11-5213-cv

United States Court of Appeals
for the
Second Circuit

TARA RANIERE, NICHOL BODDEN, and MARK A. VOSBURGH, on behalf of themselves Individually, and on behalf of all similarly situated persons,

Plaintiffs-Appellees,

– v. –

CITIGROUP INC., CITIBANK, N.A., and CITIMORTGAGE, INC.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING *EN BANC*

THOMPSON WIGDOR LLP
Attorneys for Plaintiffs-Appellees
85 Fifth Avenue
New York, New York 10003
(212) 257-6800

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Plaintiffs-Appellees ("Plaintiffs"),[1] submit this petition for rehearing *en banc* of the panel's August 12, 2013 decision, reversing on appeal the District Court's order denying Defendants-Appellants' ("Defendants") motion to compel arbitration. *See Raniere v. Citigroup, Inc.*, No. 11-5213, -- Fed. App'x --, 2013 WL 40462678 (2d Cir. Aug. 12, 2013) (summary order) ("*Raniere*" or the "*Raniere* Decision").

RULE 35(b) STATEMENT OF THE CASE

The *Raniere* Decision, which was a summary order based nearly entirely on the Second Circuit's decision in *Sutherland v. Ernst & Young LLP*, 12-304-cv, -- F.2d --, 2013 WL 4033844 (2d Cir. Aug. 9, 2013) ("*Sutherland*" or, the "*Sutherland* Decision"),[2] raises an issue of exceptional importance: whether collective action rights under the Fair Labor Standards Act ("FLSA") can be waived in an arbitration agreement as a condition of employment. In *Raniere* and *Sutherland*, the Second Circuit held that employees can be required to waive such rights in arbitration agreements as a condition of employment, and in so doing respectfully contravene the clear Congressional command contained in the FLSA, the National Labor Relations Act (the "NLRA") and the Norris-LaGuardia Act (the

[1] There is one additional named Plaintiff, Mark Vosburgh, who was not subject to the motion to compel arbitration.

[2] *Sutherland* followed a nearly identical track to *Raniere*. Oral argument on both cases were heard on March 20, 2013 by the same three-judge panel (the "Panel"), and *Sutherland* was issued only three days before *Raniere*.

"NLGA"), which override the federal policy favoring arbitration pursuant to the Federal Arbitration Act ("FAA").

Absent rehearing and reversal, *Raniere* and *Sutherland* will result in the deprivation of employees' substantive right to collective action and wholly undermine a wave of Great Depression era labor statutes that embodied national labor policy, and declared it "the public policy of the United States" that employees have the right to be "free from interference, restraint or coercion of employers" in . . . concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. §102. Permitted to stand, *Raniere* and *Sutherland* will promote the "substandard wages and excessive hours which endangered the national health and well-being . . . [and the] unequal bargaining power as between employer and employee . . . which endangered national health" and necessitated the FLSA. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 706-07 (1945).

The Panel's incorrect holding on this issue of exceptional importance was respectfully misguided by virtue of the Panel's: (i) failure to consider the text and legislative history of the FLSA, which evince an intent on the part of Congress to preclude collective action waivers, overriding any contrary command in the FAA; (ii) failure to consider the national labor policy and Congressional intent underlying the NLRA and the NLGA; and (iii) misunderstanding of the Supreme Court's decisions in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)

and *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011), which has created a direct conflict with this Court's previous readings of these cases, necessitating reconciliation by an *en banc* panel of the Court. As explained herein, an accurate analysis of these considerations requires affirmance of the District Court's order, and a holding that FLSA collective action waivers in arbitration agreements are *per se* unenforceable. Given the shortcomings of the Panel's analysis and the significance of this matter, Plaintiffs respectfully request a rehearing *en banc*.

RELEVANT FACTS

On April 8, 2011, Plaintiffs commenced this collective action to recover damages for Defendants' unlawful wage practices, alleging that Defendants improperly misclassified Home Lending Specialists as "exempt" and failed to provide them with premium overtime compensation as required by the FLSA.

On May 13, 2011, Defendants moved to compel arbitration as to Plaintiffs Raniere and Bodden based on an arbitration agreement which required, as a condition of continued employment, the pursuit of all claims on an individual basis in arbitration, and a waiver of the right to class or collective actions.

On November 22, 2011, the District Court held that the collective action waiver was unenforceable in relevant part because, *inter alia*, permitting a waiver of FLSA collective rights would (i) be contrary to Congressional intent underlying the FLSA, and (ii) deprive employees of their substantive statutory rights.

Defendants appealed the District Court's decision to this Court. On March 20, 2013, oral argument was held in both *Raniere* and *Sutherland* – a case also involving the enforceability of an FLSA collective action waiver – before the same Panel. On August 9, 2013, the Panel issued *Sutherland*, holding that, *inter alia*, the FLSA did not contain a Congressional command barring collective action waivers in arbitration agreements sufficient to override the FAA. *Sutherland*, slip. op. at 9.

In *Sutherland*, the Panel held that the FLSA's text does not evince an intention to preclude a waiver of collective action. *Id*. The Panel erroneously reasoned that even if "Congress intended to create some 'right' to class actions, if an employee must affirmatively opt in to such class action, surely the employee has the power to waive participation in a class action as well." *Id*., citing *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052-53 (8th Cir. 2013).

The Panel further – and also erroneously – held that Supreme Court precedent necessitates a finding that collective action waivers are permissible in the FLSA context. *Sutherland*, slip op. at 10. Specifically, *Sutherland* incorrectly cited *Gilmer* for the proposition that waiver of collective action rights under the Age Discrimination in Employment Act (the "ADEA") is permissible, despite the fact that the issue of collective action waiver was not even at issue in that matter. *See, generally, Gilmer*, 500 U.S. 20. The Panel also cited *Concepcion* for the principle that requiring availability of classwide arbitration would interfere with

the FAA, but failed to appreciate the vast legal and factual distinguishing factors between *Concepcion* and *Sutherland* that defy analogy. *Sutherland*, slip. op. at 10.

Moreover, the Panel failed to conduct an analysis as to whether Section 7 of the NLRA or the NLGA, which guarantee employees protection from employer restrictions of and interference with "concerted activity" for the benefit of "mutual aid or protection," render FLSA collective action waivers unenforceable. Instead, the Panel only stated, in a footnote, that it was not required to follow the National Labor Relations Board's (the "NLRB") holding in *In re D.R. Horton*, 357 NLRB No. 184 (Jan. 3, 2012), because it was not owed deference, and because it may have been decided without a proper quorum. *Sutherland*, slip. op. at 11 fn. 8.

Three days after deciding *Sutherland*, the Panel issued the *Raniere* Decision reversing the District Court's denial of Defendants' Motion to Compel Arbitration.

REASONS FOR GRANTING REHEARING

I. THE PANEL WAS RESPECTFULLY MISGUIDED IN FINDING THAT THE FLSA DOES NOT EMBODY A CONGRESSIONAL COMMAND THAT PRECLUDES THE WAIVER OF COLLECTIVE ACTION RIGHTS, WARRANTING A REHEARING *EN BANC*

The Panel, respectfully, did not conduct any meaningful analysis of the FLSA's statutory text, legislative goals or history prior to concluding that there is no Congressional command attendant to the FLSA that precludes collective action waivers in arbitration agreements. *See Shearson/American Exp. v. McMahon*, 482 U.S. 220, 227 (1987) (where Congress' intent to preclude waiver of statutory rights

and remedies can be evinced from "the statute's text, legislative history or from an inherent conflict between arbitration and the statute's underlying purpose," a waiver of such rights will be unenforceable). The Court should grant a rehearing *en banc* to ensure that all the salient factors central to whether such a command exists are fully considered on this issue of exceptional significance.

A. Congressional Command is Evinced From the Text of the FLSA

Congress expressly enumerated within the substantive text of Section 216(b) of the FLSA, the unique statutory "right" to collective action. Specifically, Section 216(b) refers to "*the right* provided by this subsection to bring an action by or on behalf of an employee, and *the right* of any employee to become a party plaintiff to any such action[.]" 29 U.S.C. § 216(b). Congress' express inclusion of the unique right to collective action within the substantive text of the FLSA alone demonstrates that there was a Congressional command guaranteeing employees the right to collective actions which overrides any contrary command in the FAA.

This proposition is bolstered by a line of Supreme Court cases regarding the reach of the FAA, culminating recently in *American Express Co. v. Italian Colors Restaurant*. 133 S.Ct. 2304 (2013) ("*AmEx*"). It is not in dispute that the FAA requires the enforcement of arbitration agreements according to their terms, unless overridden by a contrary Congressional command. *See CompuCredit v. Greenwood*, 132 S. Ct. 665, 669 (2012). In *CompuCredit*, the Supreme Court

found that the Credit Repair Organizations Act ("CROA") did not contain a Congressional command precluding judicial forum waivers, in part because the statute did not expressly provide for the "right" to a judicial remedy. Similarly, the *AmEx* Court determined that the Sherman and Clayton Acts (the "Antitrust Laws") did not evince an intention to preclude class waivers contained within an arbitration clause in part because "the Sherman and Clayton Acts *make no mention* of class actions." *AmEx*, 133 S. Ct. at 2309 (emphasis added). Thus, the *AmEx* Court suggested that so much as a mere "*mention*" of class actions could have evinced a command to preclude class waiver. Through *CompuCredit* and *AmEx*, the Supreme Court has told us that the inclusion of class or collective actions in the substantive text of a statute – or even mere *mention* of such a right – is highly probative as to whether there is a Congressional command overriding the FAA.

The Supreme Court has also told us that the inclusion of statutory language regarding the right to class or collective actions, or lack thereof, must be considered in the context of the period in which the statute was passed. In *CompuCredit*, the Court found that the CROA did not contain any Congressional command overriding the FAA's mandate in part because "the early 1990's saw increased use of arbitration clauses" such that when CROA was passed, "[h]ad Congress meant to prohibit these provisions in CROA, it would have done so in a manner less obtuse;" namely, the intention would have been manifested in express

statutory language. *Compucredit*, 132 S.Ct. at 672. The *AmEx* Court determined a lack of Congressional command in the Antitrust Laws in part because those statutes "were enacted decades before the advent of Federal Rule of Civil Procedure 23[.]" *AmEx*, 133 S. Ct. at 2309. Given that Rule 23 class actions were unavailable when the Antitrust Laws were enacted, the Supreme Court said that "it would be remarkable" to find Congressional intent to preclude class waivers. *Id*.

In contrast to *CompuCredit* and *AmEx*, Congress built the right to collective action directly into the substantive text of the FLSA. Moreover, in contrast to the Antitrust Laws at issue in *AmEx*, Rule 23 had already been promulgated when the FLSA was passed, such that there was minimal need to expressly provide for the right to collective action, unless Congress intended for this right to be a nonwaiveable, substantive feature of the law. Furthermore, in contrast to the CROA, at the time the FLSA was enacted, class action waivers were sparse, giving little need for Congress to more expressly address such waivers. In addition, though the FAA had been enacted as of the passage of the FLSA, the FAA expressly excluded contracts of employment at that time. *See* 9 U.S.C. § 1. It was not until *Circuit City Stores v. Adams*, 532 U.S. 105, 119 (2001) that employment contracts became covered. Therefore, it would be "remarkable" if the Supreme Court were to find that collective action rights expressly provided in the FLSA failed to demonstrate Congressional intent to preclude waiver.

Lastly, in assessing the text of the Antitrust Laws, the *AmEx* Court recognized that Congress had "taken some measures to facilitate affordable litigation of antitrust claims" by expressly permitting enhanced treble damages, which demonstrated that "*Congress has told us* that it is willing to go, in certain respects, beyond the normal limits of law in advancing its goals of deterring and remedying unlawful trade practices." *AmEx*, 133 S.Ct. at 2309 (emphasis added). However, the Supreme Court continued, "to say that Congress must have intended whatever departures from those normal limits [to] advance antitrust goals is simply irrational." *Id.* Put simply, the mere fact that the Antitrust Laws provide some added measures to aid litigants in pursuing their claims does not demonstrate Congressional intent to require even further measures, such as the preclusion of class action waivers. By this analysis, *Congress has also told us* that it is willing to go even further beyond the normal limits of law in advancing the goals of the FLSA; namely, by embedding the collective action into the statute. Thus, *Congress has told us* – to use the exact words of *AmEx* – through statutory text that these collective action rights are necessary to advance the goals of the FLSA.

B. Congressional Command is Evinced From the Legislative History of the FLSA and the Great Depression Era National Labor Policy

The Panel also failed to consider the FLSA's goals and legislative history. The FLSA was enacted during the Great Depression era as landmark legislation for the country's social and economic development. *See Brooklyn Savings*, 324 U.S.at

706-07; 83 Cong. Rec. 9264 (calling the FLSA ". . . the most important, the most momentous and far-reaching measure that . . . [i]t affects the welfare of millions . . . who have little voice for themselves."). The right of employees to act collectively has been embedded in the national policy since the passage of a wave of labor laws in the 1930's – *i.e.*, the NLGA, the NLRA and the FLSA.

Designed to enforce these goals, Congress provided a "comprehensive remedial scheme" in Section 216(b). *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 144 (2d Cir. 1999). Absent this enforcement scheme, the FLSA would cease to have Congress' desired effect. Section 216(b) enforcement remedies, are therefore nonwaivable pursuant to Congressional command. *See, e.g., Brooklyn Savings*, 324 U.S. at 704-7 (allowing waiver of liquidated damages would "thwart the legislative policy the FLSA was designed to effectuate"); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 740 (1981) ("FLSA rights cannot be . . . waived because this would nullify the purposes of the statute and thwart the legislative policies it was designed to effectuate").

Moreover, collective action rights carry out Congressional intent by deterring noncompliance. The deterrent element of the FLSA is most effectively derived from the ability of employees to join together to assert their rights collectively, and to provide notice to other employees of their right to collective action. The deterrent element of collective actions is indistinguishable from that of

liquidated damages, another of Section 216(b)'s remedies which has been held by the Supreme Court not subject to waiver. *Brooklyn Savings*, 324 U.S. at 709-10.

The background of the FLSA defies the comparison to the Antitrust Laws suggested by the Panel. *Sutherland*, slip. op. at 9. In enacting the Sherman Act in 1890, Congress rejected a proposed amendment that would have permitted a type of plaintiff class action in which liability would be determined as to a large group of plaintiffs, but damages would be assessed to each individually. *See* Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 Mich. L. Rev. 1, 25 (1989)); *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (Congress "rejected a proposal to allow a group of consumers to bring a collective action as a class.").

Also unlike the Antitrust Laws, courts have long recognized the unique risks that employees face in bringing individual employment-related claims. *See, e.g.*, *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) ("it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions"). Absent the collective actions provided by Congress in Section 216(b), intimidation and retaliation attendant to individual actions will severely undermine the statute's intent. The Antitrust Laws are entirely distinguishable from the FLSA given that there is simply no comparison between consumers pursuing anti-trust claims and employees bringing claims against an employer.

In sum, legislative history of the FLSA demonstrates a Congressional command does not succumb to the FAA. Due to the exceptional significance of this matter, an *en banc* Court should consider all these factors.

II. THE PANEL WAS MISGUIDED IN FINDING THE NLRA AND NLGA DO NOT PRECLUDE COLLECTIVE ACTION WAIVERS

Separately, the FLSA's collective action rights are guaranteed by the NLRA and the NLGA, which prohibit employer restriction of and interference with "concerted activity" by employees for "mutual aid and protection." 29 U.S.C. §§102, 157. The Supreme Court has plainly held that a court cannot enforce a contractual provision that violates the NLRA. *Kaiser Steel Corp. v. Mullin*, 455 U.S. 72, 83-84 (1982). The Panel failed to analyze the collective action waiver in the context of these statutes, only deciding that *D.R. Horton* was not controlling on the Panel. *Sutherland*, slip op. at 11 n.8.

Whether *D.R. Horton* is controlling or not, the reasoning of the NLRB was sound. The NLGA was enacted in 1932 and declared it "the public policy of the United States" that employees have the right to be "free from interference, restraint or coercion of employers in . . . concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. §102. Moreover, "[a]ny undertaking or promise . . . in conflict with" that policy is itself "contrary to the public policy of the United States [and] shall not be enforceable in any court[.]" 29 U.S.C. §103. In 1935, Congress passed the NLRA and again declared "[e]mployees shall have the right to

. . . engage in concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. §157. The Supreme Court has characterized the NLRA's statutory right to engage in concerted action for mutual aid as "fundamental" to national labor policy. *See, e.g., NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937). It was in short succession thereafter that the FLSA was passed in 1938.

Together, the NLGA and NLRA guarantee employees "the right to . . . engage in . . . concerted activities for the purpose of . . . mutual aid or protection." Moreover, the NLGA expressly provide that employees should be free from interference in the "designation of representatives" in connection with this concerted action. 29 U.S.C. §102. Section 8 of the NLRA also provides that it is an "unfair labor practice for an employer [] to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 157." 29 U.S.C. §158(a)(1). It can hardly be disputed that collective actions are "concerted activity" through a "designation of representatives" for "mutual aid or protection."

Therefore, collective action waivers directly violate the NLRA and NLGA. The Panel did not meaningfully address these arguments, and due to the exceptional significance of these rights, a rehearing *en banc* should be permitted.

III. THE PANEL MISUNDERSTOOD *GILMER* AND *CONCEPCION*

En banc rehearing is also necessary because the Panel incorrectly cited Supreme Court dicta in *AmEx* (regarding *Gilmer*) and *Concepcion*, respectively.

The Panel's misunderstanding is highlighted by this Court's alternate interpretations of *Gilmer* and *Concepcion* in previous opinions.

In *AmEx*, the Supreme Court stated that it previously "had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue, the Age Discrimination Act, expressly permitted collective action" in *Gilmer*. *AmEx*, 133 S. Ct. at 2311. In *Sutherland*, the Panel incorrectly followed this *dicta*. *Sutherland*, slip. op. at 10-11, fn.7. In fact, the *Gilmer* Court did not have "no qualms enforcing a class waiver in an arbitration agreement," as the enforceability of a class action waiver was not even at issue given that it was a single plaintiff action and the arbitral forum at issue permitted class actions. *AmEx*, 133 S. Ct. at 2311. This misunderstanding of *Gilmer* is shown by the fact that this Court has already correctly stated that "[w]e cannot agree with this view of *Gilmer* because a collective, and perhaps a class action remedy, in fact *was* available in that case." *See In re American Express Merchants' Litigation*, 554 F.3d 300, 314 (2d Cir. 2009) (emphasis in original). Thus, *Sutherland* and *Raniere* are in direct conflict with this Court's earlier and correct interpretation of *Gilmer*. An *en banc* Court can correct this apparent confusion.

Furthermore, the Panel's reliance on *Concepcion* in support of finding that FLSA collective action waivers are permissible is misguided. In *Concepcion*, the Supreme Court held a California judicial rule holding unconscionable class

arbitration waivers in consumer contracts preempted by the FAA. *Concepcion*, 133 S.Ct. at 1748. In contrast, there is no concern of preemption at issue here. Rather, the issue is whether the substantive federal statutes at issue here (the FLSA, NLA and NLGA) carry a Congressional command that exceeds the presumption towards arbitration embodied in the FAA, which they do.

CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request that their petition for rehearing *en banc* be granted, the District Court's denial of Defendants' motion to compel be upheld, this matter be remanded to the District Court for further proceedings, and such other and further relief that the Court deems just and proper be granted.

Dated: August 26, 2013
New York, New York

Respectfully submitted,

THOMPSON WIGDOR LLP

By: _____/s/_____
Douglas H. Wigdor
David E. Gottlieb

85 Fifth Avenue
New York, New York 10003
Telephone: (212) 257-6800
Facsimile: (212) 257-6845
dwigdor@thompsonwigdor.com
dgottlieb@thompsonwigdor.com

Attorneys for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE WITH RULE 35(b)(2)

Certificate of Compliance With Page Limitation, Typeface Requirements, and Type Style Requirements.

1. This brief complies with the page limitation of Fed. R. App. P. 35(b)(2) because this brief does not exceed 15 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft® Office Word 2010 in Times New Roman font using a 14-point font size.

Dated: August 26, 2013
New York, New York

Respectfully submitted,

THOMPSON WIGDOR LLP

By: _____/s/_____
Douglas H. Wigdor
David E. Gottlieb

85 Fifth Avenue
New York, New York 10003
Telephone: (212) 257-6800
Facsimile: (212) 257-6845
dwigdor@thompsonwigdor.com
dgottlieb@thompsonwigdor.com

Attorneys for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Appellee's Petition for Rehearing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on August 26, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

_____/s/_____
David E. Gottlieb

11-5213-cv
Raniere, et al. v. Citigroup Inc.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this Court's Local Rule 32.1.1. When citing a summary order in a document filed with this Court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 12th day of August, two thousand thirteen.

PRESENT:

RALPH K. WINTER,
JOSÉ A. CABRANES,
CHESTER J. STRAUB,
Circuit Judges.

TARA RANIERE, NICHOL BODDEN, and MARK A. VOSBURGH, on behalf of themselves individually, and on behalf of all similarly situated persons,

Plaintiffs-Appellees,

v.

CITIGROUP INC., CITIBANK, N.A., CITIMORTGAGE INC.,

Defendants-Appellants.[1]

FOR DEFENDANTS-APPELLANTS: SAM S. SHAULSON (Howard M. Radzely, William S.W. Chang, *on the brief*), Morgan, Lewis & Bockius LLP, New York, NY, Washington, DC, and Houston, TX.

[1] The Clerk of Court is directed to amend the caption of this case to conform to the listing of the parties shown above.

FOR PLAINTIFFS-APPELLEES: DOUGLAS H. WIGDOR (David E. Gottlieb, *on the brief*), Thompson Wigdor LLP, New York, NY.

FOR AMICI CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES AND SOCIETY FOR HUMAN RESOURCE MANAGEMENT: Andrew J. Pincus, Evan M. Tager, Archis A. Parasharami, Kevin Ranlett, Scott M. Noveck, Mayer Brown LLP, Washington, DC; Robin S. Conrad, National Chamber Litigation Center, Inc., Washington, DC.

FOR AMICI CURIAE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, NATIONAL EMPLOYMENT LAW PROJECT, AND THE EMPLOYEE RIGHTS ADVOCACY INSTITUTE FOR LAW & POLICY: Herbert Eisenberg, Eisenberg & Schnell LLP, New York, NY; David Borgen, Joseph E. Jaramillo, Goldstein, Demchak, Baller, Borgen & Dardarian, Oakland, CA; Rebecca M. Hamburg, National Employment Lawyers Association, San Francisco, CA.

Appeal from an order of the United States District Court for the Southern District of New York (Robert W. Sweet, *Judge*).

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the District Court's November 22, 2011 opinion and order denying defendants' motion to compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, is **REVERSED** and the cause is **REMANDED** to the District Court for proceedings consistent with this summary order.

BACKGROUND

On April 6, 2011, plaintiffs-appellees Tara Raniere, Nichol Bodden, and Mark Vosburgh brought this action against defendants-appellants Citigroup Inc., Citibank, N.A., and CitiMortgage Inc. (jointly, "Citi") to recover allegedly uncompensated "overtime" wages pursuant to the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 201, *et seq.*, and the New York Labor Law

("NYLL") § 190 *et seq*. Raniere and Bodden (jointly, "plaintiffs"),[2] who are currently employees of Citi, assert that Citi "improperly classified [them] as exempt from the provisions of the FLSA and improperly denied overtime compensation to which they were entitled." *Raniere v. Citigroup Inc.*, 827 F. Supp. 2d 294, 299 (S.D.N.Y. 2011). In particular, plaintiffs allege that they were not paid for time worked in excess of 40 hours per week despite the fact that "throughout their course of employment, they worked substantially in excess of 40 hours per week, frequently working between 50 and 70 hours per week." *Id.* at 300 (internal quotation marks omitted).

On May 13, 2011, Citi filed a motion to compel arbitration pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq*. Citi asserted that during plaintiffs' employment, they "entered into binding arbitration agreements that encompass their claims in this suit." *Id.* at 304. The relevant arbitration agreement, Citi's Employment Arbitration Policy,

> makes arbitration the required and exclusive forum for the resolution of all disputes arising out of or in any way related to employment based on legally protection rights . . . that may arise between an employee or former employee and Citi . . . including, without limitation, claims, demands, or actions under . . . the Fair Labor Standards Act of 1938 . . . and any other federal, state, or local statute, regulation, or common-law doctrine regarding employment, employment discrimination, the terms and conditions of employment, termination of employment, compensation, breach of contract, defamation, retaliation, whistle-blowing, or any claims arising under the Citigroup Separation Pay Plan.

App'x 102. Citi's Employment Arbitration Policy also explicitly provides that "this Policy applies only to claims brought on an individual basis. Consequently, neither Citi nor any employee may submit a class action, collective action, or other representative action for resolution under this Policy." *Id.*

The District Court found that Citi's Employment Arbitration Policy applied to plaintiffs' claims and that plaintiffs had agreed to arbitrate the claims at issue, *see Raniere*, 827 F. Supp. 2d at

[2] Plaintiff Mark A. Vosburgh was employed by Citi from October 30, 2002, to February 2, 2009. Citi's motion to compel arbitration did not mention Vosburgh, and the District Court's opinion did not state that Vosburgh was subject to the underlying arbitration agreement. Accordingly, we refer only to Raniere and Bodden as "plaintiffs."

305-08, but it held that the class-action waiver provision in that agreement was not enforceable, concluding that "a waiver of the right to proceed collectively under the FLSA is unenforceable as a matter of law," *id.* at 314. The District Court also stated its view that the "effective vindication doctrine" and our decision in *In re American Express Merchants' Litigation*, 634 F.3d 187, 196 (2d Cir. 2011) ("*Amex II*"), "require that if any one potential class member meets the burden of proving that his costs preclude him from effectively vindicating his statutory rights in arbitration, the clause is unenforceable as to that class or collective." *Raniere*, 827 F. Supp. 2d at 317. Because the District Court held that "the collective action waiver provision is unenforceable," it denied Citi's motion to compel plaintiffs to submit their claims to arbitration on an individual basis. *Id.*

This appeal followed.

DISCUSSION

We have jurisdiction to consider this appeal because the FAA authorizes interlocutory appeals from denials of motions to compel arbitration. *See* 9 U.S.C. § 16(a)(1)(A)-(B). "We review *de novo* a district court's refusal to compel arbitration." *Parisi v. Goldman, Sachs & Co.*, 710 F.3d 483, 486 (2d Cir. 2013).

Plaintiffs' central argument is that we should affirm the District Court because the text and legislative history of the FLSA are clear that "[t]he right to collective action is an integral and fundamentally substantive element of the FLSA that cannot be subject to waiver." Plaintiffs' Br. 10. That argument, however, is directly foreclosed by our recent decision in *Sutherland v. Ernst & Young LLP*, No. 12-304-cv (2d Cir. filed Aug. 9, 2013). In *Sutherland*, we applied the Supreme Court's recent decision in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), to claims that were virtually identical to those raised here. In doing so, we held that "[a]s in the antitrust context, no contrary congressional command requires us to reject the waiver of class arbitration in the FLSA context." *Sutherland*, slip. op. at 9 (internal quotation marks and brackets omitted). We

also noted that "every Court of Appeals to have considered this issue has concluded that the FLSA does not preclude the waiver of collective action claims." *Id.* (collecting cases).

Plaintiffs' alternative argument in support of affirming the District Court is that our decisions in *In re American Express Merchants' Litigation*, 554 F.3d 300 (2d Cir. 2009) ("*Amex I*"), *Amex II*, 634 F.3d at 187, and *In re American Express Merchants' Litigation*, 667 F.3d 204 (2d Cir. 2012) ("*Amex III*"), instruct that "collective action waivers are unenforceable where any putative member of the class or collection would be unable to vindicate their statutory rights." Plaintiffs' Br. 47. But *Italian Colors* reversed *Amex III* and requires us to conclude that the District Court's statements in this regard were erroneous. Indeed, in *Italian Colors*, the Supreme Court held that although the effective vindication doctrine was designed "to prevent [the] prospective waiver of a party's *right to pursue* statutory remedies," 133 S. Ct. at 2310 (internal quotation marks omitted), that doctrine does not apply simply because it is not "economically feasible" for a plaintiff to enforce his statutory rights individually, *id.* at 2311 n.4 (emphasis omitted). In clarifying the limits of the effective vindication doctrine in this manner, the Supreme Court specifically noted that "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy." *Id.* at 2311.

In sum, substantially for the reasons stated in *Italian Colors* and *Sutherland*, we conclude that the District Court erred in concluding that (1) "a waiver of the right to proceed collectively under the FLSA is unenforceable as a matter of law," *Raniere*, 827 F. Supp. 2d at 314, and (2) "if any one potential class member meets the burden of proving that his costs preclude him from effectively vindicating his statutory rights in arbitration, the clause is unenforceable as to that class or collective," *id.* at 317.

CONCLUSION

We have considered all of plaintiffs' arguments on appeal and find them to be without merit. In light of the Supreme Court's recent decision in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2311 (2013), and our recent decision in *Sutherland v. Ernst & Young LLP*, No. 12-304-cv (2d Cir. filed Aug. 9, 2013), we **REVERSE** the District Court's November 22, 2011 opinion and order denying defendants' motion to compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, and we **REMAND** the cause to the District Court for proceedings consistent with this summary order.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk