No. 24-365

In The
Supreme Court of the United States

COMCAST CABLE COMMUNICATIONS, LLC,

Petitioner,

v.

CHARLES RAMSEY.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SIXTH APPELLATE DISTRICT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Respondent's brief in opposition seeks to elide what has now crystallized into an enduring federal-state conflict. The Ninth Circuit and the California courts of appeal disagree about whether the Federal Arbitration Act (FAA) preempts the broad *McGill* rule regularly and routinely applied by the California courts. Respondent's discussion of *Hodges v. Comcast Cable Communications, LLC* simply ignores the Ninth Circuit's conclusion that the rule of the California courts—extending *McGill*'s bar on waivers of public injunctive relief to run-of-the-mill consumer actions like this one—"is preempted by the FAA." The California courts of appeal, of course, have reached the opposite conclusion. Far from eliminating that conflict, recent Ninth Circuit decisions discussing the federal-court application of *McGill* do not purport to address the broader version applied in the California courts—let alone disturb *Hodges*' FAA preemption holding.

Respondent's additional suggestion that the question presented is a state-law dispute for future resolution by the California Supreme Court misses the mark. Like plaintiffs-respondents seeking to avoid this Court's review four years ago, Respondent tries to manufacture confusion regarding the application of *McGill* in California courts. But that delay tactic no longer holds up. FAA preemption is a federal issue. There is now no question about how California courts are applying *McGill* and thus no state-law obstacle to this Court's review of whether the FAA preempts that settled application. And time has proven that the

California Supreme Court will not address (let alone obviate) the conflict on that federal question.

There is thus a sharp and intractable divergence between how arbitration agreements are treated in the California courts and federal courts. Indeed, the facts of this case are nearly identical to the facts in *Hodges*—but the California Court of Appeal here found no FAA preemption. Given the undeniable prevalence of actions under California's broad consumer protection statutes, the Court should not put off review of this important and recurring issue any longer.

The Petition should be granted.

ARGUMENT

I. THE FAA PREEMPTS THE *MCGILL* RULE

Respondent does not dispute that to comply with the FAA, California must not discriminate (expressly or covertly) against arbitration or interfere with fundamental attributes of arbitration. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342 (2011). Those attributes include arbitration's "individualized and informal nature." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 508 (2018). Parties can customize "the rules by which they will arbitrate," *Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 184 (2019), and limit "*with whom* a party will arbitrate its disputes," *Concepcion*, 563 U.S. at 344.

Respondent also does not dispute (at least in any meaningful way) that *McGill* was crafted to thwart arbitration. The California Supreme Court purported to discover (in 2017) that an 1872 "maxim[] of

jurisprudence," stating "a law established for a public reason cannot be contravened by a private agreement," forecloses waivers of public injunctive relief. *McGill v. Citibank, N.A.*, 393 P.3d 85, 93 (Cal. 2017) (quoting CAL. CIV. CODE § 3513). "It's clear what's really going on." Br. of Washington Legal Foundation 9. Respondent notes that California courts have applied the maxim in other contexts. BIO 17. That is unsurprising given that it can mean "everything or nothing." Jeffrey S. Klein, *A Few Clauses to Help Lawyers Along*, L.A. TIMES (Sept. 14, 1989). [1] But such vagueness, combined with the maxim's anti-"private agreement" language, is not a license to gut the FAA's enforcement mandate. "[A] doctrine normally thought to be generally applicable" cannot be "applied in a fashion that disfavors arbitration." *Concepcion*, 563 U.S. at 341.

Yet that is exactly how *McGill* applies in the California courts. Although Respondent half-heartedly tries to muddy the waters about the scope of public injunctive relief, [2] he does not deny that the California courts of appeal uniformly apply a

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[1] *Available at* https://www.latimes.com/archives/la-xpm-1989-09-14-vw-147-story.html

[2] Respondent's purported distinction between injunctions that benefit "potential consumers" and injunctions that benefit a subset of "existing customers" is illusory. BIO 13-14. Under the reasoning of the California courts of appeal, any injunction that benefits existing customers—such as an injunction requiring Comcast to disclose discounts to promotional-term subscribers—can be characterized as benefiting potential customers as well. *See* Pet. App. 103a, 107a, 119a-120a (discussing the injunction Respondent seeks).

definition that reaches virtually any request to enjoin an allegedly unlawful business practice. *See* BIO 13-14. As the decision below states, those courts have extended *McGill* to requests "to enjoin future violations of California's consumer protection statutes," so long as the requested injunction is not expressly limited to the plaintiff or those similarly situated. Pet. App. 22a (quoting *Mejia v. DACM Inc.*, 268 Cal. Rptr. 3d 642, 651 (Ct. App. 2020)). That makes public injunctive relief the default in California state court consumer protection cases.

Respondent also does not dispute the result whenever a consumer-plaintiff does not expressly limit its remedy to the plaintiff: *McGill* renders unenforceable arbitration agreements stating that the arbitrator may not award non-party relief, *i.e.*, that the arbitrator may not enter a sweeping universal injunction without regard for the status of the actual parties. *See* Pet. 16-18. In other words, either (1) the parties' arbitration agreement is not enforced because that modest waiver (consistent with Article III) triggers *McGill*; or (2) the parties may not contract for that waiver of non-party relief in the first place. *See id.* (citing, *e.g.*, *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). That is an "unacceptable choice." *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 651 (2022).

Although Respondent emphasizes that the FAA preemption inquiry focuses on "procedural mechanism[s]," BIO 11, he does not explain how public injunctive relief can be awarded and enforced under "the sort of simplified procedures the FAA protects,"

Hodges v. Comcast Cable Communications, LLC, 21 F.4th 535, 548 (9th Cir. 2021). The Ninth Circuit—based on the California Supreme Court's own reasoning—held that California courts' broad conception of public injunctive relief is "fundamentally incompatible" with such streamlined arbitration procedures. *Id.* (citing *Broughton v. Cigna Healthplans of Cal.*, 988 P.2d 67, 74 (Cal. 1999) ("inherently incompatible")). That such relief would be awarded without the "procedural rigor and appellate review of the courts" only makes matters worse. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010); *see also Concepcion*, 563 U.S. at 350. Although "[p]arties *could* agree to arbitrate" claims for public injunctive relief, "States may not superimpose" the availability of that remedy. *Concepcion*, 563 U.S. at 351. Otherwise, arbitration would be "transform[ed] *** into the 'litigation it was meant to displace.'" *Viking River*, 596 U.S. at 651 (quoting *Epic*, 584 U.S. at 509).

Respondent's contrary argument boils down to two points, both based on *Viking River*. Neither has merit.

First, Respondent argues that the FAA does not "require courts to enforce contractual waivers of substantive rights and remedies." BIO 11 (quoting *Viking River*, 596 U.S. at 653). To be sure, the FAA does not "mandate the enforcement of [such] waivers *** as a categorical rule." *Viking River*, 596 U.S. at 657. But the FAA does not tolerate *anti*-waiver regimes as a categorical rule, either. Even Respondent acknowledges that the FAA preempts any rule "at

odds with arbitration's basic form." BIO 11 (quoting *Viking River*, 596 U.S. at 656). Creative "devices and formulas" cannot "interfere with *** arbitration's fundamental attributes" merely because they are styled as anti-waiver rules. *See Epic*, 584 U.S. at 508-509.

In any event, the *McGill* rule applied in California courts is far from a traditional anti-waiver rule. Most obviously, consumer-plaintiffs can trigger it merely by requesting an injunction. Furthermore, a waiver of public injunctive relief does not require the *plaintiff* (or even an identifiable principal) to give up any substantive right or remedy. The public-injunction waiver in the arbitration agreement "merely limits arbitration to the two contracting parties," and does not "eliminate *those parties*' right to pursue *their* statutory remedy." *American Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013) (emphases added). The plaintiff can still raise any claim and seek relief on the plaintiff's own behalf—just not on behalf of "the general public." *Broughton*, 988 P.2d at 78.

Second, Respondent argues that parties to an arbitration agreement can "choose whether to arbitrate a public-injunction claim, litigate it, or leave it stayed in court while other claims or issues are arbitrated." BIO 5. But that solution from *Viking River* does not work in this context. A public injunction is a remedy, not a claim. Respondent's cumbersome proposal potentially entails duplicative or conflicting adjudication of identical claims followed by remedial proceedings in a different forum. *See* Br.

of Retail Litigation Center Inc. 5, 12 (flagging problem of successive suits with no claim preclusion). That would, "at the least, hinder speedy resolution of the controversy." *Preston v. Ferrer*, 552 U.S. 346, 358 (2008).

Regardless, parties lose their ability to bargain for *private* dispute resolution in any meaningful sense if they cannot agree to waive requests for public injunctions. The California Supreme Court has characterized a public injunction as seeking "*not* to resolve a *private* dispute, but to remedy a *public* wrong." *Broughton*, 988 P.2d at 76 (emphases added). That is not what "the traditional arbitration process" is for. *Epic*, 584 U.S. at 508.

Respondent's bifurcation argument would also undercut *Concepcion*. By Respondent's logic, a state may forbid class action waivers in arbitration agreements—contrary to *Concepcion*—so long as the state allows the parties to bifurcate named plaintiffs' claims (in arbitration) and class claims (in court). *Concepcion* did not contemplate such an end-run.

Like a class action, a claim for public injunctive relief entails procedures "at odds with arbitration's basic form." *Viking River*, 596 U.S. at 656; *see* pp. 5-6, *supra*. And, like a class action, a claim for public injunctive relief does "not resemble any of the traditional types of representative actions that [*Viking River*] references," namely "single-principal representative capacity suits." *Cedeno v. Sasson*, 100 F.4th 386, 413 (2d Cir. 2024) (Menashi, J., dissenting); *see also Viking River*, 596 U.S. at 657. *McGill* itself stated that public injunctive relief, while not intended

to benefit the plaintiff, also "does *not* constitute the pursuit of representative claims" at all. 393 P.3d at 92-93 (emphasis added) (alteration and internal quotation marks omitted).

Finally, *McGill* is not a ground for the "revocation of any contract." 9 U.S.C. § 2. Respondent insists that the California Supreme Court labeled *McGill* a ground for "revocation" by using that word in its opinion. BIO 20. But the court clearly conflated whether a contract is revocable with whether it is "unenforceable." *E.g.*, 393 P.3d at 94 (repeatedly stating that a waiver of the right to seek public injunctive relief "is invalid and unenforceable under California law"). Under the plain text of the FAA, "'grounds *** for the revocation' preserved in § 2 would mean grounds related to the making of the agreement." *Concepcion*, 563 U.S. at 355 (Thomas, J., concurring) (ellipsis in original). A rule that a "waiver[]" is "illegal," by contrast, "is a public-policy defense." *Epic*, 584 U.S. at 525-526 (Thomas, J., concurring). The California courts' application of *McGill* is preempted for that additional and independent reason.

II. REVIEW IS NECESSARY TO RESOLVE AN ENTRENCHED FEDERAL - STATE CONFLICT

Respondent's claim that there is a "lower-court consensus that the FAA does not preempt the *McGill* rule" (BIO 2) is blatantly misleading. In 2021, the Ninth Circuit both (i) declined to read *McGill* to cover virtually "*any* injunction against future illegal conduct," and (ii) rejected the "broader reading" applied by the California courts of appeal "for the

independent and alternative reason" that the "rule is preempted by the FAA." *Hodges*, 21 F.4th at 547. The Ninth Circuit's more recent decisions stating that *McGill* is not preempted address the federal application of *McGill* under the first holding. Those decisions are entirely consistent with the second holding that the California courts' application of *McGill is* preempted. *Contra* BIO 8. Respondent's answer is to pretend the second holding does not exist.

If anything, the federal-state conflict has grown starker with time. When *Hodges* was decided, only two California Court of Appeal decisions had applied the "broader" version of *McGill* that the Ninth Circuit held is preempted. *Hodges*, 21 F.4th at 547 (referring to the broader, "preempted" version as the "*Mejia-Maldonado* rule"); *see Mejia*, 268 Cal. Rptr. 3d 642; *Maldonado v. Fast Auto Loans, Inc.*, 275 Cal. Rptr. 3d 82 (Ct. App. 2021). Since then, California Court of Appeal decisions applying the broad rule, adopting the reasoning of *Mejia* and *Maldonado*, and rejecting *Hodges* have piled up. *See* Pet. App. 17a, 21a; *Vaughn v. Tesla, Inc.*, 303 Cal. Rptr. 3d 457, 475 n.16 (Ct. App. 2023). In fact, the California Court of Appeal published another one after Comcast filed its petition for certiorari. *See Kramer v. Coinbase, Inc.*, 326 Cal. Rptr. 3d 217, 222 (Ct. App. 2024) (adopting "the reasoning in *Mejia*, *Maldonado*, and *Ramsey*").

Respondent cannot deny that, as a result of that conflict, federal and state courts are treating arbitration agreements differently. Just imagine if this suit had been brought in federal court like *Hodges* was. *Hodges* concerned a materially identical Comcast

arbitration agreement, claims that Comcast failed to provide subscribers with information in violation of the UCL (among other claims), and a corresponding request for injunctive relief. 21 F.4th at 538-539 & n.1. Such an injunction would entail procedural complexity, because evaluating compliance would require the "examination of which individualized disclosures have or have not been made." *Id.* at 549. The same is true here. Because Comcast's pricing and discounts can be individualized at the subscriber level, compliance with disclosure requirements would have to be evaluated at that level as well. Pet. App. 102a (citing Respondent's own allegations regarding Comcast's "*individualized* promotional rates" (emphasis added)); *contra* BIO 15. Under *Hodges*, a federal court could not have denied Comcast's petition to compel arbitration because the FAA would preempt that result.

To be clear, that manifest conflict concerns a *federal* FAA preemption issue. There is no dispute regarding the now long-prevailing application of *McGill* in the California courts. This case is thus *not* about "the proper application of *McGill*" as a matter of state law, BIO 12, but rather about the proper application *of the FAA* to a rule being applied in the California courts. That purely federal question accepts the prevailing state-law predicate. Comcast has emphasized the California Supreme Court's refusal to take up the question not because Comcast seeks "clarification" about any "state-law issues." BIO 15. The point is that the federal FAA preemption conflict will persist until this Court resolves it. Pet. 29.

III. REVIEW IS WARRANTED IN THIS CASE

As discussed, the brief in opposition largely repeats the same objections lodged over four years ago by other plaintiffs-respondents seeking to avoid this Court's review. *See* Pet. 27-29. But the legal landscape has changed such that the scope of *McGill* is settled as a practical matter in the California courts. *Id.* The California Supreme Court cannot shield that rule from FAA preemption and forestall this Court's review by denying review itself in case after case.

Nor does this Court's recent denial of certiorari in *RAC Acceptance East LLC v. McBurnie*, No. 23-1307, weigh against a grant in this case. That federal case concerned the federal application of *McGill* (as rejected by the California courts), and thus (unlike here) did not implicate any FAA preemption conflict. Threshold standing, mootness, and waiver issues also militated against certiorari there. *See* Pet. ii, *McBurnie*, No. 23-1307 (U.S. June 12, 2024) (arguing that the plaintiff-respondent lacked Article III standing); Br. in Opp. 8, 23, *McBurnie*, No. 23-1307 (U.S. Aug. 19, 2024) (noting the district court's holding that the petitioner waived its right to arbitrate and arguing that "fact-intensive questions, whether characterized as challenges to mootness and standing or otherwise, should not be decided in the first instance at the certiorari review stage"). By contrast, Respondent has identified no case-specific vehicle issues. This is thus the ideal case to examine the California courts' latest attempt to circumvent the FAA.

Finally, the prevalence of consumer actions in California exacerbates the federal-state conflict discussed above. Without support, Respondent claims there has been no "disruption or harm" to consumer arbitration in California. BIO 23. But as *amici* explain, "companies like Comcast have no recourse to arrest the flood of public injunctive relief suits." Br. of Retail Litigation Center 11; *see id.* at 10 ("[P]laintiffs' lawyers routinely wield *McGill* as a tactic to undermine binding arbitration agreements."); *see also* Br. of Washington Legal Foundation 14 ("[A]s long as the *McGill* rule remains in place, this Court's FAA case law doesn't protect California litigants."). That is unsurprising because, under the current regime, virtually any state court consumer plaintiff can evade arbitration by requesting an injunction. The Court should take this opportunity to close the loophole that California (again) has tried to open in the FAA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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