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

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation ("NELF") seeks to present its views, and the views of its supporters, on whether certiorari should be granted to decide whether, in the case of an employment arbitration agreement that precludes class and collective actions, the mandate to enforce such an agreement under the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), is overridden by § 7 of the National Labor Relations Act, 29 U.S.C. § 157, which protects an employee's right "to engage in concerted activities for . . . mutual aid or protection."[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977, and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include both large and small businesses located primarily in the New England region.

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[1] Pursuant to Supreme Court Rule 37.6, NELF states that no counsel for a party authored NELF's proposed amicus brief in whole or in part, and no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Rule 37.2(a), NELF states that it has provided counsel for all parties with timely written notice of NELF's intent to file this brief, and that counsel for all parties have filed with the Court a blanket letter of consent to the filing of amicus briefs in this case.

NELF is committed to upholding the FAA's mandate to enforce class and collective action waiver contained in valid arbitration agreements. This serves the FAA's purpose to allow parties to fashion a streamlined arbitral process for the speedy private resolution of disputes. NELF is also committed to upholding the FAA's mandate with respect to the arbitration of federal statutory claims, unless that statute provides a "contrary congressional command" that clearly overrides the FAA's mandate to enforce such waivers. When the federal statute at issue fails to displace the FAA's mandate, here by failing to provide for a nonwaivable right to pursue group legal action, the FAA requires courts to enforce the disputed class and collective arbitration waiver according to its terms.

In addition to this amicus brief, NELF has filed many other related amicus briefs in this Court, arguing for the enforcement of arbitration agreements according to their terms under the FAA.[2]

For these and other reasons discussed below, NELF believes that its brief will assist the Court in deciding whether to grant certiorari in this case.

SUMMARY OF ARGUMENT

This Court should grant certiorari and decide that the NLRA does not displace the FAA's mandate to enforce class and collective action waivers

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[2] *See DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Green Tree Fin. Corp. v. Bazzle,* 539 U.S. 444 (2003).

contained in employment arbitration agreements. To escape their contractual obligations to arbitrate disputes on an individual basis only, the respondents in this case would have to show that the NLRA announces a "contrary congressional command" that employees have the nonwaivable right to pursue group legal action against their employer. But the NLRA contains no such contrary congressional command. The statute makes no mention of class actions and was enacted decades before the advent of the modern class action. Nor does the NLRA mention collective actions or even provide for an *individual* right of action. Congress could not have intended to provide employees with nonwaivable procedural rights associated with a nonexistent right of action.

The NLRA's "right . . . to engage in . . . concerted activities for . . . mutual aid or protection" lacks the specificity and directness that this Court has required for a federal statute to override the FAA's mandate to enforce arbitration agreements according to their terms. Under *CompuCredit v. Greenwood*, 132 S. Ct. 665 (2012), a contrary congressional command should announce itself clearly on the face of a statute. Such an intent should not be "found" in the interstices of a statute, and certainly not by engaging in a strained interpretation of the statutory language "concerted activities."

As with the Credit Repair Organization Act ("CROA") under review in *CompuCredit*, the NLRA is also silent on the issue of invalidating the disputed terms of an arbitration agreement. At

issue in *CompuCredit* was whether the CROA overrode a contractual term to submit claims to binding arbitration. At issue here is whether the NLRA overrides the contractual term to arbitrate all employment-related disputes on an individual basis only. In both cases, the federal statute at issue says nothing about the enforceability of the disputed contractual term. Therefore, the FAA's mandate to enforce the arbitration agreement according to its terms remains undisturbed for both CROA and NLRA claims. Accordingly, the respondents' class and collective action waiver should be enforced.

This is confirmed by the NLRA's statement of purpose, which makes no mention of legal action of any kind. To the contrary, the NLRA was expressly intended to avoid "industrial strife" through the "friendly adjustment of industrial disputes," 29 U.S.C. § 151, by protecting the employee's right to self-organization in order to *negotiate* on an equal footing with the employer over the terms and conditions of employment. This clear purpose of achieving industrial peace through negotiated compromise is incompatible with the *coercive* aims of a class or collective legal action, with its attendant threat of exacting an "in terrorem" settlement from the employer.

The Ninth Circuit's reliance on *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), is entirely misplaced. *Eastex* did not involve any judicial action taken by employees, did not involve the FAA, and did not even interpret the NLRA's "concerted activities" language. Instead, that case decided the entirely unrelated issue whether employees acted "for mutual aid or

protection" under the NLRA if they acted outside of the immediate employer-employee relationship, by taking political action with respect to work-related issues.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI AND DECIDE THAT THE NATIONAL LABOR RELATIONS ACT DOES NOT DISPLACE THE FEDERAL ARBITRATION ACT'S MANDATE TO ENFORCE CLASS AND COLLECTIVE ACTION WAIVERS IN EMPLOYMENT ARBITRATION AGREEMENTS.

At issue is whether this Court should grant certiorari and decide whether, in the case of an employment arbitration agreement that precludes class and collective actions, the mandate to enforce such an agreement under the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), is overridden by § 7 of the National Labor Relations Act, which protects an employee's right "to engage in . . . concerted activities for . . . mutual aid or protection . . . ." 29 U.S.C. § 157.[3]

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[3] Section 7 of the NLRA provides, in relevant part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

29 U.S.C. § 157.

A divided panel of the Ninth Circuit in this case, along with the Seventh Circuit in a case that is also before this Court on a petition for certiorari,[4] has held that the NLRA overrides the FAA by providing employees with a nonwaivable right to pursue group legal action against their employer. The Fifth Circuit, however, has held to the contrary, in a case that is *also* before the Court on a petition for certiorari.[5] Accordingly, certiorari should be granted to resolve the split of authority on this important issue of federal law.

A. Nowhere Does The NLRA State That Employees Have The Nonwaivable Right To Pursue Group Legal Action Against Their Employer.

The Court should grant certiorari and decide that the NLRA does not displace the FAA's mandate to enforce class and collective action waivers contained in employment arbitration agreements. "[C]ourts must rigorously enforce arbitration agreements according to their terms, . . . including terms that specify [how] . . . the parties choose to arbitrate their disputes," such as by restricting arbitration to individual claims only. *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (citations and internal quotation marks omitted). *See also AT&T Mobility LLC v. Concepcion*, 563 U.S.

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[4] *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), *petition for cert. filed* (Sept. 2, 2016) (No. 16-285).

[5] *NLRB v. Murphy Oil USA, Inc.,* 808 F.3d 1013 (5th Cir. 2015), *petition for cert. filed* (Sept. 9, 2016) (No. 16-307).

333, 344 (2011) ("Requiring the availability of classwide arbitration [by invalidating a class action waiver] interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (FAA requires enforcement of agreement to arbitrate employment claims under ADEA).

To escape their contractual obligation to arbitrate disputes on an individual basis only, the respondents in this case would have to show that the NLRA announces a "contrary congressional command" that employees have the nonwaivable right to pursue group legal action against their employer. *See Italian Colors*, 133 S. Ct. at 2309. (FAA's mandate "holds true for claims that allege a violation of a federal statute, unless the FAA's mandate has been 'overridden by a contrary congressional command.'") (citations and internal quotation marks omitted) (quoting *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012)). *See also Gilmer*, 500 U.S. at 26 ("[T]he burden is on [the employee] to show that Congress intended to preclude a waiver of a [class or collective legal action] for [NLRA] claims.").

But the NLRA contains no such contrary congressional command that guarantees an employee the right to pursue group legal action against his employer. As with the Sherman and Clayton Acts under review in *Italian Colors*, the NLRA, enacted in 1935, "make[s] no mention of class actions" and was "enacted decades before the advent

[in 1966] of Federal Rule of Civil Procedure 23 . . . ." *Italian Colors*, 133 S. Ct. at 2309.

Nor does the NLRA provide that employees have the right to seek a collective action, or even an *individual* action, against their employer. Instead, Congress saw fit to delegate exclusive enforcement powers to the NLRB to prosecute claims of unfair labor practices.[6] Congress could not have intended to provide employees with nonwaivable procedural rights associated with a nonexistent right of action.

Nor, for that matter, does the NLRA even mention arbitration agreements. *See CompuCredit*, 132 S. Ct. at 672 (only federal statutes making express reference to arbitration agreements can override FAA's mandate to arbitrate disputes covered by such agreements). In short, Congress has not "evinced an intention [in the NLRA] to preclude a waiver of" class or collective procedures. *Gilmer*, 500 U.S. at 26. Therefore, the FAA should require the respondents to comply with their contractual obligation to arbitrate disputes on an individual basis only.

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[6] *See* 29 U.S.C. § 160(a) ("Powers of Board generally") ("The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice . . . .").

B. An Employee's NLRA Right "To Engage In . . . Concerted Activities For . . . Mutual Aid Or Protection" Falls Far Short Of The Specificity And Directness Required Under *CompuCredit v. Greenwood* To Override The FAA's Mandate.

To be sure, the NLRA provides employees with "the right . . . to engage in . . . concerted activities for . . . mutual aid or protection . . . ." 29 U.S.C. § 157. But this "concerted activities" language lacks the specificity and directness that this Court has required for a federal statute to supplant the FAA's mandate to enforce arbitration agreements according to their terms. *See CompuCredit*, 132 S. Ct. at 670 (holding that Credit Repair Organization Act, 15 U.S.C. §§ 1679-1679j ("CROA"), does not displace FAA's mandate, even though CROA provides right to judicial remedy and bars waiver of statutory rights).

At issue in *CompuCredit* was whether the CROA provided a nonwaivable right to sue in federal court in the first instance, thereby overriding the FAA's mandate to enforce an agreement to arbitrate such claims. *See CompuCredit*, 132 S. Ct. at 668-671. The Court held that the CROA did not do so, even though it did provide a private right of judicial action and did bar the waiver of rights under that statute. *See id.* at 669. The Court concluded that "[b]ecause the CROA is *silent* on whether claims under the Act can proceed in an arbitrable forum, . . . the FAA requires the arbitration agreement to be

enforced according to its terms." *Id.* at 673 (emphasis added).

In short, *CompuCredit* teaches that a contrary congressional command should announce itself clearly on the face of a statute. Such an intent should not be "found" in the interstices of a statute, and certainly not by engaging in a strained interpretation of the statutory language "concerted activities."

Notably, the only federal statutes that the Court in *CompuCredit* identified as announcing a contrary congressional command made *express* reference to predispute arbitration agreements:

> When [Congress] has restricted the use of arbitration in other contexts, it has done so with *a clarity that far exceeds the claimed indications* in the CROA. *See, e.g.*, 7 U.S.C. § 26(n)(2) (2006 ed., Supp. IV) ("*No predispute arbitration agreement* shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section"); 15 U.S.C. § 1226(a)(2) (2006 ed.) ("Notwithstanding any other provision of law, whenever a motor vehicle franchise contract provides for *the use of arbitration* to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all

> parties to such controversy consent in writing to use arbitration to settle such controversy"); *cf.* 12 U.S.C. § 5518(b) (2006 ed., Supp. IV) [Dodd-Frank Act] (granting authority to the newly created Consumer Financial Protection Bureau to regulate *predispute arbitration agreements* in contracts for consumer financial products or services).

CompuCredit, 132 S. Ct. at 672 (emphasis added).

By contrast, the NLRA's clipped and general "concerted activities" language falls far short of these statutory examples discussed in *CompuCredit* because the language does *not* state that employees have a nonwaivable right to pursue group legal action against their employer. Only such precise and direct statutory language could satisfy *CompuCredit*.

As with the CROA under review in *CompuCredit*, the NLRA is also silent on the issue of invalidating the terms of an arbitration agreement. At issue in *CompuCredit* was whether the CROA overrode the contractual term to submit claims to binding arbitration. At issue here is whether the NLRA overrides the contractual term to arbitrate all employment-related disputes on an individual basis only. In both cases, the federal statute at issue says nothing about the enforceability of the disputed term in the arbitration agreement. Therefore, the FAA's mandate to enforce the arbitration agreement according to its terms remains undisturbed for both

CROA and NLRA claims. Accordingly, the respondents' class and collective action waiver should be enforced.

C. The NLRA's Statement Of Purpose Further Defeats Any Congressional Intent To Provide Employees With The Nonwaivable Right To Pursue Group Legal Action.

As with the other NLRA sections discussed above, the NLRA's statement of purpose makes no mention of an employee's right to pursue group (or even individual) legal action against his or her employer. In fact, the statement of purpose appears to be antithetical to coercive legal action of any kind, let alone endorse "the risk of 'in terrorem' settlements that class actions entail . . . ." *Concepcion*, 563 U.S. at 350.

In particular, the NLRA's stated purpose is to avoid "industrial strife" (such as strikes and employer lock-outs) by encouraging the "*friendly adjustment* of industrial disputes" through "collective *bargaining*," and "by restoring equality of *bargaining* power between employers and employees . . . for the purpose of *negotiating* the terms and conditions of their employment . . . ." 29 U.S.C. § 151 ("Findings and declaration of policy") (emphasis added).

Clearly, the NLRA's purpose is "to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the *mediatory influence of negotiation*." *Fibreboard*

Paper Prods. Corp. v. NLRB, 379 U.S. 203, 211 (1964) (emphasis added). This clear statutory purpose of achieving industrial peace through negotiated compromise would be incompatible with the coercive thrust of a class or collective legal action, with its attendant threat of exacting an "in terrorem" settlement from the employer, regardless of the merits of the dispute.

In sum, the NLRA does not evince a congressional intent to override, or even address, the FAA's mandate to enforce class and collective action waivers contained in employment arbitration agreements. Certiorari should therefore be granted to uphold the FAA's mandate to enforce those agreements according to their terms.

II. THE COURT'S DECISION IN *EASTEX v. NLRB* PROVIDES NO SUPPORT FOR THE NINTH CIRCUIT'S OPINION.

The Ninth Circuit has relied extensively on *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), to support its conclusion that the NLRA protects an employee's right to pursue group legal action against his or her employer. *See* Petition for Certiorari, Appendix ("App.") A, 3a, 7a, 8a, 10a. But the lower court's reliance on *Eastex* is entirely misplaced.

Unlike this case, *Eastex* did not involve any judicial action taken by employees, did not involve the FAA, and did not even interpret the NLRA's "concerted activities" language. Instead, that case decided the entirely unrelated issue whether employees acted "for mutual aid or protection" under § 7 of the NLRA if they acted outside of the

immediate employer-employee relationship, by engaging in political efforts to influence state and federal governmental action on work-related issues.[7]

To be sure, the Court in *Eastex* acknowledged, in passing, that "it has been held that the 'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums . . . ." *Eastex*, 437 U.S. at 566. But this is merely *dictum* to the Court's holding that the "mutual aid or protection" clause can extend beyond the workplace to include the proposed political activity discussed in the union newsletter at issue.[8] Moreover, none of the NLRB

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[7] In *Eastex*, employees sought to distribute a union newsletter on the employer's property that, among other things, urged employees to write their state legislators to voice their opposition to efforts to incorporate the state "right-to-work" statute into the state constitution, and to take political action against the President's veto of a bill to increase the federal minimum wage. *Eastex*, 437 U.S. at 559-60. The employer refused to allow employees to distribute the newsletter. *See id.* at 560-61. The employer argued that the proposed political action discussed in the newsletter would not be protected under the NLRA's "mutual aid or protection" clause because employees would be acting "through channels outside the immediate employee-employer relationship." *Id.* at 565.

The Court rejected the employer's position and held that the "mutual aid or protection" clause could apply to employees' actions taken outside the workplace. *Id.* at 565-67. The Court then proceeded to review and approve the NLRB's findings in that case that the proposed political activity in the union newsletter would be protected by the "mutual aid or protection" clause. *Id.* at 569-70.

[8] *See* n.7, above.

decisions that the Court cited for this proposition involved a class or collective action. *See id*., 437 U.S. at 566 n.15.

And finally, the Court in *Eastex* emphasized that "[w]e do not address here the question of what may constitute 'concerted' activities in th[e] context" of administrative or judicial forums. *Id*. *See also* App. A., 36a (Ikuta, J., dissenting) (discussing same). That is, the Court in *Eastex* declined, even in *dictum*, to address the very issue presented in this case--whether the NLRA's "concerted activities" language protects the particular procedural form of an employee's judicial action.

In short, *Eastex* provides no support for the Ninth Circuit's opinion, and certiorari should therefore be granted to reverse the lower court and enforce the FAA's mandate in employment arbitration agreements.

CONCLUSION

For the reasons stated above, NELF respectfully requests that this Court grant the petitioners' petition for certiorari.

Respectfully submitted,

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