."); *Provencher v. Dell*, 409 F. Supp. 2d 1196, 1203 n. 9 (C.D. Cal. 2006) ("it is likely that consumers actually benefit in the form of less expensive computers reflecting Dell's savings from inclusion of the arbitration clause in its contracts").

the *McGill* rule adversely impacts companies in addition to consumers.

CONCLUSION

For the foregoing reasons and the reasons set forth by Petitioners, *Amici Curiae* respectfully request that the Petitions be granted.

Respectfully submitted,

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