No. 21-31

IN THE

Supreme Court of the United States

FAST AUTO LOANS, INC.,

Petitioner,

v.

JOE MALDONADO, ALFREDO MENDEZ, J. PETER TUMA, JONABETTE MICHELLE TUMA, ROBERTO MATEOS SALMERON,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of California, Fourth District

REPLY IN SUPPORT OF PETITION FOR CERTIORARI

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I. The Petition Is Not Premature

Respondents permeate their Opposition ("Opp.") with the argument that *Hodges v. Comcast Cable Communications, LLC*, 12 F.4th 1108 (9th Cir. 2021), has made this case "less certworthy" because it created unsettled state law issues concerning the scope and application of the *McGill* rule that should be resolved by the California courts before a federal preemption analysis can be undertaken. (*See* Opp., pp. 1-4, 5-6, 8-10, 16-19, 25-26). However, that is a straw argument, as the California courts have already determined, in *this* case, what constitutes a public injunction under *McGill*. Therefore, the FAA preemption question is ripe for review, having been presented and preserved in each of the courts below, as Respondents themselves acknowledge.[1]

According to *Hodges*, the Court of Appeal in this case erroneously expanded the *McGill* rule by "effectively defining as 'public injunctive relief' *any* forward-looking injunction that restrains *any* unlawful conduct." 12 F.4th at 1117 (emphasis by the court). That expanded reading of the *McGill* rule, *Hodges* reasoned, is preempted by the FAA[2] because it can lead to "procedural complexity … that would be

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[1] *See* Opp., p. 12 (FAL contended in the California Superior Court that "the FAA preempts the *McGill* rule"); *id.*, p. 13 (FAL contended in the California Court of Appeal that the FAA "categorically preempts the *McGill* rule"); *id.*, p. 15 (FAL asked the California Supreme Court "to reconsider its decision in *McGill* entirely").

[2] Contrary to Respondents' insinuation (*see* Opp., p. 25), FAL's September 16, 2021 Supplemental Brief accurately described *Hodges*. *See* Supp. Br., p. 2 ("This 'expansion of the *McGill* rule,' it [the *Hodges* court] concluded, 'is preempted by the FAA.'").

inconsistent with the FAA's objective of 'facilitat[ing] streamlined proceedings' in arbitration." *Id.* at 1119 (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011)).

Respondents argue that the FAA preemption issue should not be addressed until the California Supreme Court has had a chance to "clarify the scope" of the *McGill* rule now that *Hodges* has muddied the waters. (Opp., p. 3). They claim that this Court needs to know, before tackling preemption, whether the California Supreme Court agrees or disagrees with the Court of Appeal's expanded reading of the *McGill* rule. That question, however, has *already been answered* by the courts in this case. When FAL petitioned the California Supreme Court to review the Court of Appeal's decision, it argued that the Court of Appeal's interpretation of *McGill* had no bounds and was preempted by the FAA:

> [T]he fact that "public injunctive relief" was mentioned at all in the [First Amended Complaint] was apparently enough to persuade the Court of Appeal that *McGill* was satisfied. While declaring "that we must follow the *McGill* case" …, **the Court of Appeal set the bar so low that almost any complaint that uses the words "public injunctive relief" and contains a boilerplate allegation of "future wrongdoing" no matter how speculative and implausible, will suffice to pass the test**—even where, as in this case, the Respondents' own allegations overwhelmingly show that they *are primarily* seeking to benefit themselves and their similarly situated putative classes.

* * * *

> [A] claim for public injunctive relief is not intended to primarily benefit the person asserting the claim. The "evident purpose" of public injunctive relief is "to remedy a public wrong" and "not to resolve a private dispute." *McGill*, 2 Cal. 5th at 961. The expanded scope of a public injunctive relief arbitration makes the proceeding much more complex, time-consuming and costly than an individualized proceeding.

App. 76a, 81a (boldface added). Nevertheless, the California Supreme Court denied FAL's Petition for Review (App. 30a), allowing the Court of Appeal's expansive interpretation of *McGill* to stand.[3]

Accordingly, there is no merit to Respondents' argument that FAL's Petition should be denied as premature because the California Supreme Court "has not yet had an opportunity to confront" or "weigh[] in" on the expanded interpretation of the *McGill* rule discussed in *Hodges*. (Opp., pp. 3, 6). On the contrary, the California Supreme Court was confronted with the Court of Appeal's expansive interpretation of *McGill* when FAL sought review. By its inaction, the California Supreme Court acquiesced in the Court of Appeal's expansive interpretation of *McGill*. There

[3] Not only is the Court of Appeal's decision the law of this case, but because it was certified for publication (App. 23a), its expanded interpretation of *McGill* has migrated to other courts. *See, e.g.*, *In re Stockx Customer Data Sec. Breach Litig.*, No. 19-12441, 2021 U.S. Dist. LEXIS 111685, at *12 (E.D. Mich. June 15, 2021) ("[t]he *Maldonado* court held that the *McGill* rule applied because the complaint's prayer for relief specifically stated that '[p]ublic injunctive relief' against defendant would prevent it from 'future violations of the aforementioned unlawful and unfair practices'").

are no "antecedent," "unsettled," or "contested" questions of state law (*see* Opp., pp. 2-3, 16-20, 25) that need to be resolved in *this case* before FAA preemption can be addressed.

Respondents are obviously interposing these diversions in order to forestall a ruling by this Court on the merits of the FAA preemption question. They ask this Court to refrain from enforcing the FAA in a case that is ripe and that cries out for review, based on the hypothetical chance (*see* Opp., pp. 10, 18-19) that the Ninth Circuit *might* grant rehearing in *Hodges* and *might* certify a state law question to the California Supreme Court, and that Court *might* exercise its discretion under Cal. R. Ct. 8.548 to accept the certification request, when in reality that Court—in this very case—has already declined to disturb the Court of Appeal's broad interpretation of *McGill*. What Respondents advocate is delay for the sake of delay, even as the number of public injunctive relief cases continues to surge (*see* page 7 *infra*) and the California courts continue to routinely invalidate arbitration agreements based on the *McGill* rule. Only this Court can halt this persistent and flagrant flouting of the FAA.

Hoping to sidestep the merits of the FAA preemption question, Respondents purport to reframe the question as whether "public injunctive relief include[s] injunctions that will benefit all consumers who may enter into a contract with a particular business, or does it only include injunctions that will actually benefit every Californian?" (Opp., p. 2). But the courts in this case have already interpreted the *McGill* rule expansively. The real question before this Court is whether a state law rule (the *McGill* rule) "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" in contravention of the FAA. *Swanson v. H&R Block*, 475 F. Supp. 3d 967, 977 (W.D. Mo. 2020).

This Court should grant FAL's Petition and answer the real question in the affirmative. *Hodges* correctly concluded that the Court of Appeal's expansive reading of the *McGill* rule is preempted by the FAA. That is because the right to individualized arbitration is "protect[ed] pretty absolutely" by the FAA, *Epic Systems Corp. v. Lewis,* 138 S. Ct. 1612, 1621 (2018). Therefore, the *McGill* rule "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" in the FAA. *Concepcion*, 563 U.S. at 352 (citation omitted).

II. No Split Is Necessary Given the Importance of the Question Presented

Respondents further argue that certiorari should be denied because there is "no split" on the FAA preemption issue. (*See* Opp., pp. 19-20). They observe that "[b]oth the California Supreme Court, in *McGill*, and the Ninth Circuit, in *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819 (9th Cir. 2019), have consistently held that the *McGill* rule is not preempted." Moreover, *Hodges* "reaffirmed that the *McGill* rule is not pre-empted." (Opp., pp. 1, 3). This argument should also be rejected.

A "split" is not the only ground for seeking certiorari. This Court will also consider granting certiorari where, as here, "a state court … has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with

relevant decisions of this Court." Sup. Ct. R. 10(c). Notably, this Court has granted review in other important arbitration cases when there was no "split." For example, in *Concepcion*, the respondents argued at length that AT&T's petition should be denied because "[e]very federal circuit and state court of last resort to have decided the question has reached the same conclusion: [t]he FAA does not preclude courts from striking down particular class-action bans under generally applicable state contract law." Brief for Respondents, No. 09-983, 2010 U.S. S. Ct. Briefs LEXIS 536, at *14 (filed April 26, 2010). Nevertheless, this Court granted certiorari and held that the FAA preempted California's "Discover Bank rule" that prohibited the use of class action waivers in consumer arbitration agreements.

Similarly, in *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017), the respondent argued that certiorari should be denied because "[t]here is no split of opinion between the decision below and any U.S. Court of Appeals … [or] any State court of last resort." Brief for Respondent, No. 16-32, 2016 U.S. S. Ct. Briefs LEXIS 3254, at *8-9 (filed Sept. 6, 2016). Nevertheless, this Court granted certiorari and held that the Kentucky Supreme Court's "clear-statement rule" contravened the FAA.

The importance of the Question Presented in this case is alone sufficient to support the grant of certiorari. But there is more. Things have changed since this Court denied certiorari in the *Tillage* and *McArdle* cases in June 2020 (*see* Opp., pp. 15-16). "[T]here is now a direct disagreement between lower courts over whether *McGill* is preempted by the

FAA";[4] *Hodges* was decided two months ago; and, predictably, the number of public injunctive relief cases filed in the California state and federal courts has continued to skyrocket from 144 cases in February 2020[5] to 372 cases in May 2021.[6] This surge in public injunctive relief filings, fueled in part by the broad Court of Appeal's decision herein, underscores the need for immediate review.

III. This Case Is an Eminently Suitable Vehicle for Review

Respondents contend that this case is a "particularly unsuitable vehicle" for review because Respondent Maldonado opted out of arbitration on two of his four loan agreements with FAL. (Opp., p. 20). However, that is no reason to deny review. Mr. Maldonado is subject to arbitration on his other two loan agreements with FAL, and none of the other four Respondents opted out of arbitration. The FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983) (emphasis by the Court); *accord*, *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985) ("[t]he preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation"). As a practical matter,

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[4] *See* Petition for Certiorari, *HRB Tax Group, Inc. v. Snarr*, No. 20-1570, p. 3 (filed May 10, 2021) ("*Snarr* Pet.") (citing *Swanson v. H&R Block*).

[5] *See* Petition for Certiorari, *AT&T Mobility LLC v. McArdle*, No. 19-1078, p. 25, and App. G thereto (filed Feb. 27, 2020)

[6] *See Snarr* Pet., p. 24, and App. D thereto.

if arbitration were compelled, the most likely scenario is that the court would stay Mr. Maldonado's non-arbitrable claims until his and the other Respondents' arbitrable claims were arbitrated.

Respondents also argue that this case is unsuitable for review because FAL "never argued that the FAA preempts certain kinds of public injunctive relief because of how those injunctions would be implemented." (Opp., p. 21). However, as Respondents acknowledge (*see* p. 1 n. 1 *supra*), FAL argued that the *McGill* rule is "categorically" and "entirely" preempted by the FAA. (*Id.*). FAL emphasized that "[t]he expanded scope of a public injunctive relief arbitration makes the proceeding much more complex, time-consuming and costly than an individualized proceeding" and imposes the same burdens and risks as Rule 23 class actions. App. 81a-82a. The California Supreme Court denied review anyway.

The *Hodges* court's discussion of the implementation of a public injunction further exemplifies the administrative complexities inherent in public injunctive relief proceedings that distinguish them from individualized arbitration. Respondents acknowledge that the crux of their case is that FAL subjects them to "unconscionable" interest rates, and they seek a public injunction "requiring Fast Auto Loans to cease charging unlawful interest rates …." (Opp., p. 11). However, the California Supreme Court held in *De La Torre v. CashCall, Inc.*, 5 Cal. 5th 966 (2018), that interest rates on a loan are not *per se* unconscionable. Rather, they are "malleable" and "highly dependent on context." *Id.* at 984. Whether an interest rate is unconscionable requires "numerous factual inquiries" into the circumstances of each loan, including, for example, the parties' sophistication, cognitive limitations, and

the availability of alternatives, whether the contract terms were hidden, whether there was pressure to sign, as well as the basis for the price of each loan, the lender's cost of obtaining money, the nature of marketplace, and whether the borrower is credit-impaired or default-prone. *Id.* at 983-84. Any public injunction would necessarily require a case-by-case evaluation for each member of the "public" because the legality of an interest rate cannot be determined in a factual vacuum. That is plainly the polar opposite of the individualized arbitration procedures that Respondents and FAL agreed to when the loans were made. There is no need for the issue to "percolate" through the court system for the next several years, as Respondents contend. (*See* Opp., p. 20).

IV. The California Court of Appeal's Decision Is Patently Inconsistent with the FAA and This Court's Precedent

A. Respondents contend that the FAA's "savings clause" immunizes the *McGill* rule from preemption because "[f]or over 150 years, California has prohibited parties from waiving rights established for a public reason and refused to enforce contracts that do so—all contracts, not just arbitration clauses." (Opp., p. 23). Respondents tout that *Blair* cited such cases decided from 1896 to 2002. (*Id.*). But *Blair* only cited five cases, decided, respectively, in 1896, 1944, 1956, 1977, and 2002—few and far between, by any measure. Respondents cite another five cases decided, respectively, in 1905, 1949, 1991, 1997, and 2014. (Opp., pp. 4-5, 22). By contrast, in just the four years that have passed since *McGill* was decided, at least 372 public injunctive relief lawsuits have been brought in California, resulting in the invalidation of scores of arbitration agreements with class action waivers. (*See*

p. 7 n. 6 *supra*). It is evident that California's anti-waiver law, averaging only about one case per decade in the 100-plus years leading up to *McGill*, has in the four years after *McGill* become a weapon of mass arbitration destruction, in contravention of the FAA. *See Epic Systems*, 138 S. Ct. at 1621 ("[u]nder our precedent, … the saving clause does not save defenses that target arbitration").

B. Respondents next argue that the FAA has no preemptive effect with respect to state "substantive" rights (Opp. 23). However, *Concepcion* rejected a substantive versus procedural distinction, reiterating that the FAA's policy favoring individual arbitration applies "'notwithstanding any state substantive or procedural policies to the contrary.'" 563 U.S. at 346 (citation omitted). When the "substantive" right either invalidates the arbitration agreement altogether, or requires an arbitration that differs radically from an individualized proceeding, it is preempted by the FAA. A rule requiring that arbitration provisions allow a claimant to seek relief for huge numbers of absent third parties is clearly an "attack [on] the individualized nature of the arbitration proceedings." *Epic Systems*, 138 S. Ct. at 1622.

C. Respondents argue that a request for public injunctive relief can be arbitrated in an individual proceeding consistent with the FAA; it is not a class or representative claim as the members of the public are not formally joined as parties. (Opp., pp. 23-24). However, that distinction is entirely superficial, since the principal attributes of individualized arbitration—speed, economy, and efficiency—are completely eviscerated when 40 million non-parties are the intended beneficiaries of the injunctive relief. (*See* Pet., p. 1, n. 1). As held in *Swanson*, "[p]laintiff'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.

D. Finally, Respondents assert that even individual arbitrations involving antitrust, RICO and securities claims can be complex, so the fact that a public injunctive relief arbitration might be complex is not a ground for preemption. (Opp., p. 24). But in those other cases, the focus was still on the individual plaintiff's claim. By contrast, Respondents concede that public injunctive relief "is necessarily 'oriented to and for the benefit of the general public.'" (Opp., p. 7) (citation omitted). This fundamental shift in the focus of the proceeding from the claimant to numerous third parties is what interferes with the "traditional individualized arbitration" protected by the FAA—in much the same manner as the shift from bilateral to class arbitration is preempted by the FAA. The right to individualized dispute resolution in an arbitration agreement is "protect[ed] pretty absolutely" by the FAA. *Epic Systems*, 138 S. Ct. at 1621. *See also Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019) (the FAA "envision[s]" an "individualized form of arbitration"). *Concepcion* instructs that a rule (such as the *McGill* rule) that restructures a bilateral arbitration agreement to include hundreds, thousands, or millions of non-parties destroys the fundamental attributes of individualized arbitration and is preempted by the FAA.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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