No.

In the Supreme Court of the United States

HRB TAX GROUP, INC.; HRB DIGITAL LLC,

Petitioners,

v.

DEREK SNARR,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has repeatedly held that the Federal Arbitration Act "protect[s]" agreements "to use individualized rather than class or collective action procedures," and that "courts may not allow a contract defense to reshape traditional individualized arbitration." *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1621, 1623 (2018).

But the California Supreme Court has interpreted California's consumer-protection laws to authorize "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). And that court has held that "a provision in a predispute arbitration agreement that waives the right to seek this statutory remedy * * * is contrary to California public policy and is thus unenforceable under California law." *Id.* at 87.

The question presented is whether California's public-policy rule declining to enforce agreements for individualized arbitration whenever a plaintiff seeks a public injunction is preempted by the FAA.

PARTIES TO THE PROCEEDING BELOW

Petitioners HRB Tax Group, Inc. and HRB Digital LLC were defendants-appellants below. Respondent Derek Snarr was plaintiff-appellee below. Pelanatita Olosoni had been a plaintiff-appellee below, but her claims were voluntarily dismissed in the district court during the pendency of the appeal. H&R Block, Inc. had been a defendant in the district court, but the operative amended complaint dropped the claims against it.

RULE 29.6 STATEMENT

HRB Tax Group, Inc. and HRB Digital LLC each is a wholly owned indirect subsidiary of H&R Block, Inc., a publicly traded company with no parent corporation. BlackRock, Inc., through its subsidiaries, is the beneficial owner of more than 10% of the common stock of H&R Block, Inc.

RULE 14.1(b)(iii) STATEMENT

The following proceedings are directly related to this case:

- *Snarr* v. *HRB Tax Group et al.*, No. 3:19-cv-03610-SK (N.D. Cal.).
- *Snarr* v. *HRB Tax Group et al.*, No. 19-17441 (9th Cir.) (judgment entered December 9, 2020).

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-6a) is reported at 839 F. App'x 53. The opinion of the court of appeals in *Blair* v. *Rent-A-Center, Inc.*, the 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 denying petitioners' motion to compel arbitration and to stay litigation (App, *infra*, 7a-23a) is unreported, but is available at 2019 WL 7576680.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 2020. App., *infra*, 1a. 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. This Court has so held on multiple occasions since its decision a decade ago in *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011).

Yet once again the Ninth Circuit and the California Supreme Court have sought to evade this Court's precedents. The California Supreme Court held that, as a matter of "California public policy," agreements for individualized arbitration 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). The Ninth Circuit 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, in that court's view, 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); see also

App., *infra*, 5a (rejecting petitioners' preemption arguments as "foreclosed by binding circuit precedent" in *Blair*).

There have been two significant developments since *Blair* that further underscore the need for this Court's review.

First, there is now a direct disagreement between lower courts over whether *McGill* is preempted by the FAA. Another judge outside of California faced with the exact same types of California-law claims against the same petitioners, involving the "same arbitration clause" and "identical facts," found "divergence [from *Blair*] is merited" and held that "*McGill* is preempted by the FAA." *Swanson* v. *H&R Block, Inc.*, 475 F. Supp. 3d 967, 978 (W.D. Mo. 2020). As that court recognized, a public injunction "has the same practical effect as a Rule 23(b)(2) class action." *Id.* at 977. And because the *McGill* rule "mandates reclassification of available relief from one individual to multiple (or in this case, millions) of people," it "impermissibly targets one-on-one arbitration" and "interfere[s] with the FAA's protection of individualized arbitration." *Id.* at 977-78. Accordingly, the *McGill* rule could not be distinguished from the California state-law rule held preempted in *Concepcion*. *Id.* at 976, 978.

The conflict between *Swanson* and the decision below brings to light in this context a phenomenon that this Court has long understood: When it comes to FAA preemption, the Ninth Circuit marches to the beat of its own drummer. Put another way, whether the FAA, a national statute, requires enforcement of H&R Block's standard-form arbitration agreement depends upon where a plaintiff chooses to file suit.

This stark conflict is unlikely to deepen for two reasons. First, when district courts compel arbitration, they typically stay the litigation pending arbitration (as required by Section 3 of the FAA), and such orders are not directly appealable under Section 16 of the FAA. As a result, district court decisions outside the Ninth Circuit that declare the *McGill* rule preempted are unlikely to reach the courts of appeals. Second, plaintiffs' counsel will simply file California-law claims in California instead, seeking to capitalize on the Ninth Circuit's erroneous approach to FAA preemption. As Judge Bumatay recently observed in a related context, "our saving-clause precedent is in disharmony with the Supreme Court's" and "is in serious need of a course correction." *Rivas* v. *Coverall N. Am., Inc.*, 842 F. App'x 55, 58-59 (9th Cir. 2021) (Bumatay, J., concurring). That is because the Ninth Circuit's recent FAA cases "undermine[]" the "parties' choice to engage in individual, bilateral arbitration." *Id.* at 59 (discussing *Sakkab* v. *Luxottica Retail N. Am., Inc.*, 803 F.3d 425 (9th Cir. 2015), on which the *Blair* court relied heavily in its approach to FAA preemption).

Indeed, the Ninth Circuit's constricted approach to FAA preemption articulated in *Blair* and followed in this case is irreconcilable with *Epic* and *Concepcion*. As in those cases, the *McGill* rule demands that arbitration provisions make available 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 request 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 prevents individualized informal arbitration—whether by requiring class procedures (as in *Concepcion*), or (as here) conditioning the enforcement of arbitration provisions on acquiescence to a process for adjudicating structural remedies aimed at a large group of third parties—the state-law rule is preempted.

Second, in the last two years, experience has proven that, as observers had predicted, *Blair* permits 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. Hundreds of plaintiffs have filed lawsuits under California's consumer statutes since *Blair* and *McGill*, expressly seeking a public injunction in a clear effort to avoid their agreements to arbitrate on an individual basis.

Accordingly, the practical consequences of the twin rulings by the Ninth Circuit and California Supreme Court are enormous. Unless the decision below is reversed, those arbitration agreements will be held invalid with respect to requests for public injunctions. And the result will be that plaintiffs' lawyers will continue to include at least one such claim in every consumer case in which the parties agreed to arbitrate their disputes by individual arbitration, thereby undermining the benefits of those agreements and circumventing 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.*).

The "public" injunction was created by the California Supreme Court as a device for circumventing arbitration agreements. In a pair of decisions, that Court declared that injunctions sought by consumers under the UCL, CLRA, and FAL are "inherently incompatible with arbitration" and held that California public policy prohibited the enforcement of agreements to arbitrate such claims. *Broughton* v. *Cigna Healthplans*, 988 P.2d 67, 74-78 (Cal. 1999) (CLRA); see *Cruz* v. *PacifiCare Health Sys., Inc.*, 66 P.3d 1157, 1164-65 (Cal. 2003) (UCL and FAL). The Ninth Circuit held that the FAA preempts the *Broughton-Cruz* rule in *Ferguson* v. *Corinthian Colleges*, 733 F.3d 928, 934-37 (9th Cir. 2013).

More recently, the California Supreme Court has reconfigured the remedy and its public policy rule. The Court now describes the remedy as a vehicle for seeking 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*, 66

P.3d at 1165). "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." *Ibid.* 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*, 988 P.2d at 76 n.5) (alterations omitted).

Although requests for public injunctions, like requests 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. As Judge Thapar recently put it, "*McGill*'s reasoning—an individual requesting relief for the entire public is suing *only* on her own behalf—is peculiar." *DiCarlo* v. *MoneyLion, Inc.*, 988 F.3d 1148, (9th Cir. 2021) (Thapar, J., sitting by designation).

B. The *McGill* and *Blair* Decisions.

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 requests 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)).

The Ninth Circuit issued a published opinion in *Blair* holding that the *McGill* rule is not preempted by the FAA. 928 F.3d 819. 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. *Id.* at 827-28.

The *Blair* court further held that the *McGill* rule does not impede the FAA's objectives. 928 F.3d at 828-31. 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 it 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." *Id.* at 829. And the court concluded that any complexity required to adjudicate a public-injunction request 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).[1]

C. Respondent's Arbitration Agreement.

Respondent Derek Snarr is an H&R Block client who agreed to arbitrate his disputes with H&R Block

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[1] The Ninth Circuit also reached the same conclusion on the FAA preemption issue "[f]or the reasons set forth in our concurrently filed opinion in *Blair*" in two other appeals that were decided on the same day as *Blair*. *McArdle* v. *AT&T Mobility LLC*, 772 F. App'x 575, 575 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2827 (2020); *Tillage* v. *Comcast Corp.*, 772 F. App'x 569, 569 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2827 (2020).

and all related entities, including petitioners, on an individual basis. App., *infra*, 12a-13a.

The arbitration agreement requires individualized arbitration of "[a]ll disputes and claims," expressly prohibiting class actions and further specifying that "any relief" awarded by the arbitrator "must be individualized to you and will not affect any other client." App., *infra*, 25a-27a.

D. Proceedings Below.

1. Snarr and former plaintiff Pelanatita Olosoni filed this putative class action lawsuit in San Francisco County Superior Court against H&R Block, Inc., HRB Tax Group, Inc., and HRB Digital LLC. Dkt. No. 1-1.[2] Defendants removed the case to federal court. Dkt. No. 1.

In the operative amended complaint, filed shortly after the Ninth Circuit decided *Blair*, Snarr alleges that H&R Block did not adequately disclose that he was eligible to file his federal tax returns for free using H&R Block's offer under the IRS Free File program, and that he ended up using and paying for H&R Block fee-based services. ER87-88, 109-113. Snarr asserts that this alleged conduct violates California's Unfair Competition Law (UCL), Consumers Legal Remedies Act (CLRA), and False Advertising Law (FAL) (ER121-128)—the same laws invoked by the plaintiffs in *Concepcion*.[3] In addition to monetary relief on behalf of a putative class, Snarr purports to

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[2] "ER__" refers to the Excerpts of Record filed in the Ninth Circuit. "Dkt. No. __" refers to entries on the district court's docket.

[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,"

seek a "public injunction" enjoining the alleged conduct described in the amended complaint. ER128-131.

2. The district court denied petitioners' motion to compel arbitration of the claims in the amended complaint. App., *infra*, 11a-16a.

The court concluded that *McGill* applied because, in its view, "Plaintiffs seek a public injunction." App., *infra*, 11a. The district court further acknowledged petitioners' argument that *McGill* is preempted by the FAA and that *Blair*'s holding that "the FAA does not preempt *McGill*" is "wrongly decided." App., *infra*, 12a, 14a. The district court concluded that it was "bound by *Blair*'s holding" on this point. App., *infra*, 14a.

3. The court of appeals affirmed. App., *infra*, 1a-6a. The court concluded that Snarr's requested relief "constitute[s] public injunctive relief," because "the relief sought here concerns marketing to the public." App., *infra*, 3a-5a.

The court then followed *Blair* in rejecting petitioners' preemption arguments in a single sentence: "HRB's argument that the Federal Arbitration Act preempts California's *McGill* rule is foreclosed by binding circuit precedent." App., *infra*, 5a (citing *Blair*, 928 F.3d at 830-31).[4]

"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).

[4] The court also followed *Blair* in affirming the district court's conclusion that the entirety of Snarr's UCL, CLRA, and FAL claims were exempt from arbitration, noting that "*Blair* involved

REASONS FOR GRANTING THE PETITION

A request for a public injunction "has the same practical effect as a Rule 23(b)(2) class action" seeking a class-wide injunction. *Swanson*, 475 F. Supp. 3d at 977. 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. It is therefore no surprise that the only court outside of California to consider the FAA preemption question presented here has expressly rejected *Blair* and held that *Epic* and *Concepcion* foreclose the procedural end-run "created by *McGill*." *Swanson*, 475 F. Supp. 3d at 978.

The stark disagreement between *Swanson* and the decision below (which rests on *Blair*)—two cases involving "identical facts" and the "same arbitration clause" (*Swanson*, 475 F. Supp. 3d at 978)—by itself provides powerful reason for granting review. As a practical matter, *Swanson* and the Ninth Circuit's decision demonstrate that the very same provision is enforceable with respect to the same claims outside of the Ninth Circuit but unenforceable within it. This is the kind of Balkanization that Congress plainly intended to overcome when it enacted the FAA.

There is no reason to wait for the conflict to deepen. Indeed, savvy plaintiffs' lawyers will avoid

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very similar severability language and held that the entire claim under the statute must be severed from arbitration, rather than just the public injunctive remedy." App., *infra*, 5a (citing *Blair*, 928 F.3d at 831).

the risk of a further conflict developing by filing suit in a federal court within the Ninth Circuit, where *Blair* governs. Accordingly, the development of a more pronounced disagreement among the lower courts is highly unlikely. When plaintiffs do file claims under California consumer law outside the Ninth Circuit, district judges—as in *Swanson*—are far more likely to enforce the arbitration agreements before them. Nevertheless, few cases are likely to reach the court of appeals, given that orders compelling arbitration and staying litigation under the FAA, like the one in *Swanson*, are not immediately appealable. See 9 U.S.C. § 16(b). And stays rather than dismissals are the norm when motions to compel arbitration are granted. See 9 U.S.C. § 3 ("a district court *shall* on application of one of the parties stay" the case pending arbitration) (emphasis added).

Review is also warranted because *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.

Under this Court's precedents, the FAA undoubtedly 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 expansion 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.

Finally, 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.

Plaintiffs (and their counsel) have in fact been taking advantage of this "end-run" in both federal and state courts. *Blair* has exacerbated this trend, as plaintiffs' lawyers are now routinely pursuing public-injunction requests to circumvent *Concepcion*'s protection of arbitration agreements.

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 *McGill* 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 has repeatedly reiterated in recent years 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 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*, 577 U.S. 47, 58-59 (2015) (holding that the FAA preempted the California Court of Appeal's idiosyncratic interpretation of arbitration agreement to invalidate a class-action waiver notwithstanding *Concepcion*).

The *McGill* rule upheld by the court below is just such a "device." 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. That is why a federal judge outside of the Ninth Circuit confronted with the same types of claims against petitioners found "divergence [from *Blair*] is merited" and held that "*McGill* is preempted by the FAA." *Swanson*, 475 F. Supp. 3d at 977-78. Judge Fenner observed that "[t]he Eighth Circuit routinely disagrees with Ninth Circuit precedent" and explained that *Concepcion* and *Epic* foreclose the procedural end-run "created by *McGill* in the consumer context." *Id.* at 978.

1. Public-injunction requests 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 requests 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 6-7, *supra*.

Accordingly, a plaintiff seeking a public injunction must prove "ongoing harm" from the challenged conduct to "other consumers" besides the plaintiff. *Maldonado* v. *Fast Auto Loans*, *Inc.*, 275 Cal. Rptr. 3d 82,

91 (Ct. App. 2021); see also *Colgan* v. *Leatherman Tool Grp., Inc.*, 38 Cal. Rptr. 3d 36, 64 (Ct. App. 2006). The adjudicator of a public-injunction request 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 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. As Judge Fenner explained in *Swanson*, "[a] state contract defense that mandates reclassification of available relief from one individual to multiple (or in this case, millions) of people impermissibly targets one-on-one arbitration by restructuring the entire inquiry." 475 F. Supp. 3d at 977. This point is, as the court in *Swanson* held, "dispositive of the issue" of FAA preemption. *Id.* at 976.

b. Conditioning the enforceability of arbitration agreements on acquiescence to public-injunction proceedings also introduces additional complexities that 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." 928 F.3d at 830. But that speculation ignores that there is no way to have a public-injunction proceeding that focuses solely on the claimant: The fundamental "factual predicate" of a public-injunction request is that the challenged conduct is affecting other individuals besides the claimant—indeed, the general public at large. *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."

c. Relatedly, 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. That is one reason why a public-injunction request "has the same practical effect as a Rule 23(b)(2) class action." *Swanson*, 475 F. Supp. 3d at 977.

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. In other words, arbitration is as "poorly suited to the higher stakes of" public injunctions as it is to the "higher stakes of class litigation." *Ibid.*

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

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. 928 F.3d at 829; see page 8, *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).

Concepcion also forecloses the Ninth Circuit's purported distinction between substantive and procedural state-law rules. See *Blair*, 928 F.3d at 829. As this Court reiterated, the FAA's policy favoring arbitration—i.e., traditional individualized arbitration—applies "notwithstanding *any state substantive or procedural* policies to the contrary." *Concepcion*, 563 U.S. at 346 (emphasis added; citation omitted). In other words, "the relevant inquiry is not whether the procedures at issue are exactly equivalent to class arbitration, but whether the contract defense in question interferes with the FAA's protection of individualized arbitration." *Swanson*, 475 F. Supp. 3d at 977.

The *Blair* court also asserted that the *McGill* rule is consistent with "bilateral arbitration" because public-injunction requests do not require the formal joinder of third parties into "a multi-party action." 928 F.3d at 829. But 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.

The Ninth Circuit's approach elevates form over substance in an effort to evade this Court's precedents: "Plaintiff's individual retention of the suit does not vitiate *McGill*'s interference with the FAA's protection of individualized arbitration just because other members of the putative class are not formally joined as parties." *Swanson*, 475 F. Supp. 3d at 977-78. 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 also "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 restore uniformity to lower courts' application of the FAA and ensure compliance with this Court's precedents.

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

This Court's review is 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*.

1. In the past few years, *McGill* and *Blair* have had far-reaching impact, permitting plaintiffs and their counsel "to evade arbitration in 'virtually every case' invoking California consumer protection statutes." Frankel, *supra*. Plaintiffs' lawyers who seek to obtain class-wide relief have sought to include a public-injunction request as a means of circumventing *Concepcion* and evading their clients' arbitration agreements. While not every request for a public injunction qualifies under the definition in *McGill*, the

[5] For the same reasons, the *Blair* court erred in attributing significance to the fact that, under *McGill*, a public-injunction request is "brought for the benefit of the general public" rather than brought on behalf of "specific absent parties." 928 F.3d at 829. The distinction is irrelevant for purposes of FAA preemption: Either type of request 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.

majority of such requests have in fact led to the evasion of arbitration agreements—either in whole or as to the requests for class-like public injunctive relief.[6]

Predicting such an outcome, the plaintiffs' counsel in *Blair* declared that the Ninth Circuit's ruling "is a very big deal." Frankel, *supra* (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 *Blair* and *McGill* speak just as loudly. By any metric, the number of cases in which plaintiffs assert that they are seeking public injunctions is substantial.

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[6] See, *e.g.*, *Blair*, 928 F.3d at 831 n.3; *Maldonado*, 275 Cal. Rptr. 3d at 89-91; *Mejia* v. *DACM Inc.*, 268 Cal. Rptr. 3d 642, 650-51 (Ct. App. 2020); *Delisle* v. *Speedy Cash*, 2020 WL 6817702, at *6 (S.D. Cal. Nov. 20, 2020); *Wu* v. *iTalk Global Commc'ns*, 2020 WL 8461696, at *9 (C.D. Cal. Oct. 21, 2020); *Cottrell* v. *AT&T Inc.*, 2020 WL 2747774, at *5-9 (N.D. Cal. May 27, 2020), *appeal pending*, No. 20-16162 (9th Cir. filed June 15, 2020); *Nguyen* v. *Tesla, Inc.*, 2020 WL 2114937, at *4-5 (C.D. Cal. Apr. 6, 2020); *Fernandez* v. *Bridgecrest Credit Co.*, 2019 WL 7842449, at *4-6 (C.D. Cal. Oct. 29, 2019); *Lotsoff* v. *Wells Fargo Bank, N.A.*, 2019 WL 4747667, at *4-5 (S.D. Cal. Sept. 30, 2019), *appeal pending*, No. 19-56240 (9th Cir. filed Oct. 25, 2019); *Lyons* v. *NBCUniversal Media, LLC*, 2019 WL 6703396, at *7-8, *13 (C.D. Cal. Sept. 27, 2019); *Eiess* v. *USAA Fed. Savings Bank*, 404 F. Supp. 3d 1240, 1258-60 (N.D. Cal. Aug. 23, 2019); *Vasquez* v. *Libre by Nexus, Inc.*, 2018 WL 5623791, at *4-5 (N.D. Cal. Aug. 20, 2018).

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 *3,677* results in the four years since *McGill* was decided in April 2017.[7]

Moreover, plaintiffs—just like respondent here—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 *McGill*. At least 372 of the above complaints expressly state that they are seeking injunctive relief on behalf of the public (see Appendix D), with 172 having been filed since *Blair*.

The frequent recurrence of the question presented is unlikely to result in any further percolation of the issue in the lower courts. See pages 11-12, *supra*. Before the Ninth Circuit issued the decision below, a federal district court in California 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.[8] And

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[7] 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 3,677 unique complaints.

[8] Indeed, after the Ninth Circuit decided *Blair*, the district court in *McGovern* granted the plaintiff's motion for reconsideration

cases decided outside of California—like *Swanson*—will deter future plaintiffs from filing California-law claims seeking public injunctions in courts outside of California, preventing the conflict from deepening.

2. 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 class-like public-injunction requests.

The adverse consequences of *Blair* and *McGill* have already necessitated changes to standard contracts used nationwide. Snarr is likely, for example, to point to the fact that, in light of *Blair*, H&R Block and other companies have revised their arbitration agreements to carve out public-injunction requests for parallel proceedings in court. See Dkt. No. 120-6, § 11.3 ("If a court decides that applicable law precludes enforcement of any of this paragraph's limitations as to a particular claim or any particular remedy for a claim (such as a request for public injunctive relief), then that particular claim or particular remedy (and only that particular claim or particular remedy) must remain in court and be severed from any arbitration."). But that is a stopgap measure to keep arbitration agreements enforceable until this Court resolves the

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and denied the defendant's motion to compel arbitration. *McGovern* v. *U.S. Bank N.A.*, 2020 WL 4582687 (S.D. Cal. Aug. 10, 2020).

issue—not a preference for creating parallel proceedings by excluding public-injunction requests from arbitration.

Indeed, the same was true in *Concepcion*. As this Court observed, the *Discover Bank* rule did "not *require* classwide arbitration" because parties could agree instead to litigate class actions in court. 563 U.S. at 346, 351. But in either setting, bifurcated proceedings—with class actions or public-injunction requests proceeding in court and other claims proceeding in arbitration—impermissibly frustrate Congress's purpose "to promote arbitration." *Id.* at 345. A regime in which parties must choose between arbitrating public-injunction requests and resolving those requests in a parallel litigation proceeding is a poor substitute for "arbitration as envisioned by the FAA" and "therefore may not be required by state law." *Id.* at 351.

3. Finally, this case and *Blair* represent 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 thirteen years. See, *e.g.*, *Lamps Plus*, 139 S. Ct. 1407; *Epic*, 138 S. Ct. 1612; *Imburgia*, 577 U.S. 47; *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. As Judge Bumatay recently remarked, "[b]oth *Epic Systems* and *Lamps Plus* required the Supreme Court to step in

and correct our saving-clause decisions—two times in the course of two terms. We should listen to what the Court is telling us * * *." *Rivas*, 842 F. App'x at 59 (Bumatay, J., concurring). Yet the decision below and *Blair* demonstrate that this advice has gone unheeded.

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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MAY 2021