APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

23-1185-cv

BRIAN FLORES, AS A CLASS REPRESENTATIVE ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,
PLAINTIFFS-APPELLANTS

v.

NEW YORK FOOTBALL GIANTS, INC.; HOUSTON NFL HOLDINGS, L.P., DBA HOUSTON TEXANS; DENVER BRONCOS; NATIONAL FOOTBALL LEAGUE,
DEFENDANTS-RESPONDENTS[*]

Filed: August 14, 2025

OPINION

Before: CABRANES, LYNCH, and LOHIER, Circuit Judges.

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[*] The Clerk of Court is directed to amend the caption as set forth above.

The National Football League ("NFL") and six of its member clubs (jointly "Defendants") moved to compel arbitration of a putative class action brought by Plaintiffs Brian Flores, Steve Wilks, and Ray Horton—current and former NFL coaches—alleging, in relevant part, claims of racial discrimination under 42 U.S.C. § 1981. The questions presented are whether the United States District Court for the Southern District of New York (Valerie E. Caproni, Judge) erred by partially denying Defendants' motion to compel arbitration and "abused its discretion" by denying Defendants' motion for reconsideration. More specifically, we consider: (1) whether the District Court erred by denying arbitration of Flores's claims against the Denver Broncos and the NFL based on his employment agreement with the New England Patriots, which incorporated by reference the NFL Constitution; (2) whether the District Court correctly denied Defendants' motion to compel arbitration of Flores's claims against the New York Giants, Houston Texans, and the NFL; and (3) whether the District Court abused its discretion by denying Defendants' motion for reconsideration.

We **AFFIRM** the District Court's order denying the motion to compel arbitration of Flores's claims against the Denver Broncos, New York Giants, Houston Texans, and NFL. We also **AFFIRM** the District Court's order denying reconsideration.

We conclude that: (1a) Flores's agreement under the NFL Constitution to submit his statutory claims against the Broncos and the NFL 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 and accordingly lacks the protection of the Federal Arbitration Act ("FAA"); (1b) Flores's agreement to submit his statutory

claims against the Broncos and the NFL to the unilateral discretion of the NFL Commissioner is unenforceable because the agreement fails to guarantee that Flores can "vindicate [his] statutory cause of action in [an] *arbitral forum*", (1c) the District Court did not err when it denied Defendants' motion to compel arbitration of Flores's claims against the Giants, Texans, and the NFL; and (2) the District Court did not abuse its discretion by denying Defendants' motion for reconsideration.

OPINION

JOSÉ A. CABRANES, Circuit Judge:

The National Football League ("NFL") and six of its member clubs (jointly "Defendants") moved to compel arbitration of a putative class action brought by Plaintiffs Brian Flores, Steve Wilks, and Ray Horton—current and former NFL coaches—alleging, in relevant part, claims of racial discrimination under a federal statute and state and local law.[1] The questions presented are whether the United States District Court for the Southern District of New York (Valerie E. Caproni, Judge) erred by partially denying Defendants' motion to compel arbitration and "abused its discretion" by denying Defendants' motion for reconsideration. More specifically, we consider: (1) whether the District Court erred by denying arbitration of Flores's claims against the Denver Broncos and the NFL based on his employment agreement with the New England Patriots, which incorporated by reference the NFL Constitution; (2) whether the District Court erred when it denied Defendants' motion to compel arbitration of Flores's claims against the New York Giants, Houston Texans, and the NFL; and (3) whether the District Court

[1] Plaintiffs brought claims under 42 U.S.C. § 1981. *See post* note 5.

abused its discretion by denying Defendants' motion for reconsideration.

We **AFFIRM** the District Court's order denying the motion to compel arbitration of Flores's claims against the Denver Broncos, New York Giants, Houston Texans, and NFL. We also **AFFIRM** the District Court's order denying reconsideration.

We conclude that: (1a) Flores's agreement under the NFL Constitution to submit his statutory claims against the Broncos and the NFL 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 and accordingly lacks the protection of the Federal Arbitration Act ("FAA"); (1b) Flores's agreement to submit his statutory claims against the Broncos and the NFL to the unilateral discretion of the NFL Commissioner is unenforceable because the agreement fails to guarantee that Flores can "vindicate [his] statutory cause of action in [an] *arbitral forum*";[2] (1c) the District Court did not err when it denied Defendants' motion to compel arbitration of Flores's claims against the Giants, Texans, and the NFL; and (2) the District Court did not abuse its discretion by denying Defendants' motion for reconsideration.

I. BACKGROUND

Brian Flores is the current defensive coordinator of the Minnesota Vikings, a member club of the NFL. Since 2008, Flores has been employed as a football coach by a variety of NFL member clubs, namely the New England

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[2] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985) (emphasis added).

Patriots (2008-2018), Miami Dolphins (2019-21), Pittsburgh Steelers (2022), and Minnesota Vikings (2023-Present).

The NFL is an unincorporated membership association consisting of 32 member clubs. The operation and structure of the NFL, as well as the relationship between the NFL, the member clubs, and the clubs' employees, are governed by the NFL Constitution and Bylaws (the "NFL Constitution"), which broadly empowers the NFL Commissioner to manage the league's affairs.[3] The NFL Commissioner's powers include, but are not limited to, the ability to interpret and establish league policy and procedure, discipline relevant parties (including member clubs and coaches), hire legal counsel to respond to conduct detrimental to "the league, its member clubs or employees, or to professional football," and the "full, complete, and final jurisdiction and authority to arbitrate" disputes between relevant parties, including between employees and member clubs.[4]

In February 2022, Flores filed a putative class action against the NFL, as well as member clubs the Denver Broncos, New York Giants, and Miami Dolphins, alleging claims of racial discrimination under 42 U.S.C. § 1981, as well as under state and local statues.[5] In April 2022, Flores filed the now-operative first amended complaint,

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[3] *See* Constitution and Bylaws of the National Football League, J.A. 571-1019.

[4] *Id* at art. VIII, J.A. 603-12.

[5] 42 U.S.C. § 1981 provides:

> (a) Statement of equal rights
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the

which included an additional claim by Flores against the Houston Texans as well as claims by two new plaintiffs, current NFL coach Steve Wilks and former NFL coach Ray Horton, against the Arizona Cardinals and Tennessee Titans, respectively.

In June 2022, the NFL and the relevant member clubs moved to compel arbitration. Defendants argued that the claims brought by Plaintiffs Flores, Wilks, Horton, and putative class members were subject to arbitration as agreed to in Plaintiffs' employment agreements with the various member clubs for which they served as coaches. Each time a Plaintiff had been hired as a coach of a member club, he signed an employment contract that included an express agreement to arbitrate disputes with the relevant member club and also incorporated by reference the NFL Constitution, which includes a broad arbitration provision.[6] Defendants argued that the NFL was entitled

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> full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) "Make and enforce contracts" defined
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) Protection against impairment
>
> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

[6] *Compare, e.g.*, Flores-Patriots Agreement (Redacted), J.A. 512 (Flores's club-specific arbitration agreement with the Patriots), *with*

to enforce Plaintiffs' arbitration agreements with respect to their claims against the NFL, pursuant to the doctrine of equitable estoppel.[7]

A. THE DISTRICT COURT'S ORDER

On March 1, 2023, the District Court granted the motion to compel arbitration with respect to Flores's claims against the Dolphins, Wilk's claims against the Cardinals, and Horton's claims against the Titans—as well as their related claims against the NFL—on the basis of the club-specific arbitration agreements in each of the Plaintiffs' employment agreements.[8] However, the District Court

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id. at J.A. 511 (incorporating the NFL Constitution in Flores's contract with the Patriots). *See also* Constitution and Bylaws of the National Football League art. VIII, § 8.3, J.A. 603.

[7] Under the doctrine of equitable estoppel, an arbitration agreement can be enforced against a non-signatory to whom the law will otherwise attribute consent. *Doe v. Trump Corp.*, 6 F.4th 400, 413 (2d Cir. 2021). Accordingly, even though the NFL Constitution's arbitration provision does not explicitly cover disputes between coaches and the NFL, the District Court determined that Plaintiffs were estopped "from avoiding arbitration of their claims against the NFL in light of their allegations that the NFL and the Defendant teams were jointly engaged in the alleged discrimination and retaliation." *Flores v. Nat'l Football League*, 658 F. Supp. 3d 198, 213 (S.D.N.Y. 2023).

In their briefing, Defendants argued that the NFL is the "membership association for the member clubs that hired Plaintiffs, and the NFL itself approved and signed those agreements." Memorandum of Law in Support of Defendants' Motion to Compel Arbitration and Stay Further Proceedings, J.A. 194. Further, Defendants argued that "Plaintiffs' claims against the NFL are wholly derivative of and factually intertwined with their claims against the member clubs whose employment practices and purported violations of NFL rules and policies are the foundation for such claims." *Id.* at 194-95.

[8] *Flores*, 658 F. Supp. 3d at 220.

denied the motion as to Flores's claims against the Broncos, Giants, and Texans, and related claims against the NFL.[9] This appeal concerns only Flores's claims against the Broncos, Giants, and Texans, and related claims against the NFL.

1. Flores's Claims Against the Denver Broncos and Related Claims Against the NFL[10]

In January 2019, while still under contract as a coach with the Patriots, Flores interviewed for the position of head coach of the Broncos. He alleges that the Broncos discriminated against him because of his race when they failed to hire him.[11] A month later, in February 2019, Flores was hired as head coach of the Miami Dolphins.

At the time of his interview with the Broncos, Flores's employment contract with the Patriots included two provisions bearing on the arbitrability of his claims. First, Flores agreed to a club-specific arbitration agreement with the New England Patriots.[12] Second, Flores agreed

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[9] *Id.*

[10] Because the details of Defendants' alleged violations of law are ancillary to issues in this appeal, we provide only a general overview.

[11] More specifically, Flores argues that he was offered an interview with the Broncos as a "sham" to satisfy the Rooney Rule. First Amended Class Action Complaint, J.A. 133-34. The Rooney Rule is a long-standing requirement by the NFL that two opportunities to interview for each open coaching positions be allotted to prospective candidates who are a member of a racial minority group and/or a woman. *See The Rooney Rule*, NFL Football Operations, https://operations.nfl.com/inside-football-ops/inclusion/the-rooney-rule/.

[12] Flores agreed "that all matters in dispute between Employee and the Club, including without limitation any dispute arising from the terms of this Agreement, shall be referred to the NFL Commissioner

"to comply at all times with, and to be bound by, the NFL Constitution," which was incorporated by reference into his employment agreement "in [its] present form and as amended from time to time hereafter."[13] Section 8.3 of the NFL Constitution grants the NFL Commissioner "full, complete, and final jurisdiction and authority to arbitrate" several types of disputes, including "[a]ny dispute between any . . . coach . . . and any member club or clubs."[14]

Inasmuch as Flores's claims against the Broncos and the NFL plainly fell outside his club-specific arbitration agreement with the Patriots, the District Court considered whether the NFL Constitution's general arbitration provision applied to Flores's claims and was enforceable. It found that the NFL Constitution's arbitration provision applied to Flores's claims but refused to enforce the arbitration provision.[15] The District Court reasoned that the arbitration provision was illusory and unenforceable under Massachusetts state law because "the NFL and its member clubs have the unilateral ability to modify the terms of the NFL Constitution."[16] As a result, the District Court ordered that Flores's claims against the Broncos and related claims against the NFL be litigated in federal court.

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for binding arbitration in accordance with the NFL's Dispute Resolution Procedural Guidelines." Flores-Patriots Agreement (Redacted), J.A. 512.

[13] *Id.* at J.A. 511.

[14] Constitution and Bylaws of the National Football League art. VIII, § 8.3, J.A. 603.

[15] *Flores*, 658 F. Supp. 3d at 214-15.

[16] *Id.* at 215.

2. Flores's Claims Against the New York Giants, Houston Texans, and Related Claims Against the NFL

In January 2022, after three seasons as the head coach of the Miami Dolphins, Flores was fired. Afterwards, Flores was interviewed for head coach positions with both the Giants and the Texans. He was not hired for either position, allegedly because of racial discrimination and retaliation. In February 2022, Flores was hired as the senior defensive assistant and linebackers coach of the Pittsburgh Steelers, signing an employment agreement that, like his employment agreement with the Patriots, included both a club-specific arbitration agreement and incorporated by reference the NFL Constitution.[17]

Defendants argued that Flores's contract with the Steelers retroactively applied to his claims against the Giants and Texans, compelling arbitration in accordance with the NFL Constitution. Without reaching the question of retroactivity, the District Court concluded, in an Opinion and Order dated March 1, 2023, that "Defendants ha[d] failed to establish that Mr. Flores entered into a valid arbitration agreement" because the version of the Flores-Steelers agreement submitted to the District Court was never signed by the NFL Commissioner.[18] As a result, the District Court ordered that Flores's claims against the Giants, Texans, and related claims against the NFL be litigated in federal court.

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[17] Flores-Steelers Agreement (Redacted), J.A. 515-522.

[18] *Flores*, 658 F. Supp. 3d at 210.

B. MOTIONS FOR RECONSIDERATION AND APPEAL

In March 2023, the parties cross-moved for partial reconsideration of the District Court's March 1 order. In their motion, Defendants asserted that they were not given notice that the District Court would rely on the absence of a signed copy of the Flores-Steelers agreement to deny their motion to compel arbitration. They explained that the NFL Commissioner had, in fact, approved the Flores-Steelers agreement on June 17, 2022, and provided the District Court with a new copy bearing his signature. On July 25, 2023, the District Court denied both motions for reconsideration.[19]

On August 21, 2023, the NFL, Denver Broncos, New York Giants, and Houston Texans (jointly, "Defendants-Appellants") filed a timely notice of appeal limited to the portion of the District Court's order of March 1, 2023, declining to compel arbitration of Flores's claims against the Broncos, Giants, and Texans, and related claims against the NFL.[20] Defendants-Appellants also appealed the District Court's order of July 25, 2023, denying Defendants' motion for reconsideration.[21] As this Court has already ruled in an unpublished order, we lack jurisdiction over Plaintiffs' cross-appeal concerning the District Court's decision to compel arbitration of Flores's claims against the Miami Dolphins, Wilks's claims against the Arizona

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[19] *Flores v. Nat'l Football League*, No. 22-CV-0871, 2023 WL 4744191, at *8 (S.D.N.Y. July 25, 2023).

[20] J.A. 1166.

[21] *Id.*

Cardinals, and Horton's claims against the Tennessee Titans.[22] The claims of Wilks and Horton are thus no longer before this Court.

II. DISCUSSION

We review *de novo* the District Court's denial of a motion to compel arbitration.[23] We review for "abuse of discretion" the District Court's order denying a motion for reconsideration.[24] Importantly, we "are free to affirm on any ground that finds support in the record, even if it was not the ground upon which the trial court relied."[25]

First, we consider whether the District Court erred by denying arbitration of Flores's claims against the Denver Broncos and the NFL based on his employment agreement with the New England Patriots, which incorporated by reference the NFL Constitution. Second, we consider whether the District Court correctly denied Defendants' motion to compel Flores to arbitrate his claims against the New York Giants, Houston Texans, and the NFL. In turn, we also consider whether the District Court abused its discretion by denying Defendants' motion for reconsideration.

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[22] In an order, this Court granted Defendants-Appellants' motion to dismiss the cross-appeal for lack of appellate jurisdiction. *See Wilks v. N.Y. Football Giants, Inc.*, No. 23-1185, 2024 WL 4110915, at *1 (2d Cir. Apr. 11, 2024) (declining to exercise pendent appellate jurisdiction).

[23] *Lloyd v. J.P. Morgan Chase & Co.*, 791 F.3d 265, 269 (2d Cir. 2015).

[24] *Contant v. AMA Cap., LLC*, 66 F.4th 59, 65 (2d Cir. 2023).

[25] *Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392, 396 n.2 (2d Cir. 2018) (quoting *Headley v. Tilghman*, 53 F.3d 472, 476 (2d Cir. 1995)).

A. THE DISTRICT COURT CORRECTLY DENIED ARBITRATION OF FLORES'S CLAIMS AGAINST THE DENVER BRONCOS AND RELATED CLAIMS AGAINST THE NFL

1. Legal Framework

The Federal Arbitration Act ("FAA") establishes "both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract."[26] Specifically, Section 2 of the FAA provides that "agreements to arbitrate [are] 'valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'"[27]

We have been reminded by the Supreme Court that "[g]iven that arbitration agreements are simply contracts . . . the first question [courts consider] in any arbitration dispute must be: What have these parties agreed to?"[28] To answer this question, courts apply the relevant "ordinary state-law principles that govern the formation of contracts."[29] If the parties have formed a valid contract, courts must generally "rigorously enforce arbitration agreements according to their terms."[30]

Nevertheless, not every self-declared "arbitration agreement" or contractual provision within such an agreement is embraced by the FAA's mandate. The Supreme

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[26] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (internal quotation marks and citations omitted).

[27] *Id.* at 336 (quoting 9 U.S.C. § 2).

[28] *Coinbase, Inc. v. Suski*, 602 U.S. 143, 148 (2024) (internal quotation marks and citations omitted).

[29] *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

[30] *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (internal quotation marks and citation omitted).

Court has recently reiterated that the FAA's mandate is limited to the enforcement of actual "arbitration agreements"—meaning "a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute."[31] Indeed, the rigorous enforcement of arbitration agreements under the FAA has long presumed "traditional arbitral practice" and "the norm of bilateral arbitration as our precedents conceive of it."[32] Fundamentally, "[a]n arbitration agreement . . . does not alter or abridge substantive rights; it merely changes how those rights will be processed."[33] When a party "agree[s] 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."[34] Accordingly, "the FAA does not require courts to enforce contractual waivers of substantive rights and remedies."[35]

This basic principle—"that the FAA requires only the enforcement of provision[s] to settle a controversy by arbitration"—means that agreements beyond the scope of

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[31] *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 653 (2022) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974)).

[32] *Id.* at 657-58; *see also AT&T Mobility LLC*, 563 U.S. at 348-50 (distinguishing so called bilateral arbitration from class-wide arbitration and noting that while arbitration works well for bilateral litigation, it is "poorly suited to the higher stakes of class litigation"). *See also* post note 51.

[33] *Viking River*, 596 U.S. at 653.

[34] *Mitsubishi Motors Corp.*, 473 U.S. at 628 (quoted in part in *Viking River*, 596 U.S. at 653).

[35] *Viking River*, 596 U.S. at 653.

this tenet are unprotected by the FAA and potentially vulnerable to invalidation.[36] There are a number of alternatives to adjudication for resolving disputes, including not only arbitration but any number of other mechanisms, such as dueling, flipping a coin, or settling controversies with a game of ping pong.[37] The only form of alternative dispute resolution protected by the FAA, though is arbitration, and neither a duel nor a game of ping pong is an arbitration, even if labeled as one.

When statutory rights are at stake, such a vulnerability can turn fatal. The Supreme Court's long-standing "effective vindication" doctrine establishes that even FAA-protected arbitration agreements are subject to invalidation when they "operat[e] . . . as a prospective waiver of a party's *right to pursue* statutory remedies."[38] The Court has explained that only "so long as the prospective litigant effectively may vindicate its statutory cause of action in the *arbitral forum*, [will] the statute . . . continue to serve both its remedial and deterrent function."[39] Put simply, an agreement to submit statutory claims to a non-arbitral process may amount to "contractual waiver[] of substantive rights and remedies" that falls outside FAA protection and is unenforceable under the foundational principles of the effective vindication doctrine.[40]

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[36] *Id.* at 653 n.5 (internal quotation marks and citation omitted).

[37] *Heckman v. Live Nation Ent., Inc.*, 120 F.4th 670, 689-90 (9th Cir. 2024).

[38] *Italian Colors Rest.*, 570 U.S. at 235 (quoting *Mitsubishi Motors*, 473 U.S. at 637 n.19).

[39] *Id.* (quoting *Mitsubishi Motors*, 473 U.S. at 637) (emphasis added).

[40] *Viking River*, 596 U.S. at 653.

2. Flores Agreed to Arbitrate His Statutory Claims

On appeal, neither party contests the District Court's determination that Flores's claims against the Denver Broncos and the NFL are covered by Flores's contract with the New England Patriots. When Flores interviewed with the Broncos, he was under contract with the Patriots. In his contract, Flores expressly agreed to abide by the NFL Constitution, which was properly incorporated into his agreement under Massachusetts state law.[41]

Section 8.3 of the NFL Constitution grants the NFL Commissioner "full, complete, and final jurisdiction and authority to arbitrate" several types of disputes, including "[a]ny dispute between any . . . coach . . . and any member club or clubs."[42] Even though the NFL arbitration provision does not explicitly cover claims against the NFL itself, the parties do not dispute that the District Court properly held that Flores is estopped from avoiding the arbitration of these claims under applicable state law.[43]

3. The NFL's Unilateral "Arbitration" Clause is Unenforceable Against Flores's Statutory Claims

On appeal, Flores argues that even though the NFL Constitution's arbitration provision (as incorporated into his employment contract with the Patriots) covers his claims against the Broncos and the NFL, the arbitration provision is unenforceable against his claims. Notably,

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[41] *See NSTAR Elec. Co. v. Dep't of Pub. Utils.*, 968 N.E.2d 895, 905-06 (Mass. 2012).

[42] Constitution and Bylaws of the National Football League art. VIII, §8.3, J.A. 603.

[43] *Flores*, 658 F. Supp. 3d at 213-14. *See ante* note 7.

while the District Court refused to enforce the arbitration provision as illusory under Massachusetts state law, Flores argues that this Court should affirm the District Court's order on two potential alternative grounds. Flores contends both that the arbitration provision is unconscionable under Massachusetts state law and that the provision precludes the effective vindication of his statutory rights.

Determining that federal law compels the affirmance of the District Court's order on alternative grounds, we need not reach questions of state law. First, we hold that Flores's agreement under the NFL Constitution to submit his statutory claims against the Broncos and the NFL 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 and accordingly lacks the protection of the FAA. Second, we hold that Flores's agreement to submit his statutory claims against the Broncos and the NFL to the unilateral discretion of the NFL Commissioner is unenforceable because the agreement fails to guarantee that Flores can "vindicate [his] statutory cause of action in [an] arbitral forum."[44]

a. Flores's Agreement with Defendants-Appellants Is Not Protected by the FAA

While we have long recognized the unique "informalities" of arbitral procedures and the ability of parties to construct arbitration agreements on their own terms,[45] the NFL Constitution's arbitration provision fails to bear

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[44] *Mitsubishi Motors Corp.*, 473 U.S. at 637.

[45] *Am. Almond Prods. Co. v. Consol. Pecan Sales Co.*, 144 F.2d 448, 451 (2d Cir. 1944).

even a passing resemblance to "traditional arbitral practice."[46] It contractually provides for no independent arbitral forum, no bilateral dispute resolution, and no procedure.[47] Instead, it offends basic presumptions of our arbitration jurisprudence by submitting Flores's statutory claims to the unilateral substantive and procedural discretion of the "principal executive officer" of one of his adverse parties, the NFL.[48] And "[s]imply labeling something as 'arbitration' does not automatically bring it within the ambit of the FAA's protection."[49] The NFL Constitution's arbitration provision is "unworthy even of the name of arbitration" and thus falls outside of the FAA's protection.[50]

First, the NFL Constitution's arbitration provision fails to provide an independent arbitral forum for bilateral dispute resolution. A basic assumption of "traditional arbitral practice" and "the norm of bilateral arbitration as our precedents conceive of it" is that even while arbitration is a matter of contract, an arbitral forum is an *inde-*

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[46] *Viking River*, 596 U.S. at 658.

[47] *See ante* pg. 7-10 and *post* pg. 20-24 for a discussion of these basic features of arbitration.

[48] Constitution and Bylaws of the National Football League art. VIII, §§ 8.3, 8.4(b), J.A. 603-04. In addition, the NFL Commissioner enjoys authority over and owes responsibilities to member clubs. *Id.* art. VIII.

[49] *Heckman*,120 F.4th at 691 (VanDyke, J., concurring).

[50] *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999) (noting that arbitration is "a system whereby disputes are fairly resolved by an impartial third party" and that a "scheme whereby one party to the proceeding so controls the arbitral panel" is not arbitration, but rather "a sham system").

pendent forum that is separate from the parties to the dispute.[51] Indeed, the Supreme Court has explained that "an arbitrator derives his or her powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution."[52] Accordingly, an arbitration agreement that prevents parties from submitting their disputes to an independent arbitral forum, and that instead compels one party to submit its disputes to the substantive and procedural authority of the principal executive officer of one of their adverse parties, is an agreement for arbitration in name only. At a structural level, it lacks the requisite independence between parties and arbitrator that is fundamental to the FAA's conception of arbitration. The FAA authorizes federal courts to *vacate* arbitration awards "where there was evident partiality . . . in the arbitrators."[53] It would make little sense if the same statute nonetheless required the courts to compel parties to arbitrate their claims in a forum that is indisputably partial.[54] Accordingly, the agreement betrays the norm of bilateral dispute resolution and, quite

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[51] *Viking River*, 596 U.S. at 657-58. The Supreme Court's arbitration jurisprudence has long presumed that an arbitral forum is independent from the parties to the dispute. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) (presuming that an "arbitration panel[]" is an entity that is separate from and independent of the parties); *Mitsubishi Motors*, 473 U.S. at 634 (1985) (referring separately to "the parties" and to "the arbitral body with whose assistance [the parties] have agreed to settle their dispute," indicating that the two categories do not overlap).

[52] *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010).

[53] *See* 9 U.S.C. § 10(a)(2).

[54] *United States v. Int'l Bhd. of Teamsters*, 170 F.3d 136, 147 (2d Cir.1999) (explaining that "evident partiality" does not require "actual partiality"); *Pitta v. Hotel Ass'n of New York City, Inc.*, 806 F.2d

simply, could not be called with a straight face a "forum-selection clause."[55]

Second, the NFL arbitration provision fails to provide "the procedure to be used in resolving the dispute."[56] In fact, in the absence of a procedure provided by contract, Defendants-Appellants argue that an additional clause of the NFL Constitution provides the Commissioner the authority to unilaterally dictate arbitral procedure. Section 8.5 of the NFL Constitution grants the Commissioner the authority to "establish policy and procedure in respect to the provisions of the Constitution and Bylaws."[57] Importantly, the arbitration provision of the NFL Constitution does not reference or incorporate the NFL's Dispute Resolution Procedural Guidelines, which, by contrast, were incorporated into Flores's club-specific arbitration agreements that are not at issue in this appeal.[58] Ulti-

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419, 423-24 & n.2 (2d Cir. 1986) (explaining that evident partiality may be "infer[red] from objective facts inconsistent with impartiality" and that "[t]he relationship between a party and the arbitrator may, in some circumstances, create a risk of unfairness so inconsistent with basic principles of justice that the arbitration award must be automatically vacated").

[55] *Viking River*, 596 U.S. at 653 (quoting *Scherk*, 417 U.S. at 519).

[56] *Id.* (quoting *Scherk*, 417 U.S. at 519).

[57] Constitution and Bylaws of the National Football League art. VIII, § 8.5, J.A. 604.

[58] J.A. 512. On appeal, Defendants-Appellants insist that the NFL's Dispute Resolution Procedural Guidelines *do* apply to Flores's claims. However, for support, Defendants-Appellants rely on the NFL Commissioner's general, unilateral procedural power under Section 8.5. Appellants' Reply Br. at 23. The mere reference to the Commissioner's unilateral power is insufficient to establish that Flores agreed to incorporate the NFL's Dispute Resolution Procedural

mately, in matters of procedure, as in matters of substance, the NFL Constitution's arbitration provision bears virtually no resemblance to arbitration agreements as envisioned and as protected by the FAA.

Late efforts by the NFL Commissioner to exercise his unilateral discretion to boot-strap a more plausible arbitration process do not alter our analysis. After the submission of briefs on appeal, Defendants-Appellants alerted the Court that the NFL Commissioner had "exercised his discretion" to appoint Peter C. Harvey to arbitrate Flores's claims.[59] Harvey has a professional relationship with Defendants-Appellants on issues at the heart of Flores's claims: he is a member of the NFL's "Diversity Advisory Committee" and has been hired as a diversity consultant by the league.[60] This relationship is perfectly appropriate, it appears, but the late unilateral designation of an adviser to the NFL as arbitrator neither provides for an even facially independent arbitral forum, nor remedies the Commissioner's unilateral contractual authority over both the substance of Flores's statutory claims and

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Guidelines into his employment agreement to govern his claims subject to arbitration under the NFL Constitution. *See generally State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 811 (Mo. 2015) (applying Missouri law and finding that relator "had no way to know that the NFL intended the guidelines to govern arbitration proceedings"). Further, Defendants-Appellants' letter to the Court does not appear to support their contention that the NFL's Dispute Resolution Procedural Guidelines apply. Kannon K. Shanmugam Letter to the Court, No. 23-1185, ECF No. 157 (Sept. 24, 2024). *See post* note 61.

[59] Kannon K. Shanmugam Letter to the Court, No. 23-1185, ECF No. 157 (Sept. 24, 2024).

[60] Douglas H. Wigdor Letter to the Court 2, No. 23-1185, ECF No. 159 (Sept. 24, 2024).

the procedures governing their alleged "arbitration."[61] In fact, the Commissioner's unilateral designation of an adviser to the NFL represents a further extension of his unilateral power rather than its remedy.[62]

Ultimately, the NFL's arbitration provision is fundamentally unlike any traditional arbitration provision protected by the FAA, in which courts are appropriately cautioned to avoid presuming at an early stage "that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators."[63] Because the FAA's mandate is limited to the enforcement of actual "arbitration agreements," the NFL Constitution's arbitration provision enjoys no special deference under the FAA.[64] This holding is an independent reason to affirm the District Court's order

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[61] Notably, Defendants-Appellants did not claim in their letter to the Court that Harvey was selected in accordance with the NFL's Dispute Resolution Procedural Guidelines. Indeed, the unilateral designation of Harvey to arbitrate federal statutory claims appears to be facially inconsistent with these procedures. *See* National Football League Dispute Resolution Procedural Guidelines, §§ 1.5, 1.7, J.A. 501 (setting forth that when the dispute is "not football-oriented," such as when it "relat[es] to or aris[es] out of discrimination," the Commissioner may either direct the dispute to "the alternative dispute resolution provider *agreed to by the parties*" or to "JAMS, Inc." (emphasis added)).

[62] Accordingly, we additionally find persuasive some of the reasoning of the Fourth and Sixth Circuits, respectively, which refused to enforce arbitration provisions because of the unilateral selection of arbitrators. *See Hooters of Am.*, 173 F.3d at 939; *McMullen v. Meijer, Inc.*, 355 F.3d 485, 493-94 (6th Cir. 2004).

[63] *Mitsubishi Motors Corp.,* 473 U.S. at 634.

[64] *Viking River*, 596 U.S. at 653.

denying the motion to compel arbitration of Flores's claims.[65]

b. Flores's Agreement with Defendants-Appellants Is Unenforceable

In proceeding to consider the enforceability of Flores's contract to submit his statutory claims to the unilateral substantive and procedural authority of the executive of one of his adverse parties, we hold that the agreement is plainly unenforceable under the most basic principles of the effective vindication doctrine.

Preliminarily, it is important to note that the effective vindication doctrine has traditionally been understood as "a judge-made exception to the FAA" designed to "harmonize competing federal policies" by invalidating offending arbitration agreements.[66] Accordingly, the precise relationship between the "rigorous[]" enforcement of arbitration agreements demanded by the FAA and "a party's *right to pursue* statutory remedies" has been subject to extended judicial debate.[67]

Here, however, we need not reach the outer bounds of potential exceptions to the FAA because the alleged arbitration provision at issue before us plainly fails to provide

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[65] Although the effective vindication doctrine is an independent reason to affirm the District Court's order denying the motion to compel arbitration of Flores's claims, it is closely linked with our conclusion that the FAA does not protect the NFL Constitution's arbitration agreement. Both conclusions rely largely on the fact that the arbitral forum guaranteed by the NFL Constitution is inherently biased.

[66] *Italian Colors Rest.*, 570 U.S. at 235.

[67] *Id.* at 233, 235 (internal quotation marks and citations omitted). *See also id.* at 242-43 (Kagan, J., dissenting).

Flores access to an "arbitral . . . forum."[68] Indeed, for the same reasons that the alleged arbitration provision lacks FAA protection, it also functions as a "prospective waiver of a party's *right to pursue* statutory remedies."[69] An arbitration agreement is only enforceable so long as a "litigant effectively may vindicate its statutory cause of action in the arbitral forum."[70] Here, enforcing this agreement would require Flores to submit his statutory claims to the unilateral discretion of the executive of one of his adverse parties, without an independent arbitral forum under contract and without a process for bilateral dispute resolution.[71] Because Flores "has been denied arbitration in any

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[68] *Viking River*, 596 U.S. at 653 (internal quotation marks and citation omitted).

[69] *Italian Colors*, 570 U.S. at 235 (quoting *Mitsubishi Motors*, 473 U.S. at 637 n.19).

[70] *Id.* (quoting *Mitsubishi Motors*, 473 U.S. at 637); *see also State Farm Mutual Auto. Ins. Co. v. Tri-Borough NY Med. Practice P.C.*, 120 F.4th 59, 90-92 (2d Cir. 2024) (noting that this Court has declined to enforce arbitration agreements that "appeared to foreclose" plaintiffs "from vindicating rights granted by federal and state law" and granting plaintiffs' motion for a preliminary injunction to enjoin various separate arbitrations of defendants' other claims against them because plaintiffs' federal RICO claim could not be effectively vindicated in the arbitral forum (internal quotation marks and citation omitted)). An agreement to an alternative dispute resolution scheme like the one here that cannot be readily severed to avoid the effective-vindication doctrine is invalid in its entirety and enforceable neither as to federal nor state law claims. *See, e.g.*, *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 127-28 (2d Cir. 2019); *Cedeno v. Sasson*, 100 F.4th 386, 408 (2d Cir. 2024).

[71] *Compare* Constitution and Bylaws of the National Football League art. VIII, § 8.3, J.A. 603 (the NFL Constitution's general arbitration provision), *with id.* art. III, § 3.8(B), J.A. 583 (a provision of the NFL Constitution, not at issue here, setting forth that when "any stockholder, partner, or holder of any interest in a member club is requested to sell or dispose of his stock or an interest in a membership

meaningful sense of the word," we conclude that this agreement is unenforceable.[72] We need not resolve the various other state law arguments raised by Defendants to support the enforceability of the Flores-Patriots agreement because Flores cannot be compelled to arbitrate any of the claims against them, given that, as we have explained, the NFL Constitution's arbitration agreement is unenforceable.

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in the League" and the terms of the sale "cannot be accomplished by mutual agreement," the "price and other terms shall be fixed by arbitration with one arbitrator to be selected by the Commissioner and the other by the affected holder of the stock or interest").

We simply observe that in the circumstances described in § 3.8(B) involving "any stockholder, partner, or holder of any interest in a member club," the arbitrator resolving the dispute appears to be separate from the parties to the dispute. Though in certain eventualities this separateness is less clear (for example, if the two arbitrators cannot agree on the terms nor on the selection of the third arbitrator, "then such arbitrator . . . shall be named by the Commissioner"), the agreement marks a strong contrast with the agreement before us. *Id.* art. III, § 3.8(B), J.A. 583.

Indeed, the agreement before us vests in the NFL Commissioner—an individual who functions as the head of the NFL and who receives his salary from the owners of the teams that compose the NFL—full and final jurisdiction and authority to arbitrate a federal employment dispute brought against the NFL and some of its member teams.

[72] *Hooters of Am.*,173 F.3d at 941.

Finally, it is important to note that our opinion does not conflict with our decision in *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527 (2d Cir. 2016). There, we conducted a "very limited" review of an arbitration award under the Labor Management Relations Act, not the FAA. *Id.* at 536, 545 n.13 (quoting *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001)). The rights at issue in *Nat'l Football League Mgmt. Council* were contractual, not federal statutory rights, and they were subject to arbitration according to the terms of a collectively bargained for arbitration agreement. *Id.* at 536.

B. THE DISTRICT COURT CORRECTLY DENIED ARBITRATION OF FLORES'S CLAIMS UNDER THE STEELERS AGREEMENT AGAINST THE NEW YORK GIANTS AND HOUSTON TEXANS AND RELATED CLAIMS AGAINST THE NFL

Flores also cannot be compelled to arbitrate his claims against the Giants, Texans, or the related claims against the NFL, based on the Flores-Steelers agreement, which incorporates by reference the same arbitration agreement in the NFL Constitution.[73] As we explained, the NFL Constitution's arbitration agreement is unenforceable. We therefore also need not decide the various state law issues that the parties raise to support their respective arguments related to the enforceability of the Flores-Steelers agreement. Finally, because we conclude that the arbitration agreement in the NFL Constitution is unenforceable, we further hold that the District Court did not abuse its discretion in denying Defendants' motion for reconsideration.[74]

III. CONCLUSION

To summarize, we hold as follows:

(1a) Flores's agreement under the NFL Constitution to submit his statutory claims against the Broncos and the NFL to the unilateral substantive and procedural discretion of the NFL Commissioner—the principal executive of one of Flores's adverse parties—provides

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[73] Flores-Steelers Agreement (Redacted), J.A. 515-522.

[74] The District Court denied Defendants' motion for reconsideration on state law grounds. *See Flores*, 2023 WL 4744191, at *2-6. We do not review those bases for the District Court's decision, but because we hold that the District Court did not err when it denied Defendants' motion to compel arbitration, we affirm its denial of Defendants' motion to reconsider that decision.

for arbitration in name only and accordingly lacks the protection of the FAA.

(1b) Flores's agreement to submit his statutory claims against the Broncos and the NFL to the unilateral discretion of the NFL Commissioner is unenforceable because the agreement fails to guarantee that Flores can "vindicate [his] statutory cause of action in [an] arbitral forum."

(1c) That same unprotected and unenforceable agreement also cannot be used to compel Flores to arbitrate his claims against the Giants and Texans or related claims against the NFL.

(2) The District Court did not abuse its discretion by denying Defendants' motion for reconsideration.

For the foregoing reasons, we **AFFIRM** the District Court's order denying the motion to compel arbitration of Flores's claims against the Denver Broncos, New York Giants, Houston Texans, and NFL. We also **AFFIRM** the District Court's order denying reconsideration.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

22-CV-0871

BRIAN FLORES, STEVE WILKS, AND RAY HORTON, AS CLASS REPRESENTATIVES, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLANTS

v.

THE NATIONAL FOOTBALL LEAGUE; NEW YORK FOOTBALL GIANTS, INC. D/B/A NEW YORK GIANTS; MIAMI DOLPHINS, LTD. D/B/A MIAMI DOLPHINS; DENVER BRONCOS FOOTBALL CLUB D/B/A DENVER BRONCOS HOUSTON NFL HOLDINGS, L.P. D/B/A HOUSTON TEXANS; ARIZONA CARDINALS; TENNESSEE TITANS ENTERTAINMENT, INC. D/B/A TENNESSEE TITANS AND JOHN DOE TEAMS 1 THROUGH 26, DEFENDANTS-RESPONDENTS

Filed: March 1, 2023

OPINION AND ORDER

VALERIE CAPRONI, United States District Judge.

This case shines an unflattering spotlight on the employment practices of National Football League ("NFL")

teams. Although the clear majority of professional football players are Black, only a tiny percentage of coaches are Black. In 2002, to much hoopla, the NFL announced that it was going to do something about the paucity of Black coaches.[1] Its solution was to adopt the so-called "Rooney Rule." The Rooney Rule as originally adopted required an NFL team looking to hire a head coach to interview at least one minority candidate. The Amended Complaint in this case alleges that, however laudable the intent, the Rooney Rule has devolved into a cruel sham, with Black candidates being interviewed for positions that the team has already decided will be filled by a white candidate and with Black coaches being treated more harshly vis-à-vis employment decisions than similarly-situated white coaches. *See* Am. Compl., Dkt. 22.

Three Black men who are current or former NFL coaches have sued the NFL and several member teams for racial discrimination in violation of 42 U.S.C. § 1981, the New York State Human Rights Law, the New York City Human Rights Law, and the New Jersey Law Against Discrimination. *See* Am. Compl. Defendants moved to compel arbitration and to stay the current proceedings, Mot. to Compel Arbitration, Dkt. 47, and Plaintiffs opposed the motion, Pls. Opp., Dkt. 62. For the reasons discussed below, the motion to compel arbitration is **GRANTED** except as to the Brian Flores's claims against the New York Giants, the Houston Texans, the Denver

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[1] *See* Gus Garcia-Roberts, *The Failed NFL Diversity 'Rule' Corporate America Loves*, Wash. Post (Oct. 4, 2022), https://www.washingtonpost.com/sports/interactive/2022/rooney-rule-nfl-black-coaches/; Dave Anderson, *Sports of The Times; Minority Candidates Should Get Fairer Shake*, N.Y. Times (Dec. 16, 2003), https://www.nytimes.com/2003/12/16/sports/sports-of-the-times-minority-candidates-should-get-fairershake. html?searchResultPosition=7.

Broncos, and his related claims against the NFL, as to which the motion is **DENIED**.

BACKGROUND[2]

The NFL is an unincorporated association of thirty-two professional football clubs. Defs. Mem., Dkt. 48 at 4. Although each club is a separate legal entity, the clubs are governed by a shared set of NFL rules and policies, including the NFL Constitution. *See generally* Second DiBella Decl. Ex. 1 ("NFL Const. & Bylaws"), Dkt. 73. The NFL is overseen by a Commissioner, currently Roger Goodell, who is appointed by member teams. *See* NFL Const. & Bylaws Art. VIII; Pls. Opp. at 3.

A. PLAINTIFFS' ALLEGATIONS OF DISCRIMINATION IN THE NFL

Brian Flores, Steve Wilks, and Ray Horton are Black men who allege that they have each been discriminated against when employed or when seeking to be employed as coaches for NFL teams. Am. Compl. 1. Messrs. Flores and Horton allege that several NFL teams interviewed them for head coaching positions solely to fulfill the so-

[2] Although not raised by the parties, recent case law seems to suggest that there is some disagreement among courts in this circuit concerning the appropriate standard to apply on a pre-discovery motion to compel arbitration. *Compare Bensadoun v. Jobe-Riat*, 316 F.3d 171, 175 (2d Cir. 2003) (applying a summary judgment standard) *with Aleksanian v. Uber Techs. Inc.*, 524 F. Supp. 3d 251, 258 (S.D.N.Y. 2021) (applying a motion to dismiss standard). Because the parties do not dispute the material facts relevant to the motion to compel arbitration, the Court need not resolve this apparent conflict for the purposes of this motion.

called "Rooney Rule" without any intent of hiring them.[3] *See id.* at ¶¶ 185, 200-05, 271-73.

1. Brian Flores

Mr. Flores alleges that he was a victim of racial discrimination on four distinct occasions.

Mr. Flores first alleges that the Denver Broncos interviewed him in 2019 solely to satisfy the Rooney Rule without actually considering him for its head coach position. *Id.* ¶¶ 200-05.

Mr. Flores next alleges that when he was head coach of the Miami Dolphins, Dolphins owner Stephen Ross attempted to bribe him (i) to lose games so the Dolphins would get the first pick in the next year's draft and (ii) to recruit "a prominent quarterback in violation of League tampering rules." *Id.* ¶ 168; *see also id.* ¶¶ 161-63. When Mr. Flores refused both requests, he was stigmatized as an "angry black man" and ultimately fired. *Id.* ¶¶ 175, 177. Mr. Flores further alleges that the Dolphins provided him with an improper separation agreement, failed to pay him contractually-required severance pay in violation of his employment contract, and instituted arbitration proceedings against him to claw back his wages as retaliation for filing this lawsuit. *Id.* ¶¶ 220-26.

Mr. Flores further alleges that, in January 2022, the New York Giants invited him to interview for the position

[3] Of course, non-compliance with the Rooney Rule is not, itself, actionable. Nevertheless, Plaintiffs' allegations that teams conducted sham interviews, if proven, could undercut any defense predicated on the teams showing that Black candidates were "considered" for all open positions.

of head coach, but the Giants had already selected Brian Daboll.[4] *Id.* ¶¶ 182-88.

Finally, Mr. Flores claims that the Houston Texans removed him from consideration for their head coach position solely as retaliation for filing the instant lawsuit. *Id.* ¶¶ 207-13.

2. Steve Wilks

Steve Wilks alleges that the Arizona Cardinals hired him as a "bridge coach," meaning a coach "who is not given a meaningful opportunity to succeed and is simply 'keeping the seat warm' until . . . a new coach is brought in." *Id.* ¶ 233; *see also id.* ¶ 232. Mr. Wilks alleges that, despite a strong coaching performance "under extremely difficult circumstances"—including the arrest of Cardinals' General Manager Steve Keim, a weak roster featuring a rookie quarterback who had been drafted over Mr. Wilks's objection, and pressure to lose games to improve the Cardinals' position in the NFL draft—he was wrongfully terminated. *Id.* ¶ 247; *see also id.* ¶¶ 19, 240, 250. Mr. Wilks alleges that the Cardinals fired him as the "fall guy" for failures that were attributable in significant part to Mr. Keim, before hiring Kliff Kingsbury, a white man, as head coach. *See id.* ¶¶ 258-60.

3. Ray Horton

In January 2016, while he was the Tennessee Titans' defensive coordinator, Mr. Horton interviewed to be the Titans' head coach. *Id.* ¶¶ 266, 271-73. Mr. Horton alleges that the Titans only offered him the interview to comply

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[4] Before Mr. Flores interviewed for the position he received a text from Bill Belichik, the New England Patriots' head coach, congratulating him for getting the job. Am. Compl., Dkt. 22 ¶¶ 186-87. Mr. Belichik appears to have confused Brian Daboll, who was hired as the Giants' head coach, with Brian Flores, who was not. *Id.*

with the Rooney Rule, as the Titans had already decided to hire Mike Mularkey, a white man, when they interviewed Mr. Horton. *Id.* ¶¶ 273-78. In a 2020 interview, Mr. Mularkey stated that Amy Adams Strunk, the Titans' controlling owner, told him that he was going to be the head coach before they "went through the Rooney rule." *Id.* ¶ 280; *see also id.* ¶ 272. Mr. Horton further alleges that his unsuccessful interview with the Titans branded him as a "stale" candidate and interfered with him receiving additional interviews for head coach positions. *Id.* ¶ 284.

B. PLAINTIFFS' EMPLOYMENT CONTRACTS

Messrs. Flores, Wilks, and Horton each had an employment contract with each team he coached. *See* Pls. Opp. at 3; Defs. Mem. at 6. The NFL was not a party to those contracts. The NFL Commissioner was, however, required to approve each contract. *See* Defs. Mem. at 3, 21; *see also, e.g.*, Second DiBella Decl. Ex. 4 ("Flores-Steelers Agreement"), Dkt. 73 § 12. In each contract, each Plaintiff acknowledged that he had read the NFL Constitution and Bylaws and agreed to be bound by them. *See* Pls. Opp. at 9; *see also, e.g.*, Second DiBella Decl. Ex. 2 ("Flores-Dolphins Agreement"), Dkt. 73 § 7.1; Second DiBella Decl. Ex. 7 ("Horton-Titans Agreement"), Dkt. 73 § 6(a)-(c); Second DiBella Decl. Ex. 5 ("Wilks-Cardinals Agreement"), Dkt. 73 § 9(a).

While the exact text of those contracts varies, in relevant part each agreement provides that the NFL Commissioner will oversee an alternative dispute resolution process for all disputes arising between the parties. *See, e.g.*, Flores-Dolphins Agreement § 12.2; Horton-Titans Agreement § 6(a); Wilks-Cardinals Agreement § 10(a). Mr. Wilks's contract with the Cardinals also included a clause delegating any disputes regarding whether the

contracts were "void or voidable" to the arbitrator. *See* Wilks-Cardinals Agreement § 10(e).

LEGAL STANDARD

Pursuant to Section 2 of the Federal Arbitration Act ("FAA"), "agreements to arbitrate [are] 'valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'"[5] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336 (2011) (quoting 9 U.S.C. § 2). "[B]efore an agreement to arbitrate can be enforced, the district court must first determine whether such agreement exists between the parties. This question is determined by state contract law." *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 73 (2d Cir. 2017) (citing *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 229 (2d Cir. 2016)) (internal citation omitted).

If an arbitration agreement exists, the Court must also determine "whether the dispute falls within the scope of the arbitration agreement." *Meyer*, 868 F.3d at 74 (internal quotation omitted). Because of the "emphatic federal policy in favor of arbitral dispute resolution," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985), "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). *See also Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 35 (2d Cir. 2002) (Sotomayor, J.) ("[A]rbitration is indicated unless it can be said with positive assurance that an arbitration clause is not susceptible to an interpretation that covers the asserted dispute." *Id.* (internal quotation omitted).). In

[5] Plaintiffs do not dispute that the Federal Arbitration Act ("FAA") applies to the parties' agreement to arbitrate. Pls. Opp., Dkt. 62 at 5 (citing the FAA).

light of the "liberal federal policy favoring arbitration agreements . . . arbitration agreements should be enforced according to their terms unless the FAA's mandate has been overridden by a contrary congressional command." *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 295 (2d Cir. 2013) (cleaned up).[6]

An agreement to arbitrate arbitrability is "an additional, antecedent agreement" that is also covered by the FAA. *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S. Ct. 524, 529 (2019) (quoting *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 70 (2010)). Unlike other agreements to arbitrate, for which there is a presumption in favor of finding the parties agreed to arbitration, "the law reverses the presumption" for agreements to arbitrate arbitrability. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1955). Accordingly, "the issue of arbitrability may only be referred to the arbitrator if there is *clear and unmistakable evidence* from the arbitration agreement, as construed by the relevant state law, that the parties intended that the question of arbitrability shall be decided by the arbitrator." *Contec Corp. v. Remote Sol., Co., Ltd.*, 398 F.3d 205, 208 (2d Cir. 2005) (quoting *Bell v. Cendant Corp.*, 293 F.3d 563, 566 (2d Cir. 2002)).

DISCUSSION

Plaintiffs acknowledge that they entered into employment agreements with several of the Defendant teams and that those agreements provide an alternative dispute

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[6] Section 1981 of the Civil Rights Act of 1866 does not indicate a Congressional intent to override the FAA's policy toward the enforcement of arbitration agreements. *See Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 65, 67-68 (2010) (applying the FAA to plaintiff's section 1981 claim).

resolution process. Plaintiffs argue, however, that the alternative dispute resolution agreements are invalid or do not encompass their claims, or, if they are valid and do encompass their claims, they are unenforceable. *See, e.g.*, Pls. Opp. at 4 n.2, 8-9, 15-16, 24. For the reasons discussed below, the Court finds that Mr. Flores's claims against the Dolphins, Mr. Wilks's claims against the Cardinals, and Mr. Horton's claims against the Titans must be submitted to arbitration; Mr. Flores may, however, litigate his claims against the Broncos, Giants, and Texans in federal court.

I. PLAINTIFFS' CLAIMS, EXCEPT THOSE AGAINST THE GIANTS AND TEXANS, ARE COVERED BY THE PARTIES' ARBITRATION AGREEMENTS

Each employment agreement selected the law of the state in which the team was based as the governing law.[7] *See* Defs. Mem. at 3 n.2. Pursuant to the applicable state laws, the Court finds that Plaintiffs' claims, except for Mr. Flores's claims against the Giants and Texans, fall within the scope of the parties' arbitration agreements.[8]

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[7] The Court applies the law of the state selected by the applicable choice of law provisions in each contract. The choice of law clauses are enforceable because each employment contract selects the law of the state in which the Defendant team is based and in which each coach was employed; consequently, "the chosen law bears a reasonable relationship to the parties or the transaction." *Fireman's Fund Ins. Co. v. Great Am. Ins. Co. of New York*, 822 F.3d 620, 641 (2d Cir. 2016) (quoting *Welsbach Elec. Corp v. MasTec N. Am., Inc.*, 859 N.E.2d 498, 500 (2006)).

[8] Mr. Flores's claims against the Broncos fall within the scope of the applicable arbitration agreement, but the agreement is not enforceable for reasons discussed *infra*, section III(A).

A. Brian Flores

Mr. Flores has sued four different football teams: the Denver Broncos, Miami Dolphins, New York Giants, and Houston Texans. From 2008 until February 3, 2019, Mr. Flores was a coach for the New England Patriots. Am. Compl. ¶ 157; Defs. Mem. at 5. While under contract to the Patriots, he interviewed for the Broncos' head coach position, but he was not hired. Am. Compl. ¶¶ 200-04. From 2019 until January 10, 2022, Mr. Flores was the Dolphins' head coach. *Id.* ¶¶ 158, 177. After being fired by the Dolphins, Mr. Flores interviewed for the Giants' and Texans' head coach position but was not hired by either team. *Id.* ¶¶ 179, 184, 191, 207, 216. This lawsuit was filed on February 1, 2022, Compl., Dkt. 1, and on February 18, 2022, the Pittsburgh Steelers hired Mr. Flores as "the senior defensive assistant and linebackers coach," Defs. Mem. at 18; *see also* Flores-Steelers Agreement at 1.[9]

Defendants argue that, even though Mr. Flores never contracted with the Giants, Broncos, or Texans, his claims against those teams are nevertheless subject to arbitration pursuant to the NFL Constitution as incorporated into his contracts with the Patriots, Dolphins, and Steelers. *See* Defs. Mem. 18, 20 n.3. For the reasons explained below, the Court finds that only Mr. Flores's contract with the Dolphins and Patriots contain valid arbitration agreements relevant to his claims, and there is no binding arbitration agreement in Mr. Flores's contract with the Steelers.

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[9] Mr. Flores now appears to be the Minnesota Vikings' defensive coordinator. *See* Craig Peters, *Vikings Hire Brian Flores as Defensive Coordinator*, Vikings.com (Feb. 6, 2023, 5:25 P.M.), https://www.vikings.com/news/brian-flores-defensive-coordinator-hired-2023.

1. Mr. Flores's Claims Against the Broncos

Mr. Flores alleges that the Denver Broncos discriminated against him because of his race when they failed to hire him. Mr. Flores argues that he is not required to arbitrate his claims against the Broncos because he never specifically agreed to arbitrate claims against the Broncos. *See* Pls. Opp. at 24. At the time Mr. Flores interviewed with the Broncos, he was under contract with the New England Patriots; in his contract with the Patriots, he expressly agreed to abide by the NFL Constitution, which was "made a part of th[e] Agreement." Second DiBella Decl. Ex. 3 ("Flores-Patriots Agreement"), Dkt. 73 § 15; *see also NSTAR Elec. Co. v. Dep't of Pub. Utilities*, 968 N.E.2d 895, 905-06 (Mass. 2012) (holding that a contract incorporates a document by reference where it "clearly communicate[s] that the purpose of the reference is to incorporate the referenced material into the contract," *id.* at 905 (internal quotation omitted)).

Section 8.3 of the NFL Constitution contains an arbitration provision that is broader than the one contained in the employment contracts; it grants the NFL Commissioner "full, complete and final jurisdiction and authority to arbitrate" several types of disputes. As is relevant here, the NFL Commissioner has jurisdiction to arbitrate "[a]ny dispute between any . . . coach . . . and any member club or clubs." NFL Const. & Bylaws § 8.3(B).

Mr. Flores's claims against the Broncos plainly constitute a "dispute between any . . . coach . . . and any member club." *Id.* Mr. Flores's contract with the Patriots bound him to follow the NFL Constitution while he was employed by the Patriots, including its provision giving the Commissioner sole authority to arbitrate any dispute with an NFL team. *See* Flores-Patriots Agreement § 15; Pls.

Opp. at 24 (acknowledging that Mr. Flores was under contract with the Patriots when he interviewed with the Broncos).

Defendants also argue that the arbitration agreement in the NFL Constitution, as incorporated into Mr. Flores's 2019 contract with the Miami Dolphins, retroactively applies to Mr. Flores's claims against the Broncos, which arose before he became the Dolphins' head coach. *See* Defs. Mem. at 18. Courts, however, have "refused to compel arbitration of claims arising from disputes which arose outside of the effective dates of arbitration agreements," unless the agreement expressly includes claims preceding the contract. *Klay v. All Defendants*, 389 F.3d 1191, 1203 (11th Cir. 2004); *see also Jones v. Waffle House, Inc.*, 866 F.3d 1257, 1271 n.1 (11th Cir. 2017) (arbitration agreement that explicitly encompassed past claims could be interpreted to include disputes over plaintiff's "previous attempts at employment."); *Baptist Hosp. of Miami, Inc. v. Media Healthcare Plans, Inc.*, 376 F. Supp. 3d 1298, 1308-10 (S.D. Fla. 2019) (applying Florida law and collecting cases).[10]

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[10] Even if the NFL Constitution, as incorporated into Flores-Dolphins contract, could be interpreted to retroactively apply to claims against teams that arose before the contract's effective date, the arbitration agreement would be unenforceable for unconscionability under Florida law. *See* Second DiBella Decl. Ex. 2 ("Flores-Dolphins Agreement"), Dkt. 73 § 19 (selecting Florida law). Mr. Flores had no power to modify the NFL Constitution, and Defendants did not commit to providing Mr. Flores notice of any changes to the NFL Constitution. *See* Flores-Dolphins Agreement § 7.1 ("Employee . . . agrees . . . to be bound by[] the Constitution, Bylaws, and the Rules and Regulations of the NFL (as they now exist or as they may be amended) . . . . "); Second DiBella Decl. Ex. 1 ("NFL Const. & Bylaws"), Dkt. 73 Art. 25 (setting forth the procedures for amendment of the NFL Constitution). Courts applying Florida law have held that a contract is illusory, and thus, unenforceable, where one party can modify the

Defendants finally argue that Mr. Flores must arbitrate his claims against the Broncos because the NFL's alleged systemic racism was already in full force while Mr. Flores was under contract to the Patriots.[11] Defs. Mem. at 18-20. The Court disagrees.

Despite the long historic narrative in the Amended Complaint reciting historical racism in the NFL, the gravamen of Mr. Flores's claim is not that the NFL is generally racist. Rather, Mr. Flores claims that specific adverse employment decisions were driven by discriminatory animus harbored by the NFL and member teams. Defendants' argument, taken to its logical extreme, would bind a coach forever to arbitration, even if he were never again employed by a team in the NFL, so long as the NFL had a practice of inflicting similar harm on other coaches while that coach was under contract. Defendants cite no cases, and research has revealed none, that endorse the idea of an endless agreement to arbitrate future disputes with legally distinct entities.

2. Mr. Flores's Claims Against the Miami Dolphins

Mr. Flores alleges that the Dolphins discriminated against him while he was employed by the Dolphins and shortly thereafter. The employment contract between

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terms of that contract without notifying the other party. *See Diverse Elements, Inc. v. Ecommerce, Inc.*, 5 F. Supp. 3d 1378, 1382 (S.D. Fla. 2014) (collecting cases); *Centennial Bank v. ServisFirst Bank, Inc.*, 2022 WL 10219893, at *31 (M.D. Fla., Oct. 10, 2022) ("[A] contract once entered into may not thereafter be unilaterally modified as subsequent modifications require consent . . . ." *Id.* at *31 (citations omitted)).

[11] Defendants make a similar argument with respect to Mr. Flores's claims against the Giants and the Texans, *see* Defs. Mem., Dkt. 48 at 18-20, which the Court rejects for the same reasons.

Mr. Flores and the Dolphins provides that "all matters in dispute" between Mr. Flores and the Dolphins "including, without limitation, any dispute arising from the terms of this Agreement, Employee's employment with the Club, or otherwise, shall be referred to the Commissioner of the NFL for binding arbitration . . . ." Flores-Dolphins Agreement § 12.2. Mr. Flores does not dispute that this agreement was binding or that his claims alleging discrimination while he was a coach and when he was fired fall within the scope of his arbitration agreement with the Dolphins. He argues, however, that his claims regarding the Dolphins' retaliatory conduct after he was fired do not fall within the scope of the contract's arbitration agreement. Pls. Opp. at 25.

There is a "presumption in favor of postexpiration arbitration of matters . . . arising out of the relation governed by the contract." *Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. N.L.R.B.*, 501 U.S. 190, 204 (1991) (internal citation omitted); *see also Doctors Assocs., Inc. v. Thomas*, 898 So.2d 159, 162 (Fla. Dist. Ct. App. 2005) (arbitration agreements govern disputes arising after the termination of a contract that does not explicitly exclude post-termination disputes).

Mr. Flores's retaliation claim against the Dolphins is subject to arbitration because it clearly arises from his employment with the club. Florida courts have interpreted the "arising from" requirement to require arbitration of an employee's claims where the "breach in question was an immediate, foreseeable result of the performance of contractual duties." *Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204, 1218 (11th Cir. 2011) (internal quotation omitted); *see also Maglana v. Celebrity Cruises, Inc.*, No. 20-14206, 2022 WL 3134373, at *4-5 (11th Cir. Aug. 5,

2022); *Phillips v. NCL Corp. Ltd.*, 824 F. App'x 675, 679 (11th Cir. 2020).

Disputes regarding the payment of wages or the terms of separation are "a fairly direct result of the performance of contractual duties" in an employment relationship. *Telecom Italia, SpA v. Wholesale Telecom Corp.*, 248 F.3d 1109, 1116 (11th Cir. 2001) (noting that an "intentional failure to perform the contract" is subject to arbitration). Upon embarking on an employment relationship, both employee and employer can anticipate that the employee may be fired and that disputes may arise regarding an employee's wages or the employer's retaliatory conduct.

In *Milestone v. Citrus Specialty Grp., Inc.*, No. 19-CV-2341, 2019 WL 5887179, at *2 (M.D. Fla. Nov. 12, 2019), the court found that an employee's claims of discrimination and retaliation were arbitrable under Florida law because "the claims were dependent upon the plaintiffs' employment's status and could not be brought in the absence of the employment relationship governed by the agreements." *Id.* (quoting *McAdoo v. New Line Transp., LLC*, No. 16-CV-1917, 2017 WL 942114, at *4 (M.D. Fla. Mar. 9, 2017) (cleaned up); *see also Ravelo v. Shutts & Bowen, LLP*, No. 09-CV-865, 2009 WL 1587272, at *1-2 (M.D. Fla. July 11, 2009) (holding that plaintiffs' racial discrimination and retaliation claims were subject to arbitration).

3. Mr. Flores's Claims Against the Giants and Texans

Defendants argue that the arbitration clause in Mr. Flores's contract with the Steelers applies retroactively to any claims accrued against the NFL or member teams before he was hired by the Steelers. Defs. Mem. at 20 n.3. Even if the Defendants are correct on that point, Defendants have failed to establish that Mr. Flores entered into

a valid arbitration agreement when he was hired by the Steelers.

The Flores-Steelers Agreement required the approval of the NFL Commissioner before it became effective. *See* Flores-Steelers Agreement § 12 ("This Agreement shall become valid and binding upon each party only when and if it shall be approved by the Commissioner of the NFL."). The version of the Flores-Steelers Agreement submitted to the Court never became binding upon Mr. Flores or the Steelers because the Commissioner never signed it. *See* Flores-Steelers Agreement at 7.

In their June 21, 2022, brief, Defendants noted that the contract was still awaiting the Commissioner's approval; more than a year after the contract's purported effective date, Defendants have failed to provide the Court with any evidence that the contract has been approved by Commissioner Goodell. *See* Defs. Mem. at 9. On February 1, 2023, the Court ordered Defendants to resubmit Plaintiffs' contracts due to omissions in the original submissions, *see* Order, Dkt. 70; Defendants once again submitted a version of the Flores-Steelers Agreement that lacked Commissioner Goodell's signature and attested that it was "a true and correct copy" of the Agreement, *see* Second DiBella Decl., Dkt. 73 ¶ 5; Flores-Steelers Agreement at 7.

"The party seeking to stay the case in favor of arbitration bears an initial burden of demonstrating that an agreement to arbitrate was made." *Hines v. Overstock.com, Inc.*, 380 F. App'x 22, 24 (2d Cir. 2010) (collecting cases). Even where the party opposing arbitration admits that he is subject to an arbitration agreement, the moving party bears the burden of demonstrating that a valid arbitration agreement exists. *See Dreyfuss v. Etelecare Glob. Sols.-U.S. Inc.*, 349 F. App'x 551, 552-53 (2d

Cir. 2009). Defendants have failed to carry that burden with respect to Mr. Flores's claims against the Giants and Texans because they have failed to prove that an arbitration agreement was in effect when or after Mr. Flores was being considered for hire by those teams. *See id.* Accordingly, Mr. Flores may litigate his claims against the Giants and Texans, and his related claims against the NFL, in federal court.[12]

B. Steve Wilks

Mr. Wilks signed an employment agreement with the Cardinals in which both the Cardinals and Mr. Wilks agreed to arbitrate "all disputes, claims or controversies that exist or that may arise between them." Wilks-Cardinals Agreement § 10(a). Mr. Wilks also agreed to arbitrate "any claim that all or any part of this Agreement is void or voidable." *Id.* § 10(e).

Where, as here, the parties have agreed that the arbitrator will decide issues regarding whether the arbitration agreement is "void or voidable," they have "clearly and unmistakably" delegated to the arbitrator the power to determine whether their dispute is subject to arbitration. *See Rent-A-Center, West, Inc.*, 561 U.S. at 66, 69-70 (delegating arbitrability dispute where the delegation clause encompassed claims regarding whether the arbitration agreement was "void or voidable"); *see also Ward v. Ernst & Young U.S. LLP*, 468 F. Supp. 3d 596, 603 (S.D.N.Y. 2020) (same). This includes the power to decide whether the arbitration agreement as a whole is unenforceable for unconscionability or any other applicable

[12] Because the Court finds that at least some claims may proceed in federal court, it need not address whether the arbitration agreement requires arbitration on an individual basis, as Mr. Flores retains the ability to pursue a class action in federal court.

contract defense. *See Rent-A-Center, West, Inc.*, 561 U.S. at 73-75.

Because neither party discussed the delegation clause in their original submissions, on February 1, 2023, the Court ordered supplemental briefing regarding the enforceability of the delegation provision. *See* Order, Dkt. 70 at 2. In response, Mr. Wilks argued that Defendants had waived their right to seek arbitration of the threshold question of arbitrability by failing to raise the issue in their moving papers or reply and that allowing the Commissioner to decide the threshold issue of arbitrability would be operationally problematic and unconscionable. Pls. Supp. Br., Dkt. 75 at 1. Defendants' failure to raise the issue does not constitute a waiver of their right to enforce the delegation clause, and neither of Plaintiffs' other arguments is persuasive.

The Supreme Court has recently made clear that federal courts should not condition waiver of the right to compel arbitration on a showing of prejudice; instead, the Court held that the focus must be on the defendants' conduct. *See Morgan v. Sundance*, 142 S. Ct. 1708, 1712-13 (2022). Following *Morgan*, the Second Circuit has held that delay alone—even a delay of nearly three years—is insufficient to constitute waiver when the parties had not engaged in substantive litigation before the defendant belatedly sought arbitration. *Nicosia v. Amazon.com, Inc.*, No. 21-2624, 2023 WL 309545, at *4 n.2 (2d Cir. Jan. 19, 2023).[13]

[13] Plaintiffs contend that because the Wilks-Cardinals agreement selects Arizona law, Arizona law governs the question of waiver. *See* Second DiBella Decl. Ex. 5 ("Wilks-Cardinals Agreement"), Dkt. 73 § 23; Pls. Supp. Br., Dkt 75 at 1, 1 n.1. Plaintiffs are incorrect. Whether Defendants waived their right to compel arbitration is governed by federal waiver law, and, thus, the issue is controlled by the

Consequently, the fact that Defendants failed to raise the issue of the delegation clause for nearly eight months after their opening brief was filed (and then only when prompted by the Court) does not waive their right to enforce the delegation clause when no other substantive litigation has occurred. "Mere silence, oversight or thoughtlessness . . . is insufficient to support an inference of waiver." *Herrera v. Manna 2nd Ave. LLC*, No. 20-CV-11026, 2022 WL 2819072, at *8 (S.D.N.Y. July 18, 2022); *see also Powell v. Vroom, Inc.*, No. 22-CV-302, 2022 WL 4096872, at *7 (N.D. Ala. Sept. 7, 2022) (holding that defendant did not waive its right to enforce the delegation clause in the parties' contract by initially submitting the threshold question of delegation to the court). Furthermore, "any doubt concerning the scope of arbitrable issues should be resolved in favor of arbitration," including "allegation of waiver . . . ." *Moses H. Cone Mem. Hosp.*, 460 U.S. at 24-25.

Plaintiffs finally argue that allowing Commissioner Goodell to arbitrate any threshold questions of arbitrability would be unconscionable because he will inevitably be biased. Pls. Supp. Br. at 4. Plaintiffs have not pointed to a single case, and research has revealed none, that applied Arizona law to find that an arbitration agreement was unenforceable because there was a risk that the arbitrator the parties jointly selected may be biased.[14] Rather, Ari-

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law of this circuit. *See Morgan v. Sundance*, 142 S. Ct. 1708, 1712-13 (2022).

[14] Because the Court finds that it would not be unconscionable for Commissioner Goodell to serve as the arbitrator, it follows that it is not "operationally problematic" to allow Commissioner Goodell to make the threshold determination of whether arbitration of the dispute should be delegated to JAMS. Pls. Supp. Br., Dkt. 75 at 4-5.

zona courts have focused on whether the arbitration provision is "fundamentally unfair" because it "grants one party to the arbitration unilateral control over the pool of arbitrators." *Arnold v. Standard Pac. of Ariz. Inc.*, No. 16-CV-452, 2016 WL 4259762, at *3 (D. Ariz. Aug. 12, 2016) (citing *McMullen v. Meijer, Inc.*, 355 F.3d 485, 494 (6th Cir. 2004)) (cleaned up); *see also Gullet on behalf of Estate of Gullet v. Kindred Nursing Ctrs. W., L.L.C.*, 390 P.3d 378, 359 (Ariz. Ct. App. 2017) (holding that arbitration was not substantively unconscionable for lack of neutrality where, *inter alia*, the employer did not have unilateral control over the arbitration selection process).

Because arbitration is a matter of contract, Plaintiffs cannot ask the Court to provide them with an arbitrator who is more neutral than the one to whom they agreed. *See Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527, 548 (2d Cir. 2016). Indeed, the Arizona legislature has only precluded individuals with "a known, direct and material interest in the outcome of the arbitration proceeding" from serving as an arbitrator where the agreement itself requires the arbitrator to be neutral. Ariz. Rev. Stat. § 12-3011(B).

C. Ray Horton

Mr. Horton's employment contract with the Tennessee Titans, which was in effect when he interviewed for the Titans' head coach position, states: "all matters in dispute between [Mr. Horton] and Titans shall be referred to the Commissioner . . . . " Horton-Titans Agreement § 6(a).[15]

[15] While Defendants assert that Mr. Horton is also subject to arbitration pursuant to the NFL Constitution as incorporated into the Horton-Titans Agreement, the only version of the NFL Constitution that is in the record did not go into effect until September 2016, after

Mr. Horton argues that clause is insufficient to constitute an arbitration agreement. Pls. Opp. at 4 n.2. It is, of course, black letter law that a contract does not have to use the word "arbitration" in order to be an arbitration agreement. *See McDonnell Douglas Fin. Corp v. Penn. Power & Light Co.*, 858 F.2d 825, 830 (2d Cir. 1988). The Second Circuit has held that an agreement that "manifests an intention by the parties to submit certain disputes to a specified third party for binding resolution" is an arbitration agreement."[16] *Id.*; *see also Bakoss v. Certain Underwriters at Lloyds of London Issuing Certificate No. 0510135*, 707 F.3d 140, 143 (2d Cir. 2013). Mr. Horton's contract with the Titans, bare bones though it may be, satisfies those requirements: the parties agreed to submit any disputes to the NFL Commissioner and that his decision would be binding. *See* Horton-Titans Agreement § 6(a).

Mr. Horton's claims against the Titans clearly fall within the scope of the arbitration agreement, which broadly encompasses "all matters in dispute" between Mr. Horton and the Titans. Horton-Titans Agreement

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Mr. Horton was no longer employed by the Titans. *See* Second DiBella Decl., Dkt. 73 ¶ 2; Am. Compl. ¶ 266. Thus, there is no record evidence of an arbitration provision in the NFL Constitution would encompass Mr. Horton's claim against the Titans.

[16] Although the applicable state law governs questions of contract formation, the Second Circuit has held that courts should apply federal common law in determining whether the form of alternative dispute resolution to which the parties have agreed is arbitration as contemplated by the FAA. *See Bakoss v. Certain Underwriters at Lloyds of London Issuing Certificate No. 0510135*, 707 F.3d 140, 143 (2d Cir. 2013) ("[F]ederal common law provides the definition of 'arbitration' under the FAA."); *but see Portland Gen. Elec. Co. v. U.S. Bank Trust Nat. Ass'n as Tr. for Trust No. 1*, 218 F.3d 1085, 1086 (9th Cir. 2000) (courts should look to state law in defining arbitration).

§ 6(a). Plaintiffs do not argue otherwise. Accordingly, there is a valid arbitration agreement applicable to Mr. Horton's claims against the Titans.

II. THE ARBITRATION AGREEMENTS APPLY TO PLAINTIFFS' CLAIMS AGAINST THE NFL

Plaintiffs argue that their arbitration agreements with the hiring teams do not apply to their disputes with the NFL because the arbitration agreements in the parties' contracts and the NFL Constitution do not explicitly include claims against the NFL. Pls. Opp. at 19. The applicable state laws, however, estop Plaintiffs from avoiding arbitration of their claims against the NFL in light of their allegations that the NFL and the Defendant teams were jointly engaged in the alleged discrimination and retaliation. *See Doe v. Trump Corp.*, 6 F.4th 400, 412 n.8 (2d Cir. 2021) ("[S]tate law governs whether a non-signatory may enforce an arbitration clause." *Id.* (citation omitted)).[17]

The Amended Complaint not only alleges that the NFL is a joint employer with the Defendant teams but that the discrimination experienced by Black players and

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[17] Plaintiffs' reliance on *Doe v. Trump Corp.*, 6 F.4th 400 (2d Cir. 2021), is misplaced. As an initial matter, in refusing to grant the defendants' motion to compel arbitration, the *Doe* court relied heavily on the fact that the third-party Trump defendants had not signed the relevant contracts; here, the NFL Commissioner signed the contracts that will be enforced. *See id.* at 412-13; *see also, e.g.*, Flores-Dolphins Agreement at 11. Furthermore, the Second Circuit explained that arbitration was generally appropriate against third parties that "had some sort of *corporate* relationship to a signatory party," contrasting that situation to cases in which one signatory is unaware of the relationship between the other signatory and the third party that is seeking to enforce the arbitration agreement. *Doe*, 6 F.4th at 413; *see also id.* at 414. The coaches were undoubtedly aware of the relationship between the NFL and the teams.

coaches was a product of collusion among NFL teams and the NFL. *See* Am. Compl. ¶¶ 337-53; *cf. State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 814 (Mo. 2015) (en banc) (enforcing plaintiff's arbitration agreement with the St. Louis Rams Partnership against non-signatories, including the St. Louis Rams, L.L.C., when plaintiffs brought allegations against defendants collectively). Throughout the Amended Complaint, Plaintiffs treat the NFL and its member teams "as a single unit;" they cannot now claim that the two entities are distinct in order to avoid arbitration. *Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 98 (2d Cir. 1999) (plaintiffs could not avoid arbitration with non-signatories where the complaint treated signatories and non-signatories alike).

"[C]ourts around the country have almost uniformly concluded" that a party to the contract is estopped from avoiding arbitration where a plaintiff brings claims against the other party and a nonparty who jointly controlled his employment and engaged in the alleged misconduct.[18] *Green v. Mission Health Cmtys., LLC*, 20-CV-439, 2020 WL 6702866, at *8 (M.D. Tenn. Nov. 13, 2020) (internal quotation omitted) (applying Tennessee law to find that an employee was equitably estopped from avoiding arbitration when she alleged that her joint employers

[18] Section 11(d) of the Horton-Titans Agreement selects Tennessee law. Although Tennessee state courts have yet to apply the doctrine of equitable estoppel to cases in which the plaintiff alleges that a nonparty engaged in misconduct with a party to the contract, at least one Tennessee appeals court has recognized the prevalence of this doctrine in other courts. *See Blue Water Bay at Ctr. Hill, LLC v. Hasty*, 2017 WL 5665410, at *14 n.12 (Tenn. App. Ct. Nov. 27, 2017) (noting that "many courts" apply the doctrine of estoppel when the plaintiff alleges "concerted misconduct by a nonsignatory and one or more signatories to the contract").

engaged in misconduct); *see also Gunson v. BMO Harris Bank, N.A.*, 43 F. Supp. 3d 1396, 1401, 1403 (S.D. Fla. 2014) (applying Florida law to compel arbitration of claims against non-signatories where plaintiff's claims arose from the joint misconduct of contractual party and non-signatory); *Kolsky v. Jackson Square, LLC*, 28 So.3d 965, 969 (Fla. Dist. Ct. App. 2010) (same); *Machado v. System4 LLC*, 28 N.E.3d 401, 409 (Mass. 2013) (plaintiffs were equitably estopped from avoiding arbitration when plaintiffs "lumped the two defendants together, asserting each claim in their complaint against [them] collectively," *id.* at 412).

III. THE ARBITRATION AGREEMENTS ARE ENFORCEABLE EXCEPT AS TO MR. FLORES'S CLAIMS AGAINST THE BRONCOS

Plaintiffs argue that, even if they agreed to arbitrate their claims against the Defendant teams and the NFL, the agreements are unconscionable, particularly because Commissioner Goodell would serve as the arbitrator and has the discretion to alter the arbitration rules.[19] *See* Pls. Opp. at 5. For the reasons discussed below, the Court finds that all the applicable arbitration agreements are enforceable except the arbitration agreement in the NFL Constitution as incorporated in Mr. Flores's contract with the New England Patriots to the extent that it applies to

[19] Defendants suggest that, pursuant to the NFL's arbitration rules, at least some of Plaintiffs' claims may be arbitrated by JAMS. Defs. Mem. at 8. Plaintiffs argue that the instant disputes are not eligible to be referred to JAMS under JAMS's rules. Pls. Opp. at 17. The Court need not address this argument because delegation to JAMS appears to be discretionary, and thus, whether it is available is of no moment. *See* Flores-Dolphins Agreement Ex. A ("NFL Dispute Resolution Procedural Guidelines"), Dkt. 73 ¶ 1.7.

his claim that the Broncos' failure to hire him was discriminatory.

A. Defendants Cannot Compel Mr. Flores to Arbitrate His Claims Against the Broncos

Mr. Flores's contract with the Patriots required him to comply with the NFL Constitution, including its arbitration provision, in its "present form and as amended from time to time hereafter." *See* Flores-Patriot Agreement § 15. Plaintiffs argue that the arbitration agreement in the NFL Constitution is unenforceable because the NFL is not required to provide Plaintiffs notice of any changes that it may make to the NFL Constitution.[20] *See* Pls. Opp. at 9. The Court agrees.

The NFL and its member clubs have the unilateral ability to modify the terms of the NFL Constitution. *See* NFL Const. & Bylaws Art. 25 (setting forth the procedures for amendment of the NFL Constitution). Under Massachusetts law, which applies to Mr. Flores's contract with the Patriots, *see* Flores-Patriots Agreement § 21, if "the party seeking to enforce the arbitration provision retain[s] the unilateral discretion to alter its terms, without notice, the agreement to arbitrate is illusory and unenforceable," *Fawcett v. Citizens Bank, N.A.*, 297 F. Supp. 3d 213, 221 (D. Mass. 2018) (internal quotation omitted) (collecting cases). *See also Jackson v. Action for Boston Cmty. Dev., Inc.*, 525 N.E.2d 411, 415 (Mass. 1988) (the unilateral right to amend arbitration rules without notice renders any "'offer' made by the defendant . . . illusory");

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[20] The Court does not address this argument for Plaintiffs' other claims. Defendants need to rely on the NFL Constitution only for Mr. Flores's claims against the Broncos, as all other claims for which there is a valid arbitration agreement are also subject to arbitration pursuant to the arbitration agreements contained in the Plaintiffs' contracts with the Defendant teams. *See supra*, section I-II.

Bekele v. Lyft, Inc., 918 F.3d 181, 189-90 (1st Cir. 2019) (enforcing contract modifiable by Lyft because Lyft was required to provide users notice and an opportunity to reject the contract).

Because there is no enforceable arbitration agreement governing Mr. Flores's claims against the Denver Broncos and his related claims against the NFL, Mr. Flores may litigate those claims in federal court.

B. POSSIBLE ARBITRATOR BIAS DOES NOT INVALIDATE THE ARBITRATION AGREEMENTS

Plaintiffs argue that Mr. Goodell could not possibly serve as a neutral arbitrator because "Mr. Goodell, as the Commissioner, *is the NFL* in all regards." Pls. Opp. at 6. As evidence of Mr. Goodell's bias, Plaintiffs rely heavily on a statement released by the NFL on the day that Mr. Flores filed his complaint, in which the NFL stated that Mr. Flores's claims were "without merit." *See* Am. Compl. ¶ 3; Wigdor Decl. Ex. 2, Dkt. 63.

"[A]rbitration is a matter of contract, and consequently, the parties to an arbitration can ask for no more impartiality than inheres in the method they have chosen." *Nat'l Football League Mgmt. Council*, 820 F.3d at 548. In the context of litigation arising out of allegations that the Patriots underinflated the balls used they used in the American Football Conference Championship Game against the Indianapolis Colts in 2015, the Second Circuit rejected the argument that, as a matter of law, the NFL Commissioner cannot fairly arbitrate claims regarding the NFL's conduct. *See id.* at 532-33, 548. As the Court noted, the parties contracted to arbitrate claims before the NFL Commissioner "knowing full well . . . that the Commissioner would have a stake both in the underlying

discipline and in every arbitration brought." *Id.* at 548. Accordingly, the Second Circuit declined to indulge allegations that the NFL Commissioner could not "adjudicate the propriety of his own conduct." *Id.*

The Court acknowledges that this structure creates a risk of biased adjudication and that the NFL statement on the day the case was filed is worrisome. Plaintiffs' descriptions of their experiences of racial discrimination—which allegedly are only the most recent chapter in the NFL's long history of systematic discrimination toward Black players, coaches, and managers—are incredibly troubling. Am. Compl. ¶ 4. Given the number of Black men who play and coach football, it is difficult to understand how it could be that, at the time Plaintiffs initiated this lawsuit, "the NFL had only one Black Head Coach."[21] *Id.* ¶ 6.

Nevertheless, the FAA cautions against judicial intervention at this early stage when Plaintiffs have, as here, agreed to a particular arbitration structure, including a specific arbitrator. Courts must avoid presupposing that the selected arbitrator will not serve as a conscientious and impartial arbitrator. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) ("We decline to indulge the presumption that the parties and arbitrable body conducting a proceeding will be unable or unwilling

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[21] In both the NFL and the National Basketball Association ("NBA"), "about 70% of the players are Black." Scott Neuman, *Why a 20-Year Effort by the NFL Hasn't Led to More Minorities in Top Coaching Jobs*, NPR (Feb. 3, 2022), https://www.npr.org/2022/02/03/1075520411/rooney-rule-nfl. When Mr. Flores filed the Complaint, thirteen of the thirty head coaches in the NBA were Black; at that same time, only one of the thirty-two head coaches in the NFL was Black. *See id.* Thus, at the time this lawsuit was filed, the percentage of NBA Black head coaches (43%) was more than thirteen times than the percentage of NFL Black head coaches (3.1%).

to retain . . . impartial arbitrators." *Id.* (cleaned up)); *Nat'l Football League Mgmt. Council*, 820 F.3d at 548. If the NFL Commissioner is, indeed, improperly biased, and that bias prevents him from fairly adjudicating Plaintiffs' claims, Plaintiffs have a recourse: this Court retains the authority to review the Commissioner's decision and to vacate the Commissioner's award. *See* 9 U.S.C. § 10(a)(2) (permitting courts to overturn arbitration decisions where there is "evident partiality or corruption").

Plaintiffs also argue that Commissioner Goodell's alleged bias would prevent them from effectively vindicating their claim in a forum in which he is the arbitrator. *See* Pls. Opp. at 15-17. The effective vindication doctrine is "a judge-made exception to the FAA" that "finds its origins in the desire to prevent prospective waiver of a party's *right to pursue* statutory remedies." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 235-236 (2013) (internal quotation omitted).

The Supreme Court has recognized two types of arbitration agreements to which this doctrine may apply: an agreement "forbidding the assertion of certain statutory rights" and an agreement imposing arbitration fees "so high as to make access to the forum impracticable." *Id.* at 236; *see also Reyes v. Gracefully, Inc.*, 2018 WL 2209486, at *7 (S.D.N.Y. May 11, 2018) (holding that an arbitration agreement could not shorten the statute of limitations for FLSA claims). Alleged structural bias falls into neither category.[22] Moreover, the Supreme Court has noted that

[22] *Cole v. Burns International Security Services, et al.*, 105 F.3d 1465 (D.C. Cir. 1997), is not to the contrary. Although the court noted that access to neutral arbitrators was one of several factors relevant to assessing whether plaintiffs could effectively vindicate their claims, *see id.* at 1482, the parties had agreed to use a neutral arbitrator, *see id.* at 1480. The *Cole* court gave no indication that lack of access to a

while several Supreme Court "cases have . . . asserted the existence of an 'effective vindication' exception," these cases have simultaneously "declined to apply it to invalidate the arbitration agreement at issue." *Am. Express Co.*, 570 U.S. at 235.[23]

Plaintiffs also argue that the risk that Commissioner Goodell will be biased renders the arbitration agreements unconscionable as a matter of state contract law. To support this argument, Plaintiffs rely heavily on *Hooters of America v. Phillips*, 173 F.3d 933 (4th Cir. 1999), and related cases in the Sixth Circuit. Pls. Opp. at 11-14. Those cases are, however, inapposite as they all concerned arbitration agreements with unfair selection procedures that, *inter alia*, granted the employer improper control over the pool of arbitrators.

The *Hooters* court refused to enforce an arbitration agreement that required all arbitrators to be selected from a list prepared by Hooters and thereby granted it "unrestricted control" over the selection of arbitrators. *See id.* at 939. And in *McMullen v. Meijier, Inc.*, 355 F.3d 485 (6th Cir. 2004), the court refused to enforce the par-

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neutral arbitrator was dispositive when the parties had agreed to a specific arbitrator. And although the Sixth Circuit in *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306 (6th Cir. 2000), expressed concern that bias in the makeup of the arbitral panel would preclude the effective vindication of plaintiffs' claims, it expressly did not resolve that question because it found that the arbitration agreement was illusory. *See id.* at 314-15.

[23] *See Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 242 (2013) (Kagan, J. dissenting) (warning that the Supreme Court's limited application of the effective vindication doctrine to arbitration agreements that "operate to" bar federal claims enables companies to "appoint as an arbitrator an obviously biased person—say, the CEO . . . .").

ties' arbitration agreement based on "procedural unfairness inherent in an arbitration agreement," while noting that the "preferred method of challenging allegations of bias is to pursue the underlying claims through the arbitration process and then seek review . . . ." *Id.* at 494 n.7; *see also id.* at 488 (noting that the employer had "the right to unilaterally select a pool of . . . potential arbitrators"). By contrast, Plaintiffs' arbitration agreements grant Defendants no discretion over the choice of the arbitrator: it must be the NFL Commissioner.[24]

The applicable state contract laws of Florida and Tennessee do not compel a different conclusion.[25] In *Garcia v. Church of Scientology Flag Service Organization, Inc.*, No. 18-13452, 2021 WL 5074465, at *12 (11th Cir. Nov. 2, 2021), the Eleventh Circuit held that an arbitration clause that required plaintiffs to arbitrate their claims against the Church of Scientology before individuals "in good standing" with the church was not unconscionable under

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[24] Similarly, in *Pokorny v. Quixtar, Inc.*, 601 F.3d 987 (9th Cir. 2010), the Ninth Circuit found that an arbitration agreement requiring plaintiffs to pay a fee if they selected an arbitrator who had not gone through defendants' "training," which was "designed to produce a very favorable view of [defendants]," unconscionably used the threat of financial hardship to give defendants control over the arbitrator selection process. *Id.* at 1003 (internal quotation omitted).

[25] Several cases, on state law grounds, have declined to enforce an arbitration agreement appointing the commissioner of a sports league as the arbitrator due to concerns of impropriety or bias. *See* Order, *Nostalgic Partners LLC v. New York Yankees P'ship*, No. 656724/2020, at 2 (N.Y. Sup. Ct. Dec. 17, 2021); *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 813-14 (Mo. 2015) (en banc); *Gruden v. The Nat'l Football League, et al.*, No. A- 21-844043-B, at 13-14 (Nev. Dist. Ct. Clark Cty. Oct. 12, 2022). Because none of the applicable contracts selects Missouri, New York, or Nevada law, those cases are interesting but not controlling.

Florida law—even in the face of the lead arbitrator making "various comments . . . reflecting bias in favor of the church." *Id.* at *12 (citing *Nat'l Football League Mgmt. Council*, 820 F.3d at 548); *see also id.* at *8-9 (applying Florida law).

In *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370 (6th Cir. 2005), the Sixth Circuit, applying Tennessee law, declined to enforce the arbitration agreement because the "arbitrator-selection process itself [was] fundamentally unfair," while making clear the general rule that pre-arbitration challenges to an allegedly biased arbitration panel will not stand. *Id.* at 385 ("[A] party cannot avoid the arbitration process simply by alleging that the arbitration panel will be biased."); *see also Iysheh v. Cellular Sales of Tenn., LLC*, No. 17-CV-542, 2018 WL 2207122, at *8 (E.D. Tenn. May 14, 2018) (arbitration agreement was not unconscionable where, *inter alia*, both parties had an opportunity to participate in arbitrator selection).

In short, Plaintiffs' concern about the Commissioner's ability to decide fairly their claims is insufficient reason not to enforce the arbitration agreements.

C. Possible Discovery Limitations Do Not Render the Agreements Unconscionable

Plaintiffs also complain that they will not be able to take robust discovery if they are compelled to arbitrate their disputes. The fact that the NFL Commissioner may limit the amount of discovery Plaintiffs can take, however, is also not grounds for refusing to enforce the various arbitration agreements. *See Gilmer*, 500 U.S. at 31 (limited discovery did not bar arbitration of plaintiff's age discrimination claims). While the Second Circuit has "recognized that a provision that deprived a claimant of a meaningful

opportunity to present her claim might well be unenforceable," plaintiffs bear the burden of demonstrating that the arbitration rules will in fact deprive them of a chance to prove their claims. *Lohnn v. Int'l Bus. Machs. Corp.*, No. 21-CV-6379, 2022 WL 36420, at *11 (S.D.N.Y. Jan. 4, 2022) (cleaned up) (quoting *Guyden v. Aetna, Inc.*, 544 F.3d 376, 386-87 (2d Cir. 2008)).

Plaintiffs have not carried that burden because they rely solely on speculation that Commissioner Goodell may interpret the arbitration rules in a manner that will improperly and unfairly limit the scope of discovery. *See* Pls. Opp. at 6-7; *see also PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 406-07 (2003) (holding that courts should not decline to enforce arbitration agreements "on the basis of mere speculation" that the arbitrator may interpret the arbitration agreement in a manner that will render it unenforceable, *id.* (internal quotation omitted)); *AT&T Mobility LLC*, 563 U.S. at 342 (cautioning that limitations on discovery should not be considered substantively unconscionable because that "rule would have a disproportionate impact on arbitration agreements").[26] If Plaintiffs are "unable to vindicate [their] rights in the arbitral forum, [they] will have recourse to the Court." *Howard v. Anderson*, 36 F. Supp. 2d 183, 187 (S.D.N.Y. 1999) (collecting cases); *see also* 9 U.S.C. § 10(a)(3) (permitting courts to vacate arbitration awards where the arbitrator "refus[es]

[26] Discovery in arbitration is not typically as extensive as federal court discovery; that reality is, of course, one reason many prefer arbitration over litigation. Nevertheless, the Court takes the NFL at its word that it is committed to combating racism, Defs. Reply, Dkt. 64 at 5, and is confident that the Defendants recognize that the Plaintiffs have raised serious claims that may require more than minimal discovery to adjudicate fairly.

to hear evidence pertinent and material to the controversy").

D. The Horton-Titans Agreement is Sufficiently Definite to Enforce

Plaintiffs argue that the arbitration agreement between Mr. Horton and the Titans is unenforceable because it fails to set forth the essential terms of the arbitration process. Pls. Opp. at 4 n.2. Mr. Horton's arbitration agreement with the Titans provides, in its entirety: "You and the Titans agree that all matters in dispute between You and Titans shall be referred to the Commissioner and his decision shall be accepted as final, complete, conclusive, binding and unappealable by You and Titans." Horton-Titans Agreement § 6(a).

Tennessee courts have held that "for a contract to be enforceable, it must be of sufficient explicitness so that a court can perceive what are the respective obligations of the parties," and "any agreement which leaves unanswered . . . critical questions" is not enforceable. *Higgins v. Oil, Chemical and Atomic Workers Int'l Union, Local No. 3-677*, 811 S.W.2d 875, 880 (Tenn. 1991) (quoting *Soar v. Nat'l Football League Players' Ass'n*, 550 F.2d 1287, 1290 (1st Cir. 1977) (holding that the NFL Commissioner's oral promise retroactively to provide pension benefits to retired NFL players was insufficiently definite)) (alterations omitted).

Although Mr. Horton's arbitration agreement with the Titans is admittedly quite succinct, it is sufficiently definite to enforce. Courts applying Tennessee law have found that a reference to "binding arbitration to resolve all disputes that may arise out of the employment context" is adequate to state the essential terms of the agreement. *Hayward v. Trinity Christian Ctr. of Santa Ana*, No. 14-

CV-2282, 2015 WL 1924552, at *3 (M.D. Tenn. Apr. 28, 2015).[27] Although the NFL Commissioner retains substantial discretion to set the arbitration procedures, the doctrines of good faith and fair dealing preclude the NFL from unilaterally adopting arbitration procedures that are "improper or oppressive." *Howell v. Rivergate Toyota, Inc.*, 144 F. App'x 475, 479 (6th Cir. 2005) (applying Tennessee law); *see also Brubaker v. Barrett*, 801 F. Supp. 2d 743, 753-55 (E.D. Tenn. 2011) (same).[28] To the extent Commissioner Goodell adopts procedures that are improper or oppressive, Plaintiffs will have recourse to this Court.

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[27] Although Tennessee courts have been skeptical of contracts that provide "little notice as to the procedure" for arbitration, those contracts appear to have either been even more succinct than the one at issue here or contracts of adhesion. For example, in *Wofford v. M.J. Edwards & Sons Funeral Home Inc.*, 490 S.W.3d 800 (Tenn. Ct. App. Nov. 23, 2015), the contract did not indicate who the arbitrator would be or the "effect" of the arbitrator's decision, i.e., that it would be binding and final, *see id.* at 822-23. And while the court in *Howell v. NHC Healthcare-Fort Sanders, Inc.*, 109 S.W.3d 731, 734 (Tenn. Ct. App. 2003), invalidated the parties' arbitration agreement in part because it did "not adequately explain how the arbitration procedure would work, except as who would administer it," *id.* at 734, Tennessee courts have subsequently limited *Howell*'s holding to contracts of adhesion, *see Wolfford*, 490 S.W.3d at 817 n.13.

[28] *Floss v. Ryan's Family Steakhouse*, 211 F.3d 306 (6th Cir. 2000), is not to the contrary. "In *Floss*, the arbitration agreement was between employees and a third-party arbitration service, not the employer . . . . In other words, the promise of the third party was too indefinite for legal enforcement." *Vision Healthcare Sys. (Int'l) Pty, Ltd. v. Vision Software Techs. Inc.*, No. 15-CV-175, 2015 WL 2404089, at *3 (M.D. Tenn. May 20, 2015) (citing *Floss*, 211 F.3d at 315-16) (upholding arbitration agreement that stated, in relevant part, "arbitration shall take place in Nashville before one arbitrator" without detailing further procedures, *id.* at *1).

CONCLUSION

For the foregoing reasons, Defendants' motion to compel arbitration is **GRANTED** except that it is **DENIED** as to Brian Flores's claims against the Denver Broncos, New York Giants, and the Houston Texans, and his related claims against the NFL. Defendants' request to stay the case is **DENIED** as to Flores's claims that may proceed to litigation and is **GRANTED** as to all of the claims that must be arbitrated. The Clerk of Court is respectfully directed to terminate the open motion at docket entry 47.

The parties are ordered to appear for a pretrial conference on **Friday, March 24, 2023, at 10:00 A.M.** in Courtroom 443 of the Thurgood Marshall Courthouse, 40 Foley Square, New York, New York, 10007. By **March 16, 2023**, the parties must submit a joint letter regarding the status of the case, including:

a. a statement of all existing deadlines, due dates, and/or cut-off dates;

b. a statement describing the status of any settlement discussions and whether the parties would like a settlement conference;

c. a statement of the anticipated length of trial and whether the case is to be tried to a jury;

d. a statement regarding the anticipated schedule of arbitration;

e. any contemplated motions;

f. a proposed schedule for discovery, which must comply with the guidance set forth in the Court's model Civil Case Management Plan and Scheduling Order, available on the Court's website;

g. any other issue that the parties would like to address at the pretrial conference; and

h. any other information that the parties believe may assist the Court in advancing the case to settlement or trial.

SO ORDERED.

/s/ Valerie Caproni
VALERIE CAPRONI
United States District Judge

Date: March 1, 2023
New York, New York

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 22-CV-0871

BRIAN FLORES, STEVE WILKS, AND RAY HORTON, AS CLASS REPRESENTATIVES, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLANTS

v.

THE NATIONAL FOOTBALL LEAGUE; NEW YORK FOOTBALL GIANTS, INC. D/B/A NEW YORK GIANTS; MIAMI DOLPHINS, LTD. D/B/A MIAMI DOLPHINS; DENVER BRONCOS FOOTBALL CLUB D/B/A DENVER BRONCOS HOUSTON NFL HOLDINGS, L.P. D/B/A HOUSTON TEXANS; ARIZONA CARDINALS; TENNESSEE TITANS ENTERTAINMENT, INC. D/B/A TENNESSEE TITANS AND JOHN DOE TEAMS 1 THROUGH 26, DEFENDANTS-RESPONDENTS

Filed: July 25, 2023

OPINION AND ORDER

VALERIE CAPRONI, United States District Judge.

Plaintiffs, who are current and former coaches for NFL teams, have sued the NFL and various member teams for racial discrimination and retaliation in violation

of 42 U.S.C. § 1981 and several state laws.[1] *See* Am. Compl., Dkt. 22. The Court granted in part and denied in part Defendants' motion to compel arbitration in an opinion dated March 1, 2023. Op. ("Arbitration Opinion"), Dkt. 76. The Court compelled arbitration of the claims brought by Ray Horton against the Tennessee Titans, Steve Wilks against the Arizona Cardinals, and Brian Flores against the Miami Dolphins, as well as all related claims against the NFL; the Court denied the motion to compel arbitration of Mr. Flores's claims against the New York Giants, the Denver Broncos, and the Houston Texans, as well as his related claims against the NFL. *Id.*

Plaintiffs moved for reconsideration of the portions of the Arbitration Opinion granting the motion to compel arbitration, and Defendants cross-moved for reconsideration, seeking to compel arbitration of the remaining claims.[2] Pls. Mot., Dkt. 79; Defs. Mot., Dkt. 81. Each party opposed their adversary's motion. *See* Defs. Opp., Dkt. 89; Pls. Opp., Dkt. 93. For the reasons discussed below, the motions for reconsideration are **DENIED**.

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[1] These include the New York State Human Rights Law, the New York City Human Rights Law, the New Jersey Law Against Discrimination, and the Florida Private Whistleblower Statute. Am. Compl., Dkt. 22.

[2] Defendants previously argued that Mr. Flores's arbitration agreement with the Miami Dolphins applied retroactively to his claims against the Denver Broncos. *See* Op., Dkt. 76 at 10. The Court held that the arbitration agreement could not be applied retroactively under Florida law, *see id.*, and Defendants do not seek reconsideration of that portion of the Arbitration Opinion.

DISCUSSION

I. LEGAL STANDARD

The standard under which courts evaluate a motion for reconsideration "is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked . . . ." *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). A motion for reconsideration may be granted if the movant demonstrates "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992) (quotation omitted); *see also Sigmon v. Goldman Sachs Mortg. Co.*, 229 F. Supp. 3d 254, 257 (S.D.N.Y. 2017) ("[A] party moving for reconsideration must set forth 'the matters or controlling decisions which counsel believes the Court has overlooked.'" (quoting Local Civil Rule 6.3)). Whether to grant a motion for reconsideration is a decision within "the sound discretion of the district court . . . ." *Aczel v. Labonia*, 584 F.3d 52, 61 (2d Cir. 2009).

A motion for reconsideration is not a party's "opportunity to put forward evidence that he could have, but failed, to provide the Court when the Court initially considered the motion." *United States v. Posada*, 206 F. Supp. 3d 866, 868 (S.D.N.Y. 2016) (internal quotation omitted) (collecting cases). Additionally, "a motion to reconsider should not be granted where the moving party seeks solely to relitigate an issue already decided." *Schrader*, 70 F.3d at 257. "[N]ewly discovered evidence" can be a basis for reconsideration, but only if the evidence was not available prior to entry of the order at issue. *Marhone v. Cassel*, No. 16-CV-4733, 2021 WL 142278, at *2

(S.D.N.Y. Jan. 14, 2021). "These criteria are strictly construed against the moving party so as to avoid repetitive arguments on issues that have been considered fully by the court." *Griffin Indus., Inc. v. Petrojam, Ltd.*, 72 F. Supp. 2d 365, 368 (S.D.N.Y. 1999) (citation omitted).

II. DEFENDANT'S MOTION FOR RECONSIDERATION IS DENIED

Defendants sought to compel arbitration of Mr. Flores's claims against the Denver Broncos, New York Giants, and Houston Texans arguing, *inter alia*, that the arbitration provisions in his recent contract with the Pittsburgh Steelers ("Flores-Steelers Agreement"), and the NFL Constitution incorporated therein, applied retroactively to claims against any NFL team. *See* Op. at 9. Defendants alternatively sought to compel arbitration of Mr. Flores's claims against the Denver Broncos because those claims arose when Mr. Flores was coaching for the New England Patriots. *See id.* His contract with the Patriots ("Flores-Patriots Agreement") had an arbitration agreement that applied to claims against any NFL team. *See id.*

The Court held that Mr. Flores did not have a valid arbitration agreement with the Steelers because Defendants had not proven that the arbitration agreement was part of a valid contract. *See id.* at 13. Section 12 of the Flores-Steelers Agreement states that the contract would "become valid and binding upon each party only when and if it shall be approved by the Commissioner of the NFL;" in the version of the contract filed by Defendants in support of their motion to compel arbitration, the Commissioner's signature line was blank. *See* Second DiBella Decl. Ex. 4 ("Flores-Steelers Agreement"), Dkt. 73. Accordingly, the Flores-Steelers Agreement submitted by

Defendants, by its own terms, was not "valid and binding." *Id.*; *see also* Op. at 13. The Court also held that the arbitration agreement contained in the NFL Constitution and incorporated into the Flores-Patriots Agreement was unenforceable because the NFL retained the unilateral right to modify the NFL Constitution and the arbitration agreement, rendering the arbitration agreement illusory according to Massachusetts state law. Op. at 21-22.

A. The Flores-Steelers Agreement Is Not Binding

In their motion for reconsideration, Defendants ask the Court to reconsider its prior decision with respect to the Flores-Steelers Agreement based on a newly-filed version of the Flores-Steelers Agreement that contains the NFL Commissioner's signature. Defs. Mem., Dkt. 82 at 13. The signed contract, which is new evidence, cannot be considered on a motion for reconsideration because it was available to Defendants before the Court issued the Arbitration Opinion. *See Marhone*, 2021 WL 142278, at *2. Defendants acknowledge that they possessed a fully-signed version of the Flores-Steelers Agreement when the motion to compel arbitration was being briefed. *See* Defs. Mem. at 13 n.7; *see also* Smith Decl., Dkt. 98 ¶ 2 (stating that Commissioner Goodell approved the Flores-Steelers Agreement on June 17, 2022). The Court credits Defendants' statement of regret for "not having supplemented the record with a Commissioner-signed version of the agreement" during the eight months that the motion to compel arbitration was pending. Defs. Mem. at 13 n.7. But a motion for reconsideration is not a means to mend holes in the record with neglected evidence. *See Horsehead Res. Dev. Co., Inc. v. B.U.S. Envt'l Serv. Inc.*, 928 F. Supp. 287, 289 (S.D.N.Y. 1996) ("[A] motion for reconsid-

eration may not be used to plug gaps in an original argument or to argue in the alternative once a decision has been made." *Id.* (cleaned up).)

Defendants alternatively argue that the Flores-Steelers Agreement was valid and binding even without Commissioner Goodell's signature. Defs. Mem. at 14. The contract plainly states, however, that it is "valid and binding upon each party only when and if it shall be approved by the Commissioner of the NFL." Flores-Steelers Agreement § 12. "Courts do not assume a contract's language was chosen carelessly," and must give effect to the "clear and unequivocal" language of a contract. *Crawford Cent. Sch. Dist. v. Commonwealth*, 888 A.2d 616, 623 (Pa. 2005). The Flores-Steelers Agreement clearly establishes that it would not be binding on the parties until it was signed by Commissioner Goodell.

In sum, as the parties moving to compel arbitration, Defendants carried the burden of proving the existence of a written agreement binding the parties to arbitrate the present matter. *See* Op. at 14 (citing *Hines v. Overstock.com, Inc.*, 380 F. App'x 22, 24 (2d Cir. 2010) (collecting cases); *Dreyfuss v. Etelecare Glob. Sols.-U.S. Inc.*, 349 F. App'x 551, 552-53 (2d Cir. 2009)). When Defendants moved to compel arbitration, they failed to do so.

Defendants argue that because Mr. Flores actually served as the Steelers' coach, there is an enforceable contract between the Steelers and Mr. Flores. *See* Defs. Mem. at 14. They posit that the Commissioner's signature was "[a]t most . . . a condition precedent to the parties' obligations to perform under the agreement, which was waived and excused when Mr. Flores performed, and accepted performance from the Steelers, under that very

same agreement."[3] *Id.* Defendants failed to raise this argument as part of the underlying motion to compel arbitration, and the Court will not consider it now. Defendants' suggestion that the Court should now revise its prior decision based on this new legal theory because neither party previously briefed the issue flips the standard for motions for reconsideration on its head. It is black letter law that, "[e]xcept where a movant is relying on new facts that could not have been previously discovered or newly promulgated law, additional facts or new legal theories cannot be asserted by way of a motion for reconsideration." *Bloomfield Inv. Res. Corp. v. Daniloff*, No. 17-CV-4181, 2021 WL 2310446, at *2 (S.D.N.Y. June 7, 2021) (internal quotation omitted).[4]

B. Flores-Patriots Contract

Defendants further dispute the Court's conclusion that the Flores-Patriots Agreement is illusory under Massachusetts law because Defendants retained the right unilaterally to modify the terms of the NFL Constitution,

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[3] Pennsylvania law, which governs the Flores-Steelers Agreement, *see* Flores-Steelers Agreement § 20, provides that "if a condition precedent is not satisfied, the obligations of the non-performing party are discharged." *McDermott v. Party City Corp.*, 11 F. Supp. 2d 612, 620 (E.D. Pa. 1998).

[4] Even if the Court were to consider Defendants' new argument, Defendants' motion would likely still fail. While some courts applying Pennsylvania law have excused compliance with conditions precedent when the parties accepted partial performance of the contract, *see McDermott*, 11 F. Supp. 2d at 622, Defendants did not previously, nor have they now, introduced evidence that might allow the Court to conclude, as a matter of law, that there was partial performance. *See MBR Constr. Servs., Inc. v. IBEW Local*, No. 14-CV-1694, 2016 WL 815566, at *7 (M.D. Pa. Mar. 2, 2016) (noting that Pennsylvania law requires the party seeking to compel performance of a contract to prove that any conditions precedent are satisfied).

which contained the arbitration agreement applicable to Mr. Flores's disputes with other teams, without notice. *See* Defs. Mem. at 1; Op. at 21. Defendants alternatively argue that even if the agreement is unenforceable, the unilateral modification provision should be severed from the arbitration agreement. *See* Defs. Mem. at 1-2. For the reasons discussed in the Arbitration Opinion and further detailed below, Massachusetts law precludes enforcement of the arbitration agreement incorporated into the Flores-Patriots Agreement because the contract is illusory; because an illusory contract is no contract at all, severance is not possible.

1. Unilateral Modification Provision

In holding the Flores-Patriots Agreement illusory, the Court relied on *Jackson v. Action for Boston Community Development, Inc.*, 525 N.E.2d 411 (Mass. 1988), which held that a former employee could not contractually enforce the terms of her employment manual. The *Jackson* court considered several factors in finding that the employee manual did not constitute an enforceable contract, including the fact that the manual could be unilaterally modified by the employer. *See id.* at 414-15. Although the manual provided that employees would be notified of any changes, the *Jackson* court found it significant that the employer did not call "special attention" to the manual, such as reviewing the manual during orientation, and the plaintiff did not sign the manual or otherwise manifest assent to the terms of the manual. *See id.* at 416 (internal citations omitted). *Jackson* observed that the fact "that the defendant retained the right to modify unilaterally the personnel manual's term . . . tends to show that any 'offer' made by the defendant in distributing the manual was il-

lusory." *Id.* at 415. The court also noted that it was significant that the record did not "reveal[] any negotiation over the terms of the personnel manual." *Id.*

O'Brien v. New England Telephone & Telegraph Co., 664 N.E.2d 843, 847 (Mass. 1996), clarified the fact-intensive inquiry that courts must undertake in evaluating whether a document subject to unilateral modification is an enforceable contract while emphasizing that the "[p]rinciples stated in the *Jackson* opinion remain sound." *Id.* at 847. The *O'Brien* court refrained from "defin[ing] the extent to which management may effectively reserve its right to change or withdraw a manual" because the employer in that case had not expressly reserved the right to make unilateral changes, although it did distribute new policy manuals annually. *See id.* at 849; *see also id.* at 848 n.3. The court held that "the context of the manual's preparation and distribution is, to us, the most persuasive proof that it would be almost inevitable for an employee to regard it as a binding commitment . . . ." *Id.* at 849 (internal quotation omitted).

Buttrick v. Intercity Alarms, LLC, 929 N.E.2d 357 (Mass. App. Ct. July 1, 2010),[5] applied *Jackson* and its progeny to find that the employee manual in that case was a binding contract. In *Buttrick*, the employer had required the employee to sign the manual, had distributed numerous copies of the manual, and had personally reviewed the manual's terms with the employees. *See id.* at *1-2. Given the "special attention" paid to the manual, *Buttrick* held that there was an enforceable contract, notwithstanding the employer's reservation of rights to make

[5] *Buttrick v. Intercity Alarms, LLC*, 929 N.E.2d 357 (Mass. App. Ct. 2010), is a nonprecedential opinion that was issued with a caveat that it "may not fully address the facts of the case or the panel's decisional rationale," *id.* at *1.

unilateral modifications. *Id.* at *1. The court reiterated, however, that "[w]hether an implied contract based upon the terms of the manual [existed] . . . was a fact-bound inquiry," while observing that "a number of factors weighed against the finding of a binding contract." *Id.*

Numerous courts have applied *Jackson* and its progeny to decline to enforce contracts that permit one party unilaterally to modify the terms without notifying the counterparty of any changes.[6] *See, e.g.*, *Douglas v. Johnson Real Est. Invs., LLC*, 470 F. App'x 823, 826 (11th Cir. 2012); *Fawcett v. Citizens Bank, N.A.*, 297 F. Supp. 3d 213, 221 (D. Mass. 2018) (collecting cases); *McNamara v. S.I. Logistics, Inc.*, No. 17-CV-12523, 2018 WL 6573125, at *3-4 (D. Mass. 2018) (collecting cases); *Wainblat v. Comcast Cable Comm'ns, LLC*, No. 19-10976, 2019 WL 5698446, at *4 (D. Mass. 2019); *Murray v. Grocery Delivery E-Servs. USA Inc.*, 460 F. Supp. 3d 93, 97-98 (D. Mass. 2020); *see also Kauders v. Uber Techs., Inc.*, 159 N.E.3d 1033, 1041 n.10 (Mass. 2021) (criticizing a terms of usage agreement permitting unilateral modification without notice and noting that courts have held that such contracts are unenforceable).[7]

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[6] *Ferguson v. Host International, Inc.*, 757 N.E.2d 267 (Mass. App. Ct. 2001), is not to the contrary. Although the employer retained the right to amend the manual without notice, the employer had in fact distributed the amended manual to employees, *id.* at 269. The *Ferguson* court noted that the employer's distribution of the manual conveyed to employees its importance as a binding document. *Id.* at 272.

[7] While Defendants assert that these cases improperly single out arbitration agreements for application of the unilateral modification rule, *see* Defs. Mem., Dkt. 82 at 11-12, Massachusetts courts find that contracts containing a unilateral modification provision are illusory in a wide variety of contexts, including employee manuals, which, like the NFL Constitution, set forth general policies governing the con-

Defendants have not demonstrated that they paid the type of "special attention" to the NFL Constitution that is necessary to make its terms part of an implied contract under Massachusetts state law. Although Mr. Flores signed a contract that incorporated by reference the NFL Constitution,[8] that does not automatically mean that the NFL Constitution is enforceable. The Supreme Judicial Court of Massachusetts has held that an employee's signature on the manual itself would suggest, at most, that

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duct of both employer and employee. *See infra* pp. 7-8; *see also Durbeck v. Suffolk Univ.*, 547 F. Supp. 3d 133, 147-48 (D. Mass. 2021) (applying *Jackson* to academic catalogs).

Defendants also attempt to analogize the instant case to *Gilbert v. Dell Technologies, Inc.*, 415 F. Supp. 3d 389 (S.D.N.Y. 2019), which applied *Jackson* to enforce an arbitration agreement provided to an employee in conjunction with her employment agreement. Defs. Mem. at 7-8. In that case, the employer retained authority unilaterally to modify the arbitration policies but not the arbitration agreement itself. *See id.* at 393-94, 398. Those policies were, as here, incorporated into the employment agreement. *See id.* at 393. The employer in *Gilbert*, however, had drawn special attention to the arbitration policies by placing the contractual clause that incorporated the arbitration policies "prominently above the signature line." *Id.* at 396; *see also id.* at 393.

[8] One provision of the Flores-Patriots Agreement stated that Mr. Flores received a copy of the 124 NFL Constitution and understood his obligations therein. Flores-Patriots Agreement § 15; *see also* Second DiBella Decl. Ex. 1 ("NFL Constitution"), Dkt. 73. Mr. Flores disputes that he received a copy of the NFL Constitution at the time of signing. He has submitted no evidence to support that assertion, Pls. Opp. to Arb. Mem., Dkt. 62 at 9, and Defendants submitted no evidence to show that he was given a copy of the constitution at that time. Because the Court finds that whether Mr. Flores received a copy of the NFL Constitution is not dispositive in light of the totality of circumstances, the Court need not resolve this dispute.

finding an implied contract exists "may be justified." *Weber v. Comm. Teamwork, Inc.*, 752 N.E.2d 700, 714 (Mass. 2001).

In the context of employee manuals, Massachusetts courts have made clear that "the context of the preparation and distribution of the employment policies is the most persuasive proof" in determining whether employment policies are implied contracts. *LeMaitre v. Mass. Turnpike Auth.*, 897 N.E.2d 1218, 1220 (Mass. 2008) (employment manual that was regularly distributed created contractual rights and obligations); *see also LeMaitre v. Mass. Turnpike Auth.*, 876 N.E.2d 888, 893 (Mass. Ct. App. 2007) (noting that the manual was "regularly distributed"). Mr. Flores argues, and Defendants do not dispute, that neither the NFL nor the Patriots reviewed with him the obligations of the NFL Constitution, required him to sign the NFL Constitution itself, or distributed to him subsequently-amended versions of the NFL Constitution. *See* Pls. Opp. to Arb. Mem., Dkt. 62 at 9; Pls. Opp. at 8; Defs. Reply, Dkt. 99 at 4. *See, e.g.*, *Buttrick*, 2010 WL 2609364, at *1-2. Nor could Mr. Flores have reasonably negotiated the terms of the NFL Constitution, which, by its terms, may only be amended by a vote of all NFL member clubs. *See Jackson*, 525 N.E.2d at 414-15 (considering lack of negotiation the terms of an employment manual as one factor in determining that a unilateral modification provision rendered the agreement illusory).

Finally, Defendants belatedly argue that the Court need not address the fact that the NFL has the unilateral power to modify the NFL Constitution because it may simply enforce the version of the NFL Constitution that was in force when the Flores-Patriots Agreement was

signed.[9] *See* Defs. Mem. at 4 n.1; Defs. Reply at 3 n.1. Defendants forfeited this argument by failing to raise it in their briefs filed in conjunction with their motion to compel arbitration and by failing to submit the version of the NFL Constitution that was in effect when the Flores-Patriots Agreement was signed with their motion to compel arbitration. They offer no explanation for their oversight, and the Court will not consider this argument now.[10] *See AlexSam, Inc. v. Aetna, Inc.*, No. 13-CV-1025, 2021 WL 3268853, at *9 n.8 (D. Conn. July 30, 2021) (noting that judicial notice of additional facts was inappropriate on a motion for reconsideration where the petitioner "has not explained any reason for failing to include [the additional facts] in its earlier filings").

2. Severability

Defendants finally argue that, even if the unilateral modification provision renders the arbitration agreement unenforceable, the Court should sever the unilateral modification provision and enforce the remainder of the parties' contract. *See* Defs. Mem. at 9-10. The Federal Arbitration Act ("FAA") requires courts to treat arbitration clauses "as severable from the contract in which it appears . . . unless the validity challenge is to the arbitration

[9] Defendants point to a court filing in a class-action litigation in an out-of-district case regarding NFL players' concussion injuries that attached as an exhibit a prior version of the NFL Constitution as proof that the NFL did not amend the arbitration provision after the Flores-Patriots Agreement was executed. Defs. Mem. at 4 n.1.

[10] Even if the Court were to consider this argument, however, serious questions would remain regarding the enforceability of the arbitration agreement in light of the NFL's ability unilaterally to modify the NFL Dispute Resolution Procedural Guidelines, which govern any arbitral proceeding between a coach and the NFL. *See* Flores-Patriots Agreement § 17; Second DiBella Decl. Ex. 2 at 13-17 ("NFL Dispute Resolution Procedural Guidelines"), Dkt. 73.

itself . . . ." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 298-99 (2010). The fact that agreements to arbitrate are "severable does not mean that they are unassailable;" if the party seeking to avoid arbitration challenges the arbitration provision specifically, as Plaintiffs have, courts may appropriately consider whether the arbitration agreement is so defective that severance cannot save it. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 71 (2010); *see also* Pls. Opp. to Arb. Mot. at 9.

The focus of *Jackson* and its progeny is whether, in the broader context of the contractual relationship, one party's ability unilaterally to change the terms of a contract renders that contract illusory.[11] *See Jackson*, 525 N.E.2d at 415; *see also O'Brien*, 664 N.E.2d at 848; *Gilbert v. Dell Techs., Inc.*, 415 F. Supp. 3d 389, 398 (S.D.N.Y.

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[11] *Emmanuel v. Handy Technologies, Inc.*, 992 F.3d 1 (1st Cir. 2021), is not to the contrary; it did not address the plaintiff's argument that the unilateral modification provision rendered the contract illusory because, *inter alia*, plaintiff did not direct that argument to the arbitration agreement specifically, *see id.* at 10-11.

Similarly, *Joule, Inc. v. Simmons*, No. SUCV200904929A, 2011 WL 7090714 (Mass. Super. Ct. Dec. 5, 2011), did not opine on the issue of whether the employer's ability unilaterally to modify the arbitration procedures, but not the arbitration agreement, rendered the contract illusory because, after remand from the Supreme Judicial Court, the only issue remaining for consideration was whether the contract was unconscionable. *See id.* at *2. In *Joule*, the employer had drawn special attention to the document containing arbitration procedures by appending it to the agreement "at the time that [the employee] signed it." *Id.* at *4. The Flores-Patriots Agreement states only that Mr. Flores had reviewed the document at an unspecified time, and the version of the Flores-Patriots Agreement in the record did not append the NFL's Constitution or Dispute Resolution Procedural Guidelines, which were both subject to the NFL's unilateral modification. *See supra*, page 10, note 10.

2019) ("Under Massachusetts law, an agreement to arbitrate can be illusory if the agreement can be modified unilaterally by one party."). Massachusetts courts view unilateral modification provisions as posing a challenge to contract formation because the fact that the offeror retains the right unilaterally and retroactively to alter the terms of the offer "tends to show that any 'offer' made . . . was illusory," such that there was no offer at all. *Jackson*, 525 N.E.2d at 415; *see also O'Brien*, 664 N.E.2d at 848. Thus, severance cannot be an appropriate remedy because there is no otherwise valid agreement from which the Court might sever invalid terms.

Defendants' "argument that any illusory provision of the contract could simply be severed and the remainder of the contract stand would require [the Court] to engage in an absurd process," essentially "reviving a contract [it] found was never formed for its lack of consideration, omitting the change-in-term provision clause that was fatal to the contract's proper formation, to therefore conclude a contract was formed." *Nat'l Fed. of the Blind v. The Container Store*, 904 F.3d 70, 87 (1st Cir. 2018); *see also McNamara*, 2018 WL 6573125, at *3 (collecting cases).[12]

[12] Even if the Court were to find that there was a valid agreement from which it could sever the unilateral modification provision in order to create a valid arbitration agreement, severance would still be inappropriate. The existence of a severance clause in a contract containing unenforceable terms "is not dispositive of the question whether those terms may in fact be severed" under Massachusetts law. *Machado v. System4 LLC*, 989 N.E.2d 464, 472 n.15 (Mass. 2013). Rather, courts must examine whether severance would alter the basic agreement to arbitrate, or the defect is so pervasive that severance would be inappropriate. *See Am. Fam. Life Assurance Co. of N.Y. v. Baker*, 848 F. App'x 11, 13 (2d Cir. 2021); *Feeney v. Dell Inc.*, 908 N.E.2d 753, 769 (Mass. 2009).

III. PLAINTIFF'S MOTION FOR RECONSIDERATION IS DENIED

Plaintiffs' motion for reconsideration extensively relitigates their arguments that the arbitration agreements are unconscionable and prevent effective vindication of Plaintiffs' statutory claims, which the Court previously considered at length and rejected. Without rehashing the entirety of the Arbitration Opinion, the Court briefly explains why the arbitration agreements contained in Mr. Flores's contract with the Miami Dolphins ("Flores-Dolphins Agreement"), Mr. Wilks' contract with the Arizona Cardinals ("Wilks-Cardinals Agreement"), and Mr. Horton's contract with the Tennessee Titans ("Horton-Titans Agreement") are enforceable.

As in their opposition to the motion to compel arbitration, Plaintiffs primarily base their arguments on their speculation that the NFL Commissioner will necessarily be biased as an arbitrator. *See, e.g.*, Pls. Mem., Dkt. 80 at

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Defendants argue that severance would be "especially straightforward" and merely require revising section 15 of the Flores-Patriots Agreement to delete the requirement that Mr. Flores adhere to the NFL Constitution "as amended from time to time hereafter." Defs. Reply, Dkt. 99 at 5 (internal quotation omitted). This assertion ignores the fact that sections 16 and 17 of the Flores-Patriots Agreement also require Mr. Flores to adhere to subsequent amendments of NFL rules, including the NFL's Dispute Resolution Procedural Guidelines, which govern arbitration. Furthermore, the NFL Constitution generally grants the NFL Commissioner the unilateral power to set and amend all NFL rules and regulations, including the NFL Dispute Resolution Procedural Guidelines, and to promulgate other arbitration-related rules in the future that would bind Mr. Flores. *See* NFL Constitution § 8.5. In sum, multiple portions of the parties' agreement grant the NFL unilateral authority to modify the contract; those provisions infect "fundamental elements of the arbitration regime" that cannot be severed from the whole. *Feeney*, 908 N.E.2d at 769.

3-5. The Second Circuit has already rejected the argument that the NFL Commissioner cannot fairly "adjudicate the propriety of his own conduct," even when he acts as the sole arbitrator.[13] *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527, 548 (2d Cir. 2016); *see also* Op. at 22-23.

While Plaintiffs attempt to distinguish that case on the grounds that it involved a contract that was the process of collective, rather than individual, bargaining and concerned a dispute over player discipline instead of federal statutory rights, the Second Circuit relied on neither fact in reaching its decision. *See* Pls. Mem. at 5-6; *Nat'l Football League Mgmt. Council*, 820 F.3d 527 at 548. Furthermore, it is well-established that "[m]ere inequality in bargaining power . . . is not a sufficient reason" to invalidate arbitration agreements; "the FAA's purpose was to place arbitration agreements on the same footing as other contracts."[14] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 33 (1991). As the Second Circuit emphasized in *National Football League Management Council*, "arbitration is a matter of contract, and consequently, the parties to an arbitration can ask for no more impartiality than inheres in the method they have chosen."[15] 820 F.3d

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[13] That case concerned "quarterback Tom Brady's involvement in a scheme to deflate footballs used during the 2015 American Football Conference Championship Game to a pressure below the permissible range." *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527, 531 (2d Cir. 2016).

[14] *Amici* law professors take issue with the trajectory of the Supreme Court's jurisprudence regarding the Federal Arbitration Act generally and suggest that *Gilmer* was wrongly decided. Amici Mem., Dkt. 88 at 6-7, 6 n.11. Whatever the merits of the learned professors' argument, this Court is, of course, bound by *Gilmer* and its progeny.

[15] There are numerous reasons why Plaintiffs rationally could have consented to select the NFL Commissioner as arbitrator, including

at 548; *see also Garcia v. Church of Scientology Flag Serv. Org,, Inc.*, No. 18-13452, 2021 WL 5074465, at *12 (11th Cir. 2021) (holding that because the plaintiff "agreed to a method of arbitration with inherent partiality" it was bound to the results of the arbitration).

The FAA contemplates that federal courts should address issues of bias in the administration of arbitration by examining whether the arbitrator demonstrated "evident partiality" in presiding over the arbitration; if he did, the arbitration award may be overturned. *Gilmer*, 500 U.S. at 30; *see also* 9 U.S.C. § 10(a)(2). Plaintiffs argue that *Gilmer* limits this rule to cases in which neutral procedures govern arbitration. *See* Pls. Mem. at 7-8. While *Gilmer* noted that the existence of unbiased procedures favored enforcing the arbitration agreement at issue, that was not central to its holding. *See Gilmer*, 500 U.S. at 30. Rather, *Gilmer* held that the FAA already contemplates protection against bias by permitting courts to overturn arbitration awards that are marred by evident partiality of the arbitrator. The Court noted only in passing that "[i]n any event," the arbitration rules applicable to that dispute protected "against biased panels." *Id.* In short, "it is well established that a district court cannot entertain an attack upon the . . . partiality of arbitrators until after the conclusion of the arbitration and the rendition of the award." *Aviall, Inc. v. Ryder Sys., Inc.*, 110 F.3d 892, 895 (2d Cir. 1997) (internal quotation omitted).

Plaintiffs alternatively ask the Court to find that the arbitration agreement is unenforceable because the alleged structural bias prevents Plaintiffs from effectively vindicating their statutory claims. Pls. Mem. at 14-15. As

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the fact that the Commissioner possesses unique subject-matter expertise on matters related to the NFL.

the Court previously explained in its Arbitration Opinion, the effective vindication doctrine is a highly circumscribed judge-made exception to the FAA. *See Am. Express v. Italian Colors Rest.*, 570 U.S. 228, 235-36 (2013); Op. at 24. The Supreme Court has never expanded it to encompass structural bias, and the nonbinding caselaw cited by Plaintiffs is unpersuasive for the reasons already discussed in the Arbitration Opinion. *See* Op. at 24. While Plaintiffs accuse the Court of breaking new ground in compelling arbitration of their claims and causing manifest injustice, this result was anticipated by Justice Kagan, who expressed concern that the Supreme Court's limitations on the effective vindication doctrine would permit companies to "appoint as an arbitrator an obviously biased person—say, the CEO . . . ." *Am. Express*, 570 U.S. at 242 (Kagan, J. dissenting); Op. at 24 n.23.[16]

Finally, Plaintiffs once again argue that the arbitration agreements are unconscionable under the applicable state contract laws. Pls. Mem. at 11-13. Plaintiffs did not initially, nor do they now, cite any binding caselaw holding that arbitration agreements in which one party consents to the appointment of the counterparty's representative as arbitrator are unconscionable. While some courts have declined to enforce arbitration agreements in which the arbitrator selection procedures were so one-sided as to render the agreement unconscionable under applicable state law, those cases are inapplicable when the party

[16] Nothing in this Opinion should be read to suggest that the Undersigned harbors no concern about whether the process the NFL has apparently chosen to implement in this sort of dispute with coaches will be, and will be publicly perceived to be, fair. The Court is ruling only that, given the current legal structure, it must await the outcome of the arbitration to decide whether Plaintiffs' fears of unfairness were warranted or whether the NFL Commissioner gave them a fair shake to prove their claims.

seeking to avoid arbitration has consented to resolving his dispute before a specific arbitrator. *See* Op. at 24-25; *see also Gainseville Health Care Ctr., Inc. v. Weston*, 857 So.2d 278, 286 (Fla. Dist. Ct. App. 2003) (noting that Florida state courts "decline to indulge the presumption that the . . . arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators" in determining whether an arbitration agreement is unconscionable (quoting *Gilmer*, 500 U.S. at 30)).

Plaintiffs, in essence, ask the Court to fashion a specific rule out of whole cloth to protect them from potential arbitrator bias that may never manifest itself. To do so would be in direct violation of the FAA's admonition against carving out rules disfavoring the enforcement of arbitration agreements from generally applicable contract law. *See Gilmer*, 500 U.S. at 24.

CONCLUSION

For the foregoing reasons, both Plaintiffs' and Defendants' motions for reconsideration are **DENIED**. The Clerk of Court is respectfully directed to terminate the open motions at docket entries 79 and 81.

The parties are ordered to appear for a pretrial conference on **Friday, August 4, 2023, at 10:00 A.M.** in Courtroom 443 of the Thurgood Marshall Courthouse, 40 Foley Square, New York, New York, 10007. By **July 27, 2023**, the parties must submit a joint letter, the contents of which are described on pages 29 and 30 of the Arbitration Opinion.

SO ORDERED.

/s/ Valerie Caproni

Date: July 25, 2023
New York, New York

VALERIE CAPRONI
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 23-1185

BRIAN FLORES, AS A CLASS REPRESENTATIVE ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,
PLAINTIFFS-APPELLANTS

v.

NEW YORK FOOTBALL GIANTS, INC.; HOUSTON NFL HOLDINGS, L.P., DBA HOUSTON TEXANS; DENVER BRONCOS; NATIONAL FOOTBALL LEAGUE,
DEFENDANTS-RESPONDENTS

Filed: October 6, 2025

ORDER

Appellants filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe,
Clerk

/s/ Catherine O'Hagan Wolfe