

Court of Appeals
of the
State of New York

DANIEL MICHALOW,

Petitioner-Appellant,

– against –

D.E. SHAW & CO., L.P., MAXIMILLIAN DANA STONE,
EDWARD L. FISHMAN, JULIUS R. GAUDIO and ERIC K. WEPSIC,

Respondents-Respondents.

MOTION FOR LEAVE TO FILE AS AN *AMICUS CURIAE*

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PLEASE TAKE NOTICE that, upon the annexed affirmation of Christopher K. Leung, dated May 22, 2025, and the accompanying proposed brief, Amici Curiae National Employment Lawyers Association/New York, Towards Justice, and National Whistleblower Center will move this Court on June 2, 2025 at 10:00 a.m., or as soon thereafter as counsel may be heard, at Court of Appeals Hall, 20 Eagle Street, Albany, New York 12207, for an order pursuant to Rule 500.23 of the Rules of Practice of the Court of Appeals of the State of New York granting Amici leave to file the accompanying brief as amici curiae in support of Plaintiff-Appellant Daniel Michalow in the above-captioned action and for such other and further relief as the Court may deem just and proper.

Date: May 22, 2025

A handwritten signature in cursive script that reads "Christopher Leung". The signature is written in black ink and is positioned above a horizontal dashed line.

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CHRISTOPHER K. LEUNG, an attorney duly admitted to practice before this Court, hereby affirms the following to be true under penalty of perjury pursuant to CPLR § 2106:

1. I am the principal of Leung Law PLLC and counsel for Amici National Employment Lawyers Association/New York, Towards Justice, and National Whistleblower Center.

2. I submit this affirmation in support of Amici's motion for leave to file an amicus curiae brief in the above-captioned action.

3. A copy of the proposed amicus curiae brief is attached. No party's counsel contributed content to that brief or participated in the preparation of that brief in any manner; no party or party's counsel contributed money that was intended to fund preparation or submission of the brief; and no person or entity, other than the movant or their undersigned counsel, contributed money that was intended to fund preparation or submission of the brief.

4. The proposed amicus brief conforms with the word and page limits set forth in 22 NYCRR § 500.1 and 500.11(m).

5. In accordance with 22 NYCRR § 500.23(4), Amici submit the following information as to (1) movants' identities and interests in this matter; and (2) why the movants' amicus curiae brief will be of assistance to the Court.

I. The Amici's interest in this matter.

6. The Amici Curiae in this matter— National Employment Lawyers Association/New York, Towards Justice, and National Whistleblower Center—are organizations engaged in the support of workers and whistleblowers. Each Amici shares a strong interest in ensuring that the hard-fought rights intended to safeguard workers are advanced for the benefit of all.

7. National Employment Lawyers Association/New York (NELA/NY): Amicus Curiae NELA/NY is the New York State affiliate of the National Employment Lawyers Association, which was founded in 1985 to provide assistance and support to lawyers in protecting the rights of employees against the greater resources of their employers and the defense bar. NELA/NY supports workplace rights through supporting and encouraging the representation of individual employees by member lawyers, while also supporting legislation and maintaining a legal referral service. As the premier organization at both the national and local level supporting lawyers in bringing cases on behalf of individual employees, NELA/NY and its members have extensive experience challenging overly broad release agreements such as the one before this Court.

8. Towards Justice: Amicus Curiae Towards Justice is a nonprofit law firm that represents workers in litigation and other advocacy efforts in order to build worker power and advance economic justice across the country. Towards Justice has

pursued litigation, advocacy, and legislation nationwide seeking to challenge unfair and abusive contract terms. In particular, Towards Justice has successfully litigated several cases challenging unconscionable arbitration agreements and inappropriate attempts to compel arbitration, and has witnessed firsthand the chilling effects such agreements have on workers' attempts to pursue their legal rights across the economic spectrum.

9. National Whistleblower Center: Amicus Curiae National Whistleblower Center (NWC) is a nonprofit, non-partisan, tax-exempt, charitable organization dedicated to the protection of whistleblowers. Founded in 1988, NWC is keenly aware of the issues facing corporate employees who report fraud both internally and to government agencies, including under the Sarbanes-Oxley Act ("SOX") and the Dodd-Frank Act Wall Street Reform and Consumer Protection Act ("DFA"). *See* National Whistleblower Center Website at www.whistleblowers.org.

10. Since 1990, NWC has participated before the U.S. Supreme Court and other courts as amicus curiae in cases that directly impact whistleblowers. *See, e.g., Murray v. UBS Securities, LLC*, 601 U.S. 23 (2024); *Dig. Realty Tr., Inc. v. Somers*, 583 U.S. 149 (2018); *Lawson v. FMR LLC*, 571 U.S. 429 (2014); *EEOC v. Waffle House*, 534 U.S. 239 (2002); *English v. G.E.*, 496 U.S. 72 (1990); *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S.

765 (2000); *Kellogg Brown & Root Servs., Inc. v. U.S. ex rel. Carter*, 575 U.S. 650 (2015); and *Universal Health Servs. v. U.S. ex rel. Escobar*, 579 U.S. 176 (2016).

II. The Amici’s proposed brief will assist this Court in its decision.

11. This case concerns Petitioner-Appellant Daniel Michalow’s employment with, and termination by, his former employer Respondent D.E. Shaw & Co. As explained in Petitioner’s brief, D.E. Shaw & Co. maintained for several years a practice of withholding a portion of its employees’ earned wages, until such employee had signed a release absolving the company from any legal liability accrued over the entire employment period, and for the three years after the employee’s departure from the firm. A question presented by the parties in this appeal is, whether by enforcing D.E. Shaw’s “release-for-pay” provision, the arbitration award in violates public policy and is properly vacated on that ground.

12. As set forth in the Amici’s proposed brief, there are several legal issues not fully explored by the parties, but which are of exceptional importance to the rule of law in New York, the rights of working people, and the courts’ proper consideration of the public policy defense.

13. For decades, this Court has invoked the State’s “long and strong public policy favoring arbitration,” and relied on such policy to instruct lower courts to interfere as little as possible with parties’ “freedom” to arbitrate disputes. This

approach has led courts to apply special rules that limit judicial scrutiny of arbitration agreements and awards.

14. The U.S. Supreme Court’s recent decision in *Morgan v. Sundance*, 596 U.S. 411 (2022), however, fundamentally redefines the federal courts’ policy on arbitration—and by extension, this State’s policy. In *Morgan*, the Court clarified that its “policy favoring arbitration” did not justify special rules for the heightened enforceability (or voidability) of arbitration agreements. Instead, arbitration agreements were to be treated just as any other kind of contract—no more, and no less.

15. Despite this, the Appellate Division ignored *Morgan*’s directive. Relying on arbitration-specific rules, the lower court conducted only a surface inquiry into the contract’s legality and its impact on fundamental rights being asserted by Michalow. Under New York law, this truncated review would not have occurred, if the agreement had lacked an arbitration provision. Accordingly, the lower court’s refusal to engage in a more searching analysis solely because of the employment agreement’s arbitration provision, made that agreement more enforceable than an ordinary contract—an outcome that *Morgan* forbids.

16. The Amici’s brief further explores the historical roots of New York’s pro-arbitration policy and its related 1920 Law of Arbitration, tracing their elevation of the “right to contract” to the discredited *Lochner* era. The brief then covers the

Supreme Court’s later rejection of *Lochner*’s unbridled right to contract (in favor of the State’s rational interest in providing for the welfare of its citizens), followed by the birth of New York’s “positive state” era—a time marked by the New York’s active participation in providing for the social and economic welfare of its citizens, culminating in the State’s enactment of several new constitutional protections, including a new Labor Bill of Rights, N.Y. CLS Const. Art. I, § 17.

17. The Amici’s brief then concludes with a close examination of this Court’s bases for inferring the State’s pro-arbitration policy, and the reasons why a decision from this Court is needed. Because of the proliferating use of arbitration and confidentiality clauses in employment agreements, millions of workers’ disputes are being (or will be) addressed through a forum that results in worse outcomes for employees, the concealment of employer violations, and an undermining of the rule of law. This Court’s last major decision on these issues predates *Morgan*, and its most recent decision in this area fails to square *Morgan*’s directive with this State’s purported “policy favoring arbitration,” the grounds of which are suspect.

18. Accordingly, the Amici respectfully urge this Court to grant Michalow’s Petition and the Amici’s request for leave to file their proposed brief. By doing so, this Court can ensure that New York remains faithful to Supreme Court precedent and to its own highest traditions of protecting workers and the public interest. A decision from this Court would furthermore clarify the proper scope of judicial

review, ensure that arbitration agreements are not improperly elevated above other contracts (in their enforcement or voidability), and reaffirm New York’s commitment to protecting the fundamental rights of its citizens.

19. In sum, these are precisely the types of legal issues—novel, of public importance, and potentially in conflict with prior decisions—that warrant this Court’s attention. And to that end, Amici’s brief will provide this Court with an informed perspective that will assist this Court’s consideration of the legal questions presented by this appeal.

20. For all the foregoing reasons, Amici Curiae NELA/NY, Towards Justice, and National Whistleblower Center respectfully request that this Court grant Petitioner-Appellant Daniel Michalow’s appeal, and the Amici’s request for leave to file the accompanying amicus brief.

Date: May 22, 2025



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**BRIEF ON BEHALF OF *AMICI CURIAE* NATIONAL
EMPLOYMENT LAWYERS ASSOCIATION/NEW YORK,
TOWARDS JUSTICE AND THE NATIONAL
WHISTLEBLOWER CENTER IN SUPPORT
OF PETITIONER-APPELLANT**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to the Rules of Practice of the New York Court of Appeals, 22 N.Y.C.R.R. § 500.1(f), Amici Curiae National Employment Lawyers Association / New York, Towards Justice, and National Whistleblower Center state that no such corporate parents, subsidiaries, or affiliates exist.

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STATUS OF RELATED LITIGATION

Pursuant to the Rules of Practice of the New York Court of Appeals, 22 NYCRR § 500.13(a), the Amici Curiae further state that they are unaware of any related litigation as of the date of filing this brief.

QUESTION PRESENTED

Should this Court provide fresh consideration of the State’s “policy favoring arbitration” and its related judicial doctrines in light of *Morgan v. Sundance*, 596 U.S. 411 (2022), a decision clarifying that arbitration agreements are no more enforceable or voidable than other contracts? Yes.

PRELIMINARY STATEMENT

For decades, this Court of Appeals has oft-repeated the State’s purportedly “long and strong public policy favoring arbitration” to “conserve[e] the time and resources of the courts and the contracting parties.” *See, e.g., Stark v. Molod Spitz DeSantis & Stark, P.C.*, 9 N.Y.3d 59, 66 (2007) (cleaned up; citing cases).

And from that starting point, this Court has directed lower courts to “interfere as little as possible with the freedom of consenting parties to submit disputes to arbitration,” *id.* (internal citation omitted), and “steadfastly discouraged courts from becoming unnecessarily entangled in arbitrations or from serving as a vehicle to protract litigation,” *Am. Intl. Specialty Lines Ins. Co. v. Allied Capital Corp.*, 35 N.Y.3d 64, 70 (2020) (cleaned up).

But this policy of non-interference in arbitration contracts (and their attendant awards and enforcement) conflicts with the U.S. Supreme Court’s recent decision in *Morgan v. Sundance*, 596 U.S. 411 (2022). There, the Court clarified that its policy of favoring arbitration had been misconstrued. *Id.* at 417 (noting also that the roots of such policy could only be traced to a decades-old opinion from the Second Circuit). The Court explained that its actual “policy” simply intended to place arbitration agreements “upon the same footing as other contracts”—i.e., “as enforceable [or as voidable] as other contracts, but not more so,” *id.* at 418. Per the Court in *Morgan*:

[A] court must hold a party to its arbitration contract just as the court would to any other kind. But a court may not devise novel rules to favor arbitration over litigation. ... The federal policy is about treating arbitration contracts like all others, not about fostering arbitration ... [or] a preference for arbitration as an alternative dispute resolution mechanism[.]

Id. at 418–19 (cleaned up).

As a result, *Morgan* holds that arbitration contracts are subject to the same contract defenses generally available under state law; and that courts “are not to create [or use] arbitration specific procedural rules” or other “custom-made rules, to tilt the playing field in favor of (or against) arbitration [agreements],” *id.* at 419.

In this case, however, the First Department ignored *Morgan*’s instruction when considering Petitioner-Appellant’s public policy defense asserted under New York Labor Law § 193. *Matter of Michalow v. D.E. Shaw & Co., L.P.*, 231 A.D.3d 442 (1st Dept. 2024). The appellate court instead cited and relied on *Transparent Value, L.L.C. v. Johnson*, 93 A.D.3d 599, 600–01 (1st Dept. 2012), a decision applying a series of judicially created rules specific to a court’s consideration of an arbitration agreement or award—i.e., rules significantly limiting the court’s focus to examining the “arbitration agreement ... on its face, without engaging in extended factfinding or legal analysis,” *id.* at 600. By applying such rules in Michalow’s case, the appellate court’s 2-page opinion failed to seriously consider or weigh the very

significant and fundamental rights being asserted under New York Labor Law § 193. The court apparently did so, because the contract at issue contained an arbitration provision.

If, however, Michalow’s contract lacked an arbitration provision, New York law would have required that same court to conduct a much more searching analysis and weighing of “(a) the strength of that policy as manifested by legislation or judicial decisions, (b) the likelihood that a refusal to enforce the term will further that policy, (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and (d) the directness of the connection between that misconduct and the term.” 2 Corbin on N.Y. Contracts § 79.01 (2025); *see, e.g., Ass’n of Surrogates & Supreme Court Reporters v. State*, 79 N.Y.2d 39, 46 (1992).

And, because the lower court did not apply that more rigorous analytical framework available only to contracts lacking an arbitration provision, the court necessarily made Michalow’s agreement containing an arbitration clause more enforceable, and less voidable, than other contracts—an outcome that *Morgan* and its progeny reject.

Given these circumstances, this Court should take the opportunity to address (a) *Morgan* and the State’s policy “favoring arbitration” and directing courts to interfere as “little as possible” with the “freedom of consenting parties” subject to an arbitration agreement; (b) the scope of the public policy defense as applied to

arbitration agreements versus other contracts; and (c) how this Court’s current policy favoring arbitration and the “freedom to contract” should be weighed against the State’s equally strong (if not stronger) policy to uphold the rule of law and protect the fundamental rights of its citizens—particularly when viewing such policies in their proper historical context.

The Court’s last major decision on such matters was issued prior to *Morgan*—i.e., *159 MP Corp. v. Redbridge Bedford, LLC*, 33 N.Y.3d 353 (2019) (“*Redbridge*”), a case that was closely decided 4–3, over a strong dissent by Justice Wilson.

Since then, however, this Court has not addressed the effect of *Morgan*, or else how courts should apply the scope of the public policy defense to arbitration agreements like the one presented here. Nor has the Court appeared to address the roots of its own policy favoring arbitration, which upon a closer examination, appear to rest in (a) the *Lochner* era’s since discredited elevation of the “right to contract” above the common good, and (b) a decades-old Court of Appeals opinion that inferred evidence of such a policy from the Legislature’s passage of Article 75—a legislative act that applies equally to hundreds of other rules and laws enacted by the State.

In sum, a decision from this Court clarifying such legal issues would benefit all New Yorkers, particularly given the expanding use of arbitration and confidentiality

provisions in employment agreements; their potential for abuse and hiding significant violations of public policy; the growing disparity in footing (and wealth) between employers and employees; and the ongoing economic upheaval, mass layoffs, and threats of an impending recession.¹

These matters are of State-wide significance and public importance, and deserving of this Court's attention. *See* N.Y. Ct. of App. Civ. Juris. & Prac. Outline § II.E.5. (July 2023) (Court of Appeals' primary function "is to decide legal issues of State-wide significance"); N.Y. Ct. of App. R. of Prac. § 500.22(b)(4) (matters that are "novel, "of public importance," or "present a conflict with prior decisions of this Court" are appropriate matters for an application to appeal).

Accordingly, Amici ask this Court to grant the Petitioner-Appellant's appeal, and Amici's request for leave to file the instant amicus curiae brief.

¹ *See, e.g.*, Katherine V.W. Stone and Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory arbitration deprives workers and consumers of their rights*, Economic Policy Institute, EPI Briefing Paper #414 (Dec. 7, 2015); Josh Bivens et al., *CEO Pay declined in 2023: But it has soared 1,085% since 1978 compared with a 24% rise in typical workers' pay*, Economic Policy Institute (Sept. 19, 2024); Peter G. Peterson Foundation, *5 Facts About Rising Income Inequality in the U.S.* (last updated Dec. 5, 2024); Clement Bohr, *UCLA Anderson Forecast Announces a Recession Watch, Trump Policies, If Fully Enacted, Promise a Recession*, UCLA Anderson School of Mgmt. (Mar. 2025); Michael Mayhew, *Wall Street Layoffs Continue to Rise in March 2025*, Integrity Research Associates (Apr. 7, 2025); Winnie Sun, *2025: The Year of the Layoffs?*, Forbes (Mar. 25, 2025); Hassan Ali Kanu, *Trump administration asks Supreme Court to allow mass layoffs of federal workers*, Politico (May 16, 2025).

ARGUMENT

I. New York’s policy favoring arbitration agreements is built on an outdated foundation.

As often cited by this Court, a foundational basis for the State’s purported policy favoring arbitration is the individual’s “right to contract.” But that right (including New York’s 1920 Law of Arbitration) must be viewed within the proper historical context in which it was born—i.e., the *Lochner* era, a discredited time that improperly elevated such “right to contract” to a fundamental individual right.

A. The *Lochner* era: An unbridled “right to contract”.

In *Lochner v. New York*, 198 U.S. 45 (1905), the Supreme Court held in a 5-4 decision that a New York State law limiting bakeshop employees from working more than 60 hours per week violated the Fourteenth Amendment’s “right of contract between the employer and employees,” a “liberty of the individual” protected under the Amendment. *Id.* at 52, 60, 61 (referring elsewhere to such right as a “liberty of contract”). Stated differently, this “general right to make a contract”—i.e., to buy and sell labor—was “part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution.” *Id.* at 53.

The dissent led by Justice Harlan, would have recognized a more limited right—one circumscribed by State’s policies “as contained in its statutes,” *id.* at 66 (quoting *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897), or else the State’s police power when “preserving the public health, safety or morals, or abatement of public

nuisances,” *id.* (noting that “a large discretion” would be “necessarily vested in the legislature” to determine the public’s interests and the measures necessary to protect those interests).² Justice Holmes’ dissent similarly emphasized the limited nature of the “liberty to contract”:

The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. ... Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views

Id. at 75–76. Taken together, these Justices viewed the “right of contract” as a limited one, subject to the State’s interest in providing for the welfare of its citizens.

² See also *Lochner*, 198 U.S. at 67 (Harlan, J., dissenting) (“The liberty secured by the Constitution of the United States to every person within its jurisdiction does not import ... an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good.”).

B. New York’s 1920 Law of Arbitration and the Federal Arbitration Act (1925).

Post-*Lochner*, the U.S. Supreme Court then spent the next 30 years using the “right to contract” to strike down laws aimed at protecting employees’ working conditions, wages, and hours. *See, e.g., Coppage v. Kansas*, 236 U.S. 1 (1915); *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923) (holding that a federal minimum wage law for women violated the “freedom of contract”).

Against this backdrop of decisions elevating the “right to contract,” New York’s 1920 Law of Arbitration was birthed. Julius Cohen, the New York State Chamber of Commerce’s general counsel, and Charles Bernheimer, the Chamber’s arbitration committee chair, were instrumental to the State’s adoption of this law, codified today at Article 75. Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 Fla. St. U. L. Rev. 99, 101 (2006); Boaz S. Morag and Katie Gonzalez, *CPLR Art. 75 or the Fed. Arb. Act*, 52 Int’l L. 265, 268 (2022). At the time, only New York had legislation that broadly enforced arbitration agreements. Morag, 52 Int’l L. at 268. So, to ensure the wider adoption and enforcement of such agreements, the two men lobbied to create a federal analogue—they succeeded. Moses, 34 Fla. St. U. L. Rev. at 101-02.

Using the New York law as a model, Congress enacted the Federal Arbitration Act of 1925 (“FAA”), which sought to put arbitration agreements on par

with other contracts by making them “valid, irrevocable, and enforceable, save upon such rounds as exist at law or in equity for the revocation of any contract,” Caitlin J. Halligan & Gabriel K. Gillett, *New York Courts at the Forefront of Arbitration Law*, L.A. Daily J. (June 24, 2016).

C. The *Lochner* era closes: The Supreme Court clarifies that the “right to contract” is only a qualified right.

By the mid-1930s, however, the Court’s enthusiasm towards an unfettered “right to contract” had begun to wane.

In *Nebbia v. New York*, 291 U.S. 502 (1934), the Court held that New York’s law setting minimum and maximum milk prices did not violate a store owner’s “right to contract.” The Court explained that while “the use of property and the making of contracts are normally matters of private ... concern,” “neither property rights nor contracts rights are absolute[.]” *Id.* at 523. A citizen cannot “use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest.” *Id.* (citing legislative efforts aimed at promoting free competition to protect the public interest, *id.* at 538).

In sum, “[t]he Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people.” *Id.* at 539.

Then, in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (“*Parrish*”), the U.S. Supreme Court laid to rest the *Lochner* era’s unbridled “right to contract.” There, the Court upheld a state minimum wage law aimed at protecting women employees, and found that a reconsideration of the Court’s earlier decisions was appropriate.

The Court clarified that the “right to contract” was not a fundamental right, but a qualified one, subject to the State’s rational interest in providing for the welfare of its citizens. With respect to the “freedom of contract,” the U.S. Supreme Court explained the following:

What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people.

Id. at 391. In short, the “freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses.” *Id.* at 392. As to employer–employee contracts, the Constitution’s power “to restrict

[the] freedom of contract ... is undeniable,” *id.* at 393 (citing examples). And, “the legislature has necessarily a wide field of discretion” to protect workers’ “health and safety” and to “insure wholesome conditions of work and freedom from oppression.” *Id.*

Addressing the argument that “adult employees should be deemed competent to make their own contracts,” the Court noted that its decision in *Holden v. Hardy*, 169 U.S. 366 (1898), had already answered that argument: An adult’s competency was but one factor—other important factors included “the inequality in the footing of the parties,” or “where the public health demands that one party to the contract shall be protected against himself.” *Parrish*, 300 U.S. at 393, 394; *id.* at 399 (noting that an employer’s “exploitation of ... workers who are in an unequal position with respect to bargaining power” is “not only detrimental to [workers’] health and well being but casts a direct burden for their support upon the community”).

Together, these decisions hold that the rights and protections provided by the law exist to protect our society at large, and cannot be freely contracted away.

II. New York’s constitutional and “positive state” protection of its citizens and rights of all New York employees.

Following the Court’s decision in *Parrish*, the *Lochner* era—and with it, the idea of an unfettered “freedom to contract”—had come to an end. David A. Strauss, *Why Was Lochner Wrong?*, *The Univ. of Chicago L. Rev.* 70:373, 374 (2003); *see, e.g., Cal. Grocers Ass’n v. City of Long Beach*, 553 F. Supp. 3d 784, 792 (C.D. Cal.

2021) (noting that the “freedom to contract” is not a fundamental right, and that to hold otherwise, “the Court would have to discard nearly ninety years of precedent running counter to the idea of ‘freedom to contract’”).

New York changed course and entered its “Positive State” era—a time marked by the State’s active participation in providing for its citizens’ social and economic welfare, most notably through the enactment of several new constitutional protections.

A. New York State’s 1938 Constitutional Convention

On April 5, 1938, the New York Secretary of State Edward Flynn called the State’s ninth “people’s convention” to order. Peter J. Galie and Christopher Bopst, *A Global Context: The New York State Constitutional Convention of 1938*, Historical Society of the N.Y. Courts (Oct. 18, 2017). His opening remarks set the convention’s tone and purpose: “You are assembled during a most critical time in the world’s history, when new forms of government are being created throughout the world and democratic principles are being forgotten.” *Id.*

At the time, the nation was in an unprecedented economic downturn. Unemployment had increased to 20% and the number of democracies throughout the world had fallen. *Id.* Fascism and Communism were on the rise, and many doubted the United States’ ability to meet the challenges of the time.

Accordingly, the convention's president, Frederick E. Crane, Chief Judge of the Court of Appeals, cast the work of the convention in a global context: "We are here to do one thing, if nothing else: To prove to the world that our form of government does work; that it will work efficiently, and can meet the problems of the day and the necessities of the times[.]" *Id.* To that end, Crane emphasized the need to reaffirm and expand, if necessary, the traditional values that were under attack: "freedom of speech, freedom of religious worship, freedom of the press, a free and independent judiciary, and electoral freedom." *Id.*

U.S. Senator Robert F. Wagner (N.Y.) went further, declaring that in addition to "strengthening the traditional protection of the Bill of Rights, ... [t]he furtherance of human freedom requires more in our time than the prevention of official tyranny. The problem of the day is to meet the threat to freedom ... from poverty and insecurity, from sickness and the slum, from social and economic conditions in which human beings cannot be free. This threat to freedom can only be met by affirmative action, much of which must come from the State. The need for such affirmative action has been fully recognized in New York." *Id.*

Thus, unshackled from *Lochner's* discredited "freedom of contract" decisions, the convention focused on changes to the Bill of Rights. *Id.*

1. New York’s commitment to equal protection and providing for the welfare of its citizens.

The delegates adopted a new equal protection provision prohibiting discrimination against an individual’s civil rights based on race, color or creed. *Id.*; N.Y. CLS Const. Art. I, § 11 (“No Person shall be denied the equal protection of the laws” or “be subjected to any discrimination in his civil rights”). Two new articles—Social Welfare (Article XVII) and Housing (Article XVIII)—were also added, including a mandate that “aid, care and support of the needy ... shall be provided by the state and by such of its subdivisions.” Galie, *N.Y.S. Const., supra*.

2. New York’s adoption of a “Labor Bill of Rights.”

The boldest innovation, however, was the addition of a “Labor Bill of Rights,” which held that labor was not to be considered a commodity or an article of commerce, limited hours of labor on public works, and guaranteed the right to organize and bargain collectively. *Id.*; N.Y. CLS Const. Art. I, § 17 (“Labor of human beings is not a commodity nor an article of commerce and shall never be so considered or construed.”).

Significantly, this consensus on the government’s responsibility for the social and economic welfare of its inhabitants was more progressive than either the national Constitution or the decisions of the U.S. Supreme Court. Galie, *N.Y.S. Const., supra*. The convention gave constitutional status to a political theory that recognized an active role for the government in providing for a variety of welfare programs for

those in need. *Id.*; N.Y.S. Archives, *N.Y. State Constitutional Convention, 1938*.

And its guiding spirit, sometimes described as “positive state,” marked a turning point in New York’s constitutional history. Galie, *N.Y.S. Const., supra*.

B. New York’s constitutional rights and protections are fundamental rights.

These constitutional rights—unlike the qualified “right to contract”—came to be viewed as fundamental rights. *See, e.g., Bd. of Higher Ed. v. Carter*, 14 N.Y.2d 138, 144 (1964) (“The interdiction of discrimination in civil rights ... is a fundamental public policy of New York, articulated in both the constitutional and statutory law”); *People ex rel. Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553, 557 (1986) (holding that New York Constitution’s freedom of speech, Art. I, § 8, is a fundamental right; and that while the U.S. Supreme Court may establish “minimal standards for individual rights,” the State Constitution’s function “is to supplement those rights to meet the needs and expectations of the particular State”); *Domanick v. Triboro Coach Corp.*, 18 N.Y.S.2d 650, 653 (Sup. Ct. 1940) (noting that the “Labor Bill of Rights” is a “fundamental right, of something that both legislative policy and prevailing court decisions had previously recognized.”).

And as fundamental rights birthed during New York’s “positive state” era, such rights must be vigorously protected to benefit the common interest. Indeed, New York and its courts have routinely provided greater protections for its citizens than those provided under federal law. *See, e.g., O’Neill v Oakgrove Constr., Inc.*,

71 N.Y.2d 521 (1988) (New York’s Constitution provides greater speech protections than the Federal Constitution); *People v Griswold*, 821 N.Y.S.2d 394 (2006).

New York has similarly taken bold steps “to eliminate and prevent discriminatory practices” by private parties. *See, e.g., State Div. of Human Rights v. Binghamton Press Co.*, 67 A.D.2d 231, 238–39 (App. Div. 4th Dept. 1979) (quoting *New York Inst. of Tech. v. State Div. of Human Rights*, 40 N.Y.2d 316, 324 (1976)). In 2018, for example, New York enacted CPLR 7515, which sought to invalidate pre-dispute agreements to arbitrate sexual harassment claims, except where inconsistent with federal law. And in 2019, New York expanded the mandatory arbitration prohibition in CPLR 7515 to include all claims for discrimination.

New York courts have furthermore read the “Labor Bill of Rights” as protecting employees from employers who would “withhold and keep the wages of the working person[.]” *Quirk v. Regan*, 148 Misc. 2d 300, 304 (Sup. Ct. 1991) (holding that the State’s practice of withholding a portion of employees’ earned pay to be unconstitutional, noting: “To withhold and keep the wages of the working person is repugnant to those rights guaranteed under the State Constitution.”).³

³ *See also Ass’n of Surrogates & Supreme Court Reporters v. State*, 79 N.Y.2d 39, 44 (1992) (citing *Matter of Quirk* with approval to find a similar state lag-payment system to be unconstitutional, and noting that if the contract at issue was simply between private parties, “courts generally defer to legislative judgment as to necessity and reasonableness”); N.Y. Labor Law § 193(b) (expressing the State’s policy to prohibit any withholdings by employers from employees, unless such withholdings are “expressly authorized in writing by the employee and are for the benefit of the employee”).

III. D.E. Shaw’s release-for-pay scheme improperly strips employees of their fundamental rights.

Against New York’s Positive State objectives and the establishment of new fundamental rights for its citizens, D.E. Shaw’s release-for-pay scheme would seek to strip employees of their fundamental statutory and civil rights.

As set forth in Michalow’s Petition, this scheme compels employees to drop claims for discrimination, harassment, wage theft, and all other harms accrued under federal and state laws. This threat is enforced by the withholding of employees’ earned wages, a mandatory arbitration provision that sweeps wrongful acts out of the public eye, and a confidentiality provision that frustrates government regulators’ ability to uphold the rule of law.

If left to stand, not only will the State’s interest in protecting the fundamental rights of all New Yorkers be frustrated, but the value of such hard-fought rights will have been effectively diminished—all pursuant to a suspect “policy favoring arbitration” born from the discredited *Lochner* era.

What is required here is a fresh consideration of the State’s purported “policy favoring arbitration,” and a meaningful opportunity for contracting parties to raise the same important public policy considerations that Petitioner-Appellant Michalow raises here, and which the First Department failed to provide.

As detailed below, the Supreme’s Court’s pre-*Morgan* “policy favoring arbitration” led to a dramatic decrease in workers’ rights. But with the Court’s

clarification in *Morgan*, it is now clear that courts must provide both arbitrating and litigating contract parties the same opportunity to void illegal portions of their contract on public policy grounds.

And given that the issues presented here will likely affect millions of other New Yorkers subject to an arbitration employment agreement, this Court should take this opportunity to freshly consider (a) the State’s historic policy of providing more protections to New Yorkers than the minimal standards provided under federal law; (b) the ongoing disparity between employers like D.E. Shaw—with billions of dollars under management—and their employees⁴; and (c) the suspect roots of the State’s purported “policy favoring arbitration” and its current conflict with *Morgan*’s directive—i.e., for courts to provide arbitration agreement parties the same meaningful opportunity to protect their fundamental rights pursuant to a public policy defense.

A. The Supreme Court’s pre-*Morgan* “federal policy favoring arbitration” has harmed workers.

When the FAA was originally enacted in 1925, the FAA’s drafters and advocates assumed that the statute applied only to business disputes—not

⁴ D.E. Shaw Composite Fund, CapEdge, <https://capedge.com/company/1137837/d-e-shaw-composite-fund-llc> (identifying over \$100 billion in assets under management); Ofc. of N.Y.S. Comptroller, *The Securities Industry in N.Y.C.*, Rept. 10-2024 (Oct. 2023) (“Compensation for CEOs at financial firms in New York State was 328 times more than the median for all employees of their companies, a much larger gap than the prior year”), <https://www.osc.ny.gov/files/reports/osdc/pdf/report-10-2024.pdf>.

employment agreements. Stone, *The Arbitration Epidemic*, at 7 (noting the FAA’s exemption for “contracts of employment”).

But with *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983), the U.S. Supreme Court declared a new “liberal federal policy favoring arbitration agreements,” *id.* at 4.

And from there, the Court dramatically expanded the FAA’s reach and scope, and increasingly restricted the states’ ability to maintain laws aimed at protecting consumers and employees. Stone, *The Arbitration Epidemic*, at 6, 8, 15; Jeremy Wright, *Arbitration in the Workplace*, Northwestern Univ. L. Rev. Online, 117:1, 16 (2022); Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration: Access to the Courts is Now Barred for More Than 60 Million American Workers*, Economic Policy Institute, at 3 (Sept. 27, 2017; updated Apr. 2018).⁵

Armed with these decisions and the federal courts’ pro-arbitration policy, employers quickly adopted mandatory arbitration provisions, class action waivers, and confidentiality provisions into their employment agreements. These provisions, often buried in fine print or included in onboarding documents, typically require

⁵ See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (applying FAA to state court disputes); *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985) (statutory disputes); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (employment disputes); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (most non-union private sector workers); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (upholding the enforceability of class action waivers in employment arbitration agreements); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) (expanding the separability doctrine, thereby making it more difficult for employees to challenge the unconscionability of an arbitration provision).

employees to waive their right to bring claims against the company in court and instead submit disputes to private arbitration.⁶ This shift from public courts to private dispute resolution forums has significant impacts on workers, whistleblowers, and the rule of law.

In the early 1990s, mandatory arbitration clauses applied to only 2% of all non-unionized private sector employees. Wright, *Arbitration in the Workplace*, at 9. But by 2018, that percentage jumped to over 56%—a figure translating to over 60 million American workers. *Id.*; Colvin, *The Growing Use of Mandatory Arbitration*, at 3. Today, it is estimated that roughly 80% of all non-unionized private sector employees are subject to an arbitration agreement, a figure translating into over 85 million American workers. NYCLU, 2023-2024 Legislative Memo. at 2 (Empowering People in Rights Enforcement); Wright, *Arbitration in the Workplace*, at 9. And in New York, an estimated 55% of employers use forced arbitration clauses in their employment contracts. NYCLU, Memo. at 2.

From this federal “policy favoring arbitration,” the benefits to employers and corresponding harms to employees have become clear: Employees proceeding in arbitration are generally less successful than those litigating their claims in court, and

⁶ Stone, *The Arbitration Epidemic*, at 4 (noting that “today it is common for employees to be presented with terms of employment that include both a clause that obligates them to arbitrate all disputes they might have with their employer and one that prohibits them from pursuing their claims in a class or collective action. The legal developments have de facto stripped employees of many of the legal rights and protections that they have fought long and hard to obtain.”).

recover significantly less than what might be expected in similar court cases.⁷

Employers who frequently appear before the same arbitrator tend to lower an individual employee's chance of winning. Stone, *The Arbitration Epidemic*, at 23. And the combination of potentially high costs (e.g., the risk of paying an employer's fees), limited discovery, restricted recovery, and minimal appeal rights can deter workers from pursuing valid claims, thereby further hindering access to justice for employees. *Id.* at 21-22, 26.

Similarly, when this pro-arbitration policy is used in combination with unlawful contract provisions and intentional employer misconduct (as here), this shift from the public courts to private dispute resolution forums poses a threat to the rule of law by undermining public justice, accountability, and the consistent application of the laws. *Id.* at 3.⁸ Employees are prevented from speaking out about their own experience, or raising important issues that the public and other workers

⁷ A 2015 study found that “the employee win rate in employment arbitration had also dipped in recent years, to an average of only 19.1 percent”; and that “plaintiffs’ overall economic outcomes are on average 6.1 times better in federal court than in mandatory arbitration (\$143,497 versus \$23,548) and 13.9 times better in state court than in mandatory arbitration (\$328,008 versus \$23,548).” Stone, *The Arbitration Epidemic*, at 19, 21; see also NYCLU, Memo. at 3 (“A recent examination of thirty years of sexual harassment claims brought before Wall Street’s arbitration body, the Financial Industry Regulatory Authority, found that in thirty years, only seventeen women on Wall Street had won sexual harassment claims in industry arbitration.”).

⁸ Per former U.S. Secretary of Labor Robert Reich, “It’s a rigged system that helps companies evade responsibility for violating antidiscrimination, consumer protection and public health laws.” Alliance for Justice, *Is the Tide Finally Turning Against Forced Arbitration?* (Nov. 21, 2018) (noting that in one survey, “arbitrators chosen by companies rule for businesses over consumers 94 percent of the time”).

would care about. *Id.* Wrongdoers are not held accountable, and other employees may remain vulnerable to similar abuses by an employer. *Id.* at 4.

B. Regulators have rejected employment agreements like D.E. Shaw’s on public policy grounds—this Court should too.

In response to these harms, courts (like those cited in the Petition) and regulators have consistently invalidated or restricted contract provisions that interfere with an employee’s statutory rights or the agency’s ability to investigate and enforce the law:

National Labor Relations Board: Per *McLaren Macomb*, 372 NLRB No. 58 (Feb. 21, 2023), employers are prohibited from offering a severance agreement containing broad confidentiality and non-disparagement clauses that might dissuade the employee from filing an unfair labor practice charge, assisting with an investigation, or discussing an (unlawful) agreement with coworkers or unions.

Equal Employment Opportunity Commission: The EEOC asserts that separation agreements that include non-cooperation or covenant-not-to-sue provisions interfere with its enforcement activities and constitute unlawful retaliation. The agency relies heavily on information gained from former employees to investigate discrimination claims. EEOC, *Q&A - Understanding Waivers of Discrimination Claims in Employee Severance Agreements*, Endnote 12.

Federal Trade Commission: The FTC also views contractual provisions that chill a person’s willingness to speak with the FTC as impeding its mandate. FTC,

Contracts That Impede Bureau of Competition Investigations (June 15, 2023).

Because such provisions undermine the protections afforded to consumers, workers, and honest businesses, they are contrary to public policy, void, and unenforceable.

Securities and Exchange Commission: The SEC similarly views agreements that might dissuade whistleblowers from contacting the Commission as being unlawful. Pursuant to the Dodd-Frank Act, the SEC adopted Rule 21F-17(a) (17 C.F.R. § 240.21F-17(a)), which states:

No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement ... with respect to such communications.

This Rule has been successfully enforced 30 times since its first use against KBR Inc. for using illegally restrictive non-disclosure agreements in 2015.⁹

In fact, in 2023, the SEC fined Respondent D.E. Shaw \$10 million to settle charges that the company's employment agreements improperly raised impediments to whistleblowing by (a) requiring employees (between 2011-19) to sign agreements prohibiting the disclosure of confidential information, without an exception for potential whistleblowers; and (b) by requiring departing employees (between 2011-

⁹ Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, *KBR, Inc.*, Release No. 7461, File No. 3-16466 (Apr. 1, 2015).

23), “to sign releases affirming that they had not filed any complaints with any governmental agency, department, or official in order for them to receive deferred compensation ... and other benefits sometimes worth millions of dollars.” SEC, *SEC Charges D.E. Shaw with Violating Whistleblower Protection Rule* (Sept. 29, 2023).

Indeed, the employment and release agreement that D.E. Shaw proffered to Petitioner-Appellant Daniel Michalow, lacked a whistleblower carveout for sharing potentially confidential information, and required Michalow to affirm that he had not filed any complaints with any government agency, department or official in order ... to receive [his] deferred compensation[.]”

IV. Fresh consideration should be given to New York’s policy of favoring arbitration agreements.

Given this backdrop, fresh consideration should be given to New York’s policy of favoring arbitration agreements, particularly in cases concerning public policy and fundamental rights.

As recently as last year, this Court maintained that New York has a “long and strong public policy favoring arbitration”; that “[i]n appreciation of that policy, New York courts interfere as little as possible with the freedom of consenting parties’ to submit disputes to arbitration”; and that courts are “steadfastly discouraged ... from becoming unnecessarily entangled in arbitrations or from serving as a vehicle to protract litigation[.]” *Wu v. Uber Tech., Inc.*, 2024 NY Slip Op 05869, ¶ 4, 2024 N.Y. LEXIS 1896, *10-11 (cleaned up).

This Court’s *Redbridge* decision then further suggested that this policy favoring the “freedom to contract” is a “‘deeply rooted’ public policy of this state”; “a right of constitutional dimension (U.S. Const. art. I, § 10[1])”; and that “[o]nly a limited group of public policy interests has been identified as sufficiently fundamental to outweigh the public policy favoring freedom of contract.” 33 N.Y.3d at 359, 361.¹⁰

But for several reasons, this Court’s reconsideration of these policies is appropriate.

A. New York’s policy of favoring arbitration agreements conflicts with the Supreme Court’s *Morgan* decision.

First, New York’s “policy favoring arbitration” conflicts with the Supreme Court’s decision in *Morgan*.

There, the Supreme Court held that arbitration agreements are to be made “as enforceable [or as voidable] as other contracts, but not more so.” 596 U.S. at 418. “[A]rbitration-specific procedural rules” are prohibited, as are “custom-made rules, to tilt the playing field in favor of (or against) arbitration.” *Id.* at 419.

¹⁰ “In some circumstances, the legislature has identified the benefits or obligations recognized in constitutional, statutory or decisional law that are so weighty and critical to the public interest that they are nonwaivable.” *Redbridge*, 33 N.Y.3d at 361. In other instances, “[w]here the legislature has not expressly precluded waiver of a right or obligation, we [the Court of Appeals] have deemed that to be a significant factor militating against invalidation of a contract term on public policy grounds.” *Id.* at 362.

Supreme Court cases decided since *Morgan* have similarly emphasized this “equal treatment” principle: “A court may invalidate an arbitration agreement based on ‘generally applicable contract defenses’ like fraud or unconscionability, but not on legal rules that ‘apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.’” *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 650 (2022); *Coinbase, Inc. v. Suski*, 602 U.S. 143 (2024) (noting that fundamentally, “arbitration is a matter of contract”; “[a]s a result, arbitration agreements are ‘valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.’”).

Here, despite these several decisions recognizing the changed “policy favoring arbitration,” this Court of Appeals has not yet issued a decision squaring *Morgan* and its progeny with this Court’s policy of directing courts to “interfere as little as possible” in arbitration matters—a judicial policy that (a) seemingly applies only to arbitration agreements, and no other contracts—a distinction that *Morgan* prohibits; and (b) severely limits any court’s reasonable consideration of a public policy defense¹¹ like the one asserted by Petitioner-Appellant.

¹¹ See, e.g., *N.Y. State Corr. Officers & Police Benevolent Ass’n v. State*, 94 N.Y.2d 321, 328–29 (1999) (identifying two different modes of analysis for considering the public policy defense—one for arbitration agreements, and a different one for other contracts).

B. The roots of New York’s stated policy favoring arbitration are suspect.

Second, this Court’s bases for inferring the State’s purported pro-arbitration policy are suspect.

This Court’s earliest decision (as found by this counsel) referencing an “announced policy of this State [that] favors and encourages arbitration as a means of conserving the time and resources of the courts and contracting parties,” is *Nationwide General Ins. Co. v. Investors Ins. Co.*, 37 N.Y.2d 91, 95 (1975). That case in turn relies on *Weinrott v. Carp*, 32 N.Y.2d 190, 199 (1973), where this Court noted that the legislature’s passage of the CPLR arbitration provisions (Art. 75) “evidence a legislative intent to encourage arbitration.” *Id.*

By that measure, however, the State’s intent is similarly observed in any number of adopted rules and enacted statutes, including the one proffered by Petitioner-Appellant, N.Y. Labor Law § 193 (“Legislative Findings. Article 6 of the labor law, and section[] 193 in particular, reflects New York’s longstanding policy against the forfeiture of earned but undistributed wages”).

Moreover, nothing in that legislative act (of adopting the arbitration rules) addresses how such rules might be weighed against the fundamental labor rights safeguarded by New York’s Constitution, N.Y. CLS Const. Art. I, § 17. *See* N.Y. CPLR § 102 (providing that any adopted civil practice rule is limited by the State’s Constitution, and shall not “abridge or enlarge the substantive rights of any party”).

And to the extent any perceived silence by the Legislature might be credited with supporting a pro-arbitration policy, it seems prudent to first consider “all other [competing] textual and contextual evidence of [legislative] intent.” *Burns v. United States*, 501 U.S. 129, 136 (1991) (observing that “not every silence is pregnant”).

C. The “freedom to contract” is not a constitutional bar to reasonable limitations made in the public interest.

This Court’s alternate basis for its pro-arbitration policy—i.e., the “freedom to contract,” which is purportedly “a right of constitutional dimension (U.S. Const. art. I, § 10[1]),” *Redbridge*, 33 N.Y.3d at 359—is also suspect.

Parrish and its progeny hold that the Constitution lacks a “freedom to contract” and that any such “freedom” is qualified and limited. This Court’s decision in *Ass’n of Surrogates* further recognizes that “not all impairments of contract are unconstitutional.” 79 N.Y.2d at 46. To determine if they are, a court must first balance “[a] the contract rights of the individual against [b] the essential attributes of sovereign power ... necessarily reserved by the States to safeguard the welfare of their citizens.” *Id.*

If the impairment is substantial, it must be examined in light of the nature and purpose of the State legislation, and will be upheld if it is reasonable and necessary to accomplish a legitimate public purpose.


Id. at 46 (cleaned up). And, “[i]n the case of private contracts, courts generally defer to legislative judgment as to necessity and reasonableness.” *Id.* (citation omitted).

Here, because this Court's *Redbridge* decision conflicts with the Supreme Court's *Parrish* decision, as well as this Court's own decision in *Ass'n of Surrogates*, this Court should clarify (a) the State's policy towards arbitration and the lower courts' involvement in such disputes; as well as (b) the appropriate analysis under which a public policy defense is asserted, for any contract. A clear pronouncement on these legal issues would likely benefit millions of New York workers across the State.

CONCLUSION

For all the foregoing reasons, this Court should grant Petitioner's appeal.

Date: May 22, 2025




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CERTIFICATE OF COMPLIANCE

Pursuant to Court of Appeals Rules of Practice 500.1(j) and 500.13(c)(1), the undersigned certifies that the foregoing brief was prepared on a computer using Microsoft Word, applies a proportionally spaced typeface (Baskerville) in 14-point type, and contains 6998 words, exclusive of the contents listed in Rule of Practice 500.13(c)(3).

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ss.:

**AFFIDAVIT OF SERVICE
BY OVERNIGHT FEDERAL
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I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above.

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the address(es) designated by said attorney(s) for that purpose by depositing **1** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on the 22nd day of May 2025.



MARIANA BRAYLOVSKIY
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2026



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