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

PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiffs Robert Weissman and Patrick Llewellyn move for summary judgment against defendant National Passenger Railroad Corporation (Amtrak) on the grounds that there is no genuine issue of disputed material fact and that plaintiffs are entitled to judgment as a matter of law. In support of this motion, plaintiffs submit the accompanying Memorandum in Support of Plaintiffs' Cross-Motion for Summary Judgment and in Opposition to Defendant's Motion to Dismiss; Plaintiffs' Statement of Material Facts as to Which There is No Dispute; declarations of Nandan M. Joshi, Robert Weissman, and Patrick Llewellyn; and a proposed order.

March 27, 2020

Respectfully submitted,

/s/ Nandan M. Joshi
Nandan M. Joshi (DC Bar No. 456750)
Scott L. Nelson (DC Bar No. 413548)
Allison M. Zieve (DC Bar No. 424786)
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Plaintiffs

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

MEMORANUDUM IN SUPPORT OF
PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT AND
IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Nandan M. Joshi (DC Bar No. 456750)
Scott L. Nelson (DC Bar No. 413548)
Allison M. Zieve (DC Bar No. 424786)
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Plaintiffs

March 27, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

FACTS 2

LEGAL STANDARDS 10

ARGUMENT 10

I. Plaintiffs have Article III standing 11

II. Amtrak is part of the government and subject to constitutional constraints. 15

III. Amtrak lacks statutory authority to include a mandatory arbitration provision as a term or condition of passenger rail travel. 19

IV. Amtrak's arbitration condition is unconstitutional. 28

A. Amtrak's arbitration condition violates the Petition Clause. 29

B. Amtrak's arbitration condition violates Article III. 35

C. Amtrak's arbitration condition violates the separation of powers. 39

V. Plaintiffs' claims do not affect arbitration agreements in other contexts. 42

CONCLUSION 45

TABLE OF AUTHORITIES

Cases

44 Liquormart, Inc. v. Rhode Island,
517 U.S. 484 (1996) 45

Adickes v. S.H. Kress & Co.,
398 U.S. 144 (1970) 10

Agency for International Development v. Alliance for Open Society International, Inc.,
570 U.S. 205 (2013) 34

Allied Tube & Conduit Corp. v. Indian Head, Inc.,
486 U.S. 492 (1988) 31

American Bus Ass'n v. Rogoff,
649 F.3d 734 (D.C. Cir. 2011) 30

American Petroleum Institute v. EPA,
52 F.3d 1113 (D.C. Cir. 1995) 24

American Premier Underwriters, Inc. v. National Railroad Passenger Corp.,
709 F.3d 584 (6th Cir. 2013) 26

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 10

Arrington v. United States,
473 F.3d 329 (D.C. Cir. 2006) 10

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 10

Association of American Railroads v. United States Department of Transportation,
721 F.3d 666 (D.C. Cir. 2013),
vacated, 575 U.S. 43 (2015) 17

BE&K Constr. Co. v. NLRB,
536 U.S. 516 (2002) 21, 29

Belbacha v. Bush,
520 F.3d 452 (D.C. Cir. 2008) 31

Belom v. National Futures Ass'n,
284 F.3d 795 (7th Cir. 2002) 38

Bill Johnson's Restaurants, Inc. v. NLRB,
461 U.S. 731 (1983) 22

BiotechPharma, LLC v. Ludwig & Robinson, PLLC,
98 A.3d 986 (D.C. 2014) 45

Board of Couty Commissioners v. Umbehr,
518 U.S. 668 (1996) 33

Board of Trade of City of Chicago v. CFTC,
704 F.2d 929 (7th Cir. 1983) 15

Bond v. United States,
572 U.S. 844 (2014) 21

* *Borough of Duryea v. Guarnieri*,
564 U.S. 379 (2011) 29, 34

Boumediene v. Bush,
553 U.S. 723 (2008) 19

Bowen v. First Family Financial Services,
233 F.3d 1331 (11th Cir. 2000) 14

Buckley v. Valeo,
424 U.S. 1 (1976) 36

California Motor Transport Co. v. Trucking Unlimited,
404 U.S. 508 (1972) 22, 29, 30

Central Hudson Gas & Electric Corp. v. Public Service Commission of New York,
447 U.S. 557 (1980) 35

* *CFTC v. Schor*,
478 U.S. 833 (1986) .... *passim*

Chamber of Commerce of United States v. SEC,
412 F.3d 133 (D.C. Cir. 2005) 11, 12

City of Arlington v. FCC,
569 U.S. 290 (2013) 26

Clark v. Martinez,
543 U.S. 371 (2005) 20, 24, 25

Coalition for Mercury-Free Drugs v. Sebelius,
671 F.3d 1275 (D.C. Cir. 2012) 11

Competitive Enterprise Institute v. National Highway Traffic Safety Administration,
901 F.2d 107 (D.C. Cir. 1990) 11, 12

Consumer Federation of America v. FCC,
348 F.3d 1009 (D.C. Cir. 2003) 11, 12, 13

Davis v. Federal Election Commission,
554 U.S. 724 (2008) 11

* *Department of Transportation v. Association of American Railroads*,
575 U.S. 43 (2015) .... *passim*

Department of Commerce v. New York,
139 S. Ct. 2551 (2019) 11

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,
365 U.S. 127 (1961) 22

Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council,
485 U.S. 568 (1988) 20, 21

First Options of Chicago, Inc. v. Kaplan,
514 U.S. 938 (1995) 7, 31, 41

Free Enterprise Fund v. Public Company Accounting Oversight Board,
561 U.S. 477 (2010) 27, 41

Freytag v. Commissioner of Internal Revenue,
501 U.S. 868 (1991) 36

Frost v. Railroad Commission of California,
271 U.S. 583 (1926) 32

Geldermann, Inc. v. CFTC,
836 F.2d 310 (7th Cir. 1999) 38

Green v. Mansour,
474 U.S. 64 (1985) 27

Horn & Hardart Co. v. National Rail Passenger Corp.,
843 F.2d 546 (D.C. Cir. 1988) 28

Illinois v. Krull,
480 U.S. 340 (1987) 45

In re Primus,
436 U.S. 412 (1978) 29

INS v. St. Cyr,
533 U.S. 289 (2001) 20, 21

Jerome Stevens Pharmaceuticals, Inc. v. FDA,
402 F.3d 1249 (D.C. Cir. 2005) 10

Jones v. Sears Roebuck & Co.,
301 F. App'x 276 (4th Cir. 2008) 15

Knick v. Township of Scott,
139 S. Ct. 2162 (2019) 14

Koveleskie v. SBC Capital Markets, Inc.,
167 F.3d 361 (7th Cir. 1999). 38

Lake James Community Volunteer Fire Department, Inc. v. Burke County,
149 F.3d 277 (4th Cir. 1998) 35

* *Lebron v. National Railroad Passenger Corp.*,
513 U.S. 374 (1995).......... *passim*

Lee v. American Express Travel Related Services, Inc.,
348 F. App'x 205 (9th Cir. 2009) 14

Legal Services Corp. v. Velazquez,
531 U.S. 533 (2001).......... 33

Lozman v. City of Riviera Beach,
138 S. Ct. 1945 (2018).......... 29

Maryland Casualty Co. v. Pacific Coal & Oil Co.,
312 U.S. 270 (1941).......... 27

McDonald v. Smith,
472 U.S. 479 (1985).......... 30

MedImmune, Inc. v. Genentech, Inc.,
549 U.S. 118 (2007).......... 13, 27, 28

Meyer v. Sprint Spectrum L.P.,
200 P.3d 295 (Cal. 2009) 15

Michigan v. EPA,
268 F.3d 1075 (D.C. Cir. 2001).......... 24

Mine Workers v. Illinois Bar Ass'n,
389 U.S. 212 (1967).......... 22

National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers,
414 U.S. 453 (1974).......... 26

NLRB v. Catholic Bishop of Chicago,
440 U.S. 490 (1979).......... 21

Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,
458 U.S. 50 (1982).......... 36, 39, 41

Oil States Energy Services, LLC v. Greene's Energy Group, LLC,
138 S. Ct. 1365 (2018).......... 32, 34, 36

Orangeburg, South Carolina v. FERC,
862 F.3d 1071 (D.C. Cir. 2017).......... 11, 12

Overbey v. Mayor of Baltimore,
930 F.3d 215 (4th Cir. 2019) 34, 35

Oxford Health Plans LLC v. Sutter,
569 U.S. 564 (2013).......... 7, 31, 41

Paragould Cablevision, Inc. v. City of Paragould,
930 F.2d 1310 (8th Cir. 1991) 35

Patchak v. Jewell,
828 F.3d 995 (D.C. Cir. 2016),
aff'd sub nom. Patchak v. Zinke, 138 S. Ct. 897 (2018) 31, 32

Peretz v. United States,
501 U.S. 923 (1991) 37, 40, 42

Perry v. Sindermann,
408 U.S. 593 (1972) 32, 34

Public Citizen Health Research Group v. Acosta,
363 F. Supp. 3d 1 (D.D.C. 2018) 10

Public Citizen v. United States Department of Justice,
491 U.S. 440 (1989) 21

Regional Rail Reorganization Act Cases,
419 U.S. 102 (1974) 13

Roell v. Withrow,
538 U.S. 580 (2003) 37, 39

Ruckelshaus v. Monsanto,
467 U.S. 986 (1984) 13, 38

Sharp Corp. v. Hisense USA Corp.,
292 F. Supp. 3d 157 (D.D.C. 2017) 43

Smith v. Highway Employees,
441 U.S. 463 (1979) 30

Solid Waste Agency of North Cook County v. United States Army Corps of Engineers,
531 U.S. 159 (2001) 20, 25

Sossamon v. Texas,
563 U.S. 277 (2011) 24

Steffel v. Thompson,
415 U.S. 452 (1974) 27

Stern v. Marshall,
564 U.S. 462 (2011) 36, 37

Stolt-Nielsen S.A. v. AnimalFeeds International Corp.,
559 U.S. 662 (2010) 8, 31

Tapia v. United States,
564 U.S. 319 (2011) 24

Terral v. Burke Construction Co.,
257 U.S. 529 (1922) 34

Thomas v. Collins,
323 U.S. 516 (1945) 29, 34

Thomas v. Union Carbide Agricultural Products,
473 U.S. 568 (1985) 13, 38, 39, 42

Tierney v. Schweiker,
718 F.2d 449 (D.C. Cir. 1983) 28, 37

United States v. Nordic Village Inc.,
503 U.S. 30 (1992) 24

United States v. Park Places Associates, Ltd.,
563 F.3d 907 (9th Cir. 2009) 43

Waters v. Churchill,
511 U.S. 661 (1994) 34

Wayte v. United States,
470 U.S. 598 (1985) 30

* *Wellness International Network, Ltd. v. Sharif*,
135 S. Ct. 1932 (2015) .... *passim*

Constitution

U.S. Const. art. I, § 9, cl. 2 21

U.S. Const. art. III, § 1 35

Statutes

5 U.S.C. § 575 44

5 U.S.C. § 575(a)(3) 44

5 U.S.C. App. § 8G(a)(2) 4

7 U.S.C. § 136a(c)(1)(F)(iii) 14

9 U.S.C. § 2 7

9 U.S.C. § 3 .... 7, 31, 39

9 U.S.C. § 4 .... 7, 31, 39

9 U.S.C. § 9 7

9 U.S.C. §§ 9–11 41

9 U.S.C. § 10(a)(1)–(4) 7

9 U.S.C. § 11 7

28 U.S.C. § 1331 27

28 U.S.C. § 1349 .... 27, 32

29 U.S.C. § 158(a)(1) 22

49 U.S.C. § 24101(a)(1) 3, 23
49 U.S.C. § 24101(b) 19, 23
49 U.S.C. § 24101(c) 23
49 U.S.C. § 24101(c)(1) 23
49 U.S.C. § 24101(c)(1)(A)–(F) 24
49 U.S.C. § 24101(c)(2) 24
49 U.S.C. § 24101(c)(5) 24
49 U.S.C. § 24101(c)(12) 23, 24
49 U.S.C. § 24101(d) 19, 23, 24
49 U.S.C. § 24103(a)(1) 25, 26, 27
49 U.S.C. § 24103(b) 26
49 U.S.C. § 24301(a) 4
49 U.S.C. § 24301(a)(2) 22
49 U.S.C. § 24301(e) 25
49 U.S.C. § 24302(a)(1) 3
49 U.S.C. § 24302(a)(2) 3
49 U.S.C. § 24302(a)(3) 4, 18
49 U.S.C. § 24303(a) 4
49 U.S.C. § 24305(c)(1) 24
49 U.S.C. § 24315 4
49 U.S.C. § 28103(a) 4

Amtrak Improvement Act of 1981, Pub. L. No. 97-35, title XI,
subtitle F, § 1179, 95 Stat 357, 693 26

Amtrak Reform and Accountability Act of 1997,
Pub. L. No. 105-134, 111 Stat. 2570 18
§ 2(5) 18
§ 415(d) 18

FAST Act, Pub. L. No. 114-94, div. A, title XI, § 11101, 129 Stat.
1312, 1622 (2015) 4

Federal Insecticide, Fungicide, and Rodenticide Act,
7 U.S.C. § 136 *et seq.* 14

Rail Passenger Service Act of 1970,
Pub. L. No. 91-518, 84 Stat. 1327 3

§ 101 3

§ 301 .... 3, 16

§ 304 3

§ 307(a) 26

Other Authorities

14 C.F.R. § 253.10 9

Constitutional Limitations on Fed. Gov't Participation in Binding Arbitration, 19 Op. O.L.C. 208 (1995) 44

Federal Rule of Civil Procedure 12(b)(1) 10

Federal Rule of Civil Procedure 12(b)(6) 10

Federal Rule of Civil Procedure 56(a) 10

Random House Dictionary of the English Language (2d ed. 1987) 24

S. Rep. No. 97-139 (1981) 26

INTRODUCTION

This case presents the question whether the federal government may condition access to its services on the public's waiver of the right to litigate claims in a federal court. Plaintiffs Robert Weissman and Patrick Llewellyn seek declaratory and injunctive relief to stop defendant National Railroad Passenger Corporation (Amtrak) from conditioning passenger rail service on an "arbitration agreement" that would force them to resolve claims against Amtrak through binding arbitration before a private arbitrator. Congress created Amtrak to provide passenger rail service to the public, and Amtrak remains substantially owned and entirely controlled by the government. Plaintiffs work in Washington, DC, where Amtrak is a major provider of intercity transportation service, and they must travel to other East Coast cities for their jobs. Under Amtrak's arbitration provisions, Plaintiffs cannot use Amtrak for transportation unless, against their will, they waive their constitutional rights to go to court.

Amtrak's arbitration requirement exceeds its statutory authority. Amtrak cannot exercise powers not delegated by Congress, and Congress did not authorize Amtrak to condition rail service on terms requiring arbitration. The Court can decide this case on statutory grounds alone.

If the Court does not resolve this case on statutory grounds, it should conclude that the arbitration condition violates three constitutional doctrines that guarantee Plaintiffs' right to seek judicial redress. First, the condition deprives Plaintiffs of their First Amendment right to petition courts for redress of grievances. Second, it deprives Plaintiffs of their Article III right to have disputes heard by an impartial and independent federal judge. Third, it violates the separation of powers by impinging on the institutional role of the judicial branch. These constitutional protections preclude Congress from forcing those who receive government services—rail passengers, Social Security claimants, recipients of veterans' benefits, the list goes on—to resolve

disputes through private arbitration. They preclude Amtrak from achieving the same result by adding an arbitration requirement to its terms and conditions of service.

Notably, Amtrak does not argue that Congress could do what Amtrak's arbitration provision does. Rather, Amtrak argues that it is not bound by the Constitution because it is not part of the federal government. The Supreme Court, however, has twice rejected that argument, and Amtrak is no less governmental today than it was when those cases were decided. Amtrak also argues that its arbitration condition is constitutional because its passengers "consent" to arbitration. The government, however, may not use "consent" obtained through an unconstitutional condition to defend its actions as constitutional. And consent cannot cure the structural damage that Amtrak's arbitration condition does to the institutional integrity of the judicial branch.

Granting summary judgment to Plaintiffs will neither end arbitration agreements in the private sector, nor preclude the government from contractually binding itself to arbitration to settle disputes or in other contexts. Rather, ruling for Plaintiffs here will prevent Amtrak—or any similar governmental body—from conditioning receipt of government services on waiver of the right to access the civil justice system. Amtrak does not identify any other government program that will be affected by such a ruling. Plaintiffs' cross-motion for summary judgment should be granted, and Amtrak's motion to dismiss denied.

FACTS

Congress Established Amtrak to Provide Passenger Rail Services to the Public.

"Amtrak is a corporation established and authorized by a detailed federal statute enacted by Congress for no less a purpose than to preserve passenger services and routes on our Nation's railroads." *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 46 (2015). Congress found that "modern, efficient, intercity railroad passenger service is a necessary part of a balanced transportation system" and that "the public convenience and necessity require the continuance and

improvement of such service to provide fast and comfortable transportation between crowded urban areas and in other areas of the country." Rail Passenger Service Act of 1970 (1970 Act), Pub. L. No. 91-518, § 101, 84 Stat. 1327, 1328, *codified as amended* at 49 U.S.C. § 24101(a)(1). Congress created Amtrak, *id*. § 301, 84 Stat. at 1330, "to serve these broad public objectives," *Am. R.Rs.*, 575 U.S. at 53.

Amtrak has issued both preferred and common stock. 1970 Act, § 304, 84 Stat. at 1331. As of September 30, 2019, the Secretary of Transportation held all of Amtrak's preferred stock, 109,396,994 shares, "for the benefit of the Federal Government," with each share of preferred stock convertible to 10 shares of common stock. Joshi Decl. Ex. 1 (Amtrak Consolidated Financial Statements), at 19. As of September 30, 2019, "four railroads whose intercity passenger operations Amtrak assumed in 1971" held 9,385,694 of the 10 million authorized shares of Amtrak's common stock. *Id*.

Unlike shareholders of a private corporation, Amtrak's stockholders do not elect its board of directors: "Amtrak's four private shareholders have not been entitled to vote in selecting the board of directors since 1981." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 386 (1995). By statute, Amtrak's 10-member board of directors includes the Secretary of Transportation, eight other directors appointed by the President of the United States and confirmed by the Senate, and the "President of Amtrak, who shall serve as a nonvoting member of the Board." 49 U.S.C. § 24302(a)(1). "In selecting Amtrak's Board members, moreover, the President must consult with leaders of both parties in both Houses of Congress in order to 'provide adequate and balanced representation of the major geographic regions of the United States served by Amtrak.'" *Am. R.Rs.*, 575 U.S. at 52 (quoting 49 U.S.C. § 24302(a)(2)). Board members serve 5-year terms, and no more than five of the eight appointed board members "may be members of the same political party." 49

U.S.C. § 24302(a)(3). Amtrak's president and other officers are "named and appointed by the board of directors" and "serve at the pleasure of the board." *Id.* § 24303(a).

"In addition to controlling Amtrak's stock and Board of Directors the political branches exercise substantial, statutorily mandated supervision over Amtrak's priorities and operations." *Am. R.Rs.*, 575 U.S. at 52. Governmental oversight occurs through reporting requirements, 49 U.S.C. § 24315, appointment of an inspector general, 5 U.S.C. App. § 8G(a)(2), and "oversight hearings." *See Am. R.Rs.*, 575 U.S. at 52. "Amtrak is also dependent on federal financial support," receiving "more than $41 billion in federal subsidies" between 1971 and 2014. *Am. R.Rs.*, 575 U.S. at 53. In 2015, Congress authorized $8.05 billion for Amtrak for fiscal years 2016 to 2020. FAST Act, Pub. L. No. 114-94, div. A, title XI, § 11101, 129 Stat. 1312, 1622 (2015). Congress has also capped Amtrak's liability for personal injury, death, and damage to property arising out of a single accident or incident. 49 U.S.C. § 28103(a).

Congress has addressed "Amtrak's status as a Government entity for purposes of matters that are within Congress's control," *Lebron*, 513 U.S. at 392, by providing that it "is a railroad carrier" for various statutory provisions, "shall be operated and managed as a for-profit corporation," and "is not a department, agency, or instrumentality of the United States Government." 49 U.S.C. § 24301(a). The "disclaimer of agency status" operates "to deprive Amtrak of all those inherent powers and immunities of Government agencies that it is within the power of Congress to eliminate," such as "sovereign immunity from suit" and "the ordinarily presumed power of Government agencies authorized to incur obligations to pledge the credit of the United States." *Lebron*, 513 U.S. at 392.

Amtrak Imposes Arbitration as a Condition of Service.

On December 11, 2018, Amtrak submitted the "Amtrak Consumer Arbitration Agreement" to the American Arbitration Association (AAA). Joshi Decl. Ex. 2 (Arbitration Agreement) & Ex. 3 (AAA Consumer Arbitration Rules), at 16. The arbitration agreement took effect on January 6, 2019. *Id.* Ex. 2. Amtrak has incorporated the arbitration agreement into its terms and conditions of service, *id.* Ex. 4 (Terms of Service), at 1, 14, which are posted on Amtrak's website at https://www.amtrak.com/terms-and-conditions.html.

Amtrak's terms and conditions provide that the arbitration provisions are "binding" and "require[]" ticket purchasers and passengers to "resolve claims and disputes with Amtrak on an individual basis through arbitration and not by way of court or jury trial." *Id.* Ex. 2. The terms requiring arbitration are not optional: "By purchasing a ticket for travel on Amtrak, You are agreeing to these Terms and Conditions and agreeing to the Arbitration Agreement." *Id.*

Amtrak's "Mutual Agreement to Arbitrate" provides that it "is intended to be as broad as legally permissible, and, except as it otherwise provides, applies to all claims, disputes, or controversies, past, present, or future, that otherwise would be resolved in a court of law or before a forum other than arbitration."[1] *Id.* Ex. 2. To purchase an Amtrak ticket, the purchaser and individuals on whose behalf tickets are purchased, "including, without limitation, family members, minor passengers, colleagues and companions," must "AGREE that this Arbitration Agreement applies, without limitation, to claims Amtrak may have against You and claims You may have against Amtrak and any affiliates or related entities, or against any party to which Amtrak owes indemnity (which party may also enforce this Agreement), including without limitation any host

[1] The only claims expressly excluded from arbitration are those "that an applicable federal statute states cannot be arbitrated." Joshi Decl. Ex. 2.

railroad," *id*., *i.e.*, a freight railroad whose track Amtrak uses to provide passenger rail service, *see* Joshi Decl. Ex. 5 (Amtrak FY 2018 Company Profile), at 3. The agreement expressly extends to claims

> based upon or related to: these Terms and Conditions, breach of contract, tort claims, common law claims, Your relationship with Amtrak, tickets, services and accommodations provided by Amtrak, carriage on Amtrak trains and equipment, any personal injuries (including, but not limited to, claims for negligence, gross negligence, physical impairment, disfigurement, pain and suffering, mental anguish, wrongful death, survival actions, loss of consortium and/or services, medical and hospital expenses, expenses of transportation for medical treatment, expenses of drugs and medical appliances, emotional distress, exemplary or punitive damages arising out of or related to any personal injury), and any claims for discrimination and failure to accommodate[.]

Id. Ex. 2. The agreement also contains a "Class Action Waiver," under which the parties may "bring any claim or dispute in arbitration on an individual basis only, and not as a class or representative action." *Id.*

The arbitration agreement states that claims "shall be decided by a single arbitrator through binding arbitration and not by a judge or jury." *Id.* Except with respect to the Class Action Waiver, the arbitrator—"not any federal, state, or local court or agency"—has "exclusive authority to resolve any dispute relating to the validity, applicability, enforceability, unconscionability or waiver of this Arbitration Agreement, including, but not limited to any claim that all or any part of this Arbitration Agreement is void or voidable." *Id.*

Amtrak's terms require arbitration under the AAA's Consumer Arbitration Rules. *Id.*; *see also id.* Ex. 3. AAA arbitrators are not federal officers of any kind, much less Article III judges, but are private persons "from the legal and business communities." *Id.* Ex. 6 (AAA National Roster of Arbitrators).

Amtrak has specified that arbitration will be "governed by the Federal Arbitration Act [FAA]." *Id.* Ex. 2. The FAA provides that a "written provision in … a contract evidencing a

transaction involving commerce to settle by arbitration" an existing or future "controversy arising out of a contract [or] transaction … shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. The FAA prohibits "courts of the United States" from adjudicating lawsuits "referable to arbitration" "until such arbitration has been had in accordance with the terms of the agreement." *Id.* § 3. A federal district court, "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue," must "direct[] the parties to proceed to arbitration in accordance with the terms of the agreement" upon petition by a party aggrieved by the other party's "alleged failure, neglect, or refusal … to arbitrate." *Id.* § 4.

Under the FAA, an arbitration agreement may provide—as Amtrak's does, *see* Joshi Decl. Ex. 2—that "a judgment of the court shall be entered upon the award made pursuant to arbitration," and the court "must grant an order [confirming the award] unless the award is vacated, modified, or corrected." 9 U.S.C. § 9. "[C]ourts may vacate an arbitrator's decision 'only in very unusual circumstances.'" *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 568 (2013) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995)). Those circumstances include where "the award was procured by corruption, fraud, or undue means"; the arbitrators engaged in "evident partiality or corruption," or in "misconduct" or "misbehavior" that prejudices a party; or "the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(1)–(4). A court may modify or correct an arbitration award only for "an evident material miscalculation of figures or an evident material mistake," where the "arbitrators have awarded upon a matter not submitted to them," or "[w]here the award is imperfect in matter of form not affecting the merits of the controversy." 9 U.S.C. § 11. "[A]n error—or even a serious error"—does not provide grounds for

overturning an arbitration award. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671 (2010).

Amtrak's former President and Chief Executive Officer Richard Anderson has explained that Amtrak imposed the arbitration requirement "for two simple reasons: to expedite resolution of claims and to reduce unnecessary litigation costs." Joshi Decl. Ex. 7 (Amtrak CEO Letter to Congress), at 2. Anderson asserted that "Amtrak spends roughly $2 – $3 million annually—some $11 million over the last five years—for outside counsel to represent the Company with respect to passenger claims," and that "arbitrating disputed passenger claims under our policy will reduce those costs significantly." *Id.* at 4. Over a five-year period, Amtrak spent a low of $1,540,606 (fiscal year 2018) and a high of $3,369,883 (fiscal year 2019) on legal fees; and in most years, it resolved at least 95 percent of passenger claims without litigation. *Id.*, Table: Amtrak Passenger Injury Claims. Amtrak's legal fees in fiscal years 2018 and 2019 represented 0.36% and 0.77%, respectively, of its total expenses, which amounted to $4.239 billion in 2018 and $4.397 billion in 2019. *Id.* Ex. 1, at 5.

Amtrak Provides Critical Transportation Services to DC-Based Workers Like Plaintiffs.

Since beginning operations in 1971, Amtrak has expanded to more than 500 destinations in 46 states, the District of Columbia, and Canada. Joshi Decl. 5, at 3. In fiscal year 2018, Amtrak passengers made on average 87,000 trips per day, or a total of 31.7 million. *Id.* Amtrak is "the nation's only high-speed intercity passenger rail provider," and it ranks sixth in total domestic passengers carried when U.S. airlines are included. *Id.* Amtrak has a "very strong position" in the Northeast Corridor, which includes Washington, Philadelphia, New York City, and Boston. *Id.* at 3–4. New York, Washington, and Philadelphia are Amtrak's top-three busiest cities, serving more than 10 million, 5 million, and 4.4 million riders in fiscal year 2018. *Id.* at 2. In the one-year period

ending June 2018, "Amtrak carried more than three times as many riders between Washington, D.C., and New York City as all of the airlines combined." *Id.* at 3.

Plaintiffs are among the millions of individuals who require intercity transportation for work-related travel. Weissman lives and works in Washington. Weissman Decl. ¶ 2. As president of the non-profit organization Public Citizen, Weissman travels to other cities to attend business meetings, participate in conferences, and meet with Public Citizen supporters. *Id*. When traveling to New York for those purposes, he typically rides Amtrak. His last three Amtrak trips to New York occurred on August 2019, August 2018, and February 2018. *Id*. ¶ 3. Subject to travel conditions related to the current pandemic, Weissman expects to take up to three trips to New York for work-related events in 2020, and anticipates similar amounts of travel to New York in subsequent years. *Id*. ¶ 4. Llewellyn likewise will be required to travel for his work, including to cities on the East Coast served by Amtrak. Llewellyn Decl. ¶ 3.[2]

Plaintiffs have options for intercity travel that do not require them to waive their right to go to court, such as travelling by car or by plane. *See* 14 C.F.R. § 253.10 (prohibiting air carriers from requiring passengers to waive their right to file an action in court). Before 2019, they also had the option of taking Amtrak to New York City and other cities in the Northeast Corridor. Plaintiffs oppose having to agree to Amtrak's arbitration agreement as a condition to obtaining passenger rail services. But because Amtrak has conditioned travel on its arbitration agreement, Plaintiffs must waive their rights to go to court or forgo Amtrak altogether, even if traveling by train would best meet their transportation needs. Weissman Decl. ¶¶ 5–6; Llewellyn Decl. ¶¶ 4–5.

---

[2] When the complaint was filed, Llewellyn, an attorney with Public Citizen Litigation Group, expected to travel to New York City in late 2020 to present oral argument in a case before the Second Circuit. In April 2020, Llewellyn will leave his current position to work at another non-profit organization, but will continue to travel for work to destinations served by Amtrak. Llewellyn Decl. ¶ 3.

LEGAL STANDARDS

Summary judgment is required when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those "that might affect the outcome of the suit under the governing law." *Arrington v. United States*, 473 F.3d 329, 333 (D.C. Cir. 2006). A dispute is "genuine" when "a reasonable jury could return a verdict for the nonmoving party." *Id*. (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The Court "must view all of the evidence in the light most favorable to the nonmoving party." *Id.* (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158–59 (1970)).

In deciding a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), a court must accept all of the factual allegations in the complaint as true, and also "may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction[.]" *Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005). In assessing a motion to dismiss for failure to state a claim under Rule 12(b)(6), "a court must accept as true all of the allegations contained in a complaint" and determine whether the complaint "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Pub. Citizen Health Research Group v. Acosta*, 363 F. Supp. 3d 1, 10 (D.D.C. 2018) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citations omitted)).

ARGUMENT

Congress established Amtrak nearly a half century ago to provide passenger rail service to the public. For most of that time, Amtrak fulfilled its statutory mission without demanding that passengers give up their right to go to court. Then, in 2019, Amtrak decided not to permit any individual to ride Amtrak without giving up that right. That decision was unlawful and

unconstitutional, and it deprived travelers like Plaintiffs of a valuable intercity transportation option. This Court should enjoin Amtrak from imposing its arbitration terms upon them.

I. Plaintiffs have Article III standing.

A. The well-established elements of Article III standing require a plaintiff to "present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019) (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 733 (2008)). Here, Plaintiffs satisfy each element.

First, Plaintiffs' present inability to obtain travel on Amtrak without an unwanted contract term requiring arbitration is a concrete, particularized, and actual or imminent injury. In this circuit, "the inability of consumers to buy a desired product may constitute injury-in-fact even if they could ameliorate the injury by purchasing some alternative product." *Consumer Fed'n of Am. v. FCC*, 348 F.3d 1009, 1012 (D.C. Cir. 2003) (internal quotation marks omitted); *see also Orangeburg, S.C. v. FERC*, 862 F.3d 1071, 1078 (D.C. Cir. 2017) ("The lost opportunity to purchase a desired product is a cognizable injury, even though Orangeburg *can* purchase, and *has* purchased, wholesale power from another source."); *Coal. for Mercury-Free Drugs v. Sebelius*, 671 F.3d 1275, 1281 (D.C. Cir. 2012) ("This Court has permitted consumers of a product to challenge agency action that prevented the consumers from purchasing a desired product."); *Chamber of Commerce of U.S. v. SEC*, 412 F.3d 133, 138 (D.C. Cir. 2005) ("[L]oss of the opportunity to purchase a desired product is a legally cognizable injury."); *Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, 901 F.2d 107, 113 (D.C. Cir. 1990) ("[A] lost opportunity to purchase vehicles of choice is sufficiently personal and concrete to satisfy Article III requirements.").

Amtrak's decision to require travelers to consent to its arbitration agreement eliminates a "desired product," *Consumer Fed'n of Am.*, 348 F.3d at 1012—rail travel not subject to terms requiring arbitration—from the range of available transportation options. Plaintiffs now must either acquiesce to Amtrak's arbitration condition, or take a car, plane, or bus for work-related travel, which may entail greater cost, burden, or inconvenience. What they cannot purchase, however, is rail service from Amtrak that preserves their right to resolve disputes in court. That injury is as concrete as the inability to purchase "wholesale power," *Orangeberg*, 862 F.3d at 1077; mutual funds, *Chamber of Commerce*, 412 F.3d at 138; uncensored high-speed internet service, *Consumer Fed'n of Am.*, 348 F.3d at 1012; and "larger passenger vehicles," *Competitive Enter. Inst.*, 901 F.2d at 112.

Second, Plaintiffs satisfy the other two standing elements: causation and redressability. Amtrak caused Plaintiffs' injury by adding the arbitration agreement to its terms and conditions of service. And this Court can redress that injury by declaring the arbitration condition invalid, which will make Plaintiffs' "desired product" of a rail ticket without an unwanted arbitration clause available to them again. *Consumer Fed'n of Am.*, 348 F.3d at 1012. Amtrak does not argue that these elements of standing are not satisfied here.

B. Amtrak argues that Plaintiffs lack a cognizable injury because they do not have existing claims against Amtrak that would be subject to arbitration and have not yet booked specific trips on Amtrak. ECF 9-1 (Mot. to Dismiss), at 9. But both Weissman and Llewellyn have used Amtrak for work-related travel, Weissman Decl. ¶ 3; Llewellyn Decl. ¶ 3, and both have jobs that entail regular travel from Washington to cities in the Northeast Corridor served by Amtrak, particularly New York City. Weissman Decl. ¶ 2–4; Llewellyn Decl. ¶ 4. Given Amtrak's "very strong position" in the Northeast Corridor, Joshi Decl. Ex. 5, at 3, Amtrak's arbitration condition has a

significant effect on Plaintiffs' transportation options. Amtrak suggests (correctly) that Plaintiffs may travel by car (or some other mode of transportation), but the availability of an alternative product does not eliminate their injury, because they would like to be able to travel by train but are "deterred" from taking Amtrak "by [their] inability" to purchase a ticket without an arbitration condition. *Consumer Fed'n of Am.*, 348 F.3d at 1012. And contrary to Amtrak's suggestion (ECF 9-1, at 9), Plaintiffs cannot avoid their injury by travelling on Amtrak with the hope that they will not be hauled into arbitration; they seek to purchase tickets and travel without those purchases and travel being conditioned on the undesired contract terms.

Amtrak's standing argument is no stronger when labeled as "ripeness." "Ripeness is peculiarly a question of timing." *Thomas v. Union Carbide Agric. Prods.*, 473 U.S. 568, 580 (1985) (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1974) (brackets removed)). Amtrak suggests that the time to challenge its arbitration requirement is after Plaintiffs travel and then after a dispute arises. This argument misunderstands Plaintiffs' injury. As explained above, they are not challenging the arbitration of a particular dispute that arose during their train travel; they are injured because the unlawful arbitration condition bars them from purchasing or using a train ticket that does not include a mandatory arbitration provision and class-action waiver. The time to remedy that injury is now, before they are forced either to avoid Amtrak for future intercity travel or acquiesce to its arbitration condition. Plaintiffs' interest in avoiding that dilemma creates a justiciable controversy. *See Medimmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007).

Amtrak is wrong to suggest that *Ruckelshaus v. Monsanto* established a per se rule that precludes standing until a plaintiff is "injured by actual arbitration." ECF 9-1, at 7 (quoting 467 U.S. 986, 1019 (1984)). In that case, the Court considered whether the "mandatory data-licensing scheme" of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 *et*

seq., violated the Takings Clause. 467 U.S. at 990, 992, 1000–01. The FIFRA scheme included a "binding arbitration" requirement solely to calculate compensation to the data submitter for the use of its data. *Id.* at 995. The Supreme Court found that mandatory data licensing was a taking for certain data, *id.* at 1004–16, but declined to enjoin the statute because a data submitter could bring a Tucker Act claim against the United States if the arbitration process failed to provide adequate compensation, *id.* at 1016–17. The Court interpreted FIFRA's forfeiture provision—under which a data submitter would "forfeit the right of compensation" if it did not arbitrate—as "an exhaustion requirement … to a Tucker Act claim." *Id.* at 1018 (internal quotation marks omitted); *see* 7 U.S.C. § 136a(c)(1)(F)(iii) (FIFRA forfeiture provision). Thus, "[t]he statute in *Monsanto* simply required the plaintiff to attempt to vindicate its claim to compensation through arbitration before proceeding under the Tucker Act." *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2173 (2019). And because "the Tucker Act is available as a remedy for any uncompensated taking," the Court concluded that Takings Clause "challenges to the constitutionality of the arbitration and compensation scheme are not ripe for our resolution." *Monsanto*, 467 U.S. at 1019. *Monsanto*, thus, says nothing about the ripeness of a challenge to an arbitration requirement that precludes assertion of a claim in court, such as the one at issue here.

The out-of-circuit cases that Amtrak invokes likewise do not call Plaintiffs' standing into question. Three of those cases involved challenges to existing private arbitration agreements. *See Bowen v. First Family Fin. Servs.*, 233 F.3d 1331, 1339 (11th Cir. 2000) (holding that plaintiffs lacked standing to challenge whether "arbitration agreements are generally unenforceable under the [Truth in Lending Act] or whether the specific agreement in this case is unenforceable"); *Lee v. Am. Exp. Travel Related Servs., Inc.*, 348 F. App'x 205, 206 (9th Cir. 2009) (explaining that plaintiffs challenged "the inclusion of allegedly unconscionable arbitration and other provisions in

their credit card agreements"); *Jones v. Sears Roebuck & Co.*, 301 F. App'x 276, 279 (4th Cir. 2008) (noting that plaintiffs sought to have existing arbitration agreement declared unconscionable due to constitutional infirmities). In a fourth case cited by Amtrak, the plaintiff argued that an agency rule requiring commodity traders to arbitrate customer claims was invalid because it deprived traders of their right to trial by jury; the Seventh Circuit held that that challenge was not ripe because "no such [customer] claims are before us." *Bd. of Trade of City of Chicago v. CFTC*, 704 F.2d 929, 932 (7th Cir. 1983). In the final case, *Meyer v. Sprint Spectrum L.P.*, 200 P.3d 295, 299 (Cal. 2009), a state court addressed statutory standing under state law.

Plaintiffs here, by contrast, assert that they suffer a present injury from being unable to purchase a train ticket without an unwanted arbitration clause. Only one of the decisions Amtrak cites, *Bowen*, addressed a similar claim. There, the court recognized that, although plaintiffs could not challenge the enforceability of an arbitration agreement that no one was yet seeking to enforce, the plaintiffs *did* have "standing to challenge the legality of [the] requirement that customers sign arbitration agreements as a condition of credit." 233 F.3d at 1334. So too here: Plaintiffs have standing to challenge the legality of Amtrak's imposition of arbitration as a condition of rail transportation. The Court should deny Amtrak's motion to dismiss this case for lack of Article III standing.

II. Amtrak is part of the government and subject to constitutional constraints.

The Supreme Court has twice held that Amtrak is part of the federal government and is subject to the Constitution. *See Am. R.Rs.*, 575 U.S. 43; *Lebron*, 513 U.S. 374. Contrary to Amtrak's contention, ECF 9-1, at 17, those cases control here.

A. In *Lebron*, the Supreme Court "consider[ed] whether actions of [Amtrak] are subject to the constraints of the Constitution." 513 U.S. at 376. In that case, Amtrak rejected as "political" a billboard that Lebron proposed to display at New York's Penn Station, a decision that Lebron

claimed violated his First and Fifth Amendment rights. *Id*. at 377. The Second Circuit had rejected Lebron's constitutional claims because "Amtrak was, by the terms of the legislation that created it, not a Government entity." *Id.* at 378. The Supreme Court reversed.

The Court considered Amtrak's statutory purposes, including its overarching purpose of serving "the public convenience and necessity"; its "structure and powers, including the manner of selecting the company's board of directors"; and the oversight of its operations by "the President and Congress." *Id.* at 384–86 (italics and internal quotation marks omitted). The Court held that "where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment." *Id.* at 400. The Supreme Court attached no significance to Congress's decision to disclaim Amtrak as "an agency or establishment of the United States Government." *Id.* at 391 (quoting 1970 Act, § 301, 84 Stat. at 1330). The Court explained that, "[i]f Amtrak is, by its very nature, what the Constitution regards as the Government, congressional pronouncement that it is not such can no more relieve it of its First Amendment restrictions than a similar pronouncement could exempt the Federal Bureau of Investigation from the Fourth Amendment." *Id*. at 392.

In 2015, the Supreme Court affirmed that holding in *American Railroads*. Congress had granted "Amtrak and the Federal Railroad Administration (FRA) joint authority to issue 'metrics and standards' that address the performance and scheduling of passenger railroad service." 575 U.S. at 45. Host railroads challenged the grant of authority "on the ground that Amtrak is a private entity and it was therefore unconstitutional for Congress to allow and direct it to exercise joint authority in their issuance." *Id*. at 45–46. The D.C. Circuit accepted the host railroads' argument, concluding that "just because *Lebron* treated Amtrak as a government agency for purposes of the

First Amendment does not dictate the same result with respect to all other constitutional provisions." *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 721 F.3d 666, 676 (D.C. Cir. 2013). The Supreme Court vacated and remanded.

As the Court explained, "*Lebron* teaches that, for purposes of Amtrak's status as a federal actor or instrumentality under the Constitution, the practical reality of federal control and supervision prevails over Congress' disclaimer of Amtrak's governmental status." 575 U.S. at 55. As in *Lebron*, the Court evaluated Amtrak's status by looking at "Amtrak's ownership and corporate structure," the "supervision" of "the political branches" over its "priorities and operations," its responsibility to pursue public policy objectives "rather than advancing its own private economic interests," and its dependency on "federal financial support." *Id*. at 51–53. Because "Amtrak was created by the Government, is controlled by the Government, and operates for the Government's benefit," the Court concluded that "in its joint issuance of the metrics and standards with the FRA, Amtrak acted as a governmental entity for purposes of the Constitution's separation of powers provisions" at issue in that case. *Id*. at 53–54.

Amtrak still has the characteristics on which the Supreme Court relied in *Lebron* and *American Railroads* to conclude that it is a governmental entity subject to the obligations and restraints placed on the government by the Constitution. Amtrak remains a creature of Congress, established to pursue important federal policy objectives. Amtrak continues to be controlled by a presidentially appointed, Senate-confirmed board of directors and to be subject to ongoing oversight by the political branches. Amtrak still depends on federal financial support. *See supra* pp. 2–4. Now, as before, Amtrak "is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution." *Lebron*, 513 U.S. at 394.

B. Amtrak's attempts to distinguish *Lebron* and *American Railroads* are meritless. *First*, Amtrak invokes Congress's pronouncement that Amtrak is not "a department, agency, or instrumentality of the United States government." ECF 9-1, at 17 (quoting 49 U.S.C. § 24301(a)(3)). *Lebron* and *American Railroads*, however, both foreclose treating § 24301(a)(3) as material to Amtrak's governmental status under the Constitution.

Second, Amtrak contends that the Amtrak Reform and Accountability Act of 1997 (1997 Amendment) "altered Amtrak's management" and made it more "'businesslike.'" ECF 9-1, at 17 (quoting Pub. L. No. 105-134, § 2(5), 111 Stat. 2570, 2571). Amtrak identifies nothing in the 1997 Amendment, however, that materially distinguishes Amtrak as it now exists from Amtrak at the time of *Lebron* (decided two years before the 1997 Amendment) or *American Railroads* (decided 18 years after that amendment). Amtrak notes (at 17–18) that the 1997 Amendment removed Amtrak from the reach of the Government Corporation Control Act (GCCA). *See* 1997 Amendment § 415(d), 111 Stat. at 2590–91. But *Lebron*'s brief mentions of the GCCA did not suggest that its application was determinative of a corporation's governmental status. *See Lebron*, 513 U.S. at 389–90, 396 (describing GCCA provisions). The 2015 decision in *American Railroads*, which never even mentions the GCCA, confirms that the issue does not turn on the GCCA's applicability.

Third, Amtrak argues that *American Railroads* "did not purport to hold that Amtrak is part of the government for all purposes." ECF 9-1, at 18. *Lebron*, however, holds that Amtrak is part of the government for purposes of the First Amendment, and *American Railroads* holds that it is part of the government for separation of powers analysis. Plaintiffs' constitutional claims are based on the First Amendment, Article III, and separation of powers principles, and *Lebron* and *American Railroads* are controlling as to Amtrak's governmental status for purposes of those

claims. This Court need not decide whether *Lebron* and *American Railroads* leave room for Amtrak to be considered a private entity for purposes of other constitutional doctrines.

Finally, Amtrak contends that "[i]n making arbitration a term or condition of its ticketing agreement," it is not "acting as the government" because it is "acting pursuant to privately-focused goals" of minimizing subsidies, maximizing the use of resources, and operating as a for-profit corporation. ECF 9-1, at 18. *Lebron*, however, involved Amtrak acting as a "landlord," 513 U.S. at 377—a function no more governmental than establishing the terms under which Amtrak fulfills its core purpose of providing intercity rail service to the public. Indeed, *American Railroads* described Amtrak's duties to provide "'efficient and effective'" rail service and "'minimize Government subsidies'" as "broad public objectives" rather than Amtrak's "own private economic interests." 575 U.S. at 53 (quoting 49 U.S.C. §§ 24101(b) and (d)). In any event, "[i]t surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form." *Lebron*, 513 U.S. at 397; *see Am. R.Rs.*, 575 U.S. at 54 (same). Thus, the Supreme Court's analysis of Amtrak's status has never turned on the specific activity in which Amtrak was engaging, but on "the practical reality of federal control and supervision" over the whole enterprise. *Am. R.Rs.*, 575 U.S. at 55. That practical reality has not materially changed. Amtrak remains subject to constitutional constraints.

III. Amtrak lacks statutory authority to include a mandatory arbitration provision as a term or condition of passenger rail travel.

Before this Court considers Plaintiffs' constitutional claims, it is "obligated to construe [Amtrak's organic] statute to avoid constitutional problems if it is fairly possible." *Boumediene v. Bush*, 553 U.S. 723, 787 (2008) (original brackets and internal quotation marks omitted). Throughout its nearly half-century existence, Amtrak carried out its statutory responsibility to provide intercity rail service without requiring passengers to waive their right to judicial resolution

of disputes. Then in 2019, without any new direction from Congress, Amtrak decided that statutory provisions that require it "to operate similarly to private businesses," ECF 9-1, at 13, granted it the authority to require its passengers to waive their constitutional rights as a condition of service. When constitutional rights are at stake, however, the Supreme Court has interpreted such general grants of authority in a way that avoids deciding serious constitutional questions. This Court should do the same here.

A. Under the canon of constitutional avoidance, "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, [courts] are obligated to construe the statute to avoid such problems." *INS v. St. Cyr*, 533 U.S. 289, 299–300 (2001) (citation and internal quotation marks omitted). This canon "allows courts to *avoid* the decision of constitutional questions" based on "the reasonable presumption that Congress did not intend the [interpretation] which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). In the same vein, the Supreme Court has held that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, [the Court] expect[s] a clear indication that Congress intended that result." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001). These principles of statutory construction reflect a reluctance to "lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988).

Consistent with these principles, the Supreme Court has interpreted broad statutory authorizations to exclude activity that would raise constitutional concerns. In *NLRB v. Catholic Bishop of Chicago*, for example, "Congress [had] defined the [National Labor Relations] Board's jurisdiction in very broad terms," but the Court interpreted the National Labor Relations Act

(NLRA) to deprive the Board of authority over "teachers in church-operated schools" because the NLRA did not contain a "clear expression of an affirmative intention" to include them. 440 U.S. 490, 504 (1979). As the Court explained, this limiting construction was required to avoid "implicat[ing] the guarantees of the Religion Clauses." *Id*. at 507; *see also Edward J. DeBartolo Corp.*, 485 U.S. at 575 (invoking "*Catholic Bishop* rule" to reverse "the Board's construction of [a] statute" that would have treated peaceful handbilling as unlawful coercive activity because that construction "poses serious questions of the validity of [the statute] under the First Amendment"). In *St. Cyr*, the Court interpreted the Immigration and Naturalization Act's limits on judicial review of removal orders not to reach a district court's habeas jurisdiction because a "construction … that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions" under the habeas clause, U.S. Const. art. I, § 9, cl. 2. And in *Public Citizen v. U.S. Department of Justice*, the Court declined to give the Federal Advisory Committee Act (FACA) a "literalistic reading" that would have brought "the Justice Department's advisory relationship with the [American Bar Association] committee" on judicial nominees "within FACA's terms," citing an "unwillingness to resolve important constitutional questions unnecessarily." 491 U.S. 440, 463, 467 (1989). *See also Bond v. United States*, 572 U.S. 844, 860 (2014) (avoiding 10th Amendment issue by giving a narrow reading to a criminal statute notwithstanding its "expansive language").

The Supreme Court has applied avoidance canons to limit the reach of statutes that might otherwise be interpreted to deny access to judicial forums. In *BE&K Construction Co. v. NLRB*, the Court considered the NLRA's prohibition on employers "interfering with, restraining, or coercing employees in the exercise of" their collective bargaining rights. 536 U.S. 516, 536 (2002) (quoting 29 U.S.C. § 158(a)(1)) (brackets omitted). The NLRB had interpreted this provision to

bar employers from "prosecuting an unsuccessful suit [against unions] with a retaliatory motive." *Id*. at 519. Recognizing that the right to petition is "one of 'the most precious of the liberties safeguarded by the Bill of Rights,'" *id*. at 524 (quoting *Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 212, 222 (1967)), and that the "right of access to the courts is but one aspect of the right to petition," *id*. at 525 (quoting *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972)) (ellipses removed), the Court concluded that the NLRB's interpretation raised "difficult constitutional questions" because it "declared *unlawful*" petitioning that was "subjectively *and* objectively genuine," *id*. at 535. To avoid that constitutional concern, the Court determined that, "while [the statutory prohibition] might be read to reach the entire class of suits the Board has deemed retaliatory, it need not be read so broadly," and the Court "decline[d] to do so." *Id*. at 536; *see also Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 742 (1983) (eschewing NLRB's interpretation of "literal language" of statute where it would implicate "right of access to the courts"); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961) (stating that the "right to petition is one of the freedoms protected by the Bill of Rights, and [the Court] cannot … lightly impute to Congress an intent to invade those freedoms").

B. Amtrak identifies no statutory provision that unambiguously authorizes it to require arbitration as a term or condition of rail service. Amtrak invokes 49 U.S.C. § 24301(a)(2), which states that Amtrak "shall be operated and managed as a for-profit corporation." This directive is addressed to Amtrak's board members and officers, who are charged with deciding how Amtrak should be operated and managed; it does not speak to the powers granted to the corporation. Further, Amtrak acknowledges that section 24301(a)(2) does not authorize actions that "conflict with any other statutory goal." ECF 9-1, at 13. Congress established Amtrak to serve the "[p]ublic convenience and necessity" and provided that the "mission of Amtrak is to provide efficient and

effective intercity passenger rail mobility." 49 U.S.C. § 24101(a)(1), (b). Congress also identified twelve specific "Goals" for Amtrak to achieve in carrying out its mission, *id.* § 24101(c), several of which serve "broad public objectives" rather than Amtrak's "own private economic interests." *Am. R.Rs.*, 575 U.S. at 53; *see also Lebron*, 513 U.S. at 384, 397, 399. Congress's directive that Amtrak be operated and managed as a for-profit corporation, therefore, does not confer on Amtrak unbridled power to take any action that a privately owned for-profit corporation can take.

Amtrak is wrong to invoke several of Congress's individual goals—particularly those seeking to minimize subsidies—as sources of authority. ECF 9-1, at 14 (citing 49 U.S.C. §§ 24101(c)(1), (c)(12), (d)). Congress's identification of goals does not confer authority on Amtrak. The goals indicate, moreover, that Congress did not contemplate giving Amtrak authority to demand that passengers forfeit constitutional rights as a condition of travel. Congress identified in painstaking detail various ways in which Amtrak should seek to minimize subsidies: "increasing fares"; "increasing revenue from the transportation of mail and express"; "reducing losses on food service"; "improving its contracts with operating rail carriers"; "reducing management costs"; "increasing employee productivity"; "encouraging State, regional, and local governments and the private sector, separately or in combination, to share the cost of providing rail passenger transportation, including the cost of operating facilities"; "develop[ing] transportation on rail corridors subsidized by States and private parties"; "maximiz[ing] the use of its resources, including the most cost-effective use of employees, facilities, and real property"; and "mak[ing] agreements with the private sector and undertak[ing] initiatives that are consistent with good business judgment and designed to maximize its revenues and minimize Government subsidies." 49 U.S.C. §§ 24101(c)(1)(A)–(F); 24101(c)(2), (5), (12); 24101(d). Congress did not, however,

identify mandatory arbitration as a cost-saving measure, suggesting that "Congress did not intend" to grant Amtrak a power that would "raise[] serious constitutional doubts." *Clark*, 543 U.S. at 381.

Amtrak also cites 49 U.S.C. § 24305(c)(1), which authorizes Amtrak to "make and carry out appropriate agreements." Amtrak, however, gives short shrift to the term "appropriate." "[A] statute must, if possible, be construed in such fashion that every word has some operative effect." *United States v. Nordic Vill. Inc.*, 503 U.S. 30, 36 (1992). By granting Amtrak authority to enter into "appropriate" agreements only, Congress denied it the power to implement agreements unsuitable for a government enterprise charged with serving the public. *Tapia v. United States*, 564 U.S. 319, 327 (2011) ("[A] thing that is not 'appropriate' is not 'suitable or fitting for a particular purpose.'") (quoting Random House Dictionary of the English Language 1611 (2d ed.1987)); *Sossamon v. Texas*, 563 U.S. 277, 286 (2011) ("[T]he word 'appropriate' is inherently context dependent."). An agreement that conditions rail travel on abdication of constitutional rights is not appropriate and, therefore, falls outside of the authority conferred by section 24305(c)(1).[3]

Finally, Amtrak argues that Congress did not "specifically" limit Amtrak's authority to impose the arbitration agreement as a term of service. ECF 9-1, at 15. With administrative agencies, courts "will not presume a delegation of power based solely on the fact that there is not an express withholding of such power." *Michigan v. EPA*, 268 F.3d 1075, 1082 (D.C. Cir. 2001) (quoting *Am. Petroleum Inst. v. EPA*, 52 F.3d 1113, 1120 (D.C. Cir. 1995)). The same rule should apply here. Although corporate in form, Amtrak is a "creature of statute," and, therefore, it "has

[3] Amtrak argues that it has entered into agreements with host railroads, unions, and suppliers that contain arbitration clauses that have been enforced by the courts. ECF 9-1, at 14–15. Amtrak does not contend, however, that any court has passed on the constitutionality of the arbitration clauses in those contracts. In any event, Plaintiffs' claims do not present the question whether arbitration provisions contained in individually negotiated commercial and labor agreements are "appropriate" within the meaning of 49 U.S.C. § 24305(c)(1). *See infra* p. 45.

no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress." *Id*. at 1081. Given the Court's responsibility to interpret statutes to "*avoid* the decision of constitutional questions" presented in this case, *Clark*, 543 U.S. at 381, this Court should not interpret Congress's silence as an affirmative grant of authority.[4]

C. Amtrak argues that 49 U.S.C. § 24103(a)(1) precludes interpreting Amtrak's statutory authority to avoid the constitutional question. Section 24103(a) provides, as relevant here, that "only the Attorney General may bring a civil action for equitable relief in a district court of the United States when Amtrak or a rail carrier … engages in or adheres to an action, practice, or policy inconsistent with this part [C] or chapter 229 [of title 49]." Section 24103(a) does not speak to this Court's jurisdiction. Therefore, the question is not whether section 24103(a) has "precluded review," as Amtrak contends. ECF 9-1, at 12 (internal quotation marks omitted). Rather, the question is whether Plaintiffs' claim that Amtrak acted beyond its authority falls within the terms of section 24103(a)(1). It does not.

Section 24103 is focused on "Enforcement," as the title of the section states. It specifies that only the Attorney General may bring an action to enforce applicable title 49 provisions "when" Amtrak acts "inconsistent with" them. Plaintiffs' argument, however, is not that Amtrak action is "inconsistent with" any provision of title 49, but rather that Congress did not delegate to Amtrak the power to require passengers to waive their constitutional rights to obtain passenger rail service.

---

[4] In a footnote, Amtrak cites the District of Columbia Business Corporation Act, ECF 9-1, at 15 n.6, but it correctly does not rely on that statute as a source of authority. The District's statute applies only "to the extent consistent with" Amtrak's authorizing legislation, 49 U.S.C. § 24301(e), and, therefore, cannot authorize Amtrak to enter into agreements not otherwise "appropriate." *See Lebron*, 513 U.S. at 385. In addition, the District's general corporation laws cannot provide the requisite "clear indication [of what] *Congress* intended." *Solid Waste Agency of N. Cook Cty.*, 531 U.S. at 172 (emphasis added).

In *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453 (1974), the Supreme Court explained the purpose of section 24103(a). That case involved section 307(a) of the 1970 Act, the predecessor to section 24103(a).[5] Section 307(a), captioned "Sanctions," provided that if Amtrak "engages in or adheres to any action, practice, or policy inconsistent with the policies and purposes of this Act[,] … the district court … shall have jurisdiction … upon petition of the Attorney General …to grant such equitable relief as may be necessary or appropriate to terminate any violation, conduct, or threat." 84 Stat. at 1333. The Court interpreted section 307(a) as "the exclusive remedies for *breaches of any duties or obligations imposed by the Amtrak Act*," and held that "no additional private cause of action to *enforce compliance* with the Act's provisions can properly be inferred." *Id.* at 464–65 (emphasis added); *see also Am. Premier Underwriters, Inc. v. Nat'l R.R. Passenger Corp.*, 709 F.3d 584, 593 (6th Cir. 2013) (stating that current section 24103(a)(1) authorizes Attorney General to bring a civil action "when Amtrak behaves inconsistently with its authorizing statute"). Plaintiffs, however, do not seek to enforce any provision of title 49 against Amtrak. Their statutory authorization claim, therefore, does not tread on the Attorney General's exclusive authority.

To be sure, it may be difficult to distinguish "an incorrect application of agency authority" from "an assertion of authority not conferred," because in both cases the question is "whether the agency has gone beyond what Congress has permitted it to do." *City of Arlington v. FCC*, 569 U.S. 290, 298 (2013). Accordingly, when Congress delegates rulemaking authority to an agency, courts will defer to the agency's reasonable interpretation of its own authority regardless of whether the

---

[5] Amtrak mistakenly states that Congress enacted the predecessor to § 24103(a)(1) in 1981. ECF 9-1, at 11 (citing S. Rep. No. 97-139, at 319 (1981)). The 1981 amendment enacted what is now 49 U.S.C. § 24103(b), which addresses suits to enjoin a decision to discontinue routes or reduce service. *See* Amtrak Improvement Act of 1981, Pub. L. No. 97-35, title XI, subtitle F, § 1179, 95 Stat 357, 693.

statute being interpreted can be categorized as "jurisdictional." *Id.* But even so, "[n]o one disputes" that "the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted." *Id.* at 306. For example, because Congress generally did not confer rulemaking authority on Amtrak, if Amtrak purported to adopt a regulation that bound passengers to submit claims to binding private arbitration, Amtrak would be acting outside the scope of its statutory authority, even though the regulation would not be "inconsistent with" any particular provision of title 49. Section 24103 would not apply in that circumstance, just as it does not prevent this Court from addressing Plaintiffs' claim that Amtrak exceeded its statutory authority by requiring arbitration as a term or condition of service.

In any event, even if Plaintiffs' statutory claim fell within the Attorney General's exclusive right of action under section 24103(a)(1), the Court could still reach that claim—and avoid Plaintiffs' constitutional claims—because Plaintiffs also seek declaratory relief. *See Steffel v. Thompson*, 415 U.S. 452, 471 (1974) (describing "Congress' intent to make declaratory relief available in cases where an injunction would be inappropriate" due to the absence of "traditional equitable prerequisites"); *Green v. Mansour*, 474 U.S. 64, 72 (1985) ("[D]eclaratory relief may be available even though an injunction is not."); *see also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 513 (2010) (awarding declaratory relief even though "petitioners are not entitled to broad injunctive relief against the Board's continued operations"). Section 24103 does not limit this Court's subject-matter jurisdiction, which rests comfortably on 28 U.S.C. §§ 1331 and 1349. And "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune*, 549 U.S. at 127 (quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). A declaratory judgment on Plaintiffs' statutory claim would enable Plaintiffs to

purchase Amtrak tickets without an enforceable arbitration provision because Amtrak would be precluded from relitigating its statutory authority to require arbitration. *See Horn & Hardart Co. v. Nat'l Rail Passenger Corp*., 843 F.2d 546, 549 (D.C. Cir. 1988). Therefore, even assuming only the Attorney General may seek *equitable relief* to enjoin Amtrak from acting outside of its statutory authority, this Court may resolve the present controversy and ensure that Plaintiffs do not have to "expose" themselves to the risk of waiving their right to go to court by travelling on Amtrak's trains. *MedImmune, Inc.*, 549 U.S. at 129; *see also Tierney v. Schweiker*, 718 F.2d 449, 456 (D.C. Cir. 1983) (stating that a declaratory judgment is appropriate "when it will either serve a useful purpose in clarifying the legal relations in issue or terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding") (internal quotation marks omitted).

IV. Amtrak's arbitration condition is unconstitutional.

The Constitution guarantees the people access to an independent judicial system for the resolution of disputes against the government through three separate protections. The Petition Clause of the First Amendment preserves the "right of the people" to petition courts for "a redress of grievances." Article III guarantees the right to a federal judge whose independence is guaranteed by salary and tenure protections. Separation of powers principles maintain the institutional integrity of the judicial branch by limiting Congress's power to shift the judicial role elsewhere. Congress would undermine these constitutional protections if it amended Amtrak's organic statute to force rail passengers to resolve disputes with Amtrak through binding private arbitration—and Amtrak does not argue otherwise. Amtrak, instead, argues that its arbitration condition poses no constitutional problem because its passengers "consent" to the arbitration agreement by purchasing tickets or riding its trains. The government, however, may not accomplish through conditions what it cannot accomplish through fiat. If Amtrak may require passengers to waive their constitutional rights as a condition of service, then Congress has the power to require the same with respect to

every federal program. As Supreme Court precedent makes clear, the Constitution cannot be evaded so easily.

A. Amtrak's arbitration condition violates the Petition Clause.

1. "[A]s a word, a concept, and an essential safeguard of freedom, [the petition] is of ancient significance in the English law and the Anglo-American legal tradition." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 395 (2011). "A petition conveys the special concerns of its author to the government and, in its usual form, requests action by the government to address those concerns." *Id.* at 388–89. The right to petition, accordingly, is "one of the most precious of the liberties safeguarded by the Bill of Rights." *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1954 (2018) (quoting *BE&K Constr. Co.*, 536 U.S. at 524).

"'The right of access to the courts is ... but one aspect of the right of petition.'" *BE&K Constr. Co.*, 536 U.S. at 525 (quoting *Cal. Motor Transp.*, 404 U.S. at 510) (brackets deleted). Petitions to judicial forums often "address matters of great public import," provide "'a vehicle for effective political expression and association, as well as a means for communicating useful information to the public,'" "facilitate the informed public participation that is a cornerstone of democratic society," and "'promote the evolution of the law.'" *Borough of Duryea*, 564 U.S. at 397–98 (quoting *In re Primus*, 436 U.S. 412, 431 (1978), and *BE&K Constr. Co.*, 536 U.S. at 532). "[T]hese and other benefits may not accrue if one class of knowledgeable and motivated citizens is prevented from engaging in petitioning activity." *Id.* at 398. Individuals thus have a right "to appeal to courts and other forums established by the government for resolution of legal disputes." *Id.* at 387.

The right to petition and the rights of "freedom in speech and press" are "inseparable"; they are "cognate rights," "united in First Amendment assurance." *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *Borough of Duryea*, 564 U.S. at 388 (same). "The right to petition is cut from the same

cloth as the other guarantees of the First Amendment, and is an assurance of a particular freedom of expression." *Am. Bus Ass'n v. Rogoff*, 649 F.3d 734, 738 (D.C. Cir. 2011) (quoting *McDonald v. Smith*, 472 U.S. 479, 482 (1985)) (brackets removed). The Supreme Court has therefore "recurrently treated the right to petition similarly to, and frequently as overlapping with, the First Amendment's other guarantees of free expression." *McDonald*, 472 U.S. at 490; *see Wayte v. United States*, 470 U.S. 598, 610 n.11 (1985) ("Although the right to petition and the right to free speech are separate guarantees, they are related and generally subject to the same constitutional analysis."). And as with speech rights, the "government is prohibited from infringing" on the right to petition "by a general prohibition against certain forms of advocacy … or by imposing sanctions for the expression of particular views it opposes." *Smith v. Highway Employees*, 441 U.S. 463, 464 (1979) (per curiam) (internal citation removed). To preclude a person from "us[ing] the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests" "would be destructive of rights of association and of petition." *California Motor Transp. Co.*, 404 U.S. at 510–11.

Consistent with these principles, Congress could not require individuals with claims against the government to resolve those claims through binding private arbitration as Amtrak's arbitration agreement purports to do. The agreement mandates that "all claims, disputes, or controversies, past, present, or future, that otherwise would be resolved in a court of law or before a forum other than arbitration" be resolved "by a single arbitrator through binding arbitration and not by a judge or jury." Joshi Decl. Ex. 2. Even the validity or enforceability of the arbitration agreement itself must be resolved by the arbitrator and "not any federal, state, or local court or agency." *Id*. If an individual with a claim against the government seeks to petition a federal court for redress, the court must enforce the arbitration requirement by staying judicial proceedings and

directing the parties to arbitrate the dispute before a private adjudicator. 9 U.S.C. §§ 3, 4. And if the individual seeks to petition the court after the arbitration process is complete, the court must enter judgment supporting the arbitrator's award absent "very unusual circumstances," *Oxford Health Plans*, 569 U.S. at 568 (quoting *First Options of Chicago, Inc.*, 514 U.S. at 942), which do not include even "serious error" by the arbitrator, *Stolt-Nielsen S.A.*, 559 U.S. at 671. If Congress could mandate these private dispute-resolution procedures by fiat, the right to petition the government would be replaced by a requirement to petition private individuals for a redress of grievances—which is not the right that the Petition Clause protects. *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501–02 (1988) (declining to recognize antitrust immunity grounded in Petition Clause where actions involved private standard-setting body rather than being "incidental to a valid effort to influence government action").

Amtrak's arbitration agreement implicates the right to petition in a way that is profoundly different from the effects of statutes that restrict a court's jurisdiction or authority to grant relief. The Petition Clause does not guarantee "a successful outcome" on the petition, or even that the government will "listen or respond to [the] complaints." *Patchak v. Jewell*, 828 F.3d 995, 1004 (D.C. Cir. 2016), *aff'd sub nom*. *Patchak v. Zinke*, 138 S. Ct. 897 (2018). Congress thus does not violate the Petition Clause if it denies a court the power to adjudicate a dispute, or preserves a defense to liability such as sovereign immunity, because such statutes would not deprive a plaintiff from *petitioning* the court and obtaining a judicial determination as to the availability of redress. *See id.* at 1001 ("The federal courts have 'presumptive jurisdiction ... to inquire into the constitutionality of a jurisdiction-stripping statute.'" (quoting *Belbacha v. Bush*, 520 F.3d 452, 456 (D.C. Cir. 2008)). In such cases, if a court concludes that it lacks jurisdiction to award the requested relief, the merits of the legal controversy between the parties remains unresolved, and the plaintiff

remains free to pursue redress through other channels. Mandatory binding arbitration, by contrast, is designed to compel individuals to resolve disputes outside of the judicial system. *See* Joshi Decl. Ex. 4, at 15 ("When you buy a ticket to ride Amtrak, you agree to resolve any legal dispute you have with Amtrak through arbitration instead of going to court."). Arbitration, therefore, implicates the Petition Clause in a way that jurisdictional limitations do not.[6]

2. Amtrak does not contend that Congress could, without violating the Petition Clause, enact a statute that compelled Amtrak's passengers to resolve disputes through binding arbitration before a private arbitrator. Rather, Amtrak contends that individuals who wish to travel on Amtrak can be required to waive their Petition Clause rights through a non-negotiable term in Amtrak's terms and conditions. ECF 9-1, at 21–22. Amtrak is mistaken.

The doctrine of unconstitutional conditions "prevents the Government from using conditions 'to produce a result which it could not command directly.'" *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1377 n.4 (2018) (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)). That doctrine recognizes that "if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." *Perry*, 408 U.S. at 597; *see also Frost v. R.R. Comm'n of Cal.*, 271 U.S. 583, 594 (1926) ("If the state may compel the

[6] Contrary to Amtrak's contention, ECF 9-1, at 22, *Patchak* does not hold that the government may infringe the right to petition the courts if individuals retain the ability to petition the non-judicial branches of government or a private arbitrator. Such an outcome would offend the Petition Clause no less than a statute that denied access to courts on the ground that individuals could lobby Congress. Rather, *Patchak* involved Congress's separate constitutional authority "to define and limit the jurisdiction of the inferior courts of the United States." 828 F.3d at 1004. It was only in that context that the court observed that Congress had not "foreclose[d] Mr. Patchak's right to petition the government in all forums." *Id*. Here, Congress has not exercised its Article III powers to limit federal courts' jurisdiction over claims against Amtrak; indeed, it has ensured that federal courts will have jurisdiction to hear every possible claim against Amtrak. *See* 28 U.S.C. § 1349. Amtrak's arbitration condition strips Plaintiffs of that right.

surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."). For example, the unconstitutional-conditions doctrine ensures that government employees are "constitutionally protected from dismissal for refusing to take an oath regarding their political affiliation, for publicly or privately criticizing their employer's policies, for expressing hostility to prominent political figures, or, except where political affiliation may reasonably be considered an appropriate job qualification, for supporting or affiliating with a particular political party." *Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 674–75 (1996) (internal citations omitted). And just as the Constitution prevents the government from requiring its employees—the individuals "who have the closest relationship with the government," *id*. at 680—to waive completely their First Amendment rights as a condition of employment, it limits Amtrak's ability to use terms and conditions to require its millions of passengers to waive their Petition Clause rights as a condition of riding its trains.

The Supreme Court has been especially "vigilant" in guarding against governmental conditions that implicate access to the judicial system. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548 (2001). In that case, the Court invalidated a congressional funding condition that precluded grantees of the Legal Services Corporation from representing clients "if the representation involves an effort to amend or otherwise challenge existing welfare law." *Id*. at 537. The Court explained that the First Amendment barred Congress from "design[ing] a subsidy to effect this serious and fundamental restriction on advocacy of attorneys and the functioning of the judiciary." *Id*. at 544. As another example, the Court has long held that "a state may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the state, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts, or thereafter

withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not." *Terral v. Burke Const. Co.*, 257 U.S. 529, 532 (1922). Because the right to access federal courts is guaranteed by "the federal Constitution," "state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void." *Id.*

Amtrak's arbitration condition has all the hallmarks of an unconstitutional condition. The condition operates indistinguishably from a statute or regulation that compels rail passengers to resolve disputes through binding arbitration. It thus "produce[s] a result which [the government] could not command directly." *Oil States Energy Servs.*, 138 S. Ct. at 1377 n.4 (quoting *Perry*, 408 U.S. 593, 597 (1972)). Amtrak is not a funding program, so cases giving Congress some leeway to "define the limits of [a] government spending program" are inapplicable here. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 215 (2013). And even under the more forgiving standard established in funding cases, the arbitration condition would be unconstitutional because it "seek[s] to leverage [service] to regulate [petitioning] outside of the contours of the program itself." *Id.* For nearly half a century, Amtrak has provided passenger rail service without requiring passengers to waive constitutional rights, and it does not contend that it must now force passengers to accept binding arbitration to continue in operation. *See supra* p. 8. "The government cannot restrict the speech of the public at large just in the name of efficiency," *Waters v. Churchill*, 511 U.S. 661, 675 (1994), and the public's "cognate right[]" to petition courts should be equally protected, *Borough of Duryea*, 564 U.S. at 388 (quoting *Thomas*, 323 U.S. at 530).

The three out-of-circuit cases that Amtrak cites (ECF 9-1, at 21–22) do not call these principles into question. The two Fourth Circuit cases involved attorney-assisted, individually negotiated agreements to settle disputes, *Overbey v. Mayor of Baltimore*, 930 F.3d 215, 220 (4th Cir. 2019) ("[F]ollowing her attorney's advice, Overbey agreed to settle her suit for $63,000.");

Lake James Cmty. Volunteer Fire Dep't, Inc. v. Burke Cty., 149 F.3d 277, 279 (4th Cir. 1998) ("The Fire Department, acting on the advice of counsel, agreed to these terms and signed a contract with the County."). Even so, the Fourth Circuit recognized that the Constitution applied to the agreements, and, in *Overbey*, struck down a negotiated non-disparagement clause under the First Amendment. 930 F.3d at 225 (stating that "when a settlement agreement contains a waiver of a constitutional right, the government's general interest in using settlement agreements to expedite litigation is not enough to make the waiver enforceable," unless the balance of interests favors enforcement); *see also Lake James Cmty. Volunteer Fire Dep't, Inc.*, 149 F.3d at 282 (upholding a negotiated waiver of First Amendment rights because the County "had a compelling interest" in ensuring public's access to fire protection services). The third case involved restrictions on advertising sales in an individually negotiated franchise agreement between a city and a cable operator. *Paragould Cablevision, Inc. v. City of Paragould*, 930 F.2d 1310, 1314 (8th Cir. 1991). That case was litigated on "commercial speech" grounds, *see id.*; *id.* at 1315 (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980)), and in that context, the Eighth Circuit concluded that "Cablevision … bargained for its franchise agreement … presumably for its own economic gain," *id.* at 1315. These cases do not speak to the constitutionality of a non-negotiable term of adhesion that binds citizens to waive their petition rights to receive government services.

B. Amtrak's arbitration condition violates Article III.

Article III of the Constitution vests "[t]he judicial Power of the United States" in courts whose judges "hold their Offices during good Behavior" and receive compensation "which shall not be diminished during the Continuance in Office." U.S. Const. art. III, § 1. "Because these protections help to ensure the integrity and independence of the Judiciary," the Supreme Court has "'long recognized that, in general, Congress may not withdraw from' the Article III courts 'any

matter which, from its nature, is the subject of a suit at the common law, or in equity, or in admiralty.'" *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1938 (2015) (quoting *Stern v. Marshall*, 564 U.S. 462, 485 (2011) (internal quotation marks omitted)). "Article III's guarantee of an impartial and independent federal adjudication is subject to waiver," *CFTC v. Schor*, 478 U.S. 833, 848 (1986), which may be "express or implied," but "must still be knowing and voluntary," *Wellness Int'l*, 135 S. Ct. at 1948.

The Supreme Court has also recognized a "public rights exception" to the principle that only Article III courts can adjudicate claims in the federal system. That exception distinguishes claims involving a private right from claims involving the government or "integrally related to particular Federal Government actions." *Stern*, 564 U.S. at 490–91. Congress has "significant latitude to assign adjudication of public rights to entities other than Article III courts." *Oil States Energy Servs.*, 138 S. Ct. at 1373. But such non-Article III entities have been either "legislative courts or administrative agencies." *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70 (1982) (plurality opinion).

Amtrak again does not contend that Congress could enact a law that required mandatory private arbitration of disputes arising out of the receipt of government services. Even if all such disputes involved public rights, the Supreme Court has permitted Congress to vest the power to adjudicate such claims only in governmental forums presided over by federal officers. *See*, *e.g.*, *Freytag v. Comm'r of Internal Rev.*, 501 U.S. 868, 881 (1991); *Buckley v. Valeo*, 424 U.S. 1, 141 (1976). A statute that compelled individuals to resolve their disputes with the government through binding private arbitration thus could not be reconciled with Article III.

Amtrak therefore falls back on the notion that passengers agree to waive their Article III rights by choosing to travel on Amtrak's trains. ECF 9-1, at 22. But as with the Petition Clause,

the Constitution prohibits Amtrak from demanding such consent through an unconstitutional condition. *See supra* pp. 32–34. What's more, making the arbitration provisions part of Amtrak's mandatory terms and conditions does not result in the "knowing and voluntary" consent needed when the government seeks to strip individuals' of their Article III rights. *Wellness Int'l*, 135 S. Ct. at 1948. As the Court has observed, a "prerequisite of any inference of consent" to adjudication by a non-Article III bankruptcy judge is "notification of the right to refuse." *Id.* (quoting *Roell v. Withrow*, 538 U.S. 580, 588 n.5 (2003)); *see also Peretz v. United States*, 501 U.S. 923, 925 (1991) (recognizing validity of consent to magistrate judge supervision of jury selection where counsel was given option of declining consent). Amtrak does not notify its passengers of the right to refuse consent because it does not provide its passengers with the right to refuse consent; their only option to avoid waiving their Article III rights is not to travel on Amtrak. It is inconceivable that the Supreme Court, having so carefully protected litigants' rights to refuse consent to adjudication by bankruptcy or magistrate judges, would conclude that the government could obtain a mass waiver by including the waiver as a mandatory term and condition on which the government will provide services. *See Stern*, 564 U.S. at 493 ("Pierce did not truly consent to resolution of Vickie's claim in the bankruptcy court proceedings" because "[h]e had nowhere else to go if he wished to recover from Vickie's estate."); *cf. Tierney*, 718 F.2d at 450, 455 (holding that "a mass mailing" in which the Social Security Administration (SSA) "asked each of four million former and current Benefits recipients to sign a consent form that would allow SSA to obtain copies of otherwise confidential tax return information maintained by the Internal Revenue Service" was not a knowing and voluntary consent under statute protecting confidentiality of tax returns).

Amtrak contends that "the consent provided by signing an arbitration agreement suffices to waive personal Article III rights," ECF 9-1, at 22, but none of the cases that it cites address the

question presented here: whether the *government* can secure a waiver of individuals' Article III rights by including an arbitration agreement as a term or condition upon which it will provide service. In *Koveleskie v. SBC Capital Markets, Inc.*, the "alleged state actor"— the Securities and Exchange Commission—did not require "entry into an arbitration agreement." 167 F.3d 361, 368 (7th Cir. 1999). In *Geldermann, Inc. v. CFTC*, the Seventh Circuit held that a commodity broker had waived its Article III rights by joining the Chicago Board of Trade (CBOT)—which, pursuant to a CFTC rule, required its broker-members to offer customers the option to arbitrate disputes—and then by failing to "rais[e] any objection" to the arbitration process "until [it] lost." 836 F.2d 310, 319–21 (7th Cir. 1987). Even so, the broker could have "preserved its constitutional claim [against the CFTC rule] by resigning its membership in the CBOT," 836 F.2d at 319 n.9, an option not available to Amtrak's passengers. *See also Belom v. Nat'l Futures Ass'n*, 284 F.3d 795, 799 (7th Cir. 2002) (stating that company counsel waived Article III argument by accepting employment with futures merchant subject to a CFTC arbitration rule). Likewise, *Union Carbide* involved FIFRA's "'mandatory licensing provision' that create[d] the relationship between the data submitter and the follow-on registrant" and required arbitration to settle disputes between them about compensation. 473 U.S. at 585. The Court had previously held that data submitters could file suit against the United States for any compensation shortfall after the arbitration process, *see id.* at 577 (citing *Monsanto*, 467 U.S. 986), and in *Union Carbide* concluded that the arbitration process did not violate data submitters' Article III rights. In declining to opine on whether data submitters could enforce a FIFRA arbitration award in court, the Court simply noted that "the only potential object of judicial enforcement power is the follow-on registrant who explicitly consents to have his rights determined by arbitration." *Id.* at 592. These cases do not give the government

carte blanche to presume a mass waiver of Article III rights through the public's use of governmental services.

Finally, Amtrak quotes *Schor*'s statement that Article III "safeguard[s] litigants' right to have claims decided before judges who are free from potential domination by other branches of government." ECF 9-1, at 23 (quoting *Schor*, 478 U.S. at 848) (internal quotation marks omitted). Here, such domination is present, where an entity created, controlled, and overseen by the political branches compels individuals to resolve claims against it through private arbitration, and where Congress has directed federal courts to enforce arbitral decisions without regard to whether they are legally sound. *See* 9 U.S.C. §§ 3–4; *see also Roell*, 538 U.S. at 588–89 (equating "potential domination" with "the possibility of coercive referrals" to magistrate judges). The government does not violate Article III only when it deprives judges of salary or tenure protections; it also violates Article III when it directs federal judges to refer claims against the government to a non-Article III forum for binding resolution. Because Amtrak's arbitration requirement purports to require that result, it violates the protections afforded to litigants under Article III.

C. Amtrak's arbitration condition violates the separation of powers.

Although Article III "preserves to litigants their interest in an impartial and independent federal adjudication of claims within the judicial power of the United States," it also "serves as 'an inseparable element of the constitutional system of checks and balances.'" *Schor*, 478 U.S. at 850 (quoting *N. Pipeline*, 458 U.S. at 58). Congress, therefore, cannot mandate a private dispute-resolution process over which Article III courts do not exercise "supervisory authority." *Wellness Int'l*, 135 S. Ct. at 1944. Because the "practical effect" of Amtrak's arbitration condition is to create such a process, it violates the constitutional separation of powers. *Id*. (quoting *Schor*, 478 U.S. at 851).

In *Wellness International*, the Supreme Court explained that the separation of powers analysis required consideration of "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, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III." *Id.* (quoting *Schor*, 478 U.S. at 851 (internal quotation marks omitted)). Applying those factors, the Court held that Congress could authorize non-Article III bankruptcy judges to adjudicate private rights on parties' consent without violating separation of powers. *Id.* at 1939. In reaching that conclusion, the Court emphasized that bankruptcy judges "are appointed and subject to removal by Article III judges," "serve as judicial officers," "hear matters solely on a district court's reference, which the district court may withdraw *sua sponte* or at the request of a party," and do not "possess … free-floating authority to decide claims traditionally heard by Article III courts," but instead may resolve only "a narrow class of common law claims as an incident to [their] primary, and unchallenged, adjudicative function." *Id*. at 1945 (internal quotation marks and citations omitted). The Court also recognized that "because the entire process takes place under the district court's total control and jurisdiction, there is no danger that use of the bankruptcy court involves a congressional attempt to transfer jurisdiction to non-Article III tribunals for the purpose of emasculating constitutional courts." *Id.* (quoting *Peretz*, 501 U.S. at 937) (brackets and internal quotation marks removed). And the Court distinguished that situation from one in which "Congress create[s] a phalanx of non-Article III tribunals equipped to handle the entire business of the Article III courts without any Article III supervision or control and without evidence of valid and specific legislative necessities." *Id*. at 1947 (quoting *Schor*, 478 U.S. at 855).

Amtrak's arbitration condition presents the scenario that the Supreme Court warned about: Amtrak's terms and conditions create a dispute-resolution system in which the arbitrators are not Article III judges; are not appointed by, removable by, or under the supervision of Article III judges; and are not judicial officers or any other type of officer of the United States. The arbitration provision does not confine arbitrators to deciding a narrow class of cases, but empowers them to issue final and binding decision on "all claims, disputes, or controversies, past, present, or future, that otherwise would be resolved in a court of law or before a forum other than arbitration," unless prohibited by federal statute. Joshi Decl. Ex. 2. Federal courts may not withdraw a matter from private arbitration; to the contrary, the FAA requires federal courts to use the judicial power to compel parties to arbitrate and to confirm arbitral awards upon request in all but "very unusual circumstances." *Oxford Health Plans*, 569 U.S. at 568 (quoting *First Options*, 514 U.S. at 942); *see also* 9 U.S.C. §§ 9–11. And there are no "concerns that drove Congress to depart from the requirements of Article III" for this Court to evaluate in this case, *see Wellness Int'l*, 135 S. Ct. at 1944 (internal quotation marks omitted), because Congress played no role in Amtrak's decision to impose the private arbitration system on travelers.

Furthermore, even if Amtrak's concerns could be attributed to Congress, Amtrak's desire to reduce legal fees accounting for less than one percent of its expenses is not a compelling justification for bypassing "an inseparable element of the constitutional system of checks and balances." *Schor*, 478 U.S. at 850 (quoting *N. Pipeline*, 458 US. at 58); *see also Free Enter. Fund*, 561 U.S. at 499 ("[F]act that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution, for convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.") (brackets and internal quotation marks removed).

Amtrak's reliance (ECF 9-1, at 24) on *Union Carbide* is misplaced. *Union Carbide* does not hold that the government may require binding private arbitration as a condition on its services without violating separation of powers. The passage Amtrak quotes states only that the government need not be a party to a dispute for the dispute to fall within the public rights doctrine. *See* ECF 9-1, at 24 (quoting *Union Carbide*, 473 U.S. at 587). In upholding the use of arbitration to determine compensation under the FIFRA data-licensing scheme, the Court also considered "the nature of the rights at issue and the concerns motivating the Legislature" to protect the "public health"; FIFRA's "own system of internal sanctions" that "relie[d] only tangentially, if at all, on the Judicial Branch for enforcement"; and the data submitters' ability to file "Tucker Act claims … for any shortfall between the arbitration award and the value of [applicable] trade secrets." 473 U.S. at 590–93 & n.4. The Court's approval of the targeted use of arbitration to set compensation levels between two private parties under a federal regulatory scheme does not open the door to wholesale use of mandatory binding arbitration by the government for all claims arising out of its provision of services to the public. In the FIFRA scheme, "the magnitude of any intrusion on the Judicial Branch can only be termed *de minimis*." *Schor*, 478 U.S. at 856. Under Amtrak's arbitration agreement, the effect is "emasculating." *Wellness Int'l*, 135 S. Ct. at 1945 (quoting *Peretz*, 501 U.S. at 937).

V. Plaintiffs' claims do not affect arbitration agreements in other contexts.

If Amtrak could condition service on arbitration of any disputes that might arise, so could governmental bodies such as the U.S. Postal Service, the Social Security Administration, or the Department of Veterans Affairs. Like Amtrak, such bodies are established, controlled, and subject to oversight by the political branches for the purpose of providing services to the public. If Amtrak's purpose of reducing its litigation budget sufficed to justify such terms, other parts of the government could follow Amtrak's lead. Amtrak does not address this important concern. Instead,

Amtrak suggests that Plaintiffs' claims threaten arbitration agreements in other contexts. Amtrak is wrong for several reasons.

A. Amtrak's assertion that Plaintiffs' claims threaten arbitration agreements voluntarily entered into between private parties is baseless. *See* ECF 9-1, at 26–28. Private parties are not bound by constitutional constraints, and Plaintiffs' claims do not rest on the argument that a court that enforces a private arbitration agreement according to its terms is engaging in state action that triggers the constitutional protections at issue here. *Cf. Sharp Corp. v. Hisense USA Corp.*, 292 F. Supp. 3d 157, 175 (D.D.C. 2017) (noting absence of "authority holding that judicial enforcement ... of an arbitration award[] constitutes state action") (internal quotation marks omitted). As part of the government, Amtrak does not enjoy the same freedom of action that a private entity would have. *See*, *e.g.*, *Lebron*, 513 U.S. at 377 (holding that Amtrak may be accountable for rejecting an advertisement as "political").

B. Plaintiffs' arguments do not preclude Amtrak or other governmental bodies from offering to arbitrate claims or from being bound by the results of such arbitration in other settings. Plaintiffs do not contend that arbitration cannot bind the government. *See* ECF 9-1, at 19 (quoting *United States v. Park Places Assocs., Ltd.*, 563 F.3d 907, 928 n.13 (9th Cir. 2009) (stating in dicta that "the Attorney General may compromise claims by settlement or arbitration")). Plaintiffs' claims, moreover, do not address arbitration clauses in individually negotiated agreements with suppliers, contractors, or unions. *See* ECF 9-1, at 14–15. Likewise, the Constitution would not prevent Amtrak from establishing a genuinely voluntary program giving passengers the option of resolving pending disputes through arbitration instead of litigation. In that situation, passengers could decide after a dispute has arisen whether to arbitrate, rather than having to decide whether to waive their constitutional rights as a condition of buying a ticket. Plaintiffs' claims focus solely

on whether a governmental enterprise can demand that members of the public waive constitutional rights to receive government services.

Amtrak's observation that the Administrative Dispute Resolution Act (ADRA) "encouraged" federal agencies to use arbitration to settle disputes, ECF 9-1, at 20 (citing 5 U.S.C. § 575), has no bearing on this question. Amtrak is not an "agency" within the meaning of that statute, and if the statute did apply, it would bar Amtrak from "requir[ing] any person to consent to arbitration as a condition of entering into a contract or obtaining a benefit." 5 U.S.C. § 575(a)(3). The ADRA contemplates voluntary agreements to arbitrate, not what Amtrak is attempting to do here.

Amtrak's reliance on a 1995 opinion by the Office of Legal Counsel (OLC) is likewise misplaced. *See* ECF 9-1, at 19, 21 (citing *Constitutional Limitations on Fed. Gov't Participation in Binding Arbitration*, 19 Op. O.L.C. 208 (1995) (OLC Opinion)). The OLC Opinion primarily deals with questions arising under the Appointments Clause, the Take Care Clause, Article II generally, the non-delegation doctrine, and the Due Process Clause, none of which are presented here. *See* OLC Opinion, 19 Op. O.L.C. at 210–26, 233–34. And OLC's analysis of the constitutional issues contemplates arbitration agreements entered into by attorneys "litigating on behalf of the government … to resolve a particular dispute through binding arbitration." *Id.* at 232. To the extent the OLC Opinion addresses the issue presented in this case, it recognizes that "Article III prohibits at least some matters from being submitted to binding arbitration." *Id.* at 227. Specifically, the OLC Opinion states that when the government enters into a binding arbitration agreement, the agreement is "still technically subject to scrutiny for conformity to the purposes underlying Article III," and that if "the executive branch were to adopt and pursue a policy of entering into binding arbitration in a systematic manner designed to undermine the judiciary's

constitutional role, a serious constitutional question would arise." *Id*. at 232 & n.44. This case presents that "serious constitutional question."

C. Finally, this case does not present the question of the government's authority to require private parties in heavily regulated industries to provide their customers the option of arbitrating disputes. *See supra* p. 37; *see also BiotechPharma, LLC v. Ludwig & Robinson, PLLC*, 98 A.3d 986, 997 (D.C. 2014) (upholding mandatory arbitration system for attorney-client fee disputes). Congress may well have authority to impose conditions on participants in such industries that would not be constitutional if imposed on the general public. *See*, *e.g.*, *Illinois v. Krull*, 480 U.S. 340, 357 (1987) ("On several occasions, this Court has upheld legislative schemes that authorized warrantless administrative searches of heavily regulated industries."); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 498 (1996) (noting that "our early cases recognized that the State may regulate some types of commercial advertising more freely than other forms of protected speech"). This Court, accordingly, can resolve Plaintiffs' claims without addressing questions presented when the government mandates use of arbitration as part of a comprehensive regulatory scheme.

CONCLUSION

For the foregoing reasons, this Court should grant plaintiffs' motion for summary judgment and deny Amtrak's motion to dismiss.

March 27, 2020

Respectfully submitted,

/s/ Nandan M. Joshi

Nandan M. Joshi (DC Bar No. 456750)
Scott L. Nelson (DC Bar No. 413548)
Allison M. Zieve (DC Bar No. 424786)
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Plaintiffs

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

PLAINTIFFS' STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO DISPUTE

In support of their Cross-Motion for Summary Judgment, plaintiffs Robert Weissman and Patrick Llewellyn submit the following statement of material facts as to which there is no genuine issue, pursuant to Local Rule 7(h)(1).

1. Amtrak is a corporation established pursuant to an act of Congress. (Rail Passenger Service Act of 1970, § 301.)

2. Congress has found that the "[p]ublic convenience and necessity require that Amtrak, to the extent its budget allows, provide modern, cost-efficient, and energy-efficient intercity rail passenger transportation between crowded urban areas and in other areas of the United States." (49 U.S.C. § 24101(a).)

3. Congress has defined Amtrak's mission as "to provide efficient and effective intercity passenger rail mobility consisting of high quality service that is trip-time competitive with other intercity travel options and that is consistent with the goals set forth in [49 U.S.C. § 24101(c)]." (49 U.S.C. § 24101(b).)

4. The goals set forth in § 24101(c) specify various public objectives for Amtrak to achieve in carrying out its mission. (49 U.S.C. § 24101(c); *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 53 (2015).)

5. Amtrak has issued 109,396,994 shares of preferred stock. The U.S. Secretary of Transportation holds all of Amtrak's preferred stock for the benefit of the federal government. Each share of Amtrak's preferred stock is convertible to 10 shares of common stock. (Consolidated Financial Statements: National Railroad Passenger Corporation and Subsidiaries (Amtrak), Years Ended September 30, 2019 and 2018, With Report of Independent Auditors (Joshi Decl. Ex. 1, at 19).)

6. Amtrak is authorized to issue 10 million shares of common stock and has issued 9,385,694 shares of common stock, which is held by four private railroads. (Consolidated Financial Statements: National Railroad Passenger Corporation and Subsidiaries (Amtrak), Years Ended September 30, 2019 and 2018, With Report of Independent Auditors (Joshi Decl. 1, at 19).)

7. Common stockholders do not have the right to vote for any of the members of Amtrak's board of directors. (Consolidated Financial Statements: National Railroad Passenger Corporation and Subsidiaries (Amtrak), Years Ended September 30, 2019 and 2018, With Report of Independent Auditors (Joshi Decl. 1, at 19); 49 U.S.C. § 24302; *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 386 (1995).)

8. Amtrak's board of directors has 10 members: the Secretary of Transportation, eight individuals nominated by the President and confirmed by the Senate, and the president of Amtrak, who serves as a non-voting member of the board. (49 U.S.C. § 24302.)

9. In nominating board members, the President must consult with leaders of both political parties in the House of Representatives and the Senate and must try to provide adequate

and balanced representation of the major geographic regions of the United States. (49 U.S.C. § 24302; *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 52 (2015).)

10. Appointed board members serve five-year terms, and no more than five of them may be members of the same political party. (49 U.S.C. § 24302; *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 52 (2015).)

11. Amtrak's corporate officers, including its president, are named and appointed by the board of directors and serve at the pleasure of the board. (49 U.S.C. § 24303.)

12. Amtrak is required by statute to submit reports to Congress about its operations. (49 U.S.C. § 24315.)

13. Amtrak must appoint an inspector general. (5 U.S.C. App. § 8G(a)(2).)

14. Amtrak is subject to oversight hearings by Congress. (*Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 52 (2015).)

15. Amtrak has received federal subsidies every year that it has been in operation. (*Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 53 (2015); FAST Act, Pub. L. No. 114-94, div. A, title XI, § 11101, 129 Stat. 1312, 1622 (2015).)

16. In 2015, Congress authorized a total of $8.05 billion in annual funding for Amtrak for fiscal years 2016 through 2020. (FAST Act, Pub. L. No. 114-94, div. A, title XI, § 11101, 129 Stat. 1312, 1622 (2015).)

17. Congress has capped Amtrak's liability for personal injury, death, and damage to property arising out of a single accident or incident. (49 U.S.C. § 28103(a).)

18. On December 11, 2018, Amtrak submitted an "Amtrak Consumer Arbitration Agreement" to the American Arbitration Association (AAA). (Amtrak Consumer Arbitration Agreement (Joshi Decl. Ex. 2).)

19. The arbitration agreement took effect on January 6, 2019. (Amtrak Consumer Arbitration Agreement (Joshi Decl. Ex. 2).)

20. Amtrak's terms and conditions for service state:

> These Terms and Conditions contain a binding Arbitration Agreement below. Please read the Arbitration Agreement carefully because it applies mutually to You and Amtrak and requires that you resolve claims and disputes with Amtrak on an individual basis through arbitration and not by way of court or jury trial. By purchasing a ticket for travel on Amtrak, You are agreeing to these Terms and Conditions and agreeing to the Arbitration Agreement.

(Amtrak Consumer Arbitration Agreement (Joshi Decl. Ex. 2); Amtrak's Terms and Conditions (Joshi Decl. Ex. 4, at 1).)

21. Amtrak's arbitration agreement states:

> Mutual Agreement to Arbitrate ("Arbitration Agreement"). This Arbitration Agreement is intended to be as broad as legally permissible, and, except as it otherwise provides, applies to all claims, disputes, or controversies, past, present, or future, that otherwise would be resolved in a court of law or before a forum other than arbitration. Amtrak and Customer (on behalf of yourself and any individuals for whom you purchase tickets, including, without limitation, family members, minor passengers, colleagues and companions (collectively "You" or "Your"), AGREE that this Arbitration Agreement applies, without limitation, to claims Amtrak may have against You and claims You may have against Amtrak and any affiliates or related entities, or against any party to which Amtrak owes indemnity (which party may also enforce this Agreement), including without limitation any host railroad, based upon or related to: these Terms and Conditions, breach of contract, tort claims, common law claims, Your relationship with Amtrak, tickets, services and accommodations provided by Amtrak, carriage on Amtrak trains and equipment, any personal injuries (including, but not limited to, claims for negligence, gross negligence, physical impairment, disfigurement, pain and suffering, mental anguish, wrongful death, survival actions, loss of consortium and/or services, medical and hospital expenses, expenses of transportation for medical treatment, expenses of drugs and medical appliances, emotional distress, exemplary or punitive damages arising out of or related to any personal injury), and any claims for discrimination and failure to accommodate, shall be decided by a single arbitrator through binding arbitration and not by a judge or jury. Except with respect to the Class Action Waiver below, the arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the validity, applicability, enforceability, unconscionability or waiver of this Arbitration Agreement, including, but not limited to any claim that all or any part of this Arbitration Agreement is void or voidable. This Arbitration Agreement is governed by the Federal Arbitration Act

> (“FAA”) and evidences a transaction involving commerce. The arbitration will be conducted before a single arbitrator under the Consumer Arbitration Rules of the American Arbitration Association (“AAA”), which are available at the AAA website (www.adr.org). A court of competent jurisdiction shall have the authority to enter judgment upon the arbitrator's decision/award. The parties agree to bring any claim or dispute in arbitration on an individual basis only, and not as a class or representative action, and there will be no right or authority for any claim or dispute to be brought, heard or arbitrated as a class or representative action (“Class Action Waiver”). Regardless of anything else in this Arbitration Agreement and/or the applicable AAA Rules, any dispute relating to the interpretation, applicability, enforceability or waiver of the Class Action Waiver may only be determined by a court and not an arbitrator. This Arbitration Agreement does not apply to any claim or dispute that an applicable federal statute states cannot be arbitrated.

(Amtrak Consumer Arbitration Agreement (Joshi Decl. Ex. 2); Amtrak’s Terms and Conditions (Joshi Decl. Ex. 4, at 14).)

22. Arbitrators for the American Arbitration Association are not Article III judges or any other type of officer of the United States; they are private persons. (AAA’s National Roster of Arbitrators (Joshi Decl. Ex. 6.).)

23. An individual cannot purchase an Amtrak ticket or travel on Amtrak trains without being deemed by Amtrak to have consented to, and to be bound by, the arbitration agreement. (Amtrak Consumer Arbitration Agreement (Joshi Decl. Ex. 2); Amtrak’s Terms and Conditions (Joshi Decl. Ex. 4).)

24. Amtrak’s terms and conditions do not provide a purchaser or traveler with the right to decline the arbitration agreement at the time of purchase or travel, or to withdraw from the arbitration agreement at a later date, including when a dispute with Amtrak has arisen. (Amtrak Consumer Arbitration Agreement (Joshi Decl. Ex. 2); Amtrak’s Terms and Conditions (Joshi Decl. Ex. 4).)

25. On November 25, 2019, Amtrak’s former president and chief executive officer Richard H. Anderson submitted a letter to the following members of the U.S. House of

Representatives: The Honorable Peter DeFazio, Chairman, Committee on Transportation and Infrastructure; The Honorable Sam Graves, Ranking Member, Committee on Transportation and Infrastructure; The Honorable Daniel Lipinski, Chairman, Subcommittee on Railroads, Pipelines, and Hazardous Materials; and The Honorable Rick Crawford, Ranking Member, Subcommittee on Railroads, Pipelines, and Hazardous Materials (Anderson Letter). (Joshi Decl. Ex. 7.)

26. The Anderson letter states that Amtrak adopted its arbitration policy for "two simple reasons: to expedite resolution of claims and to reduce unnecessary litigation costs." (Joshi Decl. Ex. 7, at 2.)

27. The Anderson Letter does not explain why these objectives could not be achieved by an arbitration policy that was optional for ticket purchasers and passengers. (Joshi Decl. Ex. 7.)

28. According to the Anderson letter, in fiscal years 2015 through 2019, Amtrak resolved passenger claims without litigation in 97%, 97%, 92%, 96%, and 95% of cases, respectively; and its total legal fees for resolved claims were $2,228,713, $1,785,768, $2.276,364, $1,540,606, and $3,369,883, respectively, in each of those fiscal years. (Joshi Decl. Ex. 7, at Attachment.)

29. In fiscal years 2018 and 2019, Amtrak's total expenses were $4,238,951,000 and $4,396,478,000, meaning that the share of its expenses that were legal fees was 0.36% and 0.77%, respectively, in each of those fiscal years. (Consolidated Financial Statements: National Railroad Passenger Corporation and Subsidiaries (Amtrak), Years Ended September 30, 2019 and 2018, With Report of Independent Auditors (Joshi Decl. Ex. 1, at 5); Anderson Letter (Joshi Decl. Ex. 7, at Attachment).)

30. Amtrak commenced passenger rail operations in May 1971. (Amtrak FY 2018 Company Profile (Joshi Decl. Ex. 5, at 2).)

31. Amtrak currently provides service to more than 500 destinations in 46 states, the District of Columbia, and Canada. (Amtrak FY 2018 Company Profile (Joshi Decl. Ex. 5, at 3).)

32. Amtrak is the nation's only high-speed intercity passenger rail provider. (Amtrak FY 2018 Company Profile (Joshi Decl. Ex. 5, at 3).)

33. In fiscal year 2018, Amtrak passengers made an average 87,000 trips per day, for a total of 31.7 million trips on Amtrak. (Amtrak FY 2018 Company Profile (Joshi Decl. Ex. 5, at 3).)

34. Amtrak ranks sixth in total domestic passengers carried when U.S. airlines are included. (Amtrak FY 2018 Company Profile (Joshi Decl. Ex. 5, at 3).)

35. The three busiest cities that Amtrak served in fiscal year 2018 were New York City, Washington, and Philadelphia, with ridership totaling 10,132,025, 5,197,237, and 4,471,992, respectively. (Amtrak FY 2018 Company Profile (Joshi Decl. Ex. 5, at 2).)

36. Amtrak carried more than three times as many passengers between Washington and New York City than all airlines combined. (Amtrak FY 2018 Company Profile (Joshi Decl. Ex. 5, at 3).)

37. Plaintiff Robert Weissman lives and works in Washington, DC. (Weissman Decl. ¶ 2.)

38. Weissman's job duties require him periodically to travel from Washington to other cities, including New York City. (Weissman Decl. ¶¶ 2–3.)

39. Weissman travelled on Amtrak to and from New York City in August 2019, August 2018, and February 2018. (Weissman Decl. ¶ 3)

40. Weissman expects to continue taking several trips between Washington and New York City annually, including between two and three times in 2020, subject to travel restrictions arising out of the current coronavirus pandemic. (Weissman Decl. ¶ 4.)

41. Weissman does not wish to agree, in advance of a dispute, to arbitrate disputes with Amtrak. (Weissman Decl. ¶ 5.)

42. Weissman would choose to travel by train on Amtrak in many instances if Amtrak did not impose an arbitration requirement. (Weissman Decl. ¶ 6.)

43. Plaintiff Patrick Llewellyn lives and works in Washington, DC. (Llewellyn Decl. ¶ 2.)

44. Llewellyn has previously ridden Amtrak for work-related travel, most recently in February 2018. (Llewellyn Decl. ¶ 3.)

45. Llewellyn's job will require him to travel from Washington to cities on the East Coast of the United States served by Amtrak. (Llewellyn Decl. ¶ 4.)

46. Llewellyn does not wish to agree in advance to arbitrate disputes with Amtrak. (Llewellyn Decl. ¶ 5.)

47. Llewellyn would choose to travel by train on Amtrak in many instances for his business travel if Amtrak did not impose an arbitration requirement. (Llewellyn Decl. ¶ 6.)

March 27, 2020

Respectfully submitted,

/s/ Nandan M. Joshi
Nandan M. Joshi (DC Bar No. 456750)
Scott L. Nelson (DC Bar No. 413548)
Allison M. Zieve (DC Bar No. 424786)
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Plaintiffs