Nos. 16-285, 16-300, 16-307

IN THE

Supreme Court of the United States

EPIC SYSTEMS CORP., PETITIONER,
v.
JACOB LEWIS.

ERNST & YOUNG LLP, ET AL., PETITIONERS,
v.
STEPHEN MORRIS, ET AL.

NATIONAL LABOR RELATIONS BOARD, PETITIONER,
v.
MURPHY OIL USA, INC., ET AL.

On Writs of Certiorari
to the United States Courts of Appeals
for the Fifth, Seventh, and Ninth Circuits

BRIEF FOR THE BUSINESS ROUNDTABLE AS AMICUS CURIAE SUPPORTING EPIC SYSTEMS CORP., ERNST & YOUNG LLP, AND MURPHY OIL USA, INC.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Business Roundtable (BRT) is an association of chief executive officers who lead companies with nearly 15 million employees and more than $6 trillion in annual revenues. The combined market capitalization of the BRT's member companies is the equivalent of nearly one-quarter of total U.S. stock market capitalization, and BRT members invest more than $100 billion annually in research and development—equal to 30 percent of U.S. private R&D spending. The BRT's member companies pay over $220 billion in dividends to shareholders and generate more than $400 billion in revenues for small and medium-sized businesses annually. BRT companies also make more than $7 billion a year in charitable contributions. The BRT was founded on the belief that businesses should play an active and effective role in the formulation of public policy, and participate in litigation as *amici curiae* where important business interests are at stake.

These consolidated cases present the question whether the National Labor Relations Act (NLRA) invalidates employment agreements that require employee-employer disputes to be resolved through individual arbitration, not collective adjudication such as a class action. For years, many of the BRT's members

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[1] All parties have consented to the filing of this brief. Blanket consents by all parties in Nos. 16-285 and 16-300 and respondent in No. 16-307 are on file with the Clerk. Consent by petitioner in No. 16-307 is submitted with this brief. No counsel for a party authored any part of this brief, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

have entered into contractual relationships with their employees that incorporate similar arbitration provisions. Rulings that render class-action waivers unenforceable, like the Seventh and Ninth Circuits' determinations below, jeopardize the reliance that many of the BRT's members have placed on having a speedy, efficient, and cost-effective means of resolving disputes with their employees.

SUMMARY OF ARGUMENT

A. For over a century, employment agreements have contained arbitration provisions in varying forms. These provisions grew in popularity with employers after courts began enforcing them under the Federal Arbitration Act (FAA). That popular momentum reached its peak after this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), which effectively held that an arbitration provision may be enforced under the FAA for a broad range of employee claims—including allegations of employment discrimination. The practice of including arbitration provisions in individual employment agreements has only grown since *Gilmer*.

B. Class action waivers are relatively new, crafted in response to an erosion of the understanding that an arbitration provision necessarily excludes the possibility of a classwide proceeding. Class arbitrations were largely an anomaly (and thus unaddressed) until 2003, when a plurality of this Court implicitly recognized the validity of such proceedings in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003). The *Bazzle* plurality opined that an arbitration provision's silence as to class arbitrations could potentially be construed by an arbitrator as allowing for class arbitrations. In response, employers began

incorporating class action waivers into their employment agreements. A majority of this Court corrected the *Bazzle* plurality's observation in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010), but by then, the waivers had become de rigueur in many employment agreements. Uncertainty caused by this Court's decision in *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013), only solidified the trend.

C. Class action waivers are the only means of ensuring that arbitration remains a "matter of consent." *Stolt-Nielsen*, 559 U.S. at 684. A holding that renders such waivers void under the NLRA would force employers to undergo "arbitration" that is bereft of the benefits of arbitration, shorn of the efficiency and cost savings that make arbitration favored in the first place. Nothing in the collective bargaining provisions of the NLRA compels such a result.

ARGUMENT

A. Arbitration agreements have long been used in individual employment agreements, rooted in a strong federal policy favoring arbitration.

Contracts between employers and employees have incorporated arbitration provisions for a century, even before the Federal Arbitration Act (FAA). Over that period, a series of this Court's decisions have reaffirmed that the parties to a contract may select an arbitral forum by mutual consent, and that employers and employees are no exception. Each decision in that line of cases has heightened employers' justifiable reliance on the efficiency and enforceability of arbitration provisions.

Some early arbitration provisions called for only limited review. *See, e.g.*, *Fabricand v. Nortz*, 170 N.E. 129, 129 (N.Y. 1929) (per curiam) (arbitration of a certain clause of an employment agreement). Others were broad in scope, allowing all manner of employment disputes to be heard in arbitration. *See, e.g.*, *Abshire v. City Ry. Co.*, 4 Ohio Law Abs. 144, 144, 1925 WL 3954 (Ohio 1925) (under employment contract, "any grievances which might arise in the future would be submitted for arbitration").

Arbitration proceeded to gain greater acceptance, including through Congress's endorsement of the principle that disputes over rights secured in a collective bargaining agreement should be arbitrated. *See, e.g.*, *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 377 (1974) (observing, in a Labor Management Relations Act case, that "[t]he federal policy favoring arbitration of labor disputes is firmly grounded in congressional command"); *Bhd. of R.R. Trainmen, Enter. Lodge, No. 27 v. Toledo, Peoria & W. R.R.*, 321 U.S. 50, 58 (1944) (Railway Labor Act and Norris-LaGuardia Act were intended to "encourage use of the nonjudicial processes of negotiation, mediation, and arbitration for the adjustment of labor disputes"); *cf. NLRB v. Acme Indus. Co.*, 385 U.S. 432, 439 (1967) (upholding NLRB order based on the "express terms of the [NLRA]" and "the national labor policy favoring arbitration"); *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co.*, 369 U.S. 95, 105 (1962) (the "basic policy" of "national labor legislation" is "to promote the arbitral process as a substitute for economic warfare").

During that same period, some courts were suspicious of agreements to arbitrate individual employment claims. *See* Stephen J. Ware, *Employment Arbitration & Voluntary Consent*, 25 Hofstra L. Rev. 83, 95-96 (1996). The result was fewer arbitration clauses in individual employment agreements than there might otherwise have been. *See id.* at 95. But despite that modest disincentive, some employers continued inserting arbitration provisions into individual employment agreements. *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956), for example, concerned a provision in an employment contract that required arbitration administered by the American Arbitration Association under New York law. An employee brought an unlawful-discharge claim in Vermont state court. *Id.* at 199. This Court held that the agreement was not governed by the FAA (because the contractual relationship did not satisfy the jurisdictional element), *id.* at 200-01, but that the question of enforceability was a question of Vermont law.

In the 1970s, a new trend began to emerge in which federal courts found that arbitration provisions in individual employment agreements were indeed enforceable under the FAA. These courts based their enforceability determinations on section 2 of the FAA, something that the *Bernhardt* Court refused to do. *See, e.g.*, *Dickstein v. duPont*, 443 F.2d 783 (1st Cir. 1971); *Legg, Mason & Co., Inc. v. Mackall & Coe, Inc.*, 351 F. Supp. 1367, 1371 (D.D.C. 1972). In *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1972), for example, the Second Circuit held that a basketball club could rely on section 2 of the FAA, 9 U.S.C. § 2, to enforce an "arbitration clause . . . as broad as can be imagined" against one of its star athletes, Julius "Dr.

J." Irving. *Id.* at 1067. Irving tried to argue that his contract did not "involv[e] commerce," and that in any event, section 1, which exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," prevented enforcement of the subject arbitration clause under the FAA. *Id.* at 1068-69. The court of appeals disagreed, concluding that: (1) professional athlete contracts for any sport other than baseball are "a subject of interstate commerce"; and (2) section 1 of the FAA did not prohibit enforcement because that provision applies "only to those actually in the transportation industry," i.e., "employees involved in, or closely related to the actual movement of goods in interstate commerce." *Id.*[2]

Even with this trend, however, enforcement of employment arbitration provisions under the FAA was by no means guaranteed. For example, courts were reluctant to send certain statutory claims to arbitration as a matter of policy. *See, e.g.*, *Lewis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 431 F. Supp. 271, 277 (E.D. Pa. 1977) ("[T]he competing policies of the Federal Arbitration Act and ERISA are not easily reconciled."). In particular, courts found employment discrimination claims to be unsuitable for arbitration, citing this Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and its conclusion that

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[2] This Court later adopted the Second Circuit's position in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). *See id.* at 119 ("In sum, the text of the FAA forecloses the construction of § 1 followed by the Court of Appeals in the case under review, a construction which would exclude all employment contracts from the FAA.").

"the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII," *id.* at 59-60. *See, e.g.*, *Utley v. Goldman Sachs & Co.*, 883 F.2d 184, 186 (1st Cir. 1989); *Swenson v. Mgmt. Recruiters Int'l, Inc.*, 858 F.2d 1304, 1305-06 (8th Cir. 1988) ("The analysis of *Alexander* lends strong support that Congress did not intend federal judicial proceedings in discrimination cases to be preempted by employment arbitration provisions enforceable under the FAA."). While these courts recognized that broad deference to the federal policy favoring arbitration was given in other areas, employment discrimination lawsuits were simply of a different kind and character. *See Utley*, 883 F.2d at 186 ("Notwithstanding this policy [favoring arbitration], however, the Court has done nothing to disturb its prior ruling in *Alexander* that arbitration agreements do not preclude an independent right of access to a judicial forum for resolution of Title VII claims."). While employers' confidence in the enforceability of individual employment arbitration provisions grew in the 1970s and 1980s, the exceptions carved out by courts left employers uncertain as to the arbitration provisions' enforceability and versatility in enforcement.

It was not until this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), that employers could believe with certainty that individual employment arbitration provisions could be used to resolve a broad range of disputes. *See* Michael H. Leroy & Peter Feuille, *Judicial Enforcement of Pre-*

dispute Arbitration Agreements: Back to the Future, 18 Ohio St. J. on Disp. Resol. 249, 281 (2003) (suggesting that the FAA did not "reemerge[] as a workplace dispute resolution law" until 1991, when the Court decided *Gilmer*). In *Gilmer*, a manager employed by a stock brokerage sued his employer over an alleged violation of the Age Discrimination in Employment Act of 1967 ("ADEA"). The employer moved to compel arbitration, citing an arbitration provision that the employee had agreed to when he first joined the employer in 1981. The employee argued that allowing arbitration of discrimination claims such as ones brought under the ADEA would be inconsistent with "the statutory framework and purposes of" the anti-discrimination statutes. *Gilmer*, 500 U.S. at 26-27.

This Court disagreed. And in doing so, it gave employers guidance as to the broad scope of arbitration provisions—to wit, what could and could not be arbitrated. The *Gilmer* Court began with a sweeping reaffirmation of the principle that "statutory claims may be the subject of an arbitration agreement." *Id.* at 26. It also reiterated that, "[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985)).

There was no exception to this rule for anti-discrimination statutes—they, too, were subject to the "healthy regard for the federal policy favoring arbitration." *Id.* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). While the Court acknowledged that "the ADEA is designed not

only to address individual grievances, but also to further important social policies," it did not "perceive any inherent inconsistency between those policies . . . and enforcing agreements to arbitrate age discrimination claims." *Id.* at 27. Arbitration, like litigation, could be used to "further broader social purposes" through the resolution of individual claims. *Id.* at 28. Although certain procedural aspects of arbitration, such as discovery, were more limited than ordinary litigation, the Court did not perceive that as an impediment because "a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Id.* at 31 (quoting *Mitsubishi*, 473 U.S. at 628).

After *Gilmer*, arbitration provisions were more widely incorporated into individual employment agreements. In 1995, the General Accounting Office reported that about 10% of employers with more than 100 employees used arbitration as a dispute resolution mechanism, with an additional 8.4% of employers considering arbitration. U.S. Gen. Accounting Office, *Employment Discrimination: Most Private-Sector Employers Use Alternative Dispute Resolution* 7-8 (July 1995). A 1997 survey of 36 mostly "well-known, national companies" showed that, while certain employment arbitration policies dated back "50 and 40 years," "[e]ighty-five percent of the [arbitration] procedures reported in the survey were implemented within the last five years, since *Gilmer* was decided," with 20% of arbitration policies being implemented between 1995 and 1997. Mei L. Bickner et al., *Developments in Employment Arbitration*, 52 Disp. Resol. J. 8, 77-78 (Jan. 1997). The Equal Employment Opportunity Commission ("EEOC"), resisting *Gilmer* but acknowledging its

precedential value, observed in 1997 that "[a]n increasing number of employers are requiring as a condition of employment that applicants and employees . . . agree to resolve disputes through binding arbitration." EEOC Notice No. 915.002 (July 10, 1997). The EEOC also observed that all manners of employers, such as "the securities industry, retail, restaurant and hotel chains, health care, broadcasting, and security services" were increasingly incorporating arbitration provisions in their individual employment agreements. *Id.* In 2000, the American Arbitration Association ("AAA") reported that "more than 500 employers and 5 million employees worldwide" relied on the AAA to resolve disputes. Am. Arbitration Ass'n, *Proud Past, Bold Future* 27 (2000), *available at* https://www.adr.org/sites/default/files/document_repository/2000%20Annual%20Report_0.pdf. There was little question that *Gilmer* encouraged employers to "increasingly require employees to sign pre-dispute compulsory arbitration agreements." Geraldine S. Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 Wash. & Lee L. Rev. 395, 398 n.6 (1999). The popularity of individual employment arbitration provisions only grew as lower courts made clear that *Gilmer* applied to "arbitration agreements involving occupations outside the securities industry . . . and [] to federal employment statutes other than the ADEA." Leroy, *supra*, at 284-85.

In short, since *Gilmer*, there has been "a consistent pattern of significant expansion of employment arbitration." Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 Employee Rts. & Emp. Pol'y J. 405, 411 (2007). And the overall trend over the life of the FAA

has shown ever-increasing reliance on arbitration in the employment context: substantial numbers of employment contracts contain arbitration provisions and depend on their enforceability.

B. Class action waivers are a recent phenomenon intended to preserve a protection long understood to be a key characteristic of arbitration: the *individual* resolution of claims.

Even as arbitration has grown in utility, popularity, and acceptance, one point has remained constant: arbitration has long been known as a device for deciding *individual* disputes. Even in the last 20 years, the notion that arbitral proceedings could entertain classwide claims—much less be *compelled* to entertain classwide claims as some sort of workplace entitlement—was foreign to the practice of arbitration.[3] Courts had perceived class actions and arbitrations as mutually exclusive devices—thus, there was little need to contemplate how the two would intersect. *See, e.g.*, *Harris v. Shearson Hayden Stone, Inc.*, 441 N.Y.S.2d 70, 94 (N.Y. App. Div. 1981) ("[I]t is clear . . . that the interests favoring arbitration should prevail over those favoring the class action, both in general and in the present instance."), *aff'd*, 56 N.Y.2d 627 (1982); *Vernon*

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[3] *E.g.*, Edward W. Dunham, *The Arbitration Clause as Class Action Shield*, 16 Franchise L.J. 141, 142 (1997) ("An arbitration clause may not be an invincible shield against class action litigation, but it is surely one of the strongest pieces of armor available to the franchisor."); *see* Hans Smit, *Class Actions in Arbitration*, 14 Am. Rev. Int'l Arb. 175, 176 (2003) ("[T]he preference for arbitration may be inspired in part by the perceived lack of class actions in arbitration . . . .").

v. Drexel Burnham & Co., 125 Cal. Rptr. 147, 153 (1975) ("Finally the substantive law of contractual agreement [an arbitration provision] takes precedence over the class action, which is merely a procedural device for consolidating matters properly before the court.").

Class arbitration waivers therefore have a shorter pedigree than arbitration clauses themselves, for the simple reason that the notion of a class arbitration is itself a recent one. In the 1970s and 1980s, the commercial arbitration rules of certain arbitral forums, such as the American Arbitration Association (AAA), were silent as to the availability of classwide relief. That silence, combined with arbitral rules limiting remedies to "the scope of the agreement of the parties," was understood to prohibit class arbitration. *See Nicholson v. CPC Int'l Inc.*, 877 F.2d 221, 228 (3d Cir. 1989), *abrogated on other grounds by Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

The first judicial decision opening the door to class arbitration was *Keating v. Superior Court*, 167 Cal. Rptr. 481 (Cal. Ct. App. 1980), in which the California Court of Appeal held that there was "no insurmountable obstacle to conducting an arbitration on a classwide basis." *Id.* at 492.[4] The only court to follow suit (at least in a reported decision) was the Pennsylvania

[4] This case eventually came before this Court in the form of *Southland Corp. v. Keating*, 465 U.S. 1 (1984). But the Court did not reach the issue of class arbitration because the California Supreme Court had not passed upon "the question whether superimposing class action procedures on a contract arbitration was contrary to the federal [Arbitration] Act." *Id.* at 9.

Superior Court. *See Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860 (Pa. Super. Ct. 1991).

By and large, however, "very few arbitrations ha[d] been handled as class actions" up until 2000.[5] And arbitral forums were largely unprepared for them.[6] For most of its existence, the AAA administered class arbitrations only when it was forced to do so, in the rare instances when a state court called for an anomalous classwide arbitration proceeding. *See Lewis v. Prudential Bache Secs., Inc.*, 225 Cal. Rptr. 69, 71, 75-76 (Cal. Ct. App. 1986) ("The superior court shall appoint the American Arbitration Association to arbitrate this matter.").

In the 1990s, arbitral forums began stating expressly whether class arbitration was allowed or disallowed. The New York Stock Exchange in *Gilmer*, for example, expressly allowed "collective proceedings," a fact that this Court ultimately deemed immaterial to its holding that employment discrimination suits could be decided by a private arbitrator, rather than a court. *See* 500 U.S. at 32 ("But 'even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at concili-

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[5] Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1, 40 n.148 (2000).

[6] David S. Clancy & Matthew M.K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 Bus. Law. 55, 56 & n.1 (2007) (noting that the American Arbitration Association adopted class arbitration provisions in 2003).

ation were intended to be barred.'" (quoting *Nicholson*, 877 F.2d at 241 (Becker, J., dissenting))). In contrast, the National Arbitration Forum disallowed class arbitrations,[7] going so far as to encourage "implement[ation of] arbitration provisions containing terms that expressly waive the right to class treatment" as a cautionary measure. Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 Mich. L. Rev. 373, 397 (2005).

Given the relative infancy of class arbitrations, it is no surprise that class action waivers are of an even more recent vintage. *Id.* These waivers were first publicly suggested in the late 1990s, with "trade-journal articles . . . encouraging corporate counsel to consider redrafting contracts to include provisions requiring consumers and others to waive the right to participate in class actions or even group arbitrations." *Id.* at 396. "Practice soon followed these practice pointers, such that waivers of class-wide arbitration [became] common features of arbitration clauses in consumer contracts." Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-wide Arbitration, and CAFA*, 106 Colum. L. Rev. 1872, 1898 (2006). Employers, too, began using such waivers to "avoid classwide exposure in the employment context." Gilles, *supra*, at 419.

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[7] David G. Wirtes, Jr., *Suggestions for Defeating Arbitration*, 24 Am. J. Trial Advoc. 111, 112 n.4 (2000) ("And under the rules of the National Arbitration Forum . . . consumers cannot join in class action lawsuits . . . ." (quoting *Consumers Losing Right to Sue*, USA Today, Feb. 1, 2000, at 13A)).

Businesses began incorporating class action waivers apace after this Court's decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003). James E. McGuire & Bette J. Roth, *Class Action Arbitrations: A First Circuit Update,* 52 Boston Bar J. 17, 18 (2008). In *Bazzle*, a plurality of the Court held that an arbitration provision was silent as to the availability of class arbitration and left it to the arbitrator to decide "whether the agreement forbids class arbitration." 539 U.S. at 451.

Rather than take the "non-trivial risk that an arbitrator will entertain class or collective actions in the absence of" a clause governing such actions, "many employers . . . incorporate[d] explicit 'no-class action' clauses" into their arbitration policies, as a prophylactic response to *Bazzle.* Samuel Estreicher & Steven C. Bennett, *Using Express No-Class Action Provisions to Halt Class-Claims*, 233 N.Y. L.J. 3 (June 10, 2005). They did so by "amend[ing] their standard employment contract and requir[ing] existing employees to agree to the new terms as a condition of continued employment." McGuire, *supra*, at 17.

This Court addressed the interpretive issue head-on in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010), holding that a silent agreement did *not* permit class arbitration by its silence. The Court held that silence could not be necessarily construed as consent to class arbitration—that "a party may not be compelled under the FAA to submit to class arbitration under there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 684.

Businesses nevertheless continued to include "explicit class action waivers in their arbitration agreements," even *after Stolt-Nielsen*.[8] They remained nervous about the possibility that silence on the issue of class actions in the employment agreement could still be construed as consent to class arbitration, in light of this Court's subsequent decision in *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013). The *Oxford* Court determined that an arbitrator could discern approval for class proceedings from an arbitration provision that lacked any express clause concerning class arbitration, so long as the parties consented to the arbitrator's authority to interpret the contract. *Id.* at 2070-71. Because of *Oxford*, silence as to the issue of class adjudication in an arbitration provision continued to "'spell[] potential danger' for businesses seeking to avoid class actions"—thus encouraging businesses to continue incorporating express class action bars in their agreements. Michael Hoenig & Linda M. Brown, *Arbitration and Class Action Waivers Under Conception: Reason and Reasonableness Deflect Strident Attacks*, 68 Ark. L. Rev. 669, 723 (2015). That practice continues to this day.

[8] Kate W. Moss, *ERISA and Arbitration: How Safe Is Your 401(k)?*, 64 DePaul L. Rev. 773, 793 (2015).

C. Invalidating class action waivers under the National Labor Relations Act's collective bargaining provisions and imposing class arbitration on employers would largely undo the benefits of arbitration.

This Court is well familiar with the benefits of bilateral arbitration, which are the same regardless of whether the arbitration takes place in the context of employment or some other business relationship. "Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001). The bargain of bilateral arbitration is straightforward: "parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen*, 559 U.S. at 685. Administering arbitral disputes on an *individual* basis is the only way of accomplishing the objectives of the FAA: the "quick, simple, and inexpensive" resolution of disputes. Imre S. Szalai, *Aggregate Dispute Resolution: Class and Labor Arbitration*, 13 Harv. Negot. L. Rev. 399, 433 (2008).

If the Court holds that class action waivers are no longer valid because they lie in tension with the NLRA's collective bargaining provisions, there is only one result that follows in light of existing arbitration provisions: employers will unwillingly be subject to class arbitrations, to which they never agreed and in-

deed expressly disavowed. As this Court recognized in *Stolt-Nielsen*, "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." 559 U.S. at 685. Compared to traditional bilateral arbitration, "the relative benefits of class-action arbitration are much less assured, giving reason to doubt the parties' mutual consent to resolve disputes through class-wide arbitration." *Id.* at 685-86. "[T]he switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011). Class arbitration imposes a level of procedural formality that is anomalous for a typical arbitration and "increases risks to defendants" by stripping certain procedural protections accorded to class actions in court. *Id.* at 349-50.

Class arbitration "eliminates many of the benefits of having arbitration in the first place." Joshua S. Lipshutz, Note, *The Court's Implicit Roadmap: Charting the Prudent Course at the Juncture of Mandatory Arbitration Agreements and Class Action Lawsuits*, 57 Stan. L. Rev. 1677, 1710 (2005). "When class action-like procedures are grafted onto arbitration," the arbitration process loses the benefits of lower costs and higher efficiency attendant to the arbitration of individual claims. *Id.* at 1712. A class arbitration instead becomes encumbered with "due process problems inherent in class arbitration that must be resolved through increased judicial supervision," which defeats the point of having an arbitration in the first place—

removing a court from the equation. *Id.* That loss of efficiency and cost savings has a bottom-line impact on consumers and employees: it "reduces savings which would otherwise be passed on . . . in the form of lower product prices [for consumers] and higher employee salaries." William H. Baker, *Class Action Arbitration*, 10 Cardozo J. Conflict Resol. 335, 364 (2009).

Federal labor law endorses labor arbitration in order to minimize disruption and to fashion a "uniform and exclusive method for orderly settlement of employee grievances." *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653 (1965). The same twin goals of minimizing disruption and promoting uniformity apply to individual, bilateral arbitrations. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995). Not so with class arbitrations. Class arbitrations can hardly be considered uniform, given that they pick up the ballast of "additional and different procedures," generating "procedural morass" that "makes the process go slower [and] more costly." *AT&T Mobility*, 563 U.S. at 348. The cumbersome nature of that anomalous proceeding has a disruptive effect for both employers and employees alike, with ripple effects reaching consumers served by those employers.

In light of this Court's post-*Bazzle* precedents and their erosion of the presumption that arbitration provisions preclude class actions, *see Harris*, 441 N.Y.S.2d at 94, the only means of ensuring that arbitration remains "a matter of consent," *Stolt-Nielsen*, 559 U.S. at 684, is to allow for express class action waivers. Nothing in the NLRA strips an employer of its ability to withhold that consent.

CONCLUSION

The judgments of the courts of appeals should be reversed in *Epic Systems Corp. v. Lewis*, No. 16-285, and *Ernst & Young LLP v. Morris*, No. 16-300. The judgment of the court of appeals in *National Labor Relations Board v. Murphy Oil USA, Inc.*, No. 16-307, should be affirmed.

Respectfully submitted.

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