ORAL ARGUMENT NOT YET SCHEDULED

No. 20-7081

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT WEISSMAN & PATRICK LLEWELLYN,

Plaintiffs-Appellants,

v.

NATIONAL RAILROAD PASSENGER CORPORATION
d/b/a AMTRAK,

Defendant-Appellee.

On Appeal from the United States
District Court for the District of Columbia
No. 1:20-cv-28-TJK
Hon. Timothy J. Kelly

OPENING BRIEF FOR APPELLANTS ROBERT WEISSMAN AND PATRICK LLEWELLYN

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

As required by Circuit Rule 28(a)(1), counsel for plaintiffs-appellants Robert Weissman and Patrick Llewellyn hereby certify as follows:

1. Parties and Amici

The parties who appeared before the district court, and the parties in this Court, are:

- **Robert Weissman**. A plaintiff in the district court and an appellant in this Court.
- **Patrick Llewellyn**. A plaintiff in the district court and an appellant in this Court.
- **National Railroad Passenger Corporation d/b/a/ Amtrak**. A defendant in the district court and the appellee in this Court.

No amici curiae appeared in the district court.

2. Ruling Under Review

Memorandum Opinion, dated July 31, 2020, issued by Judge Timothy J. Kelly in No. 1:20-cv-28-TJK (D.D.C.); published electronically at 2020 WL 4432251; and located in the appendix at pages 100–06.

3. Related Cases

This case has not previously been before this Court or any other court other than the district court from which this appeal was taken. Undersigned counsel is unaware of any other case that is related to this case.

TABLE OF CONTENTS

Certificate as to Parties, Rulings, and Related Cases i

Table of Contents ii

Table of Authorities iii

Glossary vi

Jurisdiction 1

Question Presented 1

Statutes and Regulations 1

Statement of the Case 2

Summary of Argument 10

Standard of Review 16

Argument 16

I. Plaintiffs have suffered an Article III injury because Amtrak's action prevents them from purchasing a rail ticket without entering into an unwanted arbitration agreement with Amtrak. 16

II. The district court's standing analysis misconceives the nature of Plaintiffs' injury. 21

III. The district court failed to apply this Court's precedent. 33

Conclusion 48

TABLE OF AUTHORITIES*

Cases

Bowen v. First Family Financial Services, Inc.,
233 F.3d 1331 (11th Cir. 2000) 32, 33, 46, 47

Carney v. Adams,
141 S. Ct. 493 (2020)..... 43, 44

Center for Auto Safety v. NHTSA,
793 F.2d 1322 (D.C. Cir. 1986) 17, 35

* *Chamber of Commerce of the United States of America v. SEC*,
412 F.3d 133 (D.C. Cir. 2005) 17, 18, 20, 24, 35, 36, 40, 42

Coalition for Mercury-Free Drugs v. Sebelius,
671 F.3d 1275 (D.C. Cir. 2012) 9, 17, 33, 35, 36, 43

Community Nutrition Institute v. Block,
698 F.2d 1239 (D.C. Cir. 1983),
rev'd, 467 U.S. 340 (1984)..... 18

Competitive Enterprise Institute v. NHTSA,
901 F.2d 107 (D.C. Cir. 1990) 17, 20

* *Consumer Federation of America v. FCC*,
348 F.3d 1009 (D.C. Cir. 2003)..... 17, 19, 22, 24, 35, 37, 39

Davis v. FEC,
554 U.S. 724 (2008)..... 17

Department of Commerce v. New York,
139 S. Ct. 2551 (2019) 17

Department of Transportation v. Association of American Railroads,
575 U.S. 43 (2015)..... 3, 7

* Authorities upon which we chiefly rely are marked with asterisks.

Duke Power Co. v. Carolina Environmental Study Group, Inc.,
438 U.S. 59 (1978) 10, 29, 30, 43, 44

Elk Grove Unified School District v. Newdow,
542 U.S. 1 (2004) 45

Estate of Boyland v. USDA,
913 F.3d 117 (D.C. Cir. 2019) 16

FEC v. Akins,
524 U.S. 11 (1998) 44

First Options of Chicago, Inc. v. Kaplan,
514 U.S. 938 (1995) 6

Hall Street Associates, L.L.C. v. Mattel, Inc.,
552 U.S. 576 (2008) 27

Henry Schein, Inc. v. Archer & White Sales, Inc.,
139 S. Ct. 524 (2019) 25

Jones v. Sears Roebuck & Co.,
301 F. App'x 276 (4th Cir. 2008) 9, 31, 32

Knick v. Township of Scott,
139 S. Ct. 2162 (2019) 29

Lamps Plus, Inc. v. Varela,
139 S. Ct. 1407 (2019) 41

Lance v. Coffman,
549 U.S. 437 (2007) 43

Lebron v. National Railroad Passenger Corp.,
513 U.S. 374 (1995) 7

Lee v. American Express Travel Related Services, Inc.,
348 F. App'x 205 (9th Cir. 2009) 32

Lexmark International, Inc. v. Static Control Components, Inc.,
572 U.S. 118 (2014) 44

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 21, 34, 44

Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.,
501 U.S. 252 (1991) 30

New Prime, Inc. v. Oliveira,
139 S. Ct. 532 (2019) 25

New York Stock Exchange LLC v. SEC,
962 F.3d 541 (D.C. Cir. 2020) 45

New York v. United States,
505 U.S. 144 (1992) 30

* *Orangeburg v. FERC*,
862 F.3d 1071 (D.C. Cir. 2017) 17, 18, 20, 22, 38

Oxford Health Plans LLC v. Sutter,
569 U.S. 564 (2013) 6

Public Citizen v. Foreman,
631 F.2d 969 (D.C. Cir. 1980) 43

Public Citizen, Inc. v. NHTSA,
489 F.3d 1279 (D.C. Cir. 2007) 10, 38, 42, 43

Regional Rail Reorganization Act Cases,
419 U.S. 102 (1974) 30

Rent-A-Center, West, Inc. v. Jackson,
561 U.S. 63 (2010) 23, 24, 25, 26

Ruckelshaus v. Monsanto Co.,
467 U.S. 986 (1984) 9, 13, 28, 29

Seila Law LLC v. CFPB,
140 S. Ct. 2183 (2020) 30

Steel Co. v. Citizens for a Better Environment,
523 U.S. 83 (1998) 34, 45

Stolt-Nielsen S.A. v. AnimalFeeds International Corp.,
559 U.S. 662 (2010) 6, 27

Whitmore v. Arkansas,
495 U.S. 149 (1990) 21

Constitution

U.S. Const. art. III 16

Statutes

7 U.S.C. § 136a(c)(1)(F)(iii) 28

9 U.S.C. § 2 ..... 23, 25, 26

9 U.S.C. § 3 ..... 5, 24

9 U.S.C. § 4 ..... 6, 24

9 U.S.C. § 9 ..... 6, 27

9 U.S.C. § 10 27

9 U.S.C. § 10(a) 6

9 U.S.C. § 11 27

15 U.S.C. § 1639c(e)(1) 41

28 U.S.C. § 1291 ..... 1, 40

28 U.S.C. § 1331 1

28 U.S.C. § 1349 ..... 1, 40

Regulations

14 C.F.R. § 253.10 41

Other

Jessica Silver-Greenburg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. Times, Oct. 31, 2015 41

Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 Yale L.J. 2804 (2015) 41

Sam Mintz, *Amtrak's new ticket rules won't let passengers sue in a crash*, Politico (Nov. 8, 2019), https://www.politico.com/news/2019/11/08/amtrak-crash-sue-068175 38

GLOSSARY

AAA	American Arbitration Association
Amtrak	National Railroad Passenger Corporation
APA	Administrative Procedure Act
FAA	Federal Arbitration Act
FCC	Federal Communications Commission
FERC	Federal Energy Regulatory Commission
FIFRA	Federal Insecticide, Fungicide, and Rodenticide Act
FY	Fiscal Year
SEC	Securities and Exchange Commission

JURISDICTION

The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1349. On July 31, 2020, the district court issued the opinion under review (JA 100–06) and entered a final order (JA 99) granting the defendant-appellee's motion to dismiss and denying plaintiffs-appellants' cross-motion for summary judgment, and disposing of all parties' claims. Plaintiffs-appellants filed a timely notice of appeal on August 24, 2020. JA 5. This Court has jurisdiction under 28 U.S.C. § 1291.

QUESTION PRESENTED

Whether plaintiffs-appellants, who travel on Amtrak and seek the option to purchase Amtrak tickets on terms that do not include an arbitration clause, have standing under Article III of the U.S. Constitution to challenge a mandatory arbitration requirement that Amtrak has imposed as a condition on the provision of passenger rail services, pursuant to which all purchasers of Amtrak tickets and Amtrak passengers are required to arbitrate any disputes that arise with Amtrak at any time.

STATUTES AND REGULATIONS

This case does not involve a statute or regulation that requires reproduction under D.C. Circuit Rule 28(a)(5).

STATEMENT OF THE CASE

Plaintiffs-appellants Robert Weissman and Patrick Llewellyn use passenger rail service provided by defendant-appellee National Railroad Passenger Corporation (Amtrak) for business travel on the East Coast. In 2019, Amtrak amended the terms and conditions for purchasing tickets or traveling on Amtrak to add an arbitration clause under which disputes with Amtrak must be submitted to binding arbitration before a private arbitrator. The arbitration clause is mandatory for all ticket purchasers and passengers, making it impossible for Plaintiffs to purchase rail tickets without also entering into an arbitration agreement with Amtrak. The arbitration agreement is also binding, leaving Plaintiffs with no legal right to escape the private arbitration regime if a dispute arises. Plaintiffs seek to continue travelling on Amtrak, but they have no desire to enter into the arbitration agreement.

Plaintiffs filed this suit, seeking a declaration that Amtrak, a governmental corporation, lacks the discretion enjoyed by private corporations to offer service only on the condition that individuals waive their constitutional right to go to court, and seeking injunctive relief that would enable them to purchase rail tickets without entering into the arbitration agreement. The district court dismissed the complaint for lack of

Article III standing, concluding that Plaintiffs' inability to purchase rail tickets free from the undesired arbitration clause is not a cognizable injury. The question presented in this appeal is whether the district court wrongly held that Plaintiffs lack standing.

1. Plaintiffs' Use of Amtrak. "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). Since beginning operations in 1971, Amtrak has expanded to more than 500 destinations in 46 states, the District of Columbia, and Canada. JA 92–93 (FY 2018 Company Profile). Amtrak's position as an intercity transportation provider is "very strong" in the Northeast Corridor. *Id.* at 93. 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 92. 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 93.

Plaintiffs require intercity transportation for work-related travel. Weissman lives and works in Washington, DC. *Id.* at 16 (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 similar amounts of travel to New York in future years. *Id.* (¶ 4). Llewellyn likewise has used Amtrak for business travel in the past and expects to engage in future business travel to cities on the East Coast served by Amtrak. JA 18–19 (Llewellyn Decl. ¶¶ 3, 4).

2. Amtrak's Arbitration Agreement. Amtrak has established terms and conditions that govern its provision of passenger rail service to the public. JA 72–89. In January 2019, Amtrak added a "binding Arbitration Agreement" to its terms and conditions. *Id.* at 72; *see also id.* at 24 (text of the arbitration clause as filed with the American Arbitration Association (AAA)). The terms and conditions advise ticket purchasers and passengers to "read the Arbitration Agreement carefully" because it "requires that you resolve claims and disputes with Amtrak on an individual basis through arbitration and not by way of court or jury trial." *Id.* at 24 (formatting altered). They also make clear that, "[b]y purchasing a ticket for travel on

Amtrak, You are agreeing to these Terms and Conditions and agreeing to the Arbitration Agreement." *Id.*

The Arbitration Agreement "is intended to be as broad as legally permissible" and applicable 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," unless arbitration is prohibited by "an applicable federal statute." *Id.* Under the Agreement, the arbitration must "be conducted before a single arbitrator under the [AAA's] Consumer Arbitration Rules," and claims must be adjudicated "on an individual basis only" and not "as a class or representative action." *Id.* The Agreement delegates to the arbitrator the "exclusive authority to resolve any dispute relating to the validity, applicability, enforceability, unconscionability or waiver of this Arbitration Agreement [other than the class-action waiver], including, but not limited to[,] any claim that all or any part of this Arbitration Agreement is void or voidable." *Id.*

The Agreement is "governed by the Federal Arbitration Act [FAA]," *id.*, which prohibits federal courts from adjudicating lawsuits "referable to arbitration" "until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 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. After arbitration proceedings are completed, 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)); *see also* 9 U.S.C. § 10(a) (specifying grounds for vacating an arbitration award). A court may not vacate an arbitration award for "an error—or even a serious error"—of law. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671 (2010); *see also Oxford Health Plans*, 569 U.S. at 569 ("Only if the arbitrator acts outside the scope of his contractually delegated authority … may a court overturn his determination.") (cleaned up).

3. The Present Litigation. Plaintiffs seek to continue using Amtrak for their business travel to and from Washington, DC, when Amtrak is the best transportation option available to them. JA 17 (Weissman Decl. ¶ 6); 19 (Llewellyn Decl. ¶ 6). They do not want to enter into Amtrak's arbitration agreement, however, because they prefer to retain their right to litigate

disputes in court, including through class or representative actions. JA 17 (Weissman Decl. ¶ 5); 19 (Llewellyn Decl. ¶ 5). Amtrak currently does not offer Plaintiffs a rail ticket that meets their needs. Because Amtrak has made the arbitration agreement mandatory and binding, Plaintiffs must either forgo use of Amtrak's services or forfeit their right to litigate disputes in court.

Plaintiffs take the position that their right to go to court is constitutionally protected. *See* JA 4–5, 13–14 (Compl. ¶¶ 1–2, 32–45). Plaintiffs also contend, as the Supreme Court has held, that Amtrak is "a component of the federal government for purposes of the Constitution." *Id.* at 9–10 (¶ 16) (citing *Ass'n of Am. R.Rs.*, 575 U.S. 43, and *Lebron v. National R.R. Passenger Corp.,* 513 U.S. 374 (1995)). Plaintiffs accordingly sued Amtrak, alleging that the Constitution prohibits Amtrak from denying service to individuals who decline to waive their constitutional right to a judicial forum for the resolution of disputes. Plaintiffs further allege that Congress has not delegated to Amtrak the authority to impose what amounts to an unconstitutional condition on the public that Amtrak was established to serve. *Id.* at 12 (¶¶ 28–31). Plaintiffs seek "declaratory and injunctive relief so that they may use Amtrak's passenger rail services without fear of forever

forfeiting their constitutional and legal rights to have any claims against Amtrak adjudicated in an Article III court." *Id.* at 5 (¶ 2).

4. The District Court's Decision. Amtrak moved to dismiss Plaintiffs' complaint under Federal Rule of Civil Procedure 12(b)(1) on the ground that Plaintiffs had not alleged Article III standing and to dismiss under Rule 12(b)(6) for failure to state a claim. Dist. Ct. ECF 9. Plaintiffs opposed the motion and cross-moved for summary judgment. Dist. Ct. ECF 10. Agreeing with Amtrak's argument on standing, the district court granted Amtrak's motion and denied Plaintiffs' cross-motion without reaching the merits of Plaintiffs' statutory and constitutional claims. JA 99 & 100–08.

The district court concluded that Plaintiffs lack an Article III injury because "they do not allege that Amtrak either has enforced or will likely enforce the arbitration provision against them." JA 103. In the district court's view, Plaintiffs would suffer an injury only if they "(1) decide to travel, (2) select Amtrak over other modes of transportation, (3) identify an actionable claim arising from [their] travel, and (4) face Amtrak's enforcement or threatened enforcement of the arbitration provision." *Id.* The district court concluded that this "chain of events is too much to bear to confer standing." *Id.* Citing arbitration challenges from other courts, the district court determined that, as a blanket rule, "a challenge to an

arbitration provision, in the absence of an underlying dispute or imminent injury, [is] nonjusticiable," *id.* (quoting *Jones v. Sears Roebuck & Co.*, 301 F. App'x 276, 283 (4th Cir. 2008)), and that "only after arbitration 'will [Plaintiffs'] claims with respect to the constitutionality of the arbitration scheme become ripe,'" *id.* at 104 (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1020 (1984)).

The district court attempted to distinguish this Court's decisions in "cases brought under the Administrative Procedure Act [APA] that permit 'consumers of a product to challenge agency action that prevented the consumers from purchasing a desired product.'" *Id.* (quoting *Coal. for Mercury-Free Drugs v. Sebelius*, 671 F.3d 1275, 1281 (D.C. Cir. 2012)). The district court concluded that, "[e]ven if Amtrak … is an 'agency' for standing purposes," Plaintiffs are not injured because "Amtrak has not prevented [them] from purchasing a desired product," which the court defined as "travel by rail." *Id.* at 105. The district court disregarded Plaintiffs' declarations that the arbitration agreement deters them from using Amtrak because Weissman (although not Llewellyn) had once traveled on Amtrak after it had added the arbitration agreement to its terms and conditions. *Id.*

The district court declined to view Plaintiffs' inability to obtain rail travel without an arbitration condition as an Article III injury. *Id.* Instead,

the court declared Plaintiffs' desired product to be "idiosyncratic," *id.* (internal quotation marks omitted); expressed concern about a "theory of injury" that would apply to "all manner of private companies in the marketplace," *id.*; and likened Plaintiffs' injury to a "generalized grievance," *id.* (quoting *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 80 (1978)). In the district court's view, only actions that "change the product in a 'direct, real, and palpable' way," *id.* (quoting *Public Citizen, Inc. v. NHTSA*, 489 F.3d 1279, 1292 (D.C. Cir. 2007)), can cause injury for purposes of Article III standing, and Amtrak's decision to make a binding arbitration agreement a mandatory term and condition of rail service did not satisfy that standard.

SUMMARY OF ARGUMENT

I. For decades, this Court has recognized that a litigant suffers an Article III injury when a challenged governmental action denies the litigant the ability to purchase a desired product or service in the marketplace. The Court has applied that principle to a wide range of products and services, including wholesale power, mutual funds, high-speed Internet service, and fuel-efficient automobiles. The Court has also applied the principle to a wide range of agency actions that affect both the availability of the desired product or service and the terms on which it is offered to consumers.

Plaintiffs' standing flows ineluctably from these precedents. Both Plaintiffs work in Washington, DC, and have jobs that require them to travel, particularly to cities in the Northeast Corridor served by Amtrak. Amtrak is a dominant provider of intercity transportation services between Washington and other locations in the Northeast Corridor, and Plaintiffs have submitted undisputed declarations explaining their desire to travel on Amtrak in the future. Plaintiffs, however, can no longer purchase rail tickets or ride on Amtrak trains on their preferred terms because, since January 2019, Amtrak has required individuals who purchase tickets or ride on Amtrak to enter into an arbitration agreement with Amtrak. Because Plaintiffs do not wish to forfeit their right to litigate claims in court, they must forgo use of Amtrak's service or purchase rail tickets on undesirable terms. Under this Court's longstanding precedent, that situation is sufficient to create an injury for purposes of Article III.

II.A. The district court held that Plaintiffs lack standing to challenge Amtrak's arbitration condition because they first must travel on Amtrak and a trip must then give rise to a claim before arbitration proceedings can be instituted against them. But the court was wrong to hold that Plaintiffs are not harmed until arbitration proceedings are commenced. The undisputed record evidence demonstrates that Plaintiffs need to travel for work and that

they desire to travel by train. The district court failed to appreciate that, while Plaintiffs could eliminate the risk of arbitration by avoiding Amtrak altogether, doing so would itself be an injury under Article III.

The district court also presupposed that, even if Plaintiffs purchased rail tickets, the likelihood of an arbitrable claim arising would be low. Plaintiffs, however, desire to purchase a rail ticket that presents no risk of being forced into arbitration proceedings. The court erred in refusing to recognize Plaintiffs' legitimate interest in determining what level of risk to accept in their commercial transactions.

The district court suggested that Plaintiffs enter into Amtrak's arbitration agreement and await the onset of arbitration proceedings. That suggestion provides no answer to Plaintiffs' desire to contract on terms that do not subject them to arbitration to begin with. Indeed, the district court's preferred course of action would likely preclude Plaintiffs from ever having their statutory and constitutional claims resolved by a federal court. If an arbitrable dispute is before a federal court, the FAA requires the court to refer the dispute to arbitration. Plaintiffs likely could not challenge the validity of the arbitration agreement at that time because their claims rest on Amtrak's decision to require Plaintiffs to enter into the arbitration agreement as a condition for rail travel rather than a generally applicable defense to the

arbitration agreement as a stand-alone contract. Moreover, Amtrak's arbitration agreement delegates challenges to the enforceability of the agreement to the arbitrator—likely closing the door on judicial resolution of Plaintiffs' claims. Post-arbitration review would also likely be foreclosed because the FAA generally does not grant federal courts the authority to review an arbitrator's decision for legal correctness. Plaintiffs' statutory and constitutional claims, therefore, must be vindicated now if they are to be vindicated at all.

B. In rejecting Plaintiff's standing, the district court incorrectly relied on ripeness decisions that arose in dissimilar contexts. In *Monsanto*, for instance, the Supreme Court held that a challenge to an arbitration requirement in a federal statute was unripe because arbitration had not yet occurred. There, however, the challenger was not harmed by the inability to obtain a desired product. Moreover, the challenger would not have lost its right to seek *de novo* review of its compensation claims before an Article III court after arbitration proceedings had been completed.

The out-of-circuit court of appeals decisions cited by the district court also do not support its decision. Two of the cases cited hold that challenges to the enforceability of arbitration provisions in existing agreements are unripe until those provisions have been enforced. Plaintiffs, however, do not

seek to challenge the enforceability of an existing arbitration requirement, but to purchase rail tickets that do not contain an arbitration condition. The third decision makes clear that a consumer has standing to do what Plaintiffs seek to do here: challenge the legality of a defendant's practice of conditioning the availability of its services on the consumer's agreement to arbitration.

III. The district court declined to apply this Court's relevant standing precedents, suggesting that those decisions apply only to challenges under the Administrative Procedure Act. That distinction has no principled basis in Article III, which focuses on the harm suffered by the plaintiff rather than the source of the right that the plaintiff asserts. And because Plaintiffs' harm here is exactly the same as it would have been if a traditional administrative agency imposed the arbitration condition at issue, the standing analysis is the same as well.

The district court also erred in redefining Plaintiffs' injury as the inability to travel by rail in order to conclude that Plaintiffs have not been prevented from purchasing their desired product. This Court has consistently analyzed standing based on the product that the challenger actually desires (such as automobiles with desired characteristics), not a different product defined by the court at a higher level of generality (such as

automobiles generally). This Court has also made clear that a separate showing of economic injury is not required to demonstrate this type of harm.

The district court was also wrong to characterize Plaintiffs' desired product as "idiosyncratic" because the arbitration condition did not, in the court's view, sufficiently change the nature of rail service. This Court's precedents do not regard the "idiosyncrasy" of a litigant's desire for a particular product as relevant to the standing inquiry. In any event, Plaintiffs' desire to retain their constitutional right to a judicial forum is one that society recognizes as serious and legitimate.

Contrary to the district court's view, Plaintiffs' injury is not a generalized grievance. The relief that Plaintiffs seek—the opportunity to purchase rail tickets for themselves, unencumbered by an unwanted arbitration condition—is tangible, concrete, and personalized. It is not an effort to satisfy a mere abstract interest in proper application of the law. The district court's concern about the need for a limiting principle to protect private companies is likewise misguided: This Court has recognized for decades that consumers suffer an Article III injury when they are deprived of products they desire because of governmental action, and those decisions have not led to widespread litigation against private enterprises. Faithful application of the Court's precedent here will not pose a threat to private

industry; it will affect commercial actors only if they injure consumers who have cognizable claims that conditions imposed on the availability of goods and services are unlawful.

STANDARD OF REVIEW

This Court "review[s] *de novo* the district court's dismissal for lack of standing." *Estate of Boyland v. USDA*, 913 F.3d 117, 123 (D.C. Cir. 2019).

ARGUMENT

Plaintiffs seek to purchase rail tickets without entering into an arbitration agreement with Amtrak that waives their right to judicial resolution of disputes. As this Court has repeatedly recognized, an Article III case or controversy exists when a plaintiff challenges governmental action that denies the plaintiff the ability to purchase the product he or she desires. That precedent governs this case. This Court should reverse the district court's order dismissing the case and remand to the district court for a decision on the merits of Plaintiffs' claims.

I. Plaintiffs have suffered an Article III injury because Amtrak's action prevents them from purchasing a rail ticket without entering into an unwanted arbitration agreement with Amtrak.

Article III of the Constitution confines "[t]he judicial Power of the United States" to "Cases" and "Controversies." U.S. Const. art. III. The doctrine of Article III standing enforces that constitutional limitation by

requiring a litigant that seeks relief from a federal court 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. FEC*, 554 U.S. 724, 733 (2008)).

For nearly four decades, this Court has recognized that litigants suffer an Article III injury when governmental action results in "[t]he lost opportunity to purchase a desired product." *Orangeburg v. FERC*, 862 F.3d 1071, 1078 (D.C. Cir. 2017); *accord*, *e.g.*, *Coal. for Mercury-Free Drugs*, 671 F.3d at 1281 ("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."); *Consumer Fed'n of Am. v. FCC*, 348 F.3d 1009, 1012 (D.C. Cir. 2003) ("the inability of consumers to buy a desired product may constitute injury-in-fact"); *Competitive Enter. Inst. v. NHTSA*, 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."); *Ctr. for Auto Safety v. NHTSA*, 793 F.2d 1322, 1332 (D.C. Cir. 1986) (holding that plaintiffs suffered an injury where fuel-efficiency standards "will

diminish the types of fuel-efficient vehicles and options available"); *Cmty. Nutrition Inst. v. Block*, 698 F.2d 1239, 1247 (D.C. Cir. 1983) (holding that consumers had standing where they "allege that they are being deprived of a lower priced alternative to whole milk"), *rev'd on other grounds*, 467 U.S. 340 (1984).

In *Orangeburg*, for example, this Court held that a municipality had standing to challenge a decision by the Federal Energy Regulatory Commission (FERC) to approve an agreement between two merging utility companies that included provisions determining which customers "would be entitled to the most reliable and lowest cost power." 862 F.3d at 1076. Although the municipality was not a current customer of the utilities, the terms approved by FERC would have prevented the municipality from obtaining "the best terms it can" during the next round of contract negotiations. *Id.* at 1079. Because "the city cannot purchase wholesale power from the provider of its choice *nor* on its preferred terms," *id.* at 1078, the Court concluded that the Article III injury requirement was satisfied.

This Court reached the same conclusion in *Chamber of Commerce*. In that case, the Chamber challenged a rule promulgated by the Securities and Exchange Commission (SEC) that required mutual funds to have a supermajority of directors and a chairman who were "independent" if the

fund engaged in certain otherwise prohibited transactions. 412 F.3d at 136–37. The Chamber asserted that it was injured by the SEC's rule because "it would like to invest in shares of funds that may engage in [such prohibited] transactions … but do not meet those conditions" on board independence. *Id.* at 138. This Court held that the Chamber had suffered an injury even though "there is 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." *Id.*

In *Consumer Federation of America*, this Court likewise held that a consumer group had standing to challenge an order of the Federal Communications Commission (FCC) granting approval of a merger involving Comcast Corporation. 348 F.3d at 1012. The Court rested its decision on an affidavit of one of the group's members stating that "although he would like to subscribe to Comcast's high-speed internet service, he is deterred by his inability to choose his [Internet service provider] and by the fact that Comcast could restrict his access to content." *Id.*

The standing principle set forth in these decisions is fully applicable here. Weissman and Llewellyn each hold jobs that require them to travel, particularly to New York and other East Coast cities served by Amtrak. Because of Amtrak's "very strong position" in the Northeast Corridor, JA 93

(FY 2018 Company Profile), travel by train often presents the best option for Plaintiffs' travel needs. Indeed, Plaintiffs have used Amtrak for business travel in the past, and they have expressed a desire to continue using Amtrak for business travel when it is their best transportation option. *Id.* at 16–17 (Weissman Decl. ¶¶ 3, 6); *id.* at 18–19 (Llewellyn Decl. ¶¶ 3, 6).

Since January 2019, however, Plaintiffs' desired product has not been available for purchase because Amtrak stopped selling the type of rail tickets it had traditionally offered. Today, Amtrak sells rail tickets only to individuals who enter into arbitration agreements with Amtrak. Plaintiffs do not wish to purchase rail tickets on those terms because they wish to preserve their constitutional right to a judicial forum. Plaintiffs have thus lost "the opportunity to purchase a desired product." *Chamber of Commerce*, 412 F.3d at 138. As a result, either Plaintiffs must forgo rail transportation altogether, depriving them of service from the "provider of [their] choice," or they must accede to Amtrak's condition, depriving them of the ability to purchase rail tickets "on [their] preferred terms." *Orangeburg*, 862 F.3d at 1078. Either way, the resulting deprivation "is sufficiently personal and concrete to satisfy Article III requirements." *Competitive Enter. Inst.*, 901 F.2d at 113.

II. The district court's standing analysis misconceives the nature of Plaintiffs' injury.

The district court held that Plaintiffs lack standing because it believed that Amtrak's arbitration condition could not harm Plaintiffs until arbitration proceedings were imminent or underway. Plaintiffs, however, have been denied their desired product *now*. Moreover, that injury cannot be retroactively rectified by a federal court in the future because of the nature of arbitration under the FAA. Plaintiffs' claims are, accordingly, ripe for decision. The district court erred in concluding otherwise.

A. The district court premised its decision on the belief that Plaintiffs would not be injured until "Amtrak either has enforced or will likely enforce" the arbitration agreement against them. JA 103. The court considered such enforcement "theoretical" because Plaintiffs would first need to "(1) decide to travel, (2) select Amtrak over other modes of transportation, (3) identify an actionable claim arising from [their] travel, and (4) face Amtrak's enforcement or threatened enforcement of the arbitration provision." *Id.* In the court's view, "[t]hat chain of events" can lead only to "possible future injury," *id.* (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)), which the court considered "too speculative for Article III purposes," *id.* (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 n.2 (1992)).

As an initial matter, the first two steps in the "chain of events" are not "theoretical." Plaintiff submitted undisputed evidence that their work requires intercity travel between Washington and other cities served by Amtrak. JA 16–17 (Weissman Decl. ¶ 4); *id.* at 18–19 (Llewellyn Decl. ¶ 4). To be sure, Plaintiffs filed their declarations before the full scale of the pandemic's effects on travel were known, but the pandemic does not alter their long-term need to travel for work. *See Orangeburg*, 862 F.3d at 1078 ("[s]tanding depends on the probability of harm, not its temporal proximity" (cleaned up)).

The record further shows that the arbitration condition set by Amtrak deters Plaintiffs from using Amtrak for their business travel. JA 17 (Weissman Decl. ¶ 6); *id.* at 19 (Llewellyn Decl. ¶ 6). And given Amtrak's dominance in intercity travel in the Northeast Corridor, *see id.* at 93, Amtrak will often be Plaintiffs' best transportation option in the future, as it has been in the past. *See id.* at 16 (Weissman Decl. ¶ 3); *id.* at 18 (Llewellyn Decl. ¶ 3). Of course, Plaintiffs could avoid Amtrak if they cannot obtain judicial relief from the arbitration condition, thereby breaking the "chain of events," *id.* at 103, that would lead to their being hauled into arbitration proceedings. But that deprivation would itself be an Article III injury. *See*, *e.g.*, *Consumer Fed'n of Am.*, 348 F.3d at 1012 (holding that the consumer suffered injury

because he was "deterred" from "subscrib[ing] to Comcast's high-speed internet service" even if he "could ameliorate the injury by purchasing some alternative product" (internal quotation marks omitted)).

The district court's standing analysis errs in focusing on the risk of being forced to arbitrate, rather than the fact of being deprived of a desired product. Yet even as to the risk that the court identified, its opinion rests on the presupposition that, if Plaintiffs were to purchase rail tickets and thereby enter into an arbitration agreement with Amtrak, the likelihood that their purchase or travels will result in a claim subject to arbitration is low. The flaw in the district court's reasoning is that it strips Plaintiffs of the ability to determine for themselves the level of risk to accept when deciding whether to enter into a commercial transaction. Because "arbitration is a matter of contract," *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010), Plaintiffs can be subject to binding arbitration only if they first agree "to settle by arbitration a controversy" arising from a "contract evidencing a transaction involving commerce," 9 U.S.C. § 2. Plaintiffs desire not to take on any risk of arbitration as a condition to purchasing rail travel, but Amtrak (unconstitutionally) refuses to make a "risk free" rail ticket available to them. Perhaps the district court believed that Plaintiffs are being overly cautious, but this Court has declined to substitute its own value judgment for that of

the litigants in analogous circumstances. *See Chamber of Commerce*, 412 F.3d at 138 (finding standing to challenge mutual-fund regulation despite absence of any "evidence" that unregulated funds "would perform better"); *Consumer Fed'n of Am.*, 348 F.3d at 1012 (concluding that the possibility "that Comcast *could* restrict [the consumer's] access to content" sufficient to create an Article III injury (emphasis added)).

The district court's suggestion that Plaintiffs accept the unwanted risk and await the onset of an arbitration proceeding is flawed in another respect: At that point, the arbitration agreement and the FAA would likely preclude federal courts from granting Plaintiffs redress on their claims. The FAA requires a federal court, upon motion of a party, to stay resolution of issues "referable to arbitration," 9 U.S.C. § 3, and to "direct[] the parties" to arbitrate disputes where "the making of the agreement … is not in issue," *id.* § 4. If Plaintiffs were to purchase a rail ticket, they would lose the ability to question "the making of the [arbitration] agreement" because, despite their claim that the arbitration condition is unconstitutional, Plaintiffs could not dispute that an agreement subject to the FAA would have been made at the time of purchase. *See Rent-A-Ctr.*, 561 U.S. at 70 n.2 (distinguishing between an arbitration agreement's "validity" and "the issue whether any agreement

between the parties was ever concluded" (internal quotation marks omitted)).

Although section 2 of the FAA permits parties to oppose arbitration based on objections to the validity of an arbitration agreement, it would still limit Plaintiffs' ability to raise their objections to the arbitration agreement at issue here. *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019) (stating that "before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists" and citing 9 U.S.C. § 2); *Rent-A-Ctr.*, 561 U.S. at 69 n.1 (explaining that the validity of an arbitration agreement is governed by the standard set out in 9 U.S.C. § 2). Section 2 provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Section 2 "places arbitration agreements on an equal footing with other contracts," and "[l]ike other contracts, … they may be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability." *Rent-A-Ctr.*, 561 U.S. at 67–68 (internal quotation marks omitted). A court, however, likely would not regard Plaintiffs as having any "generally applicable contract defenses" to Amtrak's arbitration agreement as a stand-alone contract. *See New Prime, Inc. v. Oliveira*, 139 S. Ct. 532, 538 (2019) ("[U]nder the severability principle, we

treat a challenge to the validity of an arbitration agreement (or a delegation clause) separately from a challenge to the validity of the entire contract in which it appears."). Rather, Plaintiffs' claims arise from Amtrak's decision to deny rail service to individuals do not want to enter into the arbitration agreement. Whether or not that condition is unconstitutional, there is a substantial risk that the arbitration agreement, viewed in isolation, would be treated by courts as "valid, irrevocable, and enforceable" under section 2.

In any event, the arbitration agreement's delegation clause would likely close the door to any later court challenge to the validity of Amtrak's arbitration condition. The delegation clause grants the arbitrator "exclusive authority to resolve any dispute relating to the validity, applicability, enforceability, unconscionability or waiver" of the agreement, "including … any claim that [the agreement] is void or voidable." JA 24. The delegation clause is enforceable absent a challenge to "the delegation provision specifically." *Rent-A-Ctr.*, 561 U.S. at 72. Plaintiffs' only basis for challenging the delegation clause, however, is not "specific[]" to delegation clause, but rests on the same unconstitutional-conditions argument that Plaintiffs' assert in this litigation. Accordingly, the delegation clause likely forecloses Plaintiff's ability to obtain *de novo* review of those claims before being subjected to arbitration.

The FAA, moreover, limits Plaintiffs' ability to obtain *de novo* review *after* arbitration. Under the FAA, a court must confirm an arbitration award unless one of the FAA's "exclusive grounds" for vacating or modifying the award are present. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584 (2008); *see also* 9 U.S.C. §§ 9–11. Those grounds address "egregious departures from the parties' agreed-upon arbitration" and "extreme arbitral conduct." *Hall St. Assocs.*, 552 U.S. at 586. The FAA does not permit a federal court to vacate an arbitration award because of a "mistake of law," *id.*, or for even a "serious error," *Stolt-Nielsen S.A.*, 559 U.S. at 671. Thus, if the arbitrator were to reject Plaintiffs' statutory and constitutional challenges to Amtrak's arbitration condition, that decision could effectively be unreviewable in court.

For these reasons, the district court's admonition that Plaintiffs' accept the arbitration risk associated with purchasing Amtrak tickets fails to grapple with the present dilemma that Plaintiffs face because of the mandatory and binding nature of Amtrak's arbitration condition. If Plaintiffs' statutory and constitutional claims are to be vindicated at all, they must be vindicated now. Plaintiffs do not need to abandon the very right that they are seeking to enforce before they suffer an injury cognizable under Article III.

B. The district court relied for support on decisions holding that challenges to the *enforceability* of *existing* arbitration provisions are unripe. *See* JA 103–04. Those cases are not analogous to the present situation. The district erred in relying on those decisions rather than this Court's precedents.

To begin with, the circumstances in *Monsanto* bear no relation to this case. In *Monsanto*, the Supreme 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. *See* 467 U.S. at 990, 992, 1000–01. The statutory 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 taking 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" for a Tucker Act claim. *Id.* at 1018 (quoting FIFRA forfeiture provision currently codified at 7 U.S.C. § 136a(c)(1)(F)(iii))). 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 "challenges to the constitutionality of the arbitration and compensation scheme are not ripe for our resolution." *Monsanto*, 467 U.S. at 1019.

Unlike Plaintiffs, Monsanto was not harmed by the inability to obtain a desired product. And unlike Amtrak's arbitration clause, the FIFRA arbitration regime preserved data submitters' right to seek *de novo* review of compensation claims before an Article III court. Indeed, the Court emphasized that its decision rested on the availability of the Tucker Act for dissatisfied claimants. *Id.* *Monsanto* accordingly does not speak to the question whether Plaintiffs' lawsuit is ripe, let alone whether they have standing.

The district court stated that *Monsanto* is "not limited to the statute or exhaustion requirement at issue there," JA 104 n.3, because the Supreme Court "contrasted," *id.*, *Monsanto*'s decision with respect to ripeness with the decision in *Duke Power Co.*, where the challenge at issue was ripe because "appellees will sustain immediate injury from the operation of the

disputed power plants," 438 U.S. at 81. *Monsanto*, however, did not draw a "contrast[]" with *Duke Power*; it cited *Duke Power*, along with *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974), as relevant precedent on the ripeness standard. *See Monsanto*, 467 U.S. at 1020. As those two cases recognize, litigation can be ripe when the plaintiff faces an "immediate injury," *Duke Power*, 438 U.S. at 59, or when "decisions to be made now or in the short future may be affected by whether or not [the challenge is] now decided," *Regional Rail Reorganization Act Cases*, 419 U.S. at 144. As applied here, those principles make Plaintiffs' present inability to obtain Amtrak tickets without the condition that they allege is unlawful, and the consequent effect on their work-related travel decisions, harm that is ripe for redress and that is likewise sufficient for standing purposes. *See*, *e.g.*, *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2196 (2020) (rejecting argument that challenge to removal provision "is not ripe until actually used" because separation-of-powers violations "inflict[] a here-and-now injury" (internal quotation marks omitted)); *New York v. United States*, 505 U.S. 144, 175 (1992) (holding that an issue is "ripe for review" because "New York must take action now in order to avoid the … provision's consequences"); *Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 265 n.13 (1991) (holding that "a challenge to the Board of

Review's veto power is ripe even if the veto power has not been exercised to respondents' detriment" because "threat of the veto hangs over the Board of Directors like the sword over Damocles").

The district court also purported to find support for its conclusion in three out-of-circuit court of appeals decisions. In *Jones*, the plaintiffs sought "a declaration that the arbitration provision in their Sears credit card agreement was unconscionable" and statutory damages under state law for the unconscionable conduct. 301 F. App'x at 279. In its unpublished opinion, the Fourth Circuit concluded that the plaintiffs lacked standing because Sears had not "invoked or threatened to invoke the arbitration provision" against them. *Id.* at 283. Unlike the *Jones* plaintiffs, Plaintiffs here do not seek to invalidate an arbitration clause in an existing contract as unconscionable; they seek the ability to purchase a rail ticket without entering into an enforceable arbitration agreement with Amtrak. And as explained above, entering into such an agreement and waiting for it to be enforced does nothing to redress the specific injury of which Plaintiffs complain. The district court was, therefore, wrong in regarding Plaintiffs' injury as "even *more* speculative than the one in *Jones*." JA 103–04 n.2. Plaintiffs' injury is more concrete because, unlike in that case, the nature of the harm they are seeking to redress is a present one.

Lee v. American Express Travel Related Services, Inc., 348 F. App'x 205 (9th Cir. 2009), also cited by the court below, is of a piece with *Jones*. In *Lee*, the plaintiffs pursued state-law claims over "the inclusion of allegedly unconscionable arbitration and other provisions in their credit card agreements." *Id.* at 206. In an unpublished opinion, the Ninth Circuit held that the plaintiffs were not "injured by the mere inclusion of these provisions in their agreements, nor is the threat of future harm from such provisions sufficiently imminent to confer standing." *Id.* at 207. As in *Jones*, the *Lee* plaintiffs did not allege that they were denied access to credit cards because of the unlawful presence of an arbitration condition. Nor were they seeking to obtain credit cards without entering into an arbitration agreement. Like *Jones*, *Lee* does not inform the justiciability of Plaintiffs' claims here.

The one published appellate decision cited by the district court on this point—*Bowen v. First Family Financial Services, Inc.*, 233 F.3d 1331 (11th Cir. 2000)—supports *Plaintiffs'* position. In *Bowen*, the Eleventh Circuit considered the plaintiffs' standing to press two types of challenges to an arbitration provision in their loan agreements: (1) challenges to "the legality of [the] requirement that customers sign arbitration agreements *as a condition of credit*," *id.* at 1334 (emphasis added); and (2) challenges to "the *enforceability* of the arbitration agreement," *id.* at 1339 (emphasis added).

The court held that the plaintiffs had standing to challenge the arbitration *condition* "because they were required to and did sign such an agreement in order to obtain credit." *Id.* at 1334. That aspect of *Bowen*—which the district court ignored—corresponds to Plaintiffs' argument that they have standing here because they are required to enter into an arbitration agreement with Amtrak in order to purchase rail tickets or ride on Amtrak. The district court relied on *Bowen*'s second holding that the plaintiffs lacked standing to challenge the *enforceability* of the arbitration agreement absent an "attempt to enforce it against them." *Id.* at 1339; *see* JA 103. But again, Plaintiffs do not challenge the enforceability of the arbitration agreement—a question that likely could be resolved only by the arbitrator in any event. *See supra* pp. 25–26. The portion of *Bowen* on which the district court relied, therefore, does not speak the question presented in this case.

III. The district court failed to apply this Court's precedent.

The district court recognized that this Court has "permit[ted] 'consumers of a product to challenge agency action that prevented the consumers from purchasing a desired product.'" JA 104 (quoting *Coal. for Mercury-Free Drugs*, 671 F.3d at 1281); *see also supra* pp. 17–19. Nonetheless, the district court concluded that this "line of cases has no

bearing here." JA 104–05. The district court's reasons for not applying this Court's precedents are wrong.

A. At the outset, the district court suggested (but did not decide) that the relevant standing decisions of this Court apply only to "cases brought under the [APA]" against a governmental body that is an "'agency' for standing purposes." *Id*. That limitation has no principled basis under Article III, under which the case-or-controversy requirement focuses on the "harm suffered by the plaintiff." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998). Plaintiffs' harm here is exactly the same as it would have been if a traditional administrative agency imposed the arbitration condition at issue. Because "there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right," *Defs. of Wildlife*, 504 U.S. at 576, Plaintiffs' injury is unaffected by Amtrak's legal status under the APA.

B. The district court was able to conclude that "Amtrak has not prevented Plaintiffs from purchasing a desired product" only by reframing the product that Plaintiffs seek as "travel by rail." JA 105. Having characterized Plaintiffs "desired product" at this high level of abstraction, the district court decided that Plaintiffs have not suffered an injury because Amtrak's arbitration clause does not increase the price of a ticket, reduce the supply of tickets, or "otherwise altogether prevent[] Plaintiffs from riding

Amtrak." *Id.* (citing *Coal. for Mercury-Free Drugs*, 671 F.3d at 1282). The court erred, however, in assessing Plaintiffs' standing by redefining the nature of the product that they desire.

Time and again, this Court has evaluated standing using the specific characteristics of the product sought by the party invoking the court's jurisdiction. In *Chamber of Commerce*, for example, the Chamber was not prevented from investing in mutual funds, but it nonetheless had standing because its "desired product" was a mutual fund that "may engage in [otherwise prohibited] transactions" without satisfying the SEC's rules on board independence. 412 F.3d at 138. Likewise, in *Consumer Federation of America*, where the injured individual stated that he "would like to subscribe to Comcast's internet service," he was not prevented from obtaining "internet service." He nonetheless had standing because he was "deterred" from choosing Comcast because the company "could restrict his access to content." 348 F.3d at 1012. And in *Center for Auto Safety*, the petitioners had "alleged a distinct injury to their members," 793 F.2d at 1334, because the members were "interested in purchasing the most fuel-efficient vehicles possible," *id.* at 1332. Although they were not prevented from purchasing vehicles, even fuel-efficient vehicles, they had standing to challenge the agency's fuel-efficiency standard, which would have "diminish[ed] the types

of fuel-efficient vehicles and options available." *Id*. In contrast to the district court in this case, the Court did not recharacterize the desired product as "fuel-efficient vehicles" or "vehicles"; it considered the availability of the product that petitioners actually desired.

Plaintiffs' standing also should be evaluated based on the nature of the product they desire—a rail ticket not tied to an unwanted arbitration condition. That product is different from a train ticket tied to an arbitration agreement. Indeed, Amtrak had no reason to add the arbitration clause to its terms and conditions—and to make it mandatory rather than optional—except to change the nature of what it sells to consumers. And it is undisputed that what Plaintiffs actually want is "not readily available" to them. JA 105 (Dist. Ct. Op.) (quoting *Coal. for Mercury-Free Drugs*, 671 F.3d at 1282).

The district court also erred in focusing on whether the arbitration clause caused train tickets to be "unreasonably priced." *Id.* (quoting *Coal. for Mercury-Free Drugs*, 671 F.3d at 1282). This Court has never required a separate showing of economic harm to establish an Article III injury when a consumer is denied the product of his choice. *See, e.g.*, *Chamber of Commerce*, 412 F.3d at 138 (finding injury even though "there is no evidence a fund of the type in which the Chamber wants to invest would perform

better"); *Consumer Fed'n of Am.*, 348 F.3d at 1012 (finding injury based on risk of content restrictions without undertaking economic analysis). This Court's approach makes sense because, in every case in which a consumer cannot purchase a desired product, there is an underlying commercial transaction that cannot occur, making an economic analysis unnecessary. Furthermore, although Amtrak's arbitration agreement is not priced separately from the rail ticket to which it is tied, that is not a reason to assume an irrevocable waiver of constitutional rights has less value under Article III than a nominal effect on price, no matter how small.

The district court insinuated that Plaintiffs are not deterred from using Amtrak because "Weissman rode an Amtrak train even *after* Amtrak added the arbitration clause." JA 105 (citing *id.* at 7, 10 (Compl. ¶¶ 7, 18)). The court ignored Weissman's declaration explaining his desire to choose Amtrak for his business travel without being bound by Amtrak's arbitration clause. *See id.* at 17 (¶¶ 5, 6). Although Weissman traveled on Amtrak once in August 2019, after Amtrak had added the arbitration clause to its terms and conditions, nothing in the record suggests that Weissman was aware of the arbitration clause when he booked his travel, which occurred three months before the November 2019 *Politico* article that put a spotlight on Amtrak's adding an arbitration provision as a condition of purchase or riding on its

trains. *See* Sam Mintz, *Amtrak's new ticket rules won't let passengers sue in a crash*, Politico (Nov. 8, 2019), https://www.politico.com/news/2019/11/08/amtrak-crash-sue-068175. In any event, the court had no basis for using *Weissman's* single trip to assess *Llewellyn's* allegation of injury. *See* JA 18 (Llewellyn Decl. ¶ 3). The decision below should be reversed on that basis alone.

C. The district court rationalized its decision to dismiss Plaintiffs' desire for an Amtrak ticket without an arbitration clause by relying on concerns that are untethered from this Court's precedent and from Article III. According to the district court, a plaintiff's "definition of a desired product" should not be respected if the court determines that the definition is "idiosyncratic." JA 105 (internal quotation marks omitted). The court faulted Plaintiffs for not "point[ing] to [a] case in which a plaintiff showed injury in fact by conditioning his desired product on a contract term that does not change the product in a 'direct, real, and palpable' way." *Id.* (quoting *Public Citizen*, 489 F.3d at 1292).

The district court erred in concluding that Plaintiffs' injury can be distinguished from the types of injuries that this Court has recognized create an Article III case or controversy. In *Orangeburg*, for example, the Court held that the municipality suffered an Article III injury because it could not

"purchase wholesale power *on its desired terms*." 862 F.3d at 1077 (emphasis added). The "product" did not "change," JA 105 (Dist. Ct. Op.), because the municipality could and did purchase "wholesale power from another source," 862 F.3d at 1078, and could purchase power as a non-native-load customer, *id.* at 1074–77. Nonetheless, the Court held that the municipality had standing to vindicate its interest in "secur[ing] the best terms it can" in future negotiations for "a new bilateral power purchase agreement." *Id.* at 1079.

Likewise, in *Consumer Federation of America*, the Court held that a consumer was injured because he was "deterred" from "subscribing to Comcast's high-speed internet service" when the FCC did not impose conditions that would have required the company to "allow unaffiliated [Internet service providers] to its cable systems" and prohibited it "from interfering with content." 348 F.3d at 1012. The Court's standing analysis did not turn on whether the requested conditions were "idiosyncratic" or "change[d]" the underlying product—Internet service—"in a direct, real, and palpable way." JA 105 (Dist. Ct. Op.) (internal quotation marks omitted). Rather, the consumer suffered an injury because the terms on which Comcast offered Internet service—which the FCC declined to alter—were not the terms on which consumer desired to purchase Internet service. *See also*

Chamber of Commerce, 412 F.3d at 138 (finding injury from inability to invest in mutual funds managed by an independent board of directors).

The district court did not explain why, in light of these precedents, it considered Plaintiffs' opposition to Amtrak's arbitration agreement to be too "idiosyncratic" to confer standing. JA 105. Amtrak "change[d] the product" that it offers to Plaintiffs when it chose to make its arbitration clause a mandatory rather than optional term of its rail service, and that change precludes Plaintiffs from rail travel unless, against their wishes, they enter into an arbitration agreement with Amtrak.

Plaintiffs' desire to avoid the possibility of arbitration cannot reasonably be considered idiosyncratic given the substantial waiver of rights involved: the abandonment of the entitlements to have claims adjudicated in court, JA 24, by an Article III judge, *see* 28 U.S.C. § 1349 (providing federal courts with subject-matter jurisdiction for all claims against Amtrak); to application of the rules of evidence, *see* JA 50 (AAA Consumer Arbitration Rules) ("Following the legal rules of evidence shall not be necessary."); 65 ("Arbitrators do not have to follow the Rules of Evidence used in court.")); and to appeal an adverse district court ruling, 28 U.S.C. 1291. Amtrak's arbitration agreement would also ban Plaintiffs from participating in class or representative actions, JA 24, making pursuit of certain types of claims cost-

prohibitive. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1421 (2019) (Ginsburg, J., dissenting) ("[C]onsumers forced to arbitrate solo face severe impediments to the vindication of their rights" because "[e]xpenses entailed in mounting individual claims will often far outweigh potential recoveries." (cleaned up)).

Far from being idiosyncratic to Plaintiffs, concern about arbitration clauses in take-it-or-leave-it consumer contracts is widespread. *See*, *e.g.*, Jessica Silver-Greenburg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. Times, Oct. 31, 2015 (available at https://nyti.ms/1KMvBJg); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 Yale L.J. 2804 (2015). They have even been banned in certain contexts. *See*, *e.g.*, 15 U.S.C. § 1639c(e)(1) (prohibiting mandatory arbitration clauses in residential mortgage loan agreements); 14 C.F.R. § 253.10 (prohibiting air carriers from precluding passengers "from bringing a claim against a carrier in any court of competent jurisdiction"). Indeed, Amtrak itself cautions ticket purchasers to "read the Arbitration Agreement carefully" precisely because it "requires that [they] resolve claims and disputes with Amtrak on an individual basis through arbitration and not by

way of court or jury trial." JA 72. The district court was wrong to regard Amtrak's arbitration agreement as of peculiar interest only to Plaintiffs.

The district court also had no basis for treating Plaintiffs' interest in declining to waive their constitutional rights as anything other than "direct, real, and palpable." *Id.* at 105 (quoting *Public Citizen, Inc.*, 489 F.3d at 1292). In *Public Citizen*, the Court stated that "the mere increased risk of some event occurring" is not itself a "concrete, direct, real, and palpable" injury because "were all purely speculative increased risks deemed injurious, the entire requirement of actual or imminent injury would be rendered moot." 489 F.3d at 1297–98 (internal quotation marks omitted). The inability to purchase a desired product, however, is not "an increased-risk-of-harm claim." *Id.* at 1298. Therefore, for example, the Chamber could show injury from the SEC's regulation of the boards of mutual funds without any "evidence [that] a fund of the type in which the Chamber wants to invest would perform better." *Chamber of Commerce*, 412 F.3d at 138. In a typical "increased risk" case, the claim is that an agency's regulatory standard is too lax to protect adequately against future injuries, *see*, *e.g.*, *Public Citizen*, 489 F.3d at 1289; the claim in such cases is *not* that the agency has *prevented* manufacturers from offering consumers a desired product, for example, one that exceeds regulatory standards. By contrast, when agency action makes a

desired product unavailable to consumers, this Court does not examine the risk of future injury but regards the inability to purchase the desired product in the marketplace as the injury that confers standing. *See Coal. for Mercury-Free Drugs*, 671 F.3d at 1281–82 (stating that the plaintiffs could have demonstrated standing if they had shown that the challenged action made their desired vaccine "not readily available" (*quoting Public Citizen v. Foreman*, 631 F.2d 969, 974 n.12 (D.C. Cir. 1980)) (emphasis removed)). That is the situation that Plaintiffs face here.

D. The district court erred as well in treating Plaintiffs' injuries as a nonjusticiable "generalized grievance." JA 105 (quoting *Duke Power,* 438 U.S. at 80). A generalized grievance is one "that amounts to nothing more than an abstract and generalized harm to a citizen's interest in the proper application of the law." *Carney v. Adams*, 141 S. Ct. 493, 498 (2020); *see also Lance v. Coffman*, 549 U.S. 437, 442 (2007) (finding that plaintiffs had a generalized grievance where "[t]he only injury plaintiffs allege is that the law … has not been followed."). "[T]he fact that a number of people could be similarly injured does not render the claim an impermissible generalized grievance." *Public Citizen, Inc.*, 489 F.3d at 1292. "[W]here a harm is concrete, though widely shared, the Court has found injury in fact." *Id.*

(quoting *FEC v. Akins*, 524 U.S. 11, 24 (1998) (internal quotation marks omitted)).

Plaintiffs do not raise a generalized grievance because the interest they seek to vindicate is not the public's interest in the "proper application of the law," *Carney*, 141 S. Ct. at 498, but their own interest in being able to purchase rail tickets and travel by rail without entering into an arbitration agreement with Amtrak. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 n.3 (2014) (explaining that litigants do not assert a generalized grievance when their injury extends beyond "every citizen's interest in proper application of the Constitution and laws" and they "seek[] relief that … directly and tangibly benefits [them more] than it does the public at large" (quoting *Defs. of Wildlife*, 504 U.S. at 573–74)). Plaintiffs filed suit to "champion[]" their "own rights," rather than redress a "generalized grievance shared by a large number of citizens in a substantially equal measure." *Duke Power Co.*, 438 U.S. at 80. Indeed, not every member of the public travels on Amtrak, and many of those who do may find the arbitration clause unobjectionable. That other Amtrak passengers certainly "may also benefit" from a decision in Plaintiffs' favor is "irrelevant" to the question of standing, where "the relief given by the court in this case is solely

for the injuries that allegedly would be suffered by [Plaintiffs]." *New York Stock Exch. LLC v. SEC*, 962 F.3d 541, 552 (D.C. Cir. 2020).

The district court expressed concern about the need for a "limiting principle" under which courts could deny standing to consumers who sued "private companies in the marketplace" "to challenge any unwanted contract term, no matter if those terms have injured them or would imminently do so." JA 105. But other than its erroneous reference to generalized grievances, the district court did not explain how its search for a so-called limiting principle arises from Article III's case-or-controversy requirement. *See Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 11 (2004) (explaining that standing doctrine "enforce[es] the Constitution's case-or-controversy requirement."); *Steel Co.*, 523 U.S. at 102 n.4 ("[O]ur standing jurisprudence … derives from Article III"). This Court has recognized for decades that consumers suffer an Article III injury when they are deprived of products they desire because of governmental action, and in those cases, the product desired were or would be sold by private enterprises. That the same type of injury might in some cases provide standing for claims against private companies provides no principled basis for ignoring its application to this case.

In any event, recognizing Plaintiffs' standing to pursue this case would not unleash floods of litigation against private actors. The district court identified no widespread litigation against private companies arising from this Court's existing standing precedents. The reason for the dearth of such litigation is not that courts pretend consumers are not harmed by unlawful action that prevents or deters them from purchasing goods and services in the marketplace. Rather, it is that the substantive law limits the causes of action and remedies available to consumers to challenge private sector decisionmaking as to the terms on which products will be offered. A consumer, for example, would be unlikely to have a viable claim against a car company for making a business decision to alter the fuel efficiency of its fleet, but the consumer has a potential claim under the APA if an agency compels that same result. *See Ctr. for Auto Safety*, 793 F.2d at 1333; *see also Bowen*, 233 F.3d at 1334 (recognizing plaintiffs' standing to challenge lawfulness of arbitration condition in private loan agreement but ruling against plaintiffs on the merits). In both instances, the injury to the consumer is the same, but the substantive law provides a viable remedy only against governmental action.

Similarly, here, Plaintiffs' claims are grounded in Amtrak's constitutional status as a component of the federal government. If Amtrak

were a private company, Plaintiffs would have no substantive legal basis for challenging its decision to offer service only to customers who agree to arbitrate their disputes. It is not surprising, therefore, that this Court's relevant standing decisions involved APA challenges to agency actions that affected private-sector availability of products desired by the challenger. In circumstances where consumers *do* have a substantive legal basis for claiming that the denial of goods or services on desired terms is unlawful, there is no reason to distort standing doctrine to protect companies against such claims by disregarding the injury that exists when a consumer is unable to engage in a desired marketplace transaction. *See*, *e.g.*, *Bowen*, 233 F.3d at 1334. To the extent that a limiting principle is needed, it is provided by Article III's injury requirement.

In sum, the district court had no basis for refusing to apply this Court's precedents. Plaintiffs seek to purchase rail tickets without entering into an arbitration agreement with Amtrak, and Amtrak (impermissibly) refuses to make that stand-alone product available to them. Under decisions of this Court spanning nearly four decades, that injury is sufficient for purposes of Article III.

CONCLUSION

The Court should reverse the judgment of the district court and remand this case with instructions to the district court to address the merits of Plaintiffs' statutory and constitutional claims.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Opening Brief for Robert Weissman and Patrick Llewellyn complies with the type-volume limitations of FRAP 32(a)(7)(B) and 29(d). The brief is composed in a 14-point proportional typeface, Georgia. As calculated by my word processing software (Microsoft Word 2019), the brief (excluding those parts permitted to be excluded under the Federal Rules of Appellate Procedure and this Court's rules) contains 10,365 words.

/s/ Nandan M. Joshi
Nandan M. Joshi

CERTIFICATE OF SERVICE

I hereby certify that, on February 3, 2021, the foregoing Opening Brief for Plaintiffs-Appellants Robert Weissman and Patrick Llewellyn was served through the Court's ECF system on counsel for all parties.

/s/ Nandan M. Joshi
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