No. 19-1066

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

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONERS

By its plain language, the Federal Arbitration Act's saving clause covers only extant defenses that provide for the "revocation" of any contract. 9 U.S.C. § 2. The principal question presented by this petition is whether a judicially created doctrine that precludes enforcement of most consumer arbitration clauses on grounds of California public policy (*McGill* v. *Citibank, N.A.*, 393 P.3d 85 (Cal. 2017)), is within the saving clause.

Justice Thomas has explained in a series of carefully reasoned concurrences that the saving clause does not extend to doctrines that preclude enforcement of contractual provisions on grounds of state public policy. *See, e.g.*, *Am. Express Co.* v. *Italian Colors Rest.*, 570 U.S. 228, 239 (2013) (Thomas, J., concurring); *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 352–57 (2011) (Thomas, J., concurring). Respondents do not engage with the substance of Justice Thomas's analysis. As a result, they do not dispute that the *McGill* rule would not be within the saving clause under the approach laid out in these concurrences.

A majority of the Court recently cited Justice Thomas's concurrences on the scope of the saving clause, but elected in the context of that case to "[p]ut to the side the question of what it takes to qualify as a ground for 'revocation' of a contract" within the meaning of the saving clause. *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1622 (2018). Respondents do not address this aspect of *Epic*. As a result, they cannot dispute that the scope of the saving clause remains an open question in this Court.

This case is the ideal vehicle for resolving the saving clause issue identified by Justice Thomas but reserved by a majority of the Court. Respondents' opposition boils down to the contention that the decision below was correct; but that position is unmoored from the text of the statute and unsupported by any decision of this Court. In any event, the law of FAA preemption would be advanced by affirmance *or* reversal on the saving clause issue. This question should be put aside no longer.

ARGUMENT

The first question presented (regarding the scope of the saving clause) is both predicate to and potentially dispositive of the second question presented (regarding implied preemption). Petitioners focus here on the former, and adopt by reference the arguments in *AT&T Mobility LLC* v. *McArdle*, No. 19-1078, which focuses on the latter. Both questions warrant this Court's review, as evidenced by the panoply of amicus curiae briefs submitted in support of these two petitions. *See* WLF Amicus Br.; The Chamber of Commerce of the U.S.A. Amicus Br.; CTIA—The Wireless Ass'n Amicus Br.; Am. Bankers Ass'n, Consumer Bankers Ass'n Amicus Br.; DRI—The Voice of the Defense Bar Amicus Br. Accordingly, both petitions should be granted and the cases set for separate briefing and coordinated (but not consolidated) argument.

I. THE SCOPE OF THE SAVING CLAUSE IS AN IMPORTANT BUT UNRESOLVED ISSUE

This Court has so far not had an occasion to decide whether the saving clause extends to a doctrine of state public policy that is neither a contract defense at law or in equity, nor a ground for the revocation of any

contract. This case presents the ideal vehicle in which to do so.

A. The *McGill* Rule Does Not Fall Within The Saving Clause

1. Section 2—the centerpiece of the FAA—makes a "written provision" in a contract "involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . 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. Congress therefore specified that arbitration agreements generally are "valid, irrevocable, and enforceable," but in the "saving clause," permitted the application of then-existing generally applicable state-law defenses only where those defenses provide for the "revocation" of any contract. The implication of this purposeful drafting is clear: The saving clause is limited to those defenses "at law or in equity" providing for the "revocation of any contract," and "revocable" means something different from "invalid" or "unenforceable." *See Gozlon-Peretz* v. *United States*, 498 U.S. 395, 404 (1991).

Respondents mount no textual response to this interpretation, because they have none. Instead, they argue that "revocation" can include state-law judgments about public policy like the *McGill* rule that have nothing to do with the "revocation" of contracts—including doctrines going to the "validity" and "enforceability" of contracts—and are not even contract defenses "at law or in equity." Opp'n 24–25. But whatever the saving clause means, it cannot be coextensive with the first part of Section 2, which makes written arbitration agreements "valid, irrevocable, and enforceable." 9 U.S.C. § 2. The *McGill* rule says nothing about "revocation"—however respondents

choose to interpret that word—and thus falls outside of the plain terms of the saving clause. Respondents' arguments, at best, go to the ultimate merits, but do no nothing to rebut the fact that the court below overlooked a threshold question of the FAA's scope.

Respondents try to obfuscate the principal question presented by arguing that petitioners' plain-text interpretation of the saving clause would "fundamentally alter" the Court's FAA jurisprudence (Opp'n 15) or has already been rejected by this Court (*id.* at 13). That is false—the Court has never definitively resolved the scope of the saving clause, as Justice Thomas has observed on several occasions. *See Epic*, 138 S. Ct. at 1632–33 (Thomas, J., concurring); *Italian Colors*, 570 U.S. at 239 (Thomas, J., concurring); *Concepcion*, 563 U.S. at 352–57 (Thomas, J., concurring). Justice Thomas has further explained that a plain-text interpretation of the saving clause accords with this Court's FAA precedents—"every specific contract defense that the Court has acknowledged is applicable under § 2 relates to contract formation." *Concepcion*, 563 U.S. at 355 n.* (Thomas, J., concurring) (discussing *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996)). By contrast, considerations of "public policy" are not within the saving clause. *Id.* at 355.

A majority of the Court has expressly *reserved* judgment on the question of "what it takes to qualify as a ground for 'revocation' of a contract." *Epic*, 138 S. Ct. at 1622. That reservation would have been unnecessary if the Court had already answered the question. Petitioners do not seek to overrule or upset settled precedent—they seek only an answer to a dispositive question of statutory interpretation that courts,

including the one below, have consistently elided. Respondents have no answer to *Epic* or the substance of Justice Thomas's concurrences. *See* Opp'n 24.

The preemption cases respondents cite (at 13) are entirely inapposite. One held only that an arbitration agreement may delegate the question of the purported unconscionability of an agreement to an arbitrator (*Rent-A-Center, W., Inc.* v. *Jackson*, 561 U.S. 63, 64 (2010)); and in the rest, this Court *struck down* as preempted state laws limiting arbitration (*see Kindred Nursing Ctrs. Ltd. P'ship* v. *Clark*, 137 S. Ct. 1421, 1429 (2017); *Concepcion*, 563 U.S. at 352; *Preston* v. *Ferrer*, 552 U.S. 346, 349–50 (2008); *Doctor's Assocs.*, 517 U.S. at 683; *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 281–82 (1995)). Respondents cannot credibly argue that this Court has already decided the saving clause issue.

2. As for the meaning of "revocation" in the saving clause, respondents offer no response to the numerous cases making clear that as a general matter, "revocation" goes to contract formation because the defense entails an "unmaking of a contract . . . from the beginning." *First Hartford Corp. Pension Plan & Tr.* v. *United States*, 194 F.3d 1279, 1296 (Fed. Cir. 1999); *see also Huffman* v. *Saul Holdings Ltd. P'ship*, 194 F.3d 1072, 1081 (10th Cir. 1999). On occasion, courts use the terminology of "rescission" to describe more generally the nullification of a contract, but even the sources respondents cite tie rescission to the formation of the agreement (*see* 8 Williston on Contracts § 19:80 (4th ed. 2019) (explaining that rescission is permitted "when one party acts under the compulsion of the other")), or use the term in an entirely different context (*see* 14 *id.* § 40:23 (describing the circum-

stances for "revocation of acceptance" of goods)). Tellingly, respondents do not propose their own definition for what "revocation" in the saving clause actually means, let alone what the enacting Congress would have understood it to mean.

Even to the extent there is some ambiguity as to what "revocation" could include in the abstract, the structure and context of the FAA provide the answer. Entirely unmentioned by respondents is Section 4 of the FAA, which directs a court to order a case to arbitration 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), and which this Court has interpreted to mean that federal courts may decide only issues that "go[] to the 'making' of the agreement to arbitrate" (*Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967)). It would make no sense to interpret the FAA to *prohibit* courts from adjudicating defenses other than those going to the "making of the agreement" in Section 4, but nevertheless *require* application of those defenses in Section 2. Nor do respondents attempt to reconcile their reading with the historical context of the FAA, which indicates that the FAA was "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).

3. Respondents simply *assume* throughout their brief in opposition that the *McGill* rule is a "generally applicable contract defense." *E.g.*, Opp'n 1–2, 6–7, 10, 13, 16. But whether the *McGill* rule is within the saving clause is the precise issue petitioners ask the

Court to resolve in this case. Respondents' brief quite literally begs the principal question presented.

Respondents assert that decisional expressions of public policy constitute the "law" of California. Opp'n 26. But by saving only defenses that "exist at law or in equity," Congress did not authorize States to manufacture new, ad hoc "rules" that themselves have no basis in well-established contract principles. The Court has recognized that the saving clause was intended to preserve traditional grounds for revocation—such as "fraud, duress, or unconscionability." *Doctor's Assocs.*, 517 U.S. at 687. It was not meant to federalize individual States' public-policy judgments about what kind of arbitration terms are desirable or enforceable.

The *McGill* rule is a mere expression of California public policy, not a contract-law defense—as demonstrated by respondents' inability to cite any treatise or case identifying it as such. *See* WLF Amicus Br. 4. The *McGill* rule ostensibly rests on a novel interpretation of a "Maxim[] of Jurisprudence" that says nothing about the "revocation" of contracts, and in fact does not even establish a contract defense. *See* Cal. Civ. Code § 3513. Contrary to respondents' contention (Opp'n 14), cases relying on Section 3513 in other contexts are of no help—before 2017, no court had *ever* applied Section 3513 to revoke a contract. Yet, since *McGill*, it has been invoked *only* to render arbitration agreements unenforceable (Pet. 30)—in derogation of the very "equal-treatment" principle that respondents trumpet (Opp'n 10).

Seeking to sidestep the question presented, respondents contend for the *first time* that the arbitration provision here does not fall within the FAA because it is "not a provision in a contract requiring that

a matter be settled by arbitration." Opp'n 18. Neither the panel nor the district court addressed that argument below, because respondents never argued it. Respondents cannot avoid review by injecting new issues into the case now (*see INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 432 (1999)), and in any event, respondents are wrong. The FAA's "primary purpose" is to ensure 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). The provision at issue here—which provides that "the arbitrator may award relief only in favor of the individual party seeking relief" (Pet. App. 41a (capitalization omitted))—is undoubtedly a "term[]" of the arbitration agreement, and indeed is similar to what the arbitration agreement in *Concepcion* provided (*see* 563 U.S. at 336 n.2). Respondents do not even try to explain how it could be that the arbitration agreement at issue in *Concepcion* fell within the FAA, but the one here does not.

Respondents contend also that the *McGill* rule is consistent with the "effective vindication" doctrine articulated in *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), and *Italian Colors*, 570 U.S. 228. Opp'n 11–12. As a threshold matter, a request for public injunctive relief is not a "substantive claim," as respondents urge—it is a request for non-bilateral relief to non-parties. Moreover, the "effective vindication" doctrine does not even apply to *state* statutes or rules: The rule "serves to harmonize competing *federal* policies by allowing courts to invalidate agreements to prevent the 'effective vindication' of a *federal* statutory right." *Italian Colors*, 570 U.S. at 235 (emphases added); *see also id.* at 252 (Kagan, J., dissenting) ("We have no earthly interest (quite the contrary) in vindicating [state] law"). In any event,

respondents affirmatively waived this argument below: "[Respondents] are not seeking to apply [the effective vindication] doctrine . . . ." C.A. Resp. Br. 34. Their eleventh-hour attempt to resurrect an already discredited argument is no reason for this Court to pass on resolving an important question of law.

B. The Saving Clause Is Dispositive In This And Other Cases

The scope of the saving clause is a threshold, dispositive question that affects numerous FAA cases nationwide. Justice Thomas has clearly laid out a path by which enforcing the text of the saving clause as written would resolve many cases involving conflicts between the FAA and state law without resort to "purposes-and-objectives pre-emption"—even inviting "briefing and argument" on this issue "in an appropriate case." *Concepcion*, 563 U.S. at 353 (Thomas, J., concurring). *This* is "an appropriate case," and a majority of the Court has signaled the need for an answer to this question. *See Epic*, 138 S. Ct. at 1622.

This case squarely presents the issue, and it was fully litigated below. If, as the Ninth Circuit held, the *McGill* rule is within the saving clause, then the question of implied preemption arises; if, on the other hand, the *McGill* rule is without the saving clause, then it may not be applied to defeat arbitration—with no further inquiry required. This issue affects virtually every consumer arbitration in California, and by extension similar cases nationwide, and clear guidance from this Court on the scope of the saving clause would be of benefit in virtually every case in which state law is interposed as an objection to applying a contractual arbitration provision. The scope of the saving clause should not be "[p]ut to the side" any

longer (*Epic*, 138 S. Ct. at 1622), and this is an ideal vehicle in which to resolve this long-simmering issue.

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

The saving clause issue that is the principal focus in this case is a predicate to the implied preemption argument that is also presented. *Concepcion*, 563 U.S. at 343 ("Although § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives").

Respondents insist that the *McGill* rule does not interfere with arbitral bilateralism because requests for public injunctive relief "require[] neither the participation of nonparties nor procedural formalities to protect their interests." Opp'n 32–33. But that is not the inquiry; rather, as this Court explained in *Epic*, the question is whether the state-law defense at issue renders an arbitration agreement "unenforceable *just because it requires bilateral arbitration*." *Epic*, 138 S. Ct. at 1623. The *McGill* rule is precisely such a device—it prohibits parties from agreeing to arbitrate *and resolve* their disputes *bilaterally*, i.e., between only the two parties to the arbitration agreement.

Respondents offer *no* response to *Epic*. And they do not even try to explain how a proceeding whose express purpose is to provide *public* injunctive relief—that is, "relief that by and large benefits the general public and that benefits the plaintiff, if at all, only incidentally" (*McGill*, 393 P.3d at 89 (alterations, citations, and quotation marks omitted))—could possibly be fairly described as bilateral. Indeed, if providing

relief to specified class members is not "bilateral" in the sense contemplated by the FAA, then surely expanding the class of beneficiaries to *all* members of the public does not cure that defect.

Finally, respondents argue that the *McGill* rule does not effectively preclude consumer arbitration in California because it leaves companies free to restructure their arbitration agreements to avoid transgressing the rule while still arbitrating most or all claims. Opp'n 27–32. All of that, of course, is equally true of the *Discover Bank* rule this Court struck down in *Concepcion*. 563 U.S. at 346–47. It thus is no answer to say that companies can avoid the *McGill* rule by amending their arbitration agreements—the purpose of the FAA is to enforce arbitration agreements "according to their terms," not to force businesses into accepting arbitration terms that a state court has deemed desirable as a matter of public policy. *Volt Info. Scis., Inc.*, 489 U.S. at 479. Like the other California "rules" struck down before it, the *McGill* rule flouts that basic premise. This Court has in the past refused to tolerate the erection of rules transparently designed to deter arbitration, and it should not do so here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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May 11, 2020