No. 16-300

IN THE

# Supreme Court of the United States

ERNST & YOUNG LLP AND
ERNST & YOUNG U.S. LLP,
*Petitioner*s,

v.

STEPHEN MORRIS AND KELLY MCDANIEL,
*Respondent*s.

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

## BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

Whether the collective-bargaining provisions of the National Labor Relations Act prohibit the enforcement under the Federal Arbitration Act of an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis.

## CORPORATE DISCLOSURE STATEMENT

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

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## INTEREST OF *AMICUS CURIAE*[1]

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

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

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

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

The abiding interest of the Foundation in the promotion of arbitration as an efficient alternative to protracted litigation is exemplified by its participation as *amicus* or as counsel for *amicus* in numerous cases before this Court, involving arbitration issues, including *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) and *DIRECTV, INC. v. Imburgia*, 136 S. Ct. 463 (2015). The Foundation has also filed an *amicus* brief in support of petitioner in *Epic Systems Corp. v. Lewis*, No. 16-285, which raises issues very similar to the issues in this case.

## PRELIMINARY STATEMENT

The FAA establishes a presumption in favor of enforcing arbitration agreements as written[2] that can be overcome by another statute, but only if that statute is a "congressional command" that is contrary to the FAA's mandate.

The Ninth Circuit in this case, 2016 WL 4433080 (9th Cir. Aug. 22, 2016), and the Seventh Circuit, in *Lewis v. Epic Systems Corp.* 823 F.3d

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[2] Section 2 of the Federal Arbitration Act (FAA), arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

1147 (7th Cir. 2016), held that the NLRA is a "congressional command" that creates an exception to the FAA's promotion of arbitration as a preferred means of dispute resolution.[3] The Fifth Circuit, in *Murphy Oil, U.S.A., Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), petition for cert. pending, No. 16-307 (filed Sept. 9, 2016) held that the NLRA is not an unambiguous "congressional command," and that it did not fall within the FAA's "saving clause" of "illegality."

Petitioners in all three cases – employers and the NLRB (charged with protecting the interests of employees) – argue in strikingly similar language that whether an employer can lawfully require its employees to sign agreements mandating individual arbitration of workplace disputes "is an important and recurring question" about the federal policy encouraging arbitration embodied in the Federal Arbitration Act and the scope of employees' rights under the NLRA. See Ernst & Young Petition at 10, Epic System Petition in No. 16-285 at 4, and NLRB Petition in No. 16-307 at 9.

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[3] Section 7 of the National Labor Relations Act (NLRA) provides that "[e]mployees shall have the right to self-organization * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. And under Section 8(a) of the NLRA, it is an unfair labor practice for an employer to "interfere with, restrain, or coerce employees" in the exercise of their Section 7 rights. 29 U.S.C. § 158(a).

The NLRB's petition in *Murphy Oil* and the employers' petitions in this case and in *Epic Systems* diverge primarily in their respective positions on the substantive issue in each case.

This Court is being asked to resolve a clear circuit split arising from contrary conclusions drawn recently by several circuit courts of appeal about whether class and collective action waivers in employment arbitration agreements violate the National Labor Relations Act, and whether the NLRA overrides the Federal Arbitration Act in three petitions for certiorari filed in September 2016, in the instant case, in *Epic Systems Corp. v. Lewis*, No. 16-285 (docketed Sept. 2, 2016) and in *NLRB v. Murphy Oil*, No. 16-307 (docketed Sept. 9, 2016). The filing of three petitions with this Court in such a short period of time by both employers and the NLRB, involving very similar legal and factual issues, is evidence of the importance of the issues and the need for the Court to determine the scope of employers' and employees' rights as applied to arbitration agreements that contain a waiver of the right to engage in class litigation or class arbitration under the FAA and the NLRA, the two federal statutory schemes at issue.

The outcome of these cases has far-reaching implications for employers and employees across the United States. If the Seventh and Ninth Circuits' rule stands, employers doing business in those circuits will be subject to a different legal regime than employers with employees in the

Second, Fifth, and Eighth Circuits. If this Court does not resolve the circuit split and establish a uniform nationwide rule, employers in other circuits that have not ruled on the issue, and even employers in the Second, Fifth, and Eighth Circuits, and face the real threat of class litigation or enforcement action before NLRB administrative tribunals.

## BACKGROUND

Respondents were employees in petitioners' audit division. See App. 45a. of petitioners. Petitioners are related international accounting, auditing and consulting firms. Each respondent signed an employment agreement that included an arbitration provision requiring all employment related disputes be resolved in individual, rather than collective, arbitration. Virtually all of petitioners' thousands of employees in the United States have signed an arbitration provision as a condition of employment.[4]

Respondent Morris filed a class-action lawsuit against petitioners in federal court (which

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[4] The arbitration provision states, in relevant part, "All claims, controversies or other disputes between [petitioners] and an Employee that could otherwise be resolved by a court" will be resolved through a program of alternative dispute resolution known as the "Common Ground Dispute Resolution Program." Under the program, "Covered Disputes pertaining to different [e]mployees will be heard in separate proceedings"; class or collective proceedings are not permitted. App. 44a.

respondent McDaniel later joined) alleging that petitioners had mis-classified them and other employees for purposes of overtime pay under the Fair Labor Standards Act (FLSA) and California law. Petitioners moved to compel arbitration. The district court granted the motion, holding that the arbitration provision was enforceable. App. 43a-67a.

A divided panel of the Ninth Circuit reversed.

The Ninth Circuit Decision

A divided panel of the court of appeals reversed and remanded. App. 1a-42a. The court of appeals began its analysis with the NLRA, and, citing case law construing Section 7 of the NLRA, concluded that Section 7 "protects a range of concerted employee activity, including the right to seek to improve working conditions through resort to administrative and judicial forums," App. 7a (internal quotation marks and citation omitted), and establishes a "substantive right" for employees "to pursue work-related legal claims, and to do so together." App. 8a, 10a.

Petitioners' arbitration provision, the majority held, "prevents concerted activity by employees in arbitration proceedings, and the requirement that employees only use arbitration prevents the initiation of concerted legal action anywhere else." App. 11a. Thus, the majority held, the arbitration provision interferes with "a protected § 7 right in violation of § 8" and "[t]hus, the 'separate proceedings' terms in the Ernst & Young contracts cannot be enforced." *Id.*

The court of appeals stated that the FAA "does not dictate a contrary result," App. 12a, "[t]he illegality of the 'separate proceedings' term here has nothing to do with arbitration as a forum," App. 13a, and "[i]rrespective of the forum in which disputes are resolved, employees must be able to act in the forum together," App. 23a (emphasis in original). The Ninth Circuit majority concluded that petitioners' arbitration provision was prohibited by the NLRA and thus unenforceable, App. 16a, 24a, under the FAA's saving clause, which provides that an arbitration agreement is enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2.

The majority "recognize[d] that our sister Circuits are divided on this question," and acknowledged that the majority of the courts of appeal that have considered the issue have ruled the other way (citing *Murphy Oil v. NLRB*, 808 F.3d at 1018; *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013); and *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053-54 (8th Cir. 2013), and agreed with the Seventh Circuit, the only one that "has engaged substantively with the relevant arguments." App. 24a n.16. The court of appeals specifically rejected the analytical framework of the courts of appeal which reached the conclusion that requires an identifiable "contrary congressional command" in a statute in order to override the FAA's mandate to enforce arbitration agreements. App. 17a.

Judge Ikuta dissented. App. 25a-42a. She cogently wrote that "This decision is breathtaking in its scope and in its error; it is directly contrary to Supreme Court precedent App. 25a, because "[c]ontrary to the majority's focus on whether the NLRA confers 'substantive rights,' in every case considering a party's claim that a federal statute precludes enforcement of an arbitration agreement, the Supreme Court begins by considering whether the statute contains an express 'contrary congressional command' that overrides the FAA." App. 29a and that the NLRA contained nothing "remotely close" to a "contrary congressional command" that mention arbitration nor specify the right to take legal action at all, whether individually or collectively." App. 35a.

Judge Ikuta also rejected the majority's reliance on the FAA's saving clause. See App., *infra*, 38a-41a. She contended that the majority's reasoning was based on the erroneous premise that collective-action waivers are illegal, when, in reality, such a waiver "would be illegal only if it were precluded by a 'contrary congressional command' in the NLRA, and here there is no such command." App. 40a. Judge Ikuta further reasoned that, even if the NLRA could be interpreted as "giving employees a substantive, nonwaivable right to classwide actions, such a purported right would "disproportionately and negatively impact arbitration agreements by requiring procedures that 'interfere[] with fundamental attributes of arbitration.'" *Id.*

(quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 at 344 (2011), which "expressly rejected" the reasoning behind the majority's conclusion that "the nonwaivable right to class-wide procedures [that the majority] has discerned in [Section] 7" complies with the FAA simply because it "applies equally to arbitration and litigation." *Id*.

Judge Ikuta concluded by observing that the majority's rule was "directly contrary to Congress's goals in enacting the FAA." App. 40a and the majority "exhibit[ed] the very hostility to arbitration that the FAA was passed to counteract." App. 41a.

The Ninth Circuit majority recognized that its ruling is at odds with decisions of three other courts of appeals – including a decision of the Second Circuit involving then same defendants (petitioners here) – which held that the identical arbitration provision at issue here is enforceable, *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013).

## SUMMARY OF ARGUMENT

The split among several circuits on the question whether arbitration clauses that require employment-related disputes are to be resolved by individual arbitration are enforceable, or whether the NLRA overrides the FAA's presumption that arbitration agreements are enforceable as written, is clear, acknowledged, and undisputed. Indeed, the two circuits that have held arbitration agreements in the labor-relations context are

unenforceable acknowledge the clear circuit split. All of the petitioners in the three cases now pending before the Court that raise this issue – employers and the NLRB alike – agree that there is a direct and serious circuit split. Likewise, all three petitions pending before the Court raising the issue presented in this case – from employers and the NLRB – agree that the circuit split is fully developed and ripe for resolution by this Court.

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

## ARGUMENT

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

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

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

The Second, Fifth, and Eighth Circuits have held that arbitration agreements that incorporate waivers of class and collective arbitration and litigation in the employment context are enforceable under the FAA.[5] The most direct conflict is between the Ninth Circuit's decision below and the Second Circuit's ruling in *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013) (per curiam), which held, contrary to the Ninth Circuit, that the very Ernst & Young arbitration clause at issue here *is* enforceable under the FAA. *Id.* at 292-293, 299 (citing *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013)).

The Second Circuit began from the premise that "arbitration agreements should be enforced according to their terms unless the FAA's mandate has been overridden by a contrary congressional

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[5] The Sixth and Eleventh circuits have also held that the FAA requires enforcement of class waivers in employment arbitration agreements, but did not discuss the NLRA in those decisions. *See Killion v. KeHE Distribs., LLC*, 761 F.3d 574, 592 (6th Cir. 2014); *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1334-1336 (11th Cir. 2014).

command." 726 F.3d at 295 (internal quotation marks and citation omitted). The Second Circuit found that neither the FLSA nor the NLRA was a "contrary congressional command" that overrode the FAA. *Id.* at 296-297 & n.8. The Second Circuit reached this conclusion even though the NLRB had ruled otherwise; the court "decline[d] to follow" the Board's views. *Id.* at 297 n.8. The Second Circuit has very recently followed its *Sutherland* precedent in *Patterson v. Raymours Furniture Co.*, No. 15-2820, 2016 WL 4598542 (2d Cir. Sept. 2, 2016) (summary order).

The Fifth Circuit has upheld class waivers in employment-related arbitration agreements. In *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013), that court overrode a decision by the National Labor Relations Board ("NLRB" or "Board"), which had found the class waiver at issue unenforceable under the FAA and the NLRA. *See D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012).

The Fifth Circuit analyzed the issue following the schema adopted by this Court in cases in which a party seeks to avoid arbitration on the basis of a purported conflict with another federal statute. The Fifth Circuit asked whether the NLRA is "a contrary congressional command" that overcomes the FAA's presumption in favor of arbitration. *Id.* (citing *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012). The Fifth Circuit determined that "there is no basis on which to find that the text of the NLRA supports a congressional command to override the FAA." *Id.*

The Fifth Circuit rejected the NLRB's decision that the FAA's saving clause was a basis for invalidating class waivers because of alleged "illegality" under the NLRA. 737 F.3d at 360 because the Board's finding of "illegality" had "the effect of * * * disfavor[ing] arbitration," *id.* at 359 (citing *Concepcion*, 563 U.S. 333, 346 (2011)).

The Fifth Circuit has adhered to this view in the face of repeated challenges by the NLRB after its decision in *D.R. Horton*. *See Citi Trends, Inc. v. NLRB,* No. 15-60913, 2016 WL 4245458, at *1 (5th Cir. Aug. 10, 2016) (per curiam) (unpublished); *PJ Cheese, Inc. v. NLRB*, No. 15-60610, 2016 WL 3457261, at *1 (5th Cir. June 16, 2016) (per curiam); and *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1021 (5th Cir. 2015), petition for cert. pending, No. 16-307 (filed Sept. 9, 2016).

In *Murphy Oil*, the Fifth Circuit again addressed the alleged illegality of arbitration agreements under Sections 7 and 8(a) of the NLRA and again upheld the enforceability of an arbitration agreement that contains a waiver of the right to commence or participate in class-wide arbitration or litigation.

Murphy Oil's original arbitration agreement[6] provided that employees must individually resolve

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

any and all disputes or claims which relate to the employment relationship by binding arbitration. Several employees filed an FLSA collective action. Murphy Oil moved to dismiss the suit and to compel arbitration.

One of the plaintiff employees also filed an unfair labor charge with the NLRB, alleging that the arbitration agreement unlawfully interfered with employees' Section 7 rights. In October 2014, ten months after the Fifth Circuit's ruling in *D.R. Horton*, the NLRB issued its opinion, in *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72 (2014). The Board disregarded the Fifth Circuit's ruling in *D.R. Horton* and, applying its own *D.R. Horton* decision and not the Fifth Circuit's *D.R. Horton* ruling, reaffirmed its position that arbitration provisions that waived the right to class relief violated the NLRA because the agreement restricted the Section 7 right to engage in concerted activity. The NLRB ruled that both the original and amended Murphy Oil arbitration language could be interpreted as unlawfully prohibiting employees from filing unfair labor practice charges.

Murphy Oil petitioned the Fifth Circuit to review the NLRB's ruling that ignored the Fifth Circuit's *D.R. Horton* decision. The Fifth Circuit held in *Murphy Oil* that the original arbitration agreement violated employees' Section 7 rights, but that the amended agreement was lawful. The court considered Murphy Oil's pre- and post- *D.R. Horton* versions of the arbitration agreement and

concluded that the original agreement was problematic because its language that employees waived the right to pursue collective or class claims for could be interpreted to mean that the employee could not file unfair labor practice charges with the NLRB, could therefore had a chilling effect on employees' ability to act collectively, and thus constitute an unfair labor practice.

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

The Eighth Circuit also has concluded that arbitration agreements containing class waivers are enforceable under the FAA, notwithstanding federal labor laws or the NLRB's interpretation of those laws. See *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052, 1054-1055 (8th Cir. 2013) and *Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772, 776 (8th Cir. 2016).

In *Owen*, the Eighth Circuit acknowledged the NLRB's determination that class waivers in employment arbitration agreements are

unenforceable, but explicitly "reject[ed]" the "invitation to follow the NLRB's rationale." 702 F.3d at 1055, and instead found the FAA's presumption in favor of the enforcement of arbitration agreements to be dispositive. *See id*. at 1052-1055. The Eighth Circuit followed this Court's teaching that "there must be a 'contrary congressional command' for another statute to override the FAA's mandate." *Id*. at 1052 (quoting *CompuCredit*, 132 S. Ct. at 669), and found that the two potential contrary congressional enactments cited by the employees in *Owen* – the FLSA and the NLRA – did not constitute such a "contrary congressional command." *Id*. at 1053-1054. The Eighth Circuit concluded that neither labor statute overrode "the mandate of the FAA in favor of arbitration." *Id*. at 1055. The Eighth Circuit noted that Congress had reenacted the FAA in 1947, *after* passing both of the labor statutes, and that "Congress intended its arbitration protections to remain intact even in light of the earlier passage" of the labor relations statutes. *Id*. at 1053.

The Eighth Circuit reaffirmed its *Owen* decision earlier this year in *Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772 (8th Cir. 2016), in which it reviewed an NLRB ruling that a mandatory agreement requiring individual arbitration of work-related claims violates the NLRA. *Id*. at 776. The court adhered to its decision in *Owe*n, which, it said, "is fatal" to the NLRB's position. The court held that an "arbitration agreement that include[s]

a waiver of class or collective actions in all forums to resolve employment-related disputes" is enforceable. *Id.*

On the other side of the circuit split, the Seventh Circuit expressly recognized that its ruling "would create a conflict in the circuits." *Lewis v. Epic Systems Corp.* 823 F.3d 1147, n. † (7th Cir. 2016), Pet. App. in *Epic Systems v. Lewis*, No. 16-285, at 15a n †. Unlike the Second, Fifth, and Eighth Circuits, the Seventh Circuit held that agreements to submit employment disputes to individual arbitration are not enforceable. That court, like the Ninth Circuit here, concluded that class waivers in employment arbitration agreements are "illegal" under the NLRA because they interfere with employees' right to engage in concerted activities. *Epic Systems*, No. 16-285, Pet. App. at 10a-11a. It also determined that such waivers are unenforceable under the FAA's saving clause because "illegality" is a "'ground[ ] * * * for the revocation of any contract.'" *Id.* at 14a-15a (quoting 9 U.S.C. § 2) and *id.* at 20a.

The Seventh Circuit acknowledged that the Fifth Circuit had reached "the opposite conclusion." *Id.* at 15a, but the Seventh Circuit characterized the Fifth Circuit's reasoning as relying on mere dicta in *Concepcion* and *Italian Colors*. *Id.* The Seventh Circuit also recognized that the Second and Eighth Circuits "agree with the Fifth," citing *Sutherland* and *Owen*, but it viewed the analyses in those decisions as insufficient. *Id.* at 19a.

## II. THE DECISION BELOW IS INCORRECT AND CONFLICTS WITH THIS COURT'S ARBITRATION PRECEDENTS.

The Ninth Circuit's decision was mistaken on the merits of the important question presented and must be rectified.

The Ninth Circuit majority erred when it began its analysis with an interpretation of the NLRA as conferring substantive rights on employees, and then concluding that those rights override the employee's agreement to arbitrate employment-related disputes. As Judge Ikuta wrote in her detailed dissent, sections 7 and 8 of the NLRA do not "expressly preserve any right for employees to use a specific *procedural* mechanism to litigate or arbitrate disputes collectively." App. 36a (emphasis in original).

The court of appeals should have begun with the FAA's presumption that arbitration agreements are enforceable as written. *See* 9 U.S.C. § 2; *CompuCredit*, 132 S. Ct. at 668-669; *Moses H. Cone*, 460 U.S. at 24-25 and it should have asked whether the NLRA was an explicit congressional command "contrary" to the FAA. *CompuCredit*, 132 S. Ct. at 669. Under this Court's criteria, the NLRA is not a "contrary congressional command" that bars class waivers in arbitration agreements. *CompuCredit*, 132 S. Ct. at 669.

In this case, the Ninth Circuit held that a waiver provision requiring employees to bring legal claims through individual arbitration violates the NLRA and therefore is unenforceable. *Id.* at *1, *5. The Ninth Circuit majority concluded that the FAA's enforcement mandate yields to the NLRA under the "saving clause." *Id.* at *7.

The FAA "establishes 'a liberal federal policy favoring arbitration agreements.'" *CompuCredit*, 132 S. Ct. at 669 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).[7] The FAA is "[t]he background law governing" questions of enforcement of arbitration agreements, even when other federal statutes are allegedly inconsistent with the FAA. *CompuCredit*, 132 S. Ct. at 668. Further, the FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24-25.

Under the FAA "[a] written provision * * * to settle by arbitration a controversy * * * 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, and "[t]he burden is on the party opposing arbitration * * * to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights

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[7] The type of arbitration "envisioned by the FAA" is "bilateral" (individual) arbitration, not class arbitration. See *Concepcion*, 563 U.S. at 348, 351.

at issue." *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 227 (1987).

This Court has consistently upheld the FAA's policy favoring enforcement of arbitration agreements as written. See, *e.g.*, *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Italian Colors*, 133 S. Ct. 2304; *CompuCredit*, 132 S. Ct. 665; *Concepcion*, 563 U.S. 333; *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Shearson/American Express*, *supra*; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Moses H. Cone*, 460 U.S. 1.

The FAA "requires courts to enforce agreements to arbitrate according to their terms[,] * * * even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *CompuCredit*, 132 S. Ct. at 669 (quoting *Shearson/American Express*, 482 U.S. at 226). The congressional command must indicate Congress's contrary intent with "clarity." *CompuCredit*, 132 S. Ct. at 672. Section 7 of the NLRA grants employees the right "to engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157, but it does not give employees the right to arbitrate or litigate an employment dispute as a class or collective action nor does it expressly prohibit class waivers. As Judge Ikuta forcefully argued in dissent, the

collective-bargaining provisions of the NLRA "neither mention arbitration nor specify the right to take legal action at all, whether individually or collectively," App. 35a, and those provisions do not "expressly preserve any right for employees to use a specific *procedural* mechanism to litigate or arbitrate disputes collectively." App. 36a (emphasis in original).

The court below also erred in its reliance on the FAA's "saving clause" to avoid enforcing the arbitration provision. The FAA's saving clause provides that an arbitration agreement is enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The saving clause permits courts to decline to enforce arbitration agreements based on generally applicable contract defenses provide for revocation of an agreement.

The Ninth Circuit court reasoned that because Ernst & Young's arbitration provision contains a class action waiver that is "illegal" under Section 7 of the NLRA and because "illegality" is a general defense to enforcement of a contract, this case falls within the FAA's saving clause. App. 16a, 24a.[8]

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[8] Judge Ikuta criticized the majority's reliance on the FAA's saving clause for a number of reasons. App. 38a-41a. First, this Court does not apply the saving clause to federal statutes unless the supposedly conflicting statute contains a congressional command contrary to the use of arbitration. App. 39a. Second, the majority incorrectly concluded that collective-action waivers are illegal, but such a waiver (continued...)

Under the Ninth Circuit majority's reasoning, there is no need to determine whether another federal statute qualifies as a "contrary congressional command" because the saving clause allows courts to decline to enforce an arbitration agreement if there is another that federal law could be interpreted to conflict with the agreement to arbitrate, and there is no need to identify an explicit "contrary congressional command." Such a rule would render nugatory the FAA's presumption of enforceability of arbitration agreements as written. But as this Court in *Concepcion* explained, "when a doctrine normally thought to be generally applicable, such as duress or * * * unconscionability, is * * * applied in a fashion that disfavors arbitration," it falls outside the saving clause. 563 U.S. at 341. Judicial refusal to enforce a waiver of class or collective arbitration is inimical to a core purpose of the FAA because "[r]equiring the availability of classwide arbitration interferes with fundamental attributes

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[8](...continued)
"would be illegal only if it were precluded by a 'contrary congressional command' in the NLRA, and here there is no such command." App. 40a. Further, even if the FAA's saving clause were applicable to federal statutes, it would not save the majority's construction of the NLRA as "giving employees a substantive, nonwaivable right to classwide actions" because such a right would "disproportionately and negatively impact arbitration agreements by requiring procedures that 'interfere[] with fundamental attributes of arbitration.'" *Id.* (quoting *Concepcion*, 563 U.S. at 344).

of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 344.

Protracted litigation frustrates Congress's intent in passing the FAA "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible" so as not to "frustrate[] the statutory policy of rapid and unobstructed enforcement of arbitration agreements." *Moses H. Cone*, 460 U.S. at 22-23. The Ninth Circuit's decision would negate numerous agreements to arbitrate, is wrong on the merits and should be reversed.

## III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT AND WARRANTS REVIEW.

All three petitions pending before the Court raising the issue presented in this case – from employers and the NLRB – argue that the circuit split is fully developed, acknowledged, and ripe for resolution by this Court. See Petition at 19, Petition in *Epic Systems v. Lewis*, No. 16-285, at 20, and Petition in *NLRB v. Murphy Oil*, No. 16-307 at 24.

The split among the circuits promises only turmoil, forum shopping and more expensive, time-consuming litigation. The split is unlikely to resolve itself and this Court should intervene now to resolve it.

## CONCLUSION

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

Respectfully submitted,
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