No.

In the Supreme Court of the United States

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

v.

STEVEN MCARDLE,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

California law authorizes plaintiffs asserting a claim under the State's consumer-protection laws to seek "public injunctive relief"—which it defines as relief that "prevent[s] further harm to the public at large" and not "[r]elief that has the primary purpose or effect of redressing or preventing injury to an individual plaintiff." *McGill* v. *Citibank, N.A.*, 393 P.3d 85, 90 (Cal. 2017) (quotation marks omitted). The California Supreme Court has held that "a provision in a predispute arbitration agreement that waives the right to seek this statutory remedy in any forum * * * is contrary to California public policy and is thus unenforceable under California law." *Id.* at 87.

Notwithstanding this Court's repeated holdings that "courts may not allow a contract defense to reshape traditional individualized arbitration" (*Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1623 (2018))—and the very close resemblance between California's public injunctive relief and class-wide injunctive relief under Federal Rule of Civil Procedure 23(b)(2)—the California Supreme Court in *McGill* and the Ninth Circuit in this case and two companion cases ruled that the Federal Arbitration Act ("FAA") does not preempt California's anti-waiver rule.

The question presented is whether California's public-policy rule conditioning the enforceability of arbitration agreements on acquiescence to public-injunction proceedings is preempted by the FAA.

RULE 29.6 STATEMENT

AT&T Mobility LLC is a limited liability company that has no parent company. Its members are all indirectly wholly owned by AT&T Inc. No other publicly held corporation has a 10% or more ownership interest in AT&T Mobility LLC.

New Cingular Wireless PCS LLC is a limited liability company that has no parent company. New Cingular Wireless PCS LLC's sole member is AT&T Mobility II, LLC; its members in turn are all privately held companies that are wholly owned subsidiaries of AT&T Inc. No other publicly held corporation has a 10% or more ownership interest in New Cingular Wireless PCS LLC.

New Cingular Wireless Services, Inc. is indirectly wholly owned by AT&T Inc. No other publicly held corporation has a 10% or more ownership interest in New Cingular Wireless Services, Inc.

RULE 14.1(b)(iii) STATEMENT

The following proceedings are directly related to this case:

- *McArdle* v. *AT&T Mobility LLC et al.*, No. 4:09-cv-01117-CW (N.D. Cal.).
- *McArdle* v. *AT&T Mobility LLC et al.*, No. 17-17246 (9th Cir.) (judgment entered June 28, 2019; petition for rehearing denied January 17, 2020).
- *McArdle* v. *AT&T Mobility LLC et al.*, No. 09-17218 (9th Cir.) (judgment entered June 29, 2012).
- *McArdle* v. *AT&T Mobility LLC et al.*, No. 13-17152 (9th Cir.) (judgment entered November 6, 2013).
- *McArdle* v. *AT&T Mobility LLC et al.*, No. 18-80102 (9th Cir.) (petition for leave to appeal denied January 23, 2019).

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-3a) is reported at 772 F. App'x 575. The order of the court of appeals denying rehearing (App., *infra*, 4a) is unreported. The opinion of the court of appeals in *Blair* v. *Rent-A-Center, Inc.*, (App., *infra*, 5a-27a), the companion case in which the court of appeals articulated the rule of decision followed by the court in this case, is reported at 928 F.3d 819. The order of the district court granting McArdle's motion for reconsideration of the court's prior order compelling arbitration and denying AT&T's motion to confirm the arbitration award in its favor (App, *infra*, 28a-42a) is unreported, but is available at 2017 WL 4354998.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 2019. App., *infra*, 1a. The court of appeals denied a timely petition for rehearing on January 17, 2020. App., *infra*, 4a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution, art. VI, cl. 2, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides in pertinent part:

> A written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, * * * or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT

The FAA directs courts to "enforce arbitration agreements according to their terms—*including terms providing for individualized proceedings*." *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1619 (2018) (emphasis added). This Court's long line of precedents interpreting the FAA make clear that the FAA "protect[s] pretty absolutely" agreements calling for "one-on-one arbitration" using "individualized * * * procedures." *Id.* at 1619, 1621. The "essential insight" of this Court's decisions in *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011), and subsequent cases is that "courts may not allow a contract defense to reshape traditional individualized arbitration." *Epic*, 138 S. Ct. at 1623.

Yet once again the Ninth Circuit and the California Supreme Court have done just that. *First*, the California Supreme Court held that, as a matter of "California public policy," arbitration provisions may not foreclose individuals from seeking so-called "public injunctions" that are "designed to prevent further harm to the public at large rather than to redress or prevent

injury to [the] plaintiff." *McGill* v. *Citibank, N.A.*, 393 P.3d 85, 86, 89-90 (Cal. 2017) (quotation marks omitted).

Second, the California court, followed by the Ninth Circuit (in three consolidated appeals, including this one), held that the FAA does not preempt the *McGill* rule because California law does not require class certification as a prerequisite to public injunctive relief and the FAA preempts only those state-law rules that impose procedures equivalent to class arbitration. *Blair* v. *Rent-A-Center, Inc.*, 928 F.3d 819, 828-31 (9th Cir. 2019) (App., *infra*, 18a-23a); see also App., *infra*, 2a (rejecting AT&T's preemption arguments for "the reasons set forth in our concurrently filed opinion in *Blair*").

This Court addressed a similarly flawed approach to FAA preemption in *Concepcion*. The California Supreme Court had held that the State's public policy required invalidating any agreement waiving class procedures—including arbitration agreements—and that court, followed by the Ninth Circuit, held that the FAA did not preempt the state-law rule. This Court reversed, holding that the FAA preempted California's rule as applied to arbitration agreements.

The Ninth Circuit's narrow conception of FAA preemption articulated in *Blair* and followed in this case warrants this Court's review because it is irreconcilable with *Epic* and *Concepcion*. As in those cases, the *McGill* rule conditions the enforcement of arbitration provisions on the availability of a procedure—here, public injunctions—that is inconsistent with the "traditional individualized arbitration" protected by the FAA (*Epic*, 138 S. Ct. at 1623). That is because a public-injunction claim focuses on a large group of third parties—the "general public"—and *not* the

claimant; involves much higher stakes; and necessitates more extensive discovery and more complex dispute resolution. And regardless of the particular route by which a state-law rule undermines individualized informal arbitration—whether by requiring class procedures (as in *Concepcion*), or (as here) conditioning the enforcement of arbitration provisions on acquiescence to providing relief to a large group of third parties—the state-law rule is preempted.

The practical consequences of the twin rulings by the Ninth Circuit and California Supreme Court are enormous. *McGill* is a California-specific rule, but California is home to over 12 percent of the Nation's population.[1] Even before the Ninth Circuit definitively rejected FAA preemption, plaintiffs were filing hundreds of lawsuits under California's consumer statutes each year. Now that the Ninth Circuit and California Supreme Court have ruled, plaintiffs who otherwise have agreed to arbitrate their disputes on an individual basis will inevitably request a public injunction in those cases—indeed, dozens already have in the few months since the ruling below.

Unless the decision below is reversed, those arbitration agreements will be held invalid with respect to these public-injunction claims. And the result will be that plaintiffs' lawyers will include at least one non-arbitrable claim in every consumer case in which the parties agreed to arbitrate their disputes by individual arbitration, thereby undermining the benefits of

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[1] The Census Bureau estimates that as of July 1, 2019, California's population was 39,512,223, which is over 12 percent of the estimated population of the United States as of the same date, 328,239,523. U.S. Census Bureau, *QuickFacts California; United States*, https://www.census.gov/quickfacts/fact/table/CA,US/PST045218.

those agreements. Moreover, *McGill* and *Blair* provide a roadmap for other States and litigants to circumvent this Court's decisions interpreting and applying the FAA.

This Court's review is therefore essential.

A. Public Injunctions Under California Law.

The California Supreme Court has interpreted California's consumer-protection statutes to allow a private plaintiff to seek "public injunctive relief, i.e., injunctive relief that has the primary purpose and effect of prohibiting unlawful acts that threaten future injury to the general public." *McGill*, 393 P.3d at 86 (citing California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200 *et seq.*; Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750 *et seq.*; and False Advertising Law ("FAL"), Cal. Bus. & Prof. Code §§ 17500 *et seq.*).

Claims for public injunctions seek collective relief for "the public at large"—and not for the plaintiff bringing the lawsuit: A public injunction is available only "to prevent further harm to the public at large rather than to redress or prevent injury to a plaintiff." *McGill*, 393 P.3d at 90 (quoting *Cruz* v. *PacifiCare Health Sys., Inc.*, 66 P.3d 1157, 1165 (Cal. 2003)). "Relief that has the primary purpose or effect of redressing or preventing injury to an individual plaintiff—or to a group of individuals similarly situated to the plaintiff—does not constitute public injunctive relief." *Id.* at 90. A public injunction "will . . . not benefit the plaintiff directly, because the plaintiff has already been injured, allegedly, by such practices and [is] aware of them." *Ibid.* (quotation marks omitted; alterations in original). Instead, the individual plaintiff

"benefits * * *, 'if at all,' only 'incidentally' and/or as 'a member of the general public.'" *Id.* at 89 (quoting *Broughton* v. *Cigna Healthplans*, 988 P.2d 67, 76 n.5 (Cal. 1999)) (alterations omitted).

Although claims for public injunctions, like claims for class-wide injunctions under Rule 23(b)(2), seek relief benefiting a large group of third parties, the California Supreme Court has held that a plaintiff seeking a public injunction does not have to meet the legal requirements under state law for certifying a class. *McGill*, 393 P.3d at 92-93.

B. The *McGill* Decision.

In *McGill*, the California Supreme Court held that California "public policy" forbids enforcing agreements that prevent a consumer from seeking a public injunction. 393 P.3d at 90, 94. The court then concluded that this state-law rule is not preempted by the FAA because the rule prohibits waivers of public-injunction claims in both litigation and arbitration (*id.* at 94) and because a public injunction is a creation of state "substantive" law rather than a "procedural" device like a class action (*id.* at 97 (quotation marks and emphasis omitted)).

C. Respondent's Arbitration Agreement.

Respondent Steven McArdle is an AT&T customer who agreed to arbitrate his disputes with AT&T on an individual basis. App., *infra*, 29a-30a, 53a-59a.

The AT&T arbitration provision that McArdle agreed to is materially identical to the version at issue in *Concepcion*. Compare App., *infra*, 53a-59a, with *Concepcion*, 563 U.S. at 336-37. It therefore contains the same features that led the district court in *Concepcion* to conclude that AT&T customers are "*better*

off under their arbitration agreement with AT&T than they would have been as participants in a class action." *Concepcion*, 563 U.S. at 352.

The arbitration provision requires individualized arbitration, specifying: "You and AT&T agree that each may bring claims against the other only in your or its individual capacity." App., *infra*, 58a (boldface and capitalization omitted). It goes on to explain that "[t]he arbitrator may award declaratory or injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party's individual claim." App., *infra*, 58a.

D. Proceedings Below.

1. McArdle sued AT&T in March 2009 over roaming fees he incurred for unanswered calls routed to voicemail by foreign carriers while he was traveling abroad. ER62, 72-73.[2] He alleged that AT&T did not adequately disclose the possibility of incurring such fees. Seeking to represent a class of California customers, McArdle asserted claims for fraud and alleged violations of California's UCL, CLRA, and FAL (ER69-78)—the same laws invoked by the plaintiffs in *Concepcion*.[3]

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[2] "ER__" refers to the Excerpts of Record filed in the Ninth Circuit.

[3] The district court's decision in *Concepcion* makes clear that the plaintiffs were pursuing class-wide claims for "restitution" and "injunctive relief" under "California's Unfair Competition Law," "False Advertising Law," and "Consumer Legal Remedies Act." *Laster* v. *T-Mobile USA, Inc.*, 2008 WL 5216255, at *1, *4, *17 (S.D. Cal. Aug. 11, 2008); see also First Amended Complaint (Dkt. No. 4) ¶¶ 17(g), 22, *Concepcion* v. *Cingular Wireless LLC*, No. 06-cv-00675 (S.D. Cal. May 2, 2006).

2. The district court denied AT&T's original motion to compel arbitration under then-existing California law. ER36-49.

After this Court decided *Concepcion*, the Ninth Circuit vacated the order denying AT&T's motion to compel arbitration. *McArdle* v. *AT&T Mobility, LLC*, 474 F. App'x 515, 516 (9th Cir. 2012). On remand, the district court compelled arbitration of McArdle's claims on an individual basis. ER24-33.

McArdle arbitrated his claims in 2016. After an evidentiary hearing in which McArdle admitted that he recognized AT&T's internal brochures and webpages containing disclosures of the disputed charges, the arbitrator denied all of McArdle's claims on the merits. App., *infra*, 43a-52a. As the arbitrator explained, "based on the materials provided to McArdle, or made readily available to him, he did not meet his burden of proof to establish that AT&T failed to disclose the international roaming charges relevant to his trip to Italy in 2008." App., *infra*, 51a.

3. After the arbitrator's decision, the parties filed cross-motions to confirm or vacate the award; McArdle also moved for reconsideration of the district court's order compelling arbitration based on the California Supreme Court's intervening decision in *McGill*. App., *infra*, 32a.

The district court denied AT&T's motion to confirm the arbitration award and, instead, granted McArdle's motion for reconsideration. The court concluded that *McGill* was an intervening change in California law that precluded enforcement of AT&T's arbitration provision and that the FAA does not preempt the *McGill* rule. App., *infra*, 32a-36a. Deeming the bar

against public injunctions in AT&T's arbitration provision non-severable (App., *infra*, 36a-39a), the district court granted McArdle's motion to certify a class of consumers to seek damages for the alleged inadequate disclosures of the roaming charges (Dist. Ct. Dkt. No. 345).

4. AT&T appealed that decision, and the case was consolidated for oral argument with two other appeals presenting the same issue of whether the FAA preempts the *McGill* rule—*Blair* and *Tillage* v. *Comcast Corp.*, No. 18-15288.

The panel issued a published opinion in *Blair* holding that the *McGill* rule is not preempted by the FAA. App., *infra*, 11a-23a. Like the *McGill* court, the *Blair* court held that the *McGill* rule is a generally applicable contract defense that is saved from preemption under Section 2 of the FAA. App., *infra*, 15a-18a.

The *Blair* court further held that the *McGill* rule does not impede the FAA's objectives. App., *infra*, 18a-23a. The court acknowledged that it is "possible" that "arbitration of a public injunction will in some cases be more complex than arbitration of a conventional individual action," but held that *Epic* and *Concepcion* apply only to rules that condition the enforceability of arbitration agreements on the availability of procedures for bringing a "multi-party action." App., *infra*, 20a. And the court concluded that any complexity required to adjudicate a public-injunction claim does not interfere with the FAA's objectives because the complexity "flows from the substance of the claim itself, rather than any procedures required to adjudicate it (as with class actions)." *Ibid.* (quotation marks omitted).

The same panel then affirmed the denial of arbitration in this case for "the reasons set forth in our concurrently filed opinion in *Blair*." App., *infra*, 2a.

The parties in *Blair* settled after the panel below issued its decisions. AT&T and Comcast, the defendants in the remaining cases, sought rehearing from the Ninth Circuit, and the court below denied rehearing in both cases. See App., *infra*, 4a.

REASONS FOR GRANTING THE PETITION

McGill and *Blair* defy this Court's holdings in *Epic* and *Concepcion* that the FAA protects the enforceability of agreements to resolve disputes through traditional, one-on-one arbitration.

A public-injunction claim is virtually identical to a claim under Rule 23(b)(2) for a class-wide injunction. Both seek wide-ranging relief on behalf of multiple third parties, introduce additional complexities as compared to individualized claims, and subject defendants to massive risks. *McGill* and *Blair* represent a thinly veiled effort to circumvent this Court's prior holdings prohibiting States from conditioning the enforcement of arbitration agreements on the availability of class or collective actions.

This Court's precedents make clear that the FAA preempts a state-law rule that would require the joinder of a handful of claimants into a single arbitration proceeding, because that rule would "interfere[]" with the "traditionally individualized and informal nature of arbitration." *Epic*, 138 S. Ct. at 1622-23 (citing *Concepcion*, 563 U.S. at 347-48).

Yet under the Ninth Circuit's view, the FAA is rendered powerless against the far more dramatic ex-

pansion of the arbitration proceeding required to adjudicate a public injunction—based on the fig-leaf distinction that a public injunction does not require the formal joinder of absent third parties. That cramped reading of the FAA defies this Court's admonition that "like cases should generally be treated alike." *Epic*, 138 S. Ct. at 1623.

The irreconcilable conflict between the decision below (which rests on *McGill* and *Blair*) and this Court's holdings in *Epic* and *Concepcion* by itself provides powerful reason for granting review.

The need for review is even more pressing because of the tremendous practical impact of the Ninth Circuit's ruling. As one academic observed, "[t]he consequences of *Blair* are momentous," because a public injunction is effectively relief "on behalf of all harmed consumers" and therefore "certainly constitutes an end-run around the class action waiver in the arbitration agreement." Henry Allen Blair, *Class Action Waivers Are Okay, But Waivers Of Public Injunctive Relief Aren't*, Arbitration Nation (July 1, 2019), http://bit.ly/2SCvQUu. And plaintiffs (and their counsel) are taking advantage of this "end-run" in both federal and state courts.

The number of cases filed under California's consumer statutes seeking injunctive relief is already substantial. *Blair* will only exacerbate this trend, as plaintiffs' lawyers have already begun using public injunction claims to circumvent *Concepcion*'s protection of arbitration agreements.

This important issue of whether the FAA preempts the *McGill* rule is fully ripe for resolution, and this case is an ideal vehicle to address the question presented. Now that both the Ninth Circuit and

California Supreme Court have spoken, a conflict is unlikely to develop in the lower courts. Moreover, the decision below rests entirely on the determination that the *McGill* rule is not preempted; McArdle did not challenge the enforceability of his agreement to arbitrate on any other ground and in fact had already unsuccessfully arbitrated his claims before the *McGill* decision.

The Court should grant certiorari and put an end to this latest effort to exalt California's policy preferences over this Court's precedents.

A. California's Anti-Waiver Rule Is Preempted By The FAA, And The Ninth Circuit's Contrary Conclusion Defies This Court's Precedents.

Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements," "to place [these] agreements upon the same footing as other contracts," and to "manifest a liberal federal policy favoring arbitration agreements." *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (quotation marks omitted).

This Court reiterated just last Term that the FAA "envision[s]" an "individualized form of arbitration." *Lamps Plus Inc.* v. *Varela*, 139 S. Ct. 1407, 1416 (2019) (citing *Epic*, 138 S. Ct. at 1622-23; *Concepcion*, 563 U.S. at 349; *Stolt-Nielsen S.A.* v. *Animal Feeds Int'l Corp.*, 559 U.S. 662, 686-87 (2010)). "In individual arbitration, 'parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution,'" including "'lower costs'" and "'greater efficiency and speed.'" *Ibid.* (quoting *Stolt-Nielsen*, 559 U.S. at 685). For example, unlike court proceedings, which can take years

to resolve, "the average consumer arbitration" is resolved "in six months, four months if the arbitration was conducted by documents only." *Concepcion*, 563 U.S. at 348.

Accordingly, this Court has repeatedly held that the FAA preempts state-law rules that "interfere[]" with the "traditionally individualized and informal nature of arbitration." *Epic*, 138 S. Ct. at 1622-23. In other words, States may not impose a "rule seeking to declare individualized arbitration proceedings off limits," because such a rule would "reshape traditional individualized arbitration." *Id.* at 1623. The FAA, the Court has explained, "seems to protect pretty absolutely" agreements calling for "one-on-one arbitration" using "individualized * * * procedures." *Id.* at 1619, 1621.

That holding followed from *Concepcion*, which stands for the "essential insight" that "courts may not allow a contract defense to reshape traditional individualized arbitration." *Epic*, 138 S. Ct. at 1623. And the *Epic* Court emphasized that this point governs regardless of the garb in which a contract defense is dressed: "Just as judicial antagonism toward arbitration before the Arbitration Act's enactment 'manifested itself in a great variety of devices and formulas declaring arbitration against public policy,' *Concepcion* teaches that we must be alert to new devices and formulas that would achieve much the same result today." *Id.* at 1623 (quoting *Concepcion*, 563 U.S. at 342).

No matter how a State frames its rule of contract invalidity, the rule is preempted if it mandates proceedings that "would take much time and effort, and introduce new risks and costs for both sides," thereby undermining "the virtues Congress originally saw in

arbitration, its speed and simplicity and inexpensiveness." *Epic*, 138 S. Ct. at 1623. If such a rule were permissible, "arbitration would wind up looking like the litigation it was meant to displace." *Ibid.*

In sum, this Court's precedents teach that any "device[]" or "formula[] declaring arbitration against public policy" because of its "traditionally individualized and informal nature" runs afoul of the FAA. *Epic*, 138 S. Ct. at 1621-23; see also, *e.g.*, *Lamps Plus*, 139 S. Ct. at 1417-19 (reversing Ninth Circuit decision and holding that the FAA preempts use of the state-law *contra proferentem* canon to authorize class arbitration); *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463, 471 (2015) (holding that FAA preempted California Court of Appeal's idiosyncratic interpretation of arbitration agreement to invalidate class-action waiver notwithstanding *Concepcion*).

The *McGill* rule upheld by the court below is just such a "device." As we next explain, the public-injunction proceedings it mandates "interfere[]" with both the "individualized" and "informal" nature of arbitration (*Epic*, 138 S. Ct. at 1622-23), and the rule is therefore preempted by the FAA.

1. *Public-injunction claims are fundamentally inconsistent with arbitration's traditionally individualized and informal nature.*

a. The California Supreme Court's own definition of a public injunction demonstrates that proceedings seeking such relief are entirely different from the "traditional individualized arbitration" (*Epic*, 138 S. Ct. at 1623) protected by the FAA.

Public-injunction claims focus on persons *other than* the claimant who institutes the arbitration. As a

matter of California law, "[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 (emphasis added). The individual plaintiff "*will not benefit* * * * directly," but rather will "benefit[]," if at all, "only incidentally and/or as a member of the general public." *Id.* at 89-90 (emphasis added; alterations and quotation marks omitted); see also pages 5-6, *supra*.

Accordingly, a plaintiff seeking a public injunction must prove "that the wrongful conduct" is ongoing and "will continue" to harm persons other than the plaintiff. *Colgan* v. *Leatherman Tool Grp., Inc.*, 38 Cal. Rptr. 3d 36, 64 (Ct. App. 2006). The adjudicator of a public-injunction claim must then determine whether the challenged practice "threaten[s] future injury to the general public"—and, if so, how to configure injunctive relief to benefit the "general public." *McGill*, 393 P.3d at 90.

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. As the California Court of Appeal recently put it, the essential "factual predicate for public injunctive relief" is that the defendant is "continuing to engage in" conduct "impacting *other*" individuals besides the claimant or impacting "the general public." *Yue* v. *Atlas Res., LLC*, 2019 WL 6726234, at *4 (Cal. Ct. App. Dec. 9, 2019) (emphasis added). That is why commentators refer to these claims as "nonclass classes." William L. Stern, RUTTER BUSINESS & PROFESSIONS CODE SECTION 17200 PRACTICE § 7:38 (2019).

This focus on third parties in a public-injunction proceeding is antithetical to the inquiry in a "traditional individualized" or "one-on-one" arbitration. *Epic*, 138 S. Ct. at 1619, 1623. When a claimant seeks individualized injunctive relief, the key questions are whether the *individual claimant* is likely to suffer injury in the future, whether damages are inadequate to remedy any such injury the *claimant* might suffer, and whether the balance of the equities "between the [claimant] and defendant" favor the issuance of an injunction. *eBay Inc.* v. *MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). If those requirements are satisfied, the arbitrator may configure forward-looking relief protecting *that claimant*, not the *general public*.[4]

b. Conditioning the enforceability of arbitration agreements on acquiescence to public-injunction proceedings also introduces additional complexities that

[4] The cases involving injunctions issued by arbitrators that McArdle cited below only confirm this distinction: Each is an example of an *individualized* injunction providing relief directed to the *claimant*. See *Biller* v. *Toyota Motor Corp.*, 668 F.3d 655, 666-70 (9th Cir. 2012) (upholding injunction in an arbitration initiated by Toyota preventing the respondent, a former Toyota employee, from disclosing Toyota's confidential material); *American Cent. E. Tex. Gas. Co.* v. *Union Pac. Res. Grp.*, 93 F. App'x 1, 11 (5th Cir. 2004) (injunction altering the contract terms between the parties to the arbitration); *Saturday Evening Post Co.* v. *Rumbleseat Press, Inc.*, 816 F.2d 1191, 1194 (7th Cir. 1987) (injunction enforcing the claimant's copyright and preventing the respondent from manufacturing unauthorized dolls); *ErgoBilt, Inc.* v. *Neutral Posture Ergonomics, Inc.*, 2002 WL 1489521, at *1-2, *8 (N.D. Tex. July 9, 2002) (injunction stopping respondent from infringing the claimant's trademark); *Nat'l Educ. Corp.* v. *Martin*, 1995 WL 622267, at *7 (N.D. Ill. Oct. 20, 1995) (injunction enforcing non-compete clause in contract between the parties); *Avraham* v. *Shigur Express, Ltd.*, 1991 WL 177633, at *5 (S.D.N.Y. Sept. 4, 1991) (same).

destroy arbitration's "traditionally * * * informal nature." *Epic*, 138 S. Ct. at 1623.

For example, the discovery required for the claimant to show an entitlement to a public injunction is essentially indistinguishable from class-action discovery. Under California law, "claimants [seeking a public injunction] are entitled to introduce evidence not only of practices which affect them individually, but also similar practices involving other members of the public who are not parties to the action." *Cisneros* v. *U.D. Registry, Inc.*, 46 Cal. Rptr. 2d 233, 244 (Ct. App. 1995). And this Court has already held that class-wide discovery is incompatible with arbitration "as envisioned by the FAA." *Concepcion*, 563 U.S. at 351.

The *Blair* court's sole rejoinder to *Cisneros* was to speculate that parties to a public-injunction proceeding in arbitration *could* "agree ex ante on the scope of discovery." App., *infra*, 22a. But that speculation ignores that the fundamental "factual predicate" of a public-injunction claim is that the challenged conduct is affecting other individuals besides the claimant. *Yue*, 2019 WL 6726234, at *4. As this Court pointed out in explaining that class-action proceedings "as a structural matter" include "absent parties, necessitating additional and different procedures" (*Concepcion*, 563 U.S. at 347-48), public-injunction proceedings likewise necessitate procedures to assess the effect of the challenged practices on numerous non-party customers and the "general public."

Moreover, public-injunction proceedings require procedures for weighing competing interests in crafting the injunction. In addition to considering the interests of the parties to the case and third-party consumers, for example, the arbitrator would have to consider the interests of other third parties (for example,

business partners of the defendant) who might be affected by the requested injunction and may wish to intervene to oppose it. Cf. *Sawyer* v. *Bill Me Later, Inc.*, 2011 WL 13217238, at *6-7 (C.D. Cal. Aug. 8, 2011) (permitting third-party bank to intervene as of right because of the bank's contractual relationship with the defendants). All of these procedures add to the burdens on the parties, undermining the benefits of individual arbitration.

If submitted to an arbitrator, a request for a public injunction requires the arbitrator to "assume quasi-executive functions of public administration that expand far beyond the resolution of private disputes." *Broughton*, 988 P.2d at 77. The *Blair* court's retort that "[t]he need for monitoring and modification is inherent in all injunctive relief" (App., *infra*, 21a) ignores that in the context of a public injunction, the arbitrator is no longer monitoring the resolution of a private dispute. Instead, the arbitrator must "reassess the balance between the public interest and private rights as changing circumstances dictate"—a "matter of considerable complexity." *Broughton*, 988 P.2d at 77. This reassessment and continued supervision "is far more problematic" in the context of a public injunction in arbitration because "a new arbitration proceeding" would be required to modify or vacate a public injunction once entered, and subsequent arbitrators are "not necessarily bound by earlier decisions of other arbitrators." *Ibid.*

c. Finally, the massive risks a defendant faces from a public injunction are indistinguishable from those that a defendant faces in a Rule 23(b)(2) action seeking class-wide injunctive relief. A public injunction, no less than a class action, can force a defendant to alter its practices, products, or services for every

one of its California customers—and, because businesses that operate in multiple States typically cannot as a practical matter adopt special rules for California, perhaps all of its customers nationwide. When a judge imposes such an injunction, the defendant at least can appeal the decision. But if the public-injunction request is decided by an arbitrator, "[t]he absence of multilayered review makes it more likely that errors will go uncorrected," the risk of which may "become unacceptable" in view of the greatly increased stakes. *Concepcion*, 563 U.S. at 350.

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. As such, California's rule—and the Ninth Circuit's rejection of AT&T's preemption challenge to that rule—cannot be reconciled with the FAA.

d. This case well illustrates the fundamental shift in focus from the individual claimant to third parties that arbitrating a public-injunction claim requires.

The arbitrator observed that "this arbitration claim involves only McArdle's individual claim based on his personal experience." App., *infra*, 44a. The arbitrator was therefore able to resolve McArdle's individual claims by reviewing his experiences during a March 2008 trip to Italy, his bills for that time period, and the disclosures made to him personally regarding the roaming charges at issue. App., *infra*, 44a-49a.

McArdle's request for a public injunction, however, would require AT&T to take affirmative actions affecting millions of its California customers, such as informing them "that, when traveling abroad, they will incur charges for" unanswered calls routed to voicemail and providing them directions on "how they can" avoid "incurring" those charges. ER70, 76.

An arbitrator evaluating that request would have to consider a substantial body of evidence regarding AT&T's evolving practices and disclosures, as well as customer expectations, over an extended period of time continuing through the present day—rather than focusing on McArdle's own experience in 2008.

Even if the arbitrator concluded that relief is warranted, he or she would then have to craft the appropriate remedy for the harms allegedly suffered by the "public." That analysis and balancing of interests would necessarily be much broader and more burdensome when the proposed injunction would apply to all of a business's California customers—warranting potentially significant changes in practices that could impose substantial costs—rather than redress the claim of a single customer.

2. The Ninth Circuit's reasons for rejecting preemption cannot be squared with this Court's precedents.

The court of appeals' justifications for saving the *McGill* rule from preemption are not persuasive.

The *Blair* court treated *Concepcion* as preempting only state-law rules that impose procedures exactly equivalent to class arbitration and noted that a plaintiff seeking a public injunction does not need to meet the requirements under California law for certifying a class. App., *infra*, 19a-20a; see page 6, *supra*. But *Epic*

confirms that *Blair*'s reading of *Concepcion* is impermissibly narrow: This Court held in *Epic* that the FAA requires "courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings," and that the preemption inquiry asks whether the asserted defense to the enforcement of the arbitration agreement interferes with "*individualized* arbitration proceedings"—because individualized or "one-on-one arbitration" is what the FAA protects. 138 S. Ct. at 1619, 1623 (emphasis added).

Relatedly, the *Blair* court asserted that the *McGill* rule is consistent with "bilateral arbitration" because public-injunction claims do not require the formal joinder of third parties into "a multi-party action." App., *infra*, 19a-20a. That distinction makes no sense. The FAA undeniably would preempt a state law that requires the joinder of five or ten similarly situated parties seeking only individualized relief into a single arbitration proceeding. But, according to the *Blair* court, the FAA does not preempt a state law authorizing a single claimant to obtain far broader relief on behalf of *millions* of individuals, so long as those individuals are not *formally* joined as parties.

Because "like cases should generally be treated alike" (*Epic*, 138 S. Ct. at 1623), the FAA necessarily preempts the far more consequential interference with individualized arbitration resulting from an injunction sought by a private plaintiff for the benefit of millions of third parties—indeed, the general public at large. The *Blair* court's contrary holding "make[s] it trivially easy for States to undermine the Act" (*Kindred Nursing Ctrs. Ltd. P'ship* v. *Clark*, 137 S. Ct. 1421, 1428 (2017)), simply by conferring on a private plaintiff an unwaivable right to seek relief on behalf

of five, ten, or (as here) millions of third parties. But that transforms the parties' agreement into something that "is not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law." *Concepcion*, 563 U.S. at 351.[5]

Review is warranted to correct the Ninth Circuit's impermissibly narrow interpretation of the FAA and ensure compliance with this Court's precedents.

3. The McGill *rule does not fall within the FAA's saving clause because it is not a ground for revocation of any contract.*

In addition to conflicting with *Epic* and *Concepcion*, the decisions of the California Supreme Court and Ninth Circuit fail to address the argument, raised in detail by Comcast in its certiorari petition in the companion *Tillage* case, that the *McGill* rule is not a ground for the "*revocation* of any contract" (9 U.S.C. § 2 (emphasis added)) and therefore is not saved from preemption by Section 2's saving clause.

This interpretation of the saving clause is one that Justice Thomas has advanced on three occasions. See, *e.g.*, *Epic*, 138 S. Ct. at 1632-33 (Thomas, J., concurring) (FAA's saving clause is limited to grounds concerning "the formation of the arbitration agreement,"

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[5] For the same reasons, the *Blair* court erred in attributing significance to the fact that, under *McGill*, a public-injunction claim is "brought for the benefit of the general public" rather than brought on behalf of "specific absent parties." App., *infra*, 19a. The distinction is irrelevant for purposes of FAA preemption: Either type of claim departs from the individualized arbitration protected by the FAA by fundamentally changing the focus from the individual claimant to third parties, regardless of whether those third parties are identified by name.

not "public-policy defense[s]") (quotation marks omitted); *American Express Co.* v. *Italian Colors Restaurant*, 570 U.S. 228, 239 (2013) (Thomas, J., concurring); *Concepcion*, 563 U.S. at 353 (Thomas, J., concurring). And in *Epic*, the Court expressly "[p]ut to the side" whether this interpretation of the saving clause is the correct one. 138 S. Ct. at 1622.

Here, it is clear that the *McGill* rule is not a basis for the "revocation" of contracts. Defenses for the revocation of contracts "such as fraud, duress, or mutual mistake" (*Concepcion*, 563 U.S. at 355 (Thomas, J., concurring)) involve challenges to whether a contract was properly formed in the first place. The *McGill* rule, by contrast, is a rule of enforceability, and thus does not fall within the interpretation of the saving clause outlined in Justice Thomas's concurring opinions. Moreover, the *McGill* rule was invented by the California Supreme Court for the purpose of invalidating an arbitration agreement—underscoring that it is not the kind of generally applicable defense for the revocation of any contract envisioned by the FAA.

The present case and *Tillage* provide the Court with ideal vehicles for finally resolving this issue.

B. The Issue Presented Is Extremely Important And Impacts Countless Arbitration Agreements.

This Court's review is urgently needed because of the great importance of the issue presented. The practical effect of the *McGill* rule is to provide enterprising plaintiffs and their lawyers with a clear route for circumventing this Court's holdings in *Epic* and *Concepcion* and thereby disrupting tens of millions of arbitration agreements in California.

1. *McGill* and *Blair* will have immediate—and far-reaching—impact, permitting plaintiffs and their counsel "to evade arbitration in 'virtually every case' invoking California consumer protection statutes." Alison Frankel, *The 9th Circuit Just Blew Up Mandatory Arbitration In Consumer Cases*, Reuters (July 1, 2019), https://reut.rs/30Ufvxq. Plaintiffs' lawyers who seek to obtain class-wide relief will simply include a public-injunction request as a means of circumventing *Concepcion* and evading their clients' arbitration agreements. As plaintiffs' counsel in *Blair* have declared, the Ninth Circuit's ruling "is a very big deal." *Ibid*. (quotation marks omitted); see also Henry Allen Blair, *supra* ("The consequences of *Blair* are momentous."). Lawyers on all sides therefore agree that *Blair* "gives plaintiffs' lawyers in California the green light to continue trying to side-step arbitration provisions with class action waivers by asserting claims for public injunctive relief." Alan S. Kaplinsky et al., *Ninth Circuit Holds FAA Does Not Preempt California's McGill Rule*, The National Law Review (July 2, 2019).

The actions of plaintiffs and their counsel following the decision in *McGill* speak just as loudly. By any metric, the number of cases in which plaintiffs assert that they are seeking public injunctions is substantial.

A search of cases filed in California state and federal courts for claims brought under the UCL, CLRA, and FAL that seek injunctive relief confirms that hundreds of such complaints have been filed each year since *McGill*. That search yielded *2001* results in the

less than three years since *McGill* was decided in April 2017.[6]

Moreover, plaintiffs have increasingly been specifying in their complaints that the injunctive relief sought is on behalf of the public—making clear that they intend to invoke the *McGill* rule. At least 144 of the above complaints expressly state that they are seeking injunctive relief on behalf of the public (see Appendix G), and that number will inevitably increase in the wake of *Blair*. Indeed, it is certain that many more complaints seek what amounts to public injunctive relief without expressly saying so. For example, in an effort to take advantage of *Blair* and *McGill*, some plaintiffs have amended their complaints to make explicit their request for a public injunction. See, *e.g.*, *Greenley* v. *Avis Budget Grp., Inc.*, 2019 WL 4416129, at *1 (S.D. Cal. Sept. 16, 2019) (granting plaintiff's post-*Blair* motion to amend the complaint to add "an explicit claim for public injunctive relief" in response to defendant's assertion in its motion to compel arbitration "that Plaintiff only seeks private relief"); *Lee* v. *Postmates Inc.*, 2018 WL 4961802, at *1 (N.D. Cal. Oct. 15, 2018) (granting plaintiff's motion for "leave to amend her complaint to add * * * a more explicit claim for public injunctive relief").

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[6] Specifically, counsel searched California federal and state court complaints filed since *McGill* was decided using the following search terms: "consumer legal remedies act" OR "false advertising law" OR "unfair competition law" OR ("Cal. Civ. Code" n/2 1750) OR ("Cal. Bus. & Prof. Code" n/2 17500) OR ("Cal. Bus. Cal. & Prof. Code" n/2 17200) AND (injunct! n/25 relief). Counsel then eliminated duplicate entries, yielding 2001 unique complaints.

To be sure, several district courts have rejected plaintiffs' strained attempts to invoke the *McGill* rule after examining the complaints and concluding that the injunctive relief sought was in fact private, not public.[7] That phenomenon only confirms, however, that plaintiffs' lawyers have been trying to shoehorn class-action claims into the public-injunction rubric in an effort to evade their clients' agreements to arbitrate.

The frequent recurrence of the question presented is unlikely to result in any further percolation of the issue in the lower courts. Before the Ninth Circuit issued the decision below, a federal district court had held that *McGill* "is an obstacle to the FAA's objectives" and therefore is preempted under *Epic* and *Concepcion*. *McGovern* v. *U.S. Bank, N.A.*, 362 F. Supp. 3d 850, 862-64 (S.D. Cal. 2019). But the Ninth Circuit and California Supreme Court have now spoken, and the twin holdings in *Blair* and *McGill* bind all of the federal and state courts in California—unless this Court steps in.

2. *McGill* and *Blair* represent a dramatic extension to the consumer context of an earlier, similar evasion of *Concepcion* in the employment context.

Specifically, California's Private Attorneys General Act ("PAGA") authorizes an "aggrieved employee"

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[7] See, *e.g.*, *Sponheim* v. *Citibank, N.A.*, 2019 WL 2498938, at *5 (C.D. Cal. June 10, 2019); *Bell-Sparrow* v. *SFG*Proschoice-beauty*, 2019 WL 1201835, at *5 n.9 (N.D. Cal. Mar. 14, 2019); *Johnson* v. *JP Morgan Chase Bank, N.A.*, 2018 WL 4726042, at *6-8 (C.D. Cal. Sept. 18, 2018); *Croucier* v. *Credit One Bank, N.A.*, 2018 WL 2836889, at *4 (S.D. Cal. June 11, 2018); *Rappley* v. *Portfolio Recovery Assocs., LLC*, 2017 WL 3835259, at *5-6 (C.D. Cal. Aug. 24, 2017); *Wright* v. *Sirius XM Radio Inc.*, 2017 WL 4676580, at *9-10 (C.D. Cal. June 1, 2017).

to recover civil penalties on a representative basis by raising alleged violations of California's Labor Code as to "himself or herself" and "other current or former employees." Cal. Labor Code § 2699(a).

In *Iskanian* v. *CLS Transportation L.A., LLC*, 327 P.3d 129 (Cal. 2014), the California Supreme Court held that arbitration agreements are unenforceable unless they permit the award of representative monetary relief under PAGA. And in *Sakkab* v. *Luxottica Retail North America*, 803 F.3d 425 (9th Cir. 2015), a divided Ninth Circuit panel held that the FAA does not preempt that public-policy rule, chiefly because the procedures for representative PAGA actions do not mirror class-action procedures—similar to the rationale adopted by the Ninth Circuit in *Blair*.

The large number of PAGA actions that have since engulfed the California courts powerfully illustrates how plaintiffs' lawyers will turn to public injunctions as a means of evading this Court's holdings in *Epic* and *Concepcion*.

PAGA claims formerly were brought, if at all, only on "the coattails of traditional class claims," largely because plaintiffs did not want to rely principally on a cause of action requiring them to remit 75% of their recovery to the State. Robyn Ridler Aoyagi & Christopher J. Pallanch, *The PAGA Problem: The Unsettled State of PAGA Law Isn't Good for Anyone*, 2013-7 Bender's California Labor & Employment Bulletin 01, at 1-2 (2013) (noting the "strong incentive" for plaintiffs to prefer class claims over PAGA claims because of the allocation of PAGA proceeds); see Cal. Labor Code § 2699(i) (requiring that plaintiffs remit 75% of any penalties they recover to the State).

But the volume of PAGA claims increased dramatically after *Sakkab* was decided—and the reason is clear. "The fact that [representative] PAGA claims cannot be waived by agreements to arbitrate" under the rule upheld in *Sakkab* "contributes heavily to the prevalence of these suits." Matthew J. Goodman, Comment, *The Private Attorney General Act: How to Manage the Unmanageable*, 56 Santa Clara L. Rev. 413, 415 (2016). PAGA is thus "a particularly attractive vehicle for plaintiffs' attorneys to bring claims against employers that instituted mandatory arbitration agreements." Tim Freudenberger et al., *Trends in PAGA claims and what it means for California employers*, Inside Counsel (Mar. 19, 2015), https://perma.cc/X3N7-LN4A.

The numbers speak for themselves. In 2005, 759 PAGA claims were filed. Emily Green, *An alternative to employee class actions*, L.A. Daily Journal (Apr. 16, 2014). By 2017—after *Sakkab*—plaintiffs' notices of intent to file PAGA actions more than quadrupled, to 3,250.[8] Another study found that approximately "15 PAGA notice letters" are filed each *day*. Jathan Janove, *More California Employers Are Getting Hit With PAGA Claims*, Society for Human Resource Management (Mar. 26, 2019), http://bit.ly/2Zb1zP1.

In short, the consequence of *Sakkab* (and the similar ruling by the California Supreme Court that it endorsed) has been a flood of PAGA actions in recent

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[8] Since September 2016, plaintiffs in PAGA cases have been required to file PAGA notices with the California Labor and Workforce Development Agency ("LWDA") through an online platform. See California Department of Industrial Relations, *Private Attorneys General Act (PAGA) Case Search*, https://cadir.secure.force.com/PagaSearch/.

years. The same effect is certain to occur in the consumer context as a result of *McGill* and *Blair*.

3. This Court has long recognized that "private parties have likely written contracts relying on [its FAA precedent] as authority." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 272 (1995). But the California Supreme Court (with an assist from the Ninth Circuit) threatens to eviscerate that reliance on the uniform national policy favoring arbitration (embodied by the FAA) by conditioning enforcement of arbitration provisions on acquiescence to the arbitration of class-like public-injunction claims.

Moreover, although the *McGill* rule is unique to California, the sheer size of California's population means that an outsized portion of consumers and businesses are affected. 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 rule. See note 1, *supra*.

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. After all, if companies must face public-injunction claims in court, it is not rational for them to continue to heavily subsidize traditional individualized consumer arbitration—as AT&T does, for instance, by paying "all costs for nonfrivolous claims" and promising to pay a claimant like McArdle a minimum of $10,000 and double the claimant's attorneys' fees if the arbitrator awards the claimant more than AT&T's last written settlement offer. *Concepcion*, 563 U.S. at 337 & n.3; cf. *id.* at 347 ("[F]aced with inevitable class arbitration, companies would have less incentive to continue resolving

potentially duplicative claims on an individual basis.").

4. Finally, this case represents only the latest in a long line of decisions by the Ninth Circuit and California courts that have failed to adhere to this Court's FAA precedents. This Court has not hesitated to grant review to correct those wayward decisions—including on five occasions in the last dozen years. See, *e.g.*, *Lamps Plus*, 139 S. Ct. 1407; *Epic*, 138 S. Ct. 1612; *Imburgia*, 136 S. Ct. 463; *Concepcion*, 563 U.S. 333; *Preston* v. *Ferrer*, 552 U.S. 346 (2008); see also *Perry* v. *Thomas*, 482 U.S. 483 (1987); *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984); Lyra Haas, *The Endless Battleground: California's Continued Opposition to the Supreme Court's Federal Arbitration Act Jurisprudence*, 94 B.U. L. Rev. 1419, 1433-40 (2014). Review is equally warranted here.

In sum, the question presented is of exceptional practical significance, and California's latest evasion of this Court's FAA precedents cries out for review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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