No. 23-303

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Benzor Shem Vidal,

Plaintiff-Appellee,

v.

Advanced Care Staffing, LLC,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of New York,
Hon. Nina R. Morrison

BRIEF OF THE ACTING SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE, SUPPORTING AFFIRMANCE

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Pursuant to Federal Rule of Appellate Procedure 29(a)(2), the Acting Secretary of Labor ("Acting Secretary") submits this brief as *amicus curiae* in support of the Plaintiff-Appellee, Benzor Shem Vidal. For the reasons set forth below, the Court should take this opportunity to clarify that an arbitration provision such as the one at issue here—a so-called "loser pays" provision that would force an employee to pay his employer's attorney's fees if he loses in arbitration—

prevents the employee from vindicating his substantive rights under the Fair Labor Standards Act ("FLSA"), and thus is unenforceable. The "loser pays" provision is contrary to the FLSA's one-way fee-shifting scheme, which entitles prevailing employees, but not prevailing employers, to recover their attorney's fees. In addition, the provision forces Vidal to risk facing a judgment for more than he can afford to pay, which is impermissible under Supreme Court precedent, and the risk of bearing those costs prevents Vidal from vindicating his FLSA rights. Furthermore, the Court should clarify that "loser pays" provisions such as the one at issue here violate the FLSA because they chill workers like Vidal from being willing to bring FLSA claims, thereby precluding them from effectively vindicating their FLSA rights.

STATEMENT OF INTEREST

The Acting Secretary administers and enforces the FLSA. 29 U.S.C. 204, 211(a), 216(c), 217. She thus has a substantial interest in ensuring that the FLSA's statutory provisions are interpreted accurately and consistently with the broad remedial purpose of the FLSA.

The ability of private parties to bring claims to remedy violations of the FLSA is a crucial enforcement mechanism of the statute, 29 U.S.C. 216(b), so contracts that effectively restrict employees' ability to bring FLSA claims undermine enforcement of the FLSA. The Department of Labor lacks the

necessary resources on its own to oversee each of the more than 10 million workplaces nationwide. Given these constraints, Congress's choice to empower workers to exercise their FLSA rights in private litigation, as well as arbitration, is critical to the success of the FLSA and enactment of Congress' intent. *See Trejo v. Ryman Hosp. Props., Inc.*, 795 F.3d 442, 448 (4th Cir. 2015) (recognizing that the "FLSA establishes two separate means of enforcement," a private right of action for workers and public enforcement power wielded by the Department of Labor, each of which "plays a distinct and critical role in the statute's enforcement regime"). If employers are able to use arbitration agreements to abridge employees' FLSA rights, enforcement of the statute would be significantly weakened.

STATEMENT OF THE ISSUE

Whether a provision in an arbitration agreement that requires an employee to pay his employer's attorney's fees if he loses his case prevents the employee from effectively vindicating his rights under the FLSA.

STATEMENT OF THE CASE

A. Factual Background

Advanced Care Staffing, LLC ("ACS") recruits nurses from other countries to work in the United States. SPA-6. In 2019, Vidal, a nurse and a native of the Philippines, signed a contract with ACS. SPA-12–13. The agreement provided that

ACS would assist Vidal in coming to the United States, and in return Vidal would work for ACS for a minimum of three years. SPA-7. The 2019 agreement contained an arbitration provision. *Id.*

Several years passed while ACS underwent the process of obtaining Vidal's visa. SPA-8. In 2022, ACS sent Vidal a revised contract. SPA-12. The revised contract contained an expanded arbitration provision that provided, as relevant here, that the prevailing party in any arbitration would be entitled to have its attorney's fees and costs, and the fees charged by the arbitrator, paid for by the losing party (a "loser pays" provision). SPA-11.

Vidal traveled to the United States and began working at an ACS client facility in Brooklyn in March 2022. SPA-12. Vidal contends that he was asked to work under conditions he believed to be unsafe. *Id.* His caseload was nearly double what ACS had told him it would be. *Id.* His patients called him repeatedly for urgent help, but he could not reach all of them in time. *Id.* He was unable to take sufficient breaks, and he suffered repeated illness. *Id.* He grew increasingly worried that he was "putting [his] personal health, the health of [his] patients, and [his] professional license at risk." *Id.* He resigned three months after he began work, in June 2022. SPA-12–13.

B. Procedural Background

ACS initiated arbitration proceedings against Vidal in July 2022 and demanded damages including ACS's "costs and lost profits," "reasonable attorney's fees," and "the cost of arbitration." SPA-13. In September 2022, the American Arbitration Association ("AAA") informed Vidal that it had selected an arbitrator who charged $450 per hour. SPA-13–14. AAA also charged a filing fee of $1,900 and a case management fee of $750. *Id.*

Vidal obtained counsel and filed the present lawsuit in September 2022. SPA-14. He alleged that the arbitration was invalid under the FLSA, the Trafficking Victims Protection Act ("TVPA"), and New York law. *Id.* He sought declaratory and injunctive relief enjoining the arbitration. *Id.*[1] In January 2023, Vidal filed a motion for a preliminary injunction to enjoin the arbitration. SPA-15. The court granted Vidal's motion in February 2023, and issued a full written opinion in April 2023. SPA-55. ACS timely appealed the district court's decision.

[1] In regard to the FLSA specifically, Vidal alleged that the arbitration provision is unenforceable under the FLSA because if Vidal were forced to pay ACS's attorney's fees and costs of arbitration, that would reduce Vidal's wages below the federal minimum wage in violation of the FLSA. A-26–27. He also alleged that the "loser pays" provision is inconsistent with the FLSA's one-way fee-shifting provision. A-27–28. As relief for his FLSA claim, he sought a declaratory judgment that the arbitration provision is unenforceable. A-28.

C. The District Court Decision

The district court began by determining that it had authority to decide the validity of the arbitration provision, because the agreement was ambiguous as to whether questions of arbitrability were delegated to the arbitrator. SPA-16. The court further concluded that even if the delegation clause were unambiguous, the court could still consider whether the clause, in conjunction with the "loser pays" provision, violated federal or state law, and was therefore unenforceable on that basis. SPA-26–27.

Turning to the merits, the court found that Vidal was likely to succeed on his TVPA claim and his claim that the "loser pays" provision is unconscionable under New York law. SPA-29. As to both claims, the court reasoned that the effect of the "loser pays" provision was unduly coercive given the evidence of Vidal's financial circumstances, which showed that Vidal had at most $650 left over each month after living expenses and making payments to support his family in the Philippines. SPA-44. The court acknowledged that Vidal had argued that the delegation clause and arbitration agreement violate the FLSA, but determined that it need not reach that issue at the preliminary injunction stage. SPA-47–48. The court did not address whether the "loser pays" provision could be severed from the rest of the arbitration clause, deeming it "premature" to address that issue on the present motion. SPA-46–47.

The court went on to find that Vidal had satisfied the other requirements for obtaining a preliminary injunction. SPA-52.

ARGUMENT

THE "LOSER PAYS" PROVISION IN THE ARBITRATION AGREEMENT PREVENTS VIDAL FROM EFFECTIVELY VINDICATING HIS FLSA RIGHTS.

The Federal Arbitration Act ("FAA") establishes "a "liberal federal policy favoring arbitration," under which "courts must place arbitration agreements on an equal footing with other contracts." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). However, courts recognize an exception to the enforcement of an arbitration agreement (or a provision of an arbitration agreement) when the agreement or provision would prevent a party from effectively vindicating their statutory rights through arbitration. This is commonly referred to as the "effective vindication" exception to the FAA. *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 235 (2013); *see, e.g.*, *Nesbitt v. FCNH, Inc.*, 811 F.3d 371, 376–77 (10th Cir. 2016).[2] "This exception, which rests on public policy grounds, 'finds its origin in the desire to prevent prospective waiver of a party's *right to pursue* statutory

[2] The Supreme Court has "repeatedly recognized" the effective vindication exception, but has not yet applied the exception to a case before it. *Harrison v. Envision Mgmt. Holding, Inc. Bd. of Dirs.*, 59 F.4th 1090, 1098 (10th Cir. 2023), *cert. denied sub nom. Argent Trust Co., et al. v. Harrison*, No. 23-30, 2023 WL 6558426 (U.S. Oct. 10, 2023). However, federal appellate courts have applied the exception. *See, e.g.*, *id.* at 1107.

remedies.'" *Harrison*, 59 F.4th at 1097 (quoting *Italian Colors*, 570 U.S. at 236). The effective vindication exception would cover, for example, "a provision in an arbitration agreement forbidding the assertion of certain statutory rights." *Italian Colors*, 570 U.S. at 236. In the FLSA context, the effective vindication exception is consistent with the principle that FLSA rights generally cannot be abridged by contract or otherwise waived. *See Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 69 (2013).[3]

Here, the provision of the arbitration agreement that requires the losing party to pay the prevailing party's attorney's fees is unenforceable because it precludes Vidal from vindicating his rights under the FLSA.[4] The "loser pays" provision is

[3] The right to a minimum wage and overtime pay under the FLSA are "nonwaivable"; "FLSA rights cannot be abridged by contract or otherwise waived because this would nullify the purposes of the statute and thwart the legislative policies it was designed to effectuate." *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981) (internal quotation marks omitted). If employees could decline the FLSA's wage protections, "employers might be able to use superior bargaining power to coerce employees . . . to waive their protections under the Act." *Tony & Susan Alamo Found. v. Sec'y of Lab.*, 471 U.S. 290, 302 (1985).

[4] In its opening brief, ACS noted that the arbitrator ruled that the AAA's Employment Rules apply to the dispute and, according to ACS, those rules require the employer to pay the arbitrator's compensation. Br. of Def-Appellant ACS at 34. Although the Acting Secretary takes no position on whether the arbitrator's ruling was correct, for the purposes of this brief, the Acting Secretary's discussion of the "loser pays" provision is focused on the requirement of the losing party to pay the prevailing party's attorney's fees. Nonetheless, many of the Acting Secretary's arguments set out in this brief apply similarly to a "loser pays" provision requiring the losing party to pay the arbitration fees and costs.

contrary to the one-way fee shifting structure of the FLSA, which was designed to enable workers to exercise their FLSA rights without the risk of having to pay their employer's attorney's fees. Furthermore, a "loser pays" provision subjects individuals like Vidal to the risk that they will be subject to a judgment for much more than they can afford to pay, forcing them to choose between possible financial insolvency and pursuing their statutory claims. And finally, this type of agreement chills workers like Vidal from being willing to bring FLSA claims, thereby precluding them from effectively vindicating their statutory rights. For all these reasons, the provision is unenforceable.

Although the district court did not reach Vidal's FLSA claim, he properly raised his FLSA argument in the briefing below, and the Court should take this opportunity to clarify that the "loser pays" provision is contrary to the FLSA's protections. Since the issue was raised before the district court, this Court can explain that the fact that the "loser pays" provision is contrary to the FLSA is an additional basis to uphold the district court's determination that Vidal is likely to show that the arbitration provision is unenforceable. The issue of "loser pays" agreements has not arisen frequently in the case law, for several reasons, including the procedural difficulties involved with challenging arbitration agreements, the resources required of a worker to challenge such a provision, and the daunting prospect of having to pay the employer's attorney's fees if the worker does not

prevail. But both employees and employers would benefit greatly from appellate case law indicating whether "loser pays" provisions are permissible under the FLSA, hence the Acting Secretary's request that the Court address the issue here.

A. The "loser pays" agreement is unenforceable because it abridges Vidal's right under the FLSA not to have to pay his employer's attorney's fees.

The "loser pays" agreement is unenforceable because it subverts the FLSA's one-way fee-shifting structure, which is designed to ensure that workers can effectively assert their FLSA rights without the risk of having to pay the employer's attorney's fees. This Court and district courts around the country have recognized that "loser pays" provisions and related fee-splitting provisions that contradict a statute's one-way fee-shifting provision prevent an individual from effectively vindicating their statutory rights. The FLSA allows a prevailing employee to be awarded attorney's fees and costs, but it does not allow a prevailing employer to obtain such an award. 29 U.S.C. 216(b). The "loser pays" agreement contradicts the clear establishment of the respective parties' rights under the FLSA, and it would significantly hinder Vidal's right to bring a FLSA claim without potentially having to pay his employer's attorney's fees.

This Court has indicated in dicta that a "loser pays" provision may interfere with an employee's right not to have to pay the employer's attorney's fees under a one-way fee-shifting statute. In *Ragone v. Atl. Video at Manhattan Ctr.*, 595 F.3d

115, 117–18, 120 (2d Cir. 2010), a Title VII case, the plaintiff signed an arbitration agreement with her employer that contained a "loser pays" provision, but once litigation commenced, the employer agreed to waive enforcement of that and other provisions. While the Court ruled that the agreement was enforceable as modified by the defendants' waivers, it "emphasize[d] that we do so with something less than robust enthusiasm." *Id.* at 125. The Court explained that an arbitration agreement is unenforceable if it prevents the effective vindication of substantive rights, and then observed that "[h]ad the defendants attempted to enforce the arbitration agreement as originally written it is not clear that we would hold in their favor." *Id.* The Court recognized that a "loser pays" provision (in addition to a reduced statute of limitations) "would significantly diminish a litigant's rights under Title VII." *Id.* at 125–26. It explained that "it is very rare that victorious defendants in civil rights cases will recover attorneys' fees," and thus suggested that "had the defendants not waived enforcement, it is at least possible that Ragone would be able to demonstrate that these provisions were incompatible with her ability to pursue her Title VII claims in arbitration, and therefore void under the FAA." *Id.* at 126.

The Court's reasoning in *Ragone* applies with equal force here. The arbitration agreement at issue allows ACS, if successful, to recover its attorney's fees from Vidal, which effectively creates a new right for ACS at Vidal's expense.

This subverts the statutory scheme established by Congress, which clearly establishes the parties' respective rights under the FLSA and, notably, does not grant a prevailing employer the ability to recover fees.

Some district courts have also recognized that "loser pays" agreements are at odds with statutes that provide for one-way fee shifting and are unenforceable because they prevent plaintiffs from effectively vindicating their statutory rights. An Oklahoma district court described a "loser pays" provision as "nullif[ying]" an individual's right to bring a civil rights lawsuit without risking paying her opponent's fees. *Smith v. AHS Okla. Heart, LLC*, No. 11-cv-691-TCK-FHM, 2012 WL 3156877, at *3, 4 (N.D. Okla. Aug. 3, 2012) (addressing claims under Equal Protection Act (a provision of the FLSA) and Title VII and concluding that even though it was "speculative" whether the plaintiff would prevail and the arbitrator would ultimately award attorney's fees, the speculative risks were "so severe as to prevent Plaintiff from effectively vindicating her statutory causes of action in the arbitral forum"); *see also Munoz v. Green Country Imports, LLC*, No. 12-cv-322-GKF-FHM, 2012 WL 4736332, at *4 (N.D. Okla. Oct. 3, 2012) ("loser pays" agreement "nullifies plaintiff's right under Title VII to bring a non-frivolous suit without risking paying his opponent's fees" (quoting *Smith*, 2012 WL 3156877, at *3)). A Colorado district court described such a provision as creating an "impermissible obstacle[] to Plaintiffs' ability to avail themselves of the rights and

protections afforded by the FLSA," reasoning that it "substantially thwarts the statutory enforcement scheme erected by the FLSA." *Daugherty v. Encana Oil & Gas (USA), Inc.*, No. 10-cv-02272-WJM-KLM, 2011 WL 2791338, at *11–12 (D. Colo. July 15, 2011). And in a Family and Medical Leave Act ("FMLA") case, a court explained that "loser pays" provisions are "unenforceable as they provide recovery to a successful defendant-employer that was not intended under the FMLA." *Champness v. J.D. Byrider Sys., LLC*, No. 1:14-cv-730, 2015 WL 247924, at *7 (S.D. Ohio Jan. 20, 2015).

Furthermore, in the context of fee-shifting cases, courts have determined that the right to obtain attorney's fees is a substantive right that cannot be abridged;[5] applying that logic to "loser pays" provisions, a worker's right *not* to pay their employer's attorney's fees when bringing a FLSA claim is also a right that cannot be contracted away. In the context of fee-splitting cases, it is well-established that where a statute allows a prevailing plaintiff to recover attorney's fees, that right cannot be waived, and therefore an agreement that prevents a successful plaintiff

[5] Courts sometimes recognize a distinction between substantive rights, which cannot be waived by an arbitration agreement, and procedural rights, which can be waived. *See, e.g., Kuehner v. Dickinson & Co.*, 84 F.3d 316, 320 (9th Cir. 1996) (right to jury trial in FLSA case is non-substantive, and thus can be forfeited in arbitration agreement). Under that definition, the right under the FLSA for a worker to be free from paying their employer's attorney's fees is a substantive right that cannot be waived, rather than a procedural right, for the reasons set forth in this brief.

from recovering attorney's fees in arbitration is unenforceable. *See Hudson v. P.I.P. Inc.*, 793 F. App'x 935, 938 (11th Cir. 2019) (agreement requiring each party to pay their own fees, thus preventing prevailing employees from obtaining attorney's fees, "defeat[ed] the purpose of the FLSA's attorney's fees and costs provisions" and precluded plaintiffs from effectively vindicating their FLSA rights, so it could not be enforced); *see also Spinetti v. Serv. Corp. Int'l*, 324 F.3d 212, 216 (3d Cir. 2003) (private contractual language cannot abridge right of prevailing employee to obtain attorney's fees in Title VII case); *Morrison v. Cir. City Stores, Inc.*, 317 F.3d 646, 673 n.15 (6th Cir. 2003) (en banc) (same). Thus, since the right for a prevailing plaintiff to obtain attorney's fees under a statute that allows such an award is a right that cannot be contracted away, then by extension, the FLSA's protection from being made to pay a prevailing employer's attorney's fees must also be a right that cannot be contracted away, since it also pertains to the statutory allocation of attorney's fees. And enforcement of the "loser pays" provision here would abridge the substantive right of Vidal under the FLSA not to have to pay his employer's attorney's fees. Accordingly, the provision cannot be enforced.

B. Vidal has demonstrated that arbitration would be prohibitively expensive if he is forced to pay ACS's attorney's fees.

Additionally, Vidal has shown that he cannot afford to pay ACS's attorney's fees if he loses in arbitration, and his inability to pay prevents him from being able to vindicate his FLSA rights. The Supreme Court has recognized that one basis on

which a party can invoke the "effective vindication" exception to challenge an arbitration agreement is by showing that there is a likelihood of having to bear the costs of arbitration, and that such the costs would be prohibitively expensive given the party's financial circumstances. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000). In *Green Tree*, the plaintiff signed a mandatory arbitration agreement as part of a purchase of a mobile home, but the agreement was silent as to which party would pay the costs of arbitration. *Green Tree*, 531 U.S. at 82–83. She later sued for violations of the federal Truth in Lending Act, and argued that the arbitration agreement was unenforceable because it failed to protect her from bearing the potentially substantial costs of arbitration, thus causing her to forgo her claims. *Id.* at 83, 89–90. Although the Supreme Court concluded that the risk that the plaintiff would bear prohibitive costs was speculative due to the agreement's silence, the Court nonetheless recognized that significant arbitration costs "could" preclude a litigant from effectively vindicating her federal statutory rights. *Id.* at 90–91. The Court explained that the party that seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive bears the burden of showing "the likelihood of incurring such costs." *Id.* at 92. The Court declined to discuss "[h]ow detailed the showing of prohibitive expense must be" since it was not necessary to reach that question in the present case. *Id.*

Appellate courts have interpreted *Green Tree* as requiring a case-by-case analysis of the costs that may be incurred by the plaintiff in arbitration as compared to the plaintiff's financial circumstances. *See, e.g., Faber v. Menard, Inc.*, 367 F.3d 1048, 1054 (8th Cir. 2004) ("The party seeking to avoid arbitration should present specific evidence of likely arbitrators' fees and its financial ability to pay those fees so that the court can determine whether the arbitral forum is accessible to the party."); *Spinetti*, 324 F.3d at 216–17 (setting forth similar "case-by-case" analysis).

While *Green Tree* seemingly concerned a fee-splitting provision (or a provision that could be interpreted as such), several courts have applied *Green Tree*'s reasoning to the determination of whether "loser pays" provisions are unenforceable. Most notably, the Third Circuit refused to "distinguish between the fee splitting provisions before the Court in *Green Tree* . . . and the provisions, like the one before us, requiring the losing party to bear the arbitrator's costs and expenses if directed by the arbitrator." *Parilla v. IAP Worldwide Servs., VI, Inc.*, 368 F.3d 269, 284 (3d Cir. 2004). The court acknowledged that "the final impact" of the "loser pays" provision "remains speculative until the objecting party has actually lost and been directed by the arbitrator to pay," but the court reasoned that "this is a distinction without a material difference." *Id.* The court remanded the case for further factual finding about the plaintiff's financial circumstances, but

held that "as long as Parilla carries her burden to show an inability to pay the anticipated arbitral costs, the 'loser pays' provision is just as unreasonably favorable to [the employer] as would be a 'fee splitting' provision." *Id.* at 285.[6] In addition to the Third Circuit, some district courts have also applied a *Green Tree* analysis to determine that a "loser pays" provision was unenforceable because the plaintiff could not afford to pay the defendant's attorney's fees and/or arbitration costs if they lost. *See, e.g., Heath v. Va. Coll., LLC*, No. 3:17-CV-366, 2018 WL 5312205, at *5 (E.D. Tenn.. 25, 2018); *Valle v. ATM Nat., LLC*, No. 14-CV-7993 (KBF), 2015 WL 413449, at *7 (S.D.N.Y. Jan. 30, 2015).

Here, Vidal has satisfied the *Green Tree* standard, as he produced specific evidence demonstrating that if he loses, he cannot afford to pay ACS's attorney's fees. As the district court explained, Vidal currently earns around $4,500 per month after taxes, his basic living expenses total at least $2,850 per month, and he sends $1,000 per month to his family in the Philippines, who depend on him for support. SPA-44. Thus, "even during the best month, Vidal would have only $650 left over." *Id.* The district court determined that paying an attorney and the

[6] In an earlier case, the Third Circuit determined that a "loser pays" provision was unconscionable where the plaintiffs submitted evidence that prospective arbitrators charged $800–$1000 per day, despite the fact that the plaintiffs "did not provide any detailed information about their own financial status," because "[a]s discharged refinery workers, they clearly could not meet this financial burden." *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 269–70 (3d Cir. 2003).

arbitrator just to "challenge the threshold issues of arbitrability before the arbitrator could cause [Vidal] financial ruin." SPA-43–44. The court explained that, assuming an experienced attorney charges a prevailing rate of $475 per hour, that would result in a charge of over $11,000 for just twenty-five hours of work. SPA-44. Accordingly, Vidal has made precisely the specific evidentiary showing required by *Green Tree*, having demonstrated that his monthly income, minus expenses, is much less than the expected amount of ACS's attorney's fees. *See, e.g., Spinetti*, 324 F.3d at 216–17 (fee-splitting provision unenforceable where plaintiff compared costs of arbitration of $4,250 filing fees and $250 per day average arbitrator charge, with her approximate $1,200 per month income and $2,000 per month expenses); *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1234 (10th Cir. 1999) (same for janitor plaintiff where arbitration would have cost between $1,875 and $5,000).[7] Thus, under the criteria established in *Green Tree*, Vidal has shown that a judgment requiring him to pay ACS's attorney's fees would be prohibitively expensive to him, preventing him from vindicating his rights.

[7] Although *Shankle* predates *Green Tree*, the Tenth Circuit continues to cite it favorably. *See Nesbitt*, 811 F.3d at 377.

C. "Loser pays" provisions are unenforceable because they deter individuals from vindicating their rights.

A "loser pays" arbitration provision that forces a worker to bear the risk of paying their employer's attorneys' fees in order to assert rights under the FLSA will chill an ordinary worker's willingness to bring an FLSA claim in arbitration, precluding their ability to vindicate their statutory rights. Workers will be reticent to come forward with their claims given the enormous risks that these provisions impose. Moreover, "loser pays" provisions resemble forms of retaliation that are barred by the FLSA. Given the chilling effect of "loser pays" provisions like the one at issue in this case, this Court should hold that "loser pays" provisions are unenforceable because they preclude workers from vindicating their FLSA rights.

Many courts have recognized that "loser pays" provisions have a chilling effect, preventing individuals from vindicating their rights. Most notably, the Third and Sixth Circuits have expressly acknowledged that the prospect of having to pay fees and costs that an employee-litigant would not otherwise have to pay has the potential to significantly chill the employees from exercising their statutory rights. The en banc Sixth Circuit, when determining the enforceability of a fee-splitting provision, reasoned that "[f]aced with this choice—which really boils down to risking one's scarce resources in the hopes of an uncertain benefit—it appears to us that a substantial number of similarly situated persons would be deterred from seeking to vindicate their statutory rights under these circumstances." *Morrison*,

317 F.3d at 669–70. The Third Circuit observed that a "loser pays" provision requiring an employee to pay the arbitrator's fees and expenses "may serve to chill [an employee's] willingness to bring a claim" because "the employee must consider whether arbitration will be so prohibitively expensive for her that she cannot take advantage of the arbitral forum." *Parilla*, 368 F.3d at 284. The court stated that it is well-established that "an arbitration provision that makes the arbitral forum prohibitively expensive for a weaker party is unconscionable." *Id.*

Similarly, the Ninth Circuit determined that a "loser pays" provision was unconscionable because it "creates a chilling effect" on an employee attempting to vindicate his statutory rights, since "it exposes him to the possibility of paying attorney's fees to [the employer] if he lost at arbitration." *Lim v. TForce Logistics, LLC*, 8 F.4th 992, 1003 (9th Cir. 2021). "Importantly," the court noted, an employee "would not face that risk in federal court," since an employer could not recover its attorney's fees there. *Id.*; *see also Pokorny v. Quixtar*, Inc., 601 F.3d 987, 1004 (9th Cir. 2010) (holding "loser pays" provision substantively unconscionable because it puts plaintiffs "at risk of incurring greater costs than they would bear if they were to litigate their claims in federal court").

Several district courts have reached similar conclusions when confronted with "loser pays" provisions. One district court explained that "[b]y far, the most common examples of arbitral provisions that thwart effective vindication of federal

statutory rights, particularly FLSA rights, are those that impose prohibitive costs on the plaintiff (such as paying or splitting the arbitrator's fee), or that would hold the plaintiff liable for the defendant's attorneys' fees and costs if the plaintiff is unsuccessful." *Pollard v. ETS PC, Inc.*, 186 F. Supp. 3d 1166, 1176 (D. Colo. 2016). In that case, the court praised the defendant for "laudably conced[ing]" that a "loser pays" provision interfered with employees' effective vindication of their FLSA rights. *Id.* And the court repeated that reasoning in *Mantooth v. Bavaria Inn Rest., Inc.*, No. 17-cv-1150-WJM-MEH, 2018 WL 2241130, at *6 (D. Colo. May 16, 2018) ("Federal courts, including this Court, have found that arbitration clauses that hold a plaintiff liable for a prevailing defendant's fees and costs would thwart effective vindication of statutory rights under the FLSA."). In another FLSA case where the plaintiffs had provided evidence showing they could not afford to pay the defendants' attorney's fees, the court determined that "[t]he chilling effect of this fee-shifting provision on Plaintiffs' ability and willingness to attempt to press their claims under the FLSA is clear." *Daugherty*, 2011 WL 2791338, at *11. Accordingly, the provision was unenforceable. *Id.* at *12; *see also Heath*, 2018 WL 5312205, at *5 (in holding "loser pays" provision unenforceable, explaining that "[t]he possibility that Plaintiff will be responsible for Defendant's fees is sufficiently certain to have a powerful deterrent effect").

Here, this Court should join these courts in holding that the "loser pays" provisions like the one at issue here prevent workers like Vidal from being able to vindicate their FLSA rights. The provision subjects workers like Vidal to the risk of having to pay their employer's attorney's fees if they lose in arbitration, which many ordinary workers would unlikely be unable to afford. That risk could have a serious chilling effect on their willingness to pursue FLSA claims. The result is that the "loser pays" provision effectively forecloses ordinary workers' ability to vindicate their FLSA rights.

Furthermore, the FLSA contains an anti-retaliation provision that prohibits employers from penalizing employees for bringing a FLSA complaint or participating in a FLSA proceeding, 29 U.S.C. 215(a)(3), and the chilling effect prompted by "loser pays" provisions is akin to a form of preemptive retaliation, because it uses the threat of paying their employer's attorney's fees and costs to discourage workers from pursuing a FLSA claim. *Cf. Soler v. G & U, Inc.*, 690 F.2d 301, 302–03 (2d Cir. 1982) ("Undoubtedly, threats of retaliation are also prohibited by the [FLSA's anti-retaliation] provision . . . ."); *Brock v. Richardson*, 812 F.2d 121, 124 (3d Cir. 1987) (focus of FLSA's anti-retaliation provision is preventing "fear of economic retaliation" from having chilling effect on employees' ability to assert rights under FLSA (quoting *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960)); *Perez v. Fatima/Zahra, Inc*.,

No. 14-cv-2337, 2014 WL 2154092, at *2 (N.D. Cal. May 22, 2014) (threatening workers with termination if they cooperate with a pending Department of Labor investigation is prohibited preemptive retaliation under the FLSA). At a minimum, finding "loser pays" agreements to be unenforceable would be consistent with the FLSA's anti-retaliation protections. The Supreme Court has recognized that employees faced with the prospect of being terminated or suffering other discipline for asserting their FLSA rights "understandably might decide that matters had best be left as they are," and has refused to read the FLSA "as presenting those it sought to protect with what is little more than a Hobson's choice." *DeMario Jewelry*, 361 U.S. at 293. Congress enacted the anti-retaliation provision to "'prevent fear of economic retaliation from inducing workers quietly to accept substandard conditions,' and to foster an atmosphere protective of employees who lodge such complaints." *Greathouse v. JHS Sec. Inc.*, 784 F.3d 105, 113 (2d Cir. 2015) (quoting *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 11 (2011)). But "loser pays" provisions are contrary to the protection that Congress intended to provide by prohibiting retaliation for asserting FLSA rights.

Some courts have held that a "loser pays" provision does not prevent an individual who cannot afford to pay the entire cost of arbitration from effectively vindicating their statutory rights, but those courts are wrong. For example, the Eleventh Circuit has reasoned that under a "loser pays" provision, a plaintiff

cannot show that they are "likely to incur" any costs in arbitration, because if they win, they would not be responsible for any costs. *Payne v. Savannah Coll. of Art & Design, Inc.*, 81 F.4th 1187, 1197 (11th Cir. 2023).[8] That reasoning fails to grapple with the actual decision that the individual must make. If a person must risk literally everything they own to pursue their claims, few are likely to take that risk. Yet the Eleventh Circuit's reasoning requires an individual such as Vidal to do precisely that. Such a worker must risk either being subject to a substantial judgment, which for many workers asserting rights under the FLSA might exceed their available resources, or forego the opportunity to pursue their claims altogether. Such a choice is no choice at all, and thus it "nullifies" the worker's ability to pursue their FLSA rights.

CONCLUSION

For the foregoing reasons, this Court should hold that the "loser pays" provision in the arbitration agreement prevents Vidal from effectively vindicating his FLSA rights, and thus it is not enforceable.

[8] In addition, the Eleventh Circuit and other courts had previously reasoned that an individual who loses in arbitration is protected by the right to appeal to a federal court. However, in *Payne*, the court recognized that the Supreme Court's decision in *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 590 (2008), severely curtailed the right to appeal to federal court. *Payne*, 81 F.4th at 1195–96. Nonetheless, the court reasoned that an individual is still required to go forward with arbitration, *id.*, at 1196–97, thus subjecting them to the risk of a decision requiring them to bear all of the other party's costs with no recourse.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of 2d Cir. Local R. 29.1(c) and 32.1(a)(4)(A) because it contains 5,758 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface, 14-point Times New Roman, using Microsoft Word 365.

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CERTIFICATE OF SERVICE

I hereby certify that, on November 22, 2023, I electronically filed the foregoing Brief of the Acting Secretary of Labor as Amicus Curiae via the Court's CM/ECF Electronic Filing System. All participants in the case are registered CM/ECF users and service on them will be accomplished by the appellate CM/ECF system.

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