Press Release

Washington Legal Foundation
Advocate for Freedom and Justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302 wlf.org

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Media Contact: Glenn Lammi | glammi@wlf.org | 202-588-0302

WLF Urges Supreme Court to Restore Proper Reading of FAA Saving Clause

(Tillage v. Comcast Corp.; McArdle v. AT&T Mobility LLC)

"The Supreme Court should make the Ninth Circuit reconnect its reading of the FAA's saving clause to what that clause actually says."
—Corbin K. Barthold, WLF Senior Litigation Counsel

WASHINGTON, DC—On Tuesday, March 24, Washington Legal Foundation filed an *amicus curiae* brief urging the U.S. supreme Court to review a Ninth Circuit decision that misconstrues the Federal Arbitration Act's saving clause.

McGill v. Citibank, N.A., 2 Cal. 5th 945 (2017), says that an arbitration clause may not extinguish a party's right to seek injunctive relief for the public at large. The Ninth Circuit held that this "*McGill* rule" is not preempted by the FAA. Under the FAA's saving clause, an arbitration agreement that is otherwise enforceable under federal law remains subject to any generally applicable state-law contract defense. The *McGill* rule, the Ninth Circuit concluded, is such a defense.

As the Ninth Circuit acknowledged, however, the *McGill* rule arises from California Civil Code § 3513, a state "maxim of jurisprudence." WLF contends in its brief that California's maxims of jurisprudence are not contract defenses that properly trigger the FAA's saving clause.

Even if it stood on a real contract defense, WLF continues, the *McGill* rule would still be preempted. Although the Ninth Circuit cited some old cases unrelated to arbitration that involve § 3513, *today* the California courts use § 3513 specifically as a cudgel for striking down arbitration agreements. The FAA preempts a state rule whose only purpose is to serve as a tool for striking down arbitration clauses.

Celebrating its 43rd year, WLF is America's premier public-interest law firm and policy center advocating for free-market principles, limited government, individual liberty, and the rule of law.

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