No. 23-1307

IN THE
Supreme Court of the United States

RAC ACCEPTANCE EAST, LLC,
Petitioner,

v.

SHANNON MCBURNIE AND APRIL SPRUELL,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Petitioner drafted, and the parties agreed to, a severance clause in an arbitration agreement stating that if any "claim for relief" is affected by an invalid waiver of statutory rights, that "claim" must be severed and heard in court. Does *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022), require federal courts to depart from generally applicable contract interpretation principles by construing the term "claim" in this context to mean "remedy," even though, as found by both courts below, its plain, ordinary, and intended meaning is "cause of action"?

2. Respondents challenged—under the Karnette Act and two other California consumer laws—the legality of a $45 processing fee charged by petitioner. Almost two years after respondents filed their complaint, the California Attorney General entered into a consent decree with petitioner's parent company in a different proceeding that generally prohibited petitioner and its parent company from charging fees that violate California's Karnette Act. That consent decree did not specifically refer to the $45 processing fee at issue in this case and did not determine whether that fee is unlawful. Does that consent decree preclude respondents, on mootness grounds, from challenging the provision in their arbitration agreement with petitioner that unlawfully waived their statutory right to seek a public injunction?

3. Are respondents, as parties to an arbitration agreement containing an unlawful contractual waiver, precluded from challenging the validity of that waiver based on petitioner's assertion, not raised below, that respondents have not shown a sufficiently

concrete risk of future harm to have standing to assert that challenge?

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INTRODUCTION

Petitioner RAC Acceptance East, LLC ("RAC") urges this Court to grant certiorari to adjudicate a dispute over the intended meaning of a single word, "claim," in an arbitration agreement's severance clause. That narrow question of contract construction, which turns on the unique language of RAC's arbitration agreement, has no practical significance to anyone other than petitioner and some of its California customers. There is no conflict of authority. The Federal Arbitration Act ("FAA") is barely implicated, if at all, by the questions presented. None of the Court's criteria for granting certiorari are remotely satisfied.

The severance clause at issue states that if any of the arbitration agreement's waiver-of-rights provisions is held invalid "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." App. 48a-49a. The Ninth Circuit construed that language according to its plain, common-sense meaning, just as it had construed that identical language five years earlier in a case against petitioner's parent company. *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819 (9th Cir. 2019). Petitioner now argues that the FAA, as applied by *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022), requires a different result. Specifically, petitioner argues that the Ninth Circuit should have severed only the affected *remedy* rather than the affected *claim*. But there is no textual support for petitioner's position—the contract very clearly says "claim," not "remedy"—and the FAA requires arbitration contracts to be construed no differently than any other contract. *Morgan v. Sundance, Inc.,* 596 U.S.

411, 418 (2022). Nothing in the FAA precludes contracting parties from agreeing that some claims may be pursued in court and some may be pursued in arbitration. Just the opposite: the FAA enshrines "the freedom of parties to determine the issues subject to arbitration." *Viking River*, 596 U.S. at 659.

Petitioner's contrary argument stems from its mistaken belief that the Ninth Circuit's construction was driven by some unstated reliance on a non-existent state law rule of mandatory claims joinder. No such rule exists, let alone does it secretly underpin the panel's plain meaning construction. The Ninth Circuit in this case (just as in *Blair*) gave full effect to the specific language of the parties' agreement, while acknowledging that the parties would have been "welcome to agree" to different language providing for severance of remedies rather than severance of claims. But that is not what they did.

Petitioner also asks this Court to grant certiorari to decide whether respondents were precluded from challenging the validity of the arbitration agreement's unlawful waiver of public injunctive relief on mootness or standing grounds. Neither of those issues is worthy of this Court's review either.

The mootness argument rests upon petitioner's construction of a consent decree entered into between its parent company and the California Attorney General, long after this lawsuit was filed. The district court rejected that argument on factual grounds, and the Ninth Circuit agreed with the district court's construction of the limited reach of that consent decree. The mootness question thus challenges the panel's application of well-settled law to the unique facts of this

case, and petitioner does not identify any split of authority or assert that there is anything novel about the mootness issue as framed.

Petitioner's standing argument, which questions whether respondents had standing to challenge the arbitration agreement's waiver of their right to seek a public injunction based on RAC's imposition of a $45 transaction processing fee, was neither raised nor decided below. There is also no split of authority; the question does not present any novel or important issues; and it is entirely fact-bound, as it rests on the unique circumstances and history of this particular case.

The petition should be denied.

STATEMENT OF THE CASE

1. Petitioner RAC partners with retail stores to enable them to sell furniture, appliances, and other household goods to consumers on a rent-to-own basis, i.e., through periodic installment payments. App. 4a-5a. Respondents April Spruell and Shannon McBurnie each paid the required $45 "processing fee" when they entered into rent-to-own agreements with RAC. App. 5a. Respondents later brought suit in state court on behalf of themselves and others similarly situated, alleging that certain fees charged by petitioner, including the $45 "processing fee," were unlawful under three California consumer protection statutes, including the Karnette Rental-Purchase Act. App. 6a.

The Karnette Act was enacted to crack down on price-gouging and other predatory practices that had taken root in the rent-to-own market. Cal. Civ. Code

§ 1812.621. The Act prohibits certain types of fees altogether, and further requires that any permissible add-on fee be "reasonable" and limited to the "actual cost incurred by the" rent-to-own company for the specific service provided. *Id.* § 1812.624(a)(5)-(a)(7).

2. In addition to charging respondents an automatic $45 processing fee, RAC also required them to sign an arbitration agreement. The terms of that agreement are identical to the arbitration agreement that a previous Ninth Circuit panel had held unenforceable in *Blair*. App. 5a. *Blair* was a class action, brought against RAC's parent company, that challenged various add-on fees charged to the company's California customers. App 23a. The *Blair* complaint sought, among other relief, a public injunction to prevent future violations of state law. *Blair*, 928 F.3d at 823. Under California law, a public injunction may be obtained by an individual plaintiff under state consumer protection laws "'to prevent further harm to the public at large.'" *McGill v. Citibank, N.A.*, 2 Cal. 5th 945, 955 (2017); *see also DiCarlo v. MoneyLion, Inc.*, 988 F.3d 1148, 1156-57 (9th Cir. 2021).

The form arbitration agreement used by RAC and its parent company required all disputes between the companies and their California customers to be arbitrated and prohibited the arbitrator from granting any relief that "would affect RAC account holders other than" the individual customer bringing suit—effectively barring plaintiffs from obtaining a public injunction in *any* forum. *Blair*, 928 F.3d at 823. Under California law, such blanket contractual waivers of the right to seek a public injunction (whether in an arbitration agreement or any other contract) are invalid and unenforceable. *McGill*, 2 Cal. 5th at 961; *see*

also id. at 963 ("'[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum'"); *accord Viking River*, 596 U.S. at 653 ("the FAA does not require courts to enforce contractual waivers of substantive rights and remedies"). Under *McGill*, a consumer must be allowed to seek a public injunction in some forum, whether that be in arbitration or in court. This is sometimes referred to as the "*McGill* rule."

In *Blair*, the Ninth Circuit concluded that the contractual waiver of public injunctions in RAC's parent company's standard arbitration agreement was invalid and that the *McGill* rule was not preempted by the FAA. *Blair*, 928 F.3d at 827-31. That preemption analysis had two principal underpinnings. First, the court concluded that the *McGill* rule is a "generally applicable" state law "contract defense" that does not discriminate against arbitration. *Id.* at 827-28. Second, it held that the *McGill* rule does not undermine the FAA's objectives because a public injunction may be obtained by an individual plaintiff (thereby preserving the bilateral nature of arbitration) and does not otherwise require formalities or procedures that are inconsistent with the purpose of arbitration. *Id.* at 828-31.

The panel in *Blair* next turned to the question of severability. The same paragraph of the arbitration agreement that waived the customer's right to seek a public injunction in any forum also provided that if "applicable law precludes enforcement of this Paragraph's limitations *as to a particular claim for relief* … then that *claim* … must be severed from the

arbitration and may be brought in court." *Id.* at 831 (emphasis added). Because the plaintiffs in *Blair*, as here, sought public injunctions under the Karnette Act and two other state laws that support public injunctive relief, and because the contractual waiver was held unenforceable as to all three of those "claims," the *Blair* panel held that the severance clause entitled plaintiffs to pursue those claims for relief in court. *Id.* at 831-32. In so holding, the Ninth Circuit rejected the defendant's argument that the court could only sever the public injunctive *remedy* and that all other remedies associated with those claims must be arbitrated. *Id.* at 831. That argument, the *Blair* panel reasoned, failed to give effect to the "ordinar[y]" meaning of the word "claim," which refers to a "cause of action," not simply a form of relief. *Id.* Finally, the panel observed that parties to an arbitration agreement "are welcome to agree to split decisionmaking between a court and an arbitrator," allowing requests for certain remedies to be heard in court while all other issues would be arbitrated, but the parties chose "not [to] do so." *Id.*

Once *Blair* was remanded to the district court, the parties entered into a stipulated consent decree. The consent decree, which was approved by the *Blair* district court in January 2020, required RAC's parent company and all those in "active concert or participation" with it (including RAC) to: (1) no longer enforce against any California resident its standard arbitration agreement—or any version of that agreement that "prohibits the customer from seeking otherwise available public injunctive remedies," and (2) revise its existing arbitration agreements to allow customers to seek a public injunction in some forum, whether arbitral or judicial. Resp. Appx. 5a. The consent decree

also provided that it could only be modified in the future "if there is a final judicial determination that *McGill v. Citibank, N.A.*, 2 Cal. 5th 945, 962 (2017) is preempted by the Federal Arbitration Act or is otherwise unenforceable," in which case the company would *then* "be entitled to conform its practices and revise its Arbitration Agreement to then-established law." Resp. Appx 5a.[1]

3. In December 2020, respondents McBurnie and Spruell filed this action in California state court, alleging causes of action under the Karnette Act, the Consumer Legal Remedies Act, and the Unfair Competition Law. App. 16a-17a. Roughly three months later, RAC removed the case to federal court. *Id.* In July 2022, 19 months after the case was filed, RAC filed a motion to stay discovery, and one month later, it filed a motion to compel arbitration. App. 18a. RAC argued that its delay in bringing the motion should be excused because (in RAC's view) this Court's decision in *Viking River* (issued two months before RAC filed its motion) impliedly abrogated the *McGill* rule, thereby allowing RAC to enforce the arbitration agreement that the Ninth Circuit had held unenforceable in *Blair*.

Respondents opposed the motion to compel arbitration on several grounds, including because: the *Blair* consent decree barred RAC from enforcing the arbitration agreement; RAC had long ago waived its

[1] RAC never revised its arbitration agreement as required by the *Blair* consent decree, yet in this case, it sought to compel arbitration pursuant to the identical agreement that the *Blair* consent decree prohibited it from seeking to enforce. *See infra* 14 n.4.

right to pursue arbitration; and far from overruling *McGill*, *Viking River* reaffirmed *McGill*'s core holding that arbitration agreements cannot be used to strip contracting parties of state statutory rights.

The district court denied RAC's motion to compel arbitration. It concluded that RAC had waived its right to arbitrate "by actively litigating this case in court for more than eighteen months," including by engaging in extensive discovery—*e.g.* deposing both named plaintiffs, making "six sets of requests for the production of documents," "three sets of requests for admissions, and propound[ing] five sets of interrogatories"—filing several discovery disputes with the court, and participating in "a number of pre-settlement conferences with a magistrate judge." App. 17a, 20a.

The court rejected RAC's argument that the *Viking River* decision excused its lengthy delay in seeking to compel arbitration, in part because the petition for certiorari in *Viking River* and this Court's order granting certiorari were filed 14 months and seven months *before* RAC's motion to compel, respectively. Yet, unlike other similarly situated litigants, RAC "never brought *Viking River* to the Court's attention." App. 21a.

The court also rejected RAC's argument that its delay should be excused because of an intervening consent decree obtained by the California Attorney General against RAC's parent company ("AG Consent Decree"), which RAC claimed mooted respondents' challenge to the validity of the arbitration agreement's contractual waiver. The district court pointed out that the consent decree was the result of a "multi-

year investigation," yet RAC had "never mentioned these proceedings" to respondents or the court before moving to compel arbitration. App. 22a. Although RAC had initially argued that respondents' challenge was also moot because RAC had by then exited the California market, RAC abandoned that argument in its reply brief before the district court's ruling. App. 24a. n.4.[2]

In addition to finding waiver, the district court held that RAC's arguments in support of arbitration failed on their merits. First, the court concluded that "*Viking River* did not reverse or otherwise abrogate" *McGill* but addressed a unique California rule that applied only to mandatory joinder of multiple employees' claims under California's Private Attorneys General Act ("PAGA"), while *McGill* did not "present the same ostensible dilemma." App. 23a.-24a. Second, the court emphasized that the AG Consent Decree, which enjoined RAC from charging "unreasonable" fees, did little more than parrot the language of the Karnette Act, and did not resolve the underlying legal dispute: whether the $45 processing fees charged by RAC in this case were unlawful. App. 24a-25a. The AG Consent Decree also made no reference to two of the three California statutes that would have supported respondents' request for public injunctive relief. *Id.*

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[2] RAC had not done business in California "for over a year" by the time it filed its motion to compel arbitration. Defendant's Motion to Compel Arbitration 11, *McBurnie v. RAC Acceptance East, LLC*, No. 3:21-cv-01429-JD (N.D. Cal. Aug. 2, 2022), Dkt. 67. RAC provided no excuse for failing to compel arbitration promptly after its exit from the California market, as its mootness and standing arguments, if at all colorable, would have enabled it to do.

Having denied RAC's motion on those two independent grounds, the district court had no need to reach respondents' argument that the *Blair* consent decree provided yet a third basis for denying RAC's motion to compel arbitration.

4. A three-judge panel of the Ninth Circuit (Lee, Fletcher, Tallman, JJ) unanimously affirmed in a published opinion, with no judge writing separately. The panel reasoned that *Blair* had held that the identical arbitration clause at issue in this case was unenforceable, and that far from calling that holding into question, *Viking River* fully supported it.

The panel observed that *Viking River* had two separate holdings that addressed two distinct California state law rules. First was a state law rule forbidding contractual waivers of the substantive right to bring a representative PAGA action.[3] The *Viking River* Court "upheld that rule," concluding that it was "not preempted by the FAA" because it was a neutral rule of general applicability and entirely compatible with the goals and purpose of arbitration. App. 10a (quoting *Viking River*, 596 U.S. at 662). The second state law rule was PAGA's unique "mandatory joinder rule that forbade dividing PAGA claims into individual and representative claims." App. 10a. That second rule was held preempted by the FAA, because it forced parties to combine into a single PAGA action the claims of plaintiff and the claims of plaintiff's co-workers, and thus "unduly circumscribes the freedom of parties to determine 'the issues subject to arbitration'

[3] PAGA is a quasi-*qui tam* statute that "gives employees a right to assert the State's claims for civil penalties on a representative basis." *Viking River*, 596 U.S. at 646.

and 'the rules by which they will arbitrate.'" *Viking River*, 596 U.S. at 659; App. 10a-11a.

The Ninth Circuit panel in this case observed that the same reasoning that led this Court in *Viking River* to uphold the first rule (invaliding contractual waivers of state statutory rights) would apply with equal force to the *McGill* rule that was at issue in *Blair*. The panel accordingly concluded that "[f]ar from overruling our holding in *Blair*, *Viking River* reaffirms it." App. 12a. Agreeing with the *Blair* panel's severance clause analysis, the panel below also held that the plain meaning of RAC's arbitration agreement's unique language required the district court to sever all "claims" that were affected by the invalidation of the contractual waiver of public injunctions. App. 9a (citing *Blair*, 928 F.3d at 831-32).

The panel also agreed with the district court that the AG Consent Decree did not preclude plaintiffs from continuing to challenge RAC's imposition of the $45 processing fee, including by seeking a public injunction pertaining to that fee. App. 12a-13a.

RAC had separately argued on appeal that respondents lacked standing to seek injunctive relief as to a separate $1.99 expedited payment fee that RAC contended the respondents had never paid. The panel remanded that question for the district court to address in the first instance, App. 14a, and respondents later dropped their challenge to the $1.99 fee. Pet. 10 n.4.

The panel did not reach the district court's alternative holding that RAC had waived its right to seek arbitration. Nor did it reach respondents' argument

that the *Blair* consent decree barred RAC from seeking to compel arbitration in the first place.

5. Petitioner did not seek en banc or panel rehearing of the Ninth Circuit's opinion. The Ninth Circuit denied RAC's request for a stay pending review by this Court. Order, *McBurnie v. RAC Acceptance East, LLC*, No.22-16868 (9th Cir. Apr. 25, 2024), Dkt. 47. On June 12, 2024, petitioner filed a certiorari petition in this Court. On July 18, 2024, the Court directed respondents to file a response.

REASONS FOR DENYING THE PETITION

I. Certiorari Should Be Denied on the First Question Presented.

A. The question presented has no practical implications outside the unique severance clause at issue in this case.

Contrary to petitioner's assertion, there is no California rule at issue here that "fuses together both individual and non-individualized components" of a litigant's request for relief by requiring both components to be heard in the same forum. Pet. 13. Just the opposite. The Ninth Circuit was clear that "[p]arties are welcome," as petitioner would now apparently prefer, "to agree to split decisionmaking between a court and an arbitrator," funneling any request for a public injunction to court and all other issues to arbitration. *Blair*, 928 F.3d at 831; *supra* 6. Indeed, Judge Lee made this very point at oral argument, observing that "state law doesn't prevent" parties from agreeing to pursue public injunctive relief and individual relief in separate fora and that "parties can always renegotiate

or redo their severability language" to reflect this preference if they choose. Ninth Cir. Oral Arg. at 15:20-40, http://tiny.cc/plsbzz. In response, counsel for petitioner did not cite anything to the contrary, opting instead to reserve the remainder of his time for rebuttal. *Id.* at 15:47-16:41.

Far from being constrained by any state law rule, the Ninth Circuit's severability analysis turned entirely on the unique phrasing of the particular severance clause in RAC's agreement, which requires severance of any "claim" affected by a court's holding that the public injunction waiver is invalid. *Blair*, 928 F.3d at 831-32; *supra* 5-6. The first question presented will accordingly have no significance to anyone who has not already signed one of RAC's standard arbitration agreements. A question of such limited interest and impact is not worthy of this Court's review.

If that weren't reason enough to deny the petition, there are at least two other reasons why petitioner's first question is likely to have no prospective significance and why this case would not be an appropriate vehicle for deciding that question even if it were otherwise cert-worthy. First, as Judge Lee observed at oral argument, companies like RAC can always draft—or prospectively modify—their arbitration agreements to require requests for public injunctive relief to proceed in court rather than arbitration. Second, with respect to RAC in particular, even if the reference to "claim" in its severance clause were construed to mean "remedy," arbitration would still not be required, both because of waiver (as the district court held, App. 19a-25a) and because RAC is still bound by the *Blair* consent decree, which requires it to remove the blanket prohibition of public injunctive

relief from its form arbitration agreement. That blanket prohibition is the only provision that the Ninth Circuit held triggers the severability clause in dispute.[4]

Petitioner's various arguments about the importance of the question presented—e.g., the dangers of "artful pleading" and speculation that other States will "follow California's example"—rest on the mistaken notion that there is some state law rule of claim joinder at issue here. Pet. 15-19. There is not. *Supra* 5-6.[5] Petitioner references *McGill*, which petitioner mischaracterizes as "forbid[ing] individualized

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[4] The *Blair* consent decree required RAC to revise its arbitration agreement to remove the blanket waiver of public injunctive relief. *Supra* 6. RAC never did, thus rendering its unmodified arbitration agreements with respondents unenforceable. Moreover, the consent decree bars RAC from enforcing its arbitration agreement unless and until *McGill* is definitively overruled. *Supra* 6-7. No court has definitively overruled *McGill*, certainly not *Viking River*, which does not even discuss *McGill* and which, in any event, reaffirms *McGill*'s reasoning. *Viking River*, 596 U.S. at 653 ("the FAA does not require courts to enforce contractual waivers of substantive rights and remedies").

[5] To be clear, there was nothing remarkable about the way the claims were pled in this case. In California, like in most other States, it is customary to request several forms of relief in connection with a single count or cause of action. *E.g. Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co.*, 5 Cal. 4th 854, 860 (1993) ("The seeking of different kinds of relief does not establish different causes of action. The cause of action is to be distinguished from the remedy and the relief sought, for a plaintiff may frequently be entitled to several species of remedy for the enforcement of a single right.") (cleaned up); Lee Edmon, et al., *Cal. Prac. Guide Civ. Pro. Before Trial*, Ch. 6-B (Rutter Group 2024) ("The fact that plaintiff seeks several different *remedies* does *not* necessarily establish different causes of action.") (emphasis original).

arbitration of public injunctions[.]" Pet. 8. In fact, *McGill* does not forbid arbitration of public injunctions. Rather, *McGill* forbids only the blanket waiver of the right to seek a public injunction. *McGill*, 2 Cal. 5th at 962 ("a provision in *any* contract—even a contract that has no arbitration provision—that purports to waive, in all fora, the statutory right to seek public injunctive relief … is invalid and unenforceable under California law") (emphasis original). That rule has no bearing on the question of severability raised in the petition. It was the language of the severance clause—not *McGill*—that dictated the outcome of the severability analysis petitioner now challenges. The Ninth Circuit simply interpreted that particular language by attributing the "ordinar[y]" meaning to the words of the contract, just as any state or federal court would do. *Blair*, 928 F.3d at 831-32.

RAC would have this Court grant certiorari to rewrite the language of the parties' agreement. But as Judge Lee observed, RAC could have solved this problem with the stroke of a pen by simply amending its severance clause to provide for whatever "split decisionmaking" (*Blair*, 928 F.3d at 831) arrangement it would prefer. This Court's intervention is not needed.

B. There is no conflict of authority.

Because the question presented only implicates the terms of the severability clause in petitioner's uniquely phrased arbitration agreement, it is unsurprising that there is no conflict of authority. Petitioner nevertheless argues that a single California Court of Appeal decision interpreting a different severance clause in a different company's arbitration agreement somehow conflicts with the decision below. Pet. 16-17.

There is no conflict. The difference in outcomes between the two cases is not attributable to the courts' application of conflicting legal rules, but to the different language of the severance clauses and underlying claims at issue.

The arbitration agreement in *Piplack v. In-N-Out Burgers* included an unlawful waiver of all PAGA claims. 88 Cal. App. 5th 1281, 1285 (2023). The agreement provided for severance under two circumstances: (1) where a "civil court [holds] the [PAGA] Waiver [] unenforceable," in which case "any [PAGA] claim must be litigated in a civil court of competent jurisdiction," or (2) whenever "severance is necessary to ensure that the individual action proceeds in arbitration." *Id.* at 1285, 1288-89. Concluding that the PAGA waiver was unenforceable under California law, the Court of Appeal construed this severance clause to require that the individual "PAGA claims [be] arbitrat[ed], and [that] the remaining representative claims … be litigated in court." *Id.* at 1289.

This case is distinguishable for the obvious reason that the second ground for severance—whenever "necessary to ensure that the individual action proceeds in arbitration" (*id.*)—expressed a clear preference for "split decisionmaking" (*Blair*, 928 F.3d at 831), while RAC's severance clause did not. *Cf. supra* 5-6. Nothing in the decision below suggests that the Ninth Circuit would have reached a different result if it were the reviewing court in *Piplack*. Just the opposite: the Ninth Circuit panel was clear that it would give effect to whatever severability arrangement the parties had agreed to. *Blair*, 928 F.3d at 831-32.

Petitioner also suggests that the Ninth Circuit's interpretation of the word "claim" is in tension with *Piplack*. Pet. 17. But both courts interpreted that term to mean cause of action. The outcome of the two cases differed because each arose under a different law. *Piplack* addressed a PAGA action. Under PAGA, non-individual and individual actions "are … separate … *causes of action*." *Viking River*, 596 U.S. at 646 (emphasis added). The *Piplack* severance clause's reference to "[PAGA] claims" accordingly encompassed both the individual and non-individual PAGA issues that, historically, were jointly adjudicated until *Viking River* held that the parties could agree in an arbitration agreement to have those issues adjudicated separately. *Piplack*, 88 Cal. App. 5th at 1285. That is why the court in *Piplack*, consistent with the contracting parties' stated intent, severed only the non-individual PAGA claims, thereby "ensur[ing] that the individual action [could] proceed[] in arbitration" as the parties had intended. *Id.* at 1289.

Public injunctions, by contrast, are not independent causes of action, but are a substantive statutory remedy that certain state laws authorize plaintiffs to pursue. *See McGill*, 2 Cal. 5th at 965 (public injunction is a "substantive statutory remedy"); *accord* Chamber Br. 14 ("a public injunction is a specific remedy that a party may seek (or not) in connection with claims under certain California consumer protection laws"); *Vaughn v. Tesla, Inc.*, 87 Cal. App. 5th 208, 237 (2023), *rev. denied* (Apr. 12, 2023) (a "public injunction is a unitary remedy that cannot be divided into 'individual' and 'representative' components"). Because the severance clause in RAC's arbitration agreement directed that the entire severed "claim" must be heard in a judicial forum if the agreement's waiver

provisions are found to be unenforceable "as to" such a claim, App. 48a-49a, there was no textual basis for treating the prayer for public injunctive relief differently from the other forms of relief associated with the severed claim.

Finally, the California Court of Appeal, following the reasoning of the decision below, expressly rejected the same meritless argument that petitioner advances here—that *Viking River* requires prayers for public injunctions to be heard in court while all other relief in connection with a claim must be arbitrated *even where the terms of the severance clause do not provide for it. See Vaughn*, 87 Cal. App. 5th at 236-37 & n.20. There is no conflict of authority.

C. The decision below is correct.

Viking River is entirely consistent with the decision below. *Viking River* addressed whether two state law rules were preempted by the FAA. This Court held that the first rule—banning a contractual waiver of the right to bring a non-individual PAGA claim in any forum—was not preempted by the FAA, because (1) the "FAA does not require courts to enforce contractual waivers of substantive rights and remedies," and (2) the procedures associated with litigating a non-individual PAGA action are not fundamentally inconsistent with the purpose of arbitration. *Viking River*, 596 U.S. at 653, 655-59.

For precisely the same reasons, the *McGill* rule at issue here—banning the contractual waiver of the right to seek a public injunction in any forum—is not preempted by the FAA either. App. 12a; *see also McGill*, 2 Cal. 5th at 962, 965-66. The *McGill* rule is a

generally applicable anti-waiver rule that does not discriminate against arbitration. *McGill*, 2 Cal. 5th at 962 ("a provision in *any* contract—even a contract that has no arbitration provision—that purports to waive, in all fora, the statutory right to seek public injunctive relief … is invalid and unenforceable under California law") (emphasis original). Nor does obtaining a public injunction impose onerous procedural requirements, require joinder of parties or claims, or otherwise interfere with the goals of arbitration. *Blair*, 928 F.3d at 828-31; *see also DiCarlo*, 988 F.3d at 1156 (public injunction may be obtained by individual litigant in arbitration).[6]

This Court held in *Viking River* that the second state law rule at issue—requiring joinder of the individual and non-individual components of a PAGA claim to ensure they will be heard at the same time in the same forum—was preempted by the FAA. The Court stated that this rule would allow "a party to expand the scope of the arbitration by introducing claims that the parties did not jointly agree to arbitrate." *Viking River*, 596 U.S. at 660. As a result, parties would face the Hobson's Choice of "either go[ing] along with an arbitration in which the range of issues under consideration is determined by coercion rather than consent, or else forgo[ing] arbitration altogether." *Id.* at 661.

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[6] Amici urge this Court to take up the question of whether *Viking River* overruled *McGill* (Chamber Br. 11-16), but that question is not presented in the petition. *See Smith v. Arizona*, 144 S. Ct. 1785, 1801 (2024) (declining to decide "issue" not "presented in … petition for certiorari").

Here, there is no state rule requiring claims joinder. The Ninth Circuit's severability analysis was governed, not by any state law, but by the agreed-upon severance clause language in RAC's arbitration agreement. *Blair*, 928 F.3d at 831. In *Viking River*, the severance clause stated that "any '*portion*' of the waiver that remains valid must still be 'enforced in arbitration.'" 596 U.S. at 662 (emphasis added). This required sending the individual PAGA claim to arbitration. *Id.* Here, by contrast, the severance clause directs that the entire "claim" affected by the invalid waiver be severed and heard in court. *Supra* 5-6. The Ninth Circuit gave effect to the parties' agreement, construing the term "claim" consistent with its "ordinar[y]" meaning, just as any state or federal court would do. *Blair*, 928 F.3d at 831.

While *Viking River* teaches that the *state* cannot compel mandatory joinder of claims, it leaves undisturbed "the freedom of parties to determine 'the issues subject to arbitration.'" 596 U.S. at 659. That "freedom" encompasses the right to craft the severance clause that the parties agreed to here. The Ninth Circuit was accordingly correct to enforce the parties' decision to remove any "claim" affected by the invalid waiver from the scope of arbitration. *See Blair*, 928 F.3d at 831 ("[p]arties are welcome to agree to split decisionmaking between a court and an arbitrator").

In retrospect, RAC might wish it had drafted its severance clause differently. But RAC's newfound preference for severing remedies rather than claims is not a legitimate reason to override the terms of the parties' agreement. *See Viking River*, 596 U.S. at 660.

Finally, *Lamps Plus* does not alter the analysis. Even if it were true that "ambiguities about the scope of an arbitration agreement must be resolved in favor of arbitration" Pet. 15 (quoting *Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 189 (2019); *but see Morgan*, 596 U.S. at 418 (requiring arbitration agreements to be construed like any other contract), there was no ambiguity in the parties' agreement. Petitioner asserts that the "*Blair* court had acknowledged that the term 'claim for relief' in RAC's severance clause could refer to the 'particular remedy' that a plaintiff seeks." Pet. 14. But the Ninth Circuit said no such thing. The quoted passage from *Blair* reads in full: "Rent-A-Center reads 'claim for relief' in the severance clause to refer only to a particular remedy, not to the underlying claim. The district court found Rent-A-Center's reading 'unnatural and unpersuasive,' and we agree." *Blair*, 928 F.3d at 831; *cf. supra* 14 n.5. *Lamps Plus* has no application to this case.

II. Certiorari Should Be Denied on the Second and Third Questions Presented.

A. Both questions involve the application of well-settled law to the particular facts of this case, and the third question was never raised below.

The decision below applied well-settled principles to the particular facts of this case in concluding that the AG Consent Decree—which was finalized long after this lawsuit was filed—does not prevent respondents from continuing to challenge the arbitration agreement's waiver of their right to seek a public injunction under California consumer protection law. App. 12a-13a, 24a-25a.

Petitioner makes no attempt to explain why its challenges to that ruling are sufficiently important or novel to merit review by this Court. Petitioner proclaims that "Article III standing to seek injunctive relief is a critical issue" and that this case provides "the opportunity to make an *incremental* development in [this Court's] case law construing federal court jurisdiction." Pet. 25-26 (emphasis added). But RAC never explains what that incremental development might be. Aside from these generalities, the petition simply repackages its arguments about the importance of the first question, without explaining how these arguments relate to the additional issues petitioner urges this Court to take up. Pet. 25.

Moreover, the so-called "standing" question—whether respondents have shown that RAC's imposition of a $45 processing fee posed a sufficient risk of future harm to enable them to challenge the arbitration agreement's public injunction waiver—was never raised by RAC below and was not addressed by the district court or Ninth Circuit. Brief of Defendant-Appellant 42-49, *McBurnie v. RAC Acceptance East, LLC*, No. 22-16868 (9th Cir. Mar. 6, 2023), Dkt. 12. Previously, RAC asserted that argument only as to the $1.99 expedited payment fee. Respondents later dropped their claims related to that fee. Pet. 10 n.4; *see also* App. 14a (remanding question of standing to challenge $1.99 fee for district court to decide in first instance). The only issue RAC raised regarding the $45 processing fee was one of mootness, not standing.

There is no reason for this Court to address petitioner's newly asserted standing question in the first instance. Just like the question of mootness that was actually raised and decided, that question does not

raise any novel or important issues worthy of this Court's review. It certainly does not present the extraordinary circumstances necessary for this Court to take up this fact-bound question before any other court has weighed in. *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, 413 (2017); *cf.* Sup. Ct. R. 11.

Finally, while styled in the petition as questions about "mootness" and "standing," these issues do not actually implicate Article III. What petitioner is really arguing is that *if* respondents were to move for a public injunction at some later point in the litigation, changed circumstances would prevent them from obtaining that relief; and, as a result, respondents should not have been allowed to challenge the arbitration agreement's waiver of their right to seek a public injunction once (in RAC's view) that relief ceased to be available to them. But those fact-intensive questions, whether characterized as challenges to mootness and standing or otherwise, should not be decided in the first instance at the certiorari review stage. At a minimum, the unusual procedural posture in which those issues are now being raised—double nested within petitioner's response to respondents' opposition to a motion to compel arbitration—makes this case a poor vehicle for deciding them.

B. There is no conflict of authority.

The only threshold challenge raised by RAC regarding the $45 processing fee was that the AG Consent Decree had mooted any request for public injunctive relief. Petitioner does not contend there is any conflict of authority on that question. App. 23a.-24a.

Petitioner also asserts that the decision below somehow creates a split of authority regarding respondents' standing to challenge that $45 fee—a question that was never raised or decided below—but that assertion misreads the Ninth Circuit decision. The panel did not hold that a litigant need not "establish that they face a risk of future harm" to establish standing for injunctive relief. Pet. 23. Nor did it "permit plaintiffs to avoid their burden to prove their own individual standing by pointing to the potential of harm to third parties." Pet. 24. (Unsurprisingly, neither of these statements are supported by citation to the decision below). Instead, the Ninth Circuit held only that the AG "Consent Decree did not determine" a key issue upon which respondents may seek public injunctive relief, namely "whether the $45 processing fee in this case violates the Karnette Act's requirement that fees be 'reasonable.'" App. 13a. Petitioner points to no conflict of authority on that question, and courts, of course, cannot create splits on questions that they do not decide.

C. The decision below is correct.

For petitioner to establish that the AG Consent Decree would moot any request for a public injunction, it must satisfy the "heavy burden" of showing that the consent decree makes it "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Env't Servs.*, 528 U.S. 167, 189 (2000) (quotations omitted); *accord Fed. Bureau of Investigation v. Fikre*, 601 U.S. 234, 240-42 (2024); *see also Chafin v. Chafin*, 568 U.S. 165, 177 (2013) ("even the availability of a partial remedy is sufficient to prevent [a] case from being moot") (quotations omitted). The decision

below correctly concluded that petitioner failed to meet this exacting standard. App. 12a-13a.

The AG Consent Decree enjoins RAC from "[c]harging or listing a processing fee or any other fee that [RAC] cannot establish as reasonable and an actual cost incurred by [RAC], as described in Civil Code section 1812.624, subdivision (a)(7)." App. 34a. For three independent reasons, that consent decree did not moot respondents' right to seek injunctive relief.

First, the words of that consent decree (which focused on different violations of the Karnette Act) merely parrot the Act's language. Cal. Civ. Code § 1812.624(a)(7) (lessor may not charge "any fee … that is not reasonable and actually incurred by the lessor"). That is just a general admonition to follow the law. Nothing in the consent decree answers the question of whether the $45 processing fee in this case is "reasonable" or was "actually incurred" by RAC, which would be the subject of any request for a public injunction. *See* App. 12a-13a.

Petitioner counters that the $45 fee "already has been enjoined to the extent that it is unlawful." Pet. 22. But the AG Consent Decree neither addressed nor resolved the actual issue raised by respondents' lawsuit: whether that fee *is* unlawful. The AG Consent Decree did not answer that question, and thus could not moot respondents' request for injunctive relief. Indeed, before the district court, the parties are continuing to dispute whether the fee is legal: respondents contend the $45 processing fee is unlawful, whereas RAC contends it is "fully compliant with the Karnette Act." Opposition to Motion for Class Certification 1, *McBurnie v. RAC Acceptance East, LLC*, No.

3:21-cv-01429-JD (N.D. Cal. Dec. 28, 2022), Dkt. 105. There is, accordingly, a live controversy.

Second, while the AG Consent Decree directs petitioner to comply with the Karnette Act, respondents also seek a public injunction under two other state laws (the Unfair Competition Law and the Consumer Legal Remedies Act). Because the AG Consent Decree does not address these other laws, it could not moot respondents' requests for a public injunction under those statutes either. *See* App. 25a.

Third, entirely apart from the AG Consent Decree, the *Blair* consent decree enjoins petitioner from seeking to enforce the arbitration agreement in this case. *Supra* 6. That consent decree accordingly provides an independent basis to deny petitioner's motion to compel arbitration, yet another reason why there is no need to consider whether the AG Consent Decree would moot respondents' request for a public injunction.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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August 19, 2024

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APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA,
SAN FRANCISCO DIVISION

No. 3:17-CV-02335-WHA

PAULA L. BLAIR, ANDREA ROBINSON,
AND FALECHIA A. HARRIS, individually
and on behalf of all others similarly situated,

Plaintiffs,

vs.

RENT-A-CENTER, INC., a Delaware
corporation; RENT-A-CENTER WEST, INC.,
a Delaware corporation; and DOES 1-50, inclusive,

Defendants.

FINAL APPROVAL ORDER AND JUDGMENT

Pending before the Court is Plaintiffs' Motion for Final Approval of Class Action Settlement and Award of Attorneys' Fees, Litigation Expenses, and Class Representative Enhancements ("Motion for Final Approval") (Dkt. No. 215) relating to the Settlement Agreement ("Settlement") between plaintiffs and class representatives Paula Blair, Andrea Robinson, Falechia Harris, and Celinda Garza (collectively, "Plaintiffs") and defendants Rent-A-Center, Inc. and Rent-A-Center West, Inc. (collectively, "RAC" or "Defendants").

WHEREAS, on October 11, 2019, this Court entered the Order Re Motion for Preliminary Approval of Class Action Settlement (Dkt. No. 208) ("Preliminary Approval Order") preliminarily approving the Settlement Agreement (Dkt. No. 204-1, Ex. 1), which sets forth the terms and conditions of the Settlement;

WHEREAS, pursuant to the Court's direction at the Preliminary Approval Hearing, the parties submitted revised class notice forms to the Court for approval, and the Court approved the revised class notice forms on October 16, 2019 (Dkt. No. 213);

WHEREAS, counsel for the parties appeared before this Court on January 23, 2020, at which time Plaintiffs requested final approval of the Settlement and Class Counsel requested the other relief set forth in the Motion for Final Approval;

WHEREAS, due and adequate notice of the Settlement having been given pursuant to the Preliminary Approval Order and the Agreement, and the Court having considered all papers filed and proceedings had herein, and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. All terms and phrases in this Order shall have the same meanings ascribed to them in the Settlement Agreement, unless otherwise noted.

2. The Court has jurisdiction over the subject matter of the litigation and over all parties to the litigation, including all Class members;

3. The Court finds that distribution of the class notice complied with the terms of the Settlement Agreement and the prior order of the Court and provided the best notice practicable under the circumstances of these proceedings and of the matters set forth therein and fully satisfied the requirements of Fed. R. Civ. P. 23, due process, and all other applicable laws.

4. The Court finds that the CAFA notice required by 28 U.S.C. § 1715(b) was served on September 13, 2019 to the appropriate federal and state officials. This Final Approval Order is being entered more than 90 days after the CAFA notice was served.

5. The Court finds and determines that:

a. The terms of the Settlement are fair, reasonable, adequate, and in the best interest of the Class members;

b. There was no collusion between or among the parties in reaching the Settlement;

c. The Settlement was the product of informed, arm's-length negotiations among competent and able counsel and with the assistance of Chief Magistrate Judge Joseph C. Spero; and

d. The record is sufficiently developed and complete to have enabled the parties to adequately evaluate and consider their positions and enter into the Settlement.

6. Accordingly, the Court hereby grants final approval of the Settlement and authorizes and directs implementation and performance of all the terms and

provisions of the Settlement Agreement, as well as the terms and provisions of this Order.

7. The persons listed on Exhibit 1 submitted timely and valid requests for exclusion from the NPS Subclass, and as a result such persons are excluded from the settlement for the NPS Subclass, will not share in the settlement proceeds, and will not be bound by the release applicable to the NPS Subclass.

8. The Court grants Class Counsel's motion for an award of attorneys' fees in the amount of $3,836,840.54, plus reimbursement of litigation expenses in the amount of $209,531.54. The Court finds that the attorneys' fees are justified as a percentage of the class recovery under the common fund doctrine and under the lodestar/multiplier approach; that the fee award is warranted in light of the time Class Counsel invested in the case, the risk Class Counsel undertook in prosecuting the action on a contingency basis, the results achieved, the novelty of the legal issues, and the skill with which Class Counsel presented Plaintiffs' claims; and the litigation expenses were reasonably incurred in the prosecution of the litigation. These amounts shall be paid from the Settlement Amount in accordance with the Settlement Agreement.

9. The Court grants the request for enhancement awards to the named plaintiffs and Class Representatives, as follows: $400 to Falechia Harris, and $200 each to Paula Blair, Andrea Robinson, and Celinda Garza. The Court finds that these payments are justified in light of the time that the Class Representatives spent, the risk they undertook, and the recovery obtained in representing the interests of the Class

members. These amounts shall be paid from the Settlement Amount in accordance with the Settlement Agreement.

10. Each member of the CLRA Class shall be bound by the Settlement Agreement, including being subject to the release set forth in Section XVII.E thereof.

11. Each member of the NPS Subclass, except those persons identified on Exhibit 1 who have previously excluded themselves from the NPS Subclass, shall be bound by the Settlement Agreement, including being subject to the release set forth in Section XVII.C thereof.

12. From and after the Effective Date, and in accordance with Section VII.D of the Settlement Agreement, RAC shall be enjoined from seeking to enforce against any California resident any contract provision that prohibits the customer from seeking otherwise available public injunctive remedies, and RAC shall revise its existing arbitration agreement to permit California customers to pursue otherwise available public injunctive remedies in some forum, either court, arbitration, or both; except that if California law concerning the right to seek public injunctive relief changes in the future so as to impose any different standard, or if there is a final judicial determination that *McGill v. Citibank, N.A.*, 2 Cal. 5th 945, 962 (2017) is preempted by the Federal Arbitration Act or is otherwise unenforceable, RAC will be entitled to conform its practices and revise its Arbitration Agreement to then-established law.

13. From and after the Effective Date, and in accordance with Section VII.E of the Settlement

Agreement, RAC shall calculate its Lessor's Cost, for items of merchandise sold or leased in California, to include the documented actual freight charges for the particular item of merchandise; except that if California law (whether statutory or controlling case law) governing rental-purchase agreements changes in the future so as to impose any different standard, RAC will be entitled to conform its practices to then-established law.

14. This Action is hereby dismissed with prejudice and without taxable costs to any party.

15. Without affecting the finality of this Final Approval Order and Judgment, the Court hereby retains continuing jurisdiction over the subject matter of the Action, the parties, and the Class members to effectuate and ensure compliance with the Settlement Agreement and this Order.

IT IS SO ORDERED, ADJUDGED AND DECREED.

Dated: January 24, 2020

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE