No. 22-16868

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHANNON MCBURNIE; APRIL SPRUELL,
Plaintiffs - Appellees,

v.

RAC ACCEPTANCE EAST, LLC,
Defendant - Appellant.

On Appeal from an Order of the United States District Court
for the Northern District of California
No. 3:21-cv-01429-JD
(Honorable James Donato)

BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, RETAIL LITIGATION CENTER, INC. AND NATIONAL RETAIL FEDERATION IN SUPPORT OF DEFENDANT - APPELLANT

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The Chamber of Commerce of the United States of America ("Chamber") states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

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IDENTITY, INTEREST, SOURCE OF AUTHORITY[1]

Amici curiae represent a group of associations with a shared interest in the enforcement of arbitration agreements.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community. The Chamber has participated as *amicus curiae* in numerous cases before the Supreme Court and this Court that concern the Federal Arbitration Act ("FAA"), including cases presenting

[1] No counsel for any party authored this brief in whole or in part. No entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

the issues at the core of this appeal. *See, e.g.*, Brief of the Chamber of Commerce of the United States of America *et al.* as *Amici Curiae* in Support of Petitioner, *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022) (No. 20-1573); Brief *Amicus Curiae* of the Chamber of Commerce of the United States of America in Support of Defendants-Appellants, *Vasquez v. Cebridge Telecom CA, LLC*, No. 21-17009 (9th Cir. Oct. 5, 2022).

The Retail Litigation Center, Inc. ("RLC") is the only trade association dedicated to representing the retail industry in the courts. In this capacity, the RLC provides courts with the retail industry's perspective on a range of important legal issues affecting its members. Collectively, the RLC's members employ millions of workers nationwide, provide goods and services to tens of millions of consumers, and generate tens of billions of dollars in annual sales. Since its founding in 2010, the RLC has filed more than 200 *amicus* briefs on a range of issues important to the country's leading retailers.

The National Retail Federation ("NRF") is the world's largest retail trade association, representing discount and department stores, home

goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and internet retailers from the United States and more than 45 countries. NRF empowers the industry that powers the economy. Retail is the nation's largest private-sector employer, contributing $3.9 trillion to annual GDP and supporting one in four U.S. jobs—52 million working Americans. For over a century, NRF has been a voice for every retailer and every retail job, educating and communicating the powerful impact retail has on local communities and global economies. NRF regularly submits *amicus curiae* briefs in cases raising significant legal issues for the retail community.

Amici have a strong interest in the issues presented by this appeal. Many members employ arbitration clauses in consumer contracts. Those arbitration clauses sometimes contain provisions similar, if not identical, to those construed by the court below. Their salient features include (i) a specification that arbitration shall proceed "on an individual basis"; (ii) a limitation on the arbitrator's remedial authority to award non-individualized relief; and (iii) a severability clause indicating that if any aspect of the individualized arbitration provision is unenforceable "as to

a particular claim for relief, then that claim (and only that claim) must be severed from the arbitration and may be brought in court." *See, e.g.*, Defendant-Appellant's Excerpts of Record ("ER")-109. The district court's erroneous conclusions about both preemption and severability implicate these interests.

Federal Rule of Appellate Procedure 29(a)(2) supplies the source of authority for this brief. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Amici agree with Appellant that the district court's order should be reversed. Relying on this Circuit's opinion in *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819 (9th Cir. 2019), the district court held, ER-012–13, that Section 2 of the FAA did not preempt California's rule conditioning the enforceability of arbitration agreements on the availability of "public injunctive relief" (hereinafter "the *McGill* rule"). *See McGill v. Citibank, N.A.*, 393 P.3d 85 (Cal. 2017). That conclusion is incorrect. *Blair* was wrong as an original matter and, contrary to the district court's reading,

cannot survive the Supreme Court's recent decision in *Viking River*. This Circuit's very recent decision in *Bonta* buttresses this view about the FAA's preemptive sweep: The judge-made *McGill* rule, even if a facially neutral bar on the prospective waiver of a public injunction request, "stands as an unacceptable obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the FAA." *Chamber of Com. of U.S. v. Bonta*, No. 20-15291, 2023 WL 2013326 at *9 (9th Cir. Feb. 15, 2023) (internal quotations omitted). Taking into account *Viking River* and *Bonta*, *amici* focus here on two reasons supporting reversal.

First, Section 2's plain language requires this result. Section 2 provides that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the *revocation* of any contract." 9 U.S.C. § 2 (emphasis added). A "ground" for "revocation" is limited to defects in "the formation of the arbitration agreement." *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 353 (2011) (Thomas, J., concurring); *see also Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018) (citing test from Justice Thomas' concurrence in

Concepcion). Under this standard, the *McGill* rule is not a "ground" for "revocation." It does not call into question the "formation" of an arbitration agreement. Thus, Section 2 preempts the *McGill* rule and requires the district court to treat the arbitration agreement in this case as "valid, irrevocable, and enforceable." 9 U.S.C. § 2.

Second, the district court's severability analysis is incompatible with *Viking River*. In relevant part, the severability provision in this case specified: "If there is a final judicial determination that applicable law precludes enforcement of this Paragraph's limitations as to a particular claim for relief, then that claim (and only that claim) must be severed from the arbitration and may be brought in court." ER-109. Nevertheless, after concluding (erroneously) that Section 2 did not preempt the *McGill* rule, the district court held that "the arbitration agreement's severance clause requires that each claim, in its entirety, 'be severed for judicial determination.'" ER-014 (citing *Blair*, 928 F.3d at 832).

But in *Viking River*, the Supreme Court held that, even if certain *remedies* cannot be prospectively waived, the plaintiff's claim of

individualized injury still must be arbitrated. 142 S. Ct. at 1919. The sort of severability analysis undertaken in *Blair* (and unreflectively applied by the district court, ER-014) is inconsistent with the Supreme Court's approach. Under that approach, Appellant was "entitled to compel arbitration of [Appellees'] individual claim[s]." *Viking River*, 142 S. Ct. at 1925. In this separate respect, by undermining the arbitrability of individualized claims, the severability analysis announced in *Blair* and parroted by the district court "interferes with fundamental attributes of arbitration." *Bonta*, 2023 WL 2013326 at *6 (quoting *Concepcion*, 563 U.S. at 344).

ARGUMENT

This case, just like *Viking River*, concerns a court's role when examining challenges to the enforceability of arbitration agreements. As in all cases involving parties' private contractual choices, that role is limited. With arbitration agreements, the judicial role is confined to certain "gateway matters." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 86 (2002). So courts generally may determine whether the contract containing the arbitration agreement was formed at all. *See*

Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 307 (2010). Likewise, they sometimes may resolve challenges to the validity of the arbitration agreement (unless the parties have delegated those questions to the arbitrator). *See Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 72–75 (2010); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). Finally, courts sometimes may examine the scope of an arbitration clause though, in doing so, federal law requires them to resolve "any doubts … in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983).

In the exercise of this limited role, courts may not "substitute [their] preferred economic policies for those chosen by the people's representatives" in the FAA. *Epic Systems*, 138 S. Ct. at 1632. Congress passed the FAA to reverse the "centuries of judicial hostility to arbitration agreements" and require the enforcement of parties' private contractual commitments. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974); *see also Epic Systems*, 138 S. Ct. at 1621; *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272–73 (1995). As this Circuit just recently reiterated, "[t]he Supreme Court's cases 'place it beyond

dispute that the FAA was designed to promote arbitration.'" *Bonta*, 2023 WL 2013326 at *6 (quoting *Concepcion*, 563 U.S. at 345).

This "preference" for arbitration, *id.* (quoting *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1160 (9th Cir. 2013)), reflects Congress's endorsement of its advantages, an endorsement buttressed by the Supreme Court and scholarly commentary. Private dispute resolution, as the Supreme Court has found, offers parties many benefits including "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010). Numerous studies have validated this judicial finding and demonstrated how arbitration supports individual consumers through the reduction of process costs and the speedy, informal, expeditious resolution of their disputes. *See, e.g.*, Nam D. Pham, Ph.D. & Mary Donovan, *Fairer, Faster, Better III: An Empirical Assessment of Consumer and Employment Arbitration*, NDP Analytics (2022), https://instituteforlegalreform.com/wp-content/uploads/2022/03/FINAL-ndp-Consumer-and-Employment-Arbitration-Paper-2022.pdf; Andrea Cann Chandrasekher & David Horton, *Arbitration*

Nation: Data from Four Providers, 107 Cal. L. Rev. 1, 51, 52, 65 (2019) (quoting *Concepcion*, 563 U.S. at 345) (noting that "[a]rbitration has the potential to be an elegant shortcut to the court system," "is almost certainly faster than litigation," and "is surprisingly affordable for plaintiffs" and concluding that "[c]reating incentives for plaintiffs' lawyers to arbitrate is both good policy and dovetails" with the FAA's objective of "promot[ing] arbitration").

Out of respect for these well recognized benefits, several doctrines demarcate the boundaries of permissible judicial intervention. Standing requirements ensure that parties can challenge the enforceability of their arbitration agreements only when they seek to redress a constitutionally cognizable injury under Article III. *See infra* at 31–36. Doctrines like *kompetenz/kompetenz* and separability reduce the risk that judicial scrutiny of arbitration agreements treads upon the merits or other issues contractually delegated by the parties to the arbitrator. *See Jackson*, 561 U.S. at 72–75; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967). Finally, Section 2's preemption doctrine polices illegitimate efforts by state courts to resurrect that ancient hostility

against arbitration, whether through overt anti-arbitration doctrines or "more subtle methods, such as by 'interfer[ing] with fundamental attributes of arbitration.'" *Epic Systems*, 138 S. Ct. at 1622 (alteration in original) (quoting *Concepcion*, 563 U.S. at 344); *see also Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 581 U.S. 246, 251 (2017); *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 54–58 (2015); *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17 (2012) (per curiam); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012) (per curiam); *Bonta*, 2023 WL 2013326 at *6.

Despite these continued clear commands, California courts regrettably have deployed a variety of "methods" (both overt and "subtle") that interfere with the "fundamental attributes of arbitration." These judicially crafted anti-arbitration doctrines have necessitated regular corrective action by the Supreme Court and this Circuit. *See Kilgore v. KeyBank, Nat. Ass'n*, 718 F.3d 1052, 1058–61 (9th Cir. 2013) (*en banc*). For example, California's *Broughton-Cruz* rule held that public injunctions could not be resolved in arbitration. *See Broughton v. Cigna Healthplans*, 988 P.2d 67 (Cal. 1999); *Cruz v. PacifiCare Health Sys., Inc.*, 66 P.3d 1157 (Cal. 2003). This Circuit subsequently found that Section 2

preempted that rule. *See Ferguson v. Corinthian Colls., Inc.*, 733 F.3d 928 (9th Cir. 2013).

Similarly, California's *Iskanian* rule barred contractual waiver of representative claims under California's Private Attorneys General Act ("PAGA"). *See Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129 (Cal. 2014). The Supreme Court recently held that Section 2 likewise preempted the *Iskanian* rule insofar as it precluded arbitration of a plaintiff's individual claims. *See Viking River*, 142 S. Ct. at 1924–25. In doing so, it abrogated this Circuit's prior decision in *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425 (9th Cir. 2015), which had reached a contrary conclusion on Section 2 preemption.

California's *McGill* rule, invalidating waivers of public injunction remedies, fits this same pattern of state judicial overreach. Yet this Circuit's response represents an anomaly. In *Blair*, this Court held that Section 2 of the FAA did not preempt the *McGill* rule. 928 F.3d at 827–28. As a corollary to this first-order holding on preemption, *Blair* read the arbitration clause's severability provision in that case to require

judicial resolution of state statutory claims that included a request for a public injunction. *Id.* at 831–32.

Blair was incorrect as an original matter, and *Viking River* now requires this Court to abandon it. While panels (and district courts) ordinarily must follow prior panel opinions, that obligation ends when intervening Supreme Court decisions require a course correction. *See, e.g.*, *Avilez v. Garland*, 48 F.4th 915, 923 (9th Cir. 2022) (quoting *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (*en banc*)) (noting that a panel may depart from Circuit precedent if "our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority"); *Apache Stronghold v. United States*, 38 F.4th 742, 763 (9th Cir. 2022) (quoting *Miller*, 335 F.3d at 900) (noting that *Miller* "permit[s] Ninth Circuit panels to treat as 'effectively overruled' any Ninth Circuit cases that are 'clearly irreconcilable' with 'intervening Supreme Court authority'").

This is just such a case. *Blair*'s preemption analysis rested on reasoning that the Supreme Court rejected in *Viking River*. When this Circuit issued *Blair*, it admitted that its prior "decision in *Sakkab* all but

decides this case." 928 F.3d at 825. *Viking River* rejected *Sakkab*. So it logically follows that, after *Viking River*, *Blair* collapses too. The *McGill* rule, just like the *Iskanian* rule invalidated in *Viking River*, exemplifies just another instance "of the myriad 'devices and formulas' used [by California courts] to declare arbitration against public policy." *Bonta*, 2023 WL 2013326 at *6 (quoting *Concepcion*, 563 U.S. at 342).

This appeal offers an opportunity to correct *Blair*'s original errors. While the district court attempted to confine *Viking River* largely to PAGA claims, ER-013, that crabbed interpretation is unsupportable. Appellant has explained why *Blair*'s preemption analysis does not survive *Viking River*.[2] Appellant's Brief at 50–63. This brief elaborates on two additional grounds for reversal: (1) a preemption argument rooted in Section 2's plain meaning and (2) flaws in the district court's severability analysis.

[2] *Amici* also agree with Appellant that it did not waive its right to compel arbitration. Appellant's Brief at 23–40.

I. The Plain Language of Section 2 Precludes Application of the *McGill* Rule.

Amid the doctrinal debates, it is worth recalling that Section 2 preemption analysis ultimately turns on a question of statutory construction. In all such cases, courts should begin with the statute's text. *See, e.g.*, *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006). When the text supplies a clear answer, that ends the analysis, averting forays into interpretive methodologies that could produce judicial policymaking disguised as statutory interpretation. *See, e.g.*, *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992). Such judicial restraint is especially important in arbitration where the parties' agreement rests on their shared desire to resolve any dispute extrajudicially, especially "in view of Congress's clear intent … to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone*, 460 U.S. at 22.

Section 2 demands that heightened judicial restraint. Its "enforcement mandate," *Viking River*, 142 S. Ct. at 1917, unambiguously declares that arbitration agreements are "valid, irrevocable, and

enforceable" as a matter of federal law and forecloses state efforts "to undercut the enforceability of arbitration agreements." *Southland Corp. v. Keating*, 465 U.S. 1, 10, 16 (1984); *see also Bonta*, 2023 WL 2013326 at *6. Its savings clause preserves a limited range of state-law defenses but only where they constitute a "ground" for the "revocation of any contract." *See Viking River*, 142 S. Ct. at 1917. (A recent amendment to Section 2 also creates a defense for certain claims related to sexual assault and sexual harassment, described in Chapter 4 of the FAA and discussed *infra* at 20–21, but does not cover the claims at issue here.)

Read in context, Section 2's savings clause has a limited sweep. The juxtaposition of the broad language of the preemption provision ("valid, irrevocable, and enforceable") and the narrow language of the savings clause ("grounds … for the revocation") suggests that Section 2 preserves only "revocation" defenses, *not* those defenses bearing upon validity or enforceability. *See Concepcion*, 563 U.S. at 354 (Thomas, J., concurring) ("The use of only 'revocation' and the conspicuous omission of 'invalidation' and 'nonenforcement' suggest that the exception does not include all defenses applicable to any contract but rather some subset of

those defenses."); *see also Epic Systems*, 138 S. Ct. at 1632–33 (Thomas, J., concurring); *Am. Express Corp. v. Italian Colors Rest.*, 570 U.S. 228, 239 (2013) (Thomas, J., concurring); *Epic Systems*, 138 S. Ct. at 1622 (citing test from Justice Thomas' concurrence in *Concepcion*).

The FAA does not define "revocation," but its historical antecedents illuminate matters. Prior to the FAA's enactment in 1925, "revocation" had two distinct meanings. As the Supreme Court explained in *Viking River*, one meaning was specific to arbitration agreements: arbitration agreements, viewed as illegal contracts attempting to "oust" courts of jurisdiction, were "revocable" until the moment that the arbitrator rendered the award. 142 S. Ct. at 1917 n.3; *see also* Wesley A. Sturges, *A Treatise on Commercial Arbitrations and Awards* §15, at 45 (1930) ("Sturges"); Charles Newton Hulvey, *Arbitration of Commercial Disputes*, 15 Va. L. Rev. 238 (1929).

A second meaning of "revocability" was generally applicable to all contracts—formation defects like fraud or duress entitling a party to nullify a contract. Sturges at 47. Prior to 1925, some state courts criticized the first, arbitration-specific revocability defense and argued,

instead, that the grounds for refusing to enforce arbitration agreements should be confined to the second meaning of revocability, namely a defense applicable to contracts generally. *See Del. & H. Canal Co. v. Pa. Coal Co.*, 50 N.Y. 250, 258 (1872); *Henry v. Lehigh Valley Coal Co.*, 64 A. 635, 636 (Pa. 1906).

In declaring arbitration agreements "irrevocable" but still subject to the "grounds … for the revocation of any contract," Congress discarded this first, arbitration-specific notion of revocability and preserved the second, generally applicable notion. *See Viking River*, 142 S. Ct. at 1917 n.3. Congress modeled the FAA, including Section 2, on New York's 1920 arbitration statute, which likewise had legislatively abrogated that state's "revocability" doctrine (in the first sense of the term). *See* Katherine V.W. Stone & Richard A. Bales, *Arbitration Law* 26–30 (2d ed. 2010). That is precisely the construction given to those terms by New York authorities in the years between enactment of the New York law and adoption of the FAA. *See, e.g.*, *Zimmerman v. Cohen*, 236 N.Y. 15, 20 (1923) ("The word 'irrevocable' … means that the [arbitration agreement] cannot be revoked at the will of one party to it, but can only

be set aside for facts existing at or before the time of its making which would move a court of law or equity to revoke any other contract . . . ."); *see generally* Julius Henry Cohen, *The Law of Commercial Arbitration and the New York Statute*, 31 Yale L.J. 147, 149 (1921) ("The [New York] act recognizes that the infirmities, common to all contracts, which furnish ground for revocation at law or in equity, may still exist in cases of arbitration agreements."). Thus, the relevant historical understanding against which Congress adopted the term "revocation" supports the proposition that it refers only to generally applicable contract formation defenses.

The FAA's structure confirms this interpretation. Section 4 outlines a procedure for a "party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration" to petition a federal district court to compel arbitration. 9 U.S.C. § 4. It mandates that a court considering such a petition "shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement," on the condition that the

court is "satisfied that the *making* of the agreement for arbitration … is not in issue." *Id.* (emphasis added).

Section 4's reference to the "making" of the agreement gels with a construction of Section 2's language ("grounds … for the revocation") to refer to formation defenses. It "indicates that Congress created an exception to the general rule (that an arbitration clause will be enforced by its terms) only when there is a flaw in the formation of the agreement to arbitrate." *Nat'l R.R. Passenger Corp. v. Consol. Rail Corp.*, 892 F.2d 1066, 1070 (D.C. Cir. 1990); *see also Supak & Sons Mfg. Co. v. Pervel Indus., Inc.*, 593 F.2d 135, 137 (4th Cir. 1979).

Recent amendments to the FAA strengthen this structural argument. Newly added Chapter 4 of the FAA limits the enforceability of arbitration agreements in certain disputes relating to sexual assault or sexual harassment. *See* 9 U.S.C. § 402. In relevant part, Section 402 specifies that an arbitration agreement in such disputes is presumptively not "valid or enforceable." *Id.* Tellingly, it does not use the term "revocable." Section 402's use of the terms "valid" and "enforceable," read alongside Section 2's parallel use of the same terms, suggests that they

have a meaning distinct from "revocable." *See IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005) ("[I]dentical words used in different parts of the same statute are … presumed to have the same meaning."). Issues of validity and enforceability concern defenses where the formation of the agreement is not at issue whereas issues of "revocability" refer specifically to formation defenses.

Finally, this interpretation tracks precedent. As the Supreme Court made clear in its pathbreaking opinion on Section 2, the grounds for revoking an arbitration agreement include *formation* defenses like fraud, duress, and lack of capacity. *Prima Paint Corp.*, 388 U.S. at 403–04. *See also Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1987). Construing "revocation" to refer only to formation defects vindicates the FAA's "basic precept that arbitration is a matter of consent, not coercion." *Stolt-Nielsen S.A.*, 559 U.S. at 681 (internal quotations omitted); *see also Concepcion*, 563 U.S. at 355 n.* (Thomas, J., concurring) ("Contract formation is based on the consent of the parties . . . ."). Consequently, "to come within § 2, a contract defense not only must apply to *any* contract, but also . . . must concern the *revocability*—

not enforceability—of the arbitration agreement." *Rivas v. Coverall N. Am., Inc.*, 842 F. App'x 55, 59, n.2 (9th Cir. 2021) (Bumatay concurring), *vacated*, 142 S. Ct. 2859 (2022) (remanding case for further consideration in light of *Viking River*).

Adjudged against this proper understanding of Section 2, the *McGill* rule is not a "ground" for "revocation of any contract." Indeed, it is not a ground for revocation whatsoever. Rather, as *Blair* itself explained, "the *McGill* rule derives from a general and long-standing [legislative] prohibition on the private contractual waiver of public rights." 928 F.3d at 827. The *McGill* rule represents nothing more than a judicially created public-policy prescription, not a doctrine that renders contracts "revocable." Proscriptions of remedial waivers do not concern contract formation and bear no relation to the "making" of an agreement. *See Arkcom Digit. Corp. v. Xerox Corp.*, 289 F.3d 536, 539 (8th Cir. 2002). Rather, such proscriptions exemplify the sort of law that, while facially applying "to other provisions … unrelated to arbitration" nonetheless, in operation, "focus" on arbitration. *Bonta*, 2023 WL 2013326 at *8. Thus,

Section 2 preempts the *McGill* rule, and the district court should have enforced the arbitration agreement.

II. The District Court's Severability Analysis Rests on an Approach Rejected by *Viking River*.

Even if Section 2 does not preempt the *McGill* rule, the district court's flawed severability conclusion requires reversal. In the final sentence of its opinion, the district court asserted, without analysis, that "under *Blair*, the arbitration agreement's severance clause requires that each claim, in its entirety, 'be severed for judicial determination.'" ER-014 (citing *Blair*, 928 F.3d at 832). This parroting of *Blair*'s strained severability analysis, like the reliance on *Blair*'s flawed preemption analysis, does not survive *Viking River*.

Return to *Blair*. After concluding (erroneously) that Section 2 of the FAA does not preempt the *McGill* rule, *Blair* examined that conclusion's implications under the arbitration clause's severability provision. 928 F.3d at 832. That provision stated: "If there is a final judicial determination that applicable law precludes enforcement of this Paragraph's limitations as to a particular claim for relief, then that claim

(and only that claim) must be severed from the arbitration and may be brought in court." *Id* at 831. The appellants in *Blair* had argued that this language at most required severance of only the request for public injunction; it did not preclude arbitration of the consumer's individual statutory claims. *Id.*

Blair rejected that argument based on two flimsy premises. The first premise was an interpretive one. While acknowledging that parties enjoyed the freedom to divide their claims between arbitrators and courts, *see id.*, *Blair* concluded that the parties had not done so in the severability clause. (Tellingly, the panel did not even attempt to ascertain the law governing its interpretation of the arbitration agreement.) The second premise was a legal one. Citing a jumble of authority (including a rule of civil procedure, a dictionary, and two non-binding judicial decisions not even involving arbitration), *Blair* equated the term "claim for relief" with the term "claim." *Id.* at 831–32. From these two premises, *Blair* concluded that virtually all of the statutory claims, including the plaintiff's individual claims, required judicial determination. *Id.* at 832.

Both premises are wrong. *Blair*'s interpretive premise ignored the Supreme Court's central guidance on this point: "*any* doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . ." *Moses H. Cone*, 460 U.S. at 24–25 (emphasis added); *see also DiCarlo v. MoneyLion, Inc.*, 988 F.3d 1148, 1152 (9th Cir. 2021) ("When in doubt, both federal and state law point toward interpreting [an arbitration agreement] to permit arbitration.").

Blair's legal premise erroneously grafted federal joinder principles onto arbitration. Arbitrations (unlike ordinary civil proceedings) do not follow joinder principles that might apply in federal litigation. Rather, parties enjoy relatively greater freedom to bifurcate matters. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (acknowledging bifurcated arbitration and judicial proceedings in case that might otherwise involve pendent claim jurisdiction); *Moses H. Cone*, 460 U.S. at 20 (acknowledging bifurcated arbitration and judicial proceedings in case that might otherwise involve pendent party jurisdiction).

Indeed, as one example of this greater procedural latitude, some arbitration clauses refer certain requests for emergency equitable relief

to court while keeping the underlying cause of action in arbitration. *See, e.g.*, *Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1380 (6th Cir. 1995) ("adopt[ing] the reasoning of the First, Second, Third, Fourth, Seventh, and arguably the Ninth, Circuits," and holding that "a district court has subject matter jurisdiction under § 3 of the [FAA] to grant preliminary injunctive relief" and "a grant of [such] relief pending arbitration is particularly appropriate and furthers the Congressional purpose behind the [FAA], where the withholding of injunctive relief would render the process of arbitration meaningless or a hollow formality").

Alongside its erroneous premises, *Blair* ignored the problematic "fallout" from its conclusion, which "underscores the implausibility of [its] interpretation." *Van Buren v. United States*, 141 S. Ct. 1648, 1661 (2021). Specifically, *Blair* created a roadmap for plaintiffs to circumvent their arbitration agreements through the simple "artifice" of appending a request for a public injunction (or some other form of non-waivable relief) to each of their claims. *See Ferguson*, 733 F.3d at 935; *Swanson v. H&R Block, Inc.*, 475 F. Supp. 3d 967, 978 (W.D. Mo. 2020). *Blair*'s

severability analysis "covertly accomplishes the same objective" as an overt anti-arbitration rule "by disfavoring contracts that . . . have the defining features of arbitration agreements." *Kindred Nursing Ctrs.*, 137 S. Ct. at 1426; *see also Bonta*, 2023 WL 2013326 at *6**.** Thus, *Blair* was wrong as an original matter.

Apart from these original flaws, *Blair* now "is clearly irreconcilable with" the "reasoning" and "theory" of an intervening Supreme Court decision, namely *Viking River*. *Miller*, 335 F.3d at 900 (*en banc*). The arbitration clause in *Viking River* (like the clause in *Blair*) contained a severability provision. That severability provision specified that (i) if the waiver of a PAGA or other representative action were found invalid, that action would presumptively be litigated in court and (ii) if any "portion" of the waiver remained valid, it would be "enforced in arbitration." *Viking River*, 142 S. Ct. at 1916. After concluding that a remedy sought in that case (a representative PAGA action) was non-waivable, the lower California court reached a second conclusion (not unlike the conclusion reached in *Blair*): It found that, under California law, a PAGA claim on behalf of other individuals could not be separated from an individual

PAGA claim. *Viking River*, 142 S. Ct. at 1923. Consequently, the lower California court refused to compel arbitration of any part of the PAGA claim. *Id.* at 1925.

The Supreme Court rejected this severability analysis. It held that Section 2 preempted California's "built-in mechanism of claim joinder." *Id.* at 1923. In the Supreme Court's view, California's prohibition on PAGA claim-splitting "unduly circumscribes the freedom of parties to determine 'the issues subject to arbitration' and 'the rules by which they will arbitrate.'" *Id.* (citing *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019)). The Court reasoned that the FAA permits contracting parties to depart from "standard rules" of claims joinder, relieving them of any obligation to follow the principles that otherwise would prevail in a garden-variety judicial proceeding. *Id.* at 1923. It found that, under the California court's logic, parties could not prospectively limit claims joinder and, consequently, an employee could "abrogate th[e] [arbitration] agreement after the fact and demand either judicial proceedings or an arbitral proceeding that exceeds the scope jointly intended by the parties." *Id.* at 1924. This "effectively coerce[d] parties

to opt for a judicial forum" rather than realize the benefits of arbitration. *Id.* Accordingly, the Supreme Court concluded that Viking River was "entitled to compel arbitration of [the plaintiff's] individual claim." *Id.* at 1925. *See also Piplack v. In-N-Out Burgers*, No. G061098, 2023 WL 2384502 at *4 (Cal. Ct. App. Mar. 7, 2023) (explaining how *Viking River* modified California's rules governing severability analysis of an arbitration clause).

Blair's severability analysis is "clearly irreconcilable" with the "reasoning" and "theory" of *Viking River*. First, whereas *Blair* was unclear about the law governing the interpretation of the severability clause, *Viking River* makes clear that *federal law* informs that construction—otherwise, Section 2 could not preempt California's prohibition on PAGA claim splitting.

Second, *Viking River* rejected *Blair*'s interpretive premise. *Viking River* requires that any judicial construction of an arbitration clause preserve the parties' ability to realize the benefits of the arbitral forum (in that case by keeping the individual PAGA claim in arbitration). That pro-arbitration principle is the polar opposite of *Blair*'s approach, which

enabled the plaintiff employee to "abrogate th[e] [arbitration] agreement after the fact" and force wholesale judicial resolution of her California statutory claims, including her individual claims, simply by including a request for a public injunction. *Viking River*, 142 S. Ct. at 1924.

Third, *Viking River* rejected *Blair*'s legal premise. Recall that *Blair*'s legal premise rested on a jumble of authority drawn from federal civil practice about the inseparability between "claims" and the "relief" connected to those claims (*supra* at 25–26). That jumble of authority carries no weight after *Viking River*. *Viking River* found that principles of claims joinder, developed in civil litigation, carried no value in arbitration. Rather, the contractual freedom afforded to parties in arbitration encompasses a greater latitude to regulate joinder issues. Even if some *remedies* might warrant judicial resolution, *Viking River* makes clear that finding does not necessitate severing the plaintiff's claim for *individual* relief. Consequently, under *Viking River*, if Section 2 does not preempt a rule barring waiver of a remedy, a court still must order arbitration as to a plaintiff's individual claims.

Here, the district court's severability holding constitutes reversible error under *Viking River*. Even if the district court correctly concluded that Section 2 does not preempt the *McGill* rule (and, to reiterate, *amici* agree with Appellant that this antecedent conclusion was erroneous), it should not have severed Appellees' *individual* statutory claims. *See Piplack*, 2023 WL 2384502 at *4 (applying *Viking River* to require arbitration of party's individual claims). Rather, to give effect to the parties' contractual choices and to avoid "effectively coerc[ing] [Appellant] to opt for a judicial forum," it should have compelled Appellees to arbitrate those claims—just like the Supreme Court did in *Viking River*. 142 S. Ct. at 1912. *See also Zhang v. Superior Ct. of Los Angeles Cnty.*, 85 Cal. App. 5th 167, 183–85 (Cal. Ct. App. 2022) (reading *Viking River* for the proposition that Section 2 preempts rules that "would erect an obstacle to arbitration that is inconsistent with the FAA's principle that parties are free to determine the issues subject to arbitration").

Once the Appellees' request for a public injunction is severed, it fails on justiciability grounds. *See Stover v. Experian Holdings, Inc.*, 978

F.3d 1082, 1087–88 (9th Cir. 2020). While the district court examined the justiciability issues exclusively under the mootness doctrine, ER-013–14, it failed to examine them under the standing doctrine. A federal court has an "independent obligation to assure standing exists." *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009). Under the familiar three-part constitutional test for standing, the plaintiff must show (i) a concrete injury-in-fact, (ii) causation and (iii) that judicial relief would redress the injury. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). A plaintiff must demonstrate standing for each claim and each form of relief, including "injunctive relief." *Id.* at 2208. Failure to prove any of these three elements defeats standing. *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 797 (2021).

In this case, Appellees cannot prove several of the constitutionally required elements of standing. Appellant has explained why Appellees cannot satisfy the injury-in-fact requirement. Appellant's Brief at 40–49. This brief explains why Appellees also cannot satisfy the redressability requirement.

The redressability requirement ensures that "federal courts decide only the rights of individuals" and "do not exercise general legal oversight" over "private entities." *TransUnion*, 141 S. Ct. at 2203 (internal quotations omitted). To effectuate this purpose, redressability requires a "relationship between the judicial relief requested and the injury suffered" by a plaintiff. *California v. Texas*, 141 S. Ct. 2104, 2115 (2021) (internal quotations omitted). That relationship is lacking in cases where a plaintiff's individual claim is sent to arbitration. When that occurs, the residual California public injunction does not "redress or prevent injury to a[n individual] plaintiff" but "benefits the plaintiff, if at all, only incidentally and/or as a member of the general public." *McGill*, 393 P.3d at 90, 89 (internal quotations omitted). *See also Kilgore*, 718 F.3d at 1060 (noting that a public injunction "is for the benefit of the general public rather than the party bringing the action"); *accord DiCarlo*, 988 F.3d at 1152.

Consistent with this view – that a public injunction need not redress a plaintiff-specific injury – several district courts in this Circuit have held that certain plaintiffs in federal court lack standing to pursue

a public injunction. *See Rogers v. Lyft, Inc.*, 452 F. Supp. 3d 904, 919–20 (N.D. Cal. 2020), *aff'd on other grounds*, 2022 WL 474166 (9th Cir. Feb. 16, 2022); *Bow v. Cebridge Telecom, LLC*, 2022 WL 313905, at *4 (E.D. Cal. Feb. 2, 2022); *Herrera v. Wells Fargo Bank, N.A.*, 2020 WL 5804255, at *5 (C.D. Cal. Sept. 8, 2020). This is true even where state law authorizes a plaintiff to seek a public injunction because "that authorization, standing alone, does not confer standing in federal court." *Rogers*, 452 F. Supp. 3d at 919 (citing *Hollingsworth v. Perry*, 570 U.S. 693, 715 (2013)); *accord Herrera*, 2020 WL 5804255, at *5.

No decision of this Court has even squarely addressed the issue. While *Blair* and other decisions appear to *assume* that plaintiffs can pursue a public injunction in federal court, none has squarely addressed the redressability requirement, and "drive-by jurisdictional ruling[s]" of this kind "carr[y] no precedential weight." *Hampton v. Pac. Inv. Mgmt. Co.*, 869 F.3d 844, 847 (9th Cir. 2017) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998)).[3]

[3] While this Circuit in *Davidson v. Kimberly-Clark Corp.* briefly observed that the plaintiff in that case satisfied "the redressability prong of

Here, Appellees cannot establish redressability. As Appellant explains, it is undisputed that Appellees never paid an expedited payment fee. Moreover, the District Court acknowledged (and Appellant agrees) that it is bound by an injunction agreed to between its parent company and the Attorney General under which Appellant cannot charge "a processing fee or any other fee that [it] cannot establish as reasonable and an actual cost incurred by [Appellant] as described in [the Karnette Act]." ER-014; Appellant's Brief at 44–45. "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co.*, 523 U.S. at 107. That's precisely the case here. The public injunction cannot redress Appellees' alleged injuries either because the agreed-upon injunction with the Attorney General already does that work (with respect to the Karnette Act claims) or because there is no injury to redress (with respect to the expedited payment fee claims). Because Appellees have failed to

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standing" to seek a public injunction predicated upon a false advertising claim, 889 F.3d 956, 972 (9th Cir. 2018), the public injunction sought by Appellees in this case would not "provide redress for [their] alleged injury." *See Herrera*, 2020 WL 5804255, at *5.

demonstrate a public injunction would remedy an injury they have suffered, they have failed to prove their standing to seek that remedy.

Thus, in the event that this Court rejects Appellant's and *amici*'s primary argument that Section 2 preempts the *McGill* rule, it should nonetheless hold that Appellees must arbitrate their claim for individualized relief under the severability analysis required by *Viking River*. In that case, Appellees' public injunction request should be severed and dismissed for lack of Article III standing.

CONCLUSION

For the foregoing reasons, in addition to those offered by Appellant, the district court's order should be reversed, and the case should be remanded with instructions to grant Appellant's motion to compel arbitration.

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Respectfully submitted,

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