No. 23-20035

In the United States Court of Appeals
For the Fifth Circuit

JENNIFER HARRIS,

Plaintiff–Appellee

v.

FEDEX CORPORATE SERVICES, INC.,

Defendant–Appellant.

On Appeal from the United States District Court
For the Southern District of Texas, Houston Division
No. 4:21-cv-01651 (Hoyt, J.)

MOTION FOR LEAVE TO FILE BRIEF OF UNITED STATES CHAMBER OF COMMERCE AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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The undersigned counsel of record certifies that the following listed persons and entities described in the fourth sentences of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. The representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

Appellant:	***Counsel for Appellant*:**
FedEx Corporate Services, Inc.	Kyle D. Hawkins Leah F. Bower LEHOTSKY KELLER LLP Barak J. Babcock Christopher M. Ahearn FEDERAL EXPRESS CORPORATION
***Appellee*:**	***Counsel for Appellee*:**
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s/ William R. Peterson
William R. Peterson
Counsel for Amicus Curiae
U.S. Chamber of Commerce

Dated: May 3, 2023

MOTION FOR LEAVE TO FILE BRIEF OF UNITED STATES CHAMBER OF COMMERCE AS AMICUS CURIAE IN SUPPORT OF APPELLANT

The United States Chamber of Commerce moves for leave to file the attached proposed amicus curiae brief in support of Defendant-Appellant FedEx Corporate Services, Inc. pursuant to Federal Rules of Appellate Procedure 27 and 29(a)(3). A copy of the proposed brief is attached hereto as Exhibit A. Defendant-Appellant has consented to the filing of this amicus brief; Plaintiff-Appellee objects.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The proposed amicus brief addresses matters "relevant to the disposition" of this appeal. *See* Fed. R. App. P. 29(a)(3) (providing that a motion for leave to file an amicus brief during a court's initial consideration of a case on the merits must state "the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case"). The discussion of the two issues in the proposed amicus brief will aid this Court's decision-making process because Amicus

provides a holistic perspective on the importance of correcting the district court's errors to the business community and the practical implications if the district court's errors go uncorrected. *See* 5th Cir. R. 29.2. Amicus seeks to address two issues of particular concern to the Chamber's members through the proposed brief: (1) the staggering and facially unconstitutional award of punitive damages; and (2) the failure to enforce the contractual limitations period for Plaintiff's Section 1981 claim.

The arbitrary and unconstitutional imposition of punitive damages is of particular concern to the business community. The Supreme Court has recognized that large businesses are often the target of such awards. Amicus explains why this case exemplifies those constitutional concerns, as here there was an award of significant compensatory damages primarily for future emotional distress—which already reflects a punitive component—and the jury awarded punitive damages at a more than 300:1 ratio in the amount of $365 million. Certainty and predictability as to the amount of potential liability is important to the business community and the jury verdict here must at minimum be brought within the constitutional limits.

Amicus also seeks to address the importance of enforcing contractual limitations provisions in providing certainty to the business community and employees. This Court respects the right of parties to contract for the efficient and timely resolution of disputes. Enforcement of Plaintiff's contractual limitations

period for her Section 1981 claim is entirely consistent with public policy and any holding otherwise would create a circuit split and introduce confusion in the law. This is of concern to businesses generally, but in particular to businesses that use nationwide employment agreements and rely on uniform enforcement of the contractual provisions in different jurisdictions. Amicus asks this Court to restore certainty as to whether contractual provisions for dispute resolution will be enforced in this Circuit.

CONCLUSION

For these reasons, Amicus respectfully requests leave to file the attached proposed amicus curiae brief in support of Defendant-Appellant.

Dated: May 3, 2023

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS LLP
U.S. CHAMBER LITIGATION CENTER

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CERTIFICATE OF SERVICE

I certify that on this day of May 3, 2023 I served a true and correct copy of the foregoing Motion for Leave to File Brief of United States Chamber of Commerce as Amicus Curiae in Support of Appellant on counsel of record for all other parties through this Court's CM/ECF system:

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Dated: May 3, 2023

CERTIFICATE OF CONFERENCE

I certify that Counsel for Amicus Curiae conferred with Counsel for Appellant and Counsel for Appellee. Appellant consents to filing the amicus brief and Appellee opposes the filing.

s/ William R. Peterson
William R. Peterson
Counsel for Amicus Curiae
U.S. Chamber of Commerce

Dated: May 3, 2023

CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the type-face, type-style, and type-volume limitations of Federal Rules of Appellate Procedure 32 and Fifth Circuit Rule 32. *See* FED. R. APP. P. 27(d)(1), 32(g)(1). Excluding the parts exempted by the Federal Rules of Appellate Procedure 32, this motion contains 586 words in proportionately-spaced, size-14, Times New Roman font, as determined by the word-processing program Microsoft Word for Microsoft 365 MSO.

I further certify that all privacy redactions have been made pursuant to Fifth Circuit Rule 25.2.13 and that the electronic submission of this motion is an exact copy of any paper document filed pursuant to Fifth Circuit Rule 25.2.1.

s/ William R. Peterson
William R. Peterson
Counsel for Amicus Curiae
U.S. Chamber of Commerce

Dated: May 3, 2023

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

Few issues are of more concern to U.S. businesses than the fair and lawful administration of punitive damages. As a result, the Chamber has a vital interest in the constitutional limits on punitive damages and routinely files amicus briefs in significant punitive-damages cases. In addition, as one of the largest representatives of American employers, the Chamber seeks to ensure that employment agreements are enforced, including contractual limitations periods in such agreements that businesses rely on for certainty and predictability.

No counsel for a party in this case authored this brief in whole or in part. No person or entity—other than amicus, its members, or its counsel—made any monetary contributions intended for the preparation or submission of this brief.

ARGUMENT OF AMICUS CURIAE

Among its various flaws, the judgment in this case is facially unconstitutional. After a trial tainted by several questionable rulings against the defense—including an unqualified "HR expert" testifying based only on her review of the complaint and inflammatory and improper closing argument by the plaintiff's attorney—the jury awarded the single plaintiff $365,000,000 in punitive damages, *over 300 times* the $1,160,000 compensatory award. But "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process," and "[w]hen compensatory damages are substantial," as they are here, then a punitive-damages award "equal to compensatory damages . . . reach[es] the outermost limit of the due process guarantee." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). Despite this Supreme Court guidance, the District Court entered a blatantly unconstitutional judgment reflecting the jaw-dropping jury verdict without even accepting full briefing on the defense's extensive post-trial motions. At the very most, the plaintiff may receive an award in an amount up to maximum recoverable under Title VII, 42 U.S.C. § 1981a(b)(3)(D), because the District Court should have dismissed her claim under § 1981 as time barred by the limitations clause in her employment agreement. Businesses require predictability and certainty when entering into negotiations, and they reasonably expect that courts will properly enforce contractual provisions and constitutional

limits on punitive damages. The judgment here undermines that predictability and certainty. This Court should reverse.

I. The $365 Million Punitive-Damages Award Is Facially Unconstitutional.

Even if the evidence permits an award of punitive damages, *cf.* FedEx Br. 44-46, the award here dramatically exceeds what due process allows. "[T]he stark unpredictability of punitive awards" is a "real problem." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 499 (2008). "Apart from impairing the fairness, predictability and proportionality of the legal system, judgments awarding unreasonable amounts as damages impose harmful, burdensome costs on society." *Payne v. Jones*, 711 F.3d 85, 94 (2d Cir. 2013). "[A]n excessive verdict that is allowed to stand establishes a precedent for excessive awards in later cases." *Id.* Indeed, "[t]he publicity that accompanies huge punitive damages awards will encourage future jurors to impose similarly large amounts." *Id.* (internal citation omitted). In turn, "[u]nchecked awards levied against significant industries can cause serious harm to the national economy." *Id.* Driven in part by punitive-damages awards, large and unpredictable "nuclear" jury verdicts "drive up the costs of goods and services, create insurability problems, inhibit job growth and new investments for businesses or industries, deplete judicial resources, and—perhaps most significantly—undermine confidence in the rule of law." U.S. Chamber of Commerce Institute for Legal Reform, *Nuclear Verdicts: Trends, Causes, and Solutions* 34 (Sept. 2022),

available at https://instituteforlegalreform.com/wp-content/uploads/2022/09/NuclearVerdicts_RGB_FINAL.pdf.

As a result, "it is well established that there are procedural and substantive constitutional limitations on these awards." *State Farm*, 538 U.S. at 416. Due process "prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *Id.* These limitations derive from the principle that a person is entitled to "fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996). This notice allows members of the public—including businesses—to shape their conduct according to their expected liability.

To provide this notice and ensure the predictability of punitive damages, courts must review punitive damages according to three guideposts: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *State Farm*, 538 U.S. at 418. Although the Supreme Court declined to adopt a "bright-line ratio which a punitive damages award cannot exceed" compared to compensatory damages, it made clear that only in an exceptional case will an award "exceeding a single-digit

ratio between punitive and compensatory damages . . . satisfy due process." *Id.* at 425.

A. The constitutional limits on punitive damages are particularly important to out-of-state businesses.

These constitutional limits on punitive damages protecting against arbitrary or grossly excessive punishments are particularly important to large, out-of-state businesses. The Supreme Court cautioned in *State Farm* against the danger "that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." 538 U.S. at 417. Driven by such biases, the unpredictability of punitive-damages awards has persisted. *See* U.S. Chamber of Commerce Institute for Legal Reform, *Nuclear Verdicts: Trends, Causes, and Solutions* at 36; Ashley Stamegna, *The Missing Civility in Civil Damages: A Proposed Guidelines Structure for Calculating Punitive Damages*, 106 C.N.L.L.R. 1897, 1901-1902 (2022) (collecting studies identifying disparities in punitive-damages awards based on bench versus jury trials, geographic region, trial type, and common ploys such as "the more you ask for, the more you'll get"); *see also* Benjamin J. McMichael & W. Kip Viscusi, *Bringing Predictability to the Chaos of Punitive Damages*, 54 Ariz. St. L.J. 471, 507–08 (2022) (arguing that blockbuster punitive damages have become more unpredictable over time); Cass R. Sunstein, et al., *Punitive Damages: How Juries Decide*, 240 (2002) (identifying "salient numbers, such as a plaintiff's request for a specific dollar amount, [can] have a

dramatic impact on [mock] jurors' awards" of punitive damages, whether or not those numbers have a legitimate relationship to the appropriate punishment for the defendant's conduct.").

Invited by the Plaintiff's counsel, the jury's biases undoubtedly drove the massive punitive award in this case. Harris's counsel urged the jury counsel to "take into account" FedEx's net worth in awarding punitive damages: "745.2 million. Now, that's the net worth of FedEx Corporate Services[.] . . . [T]hat's something you can take into account for punitive damages." ROA.5543. And counsel urged the Houston-based jury to make an award that would be heard beyond Houston, Texas, by the Memphis, Tennessee-based corporate defendant. *See* ROA.5543-44; FedEx Br. 20. Given these arguments, the most rational explanation for the extraordinary amount of punitive damages awarded is that the jury used its verdict to express its bias against a big business headquartered in a different state.

Protecting against a jury verdict driven by such bias is why the Supreme Court requires trial courts to review punitive damages using the three *BMW* guideposts and mandates "[e]xacting appellate review," with "*de novo* review of a trial court's application of [the guideposts] to the jury's award." *State Farm*, 538 U.S. at 418. In absence of such scrutiny from this Court, the punitive-damages award in this case will rest on "a decisionmaker's caprice" rather than "application of law." *Id.*

B. The punitive-damages award violates the Due Process Clause.

Applying the constitutionally required standards and exacting review, the punitive-damages award here—over 300 times the compensatory award—far exceeds constitutional limits, regardless of the defendant's conduct. The Supreme Court has instructed that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm*, 538 U.S. at 425. Even punitive awards "more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." *Id.* Moreover, where "compensatory damages are substantial," an amount "equal to compensatory damages" is "the outermost limit of the due process guarantee." *Id.* In *State Farm*, applying the *BMW* factors, the Court held that a punitive-damages award 145 times compensatory damages exceeded constitutional bounds—$145 million in punitive damages compared to a "substantial" $1 million compensatory award. That case was "neither close nor difficult." *Id.* at 418.

This case is even easier. The ratio of punitive to compensatory damages is over 300:1, *double* the clearly unconstitutional ratio in *State Farm* and far beyond single digits. The jury awarded an amount nearly half the defendant corporation's net worth in a single-plaintiff case where there was a significant ($1.16 million) compensatory damages award, and the jury *rejected* Plaintiff's claim of racial discrimination. There is no question that these damages are unconstitutional. The

only question is the amount of reduction necessary to ensure that any punitive-damages award satisfies due process (if any award at all is warranted).

As the Supreme Court requires, this Court closely reviews any award of punitive damages. For example, in *Lincoln v. Case*, 340 F.3d 283 (5th Cir. 2003), a Fair Housing Act case, after taking account of the *BMW* "guideposts, and weighing the relative strength or weakness of each," this Court concluded "that the $100,000 punitive damages award must be remitted to $55,000 in order to comport with due process." *Id.* at 294. Similarly, in *Rubinstein v. Administrators of Tulane Educ. Fund*, 218 F.3d 392 (5th Cir. 2000), this Court found a ratio of 30:1 to be unreasonable under the facts of the case and reduced the award of $75,000 in punitive damages to $25,000. *Id.* at 408. This Court explained that, where the illegal conduct was not "exceptional," a multiplier of 30 was so disproportionate as to "raise a suspicious judicial eyebrow." *Id.*

As FedEx explains in its brief (at 41-50), the *BMW* guideposts do not support a punitive-damages award of $365 million based on an approximately $1 million compensatory award. There is scant, if any, evidence that FedEx engaged in reprehensible conduct; the jury rejected the Plaintiff's race-discrimination claim; the Plaintiff alleges only emotional harm; her evidence of that harm is likewise minimal; and the compensatory award greatly exceeds the typical compensatory award in this Circuit in employment-discrimination cases. *See* FedEx Br. at 48-50.

At minimum, to satisfy due process, the punitive-damages award must be reduced to the amount of compensatory damages (a 1:1 ratio). There is nothing exceptional about this case that merits a higher multiplier. *See Rubinstein*, 218 F.3d at 408-09; *see, e.g.*, *Saccameno v. U.S. Bank Nat'l Assn.*, 943 F.3d 1071, 1078 (7th Cir. 2019) (reducing a punitive-damages award of $3 million to the size of the compensatory-damages award of $582,000 where the defendant's "atrocious record keeping" led to years of harassment of a mortgagee); *Jones v. United Parcel Serv., Inc.*, 674 F.3d 1187, 1207-08 (10th Cir. 2012) (determining an award of $2 million unconstitutional where there were "substantial" compensatory damages of $630,307 and ordering a reduction of punitive damages to equal the compensatory damages); *Bach v. First Union Nat. Bank*, 486 F.3d 150, 156 (6th Cir. 2007) (concluding an award of over $2 million in punitive damages should be reduced to $400,000, which was the amount of compensatory damages); *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 603 (8th Cir. 2005) (reducing the jury's punitive award from $15 million (3:1 ratio) to $5 million (1.25:1 ratio), because the award "is excessive when measured against the substantial compensatory-damages award"); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004) (reducing to 1:1 ratio because "plaintiff's large compensatory award . . . militates against departing from the heartland of permissible exemplary damages."); *see also Payne*, 711 F.3d at 103 (10:1 ratio might be permissible if compensatory damages were

$10,000, but 1:1 ratio would be "very high" if compensatory damages were $300,000).

C. The inherent punitive component of the emotional-damages award requires greater scrutiny of the punitive-damages award.

The punitive-damages award in this case should be subject to even greater scrutiny because the compensatory damages are for emotional distress, an award that courts recognize may already include a significant punitive component. *See* U.S. Chamber of Commerce Institute for Legal Reform, *Nuclear Verdicts: Trends, Causes, and Solutions* at 25-26 (explaining that as large punitive damages awards have faced greater judicial scrutiny, plaintiffs' lawyers have instead improperly sought to use pain and suffering awards, which are subject to less exacting review).

The Supreme Court has explained that a "major role of punitive damages" is to condemn conduct that causes "outrage and humiliation." *State Farm*, 538 U.S. at 426. But if the plaintiff received compensatory damages for emotional distress, then "[c]ompensatory damages . . . already contain this punitive element." *Id.* "In many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant's act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both[.]" *Id.* (quoting Restatement (Second) of Torts § 908, cmt. c (1977)). Indeed, the First Circuit has described an award of $300,000 for emotional distress—significantly less than the award in this

case—as a "high award" that "may partly reflect punishment for what the jury may have concluded was the degree of reprehensibility of the City's conduct." *McDonough v. City of Quincy*, 452 F.3d 8, 25 (1st Cir. 2006); *see also Turley v. ISG Lackawanna, Inc.*, 774 F.3d 140, 165–66 (2d Cir. 2014) (4:1 ratio "serves neither predictability nor proportionality . . . particularly . . . where the underlying compensation is, as it is in this case, for intangible—and therefore immeasurable—emotional damages. Imposing extensive punitive damages on top of such an award stacks one attempt to monetize highly offensive behavior, which effort is necessarily to some extent visceral, upon another.").

The size of the compensatory-damages award—particularly the future emotional distress award exceeding $1 million—indicates that it already reflects the jury's intent to punish FedEx. As FedEx notes, the compensatory-damages award significantly exceeds such awards in comparable cases. *See* FedEx Br. 43 (discussing *Vadie v. Mississippi State University*, 218 F.3d 365 (5th Cir. 2000)). In cases such as this, where punitive considerations already drive the high compensatory award, a significant ratio between punitive damages and compensatory damages is particularly inappropriate.

* * *

The constitutional limits on punitive damages provide important notice to businesses of the potential liability they face and protect against jury bias against

large, out-of-state businesses. Under well-established law, the punitive damages in this case dramatically exceed what due process permits. Even assuming that the evidence justifies any punitive damages at all, any punitive-damages award above the amount of compensatory damages (which likely already includes a punitive component) would be unconstitutional. If punitive damages are even justified, this Could should reduce them to within the constitutional bounds.

II. Contractual Limitations Periods Are Enforceable And Serve Important Policies.

Although the punitive-damages award is flagrantly unconstitutional, Harris's claim under § 1981 is independently time-barred because it falls outside the contractual limitations period in her employment agreement. FedEx Br. 27-31.

Parties may decide by contract where, how, and when their disputes will be resolved. Forum-selection clauses, for example, permit parties to agree where claims, including those sounding in tort, will be heard. *E.g.*, *Marinechance Shipping, Ltd. v. Sebastian*, 143 F.3d 216, 223 (5th Cir. 1998). Parties can agree that their statutory claims will be resolved through arbitration rather than judicial proceedings. *E.g.*, *Robertson v. Intratek Computer, Inc.*, 976 F.3d 575, 581 (5th Cir. 2020). Parties can agree that their disputes will be resolved individually, rather than through class or collective actions. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010). And, as relevant here, parties can agree that claims must be brought within a certain period of time.

Contractual limitations clauses provide predictability and certainty. Businesses rely on their ability to agree with their employees on timely and efficient dispute resolution. By limiting the time in which claims can be brought, the parties gain all of the benefits of a typical statute of limitations, including "protecting parties from the prosecution of stale claims, when, by loss of evidence from death of some witnesses, and the imperfect recollection of others, or the destruction of documents, it might be impossible to establish the truth," and "encourag[ing] promptitude in the prosecution of remedies." *Riddlesbarger v. Hartford Ins. Co.*, 74 U.S. 386, 390 (1868).

Early notice of employment-related claims is particularly important to large employers. If employees are being harmed by the decisions of a mid-level manager, for example, responsible employers want to be notified as soon as possible so that they can quickly take any necessary corrective action.

A. Texas law enforces the plain language of the parties' agreement.

Harris and FedEx agreed that "[t]o the extent the law allows an employee to bring legal action against the Company," Harris would "bring that Complaint within . . . 6 months from the date of the event forming the basis of my lawsuit." FedEx Br. 28 (quoting ROA.5653).

Texas enforces contracts according to their plain language: "In construing contracts, we look to the plain language as the written expression of the parties'

intent." *Wal-Mart Stores, Inc. v. Xerox State & Local Sols., Inc.*, No. 20-0980, 2023 WL 2543049, at *12 (Tex. Mar. 17, 2023); *see also Carrillo v. Anthony Indep. Sch. Dist.*, 921 S.W.2d 800, 804 (Tex. App.—El Paso 1996, no writ) ("[The] terms of an employment contract must be given a plain-meaning interpretation if they are clear and unambiguous.").

The plain language of the parties' agreement covers Harris's Section 1981 claim against FedEx. Harris's claim is a "legal action" that she has brought against FedEx, so the contractual limitations period applies. There is nothing ambiguous about the language of the parties' agreement, and the district court's interpretation—limiting the clause to "lawsuits about events arising out of this contract of employment"—conflicts with black-letter principles of Texas contract interpretation. FedEx Br. 28 (citing ROA.5213-14).

B. Public policy does not bar contractual limitations periods.

Nor does public policy preclude enforcement of the agreement. Contractual limitations periods have a long pedigree. More than 80 years ago, it was already "well established" that "in the absence of a controlling statute to the contrary, a provision in a contract may validly limit, between the parties, the time for bringing an action on such contract to a period less than that prescribed in the general statute of limitations, provided that the shorter period itself shall be a reasonable period." *Order of United Commercial Travelers of Am. v. Wolfe*, 331 U.S. 586, 608 (1947).

Courts across the country have thus upheld the enforceability of contractual limitations periods to claims under § 1981. *See Thurman v. DaimlerChrysler, Inc.*, 397 F.3d 352, 358 (6th Cir. 2004) ("[W]e conclude that the abbreviated [six-months] limitations period contained in the employment application is reasonable."); *Taylor v. W. & S. Life Ins. Co.*, 966 F.2d 1188, 1206 (7th Cir. 1992) ("[W]e agree with the district court that the six-month limitations clause was reasonable."). Then-Judge (now Justice) Ketanji Brown Jackson reached the same conclusion:

> Consistent with the findings of other courts that have addressed the propriety of a six-month limitations period with respect to employment-related discrimination actions, this Court concludes that the six-month limitations period in Plaintiff's contract is reasonable as applied to Plaintiffs' Section 1981 claims.

Njang v. Whitestone Group, Inc., 187 F. Supp. 3d 172, 179 (D.D.C. 2016). And, as FedEx explains, these provisions have been enforced in the Southern District of Texas as well. *See* FedEx Br. 29 (collecting cases).

This Court should be particularly careful to avoid a circuit split on this issue: Many national employers, like FedEx, use uniform employment agreements across the country. The enforceability of these agreements, particularly with respect to federal claims, should not vary from state to state or circuit to circuit. Such unpredictability and disharmony should be avoided. Consider FedEx, for example, which is headquartered in the Sixth Circuit where, under *Thurman*, identical provisions are enforceable, but now faces uncertainty about whether these

contractual limitations periods will be enforced in Texas (and other states). Indeed, businesses are likely to consider the certainty of enforceability of such standard clauses when determining where to invest resources and create jobs. This Court should restore that certainty for both employers and employees and hold that contractual limitations periods on § 1981 claims are enforceable.

C. The district court misread *Burnett*.

In holding on summary judgment that public policy precludes enforcement of the contractual limitations period, the District Court erroneously relied on *Burnett v. Grattan*, 468 U.S. 42, 48 (1984). ROA.2365. *Burnett* does not concern contractual limitations periods—the Supreme Court instead considered which Maryland statute of limitations should be borrowed as the federal limitations period: an "administrative statute of limitations" or the general "statute of limitations for all civil actions for which the Code does not otherwise provide a limitations period." 468 U.S. at 45-46, 49. In selecting between these two limitations periods, the Supreme Court deferred to the Maryland legislature's "policy assessment of the state causes of action to which [a statute of limitations] applies." *Id.* at 52; *see also id.* at 53 ("[T]he length of a limitations period will be influenced by the legislature's determination of the importance of the underlying state claims, the need for repose for potential defendants, considerations of judicial or administrative economy, and the relationship to other state policy goals.").

Ultimately, the Supreme Court recognized a "divergence between the goals of the federal civil rights statutes and of the [Maryland] employment discrimination administrative statute." *Id.*; *see also id.* at 50 ("[B]orrowing an administrative statute of limitations ignores the dominant characteristic of civil rights actions[.]"). For this reason, the state administrations limitations period was "an inappropriate analog," *id.* at 50, and federal courts should borrow the State's general limitations period.

None of *Burnett*'s analysis concerns the enforceability of a contractual limitations period, and it does not justify refusing to enforce the provision here.

CONCLUSION

For these reasons, Amicus urges this Court to hold that the contractual limitations period applies to Plaintiff's § 1981 claim and that the punitive damages award exceeds constitutional limits.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this day of May 3, 2023 I served a true and correct copy of the foregoing Brief of United States Chamber of Commerce as Amicus Curiae in Support of Appellant on Counsel of record for all other parties through this Court's CM/ECF system:

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 3,814 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 29(a)(5).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 MSO in Times New Roman 14 point font.

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