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
KELLEY MCDANIEL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR *AMICUS CURIAE* INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The International Association of Defense Counsel (IADC), established in 1920, is an association of approximately 2,500 corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, culpable defendants are held liable for appropriate damages, and non-culpable defendants are exonerated and can defend themselves without unreasonable cost. In particular, the IADC has a strong interest in the fair and efficient administration of class actions as well as arbitrations, both of which are increasingly global in reach.

The abiding interest of the IADC in the benefits of arbitration is exemplified by its participation as *amicus* before this Court in several cases concerning federal arbitration law, including, inter alia, *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463

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[1] No counsel for a party authored this brief in whole or in part. Neither a party, nor its counsel, nor any other entity other than *amicus curiae* and counsel has made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for the parties were timely notified of the *amicus*' intent to file this brief under Sup. Ct. R. 37.2(a), and all parties have filed general letters with the Clerk's office consenting to the filing of *amicus* briefs or have separately consented to the filing of this brief.

(2015); and *Lewis v. Epic Systems*, 823 F.3d 1147 (7th Cir. May 26, 2016), petition for cert. pending, Case No. 16-285.

SUMMARY OF THE ARGUMENT

The petition for writ of certiorari arises from an undisputed, deepening circuit split – originating with the Seventh Circuit's opinion in *Lewis v. Epic Systems* and deepening with the Ninth Circuit's opinion in this case – concerning an issue of federal statutory interpretation and the enforceability of arbitration agreements with class action or collective action waivers in the employment context. In this *amicus* brief, we provide additional reasons why this Court's guidance concerning the impact of the National Labor Relations Act (NLRA) on the enforceability of such arbitration agreements under the Federal Arbitration Act (FAA) is needed now, and not later.

In the decision below, the Ninth Circuit departed from the Second, Fifth and Eighth Circuits and joined the Seventh Circuit in holding that employer-employee agreements to arbitrate employment disputes on an individual basis are impermissible restrictions on employees' rights to act in concert under the NLRA and therefore unenforceable under the FAA. Notably, the Ninth Circuit's ruling directly contravenes the Second Circuit's ruling in *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2013) (per curiam), in which the Second Circuit found the same arbitration agreement to be

valid and enforceable and reversed the district court's denial of Petitioner's motion to compel arbitration. Like the Seventh Circuit, the Ninth Circuit reached this conclusion by improperly beginning its analysis with a determination that such agreements could be deemed unlawful under the NLRA and then looking to whether the FAA changed this result. Instead, both courts should have begun with the presumption of enforceability required by the FAA and this Court's prior decisions.

This Court should grant review now because the Ninth Circuit's holding increases the potential for collateral unfair labor practice litigation before the National Labor Relations Board (NLRB) for employers across the country. Where employers seek to compel individual arbitration of employment disputes pursuant to a lawful arbitration agreement, they may face unfair labor practice charges from the NLRB asserting that, by seeking to compel arbitration, they committed an unfair labor practice[2] – even if they successfully compelled arbitration in a jurisdiction that enforces arbitration agreements with class action waivers. And because the NLRA's broad appellate venue provisions preclude any certainty regarding where such NLRB decisions may be heard on appeal, there is no guarantee that an appeal of an NLRB order invalidating an

[2] This approach amounts to punishing an employer for invoking its arbitration rights and improperly threatens the "emphatic federal policy in favor of arbitral dispute resolution" underlying the FAA, which this Court has reaffirmed multiple times. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 105 S. Ct. 3346, 3356 (1985).

arbitration agreement and declaring an employer to have engaged in an unfair labor practice will be heard in the same jurisdiction as the one that heard the motion to compel arbitration.

Thus, the uncertainty created by the circuit split concerning the enforceability of employment arbitration agreements has repercussions across the country. As a result, this Court should not wait for the circuit split to deepen even further before taking up the issue.

ARGUMENT

I. The Ninth Circuit's Analysis Incorrectly Burdens the Proponent of Arbitration in Contravention of this Court's Analysis in *CompuCredit Corp. v. Greenwood*.

The FAA declares that 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. The FAA, and FAA section 2 in particular, was intended to "'revers[e] centuries of judicial hostility to arbitration agreements,' by 'plac[ing] arbitration agreements upon the same footing as other contracts.'" *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974)). The FAA reflects "a 'liberal federal policy favoring arbitration.'" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 340 (2011) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24

(1983); *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)). This Court has repeatedly held that the "fundamental principle [is] that arbitration is a matter of contract," *Concepcion*, 563 U.S. at 339 (quoting *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010)); *see also Stolt-Nielsen S.A. v. Animal-Feeds Int'l Corp.*, 559 U.S. 662, 681 (2010); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989), and that courts must enforce arbitration agreements according to their terms, *Volt*, 489 U.S. at 478*; Stolt-Nielsen*, 559 U.S. at 682*; Concepcion*, 563 U.S. at 339.

This Court has repeatedly upheld agreements requiring the parties to arbitrate disputes individually, rather than on a class or collective basis. *See, e.g.*, *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308-10 (2013); *Concepcion*, 563 U.S. at 352. And this Court has further explained that these 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." *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012). These principles have been applied equally to employment disputes, even where the claims at issue implicated federal statutes that expressly provide for class or collective action litigation. *See, e.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (employee's claims under the Age Discrimination in Employment Act must be arbitrated "even if the arbitration could not go forward as a class action").

In contravention of this Court's precedent, the NLRB determined in 2012 that agreements requiring individual arbitration of employment disputes unlawfully interfere with employees' rights to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection" under NLRA Section 7. *D.R. Horton, Inc.*, 357 NLRB 2277, 2279 (2012); *see also* 29 U.S.C. § 157. The NLRB further concluded that such agreements violate NLRA Section 8(a)(1), which makes it an unfair labor practice to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [Section 7]." *Id*. at 2280; *see also* 29 U.S.C. § 158(a)(1). The NLRB accordingly ordered the employer-respondent to cease and desist from invoking a mandatory arbitration agreement with class and collective action waivers, and to rescind or revise its existing arbitration agreement to clarify that it did not constitute a waiver of the right to maintain employment-related class or collective actions. *Id*. at 2289.

NLRB orders are not self-enforcing. Rather, if an employer does not voluntarily comply with a remedial order issued by the NLRB, the NLRB may file a petition for enforcement with a United States circuit court of appeals within any circuit where the unfair labor practice in question occurred or where the person alleged to have committed an unfair labor practice resides or transacts business. 29 U.S.C. § 160(e). Similarly, "any person aggrieved by a final order of the [NLRB]" may obtain judicial review and seek to have the order modified or set aside by "any United States

court of appeals in the circuit in which the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business," or in the D.C. Circuit. 29 U.S.C. § 160(f). The employer-respondent in *D.R. Horton* filed a petition for review in the Fifth Circuit, and the NLRB filed a cross-application for enforcement. The Fifth Circuit ultimately refused to enforce the portion of the NLRB's order invalidating the employer's arbitration agreement on the basis of its class and collective action waivers, finding the NLRB's hostility to such waivers in employee arbitration agreements to be incompatible with the FAA. *D.R. Horton, Inc. v. Nat'l Labor Relations Bd.*, 737 F.3d 344, 364 (5th Cir. 2013).

Despite the Fifth Circuit's refusal to enforce the NLRB's order in *D.R. Horton*, employee-plaintiffs have begun citing the NLRA in opposition to employer-defendants' attempts to enforce agreements to arbitrate employment disputes on an individual basis. Until recently, this argument met little success. The Second Circuit affirmed the validity of the same arbitration agreement that the Ninth Circuit rejected here (*Sutherland*, 726 at 297 & n.8), and the Fifth and Eighth Circuits and the Supreme Courts of California and Nevada also rejected the argument that the NLRA renders unenforceable employee-employer agreements to resolve employment disputes in individual arbitration. *See Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772, 776 (8th Cir. 2016); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052, 1054-55 (8th Cir. 2013); *D.R. Horton, Inc. v. Nat'l Labor Relations Bd.*, 737 F.3d 344 (5th Cir. 2013);

Iskanian v. CLS Transp. L.A., LLC, 327 P.3d 129, 141 (Cal. 2014); *Tallman v. Eighth Jud. Dist. Ct.*, 359 P.3d 113, 122-23 (Nev. 2015).

But the Ninth Circuit in this case, like the Seventh Circuit, reached the opposite conclusion in employment cases involving motions to compel arbitration, concluding that arbitration agreements with class or collective action waivers were unenforceable under the NLRA. Both decisions relied on the FAA's savings clause, which creates an exception to the FAA's presumption of enforceability "upon such grounds as exist at law or in equity for the revocation of any contract" 9 U.S.C. § 2, and rejected this Court's prescribed analysis in *CompuCredit*, under which courts are required to determine whether another federal statute like the NLRA contains a "contrary congressional command" to that of the FAA. 132 S. Ct. at 669. Rather, the Ninth Circuit began with the conclusion that NLRA Section 7 creates a "substantive right" to the collective pursuit of "work-related legal claims" and that an employment arbitration agreement with a class or collective action waiver "interferes with" concerted legal action, and "cannot be enforced." Pet. App. at 1a. Like the Seventh Circuit, the Ninth Circuit relied on the FAA's savings clause to conclude that the FAA "does not dictate a contrary result." *Id.* at 12a.

Judge Ikuta dissented from the majority opinion below, taking issue with virtually every step of the majority's reasoning. (*See id*. at 25a-42a). As Judge Ikuta explained, the relevant inquiry under *CompuCredit* is whether an express "contrary congressional command"

appears in the statute at issue. *Id.* (citing *CompuCredit*, 132 S. Ct. at 669). If not, the statute can and should be harmonized with the FAA, which furthers the strong federal policy in favor of arbitration. *Id*. But the Ninth Circuit majority inverted this analysis by beginning with the NLRA and requiring the proponent of arbitration to show that the FAA overrides the NLRA, rather than beginning with the FAA's presumption that arbitration agreements are enforceable as written and requiring the party opposing arbitration to identify a "contrary congressional command" overriding the FAA. *See* 9 U.S.C. § 2; *CompuCredit*, 132 S. Ct. at 669. As the dissent concluded, this "erroneous reasoning leads to a result that is directly contrary to Congress's goals in enacting the FAA." (*See id.* at p. 40a).

II. The NLRA's Broad Appellate Jurisdiction Provisions Ensure that the Split of Authority Concerning the Enforceability of Employment Arbitration Class or Collective Action Waivers Will Reverberate Across the Country.

The Seventh and Ninth Circuits' hostility to arbitration agreements with class action waivers affects employers outside those circuits. This is because both courts' decisions pave the way for employee-plaintiffs opposing arbitration to file collateral unfair labor practice charges against employers who seek to assert their rights under the FAA.

As Petitioners' brief notes (*see* p. 23), an employer's "ability to enforce its uniform nationwide arbitration provision depends on where a given employee is located (or where the employee files suit)." But even if an employer may have a modicum of certainty regarding its ability to successfully compel arbitration in the Second, Fifth, or Eighth Circuits, that does not preclude collateral unfair labor practice litigation before the NLRB. This is because the logical consequence of the position that class and collective litigation is a protected "substantive" right is that any employer opposition to class or collective actions via efforts to enforce a provision requiring individual arbitration unlawfully "interferes with" this putative "right" in violation of NLRA Section 8(a)(1). *See* 29 U.S.C. § 158(a)(1). In accordance with this interpretation, the NLRB has not limited itself to ordering employers to rescind or revise arbitration agreements with class or collective action waivers, as it did in *D.R. Horton*. Instead, the NLRB has taken its hostility to such agreements to its logical conclusion, ordering employers to reimburse employee-plaintiffs for fees spent opposing motions to compel individual arbitration. *See*, *e.g.*, *Bloomingdale's, Inc.*, 363 NLRB No. 172, 2016 NLRB LEXIS 314 at *26 (Apr. 29, 2016).

Neither the FAA nor this Court's prior decisions support treating efforts to enforce lawful, valid arbitration agreements like a poison pill that invites significant litigation costs and collateral litigation.

Nevertheless, attorneys representing plaintiffs[3] in employment class actions have already seized on the increased leverage that a tactical unfair labor practice charge may confer; so long as the circuit split remains, this practice will be encouraged. Thus, an employer facing an employment class action may successfully compel arbitration in a state or federal district court, and further successfully defend on appeal the court's order compelling the parties to arbitration. But the NLRB may still pursue that employer in collateral unfair labor practice litigation. *See id.* at **15-26 (Apr. 29, 2016) (ordering employer to reimburse all fees expended by plaintiffs incurred in unsuccessfully opposing employer's motion to compel arbitration, even though the Ninth Circuit affirmed the agreement's enforceability, and that its opt-out provision rendered it voluntary and not unlawful under the NLRA); *see also Johnmohammadi v. Bloomingdale's*, 755 F.3d 1072 (9th Cir. 2014).

Moreover, because an appeal of an NLRB decision ordering the reimbursement of attorneys' fees incurred in opposition to a successful motion to compel arbitration may be heard in nearly any circuit, an employer may face inconsistent rulings and punishment for enforcing an arbitration provision that was already found

[3] Because the NLRB's rules permit charges to be filed by "any person," 29 C.F.R. § 102.9, an attorney representing a group of employees may file such a charge, even if no class members file a charge themselves. *See Labor Ready Sw., Inc., and Jason Kuller, Esq. of Thierman Law Firm, P.C.*, 363 NLRB No. 138, 2016 NLRB LEXIS 159 (Feb. 26, 2016).

to be enforceable by a different federal circuit court or a state supreme court.

There is no certainty at the outset of unfair labor practice litigation that an appeal of an NLRB order invalidating such an agreement will land in a specific venue. "[A]ny person" who is "aggrieved" by an NLRB order may obtain review of the order in either the circuit in which the unfair labor practice was alleged to have been committed, the circuit wherein such person resides or transacts business, or the Court of Appeals for the District of Columbia. 29 U.S.C. § 160(f). Further, even if an employer timely files a petition for review in its home circuit, another petition may be filed in another circuit by another person "aggrieved" by that NLRB order. When these competing petitions for review are filed in different circuits on the same day, the conflict is resolved by the judicial panel on multidistrict litigation selecting a circuit "by means of random selection" and consolidating all other petitions for review of the NLRB's order there. 28 U.S.C. § 2112(a)(3); *see also Samsung Elecs. Am., Inc. v. NLRB*, No. 16-60089 (5th Cir. 2016), *consolidated sub nom. Jorgie Franks v. NLRB*, No. 16-10644 (11th Cir. 2016). Such consolidated appeals could easily end up in the Seventh or Ninth Circuits.

As a result, employers across the country – even those who "reside or transact business" outside the Seventh or Ninth Circuits – cannot know whether the lawfulness of their arbitration agreements will be assessed in a jurisdiction that is faithful, or hostile, to

such agreements. This uncertainty may well lead employers to assess whether to promulgate, maintain, or enforce arbitration agreements in light of the least-protective jurisdictions, which would further undermine the Congressional policy expressed in the FAA.

We urge this Court to remedy the perverse incentives for gamesmanship and tactical unfair labor practice litigation created by the Ninth Circuit's decision and the attendant deepening circuit split.

CONCLUSION

For the foregoing reasons and for the reasons expressed in the Petition for Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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