NOS. 16-285, 16-300, 16-307

IN THE

Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
Petitioner,
v.
JACOB LEWIS,
Respondent.

ERNST & YOUNG LLP, ET AL.,
Petitioners,
v.
STEPHEN MORRIS, ET AL.,
Respondents.

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

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURTS OF APPEALS FOR
THE FIFTH, SEVENTH, AND NINTH CIRCUITS

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF THE EMPLOYER PARTIES

Counsel for Amicus Curiae
Benjamin G. Robbins
Counsel of Record
Martin J. Newhouse, President
New England Legal Foundation
150 Lincoln Street,
Boston, Massachusetts 02111-2504
(617) 695-3660
benrobbins@nelfonline.org

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation ("NELF") seeks to present its views, and the views of its supporters, on whether, in the case of an arbitration agreement requiring employees to arbitrate on an individual basis only, the mandate to enforce such an agreement under § 2 of the Federal Arbitration Act (FAA), is overridden by § 7 of the National Labor Relations Act (NLRA), which protects an employee's "right . . . to engage in other concerted activities for . . . mutual aid or protection." 29 U.S.C. § 157.[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977, and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include both large and small businesses located primarily in the New England region.

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[1] Pursuant to Supreme Court Rule 37.6, NELF states that no counsel for a party authored NELF's amicus brief in whole or in part, and no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Rule 37.3(a), NELF has filed with this brief a letter of consent from counsel for the NLRB, which is the petitioner in *NLRB v. Murphy Oil,* Case No. 16-307. All of the remaining parties in these consolidated cases have filed with the Court blanket letters of consent to the filing of amicus briefs.

NELF is committed to upholding the FAA's mandate to enforce class action waivers contained in valid arbitration agreements. This serves the FAA's purpose to enforce arbitration agreements according to their terms so as to facilitate streamlined proceedings. NELF is also committed to upholding the FAA's mandate with respect to the arbitration of federal statutory claims, unless the relevant statute displaces the FAA by providing a nonwaivable right to pursue group legal action. When the federal statute at issue, here the NLRA, does not announce any such substantive right, the class action waiver should be enforced under the FAA.

In addition to this amicus brief, NELF has filed many other related amicus briefs in this Court, arguing for the enforcement of arbitration agreements according to their terms under the FAA.[2]

For these and other reasons discussed below, NELF believes that its brief will assist the Court in deciding the issue presented in this case.

SUMMARY OF ARGUMENT

At issue is whether the FAA's mandate to enforce class and collective action waivers in employment arbitration agreements is displaced by § 7 of the NLRA, which grants employees "the right . . . to engage in other concerted activities for . . . mutual aid or protection." Nowhere does the text,

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[2] *See DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Green Tree Fin. Corp. v. Bazzle,* 539 U.S. 444 (2003).

purpose, or history of the NLRA clearly establish that employees have a substantive right to join together and sue their employer. Therefore, the waivers should be enforced.

The employees' underlying claim is a *legal* dispute over their qualification to receive overtime payments, as provided by the FLSA and state wage law. This is not an "industrial dispute" over a *negotiable* "difference as to wages, hours, or other working conditions," as Congress expressly intended in the NLRA's statement of purpose. The NRLA was clearly intended to resolve contractual disputes over terms of employment, by protecting employees' rights to organize in the workplace and bargain collectively with their employers. This has nothing to do with the resolution of a legal dispute over rights of employment that are guaranteed by other statutes. Such rights are not negotiated in the workplace. Therefore, the underlying statutory claims here appear to fall outside the NLRA's intended scope and should not be enforceable under the NLRA.

The NLRA was intended to achieve industrial peace by promoting group negotiation and compromise in the workplace. This purpose is incompatible with group litigation in court or in arbitration. Class actions are inherently coercive, not cooperative, and they often create the risk of "in terrorem" settlements. Group legal action is not the "strength in numbers" that Congress had in mind when it declared its intent to protect employees' "full freedom of association" for the purpose of "negotiating" and "bargaining" with their employers.

Section 7 of the NLRA enumerates specific protected concerted activities, followed by the catchall phrase "other concerted activities." Under the rule of *ejusdem generis* ("of the same kind"), "other concerted activities" should be defined and limited by the specific concerted activities that precede it. Those specific concerted activities identify certain formal ways in which employees can organize in the workplace and address working conditions with their employer. "Other concerted activities," then, should only protect various similar ways in which employees can join together in the workplace, but without having to form a union or engage in collective bargaining. Those activities would have nothing to do with group legal action. To interpret the phrase so broadly would render § 7's list of concerted activities superfluous.

Congress chose the phrase "concerted *activities*" in § 7, not "concerted action." When Congress wants to protect or proscribe certain conduct, it generally uses the word "activity," as it did here. But when Congress wants to create a right to sue, it generally uses the word "action," whether by itself or in such phrases as "civil action" or "cause of action." Similarly, Congress did not create a private right of action in the NLRA and instead delegated enforcement powers to the NRLB. It is unlikely, then, that "other concerted activities" was intended to include group legal action by employees.

The NLRA should be understood in its historical context. Before the NLRA's passage, any efforts by employees to act in concert, in and around

the workplace, were treated as illegal conspiracies or combinations in restraint of trade. In the labor-related statutes preceding the NLRA, Congress used the phrases "in concert" and "concerted activities" to begin removing the legal barriers that had prevented workers from joining forces in the workplace. In a clean break from the past, the NLRA reversed the historical meaning of "concerted activities"--i.e., legally prohibited group conduct--to legally protected group conduct. But this had nothing to do with creating a new right of collective legal action against employers.

Nothing in *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), suggests that the NLRA creates a substantive right of group legal action that displaces the FAA's mandate to enforce class and collective action waivers in employment arbitration agreements. *Eastex* did not involve the FAA, did not involve a dispute over the NLRA's "other concerted activities" language, and it did not involve any judicial action taken by employees. Instead, that case decided the unrelated issue whether the *purpose* of certain concerted activity--the distribution of a union newsletter in the workplace--satisfied the NLRA's "other mutual aid or protection" requirement. The Court held that the concerted workplace activity at issue served a protected purpose, even though the newsletter urged employees to take political action outside the workplace, concerning issues affecting workers generally. The Court based its decision largely on the NLRA's broad definition of "employee," which includes the employees of other employers. None of this bears on the issue here.

ARGUMENT

I. THE NLRA DOES NOT DISPLACE THE FAA'S MANDATE TO ENFORCE CLASS AND COLLECTIVE ACTION WAIVERS IN EMPLOYMENT ARBITRATION AGREEMENTS.

At issue in these consolidated cases is whether, in the case of an arbitration agreement that requires employees to arbitrate on an individual basis only, the mandate to enforce the agreement under § 2 of the Federal Arbitration Act, 9 U.S.C. § 2 (FAA), is overridden by § 7 of the National Labor Relations Act (NLRA), which protects an employee's "right . . . to engage in other concerted activities for . . . other mutual aid or protection . . . ." 29 U.S.C. § 157.[3] The NLRA also provides that "[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] . . . ." 29 U.S.C. § 158(a)(1).

The employees here each signed such a pre-dispute arbitration agreement. They now allege that they have been wrongfully denied overtime

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[3] Section 7 of the NLRA provides, in relevant part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

29 U.S.C. § 157.

payments under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*. (FLSA), and cognate state wage laws. Notwithstanding their arbitration agreements, the employees filed putative class and collective actions in federal court, invoking both Fed. R. Civ. P. 23 and the FLSA's mechanism for a collective (opt-in) action.[4]

Notably, the Court has already decided that neither Rule 23 nor the FLSA's collective action mechanism overrides the FAA's mandate to enforce class action waivers in valid arbitration agreements.[5] Nonetheless, the employees and the NLRB, which is also a party to these consolidated cases, argue that employees have a nonwaivable right to pursue group legal action against their employers, because it is a form of "other concerted activity" that is protected under § 7 of the NLRA.

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[4] 29 U.S.C. § 216(b) ("An action to recover [for] liability . . . may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.")

[5] *See American Exp. Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013) ("Nor does congressional approval of Rule 23 establish an entitlement to class proceedings for the vindication of statutory rights."); *id*. at 2311 ("In *Gilmer* [*v. Interstate/Johnson Lane Corp*., 500 U.S. 20 (1991)] . . . , we had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue, the Age Discrimination in Employment Act[,] [which incorporates the FLSA's procedures at 29 U.S.C. § 626(b)] expressly permitted collective actions.").

A. The Starting Point Is The FAA, Which Requires The Challenging Party To Show That The NLRA Clearly Provides Employees With The Substantive Right To Pursue Group Legal Action Against Their Employer.

"The [FAA] provides the starting point for answering the questions raised in this case." *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 225 (1987) (first considering FAA's mandate and then concluding that FAA requires enforcement of agreement to arbitrate disputes under Securities Exchange Act of 1934 and civil RICO statute). And the FAA requires the enforcement of a class action waiver that is contained in a valid arbitration agreement. This is because "[t]he overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011). Invalidating a class action waiver "[r]equir[es] the availability of classwide arbitration[.] [This, in turn,] interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id*.

The FAA's mandate to enforce class action waivers applies equally in "claims that allege a violation of a federal statute, unless the FAA's mandate has been "overridden by a *contrary congressional command*." *American Exp. Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013) (emphasis added) (citation and internal quotation marks omitted). The burden falls on the

party opposing the class action waiver (here, the employees and the NLRB) to show that the NLRA displaces the FAA's mandate to enforce the waiver. *See McMahon,* 482 U.S. at 227 ("The burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of [the right to pursue group legal action] . . . for the statutory rights at issue.").

To satisfy their burden, the employees and the NLRB must show that "such an intent [to provide a nonwaivable right to pursue group legal action] will be deducible from [the NLRA's] text or legislative history, or from an inherent conflict between arbitration and the [NLRA's] underlying purposes." *McMahon*, 482 U.S. at 227 (citation and internal quotation marks omitted). *See also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (discussing same). And if this inquiry raises any doubts on the matter, "we resolve doubts in favor of arbitration." *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 109 (2012) (Sotomayor, J., concurring). *See also Gilmer*, 500 U.S. at 26 ("Throughout such an inquiry, it should be kept in mind that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.") (citation and internal quotation marks omitted).

To displace the FAA's mandate, then, it is not enough for the parties to argue that the isolated residual phrase "other concerted activities," in § 7 of the NLRA, *could* be interpreted to include group legal action. Instead, the employees and the NLRB must show that the full text, the purpose, or the history of the NLRA *requires* such an interpretation.

Whether the employees and the NLRB have met their burden is an issue of *inter*-statutory interpretation that should be decided by this Court, not the NLRB. At stake is the resolution of a potential conflict between two federal statutes (the FAA and the NLRA), as opposed to the resolution of a purely internal issue of statutory interpretation under the NLRA, which would have no consequences on another federal statute. "[W]e have accordingly never deferred to the [NLRB's] remedial preferences where such preferences *potentially trench upon federal statutes and policies unrelated to the NLRA . . . .*" *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002) (emphasis added). *See also Dorsey v. United States*, 567 U.S. 260, 291 (2012) ("[W]hen two statutes are capable of co-existence, it is the *duty of the courts*, absent a clearly expressed congressional intention to the contrary, to regard each as effective.") (emphasis added) (citation and internal quotation marks omitted); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 529 n.9 (1984) ("While the Board's interpretation of the NLRA should be given some deference, the proposition that the Board's interpretation of statutes outside its expertise is likewise to be deferred to is novel.").

B. The NLRA Was Intended To Resolve Workplace "Industrial Disputes" Over Negotiable "Terms And Conditions Of Employment," Not Legal Disputes Over Rights Of Employment That Are Guaranteed By Other Statutes.

In their underlying dispute, the employees allege a violation of their statutory right to receive

overtime payments, as provided by the FLSA and cognate state wage laws. This is a *legal* dispute over their qualification to receive wages in an amount that is guaranteed by statutes other than the NLRA. This is not an "industrial dispute" over a *negotiable* "difference as to wages, hours, or other working conditions," as Congress intended those words in the NLRA. 29 U.S.C. § 151 ("Findings and Declaration of Policy"). *See also McMahon,* 482 U.S. at 227 (federal statute's underlying purpose is a key factor in determining whether that statute displaces FAA).

In particular, the NLRA's stated purpose is to promote "the friendly *adjustment* of industrial disputes arising out of *differences* as to wages, hours, or other working conditions," which is achieved "by protecting the exercise by workers of full freedom of association" so that they may "*negotiat[e]* the terms and conditions of their employment" through "*collective bargaining*." 29 U.S.C. § 151 (emphasis added).

Clearly, the NRLA was intended to resolve contractual disputes over negotiable terms of employment, by protecting employees' rights to organize in the workplace and bargain collectively with their employers. This is "the friendly adjustment of industrial disputes" that Congress identified in § 1 of the NLRA.

But this bargaining process in the workplace has nothing to do with the resolution of a legal dispute over rights of employment that are guaranteed by other statutes. A statutorily fixed right of employment is not determined by

"negotiat[ion]," "adjustment," or "bargaining" between employees and their employer. 29 U.S.C. § 151. That statutory right is therefore not a negotiable "term" or "condition" of employment under § 1 of the NLRA. Instead, such a statutory right has already been "negotiated" by the legislature on behalf of all employees. The resolution of a legal dispute arising from a guaranteed statutory right appears to fall outside the NLRA's intended scope.

In short, the underlying claims here do not arise from contractual rights of employment that have been bargained for in the workplace. The claims should therefore not be enforceable under the NLRA.

C. Group Litigation Is Incompatible With The NLRA's Purpose Of Achieving Industrial Peace Through Group Negotiation In The Workplace.

It is unlikely that Congress intended the NLRA to apply to litigation of any kind, let alone group litigation, because "the underlying purpose of this statute is industrial peace," achieved through negotiation and compromise in the workplace. *Brooks v. NLRB*, 348 U.S. 96, 103 (1954). *See also Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785 (1996) ("The object of the National Labor Relations Act is *industrial peace and stability*, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes between workers and employers.") (emphasis added).

The NLRA was intended to protect employees' right of association in the *workplace*, not in a courtroom or in arbitration, so that employees could negotiate their differences with their employer, not litigate over them. *See* Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at A General Theory of Section 7 Conduct*, 137 U. Pa. L. Rev. 1673, 1683, 1685 (1989) ("The purpose of the Wagner Act, and therefore the purpose of . . . section 7, was to bring *to the workplace* a legally protected right of association . . . [which] . . . would be comparable to the rights of freedom of speech and association the first amendment guaranteed to workers in their political lives.") (emphasis added); Robert A. Gorman and Matthew W. Finkin, *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*, 130 U. Pa. L. Rev. 286, 343 (1981) (discussing NLRA's purpose to establish "civil rights *at the workplace*") (emphasis added).

Group litigation, then, is far removed from the NLRA's purpose of protecting group negotiation in the workplace. It is inherently coercive, and it is hardly the cooperative process that Congress had in mind to promote industrial peace. *See Morris*, *NLRB Protection in the Nonunion Workplace*, 137 U. Pa. L. Rev. at 1682 (discussing statement of Senator Wagner that NLRA was intended to establish "a cooperative relationship between workers and employers," achieved through "equality of bargaining power."). In particular, a class action is at odds with the NLRA's purposes because it creates "the risk of 'in terrorem' settlements," *Concepcion*, 563 U.S. at 350, due to the sheer size of the plaintiff class and

the potential damages at stake, quite apart from the merits of the underlying dispute. *See id*.

It is doubtful, then, that a class action is the "strength in numbers" that Congress had in mind when it declared its intent to protect employees' "full freedom of association" for the purpose of "negotiating" and "bargaining" their differences with their employer. 29 U.S.C. § 151. And "we resolve doubts in favor of arbitration." *CompuCredit*, 565 U.S. at 109.

D. Under The Rule of *Ejusdem Generis*, Section 7's Residual Phrase "Other Concerted Activities" Simply Means That Employees Have The Right To Join Together In The Workplace For A Common Cause, But Without Having To Form A Union Or Engage In Collective Bargaining.

In light of the NLRA's clear statement of purpose, it is already doubtful that § 7's "right . . . to engage in other concerted activities" would include group litigation. But that proposition becomes even more doubtful when the catchall phrase "other concerted activities" is interpreted properly in its immediate context, not in isolation from the rest of § 7. "[I]t is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word [or phrase] cannot be determined in isolation, but must be drawn from the context in which it is used . . . ." *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015) (citation and internal quotation marks omitted).

In particular, § 7 enumerates specific concerted activities (self-organization; forming, joining or assisting labor unions; and collective bargaining) followed by the residual phrase "other concerted activities."[6] And "[i]t is a commonplace of statutory construction that the specific governs the general." *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 941 (2017) (citation and internal punctuation marks omitted). *See also Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 163 (2012) ("[T]he rule of *ejusdem generis* ["of the same kind"] should guide our interpretation of the catchall phrase, since it follows a list of specific items.").

And so the meaning of "other concerted activities" "should itself be controlled and defined by reference to the enumerated [concerted activities] which are recited just before it . . . ." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001) (§ 1 of FAA, which exempts "contracts of employment of seamen, railroad employees, or any *other* class of workers engaged in foreign or interstate commerce," applies only to other similar transportation workers) (emphasis added). Simply put, "other concerted activities" should only protect those concerted

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[6] Again, § 7 provides, in relevant part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

29 U.S.C. § 157.

activities that are similar in kind to the concerted activities listed in § 7. *See Circuit City*, 532 U.S. at 114–15 (discussing same).

And the specific concerted activities in § 7 (self-organization; forming, joining, and assisting a union; and collective bargaining through elected union representatives) identify certain formal ways in which employees can organize in the workplace and address working conditions with their employer. When read together, then, these enumerated concerted activities describe the various stages of an industrial democracy in the workplace--"a congressional intent to create an equality in bargaining power between the employee and the employer throughout the entire process of labor organizing, collective bargaining, and enforcement of collective-bargaining agreements." *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 835 (1984). *See also* Morris, *NLRB Protection In The Nonunion Workplace*, 137 U. Pa. L. Rev. at 1684 (§ 7 was intended to achieve a "democracy in the workplace").

And so the residual phrase "other concerted activities" should be interpreted to protect various similar ways in which employees can join together in the workplace for a common cause, but without having to form a union or engage in collective bargaining. That is, "other concerted activities" protects the associational rights of all employees, not just unions. "A proper construction [of 'other concerted activities'] is that the employees shall have the right to engage in concerted activities for their mutual aid or protection even though no union activity be involved, or collective bargaining be contemplated." *NLRB v. Phoenix Mut. Life Ins. Co.*,

167 F.2d 983, 988 (7th Cir. 1948). *See also NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962) (work stoppage by seven nonunion employees was "other concerted activity" under § 7: "The seven employees here were part of a small group of employees who were wholly unorganized. They had no bargaining representative and, in fact, no representative of any kind to present their grievances to their employer. Under these circumstances, they had to speak for themselves as best they could."); Morris, *Protection in the Nonunion Workplace*, 137 U. Pa. L. Rev. at 1687 (phrase "other concerted activities" protects "one or more employees attempting to interact or make common cause with one another regarding a matter relevant to their working conditions. The process may or may not come to the attention of the employer, and it may or may not reach the stage of formal union organizational activity.").

Group legal action, however, has nothing to do with the ways in which employees can join together in the workplace to address working conditions. "Had Congress intended the latter all encompassing meaning, . . . it is hard to see why it would have needed to include the examples at all." *Yates*, 135 S. Ct. at 1086 (citation and internal quotation marks omitted). To interpret "other concerted activities" as broadly as the employees and the NLRB assert would render superfluous Congress' careful enumeration of the concerted activities in § 7. And "[w]e typically use *ejusdem generis* to ensure that a general word will not render specific words meaningless." *Id.* at 1087 (citation and internal quotation marks omitted).

E. Congress Chose The Phrase "Concerted Activities," Not "Concerted Action," Indicating An Intent To Protect The Right To Engage In Certain Conduct, Not The Right To Sue.

Notably, Congress chose the phrase "concerted *activities*" in § 7, which indicates conduct, not litigation. Congress did not use the phrase "concerted *action*," which could include litigation.

In particular, when Congress wants to protect or proscribe certain conduct, it generally uses the word "activity," as it has done here.[7] But when Congress wants to create a right to sue, it generally uses the word "action," whether by itself or in such phrases as "civil action" or "cause of action."[8] And in some instances, Congress has used both words--"activity" and "action"--in the same statutory section, precisely to distinguish between the conduct that is being regulated (the "activity") and the right to sue

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[7] *See, e.g.* 18 U.S.C. § 1962(a) ("Prohibited Activities") (RICO statute proscribes conduct related to "racketeering *activity*") (emphasis added); 8 U.S.C. § 1182(a)(3)(B) ("Terrorist *activities*") (prohibiting issuance of visas to anyone engaged in "terrorist *activities*") (emphasis added).

[8] *See, e.g.*, 42 U.S.C. § 2000e-5(f)(1) ("a civil *action* may be brought against the [employer]" for workplace discrimination) (emphasis added); 15 U.S.C. § 78u-6(h)(1)(B)(i) ("Cause of *action*") (Dodd-Frank whistleblower "may bring an *action*" for retaliatory employment decision) (emphasis added); 42 U.S.C. § 3613(a)(1)(A) ("Civil *Action*") ("An aggrieved person may commence a civil *action*" for discriminatory housing practices) (emphasis added).

over that regulated conduct (the "action").[9] In short, interpreting the word "activity" to embrace legal action is inconsistent with Congress' own use of that word. It is therefore a strained and unpersuasive reading of § 7.

This point is reinforced by the fact that the NLRA does not provide employees with a private right of action against their employer. Instead, Congress delegated exclusive enforcement powers to the NLRB to pursue claims of unfair labor practices. *See* 29 U.S.C. § 160(a) ("Powers of Board generally") ("The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . ."). It is doubtful, then, that Congress would have intended the term "other concerted activities" to include group legal action when Congress did not even deem it necessary to allow employees to sue individually, on their own behalf.

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[9] *See, e.g.*, 15 U.S.C. § 1125(a)(1)(A)-(B) ("Civil Action") (Lanham Act provides "civil *action*" for unfair competition through misleading advertising or labeling pertaining to "goods, services, or commercial *activities*") (emphasis added); 28 U.S.C. § 1605(a)(2) ("A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any *case* . . . in which the *action* is based upon a *commercial activity* carried on in the United States . . . .") (emphasis added).

F. When Understood In Its Historical Context, The NLRA's Protection Of "Concerted Activities" Simply Meant That It Was No Longer Illegal For Employees To Act In Concert To Address Their Working Conditions.

The Court has instructed that the NLRA should be understood in its historical context, "[so that] we may, by such an examination, reconstitute the gamut of values current at the time when the words were uttered." *Nat'l Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 620 (1967) (quotation and internal quotation marks omitted).

Before the NLRA's passage, any concerted efforts by employees to address working conditions would have been illegal "merely because they [were] undertaken by many persons acting *in concert*." *Int'l Union, U. A. W., A. F. of L., Local 232 v. Wisconsin Employment Relations Bd.*, 336 U.S. 245, 258 (1949) (emphasis added) (*overruled on other grounds by Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976)).

The NLRA simply reversed the historical meaning of "concerted activities"--i.e., legally prohibited group conduct--to legally protected group conduct. This had nothing to do with creating a new right of group legal action and everything to do with permitting employees to engage in collective workplace efforts to address the terms and conditions of their employment.

In the years preceding the NLRA's passage,

employees had been prohibited from acting "in concert" to address working conditions, such as by organizing, striking, or picketing. "Th[e] history [of § 7] begins in the early days of the labor movement, when employers [successfully] invoked the common law doctrines of criminal conspiracy and restraint of trade to thwart workers' attempts to unionize." *City Disposal Sys.*, 465 U.S. at 834. Any such efforts to address working conditions, "although lawful if pursued by a single employee, became unlawful when pursued through the *'conspiracy' of concerted activity*." *Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n*, 457 U.S. 702, 716 (1982) (discussing legislative history of Norris-LaGuardia Act of 1932, a predecessor labor statute to NLRA) (emphasis added).

In the labor-related statutes that came before the NLRA, Congress began to remove the legal barriers that had prevented workers from joining together, in and around the workplace, to address their working conditions. To do this, Congress used the phrases "in concert" and "concerted activities"--buzzwords of that era that had been associated with workers' illegal efforts to combine or conspire in the workplace--in order to begin reversing the pejorative meaning of those words.[10]

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[10] "[Congress'] first use of the term "concert" in th[e labor] context, came in 1914 with . . . the Clayton Act, which exempted from the antitrust laws certain types of peaceful union activities." *City Disposal Sys.*, 465 U.S. at 834. *See also* 29 U.S.C. § 52 (Clayton Act prohibits federal courts from enjoining "any person or persons, whether singly or in *concert*, from [organizing, boycotting, striking] . . . or from peaceably assembling in a lawful manner, and for lawful purposes[.]")

With the NLRA's enactment in 1935, Congress made a clean break from the past by declaring that employees were no longer legally prohibited from engaging in concerted activities in the workplace. To the contrary, they now had the protected legal right to do so. As the Court explained, not many years after the NLRA's passage:

> The most effective legal weapon against the struggling labor union was the doctrine that *concerted activities were conspiracies*, and for that reason illegal. Section 7 of the Labor Relations Act took this conspiracy weapon away from the employer . . . . No longer can any state . . . treat otherwise lawful activities to aid unionization as an *illegal conspiracy merely because they are undertaken by many persons*

(emphasis added).

In 1932, in § 4 of the Norris-LaGuardia Act, Congress again prohibited federal courts from enjoining employees, "whether [acting] singly or *in concert*," from engaging in various listed activities, such as participating in a labor organization or a strike, which occur during a labor dispute. 29 U.S.C. § 104 (emphasis added). The Norris-LaGuardia Act also stated the broad public policy that "the individual unorganized worker . . . shall be free from the interference, restraint, or coercion, of employers . . . in self-organization or in *other concerted activities for the purpose of collective bargaining or other mutual aid or protection*." 29 U.S.C. § 102 (emphasis added). *See also City Disposal Sys.*, 465 U.S. at 834-35 (discussing same). This language, in turn, "was the source of the language enacted in § 7 [of the NLRA]." *Id*. at 835.

acting in concert.

Int'l Union, U. A. W., A. F. of L., Local 232, 336 U.S. at 257–58 (emphasis added).

When viewed in its historical context, then, "concerted activities" means only that "lawful individual action should not become unlawful when engaged in collectively." Gorman and Finkin, *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*, 130 U. Pa. L. Rev. at 336. In sum, the NLRA's deliberate reversal of the negative historical meaning of "concerted activities" had nothing to do with creating a new right of employees to join together and sue their employer.[11] Instead, the NLRA merely removed the legal barriers that had prevented employees from joining together in the workplace.

[11] In this connection, there was no such thing as a class suit for damages when the NLRA was enacted in 1935. "It was not until the promulgation of original Rule 23 and the first Federal Rules of Civil Procedure in 1938 that law and equity were merged, and [opt-in] class suits for damages in the United States first became available . . . ." William B. Rubenstein, 1 *Newberg on Class Actions* § 1.13, at 36 (5th ed. 2011). Similarly, the FLSA's opt-in collective action provision was not enacted until 1938. *See* Pub. L. No. 75–718, § 16(b), 52 Stat. 1069 (1938) (codified at 29 U.S.C. § 216(b)). And, of course, the "modern [opt-out] class action practice emerged in the 1966 revision of Rule 23." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833 (1999).

II. NOTHING IN *EASTEX V. NL*RB SUGGESTS THAT THE NLRA OVERRIDES THE FAA'S MANDATE TO ENFORCE CLASS AND COLLECTIVE ACTION WAIVERS IN EMPLOYMENT ARBITRATION AGREEMENTS.

Nothing in *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), suggests that the NLRA creates a substantive right of group legal action that displaces the FAA's mandate to enforce class and collective action waivers in employment arbitration agreements. *Eastex* did not involve the FAA, did not concern the NLRA's "other concerted activities" language, and it did not involve any judicial action taken by employees. Instead, that case decided the unrelated issue whether the *purpose* of certain concerted workplace activity constituted "other mutual aid or protection" under § 7. *See* 129 U.S.C. § 157 ("Employees shall have the right . . . to engage in other concerted activities for the *purpose* of collective bargaining or *other mutual aid or protection* . . . .") (emphasis added).

In *Eastex*, employees wanted to distribute a union newsletter in the workplace that, among other things, encouraged employees to write to their state legislators to oppose incorporation of Texas' "right-to-work" statute into the state constitution; criticized a Presidential veto of an increase in the federal minimum wage; and urged employees to register to vote to "defeat our enemies and elect our friends." *Eastex*, 437 U.S. at 558-60. The employer refused to allow the employees to distribute the newsletter, asserting that the newsletter was not for their "mutual aid or protection" because it discussed ways

in which employees could "improve their lot as employees through [political] channels [that were] outside the immediate employee-employer relationship." *Id.* at 565.

The Court rejected the employer's position and affirmed the NLRB's decision that the proposed concerted activity--distribution of the union newsletter in the workplace--was for the protected purpose of "mutual aid or protection" under § 7. *Id.* at 564-70. The Court based its decision largely on the NLRA's broad definition of "employee," which "shall include *any* employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise . . . ." 29 U.S.C. § 152(3) (emphasis added). The Court explained that this definition "was intended to protect employees when they engage in otherwise *proper concerted activities* in support of employees of employers other than their own." *Eastex*, 437 U.S. at 564 (emphasis added).

Consistent with this broad statutory definition of "employee," the Court held that the NLRA protected the employees' concerted activity of distributing the newsletter in the workplace, even though the newsletter advocated political activity taken outside the workplace. *Id.* at 564-67. The Court explained that the purpose of that outside activity was for Eastex employees to act in solidarity with the rights of fellow employees located throughout the state of Texas (the "right to work" statute) and the nation (the federal minimum wage). *Id.*

To be sure, the Court in *Eastex* stated, in passing, that "it has been held [by the NLRB] that the 'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums . . . ." *Eastex*, 437 U.S. at 565-66. *See also id.* at 566 n.15 (citing NLRB decisions involving judicial or administrative action taken by employees).[12] But this statement is merely *dictum* to the Court's holding that the "mutual aid or protection" clause can include purposes that are outside the employer's control, such as the political activity discussed in the disputed union newsletter. Moreover, the Court expressly declined to consider whether the cited NLRB decisions involving judicial or administrative action would satisfy the "other concerted activities" requirement. "We do not address here the question of what may constitute 'concerted' activities in this context." *Id.* at 566 n.15

In short, *Eastex* does not suggest in any way that the NLRA displaces the FAA's mandate to enforce class and collective waivers in employment arbitration agreements. Nor does the NLRA contain a contrary congressional command that overrides the FAA's mandate, for all of the reasons that NELF has discussed above. Therefore, the employees' arbitration agreements in these consolidated cases should be enforced according to their terms.

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[12] Notably, none of the NLRB decisions that the Court cited for this proposition involved a class or collective action. *See Eastex*, 437 U.S. at 566 n.15.

CONCLUSION

For the reasons stated above, NELF respectfully requests that the judgment in the Fifth Circuit in *Murphy Oil* should be affirmed, and that the judgments in the Seventh Circuit in *Epic*, and in the Ninth Circuit in *Ernst & Young*, should be reversed.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION

By its attorneys,

Benjamin G. Robbins
Counsel of Record
Martin J. Newhouse, President
New England Legal Foundation
150 Lincoln Street
Boston, Massachusetts 02111-2504
Telephone: (617) 695-3660
benrobbins@nelfonline.org

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