No. 24-365

IN THE
Supreme Court of the United States

COMCAST CABLE COMMUNICATIONS, LLC,
Petitioner,
v.
CHARLES RAMSEY,
Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal, Sixth District

BRIEF FOR *AMICUS CURIAE* RETAIL LITIGATION CENTER INC. IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Retail Litigation Center, Inc. (RLC) represents national and regional retailers, including many of the country's largest and most innovative retailers, across a breadth of retail verticals. The RLC's members employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC offers courts retail-industry perspectives on important legal issues and highlights the industry-wide consequences of significant cases. Since its founding in 2010, the RLC has filed more than 250 amicus briefs on issues of importance to the retail industry, some of which have been relied on by this Court. *See South Dakota* v. *Wayfair*, 585 U.S. 162, 184 (2018) (citing the RLC's brief); *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U.S. 519, 542 (2013) (same).

The RLC has a particular interest in this Petition because many of the association's members use arbitration to resolve disputes with employees and

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[1] Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief. Amicus notified Petitioner's counsel of its intent to file this brief more than 10 days prior to the due date; amicus notified Respondent's counsel on October 29, 2024. No party objects to this brief based on the notice to Respondent's counsel occurring fewer than 10 days prior to this brief's filing. *See* Rule 37.2(a). Respondent previously received an extension of the time to file a brief in opposition until December 2, 2024.

customers on an individual and efficient basis. The RLC's members know from firsthand experience that arbitration's streamlined procedures contrast sharply with complex class actions, which can last for years and result in enormous legal fees that benefit no one but plaintiffs' counsel.

This Court has repeatedly confirmed that the Federal Arbitration Act (FAA) secures the right to contract for individual arbitration. In the case below and others like it, however, California courts have sought to circumvent this Court's precedent and undermine the federal arbitration framework that Congress enacted. RLC members—many of whom operate in California—bear the brunt of those efforts and urge this Court to grant the Petition.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the FAA in 1925 to combat "widespread judicial hostility to arbitration." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011). The Act requires courts to enforce arbitration agreements according to their terms and reflects a legislative judgment that arbitration holds considerable advantages over traditional litigation. In particular, arbitration's informal nature allows for efficient and inexpensive resolution procedures—which benefit plaintiffs and defendants alike.

As the decision below underscores, however, the judicial hostility to arbitration that prompted Congress to enact the FAA remains alive and well a century later. Indeed, in the last two decades, this Court has confronted and rejected multiple state law rules "that target arbitration either by name or by more subtle methods" that "interfer[e] with fundamental

attributes of arbitration." *Epic Sys. Corp.* v. *Lewis*, 584 U.S. 497, 508 (2018) (quotation marks omitted). And this Court has specifically invalidated California rules that permit plaintiffs in that state in particular to revive class-like aggregate proceedings in the face of an otherwise valid and enforceable arbitration agreement. *See Viking River Cruises, Inc.* v. *Moriana*, 596 U.S. 639 (2022); *Lamps Plus, Inc.* v. *Varela*, 587 U.S. 176 (2019); *DIRECTV, Inc.* v. *Imburgia*, 577 U.S. 47, 52 (2015); *Concepcion*, 563 U.S. at 339; *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010). This case presents that circumstance yet again, and this Court should once more step in to course-correct.

The Petition seeks review of the *McGill* rule. Named for the case in which it was announced—*McGill* v. *Citibank, N.A.*, 2 Cal. 5th 945 (2017)—the *McGill* rule provides that, as a matter of California law, parties may not waive their right to seek "public injunctive relief" "in any forum" in predispute arbitration agreements. *See id.* at 956; Pet. App. 18a. Splitting with the Ninth Circuit, the California Court of Appeal has interpreted the *McGill* rule broadly enough to encompass virtually any claim for equitable relief in garden-variety consumer suits. Pet. App. 21a. As a result, Petitioner and RLC members' ability to arbitrate turns solely on the forum in which suit is brought—the very type of "disarray" the FAA was designed to prevent. *J. Alexander Sec., Inc.* v. *Mendez*, 511 U.S. 1150 (1994) (O'Connor, J. dissenting from denial of cert.).

Public injunctive relief shares the hallmarks of representative relief that is properly waived in individualized arbitration. Public injunctive relief is

essentially class-wide equitable relief—but even broader. When a plaintiff seeks public injunctive relief, she does not seek injunctive relief as a representative of a class of similarly situated plaintiffs. She seeks injunctive relief on behalf of the "the general public" at large. *McGill*, 2 Cal. 5th at 633 (quotation marks omitted). Public injunctive relief is thus indistinguishable from other forbidden aggregation devices that vastly increase the complexity of proceedings and are thus incompatible with the "ability of parties to control which claims are subject to arbitration." *See Viking River Cruises, Inc.*, 596 U.S. at 660. Consider this case. Respondent—an individual who agreed to arbitrate any claims he had against Petitioner Comcast—is asking a court to require Comcast to affirmatively offer new promotional contracts to *all subscribers* nearing the end of their initial contract terms. Pet. 2.

The *McGill* rule robs parties of arbitration's benefits and directly conflicts with this Court's decision in *Concepcion*. Exempting public injunctive relief from claims that can be waived, as the California Supreme Court has openly admitted, is "incompatible" with arbitration because the "complexity" inherent in such wide-ranging relief far exceeds the institutional capacity of an individual arbitrator. *Broughton* v. *Cigna Healthplans of California*, 21 Cal. 4th 1066, 1081 (1999). That means companies must forgo the bargained-for arbitration.

That situation makes plain why the *McGill* rule must be preempted. Parties "sacrifice the principal advantage of arbitration"—the informal and low-stakes nature of individual dispute resolution. *See Concepcion*, 563 U.S. at 348. It also facilitates

gamesmanship by plaintiffs, who can seek to leverage their public injunctive relief claim—which may still pose a tremendous risk to business even with a low chance of success—to force companies to settle otherwise unmeritorious individual claims. And because public injunctive relief, as defined by California courts, does not technically count as the "pursuit of representative * * * relief," *McGill*, 2 Cal. 5th at 959, companies cannot even rely on claim preclusion to stem the tide of successive suits by similar plaintiffs.

This Court should reject California's latest anti-arbitration device. This Petition is an ideal vehicle with which to do so. In a spate of three decisions, the California Courts of Appeal have tripled down on a broad version of the *McGill* rule that applies in virtually any consumer case—and the California Supreme Court has refused to review these cases, perhaps in an effort to evade this Court's review. Pet. 9. Meanwhile, the California courts have openly split with the Ninth Circuit, which has largely cabined the scope of relief available under the *McGill* rule to avoid running afoul of the FAA. *Hodges* v. *Comcast Cable Commc'ns, LLC*, 21 F.4th 535, 549 (9th Cir. 2021). Thus, companies operating in California—including many of the RLC's members—now face an unacceptable reality: the enforceability of their agreements to arbitrate will turn on the jurisdictional happenstance of whether a plaintiff files in state or federal court. The Court should grant the Petition and reverse.

ARGUMENT

I. THE *MCGILL* RULE UNDERMINES THE BENEFITS OF ARBITRATION.

A. "The FAA was enacted in response to judicial hostility to arbitration." *Viking River Cruises, Inc.*, 596 U.S. at 649. The Act established a "liberal" policy favoring arbitration that mandates arbitration agreements be enforced "according to their terms" and placed on equal footing with other contracts. *Epic Sys. Corp.*, 584 U.S. at 505-506 (quotation marks omitted). In Congress's view, arbitration had "more to offer" than critics of the process realized—from "quicker, more informal, and often cheaper resolutions for everyone involved," *id.* at 505, to "less intrusive discovery," *Coinbase, Inc.* v. *Bielski*, 599 U.S. 736, 743 (2023), and confidential proceedings, *Stolt-Nielsen*, 559 U.S. at 686. The Act's "overarching purpose" is to honor the terms of parties' arbitration agreements and "facilitate streamlined proceedings." *Concepcion*, 563 U.S. at 344.

Real world evidence demonstrates that arbitration benefits both plaintiffs and defendants alike. In the typical class or aggregate action, plaintiffs may wait "months, if not years" for proceedings to run their course, only to claim "a few dollars" at the end—*after* plaintiffs' lawyers take a hefty fee. *Id.* at 352 (quotation marks omitted). By contrast, arbitrations are efficient and informal, meaning plaintiffs can even represent themselves if they choose.

One recent study found that consumer plaintiffs who initiate cases were more likely to prevail in arbitration (41.7%) than in litigation (29.3%). *See* Nam D. Pham & Mary Donovan, Fairer, Faster, Better III: An

Empirical Assessment of Consumer and Employment Arbitration 4 (March 2022), available at https://perma.cc/2N22-DU6R. The same study found that the timeline of proceedings in those arbitrations was more than 100 days shorter on average than in litigation, and awards were $8,000 larger. *Id*.

Similarly, employees who arbitrate with their employers fare better than employees who sue in court. Those who proceed in arbitration prevail more frequently, win larger awards, and receive their awards more quickly compared to employees who litigate. *Id*.; *see also* Andrea Cann Chandrasekher & David Horton, Arbitration Nation: Data from Four Providers, 107 Cal. L. Rev. 1, 51 (2019) (noting that in "sharp contrast" to employment litigation, which can last two-to-three years on average, the average arbitration took fewer than eleven months).

Defendants receive myriad benefits, too. Individualized arbitration reduces the need for expansive discovery and decreases costs for all involved. It also allows for predictability in timing, location, experience of the adjudicator, and claim administration that is not possible in the judicial system. The lower stakes similarly reduce the cost of potential error, which allows parties to "forgo the procedural rigor and appellate review of the courts." *Stolt-Nielsen*, 559 U.S. at 685.

B. This Court has recognized that certain kinds of procedures—such as class actions—are fundamentally incompatible with speedy, efficient arbitration.

Arbitration's advantages are directly tied to its informal and limited scope. Over the past decade, this Court has repeatedly held that "aggregation devices"—chiefly, but not always, devices that force

defendants to enter into a class-wide proceeding—"cannot be imposed on a party to an arbitration agreement." *Viking River*, 596 U.S. at 664 (Barrett, J., concurring). For example, this Court in *Viking River* struck down a California judge-made rule prohibiting waiver of representative Private Attorneys General Act (PAGA) claims. *Id*. at 661-62. The rule, this Court explained, would either require "judicial proceedings or an arbitral proceeding that exceed[ed] the scope jointly intended by the parties." *Id*. at 661. Similarly, *Lamps Plus* addressed a Ninth Circuit decision that applied California contract law principles and construed an ambiguous arbitration clause "against the drafter" and in favor of class arbitration. 587 U.S. at 180. This Court explained that even general canons of contract interpretation could not "reshape traditional individualized arbitration" "without the parties' consent." *Id*. at 187.

C. The *McGill* rule, like the *Discover Bank* rule before it, is yet another state procedural rule that seeks to aggregate claims and circumvent the FAA's protections for individualized arbitration.

In essence, a claim for public injunctive relief is no different than a class action claim for purposes of FAA preemption. The former is class-wide relief and then some, as the "class" is the entire public at large. While administering such broad and complex relief may be within the competency of judges, it entails a degree of "complexity" far beyond "the resolution of private disputes" and is thus fundamentally incompatible with arbitration. *Broughton*, 21 Cal. 4th at 1081.

Just consider this case. Respondent seeks an injunction that would mandate Comcast either cease promotional practices to certain consumers or affirmatively

offer all those consumers new contract terms. Pet. 2. If Respondent prevailed, this relief would involve analyzing the specific agreements governing each customer's account, and then tailoring relief accordingly. Pet. 20. That degree of complexity—regulating the "substantive terms of actual contracts with innumerable persons"—is the stuff of litigation, not arbitration. *See Hodges*, 21 F.4th at 547.

D. The history of the *McGill* rule underscores how California courts crafted the rule to undermine arbitration.

Prior to *McGill*, California courts operated under what was known as the *Broughton-Cruz* rule. The *Broughton-Cruz* rule specifically targeted arbitration agreements by name and stated that "[a]greements to arbitrate [certain] claims for public injunctive relief" were unenforceable because claims for public injunctive relief were fundamentally incompatible with arbitration. *McGill*, 2 Cal. 5th at 953; *accord Broughton*, 21 Cal. 4th at 1083; *Cruz* v. *PacifiCare Health Sys., Inc.*, 30 Cal. 4th 303, 316 (2003) (noting the "inherent conflict between arbitration and the underlying purpose of [the public] injunctive relief remedy" available under certain consumer statutes (internal quotation marks omitted)).

But *Broughton-Cruz* had an obvious flaw: It "prohibit[ed] outright the arbitration of a particular type of claim," and was therefore preempted by the FAA. *Ferguson* v. *Corinthian Colleges, Inc.*, 733 F.3d 928, 934 (9th Cir. 2013) (quoting *Concepcion*, 563 U.S. at 341).

After the Ninth Circuit held that the FAA preempted the *Broughton-Cruz* rule, the California Supreme Court crafted a workaround in *McGill* by

dressing up the *Broughton-Cruz* rule in more neutral language. *McGill* disavowed prior decisions of the California Supreme Court that had found public injunctive relief "inherently conflicts" with arbitration. *See Broughton*, 21 Cal. 4th at 1083; *Cruz*, 30 Cal. 4th at 313. And, citing a long-dormant statutory maxim, the California Supreme Court reframed *Broughton-Cruz* as a rule against "waivers" of public injunctive relief "in any forum" in predispute arbitration agreements. *See McGill*, 2 Cal. 5th at 953.

This Court should reject the California Supreme Court's effort to evade the FAA by disguising a rule designed to undermine arbitration as a doctrine that nominally applies to all contracts. Indeed, this Court did just that in *Concepcion* when it rejected the California Supreme Court's *Discover Bank* rule. Like the *McGill* rule, the *Discover Bank* rule held that "class action waivers" in any contract were unconscionable and thus unenforceable. *Concepcion*, 563 U.S. at 338. This Court rejected the notion that the rule's supposed "general[] applicabil[ity]" immunized it from scrutiny. *Id*. at 344, 348. Instead, this Court explained that the FAA preempts "state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Id*. at 343. A rule that forces parties to arbitrate claims in the aggregate conflicts with the Act regardless of its packaging.

E. Today, plaintiffs' lawyers routinely wield *McGill* as a tactic to undermine binding arbitration agreements. Indeed, because public injunctive relief should benefit only the "diffuse" public at large, *Hodges*, 21 F.4th at 542, plaintiffs with garden-variety consumer claims like Respondent here have no reason to bring a

public injunctive relief claim *other* than to circumvent arbitration.

Some plaintiffs tack on public injunctive relief claims to discourage defendants from compelling arbitration altogether. Others assert claims in two fora, using the threat of public injunctive relief in court to cudgel business into settling claims in arbitration.

Still other plaintiffs use public injunctive relief to avoid removal to federal court under the Class Action Fairness Act (CAFA). CAFA generally permits defendants to remove class-wide claims, which may include claims for injunctive relief, where the parties are minimally diverse and the amount in controversy exceeds $5 million. 28 U.S.C. §§ 1332(d), 1453(b). To avoid CAFA, plaintiffs try to plead a single broad request for injunctive relief—essentially asserting the same class-wide claim on a non-representative basis.

Plaintiffs' lawyers stand to receive enormous attorneys' fees if they secure a public injunction, regardless of whether they prevail in securing damages for their actual client. *See* Cal. Civ. Code § 1780(e). The stakes for companies, meanwhile, are also extremely high. Public injunctions can require defendants to fundamentally alter their business practices and can result in relief that is even broader than the relief available in a class action. *See McGill*, 2 Cal. 5th at 955.

Worse still, companies like Comcast have no recourse to arrest the flood of public injunctive relief suits. Class actions—notwithstanding their burdensome procedures—are regulated by Fed. R. Civ. P. 23 and at least offer the possibility of a global resolution that binds all absent parties. *Taylor* v. *Sturgell*, 553 U.S. 880, 894 (2008). Claims for public injunctive relief are unlimited by comparison. *McGill* held that

those claims, despite seeking relief *for the general public*, do not "constitute the 'pursuit' of 'representative claims or relief on behalf of others,' " meaning plaintiffs need not comply with Fed. R. Civ. P. 23 or statutory limits on representative suits. 2 Cal. 5th at 959-960 (cleaned up) (quoting Cal. Bus. & Prof. Code, §§ 17203, 17535). Public injunctive relief, in other words, is simply a pleading game unaffected by claim preclusion or any other typical limit on representative relief.

Claims for public injunctive relief thus present the same concerns that have led this Court to reject similar anti-arbitration devices. For one thing, arbitration is "poorly suited to the higher stakes" posed by classwide relief, not to mention relief targeted at the public as a whole. *See Viking River*, 596 U.S. at 662 (quotation marks omitted). The "absence of multilayered review" vastly increases the risk of error inherent in aggregated relief. *See Concepcion*, 563 U.S. at 350. And the scope of available relief raises the same specter of "in terrorem settlements" that the Court has cited repeatedly in rejecting rules that disfavor arbitration. *See id.*; *Viking River Cruises, Inc.*, 596 U.S. at 662 (same); *Bielski*, 599 U.S. at 743 (explaining that the "potential for coercion is especially pronounced" in aggregate proceedings like class actions) *cf. Stolt-Nielsen*, 559 U.S. at 686 (noting the "commercial stakes" of aggregate arbitration proceedings). The *McGill* rule channels those same forces in coercing parties to forgo "the benefits of private dispute resolution." *See Stolt-Nielsen*, 559 U.S. at 685. It should be rejected, like this Court has done with other similar anti-arbitration devices.

II. CALIFORNIA COURTS HAVE A LONG HISTORY OF EVADING THE FAA.

California courts in particular have a long history of developing anti-arbitration jurisprudence designed to circumvent the FAA. Over a decade ago in *Concepcion*, Justice Scalia noted that California courts were far more likely to invalidate an arbitration agreement than any other type of contract. *Concepcion*, 564 U.S. at 342 (citing Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 Hastings Bus. L.J. 39, 54, 66 (2006); *see also* Broome, *supra*, at 40 ("[U]nconscionability challenges before the California appellate courts succeed with far greater frequency when the contractual provision at issue is an arbitration agreement.")).

It is no surprise that a disproportionate share of this Court's arbitration cases come from California state courts or involve California law. *See, e.g.*, *Viking River Cruises, Inc.*, 596 U.S. 639 (overturning the *Iskanian* rule); *Lamps Plus, Inc.* 587 U.S. at 188 (California doctrine construing contractual ambiguities to defeat arbitration); *Concepcion*, 563 U.S. at 339 (invalidating *Discover Bank* rule); *Perry* v. *Thomas*, 482 U.S. 483, 488 (1987) (California Labor Code provision displacing arbitration). These decisions include not just novel legal doctrines, but efforts by California courts to defy this Court's precedent. Take *DIRECTV* 577 U.S. 47. There, on the heels of *Concepcion*, the California Court of Appeal deployed a convoluted theory that a choice of law provision in a contract resurrected the very rule that this Court invalidated in *Concepcion*. *Id*. at 51-52. Or consider *Preston* v. *Ferrer*, 552 U.S. 346 (2008), which addressed the Court of

Appeal's declaration that this Court's decision in *Buckeye* was "inapposite" based on spurious factual distinctions far afield from this Court's core holding. *Id*. at 351, 354. This Court's decisions in *Imburgia* and *Preston* snuffed out those gambits, but the fact that this Court has had to do so repeatedly is cold comfort to parties regularly seeking to enforce arbitration agreements before hostile California courts.

The *McGill* rule is the latest iteration in this long line of California anti-arbitration devices. *McGill* simply recast the explicitly anti-arbitration *Broughton-Cruz* rule as a general contract defense. *See supra* pp. 9-10. But much like California courts' application of the doctrine of unconscionability prior to *Concepcion*, the *McGill* rule operates to uniquely disfavor arbitration.

McGill cases follow a similar pattern. Pre-dispute, parties bargain for individualized arbitration, and they include now-standard language waiving aggregate proceedings, tracking closely with this Court's caselaw. *See, e.g.*, Pet 11 ("[T]he arbitrator may award injunctive relief only in favor of the individual party seeking relief * * *."); *Jack* v. *Ring LLC*, 91 Cal. App. 5th 1186, 1204 (2023) (agreeing to arbitrate "on an individual basis and not in a class, representative or private attorney general action" with wards "on an individual basis" (quotation marks omitted)). California courts then apply *McGill* to conclude that such language—the very same terms which this Court has approved—prohibits "awards of public injunctive relief in arbitration" and is therefore unenforceable, even in cases involving garden-variety consumer claims. *See Jack*, 91 Cal. App. 5th at 1205. That is precisely the kind of judicial hostility to arbitration

which the FAA was designed to prevent, and the kind of defiance of this Court's jurisprudence that warrants review.

It is imperative that the Court intervene. The California Supreme Court has declined to review the rule despite being asked to do so many times, and the California Courts of Appeal have created an open split with the Ninth Circuit regarding the scope of the *McGill* rule and whether it is preempted by the FAA. Pet. App. 13-14a, 20a (declining to "follow *Hodges*" and holding that public injunctive relief encompasses relief that would benefit a limited group of consumers). As a result, the same parties in California, with identical arbitration agreements, will be able to have those agreements enforced in in federal court but not in state court—frustrating the FAA's goal of consistently enforcing such agreements by their terms.

This case is an especially good vehicle because the California Court of Appeal's holding below eliminated any ambiguity in the extremely broad scope of public injunctive relief. Pet. 1-2, 29-30. The Petition also presents a better vehicle than *RAC Acceptance East, LLC* v. *McBurnie*, No. 23-1307, where this Court recently declined to review aspects of the *McGill* rule.

The *McBurnie* petition presented both substantive and procedural problems. As to the former, *McBurnie* was a federal case and therefore did not implicate the broad construction of the *McGill* rule adopted below—a construction the Ninth Circuit held would be preempted by the FAA. *See Hodges*, 21 F.4th at 547.

Procedurally, it was unclear if the *McBurnie* petitioner had waived its right to arbitrate by litigating for "more than eighteen months" before moving to compel arbitration. Brief in Opposition at 8,

McBurnie, No. 23-1037 (U.S. Aug. 19, 2024). Here, by contrast, Comcast fully preserved its request to compel arbitration. *McBurnie* also presented antecedent jurisdictional questions, unrelated to whether the FAA preempted *McGill*.

None of those thorny circumstances are present here. Instead, the question presented was preserved at every stage of the litigation, culminating in a California Court of Appeal opinion squarely addressing the issue and framing a stark dispute with the Ninth Circuit. The Court should grant the Petition and reverse.

CONCLUSION

For the foregoing reasons and those in the Petition, the Petition should be granted.

Respectfully submitted,

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