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

REPLY BRIEF FOR APPELLANTS ROBERT WEISSMAN AND PATRICK LLEWELLYN

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Cases

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

Constitution

GLOSSARY

Amtrak	National Railroad Passenger Corporation
APA	Administrative Procedure Act
FAA	Federal Arbitration Act
FERC	Federal Energy Regulatory Commission

SUMMARY OF ARGUMENT

Plaintiffs Robert Weissman and Patrick Llewellyn have a live dispute with Amtrak. They would use Amtrak for business travel, but they do not want to enter into the arbitration agreement that Amtrak has made a mandatory condition of service. Plaintiffs claim that Amtrak lacks the statutory and constitutional authority to condition rail service in this way, and it is undisputed that if Plaintiffs prevail on their claims, Amtrak will be required to make rail tickets available to them on their preferred terms. Although Amtrak disagrees with the value that Plaintiffs place on retaining their right to go to court, Plaintiffs' inability to obtain rail travel without forfeiting that right is an injury that the federal courts have the constitutional power to redress. The district court erred in holding otherwise, and this Court should reverse.

I.A. This Court has consistently recognized that a plaintiff suffers an Article III injury when denied the ability to purchase a desired product on desired terms. Amtrak argues that this principle applies only to claims challenging agency action under the Administrative Procedure Act (APA), but the Article III standing inquiry focuses on the harm suffered by the plaintiff, not the cause of action. The Plaintiffs' injury here is exactly the same as it would be if a federal regulation had required them to consent to the

arbitration agreement as a condition of rail travel. The outcome under Article III should also be the same. Congress's decision to exclude Amtrak from APA review does not alter the analysis.

B. Amtrak argues that its arbitration condition does not alter the relevant product and, therefore, cannot cause injury. The arbitration provisions, however, purport to bind Plaintiffs to a contract requiring arbitration of disputes, and Amtrak has made acceptance of those provisions an intrinsic and non-negotiable component of the product it offers for sale. Amtrak attempts to downplay Plaintiffs' interest in declining consent to mandatory arbitration by labeling the arbitration requirement an "ancillary" term, but this Court's precedents assess injury by focusing on the effect of the undesired term on the plaintiff, not by applying an arbitrary label assigned to that term. Amtrak's attempt to distinguish between "core" and "ancillary" components of a desired product would lead inevitably to capricious outcomes, in which similarly harmed plaintiffs would be treated differently in their ability to seek judicial redress under Article III.

Amtrak identifies no constitutional principle to support its argument that, to protect private corporations from lawsuits, the Court should artificially limit the product characteristics than can give rise to judicially cognizable consumer injury. And recognizing that consumers suffer an

Article III injury in cases such as this one will not subject private businesses to lawsuits unless there is a basis in federal or state law for alleging that their conduct is unlawful. The extent to which a private business should be responsible for harms it causes consumers is a question within the purview of democratically accountable policymakers and state common-law courts, not a matter for federal courts to resolve in the guise of considering standing. Amtrak, in any event, is not a private corporation, and Plaintiffs' statutory and constitutional claims arise solely out of its status as a governmental enterprise.

II. Plaintiffs' injury is imminent, and their claims are ripe for review. Absent judicial intervention now, they will either need to forgo use of rail service or forfeit the rights they have filed this lawsuit to protect.

A. Amtrak's citation to other cases dismissing challenges to arbitration requirements in different contexts does not call Plaintiffs' standing into question. Indeed, as Amtrak admits, in the case most analogous to this one, the court held that the plaintiffs *had standing* to challenge the legality of an arbitration condition imposed as a condition to a credit agreement. Because none of the other decisions on which Amtrak relies involved a similar challenge to the imposition of an allegedly impermissible arbitration

condition on the availability of products or services, they do not speak to the question presented here.

B. Plaintiffs satisfy Article III's imminence requirement. Plaintiffs are faced with two undesirable choices: forgo rail transportation or irrevocably waive their constitutional rights. Plaintiffs have a current interest in securing a third option—one that would permit them to travel on Amtrak without waiving their rights. Although Amtrak argues that Plaintiffs have not committed to using rail service for specific future travels, Plaintiffs have demonstrated that their use of Amtrak for business travel is likely, which is all that Article III requires.

Amtrak incorrectly argues that Plaintiffs assert standing based on an increased risk of harm of being subject to a future arbitration proceeding. On the contrary, Plaintiffs assert a present harm: They are required to consent to Amtrak's arbitration provisions in order to travel by rail. Although Plaintiffs' *motivation* for declining consent is to avoid the risk of arbitration, the immediate interest they are seeking to vindicate is the right not to enter into contracts that compel them to accept unwanted risks.

Amtrak provides no assurance that Plaintiffs would be able to obtain *de novo* federal court review of their claims if they were to accept Amtrak's invitation to agree to the arbitration provisions, including the embedded

delegation clause. Although Amtrak argues that courts would retain the authority to declare the arbitration agreement and delegation clause invalid on unconscionability grounds, it cites no authority for its assertion that Plaintiffs' statutory and constitutional claims constitute the type of general contract defenses that a court may consider in assessing unconscionability. Plaintiffs, accordingly, have a significant interest in declining to consent to the arbitration provisions in the first place, an interest that must be vindicated before they are forced to consent.

ARGUMENT

I. Plaintiffs suffer an Article III injury because they cannot obtain rail travel from Amtrak on their desired terms.

We begin where Amtrak's brief ends: with this Court's precedent. This Court has recognized that "[t]he lost opportunity to purchase a desired product" is a cognizable Article III injury. *Orangeburg v. FERC*, 862 F.3d 1071, 1078 (D.C. Cir. 2017). A desired product is unavailable if a plaintiff cannot obtain it from "the provider of its choice" or "on its preferred terms." *Id.* A plaintiff who is "deterred" from obtaining a product because of its undesirable features has standing to sue in federal court to have those features removed. *Consumer Fed'n of Am. v. FCC*, 348 F.3d 1009, 1012 (D.C. Cir. 2003). *See also* Opening Br. 16–20 (discussing cases).

Amtrak does not dispute that Plaintiffs cannot purchase a rail ticket on terms they desire because Amtrak has made an undesired arbitration agreement a mandatory condition of rail travel. Nonetheless, Amtrak advances two reasons for not applying the Court's Article III precedents here. First, Amtrak argues that those precedents apply only to APA claims challenging agency action. Second, Amtrak argues that the arbitration agreement does not "sufficiently affect" rail service to deny Plaintiffs a product they desire. Neither argument withstands scrutiny.

A. Plaintiffs' standing does not depend on their cause of action.

The Article III standing inquiry focuses on the "harm suffered by the plaintiff." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998). The harm suffered by Plaintiffs is the inability to purchase rail tickets that do not contain an unwanted arbitration condition. Plaintiffs' harm—and thus their standing—would be the same if a federal regulation (or Congress) had required Plaintiffs to consent to the arbitration agreement to use rail service. Plaintiffs made this point in their opening brief, and Amtrak does not address it. *See* Opening Br. 34.

Amtrak nonetheless asks this Court to create an Article III distinction between harms caused by "regulations that distort a marketplace" and the exact same harms caused by a governmental corporation "acting as a market

participant." Amtrak Br. 34. Amtrak does not attempt to ground that distinction in any Article III principle—and for good reason, because "[t]hat is not how Article III works." *Maloney v. Murphy*, 984 F.3d 50, 62 (D.C. Cir. 2020). In *Maloney*, the Court considered whether members of Congress had suffered an Article III injury when the government refused to furnish information to which they were entitled under federal law. Explaining that "the point of Article III's standing requirement is to ensure that there is a 'case or controversy' for the federal courts to resolve," the Court concluded that the members' injury "is no different for standing purposes than if the same [members] had filed a [Freedom of Information Act (FOIA)] request for the same information." *Id.* (quoting U.S. Const. art. III, § 2); *see also id.* at 64 ("the injury is the same as one suffered by a FOIA plaintiff"). Because a FOIA plaintiff undisputedly has standing to challenge the denial of an information request, the Court held that the members had standing as well.

The same principle applies here. Article III asks only whether the defendant caused the plaintiff to suffer an injury that the court can redress. *Steel Co.*, 523 U.S. at 102–03. It does not ask whether otherwise identical harms resulted from the government acting as a regulator or a market participant. Indeed, in *Consumer Federation of America*, the consumer's injury was caused by the agency's *refusal to regulate* market participants by

imposing conditions on its approval of a merger. 348 F.3d at 1012 (explaining that the agency "permitted the practices to exist"). Amtrak's suggestion (at 34) that the requisite injury can arise only from "government manipulation of the market" has no basis in this Court's precedent.

Amtrak is also wrong to suggest (at 35) that arbitrary-and-capricious review in APA cases has special stature in the Article III standing inquiry. Amtrak's argument rests on *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970), in which this Court stated that "[c]onsumers of regulated products and services have standing to protect the public interest in the proper administration of a regulatory system enacted for their benefit," *id.* at 1097. Although *Environmental Defense Fund* was an APA case, the decision does not in any way purport to restrict consumers' standing only to APA cases. Indeed, Amtrak identifies nothing in that case (or any other) that suggests that "the source of the asserted right" is relevant to Article III standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992).

Amtrak argues that APA claims are different from other claims because a "wide variety of people and entities can say that an agency injured them in some way if they are subject to regulation, directly or indirectly, by the agency." Amtrak Br. 35. But the breadth of the APA right of action does not

affect the bedrock requirement that individual plaintiffs show a personal injury in fact. *See Sierra Club v. Norton*, 405 U.S. 727, 739 (1972) (rejecting any contrary suggestion in *Environmental Defense Fund*). And Amtrak does not explain any way in which its arbitration condition would affect Plaintiffs differently if it had been imposed by a traditional agency (or by Congress) rather than by Amtrak acting on its own.

Congress's decision to exclude Amtrak from APA review likewise does not affect Plaintiffs' standing to assert their statutory and constitutional claims. *See* Amtrak Br. 35. Congress's authority to create and define "cause[s] of action" does not "implicate … the court's … constitutional *power* to adjudicate the case." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 & n.4 (2014) (internal quotation marks omitted). An injury that would give Plaintiffs standing to raise an APA claim against Amtrak, if such a cause of action existed, is also necessarily sufficient to give them standing to raise the statutory and constitutional claims that they do possess.

B. The arbitration agreement prevents Plaintiffs from purchasing their desired product.

In assessing standing, this Court has consistently focused its analysis on the specific characteristics of the product desired by the litigant invoking the court's jurisdiction. *See* Opening Br. 38–40. That focus faithfully

implements Article III by directing the inquiry toward the actual harm suffered by the plaintiff, rather than a court's subjective view of alternative products that the plaintiff could purchase to ameliorate the harm.

Plaintiffs have explained why they do not wish to consent to the substantial waiver of rights that private arbitration entails, and Amtrak does not seriously defend the district court's characterization of Plaintiffs' concerns as "idiosyncratic." Opening Br. 40–41 (citing JA 105 (Dist. Ct. Op.)). Amtrak nonetheless asks this Court to conclude that the addition of a *binding* agreement to arbitrate disputes "does not sufficiently affect the relevant product to confer standing." Amtrak Br. 36. But Amtrak cannot excise the arbitration provisions from its offer of services for purposes of Article III for the simple reason that Plaintiffs cannot decline the arbitration provisions when purchasing rail tickets. Thus, this dispute is not over a "desired characteristic" that is "attenuated … from the underlying product being purchased," *id.* at 39, but a characteristic that Amtrak has elected to make an intrinsic and non-negotiable component of the product it offers for sale. For Amtrak, and therefore for Plaintiffs, rail travel and a binding arbitration agreement are joined at the hip.

The harm to Plaintiffs is indistinguishable from the harm to the consumer in *Consumer Federation of America*, who was "deterred" from

purchasing high-speed internet service because the company could restrict his choice of internet service provider and access to content. 348 F.3d at 1012. Amtrak, by its own *ipse dixit*, labels those undesired characteristics as "core" rather than "ancillary," Amtrak Br. 37, but neither that case nor any other deconstructs a litigant's desired product in those terms. Further, what Amtrak characterizes as "ancillary" is "core" to Plaintiffs, and Amtrak's decision to require passengers and purchasers to forfeit their right to go to court if they wish to travel by train shows that the term is substantively important to Amtrak as well.

Amtrak's approach, moreover, guarantees capricious outcomes. For example, if Amtrak refused to sell rail tickets to an individual outright, Amtrak seemingly agrees that the individual would have standing as a result of being "*prevented*" from traveling by rail. *Id.* at 36 (quoting *Coalition for Mercury-Free Drugs v. Sebelius*, 671 F.3d 1275, 1281 (D.C. Cir. 2012)). Where, however, Amtrak refuses to sell tickets to individuals who wish to retain their right to sue, Amtrak asserts that those individuals lack standing—although the harm is exactly the same. Similarly, Amtrak recognizes that actions that have an "effect on price" may cause injury, *id.* at 38, and states that the arbitration condition "does not change the tickets' price one cent," *id.* at 36. But regardless of whether the price of a rail ticket

has changed, the *value* of a ticket to Plaintiffs has, because now the "price" of the ticket includes an irrevocable waiver of their rights. *See* Opening Br. 37. Furthermore, under Amtrak's approach, a rule curtailing investment options gives rise to an injury even absent evidence of economic harm, *id.* at 36 (citing *Chamber of Commerce*, 412 F.3d at 136), but a rule curtailing consumer's constitutionally protected litigation rights would be categorically unreviewable regardless of the value of those rights to the consumer. Amtrak identifies nothing in Article III principles that supports treating harm to consumers' ability to control their legal affairs as less concrete than harm to their ability to control their financial affairs.

At bottom, Amtrak's argument is that this Court must artificially limit the characteristics of a product or service that can give rise to consumer injury because otherwise there would be "no limit" on suits against private companies. Amtrak Br. 39. But recognizing that consumers suffer real harm when they cannot purchase desired goods and services is no more extraordinary than recognizing that businesses suffer real harm when they cannot sell the goods and services they wish to sell. *See CC Distribs., Inc. v. United States*, 883 F.2d 146, 150 (D.C. Cir. 1989) ("a plaintiff suffers a constitutionally cognizable injury by the loss of an opportunity to pursue a benefit, such as a … contract" (emphasis removed)); *cf. Blue Shield of Va. v.*

McCready, 457 U.S. 465, 483 (1982) (holding that a consumer facing "a Hobson's choice" "between visiting a psychologist and forfeiting reimbursement, or receiving reimbursement by forgoing treatment by the practitioner of their choice" suffered an antitrust injury). No constitutional principle supports Amtrak's theory that the Court may refuse to recognize consumer injury simply because doing so might support standing in other suits against private companies that cause harm to consumers.

Indeed, as Plaintiffs have explained, whether a business should be held accountable for the harms their actions cause consumers is properly a question answered by substantive laws that govern causes of actions and remedies, not Article III. Opening Br. 46. Amtrak derides the provisions of such laws as "happenstance," Amtrak Br. 39, but they reflect the judgment of democratically accountable lawmakers and common-law courts as to the optimal societal balance between the interests of business and the protection of consumers. Article III standing, by contrast, sets an "irreducible constitutional minimum" for the exercise of judicial authority, *Defs. of Wildlife*, 504 U.S. at 560, that is beyond the reach of normal policymaking mechanisms. Rather than vindicating the "proper—and properly limited—role of the courts in a democratic society," *Summers v. Earth Island Inst.*,

555 U.S. 488, 492–93 (2009) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)), Amtrak's view of Article III standing would undermine it.

In any event, despite Amtrak's attempt to don the mantle of a "traditional corporation," *id.* at 35, this case does not involve the private sector. Plaintiffs have alleged that Amtrak is "a component of the federal government for purposes of the Constitution," JA 9–10 (Compl. ¶ 16) (citing *Ass'n of Am. R.Rs.*, 575 U.S. 43 (2015), and *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374 (1995)), and their claims arise out of Amtrak's status as a governmental enterprise bound by the Constitution and the limits of its congressionally delegated authority, *id.* at 12–14 (¶¶ 28–45). *See* Opening Br. 46–47. Accordingly, whether Article III standing principles would apply differently to a private enterprise's decisions about the commercial products and services it offers to consumers is not a question that is before the Court in this case.

II. Plaintiffs' injury can only be redressed now.

Plaintiffs seek the ability to purchase rail tickets without an arbitration condition, and obtaining that relief would guarantee that they cannot be forced into private arbitration. Without judicial intervention, Plaintiffs' only means of obtaining that guarantee would be to avoid using passenger rail service altogether—which by its very nature cannot vindicate their interest in

traveling by rail. Amtrak does not seriously dispute the dilemma Plaintiffs face. Rather, its argument boils down to the proposition that, because the likelihood that Plaintiffs' travels will result in an arbitration proceeding is low, Plaintiffs' interest in declining to give their irrevocable consent to Amtrak's arbitration regime does not give rise to a sufficiently "imminent" injury or "ripe" controversy to satisfy Article III. Neither applicable legal principles nor the record in this case support Amtrak's cavalier approach toward Plaintiffs' desire to retain their constitutional rights.

A. Plaintiffs' standing to challenge Amtrak's arbitration condition does not depend on commencement of arbitration proceedings.

Amtrak observes that other courts in other cases have dismissed other challenges to arbitration provisions where an arbitration proceeding was not at hand. Amtrak Br. 13–14. Amtrak does not identify, however, any case that sets forth the *per se* rule that Amtrak asks this Court to adopt: that every challenge implicating an arbitration provision is premature until an arbitration has occurred. Just as a string cite to cases in which environmental plaintiffs are found to lack standing does not mean that environmental plaintiffs always lack standing, a string cite to arbitration decisions arising in different contexts should not determine the Court's decision on Plaintiffs' standing in this case.

Amtrak admits that, in the case most analogous to this one, the Eleventh Circuit "did find that the plaintiffs had standing" to challenge the legality of conditioning a credit agreement on an arbitration clause. Amtrak Br. 25 (citing *Bowen v. First Family Fin. Servs., Inc.*, 233 F.3d 1331 (11th Cir. 2000)); *see also* Opening Br. 32–33 (discussing *Bowen*). Amtrak argues, however, that *Bowen* is distinguishable because the plaintiffs there alleged discrimination under the Truth in Lending Act, and "it was the discrimination against them based on their desire not to arbitrate that caused their injury." Amtrak Br. 25. But that purported distinction is word play. Like the *Bowen* plaintiffs, Plaintiffs are would-be customers who "would be denied [a rail ticket] if [they] declined to sign the arbitration agreement in order to preserve [their] right to litigate under the [Constitution]," and they could characterize their injury as being "that [Amtrak] discriminates against [them] based on a good faith" desire to preserve "their rights under the [Constitution]." *Bowen*, 233 F.3d at 1335. Likewise, the harm suffered by the *Bowen* plaintiffs could be portrayed as the inability to purchase their desired product: credit without an unwanted arbitration agreement. *See id.* at 1334 ("[t]he plaintiffs have standing to challenge the legality of [the] requirement that customers sign arbitration

agreements as a condition of credit"). Plaintiffs' injury should be assessed based on the reality of the harm they suffer, not semantics.

Amtrak's effort to bring this case within *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), also fails. *See* Amtrak Br. 27–29. As Plaintiffs have explained, *Monsanto* held that a company was required to exhaust a statutorily required arbitration process for calculating compensation for the use of its data before its challenge to that process would be ripe for review. Opening Br. 29; *see also Monsanto*, 467 U.S. at 1019. Unlike here, the statutory scheme in *Monsanto* did not depend on Monsanto's agreement to arbitrate, and Monsanto was not denied any product or service for refusing to agree. Amtrak observes that *Monsanto*'s ripeness holding rested on the presence of "contingent future events." Amtrak Br. 28 (quoting *Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568, 580–81 (1985)). Here, unlike in *Monsanto*, Plaintiffs' injury is not "contingent" on future events. They currently are denied rail tickets unless they agree to waive their right to sue, and their injury cannot be redressed at some later date. *Monsanto*, accordingly, does not speak to Plaintiffs' standing.

The other arbitration cases on which Amtrak relies are similarly inapposite. *See* Amtrak Br. 13–14, 21 (citing cases). Plaintiffs have already addressed *Jones v. Sears Roebuck & Co.*, 301 F. App'x 276, 283 (4th Cir.

2008); *Lee v. American Express Travel Related Services, Inc.*, 348 F. App'x 205 (9th Cir. 2009); and the portion of *Bowen* in which the court dismissed the plaintiffs' claim. *See* Opening Br. 31–33. As explained, in those cases, the plaintiffs' claims were dismissed to the extent they challenged the enforceability of an arbitration provision that the plaintiff had previously entered into. *Id.*

Board of Trade of Chicago v. CFTC, 704 F.2d 929 (7th Cir. 1983), is even further afield. There, the plaintiff argued that an arbitration requirement imposed by regulation violated the Seventh Amendment right to trial by jury. The court dismissed the claim "because a specific factual context is required before a court can decide whether a right to a jury trial exists." *Id.* at 933. By contrast, no additional factual context is necessary to decide Plaintiffs' statutory and constitutional claims. And in *Meyer v. Sprint Spectrum L.P.*, 200 P.3d 295 (Cal. 2009), the California Supreme Court addressed statutory standing under state law, not Article III standing.

Amtrak nonetheless contends that these cases are analogous because the plaintiffs there claimed that "the very existence" of arbitration provisions "violated their constitutional and statutory rights." Amtrak Br. 21. But Plaintiffs do not assert *injury* from the "existence" of Amtrak's arbitration provisions, but from Amtrak's decision to tie acceptance of the arbitration

provisions to the ability to access rail travel. If Amtrak had chosen to make the arbitration agreement an optional feature, its "existence" would not have injured Plaintiffs.

Amtrak also asserts that, just as Plaintiffs must choose whether to forgo rail service or consent to the arbitration provisions, plaintiffs in other cases who are "already subject to an arbitration clause" must choose "between continuing to accept that provision or forgoing a desired service by canceling the contract." Amtrak Br. 23. There may well be circumstances in which a plaintiff who had the ability to avoid the possibility of arbitration by canceling a contract could assert injury on such a basis; indeed, the case Amtrak cites recognizes that the justiciability analysis should account for the plaintiff's situation. *Geldermann, Inc. v. CFTC*, 836 F.2d 310, 319 n.9 (7th Cir. 1987) (stating that the plaintiff "could have satisfied the ripeness requirement" by resigning from its board of trade membership). But Amtrak identifies no case in which a plaintiff subject to an existing arbitration clause asserted such an injury, much less one in which a court rejected it. That may be because even if a plaintiff could assert injury on such a basis, very few plaintiffs would have valid claims that could be supported by such an injury: Defendants in consumer arbitration cases are typically private businesses, and private businesses generally may require their customers to accept

mandatory arbitration terms. Thus, a consumer plaintiff seeking to contest a private defendant's *authority* to condition a contract on an arbitration agreement, as opposed challenging the *validity* or *enforceability* of a particular arbitration agreement on general contract-law grounds, would typically lose on the merits unless the plaintiff could identify a specific federal statute that potentially barred the practice, as the plaintiff in *Bowen* attempted to do. 233 F.3d at 1334.

As Amtrak recognizes, however, Plaintiffs' claims are different because they center on Amtrak's statutory and constitutional power to "compel[] agreement to an arbitration provision" as a condition of rail travel. Amtrak Br. 22. Although Amtrak also suggests that Plaintiffs' claims are "tied to rights" that Plaintiffs would be "giving up *at the time adjudication occurs*," *id.* at 22–23, each of Plaintiffs' causes of action focuses on "Amtrak's decision to impose the Arbitration Agreement on plaintiffs as a term and condition of passenger rail service." JA 9–11 (Compl. ¶¶ 31, 35, 41, 45); *see also* Mem. in Supp. of Pls. Mot. for Summ. J. 32–35, Dist. Ct. ECF No. 10 (discussing unconstitutional-conditions doctrine). Amtrak passengers "give up" their rights when they consent to arbitration, not when an arbitration occurs. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010)

(recognizing "basic precept that arbitration is a matter of consent, not coercion" (internal quotation marks omitted)).

B. Plaintiffs' injury is imminent.

1. Amtrak embraces the district court's "chain of events" theory, which gives no weight to Plaintiffs' interest in obtaining rail travel without entering into an irrevocable arbitration agreement and, instead, regards an arbitration proceeding as the only possible harm Plaintiffs can suffer. Amtrak Br. 16 (quoting JA 103 (Dist. Ct. Op.)). Like the district court, Amtrak does not grapple with the harm that Plaintiffs would suffer if they must forgo rail service to avoid waiving their rights. *See* Opening Br. 22. As this Court has recognized, a plaintiff forced to choose between two undesirable options has standing to seek redress that would make a third, desirable option available to it. *See City of Oberlin v. FERC*, 937 F.3d 599, 604 (D.C. Cir. 2019) ("a landowner is injured in fact when she is *put to the choice* of having to either reach an agreement with a pipeline seeking to access her property or have her property condemned," and has standing where vacatur of the agency's order would restore her rights). Amtrak may believe that committing to arbitration is a risk worth taking, but Plaintiffs have a cognizable interest in deciding for themselves whether to gamble with their legal rights. *See Idaho Power Co. v. FERC*, 312 F.3d 454, 460 (D.C. Cir.

2002) (holding that power company had standing where it was required to "enter a shorter-term contract with its associated market risks"); *see also Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991) (recognizing a plaintiff's interest in litigating in "the forum of their choice").

Amtrak also contends that Plaintiffs cannot suffer an "imminent" injury unless they commit to using rail transportation for specific future trips. Amtrak Br. 17; *see also id.* at 41–42. This Court's precedents, however, recognize that the "risk of losing out on the opportunity to purchase [a] desired product" is an imminent injury. *Orangeburg*, 862 F.3d at 1079–80 (finding imminent injury where the plaintiff will seek the desired product "in the next few years"). Thus, to have Article III standing, Plaintiffs need only show that they are "likely" to travel on Amtrak "in the reasonably foreseeable future" if the mandatory arbitration provision is removed. *Carney v. Adams*, 141 S. Ct. 493, 500 (2020).

As Plaintiffs have explained, they have used Amtrak for business travel in the past, hold jobs that will require intercity travel in the future, and would use Amtrak for such travel but for the deterrent effect of the arbitration condition. Opening Br. 22–23; *see also* JA 16–17 (Weissman Decl.), 18–19 (Llewellyn Decl.). Given Plaintiffs' travel needs, coupled with Amtrak's "very

strong" position in the Northeast Corridor (Opening Br. 3, quoting JA 93 (FY 2018 Company Profile)), Plaintiffs have established a "probability of harm" sufficient to satisfy the imminence requirement. *Orangeburg*, 862 F.3d at 1078 (internal quotation marks omitted); *see also Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 (1977) (holding that individual suffered injury because he would "probably move" to housing development whose construction was thwarted by the challenged action).

Contrary to Amtrak's contention (at 16), Plaintiffs' position is not comparable to that of the affiants in *Defenders of Wildlife*. The Court there faulted the affiants' "'some day' intentions" to go to foreign locations to observe wildlife that the challenged agency action allegedly would harm. 504 U.S. at 564. The Court explained that alleging that an injury will occur "'in this lifetime'" fails "to ensure that the alleged injury is not too speculative for Article III purposes." *Id.* at 565 n.2. Plaintiffs' future use of Amtrak, by contrast, is not speculative, but likely. *See Sierra Club v. FERC*, 827 F.3d 59, 68 (D.C. Cir. 2016) (holding that "a statement of definite dates" is not necessary "to establish Article III standing where" the declarant "lives an hour's drive from the affected area and … 'frequently' fishes, boats, and duck hunts in the waters around the Terminal.").

Amtrak's suggestion (at 18) that the pandemic somehow alters Plaintiffs' future use of rail transportation lacks merit, because their work-related travel needs are inherent aspects of their jobs. *See* JA 16–17 (Weissman Decl. ¶ 4); 18–19 (Llewellyn Decl. ¶ 4). Amtrak cites no authority to support its suggestion that temporary disruptions that affect individuals' ability to make immediate concrete plans, such as an unprecedented worldwide public health emergency, eliminate an Article III case or controversy.

2. Like the district court, Amtrak seeks to shift the focus from Plaintiffs' dilemma—whether to waive their rights or preserve their rights by avoiding Amtrak—to the distinct harm that would occur if Plaintiffs purchased a rail ticket and arbitration proceedings were later instituted for claims arising out of their travel. Amtrak Br. 18–20, 26, 29; JA 103–04 (Dist. Ct. Op.). As Plaintiffs have explained, that approach fails to recognize their interest in refusing consent to unwanted legal risks, because it would force them to give their consent to such risks before they can raise their claims. Opening Br. 23–24. Plaintiffs have also explained that, once they consent, the arbitration agreement, its delegation clause, and the Federal Arbitration Act (FAA) would likely bar a federal court from addressing the merits of the

claims they raise here. *Id.* at 24–27. Amtrak has no adequate response to these points.

First, Amtrak seeks to portray Plaintiffs' injury as an "increased risk" of being subject to an arbitration proceeding, which permits Amtrak to argue that the risk is not sufficiently "substantial" to satisfy Article III. Amtrak Br. 20 (quoting *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 914 (D.C. Cir. 2015)). Plaintiffs, however, do not assert standing based on an increased risk of future harm. Rather, they assert a present harm because they are required to consent to Amtrak's arbitration provisions in order to travel by rail. To be sure, Plaintiffs' desire not to consent is *motivated* by their preference to avoid the risk of arbitration, but the interest that is harmed is their right to avoid contracts that compel them to accept unwanted risk. The increased-risk-of-harm cases do not apply to this situation. *See Food & Water Watch*, 808 F.3d at 914 (noting that standing is easier to establish when the plaintiff is "directly subjected to the regulation they challenge" (internal quotation marks omitted)); *Idaho Power*, 312 F.3d at 461 ("it is inconceivable that Idaho Power could be subjected to a FERC order requiring it to enter into a specific contract concerning the use of its property but lack standing to challenge that order").

Likewise, Amtrak's reliance on *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), is misplaced. *Clapper* held that the plaintiffs lacked standing to challenge a governmental surveillance program based on their "highly speculative fear" that they would be surveilled, *id.* at 410, and stated that the plaintiffs could not create a present injury by "inflicting harm on themselves" to mitigate their fears, *id.* at 416. The surveillance program in *Clapper*, however, did not require the plaintiffs to *waive* their right to be free of surveillance, or do anything else, as a condition of obtaining a product or service. *See id.* at 419 (indicating that a "'chilling effect'" resulting from "a governmental policy *that does not regulate, constrain, or compel any action on their part*" is insufficient to confer standing (emphasis added)). *Clapper*, accordingly, does not address Plaintiffs' situation.

Second, Amtrak does not seriously counter Plaintiffs' explanation of why they would likely be unable to obtain a *de novo* court ruling on their claims after they consent to the arbitration provisions. Amtrak offers its assurance that a court can, in fact, invalidate the provisions (including the delegation clause) as "unconscionable" if Plaintiffs' statutory and constitutional claims have merit. *See* Amtrak Br. 31. But Amtrak cites no authority to support its suggestion that Plaintiffs' claims would constitute the type of "generally applicable contract defense[]" that the FAA authorizes a

court to consider, *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68 (2010) (internal quotation marks omitted), or that their claims, if meritorious, would render the arbitration provision (or its delegation clause) "unconscionable," *see AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (explaining that unconscionability "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue" cannot invalidate an arbitration agreement). The absence of such authority highlights Plaintiffs' interest in declining to consent to the arbitration agreement in the first place—and why their injury can only be redressed now.

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 Reply Brief for Robert Weissman and Patrick Llewellyn complies with the type-volume limitations of FRAP 32(a)(7)(B). The brief is composed in a 14-point proportional typeface, Georgia. As calculated by my word processing software (Microsoft Word 365), the brief (excluding those parts permitted to be excluded under the Federal Rules of Appellate Procedure and this Court's rules) contains 5900 words.

/s/ Nandan M. Joshi
Nandan M. Joshi

CERTIFICATE OF SERVICE

I hereby certify that, on April 19, 2021, the foregoing Reply 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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