No. 16-300

IN THE

Supreme Court of the United States

ERNST & YOUNG LLP and ERNST & YOUNG U.S. LLP,

Petitioners,

—v.—

STEPHEN MORRIS and KELLY MCDANIEL,

Respondents.

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

BRIEF OF RESPONDENTS

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COUNTER-STATEMENT OF QUESTION PRESENTED

1. Whether Sections 7 and 8(a)(1) of the National Labor Relations Act, 28. U.S.C. §§ 157, 158, which establish a statutory right for employees to "engage in***other concerted activities for the purpose of ***mutual aid or protection," render unlawful a term of an arbitration agreement that requires arbitration of an employee's work-related disputes to be conducted individually and in "separate proceedings."

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INTRODUCTION

For well over a century, employers have sought to use employment contracts as a device to prohibit or otherwise limit the ability of employees to band together to address their employment grievances collectively. The employers in these cases similarly seek to use contracts with individual employees to deny those employees the right to address illegal underpayment of their wages collectively.

This time, because the employers' case is premised on the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.,* the employers praise the advantages of arbitration. They seek to portray their contracts barring collective litigation as a "benefit" of "particular importance" to employees citing allegedly lower costs and allegedly faster resolution. That is hardly universally true. It not true in this case.

Petitioner Ernst & Young's arbitration process is so complex that the expense dwarfs the generally small amount of unlawfully withheld overtime payments. In *Sutherland v. Ernst & Young LLP*, uncontested evidence showed the potential cost was $200,000; the potential recovery was only $1,867.02. Judge Kimba Wood of the United States District Court for the Southern District of New York found: "Only a 'lunatic or a fanatic' would undertake such an endeavor" individually. *Sutherland v. Ernst & Young LLP*, 768 F. Supp. 2d 547, 552 (S.D.N.Y. 2011), *rev'd*, 726 F. 3d 290 (2d Cir. 2013).

The only case we are aware of where arbitration was individually pursued against Ernst & Young is the currently pending *Richards v. Ernst & Young, LLP*, AAA 01 15 0003 6796, pursued by counsel for Respondents here, under protest, with reservation of

all rights. That arbitration is currently stayed pending the result of this appeal.

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The Norris-LaGuardia Act ("Norris-LaGuardia"), 29 U.S.C. § 101, *et seq.* and the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, *et seq.*, guarantee employees a ***right to pursue*** overtime claims ***collectively.*** Those laws ***do not*** guarantee collective litigation will be successful, or even economically viable. Yet, collective litigation to enforce statutory overtime rights is often viable and sustainable as both this case and *Epic Systems Corp. v. Lewis,* No. 16-285 ("*Epic*"), demonstrate.

The importance of the protection of the right to pursue "concerted activities" for the purpose of "mutual aid or protection" is powerfully illustrated by the decade long history of litigation by employees of Ernst & Young seeking to enforce their statutory overtime rights under the Fair Labor Standards Act ("FLSA") and state law.

Epic Petitioners note that Congress gave employees the right to pursue employment disputes through "concerted activities" to "increase[ ] [employees'] bargaining power and thereby increase[ ] the possibility of fair outcomes" in employment disputes. *Epic* Br. 43. We agree. The right to pursue collective judicial action does increase the possibility of fair outcomes, just as Congress intended.

STATEMENT

Six months after first being sued in a class action under state law, *see Ho v. Ernst & Young LLP*, Case No., 05-cv-04867-RMW (N.D. Cal.), Ernst & Young adopted the arbitration agreement at issue. Pet. 45a. The agreement required individual arbitration of all

employment disputes and barred collective or class proceedings. Ernst & Young required employees to agree to the arbitration agreement as a condition of initial or continued employment. Pet. 45a. Ernst & Young has resisted collective and class actions by its employees seeking unlawfully withheld overtime payments on the basis of that arbitration agreement.

Stephen Morris ("Morris") commenced this action against Ernst & Young seeking overtime payments that he alleged were required to be paid under the terms of Section 7(a)(1) of the FLSA. 29 U.S.C. § 207(a)(1). Morris sought to proceed as a collective action under Section 16(b) of that statute. 29 U.S.C. § 216(b). J.A. 27-28. He also sought relief under California Labor Code Section 1194 (Deering), which has its own overtime payment requirements, and other related relief under state law. With respect to the state law claims, Morris proceeded under Rule 23 of the Federal Rules of Civil Procedure. The Complaint was amended to include Kelly McDaniel ("McDaniel" and collectively with Morris "Respondents") as an additional collective and representative plaintiff. Ernst & Young moved to compel each of the Respondents to arbitrate individually.

A. The History of This Court's Recognition of Congressional Protection for Concerted Action by Employees.

During the beginning of the 19th Century, employers persuaded this Court that their right to freedom of contract overcame statutory limitations on legislation limiting the hours an employee could work. *Lochner v. New York*, 198 U.S. 45 (1905). "Employers required [employees] to sign agreements stating that the workers were not and would not become labor union

members," referred to as "yellow dog contracts." *Lincoln Fed. Labor Union v. Nw. Iron & Metal Co.*, 335 U.S. 525, 534 (1949). Both Congress and state legislatures passed laws outlawing such agreements. For a time, both state and federal laws against "yellow dog contracts" were struck down by this Court based on a "constitutional doctrine also used to strike down laws fixing minimum wages and maximum hours in employment. . . ." *Id.* at 535. *See also*, *Adair v. United States*, 208 U.S. 161 (1908); *Coppage v. Kansas*, 236 U.S. 1 (1915). In 1932 Norris-LaGuardia outlawed "yellow dog contracts" and established, as public policy of the United States, protection of employees' right to engage in "other concerted activities" for the purpose of "mutual aid or protection."

Shortly thereafter, the 74th Congress enacted Section 7 of the 1935 NLRA making clear that employees have "the right" to "engage in" "other concerted activities for *** mutual aid or protection" and making "interfere[nce]" with the exercise of that right illegal. 29 U.S.C. §§ 157, 158(a). "Other concerted activities" includes and protects concerted action in judicial forums. Without exception, each of the seven circuit courts to have ruled on that issue over the years has found that to be the plain meaning of "other concerted activities".

Norris-LaGuardia also ***expressly repealed*** "[a]ll acts or parts of acts" in "conflict" with its "public policy" protecting the "right" of employees to engage in "other concerted activities *** for their mutual aid or protection." 29 U.S.C. §§ 102, 115.

Following passage of the NLRA, the next session of Congress passed the FLSA, 52 Stat. 1060, 29 U.S.C. § 201 *et seq.*, perhaps the signature legislation of the New Deal. The FLSA set forth employment rules concerning minimum wages, maximum hours, and

overtime pay. It expressly provided for a right of employees to sue collectively to enforce the wage, hour and overtime pay rules. 29 U.S.C. § 16(b).

The *Lochner, Adair, Coppage* line of authority has been decisively rejected by this Court. *See Fed. Labor Union v. Nw. Iron & Metal Co.*, 335 U.S. at 536. Since that time both the National Labor Relations Board ("NLRB") and this Court have repeatedly and consistently resisted any attempt by employers to contractually dictate any limitation on the right of "employees to band together in confronting an employer regarding the terms and conditions of their employment." *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 835 (1984); s*ee also, infra* at 15-17. In these consolidated cases, the employers seek to use individual employment contracts to effectively overturn nearly a century of Supreme Court authority.

B. The Arbitration Agreement

As a condition of McDaniel's initial employment and Morris' continued employment, both were required to agree to an arbitration agreement entitled "Ernst & Young's Common Ground Dispute Resolution Program," (the "EY Arbitration Agreement"). J.A. 36-48. The EY Arbitration Agreement bars all court proceedings, as well as proceedings in arbitration as a class or collective action. § II.B.1, J.A. 37. Employees are allowed to participate in administrative proceedings, but they are not allowed to obtain any monetary awards in those proceedings. § V.D.2, J.A. 47.

The EY Arbitration Agreement imposes a mandatory multi-phased process, adding to the cost and delaying the outcome. Phase I requires mediation. §§ III and III.G, J.A. 39-40. Phase II is arbitration, either before the International Institution for Conflict

Prevention and Resolution ("CPR"), American Arbitration Association, or J.A.MS, as the employee chooses. § IV and IV.C., J.A. 41-48.

The chosen provider must agree to comply by the terms of the EY Arbitration Agreement. § IV.G.4 , J.A. 43. If there is any conflict between the provider's arbitration rules and terms of the EY Arbitration Agreement, the EY Arbitration Agreement "will take precedence." § IV.D., J.A .41.

Discovery is required. It is expansive and expensive, including "reasonable" documentary discovery, at least six depositions of fact witnesses (three for each side for seven hours each), and depositions of expert witnesses. § IV.L., J.A. 44. There is a right to move for summary adjudication. § IV.N., J.A. 44-45. Finally, there is a full evidentiary hearing. § IV.O., J.A. 45.

The EY Arbitration Agreement provides confidentiality for "all aspects of the proceeding." As a result, an employee in one arbitration will not be able to share discovery with other employees. § V., J.A. 46.

C. The Decision Below

The Ninth Circuit concluded that this case turned upon the issue of whether the "concerted activities" right was "interfered with" by the concerted action waiver in the EY Arbitration Agreement. Recognizing the significance of the decision of the NLRB in *D.R. Horton,* 357 NLRB 2277 (2012), Chief Judge Thomas analyzed that decision under the two step framework required by *Chevron U.S.A. Inc. v. NRDC*, *Inc.,* 467 U.S. 837, 843 (1984). Pet. 3a-5a.

Under the first step of *Chevron*, the Circuit found that Section 7 of the NLRA "protects a range of concerted employee activity, including the right to 'seek to improve working conditions through resort to administrative and judicial forums.'" Pet. 7a (citations

omitted). The Circuit further found that the "separate proceedings" clause in the EY Arbitration Agreement "is the 'very antithesis' of § 7's substantive right to pursue concerted work-related legal claims." Pet. 9a-10a, *quoting, NLRB v. Stone*, 125 F.2d 752,756 (7th Cir. 1942). The Circuit agreed with the Board's finding that the "separate proceedings clause" "is 'interference' within the meaning of § 8." Pet. 8a. The Circuit further found that the "employer violates § 8 a second time by conditioning employment on signing a concerted action waiver." Pet. 8a-9a, (citations omitted)

As a result, the Circuit concluded: "The NLRA is unambiguous, and there is no need to proceed to the second step of *Chevron.* Thus, the 'separate proceedings' terms in the Ernst & Young contracts cannot be enforced." Pet. 11a. The Circuit also found that the right to "concerted activities" is a substantive federal right, Pet. 14a-17a, 20a-21a, which does not "specially disfavor" arbitration. Pet. 22a.

Therefore, construing Section 2 of the FAA, the Circuit found that "[w]hen an illegal provision not targeting arbitration is found in an arbitration agreement, the FAA treats the contract like any other; the FAA recognizes a general contract defense of illegality." Pet. 14a, *citing, AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). Accordingly, the Circuit held that "nothing in the Supreme Court's recent arbitration case law suggests that a party may simply incant the acronym 'FAA' and receive protection for illegal contract terms anytime the party suggests it will enjoy arbitration less without those illegal terms. *** *Concepcion* supports no such argument." Pet. 23a.

Given the holding concerning the NLRA, the Circuit found it unnecessary to reach "plaintiffs' alternative

arguments regarding the Norris-LaGuardia Act." Pet. 24a-25a.

Judge Ikuda filed a dissent, which did not address Norris-LaGuardia.

SUMMARY OF THE ARGUMENT

I. The task before this Court is to determine the intent of Congress, primarily expressed in three statutes—the 1925 FAA, Norris-LaGuardia in 1932, and the NLRA in 1935—regarding protection of collective judicial action by employees. Norris-LaGuardia and the NLRA both protect employees' "right" to engage in "other concerted activities for *** mutual aid or protection." The arbitration agreements under appeal are governed by the FAA and all expressly bar "concerted" arbitration and all litigation.

A. The plain meaning of Norris-LaGuardia's and the NLRA's broad general term, "other concerted activities," encompasses any lawful and proper concerted activities through which workers "act together to better their working conditions ***." *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978) (hereinafter "*Eastex*"), *quoting*, *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (l962). Every circuit to have directly addressed the plain meaning of "other concerted activities" has held that NLRA Section 7 protects collective or class judicial proceedings.

Petitioners never questioned the plain meaning of NLRA Section 7 below, but they now argue that an analysis of the statutory "text" shows that only concerted actions relating to self-organization or collective bargaining are protected. Pet. Br. 29-30, 43. At most, they argue "concerted" action may be protected to "assist" litigation, but not to participate in

it. *Epic* Br. 39-40. At a minimum, they argue the language is ambiguous. *Id.*

This Court already rejected the limitation of Section 7 to union related activities. *Eastex,* 437 U.S. 556, 565. Section 7's broad general right to engage in "other concerted activities" protects all lawful means of proceeding to raise collectively, and to resolve collectively, grievances concerning the terms and conditions of employment.

Congress did not protect only some forms of "concerted" activities and disregard others. *See NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 835 (1984). The specifically enumerated rights under Section 7 all relate to the ability of workers to collectively address employment grievances. Collective litigation under Section 16(b) of the FLSA fits squarely within Section 7's broad general protection of "other concerted activities for *** mutual aid or protection."

If there were ambiguity in the statutory text as Petitioners argue, the purpose and legislative history of the NLRA resolves that ambiguity and shows that collective judicial action is protected. The history of labor legislation in the 20th century shows an unmistakable congressional intent to protect the right of workers to act collectively, through any lawful means, to address and resolve employment disputes.

It is not true, as Petitioners claim, that class, collective or representative procedures only became established decades after the NLRA. *See* Pet. Br. 31. Representative and class actions existed since the founding of the Republic. Equity Rule 38, as amended in 1912, provided for class actions in appropriate cases.

B. If the FLSA is read harmoniously with the NLRA, as it must be, those two statutes further

evidence congressional intent to protect concerted judicial action. That protected right extends to state law class actions as well as to federal collective actions under Section 16(b) of the FLSA.

C. If there is still ambiguity remaining, the NLRB has consistently construed "concerted activities" to include concerted judicial and arbitral disputes since shortly after the NLRA was enacted. The NLRB's determination of ***the meaning of the NLRA*** is entitled to deference. *City Disposal Sys., Inc.*, 465 U.S. at 830; *Eastex,* at 568.

D. With the meaning of the NLRA resolved, the illegality of Petitioners' contractual prohibition of "concerted" litigation renders that prohibition unenforceable. The right to "concerted" litigation is a substantive right. Petitioners argue that even substantive rights can be waived. That argument misses the point. Employers may not lawfully "coerce" employees into such a waiver, or "interfere" with the waiver choice by making waiver a condition of employment, as Ernst & Young has here.

II. A. Denying enforcement to the "separate proceedings" term in the EY Arbitration Agreement is consistent with Section 2 of the FAA. Arbitration agreements were intended to be as enforceable as other contracts, no more. Congress did not intend to immunize arbitration agreements from the effects of earlier or later legislation that might cause those agreements to be illegal or unenforceable. Section 2 of the FAA proves that intent.

Sections 2 and 3 of Norris-LaGuardia, passed seven years after the FAA, protects the right of employees to engage in "concerted activities" for "mutual aid or protection." *Id.* §§ 102-103. Section 15 of Norris-LaGuardia ***expressly repeals*** any "acts or parts of acts" that are in conflict with its provisions. 29 U.S.C. § 115.

If the FAA conflicts with Norris-LaGuardia, then the FAA was expressly repealed to the extent of the conflict.

B. If the FAA conflicts with the NLRA, then the FAA also was impliedly repealed by the NLRA to the extent of the conflict. "When a statute specifically *** prohibits what [an earlier statute permitted, the earlier statute is *** impliedly repealed." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012).

Under the last-in-time canon where statutes are in conflict, the general rule is that the later statute repeals the earlier one. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976). Petitioners claim other canons, *ejusdem generis* and the canon that a specific statute governs a general one, support a different result. They do not. Even if they did, the last-in-time canon is the tie-breaker. To the extent of any conflict between the FAA and the later enacted NLRA, the FAA was repealed by necessary implication.

The Acting Solicitor General argues that the Section 7 right to engage in "concerted activities" cannot apply to collective litigation under Section 16(b) of the FLSA. He claims to so hold would "expand the availability of class or collective remedies beyond those that are authorized by" the FLSA itself. U.S. Br. 10. That would be true only if the FLSA impliedly repealed or limited the rights granted in the NLRA by not including and re-passing those rights as a separate section of the FLSA.

The text and legislative history of the FLSA, when read in harmony with the NLRA, supports the conclusion that Congress did intend to protect collective litigation. The Acting Solicitor General cites no contrary evidence.

C. Petitioners argue that the holdings of this Court require a new and special canon of statutory construction: any federal statute that might impact an arbitration agreement must contain a "clear" congressional command with an explicit reference to the FAA and clearly state an intention to overrule the FAA. *See* Pet. Br. 22-24, *citing CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 100 (2012).

Neither *CompuCredit* nor any prior authority requires an "explicit reference" to the FAA in order to outlaw certain contractual terms. *Id.* at 109. (Sotomayor, J. and Kagen, J. concurring). Declaring a contractual term to be ***illegal*** is as clear a Congressional command as any that can be imagined.

Moreover, the 69th Congress which passed the FAA had no power to create an enforceable "explicit reference" binding on later sessions of Congress. A later Congress may "make its will known in whatever fashion it deems appropriate—including the repeal of pre-existing provisions by simply and clearly contradicting them." *Lockhart v. United States*, 546 U.S. 142, 148 (2005) (Scalia J., concurring with unanimous court).

D. The decision below reads the FAA and the NLRA harmoniously. It preserves arbitration for any individual dispute where the employee choses to proceed individually. It preserves class arbitration only if the contract of the parties contains an agreement for that result.

III. Under Norris-LaGuardia, Congress restricted federal courts from enforcing contracts contrary to the policy expressed in Section 2 of that Act. Respondents respectfully suggest there is a limitation on the remedies that may be provided to Petitioners. Federal courts are without authority to enforce Petitioners'

arbitration agreements or to compel Respondents to engage in individual arbitration.

ARGUMENT

The congressional intent in passing Norris-LaGuardia, the NLRA and the FAA is clearly expressed through the text, legislative histories, and purposes of those statutes. Notwithstanding Petitioners' and the Acting Solicitor General's many complex, conflicting, and self-contradictory arguments, the issues before the Court can be resolved simply by applying the plain meaning of the text of those statutes.

The first question that must be addressed is whether, in the unique and specialized context of employer and employee disputes, Congress intended to preclude enforcement of agreements prohibiting "concerted" litigation. It did. Congress rendered such agreements both unenforceable (in Norris-LaGuardia) and illegal (in the NLRA).

If an otherwise illegal and unenforceable contract term is contained in an arbitration agreement, the next question that must be answered is whether the FAA creates an exception to the "concerted activities" "right" established in the NLRA. A plain reading of FAA Section 2 makes clear that Congress had the opposite intent. Congress did not seek to have the FAA supplant any earlier or later statute which makes an arbitration agreement or any of its terms unenforceable. There is no conflict between the FAA and the NLRA.

Were there a conflict between the FAA and the "concerted activities" clause of the NLRA and Norris-LaGuardia, the NLRA must be enforced. This Court's arbitration jurisprudence does not purport to, and does

not, overcome that clearly expressed congressional intent.

I. CONGRESS CLEARLY INTENDED TO MAKE EMPLOYMENT CONTRACTS LIMITING EMPLOYEE "CONCERTED ACTIVITIES" ILLEGAL AND UNENFORCEABLE.

Congress intended to remediate the unequal bargaining power between employers and employees by protecting the right of employees to "band together," and confront their employer collectively, in any lawful manner they believed to be effective. NLRA Section 7 thus gave employees 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." *See* 29 U.S.C. § 157.

Similar language was included earlier in Norris-LaGuardia, which established the "public policy of the United States" to protect the "individual unorganized worker" from "interference" "by employers" with those "concerted activities." Norris-LaGuardia Section 2, 29 U.S.C. § 102 (emphasis supplied).

A. The Plain Meaning of the Statutory Language Includes Judicial and Arbitral "Concerted Action."

The broad general language of Section 7 of the NLRA encompasses a wide and diverse range of concerted activities. The statutory language does not suggest that the common, and often essential, right of employees to take judicial action, is somehow deserving of less protection than all other protected "concerted activities." *See City Disposal Sys., Inc.*, 465

U.S. at 835. "If a statute's meaning is plain," the Court "must give effect to the unambiguously expressed intent of Congress." *Holly Farms Corp. v. Nat'l Labor Rels. Labor Bd.*, 517 U.S. 392, 398-99 (1996), *quoting, Chevron U.S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Circuit City Stores v. Adams*, 32U.S. 105, 109, (2001).

1. The Ordinary Meaning of "Other Concerted Activities for *** Mutual Aid or Protection" Includes any Lawful Concerted Activity to Address the Terms and Conditions of Employment.

The statutory language of the NLRA should be interpreted "broadly." *Kasten v. Saint-Gobain Performance Plastics Corp.,* 563 U.S. 1, 13 (2011). The use of the word "other" in the phrase "other concerted activities" indicates "an intent on the part of Congress to afford broad rather than narrow protection to the employee." Cf. *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972) (construing the word "otherwise" in Section 8 (a)(4)).

The Acting Attorney General concedes that Respondent's reading of Section 7 to protect concerted judicial action may be "permissible." U.S. Br. 14. *EY* Petitioners concede that interpretation is perhaps "plausible," but find the language at best "ambiguous." Pet. Br. 27-28. *Epic* Petitioners conclude that "construing 'concerted activities' to include class proceedings" is "not even . . . *plausible. . .*" *Epic* Br. 33-34 (emphasis in the original).

This Court has read the NLRA much more broadly. Even when interpreting very narrow language in the NLRA anti-retaliation provisions, this Court has expanded that language to provide broader protections consistent with the statute's purpose. *Kasten*, 563 U.S. at 13*, citing, Scrivener*, 405 U.S. at 123. Thus, the statutory prohibition in Section 8(a) (4) on retaliation against workers who had "filed charges" with the Board or had "given testimony," before the Board, was "broadly interpreted" as "protecting workers who *neither* filed charges *nor* were "called *formally* to testify" but simply "participate[d] in a [National Labor Relations] Board investigation." *Id.* (emphasis in the original); 29 U.S.C. § 158(a)(4).

"The ordinary meaning of the word 'concerted' is: 'jointly arranged, planned, or carried out; coordinated.' Concerted, NEW OXFORD AMERICAN DICTIONARY 359 (3d ed. 2010). Activities are 'thing[s] that a person or group does or has done' or 'actions taken by a group in order to achieve their aims.' *Id.* at 16. Collective or class legal proceedings fit well within the ordinary understanding of 'concerted activities.'" *Epic* Pet. 5a.

In *Eastex*, this Court found distribution of a newsletter seeking opposition to a state constitutional amendment relating to a "right to work" law, and encouraging election of "friends" of labor were protected activities under Section 7. *Eastex* held: "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." *Eastex*, 437 U.S. at 565.

Six years later, in *City Disposal Sys., Inc.*, 465 U.S. at 822, this Court held that "[t]here is no indication that Congress intended to limit this protection to

situations in which *** fellow employees combine with one another in any particular way." *Id.* at 835. Similarly there is no indication that Congress protected a panoply of "activities" by employees to increase their wages including the rights to unionize, the right to strike, the right to engage in political activity, but nonetheless left completely unprotected litigation ***by employees***, to enforce their ***rights as employees***, to ***wages*** guaranteed them by law.

Unsuprisingly, without exception, those courts of appeal to have addressed the issue have found that the "mutual aid or protection" clause encompasses collective judicial proceedings. *NLRB v. Alternative Entm't, Inc.,* 858 F.3d 393, 408 (**6th Cir.** May 26, 2017)("§ 8 makes it illegal to force workers, as a condition of employment, to give up the right to concerted legal action, whether that right is substantive or procedural") (emphasis supplied); *Morris v. Ernst & Young, LLP,* Pet. 7a-9a (**9th Cir.** 2016)(NLRA unambiguously provides that "'mutual aid or protection clause' includes the substantive right to collectively 'seek to improve working conditions through resort to administrative and judicial forums.'"); *Lewis*, Epic Pet. 5a. (**7th Cir.** 2016), ("[c]ollective or class legal proceedings fit well within the ordinary understanding of 'concerted activities.'"); *Brady v. NFL*, 644 F.3d 661, 673 (**8th Cir.** 2011) ("a lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is 'concerted activity' under § 7 of the National Labor Relations Act."); *Mohave Elec. Coop., Inc. v. NLRB*, 206 F.3d 1183, 1188, 1189 (**D.C. Cir.** 2000)("mutual aid or protection" clause protects collective action in litigation); *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 297 (**5th Cir.** 1976)("filing by employees of a labor related civil

action is protected activity under section 7 of the NLRA"); *Leviton Mfg. Co. v. NLRB*, 486 F.2d 686, 689 (**1st Cir.** 1973) ("the filing of a labor related civil action by a group of employees is ordinarily a concerted activity protected by § 7").

None of those courts found any ambiguity in the language of Section 7. Petitioners do not explain why an interpretation that is merely "plausible," or "not even plausible," was found plainly correct and unambiguous by so many experienced circuit court judges.

2. Reading the "Other Concerted Activities" Clause as a Whole, and Together with Other Sections of the NLRA, Supports its Plain Meaning to Encompass Concerted Judicial Action.

Without having raised the argument below, Petitioners raise a textual argument and now assert that the phrase "other concerted activities" must be understood to "embrace only [conduct] similar in nature to [the conduct] enumerated by the preceding specific words." Pet. Br. 27-28, *citing*, *Yates v. United States*, 135 S. Ct. 1074, 1086 (2015); *see also*, *Epic* Pet Br. 33-34. They argue that since arbitration and litigation are not mentioned in the specifically enumerated rights, they cannot be included in the broad general final phrase. *See* Pet. Br. 27-28.

If the canon of *ejusdem generis* does apply to the concept Petitioners seek to advance, it refers to the "***general*** nature" of the prior terms, as providing context, to a final phrase. *See Circuit City Stores*, 532 U.S. at 109. (emphasis added). Petitioners fail to analyze the "general nature" of the "proceeding specific words" other than to make the claim that the general words refer only to "self-organization" and

"collective bargaining." Pet. Br. 27, 43-44; *See also,* U.S. Br. 11, 20-22.

A substantially similar argument was raised in *Eastex* and rejected by this Court. There, the question was whether protected activity included passing out leaflets which opposed certain legislation, or encouraged the election of "friends" of labor. Petitioner there, like Petitioner here, argued that "other mutual aid or protection" only referred to activities similar to collective bargaining. The Court disagreed holding: "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.'" *Eastex*, 437 U.S. at 565; *cf., CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277, 285 (2011) (reading final phrase "another tax," to encompass "any form of tax a State might impose, on any asset or transaction," except for the preceding specific words.).

Second, in *Eastex,* his Court held that the language of Section 7 "expresses Congress' recognition of the 'right of wage earners to organize and to act jointly in questions affecting wages.'" *See Eastex*, 437 U.S. at 565 n.14. Class and collective litigation to enforce legally required overtime payments is precisely that.

Third, the Court does not limit its "inquiry to the text of" Section 7 "in isolation. '[I]nterpretation of a phrase of uncertain reach is not confined to a single sentence when the text of the whole statute gives instruction as to its meaning.'" *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017), *quoting*, *Maracich* v. *Spears*, 133 S. Ct. 2191, 2203 (2013). Section 1 of the NLRA "declared *** the policy of the United States" to include "protect[ing] the exercise by workers of full freedom of association *** for the purpose of negotiating the terms and conditions

of their employment or other mutual aid or protection." 29 U.S.C. § 151. That section provides still further support for a broad reading of Section 7 to include collective litigation.

3. The Purpose and Legislative History of Norris-LaGuardia and the NLRA, and the Roughly Contemporaneous FLSA Show Congressional Intent to Protect Collective Legal Action.

The purpose and the legislative history of the NLRA and Norris-LaGuardia strongly support the conclusion that concerted judicial and arbitral actions are protected by Section 3 of Norris-LaGuardia and Section 7 of the NLRA. The purpose and legislative history thus resolves any "ambiguity" Petitioners find in the statutory language. Pet. Br. 28. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226-227 (1987).

a. Norris-LaGuardia and the NLRA Sought to End Judicial Hostility to Collective Action by Workers.

Norris-LaGuardia and the NLRA grew out of two historic struggles: the struggle of labor to act collectively to obtain better bargaining power with employers; and the struggle by Congress to overcome "the social and economic ideas of judges, which *** became translated into law, [and] were prejudicial to a position of equality between workingman and employer ***." *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 485 (1921)(Brandeis, J. joined by Holmes, J., and Clarke, J. dissenting).

Throughout the 19th century, courts issued many rulings hostile to labor based on both constitutional and statutory grounds. Courts "had reinterpreted

federal statutes that Congress had not intended for use against the organizing activities of labor unions." *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 542 (2002)(Breyer, J., joined by Stevens, J., Souter, J. and Ginsberg, J. concurring in part and concurring in the judgment) (citations and parentheticals omitted).

Congressional efforts to overcome this judicial hostility to the right of workers to act collectively began with the Clayton Act in 1914. 9 U.S.C. § 1, *et seq.* Section 20 of that Act restricted the issuance of injunctions "in any case between an employer and employees, *** or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right *** ." 29 U.S.C. § 52.

When that proved insufficient to combat judicial hostility to employees acting collectively, Congress passed Norris-LaGuardia. "The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction." *United States v. Hutcheson*, 312 U.S. 219, 235-36 (1941).

"Similar objectives informed Congress' later enactment of the NLRA ***." *BE&K Constr. Co.* 536 U.S. at 543 (concurring opinion). Congress sought "to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment." *City Disposal Sys., Inc.*, 465 U.S. at 835. As Section 2 of Norris-LaGuardia and Section 1 of the NLRA make clear, Congress felt that "concerted" action was essential because it recognized that "the individual unorganized worker is commonly helpless to exercise

actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment ***. 29 U.S.C. § 102; *see also,* 29 U.S.C. § 151.

The purpose and legislative history of Norris-LaGuardia and the NLRA reflects congressional intent to protect a worker's right to "concerted" action whenever the worker was (in the words of *City Disposal*) "confronting an employer regarding the terms and conditions of employment."

b. Representative, Class and Collective Litigation Had Been Established for Over a Century When Norris-LaGuardia and the NLRA Were Passed.

Petitioners are wrong when they argue that there is "no indication that, when Congress enacted the NLRA it was concerned about protecting the ability to invoke class or other collective procedures when pursuing claims arising under other statutes." Pet. Br. 29. Congress surely was aware that confronting an employer regarding the terms and conditions of their employment, might sometimes occur in court, or for that matter in arbitration. There is ***no indication that Congress did not intend to protect*** concerted action in judicial or arbitral proceedings.

"[R]epresentative suits have been recognized in various forms since the earliest days of English law." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 832 (1999) *citing,* S. Yeazell, *From Medieval Group Litigation to the Modern Class Action* (1987); *and* Marcin, *Searching for the Origin of the Class Action*, 23 Cath. U. L. Rev. 515, 517-24 (1973). From the earliest days of the Republic, proceedings in Equity allowed for joinder of many parties, and if too numerous, exceptions to the necessary party rule allowed for

representative plaintiffs. Equity also allowed for the combination of suits through bills of peace. *Id.*

Rule 38 of the Equity Rules of this Court, promulgated in 1912, provided for class suits, much like Rule 23 today: "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole." *See Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 363-64 (1921). *See also, Kelly v. Cent. Hanover Bank & Tr. Co.*, 11 F. Supp. 497 (S.D.N.Y. 1935) (plaintiff suing in a class suit on behalf of herself and all other debenture holders).

In *Hansberry v. Lee*, 311 U.S. 32 (1940), this Court collected cases, going back more than a century before that, illustrating the "familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present ***." *Id.* at 42-43.

The Supreme Court's Advisory Committee started work on its Preliminary Draft of the Federal Rules of Civil Procedure in 1935. When that draft was presented it contained the original version of Rule 23. *See* Moore, *The Federal Rules of Civil Procedure: Some Problems With The Preliminary Draft*, 25 Geo. L. J. 551, 570-76 (1937).

Prior to Norris-LaGuardia and the FLSA, battles between employees and employers were often conducted in court, *e.g., United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 (1922), and sometimes in arbitration. *E.g., Chas. Wolff Packing Co. v. Court of Indus. Relations*, 267 U.S. 552

(1925)(addressing mandatory arbitration under Kansas Industrial Relations Act).

Accordingly, there is no reason why Congress would have had to expressly mention litigation or arbitration in order to protect the right of employees to engage in concerted actions in those forums. If Congress intended to carve out judicial or arbitral proceedings from the broad general protection of "other concerted activities," the natural way to do so would have been to identify that intended exception. To paraphrase this Court's holding in *City Disposal,* there is no indication that Congress intended to limit its protection of "concerted activities" to only certain types of the many "activities" available for resolution of employment disputes.

B. The FLSA Collective Litigation Remedy is Further Evidence that Congress Intended NLRA's Section 7 "Concerted Activity" Right to Extend to Litigation.

Following passage of the NLRA, the next session of Congress passed the FLSA, 52 Stat. 1060, 29 U.S.C. § 201 *et seq.* The FLSA established legally enforceable federal rights to minimum wages and overtime pay and included a right to sue, "which puts directly into the hands of the employees who are affected by violation the means and ability to assert and enforce their own rights ***." Sloan, 4 American Landmark Legislation (1984), at 465, Congressional Debates (House), June 14, 1938 (comments of Congressman Kent Keller, member of Conference Committee).

The Acting Solicitor General makes the counter-intuitive and counter-factual argument that the Section 7 right to engage in "concerted activities" cannot apply to collective litigation under Section 16(b) of the FLSA because to so hold would "confer[ ]

greater rights to pursue FLSA claims collectively than does the FLSA itself." U.S. Br. 10. Both the premise and the conclusion are wrong. If the FLSA and the NLRA are read together harmoniously, they fully support the conclusion that Congress intended to protect collective and class litigation.

1. This Court Has Never Held That the FLSA Does Not Protect Collective Judicial Action.

The Acting Solicitor General takes the position that the FLSA did not create a collective action "right" by enacting Section 16(b). U.S. Br. 9-10, 16. This Court has never addressed that issue and a there is a split in the circuits as to whether Section 16(b) creates such a right.[1]

Petitioners' and the Acting Solicitor General's reliance on *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991), *e.g.* Pet. Br. 25, U.S. Br. 16, is misplaced. *Gilmer* did not resolve or even address the question of whether the FLSA created a right to engage in collective litigation under Section 16(b). One of the questions in *Gilmer* was whether the Age Discrimination in Employment Act ("ADEA") created such a right merely by "cutting and pasting" Section 16(b) of the FLSA into the ADEA. *Gilmer* involved an individual employee seeking to proceed individually in court and avoid individual arbitration. Gilmer argued that because class arbitration (which he did not seek)

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[1] *Compare, Killion v. KeHE Distribs.*, LLC, 761 F.3d 574 (6th Cir. 2014); *and Boaz v. FedEx Customer Info. Servs.*, 725 F.3d 603 (6th Cir. 2013), *with*, *Owen,* 702, F.3d at 1054-55 (citing *Gilmer, Concepcion, CompuCredit,* and *Italian Colors*); *Sutherland,* 726 F.3d at 296 (quoting *Italian Colors*); *Carter v. Countywide Credit Indus.,* 362 F.3d 294, 298 (5th Cir. 2004) (citing *Gilmer*); *Adkins v. Labor Ready, Inc.,* 303 F.3d 496, 502 (4th Cir. 2002) (citing *Gilmer*).

was arguably unavailable under the arbitration agreement, the arbitration agreement was invalid.

We do not argue that merely "cutting and pasting" the language of Section 16(b) into any statute would automatically create a "right" to collective action. Under *Gilmer* and *CompuCredit*, in the absence of further support in the statutory language, legislative history, or purpose of an Act, a cut and paste by itself would be insufficient. Nor do we argue that an arbitration agreement may not be enforced to address individual claims, where an employee does not seek to enforce his or her right to engage in concerted activities. *Gilmer*, therefore, does not address any issue before the Court in these cases.

2. Reading the FLSA Harmoniously With the NLRA Demonstrates Congressional Intent to Protect Collective Judicial Action.

In all events, it really does not matter whether the FLSA itself did or did not create workers' "right" to concerted judicial action. The NLRA surely did. In light of the NLRA, "there was no need for Congress to include explicit language about" protection of "concerted activities" in the FLSA. *Cf. CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 453-54 (2008).

The language used to define the employees' right to sue in the FLSA paralleled the language used to define the scope of the right to "concerted action," individually, collectively, or through a designated representative, as set forth in Norris-LaGuardia and the NLRA. Section 16(b) was only amended later by the Portal-to-Portal Act of 1947 to require an "opt in" class procedure. *See Integrity Staffing Sols., Inc. v. Busk,* 135 S. Ct. 513, 516 (2014).

The FLSA "is a part of the social legislation of the 1930's of the same general character as the [NLRA]."

Rutherford Food Corp. v. McComb, 331 U.S. 722, 723-24 (1947). Passage of the two statutes was "relatively contemporaneous." *Kasten*, 563 U.S. at 22 n.4. (Scallia, J. with Thomas, J. dissenting).

"[U]nder the *pari materia* canon, statutes addressing the same subject matter generally should be read 'as if they were one law.'" *Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 306 (2006), *quoting, Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972). That canon "assumes that whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject***." *Erlenbaugh v. United States*, 409 U.S. at 243.

The FLSA and the NLRA must be read together in harmony, if not in *pari materia. W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 100 (1991) (statutes should be construed to "contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law.").

The Acting Solicitor General's argument, that the FLSA must be read in isolation from the NLRA, conflicts with the argument that the Acting Solicitor General and petitioners advance so vigorously regarding the principle of reading federal statutes "harmoniously." Pet. Br. 13 *Epic* Br. 13-14.

Reading Section 7 and Section 16(b) as if they appeared in the same statute, as the *pari materia* canon, requires, the fact that a specific enforcement mechanism was enacted in a later section of the same statute, would not suggest that the right was somehow diminished or abrogated by the later enforcement terms.

The Acting Solicitor General's argument makes no greater sense if the two statutes are simply read harmoniously, rather than in *pari materia.* To do

otherwise is akin to a implied partial repeal, which petitioners and the Acting Solicitor General correctly point out is disfavored.

The fact that an employer acts unlawfully if it retaliates against the filing of a Section 16(b) action is further evidence filing such suits collectively is a substantive right. Retaliation is unlawful interference with a legal right, not interference with a mere "procedural mechanism."[2] *See BE&K Constr. Co.* 536 U.S. at 533 (retaliatory suits are those "filed in retaliation for the exercise of the employees' [NLRA] § 7 rights."), *quoting*, *Bill Johnson's Rests. v. NLRB*, 461 U.S. 731, 747 (1983). The "anti-retaliation" provisions of the FLSA cover retaliation for "fil[ing] any complaint or institut[ing] or caus[ing] to be instituted any proceeding under or related to this Act [the FLSA]." 29 U.S.C. § 215(a)(3). That provision protects an employee from retaliation for filing a Section 16(b) action as epic Petitioners concede. *Epic* Br. 37. *See also* U.S. Br. 24.

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There is no support cited, and none we can discover, to buttress the Acting Solicitor General's argument that the NLRA was intended to be narrowly construed, and frozen in time. To the contrary, this Court has recognized that the NLRA is interpreted to adapt "to changing patterns of industrial life." *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975). Similarly, the types of "concerted activities" that are protected

[2] That is not to say that a prohibition on retaliation necessarily can be inferred from wage and hour rights in the absence of an antiretaliation provision. Broad antidiscrimination provisions may also encompass an implied "antiretaliation component." *Gomez-Perez v. Potter*, 553 U.S. 474, 494 (2008) (Roberts, C.J., joined by , Scalia, J. and Thomas, J., dissenting in part). The FLSA is not such a statute.

likewise adapts to changes in the types of "activities" available to employees which they may engage in "concertedly." *See NLRB v. Pier Sixty, LLC*, 855 F.3d 115, 125 (2d Cir. 2017)(Facebook "is a key medium of communication among coworkers and a tool for organization in the modern era."); *Three D, LLC v. NLRB*, 629 F. App'x 33, 36 (2d Cir. 2015)(upholding Board determination that Facebook posts are protected under Section 7 of the NLRA).

The FLSA, adopted near in time to the NLRA, provides strong support for the conclusion that the collective judicial actions are included among the rights protected by Section 7.

3. The Text of the FLSA Provides Further Support for Interpreting the NLRA to Also Protect Rule 23 Class Actions Based on State Law Claims.

NLRA protection also extends to Rule 23 class remedies for employees seeking to vindicate violation of state law wage and hour laws. Nothing in the text or the history of the NLRA supports excluding Rule 23 class actions under state wage and hour laws from the protection of Section 7. The text and history of the FLSA supports the opposite conclusion.

Section 16(b) as originally drafted provided for representative or collective ligation by one or more employees or their designated agent or representative. 52 Stat. 1060 § 16(b). Section 16(b) "explicitly limits its scope to the provisions of the FLSA, and does not address state-law relief." *Knepper v. Rite Aid Corp.*, 675 F.3d 249, 260 (3d Cir. 2012).

Section 18(a) of the FLSA contains a saving clause stating: "No provision of this chapter *** shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage

higher than the minimum wage *** or a maximum work week ***." 29 U.S.C. § 218(a). "In the absence of a direct expression by Congress of its intent to depart from the usual course of trying 'all suits of a civil nature' under the Rules established for that purpose, class relief is appropriate in civil actions brought in federal court ***." *Califano v. Yamasaki,* 442 U.S. 682, 700 (1979). That includes state law claims brought in federal court under diversity or pendant jurisdiction.

Every circuit to have considered the issue has found that there is no indication of any congressional intent in the FLSA to deny employees the right to sue on state law claims in federal court under Rule 23 even if joined in the same action as FLSA claims brought under Section 16(b). *See e.g.*, *Busk v. Integrity Staffing Sols., Inc.*, 713 F.3d 525, 528 (9th Cir. 2013), *rev'd on other grounds*, *Integrity Staffing Sols., Inc. v. Busk*, 135 S. Ct. 513 (2014); *Knepper*, 675 F.3d at 253-62 (3d Cir. 2012); *Ervin v. OS Rest. Servs., Inc.*, 632 F.3d 971, 976-79 (7th Cir. 2011); *Salim Shahriar v. Smith & Wollensky Rest. Grp.*, 659 F.3d 234, 247-49 (2d Cir. 2011); *Lindsay v. Gov't Emps. Ins. Co.*, 448 F.3d 416, 424, 371 U.S. App. D.C. 120 (D.C. Cir. 2006).

There is no basis to conclude that the protection of judicial action in Section 7 does not extend to Rule 23 class actions.

C. The NLRB's Determination of the Meaning of Section 7 and Section 8 of the NLRA Must be Given Deference.

In *D.R. Horton, Inc.* and *Murphy Oil,* 361 N.L.R.B. No. 72 (2014), the NLRB ruled that contracts including arbitration agreements, entered into as a condition of employment, which require employees to litigate employment disputes on an individual basis only, "unlawfully restrict[ ] employees' Section 7 right to

engage in concerted action for mutual aid or protection" and are an unfair labor practice under Section 8. *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012); *Murphy Oil,* 361 N.L.R.B. No. 72 (2014).

Long standing precedent of this Court requires deference to the NLRB's interpretation of the NLRA. *E.g.*, *City Disposal Sys., Inc.*, 465 U.S. at 830 ("we have not hesitated to defer to the Board's interpretation of the [NLRA]"); *Chevron, U.S.A., Inc.*, 467 U.S. at 844 ("considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer"); *see also, Lechmere, Inc. v. NLRB,* 502, 536 (1992); *NLRB v. United Food & Commercial Workers Union, Local 23,* 484 U.S. 112, 123 (1987)*; Lewis.,* Epic Pet. 5a (7th Cir. 2016);*Owen v. Bristol Care, Inc.,* 702 F.3d 1050, 1054 (8th Cir. 2013); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 356 (5th Cir. 2013). The Board also found that the arbitration agreements were in violation of Section 3 of Norris-LaGuardia. *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012). That aspect of the decision is entitled to deference "to the extent that it is persuasive" under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (l945).

In order to apply *Chevron* deference, "[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron, U.S.A., Inc.*, 467 U.S. at 843. The Acting Solicitor General concedes that "the Board's interpretation of ambiguous NLRA language is entitled to judicial deference" and "may govern in contexts where the FAA does not apply." U.S. Br. 23. That concession effectively resolves the issue of the meaning of the NLRA. Whether the NLRA, so interpreted, conflicts with the FAA, and, if

so, which statute takes precedence are separate questions. Petitioners' analysis conflates those arguments in a way the obscures the congressional intent rather than illuminating it. *See* Pet. Br. 48-49.

Petitioners argue that the Board's determination in adjudication is not entitled to deference because the Board's 2012 decision "reversed course" from a 2010 "guidance memorandum" by the General Counsel of the Board which reached a different conclusion. Pet. Br. 49. However, rulemaking or adjudicatory decisions ***of the Board*** represent the considered judgment of the agency, *see NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 138 (1975), and as such they are entitled to deference. A General Counsel's Advice Memorandum constitutes advice issued by the General Counsel to his staff, which does not bind the Board, and is not entitled to deference from the courts. *See* 29 U.S.C. § 153(d) (powers of General Counsel); *Kent Corp. v. NLRB*, 530 F.2d 612, 618 (5th Cir. 1976) (memoranda of the General Counsel directing the filing of a complaint do not inform the public about agency law).

The Board's position has been consistently held since the earliest days after the NLRA was passed. *Spandsco Oil & Royalty Co.*, 42 N.L.R.B. 942, 948-949 (1942); *Murphy Oil,* 361 NLRB No. 72, *Murphy Oil* Pet. 17a. In all events, the Board's decision is indisputably correct, as seven circuit courts have found and the above analysis shows.

D. The EY Arbitration Agreement Unlawfully Interferes with the Right of Employees to Proceed In "Concert" With Other Employees.

Section 8(a)(1) of the NLRA explicitly prohibits employers from "interfering with, restraining, or coercing employees in the exercise of the rights guaranteed" in Section 7, *BE&K Constr. Co.*, 536 U.S.

at 536. A contract which prohibits engaging in "concerted activity" unlawfully "interferes with" the exercise of Section 7 rights, and so this Court has found.

In *National Licorice Co. v. NLRB*, 309 U.S. 350, 360 (1940), and *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944), this Court established the proposition that individual employment contracts that prohibit or discourage the exercise of Section 7 rights are unlawful under Section 8. In *National Licorice,* this Court invalidated an employers' individual contract with employees which provided that discharged employees could complain to the employer that his or her discharge was unreasonable, but precluded the ability of employees to raise the "question as to the propriety of an employee's discharge [in] arbitration or mediation." *National Licorice,* 309 U.S. at 360.

This Court held that provision was unlawful because "[t]he effect of this clause was to discourage, if not forbid, any presentation of the discharged employee's grievances to appellant through a labor organization ***or his chosen representatives, or in any way except personally.***" *Id.* (emphasis supplied). That contractual term violated the NLRA because it "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 ***." *Id.* at 361.

Epic Petitioners and the Acting Solicitor General seek to distinguish *National Licorice* by focusing exclusively on the part of the opinion dealing with the contractual requirement that employees bargain through an employer dominated "Committee." *See id.* at 353-54*;* *Epic* Br. 46, U.S. Br. 27-28. But the contract and this Court's opinion in that case were broader than that argument suggests. The "employer

dominated union" issue that *Epic* Petitioners and the Acting Solicitor General concentrate on was only one of the two unlawful contract issues in that case. The relevant provision is the one discussed above.

In *J. I. Case*, 321 U.S. 332, this Court recognized the that the NLRA established "the public interest [in] preventing unfair labor practices" and held "[w]herever private contracts conflict with [the enforcement of the NLRA] they obviously must yield or the Act would be reduced to a futility." *Id.* at 337.

Epic Petitioners, and the Acting Solicitor General strain to limit the rule in *National Licorice* and *J.I. Case*, to contracts which interfere with collective bargaining through a labor organization. *Epic* Br. 46. That interpretation would leave the great majority of workers who are not unionized unprotected by the Act. Congress has expressed no such intent. *Washington Aluminum Co.*, 370 U.S. at 14 (non-unionized workers covered by Section 7). Contrary to the arguments of the Acting Solicitor General and Petitioners in this case and in *Epic*, the prohibition on the use of employment agreements to undermine the protections of the NLRA extends as far as the protections of the NLRA themselves, and there is no indication that Congress intended any lesser protections when employer individual contracts were involved.

Epic Petitioners and the Acting Solicitor General argue that reading the NLRA to require the availability of class or collective relief would lead to the "absurd" result of disabling the employer from even "opposing a request for class certification, no matter what the forum," and courts "would be unable to deny" class certification. *Epic* Br. 48-49; *but compare* U.S. Br. 21-22 (taking the opposite position). That result would indeed be "absurd," but it would not occur.

"'First Amendment and federalism concerns' prevent interfering with the employer's right to pursue any 'well-founded' defense in litigation, even if motivated by a 'desire' to interfere with employees 'exercising rights protected by the NLRA.'" *See BE&K Constr. Co.,* 536 U.S. at 526-27 (brackets omitted).

II. THE FAA DOES NOT SUPERSEDE NORRIS-LAGUARDIA OR THE NLRA, OR RENDER THE EY ARBITRATION AGREEMENT LAWFUL.

The FAA "was designed to allow parties to avoid 'the costliness and delays of litigation,' and to place arbitration agreements 'upon the same footing as other contracts ***.'" *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974) (citations omitted). "The legislative history demonstrates that the Act's purpose was solely to bind merchants who were involved in commercial dealings." *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1089 (9th Cir. 1998), *overruled based on the text of the statute, Circuit City Stores,* 532 U.S. 105, *citing*, *Local 205, United Elec. Workers v. General Elec. Co.*, 233 F.2d 85, 99 (1st Cir. 1956) (citations omitted).

A. The FAA's Savings Clause Shows Congressional Intent to Preserve Defenses Such as Illegality Under Federal Law.

Given the purpose of the FAA, it is unsurprising that the statute contains a saving clause which provides that arbitration agreements are to be treated like other contracts with respect to their enforcement. Section 2 of the FAA provides: a contract evidencing a transaction involving commerce to settle by arbitration *** shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or*

in equity for the revocation of any contract." 9 U.S.C. § 2 (*emphasis added*).

This Court has consistently held that illegality under federal law is a ground for denying enforcement of a contract. *E.g.*, *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 77 (1982)(emphasis supplied). *See also*, *W. R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983). Petitioners argue that illegality under federal law is not encompassed within the FAA's savings clause because it is not "necessary" to protect federal statutes, Pet. Br. 34, and because the defense of illegality is primarily a state law issue. Pet. Br. 35. Neither argument survives a closer analysis.

As Petitioners argue, a saving clause is not "necessary" to preserve a subsequent Congress' power to repeal an earlier statute. However, they draw from that fact the unwarranted conclusion that a saving clause ***never*** applies to federal statutes. Pet. Br. 33-34; *Epic* Br. 20; *but see* U.S. Br. 30-31(saving clause "would cover *** a federal law that barred enforcement of contracts on a generally applicable ground"). That argument is both wrong and self -contradictory. Because of the last-in-time canon, a saving clause is needed to "save" prior inconsistent federal legislation.

For example, the Sherman Act's prohibitions on contracts in restraint of trade, 15 U.S.C. § 1, using Petitioners' logic, would be impliedly repealed in the absence of a "saving clause." Conversely, if legislation passed by an earlier Congress might take precedence over an enactment of a later Congress, (as Petitioners argue the FAA does here) then a saving clause disavowing that precedence is critical and should be enforced.

Section 2's saving clause makes crystal clear the intention of Congress to make arbitration agreements ***only*** "as enforceable as other contracts, not more so."

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12 (1967); *see Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017) (Section 2 "establishes an equal-treatment principle"); *Epic* Br. 24.

Section 2 thus reflects a clear congressional intent to preserve any earlier legislation declaring certain contracts unenforceable (such as the Sherman Act), as well as later legislation declaring arbitration agreements unlawful or unenforceable, including Norris-LaGuardia and the NLRA. That reading of Section 2 is consistent with this Court's precedent. *See W. Va. Univ. Hosps.*, 499 U.S. at 100. Petitioner's reading of Section 2 is not.

Petitioners and the Acting Solicitor General argue on the basis of various canons of statutory construction the FAA should take precedence over the NLRA. The saving clause reveals the opposite congressional intent: to preserve the right of any subsequent Congress to render arbitration agreements, or terms of those agreements, unlawful. In attempting to discern the intent of Congress as expressed in both the FAA and the NLRA, the clarity of intent expressed in the saving clause is determinative.

B. Norris-LaGuardia Expressly Repealed All Conflicting Parts of the FAA. Had it not, the NLRA Impliedly Repealed Those Conflicting Parts.

Petitioners, do not deny that Congress has the power to limit, amend, or repeal the FAA entirely or in part. *See* Pet. Br. 21; Epic Br. 21. Petitioners' central argument is that based on this Court's "arbitration jurisprudence" the FAA has restrictive impact on the ability of ***any subsequent legislature*** to exercise that power. Yet, they fail to recognize that if the FAA is

read to allow employers to "interfere" with the right of workers to engage in "concerted" judicial or arbitral dispute resolution, that part of the FAA has been repealed, both expressly and impliedly.

From the earliest days of the Republic, this Court recognized the foundational principle that "one legislature cannot abridge the powers of a succeeding legislature." *Fletcher v. Peck*, 10 U.S. 87, 6 (1810). A long and unbroken line of Supreme Court precedent embraces that proposition. *See e.g., United States v. Winstar Corp.*, 518 U.S. 839, 872, (1996) (plurality opinion); *Reichelderfer v. Quinn*, 287 U.S. 315, 318 (1932) ("[T]he will of a particular Congress *** does not impose itself upon those to follow in succeeding years"); *Manigault v. Springs*, 199 U.S. 473, 487 (1905); *Newton v. Commissioners*, 100 U.S. 548, 559, 25 L. Ed. 710 (1880) (in cases involving "public interests" and "public laws," "there can be . . . no irrepealable law").

1. Parts of the FAA Inconsistent with Norris-LaGuardia are Repealed.

The 72ed Congress made clear its will to expressly "repeal[ ]" "[a]ll [previously enacted] acts or parts of acts in conflict with the provisions" of Norris-LaGuardia. Section 15, 29 U.S.C. § 115. Therefore, to the extent that the 1925 FAA is read to protect arbitration agreements that "interfere" with, or prohibit, the right of employees to engage in "concerted" judicial dispute resolution, the FAA was, to that extent, "repealed" by the 72ed Congress when it enacted Norris-LaGuardia in 1932. That repeal, unaddressed by either of Petitioners' Briefs, or by the Acting Solicitor General, effectively resolves the issue before this Court and requires affirmance.

Further, the 72ed Congress which passed Norris-LaGuardia recognized that courts "had reinterpreted federal statutes that Congress had not intended for use against the organizing activities of labor unions." *BE&K Constr. Co.*, 536 U.S. at 542 (concurring opinion). To affect the congressional intent and protect against any such judicial "reinterpretation" which could construe an earlier statute to be in "conflict" with Norris-LaGuardia, Congress phrased the language of repeal in broad general terms to cover any then existing conflict, and any later "reinterpretation" of a statute to create a conflict. Under that language, should any court find any conflict between an earlier statute and Norris-LaGuardia, as Petitioners urge this Court to find with respect to the FAA, Congress was clear that the earlier statute is repealed.

We suspect when Petitioners finally address Norris-LaGuardia's express repeal, they will raise a variation of the argument they raise as to the NLRA: this Court's arbitration jurisprudence requires an "express reference" to the FAA in order for repeal to be effective.[3] But that argument makes no legal or logical sense for two reasons. The first is found in the FAA itself, in the saving clause of Section 2. As pointed out above, the savings clause makes clear the intent of

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[3] Petitioners may also seek to rely upon *Boys Mkts., Inc. v. Retail Clerk's Union*, 398 U.S. 235 (1970) for the proposition that Norris-LaGuardia did not repeal the FAA. In *Boys Markets*, this Court upheld an injunction against a strike on the basis of a "no strike" agreement and arbitration clause in a Collective Bargaining Agreement. Norris-LaGuardia only applies to acts or parts of act that are "in conflict" with the public policy in Section 2 of that act. Allowing the employees' chosen representative, their duly elected union, to agree to a no strike clause and to arbitration is consistent with, and not "in conflict with," the rights protected by Section 2. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257.

Congress not to allow the FAA to supplant any statute declaring an arbitration agreement in whole or in part illegal. The second reason an enforceable "express reference" cannot apply is the constitutional limitation on the power of one session of Congress to limit the power of a later session of Congress as pointed out above. *See also, infra* at 48-49.

2. The NLRA Repealed Any Inconsistent Provision in the FAA by Implication.

For the same reasons, the NLRA has repealed the inconsistent terms of the FAA by necessary implication. Petitioners and the Acting Solicitor General correctly interpret this Court's precedent to require harmonizing allegedly conflicting federal statutes wherever possible. Courts "are not at liberty to pick and choose among congressional enactments and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

However, when Petitioners and the Acting Solicitor General claim to apply the "harmonization" standard to the FAA and Section 7 of the NLRA, what they refer to as "harmonizing" is disregarding the NLRA, and choosing to enforce the FAA instead. Where an arbitration agreement's "terms" prohibits any collective or class proceedings, there is a clear and unavoidable conflict between the FAA mandated enforcement of those "terms," and the NLRA's mandated illegality of any "interference" with and employee's right to engage in "concerted activities." It is impossible to have it both ways. One statute must take precedence over the other.

Epic Petitioners quote *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936) to support "'[t]he cardinal rule that 'repeals by implication are not favored.'" *Epic* Br. 14, *accord*, Pet. Br. 21. But both the quotation and the analysis stop too soon. The *Posadas* Court continued to state: "There are two well-settled categories of repeal by implication." The relevant "settled categor[y]" is that "where provisions in . . . two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one." *Id., quoted in, Radzanower*, 426 U.S. at 154. "When a statute specifically permits what an earlier statute prohibited, or prohibits what it permitted, the earlier statute is (no doubt about it) impliedly repealed." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012). In such a case, like this one, the intention to repeal is "clear and manifest."

Epic Petitioners cite *Radzanower* for the proposition that the specific statute governs the more general. *Epic* Br. 54. They then claim that the FAA is "more specific" because it did "address" employment agreements. *Id.* at 55. The argument is illogical and wrong. The only manner in which the FAA "addressed" employment agreements was to exclude specific employment agreements from the reach of the statute, and not to legislate with respect to them. *See* 9 U.S.C. § 1. The FAA never addressed the specific terms of employment agreements. The NLRA did and is therefore more specific.

Even if the more specific statute canon favored the FAA, the last-in-time canon is generally the most important rule of construction. The last-in-time canon is the "tie-breaker" that resolves all issues when other canons point in other directions. William N. Eskridge Jr. *Interpreting Law: A Primer on How to Read*

Statute and the Constitution. (2016), at 136. Given the Constitutional limitation that one session of Congress cannot diminish the effect later legislation, the rule could not be otherwise.

It is not "plausible," in truth it is hardly conceivable, that Congress could have intended to allow an employer to defeat the right to collective litigation through an employer drafted contractual prohibition coercively imposed on individuals as a condition of employment. That supposed intent is inconsistent with congressional protection of the employees' rights to collectively complain, or to collectively strike. It is inconsistent with congressional protection of an employee from employer interference at every step of enforcement of the NLRA by the Board. It is inconsistent with the prohibition of retaliation for filing a collective suit. It is inconsistent with prior and subsequent labor legislation.

While "repeal by implication is disfavored, so is failure to give a later-enacted statute the full scope that its terms require." *Branch v. Smith*, 538 U.S. 254, 305 (2003) (O'Connor, J. joined by Thomas, J., concurring in part and dissenting in part). If the FAA contradicts the NLRA, "the full scope" of the NLRA requires that the FAA be found to have been partially repealed.

3. The Decision Below "Harmonized" the FAA With the NLRA as this Court's Precedent Requires.

The NLRA can be read in perfect harmony with the FAA, and the decision below did just that. Notwithstanding the NLRA, where an employee has an individual dispute that he or she seeks to resolve individually, as was the case in *Gilmer*, 500 U.S. 20, "individual attempts at conciliation" or resolution may

still be pursued in arbitration. *Id.* at 32. Individual arbitration may not be compelled if the employee wishes to assert his or her right to resolve his or her claims in "concerted" litigation, even where an employment contract purports to waive that right. An employer may not "interfere" with the employees' exercise of that right, or "coerce" an employee into waiving that right, by prohibiting the exercise of that right in a contract entered into as a condition of employment.

Similarly, class or collective arbitration of employment disputes, may not be compelled if the employer has not clearly agreed to it. *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 687 (2010). For those reasons, the Ninth Circuit remanded to the District Court to determine whether the severability clause of the EY Arbitration Agreement resolved the issue of whether the parties had agreed to collective arbitration. In *Epic*, such a remand was unnecessary because the contract precluded arbitration if the "concerted" action waiver was held unenforceable.

The decisions below followed the harmonizing approach and remanded for resolution of the issue of whether the contract between the parties required Respondents' claims to be arbitrated on a class or collective basis.

III. ARBITRATION AGREEMENTS BARRED BY NORRIS-LAGUARDIA AND THE NLRA ARE NOT RENDERED LAWFUL BY THIS COURT'S ARBITRATION JURISPRUDENCE.

The language, purpose, and legislative history of the three statutes involved point inexorably to the conclusion that the contractual "concerted" litigation ban is illegal (under the NLRA) and unenforceable

(under Norris-LaGuardia) and the FAA has been repealed to that extent.

Petitioners argue, however, that this Court's arbitration jurisprudence has effectively amended the statutory language of the FAA. Petitioners claim no subsequent federal legislation may contain terms that conflict with the FAA, or adversely impacts arbitration, without a "clear congressional command." They suggest that "command" must contain an explicit reference to the FAA, or to arbitration or include collective or class proceedings. *See* Pet. Br. 15, 19, 25; *Epic* Br. 30, 33. That requirement is nowhere found in the text or the legislative history of the FAA. As we point out below, we believe this argument is a distortion of this Court's opinions, as the following review of those decisions shows.

The modern era of this Court's arbitration jurisprudence begins with *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985). There, an automobile manufacturer sought to compel arbitration of a variety of claims, including an anti-trust claim against its distributor. This Court found "no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims." *Id.* at 625. That decision called into question the Court's holding in *Wilko v. Swan*, 346 U.S. 427, 438 (1953), which found that claims under Section 12(2) of the Securities Act of 1933 were not arbitrable.

After *Mitsubishi*, the Court addressed the arbitrability of claims under a number of federal statutes. Each case found that arbitration of those statutory claims was permitted. *See e.g.,. McMahon*, 482 U.S. at 226, (Securities Act of 1934), *Rodriguez de QuiJ.A.s v. Shearson/American Express, Inc.*, 490 U.S. 477, 480-484 (1989)(Securities Act of 1933, overruling

Wilko, 346 U.S. 427.); and *CompuCredit Corp.,* 565 U.S. 95 (Credit Repair Organization Act). The "clear congressional command" language and the alleged requirement of an explicit reference to the FAA are drawn exclusively from those cases.[4]

Where it is claimed that Congress intended to prohibit waiver of a judicial forum for a particular statutory claim, it makes sense to expect Congress to make clear its intent through a "clear congressional command." Absent such clarity, "judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals' [could] inhibit enforcement of the [Federal Arbitration] Act in controversies based on statutes." *McMahon*, 482 U.S. at 226, *quoting*, *Mitsubishi Motors Corp.,* 473 U.S. at 626-627, *and Wilko*, 346 U.S. at 432. (internal quotations omitted).

By contrast, this Court's precedent has always recognized that ***a term*** in an arbitration agreement may be unlawful and unenforceable if it requires a party to "forgo *** the substantive protection afforded by a given statute ***." *Mitsubishi Motors Corp.,* 473 U.S. at 628; *accord, Gilmer,* 500 U.S. at 26.

Moreover, the issue is not only whether a substantive right is being contractually prohibited. Illegality is a separate ground for denying enforcement. There is "no doubt that illegal promises ***will not be enforced*** ***." *Kaiser Steel Corp.*, 455 U.S. at 77 (emphasis supplied). *See also*, *W. R. Grace & Co.*, 461 U.S. at 766 (1983 (citations omitted) ("If the contract as interpreted by [the arbitrator] violates

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[4] *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013), discussed below, *infra* at 47-48, does use the phrase "congressional command," but could not be referring to the same type of "command" since at the time of passage of the anti-trust laws at issue there the FAA had not been passed.

some explicit public policy, we are obliged to refrain from enforcing it.").

This Court has never held that the "clear congressional command" rule should be applied to a statute that makes certain contract terms illegal. In all events, if any heightened "clarity" is required by this Court's precedents, a statute declaring contractual terms illegal is as clear a "congressional command" as can be imagined. Contract terms which are illegal and unenforceable do not magically become legal and enforceable by being included in an arbitration clause. Pet. 23a. An employer may not "simply incant the acronym 'FAA' and receive protection for illegal contract terms." *Id.*

It makes perfect sense that FAA does not require special rules to make contract terms in arbitration agreements illegal. Congress, or, indeed the Constitution, might create illegality for many different reasons, and in many different ways, without giving a single thought to the impact of that illegality on an arbitration agreement. An agreement between merchants might contain an arbitration agreement with terms "in restraint of trade" that are unlawful under the anti-trust laws. 15 U.S.C. § 1. In conflict with laws providing for administrative remedies for statutory violations, an arbitration agreement might prohibit complaints from being filed with the relevant agencies. Similarly, Constitutional Due Process rights and statutory substantive rights might be impaired by a term in an arbitration agreement.

Contrary to the arguments of Petitoners and the Acting Solicitor General, in declaring conduct "illegal" Congress need not have addressed whether employers might try to craft an arbitration agreement that would allow evasion of congressionally declared illegality. None of the cases cited by petitioners or the Acting

Solicitor General place any limitation on the ability of Congress to outlaw a term in an arbitration agreement.[5]

Italian Colors, 133 S. Ct. 2304, which *Epic* Petitioners claim is "dispositive," *Epic* Br. 31, does not support the arguments of Petitioners or the Acting Solicitor General. In *Italian Colors* , claimants alleged that the high cost of individual arbitration of their case under the anti-trust laws, eliminated an "affordable procedural path to the vindication of" claimant's anti-trust claims. This Court found the anti-trust laws created a ***right to pursue judicial*** procedures, but did not "***guarantee an affordable procedural path to the vindication***" of statutory claims. *Id.* at 2309.

This case arises because Congress established the right of employees ***to pursue*** litigation collectively. As

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[5] *See e.g.,* **cases addressing enforceability of an arbitration agreement in unrelated context:** *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-521 (1974) (cited Pet. Br. 22)(Wilko rule inapposite to international contract dispute subject to arbitration before the International Chamber of Commerce in Paris, arbitration enforced); *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 90-92 (2000) (cited Pet. Br. 22)(Silence of arbitration agreement on who is to bear costs does not invalidate agreement.); **cases addressing individual employment claims:** *Circuit City Stores v. Adams*, 532 U.S. 105, 110, 118-19 (2001)(Individual discrimination claim by employee); *Gilmer*, 500 U.S. 20, 23, 26-27 (Individual claim under ADEA); **cases addressing preempted state laws or preempted state court rulings:** *E.g., Southland Corp. v. Keating,* 465 U.S. 1, 16 (1984)(California Franchise Investment Law, barring arbitration of franchise related disputes violates the Supremacy Clause); *AT&T Mobility LLC*, 563 U.S. at 351 (state Supreme Court rule requiring class-wide arbitration of specified group of consumer claims, preempted by FAA.); *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017) (FAA preempts any state rule discriminating on its face against arbitration disfavoring contracts with the defining features of arbitration agreements).

in *Italian Colors,* there is no guarantee that collective litigation will be affordable, or successful. And just as with the anti-trust laws where Congress enacted a treble-damage remedy to "facilitate" litigation under that Act, *id.*, in the NLRA Congress enacted the protections on "concerted activities" to facilitate the congressional goal of remediating unequal bargaining power between employers and employees and thus to promote industrial peace.

"The illegality of the 'separate proceedings' term here has nothing to do with arbitration as a forum ***. The problem with the contract at issue is not that it requires arbitration; it is that the contract term defeats a substantive federal right to pursue concerted work-related legal claims." Decision below, Pet. at 13a-14a. Congress intended to outlaw any interference with an employee's right to engage in "concerted" litigation. This Court's precedents require enforcement, not disregard, of that congressional intent.

Moreover, as recognized by this Court in cases going back to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) and the common law of England before the founding of the Republic, "one legislature," "cannot abridge the powers of a succeeding legislature. The correctness of this principle, so far as respects general legislation, can never be controverted." *Fletcher v. Peck*, 10 U.S. 87 (6 Cranch) (1810); *see also, Marbury,* 5 U.S. (1 Cranch) at 177 (unlike the Constitution, a legislative Act is "alterable when the legislature shall please to alter it"). As Blackstone memorably phrased it: "Acts of parliament derogatory from the power of subsequent parliaments bind not." 1 *W. Blackstone, Commentaries on the Laws of England* 90 (1765).

"Among the powers of a legislature that a prior legislature cannot abridge is, of course, the power to

make its will known in whatever fashion it deems appropriate—including the repeal of pre-existing provisions by simply and clearly contradicting them." *Lockhart*, 546 U.S. at 148. (Scalia, J. concurring with unanimous court).

Therefore, even a congressionally enacted "express-statement" requirement "'cannot justify a disregard of the will of Congress as manifested either expressly or by necessary implication in a subsequent enactment.' A subsequent Congress *** may exempt itself from such requirements by 'fair implication'—that is, without an express statement." *Id.* (emphasis in the original), *quoting Great Northern R. Co. v. United States*, 208 U.S. 452, 465 (1908), *and citing*, *Warden v. Marrero*, 417 U.S. 653, 659-660, n. 10, (1974), *and Hertz v. Woodman*, 218 U.S. 205, 218 (1910).

This Court applied that rule to a subsequent legislative modification of the Administrative Procedure Act ("APA") in *Marcello v. Bonds*, 349 U.S. 302, 310 (1955). Section 12 of the APA provides that "[n]o subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly." Nonetheless, this Court held that it would not "require the Congress to employ magical passwords" in order pass superseding legislation. *Id.* at 310.

Since Congress did not have the power to include an enforceable "express statement" requirement in the FAA, this Court's power under Article III does not allow it to imbue the FAA with a force and effect greater than Congress itself could create. The absence of an "express reference" to the FAA in Norris-LaGuardia does not diminish the effect of the express repeal, of any "acts or parts of acts" inconsistent with provisions of Norris-LaGuardia, and that includes any conflicting, provision in the FAA.

IV. SUGGESTION OF A LIMITATION ON THE JURISDICTION OF THIS COURT TO COMPEL INDIVIDUAL ARBITRATION.

The limitation on the remedies available in federal courts under Norris-LaGuardia was raised by Respondents below but never ruled upon.

Norris-LaGuardia has two sections which deprive federal courts of jurisdiction to enter an order enforcing the EY Arbitration Agreement or to compel Respondents to engage in individual arbitration. Section 3 of Norris-Laguardia provides that "[a]ny *** undertaking or promise in conflict with the public policy declared in section 2 of this Act, *** shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court***." 29 U.S.C. § 103.

The public policy declared in Section 2 of Norris-LaGuardia provides the same right to engage in "other concerted activities for *** mutual aid or protection" that is contained in Section 7 of the NLRA. *Compare,* 29 U.S.C. § 102 *and* 29 U.S.C. § 157.

Additionally, Section 4 of Norris-LaGuardia provides that "[n]o court of the United States shall have jurisdiction to *** prohibit any person or persons participating or interested in [a labor] dispute *** from *** aiding any person participating *** in any action or suit in any court of the United States or of any State. 29 U.S.C. § 104.

This Court has interpreted Section 4 to be "facially a limitation upon the relief that can be accorded, not a removal of jurisdiction over 'any case involving or growing out of a labor dispute.'" *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 469-70 (2007). Section 3 is also, on its face, "a limitation upon the relief that can be accorded."

Should the Court conclude, as Petitioners and the Acting Solicitor General argue, that the EY Arbitration Agreement is enforceable according to its terms, we respectfully suggest that this case should be remanded to the Ninth Circuit to address the issue of the jurisdiction of federal courts to provide the relief Petitioners seek.

CONCLUSION

The right of an employee to sue to enforce legal rights being violated by their employer is an essential right. The right to pursue such litigation on a collective or class basis is a valuable counterbalance to the unequal bargaining power of employers and is protected by the NLRA and Norris-LaGuardia. Section 2 of the FAA demonstrates that Congress never intended misuse of the FAA to require enforcement of agreements that Congress has declared illegal and unenforceable. To hold otherwise is to encourage unlawful underpayment of wages, and underpayment of taxes.

It is unsurprising that employers would wish to accomplish that result. But it would take a disregard of the will of Congress to accomplish it.

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Respectfully Submitted,
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ADDENDUM

ADDITIONAL STATUTORY PROVISIONS INVOLVED

Section 2 of the Norris-LaGuardia Act ("Norris-LaGuardia") provides in relevant part:

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

29 U.S.C. §102.

Section 3 of Norris LaGuardia provides in relevant part:

> Any…undertaking or promise in conflict with the public policy declared in section 2 of this Act, is hereby declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court…

29 U.S.C. § 103.

Section 4 of Norris LaGuardia provides in relevant part:

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

29 U.S.C. § 104.