No. 16-285

In the
Supreme Court of the United States

EPIC SYSTEMS CORPORATION,

Petitioner,

v.

JACOB LEWIS,

Respondent.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioner, Epic Systems, Inc.[1] Founded over 40 years ago, PLF litigates matters affecting the public interest at all levels of state and federal court, representing the views of thousands of supporters nationwide. Among other things, PLF's Free Enterprise Project defends the freedom of contract, including the right of parties to agree by contract to the process for resolving disputes that might arise between them. To that end, PLF has participated as amicus curiae in many important cases involving contractual arbitration and class actions in both the consumer and employment context. *See, e.g.*, *ABM Indus., Inc. v. Castro*, No. 15-1427 (pending); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *D.R. Horton, Inc. v. National Labor Relations Board*, 737 F.3d 344 (5th Cir. 2013); and *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (2014), *cert. denied*, 135 S. Ct. 1155 (2015).

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[1] Pursuant to this Court's Rule 37.2, all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

In April, 2014, Jacob Lewis, a technical writer for Epic Systems, agreed to arbitrate wage-and-hour claims on an individual basis, specifically waiving "the right to participate in or receive money or any other relief from any class, collective, or representative proceeding." *Lewis v. Epic Systems Corporation*, 823 F.3d 1147, 1151 (7th Cir. 2016). In February, 2015, Lewis sued Epic in federal district court for alleged violations of the Fair Labor Standards Act. He sued on behalf of himself and the other technical writers, alleging they were misclassified as exempt employees and thereby deprived of overtime pay. Epic moved to dismiss based on the arbitration agreement and class-action waiver. *Id.*

The district court agreed with Lewis that mandatory individual arbitration violated the employees' right under the National Labor Relations Act (NLRA) to engage in concerted activities for mutual aid and protection. *See* 29 U.S.C. § 157. The Seventh Circuit affirmed on the grounds that the "concerted activities" statute controls and the Federal Arbitration Act (FAA) simply does not apply and therefore creates no conflict with the NLRA. *Lewis*, 823 F.3d at 1157.

This Court should grant the petition for a writ of certiorari because: (1) the decision below deepens an acknowledged and fracturing split among the circuit courts, both as to the interpretation of the NLRA, *id.* at 1155, and as to its holding that the FAA does not apply to mandatory arbitration within the employment context, *id.* at 1157-58, and (2) the Seventh Circuit opinion affects more businesses than those present

within its geographical boundaries because it reinforces the National Labor Relations Board's policy of nonacquiescence, which impels it to bring enforcement actions against companies nationwide on this issue, even in circuits that respect class-action waivers. *See Murphy Oil USA v. NLRB*, 808 F.3d 1013, 1018 (5th Cir. 2015).

The petition for a writ of certiorari should be granted.

REASONS FOR GRANTING THE WRIT

I

THERE IS AN IRRECONCILABLE AND GROWING CONFLICT AMONG THE CIRCUITS

Until just six months ago, every one of the federal circuit courts and state supreme courts that considered the effect of the NLRA's "concerted activities" provision on FAA-protected arbitration contracts came to the same conclusion: This Court's decisions in *AT&T Mobility v. Concepcion*, 563 U.S. at 346, and *Am. Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2310 (2013), which applied both the FAA and federal substantive law of arbitration, affirmed the validity of class action waivers in the employment context. *See D.R. Horton*, 737 F.3d at 360 ("[T]here is no basis on which to find that the text of the NLRA supports a congressional command to override the FAA."); *Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772, 776 (8th Cir. 2016) ("Cellular Sales did not violate section 8(a)(1) [of the NLRA] by requiring its employees to enter into an arbitration agreement that included a waiver of class or collective actions in all forums to resolve employment-related disputes.");

Sutherland v. Ernst & Young LLP, 726 F.3d 290, 297-98 & n.8 (2d Cir. 2013) (neither the Fair Labor Standards Act nor the NLRA overrides the FAA's enforcement of arbitration agreements); *Iskanian v. CLS Transp. L.A., LLC*, 59 Cal. 4th at 372 ("[N]either the NLRA's text nor its legislative history contains a congressional command prohibiting such waivers."); *Tallman v. Eighth Jud. Dist. Ct.*, 359 P.3d 113, 123 (Nev. 2015) ("[I]nvalidation of class arbitration waivers cannot be reconciled with the FAA as authoritatively interpreted by the Supreme Court in *Concepcion* and *Italian Colors*.").

Since then, however, both the Seventh and Ninth Circuit courts have held to the contrary—invalidating otherwise valid arbitration agreements solely because they allegedly infringe upon employees' rights to engage in concerted activities under the NLRA. *See Lewis*, 823 F.3d 1147; *Morris v. Ernst & Young, LLP*, ___ F.3d ___, 2016 WL 4433080 (9th Cir. Aug. 22, 2016), *petition for writ of certiorari filed* Sept. 8, 2016 (No. 16-300).[2] In part, these decisions were based on a deferential adoption of the National Labor Relations Board's position that arbitration agreements cannot require an employee to forego class resolution of work-related claims.

The effect of this split in the circuits is particularly confusing because the NLRB takes the position—despite the conflict in the circuits—that its own agency decision in *D.R. Horton* "remains controlling Board law" nationwide until such time as

[2] Because the question presented in Ernst & Young's petition is equivalent to that presented in Epic Systems' petition, amicus Pacific Legal Foundation urges this Court to grant certiorari in both cases.

this Court overturns it. *See 20/20 Communications, Inc. and Charlie Smith*, 2016 WL 4651564 (N.L.R.B. Div. of Judges Sept. 6, 2016) (citing *Manor West, Inc.*, 311 NLRB 655, 667 n.43 (1993)). This matter must be resolved.

II

THE QUESTION PRESENTED IS OF NATIONAL IMPORTANCE AS TO THE FREEDOM OF CONTRACT IN THE EMPLOYMENT CONTEXT

While federal law places some substantive limits on the ability of adults to freely contract to arrange their affairs, courts generally respect people's rights to determine the procedures by which they will resolve their disputes. *See H.K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 108 (1970) ("One of the fundamental policies" underlying the NLRA is "freedom of contract."). A key issue presented by this case is whether Section 7 creates a substantive, non-waivable right to pursue claims unrelated to the NLRA on a class basis.

A. This Court Should Grant Review To Affirm That Aggregate Litigation Is a Matter of Procedure, Not Substance

The FAA provides that arbitration agreements are "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. The Act also "mandates that district courts '*shall*' direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (citing 9 U.S.C. §§ 3, 4). Accordingly, "agreements to arbitrate must be enforced, absent a ground for revocation of the

contractual agreement." *Id.* The FAA was designed "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate." *Id.* at 219-20. In this case, it is the NLRB's hostility to individual arbitration that has only recently enjoyed refuge in two circuit courts.

Current law considers collective litigation, however styled, to be a matter of procedure, not a substantive right. This Court held in *Italian Colors* that the antitrust laws and Federal Rule of Civil Procedure 23 do not counteract the procedural choices made by parties in arbitration contracts. 133 S. Ct. at 2310. *See also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims."); *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1336 (11th Cir. 2014) ("Congress's decision to specifically include the procedural right to a collective action in the FLSA does not somehow transform that procedural right into a substantive right.").

This Court held in *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009), that "the recognition that arbitration procedures are more streamlined than federal litigation is not a basis for finding the forum somehow inadequate; the relative informality of arbitration is one of the chief reasons that parties select arbitration." *See also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) ("The Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination

prohibited by federal law."); *Gilmer*, 500 U.S. at 26 ("[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."). In short, plaintiffs do not give up their substantive rights under the federal laws by being required to arbitrate their dispute. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). By agreeing to arbitrate disputes, plaintiffs agree to substitute one forum for another; they "trade the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Id*.

Moreover, the Board's position, accepted by the court below, that an employee's agreement to pursue employment disputes on an individual basis violates a core purpose of the NLRA, cannot be reconciled with the Board's acceptance of arbitration encompassed within collective bargaining agreements. *See, e.g.*, *Olin Corp*., 268 N.L.R.B. 573, 577 (1984); *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080, 1082 (1955)" ' (After collectively bargained-for arbitration, Board defers to arbitrators' awards, even when it would have decided the underlying statutory issue differently.); Kenneth T. Lopatka, *A Critical Perspective on the Interplay Between Our Federal Labor and Arbitration Laws*, 63 S.C. L. Rev. 43, 48 (2011). The Board's differing approach to arbitration when agreed to by unions versus individuals cannot stand. This Court has routinely allowed and enforced waivers of the right to strike, which waive employees' rights to engage in concerted activity, where the "no-strike" clause was part of a freely negotiated collective bargaining

agreement. *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 455 (1957) ("Plainly the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike."); *Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 238-39 (1970) (exclusive bargaining representative may waive Section 7 rights of the employees it represents in exchange for other concessions); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280-83 (1956) (same). This Court even implied an agreement not to strike where a collective bargaining agreement contains an arbitration provision. *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104-05 (1962).

While this Court has expressly held arbitration to be procedural in nature in many contexts, it has not yet done so in the context of individual workplace disputes that arguably implicate provisions of the NLRA.[3] The Court should grant the petition in this case to ensure that employees and employers retain the right to arbitrate their workplace disputes.

B. This Case Arises in the Nationally Important Context of Circuit Court Deference to Agency Nonacquiescence

Nonacquiescence refers to the "selective refusal of administrative agencies to conduct their internal proceedings consistently with adverse rulings of the courts of appeals." Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679, 681 (1989). The NLRB, "more than most [agencies], has openly asserted the

[3] Pacific Legal Foundation disagrees that Lewis's claims in this case implicate the "concerted action" provision of the NLRA.

authority to decline to acquiesce." *Id*. at 706. The Board is committed to pressing its own view of the law until the Board itself or this Court overrules it; it claims that piecemeal acceptance of particular circuits' interpretations of the law would frustrate its development of a national labor policy. *Id.* at 706 (citing *Insurance Agents' Int'l Union*, 119 N.L.R.B. 768, 773 (1957)). The Board's sole nod to the rule of law established by federal courts is with regard to an appellate court's "treatment of a particular case on remand." *Id.* at 706 n.148.

Decisions by federal courts hold no sway over the NLRB and its administrative law judges (ALJs) in light of the NLRB's "policy of non-acquiescence" that instructs ALJs to follow Board precedent rather than the precedent of courts of appeals. *See, e.g.*, *Murphy Oil USA v. NLRB*, 808 F.3d 1013, 1018 (5th Cir. 2015) ("We do not celebrate the Board's failure to follow our D.R. Horton reasoning, but neither do we condemn its nonacquiescence."); *Sheet Metal Workers' Int'l Ass'n, Local 15, AFL-CIO v. NLRB*, 491 F.3d 429, 435 (D.C. Cir. 2007) (NLRB refuses even to recognize the existence of circuit court decisions contrary to its own policies.).

Other agencies may invoke a policy of nonacquiescence as well. For example, like the NLRA, the Immigration and Naturalization Act provides for appellate review in such a way that Immigration Judges cannot know for certain which court of appeals will review their decisions. *Rosendo-Ramirez v. INS*, 32 F.3d 1085, 1093-94 (7th Cir. 1994). In *Rosendo-Ramirez*, the Immigration and Naturalization Service (INS), urged the Seventh Circuit to apply the law of the Fifth Circuit, which adopted the INS's position,

while disregarding the Seventh Circuit's own decision in *Leal-Rodriguez v. INS*, 990 F.2d 939 (7th Cir. 1993), which rejected the INS's position. The *Rosendo-Ramirez* court interpreted INS's argument as "an inartful (or maybe in fact cleverly disguised) attempt at nonacquiescence to [the] rule in *Leal-Rodriguez*." *Id*. at 1083. The court declined to adopt the INS's proposal.

District of Columbia Circuit Chief Judge Abner Mikva decried the United States Railroad Retirement Board's policy of nonacquiescence that led it to deny benefits to the spouses and widows of railroad workers even after multiple appellate courts held that denial to be unlawful. *Johnson v. U.S. R.R. Retirement Bd.*, 969 F.2d 1082, 1083 (D.C. Cir. 1992) ("In a bold challenge to judicial authority, the United States Railroad Retirement Board argues that it is free, when it chooses, to ignore the decisions of United States courts of appeals."). As in this case, the Retirement Board declined to petition this Court for review of adverse circuit court rulings while continuing to apply the rejected interpretation of its controlling statute. *Id.* at 1087. *See also id.* at 1092 ("When an agency honestly believes a circuit court has misinterpreted the law, there are two places it can go to correct the error: Congress or the Supreme Court. The Railroad Retirement Board has done neither.").[4] Also similar to this case, the Board—and here, the decision below (Pet. App. 7a)—applied *Chevron* deference to the agency

[4] Only subsequent to the filing of the petition in this case and in the *Ernst & Young* case did the NLRB file a petition for writ of certiorari seeking review of the Fifth Circuit's ruling adverse to its position. *National Labor Relations Board v. Murphy Oil USA, Inc.*, No. 16-307 (petition filed Sept. 9, 2016).

interpretation. The *Johnson* court held that *Chevron* deference does not apply because the Board was "not interpreting its governing statute alone, but rather the relationship between" the governing statute and another federal statute (the Social Security Act). *Id.* at 1088. Moreover, a policy of nonacquiescence creates an inherently non-uniform application of the law because it "results in very different treatment for those who seek and who do not seek judicial review." *Id.* at 1092. *See also Ruppert v. Bowen*, 871 F.2d 1172, 1178 (2d Cir. 1989) (noting the Social Security Administration's "history of uncooperativeness" in its failure to follow circuit court decisions); *cf. Atchison, Topeka and Santa Fe Ry. Co. v. Peña*, 44 F.3d 437, 446 (7th Cir. 1994) (en banc) (without Supreme Court review, "nonacquiescence may yield entrenched differences among the circuits") (Easterbrook, J., concurring).

The Environmental Protection Agency (EPA) also issued a directive adhering to a judicially-invalidated interpretation of the Clean Air Act. *Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, 752 F.3d 999 (D.C. Cir. 2014). The case involved an EPA regulation broadly defining what constitutes a "major" source of pollution. *Id.* at 1002. The Sixth Circuit, in *Summit Petroleum Corp. v. EPA*, 690 F.3d 733, 740-41 (6th Cir. 2012), held that the EPA's definition was "arbitrary and capricious" and then denied the EPA's petition for rehearing. The EPA continued to apply its own definition everywhere outside the Sixth Circuit. *Nat'l Envtl. Dev. Ass'n's Clean Air Project*, 752 F.3d at 1003. The D.C. Circuit found "no merit in EPA's arguments" and struck down the directive to ignore *Summit*. *Id.* at 1004, 1011 ("The doctrine of intercircuit nonaquiescence does not allow EPA to ignore the plain

language of its own regulations" that require uniformity.) *See also id.* at 1010 (EPA could have petitioned this Court to review *Summit* but failed to do so). EPA responded to the D.C. Circuit opinion by amending its regulations to provide an exception to the uniformity requirement and "fully accommodate intercircuit nonacquiescence." *Amendments to Regional Consistency Regulations*, 81 F.R. 51102-01, 51103, 2016 WL 4089445 (Aug. 3, 2016).

By granting the petition in this case, this Court need not determine whether agency policies of nonacquiescence are constitutional in all their varieties. *See* Dan T. Coenen, *The Constitutional Case Against Intracircuit Nonacquiescence*, 75 Minn. L. Rev. 1339, 1351 (1991) (intracircuit nonacquiescence vulnerable to separation of powers, due process, and equal protection challenges). However, the NLRB's policy of nonacquiescence provides an important context to the question presented and this Court's consideration of that context will guide circuit courts and administrative agencies when other agency-court conflicts arise.

CONCLUSION

The National Labor Relations Board "has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives." *S. S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942). Only this Court can settle the important question of whether the NLRA's protection of "concerted action" eliminates the freedom of employers and employees to contract for arbitral resolution of workplace disputes, as guaranteed by the Federal Arbitration Act.

The petition for a writ of certiorari should be granted.

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