

No. 25-790

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IN THE  
**Supreme Court of the United States**

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

*Petitioners,*

*v.*

BRIAN FLORES,

*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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**BRIEF IN OPPOSITION**

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**QUESTION PRESENTED**

Whether professional sports leagues may require statutory employment discrimination claims against the league and its teams to be adjudicated by the league's chief executive.

**TABLE OF CONTENTS**

	<i>Page</i>
QUESTION PRESENTED .....	i
TABLE OF CONTENTS.....	ii
TABLE OF CITED AUTHORITIES .....	iii
INTRODUCTION.....	1
STATEMENT OF THE CASE .....	1
I. The Claims Asserted in the Lawsuit .....	1
II. Relevant District Court Proceedings.....	2
III. The Second Circuit’s Decision .....	5
REASONS FOR DENYING THE PETITION .....	6
I. There is No Circuit Split or Inconsistency Among Lower Courts.....	6
II. Petitioners’ Question Presented Undercuts Its Claim of Exceptional Importance .....	8
III. The Second Circuit’s Application of the Effective Vindication Doctrine Does Not Warrant Review .....	10
IV. The Decision Below Does Not Conflict with This Court’s FAA Precedent.....	13
CONCLUSION .....	17

TABLE OF CITED AUTHORITIES

	<i>Page</i>
<b>Cases</b>	
<i>Am. Almond Prods. Co. v. Consol. Pecan Sales Co.</i> , 144 F.2d 448 (2d Cir. 1944) .....	16
<i>American Express Co. v. Italian Colors Rest.</i> , 570 U.S. 228 (2013) .....	11, 12
<i>Aviall, Inc. v. Ryder Sys., Inc.</i> , 110 F.3d 892 (2d Cir. 1997) .....	13
<i>Charles O. Finley &amp; Co., Inc. v. Kuhn</i> , 569 F.2d 527 (7th Cir. 1978) .....	7, 16
<i>Cole v. Burns Int’l Sec. Services</i> , 105 F.3d 1465 (D.C. Cir. 1997) .....	15
<i>Duvall v. Sulzner</i> , 155 F. 910 (C.C.W.D. Pa. 1907) .....	14
<i>Gilmer v. Interstate/Johnson Lane Corp.</i> , 500 U.S. 20 (1991) .....	14, 15
<i>Gulf Guar. Life Ins. Co. v.</i> <i>Connecticut Gen. Life Ins. Co.</i> , 304 F.3d 476 (5th Cir. 2002) .....	13
<i>Harrison v. Envision Mgmt. Holding, Inc.</i> <i>Bd. of Directors</i> , 59 F.4th 1090 (10th Cir. 2023) .....	12

*Cited Authorities*

	<i>Page</i>
<i>Haskins v. Royster</i> , 70 N.C. 601 (N.C. 1874) . . . . .	14
<i>Heckman v. Live Nation Ent., Inc.</i> , 120 F. 4th 670 (9th Cir. 2024) . . . . .	14
<i>Hooters of America, Inc. v. Phillips</i> , 173 F.3d 933 (4th Cir. 1999) . . . . .	12, 15
<i>Keachie v. Starkweather Drainage Dist.</i> , 170 N.W. 236 (Wis. 1919) . . . . .	14
<i>Layne &amp; Bowler Corp. v. W. Well Works</i> , 261 U.S. 387 (1923) . . . . .	9
<i>Marsch v. S. New England R.R. Corp.</i> , 120 N.E. 120 (Mass. 1918) . . . . .	14
<i>McMullen v. Meijer, Inc.</i> , 355 F.3d 485 (6th Cir. 2004) . . . . .	12, 15
<i>Merit Ins. Co. v. Leatherby Ins. Co.</i> , 714 F.2d 673 (7th Cir. 1983) . . . . .	15, 16
<i>Mitsubishi Motors Corp. v.</i> <i>Soler Chrysler-Plymouth, Inc.</i> , 473 U.S. 614 (1985) . . . . .	3, 6, 11
<i>Nat'l Football League Mgmt. Council v.</i> <i>Nat'l Football League Players Ass'n</i> , 820 F.3d 527 (2d Cir. 2016) . . . . .	16

*Cited Authorities*

	<i>Page</i>
<i>Nat'l Football League Players Ass'n on behalf of Peterson v. Nat'l Football League, 831 F.3d 985 (8th Cir. 2016)</i> .....	7
<i>Nat'l Football League v. Gruden, 573 P.3d 1240 (Nev. 2025)</i> .....	12
<i>Oakland Raiders v. Nat'l Football League, 32 Cal. Rptr. 3d 266 (Cal. Ct. App. 2005)</i> .....	16
<i>Rice v. Sioux City Mem'l Park Cemetery, 349 U.S. 70 (1955)</i> .....	9
<i>State v. Bowlby, 132 P. 723 (Wash. 1913)</i> .....	14
<i>State ex rel. Hewitt v. Kerr, 461 S.W.3d 798 (Mo. 2015)</i> .....	12
<i>Strong v. Strong, 63 Mass. 560 (Mass. 1852)</i> .....	14
<i>Viking River Cruises, Inc. v. Moriana, 596 U.S. 639 (2022)</i> .....	11
<i>Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370 (6th Cir. 2005)</i> .....	12, 15
<i>Wildfire Prods., L.P. v. Team Lemieux LLC, No. CV 2021-1072-PAF, 2022 WL 2342335 (Del. Ch. June 29, 2022)</i> .....	16

*Cited Authorities*

	<i>Page</i>
<i>Williams v. Cigna Fin. Advisors Inc.</i> , 197 F.3d 752 (5th Cir. 1999) . . . . .	15
<i>Williams v. Nat’l Football League</i> , 582 F.3d 863 (8th Cir. 2009) . . . . .	7
<i>Winfrey v. Simmons Foods, Inc.</i> , 495 F.3d 549 (8th Cir. 2007) . . . . .	16
<i>Yee v. City of Escondido, Cal.</i> , 503 U.S. 519 (1992) . . . . .	8

**Statutes and Other Authorities**

9 U.S.C. §§ 1 <i>et seq.</i> . . . . .	1
9 U.S.C. § 2 . . . . .	14
9 U.S.C. § 10(a)(2) . . . . .	12
29 U.S.C. §§ 141 <i>et seq.</i> . . . . .	7
42 U.S.C. § 1981 . . . . .	1
Sup. Ct. R. 14.1(a) . . . . .	8

## INTRODUCTION

The petition asks the Court to address a narrow question limited to the enforcement of commissioner-based arbitration regimes unique to the National Football League (“NFL”) and potentially other professional sports leagues. The petition identifies no conflict among the courts of appeals, no confusion and no issue of exceptional importance warranting the Court’s review. Petitioners’ predictions of dire consequences for the enforcement of the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* (“FAA”) absent Court review rest on purely speculative extensions of the lower court’s decision which are untethered to the question presented. The Second Circuit’s decision is consistent with all other circuit courts in holding that an employer—whether a professional sports league, restaurant, retail store or otherwise—cannot force employees to arbitrate statutory employment discrimination claims before the employer’s own chief executive. No court of appeals has held to the contrary.

## STATEMENT OF THE CASE

### I. The Claims Asserted in the Lawsuit

Respondent Brian Flores is an NFL football coach who alleges he was disparately treated and/or impacted by systemic race discrimination in the NFL. On February 1, 2022, Mr. Flores commenced a lawsuit against the NFL and three teams, the Miami Dolphins (“Dolphins”), New York Giants (“Giants”) and Denver Broncos (“Broncos”), under 42 U.S.C. § 1981 and state anti-discrimination laws. As originally pleaded, Mr. Flores asserted claims of, *inter alia*, race discrimination related to his termination by

the Miami Dolphins and failure to hire by the New York Giants and Denver Broncos. On April 7, 2022, Mr. Flores, joined by co-plaintiffs Steve Wilks and Ray Horton (also NFL coaches), filed an amended complaint in which Mr. Flores asserted additional claims of retaliation against the Houston Texans based on being removed from consideration for a head coach position after the lawsuit was filed; Mr. Wilks and Mr. Horton asserted race discrimination claims against the Arizona Cardinals and Tennessee Titans, respectively. Pet. App., 4a-10a.

## II. Relevant District Court Proceedings

Petitioners moved to compel arbitration of all Respondent's (and his co-plaintiffs') claims based on an array of different contracts, including team-specific employment contracts and an arbitration provision in the NFL Constitution. Unlike NFL players, coaches are not unionized or party to any collective bargaining agreement. *Id.* Each of the arbitration provisions delegated full and complete arbitral authority to the NFL commissioner, at the time and currently, Roger Goodell. Relevant here, the arbitration provision in the NFL Constitution provides nothing more than that "The Commissioner shall have full, complete and final jurisdiction and authority to arbitrate [specified types of disputes]." *Id.*, 16a.

Even though Mr. Flores was not under contract with any NFL team when he sought a head coach job with the Broncos, Giants and Texans, Petitioners argued that arbitration provisions incorporated into inactive and terminated contracts with the New England Patriots ("Patriots") and the Dolphins bound him to arbitrate his claims against the NFL and those other teams. Petitioners

also argued that Mr. Flores' contract to become an assistant coach with the Pittsburgh Steelers ("Steelers"), which post-dated the filing of the lawsuit, required him to arbitrate pre-existing claims against the NFL and the other teams. *Id.*, 8a-10a. Petitioners advanced the latter argument even though the Steelers agreed in writing with Mr. Flores that "[t]his employment agreement is not intended to infringe in any way on the lawsuit filed by Coach Flores in February 2022, which is currently pending." C.A. App., 1130-36.

Mr. Flores opposed the motion on multiple grounds including, *inter alia*, that an arbitration agreement designating full unfettered authority to the chief executive of the adverse party to adjudicate statutory discrimination claims was unenforceable because it prevented the effective vindication of statutory rights as first articulated in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985) and violated applicable state laws prohibiting enforcement of unconscionable and/or illusory contracts. More specifically, Mr. Flores argued that the NFL commissioner was inherently biased towards the NFL and its teams because, *inter alia*: (i) the NFL is a defendant and he is the NFL's chief executive; (ii) he has financial incentives and professional obligations to act in the NFL and teams' best interest; (iii) he works for and reports to the teams, including those named as defendants, and serves completely at their leisure; (iv) he is reportedly paid more than \$60 million per year by the NFL and its teams; and (v) he will likely be a witness in the litigation. Pet. App., 51a-58a. Mr. Flores also argued that the arbitration provision of the NFL Constitution could be unilaterally modified without notice, does not require arbitrator conflict disclosures, does not provide

for any discovery or rules of procedure, does not require the commissioner to preside in an impartial manner, and does not even prohibit the teams from taking action against the commissioner (i.e., replacing him) based on his arbitral decisions. *Id.*, 52a-53a. In fact, immediately after the lawsuit was filed, Mr. Goodell's office issued a public statement announcing that the claims were "without merit." *Id.*, 53a.

The district court granted Petitioners' motion in part and denied it in part. The district court compelled arbitration as to the claims in which there was a specific employment contract between the respective coach and team (Flores-Dolphins, Wilks-Cardinals and Horton-Titans). The district court refused to compel arbitration of the remaining claims (Flores-Giants, Flores-Texans, Flores-Broncos) where Petitioners relied on contracts with other teams that incorporated the NFL Constitution's arbitration provision by reference. The district court denied arbitration as to those claims on multiple independent grounds. *Id.*, 28a-30a.

With respect to Mr. Flores' claims against the Broncos and the NFL, for which those Petitioners sought to compel arbitration based on Mr. Flores' contract with Patriots, the district court found that the NFL Constitution's arbitration provision was illusory and unenforceable under Massachusetts law because it could be unilaterally modified without any notice. *Id.*, 52a-53a. With respect to Mr. Flores' claims against the NFL, Giants and Texans, for which those Petitioners sought to compel arbitration based on Mr. Flores' contract with the Steelers, the district court refused to compel arbitration for failure to establish a condition precedent to the enforcement of the

arbitration provision; namely, that the commissioner had reviewed and approved the contract. *Id.*, 42a-43a.

After dueling motions for reconsideration were denied, *id.*, 11a, Petitioners appealed as to the denial of the motion to compel arbitration as applicable to Mr. Flores' claims against the NFL, Giants, Broncos and Texans (Petitioners collectively referred to hereinafter as the "NFL").

### **III. The Second Circuit's Decision**

Before the Second Circuit, Mr. Flores advanced multiple independent grounds for affirmance, including the effective-vindication doctrine, unconscionability, illusoriness, failure to satisfy conditions precedent, and waiver of newly asserted arguments. The court of appeals affirmed based on two grounds—failure to provide an FAA-based arbitral forum and violation of the effective vindication doctrine—and did not reach the remaining alternative bases (including the bases specifically relied upon by the district court). *Id.*, 16a-17a, 26a.

First, the Second Circuit held, as an "independent reason to affirm," that the provision at issue cannot even be fairly called an arbitration agreement because it "offends basic presumptions of our arbitration jurisprudence by submitting Flores' statutory claims to the unilateral, substantive and procedural discretion of the principal executive of one of his adverse parties." As such, the court found that the arbitration provision was not entitled to the protections of the FAA. *Id.*, 17a-22a.

Second, the court held the arbitration provision unenforceable based on the effective vindication

doctrine, which provides that an arbitration agreement is enforceable only “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum.” *Mitsubishi Motors Corp.*, 473 U.S. at 637. The court reasoned that Mr. Flores could not effectively vindicate his statutory anti-discrimination rights if forced “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.” Pet. App., 23a-25a.

Finally, in holding the NFL Constitution’s arbitration provision unenforceable under federal law, the court of appeals expressly declined to address whether the arbitration agreement was unconscionable, illusory or otherwise unenforceable under applicable Massachusetts and Pennsylvania state law. *Id.*, 16a-17a, 26a. Those unresolved state law issues would require independent review and resolution in the event of a remand following any grant of certiorari.

The NFL filed a petition for an *en banc* review of the decision, which was denied without dissent. *Id.*, 85a.

## **REASONS FOR DENYING THE PETITION**

### **I. There is No Circuit Split or Inconsistency Among Lower Courts**

No circuit has ever held that the chief executive of an employer may arbitrate statutory employment discrimination claims, whether in the context of professional sports leagues or otherwise. Petitioners

identify no decision from any court of appeals requiring enforcement of an arbitration agreement that designates an employer's chief executive as the adjudicator of statutory employment discrimination claims. To the contrary, courts of appeals have consistently declined to enforce arbitration provisions presenting materially less severe concerns about arbitral neutrality. *See infra*, § III. Nor do Petitioners point to any appellate decision holding that employees can effectively vindicate statutory anti-discrimination rights in a forum controlled by the employer.

Petitioners attempt to manufacture a circuit split by arguing that the Second Circuit's decision is inconsistent with other circuit courts that have enforced commissioner-based arbitration agreements in professional sports leagues, citing principally *Williams v. Nat'l Football League*, 582 F.3d 863 (8th Cir. 2009), *Nat'l Football League Players Ass'n on behalf of Peterson v. Nat'l Football League*, 831 F.3d 985 (8th Cir. 2016) and *Charles O. Finley & Co., Inc. v. Kuhn*, 569 F.2d 527 (7th Cir. 1978).

Those decisions do not address the question presented in the matter at bar and arise in materially different legal contexts. *Williams* and *Peterson* involved collectively bargained labor disputes governed by the Labor Management Relations Act, 29 U.S.C. §§ 141 *et seq.* ("LMRA") and post-award review of disciplinary decisions under § 10 of the FAA, not the enforceability of an arbitration agreement in the first instance under § 2 of the FAA or the effective-vindication doctrine. *Kuhn*, likewise, involved a non-statutory intra-league governance dispute. None of those cases involved statutory employment discrimination claims or implicated

the effective vindication doctrine. That those cases arose in professional sports leagues does not create a conflict of law. Petitioners' remaining district and state authorities likewise involve non-statutory intra-league business disputes and do not address the enforceability of arbitration agreements governing statutory employment claims.

Petitioners' asserted conflict rests on decisions arising in materially different legal contexts that do not even implicate the question presented here simply because they involved professional sports leagues. Given the absence of any conflicting decisions among the courts of appeals, there is no mature dispute for this Court to resolve.

## **II. Petitioners' Question Presented Undercuts Its Claim of Exceptional Importance**

This petition does not present an important question warranting this Court's review. Petitioners argue that this is a matter of "exceptional importance," but the question presented defeats that claim—by its own terms the petition is limited to the enforceability of commissioner-based arbitration systems in professional sports leagues. The Court's review—if granted—would be confined to that question and those "fairly included" therein, i.e., issues necessary to resolve the question presented. *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 535 (1992) ("The framing of the question presented has significant consequences, however, because under this Court's Rule 14.1(a), '[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court.'").

Petitioners' claim of importance rests on speculative extensions well beyond the question presented as to how they believe "judges will predictably view [the lower court decision as] boundless discretion" and "license" to reject enforcement of arbitration agreements in contravention of the FAA. Those hypothetical consequences are untethered to the facts of this case and the narrow question the petition asks this Court to review.

The petition is also a poor vehicle for addressing any broader concerns about arbitration agreements or the enforcement of the FAA. The court of appeals' decision was not predicated on speculation about how an arbitration might proceed; rather, it rested on the structure of the NFL's asserted forum itself, which requires statutory discrimination claims to be resolved by the chief executive of an adverse party and therefore does not constitute arbitration as contemplated by the FAA or provide a forum in which those statutory rights could be effectively vindicated. Nothing in the decision threatens ordinary arbitration agreements or neutral arbitral forums.

The question presented also concerns a narrow category of employment relationships in the professional sports leagues industry, rather than any matter of importance to the public or employers at large. This Court has long emphasized that certiorari is reserved for cases presenting questions of broad public significance or resolving conflicts among the courts of appeals. *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 79 (1955) (citing *Layne & Bowler Corp. v. W. Well Works*, 261 U.S. 387, 393 (1923)) ("it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is

of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.”)).

Even within professional sports leagues, the decision below does not implicate commissioner-based arbitration systems generally. The court of appeals did not announce any categorical rule invalidating commissioner-based arbitration in sports leagues; it addressed whether statutory employment discrimination claims may be adjudicated by the chief executive of an adverse party. The decision does not affect commissioner-based arbitration of collectively bargained disciplinary matters under the LMRA (i.e. grievances filed by unionized players) or intra-league disputes concerning league rules or business affairs.

Finally, even if review were granted, this case would not resolve the dispute between the parties as to whether the plaintiffs’ claims must be arbitrated. The judgment below rests on limited grounds, and any reversal would require remand for consideration of several additional, unresolved grounds for affirmance, including whether the arbitration agreement is unconscionable or illusory under applicable state law and whether conditions precedent to certain contracts were satisfied.

### **III. The Second Circuit’s Application of the Effective Vindication Doctrine Does Not Warrant Review**

The court of appeals applied the settled effective vindication doctrine to the unusual arbitral structure at issue and did not expand or modify this Court’s precedent.

Nor have Petitioners identified any conflict among the courts of appeals regarding the application of that doctrine in comparable circumstances.

This Court has long recognized that arbitration agreements are unenforceable where they operate to prevent a litigant from effectively vindicating federal statutory rights. *See, e.g., Mitsubishi Motors Corp.*, 473 U.S. at 637 (“so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function”); *American Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 235 (2013) (“in *Mitsubishi Motors*, . . . we expressed a willingness to invalidate, on ‘public policy’ grounds, arbitration agreements that ‘operat[e] . . . as a prospective waiver of a party’s *right to pursue* statutory remedies.”); *cf. Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 653 n. 5 (2022) (doctrine not limited to federal statutory rights). The court of appeals applied that settled principle to the unique commissioner-based arbitral structure here.

The Second Circuit concluded that, given the commissioner-controlled arbitral forum, the arbitration agreement did not permit effective vindication of statutory anti-discrimination rights. Applying this Court’s established effective-vindication framework, the court determined that requiring such claims to be resolved by the chief executive of the adverse party was incompatible with meaningful enforcement of those rights. The court of appeals’ analysis fell well within the confines of the doctrine and reflected a straightforward application of settled law to the specific arbitral arrangement presented here.

Petitioners frame the effective-vindication doctrine as limited to a narrow set of circumstances. This Court’s decisions, however, have articulated the inquiry more generally to allow arbitration only when “the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum.” *Italian Colors Rest.*, 570 U.S. at 235; *see also Harrison v. Envision Mgmt. Holding, Inc. Bd. of Directors*, 59 F.4th 1090, 1098 (10th Cir. 2023) (“The key question is whether ‘the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum.’”).

The decision below accords with other courts of appeals that have declined to enforce arbitration provisions requiring statutory discrimination claims to be resolved in biased or non-neutral forums, whether under federal law or ordinary state-law contract principles. Courts of appeals and state supreme courts have long held that an employer’s control over the arbitral forum, even when less extensive than here, renders the arbitration provision unenforceable. *See Walker v. Ryan’s Family Steak Houses, Inc.*, 400 F.3d 370, 385 (6th Cir. 2005) (applying effective vindication doctrine); *McMullen v. Meijer, Inc.*, 355 F.3d 485 (6th Cir. 2004) (effective vindication doctrine); *Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999) (state law contract principles); *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 813-814 (Mo. 2015) (unconscionability); *Nat’l Football League v. Gruden*, 573 P.3d 1240 (Nev. 2025) (unconscionability).

Petitioners’ reliance on the vacatur provision of 9 U.S.C. § 10(a)(2) does not implicate any question warranting this Court’s review. That provision presupposes the existence of a valid arbitration agreement in the first instance and

governs post-award challenges; this case concerns the enforceability of the asserted arbitration agreement from the start. Petitioners identify no conflict between the threshold inquiry of contract enforcement and this Court's FAA precedents related to post-award vacatur, and the authorities on which they rely arise in materially different procedural contexts. *See Gulf Guar. Life Ins. Co. v. Connecticut Gen. Life Ins. Co.*, 304 F.3d 476, 490 (5th Cir. 2002) (no challenge to the enforceability of arbitration agreement); *Aviall, Inc. v. Ryder Sys., Inc.*, 110 F.3d 892, 895 (2d Cir. 1997) (same).

The court of appeals applied this Court's established effective vindication framework to the particular arbitral structure presented here and did not extend or modify existing doctrine. That analysis independently supports the judgment below and does not implicate any conflict among the courts of appeals or any unsettled question of federal law warranting review.

#### **IV. The Decision Below Does Not Conflict with This Court's FAA Precedent**

The court of appeals identified the absence of an FAA-compliant arbitral forum as an independent basis for affirmance, separate from its application of the effective vindication doctrine. Accordingly, any review as to whether the arbitration agreement at issue is FAA-compliant would not affect the judgment below, as the effective vindication analysis would remain intact and unaffected.

The Second Circuit correctly concluded that the NFL's league-controlled forum does not constitute arbitration as contemplated by the FAA. This Court has repeatedly

described arbitration as a substitute for bilateral judicial proceedings in which disputes are resolved by a neutral decisionmaker using neutral procedures, as cited below. *See infra* p. 14-15. A system that requires statutory employment discrimination claims to be adjudicated by the chief executive of an adverse party falls well outside that understanding and therefore does not implicate any conflict of federal law warranting this Court's review.

Arbitration was historically used to resolve contract and commercial disputes, as reflected in the very authorities Petitioners cite. 9 U.S.C. § 2 (“any maritime transaction or a contract”); *Keachie v. Starkweather Drainage Dist.*, 170 N.W. 236, 238 (Wis. 1919) (contract dispute); *Strong v. Strong*, 63 Mass. 560, 572-573 (Mass. 1852) (commercial dispute); *Duvall v. Sulzner*, 155 F. 910, 919 (C.C.W.D. Pa. 1907) (same); *State v. Bowlby*, 132 P. 723 (Wash. 1913) (same); *Marsch v. S. New England R.R. Corp.*, 120 N.E. 120, 123 (Mass. 1918) (same); *Haskins v. Royster*, 70 N.C. 601, 601 (N.C. 1874) (same). None involved the adjudication of federal statutory employment discrimination claims by the chief executive of a defendant employer.

The Court first applied the FAA to statutory claims in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Courts have since consistently recognized that arbitration governed by the FAA must provide a neutral and impartial forum, particularly when federal statutory rights are at stake. *See, e.g., Gilmer*, 500 U.S. at 30 (approving arbitration for discrimination cases that “provide protections against biased panels”); *Heckman v. Live Nation Ent., Inc.*, 120 F. 4th 670, 690 (9th Cir. 2024) (“Arbitration, as understood by Congress when it

enacted the FAA, was designed to be a fair and efficient alternative to bilateral judicial proceedings”); *Phillips*, 173 F.3d at 940 (Fourth Circuit describing arbitration as a “system whereby disputes are fairly resolved by an impartial third party.”); *McMullen*, 355 F.3d at 492, 494 (Sixth Circuit: “Under *Gilmer*, the arbitral forum must provide litigants with an effective substitute for the judicial forum’ . . . [and it is not an] effective substitute for a judicial forum [where it] inherently lacks neutrality”); *Walker*, 400 F.3d at 388 (Sixth Circuit: “structural bias in the make-up of the arbitration panel . . . can be just as prejudicial as arbitral bias” which would “not allow for the effective vindication” of rights); *cf. Cole v. Burns Int’l Sec. Services*, 105 F.3d 1465, 1482 (D.C. Cir. 1997) (dicta); *Williams v. Cigna Fin. Advisors Inc.*, 197 F.3d 752, 763 (5th Cir. 1999) (dicta).

Consistent with those principles, the Second Circuit concluded that the NFL’s arbitration system differs from arbitral forums the FAA protects, because it requires statutory employment discrimination claims against the league and its teams to be resolved under the authority of the adverse party’s chief executive. Petitioners do not appear to dispute the Second Circuit’s determination that the arbitral forum provided by the NFL Constitution lacks neutrality. Rather, Petitioners argue that such a provision is enforceable because certain courts have opined in other circumstances that “parties to an arbitration choose their method of dispute resolution, and can ask no more impartiality than inhere in the method they have chosen.” *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 679 (7th Cir. 1983).

That proposition, however, has been articulated strictly in cases involving neutral or collectively bargained arbitral forums, where a party later attempted to challenge the fairness of the forum it had agreed to. *See Am. Almond Prods. Co. v. Consol. Pecan Sales Co.*, 144 F.2d 448, 450 (2d Cir. 1944) (neutral arbitrators in commercial arbitration); *Merit Ins. Co.*, 714 F.2d at 676 (mixed panel of party and neutral arbitrators); *see also Winfrey v. Simmons Foods, Inc.*, 495 F.3d 549 (8th Cir. 2007) (mixed panel of party and neutral arbitrators); *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527, 548 (2d Cir. 2016) (collectively bargained labor arbitration under the LMRA).

Petitioners cite no courts which have held that the FAA permits statutory employment claims to be adjudicated by a chief executive in professional sports leagues due to their “specialized nature.” The cases on which Petitioners rely for that proposition instead involved non-statutory disputes or challenges to league governance decisions under distinct legal standards. *See Oakland Raiders v. Nat'l Football League*, 32 Cal. Rptr. 3d 266, 279 (Cal. Ct. App. 2005) (non-statutory league governance dispute); *Kuhn*, 569 F.2d at 527 (same in Major League Baseball); *Wildfire Prods., L.P. v. Team Lemieux LLC*, No. CV 2021-1072-PAF, 2022 WL 2342335 (Del. Ch. June 29, 2022) (same in National Hockey League).

The decision below reflects the application of settled FAA principles, as applied consistently across the courts of appeals, to a particular arbitral structure unique to the NFL. The court of appeals concluded that the arbitration agreement at issue did not provide a neutral forum for the adjudication of statutory claims and, independently from

that, that it precluded effective vindication of statutory rights. Those holdings do not implicate any conflict among the courts of appeals or any unsettled question of federal law warranting this Court's review.

### CONCLUSION

For the reasons set forth herein, the petition for writ of certiorari should be denied.

Respectfully submitted,

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