No. 19-1078

IN THE

Supreme Court of the United States

AT&T MOBILITY LLC; NEW CINGULAR WIRELESS PCS LLC; NEW CINGULAR WIRELESS SERVICES, INC.,

Petitioners,

v.

STEVEN MCARDLE,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Arbitration Act preempts California decisional law applying general principles of contract law to hold that, when a party has a statutory right to seek "public injunctive relief"—that is, injunctive relief obtained by an individual that benefits the public generally—contractual agreements, including arbitration agreements, that purport to forbid the plaintiff from seeking and obtaining such relief in any forum are invalid.

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INTRODUCTION

California consumer-protection statutes allow plaintiffs in certain cases to obtain an award of injunctive relief that benefits the general public, rather than the plaintiffs only. Longstanding principles of California contract law also prohibit contracts from waiving rights or laws that protect the public at large. In *McGill v. Citibank, N.A.*, 393 P.3d 85 (2017), the California Supreme Court applied these principles to hold that any agreement, including an arbitration provision, that purports to extinguish prospectively a person's right to seek public injunctive relief is invalid and unenforceable. Under *McGill*, arbitration provisions remain enforceable whether or not they provide for arbitration of public-injunction claims. *McGill* affects only an agreement that leaves no forum for pursuing such relief, and even then it allows enforcement of the rest of the agreement (including an arbitration provision).

In *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819 (9th Cir. 2019) (Pet App. 5a), a unanimous panel agreed with the California Supreme Court that the Federal Arbitration Act (FAA)—which requires generally that arbitration provisions be enforced to the same extent as other contracts—does not preempt *McGill*'s holding. *Blair* held that the *McGill* rule is a generally applicable contract defense, Pet. App. 15a–18a, and that it does not interfere with the FAA's objectives by disfavoring or burdening arbitration, or interfering with its fundamental attributes, including its bilateral nature. *Id.* 18a–23a.

In this case, the Ninth Circuit applied *Blair* to hold that a clause in petitioner AT&T Mobility's arbitration provision that purported to waive consumers'

rights to pursue public injunctive relief in any forum is invalid and unenforceable. *Id.* 2a. Because AT&T's agreement provides that the invalid waiver provision cannot be severed from the remainder of the arbitration provision, the consequence of that holding in this specific case was that AT&T's arbitration provision was unenforceable. *McGill* itself, however, would not have required that result if the contract did not.

AT&T requests that this Court review the lower court's holding, but does not claim there is any conflict among the lower courts. Nor does AT&T identify any holding of this Court, or of any other court, that the FAA requires enforcement of an agreement that, instead of requiring arbitration of a substantive claim, purports to waive it altogether.

AT&T instead argues that, in concluding that the *McGill* rule poses no obstacle to achieving the FAA's purposes and objectives, both *Blair* and *McGill* got it wrong. The argument that two unanimous courts erred in applying settled principles of law does not ordinarily justify exercise of this Court's discretionary jurisdiction, and this case is no exception. In any event, the claim of error is unsupported. As both *Blair* and *McGill* explain, the nonwaivability of a consumer's substantive entitlement to public injunctive relief neither interferes with arbitration nor affects its fundamental attributes by imposing incompatible procedures. The *McGill* rule merely ensures that parties to bilateral proceedings—whether in arbitration or in court—have the opportunity to obtain the relief to which substantive law entitles them.

Finally, AT&T's assertions, and those of its amici, that the consequences of *McGill* are "enormous" because it will invalidate "tens of millions of arbitration

agreements in California," Pet. 23, are flatly wrong. Those assertions are premised on the misconception that *McGill* holds that public injunction claims are "non-arbitrable" and that plaintiffs will include them in lawsuits to "circumvent[] *Concepcion* and evad[e]" arbitration provisions. Pet. 4, 24. But *McGill allows* parties to agree that claims for public injunctive relief must be arbitrated, or to agree that all liability issues and other remedial issues must be arbitrated while deferring public injunctive relief for later judicial resolution. Many companies have crafted valid and enforceable agreements to provide for arbitration in one of those ways. *McGill* holds only that the parties cannot waive public-injunction claims altogether. The only reason the lower courts did not enforce AT&T's arbitration provision here was that AT&T wrote into it a "poison pill" clause providing that if a court found the public-injunction waiver invalid and unenforceable, the entire arbitration provision would be null and void. This Court need not grant certiorari to spare AT&T the consequences of its own contractual choices.

STATEMENT

A. The *McGill* Rule

California's Consumer Legal Remedies Act (CLRA), Cal. Civ. Code §§ 1750 *et seq.*, together with its Unfair Competition Law (UCL), Cal. Bus. & Prof. Code §§ 17200 *et seq.*, and its false advertising law, *id.* § 17500, provide substantive rights and remedies to protect California consumers from unfair and deceptive business practices. The CLRA provides that any agreement purporting to waive its protections is void and unenforceable. Cal. Civ. Code § 1751. Another longstanding California statute prohibits private

agreements that waive rights for the protection of the public. Cal. Civ. Code § 3513.

Among the substantive rights afforded by California's consumer protection laws is the entitlement to obtain an injunction against unlawful acts or practices, such as false advertising, for the benefit of the public at large. Unlike private injunctive relief, which is principally intended to benefit individual plaintiffs or discrete classes of similarly situated individuals, public injunctive relief is intended primarily to benefit the general public and only incidentally to benefit the individual plaintiff as a member of the public. *See McGill*, 393 P.3d at 89. A plaintiff may seek such relief if she has suffered a personal injury in fact, *see id*. at 92, and a request for public injunctive relief does not, under California law, require class or representative proceedings: It may be sought in purely bilateral proceedings between an individual plaintiff and a defendant. *Id*. at 93.

In a pair of decisions preceding this Court's decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), the California Supreme Court held that claims for public injunctive relief were not subject to arbitration and that agreements requiring parties to arbitrate them were unenforceable. *Broughton v. Cigna Healthplans*, 988 P.2d 67 (1999); *Cruz v. PacifiCare Health Systems, Inc.*, 66 P.3d 1157 (2003). Following *Concepcion,* however, the Ninth Circuit held that the *Broughton-Cruz* rule was preempted by the FAA because it "prohibit[ed] outright the arbitration of a particular type of claim." *Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928, 932 (2013) (quoting *Concepcion*, 563 U.S. at 341).

Later, in *McGill*, the California Supreme Court considered a contract posing a different question regarding public injunctive relief. Rather than requiring arbitration of public-injunction claims, the contract prohibited their assertion in any forum at all. In a unanimous opinion by Justice Chin, the court held that the case did not present the *Broughton-Cruz* issue of whether an agreement to arbitrate public-injunction claims is enforceable, because the parties had, as the FAA permits, excluded such claims from their arbitration agreement. *See McGill*, 393 P.3d at 90, 97. Instead, the issue presented was whether the agreement was "valid and enforceable insofar as it purports to waive McGill's right to seek public injunctive relief *in any forum*." *Id*. at 90.

McGill held that because California contract law prohibits private agreements from waiving statutory rights that protect the public, an agreement that purports to waive prospectively the right to seek public injunctive relief is "invalid and unenforceable." *Id*. at 93. *McGill* further held that the FAA does not preempt this ruling. Adhering to this Court's repeated statements that the FAA requires courts to "place arbitration agreements on an equal footing with other contracts" and thus permits them "to be declared unenforceable upon such grounds as exist at law and equity for the revocation of any contract," *id*. at 94 (quoting *Concepcion*, 563 U.S. at 339) (internal quotation marks omitted), *McGill* explained that the rule against waivers of substantive rights created for public protection was a generally applicable principle of California contract law that applied to "*any* contract—even a contract that has no arbitration provision," *id*. *McGill* also pointed out that this Court has consistently stated that the arbitration provisions that the

FAA enforces do not encompass waivers of substantive statutory rights. *See id*. at 95.

McGill rejected the argument that applying general California contract-law principles to invalidate a waiver of the right to obtain public injunctive relief would "disfavor[] arbitration" or "interfere[] with fundamental attributes of arbitration." *Id*. at 96. The court reasoned that waiver of substantive statutory remedies is not a fundamental attribute of arbitration. *Id*. at 97. Moreover, it pointed out that its holding would not require parties to arbitrate claims for public injunctive relief. The parties could exclude those claims from arbitration and require arbitration of other issues, including liability, leaving the issue of public injunctive remedies for later litigation in court if the plaintiff showed entitlement to relief. *Id*. at 97.

Finally, *McGill* noted that the agreement before it was unclear about whether the invalid agreement to waive claims to public injunctive relief was severable from the arbitration provision. The court accordingly left that issue for resolution on remand. *Id*. at 98.

B. The *Blair* decision

In *Blair*, the Ninth Circuit considered an appeal from a district court order holding that a provision in an arbitration clause purporting to waive the right to public injunctive relief was unenforceable under *McGill*. In a published opinion, a unanimous panel agreed with the California Supreme Court that the FAA does not preempt the *McGill* rule. *See* Pet. App. 6a.

The court began its preemption analysis by recognizing that the *McGill* rule "is a generally applicable contract defense" that governs both arbitration and non-arbitration agreements. *Id.* 15a. Unlike the

Broughton-Cruz rule that the Ninth Circuit held preempted in *Ferguson*, the *McGill* rule "shows no hostility to, and does not prohibit, the arbitration of public injunctions," but "merely prohibits the waiver of the right to pursue public injunctive relief in any forum." *Id.* 16a.

Blair further observed that the *McGill* rule was unlike the rule this Court held preempted in *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421 (2017), which "hing[ed] on the primary characteristic of an arbitration agreement—namely a waiver of the right to go to court and receive a jury trial." Pet. App. 16a (quoting *Kindred*, 137 S. Ct. at 1427). The *McGill* rule, by contrast, does not turn on any attribute inherent to arbitration. And, unlike the rule at issue in *Kindred*, the underlying contract-law principle has repeatedly been applied to contracts other than arbitration agreements: It "derives from a general and long-standing prohibition on the private contractual waiver of public rights" that "California courts have repeatedly invoked … to invalidate waivers unrelated to arbitration." *Id.* 17a (citing cases).

Recognizing this Court's holdings that even generally applicable contract-law principles may be preempted if they present an obstacle to accomplishing the FAA's objectives, *id.* 18a (citing *Concepcion*, 563 U.S. at 341), *Blair* further concluded that the *McGill* rule does not deprive parties of arbitration's benefits. Because public injunctive relief may be obtained in wholly bilateral proceedings, the court explained that the *McGill* rule does not require the procedural formalities of multiparty or collective proceedings even if parties choose to arbitrate claims for public injunctive relief rather than leave them for judicial resolution. *See id.* 19a. Moreover, *McGill*'s non-waiver

principle does not require parties to change arbitral procedural rules such as those involving discovery. *Id.* 22a. And issuing or implementing public injunctive relief would not exceed the competency of arbitrators or involve "procedural complexities not already common to the arbitration of private injunctions," *id.* 21a.

Blair acknowledged that claims for public injunctive relief may involve some "substantive … complexity," but held that "[a] state-law rule that preserves the right to pursue a substantively complex claim in arbitration without mandating procedural complexity does not frustrate the FAA's objectives," *Id.* 20a. Similarly, the court noted that some claims for public injunctions—like many other arbitrable claims including antitrust, civil RICO, and securities claims—may involve "lucrative business practices" and "high stakes" for the defendant. *Id.* 22a. However, absent "interfere[nce] with the informal, bilateral nature of traditional consumer arbitration," the court concluded that "high stakes alone [do] not warrant FAA preemption" of a rule aimed only at preserving substantive rights. *Id.* 23a.[1]

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[1] *Blair*'s preemption analysis is generally similar to that employed in *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425 (9th Cir. 2015). *Sakkab* held that the FAA does not preempt *Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129 (Cal. 2014), in which the California Supreme Court held that the FAA does not require enforcement of agreements that purport to waive an employee's right to bring a representative qui tam action to collect penalties for California Labor Code violations under California's Private Attorneys General Act (PAGA). This Court has repeatedly denied petitions for certiorari seeking review of *Sakkab* and *Iskanian*. *See*, *e.g.*, *Five Star Sr. Living Inc. v. Mandviwala*, 138 S. Ct. 2680 (2018). This case, however, does not involve PAGA claims or representative actions.

C. Facts and proceedings of this case

This case is one of two that were argued in conjunction with *Blair* and disposed of by unpublished opinions.[2] The case arose in 2009 when respondent Steven McArdle filed suit in a California state court alleging, among other things, claims under the CLRA, UCL, and false advertising law against AT&T. The claims were based on AT&T's practice of charging customers international roaming charges for unanswered calls if they turned on their phones even once while abroad, while advertising that international phone usage is like using the phone at home, where customers are not charged for unanswered calls. The complaint sought injunctive relief for the benefit of the general public against AT&T's false and misleading advertising.

AT&T removed the case to the U.S. District Court for the Northern District of California and moved to compel arbitration, citing an arbitration provision calling for arbitration of "all disputes and claims" between it and its customers. Pet. App. 54a. The provision included a paragraph stating that "[t]he arbitrator may award declaratory or injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party's individual claim." Pet. App. 58a. The same paragraph included a ban on bringing claims as a plaintiff or class member in any class proceeding. The paragraph concluded with a "poison pill" provision stating: "If this specific provision is found unenforceable, the entirety of this arbitration provision shall be null and void." *Id.*

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[2] The other case is the subject of the pending petition for certiorari in *Comcast Corp. v. Tillage*, No. 19-1066.

In 2009, the district court denied AT&T's motion to compel arbitration based on the California Supreme Court's decision in *Discover Bank v. Superior Court*, 113 P.3d 1100 (2005), which held that class-action bans in consumer arbitration provisions were unenforceable, and the Ninth Circuit's decision in *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976 (9th Cir. 2007), which held the *Discover Bank* rule not preempted by the FAA. *See McCardle v. AT&T Mobility LLC*, 657 F. Supp. 2d 1140 (N.D. Cal. 2009). While AT&T's appeal was pending, this Court held in *Concepcion* that the FAA preempts the *Discover Bank* rule. The Ninth Circuit reversed and remanded this case in light of *Concepcion*. *See McCardle v. AT&T Mobility LLC*, 474 F. Appx. 515 (2012). Meanwhile, the parties had completed briefing on Mr. McArdle's motion to certify this case as a class action.

On remand, Mr. McArdle opposed AT&T's motion to compel arbitration on the ground that the arbitration provision's purported waiver of his right to seek public injunctive relief made it unenforceable. In the course of the district court proceedings, AT&T confirmed to the district court that the agreement's poison-pill provision applied to the entire paragraph concerning limits on relief and class proceedings.

Ruling before the California Supreme Court's decision in *McGill*, the district court held that the waiver of public injunctive relief was enforceable, granted AT&T's motion to compel arbitration, and stayed the case pending arbitration. *See McCardle v. AT&T Mobility LLC*, 2013 WL 5372338 (N.D. Cal. Sept. 25, 2013). The parties then commenced arbitration proceedings. While the proceedings were pending, the California Supreme Court granted review in *McGill*, and Mr. McArdle requested that the arbitration be

stayed pending the outcome. The arbitrator refused that request and held a two-day hearing in June 2016. In September 2016, the arbitrator ruled in favor of AT&T, rejecting Mr. McArdle's proof that AT&T's marketing and contractual materials were misleading, contained key omissions, and were given inconsistent interpretations by AT&T.

Mr. McArdle filed a timely motion in the district court to vacate the award and, after the decision in *McGill*, moved that the district court reconsider its order granting AT&T's motion to compel arbitration. The district court granted the motions based on the intervening decision in *McGill* and held that the FAA does not preempt the *McGill* rule. The court also rejected AT&T's contention that the invalid waiver of public injunctive relief could be severed from the arbitration provision. The court held that AT&T's request for severance contradicted not only the plain language of the poison-pill provision, but also AT&T's previous representations about the meaning of that provision. *See* Pet. App. 28a–42a.

AT&T again appealed. Pending completion of the appeal, the parties briefed a renewed motion for class certification, and the district court granted class certification in part in August 2018. *See McCardle v. AT&T Mobility LLC*, 2018 WL 6803743 (N.D. Cal. Aug. 13, 2018). AT&T filed a petition for leave to appeal under Federal Rule of Civil Procedure 23(f), which the court of appeals denied in January 2019. Meanwhile, the district court stayed class notice pending resolution of the Rule 23(f) petition and the pending appeal of the order reconsidering the motion to compel arbitration. The case has otherwise not been stayed in the district court, and discovery is ongoing.

Following its decision in *Blair*, the Ninth Circuit, in an unpublished decision, affirmed the district court's ruling that this case is not subject to arbitration under *McGill*. Pet. App. 1a. The court held that the waiver of public injunctive relief was invalid under *McGill*, and that its invalidity rendered the entirety of the arbitration provision null and void under the unambiguous terms of the poison-pill clause. Pet. App. 2a.

AT&T petitioned for panel rehearing and rehearing en banc. The panel denied rehearing, and no Ninth Circuit judge requested a vote on rehearing en banc. Pet. App. 4a.

REASONS FOR DENYING THE WRIT

I. The court of appeals' holding does not conflict with decisions of other courts of appeals or of this Court.

A. AT&T makes no pretense of claiming a conflict among federal courts of appeals or state courts of last resort over whether the FAA preempts the *McGill* rule. The two courts that have addressed that issue—the California Supreme Court and the Ninth Circuit—both applied this Court's FAA preemption jurisprudence and agreed that it does not require enforcement of arbitration provisions that waive the right to public injunctive relief in any forum and are thus invalid and unenforceable under California state law. Both courts concluded that the *McGill* rule is an application of generally applicable principles of contract law that satisfy the FAA's "equal-treatment principle," *Kindred*, 137 S. Ct. at 1426, because they do not discriminate overtly or covertly against arbitration. And both agreed that the requirement that plaintiffs be allowed to seek public injunctive relief in some forum does not

pose an obstacle to achieving the FAA's purposes and objectives because nothing about the requirement is inconsistent with arbitration's bilateral nature and procedural informality.

AT&T likewise cites no decisions of other circuits calling *Blair*'s analysis into question or holding that the FAA requires enforcement of arbitration provisions that purport to waive substantive claims for relief in the face of general contract-law principles under which such waiver agreements are invalid. Nor does AT&T identify decisions in other states that have led to disagreement over whether the FAA preempts the sort of non-waiver rule adopted in *McGill*. Rather, similarly to *McGill* and *Blair*, courts addressing arbitration provisions in other contexts have held that the FAA does not require enforcement of waivers of substantive claims for relief. *See*, *e.g.*, *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 83 (D.C. Cir. 2005) (Roberts, J.) (holding arbitration provision's prohibition on attorney's fees to be invalid and unenforceable, but severable). In the absence of any broad conflict over the principles underlying *Blair* and *McGill*, the agreement of two courts concerning whether decisional law of a single state is preempted does not require review by this Court.

B. *Blair* and *McGill* are also fully consistent with this Court's decisions. This Court has never held that the FAA requires enforcement of a purported waiver of a substantive claim, and AT&T does not suggest otherwise. Rather, this Court's decisions enforcing arbitration provisions repeatedly emphasize that arbitration involves a choice of forum, not a waiver of claims: "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an

arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *accord EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295, n.10 (2002); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 229–30 (1987). An agreement to arbitrate is not "a prospective waiver of the substantive right." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 265 (2009). Indeed, this Court has agreed that an arbitration clause containing "a prospective waiver of a party's right to pursue statutory remedies" would be "against public policy," *Mitsubishi*, 473 U.S. at 637, n.19.

In *American Express Co. v. Italian Colors Restaurant*, this Court held that a class-action ban in an arbitration provision was enforceable even though its *practical* effects might make particular claims too costly for the plaintiffs, but reiterated that the FAA does not require enforcement of arbitration provisions that expressly waive statutory claims and remedies. 570 U.S. 228, 236–39 (2013). The Court explained that the principle that an arbitration provision may not foreclose assertion of substantive claims "finds its origin in the desire to prevent 'prospective waiver of a party's *right to pursue* statutory remedies.'" *Id.* at 236 (quoting *Mitsubishi*, 473 U.S. at 637 n.19). The Court added: "That [principle] would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights." *Id.*

The principle that the FAA does not require enforcement of agreements *forbidding* assertion of claims applies equally to state and federal claims. This Court's decisions, including *Italian Colors*, have

repeatedly stated that arbitration clauses may not waive claims, without suggesting that state-law claims differ in this respect. Indeed, in *Preston v. Ferrer*, this Court held that an arbitration provision was enforceable in part because the signatory "relinquishe[d] no substantive rights … California law may accord him." 552 U.S. 346, 359 (2008). *Blair* and *McGill* likewise protect against the relinquishment of substantive rights, something this Court has never held that the FAA requires.

In this respect, the Court's decisions reflect the language of section 2 of the FAA, 9 U.S.C. § 2, which makes an agreement to "settle by arbitration a controversy" valid, irrevocable, and enforceable. The FAA thus provides for enforcement of an agreement "to arbitrate," *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*,489 U.S. 468, 474 (1989), and "withdr[aws] the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration," *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). Section 2, however, says nothing about the enforcement of an agreement that does not provide for arbitration of a substantive claim, but instead purports to waive it altogether. Nothing in section 2 withdraws the states' power to require some forum for the presentation of claims that parties have *not* agreed to resolve by arbitration.

The *McGill* rule does not implicate section 2 as this Court has construed it because it does not render unenforceable an agreement to arbitrate a controversy over the availability of public injunctive relief. It also does not prevent enforcement of agreements to arbitrate matters *other* than the availability of public injunctive relief. And it does not prevent arbitration

over matters that the parties *have* agreed to arbitrate from proceeding in accordance with their agreement, as the FAA also requires. *See Volt*, 489 U.S. at 475. Rather, it honors the parties' decision to exclude the availability of public injunctive relief from the scope of their arbitration.

The only agreement that the *McGill* rule holds unenforceable is one that waives *altogether* a party's right to obtain public injunctive relief *in some forum*. Such an agreement is not within section 2's enforcement mandate to begin with because it is not a provision in a contract requiring that a matter be settled by arbitration. Nor is it transformed into such an agreement when embedded in the same section of the contract that contains provisions for arbitration. It is a fundamental principle of this Court's FAA jurisprudence that the enforcement of an agreement to arbitrate is an entirely separate matter from the enforcement of a contract's substantive terms. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402 (1967) (adopting the view that "except where the parties otherwise intend[,] arbitration clauses as a matter of federal law are 'separable' from the contracts in which they are embedded"). Only where, as here, a contract conditions the agreement to arbitrate on the enforceability of the substantive waiver does the *McGill* rule have the indirect consequence of preventing arbitration. Even that, however, is a matter of *enforcing* the terms of the agreement to arbitrate, not denying enforcement.

C. *Blair* and *McGill* are also consistent with this Court's repeated recognition that section 2 of the FAA makes "arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint*, 388 U.S. at 404 n.12. By providing that arbitration

provisions "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, the FAA "establishes an equal-treatment principle: A court may invalidate an arbitration agreement based on 'generally applicable contract defenses' like fraud or unconscionability, but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Kindred*, 137 S. Ct. at 1426 (quoting *Concepcion*, 563 U.S. at 339); *accord Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018).

The Court has repeatedly recognized that generally applicable state-law defenses to "[t]he *validity* of a written agreement to arbitrate (whether it is legally binding, as opposed to whether it was in fact agreed to—including, of course, whether it was void for unconscionability)" are preserved by section 2's saving clause. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 69 n.1 (2011); *see also*, *e.g.*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006). Thus, "the text of § 2 declares that state law may be applied '*if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.'" *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686–87 (1996) (quoting *Perry v. Thomas*, 482 U.S. 483, 492–93 n.9 (1987)); *accord Arthur Andersen LLP v. Carlisle*, 556 U.S. 630–31 (2009). "States may regulate contracts, including arbitration clauses, under general contact law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.'" *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) (quoting 9 U.S.C. § 2).

Blair and *McGill* conscientiously apply these precedents, and their results are fully consistent with this Court's insistence that state laws "place[] arbitration contracts 'on equal footing with all other contracts.'" *DIRECTV Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015) (quoting *Buckeye*, 546 U.S. at 443). As *Blair* and *McGill* explain, California law neither discriminates against arbitration "on its face" nor does so "covertly." *Kindred*, 137 S. Ct. at 1426. Rather, California has for more than a century applied its general prohibition against private agreements that waive public rights "to invalidate waivers unrelated to arbitration." *Blair*, Pet. App. 17a (citing cases decided from 1896 to 2002). The California contract-law principle at issue is not one applicable only "to arbitration agreements and black swans"; it "in fact appl[ies] generally, rather than singl[ing] out arbitration." *Kindred*, 137 S. Ct. at 1428 & n.2.

Moreover, both *Blair* and *McGill* follow this Court's instruction in *Concepcion* that, in assessing whether the FAA preempts state law, courts must look beyond whether the law at issue satisfies the equal-treatment criterion and consider whether it stands as an obstacle to fulfillment of the FAA's purposes by imposing procedures incompatible with arbitration. *See Concepcion*, 563 U.S. at 343. As both *Blair* and *McGill* explain, even if companies respond to the *McGill* rule by choosing to require arbitration of the issue of public injunctive relief rather than carving it out of their arbitration clauses, the result will not alter arbitration's bilateral nature, require procedural formalities inconsistent with arbitration, or exceed the competencies of arbitration tribunals. *See Blair*, Pet. App. 18a–23a; *McGill*, 393 P.3d at 97.

In sum, the preemption analysis applied in *Blair* and *McGill* conflicts neither with decisions of other courts of appeals and state supreme courts nor with this Court's precedents. In the absence of such conflict, review by this Court is unwarranted.

II. The *McGill* rule is not contrary to the FAA's purposes and objectives.

AT&T asserts that the FAA impliedly preempts the *McGill* rule because, in AT&T's view, the rule is incompatible with the individualized proceedings characteristic of arbitration and thus interferes with the achievement of the FAA's purposes and objectives. According to AT&T, the court of appeals relied on an "impermissibly narrow" reading of *Concepcion*'s holding that state laws that would impose procedural requirements incompatible with arbitration are preempted, Pet. 21, and wrongly treated "*Concepcion* as preempting only state-law rules that impose procedures exactly equivalent to class arbitration," *id*. 20. The court of appeals, however, did no such thing. In fact, both *Blair* and *McGill* recognized that, under *Concepcion*, even a generally applicable state-law contract doctrine "is nonetheless preempted by the FAA if it 'stand[s] as an obstacle to the accomplishment of the FAA's objectives.'" *Blair*, Pet. App. 18a (quoting *Concepcion*, 563 U.S. at 341); *see McGill*, 393 P.3d at 96–97. *Blair* further acknowledged that the imposition of procedures incompatible with the bilateral nature of arbitration would create such an obstacle. Pet. App. 19a–20a.

AT&T's contrary argument reflects its mistaken view that the FAA's command that arbitration provisions be enforced extends beyond "terms providing for individualized *proceedings*," *Epic*, 138 S. Ct. at 1619

(emphasis added), and imposes a check on the substantive rights that may be at stake in such proceedings. But the implied preemptive effect of the FAA, as this Court has construed it, is more limited: "States cannot require a *procedure* that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Concepcion*, 563 U.S. at 351 (emphasis added). Thus, the court of appeals was correct to focus on whether public injunctive relief would require multi-party or collective procedures or other procedural formalities incompatible with individualized arbitration, not on whether the *substance* of a claim for such relief may involve consideration of matters beyond the individual circumstances of the plaintiff.

As *Blair* explains, the contention that the *McGill* rule is inconsistent with the individualized nature of arbitration *procedures* and the advantages Congress sought to achieve by allowing parties to choose such procedures is unconvincing. A claim for public injunctive relief requires neither the participation of nonparties nor procedural formalities to protect their interests, and it requires no alteration of agreed-to arbitral mechanisms involving discovery and other procedural matters. *See* Pet. App. 18a–22a. Thus, even if parties choose to arbitrate claims for public injunctive relief rather than leaving them to judicial resolution, they need not forgo "arbitration as envisioned by the FAA" or resort to "a procedure that is inconsistent with the FAA." *Concepcion*, 563 U.S. at 351. The *McGill* rule in no way provides "that a contract is unenforceable *just because it requires bilateral arbitration*." *Epic*, 138 S. Ct. at 1623.

AT&T's arguments consistently miss the mark in failing to appreciate that prohibiting a waiver of the right to obtain public injunctive relief does not entail

a change in the nature of arbitration procedures. For example, AT&T asserts that "[a] public-injunction claim is virtually identical to a claim under Rule 23(b)(2) for a class-wide injunction." Pet. 10. A Rule 23(b)(2) injunctive action, however, asserts claims for relief "respecting the class," not the general public, and Rule 23 imposes federal procedures regulating how that collective proceeding may be prosecuted in federal court by the named plaintiffs who represent the class. Such procedures are not implicated when an individual plaintiff seeks a public injunction in arbitration or state court, because California law explicitly states that public injunctions do not require any class, representative, or collective proceedings. *See McGill*, 393 P.3d at 93. Moreover, a judgment on an individual plaintiff's claim for a public injunction under state consumer protection law is preclusive only as to that plaintiff, just as is a judgment on an individual plaintiff's claim for an injunction under antitrust law, so there are no due-process concerns requiring collective procedures. *Cf. Concepcion*, 563 U.S. at 349 (stating that procedural formalities would be "required for absent parties to be bound by the results of [class] arbitration"). Nothing in *Concepcion*, *Epic*, or this Court's other decisions suggests that, in the absence of a requirement of procedural formalities, the availability of a substantive statutory remedy to an individual plaintiff by itself transforms the procedural nature of arbitration.

Similarly, AT&T's assertion that public injunctions may strain the administrative capabilities of arbitrators does not demonstrate that the possibility of such relief is incompatible with individualized proceedings. Such an injunction operates only on one of the parties to a one-on-one arbitration, and it has long

been established that "an arbitrator generally has the authority to enter injunctive relief against a party that has entered into an arbitration agreement." *Ferguson*, 733 F. 3d at 937. Moreover, the notion that arbitrators lack "institutional advantages" necessary to the issuance or supervision of such relief reflects the kind of mistrust of arbitral capability that the Ninth Circuit rejected in *Ferguson* when it held that the *Broughton-Cruz* rule prohibiting arbitration of claims for public injunctive relief was hostile to arbitration and preempted by the FAA. *Id*. at 936.

That public-injunction claims, as a substantive matter, may involve consideration of the public interest and evidence of the impact of the defendant's conduct on the public likewise does not alter the fundamental attributes of arbitration, or transform an individualized, bilateral proceeding into something more. Many arbitrable claims require consideration of such evidence, and consideration of whatever evidence is needed to resolve a claim is a fundamental attribute of arbitration. *See* 9 U.S.C. § 10(a)(3). An antitrust claim pursued in arbitration typically requires evidence of the anticompetitive effect of the defendant's conduct and any procompetitive justifications for it—matters that extend far beyond the individual circumstances of the parties. But no one would suggest that arbitration of an antitrust claim "is not arbitration as envisioned by the FAA." *Concepcion*, 563 U.S. at 351. Indeed, in *Italian Colors*, this Court held that the FAA *requires* arbitration of such claims despite the cost of developing such evidence. 570 U.S. at 238–39. This Court has likewise held that many claims requiring consideration of evidence beyond the individual parties are arbitrable. *See, e.g., Mitsubishi*, 473 U.S. at 637 (antitrust); *McMahon*, 482 U.S. at 229–33

(Securities Exchange Act claims); *id.* at 238–42 (civil RICO claims); *Pyett*, 556 U.S. at 258 (employment discrimination claims); *Gilmer*, 500 U.S. at 33–35 (federal civil rights claims). The FAA would not permit, let alone require, enforcement of an arbitration provision that purported to waive altogether one party's right to bring such claims against the other in any forum. *See Mitsubishi*, 473 U.S. at 637 n.19.

Similarly, consideration of even private injunctive relief requires consideration of the public interest and possible effects on nonparties. *See Blair*, Pet. App. 21a. Yet AT&T concedes that such relief is not incompatible with arbitration. And AT&T does not argue that the public-interest considerations necessarily involved in issuing such relief require a departure from individualized arbitration proceedings or that an arbitration provision could permissibly require a party to waive entitlement to any form of injunctive relief.

AT&T's comparison between the stakes of class arbitration and the stakes of public injunctive relief likewise fails. *Concepcion*'s holding that requiring collective *procedures* that dramatically alter the stakes of arbitration is incompatible with the FAA's purposes, *see* 563 U.S. at 350–51 & n.8, does not imply that the FAA grants parties a license to contract out of all high-stakes *substantive* rights and remedies. Of course, some companies may choose, as *McGill* permits, not to arbitrate public injunctive relief because of their assessment of the stakes of such litigation. Similarly, a company might consider antitrust cases or other high-stakes commercial cases unsuitable for arbitration. But AT&T does not suggest that state antitrust laws are by nature inconsistent with bilateral arbitration procedures and preempted by the FAA for that reason,

or that, if they were, the FAA would require enforcement of contracts providing for waiver of such claims.

The FAA does not preempt state laws that create substantive claims for relief just because some parties might view those claims as poor candidates for arbitration, and it does not require states to allow companies to force consumers to waive altogether any substantive claims companies would prefer not to arbitrate. Such substantive state laws neither disfavor contracts that "have the defining features of arbitration agreements" nor "hing[e] on the primary characteristic of an arbitration agreement." *Kindred*, 137 S. Ct. at 1426, 1427. Individualized procedures may be one of those defining features, but waiver of substantive entitlements to relief—even high-stakes ones—is not. And not even AT&T suggests that facilitating otherwise impermissible waivers of substantive rights was one of the objectives that Congress sought to achieve in enacting the FAA. Indeed, such waivers are antithetical to the FAA's purposes. *See Mitsubishi*, 473 U.S. at 628, 637 n.19.

Moreover, even if it were true, as AT&T argues, that arbitration of high-stakes, *substantively* complex claims is not "arbitration as envisioned by the FAA," Pet. 22 (quoting *Concepcion*, 563 U.S. at 355), the consequence would not be that the FAA requires enforcement of agreements waiving such claims. At most, the implication of such a view might be that it would take a particularly plain statement of intent to arbitrate such claims before the FAA would require or permit their arbitration. *See Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415 (2019). But nothing in the FAA would authorize enforcement of the waiver of such substantive claims in the face of contrary state law.

In sum, a state law that seeks only to preserve substantive rights while giving full scope to parties' choices about whether or not to arbitrate those rights does not conflict with the FAA. Unless and until there is disagreement among the lower courts over that proposition, there is no need for this Court's intervention.

III. The *McGill* rule is a ground for "revocation" of contracts within the meaning of section 2 of the FAA.

While relying primarily on its implied preemption arguments, AT&T also briefly incorporates by reference the argument made in the petition in *Comcast Corp. v. Tillage*, No. 19-1066, that the *McGill* rule does not fall within the saving clause of section 2 of the FAA because it is not among the "grounds [that] exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The brief in opposition in *Tillage* explains in detail why that argument does not merit review by this Court. It suffices here to say that the Court need not consider the saving clause to sustain the *McGill* rule, because an agreement to *waive* a claim for substantive relief is not an agreement to *arbitrate* within the meaning of section 2's enforcement mandate to begin with. In any event, this Court has repeatedly held that the saving clause's reference to grounds for "revocation" encompasses generally applicable grounds on which an arbitration provision may be "invalidated" by courts—that is, nullified because it is not "legally binding," regardless of "whether it was in fact agreed to." *Rent-A-Center*, 561 U.S. at 68, 69 n.1; *see also*, *e.g.*, *Epic*, 138 S. Ct. at 1622; *Kindred*, 137 S. Ct. at 1326; *Concepcion*, 53 U.S. at 340; *Preston*, 552 U.S. at 983; *Buckeye*, 546 U.S. at 444; *Casarotto*, 517

U.S. at 687; *Allied-Bruce*, 513 U.S. at 281. *McGill* expressly provides a basis for finding a contract "invalid," 393 P.3d at 93, and its application in this case rendered the agreement, by its own terms, "null and void," Pet. App. 58a. There is no reason for this Court to reconsider whether a contract defense with that effect satisfies the saving clause.

IV. The *McGill* rule does not impair consumer arbitration in California.

AT&T argues that review is "urgently needed" to prevent "enterprising plaintiffs" from "circumventing this Court's holdings in *Epic* and *Concepcion*" in order "to evade arbitration in 'virtually every case' invoking California consumer protection statutes." Pet. 23–24. But *McGill* does not allow evasion of arbitration: In accordance with the FAA, it allows companies to require consumers to agree to broad arbitration provisions covering disputes arising out of their contractual relationships. Many well-known companies have already crafted arbitration agreements that comply with *McGill* by allowing arbitration of public-injunction claims or deferring such claims to judicial proceedings that would follow arbitration of other issues. What *McGill* does not allow a company to do is eliminate claims for such relief altogether.

A. Under *McGill*, courts have held that an arbitration provision that is silent as to the availability of public injunctive relief will be enforced. *See Rivera v. Uniqlo Calif., LLC*, 2017 WL 6539016 (C.D. Cal. Sept. 8, 2017); *see also Aanderud v. Super. Ct.*, 221 Cal. Rptr. 3d 225, 239 (Cal. Ct. App. 2017). *McGill* likewise does not bar enforcement of an arbitration provision that allows an arbitrator to issue public injunctive relief. *See Greenley v. Avis Budget Group Inc.*, 2020 WL

1493618, at *8 (S.D. Cal. March 27, 2020); *Gonzalez-Torres v. Zumper, Inc.*, 2019 WL 6465283, at *8 (N.D. Cal. Dec. 2, 2019).

McGill also allows a defendant to exclude public injunctive relief from arbitration while requiring arbitration of the rest of a consumer's claims, as long as the consumer eventually has the ability to seek public injunctive relief in court. *See*, *e.g.*, *Eiess v. USAA Fed. Sav. Bank*, 404 F. Supp. 3d 1240 (N.D. Cal. 2019). In such cases, the defendant can write its agreement to require that arbitration (including on liability and other forms of relief on the claims that underlie the request for public injunctive relief) precede any judicial proceedings on public injunctive relief. *See id.* at 1260 (staying litigation of public injunctive claims pending arbitration pursuant to 9 U.S.C. § 3); *see also McGill*, 393 P.3d at 97 (noting appropriateness of such stays); *Blair*, Pet. App. 25a ("Parties are welcome to agree to split decisionmaking between a court and an arbitrator in this manner."). Thus, the defendant will receive the full benefits of arbitration, subject only to the requirement that, at some point, it litigate over possible public injunctive relief if the plaintiff succeeds in proving liability. Indeed, a defendant can achieve this result even if its arbitration provision contains an invalid waiver of public injunctive relief, as long as the agreement permits severance of the public-injunction waiver from the agreement to arbitrate other claims. With all these options available, a company would lose its ability to arbitrate consumer claims only if it chose to bet its entire arbitration provision on the enforceability of its public-injunction waiver, as AT&T did here, rather than taking the more typical approach of requiring severance of invalid or unenforceable provisions.

B. That large numbers of consumer plaintiffs may include claims for injunctive relief in their complaints does not mean that they will thereby "side-step" arbitration. Pet. 24. Claims for injunctive relief in consumer cases do not trigger the *McGill* rule unless they satisfy *McGill*'s detailed criteria defining what qualifies as "public injunctive relief." *See McGill*, 393 P.3d at 89–90. Therefore, AT&T's claim (Pet. 24–25) that 2001 consumer plaintiffs have sought injunctive relief in three years—besides not being a tremendously large number for a state the size of California—says nothing about how many cases potentially implicate *McGill*. Indeed, AT&T acknowledges that only a small fraction of those post-*McGill* claims seek public injunctive relief. Pet. 25. Moreover, even complaints that refer to public injunctive relief do not necessarily bring the *McGill* rule into play. "Merely declaring that a claim seeks a public injunction … is not sufficient to bring that claim within the bounds of the rule set forth in *McGill*." *Colopy v. Uber Techs. Inc.*, 2019 WL 6841218 (N.D. Cal. Dec. 16, 2019).

In any event, plaintiffs who plead proper claims for public injunctive relief do not thereby "evade their … agreements to arbitrate." Pet. 26. An arbitration provision will remain enforceable unless it precludes public injunctive relief in any forum and is written to prevent severance of that invalid waiver from otherwise enforceable arbitration provisions. Thus, a plaintiff whose arbitration provision excludes public injunctive relief from the scope of arbitration is still likely to be required to arbitrate liability and other forms of relief before being able—if she can establish liability—to request public injunctive relief from the court.

The possibility that, at the end of the day, an individual who otherwise succeeds in proving liability in

individual proceedings will be able to present a claim for public injunctive relief either to an arbitrator or a court thus hardly amounts to the revival of class proceedings under another name, as AT&T suggests. Pet. 24. In particular, such cases present no possibility of aggregated damages awards (and associated common-fund class fee awards), the principal feature of class proceedings that was of concern to the Court in *Concepcion*. 563 U.S. at 350.

C. AT&T's contention that its dire predictions are supported by experience following the holdings in *Iskanian* and *Sakkab* that the right to bring a representative action under PAGA is not subject to waiver, *see supra* n.1, does nothing to advance its claim for review. As explained above, *supra* n.1, this Court has repeatedly declined to review *Iskanian* and *Sakkab*, and this case in any event provides no opportunity to do so. Moreover, although PAGA claims are undoubtedly common (largely because disregard of wage-and-hour laws is widespread), *Iskanian* and *Sakkab* have not led to wholesale evasion of arbitration provisions.

Rather, as has already begun to happen under *McGill* and *Blair*, courts following *Sakkab* and *Iskanian* have held that an employee-plaintiff who is a party to an otherwise valid arbitration provision that contains an invalid PAGA waiver must arbitrate his individual wage-and-hour claims while litigation is stayed. Only after arbitrating may he pursue representative claims for statutory penalties under PAGA, and only if the arbitration has borne out his claim to have been aggrieved by a Labor Code violation. Even then, 75 percent of any penalties awarded will go to the state. *See Aviles v. Quik Pick Express, LLC*, 703 F. Appx. 631, 632 (9th Cir. 2017).

The non-waivability of PAGA claims, in short, provides neither a means for evading arbitration nor a pot of gold at the end of the rainbow for plaintiffs.[3] Thus, arbitration of employee claims remains prevalent after *Iskanian* and *Sakkab*, and there is no sign that employers' inability to use it to obtain waiver of qui tam liability for penalties under PAGA has deprived employers of whatever legitimate benefits they see in arbitration or induced them to forgo requiring employees to arbitrate. Indeed, while AT&T trumpets the number of PAGA claims that have been asserted since *Iskanian*, it makes no effort to demonstrate that large numbers of cases have evaded arbitration or that large numbers of plaintiffs have emerged from individual arbitration to successfully pursue PAGA penalty claims.

D. For all the reasons just discussed, AT&T's prediction that *Blair* and *McGill* "may lead companies to abandon arbitration," Pet. 29, is highly unlikely. The mere possibility that a consumer plaintiff who otherwise surmounts the hurdle of proving liability in individual arbitration may have an opportunity to seek public injunctive relief either from a court or an arbitrator will not lead "rational" companies to forgo the benefits of arbitration that make it worth their while to "subsidize" it, Pet. 29—a choice they make not out of charitable motives but because they believe that individualized arbitration is advantageous to them.

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[3] In addition, the California Supreme Court recently held in *ZB, N.A. v. Superior Court*, 448 P.3d 239 (2019), that a representative action under PAGA is limited to statutory penalties and does not entitle a plaintiff, as "representative" of other employees, to seek back wages on their behalf. That holding substantially limits the financial consequences of *Iskanian*'s non-waivability holding.

Companies that otherwise see benefits in consumer arbitration provisions will not forgo using them just because they cannot be used to force a waiver of the plaintiff's entitlement to a particular form of relief, just as employers have not abandoned arbitration after *Sakkab* and *Iskanian*.

Even before *McGill*, not all arbitration provisions precluded arbitration of claims for public injunctive relief or purported to require waiver of such claims. And after *McGill*, companies have continued to use broad consumer arbitration provisions while complying with *McGill*'s prohibition on waiver of public injunctive relief in various ways. Ticketmaster's terms, for example, provide that all customer claims are subject to individual arbitration, in which the arbitrator may award any relief provided by law: "[A]n arbitrator can award on an individual basis the same damages and relief as a court (including injunctive and declaratory relief or statutory damages) and must follow these Terms as a court would. For the avoidance of doubt, the arbitrator can award public injunctive relief."[4] Bank of the West has drafted its arbitration provision similarly: "If the remedy is available to you under applicable law, this paragraph does not affect your ability to seek public injunctive relief, as defined in *McGill v. Citibank* … pursuant to the process described in this provision."[5]

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[4] https://help.ticketmaster.com/s/article/Terms-of-Use?language=en_US#section17, ¶ 17 (last visited April 22, 2020) (terms effective June 25, 2019).

[5] https://www.bankofthewest.com/-/media/pdf/deposits/personal-account-disclosure.pdf, p.57 (last visited April 20, 2020) (terms effective December 1, 2019).

Other companies have taken a different approach, creating severability provisions designed to allow public injunctive relief to be decided by courts while otherwise calling for arbitration of consumer claims. Williams-Sonoma's terms, for example, permit customers to seek public injunctive relief in court, but require that any such proceedings happen only if, and after, the customer arbitrates liability and other requested relief.[6] H&R Block, in its terms for tax year 2019, continues to purport to waive claims for public injunctive relief, but goes on to provide: "If a court decides that applicable law precludes enforcement of any of this paragraph's limitations as to a particular claim or any particular remedy for a claim (such as a request for public injunctive relief), then that particular claim or particular remedy (and only that particular claim or particular remedy) must remain in court and be severed from any arbitration."[7] Discover also now provides that its provision precluding claims for public injunctive relief is severable if invalid or unenforceable.[8]

In short, AT&T's prediction that companies will cut off their nose to spite their face by abandoning

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[6] https://www.williams-sonoma.com/customer-service/legal-statement.html#terms (last visited April 20, 2020) (terms effective January 2020) ("If either party seeks a 'public injunction,' all other claims and prayers for relief must be adjudicated in arbitration first and any prayer or claim for a 'public injunction' in…court stayed until the arbitration is completed, after which the…court can adjudicate the party's claim or prayer for 'public injunctive relief.'").

[7] https://www.hrblock.com/pdf/HRBlock-Software-License-Agreement.pdf, § 11.3 (last visited April 20, 2020).

[8] https://www.discover.com/applications/cma/assets/EBZ_19_693003_Cardmember_Agreement_Updates_Prime.pdf, p.4 (last visited April 22, 2020) (terms effective Dec. 31, 2019).

arbitration altogether if they cannot use it as a device to limit consumers' substantive rights has already proved to be false.

E. At a minimum, it is extremely premature to predict that *Blair*'s holding that the FAA does not provide a license for waiver of substantive rights will have the disastrous effects AT&T predicts. Consideration of the issue would be particularly inappropriate in the context of a case where the impact of the *McGill* rule has been distorted by AT&T's choice to make its arbitration provision self-destruct if its waiver of public-injunctive relief is invalidated. If review were otherwise justified, a case in which the invalidation of a waiver of public injunctive relief resulted in either an arbitrator's issuance of such an injunction or a court's issuance of an injunction following the proper arbitration of other issues under an otherwise valid arbitration provision would allow a more informed assessment of the *McGill* rule's impact on the arbitration process. Meanwhile, this case—whose resolution has already been too long delayed—should be permitted to proceed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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