No. 23-1307

IN THE

Supreme Court of the United States

RAC ACCEPTANCE EAST, LLC,
Petitioner,
v.
SHANNON MCBURNIE, APRIL SPRUELL,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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The petition identified two important questions on which the Ninth Circuit has deviated from this Court's precedents and is in conflict with other lower courts. In response, the brief in opposition seeks to distract this Court from Respondents' attempt to sidestep the Federal Arbitration Act ("FAA") and Article III by concocting reasons why the petition is not "worthy" of the Supreme Court's time. *See* Opp. 1-3. Respondents are wrong.

For instance, without *any* substantiation, Respondents claim the petition's first question is a "narrow question of contract construction, which turns on the unique language of RAC's arbitration agreement" that "has no practical significance to anyone other than petitioner and some of its California customers." *Id*. at 1. Not true. This issue is a general one regarding the limits that the FAA imposes on adventurous and improper state-law readings of severability clauses to defeat the enforcement of agreements for individual arbitration. This Court's guidance is needed on this issue.

In any event, the contract language at issue is in widespread use. An ADR treatise recommends this language to drafters of arbitration agreements.[1] And a simple Westlaw search yields at least six recent consumer-protection actions involving identical or materially identical severability clauses, likely implicating many

[1] *See* Jay E. Grenig, 2 *Alternative Dispute Resolution* app. R, form 97.60, § 7 (4th ed. 2023) ("precludes enforcement … 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.") (model arbitration agreement).

millions of consumer contracts.[2] Litigation of this issue is recurring.

Next, Respondents contend this Court should decline review of the applicability of *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022), to the interpretation of severability clauses because the Ninth Circuit did *not* reach two unrelated arguments for affirmance. *See* Opp. 7-10, 13-14, 26. This defies common sense—it is unlikely the Ninth Circuit would dodge purportedly straightforward dispositive arguments that RAC had waived its right to arbitration or was somehow enjoined "from seeking to compel arbitration in the first place," *id*. at 11-12, in order to tackle the more difficult and novel *Viking River* argument. Regardless,

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[2] *See Cal. Crane Sch., Inc. v. Google LLC*, __ F. Supp. 3d __, 2024 WL 1221964, at *5 (N.D. Cal. Mar. 21, 2024) ("[i]f a court decides that applicable law precludes enforcement" of the individual-arbitration requirement "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."); *Jack v. Ring LLC*, 91 Cal. App. 5th 1186, 1209 (2023), *review denied* (Sept. 13, 2023) (same); *Guaschino v. Hyundai Motor Am.*, No. 2:23-cv-04354, 2023 WL 8126846,at *2 (C.D. Cal. Sept. 27, 2023) (if requirement "cannot be enforced as to a particular claim for relief, then that claim (and only that claim) must be brought in court and must be stayed pending arbitration of the arbitrable claims."); *In re Stubhub Refund Litig.,* No. 20-md-02951-HSG, 2022 WL 1028711, at *2 (N.D. Cal. Apr. 6, 2022) (if law "precludes enforcement … 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."); *Vasquez v. Cebridge Telecom CA, LLC*, 569 F. Supp. 3d 1016, 1028-29 (N.D. Cal. 2021) (Suddenlink, now Optimum) (if "unenforceable as to a particular *claim*, then that *claim* (and only that *claim*) must be severed from the arbitration and brought in court."); *Swanson v. H&R Block, Inc.*, 475 F. Supp. 3d 967, 971 (W.D. Mo. 2020) (if law "precludes enforcement … as to a particular claim for relief, then that claim for relief (and only that claim for relief) must remain in court and be severed from any arbitration.").

the court *did* address *Viking River*, and its analysis of that issue is both mistaken and in conflict with the California Court of Appeal, necessitating this Court's review.

Respondents' attempts to excuse their lack of Article III standing to seek injunctive relief are even less compelling. Contrary to Respondents' assertion, this issue was raised below. At every step, RAC cited to the requirement in *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013), that, to establish Article III standing for injunctive relief, plaintiffs must face a risk of "certainly impending" future harm. *See* note 3, *infra*. And at every step, Respondents failed to explain how they were in imminent danger of incurring either of the two fees they challenged.

Even now, after finally abandoning their public-injunction claim against one of the two challenged fees (*see* Opp. 22), Respondents again fail to assert they face impending future harm of incurring the other (processing) fee. In fact, Respondents do not even mention *Clapper*, much less distinguish it.

Finally, Respondents claim that "the petition simply repackages its arguments about the importance of the first question [presented], without explaining how those arguments related to the additional issues petitioner urges this Court to take up." Opp. 22. Again, not true. As RAC has explained, Respondents' public-injunction claim is their only "ticket" out of arbitration under the Ninth Circuit's improper interpretation of the severability clause. Pet. 4. Without standing to seek a public injunction, Respondents must arbitrate because the *McGill* rule—the sole basis for avoiding arbitration—would no longer be implicated. *See McGill v. Citibank, N.A.*, 2 Cal. 5th 945 (2017).

Respondents well understand that and lay bare the ruse by arguing that any standing issues arise only "*if* respondents were to move for a public injunction at some later point in the litigation." Opp. 23. Put another way, despite having no standing to seek to enjoin the processing fee, Respondents attempt to leverage the *possibility* of seeking that injunction to evade arbitration entirely.

I. Faithful Adherence to *Viking River* and *Lamps Plus* Requires Granting Review on the First Question and Reversing the Decision Below.

The Court has not hesitated to take up cases defying its arbitration precedents. And that is true even if the case involves idiosyncratic language affecting only a single company's agreement. *See DIRECTV, Inc. v. Imburgia*, 577 U.S 47 (2015).

Here, the contract language is frequently used model form language. Thus, Respondents' myopic focus on the fact that RAC's severability clause *could* be revised to be harmonious with *Blair* (Opp. 13, 15, 20) is no answer. Given the millions of implicated agreements, this language will continue to be litigated. And if the Ninth Circuit's misunderstanding of how *Viking River* and *Lamps Plus, Inc. v. Varela*, 587 U.S. 176 (2019), impact the interpretation of severability clauses were left uncorrected, the FAA's purpose of promoting the enforcement of arbitration agreements would be frustrated.

Respondents are simply wrong in denying a split in authority between the Ninth Circuit and California's appellate courts on the severability issue. And this conflict invites forum shopping by parties seeking to avail themselves of—or avoid—enforcement of the FAA and this Court's arbitration precedents.

Specifically, in *Piplack v. In-N-Out Burgers*, 88 Cal. App. 5th 1281 (2023), *review granted*, (Cal. June 14, 2023), *review dismissed* (Cal. Sept. 13, 2023), the California Court of Appeal addressed similar severability language in an arbitration agreement and held that—contrary to the decision below—under *Viking River*, the plaintiffs' entire claim cannot be kept in court. *Id.* at 1285. Instead, the individual components must be severed and compelled to individual arbitration. *Ibid.*

The *Piplack* plaintiffs asserted a PAGA claim, seeking civil penalties for violations experienced both by them and other similarly situated employees. *Id.* at 1285-86. In opposing arbitration, plaintiffs argued that their entire PAGA claim must be "heard in court" because the arbitration agreement specified that if the waiver of representative PAGA claims "is unenforceable," then "any private attorney general claim must be litigated in a civil court[.]" *Id.* at 1288.

Respondents here made the same argument, contending their entire statutory causes of action, not just the non-arbitrable requests for public injunctions, are exempt from arbitration because their arbitration agreements stated that if the requirement of individual arbitration is unenforceable as to a "particular claim for relief, then that claim (and only that claim)" proceeds "in court." Appellants' Br., 9th Cir. Dkt. 12 at 46 (quoting *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819, 831 (9th Cir. 2019)).

The *Piplack* court explained that although "the phrase 'a private attorney general action'" might have referred to an entire "PAGA claim" *before Viking River,* that decision "changes the analysis," because it confirms that "every PAGA action is properly understood as a combination of two claims: an 'individual' claim …

and a 'representative' claim,'" and so the only "claim" exempted from arbitration is the "representative claim." *Id.* at 1288-89. The same is true here, because after *Viking River*, the FAA requires a statutory claim that includes a public injunction to be subdivided into individual and non-individual components to permit enforcement of the agreement for individual arbitration.

Respondents contend that the *Piplack* agreement more clearly required severance because it separately required severance "whenever 'necessary to ensure that the individual action proceeds in arbitration.'" Opp. 16. But that additional ground for severance was irrelevant to *Piplack*'s holding; the court declared that "[t]he key point is the meaning of the phrase 'a private attorney general action,'" which "[a]fter *Viking* [*River*]" had to be read to refer to the individual or representative component of a PAGA claim, not the *entire* cause of action. *Piplack*, 88 Cal. App. 5th at 1288-89. RAC's arbitration agreement is even clearer than *Piplack*'s in expressing the parties' intent to carve out as few issues as possible from arbitration. RAC's agreement says that "only" the "particular claim for relief" that cannot be arbitrated individually is to be "severed from the arbitration and may be brought in court." Pet. App. 62-63a.

Nor can Respondents distinguish *Piplack* on the ground that it involved a PAGA claim rather than the consumer-protection claims for public injunctions. Opp. 17. Respondents argue that public injunctions are merely remedies, not claims, and in any event are indivisible. *Id.* at 17-18 (citing *Vaughn v. Tesla, Inc.*, 87 Cal. App. 5th 208, 237 (2023)). But the same was true of PAGA claims before *Viking River*.

Finally, Respondents' suggestion that a different California appellate court rejected subdivision of claims seeking public injunctions into individual and

representative components (Opp. 18) is mistaken. Unlike typical arbitration agreements, there was no severability clause, much less language agreeing to arbitrate even if some portion must remain in court. *Vaughn*, 87 Cal. App. 5th at 237 n.20. Moreover, the business was asking that the public-injunction remedy *itself* be subdivided into individual and representative components. *Id.* at 236-37. Here, RAC seeks individual arbitration of the individual components of Respondents' claims, just as in *Viking River*. Pet. 10-19.

Respondents also argue *Lamps Plus* is irrelevant, even doubting whether, after *Morgan v. Sundance, Inc.*, 596 U.S. 411, 418 (2022), it remains good law for the proposition that "ambiguities" in "an arbitration agreement must be resolved in favor of arbitration." Opp. 21 (quoting *Lamps Plus*, 587 U.S. at 1189). But nothing in *Morgan*, which concerned whether there should be a "special, arbitration-preferring procedural rule[]" requiring a showing of prejudice for waiver of the right to arbitrate, 596 U.S. at 418, suggests that this Court was disturbing *Lamps Plus*, which as here, involved the *scope of what is arbitrable*. Thus, even if *Viking River* has no impact on the interpretation of the severability clause, *Lamps Plus independently* requires reversal of the Panel.

Applying *Lamps Plus*, the issue is whether "claim for relief" or "claim" *may* refer to a public injunction. The *Blair* panel relied on one Black's Law Dictionary definition to find that "[a] claim for relief,' as that term is ordinarily used, is synonymous with 'claim' or 'cause of action.'" *Blair*, 928 F.3d at 831-32 (citing Black's Law Dictionary (10th ed. 2014)). But in rejecting RAC's interpretation as "unnatural and unpersuasive," *id*. at 831, the Ninth Circuit overlooked another Black's Law Dictionary definition of "claim" as a "demand for

money, property, *or a legal remedy* to which one asserts a right; *esp., the part of a complaint in a civil action specifying what relief the plaintiff asks for*. Also termed *claim for relief*." Black's Law Dictionary, *supra* (first emphasis added). This definition, in combination with the cases cited in the petition referring to a request for a public injunction as a type of "claim," Pet. 14 n.7, renders the severability clause, *at worst*, ambiguous. Thus, in accordance with *Lamps Plus*, it *must* be construed in favor of arbitration.

II. The Decision Below Enabling Respondents to Avoid Arbitration by Permitting Them to Seek Injunctive Relief Without Article III Standing Violates *Clapper* and Other Circuits' Law.

The petition also should be granted on the second question regarding Respondents' lack of Article III standing. Their efforts to distract from the six other circuits in conflict with the decision below (Pet. 23-24) and the foundational nature of the standing inquiry are consistent with their efforts to avoid the issue below. RAC *repeatedly* raised Respondents' lack of Article III standing to seek injunctive relief as to the two challenged fees—the expedited payment fee (later abandoned) and the processing fee—and Respondents' contention to the contrary is wrong. Opp. i-ii, 22. Under *Clapper*, this Court held only a plaintiff who asserts imminent harm from an unlawful practice has Article III standing to seek injunctive relief. *Clapper*, 568 U.S. at 409. RAC consistently cited *Clapper* below for this proposition and steadfastly argued Respondents

failed to demonstrate any harm that could support injunctive relief.[3]

Even now, Respondents do not argue they have Article III standing under *Clapper*. Respondents have never addressed *Clapper* here or below. And they have never—*in any court*—claimed that they have an injury that can demonstrate imminent harm. Instead, Respondents skirt the issue by focusing narrowly on the impact of the AG Consent Decree on the possibility that RAC might charge the processing fee. Opp. 25-26. But this is not the inquiry under *Clapper*, and does not answer whether *Respondents* can personally establish imminent harm.

Respondents' attempt to characterize "mootness" as an issue separate from Article III standing is also unsuccessful. *See* Opp. 21-23. The mootness doctrine merely recognizes Article III standing must be present at every stage of the lawsuit. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). Thus, Respondents' deflection

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[3] *E.g.*, 9th Cir. ER-023-24, 095-97 (in district court, citing *Clapper* and arguing Respondents could not show imminent harm, and, on reply, noting Respondents "do not contest that they lack Article III standing"); *see also* Appellants' Br., 9th Cir. Dkt. 12 at 40-41 n.11; Appellants' Br., 9th Cir. Dkt. 12 at 4 (Issue Presented questioning "[w]hether Plaintiffs still have Article III standing to seek the requested public injunctions concerning RAC's disputed fees"), 20-21 (arguing *Clapper*), 40-48 ("Article III does not confer standing on parties who, like Plaintiffs, cannot articulate a threat of any future harm but nonetheless would like a superfluous injunction."); Appellants' Reply, 9th Cir. Dkt. 33 at 7 ("Given the complete overlap between the permanent AG injunction and the conduct Plaintiffs seek to enjoin, plus the oversight of the AG and the superior court, Plaintiffs cannot meet their burden to show that 'the threatened injury' is '*certainly impending*,' as is required for Article III standing.") (quoting *Clapper*, 568 U.S. at 409); *see also id.* at 3-11.

to the Ninth Circuit's conclusion that the AG Consent Decree did not determine whether the specific processing fee amount violates the Karnette Act does nothing to demonstrate Respondents are in imminent harm of incurring any unlawful fee. Opp. 24.

Respondents' insistence that this petition is a "poor vehicle" for determining Article III standing cannot dodge the issue, because this Court has made clear that it has an independent duty to examine standing even when it has been erroneously assumed by the court below or not raised by the parties. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (per curiam) ("We are obliged to examine standing *sua sponte* where standing has erroneously been assumed below.") (citation omitted). And RAC *did* raise the issue below.

The contrary circuit decisions RAC cited in its petition demonstrate how far afield the decision below is in permitting the claim for injunctive relief to proceed without any showing of imminent harm. Pet. 23-24. Respondents' cursory statement that there is "no conflict of authority" with the Panel's opinion without any effort to address that circuit law is wholly insufficient. Opp. 23-24.

Recent case law deepens this split. After RAC's petition was filed, this Court reiterated *Clapper*'s importance, reversing a Fifth Circuit issuance of a preliminary injunction because "no plaintiff carried [the] burden" for standing by demonstrating "a substantial risk that, in the near future, they will suffer an injury that is traceable to a … defendant and redressable by the injunction they seek." *Murthy v. Missouri*, 144 S. Ct. 1972, 1981, 1985-86 (2024) ("We begin—and end—with standing. At this stage, [no plaintiff has] established standing to seek an

injunction against any defendant. We therefore lack jurisdiction to reach the merits of this dispute.").

Subsequently, the Fifth Circuit emphasized courts must address jurisdictional issues before deciding a motion to compel arbitration. *Hines v. Stamos*, --- F.4th ---, 2024 WL 3580618, at *9 (5th Cir. 2024) ("unlike other threshold issues, a court cannot rule on arbitrability without subject-matter and personal jurisdiction."). This case illustrates exactly why this is true. Under *McGill*, Respondents rely solely on their public-injunction claims to avoid arbitration entirely. But if they lack standing to seek the injunction, there can be no bar to arbitration, even under the Ninth Circuit's reading of the agreement.

Thus, the Panel's opinion permits Respondents to both proceed on a broad injunction without a personal stake in the outcome and circumvent the FAA at the same time. This result is contrary to this Court's authority and the weight of authority within the circuits and should not be permitted to stand.

CONCLUSION

This Court should grant this petition.

Respectfully submitted,

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