2021 WL 2917640 (U.S.) (Appellate Petition, Motion and Filing)
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.

No. 31-07122021.
July 7, 2021.

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

Petition for A Writ of Certiorari

Susan N. Nikdel, Ballard Spahr Llp, 2029 Century Park East, Suite 800, Los Angeles, CA 90067, (424) 204-4400, nikdels@ballardspahr.com, Mark J. Levin, Counsel of Record, Ballard Spahr Llp, 1735 Market Street, 51st Floor, Philadelphia, PA 19103, (215) 665-8500, levinmj@ballardspahr.com, Counsel for Petitioner.

***i QUESTION PRESENTED**

Is California's *McGill* rule, under which agreements for individualized arbitration are invalidated when a plaintiff seeks public injunctive relief, preempted by the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.,* given this Court's holdings that:

• the FAA requires courts to "enforce arbitration agreements according to their terms," *Lamps Plus, Inc. v. Varela,* 139 S. Ct. 1407, 1413 (2019);

• arbitration agreements with terms requiring "individualized" arbitration are "protect[ed] pretty absolutely" by the FAA, *Epic Systems Corp. v. Lewis,* 138 S. Ct. 1612, 1621 (2018);

• state law is preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the FAA, *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 352 (2011);

• states cannot carve out particular categories of disputes from the operation of the FAA, *Marmet Health Care Ctr., Inc. v. Brown,* 565 U.S. 530, 532 (2012); and

• state 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)?

***II CORPORATE DISCLOSURE STATEMENT**

Community Loans of America, Inc., a privately held Georgia corporation, owns 100% of Fast Auto Loans, Inc.'s stock.

RULE 14.1(b)(iii) STATEMENT

The following proceedings are directly related to this case:

• *Maldonado, et al. v. Fast Auto Loans, Inc.,* No. 30-2019-01073154-CU-BT-CXC (Cal. Super. Ct. Orange County) (Order filed Nov. 21, 2019).

• *Maldonado, et al. v. Fast Auto Loans, Inc.,* No. G058645 (Cal. Ct. App., 4th App. Dist., Div. Three) (Order filed Jan. 11, 2021).

• *Maldonado, et al. v. Fast Auto Loans, Inc.,* No. S267681 (Cal. Sup. Ct.) (Order filed April 28, 2021).

***iii** TABLE OF CONTENTS

***v** TABLE OF AUTHORITIES

*1 PETITION FOR A WRIT OF CERTIORARI

Petitioner Fast Auto Loans, Inc. ("Fast Auto") respectfully petitions for a writ of certiorari to review the opinion of the Court of Appeal of California in this case.

OPINIONS BELOW

The opinion of the Court of Appeal of California (App., *infra,* 1a-23a) is reported at 60 Cal. App. 5th 710 (Ct. App. 2021). The order of the Supreme Court of California denying review of the Court of Appeal opinion (App., *infra,* 30a) is unreported, but is available at 2021 Cal. LEXIS 2956 (Cal. Apr. 28, 2021). The opinion of the trial court (the Superior Court of California) is unpublished and is not available on Lexis or Westlaw, but appears at App. 24a-29a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a) because the Court of Appeal of California held that the FAA does not preempt California law invalidating agreements for individualized arbitration when a plaintiff seeks public injunctive relief and the Supreme Court of California denied discretionary review. *See Perry v. Thomas,* 482 U.S. 483, 489 n. 7 (1987) (finding

jurisdiction under § 1257 to decide whether the FAA preempted a state statute that was construed by the Court of Appeal of California to invalidate arbitration agreements covered by the FAA and the Supreme Court of California denied review); *Southland Corp. v. Keating,* 465 U.S. 1, 6-7 (1984) (finding jurisdiction under § 1257 to decide whether the FAA preempted California law since "to delay review of a state judicial decision denying enforcement of the contract to arbitrate until the state court litigation has run its course would defeat the core purpose ***2** of a contract to arbitrate"); *Volt Info. Sciences, Inc. v. Board of Trustees,* 489 U.S. 468, 473 n. 4 (1989) (finding jurisdiction under § 1257 where the Court of Appeal of California affirmed the trial court's denial of the petitioner's motion to compel arbitration and the Supreme Court of California denied review). *See also DIRECTV, Inc. v. Imburgia,* 577 U.S. 47, 51-53 (2015) (granting certiorari and finding FAA preemption where the Court of Appeal of California affirmed the trial court's denial of the petitioner's motion to compel arbitration and the Supreme Court of California denied review); *Preston v. Ferrer,* 552 U.S. 346, 351-52 (2008) (same).

This petition is timely under Supreme Court Rule 13, in that the Court of Appeal of California issued its opinion on January 11, 2021, App. la, and the Supreme Court of California denied Fast Auto's motion for discretionary review on April 28, 2021, App. 30a. This petition is filed within 90 days of the latter date.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

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

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

> A written provision in * * * a contract evidencing a transaction involving commerce ***3** to settle by arbitration a controversy thereafter arising out of such contract or transaction, * * * or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

INTRODUCTION

Whether the FAA preempts California's *McGill* rule is a recurring but still unresolved question of FAA preemption that is of great importance to Fast Auto and countless companies nationwide that do business in California-the nation's largest state with almost 40 million residents (one-eighth of the U.S. population). [1] That question is also before this Court in another pending petition, *see* Pet. for Cert., *HRB Tax Group, Inc. v. Snarr,* No. 20-1570 (filed May 10, 2021), and was the subject of petitions filed last term by Comcast Corporation and AT&T Mobility LLC. [2]

***4** In *McGill v. Citibank, N.A,* 393 P.3d 85 (Cal. 2017), the Supreme Court of California held that arbitration agreements that waive the right to seek "public injunctive relief"--relief that has "the primary purpose and effect of prohibiting unlawful acts that threaten future injury to the general public"--are invalid and unenforceable under state law. *Id.* at 93-94. Construing the FAA's saving clause, 9 U.S.C. § 2, it further held that the *"McGill* rule" is not preempted by the FAA because "[t]he contract defense at issue here--'a law established for a public reason cannot be contravened by a private agreement' (Civ. Code, § 3513)--is a generally applicable contract defense, i.e., it is a ground under California law for revoking any contract ... [and] is not a defense that applies only to arbitration or that derives its meaning from the fact that an agreement to arbitrate is at issue." *Id.* at 94 (emphasis by the court).

A claim for public injunctive relief is nothing more than a representative action under a different name. Earlier attempts by the Supreme Court of California to invalidate arbitration agreements where consumers sought injunctions under state consumer protection statutes were held to be preempted by the FAA. *See, e.g., Ferguson v. Corinthian Colleges,* 733 F.3d 928, 934-37 (9th Cir. 2013) (holding that the FAA preempted California's *"Broughton-Cruz* rule" under which agreements to arbitrate claims for public injunctive relief under the Legal Remedies Act, the Unfair Competition Law and the false advertising law were not enforceable). Subsequently, the court devised the *McGill* rule, under which a consumer seeking injunctive relief for "the public at large" is immunized from arbitration agreements that require individualized resolution of disputes since such agreements do not allow "public" relief to be obtained in ***5** court or in arbitration. *See McGill,* 393 P.3d at 90. For defendant companies, public injunctive relief is classwide injunctive relief on steroids--the "class" is 40 million California residents rather than a defined group of similarly situated customers because the plaintiff is not required to establish that a class should be certified. *Id.* at 92-93.

The *McGill* rule is preempted by the FAA because it requires either that public injunctive relief claims be tried in court, nullifying the parties' choice of arbitration as the venue for resolving disputes, or that such claims be tried in arbitration, overriding the parties' choice of individualized arbitration and exposing companies to virtually the same risk of "bet the ranch" class arbitration that *Concepcion* eliminated because it effectively forces them to arbitrate rights and interests of countless non-parties to the arbitration agreement. In either case, the agreement of the parties to resolve disputes on an individualized basis is not enforced, not because of any defect in the formation of the arbitration agreement, but because it allegedly violates Cal. Civ. Code § 3513 and state public policy. The *McGill* rule is unmistakably a device that circumvents the fundamental premise of *Concepcion, Epic Systems* and *Lamps Plus* that agreements calling for individualized arbitration are valid under the FAA and must be enforced according to their terms. *See Concepcion,* 563 U.S. at 352 ("[a]lthough § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives").

McGill, and its subsequent adoption by the Ninth Circuit in ***6** *Blair v. Rent-A-Center, Inc.,* 928 F.3d 819 (9th Cir. 2019), have opened the floodgates to a tsunami of public injunctive relief lawsuits in California, including this case, *HRB Tax Group* and hundreds more. [3] Companies that implement bilateral arbitration programs do so in order to resolve business disputes with specific customers on a one-on-one basis, not to benefit the "general public" in expensive and protracted litigation that is fraught with even more risks than a suit for class-wide injunctive relief under Fed. R. Civ. P. 23(b)(2).

Moreover, in practice, the bar for successfully pleading a public injunctive claim has been set extremely low. Simply inserting the words "public injunctive relief" in the complaint will often suffice. For example, in this case, Respondents were permitted to pursue public injunctive relief even though their complaint *conceded* that certification of a class would easily rectify *all* of the harm they allege-both private *and* public. App. 48a ("[i]f the Classes are certified, the harms to the public and the classes can be easily rectified"). Yet, by including the words "public injunctive relief" at the tail end of their complaint, [4] Respondents were able to invoke the *McGill* rule and dodge their agreement to arbitrate on an individualized basis.

Subsequent to *McGill,* this Court-building upon the foundation laid in *AT&T Mobility LLC v. Concepcion-held* that the right to "individualized" ***7** 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,* 139 S. Ct. at 1416 (the FAA "envision[s]" an "individualized form of arbitration"). Nevertheless, in this case, the Court of Appeal of California, citing *McGill* and *Blair,* refused to enforce Fast Auto's arbitration provision and flatly rejected its argument that the FAA preempts the *McGill* rule.

Review should be granted because the *McGill* rule interferes with the fundamental policies underlying the FAA and flouts this Court's precedential decisions interpreting the FAA. Individual arbitration provides a fast, inexpensive, consumer-friendly, convenient and efficient means of resolving customer disputes precisely because it is *not* intended to adjudge claims of nonparties, much less the "general public." *See Lamps Plus,* 139 S. Ct. at 1416 (in individual arbitration, "parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, [and] greater efficiency and speed ...") (citations omitted). Only this Court can restore the overriding *"national* policy favoring arbitration" embodied in the FAA that businesses rely upon in formulating and pricing their consumer dispute resolution platforms. *See Southland Corp. v. Keating,* 465 U.S. at 10 (emphasis added).

STATEMENT OF THE CASE

A. Procedural History and Preservation of the FAA Preemption Question Herein Presented

On May 30, 2019, Respondents Joe Maldonado, Alfredo Mendez, J. Peter Tuma, Jonabette Michelle Tuma, and Roberto Mateos Salmeron ("Respondents")--each ***8** of whom had obtained one or more consumer loans from Fast Auto-filed a class action complaint against Fast Auto on behalf of themselves and similarly situated borrowers in the Superior Court of Orange County, California. Respondents alleged that the interest rates on their loans are unconscionable and violate California law. On July 3, 2019, Respondents filed a First Amended Class Action Complaint asserting claims under the California Unfair Competition Law and the Consumer Legal Remedies Act. App. 31a. In addition to class relief, the First Amended Class Action Complaint seeks public injunctive relief to prohibit "future violations of the aforementioned unlawful and unfair practices." App. 56a.

On August 26, 2019, pursuant to the arbitration provision in Respondents' loan agreements requiring disputes to be arbitrated on an individualized basis, Fast Auto moved to compel individual arbitration and stay litigation pending the completion of arbitration. [5] App. 89a. Fast Auto argued, *inter alia,* that the FAA preempts the *McGill* rule. App. 111a-112a. By Order dated November 21, 2019, the Superior Court of California denied First Auto's motion to compel arbitration. Finding *McGill* to be "directly on point," the court held that "the arbitration provision is invalid under California law and cannot be enforced." App. 29a. The court based its decision on the following language from *McGill:*

The question we address in this case is the validity of a provision in a predispute arbitration ***9** agreement that waives the right to seek this statutory remedy in any forum. We hold that such a provision is contrary to California public policy and is thus unenforceable under California law. We further hold that the Federal Arbitration Act does not preempt this rule of California law or require enforcement of the waiver provision.

App. 28a (quoting *McGill,* 393 P.3d at 87).

Fast Auto timely appealed, again arguing that the FAA preempts the *McGill* rule. App. 8a, 20a. On January 11, 2021 the Court of Appeal of California rejected Fast Auto's arguments and affirmed. App. la. The Court of Appeal held in a published opinion:

[O]ur California Supreme Court in *McGill* held that there is no [FAA] preemption .... [W]e are bound to follow the precedent of the California Supreme Court .... Moreover, we find its analysis to be legally soun[] and persuasive, as does the Ninth Circuit

(*Blair, supra,* 928 F.3d at p. 822 [FAA does not preempt the *McGill* Rule] ....) We conclude Lender's arguments the FAA preempts the *McGill* Rule lack merit....

60 Cal. App. 5th at 724-25. App. 21a.

Fast Auto then timely filed a discretionary Petition for Review with the Supreme Court of California which presented the question:

Is *McGill* preempted by the Federal Arbitration Act ("FAA") given the U.S. Supreme Court's subsequent pronouncements that (a) arbitration agreements requiring "individualized" arbitration are "protect[ed] pretty absolutely" by the FAA, and (b) even if a state law ***10** defense applies equally to all contracts, it is preempted by the FAA if it interferes with the right to "individualized" arbitration?

App. 69a. The Supreme Court of California denied review on April 28, 2021 in an order without opinion. App. 30a.

REASONS FOR GRANTING THE PETITION

Pursuant to the Supremacy Clause of the U.S. Constitution, art. VI, cl. 2, when a state law conflicts with the FAA, the conflicting state rule is displaced by the FAA through the doctrine of preemption. See *Preston v. Ferrer,* 552 U.S. at 353. A state-law principle that applies solely because a contract to arbitrate is at issue is preempted by the FAA. *Perry,* 482 U.S. at 492 n. 9; *see also Doctor's Assocs., Inc. v. Casarotto,* 517 U.S. 681, 687 (1996) (courts may not "invalidate arbitration agreements under state laws applicable only to arbitration provisions" because "Congress precluded States from singling out arbitration provisions for suspect status ...."). Thus, "[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." *Concepcion,* 563 U.S. at 341. In addition, a state law doctrine "normally thought to be generally applicable," such as "unconscionability," that is "applied in a fashion that disfavors arbitration" or has a "disproportionate impact on arbitration agreements" also is preempted. *Id.* at 342.

Section 2 of the FAA provides a limited "saving clause" that permits the application of state law defenses that "exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The saving clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such ***11** as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion,* 563 U.S. at 339.

After *McGill* was decided, this Court reinforced that arbitration agreements requiring "individualized" arbitration are protected from state interference by the FAA. Building upon the foundation laid in *Concepcion,* this Court held that the right to "individualized" dispute resolution in an arbitration agreement is "protect[ed] pretty absolutely" by the FAA. *Epic Systems, Inc.,* 138 S. Ct. at 1619. *See also Lamps Plus,* 139 S. Ct. at 1416 (the FAA "envision[s]" an "individualized form of arbitration"). As explained in *Epic Systems,* procedures that interfere with the attributes of individualized arbitration are preempted by the FAA: Not only did Congress [in the FAA] require courts to respect and enforce agreements to arbitrate; it also specifically directed them to respect and enforce the parties' chosen arbitration procedures .... The parties before us contracted for arbitration. They proceeded to specify the rules that would govern their arbitrations, indicating their intention to use individualized rather than class or collective action procedures. And this much the Arbitration Act seems to protect pretty absolutely

The [FAA's saving] clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.' " .... At the same time, the clause offers no refuge for "defenses that apply only to arbitration or ***12** that derive their meaning from the fact that an agreement to arbitrate is at issue." .... Under our precedent, this means the saving clause does not save defenses that target arbitration either by name or by more subtle methods, such as by "interfer[ing] with fundamental attributes of arbitration." ....

[B]y attacking (only) the individualized nature of the arbitration proceedings, the employees' argument seeks to interfere with one of arbitration's fundamental attributes .... Just as judicial antagonism toward arbitration before the Arbitration Act's enactment "manifested itself in a great variety of devices and formulas declaring arbitration against public policy" ..., we must be alert to new devices and formulas that would achieve much the same result today .... And a rule seeking to declare individualized arbitration proceedings off limits is just such a device.

138 S. Ct. at 1619, 1621 (citations omitted).

The *McGill* rule contravenes the principle that the right to individualized arbitration is "protect[ed] pretty absolutely" by the FAA. *Epic Systems, supra.* If required to litigate a public injunctive relief claim in court, the company loses all of the benefits of the arbitration agreement. If required to arbitrate a public injunctive relief claim, the company is deprived of the contractual right to resolve disputes on an individualized basis. Moreover, the scope of review of an arbitrator's award is narrow. *See Oxford Health Plans LLC v. Sutter,* 569 U.S. 564, 572 (2013); *see also Concepcion,* 563 U.S. at 360 ("[faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims"). And, ***13** the risk is exponentially enhanced by the fact that the plaintiff is seeking "public" injunctive relief on behalf of 40 million California residents, not just a discrete group of similarly situated customers. The *McGill* rule thus impermissibly "allow[s] a contract defense to reshape individualized arbitration." *Epic Systems,* 138 S. Ct. at 1623. By its very definition, 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,* 393 P.3d at 94. The expanded scope of a public injunctive relief arbitration makes the proceeding much more complex, time-consuming and costly than an individualized proceeding. *See, e.g., Cisneros v. U.D. Registry,* Inc., 39 Cal. App. 4th 548, 564 (Ct. App. 1995) (trial court erred in restricting the scope of the evidence introduced at trial to that directly relevant to each individual plaintiff because public injunction "claimants are entitled to introduce evidence not only of practices which affect them individually, but also similar practices involving other members of the public who are not parties to the action").

In *Swanson v. H&R Block, Inc.,* 475 F. Supp. 3d 967 (W.D. Mo. 2020), plaintiff, a California resident, argued that her claims under the California Consumer Legal Remedies Act, the California Unfair Competition Law and the California False Advertising Law were excluded from arbitration under *McGill.* The court, relying heavily upon both *Epic Systems* and *Lamps Plus,* held that the plaintiffs statutory claims were subject to individual arbitration because "[t]he Supreme Court has repeatedly rejected state contract defenses that interfere with the 'traditionally individualized and informal nature of arbitration.' " ***14** *Id.* at 976. According to the court, *"McGill* does not 'save' enforcement of a contract that clearly delineates Plaintiff as the only potential claimant. A state contract defense that mandates reclassification of available relief from one individual to multiple (or in this case, millions) of people impermissibly targets one-on-one arbitration by restructuring the entire inquiry." (*Id.* at 977). Moreover, the *Swanson* court emphasized, "[i]ndividualized arbitration is the type of arbitration the FAA seeks to protect and the Supreme Court has called upon lower courts to be vigilant to new devices that seek to interfere with this goal." (*Id.* at 978). The court thus declined to follow *McGill* and the Ninth Circuit cases following *McGill* because "[t]his Court ... is not bound by the Ninth Circuit. The Eighth Circuit routinely disagrees with Ninth Circuit precedent, and the Court finds divergence is merited in the current cause. Accordingly, the Court holds *McGill* is preempted by the FAA and Plaintiffs CLRA, UCL and FAL claims (Counts I through III) must be compelled to individual arbitration." *Id.* at 978 (footnote omitted). [6]

In the present case, the Court of Appeal's refusal to enforce consumer arbitration provisions that require individualized arbitration when public injunctive relief claims are asserted directly conflicts with the FAA and this Court's precedential decisions interpreting the FAA. Indeed, the court's ruling exhibits the very judicial hostility to arbitration (cloaked in public policy terms) that the FAA was intended to abolish. ***15** The Court of Appeal's decision also frustrates the FAA, the "overarching purpose" of which, "evidenced in the text of §§ 2, 3 & 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Concepcion,* 563 U.S. at 340. [7]

Enforcing Fast Auto's arbitration provision as written will not leave Respondents without an equitable remedy if they prevail on the merits because the arbitration provision authorizes the arbitrator to award "injunctive, equitable and declaratory relief... in favor of the individual party seeking relief ... to the extent necessary to provide relief warranted by that party's individual claim." Arbitration Provision, ¶ 14(k), App. 129a. *See, e.g., Marsh v. First USA Bank, N.A.,* 103 F. Supp. 2d 909, 924 (N.D. Tex. 2000) ("Contrary to Plaintiffs 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 ***16** 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 consumer and employee arbitrations maintained by the American Arbitration Association ("AAA") pursuant to California law [8] shows that in hundreds of arbitrations various forms of equitable relief, including a declaratory judgment, were awarded to consumers or achieved through settlement.

In rejecting FAA preemption, the *McGill* court noted: "The contract defense at issue here--'a law established for a public reason cannot be contravened by a private agreement' (Civ. Code, § 3513)--is a generally applicable contract defense, *i.e.,* it is a ground under California law for revoking any contract .... It is not a defense that applies only to arbitration or that derives its meaning from the fact that an agreement to arbitrate is at issue." 393 P.3d at 94 (emphasis by the court). However, as subsequently held in *Epic Systems,* even a state law defense that applies to all contracts is preempted by the FAA if (as here) it interferes with the fundamental attributes of arbitration:

[In *Concepcion,*] this Court faced a state law defense that prohibited as unconscionable class action waivers in consumer contracts. The Court readily acknowledged that the defense formally applied in both the litigation and the arbitration context .... But, the Court held, the defense failed to qualify for protection under the saving clause because it ***17** interfered with a fundamental attribute of arbitration all the same. It did so by effectively permitting any party in arbitration to demand classwide proceedings despite the traditionally individualized and informal nature of arbitration. This "fundamental" change to the traditional arbitration process, the Court said, would "sacrific[e] the principal advantage of arbitration - its informality - and mak[e] the process slower, more costly, and more likely to generate procedural morass than final judgment." .... [T]he saving clause does not save defenses that target arbitration either by name or by more subtle methods, such as by "interfer[ing] with fundamental attributes of arbitration."

138 S. Ct. at 1622-23 (citations omitted); *accord, Lamps Plus,* 139 S. Ct. at 1415 ("state law is preempted to the extent it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives' of the FAA") (citation omitted); *Kindred Nursing Homes v. Clark,* 137 S. Ct. 1421, 1426 (2017) (the FAA "displaces any rule that covertly [discriminates against arbitration] by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements"); *Epic Systems,* 138 S. Ct. at 1623 ("[j]ust as judicial antagonism toward arbitration before the Arbitration Act's enactment 'manifested itself in a great variety of devices and formulas declaring arbitration against public policy,' *Concepcion* teaches that we must be alert to new devices and formulas that would achieve much the same result today").

Moreover, the Section 3513 defense, if carried to its logical extreme, would result in the FAA's saving ***18** clause swallowing the FAA itself, since many if not most statutes can be argued to have been enacted for a "public reason." *See* U.S. National Archives and Records Administration, "Public Laws," www.archives. gov/federal-register/laws (December 28, 2017) ("Most laws passed by Congress are public laws. Public laws affect society as a whole."). As this Court has repeatedly held, a saving clause cannot be held to devour the very statute in which it is contained. See, *e.g., Concepcion,* 563 U.S. at 334 ("Although § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives .... As we have said, a federal statute's saving clause 'cannot in reason be construed as [allowing] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself.' ") (citations omitted). California's *McGill* rule, when viewed in the context of this Court's precedential arbitration decisions, is plainly preempted by the FAA.

*19 CONCLUSION

For the foregoing reasons, Petitioner Fast Auto Loans, Inc. respectfully requests that its Petition for Certiorari be granted.

SUSAN N. NIKDEL

BALLARD SPAHR LLP

2029 Century Park East

Suite 800

Los Angeles, CA 90067

(424) 204-4400

nikdels@ballardspahr.com

Respectfully submitted,

MARK J. LEVIN

Counsel of Record

BALLARD SPAHR LLP

1735 Market Street

51st Floor

Philadelphia, PA 19103

(215) 665-8500

levinmj@ballardspahr.com

Counsel for Petitioner

July 7, 2021

Appendix not available.

Footnotes

1 Public Policy Institute of California, "Just the Facts," https://www.ppic.org/blog/publication-type/just-the-facts/ (last visited June 29, 2021).

2 *See Tillage v. Comcast Corp.,* 772 F. App'x 569 (9th Cir. 2019), *cert. denied,* 140 S. Ct. 2827 (2020); *McArdle v. AT&T Mobility LLC,* 772 F. App'x 575 (9th Cir. 2019), *cert. denied,* 140 S. Ct. 2827 (2020). The denial of certiorari in those cases was not a decision on the merits of the FAA preemption issue. *See Halprin v. Davis,* 140 S. Ct. 1200, 1202 (2020) (the denial of certiorari "carries with it no implication whatever regarding the Court's views on the merits of [petitioner's] claims") (citing *Maryland v. Baltimore Radio Show, Inc,* 338 U.S. 912, 919 (1950) (Frankfurter, J.)).

3 *See* Pet. for Cert., *HRB Tax Group, Inc. v. Snarr,* No. 20-1570, Appendix D (App. 29a) (identifying 372 *post-McGill* lawsuits brought against businesses seeking public injunctive relief).

4 *See* First Amended Complaint, ad damnum clause (App. 56a) (out of twelve specified requests for relief, class certification is first on the list, while public injunctive relief is twelfth).

5 Respondent Joe Maldonado opted out of the arbitration provision in two of his four loan agreements. Fast Auto asked the Superior Court to stay Mr. Maldonado's non-arbitrable claims pending the completion of arbitration on his arbitrable claims, App. 97a, but the court denied arbitration altogether. App. 24a.

6 In light of *Swanson* there is now a conflict in the federal courts on the question of whether the FAA preempts the *McGill* rule, further underscoring the need for this Court's review. *See* Pet. for Cert., *HRB Tax Group, Inc. v. Snarr,* No. 20-1570, pp. 3-4 (filed May 10, 2021).

7 Section 4 of the FAA "requires courts to compel arbitration 'in accordance with the terms of the agreement' upon the motion of either party to the agreement...." *Id.* The FAA "leaves no place for the exercise of discretion by a ... court, but instead mandates that ... courts shall direct the parties to proceed to arbitration." *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 218 (1985); *accord, KPMG LLP v. Cocchi,* 565 U.S. 18, 25-26 (2011) (per curiam).

8 See American Arbitration Association, "AAA Consumer and Employment Arbitration Statistics," https://www.adr.org/consumer (last visited June 29, 2021).

End of Document