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 a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF OF THE RETAIL LITIGATION CENTER, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

DEBORAH R. WHITE
RETAIL LITIGATION
CENTER, INC.
1700 N. Moore Street
Suite 2250
Arlington, VA 22209

ADAM G. UNIKOWSKY
Counsel of Record
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

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 individual to arbitrate claims against an employer on an individual, rather than collective, basis.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and contributes to legal proceedings affecting the retail industry. The RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. The RLC frequently files amicus briefs on behalf of the retail industry.

The members of the RLC have a strong interest in the outcome of this proceeding. Many of the RLC's members and affiliates include arbitration agreements in their employment contracts because arbitration allows all parties to resolve disputes quickly and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in

---

[1] Pursuant to this Court's Rule 37.2(a), *amicus* timely notified all parties of its intention to file this brief. Counsel for all parties have submitted letters to the Clerk granting blanket consent to *amicus* briefs. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

court. Relying on the legislative policy reflected in the Federal Arbitration Act ("FAA"), and this Court's consistent recitation of the federal policy favoring arbitration, many of the RLC's members have structured employment relationships with their substantial employee pools around arbitration agreements.

These agreements typically require that arbitration be conducted on an individual, rather than a class or collective, basis. As this Court explained in *AT&T Mobility LLC v. Concepcion*, collective resolution of claims on an aggregate or class-wide basis is "not arbitration as envisioned by the FAA" and "lacks its benefits"—the simplicity, informality, and expedition that are characteristics of arbitration. 563 U.S. 333, 351 (2011).

The National Labor Relations Board ("Board") has taken the position that individual arbitration agreements with employees are unfair labor practices under the National Labor Relations Act ("NLRA"). That position, if it were to prevail, would invalidate millions of arbitration agreements, to the detriment of both employers and employees. This petition presents the question whether the Board's position is correct. The members of the RLC therefore have a strong interest in this proceeding.

SUMMARY OF ARGUMENT

The Court should grant certiorari to resolve the circuit split over the enforceability of individualized arbitration agreements. The conflict of authority is causing serious practical problems for employers: they

do not know whether a basic and widespread provision of employment agreements is legal. This problem is particularly acute for national employers (such as the RLC's members) that operate in multiple, if not all, jurisdictions of the United States. As a practical matter, and for reasons of predictability and fairness across a wide employee base, it is very difficult for such an employer to have agreements with different terms depending on the location of the employee. The circuit split is also creating opportunities for forum-shopping, both for class action plaintiffs and for employers seeking review of the Board's orders.

The Court should grant certiorari in this case, and should hold the Board's petition for certiorari in *NLRB v. Murphy Oil USA, Inc.*, No. 16-307 (pet. filed Sept. 9, 2016), in abeyance pending disposition of this case. *Murphy Oil* is an inferior vehicle for considering the issue for four reasons. First, this case presents the paradigmatic procedural context in which the question presented will arise, whereas the procedural posture in *Murphy Oil* is comparatively unusual. Second, the unusual procedural posture in *Murphy Oil* raises collateral constitutional questions that this case lacks. Third, a decision in *Murphy Oil* might not resolve the question presented as applied to ordinary private employment disputes. Fourth, the Board's question presented in *Murphy Oil* is poorly stated and will unnecessarily limit the scope of issues before this Court.

On the merits, prohibiting individualized arbitration agreements would harm both employers and employees. If employers are barred from entering into

individualized arbitration agreements, they will abandon arbitration altogether. Litigation is slower and more expensive than arbitration, and consigning employee disputes to litigation will lead to workplace disharmony. Moreover, there is no empirical evidence that employees—as opposed to class action lawyers—are more likely to recover damages in litigation than arbitration.

ARGUMENT

I. The Circuit Split Over The Enforceability of Individualized Employee Arbitration Agreements Is Causing Substantial Practical Problems that Warrant This Court's Immediate Review.

This case presents the question whether employment agreements requiring disputes to be resolved through individual arbitration are enforceable. The Board has taken the position that such agreements violate the NLRA, notwithstanding the FAA's command that such agreements are enforceable. *See Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454 (Oct. 28, 2014), *enforcement denied*, 808 F.3d 1013 (5th Cir. 2015). As the petition explains, the Seventh and Ninth Circuits have agreed with the Board's position, while the Second, Fifth, and Eighth Circuits have rejected it. Pet. 11-14.

This circuit split is causing significant practical problems for employers. At present, individualized arbitration agreements are legal in three circuits; illegal in two circuits; and of unknown legal status in the remaining circuits. This conflict of authority leaves

employers with three unappealing choices. They can enter into individualized arbitration agreements with all new employees, and face the risk of Board enforcement actions. Or they can stop entering into such arbitration agreements altogether, and subject themselves to cumbersome dispute resolution procedures which would prove unnecessary if this Court rejects the Board's position. Or they can vary their employment agreements depending on the judicial circuit in which their employees are located, and continue to rewrite those agreements on a circuit-by-circuit basis each time a new judicial opinion comes out. Leaving employers in this legal limbo is untenable, and it is imperative that the Court resolve the question nationwide.

The circuit split will also lead to two types of forum-shopping. First, class-action lawyers will flock to courts within the Seventh and Ninth Circuits and seek to certify nationwide classes, in order to evade the decisions in the Second, Fifth, and Eighth Circuits holding that individualized arbitration agreements are enforceable. As a result, an employee's status as a class member will depend on whether his employer has a national or a regional scope. Consider, for example, two employers that enter into individualized arbitration agreements with all of their employees: one that operates exclusively in Texas, and one that operates in both Texas and California. Employees of the first employer will never become members of an employee class, because individualized arbitration agreements are enforceable within the Fifth Circuit. But a California-based employee of the second

employer can seek to certify a *national* class—including employees based in Texas—on the theory that, in the Ninth Circuit's view, federal law prohibits the enforcement of individualized arbitration agreements nationwide. An employee's ability to serve as a class member should not turn on whether the employer happens to have operations within other judicial circuits.

Second, petitions for review of Board orders may be brought "within any circuit … wherein [the petitioner] transacts business." 29 U.S.C. § 160(e). Thus, if the Board declares an employer to have committed an unfair labor practice based on an individualized arbitration agreement, the employer will be guaranteed to obtain reversal of the Board's order—as long as it happens to have operations in the 13 states comprising the Second, Fifth, and Eighth Circuits. The *Murphy Oil* case illustrates the forum-shopping problem. In that case, a federal district court within the Eleventh Circuit enforced an individualized arbitration agreement against an employee, precipitating an enforcement action by the Board. *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1016 (5th Cir. 2015). If Murphy Oil's operations were limited to the Eleventh Circuit, it would have been forced to file a petition for review in the Eleventh Circuit, and it would have faced the risk of losing if the Eleventh Circuit chose to follow the Seventh and Ninth Circuit's positions. But because Murphy Oil happened to have operations in Texas, it was able to file its petition in the Fifth Circuit—which guaranteed victory, given that the Fifth Circuit had already held that individualized employee arbitration

agreements are enforceable. *Id.* (citing *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013)). The Board's ability to enforce an order related to an employee in one judicial circuit should not turn on the happenstance of whether the employer operates in other judicial circuits.

The circuit split will also cause confusion as to the effect of arbitration awards rendered in the Second, Fifth, and Eighth Circuits on class actions proceeding in the Seventh and Ninth Circuits. Does an arbitration award, deemed valid in the judicial circuit in which it was rendered, preclude an employee from also being a class member in a judicial circuit in which the same arbitration agreement is deemed invalid? Head-spinning questions like these are the reason this Court resolves circuit splits.

The practical problems wrought by the circuit split are magnified by the sheer volume of individualized employee arbitration agreements currently in existence. The retail industry employs over 15 million people, including over 4 million retail salespersons, over 2 million cashiers, over 1 million stock clerks, and over 1 million first-line supervisors. Bureau of Labor Statistics, Industries at a Glance: Retail Trade Sector.[2] As a matter of fairness and predictability, a substantial number of retailers utilize individualized arbitration agreements to manage employment-related disputes

[2] This information is available at http://www.bls.gov/iag/tgs/iag44-45.htm (last visited October 8, 2016). Statistics are current as of either July or August 2016.

for all of their employees. The legality of all those agreements is at stake in this case.

In light of the problems caused by the circuit split, and the widespread nature of individualized arbitration agreements, the Court should grant certiorari and decide this case expeditiously.

II. This Case Is A Better Vehicle Than *Murphy Oil*.

The RLC agrees with Petitioner that this case is the ideal vehicle to consider the question presented. As Petitioner notes, this case presents the conflict of authority in its clearest possible form: the arbitration agreement invalidated by the Ninth Circuit is identical to the arbitration agreement upheld by the Second Circuit in *Sutherland v. Ernst & Young, LLP*, 726 F.3d 290 (2d Cir. 2013). Pet. 22-23. This situation precisely reflects the potential catch-22 in which national retailers could find themselves if the circuit split is not resolved. Moreover, the Ninth Circuit's decision was accompanied by a detailed dissent, ensuring that the arguments on both sides of this important question were fully aired.[3]

The RLC is aware that the Board has filed a separate petition for certiorari challenging the Fifth Circuit's decision in *Murphy Oil*. *See NLRB v. Murphy Oil USA, Inc.*, No. 16-307 (pet. filed Sept. 9, 2016). In

[3] Alternatively, the Court may wish to consider granting certiorari in this case and consolidating it with *Epic Systems Corp. v. Lewis*, No. 16-285 (pet. filed Sept. 2, 2016), which presents the same question.

the RLC's view, the Court should grant the petition for certiorari in this case, and should hold the Board's petition in *Murphy Oil* until this case is decided.

The Board's petition declares that the Board's presence as a party makes *Murphy Oil* the best vehicle. *See Murphy Oil* Pet. 22 n.9, 23 n.10, 2016 WL 4761717. But the mere fact that the government is a party to litigation does not, in and of itself, make a case a superior vehicle for this Court's review. Indeed, as explained below, there are four reasons why this case would be a markedly better vehicle than *Murphy Oil*.

First, as Petitioner states, this case presents the paradigmatic procedural context in which the question presented will arise: a lawsuit brought by an employee in which the employer seeks to compel arbitration. Pet. 2.

By contrast, *Murphy Oil* arises in the context of a Board enforcement action against an employer that successfully moved to compel arbitration. That procedural posture is the exception rather than the rule: employee arbitration agreements are so widespread that the Board cannot possibly pursue an enforcement action in any more than a small fraction of cases where an employer compels arbitration of a dispute with an employee. The Court should grant certiorari in a case that presents a realistic portrayal of the context in which the issue will typically arise.

Second, in addition to being unusual, *Murphy Oil*'s procedural posture is also awkward. In *Murphy Oil*, an employee brought a putative collective action against Murphy Oil in the Northern District of

Alabama. Murphy Oil successfully moved to dismiss that collective action and compel individual arbitration. The Board then conducted an enforcement proceeding against Murphy Oil, and concluded, by a 3-2 vote, that Murphy Oil's successful motion to dismiss constituted an unfair labor practice under the NLRA. *See* 808 F.3d at 1015-16 (describing procedural history). The Fifth Circuit then granted Murphy Oil's petition for review of the Board's decision in relevant part. *Id.* at 1018. Thus, the Board order under review in *Murphy Oil* is, in effect, a collateral attack by the Board on a federal district court's decision.

This unusual procedural posture results in complex constitutional and jurisdictional questions. As the Board's *Murphy Oil* dissenters pointed out, punishing an employer for a *successful* motion to dismiss in a federal District Court raises serious Petition Clause concerns. *See Murphy Oil* Pet. App. 127a, 146a n.15 (citing *BE & K Constr. Co. v. NLRB*, 536 U.S. 516 (2002)). Moreover, it is not even clear that Article III permits the Board to, in effect, reopen a judgment declaring an individualized arbitration agreement to be enforceable. *Cf. Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). It is the Eleventh Circuit, not the Board, which is the proper venue to challenge the Northern District of Alabama's ruling. *Cf. District of Columbia Ct. of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). At a minimum, the Court should err on the side of granting certiorari in the case that does not raise these difficult collateral issues.

Third, there is a risk that a decision in *Murphy Oil* would not resolve the question presented as applied to the mine run of cases in which the Board is not a party. If the Court grants certiorari in *Murphy Oil*, the Board may take the position that because the case arises from a Board enforcement proceeding, an extra measure of deference to the Board's conclusions is warranted.

In the RLC's view, this position would be wrong; the Court should review the legal issues *de novo* regardless of whether an appeal arises from private litigation or from a Board enforcement action. "Like other administrative agencies, the NLRB is entitled to judicial deference when it interprets an ambiguous provision of a statute *that it administers*." *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536 (1992) (emphasis added). But the Board does not administer the FAA, and as this Court has held, "the Board's interpretation of a statute … far removed from its expertise merit[s] no deference from this Court." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 143-44 (2002). Thus, the Court owes no deference to the Board's efforts to reconcile the NLRA with the FAA. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528-29 (1984) (rejecting Board's application of the NLRA that conflicted with Bankruptcy Code); *id.* at 529 n.9 ("While the Board's interpretation of the NLRA should be given some deference, the proposition that the Board's interpretation of statutes outside its expertise is likewise to be deferred to is novel. We see no need to defer to the Board's interpretation of Congress's intent in passing the Bankruptcy Code.").

Nevertheless, if the Board argues that some aspect of the agency decision is entitled to deference, there is a risk that the Court's decision will not apply to lawsuits that do *not* arise in the context of Board enforcement actions—which, as noted above, will be most lawsuits. Granting certiorari in the instant case, rather than in *Murphy Oil*, will prevent that prospect from arising.

Fourth, the question presented in *Murphy Oil* is poorly stated and will artificially truncate the scope of the issues before this Court. The Board's question presented is as follows:

> Whether arbitration agreements with individual employees that bar them from pursuing work-related claims on a collective or class basis in any forum are prohibited as an unfair labor practice under 29 U.S.C. 158(a)(1), because they limit the employees' right under the National Labor Relations Act to engage in "concerted activities" in pursuit of their "mutual aid or protection," 29 U.S.C. 157, and are therefore unenforceable under the saving clause of the Federal Arbitration Act, 9 U.S.C. 2.

Murphy Oil Pet. i.

Framed as such, the Board's question presented assumes the premise that *if* individualized arbitration agreements are illegal under the NLRA, *then* they would be unenforceable under the FAA's savings clause. The FAA's savings clause provides that arbitration agreements may be invalidated upon "grounds as exist at law or in equity for the revocation of any contract"; thus, according to the Board's

premise, a rule declaring individualized arbitration agreements to be illegal *constitutes* "grounds as exist at law or in equity for the revocation of any contract," and permits an arbitration agreement to be invalidated without any further inquiry.

But that premise directly conflicts with this Court's decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). In *Concepcion*, California had adopted a rule holding that individualized arbitration agreements were illegal. The question before the Court was whether that rule was preempted by the FAA. If the Board's premise was correct, the answer would have been "no." The FAA's savings clause applies to *any* "grounds as exist at law or in equity for the revocation of any contract"—whether such "grounds" are under state law or federal law. 9 U.S.C. § 2. Thus, if, as the Board maintains, a rule declaring individualized arbitration agreements to be illegal constituted "grounds as exist at law or in equity for the revocation of any contract," then California's rule would have fallen within the savings clause, and would not have conflicted with the FAA.

Yet, the Court held that California's rule was preempted, reasoning that "[a]lthough § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." 563 U.S. at 343. In other words, *Concepcion*'s holding was that a rule invalidating individualized arbitration agreements *did not constitute* "grounds as exist at law or in equity for the revocation of any contract," which directly

contradicts the premise of the Board's question presented. Rather, *Concepcion* held that a rule invalidating individualized arbitration agreements conflicted with the FAA. For the identical reason, if the Board is correct that the NLRA invalidates individualized arbitration agreements, then the NLRA, too, conflicts with the FAA.

Of course, just because a federal law conflicts with the FAA, does not mean the FAA automatically prevails. When a state law conflicts with the FAA, the state law is automatically preempted under the Supremacy Clause. By contrast, when a federal law conflicts with the FAA, a different analysis is required: The Court must instead determine whether the federal statute invalidates arbitration agreements in sufficiently clear terms to override the FAA's command. *See generally CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 672-73 (2012). In many statutes—including certain employee causes of action—Congress has indeed stated clearly that arbitration agreements are unenforceable, and the FAA therefore gives way. *See, e.g.*, 18 U.S.C. § 1514A(e)(2) (employee whistleblower statute) ("No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section."). Thus, the question before the Court is whether the NLRA falls within the category of statutes that invalidate arbitration agreements in sufficiently clear terms to override the FAA's command.

The Board's question presented would sweep that question under the rug. Under the Board's framing,

the sole question before the Court is whether the NLRA bars individualized arbitration agreements; if it does, then the savings clause applies and no further analysis is required. The Board's question presented completely ignores the critical question of whether the NLRA speaks with sufficient clarity to override the FAA.

By contrast, the question presented in the instant case captures all of the issues presented by this case: "Whether the collective-bargaining provisions of the National Labor Relations Act prohibit the enforcement under the Federal Arbitration Act of an agreement requiring an individual to arbitrate claims against an employer on an individual, rather than collective, basis." Thus, the Court should grant certiorari in this case, rather than in *Murphy Oil*, in which the question presented is designed to artificially limit the scope of the issues before the Court.

III. Invalidating Individualized Arbitration Agreements Would Have Harmful Consequences For Both Employers and Employees.

On the merits, the Court should hold that individualized arbitration agreements with employees are enforceable. The RLC fully agrees with Petitioner's arguments that the FAA requires enforcement of individualized arbitration agreements, Pet. 15-19, and will not reiterate them here. Rather, the RLC will highlight the deleterious consequences of the Board's position.

If the Court holds that individualized employee arbitration agreements are unenforceable, its decision would spell the end of employee arbitration. Employers would not agree to arbitrate claims if they faced the risk of being forced into class arbitration. As the Court observed in *Concepcion*, "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." 563 U.S. at 348. Further, given that a single class action can lead to enormous liability, employers would be unwilling to sacrifice the elaborate discovery, cumbersome procedures, and layers of appellate review that characterize litigation in court. Consider, for instance, the historic *Wal-Mart* litigation, in which the Ninth Circuit upheld the certification of a class of 1.5 million Wal-Mart employees, only to be reversed unanimously by this Court. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). If the order certifying the class had been left intact, Wal-Mart would have faced the risk of a gargantuan damages award. There is no way a rational employer would leave such a momentous class-certification decision to a single arbitrator, subject only to exceedingly deferential judicial review.

Thus, abolishing individualized employee arbitration would mean abolishing employee arbitration altogether. That would harm both employers and employees. Employers, of course, have a strong incentive to avoid class actions that may lead to *in terrorem* settlements, with large sums flowing to class-action lawyers. But abolishing arbitration would harm

employees too. Arbitration is an inexpensive and speedy way of resolving disputes. *Concepcion*, 563 at 345 ("[T]he informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution."). And both the low cost and the speed of arbitration are in employees' interests.

First, many employment cases are low-value disputes, and the cost of litigating them may well exceed the employee's expected recovery. Thus, consigning these claims to litigation will mean that employees will never be able to bring them at all. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) ("Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contract."). For these employees, class actions are no panacea—as *Wal-Mart* demonstrates, many types of employee claims cannot be brought as class actions. Even if the employee winds up as a class member, the employee will yield the fate of his case to a class action lawyer without a meaningful voice in how the case is litigated or resolved.

By contrast, arbitration is sufficiently cheap that employees can pursue all but the lowest-value claims. It is common for employers to cover the vast majority of the fee for initiating an arbitration so that arbitration can be an affordable option for its employees. For example, one of the RLC's members enters into a standard arbitration agreement with its employees, in which it promises to pay all of the American

Arbitration Association's costs and all arbitrator's fees, except for a $200 contribution from the employee—which it reimburses to the employee if the employee prevails in the arbitration. And while employees may be required to pay their own attorney's fees (as in litigation), those fees will be far cheaper in the arbitration context, in which the parties forego expensive discovery procedures. Thus, arbitration may be the only realistic mechanism for an employee to bring his dispute with his employer before a neutral third party. Abolishing employee arbitration would preclude employees from bringing many claims altogether. *See* Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 Disp. Resol. J. 9, 11 (2003) (citing empirical evidence that "lower-income employees cannot afford to take … employment-related claims to court," and "arbitration may be the sole forum for their claims").

Second, the need for speedy dispute resolution is of particular import in the employment context. Employee litigation is unique in that it pits two who may have an ongoing relationship against each other. An employee who is bringing claims against his employer while still on the job must also cooperate with his employer on a day-to-day basis. Especially in these cases, it is critical to adopt a dispute resolution process that preserves workplace harmony to the greatest possible extent. In the experience of the RLC's members, the arbitration process ensures that disputes can be quickly resolved without adversarial procedures.

This problem is exacerbated in the class action context. It is difficult to conceive of a procedural device

more antithetical to the goal of speedy and informal dispute resolution than the class action. The notion that class actions will promote the NLRA's goal of workplace cooperation is divorced from reality.

Not only does litigation result in concrete harms to employees, but there is no evidence of any corresponding benefit. The available evidence shows that litigation in general, and class actions in particular, do not result in greater recoveries for employees than arbitration. Empirical analysis has shown that employees are no more likely to prevail in litigation than in arbitration. Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58 Disp. Resol. J. 56, 58 (2004) ("[O]ur findings show that there is a statistically greater probability of a plaintiff winning a discrimination case before an arbitrator than in federal court."); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 46 (1998) ("Comparisons of the result rates in arbitration versus litigation reveal that, contrary to what many would expect, employees prevail more often in arbitration than in court."). And there is a rich literature arguing that class actions typically are far more lucrative for class counsel than they are for the class. *See, e.g.*, Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 618-19 (2010); John H. Beisner et al., *Class Action 'Cops': Public Servants or Private Entrepreneurs?*, 57 Stan. L. Rev. 1441 (2005). There is simply no real-world basis

for the Board's assumption that forcing employees into court will make them better off.

Arbitration is good for employers and good for employees. The Court should not interpret the NLRA as a straightjacket that prohibits employers and employees from entering into these mutually beneficial agreements. The Court should hold that individualized employee arbitration agreements are enforceable.

CONCLUSION

The petition for writ of certiorari should be granted, and the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

DEBORAH R. WHITE
RETAIL LITIGATION CENTER, INC.
1700 N. Moore Street
Suite 2250
Arlington, VA 22209

ADAM G. UNIKOWSKY
Counsel of Record
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

October 11, 2016