Nos. 19-1066, 19-1078

IN THE SUPREME COURT OF THE UNITED STATES

COMCAST CORPORATION, COMCAST CABLE COMMUNICATIONS, LLC,

Petitioners,

v.

CHARLES TILLAGE, JOSEPH LOOMIS,

Respondents.

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

Petitioners,

v.

STEVEN MCARDLE,

Respondent.

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

---

BRIEF OF *AMICUS CURIAE* DRI—THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONERS

PHILIP L. WILLMAN,
PRESIDENT OF DRI—THE VOICE OF THE DEFENSE BAR
BROWN & JAMES PC
800 Market Street
Suite 1100
St. Louis, MO 63101
(314) 421-3400
pwillman@bjpc.com

ZACH CHAFFEE-MCCLURE
Counsel of Record
ELISABETH A. HUTCHINSON
SHOOK, HARDY & BACON LLP
2555 Grand Blvd.
Kansas City, MO 64108
(816) 474-6550
zmcclure@shb.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

INTEREST OF THE AMICUS CURIAE[1]

DRI—The Voice of the Defense Bar (www.dri.org) is an international membership organization composed of more than 20,000 attorneys involved in the defense of parties in civil litigation. DRI's mission includes promoting appreciation of the role of defense lawyers in the civil justice system, addressing substantive and procedural issues germane to defense lawyers and their clients, improving the civil justice system, and preserving the civil jury. To help foster these objectives, DRI participates as *amicus curiae* at both the certiorari and merits stages in carefully selected Supreme Court appeals presenting questions that are important to civil defense attorneys, their clients, and the conduct of civil litigation.

Arbitration is an issue of particular interest because DRI members often advise or represent clients in drafting contracts containing arbitration clauses and in subsequent proceedings. Frequently, such contractual disputes address the enforceability of arbitration agreements. Based on the informed interest and relevant experience of its members, DRI has submitted several *amicus* briefs in recent

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* DRI—The Voice of the Defense Bar certifies that no counsel for a party authored this brief in whole or in part, and that no party or counsel other than DRI, its members, and its counsel, made a monetary contribution intended to fund preparation or submission of this brief. In accordance with Supreme Court Rule 37.2, counsel of record for all parties received notice at least ten days prior to the due date of the intention to file this *amicus curiae* brief and have provided written consent to the filing of this brief.

years in cases presenting issues under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"). *See, e.g.*, *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019); *DIRECTV, Inc. v. Imburgia,* 136 S. Ct. 463 (2015); *Am. Express Co. v. Italian Colors Rest.,* 570 U.S. 228 (2013); *Oxford Health Plans LLC v. Sutter,* 569 U.S. 564 (2013); *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 559 U.S. 662 (2010).

The Ninth Circuit's opinion in *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819 (9th Cir. 2019), as applied in *McArdle v. AT&T Mobility LLC*, 772 F. App'x 575 (9th Cir. 2019), and *Tillage v. Comcast Corp.*, 772 F. App'x 569 (9th Cir. 2019), not only disregards this Court's long-standing precedent regarding FAA preemption, but also will subject numerous defendants to the very financial risks and burdens they sought to contain by contracting for arbitration in the first instance.

Based on its members' extensive practical experience, DRI is uniquely suited to demonstrate why the decisions below create an insurmountable obstacle to the enforcement of tens of millions of arbitration agreements, which benefit customers and businesses alike, and prevent counsel from reliably advising clients as to the enforceability of such agreements. In addition, DRI desires to explain why, in its members' experience, public-injunction claims are fundamentally incompatible with arbitration and its benefits.

DRI and its members seek uniform application of arbitration agreements to ensure that arbitration can

achieve its basic purpose of resolving disputes efficiently, predictably, and at minimal cost. The Ninth Circuit's decision in *Blair*, as applied in both *McArdle* and *Tillage*, thwarts that goal. DRI thus has a vital interest in these cases.

SUMMARY OF ARGUMENT

The petitions in both *McArdle* and *Tillage* present an issue of the utmost importance under the FAA: whether a State may refuse to enforce an arbitration agreement based solely on a public policy in favor of public-injunction proceedings, notwithstanding that the parties can fully vindicate their claims in arbitration. The enforceability of tens of millions of arbitration agreements turns on the answer to this question.

As the petitioners have amply explained, the California Supreme Court's ruling in *McGill v. Citibank, N.A.*, 393 P.3d 85 (Cal. 2017), and the Ninth Circuit's subsequent upholding of the so-called "*McGill* rule" in *Blair*, *Tillage*, and *McArdle* conflicts with the FAA in almost every way fathomable: it undermines with the FAA's primary purpose of ensuring arbitration agreements are enforced according to their terms; it runs afoul of the principle that states must apply to arbitration agreements the same law that applies to contracts generally; and it conflicts with the FAA's "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Because the petitions fully outline these issues, among others,

this *amicus* brief addresses three additional reasons the Court should resolve the question presented.

First, the *McGill* rule and the decisions at issue below are the latest manifestation of ongoing hostility to arbitration agreements from California courts. But as this Court made clear in *Concepcion*, regardless of any state public-policy considerations regarding the merits of arbitration, the FAA controls. This case presents an opportunity for the Court to reassert this principle.

Second, in upholding the *McGill* rule, the Ninth Circuit has opened the floodgates to abuse and created a burden defendants realistically cannot overcome. This burden presents an insurmountable obstacle to the enforcement of tens of millions of arbitration agreements that are fair and beneficial to both consumers and businesses. The arbitration of public-injunction claims inherently involves procedures incompatible with traditional bilateral arbitration—*e.g.*, informality, streamlined proceedings, expedition, low cost, and limited judicial review. Just as the Court observed in *Concepcion*, the advantages of arbitration that the FAA seeks to protect are absent in the arbitration of public-injunction claims. With the *McGill* rule, California and the Ninth Circuit again are attempting to "chip away at [the FAA] by indirection." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122 (2001).

Lastly, the *McGill* rule makes the enforceability of arbitration agreements highly unpredictable for businesses having customers and employees dispersed regionally and nationally, and it

encourages forum shopping. Arbitration should foster uniformity in expectations and discourage forum shopping. The uncertainty created by the *McGill* rule substantially undermines these objectives, interferes with the federal right to enforce arbitration agreements, and conflicts with the FAA's purpose of making such agreements predictably enforceable, regardless of the forum.

ARGUMENT

I. The *McGill* Rule Is the Latest in A Long Line of Cases from California Courts and the Ninth Circuit Attempting to Undermine the FAA and this Court's Precedent.

The FAA was enacted "in response to widespread judicial hostility to arbitration" and requires courts to "'rigorously enforce' arbitration agreements according to their terms," including the terms setting "the rules under which that arbitration will be conducted." *Italian Colors*, 570 U.S. at 233 (citations omitted); *see Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018) (the FAA requires that courts "enforce arbitration agreements according to their terms"). Unfortunately, that hostility—particularly from California courts and the Ninth Circuit—has continued. The *McGill* rule is its latest manifestation.

Over the years, courts have employed (and, in some cases, created) "'a great variety' of 'devices and formulas'" to avoid enforcing arbitration agreements by "declaring arbitration against public policy." *Concepcion*, 563 U.S. at 342 (citation omitted).

"California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts" and more likely to apply their own state laws to preclude enforcement of arbitration agreements. *Id.* (citations omitted).

This trend has been nothing short of prolific in California and the Ninth Circuit.[2] The *McGill* rule is

---

[2] *See, e.g.*, *Varela v. Lamps Plus, Inc.*, 701 F. App'x 670 (9th Cir. 2017) (affirming lower court order denying employer's motion to compel bilateral arbitration and permitted classwide arbitration to proceed despite contractual language prohibiting such); *Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129, 137 (Cal. 2014) (overruling *Gentry* in light of *Concepcion*, but reaffirming that "the FAA does not prevent states through legislative or judicial rules from addressing the problems of affordability and accessibility of arbitration"); *L.A. Sonic-Calabasas A, Inc. v. Moreno* (*Sonic II*), 311 P.3d 184 (Cal. 2013) (refusing to enforce arbitration agreement to arbitrate state statutory claims if arbitration would not afford procedural benefits that plaintiffs could have received outside of arbitration); *Sonic-Calabasas A, Inc. v. Moreno* (*Sonic I*), 247 P.3d 130 (Cal. 2011) (holding FAA did not preempt California law prohibiting arbitration agreement's waiver of administrative wage hearing); *Gentry v. Superior Court*, 165 P.3d 556 (Cal. 2007) (holding that preclusion of a class procedure in an arbitration agreement is unenforceable as a matter of California public policy); *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005) (holding courts may invalidate class arbitration waivers pursuant to an unconscionability defense); *Little v. Auto Stiegler, Inc.*, 63 P.3d 979 (Cal. 2003) (enforcing California's public-policy limitation on enforceability of arbitration agreements); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669 (Cal. 2000) (refusing to enforce employment-related arbitration agreement on public-policy grounds); *Broughton v. Cigna Healthplans of Cal.*, 988 P.2d 67 (Cal. 1999) (holding that the FAA did not preempt state public policies that prohibited enforcement of certain types of arbitral procedures or arbitration of particular types of claims);

the most recent in a long line of such cases employing state-made rules attempting to evade FAA preemption on public-policy grounds.

This trend must stop. As this Court made clear in *Concepcion*, "[t]he 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms'" and that states cannot—whether under the guise of unconscionability, public policy, or some other state-law defense—"require a procedure that is inconsistent with the FAA, even if it is desired for unrelated reasons." *Id.* at 344, 351 (citations omitted).

"*Concepcion* teaches that we must be alert to new devices and formulas" courts may employ to attempt to undermine the FAA. *Epic*, 138 S. Ct. at 1623. This is one such time for the Court to be vigilant in maintaining the integrity of federal law and its uniform application across the country.

II. Public-Injunction Claims Have No Limit and Are Inherently Incompatible with Arbitration.

The *McGill* rule, like so many devices to avoid enforcing arbitration agreements, invites abuse by the plaintiffs' bar and creates insurmountable obstacles to the enforcement of binding arbitration agreements. California and the Ninth Circuit's insistence that consumer arbitration agreements

---

Imburgia v. DIRECTV, Inc., 225 Cal. App. 4th 338 (2014) (holding state consumer protection laws did not require enforcement of arbitration agreement).

must acquiesce to public-injunction claims is particularly egregious because such claims not only circumvent arbitration agreements but also impose procedures inherently incompatible with the core features and advantages of arbitration repeatedly endorsed by this Court and Congress.

Indeed, public-injunction claims are every bit as incompatible with arbitration as the class actions that were the subject of the *Discover Bank* rule invalidated in *Concepcion*.[3] The *McGill* rule is yet another "subtle method[]" employed by courts "interfering with the fundamental attributes of arbitration." *Epic*, 138 S. Ct. at 1622 (quoting *Concepcion*, 563 U.S. at 344) (original brackets omitted). Even where there are valid state public-policy reasons to challenge particular arbitration agreements, whether involving class-action or public-injunction claims, "[a]llowing judges to pick and choose between statutes risks transforming them from expounders of what the law *is* into policymakers choosing what the law *should be*." *Id.* at 1624.

---

[3] In upholding the *McGill* rule, the Ninth Circuit analogized public-injunction claims to California's representative claims brought under the Private Attorneys General Act, Cal. Lab. Code § 2698 *et seq.* ("PAGA"), which the Ninth Circuit has held California can exempt from individual arbitration. *See Blair*, 928 F.3d at 826–27; *see also Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 427 (9th Cir. 2015) (holding FAA does not preempt California rule requiring arbitration agreements to permit PAGA claims). But both representative PAGA claims and public-injunction claims are incompatible with the simplicity and informality of individual arbitration, as both impose the same procedural burdens on traditional bilateral arbitration. Indeed, at least one commentator has dubbed PAGA claims "nonclass class" claims. William L. Stern, Rutter Business & Professions Code Section 17200 § 7:38 (Mar. 2019).

The *McGill* rule, like the *Discover Bank* rule before it, opens the floodgates to abuse and undermines the very benefits of arbitration this Court has upheld and recognized time and time again. The rule is thus an attack on arbitration itself—an effort to "chip away at [the FAA] by indirection." *Adams*, 532 U.S. at 122. It is preempted by the FAA "[b]ecause it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Concepcion*, 563 U.S. at 352 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

A. The *McGill* Rule Permits Rampant Abuse Because There Is No Meaningful Limitation to Its Invocation.

In *Concepcion*, this Court recognized the *Discover Bank* rule was too easily abused to offer any meaningful ability for parties to enforce arbitration agreements. Even though the rule required a "predictably small" damage size, the Court dismissed this requirement as "toothless and malleable." *Id.* at 347. The rule's requirement that "the consumer allege a scheme to cheat consumers," similarly presented "no limiting effect," because "all that is required is an allegation." *Id.*

The *McGill* rule is even worse.

Under the holdings of the California Supreme Court and Ninth Circuit, any party to a consumer contract can use the *McGill* rule to avoid arbitration *ex post*. Because the *McGill* rule requires nothing

more than a mere allegation, it is "trivially easy" for a plaintiff to add a public-injunction claim to any complaint, regardless of its merits, to render any proper arbitration agreement unenforceable. *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1428 (2017). And there is no other limitation on its use, in terms of the amount of damages sought or otherwise.

Given its lack of limits, the *McGill* rule is nothing short of an impermissible "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), https://perma.cc/QUL9-QLG6. As one commentator noted, with its "trio of rulings" in *Blair*, *Tillage*, and *McArdle*, "the 9th U.S. Circuit Court of Appeals blessed a tactic that will allow plaintiffs lawyers litigating California consumer class actions to defeat defense motions to compel arbitration." Alison Frankel, *The 9th Circuit Just Blew Up Mandatory Arbitration in Consumer Cases* (July 1, 2019), https://perma.cc/HD48-RV39.

Even more clearly than in *Concepcion*, there is no limiting effect on the *McGill* rule, leaving no way for a defendant to enforce an arbitration agreement.

B. The *McGill* Rule Requires Procedures Inherently Incompatible with Arbitration.

As this Court has repeatedly highlighted, via 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." *Lamps Plus*, 139 S Ct. at 1416 (citation omitted). Unsurprisingly, then, "that arbitration procedures are more streamlined than federal litigation is not a basis for finding the forum somehow inadequate; the relative informality of arbitration is one of the chief reasons that parties select arbitration." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009). Arbitration offers plaintiffs and defendants alike key advantages: "it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; [and] it is often more flexible in regard to scheduling of times and places of hearings and discovery devices." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (quoting H.R. Rep. No. 97-542, at 13 (1982)); *see also Concepcion*, 563 U.S. at 345 ("[T]he informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.").

With these features in mind, "arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation." *Allied-Bruce*, 513 U.S. at 280 (citations omitted). There is no question that "Congress, when enacting [the FAA], had the needs of consumers . . . in mind." *Id.* (citation omitted). Simply put, "arbitration is favorable to the individual." *Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268, 1279 (11th Cir. 2002) (citing *Allied-Bruce*, 513 U.S. at 280).

These advantages disappear when public-injunction claims are forced upon parties that have not agreed to such claims in their valid arbitration agreements. Like class arbitration, arbitration of public-injunction claims inherently involves protracted, complex, and expensive procedures that should not be forced on unwilling parties.

Public-injunction claims are not technically class actions in the formal sense of requiring class certification. *See McGill*, 393 P.3d at 92–93. But in every other respect, a public-injunction claim functions in the same manner as a class action, but without procedural and substantive safeguards.

Both public-injunction claims and Rule 23(b)(2) claims for classwide injunctions require virtually the same complex procedures that undermine the benefits of arbitration. Most critically, like classwide injunctions, public-injunction claims implicate lengthy and costly mass discovery. Public-injunction claims inherently involve "evidence not only of practices which affect [the claimant] 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) (collecting cases). The *McGill* rule only serves to undermine the streamlined arbitration proceedings the FAA seeks to protect.

The rule also undermines the timely resolution of disputes. According to one study completed by the California Dispute Resolution Institute, consumer and employment disputes are resolved in an average of 116 days in arbitration. *See* Cal. Dispute

Resolution Inst., *Consumer and Employment Arbitration in California: A Review of Website Data Posted Pursuant to Section 1281.96 of the Code of Civil Procedure* 19 (Aug. 2004), perma.cc/6NWR-B5DU. This Court has identified the time of "the average consumer arbitration" as generating "a disposition on the merits in six months, four months if the arbitration was conducted by documents only." *Concepcion*, 563 U.S. at 348.

But where parties must manage the complex discovery characteristic of public-injunction claims, consumers and defendants face protracted timelines. In DRI members' experience, public-injunction claims are as arduous as Rule 23(b)(2) class actions, in that both implicate costly, lengthy discovery and high stakes. Statistics from the American Arbitration Association ("AAA") shed light on the extent to which these features delay resolution. According to the AAA, "the median time frame from filing [a AAA class arbitration] to settlement, withdrawal, or dismissal—not judgment on the merits—was 583 days, and the mean was 630." *Id.* at 349. And of those class arbitrations cited, not a single one "resulted in a final award on the merits"; all claims cited were either settled, withdrawn, or dismissed, 85% of which before the arbitrator even ruled on class certification. *See* Brief for AAA as *Amicus Curiae* in *Stolt-Nielsen*, O.T.2009, No. 08-1198, at 23. There is no reason to think the mass discovery implicated by arbitration of public-injunction claims would produce better timelines. The protracted and expensive discovery required to arbitrate public-injunction claims is thus akin to high-stakes litigation, far from the efficient process contemplated

by traditional bilateral arbitration clauses. As long as this rule prevails, "the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness, . . . wind up looking like the litigation it was meant to displace." *Epic*, 138 S. Ct. at 1623.

The cost savings of individual arbitration also are absent from public-injunction claims. Indeed, "[t]he major cost savings in arbitration come from the lack of extensive and prolonged discovery." Corporate Counsel's Guide to Alternative Dispute Resolution Techniques § 3:19 (May 2019). Arbitration fees matter, as well. For instance, examining the Kaiser Foundation Health Plan, Inc.'s arbitration system, one legal scholar found the filing fee to bring an arbitration was $150, compared to $400 or more for federal and California court filing fees. *See* Alan B. Morrison, *Can Mandatory Arbitration of Medical Malpractice Claims Be Fair? The Kaiser Permanente System*, 70 Disp. Resol. J. 35, 46 (2015). This adds up claim after claim. Considering lengthy discovery and pretrial litigation, "direct losses associated with additional time to trial required for district court cases compared with AAA arbitration are approximately $10.9 – $13.6 billion between 2015 and 2016 (i.e. more than $180 million per month)." Roy Weinsten, et. al., *Efficiency and Economic Benefits of Dispute Resolution through Arbitration Compared with U.S. District Court Proceedings*, p. 4, Microeconomics Economic Research and Consulting (2017) (emphasis omitted).

The *McGill* rule is an attack on the "simplicity, informality, and expedition of arbitration." *Gilmer v.*

Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991) (citation omitted). As such, it undermines the very "characteristics that generally make arbitration an attractive vehicle for resolution of low-value claims." *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005) (quoting *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 174 (5th Cir. 2004)).

To make matters worse, the added time and expense of public-injunction claims in arbitration comes without the safeguards and judicial oversight that are indispensable to traditional public-injunction and class litigation. Arbitration lacks the procedural mechanisms inherent in civil litigation that can end meritless litigation before discovery or trial and ensure a hearing before a judge with no financial incentive to allow meritless claims to proceed.

For instance, this Court has imposed pleading standards in consumer cases to protect against meritless claims before expensive and protracted discovery. *See generally Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979) ("District courts must be especially alert to identify frivolous [consumer] claims brought to extort nuisance settlements . . . ."). Motions to dismiss and motions for summary judgment are thus common methods for disposing of deficient claims short of trial. In arbitration, by contrast, dispositive motions are disfavored. Indeed, "[s]ummary judgment in AAA arbitration is so rare as to be statistically insignificant." Lewis L. Maltby,

Employment Arbitration and Workplace Justice, 38 U.S.F. L. Rev. 105, 113 (2003) (citation omitted).

These risks are widely accepted in traditional bilateral arbitration as part of its efficient and streamlined proceedings. But in the arbitration of public-injunction claims, the common unavailability of early dispositive motions exposes defendants to the expense of discovery and even a merits hearing on facially deficient claims. *Cf. Twombly*, 550 U.S. at 559 ("[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases . . . .").

What's more, arbitration lacks meaningful appellate review. When public-injunction claims proceed in arbitration, some of the benefits of arbitration become liabilities. The narrow scope of judicial review of arbitrator decisions suddenly poses intolerable risks for defendants in the context of public-injunction claims. Section 10 of the FAA identifies the "exclusive" grounds for vacating an award, all of which "address egregious departures from the parties' agreed-upon arbitration" or "extreme arbitral conduct." *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008). Courts may not engage in "legal review generally" when considering arbitral awards. *Id.*

This narrow scope of appellate review has its merits in traditional bilateral arbitration. Were it otherwise, "parties who lose in arbitration [could] freely relitigate their cases in court," and as a result, "dispute resolution [would] be slower instead of faster[,] and reaching a final decision [would] cost

more instead of less." *B.L. Harbert Int'l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 907 (11th Cir. 2006), *abrogated on other grounds by Frazier v. CitiFinancial Corp.*, 604 F.3d 1313 (11th Cir. 2010). But where a company is facing the stakes of a public injunction coupled with narrow judicial review, the risk of arbitrator error easily increases to an unacceptable level. This risk will produce multiple negative consequences.

Among other things, a defendant facing the vastly increased stakes of public-injunction claims and the narrow grounds for vacating an arbitration award will feel compelled to mitigate its risk by insisting on a panel of three arbitrators despite the added expense. *See* Claude R. Tomson & Annie M.K. Finn, *Managing an International Arbitration: A Practical Perspective*, 60-JUL Disp. Res. J. 74, 78 (July 2005) ("Having three heads is better than one, and it prevents a so-called 'rogue' arbitrator from running off in the wrong direction."). But that tactic magnifies the substantial arbitrators' fees that have "no equivalent in traditional, judicial" proceedings such that arbitration of public-injunction claims can prove more expensive than its judicial counterpart. David S. Clancy & Matthew M.K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 Bus. Law. 55, 64 (Nov. 2007).

More importantly, the increased risk inherent in the arbitration of public-injunction claims exacerbates the problem of "blackmail settlements"—"settlements induced by a small probability of an immense judgment." *In re: Rhone-Poulenc Rorer Inc.*,

51 F.3d 1293, 1298 (7th Cir. 1995) (quoting Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973)). These risks are moderated in the class action context by Rule 23. As the Third Circuit has explained, one "factor [courts] weigh in [their] certification calculus" is whether "the size of the class and number of claims may place acute and unwarranted pressure on defendants to settle." *Newton v. Merrill Lynch*, 259 F.3d 154, 167 n.8 (3d Cir. 2001) (collecting cases); *see Reiter*, 442 U.S. at 345 (directing district courts to be wary of "claims brought to extort nuisance settlements" by exercising their "broad power and discretion vested in them by Fed. R. Civ. P. 23 with respect to matters involving the certification and management of potentially cumbersome or frivolous class actions" (citation omitted)).

But there are no equivalent protections in the resolution of public-injunction claims. Neither the court nor the arbitrator weighs the risks of allowing a potentially unmeritorious claim. And because public-injunction claims are not subject to class-action fairness hearings, parties are free to devise settlements that sacrifice the interests of non-participating stakeholders.

And they will. If "[f]aced with even a small chance of a devastating loss," defendants will settle and concede to whatever "in terrorem" settlements they must to avoid the "unacceptable" "risk of error" in the arbitration of a public-injunction claim that may have a lasting and vast impact. *Concepcion*, 563 U.S. at 350 (citation omitted). As this Court recognized in *Concepcion*, "there is little incentive for

lawyers to arbitrate on behalf of individuals" or omit a public-injunction claim from a complaint when such a claim permits the attorney to "reap far higher fees in the process" and forces defendants into meritless settlements to avoid the high stakes and costly discovery procedures. *Id.* at 347.

If forced to arbitrate public-injunction claims notwithstanding a valid waiver of such claims in an otherwise binding arbitration agreement, companies lose the benefit of their bargain. Like class arbitration, arbitration of public-injunction claims "greatly increases risks to defendants." *Id.* at 350. There is undue pressure to settle even "questionable claims" once public-injunction issues arise. *Id.* And no procedural safeguard is effective against the totality of these effects. Severance of the public-injunction claims for litigation in court, for example, does not relieve the added discovery costs or settlement pressure.

The *McGill* rule forces companies into a corner: settle the claim for an outrageous amount (and possibly to the detriment of the consumer), or face costs and burdens equivalent with classwide litigation. It is "hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision." *Id.* at 351. Like class arbitration, requiring arbitration of public-injunction claims "will have a substantial deterrent effect on incentives to arbitrate." *Id.* at 351 n.8. In fact, continued attacks on the efficiency of arbitration reduce defendants' incentive to continue subsidizing individual

arbitration for consumers to the point that they may abandon arbitration altogether in California.

III. The Decision of the Ninth Circuit Undermines the FAA By Creating Unpredictability in the Law and Encouraging Forum Shopping.

The *McGill* rule undermines the FAA by fostering the very unpredictability in the law that the FAA sought to avoid. In enacting the FAA, Congress intended to create a uniform, national standard to be predictably enforced across the United States. *See Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and HR. 646 Before the Subcomms. of the Judiciary*, 68th Cong. 28 (1924) (testimony of Alexander Rose) ("There is one excellent result to be achieved in the enactment of [the FAA], . . . it will set a standard throughout the United States . . . . [T]he enactment of this law, extending its effect all over the United States, will have an effect upon the cause of that much-desired thing-uniform legislation on a subject of this character."); *see also Bakoss v. Certain Underwriters at Lloyds of London,* 707 F.3d 140, 143–44 (2d Cir. 2013) ("The circuits that apply federal common law have relied on congressional intent to create a uniform national arbitration policy." (collecting cases)); *Salt Lake Tribune Publ'g Co. v. Mgmt. Planning, Inc.,* 390 F.3d 684, 689 (10th Cir. 2004) ("Congress did not plainly intend arbitration to mean different things in different states. Rather, it sought a uniform federal policy favoring agreements to arbitrate.").

The *McGill* rule makes the enforceability of arbitration agreements highly unpredictable for businesses with customers and employees dispersed regionally and nationally. Businesses often use the same arbitration agreement in contracts with customers nationwide—a practice encouraged and protected by the FAA. But with the *McGill* rule, California and the Ninth Circuit have created a road map to evade the FAA's preemptive reach. It is now difficult—if not impossible—to properly advise a national client on how to draft a uniform arbitration agreement to protect itself from the risks discussed *supra*. It is even more difficult to advise that same client on how the *McGill* rule will ultimately shape the national legal landscape if this Court does not step in to restore uniformity in the law. This uncertainty imposed by the *McGill* rule thus substantially undermines the federal right to enforce arbitration agreements and conflicts with the FAA's purpose of making such agreements predictably enforceable regardless of the forum.

The *McGill* rule also encourages forum shopping. Any national company facing the possibility of a public-injunction claim can anticipate suit will be brought in California, where the claim has the highest likelihood of skirting the FAA and thereby coercing the most substantial settlement. Precedent has already shifted patterns of consumer claims. As discussed in the *McArdle* petition, plaintiffs are amending their complaints to include public-injunction claims, and new suits are filed in disproportionately California. *See also* Frankel, *supra* (noting that if this Court declines to consider this issue, "we're going to see a lot of consumer class

actions filed in California" merely "wait[ing] until another circuit takes a look at the intersection of the FAA and injunction rights in state consumer and employment laws").

DRI and its members are already seeing such patterns emerge because of the *McGill* rule. This Court need not wait for a Circuit split or to see if other states follow California and the Ninth Circuit's lead before addressing the issue presented. All claims are being filed in Ninth Circuit in the meantime, and defendants are facing—in real time—the very difficult decisions regarding costly mass discovery procedures and questionable settlement negotiations. It is therefore essential that this Court resolve the question presented so that nationwide arbitration agreements—which are enforceable in the vast majority of jurisdictions in which they are used—are not rendered unenforceable by the anti-arbitration hostility of one State and one Circuit.

CONCLUSION

For the foregoing reasons and those stated in the petitions, the *McArdle* and *Tillage* petitions for a writ of certiorari should be granted.

Respectfully submitted,

PHILIP L. WILLMAN,
PRESIDENT OF DRI—THE VOICE OF THE DEFENSE BAR
BROWN & JAMES PC
800 Market Street

ZACH CHAFFEE-MCCLURE
Counsel of Record
ELISABETH A. HUTCHINSON
SHOOK, HARDY & BACON LLP
2555 Grand Blvd.

Suite 1100
St. Louis, MO 63101
(314) 421-3400
pwillman@bjpc.com

Kansas City, MO 64108
(816) 474-6550
zmcclure@shb.com

Counsel for Amicus Curiae

MARCH 2020