No. 16-307

IN THE

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MURPHY OIL USA, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT SHEILA HOBSON IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether an employer's requirement, in an agreement to arbitrate all future legal claims, that employees agree to waive their right to pursue any claim against their employer in any forum—judicial or arbitral—on a joined, collective or class basis or in any manner except individually,

1) "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of" their right under § 7 of the National Labor Relations Act (NLRA) "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection," and, therefore, is an unfair labor practice under § 8(a)(1) of the Act, 29 U.S.C. §§ 157 and 158(a)(1), and

(2) "conflict[s] with the public policy declared in" § 2 of the Norris-LaGuardia Act (Norris-LaGuardia), in terms identical to those in NLRA § 7, and, therefore, results in an agreement that "shall not be enforceable" under Norris-LaGuardia § 3, 29 U.S.C. §§ 102 and 103?

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INTRODUCTION

Each of the Employers in these three cases required their employees to relinquish the central substantive right protected by the NLRA—the right "to act together to better their working conditions." *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 14 (1962). The instrument used to effect that interference with § 7 rights, an agreement required as a condition of employment, has been a target of Congress since Norris-LaGuardia because of the concern that employers would "set at naught" employees' statutory rights "by inducing their workmen to agree" to cede their rights. *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 364 (1940).

Because the challenged provisions were part of agreements to arbitrate, the Employers and the Acting Solicitor General (SG) begin their analyses with the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* (FAA). Because this case arose out of the filing of an unfair labor practice charge with the National Labor Relations Board (NLRB), we begin, as did the Board, with the application of the NLRA and Norris-LaGuardia. But the choice of starting point cannot be determinative of the conclusion. This Court must determine whether it is fairly possible to give effect to all three statutes and thus to Congress' full intent. The Board as well as the Seventh and Ninth Circuits correctly concluded that the agreements violate the NLRA and are thus unenforceable, and that that result is fully consistent with the FAA.

Many of the arguments advanced by the Employers and the SG address facts and conclusions not ac-

tually at issue. Thus, it is important at the outset to understand what these cases are *not* about.

First, these cases are *not* only or even principally about class actions. Each of the agreements at issue prohibits a wider category of concerted activity, including two employees joining identical claims in a single complaint or arbitrating claims jointly. *See, e.g.*, JA 11 ("any claim . . . against . . . the Company shall be heard without consolidation of such claim with any other person"). And in this case, the Board held that "by maintaining" the agreement, wholly apart from any enforcement thereof in relation to any particular form of joint action, Murphy Oil violated the NLRA. Pet. 84a-85a.

Second, these cases are also *not* only or even principally about which particular types of joint enforcement activity constitute protected "concerted activity" under § 7. In this case, four employees joined their claims in a single complaint. JA 14. In *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 979 (9th Cir. 2016), two employees joined their claims. In *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), ten employees joined the original named plaintiff by filing consent forms after the original complaint was filed. *See Lewis v. Epic Systems Corp.*, No. 15-cv-82 (W.D. Wis.), Docket Nos. 14, 15, 16, 18, 24-27, 39, 41. That was all unquestionably "concerted activity" as that term "clearly . . . 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). The employees' joint filing of identical claims would be "concerted activity" even if they had not also sought to act as other employees'

representative, to provide notice to others, and to invite others to join the collective actions.[1]

Third, these cases are *not* about whether employers can oppose joinder under Fed. R. Civ. P. 20 or certification under Rule 23 or § 16(b) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 216(b). They can do so, albeit not on the basis of an unlawful waiver. As the Board expressly stated:

> Nothing in our holding guarantees class certification; it guarantees only employees' opportunity to pursue without employer coercion, restraint or interference such claims of a class or collective nature as may be available to them under Federal, State or local law. Employees who seek class certification in Federal court will still be required to

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[1] By the latter actions, the employees sought to initiate group action no less than if they had formed a union and asked other employees to join. This Court has recognized that "an individual employee may be engaged in concerted activity when he acts alone," if "the lone employee intend[s] . . . to induce group activity." *City Disposal*, 465 U.S. at 831. The concert requirement is satisfied "in situations in which a single employee, acting alone, participates in an integral aspect of a collective process." *Id.* at 835. "Under this longstanding Board doctrine," an individual act "is 'concerted as long as it is engaged in with the object of initiating or inducing . . . group action.'" *NLRB v. Caval Tool Div.*, *Chromalloy Gas Turbine Corp.*, 262 F.3d 184, 190 (2d Cir. 2001) (quoting *Whittaker Corp.*, 289 NLRB 933, 933 (1988)). Thus, the Board was correct when it concluded, "an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action" and is thus engaged in concert within the scope of § 7. *D.R. Horton*, *Inc.*, 357 NLRB 2277, 2279 (2012), *enf. denied*, 737 F.3d 344 (5th Cir. 2013).

> prove that the requirements for certification under Rule 23 are met, and their employer remains free to assert any and all arguments against certification (other than the [unlawful waiver]).

D.R. Horton, 357 NLRB at 2286 n. 24. The Board's holding also obviously does not "require Congress or the States to create or maintain any type of group procedure at all." Pet. 61a.

STATEMENT

The following additional facts are material.

Respondent in Support of Petitioner, Sheila Hobson (Hobson) and other Murphy Oil employees and job applicants were required to execute the "Binding Arbitration Agreement and Waiver of Jury Trial" (Agreement) as a condition of employment. Pet. 24a.

In her District Court Complaint, Hobson, together with three other named plaintiffs (two of whom worked with her at Murphy Oil's Calera, Alabama gas station and the third at a station in a nearby town) alleged that they and other similarly-situated Murphy Oil employees were required to perform "fuel surveys," checking the prices at competitor stations, and other tasks, including "cleaning the store, stocking the shelves, unloading merchandise from trucks, making bank deposits, running errands, and getting supplies" while "off-the-clock," *i.e.*, without any additional hourly compensation or recognition of the hours for purposes of determining entitlement to compensation at the statutorily-required overtime rate. JA 15-19.

The Board held that the maintenance of the Agreement, separate and apart from its enforcement in the District Court or any other specific application, was unlawful. Pet. 84a-85a.

SUMMARY OF ARGUMENT

I.A. The central right that Congress vested in employees through the NLRA is the § 7 right to form unions, participate in collective bargaining, and "engage in other concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 157. Since shortly after the NLRA was adopted and consistently to date, the NLRB has construed § 7 to give two or more employees the right to join together in court or arbitration to enforce their workplace rights free from employer interference. Every court of appeals that has addressed the question has agreed with the Board's construction. In *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978) (footnotes omitted), this Court stated that "the 'mutual aid or protection' clause protects employees . . . when they seek to improve working conditions through resort to . . . judicial forums."

Construing § 7's plain text to encompass joint pursuit of legal claims is consistent with the purpose of the Act—"to protect the right of workers to act together to better their working conditions." *Washington Aluminum*, 370 U.S. at 14. As this Court concluded, "Congress knew well enough that labor's cause often is advanced on fronts other than . . . the immediate employment context" and it intended the "mutual aid or protection" clause to encompass concerted appeals to government to improve working

conditions, whether the appeal be to the legislative, executive or judicial branch. *Eastex*, 437 U.S. at 565.

The NLRA protects the § 7 right to engage in concerted activity to enforce workplace rights by barring retaliation in § 8(a)(3), but also by barring all other forms of interference, restraint and coercion in § 8(a)(1). Employer rules that prohibit protected activity, whether imposed unilaterally or through a compelled agreement, constitute interference, restraint and coercion. Neither the Board nor any court has ever held that the NLRA protects a particular form of concerted activity against retaliation, but permits an employer to extract an enforceable promise from employees not to exercise their right to engage in the activity.

B. Among the central wrongs Congress aimed to eliminate in the NLRA and its precursor, Norris-LaGuardia, were employer-imposed agreements through which individual employees were required to waive their rights. The 1932 Norris-LaGuardia Act specifies that agreements "not to join . . . any labor organization" and every other agreement "in conflict with the public policy" that "the individual unorganized worker . . . be free from the interference, restraint, or coercion of employers . . . [when they engage] in other concerted activities for the purpose of . . . mutual aid or protection" "shall not be enforceable." 29 U.S.C. §§ 103 and 102. In the 1935 NLRA, Congress extended Norris-LaGuardia's prohibition of judicial enforcement of such agreements by directly prohibiting employers' maintenance of such agreements. Imposition of such agreements violates the NLRA because it "interfere[s], restrain[s], or

coerce[s] employees in the exercise of the rights guaranteed in section [7]." 29 U.S.C. § 158(a)(1).

In *National Licorice*, this Court held that "contracts" that "stipulated for the renunciation by the employees of rights guaranteed by the Act . . . were a continuing means of thwarting the policy of the Act" and thus "were appropriate subjects for the affirmative remedial action of the Board." 309 U.S. at 361.

Under those long-settled constructions of federal labor law, the provisions of the agreements at issue barring concerted pursuit of legal claims are unlawful under the NLRA and unenforceable under Norris-LaGuardia.

II. There are five, *separate* reasons why the inclusion of these unlawful terms in an arbitration agreement does not save them from invalidation.

First, the FAA's saving clause, 9 U.S.C. § 2, expresses Congress' intent that terms of arbitration agreements that are unlawful for reasons unrelated to the designation of an arbitral forum to resolve disputes should not be enforced. The Employers' wholly novel constructions of the saving clause should be rejected not only because they are contrary to statutory language and legislative intent, but because they create an unnecessary and unintended conflict between the FAA and the later-enacted labor statutes as explained in *NLRB v. Alternative Entertainment, Inc.*, 858 F.3d 393, 402, 405-08 (6th Cir. 2017); *Morris*, 834 F.3d at 984-85; and *Lewis*, 823 F.3d at 1156-57.

Second, under this Court's FAA jurisprudence, agreements to arbitrate are enforceable only if, "[b]y

agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627-28 (1985). The core substantive right protected by the NLRA is the right to engage in concerted activity. By forbidding joint enforcement of legal claims, the agreements require employees to "forgo the substantive rights afforded by the [NLRA]." *Id.* at 628. That employees may exercise their substantive right by invoking available procedures in court or arbitration does not alter the conclusion. "The difference is that between explicit statutory guarantees and the procedure for enforcing them, between applicable liability principles and the forum in which they are to be vindicated." *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 534 (1995). In the NLRA, the "explicit statutory guarantees" that establish "applicable liability principles" are in § 7 while the "procedures for enforcing them" are in § 10, 29 U.S.C. § 160. In the agreements, employees "forgo" the former, not the latter.

Third, the agreements are unenforceable under Norris-LaGuardia because they "conflict[] with the public policy" that it is "necessary" that employees be "free from interference, restraint, or coercion" when they engage "in other concerted activities for the purpose of . . . mutual aid or protection." Norris-LaGuardia provides that "[a]ny undertaking or promise" "contrary to th[at] public policy . . . shall not be enforceable." 29 U.S.C. §§ 102 and 103.

Fourth, the Board appropriately accommodated all three federal statutes by concluding that the FAA's saving clause applies to provisions in arbitration

agreements waiving the right to act in concert that are unlawful under the NLRA, but that employers can nevertheless require employees to arbitrate purely individual claims or to arbitrate all claims so long as employees are permitted to do so on a collective basis as they could otherwise do in court.

Fifth, if there is an unavoidable conflict between the FAA and the two labor laws, the later-enacted NLRA and Norris-LaGuardia take precedence.

III. Under the Board's holding, employers remain free to adopt arbitration systems available only to employees who choose to proceed individually and not to join their claims with others or seek to represent others. The Board's holding merely prevents employers from requiring, as a condition of employment, that employees categorically waive their right to proceed collectively in court and in arbitration in all future disputes.

ARGUMENT

I. The Agreements Violate the Core Provision of the NLRA and Are Inconsistent with Federal Labor Policy

The Board's foundational legal conclusion—that requiring employees to assent to the agreements as a condition of employment violated the NLRA—is correct and rooted in the core provisions and central purposes of the Act. The conclusion follows inexorably from long-standing, unchallenged constructions of §§ 7 and 8(a)(1) of the Act that have been endorsed by this Court.

The Board's holdings applied settled doctrine to a new employer practice. The Board did not overrule any past precedent in reaching its holding. The Board has never upheld agreements of the type at issue here and, prior to the Fifth Circuit's ruling, no court had upheld such an agreement against a claim that it violated the NLRA or was unenforceable under Norris-LaGuardia.

A. § 7 Protects Employees' Concerted Appeals to Government to Improve Working Conditions

The core of the NLRA is its § 7:

> 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 . . . .

29 U.S.C. § 157. On its face, § 7 protects a broad range of joint action by employees, expressly extending beyond joining a union and engaging in collective bargaining to "other concerted activities for the purpose of . . . mutual aid or protection."

This Court has held that the activity protected by § 7 need not involve a union or collective bargaining. In *Washington Aluminum*, this Court upheld the Board's conclusion that a spontaneous walkout of unrepresented employees prompted by cold temperatures in a plant was protected by § 7. The "policy of the Act," this Court concluded, is "to protect the right

of workers to act together to better their working conditions." 370 U.S. at 14.

Section 7's protection is also not limited to traditional forms of labor protest, such as strikes, or to appeals directed only to employers. Employees' concerted appeals to a range of third parties, including consumers and government actors, to take action to alter employers' behavior are protected. *See*, *e.g.*, *NCR Corp.*, 313 NLRB 574, 576 (1993) (employees have a right to "solicit sympathy" and "support" from "the general public[and] customers"); *DirecTV, Inc. v. NLRB*, 837 F.3d 25, 27 (D.C. Cir. 2016), *petition for cert. filed*, No. 16-1379 (U.S. May 16, 2017) (§ 7 "right encompasses protesting an employer's actions or policies through an appeal to the public for support"); *Bethlehem Shipbuilding Corp. v. NLRB*, 114 F.2d 930 (1st Cir. 1940) ("the right of employees . . . guaranteed by Section 7 . . . extends to . . . [the] appearance of employee representatives before legislative committees"). Joining a union to remedy substandard wages, joining a strike to remedy substandard wages, and joining with other employees in an appeal to consumers or government to intervene to remedy substandard wages all fall squarely within the protection of § 7.

Congress' intent to protect concerted resort to the courts in the NLRA is evident in Norris-LaGuardia's express protection of that right. In that precursor statute, from which the precise language of § 7 was drawn, Congress barred federal courts from enjoining the act of "aiding any person participating or interested in any labor dispute who is . . . prosecuting[] any action or suit in any court." 29 U.S.C. § 104(d).

The Senate Committee Report makes clear that that provision was intended to prevent courts from "prohibit[ing] laboring men from litigating in . . . courts . . . to sustain what they claim to be their rights." S. Rep. No. 163, 72d Cong., 1st Sess. 17 (Feb. 4, 1932).[2] The NLRA's § 7 protects the exact same set of rights set forth in Norris-LaGuardia's § 2. But the NLRA, in § 8(a)(1), went one step further than Norris-LaGuardia by prohibiting employer interference with those rights. As Senator Wagner, the primary sponsor of the NLRA, explained, "employees must have more than the mere knowledge that the courts will not be used to confirm injustice. They need protection . . . where the employer is strong enough to impress his will without the aid of the law." Labor Disputes Act, Hearings before the Committee on Labor, House of Representatives, H.R. 6288, 74th Cong., 1st Sess. 14 (March 13, 1935). Thus, it could not be clearer that Congress intended to protect concerted resort to the courts through NLRA §§ 7 and 8(a)(1).

This Court has agreed that § 7 protects "concerted activity" aimed at obtaining relief from substandard working conditions via appeals to government, including the executive, legislative and judicial branches. In *Eastex*, this Court directly addressed "the scope of rights protected by the 'mutual aid or protection' clause of § 7." 437 U.S. at 562. The issue arose in the context of an employer's refusal to per-

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[2] The Report further emphasizes the broad scope of the "right of wage earners" "to act jointly in questions affecting" not simply the welfare of employees of their employer but "the welfare of labor generally." S. Rep. No. 163, 72d Cong., 1st Sess. 9 (Feb. 4, 1932).

mit employees to distribute a newsletter in non-work areas of its facility, on the grounds that parts of the newsletter contained an appeal to employees to write their legislators, urging them, *inter alia*, to increase the minimum wage. *Id.* at 559-61.

Precisely paralleling the Employers' arguments here, the employer in *Eastex* argued that those parts of the newsletter urging workers to appeal to the government did not relate to union representation or collective bargaining and thus their distribution was unprotected by § 7. *Id.* at 561. This Court emphatically rejected such a narrow construction:

> We . . . find no warrant for petitioner's view that employees lose their protection under the "mutual aid or protection" clause when they seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship. The 74th Congress knew well enough that labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context. It 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."

Id. at 565.

This Court then held that Congress' "broader purpose" in adopting the "mutual aid or protection" lan-

guage included protecting collective appeals to all three branches of government.

> Thus, it has been held that the "mutual aid or protection" clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums, and that employees' appeals to legislators to protect their interests as employees are within the scope of this clause.

Id. at 565-66 (footnotes omitted). This Court cited with approval cases holding that collective legal action, including filing civil actions in court, charges with the EEOC, and complaints with the Department of Labor and with OSHA, is protected by § 7. *Id.* at 566 n. 15.[3] And this Court held that the prior construction was correct: "We do not think that Congress could have intended the protection of § 7 to be as narrow as petitioner insists." *Id.* at 566-67. This Court thus squarely held that employees' concerted appeals to all branches of government to improve their lot as employees—specifically to increase their wages—are protected by § 7.

This Court did recognize in *Eastex* that not all "concerted activity" is for "mutual aid or protection." "[S]ome concerted activity bears a less immediate relationship to employees' interests as employees" and "at some point the relationship becomes so attenu-

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[3] Among the cases cited with approval was *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976), where the Fifth Circuit held, "filing by employees of a labor related civil action is protected activity under section 7 of the NLRA unless the employees acted in bad faith."

ated that an activity cannot fairly be deemed to come within the 'mutual aid or protection' clause." *Id.* at 567-68. But the concerted activity at issue in these cases—the filing of joined claims alleging employers failed to pay the minimum wage or required overtime—falls well on the protected side of that continuum. "Few topics are of such immediate concern to employees as the level of their wages," this Court observed. *Id.* at 569.

The Employers' and SG's three central arguments about § 7 are contradicted by *Eastex*. First, the Employers resort to the maxim that "'[w]ords in a list are generally known by the company they keep'" to suggest that the final clause of § 7 describes only activities just like forming a union and collective bargaining. Brief for Petitioners Epic Systems Corp. and Respondent Murphy Oil USA (Epic) at 33-34. But *Eastex* is inconsistent with use of that maxim to narrowly construe § 7: Congress recognized "that labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context" and therefore chose "the language of § 7 . . . 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.[4]

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[4] In any event, the maxim cannot be used to render words in a statute superfluous. The maxim merely suggests that the words in § 7 describe actions that fit into a coherent set, namely the set described by this Court in *Washington Aluminum*: "workers . . . act[ing] together to better their working conditions." 370 U.S. at 14.

Second, the Employers and the SG argue that protected activity cannot "concern[] dispute resolution outside the workplace" and is limited to "activities . . . that employees could do without the involvement of anyone else." Brief of the United States as Amicus Curiae (U.S.) at 23; Epic Br. at 36. But, again, *Eastex* holds otherwise, recognizing that Congress chose the language of § 7 in order to protect activity that advances employees' welfare by means outside "the immediate employment context," including "resort to administrative and judicial forums" as well as "appeals to legislators." 437 U.S. at 565-66.

Third, the Employers and the SG argue that, even if § 7's protection extends to concerted enforcement activity, such activity is only protected against retaliation and not against the imposition of an agreement barring the activity. U.S. Br. at 14, 24 n. 3; Epic Br. at 37.[5] But *Eastex* itself involved *no*

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[5] None of the agreements at issue state that their enforcement will *not* include discipline, including discharge. A reasonable employee would understand that violation of the agreements, like violation of any other employer policy, might result in discipline. *See Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004) ("an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights"). Indeed, it is undisputed that consent to the agreements was a condition of employment, *i.e.*, that employees who did not sign could be fired. That was not an idle threat. *See*, *e.g.*, *Everglades Coll.*, 363 NLRB No. 73, slip op. at 5-6 (2015), *pet. for review pending*, No. 16-10341 (11th Cir.) (holding discharge of employee for not signing agreement parallel to those at issue here was unlawful).

retaliation. Rather, *Eastex* involved an employer's unilateral imposition of a policy restricting the exercise of employee rights exactly as these cases do. As here, only § 8(a)(1) was at issue in *Eastex*, not § 8(a)(3), which bars retaliation. If an employer interferes with § 7 rights by adopting a policy preventing employees from distributing a flyer concerning collective appeals to government officials to raise wages, surely it interferes with § 7 rights by adopting a policy preventing employees from actually making a collective appeal to government officials to raise wages.

If the Employers and the SG were correct that the NLRA bars retaliation but does not bar imposition or enforcement of an agreement restricting collective appeals to government, employers could require employees to agree not to make any form of collective appeal to legislators and could obtain an injunction against a group of workers speaking to their state representative about unsafe conditions so long as no retaliatory action was taken. Such a construction of the Act flies in the face of *Eastex*, reads § 8(a)(1) out of the Act, and ignores the history of federal labor policy, which expressly seeks to prevent this form of contractual end-run around employees' rights.

The Employers' remaining efforts to dismiss *Eastex* are equally unavailing. The Employers suggest that this Court merely "noted that some lower courts, as well as the Board, had held that employees engage in 'mutual aid or protection' when 'they seek to improve working conditions through resort to administrative and judicial forums.' " Epic Br. at 36 (quoting

Eastex, 437 U.S. at 565-66). But this Court's approval of the prior rulings was essential to its holding "that distribution of both the second and the third sections of the newsletter," which called for concerted activity to induce government action to raise wages, "is protected under the 'mutual aid or protection' clause of § 7." 437 U.S. at 570.

The Employers also point to a sentence in *Eastex* stating, "'We do not address here the question of what may constitute 'concerted' activities in this context.'" Epic Br. at 36-37 (quoting *Eastex*, 437 U.S. at 566 n. 5). But the Court reserved that question because in *Eastex*, as here, the requirement of concert was not contested. "To be protected under Section 7, employee activity must be both 'concerted' in nature and pursued either for union-related purposes aimed at collective bargaining or for other 'mutual aid and protection.'" 1 *The Developing Labor Law* 210 (J. Higgins ed., 6th ed. 2012) (quoting 29 U.S.C. § 157). *See also City Disposal*, 465 U.S. at 830 (distinguishing requirement that actions be "concerted" from requirement that they be for "mutual aid or protection"). Only the latter requirement was at issue in *Eastex*. 437 U.S. at 562 ("Because of apparent differences among the Courts of Appeals as to the scope of rights protected by the 'mutual aid or protection' clause of § 7, . . . we granted certiorari.") *Eastex* (like these cases as explained *supra* at 2-3) involved indisputably concerted action—communication urging group action. Thus, the cited sentence does not in any way undermine the Court's holding that concerted activity aimed at inducing government action to raise wages is protected by § 7.

Eastex affirmed settled law and has been uniformly followed in the 40 years since this Court's decision. In this case, the Board observed, "For almost 80 years, Federal labor law has protected the right of employees to pursue their work-related legal claims *together*, *i.e.*, with one another, for the purpose of improving their working conditions." Pet. 17a. The Board has so held in numerous cases and the courts of appeals that have addressed the issue have uniformly agreed. *D.R. Horton*, 357 NLRB at 2278-79; Pet. 31a-32a (citing cases). *No* court has held to the contrary, including the Fifth Circuit in *D.R. Horton* itself. *See* 737 F.3d at 357.

This unbroken line of precedent is not only consistent with § 7's unambiguous language, but also with Congress' underlying purpose of reducing both "industrial strife" and "inequality of bargaining power." 29 U.S.C. §§ 141(b), 151. Given Congress' aim to protect the uninterrupted "flow of commerce," 29 U.S.C. § 141(b), it is inconceivable that it intended to protect strikes over substandard wages, but not concerted legal actions to remedy the same grievance. Moreover, the Employers' suggestion that Congress' desire to address "inequality of bargaining power between employees . . . and employers," 29 U.S.C. § 151, is not served by protecting concerted resort to legal remedies, Epic Br. at 43, simply ignores the practical realities of both litigation and arbitration.

The NLRB explained in *D.R. Horton* how protecting collective legal action "serves the congressional purpose" underlying § 7's "mutual aid or protection" clause no less than protecting union organizing or picketing. In each case, there is security in numbers. This Court has observed, "it needs no argument to

show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions." *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). Because that "risk of retaliation is virtually unique to employment litigation, compared, for example, to securities or consumer fraud litigation," concerted enforcement is "'in a real sense . . . for 'mutual aid or protection.'" *D.R. Horton*, 357 NLRB at 2279 n. 5 (quoting *Salt River Valley Water User's Ass'n v. NLRB*, 206 F.2d 325, 328 (9th Cir. 1953) (in turn quoting § 7)). Innumerable courts have recognized that "fear of employer retaliation may have a chilling effect on employees bringing claims on an individual basis." *Overka v. Am. Airlines, Inc.*, 265 F.R.D. 14, 24 (D. Mass. 2010). Thus, for example, two employees act to "aid" and "protect[]" one another by joining their claims in a single action just as they do when they bargain together through a union or walk out together in a strike.

Congress' intent to protect a wider category of concerted activity than forming unions and engaging in collective bargaining is also made clear by comparing the narrower terms of the Railway Labor Act (RLA) with the language in § 2 of Norris-LaGuardia and the identical language in § 7 of the NLRA. Section 2, Fourth of the RLA, adopted in 1934,[6] granted employees only "the right to organize and bargain collectively through representatives of their own choosing." 45 U.S.C. § 152, Fourth. In contrast, § 2 of Norris-LaGuardia declares it to be the "public policy" of the United States that employees "be free from" employ-

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[6] *See Trans World Airlines, Inc. v. Indep. Fed'n of Flight Attendants*, 489 U.S. 426, 440 (1989).

er "interference, restraint, or coercion" when joining unions, participating in collective bargaining, and engaging in "other concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 102. Congress expressly drew on both Norris-LaGuardia and the RLA when drafting the NLRA. *See*, *e.g.*, 79 Cong. Rec. 2368 (Feb. 21, 1935) (statement of Senator Wagner). The decision to incorporate Norris-LaGuardia's broader language into § 7 was clearly intentional and designed to protect *more* than joining unions and engaging in collective bargaining.

The Employers ignore both the breadth of their contractual prohibitions and the pre-1935 history of joint legal proceedings in arguing that Congress could not have intended to protect pursuit of a class action under Rule 23 or a collective action under § 16 of the FLSA in the 1935 NLRA, because Rule 23 did not take its modern form until 1966 and the FLSA was not adopted until 1938. Epic Br. at 43. But the activity barred by the agreements encompasses a wider array of collective enforcement than pursuing a Rule 23 class action or a § 216(b) collective action, extending to *any* form of joinder of claims. *See* JA 11. Moreover, the Board did not hold that employees have a § 7 right to invoke any *particular* mechanism for collective assertion of claims, but only that they have a right to invoke whatever mechanisms are "available to them under Federal, State or local law." *D.R. Horton*, 357 NLRB at 2286 n. 24.[7] In 1935, when

[7] The fact that available mechanisms may vary across states is no different than the fact that some cities lay sidewalks upon which employees can exercise their right to picket and others do not.

the NLRA was adopted, and continuously since that time, employees have been able to join parallel claims in a single action under federal and state rules of civil procedure and various other mechanisms.[8] The fact that those mechanisms have evolved over time through legislative amendment and judicial construction is irrelevant. The Employers' argument is no different than suggesting that one employee asking another employee to join a union using email is not protected because email did not exist in 1935.

The Employers' and SG's final argument simply misstates the Board's holding. The Employers argue that the Board's holding "forc[es] employers and courts alike to acquiesce whenever employees seek class certification." Epic Br. at 11. The SG similarly argues that the Board has construed § 7 "to expand the availability of class or collective remedies beyond those that are authorized by the laws that directly address those issues." U.S. Br. at 10. But as explained *supra* at 3-4, the Board did not hold that employees have a right to have any action treated as a class action or that employers cannot oppose class certification on all grounds other than an unlawful agreement. Thus, employers are free to lobby state legislatures to restrict access to joinder or class actions in employment cases and to urge a judge to sever joined claims or deny class certification on the facts of a particular case. But they may not require, under threat of termination, that employees prospec-

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[8] This Court observed in 1921, "Class suits have long been recognized in federal jurisprudence." *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 363 (1921).

tively waive their right to seek such joinder or certification when it is otherwise appropriate.

For the same reason, the SG's suggestion that the "asserted right is very different from" other § 7 rights because "it cannot plausibly be derived from the NLRA alone," U.S. Br. at 23, is misplaced. Section 7 creates a right to picket that employees may exercise on available sidewalks. Similarly, § 7 creates a right to join together to enforce workplace rights that employees may exercise through available mechanisms. In both instances, the right is derived solely from the NLRA even if the circumstances under which it can be exercised can be expanded or contracted by local, state, or federal action.

The agreements prohibit activity protected by § 7.

B. Federal Labor Law Prohibits Employers From Requiring That Employees Waive Their § 7 Rights

Given that employees have a § 7 right to take concerted action to enforce workplace rights, it is equally clear that employers violate the NLRA by requiring, as a condition of employment, that employees agree not to exercise that right.

Section 8(a)(1) of the NLRA makes it unlawful 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). Requiring individual, unrepresented employees to waive their § 7 rights constitutes such interference, restraint and coercion as this Court and the Board have long held.

1. Federal Labor Law Has Barred Enforcement of Agreements Under Which Employees Waive the Right to Engage in Concerted Activity Since Before Adoption of the NLRA

Even before adoption of the NLRA, Norris-LaGuardia barred enforcement of individual employment agreements purporting to waive the right to engage in concerted activity.

Congress had two central purposes in adopting Norris-LaGuardia: barring enforcement of contracts waiving employees' right to join unions or engage in other concerted action and limiting federal courts' authority to issue injunctions in labor disputes. Section 2 of Norris-LaGuardia declares it to be the "public policy of the United States" that individual employees be free from "interference" or "restraint" by employers when they engage in "concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 102. Section 3 of the Act provides that, "*any* undertaking or promise" contrary to that policy "shall not be enforceable in any court of the United States." 29 U.S.C. § 103 (emphasis added). Requiring employees to waive their right to engage in concerted activities for the purpose of mutual aid or protection is directly contrary to the policy declared in § 2 and therefore the agreements at issue here are unenforceable under § 3.

The unambiguous language of § 3 makes clear that Congress did not intend to limit its reach to agreements not to join a union. Section 3 prohibits enforcement of two categories of contracts: (1) "Any 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 undertakings or promises "described in this section" are:

> Every . . . contract or agreement of hiring or employment . . . , whereby
>
> (a) Either party to such contract . . . promises not to join, become, or remain a member of any labor organization . . . ; or
>
> (b) Either party to such contract . . . promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization.

29 U.S.C. § 103. Thus, the first category of unenforceable contracts—"described in this section"—are those to refrain from joining unions. Consequently, the second category of unenforceable contracts—"any *other* undertaking or promise in conflict with the public policy declared in section [2]" (emphasis added)—necessarily encompasses a wider array of agreements not to take concerted action to improve working conditions, including the agreements at issue here.

Senator Norris emphasized that the broad language of § 3 was intended to bar enforcement of agreements forfeiting the right to present grievances collectively. Describing the effects of the contracts his proposed law was intended to render unenforceable, Norris explained, "In connection with his fellows, [the employee] cannot present a grievance to the employer. . . . He must singly present

any grievance he has." 75 Cong. Rec. 4504 (Feb. 23, 1932).

As with the broad language protecting "concerted activities for the purpose of . . . mutual aid or protection" in both Norris-LaGuardia and the NLRA, the category of contracts that courts cannot enforce under Norris-LaGuardia is broader than under the 1926 RLA. RLA § 2, Fifth is headed, "Agreements to join or not to join labor organizations forbidden," and narrowly provides:

> No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization.

45 U.S.C. § 152, Fifth. That language contrasts with that adopted six years later in Norris-LaGuardia barring enforcement of agreements not to join unions and of "any other undertaking or promise in conflict with the public policy declared in section [2]." 29 U.S.C. § 103. Congress expressly drew on the RLA when drafting Norris-LaGuardia. *See* S. Rep. No. 163, 72d Cong., 1st Sess. 11, 13 (1932). The broader language of § 3 was thus clearly intended to prohibit enforcement not simply of agreements purporting to bar joining unions but also those barring "other concerted activities for the purpose of . . . mutual aid or protection."

Congress' intent to bar enforcement of contracts purporting to waive the right to take collective legal action is also evidenced by § 4 of Norris-LaGuardia:

> 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 . . . 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 . . . prosecuting, any action or suit in any court of the United States or of any State.

29 U.S.C. § 104. On its face, this section protects employees' right to join together in pursuing legal claims as that constitutes "aiding" each other in "prosecuting" an "action or suit." The Senate Committee Report makes that intention clear:

> Why the judges of the United States . . . should prohibit laboring men from litigating in . . . courts . . . to sustain what they claim to be their rights, is almost beyond human comprehension. . . .
>
> The bill, under section 4, takes away from all Federal courts the power to issue such injunctions.

S. Rep. No. 163, 72d Cong., 1st Sess. 17 (1932).

The Employers argue that § 4 only protects payment of attorney's fees or other assistance short of actual joinder or participation in a suit. Epic Br. at 38-39. But that limitation is illogical. There is no reason Congress would have prevented courts from enjoining one worker from aiding another by paying half the cost of a wage action while permitting courts to enjoin the same worker from joining the action and thus reducing each workers' costs by half.

Norris-LaGuardia not only supports but compels the Board's conclusions that the agreements violate the NLRA.[9]

2. NLRA § 8(a)(1) Prohibits Employers from Exacting Agreements Purporting to Waive the Right to Engage in Concerted Activity

Norris-LaGuardia's prohibition on judicial enforcement of agreements purporting to waive employees' statutory rights was extended in the NLRA's § 8(a)(1) to prohibit employer conduct. The Senate Committee Report on the NLRA makes this clear:

> The first unfair labor practice [now § 8(a)(1)] restates the familiar law already enacted by Congress in section 2 of the Norris-LaGuardia Act. . . . The language restrains employers from attempting by interference or coercion to impair the exercise by employees of rights.

S. Rep. No. 1184, 73d Cong., 1st Sess. 4 (1934). Senator Wagner emphasized, "This provision [§ 8] is merely a logical and imperative extension of that section

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[9] The Employers will likely argue that *Textile Workers v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957), and *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970), hold that Norris-LaGuardia does not bar injunctions in aid of arbitration. But those holdings did not address § 3 and rested on the proposition that enforcing collectively bargained agreements furthers rather than frustrates Norris-LaGuardia's protection of "concerted activities," specifically "collective bargaining." The holdings "deal only with the situation in which a collective-bargaining contract contains a[n] . . . arbitration procedure." *Id.* at 253.

of the Norris-LaGuardia Act which makes the yellow-dog contract[10] unenforceable in . . . court." Labor Disputes Act, Hearings before the Committee on Labor, House of Representatives, H.R. 6288 74th Cong., 1st Sess. 14 (1935).

Just five years after the NLRA became law, this Court held in *National Licorice* that individual contracts that prospectively waive § 7 rights violate § 8(a)(1). This Court upheld a Board order that "'such contract[s] constitutes a violation' of the Act," reasoning, "We think it is plain . . . that by their terms [the contracts between the employer and individual employees] imposed illegal restraints upon the employees' rights to organize and bargain collectively guaranteed by §§ 7 and 8 of the Act." 309 U.S. at 356, 359.

The Employers and the SG argue that *National Licorice* held the contracts unlawful only because (1) they were obtained through the efforts of a company-dominated union and (2) they prevented an independent union from acting as the employees' agent for collective bargaining. Epic Br. at 46; U.S. Br. at 28. But the holding is not so limited. This Court addressed the terms of the contracts, not the process leading to their formation: "[T]he petition raises the question whether the terms of the contract[s] . . . violate the [NLRA]." 309 U.S. at 359. Nor was the holding limited to the particular § 7 rights at issue. Rather, this Court held that it was

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[10] The term "yellow-dog contract" was used at the time to refer to a broad set of contracts through which employees were required to give up the right to act collectively, including, but by no means limited to, the right to join a union. *See* Matthew W. Finkin, *The Meaning and Contemporary Vitality of the Norris-LaGuardia Act*, 93 Neb. L. Rev. 6, 10-11, 15-16 (2014).

unlawful for employers to procure waivers of any § 7 rights from individual employees: "Since the contracts . . . stipulated for the renunciation by the employees of rights guaranteed by the Act, and were a continuing means of thwarting the policy of the Act, they were appropriate subjects for the affirmative remedial action of the Board." *Id.* at 361. "Obviously," this Court held, "employers cannot set at naught the [NLRA] by inducing their workmen to agree not to demand performance of the duties which it imposes." *Id.* at 364. Any such contract is "an unlawful contract." *Id.*

Moreover, this Court did not simply hold that an employer's promulgation of contracts under which individual employees waive their § 7 rights is unlawful as a general matter, it also specifically held that one reason the contracts were unlawful in *National Licorice* was that they barred employees from presenting grievances collectively. One clause of the agreements provided "that a discharged employee may submit to the employer facts indicating that his discharge was unreasonable," but stipulated "that the 'question as to the propriety of an employee's discharge is in no event to be one for arbitration or mediation.'" *Id.* at 360. This Court recognized that "[t]he effect" of that clause "was to discourage, if not forbid, any presentation of the discharged employee's grievances to [the employer] through a labor organization or his chosen representatives, *or in any way except personally*" and, for that specific reason, held that the agreements were unlawful. *Id.* (emphasis added).

Since *National Licorice*, the Board and federal courts have "consistently struck down agreements that require employees to prospectively waive their

Section 7 rights." *On Assignment Staffing Services, Inc.*, 362 NLRB No. 189, slip op. at 6 (2015) (citing cases), *rev'd on other grounds*, 2016 U.S. App. LEXIS 12750 (5th Cir. 2016).

The Employers argue that, if lawfully recognized unions can waive certain § 7 rights of employees they represent, then individual, unrepresented employees can also waive their rights. But that is mistaken. Unions have authority through collective bargaining to waive some § 7 rights that employers cannot induce individuals to waive via contract; the right to strike is the most obvious example. Indeed, the Seventh Circuit rejected the precise argument advanced here. In collective bargaining, an "arbitration clause is the result of an agreement reached with the duly selected bargaining agent of the employees" and thus "is in conformity with the Act," but an arbitration agreement with individual employees "must be distinguished" because it is the "result of individual action" and is unlawful when it "impose[s] a restraint upon collective action." *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942). To hold otherwise would contradict the foundational congressional finding that "the individual unorganized worker is commonly helpless to exercise actual liberty of contract." 29 U.S.C. § 102.

Section 7's right to "refrain" from engaging in concerted activity also does not support the Employers' argument. Nothing in the Board's holdings compels employees to take concerted enforcement action. Employees remain free to pursue claims individually, to decline to join collective actions, and to opt out of class actions. All the Board held is that employers cannot require employees to agree to do so in all fu-

ture cases. "In preventing *employers* from enforcing agreements by individual employees not to exercise their statutory rights to engage in concerted activity, the Board does not require *employees* to act collectively. Rather, it permits them to do so in cases (like this one) where they have chosen to do so, notwithstanding their prior (invalid) agreement." *Bristol Farms*, 363 NLRB No. 45, slip op. at 2 (2015).

The Employers' construction of the "right to refrain" would allow employers to require employees to agree to refrain from joining a union and require courts to enforce such agreements. The right to refrain would thereby swallow the right to engage in concerted activity.

Senator Taft, the Chief Sponsor of the 1947 Taft-Hartley amendments that inserted the "right to refrain" language into § 7, responded to Senator Pepper's concern that the language might be used "as the basis for future 'yellow dog' contracts,'" *i.e.*, to permit employers to require employees to agree to refrain. 93 Cong. Rec. 6513 (June 6, 1947). Taft dispatched that concern, and likewise the Employers' argument, stating, "Nothing could be further from the truth." 93 Cong. Rec. 6859 (June 12, 1947).

The Employers argue that because not *all* concerted activity aimed at vindicating legal rights is contractually barred, *e.g.*, because employees can still "cooperate in hiring a lawyer" to represent them in separate arbitration proceedings, the agreements do not violate § 8(a)(1). Epic Br. at 40.[11] But that is no

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[11] Even the forms of cooperation cited by the Employers are often impossible when arbitration agreements require confiden-

different than suggesting that employers can require employees to agree not to join union A so long as they can join union B, or can require employees to agree not to strike so long as they can picket.

The Employers assert that the Board and the employee parties "cannot point to a single activity that employees can engage in 'concerted[ly]' by litigating as a class that they cannot engage in 'concerted[ly]' by litigating individually with the support and assistance of their colleagues." Epic Br. at 40. But under the agreements, one employee cannot represent other employees in litigation and obtain relief for them without their having to step forward by themselves and individually initiate a claim against their employer, thereby significantly increasing the fear and risk of retaliation. Nor can two employees join their claims in a single proceeding so that their counsel need not incur the significantly increased costs of making appearances and filing papers in two different proceedings. The Employers' argument is no different than arguing it would not restrict the right to strike to bar employees from laying down their tools at the same time and requiring instead that each employee walk out of the plant by himself or herself. The NLRA does not permit a forced waiver of some § 7 rights so long as others remain; and here, in any event, the rights that remain are not equivalent to the rights that were relinquished.[12]

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tiality. *See, e.g.*, *Ernst & Young LLP v. Morris*, No. 16-300, JA 46.

[12] Expressly accommodating the FAA, the Board has nevertheless held that employers can bar collective enforcement in court so long as collective enforcement is permitted in arbitration. *See infra* at 55.

The agreements interfere with the exercise of §7 rights in violation of §8(a)(1).

II. The FAA Does Not Require Enforcement of the Unlawful Agreements

For the reasons stated above, this Court must affirm the Board unless it finds that the FAA requires enforcement of an agreement that is otherwise unlawful under the NLRA and unenforceable under Norris-LaGuardia. We now demonstrate that the FAA does not so require for five, *separate* reasons.

A. Nonenforcement of the Unlawful Agreement Is Authorized by the Saving Clause

The Sixth, Seventh and Ninth Circuits all agree with the Board that the FAA does not immunize the unlawful agreements because they are excepted from the Act's enforcement mandate by its saving clause. Pet. 34a, 39a-43a; *Alternative Entertainment*, 858 F.3d at 407; *Lewis*, 823 F.3d at 1156-60; *Morris*, 834 F.3d at 986.

The saving clause provides that arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Through the saving clause, Congress instructed courts how to reconcile the FAA's direction to enforce agreements to arbitrate with other laws and legal principles that bar contract enforcement. The saving clause thus implements Congress' intent "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) (emphasis added). Any aspects of an arbitration clause that violates federal law cannot be enforced under the saving clause. "To immunize an arbitration agreement from judicial challenge . . . would be to elevate it over other forms of contract—a situation inconsistent with the 'saving clause.'" *Id.*

The saving clause implements the venerable principle, which "authorities from the earliest time to the present unanimously" embrace, "that no court will lend its assistance in any way towards carrying out the terms of an illegal contract." *McMullen v. Hoffman*, 174 U.S. 639, 654 (1899). "The relevant principle is well established: a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987). "The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in . . . federal statutes . . . . Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power." *Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948). That principle applies to contracts that violate federal labor law no less than other statutes. There is no "doubt that illegal promises will not be enforced in cases controlled by the federal law." *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 77 (1982).[13]

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[13] In Alabama, where the Murphy Oil Agreement was executed, "It is established by a long line of decisions of th[e state

Congress did not intend the FAA to require courts to "lend . . . assistance towards carrying out" an illegal term in an arbitration clause. That intent is evident in the construction of the New York Arbitration Law of 1920 (NYAA), 120 N.Y. Laws, ch. 275, which was the model for the FAA and the origin of the saving clause's precise terms. *See Hall St. Assocs. LLC v. Mattel, Inc.*, 552 U.S. 576, 589 n. 7 (2008). In the first case construing the NYAA, the New York Court of Appeals, per Justice Cardozo, stated, "Of course, we exclude [from the arbitration act's mandate] cases where the contract is . . . in contravention of a statute." *Berkovitz v. Arbib & Houlberg, Inc.*, 230 N.Y. 261, 271-72, 130 N.E. 288, 290 (1921).

Congress was fully aware of Justice Cardozo's opinion in *Berkovitz* when it drafted the FAA as the opinion was introduced into the record and referenced in testimony at both the Senate and joint hearings on the measure. "The bill . . . follows the principles laid down by the New York Court of Appeals in the leading case of Matter of Berkovitz." Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration, Hearing before a Subcommittee of the Committee on the Judiciary, United States Senate, S. 4213 & 4214, 67th Cong., 4th Sess. 2 (1923) (testimony of Charles L. Bernheimer, Chairman of New York Chamber of Commerce, Arbitration Committee). *See also id.* at 1,

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supreme] court that contracts specifically prohibited by law, or the enforcement of which violates the law, or the making of which violates the laws which were enacted for regulation and protection . . . are void and unenforceable." *Marx v. Lining*, 231 Ala. 445, 448, 165 So. 207, 209-10 (1935).

18-22; Arbitration of Interstate Commercial Disputes: Joint Hearings before the Subcomms. of the H. & S. on the Judiciary on S. 1005 & H.R. 646, 68th Cong., 1st Sess. 33, 34, 39 (1924).

In *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), this Court held that illegality constitutes one "such ground[] as exist[s] at law or in equity for the revocation of any contract" under the saving clause. The issue in *Buckeye* was whether the question of illegality should be decided by a court or the arbitrator. But there was no question, in this Court's view, that illegality places a contract within the saving clause. "Challenges to the validity of arbitration agreements 'upon such grounds as exist at law or in equity for the revocation of any contract' can be divided into two types," this Court observed. "One type challenges specifically the validity of the agreement to arbitrate . . . . The other challenges the contract as a whole, either on a ground that directly affects the entire agreement (*e.g.*, the agreement was fraudulently induced), or *on the ground that the illegality of one of the contract's provisions* renders the whole contract invalid." 546 U.S. at 444 (emphasis added). *Buckeye* thus recognized that "illegality" is a "grounds" that "exists at law or in equity for the revocation of any contract" and held that when the alleged "illegality" is of the "agreement to arbitrate" itself, the question should be addressed by a court rather than the arbitrator.

The Employers argue that this Court's *earlier* decision in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), is to the contrary. Epic Br. at 21-24. But *Southland* rests on a self-evident principle that has

no application here: "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." 465 U.S. at 16. The only holding in *Southland* was that a state cannot undermine the federal policy articulated in the FAA by declaring certain arbitration agreements unlawful. Otherwise, a "state[] could wholly eviscerate Congressional intent to place arbitration agreements 'upon the same footing as other contracts.'" *Id.* at 16 n. 11. *Southland* did not hold, as the Employers contend, that illegality generally is not a "grounds as exist at law or in equity for the revocation of any contract."

The Employers advance four additional arguments against application of the saving clause, but none is persuasive.

First, relying primarily on *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011), the Employers argue that enforcement of the NLRA and Norris-LaGuardia would interfere with fundamental attributes of arbitration by allowing employees to pursue claims in arbitration on a multi-claimant basis. Epic Br. at 24-27. To the degree that *Concepcion*, a consumer class action under state law, invoked the doctrine of obstacle preemption, that Supremacy Clause doctrine does not apply in reconciling potentially conflicting federal statutes. More importantly, *Concepcion* turned on this Court's determination that the California state courts were applying the common law of unconscionability in a manner that disfavored arbitration. The holding thus hinged on a finding that the "doctrine normally thought to be generally applicable" was being "applied in a fash-

ion that disfavors arbitration," *i.e.*, "that California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts." 563 U.S. at 341-42.

Here, the illegality of the agreements has nothing to do with the arbitration requirement and the Board did not apply its settled doctrine in a manner that disfavors arbitration. As the Ninth Circuit concluded, "the arbitration requirement is not the problem" as "[i]t would equally violate the NLRA for [an employer] to require its employees to sign a contract requiring the resolution of all work-related disputes in court and in 'separate proceedings.'" *Morris*, 834 F.3d at 984-85. Thus, if Murphy Oil's contract had no arbitration clause, but simply provided that employees "waive their right to commence, be a party to, or [act as a] class member [in, any class] or collective action in any court action against the other party relating to employment issues," Pet. 25a, the agreement would still be unlawful as the Board has held. *See Convergys Corp.*, 363 NLRB No. 51 (2015), *rev'd*, No. 16-60860 (5th Cir. Aug. 7, 2017).

Unlike the California courts, the Board is in no way hostile to arbitration. To the contrary, "arbitration has become a central pillar of Federal labor relations policy and in many different contexts the Board defers to the arbitration process." *D.R. Horton*, 357 NLRB at 2289.

In addition, *Concepcion* considered only whether a state could condition "the enforceability of certain arbitration agreements on the availability of *class-wide* arbitration procedures." 563 U.S. at 336 (emphasis added). This Court found only that "[r]equir-

ing the availability of *classwide* arbitration interferes with fundamental attributes of arbitration." *Id.* at 344 (emphasis added). The grounds for that conclusion apply only to classwide arbitration—that it "includes absent parties," "*requires* procedural formality," and potentially involves "tens of thousands of potential claimants." *Id.* at 348-50 (emphasis added). The class certification process itself—which is needed to protect the claims of absent class members—introduces complexities that are not endemic to collective adjudication generally. Simple joinder of the claims of two parties and the opt-in procedures created by the FLSA's § 216(b)—equally barred by the agreements here—do not implicate any of *Concepcion*'s concerns and thus do not even arguably "interfere with fundamental attributes of arbitration." *Concepcion* provides no support for the full breadth of the compelled waivers at issue here.

Second, the Employers argue that the saving clause saves only "inferior," *i.e.*, state laws. Epic Br. at 20. The argument finds no support in the plain text of FAA § 2, which refers without limitation to "grounds as exist at law or in equity." *See Abbott Labs. v. Gardner*, 387 U.S. 136, 145 (1967) ("The saving clause itself contains no limitations."). When Congress has intended to limit the application of a saving clause to state laws it has expressly so stated. *See*, *e.g.*, 33 U.S.C. § 2718(a) ("Preservation of state authorities"); 8 U.S.C. § 1324a(h)(2) (saving "State or local . . . licensing and similar laws"). Moreover, the argument finds no support in any prior holding. Finally, the argument that the saving clause saves only state laws while an express and specific "contrary congressional command" is needed to save

federal laws is illogical and would lead to the perverse result of ignoring arguably conflicting federal laws more readily than state laws.

Third, the Employers argue that illegality under the NLRA is not grounds for the revocation of "any contract" because the NLRA applies only to contracts between covered employers and employees. Epic Br. at 20-24. But the point of requiring that the "grounds" recognized by the saving clause apply to "any contract" was to prevent the clause from undermining the FAA's objective by permitting the application of laws or doctrines "applicable *only* to arbitration provisions," *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996), not to exclude laws that apply only to some other category of contracts. Emphasizing the word "*any*" in the saving clause, this Court concluded in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995), that Congress intended to exclude from the saving clause laws providing "that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause"—*i.e.*, laws applying only to agreements to arbitrate. Only a law that "places arbitration agreements in a class apart from 'any contract' " falls outside the saving clause. *Doctor's Assocs.*, 517 U.S. at 688.

The Employers' novel and capacious reading of the word "any" would exclude all contracts that are unenforceable on grounds turning on the identity of the parties, for example, contracts with incompetent parties. Thus, courts would have to enforce a minor's agreement to arbitrate. The Employers' argument similarly suggests that an arbitration agree-

ment providing that claims by African-American employees have to be heard by white arbitrators also does not fall into the saving clause because Title VII also only applies to employees of covered employers. *See* 42 U.S.C. § 2000e(b). That construction is untenable.

Southland is not to the contrary. There, this Court held that the California law at issue was "not a ground that exists at law or in equity 'for the revocation of any contract'" because it was "merely a ground that exists *for the revocation of arbitration provisions* in contracts subject to" the law. 465 U.S. at 16 n. 11 (emphasis added). Contrary to the Employers' contention, dissenting Justice Stevens did not advance the construction of the saving clause adopted by the Board and Courts here, but rather suggested that the FAA did not preempt all state laws specifically precluding arbitration. *See id.* at 21 ("I am not persuaded that Congress intended the pre-emptive effect of this statute to be 'so unyielding as to require enforcement of an agreement to arbitrate a dispute over the application of a regulatory statute which a state legislature . . . has decided should be left to judicial enforcement.'") (Stevens, J., dissenting) (quoting California Supreme Court).

Fourth, the Employers argue that only defenses having to do with contract formation are grounds for "revocation," and thus nonenforcement under the saving clause. Epic Br. at 27-29. The argument is unsupported by any court decision. In fact, this Court has stated that the saving clause permits the application of laws that "govern issues concerning the validity, revocability, and enforceability of con-

tracts generally," *Perry v. Thomas*, 482 U.S. 483, 493 n. 9 (1987), and, as demonstrated *supra* at 35, an unlawful contract cannot be enforced.

The Employers argue that the "grounds for the revocation of any contract" in the saving clause must be parallel to the conditions for judicial enforcement of arbitration agreements in §4—"upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue." Epic Br. at 27. But while acknowledging that "the making of the agreement" can present both factual and legal issues (as in fraud in the inducement), the Employers do not acknowledge that the same is true of "the failure to comply," *i.e.*, that it may be legally excused as in this case. *See Nitro-Lift Techs.*, *LLC v. Howard*, 568 U.S. 17, 20-21 (2012) ("attacks on the validity of the arbitration clause itself" are "subject to initial court determination").

Finally, even if the Employers' construction of the saving clause was plausible, it would be preferable to adopt the Sixth, Seventh, and Ninth Circuits' and Board's more plausible construction, which avoids a conflict among the federal statutes. *See Vimar Seguros*, 515 U.S. at 533.

B. The Agreements Purport to Waive a Substantive Right Contrary to This Court's Jurisprudence

The Sixth, Seventh and Ninth Circuits and the NLRB all correctly concluded that the agreements waive a substantive right contrary to this Court's jurisprudence. *Alternative Entertainment*, 858 F.3d at

407; *Lewis*, 823 F.3d at 1160-61; *Morris*, 834 F.3d at 986; Pet. 34a, 39a-43a.

1. An Arbitration Agreement Cannot Waive Substantive Rights

This Court's FAA jurisprudence makes clear that, while there is "no basis for disfavoring agreements to arbitrate statutory claims," that is the case only so long as "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute," but rather "only submits to their resolution in an arbitral, rather than a judicial forum." *Mitsubishi*, 473 U.S. at 628. Here, the Employers required employees to "forgo the substantive rights afforded by the" NLRA, as explained in § I *supra*, even if they did not require them to forgo the substantive rights afforded by other statutes, *e.g.*, the FLSA.

Gilmer v. Interstate/Johnson Lane Corp., the first case in this Court's arbitration jurisprudence involving an employment claim, endorses the principle that an agreement to arbitrate cannot require a party to "forgo the substantive rights afforded by the statute." 500 U.S. 20, 26 (1991). In *Gilmer*, the substantive right was the right to be free of age discrimination under the ADEA. Here, the substantive right is the right to engage in concerted activity for mutual aid or protection under the NLRA.

Gilmer argued only "that compulsory arbitration of [his] ADEA claims . . . would be inconsistent with the statutory framework and purposes *of the ADEA*." *Id.* at 27 (emphasis added). He made *no* argument under either the NLRA or Norris-LaGuardia. Nor

could he have, because the arbitration procedures he had agreed to follow expressly "provide[d] for collective proceedings," he was a high-level executive not covered by the NLRA,[14] and he stated a claim of discrimination based only on his own discharge with no allegations that could possibly have been the basis for any form of class, collective or joined claims. *Id.* at 32; *Gilmer v. Interstate Securities Corp.*, Complaint, ¶ VII (W.D.N.C. Aug. 29, 1988). Thus, the only holding in *Gilmer* was "that the right to a federal judicial forum for an ADEA claim could be waived." *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 77 (1998). *Gilmer*'s discussion of the FLSA's opt-in procedures, 500 U.S. at 32, was dicta. Of course, even if Gilmer could have raised the NLRA and Norris-La-Guardia issues, but did not, "[t]hat does not mean that" a similar agreement is "immune from attack on other statutory grounds in an appropriate case." *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 72 (1975).

This Court's nonemployment arbitration precedents also distinguish the nonwaivable substantive guarantees of a statute from the procedural means provided for enforcing the substantive rights. As this Court explained in *Vimar Seguros*, 515 U.S. at 534, "The difference is that between explicit statutory guarantees and the procedure for enforcing them, between applicable liability principles and the forum in which they are to be vindicated." "[E]ven claims arising under a statute designed to

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[14] *See* 29 U.S.C. § 152(11) (excluding supervisors from the Act's protection); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 289 (1974) (excluding managers).

further important social policies may be arbitrated," this Court explained in *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 90 (2000), because, "'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum,' the statute serves its functions." *Id.* (quoting *Gilmer*, 500 U.S. at 28, quoting *Mitsubishi*, 473 U.S. at 637). Here, the "statutory guarantees" or "applicable liability principles" are those in § 7 of the NLRA, while the procedural means for enforcing those substantive rights are in § 10, *e.g.*, 29 U.S.C. § 160(b) ("person aggrieved" may file "a charge with the Board"). It is the former that the agreements purport to waive, contrary to this Court's repeated command.

This Court's elaboration of precisely what cannot be waived in an arbitration agreement confirms this point. In *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 102 (2012), this Court specified that it is "the guarantee of the legal power to impose liability" that must be "preserved." But it is precisely that "liability" *under the NLRA*—the Board's finding that Murphy Oil committed an unfair labor practice—that the Employer seeks to escape by means of the Agreement here. Similarly in *American Express Co. v. Italian Colors*, 133 S. Ct. 2304, 2310 (2013), this Court explained that "the exception [to the rule that arbitration agreements must be enforced] . . . would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights." But by forbidding all collective enforcement of workplace rights, that is exactly what the agreements do here in respect to the "statutory rights" embodied in § 7.

2. Section 7 Creates Substantive Rights

The NLRA clearly creates substantive rights as defined in this Court's arbitration jurisprudence, as the SG concedes. U.S. Br. at 26-27. Section 7 is headed, "Right of employees . . ." and it provides, "Employees shall have the right . . . ." 29 U.S.C. § 157. The very next section makes it unlawful for employers "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]." 29 U.S.C. § 158(a)(1). Indeed in upholding the NLRA against constitutional challenge, this Court emphasized that "the [§ 7] right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer . . . is a fundamental right." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937). As the Seventh Circuit observed, "Section 7 is the NLRA's *only* substantive provision." *Lewis*, 823 F.3d at 1160.

The § 7 right to engage in concerted activity for mutual aid or protection is no less a substantive right than the right to join a union or engage in collective bargaining. Neither the NLRB nor any federal court has ever distinguished among the rights protected by § 7, classifying some as substantive and others as procedural. That the substantive right to engage in concerted activity for mutual aid and protection may be exercised by invoking procedural mechanisms, such as joinder, does not make it any less a substantive right.[15] Collective bargaining, after all, is "a pro-

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[15] *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295 n. 10 (2002), makes clear that the exercise of substantive rights may involve

cess" no less than litigation or arbitration. *Scofield v. NLRB*, 394 U.S. 423, 432 (1969). *See also Conley v. Gibson*, 355 U.S. 41, 46 (1957) ("Collective bargaining is a continuing process.")

This Court's FAA jurisprudence does not examine how rights are exercised in categorizing them as substantive, but instead examines whether the rights are "statutory guarantees," *i.e.*, "liability principles" in contrast to "the procedures for enforcing them." The SG concedes that any violation of § 7 rights creates liability: "an employer may commit an unfair labor practice . . . if it discharges an employee for utilizing collective dispute-resolution mechanisms." U.S. Br. at 23. That concession is determinative under this Court's jurisprudence.

The Employers point to how the words "substantive" and "procedural" are used in other contexts where they have a different meaning, citing *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980). Epic Br. at 47. But *Roper* was decided under Rule 23 and addressed a question of mootness. The Board did not hold that Rule 23 creates a substantive right. Rather, it held that the NLRA creates a substantive

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use of procedures. There, this Court reiterated that statutory claims may be subject to arbitration so long as "the agreement only determines the choice of forum." But, this Court held, "the substantive statutory prerogative of the EEOC to enforce . . . claims [of discrimination] for whatever relief and in whatever forum the EEOC sees fit" could not be waived in an arbitration agreement. *Id.* The substantive right of the EEOC to invoke judicial procedures is no different from the substantive right of employees at issue here to invoke existing procedures for collective enforcement.

right to take collective action to enforce workplace right using whatever legal procedures are available.

The § 7 right to act in concert to enforce workplace rights is a substantive right.

3. A "Contrary Congressional Command," As Understood by the Employers and the SG, is Not Necessary to Preserve a Substantive Right

This Court's "contrary congressional command" requirement applies only where the question is whether Congress adequately articulated its intent not to permit arbitral rather than judicial enforcement of a particular substantive right given the presumption underlying the FAA that the two forums are equivalent. The requirement, particularly as aggressively construed by the Employers and the SG, does not apply in cases involving prospective waivers of substantive, statutory rights.

While the exact phrase did not appear until 1987, the concept was originally explained in *Mitsubishi* in 1985: "Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of *judicial remedies for the statutory rights at issue*." 473 U.S. at 628 (emphasis added). Two years later, in the case in which the "contrary congressional command" language first appeared, this Court again stated that finding such a "command" was necessary only when considering whether Congress intended judicial enforcement procedures to be nonwaivable. "Like any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional com-

mand. The burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of *judicial remedies* for the statutory rights at issue." *Shearson-American Express Inc. v. McMahon*, 482 U.S. 220, 226-27 (1987) (emphasis added).[16] Here, the issue is not a "waiver of judicial remedies for the statutory rights at issue," but rather a waiver of the "statutory rights" themselves.

To understand why a "contrary congressional command" of the sort demanded by the Employers and the SG cannot be required to prevent enforcement of agreements waiving substantive rights under the NLRA, the Court need only consider the implications of such a holding for other federal, substantive rights. For example, agreements providing that men can bring collective actions in arbitration but women cannot would have to be "enforced according to their terms," including terms "specify[ing] with whom [the parties] choose to arbitrate their disputes," because Title VII "does not specifically bar enforcement of agreements to arbitrate statutory claims or declare such agreements to be unlawful," as the Employers and the SG argue is required. Epic Br. at 19, 20; U.S. Br. at 18-19.

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[16] This Court used the phrase "contrary congressional command" twice more: in *CompuCredit*, 565 U.S. at 98, and in *Italian Colors*, 133 S. Ct. at 2309, but in the latter it was by citation to *CompuCredit* and in *CompuCredit* is was by citation to *Shearson*. The Court has never broadened the application of the phrase beyond what was specified in *Shearson*. Moreover, there was no argument in either *CompuCredit* or *Italian Colors* that any substantive rights under the *only* statutes at issue—the Sherman Act in *Italian Colors* and the Credit Repair Organizations Act in *CompuCredit*—had been contractually waived.

The proper standard to apply in this case is that stated in *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985): the FAA "requires that we rigorously enforce agreements to arbitrate . . . absent a countervailing policy manifested in another federal statute." Title VII manifests such a countervailing policy in respect to the hypothetical clause described in the preceding paragraph and the NLRA and Norris-LaGuardia manifest a countervailing policy here. No "magical passwords" are required for Congress to make its intentions known. *Marcello v. Bonds*, 349 U.S. 302, 310 (1955).[17]

4. Even Assuming the FLSA Alone Does Not Bar Enforcement of the Agreements, That Would Not Be Contrary To or in Tension With Application of the NLRA and Norris-LaGuardia Producing a Different Outcome

The SG correctly states that neither the Board nor the Seventh or Ninth Circuit suggested that the FLSA alone[18] precludes enforcement of the agreements.

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[17] Thus, properly understood, a "contrary congressional command" does exist in the NLRA and Norris-LaGuardia—not a command that the arbitration agreements not be enforced, but a command that the collective action waivers in the agreements not be enforced.

[18] *Gilmer* was decided under the ADEA, which incorporates by reference FLSA § 216(b) ("An action to recover the liability prescribed in [the FLSA] may be maintained . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated."). *See* 29 U.S.C. § 626(b). This Court has never held that Congress in the FLSA

Taking that as a concession, the SG argues that it is somehow anomalous for NLRA § 7 to "give employees greater rights to pursue class or collective remedies in court than they would have under the laws that directly address those issues." U.S. Br. at 21. But there is nothing anomalous about Congress having taken two, distinct approaches to ensuring decent working conditions—establishing minimum standards, with ancillary procedural rights, and protecting workers' concerted activity, including concerted resort to the courts. Nor is there anything peculiar about the application of two statutes to the same set of facts resulting in different outcomes. For example, an employer that retaliates against two employees who jointly file a complaint alleging violation of the FLSA could be ordered by the Board to post a notice in the workplace acknowledging its violation of the NLRA and stating that it will cease and desist such conduct, as is standard under the NLRA,[19] even though the FLSA affords no such remedy. Different laws applied to the same facts often lead to different outcomes and "[w]hen there are two acts upon the same subject, the rule is to give effect to both if possible." *United States v. Borden Co.*, 308 U.S. 188, 198 (1939).

The SG argues that the NLRA "does not supersede the balance struck in the FAA and FLSA, or expand the range of circumstances in which collective litigation can go forward." U.S. Br. at 10. But these cases

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did not intend to preclude enforcement of an agreement to arbitrate FLSA claims solely on an individual basis, but that question is not at issue here.

[19] *See J & R Flooring, Inc.*, 356 NLRB 11, 12 (2010), *enf'd*, 656 F.3d 953 (9th Cir. 2011).

are not about access to the particular collective enforcement mechanism made available to employees under the FLSA or any other employment law. The Murphy Oil Agreement, for example, applies to a wide variety of claims other than those based on the FLSA. *See* JA 8 ("any and all . . . claims . . . which relate in any manner whatsoever as to Individual's employment"). The Board held that Murphy Oil's maintenance of that Agreement constituted unlawful interference with its employees' rights wholly apart from the Agreement's enforcement in any specific case. The Board's holding simply prevents an employer from using a waiver extracted in violation of the NLRA to prevent employees from attempting to demonstrate that the "circumstances" are such that "collective litigation can go forward" under FLSA § 216(b) or other existing procedural mechanisms.

The heart of the SG's argument is that § 7 does not "allow[] employees who *validly* waived their collective-litigation rights under the FLSA to escape the consequences of that choice." U.S. Br. at 14 (emphasis added). But under the NLRA, the waiver was not "valid." The SG attempts to escape this logic with a temporal sleight of hand, arguing that "[a]t the time they filed suit . . . plaintiffs had no FLSA rights to pursue collective actions because they had waived those rights through contracts that were 'valid . . .' under the terms of the FAA." U.S. Br. at 25. But the NLRA does not apply only after the "contracts" were entered into. It applies to the Employers' imposition of contracts that were illegal the moment they were proffered. In fact, the Employers violated the NLRA as soon as they imposed the requirement that employees enter into the

agreements, *i.e.*, before any employee acquiesced and thus before the FAA applied.

C. Norris-LaGuardia Bars Enforcement of the Agreements

As explained *supra* in § I(B), the NLRB correctly concluded that the prospective waivers at issue conflict with the national labor policy announced in § 2 of Norris-LaGuardia and are thus unenforceable under § 3, even considering the commands of the FAA. Pet. 34a-35a, 48a-50a; *D.R. Horton*, 357 NLRB at 2282. *See also On Assignment Staffing*, 362 NLRB No. 189 slip op. at 7 ("An arbitration agreement between an individual employee and an employer that completely precludes the employee from engaging in concerted legal activity clearly conflicts with the express federal policy declared in the Norris-LaGuardia Act"). Norris-LaGuardia was enacted seven years *after* the FAA, and it *expressly* provides that "[a]ll acts and parts of acts in conflict with the provisions of this chapter are repealed." 29 U.S.C. § 115.

D. Even if the NLRA and Norris-LaGuardia Were In Tension With the FAA, the Board Appropriately Accommodated All Three Statutes

Even if the NLRA and Norris-LaGuardia were in tension with the FAA (which they are not, as demonstrated in § II(A-B) *supra*), the Board appropriately sought a "careful accommodation" of the statutes in *D.R. Horton*, 357 NLRB at 2284, 2288 (quoting *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942), and subsequent decisions. In contrast, while argu-

ing that accommodation is necessary, the Employers and the SG simply assert that the FAA trumps the NLRA.

As explained in §§ I(A) and (B) *supra*, the Board first held that enforcement of the collective action waiver in the agreements would violate the core right protected by both the NLRA and Norris-LaGuardia through a means Congress specifically intended to outlaw. Nevertheless, the Board also made clear that nothing in its holdings prevents employers from requiring employees to arbitrate their purely individual claims. *See D.R. Horton*, 357 NLRB at 2287. Under the Board's analysis, employers may also lawfully make bilateral arbitration available to employees who could pursue joint actions but wish to avail themselves of arbitration solely as individuals after a dispute arises. *See* § III *infra*. Finally, after reserving the question in *D.R. Horton*, 357 NLRB at 2289 n. 28, the Board subsequently made clear that an employer may "foreclose[] employees from pursuing joint, class, or collective claims in court" so long as it "*permits* them to do so in arbitration," thus further accommodating the FAA's command that "arbitration must be treated as equivalent to a judicial forum." *SolarCity Corp.*, 363 NLRB No. 83, slip op. at 4 n. 15 (2015), *pet. for review pending*, No. 16-60001 (5th Cir.). The Board made this express accommodation despite its ordinary rule that "it is no defense" to a restriction of § 7 rights "that employees remain able to engage in *other* concerted activities." *Id.*

The Board's holdings protect express, core principles of federal labor law while not significantly affecting policies implicit in the FAA. Thus, they rep-

resent a "careful accommodation" of the federal statutes. *Southern S.S.*, 316 U.S. at 47.

E. Even if the Federal Labor Laws and the FAA Were In Conflict, the Latter Enacted NLRA and Norris-LaGuardia Should be Enforced

Even if there were an "irreconcilable conflict" between the two labor statutes and the FAA, this Court has instructed that in that rare case the later-enacted statute impliedly repeals the earlier. *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936). Norris-LaGuardia (1932) and the NLRA (1935) were both adopted after the FAA (1925).[20] Consequently, the NLRA and Norris-LaGuardia would take precedence if there were an irreconcilable conflict.

For each of those five, separate reasons, the FAA does not require enforcement of agreements that are unlawful under the NLRA and unenforceable under Norris-LaGuardia.

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[20] While the FAA was recodified in 1947, no substantive change was made or intended. *See* H.R. Rep. No. 80-251 (1947), *reprinted in* 1947 U.S.C.C.A.N. 1511 (recodification made "no attempt" to amend existing law); H.R. Rep. No. 80-225 (1947), *reprinted in* 1947 U.S.C.C.A.N. 1515 (same). Recodification by itself is not a substantive amendment and this Court has held that, for purposes of the last-in-time rule, a nonsubstantive reenactment does not take precedence over an otherwise later enacted statute. *See Finley v. United States*, 490 U.S. 545, 554 (1989); *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961). Moreover, the NLRA was substantively and significantly amended in 1947, 1959, and 1974. *See* Pub. L. No. 80-101, 61 Stat. 136 (June 23, 1947); Pub. L. No. 86-257, 73 Stat. 519 (Sept. 14, 1959); Pub. L. No. 93-360, 88 Stat. 395 (July 26, 1974).

III. Nothing in the Board's Holding Prevents Employers From Making Bilateral Arbitration Available to Employees

The Employers argue that the Board's holding bars all employment arbitration. Epic Br. at 47-48. But an employer that truly believes that "'employers and employees alike may derive significant advantages' from" arbitration, Epic Br. at 56 (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001)), may lawfully make arbitration available to individual employees who wish to avail themselves of that option, after a dispute arises, without foreclosing employees from seeking to concertedly pursue their disputes in court if they so choose. Such an employer is free to tout the advantages of arbitration among its employees. Individual employees may choose arbitration, just as nonemployee litigants do, when they believe it might avoid delay or minimize costs. It is not the Employers' maintenance of a system of arbitration open only to individual employees that violates the NLRA, but rather the Employers' imposition of that system to wholly preclude concerted enforcement activity via the compelled agreements.

In other words, employers may lawfully maintain a system of arbitration to resolve workplace disputes and make that system available only to individual employees who may invoke the system when a dispute arises. But employers may not, consistent with the NLRA and Norris-LaGuardia, require individual employees to waive their core, substantive right to engage in concerted enforcement activity concerning any and all future disputes.

CONCLUSION

The judgment of the Fifth Circuit should be reversed.

Respectfully submitted,

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