No.

IN THE
Supreme Court of the United States

COMCAST CORPORATION, COMCAST CABLE COMMUNICATIONS, LLC,

Petitioners,

v.

CHARLES TILLAGE, JOSEPH LOOMIS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

SEAMUS C. DUFFY
AKIN GUMP STRAUSS HAUER & FELD LLP
Two Commerce Square
2001 Market Street, Suite 4100
Philadelphia, PA 19103
(215) 965-1212

MARK A. PERRY
Counsel of Record
JOSHUA M. WESNESKI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
MPerry@gibsondunn.com

Counsel for Petitioners

(Additional Counsel Listed on Inside Cover)

MICHAEL J. STORTZ
AKIN GUMP STRAUSS HAUER
& FELD LLP
580 California Street,
Suite 1500
San Francisco, CA 94104
(415) 765-9508

Counsel for Petitioners

QUESTIONS PRESENTED

The Federal Arbitration Act makes written arbitration agreements "valid, irrevocable, and enforceable," although its "saving clause" permits the application of defenses that "exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. But even a defense that falls within the saving clause is preempted by the Act if it interferes with fundamental attributes of arbitration, such as bilateralism. *See Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1623 (2018).

In 2017, the California Supreme Court announced for the first time that provisions in predispute arbitration agreements waiving the parties' right to seek "public injunctive relief" in any forum are contrary to California public policy and unenforceable. *See McGill* v. *Citibank, N.A.*, 393 P.3d 85 (Cal. 2017). This so-called "*McGill* rule" effectively precludes bilateral arbitration of consumer disputes in California. The questions presented are:

1. Whether the *McGill* rule falls outside the FAA's saving clause because it is not a ground that "exist[s] at law or in equity" for the "revocation" of any contract?

2. Whether, even if the *McGill* rule falls within the FAA's saving clause, it is otherwise preempted by the FAA because it interferes with fundamental attributes of arbitration by negating the parties' agreement to resolve their dispute bilaterally?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties to the proceeding are set forth in the caption.

Pursuant to this Court's Rule 29.6, undersigned counsel state that petitioner Comcast Cable Communications, LLC is an indirect subsidiary of petitioner Comcast Corporation, a publicly held corporation. Comcast Corporation has no parent corporation and no publicly held corporation owns 10% or more of its stock.

RULE 14.1(b)(iii) STATEMENT

Pursuant to this Court's Rule 14.1(b)(iii), the following proceedings are related to this case:

- *Tillage et al.* v. *Comcast Corp. et al.*, No. 3:17-cv-06477-VC-DMR (JCS) (N.D. Cal.).
- *Tillage et al.* v. *Comcast Corp. et al.*, No. 18-15288 (9th Cir.) (judgment entered June 28, 2019, petition for rehearing denied January 17, 2020).

There are no additional proceedings in any court that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Comcast Corporation and Comcast Cable Communications, LLC respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The memorandum disposition of the court of appeals (Pet. App. 1a–2a) is reported at 772 F. App'x 569. The opinion of the court of appeals in a parallel case raising the same issues (Pet. App. 3a–28a) is reported at 928 F.3d 819. The district court's order (Pet. App. 29a–32a) is unreported but available at 2018 WL 4846548.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 2019. Pet. App. 1a. A timely petition for rehearing was denied on January 17, 2020. Pet. App. 33a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Constitution and the Federal Arbitration Act are reproduced in the Appendix. Pet. App. 34a–43a.

STATEMENT

The Federal Arbitration Act ("FAA") provides that written arbitration agreements are "valid, irrevocable, and enforceable," except "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This Court recently "[p]ut to the side the question of what it takes to qualify as a ground for 'revocation' of a contract," while reiterating that the FAA "protect[s] pretty absolutely" the ability of contracting parties to agree to "use individualized . . . procedures" to resolve disputes. *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1621–22 (2018). In this case, the Ninth Circuit sustained a judge-made rule rendering unenforceable arbitration provisions that preclude requests for public injunctive relief—that is, relief that primarily benefits persons other than the individual plaintiff. Pet. App. 1a–28a (citing *McGill* v. *Citibank, N.A.*, 393 P.3d 85, 87 (Cal. 2017)). The court of appeals ruled both that this "*McGill* rule" falls within the FAA's saving clause, and that it does not interfere with the fundamental attribute of arbitral bilateralism. Pet. App. 19a, 24a. As a result, the *McGill* rule now effectively precludes bilateral arbitration of consumer disputes in California.

1. The FAA was enacted in 1925 (and recodified in 1947) "in response to widespread judicial hostility to arbitration agreements." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011). Prior to its enactment, the "traditional judicial hostility against ousting courts" had resulted in the nonenforcement of otherwise valid agreements to arbitrate. *Bernhardt* v. *Polygraphic Co. of Am.*, 350 U.S. 198, 210 (1956). The purpose of the Act is "to ensure judicial enforcement of privately made agreements to arbitrate." *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 219 (1985).

In doing so, the FAA establishes "a 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).

The linchpin of the FAA is Section 2, which provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . 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. Section 2 "reflects the fundamental principle that arbitration is a matter of contract." *Rent-A-Center, W., Inc.* v. *Jackson*, 561 U.S. 63, 67 (2010).

Under the Supremacy Clause (U.S. Const. art. VI, cl. 2), state laws that conflict with the FAA are displaced by the FAA through the doctrine of preemption (*see Preston* v. *Ferrer*, 552 U.S. 346, 353 (2008)). Under Section 2, a State may not impose rules that—whether explicitly or covertly—disfavor arbitration. *See Concepcion*, 563 U.S. at 341. This Court has applied Section 2 to hold preempted a number of state rules (many of them originating in California) undermining the enforceability of arbitration agreements. *See, e.g.*, *Preston*, 552 U.S. at 352, 359 (holding that the FAA preempted a California statute requiring the Labor Commissioner to determine certain issues relevant to the dispute); *Perry* v. *Thomas*, 482 U.S. 483,

491–92 (1987) (holding that the FAA preempted a California statute requiring a judicial forum for resolving wage disputes); *Southland Corp.* v. *Keating*, 465 U.S. 1, 10, 16–17 (1984) (holding that the FAA preempted the California Supreme Court's interpretation of a statute to require a judicial forum for claims arising under the Franchise Investment Law).

Section 2 of the FAA provides a limited exception to the general rule that written arbitration agreements are "valid, irrevocable, and enforceable": A party resisting arbitration may raise, as a defense, state-law grounds that "exist at law or in equity for the *revocation* of any contract." 9 U.S.C. § 2 (emphasis added). The saving clause of the FAA therefore "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such 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 (quoting *Doctor's Assocs.* v. *Casarotto*, 517 U.S. 681, 687 (1996)). The saving clause does *not*, however, permit state-law rules that "covertly" discriminate against arbitration "by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Kindred Nursing Ctrs. Ltd. P'ship* v. *Clark*, 137 S. Ct. 1421, 1426 (2017).

Even a ground "at law or in equity for the revocation of any contract," and thus within the saving clause, will be preempted by the FAA if it "interferes with fundamental attributes of arbitration." *Concepcion*, 563 U.S. at 344. In *Concepcion*, this Court held that the FAA preempted a California rule prohibiting waivers of class-action relief in consumer arbitration

agreements. *Id.* at 340 (citing *Discover Bank* v. *Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005)). Because of the complexities and costs associated with class-wide arbitration, this Court concluded that applying the *Discover Bank* rule to invalidate arbitration agreements containing class-action waivers would frustrate the FAA's twin goals of "enforcement of private agreements and encouragement of efficient and speedy dispute resolution." *Id.* at 345 (quotation marks omitted).

Justice Thomas, who joined the majority in *Concepcion*, also wrote a concurrence regarding the scope of the saving clause. He explained that because the saving clause permits application of only "such grounds as exist at law or in equity for the revocation of any contract," "[i]t would be absurd to suggest that [the saving clause] requires only that a defense apply to 'any contract.'" *Concepcion*, 563 U.S. at 352 (Thomas, J., concurring) (some quotation marks omitted). Instead, "the FAA requires that an agreement to arbitrate be enforced unless a party successfully challenges the formation of the arbitration agreement, such as by proving fraud or duress." *Id.* at 353. Justice Thomas further observed that Section 4 of the FAA requires that "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court must order arbitration in accordance with the terms of the agreement." *Id.* at 354–55 (quotation marks omitted). Reading the saving clause and Section 4 "harmoniously," the saving clause "require[s] enforcement of an agreement to arbitrate unless a party successfully asserts a defense concerning the formation of the agreement to arbitrate, such as fraud, duress, or mutual mistake." *Id.* at 355. The *Discover Bank* rule was not such a defense. *Id.* at 356–57; *see also Am. Express*

Co. v. *Italian Colors Rest.*, 570 U.S. 228, 239 (2013) (Thomas, J., concurring) (advancing the same interpretation).

More recently, this Court held in *Epic* that the FAA's enforcement of arbitration agreements was not displaced by the National Labor Relations Act, which prohibits employers from barring employees from engaging in "'concerted activit[y].'" 138 S. Ct. 1612 (quoting 29 U.S.C. § 157). The Court explained that the FAA protects "pretty absolutely" the right of parties in arbitration "to use individualized rather than class or collective action procedures." *Id.* at 1621. And for that reason, "an argument that a contract is unenforceable *just because it requires bilateral arbitration*" cannot withstand scrutiny under the FAA. *Id.* at 1623. Thus, "by attacking (only) the individualized nature of the arbitration proceedings, the [challengers' argument] s[ought] to interfere with one of arbitration's fundamental attributes." *Id.* at 1622. Justice Thomas, in concurrence, reiterated his view of the limited scope of the saving clause. *See id.* at 1632–33 (Thomas, J., concurring). The majority did not disagree; rather, the Court "[p]ut to the side the question of what it takes to qualify as a ground for 'revocation' of a contract" (*id.* at 1622), and decided the case on other grounds.

2. After *Concepcion*—but before *Epic*—the California Supreme Court announced a new "rule" regarding "the validity of a provision in a predispute arbitration agreement that waives the right to seek [public injunctive relief] in any forum." *McGill*, 393 P.3d at 87. "[P]ublic" injunctive relief is a type of relief in California that has "the primary purpose and effect of prohibiting unlawful acts that threaten future injury to the general public." *Id.* at 90 (quotation marks

omitted). The individual plaintiff benefits, "if at all, only incidentally and/or as a member of the general public." *Id.* at 89 (alteration and quotation marks omitted). Public injunctive relief is frequently sought in false advertising suits, where the plaintiff is already aware of the alleged falsity and cannot benefit from prospective relief.

In *McGill*, the California Supreme Court held that a waiver "in a predispute arbitration agreement" of the right to seek public injunctive relief "in any forum" is "contrary to California public policy and is thus *unenforceable* under California law." 393 P.3d at 87 (emphasis added). To reach that holding, the court excavated a provision from California's "Maxims of Jurisprudence," enacted in 1872 to aid statutory construction (Cal. Civ. Code § 3513), that has never been applied as a defense to contract formation or as a ground for the "revocation" of a contract. Nevertheless, the California Supreme Court held that its new rule was not preempted by the FAA because it preserved substantive rights, citing *Italian Colors*, which was not a preemption case, for the proposition that the FAA does not require enforcement of an arbitration clause "that forbids the assertion of certain statutory rights." *McGill*, 393 P.3d at 94–95 (alteration and quotation marks omitted). Even as it applied the new rule in *McGill* itself, the court did not hold the parties' contract, or even the arbitration clause, "revoked" or invalid; rather, the court remanded the case for the lower court to determine whether the rest of the arbitration agreement could nonetheless be enforced. *Id.* at 97–98.

3. Respondents are subscribers to petitioners' cable, Internet, and/or telephone services. In the course of their relationship with petitioners, respondents

each received and assented to several iterations of petitioners' Subscriber Agreement. Each version of the Subscriber Agreement contains a materially identical arbitration clause. The most recent version in effect—the 2017 Subscriber Agreement—sets forth the terms of arbitration in Section 13, entitled "BINDING ARBITRATION," providing that "[a]ny Dispute involving [respondents] and [petitioners] shall be resolved through individual arbitration." Pet. App. 37a.

In subsection (h), the 2017 Subscriber Agreement includes a "Waiver of Class Actions and Collective Relief":

> THERE SHALL BE NO RIGHT OR AUTHORITY FOR ANY CLAIMS TO BE ARBITRATED OR LITIGATED ON A CLASS ACTION, JOINT OR CONSOLIDATED BASIS OR ON BASES INVOLVING CLAIMS BROUGHT IN A PURPORTED REPRESENTATIVE CAPACITY ON BEHALF OF THE GENERAL PUBLIC (SUCH AS A PRIVATE ATTORNEY GENERAL), OTHER SUBSCRIBERS, OR OTHER PERSONS. THE ARBITRATOR MAY AWARD RELIEF ONLY IN FAVOR OF THE INDIVIDUAL PARTY SEEKING RELIEF AND ONLY TO THE EXTENT NECESSARY TO PROVIDE RELIEF WARRANTED BY THAT INDIVIDUAL PARTY'S CLAIM.

Pet. App. 41a. It is undisputed that this provision prohibits either side from seeking public injunctive relief in arbitration.

Respondents and two other consumers brought this lawsuit in California state court in 2017, alleging

that petitioners engage in false and misleading advertising with respect to the pricing of their cable television service packages. Respondents seek relief under California's Unfair Competition Law (Cal. Bus. & Prof. Code § 17200 et seq.), False Advertising Law (*id.* § 17500 et seq.), and Consumer Legal Remedies Act (Cal. Civ. Code § 1750 et seq.), and also allege breach of contract. First Am. Compl. ¶¶ 237–93. In addition to seeking to certify a class of "approximately two million California consumers" (*id.* ¶ 232), respondents also "seek public injunctive relief for the benefit of themselves and for the benefit of millions of other California consumers" (*id.* ¶ 180). Petitioners removed the case to the United States District Court for the Northern District of California on the basis of diversity and filed a motion to compel individual arbitration with respect to two plaintiffs (respondents here); the other two plaintiffs timely opted out of arbitration.

Respondents did not dispute that their claims fall within the arbitration provision, but resisted arbitration principally on the ground that the *McGill* rule renders Section 13(h)'s waiver of public injunctive relief in arbitration unenforceable; and therefore, because the 2017 Subscriber Agreement contains a nonseverability clause (Pet. App. 41a), the *entire* arbitration provision is unenforceable (but not revoked). In reply, petitioners argued that the FAA preempts the *McGill* rule.

In February 2018, the district court denied the motion to compel arbitration, relying entirely on the *McGill* rule. Pet. App. 29a–32a. The court cited two other district court decisions applying the *McGill* rule in analogous circumstances. Pet. App. 30a. Each of them had relied in substantial part on *Sakkab* v. *Luxottica Retail North America, Inc.*, 803 F.3d 425 (9th

Cir. 2015)—a case in which a divided panel of the Ninth Circuit upheld against a FAA challenge a different California "rule" prohibiting arbitral waivers of the right to bring a representative claim under California's Private Attorneys General Act. *See* Cal. Lab. Code § 2698. Petitioners here filed a timely appeal pursuant to 9 U.S.C. § 16(a)(1)(B).

4. The Ninth Circuit heard oral argument in three related cases all raising the same issue: Whether the FAA preempts the *McGill* rule. Emphasizing the weight of Supreme Court precedent requiring the enforcement of arbitration agreements, counsel for petitioners had the following exchange with the panel:

> Counsel: We have every Supreme Court case for the last thirty years on our side, and they have *Sakkab* on their side. I mean, that's really the weighing that's before the Court, right?
>
> The Court: That's actually fairly common. You've got the Supreme Court over there and the Ninth Circuit over here.

That colloquy proved prescient: On June 28, 2019, the Ninth Circuit issued a panel opinion in the first filed of the three related cases, holding that the FAA does not preempt the *McGill* rule. Pet. App. 3a. It simultaneously issued a memorandum disposition in this case (Pet. App. 1a–2a) as well as in another case involving AT&T (*see McArdle* v. *AT&T Mobility LLC*, 772 F. App'x 575 (9th Cir. 2019)).

With respect to the applicability of the FAA's saving clause, the Ninth Circuit held that "[t]he *McGill* rule . . . is a generally applicable contract defense." Pet. App. 16a. The panel did not engage with the extensive arguments presented by petitioners in this

case regarding the limited scope of the saving clause. *See* C.A. Br. 27; C.A. Reply Br. 5–8. Rather, the panel discussed only the fact that the California statute from which the California Supreme Court purported to derive the *McGill* rule (Cal. Civ. Code § 3513) had been applied in a variety of different contexts. Pet. App. 18a–19a. The panel did not (and could not) identify *any* cases in which the statute had been applied to *revoke* a contract. Nevertheless, the panel summarily concluded that the rule "is a ground for the revocation of any contract and falls within the FAA's saving clause." Pet. App. 19a (alterations and quotation marks omitted).

On the question of whether the *McGill* rule interferes with fundamental attributes of arbitration, the panel relied principally on the majority decision in *Sakkab*. Pet. App. 20a. The court did not even address the California Supreme Court's erroneous reliance on the "effective vindication" doctrine set forth in *Italian Colors*. Instead, the panel held that public injunctive relief did not interfere with bilateralism, because a request for such relief does not implicate "state-law class procedures," and a plaintiff seeking public injunctive relief "files the lawsuit on his or her own behalf and retains sole control over the suit." Pet. App. 20a–21a (quotation marks omitted).

Petitioners filed a timely petition for panel rehearing and rehearing en banc, which the court denied on January 17, 2020. Pet. App. 33a.

REASONS FOR GRANTING THE PETITION

This petition presents two important questions under the Federal Arbitration Act that should be decided by this Court at this time. The first is whether

state anti-arbitration rules that are not generally applicable defenses to contract formation fall within the FAA's saving clause, an issue that Justice Thomas has identified in a series of concurring opinions but the full Court has never addressed; the second is whether such state rules (even if they fall within the saving clause) are preempted outside the class- or collective-action context.

First, this case squarely presents the question whether the FAA's saving clause applies only to those defenses that provide a ground for the "revocation" of a contract, such as those defenses going to the formation of the agreement. This Court has expressly reserved judgment on whether the saving clause can sweep more broadly than its plain text permits. That question should be decided now, in this case, to provide guidance to lower courts and contracting parties. The saving clause, by its express terms and consistent with the structure and history of the FAA, permits application only of those defenses that relate to the formation of an arbitration agreement. The *McGill* rule is not such a defense. The panel decision, by concluding that the *McGill* rule is within the saving clause, conflicts with the FAA itself as well as decisions of other courts of appeals. Review is warranted to resolve that conflict.

Second, even if the *McGill* rule is within the saving clause, it interferes with fundamental attributes of arbitration by rendering unenforceable an arbitration provision because it requires bilateral arbitration, and therefore is preempted. This Court recently held in *Epic* that the FAA "pretty absolutely" protects parties' ability to agree to individualized arbitration procedures. The *McGill* rule violates that maxim by

requiring parties to arbitrate requests for public injunctive relief (or lose access to arbitration altogether), even though that relief is manifestly not bilateral. The panel decision ignored the pertinent part of *Epic* and sought to limit the Court's previous decision in *Concepcion* to the realm of class actions; review is warranted to bring the Ninth Circuit, once again, in line with this Court's precedent.

I. THE *MCGILL* RULE FALLS OUTSIDE THE FAA'S SAVING CLAUSE

The scope of the FAA's saving clause as it relates to judge-made rules, like the *McGill* rule, that do not provide for the "revocation" of any contract is an important and recurring question. While Justice Thomas has identified and addressed this issue in a series of concurring opinions, the full Court has expressly reserved judgment on it—electing instead to rule on other grounds in past cases. But this case squarely presents the issue and is the ideal vehicle to resolve that uncertainty.

A. The *McGill* Rule Is Not A Defense Providing For Revocation Of Contracts

Section 2 of the FAA makes written arbitration agreements involving interstate commerce "valid, irrevocable, and enforceable." 9 U.S.C. § 2. The sole exception to that mandate is set forth in the saving clause of Section 2, which permits the application of "such grounds as exist at law or in equity for the revocation of any contract." *Ibid.* Overlooking this plain text, the panel's decision assumed, without analysis, that a state-law doctrine (such as the *McGill* rule) that applies to "any contract" is covered by the saving clause, even if it does not provide for the "*revocation*" of contracts. Pet. App. 16a–19a. That holding is in

direct conflict with the plain text and structure of the FAA, and undermines the purpose and objectives of the Act.

1. Justice Thomas has persuasively analyzed the text of Section 2 and concluded that the saving clause applies only to those state-law defenses that exist "at law or in equity" and provide for the "revocation" of contracts. *See AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 352–53 (2011) (Thomas, J., concurring). This means that "the FAA requires that an agreement to arbitrate be enforced unless a party successfully challenges the formation of the arbitration agreement, such as by proving fraud or duress." *Id.* at 353 (citing 9 U.S.C. §§ 2, 4). Justice Thomas reached that conclusion by noting that "the statute does not parallel the words 'valid, irrevocable, and enforceable' by referencing the grounds as exist for the 'invalidation, revocation, or nonenforcement' of any contract," and that other provisions of the FAA likewise focus on the making of the agreement. *Id.* at 354–55. Defenses "unrelated to the making of the agreement—such as public policy"—therefore cannot "be the basis for declining to enforce an arbitration clause." *Id.* at 355.

The plain text of Section 2 demonstrates that only defenses providing for the *revocation* of any contract may qualify for protection under the saving clause. *See Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) ("We must enforce plain and unambiguous statutory language according to its terms"). In Section 2's preemption clause, Congress made arbitration agreements "valid, irrevocable, and enforceable." *See* 9 U.S.C. § 2. Yet in the saving clause, Congress "save[d]" *only* those state-law defenses providing for the "revocation" of any contract. *Ibid.* The implica-

tion of that omission is clear: The saving clause applies only to defenses providing for "revocation," and not to those rendering an arbitration provision invalid or unenforceable. *See Gozlon-Peretz* v. *United States*, 498 U.S. 395, 404 (1991) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" (alteration and quotation marks omitted)). To construe the statute otherwise would impermissibly "read . . . absent word[s] into the statute." *Lamie* v. *U.S. Tr.*, 540 U.S. 526, 538 (2004).

"Revocation" is not synonymous with unenforceability or invalidity. Although the FAA does not provide a definition of "revocation," "[w]here," as here, "Congress uses terms that have accumulated settled meaning under the common law, . . . Congress means to incorporate the established meaning of these terms." *Neder* v. *United States*, 527 U.S. 1, 21 (1999) (alteration and quotation marks omitted). And in the context of the FAA, "revocation" "obviously is intended to be synonymous with 'rescission.'" *Halcon Int'l, Inc.* v. *Monsanto Austl. Ltd.*, 446 F.2d 156, 159 (7th Cir. 1971).

Revocation and rescission are common-law remedies that have the effect of extinguishing a contract and rendering it void ab initio. *See, e.g.*, *First Hartford Corp. Pension Plan & Tr.* v. *United States*, 194 F.3d 1279, 1296 (Fed. Cir. 1999) ("[R]escission amounts to the unmaking of a contract or an undoing of it from the beginning and not merely a termination of the contract" (quotation marks omitted)); *Huffman* v. *Saul Holdings Ltd. P'ship*, 194 F.3d 1072, 1081

(10th Cir. 1999) ("Rescission contemplates an annulment voiding the contract ab initio, accompanied by restoration of the parties to their pre-contract status" (quotation marks omitted)). The focus of revocation is on the circumstances of the making of the agreement—if an agreement was the result of fraud (*see* 27 Williston on Contracts § 69:47 (4th ed. 2019)), duress (*see* 28 *id.* § 71:8), or mistake (*see* 27 *id.* § 70:40), it is subject to revocation (*see* 1 Henry Campbell Black, *A Treatise on the Rescission of Contracts & Cancellation of Written Instruments* § 14 (1916) ("[A] contract properly entered into by competent parties and founded upon a consideration . . . cannot be rescinded by the other, unless he is able to show the existence of some well-recognized title to equitable relief, such as fraud, mistake, or duress")).

"Unenforceability" and "invalidity" are different. Unlike revocation and rescission, unenforceability and invalidity address issues unrelated to whether the parties have in fact mutually agreed to the contract. For example, a contractual provision may be held unenforceable or invalid if it is too vague (*see Long Beach Drug Co.* v. *United Drug Co.*, 88 P.2d 698, 701 (Cal. 1939)), if it too broadly exempts a party from liability (*see Broadley* v. *Mashpee Neck Marina, Inc.*, 471 F.3d 272, 276 (1st Cir. 2006)), or if it is otherwise contrary to public policy (*see Hurd* v. *Hodge*, 334 U.S. 24, 34–35 (1948)). These defenses relate not to the mutual assent of the parties to the terms of a contract, but to substantive judgments about the desirability or undesirability of certain provisions of that contract. And they generally apply only to a particular provision, and not to the entire contract.

Understood in that context, only state-law defenses that go to contract formation fall within the

saving clause. To expand "revocation" in the saving clause to include "unenforceability" and "invalidity" would essentially rewrite the statute while making Section 2's mandate that arbitration agreements be honored as "valid" and "enforceable" superfluous. *See Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute" (quotation marks omitted)). The FAA anticipates that arbitration agreements not properly *formed* under state law will be revocable, but that state-law judgments about the substantive validity of arbitration provisions will have no force.

The limited scope of the saving clause is further confirmed by the fact that the clause applies only to those defenses that "exist at law or in equity." 9 U.S.C. § 2. By restricting the defenses "saved" under Section 2 to those existing "at law or in equity," the FAA plainly does not permit judges to contrive new, ad hoc rules to thwart arbitration. *See* Comment, Erie*,* Bernhardt*, and Section 2 of the United States Arbitration Act: A Farrago of Rights, Remedies, and a Right to a Remedy*, 69 Yale L.J. 847, 860 (1960) ("Congress probably meant prevailing rules of law and equity . . ."). To the contrary, this Court has identified the paradigmatic, common-law defenses applicable under the FAA, which, not surprisingly, all provide for the "revocation" of a contract in appropriate circumstances. *See Doctor's Assocs.* v. *Casarotto*, 517 U.S. 681, 687 (1996) ("[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2").

Other provisions in the FAA confirm this reading. Courts should interpret statutes to form a "symmetrical and coherent regulatory scheme." *Mellouli* v.

Lynch, 135 S. Ct. 1980, 1989 (2015) (quotation marks omitted). The FAA's analytical scheme expressly contemplates that a court will order a case to arbitration only after "being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue." 9 U.S.C. § 4. This Court therefore has held that federal courts may adjudicate only claims that "go[] to the 'making' of the agreement to arbitrate." *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967).

Although Section 4 addresses only the *forum* for resolution of contract defenses, it is reflective of the FAA's "basic precept that arbitration is a matter of consent, not coercion." *Stolt-Nielsen S.A.* v. *Animal-Feeds Int'l Corp.*, 559 U.S. 662, 681 (2010) (quotation marks omitted). The FAA's "primary purpose" is "ensuring that private agreements to arbitrate are enforced *according to their terms*." *Volt Info. Scis., Inc.* v. *Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (emphasis added). That framework is undermined by state-law rules that place substantive limitations on *which* arbitration terms may be enforced: "What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 281 (1995).

The context in which the FAA was enacted also provides evidence of the saving clause's scope. Starting at least in the 18th century, English courts began holding arbitration agreements invalid and unilaterally revocable on the ground that "the agreement of the parties cannot oust [a] Court" of jurisdiction. *Kill* v. *Hollister* (1746) 95 Eng. Rep. 532 (KB); *see also Kulukundis Shipping Co., S/A* v. *Amtorg Trading Corp.*,

126 F.2d 978, 983 (2d Cir. 1942) ("[B]y way of rationalization, it became fashionable in the middle of the 18th century to say that [arbitration] agreements were against public policy because they 'oust the jurisdiction' of the courts"). American courts soon adopted this hostility to arbitration. *See, e.g.*, *Ins. Co.* v. *Morse*, 87 U.S. (20 Wall.) 445, 450 (1874).

The FAA was Congress's response to that practice, "specifically enacted to reverse antiquated state rules of law that ma[d]e arbitration agreements revocable at will anytime prior to the issuance of the arbitration award." *Johnson Controls, Inc.* v. *City of Cedar Rapids*, 713 F.2d 370, 376 (8th Cir. 1983). Section 2 was drafted broadly to ensure that *no* judge-made rules would prevent the recognition and enforcement of arbitration agreements. By making arbitration agreements "valid, irrevocable, and unenforceable," Congress preempted the common-law practice permitting parties to repudiate their arbitration agreements. *See Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before the S. Subcomm. on the Judiciary*, 67th Cong. 3–4 (1923) (statement of Charles L. Bernheimer).

The limited exception, codified in the saving clause, is that a defense providing for the *revocation* of any contract could still apply. But Congress did not intend for that provision to permit the application of state-law rules that would undermine the enforceability of arbitration agreements by placing substantive restraints on the *types* of arbitration provisions to which parties may agree—that would defeat the very purpose of the preceding clause preempting common-law rules that did just that.

Thus, nothing in the FAA suggests that Congress intended to preserve state-law defenses to the enforcement of arbitration agreements *other* than the limited class of defenses expressly carved out in the statute—those providing for the "revocation of any contract."

2. The *McGill* rule is not a ground at law or in equity for the "revocation" of any contract. By its own terms, the rule only makes "unenforceable" provisions waiving the right to seek public injunctive relief, and does so as a matter of "California public policy." *McGill*, 393 P.3d at 87. The rule does not relate to the "revocation" of any contract, and in fact, the court in *McGill* remanded the case to the trial court to determine whether the other provisions of the arbitration agreement were severable—an exercise that would be pointless if the *McGill* rule went to the formation of the agreement. *Id.* at 98.

More broadly, the *McGill* rule is simply a judicial declaration regarding the enforceability of certain arbitration provisions as a matter of California public policy. *See McGill*, 393 P.3d at 87 (waivers of public injunctive relief are "contrary to California public policy"). It says nothing about whether the parties actually agreed to arbitrate or to the terms of that arbitration. It bears no resemblance to the traditional grounds for rescission—fraud, duress, mistake, etc.—contemplated by the FAA as grounds to resist arbitration. *See Doctor's Assocs.*, 517 U.S. at 687. Instead, it reflects a State's judgment about whether and in what situations agreed-to arbitration provisions should be enforced according to their terms, and such a rule cannot stand under the FAA.

In fact, the *McGill* rule is not even a contract defense at "law" or in "equity." The statute from which

the *McGill* rule is derived provides, in full, that "[a]ny one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement." Cal. Civ. Code § 3513. This opaque statement (which says nothing about contracts, let alone revoking them) appears in California's "Maxims of Jurisprudence," a section of the Civil Code whose stated purpose is to "aid in the[] just application" of the Civil Code. *Id.* § 3509. Section 3513 is a principle of statutory construction; it has nothing to do with contract law and has no relation to the type of traditional contract formation defenses the saving clause was plainly intended to cover. *See* Comment, *supra*, at 860 ("Congress probably meant [in the saving clause] prevailing rules of law and equity . . .").

The *McGill* rule itself was contrived by the California Supreme Court in 2017, 92 years after the enactment of the FAA, as an apparent response to *Concepcion*. The California Supreme Court repurposed a hoary "[m]axim" of statutory construction to preclude enforcement of predispute arbitration agreements. Thus, even if the *McGill* rule could be conceived as a ground for the "revocation" of a contract (it cannot), it is not a ground at "law" or in "equity"—it was manufactured by a state supreme court from a moribund statute having nothing to do with contract law, solely to impair the enforcement of arbitration clauses.

The Ninth Circuit panel was wrong to summarily conclude that "the *McGill* rule is a generally applicable contract defense derived from long-established California public policy," or that it is a "ground for the revocation of any contract." Pet. App. 19a (alterations and quotation marks omitted). It plainly is neither,

and a faithful reading of the FAA does not permit contracting parties to resist arbitration on the ground that certain terms of arbitration are contrary to the public policy of a State.

B. Review Is Warranted To Protect Consumer Arbitration In California

This Court so far has not had an occasion to resolve the scope of the saving clause. In *Concepcion*, Justice Thomas observed that the question "ha[d] not been fully developed by any party," and "could benefit from briefing and argument in an appropriate case." 563 U.S. at 353 (Thomas, J., concurring). In *Epic*, this Court expressly reserved judgment on this important issue, saying that it would "[p]ut to the side the question of what it takes to qualify as a ground for 'revocation' of a contract." *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1622 (2018) (citing *Concepcion*, 563 U.S. at 352–55 (Thomas, J., concurring)). That issue should not be "[p]ut to the side" any longer. The lack of guidance regarding the scope of the saving clause has substantial implications in this case and others. The Ninth Circuit's decision is in tension—or outright conflict—with the decisions of several other courts of appeals. Certiorari is warranted to resolve that conflict and avoid further harm arising from the *McGill* rule.

1. The effect of the *McGill* rule is to render unenforceable scores of consumer arbitration agreements in California.

While the *McGill* rule applies only to cases in which a plaintiff seeks public injunctive relief (*see McGill*, 393 P.3d at 90), a plaintiff in California can do so in virtually *every* California consumer case (*see* Mathieu Blackston, *California's Unfair Competition Law—Making Sure the Avenger Is Not Guilty of the*

Greater Crime, 41 San Diego L. Rev. 1833, 1839 (2004)). That is because public injunctive relief is available under California's Unfair Competition Law, and a plaintiff can plead a claim under that statute for "'any unlawful'" business practice—which means an alleged violation of any other law, state or federal. *See Cel-Tech Commc'ns, Inc.* v. *L.A. Cellular Tel. Co.*, 973 P.2d 527, 539–40 (Cal. 1999).

In effect, any plaintiff who is a party to an otherwise valid arbitration agreement and waives the right to seek representative relief—the same provision at issue in *Concepcion* (563 U.S. at 336)—can plead her way out of arbitration by simply tacking onto her complaint a request for public injunctive relief under the Unfair Competition Law. And because many consumer arbitration agreements include a severability provision similar to that here (Pet. App. 41a), the effect will be the unenforceability of those arbitration agreements in toto. The ruling below thus "blesse[s] 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*, Reuters (July 1, 2019), https://reut.rs/30Ufvxq.

It is no solution for petitioners and others to simply rewrite their arbitration agreements to conform with California's new public-policy rule. As in *Concepcion*, the harm is not that the *McGill* rule *requires* arbitration of public injunctive relief, but that "it allows any party to a consumer contract to demand it *ex post*." *Concepcion*, 563 U.S. at 346. In other words, the *McGill* rule forces parties to choose between litigation and non-bilateral arbitration (with limited procedural protections or judicial review).

And faced with that choice, companies will have little incentive to arbitrate at all (*id.* at 347), contravening the underlying purpose and objectives of the FAA. Thus, as long as the *McGill* rule is in effect, it will cast a shadow over consumer arbitration agreements in California that, like this one, require bilateral arbitration.

But the question of the proper scope of the saving clause goes far beyond this particular case or rule. This Court has on numerous occasions taken up cases implicating Section 2, involving attempts by plaintiffs to evade binding arbitration agreements on the ground that state policy prohibits enforcement of the agreement as written. *See, e.g.*, *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463 (2015); *Concepcion*, 563 U.S. 333; *Allied-Bruce*, 513 U.S. 265; *Perry* v. *Thomas*, 482 U.S. 483 (1987). The scope of the saving clause was relevant—and potentially dispositive—in each of those cases. The issue therefore informs not just this case, but *any* case in which a plaintiff asserts a (purportedly) generally applicable state-law rule to resist arbitration. Resolution of this important question is needed now, before more judicial resources are expended adjudicating the propriety of state-law rules that frustrate arbitration.

2. The panel decision conflicts with the decisions of this Court and of other federal courts of appeals.

Several of this Court's decisions have emphasized that Section 2 contemplates only that the district court will assure itself that the parties have actually agreed to arbitrate. In *Dean Witter Reynolds, Inc.* v. *Byrd*, the Court explained that the FAA "mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed," and that "agreements to

arbitrate must be enforced, absent a ground for *revocation* of the contractual agreement." 470 U.S. 213, 218 (1985) (second emphasis added). More pointedly, in *Shearson/American Express, Inc.* v. *McMahon*, this Court explained that "[a]bsent a well-founded claim that an arbitration agreement resulted from the sort of fraud or excessive economic power that would provide grounds for the revocation of any contract," the FAA "provides no basis" for disfavoring arbitration agreements. 482 U.S. 220, 226 (1987) (quotation marks omitted).

The holdings of the federal courts of appeals are even more on point.

In *Middlesex County* v. *Gevyn Construction Corp.*, the plaintiff sought to avoid arbitration by claiming that the defendant's material breach of the contract rendered the entire agreement, including the arbitration clause, unenforceable. 450 F.2d 53, 54 (1st Cir. 1971). The First Circuit rejected that contention, explaining that the FAA limited the grounds upon which a party could seek to avoid arbitration, explaining that "the only grounds for revocation which meet the requirement of 9 U.S.C. § 2 are mutual agreement or a condition which vitiates agreement *ab initio*, i.e., fraud, mistake, or duress," because "it is only this kind of 'revocation' which can be harmonized with adjudication directed to 'the making of the agreement for arbitration.'" *Id.* at 56.

Likewise, in *Halcon International*, the Seventh Circuit held that a defense of laches—which, if accepted, would have rendered the entire contract "unenforcable"—was to be adjudicated by the arbitrator, and that such a defense could not be applied to invalidate the arbitration agreement. *See* 446 F.2d at 159. The court explained that because

"the savings clause of Section 2 is limited to 'revocation,'" it applies only to "an unmaking resulting from the mutual cancellation of the contract by the parties or the voiding of the transaction due to fraud, mistake or duress." *Ibid.*; *see also ibid.* (contrasting grounds for rescission with grounds for unenforceability).

Other courts have strongly indicated that the saving clause applies only to defenses going to the formation of the agreement to arbitrate. The D.C. Circuit has explained that Section 2, "especially when read in conjunction with [Section] 4," indicates "that Congress created an exception to the general rule (that an arbitration clause will be enforced by its terms) only when there is a flaw *in the formation of the agreement to arbitrate*." *Nat'l R.R. Passenger Corp.* v. *Consol. Rail Corp.*, 892 F.2d 1066, 1070 (D.C. Cir. 1990) (citing *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985)) (emphasis added). And the Fourth Circuit has likewise held that "Section 2 dictates the effect of a contractually agreed-upon arbitration provision, but it does not displace state law on the general principles governing *formation of the contract itself*." *Supak & Sons Mfg. Co.* v. *Pervel Indus., Inc.*, 593 F.2d 135, 137 (4th Cir. 1979) (emphasis added).

The panel's decision here—which permits application of a state-law rule that does not require a "flaw in the formation of the agreement to arbitrate" (*Nat'l R.R. Passenger Corp.*, 892 F.2d at 1070)—is in conflict with the decisions of several other courts of appeals. Review is needed to resolve that conflict and answer a purely legal question of national importance, which was preserved by petitioners below and

actually decided (incompletely and incorrectly) by the court of appeals.

II. THE *MCGILL* RULE UNDERMINES THE FAA'S PROTECTION OF BILATERAL ARBITRATION

Even if the *McGill* rule were within the saving clause (or if the Court elects once again to put that question to the side), this case also presents a second question—whether a rule prohibiting waivers of public injunctive relief conflicts with the FAA's requirement that courts enforce bilateral arbitration agreements according to their terms. The *McGill* rule is such a rule, and under this Court's precedents, it is preempted by the FAA because it interferes with the bilateral nature of arbitration. Certiorari is warranted to bring the Ninth Circuit in line with this Court.

This second question is the focus of AT&T's petition for a writ of certiorari in *McArdle*, which petitioners hereby adopt and incorporate by reference. (Rent-A-Center settled the *Blair* case after the Ninth Circuit panel decision issued.)

A. The Decision Below Interferes With Bilateral Arbitration

The panel decision conflicts with precedent from this Court holding that the FAA protects parties' agreements to engage in bilateral arbitration.

1. This Court has explained that the FAA requires courts to "rigorously enforce arbitration agreements according to their terms." *Am. Express Co.* v. *Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (quotation marks omitted). This includes "*with whom* the[] [parties] choose to arbitrate their disputes" (*Stolt-Nielsen*, 559 U.S. at 683), and "the rules under which that arbitration will be conducted" (*Volt Info. Scis.,*

Inc., 489 U.S. at 479). Thus, in *Concepcion*, this Court held that the FAA preempted a judge-made rule prohibiting the enforcement of waivers of class-action relief in arbitration agreements. *See* 563 U.S. at 344.

The Court expounded on these principles in *Epic*. There, the Court held that the plaintiffs could not rely on a federal statute making class and collective action waivers illegal to avoid arbitration, because such a defense "attack[ed] (only) the individualized nature of the arbitration proceedings." *Epic Sys.*, 138 S. Ct. at 1622. Noting that the parties had "specif[ied] the rules that would govern their arbitrations, indicating their intention to use individualized rather than class or collective action procedures," the Court observed that the FAA "seems to protect pretty absolutely" that election. *Id.* at 1621. The Court warned that courts "must be alert to new devices and formulas" that disfavor arbitration much in the same way the common law did prior to the FAA's passage, and that "a rule seeking to declare individualized arbitration proceedings off limits is . . . just such a device." *Id.* at 1623. Most critically, the Court held that "an argument that a contract is unenforceable *just because it requires bilateral arbitration*" is one "that impermissibly disfavors arbitration." *Ibid.*

The Court's holding in *Epic* resonates with its earlier admonition in *Kindred Nursing Centers Ltd. Partnership* v. *Clark*, 137 S. Ct. 1421 (2017). In striking down a state-law rule that required a clear statement from a principal before a representative could waive the principal's jury rights (i.e., enter into an arbitration agreement), the Court observed that the FAA "displaces any rule that covertly" disfavors arbitration "by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements."

Id. at 1426. The state court therefore had impermissibly "adopt[ed] a legal rule hinging on the primary characteristic of an arbitration agreement." *Id.* at 1427.

2. The panel opinion conflicts with this precedent because the *McGill* rule impairs the parties' ability to agree to bilateral arbitration.

Section 13 of the 2017 Subscriber Agreement at issue here ensures that the parties will arbitrate *with each other* to resolve any disputes *as between the two parties*. Pet. App. 41a. In other words, it is a set of terms providing "with whom" the parties will arbitrate and "the rules under which that arbitration will be conducted." *Am. Express Co.*, 570 U.S. at 233 (emphasis and quotation marks omitted). And what Section 13 specifies is that the parties will engage in *bilateral* arbitration.

The *McGill* rule, however, nullifies the choice of the parties to engage in bilateral arbitration and effectively forces them to arbitrate the rights and interests of scores of consumers who have not even entered into an arbitration agreement with Comcast. This is the very kind of "device" disfavoring arbitration that the Court warned of in *Epic*. *See* 138 S. Ct. at 1623.

Moreover, bilateralism in the context of arbitration has value as to both the right *and* the remedy. Even to the extent the underlying claims in this case are bilateral, the relief sought is not, and that is no less offensive to the FAA than a rule prohibiting class- or collective-action waivers. In fact, this Court in *Concepcion* pointed to the higher *stakes* of class arbitration (i.e., the scope of the remedy) as one of the reasons the *Discover Bank* rule was inconsistent with

the FAA. *See Concepcion*, 563 U.S. at 350. Arbitration is a tradeoff wherein parties are able to secure a "prompt, economical and adequate solution of controversies" in exchange for "less certainty of legally correct adjustment." *Wilko* v. *Swan*, 346 U.S. 427, 438 (1953). The nature of the relief available in arbitration is part of what persuades parties that even with its limited judicial review, arbitration is desirable because it provides a way to resolve the dispute bilaterally in *all* respects. The *McGill* rule dishonors that tradeoff by making bilateral arbitration unlawful.

Like the rule in *Kindred Nursing*, the *McGill* rule "hing[es] on [one of] the primary characteristics of an arbitration agreement" (*Kindred Nursing Ctrs.*, 137 S. Ct. at 1427)—bilateralism—and in fact applies only to "predispute arbitration agreement[s]" (*McGill*, 393 P.3d at 87). And although the California Supreme Court and the panel below each contend that the *McGill* rule is applicable to all agreements, as a practical matter, the rule has been applied *only* to arbitration agreements, save one case in which it was discussed in dicta in a footnote. *See Bishay* v. *Icon Aircraft, Inc.*, No. 19-CV-178, 2019 WL 3337885, at *4 n.2 (E.D. Cal. July 25, 2019). By design, the rule targets a "primary characteristic" of arbitration agreements. *Kindred Nursing Ctrs.*, 137 S. Ct. at 1427. And like the rule in *Kindred Nursing*, its application to agreements other than arbitration agreements is purely hypothetical—it functions "much as if it were made applicable to arbitration agreements and black swans." *Id.* at 1428. That the California Supreme Court sought to defend the *McGill* rule on the basis of the "effective vindication" doctrine (*McGill*, 393 P.3d at 97)—which even the Ninth Circuit appears to agree applies only to *federal* remedies—highlights the arbitrary nature of the rule. The *McGill* rule therefore

interferes with the fundamental attributes of arbitration and is preempted.

The panel also relied on the Ninth Circuit's divided decision in *Sakkab*, holding that the FAA does not preempt a similar judge-made rule prohibiting waivers of claims brought under California's Private Attorneys General Act (Cal. Lab. Code § 2698). But both the majority in *Sakkab* and the panel below relied on the same misinterpretation of *Concepcion*, incorrectly assuming that the FAA protects only *non-class* arbitration. *Sakkab*, 803 F.3d at 435; Pet. App. 20a. By its own lights, *Concepcion* was not limited to class waivers; rather, *any* "state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives" are preempted. *Concepcion*, 563 U.S. at 343.

In fact, the majority in *Sakkab* based its holding on its view that the FAA does not "require the enforcement of all waivers of representative claims in arbitration agreements." 803 F.3d at 436. The dissent in *Sakkab*, on the other hand, concluded that the relevant question was whether the state-law rule would interfere with "individual, bilateral arbitration (what the parties had agreed to do in their arbitration agreement)." *Id.* at 446 (N.R. Smith, J., dissenting). This Court's decision in *Epic* resolved that difference of opinion in favor of the *Sakkab* dissent, explaining that the FAA preempts a state-law rule "that a contract is unenforceable *just because it requires bilateral arbitration*." *Epic Sys.*, 138 S. Ct. at 1623. That unambiguous pronouncement of the FAA's preemptive reach should have controlled the decision below, yet the panel all but ignored it.

The panel decision paid lip service to the FAA's protection of bilateralism, but insisted that public injunctive relief *is* bilateral. Pet. App. 21a. That is preposterous. Public injunctive relief in California has "the primary purpose and effect of prohibiting unlawful acts that threaten future injury to the general public." *McGill*, 393 P.3d at 90 (quotation marks omitted). Relief whose principal or sole purpose is to benefit persons not party to an arbitration is not "bilateral" in any meaningful sense of that term. The panel's artificial distinction between claims brought "for the benefit of the general public" (public injunctive relief) and those brought "on behalf of specific absent parties" (class actions) finds no footing in precedent or logic. Pet. App. 21a. If, as this Court held in *Concepcion* and *Epic*, litigating on behalf of "specific absent parties" interferes with the bilateral nature arbitration, then surely *expanding* the potential beneficiaries to include the "general public"—here, *millions* of Californians—without the protections of a class action would exacerbate, not alleviate, that interference.

B. Review Is Warranted To Correct The *McGill* Rule's Intrusion On Bilateralism

California's aversion to arbitration is well documented by this Court (*see Concepcion*, 563 U.S. at 342–43 (collecting sources)), and the *McGill* rule continues that tradition. Since the rule was created in 2017, it has been deployed on numerous occasions to render numerous arbitration agreements—and *only* arbitration agreements—unenforceable. *See, e.g.*, *Olosoni* v. *HRB Tax Grp., Inc.*, No. 19-CV-3610, 2019 WL 7576680, at *3 (N.D. Cal. Nov. 5, 2019); *Fernandez* v. *Bridgecrest Credit Co.*, No. 19-CV-877, 2019 WL 7842449, at *4–7 (C.D. Cal. Oct. 29, 2019); *Lyons* v. *NBCUniversal Media, LLC*, No. 19-CV-3830, 2019

WL 6703396, at *8 (C.D. Cal. Sept. 27, 2019). In fact, the *McGill* rule appears to be the California Supreme Court's effort to undo (or undermine) this Court's decision in *Concepcion*.

The *McGill* rule joins the conga line of other "rules"—the *Discover Bank* rule (*see Concepcion*, 563 U.S. at 352), the *Iskanian* rule (*see Sakkab*, 803 F.3d at 427), the *Broughton-Cruz* rule (*see Ferguson* v. *Corinthian Colls., Inc.*, 733 F.3d 928, 930 (9th Cir. 2013))—that the California Supreme Court has manufactured to discourage or disfavor arbitration. Thus, "[d]espite clear direction from Congress and the Supreme Court to treat arbitration agreements no less favorably than ordinary contractual terms, the California courts continue to view arbitration agreements as a 'lesser caste' of contract provision[s]." Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 Hastings Bus. L.J. 39, 65 (2006) (footnote omitted). Like its predecessors, the *McGill* rule is preempted by federal law.

The term "public injunctive relief," as contrasted with other types of injunctive relief, was not even recognized in California until 1999 (*see Broughton* v. *Cigna Healthplans*, 988 P.2d 67 (Cal. 1999)), and before 2017, nobody thought a 148-year-old "Maxim[] of Jurisprudence" could be warped to render unenforceable scores of consumer arbitration agreements in California. That idea came about only after this Court held in *Concepcion* that California could not nullify consumer arbitration agreements by prohibiting class-action waivers. The California Supreme Court thus seeks to do through the *McGill* rule what it could not do through the *Discover Bank* rule—discourage

arbitration by forcing businesses to choose between non-bilateral arbitration and litigation. That court's determination to contravene this Court's repeated emphasis on the scope of the FAA yet again warrants this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SEAMUS C. DUFFY
AKIN GUMP STRAUSS HAUER & FELD LLP
Two Commerce Square
2001 Market Street, Suite 4100
Philadelphia, PA 19103
(215) 965-1212

MICHAEL J. STORTZ
AKIN GUMP STRAUSS HAUER & FELD LLP
580 California Street, Suite 1500
San Francisco, CA 94104
(415) 765-9508

MARK A. PERRY
Counsel of Record
JOSHUA M. WESNESKI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
MPerry@gibsondunn.com

Counsel for Petitioners

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