No. 17-17246

In the

United States Court of Appeals

for the

Ninth Circuit

STEVEN MCARDLE,

Plaintiff-Appellee,

v.

AT&T MOBILITY LLC; NEW CINGULAR WIRELESS PCS LLC;
NEW CINGULAR WIRELESS SERVICES, INC.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California, No. 4:09-cv-01117-CW

BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF DEFENDANTS-APPELLANTS' PETITION FOR REHEARING EN BANC

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

The National Association of Manufacturers is a nonprofit corporation organized under the laws of New York State. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

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INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. The Chamber represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations in every economic sector and geographic region of the country. The Chamber represents the interests of its members in matters before the courts, Congress, and the Executive Branch.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of the nation's private-sector research and development. NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The Chamber and NAM ("*amici*") regularly file *amicus* briefs in cases raising concern to the Nation's business community, including cases involving the enforceability of arbitration agreements. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). Indeed, they previously filed a brief in this case. *McArdle v. AT&T Mobility LLC*, 772 F. App'x 575 (9th Cir. 2019).

Many of *amici's* members employ arbitration agreements in their contracts. Arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Based on the legislative policies reflected in the Federal Arbitration Act and this Court's consistent endorsement of arbitration, *amici's* members have structured millions of contractual relationships around arbitration agreements. *Amici* thus have a strong interest in the faithful, consistent application of the Act.

STATEMENT OF COMPLIANCE WITH RULE 29

All parties have consented to the filing of this brief. No counsel for a party authored any part of this brief. And no one other than the amici curiae, their members, or their counsel financed the preparation or submission or this brief.

SUMMARY OF THE ARGUMENT

Amici agree with Defendants-Appellants ("AT&T") that en banc review is warranted. The panel held that California's *McGill* rule—which invalidates arbitration agreements unless they permit the arbitrator to issue public injunctions—is not preempted by the Federal Arbitration Act (the "Act"). The panel decision is plainly inconsistent with the Supreme Court's decisions in *AT&T Mobility, LLC v. Concepcion* and *Epic Systems Corp. v. Lewis*, as the *McGill* rule effectively bars traditional, bilateral agreements and thus interferes with the "fundamental attributes" of individualized arbitration. *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018).

If left uncorrected, the panel decision would nullify millions of consumer arbitration agreements in California, and more broadly. This is because nearly every consumer claim under California law can include a request for a public injunction. If this Court allows the panel decision to stand, it will undermine the Federal Arbitration Act's "liberal federal policy favoring arbitration." *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (cleaned up).

Amici agree with AT&T that the Act preempts the *McGill* rule because it interferes with the fundamental attributes of arbitration and because it is not a ground for the "revocation of any contract." *Amici* write separately to explain how the Act preempts the *McGill* rule in both respects and to underscore how forcing the arbitration of public injunctions would interfere with the fundamental attributes of individualized arbitration as protected by the Federal Arbitration Act.

ARGUMENT

I. The Federal Arbitration Act Preempts the *McGill* Rule, which Interferes with the Fundamental Attributes of Individualized Arbitration.

The *McGill* rule bars arbitration where a litigant seeks injunctive relief to benefit the public broadly (that is, relief that would apply beyond the particular claimant). It thus is preempted by the Act, as the Supreme Court has made clear through recent cases such as *Concepcion* and *Epic Systems*. The panel should have recognized that those cases prohibit a state from invalidating an arbitration agreement that requires individualized arbitration. The *McGill* rule's wholesale invalidation of arbitration agreements that require individualized, rather than class-wide, proceedings and relief eviscerates the system of individualized arbitration that provides fair, fast, and efficient relief to millions of employees and customers. It thus flies in the face of the Supreme Court's admonition that the Federal Arbitration Act "absolutely" protects the right of parties to "specify the rules that would govern their arbitrations, [including] their intention to use individualized rather than class or collective action procedures." *Epic Systems*, 138 S. Ct. at 1621. If *McGill* and this Court's decisions are allowed to stand, then they will threaten the viability of arbitration broadly in this Circuit (and likely beyond)—to the detriment of employees, consumers, and businesses alike.

A. Under *Concepcion* and *Epic Systems*, the Act Preempts Any State-Law Rule that Interferes with the Fundamental Attributes of Individualized Arbitration.

In *Concepcion*, the Supreme Court held that the Act prohibits States from "conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." 563 U.S. at 336. The Court reasoned that class proceedings "sacrifice[] the principal advantage of arbitration—its informality"—thereby "mak[ing] the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 348. Simply put, "arbitration as envisioned by the [Act]" is individualized arbitration, not class-wide arbitration, which "lacks its benefits." *Id.* at 351.

Further, class arbitration involves the same high stakes as a judicial class action but without multilayered appellate review, making it "more likely that errors will go uncorrected." *Id.* at 350. Companies "are willing to accept the costs of these errors in [conventional] arbitration, since their impact is limited to the size of individual disputes," but when hundreds or thousands of claims "are aggregated and decided at once, the risk of an error will often become unacceptable." *Id.* Accordingly, conditioning the enforceability of an arbitration agreement on the availability of class procedures (without a contractual basis for doing so) effectively prohibits traditional one-to-one arbitration altogether—a result that is fundamentally at odds with the Act's purpose and objective "to promote arbitration." *Id.* at 345.

Though *Concepcion* specifically concerned a requirement of class procedures, its rule goes further. It makes clear that the Act preempts any state-law rule that "interferes with fundamental attributes of arbitration." *Id.* at 344. The message of *Concepcion*, then, is that courts may not refuse to enforce arbitration agreements because they require arbitration to be conducted on an individual basis.

The Supreme Court made that message crystal clear in *Epic Systems*. In that case, the Court reiterated that *Concepcion* bars state-law defenses that "interfere[] with a fundamental attribute of arbitration." *Id.* at 1622. To be sure, the Court recognized *Concepcion's* "essential insight" as barring state-law contract defenses that "reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent." *Id.* at 1622-23. But the Court emphasized that "the Arbitration Act seems to protect pretty absolutely" the right of parties to "specify the rules that would govern their arbitrations, [including] their intention to use individualized rather than class or collective action procedures." *Id.* at 1621. Thus, any state-law rule "that a contract is unenforceable *just because it requires bilateral arbitration*" disfavors arbitration and interferes with its fundamental attributes and thus is preempted by the Act. *Id.*

B. The *McGill* Rule Interferes with the Fundamental Attributes of Individualized Arbitration.

1. Public-injunction arbitration proceedings are fundamentally incompatible with individualized arbitration.

Individualized consumer arbitration is an informal and expeditious process. Typically, a claimant initiates a case by submitting a demand for arbitration, which is an informal description of the claimant's desired outcome. AAA Consumer Arbitration Rule R-2(a)(1). No written answer is required. *Id.* R-2(c), R-2(e). Discovery is permitted at the discretion of the arbitrator, "keeping in mind that arbitration must remain a fast and economical process." *Id.* R-22. Ordinarily, discovery is limited to an informal exchange of documents five days before the hearing and identification of witnesses, without depositions. *Id.* Written motions are rare, and permitted only at the discretion of the arbitrator. *Id.* R-24, R-33. The actual arbitral hearing "generally will not exceed one day," *id.* R-32(d), and oftentimes occurs online or telephonically, *id.* R-32(b). And cases where the claims are for less than $25,000 are frequently resolved via desk arbitration—that is, on the basis of the documents submitted to the arbitrator, without a hearing. *Id.* R-29.

Public-injunction proceedings are quite different. Public-injunctive relief is not about the individual plaintiff and his or her claims; it is "injunctive relief that has the primary purpose and effect of prohibiting unlawful acts that threaten future injury to the general public." *McGill v. Citibank, N.A.*, 393 P.3d 85, 87 (Cal. 2017). The panel emphasized that "public injunctions benefit the public directly by the elimination of deceptive practices, but do not otherwise benefit the plaintiff, who has already been injured, allegedly, by such practices and [is] aware of them." Blair Op. 8 (cleaned up).

Arbitration of a claim for a "public injunction" is thus a fundamentally different affair from individualized arbitration. It transforms the proceeding into a representative action, in which an arbitral claimant is seeking relief on behalf of not just himself or herself, but the broader public. Naturally, whether an injunction is warranted to bar a business from engaging in acts or practices against third parties outside the arbitration requires an arbitrator to make findings about how the general public may be "adversely affected by the challenged conduct and how injunctive relief should be crafted to protect them." AT&T Pet. 9-10 (quotation omitted). The focus of any claim for public injunctive relief thus is far broader than the typical bilateral arbitration. *See McGill*, 393 P.3d at 93-94.

Naturally, arbitrating a public-injunction proceeding swaps the informalities of traditional bilateral arbitration for procedural complexities. In California, public-injunction "claimants are entitled to introduce evidence not only of practices which affect them individually, but also similar practices involving other members of the public who are not parties to the action." *Cisneros v. U.D. Registry, Inc.*, 46 Cal. Rptr. 2d 233, 244 (Ct. App. 1995). As a practical matter, public-injunction claimants must show not only similar practices affecting non-party members of the public but also evidence demonstrating that such practices are likely to cause future harm. *Feitelberg v. Credit Suisse First Boston, LLC*, 134 Cal. App. 4th 997, 1012 (2005). This necessarily means more discovery, more witnesses, and inevitably more complexity—"necessitating additional and different procedures and involving higher stakes." *Concepcion*, 563 U.S. at 348. And, of course, it also means more evidence required to justify public-injunctive relief. Clearly then, adjudicating a public-injunction claim via arbitration would "sacrifice … informality … and make the process slower, more costly, and more likely to generate procedural morass than final judgment." *Epic Systems*, 138 S. Ct. at 1623 (cleaned up).

2. Arbitrating public-injunction claims would magnify the risks to defendants while depriving them of meaningful appellate review.

The shift from bilateral arbitration to arbitration of a request for public-injunctive relief drastically increases the stakes for defendants. As AT&T notes, "a public injunction can force a defendant to alter its practices, products, or services for every one of its California customers—and as a practical matter, perhaps all of its customers nationwide." AT&T Pet. at 17. The risk of such a massive public injunction is exactly what is at play when a defendant faces a Rule 23(b)(2) class action in federal court.

The threat of potentially inconsistent injunctions only exacerbates the risks facing defendants. When different plaintiffs bring separate public-injunction claims against the same defendant, that defendant faces the risk of conflicting public injunctions. Such an outcome is particularly problematic in arbitration where there is no appellate system designed to resolve conflicts among different lower courts. That is, in a scenario where two district courts issue conflicting injunctions, those conflicting judgments can be resolved in the courts of appeals. But in a scenario where two arbitrators order conflicting injunctions, resolution of the competing decisions is much more difficult (and unlikely), given the narrowly circumscribed grounds for vacatur under Section 10 of the Act. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, (2008). And the risk of conflicting injunctions is very real given that the two arbitrators would be answering the same issue: whether the challenged practice "threaten[s] future injury to the general public"—and, if so, how to configure relief to benefit the "general public." *McGill*, 393 P.3d at 90.

The absence of meaningful appellate review exacerbates the problem by "mak[ing] it more likely that errors will go uncorrected." *Concepcion*, 563 U.S. at 350. Where arbitration is individualized, defendants are "willing to accept the costs of these errors" because "their impact is limited to the size of individual disputes, and presumably outweighed by savings from avoiding the courts." *Id.* But when a defendant's business practices as to the general public are at issue, "the risk of an error will often become unacceptable" and defendants may "be pressured into settling questionable claims." *Id.* It is "hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision." *Id.* at 351.

C. If Left Uncorrected, the Panel Decision Will Eviscerate Consumer Arbitration.

The panel's decision would allow nearly every California consumer plaintiff to evade arbitration in any case in which he or she includes a UCL claim for public-injunctive relief. As one commentator put it, "[t]he 9th Circuit just blew up mandatory arbitration in consumer cases." Alison Frankel, *The 9th Circuit just blew up mandatory arbitration in consumer cases*, Reuters (July 1, 2019), https://reut.rs/30Ufvxq. For their part, plaintiffs agree that this "is a very big deal." *Id.*

The reason why it is a "very big deal" is because of the extraordinary breadth of California's UCL. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1143 (2003). "Section 17200 borrows violations from other laws by making them independently actionable as unfair competitive practices. In addition, under section 17200, a practice may be deemed unfair even if not specifically proscribed by some other law." *Feitelberg*, 134 Cal. App. 4th at 1009 (internal quotations omitted). Thus, "[v]irtually any federal, state, or local law can serve as the predicate for a [UCL public-injunction] action." Mathieu Blackston, *California's Unfair Competition Law—Making Sure the Avenger Is Not Guilty of the Greater Crime*, 41 San Diego L. Rev. 1833, 1839 (2004). This means that a UCL public-injunction claim can be easily tacked onto virtually every California consumer complaint. Accordingly, if the decision below is left uncorrected, it will effectively nullify *Concepcion* and *Epic Systems* within California and bar "traditional individualized arbitration" in consumer cases in California. *Epic Systems*, 138 S. Ct. at 1623.

Indeed, the preconditions for bringing a public-injunction claim triggering the *McGill* rule are even more "toothless and malleable" and lacking in "limiting effect" than the rule the Supreme Court worried would lead companies to abandon consumer arbitration in *Concepcion*. 563 U.S. at 347; *id.* at 351. The *McGill* rule does not even require the plaintiff consumer to sue on behalf of a putative class, which typically requires some at least remotely colorable explanation of why the federal or state class-certification requirements are met. *McGill*, 393 P.3d at 93. Instead, to evade enforcement of an arbitration agreement, the plaintiff merely must allege in the complaint that the defendant's disputed conduct is ongoing and affects others. The plaintiff bears no burden of proof or persuasion on this score: According to the California Supreme Court, a motion to compel arbitration is "premature" at the pleading stage. *Id.* at 91 (cleaned up). As a consequence of the UCL's breadth and the *McGill* rule, any consumer who enters an arbitration agreement is free to evade the agreement "*ex post*." *Concepcion*, 563 U.S. at 346.

Worse still, the negative impact of the panel decision is likely to ripple far beyond California. Because many of *amici's* members have national consumer bases, they often employ standardized consumer contracts to facilitate uniform contracting across the country. *Concepcion*, 563 U.S. at 346-47. Being forced to change their consumer agreements in California, the most populous state, thus may force them to change their practices nationwide. Companies may have no choice but to abandon arbitration for all of their customers rather than bear the large expense of maintaining separate contracts for customers in separate states—a task that is even more complicated by the fact that consumers can move across state lines.

On top of that, if *amici's* members are forced to change their consumer contracts to allow for the arbitration of public injunction claims, it may mean the end of arbitration altogether for those businesses. The typical consumer agreement for bilateral arbitration includes subsidies for consumers bringing disputes. For example, companies must pay the vast majority of the arbitration provider's and the arbitrator's fees, and many companies simply pay all of the fees in order to make arbitration even more accessible for consumers.[1] Some companies also pay special inducements to consumers who arbitrate. Under AT&T's arbitration provision, for instance, if the arbitrator awards the consumer more relief than AT&T's last written settlement offer before the arbitrator was selected, AT&T agrees to pay the consumer $10,000 and his or her attorney double attorneys' fees in lieu of any smaller award.[2] If companies must also face more expansive public injunction claims in court, it makes little sense for them to continue to offer such heavy subsidies for consumer arbitration.

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[1] Under the AAA Consumer Arbitration Rules, the consumer's share of arbitration costs is capped at $200. *See* AAA, Consumer Arbitration Rules: Costs of Arbitration, at http://www.adr.org/sites/default/files/Consumer_Fee_Schedule_0.pdf (visited Aug. 19, 2019). Many companies also pay the consumer's share. For example, AT&T and Comcast (the parties seeking rehearing), both commit to pay all arbitration costs for claims for up to $75,000. *See* http://www.att.com/disputeresolution ¶ 3 (visited Aug. 19, 2019); http://www.xfinity.com/corporate/customers/policies/subscriberagreement ¶ 13(i) (visited Aug. 19, 2019).

[2] *See* http://www.att.com/disputeresolution ¶ 4.

The massive risks of classwide arbitration may also "render arbitration unattractive" and induce businesses to move away from it altogether, instead opting for class litigation. *Id.* at 350-51 n.8. Both companies and consumers would suffer from the loss of bilateral arbitration. Without the efficiencies of bilateral arbitration, most consumer disputes would be priced out of the justice system and left unpursued. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995). And the increased cost of dispute resolution for businesses would, by increasing the cost of doing business, inevitably result in higher prices for consumers.

Leaving the panel decision uncorrected thus threatens to undermine the very heart of the FAA and its "liberal federal policy favoring arbitration." *Epic Systems*, 138 S. Ct. at 1622 (quotation omitted). Given the ease of asserting a UCL public injunction claim, the panel decision not only nullifies *Concepcion* and *Epic Systems* within California, it may lead to the wholesale abandonment of consumer arbitration, both in California and nationwide.

II. Section 2 of the Federal Arbitration Act Independently Preempts the *McGill* Rule.

Section 2 is the cornerstone of the Act. It declares that arbitration agreements are "valid, irrevocable, and enforceable" as a matter of federal law, preempting state law to the contrary. Section 2 includes a "savings clause" that preserves state-law defenses that serve as "grounds … for the revocation of any contract." 9 U.S.C. § 2. The text and structure of the Act make clear that Sections 2's grounds "for the *revocation* of any contract" refer exclusively to defects in formation.

Starting with the text, Congress chose to make arbitration agreements "valid, irrevocable, and enforceable," preserving only "revocation" defenses—not defenses related to validity or enforceability. *Concepcion*, 563 U.S. at 354 (Thomas, J.) ("The use of only 'revocation' and the conspicuous omission of 'invalidation' and 'nonenforcement' suggest that the exception does not include all defenses applicable to any contract but rather some subset of those defenses.").

The Act does not specifically define "revocation," but at the time of its enactment, the term "revocability" had two distinct meanings. In the context of arbitration agreements, "revocability" referred to a contracting party's ability to repudiate such an agreement at will. Wesley A. Sturges, *A Treatise on Commercial Arbitrations and Awards* § 15, at 45 (1930).

Outside the arbitration context, "revocability" referred to the more limited ability of a party to nullify a contract based on formation defects. *Id.* at 47 (condoning refusal to enforce if the agreements were obtained "by fraud, or overreaching, or entered into unadvisedly through ignorance, folly or undue pressure") (cleaned up)). In fact, some pre-Act decisions criticized the special rule of "revocability" in the arbitration context and argued that arbitration agreements should be revocable only for the typical reasons applicable to any contract. *Del. & H. Canal Co. v. Pa. Coal Co.*, 50 N.Y. 250, 258 (1872); *Henry v. Lehigh Valley Coal Co.*, 64 A. 635, 636 (Pa. 1906).

In declaring arbitration agreements *irrevocable* but still subjecting them to challenges based on "grounds … for the *revocation* of any contract," Congress discarded the arbitration-specific concept of revocability, preserving the traditional, neutral form of revocability. *Zimmerman v. Cohen*, 236 N.Y. 15, 20 (1923) ("The word 'irrevocable,' … means that the [arbitration agreement] cannot be revoked at the will of one party to it, but can only be set aside for facts existing at or before the time of its making which would move a court of law or equity to revoke any other contract."); Julius Henry Cohen, *The Law of Commercial Arbitration and the New York Statute*, 31 Yale L.J. 147, 149 (1921) ("The act recognizes that the infirmities, common to all contracts, which furnish ground for revocation at law or in equity, may still exist in cases of arbitration agreements."). Thus, only defects in formation were preserved as defenses to arbitration agreements under Section 2.

This reading of Section 2 is confirmed by the Act's structure. Section 4, in particular, outlines a procedure for a "party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration" to petition a federal district court to compel arbitration. 9 U.S.C. § 4. It mandates that a court considering such a petition "shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement," on the condition that the court is "satisfied that the making of the agreement for arbitration … is not in issue." *Id.* Thus, the language of Section 2—when read together with Section 4—"indicates that Congress created an exception to the general rule (that an arbitration clause will be enforced by its terms) only when there is a flaw in the formation of the agreement to arbitrate." *Nat'l R.R. Passenger Corp. v. Consol. Rail Corp.*, 892 F.2d 1066, 1070 (D.C. Cir. 1990); *Supak & Sons Mfr. Co. v. Pervel Indus.*, 593 F.2d 135, 137 (4th Cir. 1979).

Grounds for revoking an arbitration agreement thus include defects such as fraud, duress, unequal bargaining power, and lack of capacity. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967) ("[F]raud in the inducement … goes to the 'making' of the agreement[] to arbitrate."); *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (recognizing "fraud or excessive economic power" as "grounds for the revocation of any contract"). Construing "revocation" to refer only to defects in formation vindicates the Federal Arbitration Act's "basic precept that arbitration is a matter of consent, not coercion." *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 681 (2010) (internal quotation omitted). *Concepcion*, 563 U.S. at 355 n.* (Thomas, J.) ("Contract formation is based on the consent of the parties.").

Adjudged against this proper understanding of Section 2, the *McGill* rule is not a ground for "revocation of any contract." Indeed, it is not a ground for revocation whatsoever. As the panel put it, "the *McGill* rule derives from a general and long-standing [legislative] prohibition on the private contractual waiver of public rights" that "California courts have repeatedly invoked … to invalidate waivers" of public rights. Blair Op. 15. In the panel's words, then, the *McGill* rule is a public-policy proscription designed to invalidate a class of agreements. It has nothing to do with contract *formation*, no relation to the "making" of an arbitration agreement. The *McGill* rule thus is preempted by Section 2 of the Act.

* * *

The arbitration agreement at issue is materially identical to the one approved by the U.S. Supreme Court eight years ago in *Concepcion*. It is unthinkable that the Supreme Court would enforce this agreement in *Concepcion* only so that it could be gutted here simply because McArdle happened to include a UCL claim for public-injunctive relief in his complaint—especially given that the *Concepcion* plaintiffs sought that very same relief. AT&T Opening Br. (Mar. 26, 2018), at 10 & n.2. The *McGill* rule and the panel's opinions are nothing more than an intentional evasion of *Concepcion* and *Epic Systems*.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Thomas R. McCarthy
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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Circuit Rule 32-1(a) and Federal Rules of Appellate Procedure 32(a)(7)(B)(iii). This brief uses a proportional typeface and 14-point font, and contains 4,180 words.

/s/ Thomas R. McCarthy
Thomas R. McCarthy
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Dated: August 19, 2019