No. 24-1230

IN THE

# Supreme Court of the United States

COINBASE, INC., *et al.*,
*Petitioners,*
v.
DARREN KRAMER, *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the California Court of Appeal, First Appellate District**

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


THOMAS PINDER
ANDREW DOERSAM
AMERICAN BANKERS ASSOCIATION
1333 New Hampshire Ave, NW
Washington, DC 20036
(202) 663-5028

DAVID POMMEREHN
*General Counsel and Senior Vice President*
CONSUMER BANKERS ASSOCIATION
1225 New York Ave, NW
Suite 1100
Washington, D.C. 20005
(202) 552-6368

MARK J. LEVIN
*Counsel of Record*
ALAN S. KAPLINSKY
BALLARD SPAHR LLP
1735 Market Street
51st Floor
Philadelphia, PA 19103
(215) 665-8500
levinmj@ballardspahr.com
kaplinsky@ballardspahr.com

*Counsel for Amici Curiae American Bankers Association and Consumer Bankers Association*


July 1, 2025

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

## INTRODUCTION

*Amici Curiae* American Bankers Association and Consumer Bankers Association respectfully submit this brief in support of Petitioners Coinbase, Inc., *et al.*[1]

## *AMICI CURIAE'S* INTEREST IN THIS CASE

The American Bankers Association ("ABA") is the principal national trade association of the financial services industry in the United States. Founded in 1875, the ABA is the voice for the nation's $24.1 trillion banking industry and its 2.1 million employees. ABA members provide banking services in each of the 50 states and the District of Columbia. Among them are state banks and savings associations of all sizes.

The Consumer Bankers Association ("CBA") is the only national trade association focused exclusively on retail banking. Established in 1919, the association is a leading voice in the banking industry and Washington, representing members who employ nearly two million Americans, extend roughly $3 trillion in consumer loans, and provide $270 billion in small business loans.

These cases are crucial to *Amici* members, constituent organizations and affiliates (collectively, "Members") because the "*McGill* rule," as interpreted and applied overbroadly by the California state courts, threatens to eliminate millions of consumer arbitration agreements between *Amici* Members and their customers. Those agreements, governed by the Federal Arbitration

---

[1] No counsel for any party authored this brief in whole or in part. No counsel, party or person other than *Amici Curiae* and their members made a monetary contribution intended to fund the preparation or submission of the brief. All counsel of record were notified in writing of *Amici*'s intent to file this brief on June 9, 2025.

Act (the "FAA"), 9 U.S.C. § 1 *et seq.*, call for individual (bilateral) arbitration of disputes, a procedure first authorized by this Court more than a decade ago in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). Individual arbitration provides a fast, inexpensive, consumer-friendly and efficient means of resolving customer disputes precisely because it is *not* intended to adjudge claims of non-parties. As this Court emphasized in *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010):

> [P]arties are 'generally free to structure their arbitration agreements as they see fit.' .... [P]arties may specify with whom they choose to arbitrate their disputes …. "'Arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.'"

*Id.* at 683-84 (citations omitted). *See also United Steelworkers v. Warrior & Gulf Nav. Co.,* 363 U.S. 574, 581 (1960) (an arbitrator "has no general charter to administer justice for a community which transcends the parties" but rather is "part of a system of self-government created by and confined to the parties") (internal quotation marks omitted)). The FAA protects this "individualized form of arbitration" against inconsistent state laws and public policies. *Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 184 (2019). *Amici*, who participated in *Concepcion*,[2] were confident that

[2] *See Concepcion*, Docket No. 09-893, Brief of *Amici Curiae* American Bankers Association, Consumer Bankers Association, *et al.*, filed Aug. 9. 2010. *Amici* also supported the petitioners in *AT&T Mobility LLC v. McArdle*, Docket No. 19-1078, and *Comcast Corp. v. Tillage*, Docket No. 19-1066 (Brief of *Amici*

*Concepcion* and its progeny would protect the enforceability of arbitration agreements that call for "traditional, individualized arbitration" because the FAA "protect[s] pretty absolutely" agreements calling for "one-on-one arbitration" using "individualized … procedures." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 507, 509 (2018).

That confidence has been shattered by the California courts' overly expansive interpretation and application of the "*McGill* rule" and their uniform refusal to find that the rule is not preempted by the FAA in any respect. In *McGill v. Citibank, N.A.*, 393 P.3d 85 (Cal. 2017), the California Supreme Court held on public policy grounds that claims for "public injunctive relief"—relief that has "the primary purpose and effect of prohibiting unlawful acts that threaten future injury to the general public"—cannot be waived by parties to private arbitration agreements and that the FAA does not preempt that rule. *Id.* at 87, 90.

In practice, however, the California courts have greatly expanded the rule to defeat the enforcement of arbitration clauses governed by the FAA even when an injunction is intended to benefit not the general public as a whole, but rather only a discrete segment of the general public, usually other customers of the defendant company (in this case, users or potential users of the Coinbase platform). *See Kramer v. Coinbase, Inc.*, 326 Cal. Rptr. 3d 217, 224 (Ct. App. 2024); *see also Mejia v. DACM Inc.*, 268 Cal. Rptr. 3d 642, 650-51 (Ct. App. 2020) (individuals who would buy a motorcycle with a conditional sale contract from the defendant); *Maldonado v. Fast Auto Loans, Inc.*, 275

---

*Curiae* American Bankers Association and Consumer Bankers Association, filed March 26, 2020).

Cal. Rptr. 3d 82, 89-90 (Ct. App. 2021) (individuals who would borrow money from the defendant); *Ramsey v. Comcast Cable Commc'ns, Inc.*, 317 Cal. Rptr. 3d 561, 564-65 (Ct. App. 2023) (customers of the defendant who were offered extensions of their promotional rates when they sought to cancel their subscription). *Amici* Members view these "public injunction" cases as virtually indistinguishable from class actions, except that under the FAA, class action claims would be resolved in a bilateral (non-class) arbitration under *Concepcion*, while under the overly expanded *McGill* rule they remain in court because the words "public injunction" have been added to the *ad damnum* clause of the plaintiff's complaint.

Plaintiffs in California consumer litigation are encouraged to assert public injunctive relief claims because "[i]t takes almost nothing for a plaintiff to add such an arbitration-negating claim to a suit …. [P]laintiffs need only allege that they seek a 'public' injunction and add a few untested supporting allegations, even if they seek relief only for a class of consumers under a consumer-protection statute." Pet., p. 24. *See, e.g., Maldonado*, 275 Cal. Rptr. 3d at 716 (court denied lender's motion to compel individual arbitration because the class action complaint also requested a public injunction "prohibiting [Lender] from future violations of the aforementioned unlawful and unfair practices"). Tellingly, while *McGill* has been invoked in "*hundreds* of cases," there are "*only two* post-*McGill* cases where a court ordered any public injunctive relief to a private plaintiff under the [California consumer protection statutes]." Pet., p. 25. "Plaintiffs invoke *McGill* solely to avoid arbitration. It serves no other purpose." *Id.*, p. 5.

*Amici* Members view arbitration as a viable and predictable mechanism for resolving disputes arising from consumer transactions, and they rely heavily on the FAA and this Court's prior decisions validating individual arbitration in transacting business nationwide. Nevertheless, in California state courts and in cases applying California law, they are being "force[d] … into more costly and less streamlined litigation" because plaintiffs have invoked the *McGill* rule solely "to evade otherwise enforceable arbitration agreements." Pet., p. 25.

*Amici* Members were heartened when the Ninth Circuit, in *Hodges v. Comcast Cable Commc'ns, LLC*, 21 F.4th 535 (9th Cir. 2021), held that the California state courts' "expansion of the *McGill* rule is preempted by the FAA" because it "forbids waiving claims for prospective injunctive relief against unlawful conduct even if, for example, the implementation of such an injunction would require evaluation of the individual claims of numerous non-parties" and "involve the sort of procedural complexity or formality that would be inconsistent with the FAA's objective of 'facilitat[ing] streamlined proceedings' in arbitration." *Id.* at 547 (citation omitted). As the *Hodges* court further explained:

> [I]njunctions are not simply words on a page, and their compatibility with bilateral arbitration must be evaluated in light of how they would actually be implemented …. By insisting that contracting parties may not waive a form of relief that is fundamentally incompatible with the sort of simplified procedures the FAA protects, the [California state court rulings] effectively ban[] parties from agreeing to arbitrate all of their disputes

> arising from [their] contracts. To say that such a rule is not preempted would flout Supreme Court authority. *See, e.g., Epic Sys*., 138 S. Ct. at 1623 (holding that, under *Concepcion*, "courts may not allow a contract defense to reshape traditional individualized arbitration" and "a rule seeking to declare individualized arbitration proceedings off limits" is preempted by the FAA). And that we cannot do.

21 F.4th at 548.

Unfortunately, the California state courts, including the court of appeal here, have refused to find that the FAA preempts the *McGill* rule in any respect. Accordingly, whether an *Amici* Member in California can enforce an arbitration agreement governed by the FAA depends on whether the venue of the suit is federal court or state court, resulting in flagrant gamesmanship and forum shopping (*see* Pet., pp. 20-21) and the kind of Balkanization that Congress plainly intended to overcome when it enacted the FAA. Only this Court can resolve this conflict and restore the overriding "*national* policy favoring arbitration" embodied in the FAA. *See Southland Corp. v. Keating*, 465 U. S. 1, 10 (1984) (emphasis added). As this Court observed in a different context, "for the same transaction … a suit by a … litigant in a federal court instead of a State court … should not lead to a substantially different result." *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945).

Review should be granted because the *McGill* rule, which the California state courts and other courts

applying California law[3] hold is not preempted by the FAA even when incompatible with fundamental FAA principles, eviscerates both the letter and the spirit of the FAA and casts an ominous cloud over the ability of *Amici* Members to resolve consumer disputes in a rational, predictable, consumer-friendly and cost-effective manner. A vast number of consumer arbitration programs established by *Amici* Members are imperiled since courts in the nation's largest state with almost 40 million residents (one-eighth of the U.S. population)[4] have chosen to flout the FAA and this Court's precedents interpreting that statute, thus far with impunity. Moreover, the *McGill* rule may only be the tip of the iceberg. "[A] number of other states are now on the verge of enacting statutes … granting public injunction remedies like those provided by [California law] …." Myriam Gilles & Gary Friedman, *Unwaivable: Public Enforcement Claims and Mandatory Arbitration*, 89 Fordham L. Rev. 451, 454-55 (2020). If permitted to stand, the California state courts' refusal to find that the *McGill* rule is preempted by the FAA in any respect, typified by this case, will entice other states and litigants to create their own "devices and formulas" for circumventing *Concepcion*, *Epic Systems* and *Lamps Plus*. Therefore, the important question presented by Petitioners[5] is

---

[3] [B]ecause so many contracts are formed in California, that State's law often applies in other states. This means that *McGill* does too." Pet., p. 25.

[4] Public Policy Institute of California, "California's Population," https://www.ppic.org/publication/californias-population/ (Jan. 2025).

[5] "Whether, or to what extent, the FAA preempts a state-law rule allowing a plaintiff to evade arbitration by pleading a request for "public injunctive relief," even if the relief sought

potentially nationwide in scope, affecting *Amici* Members across the country and hundreds of millions of consumer arbitration agreements. For these reasons, *Amici* and their Members have a strong interest in the outcome of this case.

## SUMMARY OF ARGUMENT

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

*Amici* Members who use bilateral arbitration agreements in their consumer banking and lending contracts rely on the consistent and uniform application of these fundamental FAA principles. Regrettably, the *McGill* rule, as excessively broadened and applied by the California state courts, generates great uncertainty and confusion because it creates a gaping "public injunctive relief" exception to the FAA—*i.e.*, arbitration agreements calling for individual resolution of disputes are unenforceable

---

would benefit only consumers of a particular product or service." (Pet., p. i).

because they collide with the allegedly unwaivable statutory remedy of public injunctive relief, even where the supposed beneficiaries are only a sliver of the general public. The *McGill* rule—and the promise of attorneys' fees to successful plaintiffs, who only need to include a generic request for a "public" injunction in their complaints to defeat a motion to compel individual arbitration (*see* Pet., p. 23)[6]—has unleashed a torrent of public injunctive relief litigation against companies (including many *Amici* Members) that could drive at least some companies to abandon arbitration altogether since they face the prospect of having to litigate claims in court *in addition to* maintaining their consumer arbitration platforms.[7] That would be most unfortunate, since the public—the body supposedly protected by the *McGill* rule—would be deprived of the many benefits of individual arbitration, as documented by the Consumer Financial Protection Bureau ("CFPB") itself. Individual arbitration benefits consumers with equitable claims,

---

[6] California trial lawyers are incentivized to bring such litigation not only because it is so easy to do, but also because under California law, plaintiff's attorneys are entitled to obtain attorneys' fees from the defendant if they are successful in obtaining "a significant benefit, whether pecuniary or nonpecuniary" on behalf of the "general public or a large class of persons." *See* Cal. Code of Civil Procedure § 1021.5.

[7] Under the rules of the two most widely used consumer arbitration administrators, the American Arbitration Association ("AAA") and JAMS, the consumer's share of the filing, administrative and arbitrator fees is capped at $225 and $250, respectively, and the company is required to pay the remainder of the fees, which can amount to several thousand dollars or more. *See* AAA Consumer Fee Schedule (Jan. 15, 2024), https://www.adr.org/media/3uofn4lu/consumer_rules_and_mediation_procedures_feeschedule.pdf; JAMS Consumer Fee Schedule (May 2, 2024), https://www.jamsadr.com/consumer-minimum-standards/.

not just those with damages claims. Being forced to litigate an arbitrable claim in court causes irreparable harm because the parties are "deprived of the inexpensive and expeditious means by which the[y] … had agreed to resolve their disputes." *Alascom, Inc. v. ITT N. Elec. Co.*, 727 F.2d 1419, 1422 (9th Cir. 1984).

Review by this Court is necessary because the *McGill* rule, as applied overbroadly by the California state courts, impairs the public interest by eliminating bilateral arbitration as a method for resolving consumer disputes that would otherwise be resolved in an individual arbitration under *Concepcion*. Review should also be granted so that this Court can reinforce that "[s]tate … courts must enforce the [FAA] … with respect to all arbitration agreements covered by that statute." *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 530 (2012); *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995) (state-law principles must be applied with "'due regard … to the federal policy favoring arbitration'") (citation omitted). In the absence of review, California state court decisions expansively applying the *McGill* rule will send a strong signal to other state courts and legislatures that still harbor distrust of arbitration[8]

[8] The FAA was designed specifically "'to reverse the longstanding judicial hostility to arbitration agreements ….'" *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (citation omitted); *accord*, *Concepcion*, 563 U.S. at 339 (the FAA was enacted by Congress to reverse the "widespread judicial hostility to arbitration agreements"). It embodies a liberal federal policy favoring arbitration agreements. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). The FAA creates federal substantive law of arbitrability that is binding on state as well as federal courts. *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984). States are not permitted to discriminate against arbitration or single out arbitration agreements for special

that they, too, can disregard the FAA without consequence. *See Concepcion*, 563 U.S. at 342 (judicial hostility towards arbitration manifests itself in "'a great variety' of 'devices and formulas …'") (citation omitted).

The *McGill* rule, as applied overbroadly by the California state courts, is quintessentially the type of "device" or "formula" described in *Concepcion*. It rests on the faulty premise that California can evade the FAA and *Concepcion* by enacting a statute which it declares to be a "non-waivable" substantive right because it benefits the "public,"[9] and then allowing the term "public" to be defined as only a fraction of the general public dealing with the defendant company. Such rhetorical legerdemain cannot disguise the fact that the *McGill* rule is "a state-law rule tailor-made to invalidate arbitration contracts, and *only* arbitration contracts." (Pet., p. 5). It is designed to keep claims in court and out of arbitration just as if California had purported to expressly carve out such claims from the operation of the FAA, which would be preempted.[10]

---

treatment. *See, e.g.*, *Doctors' Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (state could not require special notice requirements for arbitration agreements but not for other contracts).

[9] *McGill* was premised on California Civil Code section 3513, which provides that "[a]ny one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement." 2 Cal. 5th at 961 (quoting Cal. Civ. Code § 3513). By that logic, *McGill*'s public injunctive relief exception could swallow the FAA, since many if not most statutes can be argued to benefit the public. *See* U.S. National Archives and Records Administration, "Public Laws" (2020), https://www.archives.gov/federal-register/laws ("Most laws passed by Congress are public laws. Public laws affect society as a whole."), https://www.archives.gov/federal-register/laws.

[10] *See, e.g.*, *Marmet*, 565 U.S. at 532-33 (FAA preempted state supreme court decision prohibiting arbitration of personal injury

## ARGUMENT

### I. Review Should Be Granted Because the California State Courts' Overly Broad Application of the *McGill* Rule Contravenes the FAA and Deprives Consumers, Businesses and the Public of the Many Benefits of Individual Arbitration

*Amici* Members and other businesses that use arbitration agreements in their contracts do so because it is a faster, more efficient and more cost-effective method of resolving disputes than court litigation, it minimizes the disruption and loss of good will that often results from litigation and it substantially reduces litigation costs. Moreover, it is more convenient for both *Amici* Members and their consumer customers.[11] This Court has often

---

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

[11] There are important intangibles associated with arbitration. For example, in arbitration, consumers can speak directly to an arbitrator sitting at a conference table, unencumbered by the cold formalities of a courtroom and the rigid court rules governing procedure and evidence. They can also choose arbitrators with expertise in the subject matter of the dispute. Consumers can even participate virtually by telephone or by Zoom or Teams

acknowledged the many benefits of arbitration. *See, e.g.*, *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) ("[T]he Act [FAA], by avoiding 'the delay and expense of litigation,' will appeal 'to big business and little business alike, corporate interests [and] individuals'") (citations omitted); *Stolt-Nielsen*, 559 U.S. at 685 ("[i]n bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes"); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) ("by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration'") (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)); *Coinbase, Inc. v. Bielski*, 599 U.S. 736, 743 (2023) (the "benefits of arbitration" include "efficiency, less expense, less intrusive discovery").

Given these attributes of arbitration, it is no surprise that consumers who have actually participated in individual arbitration have enjoyed the experience. A Harris Interactive online poll of 609 individuals who had participated in an arbitration that reached a decision found, *inter alia*, that: (i) arbitration was widely seen as faster (74%), simpler (63%) and cheaper (51%) than going to court; (ii) two thirds (66%) of the participants said they would be likely to use arbitration again with nearly half (48%)

---

while thousands of miles away. Such conveniences and efficiencies do not exist in court, which can be intimidating and frustrating to non-lawyers and fraught with unpleasantries and delays.

saying they were extremely likely to do so. Even among those who lost, a third said they were at least somewhat likely to use arbitration again; (iii) most participants were very satisfied with the arbitrators' performance, the confidentiality process and its length; and (iv) although winners found the process and outcome very fair and losers found the outcome much less fair, 40% of those who lost were moderately to highly satisfied with the fairness of the process and 21% were moderately to highly satisfied with the outcome.[12]

The California state courts' overly expansive reading of the *McGill* rule, which immunizes the rule from application of the FAA in any respect and effectively precludes bilateral arbitration of consumer disputes whenever the words "public injunction" appear in a complaint, causes harm to the very "public" that it purports to protect. The elimination of individualized arbitration agreements deprives consumers, including customers of many *Amici* Members, of the many proven benefits of individual arbitration—speed, economy, convenience and efficiency—and forces them into court systems with very limited resources[13] that are chronically overburdened and underfunded and that are slower, more expensive, more intimidating and far less accommodating than arbitration. Forty years ago, Chief Justice Burger urged greater use of arbitration to reduce "the backlog of cases in the overburdened federal and state courts." "Protracted

---

[12] *See* U.S. Chamber Institute for Legal Reform, "Arbitration: Simpler, Cheaper, and Faster Than Litigation—A Harris Interactive Survey," https://instituteforlegalreform.com/wp-content/uploads/media/ArbitrationStudyFinal.pdf (2005).

[13] As this Court has recognized, judicial resources are "scarce." *Coinbase, Inc. v. Bielski*, 599 U.S. at 743; *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

cases," he emphasized, "not only deny parties the benefits of a speedy resolution of their conflicts, but also enlarge the costs, tensions and delays facing all other litigants waiting in line." "In terms of cost, time and human wear and tear, arbitration is better by far," he concluded.[14] Contrary to its supposed mission, the *McGill* rule, as applied over broadly by the California state courts, ends up disserving the public interest.

Statistics compiled by the CFPB over four years of research confirm the tangible benefits of individual arbitration to consumers, particularly when compared to non-bilateral procedures such as class action litigation. In 2015, the CFPB released a 735-page Arbitration Study,[15] which then-Chairman Richard Corday described as "the most comprehensive empirical study of consumer financial arbitration ever conducted …."[16] Among the Study's findings were the following:

- Individual consumer arbitration is up to 12 times faster than consumer class action litigation. The CFPB's data found that: (i) the median desk arbitration (just documents) was resolved in four months; (ii) the median telephone arbitration was resolved in five months; (iii) the

---

[14] *See* Giles Hudson, "Burger Urges Greater Use of Arbitration to Reduce Court Backlog," https://www.nytimes.com/1985/08/22/us/chief-justice-urges-greater-use-of-arbitration.html (Aug. 21, 1985).

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

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

median in-person hearing was resolved in seven months; and (iv) when the arbitration settled, the median arbitration proceeding lasted two to five months.[17] By contrast, the average class action settlement received final court approval in 1.89 years, and federal court multi-district litigation class actions filed in 2010 closed in a median of 2.07 years.[18]

- Arbitration is far less expensive than litigation. For example, under the AAA's Consumer Rules, the consumer's share of the administrative and arbitrator fees is capped at $225, with the company paying the remainder.[19] That is 45% less than the $405 it costs for a plaintiff to file a new complaint in federal court.[20]
- Because California state courts are using the *McGill* rule as a pretext for avoiding *Concepcion*'s approval of class action waivers, it is notable that the CFPB found that consumers recover far more in individual arbitrations than in class action settlements. In 87% of the 562 class actions the CFPB studied, the putative class members received no benefits whatsoever.[21] In the remaining 13%, the average class

---

[17] Study, § 1, p. 13.

[18] *Id.*, § 6, pp. 9, 43.

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

[20] *Id.*, § 4, p. 10.

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

> member's recovery was a mere $32.35,[22] while class counsel obtained almost half a billion dollars ($424,495,451) in attorneys' fees.[23] By contrast, in arbitrations where consumers obtained relief on affirmative claims, the consumer's average recovery was $5,389 (an average of 57 cents for every dollar claimed and 166 times as much as the average putative class member's recovery).[24]

The elimination of individual arbitration caused by the California state courts' expansive reading of the *McGill* rule is also detrimental to businesses, ultimately causes consumers to pay more for goods and services and clogs the public court systems. For *Amici* Members who use arbitration, the ability to save substantial legal fees and costs by resolving consumer disputes on an individual basis is a substantial incentive to maintain an arbitration program. Individual arbitration leads to greater predictability and control over legal budgets and thus to more competitive pricing for goods and services (which also benefits consumers). Arbitration is viewed as an integral component of a sound compliance program. Conversely, court litigation foists on companies the very complexities, high expenses and greater litigation risks that individual arbitration was designed to avoid.

As a matter of basic economics, consumers ultimately pay for increased litigation costs in the form of higher prices or reduced services, as these

---

[22] *See* Consumer Financial Protection Bureau, Arbitration Agreements, Proposed Rule, 81 Fed. Reg. 32,830, p. 73 n. 305 (May 24, 2016) (CFPB acknowledged that the number is "approximately $32").

[23] Study § 8, p. 33.

[24] Study, § 5, pp. 13, 41.

expenses must be funded. Conversely, individual arbitration helps reduce a company's litigation costs and those savings are passed along in the form of lower costs or increased services to consumers. *See, e.g.*, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) ("it stands to reason that passengers containing a forum clause … benefit in the form of reduced fares …"); *Metro E. Ctr. for Conditioning & Health v. Quest Communications Int'l*, 294 F.3d 294, 297 (7th Cir.), *cert. denied*, 537 U.S. 1090 (2002) (The "benefits of arbitration are reflected in a lower cost of doing business that is passed along to customers. That is because by limiting discovery and dealing with individual rather than class claims it "curtails the cost of the proceedings and allows swift resolution of small disputes."); *Provencher v. Dell*, 409 F. Supp. 2d 1196, 1203 n. 9 (C.D. Cal. 2006) ("it is likely that consumers actually benefit in the form of less expensive computers reflecting Dell's savings from inclusion of the arbitration clause in its contracts").[25]

The already overburdened and underfunded California state court system[26] will become even more overburdened

---

[25] The additional costs to companies associated with defending class actions in court are substantial. In 2017, when it promulgated its Final Arbitration Rule, the CFPB estimated that it would cause 53,000 providers who then used arbitration agreements to incur between $2.62 billion and $5.23 billion in costs over a five-year period to deal with 6,042 additional federal and state court class actions that would be filed due to the Rule's elimination of class action waivers. 82 Fed. Reg. 33210, 33403-33410 (July 19, 2017). That data undoubtedly understates what the current numbers would be some eight years later. While these statistics are nationwide in scope, a significant percentage would be attributable to California class actions. *See* text at note 4 *supra*.

[26] *See* Sharon Bernstein, "California courts are underfunded, leading to delays in cases, chief justice says," The Fresno Bee

and underfunded if disputes that should be resolved in arbitration are instead shuttled to court due to an over-expansive interpretation of the *McGill* rule. Businesses will also be saddled with enormous additional litigation costs, and consumers will pay higher prices and/or suffer reduced services because the added litigation costs will be passed through to them in whole or in part. As taxpayers, they will also pay for the increased costs to the court systems required to handle the burgeoning increase in additional court cases. Public policy considerations, in addition to federal arbitration jurisprudence, overwhelmingly favor a holding that the FAA preempts the California State courts' expansive application of the *McGill* rule.

## II. Holding that the FAA Preempts the *McGill* Rule in the Circumstances Presented by Petitioners Will Not Deprive Consumers of Their Individual Claims in Arbitration, Including Claims for Equitable Relief

Arbitration does not deprive parties of substantive claims; it merely changes the forum for resolving those claims. *See Gilmer*, 500 U.S. at 26. In *Hodges*, the Ninth Circuit held that the *McGill* rule is preempted by the FAA when a plaintiff seeks an injunction that would primarily benefit only a specific class of consumers or when the implementation of the requested injunction would require evaluation of the individual claims of non-parties. 21 F.4th at 545-47. In such circumstances, the defendant's motion to compel individual arbitration should be granted. Importantly, such a result will not deprive consumer plaintiffs of their *individual* claims for relief, including

---

(Jan. 16, 2025), https://www.yahoo.com/news/california-courts-underfunded-leading-delays-223410892.html.

injunctive relief. In fact, in most cases, individual arbitration will benefit consumers *more* than claims for public injunctive relief.

By its very definition, a claim for public injunctive relief is not intended to benefit the person asserting the claim. In *McGill*, the California Supreme Court distinguished between public injunctive relief and non-public injunctive relief, explaining that "public injunctive relief … is relief that has 'the primary purpose and effect of' prohibiting unlawful acts that threaten future injury to the general public," whereas "[r]elief that has the primary purpose or effect of redressing or preventing injury to an individual plaintiff … does not constitute public injunctive relief." 2 Cal. 5th at 955 (citation and internal quotations omitted). The "evident purpose" of public injunctive relief is "to remedy a public wrong" and "not to resolve a private dispute." *Id*. at 961.

By contrast, in an individual arbitration, a consumer can resolve his or her private dispute and obtain relief that actually benefits the consumer. That includes injunctive relief. In *Gilmer*, the plaintiff contended that claims under the Age Discrimination in Employment Act ("ADEA") could not be subject to arbitration because, among other reasons, "arbitration procedures cannot adequately further the purposes of the ADEA because they do not provide for federal class actions." 500 U.S. at 32. This Court rejected that argument, explaining that:

> It is also argued that arbitration procedures cannot adequately further the purposes of the ADEA because they do not provide for broad equitable relief and class actions. As the court below noted, however, arbitrators do have the power to fashion equitable relief …. But "even

> if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred."

500 U.S. at 32 (citation omitted).

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

An online data base of individual arbitrations maintained by the AAA under California law shows

that in hundreds of arbitrations real-world equitable relief such as rescission, reinstatement, a declaratory judgment, an accounting, and a release of lien was awarded to consumers or achieved through settlement.[27] Accordingly, holding that the FAA preempts the California state courts' uniform application of the *McGill* rule to deny arbitration will not impair consumer plaintiffs' individual claims. Their substantive rights will merely be resolved in arbitration instead of in court, and their claims will be resolved in a faster, cheaper and more convenient manner.

[27] *See* AAA Consumer and Employment Arbitration Statistics, https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fadr.org%2Fmedia%2Fpwgfahhn%2Fconsumerreport_q1_2025_formatted_1.xlsx&wdOrigin=BROWSELINK.

## CONCLUSION

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

Respectfully submitted,

THOMAS PINDER
ANDREW DOERSAM
AMERICAN BANKERS ASSOCIATION
1333 New Hampshire Ave, NW
Washington, DC 20036
(202) 663-5028

DAVID POMMEREHN
*General Counsel and Senior Vice President*
CONSUMER BANKERS ASSOCIATION
1225 New York Ave, NW
Suite 1100
Washington, D.C. 20005
(202) 552-6368

MARK J. LEVIN
*Counsel of Record*
ALAN S. KAPLINSKY
BALLARD SPAHR LLP
1735 Market Street
51st Floor
Philadelphia, PA 19103
(215) 665-8500
levinmj@ballardspahr.com
kaplinsky@ballardspahr.com

*Counsel for Amici Curiae American Bankers Association and Consumer Bankers Association*

July 1, 2025