No. 23-20035

IN THE UNITED STATES COURT OFAPPEALS FOR THE FIFTH CIRCUIT

JENNIFER HARRIS,

Plaintiffs-Appellees,

V.

FEDEX CORPORATE SERVICES, INC.,

Defendant-Appellant.

On Appeal from the United States District Court for the
Southern District of Texas, Houston Division
No. 4:21-cv-1651

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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IDENTITY AND INTEREST OF AMICUS CURIAE

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. Throughout its 77-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.[1]

SUMMARY OF ARGUMENT

1. AAJ addresses this Court regarding whether employers like FedEx can substitute time limits set forth in their employment contracts in place of the statute of limitations Congress has established for employment discrimination lawsuits.

The U.S. Supreme Court in 1947 referenced *in dicta* a general rule that, in the absence of a contrary statute, contracting parties may shorten the time for filing actions under the contract. However, important developments since that time argue strongly against the blanket recognition of contractual limitations as a defense to federal employment discrimination actions, such as Plaintiff's § 1981 suit.

[1] All parties have consented to the filing of this brief. No party or party's counsel authored this brief in whole or in part. No person, other than amicus curiae, its members, and its counsel, contributed money that was intended to fund the preparation or submission of this brief.

Texas, like many other states, has enacted a contrary statute, which expressly voids contract provisions that shorten the time to file an action on the contract to a period shorter than two years. Actions like Plaintiff's—which allege racially unequal application of the benefits, privileges, terms, or conditions of her employment contract and racially motivated termination of her employment contract—are suits "on" her employment contract. Section 1981 provides no independent benefit to covered workers; it simply requires those benefits and terms of the contract the employer has agreed to provide be provided on a racially equal basis. Essentially, § 1981 imposes a covenant of racially equal treatment in the performance of contracts not unlike the implied covenant of good faith and fair dealing imposed by law. A suit alleging unequal treatment by an employer arises under § 1981, but it undeniably is a suit "on" the employment contract. This Court should not allow FedEx to demand enforcement of its contract provision imposing a six-month limit while denying that Plaintiff's action is a suit "on" that contract.

2. The Supreme Court has repeatedly declared that contract provisions that constitute a prospective waiver of federal statutory rights are unenforceable, as federal statutes can only accomplish important remedial and deterrent functions if claimants may effectively vindicate their causes of action provided by Congress.

This Court should not give approval to foreshortened time limits drafted by Defendant in this case. Public policy deems unenforceable provisions that as a

practical matter impede the aggrieved person's ability to obtain legal recourse. In civil rights cases, the Supreme Court has cautioned that federal courts must not apply time limits that do not take account of the complexity of preparing a federal employment discrimination action. A person must recognize that illegal discrimination has taken place, obtain counsel, and conduct sufficient investigation to prepare a complaint. Therefore, the Supreme Court has instructed federal courts not to apply state statutes of limitations that are so truncated as to make the vindication of federal statutory rights impracticable.

On this basis, federal courts have refused to enforce contractual limitations to dismiss employment discrimination cases brought under Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Family Medical Leave Act. In some cases, courts have observed that under Title VII and other federal statutes, a claimant must exhaust their administrative remedies with the EEOC before filing a civil action. During that period, the employee's short contractual time limit could well expire. However, the absence of an exhaustion requirement under § 1981 does not render a truncated limitations period acceptable. As the Supreme Court explained in detail, shortened time limits are also unenforceable if they do not account for the many other complexities of federal civil rights litigation.

3. Assuring that aggrieved parties can vindicate their federal statutory rights

is all the more compelling where the purpose of those statutory rights is remedying and rooting out racial discrimination in the workplace. It is firmly established that contractual provisions are unenforceable if enforcement would undermine important public policy goals, such as eliminating workplace racial discrimination.

Granting employers dismissal based upon a time limit that they themselves devised and inserted into their own documents severely undermines Congress's purpose in arming employees with a private cause of action. Congress enacted a general statute of limitations applicable to § 1981 employment discrimination suits precisely because it found the wide variation and unfairness caused by borrowing state limitations to be untenable. This Court should not undo this important uniformity.

Finally, this Court cannot ignore the fact that provisions like the one at issue in this case are not true agreements. Instead, they are inserted unilaterally by employers into documents presented to employees or applicants for employment on a take-it-or-leave-it basis. Under these conditions, employers can count on most, if not all, employees being unaware of the rapidly ticking clock they have "agreed" to until it is too late. Dismissal is not the unhappy result of the worker's irresponsible failure to study the terms of their contract—it is precisely the outcome the document was designed to achieve.

To accept and enforce such provisions is to give approval to a race to the

bottom, as companies compete to insert provisions designed to escape accountability and dismantle the protections Congress put in place to protect all workers and their families.

ARGUMENT

I. THERE IS NO GENERAL RULE REQUIRING FEDERAL COURTS TO SUBSTITUTE A PRIVATE CONTRACTUAL TIME LIMIT IN PLACE OF THE STATUTE OF LIMITATIONS ESTABLISHED BY CONGRESS FOR FEDERAL EMPLOYMENT DISCRIMINATION ACTIONS.

A. There Is No Blanket Rule That Private Parties May Shorten Federal Statutes of Limitations.

AAJ addresses this Court about an important issue presented in this case: Whether employers can replace the statutes of limitations established by Congress to allow employees to vindicate their civil rights, with their own, much shorter, time limits. This Court's resolution will impact workers around the country who depend on access to the courts to protect their right to perform their jobs free of illegal discrimination.

As the parties have set forth, Jennifer Harris alleged that she was the victim of racial discrimination at work, and that she was not treated equally in job performance under her contract compared to her white counterparts. *See Harris v. FedEx Corp.*, No. 4:21-CV-01651, 2022 WL 4003876, at *3 (S.D. Tex. Aug. 31, 2022) (denying defendant's motion for summary judgment). When she tried to assert her right to equal treatment, FedEx terminated her contract of employment effective

January 7, 2020.

That contract incorporated a provision set out in her employment application: "To the extent the law allows an employee to bring legal action against the Company, I agree to bring that complaint within the time prescribed by law or 6 months from the date of the event forming the basis of my lawsuit, whichever expires first." Defendant's Memorandum of Law in Support of its Motion for Summary Judgment, *Harris v. FedEx Corp*., No. 4:21-cv-1651, 2022 WL 17085009 (S.D. Tex., June 15, 2022).

Ms. Harris brought this action under 42 U.S.C. § 1981 on May 20, 2021, well within the four-year limitations period prescribed by Congress.[2] The district court rejected FedEx's motion to dismiss Ms. Harris's suit as time-barred by the company's six-month provision, allowing her to present her case to the jury. AAJ urges this court to affirm.

More than 75 years ago, the Supreme Court stated:

> [I]n the absence of a controlling statute to the contrary, a provision in a contract may validly limit, between the parties, the time for bringing an action on such contract to a period less than that prescribed in the general statute of limitations, provided that the shorter period itself shall be a reasonable period.

Order of United Com, Travelers of Am. v. Wolfe, 331 U.S. 586, 608 (1947). This

[2] Section 1981 actions are governed by the "catch-all" four-year statute of limitations in 28 U.S.C. § 1658. *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 378–79 (2004).

passage was little more than dictum[3] and certainly does not provide blanket license for employers to insert and enforce contract provisions designed to cut off their employees' legal recourse under federal law for job discrimination. Nevertheless, FedEx has so asserted, and one district court in this Circuit has agreed. *Morgan v. Fed. Exp. Corp.*, 114 F. Supp. 3d 434, 442 (S.D. Tex. 2015) (citing *Wolfe*). Much has changed since 1947 that should persuade this Court otherwise.

B. Contractual Limitations Provisions Are Void and Unenforceable Under Texas Law in § 1981 Actions.

One crucial development since 1947 is that the Texas Legislature enacted a "controlling statute to the contrary." *See* Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

Texas law currently provides:

> [A] person may not enter a stipulation, contract, or agreement that purports to limit the time in which to bring suit on the stipulation, contract, or agreement to a period shorter than two years. A stipulation, contract, or agreement that establishes a limitations period that is shorter than two years is void in this state.

Tex. Civ. Prac. & Rem. Code Ann. § 16.070(a).

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[3] The quoted proposition reflected matters of state public policy formulated primarily in litigation involving contracts of insurance. *See* 331 U.S. at 608 & n.20. No federal right of action was involved. Rather, the Court in *Wolfe* was asked whether a private time limitation in an Ohio death benefit policy must be enforced by the courts of South Dakota, where such provisions were prohibited. *Id.* at 613. "[T]he ultimate determination . . . in *Wolfe* was based on the Full Faith and Credit Clause of the federal Constitution, rather than on a general rule that federal courts must enforce contractual limitation periods." *Logan v. MGM Grand Detroit Casino*, 939 F.3d 824, 834 (6th Cir. 2019).

Many states have enacted similar prohibitions to prevent a party from using its dominant position to unfairly limit its liability by inserting shortened time limits into a contract.[4] In this Circuit, for example, Mississippi law provides that "any change in [state] limitations made by any contracts stipulation whatsoever shall be absolutely null and void." Miss. Code Ann. § 15-1-5. The prevalence among the states of such enactments is indicative of the strong public policy that animates Tex. Civ. Prac. & Rem. Code Ann. § 16.070(a).

C. A Lawsuit That Alleges Employment Discrimination and Retaliation in Violation of 42 U.S.C. § 1981 Is a "Suit on the Stipulation, Contract, or Agreement."

One district court has suggested that Section 16.070 might not apply to employment discrimination lawsuits. Plaintiff in *Ceyala v. Am. Pinnacle Mgmt. Servs., LLC*, No. 3:13–CV–1096–D, 2013 WL 4603165 (N.D. Tex. Aug. 29, 2013), sued her former employer under Title VII and § 1981 for racial discrimination and retaliation. Defendant moved to compel arbitration based on a provision in plaintiff's employment application that forced resolution of all disputes with Pinnacle through arbitration, commenced within one year of the facts giving rise to the claim. *Id.* at *1. The district court granted defendant's motion to compel, rejecting Ms. Ceyala's

[4] Other states that have adopted similar legislation include Alabama, Florida, Idaho, Mississippi, Missouri, Montana, North Dakota, Oklahoma, South Carolina, South Dakota, and Vermont. *See* Ala. Code § 6-2-15; Fla. Stat. Ann. § 95.03; Idaho Code § 29-110; Miss. Code Ann. § 15-1-5; Mo. Rev. Stat. § 431.030; Mont. Code Ann., 28-2-708; N.D. Cent. Code § 9-08-05; Okla. Stat. tit. 15, § 216; S.C. Code Ann. § 15-3-140; S.D. Codified Laws § 53-9-6; Vt. Stat. Ann. tit. 12, § 465.

argument that the arbitration agreement was unconscionable or inconsistent with Texas law under Section 16.070. District Judge Fitzwater observed, without discussion, "Celaya is not bringing suit on a stipulation, contract, or agreement. She is suing for alleged violations of two federal statutes." *Id.* at *5.[5]

The district court's reasoning in *Celaya* does not speak to the question presently before this Court. Pinnacle did not claim that plaintiff was time-barred by the contract provision; Pinnacle *wanted* to go to arbitration. Moreover, the determinative factor for the court was that the contractual limitation was part of an arbitration agreement, the enforcement of which, the Supreme Court has stated, is supported by a "liberal federal policy favoring arbitration." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). Judge Fitzwater acknowledged that the outcome of the validity of the shortened limitations period would be different if plaintiff were seeking to enforce rights under a federal statute that "is to be construed liberally and enforced fully." *Ceyala*, at *4 (quoting *Allen v. McWane, Inc.*, 593 F.3d 449, 452 (5th Cir. 2010)). It can scarcely be questioned that § 1981 embodies just such a federal command. *See, e.g.*, *Spiess v. C. Itoh & Co. (America), Inc.*, 408 F. Supp. 916, 928 n.17 (S.D. Tex. 1976) ("Section 1981 has been and is to be liberally

[5] *See also Adevereaux v. Sports & Fitness Clubs or Am., Inc.*, No. 3-03-CV-2824-L, 2004 WL 414896, at *2 (N.D. Tex. Feb. 17, 2004) (holding Section 16.070 did not preclude enforcing an agreement to arbitrate Title VII and ADEA claims, because plaintiff was "not suing on a 'stipulation, contract, or agreement.'").

construed.").

It is also very clear that a § 1981 employment discrimination action is indeed a "suit on" plaintiff's contract of employment. The statute was enacted in 1870 to ensure that all people, regardless of race, have equal rights "to make and enforce contracts." 42 U.S.C. § 1981(a). Congress amended the statute in 1991 to define this right further, such that "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." *Id.* at § 1981(b); Civil Rights Act of 1991, PL 102–166, November 21, 1991, 105 Stat. 1071. Congress's purpose was to make clear that statute applies "to cover all aspects of the employment relationship," not only the formation of contracts, but also the "benefits, privileges, terms and conditions" under the contract, including "claims of harassment, discharge, demotion, promotion, transfer, retaliation, and hiring." H.R. Rep. No. 102–40, at 37 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 694, 730–31.

Section 1981 does not confer new job benefits or privileges on workers. It simply requires an employer to apply the "benefits, privileges, terms and conditions" that the employer has already agreed to in the contract on a racially equal basis. This principle of evenhandedness becomes, by virtue of § 1981, an implied term of every covered contract, not unlike the broadly recognized "implied covenant of good faith and fair dealing." *See, e.g.*, *Taylor-Travis v. Jackson State Univ.*, 984 F.3d 1107,

1110 (5th Cir. 2021); *cf. Arnold v. Nat'l Cnty. Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987) ("[A] duty of good faith and fair dealing may arise as a result of a special relationship between the parties governed or created by a contract.").

Section 1981 proscribes racial discrimination in employment "in broad terms," *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295 (1976), using "broadly inclusive language." *Burnett v. Grattan*, 468 U.S. 42, 50 (1984). Any construction that a § 1981 employment discrimination lawsuit is not a suit "on" plaintiff's employment contract would not achieve the broad scope Congress intended for § 1981.

As Justice Scalia has explained, an essential element under § 1981 is "an impaired 'contractual relationship,' under which the plaintiff has rights." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 (2006). Section 1981 offers relief "when racial discrimination impairs an existing contractual relationship." *Id.*

Ms. Harris's allegations that FedEx applied different performance requirements under her employment contract than white coworkers and terminated her contract in retaliation for seeking recourse for that unequal treatment *is* a suit on her contract of employment. It would be absurd to allow FedEx to claim Ms. Harris's suit for unequal treatment under her contract is barred by a provision of that employment contract, and at the same time rule that her action was not a suit on her

employment contract for purposes of Section 16.070.[6]

The Texas Legislature sought to protect Texas workers and others from such sharp practices. Major corporations may have such unequal bargaining power that they can insist that employers (and consumers) assent to the take-it-or-leave-it "agreements" they have drafted. But they should not be permitted to grant themselves immunity from accountability under federal civil rights statutes by inserting provisions that purport to take away seven-eighths of the time Congress has allowed for filing such actions.

II. A PRIVATE CONTRACTUAL TIME LIMIT FOR INITIATING EMPLOYMENT DISCRIMINATION ACTIONS UNDER FEDERAL LAW CONSTITUTES AN IMPERMISSIBLE PROSPECTIVE WAIVER OF FEDERAL STATORY RIGHTS.

A. Public Policy Denies Enforcement of Contractual Prospective Waivers of Federal Statutory Rights.

Independent of whether FedEx's private contractual limitation is void under Texas law, it is unenforceable as violative of public policy under settled federal law. Ms. Harris's right to racially evenhanded application of "all benefits, privileges, terms, and conditions" of her employment contract with FedEx is a substantive right conferred by 42 U.S.C. § 1981, as is her private cause of action for damages for

[6] In fact, FedEx states quite emphatically that the contractual time limit set forth in the application "cannot be said to be restricted to matters within the application itself," but extends to "claims arising out of such [legal] duties" flowing from FedEx to Plaintiff. Defendant FedEx Corporate Services, Inc.'s Memorandum of Law in Support of Motion for Judgment as a Matter of Law at *8, *Harris v. FedEx Corp*., No. 4:21-cv-1651, 2022 WL 17085009 (S.D. Tex. Jan. 12, 2023).

violating that right.

The Supreme Court of the United States has made clear that, even in a contract freely negotiated by sophisticated commercial parties, where contractual provisions operate "as a prospective waiver of a party's right to pursue statutory remedies . . . we would have little hesitation in condemning the agreement as against public policy." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 637 n.19 (1985). The Court emphasized that only "so long as the prospective litigant *effectively* may vindicate its statutory cause of action" could the federal statute "continue to serve both its remedial and deterrent function." *Id.* at 637 (emphasis added). The Court has consistently reaffirmed this principle, including in the context of employees' rights under federal employment discrimination statutes. *See, e.g.*, *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273–74 (2009) ("[W]aiver of federally protected civil rights" under the Age Discrimination in Employment Act "will not be upheld."); *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 28 (1991) (same); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) ("[T]here can be no prospective waiver of an employee's rights under Title VII.").

The provision in FedEx's contract of employment requiring employees to waive most of the four-year period that Congress provided for preparing and filing a § 1981 action is just such a prospective waiver.

B. Contract Provisions that Substantially Shorten the Time Set by Congress for Filing a Statutory Cause of Action Amounts to an Impermissible Prospective Waiver of Federal Rights.

It is true the provision buried in Ms. Harris's application for employment with FedEx did not outright preclude her from pursuing her § 1981 remedy. But the Supreme Court did not limit its condemnation to only contract provisions that make the filing of a federal cause of action impossible. Provisions must also be set aside if the party "will *for all practical purposes* be deprived of his day in court." *Mitsubishi*, 473 U.S. at 632 (emphasis added). For example, a contractual provision that required a claimant to pay "filing and administrative fees . . . that are so high as to make access to the forum impracticable" would also be void as against public policy. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013).

The Supreme Court has indicated that limitations that do not take account of the complexity of preparing a federal employment discrimination action may also make vindication of federal rights impracticable. Before Congress's enactment of the general statute of limitations in 1990 in 28 U.S.C. § 1658, Congress had provided no specific statute of limitations governing cases brought under the Civil Rights Acts, including actions under § 1981 or § 1983, instead directing in 42 U.S.C. § 1988 that courts apply the most analogous state statute of limitations. *See Burnett*, 468 U.S. at 47–48. Congress did so, the Court stated, because it appeared "most unlikely" that such state statutes of limitations "ever would be, fixed in a way that would

discriminate against federal claims, or be inconsistent with federal law in any respect." *Felder v. Casey*, 487 U.S. 131, 139–40 (1988) (quoting *Wilson v. Garcia,* 471 U.S. 261, 279 (1985)).

However, the Court made clear, even express statutory authorization for courts to borrow state statutes of limitations must not be used to deprive civil rights claimants of sufficient time to prepare their cases:

> [W]e have disapproved the adoption of state statutes of limitation that provide only a truncated period of time within which to file suit, because such statutes inadequately accommodate the complexities of federal civil rights litigation and are thus inconsistent with Congress' compensatory aims.

Felder, 487 U.S. at 139–40.

The Court cited as an example its decision in *Burnett v. Grattan*, where plaintiffs alleged that they were terminated from their positions at a university in violation of the Civil Rights Acts, including § 1981. The Court emphasized that a district court's selection of an appropriate state limitation must take into account the "practicalities of litigation" under § 1981. *Burnett*, 468 U.S. at 50.

> Litigating a civil rights claim requires considerable preparation. An injured person must recognize the constitutional dimensions of his injury. He must obtain counsel, or prepare to proceed pro se. He must conduct enough investigation to draft pleadings that meet the requirements of federal rules; he must also establish the amount of his damages, prepare legal documents, pay a substantial filing fee or prepare additional papers to support a request to proceed in forma pauperis, and file and serve his complaint. At the same time, the litigant must look ahead to the responsibilities that immediately follow filing of a complaint. He must be prepared to withstand various responses,

> such as a motion to dismiss, as well as to undertake additional discovery.

Id. at 50–51 (footnotes omitted).

The Court held that Maryland's six-month statute of limitations could not serve as an appropriate time limit for plaintiffs pursuing a § 1981 action because it "fails to take into account practicalities that are involved in litigating federal civil rights claims and policies that are analogous to the goals of the Civil Rights Acts." *Id.* at 50.

If state statutes of limitations cannot limit the time for bringing a federal civil rights action to six months, certainly application of a six-month time limit devised by a corporate defendant is even more indefensible. The Sixth Circuit, for example, has held that Title VII cases may not be dismissed based on defendant's six-month contractual limitation. *Logan*, 939 F.3d at 829. In that case, the court observed that plaintiff was required to wait for the EEOC to complete its administrative review and issue a right-to-sue letter, which could well take six months. *Id.* at 829. [7]

It is true that § 1981 has no similar administrative exhaustion requirement in employment discrimination cases. Nevertheless, Title VII and § 1981 generally cover the same discriminatory misconduct and are often, as here, pleaded in the same

[7] Title VII "cases filed in the Fifth Circuit are subject to Rule 12 dismissal if plaintiff has not completed the EEOC process." *Mazurkiewicz v. Clayton Homes, Inc.*, 971 F. Supp. 2d 682, 689 (S.D. Tex. 2013).

lawsuit. *Anderson v. Douglas & Lomason Co., Inc*., 26 F.3d 1277, 1284 n.7 (5th Cir. 1994) ("Even though plaintiffs alleged violations of both § 1981 and Title VII, the elements of both claims are identical.") (citations omitted). As the Supreme Court explained in detail in *Burnett*, *supra*, the complexities of federal civil rights litigation extend far beyond the requirement of EEOC administrative exhaustion under Title VII and other anti-discrimination statutes.

Many federal courts have applied the "effective vindication" principle to bar reliance on contractually shortened time limits in other federal statutory employment rights cases as well. For example, in a suit brought under the Americans with Disabilities Act, District Judge George Ross Anderson for the District of South Carolina denied the employer's motion to dismiss on the basis of its contractual six-month time limit for filing actions.

> Congress created the ADA to provide a clear and comprehensive mandate for the elimination of discrimination against individuals with disabilities. . . . [T]his Court will not allow the Defendant to frustrate Congressional intent through a cleverly-drawn unilateral contract. The Defendant's contract would shorten a time limit established by federal mandate. This is abhorrent to public policy and defeats federally-protected rights of workers. This Court would not enforce a contract that required an employee to waive his or her federal protections. Similarly, this Court will not enforce a contract that reduces the time limits to assert a federal cause of action.

Scott v. Guardsmark Sec., 874 F. Supp. 117, 121 (D.S.C. 1995). *See also Mabry v. W. & S. Life Ins. Co*., No. 1:03 CV 848, 2005 WL 1167002, at *4 (M.D.N.C. Apr. 19, 2005); *Salisbury v. Art Van Furniture*, 938 F. Supp. 435, 437–38 (W.D. Mich.

1996) (holding that a six-month limitation "certainly effected a 'practical abrogation' of the right to file an ADA claim and is, therefore, unreasonable").

Federal courts have also rejected employer attempts to rely on contractual limitations to dismiss actions bought under the Age Discrimination in Employment Act, *e.g.*, *Thompson v. Fresh Products, LLC*, 985 F.3d 509 (6th Cir. 2021), and under the Family Medical Leave Act, *e.g.*, *Bullard v. Fedex Freight, Inc.*, 218 F. Supp. 3d 608, 614 (M.D. Tenn. 2016).

Those decisions to the contrary, allowing employers to write their own private statutes of limitations into employment contracts, are not persuasive. In this Circuit, the district court in *Morgan*, granted FedEx's motion for summary judgment in a former employee's § 1981 retaliation action. 114 F. Supp. 3d at 444. The district court reasoned that '"by enacting section 1981 without a statute of limitations, Congress implied that it is willing to live with a wide range of state statutes and rules governing limitations of action' and allow parties to contract for a shorter limitations period." *Id*. (quoting *Taylor v. W. & S. Life Ins. Co.*, 966 F.2d 1188, 1205 (7th Cir. 1992)). The *Taylor* court was applying federal law as it existed prior to the enactment of the four-year general statute of limitations in 28 U.S.C. § 1658 and prior to the Supreme Court's decision in *Jones*. 541 U.S. at 382 (holding that the four-year limitation applies to § 1981 actions because Congress was unwilling to tolerate a wide range of time limits

and sought to "alleviat[e] the uncertainty inherent in the practice of borrowing state statutes of limitations").

By inserting such provisions into form documents, employers like FedEx can count on many aggrieved workers being unaware of the rapidly ticking clock until it is too late, thereby securing immunity from even having to respond on the merits of an employee's federal discrimination claim. In this case, FedEx's provision attempts to deprive its workers of all but six months of the time that Congress provided to her to file her action. During that time, Ms. Harris was experiencing a traumatic disruption of her life and livelihood, dealing with the exigencies of caring for her family, locating documents or witnesses that would shed light on whether her adverse treatment was discriminatory, and trying to retain an attorney to represent her. This shortened time frame is made all the more unreasonable given insurance industry standards requiring plaintiff attorneys to certify that their firm will decline all cases with less than six months to the given statute of limitations. *See, e.g.*, Aspen Lawyer's Protector Plan, Lawyers Professional Liability Area of Practice Supplement, ASP LPP 049 (03 20). If this Court were to uphold a provision that limits the time in which plaintiffs may file their federal civil rights claim to six months, untold numbers of employees would encounter much greater difficulty obtaining representation to vindicate their federal statutory rights.

III. PRIVATE CONTRACTUAL LIMITATIONS VIOLATE PUBLIC POLICY BY ALLOWING EMPLOYERS TO DESTROY THE UNIFORMITY AND TRANSPARENCY THAT ARE ESSENTIAL TO EMPLOYEES' VINDICATION OF THEIR FEDERAL STATUTORY RIGHTS.

A. FedEx's Contractual Time Limit Thwarts the Important Policy of Racial Equality in the Workplace.

Beyond this Court's obligation to preserve an individual's ability to vindicate her federal statutory rights, courts must also decline enforcement of private contract provisions that stand in the way of important public policy objectives that Congress sought to achieve by authorizing such private causes of action.

It is a "traditional" and "well-established" common-law principle that "a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987). Based on this axiom, the Supreme Court has instructed:

> The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents. Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power.

Hurd v. Hodge, 334 U.S. 24, 34–35 (1948) (rejecting enforcement of racially restrictive real estate covenants). *See, e.g.*, *Mid State Horticultural Co. v. Pennsylvania R. Co.*, 320 U.S. 356, 363-64 (1943) (invalidating waiver of three-year

limitation on Interstate Commerce Act claim as contrary to Congress's intent to prevent unjust discrimination by interstate carriers against shippers).

In this case, the importance of the public policy goal at stake can scarcely be overstated. Section 1981 is rooted in the Civil Rights Act of Apr. 9, 1866, c. 31, 14 Stat. 27. Entitled "An Act to protect all persons in the United States in their civil rights, and to furnish the means for their vindication," the Act was enacted to eliminate the "conditions of inequality and servitude" rooted in slavery pursuant to the Thirteenth and Fourteenth Amendments. *Ex parte Commonwealth of Virginia*, 100 U.S. 339, 344 (1879).

When Congress amended the statute in 1991 to add § 1981(b), its purpose was to further strengthen federal civil rights protection of employees. As this Court has declared: "None can contest that discriminating against an employee on the basis of race is illegal and against public policy. In amending § 1981, Congress was advancing such public policy concerns by providing a vehicle for every employee to remedy racial discrimination in the workplace." *Fadeyi v. Planned Parenthood Ass'n of Lubbock, Inc.*, 160 F.3d 1048, 1052 (5th Cir. 1998).

Congress's chosen vehicle to accomplish this goal is to equip employees with a private cause of action to compensate workers who have been victims of unlawful discrimination and provide financial incentive for employers to guard against such misconduct. This Court has long recognized that the ability to bring such private

actions furthers a "strong public interest." *James v. Stockham Valves and Fittings Co.*, 559 F.2d 310, 358 (5th Cir. 1977).

Section 1981, like Title VII, is "strong medicine," and this Court should "refuse to vitiate its potency by glossing it with judicial limitations unwarranted by the strong remedial spirit of the act." *Johnson v. Goodyear Tire & Rubber Co., Synthetic Rubber Plant*, 491 F.2d 1364, 1377 (5th Cir. 1974). Nor should this Court allow employers to undermine the means Congress has chosen by crippling their employees' ability to bring their claims to court. If this Court gives its approval to the six-month private limitation in this case, it is inevitable that many employers will add similar boilerplate to the fine print in its documents, effectively erasing the four-year statute of limitations that Congress deemed appropriate.

B. Private Contractual Time Limits Destroy the Uniformity That Congress Recognized as Essential to the Remedy Provided by Federal Employment Discrimination Statutes.

Allowing employers to choose their own limitations periods for filing federal employment discrimination suits would also destroy the uniformity of time limits that Congress intended to establish. Recognizing such private provisions as defenses to federal statutory claims would reinstitute wide variations in time limits that both Congress and the judicial branch found untenable.

As noted above, Congress initially provided no specific statute of limitations in the Civil Rights Acts, instead directing federal courts in 42 U.S.C. § 1988 to

borrow "the most analogous" state statute of limitation. *See Wilson*, 471 U.S. at 368. As a result, federal civil rights actions arising out of very similar circumstances could be governed by widely divergent limitations periods.

The resulting uncertainty and unfairness—as well as the burden placed on federal courts to make difficult determinations as to the appropriate state law—led many jurists and a Congressional Federal Courts Study Committee to urge Congress to enact uniform federal statutes of limitation. *See, e.g.*, *Sentry Corp. v. Harris*, 802 F.2d 229, 246 (7th Cir. 1986) ("We join the growing number of commentators and courts who have called upon Congress to eliminate these complex cases, that do much to consume the time and energies of judges but that do little to advance the cause of justice, by enacting federal limitations periods for all federal causes of action.").

Congress responded by enacting 28 U.S.C. § 1658, requiring that a federal cause of action "may not be commenced later than 4 years after the cause of action accrues." The House Report explained that the new statute rejected the practice of borrowing state limitations for federal causes of action because "it imposes uncertainty on litigants, . . . results in undesirable variance among the federal courts and disrupts the development of federal doctrine on the suspension of limitation periods." H.R. Rep. No. 101-734, at 24 (1990) (quoting Fed. Courts Study Comm., Judicial Conference of the U.S., Report of the Federal Courts Study Committee, 93

(1990)).

In holding that the four-year general statute of limitations Congress established in 28 U.S.C. § 1658 governs employment discrimination cases under § 1981, the Supreme Court emphasized that this uniformity "best serves Congress' interest in alleviating the uncertainty" that is inherent in applying divergent time limitations on filing federal causes of action. *Jones*, 541 U.S. at 382. This Court should not undo this uniformity by allowing the time for filing a federal employment discrimination suit to be determined not by looking to 28 U.S.C. § 1658, or even by ascertaining the proper "analogous" state statute, but by unearthing a provision lurking in the employment documents drafted by the Defendant.

C. Enforcing Contractual Limitations Provisions in Non-Negotiated Employment Contracts Would Create Incentives for Employers to Secretly Undermine Their Workers' Employment Rights.

The general rule referenced by the Supreme Court *in dicta* in 1947, reflects the common-law principle that contracting parties should be free to agree between themselves their respective rights and responsibilities. *See, e.g.*, *Int'l Bus. Mach. Corp. v. Catamore Enter., Inc.*, 548 F.2d 1065, 1073 (5th Cir. 1976) (upholding contractually shortened limitations period in a "facially comprehensive written agreement[] between sophisticated corporate entities."). But this Court cannot ignore the fact that when employers seek to dismiss workers' suits as barred by private contractual limits, those limits are not truly "agreements."

Rather, they are most often imposed on workers in a manner very similar to this case. The provision is buried in boilerplate fine print in a form document presented to the employee (or to an applicant for employment) on a take-it-or-leave-it basis. *See, e.g.*, *Delgado v. Fed. Express Corp.*, No. C-08-3576-MMC, 2009 WL 2707362, at *2 (N.D. Cal. Aug. 25, 2009) (holding that FedEx's six-month private limitation period, in a non-negotiated employment agreement, was substantively unconscionable and thus unenforceable). Most would have no knowledge of the provision; nor could they weigh its implications at that time. The employee's unawareness of the time limit until the employer has moved to dismiss her lawsuit as untimely is not due to the employee's failure to responsibly study the terms of the document—it is precisely the outcome the document was designed to achieve.

FedEx's six-month private limitation period not only offends public policy because it purports to take away seven-eighths of the time Congress determined to be appropriate in this case, but it is doubly offensive because the company claims the right to do so essentially in secret.

The purpose of a statute of limitations is transparency. It "represents a policy judgment by the Legislature that serves the interest of a plaintiff in having adequate time to investigate a cause of action and file suit," as well as the defendant's interest in repose. *Ceccone v. Carroll Home Servs., LLC*, 165 A.3d 475, 481 (Md. 2017). It cannot serve those interests unless the applicable time limit for filing suit is readily

ascertainable by claimants seeking legal redress and their counsel. Time limits contained in non-negotiable documents to which an employee must assent to obtain or continue in employment, are practically unknowable until too late.

To the extent that courts uphold and enforce such unilateral contract provisions, Americans can expect to witness a race to the bottom as companies strive to gain competitive advantage by inserting ever more stringent obstacles to holding employers accountable for discrimination. This Court should neither trigger such a race by declaring such private contractual provisions broadly enforceable nor tolerate corporate attempts to dismantle Congress's efforts to combat employment discrimination under the guise of "freedom of contract."

CONCLUSION

For the foregoing reasons, amicus curiae respectfully urges this Court to affirm the decision below.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 6,391 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14-point Times New Roman type style.

Date: July 20, 2023

/s/ Robert S. Peck
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CERTIFICATE OF SERVICE

I, Jeffrey White, counsel for amicus curiae and a member of the Bar of this Court, certify that on July 20, 2023, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I also certify that the foregoing document is being served on this day on all counsel of record via transmission of the Notice of Electronic Filing generated by CM/ECF. All participants in this case are registered CM/ECF users.

/s/ Robert S. Peck
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