No. 21-31

In the Supreme Court of the United States

FAST AUTO LOANS, INC.,
Petitioner,
v.
JOE MALDONADO, ALFREDO MENDEZ,
J. PETER TUMA, JONABETTE MICHELLE TUMA,
and ROBERTO MATEOS SALMERON,
Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. As a matter of California law, does public injunctive relief encompass injunctions that prohibit future violations of the law with respect to members of the general public who are or will eventually become the defendant's customers?

2. If the answer to this state-law question is yes, does the Federal Arbitration Act in such cases preempt California's law of general applicability prohibiting the waiver of such relief?

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INTRODUCTION

Fast Auto Loans is an unlicensed lender that offers car loans to cash-strapped consumers at usurious interest rates—as high as 180%. When borrowers attempt to pay off their loans, the company uses deceptive practices to trap them into a cycle of repaying many times the value of the loan without ever reducing the principal balance. This case was brought by consumers who seek a public injunction to stop these unlawful practices.

A public injunction is a substantive remedy available under California's consumer-protection laws. When consumers prove violations of those laws, they have a right to seek an injunction against future violations for the benefit of the general public. In *McGill v. Citibank, N.A.*, 393 P.3d 85 (Cal. 2017), the California Supreme Court applied longstanding principles of state contract law to hold that the right to bring claims for public injunctive relief may not be waived by any contract.

Fast Auto Loans urges this Court to grant certiorari to decide whether this generally applicable state-law rule, known as the *McGill* rule, is preempted by the Federal Arbitration Act when applied to arbitration clauses. But the petition identifies no split on this question. Both the California Supreme Court, in *McGill*, and the Ninth Circuit, in *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819, 831 (9th Cir. 2019), have consistently held that the *McGill* rule is not preempted. And, as the petition acknowledges, this Court has recently denied petitions on this very question.

The question is even less certworthy now than it was when this Court denied the previous petitions—and this case is a particularly unsuitable vehicle to address it. A recent decision from the Ninth Circuit, *Hodges v. Comcast Cable Communications, LLC*, 12 F.4th 1108 (9th Cir.

Sept. 10, 2021), shows why. *Hodges* reaffirmed the holding that "the FAA does not preempt the *McGill* rule," *id.* at 1112, thus confirming the absence of a split. Just as importantly, both *Hodges* and the decision below (from the Fourth District Court of Appeal, Division Three) turn on a contested question of *state law:* Does public injunctive relief include injunctions that will benefit all consumers who may enter into a contract with a particular business, or does it only include injunctions that will actually benefit every Californian? This state-law question—which has not yet reached the California Supreme Court—is logically antecedent to any federal-preemption analysis. And it may well prove dispositive, as it did in *Hodges*, obviating any need to address preemption.

Hodges recognized that its resolution of "unresolved or unclear questions of state law" must be "guided by the principles that the state high court has articulated." *Id.* at 1113. Applying that *Erie* lens, the court predicted that California's high court would hold that *McGill* does not extend to injunctions that only protect members of the public who already have or will eventually enter into contracts with the defendant. *Id.* at 1115–19. And the panel specifically rejected the Fourth District's holding in *this* case "that an injunction aimed at preventing unconscionable loan agreements with excessive interest rates was public injunctive relief." *Id.* at 1118 (discussing the decision below). That holding, it reasoned, rests on an "expanded version of the *McGill* rule" and "we do not think it would be followed by the California Supreme Court." *Id.* at 1117. The dissent, for its part, rejected the majority's distinction between this case and *McGill* as "untenable" and concluded that "it would be rejected by the California Supreme Court." *Id.* at 1126.

This Court, of course, can't settle this live debate over state law. Only the California Supreme Court can do that. Last month, the Ninth Circuit ordered the defendants in *Hodges* to respond to the plaintiff's petition for rehearing–and, specifically, to address his "alternative request for certification" to the California Supreme Court of the issue of what constitutes public injunctive relief. Dkt. 62 in *Hodges*, No. 19-16383 (9th Cir. Oct. 29, 2021). This Court should not take a case to determine whether or to what extent the *McGill* rule is preempted before the California Supreme Court has had a chance to clarify the scope of the rule. There is no reason for this Court to leap to address an issue that hinges on an unsettled, predicate question of state law that the state's highest court has not yet had an opportunity to (and may soon) address—especially when there is no split on the federal issue.

If the Court were to grant certiorari under these circumstances, the unsettled scope of the state-law rule could present a serious impediment to intelligent resolution of the federal issue. *Cf. Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (failing to resolve the question presented under the FAA in light of an antecedent and uncertain question of state contract law). *Hodges* again shows why. The panel there reaffirmed that the *McGill* rule is not preempted. But, at the same time, it opined that, if it had made the opposite prediction on the state-law issue, it would have found preemption based on concerns about how an injunction might be implemented. *Hodges,* 12 F.4th at 1119. That is an entirely novel theory of preemption—and one the panel believed would only become relevant if its state-law prediction were wrong. And because the theory was not presented below in this case, or in any other case, the California state court system has not yet had an opportunity to confront it.

As things stand, then, the state courts have not decided whether the state-law remedy at issue is available on the facts of this case; there is no split over the federal question presented; and there is a real possibility that developments in the courts below will make it unnecessary for this Court to ever wade in.

STATEMENT

A. California's longstanding anti-waiver prohibition and its application to public injunctions

Since the early decades of its statehood, California has prohibited parties from contracting around laws enacted to protect the public. *See, e.g.*, *Grannis v. Super. Ct. of San Francisco*, 79 P. 891, 895 (Cal. 1905) ("[T]here can be no effectual waiver by the parties of any restriction established by law for the benefit of the public."). In 1872, the California legislature passed two statutes that codified this prohibition—statutes that remain on the books to this day. The first provides that although "[a]ny one may waive the advantage of a law intended solely for his benefit," "a law established for a public reason cannot be contravened by a private agreement." Cal. Civ. Code § 3513. The second holds that contracts that purport to "exempt anyone from responsibility for his own fraud . . . or violation of law . . . are against the policy of the law." Cal. Civ. Code § 1668.

For the past century and a half, California courts have consistently refused to enforce contracts that violate this prohibition in a wide variety of contexts. *See, e.g.*, *In re Marriage of Fell*, 64 Cal. Rptr. 2d 522, 526 (Ct. App. 1997) (collecting cases); *Munoz v. Express Auto Sales*, 166 Cal. Rptr. 3d 921, 929 (Cal. App. Dep't Super. Ct. 2014) (auto-sales contract disclosure requirements enacted to protect car-buyers could not be waived); *PJNR, Inc. v. Dep't of*

Real Est., 281 Cal. Rptr. 673, 681 (Ct. App. 1991) (agreement between homeowners' association and developer releasing developer from liability for violations of law designed to protect residents of subdivided developments unenforceable); *California Bank v. Stimson*, 201 P.2d 39, 41 (Cal. Ct. App. 1949) (regulations governing collection of deficiency judgments after foreclosure were "adopted to promote the public welfare by shielding the debtor class from oppression" and therefore could not be waived by agreement); *De Haviland v. Warner Bros. Pictures, Inc.*, 153 P.2d 983, 988 (Cal. Ct. App. 1944) (law limiting personal service contracts to seven years could not be waived by private agreement).

One of the rights the California Supreme Court has held may not be waived is the right to a public injunction. *See McGill*, 393 P.3d at 93–94. California's consumer-protection statutes provide Californians injured by a company's unlawful practices the right to obtain an injunction prohibiting the company from continuing to engage in those practices. *See id.* at 89–90. The obvious purpose of this right is to "benefit [] the general public" by preventing "unlawful acts" that would otherwise "threaten future injury." *Id.* at 90. Allowing parties to waive this right, the California Supreme Court has held, "would seriously compromise the public purposes" the State's consumer-protection statutes "were intended to serve." *Id.* at 94. Contracts that do so, therefore, are unenforceable. *Id.* This application of California's longstanding prohibition on the waiver of public rights to public injunctive relief is commonly called the *McGill* rule.

The California Supreme Court has not specified the exact bounds of what constitutes a public injunction. And

following *McGill*, courts have split on the issue. *See, e.g.*, *Hodges*, 12 F.4th at 1117 (expressly disagreeing with two California Court of Appeal decisions, including the decision below). The California Supreme Court has not yet weighed in on this dispute.

B. The California Supreme Court and the Ninth Circuit hold that the *McGill* rule is not preempted by the Federal Arbitration Act.

Both the California Supreme Court and the Ninth Circuit have considered whether the *McGill* rule is preempted in cases where the contract waiving the right to seek public injunctive relief happens to be an arbitration clause. Both courts have held that it is not. *See McGill*, 393 P.3d at 94–95; *Blair*, 928 F.3d at 831.

In *McGill*, the California Supreme Court explained that the Federal Arbitration Act mandates only that the enforceability of arbitration contracts be subject to the same state law that "govern[s] issues concerning the validity, revocability, and enforceability of contracts generally." *McGill*, 393 P.3d at 96 (quoting *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630–31 (2009)).

And the prohibition on waiving rights established for a public reason "*is* a generally applicable contract defense, i.e., it is a ground under California law for revoking any contract." *Id.* at 94. "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." *Id.* Rather, any contract that "purports to waive . . . the statutory right to seek public injunctive relief . . . is invalid and unenforceable under California law"—regardless of whether that contract has (or is) an arbitration clause or not. *Id.*

McGill, therefore, concluded that the prohibition on waiving public injunctive relief is not preempted. *See id.* "This conclusion, the Court held, is consistent with [this Court's] statement that, 'by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" *Id.* at 95 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

Two years after *McGill*, the Ninth Circuit, too, held that the *McGill* rule is not preempted. *Blair*, 928 F.3d at 831. As the *Blair* panel understood it, an injunction is public under California law if it "enjoin[s] future violations of California's consumer protection statutes," because that relief is necessarily "oriented to and for the benefit of the general public." *Id.* at n.3. California's prohibition on waiving such relief, the Ninth Circuit explained, "is a generally applicable contract defense." *Id.* at 827. It applies "equally to arbitration and non-arbitration agreements." *Id.* (quotation marks omitted). And it "expresses no preference as to whether public injunction claims are litigated or arbitrated [;] it merely prohibits the waiver of the right to pursue those claims in any forum." *Id.*

Furthermore, the Ninth Circuit explained, public injunctive relief "does not interfere with the informal, bilateral nature of traditional consumer arbitration." *Id.* at 830. "A plaintiff requesting a public injunction files the lawsuit 'on his or her own behalf' and retains sole control over the suit." *Id.* at 829. And unlike a class action, arbitrating public injunctive relief does not require procedural formality. *See id.* Although a public injunction claim may sometimes be *substantively* complex, that

substantive complexity is not accompanied by procedural complexity. *See id.* Parties may still adopt reasonable limitations on discovery; the arbitration may still follow streamlined procedures. *See id.* "A state-law rule that preserves the right to pursue a substantively complex claim in arbitration without mandating procedural complexity," the court held, "does not frustrate the FAA's objectives." *Id.* at 829.

Following *Blair*, the Ninth Circuit repeatedly reaffirmed that the *McGill* rule is not preempted, including in circumstances similar to those here. *See, e.g.*, *Delisle v. Speedy Cash*, 818 F. App'x 608, 609 (9th Cir. 2020) (concluding that injunction barring lender from issuing illegal loans is a public injunction, and holding that the FAA does not preempt the prohibition on waiver of the right to seek such an injunction); *Snarr v. HRB Tax Grp., Inc.*, 839 F. App'x 53, 56 (9th Cir. 2020).

C. The Ninth Circuit's decision in *Hodges*

Recently, however, a divided panel of the Ninth Circuit took a novel approach both to determining whether an injunction constitutes a public injunction under California law, and to analyzing whether the *McGill* rule is preempted by the FAA. *Hodges*, 12 F.4th 1108. Whereas *Blair* held that any injunction that prohibits "future violations of California's consumer protection statutes" constitutes a public injunction, the *Hodges* panel predicted that the California Supreme Court would adopt a narrower view. *Hodges* predicted that the court would limit public injunctive relief to "forward-looking injunctions that seek to prevent future violations of law for the benefit of the general public *as a whole*, as opposed to a particular class of persons, and that do so without the

need to consider the individual claims of any non-party." *Id.* at 1115 (emphasis added).

The panel rejected the broader understanding of public injunctive relief some California appellate courts had adopted—including specifically the decision below—as "a patent misreading of California law that we do not think [] would be followed by the California Supreme Court." *Id.* at 1117. According to *Hodges*, the injunction at issue in this case—which would prohibit a lender from issuing illegal loans—is not public because it would only benefit those Californians who at some point became customers of that lender. *See id.* at 1118. To be a public injunction under California law, the court held, it must benefit "the general public as a whole," not just a subset thereof. *Id.* at 1117.[1]

Based on its limited conception of what constitutes a public injunction, the *Hodges* panel reaffirmed that the *McGill* rule is not preempted. *Id.* at 1112. But the panel

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[1] In addition, the panel assumed that any injunction that is ultimately issued in this case would prohibit unconscionable loans without specifying exactly what practices would violate that prohibition. *See Hodges*, 12 F.4th at 1118. And based on its own brief assessment of California unconscionability law, the panel believed that such an injunction would be impossible to administer without undergoing a fact-intensive assessment of every single loan the company issued. *See id.* The panel did not explain why it assumed a court or arbitrator would enter an injunction that, in its view, would be virtually impossible to administer. Nor did it explain how its view of public injunctive relief would avoid administrability problems that are not already avoided by the general principles that govern injunctions. *See, e.g.*, *Simon T. v. Miller*, 2006 WL 2556217, at *9 (Cal. Ct. App. Sept. 6, 2006) (holding that an injunction "prohibiting nonspecific conduct," where identifying prohibited conduct may require "disputed factual and legal interpretation," was "overly broad and inappropriate").

believed that the FAA would preempt the rule if it had taken a broader conception of public injunctive relief. *Id.* at 1119. In the panel's view, if an injunction prohibiting future violations of California's consumer-protection law benefits only a subset of consumers—rather than all Californians—its enforcement could require consideration of individual Californians' claims. *Id.* And that consideration, *Hodges* asserted, "is inherently incompatible with the informal, bilateral nature of traditional consumer arbitration." *Id.* at 1120. The *Hodges* majority did not explain why it would be incompatible with the informal, bilateral nature of arbitration for an individual consumer to bring an individual arbitration proceeding alleging that a company's conduct as to that consumer violated an injunction.

Last month, the plaintiff in *Hodges* filed a petition for rehearing or rehearing en banc, including a request that the Ninth Circuit certify to the California Supreme Court the question of what constitutes a public injunction under California law. *See* Dkt. No. 58, *Hodges v. Comcast*, No. 19-16483 (9th Cir. Oct. 22, 2021), at 16. And the Ninth Circuit ordered the defendant to respond, specifically instructing it to provide a response on certification. Dkt. No. 62. That petition remains pending.

D. Factual and procedural background in this case

Maldonado's lawsuit. In September 2018, Joe Maldonado entered into a loan agreement with Fast Auto Loans to borrow $2,819. Pet. 4a, 37a. Over the course of the next year and a half, Maldonado "refinanced" that loan multiple times. *Id.* Each time Maldonado refinanced, he was charged a fee greater than the principal balance on his loan, and the annual percentage rate on the loans ranged between 158.66% to 159.09%. *Id.* at 38a.

Each loan agreement that Maldonado entered also included an arbitration provision. *See id.* But on at least two occasions, Maldonado exercised his right to opt out of arbitration. *Id.*, Pet. 98a–99a.

In May 2019, Maldonado, along with four other Fast Auto Loan borrowers, filed this lawsuit in California Superior Court. Pet. 2a, 31a. Like Maldonado, each of the other plaintiffs had signed loan contracts with Fast Auto Loans that imposed exorbitant interest rates and penalties, causing them to pay late, reborrow, or default on other financial obligations. *Id.* at 2a–3a. The lawsuit alleged that the company "continues to harm consumers who may be unaware that [Fast Auto Loans] subjects them to unconscionable loan provisions, including unconscionable and usurious loan rates which are prohibited by law," *id.* at 53a, § 84, and that "the harms are continuous and ongoing and are injurious to the public and consumers," *id.* at § 88.

Invoking California's Consumer Legal Remedies Act and Unfair Competition Law, the complaint sought, among other relief, a public injunction requiring Fast Auto Loans to cease charging unlawful interest rates, to institute corrective advertising, and to provide notice to the public of the unlawfully charged interest rate on prior loans. Pet. 52a–56a.

Motion to compel. Fast Auto Loans moved to compel arbitration. As an initial matter, the company conceded that Maldonado had the right to pursue an action for public injunctive relief against Fast Auto Loans regardless of whether its motion to compel was granted because Maldonado had opted out of arbitration clause with respect to two of his contracts. Pet. 113a. The

company therefore sought to stay any of Maldonado's claims that arose from those contracts. Pet. 105a n.4, 113a.

As for the other contracts, Maldonado and the other plaintiffs contended that by its terms, Fast Auto Loans' arbitration clause was unenforceable. *See* Pls.' Opp. to Def.'s Mot. to Stay and/or Compel Arbitration at 2–10, Dkt. No. 24, *Maldonado, et al. v. Fast Auto Loans, Inc.*, No. 30-2019-01073154-CU-BT-CXC (Cal. App. Dep't Super. Ct. November 21, 2019). The parties agreed that Fast Auto Loans' contract prohibits claims for public injunctive relief. *Id.* at 10–13; Pet. 109a–10a.[2] But that prohibition, the plaintiffs explained, is unenforceable under *McGill* and California's longstanding doctrine prohibiting the waiver of rights established for a public reason. Pls.' Opp. to Def.'s Mot. to Stay and/or Compel Arbitration at 10–13. And the arbitration clause itself states that if this prohibition is found unenforceable, the arbitration clause as a whole "shall be null and void." Pet. 18a.

In a footnote in its response, Fast Auto Loans contended that "the FAA preempts the *McGill* rule" but nonetheless advised the court that "because Plaintiffs' claims, on their face, do not even state viable claims for public injunctive relief under California law, this Court

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[2] Fast Auto Loans' contract doesn't actually explicitly mention public injunctive relief. Instead, it prohibits parties from bringing claims as a "private attorney general." Pet. 26a–27a. Whether language that prohibits private attorney general actions waives public injunctive relief is another unsettled question of California law. The Ninth Circuit recently held that it does not. *DiCarlo v. MoneyLion, Inc.*, 988 F.3d 1148, 1158 (9th Cir. 2021). California courts have at least assumed otherwise. *See* Pet. 16a.

will not need to address that issue." *Id.* at 111a n.8. Because the public injunctive relief Maldonado seeks would benefit the plaintiffs and "other Fast Auto Loans customers," Fast Auto Loans argued, it would benefit a "limited class of consumers . . . rather than the general public." *Id.* at 109a.

The trial court concluded that the plaintiffs sought a public injunction, and that the waiver of that relief in Fast Auto Loans' contract was unenforceable. *Id.* at 27a (citing *McGill).* And because the waiver could not be severed under the terms of the contract, the court found the entire arbitration provision null and void. *Id.* at 28a–29a.

The appeal to the Fourth District, Division Three. Before Division Three of the Fourth District Court of Appeal, the company repeated its principal contention that "*McGill* simply does not apply here because Respondents do not actually seek public injunctive relief, *i.e.*, relief that would primarily benefit the general public." Br. of Appellant, *Maldonado, et al. v. Fast Auto Loans, Inc.*, No. G058645, 2020 WL 2789761, at *12 (Cal. Ct. App. Jan. 11, 2021). The company devoted the bulk of its brief to the argument that the requested relief "does not have the 'primary purpose and effect' of prohibiting unlawful acts that threaten injury to the general public." *Id.* at *36 (quoting *McGill*, 393 P.3d at 86); *see also* *26–*38.

The company also argued, in the alternative, that the Federal Arbitration Act categorically preempts the *McGill* rule, without distinguishing between how federal preemption might apply differently to different interpretations of the state-law rule. The company's brief pointed to two pending petitions for certiorari to this Court on whether the *McGill* rule is preempted and asked

the court to stay the case pending this Court's disposition of those petitions. *Id.* at *46.

The Court of Appeal affirmed the trial court. Its analysis focused on another recent Court of Appeal decision, *Mejia v. DACM Inc.*, 268 Cal. Rptr. 3d 642 (Ct. App. 2020), where the same division had applied *McGill* to refuse the enforcement of an arbitration clause that prospectively waived claims for public injunctive relief. Like Fast Auto Loans, the defendant in *Mejia* argued that although the plaintiff claimed to seek a public injunction, the injunction they had actually requested was in fact private. Pet. 11a (discussing *Mejia*, 268 Cal. Rptr. 3d at 650–51). The *Mejia* court disagreed. The plaintiff there sought to enjoin the defendant car dealership from "selling motor vehicles in the state of California without first providing the consumer with all disclosures mandated by Civil Code [section] 2982 in a single document." *Mejia*, 268 Cal. Rptr. 3d at 650–651 (quotes in original). That relief is "plainly [] a public injunction," the court explained, "given that Mejia seeks to enjoin future violations of California's consumer protection statutes, relief oriented to and for the benefit of the general public." *Id.*

Both the *Mejia* and *Maldonado* panels pointed to the example of a public injunction offered in *McGill*: "an injunction under the Consumer Legal Remedies Act against a defendant's deceptive methods, acts, and practices which generally benefits the public directly by the elimination of deceptive practices and will not benefit the plaintiff directly because the plaintiff has already been injured, allegedly, by such practices and is aware of them." Pet. 12a (citing *McGill*, 393 P.3d at 90) (cleaned up); *see also Mejia*, 268 Cal. Rptr. 3d at 651. The same is true in

this case, the Court of Appeal explained. The requested relief—that Fast Auto Loans stop charging unlawful interest rates and adopt corrective advertising—"does not limit the requested remedies for only some class members, but rather encompasses all consumers and members of the public." Pet. 15a. As the Court of Appeal reasoned, Maldonado has "already been harmed and [is] already aware of [Fast Auto Loans'] misconduct," so the benefit to him and the other plaintiffs is "incidental to the 'general public benefit of enjoining such a practice.'" *Id.* (quoting *McGill*, 393 P.3d at 90).

And, with respect to Fast Auto Loans' argument that *McGill* was wrongly decided on preemption grounds, the Court of Appeal found that these arguments "lack[ed] merit." Pet. 21a. And it noted that this Court had denied the petitions in *McArdle* and *Tillage*. *Id.* Thus, the Court of Appeal declared itself bound by the "legally sound and persuasive" holding in *McGill*. *Id.*

The petition to the California Supreme Court. Fast Auto Loans next sought review in the California Supreme Court. Pet. 64a. The company's petition urged the Court to clarify the distinction between "private relief" and "public relief" under California law. Alternatively, the petition asked the court to reconsider its decision in *McGill* entirely. The court denied review. Pet. 30a. At the time that the court denied review, the Ninth Circuit had not yet issued its decision in *Hodges*.

REASONS TO DENY THE PETITION

As Fast Auto Loans acknowledges, this Court considered petitions on the same question that it asks this Court to decide—Is the *McGill* rule preempted by the FAA?—just last year. Following *Blair*, petitions were filed in two companion cases: *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). This Court denied them both. 140 S. Ct. 2827 (2020).[3]

It should do the same here. Fast Auto Loans does not claim that the petitions in those cases overlooked any relevant conflicts. Nor does it claim that any conflicts among the federal circuits or state supreme courts have arisen in the short time since then. That is reason enough to deny review. But a divergence of views *has* recently arisen over an antecedent question of state law: What is the scope of the *McGill* rule? In several respects, this uncertainty over that antecedent question of state law takes an already weak case for certiorari and makes it nonexistent—both for the issue in general and for this case in particular.

I. This case implicates an antecedent and unsettled question of state law that may either obviate or alter resolution of the federal-preemption issue.

Fast Auto Loans ask this Court to grant certiorari to decide "[w]hether the FAA preempts California's *McGill* rule." Pet. 3. But that question can't be intelligently answered without knowing the contours of the *McGill* rule—and, at the very least, whether it properly extends to the facts presented. That is a question of California law and "therefore is one for the state court of last resort to resolve." *Rescue Army v. Mun. Ct. of Los Angeles,* 331 U.S. 549, 576 (1947).

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[3] Another petition on the question is pending in *HRB Tax Grp., Inc. et al. v. Snarr*, No. 20-1570, but the petitioners in *Snarr* have filed a supplemental brief indicating that the district court has reached a final decision in their favor, dismissing the action in its entirety.

There is now an active disagreement among the lower courts about this state-law question. Two months ago, a panel of the Ninth Circuit issued *Hodges,* whose principal holding is that an injunction is only a "public injunction" under California law if it would benefit *every* member of the general public in California, not just a "defined group of similarly situated persons," such as those who are or who may become customers of the defendant. 12 F.4th at 1115. By contrast, Division Three of California's Fourth District Court of Appeal held below that an injunction to protect "other consumers in *future* contracts from outrageous interest rates" would constitute a public injunction, because such an injunction offers benefits to the general public, even if "not all members of the public will become customers of [the lender]." Pet. App. 16a; *accord Mejia,* 268 Cal. Rptr. 3d at 651.

The panel and the dissent in *Hodges* both made clear that their disagreement over this antecedent question of state law is directly implicated by the facts of *this* case. The panel specifically rejected, on state-law grounds, the proposition "that an injunction aimed at preventing unconscionable loan agreements with excessive interest rates was public injunctive relief." *Hodges*, 12 F.4th at 1118. The panel further characterized the Fourth District's approach as resting on an "expanded version of the *McGill* rule" and predicted that "we do not think it would be followed by the California Supreme Court." *Id.* at 1117. The dissent, by contrast, rejected the majority's distinction between this case and *McGill* as "untenable" and predicted that "it would be rejected by the California Supreme Court." *Id.* at 1126 (Berzon, J., dissenting).

The need to ascertain the scope of public injunctions available under California's *McGill* rule—without any

definitive guidance from that state's highest court—may present a serious impediment to deciding whether or to what extent that rule is preempted. *Cf. Green Tree Fin. Corp.*, 539 U.S. at 450–54 (failing to resolve the question presented under the FAA in light of an antecedent and uncertain question of South Carolina state contract law). *Hodges* itself shows how the federal-preemption theories may differ depending on the scope of the rule and the nature of the injunction sought. Although its state-law holding made the question unnecessary to decide, the panel majority opined that a broader view of public injunctive relief would be preempted because, in its view, "the implementation of such an injunction would require evaluation of the individual claims of numerous non-parties," thus requiring "a level of procedural complexity that is inherently incompatible 'with the informal, bilateral nature of traditional consumer arbitration.'" *Hodges*, 12 F.4th at 1119–20 (quoting *Blair*, 928 F.3d at 830). That novel theory of preemption, neither presented nor addressed below (and not even identified in Fast Auto Loans' petition), turns entirely on the choice between competing interpretations of state law. And, as *Hodges* shows, resolution of the state-law issue may eliminate the need to address it. Until the California Supreme Court answers the antecedent state-law question, review by this Court on the preemption question would be premature.

Such "premature adjudication" of federal questions in the face of state-law uncertainty is particularly inadvisable because "the federal tribunal risks friction-generating error when it endeavors to construe a novel" issue of state law "not yet reviewed by the state's highest court." *Arizonans for Official Eng. v. Arizona*, 520 U.S. 43, 79 (1997). Here, that prematurity is highlighted because a request that the Ninth Circuit certify this issue

to the California Supreme Court is now pending. Certification avoids unnecessary federal adjudication "until a state court has authoritatively resolved the antecedent state-law question." *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1156 (2017) (Sotomayor, J., joined by Alito, J., concurring). Depending on how the state court rules, the federal court's analysis may be rendered "irrelevant" or "may turn out to be unnecessary." *Id.*

II. There is no split over whether the *McGill* rule is preempted.

Given the uncertainty over the predicate state law, it makes little sense for this Court to jump in absent, at the very least, a deep split on the federal issue. But Fast Auto Loans' petition does not identify *any* division among the federal circuits, or between state and federal appellate courts, over the question it asks this Court to answer—whether the *McGill* rule is preempted. In a footnote (at 14 n.6), the company suggests in passing that there is a "conflict in the federal courts on the question whether the FAA preempts the *McGill* rule" because of a single decision from the Western District of Missouri. *See Swanson v. H&R Block, Inc.*, 475 F. Suppl. 3d 967 (W.D. Mo. 2020). But one district court's disagreement with a precedent of a court of appeals and state supreme court does not merit review by this Court, and the petition does not seriously contend otherwise.

Nor does *Hodges* reflect a split. Fast Auto Loans incorrectly claims that *Hodges* held that "the *McGill* rule is preempted by the FAA," Suppl. Br. 1, but *Hodges* in fact held just the opposite: It reaffirmed the Ninth Circuit's prior holding that "the FAA does not preempt the *McGill* rule" and expressly rejected Comcast's arguments to the

contrary. *See* 12 F.4th at 1112. As discussed, *Hodges*' primary holding turns on a question of state law. And the novel theory of preemption that it floats in the alternative—that an "expansion" of *McGill* could be preempted even if the *McGill* rule is not, *id.* at 1119—is not the question presented by Fast Auto Loans' petition and has never been considered by any California court or any other federal court. Thus, there is no conflict among the federal circuits or state courts of last resort. At most, *Hodges* illustrates that these issues, both state and federal, are still percolating and that it would be premature at this juncture to wade in.

III. This case is a particularly unsuitable vehicle.

Even apart from the impediment presented by the antecedent state-law question and the absence of any split, this case is an unsuitable vehicle. As an initial matter, if this Court were to grant certiorari, a decision on the preemption question would have no practical impact on respondent Joe Maldonado's ability to seek public injunctive relief against Fast Auto Loans. In other words, although the company seeks review by this Court to avoid defending against Maldonado's claim for a public injunction, it will have to do so regardless. As Fast Auto Loans concedes, *see* Pet. 113a, Maldonado opted out of arbitration with respect to two loan contracts, and his claims arising from those contracts are not subject to arbitration. So Maldonado may still pursue an action for the exact same public injunctive relief requested here, even if other plaintiffs may not.

This case is also a poor vehicle because the state court below did not even consider, let alone rule on, the new preemption theory floated in *Hodges*, which Fast Auto Loans raises for the first time in its supplemental brief to

this Court. *See* Suppl. Br. 2–3. Before the Fourth District, and in its petition for certiorari to the California Supreme Court, Fast Auto Loans argued only that the *McGill* rule is categorically preempted by the FAA. *See* Opening Br. of Appellant, 2020 WL 2789761, at *42; Pet. 81a. The company never argued that the FAA preempts certain kinds of public injunctive relief because of how those injunctions would be implemented. And the record here would afford this Court no basis on which to evaluate that theory because the parties did not debate the mechanics of implementation in the courts below or present any facts on that issue. No court other than the *Hodges* panel has considered this theory of preemption and, even there, it was offered only as an alternative ground that was unnecessary to the resolution of the case.

This is "a court of review, not of first view." *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1559 (2017) (quotation marks omitted). The Court "generally do[es] not address arguments that were not the basis for the decision below." *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996); *see also Duignan v. United States*, 274 U.S. 195, 200 (1927) ("This court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.").

That restraint is especially warranted here. "[I]t would be unseemly in our dual system of government," the Court has explained, "to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Adams v. Robertson*, 520 U.S. 83, 90 (1997) (dismissing writ as improvidently granted). This principle not only "serves an important interest of comity," *id.*, but also reflects "a constellation of practical

considerations," *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 79 (1988), including the possibility that the state high court will decide the issue in way "so as to avoid or obviate" the federal issue, or to at least narrow or alter its contours, *Webb v. Webb*, 451 U.S. 493, 500 (1981).

If the issue indeed recurs as frequently as the petition suggests, and if a split develops, this Court will have plenty of better vehicles to resolve the preemption question in the future, once both the state and federal issues have been sufficiently clarified. What's more, because one or more justices are of the view that the FAA does not apply to proceedings in state court, *see Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1429 (2017) (Thomas, J., dissenting), the Court may wish to await a case from the Ninth Circuit.

IV. The decision below is consistent with the Federal Arbitration Act and this Court's cases.

Fast Auto Loans argues that "the *McGill* rule is preempted by the FAA." Pet. 5. As already discussed at length, it is difficult to see how this Court could possibly assess that contention without knowing exactly what the *McGill* rule is—a question that, again, only the California Supreme Court can answer. But even assuming that the California Supreme Court would adopt the same version of the *McGill* rule as the decision below, that rule—as the Fourth District correctly held—would not be preempted.

The FAA provides that arbitration clauses "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In other words, they must be "as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967). Fast Auto Loans concedes that this

equal-footing principle is satisfied here. Pet. 16 (acknowledging that this case involves "a state law defense that applies to all contracts"). The company has no choice but to concede the point. For over 150 years, California has prohibited parties from waiving rights established for a public reason and refused to enforce contracts that do so—all contracts, not just arbitration clauses. *See Grannis*, 79 P. at 895; *Blair*, 928 F.3d at 827–28 (citing cases decided from 1896 to 2002).

Unable to argue that California treats arbitration clauses differently, Fast Auto Loans instead argues that some fundamental attribute of arbitration requires that it be permitted to evade this longstanding rule. But it is not a fundamental attribute of arbitration that companies be able to opt out of state laws and remedies they don't like. To the contrary, this Court has repeatedly held that an arbitration agreement does not alter the parties' substantive statutory rights or obligations; it merely submits "their resolution [to] an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp.*, 473 U.S. at 628; *see*, *e.g.*, *Preston v. Ferrer*, 552 U.S. 346, 359 (2008); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 266 (2009); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987) ("[T]he streamlined procedures of arbitration do not entail any consequential restriction on substantive rights.").

So Fast Auto Loans instead resorts to arguing that a claim for public injunctive relief cannot be arbitrated in an individualized proceeding. Pet. 13. But that's just not true. As the California Supreme Court has explained, a request for a public injunction is not a representative claim; it does not require a class action—or any other procedure that aggregates the claims of others. *See McGill*, 393 P.3d at

97. It is a claim for relief that can be brought and litigated by an individual plaintiff in a bilateral proceeding that requires no additional procedural formality. *See id.*; *Blair*, 928 F.3d at 829.

Fast Auto Loans does not seriously argue otherwise. Its only feint at doing so is a citation to a single case holding that an individual plaintiff seeking a public injunction can introduce evidence of the impact of a defendant's practices on the public. Pet. 13. But, of course, such evidence is introduced in individualized, bilateral proceedings all the time. *See*, *e.g.*, *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284, 2287–89 (2018) (litigation of antitrust claim requires introduction of evidence of anti- or pro-competitive impact of defendant's conduct on public). Indeed, a private injunction—something Fast Auto Loans does not dispute may be arbitrated—requires the consideration of its potential impact on the public. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). And this Court has routinely held that claims, which by their nature require consideration of evidence beyond the impact on the individual parties, may be arbitrated. *See, e.g.*, *Mitsubishi*, 473 U.S. at 637 (antitrust claims); *Shearson/Am. Express, Inc.*, 482 U.S. at 239 (civil RICO claims); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) ("[A]rbitrators do have the power to fashion equitable relief."). The contention that arbitration is not capable of handling individual claims, simply because those claims might involve evidence that extends beyond the parties themselves, conflicts with decades of this Court's case law.

Fast Auto Loans' real complaint is not that a public injunction cannot be litigated in a bilateral proceeding. It's that it would prefer not to arbitrate high-stakes claims.

See Pet. 12–13. But that doesn't mean that such claims are preempted. To the contrary, this Court has repeatedly held that complex, high-stakes claims may be arbitrated. *See, e.g.*, *Mitsubishi*, 473 U.S. at 633–36; *Shearson/Am. Express, Inc.*, 482 U.S. at 239. If Fast Auto Loans would prefer not to do so, it can exclude these claims from its arbitration clause and require them to be brought in court. What it cannot do is prohibit its customers from bringing those claims at all. Nothing in the FAA or this Court's case law allows—let alone requires—that companies be permitted to exempt themselves from substantive state law, simply by including an arbitration clause in their contract. It is hard to imagine anything more hostile to arbitration than seeking to enlist this Court in transforming arbitration from a legitimate means of dispute resolution into a mere fig leaf for evading state law.

Contrary to Fast Auto Loans' contention, *Hodges* does not hold otherwise. Fast Auto Loans claims that *Hodges* held that "the *McGill* rule is preempted by the FAA." Suppl. Br. 1. That is false. *Hodges* holds precisely the opposite. *Hodges*, 12 F.4th at 1112 ("We held in *Blair* that 'the FAA does not preempt the *McGill* rule,' and we therefore reject Comcast's contrary arguments here." (citation omitted)). Instead, the panel majority offered its opinion that, if the antecedent state-law question were decided the opposite way, the majority would hold that such an application of the *McGill* rule would be preempted. *Id.* at 1119.

That conclusion is both dubious and undeveloped. *Hodges* acknowledged that entering an injunction like the kind sought here is perfectly consistent with the bilateral arbitration this Court has held the FAA requires. *See id.*

It worried, however, about the implementation of the injunction. *See id.* But the panel offered no reason why it would be inconsistent with the FAA for an individual who believes an injunction has been violated as to them to bring an individual, bilateral arbitration proceeding to enforce that injunction. And the California courts have not yet had any opportunity to even consider, let alone pass upon, this novel and idiosyncratic theory of FAA preemption—or how it might impact its determination of what constitutes a public injunction under California law in the first place. *Cf. Howell v. Mississippi*, 543 U.S. 440, 443 (2005) ("[T]his Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.").

In any event, even *Hodges* recognizes that there is at least one version of the *McGill* rule—the version currently in force in the Ninth Circuit—that is not preempted. Until the California Supreme Court rules on what constitutes a public injunction, this Court cannot possibly determine whether California's prohibition on waiving public injunctive relief is preempted.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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