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

REPLY TO DEFENDANT'S OPPOSITION TO
PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Constitution creates three coequal branches of government, and it allocates to the judicial branch the power to decide cases and controversies. It guarantees that individuals retain the right to petition a court for redress of grievances, and it protects the impartiality and independence of the federal court system. The Constitution does not permit a government entity to subvert this constitutional design by creating a system of binding private arbitration and forcing the public into it. Nor does it allow a government entity to use an unconstitutional condition to achieve what it cannot accomplish by fiat.

This case is about whether Amtrak is bound by those constraints. Amtrak argues that it is not so bound because it is not part of the government, but Supreme Court precedent forecloses that argument. Amtrak also argues that Congress granted it the authority to force its passengers into arbitration, but that assertion runs up against the presumption that Congress does not intend its statutes to raise serious constitutional questions. Amtrak argues that passengers validly waive their constitutional rights by purchasing train tickets, but that theory ignores the unconstitutional-conditions doctrine, which is designed to prevent government from doing exactly what Amtrak is doing here. Amtrak argues that it is not subject to that doctrine because it does not provide a valuable public benefit, but that argument conflicts with precedent and the purposes for which Congress established Amtrak. Amtrak argues that this Court cannot address any of these important questions because only passengers that are already within its private-arbitration system have standing to raise them. But that argument ignores relevant case law and would provide no remedy for the claims asserted here, because once a passenger is in Amtrak's arbitration system, it is too late to avoid the injury of being forced into that system, in which the arbitrator—not any court—would have the exclusive authority to decide the statutory and constitutional questions presented in this case.

This Court has Article III jurisdiction to decide Plaintiffs' claims. Exercising that jurisdiction, the Court should hold that Amtrak's arbitration condition exceeds its statutory and constitutional authority. Plaintiffs' motion for summary judgment should be granted.

ARGUMENT

I. Plaintiffs have demonstrated Article III standing.

"[T]he 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* ECF 10 (Pls. Mem.), at 11. Plaintiffs have submitted undisputed evidence that Amtrak is a significant provider of intercity transportation services to District travelers; that plaintiffs have used Amtrak to engage in intercity travel and intend to use Amtrak for future work-related travel; that they do not wish to acquiesce to Amtrak's arbitration requirement as a condition of riding Amtrak, and that they cannot obtain rail services from Amtrak while preserving their right to resolve disputes in court. Plaintiffs have also demonstrated—and Amtrak does not dispute—that their injury was caused by Amtrak's decision to incorporate an arbitration condition into its terms and conditions of service and that this Court can redress that injury by invalidating the arbitration condition, which would enable Plaintiffs to obtain passenger rail services from Amtrak without waiving their constitutional rights. Plaintiffs have thus satisfied the three elements of the "constitutional minimum of standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

In response, Amtrak contends that Plaintiffs' inability to obtain a desired product would be an Article III injury if caused by a traditional administrative agency, but that it is not when caused by a government corporation that is not an agency for statutory purposes and is not subject to the Administrative Procedure Act. ECF 13 (Amtrak Opp.), at 5–6. Amtrak does not—and cannot—explain how its *statutory* status alters the nature of Plaintiffs' *constitutional* injury-in-fact. If, as

circuit precedent holds, a plaintiff has standing when traditional agency action causes regulated companies to make a desired product unavailable to the plaintiff, it follows *a fortiori* that a plaintiff has standing when a government corporation acts on its own to make a desired product unavailable to the plaintiff. Amtrak cites no authority that Article III analysis changes based on the identity or legal status of the defendant.

Amtrak next contends that Plaintiffs have not suffered an Article III injury because they may obtain "the product Amtrak sells: rail service." ECF 13, at 6. Plaintiffs' injury, however, cannot be erased by redefining the nature of the product or service that plaintiffs would like to obtain. In *Consumer Federation of America*, for example, the consumer sought high-speed internet service unencumbered by restrictions on access to content; the court held that the consumer had standing even though he could obtain internet service *with* the threat of content restrictions. 348 F.3d at 1012. In *Chamber of Commerce of the United States v. SEC*, the Chamber sought to invest in mutual funds that were not subject to regulations that preserved the independence of their boards; the court held that the Chamber had standing even though it could obtain the underlying mutual funds and "there [was] no evidence a fund of the type in which the Chamber wants to invest would perform better than a fund that conforms to the two corporate governance conditions." 412 F.3d 133, 138 (D.C. Cir. 2005). Likewise, Plaintiffs' ability to obtain rail services from Amtrak does not ameliorate the injury they suffer from being unable to obtain rail services "on [their] preferred terms." *Orangeburg, S.C. v. FERC*, 862 F.3d 1071, 1078 (D.C. Cir. 2017). And *Chamber of Commerce* makes clear that Amtrak's assertion that the arbitration condition "has no actual present effect on price, availability, or any pertinent aspect of the service experience," ECF 13, at 6, is irrelevant to Plaintiffs' standing.

Turning away from D.C. Circuit precedent, Amtrak repeats its argument that an arbitration proceeding must have occurred or be "certainly impending" for a plaintiff to have Article III standing. ECF 13, at 3 (quoting ECF 9-1 (Mot. to Dismiss), at 10, quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013)). But Amtrak's suggestion that Plaintiffs might suffer some other injury at some future date if they decide to ride Amtrak and are forced into arbitration has no bearing on the standing question currently before the Court. As Plaintiffs have explained, they suffer a present injury because they are "forced either to avoid Amtrak for future intercity travel or acquiesce to its arbitration condition." ECF 10, at 13. If this Court agrees that Plaintiffs have suffered an injury in these circumstances, it must exercise jurisdiction to resolve the merits of Plaintiffs' claims. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) ("[A] federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." (internal quotation marks omitted)).

Amtrak's continued reliance on *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), is also misplaced. According to Amtrak, "[t]he Court [*in Monsanto*] did not hold, as Plaintiffs suggest, that the suit was unripe because plaintiff could bring a Tucker Act suit to vindicate its Takings Clause claim." ECF 13, at 3 n.2. According to the Supreme Court, however, "[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). In other words, the arbitration procedure in *Monsanto* was "an exhaustion requirement … to a Tucker Act claim." *Monsanto*, 467 U.S. at 1018. Amtrak's arbitration process, by contrast, is not an exhaustion requirement to a lawsuit, but a substitute for a lawsuit. And, in any event, *Monsanto* did not address the injury that arises when a plaintiff cannot obtain a desired product or service, which is the injury that Plaintiffs assert here.

Amtrak's understanding of *Monsanto* is also inconsistent with *Bowen v. First Family Financial Services, Inc.*, 233 F.3d 1331 (11th Cir. 2000), which, as Amtrak acknowledges, upheld "pre-enforcement standing to challenge arbitration agreements." ECF 13, at 4. Amtrak contends that the *Bowen* plaintiffs "alleged that an act tied to the imposition of an arbitration clause—discrimination in provision of credit—was prohibited by statute and caused them injury *outside of* any harm from the arbitration clause." *Id.* at 4–5. Not so. In *Bowen*, the plaintiffs alleged that the arbitration condition *was* the unlawful discrimination in provision of credit. *See Bowen*, 233 F.3d at 1335.

None of the other out-of-circuit cases on which Amtrak relies speaks to Plaintiffs' present inability to purchase Amtrak tickets without acquiescing to the arbitration condition. *See* ECF 13, at 4 (citing cases); *see also* ECF 10, at 14–15 (distinguishing those cases). In particular, a plaintiff that has already entered into an arbitration agreement does not face the dilemma that Plaintiffs face here: having to reconsider their future transportation plans because a travel option that should be available to them—rail service that preserves their right to judicial redress—has been unconstitutionally removed from the market. Amtrak responds that Plaintiffs "give up no alleged constitutional rights to petition or to access the courts if Amtrak never seeks arbitration against them." ECF 13, at 5. But Amtrak's terms of service make clear when and how a traveler gives up his or her constitutional rights: "[b]y purchasing a ticket for travel on Amtrak, [the traveler is] agreeing to the Arbitration Agreement." ECF 13 (Def. Amtrak's Statement of Genuine Issues and Response to Pls.' Statement of Material Facts Not in Dispute), at 31. Thereafter, the traveler cannot "withdraw from the arbitration agreement," *id.* at 33, and must present any challenges to its validity to the arbitrator for binding resolution, *id.* at 31–32. In these circumstances, "[t]he time to remedy [the Plaintiffs'] injury is now, before they are forced either to avoid Amtrak for future intercity travel or acquiesce to its arbitration condition." ECF 10, at 13.

Finally, Amtrak makes a last-ditch attempt to question Robert Weissman's standing (but not Patrick Llewellyn's) by asserting that Weisssman "is already subject to Amtrak's arbitration clause," ECF 13, at 4, presumably because he travelled on Amtrak in 2019, after Amtrak began to impose the arbitration condition. Any arbitration agreement to which he previously acquiesced would not govern his future travels. Under the Federal Arbitration Act (FAA), an arbitration clause in a contract governs "controversies thereafter arising out of such contract." 9 U.S.C. § 2. Because each ticket purchase is a new agreement, ECF 13, at 31–32, Weissman's past travels cannot lessen the injury that he suffers from being forced to forgo Amtrak or acquiesce to the arbitration condition for future work-related travel.

II. Amtrak is a government entity.

As Plaintiffs have explained (ECF 10, at 15–19), two Supreme Court decisions—issued two decades apart—confirm that Amtrak is a component of the federal government under the Constitution. *See Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43 (2015); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995).

In resisting this conclusion, Amtrak continues to rely on Congress's decision, after *Lebron*, to remove Amtrak from the scope of the Government Corporation Control Act (GCCA). ECF 13, at 15. In Amtrak's apparent view, because *Lebron* used the word "accountability" in describing the purpose of the GCCA, *id.* (quoting *Lebron*, 513 U.S. at 389), removing Amtrak from the GCCA's scope transformed Amtrak from a governmental entity into a "private corporation[]," *id.* This argument misunderstands the GCCA. As *Lebron* explains, the GCCA required government corporations to "be audited by the Comptroller General" and directed that their "budgets … be included in the budget submitted annually to Congress by the President." 513 U.S. at 389–90. Amtrak is still subject to audits by the Comptroller General, 49 U.S.C. § 24315(e), and its finances remain subject to presidential and congressional oversight, *id.* § 24315(a), (b), (g). Thus, regardless of the GCCA,

Amtrak remains "accountable" to the political branches in a way that that a private corporation would not be. Unsurprisingly, therefore, the Supreme Court's 2015 decision in *American Railroads* never even alludes to the GCCA in confirming Amtrak's continued governmental status under the Constitution.[1]

Amtrak next contends that its "ticketing agreements" are "less governmental" than the "imposition of rules about political speech on its property in *Lebron*." ECF 13, at 15. As Plaintiffs have explained, however, "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." ECF 10, at 19 (quoting *Am. R.Rs.*, 575 U.S. at 55). Amtrak notes that the government's regulation of speech on its property is subject to "forum" analysis, ECF 13, at 15, but the Constitution applies to government contracts as well. *See, e.g.*, *Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 679 (1996) (holding that the government does not have "*carte blanche* to terminate independent contractors for exercising First Amendment rights"); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (applying strict scrutiny to racial classifications in government contracting). Surely Amtrak could not, as its argument suggests, evade *Lebron* by putting speech restrictions into its ticketing agreements. In any event, the mode of constitutional analysis that applies *after* an entity is found to be governmental in character does not inform the antecedent question whether the entity is governmental.

Finally, Amtrak seeks to limit *American Railroads* to the specific action taken by Amtrak in that case: the issuance of "metrics and standards" applicable to host railroads. ECF 13, at 15–

[1] Amtrak mentions that the Amtrak Reform and Accountability Act of 1997 allowed Amtrak to contract out services and establish an employee stock ownership option plan. ECF 13, at 15 (citing Pub. L. No. 105-134, §§ 121, 415, 111 Stat. 2570, 2574, 2590); *see also* 49 U.S.C. §§ 24304, 24312 (current codification). Amtrak does not explain how these labor-relations measures are pertinent to the question whether Amtrak is a governmental entity.

16. But *American Railroads* considered Amtrak's issuance of metrics and standards "for purposes of the Constitution's separation of powers principles." 575 U.S. at 54. And Amtrak does not point to any aspect of the Court's analysis that would not control here. *See id*. at 51–55. Amtrak cannot "evade the most solemn obligations imposed in the Constitution" by relying on its "corporate form." *Id.* at 54 (quoting *Lebron*, 513 U.S. at 397). It is part of the government for purposes of Plaintiffs' claims.

III. Congress has not granted Amtrak the authority to include a mandatory arbitration provision as a term or condition of passenger rail service.

This Court can avoid reaching Plaintiffs' constitutional claims if it concludes that Congress has not delegated to Amtrak the authority to impose an arbitration condition on rail passengers. As Plaintiffs have explained, the Supreme Court has repeatedly used constitutional-avoidance canons to construe broad statutory grants of authority so as to exclude activities that would raise serious constitutional concerns—including concerns about access to judicial forums. ECF 10, at 19–22. This Court should do the same here, because no provision of Amtrak's authorizing legislation unambiguously authorizes it to include an arbitration requirement as a term or condition of service. *Id*. at 22–25. Indeed, under constitutional-avoidance canons, this Court *must* interpret such legislation to exclude that authority if that interpretation is "fairly possible." *INS v. St. Cyr*, 533 U.S. 289, 300 (2001) (internal quotation marks omitted).

Amtrak responds that this Court cannot find a plausible interpretation of Amtrak's statutory authority under which the arbitration condition would not be authorized. ECF 13, at 10–14. The only express power-granting provision that Amtrak cites, however, is 49 U.S.C. § 24305(c)(1), which authorizes Amtrak to "make and carry out *appropriate* agreements" (emphasis added). As Plaintiffs have explained, the term "appropriate" constrains Amtrak's authority to make agreements by authorizing only those agreements that are "suitable or fitting for a particular

purpose," ECF 10, at 24 (quoting *Tapia v. United States*, 564 U.S. 319, 327 (2011) (internal quotation marks omitted)), and it is not suitable for a government enterprise to require the public to waive its constitutional rights as a condition of service.[2] Amtrak responds that, if it lacks statutory authority to mandate that its passengers resolve disputes through arbitration, it may also lack statutory authority to negotiate arbitration agreements with host railroads, unions, and suppliers (a question on which no court has passed). But that conclusion does not necessarily follow from Plaintiffs' statutory claim, because an agreement inappropriate in one context may be appropriate in another. *Sossamon v. Texas*, 563 U.S. 277, 286 (2011) (holding that the word "appropriate" is "inherently context dependent"). Amtrak also contends that the term "appropriate" requires "consideration of all the relevant factors." ECF 13, at 12 (quoting *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (internal quotation marks omitted)). But in interpreting the term "appropriate," Amtrak's status as a governmental entity—and the constitutional constraints that entails—is surely one of the relevant factors that this Court should consider.

Citing "context" (*id.*), Amtrak invokes statutory provisions that instruct Amtrak to operate as a "for-profit corporation," 49 U.S.C. § 24301(a)(2); to use "good business judgment" and "maximize … revenues, *id.* § 24101(d); to "minimize United States Government subsidies," *id.* § 24101(c)(1); and to reduce "management costs," *id*. § 24101(c)(1)(E). Amtrak acknowledges, however, that Congress's instruction to Amtrak's officials that they "operate[] and manage[]" Amtrak as a "for-profit corporation" (*id.* § 24301(a)(2)) does not "by itself grant Amtrak greater powers." ECF 13, at 10. And the provisions that relate to Amtrak's finances do not give Amtrak *carte blanche* to take any action that improves its balance sheet; they would not, for example,

[2] Contrary to Amtrak's suggestion (ECF 13, at 11 n.6), nothing in the language of the slightly more verbose predecessor to section 24305(c)(1) informs the question whether it is "appropriate" for Amtrak to include a mandatory arbitration agreement in its terms and conditions.

authorize Amtrak to violate otherwise applicable federal criminal laws simply because doing so would be profitable or reduce Amtrak's costs. There is similarly no reason to construe those provisions to authorize Amtrak to engage in activities that threaten constitutional violations, especially given "the reasonable presumption that Congress did not intend [an interpretation] which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

Finally, although Amtrak cites its "broad authorities," ECF 13, at 13, it ignores the Supreme Court's repeated admonitions that broad grants of authority exclude the power to engage in activity that raises serious constitutional concerns. *See* ECF 10, at 20–22. In light of these precedents, Amtrak must do more than characterize its statutory authority as "broad"; it must identify a "clear expression of an affirmative intention" by Congress to authorize Amtrak to mandate that its passengers resolve disputes through binding arbitration. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 504 (1979). Statutory provisions directing Amtrak to "cut costs," ECF 13, at 14, are not the "clear indication" of Congress's intent that the constitutional-avoidance canon demands. *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001).

As Plaintiffs have explained (ECF 10, at 25–28), their statutory-authority claim does not transgress the Attorney General's exclusive authority under 49 U.S.C. § 24103(a)(1). That provision speaks to the "Enforcement" of certain provisions of title 49 through a civil action for "equitable relief" when Amtrak takes action that is "inconsistent" with its statutory authority.

Amtrak contends that actions in excess of statutory authority necessarily must be "inconsistent with" statutory authority as that term is used in section 24103(a)(1). ECF 13, at 8. The cases it cites, however, do not so hold. In *Trump v. Hawaii*, the Supreme Court first determined that Congress had delegated to the President the statutory authority to issue a ban on travel from certain countries, 138 S. Ct. 2392, 2408–10 (2018), before turning to challengers' argument that the Presidents' exercise of that authority conflicted with other provisions of the Immigration and Nationality Act,

id. at 2410–12. The Court did not construe the term "inconsistent with" as used in a statutory provision, or otherwise suggest that actions that exceed a statutory delegation of authority are inherently "inconsistent with" the statute. In *Coalition for Common Sense in Government Procurement v. United States*, the phrase being construed was "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right within the meaning of [the APA,] 5 U.S.C. § 706(2)(C)." 576 F. Supp. 2d 162, 170 (D.D.C. 2008). Not only is that phrase different from the term "inconsistent with" in section 24103(a)(1), but the use of three separate terms to describe the waterfront of statutory violations—"jurisdiction," "authority," and "limitation"—suggests that actions that exceed an agency's jurisdiction or authority are different in kind from actions that are "inconsistent with" a "limitation" on agency authority. And as previously explained, ECF 10, at 26–27, in *City of Arlington v. FCC*, the Supreme Court held that the deference that an agency receives under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council,* 467 U.S. 837 (1984), does not depend on whether the statute the agency is interpreting is labeled "jurisdictional." 569 U.S. 290, 298 (2013). The Court's refusal to draw a distinction between jurisdictional and non-jurisdictional statutory provisions for *Chevron* purposes does not suggest that an action taken in excess of statutory authority is action that is "inconsistent with" any particular statutory provision.

Although Amtrak asserts that such a distinction "slic[es] the baloney mighty thin." ECF 13, at 8 (citation omitted), the D.C. Circuit has had no difficulty cutting the meat when interpreting statutes that restrict a court's authority to award equitable relief. In *Perry Capital LLC v. Mnuchin*, for example, the court considered a provision that bars courts from taking "'any action' that would 'restrain or affect' [the Federal Housing Finance Agency's] exercise of its 'powers or functions … as a conservator or a receiver.'" 864 F.3d 591, 604 (2017) (quoting 12 U.S.C. § 4617(f)). The court explained that it had "interpreted a nearly identical statutory limitation on judicial review to

prohibit claims for declaratory, injunctive, and other forms of equitable relief as long as the agency is acting within its statutory conservatorship authority." *Id.* at 605 (citing 12 U.S.C. § 1821(j)). But the court also interpreted the provision to incorporate an "exception to the bar on judicial review" under which the "prohibition on injunctive and declaratory relief would not apply if the agency has acted or proposes to act beyond, or contrary to, its statutorily prescribed, constitutionally permitted, powers or functions." *Id.* at 606 (internal quotation marks omitted). To determine whether the exception applies, the court asks whether the action under review "falls within FHFA's statutory conservatorship powers," *id.*, or, put another way, whether "FHFA has exceeded the bounds of conservatorship," *id.* at 614. Courts are thus capable of distinguishing actions that violate a statutory provision from those that exceed an agency's delegated authority.

Amtrak, moreover, fails to grapple with the purpose of section 24103(a)(1), which, as the section heading indicates, is to restrict the "Enforcement" of certain title 49 provisions to the Attorney General. *See* ECF 10, at 26. Amtrak responds that "[t]he plain meaning of a statute cannot be limited by its title." ECF 13, at 8 (quoting *Nat'l Ctr. for Mfg. Scis. v. Dep't of Def.*, 199 F.3d 507, 511 (D.C. Cir. 2000)). True, but "section headings" can "supply cues as to what Congress intended." *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 893 (2018) (internal quotation marks and citations omitted). Here, section 24103(a)(1)'s heading aptly describes its purpose: to provide "the exclusive remedies for breaches of any duties or obligations imposed by the Amtrak Act." *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 464–65 (1974). Because Plaintiffs do not contend that Amtrak breached its duties under its authorizing statutes, section 24103(a)(1) does not bar their statutory claim.

Amtrak asserts otherwise, citing the complaint's allegation that Amtrak's arbitration condition "lacks congressional authorization and violates Amtrak's statutory responsibilities."

ECF 13, at 8–9 (emphasis removed) (quoting ECF 1, at ¶ 31). The statutory claim, however, is styled "Absence of Statutory Authority," ECF 1 (heading preceding paragraph 28), and the motion for summary judgment focuses on the absence of statutory authority for Amtrak's action. ECF 10, at 22 ("Amtrak identifies no statutory provision that unambiguously authorizes it to require arbitration as a term or condition of rail service."); *id*. at 23 (("Amtrak is wrong to invoke several of Congress's individual goals—particularly those seeking to minimize subsidies—as sources of authority."). Plaintiffs' statutory claim thus does not fall with the scope of section 24103(a)(1).

IV. Amtrak's arbitration condition is unconstitutional.

Plaintiffs' constitutional argument is straightforward: The Constitution precludes Congress from enacting a law that states: "Individuals who purchase Amtrak tickets or travel on Amtrak's trains must submit claims to binding arbitration before a private arbitrator." Such a law would deprive individuals of their First Amendment right to petition the courts and their Article III right to an impartial and independent federal judiciary. ECF 10, at 28–39. It would also violate the constitutional separation of powers by creating a system of dispute resolution over which the federal judiciary could not exercise any meaningful control. *Id.* at 39–42. As a creature of Congress, Amtrak lacks the constitutional authority to do what Congress may not. Accordingly, Amtrak cannot create a binding arbitration condition by amending its terms and conditions any more than Congress could create a binding arbitration condition by amending the U.S. Code.

None of Amtrak's responses to this basic argument stands up to scrutiny.

A. Amtrak is subject to the unconstitutional-conditions doctrine.

Amtrak relies heavily on the principle that constitutional rights may be waived. ECF 13, at 16–19. The question here, however, is not whether passengers may waive their constitutional rights. Plaintiffs do not contend, for example, that a passenger in litigation against Amtrak cannot agree to settle that live dispute by submitting the dispute to an arbitrator for resolution. The

question here is whether the government may *require* the public to waive constitutional rights as a condition of receiving governmental services. Amtrak does not dispute that the "doctrine of unconstitutional conditions 'prevents the Government from using conditions "to produce a result which it could not command directly."'" ECF 10, at 32 (quoting *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)). Accordingly, if Congress could not compel passengers to settle disputes through binding private arbitration, Amtrak cannot achieve that result by appending an arbitration requirement to its terms and conditions of service. *See Frost v. R.R. Comm'n of Cal.*, 271 U.S. 583, 594 (1926) ("If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all.").

Amtrak responds is that it is not subject to the unconstitutional-conditions doctrine because passenger rail service is not a "valuable governmental benefit" to which that doctrine applies. ECF 13, at 18 (quoting *Perry*, 408 U.S. at 597). Amtrak suggests that *Perry* and *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013), limit the unconstitutional-conditions doctrine to government benefits that implicate "one's livelihood" or "a generalized government program available freely to those who meet regulatory standards." ECF 13, at 18. To begin with, Amtrak fails to explain why its rail service would not be "a generalized government program available freely to those who meet regulatory standards" (*i.e.*, ticket purchasers and passengers). Amtrak also does not explain why access to passenger rail would not implicate "one's livelihood" given the needs of Plaintiffs and others to undertake work-related intercity travel. But more fundamentally, even putting aside those gaps in Amtrak's argument, although *Perry* and *Koontz* list the benefits the Supreme Court had previously held to be subject to the doctrine, neither case

purports to define the term "valuable public benefit" in a way that would exclude Amtrak's rail service.

Amtrak's restrictive reading of the unconstitutional-conditions doctrine also cannot be reconciled with *Autor v. Pritzker*, 740 F.3d 176 (D.C. Cir. 2014). In that case, lobbyists challenged President Obama's ban on "federally registered lobbyists … serving on advisory committees." *Id.* at 177. Lobbyists seeking appointment to "Industry Trade Advisory Committees" (ITACs) challenged the ban as an unconstitutional condition on their right to petition. *Id.* In concluding that the lobbyists had stated a claim, the D.C. Circuit held that committee membership "qualif[ies] as a governmental benefit." *Id.* at 182. The court observed that membership carried with it the ability to influence national trade policy and provided members with "valuable expertise, experience, and a resume-enhancing characteristic." *Id.* (internal quotation marks omitted). The court rejected the argument that a governmental benefit had "to have measurable economic worth" for the unconstitutional-conditions doctrine to apply: "[S]o long as [the benefit] has value to those who seek it," the court explained, "the government can use its power to withhold the benefit to pressure [them] to forgo constitutionally protected activity," which is precisely what the "doctrine's foundational principle" was designed to prevent. *Id.* Indeed, the D.C. Circuit noted that other circuit courts had extended the doctrine "to a broad range of non-monetary benefits and none, to [the court's] knowledge, ha[d] found a benefit too insignificant." *Id.* (citing cases).

Congress created Amtrak to serve the "[p]ublic convenience and necessity" by offering "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)(1). To that end, Congress has appropriated billions of dollars since 1971 to subsidize Amtrak's operations. *See* ECF 10, at 4. Amtrak manifestly "has value to those who seek" to use it, *Autor*, 740 F.3d at

182; as of 2018, it annually served over 30 million passengers across the nation and held a "very strong position" in the Northeast Corridor, where it is a leading provider of intercity transportation services. ECF 10-5 (Joshi Decl. Ex. 5), at 3; ECF 10, at 8–9. Plaintiffs also value Amtrak's service, which is why they have previously traveled on Amtrak and seek to be able to do so for future travel without having to acquiesce to Amtrak's arbitration condition. The unconstitutional-condition doctrine accordingly applies to ensure that Amtrak cannot "use its power to withhold the benefit to pressure [Plaintiffs] to forgo constitutionally protected activity." *Autor*, 740 F.3d at 182.

Amtrak's remaining argument lack merit. Amtrak's reliance (ECF 13, at 17–18), on *CFTC v. Schor*, 478 U.S. 833 (1986), is misplaced: The Supreme Court's general recognition that procedural rights may be waived does not suggest that Amtrak may secure such a waiver by imposing it as a condition for providing passenger rail service. And Plaintiffs previously explained why cases involving individually negotiated agreements with governmental entities are distinguishable from the unconstitutional-conditions argument presented in this case. *See* ECF 10, at 34–35. Likewise, Plaintiffs have already addressed Amtrak's reliance (ECF 13, at 18) on cases involving imposition of arbitration requirements on highly regulated private parties as part of an overarching regulatory system. *See* ECF 10, at 37–39, 45. To the extent this Court accepts Amtrak view that the circuit-court decisions Amtrak cites are not "substantive[ly] differen[t]" from this case, ECF 13, at 18, the Court should not follow the non-binding decisions cited by Amtrak, none of which grapples with the dangers of permitting the government to obtain mass waivers of constitutional protections as a condition of providing service to the public.

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

The Petition Clause safeguards individuals' "right of access to the courts." *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 525 (2002) (internal quotation marks omitted). If Congress were to enact a law that forced those who used government services to resolve disputes through binding

arbitration before a private arbitrator, such a law would violate the Petition Clause by depriving individuals of their right "to appeal to courts and other forums established by the government for resolution of legal disputes." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011). Because Amtrak's arbitration condition produces the same result as such a law, it too is irreconcilable with the First Amendment. *See* ECF 10, at 30–35.

Amtrak contends that its arbitration condition does not violate the Petition Clause because "the government is acting as a proprietor" and not a "lawmaker." ECF 13, at 19 (quoting *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992)). The arbitration condition, however, does not regulate a passenger's conduct while on Amtrak's property; it binds the passenger to a private dispute-resolution process that occurs well after the passenger has left Amtrak's property. In the speech context, for example, Amtrak (or Congress) may be able to impose "reasonable" restrictions to protect passengers from harms of unwanted solicitations. *See Krishna Consciousness*, 505 U.S. at 685. Yet Amtrak would violate the First Amendment if it sought to use its ownership of property to strip visitors of their First Amendment rights. *See Bd. of Airport Comm'rs of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 575 (1987) (ban on "all 'First Amendment activities'" at airport facility unconstitutionally overbroad). Because Amtrak's arbitration condition is unrelated to its "power to preserve the property under its control for the use to which it is lawfully dedicated," *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) (internal quotation marks omitted), it cannot rely on its status as a "proprietor" to defend its arbitration requirement.

Amtrak also argues that the arbitration condition does not violate the Petition Clause because "any burden on petition rights is slight." ECF 13, at 19. Amtrak concedes, however, that the arbitration clause requires that passengers submit their "substantive rights" to resolution "in an arbitral, rather than a judicial, forum." *Id*. (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-*

Plymouth, Inc., 473 U.S. 614, 628 (1985)). The right to petition the "Government," U.S. Const. amend. I, cannot be satisfied by a right to petition a private adjudicator. *See* ECF 10, at 31 (citing *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501–02 (1988)). The burden on the First Amendment right to petition is therefore not "slight," but crushing.

Amtrak's continues to interpret *Patchak v. Jewell*, 828 F.3d 995 (D.C. Cir. 2016), *aff'd sub nom*. *Patchak v. Zinke*, 138 S. Ct. 897 (2018), to hold that Congress may negate the right to petition the judiciary so long as an individual may petition other governmental forums. ECF 13, at 19–20. As Plaintiffs have explained (ECF 10, at 31–32 & n.6), such a reading of *Patchak* would write the constitutional right to access courts out of the Petition Clause. Amtrak has no response to that argument, and nothing in the single sentence in *Patchak* on which Amtrak relies suggests that the D.C. Circuit believed it was making such a far-reaching decision. 828 F.3d at 1004. Indeed, Amtrak's understanding of *Patchak* conflicts with *Autor*, which held that the government cannot defeat a Petition Clause claim by identifying alternative avenues by which the plaintiff can seek to influence the government. *Autor*, 740 F.3d at 183 (citing *Healy v. James*, 408 U.S. 169, 183 (1972)).

Amtrak suggests that, because an individual may appeal an arbitration decision under the FAA, "[t]hat courts may be restricted in their response by the FAA is no more a violation of the petition right than is the jurisdictional restriction upheld in *Patchak*." ECF 13, at 19. Congress's constitutional authority to define a federal court's jurisdiction, however, is part and parcel of its authority to create those courts. *See Palmore v. United States*, 411 U.S. 389, 401 (1973); *Patchak v. Zinke*, 138 S. Ct. at 906 ("Congress' greater power to create lower federal courts includes its lesser power to 'limit the jurisdiction of those Courts'" (quoting *United States v. Hudson*, 7 Cranch 32, 33 (1812)) (plurality op.). Just as Congress would not violate the Petition Clause if it declined to establish federal courts, it would not violate the Petition Clause by establishing federal courts of limited jurisdiction. But having

created federal courts with jurisdiction, Congress cannot then treat those courts as if they were not part of the "Government" for purposes of the Petition Clause. If Congress had that power, the Petition Clause could hardly protect individuals' right "to appeal to courts and other forums established by the government for resolution of legal disputes." *Borough of Duryea*, 564 U.S. at 387.

Finally, Amtrak argues (ECF 13, at 20) that its arbitration requirement constitutes a valid waiver of passengers' Petition Clause rights under *Town of Newton v. Rumery*, 480 U.S. 386 (1987), and *Pee Dee Health Care, P.A. v. Sanford*, 509 F.3d 204 (4th Cir. 2007). Those cases, respectively, considered whether public policy precluded enforcement of a settlement agreement that waived statutory claims under 42 U.S.C. § 1983, *see Town of Newton*, 480 U.S. at 392, and a contractual forum selection clause that did "not involve a waiver of a constitutional right, but only the ancillary right to select a federal forum to pursue a statutory right," *Pee Dee Health Care*, 509 F.3d at 213. Neither case addressed whether the government may secure a waiver of individuals' Petition Clause rights through a condition to the terms on which it will provide service. What's more, even under the standard set out in those cases, Amtrak's arbitration condition would be unenforceable because it "undermine[s] the public's interest in protecting the right." *Pee Dee Health Care*, 509 F.3d at 213; *see also Town of Newton*, 480 U.S. at 392 n.2. Although Amtrak asserts that "[t]icktholders' petition right is, at best, limited," ECF 13, at 20, there can be no doubt that, absent the arbitration agreement, passengers would have unrestricted access to courts to assert any viable legal claim, and that the arbitration requirement applies to claims that could be filed in any court and treats the arbitrator's decision as binding. ECF 13, at 31; *see also* ECF 10, at 5–6. And Amtrak has provided no compelling public policy rationale for the requirement. The requirement is not tailored to protect Amtrak from "unjust claims," ECF 13, at 20 (quoting *Town of Newton*, 480 U.S. at 396 (plurality opinion)), and if Amtrak genuinely believes that "arbitration would better serve its passengers," *id.*, there is no reason Amtrak cannot offer them arbitration as

an option (rather than a requirement). In the end, Amtrak rests on its duty to "cut costs." *Id.* But if cost savings amounting to a fraction of one percent, *see* ECF 10, at 8, permitted the government to obtain enforceable waivers of statutory or constitutional rights, it is difficult to envision a waiver that would not survive a public policy analysis (even if such an analysis were appropriate).

C. Amtrak's arbitration condition violates Article III.

While the Petition Clause safeguards access to the courts generally, Article III ensures that federal courts are presided over by judges with salary and tenure protection, thereby protecting the "integrity and independence of the federal judiciary." *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1938 (2015). To avoid circumvention of this protection, Article III prevents Congress from "withdraw[ing]" from federal courts "any matter which, from its nature, is the subject of a suit at the common law, or in equity, or in admiralty." *Id.* (quoting *Stern v. Marshall,* 564 U.S. 462, 484 (2011)) (internal quotation marks omitted). The Supreme Court has recognized an exception to this principle for "public rights," which permits administrative agencies and legislative courts to adjudicate certain matters. *See* ECF 10, at 36. But the Supreme Court has not recognized an exception that would allow Congress to redirect federal cases into private systems of dispute resolution for binding adjudication.

Amtrak repeats its contention that Article III only protects federal judges from "domination by another branch over the judiciary." ECF 13, at 21 (quoting ECF 9-1, at 23). But as Plaintiffs have explained, "[t]he 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." ECF 10, at 39. Indeed, none of the Supreme Court decisions that address the constitutionality of bankruptcy court adjudications, *see, e.g.*, *Stern*, 564 U.S. 462; *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70 (1982), or the public-rights exception, *see, e.g.*, *Oil States Energy Servs., LLC v.*

Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1373 (2018), implicated the salary and tenure protections enjoyed by federal judges. Nonetheless, those cases recognize that Article III concerns arise when Congress deprives litigants of their right to an Article III forum for the adjudication of their claims. So too here. Regardless of whether private arbitrators are "biased" or fair, ECF 13, at 22, they are not the judges that Article III guarantees.

Amtrak also reiterates its argument that passengers validly consent to a waiver of their Article III rights by purchasing Amtrak tickets and may "refuse their consent by not buying or using tickets." ECF 13, at 21. But as with the Petition Clause, the validity of such a waiver turns on whether Amtrak is subject to the unconstitutional-conditions doctrine. Amtrak does not dispute that, if it is subject to that doctrine, it has violated Article III by conditioning rail service on the waiver of constitutional rights. *See* ECF 10, at 36–37.[3] Because Amtrak is subject to that doctrine for the reasons stated above, its arbitration condition cannot be reconciled with Article III.

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

"Article III is 'an inseparable element of the constitutional system of checks and balances' that 'both defines the power and protects the independence of the Judicial Branch.'" *Stern*, 564 U.S. at 482–83 (quoting *N. Pipeline*, 458 U.S. at 58 (plurality op.)). Accordingly, the Supreme Court has cautioned that Congress may violate the separation of powers by "creat[ing] 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." *Wellness Int'l*, 135 S. Ct. at 1947 (quoting *Schor*, 478 U.S. at 855). That is exactly

[3] Amtrak notes that Plaintiffs have notice that Amtrak imposes the arbitration clause as a condition of passenger rail travel. ECF 13, at 21 n.7. Amtrak does not dispute, however, that "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." ECF 10, at 37.

what Amtrak's arbitration requirement does: create "non-Article III tribunals" to handle business that would otherwise by handled by the federal court system. *See* ECF 10, at 40–41. If Amtrak is constitutionally permitted to compel those who use its services to resolve disputes in this manner, other components of the federal government may do so as well.

Amtrak responds that "[s]eparation-of-powers analysis is appropriate when Congress legislates non-Article III adjudication, not when an entity like Amtrak includes arbitration clauses in standard business contracts." ECF 13, at 22. Amtrak provides no authority for the remarkable proposition that a congressionally created governmental entity is subject to fewer constitutional restraints than the people's elected representatives, or that government possesses greater constitutional authority to subvert separation of powers when contracting than when legislating. "[A]n agency literally has no power to act … unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). If Congress lacks the constitutional authority to "emasculat[e]" the judicial branch, Amtrak lacks that power as well. *Wellness Int'l*, 135 S. Ct. at 1945 (quoting *Peretz v. United States*, 501 U.S. 923, 937 (1991)).

Amtrak next contends that the judicial branch's constitutional role is preserved because the FAA authorizes courts to review arbitral decisions for "fraud, misconduct, or misrepresentation." ECF 13, at 22 (quoting *Thomas v. Union Carbide Agric. Prods.*, 473 U.S. 568, 592 (1985)); *see* 9 U.S.C. § 10. As Plaintiffs have explained (ECF 10, at 42), Amtrak's reliance on *Union Carbide* ignores the specific elements of the arbitration scheme on which the Court relied in that case, including the "tangential[]" reliance "on the Judicial Branch for enforcement" and the data submitters' ability to obtain Tucker Act review "for any shortfall" in compensation. 473 U.S. at 590–93 & n.4. Amtrak makes no effort to demonstrate that the arbitration system it has established is analogous to the scheme addressed in *Union Carbide*.

Separation-of-powers analysis examines whether relegation to a non-Article III tribunal is limited to a "narrow class" of claims, *Wellness Int'l*, 135 S. Ct. at 1945 (internal quotation marks omitted), and Amtrak concedes that its arbitration is not so limited, *see* ECF 13, at 23. Amtrak nonetheless suggests that its arbitration requirement is narrow because it applies only to Amtrak passengers. Amtrak, however, served 31.7 million passengers in fiscal year 2018, ECF 13, at 35, equivalent to just under 10 percent of the then-current U.S. population. *See* U.S. and World Population Clock, https://www.census.gov/popclock/ (date selected: Sept. 30, 2018). In any event, Amtrak is not exempt from constitutional separation-of-powers just because other government entities have not yet followed its lead in requiring citizens to forgo their rights of access to courts. *See Stern*, 564 U.S. at 502–03 ("A statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely.").

Amtrak questions whether "agencies of the federal government" would similarly have the constitutional authority to impose an arbitration condition on their services if the Court upholds Amtrak's arbitration condition. *See* ECF 13, at 24 n.8. Amtrak, however, identifies nothing in the Constitution that entitles it to unique powers that are denied traditional governmental agencies. The *statutory* constraints imposed on agencies by the Administrative Dispute Resolution Act, 5 U.S.C. § 571 *et seq.*, have no bearing on the *constitutional* separation of powers.

Amtrak's remaining arguments lack merit. First, because the arbitration clause "applies to all claims, disputes, and controversies" unless prohibited by federal law, ECF 13, at 31–32, this Court need not wait for an arbitration to commence to evaluate "the importance of the right" implicated by the arbitration requirement, *id*. at 23 (quoting *Schor*, 478 U.S. at 851). Second, the absence of a "legislative[] mandate[]" for the arbitration condition cuts *against* Amtrak's attempt to create its own "carve-out from Article III jurisdiction." *Id.*; *see also* ECF 10, at 41. Amtrak,

moreover, does not dispute that its desire to "reduce legal fees accounting for less than one percent of its expenses" (ECF 10, at 41) is an insufficient basis for creating such a carve-out. Finally, Amtrak's claim that the purpose of the arbitration required is not to "emasculat[e] constitutional courts" (ECF 13, at 23, quoting *Wellness Int'l*, 135 S. Ct. at 1945 (citation omitted)), is belied by the text of the arbitration provision, which precludes federal courts (or any courts) from resolving claims covered by the agreement, including issues concerning the "validity, applicability, [or] enforceability" of the agreement itself. ECF 13, at 31–32.

Because Amtrak's arbitration provision effectively reduces the judicial branch to policing "fraud, misconduct, or misrepresentation" in the arbitration process, *see* ECF 13, at 22 (internal quotation marks omitted), it offends the constitutional separation of powers.

V. Plaintiffs' claims do not threaten private arbitration agreements.

Plaintiffs' claims focus on whether Amtrak has the statutory authority to impose an arbitration requirement as a condition on which it will provide passenger rail service and whether such a condition violates the Constitution. Private parties do not need congressional authority to enter into arbitration agreements, and they are not bound by the Constitution. Accordingly, none of Plaintiffs' claims implicate the enforceability of arbitration agreements in the private sector. *See* ECF 10, at 43. Amtrak has no basis for suggesting otherwise. *See* ECF 13, at 24.

Amtrak correctly observes that "[a]rbitration has become a fixture of modern commercial life." *Id.* But arbitration has not yet become a fixture of the government's relationship with its citizens. That may change if this Court holds that Amtrak may refuse service to travelers who will not give up their right to go to court. This Court should not open that door.

CONCLUSION

The Court should grant Plaintiffs' motion for summary judgment.

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Respectfully submitted,

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