Nos. 19-1066 & 19-1078

IN THE

Supreme Court of the United States

COMCAST CORPORATION, et al.,
Petitioners,

v.

CHARLES TILLAGE, et al.,
Respondents.

AT&T MOBILITY LLC, et al.,
Petitioners,

v.

STEVEN MCARDLE,
Respondent.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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March 24, 2020

QUESTION PRESENTED

Whether the Federal Arbitration Act preempts California's public policy, set forth in *McGill v. Citibank, N.A.*, 2 Cal. 5th 945 (2017), against arbitration clauses that waive claims for "public injunctive relief."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Page(s)

Constitution and Statutes:

Page(s)

Miscellaneous:

INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It appears often as *amicus curiae* in important Federal Arbitration Act cases. See, e.g., *Epic Systems Corp. v. Lewis*, 136 S. Ct. 1612 (2018); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015). It has also published many articles on arbitration by outside experts. See, e.g., Victor E. Schwartz & Christopher E. Appel, *Setting the Record Straight About the Benefits of Pre-Dispute Arbitration*, WLF Legal Backgrounder, www.bit.ly/2Z6rKqg (June 7, 2019).

The FAA "establishes a federal policy favoring arbitration." *Shearson/Am. Exp. Inc. v. McMahon*, 482 U.S. 220, 226 (1987). An arbitration clause in a contract involving commerce, the FAA says, is valid and enforceable. 9 U.S.C. § 2. True, the FAA contains a saving clause, but it says merely that an arbitration clause may be invalidated based on any ground "for revocation of any contract"—based, that is, on a generally applicable contract defense. *Id.* If the federal policy favoring arbitration is to be

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[*] No party's counsel authored any part of this brief. No person or entity, other than Washington Legal Foundation and its counsel, helped pay for the brief's preparation or submission. At least ten days before the brief was due, WLF notified each party's counsel of record of WLF's intent to file the brief. Each party's counsel of record has consented in writing to the brief's being filed.

upheld, the saving clause must be taken to mean no more than what it says.

In the decision below, the Ninth Circuit, applying a rule created by the California Supreme Court, expanded the meaning of the saving clause far beyond what its words can bear. The decision enables a party to use a free-floating state public policy—rather than a contract defense—to attack a duly executed arbitration clause. The decision also "covertly" (and improperly) lets a supposedly *general* rule be used as a *precision* tool for "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).

The California Supreme Court and the Ninth Circuit have struggled to apply this Court's FAA decisions. (See AT&T Pet. 30.) These petitions give the Court a chance to address both those lower courts at once, reminding each of them that the FAA trumps contrary state law. WLF urges the Court to grant review.

SUMMARY OF ARGUMENT

McGill v. Citibank, N.A., 2 Cal. 5th 945 (2017), says that an arbitration clause may not extinguish a party's right to seek injunctive relief for the public at large. In the decision below, the Ninth Circuit held that this "*McGill* rule" is not preempted by the Federal Arbitration Act. Under the FAA's saving clause, an arbitration agreement that is otherwise enforceable under federal law remains subject to any generally applicable state-law contract defense. 9

U.S.C. § 2. The *McGill* rule, the Ninth Circuit concluded, is such a defense.

As the Ninth Circuit acknowledged, however, the *McGill* rule arises from California Civil Code § 3513, a state "maxim of jurisprudence" that says: "a law established for a public reason cannot be contravened by private agreement." California's maxims of jurisprudence are not contract defenses; they are (at most) guiding principles for interpreting statutes. A court that invalidates part or all of an arbitration clause because it conflicts with one of these maxims has not properly applied the FAA's saving clause; it has simply slighted the FAA and flouted the Supremacy Clause.

In any event, we know from *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), that a court may not apply even a generally applicable contract defense in a way that will "disproportionate[ly] impact" arbitration agreements, *id.* at 342. The court below cited five cases that apply the §3513 bar outside the context of arbitration. Only one of them is from this century; the oldest is 122 years old. Contrast this with the heap of recent decisions that have used §3513, or the principle underlying it, to alter or erase an arbitration clause. The comparison confirms that in California, both in state and in federal court, §3513 is being used, quite improperly, as a vehicle to disfavor arbitration.

This case presents an opportunity for the Court to get both the Ninth Circuit and the California courts out of the business of using state public policy to discriminate against arbitration. In addition, it gives the Court a chance to remind the lower courts

not to use a rigged version of a general contract defense as a tool for striking down arbitration clauses. The Court should grant review.

REASONS FOR GRANTING THE PETITION

I. *McGILL* IS BIASED AGAINST ARBITRATION IN PRINCIPLE.

The *McGill* rule stands on California Civil Code § 3513, which says that although "any one may waive the advantage of a law intended solely for his benefit," a "law established for a public reason cannot be contravened by private agreement."

Section 3513 is a California "maxim of jurisprudence." The maxims lie, "almost buried and forgotten," among California's nineteenth-century Field codes. Jeffrey S. Klein, *A Few Clauses to Help Lawyers Along*, L.A. Times, www.lat.ms/2HyLNXK (Sept. 14, 1989). They include such cosmic riddles as "That is certain which can be made certain," and "Things happen according to the ordinary course of nature and the ordinary habits of life." Cal. Civ. Code §§ 3538, 3546. As these examples suggest, the maxims "can mean everything and nothing." Klein, *supra*. Some of them, in fact, seem to contradict both §3513 and the notion that arbitration clauses should be subjected to discrimination. "He who consents to an act," for example, "is not wronged by it." Cal. Civ. Code § 3515. "Private transactions," after all, "are fair and regular." *Id.* at § 3545.

If it seems like §3513 makes no sense as a contract defense, that's because it *isn't* one. The maxims of jurisprudence are "interpretive canon[s]

for construing *statutes*." *McGovern v. U.S. Bank N.A.*, 362 F. Supp. 3d 850, 860 (S.D. Cal. 2019) (quoting *Nat'l Shooting Sports Found., Inc. v. State*, 5 Cal. 5th 428, 433 (2018)). The *McGill* rule is not a contract defense that properly triggers the FAA's saving clause. See 9 U.S.C. § 2. It is, rather, a free-floating public policy.

A state court may not use state public policy to undermine the FAA. If Congress says an arbitration agreement not subject to a *contract defense* must be enforced, a state court may not refuse to enforce the agreement because it thinks arbitration isn't part of the "ordinary course of nature and the ordinary habits of life." Cal. Civ. Code § 3546. Federal law is the supreme law of the land; it trumps contrary state law. See U.S. Const. art. VI, cl. 2.

The California courts gain nothing from their frequent use, including in *McGill* itself, of the "effective vindication" theory, under which an arbitration clause is void if a litigant cannot "vindicate its statutory cause of action in the arbitral forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985). This exception applies only when the FAA runs into "a contrary *congressional* command." *Shearson*, 482 U.S. at 226 (emphasis added). A state law cannot be "vindicated" at a federal law's expense: only a federal law can displace another federal law. See again U.S. Const. art. VI, cl. 2.

The limited scope of the vindication theory was confirmed in *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013), in which all nine justices treated the exception as one that governs

federal law. The five-justice majority described the exception as addressing whether "*federal* statutory claims are subject to arbitration." *Id.* at 235 n.2 (emphasis added). And the four dissenters were even more explicit. The effective-vindication rule, they explained, ensures that "an arbitration clause may not thwart *federal* law," and that a plaintiff can enforce "meritorious *federal* claims." *Id.* at 240-41 (Kagan, J., dissenting) (emphasis added). "We have no earthly interest (quite the contrary)," they continued, "in vindicating [state] law." *Id.* at 252. The "effective-vindication rule comes into play," therefore, "only when the FAA is alleged to conflict with another *federal* law." *Id.*

To justify applying the vindication theory to state law, *McGill* points to *Preston v. Ferrer*, 552 U.S. 346 (2008). *Preston*, it is true, notes that the respondent before it would not, by proceeding to arbitration, "forgo the substantive rights afforded by the [state] statute" there at issue. *Id.* at 359 (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 628). But *Preston* never treats this fact as dispositive. The absence of waiver in *Preston* appears merely to have *bolstered* the Court's conclusion that the dispute belonged in arbitration. *McGill* seizes on this ambiguous dicta—dicta from, ironically, one of the many cases correcting a California court's overly narrow reading of the FAA—as cause to cast aside the clear and direct mandates of *Concepcion* and *Italian Colors*.

II. *McGill* Is Biased Against Arbitration In Practice.

Even if it stood on a real contract defense, the *McGill* rule would still be preempted. The rule's only purpose is to serve as a tool for striking down arbitration clauses.

As *Concepcion* confirms, the FAA bars a court from applying a "generally applicable" state doctrine "in a fashion that disfavors arbitration." 563 U.S. at 341. Such use of a doctrine is not valid simply because the doctrine also governs contracts outside the context of arbitration clauses. *Id.* at 342. A doctrine that stands on "the general principle of unconscionability," for example, nonetheless violates the FAA if "in practice" it "would have a disproportionate impact on arbitration agreements." *Id.*

The California Supreme Court has neglected this principle. What matters, in that court's view, is merely that a rule respects arbitration's "fundamental attributes" and "applies equally to arbitration and nonarbitration agreements." *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1149 (2013). The California high court has even gone so far as to stand the "disproportionate impact" principle on its head. "A facially neutral state-law rule," the court has said, "is *not* preempted simply because its evenhanded application 'would have a disproportionate impact on arbitration agreements.'" *Id.* at 1130 (emphasis added) (quoting *Concepcion*, 563 U.S. at 342).

McGill relies heavily on this inversion of *Concepcion*. In declaring that the FAA does not preempt the §3513 no-waiver maxim, it says:

> [The §3513] bar 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. . . . [A] provision in *any* contract—even a contract that has no arbitration provision—that purports to waive . . . the statutory right to seek public injunctive relief . . . is invalid and unenforceable under California law.

2 Cal. 5th at 962. Under *Concepcion*, this is insufficient. It is not enough that a rule apply "even [to] a contract that has no arbitration provision." *Id.* A rule also must not "in practice" have "a disproportionate impact on arbitration agreements." *Concepcion*, 563 U.S. at 342.

Unlike the California Supreme Court, the panel below seemed to grasp that a contract defense must apply outside the context of arbitration not just in *principle* but in *reality*. "California courts," the panel wrote, trying to bolster the *McGill* rule, "have repeatedly invoked California Civil Code § 3513 to invalidate waivers unrelated to arbitration." 928 F.3d at 827. There follows a string cite with a case from 2002, a case from 1977, a case from 1956, a case from 1944, and a case from 1896.

But the court below did not address the fact that, *today*, the California courts use §3513 specifically as a cudgel for striking down arbitration agreements. The California Reports are rife with recent cases

that use §3513 (or rely on a case that in turn uses it) to disfavor arbitration. See, e.g., *McGill*, 2 Cal. 5th at 962; *Sonic-Calabasas A*, 57 Cal. 4th at 1130; *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 382-83 (2014) ("[I]t is contrary to public policy for an [arbitration] agreement to . . . require[e] employees to waive the right to bring a PAGA [representative] action."); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 100-01 (2000) ("[A]n arbitration agreement cannot be made to serve as a vehicle for the waiver of [state] statutory rights created by the FEHA."); *Serafin v. Balco Properties Ltd., LLC*, 235 Cal. App. 4th 165, 183 (2015) ("[A]n arbitration agreement cannot be made to serve as a vehicle for the waiver of [state] statutory rights."); *Bickel v. Sunrise Assisted Living*, 206 Cal. App. 4th 1, 8-9, 12 (2012) ("Where a provision in an arbitration agreement seeks to waive such [state statutory] rights, as was the case here, the provision is contrary to public policy and may be severed."); *Samaniego v. Empire Today LLC*, 205 Cal. App. 4th 1138, 1147 (2012) ("Where, as in this case, arbitration provisions undermine [state] statutory protections, courts have readily found unconscionability. . . . [A]n arbitration agreement cannot be made to serve as a vehicle for the waiver of [state] statutory rights."); *Ajamian v. CantorCO2e, L.P.*, 203 Cal. App. 4th 771, 799 (2012) ("[T]he arbitration provision . . . forces [the plaintiff] to waive her unwaivable [state] statutory rights and remedies.").

In any case, §3513 is just a pillar on which the *McGill* rule stands. The *McGill* rule itself was created specifically for, and aims squarely at, and

has not been used on anything other than, arbitration agreements.

It's clear what's really going on. California's courts have dusted off an ancient, rarely used doctrine and repurposed it as a device for striking down arbitration agreements. The *McGill* rule exists precisely *because* it has "a disproportionate impact on arbitration agreements." *Concepcion*, 563 U.S. at 342. Whatever it might be in theory, in practice the *McGill* rule is just another of the "great variety" of "devices and formulas" that judges "hostil[e] towards arbitration" use to "declar[e] arbitration against public policy." *Id*.

* * *

The California courts are using state public policy—sometimes openly and defiantly; other times surreptitiously, through the spurious application of a purportedly general contract defense—to disfavor arbitration. Making matters worse, the Ninth Circuit is uncritically following the California courts' lead. These petitions offer this Court an excellent opportunity to direct both the Ninth Circuit and the California courts to change course.

CONCLUSION

The petitions should be granted.

Respectfully submitted,

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