No. 21-17009

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NICK VASQUEZ, For Himself, as a Private Attorney General, and/or On Behalf of All Others Similarly Situated,

Plaintiff-Appellee,

v.

CEBRIDGE TELECOM CA, LLC d/b/a Suddenlink Communications; ALTICE USA, INC.,

Defendants-Appellants.

Appeal from an Order of the United States District Court for the Northern District of California No. 21-CV-6400-EMC (Hon. Edward M. Chen)

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS-APPELLANTS

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

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]

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 this Court and the Supreme Court that concern the Federal Arbitration Act ("FAA"), including cases presenting 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

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

Support of Petitioner, *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022) (No. 20-1573); Brief *Amici Curiae* of the Chamber of Commerce of the United States of America *et al.* in Support of Defendant-Appellants, *McArdle v. AT&T Mobility LLC*, 772 F. App'x 575 (9th Cir. 2019) (No. 17-17246).

The Chamber has a strong interest in the issues presented by this appeal. Many Chamber members employ arbitration clauses in consumer contracts. Sometimes, those arbitration clauses 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[ized] basis"; (ii) a limit on the arbitrator's remedial authority to award "non-individualized relief that would affect other[s]"; and (iii) a severability provision indicating that if any provision of the arbitration clause "is held to be unenforceable as to a particular claim," then that claim shall be "severed from arbitration." *See, e.g.*, Defendants-Appellants' Excerpts of Record ("ER") at 75. 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

The Chamber agrees with Appellants 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 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 was incorrect. *Blair* was wrong as an original matter and, in all events, cannot survive the Supreme Court's recent decision in *Viking River*. The Chamber focuses here on two reasons that support reversal.

First, the plain language of Section 2 requires this result. Section 2 provides in relevant part 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. 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." Limits on the waiver of remedies do not call into question the formation of the arbitration agreement. Thus, Section 2 preempts the *McGill* rule and required the district court to treat the arbitration agreement as "valid, irrevocable, and enforceable."

Second, the district court's severability analysis is incompatible with *Viking River*. In relevant part, the severability provision in this case provided: "If any of the prohibitions in the preceding paragraph [of the arbitration clause] is held to be unenforceable as to a particular claim, then that claim (and only that claim) must be severed from the arbitration and brought in court." ER-10. Nevertheless, after concluding (erroneously) that Section 2 did not preempt the *McGill* rule, the district court decided that the entire case must be brought into court because

each claim included a non-waivable request for a public injunction. ER-20–21; *see also Blair*, 928 F.3d at 831.

But in *Viking River*, the Supreme Court held that, even if certain remedies cannot be prospectively waived, an arbitration agreement must still be enforced with respect to the plaintiff's individual injury. 142 S. Ct. at 1906. The sort of severability analysis undertaken in *Blair* (and parroted by the district court) is inconsistent with the Supreme Court's approach, under which Appellants were "entitled to compel arbitration of [Appellee's] individual claim." *Id.* at 1925.

ARGUMENT

This appeal, just like the Supreme Court's recent decision in *Viking River*, concerns a court's role when examining challenges to the enforceability of arbitration agreements. Just like they do with any other contract, courts play a limited role. That limited role respects the parties' private choices. In arbitration, the judicial role is confined to certain "gateway matters." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83–84 (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, courts sometimes may resolve challenges to the validity of the arbitration agreement (unless the parties have delegated those questions to the arbitrator). *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 72–75 (2010); *First Options of Chicago, 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 all events, 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 that law to reverse the "centuries of judicial hostility to arbitration agreements" and require the enforcement of parties' private arbitration agreements. *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). 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 confirmed the Court's intuition 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* (2022); 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;" 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 benefits, several doctrines demarcate the permissible boundaries of judicial action. Standing requirements, like

those discussed by Appellants, 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* Appellants' Brief at 32–47. Doctrines like separability reduce the risk that judicial scrutiny of arbitration agreements will tread upon the merits or other issues that the parties have delegated to the arbitrator. *See Preston v. Ferrer*, 552 U.S. 346, 349 (2008); *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*, 137 S. Ct. 1421, 1426 (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).

Despite these continued commands, California courts unfortunately have crafted a variety of anti-arbitration rules (both overt and subtle), necessitating regular corrective intervention by the federal courts. 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. Los Angeles, 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. *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 overreach. Yet this Court in *Blair* held that Section 2 of the FAA did not preempt the *McGill* rule. 928 F.3d at 825. As a corollary to this general holding on preemption, *Blair* also interpreted the arbitration clause's severability provision 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*, No. 20-16142, 2022 WL 4101174, at *8 (9th Cir. Sept. 8, 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. As Appellants explain, *Blair*'s preemption analysis rested on reasoning that the Supreme Court rejected in *Viking River*. Indeed, *Blair* admitted that this Circuit's prior "decision in *Sakkab* all but decides this case." 928 F.3d at 825. So when *Viking River* rejected *Sakkab*, it logically follows that *Blair* collapses as well. Both the *Iskanian* rule and the *McGill* rule embody the sort of state judicial hostility to arbitration that the FAA was designed to overcome.

While the district court was required to follow *Blair* at the time of its decision, this appeal presents an opportunity for this Court to correct both the district court's decision and the erroneous foundation upon which it rests, namely *Blair*. Appellants have identified (and the Chamber supports) a variety of avenues supporting reversal, whether that is Article III standing or Section 2 preemption of the *McGill* rule after *Viking River*. This brief elaborates on two grounds for reversal: (1) the plain meaning of Section 2 and (2) flaws in the district court's severability analysis.

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 the arbitration context where the parties' agreement rests on a shared desire to resolve their disputes extrajudicially and "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 Dr.'s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 684–85 (1996). Its savings clause preserves certain state-law defenses provided that 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, 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 meant to preserve only "revocation" defenses, not those defenses bearing generally 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 recently 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 revocability 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 had legislatively abrogated that state's "revocability" doctrine, *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 defects.

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 construing Section 2's language ("grounds … for the revocation") to refer to formation defenses and "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, suggest 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 where issues of "revocability" refer specifically to formation defects.

Finally, this interpretation also comports with 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 quotation marks 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,

C.J., 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). 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 analysis requires reversal. That severability

analysis derived largely from the approach taken in *Blair*. *Blair* held that, because any request for a public injunction was not prospectively waivable, the arbitration clause's severability provision in that case required judicial resolution of all state statutory claims requesting such relief. 928 F.3d at 831. That holding was wrong as an original matter and, in all events, does not survive *Viking River*.

After concluding (erroneously) that Section 2 of the FAA does not preempt the *McGill* rule, *Blair* then examined the implications of that conclusion under the arbitration clause's severability provision. *Id.* 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.* 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 concerned an interpretation of the arbitration agreement.

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 specify the law governing its interpretation of the arbitration agreement.) The second premise was a legal assertion. 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. First, *Blair*'s interpretive premise ignored the Supreme Court's central interpretive guidance on this point: "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . ." *Moses H. Cone*, 460 U.S. at 24–25; *see also First Options*, 514 U.S. at 945; *Ferguson*, 733 F.3d at 934–35.

Second, *Blair*'s legal assertion erroneously grafted federal joinder principles onto arbitration and inextricably tied a request for a public

remedy to a claim for individual relief. Yet 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").

Finally, *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, it 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. For all three reasons, *Blair* was wrong as an original matter.

Moreover, *Blair* "is clearly irreconcilable with" the "reasoning" and "theory" of the intervening Supreme Court decision in *Viking River*. *Miller v. Gammie*, 335 F.3d at 900 (*en banc*). The arbitration clause in

Viking River (like the clause in *Blair*) contained a severability provision. The 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 completely 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.

Blair's severability analysis is "clearly irreconcilable" with the "reasoning" and "theory" of *Viking River*. Begin with *Blair*'s interpretive premise. After *Viking River*, that premise is flawed in at least two respects. 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* 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.

Blair's legal assertion fares no better after *Viking River*. As explained above, *Blair*'s legal assertion rested on a jumble of authority drawn from federal civil practice about the inseparability between "claims" and the "relief" connected to those claims. That jumble of authority carries no weight after *Viking River*. *Viking River* found that principles of claims joinder, developed in civil litigation, carried little to

no value in arbitration. Rather, the contractual freedom afforded to parties in arbitration encompasses a greater latitude to regulate joinder issues. Even if some forms of relief might warrant judicial resolution (where, as Appellants explain (at 28), they still fail on justiciability grounds, *see Stover v. Experian Holdings, Inc.*, 978 F.3d 1082, 1087–88 (9th Cir. 2020)), *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 analysis 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, the Chamber agrees with Appellants that this conclusion was erroneous), it should not have severed Appellee's individual statutory claims. Rather, to give effect to the parties' contractual choices and to avoid "effectively coerc[ing] [Appellants] to opt for a judicial forum," it should have compelled Appellee to arbitrate those claims—just like the Supreme

Court did in *Viking River*. 142 S. Ct. at 1912. (Once that occurs, as Appellants explain, the residual request for public injunctive relief fails for independent reasons, *see* Appellants' Brief at 68–70.)

Moreover, the district court's severability analysis compounded *Blair*'s original error. According to the district court, to avoid the import of *Blair*'s non-severability analysis, an arbitration clause must "precisely" sever the public injunction remedy from the underlying individual claim. ER-20 (quoting *Lag Shot LLC v. Facebook, Inc.*, 545 F. Supp. 3d 770, 785 (N.D. Cal. 2021)). This "precision" requirement, however, appears nowhere in the FAA. *Lag Shot*, cited by the district court, purported to discover it in *Blair*. Yet the FAA does not tolerate judicially crafted rules that subject arbitration agreements to arbitration-specific form requirements. *See Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 937 (9th Cir. 2001). In all events, this manufactured "precision" requirement does not survive *Viking River*'s clear command to construe an arbitration clause in a manner that preserves the parties' ability to realize the benefits of the arbitral forum and avoids coercing parties into a judicial forum.

CONCLUSION

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

October 5, 2022

Respectfully submitted,

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