No. 25-790

IN THE

Supreme Court of the United States

NEW YORK FOOTBALL GIANTS, INC., *et al.*,

Petitioners,

v.

BRIAN FLORES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF ATLANTIC LEGAL FOUNDATION & WASHINGTON LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

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[1] Petitioners' and Respondent's counsel were provided timely notice of this brief in accordance with Supreme Court Rule 37.2. No counsel for a party authored this brief in whole or part, and no party, counsel for a party, or person other than *amici curiae* and their counsel made a monetary contribution intended to fund preparation or submission of this brief.

the rule of law. WLF often appears as an *amicus curiae* in important arbitration cases. *See, e.g., Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022); *Epic Sys. Corp. v. Lewis*, 584 U.S. 497 (2018). WLF's Legal Studies Division also regularly publishes papers by outside experts on arbitration. *See, e.g.*, John F. Querio, *Courts in California Enable End-Run of Federal Arbitration Act by Expanding Obscure State Labor Law*, Wash. Legal Found. (June 16, 2017).

* * *

The FAA "establishes a federal policy favoring arbitration[.]" *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). This means that "a court must hold a party to its arbitration contract just as the court would to any other kind" of contract. *Morgan v. Sundance*, 596 U.S. 411, 418 (2022). The Second Circuit's flawed decision—including its improper expansion of the narrow effective-vindication exception to the FAA—renders a valid arbitration provision unenforceable whenever a judge speculates that certain arbitral procedures, which the parties *agreed* to follow, might be "unfair."

This Court should grant certiorari and reverse the Second Circuit's opinion to prevent district courts from deciding for themselves—in violation of the FAA and the Court's precedents—whether contracting parties' agreements to arbitrate are fair.

SUMMARY OF ARGUMENT

The Court has long recognized that "federal statutory claims can be appropriately resolved through arbitration and has enforced agreements involving such claims." *Green Tree Fin. Corp.- Ala. v. Randolph*, 531 U.S. 79, 80 (2000); *see also Rent-A-Ctr.,*

W., Inc. v. Jackson, 561 U.S. 63 (2010) (sending to arbitration claims brought under Section 1981 of the Civil Rights Act of 1866, 42 U.S.C. § 1981). In this case, Respondent Flores, a coach with the National Football League ("NFL"), filed an employment discrimination lawsuit asserting claims under Section 1981. The Second Circuit's decision affirming the district court's order denying in part the motion to compel arbitration as to the NFL and certain NFL teams was based, in part, upon its improper expansion of the "judge-made exception" to the FAA known as the "effective vindication" exception. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 235 (2013).

Under this narrow exception, which is the focus of this amicus brief, a court can refuse to enforce an arbitration provision if it would preclude the litigant from effectively vindicating his federal statutory rights. *See id.* at 235-36 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 637 (1985)) ("The 'effective vindication' exception to which respondents allude originated as . . . a willingness to invalidate, on 'public policy' grounds, arbitration agreements that 'operat[e] . . . as a prospective waiver of a party's right to pursue statutory remedies.'"). This Court, however, has never invalidated an arbitration provision based on this exception. *See, e.g.*, *id.* (holding that effective-vindication exception did not apply to claims brought under federal antitrust statute); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009) (effective-vindication exception did not apply to claims brought under the Age Discrimination in Employment Act); *Green Tree Fin.*, 531 U.S. at 82 (effective-vindication exception

did not apply to claims brought under the Truth in Lending Act and Equal Credit Opportunity Act).

Although the Second Circuit panel claimed that it applied the effective-vindication exception "for the same reasons that the alleged arbitration provision lacks FAA protection," Pet. App. 24a, it did not meaningfully consider this Court's precedents that clearly establish the extremely narrow scope of the exception.[2]

More specifically, the Court has limited the potential application of the effective-vindication exception to two possible circumstances where federal statutory rights are at issue: (1) where an arbitration provision "forbid[s] the assertion of certain statutory rights," or (2) where the exception "would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable.'" *Italian Colors*, 570 U.S. at 236. Although neither circumstance is present here, *see* Pet. at 5-6, the panel completely disregarded these express limitations as to when the effective-vindication exception may apply.

In its most glaring error, the panel ignored this Court's guidance requiring courts to analyze the federal statute and arbitration provision to determine whether either forbids adjudication of the federal statutory claims in arbitration. *See, e.g.*, *Italian Colors*, 570 U.S. at 236 (examining whether "a provision in an arbitration agreement forbid[s] the

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[2] The Second Circuit erred as to whether the NFL Constitution provides for arbitration "in name only," *see* Pet. at 11, but the focus of this brief is on the effective-vindication exception.

assertion of certain statutory rights"). Nowhere in its opinion did the Second Circuit examine the text and history of Section 1981; the specific relief that Respondent seeks under that federal statute; whether that federal statute prohibits arbitration of claims brought under that law; or whether the arbitration provision expressly prohibited or would have the effect of preventing Respondent from adjudicating his Section 1981 claims in arbitration. Had the court of appeals done so, it would have been compelled to conclude that none of these concerns is present.

The Second Circuit's errors are made obvious by the text of Section 1981, which expressly recognizes that "arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title." 42 U.S.C. § 1981 note to 1991 amendment (Alternative Means of Dispute Resolution). Untethered to any textual or historical underpinnings to the relevant statute or arbitration provision, the Second Circuit wielded the narrow effective-vindication exception as a trump card to invalidate an agreed-to arbitration provision in a way that this Court never has done before.

The Second Circuit's improper expansion of the effective-vindication exception also fails to consider this Court's precedents on which party bears the burden of proof. The Court has repeatedly instructed that "[t]he burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *McMahon*, 482 U.S. at 227. The Second Circuit's opinion provides no such discussion, and the

plain text of Section 1981 and the arbitration provision provide evidence to the contrary.

Finally, in speculating about what *might* happen during an arbitration proceeding, the Second Circuit's approach encourages other courts to disfavor, or reject, the enforcement of arbitration provisions. This type of subjective and arbitrary decision-making is forbidden by this Court's effective-vindication precedents and undoubtedly would lead to inconsistent results among courts when ruling on motions to compel arbitration.

The Court should grant the petition for a writ of certiorari and honor the FAA's fundamental purpose of honoring arbitration agreements by reaffirming the narrow scope of the effective-vindication exception.

ARGUMENT

A. Federal statutory claims may be adjudicated through arbitration

Congress "enacted the FAA in response to widespread judicial hostility to arbitration." *Italian Colors*, 570 U.S. at 232 (citation omitted). Under the FAA, "courts must rigorously enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes, and the rules under which that arbitration will be conducted." *Id.* at 233 (citation modified). This "holds true for claims that allege a violation of a federal statute, unless the FAA's mandate has been overridden by a contrary congressional command." *Id.* (citation modified).

The Court has consistently rejected the notion that federal statutory claims cannot be adjudicated in

arbitration. *See Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 516 (2018) (recognizing "this Court has rejected *every* such effort to date"). As the Court stated in *Green Tree Financial*, "[i]n light of the FAA's purpose to reverse longstanding hostility to arbitration agreements and to place them on the same footing as other contracts," the "Court has recognized that federal statutory claims can be appropriately resolved through arbitration and has enforced agreements involving such claims." 531 U.S. at 80 (citation modified).

B. The effective-vindication exception to the FAA is limited to arbitrations that would preclude enforcement of federal statutory rights

The effective-vindication exception "originated as dictum in *Mitsubishi Motors*," where this Court "expressed a willingness to invalidate, on 'public policy' grounds, arbitration agreements that 'operat[e] … as a prospective waiver of a party's right to pursue statutory remedies.'" *Italian Colors*, 570 U.S. at 235 (quoting *Mitsubishi*, 473 U.S. at 637 n.19 (1985)).

To determine whether a party's right to pursue federal statutory remedies would be precluded if adjudicated in arbitration, courts must examine both the text of the arbitration provision and the federal statute at issue. For example, if there is "a provision in an arbitration agreement forbidding the assertion of certain statutory rights," then the effective-vindication exception may apply. *Italian Colors*, 570 U.S. at 236. The exception also may apply if the federal statute prohibits the arbitration of claims brought thereunder. *See id.* at 228-29 (quoting

Mitsubishi, 473 U.S. at 628 (Sherman and Clayton antitrust laws do not "evince[] an intention to preclude" resolution of those federal statutory rights in arbitration).

The effective-vindication exception should not be applied to invalidate the arbitration provision unless there is explicit evidence of Congress' intent to preclude arbitration of claims protected by that federal statute. *See McMahon*, 482 U.S. at 238 ("[T]here is nothing in the text of the RICO statute that even arguably evinces congressional intent to exclude civil RICO claims from the dictates of the Arbitration Act."); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) ("Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.") (citation modified).

Claims brought under federal anti-discrimination statutes receive no different treatment. *See, e.g.*, *Jackson*, 561 U.S. at 65, 67–68 (Section 1981 anti-discrimination claims subject to arbitration); *Gilmer*, 500 U.S. at 26 (Age Discrimination in Employment Act claims can be adjudicated through arbitration). This Court's precedent undeniably confirms Respondent's Section 1981 claims may be subject to arbitration.

C. Neither the federal statute nor the arbitration provision at issue precludes arbitration of Respondent's statutory claims

The Court has repeatedly held that "the party resisting arbitration bears the burden of proving that Congress intended to preclude arbitration of the statutory claims at issue." *Green Tree Fin.*, 531 U.S. at

81 (citing *Gilmer*, 500 U.S. at 26); *see also McMahon,* 482 U.S. at 227. Respondent bears this burden because to "invalidate the agreement would undermine the liberal federal policy favoring arbitration agreements." *Green Tree Fin.*, 531 U.S. at 91 (citation modified).

The Second Circuit's opinion includes no discussion of whether Section 1981 or the arbitration provision at issue precludes Respondent from adjudicating his Section 1981 claims through arbitration. The plain text of Section 1981 and the arbitration provision provide evidence to the contrary. Section 1981 forbids racial discrimination in the making and enforcement of contracts. The Second Circuit was required to examine that statute along with the arbitration provision to determine whether either precludes him from pursuing his federal statutory claims by arbitration. The Second Circuit did not undertake this analysis.

Had the Second Circuit conducted the required analysis, it would have found that there is nothing in the text of Section 1981 evincing an intent to prohibit adjudication of Section 1981 claims in arbitration, as this Court previously held. *See Jackson*, 561 U.S. at 65, 67–68 (sending Section 1981 claim to arbitration). Instead, a review of the law supports adjudicating Section 1981 claims by arbitration. The 1991 amendments to Section 1981 state: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, *including . . . arbitration*, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title." 42 U.S.C. § 1981

note to 1991 amendment (Alternative Means of Dispute Resolution) (emphasis added).

Where neither the text nor the legislative history of a federal statute establishes an intent to preclude arbitration of claims, this Court is loath to find a conflict with the FAA. For example, in *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98, 103-05 (2012), the Court refused to find a conflict with enforcing a contractual arbitration provision even though the federal statute, the Credit Repair Organizations Act, provides a "right to sue," repeatedly uses the words "action and court," and even declares that "[a]ny waiver by any consumer of any protection provided by or any right of the consumer under this subchapter . . . shall be treated as void."

There is nothing in the arbitration provision at issue here that forbids or otherwise precludes Respondent from seeking to adjudicate his Section 1981 claims in arbitration. *See* App. 5a. The FAA and this Court's precedents preclude a court from negating the parties' agreement to arbitrate where, as here, the statute and arbitration provision both allow arbitration of the statutory claims. *See Italian Colors*, 570 U.S. at 236.

D. The effective-vindication exception forbids speculation about the arbitration proceeding, including about the impartiality of the arbitrator

The Second Circuit's holding partially denying the motion to compel arbitration rested entirely upon its subjective view that the NFL Commissioner categorically could not be an impartial arbitrator and thus that Respondent would be unable to effectively

vindicate his claims in arbitration. *See* Pet. App. 55a (holding that submitting Respondent's claims "to the unilateral substantive and procedural discretion of the NFL Commissioner – the principal executive of one of Flores's adverse parties – provides for arbitration in name only . . . ."). But each time this Court has discussed the effective-vindication exception, it has cautioned courts against this very type of speculation about the potential impartiality of an arbitrator. *See, e.g.*, *Mitsubishi*, 473 U.S. at 634 ("We decline to indulge the presumption that the parties and the arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators."). The Second Circuit disregarded this precedent.

A court considering a motion to compel arbitration should not make presumptions about the impartiality of arbitrators before the arbitration proceeds. *See McMahon,* 482 U.S. at 232 ("We have indicated that there is no reason to assume at the outset that arbitrators will not follow the law . . ."). Instead, the appropriate method of challenging allegations of arbitrator bias is to pursue the underlying claims through arbitration and then seek judicial review challenging the arbitration award under Section 10 of the FAA. *See id.* ("[A]lthough judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute."); 9 U.S.C. § 10(a)(2) ("In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration where there

was evident partiality or corruption in the arbitrators, or either of them.") (citation modified).

Speculation of any kind about what might happen during arbitration has no place in deciding whether the effective-vindication exception applies.

For example, in *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003), this Court refused to determine whether the arbitration provision's bar on punitive damages prohibited awarding the treble damages available under the RICO statute. As this Court stated, "we should not, on the basis of 'mere speculation' that an arbitrator might interpret these ambiguous agreements in a manner that casts their enforceability into doubt, take upon ourselves the antecedent question of how the ambiguity is to be resolved." *Id.* at 406-07. Similarly, in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, this Court enforced an arbitration clause after holding that "mere speculation" that the foreign arbitrator "might" apply foreign law that "might" be less favorable than a federal statute did not provide a basis for declaring the relevant arbitration agreement unenforceable. 515 U.S. 528, 540 (1995).

Chief Justice Roberts, while on the D.C. Circuit, said it best when summarizing "two basic propositions" from this Court's precedents on the effective-vindication exception:

> [*F*]*irst*, that the party resisting arbitration on the ground that the terms of an arbitration agreement interfere with the effective vindication of statutory rights bears the burden of showing the likelihood of such interference, and *second*, that this

> burden cannot be carried by "mere speculation" about how an arbitrator "might" interpret or apply the agreement.

Booker v. Robert Half Int'l, Inc., 413 F.3d 77, 81 (D.C. Cir. 2005) (emphasis in original) (refusing to apply effective-vindication exception where arbitration provision gave arbitrator broad discretion over scope and method of discovery).

Discussing this Court's precedents, then-Circuit Judge Roberts reasoned that "[u]nder the approach set forth in *PacifiCare*, *Green Tree Finance*, and *Vimar*, such speculation about what *might* happen in the arbitral forum is plainly insufficient to render the agreement to arbitrate unenforceable." *Id.* The Second Circuit's decision, which rests entirely on speculation and circular reasoning, *see* Pet. App. 59a, violates these "basic propositions." *Booker*, 413 F.3d at 81.

In short, the Second Circuit assumed too much in speculating that Respondent might have prospectively waived his federal statutory rights by agreeing to the arbitration requirement in the NFL's constitution before any actions indicating ineffective vindication could arise.

E. The Court should grant certiorari to prevent reviewing courts from speculating about arbitration proceedings in violation of this Court's precedents and the fundamental purpose of the FAA

By conjuring a parade of horribles that *might* happen during an arbitration proceeding, the Second Circuit's decision risks encouraging other courts to disfavor or reject the enforcement of contractual

arbitration provisions. Fundamentally, the Second Circuit's decision is contrary to the FAA's "overarching principle that arbitration is a matter of contract," *Italian Colors*, 570 U.S. at 233, and that courts must "rigorously enforce" an arbitration provision according to its terms. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985). To allow courts to address premature or speculative questions about arbitration procedures would deny the parties their agreement to arbitrate claims and disputes. *See Italian Colors*, 570 U.S. at 233. Such an approach results in the type of "preliminary litigating hurdle [that] would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure." *Id.* at 239. The FAA does "not sanction such a judicially created superstructure," *id.*, which is precisely what the Second Circuit's decision imposes.

If left standing, the Second Circuit's decision will pry wide open a narrow exception created by this Court without providing a workable standard or meaningful guidelines for lower courts to follow in determining whether federal statutory rights can be effectively vindicated in arbitration. This would promote inconsistent results among the courts, often in direct conflict with the purpose of the FAA. Courts would be substituting their own subjective beliefs about what arbitration should look like instead of following this Court's precedents and honoring the parties' contractual bargains in this case and in the host of industrial, commercial, professional, and entrepreneurial communities standing to be adversely impacted by such an unprecedented decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 2026