No. 16-285

In the Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
PETITIONER

v.

JACOB LEWIS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

DAVID C. ZOELLER
WILLIAM E. PARSONS
CAITLIN M. MADDEN
KATELYNN M. WILLIAMS
HAWKS QUINDEL, S.C.
222 West Washington Ave., Suite 450
Madison, WI 53701
(608) 257-0040

DANIEL R. ORTIZ
Counsel of Record
TOBY J. HEYTENS
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
SUPREME COURT
LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127
dro@virginia.edu

[Additional Counsel Listed on Inside Cover]

ADAM HANSEN
APOLLO LAW LLC
400 South 4th Street,
Suite 401M - 250
Minneapolis, MN 55415
(612) 927-2969

QUESTION PRESENTED

Whether arbitration agreements with individual employees that bar them from pursuing work-related claims on a joint basis in any forum are illegal because they limit the employees' right under the National Labor Relations and Norris-LaGuardia Acts to engage in "concerted activities" in pursuit of their "mutual aid or protection," 29 U.S.C. 157, 102, and are therefore unenforceable under the Federal Arbitration Act, 9 U.S.C. 1 *et seq*.

TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases:

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

BRIEF FOR THE RESPONDENT

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are set out in the appendix. App. 1a-7a.

STATEMENT

A. Statutory Background

1. In the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, Congress articulated "the policy of the United States" of "protecting the exercise by workers of full freedom of association." 29 U.S.C. 151. Section 7 of the NLRA expressly provides that "[e]mployees shall have the right * * * to engage in * * * concerted activities for the purpose of * * * mutual aid or protection." 29 U.S.C. 157. This Court has described the rights under section 7 as including employees' efforts "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship," including "through resort to administrative and judicial forums." *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 565-566 (1978).

The NLRA also provides that any employer that "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in section [7]" commits an unfair labor practice, 29 U.S.C. 158(a)(1), and this Court has held that the "acts which constitute the unfair labor practice [are] unlawful," *NLRB* v. *Express Publ'g Co.*, 312 U.S. 426, 436 (1941). In addition, the Norris-LaGuardia Act of 1932 (NLGA), 29 U.S.C. 101 *et seq.*, declares that employees "shall be free from the interference, restraint, or coercion of

employers * * * in * * * concerted activities for the purpose of * * * mutual aid or protection," *id.* 102, and that any contrary "undertaking or promise * * * shall not be enforceable," *id.* 103.

2. The Federal Arbitration Act (FAA), 9 U.S.C. 1 *et seq.*, provides that any written contract "evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2.

B. Factual Background And Court Proceedings

1. On April 2, 2014, petitioner Epic Systems Corporation (Epic), a healthcare software company, sent an email containing an arbitration agreement to some of its employees, including respondent Jacob Lewis. Pet. App. 1a-2a. The agreement required employees to bring all wage-and-hour claims through individual arbitration and stated that the employees waived "the right to participate *in* or receive money or any other relief from any class, collective, or representative proceeding." *Id.* at 2a. The agreement included a clause stating that if this ban was deemed unenforceable, "any claim brought on a class, collective, or representative action basis must be filed *in* a court of competent jurisdiction." *Ibid.* It also stated that employees were "deemed to have accepted this Agreement" if they "continue[d] to work at Epic." *Ibid.* "Epic gave employees no option to decline [the agreement] if they wanted to keep their jobs." *Ibid.*

2. In February 2015, Lewis sued Epic in federal court on behalf of a putative group of technical communications employees, claiming that Epic had denied them required overtime pay. Pet. App. 2a. Although the court did not notify other employees of the suit, several joined shortly thereafter. See, *e.g.*, Notice of Consent to Join Lawsuit, Ex. A, ECF No. 18 (Brittaini Maul); Notice of Consent to Join Lawsuit, Ex. A, ECF No. 14 (Charles Blackburn). Epic moved to dismiss the complaint, arguing that Lewis, through the arbitration agreement, had waived his right to bring in court any claim involving the payment of wages and any right to participate in joint actions. Pet. App. 2a, 24a. Lewis responded that the agreement was unenforceable because, among other reasons, it interfered with his and his coworkers' right to engage in "concerted activities" under section 7 of the NLRA. *Id.* at 2a-3a. He also argued that pursuant to the arbitration agreement's own saving clause his class suit was properly brought in federal court. *Id.* at 25a. The district court agreed. *Id.* at 28a.

3. The Seventh Circuit unanimously affirmed. The court noted first that section 7 of the NLRA provides that "[e]mployees shall have the right * * * to engage in * * * concerted activities for the purpose of * * * mutual aid or protection"; that section 8 "enforces Section 7 unconditionally by deeming that it 'shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 7]'"; and that "the [National Labor Relations] Board [(NLRB)] has, 'from its earliest days,' held that 'employer-imposed, individual agreements that purport to restrict Section 7 rights' are unenforceable" and "has

done so with 'uniform judicial approval.'" Pet. App. 3a-4a (citations omitted; first brackets in original). "[B]oth courts and the [NLRB]," the court added, "have held that filing a collective or class action suit constitutes 'concerted activit[y]' under Section 7." *Id.* at 4a.

"Section 7's text, history, and purpose," the court argued, "support this rule." Pet. App. 5a. "Collective or class legal proceedings fit well within the ordinary understanding of 'concerted activities,'" *ibid.*, the relevant statutory term, and "[t]he NLRA's history and purpose confirm that the phrase * * * should be read broadly to include resort to representative, joint, collective, or class legal remedies," *id.* at 6a. The court alternatively held that "even if Section 7 *were* ambiguous—and it is not"—the NLRB's interpretation is "entitled to *Chevron* deference." Pet. App. 7a.

With these legal principles established, the court determined that "[t]he question thus becomes whether Epic's arbitration provision impinges on 'Section 7 rights.' The answer is yes." Pet. App. 9a. The collective action ban, it held, "runs straight into the teeth of Section 7" and is therefore "unenforceable." *Id.* at 10a.

The court then turned to the FAA. It first rejected Epic's argument that the "FAA trumps the NLRA." Pet. App. 12a. "[T]his argument," the court noted, "puts the cart before the horse." *Id.* at 13a. As the court explained, "[b]efore we rush to decide whether one statute eclipses another, we must stop to see if the two statutes conflict at all." *Ibid.* Because the FAA's own saving clause forecloses arbitration

> 'upon such grounds as exist at law or in equity for the revocation of any contract' [and i]llegality is one of those grounds[, a] contract provision[] like Epic's, which strip[s] away employees' rights to engage in 'concerted activities' * * * is illegal, and meets the criteria of the FAA's saving clause for nonenforcement.

Id. at 15a (internal citation omitted).

Then the court rejected Epic's argument that section 7's right to collective action "is procedural only, not substantive, and thus the FAA demands enforcement." Pet. App. 20a. "The right to collective action," it stated, "lies at the heart of the restructuring of employer/employee relationships that Congress meant to achieve in the statute." *Ibid.* In fact, it held, "Section 7 is the NLRA's *only* substantive provision. Every other provision of the statute serves to enforce the rights Section 7 protects." *Id.* at 21a.

SUMMARY OF ARGUMENT

The court of appeals correctly held that the right to engage in "concerted activities" guaranteed by section 7 of NLRA includes joint legal action and that any contract that violates this right is illegal. It also correctly held that that this illegal contract could not be resuscitated by requiring an employee to sign an arbitration agreement.

I. Section 7 of the NLRA grants employees a broad right to pursue joint legal action. Employees have the right, it states, "to engage in * * * concerted activities for the purpose of * * * mutual aid or protection." 29 U.S.C. 157. In particular, this Court has explained that section 7 protects the right to "seek to improve

working conditions through resort to administrative and judical forums." *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 565-566 (1978). Courts and the NLRB have consistently held that section 7 includes the right to jointly pursue work-related legal claims.

The text, purpose, and history of section 7 strongly support this judicial consensus. The plain meaning of "concerted activities" undoubtedly includes joint legal activities. Indeed, courts have read "concerted activities" broadly to protect many individual employee actions even when "the employee alone may have an immediate stake in the outcome." *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 260 (1975). The NLRA's legislative history, moreover, supports this common-sense interpretation of section 7's text.

In addition, the NLRA's underlying purpose compels a reading of "concerted activities" that includes joint legal action. This Court has recognized that section 7 was passed "to equalize the bargaining power of the employee with that of his employer by allowing employees to band together." *NLRB* v. *City Disposal Sys., Inc.*, 465 U.S. 822, 835 (1984). Joint legal action advances this purpose by enabling employees to jointly seek those protections that law gives them. This purpose is made particularly clear by the history of the NLRA and the NLGA. Both statutes were enacted specifically to give employees the ability to band together in a wide variety of ways, including through legal action, a means less confrontational and disruptive to the employer-employee relationship than traditional economic weapons, like striking.

Consistent with the NLRA's plain language, purpose, and history, the NLRB has interpreted

section 7 to protect joint legal action, stating unambiguously that "the substantive right to engage in concerted activity * * * through litigation or arbitration lies at the core of the rights protected by section 7." *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2281 (2012) (*Horton I*). This longstanding and consistent interpretation is entitled to deference.

Section 8 of the NLRA renders unlawful any contract that violates the rights granted by section 7. This section asserts that "[i]t shall be an unfair labor practice for an employer * * * to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]." 29 U.S.C. 158. By forcing employees to sign an agreement which "interfere[d] with, restrain[ed], [and] coerce[d]" their "exercise of the rights guaranteed in section [7,]" Epic engaged in an illegal "unfair labor practice." *Ibid.* The ban against joint legal action thus violates federal law and federal courts cannot enforce it.

II. Nothing in the FAA revives Epic's ban. First, even if the FAA were applicable, its own terms would preclude enforcement. The Act provides three grounds for doing so: (1) its saving clause, (2) the prospective waiver doctrine, and (3) a contrary congressional command as shown by congressional intent. All three grounds bar enforcement here.

The FAA's saving clause provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds * * * for the revocation of any contract." 9 U.S.C. 2. It recognizes that the FAA was designed "to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp.* v. *Flood & Conklin Mfg.*

Co., 388 U.S. 395, 404 n.12 (1967). Hence, where arbitration contracts are subject to "generally applicable contract defenses," *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011) (citation omitted), such as illegality, the FAA prevents enforcement to avoid offering *extra* protection.

Epic's ban is illegal because it "interfer[es]" with employees' right to pursue joint action in violation of the NLRA and NLGA. 29 U.S.C. 102; 158(a)(1). Thus, the FAA's saving clause renders it unenforceable. This illegality defense is "generally applicable," moreover, because it rests on Epic's forbidding *all* forms of joint legal action. It does not target arbitration.

Epic's ban also violates the prospective waiver doctrine, which nullifies specific terms in "arbitration agreements that 'operat[e] . . . as a prospective waiver" of core federal statutory rights. See *Am. Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013) (citation omitted). The doctrine patently applies to Epic's ban, which not only conflicts with federal statutes, but also infringes the right *most* central to their purposes.

The NLRA and NLGA also represent a strong signal from Congress that courts should not uphold joint-action bans. Although arbitration agreements are generally enforced "according to their terms," *Italian Colors*, 133 S. Ct. at 2309, "th[at] mandate may be overridden by a contrary congressional command" evidenced by a statute's text, its legislative history, or "an inherent conflict between arbitration and the statute's underlying purposes." *Shearson/Am. Express, Inc.* v. *McMahon*, 482 U.S. 220, 226-227 (1987).

There is certainly such a command here. The NLRA's and NLGA's text, history, and purposes unambiguously conflict with contract terms, such as Epic's, that ban employees from "band[ing] together," *NLRB* v. *City Disposal Sys., Inc.*, 465 U.S. 822, 835 (1984), "for the purpose of * * * mutual aid or protection," 29 U.S.C. 157. No magic words are required.

Lastly, the employers read this Court's contrary-congressional-command jurisprudence so narrowly, allowing only specific and emphatic textual directives to count, that they would require enforcement of *any* arbitration provision, even one violating another federal statute, so long as that statute failed to reference arbitration specifically. Not only is this outcome absurd, but it would also render arbitration agreements substantially *more* enforceable than other contracts.

In sum, Epic's ban against joint legal action is unlawful under both the NLRA and NLGA. Further analysis is unnecessary since courts cannot enforce illegal contract provisions. Even were the FAA relevant, however, it would foreclose enforcement by its own terms.

ARGUMENT

I. Epic's Joint-Action Ban Is Unlawful Under Sections 7 & 8 Of The NLRA

The Seventh Circuit correctly determined that section 7 of the NLRA grants employees a substantive right to pursue joint legal actions. Both the plain language and purpose of the NLRA, as well as this

Court's and the NLRB's interpretations of section 7, support this conclusion.

A. The Plain Text Of Section 7 Encompasses A Right To Joint Legal Action

Section 7 provides: "Employees have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in *other concerted activities* for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. 157 (emphasis added). This Court has explained that section 7's protections cover employees' "seek[ing] to improve working conditions through resort to administrative and judicial forums." *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 565-566 (1978).[1] Both lower courts and the NLRB have consistently held that section 7 includes a right to jointly pursue work-related legal claims. See, *e.g.*, *Brady* v. *Nat'l Football*

---

[1] Employers and their amici try to minimize *Eastex*'s implications by arguing that in a footnote the Court effectively reserved "the question of what may constitute 'concerted' activities in this context." Pet. Br. 36-37 (Epic Br.) (quoting *Eastex*, 437 U.S. at 566 n. 15) ; Pet. Br. 27, *Ernst & Young LLP* v. *Morris*, No. 16-300 (June 9, 2017) (E&Y Br.) (same); U.S. Amicus Br. 24 n.3 (same). That is mistaken. Concertedness was not contested in the case. The Court made the remark only to avoid appearing to approve the particular legal theories of concertedness adopted by the Board and the lower courts in the cases it cited as supporting its view of "mutual aid or protection." In any event, the Court made clear in the very next sentence that joint legal action could meet both the "concertedness" and "mutual aid or protection" requirements of section 7 when it noted that "to hold that activity of this nature is entirely unprotected * * * would leave employees open to retaliation for much legitimate activity [and] could frustrate the policy of the Act." 437 U.S. at 566.

League, 644 F.3d 661, 673 (8th Cir. 2011) ("[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment *is* 'concerted activity' under § 7 of the [NLRA]."); *Altex Ready Mixed Concrete Corp.* v. *NLRB*, 542 F.2d 295, 296-297 (5th Cir. 1976) (similar); *Leviton Mfg. Co.* v. *NLRB*, 486 F.2d 686, 689 (1st Cir. 1973) (same).

The judicial consensus favoring a right to engage in joint legal action is unsurprising given the plain language of section 7. This Court has instructed that "[a]bsent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). When interpreting a statute's language, the Court "giv[es] the words used their ordinary meaning." *Lawson* v. *FMR LLC*, 134 S. Ct. 1158, 1165 (2014) (quoting *Moskal* v. *United States*, 498 U.S. 103, 108 (1990)).

Joint legal action fits easily within the ordinary meaning of "concerted activities." "Concerted" means "jointly arranged, planned, or carried out; coordinated." *New Oxford American Dictionary* 359 (3d ed. 2010); see also *Webster's Third New International Dictionary* 470 (Gove ed., 2016), (defining "concerted" as "performed in unison"). "Activities" are "thing[s] that a person or group does or has done" or "actions taken by a group in order to achieve their aims." *New Oxford American Dictionary* at 16. Similarly, *Black's Law Dictionary* defines "concerted activity" as "[a]ction by employees concerning wages or working conditions; esp., a conscious commitment to a common scheme designed

to achieve an objective." *Black's Law Dictionary* 349 (Garner ed., 10th ed. 2014). These meanings have remained essentially the same since the NLRA's enactment. See *Webster's New International Dictionary of the English Language* 553 (2d ed. 1936) (defining "concert"); *id.* at 27 (defining "activity"); *Black's Law Dictionary* 385 (3d ed. 1933) (defining "concerted action").

Additionally, the definition of "concerted activities" must include something beyond "the right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of [employees'] own choosing." 29 U.S.C. 157. Otherwise, the statute's next phrase, "to engage in *other* concerted activities," *ibid.* (emphasis added), would be rendered superfluous. This Court has repeatedly "hesita[ted] to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." *Mackey* v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988).

Employers invoke the canon of *ejusdem generis* in an attempt to narrow the broad reach of section 7. See Epic Br. 33; E&Y Br. 27. Ernst & Young argues that this canon limits section 7's "other concerted activities" to only "self-organization and collective bargaining," *ibid.*, while Epic argues that it limits "other concerted activities" to actions "that employees can engage in either on their own or with the involvement of no one other than their employers," Epic Br. 34. Both arguments fail.

Ernst & Young misapplies the canon by reading the final clause as practically identical to the preceding

ones. In Ernst & Young's view, "other concerted activities for the purpose of collective bargaining or other mutual aid or protection," merely restates the general category established by the preceding ones: "self-organization and collective bargaining." E&Y Br. 27. As this Court has held, however,

> [i]f the particular words exhaust the [class], there is nothing *ejusdem generis* left, and in such case we must give the general words a meaning outside of the class indicated by the particular words, or we must say that they are meaningless, and thereby sacrifice the general to preserve the particular words. In that case the rule would defeat its own purpose.

United States v. *Mescall*, 215 U.S. 26, 31-32 (1909); see also *Mason* v. *United States*, 260 U.S. 545, 554 (1923). Unless the final six words, "or other mutual aid or protection," 29 U.S.C. § 157, have no meaning, then, they must encompass more than what Ernst & Young allows.

This Court has, in fact, already rejected Ernst & Young's position. In *Eastex*, the Court held, "Congress knew well enough that labor's cause often is advanced on fronts other than collective bargaining [and] recognized this fact by choosing, as the language of § 7 makes clear, to protect concerted activities for the somewhat *broader* purpose of 'mutual aid or protection' as well as for the *narrower* purposes of 'self-organization' and 'collective bargaining.'" 437 U.S. at 565 (emphasis added). It then specifically noted that the NLRB and lower courts "have held that the 'mutual aid or protection' clause protects employees * * * when they seek to improve working conditions

through resort to administrative and judicial forums." *Id*. at 565-566. Although, it is true, the Court did not specifically "address the question of what may constitute 'concerted' activities in this context," see pp. 10 n.1, *supra*, it did hold that finding "activity of this nature [to be] entirely unprotected," as the employers would here, "would leave employees open to retaliation for much legitimate activity [and] could frustrate the policy of the Act to protect the right of workers to act together to better their working conditions," 437 U.S. 566-567 (quotations omitted). It thus rejected the idea "that Congress could have intended the protection of § 7 to be as narrow as [the employer] insists." *Id*. at 567.

Epic's more novel argument succumbs to a different difficulty. It proves incoherent—and too much. First, "self-organization, * * * form[ing] labor organizations, [and] bargain[ing] collectively through representatives of their own choosing," all activities section 7 expressly protects, are hardly things "that employees just *do*," Epic Br. 34 (quoting *NLRB* v. *Alt. Entm't, Inc.*, 858 F.3d 393, 415 (6th Cir. 2017) (Sutton, J. concurring in part and dissenting in part)), let alone by themselves or with only the aid of their employers. To certify a union as their exclusive bargaining representative, for example, employees must typically first petition the NLRB. See 29 U.S.C. 159(c)(1)(A). If the NLRB finds after investigation that "a question of representation exists," *id.* 159(c)(1), and determines that the employee group represents an appropriate "bargaining unit," *id.* 159(b), it then "direct[s] an election through secret ballot," *id.* 159(c)(1), which it conducts itself, 29 C.F.R. 102.69(a). The employer can then contest the petition before the NLRB, 29 C.F.R. 101.30, and, if the

employees are ultimately successful, the election result itself, 29 C.F.R. 102.69(c)(1)(ii). And, if the NLRB rules against the employer at either stage, the employer can challenge the decision in court. 29 U.S.C. 160(f). In a typical case, then, forming a union requires the participation of not only the employees, but also the employer, the NLRB, and the courts. The "concerted activities" specifically and individually mentioned in section 7, in other words, often require more extensive participation by third-parties than filing a joint law suit. If, as Epic contends, section 7 excludes activities that require the participation of "third parties," Epic Br. 34, it necessarily excludes "form[ing] labor organizations," one of the NLRA's express core rights. That makes no sense.

Understanding section 7 to protect joint legal action makes particular sense given how broadly this Court has defined "concerted activities" in related labor contexts. This Court has stated that section 7's protection "clearly enough embraces the activities of employees who have joined together in order to achieve common goals." *NLRB* v. *City Disposal Sys., Inc.*, 465 U.S. 822, 830 (1984). As such, this Court has held that "concerted activities" can include even a single employee bringing a complaint in his *individual* capacity to protect his own rights simply because those rights arose out of a collective bargaining agreement. *Id.* at 832. Likewise, this Court has explained that "the literal wording" of section 7 "clearly" encompasses an individual union member's right to have a union representative present at an informal hearing he worries may lead to discipline. *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 254-256, 260 (1975). "This is true even though the employee *alone* may have

an immediate stake in the outcome." *Id.* at 260 (emphasis added). If section 7's "concerted activit[y]" protections are so broad as to protect individuals acting alone and only for themselves, they are clearly broad enough to include *joint* legal action taken to benefit themselves as a group.

The NLRA's legislative history supports this common-sense understanding of section 7's plain text. The NLRA's principal author—Senator Robert F. Wagner—explained that "[s]till less open to question is the proposition that workers also should be allowed to cooperate fully. * * * In order that the strong may not take advantage of the weak, every group must be equally strong." 78 Cong. Rec. 12,017 (1934) (referencing S. 2926, a predecessor to the NLRA). Senator Wagner also testified that the Act's unfair labor practices should be articulated "without in any way placing limitations upon the broadest reasonable interpretation of its omnibus guaranty of freedom." *Hearings Before the Senate Comm. on Educ. & Labor on S. 1958*, 74th Cong., 1st Session 38 (1935), *reprinted in* 1 NLRB, *Legislative History of the National Labor Relations Act 1935* 1414 (1949). Joint legal action, which allows employees to protect themselves and improve their condition, therefore fits easily within Congress's intentions for section 7's protections. Employees who can pursue legal action jointly will fear employer retaliation less and be able to share the costs with others.

B. The NLRA's Underlying Purpose Supports An Inclusive Interpretation Of "Concerted Activities"

The NLRA's underlying purpose further supports interpreting "concerted activities" to include joint legal action. The best source to discover Congress's purpose is the statute itself. The Act's declaration of policy states:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce * * * by protecting the exercise by workers of full freedom of association* * * for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. 151. A protection as broad as "full freedom of association" certainly includes the right to joint legal action. And joint suits involving wage-and-hour claims—such as this one, Epic Pet. App. 2a—fall within the comprehensive umbrella of "mutual aid or protection." They seek to jointly vindicate rights gained through legislation or bargaining.

Congress enacted section 7 "to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment." *City Disposal*, 465 U.S. at 835. Joint legal actions level the playing field exactly in the way. By lessening fear of employer retaliation and spreading the cost of seeking vindication, employees' banding together allows them

to improve their condition. See, *e.g.*, *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 809 (1985) (explaining that class action procedures allow plaintiffs who otherwise would "have no realistic day in court" to enforce their rights). This Court has found, moreover, "no indication that Congress intended to limit [section 7's] protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way." *City Disposal*, 465 U.S. at 835. The Court continued: "[W]hat emerges from the general background of § 7—and what is consistent with the Act's statement of purpose—is a congressional intent to create an equality in bargaining power between the employee and the employer throughout the entire process." *Ibid.* Adopting this Court's inclusive understanding of section 7, the court below appropriately concluded that "other concerted activities" include joint legal action. Pet. App. 4a-7a.[2]

---

[2] Epic argues that since "in a judicial or arbitral forum[] outcomes are not dependent on whether claims are heard as a class or individually," joint proceedings "do not serve the purpose of the right to engage in 'concerted activities' and thus should not be protected under section 8." Epic Br. 43-44. Although Epic may be correct that the number of employees joining in a dispute does not affect how a court or arbitrator ultimately *decides* the issue, it certainly affects whether the employees can and do *present* the issue for decision. As many have noted, unless employees can share the cost of dispute resolution by proceeding through joint action, it is simply irrational for them to arbitrate or litigate many claims. See Daniel T. Deacon, *Agencies and Arbitration*, 117 Colum. L. Rev. 991, 992 & nn.1-2 (2017) (collecting authorities). They may also fear retaliation and decline to challenge their employers unless they can band together, which makes retaliation more difficult.

C. The NLRA's Enactment History Confirms That Congress Intended Section 7 To Protect Employees' Joint Legal Activity

The context of the NLRA's enactment offers yet more support that section 7's protected "concerted activities" include joint legal action. The text, purpose, and history of the NLGA, 29 U.S.C. 102 *et seq.,* for example, provide such support. Enacted three years before the NLRA, the NLGA established the right to joint action as the basic premise of national labor policy. As Senator Wagner explained to the Senate Committee on Education and Labor, "[t]he language [of section 7 of the NLRA] follows practically verbatim the familiar principles already embedded in our law by * * * section 2 of the [NLGA]." *Hearings Before the Senate Comm. on Educ. and Labor on S. 1958*, 74th Cong., 1st Sess. 38 (1935), *reprinted in* 1 NLRB, *Legislative History of the National Labor Relations Act 1935* 1414 (1949); see also *City Disposal*, 465 U.S. at 834-835 ("[Section 2 of the NLGA] was the source of the language enacted in § 7 [of the NLRA]."); *Eastex, Inc.* v. *NLRB*, 437 U.S 556, 565 n.14 (1978) ("Congress modeled the language of § 7 after that found in § 2 of the [NLGA.]"). Section 2 of the NLGA declares the following to be the "public policy of the United States":

> Whereas * * * the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment * * * it is necessary that he have full freedom of association [and] be free from the interference, restraint, or coercion of employers * * * in self-organization or in *other*

> *concerted activities* for the purpose of * * * mutual aid or protection.

29 U.S.C. 102 (emphasis added). Section 3 enforces this policy by requiring that "any other undertaking or promise in conflict with the public policy declared in [section 2] * * * shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court." 29 U.S.C. 103. The NLGA and NLRA thus protect employees' right to engage in "concerted activities" in two distinct yet complementary ways. First, sections 2 and 3 of the NLGA prohibit federal courts from enforcing contracts that interfere with, restrain, or coerce employee concerted activity. Second, sections 7 and 8 of the NLRA extend this protection by declaring any employer interference, restraint, or coercion of employee concerted activity an "unfair labor practice." 29 U.S.C. 158(a)(1).

The language and structure of sections 2 and 3 make clear that Congress intended the NLGA—and thus the NLRA—to protect a broad class of "concerted activities," including joint legal action. As explained above, joint legal action fits easily within the ordinary meaning of "concerted activities." See pp. 10-16, *supra*. Section 3, moreover, prohibits federal courts from enforcing *two* categories of contracts: (1) "[a]ny undertaking or promise, such as is described in this section"; and (2) "any *other* undertaking or promise in conflict with the public policy declared in section [2]." 29 U.S.C. 103 (emphasis added). The "undertaking[s] or promise[s] * * * described in this section" are promises not to join or remain in a labor organization, which section 3 explicitly proscribes. *Ibid.* Thus, the

second category of unenforceable contracts—those which *otherwise* conflict with the public policy of section 2—necessarily refers to agreements interfering with a broader class of concerted activities than membership in a labor organization.

Section 4 of the NLGA, which identifies specific acts that are not subject to restraining orders or injunctions, provides additional textual support for interpreting "concerted activities" to include joint legal action. Section 4 states:

> No court of the United States shall have jurisdiction to issue any * * * injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute * * * from doing, *whether singly or in concert*, any of the following acts:
>
> * * *
>
> (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against, *or is prosecuting*, *any action or suit in any court of the United States or of any State*.

29 U.S.C. 104 (emphasis added). While the NLGA does not expressly define the activities listed in section 4 as "concerted activities," the character of the activities protected implies that they are specific types of concerted activity encompassed by section 2's public policy. Other activities explicitly protected by section 4 include striking, joining labor organizations, and assembling peaceably to promote collective interests in a labor dispute—all indisputable forms of concerted activity protected by the NLRA and NLGA. See 29

U.S.C. 104(a), (b) and (f). Section 4(d) therefore demonstrates that Congress intended section 2's protection to encompass certain concerted legal activities. Any protection of the right to "*aid*" persons involved in legal actions arising from labor disputes must *a fortiori* protect the right to *join* in bringing such actions since that is the most helpful and direct form of "aid" available. As a result, section 4(d) makes clear that joint legal action, like striking or joining a labor organization, is a form of concerted activity protected by both section 2 of the NLGA and section 7 of the NLRA.[3]

The NLGA's underlying purpose also supports this interpretation of "concerted activities." Congress enacted sections 2 and 3 of the NLGA in response to widespread judicial enforcement of "yellow dog contracts" that prospectively waived the right to various forms of concerted activity. See *Iskanian* v. *CLS Trasp. L.A., LLC*, 327 P.3d 129, 159-162 (Cal. 2014) (Werdegar, J., concurring in part and dissenting in part); see also *Lincoln Fed. Labor Union No. 19129* v. *Nw. Iron & Metal Co.*, 335 U.S. 525, 534 (1949) (explaining the historical conditions that "prompted

---

[3] Epic's reading of section 4 of the NGLA is extremely puzzling. In its view, "[w]hat Congress had in mind [in section 4] was employees helping one another by, for instance, 'sending money' to litigants—something employees can do of their own accord" without involving "a tribunal or employer." Epic Br. 38-39 (omitting citations). But it defies common sense to think that Congress would specifically protect an employee's sending money to a co-employee to support her law suit against their common employer and not protect his right to file a joint legal action together with her concerning the same dispute. This is *Hamlet* without the prince.

passage of state and federal laws to ban employer discrimination against union members and to outlaw yellow dog contracts"). While most people now associate the term "yellow dog contract" with prospective waiver of an employee's right to join a union, at the time of the NLGA's enactment the term was generally understood to encompass prospective waivers of a far broader class of concerted activity. See Matthew W. Finkin, *The Meaning and Contemporary Vitality of the Norris-LaGuardia Act*, 93 Neb. L. Rev. 6, 10-17 (2014). Indeed, the term was first applied not to unionization waivers, but to company housing leases prohibiting anyone other than the employee's immediate family, doctors, or morticians from having access to his home. U.S. Coal Comm'n, *Report of the United States Coal Commission* 169-170 (1923). When Congress passed the NLGA, moreover, the term was understood to include prospective bars of joint *legal* action. See Joel I. Seidman, *The Yellow Dog Contract* 58 (1932) (discussing an employer-mandated promise to "adjust all differences by means of individual bargaining" as an example of a yellow dog contract).

The NLGA's legislative history confirms that Congress was well aware of the breadth of contractual limitations on employee concerted activity and sought to bar enforcement of all such agreements. In describing the types of contracts rendered unenforceable by section 3, the Senate Report explains: "Not all of these contracts are the same, but, in general, the conditions are such [that] the employee waives his right of free association and genuine representation in connection with his wages, the hours of labor, and other conditions of employment." S. Rep. No. 72-163, 72d Cong., 1st Sess. 14 (1932). The House

Report describes such contracts in equally broad terms: "[T]he character of contract condemned * * * prevents a man from joining with his fellows for collective action." H. R. Rep. No. 72-669, 72d Cong., 1st Sess. 7 (1932). Similarly, in debate, Senator George W. Norris—the Act's co-sponsor—described the contracts rendered unenforceable by section 3 as those in which an "employee waives his right absolutely to free association * * * in connection with his * * * conditions of employment." 75 Cong. Rec. 4,504 (1932). Senator Norris further explained that the agreements proscribed include contracts requiring employees to "singly present any grievances [they have]." *Ibid.* The NLGA's legislative history—like its plain language and purpose—thus confirms Congress's intent to protect joint legal action as "concerted activities." Nothing in the NLRA suggests that Congress intended to limit the scope of protected activities when it adopted the same language in section 7 of the NLRA.

The right to joint legal action guaranteed by the NLRA and NLGA is critical to both Acts' structures. Without the joint action guarantees at the heart of these laws, the statutes would lack practical meaning. Congress passed these statutes to enable employees "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Eastex, Inc.* v. *NLRB*, 437 U.S 556, 565 (1978). It recognized that there is no freedom of contract between "a single workman[] with only his job between his family and ruin" and "a tremendous organization having thousands of workers." 78 Cong. Rec. 3,679 (statement of Sen. Wagner) (1934). The

Acts were not designed to regulate the minute details of employee-employer interactions, but rather to allow for joint action so that "the strong may not take advantage of the weak." 78 Cong. Rec. 12,017 (statement of Senator Wagner).

The Acts, moreover, protect collective action rights "not for their own sake but as an instrument of the national labor policy of minimizing industrial strife." *Emporium Capwell Co.* v. *W. Addition Cmty. Org.*, 420 U.S. 50, 62 (1975). Protecting employees' ability to jointly resolve workplace disputes in an adjudicatory forum critically serves that purpose. Joint pursuit of legal remedies has far less potential for economic disruption than many indisputably protected concerted activities, like strikes and boycotts. Denying employees the safety valve of joint legal action, like denying them the safety valve of walking out in protest of working conditions, "would only tend to frustrate the policy of the [NLRA]." *NLRB* v. *Wash. Aluminum Co.*, 370 U.S. 9, 14 (1962).

D. The NLRB's Interpretation Of Section 7 Is Entitled To Deference

The NLRB, furthermore, has long and consistently interpreted section 7 to include a right to engage in joint legal action, and the Board's interpretation is entitled to deference. This Court has "often reaffirmed that the task of defining the scope of § 7 'is for the [NLRB] to perform in the first instance as it considers the wide variety of cases that come before it.'" *City Disposal*, 465 U.S. at 829 (quoting *Eastex*, 437 U.S. at 568) (noting also that the NLRB's interpretations of

ambiguous provisions of the NLRA are entitled to "considerable deference").[4]

For more than seventy years, the NLRB has consistently interpreted the NLRA to protect joint legal action—whether in court or arbitration. The interpretation stems from *Spandsco Oil & Royalty Co.*, 42 N.L.R.B. 942, 948-949 (1942), decided shortly after the passage of the NLRA, where the NLRB held that "the filing of a [FLSA] suit by three employees was protected concerted activity." *Horton I*, 357 N.L.R.B. at 2278; see also *127 Rest. Corp.*, 331 N.L.R.B. 269, 275 (2000) ("[T]he filing of a civil action by employees is protected activity unless done with malice or in bad faith."); *52nd St. Hotel Assocs.*, 321 N.L.R.B. 624, 633 (1996) ("48 * * * employees * * * join[ing] together to seek legal redress for their wage claims [are] engaged in protected, concerted activity under Section 7."); *Health Enters. of Am., Inc.*, 282 N.L.R.B. 214, 218 (1986) (holding that a group of employees' "filing a civil lawsuit against" an employer is "concerted activity"); *Clara Barton Terrace Convalescent Ctr.*, 225 N.L.R.B. 1028, 1033 (1976) ("It is * * * well settled that the advancement of a collective grievance is protected activity.").

E. Bans Against Joint Legal Action Violate Section 8(a)(1) Of The NLRA And Are Therefore Unlawful

While section 7 of the NLRA establishes a right to joint legal action, the Act's enforcement provision,

---

[4] To be clear, the NLRB is entitled to deference only on its interpretation of the NLRA, a statute which it administers. There is no need to defer to the NLRB's interpretation of the FAA or the NLGA, nor has the Board requested such deference.

section 8, renders contractual provisions that violate that right unlawful. Section 8 provides: "It shall be an unfair labor practice for an employer * * * to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]." 29 U.S.C. 158(a)(1). The plain text of section 8, as well as this Court's and lower courts' precedents, make clear that contracts requiring employees to forswear the possibility of joint legal action as a condition of continued employment are unlawful.

To "interfere" means "to come in collision[;] to be in opposition[;] to run at cross-purposes[;] clash," or "to enter into or take a part in the concerns of others[;] intermeddle, interpose, intervene." *Webster's Third New International Dictionary, Unabridged* 1178 (Gove ed., 2016) (some words capitalized in original). This meaning has not changed since Congress first enacted the NLRA. See *Webster's New International Dictionary of the English Language* 1294 (2d ed. 1936) (defining "interfere" as "[t]o come in collision; to clash; also, to be in opposition; to run at cross-purposes"; "[t]o enter into, or take a part in, the concerns of others; to intermeddle; interpose; intervene"). Similarly, to "restrain" has not varied in definition. Compare *Webster's Third New International Dictionary Unabridged* 1936 (Gove ed., 1993) (defining "restrain" as "to hold (as a person) back from some action, procedure, or course[;] prevent from doing something"; "to limit or restrict to or in respect to a particular action or course[;] keep within bounds or under control"; "to moderate or limit the force, effect, development, or full exercise of"; "to keep from being manifested or performed[;] repress") (some words capitalized in original), with *Webster's New*

International Dictionary of the English Language 2125 (2d ed. 1936) ("To draw back again; to hold back; to check; to keep in check; to hold back from acting, proceeding, or advancing, either by physical or moral force, or by any interposing obstacle; to repress or suppress; to curb."). Finally, to "coerce" was defined at the passage of the NLRA as "[t]o constrain or restrain by force, esp. by law or authority; to repress; curb," or "[t]o compel to any action," *id*. 519, and today holds the same meaning, see *Webster's Third New International Dictionary, Unabridged* 439 (Gove ed., 1993) (defining "coerce" as "to restrain, control, or dominate, nullifying individual will or desire (as by force, power, violence, or intimidation)"; "to compel to an act or choice by force, threat, or other pressure"). Section 8 thus plainly makes illegal any agreement that preconditions continued employment on the waiver of section 7 rights.

Consistent with section 8's plain text, this Court's precedent makes clear that requiring individuals to prospectively waive section 7 rights is illegal. This Court has held that contracts that "stipulate[] for the renunciation by the employees of rights guaranteed by the [NLRA]" are illegal. *Nat'l Licorice Co.* v. *NLRB,* 309 U.S. 350, 361 (1940). In *National Licorice Co.*, for example, this Court held that individual contracts in which employees waived their right to present grievances "in any way except personally" were unenforceable as "a continuing means of thwarting the policy of the [NLRA]." *Id.* at 360-361. The Court further explained in *J.I. Case Co.* v. *NLRB* that "[w]herever private contracts conflict with [the NLRB's] functions, they obviously must yield or the [NLRA] would be reduced to a futility." 321 U.S. 332,

337 (1944); see also *ibid.* ("Individual contracts no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the [NLRA].").

Epic tries to spin these two cases as inapposite.[5] Epic Br. 46-47. *Nat'l Licorice*, it surmises, rested on a finding that the contracts the employer made with its individual employees "were not truly voluntary." *Id.* at 46. That is odd. The Court never described the individual contracts as such. See 309 U.S. at 360.

---

[5] The United States also tries to duck the implications of these cases by arguing that "both decisions were highly dependent on a key factual feature that is absent here." U.S. Amicus Br. 28. Both, it claims, concerned agreements "adopted to eliminate the Union as the collective bargaining agency of [the] employees," *ibid.*, a "concern" that "the present cases do not implicate," *id.* at 29. The very first sentence of *Nat'l Licorice* itself, however, describes its holding in broader terms that do not turn on this "key factual feature": "the question[] presented [is] whether the Board has the authority to order an employer not to enforce contracts with its employees, found to have been procured in violation of the National Labor Relations Act and to contain provisions violating that act." 309 U.S. at 351. And in *J.I. Case*, this Court restated its holding in *Nat'l Licorice* without even mentioning this purported "key factual feature"—" We have * * * held that individual contracts obtained as the result of an unfair labor practice may not be the basis of advantage to the violator of the Act nor of disadvantage to employees. *National Licorice Co.* v. *National Labor Relations Board*, 309 U.S. 350."—and then proceeded to apply that broader holding again without mentioning this feature: "Wherever private contracts conflict with [the Board's] functions, they obviously must yield or the Act would be reduced to a futility." *Id.* at 337. The "factual feature" the United States points to, in short, may help explain why the particular contracts in those cases violated the NLRA but it does not serve to arbitrarily limit the kinds of violations that count.

Instead it identified three different and specific ways in which the individual contracts "by their terms * * * imposed illegal restraints upon the employees' rights to organize and bargain collectively guaranteed by § 7 and 8 of the Act." *Ibid.* Their illegality, not any question of their voluntariness, was the reason the Court did not permit them to be enforced.

Epic's take on *J.I. Case*, 321 U.S. 332, is odder still. Epic contends that it is inapposite because it "involved a collective-bargaining agreement governing *substantive* benefits relating to work and pay." Epic Br. 46 (emphasis added). "The issue," it claims, "was whether an individual contract could [waive] those benefits, and the Court answered no." *Ibid.* The case, however, involved no "collective-bargaining agreement," let alone one "governing *substantive* benefits related to work and pay." Since the employer had cited the individual contracts as a reason why it could not even negotiate with the union over terms the individual contracts covered, no collective-bargaining agreement was ever reached. 321 U.S. at 334 ("The union then asked the Company to bargain. It refused, declaring that it could not deal with the union in any manner affecting rights and obligations under the individual contracts."). Rather, the Court invalidated the contracts because "[i]ndividual contracts * * * may not be availed of to defeat or delay the *procedures* prescribed by the National Labor Relations Act." *Id.* at 337 (emphasis added). An individual contract, it held, could not interfere with the core protections of the NLRA, even if they concerned "procedures."

Throughout their briefs, the employers work hard in an attempt to distinguish substantive from

procedural NLRA rights. The latter can be waived, they claim,[6] *e.g.*, Epic Br. 10, 30, 44-47; E&Y Br. 45-48, and, in any event, are overridden by the FAA, *e.g.*, Epic Br. 39-42. As this Court held in *J.I. Case*, however, the characterization of core section 7 rights as procedural or substantive makes no difference. A contract that conflicts with a core section 7 right is a nullity, no matter how one characterizes it. That makes perfect sense. After all, nearly all the core protections of section 7, including ones that the employers themselves believe cannot be individually waived or displaced by the FAA, like collective bargaining, see, *e.g.*, *id.* at 34 (arguing that specific terms in section 7, like "bargaining collectively," are protected), are "procedural" in some sense. Collective bargaining is no more "substantive" than joint legal

---

[6] The employers' waivability argument rests on a flawed syllogism. They reason that since "[e]mployees may validly waive their right to class proceedings in agreements reached through collective bargaining," and "'[n]othing * * * suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative,'" Epic Br. 44-45 (quoting *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 258 (2009)), then individuals may waive their rights to joint legal action as well. The syllogism's secondary premise, however, is mistaken. In context, the Court in *Penn Plaza* was saying only that whatever section 7 rights an individual employee could waive a union could also waive through collective bargaining. That makes sense. But its converse—whatever section 7 rights a union can waive through collective bargaining an individual may as well—does not, as this Court has repeatedly held. See, *e.g.*, *J.I. Case*, 321 U.S. at 337 (holding that "[i]ndividual contracts no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the [NLRA.] * * * Wherever private contracts conflict with [the NLRA], they obviously must yield or the Act would be reduced to a futility").

action. It is a procedural mechanism through which employees can better bargain for "substantive benefits related to work and pay." *Id.* at 46. In that respect, it resembles core constitutional procedural protections, like freedom of association, that allow individuals to band together to achieve their ends.

Nearly all the arguments employers make against the centrality of joint legal action, in fact, could be made just as easily against collective bargaining itself. Collective bargaining, just like joint legal action, often requires participation—indeed, more participation—by "third-parties," like agencies and courts. See pp. 14-15, *supra*. And the substantive fruits of collective bargaining, just like those of joint legal action, can be achieved—albeit to a much smaller degree—through individual action. See, *e.g.*, Epic Br. 41 (arguing that an employee can waive a procedure that might be necessary to ensure "effective vindication" of substantive rights). Under the employers' reasoning, in fact, a waiver of collective bargaining itself "would leave employees free to work together at every step of the [bargaining] process." Epic Br. 40. In Epic's words, "[e]mployees [could] cooperate in hiring [the same bargaining agent], drafting their [bargaining demands], developing their [bargaining] strategies, finding and preparing [experts], [and]writing [bargaining proposals]," all while bargaining individually with their employer. *Ibid.* (replacing legal action terms in original quotation with collective bargaining ones). "To be sure," as Epic puts it, "a [collective-bargaining] waiver may channel [employees'] 'concerted activities' into a different *procedural* form, but their exercise of the substantive right remains the same." *Ibid.* (same). In short, the

employers cannot displace joint legal action from section 7 without displacing collective bargaining itself. In their view, doing either would merely "channel[] concerted activities into individual [proceedings.]" Epic Br. 39 (emphasis deleted). That is an argument too far.

Also, although, as employers and their amici repeatedly argue, modern Rule 23 class-action litigation and FLSA class proceedings developed after the FAA was enacted, see, *e.g.*, Epic Br. 32, they are wrong to conclude that the NLRA and NGLA cannot therefore protect joint legal proceedings. At the time both the NLRA and NGLA were enacted, of course, federal law recognized joint legal action. Indeed, it had done so since the beginning of the federal court system. The first case docketed in this Court, for example, *Van Staphorst* v. *Maryland*, 2 U.S. (2 Dall.) 401 (1791), concerned a suit by two brothers against the state of Maryland. Likewise, the one civil jury trial this Court has held in its history concerned a suit over a debt involving multiple defendants. *Georgia* v. *Brailsford*, 3 U.S. (1 Dall.) 1 (1794). The employers' joint-action bars would, of course, make impossible traditional actions like these involving more than one plaintiff or more than one defendant—in court or in arbitration. Although the NLRA and NLGA protect appeals to forms of joint legal action fashioned after their enactment, the employers' position sweeps much more broadly. It would invalidate the most traditional and long-standing forms of legal action, not just two particular forms developed more recently.

* * *

As this Court has explained, "our cases leave no doubt that illegal promises will not be enforced in cases controlled by federal law." *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72, 77 (1982). "Where the enforcement of private agreements would be violative of [federal] policy, it is the obligation of the courts to refrain from such exertions of judicial power." *Id.* at 84. To that end, both courts and the NLRB consistently invalidate under section 8 contractual provisions that interfere with employees' section 7 rights and provisions like joint-action bans contained in arbitration agreements should be no exception. See, *e.g.*, *NLRB* v. *Pilgrim Foods, Inc.*, 591 F.2d 110 (1st Cir. 1978); *Extendicare Homes, Inc.,* 348 N.L.R.B. 1062, 1078 (2006). The joint-action ban's illegality alone is thus enough to decide this case—without any reference to the FAA.

II. Nothing In The FAA Revives Epic's Illegal Joint-Action Ban

The fact that the joint-action ban is illegal under federal law completely resolves this case. There is "no doubt" that agreements made illegal by federal statute "will not be enforced." *Kaiser Steel*, 455 U.S. at 77 (permitting an illegality defense to a collective bargaining agreement on the grounds that it violated the NLRA and the Sherman Act).

Notwithstanding the plain illegality of Epic's ban, petitioner alleges that the FAA somehow resurrects it and demands enforcement. This is not so. In fact, even if the FAA applies, it offers at least three independent grounds for invalidating the joint-action ban. The first springs from the language of the FAA itself, which states that arbitration contracts "shall be valid,

irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*." 9 U.S.C. 2 (emphasis added). This "saving clause" invalidates agreements made unenforceable by federal statute. The second is the "rule against prospective waivers," an FAA doctrine designed to ensure that particular terms in arbitration agreements do not obstruct parties' core federal statutory rights, even when the underlying claims are otherwise arbitrable. See *Am. Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2310-2311 (2013); *id.* at 2314 (Kagan, J., dissenting). And the third is the "contrary-congressional-command" doctrine much noted by the employers.

Each of these lines of argument is sufficient to nullify contract terms subject to the FAA. Accordingly, the employers must overcome all three to sustain their position. But, properly construed, none of these approaches support them: the NLRA and NLGA render joint-action bans illegal, such agreements prospectively waive the core rights these statutes protect, and both statutes represent a contrary congressional command sufficient to override the FAA's mandate.

A. The FAA's Saving Clause Prohibits Enforcement Of Arbitration Provisions That Violate Federal Statutes Such As The NLRA And NLGA

The FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*." 9 U.S.C. 2 (emphasis added). Epic's joint-action ban is an illegal contract

provision that falls squarely within the FAA's saving clause and is thus unenforceable.

It is a fundamental principle of contract law that illegal promises cannot be enforced. See, *e.g.*, Restatement (Second) of Contracts § 178 (Am Law Inst. 1981) ("A promise or other term of an agreement is unenforceable * * * if legislation provides that it is unenforceable."). This Court has unequivocally held that its "cases leave no doubt that illegal promises will not be enforced in cases controlled by * * * federal law." *Kaiser Steel*, 455 U.S. at 77. Thus, if a contract formed under state law violates a federal law, as joint-action bans do, pp. 26-33, *supra,* no court should enforce it.

Wisconsin contract law, which governs the dispute in question, is clear, moreover, that "[t]he general rule of law is, that all contracts which are * * * contrary to the provisions of any statute, are void." *Melchoir* v. *McCarty*, 31 Wis. 252, 254 (1872). Under generally applicable state law, then, the ban is a legal nullity and an agreement without legal effect cannot force employees into individual arbitrations.

The saving clause, of course, does not recognize grounds of contract illegality that target arbitration. In particular, this Court has held that the saving clause allows arbitration agreements to be invalidated by "generally applicable contract defenses" but not by "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339 (quoting *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996)). Here, the contract defense of illegality does not apply only to arbitration nor does it

derive its meaning from the fact that an agreement to arbitrate is at issue. As the Ninth Circuit explained in analyzing the arbitration agreement in *Morris*, "[t]he problem with the contract at issue is not that it requires arbitration; it is that the contract term defeats a substantive federal right [under the NLRA] to pursue concerted work-related legal claims." Pet. App. at 14a, *Ernst & Young LLC* v. *Morris*, (No. 16-300). The problem with the joint-action ban, in short, is not that it requires arbitration as a forum, but rather that it forbids joint action in *any* forum in violation of the NLRA and NLGA. The Epic agreement also bars any non-individual—*i.e.*, injunctive—relief, Pet. App. 2a, and thus strips employees of additional statutory rights. Asserting illegality under the NLRA and NLGA, moreover, hardly disfavors arbitration. A contract forbidding joint action in court (without mentioning arbitration) would be equally invalid. Because the defense of illegality is a "generally applicable contract defense" that does not attack the arbitration clause itself, it falls squarely within the FAA's saving clause.

Epic makes four arguments as to why the saving clause should not apply to defenses of illegality.[7] First,

---

[7] Ernst & Young makes a separate argument as novel as it is wrong. It suggests that state-law contract defenses of illegality cannot recognize contract illegality under federal law. See E&Y Br. 35. That reasoning disregards both the Supremacy Clause and this Court's reasoning in *Testa* v. *Katt*, 330 U.S. 386 (1947). There, this Court held, "[w]hen Congress * * * adopt[s an] act, it sp[ea]k[s] for all the people and all the states, and thereby establishe[s] a policy for all. That policy is as much the policy of [a state] as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state." *Id*. at

it claims, "saving clauses in federal statutes save *inferior* laws, like state law or federal common law; they do not save 'other federal statutes enacted by the same sovereign.'" Epic Br. 20 (quoting *Alt. Entm't*, 858 F.3d at 418 (Sutton, J., concurring in part and dissenting in part). That is simply—there is no polite way to put it—wrong. Just two weeks before Epic filed its opening brief, for example, this Court held that the federal venue statute's "saving clause," 28 U.S.C. 1391(a), saved the venue provisions of another federal statute, 28 U.S.C. 1400(b). *TC Heartland LLC* v. *Kraft Foods Group Brands LLC*, 137 S. Ct. 1514 (2017). Other examples where this Court has found federal saving clauses saving other federal statutory provisions include *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 386-387 (1982) (noting that "saving clause [of] exclusive-jurisdiction provision [of federal securities law]" saved general statutory "jurisdiction conferred on courts of the United States"), and *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 144-146 (1967) (holding that saving clause of Food, Drug, and Cosmetic Act saved judicial review provisions available under the APA).

Second, Epic claims that, by its terms, the FAA's saving clause "applies only to grounds for the revocation of '*any* contract'" and "in turn excludes defenses * * * that may be invoked only with respect to a specific subset of contracts." Epic Br. 20-21 (quoting 9 U.S.C. 2). The single authority it extensively discusses, however, *Southland*, 465 U.S. 1, concerns a defense that specifically *targeted* arbitration, *id.* at 10.

---

392 (quoting *Mondou* v. *New York, N.H. & H.R. Co.*, 223 U.S. 1, 57 (1912)).

The saving clause has never recognized such targeted defenses. Epic's general argument, moreover, surprises on its face. Under its reasoning, the saving clause would not recognize the defense of incapacity, for example, because it "may be invoked only with respect to a specific subset of contracts," namely those involving an underaged party or one otherwise incapable of forming consent.

Third, Epic contends, "the saving clause does not preserve any ground that would interfere[] with fundamental attributes of arbitration." Epic Br. 24. At such a lofty level of generality, however, that cannot be right. If taken seriously, it would undercut *all* contract defenses, whenever they would invalidate a "fundamental attribute of arbitration." Consider someone raising the defense of fraud-in-the-inducement to an arbitration provision. Under Epic's reasoning, that defense could not succeed since it would invalidate the arbitration itself—surely one of its own "fundamental attributes." Such a view, however, would turn the saving clause into a nullity.

Epic also makes a narrower form of this argument resting on *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011). Epic Br. 24-27. But that case is not to the contrary. In *Concepcion*, consumers asserted that an arbitration provision was unenforceable under a judicially-created California state law that barred class-action waivers in most arbitration agreements on the grounds that they were unconscionable. *Id.* at 337-340. This Court declined to read the FAA's saving clause as facilitating a state policy which "st[oo]d as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 343.

Concepcion is inapposite for several reasons. First, the holding in *Concepcion* turned on the fact that a *state* law disfavored arbitration. The Court explicitly recognized that there were certain procedures "not * * * envisioned by the FAA" that "*States* may not superimpose on arbitration." *Concepcion*, 563 U.S. at 351 (emphasis added). The Court went on to explain that some procedures "may not be required by *state* law" and that "*States* cannot require a procedure that is inconsistent with the FAA." *Ibid.* (emphasis added). At no point did this Court suggest that the FAA requires enforcement of a contractual provision that directly violates *federal* statutes such as the NLRA and NLGA.

Second, the focus of the Court's concern in *Concepcion* was California's law of unconscionability, a state contract doctrine which the Court noted could be applied in a way that was "toothless and malleable" and "ha[d] no limiting effect." *Concepcion*, 563 U.S. at 347. The doctrine gave judges who disfavored arbitration great discretion to restrict the practice at will. Its standards were flexible, moreover, and were not susceptible to effective appellate supervision. These characteristics made the doctrine less than neutral and generally applicable and meant that in a particular case the doctrine "derive[d its] meaning from the fact that an agreement to arbitrate is at issue." *Id.* at 339. The Court specifically "not[ed, moreover,] that California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts." *Id.* at 342. Indeed, numerous scholars have attacked unconscionability for its ad hoc application and many have seen California as the paradigm of its abuse. See, *e.g.*, Arthur Allen Leff,

Unconscionability and the Code—The Emperor's New Clause, 115 U. Pa. L. Rev. 485, 488 (1967) (noting the "amorphous intelligibility" of California's unconscionability statute); Harry G. Prince, *Unconscionability in California*: *A Need for Restraint and Consistency* 46 Hastings L.J. 459, 465 (1995) ("California courts have been both less restrained and more inconsistent than courts in other jurisdictions in applying the unconscionability doctrine."). Illegality, on the other hand, which includes violations of the public policies expressly set forth in the NLRA and NLGA, is not a pliable contract defense, is not subjective, and is subject to effective appellate supervision. Statutes are limited in scope, and the justification for holding a contract unenforceable when it violates a federal statute is much greater than when it offends a malleable and amorphous state-law doctrine.

This Court's decision in *CompuCredit*, 565 U.S. 95, a choice-of-forum case, also does not help petitioner. In that case, the Court characterized the issue as "whether claims under the [Credit Repair Organization Act (CROA)] can proceed in an arbitrable forum." *Id.* at 104. Here, the issue is not whether any particular forum, including arbitration, is appropriate, but rather whether a provision that illegally bans joint action in *any* forum can be enforced under the FAA. *CompuCredit* concerned, moreover, a completely different objection to arbitration: whether the CROA represents a "contrary congressional command," *id.* at 98-101, foreclosing arbitration (discussed pp. 47-52, *infra*). It nowhere discussed whether an illegal provision of a contract could be enforced under the FAA's saving clause.

Fourth, Epic argues that since the text of the saving clause "applies only to grounds 'for the *revocation* of any contract'" it recognizes only those defenses specified in a *different* FAA provision going to "'the making of the agreement for arbitration.'"[8] Epic Br. 27 (quoting 9 U.S.C. 2, 4). Even if Epic's statutory argument were correct, however—and it is not—the saving clause would still recognize the defense of illegality. If, as Epic contends, the "word 'irrevocable[']means that the contract to arbitrate * * * can be set aside for facts existing at or before the time of its making which would move a court of law or equity to revoke any other contract or provision of a contract," *id*. at 28 (quoting *Zimmerman* v. *Cohen*, 139 N.E. 764, 766 (N.Y. 1923)), illegality is exactly such a defense. A court, if asked, would revoke a provision of a contract illegal "at or before the time of its making." That is, in fact, exactly the situation here. Contracts barring joint legal action have been illegal since the NLRA and NLGA were enacted, see pp. 9-33, *supra*, long before Epic forced its employees to waive that right.

The history of the FAA is more helpful, moreover, than Epic allows. It makes clear that the saving clause was never understood to require enforcement of illegal agreements. The language of the FAA originated in the New York Arbitration Act (NYAA), 120 N.Y. Laws, ch. 275. Indeed, Congress itself acknowledged that the FAA is based on the NYAA. See *Arbitration of Interstate Commercial Disputes: Joint Hearings before*

---

[8] Epic also ignores that the saving clause in the *Lewis* contract itself does not rest on revocability but on unenforceability. See Pet. App. 35a. Thus, even if Epic's fourth argument were correct as to the FAA itself, it would not control in this case.

the Subcomms. of the H. & S. on the Judiciary on S. 1005 & H.R. 646, 68th Cong., 1st Sess. 19 (1924) (statement of Sen. Sterling) (*Arbitration: Joint Hearings*). And this Court has considered New York courts' understanding of the NYAA instructive when interpreting the FAA. See, *e.g.*, *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 286-287 (1995) (interpreting the FAA in light of New York precedents). Indeed, this Court has noted that "the FAA was copied" from the NYAA. *Id.* at 287.

The NYAA and the FAA were passed to remedy a particular problem: the so-called "revocability doctrine," which denied specific performance as a remedy for breach of an arbitration agreement. See *Arbitration: Joint Hearings* 16 (describing how FAA overturns revocability doctrine). In the first major lawsuit challenging the new law, then-Judge Cardozo, writing for the New York Court of Appeals, held that the NYAA permitted specific performance but that "[o]f course, we exclude cases where the contract is inherently immoral *or in contravention of a statute*."[9] *Berkovitz*, 130 N.E. at 290 (emphasis added). This view of the NYAA's scope was widely shared around the time of the FAA's enactment in 1925. See, *e.g.*, *Am. Eagle Fire Ins. Co.* v. *N.J. Ins. Co.*, 148 N.E. 562, 566 (N.Y. 1925) (Crane, J., dissenting) ("The contract of arbitration is to be construed like any other contract and all its terms and conditions given force and effect *unless they are against public policy or illegal*."

[9] Then-Judge Cardozo's exception also puts paid to Epic's argument that saving clauses can save only inferior laws, see p. 37, *supra*. What New York inferior statutes could then-Judge Cardoza have been referring to? Municipal ordinances?

(emphasis added)); *Zimmerman* v. *Cohen*, 139 N.E. 764, 765 (N.Y. 1923) ("The [NYAA] was passed to provide a means for enforcing an agreement to arbitrate; it did not otherwise change the law of contracts which is as applicable to such an agreement as to other terms and conditions."). *Berkovitz* was also frequently mentioned in congressional hearings during the enactment of the FAA, alerting Congress to New York's interpretation. See *Arbitration: Joint Hearings* 17, 33, 34, 39.

B. By Preventing Employees From Exercising Core Rights Under The NLRA And NLGA, Epic's Joint-Action Ban Violates The Rule Against Prospective Waivers

The FAA's prospective-waiver doctrine also forbids enforcement of Epic's joint-action ban. As a general matter, courts will not enforce even agreed-upon waivers of federal statutory rights necessary to achieving Congress's purposes. See *Brooklyn Sav. Bank*, 324 U.S. at 707 ("No one can doubt but that to allow waiver of statutory wages by agreement would nullify the purposes of the Act."). For example, in *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, this Court drew a distinction between parties' inability to alter by agreement "applicable liability principles," *i.e.*, "substantive obligations and particular procedures" protected by the statute at issue, which were "designed to correct specific abuses," and parties' freedom to decide "the forum in which the[se principles] are to be vindicated." 515 U.S. 528, 534-536, 540-541 (1995); see also *CompuCredit*, 565 U.S. at 102 ("The parties remain free to [arbitrate], so long as * * * *the guarantee of the legal power to impose*

liability—is preserved."). This Court has long acknowledged this basic maxim in its FAA jurisprudence by recognizing that "arbitration agreements that 'operat[e] . . . as a prospective waiver of a party's *right to pursue* statutory remedies'" will not be enforced. *Italian Colors*, 133 S. Ct. at 2310 (quoting *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985)).

Under this "prospective-waiver doctrine," courts evaluate whether specific provisions of an arbitration agreement obstruct parties' core federal statutory rights. See *Italian Colors*, 133 S. Ct. at 2310-2311; *Randolph*, 531 U.S. at 90. If a provision does so, it is unenforceable, even if it is not formally illegal or the relevant statute does not reflect a congressional command forbidding arbitration. See *Italian Colors*, 133 S. Ct. at 2310; *Randolph*, 531 U.S. at 90.

The doctrine most conclusively applies where a party can demonstrate that an arbitration agreement prohibits the exercise of federal statutory rights, *Italian Colors*, 133 S. Ct. at 2310 ("[The doctrine] would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights."), as joint-action bans do. It is beyond doubt that the right to joint action is an "essential feature[]," *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 481-482 (1989), of the NLRA and NLGA and that it was fundamental to Congress's objectives in enacting these statutes. The statutes' text affirmatively grants and protects the right of workers to act jointly to promote their employment interests. See pp. 10-16, 19-25 *supra*.

The history and purposes of the NLRA and NLGA do the same. The Acts' history plainly reflects the importance of the right to joint action. See pp. 19-22, *supra*. Their public policy declarations equally do so. See pp. 17, 19-20, *supra*; 29 U.S.C. 102, 151. And adjudicative interpretations of the Acts' purposes further highlight the right's "essential" nature. For example, this Court has described section 7 of the NLRA, including its "mutual protection" clause, as "a fundamental right" *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937). The NLRB has likewise held that joint action "is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest." *Horton I*, 357 N.L.R.B. at 2286.

This Court's discussion of *Vimar*, 515 U.S. at 530-536, and *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991), in *Italian Colors*, 133 S. Ct. at 2311-2312, reinforces this analysis. There, this Court observed that, in *Vimar*, "[t]he Court rejected the argument that the 'inconvenience and costs of [arbitrating]' abroad 'lessen[ed]' the defendants' liability" under the Carriage of Goods by Sea Act, and it indicated that "[s]uch a 'tally[ing] [of] the costs and burdens'" is impermissible in the FAA context. *Ibid.* (citations omitted). Here, however, Epic's joint-action ban directly proscribes exercising rights protected by the NLRA and NLGA. See pp. 9-33 *supra*. It does not simply make doing so costly or inconvenient. Likewise, this Court explained that, "[i]n *Gilmer*, we had no qualms in enforcing a class waiver in an arbitration agreement even though the * * * Age Discrimination in Employment Act[] expressly permitted collective actions." *Italian Colors*, 133 S. Ct.

at 2311. This decision, however, was premised on the fact that, under the ADEA, joint action is not a core, unwaivable right akin to freedom from discrimination. See *Gilmer*, 500 U.S. at 27-28, 32. *Gilmer*, in fact, did not involve any NLRA or NLGA claims. Under the NLRA and NLGA, by contrast, joint action *is* a core right. See pp. 9-16, 19-22, *supra*. Accordingly, enforcing Epic's contract would not be comparable to sustaining the class waiver in *Gilmer*, but rather to upholding a prospective waiver of liability for age discrimination or of any other "essential" federal right. Cf. *14 Penn Plaza*, 556 U.S. at 265 ("[F]ederal antidiscrimination rights may not be prospectively waived.").

C. The NLRA And NLGA Represent A Contrary Congressional Command Sufficient To Override The FAA

This Court need not inquire whether the NLRA "overrides" the FAA because, as demonstrated above, the statutes can be read in harmony by applying the FAA's saving clause or the prospective-waiver doctrine. If the Court does reach this inquiry, however, and finds that the FAA and NLRA conflict, the NLRA and NGLA announce a strong "contrary congressional command" against the enforcement of joint-legal action bans in individual employment-related arbitration agreements. In addition, if the Court were to find an irreconcilable conflict between the FAA, on the one hand, and the NLRA and NLGA, on the other, the later-enacted NLRA and NLGA would repeal the FAA to that extent.

This Court has explained that "[l]ike any statutory directive, the [FAA's] mandate may be overridden by a

contrary congressional command." *Shearson/Am. Express, Inc.* v. *McMahon*, 482 U.S. 220, 226 (1987). Such a command can be deduced from the conflicting statute's "text or legislative history," or "from an inherent conflict between arbitration and the statute's underlying purpose," *id.* at 227, and can apply to specific provisions of an arbitration agreement, see *Italian Colors*, 133 S. Ct. at 2309 (analyzing class-action waiver). The question is simple: did Congress "evince[] an intention to preclude" the disputed directive. *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628). Such a command requires no specially emphatic force, specificity, or magic words.

Both the text and underlying purpose of the NLRA and NLGA evince precisely this type of narrow contrary congressional command against the enforcement of joint-action bans in individual employment-related arbitration agreements. First, the text of the NLRA unambiguously protects employees' right to engage in joint action. See pp. 10-16 *supra*. Section 7 explicitly declares that employees have a right to "engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. 157. Similarly, section 3 of the NLGA bars enforcement of any "agreement" that violates the Act's public policy guaranteeing employees' right to act concertedly for mutual aid and protection. *Ibid.* Section 3 further declares that such agreements "shall not afford any basis for the granting of legal or equitable relief by any [court of the United States]." 29 U.S.C. 103. And, as this Court has explained, an order compelling arbitration pursuant to an agreement between parties is a form of specific performance, a remedy in equity. See *Southland Corp.*

v. *Keating*, 465 U.S. 1, 13 (1984) ("The [FAA] sought to 'overcome the rule of equity, that equity will not *specifically enforce* any arbitration agreement.'") (citation omitted) (emphasis added); *Red Cross Line* v. *Atl. Fruit Co.*, 264 U.S. 109, 118-122 (1924) (describing orders compelling arbitration as a type of specific performance).

Although these statutes lack specific language referencing arbitration, this is hardly surprising given that when the Acts were passed courts had never applied the FAA to individual employment contracts. In fact, it was not until 2001 that this Court definitively ruled that the FAA applied to them. See *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105 (2001). By prohibiting employer interference with employees' right to engage in joint legal action, the plain text of the NLRA and NLGA establishes a contrary congressional command precluding the enforcement of employer-mandated joint-action bans in individual arbitration agreements.

Pursuant to this Court's explanation in *McMahon*, federal courts have consistently found a contrary congressional command when the FAA's enforcement mandate inherently conflicts with the underlying purpose of another federal statute. See, *e.g.*, *In re Nat'l Gypsum Co.*, 118 F.3d 1056, 1067-1069 (5th Cir. 1997) (finding that arbitration of some core bankruptcy proceedings conflicts with the underlying purposes of the Bankruptcy Code). In the bankruptcy context, for example, federal courts have concluded that arbitration of some bankruptcy proceedings would conflict with the Bankruptcy Code's underlying purposes of "centraliz[ing] [the] resolution of purely

bankruptcy issues [and] protect[ing] creditors and reorganizing debtors from piecemeal litigation." *Id.* at 1069; see also *In re White Mountain Mining Co., LLC*, 403 F.3d 164, 169-170 (4th Cir. 2005) (similarly concluding that arbitration of certain core bankruptcy proceedings would conflict with the Bankruptcy Code's purposes of "[c]entralization of disputes concerning a debtor's legal obligations" and "protect[ion of] reorganizing debtors and their creditors from piecemeal litigation").

Although the Court failed to find a contrary congressional command in *CompuCredit*, 565 U.S. 95, in the Credit Repair Organization Act (CROA), the history and purpose of that Act differ markedly from those of the NLRA and NLGA. As the Court noted, the CROA was designed only to create "the guarantee of the legal power to impose liability," not to specify the forum that must impose such liability. *CompuCredit*, 565 U.S. at 102 (emphasis not included). As demonstrated above, the text, purpose, and history of the NLRA and NLGA make clear that the statutes were designed to allow employees to join together in legal actions "for the purpose of * * * mutual aid or protection."

Furthermore, the later-enacted NLRA (1935) and NLGA (1932) repealed conflicting provisions of the FAA (1925) and therefore supersede its mandates. Section 15 of the NLGA *expressly* repeals provisions of the FAA that conflict with the NLGA. 29 U.S.C. 115 ("All acts and parts of acts in conflict with the provisions of this chapter are repealed."). And, although the NLRA contains no similar express repeal, this Court has instructed that in the rare cases

where statutes "irreconcilabl[y] conflict," the later-enacted Act impliedly repeals the earlier. *Posadas* v. *Nat'l City Bank of New York*, 296 U.S. 497, 503 (1936). In both acts, then, Congress repealed any conflicting provisions within the FAA. See *Lockhart* v. *United States*, 546 U.S. 142, 149 (2005) (Scalia, J., concurring) ("When the plain import of a later statute directly conflicts with an earlier statute, the later enactment governs."); *Marcello* v. *Bonds*, 349 U.S. 302, 310 (1955) ("Unless we are to require the Congress to employ magical passwords in order to effectuate an exemption * * * we must hold that the present statute expressly supersedes the [earlier-enacted, conflicting] provisions."). And, while the FAA was recodified in 1947, this Court has held that a non-substantive re-enactment of a statute does not affect last-in-time analysis. See *Bulova Watch Co.* v. *United States*, 365 U.S. 753, 758 (1961) (re-enacted "identical" provision "can[not] fairly be regarded as a later enactment"); *Anderson* v. *Pac. Coast S.S. Co.*, 225 U.S. 187, 199 (1912) ("[I]t will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect, unless such intention is clearly expressed."). When Congress recodified the FAA, it had no intention of substantively changing the Act. See S. Rep. No. 80-664, 80th Cong., 1st Sess. 1 (1947) (recodification made no "material change[s]" and "[n]o attempt * * * to make amendments in existing law"); H.R. Rep. No. 80-251, 80th Cong., 1st Sess. 1 (1947) (same); H.R. Rep. No. 80-255, 80th Cong., 1st Sess. 1 (1947) (same). Congress substantively amended the NRLA, on the other hand, in 1947, 1959, and 1974, further supporting an implied repeal of any irreconcilably conflicting provisions in the FAA. See

Labor Management Relations Act, Pub. L. No. 80-101, 61 Stat. 136 (1947); Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 136 (1959); Labor Relations Act, amendments, Pub. L. 93-360, 88 Stat. 395 (1974).

* * *

Employers and their amici mistakenly and repeatedly rely on two faulty assumptions about arbitration. First, they assert that there is a federal policy favoring arbitration agreements. While there is no doubt that the FAA was originally enacted in response to "hostility to arbitration agreements," this federal policy applies only to put arbitration contracts "on an equal footing with other contracts." *Concepcion*, 563 U.S. at 339. After that, the policy has little applicability, especially to provisions, like the joint-action bans here, that would have exactly the same scope and effect if they appeared in a contract that did not mention arbitration. Thus, the FAA cannot resuscitate a contract that clearly violates federal law. That would put the contract not "on equal footing" but on steroids—far beyond what Congress intended.

Second, the employers argue that there is a presumption in favor of arbitrability. Any such presumption applies, however, "only where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand" and controls only "where the presumption is not rebutted." *Granite Rock* v. *Int'l Bhd. of Teamsters*, 561 U.S. 287, 301 (2010). Since the joint-action ban is illegal, however, it cannot "cover[]" any dispute and,

even if it somehow did, its illegality would conclusively rebut any presumption that it should apply.

D. The Employers' View Of The FAA, Not The Employees', Would Lead To Absurd Results

Epic makes several eye-popping claims about where requiring the availability of joint proceedings would lead. All are unfounded. First, Epic argues, "mandatory arbitration in the employment context would be a thing of the past." Epic Br. 47. Not true. So long as employees can pursue joint legal action through a law suit *or* arbitration their section 7 rights are preserved and joint arbitration has long been a feature of labor law. Second, Epic fancifully contends that "employers would be forever prohibited from opposing a request for class certification, no matter the forum [and that] courts would be unable to deny them." *Id*. at 48. Again, untrue. Section 7 does not mean that otherwise inappropriate joint action can proceed, just that an employer cannot take away all types of otherwise available joint action.[10]

---

[10] The employers and their amici's various arguments sounding in the Rules Enabling Act, 28 U.S.C. 2072(b), *e.g.*, Epic Br. 48-49, are especially puzzling. Epic, for example, argues that a court could never enforce Rule's 23's certification requirements without "abridg[ing]" or "modify[ing]" the employees' section 7 right. *Id*. at 49. But section 7 requires only that a generally available joint procedural device be made available to employees on the same terms as it is made available to everyone else. It does not require that it be made available on preferential or unconditional terms.

Amici push the Rules Enabling Act even further. They argue in various ways that if section 7 grants a right to pursue joint legal action, then Rule 23 "modif[ies]" that right and is therefore an invalid rule of federal procedure. See, *e.g.*, Amicus Br. Retail

Rather it is Epic's position that leads to absurd results. It would require courts to uphold arbitration provisions that are *themselves* illegal because "[a] defense that exists only because of the presence of a particular arbitration provision in a contract is not generally applicable." Pet. 19. Thus, under Epic's view, its joint-action ban would be impervious to legal challenge even if, for instance, it were adopted by collusive arrangement with other employers for the purpose of restraining trade. Such an interpretation, however, is foreclosed by this Court's decision in *Paramount Famous Lasky Corp.* v. *United States*, in which an arbitration agreement was held unlawful under the Sherman Act because it "provide[d] for compulsory joint action [against violators]" and major film industry participants "refus[ed] to contract for display of pictures" using any other arrangement. 282 U.S. 30, 40-41 (1930); see also *Ross* v. *Am. Express Co.*, 35 F. Supp. 3d 407, 456 (S.D.N.Y. 2014) ("[T]he collusive adoption of mandatory class-action-barring arbitration clauses, if proven, would have constituted an unreasonable restraint on trade."). Likewise, the employers' view would require courts to enforce arbitration agreements inserted into contracts solely on the basis of race or sex. But see 42 U.S.C. 1981(b); *Hishon* v. *King & Spalding*, 467 U.S. 69, 75 (1984) ("A

Litigation Center 20-22; Amicus Br. Council on Labor Law Equality 24-26. They fail to see, however, that their argument would eat through all the federal rules. As the employers admit, for example, section 7 clearly protects the right to pursue individual legal action to vindicate rights secured by a collective bargaining agreement. See, *e.g.*, Epic Br. 37. Under the employers' amici's view, however, most of the federal rules would "modify" that right since they determine how it can be exercised in a judicial proceeding and would thus be invalid.

benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion."). But, as this Court has held, "where the judgment of the Court would itself be enforcing the precise conduct made unlawful by [an] Act," a court cannot require such conduct. *Kelly* v. *Kosuga*, 358 U.S. 516, 520 (1959).

The sole exception Epic would allow is when Congress has not only made certain conduct illegal but also specifically and expressly referenced arbitration or the manner in which it is carried out. But that would require Congress to add otherwise unnecessary language expressly addressing arbitration in *every* statute that makes conduct illegal.[11] Surely, the FAA does not require Congress to act so redundantly. If Congress has declared something illegal, the courts cannot require it.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

---

[11] This view of illegality does not, as the employers contend, "gut," E&Y Br. 35, "circumvent," *id*. at 36, or "swallow," *e.g.*, Amicus Br. Washington Legal Foundation 19, this Court's contrary-congressional-command analysis. That analysis applies primarily to *legal* arbitration provisions and practices, not *illegal* ones. That explains why prior cases in this Court addressing the conflict between the FAA and other federal statutes turned on contrary congressional commands rather than the FAA's saving clause, see, *e.g.*, Epic Br. 20. These cases alleged conflict but no illegality.

Respectfully submitted.

DAVID C. ZOELLER
WILLIAM E. PARSONS
CAITLIN M. MADDEN
KATELYNN M. WILLIAMS
HAWKS QUINDEL, S.C.
222 West Washington Ave., Suite 450
Madison, WI 53701
(608) 257-0040
dzoeller@hq-law.com

DANIEL R. ORTIZ
Counsel of Record
TOBY J. HEYTENS
UNIVERSITY OF VIRGINIA SCHOOL OF LAW SUPREME COURT LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127
dro@virginia.edu

ADAM HANSEN
APOLLO LAW LLC
400 South 4th Street, Suite 401M - 250
Minneapolis, MN 55415
(612) 927-2969

AUGUST 2017

Appendix of Relevant Statutory Provisions

Section 2 of the Federal Arbitration Act (FAA), 9 U.S.C.A. § 2, provides:

Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 1 of the Norris-LaGuardia Act (NLGA), 29 U.S.C.A. § 101, provides:

Issuance of restraining orders and injunctions; limitation; public policy

No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

Section 2 of the Norris-LaGuardia Act (NLGA), 29 U.S.C.A. § 102, provides:

Public policy in labor matters declared

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

Section 3 of the Norris-LaGuardia Act (NLGA), 29 U.S.C.A. § 103, provides:

Nonenforceability of undertakings in conflict with public policy; "yellow dog" contracts

Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 102 of this title, is declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following:

Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby

(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.

Section 4 of the Norris-LaGuardia Act (NLGA), 29 U.S.C.A. § 104 provides in pertinent part:

Enumeration of specific acts not subject to restraining orders or injunctions

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

* * *

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

* * *

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified.

Section 15 of the Norris-LaGuardia Act (NLGA), 29 U.S.C.A. § 115 provides:

Repeal of conflicting acts

All acts and parts of acts in conflict with the provisions of this chapter are repealed.

Section 1 of the National Labor Relations Act (NLRA), 29 U.S.C.A. § 151 provides:

Findings and declaration of policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or

interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 7 of the National Labor Relations Act (NLRA), 29 U.S.C.A. § 157 provides:

Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8 of the National Labor Relations Act (NLRA), 29 U.S.C.A. § 158 provides in pertinent part:

Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer-

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.