No. 23-1307

IN THE

Supreme Court of the United States

RAC ACCEPTANCE EAST, LLC,
Petitioner,

v.

SHANNON MCBURNIE, ET AL.,
Respondents.

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

BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL RETAIL FEDERATION AND THE RETAIL LITIGATION CENTER IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae represent a diverse array of industry associations with a significant number of members that routinely employ arbitration clauses in their contracts. They share common concerns about the implications of the lower court's decision for the enforceability of those clauses.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The National Retail Federation ("NRF") is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and internet retailers from the United States and more than 45 countries. NRF empowers the industry that powers the economy.

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[1] Pursuant to Supreme Court Rule 37, *amici* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Counsel for the parties received notice of the intent to file this brief at least ten days prior to filing.

Retail is the nation's largest private-sector employer, contributing $3.9 trillion to annual GDP and supporting one in four U.S. jobs—52 million working Americans. For over a century, NRF has been a voice for every retailer and every retail job, educating and communicating the powerful impact retail has on local communities and global economies. NRF regularly submits *amicus curiae* briefs in cases raising significant legal issues for the retail community.

The Retail Litigation Center ("RLC") is the only trade association dedicated to representing the retail industry in the courts. In this capacity, the RLC provides courts with the retail industry's perspective on a range of important legal issues affecting its members. Collectively, the RLC's members employ millions of workers nationwide, provide goods and services to tens of millions of consumers, and generate tens of billions of dollars in annual sales. Since its founding in 2010, the RLC has filed more than 200 *amicus curiae* briefs on a range of issues important to the country's leading retailers.

Amici have a strong interest in the issues presented by this petition. The arbitration clauses employed by many of *amici*'s members contain provisions that share the same salient features as those construed by the court below, including: (i) a specification that arbitration shall proceed "on an individual basis"; (ii) a limitation on the arbitrator's remedial authority to award non-individualized relief; and (iii) a severability clause indicating that if any aspect of the individualized arbitration provision is unenforceable "as to a particular claim for relief, then that claim (and only that claim) must be severed from the arbitration and may be brought in court." The lower court's erroneous

conclusion about preemption and its inexplicable failure to address severability implicate these interests.

SUMMARY OF ARGUMENT

In addition to the reasons advanced by the Petitioner, the petition for a writ of *certiorari* should be granted for three reasons.

First, the petition presents exceedingly important questions. This case concerns the enforceability of arbitration clauses in consumer contracts. Consumer contracts in a variety of industries, ranging from telecommunications to retail, regularly utilize such clauses. Those clauses offer substantial benefits to all parties, including consumers. The consumers' benefits, as this Court has repeatedly recognized, include "the promise of quicker, more informal, and often cheaper resolutions for everyone involved." *Epic Sys., Corp. v. Lewis*, 584 U.S. 497, 505 (2018) (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)). The decision below threatens the enforceability and, consequently, the viability of that beneficial system of dispute resolution. It creates a roadmap whereby parties can avoid their contractual undertakings by lodging claims (that otherwise are fully arbitrable) and then appending to those claims requests for particular remedies that are not prospectively waivable under judicially manufactured state rules designed to undermine arbitration—all in contravention of the Federal Arbitration Act ("FAA").

Second, the Ninth Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). As Petitioner explains, the decision below represents the latest judicial effort to craft anti-arbitration rules. Pet. 2. Section 2 of the FAA, as this Court has consist-

ently held, does not permit judicial doctrines employing "devices and formulas" indistinguishable from direct legislative efforts designed to thwart arbitration. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342 (2011) (citation omitted); *see also Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 649–51, 660–61 (2022). The Ninth Circuit's effort to confine this Court's Section 2 jurisprudence to the precise "device" or "formula" at issue in *Concepcion* and *Viking River* twists those precedents and is unfaithful to their reasoning. General antiwaiver rules do not automatically survive Section 2 preemption. Even if they sometimes do, the court did not give effect to the parties' severability clauses.

Third, to the extent the Ninth Circuit's decision does not clearly conflict with this Court's precedents, then the petition should be granted to clear up any confusion leading to decisions inconsistent with the FAA. Not all courts have given *Viking River* the same crabbed interpretation as the Ninth Circuit. Even before *Viking River* was decided, lower courts reached differing conclusions on whether Section 2 of the FAA preempted antiwaiver rules that effectively precluded the enforcement of arbitration clauses. The petition offers a prime opportunity for this Court to resolve those differences and to clarify *Viking River*.

ARGUMENT

This petition concerns the preemptive effect of Section 2 of the FAA on a judicially created state-law doctrine that frustrates the enforcement of arbitration agreements. Section 2 provides, in relevant part, 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. Nearly a century ago, Congress included this provision as part of the FAA to overcome the centuries' old judicial hostility to the enforcement of arbitration clauses. *Epic Sys.*, 584 U.S. at 505; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Through it, "Congress declared a national policy favoring arbitration and withdrew 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). This "national policy favoring arbitration" displaces "any state substantive or procedural policies to the contrary." *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

Since the FAA's enactment, this Court has faithfully applied Section 2 to preempt state legal rules—whether grounded in statute or judicial decision—that frustrate its mandate. "[S]tate law is preempted to the extent it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives' of the FAA." *Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 183 (2019) (quoting *Concepcion*, 563 U.S. at 352). Consistent with this principle, the FAA preempts state statutes by expressly declaring "that state courts cannot apply state statutes that invalidate arbitration agreements." *Allied Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995) (citing *Southland Corp.*, 465 U.S. at 15–16). The FAA likewise precludes enforcement of state laws requiring "that litigants be provided a judicial forum for resolving" particular categories of disputes. *See, e.g.*, *Perry*, 482 U.S. at 491.

Apart from state anti-arbitration legislation, the FAA also preempts state judicial doctrines having a comparable effect. Otherwise, "this would enable

the court to effect what . . . state legislatures cannot." *Id.* at 492 n.9. Consequently, the FAA bars the application of state common-law contract defenses (like public policy) when judicial application of those defenses is indistinguishable from explicit anti-arbitration legislation. *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533–34 (2012) (per curiam). The FAA also displaces state common-law doctrines that compel the aggregation of claims in a manner inconsistent with the parties' intentions to engage in individualized arbitration. *See, e.g.*, *Viking River*, 596 U.S. at 659–62; *Concepcion*, 563 U.S. at 346–48. This broad preemptive sweep protects against the "great variety of devices and formulas" by which state courts might frustrate Congress's mandate. *Concepcion*, 563 U.S. at 342 (citation and internal quotations omitted).

The rule at issue in this case represents a paradigmatic judicially-crafted device falling squarely within Section 2's preemptive sweep. As Petitioner explains, the petition implicates California's judicially-created *McGill* rule. Pet. 7–8. Originating in a 2017 decision of the California Supreme Court, the *McGill* rule forbids enforcement of an agreement for individual arbitration to the extent it waives a request for broad injunctive relief on behalf of the general public under California's consumer-protection laws. *McGill v. Citibank, N.A.*, 393 P.3d 85, 97–98 (2017). The *McGill* rule traces its roots to another California Supreme Court decision—*Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014). *See* Myriam Gilles & Gary Friedman, *Unwaivable: Public Enforcement Claims and Mandatory Arbitration*, 89 Fordham L. Rev. 451, 466–68 (2020) (highlighting the similar analysis shared in *Iskanian* and *McGill*). *Iskanian* held that agreements for individualized arbitration could not be enforced as to claims under

California's Private Attorneys General Act (PAGA) because California deems the right to seek penalties for violations as to other employees to be non-waivable.[2] 327 P.3d at 152–53.

Two terms ago in *Viking River*, this Court held that the FAA largely preempts the *Iskanian* rule. True to its Section 2 jurisprudence, the Court explained that "state law cannot condition the enforceability of an arbitration agreement on the availability of a procedural mechanism that would permit a party to expand the scope of the arbitration by introducing claims that the parties did not jointly agree to arbitrate." 596 U.S. at 660. The *Iskanian* rule imposed just such a prohibited condition because it "compel[led] parties to either go along with an arbitration in which the range of issues under consideration is determined by coercion rather than consent, or else forgo arbitration altogether." *Id.* at 661. Consequently, the *Iskanian* rule coerced parties "into giving up a right they enjoy under the FAA." *Id.* (citations omitted). In reaching this conclusion, the Court effectively overruled the Ninth Circuit's prior decision in *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425, 431–32 (9th Cir. 2015), which had previously

[2] The timing of the *McGill* rule's creation is noteworthy. Earlier, the California Supreme Court had announced the *Broughton-Cruz* rule; the rule held that public injunctions were not arbitrable. *Broughton v. Cigna Healthplans*, 988 P.2d 67, 75–79 (Cal. 1999); *Cruz v. PacificCare Health Sys., Inc.*, 66 P.3d 1157, 1165 (Cal. 2003). In 2013, the Ninth Circuit held that Section 2 preempted the *Broughton-Cruz* rule. *Ferguson v. Corinthian Colls., Inc.*, 733 F.3d 928, 930 (9th Cir. 2013). Apparently undaunted by *Ferguson*, the California Supreme Court announced the *Iskanian* rule the next year and the *McGill* rule four years later.

concluded that Section 2 did not preempt the *Iskanian* rule.

In the wake of *Viking River*, one would have expected the court below to conclude that the FAA also preempts the *McGill* rule, like the *Iskanian* rule. This is especially so because prior Ninth Circuit jurisprudence had explicitly linked the two rules: In a decision predating *Viking River*, *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819, 830–31 (9th Cir. 2019), the Ninth Circuit held that Section 2 did not preempt the *McGill* rule. To reach this (erroneous) conclusion, *Blair* admitted that its prior "decision in *Sakkab* [addressing *Iskanian*] all but decides this case." *Id.* at 825. So when the Supreme Court in *Viking River* rejected *Sakkab*, logically *Blair* too should have fallen.

But it did not. Instead, the panel below rejected logic, reaffirmed *Blair*, and renewed its belief that Section 2 does not preempt the *McGill* rule. Pet. App. 8a–10a, 12a. Despite an intervening Supreme Court decision directly addressing the intellectual foundations of the *McGill* rule, the lower court's analysis spans only two paragraphs. *See* Pet. App. 11a–12a. Without explanation, the Ninth Circuit asserted that public injunctions differ from mandatory-joinder rules. Through this unsubstantiated assertion, the Ninth Circuit confined *Viking River* to rules "specific to California's PAGA statute." Pet. App. 11a. Again without reasoning, it likened the *McGill* rule to an aspect of *Iskanian* that "forbids a party to waive the right to bring a representative claim in any forum." Pet. App. 12a. Because, in the Ninth Circuit's view, *Viking River* held that this aspect of *Iskanian* survived Section 2 preemption, the *McGill* rule did likewise. *See* Pet. App. 10a.

That erroneous conclusion warrants this Court's review. Petitioner identifies several circuit splits implicated by the decision below; those circuit splits alone justify review. This brief offers three additional reasons: (1) the issue is exceedingly important; (2) the decision conflicts with this Court's precedents; and (3) to the extent this Court's precedents permit alternative interpretations, this petition offers a prime opportunity to clear up any confusion.

I. The petition presents important questions.

Arbitration clauses in consumer contracts have become an important feature of consumer transactions. As this Court recognized over a decade ago, "the early 1990's saw the increased use of arbitration clauses in consumer contracts generally, and in financial services contracts in particular." *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 103 (2012) (citations omitted). *See also* Jon O. Shimabukuro, Cong. Rsch. Serv., RL30934, *The Federal Arbitration Act: Background and Recent Developments* 1 (2002). Since that initial observation, subsequent empirical studies have tracked the increased use of arbitration clauses in consumer contracts across industries. Amit Seru, Stan. Inst. for Econ. Pol'y Rsch., *Tipping the Scales: Balancing Consumer Arbitration Cases* 2 (2023), *available at* https://siepr.stanford.edu/publications/policy-brief/tipping-scales-balancing-consumer-arbitration-cases.

Those popular contracting provisions offer substantial benefits to all parties, including consumers. Those benefits, as this Court has repeatedly recognized, include "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010); *see also Epic*

Sys., 584 U.S. at 505 (noting that arbitration offers "the promise of quicker, more informal, and often cheaper resolutions for everyone involved" (citing *Scherk*, 417 U.S. at 511)). Numerous studies have validated these judicial findings and demonstrated how arbitration supports individual consumers through the reduction of process costs and the speedy, informal, and expeditious resolution of their disputes. *See, e.g.*, Nam D. Pham & Mary Donovan, NDP Analytics, *Fairer, Faster, Better III: An Empirical Assessment of Consumer and Employment Arbitration* 4–5, 9–11, 15 (2022); Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 Cal. L. Rev. 1, 51, 52, 65 (2019) (noting that "[a]rbitration has the potential to be an elegant shortcut to the court system," "is almost certainly faster than litigation," and "is surprisingly affordable for plaintiffs" and concluding that "[c]reating incentives for plaintiffs' lawyers to arbitrate is both good policy and dovetails" with the FAA's objectives of "promot[ing] arbitration" (quoting *Concepcion*, 563 U.S. at 345)).

The decision below jeopardizes that mutually beneficial system of dispute resolution. No different from an explicit statute barring arbitration of particular claims, the Ninth Circuit's conclusion that Section 2 does not preempt the *McGill* rule creates a roadmap to evade that system: Parties can avoid their contractual commitments by lodging claims (that otherwise are fully arbitrable) and then appending to those claims requests for particular remedies that are not prospectively waivable under judicially manufactured state rules designed to undermine arbitration. Such an outcome "frustrate[s] the [FAA's] statutory policy of rapid and unobstructed enforcement of arbitration agreements." *Moses H.*

Cone, 460 U.S. at 23; *see also Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 238 n.5 (2013) ("[T]he FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims."). Given the pervasiveness of arbitration clauses in consumer contracts and the nationwide examples of efforts to develop analogous anti-arbitration "devices" under the guise of antiwaiver rules, *see* Pet. 19, the important issues in this case warrant this Court's attention.

II. The decision below clearly conflicts with this Court's precedents.

While this Court customarily does not grant petitions simply to correct erroneous decisions, it will do so when "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). The decision below satisfies this standard. Its conclusion about Section 2 preemption "conflicts with relevant decisions of this Court" in at least two respects.

First, the decision misreads *Viking River* and *Concepcion*. The Ninth Circuit attempted to confine *Viking River* exclusively to the mandatory-joinder rules under California's PAGA statute. PAGA's mandatory-joinder rules simply represent one example of the myriad "devices and formulas" against which this Court warned—just like the *Discover Bank* rule at issue in *Concepcion*. *See* 563 U.S. at 342–43; *see also Marmet*, 565 U.S. at 533–34; *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 581 U.S. 246, 251–54 (2017). Confining this Court's Section 2 decisions to the facts (or, more precisely, to a specific "device or formula") thwarts the "liberal federal policy favoring arbitration

agreements." *See Moses H. Cone*, 460 U.S. at 24, *quoted in Epic Sys.*, 584 U.S. at 505. Far from helping to reverse judicial hostility to arbitration agreements, the Ninth Circuit's miserly interpretation of *Viking River* doubles-down on that hostility and "does not give due regard to the federal policy favoring arbitration." *See DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 58 (2015) (citation and internal quotations omitted). It ignores this Court's recent reminder that the FAA "does not save defenses that target arbitration either by name or by more subtle methods." *Epic Sys.*, 584 U.S. at 508 (quoting *Concepcion*, 563 U.S. at 344).

Properly understood, the relevant preemption inquiry under *Viking River* and *Concepcion* is not whether the instant case involves the precise "device" or "formula" at issue in those cases; instead, it is whether the instant device or formula "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Concepcion*, 563 U.S. at 344, *quoted in Lamps Plus*, 587 U.S. at 188 (citing *Epic Sys.*, 584 U.S. at 508). Just like the arbitration agreements at issue in *Epic Systems*, *Concepcion*, and *Viking River*, the arbitration agreement here called for binding individual arbitration, reflecting the commonsense principle that arbitration is a matter of consent and not coercion between the parties. *See* Pet. App. 56a–57a, 70a–71a. The *McGill* rule overrides that consent by "mandat[ing] reclassification of available relief from one individual to multiple (or in this case, millions of) people" and, in doing so, "impermissibly target[ing] one-on-one arbitration by restructuring the entire inquiry." *Swanson v. H&R Block, Inc.*, 475 F. Supp. 3d 967, 977–78 (W.D. Mo. 2020). Unsurprisingly, the only court to consider the FAA's preemption of *McGill*

outside California and the Ninth Circuit held that the FAA preempted *McGill*. *See id.*

The decision below offers a roadmap to evade this Court's precedents. "*Concepcion* teaches that we must be alert to new devices and formulas that would achieve much the same result today." *Epic Sys.*, 584 U.S. at 509 (citing *Concepcion*, 563 U.S. at 342). True to that admonition, the *Iskanian* rule (at issue in *Viking River*) and its kin the *McGill* rule (at issue in this case) were both announced by the California courts shortly after *Concepcion* declared that the FAA preempted California's *Discover Bank* rule. While *Viking River* largely reined in the *Iskanian* rule, the decision below risks turning its intellectual kin, the *McGill* rule, into the latest "device and formula" designed to circumvent Section 2 of the FAA and Congress's underlying goals. *See* Tamar Meshel, *The PAGA Saga*, 2021 Pepp. L. Rev. 36, 66–72 (explaining how the Ninth Circuit's antiwaiver jurisprudence does not survive *Epic Systems* and *Concepcion*). Parties can use the judicially-created doctrine to avoid the FAA's framework through intentionally constructing their complaints to include certain statutory claims under state law and then seek remedies that, under state law, are not waivable. *See* Gilles & Friedman, *supra*, at 469 (highlighting *Blair*'s "reasoning that a single claim underlay the requests for both injunctive and monetary relief and, under the severance clause, that claim in its entirety may be brought in court") (footnote and internal quotations omitted). "This is precisely the type of *ex-post* maneuvering *Concepcion* sought to avoid by overruling the *Discover Bank* rule." *Swanson*, 475 F. Supp. 3d at 978. Unless corrected, the decision below "would make it trivially easy for States to undermine

the [FAA]—indeed, to wholly defeat it." *See Kindred Nursing*, 581 U.S. at 255.

Second, the Ninth Circuit ignored this Court's prior decisions addressing the interplay between Section 2 preemption and general antiwaiver rules, specifically *Keating*, *Greenwood*, and *Epic Systems*. The Ninth Circuit recharacterized the public injunction as a freestanding statutory right. Contrary to the Ninth Circuit's characterization, a public injunction is a specific remedy that a party may seek (or not) in connection with claims under certain California consumer protection laws for which it is authorized. *McGill*, 393 P.3d at 87, 95. *McGill* declares prospective waivers of this remedy to be unenforceable. *Id.* at 97–98.

Contrary to the decision below, generally phrased state antiwaiver rules are not automatically immune from Section 2 preemption. This much is clear from this Court's opinion in *Keating*. 465 U.S. at 10–14. *Keating* concerned a Section 2 challenge to California's Franchise Investment Law. *Id.* at 3. That law provided, in relevant part, that "[a]ny condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with *any provision of this law* or any rule or order hereunder is void." *Id.* at 10 (emphasis added) (citing Cal. Corp. Code § 31512 (West 1977)). Even though this provision was phrased as a general antiwaiver provision, this Court held that Section 2 preempted its application to an arbitration clause contained in a franchise agreement. *Id.* at 17. The Court reasoned that, through Section 2, "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." *Id.* at 16.

Arbitration can proceed even where the antiwaiver provisions include language barring the waiver of "rights" or "protections" under a statutory scheme. This Court's prior decisions in *Greenwood* and *Epic Systems* illustrate the point. *Greenwood* involved the federal Credit Repair Organizations Act ("CROA"). 565 U.S. at 96. In relevant part, the CROA provided that "waiver of . . . any protection . . . or any right" under CROA "shall be treated as void" and "may not be enforced." 15 U.S.C. § 1679f(a). Despite the strong antiwaiver language, this Court held that the FAA still could apply to claims under the CROA. *Greenwood*, 565 U.S. at 104–05. Similarly, *Epic Systems* involved the interplay between federal labor protection laws and the FAA. 584 U.S. at 502. Following *Greenwood*, *Epic Systems* held that the Norris LaGuardia Act's prohibition against "unenforceable contracts that conflict with its policy of protecting workers' concerted activities for . . . mutual aid or protection" was not in conflict with the FAA. *Id.* at 516 (internal quotations omitted) (first quoting 29 U.S.C. §§ 102, 103, and then citing *Boys Mkts., Inc. v. Retail Clerks*, 398 U.S. 235, 252–53 (1970)).

While both *Greenwood* and *Epic Systems* involved antiwaiver provisions in federal statutes (as opposed to a state judicial doctrine), the unifying feature is that the strong federal policy favoring arbitration does not permit general antiwaiver provisions to displace Congress's requirement that courts rigorously "enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes and the rules under which that arbitration will be conducted." *Epic Sys.*, 584 U.S. at 506 (quoting *Italian Colors*, 570 U.S. at 233). If the FAA does not allow federal law implicitly to create a nonwaivable opportunity to vindicate

federal policies through aggregation mechanisms, a state judicial decision cannot create a nonwaivable opportunity to vindicate state policies.

Finally, even if some general state antiwaiver rules are the proper provenance of courts and can survive Section 2's preemptive sweep, the decision below still ignores the import of severability clauses. Severability clauses help to preserve the parties' intentions to arbitrate the remainder of their dispute even if some fraction of the dispute might not fall within the tribunal's jurisdiction. Such clauses ensure that parties retain some ability to "shape such [arbitration] agreements to their liking by specifying with whom they will arbitrate, the issues subject to arbitration, the rules by which they will arbitrate, and the arbitrators who will resolve their disputes." *Lamps Plus*, 587 U.S. at 184 (citing *Stolt-Nielsen*, 559 U.S. at 682). While the arbitration agreements at issue here contained just such a clause, Pet. App. 56a–57a, 70a–71a, the court below simply ignored it. Instead, the Ninth Circuit leapt straight from its unanalyzed reaffirmation of *Blair* to the conclusion that the lower court correctly declined to compel arbitration. That casual approach to party autonomy saps severability clauses of any value and flouts the judiciary's obligation to "enforce arbitration contracts according to their terms." *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 586 U.S. 63, 67 (2019) (citing *Rent-A-Center W. v. Jackson*, 561 U.S. 63, 67 (2010)). As Petitioner explains, it also creates a split with California's own courts over how to apply severability clauses where a court concludes that the FAA does not preempt the *McGill* rule. *See* Pet. 16–17.

III. Even if this Court's precedents were to allow multiple interpretations, the petition offers a prime opportunity to clear up any confusion.

This Court has frequently stated that if a prospective litigant can "vindicate *his or her* statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent functions." *Gilmer*, 500 U.S. at 28 (emphasis added) (internal quotation marks omitted) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)); *see also Italian Colors*, 570 U.S. at 236–37. Some language in *Viking River*—contrasting statutory claims and substantive rights—may have spawned uncertainty about the enforceability of arbitration agreements when a prospective litigant pursues multiple remedies, especially when a statute allows plaintiffs to bring suit in a representative capacity. *Compare Cedeno v. Sasson*, 100 F.4th 386, 406–08 (2d Cir. 2024) (holding that a representative action under Sections 409 and 502 of the Employee Retirement Security Act creates a non-waivable substantive right under *Viking River* and denying motion to compel arbitration), *with Coleman v. Optum*, No. 1:22-cv-05664 (ALC), 2023 WL 6390665, at *7–8 (S.D.N.Y. Oct. 1, 2023) (holding that a representative action under Section 2104(a)(5) of the Worker Adjustment and Retraining Notification Act does not create a non-waivable substantive right under *Viking River* and granting motion to compel arbitration).

The decision below illustrates how courts can exploit this uncertainty. The California Supreme Court in fashioning the *McGill* rule characterized public injunctions as "statutory rights." *McGill*, 393 P.3d at 87, 95. Of course, a public injunction simply repre-

sents a particular remedy brought in the litigant's representative capacity. A waiver of that remedy, just like a class waiver, does not inhibit the individual's ability to effectively vindicate *her own* substantive rights under the statute. *See generally Italian Colors*, 570 U.S. at 236–37 ("[An] individual suit that was considered adequate to assure 'effective vindication' of a federal right before adoption of class-action procedures did not suddenly become 'ineffective vindication' upon their adoption."). Public enforcement authorities remain available to vindicate any remedies on behalf of the general public. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 291–92 (2002). True to this point, the California Attorney General already has sought (and obtained) an injunction in this case. Pet. 4, 9, 23; Pet. App. 3a.

In contrast with the decision below, other courts, even before *Viking River*, refused to follow *McGill*'s attempt to circumvent the FAA. Some resolved the matter on the ground that the state statute at issue does not authorize a public injunction. *See, e.g.*, *Bodie v. Cricket Wireless, LLC*, 350 So. 3d 480, 481 (Fla. Dist. Ct. App. 2022) (LaRose, J., concurring). Others concluded that, even if state law could be read to authorize a public injunction, the requested injunction does not qualify as one because it benefits a limited class of individuals and accords "only ancillary benefits to the public." *Cunningham v. Lyft, Inc.*, 17 F.4th 244, 254 n.6 (1st Cir. 2019).

By holding that the FAA does not preempt a prospective waiver of a representative remedy, the Ninth Circuit has for the second time—first in *Blair* and now (even after *Viking River*) in the decision below—exploited the *McGill* Rule to reshape "traditional individualized arbitration by mandating

classwide arbitration procedures without the parties' consent." *Epic Sys.*, 584 U.S. at 509 (citation omitted); *see also Lamps Plus*, 587 U.S. at 187. Left unaddressed, the decision below licenses state courts to destroy arbitration agreements through the "device" of antiwaiver rules (governing public injunctions or other remedies), *Concepcion*, 563 U.S. at 343–44 (citations omitted), and "provide[s] a template for other states." Gilles & Friedman, *supra*, at 474; *see also* Cameron Molis, Note, *Curbing* Concepcion*: How States Can Ease the Strain of Predispute Arbitration to Counter Corporate Abusers*, 24 U. Pa. J.L. & Soc. Change 411, 422 (2021) ("[T]he carefully crafted legal arguments in . . . *Blair* . . . could spark a revolution in employee and consumer arbitration jurisprudence if adopted by courts nationwide."). As Petitioner explains, some states are already being urged to follow *McGill*'s lead. Pet. 19. While *Viking River* and its antecedents are most sensibly read to preclude this technique, any residual uncertainty over the reach of these precedents provides an additional reason to grant review and to clear up the confusion.

CONCLUSION

For the foregoing reasons, in addition to those offered by Petitioner, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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