UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT WEISSMAN and
PATRICK LLEWELLYN,

Plaintiffs,

v.

NATIONAL RAILROAD
PASSENGER CORPORATION
d/b/a AMTRAK,

Defendant.

Civil Action No. 1:20-cv-28-TJK

STATEMENT OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO DISMISS

Jessica Ring Amunson (DC Bar # 497223)
Noah B. Bokat-Lindell (DC Bar # 156032)
JENNER & BLOCK LLP
1099 New York Ave. NW, Suite 900
Washington, DC 20001
Tel. 202-639-6000
Fax: 202-639-6066
jamunson@jenner.com
nbokat-lindell@jenner.com

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INTRODUCTION

Like consumers of many products and services, passengers who wish to travel on Amtrak agree to certain terms and conditions in exchange for the benefits of rail travel. Patrons make this choice freely: if they disapprove of the terms on which Amtrak offers its services, they can select a different form of transportation. The plaintiffs in this case, however, object to this basic bargain. Two lawyers at Public Citizen Litigation Group allege that they may travel sometime this year from Washington, DC to New York City and may want to take Amtrak rather than driving or flying. They are upset by Amtrak's decision to include an arbitration provision in its agreement with ticketholders and therefore have sued Amtrak, raising theories that would upset decades of settled precedent regarding the constitutionality of arbitration.

As an initial matter, plaintiffs lack standing. One of the two plaintiffs has not even bought a ticket including the arbitration clause, and Amtrak has not invoked the clause against either of them, rendering them without any actual or imminent injury sufficient to grant them standing. Even if they had standing, however, they are not the proper plaintiffs to claim entitlement to equitable relief against Amtrak for a purported violation of statutory authority. Congress has provided a right of action only to the Attorney General to bring such a claim. And the claim lacks merit in any event given that Congress gave Amtrak broad authority to pursue pro-efficiency measures and to make agreements that serve its business mission.

Plaintiffs' constitutional claims fare no better. Amtrak is not the government for purposes of implementing an arbitration agreement and so no constitutional claim can stand. But even if Amtrak were the government for these purposes, there is no First Amendment or Article III issue with government-initiated arbitration. Indeed, the plaintiffs present constitutional theories so

expansive in application that they could derail both public and private arbitration. The Court should not sanction such arguments. This case should be dismissed.

STATEMENT OF FACTS

Amtrak provides intercity passenger rail service to customers throughout the United States. Compl. ¶¶ 11, 17. Though authorized by statute, *see* Rail Passenger Service Act of 1970, Pub. L. No. 91-518, § 301, 84 Stat. 1327, 1330; Compl. ¶ 12, and "dependent on the government in ways other for-profit corporations are not," *Ass'n of Am. R.R.s v. U.S. Dep't of Transp.* (*Ass'n of American Railroads II*), 821 F.3d 19, 32 (D.C. Cir. 2016), Amtrak "is not a department, agency, or instrumentality of the United States Government," 49 U.S.C. § 24301(a)(3). Rather, from its inception, Amtrak has remained "a private, for-profit corporation." *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 454 (1985); *accord Ass'n of American Railroads II*, 821 F.3d at 23 ("a for-profit corporation"); *see* 49 U.S.C. § 24301(a)(2) ("Amtrak . . . shall be operated and managed as a for-profit corporation."); Compl. ¶¶ 15-16.

To ensure that Amtrak becomes financially viable and independent, Congress has mandated that it act "as much like a private business as possible." S. Rep. No. 105-85 at 1 (1997), *as reprinted in* 1997 U.S.C.C.A.N. 3055, 3055. Amtrak must "use its best business judgment in acting to minimize United States Government subsidies," 49 U.S.C. § 24101(c)(1), including by "reducing management costs," *id.* § 24101(c)(1)(E). It also must "maximize the use of its resources." *Id.* § 24101(c)(12). To do so, Congress has "encouraged" Amtrak to "undertake initiatives that are consistent with good business judgment and designed to maximize its revenues and minimize Government subsidies." *Id.* § 24101(d). Amtrak also may "make and carry out appropriate agreements." *Id.* § 24305(c)(1).

Like many businesses, Amtrak offers its services to the public subject to various terms and conditions. Compl. ¶¶ 18-19. In January 2019, Amtrak amended those terms and conditions.

Compl. ¶ 18. Among the changes, Amtrak added an arbitration agreement. *Id.* The provision operates similarly to arbitration clauses included in many other consumer contracts. By purchasing a ticket, the buyer agrees that she and anyone else for whom she purchased tickets will arbitrate any claims individually against Amtrak, its affiliates, and indemnified parties. Compl. ¶¶ 19-20, 23. Claims will not be arbitrated, however, if arbitration is prohibited by statute or otherwise illegal. Compl. ¶ 21. Any arbitrations will be conducted under the Consumer Arbitration Rules of the American Arbitration Association ("AAA"), with review by Article III courts as provided in the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 10-11. Compl. ¶¶ 24-25.

Amtrak implemented the arbitration agreement in January 2019 after determining that resolving passenger claims through arbitration would improve customers' experience and reduce litigation costs (for all parties). Arbitration provides for much faster resolution of claims, and much faster compensation to injured parties, than does the civil litigation system. *See, e.g.*, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010) (describing the "benefits of private dispute resolution" as "lower costs" and "greater efficiency and speed"). Amtrak's arbitration program retains most important protections of the civil litigation system: legal representation, an independent decision-maker, authorization for appropriate discovery, and the availability of all relief authorized under applicable law. Compl. ¶ 18 (referencing terms and conditions of arbitration agreement at https://www.amtrak.com/terms-and-conditions.html). And unlike some other arbitration programs, Amtrak's does not restrict arbitrations to a particular venue, giving customers the option to initiate arbitration in a location convenient to them. *Id.* By avoiding unnecessary discovery and the long wait for trial dates on overcrowded court dockets, arbitration provides a resolution far swifter than the courts can. *See Stolt-Nielsen,* 559 U.S. at 685.

Plaintiffs Robert Weissman and Patrick Llewellyn (together, "Plaintiffs") are, respectively, the President of and an attorney at Public Citizen Litigation Group. Compl. ¶¶ 7, 9. Both live and work in Washington, DC. Compl. ¶¶ 7, 9. Mr. Weissman rode to and from New York City on Amtrak twice in 2018 and once in 2019, Compl. ¶ 7, though he also "sometimes travels to New York City by car," Compl. ¶ 8. Mr. Llewellyn traveled via Amtrak only once in recent years, for a court appearance in New York City in February 2018. Compl. ¶ 9. Mr. Llewellyn's February 2018 trip, and two of Mr. Weissman's three Amtrak trips, took place before Amtrak introduced the arbitration provision at issue in this case. Compl. ¶¶ 7, 9, 18.

Plaintiffs raise the possibility of future trips to New York City. Mr. Weissman "anticipates" traveling to New York City two or three times in 2020. Compl. ¶ 8. Mr. Llewellyn "expects to travel to New York City" at some future date to present oral argument in a case. Compl. ¶ 10. Both object to having to choose between driving, "tak[ing] other transportation," or agreeing to Amtrak's arbitration provision as a condition of taking Amtrak. Compl. ¶¶ 8, 10.

Plaintiffs filed this challenge, seeking "declaratory and injunctive relief to prevent" Amtrak "from imposing an arbitration requirement on rail passengers and purchasers of rail tickets." Compl. ¶ 1. They claim "a non-statutory right of action" against Amtrak. Compl. ¶¶ 28, 32, 36, 42. Plaintiffs allege that Amtrak's arbitration agreement lacks statutory authorization, Compl. ¶ 31, violates the Petition Clause of the First Amendment, Compl. ¶ 35, violates their personal right to an Article III court, Compl. ¶ 41, and violates the separation of powers by "threaten[ing] the institutional integrity of the judicial branch," Compl. ¶¶ 44-45. Plaintiffs seek, first, a facial declaration that Amtrak's arbitration agreement violates the U.S. Code and the Constitution; and second, an injunction to prevent Amtrak from either including the agreement as a term and condition of providing services to Plaintiffs or enforcing the agreement against Plaintiffs. Compl.

at 12 (Prayer for Relief). Amtrak now files the accompanying motion to dismiss for lack of subject-matter jurisdiction, *see* Fed. R. Civ. P. 12(b)(1), and failure to state a claim, *see id.* 12(b)(6).

LEGAL STANDARDS

1. "To survive a motion to dismiss for lack of standing [under Rule 12(b)(1)], a complaint must state a plausible claim that the plaintiff has suffered an injury in fact fairly traceable to the actions of the defendant that is likely to be redressed by a favorable decision on the merits." *Williams v. Lew*, 819 F.3d 466, 472 (D.C. Cir. 2016) (citation omitted). Plaintiffs, as the parties invoking this Court's jurisdiction, bear the burden of proving jurisdiction exists. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016); *Khadr v. United States*, 529 F.3d 1112, 1115 (D.C. Cir. 2008). "Where, as here, a case is at the pleading stage, the plaintiff[s] must 'clearly . . . allege facts demonstrating' each element" of standing. *Spokeo*, 136 S. Ct. at 1547 (citation omitted). At least one plaintiff "must demonstrate standing for each claim he seeks to press" and each form of relief sought. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006).

While the Court must accept as true any well-pleaded factual allegations in the complaint and draw all reasonable inferences in the non-moving party's favor, it "do[es] not assume the truth of legal conclusions." *Williams*, 819 F.3d at 472. And "the Court need not accept inferences drawn by the plaintiff if those inferences are unsupported by facts alleged in the complaint." *Williams v. Wilkie*, 320 F. Supp. 3d 191, 195 (D.D.C. 2018), *appeal dismissed*, No. 18-5272, 2019 WL 1150043 (D.C. Cir. Jan. 9, 2019).

2. To survive a motion to dismiss for failure to state a claim upon which relief can be granted, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). As when examining Rule 12(b)(1) motions, under Rule 12(b)(6) a court need not accept as true the complaint's legal conclusions, whether stated as such or couched as factual allegations. *Id.* at

678-79. Nor may "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," suffice to state a claim. *Id.* In ruling on a Rule 12(b)(6) motion, a court "may consider only the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which [the court] may take judicial notice." *Hurd v. D.C., Gov't*, 864 F.3d 671, 678 (D.C. Cir. 2017) (citation omitted) (alteration in original).

ARGUMENT

This Court should dismiss Plaintiffs' complaint under Rule 12(b)(1) because Plaintiffs do not have standing. Amtrak has not invoked the arbitration agreement against Plaintiffs. Indeed, Mr. Llewellyn is not even subject to it. Nor do Plaintiffs allege that they possess, or will soon possess, legal claims regarding which Amtrak likely will invoke the arbitration agreement. Plaintiffs therefore cannot plausibly allege an actual or imminent injury.

Alternatively, this Court should dismiss the complaint under Rule 12(b)(6) because Plaintiffs fail to state a claim on the merits. Only the Attorney General may sue for declaratory or injunctive relief regarding Amtrak's statutory powers. Regardless, Amtrak has statutory authority to implement the arbitration agreement. And Plaintiffs' constitutional claims likewise fail. Amtrak does not act as a governmental entity in the first place when it creates consumer contracts and agrees to arbitrate. But even assuming that Amtrak were the government for purposes of Plaintiffs' constitutional claims, there is no constitutional problem with government arbitration. On the merits, ticketholders' consent to the arbitration agreement disposes of Plaintiffs' Petition Clause and personal Article III claims, and it likewise tips their separation-of-powers claim in Amtrak's favor. Even leaving consent aside, none of Plaintiffs' constitutional claims succeed. In fact, taken at face value, Plaintiffs' constitutional rationales would undermine *all* arbitration agreements, in both the public and private sectors.

I. Plaintiffs Lack Standing to Bring This Action

Plaintiffs' complaint cannot pass its first hurdle. To meet Article III's case-or-controversy requirement, Plaintiffs, "based on their complaint, must establish that they have standing to sue." *Raines v. Byrd*, 521 U.S. 811, 818 (1997). They have not done so.

"[T]he irreducible constitutional minimum of standing contains three elements." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Plaintiffs "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo*, 136 S. Ct. at 1547. Plaintiffs cannot make it past step one, as neither Mr. Weissman nor Mr. Llewellyn can plausibly allege an actual or imminent injury.

The reason for this is simple: Plaintiffs cannot claim injury from Amtrak's arbitration clause because Amtrak has not invoked it against them. Courts have routinely held that plaintiffs do not have standing to challenge arbitration agreements when the plaintiffs "did not allege or establish that [they] had been injured by actual arbitration." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019-20 (1984); *accord Bowen v. First Family Fin. Servs., Inc.*, 233 F.3d 1331, 1340 (11th Cir. 2000) (holding that plaintiffs lacked standing to challenge the enforceability of an arbitration agreement because "the plaintiffs will not be injured by the arbitration agreement unless and until it is enforced, and there are no indications of a substantial likelihood the agreement will be enforced against the plaintiffs"); *Jones v. Sears Roebuck & Co.*, 301 F. App'x 276, 283 (4th Cir. 2008) (similar); *Lee v. Am. Exp. Travel Related Servs., Inc.*, 348 F. App'x 205, 207 (9th Cir. 2009) (similar); *Bd. of Trade of City of Chicago v. Commodity Futures Trading Comm'n*, 704 F.2d 929, 932 (7th Cir. 1983) (similar); *see also Meyer v. Sprint Spectrum L.P.*, 200 P.3d 295, 301 (Cal. 2009) (denying right to challenge arbitration agreement as unconscionable under California

Consumer Legal Remedies Act, which requires "damage" to result from an unlawful act, because "Sprint had not sought to enforce any unconscionable term against plaintiffs").

This rule—that one cannot challenge arbitration agreements until they have been invoked—is occasionally framed as a ripeness issue. In *Monsanto*, for instance, the Supreme Court held that "[o]nly after . . . an arbitrator has made an award will Monsanto's claims with respect to the constitutionality of the arbitration scheme become ripe." 467 U.S. at 1020; *see Bd. of Trade of City of Chicago*, 704 F.2d at 932 (refusing to hear Seventh Amendment claim against Commodity Futures Trading Commission (CFTC) rule that "compels arbitration of common-law claims" because it was not "ripe for adjudication"). But "[t]he doctrines of standing and ripeness 'originate' from the same Article III limitation." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 n.5 (2014) (quoting *DaimlerChrysler Corp.*, 547 U.S. at 335). There is thus little daylight between ripeness and standing in this instance. *See Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568, 580-81 (1985) (describing claims in *Monsanto* as involving "contingent future events that may not occur as anticipated, or indeed may not occur at all," because "no . . . arbitrations had as yet taken place when Monsanto brought its claim" (quoting 13A C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3532 (1984))). Whether as a matter of ripeness or standing, Plaintiffs cannot establish Article III jurisdiction because their suit is premature.

Plaintiffs' predicament flows from first principles of standing doctrine: those challenging an arbitration clause before it has been invoked lack the imminent injury necessary for injunctive or declaratory relief. "To pursue an injunction or a declaratory judgment, the . . . plaintiffs must allege a likelihood of future *violations* of their rights by [the defendant], not simply future *effects* from past violations." *Fair Emp't Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1273 (D.C. Cir. 1994). Likewise, "threatened injury must be *certainly*

impending to constitute injury in fact"; "'[a]llegations of *possible* future injury' are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (citation omitted).

Plaintiffs' claims do not rely on any existing injury. Mr. Weissman does not allege that he has any past or present claims against Amtrak that would be covered by the arbitration clause to which he agreed. Compl. ¶¶ 7-8. Mr. Llewellyn, meanwhile, has not even purchased an Amtrak ticket containing the challenged provision. Compl. ¶¶ 9-10, 18. And neither plaintiff alleges that any claims could arise in the future that would stem from their past trips. Instead, their alleged injuries must depend on a series of possible future events coming to pass. While Mr. Weissman alleges that he "*anticipates* taking two or three trips to New York City in 2020," Compl. ¶ 8 (emphasis added), he does not allege with any degree of certainty if or when these trips will occur, or that these trips will be on Amtrak. Indeed, the complaint admits that "he sometimes travels to New York City by car." *Id.* Mr. Llewellyn, meanwhile, alleges that he "*expects* to travel to New York City to present oral argument." Compl. ¶ 10 (emphasis added). However, "the Second Circuit has not set the case for argument," *id.*, and Mr. Llewellyn does not allege that he will take Amtrak (as opposed to some other form of transportation) if or when the court does schedule argument.

Even assuming Plaintiffs plausibly pleaded that they would imminently use Amtrak's services, the complaint does not even speculate that Plaintiffs will develop claims against Amtrak, or that Amtrak will bring claims against them, that would be covered by the arbitration clause. *See* Compl. ¶¶ 8, 10 (alleging only that Plaintiffs "wish[] to have the ability to use Amtrak's passenger rail services without having to agree in advance to binding arbitration before a private arbitrator . . . for resolution of any claims against Amtrak"). Nor do they plausibly allege that any such claims are unlikely to be resolved short of arbitration, or that Amtrak would invoke the arbitration agreement against them. Plaintiffs thus "ask[] this Court to assume [1] that [they] will commence

suit at some point in the future," [2] "that if and when [they] decide[] to commence suit, the parties will not be able to resolve any such suit without judicial or arbitral intervention," and [3] "that [Amtrak] would seek to enforce the arbitration agreement upon [their] commencement of a suit." *Tamplenizza v. Josephthal & Co.*, 32 F. Supp. 2d 702, 704 (S.D.N.Y. 1999) (finding plaintiff lacked standing to challenge arbitration agreement). This "speculative chain of possibilities does not establish that injury based on potential future" arbitrations, premised on potential future claims, "is certainly impending." *Clapper*, 568 U.S. at 414.[1]

No arbitration pends against Plaintiffs, and the complaint alleges no credible threat of future arbitrations against them. Under traditional standing principles, therefore, Plaintiffs lack standing to challenge Amtrak's arbitration clause. *See id.*; *cf. Susan B. Anthony List*, 573 U.S. at 164 (examining whether there is credible "threat of future enforcement" as part of pre-enforcement standing inquiry); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 15 (2010) (stating that plaintiffs have standing to seek pre-enforcement review of criminal statutes only when they "face 'a credible threat of prosecution'" (citation omitted)).

II. Plaintiffs' "Absence of Statutory Authority" Claim Fails

Even if Plaintiffs had standing to pursue this case, their "absence of statutory authority" claim fails. Plaintiffs are the wrong parties to seek declaratory or injunctive relief regarding the scope of Amtrak's statutory authority. Only the Attorney General of the United States may do that. And in any event, the claim would fail on the merits. Congress provided Amtrak with ample

[1] That Plaintiffs bring constitutional claims does not affect the analysis. Other courts have rejected constitutional challenges to arbitration clauses for lack of standing when there was no imminent threat of enforcement. *See, e.g.*, *Bd. of Trade of City of Chicago*, 704 F.2d at 932. And *Clapper* itself involved First Amendment, Article III, and separation-of-powers claims, just like this case. *See* 568 U.S. at 407.

statutory authority to make agreements that will serve the purpose Congress established for Amtrak—including arbitration agreements.

A. Only the Attorney General Can Seek Equitable Relief for Purported Statutory Violations.

In 1981, Congress sought to end the "hamper[ing]" of Amtrak's activities "by a multitude of court actions for injunctive relief." S. Rep. No. 97-139, at 319 (1981), *as reprinted in* 1981 U.S.C.C.A.N. 396, 607. It therefore amended the Rail Passenger Service Act to provide that, except as to certain employee actions, "only the Attorney General may bring a civil action for equitable relief in a district court of the United States when Amtrak . . . engages in or adheres to an action, practice, or policy inconsistent with this part [chapters 241-249] or chapter 229 [of Title 49]." 49 U.S.C. § 24103(a)(1). This provision covers any claim that Amtrak acts beyond its statutory powers or limits, which are outlined in Chapter 243. *See* 49 U.S.C. §§ 24301-24322; *see also id.* §§ 24701-24712 (Chapter 247, Amtrak Route System); *id.* §§ 24901-24911 (Chapter 249, Northeast Corridor Improvement Program). Thus, in enacting § 24103(a), Congress created "an exclusive public enforcement mechanism" for seeking "equitable relief when Amtrak behaves inconsistently with its authorizing statute." *Am. Premier Underwriters, Inc. v. Nat'l R.R. Passenger Corp.*, 709 F.3d 584, 593 (6th Cir. 2013).

The text of § 24103(a) also clarified Congress's intent that private individuals cannot bring statutory claims in equity against Amtrak. *See id.* at 592 (finding no private right of action for shareholders to sue Amtrak in part because "the Attorney General may sue Amtrak" under § 24103(a), but "shareholders may not compel him to do so"); *Jenkins v. Nat'l R.R. Passenger Corp.*, No. 07 C 3427, 2008 WL 68685, at *15 (N.D. Ill. Jan. 3, 2008) (stating that "49 U.S.C. § 24103 limits the ability of a private citizen to bring a civil action for equitable relief against Amtrak"). "Absent statutory intent to create a cause of action, none exists, and 'courts may not

create one . . . .'" *Int'l Union, Sec., Police & Fire Professionals of Am. v. Faye*, 828 F.3d 969, 972 (D.C. Cir. 2016) (quoting *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001)).

All Plaintiffs have left is the suggestion in their complaint that they have a "non-statutory right of action" to "declare unlawful official action that is *ultra vires*." Compl. ¶ 28. Such a right of action is not available here. It is true that "[e]ven where Congress is understood generally to have precluded review, the Supreme Court has found an implicit but narrow exception, closely paralleling the historic origins of judicial review for agency actions in excess of jurisdiction." *Trudeau v. FTC*, 456 F.3d 178, 190 (D.C. Cir. 2006) (quoting *Griffith v. Fed. Labor Relations Auth.*, 842 F.2d 487, 492 (D.C. Cir. 1988)). Under this doctrine, "'judicial review is available when an agency acts *ultra vires*,' even if a statutory cause of action is lacking." *Id.* (quoting *Aid Ass'n for Lutherans v. United States Postal Serv.*, 321 F.3d 1166, 1173 (D.C. Cir. 2003)).

However, this "exception is intended to be of extremely limited scope." *Griffith v. Fed. Labor Relations Auth.*, 842 F.2d 487, 493 (D.C. Cir. 1988); *accord Am. Fed'n of Gov't Emps. v. Fed. Labor Relations Auth.*, No. CV 19-142, 2019 WL 3532942, at *4 (D.D.C. Aug. 2, 2019) (quoting similar language from several D.C. Circuit cases). The *ultra vires* review doctrine requires plaintiffs to clear three cumulative barriers. First, "the statutory preclusion of review [must be] implied rather than express." *DCH Reg'l Med. Ctr. v. Azar*, 925 F.3d 503, 509 (D.C. Cir. 2019) (quoting *Nyunt v. Chairman, Broad. Bd. of Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009)). Second, "there [must be] no alternative procedure for review of the statutory claim." *Id.* (quoting *Nyunt*, 589 F.3d at 449). And third, there must be "extreme" error, in which the entity has "plainly act[ed] in excess of its delegated powers and contrary to a specific prohibition in the statute that is clear and mandatory." *Id.* (quoting *Nyunt*, 589 F.3d at 449; and *Griffith*, 842 F.2d at 493). The

ultra vires exception "is essentially a Hail Mary pass—and in court as in football, the attempt rarely succeeds." *Id.* (quoting *Nyunt*, 589 F.3d at 449).

Plaintiffs' play certainly falls short. First, § 24103(a) expressly precludes review. Second, two alternative procedures exist for reviewing the statutory claim: Plaintiffs may raise the statutory authority issue as a defense in any future arbitration Amtrak might bring; or else they may convince the Attorney General to file suit under § 24103(a). And third, no statutory provision casts doubt on Amtrak's power to implement an arbitration clause, much less acts as a "specific prohibition . . . that is clear and mandatory." *Id.* (quoting *Nyunt*, 589 F.3d at 449); *see infra* Part II.B.[2] Plaintiffs meet none of the *ultra vires* doctrine's three prerequisites, and their statutory authority claim should be dismissed.

B. Amtrak Has Statutory Authority to Enact the Arbitration Clause

Even assuming Plaintiffs *could* challenge Amtrak's statutory authority to use an arbitration agreement, Amtrak has ample authority to do so. Several statutory provisions require Amtrak to operate similarly to private businesses. Those provisions empower Amtrak to form arbitration agreements. Most fundamentally, Congress has provided that "Amtrak . . . shall be operated and managed as a for-profit corporation." 49 U.S.C. § 24301(a)(2). Thus, by statutory mandate, Amtrak must seek ways to reduce inefficiencies—such as spending on outside counsel to represent Amtrak with respect to passenger claims—so long as this does not conflict with any other statutory goal. Congress expressly authorized Amtrak to "make and carry out appropriate agreements," *id.* § 24305(c)(1), in order to operate like a for-profit corporation. This provision gives Amtrak power to create ticketing agreements and to include arbitration provisions in those contracts.

[2] Plaintiffs face an additional problem: the *ultra vires* doctrine applies to actions of "an agency," *Trudeau*, 456 F.3d at 190, but "Amtrak . . . is not a[n] . . . agency," 49 U.S.C. § 24301(a)(3).

But there's more. Congress has "encouraged" Amtrak "to make agreements with the private sector and undertake initiatives that are consistent with good business judgment and designed to maximize its revenues and minimize Government subsidies." *Id.* § 24101(d). Indeed, Amtrak is required to—it "shall"—"use its best business judgment in acting to minimize United States Government subsidies." *Id.* § 24101(c)(1). And yet again: Amtrak "shall . . . maximize the use of its resources." *Id.* § 24101(c)(12). Each of these provisions further reinforces Amtrak's mandate to implement programs that will make Amtrak more efficient. Arbitration, which guarantees "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes," *Stolt-Nielsen*, 559 U.S. at 685, well serves this purpose. Amtrak thus had statutory authority to "make . . . appropriate agreements" to arbitrate. 49 U.S.C. § 24305(c)(1).

Consistent with these directives from Congress to implement private-sector policies, Amtrak has long employed arbitration agreements elsewhere. Since its earliest years, for example, Amtrak has entered into arbitration agreements with its host railroads. Courts have long enforced these contracts.[3] Additionally, pursuant to the Railway Labor Act, 45 U.S.C. § 153, Amtrak

[3] *See, e.g.*, *Nat'l R.R. Passenger Corp. v. Bos. & Maine Corp.*, 850 F.2d 756, 764 (D.C. Cir. 1988) (requiring arbitration, under "broad arbitration clause, requiring arbitration of all disputes concerning the meaning of the contract" between Amtrak and a host railroad, of claim that contract containing the clause had expired); *Seaboard Coast Line R.R. Co. v. Nat'l Rail Passenger Corp.*, 554 F.2d 657, 658 (5th Cir. 1977) (per curiam) (enforcing arbitration agreement in dispute over compensation to host railroad); *Nat'l R.R. Passenger Corp. v. Chesapeake & Ohio Ry. Co.*, 551 F.2d 136, 140 (7th Cir. 1977) ("[W]e find that the trackage dispute between Amtrak and C & O comes within the ambit of the broad arbitration clause of the Basic Agreement."); *Nat'l R. R. Passenger Corp. v. Missouri Pac. R.R. Co.*, 501 F.2d 423, 424, 429 (8th Cir. 1974) (sending to arbitration, under arbitration agreement between Amtrak and Missouri Pacific, dispute over Amtrak's use of Missouri Pacific subsidiary's tracks); *Providence & Worchester R.R. Co. v. Nat'l R.R. Passenger Corp.*, 239 F. Supp. 2d 207, 207 (D. Conn. 2002) (confirming award for Amtrak under arbitration agreement with Providence & Worchester Railroad); *see also In re Penn Cent. Transp. Co.*, 560 F.2d 169, 175, 179 (3d Cir. 1977) (discussing the agreement between Amtrak and Penn Central, which included an arbitration clause, and stating that "it is clear that Amtrak has

routinely arbitrates disputes with its employees under the collective bargaining agreements it has negotiated with its employee unions.[4] Amtrak also has entered into arbitration agreements with other transportation agencies for provision of services and equipment. And courts have likewise enforced these provisions.[5] Never, in any of these or the many other cases in which courts have enforced arbitration decisions involving Amtrak, has any court ever questioned Amtrak's statutory authority to engage in arbitration. That is because Congress *has* given Amtrak that power.

In contrast, when Congress wants to limit Amtrak's authority, it does so specifically. Congress has subjected Amtrak to certain provisions related to railroad operations and employee matters, none of which are relevant here.[6] But Congress has imposed no limits on Amtrak's authority to use arbitration. Nor has the Department of Transportation prohibited arbitration for

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the right to request enforcement of [an] arbitration award by [a Bankruptcy] Reorganization Court" in the case).

[4] *See, e.g.*, *Nat'l R.R. Passenger Corp. v. Fraternal Order of Police, Lodge 189 Labor Comm.*, 855 F.3d 335, 338 (D.C. Cir. 2017); *Bhd. of R.R. Signalmen v. Nat'l R.R. Passenger Corp.*, 310 F. Supp. 3d 131, 134-35 (D.D.C. 2018); *United Transp. Union v. Nat'l R.R. Passenger Corp. (AMTRAK)*, No. CV 03-1350 JH/RLP, 2006 WL 8444133, at *1 (D.N.M. June 14, 2006).

[5] *See, e.g.*, *Nat'l R.R. Passenger Corp. v. ExpressTrak, L.L.C.*, 330 F.3d 523, 525 (D.C. Cir. 2003) (determining arbitrability of dispute under arbitration agreement included in lease "agreements providing for the transportation of perishable goods in temperature-controlled express cars attached to Amtrak passenger trains"); *Nat'l R.R. Passenger Corp. v. Consol. Rail Corp.*, 892 F.2d 1066, 1067 (D.C. Cir. 1990) (enforcing arbitration clause in agreement between Amtrak and Conrail); *Md. Transit Admin. v. Nat'l R.R. Passenger Corp.*, 372 F. Supp. 2d 478, 479-80 (D. Md. 2005) (reviewing arbitrations under FAA pursuant to an agreement between Amtrak and MTA that "contains a broad arbitration clause"); *see also* 49 U.S.C. § 24305(a)(1) (creating power to "make contracts for the operation and maintenance of equipment and facilities").

[6] *See, e.g.*, 49 U.S.C. § 24301(c)-(d); *see id.* § 11123 (delineating emergency procedures); *id.* § 11301 (setting out procedures for filing, recordation, and recognition of certain financial instruments); *id.* § 11322(a) (prohibiting rail carriers from pooling or dividing traffic or services); *id.* § 11502 (governing withholding of state and local income tax for rail carrier employees); *id.* § 11706 (laying out liability standards related to receipts and bills of lading). Congress also subjected Amtrak to "the District of Columbia Business Corporation Act (D.C. Code § 29-301 et seq.)," "to the extent consistent with this part." *Id.* § 24301(e). That Act, too, contains no limitation on arbitration. *See* D.C. Code §§ 29-301.01 to -314.02.

Amtrak, as it has for airlines. *See* 14 C.F.R. § 253.10 ("No carrier may impose any contract of carriage provision containing a choice-of-forum clause that attempts to preclude a passenger, or a person who purchases a ticket for air transportation on behalf of a passenger, from bringing a claim against a carrier in any court of competent jurisdiction . . . .").

In sum, Congress granted Amtrak wide discretion to use its business judgment to make itself more efficient and to make appropriate agreements to do so. "[I]f Congress had intended" to prohibit Amtrak from arbitrating, "it would have made that clear," as it has for other restrictions. *Indian River Cty. v. Dep't of Transp.*, 348 F. Supp. 3d 17, 34 (D.D.C. 2018), *aff'd*, 945 F.3d 515 (D.C. Cir. 2019). It has not done so. Plaintiffs' statutory claim should be dismissed.

III. Plaintiffs' Constitutional Claims Should Likewise Be Dismissed

Plaintiffs' constitutional claims fare no better. As an initial matter, each of their constitutional claims requires government action. But Amtrak is not the government when it implements a private-sector program like arbitration. Even if Amtrak were the government for these purposes, government arbitration is a commonly used, and commonly upheld, activity. Courts have regularly rejected both First Amendment and Article III objections to arbitration agreements to which the government is a party. Such arbitration provisions, like Amtrak's, are based on the parties' consent, and with consent, a contract may waive any constitutional objections Plaintiffs raise. Even if consent were not a factor, the arbitration clause does not unconstitutionally infringe Plaintiffs' Petition Clause or Article III rights. Indeed, if Plaintiffs' constitutional arguments were correct, then *all* arbitration agreements, not merely Amtrak's, would be unconstitutional.

A. Amtrak Is Not the Government for Purposes of this Case

To begin with, Plaintiffs' constitutional claims fail because Amtrak is not a state actor when it formulates and invokes arbitration agreements. "[S]ince the company was created in 1971 . . . Amtrak's organic statute has flatly stated that the company 'is not a department, agency, or instrumentality of the United States Government.'" *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 491 (D.C. Cir. 2004) (Roberts, J.) (quoting 49 U.S.C. § 24301(a)(3)). Where, as here, Amtrak acts solely in its private capacity, entering into private consumer contracts with its customers as any other company might, it does not act as the government.

To be sure, the Supreme Court has twice held that Amtrak is part of "the government" for purposes of certain constitutional claims. In *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 400 (1995), the Court held that Amtrak was part of the government for First Amendment purposes. And in *Department of Transportation v. Ass'n of American Railroads* ("*Ass'n of American Railroads I*"), 575 U.S. 43, 53-54 (2015), the Court held that, "in its joint issuance of [] metrics and standards with the [Federal Railroad Administration], Amtrak acted as a governmental entity for purposes of the Constitution's separation of powers provisions." But those cases are readily distinguishable from the situation presented here.

First, *Lebron* issued two years before Congress passed the Amtrak Reform and Accountability Act of 1997. That statute altered Amtrak's management, seeking to make Amtrak "operate as much like a private business as possible." S. Rep. 105-85, at 1, 1997 U.S.S.C.A.N. at 3055; *see* Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134, § 2(5), 111 Stat. 2570, 2571 ("The Congress finds that . . . additional flexibility is needed to allow Amtrak to operate in a businesslike manner in order to manage costs and maximize revenues . . . ."). The *Lebron* Court also pointed to the Government Corporation Control Act ("GCCA"), to which Amtrak was

then subject, as evidence of the government's control over Amtrak. *See* 513 U.S. at 389-91, 396-97. But among the 1997 Act's many changes, it removed Amtrak from the GCCA's reach. *See* Amtrak Reform and Accountability Act § 415(d), 111 Stat. at 2590-91.

Second, the Court in *Ass'n of American Railroads I* took pains to limit its holding. It held only "that Amtrak is a governmental entity, not a private one, *for purposes of determining the constitutional issues presented in this case*." 575 U.S. at 55 (emphasis added). The Court did not purport to hold that Amtrak is part of the government for all purposes.

Third, and most importantly, in both cases Amtrak was engaging in traditional governmental functions. *Lebron* concerned Amtrak's decision to deny the display of a political advertisement on government property. 513 U.S. at 376-77, 399. *Ass'n of American Railroads I*, in turn, concerned Amtrak's joint promulgation with an agency of "metrics and standards" for "the performance and scheduling of passenger railroad services"—including those of rival railroads. 575 U.S. at 45. "This scheme [was] obviously regulatory." *Id.* at 58 (Alito, J., concurring). Amtrak's role as government property-owner and regulator, rather than as a business interacting with customers, was at issue.

In making arbitration a term or condition of its ticketing agreements, by contrast, Amtrak is not acting as the government. Indeed, Amtrak acts *least* like the government in this context, because it has merely adopted a policy common in the private sector pursuant to a statutory directive to operate as a for-profit corporation. Unlike in *Lebron* and *Ass'n of American Railroads I*, here Amtrak is acting pursuant to privately-focused goals: to "minimize United States Government subsidies," "maximize the use of its resources," and "operate[] . . . as a for-profit corporation." 49 U.S.C. §§ 24101(c)(1), (12), 24301(a)(2).

Since Amtrak does not act as the government for purposes of amending its ticketing agreement, no constitutional claim can succeed. "All analysis of constitutional rights must begin with a recognition that the Constitution, with rare exceptions, is a declaration of the powers, duties, and limitations of the Federal Government and of the States. . . . [T]he Constitution proprio vigore only places limitations on actions undertaken by governmental entities." *Greenya v. George Wash. Univ.*, 512 F.2d 556, 559 (D.C. Cir. 1975) (footnote omitted). Accordingly, "the First Amendment right to petition is 'a guarantee only against abridgment by [the] government.'" *Roberts v. AT&T Mobility LLC*, 877 F.3d 833, 837 (9th Cir. 2017) (quoting *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976)); *see id.* at 838 n.1 ("It is well established that judicially enforcing arbitration agreements does not constitute state action."). Similarly, Article III concerns arise when "*the other branches of the Federal Government* . . . confer the Government's 'judicial Power' on entities outside Article III." *Stern v. Marshall*, 564 U.S. 462, 484 (2011) (emphasis added). As Amtrak is not the government when it contracts to arbitrate with customers in its corporate capacity, Plaintiffs cannot attack Amtrak's arbitration clause on constitutional grounds.

B. Even if Amtrak Were the Government, Its Arbitration Clause Is Constitutional

Even if Amtrak qualified as a government entity here, it is well established that government arbitration poses no *per se* constitutional problem. "The government may expressly enter into binding arbitration 'assuming the availability of authority to effect any remedy that might result from the arbitration.'" *United States v. Park Place Assocs., Ltd.*, 563 F.3d 907, 929 n.13 (9th Cir. 2009) (quoting *Constitutional Limitations on Federal Government Participation in Binding Arbitration*, 19 Op. O.L.C. 208, 232 & n.4 (1995) [hereinafter "*OLC Opinion*"]). The Federal Arbitration Act provides that authority, through actions in federal court to confirm arbitration awards and appeals therefrom. *See* 9 U.S.C. §§ 9-11, 16. And for more than two decades, the

Administrative Dispute Resolution Act has not just allowed, but encouraged, federal agencies to use arbitration "as an alternative means of dispute resolution whenever all parties consent." 5 U.S.C. § 575(a).

Accordingly, courts have upheld government-initiated arbitration schemes against numerous constitutional challenges. *See, e.g.*, *Thomas*, 473 U.S. at 571 (rejecting claim that "Article III of the Constitution prohibits Congress from selecting binding arbitration with only limited judicial review as the mechanism for resolving disputes among participants in [Federal Insecticide, Fungicide, and Rodenticide Act's] pesticide registration scheme"); *Belom v. Nat'l Futures Ass'n*, 284 F.3d 795, 796-97, 799 (7th Cir. 2002) (stating, in Article III challenge to futures association arbitration agreement promulgated pursuant to Commodity Exchange Act (CEA) and CFTC regulations, that "[w]here an individual consents to arbitration, he waives the right to an impartial and independent adjudication"); *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 368 (7th Cir. 1999) (rejecting plaintiff's argument "that mandatory securities industry arbitration under federally-compelled and SEC-approved procedures violates her rights under Article III, the Seventh Amendment and the Fifth Amendment based on the 'unconstitutional conditions' doctrine"); *Geldermann, Inc. v. Commodity Futures Trading Comm'n*, 836 F.2d 310, 311-12 (7th Cir. 1987) (upholding, against Seventh Amendment and personal and structural Article III challenges, CEA's requirement that CFTC "promulgate rules requiring commodity exchange members to submit to customer-initiated arbitration"); *Syngenta Crop Prot., Inc. v. Drexel Chem. Co.*, 655 F. Supp. 2d 54, 57, 61 (D.D.C. 2009) (stating, in a challenge to "a binding arbitration proceeding initiated under the data-sharing provisions of the Federal Insecticide, Fungicide and Rodenticide Act ('FIFRA')," that "[t]he Constitution is not offended when parties are willing to arbitrate, which underscores that the arbitration panel's interim order does not violate Article III");

BiotechPharma, LLC v. Ludwig & Robinson, PLLC, 98 A.3d 986, 988-89 & n.1, 996 (D.C. 2014) (rejecting Seventh Amendment and due process challenges to D.C. Bar rules, created by D.C. Court of Appeals, requiring attorneys to agree to arbitrate attorney-client fee disputes upon the client's request).

The Office of Legal Counsel at the U.S. Department of Justice (OLC) has agreed. OLC has conducted a full examination of the constitutionality of government arbitration. Like the courts that have examined government arbitration, OLC has determined that no "constitutional provision or doctrine [imposes] a general prohibition against the federal government entering into binding arbitration." *OLC Opinion*, 19 Op. O.L.C. at 234. It has also opined that, "assuming the availability of authority to effect any remedy that might result from the arbitration, we perceive no broad constitutional prohibition [under Article III] on the government entering into binding arbitration." *Id.* at 232. Both the judicial and the executive branches, then, have rejected the sorts of broad constitutional challenges to government arbitration that Plaintiffs raise here.

If plaintiffs *could* bring constitutional challenges to Amtrak's arbitration provision, however, those challenges would fail on their merits, for reasons discussed below.

i. Plaintiffs' Petition Clause claim fails

Plaintiffs do not plausibly plead a claim under the Petition Clause. "[T]he Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011). But "[i]t is well-settled that a person may choose to waive certain constitutional rights pursuant to a contract with the government." *Overbey v. Mayor of Baltimore*, 930 F.3d 215, 223 (4th Cir. 2019). First Amendment rights, including the right to petition, are no exception. *See Lake James Cmty. Volunteer Fire Dep't Inc. v. Burke Cty.*, 149 F.3d 277, 278 (4th Cir. 1998) (enforcing agreement that waived Petition Clause rights); *Paragould Cablevision, Inc. v. City of Paragould*, 930 F.2d

1310, 1315 (8th Cir. 1991) (finding that cable company "effectively bargained away some of its free speech rights" in agreement with city). Plaintiffs do not allege any legal problem with the actual formation of Amtrak's contracts. Therefore, they have waived their Petition Clause rights.

In any event, Plaintiffs have other options for petitioning the government regarding Amtrak's actions. The petition right "is not absolute." *Patchak v. Jewell*, 828 F.3d 995, 1004 (D.C. Cir. 2016), *aff'd sub nom. Patchak v. Zinke*, 138 S. Ct. 897 (2018). Amtrak's arbitration clause "does not foreclose [Plaintiffs'] right to petition the government in all forums; it affects only [their] ability to do so via [the] courts." *Patchak*, 828 F.3d at 1004. There remain "other forms of petition—such as seeking redress directly from [Amtrak]" or from Congress. *Id.* And there remains, of course, arbitration itself. While not a government-run process, it does allow Plaintiffs to petition Amtrak (assuming Amtrak is part of the government) for a redress of any grievances they may someday develop. Plaintiffs' Petition Clause claim should therefore be dismissed.

ii. Plaintiffs' individual-rights Article III claim fails

Plaintiffs' individual-rights Article III claim likewise fails. "[A]s a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848-49 (1986). As numerous courts have found, the consent provided by signing an arbitration agreement suffices to waive personal Article III rights. *See, e.g.*, *Koveleskie*, 167 F.3d at 368 ("The right to an Article III forum is waivable, and Koveleskie waived this right by signing the Form U–4 and consenting to arbitration."); *Geldermann*, 836 F.2d at 316, 318 (holding that plaintiff had waived personal Article III right and that, "[i]n light of *Thomas* [*v. Union Carbide*], the district court's finding that if Geldermann was to continue in business it had no choice but to accept the [Chicago Board of Trade's (CBOT)] rules and regulations has no impact on the question of Geldermann's

consent to follow all of the rules of the CBOT, including the arbitration rules"); *Katz v. Cellco P'ship*, No. 12 CV 9193 VB, 2013 WL 6621022, at *13 & n.7 (S.D.N.Y. Dec. 12, 2013) (so holding and collecting cases), *aff'd in relevant part, vacated in part on other grounds, and remanded*, 794 F.3d 341 (2d Cir. 2015).

Regardless, arbitration with a government party does not trigger the concerns that drive the individual Article III right. As an individual guarantee, Article III is meant "to safeguard litigants' 'right to have claims decided before judges who are free from potential domination by other branches of government.'" *Schor*, 478 U.S. at 848 (quoting *United States v. Will*, 449 U.S. 200, 218 (1980)). Adjudication in front of private arbitrators does not threaten domination by another branch over the judiciary. The Supreme Court has "decline[d] to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985). And the judicial branch maintains jurisdiction to review arbitral decisions on certain grounds. *See* 9 U.S.C. §§ 9-11, 16. "[A]lthough judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of" the law. *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 232 (1987).

Moreover, Plaintiffs' allegation—that they have an indefeasible right to access the courts—is not limited to arbitrations involving government parties. As discussed in greater detail below, *see infra* Part III.C, this argument would invalidate *all* arbitration. The Court should dismiss Plaintiffs' individual-rights Article III claim.

iii. Plaintiffs' separation-of-powers Article III claim fails

Finally, Plaintiffs do not raise a plausible separation-of-powers concern with Amtrak's arbitration agreement. There is little difference between Plaintiff's separation-of-powers Article III claim and their individual-rights Article III claim. Both complain of the same basic harm: that

arbitrators, rather than courts, would resolve cases involving Amtrak. The sole distinguishing feature of Plaintiffs' separation-of-powers claim is their allegation that Amtrak, as a "component of the federal government," is constrained in its actions vis-à-vis the judiciary by the Constitution's structural provisions. Compl. ¶ 44. But this distinction proves too much. Indeed, if mere government involvement determined Article III's reach, "under [Plaintiffs'] theory the constitutionality of many quasi-adjudicative activities carried on by administrative agencies involving claims between individuals would be thrown into doubt." *Thomas*, 473 U.S. at 587.

Little independent separation-of-powers analysis is needed here. Amtrak introduced the arbitration clause into a consumer contract, in the same manner as any private party. It therefore makes little sense to apply traditional Article III standards, which were developed for congressional promulgation of non-Article III adjudication by fiat. Indeed, though the contractual nature of Amtrak's arbitration agreement is not dispositive of Plaintiffs' separation-of-powers claim, it places a heavy thumb on the scale in favor of constitutionality. While one cannot "us[e] consent to excuse an actual violation of Article III," "*Schor* confirms that consent remains highly relevant when determining . . . whether a particular adjudication in fact raises constitutional concerns." *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1945 n.10 (2015). Contractual arbitration, as governed by the Federal Arbitration Act, does not violate Article III. *See Katz v. Cellco P'ship*, 794 F.3d 341, 344 (2d Cir. 2015), *aff'g in part, rev'g in part* No. 12 CV 9193, 2013 WL 6621022, at *8-12 (S.D.N.Y. Dec. 12, 2013).

However, even under the guidelines used to analyze statutes that mandate non-Article III adjudication, Amtrak's arbitration provision passes constitutional muster. When considering (1) "the extent to which the 'essential attributes of judicial power' are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction

and powers normally vested only in Article III courts"; (2) "the origins and importance of the right to be adjudicated"; and (3) "the concerns that drove Congress to depart from the requirements of Article III," *Schor*, 478 U.S. at 851, Amtrak's arbitration agreement plainly comports with Article III.

First, Article III courts retain the essential attributes of judicial power. "'[S]eparation of powers concerns are diminished' when, as here, 'the decision to invoke [a non-Article III] forum is left entirely to the parties and the power of the federal judiciary to take jurisdiction' remains in place." *Wellness Int'l*, 135 S. Ct. at 1945 (citation omitted) (alterations in original). A scheme such as the one laid out in Amtrak's arbitration clause, which "limits but does not preclude review of the arbitration proceeding by an Article III court . . . . preserves the 'appropriate exercise of the judicial function.'" *Thomas*, 473 U.S. at 592 (citation omitted).

Second, for the same reason Plaintiffs lack standing in this case, they lack any argument regarding the rights they seek to adjudicate. Since Plaintiffs chose to bring suit before any party even sought arbitration, the Court cannot evaluate the "importance of the right to be adjudicated" in any hypothetical future case they might bring. *Schor*, 478 U.S. at 851.

And third, "the concerns that drove" the arbitration provision confirm that the provision is appropriate. *Id.* This factor, as laid out in *Schor*, illustrates why the *Schor* standards are an ill fit here: this case does not concern a decision by "*Congress*" to "depart from the requirements of Article III" as a matter of governmental decree. *Id.* (emphasis added). Nevertheless, Amtrak's rationale is sound. Amtrak introduced the arbitration provision pursuant to Congress's command that it operate as a for-profit corporation and reduce its dependence on federal subsidies. Arbitration promotes efficient adjudication, which saves all parties money as compared to court proceedings. *See Stolt-Nielsen*, 559 U.S. at 685.

Finally, Plaintiffs do not plausibly allege an attempt by a governmental authority "'to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts." *Peretz v. United States*, 501 U.S. 923, 937 (1991) (citation omitted) (alteration in original). The complaint does not allege that Amtrak designed its arbitration clause "in an effort to aggrandize itself or humble the Judiciary." *Wellness Int'l*, 135 S. Ct. at 1945. Rather, Amtrak simply sought to take advantage of a form of adjudication that Congress has encouraged through both the Federal Arbitration Act and Alternative Disputes Resolution Act, that the Supreme Court has repeatedly blessed, and that other for-profit corporations routinely use. As with their other constitutional claims, then, Plaintiffs fail to state a separation-of-powers claim.

C. Plaintiffs' Arguments Would Render All Arbitration Unconstitutional

Amtrak violated no constitutional provision when it added an arbitration clause to its consumer contracts. In arguing to the contrary, Plaintiffs put forth rationales in their complaint that would equally imperil all arbitration agreements. This Court should not adopt these lines of argument, which would place both public and private arbitration at constitutional risk.

To take one prominent example, the complaint faults Amtrak for applying its arbitration clause to "millions" of customers, Compl. ¶ 45, and for making the provision a mandatory condition of purchasing or using a ticket, Compl. ¶¶ 1-2, 27, 41, 45. Yet "the times in which consumer contracts were anything other than adhesive are long past." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346-47 (2011). Courts have enforced any number of arbitration agreements in consumer contracts of adhesion. *E.g.*, *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 231, 238-39 (2013) (rejecting challenge to class action ban in arbitration provision in standard agreement between merchants and credit card companies); *Concepcion*, 563 U.S. at 336-37, 352 (same as to standard AT&T cellular service contracts); *Ferguson v. Corinthian Colleges, Inc.*, 733

F.3d 928, 930-31 (9th Cir. 2013) (compelling arbitration under Corinthian College's standard enrollment agreement); *Pendergast v. Sprint Nextel Corp.*, 691 F.3d 1224, 1226 (11th Cir. 2012) (compelling arbitration under Sprint's standard arbitration clause).

Relatedly, Plaintiffs complain that the arbitration provision "prevents Amtrak's passengers and purchasers from waiting until a dispute has arisen before deciding whether binding arbitration is in their best interest." Compl. ¶ 1. But this is true of nearly all consumer arbitration agreements. And indeed, arbitration serves the interests of consumers who would otherwise find lawsuits against corporations protracted and prohibitively expensive. *See Stolt-Nielsen*, 559 U.S. at 685 ("In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."). "[T]he recognition that arbitration procedures are more streamlined than federal litigation is not a basis for finding the forum somehow inadequate; the relative informality of arbitration is one of the chief reasons that parties select arbitration." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009).

Plaintiffs also claim that arbitration "threatens the institutional integrity of the judicial branch by" having customers litigate "through a non-governmental process," separate from and (supposedly) not meaningfully reviewable by Article III courts. Compl. ¶ 45. This, too, is an argument against all arbitration. "Such generalized attacks on arbitration 'res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,' and as such, they are 'far out of step with [the Supreme Court's] current strong endorsement of the federal statutes favoring this method of resolving disputes.'" *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) (quoting *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 481 (1989)). As for the argument that Amtrak's arbitration

clause is somehow unconstitutional because there is limited "judicial supervision or review" by Article III courts, Compl. ¶ 45, the Supreme Court has already rejected this line of reasoning. *See 14 Penn Plaza*, 556 U.S. at 268 ("[T]here is no reason to assume at the outset that arbitrators will not follow the law." (citation omitted)); *Shearson/Am. Exp.*, 482 U.S. at 232 (stating that limited judicial review of arbitration suffices to ensure arbitrators' compliance with the law).

That Amtrak provides "rail transportation services to the public," Compl. ¶ 3, does not change the analysis. Other entities that provide right-of-way services to the public, such as utilities, cable companies, and communications providers all use arbitration agreements. Telephone companies, for instance, routinely include arbitration provisions in their contracts with customers. *See, e.g.*, *Concepcion*, 563 U.S. at 336-37; *S. Commc'ns Servs., Inc. v. Thomas*, 720 F.3d 1352, 1354-55 (11th Cir. 2013). So, too, cable companies. *See, e.g.*, *Kristian v. Comcast Corp.*, 446 F.3d 25, 29-30 (1st Cir. 2006). Public utilities, likewise, have included arbitration clauses in contracts with customers. *See, e.g.*, *Salinas v. Atlanta Gas Light Co.*, 819 S.E.2d 903, 904-05 (Ga. Ct. App. 2018).

Taken to their logical conclusion, Plaintiffs' constitutional rationales could strike down the sorts of contractual provisions used by more than eighty percent of the Fortune 100 companies, and which cover over sixty percent of all retail e-commerce sales. *See* Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. Davis L. Rev. Online 233, 234 (2019). This Court should reject Plaintiffs' gambit, which defies both decades of jurisprudence and Congress's decision to adopt a "liberal federal policy favoring arbitration." *Concepcion*, 563 U.S. at 339 (citation omitted).

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' complaint for lack of subject-matter jurisdiction, *see* Fed. R. Civ. P. 12(b)(1), or for failure to state a claim upon which relief can be granted, *see id.* 12(b)(6).

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Respectfully submitted,

/s/ Jessica Ring Amunson

Jessica Ring Amunson (DC Bar # 497223)
Noah B. Bokat-Lindell (DC Bar # 156032)
JENNER & BLOCK LLP
1099 New York Ave. NW, Suite 900
Washington, DC 20001
Tel. 202-639-6000
Fax: 202-639-6066
jamunson@jenner.com
nbokat-lindell@jenner.com