No. 16-285

IN THE

Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
Petitioner,

v.

JACOB LEWIS,
Respondent.

On a Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether an agreement that requires an employer and an employee to resolve employment-related disputes through individual arbitration, and waive class and collective proceedings, is enforceable under the Federal Arbitration Act, notwithstanding the provisions of the National Labor Relations Act.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, *amicus curiae* Atlantic Legal Foundation states that Atlantic Legal Foundation is a not-for-profit corporation incorporated under the laws of the Commonwealth of Pennsylvania. It has no shareholders, parents, subsidiaries or affiliates.

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INTEREST OF *AMICUS CURIAE*[1]

The Atlantic Legal Foundation is a non-profit public interest law firm founded in 1976 whose mandate is to advocate and protect the principles of less intrusive and more accountable government, a market-based economic system, and individual rights. It seeks to advance this goal through litigation and other public advocacy and through education. Atlantic Legal Foundation's board of directors and legal advisory council consist of legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists. Atlantic Legal's directors and advisors are familiar with the role arbitration clauses play in the contracts entered into between companies and between companies and consumers. Some of Atlantic Legal's directors and advisers have decades of experience with arbitration – as legal counsel, as arbitrators, and as members or supporters of organizations that administer

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[1] Pursuant to Rule 37.2(a), *amicus* has given notice of intent to file this brief to all parties more than 10 days before this brief was filed. All parties have consented to the filing of this brief.; the consents have been lodged with the Clerk.

Pursuant to Rule 37.6, *amicus* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* nor their counsel made a monetary contribution to the preparation or submission of this brief.

arbitration regimes. They are familiar with the benefits of arbitration, especially the role of arbitration (and other "alternative dispute resolution" mechanisms) in facilitating business and commerce and in alleviating the burdens on courts and parties.

The abiding interest of the Foundation in the promotion of arbitration as an efficient alternative to protracted litigation is exemplified by its participation as *amicus* or as counsel for *amicus* in numerous cases before this Court, involving arbitration issues, including *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) and *DIRECTV, INC. v. Imburgia*, 136 S. Ct. 463 (2015).

There is a clear, acknowledged, and undisputed circuit split The federal courts of appeals are divided as to whether the National Labor Relations Act, 29 U.S.C. *et seq*. (NLRA) overrides the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq*. ("FAA")'s presumption that arbitration agreements are enforceable as written. The two circuits that have held arbitration agreements in the labor-relations context are unenforceable acknowledge a clear circuit split and all of the petitioners in the three cases now pending before the Court that raise this issue – employers and the NLRB alike – agree that there is a serious and direct circuit split.

Amicus also believes that the decision of the Court of Appeals for the Seventh Circuit in this case is inconsistent with the purposes of the FAA

and both the long-standing and recent teaching of this Court regarding arbitration, and is in direct conflict with decisions of at least three other Circuits.

The decision below, if allowed to stand, will deter many employers from incorporating arbitration as a dispute resolution mechanism in their dealings with employees, thus frustrating a fundamental purpose of the FAA.

PRELIMINARY STATEMENT

The Supreme Court is being asked to resolve a clear circuit split arising from contrary conclusions drawn recently by several circuits about whether class and collective action waivers in employment arbitration agreements violate the National Labor Relations Act, and whether the NLRA overrides the Federal Arbitration Act in three petitions for certiorari filed in September 2016, namely the instant case as well as *Ernst & Young, LLP v. Morris*, No. 16-300, (filed Sept. 8, 2016) and *NLRB v. Murphy Oil*, No. 16-307 (filed Sept. 9, 2016). The fact that three petitions have been filed with the Court in such a two week period, involving very similar legal and factual issues, and that petitions have been filed by both employers and the NLRB, indicates the importance of the issues and the importance of the Court determining the scope of employers' and employees' rights under the two federal statutory schemes at issue as applied to arbitration agreements that contain a waiver of

the right to engage in class litigation or class arbitration.

The FAA establishes a presumption in favor of enforcing arbitration agreements as written that can be overcome by another statute, but only if that statute is a "congressional command" that is contrary to the FAA's mandate.

The Ninth Circuit in *Morris v. Ernst & Young, LLP*, No. 13-16599, 2016 WL 4433080 (9th Cir. Aug. 22, 2016), petition for cert. pending, No. 16-300 (filed Sept. 8, 2016), and Seventh Circuit in this case held that the NLRA is a "congressional command" that creates an exception to the FAA's promotion of arbitration as a preferred means of dispute resolution. The Fifth Circuit, in *Murphy Oil, U.S.A., Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), petition for cert. pending, No. 16-307 (filed Sept. 9, 2016) held that the NLRA is not an unambiguous "congressional command," and that it did not fall within the FAA's "saving clause" of "illegality."

Petitioners in all three cases – employers and the NLRB (charged with protecting the interests of employees) – argue in strikingly similar language that the issue whether an employer can lawfully require its employees to sign agreements mandating individual arbitration of workplace disputes "is an important and recurring question" about the federal policy encouraging arbitration embodied in the Federal Arbitration Act and the scope of employees' rights under the NLRA. See NLRB Petition in No. 16-307 at 9; see also Ernst

& Young Petition in No. 16-330 at 10 and Epic Petition in this case at 4.

The employer petitioners in the cases arising from the decisions of the Seventh and Ninth Circuits – the case at bar and *Ernst & Young v. Morris*, No. 16-330 – diverge from the NLRB primarily in their respective positions on the substantive issue in each case.

The outcome of these cases has far-reaching implications for employers and employees across the United States. If the Seventh and Ninth Circuits' rule stands, employers doing business in those circuits will be subject to a different legal regime than employers with employees in the Second, Fifth, and Eighth Circuits, and even employers in those circuits face the real threat of enforcement action by the NLRB before administrative tribunals until the Supreme Court establishes a uniform nationwide rule.

BACKGROUND

Epic Systems is a Wisconsin-based developer of computer software for recording, organizing, storing and sharing healthcare data. Epic employees develop, install, and maintain the software.

In April 2014, Epic sent an email containing an arbitration agreement to many of its employees. The email asked recipients to confirm that they understood and consented to the agreement, or

they could request that someone contact them about it. Pet. App. 2a.

Lewis, a technical writer at Epic, acknowledged the arbitration agreement and continued to work at Epic. The agreement provided that by continuing to work at Epic, Lewis was deemed to have accepted its terms. In the agreement, Lewis waived his "right to participate in or receive money or any other relief from any class, collective, or representative proceeding."

Lewis left Epic's employ and later filed suit in federal court in Wisconsin on behalf of himself and other technical writers alleging the company had violated the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (FLSA), by misclassifying them and depriving them of overtime pay.

Epic moved to dismiss Lewis's claim and compel individual arbitration. Lewis responded that the agreement's class and collective action waiver was unenforceable because it interfered with his right to engage in concerted activities under Section 7 of the NLRA. The district court agreed with Lewis's arguments and Epic appealed to the Seventh Circuit. Epic appealed, and the Seventh Circuit affirmed.

The Seventh Circuit's Decision

The Seventh Circuit Court of Appeals concluded that "[a] collective, representative, or class legal proceeding is * * * a 'concerted activit[y]'" under NLRA Section 7. Pet. App. 10a (brackets in original), and Section 8 of the NLRA prohibits an

employer from interfering with an employee's right to engage in concerted activity, 29 U.S.C. § 158(a)(1). Thus, the court held, the NLRA renders the waiver of class and collective proceedings "unenforceable." Pet. App. 11a.

The Seventh Circuit began its analysis by adopting the NLRB's reasoning – promulgated in *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012) – that engaging in class, collective or representative proceedings is "concerted activity" and a protected right under Section 7 of the NLRA, and thus it would be an unfair labor practice under Section 8 of the NLRA for an employer "to interfere with, restrain, or coerce employees in the exercise" of this right. According to the court, the NLRA's legislative history and purpose indicated that "concerted activity" unambiguously includes representative, class, joint and collective actions. Further, even if the court were to find the term "concerted activity" ambiguous, it would then have to defer to the NLRB's interpretation of that term and find the class action waiver to be unlawful.

The Seventh Circuit rejected Epic's three principal arguments. First, Epic argued that because class actions under Rule 23 of the Federal Rules of Civil Procedure did not exist when Congress enacted the NLRA in 1935, Congress could not have intended Rule 23 class actions to be "concerted activity" under the NLRA. The court, however, held that "concerted activity" is not limited to what was "concerted activity" in 1935. Also, the arbitration agreement not only waived

Rule 23 class actions, it waived all forms of representative, collective or joint proceedings, and these types of proceedings, including collective actions under §216(b) of the FLSA, existed prior to 1935.

Second, the Seventh Circuit rejected the argument, accepted by all the other circuits that had theretofore ruled on the matter, that the arbitration agreement must be enforced under the Federal Arbitration Act (FAA). The court even went so far as to say that "it is not clear to us that the FAA has anything to do with this case." Nevertheless, the court proceeded to examine whether there was a conflict between the FAA's mandate to place arbitration agreements on the same footing as any other contract and the NLRA. In doing so, the court addressed the FAA's "savings clause," contained in 9 U.S.C. § 2, which provides that arbitration agreements are "enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Pet.App. at 14a-15a (quoting 9 U.S.C. § 2) and "[i]llegality is one of those grounds." *Id*. at 15a. The court found the savings clause provided a way to harmonize the NLRA and FAA, by finding the agreement's class waiver to be unenforceable. According to the court, the agreement is illegal under the NLRA, and because an illegal agreement is not enforceable under the FAA's savings clause, there is no conflict between the FAA and NLRA. *Id*. at 20a.

Finally, Epic contended that even if Section 7 protects a right to class or collective actions, the right is merely procedural not substantive, and the FAA requires enforcement of the agreement since it does not involve the forfeiture of a substantive right. The court rejected this argument because it found the right to engage in "concerted activity" through class or collective actions is a substantive right under the NLRA, even though the class action device itself is procedural. Since the arbitration agreement required employees to relinquish a right that the NLRB has declared to be substantive, it was not enforceable under the FAA.

The Seventh Circuit acknowledged that the Fifth Circuit in *D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344 (5th Cir. 2013), had come "to the opposite conclusion," Pet. App. 15a, and proceeded to "create a conflict in the circuits." *Id.* at 15a n.†.

SUMMARY OF ARGUMENT

The split of authority among several circuits in this case is clear, acknowledged, and undisputed. The federal courts of appeals are divided, three to two, on whether the NLRA overrides the FAA's presumption that arbitration agreements are enforceable as written, requires that employment-related disputes be resolved by individual arbitration. Indeed, the two circuits that have held arbitration agreements in the labor-relations context are unenforceable acknowledge a clear circuit split and all of the

petitioners in the three cases now pending before the Court that raise this issue – employers and the NLRB alike – agree that there is a serious and direct circuit split.

Likewise, all three petitions pending before the Court raising the issue presented in this case – from employers and the NLRB – argue that the circuit split is fully developed, acknowledged, and ripe for resolution by this Court.

Review is also warranted because the decision below was incorrect. It ignores this Court's teaching that the FAA embodies "a liberal federal policy favoring arbitration agreements" and that arbitration agreements must be enforced according to their terms, that the foregoing principle applies even when the claims at issue are federal statutory claims, unless the FAA's mandate has been overridden by a contrary congressional command which must be expressed with "clarity."

ARGUMENT

I. THERE IS AN ACKNOWLEDGED AND INDISPUTABLE SPLIT OF AUTHORITY AMONG THE CIRCUITS ON THE QUESTION PRESENTED.

The split of authority in this case is clear, acknowledged, and undisputed. The federal courts of appeals are divided, three to two, on whether the NLRA overrides the FAA's presumption that arbitration agreements are enforceable as written, requires that employment-related disputes be

resolved by individual arbitration. Indeed, the two circuits that have held arbitration agreements in the labor-relations context are unenforceable acknowledge a clear circuit split and all of the petitioners in the three cases now pending before the Court that raise this issue – employers and the NLRB alike – agree that there is a serious and direct circuit split.

The Second, Fifth, and Eighth Circuits have held that arbitration agreements that incorporate waivers of class and collective arbitration and litigation in the employment context are enforceable under the FAA.

The Fifth Circuit has squarely and repeatedly upheld class waivers in employment-related arbitration agreements. In *D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344, 362 (5th Cir. 2013), the court rejected a decision by the National Labor Relations Board (NLRB or Board), which had found the class waiver at issue unenforceable under the FAA and the NLRA. *See D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012). The Fifth Circuit considered and rejected the NLRB's decision that the FAA's saving clause was a basis for invalidating class waivers because of alleged " illegality" under the NLRA. 737 F.3d at 360. The NLRB's analysis was flawed, the Fifth Circuit explained, because its finding of illegality had "the effect of * * * disfavor[ing] arbitration." *Id.* at 359 (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346 (2011)). The court therefore concluded that the defense falls outside the saving clause. *Id.*

The Fifth Circuit then analyzed the issue in the schema required by this Court's in cases in which a party seeks to avoid arbitration based on a purported conflict with another federal statute such as the NLRA. The court asked whether the NLRA is "'a contrary congressional command'" that overcomes the FAA's presumption in favor of arbitration. *Id.* (quoting *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012). The Fifth Circuit determined that "there is no basis on which to find that the text of the NLRA supports a congressional command to override the FAA." *Id.* In so holding, the Fifth Circuit recognized that "[e]very one of our sister circuits to consider the issue" has "held arbitration agreements containing class waivers enforceable," and the court was "loath to create a circuit split." *Id.* at 362 and the proper result was that a class waiver "must be enforced according to its terms." *Id.*

The Fifth Circuit has adhered to this view consistently since its decision in *D.R. Horton*, in the face of serial challenges to its decisions from the NLRB, challenges that are brought when aggrieved parties elect to file petitions to review NLRB rulings in the Fifth Circuit. *See Citi Trends, Inc. v. NLRB,* No. 15-60913, 2016 WL 4245458, at *1 (5th Cir. Aug. 10, 2016) (per curiam) (unpublished); *PJ Cheese, Inc. v. NLRB*, No. 15-60610, 2016 WL 3457261, at *1 (5th Cir. June 16, 2016) (per curiam); and, most recently, in *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013,

1021 (5th Cir. 2015), petition for cert. pending, No. 16-307 (filed Sept. 9, 2016).

In *Murphy Oil*, the Fifth Circuit again addressed the legality of individual arbitration agreements under Sections 7 and 8(a) of the NLRA and once again upheld the legality of an arbitration agreement that contains a waiver of the right to commence or participate in class-wide arbitration or litigation. The Fifth Circuit considered a nearly identical case only two years earlier in *D.R. Horton*.

Murphy Oil's arbitration agreement included a waiver of the employee's right to pursue class and collective actions. The agreement provided that employees must individually "resolve any and all disputes or claims…which relate…to Individual's employment…by binding arbitration." Several employees filed a FLSA collective action and Murphy Oil sought dismissal of the suit and to compel arbitration. One of the plaintiff employees filed an unfair labor charge with the NLRB alleging that the agreement unlawfully interfered with employees' Section 7 rights guaranteed by the NLRA.

In October 2014, ten months after the Fifth Circuit's ruling in *D.R. Horton*, the NLRB issued its *Murphy Oil* opinion, *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72 (2014). The Board disregarded the Fifth Circuit's ruling in *D.R. Horton* and chose instead to reaffirm its previous position that an arbitration agreement similar to Murphy Oil's violated the NLRA because the agreement

restricted Section 7 rights to engage in concerted activity. The NLRB applied its *D.R. Horton* decision, *In re D.R. Horton, Inc.,* 357 N.L.R.B. No. 184 (2012), to Murphy Oil's arbitration agreement and similarly concluded that both the original and amended Murphy Oil arbitration agreements could be interpreted as unlawfully prohibiting employees from filing unfair labor practice charges, and thus required corrective action.[2] *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72 (2014).

Before the NLRB issued its *Murphy Oil* ruling, the Fifth Circuit had overturned the NLRB's *D.R. Horton* decision. *D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344 (5th Cir. 2013). Murphy Oil petitioned the Fifth Circuit to review the NLRB's decision that ignored the Court's *D.R. Horton* ruling. The Fifth Circuit held in *Murphy Oil* that the original arbitration agreement violated employees' Section 7 rights, but that the amended agreement was lawful. The court considered Murphy Oil's pre- and post-*D.R. Horton* agreements separately because the agreements had different language. The Fifth Circuit concluded that the original agreement was problematic because its language that employees waived the right to pursue collective or class claims for "any and all disputes or claims…which relate…to Individual's employment" could be

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[2] After the Fifth Circuit's *D.R. Horton* decision Murphy Oil revised its agreement to include language clarifying that the agreement did not bar employees from "'participating in proceedings to adjudicate unfair labor practice[] charges before the Board."

interpreted to mean that the employee could not file unfair labor practice charges with the NLRB, since "any and all" claims related to employment had to proceed to individual arbitration, could have a chilling effect on employees' ability to act collectively, and thus constituted an unfair labor practice.

But the Court found Murphy Oil's revised arbitration agreement did not violate the NLRA because an employee could not reasonably interpret the revised agreement to prohibit filing unfair labor practice charges, because the agreement clearly stated the opposite. The Fifth Circuit's *Murphy Oil* decision held that individual arbitration agreements are not a per se unfair labor practices and held further that "an express statement" preserving employees' right to file Board charges is not required. See NLRB Petition in *Murphy Oil*, No. 16-307, Pet.App. 11a.

The Eighth Circuit also has concluded that employment arbitration agreements containing class waivers are enforceable under the FAA, notwithstanding federal labor laws or the NLRB's interpretation of those laws. *See Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772, 776 (8th Cir. 2016); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052, 1054-1055 (8th Cir. 2013). In *Owen*, the Eighth Circuit acknowledged the NLRB's determination that class waivers in employment arbitration agreements are unenforceable, but explicitly "reject[ed]" the "invitation to follow the NLRB's rationale." 702 F.3d at 1055, and instead

found the FAA's presumption in favor of the enforcement of arbitration agreements to be dispositive. *See id.* at 1052-1055.

The Eighth Circuit followed this Court's teaching that "there must be a 'contrary congressional command' for another statute to override the FAA's mandate." *Id.* at 1052 (quoting *CompuCredit*, 132 S. Ct. at 669), and found that the two potential contrary congressional commands alleged in *Owen* – the FLSA and the NLRA – did not constitute such a "contrary congressional command." *Id.* at 1053-1054. The Eighth Circuit concluded that neither statute sufficed to "override[] the mandate of the FAA in favor of arbitration." *Id.* at 1055. Because Congress had reenacted the FAA in 1947, *after* passing both of the labor statutes, the court reasoned, "Congress intended its arbitration protections to remain intact even in light of the earlier passage of * * * major labor relations statutes." *Id.* at 1053.

The Eighth Circuit reaffirmed its *Owen* decision recently in *Cellular Sales*, 824 F.3d 772. That case came before the court of appeals on a petition to review the NLRB's ruling "'that a mandatory agreement requiring individual arbitration of work-related claims' violates the NLRA." *Id.* at 776. The court granted the petition in relevant part, explaining that the "holding in *Owen* is fatal" to the NLRB's position because following *Owen*, an "arbitration agreement that include[s] a waiver of class or collective actions in all forums to resolve employment-related disputes" is enforceable. *Id.*

The Second Circuit is in agreement with the Fifth and Eighth Circuits. *See Sutherland* v. *Ernst & Young LLP*, 726 F.3d 290, 297 & n.8 (2d Cir. 2013) (per curiam); it, too, held that a class waiver in an arbitration clause in the employment context is enforceable. Sutherland worked for Ernst & Young and agreed to resolve all disputes with Ernst & Young through individual arbitration. *Id.* at 293-294. After the plaintiff filed a class action in federal court, Ernst & Young moved to compel arbitration. *Id.* at 294. The district court denied the motion, but the Second Circuit reversed. *Id.* at 299. Like the Eighth Circuit in *Owen*, the Second Circuit began from the premise that "arbitration agreements should be enforced according to their terms unless the FAA's mandate has been overridden by a contrary congressional command." *Id.* at 295 (internal quotation marks and citation omitted). The court found that neither the FLSA nor the NLRA was a "contrary congressional command" that overrode the FAA. *Id.* at 296-297 & n.8. Like the Eighth Circuit, the Second Circuit reached this conclusion even though the NLRB had decided otherwise; the court "decline[d] to follow" the Board's views. *Id.* at 297 n.8. It held that an employment arbitration agreement is enforceable under the FAA. *Id.* at 292-293, 299 (citing *American Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304 (2013)).[3]

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[3] The Sixth and Eleventh circuits have also held that (continued...)

On the other side of the split are the Seventh and Ninth Circuits. The Seventh Circuit deviated from its sister circuits in the decision below. It expressly recognized that its opinion "would create a conflict in the circuits." Pet. App. 15a n †. Unlike the Second, Fifth, and Eighth Circuits, the Seventh Circuit held that agreements to submit employment disputes to individual arbitration are *not* enforceable under the NLRA and the FAA. The panel concluded that class waivers in employment arbitration agreements are "illegal" under the NLRA because they interfere with employees' right to engage in concerted activities. *Id.* at 10a-11a. It determined that such waivers are unenforceable under the FAA's saving clause because illegality is a "'ground[ ] * * * for the revocation of any contract.'" *Id.* at 14a-15a (quoting 9 U.S.C. § 2); *see id.* at 20a.

The Seventh Circuit acknowledged that the Fifth Circuit had reached "the opposite conclusion." *Id.* at 15a, but the Seventh Circuit minimized the Fifth Circuit's reasoning as relying on mere "dicta" from this Court's decisions in *Concepcion* and *Italian Colors*. *Id.* As for the Second and Eighth Circuits, the panel did not

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[3](...continued)
the FAA requires enforcement of class waivers in employment arbitration agreements, but without discussing the NLRA in their decisions. *See Killion v. KeHE Distribs., LLC*, 761 F.3d 574, 592 (6th Cir. 2014); *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1334-1336 (11th Cir. 2014).

dispute that these "two circuits agree with the Fifth," citing *Sutherland* and *Owen*, but it viewed the analysis by those circuits as insufficient. *Id.* at 19a.

The Ninth Circuit has joined the Seventh. In *Morris* v. *Ernst & Young, LLP*, No. 13-16599, 2016 WL 4433080 (9th Cir. Aug. 22, 2016), a divided panel held that a waiver provision requiring employees to bring legal claims through individual arbitration violates the NLRA and therefore is unenforceable. *Id.* at *1, *5. The Ninth Circuit majority concluded that the FAA's saving clause "caus[es] the FAA's enforcement mandate to yield" to the NLRA. *Id.* at *7.

The majority acknowledged that it was widening a circuit split. Although it "agree[d] with the Seventh Circuit," the majority "recognize[d] that sister Circuits are divided on this question." *Id.* at *10 n.16.

Judge Ikuta dissented. She described the majority's decision as "breathtaking in its scope and in its error." *Id.* at *11. In her view, the NLRA was not a contrary congressional command that overrode the FAA's enforcement mandate. *Id.* at *12-*14. Judge Ikuta stressed that the majority's decision was "directly contrary to Supreme Court precedent and join[ed] the wrong side of a circuit split." *Id.* at *11.

The split in the circuits promises only more turmoil and expensive, time-wasting litigation. It frustrates Congress's intent in passing the FAA "to move the parties to an arbitrable dispute out of

court and into arbitration as quickly and easily as possible" so as not to "frustrate[] the statutory policy of rapid and unobstructed enforcement of arbitration agreements." *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 22-23 (1983).

II. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT AND WARRANTS REVIEW.

All three petitions pending before the Court raising the issue presented in this case – from employers and the NLRB – argue that the circuit split is fully developed, acknowledged, and ripe for resolution by this Court. See Pet. at 20, Petition in *Ernst & Young v. Morris*, No. 16-300 at 19, and Petition in *NLRB v. Murphy Oil*, No. 16-307 at 24.

The competing decisions by several courts of appeal have examined and evaluated the arguments on both sides. The Second, Fifth and Eighth Circuits have upheld class and collective waivers under the FAA and the NLRA; the Seventh and Ninth Circuits have invalidated the waivers.

The split is unlikely to resolve itself. This Court should intervene now to resolve it.

III. THE SEVENTH CIRCUIT'S DECISION IS INCORRECT.

Review is also warranted because the decision below was incorrect.

As this Court has repeatedly stated, the FAA embodies "a liberal federal policy favoring

arbitration agreements." *Moses H. Cone Memorial Hospital*, 460 U.S. 1, 24 (1983). Consistent with that policy, the Court has repeatedly held that "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration") and has consistently upheld the FAA's policy favoring enforcement of arbitration agreements as written. *See, e.g.*, *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Italian Colors*, 133 S. Ct. 2304; *CompuCredit*, 132 S. Ct. 665; *Concepcion*, 563 U.S. 333; *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Shearson / American Express*, 482 U.S. 220; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Moses H. Cone*, 460 U.S. 1). arbitration agreements must be enforced according to their terms. See, *e.g.*, *Italian Colors*, 133 S. Ct. at 2309; *Concepcion*, 563 U.S. 333, 339, 346.

The foregoing principle applies "even when the claims at issue are created by federal statutory claims, unless the FAA's mandate has been overridden by a contrary congressional command." *CompuCredit*, 132 S. Ct. at 669 (citation and internal quotation marks omitted). The party challenging the arbitration agreement has the burden of showing that "Congress intended to preclude a waiver of the judicial forum." *Gilmer*, 500 U.S. 20, 26 (1991) and Congress' intent to supersede the FAA must be expressed with "clarity." *CompuCredit*, 132 S. Ct. at 672.

The Seventh Circuit did not evaluate whether the NLRA supplies the necessary "contrary congressional command" that overrides the FAA's overarching policy in favor of enforcing arbitration agreements according to their terms. The NLRA contains no congressional command contrary to collective-action waivers. The collective bargaining provisions of the NLRA do not mention arbitration and do not confer a specific right to take legal action at all, whether individually or collectively. Section 7 gives employees the right to "engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U.S.C. § 157, but it contains no "command" that this Court has indicated would override the presumption that arbitration agreements should be enforced according to their terms. The NLRA does not contain the requisite "contrary congressional command," that overrides the parties' arbitration agreement according to its terms. *CompuCredit*, 132 S. Ct. at 669, 672.

In *CompuCredit*, the Court found that more direct statutory language lacked the kind of clear congressional command necessary to nullify an arbitration agreement. The Court found the language in the Credit Repair Organizations Act (CROA), 15 U.S.C. § 1679-1679j, insufficient to override the FAA's policy. Plaintiffs in that case argued the CROA precluded enforcement of an arbitration agreement that contained a waiver of consumers' right to litigate in court, 132 S. Ct. at

669[4] and held that Congress did not intend to preclude arbitration of claims under CROA. See *id.* at 672-673. The Court remarked that if Congress had intended to bar arbitration of consumers' claims, "it would have done so in a manner less obtuse than what respondents suggest." *Id.* at 672, and it gave examples of congressional commands that would be sufficiently clear. *Id.*

Nothing in the language of the NLRA establishes congressional intent to override the FAA with the requisite clarity, and nothing in the legislative history of the NLRA suggests an intent to confer a right to file class or consolidated claims against employers or that overrides the FAA. See *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 361 (5th Cir. 2013). Nothing in the NLRA suggests that employees' right to bargain collectively includes the right to resolve disputes using a particular legal procedure.

Moreover, there is no conflict between collective action waivers and the NLRA's underlying purposes. See *Gilmer*, 500 U.S. at 26. Indeed, "arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself." See *United*

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[4] Plaintiffs in *CompuCredit* cited language in the CROA that provided that "[a]ny waiver by any consumer of any protection provided by or any right of the consumer" was void and could "not be enforced by any Federal or State court," 15 U.S.C. § 1679f(a). See 132 S. Ct. at 669.

Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960).

The Seventh Circuit's application of the FAA's saving clause is inconsistent with this Court's decision in *Concepcion*. There, the Court explained that, "when a doctrine normally thought to be generally applicable * * * [is] applied in a fashion that disfavors or interferes with arbitration," it does not trigger the saving clause. *Concepcion*, 563 U.S. at 341. This Court determined that a defense that precludes the waiver of class or collective arbitration is not generally applicable because "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 344.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition.

Respectfully submitted,

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