No. 16-307

In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MURPHY OIL USA, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

EDWIN S. KNEEDLER
Deputy Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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The National Labor Relations Board (Board)—the agency charged with interpreting and enforcing the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*—has concluded that that an employer commits an unfair labor practice prohibited by the NLRA when it requires its employees to resolve their employment-related claims through individual arbitration and thereby prevents the employees from pursuing such claims in class or collective actions in any forum. See Pet. App. 31a-33a. The Board has further concluded that the Federal Arbitration Act (FAA), 9 U.S.C. 1 *et seq.*, does not compel enforcement of an agreement that thus waives employees' statutory right under 29 U.S.C. 157 to "engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection." See Pet. App. 34a.

As our petition for a writ of certiorari explains (at 19-25), there is a circuit split about the enforceability

of individual employees' class- and collective-action waivers in arbitration agreements—an issue that affects countless employees and employers throughout the Nation. Although respondent disagrees with the Board about the correct answer to the question presented, it supports certiorari in this case, recognizing that "the Board's petition provides an appropriate vehicle for the Court to resolve the issue that has caused the courts of appeals to issue conflicting opinions." Br. for Resp. in Support of Granting Pet. 11.

The Court should grant the Board's petition for a writ of certiorari, whether or not it grants any of the other pending petitions that present variants of the same question.

A. The Court Should Determine The Enforceability Of Class- And Collective-Action Waivers In Individual Employees' Arbitration Agreements

The parties in this case agree that this Court should address whether class- and collective-action waivers in individual employees' arbitration agreements are enforceable. There is little doubt about the importance of that issue or the need for this Court's review. The Seventh and Ninth Circuits have expressly rejected the Fifth Circuit's reasoning in the decision below, and the employers in those cases are seeking this Court's review. See *Morris* v. *Ernst & Young, LLP*, 834 F.3d 975, 990 n.16 (9th Cir. 2016), petition for cert. pending, No. 16-300 (filed Sept. 8, 2016); *Lewis* v. *Epic Sys. Corp.*, 823 F.3d 1147, 1157 & n.† (7th Cir. 2016), petition for cert. pending, No. 16-285 (filed Sept. 2, 2016). Meanwhile, the Second Circuit has reaffirmed an earlier decision that declined to follow the Board's approach, and the employees in that case are seeking this Court's review. See *Patterson* v. *Raymours Furni-*

ture Co., No. 15-2820, 2016 WL 4598542, at *2-*3 (Sept. 14, 2016), petition for cert. pending, No. 16-388 (filed Sept. 22, 2016).[1] Among this case, *Ernst & Young*, and *Epic Systems*, more than ten amicus briefs have been filed in support of certiorari.

B. This Case Is An Appropriate Vehicle For Resolving The Circuit Split

Some of the other certiorari petitions and amicus briefs contend that this case is a less appropriate vehicle for the Court's review than *Ernst & Young* or *Epic Systems*, in which the petitioners are employers. Yet, as respondent acknowledges (at 11), this case is a fully appropriate vehicle for considering the enforceability of class- and collective-action waivers in individual employees' arbitration agreements with their employers.

Indeed, this is the only one of the four contemporaneous petitions for writs of certiorari in which the Board is a party.[2] The Court has "often reaffirmed

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[1] After the decision below, the Eighth Circuit also reaffirmed an earlier decision rejecting the Board's position. See *Cellular Sales of Mo., LLC* v. *NLRB*, 824 F.3d 772, 776 (2016). The Board did not seek further review in *Cellular Sales*.

[2] The Board recently filed another petition for a writ of certiorari presenting the same question as in this case. See *NLRB* v. *24 Hour Fitness USA, Inc.*, No. 16-689 (filed Nov. 23, 2016). The Board is, of course, also a party in that case, in which the Fifth Circuit granted summary disposition in reliance on the decision below in this case. The Board has suggested that the Court hold the petition in that case pending its disposition of this and the other pending cases. In the ordinary course, the Court would make its certiorari decisions appreciably sooner in this case (and in the other three in which the petitions were filed in September) than in *24 Hour Fitness*, and there is no reason to delay doing so based on the filing of the Board's hold petition in *24 Hour Fitness*.

that the task of defining the scope of [Section 157] 'is for the Board to perform in the first instance.'" *NLRB* v. *City Disposal Sys., Inc.*, 465 U.S. 822, 829 (1984) (quoting *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 568 (1978)). The Board's construction of Section 157 underlies the reasoning of the Seventh and Ninth Circuit decisions that the employers challenge in *Ernst & Young* and *Epic Systems*. See *Morris*, 834 F.3d at 980-981; *Lewis*, 823 F.3d at 1155-1156. The interest in enabling the Board to appear in this Court to defend that construction in a party capacity counsels strongly in favor of granting the petition in this case, whether or not the Court also grants review in one or more of the cases involving only private parties.

The reasons that have been advanced for preferring *Ernst & Young* or *Epic Systems* to this case are insubstantial. For instance, Ernst & Young's petition notes that the Ninth Circuit declined to enforce "the very same arbitration provision" that the Second Circuit previously found to be enforceable. Pet. at 23, *Ernst & Young, LLP* v. *Morris*, No. 16-300 (filed Sept. 8, 2016). That vividly illustrates the need for this Court's intervention, but there is no suggestion in the decisions of the courts of appeals that the particular language of that agreement (or of any other individual waiver) has affected the analysis of the basic question posed by all of these cases. Ernst & Young's petition further notes that the Ninth Circuit's decision includes both a majority opinion and a dissenting opinion that have "clearly and thoroughly framed the competing arguments." *Id.* at 22. Members of this Court, however, will be able to draw from the reasoning of either of those opinions, whether or not it grants review in that particular case.

The petitions in both *Ernst & Young* and *Epic Systems* contend that the Court should grant review in a case involving a direct dispute between an employer and its employees. See *Ernst & Young* Pet. at 22; Pet. at 25, *Epic Sys. Co.* v. *Lewis*, No. 16-285 (filed Sept. 2, 2016). But this case involves an equally concrete dispute. On one side, a Fortune 1000 company with operations in 21 States wishes to be able to enforce the class waivers in its arbitration agreements. Pet. App. 24a, 29a; see Pub. Citizen, Inc. Amicus Br. 5. On the other side, the Board seeks to prevent such enforcement by asserting its traditional role as Congress's "chosen * * * instrument to assure protection" from unfair labor practices. *Amalgamated Util. Workers C.I.O.* v. *Consolidated Edison Co.*, 309 U.S. 261, 265 (1940). In this instance, moreover, the Board's position is generally aligned with that of the employees in *Ernst & Young* and *Epic Systems*, who agree that the Board's petition is an appropriate vehicle for resolving the correctness of the lower courts' reasoning in those two cases. See Br. of Resps. in Support of Pet. at 3 & n.2, *Ernst & Young*, *supra* (No. 16-300) (supporting certiorari in this case and in *Ernst & Young*); Br. in Opp. at 32 n.6, 34, *Epic Sys.*, *supra* (No. 16-285) (supporting certiorari in this case, but not in *Epic Systems*, if the Court believes that review is warranted). Similarly, the employees in *Patterson* support certiorari in this case, recognizing that "it is the Board's analysis that is ultimately at issue." Pet. at 9, *Patterson* v. *Raymours Furniture Co.*, No. 16-388 (filed Sept. 22, 2016).

One amicus brief suggests that this case does not really turn on the question of the enforceability of class waivers because the decision below "only briefly

addressed whether the agreement itself was enforceable" and instead "focused most of its attention on a collateral issue." Bus. Roundtable Amicus Br. at 9-10, *Ernst & Young*, *supra* (No. 16-300). But the decision below proceeded from the fundamental premise that the panel was bound to "adhere" to the Fifth Circuit's "prior ruling" rejecting the Board's position in *D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344 (2013). Pet. App. 2a; see *id.* at 4a-5a. Because the Fifth Circuit found no need to "repeat [*D.R. Horton*'s] analysis," *id.* at 8a, its discussion was understandably devoted to other issues. Thus, the Ninth Circuit recognized that its position about the unenforceability of class waivers conflicts with the Fifth Circuit's decision *in this case*. *Morris*, 834 F.3d at 990 n.16.[3] And it is that aspect of the decision below on which the Board seeks this Court's review.

Another amicus brief contends that the question presented in the Board's petition is too narrow to allow the Court to fully address the enforceability of class waivers in arbitration agreements. See Chamber of Commerce of the U.S. Amicus Br. 3-4. In fact, the different formulations of the questions presented merely represent what Ernst & Young has called "a different mode of analysis" in determining whether class waivers are enforceable. *Ernst & Young* Pet. at 18. Like the Seventh and Ninth Circuits, the Board believes that the enforceability question and any potential conflict between the NLRA and the FAA are best addressed by applying the saving clause con-

[3] The Seventh Circuit characterized its decision in *Lewis* as conflicting with the Fifth Circuit's earlier decision in *D.R. Horton*, which the decision below viewed as controlling. See *Lewis*, 823 F.3d at 1157 & n.†.

tained in 9 U.S.C. 2. See *Morris*, 834 F.3d at 985-990; *Lewis*, 823 F.3d at 1157-1161. The Fifth Circuit, however, concluded that "the Board's rule does not fit within the FAA's saving clause." *D.R. Horton*, 737 F.3d at 359. It therefore also considered whether the NLRA provides a contrary "congressional command to override the FAA." *Id.* at 360. The phrasing of the question presented in the Board's petition would not prevent this Court from considering both the saving-clause argument and the alternative argument—which respondent in this case continues to address in defending the court of appeals' judgment on the merits. See Br. for Resp. in Support of Granting Pet. 28-30; *id.* at 28 n.12 (citing the Chamber of Commerce's amicus brief).

The issue that divides the courts of appeals includes the interpretation of an Act of Congress the Board is charged with enforcing. Accordingly, and for the additional reasons set out above, the Board's petition for a writ of certiorari should be granted, whether or not the Court also decides to grant one or more of the other three petitions presenting variations on the same question.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

EDWIN S. KNEEDLER*
Deputy Solicitor General

NOVEMBER 2016

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* The Acting Solicitor General is recused in this case.