No. 24-365

IN THE

Supreme Court of the United States

COMCAST CABLE COMMUNICATIONS, LLC,

Petitioner,

v.

CHARLES RAMSEY,

Respondent.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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October 28, 2024

QUESTIONS PRESENTED

Whether the Federal Arbitration Act preempts California's public policy, set forth in *McGill v. Citibank, N.A.*, 393 P.3d 85 (Cal. 2017) and its progeny, refusing to enforce arbitration clauses that waive claims for "public injunctive relief."

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INTEREST OF AMICUS CURIAE*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. WLF often appears as an amicus curiae in important Federal Arbitration Act cases. *See, e.g., Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022); *Epic Sys. Corp. v. Lewis*, 578 U.S. 437 (2018). And WLF's Legal Studies Division regularly publishes papers by outside experts on arbitration. *See, e.g.,* John F. Querio, *Courts in California Enable End-Run of Federal Arbitration Act by Expanding Obscure State Labor Law*, WLF LEGAL BACKGROUNDER (June 16, 2017**),** https://perma.cc/29JD-4DYN.

The FAA "establishes a federal policy favoring arbitration." *Shearson/Am. Exp. Inc. v. McMahon*, 482 U.S. 220, 226 (1987). Under that federal policy, an arbitration clause in a contract involving commerce is valid and enforceable. 9 U.S.C. § 2. True, the FAA contains a saving clause, but it says merely that an arbitration clause may be invalidated based on any ground "for revocation of any contract"—that is, on a generally applicable contract defense. *Id.* If the federal policy favoring arbitration is to be upheld, the FAA's saving clause must be taken to mean no more than what it says.

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* No party's counsel authored any part of this brief. No person or entity, other than Washington Legal Foundation and its counsel, contributed money for preparing or submitting this brief. WLF timely notified all counsel of record of its intent to file this brief.

But a specter is haunting the California Reports—a specter named *McGill*. Created by the California Supreme Court in 2017, the *McGill* rule—and a line of decisions applying it—enables parties to use a free-floating state public policy (rather than a contract defense) to nullify a duly executed arbitration clause. *See McGill v. Citibank, N.A.*, 393 P.3d 85, 87–88 (Cal. 2017). As wielded by the California courts, the *McGill* rule renders an otherwise valid arbitration agreement unenforceable whenever a consumer seeks to enjoin virtually any allegedly unlawful business practice. *McGill* thus expands the reach of § 2's saving clause far beyond what its words can bear. It also "covertly" (and improperly) transforms a supposedly general rule into a precision tool for "disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 581 U.S. 246, 251 (2017).

The California courts have struggled notoriously to apply this Court's FAA decisions. The petition offers the Court a clean vehicle for vindicating the FAA and ending the havoc *McGill* has wrought.

SUMMARY OF ARGUMENT

Litigation is expensive. It's expensive for businesses, which must pay lawyers to try cases and employees to miss work to testify. It's expensive for consumers and workers, who cover businesses' costs through higher prices and lower wages. It's expensive for the judiciary, which must pay for "judges, attendants, light, heat, and power—and even ventilation in some courthouses." Joint Hearings on

S. 1005 and H. R. 646 before the Subcommittees on the Judiciary, 68th Cong., 1st Sess. (1924) (statement of Charles L. Bernheimer). And it's expensive for the average citizen; for just as corporate litigation expenses are really consumer and worker expenses, the judiciary's expenses are really taxpayer expenses.

It's no mystery, then, why Congress passed the FAA. Courts had long refused to enforce most arbitration agreements, and this meant that more disputes remained in litigation. To save people time, money, and trouble, Congress empowered courts to enforce otherwise valid clauses, in contracts "involving commerce," that require streamlined private dispute resolution—arbitration. 9 U.S.C. § 2. But the FAA contains a qualification. Under the FAA's saving clause, an arbitration agreement that is otherwise enforceable under federal law remains subject to any generally applicable state-law contract defense. *Id.*

The *McGill* rule is not such a defense. It instead arises from California Civil Code § 3513, a state "maxim of jurisprudence" that says: "a law established for a public reason cannot be contravened by private agreement." California's maxims of jurisprudence are *not* contract defenses; they are (at most) guiding principles for interpreting statutes. A court that partially or entirely invalidates an arbitration clause because it conflicts with one of these maxims has not properly applied the FAA's saving clause; it has simply ignored the FAA and flouted the Supremacy Clause.

At all events, a court may not apply even a generally applicable contract defense in a way that

will "disproportionate[ly] impact" arbitration agreements. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342 (2011). Yet the California courts have battled this Court, for decades, over the State's anti-arbitration rules. Contrary to this Court's giving full effect to the FAA's language and the Supremacy Clause, California courts do not want to enforce duly-executed arbitration agreements. *McGill* is perhaps the most brazen example of California's determination to skirt the FAA. Yet many California courts behave as if they can only ignore this Court's FAA precedent long enough, then some of their anti-FAA decisions will evade review. This Court should disabuse California courts of that belief.

True, the Ninth Circuit has squarely held that California's *McGill* rule can't extend to avoid FAA preemption for nearly every claim for injunctive relief under California law. *Hodges v. Comcast Cable Commc'ns, LLC*, 21 F.4th 535, 544 (9th Cir. 2021). But that federal holding has no purchase in California courts, as this case shows. Pet. App. 19a (disagreeing with both the holding of *Hodges* and the Ninth Circuit's characterization of an expanded *McGill* rule). As the petition confirms, the California courts' split with the Ninth Circuit on this vital issue only exacerbates the problem. *See* Pet. 23–24. In California, successful removal to federal court now determines whether § 2 of the FAA governs—or whether the FAA is a dead letter. This disparity is untenable.

The petition thus presents the Court with an ideal vehicle for stopping the California courts from using state public policy to discriminate against arbitration. It also gives the Court a chance to remind

the lower courts not to use a rigged version of a general contract defense as a tool for striking down arbitration clauses. The Court should grant review.

ARGUMENT

I. REVIEW IS NEEDED BECAUSE *MCGILL* IS BIASED AGAINST ARBITRATION IN PRINCIPLE.

The *McGill* rule stands on California Civil Code § 3513, which says that although "any one may waive the advantage of a law intended solely for his benefit," a "law established for a public reason cannot be contravened by private agreement." Cal. Civ. Code § 3513.

Section 3513 is a California "maxim of jurisprudence." These maxims lie "almost buried and forgotten" among California's nineteenth-century Field Codes. Jeffrey S. Klein, *A Few Clauses to Help Lawyers Along*, L.A. Times (Sept. 14, 1989), https://perma.cc/BJ5F-TVLU. They include such cosmic riddles as "That is certain which can be made certain," and "Things happen according to the ordinary course of nature and the ordinary habits of life." Cal. Civ. Code §§ 3538, 3546.

As these examples show, these maxims "can mean everything and nothing." Klein, *supra*. Some of them, in fact, seem to contradict both § 3513 and the notion that arbitration clauses should be subjected to discrimination. "He who consents to an act," for example, "is not wronged by it." Cal. Civ. Code § 3515. "Private transactions," after all, "are fair and regular." *Id.* § 3545.

If it seems like § 3513 makes no sense as a contract defense, that's because it isn't one. California's maxims of jurisprudence are merely "interpretive canon[s] for construing *statutes*." *McGovern v. U.S. Bank N.A.*, 362 F. Supp. 3d 850, 860 (S.D. Cal. 2019) (quoting *Nat'l Shooting Sports Found., Inc. v. State*, 420 P.3d 870, 873 (Cal. 2018)). The *McGill* rule therefore is not a contract defense that triggers the FAA's saving clause. *See* 9 U.S.C. § 2. Rather, it is a free-floating public policy.

A state court may not use state public policy to undermine the FAA. If Congress says an arbitration agreement free from any *contract defense* must be enforced, a state court may not refuse to enforce the agreement because it thinks arbitration isn't part of the "ordinary course of nature and the ordinary habits of life." Cal. Civ. Code § 3546. The Supremacy Clause won't allow it. *See* U.S. Const. art. VI, cl. 2. Neither should this Court.

II. REVIEW IS NEEDED BECAUSE *MCGILL* IS BIASED AGAINST ARBITRATION IN PRACTICE.

Even if it stood on a real contract defense, the *McGill* rule would still be preempted. The rule's only purpose is to serve as a tool for striking down arbitration clauses.

As *Concepcion* confirms, the FAA bars a court from applying a "generally applicable" state doctrine "in a fashion that disfavors arbitration." 563 U.S. at 341. Such a doctrine is not automatically valid simply because it also governs contracts outside the arbitration context. *Id.* at 342. Even a doctrine that stands on "the general principle of unconscionability,"

for example, still violates the FAA if "in practice" it "would have a disproportionate impact on arbitration agreements." *Id.*

The California Supreme Court has consistently resisted this holding. All that matters in that court's view is that a rule merely respects arbitration's "fundamental attributes" and "applies equally to arbitration and nonarbitration agreements." *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 196 (Cal. 2013). The California high court has even gone so far as to stand the "disproportionate impact" principle on its head. "A facially neutral state-law rule," the court has decided, "is *not* preempted simply because its evenhanded application 'would have a disproportionate impact on arbitration agreements.'" *Id.* at 201 (emphasis added) (quoting *Concepcion*, 563 U.S. at 342).

McGill relies heavily on this perversion of *Concepcion*. In declaring that the FAA does not preempt § 3513's no-waiver maxim, *McGill* insists that the §3513 bar "is not a defense that applies only to arbitration or that derives its meaning from the fact that an agreement to arbitrate is at issue." 393 P.3d at 94. Rather, "a provision in *any* contract—even a contract that has no arbitration provision—that purports to waive * * * the statutory right to seek public injunctive relief * * * is invalid and unenforceable under California law." *Id.*

This directly contradicts *Concepcion*. Under this Court's holding, it is not enough that a state rule apply "even [to] a contract that has no arbitration provision." *Id.* A state rule also may not "in practice" have "a disproportionate impact on arbitration

agreements." *Concepcion*, 563 U.S. at 342. California's *McGill* rule has such an impact—in spades.

Indeed, the California courts increasingly use § 3513 as a cudgel for striking down arbitration agreements. The California Reports are now rife with cases that use § 3513 (or rely on a case that in turn uses it) to disfavor arbitration. *See, e.g.*, *McGill*, 393 P.3d at 94; *Sonic-Calabasas A*, 311 P.3d at 192–93; *Armendariz v. Found. Health Psychcare Servs.,* 6 P.3d 669, 758 (Cal. 2000) ("[A]n arbitration agreement cannot be made to serve as a vehicle for the waiver of [state] statutory rights created by the FEHA."); *Serafin v. Balco Properties Ltd., LLC*, 235 Cal. App. 4th 165, 183 (2015) ("[A]n arbitration agreement cannot be made to serve as a vehicle for the waiver of [state] statutory rights."); *Bickel v. Sunrise Assisted Living*, 206 Cal. App. 4th 1, 8–9, 12 (2012) ("Where a provision in an arbitration agreement seeks to waive such [state statutory] rights, as was the case here, the provision is contrary to public policy and may be severed."); *Samaniego v. Empire Today LLC*, 205 Cal. App. 4th 1138, 1147 (2012) ("Where, as in this case, arbitration provisions undermine [state] statutory protections, courts have readily found unconscionability. * * * [A]n arbitration agreement cannot be made to serve as a vehicle for the waiver of [state] statutory rights."); *Ajamian v. CantorCO2e, L.P.*, 203 Cal. App. 4th 771, 799 (2012) ("[T]he arbitration provision * * * forces [the plaintiff] to waive her unwaivable [state] statutory rights and remedies.").

In any case, § 3513 is just a flimsy pretext on which the *McGill* rule stands. The *McGill* rule itself

was created specifically for, aims solely at, and has not been used on anything other than—arbitration agreements. It's clear what's really going on. California's courts have dusted off an ancient, rarely used maxim and repurposed it as a device for striking down arbitration agreements. The *McGill* rule exists precisely *because* it has "a disproportionate impact on arbitration agreements." *Concepcion*, 563 U.S. at 342. Whatever else it might be in theory, in practice the *McGill* rule is just another of the "great variety" of "devices and formulas" that judges "hostil[e] towards arbitration" use to "declar[e] arbitration against public policy." *Id*.

III. REVIEW IS NEEDED BECAUSE CALIFORNIA COURTS PERSIST IN REFUSING TO ENFORCE THE FAA.

Bottomed on the *McGill* rule, the Court of Appeal's holding here flouts this Court's FAA preemption holdings. Unsurprisingly, the Supreme Court of California denied review—as it has done in every other case using *McGill* to nullify an arbitration agreement. *See* Pet. 27–29. If this Court wants state courts to faithfully apply its decisions, it should grant the petition and remind California courts, yet again, that they are not the final arbiters of federal law.

The number of this Court's decisions that California courts have not fully embraced is legion. Yet arbitration has been particularly despised by California jurists. Consider a pre-*Concepcion* study. It found that in a three-year period, three California appellate districts addressed unconscionability in 119 cases. Paul Thomas, Note, *Conscionable Judging: A Case Study of California Courts' Grapple with*

Challenges to Mandatory Arbitration Agreements, 62 Hastings L.J. 1065, 1083 (2011). The courts found unconscionability in 50.6% of the arbitration cases, but in only 16.7% of the non-arbitration cases. *Id.* And, remarkably, 89 of the 119 cases in the sample (75%) involved an arbitration agreement. *Id.*

Or consider Westlaw's Notes of Decisions for California Civil Code § 1670.5, the State's codification of its unconscionability rule. The Notes read like little more than a never-ending chronicle of challenges to arbitration clauses. In one section, for example, which addresses "substantive unconscionability" for "employment agreements," nearly all the cases discussed (33 of 36) concerned an arbitration agreement. Nor is that all. The Notes contain at least 17 free-standing sections devoted exclusively to arbitration agreements. A review of these Notes confirms that California's courts continue to strike down arbitration clauses at an unrelenting pace.

The FAA's "broad principle of enforc[ing]" arbitration provisions "withdraws the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 684 (1996) (cleaned up). Yet California consistently ignores the FAA's simple command. It continues to build barriers to companies' enforcing arbitration agreements.

In *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47 (2015), the Court reversed a California Court of Appeal decision holding a class-arbitration waiver unenforceable under state law. The Court held that the FAA preempted California's class-arbitration bar.

Id. at 58 (citation omitted). As the Court explained, the California Court of Appeal's "view that state law retains independent force even after it has been authoritatively invalidated by this Court" is wrong. *Id.* at 57. Rather, state courts must follow this Court's commands.

The Court of Appeal's decision in *DIRECTV* followed the Supreme Court of California's decision in *Discover Bank v. Superior Ct. of L.A. Cnty.*, 113 P.3d 1100 (Cal. 2005). There, the court held that the FAA did not preempt a California law barring class-arbitration waivers. *Id.* at 1110–17. The decision stood for six years until this Court abrogated it in *Concepcion*.

As the Court explained when abrogating *Discover Bank*, the supposedly general nature of a state law cannot save one "that stand[s] as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 563 U.S. at 343 (citations omitted). Otherwise, that loophole would destroy the FAA. *See id.* (citing *Am. Tel. & Tel. Co. v. Cent. Off. Tel., Inc.*, 524 U.S. 214, 227–28 (1998)). Yet that is what the Court of Appeal's application of the *McGill* rule does here. It destroys the FAA's goal of making arbitration provisions enforceable—even in States that wish not to enforce them.

In *Viking River Cruises*, this Court abrogated yet another California rule circumventing the FAA. 596 U.S. at 639. There, the Court of Appeal's holding was dictated by the California Supreme Court's decision in *Iskanian v. CLS Transportation Los Angeles*, 327 P.3d 129 (Cal. 2014). Like *McGill*, *Iskanian* stood on California Civil Code § 3513's

maxim that "a law established for a public reason cannot be contravened by a private agreement." *Id.* at 148 (citing Cal. Civ. Code § 3513). Relying on this maxim, *Iskanian* declared it "contrary to public policy for an [arbitration] agreement to * * * requir[e] employees to waive the right to bring a [Private Attorneys General Act representative] action." *Id.* at 149.

This Court reversed, holding that the FAA preempts *Iskanian* "insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate." *Viking River Cruises*, 596 U.S. at 662. After elaborating on the FAA's "equal-treatment principle," the Court reiterated that "even rules that are generally applicable as a formal matter are not immune to preemption by the FAA." *Id.* at 650. As applied, *Iskanian* improperly "coerce[d] parties into forgoing their right to arbitrate by conditioning that right" on a procedure that "makes arbitration artificially unattractive." *Id.* at 656. In other words, California tried to apply a general rule of interpretation while ignoring the FAA's preemption provision. This it could not do. Unfortunately, *Iskanian* wreaked havoc on arbitration in California courts for eight years until this Court intervened.

If anything, *Viking River Cruises* should have signaled to California courts that the FAA forecloses the *McGill* rule too. After all, *Viking River Cruises* confirms that California may not "transform traditional individualized arbitration * * * into the litigation it was meant to displace" under the guise of applying "generally applicable principles of state

law." 596 U.S. at 651 (quotations and alterations omitted).

The FAA thus bars state anti-waiver rules "at odds with arbitration's basic form." *Id*. at 656. *McGill* is plainly such a rule, because it shoehorns parties into either (1) "judicial proceedings" because virtually every consumer claim seeking an injunction triggers *McGill* or (2) "an arbitral proceeding that exceeds the scope jointly intended by the parties" because parties who agreed to only party-specific relief find themselves in arbitration "not to resolve a private dispute but to remedy a public wrong," in the California Supreme Court's own words. *Broughton v. Cigna Healthplans of Cal.*, 988 P.2d 67, 76 (Cal. 1999). Under the FAA, then, California can't insist on tying together individual and universal (at least within California) injunctions to nullify agreements for individual arbitration.

The economic stakes are high. One overlooked but vital aspect of an arbitration agreement is the benefits it provides the many contracting parties who never have a dispute. The use of arbitration lowers a company's dispute-resolution costs, and these cost-savings are generally passed on in the form of higher wages for employees and lower prices for consumers. Put differently, a company pays for its arbitration rights. That is, Comcast "paid [Ramsey] to do a number of things; one of the things it paid [him] to do was agree to non-judicial dispute resolution." *Oblix, Inc. v. Winiecki*, 374 F.3d 488, 491 (7th Cir. 2004) (Easterbrook, J.).

Businesses "crave certainty as much as almost anything: certainty is what allows them to make long-

term plans and long-term investments." Alan Greenspan & Adrian Wooldridge, *Capitalism in America: A History* 258 (2018). Yet so long as the *McGill* rule remains in place, this Court's FAA case law doesn't protect California litigants. They can never be sure whether courts will enforce their arbitration agreements as written. Rather, they must constantly worry that they gave up something in return for an arbitration clause only to have that arbitration clause ignored by a California court. This Court should intervene and grant the petition to vindicate the federal right to arbitrate.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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