No. 16-285

IN THE

Supreme Court of the United States

EPIC SYSTEMS CORPORATION,

Petitioner,

v.

JACOB LEWIS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

RAE T. VANN
Counsel of Record
NT LAKIS, LLP
1501 M Street, NW
Suite 400
Washington, DC 20005
rvann@ntlakis.com
(202) 629-5600

Attorneys for *Amicus Curiae* Equal Employment Advisory Council

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

FEDERAL CASES Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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The Equal Employment Advisory Council (EEAC) respectfully submits this brief *amicus curiae*. The brief supports the Petitioner and urges reversal of the decision below.[1]

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no 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 its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 250 major U.S. corporations, collectively providing employment to millions of workers. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's member companies are strongly committed to equal employment opportunity and seek to establish and enforce internal policies that are consistent with federal employment nondiscrimination laws. This commitment extends to the prompt and effective resolution of employment disputes using arbitration and other forms of alternative dispute resolution. Many of them thus have adopted company-wide policies requiring the use of binding arbitration to resolve all employment-related disputes. Some of those arbitration agreements contain class action waiver provisions, which primarily are designed to preserve the benefits of arbitration, while at the same time avoiding costly, complex, and protracted class-based litigation. The issues presented in this case thus are extremely important to the nationwide employer constituency that EEAC represents.

Agreements to arbitrate, like other privately negotiated contracts, afford parties to a dispute the right to

establish clear standards and criteria against which their future conduct will be judged. Accordingly, such agreements must be strictly enforced in the same manner and to the same extent as any other valid contract. Disregarding these well-established legal principles, the Seventh Circuit below incorrectly held that an agreement requiring employees to submit their work-related disputes to binding arbitration as a condition of employment, but which contains a clause barring class-based or collective claims, impermissibly restricts the right of employees to engage in protected concerted activity for their "mutual aid and protection," in violation of the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151 *et seq.*

Because of its interest in this subject, EEAC has filed *amicus curiae* briefs supporting the enforceability of arbitration agreements in numerous cases before this Court, including *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009); *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 559 U.S. 662 (2010); *Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 63 (2010); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *CarMax Auto Superstores Cal., LLC v. Fowler*, 134 S. Ct. 1277 (2014); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *MHN Gov't. Svcs., Inc. v. Zaborowski*, 136 S. Ct. 1539 (2016) (cert. dismissed); and *Bloomingdale's, Inc. v. Vitolo*, No. 16-1110 (brief *amicus curiae* filed

Apr. 14, 2017). EEAC is thus deeply familiar with the issues presented in this case and is well situated to brief the Court on their importance beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Respondent Jacob Lewis worked for Petitioner Epic Systems Corporation (Epic) as a technical writer. Pet. App. 24a. In April 2014, Epic sent an email to staff advising that the company would now require that all wage and hour disputes be submitted to binding, individual arbitration. *Id.* at 2a. The agreement contained an express clause barring class, collective, and representative proceedings, which specified that if the class waiver were ever deemed unenforceable, any class-based claim would have to be brought in court. *Id.* Employees were required to agree as a condition of employment. *Id.*

Sometime thereafter, Lewis sued Epic in federal court, accusing the company of misclassifying him and others similarly situated as exempt in violation of the Fair Labor Standards Act (FLSA). *Id.* Pointing to the agreement to arbitrate, Epic moved to dismiss the action and to compel individual arbitration of Lewis's claims. *Id.* Lewis responded that the arbitration agreement was unconscionable and thus unenforceable. *Id.* at 2a-3a. Alternatively, he contended that the class waiver provision impermissibly interfered with the right of employees to engage in protected concerted activities under the NLRA, and therefore was unlawful. *Id*. at 3a.

Deferring to the NLRB's position on the question, the trial judge held that the class waiver was inconsistent with the NLRA's "concerted activity" protections. *Id.* It found there to be no conflict with

the FAA, because the FAA does not mandate enforcement of arbitration agreements that "conflict with substantive provisions" of other federal laws, like the NLRA. *Id.* at 27a. Therefore, the trial court refused to dismiss Lewis's court claim and order him into arbitration. *Id.* at 28a-29a.

Epic appealed to the Seventh Circuit, which affirmed. *Id.* at 2a. Like the trial court, the appeals court adopted the Board's view that class waivers impermissibly interfere with employee Section 7 rights, and therefore are unenforceable under the NLRA. *Id.* at 23a. Epic filed a petition for a writ of certiorari with this Court on September 2, 2016. The Court granted certiorari on January 13, 2017.

SUMMARY OF ARGUMENT

This Court consistently has held that under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, agreements to arbitrate must be enforced as written. This pro-arbitration mandate applies equally to agreements containing explicit class and collective action waivers, as well as to those that do not address the availability of such procedures. That is because allowing arbitrable claims to be adjudicated on a class or collective basis where the parties have not expressly so agreed "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011).

Disregarding the strong federal policy expressed in the FAA favoring enforcement of arbitration agreements, the Seventh Circuit instead applied a controversial National Labor Relations Board (NLRB or Board) rule, which strongly *disfavors* arbitration, to invalidate Petitioner's arbitration agreement simply

because it contained a class action waiver. According to the Board, an arbitration agreement that restricts the availability of class or collective procedures impermissibly interferes with the right of employees to engage in protected concerted activity for their "mutual aid and protection" under Section 7 of the National Labor Relations Act (NLRA), 29 U.S.C. § 157. Because the decision below, as well as the NLRB policy position on which it is based, cannot be reconciled with sound and established FAA principles, it is erroneous and must be reversed.

The FAA provides that 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. Its primary objective is to ensure that arbitration agreements are rigorously enforced "in order to give effect to the contractual rights and expectations of the parties." *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 458 (2003) (citations and internal quotations omitted). For that reason, where an arbitration agreement contains an express class or collective action waiver – or does not explicitly *authorize* such procedures – the agreement must be enforced as written. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, (2011); *Stolt-Nielsen S.A. v. AnimalFeeds International Corp*., 559 U.S. 662 (2010).

Contrary to the Board's view, waiving a party's access to class procedures is not tantamount to a waiver of any substantive rights, including the Section 7 right to engage in protected concerted activities. This Court long ago held in *Gilmer v. Interstate/Johnson Lane Corp* that when an individual agrees, as a condition of employment, to submit all employment-related disputes to arbitration, that agreement stands

"upon the same footing as other contracts" and is enforceable with respect to substantive discrimination claims as well as other disputes. 500 U.S. 20 (1991) (citations omitted).

In addition, enforcement of a class waiver implicates an individual's ability to utilize certain procedures, *not* the substantive right to engage in protected concerted activities itself, a principle confirmed by this Court in *Gilmer*. Accordingly, any suggestion that a class or collective action waiver prevents the exercise of protected concerted activity is belied by this Court's longstanding FAA jurisprudence since and including *Gilmer*.

Furthermore, the NLRA does not establish a non-waivable right to class or collective proceedings; accordingly, enforcing a class waiver pursuant to the FAA does not conflict with any contrary mandate expressed in the NLRA. *Kindred Nursing Ctrs. L.P. v. Clark*, 137 S. Ct. 1421, 1427 (2017). Moreover, because the Board's *D.R. Horton* rule – on which the court below relied – does not reflect a reasonable interpretation of the NLRA, is inconsistent with the Board's own longstanding views, and in fact exhibits the very hostility towards arbitration that this Court long ago rejected, it is not entitled to any judicial deference. *See Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991) (citations and quotations omitted), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166 (1991); *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1352 (2015).

In *Concepcion*, this Court once again made clear that rules imposing burdens on arbitration agreements that do not exist for other types of contracts are incompatible with, and thus displaced by, the FAA.

D.R. Horton is such a rule. In addition to contravening the strong federal policy favoring arbitration, it also undermines most, if not all, of the practical benefits that inure to employers and employees alike by agreeing to arbitrate workplace disputes. For employees, the speed of resolving disputes via individual arbitration can be particularly advantageous, especially for those who will continue their employment well after their claims have been addressed. For employers, the well-recognized practical and financial advantages to arbitration are likely to disappear altogether if they are forced to submit to complex, class-based procedures, despite having expressly agreed to waive such procedures. For example, "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *Concepcion*, 563 U.S. at 350.

ARGUMENT

I. THE *D.R. HORTON* RULE ENDORSED BY THE COURT BELOW CANNOT BE RECONCILED WITH THE PLAIN TEXT OF THE FAA AND THIS COURT'S REPEATED ADMONITION THAT ARBITRATION AGREEMENTS ARE TO BE ENFORCED IN ACCORDANCE WITH THEIR TERMS

Section 2 of the Federal Arbitration Act (FAA), 9 U.S.C. § 2, is the "primary substantive provision" of the Act. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). It 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.

This Court has described this provision as "reflecting both a 'liberal federal policy favoring arbitration,'" *Concepcion*, 563 U.S. at 339 (citation omitted), and the "'fundamental principle that arbitration is a matter of contract.'" *Id.* (citation omitted); *see also Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500, 503 (2012) (*per curiam*); *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 97-98 (2012). Indeed, a principal aim of the FAA is to construe private arbitration agreements in accordance with the parties' desires and expectations. "[T]he FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995). To the contrary, courts are to "rigorously enforce agreements to arbitrate . . . in order to give effect to the contractual rights and expectations of the parties." *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 458 (2003) (citations and internal quotations omitted).

A. The Mere Existence Of A Class Action Waiver Does Not Render An Arbitration Agreement Unenforceable

This Court has spoken directly to the enforceability of mandatory arbitration agreements that do not authorize the parties to bring claims on a class-wide basis. In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010), the Court held that imposing class arbitration on parties who have not expressly agreed to authorize such procedures is inconsistent with the FAA. The Court reinforced that principle in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), invalidating a California state law that imposed heightened enforceability standards on mandatory arbitration agreements containing express class action waiver provisions. Reaffirming the strong public policy favoring arbitration, the Court in *Concepcion* said that efforts to impose class arbitration on parties who have not expressly agreed to such procedures "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 344.

Subsequently, the Court in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), confirmed the validity of class action waivers contained in arbitration agreements, even where the costs associated with individual arbitration (or the perceived procedural limitations associated with it) may make arbitration less desirable to one side or the other. The basic premise on which those rulings rests is that class action procedures tend to interfere with the hallmarks of arbitration – including swift and cost-effective resolution – such that they may not be imposed on the parties in the absence of a clear contractual basis for doing so.

And yet the Seventh Circuit below, relying on a flawed policy argument derived from the NLRB's decision in *D.R. Horton*, "did exactly what *Concepcion* barred: adopt a legal rule hinging on the primary characteristic of an arbitration agreement–namely, a waiver of the right to go to court and receive a jury trial." *Kindred Nursing Ctrs.*, 137 S. Ct. at 1427. Because the rule on which the decision below is based purports to apply national labor law in a manner that effectively precludes enforcement of *all* bilateral employment arbitration agreements, it is contrary to the FAA as construed by this Court, and therefore should be reversed.

B. Waiving Access To Certain Procedural Devices, Like Class Or Collective Action, Is Not Akin To Waiving The Substantive Right To Engage In NLRA-Protected Concerted Activities

1. Arbitration is an effective, if not preferable, means of vindicating substantive rights

Respondent contends that class and collective action waivers are categorically unlawful because they prevent employees from exercising their Section 7 right to engage in protected concerted activities for their "mutual aid or protection." Pet. App. 8a, 21a; *see also D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012), *overruled by D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). But the waiver in question neither explicitly nor implicitly imposes such a restriction; it merely calls for disputes arising from those rights to be resolved on an individual basis in an arbitral, instead of a judicial, forum. Respondent and the Board purport to equate the availability of class procedures with the substantive right to engage in

concerted activities for the "mutual aid or protection" of employees. Such an assertion is essentially the same as arguing that denying access to class procedures is equivalent to precluding vindication of the right to be free from workplace discrimination – a notion disabused by this Court long ago in *Gilmer*.

The substantive right created by Section 7 is to engage in protected concerted activities by whatever *permissible* means – including, but not limited to, class or collective action. *Gilmer* makes clear that an individual may waive the right to bring substantive claims on a collective basis, and that doing so is not the same as waiving the substantive right itself.

Thus for employees subject to agreements containing class waivers, that particular means for engaging in concerted activity is not available to them. They are not prevented from engaging in such activity via other means, however, as the Board has readily acknowledged in other contexts. Accordingly, any suggestion that a class or collective action waiver prevents "employees from taking *any* concerted legal action," *NLRB v. Alt. Entm't, Inc.*, __ F.3d __, 2017 WL 2297620, at *4 (6th Cir. May 26, 2017) (emphasis added) (citation omitted), is belied by this Court's settled FAA jurisprudence, beginning with *Gilmer*.

2. The NLRA does not confer a nonwaivable right to class or collective proceedings

Moreover,

> [t]he NLRA, all agree, does not create an express exemption from the FAA or expressly prohibit class-action waivers by name, not when the NLRA was first enacted in 1935 and not through any subsequent amendments to it. In view of [this

> Court's] FAA decisions over the last several years, that should end this case. Nor does the NLRA indirectly create an exception to the FAA.

Alt. Entm't at *14. (Sutton, J., concurring in part and dissenting in part).

In other words, the NLRA does not give employees a right to *class* or *collective* action; rather, employees have the right to engage in concerted activities, among them participation in class or collective proceedings where those procedures are available. In fact, the general availability of class action procedures typically is conditioned upon the satisfaction of several important preconditions. For instance, "[e]mployees cannot 'mutually contrive or agree' to litigate as a class, or even to join their claims. A judge or arbitrator makes the decision to group claims together based on the procedural rules of the forum." *Id.* at *15.

However, "[e]mployees participating in a litigation campaign are still 'joined together in order to achieve common goals' even if their claims are kept separate." *Id.* (citation omitted). Therefore, waiving the right to access certain procedural devices, like class or collective action, is not the equivalent of waiving the substantive right under Section 7 to engage in concerted activity for the mutual aid or protection of employees. Filing a class action is simply one possible means of engaging in protected concerted activity, just as an individual's act of posting a Facebook comment critical of working conditions or standards, which the Board itself has characterized as falling within Section 7's protections. *See, infra*, at II.C.

As one commentator has observed:

> Preliminarily, a semantic problem plagues the terms "concerted activities" and "class" or "collective" actions. Despite some linguistic similarity, these terms are neither synonymous nor equivalent. In their respective statutory schemes, the terms have quite different meanings, and using them interchangeably bespeaks a logical and legal fallacy. Employees have a § 7 right to act concertedly to file and try to prosecute lawsuits and grievances on a class or non-class basis to improve their lot as employees, but they have no more of a § 7 right to prevail on the class certification or class grievance issue than they have to win on the merits. More specifically, employees who sign *Gilmer*-authorized arbitration agreements that ban litigation, including class litigation as well as class grievances, have no § 7 right to a ruling by a court or arbitrator that they may maintain such class-based actions whenever they are pursued concertedly.

Kenneth T. Lopatka, *A Critical Perspective on the Interplay Between Our Federal Labor and Arbitration Laws*, 63 S.C. L. Rev. 43, 91 (2011) (footnotes omitted).

Because the NLRA does not establish a substantive right to class or collective action, it follows that a class or collective action waiver is not unlawful. Therefore, even assuming the court below was correct in concluding the FAA's savings clause applies, Brief of Petitioner at 19-20, it could not be invoked to invalidate the agreement on that basis. As this Court observed earlier this Term, "A court may invalidate an arbitration agreement based on 'generally applicable contract defenses' like fraud or unconscionability, but not on legal rules that 'apply only to arbitration or that

derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Kindred Nursing Ctrs.*, 137 S. Ct. at 1426 (citation omitted).

II. PROPERLY CONSTRUED, THERE EXISTS NO INHERENT CONFLICT BETWEEN THE NLRA AND THE FAA

A. The FAA Expresses A Strong Federal Policy Favoring Individual Arbitration

Where the parties to an arbitration agreement have expressly waived the availability of certain procedures, such as class or representative arbitration, the FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (citations omitted). As this Court observed in *Gilmer*, "'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.'" *Gilmer*, 500 U.S. at 26 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). Accordingly, agreements to arbitrate on an individual basis must be enforced as necessary to effectuate the FAA's policy goals and objectives.

The court below invalidated the agreement in question simply because it imposed a restriction on class-based proceedings. Such a result is directly at odds with the unequivocal pro-arbitration federal policy reaffirmed repeatedly by this Court over the last quarter-century, on which American businesses increasingly have relied in crafting their own dispute resolution strategies.

In particular, two major developments occurred in 1991 that had a profound impact on the use of binding arbitration in the employment context. First, this Court ruled in *Gilmer* that statutory discrimination claims brought under the Age Discrimination in Employment Act (ADEA) can be subject to binding arbitration. 500 U.S. at 35. Pointing out that the main purpose of the FAA was to "reverse the long-standing judicial hostility to arbitration agreements," *id.* at 24, it noted that by choosing arbitration, parties do not give up their substantive rights, but rather elect to have their claims heard in an arbitral forum instead of a court.

Next, Congress enacted the 1991 Civil Rights Act (CRA), which among other things amended Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, to provide for a right to jury trial, and to obtain statutory compensatory and punitive damages, as well as attorney's fees. At the same time, the CRA expressly encouraged the use of alternative dispute resolution mechanisms, including arbitration, leading more private sector employers to implement such programs as a means of reducing the time and increasing costs required to resolve EEO claims.[2]

Since *Gilmer*, this Court has resolved many cases involving scope of the FAA and the validity of employment arbitration. In *Circuit City Stores, Inc. v. Adams*, the Court expressly acknowledged the benefits of arbitration in the employment context, including the significant cost and time savings as compared to litigation. 532 U.S. 105 (2001). Then in 2002, the Court in *EEOC v. Waffle House, Inc.* again made clear

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[2] Pub. L. No. 102-166, § 118, codified as 42 U.S.C. § 1981 note (Alternative Means of Dispute Resolution).

that binding arbitration is a valid means of resolving employment disputes. 534 U.S. 279 (2002). Since that time, the Court has consistently endorsed the use of arbitration as an alternative to litigation in other contexts as well.

B. Nothing In The NLRA's Plain Text Evinces A Congressional Intent To Preclude Individual Arbitration

A clause contained in an arbitration agreement that precludes class actions is invalid only if Congress intended to create a non-waivable right to class procedures under the statute in question. *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 100 (2012); *see also Carter v. Countrywide Credit Indus.*, 362 F.3d 294, 298 (5th Cir. 2004). The mere inclusion of language referencing a private right of action, for instance, will be insufficient to make such a showing. As this Court pointed out in *CompuCredit Corp. v. Greenwood*:

> It is utterly commonplace for statutes that create civil causes of action to describe the details of those causes of action, including the relief available, in the context of a court suit. If the mere formulation of the cause of action in this standard fashion were sufficient to establish the "contrary congressional command" overriding the FAA, valid arbitration agreements covering federal causes of action would be rare indeed. But that is not the law.

565 U.S. at 100-01 (citation omitted). Thus, it is not enough merely to show that a statute specifically contemplates and encourages class actions. Rather, a party seeking to avoid a class action waiver must establish that Congress actually intended to prevent

parties from waiving the availability of class procedures.

Where a federal statute's plain text or legislative history does not preclude individual arbitration, the party opposing arbitration must demonstrate that an "inherent conflict" exists between arbitration and the statute in question. *Gilmer*, 500 U.S. at 26; *see also CompuCredit*, 565 U.S. at 109 ("If such an intention exists, it will be discoverable in the text of the [statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute's] underlying purposes") (Sotomayor, J., concurring) (citation omitted). Neither Respondent below, nor the Board in *D.R. Horton*, made such a showing. To the contrary, "[h]aving worked in tandem with arbitration agreements in the past, [it is evident that] the NLRA has no inherent conflict with the FAA." *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 361 (5th Cir. 2013).

Because Congress failed to include in the NLRA a non-waivable right to class or collective procedures, the Board in *D.R. Horton* was without legal authority to declare class action waivers – applicable to any number of workplace issues including, but not limited to, those implicating Section 7 – categorically unlawful. And by embracing the Board's policy position, the Seventh Circuit below acted in plain disregard of the FAA's command that arbitration agreements be enforced according to their terms – including those limiting the availability of class procedures.

C. The Board's Contrary Interpretation Is Not Entitled To Any Judicial Deference

In judging the arbitration agreement in the instant case to be an unlawful restraint on employee rights under Section 7 simply because it contained a class

waiver provision, the Seventh Circuit disregarded this Court's settled FAA jurisprudence, and instead embraced a controversial, legally unsupportable policy position invented by the NLRB in *D.R. Horton* just a few years ago. Because the Board's new position does not reflect a reasonable interpretation of the NLRA, is inconsistent with its own longstanding views, and in fact exhibits the very hostility towards arbitration that this Court long ago rejected, it is not entitled to any judicial deference.

In *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), this Court ruled that an agency's interpretations of a statute it is authorized to administer, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." 323 U.S. at 140. In determining what level of deference is to be accorded administrative interpretations of statutory law, courts applying *Skidmore* have considered "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991) (citations and quotations omitted), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166 (1991); *see also Federal Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) ("Under *Skidmore*, we consider whether the agency has applied its position with consistency") (citation omitted); *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1352 (2015). Such an approach "has produced a spectrum of judicial responses, from great respect at one end … to near indifference at the other." *U.S. v. Mead Corp.*, 533 U.S. 218, 228 (2001) (citations omitted).

The Board articulated its anti-class waiver policy position for the first time in *D.R. Horton*, where it expressed no qualms or reservations about categorically precluding enforcement of employment arbitration agreements containing class action waivers. It reasoned that prohibiting class waivers neither impermissibly conflicts with the FAA nor undermines "the pro-arbitration policy" on which it is based, 357 N.L.R.B. at 2285, because maintaining such waivers "interferes with substantive statutory rights under the NLRA, and the intent of the FAA was to leave substantive rights undisturbed." *Id.* at 2286.

In the Board's view, its broad interpretation of Section 7 rights under the NLRA does not conflict at all with what it characterized as the FAA's policy "permitting" enforcement of private arbitration agreements. *Id.* at 2285. Even assuming such a conflict did exist, the Board reasoned that its construction "represents an appropriate accommodation of the policies underlying the two statutes." *Id.* at 2284.

However, until *D.R. Horton* was decided, the Board had *never* construed Section 7 in that manner, and in fact only a few years earlier had published written guidance *confirming* that the mere existence of a class waiver would not implicate the Act. Specifically, in a June 2010 General Counsel memorandum, the Board provided that an employer does not violate the NLRA merely by requiring employees, as a condition of employment, to submit their employment disputes to arbitration on an individual, rather than class-wide, basis. Memorandum GC 10-06 from Ronald Meisburg, General Counsel, NLRB to All Regional Directors, Officers-in-Charge and Resident Officers (June 16,

2010).[3] In *D.R. Horton*, the Board switched course, concluding that the General Counsel's analysis just two years earlier was flawed and could not be reconciled with the Act's aims and purposes.

The Board elected to do so in a case decision, rather than through formal rulemaking, as expressly authorized by the NLRA. Notably, "Section 6 of the National Labor Relations Act empowers the Board to make …, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 763 (1969) (quoting 29 U.S.C. § 156) (internal quotations omitted); *see also Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015) (describing difference between legislative and interpretive rulemaking under Administrative Procedures Act).

Despite its statutory authority to do so, the Board has never promulgated a legislative rule interpreting the meaning of "concerted activities." Instead, it has elected to establish enforcement policy on a case-by-case basis, which has facilitated the inconsistencies and dramatic shifts in interpretation that have marked the agency's arbitration guidance over the years. Indeed:

> [C]urrent problems with the NLRA are largely a result of the NLRB's approach to deciding unfair labor practice cases. The Board's approach is – some might say "notoriously" – marked by frequent shifts in precedent when the administration changes, combined with a policy of non-acquiescence with federal appellate court rulings

[3] https://www.nlrb.gov/reports-guidance/general-counsel-memos (last visited June 15, 2017).

> until the Supreme Court ultimately decides an issue. In this regard, it is well-established that the NLRA empowers the Board to engage in both notice-and-comment rulemaking and adjudication of individual cases (subject to review by the federal courts of appeal). However, the Board has historically opted to set policy almost entirely through the latter means, generally refusing to propagate concrete rules guiding the interpretation of the NLRA. In the more than seventy-five years since its inception the Board has successfully engaged in legislative rulemaking on just a few occasions.

Zev J. Eigen & Sandro Garofalo, *Less Is More: A Case for Structural Reform of the National Labor Relations Board*, 98 Minn. L. Rev. 1879, 1884-85 (2014) (footnotes omitted).

The NLRA does not define the terms "concerted" or "protected" activity, or "mutual aid or protection." Rather, over the years, cases decided by the NLRB and the courts have reasoned that to be "concerted," the activity in question must include other employees or be authorized by other employees, and typically does not, but sometimes may, occur where an employee has acted solely on his or her own. For instance, concerted activity has been found where the employee's individual action is a "logical outgrowth" of previous group activity, *Every Woman's Place, Inc.*, 282 N.L.R.B. 413 (1986), *enforced*, 833 F.2d 1012 (6th Cir. 1987), or anticipates group participation in the future. *Meyers Indus., Inc.*, 281 N.L.R.B. 882 (1986), *aff'd sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987).

In *Timekeeping Systems, Inc.*, for example, the Board determined that concerted activity existed when an employee emailed his coworkers about a

proposed change in a company vacation policy in order to arouse support for his opposition to the proposal. 323 N.L.R.B. 244 (1997). Similarly, in *Citizens Investment Services Corp*., a senior financial employee's email complaints to coworkers and management, as spokesperson for the other employees, was considered to be concerted activity. 342 N.L.R.B. 316 (2004), *enforced*, 430 F.3d 1195 (D.C. Cir. 2005).

Indeed, the Board's interpretation of "concerted activities" often seems to change from one factual scenario to the next. In the class waiver context, the Board insists that employees cannot exercise their Section 7 rights without access to class-based procedures. In other contexts, however, it has embraced a much more generous construction, judging many actions that epitomize pursuit of individual, as opposed to collective, interests nevertheless to fall within Section 7's protection. *See*, *e.g., Whole Foods Market*, 363 NLRB No. 87 (2015), *enforced, Whole Foods Mkt. Grp., Inc. v. NLRB*, __ F. App'x __, 2017 WL 2374843 (2d Cir. June 1, 2017) (*per curiam*) (non-union employer's "no recording" policy chills employee Section 7 rights).

Over the last several years, for instance, the Board has been especially aggressive in expanding employee protections and curbing the right of employers to enforce workplace conduct policies. This includes a line of decisions prohibiting employers from disciplining employees who make offensive social media postings in the name of protecting their Section 7 rights.

The Board brought its first "social media" case against an employer in 2011, accusing the company of violating the Act by firing an employee who posted negative comments about her supervisor on her

personal Facebook page. *Three D LLC d/b/a Triple Play Sports Bar & Grille*, 2012 WL 76862 (N.L.R.B. 2012), *aff'd*, 361 N.L.R.B. No. 31 (2014), *enforced, Three D LLC v. NLRB*, 629 F. App'x 33 (2d Cir. 2015). Since then, the Board has continued to pursue cases involving employees' use of social media. The Board cannot have it both ways by arguing that individual Facebook postings or workplace recordings may constitute concerted activity, but non-class arbitration somehow deprives employees of exercising those rights.

The Board's unpredictable and inconsistent views regarding what constitutes "concerted activity" under Section 7 further counsels against judicial deference, and the court below was wrong to have deferred to those views in this matter.

III. IMPOSING CLASS PROCEEDINGS EVEN WHERE THE UNDERLYING AGREEMENT DOES NOT PROVIDE FOR SUCH PROCEDURES FUNDAMENTALLY WOULD ALTER THE EXPECTATIONS OF BOTH EMPLOYERS AND EMPLOYEES BY IMPOSING THE VERY COSTS AND BURDENS SOUGHT TO BE AVOIDED BY FORGOING CLASS PROCEDURES

A. Forcing Access To Class Procedures Defeats Most, If Not All, Of The Business Advantages Of Arbitration

Taking the decision whether to allow class-based procedures out of the hands of the parties and instead permitting the Board to dictate the terms of such private agreements would be contrary to the strong

federal policy favoring arbitration and a disservice to the interests of employers and employees alike.

> In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. *See* Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 Cornell L. Rev. 941, 958 (1995). The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. These settlements have been referred to as judicial blackmail.

Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996) (citation omitted); *see also Concepcion*, 563 U.S. at 350.

For that reason and others, class action waivers have become an integral part of many employers' arbitration agreements. One reason that employers have adopted mandatory arbitration programs has been to reduce litigation costs. Allowing an arbitration to proceed as a class action after the parties have agreed to the contrary would undermine fundamentally the benefits of arbitration agreements by imposing on employers the very burdens they sought to avoid. Doing so would significantly discourage the use of arbitration, in contravention of the "liberal federal policy favoring arbitration agreements." *Gilmer*, 500 U.S. at 25 (citation and footnote omitted).

Allowing an arbitration to proceed as a class action (whether in an arbitral or judicial forum) despite unambiguous contractual language barring such procedures also would profoundly undermine the efficiencies of arbitrating workplace disputes. Unlike the typical arbitration, employment class actions

involving hundreds or thousands of class members can be extremely complex and time-consuming to defend, especially where each class member is entitled to substantial individual damages, including compensatory and punitive damages. *See, e.g.*, 42 U.S.C. § 1981a.

Perhaps even more so than other types of claims, class-wide arbitration of employment disputes "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." *Stolt-Nielsen*, 559 U.S. at 685. As this Court pointed out in *Stolt-Nielsen*:

> Consider just some of the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration. An arbitrator chosen according to an agreed-upon procedure … no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties … thus potentially frustrating the parties' assumptions when they agreed to arbitrate. The arbitrator's award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well. … And the commercial stakes of class-action arbitration are comparable to those of class-action litigation.

Id. at 686 (citations omitted).

For employers, there are significant financial advantages to arbitration that are likely to disappear altogether if they are forced to submit to complex, class-based procedures, despite having expressly agreed to waive such procedures. For example, "when

damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *Concepcion*, 563 U.S. at 350.

The Board in *D.R. Horton* downplayed the significance of the Court's observations in *Concepcion*, reasoning that the issues there were far more significant than in its case: whereas tens of thousands of potential claimants might be covered by the arbitration agreements California attempted to outlaw in *Concepcion*, in *D.R. Horton*, "only agreements between employers and their own employees are at stake." *D.R. Horton, Inc.*, 357 N.L.R.B. at 2287. According to the Board, "the average number of employees employed by a single employer … is 20," *id.* (footnote omitted), and employment related class action litigation "involves only a specific subset of an employer's employees." *Id.* Therefore, in the Board's view, class-based employment arbitration is "far less cumbersome and more akin to an individual arbitration proceeding" in terms of cost, risk, speed and the like than the consumer claims at issue in *Concepcion*. *Id.*

The Board's characterization is completely off base and betrays a flimsy attempt, steeped in its newfound anti-arbitration bias, to create a special rule for employment arbitration agreements that does not apply to other contexts. Among other things, while most U.S. *businesses* may well employ less than 100 workers, a substantial proportion of the U.S. worker *population* overall likely is covered by an arbitration agreement.

Recent North American Industry Classification System (NAICS) data show that in 2015, 16,205 businesses employed at least 1,000 employees.[4] Many of those include companies whose arbitration programs have been challenged in court – including Ernst & Young, AT&T Mobility, and Bank of America, to name a few. In 2016, those three companies employed more than 450,000 workers in the U.S. alone.[5] The Board's suggestion that mandating class arbitration of employment claims would have little practical impact therefore is either naively off-the-mark, or intentionally misleading.

Arbitration by its very nature is designed to promote, rather than discourage, cost-effective resolution of individual claims in as non-adversarial a manner as possible. As Chief Justice Burger once observed:

> The reasons for favoring arbitration are as wise as they are obvious: litigation is costly and time consuming, and, more to the point in this case, judges are less adapted to the nuances of the disputes that typically arise in shops and factories than shop stewards, business agents, managerial supervisors, and the traditional ad hoc panels of factfinders. By bringing together persons actually involved in the workplace, often assisted by a neutral arbitrator experienced in such matters, disputes are resolved more swiftly and cheaply. This mechanism promotes industrial harmony

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[4] *Firmographic Breakdown of Business Establishments by Company Size*, NAICS Ass'n, https://www.naics.com/counts-by-company-size/ (last visited June 15, 2017).

[5] STATISTA, The Statistics Portal, https://www.statista.com (last visited June 15, 2017).

> and avoids strikes and conflicts; it provides a swift, fair, and inexpensive remedy.

Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 747 (1981) (Burger, C.J., dissenting) (citation omitted). Allowing an arbitration to proceed on a class-wide basis where the parties have agreed not to do so defeats most, if not all, of those aims.

B. Class Arbitration Deprives Employees Of Access To Speedy, Efficient Dispute Resolution

From an employee relations viewpoint, the informal nature of arbitration is a tremendous benefit to both employers and employees. Many employers view arbitration and other forms of alternative dispute resolution as an opportunity not only to resolve a specific dispute but also to preserve relationships with their employees, particularly those who will continue to work for them well after their claims are addressed. Besides the statutory mandate that arbitration agreements be enforced according to their terms, "for parties to employment contracts … there are real benefits to the enforcement of arbitration provisions." *Circuit City Stores*, 532 U.S. at 122-23. As this Court observed over a decade ago:

> We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context. Arbitration agreements allow the 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.

Id. at 123 (citation omitted).

Despite all the tangible benefits of employment arbitration, the *D.R. Horton* rule will only make it less likely that employers will retain employment arbitration programs, which in turn invariably will impose significant potential hardships on many workers whose ***only*** realistic access to justice is through arbitration. If employees with small individualized claims do not have access to simplified, low-cost arbitration and are forced into court, they could be priced out of the judicial system entirely. And it is not only employees with disputes who benefit from arbitration. The lower cost of dispute resolution reduces the costs of doing business, which manifests in lower prices for consumers and higher wages for employees. *See, e.g.*, Stephen Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Disp. Resol. 89, 91 (2001); Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. Legal Stud. 1, *5-*7 (Jan. 1995).

CONCLUSION

Accordingly, the decision below should be reversed.

Respectfully submitted,

RAE T. VANN
Counsel of Record
NT LAKIS, LLP
1501 M Street, NW
Suite 400
Washington, DC 20005
rvann@ntlakis.com
(202) 629-5600

Attorneys for *Amicus Curiae*
Equal Employment Advisory
Council

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