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

RESPONDENT'S BRIEF IN OPPOSITION

RYAN H. WU
CAPSTONE LAW APC
1875 Century Park East
Suite 1000
Los Angeles, CA 90067
(310) 556-4811

NICOLAS SANSONE
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
nsansone@citizen.org

Attorneys for Respondent

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QUESTION PRESENTED

Whether the lower courts erred in reaffirming the settled holding that the Federal Arbitration Act does not preempt a state-law rule barring enforcement of a private agreement that purports to waive a party's statutory right to seek public injunctive relief.

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INTRODUCTION

California's consumer-protection statutes afford individuals who have been injured by unfair or deceptive business practices the right to seek an injunction against those practices where the benefit of the injunction will redound primarily to the general public and only incidentally to the plaintiff. In *McGill v. Citibank, N.A.*, 393 P.3d 85 (Cal. 2017), the California Supreme Court held that a provision of the state's civil code bars enforcement of private agreements that purport to waive a party's right to seek such relief in any forum. The court further held that the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16, does not preempt this generally applicable rule because the FAA does not require enforcement of wholesale waivers of substantive rights.

Respondent Charles Ramsey subscribes to a cable and internet package offered by Petitioner Comcast Cable Communications, LLC (Comcast). Over the years, he noticed that Comcast offers discounted promotional prices to attract new subscribers but then raises those prices—sometimes by as much as 100 percent—at the end of the promotional period, even though lower, unadvertised rates are available if subscribers are savvy enough to ask for them. Mr. Ramsey filed suit against Comcast in state court, seeking an injunction that will benefit the public by requiring Comcast to comply with its state-law obligation to be transparent about its pricing. Comcast petitioned to compel arbitration, invoking an agreement that required arbitration of all claims and barred the arbitrator from awarding public injunctive relief. Applying *McGill*, the trial court denied the petition to compel arbitration. Comcast appealed, and

the Court of Appeal affirmed, holding that the waiver of claims for a public injunction was unenforceable. And because the parties had not agreed to arbitrate those claims, the court held, the trial court properly denied Comcast's petition to compel arbitration.

The Court of Appeal's decision does not merit review. Every court that has considered the issue agrees that the FAA does not preempt *McGill*'s nonwaiver rule, and this Court has accordingly denied review of that issue on several prior occasions. Review remains unwarranted.

Indeed, this Court's decision in *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022), has since reinforced the correctness of the lower-court consensus that the FAA does not preempt the *McGill* rule. *Viking River* reaffirms the longstanding principle that "the FAA does not require courts to enforce contractual waivers of substantive rights and remedies," *id.* at 653, and the conclusion that the FAA does not preempt California's bar on enforcing waivers of the substantive right to pursue public injunctive relief follows directly from that principle. Comcast's contrary arguments misread *McGill* and rehash theories that this Court rejected in *Viking River*.

Although Comcast emphasizes a 2021 Ninth Circuit opinion that disagreed with two intermediate state-court opinions on the scope of the "public injunctive relief" that is subject to California's *McGill* rule, that issue of state law is not one for this Court. In any event, the meaning of "public injunctive relief" is not the question presented in Comcast's petition.

Finally, Comcast's assertions that the preemption issue urgently requires this Court's consideration ring

hollow. *McGill* was decided seven years ago, the Ninth Circuit issued the first of its decisions agreeing that the FAA does not preempt the *McGill* rule five years ago, and this Court declined review of the issue soon after. In the years since, it has been clear that companies cannot require waiver of claims for public injunctive relief but may require that those claims (or portions of those claims) be arbitrated. Comcast does not identify any practical problems that have arisen from this settled state of affairs. And its assertion that *McGill* has effectively eliminated arbitration in California consumer cases is patently false.

This Court should deny the petition.

STATEMENT

Legal Background

1. California's Consumer Legal Remedies Act (CLRA), Cal. Civ. Code §§ 1750 *et seq.*, and Unfair Competition Law (UCL), Cal. Bus. & Prof. Code §§ 17200 *et seq.*, create substantive rights and remedies to protect California consumers from unfair and deceptive business practices. Among the rights conferred on an injured consumer with standing to sue is an individual entitlement to seek an injunction against unlawful business practices that harm the public. *See McGill v. Citibank, N.A.*, 393 P.3d 85, 89–90 (Cal. 2017). Unlike private injunctive relief, which is chiefly intended to benefit identifiable parties, public injunctive relief is intended primarily to benefit the public at large. *Id.*

Although a plaintiff seeking a public injunction aims to promote the public good, a public-injunction suit need not take the form of a class action or a representative action. *See id.* at 93 (explaining that

most suits for public injunctive relief cannot proceed as a class action because the general public is not a cognizable class). Rather, many suits for public injunctive relief, including this one, are brought by a single plaintiff who has been injured by an unlawful business practice and who wants that practice to end.

2. In *McGill*, the California Supreme Court held that an agreement to waive the "right to seek public injunctive relief in any forum" is unenforceable under state law. 393 P.3d at 88. The court observed that the CLRA contains an express nonwaiver provision, *id.* at 89 (citing Cal. Civ. Code § 1751), and that a separate provision of California's civil code provides that "a law established for a public reason cannot be contravened by a private agreement," *id.* at 93 (quoting Cal. Civ. Code § 3513). Because public injunctive relief under the CLRA and UCL "[b]y definition" serves the public good, the court held that a pre-dispute contractual provision that "purports to waive [a party's] right to request in any forum such public injunctive relief … is invalid and unenforceable under California law." *Id.* at 94.

The court in *McGill* also held that this state-law contract rule is not preempted by the FAA, *id.* at 94–97, which states 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. As the court explained, the statutory bar on the waiver of rights "established for a public reason," such as the right to seek public injunctive relief, "*is* a generally applicable contract defense, i.e., it is a ground under California law for revoking any contract." 393 P.3d at 94 (first quoting Cal. Civ. Code § 3513). The court rejected the

argument that California's "antiwaiver rule … interferes with the fundamental attributes of arbitration." *Id.* at 96. Although the FAA preempts state laws that prohibit waiver of "*procedural* device[s]," such as class-action proceedings, that are inconsistent with arbitration, the court explained that the right to pursue a public injunction "is a *substantive statutory remedy* that the Legislature, through the UCL [and] the CLRA … has made available to those … who meet the statutory standing requirements for filing a private action." *Id.* at 97 (citation omitted). Further, the court noted, parties are free to choose whether to arbitrate a public-injunction claim, litigate it, or leave it stayed in court while other claims or issues are arbitrated. *Id.* What an arbitration agreement *cannot* do, the court emphasized, is bar a party from bringing the claim "*in any forum*." *Id.* at 90.

3. Agreeing with the California Supreme Court, the Ninth Circuit in 2019 held that the FAA does not preempt the *McGill* rule. *See Blair v. Rent-A-Center, Inc.*, 928 F.3d 819, 822 (9th Cir. 2019). Shortly thereafter, this Court denied two petitions seeking review of the preemption issue. *See Comcast Corp. v. Tillage*, 140 S. Ct. 2827 (2020) (mem.); *AT&T Mobility LLC v. McArdle*, 140 S. Ct. 2827 (2020) (mem.).

Factual and Procedural Background

1. Charles Ramsey began subscribing to one of Comcast's cable and internet subscription services in 2009. Pet. App. 2a. At his enrollment, he received a discounted "promotional rate" that Comcast told him would expire after one year. *Id.* at 2a–3a. Near the end of the promotional period, Mr. Ramsey decided that Comcast's regular rate was too expensive, so he called Comcast to discuss cancelling his subscription. *Id.* at

3a. After a period of back-and-forth, Comcast offered Mr. Ramsey a "new" one-year promotional rate that was comparable to the prior one. *Id.* Since then, Mr. Ramsey has contacted Comcast every year to inquire about discounted rates for the upcoming year. *Id.* Comcast invariably responds by offering another promotional package, but Comcast never advertises these promotions or offers them to Mr. Ramsey until he contacts Comcast. *Id.* at 3a–4a.

Mr. Ramsey sued Comcast in California Superior Court in 2021. *Id.* at 4a. His complaint alleges that Comcast's failure to make its pricing structures transparent violates the CLRA and the UCL. *Id.* at 4a–5a. As relief, Mr. Ramsey seeks an injunction that would require Comcast to stop "issuing secret discounts" and instead to disclose its "pricing models, reasons for changes in pricing, and the availability of discounts," among other things. *Id.* Mr. Ramsey does not seek monetary damages. *Id.* at 6a.

Comcast petitioned to compel arbitration based on a Subscriber Agreement that required "individual arbitration" of any dispute between the parties. *Id.* at 6a–7a. Under the terms of the Agreement, however, the remedies available in arbitration were limited: The arbitrator would be permitted to "award injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that individual party's claim." *Id.* at 7a.

The trial court denied Comcast's petition. *Id.* at 41a. The court held that the Agreement's limitation on the remedies available in arbitration—coupled with the requirement to arbitrate—violated *McGill* by leaving Mr. Ramsey without a forum in which to bring

his claim for public injunctive relief. *Id.* at 34a–35a. In response to Comcast's argument that Mr. Ramsey sought "*private* injunctive relief that would benefit a subset of existing subscribers only," *id.* at 34a (emphasis added), the court explained that California courts read a complaint to seek nonwaivable public relief if it alleges that the defendant's misconduct is "ongoing and injurious to the public and consumers, and w[ill] continue unless the court t[akes] action to enjoin said practices," *id.* at 36a–37a. Accordingly, here, where Mr. Ramsey sought to enjoin sales practices that misled the public, his state-law claims were nonwaivable. *Id.* at 38a–39a. And because the parties had not agreed to arbitrate those claims, the court declined to compel arbitration. *Id.* at 41a.

2. The California Court of Appeal affirmed. Pet. App. 2a. Like the trial court, it held that Mr. Ramsey sought "injunctive relief that 'has the primary purpose and effect of prohibiting unlawful acts that threaten future injury to the general public.'" *Id.* at 12a (quoting *McGill*, 393 P.3d at 87). Mr. Ramsey, the Court of Appeal explained, sought to "prohibit a business from engaging in unfair or deceptive practices and marketing, require[] it to provide enhanced pricing transparency, and require[] it to comply with … consumer protection laws." *Id.*

In so holding, the court rejected Comcast's effort to recast Mr. Ramsey's claim as benefiting only Comcast subscribers who now have a promotional rate and must soon decide whether to renew. *Id.* at 13a. The Court of Appeal observed that the injunction that Mr. Ramsey sought "would benefit both existing Comcast subscribers and any member of the public who considers signing up with Comcast" by creating

"enhanced transparency." *Id.* at 14a. This transparency, the court continued, would ensure that the public had sufficient information to "make informed decisions from the outset about whether to subscribe to Comcast, [and] for how long, and to compare Comcast prices against those of its competitors." *Id.*

Finally, the Court of Appeal noted Comcast's argument that "the FAA preempts *McGill*." *Id.* at 23a. Explaining that it was bound by the California Supreme Court's holding in *McGill*, the court rejected Comcast's argument. *Id.*

Comcast then petitioned the California Supreme Court for review. *Id.* at 94a–131a. That court denied the petition. *Id.* at 42a.

REASONS FOR DENYING THE WRIT

I. There is no split of authority on the question presented.

A. Federal and state appellate courts agree that the FAA does not preempt the *McGill* rule.

Comcast asks this Court to decide "[w]hether the FAA preempts California's *McGill* rule." Pet. i. There is no division of authority on that question. A unanimous California Supreme Court answered the question "no" in *McGill* itself. *See* 393 P.3d at 94–97. The Ninth Circuit later agreed and has consistently reaffirmed its agreement. *See Blair*, 928 F.3d at 822; *Fernandez v. Bridgecrest Credit Co.*, 2022 WL 898593, at *1 (9th Cir. Mar. 28, 2022) (mem.) ("[T]he issue of whether the FAA preempts the *McGill* rule is settled."); *McBurnie v. RAC Acceptance E., LLC*, 95 F.4th 1188, 1193 (9th Cir. 2024). No court has held otherwise.

These courts' agreement on this issue derives from the principle that the FAA can preempt procedural rights regarding *how* a claim is adjudicated but does not require enforcement of a waiver of the underlying claim. *See McGill*, 393 P.3d at 97; *Blair*, 928 F.3d at 829. Other courts of appeals likewise agree on this principle. As the Second Circuit put it, the "core concern of the FAA is protecting the enforceability of agreements to vindicate substantive rights through an arbitral *forum* using arbitral *procedures*," but "the FAA does not purport to reach agreements to waive *substantive rights and remedies*." *Cedeno v. Sasson*, 100 F.4th 386, 395 (2d Cir. 2024), *cert. denied sub nom. Argent Tr. Co. v. Cedeno*, — S. Ct. —, 2024 WL 4655015 (Nov. 4, 2024); *see Parker v. Tenneco, Inc.*, 114 F.4th 786, 792–93 (6th Cir. 2024) (making a similar point), *petition for cert. filed*, No. 24-559 (Nov. 19, 2024); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1371 (11th Cir. 2005) ("[A] party agreeing to arbitration does not waive any substantive statutory rights; rather, the party simply agrees to submit those rights to an arbitral forum.").

The lower courts' consensus follows directly from this Court's consistent recognition of the same point. Time and again, this Court has emphasized that arbitration involves a choice of forum, not a waiver of substantive claims: "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *accord EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295 n.10 (2002); *Gilmer v. Interstate/Johnson Lane Corp.*, 500

U.S. 20, 26 (1991); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480–81 (1989); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 229–30 (1987). Indeed, this Court has indicated that it "would have little hesitation" in determining that an arbitration agreement that "operated … as a prospective waiver of a party's right to pursue statutory remedies" would be "against public policy." *Mitsubishi*, 473 U.S. at 637 n.19. Not surprisingly, then, this Court has denied petitions seeking review of Comcast's question presented several times *See Fast Auto Loans, Inc. v. Maldonado*, 142 S. Ct. 708 (2021) (mem.); *Tillage*, 140 S. Ct. 2827; *McArdle*, 140 S. Ct. 2827.

B. *Viking River* confirms that the FAA does not require enforcement of waivers of substantive rights.

This Court's recent decision in *Viking River* strongly reinforces the reasoning of the California Supreme Court in *McGill* and the Ninth Circuit in *Blair*, and it underscores the absence of any reason for review in this case. Indeed, as the Ninth Circuit has noted, "[f]ar from overruling [the] holding in *Blair*, *Viking River* reaffirms it." *McBurnie*, 95 F.4th at 1193.

In *Viking River*, the Court held that the FAA does not preempt California's bar on the enforcement of pre-dispute waivers of claims under the state's Private Attorneys General Act of 2004 (PAGA). 596 U.S. at 653. Under PAGA, a plaintiff who has been injured by an employer's Labor Code violation may sue the employer on the state's behalf to seek civil penalties not only for that "individual" violation, but also for "non-individual" Labor Code violations that the employer has committed against other, similar

workers. *Id.* at 644–45. The employer in *Viking River* argued that the right to bring non-individual claims was inconsistent with arbitration's bilateral nature and that the FAA therefore preempted a rule of California contract law under which that right was nonwaivable. *Id.* at 656. This Court rejected that argument. *Id.*

As the Court held, the FAA "does not require courts to enforce contractual waivers of substantive rights and remedies." *Id.* at 653. Rather, the FAA preempts only those state-law rules that "tak[e] the individualized and informal *procedures* characteristic of traditional arbitration off the table." *Id.* at 656. And PAGA, the Court held, creates no "procedural mechanism at odds with arbitration's basic form." *Id.* Unlike class-action proceedings, which require an adjudicator to resolve the individual claims of multiple parties (including absent parties) based on a representative plaintiff's claims, *see id.* at 654–55, PAGA actions—in which the state has authorized a plaintiff to raise multiple claims on its behalf—are the sort of "single-agent, single-principal representative suits" that this Court has not found "inconsistent [with] the norm of bilateral arbitration," *id.* at 657.

The California Supreme Court's reasoning in *McGill* mirrors this Court's reasoning in *Viking River*. In holding that the FAA does not preempt the state-law rule that the right to seek public injunctive relief is nonwaivable, *McGill* noted this Court's recognition that an arbitration agreement does not "forgo [a party's] substantive rights" but "only submits to their resolution in an arbitral, rather than a judicial, forum." *McGill*, 393 P.3d at 95 (quoting *Mitsubishi*, 473 U.S. at 628). Like *Viking River*, *McGill* draws a

sharp "contrast" between "the right *to pursue statutory remedies*," which is unaffected by an agreement to arbitrate, and "a *procedural path* to vindicating the statutory claim," which parties are free to alter by enforceable private agreement. *Id.* at 97. The nonwaiver rule in *McGill*, like the nonwaiver rule addressed in *Viking River*, safeguards "a *substantive statutory remedy* that the Legislature … made available" and, likewise, is not preempted. *Id.*

II. Comcast's arguments about the scope of "public injunctive relief" under the *McGill* rule concern a state-law issue.

The Ninth Circuit has described Comcast's question presented as "settled," *Fernandez*, 2022 WL 898593, at *1, and as recently as March 2024 "reaffirm[ed]" that "the *McGill* rule is not preempted by the FAA," *McBurnie*, 95 F.4th at 1193. Comcast contends, however, that the Ninth Circuit disagrees with "*McGill*'s prevailing application in the California courts." Pet. 12; *see id.* at 23. That contention confuses debate over the proper application of *McGill* to particular facts not presented here with disagreement on a principle of law. More importantly, Comcast's assertion fundamentally concerns an issue of *state* law that is distinct from the question of preemption that Comcast's petition seeks to present and that this Court cannot definitively settle in any event.

Comcast's argument is based solely on the Ninth Circuit's 2021 decision in *Hodges v. Comcast Cable Communications, LLC*, 21 F.4th 535 (9th Cir. 2021). Pet. 23–24. In that case, the court reiterated its previous holding that "the FAA does not preempt the *McGill* rule," and it "reject[ed] Comcast's contrary arguments." 21 F.4th at 539–40 (first quoting *Blair*,

928 F.3d at 830–31). The court then considered the meaning of "public injunctive relief" under California law, focusing on California Civil Code § 3513 and the California Supreme Court's decision in *McGill*. *See id.* at 541–42. Based on its state-law review, the court concluded that "public injunctive relief within the meaning of *McGill* is limited to forward-looking injunctions that seek to prevent future violations of law for the benefit of the general public as a whole." *Id.* at 542. By contrast, the court concluded that injunctive relief sought "for the benefit of a discrete class of persons" is not "public injunctive relief" and *can* be waived under California law. *Id.* at 543.

In this regard, *Hodges* is addressing state law, and its reading of state law is consistent with state-law cases, including *McGill*, on which it relies. Thus, both earlier and subsequent decisions of state and federal courts have applied the *McGill* rule in cases like this one, where a requested injunction would benefit the public by enjoining unlawful practices directed at potential consumers. *See McGill*, 393 P.3d at 87–88 (seeking to enjoin Citibank's allegedly illegal and deceptive marketing practices); *Kramer v. Coinbase, Inc.*, 105 Cal. App. 5th 741, 749–50 (2024) (seeking to enjoin Coinbase's deceptive marketing practices); *Blair*, 928 F.3d at 823 (seeking to enjoin Rent-A-Center from structuring its rent-to-own pricing in violation of state law); *McBurnie*, 95 F.4th at 1190 (seeking to enjoin a company from charging an allegedly unlawful $45 processing fee for new rent-to-own agreements).

Hodges, by contrast, presented a different factual scenario: The court found that the requested injunctive relief, which targeted Comcast's data-

collection practices, was specific to Comcast's existing cable subscribers. 21 F.4th at 548–49. Drawing a contrast with an injunction that would require a defendant "to make [certain] public disclosures," the court further explained that the injunction sought in *Hodges* "would require either consideration of which particular consents each subscriber has or has not given or examination of which individualized disclosures have or have not been made." *Id.* at 549.

As Comcast emphasizes, Pet. 23–24, *Hodges* voices disagreement with two state intermediate court decisions as to the correct reading "of California law." 21 F.4th at 544 (discussing *Mejia v. DACM Inc.*, 54 Cal. App. 5th 691 (2020), and *Maldonado v. Fast Auto Loans, Inc.*, 60 Cal. App. 5th 710 (2021), *cert. denied* 142 S. Ct. 708). Viewing those cases as involving claims for relief that would benefit only a delimited class of existing customers, *Hodges* disagreed with the characterization of the requested relief in those cases as "public injunctive relief." *Id.* at 544–47. To begin with, the *Hodges* majority seems to have misunderstood the nature of the relief sought in *Mejia* and *Maldonado*, which was directed at allegedly unlawful and ongoing business practices that threatened the general public, not a class of existing customers. *See Mejia*, 54 Cal. App. 5th at 695–96 (seeking injunction to require motorcycle dealer to make certain disclosures to future customers); *Maldonado*, 60 Cal. App. 5th at 714–15 (seeking injunction against entering into allegedly unconscionable loan agreements).

More importantly, *Hodges*' disagreement with *Mejia* and *Maldonado* is primarily a disagreement as to the application of the law to the particular facts of

those cases. *See* S. Ct. R. 10 (noting that such disagreements "rarely" merit review). To the extent that *Hodges* suggests some disagreement touching on an issue of law, that issue concerns the meaning of the term "public injunctive relief" *under state law*—a question properly left to the state supreme court to decide in an appropriate case. *See* 28 U.S.C. § 1257(a) (limiting certiorari review of state-court judgments to issues of federal law). Noting that the California Supreme Court denied review in *Mejia* and *Maldonado*, Comcast suggests that the California Supreme Court will never provide the clarification that Comcast seeks. *See* Pet. 24. That suggestion is unsupported and, regardless, this Court does not have jurisdiction to resolve state-law issues, even when state supreme courts decline to address them.

Finally, this case does not implicate Comcast's claimed dispute over the scope of California law in the first place. The Court of Appeal in this case specifically held that the requested injunction—unlike the injunction at issue in *Hodges*—"would benefit not only those who subscribe to Comcast …, but any member of the public considering such a subscription." Pet. App. 21a–22a. Although Comcast vaguely suggests that implementing an injunction in this case would require some sort of individualized inquiry, Pet. 19, a requirement that Comcast openly communicate its prices is exactly the sort of "public disclosure[]" that *Hodges* held is a form of public injunctive relief under state law. 21 F.4th at 549. And unlike the relief requested in *Hodges*, which the Ninth Circuit believed would entail an intolerable "level of procedural complexity" by requiring "evaluation of the individual claims of numerous non-parties," *id.* at 547,

an order requiring Comcast to disclose its discounts in the future would not involve the consideration of any claims other than Mr. Ramsey's own.

III. Comcast's assertion that the lower courts have erred in holding that the FAA does not preempt the *McGill* rule is incorrect.

Absent a relevant disagreement among the lower courts over the question presented, Comcast devotes the bulk of its petition to rearguing the merits of the preemption issue resolved by the California Supreme Court in *McGill* and the Ninth Circuit in *Blair* and subsequent cases. Comcast's contention that the lower courts have incorrectly applied settled principles in rejecting its preemption arguments does not warrant review. *See* S. Ct. R. 10. In any event, Comcast's arguments are incorrect.

A. *McGill* neither targets nor interferes with the attributes of arbitration.

1. As this Court reaffirmed in *Viking River*, "the FAA does not require courts to enforce contractual waivers of substantive rights and remedies." 596 U.S. at 653. *McGill*'s preemption holding, and the outcome below, follow directly from this principle.

Comcast argues that *McGill*'s nonwaiver rule is preempted because it "expressly targets" arbitration. Pet. 13. Comcast's contention in this respect is apparently based on the fact that *McGill* states that "[a] provision in a predispute arbitration agreement" cannot validly waive the right to pursue public injunctive relief. *Id.* (quoting *McGill*, 393 P.3d at 87). *McGill*, though, spoke in terms of arbitration agreements because the unlawful waiver in that case was part of an arbitration agreement. *McGill* clearly

did not mean that *only* arbitration agreements are subject to the nonwaiver rule. Indeed, *McGill* said exactly the opposite. *See McGill*, 393 P.3d at 94 ("[A] provision in *any* contract—even a contract that has no arbitration provision—that purports to waive, in all fora, the statutory right to seek public injunctive relief … is invalid and unenforceable under California law.").

Comcast's claim that *McGill*'s nonwaiver rule "has been applied *only* to arbitration agreements" rests on the same flawed reasoning. Pet. 13. Because Comcast narrowly defines *McGill*'s "rule" in terms of arbitration, of course that rule—as Comcast defines it—has not been applied outside the arbitration context. The state-law contract defense that *McGill* actually applied, though, was that "a law established for a public reason cannot be contravened by a private agreement." 393 P.3d at 94 (quoting Cal. Civ. Code § 3513). And California has for more than a century applied this generally applicable prohibition "to invalidate waivers unrelated to arbitration." *Blair*, 928 F.3d at 827–28 (citing cases decided from 1896 to 2002). Indeed, Comcast admits that this state-law contract defense "had not been applied to prevent the enforcement of an arbitration agreement for nearly a century-and-a-half" prior to 2014. Pet. 14 & 15 n.2. That history only underscores that *McGill*, far from *targeting* arbitration, applied longstanding state-law contract principles to the case before it.

Finally, Comcast turns to "*McGill*'s history" to suggest that its nonwaiver rule was "invented to thwart arbitration." *Id.* at 14. Prior to *McGill*, the California Supreme Court had held that agreements requiring the arbitration of public-injunction claims

were unenforceable. *See Broughton v. Cigna Healthplans of Cal.*, 988 P.2d 67, 71 (Cal. 1999); *Cruz v. PacifiCare Health Sys., Inc.*, 66 P.3d 1157, 1159 (Cal. 2003). Comcast claims that because the FAA "clearly preempt[s]" the *Broughton-Cruz* rule, *McGill* invented a nonwaiver rule as a disguised form of the preempted rule. Pet. 14. The *Broughton-Cruz* rule is not at issue here, and *McGill* is far from a disguised version of that earlier rule. Unlike the *Broughton-Cruz* rule, which prohibited arbitration of a particular type of claim, the *McGill* nonwaiver rule, which *permits* arbitration of claims for public injunctive relief, 393 P.3d at 97, provides companies that do not wish to arbitrate such claims a number of means of requiring individual arbitration of all other issues in cases involving such claims, and declines only to enforce a waiver of the right to pursue such claims "not just in arbitration, but *in any forum*." *Id.* at 88.

2. Comcast also asserts that *McGill* "plainly interferes with fundamental attributes of arbitration." Pet. 15. Drawing on separate opinions from Justices Thomas and Gorsuch regarding the scope of injunctive relief that is available in federal court, Comcast states that "contracting parties [must] at least" be able to "incorporate Article III's traditional limitation on non-party relief in their arbitration agreements."[1] Pet. 16–17. But even if Comcast is correct that federal injunctive remedies are not as broad as the injunctive

[1] Irrespective of his views on federal injunctions, Justice Thomas "continue[s] to adhere to the view that the [FAA] does not apply to proceedings in state courts." *Viking River*, 596 U.S. at 665 (Thomas, J., dissenting). There is every reason to expect that he would continue to adhere to that view in this case.

remedies that California's legislature wrote into law, the point is irrelevant. The FAA does not require the enforcement of an unlawful waiver of substantive federal *or* state-law remedies. *See Viking River*, 596 U.S. at 653 n.5.

According to Comcast, though, California's public-injunction remedy creates a unique problem because a contracting party that does not want to forgo arbitration of consumer-injunction suits altogether must agree to arbitrate "massive-scale disputes." Pet. 18. This Court already rejected a similar argument in *Viking River*. In that case, the employer argued that the FAA required the enforcement of an arbitration agreement that waived an employee's right to bring "non-individual" PAGA claims based on Labor Code violations that the employee had not personally experienced. *See Viking River*, 596 U.S. at 655–56. The Court recognized that a PAGA plaintiff holds "a potentially vast number of claims," but it nonetheless rejected the employer's argument. *Id.* at 656. Critically, the Court declined to "hold that the FAA allows parties to contract out of *anything* that might amplify defense risks." *Id.* What the FAA forbids, the Court explained, are state-law rules that "coerce parties into forgoing their right to arbitrate … by conditioning that right on the use" of a particular "*procedural* format." *Id.* (emphasis added).

To be sure, *Viking River* went on to hold that California did impose a preempted procedural rule in the PAGA context by barring parties from agreeing to divide a PAGA action between arbitral proceedings intended to resolve the case's "individual" PAGA claims and judicial proceedings intended to resolve the case's "non-individual" PAGA claims. *See id.* at

659–62. Under the FAA, the Court emphasized, parties must be able to "control which claims are subject to arbitration," even if "bifurcated proceedings are an inevitable result." *Id.* at 660. That aspect of *Viking River* does not change the analysis here.

Unlike in *Viking River*, Comcast does not identify a "procedural format" imposed by California law that is inconsistent with the attributes of traditional bilateral arbitration. *Id.* at 656. Indeed, *McGill* emphasizes that contracting parties are free to select arbitration for some claims and judicial proceedings for others. *See McGill*, 393 P.3d at 97. And where parties "*have agreed* to arbitrate," *McGill* continues, the arbitration "may proceed pursuant to whatever procedures the arbitration agreement specifies." *Id.*

B. The *McGill* rule is a generally applicable state-law basis for contract revocation.

Comcast notes that the FAA requires the enforcement of arbitration agreements except "upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, and argues that *McGill*'s nonwaiver rule is not a ground for contract "revocation." Pet. 21–22. This argument is wrong and, in any event, would not merit review.

1. Comcast's argument rests on a faulty state-law premise. In flat contradiction to Comcast's argument, the California Supreme Court held in *McGill* itself that *McGill*'s nonwaiver rule is a ground "under California law 'for the revocation of a[] contract.'" 393 P.3d at 96 (quoting 9 U.S.C. § 2). This pronouncement of California's high court "with respect to state law [is] binding on the federal courts," including on this Court.

Wainwright v. Goode, 464 U.S. 78, 84 (1983) (per curiam); *cf. Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009) (observing that the FAA "explicitly retains an external body of law governing revocation").

Comcast, then, must pin its theory on *federal* law. In an effort to do so, it argues that the FAA assigns the term "revocation" a distinct statutory meaning, whereby a contract defense is "grounds … for … revocation," 9 U.S.C. § 2, only if it arises from a deficiency in the contract's formation. This Court, though, has said otherwise: "A court may invalidate an arbitration agreement based on 'generally applicable contract defenses' like fraud or unconscionability." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 581 U.S. 246, 251 (2017) (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)). And the Court has consistently proceeded under that understanding. For example, in *Viking River*, the Court held that a state-law nonwaiver rule similar to the one at issue here is a state-law ground that "permits invalidation of arbitration clauses." 596 U.S. at 650. Comcast offers no reason to depart from the established view. Indeed, if Comcast's argument were correct, this Court's recent opinion in *Viking River* would be wrong.

2. Comcast's "revocation" argument also does not merit review because Comcast does not identify any court that has accepted or grappled with it. The only evidence that Comcast can muster in support of a split of authority on this issue is a pair of inapposite cases that are over 50 years old.

Comcast first points to *Halcon International, Inc. v. Monsanto Australia Ltd.*, 446 F.2d 156 (7th Cir.

1971), which described the FAA's reference to "grounds … for … revocation" as referring to those contract defenses that can support the "unmaking" of the contract, *id.* at 158–59 (first quoting 9 U.S.C. § 2). But in *Halcon*, the party seeking to avoid arbitration did not raise any contract defense at all. Rather, it raised a laches defense, arguing that the party that had invoked the arbitration agreement had unduly delayed in making a demand for arbitration. *Id.* at 158. In this context, the Seventh Circuit held that the laches defense was not a valid basis for refusing to compel arbitration because "[w]hen laches are applied, the contract becomes unenforceable but not invalid," *id.* at 159, and it was properly for the arbitrator to decide whether the underlying contract terms could be enforced in light of the laches defense.

Comcast also relies on *Middlesex County v. Gevyn Construction Corp.*, 450 F.2d 53 (1st Cir. 1971), which stated that the only permissible "grounds for revocation" of an arbitration agreement under the FAA are "mutual agreement or a condition which vitiates agreement *ab initio*," *id.* at 56. As in *Halcon*, the party resisting arbitration in *Middlesex County* did not rely on any claimed infirmity in the contract itself, but rather claimed that the contract should be treated as rescinded because the counterparty was in breach. *Id.* at 54. And as in *Halcon*, the court held that the defense went to the enforceability rather than the validity of the contract and so was a matter for the arbitrator to decide. *Id.* at 56.

Far from conflicting with the decision below, *Halcon* and *Middlesex County* reinforce that it is correct. The illegality of a contract provision—unlike a party's failure to invoke the provision in a timely

fashion or a party's breach of contractual duties—renders the provision void *ab initio* and thus constitutes "grounds … for … revocation" under the FAA. 9 U.S.C. § 2. Despite reaching back more than a half-century into the case law, Comcast has not managed to identify a case that says otherwise.

IV. Comcast's remaining arguments do not support review.

It has been more than seven years since the California Supreme Court decided *McGill* and more than five years since the Ninth Circuit decided *Blair*. It has thus long been "settled" that the FAA does not preempt the California state-law rule that claims for public injunctive relief cannot be waived. *Fernandez*, 2022 WL 898593, at *1. Despite Comcast's claim that the status quo is "eliminating consumer arbitration in California" and requiring companies to "structure their operations … around California's policies," Pet. 26, it provides no evidence that *McGill* has caused any disruption or harm in the seven years since it was issued.

Comcast's claims regarding the death of consumer arbitration are illogical in any event. As *McGill* emphasized, parties remain free under California law to structure their dispute-resolution processes as they wish, such that public-injunction claims may be arbitrated, decided in court, or stayed in court while other claims or preliminary issues, such as liability, are arbitrated. Far from "shield[ing] controversies from arbitration," Pet. 15, *McGill* leaves Comcast free to require its customers to submit any claim to arbitration (subject to any generally applicable state-law defenses). What Comcast *cannot* do is require its

customers to preemptively relinquish their claims altogether.

This point exposes the irrelevance of Comcast's claim that California courts have "expan[ded]" *McGill* by broadening their view of what constitutes public injunctive relief. *Id.* at 29. Set aside the fact that Comcast's claim of judicial expansion rests on Comcast's say-so. Even if Comcast were correct, and *McGill*'s nonwaiver rule now covers *all* consumer injunctions, parties would remain free—just as they were when *McGill* was decided—to write a contract that specifies which claims for injunctive relief shall be arbitrated and which shall be litigated. The fact that a larger volume of claims might be nonwaivable in such a regime, such that Comcast may be subject to a greater number of claims overall, does not affect Comcast's ability to choose an arbitral forum.

At bottom, Comcast's gripe is not with FAA preemption principles, but with the substantive remedies that California's elected representatives have designed to combat unfair or deceptive business practices. The proper course for challenging these legislative decisions is through the legislative process. *See, e.g.*, Daniel Wiessner, *California Legislature Clears Changes to "Private Attorney General" Law*, Reuters (June 27, 2024), https://tinyurl.com/mw34x5kr (describing amendments enacted in part to respond to industry's desire to "curb the number of PAGA lawsuits"). But Comcast's policy disagreement is not a reason for this Court to grant review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

RYAN H. WU
CAPSTONE LAW APC
1875 Century Park East
Suite 1000
Los Angeles, CA 90067
(310) 556-4811

NICOLAS SANSONE
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
nsansone@citizen.org

Attorneys for Respondent

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