No. 16-307

IN THE

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

MURPHY OIL USA, INC., *ET AL.*,

Respondents.

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

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s)**

Other:

INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., is a consumer advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen has longstanding interests in issues concerning class actions and mandatory arbitration, and its attorneys have participated as counsel to parties or amici curiae in many cases involving such issues in this Court and lower courts. In particular, Public Citizen's attorneys represented the respondents in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), and *CompuCredit Corp v. Greenwood*, 132 S. Ct. 665 (2012). Public Citizen's attorneys are familiar with practice before this Court at the certiorari stage, and often prepare or assist in the preparation of briefs in opposition and—less frequently because cases that genuinely merit review are rarer—petitions for certiorari or amicus briefs supporting them.

Public Citizen submits this brief to explain why this case is the most appropriate vehicle for resolving the conflict among the circuits over whether arbitration agreements that bar class actions infringe workers' rights to engage in concerted activity under the National Labor Relations Act (NLRA).

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel of record for all parties received 10 days' notice of the filing of this brief, and letters of consent to its filing from counsel for all parties are on file with the Clerk.

REASONS FOR GRANTING THE WRIT

In quick succession, this Court has received four petitions for certiorari raising the question whether workplace arbitration agreements that ban class actions and other collective proceedings violate the federal labor laws' protection of concerted worker action. In addition to the petition of the National Labor Relations Board (NLRB) in this case, the petitions are: *Epic Systems Corp. v. Lewis*, No. 16-285 (filed Sept. 2, 2016), *Ernst & Young LLP v. Morris*, No. 16-300 (filed Sept. 8, 2016), and *Patterson v. Raymours Furniture Co.*, No. 16-388 (filed Sept. 22, 2016).

The petitions reveal irreconcilable conflict among the circuits. The petitions in *Epic Systems* and *Ernst & Young* seek review of decisions of the Seventh and Ninth Circuits, respectively, holding that arbitration agreements that do not permit collective proceedings violate federal labor laws and are not enforceable under the Federal Arbitration Act (FAA). The petitions in this case and *Patterson* arise from decisions of the Fifth and Second Circuits, respectively, holding that such arbitration agreements do not violate the labor laws and that the FAA commands their enforcement. As all four petitions acknowledge, the Eighth Circuit has agreed with the Fifth and Second, *see Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013), and the issue is pending in at least five more circuits. *See* NLRB Pet. 24 & n.11.

The intercircuit conflict and the importance of the issue make it likely that this Court will agree that the issue merits review. The question for the Court is not so much *whether* to grant certiorari as *which* petition to grant. Under the circumstances, the Court should, at a minimum, grant the NLRB's petition. It should

either hold the others pending the decision in this case, or grant one or more of them as well.

In several ways, the petitions are on equal footing. First, cognizant of the "cert-worthiness" of the questions presented in the cases, the parties jockeyed for position in filing their petitions: The petitioners in *Epic Systems* and *Ernst & Young* filed ahead of their original or extended due dates to beat the extended filing date granted to the NLRB in this case, and the petitioners in *Ernst & Young* and *Patterson* filed less than three weeks after the decisions of which they seek review. The horse race effectively resulted in a dead heat, as extensions of the dates for filing responses make it likely that all four will be considered by this Court at or about the same time.

Second, each of the petitions presents the issue squarely and cleanly, and the question determined the outcome at the appellate level in each case. None of the petitions identifies any significant respect in which the specific case it concerns presents the issue better than the others, and the NLRB's statement of the question presented fairly encompasses all the issues the Court must decide to resolve the matter. Although the *Ernst & Young* petition argues that the majority and dissenting opinions in that case addressed the arguments on each side of the issue more thoroughly than the opinions in the other cases, *Ernst & Young* Pet. 21–22, that point is of no moment to the choice of cases before the Court. Whichever case the Court selects, it will have the benefit of the opinion of each appellate court that has considered the issue—not only in the cases that produced the petitions, but in earlier cases as well.

Third, there are no material differences among the arbitration agreements at issue in the cases. The petition in *Ernst & Young* argues that the specific arbitration agreement at issue in that case has been the subject of conflicting decisions of the Ninth and Second Circuits. *See id*. at 23. There is no argument, however, that the question presented turns in any way on language specific to that agreement, and deciding any of the cases will resolve whatever difficulty Ernst & Young, or any other multistate employer (*see*, *e.g.*, *Epic Systems* Pet. 24), faces in being subject to different standards in different circuits.

Given that none of the petitions offers any timing advantage or has a real claim to presenting the issue better than the others, the natural course of action would be to grant the NLRB's petition, which arises from the sole case among the four in which the NLRB is a party. The issue concerns the NLRB's construction of the scope of concerted activity under the federal labor laws as well as the relationship between the NLRA's protection of such activity and the FAA's provisions concerning the enforceability of arbitration agreements. "[T]he task of defining the scope of [concerted activity] 'is for the Board to perform in the first instance as it considers a wide variety of cases that come before it,' … and, on an issue that implicates its expertise in labor relations, a reasonable construction by the Board is entitled to considerable deference." *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984). Respect for the "overriding interest in a uniform, nationwide interpretation of the federal statute by the centralized expert agency created by Congress," *N.Y. Tel. Co. v. N.Y. State Dep't of Labor*, 440 U.S. 519, 528 (1979) (plurality opinion), would ordinarily counsel allowing the Board, where possible, to

participate as a party to defend its construction of federal labor law against a charge that that construction violates allegedly contrary commands of another statute.

The petitioners in both *Epic Systems* and *Ernst & Young* suggest, counterintuitively, that a case in which the NLRB is *not* a party is a better choice. Employers and employees, these petitioners state, are the "real parties in interest …[,] have the most direct stake in the courts' interpretations of these statutes and therefore are the parties most acutely interested in the question presented." *Epic Systems* Pet. 25. They assert that employers and employees "are best situated to represent the two opposing viewpoints" at stake. *Id.*; *Ernst & Young* Pet. 22 (same phrase).

Although employers certainly have a powerful interest in seeking to block workers from engaging in collective legal actions, that interest will be well and fully represented if the Court grants the Board's petition in this case. The respondent, Murphy Oil Corp., has the same interest as the employers in the other cases and, as a Fortune 1000 company (ranked number 662 in 2016),[2] has the resources needed to secure the best possible representation before this Court.

Employees, too, have an undoubted interest in the question presented, but that interest alone does not situate them to represent their viewpoint on the issue better than the NLRB, represented by the Office of the Solicitor General of the United States. No matter how able and experienced the attorneys representing the employees in the wage-and-hour cases that gave

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[2] *See* http://beta.fortune.com/fortune500/murphy-oil-662.

rise to the petitions in *Epic Systems* and *Ernst & Young* may be, it strains credulity to assert that they would be better situated to defend the Board's position than are the attorneys of the Solicitor General's Office. Tellingly, in the one case where employees filed their own petition, *Patterson*, they do *not* assert that they are better situated then the Board to present the issue to this Court. Rather, they urge the Court to give precedence to *this* case "because it is the Board's analysis that is ultimately at issue and because the Solicitor General is best situated to address the interplay among the … federal statutes at issue." *Patterson* Pet. 9.

Moreover, the interests at stake are not just those of the workers in the particular cases before the Court. The Court long ago recognized that the protections granted workers by the NLRA are not the exclusive property of those workers, but were created by Congress in the public interest, and "[t]he Board as a public agency acting in the public interest … is chosen as the instrument to assure protection from the described unfair conduct." *Amalgamated Util. Workers v. Consol. Edison Co.*, 309 U.S. 261, 265 (1940). The suggestion by Epic Systems and Ernst & Young that the Board should take a back seat to representatives of workers affected by unfair labor practices runs counter to the primacy of the Board's role in labor-law enforcement, as it could always be asserted that specific workers are the "real parties in interest" when their rights have been violated. That argument ignores the importance of the Board's function of representing the public interest animating the federal labor laws.

Indeed, "[t]he public interest in effectuating the policies of the federal labor laws, not the wrong done the individual employee, is always the Board's principal concern in fashioning unfair labor practice remedies." *Vaca v. Sipes*, 386 U.S. 171, 182 n.8 (1967). As the lone party in any of the cases answerable to the public interest, the Board has a strong claim to be "best situated" to represent the interest ultimately at stake here.

At bottom, granting only an employer-versus-employee case would relegate the Solicitor General's office to a subsidiary role as amicus curiae, with a diminished brief and a reduced opportunity for argument. That outcome might well impair the presentation to the Court and would ill serve the objective of assisting the Court in resolving the propriety of the government's interpretation of a statute that it is charged with administering.

When the Court has a choice of multiple cases presenting the same issue, the selection may unavoidably confer some advantage on one side or the other. Here, however, where the only reason *not* to select the Board's petition would be to deny to one side the best and most appropriate advocate for its viewpoint, the Court should follow the most natural course of granting the petition in this case. The Court may, of course, grant more than one of the four petitions if it feels that doing so would further the goal of a well-balanced representation of the opposing interests and viewpoints. But if the Court grants only one, it should unquestionably be the Board's.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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