Nos. 19-1066, 19-1078

IN THE
Supreme Court of the United States

COMCAST CORPORATION, et al.,
Petitioners,
v.

CHARLES E. TILLAGE, et al.
Respondents.

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

STEVEN MCARDLE,
Respondent.

On Petitions for Writs of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF OF CTIA—THE WIRELESS ASSOCIATION® AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Federal Arbitration Act preempts the rule of *McGill v. Citibank, N.A.*, 393 P.3d 85 (Cal. 2017), which holds that arbitration agreements waiving the right to seek public injunctive relief are unenforceable.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

CTIA—The Wireless Association® ("CTIA") represents the U.S. wireless communications industry and companies throughout the mobile ecosystem that enable Americans to lead a 21st century connected life. CTIA's members include wireless carriers, device manufacturers, suppliers as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. CTIA regularly files amicus briefs in cases presenting issues of importance to its members, including amicus briefs in support of petitions for certiorari. *See, e.g.*, *FCA US LLC v. Flynn*, No. 18-398; *Gilead Sciences, Inc. v. United States ex rel. Campie*, No. 17-936.

Many members of CTIA have adopted, as standard features of their business contracts, provisions that require the parties to pursue disputes in arbitration rather than in courts of general jurisdiction. CTIA members use arbitration because—in its traditional, individual form—it is a quick, fair, inexpensive, and non-adversarial method of resolving disputes. Typically, the arbitration agreements employed by CTIA's members

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[1] Pursuant to this Court's Rule 37.2(a), *amicus* timely notified all parties of its intention to file this brief. Counsel for all parties have consented to the filing of this *amicus* brief. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

require that arbitration be bilateral. Thus, they provide that plaintiffs may assert their own rights in arbitration, but may not assert the rights of third parties, either via class actions or via requests for public injunctive relief.

In these cases, the Ninth Circuit upheld a California rule invalidating arbitration agreements to the extent they waive a consumer's ability to pursue public injunctive relief. If California's rule stands, then the advantages of arbitration would be forfeited. In standard bilateral arbitration, the arbitrator's remedial authority is limited to issuing relief that is tailored to the plaintiff's own harm. By contrast, public injunctions are intended to alter a company's practices with respect to the public at large. If plaintiffs could seek public injunctions, arbitration would become more complex and cumbersome—and defendants would be unwilling to give up the procedural protections of the judicial system when the stakes are so much higher. The Court should grant certiorari, reverse the Ninth Circuit, and hold that arbitration agreements should be enforced according to their terms, as required by the Federal Arbitration Act.

SUMMARY OF ARGUMENT

In *McGill v. Citibank, N.A.*, 393 P.3d 85 (Cal. 2017), the California Supreme Court ruled that arbitration agreements that require bilateral arbitration—and that hence prevent plaintiffs from seeking public injunctions—are unenforceable under California law. In these cases, the Ninth Circuit held that the Federal Arbitration Act ("FAA") did not preempt *McGill*, and hence ruled that an arbitration agreement requiring bilateral arbitration must be invalidated under *McGill*. The Ninth Circuit's holding conflicts with decisions of

this Court and will cause significant harm to both businesses and consumers. The Court should therefore grant certiorari and reverse.

The Ninth Circuit's decision conflicts with this Court's precedents. In *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), this Court held that the FAA requires courts to enforce arbitration agreements with class-action waivers. It thus held that the FAA preempted a California rule purporting to hold class-action waivers unenforceable. The *McGill* rule should have met the same fate. Like class actions, actions for public injunctive relief are complex proceedings implicating the rights of third parties. Like class actions, actions for public injunctive relief cannot be arbitrated without sacrificing the core advantages of arbitration: efficiency and low cost. Indeed, actions for public injunctive relief are even less compatible with arbitration than class actions, given the risk that judges will issue conflicting injunctions that create inconsistent obligations towards the public—without an appellate court that can harmonize the conflicting injunctions.

The Court should grant certiorari. This Court's consistent practice has to been to grant certiorari and reverse lower-court decisions that defy this Court's FAA precedents—even in the absence of a square circuit split. Indeed, at least twice, the Court has done exactly that in the context of California-specific anti-arbitration rules.

Review is further warranted in light of the practical significance of the Ninth Circuit's erroneous ruling. The Ninth Circuit's decision threatens to bar enforcement of millions of consumer contracts—including numerous cell

phone contracts. And because many companies, including telecommunications companies, rely on standardized contracts, the Ninth Circuit's decision will affect those companies' operations not only in California, but also nationwide. The Ninth Circuit's decision will harm not only companies, but also consumers, who will face higher prices and will lose the benefit of an inexpensive and efficient forum for resolving disputes. The Court should grant certiorari and rule that the *McGill* rule is preempted by the Federal Arbitration Act.

ARGUMENT

I. The FAA Preempts the *McGill* Rule.

The Ninth Circuit erred in holding that the *McGill* rule is compatible with the Federal Arbitration Act. Under *Concepcion*, these cases are straightforward. *Concepcion*'s rationales for requiring enforcement of arbitration agreements with class-action waivers establish that arbitration agreements with public-injunction waivers must be enforced as well. The Court should grant certiorari, reverse the Ninth Circuit, and reaffirm its repeated holdings that the FAA bars state-law rules that sap arbitration agreements of their force.

In *Concepcion*, this Court held that the FAA preempted a California rule barring enforcement of arbitration agreements with class-action waivers. The Court explained: "Arbitration is poorly suited to the higher stakes of class litigation. In litigation, a defendant may appeal a certification decision on an interlocutory basis and, if unsuccessful, may appeal from a final judgment as well." 563 U.S. at 350. By contrast, the

Court emphasized that the grounds for vacating an arbitration award are extremely narrow, and "parties may not contractually expand the grounds or nature of judicial review." *Id.* at 350-51. The Court found it "hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision." *Id.* at 351.

The same words could have been written for these cases. In public-injunction actions, plaintiffs do not merely seek to resolve their own disputes. They seek injunctions designed to alter a company's business practices with respect to the public at large—which can have enormous financial and reputational consequences. Arbitrating such disputes would also "bet the company with no effective means of review." *Id.* Congress therefore did not "intend[] to allow state courts to force such a decision." *Id.*

This Court reaffirmed *Concepcion* in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018). It held that a rule barring class-action waivers "interfered with a fundamental attribute of arbitration": the "traditionally individualized and informal nature of arbitration." *Id.* at 1622-23. "[A] rule seeking to declare individualized arbitration proceedings off limits is," for practical purposes, "a device" that "declar[es] arbitration against public policy." *Id.* at 1623 (internal quotation marks omitted).

Here, too, an action seeking a public injunction is, by definition, not individualized. As such, the *McGill* rule is a "rule seeking to declare individualized arbitration

proceedings off limits[,]" *id.*—just what the FAA prohibits.

The *Blair v. Rent-A-Center, Inc.* panel's[2] reasoning to the contrary does not withstand scrutiny. 928 F.3d 819 (9th Cir. 2019). The *Blair* panel held that public-injunction actions "do[] not require formalities inconsistent with arbitration," such as "state-law class procedures." 928 F.3d at 828. That is not responsive to the core concern driving *Concepcion* and *Epic*—that arbitration was designed to be bilateral and individualized. A public-injunction claim, in which the plaintiff seeks to vindicate the rights of third parties, is neither. The *Blair* panel also noted that public injunction claims may be "more complex than arbitration of a conventional individual action," but that substantively complex claims can nonetheless be arbitrated. *Id.* at 829. Again, however, this reasoning misses the point. Obviously, substantively complex claims can be arbitrated. The problem with public-injunction arbitration is not *complexity*, but rather, complexity driven by its *non-individualized nature*. Public-injunction actions require courts to assess the impact of an order on third parties, which may require third-party discovery, intervention, and other procedural devices that bilateral arbitration is designed to avoid.

Moreover, the *Blair* panel overlooked *why* formal class-certification procedures are required in class

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[2] The Ninth Circuit's decisions in these cases relied on the same panel's published decision (issued the same day) in *Blair v. Rent-a-Center*, No. 17-17221. *See* No. 19-1066 Pet. App. 3a-28a.

actions but not in public-injunction actions—because a class judgment or settlement strips other plaintiffs of their right to sue, whereas a public-injunction judgment or settlement does not. But that makes public-injunction actions even *less* suited to arbitration than class actions. This is because when other plaintiffs may bring their own public-injunction claims, defendants face the risk of conflicting public injunctions—an outcome that is uniquely harmful in the context of arbitration. If two district courts issue conflicting injunctions, then appeals of both injunctions can go to the court of appeals, which can harmonize them. By contrast, if two arbitrators issue conflicting injunctions, and both injunctions withstand the extraordinarily narrow grounds for vacating an arbitration award, the defendant is out of luck. This risk of conflicting injunctions does not arise in traditional, bilateral arbitration: when an arbitrator merely resolves a dispute between contracting parties, there is no reason why the arbitrator's order would conflict with any other arbitrator's order. But this risk may well arise when two plaintiffs both seek public injunctions. This is because both arbitrators will consider the exact same question—what injunction will benefit the public at large—and may well resolve it in two different ways.

The *Blair* panel acknowledged this problem, but purported to identify a solution: a defendant could merely "inform the arbitrator of its existing obligations," and "obtain permission from the earlier arbitrator" to disclose confidential information. 928 F.3d at 829. Of course, arbitrators might not accede to a party's wishes so easily. More fundamentally, the need

to resort to these procedures confirms that *Concepcion* and *Epic* are correct: arbitration is designed for individualized and bilateral dispute resolution, and the FAA therefore requires enforcement of individualized and bilateral arbitration agreements.

II. The Court Should Grant Certiorari In These Cases.

The Court should grant certiorari in these cases and reverse the Ninth Circuit. The significant and harmful practical consequences of the Ninth Circuit's ruling further militate in favor of review. Moreover, the Ninth Circuit's decision reflects the type of defiance of this Court's FAA jurisprudence that has led this Court to reverse lower-court decisions time and time again.

A. The Court should grant certiorari because the Ninth Circuit's decision will harm both companies and consumers.

These cases are extraordinarily important because they affect contracts signed by virtually all Americans. 96% of Americans own a cell phone.[3] Anyone who owns a cell phone must sign a contract with a telecommunications provider. Bilateral arbitration agreements are common in cell phone contracts. All such contracts, to the extent they bar actions for public injunctive relief, are now unenforceable in California.

Moreover, the effect of the Ninth Circuit's ruling cannot be limited to California—or indeed, to this circuit. For many good business reasons, large companies like

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[3] *Mobile Fact Sheet*, Pew Research Ctr. (June 12, 2019), https://www.pewinternet.org/fact-sheet/mobile/.

cell phone providers typically provide forms that do not vary from state to state. If cell phone providers are forced to change their forms in California, then they may be effectively forced to change their forms nationwide.

And not only cell phone providers. The Ninth Circuit decided three cases presenting the same issue: one involving a cell phone agreement (*McArdle*), one involving an agreement with a cable provider (*Tillage*), and one involving a agreement to rent household items (*Blair*). The vast majority of Americans have bought cable TV, and millions of people have rented items for their homes—and therefore are likely to have signed a bilateral arbitration agreement in that context as well. Indeed, bilateral arbitration agreements exist in virtually every industry in which any consumer signs a contract with any provider.

If the Ninth Circuit's decision stands, bilateral arbitration agreements will be unenforceable across all such industries. And abolishing bilateral arbitration agreements may, for all practical purposes, result in the abolition of arbitration agreements altogether. Although the Ninth Circuit's decision nominally permits public-injunction claims to proceed in arbitration, companies may be unwilling to face the risk of arbitrating such consequential claims. If companies face the risk of a public injunction—or even multiple public injunctions—that could force them to change their business practices, they may give up on arbitration and preserve their right to litigate in court, with its extensive procedures and layers of appellate review. The result would be that consumer disputes would end

up in court—precisely the outcome the FAA is intended to avoid.

That outcome would, of course, harm companies who rely on the efficiency and speed of arbitration. It would also harm consumers. Companies would undoubtedly pass down some of the extra cost of litigation to consumers in the form of higher prices. Moreover, consumers risk losing access to arbitration—the only forum in which they could realistically vindicate low-value consumer claims. A consumer alleging he has been overcharged by a few hundred dollars can benefit from arbitration. Arbitration is much quicker than going to court. *See, e.g.*, Andrew Cann Chandrasekhar & David Horton, *Arbitration Nation: Data from Four Providers*, 107 Cal. L. Rev. 1, 51 (2019) (noting that the average disposition time for a state court jury trial was 26.6 months, while the average length for awarded arbitrations was less than eleven months); NDP Analytics, *Fairer, Faster, Better: An Empirical Assessment of Employment Arbitration*, at 11-12 (May 2019), https://bit.ly/2vP8VOS (collecting data showing that employment arbitration is speedier than employment litigation). Arbitration is also cheap: many businesses, including wireless carriers, heavily subsidize the cost of arbitration for consumers. For instance, for claims under $75,000, several of CTIA's members, including AT&T, pay all of the arbitration providers' and arbitrators' fees. In addition, the standardized arbitration agreements of several of CTIA's members ensure that a plaintiff with a meritorious case need not bear the cost of an attorney: in *Concepcion*, for instance, the arbitration agreement "denie[d] AT & T any ability

to seek reimbursement of its attorney's fees, and, in the event that a customer receives an arbitration award greater than AT & T's last written settlement offer, requires AT & T to pay a $7,500 minimum recovery and twice the amount of the claimant's attorney's fees." 563 U.S. at 337. By contrast, such a consumer has no incentive to go to court, where filing fees and attorney's fees will rapidly swamp the value of the claim.

The likelihood of the *McGill* rule providing any concomitant benefit to those consumers is minimal. For multiple reasons, public-injunction litigation is a uniquely pathological form of mass litigation, benefiting plaintiffs' counsel the most while benefiting consumers the least.

First, the *McGill* rule comes into play only when the Attorney General, county officials, and other public officials decline to exercise their statutory authority to enforce state law. Public officials have broad authority to enforce state unfair-competition laws. *See, e.g.*, Cal. Bus. & Prof. Code § 17204 (authorizing the Attorney General, District Attorneys, County Counsel, and City Attorneys to enforce unfair competition statute). Enforcing arbitration agreements as written would not affect those public officials' ability to bring such enforcement actions. Thus, the *McGill* rule opens the door to public-injunction actions precisely in those cases least likely to be meritorious: cases where actual public officials fail to seek public relief.

Even in those cases, defendants will still face settlement pressure, which will only increase if a single arbitrator can decide the case without appellate review. In the context of class actions, this Court has observed

that defendants "may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978), *superseded by rule as stated in Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017); *accord Concepcion*, 563 U.S. at 350 ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."). The same dynamic applies in public-injunction cases, where even a small chance of an intrusive injunction may induce the company to settle.

And this leads to an additional problem with *McGill* rule—it will lead to extortionate settlements with virtually no benefit for the consumers it is designed to protect. Courts have often recognized that in class action cases, class counsel's incentives are not to maximize recovery for the class: "From the selfish standpoint of class counsel and the defendant, … the optimal settlement is one modest in overall amount but heavily tilted toward attorneys' fees." *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014). There is a rich secondary literature similarly concluding that class actions typically are far more lucrative for class counsel than they are for the class. *See, e.g.*, Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 618-19 (2010); John H. Beisner et al., *Class Action 'Cops': Public Servants or Private Entrepreneurs?*, 57 Stan. L. Rev. 1441, 1471-72 (2005).

In the context of public-injunction claims, this problem is even worse. First, in class actions, attorney's fees are (sometimes) based on a percentage of the total damages recovery; in that scenario, class counsel has an

incentive to maximize the total recovery for the class. In public-injunction litigation, by contrast, that incentive does not exist because there *is* no damages recovery. And plaintiffs' counsel has no particular incentive to negotiate an injunction for the benefit of consumers that are not clients, and to whom counsel owes no legal or fiduciary duty. Rather, counsel's incentive is to negotiate a settlement maximizing attorney's fees.

Second, in class actions, there is a safeguard against abusive settlements—judges must conduct a fairness hearing, including hearing from objecting class members. That safeguard does not exist in public-injunction litigation because such suits do not foreclose third parties from bringing their own suits.

In sum, the Ninth Circuit's decision violates federal law and will harm both companies and consumers. The Court should grant certiorari and hold that the Federal Arbitration Act preempts the *McGill* rule.

B. The Court should grant certiorari in view of the Ninth Circuit's defiance of this Court's precedents.

CTIA agrees with Comcast that the Ninth Circuit's decision conflicts with decisions of other courts of appeals addressing the scope of 9 U.S.C. § 2. As Comcast explains, the First, Fourth, Seventh, and D.C. Circuits have held that the Savings Clause applies only to *formation* defenses, in conflict with the decision below, which invalidates an arbitration agreement even absent such a defense. 19-1066 Pet. 24-26.

There is no square conflict of authority on the specific question of whether the FAA preempts the *McGill* rule.

The California Supreme Court rejected an FAA preemption defense in *McGill* itself, and the Ninth Circuit rejected an FAA preemption defense in the decision below, so both courts to have considered that specific issue have reached the same conclusion. Nonetheless, this Court's review is warranted. The Court historically has not viewed a circuit split as a prerequisite to its review of FAA preemption cases. That practice has sensible jurisprudential and practical justifications. These cases are an especially strong candidate for a grant of certiorari, in light of the economic importance of the issue and the structural impossibility of any split developing on whether the *McGill* rule is preempted.

This Court routinely grants certiorari in FAA preemption cases, even without a conflict of authority—almost invariably when the party seeking to enforce the arbitration agreement is the petitioner. Indeed, it has done so at least twice in the context of FAA preemption of California-specific rules. In *Concepcion*, this Court granted certiorari to consider whether the FAA preempted California's state-law rule invalidating class action waivers, notwithstanding the absence of a split.[4]

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[4] At the time of the Ninth Circuit's decision in *Concepcion*, the sole other circuit to consider the issue—the Third Circuit—had held that state laws that invalidated class-action waivers were enforceable so long as they applied to both litigation and arbitration, which was the precise argument this Court ultimately rejected in *Concepcion*. *See* Petition for a Writ of Certiorari at 19, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (No. 09-893), 2010 WL 6617833. The *Concepcion* petition also asserted a conflict with a decision from an intermediate appellate court in Tennessee, but not with any state supreme court case. *Id.* at 21.

Likewise, in *Preston v. Ferrer*, 552 U.S. 346 (2008), the Court granted certiorari to consider the splitless question of whether California's state-law rule concerning arbitration of disputes involving talent agents was preempted.

Other examples abound. For instance, in *Kindred Nursing Centers Ltd. v. Clark*, 137 S. Ct. 1421 (2017), the Court granted certiorari and reversed a state supreme court decision refusing to follow the FAA. The petition in that case did not identify a conflict with any state supreme court or federal appellate decision; instead, the petition argued that "the decision below conflicts with the FAA and defies this Court's precedents" and "the decision below is exceptionally important."[5] This Court has also summarily reversed several state court cases that violated the FAA, despite the absence of any conflicts of authority. *See, e.g.*, *Nitro-Lift Techs., LLC v. Howard*, 568 U.S. 17 (2012) (per curiam); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012) (per curiam); *KPMG LLC v. Cocchi*, 565 U.S. 18 (2011) (per curiam).

The Court's practice of granting certiorari in FAA preemption cases, even in the absence of a circuit split, has sound justifications. First, FAA preemption cases, by definition, involve the application of this Court's FAA jurisprudence to a particular state's laws. Because state laws vary, different geographic circuits will rarely

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[5] Petition for a Writ of Certiorari at 12, 17, *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 368 (2016) (No. 16-32), 2016 WL 3640709. The petition did assert a conflict with federal district court decisions. *Id.* at 18-19.

consider the identical FAA arbitration question. Yet the fact that different states implement their hostility to arbitration through different state laws should not insulate *all* of those state laws from this Court's review.

Second, FAA preemption decisions frequently have an outsized economic impact, even when confined to one state. Arbitration agreements are common. They are also mostly standardized. When a large employer hires a new employee and enters into an arbitration agreement, or when a store customer enters into a consumer arbitration agreement, the terms of the arbitration agreements will typically not vary from agreement to agreement. Accordingly, a decision invalidating a single arbitration agreement will often have the effect of invalidating thousands of arbitration agreements simultaneously.

This effect is especially likely to arise when a lower court invalidates an arbitration agreement because it waives class or class-like procedures. Such cases arise only when a putative class representative seeks to represent a large group of similarly situated people—which means that those decisions necessarily will invalidate a large group of similarly situated arbitration agreements. As such, this Court has regularly granted certiorari to reverse lower-court decisions that, on one ground or another, injected class proceedings into arbitration that was supposed to be individualized. *See, e.g.*, *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013);

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010).

These petitions present classic examples of the types of FAA preemption cases that this Court should hear, notwithstanding the absence of a circuit split on the specific question of whether the *McGill* rule is preempted. The reason there is no split—and that no split is likely to develop—is that the *McGill* rule is a California-specific rule. Now that both the California Supreme Court and the Ninth Circuit have held that the FAA does not preempt California's rule, the issue is unlikely to arise in any other court, because any plaintiff with a claim for public injunctive relief will simply bring it in California. Thus, awaiting additional percolation would serve no purpose.

Yet, the outsized economic importance of these cases justifies this Court's review. As explained above, the Ninth Circuit's decision may functionally lead to the end of employee and consumer arbitration in California. Given that California is the Nation's largest state, home to about 12% of the nation's population (19-1078 Pet. 29), the practical outcome of these cases could be substantial and warrants this Court's attention.

Worse, while *McGill* may evade judicial review outside California, *McGill*'s effect cannot be confined to California. California law inevitably affects companies' nationwide operations, who use standardized contracts when dealing with employees and consumers. Telecommunication companies, for instance, typically advertise nationally, have national prices, and have national policies that are reflected in the contracts that consumers sign. There are sound reasons for that

practice: it is both efficient, and ensures that employees and consumers are treated consistently and equally, with the same legal rights and remedies. It is both unrealistic and undesirable for large companies to have one set of procedures for California and a different set of procedures for other states—especially for companies with a significant percentage of their operations in California.

Moreover, public injunctions in settlements or judgments may affect the defendant's nationwide operations. The purpose of the FAA is to avoid such outcomes by establishing a single nationwide rule requiring arbitration agreements to be enforced.

McGill exacerbates the harmful effect of a similar California law: California's Private Attorneys General Act of 2004 ("PAGA"). As AT&T explains (19-1078 Pet. 26-29), PAGA permits an "aggrieved employee" to recover civil penalties on a representative basis for "other current or former employees." Cal. Labor Code § 2699(a). In *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014), the California Supreme Court ruled that agreements requiring individualized arbitration of claims arising under PAGA were unenforceable—and that this unenforceability rule complied with the Federal Arbitration Act ("FAA"). In *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425 (9th Cir. 2015), the Ninth Circuit agreed with the California Supreme Court that the *Iskanian* rule was not preempted. PAGA has largely destroyed the benefit of individualized employee arbitration in California, as thousands of arbitrations have been transformed into the functional equivalent of class

actions. 19-1078 Pet. 28-29. But the *McGill* rule is even worse: it applies to *all* arbitration agreements, not only employee arbitration agreements.

The reality of both public-injunction claims and PAGA claims is that they are mechanisms of circumventing *Concepcion*—and the Court need not take CTIA's word for it. Defenders of public-injunction and PAGA actions explicitly characterize those claims as mechanisms to ensure that consumers and employees have a substantive right to file class actions, notwithstanding class action waivers in arbitration agreement. For instance, the Texas Law Review recently published an article opining that "the present Administration has openly repudiated its role in enforcing the federal statutory rights of consumers, voters, workers, and students," and "an increasingly conservative federal judiciary has hamstrung the ability of private litigants to enforce laws through class and representative litigation." Myriam Gilles & Gary Friedman, *The New Qui Tam: A Model for the Enforcement of Group Rights in a Hostile Era*, 98 Tex. L. Rev. 489, 490 (2020). The article identifies *Iskanian* and *McGill* as decisions that can help "fill the enforcement gap." *Id.* at 526, 530 & nn.195-96. Similarly, in the wake of *McGill*, a leading commentator wrote an article lamenting "[t]he extraordinary expansion of the FAA's application by the Supreme Court" and citing *McGill* as an example of the author's "sense (perhaps it is unjustified optimism) that some courts are not eager to extend the Supreme Court's arbitration decisions." Arthur R. Miller, *What are*

Courts For? Have we Forsaken the Procedural Gold Standard?, 78 La. L. Rev. 739, 775 & n.99 (2018).

Commentators have expressed similar hopes about PAGA claims. A Stanford Law Review Note entitled "State Court Resistance to Federal Arbitration Law" explains that "some courts have developed legal theories that, though entirely valid, effectively render the FAA moot in certain circumstances. The most prominent example of this is the application of the Private Attorneys General Act (PAGA) in California courts." Salvatore U. Bonaccorso, Note, *State Court Resistance to Federal Arbitration Law*, 67 Stan. L. Rev. 1145, 1163 (2015). It observes that "state resistance may play an essential part in preserving states' legal autonomy," and proposes that states can "develop[] novel theories that function as valid work-arounds to preemption or by cabining the federal precedent to its facts," characterizing the California rule requiring invalidating PAGA waivers as "representative of this approach." *Id.* at 1167-68. Along the same lines, a California Law Review article cites that rule as reflecting a strategy of circumventing *Concepcion*. Aaron Blumenthal, Comment, *Circumventing* Concepcion*: Conceptualizing Innovative Strategies to Ensure the Enforcement of Consumer Protection Laws in the Age of the Inviolable Class Action Waiver*, 103 Cal. L. Rev. 699 (2015). The note explains that the "key benefit of a state qui tam statute is that it bypasses any arbitration agreement in a consumer contract," while expressing concern that PAGA suits might be too similar to class actions to escape preemption and achieve the goal of circumventing *Concepcion*. *Id.* at 742.

It is not the role of California's state courts to circumvent Supreme Court decisions construing federal law. Rather, California's state courts should apply the FAA faithfully. The Court should grant certiorari and ensure that this Court's decisions are applied as written.

CONCLUSION

The petition for writ of certiorari should be granted, and the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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