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

RESPONDENTS' 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 entitle plaintiffs in certain cases to the award of injunctive relief that benefits the public generally, such as an order stopping false advertising. Longstanding principles of California law prohibit private contracts that waive laws protecting the public. 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*, pre-dispute 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 asserting such rights, 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. 3a), a unanimous panel agreed with the California Supreme Court that the Federal Arbitration Act (FAA)—which requires generally that arbitration agreements 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. 16a–19a, and does not interfere with the FAA's objectives by disfavoring or burdening arbitration, *id.* 19a–24a.

In this case, the Ninth Circuit applied *Blair* to hold that a provision in petitioner Comcast's arbitration provision that purported to waive consumers' rights to pursue public injunctive relief in any forum is invalid and unenforceable. *Id.* 2a. Here, the consequence of

that holding was that Comcast's arbitration provision was invalid, but only because Comcast specified that the invalid waiver provision could not be severed from the remainder of the arbitration clause, not because *McGill* by itself would require that result.

Comcast requests that this Court review the lower court's holding, but does not claim there is any conflict among the lower courts over whether the *McGill* rule is preempted. Nor does Comcast identify any decision of this Court, or any other court, holding that the FAA requires enforcement of an agreement that, instead of requiring arbitration of a substantive claim, purports to waive the claim altogether.

Instead, Comcast argues that the lower court erred in ruling that the FAA allows courts to apply generally applicable principles of state contract law to hold arbitration provisions invalid and unenforceable. That claim rests in turn on a request that this Court alter its own longstanding interpretation of the FAA and hold, for the first time, that the FAA preserves only state-law defenses involving contract *formation*. Comcast's position is at odds with this Court's decisions, those of other circuits, and the FAA's text. Comcast's assertion that the lower court erred by applying this Court's decades-long construction of the FAA does not warrant review.

Comcast's alternative argument, that this Court should consider whether *McGill* interferes with the bilateral nature of arbitration, is equally meritless. As *Blair* and *McGill* explain, a rule that the substantive entitlement to public injunctive relief cannot be waived in a consumer contract has no effect on whether arbitration is bilateral: It merely ensures that parties to bilateral proceedings—whether in

arbitration or court—can seek relief to which substantive law entitles them.

Finally, Comcast's assertions, and those of its amici, that *McGill* does away with consumer arbitration in California are flatly wrong. *McGill* does not foreclose arbitration of consumer claims, nor does it require or preclude arbitration of requests for public injunctive relief. A company that wishes to arbitrate consumer claims but not the award of public injunctive relief may require arbitration of liability issues and other remedial issues while carving out the issue of public injunctive relief for later resolution by a court. A company may also require individual arbitration of public-injunction claims together with the rest of a consumer's claims. Many companies have crafted valid and enforceable arbitration provisions reflecting one of those choices. What a company may not do is enforce an arbitration agreement—or any agreement—that prevents a plaintiff from seeking public injunctive relief in any forum. Here, Comcast must litigate in court only because it drafted its agreement to make its arbitration provision inseverable from the invalid public-injunction waiver. This Court need not grant certiorari to spare Comcast 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, 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 to stop unlawful acts directed at the public at large, such as false advertising. 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. An individual 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. *Id.* at 93.

In a pair of decisions predating *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), the California Supreme Court held that agreements requiring parties to arbitrate public-injunction claims were unenforceable. *Broughton v. Cigna Healthplans*, 988 P.2d 67 (1999); *Cruz v. PacifiCare Health Sys., Inc.*, 66 P.3d 1157 (2003). Following *Concepcion*, the Ninth Circuit held the *Broughton-Cruz* rule preempted 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 agreements to arbitrate public-injunction claims are 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 under California contract-law principles, which prohibit private agreements 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 application of these contract-law principles to an arbitration provision that purports to waive a claim for public injunctive relief rather than requiring its arbitration. Adhering to this Court's repeated statements that the FAA requires courts to "place arbitration agreements on an equal footing with other contracts" and 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 general principle of California contract law applicable to "*any* contract—even a contract that has no arbitration provision," *id*. *McGill* also pointed out that this Court has consistently stated that arbitration

under the FAA does not involve waiver of substantive statutory rights. *See id*. at 95.

McGill rejected the argument that applying general California contract-law principles to invalidate a public-injunction waiver would "disfavor[] arbitration" or "interfere[] with fundamental attributes of arbitration." *Id*. at 96. The court noted 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, the *McGill* court found that the Citibank agreement before it was unclear about whether the invalid waiver of 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. 7a.

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.* 16a. 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.* 17a.

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. 18a (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 basis of *McGill* has repeatedly been applied to contracts other than arbitration agreements: It "derives from a general and longstanding prohibition on the private contractual waiver of public rights" that "California courts have repeatedly invoked … to invalidate waivers unrelated to arbitration." *Id.* 18a (citing cases).

Blair also recognized that, under this Court's FAA decisions, even generally applicable contract principles may be preempted if they present an obstacle to accomplishment of the FAA's objectives. *Id.* 19a (citing *Concepcion*, 563 U.S. at 341). Analyzing that issue, *Blair* concluded that the *McGill* rule does not deprive parties of arbitration's benefits. Because public injunctive relief may be sought 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 leaving them for judicial resolution (either of which the *McGill* rule allows). *See id.* 20a. Moreover, *McGill*'s non-waiver principle leaves parties free to agree to whatever arbitral procedural rules they

choose, such as streamlined discovery rules. *Id.* 23a. And issuing or implementing public injunctive relief does not exceed the competency of arbitrators or involve "procedural complexities not already common to the arbitration of private injunctions." *Id.*

Blair acknowledged that claims for public injunctive relief may sometimes involve "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.* 21a. Similarly, the court noted that some claims for public injunctions—like many claims not involving public injunctions—may involve "lucrative business practices" and "high stakes" for the defendant. *Id.* 24a. 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.*

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.[1] In this case, respondents Charles Tillage and Joseph Loomis, with two other plaintiffs, filed suit in a California state court alleging that Comcast engages in false and misleading advertising regarding the pricing of its cable television services, by pervasively advertising to the public prices considerably lower than its actual prices and failing to disclose hefty surcharges. Their complaint sought, among other things,

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[1] The other case is the subject of another pending petition for certiorari, *AT&T Mobility LLC v. McArdle*, No. 19-1078.

injunctive relief to stop Comcast's false and misleading advertising, for the benefit of the general public.

Comcast removed the case to federal court and sought to compel Messrs. Tillage and Loomis to arbitrate their claims. Comcast's subscriber terms, however, provide that "the arbitrator may award relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that individual party's claims." Pet. App. 41a (capitals omitted). Because Comcast's terms also require arbitration of all claims asserted by consumers, they do not allow the parties to seek public injunctive relief in any forum. And in contrast to most companies' form contracts (which include *severability* clauses), Comcast's arbitration provision contains a non-severability clause providing that the public-injunction waiver "is an essential part of this arbitration provision and cannot be severed from it." *Id.* 41a (capitals omitted). By contrast, all *other* parts of the arbitration provision *are* severable. *See id.* 41a–42a.

The district court denied Comcast's motion to compel arbitration because the public-injunction waiver was invalid and unenforceable under *McGill*, and because the arbitration provision's own terms rendered it entirely invalid if the waiver were unenforceable.

Comcast appealed. Following *Blair*, the court of appeals issued an unpublished affirmance. The court held that *Blair* disposed of Comcast's claims that the FAA preempts the *McGill* rule, and that Comcast's "non-severability clause results in the invalidation of the entire arbitration agreement." Pet. App. 2a. Comcast petitioned for panel rehearing and rehearing en banc. The panel denied rehearing, and no Ninth Circuit judge requested a vote on rehearing en banc.

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. Comcast makes no pretense of claiming a direct 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 embodies 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.

Comcast cites no decision of another circuit calling *Blair*'s analysis into question or holding that the FAA requires enforcement of arbitration agreements that purport to waive substantive claims for relief in the face of general contract-law principles under which such waiver agreements are invalid. And Comcast identifies no decisions from 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 agreements 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 agreement'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 Comcast does not suggest otherwise. Rather, this Court's decisions enforcing arbitration agreements 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*, 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 agreement 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 agreements that waive statutory claims and remedies. 570 U.S. 228, 236–39 (2013). The Court explained that the principle that an arbitration agreement 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 agreement was enforceable in part because the signatory "relinquishe[d] no substantive rights … California law may accord him." 552 U.S. 346, 359 (2008).

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 Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12

(1967). By providing that arbitration agreements "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).

This 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). In other words, "[s]tates 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 those decisions explain, the state law at issue here 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. 18a (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, interfere with parties' rights to choose discovery procedures, require any procedural formalities inconsistent with arbitration, or exceed the competencies of arbitration tribunals. *See Blair*, Pet. App. 19a–24a; *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. Absent conflict among the circuits or misapplication of this Court's holdings, certiorari is not warranted.

II. Comcast's request that the Court fundamentally alter its FAA jurisprudence does not merit review.

In light of the consistency of *Blair* and *McGill* with this Court's FAA decisions, Comcast asks this Court to grant certiorari to adopt a new interpretation of the FAA's saving clause that departs from a half-century of this Court's FAA jurisprudence. Specifically, Comcast asserts that the FAA does not allow courts to withhold enforcement of arbitration agreements on the basis of contract-law doctrines that determine the validity, revocability, and enforceability of contractual provisions generally, but only on the basis of a subset of contract-law doctrines that provide for rescission of contracts based on contract-*formation* issues. Comcast thus seeks to overturn this Court's longstanding recognition that the FAA makes arbitration agreements as enforceable, but no more enforceable, than contracts generally, *see Prima Paint*, 388 U.S. at 404 n.12, and replace it with a doctrine that "elevate[s] [arbitration agreements] over other forms of contract—a situation inconsistent with the 'saving clause,'" *id.*

The assertion that this Court's longstanding construction of a statute is wrong does not merit review absent a special justification demonstrating that the basis for the construction has eroded over time through the development of judicial doctrine or

further action by Congress and that it has proved unworkable in practice. *See*, *e.g.*, *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2410–11 (2015). Comcast makes no effort to show that these factors justify the Court's exercise of its discretionary jurisdiction. This Court's repeated acknowledgment, including in recent cases, that generally applicable state-law contract principles determine the validity of arbitration agreements refutes any notion that doctrinal developments support an alteration of the Court's longstanding view. Nor has the Court's approach proved unworkable in practice: Courts regularly apply this Court's longstanding interpretation to uphold and enforce arbitration agreements. Finally, Congress—which always has the ability to alter this Court's approach to statutory issues, *see Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019)—has shown no sign that it thinks this Court's arbitration jurisprudence or interpretation of the FAA saving clause grants *too much* deference to state contract-law doctrines.[2]

Even setting aside the heightened showing necessary to support a claim that the Court should grant certiorari to correct its own longstanding statutory construction, Comcast's arguments for its proposed reading of the FAA's saving clause do not warrant review under the ordinary standards governing exercise of this Court's certiorari jurisdiction. *First*, the outcome below, and in *McGill* and *Blair*, can be sustained without regard to the saving clause. The agreements *McGill* holds invalid and unenforceable are not agreements to *arbitrate* claims for relief, but agreements to

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[2] Pending legislative proposals reflect the opposite view. *See, e.g.*, H.R. 1423, 116th Cong. (passed by the House of Representatives, Sept. 20, 2019).

waive substantive rights altogether. Section 2 of the FAA does not require enforcement of such an agreement regardless of its saving clause. *Second*, the construction of the saving clause in *McGill* and *Blair* does not, in any event, conflict with decisions of this Court or other circuits. *Third*, Comcast's argument that the plain meaning of the statute supports its position is wrong.

A. Section 2 of the FAA makes an agreement to "settle by arbitration a controversy" valid, irrevocable, and enforceable, subject to the saving clause. *See* 9 U.S.C. § 2. Thus, this Court has held, the FAA 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 matter, but instead purports to waive a substantive right 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 render an agreement to arbitrate (or not to arbitrate) a controversy over the availability of public injunctive relief unenforceable. In fact, it does not bar enforcement of any agreement to arbitrate anything. Nor does it 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. Instead, it honors parties' decisions to exclude or

include public injunctive relief from the scope of their arbitration.

The only agreement that the *McGill* rule does not allow a party to enforce is an agreement to waive altogether the right to obtain public injunctive relief in any forum. Such an agreement is not within section 2's enforcement mandate because it is not a provision in a contract requiring that a matter be settled by arbitration, and it cannot be transformed into such an agreement merely by embedding it in the same section of a 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*, 388 U.S. at 402 (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 a contract—like the one Comcast drafted here—makes the agreement to arbitrate contingent on the enforceability of the substantive waiver does the *McGill* rule have the indirect consequence if preventing arbitration. That consequence, however, is a matter of *enforcing* the terms of the agreement to arbitrate, not denying enforcement.

Because the only agreement that *McGill* holds invalid and unenforceable is one that is outside of section 2's enforcement mandate, Comcast's arguments about the scope of the saving clause have no bearing on the question whether the FAA preempts the *McGill* rule. Comcast's arguments on this point therefore do not support a grant of certiorari in this case.

B. In any event, Comcast's incorrect claim that *Blair* and *McGill* conflict with decisions of this Court regarding the saving clause, and Comcast's attempt to conjure up a circuit split on the issue, fall well short of justifying review.

1. Comcast makes a tepid argument that *Blair* and *McGill* conflict with decisions of this Court, but it identifies no decisions that adopt the position that the saving clause applies only to contract-formation defenses and excludes generally applicable state-law defenses regarding contract validity and enforceability. Comcast's invocation of *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985), illustrates that Comcast is grasping at straws. *Dean Witter* did not involve a claim that a generally applicable contract doctrine invalidated a provision of an arbitration agreement, and thus it did not construe the scope of the saving clause. It merely cited section 2, including its reference to grounds for "revocation," in framing the Court's holding that in the absence of a claim that such grounds exist, an agreement to arbitrate must be enforced.

Likewise, in *McMahon*, 482 U.S. 220, the Court did not address an argument that generally applicable contract-law principles rendered an arbitration agreement invalid in whole or in part. Rather, the Court addressed and rejected the argument that federal statutory claims in general, and RICO and Securities Exchange Act claims in particular, are exempt from arbitration. *McMahon* noted in passing that an agreement to arbitrate such claims would be unenforceable in circumstances that "would provide 'grounds for the revocation of any contract,'" *id.* at 226 (quoting 9 U.S.C. § 2), and it offered an example of such grounds. But *McMahon* had no reason to and did not attempt

to define the limits of the saving clause, let alone exclude any particular grounds for contract invalidation from its scope.

This Court has repeatedly recognized that "revocation" as used in the saving clause means "invalidat[ing]" an arbitration provision—that is, nullifying it because it is not "legally binding," regardless of "whether it was in fact agreed to"—and that the saving clause encompasses generally applicable contract defenses that have that effect. *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; *Casarotto*, 517 U.S. at 687; *Allied-Bruce*, 513 U.S. at 281. In *Kindred*, the Court held explicitly that the saving clause applies equally to issues of contract formation and other issues of contractual validity and enforceability. 137 S. Ct. at 1428. And in *Buckeye*, the Court explained that the saving clause applies to all challenges to "the validity of the agreement to arbitrate." 546 U.S. at 444. And it expressly rejected the proposition, central to Comcast's argument here, that the saving clause distinguishes between contract-law doctrines governing whether a contract is "void *ab initio*" and those that determine whether it is "voidable." *Id.* at 446.

Thus, for example, this Court has often stated that unconscionability—a generally applicable contract defense under state law that depends in part on the substantive provisions of a contract, not just the circumstances of its formation—is a ground for invalidating arbitration agreements covered by the saving clause. *See, e.g.*, *Concepcion*, 563 U.S. at 339 (quoting *Casarotto*, 517 U.S. at 687); *accord*, *e.g.*, *Epic*, 138 S. Ct. at 1622; *Kindred*, 137 S. Ct. at 1426. If unconscionability were not preserved as a defense, parties with superior

bargaining power could impose all manner of onerous terms in an arbitration provision, and those terms could never be subject to challenge.

The suggestion that *Blair* and *McGill* conflict with this Court's precedents construing the saving clause is thus wholly meritless.

2. Comcast's assertion of a conflict among the circuits over whether its own narrow reading of the saving clause is proper is equally unconvincing. In surveying decades of circuit precedent interpreting the FAA, Comcast identifies only four decisions that it claims support limiting the saving clause to formation issues, two dating from 1971 and none more recent than 1990. Even a cursory reading of the opinions shows that they do not support Comcast's view.

Comcast's leading authority, *County of Middlesex v. Gevyn Constr. Corp.*, 450 F.2d 53 (1st Cir. 1971), holds that a claim that the party invoking arbitration breached the contract containing the arbitration agreement does not assert a generally applicable contract-law ground for "revocation" of the arbitration agreement within the meaning of section 2's saving clause. *Middlesex* rests principally on this Court's holding in *Prima Paint* that an asserted ground for unenforceability that is applicable to the contract containing an arbitration provision rather than to the arbitration provision itself is not a basis for avoiding enforcement under section 2. *See* 450 F.2d at 55. *Middlesex* further indicates that the saving clause would apply to contract-law grounds for "voiding" an arbitration provision. *Id.* at 56. The court's reasoning does not suggest that a generally applicable contract-law doctrine such as *McGill*, which renders an agreement invalid, does not satisfy the saving clause.

Comcast's other featured example, *Halcon International, Inc. v. Monsanto Australia Ltd.*, 446 F.2d 156 (7th Cir. 1971), is equally off-point. There, the Seventh Circuit rejected the argument that an asserted defense of laches was a basis for revocation of an arbitration agreement under the saving clause. Again, the outcome hinged mainly on *Prima Paint*: The court pointed out that "[i]n this case, the question of timeliness or untimeliness involves the whole contract and its interpretation." *Id.* at 162. Because the defense related to "the entire contract" rather than the arbitration clause, *Prima Paint* made it an issue for consideration by the arbitrators, not a defense to enforcement of the arbitration agreement. *Id.* The court also noted that a laches defense, by its nature, did not eliminate a contractual right or render the contract "invalid." *Id.* at 159. The court expressed the view that revocation within the meaning of the saving clause should be "limited to invalidation." *Id.* As in *Middlesex*, that observation, even if it were not dicta given that the court based its holding on *Prima Paint*, would *support* the view that *McGill*'s holding—that a waiver of public-injunctive relief is *invalid*—is the kind of contract defense that is cognizable under the saving clause.

The two somewhat more recent cases Comcast cites are weaker still. In *Supak & Sons Manufacturing Co. v. Pervel Industries, Inc.*, 593 F.2d 135 (4th Cir. 1979), the Fourth Circuit observed that the FAA does not displace state-law contract-formation principles. *Id.* at 137. Neither that wholly accurate observation nor anything else in *Supak* supports Comcast's argument that the FAA *does* displace state-law contract-validity principles. Indeed, *Supak* expressly acknowledges that section 2's purpose is to "make arbitration

agreements as enforceable as other contracts, but not more so." *Id.* (quoting *Prima Paint*, 388 U.S. at 404 n.12). Comcast's argument directly contradicts *Supak*'s endorsement of that fundamental equal-treatment principle.

Comcast's reliance on *National Railroad Passenger Corp. v. Consolidated Rail Corp.*, 892 F.2d 1066 (D.C. Cir. 1990), is equally misplaced. There, Amtrak sought to avoid arbitration based on the argument that the substantive contractual indemnity obligation that Conrail sought to enforce in the arbitration was invalid. The court held that section 2's saving clause is limited to "a claimed infirmity that affects the validity of the arbitration clause" and does not allow a party to resist arbitration based on "a claimed infirmity that relates only to another part of the contract." *Id.* at 1070. That unexceptionable holding does not suggest that section 2's saving clause denies effect to state contract-law defenses that, like *McGill*, affect the validity of the arbitration clause.

If there were any doubt about the meaning of the decisions Comcast cites, more recent decisions from each of the circuits that issued them demonstrate that those courts follow this Court's precedents recognizing that the saving clause subjects arbitration agreements to generally applicable state-law principles governing the validity and enforceability as well as formation of contracts. *See*, *e.g.*, *Bekele v. Lyft, Inc.*, 918 F.3d 181, 185 (1st Cir. 2019) ("State contract law supplies the principles for determining validity, revocability, and enforceability [of an agreement to arbitrate]."); *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 779–80 & n.39 (7th Cir. 2014) (applying general Illinois law concerning validity of contract terms to arbitration agreements under section 2); *Booker*, 413 F.3d

at 79 (recognizing that the FAA does not permit courts to enforce invalid provisions of arbitration agreements); *Murray v. United Food & Commercial Workers Int'l Union*, 289 F.3d 297, 302 (4th Cir. 2002) (holding that inquiry under saving clause is "not focused solely" on "contractual formation defects" and extends to validity and enforceability).

Thus, in declining to accept Comcast's restrictive theory of the saving clause, the court of appeals here did not decide this case in conflict with precedent of this Court or other circuits.

C. Comcast's assertion that the "plain meaning" of the saving clause's reference to "such grounds as exist at law or in equity for the revocation of any contract" limits the clause's application to formation defenses is, in any event, wrong. The FAA's language readily supports the judicial consensus that the statute creates an equal-treatment principle allowing assertion of generally applicable contract doctrines encompassing the validity and enforceability of contracts. Indeed, the sole Justice who has been a proponent of Comcast's theory has acknowledged that "the difference between revocability, on the one hand, and validity and enforceability, on the other, is not obvious." *Concepcion*, 563 U.S. at 354 (Thomas, J., concurring).

Comcast's attempt to come up with a convincing reading of the text that excludes validity and enforceability challenges does nothing to demonstrate any obvious reading of "revocation" that supports its view. Comcast acknowledges that "revocation" itself is not a term with a well-defined meaning, Pet. 15, so it picks another term it likes better and offers it as a synonym: "rescission." But this substitution does Comcast no good, for "rescission" itself is a generic term referring

to the circumstances in which a contract has been "terminated, abrogated, annulled, avoided, discharged, or rescinded." 26 Williston on Contracts § 68:3 (4th ed. 2019). Both "revocation" and "rescission" encompass the voiding or "invalidation" of all or part of a contract, as Comcast's own lead authority for equating "revocation" with "rescission" acknowledges. *Halcon*, 446 F.2d at 159.

Neither "revocation" nor "rescission" is a term limited to formation errors. Indeed, "revocation" may be available based on circumstances long postdating contract formation. For example, both the Uniform Commercial Code and general contract-law principles recognize that a contract may be revoked when one party engages in a fundamental breach that goes to the essence of the contract. *See* UCC § 2-608; 14 Williston on Contracts § 40:23 (4th ed. 2019). In addition, California contract law has long recognized that the substantive terms of an agreement, as well as the circumstances of its formation, may provide a basis for rescission. *See* Cal. Civ. Code § 1689; *see also People ex rel. Brown v. Barenfeld*, 21 Cal. Rptr. 501, 510 (Cal. Ct. App. 1962) (recognizing availability of rescission in cases of contracts that are illegal or contrary to public policy). Rescission, moreover, is available not only where a contract is void *ab initio*, but also where it is voidable, including for unconscionability or unlawfulness of its terms. *See* 1 Williston on Contracts § 3:3 (4th ed. 2019); 8 Williston on Contracts § 19:80 (4th ed. 2019). The saving clause's language thus supports the construction this Court and the lower courts have long placed on "revocation" as a term broadly capturing general state contract-law doctrines that justify invalidating or avoiding contract terms.

In addition to asserting that the saving clause is limited to preserving state laws governing contract formation, Comcast also argues that the *McGill* rule cannot be a contract defense at "law" or in "equity" for "revocation" of a contract because it was "manufactured" by the California courts based on a statute that "says nothing about contracts," Pet. 21, and because it permits severance of other portions of an arbitration provision rather than rendering it entirely void, Pet. 20. Comcast's argument that state decisional law, from the highest court in the State and based on a state statute, does not qualify as "law" lacks any support in precedent or logic. Comcast's assertion that the statute invalidating waivers of public rights does not refer to contracts is also false: The statute plainly states that "a law established for a public reason cannot be contravened by a *private agreement*"—that is, a contract. Cal. Civ. Code § 3513 (emphasis added).

Comcast's claim that the *McGill* rule does not involve revocation because it allows for the possibility of severing an invalid waiver of the right to public injunctive relief from an otherwise valid arbitration agreement is likewise meritless. It is black-letter contract law that a contract may be rescinded or invalidated in part if it provides for severability. *See* 27 Williston on Contracts § 69:48 (4th ed. 2019); 8 Williston on Contracts § 18:18 (4th ed. 2019). California contract law accordingly provides for contracts to be "rescinded in whole or in part," Cal. Civ. Code § 1692, and, in some circumstances, permits severance of valid terms from those that are unlawful or unconscionable, *id.* §§ 1599, 1670.5. *Failure* to apply these general principles of contract law would violate the FAA by treating arbitration agreements differently from other contracts. *See Bodine v. Cook's Pest Control*

Inc., 830 F.3d 1320, 1325 (11th Cir. 2016) (stating that FAA requires application of state law to determine severability); *Booker*, 413 F.3d at 83–84 (severing invalid limitation on remedies and enforcing remainder of arbitration clause). Comcast cannot turn *McGill*'s compliance with this key FAA requirement into a strike against it.

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

Comcast urges the Court to take up its revisionist interpretation of the saving clause because, it asserts, *McGill* "cast[s] a shadow over consumer arbitration agreements in California." Pet. 24. But *McGill* does no such thing: In accordance with this Court's interpretation of the FAA, it allows companies to require consumers to agree to broad arbitration agreements covering disputes arising out of their relationships. *McGill* also does not restrict companies from requiring customers to waive the right to bring or participate in class or "representative" claims in any forum, contrary to Comcast's suggestion. Pet. 23. A claim for public injunctive relief is *not* brought in a representative capacity. *McGill*, 393 P.3d at 93. Thus, a provision that bars "representative claims" but not public injunctive relief does not trigger the *McGill* rule. *See*, *e.g.*, *Greenley v. Avis Budget Group Inc.*, 2020 WL 1493618, at *8 (S.D. Cal. March 27, 2020).[3]

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[3] Separately, California law provides that the right to bring one type of "representative" action—a qui tam action under the Private Attorneys General Act (PAGA), in which the plaintiff seeks statutory penalties for California Labor Code violations on behalf of the state—may not be waived contractually. *See Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129 (Cal. 2014). The

(*Footnote continued*)

Moreover, *McGill* provides a variety of options for addressing individual claims for public injunctive relief by allowing enforcement of arbitration agreements regardless of whether they provide for arbitration of the issue of public injunctive relief. The only thing *McGill* does not allow a company to do is excuse itself from liability for such relief altogether.

Under *McGill*, courts have held that an arbitration agreement that is silent about 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 agreement that allows an arbitrator to issue public injunctive relief. *See Greenley*, 2020 WL 1493618, at *8; *Gonzalez-Torres v. Zumper, Inc.*, 2019 WL 6465283, at *8 (N.D. Cal. Dec. 2, 2019).

McGill also allows a company 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, 1260–61 (N.D. Cal. 2019). A company can even, if it chooses, draft its consumer agreement to require that arbitration (including on liability and other forms of relief on the claims that underlie the request for public injunctive relief)

Ninth Circuit has held that the FAA does not preempt *Iskanian*'s holding, *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425 (9th Cir. 2015), and this Court has repeatedly denied certiorari on that issue, *see, e.g.*, *Five Star Sr. Living Inc. v. Mandviwala*, 138 S. Ct. 2680 (2018). The present case, however, does not involve PAGA claims or representative actions.

precede any judicial proceedings on public injunctive relief. *See id.* (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. 26a ("Parties are welcome to split decision making between a court and an arbitrator in this manner.").

Indeed, a defendant can receive the full benefits of arbitration even if its contract violates *McGill* (that is, even if it contains an invalid waiver of public injunctive relief), as long as the agreement does not *also* preclude severance of that waiver from the agreement to arbitrate other claims (as Comcast's does). *See*, *e.g.*, *Eiess*, 404 F. Supp. 3d at 1260. In other words, a defendant would lose the ability to arbitrate consumer claims under *McGill* only if it chose to bet its entire arbitration provision on the enforceability of its public-injunction waiver, as Comcast did here—rather than the more typical approach of requiring severance of invalid or unenforceable provisions.

Comcast is wrong to assert that *McGill* allows any consumer plaintiff to "plead her way out of arbitration by simply tacking onto her complaint a request for public injunctive relief." Pet. 23. To begin with, *McGill* does nothing to hinder a company from enforcing its arbitration provision, even if a plaintiff requests public injunctive relief, as long as the provision either: (a) makes public injunctive relief available in some forum—court or arbitration; or (b) does not expressly preclude severance of any purported waiver of that right from the broader arbitration provision. The company has complete control over those possibilities when drafting its own form contract.

Moreover, *McGill*'s detailed analysis of what qualifies as "public injunctive relief" under California's consumer protection statutes, *McGill*, 393 P.3d at 89–90, undermines Comcast's warning that any plaintiff can invoke the McGill rule just by "tacking on" a purported request for public injunctive relief. "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). Only genuine requests for public injunctions, such as respondents' effort to stop Comcast's false advertising to the California public, qualify.

Comcast nonetheless insists that *McGill* will prove fatal to arbitration because it will allow plaintiffs to demand arbitration of public injunctive relief "ex post," Pet. 23, and will provide companies "little incentive to arbitrate at all," *id*. at 24. Neither assertion is correct. If an arbitration provision does not provide for arbitration of public injunctive claims, a plaintiff will *not* be able to demand it, as neither *McGill* nor the FAA permits that result. *See McGill*, 393 P.3d at 97. And it is highly unlikely that companies that otherwise see benefits in arbitration provisions will forgo using them just because they cannot be used to waive outright the plaintiff's entitlement to a particular form of relief. Comcast provides no evidence that companies have reduced their reliance on arbitration provisions since *McGill*.

The lack of evidence is unsurprising because, even before *McGill*, not all arbitration agreements precluded arbitration of claims for public injunctive relief or purported to require outright 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. Bank of the West, for example, has altered its arbitration provision to permit arbitration of claims for public injunctive relief: "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."[4]

Other companies have taken a different approach, creating severability provisions designed to allow public injunctive relief to be decided by courts while otherwise requiring arbitration. 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.[5] 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

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

[5] https://www.williams-sonoma.com/customer-service/legal-statement.html#terms (last visited Apr. 20, 2020) (terms effective January 2020).

remedy) must remain in court and be severed from any arbitration."[6]

In short, Comcast's prediction that companies will cut off their nose to spite their face by abandoning arbitration altogether if they cannot use it as a device to limit consumers' substantive rights has already proved false.

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

As a fallback, Comcast asserts that the FAA impliedly preempts the *McGill* rule because the rule is incompatible with arbitration's bilateral nature and its application thus interferes with the achievement of the FAA's purposes and objectives. According to Comcast, the court of appeals gave short shrift to this argument in *Blair* because it "incorrectly assum[ed] that the FAA protects only *non-class* arbitration." Pet. 31. 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. 19a (quoting *Concepcion*, 563 U.S. at 341); *see McGill*, 393 P.3d at 96–07.

As *Blair* explains, the contention that the *McGill* rule is inconsistent with the bilateral 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

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

interests, and it requires no alteration of (or limits to) terms setting arbitral procedures such as discovery, motions practice, or briefing. 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.

Of course, some companies may choose not to arbitrate public injunctive relief for any number of reasons, just as they may choose not to arbitrate other claims. For example, a company might consider antitrust cases or other complex commercial cases unsuitable for arbitration in part because they involve consideration of impacts on competition that extend beyond the parties. No one would suggest, however, that state antitrust laws are inconsistent with bilateral arbitration and preempted by the FAA for that reason. *Cf. Italian Colors*, 570 U.S. at 234 (enforcing arbitration of antitrust 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 do not disfavor contracts that "have the defining features of arbitration agreements," nor do they "hing[e] on the primary characteristic of an arbitration agreement." *Kindred*, 137 S. Ct. at 1426, 1427. Bilateral procedures may be one of those defining features, but waiver of substantive

entitlements to relief is not. Waivers of substantive rights are antithetical to the FAA's purposes. *See Mitsubishi*, 473 U.S. at 628, 637 n.19. A state law that seeks only to preserve substantive rights while giving full scope to parties' choices about whether or not to (or how to) arbitrate those rights does not conflict with the FAA, and unless and until there is disagreement among the lower courts over that proposition, there is no need for this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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