No. _____

IN THE

Supreme Court of the United States

CONNIE PATTERSON, on behalf of herself and all others similarly situated, DAVID AMBROSE,
Petitioners,

v.

RAYMOURS FURNITURE COMPANY, INC.,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

JUSTIN M. SWARTZ
OUTTEN & GOLDEN LLP
685 Third Avenue, 25th Floor
New York, NY 10017
(212) 245-1000
jms@outtengolden.com

*MICHAEL RUBIN
ERIC P. BROWN
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151
mrubin@altber.com
ebrown@altber.com

**Counsel of Record*

Peake DeLancey Printers, LLC - (301) 341-4600 - Cheverly MD

QUESTIONS PRESENTED

Whether a provision in an employment arbitration agreement that prohibits employees from seeking adjudication of any work-related claim on a class, collective, joint, or representative basis in any forum is invalid and unenforceable under Sections 2 and 3 of the Norris-LaGuardia Act, 29 U.S.C. §§102, 103, and Sections 7 and 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §§157, 158(a)(1), because it "interfere[s]" with the employees' statutory right "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection."

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

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Connie Patterson, on behalf of herself and all others similarly situated, and David Ambrose respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Second Circuit's September 2, 2016, summary order is available at: __ F. App'x __, 2016 WL 4598542 (App. 1a-8a) (corrected version dated September 14, 2016). The district court decision granting respon-

dent employer's motion to compel arbitration and dismissing the case is reported at 96 F.Supp.3d 71 (App. 25a-42a).

JURISDICTION

The judgment of the Second Circuit was entered on September 2, 2016. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Norris-LaGuardia Act ("NLGA"), the National Labor Relations Act ("NLRA"), and the Federal Arbitration Act ("FAA").

Section 2 of the NLGA provides:

> In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:
>
> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own

> choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

29 U.S.C. §102.

Section 3 of the NLGA provides:

> Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 102 of this title, is declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court.

29 U.S.C. §103.

Section 15 of the NLGA provides:

> All acts and parts of acts in conflict with the provisions of this chapter are repealed.

29 U.S.C. §115.

Section 7 of the NLRA provides:

> 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, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. §157.

Section 8(a)(1) of the NLRA provides:

> It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title . . . .

29 U.S.C. §158(a)(1).

Section 2 of the FAA provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, 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.

INTRODUCTION

This is one of four cases currently before the Court that raise the identical issue: whether an employer can prevent its workers from exercising their federal labor law right to join together to seek adjudication of workplace disputes by inserting a clause in a mandatory employment arbitration agreement that prohibits those employees from pursuing concerted legal action in any forum. *See NLRB v. Murphy Oil*, No. 16-307 (petition filed Sept. 9, 2016 by Solicitor General on behalf of NLRB); *Epic Sys. Corp. v. Lewis*, No. 16-285 (petition filed Sept. 2, 2016 by employer); *Ernst & Young U.S. LLP v. Morris*, No. 16-300 (petition filed Sept. 8, 2016 by employer). If such a prohibition were set forth in an individual stand-alone employment agreement, it would surely be unlawful and unenforceable, because it would deprive covered employees of the core statutory right guaranteed by the 1932 NLGA and 1935 NLRA—the right to be free from employer interference, restraint, and coercion when seeking to engage in concerted activity for mutual aid and protection. The question in these cases is whether the same prohibition, if inserted instead in an employment arbitration agreement, becomes lawful and enforceable as a result of the 1925 FAA's general policy favoring enforcement of private arbitration agreements according to their terms.

An irreconcilable conflict exists among the federal and state appellate courts to have considered this issue. *Compare Morris v. Ernst & Young LLP*, __ F.3d __, 2016 WL 4433080 (9th Cir. Aug. 22, 2016), *and Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), *with Cellular Sales of Missouri, LLC v. NLRB*,

824 F.3d 772 (8th Cir. 2016), *Murphy Oil v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), *D.R. Horton v. NLRB*, 737 F.3d 344 (5th Cir. 2013), *Sutherland v. Ernst & Young*, 726 F.3d 290 (2d Cir. 2013), *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013), *Tallman v. Eighth Judicial District Court*, 359 P.3d 113 (Nev. 2015), *and Iskanian v. CLS Transp. L.A., LLC*, 59 Cal.4th 348 (2014), *cert denied*, 135 S.Ct. 1155 (2015). That conflict will only deepen if certiorari review is delayed, because the same issue is now fully briefed and pending before at least five more circuit courts of appeal. *See The Rose Group v. NLRB*, 3d Cir. Nos. 15-4092 and 16-1212; *AT&T Mobility Servs., LLC v. NLRB*, 4th Cir. Nos. 16-1099 and 16-1159; *NLRB v. Alternative Entm't, Inc.*, 6th Cir. No. 16-1385; *Everglades Coll., Inc. v. NLRB*, 11th Cir. Nos. 16-10341 and 16-10625; *Price-Simms, Inc. v. NLRB*, D.C. Cir. Nos. 15-1457 and 16-1010. That conflict can only be resolved by this Court.

For more than 80 years, the National Labor Relations Board has held that an employer violates federal labor law by seeking to enforce any individual employment contract or workplace policy that prohibits its employees from acting in concert to vindicate workplace rights. The right "to engage in . . . concerted activities for the purpose of . . . mutual aid and protection" has long been the core substantive right protected by the NLGA and NLRA; and federal courts have repeatedly agreed with the Board that the right extends to concerted efforts to seek adjudication of claims challenging the lawfulness of an employer's workplace policies and practice. *See, e.g., Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978); *Brady v. Nat'l Football League*, 644 F.3d 661, 673 (8th

Cir. 2011); *Mohave Elec. Co-op., Inc. v. NLRB*, 206 F.3d 1183, 1188-89 (D.C. Cir. 2000).

The Board first applied these statutory principles to invalidate an employer's use of a mandatory arbitration agreement to prohibit concerted adjudication activity in *D.R. Horton, Inc.*, 357 NLRB No. 184, 2012 WL 36274 (2012), *rev'd in part*, 737 F.3d 344 (5th Cir. 2013), and it expanded upon that analysis two years later in *Murphy Oil*, 361 NLRB No. 72, 2014 WL 5465454 (2014), *rev'd in part*, 808 F.3d 1013 (5th Cir. 2015). Since then, the Board has reached the same result, under similar if not identical circumstances, in well over 70 cases, many now pending in the federal courts of appeals.

Although the appellate courts that initially reviewed the Board's rulings on this issue denied enforcement to those rulings, principally on the ground that the Board's reasoning was not entitled to deference and that the pro-arbitration policies of the FAA trumped the federal labor statutes,[1] the more recent decisions, by the only two circuit courts to "engage[] substantively with the relevant arguments," *Morris*, 2016 WL 4433080 at *10 n.16 (quoting *Lewis*, 823 F.3d at 1159), agreed with the NLRB and concluded that because of the FAA's "savings clause," 9 U.S.C. §2, there is no conflict between the FAA and the long-established federal labor policies guaranteeing employees the right to act in concert to vindicate workplace rights.[2] The Second Circuit panel in the present case (Lynch,

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[1] *See D.R. Horton*, 737 F.3d 344; *Owen*, 702 F.3d 1050; *Sutherland*, 726 F.3d 290.

[2] *See Morris*, 2016 WL 4433080 at *7-*8; *Lewis*, 823 F.3d at 1157.

Carney, Hellerstein, J.J.), after considering the Seventh Circuit's and Ninth Circuit's analysis, wrote: "If we were writing on a clean slate, we might well be persuaded, for the reasons forcefully stated in Chief Judge Wood's and Chief Judge Thomas's opinions in *Lewis* and *Morris*, to join the Seventh and Ninth Circuits and hold that the [employer's arbitration agreement's] waiver of collective action is unenforceable. But we are bound by our Court's decision in *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013)"—which had followed the Fifth and Eighth Circuits in a brief footnote, and which the panel in this case found controlling absent rehearing en banc. App. 7a-8a; *see also SF Markets v. NLRB*, Case No. 16-60186 (5th Cir. Order of July 26, 2016) (Dennis, J., concurring) ("Given the inter-circuit conflict generated by the well-reasoned opinion in *Lewis*, I urge our court to reconsider this issue en banc.").[3]

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[3] The footnote in the per curiam *Sutherland* decision had stated:

> One of Sutherland's alternative arguments for affirming the District Court is that the National Labor Relations Board, in *In re D.R. Horton, Inc.*, 357 NLRB No. 184 (Jan. 3, 2012), held that a waiver of the right to pursue a FLSA claim collectively in any forum violates the National Labor Relations Act ("NLRA"). Like the Eighth Circuit, however, we decline to follow the decision in *D.R. Horton*. Even assuming that "D.R. Horton addressed the more limited type of class waiver present here, we still would owe no deference to its reasoning." *Owen*, 702 F.3d at 1053-54; *see also Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144, 122 S.Ct. 1275, 152 L.Ed.2d 271 (2002) ("[W]e have accordingly never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA."). Moreover, *In re D.R.*

Petitioners now ask this Court to resolve the square conflict among state and federal appellate courts and to hold that the Board was correct as a matter of law and acted well within its statutory authority in concluding that an employment contract that prohibits workers from pursuing legal claims on a concerted action basis in all forums is void and unenforceable as a matter of federal labor law, even if included in an employment arbitration agreement.[4]

Petitioners further ask this Court to designate *NLRB v. Murphy Oil*, *supra*, as the lead 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 three federal statutes at issue. Finally, petitioners ask the

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Horton may have been decided by the National Labor Relations Board without a proper quorum. *See Canning v. NLRB*, 705 F.3d 490, 499 (D.C. Cir. 2013) (holding that the President's "appointments [of three NLRB members] were constitutionally invalid and the Board therefore lacked a quorum"), *cert. granted*, ___ U.S. ___, 133 S.Ct. 2861, ___ L.Ed.2d ___ (Mem.) (2013).

Sutherland, 726 F.3d at 297 n.8. This Court later reversed in relevant part the D.C. Circuit's *Noel Canning* decision in *NLRB v. Noel Canning*, __ U.S. __, 134 S.Ct. 2550 (2014).

[4] The Court's resolution of this petition will also resolve the unfair labor practice charge filed by petitioners against respondent Raymours which raises the identical issue, *see* NLRB Case No 02-CA-136163, which the parties presented to the Board on stipulated facts. When the Board filed its amicus brief in support of petitioners in this case in the Second Circuit, it agreed to hold the administrative case in abeyance and to accept the courts' ruling in this action as controlling. Brief of Amicus Curiae National Labor Relations Board at 2, *Patterson v. Raymours Furniture Co, Inc.*, No. 15-2820 (2d Cir. Dec. 23, 2015).

Court to consider these issues in the context of not only the NLRA and FAA, which were the focus of the Seventh and Ninth Circuit's decisions, but the NLGA as well, which the Board has consistently cited as support for its construction of the NLRA in *D.R. Horton*, *Murphy Oil* and all subsequent cases,[5] and which the Second Circuit in the present case recognized was central to petitioner's and the Board's analysis. App. 5a & n.5.

STATEMENT OF THE CASE

A. Facts

Respondent Raymours Furniture Company, Inc. ("Raymours") requires all employees, as a condition of their employment, to be bound by its Employment Arbitration Program ("EAP"), which includes a mandatory pre-dispute employment arbitration agreement that prohibits any form of joint, group, or class adjudication. A-53, A-61 (2012 EAP at 57, 65); A-79, A-132, A-140 (2013 EAP at 58, 66).[6] The agreement broadly defines covered claims to encompass

> any employment-related or compensation-related claims, disputes, controversies, or actions between you and us that in any way arise from or relate to your employment with us **and** that are

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[5] *See, e.g.*, *D.R. Horton*, 357 NLRB No. 184 at *7-8, 16; *Murphy Oil*, 361 NLRB No. 72 at *13-14; *On Assignment Staffing*, 362 NLRB No. 189, 2015 WL 5113231 at *1, 10, 12 (2015), *rev'd by* 2016 WL 3685206 (5th Cir. June 6, 2016).

[6] Citations to "A-##" refer to the joint appendix filed as Docket No. 30 in the Second Circuit, *Patterson v. Raymours Furniture Co.*, No. 15-2820-cv (2d Cir.).

> based upon a 'legally protected right." . . . Examples of such Claims include . . . failure to pay wages in accordance with law.

A-133 (emphases in original). The EAP defines "legally protected right" to include rights under "the federal Fair Labor Standards Act or any state wage and hour laws" and "any other federal, state or local statute, regulation or common law doctrine regarding . . . payment of salary, wages, [or] commissions." A-133-34.

Raymours' EAP expressly precludes covered employees from joining together to pursue any covered workplace claim against the company in any forum:

> Claims under this Program cannot be litigated by way of class or collective action. Nor may Claims be arbitrated by way of a class or collective action. All Claims between you and us must be decided individually. This means that, notwithstanding any other provision of this Program, if you or we elect to arbitrate a Claim, neither you nor we will have the right, with respect to that Claim, to do any of the following in court or before an arbitrator under this Program:
>
> - obtain relief from a class action or collective action, either as a class representative, class member or class opponent
> - act as a private attorney general; or
> - join or consolidate your Claim with the Claims of any other person.

A-140; *see also* A-61. Raymours' EAP thus bans not only opt-out class actions, but any and all forms of joint, consolidated, representative, and opt-in collec-

tive legal actions. The EAP's confidentiality clause also prohibits petitioners and other employees from "reveal[ing] or disclos[ing] the substance of the [arbitration] proceedings to any other person," including to "any members of the public, and . . . any current, future or former employees of Raymour & Flanigan," A-61, A-140; and the EAP authorizes the company to discipline any employee who violates the "rules and procedures" set forth in the Handbook (in which the EAP is located) or who otherwise violates "any company policy," A-147-49.

B. Proceedings Below

Petitioners are former Raymours employees who brought this class and collective action against respondent in the U.S. District Court for the Southern District of New York, alleging violations of the Fair Labor Standards Act ("FLSA") and the New York Labor Law ("NYLL"). Raymours moved to compel arbitration pursuant to the EAP.

On March 27, 2015, the district court entered an order granting Raymours' motion, requiring petitioners to arbitrate their claims on an individual basis, and dismissing the case. App. 25a-42a. In a brief footnote that relied on *Sutherland*, 726 F.3d at 297 n.8, but provided no additional analysis, the district court rejected petitioners' argument that the EAP's prohibition unlawfully interfered with their right under federal labor statutes to seek legal recourse for workplace violations on a concerted action basis. App. 42a n.8.[7]

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[7] The district court subsequently denied plaintiffs' motion for reconsideration, which had argued that dismissal would

After full briefing by the parties, joined by several amici (the NLRB and a group of prominent labor law scholars for petitioner; the National Retail Federation and Chamber of Commerce for respondent), the Second Circuit heard oral argument on August 19, 2016. On September 2, 2016, the panel issued an unpublished per curiam opinion affirming the district court's judgment. App. 1a-8a. The panel concluded that it was bound by the Second Circuit's prior opinion in *Sutherland*, which had considered and rejected the parties' "extensively briefed . . . arguments under the NLRA and the NLGA" on their merits. App. 7a.

REASONS THE PETITION SHOULD BE GRANTED

A. There Is a Clear and Irreconcilable Conflict Among the Appellate Courts

Although the Board has been entirely consistent in its analysis of the *D.R. Horton* issue over the past four years (and in decades of prior Board decisions invalidating employer contracts and policies that interfered with Section 7-protected group legal activity), federal and state appellate courts have recently been anything but consistent in their treatment of the issue presented. To be sure, none of those courts seem to have questioned the Board's threshold ruling that Sections 7 and 8(a)(1) of the NLRA and Sections 2 and 3 of the NLGA preclude employers from interfering with em-

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cause "manifest injustice" to petitioner David Ambrose because his claim appeared to be time-barred under the EAP. App. 43a-48a. That ground for reconsideration is not material to the question presented in this Petition.

ployee efforts to pursue workplace legal claims on a concerted action basis. Yet there is a clear and irreconcilable split of authority concerning whether an employer can insulate an otherwise unlawful prohibition against concerted legal activity from invalidation by inserting that prohibition into employment arbitration agreement covered by the FAA.

The Board first explained in *D.R. Horton*, 357 NLRB No. 184, 2012 WL 36274 (2012), why an employer commits an unfair labor practice by including a prohibition against concerted adjudication activity in its employment arbitration agreements. The Board began by analyzing the statutory history of the right to engage in concerted activity free from employer interference and the centrality of that right to federal labor policy, *id.* at *2-*10—an analysis that requires judicial deference. *See NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984). The Board then turned to the FAA and concluded that no conflict exists between the two sets of statutes because the FAA §2 savings clause does not permit enforcement of arbitration provisions that violate public policy and federal law, 2012 WL 36274 at *14, and because an arbitration agreement may not require parties to waive substantive federal statutory rights, *id.* at *12-*13. The Board further explained that even if there were a conflict between the two statutory regimes, the 1925 FAA would have to yield to the later-enacted federal labor statutes. *Id.* at *16.

Two years later, in *Murphy Oil*, 361 NLRB No. 72, 2014 WL 5465454 (2014), the Board deepened and expanded this statutory analysis, including by addressing at greater length the NLGA origins of the

underlying rights. Subsequent to *Murphy Oil*, the Board has applied this same analysis in scores of cases, consistently holding that employers may not insulate an otherwise unlawful prohibition against concerted legal activity from invalidation by embedding it in a pre-dispute arbitration agreement. These Board's rulings do not prevent employers from requiring arbitration of workplace claims; rather, consistent with the NLGA and NLRA, they require employers to provide either an arbitral or a judicial forum for their employees who seek to pursue workplace claims on a concerted action basis. *See* App. 5a n.3.

The Fifth and Eighth Circuits rejected the Board's *D.R. Horton* reasoning, refusing to grant deference to the Board's construction of the NLRA and concluding that the right to concerted legal activity guaranteed by the federal labor statutes must yield in the face of the FAA's policy favoring enforcement of private arbitration agreements. In *Owen*, 702 F.3d 1050, the Eighth Circuit concluded that Congress had demonstrated an intent to elevate federal arbitration policy over federal labor policy by including the FAA in its recodification of the U.S. Code in 1947 (even though that re-codification was non-substantive, H.R. Rep. No. 80-251 (1947), *reprinted in* 1947 U.S.C.C.A.N. 1511 (1947 recodification made "no attempt" to amend existing law); H.R. Rep. No. 80-225 (1947), *reprinted in* 1947 U.S.C.C.A.N. 1515 (same)), 702 F.3d at 1053; and it further concluded that an employee's ability to file administrative claims with the Department of Labor or other agencies to challenge certain workplace violations was sufficient to protect the employees'

statutory right to engage in concerted legal activity. *Id.* at 1053-54; *see also Cellular Sales*, 824 F.3d at 776 (following *Owen*). The Eighth Circuit's decisions did not address the relevance or effect of the FAA's savings clause.

The Fifth Circuit also rejected the Board's reasoning in a series of cases starting with *D.R. Horton* itself. Relying on this Court's state law preemption decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), a divided panel (Graves, J. dissenting) concluded that to allow the Board to invalidate an employee's contractual waiver of the right to engage in concerted adjudication activity would "'[i]nterfere with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.' Requiring a class mechanism is an actual impediment to arbitration and violates the FAA." *D.R. Horton*, 737 F.3d at 359-60 (quoting *Concepcion*, 563 U.S. at 344). The Fifth Circuit further concluded that because the federal labor statutes contained no "contrary congressional command," the right to concerted legal activity must yield to the policy favoring arbitration. *Id.* at 360-62; *see also Murphy Oil*, 808 F.3d 1013 (following *D.R. Horton*).[8]

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[8] The Nevada Supreme Court followed suit in *Tallman v. Eighth Judicial District Court*, 359 P.3d 113 (Nev. 2015), as did the California Supreme Court in *Iskanian v. CLS Transp. L.A., LLC*, 59 Cal.4th 348 (2014), over a forceful dissent that explained why there is no conflict between the federal labor statutes and the FAA and why individual employment contracts prohibiting concerted legal activity violate the NLGA and its underlying purposes, *id.* at 397-406 (Werdegar, J., concurring and dissenting).

By contrast, the circuit courts that have more recently analyzed the merits of the Board's analysis have held that the Board's construction of its own statute, the NLRA, is entitled to deference and that the FAA's savings clause eliminates any potential statutory conflict. In *Lewis*, 823 F.3d 1147, the Seventh Circuit (in an opinion authored by Chief Judge Wood) examined the history of the right to concerted activity, *id.* at 1151-53, and concluded that "[c]ontracts 'stipulat[ing] . . . the renunciation by the employees of rights guaranteed by the [NLRA]' are unlawful and may be declared to be unenforceable by the Board." *Id.* at 1152 (quoting *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 365 (1940)) (alterations in original). The unanimous panel (in a decision that was circulated to every active judge before issuance, *id* at 1157 n.†) further held that no conflict exists between the NLRA and the FAA: "Here, the NLRA and FAA work hand in glove" because the latter's savings clause prevents enforcement of contract terms that violate federal statutory rights, *id.* at 1157, and because the NLRA is expressly "*pro*-arbitration." *Id.* at 1158 (emphasis in original). Explaining why this Court's recent arbitration decisions do not require a different result, the panel further noted that none of those decisions address the statutory rights at issue under *D.R. Horton* or suggest that all arbitration contracts are necessarily enforceable by their terms. *Id.* Rather, as this Court has repeatedly recognized, Congress' goal in enacting the FAA was to make arbitration agreements "as enforceable as other contracts, but not more so." *Id.* at 1159 (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967)).

The Ninth Circuit reached the same result in *Morris*, __ F.3d __, 2016 WL 4433080, in which Chief Judge Thomas, writing for a divided panel (Ikuta, J., dissenting) concluded that no conflict exists between the NLRA and FAA because "when an arbitration contract professes to waive a substantive federal right, the saving clause of the FAA prevents the enforcement of that waiver." *Id.* at *8. The panel further noted that enforcing the right to concerted legal activity in this context does not disfavor arbitration because "[t]he same provision in a contract that required court adjudication as the exclusive remedy would equally violate the NLRA," *id.* at *6, and adding that "our holding is simply that when arbitration or any other mechanism is used exclusively, substantive federal rights continue to apply in those proceedings." *Id.* at *10. Accordingly, the panel concluded: "The NLRA establishes a core right to concerted activity. Irrespective of the forum in which disputes are resolved, employees must be able to act in the forum *together*." *Id.* (emphasis in original).

Finally, in the present case, a Second Circuit panel indicated that, but for circuit precedent, it would likely follow the Seventh and Ninth Circuits. The panel decided, however, that it was bound by a footnote in the prior *Sutherland* per curiam decision that "decline[d] to follow" the Board's *D.R. Horton* decision. App. 7a-8a (citing *Sutherland*, 726 F.3d at 297 n.8). Thus, the Seventh and Ninth Circuits have joined the NLRB in holding that employees may not be required to waive the right to engage in concerted adjudication activity, and that no conflict exists between the federal labor statutes and the FAA because of the FAA's savings clause, 9 U.S.C. §2. By contrast,

the Fifth and Eighth Circuits, the court below (although not without expressing discomfort with the controlling circuit authority), and the California and Nevada Supreme Courts have rejected the Board's reasoning and have concluded that the right to concerted legal activity must yield in the face of the FAA's general policy favoring enforcement of private arbitration agreements according to their terms.

These competing decisions create enormous uncertainty concerning an issue of utmost importance to workers and employers throughout the country concerning the scope and enforceability of the "core, substantive right" established by Congress in the NLGA and NLRA more than 80 years ago. *Morris*, 2016 WL 4433080 at *9. Because the conflict between the courts of appeals is irreconcilable, plenary review by this Court is both necessary and appropriate.

Petitioners request that the Court grant certiorari in the pending Fifth Circuit *Murphy Oil* case and hold this petition until that case is resolved, thus permitting the Solicitor General, on behalf of the federal administrative agency charged with implementing and enforcing federal labor policy, to take the lead in defending the Board's underlying analysis in these cases. In the alternative, petitioners request that the Court grant this petition, which squarely presents the question of whether a mandatory employment arbitration agreement that prohibits all forms of joint or group adjudication in all forums, upon penalty of employer discipline, are barred by the NLGA and NLRA—a question that enables the Court to rest its analysis on the federal labor statutes as a coherent whole.

B. The Decision Below Deprives Workers of the Core, Substantive Right Guaranteed by the Federal Labor Statutes, and it Conflicts with this Court's Precedents Applying Those Statutes

Since the early 1930s, federal labor policies and statutes have guaranteed employees the right to engage in "concerted activities for the purpose of . . .mutual aid or protection." This fundamental principle of national labor policy was first established by the NLGA in 1932, when Congress declared as "the public policy of the United States" that individual employees have the right to be "free from the interference, restraint, or coercion of employers" in the "designation of . . . representatives" and "other concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. §102. In unequivocal terms, the NLGA states that "[*a*]*ny* undertaking or promise . . . in conflict with" that policy is "contrary to the public policy of the United States [and] *shall not be enforceable in any court* of the United States . . . ." *Id.* §103 (emphasis added). The NLGA also includes a clear expression of Congress's intent to ensure the primacy of this statutory right, as it further states: "All acts and parts of acts in conflict with the provisions of this chapter are repealed." *Id.* §115; *see also On Assignment Staffing Servs.*, 2015 WL 5113231 at *10 (describing purpose and scope of NLGA).

The NLGA was enacted in response to employers' then-common practice of requiring workers to submit to contract terms prohibiting them from joining a union (or certain unions) or from engaging in oth-

er group or concerted action to improve workplace conditions. *See Iskanian*, 59 Cal.4th at 397-400 (Werdegar, J., concurring and dissenting) (describing history of NLGA and explaining that "[e]ight decades ago, Congress made clear that employees have a right to engage in collective action and that contractual clauses purporting to strip them of those rights as a condition of employment are illegal"); *id.* at 399 (quoting the NLGA's co-sponsor, who urged enactment to "end a regime in which 'the laboring man . . . must singly present any grievance he has.'" (Remarks of Sen. Norris, Debate on Sen. No. 935, 72nd Cong., 1st Sess., 75 Cong. Rec. 4504 (1932))); Matthew W. Finkin, "The Meaning and Contemporary Vitality of the Norris LaGuardia Act," 93 Neb. L. Rev. 6 (2014).

Just three years after Congress enacted the NLGA, it reiterated those central principles of federal labor policy in the NLRA, which created the Board and vested in it the authority to construe and administer the statutory right of employees to engage in concerted activity. In the section of the NLRA entitled "Rights of employees as to organization, collective bargaining, etc.," Congress expressly guaranteed "[e]mployees . . . the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection," 29 U.S.C. §157; and in the next section, Congress provided that "[i]t shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title," 29 U.S.C. §158(a)(1); *see also Murphy Oil*, 2014 WL 5465454, at *1, *9-*10, *13 (describing statutory basis and history of right to engage in concerted activ-

ity). Both Depression-era labor statutes were enacted to redress the enormous disparity of bargaining power that left individual employees unable to meaningfully improve the terms and conditions of their employment. *See Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724, 753-54 (1985). As this Court has explained, Congress chose to protect the right to engage in concerted activity under Section 7 "not for [its] own sake but as an instrument of the national labor policy . . . ." *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 62 (1975); *see also NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) (NLRA and NLGA right to engage in collective activity is "fundamental" to national labor policy).

The broad statutory guarantee of the right to engage in concerted activity has long been held to protect collective efforts to improve working conditions "through resort to administrative and judicial forums"—*i.e.*, through group adjudication (which of course encompasses more than just class actions). *Eastex, Inc. v. NLRB*, 437 U.S.at 565-66; *Brady*, 644 F.3d at 673 ("a lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment *is* 'concerted activity' under §7 of the [NLRA]"); *Mohave Elec. Co-op.*, 206 F.3d at 1188-89 (filing judicial petition "supported by fellow employees and joined by a co-employee" constitutes protected concerted activity); *Trinity Trucking & Materials Corp.*, 221 NLRB 364, 365, 1975 WL 6428, *2-*3 (1975) ("filing of the civil action by a group of employees is protected activity"), *enforced*, 567 F.2d 391 (7th Cir. 1977) (mem. disp.), *cert. denied*, 438 U.S. 914 (1978); *see also City Disposal Sys.*

Inc., 465 U.S. at 835 ("There is no indication that Congress intended to limit this protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way.").

Any employer policy or agreement that interferes with, restrains, or coerces employees in their exercise of Section 7 rights constitutes an unfair labor practice under Section 8(a)(1) of the NLRA, 29 U.S.C. §158(a)(1), a result that is especially clear when the employer, like respondent here, imposes a workplace policy or agreement that "*explicitly* restricts activities protected by Section 7." *Martin Luther Mem'l Home*, *Inc.*, 343 NLRB 646, 646, 2004 WL 2678632, *1 (2004) (emphasis in original). A mandatory employment arbitration agreement that prohibits its employees from initiating, joining, or supporting group legal activity to enforce workplace rights, like any other contract or workplace policy prohibiting concerted protected activity, is therefore unlawful on its face as a matter of federal labor law. *See id.* at 646 n.5; *Ashley Furniture Indus. Inc.*, 353 NLRB 649, 653-54, 2008 WL 5427716, *10-*11 (2008).

If Raymours had inserted its prohibition against concerted legal activity in a stand-alone employment contract or in a stand-alone workplace policy rather than as part of its EAP, the prohibition would surely be unenforceable under Sections 7 and 8(a)(1) of the NLRA and Sections 2 and 3 of the NLGA. *See*, *e.g.*, *Convergys Corp.*, 363 NLRB No. 51, 2015 WL 7750753 (2015). Surely an employer cannot obtain a different result by the simple expedient of embedding its prohibition in a pre-dispute employment arbitration agree-

ment. If statutory labor protections could be bypassed so easily, nothing would prevent employers from prohibiting their employees from picketing, striking, or taking other concerted actions to improve workplace conditions—as long as the employer required its employees to pursue their workplace complaints through an individual arbitration procedure instead.

The reason this absurd result is not required by the FAA is because Congress in 1925 included in the FAA a broad savings clause, which provides that an arbitration agreement, like any other contract, is *not* enforceable if any "grounds . . . exist at law or in equity for [its] revocation . . . ." 9 U.S.C. §2. As this Court explained in *Prima Paint*, 388 U.S. 395, "the purpose of Congress [in enacting the FAA] was to make arbitration agreements as enforceable as other contracts, but not more so. To immunize an arbitration agreement from judicial challenge [on grounds applicable to other contracts] would be to elevate it over other forms of contract . . . ." *Id.* at 404 n.12; *see also Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447 (2006) ("substantive command" of FAA is that "arbitration agreements be treated like all other contracts"). Because contracts that violate expressly stated public policy are void and unenforceable, *see, e.g.*, *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987), any contract term that violates the NLRA and/or NLGA is invalid, both as a matter of national labor policy and under the specific provisions of the NLGA. *See, e.g.*, *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83 (1982) ("It is . . . well established . . . that a federal court has a duty to determine whether a contract violates federal law before enforcing it."); *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944) (courts may not

enforce individual employment contract provisions that violate the NLRA); 29 U.S.C. §103 ("Any undertaking or promise . . . in conflict with the public policy declared in section 102 of this title, is declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court.").[9]

When a question arises concerning a potential conflict among federal statutes, the relevant inquiry is one of "implied repeal"—whether Congress intended to repeal part or all of a previously enacted statute as a result of its enactment of a subsequent, inconsistent statute. Findings of implied repeal are highly disfavored and may never be presumed. *See, e.g.*, *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Intern., Inc.*, 534 U.S. 124, 142 (2001)

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[9] This Court's decision in *CompuCredit Corp v. Greenwood*, __ U.S. __, 132 S.Ct. 665 (2012), does not require a different result. In *CompuCredit*, this Court considered whether claims under the Credit Repair Organization Act ("CROA") were arbitrable. The Court held that because CROA contained no express command to the contrary, the consumer plaintiffs would be bound by their agreement to arbitrate their statutory CROA claims. *Id.* at 670, 673. Nothing in that case held that the FAA would require enforcement of an arbitration agreement that deprived a contracting party of rights protected by federal statute or that would be unenforceable under another federal statute. For example, Title VII would surely preclude enforcement of an arbitration agreement that required all gender discrimination claims to be heard by male arbitrators, or that required Hispanic employees to comply with burdensome arbitration procedures that did not apply to claims filed by other employees—even though nothing in Title VII expressly refers to the FAA.

("stringent" standard requires "irreconcilable conflict"); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) (intention must be "clear and manifest"). Certainly the 1925 FAA did not repeal *in advance* the fundamental labor law right to join with coworkers in seeking to vindicate workplace rights through collective legal activity, especially because Section 15 of the NLGA, 29 U.S.C. §115, expressly states Congress's intent to supersede prior, inconsistent statutory law. But even if there were a conflict between the federal labor statutes and the FAA, it would have to be resolved in favor of the later-enacted labor statutes. *See Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936) (in the rare case of an "irreconcilable" statutory conflict, the later-enacted statute controls).[10]

The decision of the Second Circuit in this case and *Sutherland*, as well as those of the Fifth and Eighth Circuits, improperly allow employers to use the FAA as a mechanism to extinguish their employees' fundamental statutory right to pursue workplace claims on a concerted action basis by prohibiting such concerted action in a pre-dispute employment arbitration agreement. Allowing those decisions to stand would presage a return to precisely the type of Depression-era employer conduct that the NLGA, and later the NLRA, were enacted more than 80 years ago to outlaw.

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[10] Although the NLRA was substantively amended in 1947, Taft-Hartley Act, Pub. L. 80-101, 61 Stat. 136 (1947), the FAA has not been, and the 1947 re-codification was not a substantive reenactment. *See supra* at 15.

C. The Issue Presented is of Great Importance for Workers and Employers Around the Country and a Uniform Rule is Necessary

The question presented is of great nationwide importance. Due to the relatively low monetary value of many individual employees' workplace claims and the relatively high costs of litigation, workers have long relied on their ability to band together to pursue workplace grievances and enforce their rights, including through class, collective, joint, and representative actions. In the absence of the right to join together it becomes nearly impossible for many workers to vindicate workplace rights, leaving employers effectively immune from legal challenge. Perhaps for this reason, employers throughout the country have begun routinely to include clauses in their arbitration agreements that strip workers of their right to pursue legal claims in conjunction with their co-workers. *See* Nicole Wredberg, *Subverting Workers' Rights: Class Action Waivers and the Arbitral Threat to the NLRA*, 67 HASTINGS L.J. 881 (2016); Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1 (2011). The sheer number of Board decisions striking down such provisions in the four years since *D.R. Horton* shows how pervasive this rights-stripping practice has become.

The Court now has four petitions pending before it that present the same legal issue. The underlying conflict among the federal and state appellate courts is causing great uncertainty to workers and employers alike, including employers like Raymours that operate in different states and different circuits, and

whose ability to enforce their contractual prohibition against concerted adjudicative activity may depend on whether they are sued in state or federal court, or in which state, or whether an unfair labor practice charge is filed separately or in conjunction with such a lawsuit. Further delay in resolving this issue will only lead to greater uncertainty. Thus, whether the Court grants certiorari in *Murphy Oil*, in this case, or in one of the others, it is critical that this issue be resolved this Term.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari either in *NLRB v. Murphy Oil*, No. 16-307 or this case.

Respectfully submitted,

MICHAEL RUBIN*
ERIC P. BROWN
**Counsel of Record*
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151
mrubin@altber.com
ebrown@altber.com

JUSTIN M. SWARTZ
OUTTEN & GOLDEN LLP
685 Third Avenue, 25th Floor
New York, NY 10017
(212) 245-1000
jms@outtengolden.com

Counsel for Petitioners Connie Patterson and David Ambrose

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CORRECTED SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 14th day of September, two thousand sixteen.

No. 15-2820-cv

PRESENT:
GERARD E. LYNCH, SUSAN L. CARNEY,
Circuit Judges,
ALVIN K. HELLERSTEIN,*
District Judge.

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* Judge Alvin K. Hellerstein, of the United States District Court for the Southern District of New York, sitting by designation.

CONNIE PATTERSON, on behalf of herself and all others similarly situated, and DAVID AMBROSE,
Plaintiffs-Appellants,

v.

RAYMOURS FURNITURE COMPANY, INC.,
Defendant-Appellee.

FOR APPELLANT:

MICHAEL RUBIN, Altshuler Berzon LLP, San Francisco, CA (Eric P. Brown, Altshuler Berzon, San Francisco; Justin M. Swartz, Outten & Golden LLP, New York, NY *on the brief*).

FOR APPELLEES:

DAVID M. WIRTZ, Littler Mendelson P.C., New York, NY (Ron Chapman, Jr., Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Dallas, TX; Christopher C. Murray, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Indianapolis, IN *on the brief*).

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Evan J. Spelfogel, Steven M. Swirsky, Epstein Becker & Green, P.C., New York, NY, on behalf of The National Retail Federation.

James Reif, Gladstein, Reif & Meginniss, LLP, New York, NY, on behalf of certain labor law scholars.

Appeal from the United States District Court for the Southern District of New York (Valerie Caproni, *Judge*).

UPON DUE CONSIDERATION IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Defendant-appellee Raymours Furniture Company, Inc. ("Raymours") requires all its employees, as a condition of their employment, to participate in the company's Employment Arbitration Program ("EAP"), which requires that employees submit all employment and compensation-related claims to arbitration. The EAP also mandates that such claims be decided on an individual basis.[1] The EAP does

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[1] A relevant portion of the EAP's collective action waiver reads as follows:

> CAN CLAIMS BE DECIDED BY CLASS OR COLLECTIVE ACTION?
>
> No. This section describes the "Class Action Waiver" of the Program. Claims under this Program cannot be litigated by way of class or collective action. Nor may Claims be arbitrated by way of a class or collective action. All Claims between you and us must be decided individually. . . . Thus, the arbitrator shall have no authority or jurisdiction to process, conduct or rule upon any class, collective, private attorney general or multiple-party proceeding under any circumstances.

(App'x 140.)

not, however, prevent employees from filing charges or participating in investigations conducted by the Equal Employment Opportunity Commission and/or state or local human rights agencies, nor does it require employees to waive any rights they might have under the National Labor Relations Act ("NLRA") or prevent employees from filing unfair labor practice charges under the NLRA. Plaintiff-appellant Connie Patterson, a Raymours employee, brought this putative class and collective action, asserting claims against Raymours under the Fair Labor Standards Act ("FLSA") and the New York Labor Law.[2] Raymours moved to compel arbitration pursuant to the EAP. The district court granted Raymours's motion, holding that the EAP's class action waiver was enforceable. *See Patterson v. Raymours Furniture Co.*, 96 F. Supp. 3d 71 (S.D.N.Y. 2015). The district court rejected Patterson's claim that the EAP's ban on class or collective litigation or arbitration of workplace grievances violated the employees' right under the NLRA to "engage in . . . concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 157. It held that the Federal Arbitration Act ("FAA") mandated arbitration of Patterson's claims because the plaintiffs, by accepting the EAP, had agreed to arbitrate their claims according to its terms.

The only question presented on appeal is whether the EAP's prohibition of class or collective adjudication of work-related claims illegally restricts employees' substantive rights under the NLRA and the Norris-La Guardia Act ("NLGA"), and is unenforceable

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[2] Plaintiff-appellant David Ambrose, a fellow employee, later joined the lawsuit as an FLSA opt-in plaintiff.

under the FAA.[3] We assume the parties' familiarity with the underlying facts, procedural history, specification of issues for review, and positions espoused by amici curiae.

The National Labor Relations Board (the "Board") has squarely addressed the issue on appeal and repeatedly concluded that Sections 7 and 8(a)(1) of the NLRA[4] and Sections 2 and 3 of the NLGA[5] foreclose

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[3] Appellants do not claim a right to pursue collective action in every forum or even in any particular forum. Instead, they seem to argue that Raymours must either (a) permit class or collective arbitration, or (b) waive the arbitral forum to the extent an employee seeks to invoke class or collective procedures in court.

[4] Section 7 of the NLRA states:

> 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 (emphasis added). Section 8(a)(1) of the NLRA states, "[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]." *Id.* § 158(a)(1).

[5] Section 2 of the NLGA declares, as "the public policy of the United States," that an individual employee

> shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in *other concerted activities for the purpose of collective bargaining or other mutual aid or protection.*

29 U.S.C. § 102 (emphasis added). Section 3 enforces Section 2: "any [] undertaking or promise in conflict with the public policy declared in [Section 2] . . . shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court . . . ." *Id.* § 103.

enforcement of arbitration agreements that waive an employee's right to pursue legal claims in any judicial or arbitral forum on a collective action basis. *See, e.g.*, *D.R. Horton, Inc.*, 357 NLRB No. 184, 2012 WL 36274 (2012) ("*Horton I*"); *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454 (2014) ("*Murphy Oil I*"). The circuit courts, however, are irreconcilably split on the question. The Fifth and Eighth Circuits have reversed the Board's rulings on three separate occasions. *See D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344 (5th Cir. 2013) ("*Horton II*") (reversing *Horton I*); *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013, 1015 (5th Cir. 2015) (reversing *Murphy Oil I* and noting that the "Board will not be surprised that we adhere, as we must, to [*Horton II*]"); *Cellular Sales of Missouri, LLC v. N.L.R.B.*, 824 F.3d 772 (8th Cir. 2016); *see also Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013). The Seventh and Ninth Circuits, on the other hand, have agreed with the Board that clauses precluding employees from bringing, in any forum, a concerted legal claim violate the NLRA, and have further held that such agreements are unenforceable under the FAA. *See Morris v. Ernst & Young, LLP*, No. 13-16599, 2016 WL 4433080 (9th Cir. August 22, 2016); *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016).[6]

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[6] These courts see no conflict between the NLRA and the FAA with respect to such agreements. The saving clause of the FAA confirms that agreements to arbitrate "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 (emphasis added). The Seventh and Ninth Circuits have held that an "illegal" arbitration agreement, one that is unlawful under the NLRA, "meets the criteria of the FAA's sav-

If we were writing on a clean slate, we might well be persuaded, for the reasons forcefully stated in Chief Judge Wood's and Chief Judge Thomas's opinions in *Lewis* and *Morris*, to join the Seventh and Ninth Circuits and hold that the EAP's waiver of collective action is unenforceable. But we are bound by our Court's decision in *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013), which aligns our Circuit on the other side of the split. In considering an alternative argument made by the plaintiff in that case, *Sutherland* "decline[d] to follow the [NLRB's] decision" in *Horton I* "that a waiver of the right to pursue a FLSA claim collectively in any forum violates the [NLRA]." *Id.* at 297 n.8. We are bound by that holding "until such time as [it is] overruled either by an en banc panel of our Court or by the Supreme Court." *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004).

Appellants' argument that this panel is not bound by *Sutherland* is unpersuasive. Although the *Sutherland* court rejected *Horton I* in a brief footnote, it unquestionably rejected the NLRB's analysis and embraced the Eighth Circuit's position in *Owen*. The parties in *Sutherland* extensively briefed their arguments under the NLRA and the NLGA, and the panel's rejection of those arguments was necessary to its judgment.

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ing clause for nonenforcement." *Epic Systems*, 823 F.3d at 1157; *see also Morris*, 2016 WL 4433080, at *7 ("when an arbitration contract professes the waiver of a substantive federal right, the FAA's saving clause prevents a conflict between the statutes by causing the FAA's enforcement mandate to yield.").

Appellants also argue that the Board's more recent rulings that continue, subsequent to *Sutherland*, to uphold the Board's position have undermined the authority of *Sutherland* by developing more refined arguments not addressed by our Court in that case. But such subtleties of argument do not change the fact that the controlling question in this case was clearly presented in *Sutherland*, and this Court rejected appellants' position.

We have considered appellants' remaining arguments and find them to be without merit. For the reasons stated above, the judgment of the district court is **AFFIRMED**.

FOR THE COURT:

s/ *Catherine O'Hagan Wolfe*
Catherine O'Hagan Wolfe, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
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PRESENT:
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29 U.S.C. § 157 (emphasis added). Section 8(a)(1) of the NLRA states, "[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]." *Id.* § 158(a)(1).

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> shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in *other concerted activities for the purpose of collective bargaining or other mutual aid or protection.*

29 U.S.C. § 102 (emphasis added). Section 3 enforces Section 2: "any [] undertaking or promise in conflict with the public policy declared in [Section 2] . . . shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court . . . ." *Id.* § 103.

See, *e.g.*, *D.R. Horton*, *Inc.*, 357 NLRB No. 184, 2012 WL 36274 (2012) ("*Horton I*"); *Murphy Oil USA*, *Inc.*, 361 NLRB No. 72, 2014 WL 5465454 (2014) ("*Murphy Oil I*"). The circuit courts, however, are irreconcilably split on the question. The Fifth and Eighth Circuits have reversed the Board's rulings on three separate occasions. *See D.R. Horton*, *Inc. v. N.L.R.B.*, 737 F.3d 344 (5th Cir. 2013) ("*Horton II*") (reversing *Horton I*); *Murphy Oil USA*, *Inc. v. N.L.R.B.*, 808 F.3d 1013, 1015 (5th Cir. 2015) (reversing *Murphy Oil I* and noting that the "Board will not be surprised that we adhere, as we must, to [*Horton II*]"); *Cellular Sales of Missouri*, *LLC v. N.L.R.B.*, 824 F.3d 772 (8th Cir. 2016); *see also Owen v. Bristol Care*, *Inc.*, 702 F.3d 1050 (8th Cir. 2013). The Seventh and Ninth Circuits, on the other hand, have agreed with the Board that clauses precluding employees from bringing, in any forum, a concerted legal claim violate the NLRA, and have further held that such agreements are unenforceable under the FAA. *See Morris v. Ernst & Young*, *LLP*, No. 13-16599, 2016 WL 4433080 (9th Cir. August 22, 2016); *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016).[6]

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[6] These courts see no conflict between the NLRA and the FAA with respect to such agreements. The saving clause of the FAA confirms that agreements to arbitrate "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 (emphasis added). The Seventh and Ninth Circuits have held that an "illegal" arbitration agreement, one that is unlawful under the NLRA, "meets the criteria of the FAA's saving clause for nonenforcement." *Epic Systems*, 823 F.3d at 1157; *see also Morris*, 2016 WL 4433080, at *7 ("when an arbitration contract professes the waiver of a substantive federal

If we were writing on a clean slate, we might well be persuaded, for the reasons forcefully stated in Chief Judge Wood's and Chief Judge Thomas's opinions in *Lewis* and *Morris*, to join the Seventh and Ninth Circuits and hold that the EAP's waiver of collective action is unenforceable. But we are bound by our Court's decision in *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013), which aligns our Circuit on the other side of the split. In considering an alternative argument made by the plaintiff in that case, *Sutherland* "decline[d] to follow the [NLRB's] decision" in *Horton I* "that a waiver of the right to pursue a FLSA claim collectively in any forum violates the [NLRA]." *Id.* at 297 n.8. We are bound by that holding "until such time as [it is] overruled either by an en banc panel of our Court or by the Supreme Court." *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004).

Appellants' argument that this panel is not bound by *Sutherland* is unpersuasive. Although the *Sutherland* court rejected *Horton I* in a brief footnote, it unquestionably rejected the NLRB's analysis and embraced the Eighth Circuit's position in *Owen*. The parties in *Sutherland* extensively briefed their arguments under the NLRA and the NLGA, and the panel's rejection of those arguments was necessary to its judgment. Appellants also argue that the Board's more recent rulings that continue, subsequent to *Sutherland*, to uphold the Board's position have undermined the authority of *Sutherland* by developing more refined arguments not addressed by our Court

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right, the FAA's saving clause prevents a conflict between the statutes by causing the FAA's enforcement mandate to yield.").

in that case. But such subtleties of argument do not change the fact that the controlling question in this case was clearly presented in *Sutherland*, and this Court rejected appellants' position.

We have considered appellants' remaining arguments and find them to be without merit. For the reasons stated above, the judgment of the district court is **AFFIRMED**.

FOR THE COURT:

s/ *Catherine O'Hagan Wolfe*
Catherine O'Hagan Wolfe, Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 2nd day of September, two thousand sixteen.

No. 15-2820-cv

PRESENT:
GERARD E. LYNCH, SUSAN L. CARNEY,
Circuit Judges,
ALVIN K. HELLERSTEIN,*
District Judge.

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* Judge Alvin K. Hellerstein, of the United States District Court for the Southern District of New York, sitting by designation.

CONNIE PATTERSON, on behalf of herself and all others similarly situated, and DAVID AMBROSE,
Plaintiffs-Appellants,

v.

RAYMOURS FURNITURE COMPANY, INC.,
Defendant-Appellee.

FOR APPELLANT:

MICHAEL RUBIN, Altshuler Berzon LLP, San Francisco, CA (Eric P. Brown, Altshuler Berzon, San Francisco; Justin M. Swartz, Outten & Golden LLP, New York, NY *on the brief*).

FOR APPELLEES:

DAVID M. WIRTZ, Littler Mendelson P.C., New York, NY (Ron Chapman, Jr., Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Dallas, TX; Christopher C. Murray, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Indianapolis, IN *on the brief*).

FOR AMICI CURIAE:

JOEL A. HELLER, on behalf of National Labor Relations Board, Washington, DC.

EVAN M. TAGER, Mayer Brown LLP, Washington, DC, on behalf of The Chamber of Commerce of the United States of America (Andrew J. Pincus, Archis A. Parasharami, Matthew A. Waring, Mayer Brown LLP, Washington, DC; Kate Comerford Todd, Warren Postman, U.S. Chamber Litigation Center, Washington, DC *on the brief*).

Appeal from the United States District Court for the Southern District of New York (Valerie Caproni, *Judge*).

UPON DUE CONSIDERATION IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Defendant-appellee Raymours Furniture Company, Inc. ("Raymours") requires all its employees, as a condition of their employment, to participate in the company's Employment Arbitration Program ("EAP"), which requires that employees submit all employment and compensation-related claims to arbitration. The EAP also mandates that such claims be decided on an individual basis.[1] The EAP does not, however, prevent employees from filing charges or participating in investigations conducted by the Equal Employment Opportunity Commission and/or state or local human rights agencies, nor does it require employees to waive any rights they might have

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[1] A relevant portion of the EAP's collective action waiver reads as follows:

> CAN CLAIMS BE DECIDED BY CLASS OR COLLECTIVE ACTION?
>
> No. This section describes the "Class Action Waiver" of the Program. Claims under this Program cannot be litigated by way of class or collective action. Nor may Claims be arbitrated by way of a class or collective action. All Claims between you and us must be decided individually. . . . Thus, the arbitrator shall have no authority or jurisdiction to process, conduct or rule upon any class, collective, private attorney general or multiple-party proceeding under any circumstances.

(App'x 140.)

under the National Labor Relations Act ("NLRA") or prevent employees from filing unfair labor practice charges under the NLRA. Plaintiff-appellant Connie Patterson, a Raymours employee, brought this putative class and collective action, asserting claims against Raymours under the Fair Labor Standards Act ("FLSA") and the New York Labor Law.[2] Raymours moved to compel arbitration pursuant to the EAP. The district court granted Raymours's motion, holding that the EAP's class action waiver was enforceable. *See Patterson v. Raymours Furniture Co.*, 96 F. Supp. 3d 71 (S.D.N.Y. 2015). The district court rejected Patterson's claim that the EAP's ban on class or collective litigation or arbitration of workplace grievances violated the employees' right under the NLRA to "engage in . . . concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 157. It held that the Federal Arbitration Act ("FAA") mandated arbitration of Patterson's claims because the plaintiffs, by accepting the EAP, had agreed to arbitrate their claims according to its terms.

The only question presented on appeal is whether the EAP's prohibition of class or collective adjudication of work-related claims illegally restricts employees' substantive rights under the NLRA and the Norris-La Guardia Act ("NLGA"), and is unenforceable under the FAA.[3] We assume the parties' familiarity

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[2] Plaintiff-appellant David Ambrose, a fellow employee, later joined the lawsuit as an FLSA opt-in plaintiff.

[3] Appellants do not claim a right to pursue collective action in every forum or even in any particular forum. Instead, they seem to argue that Raymours must either (a) permit class or collective arbitration, or (b) waive the arbitral forum to the

with the underlying facts, procedural history, specification of issues for review, and positions espoused by amici curiae.

The National Labor Relations Board (the "Board") has squarely addressed the issue on appeal and repeatedly concluded that Sections 7 and 8(a)(1) of the NLRA[4] and Sections 2 and 3 of the NLGA[5] foreclose enforcement of arbitration agreements that waive an employee's right to pursue legal claims in any judicial or arbitral forum on a collective action basis.

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extent an employee seeks to invoke class or collective procedures in court.

[4] Section 7 of the NLRA states:

> 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 (emphasis added). Section 8(a)(1) of the NLRA states, "[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]." *Id.* § 158(a)(1).

[5] Section 2 of the NLGA declares, as "the public policy of the United States," that an individual employee

> shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in *other concerted activities for the purpose of collective bargaining or other mutual aid or protection.*

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See, *e.g.*, *D.R. Horton*, *Inc.*, 357 NLRB No. 184, 2012 WL 36274 (2012) ("*Horton I*"); *Murphy Oil USA*, *Inc.*, 361 NLRB No. 72, 2014 WL 5465454 (2014) ("*Murphy Oil I*"). The circuit courts, however, are irreconcilably split on the question. The Fifth and Eighth Circuits have reversed the Board's rulings on three separate occasions. *See D.R. Horton*, *Inc. v. N.L.R.B.*, 737 F.3d 344 (5th Cir. 2013) ("*Horton II*") (reversing *Horton I*); *Murphy Oil USA*, *Inc. v. N.L.R.B.*, 808 F.3d 1013, 1015 (5th Cir. 2015) (reversing *Murphy Oil I* and noting that the "Board will not be surprised that we adhere, as we must, to [*Horton II*]"); *Cellular Sales of Missouri*, *LLC v. N.L.R.B.*, 824 F.3d 772 (8th Cir. 2016); *see also Owen v. Bristol Care*, *Inc.*, 702 F.3d 1050 (8th Cir. 2013). The Seventh and Ninth Circuits, on the other hand, have agreed with the Board that clauses precluding employees from bringing, in any forum, a concerted legal claim violate the NLRA, and have further held that such agreements are unenforceable under the FAA. *See Morris v. Ernst & Young*, *LLP*, No. 13-16599, 2016 WL 4433080 (9th Cir. August 22, 2016); *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016).[6]

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[6] These courts see no conflict between the NLRA and the FAA with respect to such agreements. The saving clause of the FAA confirms that agreements to arbitrate "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 (emphasis added). The Seventh and Ninth Circuits have held that an "illegal" arbitration agreement, one that is unlawful under the NLRA, "meets the criteria of the FAA's saving clause for nonenforcement." *Epic Systems*, 823 F.3d at 1157; *see also Morris*, 2016 WL 4433080, at *7 ("when an arbitration contract professes the waiver of a substantive federal

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Appellants' argument that this panel is not bound by *Sutherland* is unpersuasive. Although the *Sutherland* court rejected *Horton I* in a brief footnote, it unquestionably rejected the NLRB's analysis and embraced the Eighth Circuit's position in *Owen*. The parties in *Sutherland* extensively briefed their arguments under the NLRA and the NLGA, and the panel's rejection of those arguments was necessary to its judgment.

Appellants also argue that the Board's more recent rulings that continue, subsequent to *Sutherland*, to uphold the Board's position have undermined the au-

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right, the FAA's saving clause prevents a conflict between the statutes by causing the FAA's enforcement mandate to yield.").

thority of *Sutherland* by developing more refined arguments not addressed by our Court in that case. But such subtleties of argument do not change the fact that the controlling question in this case was clearly presented in *Sutherland*, and this Court rejected appellants' position.

We have considered appellants' remaining arguments and find them to be without merit. For the reasons stated above, the judgment of the district court is **AFFIRMED**.

FOR THE COURT:

s/ *Catherine O'Hagan Wolfe*
Catherine O'Hagan Wolfe, Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

14-CV-5882 (VEC)
DATE FILED: 3/27/2015

OPINION AND ORDER

CONNIE PATTERSON, on behalf of herself and all others similarly situated,

Plaintiff,

-against-

RAYMOURS FURNITURE COMPANY, INC.,

Defendant.

VALERIE CAPRONI, United States District Judge:

Plaintiff brings this putative collective and class action against her former employer for alleged violations of the Fair Labor Standards Act ("FLSA") and the New York Labor Law ("NYLL"). Defendant moved to compel arbitration pursuant to an arbitration clause contained in its employee handbook. For the reasons stated below, Defendant's motion is GRANTED.

BACKGROUND

Defendant is a furniture retailer that operates stores in multiple states, including New York. Compl. ¶ 2; McPeak Decl. ¶ 4. Plaintiff worked as a Sales As-

sociate from June 20, 2005, to February 2, 2014, the date on which she was terminated. Compl. ¶ 17; McPeak Decl. ¶¶ 5, 11, Ex. 1. Plaintiff claims that Defendant misclassified all of its Sales Associates as exempt from the overtime provisions of the FLSA and NYLL. Compl. ¶ 5. As a result, Defendant failed to pay them overtime wages for all the hours worked in excess of forty hours per week in violation of both statutes. *Id.* ¶¶ 78, 87.[1]

When Plaintiff was hired, Defendant provided her with a copy of its Associate Handbook ("Handbook"). McPeak Decl. ¶ 5. Plaintiff signed an acknowledgment form stating that she understood the Handbook's contents to be "applicable to the position" for which she had been hired. McPeak Decl. Ex. 1. The form stated that the Handbook's contents were "not promissory or contractual in nature" and that Plaintiff's employment was "not for any stated period." *Id.* In October 2009, Defendant updated its Handbook and distributed copies to all employees. McPeak Decl. ¶ 6. Plaintiff acknowledged that her continued employment would constitute her agreement to the 2009 changes and all future changes made to the Handbook. McPeak Decl. Ex. 2. The 2009 acknowledgment form stated that "nothing in the Handbook constitutes a contract or promise of continued employment," that Plaintiff's employment was "at will" and that the parties had not "entered into an employment agreement for a specified period of time." *Id.*

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[1] Plaintiff also alleges a variety of other state labor law violations.

In February 2012, Defendant issued a revised version of its Handbook, which, for the first time, included the Employment Arbitration Program ("EAP"). McPeak Decl. ¶ 12, Ex. 6. Defendant notified its employees by email and required them to acknowledge that they had reviewed the updated Handbook. McPeak Decl. ¶ 13, Exs. 7, 8. Plaintiff did so. McPeak Decl. Ex. 9. Defendant amended its Handbook one more time in April 2013 and again emailed its employees and required them to acknowledge the updates. McPeak Decl. ¶ 18, Ex. 11. Plaintiff electronically acknowledged her review of the Handbook. McPeak Decl. Ex. 12.

Page five of the 2013 version of the Handbook declares: "**THIS HANDBOOK IS NOT A CONTRACT OF EMPLOYMENT. All Associates of the Company are employed on an 'at will' basis**." McPeak Decl. Ex. 10 at 5 (emphasis in original). It goes on to state that the Handbook "is intended for informational purposes only" and that nothing in it "**creates a promise of continued employment, employment contract, term or obligation of any kind on the part of the Company**." *Id.* (emphasis in original). On the same page, the document states that "[c]ontinuing employment after the issuance of this Handbook (or any subsequent revision) constitutes the associate's agreement to rules, policies, practices and procedures contained herein." *Id.*

The Handbook describes the EAP as "**an essential element of your continued employment relationship**" and "**a condition of your employment**." *Id.* at 58 (emphasis in original). It also provides that the EAP "**is not a contract of em-**

ployment and does not change your status as an at-will employee." *Id.* (emphasis in original). Under the EAP, employees are required to arbitrate "any employment-related or compensation-related claims . . . that in any way arise from or relate to your employment with us . . . **and** that are based upon a legally protected right." *Id.* at 59 (emphasis in original). The EAP defines "legally protected right" to include rights arising under the "the federal Fair Labor Standards Act or any state wage and hour laws." *Id.* Finally, the program has a class action waiver:

> **Claims under this Program cannot be litigated by way of class or collective action. Nor may Claims be arbitrated by way of a class or collective action. All Claims between you and us must be decided individually. This means that, notwithstanding any other provision of this Program, if you . . . elect to arbitrate a Claim, . . . you . . . will [not] have the right . . . to . . . obtain relief from a class action . . ..**

Id. at 66 (emphasis in original).

Defendant moves to compel arbitration based on the company's EAP.

DISCUSSION

In deciding a motion to compel arbitration under the Federal Arbitration Act ("FAA"), 29 U.S.C. §§ 3 and 4, the Court "applies a standard similar to that applicable for a motion for summary judgment." *Bensadoun v. Jobe-Riat*, 316 F.3d 171, 175 (2d Cir. 2003) (citations omitted). A motion to compel arbitration may be granted "when the pleadings, the discovery and

disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that movant is entitled to judgment as a matter of law." *Thomas v. Pub. Storage, Inc.*, 957 F.Supp.2d 496, 499 (S.D.N.Y. 2013) (citations and internal quotation marks omitted). "All facts, inferences, and ambiguities must be viewed in a light most favorable to the nonmovant." *Alexander & Alexander Servs., Inc. v. These Certain Underwriters at Lloyd's, London*, 136 F.3d 82, 86 (2d Cir. 1998) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). If the Court determines "that an arbitration agreement is valid and the claim before it is arbitrable, it must stay or dismiss further judicial proceedings and order the parties to arbitrate." *Nunez v. Citibank, N.A.*, No. 08-CV-5398 (BSJ), 2009 WL 256107, *2 (S.D.N.Y. Feb. 3, 2009) (citations omitted).

I. The FAA Mandates Arbitration of Plaintiff's Claims

The FAA was designed to "ensure judicial enforcement of privately made agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985). Under the FAA, a written agreement to arbitrate "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. This section manifests "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). To decide a motion to compel arbitration, the Court must: (1) determine whether the parties agreed to arbitrate; (2) determine the scope of the parties' agreement; (3) if federal statutory claims are asserted,

consider whether Congress intended those claims to be nonarbitrable; and (4) if some, but not all, of the claims in the case are arbitrable, determine whether to stay the balance of the proceedings pending arbitration. *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 844 (2d Cir. 1987).

A. The Parties Agreed to Arbitrate

Plaintiff asserts that there is no arbitration agreement between her and Defendant. The Court disagrees.

The question whether the parties agreed to arbitrate is governed by state law principles regarding contract formation. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *see also Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 119 (2d Cir. 2012) ("Whether or not the parties have agreed to arbitrate is a question of state contract law."). In applying state law principles, however, the FAA will preempt "state law that treats arbitration agreements differently from any other contracts." *Chelsea Square Textiles, Inc. v. Bombay Dyeing & Mfg. Co.*, 189 F.3d 289, 295 (2d Cir. 1999).

Under New York law, a party who signs a written contract is conclusively presumed to know its contents and to assent to them, and he is therefore bound by its terms and conditions. *Level Exp. Corp. v. Wolz, Aiken & Co.*, 305 N.Y. 82, 87 (1953). With regards to arbitration agreements in the employment context, "[c]ourts in this district routinely uphold arbitration agreements contained in employee handbooks where . . . the employee has signed an acknowledgment form." *Chanchani v. Salomon/Smith Barney, Inc.*,

No. 99-CV-9219 (RCC), 2001 WL 204214, *3 (S.D.N.Y. Mar. 1, 2001); *see also Litvinov v. UnitedHealth Grp. Inc.*, No. 13-CV-8541 (KBF), 2014 WL 1054394, *3 (S.D.N.Y. Mar. 10, 2014) (the parties agreed to arbitrate; the employee "electronically acknowledged that she received and reviewed the Arbitration Policy" of her employer.); *Beletsis v. Credit Suisse First Boston, Corp.*, No. 01-CV-6266 (RCC), 2002 WL 2031610, *3 (S.D.N.Y. Sep. 4, 2002) (the parties agreed to arbitrate; the employee "signed the Compliance Certification" that referred to the employer's arbitration program); *Arakawa v. Japan Network Grp.*, 56 F.Supp.2d 349, 352 (S.D.N.Y. 1999) ("[T]he parties' agreement to arbitrate is evidenced by the Employee Handbook and the Acknowledgment signed by plaintiff.").

In this case, there is an agreement to arbitrate because the Plaintiff acknowledged that she had read and reviewed the 2013 version of Defendant's Handbook, containing the EAP. McPeak Decl. Ex. 12. The 2013 Handbook expressly provided that "[a]s an associate, [Plaintiff was] responsible for abiding by Raymour & Flanigan's rules, policies and practices." McPeak Decl. Ex. 10 at 5. Under these circumstances, it is clear that Plaintiff agreed to be bound by the EAP.

Moreover, the FAA does not require a signed writing, but only a writing, 9 U.S.C. §§ 2, 3 and 4, and, "[u]nder New York law, the conduct of the parties may lead to the inference of a binding agreement." *Beth Israel Med. Ctr. v. Horizon Blue Cross & Blue Shield of N.J., Inc.*, 448 F.3d 573, 582 (2d Cir. 2006) (citing *Jemzura v. Jemzura*, 36 N.Y.2d 496, 503-504 (1975)). It is well-settled that revisions to an employee handbook are binding when the employee

continues to work after receiving notice of the revisions. *See Manigault v. Macy's E., LLC.*, 318 Fed. Appx. 6, 8 (2d Cir. 2009) ("An employee may consent to a modification to the terms of employment by continuing to work after receiving notice of the modification.") (citations omitted); *see also Brown v. St. Paul Travelers Co.*, 331 Fed.Appx. 68, 70 (2d Cir. 2009) (holding that the employee's "continued employment after" repeated notifications regarding the employer's arbitration policy "lends force to the presumption that she agreed to be bound to the arbitration policy.").

By continuing to work after receiving notice of the EAP, Plaintiff agreed to the terms of the arbitration program. When Defendant released the 2013 Handbook, Plaintiff received an email from the Vice President of Human Resources informing her that the Handbook had been revised and requiring her to review it. McPeak Decl. Ex. 11. Plaintiff electronically acknowledged the Handbook a few weeks later. McPeak Decl. Ex. 12. As with the prior versions, the 2013 Handbook made clear that the employee's continued employment after the Handbook's issuance constituted the employee's agreement to its contents. McPeak Decl. Ex. 10 at 5, 58. After receiving notice of the EAP for the second year in a row, Plaintiff continued to work for Defendant for approximately another year. Compl. ¶ 17; McPeak Decl. ¶ 11.

Plaintiff argues that *Manigault* and *Brown*, the cases relied on by Defendant, are distinguishable because the arbitration provisions at issue in those cases were much more prominently presented to the

employees and were not included in an employee handbook. But *Manigault* and *Brown* did not turn on a particular degree of notice or the format in which it was given. For contract formation purposes, these cases simply require continued employment after notice of the handbook's terms, without specifying any particular form of required notice. In this case, there is no dispute that Plaintiff continued to work for Defendant after receiving notice of the Handbook's 2012 and 2013 revisions, including the addition of the EAP in 2012.

In any event, Plaintiff did not receive less notice than the plaintiffs in the cited cases. In *Manigault*, 318 Fed.Appx. at 8, the employee received information regarding the employer's arbitration program by mail and in *Brown*, 331 Fed.Appx. at 70, the employee received a copy of a revised handbook and an email from her employer directing her to read all company policies and stating that such policies were an express condition of continued employment. In this case, Defendant specifically highlighted the EAP when it announced the 2012 Handbook revisions, referred employees to the page at which the program could be found, and briefly described the program as implementing a "consistent and efficient way for our associates and the company to resolve employment disputes." McPeak Decl. Ex. 7. Such notice is sufficient.

Plaintiff's chief argument in support of her position that there is no agreement to arbitrate is that the disclaimers at the beginning of the Handbook prevent the formation of an agreement to arbitrate. In support, Plaintiff relies on a group of cases that hold

that an employee handbook with language that negates the creation of contractual rights or obligations cannot be the basis of a breach of contract claim brought by an employee against his or her employer. *See Maas v. Cornell Univ.*, 94 N.Y.2d 87 (1999); *Dellefave v. Access Temp., Inc.*, 37 Fed.Appx. 23 (2d Cir. 2002); *Baron v. Port Auth. of NY & NJ*, 271 F.3d 81 (2d Cir. 2001); *Jain v. McGraw-Hill Co.*, 827 F. Supp.2d 272 (S.D.N.Y. 2011); *Sharkey v. J.P. Morgan Chase & Co.*, No. 10-CV-3824, 2011 WL 135026 (S.D.N.Y. Jan. 14, 2011).

Plaintiff's argument fails for two reasons. First, none of the cases cited by Plaintiff considered the enforceability of an arbitration agreement included in an employee handbook.

> An arbitration agreement included in an employee handbook with language "providing that the handbook does not constitute a ... contract of employment or that the arbitration policy may be amended" is enforceable when the language of the arbitration agreement is "distinct and mandatory" and when the employee is advised of the policy and that "compliance with it [is] a condition of employment."

Isaacs v. OCE Bus. Serv., Inc., 968 F.Supp.2d 564, 571 (S.D.N.Y. 2013) (citing *Brown v. St. Paul Travelers Co.*, 559 F.Supp.2d 288, 292 (W.D.N.Y. 2008), *aff'd*, 331 Fed.Appx. 68 (2d Cir. 2009)). Here, the EAP clearly states: "This Program is an essential element of your continued employment relationship with Raymour & Flanigan and is a condition of your employment." McPeak Decl. Ex. 10 at 58 (emphasis omitted). This language stands in sharp contrast with

other language in the Handbook negating the creation of "a promise of continued employment, employment contract, term or obligation of any kind." *Id.* at 5 (emphasis omitted). The EAP's language is, consequently, "distinct and mandatory."[2] *Isaacs*, 968 F.Supp.2d at 571.

Second, even if the Court were to conclude that the language of the EAP is not sufficiently distinctive, the disclaimers at the beginning of the Handbook do not prevent contract formation with respect to the EAP. The disclaimers in Defendant's Handbook are different from those in the cases relied on by Plaintiff because, instead of negating the creation of contractual obligations in general, they do so only "on the part of the Company." McPeak Decl. Ex. 10 at 5 (emphasis omitted). Although the Handbook does not impose contractual obligations on Defendant, the arbitration provisions are nonetheless binding on Plaintiff.

Finally, Plaintiff asks the Court to follow a New Jersey District Court decision holding that Defendant's Handbook does not contain a binding arbitration agreement. *See Raymours Furniture Co., Inc. v. Rossi*, No. 13-CV-4440 (JBS), 2014 WL 36609,

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[2] This conclusion also answers Plaintiff's argument that the disclaimer in the EAP prevents contract formation. The language in the EAP states that "it is not a contract of employment and does not change your status as an at-will employee." McPeak Decl. Ex. 10 at 58 (emphasis omitted). That language cannot be read to prevent the formation of the agreement to arbitrate because its only purpose—quite obviously—is to avoid modification of the "at-will" regime that governs the parties' employment relationship.

*6 (D.N.J. Jan 2, 2014). *Rossi* is premised partly on New Jersey law that is inconsistent with New York law. In New Jersey, continued employment after receipt of an employee handbook does not constitute acceptance of its terms. *See id.* That rule of law is entirely at odds with New York law as interpreted in *Manigault* and *Brown* and, therefore, *Rossi* is not even persuasive precedent for this case.

B. All of Plaintiff's Claims are Within the Scope of the EAP and are Arbitrable

The remaining *Genesco* factors further weigh in favor of arbitration. With respect to the second factor, it is undisputed that Plaintiff's claims under the FLSA and NYLL fall within the EAP's scope. Defendant's EAP covers "any employment-related or compensation-related claims . . . that in any way arise from or relate to your employment with us . . . and that are based upon a legally protected right," including rights under the "the federal Fair Labor Standards Act or any state wage and hour laws." McPeak Decl. Ex. 10 at 59 (emphasis omitted). As for the third factor, there is no indication that Congress intended Plaintiff's FLSA claims to be nonarbitrable. *See*, *e.g.*, *Martin v. SCI Mgmt. L.P.*, 296 F.Supp.2d 462, 467 (S.D.N.Y. 2003).[3]

[3] Because all of Plaintiff's claims are subject to arbitration, the Court need not address the fourth *Genesco* factor regarding a stay.

II. The EAP's Class Action Waiver Is Enforceable[4]

Section 2 of the FAA "requires courts to enforce agreements to arbitrate according to their terms," *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 669 (2012) (citation omitted), "including terms that specify . . . the rules under which that arbitration will be conducted." *Am. Express Co. v. Italian Colors Rest.*, 133 S.Ct. 2304, 2309 (2013) (quoting *Volt Info. Sci., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)) (internal quotation marks omitted).

Plaintiff advances two arguments why the EAP's class action waiver is unenforceable. Neither argument has merit.

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[4] Normally, "once a district court determines that the arbitration agreement is valid and the parties have agreed to arbitrate, the arbitrator should determine the meaning of specific provisions of the arbitration agreement at issue." *Tarulli v. Circuit City Stores, Inc.*, 333 F.Supp.2d 151, 158 (S.D.N.Y. 2004) (citation omitted). Thus, "procedural questions which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator, to decide." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (emphasis in original) (citation and internal quotation marks omitted). But, ultimately, "arbitration is a matter of contract," *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010), and the EAP to which the parties are bound provides that "disputes about the validity, enforceability, coverage or scope of this Program or any part thereof (including, without limitation, the *Class Action Waiver* described below)" are for a court, not an arbitrator, to decide. McPeak Decl. Ex. 10 at 60-61 (emphasis added). Consequently, the Court can properly address this issue.

A. The EAP Does Not Carve Out Plaintiff's NLRA Right to Proceed Collectively

Plaintiff first argues that the class action waiver in Defendant's EAP should not be enforced because the EAP carves out Plaintiff's rights under the National Labor Relations Act ("NLRA"). The EAP states:

> This Program also does not: . . . waive any rights you might have under the National Labor Relations Act ("NLRA") nor does it exclude the National Labor Relations Board from jurisdiction over disputes covered by the NLRA. Thus, the Program does not prevent you from filing an unfair labor practice charge under the NLRA .
>
> . . .

McPeak Decl. Ex. 10 at 61 (emphasis omitted). Under the NLRA, employees have the right to "engage in . . . concerted activities for the purpose of . . . mutual aid or protection . . .." 29 U.S.C. § 157. That phrase has been interpreted to include a right to proceed collectively in litigation or arbitration. *See Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978) (recognizing that employees engage in concerted activity "when they seek to improve working conditions through resort to administrative and judicial forums."); *see also In re D. R. Horton, Inc.*, Case 12-CA-25764, 2012 WL 36274, *2 (N.L.R.B. Jan. 3, 2012) (holding that arbitration is also protected as concerted activity). Consequently, Plaintiff claims that she should be permitted to arbitrate her claims collectively, notwithstanding the EAP's class action waiver.

This argument is unpersuasive. The EAP provides that "*notwithstanding any other provision of this*

Program, if you . . . elect to arbitrate a Claim, . . . you . . . will [not] have the right . . . to . . . obtain relief from a class action . . . ." McPeak Decl. Ex. 10 at 66 (emphasis added). Under New York law, "clauses similar to the phrase '[n]otwithstanding any other provision' trump conflicting contract terms." *Bank of N.Y. v. First Millennium, Inc.*, 607 F.3d 905, 917 (2d Cir. 2010) (citing *Int'l Multifoods Corp. v. Commercial Union Ins. Co.*, 309 F.3d 76, 90-91 (2d Cir. 2002); *L & B 57th St., Inc. v. E.M. Blanchard, Inc.*, 143 F.3d 88, 93 (2d Cir. 1998); *Morse/Diesel, Inc. v. Trinity Indus., Inc.*, 67 F.3d 435, 438-439 (2d Cir. 1995)). Thus, to the extent the EAP language on which Plaintiff relies can be read to include the right to collective activity outside of the context of filing an unfair labor practice claim with the NLRB,[5] the EPA's class action waiver overrides the language on which Plaintiff relies.

B. The EPA's Class Action Waiver Does Not Violate the NLRA

Finally, Plaintiff asserts that the class action waiver in Defendant's EAP should not be enforced because it

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[5] Defendant argues that the language at issue should be read to preserve only the right to file an unfair labor practice charge with the National Labor Relations Board ("NLRB") or to guarantee employees that they will not be retaliated against for initiating an unfair labor practices charge. Neither reading is particularly persuasive because the EAP states that it does not waive "*any* rights" an employee might have under the NLRA, without further qualification. McPeak Decl. Ex. 10 at 61 (emphasis added). Nonetheless, given New York law, as discussed above, any conflict between the two phrases has to be resolved in favor of the class action waiver because it includes the phrase "notwithstanding any other provision of this Program."

violates section 157 of the NLRA. Plaintiff relies heavily on *D.R. Horton*, 2012 WL 36274, at **1, 5, in which the NLRB held that an employer violates the NLRA when "it requires employees . . . as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum, arbitral or judicial." The NLRB further held that the NLRA does not conflict with the FAA because the latter does not require a party to forgo substantive rights. *Id.* at *13. In the alternative, the NLRB indicated that if a conflict exists between the two statutes, the FAA must yield to the NLRA. *Id.* at *16. Although the Fifth Circuit refused to enforce *D.R. Horton* in this respect, *see D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), the NLRB has recently reaffirmed its position in *Murphy Oil USA, Inc.*, Case 10-CA-038804, 2014 WL 5465454 (N.L.R.B. Oct. 28, 2014).

In *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 296 (2013), the Second Circuit held that the FLSA, which has a grant of authority for collective action that is much more specific than that provided by the NRLA, *see* 29 U.S.C. § 216(b),[6] did not prevent enforcement of a class action waiver included in an ar-

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[6] Section 216(b) of the FLSA, in relevant part, provides:

> An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated . . ..

29 U.S.C. § 216(b).

bitration agreement. In a footnote, the Court declined to follow the NLRB's views as articulated in *D.R. Horton*. *Sutherland*, 726 F.3d at 297 n.8. Drawing upon the Second Circuit's analysis, this Court finds that the NLRA does not stand in the way of the FAA's command to enforce arbitration agreements "according to their terms." *CompuCredit*, 132 S.Ct. at 669. Significantly, other judges in this District have reached the same conclusion. *See Litvinov*, at *3 n.11; *Lloyd v. J.P. Morgan Chase & Co.*, Nos. 11-CV-9305 (LTS), 12-CV-2197 (LTS), 2013 WL 4828588, *6 n.7 (S.D.N.Y. Sep. 9, 2013); *LaVoice v. UBS Fin. Serv., Inc.*, No. 11-CV-2308 (BSJ), 2012 WL 124590, *6 (S.D.N.Y. Jan 13, 2012). Other than pointing out that the NLRB has recently reiterated its view in the *Murphy Oil* decision,[7] Plaintiff makes no new arguments to show that the cited cases were wrongly decided. Rather, she recites the arguments made by the NLRB in *D.R. Horton*, which are the same arguments that the Second Circuit considered and rejected in *Sutherland*. Without more, the Court declines Plaintiff's in-

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[7] It also appears that the NLRB stands alone in holding that the NLRA overrides the FAA relative to class action waivers. Like the Second Circuit and this Court, a significant number of circuit and district courts around the country have declined to follow *D.R. Horton*. *See*, *e.g.*, *D.R. Horton*, 737 F.3d at 362; *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053-1054 (8th Cir. 2013); *Carey v. 24 Hour Fitness USA, Inc.*, Civil Action No. H-10-3009, 2012 WL 4754726, *2 (S.D.Tex. Oct. 4, 2012); *Tenet HealthSystem Phila., Inc. v. Rooney*, No. 12-MC-58, 2012 WL 3550496, **2-4 (E.D.Pa. Aug. 17, 2012); *Delock v. Securitas Sec. Servs. USA, Inc.*, 883 F.Supp.2d 784, 789 (E.D.Ark. 2012); *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F.Supp.2d 831, 841-845 (N.D.Cal. 2012).

vitation to depart from this precedent.[8] For all of these reasons, the Court therefore finds that the EAP's class action waiver is enforceable.

CONCLUSION

For the forgoing reasons, Defendant's motion to compel arbitration is GRANTED. Because all claims are arbitrable, the case is dismissed. The Clerk of the Court is respectfully directed to terminate docket number 14 and to close the case.

SO ORDERED.

s/ *Valerie Caproni*
VALERIE CAPRONI
United States District Judge

Date: March 27, 2015
New York, New York

[8] The Court also notes that *Sutherland* is entirely consistent with recent Supreme Court cases enforcing class action waivers. "The overarching purpose of the FAA," the Court explained, "is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1748 (2011); *see also Am. Express Co.*, 133 S.Ct. at 2312.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

14-CV-5882 (VEC)
DATE FILED: 8/07/2015

ORDER

CONNIE PATTERSON, on behalf of herself and all others similarly situated,

Plaintiff,

-against-

RAYMOURS FURNITURE COMPANY, INC.,

Defendant.

VALERIE CAPRONI, United States District Judge:

Plaintiffs have moved for partial reconsideration of the Court's March 27, 2015 Order (the "March 27 Order") granting Defendant's Motion to Compel Arbitration with respect to Plaintiffs' claims for alleged violations of the Fair Labor Standards Act ("FLSA") and the New York Labor Law ("NYLL"). By their Motion for Partial Reconsideration (the "Motion"), Plaintiffs seek reconsideration on that grounds that the March 27 Order allegedly leaves opt-in Plaintiff David Ambrose without recourse to vindicate his statutory rights. For the reasons stated below, Plaintiffs' Motion is DENIED.

BACKGROUND

Plaintiff Connie Patterson filed this class and collective action lawsuit on July 30, 2014. Compl., Dkt. 1. On August 6, 2014, Ambrose joined the action as an opt-in Plaintiff. Dkt. 6. Ambrose's last day of employment with Defendant Raymours Furniture Company, Inc. ("Raymours") had been approximately 15 months earlier, on May 4, 2013. Pls.' Reply at 1. Pursuant to Raymours's employment arbitration program, arbitration claims that are not filed with the program administrator within 180 days of accrual are, with few exceptions, contractually time-barred. *See* Swartz Decl., Ex. B.[1]

On September 8, 2014, Raymours moved to compel arbitration of Plaintiffs' claims. Dkts. 14-16. On October 24, 2014, over 17 months after his termination from Raymours, counsel for Ambrose sent Raymours a "Claim Notice" that was signed by Ambrose and dated September 25, 2014. Def.'s Opp. at 2-3; *see also* Swartz Decl., Ex. A. Ambrose's Claim Notice described his FLSA and NYLL claims and stated: "Absent a negotiated resolution, I intend to pursue my claims in arbitration." Swartz Decl., Ex. A at 2. On

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[1] Raymours cites to Local Civil Rule 6.3 in arguing that Plaintiffs' Motion should be denied because it relies considerably on documents filed in connection with the Swartz Declaration, without having obtained prior authorization from the Court to file such materials. Def.'s Opp. at 4. Raymours further argues that Plaintiffs' proffered documents are incomplete and therefore misleading. *Id.* The Court need not further address this issue because, even accepting Plaintiffs' proffered materials, their Motion fails to meet the legal standard applicable to a motion for reconsideration.

December 5, 2014, Raymours sent a letter to Ambrose's counsel stating that, in Raymours's view, Ambrose's claims were untimely under the arbitration program and therefore Raymours was "unwilling to offer to settle those claims." Swartz Decl., Ex. B at 2. Ambrose has not yet filed a formal demand for arbitration as is required under the arbitration agreement. *See* Def.'s Opp. at 1, 7; Swartz Decl., Ex. A.

In the March 27 Order, the Court found that Plaintiffs' FLSA and NYLL claims fell within the scope of the arbitration provisions contained in the Raymours employment handbook and that the arbitration provisions were binding and enforceable. March 27 Order at 9-14. Plaintiffs now ask the Court to reconsider the March 27 Order by denying Defendant's Motion to Compel with respect to Ambrose, dismissing Ambrose's claims without prejudice and with tolling intact, and either retaining jurisdiction over Ambrose's claims or granting him 30 days to re-file elsewhere. Pls.' Mem. at 3.[2]

DISCUSSION

"The standards governing motions to alter or amend judgment pursuant to Rule 59(e) and motions for reconsideration or reargument pursuant to Local Rule 6.3 are the same." *Henderson v. Metro. Bank & Trust Co.*, 502 F. Supp. 2d 372, 375-76 (S.D.N.Y. 2007) (citing *4200 Avenue K LLC v. Fishman*, No. 00 Civ. 8814,

[2] In their Reply brief, Plaintiffs seek slightly different relief, requesting that the Court dismiss Ambrose's claims without prejudice and with tolling for 30 days following the arbitrator's ruling on whether his claims are timely under the arbitration program. Pls.' Reply at 2.

2001 WL 498402, at *1 (S.D.N.Y. May 10, 2001)). "A motion for reconsideration should be granted only when the defendant identifies 'an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'" *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust*, 729 F.3d 99, 104 (2d Cir. 2013) (quoting *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992)); *see also Analytical Surveys, Inc. v. Tonga Partners, L.P.*, 684 F.3d 36, 52 (2d Cir. 2012), *as amended* (July 13, 2012). A motion for reconsideration should not be used as a "vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a 'second bite at the apple' . . . ." *Analytical Surveys, Inc.*, 684 F.3d at 52 (quoting *Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 144 (2d Cir. 1998)).

Plaintiffs argue that reconsideration is warranted because "there is new evidence that the March 27 Order will cause a manifest injustice." Pls.' Mem. at 2. In particular, Plaintiffs contend that Raymours's December 5, 2014 decision to view Ambrose's Claim Notice as time-barred under the applicable arbitration program is "new evidence" that the March 27 Order will cause a manifest injustice by effectively foreclosing Ambrose's ability to arbitrate or litigate his claims. *Id.*; *see also* Swartz Decl. Ex. B.

The Court disagrees. First, Defendant's December 5, 2014 letter cannot be considered "new evidence." The arbitration program at issue was extensively litigated prior to the Court's entry of the March 27 Order, so it could not have come as a surprise to the parties or their counsel that, under the program, arbitration claims

filed outside the 180-day window might be time-barred. Nor could it have been any secret that Raymours would raise a timing defense to an arbitration action initiated by Ambrose after the 180-day window had closed; Plaintiffs' own brief acknowledges that Ambrose's claims were "already outside the six-month limit by the time he learned of this case." Pls.' Reply at 2. The mere acknowledgment by Raymours in its December 5, 2014 letter that it viewed Ambrose's claims as time-barred cannot, therefore, constitute "new evidence." If Plaintiffs thought that the six-month limitations period was legally unenforceable or somehow made Defendant's arbitration program fundamentally unfair, they could have raised that issue in the briefing on Defendant's Motion to Compel. *See Goldstein v. State of New York*, No. 00 Civ. 7463(LTS), 2001 WL 893867, at *1 (S.D.N.Y. Aug. 7, 2001) ("A motion for reconsideration . . . should not be used to put forward additional arguments which the movant could have made, but neglected to make before judgment." (citation and internal quotations omitted)); *see also Universal Trading & Inv. Co. v. Credit Suisse (Guernsey) Ltd.*, No. 12 CIV. 0198(PAC), 2013 WL 1404805, at *2 (S.D.N.Y. Apr. 5, 2013) ("[T]hese are not facts that Plaintiffs were 'excusably ignorant of . . . despite using due diligence to learn about them,' and do not constitute new evidence for purposes of Rule 59(e)") (citation omitted).[3]

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[3] Plaintiffs argue in their Motion that the shortened statute of limitation contained in the arbitration agreement is not enforceable. *See* Pls.' Mem. at 3 n.1. That is an issue that must be presented to the arbitrator if and when Ambrose makes a formal demand for arbitration. If they are correct, then the arbitrator will rule in Ambrose's favor on the issue of whether the arbitration is time-barred and Ambrose can proceed in arbitration.

Second, the Court disagrees with Plaintiffs' contention that "manifest injustice" will result unless the Court alters its March 27 Order. Plaintiffs have not argued that the Court should reconsider the March 27 Order due to any clear error or change of controlling law; the only "injustice" they assert is the possibility that the arbitrator will hold that Ambrose's claims are time-barred. But if Ambrose is unable to arbitrate his claims, it will be because the arbitrator finds that the shortened statute of limitations under the arbitration program is legally enforceable and he missed the deadline, not because of the Court's March 27 Order. The March 27 Order merely holds that the arbitration program governs such claims. While it may be unfortunate for Ambrose if the arbitrator determines that he missed his opportunity to arbitrate his claims, it does not rise to the level of "manifest injustice" necessary to succeed on a motion for reconsideration.

CONCLUSION

For the forgoing reasons, Plaintiff's Motion is DENIED. The Clerk of the Court is respectfully directed to terminate docket number 28 and to close the case.

SO ORDERED.

s/ *Valerie Caproni*
VALERIE CAPRONI
United States District Judge

Date: August 7, 2015
New York, New York