16-285

No. 16-____

IN THE
Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
Petitioner,

v.

JACOB LEWIS,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an agreement that requires an employer and an employee to resolve employment-related disputes through individual arbitration, and waive class and collective proceedings, is enforceable under the Federal Arbitration Act, notwithstanding the provisions of the National Labor Relations Act.

PARTIES TO THE PROCEEDING

1. Epic Systems Corporation, petitioner on review, was the defendant-appellant below.

2. Jacob Lewis, respondent on review, was the plaintiff-appellee below.

RULE 29.6 DISCLOSURE STATEMENT

Epic Systems Corporation has no parent corporation, and no publicly held company owns 10% or more of Epic Systems Corporation's stock.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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Epic Systems Corporation (Epic) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The Seventh Circuit's opinion is reported at 823 F.3d 1147. The District Court's opinion denying Epic's motion to dismiss and compel individual arbitration is not published in the *Federal Supplement*, but it is available at 2015 WL 5330300.

JURISDICTION

The judgment of the Seventh Circuit was entered on May 26, 2016. On July 29, 2016, Justice Kagan extended the time within which to file a petition for a

writ of certiorari to and including September 23, 2016. *See* No. 16A93. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Federal Arbitration Act (FAA) and the National Labor Relations Act (NLRA).

The FAA provision at issue states:

> 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.]

Two provisions of the NLRA are at issue. The first, Section 7 of the NLRA, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a

> labor organization as a condition of employment as authorized in section 158(a)(3) of this title. [29 U.S.C. § 157.]

The second, Section 8 of the NLRA, states:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title * * *. [*Id.* § 158(a).]

INTRODUCTION

This case is about the enforceability of arbitration agreements under the FAA. As a matter of federal substantive law, the FAA establishes a presumption in favor of enforcing arbitration agreements as written. *See* 9 U.S.C. § 2. This presumption may be overcome by another federal statute, but only—as the Court has recently reaffirmed—if that statute qualifies as a "congressional command" that is "contrary" to the FAA's enforcement mandate. *CompuCredit Corp.* v. *Greenwood*, 132 S. Ct. 665, 669 (2012). The question presented here arises in the context of employer-employee agreements that require employment-related disputes to be resolved through individual arbitration and not class or collective arbitration. It asks whether Section 7 of the NLRA, which gives employees the right to "engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U.S.C. § 157, qualifies as a contrary congressional command sufficient to overcome the FAA's presumption that these agreements should be enforced according to their terms.

The courts are squarely divided over this important and recurring question. Three federal courts of appeals (the Second, Fifth, and Eighth Circuits) and two state courts of last resort (the California and Nevada Supreme Courts) have concluded that the answer is no: agreements to submit employment disputes to individual arbitration are fully enforceable. Two other federal courts of appeals (the Seventh and Ninth Circuits)—as well as the National Labor Relations Board—have concluded that the answer is yes: these agreements are unenforceable because they bar class and collective proceedings. Thus the outcome of a case deciding the question presented will depend on whether the case is filed in one circuit or another—and, in the Ninth Circuit, on whether the case is litigated in state or federal court. This divergence in authority renders the dispute-resolution process in employer-employee relationships unpredictable, to the detriment of employers and employees alike.

The question presented has been fully ventilated and the subject of both majority and dissenting opinions by eminent jurists. This Court's intervention is needed now to resolve the acknowledged and intractable split. The petition should be granted.

STATEMENT

1. Epic Systems Corporation is a Wisconsin-based company that makes software for recording, organizing, and sharing healthcare data. Across the country, Epic's software is used every day by hospitals, academic medical facilities, retail clinics, safety-net providers, and other healthcare organizations. Epic relies on its own employees to develop, install, and maintain its software.

In April 2014, Epic sent an email to many of its employees. Pet. App. 2a. Contained within the email was an arbitration agreement. *Id.* The email asked recipients to review and acknowledge the agreement by responding in one of two ways: the recipients could either confirm that they understood and consented to the agreement, or they could request that someone contact them about it. *Id.*; C.A. App. 15.

One day after receiving the email, Jacob Lewis, who was then a technical communications employee of Epic, responded by acknowledging that he understood and consented to the terms of the arbitration agreement. Pet. App. 2a. In doing so, Lewis "agree[d] to use binding arbitration, instead of going to court, for any 'covered claims'"—a category that the agreement specifically defined as including any "claimed violation of wage-and-hour practices or procedures under local, state or federal statutory or common law." *Id.* at 30a-31a.

The arbitration agreement also contained a "Waiver of Class and Collective Claims." *Id.* at 31a. By accepting that waiver, Lewis "agree[d] that covered claims will be arbitrated only on an individual basis," and "waive[d] the right to participate in or receive money or any other relief from any class, collective, or representative proceeding." *Id.* The agreement further provided that "if the Waiver of Class and Collective Claims is found to be unenforceable, then any claim brought on a class, collective, or representative action basis must be filed in a court of competent jurisdiction." *Id.* at 35a.

2. Lewis continued to work for Epic until December 2014. C.A. App. 9. Then, in February 2015,

Lewis sued Epic in federal court on behalf of a putative class and collective of technical communications employees, claiming that they had been denied overtime wages in violation of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201 *et seq.*, and Wisconsin law. Pet. App. 2a.

Epic moved to dismiss the complaint and compel individual arbitration, citing the arbitration agreement to which Lewis had consented. *Id.* Although Lewis acknowledged that his claims fell within the scope of that agreement, the District Court denied Epic's motion. *Id.* at 24a, 29a. According to the District Court, the waiver of class and collective proceedings was unenforceable because it violated the right of employees to engage in "concerted activities" under Section 7 of the NLRA. *Id.* at 25a-28a (quoting 29 U.S.C. § 157).

3. Epic appealed, *see* 9 U.S.C. § 16(a), and the Seventh Circuit affirmed.

Turning first to the NLRA, the court concluded that "[a] collective, representative, or class legal proceeding is *** a 'concerted activit[y]'" under NLRA Section 7. Pet. App. 10a (brackets in original). And because Section 8 of the NLRA prohibits an employer from interfering with an employee's right to engage in concerted activity, 29 U.S.C. § 158(a)(1), the court held that the NLRA renders the waiver of class and collective proceedings "unenforceable." Pet. App. 11a.

Only then did the court turn to the FAA, asking whether that statute "resuscitates" the waiver. *Id.* at 12a. The court concluded that it does not, because of the FAA's saving clause. *Id.* at 15a. Under that clause, an arbitration agreement may be rendered

unenforceable by "such grounds as exist at law or in equity for the revocation of any contract." *Id.* at 14a-15a (quoting 9 U.S.C. § 2). And according to the court, "[i]llegality is one of those grounds." *Id.* at 15a. The court thus held that the waiver was "unenforceable" even under the FAA. *Id.* at 20a. In doing so, the court acknowledged that the Fifth Circuit in *D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344 (5th Cir. 2013), had come "to the opposite conclusion." Pet. App. 15a. The court nevertheless proceeded to "create a conflict in the circuits." *Id.* at 15a n.†.

This petition followed.

REASONS FOR GRANTING THE PETITION

I. THERE IS AN ACKNOWLEDGED SPLIT OF AUTHORITY ON THE QUESTION PRESENTED.

The split of authority in this case is clear, acknowledged, and undisputed. The federal courts of appeals and state courts of last resort are divided, five to two, on whether the NLRA overcomes the FAA's presumption that arbitration agreements are enforceable as written, when the agreement at issue submits employment-related disputes to individual arbitration.

1. The Second, Fifth, and Eighth Circuits, as well as the Supreme Courts of California and Nevada, have each determined that provisions waiving class and collective arbitration in the employment context are enforceable under the FAA.

a. The Fifth Circuit has squarely and repeatedly upheld class waivers in employment-related arbitration agreements. Starting with *D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344, 362 (5th Cir. 2013), the court

rejected a decision by the National Labor Relations Board (NLRB or Board), which had found the class waiver at issue unenforceable under the FAA and the NLRA. *See D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012). The Fifth Circuit considered and rejected the Board's determination that the FAA's saving clause was "a basis for invalidating" class waivers due to their purported illegality under the NLRA. 737 F.3d at 360. The Board's analysis was flawed, the court explained, because its finding of illegality had "the effect of * * * disfavor[ing] arbitration." *Id.* at 359 (citing *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 346 (2011)). That type of illegality is not a "ground[] * * * for the revocation of *any* contract," 9 U.S.C. § 2 (emphasis added); it is a ground that specifically targets arbitration, *D.R. Horton*, 737 F.3d at 360. The court therefore concluded that the defense falls outside the saving clause. *Id.*

After dispensing with the Board's reasoning, the Fifth Circuit proceeded to the analysis required by this Court's precedent in cases where a party seeks to avoid arbitration based on another federal statute such as the NLRA. The court asked whether the NLRA is "'a contrary congressional command'" that overcomes the FAA's presumption favoring arbitration. *Id.* (quoting *CompuCredit*, 132 S. Ct. at 669). The Fifth Circuit answered no: "there is no basis on which to find that the text of the NLRA supports a congressional command to override the FAA." *Id.* In so holding, the Fifth Circuit recognized that "[e]very one of our sister circuits to consider the issue" has "held arbitration agreements containing class waivers enforceable," and the court was "loath to create a circuit split." *Id.* at 362. The proper resolution,

therefore, was straightforward: a class waiver "must be enforced according to its terms." *Id.*

The Fifth Circuit has adhered to this view consistently for the last three years. It has done so in the face of serial challenges to its decisions from the NLRB—challenges that are mounted whenever aggrieved parties elect to file petitions to review NLRB rulings in the Fifth Circuit. *See Citi Trends, Inc.* v. *NLRB*, No. 15-60913, 2016 WL 4245458, at *1 (5th Cir. Aug. 10, 2016) (per curiam) (unpublished); *PJ Cheese, Inc.* v. *NLRB*, No. 15-60610, 2016 WL 3457261, at *1 (5th Cir. June 16, 2016) (per curiam); *Chesapeake Energy Corp.* v. *NLRB*, 633 F. App'x 613, 615 (5th Cir. 2016) (per curiam) (unpublished); *Murphy Oil USA, Inc.* v. *NLRB*, 808 F.3d 1013, 1021 (5th Cir. 2015). *See also infra* pp. 22-24 (discussing how the NLRA's judicial review provision, 29 U.S.C. § 160(f), allows a party to petition for review of an NLRB decision in one of several different courts of appeals).

b. The Eighth Circuit also has concluded that employment arbitration agreements containing class waivers are enforceable under the FAA, notwithstanding federal labor laws or the NLRB's interpretation of those laws. *See Cellular Sales of Mo., LLC* v. *NLRB*, 824 F.3d 772, 776 (8th Cir. 2016); *Owen* v. *Bristol Care, Inc.*, 702 F.3d 1050, 1052, 1054-1055 (8th Cir. 2013); *see also* NLRB C.A. Amicus Br. 23-24 (identifying the Eighth Circuit as aligned with the Fifth Circuit). In *Owen*, the Eighth Circuit acknowledged the NLRB's determination that class waivers in employment arbitration agreements are unenforceable, but the court specifically "reject[ed]" the "invitation to follow the NLRB's rationale." 702 F.3d

at 1055. The court instead found the FAA's presumption in favor of the enforcement of arbitration agreements to be dispositive. *See id.* at 1052-1055.

Applying that presumption, the Eighth Circuit followed this Court's rule that "there must be a 'contrary congressional command' for another statute to override the FAA's mandate." *Id.* at 1052 (quoting *CompuCredit*, 132 S. Ct. at 669). The two potential contrary congressional commands alleged in *Owen* were the FLSA and the NLRA. *Id.* at 1053-1054. The Eighth Circuit concluded that neither statute sufficed to "override[] the mandate of the FAA in favor of arbitration." *Id.* at 1055. Because Congress had reenacted the FAA in 1947, *after* passing both of those statutes, the court reasoned, "Congress intended its arbitration protections to remain intact even in light of the earlier passage of * * * major labor relations statutes." *Id.* at 1053.

The Eighth Circuit reaffirmed its *Owen* decision just a few months ago, in *Cellular Sales*, 824 F.3d 772. That case came before the court of appeals on a petition to review the NLRB's ruling " 'that a mandatory agreement requiring individual arbitration of work-related claims' violates the NLRA." *Id.* at 776. The court granted the petition in relevant part, explaining that the "holding in *Owen* is fatal" to the NLRB's position. *Id.* Under *Owen*, an "arbitration agreement that include[s] a waiver of class or collective actions in all forums to resolve employment-related disputes" is enforceable. *Id.*

c. The Second Circuit agrees with the Fifth and Eighth Circuits. *See Sutherland* v. *Ernst & Young LLP*, 726 F.3d 290, 297 & n.8 (2d Cir. 2013) (per curiam). It too has held that a class waiver in an

employment arbitration agreement is enforceable under the FAA. *Id.* at 292-293, 299 (citing *American Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304 (2013)). The court found that neither the FLSA nor the NLRA was a "contrary congressional command" that overrode the FAA. *Id.* at 296-297 & n.8. And like the Eighth Circuit before it, the Second Circuit reached this conclusion even though the NLRB had decided otherwise; the court "decline[d] to follow" the Board's views. *Id.* at 297 n.8.[1]

d. The validity of class and collective waivers under the FAA and the NLRA has reached state courts of last resort as well. The Supreme Courts of California and Nevada have both upheld class waivers in employment arbitration agreements. *See Iskanian* v. *CLS Transp. L.A., LLC*, 327 P.3d 129, 137-143 (Cal. 2014); *Tallman* v. *Eighth Jud. Dist. Ct.*, 359 P.3d 113, 122-123 (Nev. 2015). The California Supreme Court reached its decision by adopting the Fifth Circuit's *D.R. Horton* analysis. *See Iskanian*, 327 P.3d at 141-142. And the Nevada Supreme Court did the same, citing *Iskanian*. *See Tallman*, 359 P.3d at 123.

2. On the other side of the split are the Seventh and Ninth Circuits.

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[1] Several other circuits have similarly held that the FAA demands enforcement of class waivers in employment arbitration agreements, albeit without expressly discussing the NLRA in their decisions. *See Killion* v. *KeHE Distribs., LLC*, 761 F.3d 574, 592 (6th Cir. 2014); *Walthour* v. *Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1334-1336 (11th Cir. 2014); *Adkins* v. *Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002).

a. The Seventh Circuit broke from its sister circuits in the decision below, expressly recognizing that its opinion "would create a conflict in the circuits." Pet. App. 15a n.†. Unlike the Second, Fifth, and Eighth Circuits, the Seventh Circuit held that agreements to submit employment disputes to individual arbitration are *not* enforceable under the NLRA and the FAA. The panel concluded that class waivers in employment arbitration agreements are "illegal" under the NLRA because they interfere with employees' right to engage in concerted activities. *Id.* at 10a-11a. And it determined that such waivers are unenforceable under the FAA's saving clause because illegality is a "'ground[] * * * for the revocation of any contract.'" *Id.* at 14a-15a (quoting 9 U.S.C. § 2); *see id.* at 20a.

The court acknowledged that the Fifth Circuit had reached "the opposite conclusion." *Id.* at 15a. But the Seventh Circuit minimized the Fifth Circuit's reasoning as relying on mere "dicta" from this Court's decisions in *Concepcion* and *Italian Colors*. *Id.* As for the Second and Eighth Circuits, the panel did not dispute that these "two circuits agree with the Fifth," but it deemed the analysis from those circuits to be "substantively" insufficient. *Id.* at 19a (citing *Sutherland* and *Owen*).

b. The Ninth Circuit has now joined the Seventh. In *Morris* v. *Ernst & Young, LLP*, No. 13-16599, 2016 WL 4433080 (9th Cir. Aug. 22, 2016), a divided panel held that a waiver provision requiring employees to bring legal claims through individual arbitration violates the NLRA and therefore is unenforceable. *Id.* at *1, *5. Echoing the Seventh Circuit's decision, the majority concluded that the FAA's saving clause

"caus[es] the FAA's enforcement mandate to yield" to the NLRA. *Id.* at *7. In so holding, the majority acknowledged that it was widening a circuit split: Although it "agree[d] with the Seventh Circuit," the majority "recognize[d] that [its] sister Circuits are divided on this question." *Id.* at *10 n.16.

Judge Ikuta dissented. She described the majority's decision as "breathtaking in its scope and in its error." *Id.* at *11. In her view, the NLRA was not a contrary congressional command that overrode the FAA's enforcement mandate. *Id.* at *12-*14. Judge Ikuta stressed that the majority's decision otherwise was "directly contrary to Supreme Court precedent and join[ed] the wrong side of a circuit split." *Id.* at *11.

3. This split of authority is now fully developed, acknowledged, and ripe for resolution by this Court. The competing pronouncements from the courts of appeals and state courts of last resort have vetted the arguments on both sides. Five of these courts have upheld class and collective waivers under the FAA and the NLRA; two others have invalidated them. As more courts take a side in this dispute, the split becomes less likely to resolve itself. And because the issue is a discrete question of statutory interpretation, it is unlikely to benefit from further percolation. This Court should intervene now to resolve it.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S ARBITRATION PRECEDENTS AND WAS INCORRECT.

This Court's intervention is also needed because the Seventh Circuit's decision was mistaken on the

merits of the important question presented. The court claimed that it was "harmoniz[ing]" the FAA with the NLRA. Pet. App. 16a. Instead, it was disregarding this Court's instructions about how to interpret arbitration agreements under the FAA and misreading the NLRA to boot.

A. The FAA Controls The Enforceability Of Arbitration Agreements Absent Contrary Congressional Command.

Federal statutes are not all on equal footing when it comes to arbitration agreements. The FAA is "[t]he background law governing" questions relating to the enforcement of an arbitration provision, even when other federal statutes are at issue. *CompuCredit*, 132 S. Ct. at 668. It "establishes 'a liberal federal policy favoring arbitration agreements.'" *Id.* at 669 (quoting *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). More particularly, the type of arbitration "envisioned by the FAA" is "bilateral" (individual) arbitration, not class arbitration. *Concepcion*, 563 U.S. at 348, 351.

Under the FAA, the default rule is enforceability: "A written provision *** to settle by arbitration a controversy *** 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. Accordingly, "[t]he burden is on the party opposing arbitration *** to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *Shearson/Am. Express Inc.* v. *McMahon*, 482 U.S. 220, 227 (1987); *see also Moses H. Cone*, 460 U.S. at 24-25 (explaining that the FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable

issues should be resolved in favor of arbitration"). That is why, for decades, this Court has consistently upheld the FAA's policy favoring enforcement of arbitration agreements as written. *See, e.g.*, *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463 (2015); *Italian Colors*, 133 S. Ct. 2304; *CompuCredit*, 132 S. Ct. 665; *Concepcion*, 563 U.S. 333; *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *McMahon*, 482 U.S. 220; *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213 (1985); *Moses H. Cone*, 460 U.S. 1; *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

Consistent with the strong federal policy favoring arbitration, the FAA "requires courts to enforce agreements to arbitrate according to their terms[,] * * * even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *CompuCredit*, 132 S. Ct. at 669 (quoting *McMahon*, 482 U.S. at 226); *see Morris*, 2016 WL 4433080, at *12-*14 (Ikuta, J., dissenting). This contrary congressional command cannot be "obtuse," but rather must indicate Congress's contrary intent with some "clarity." *CompuCredit*, 132 S. Ct. at 672. And, as stated, the directive must be "congressional," *id.* at 669—not administrative or judicial.

B. The Court of Appeals Failed To Follow The Requisite *CompuCredit* Analysis.

1. The court of appeals below erred when it expressly declined to evaluate whether the NLRA is a "contrary congressional command," as *CompuCredit*

requires. *See* Pet. App. 13a. It concluded that the *CompuCredit* analysis would "put[] the cart before the horse." *Id.* The court perceived a preceding, and ultimately superseding, obligation "to see if the two statutes conflict." *Id.* Above all else, the court said, it was required to "harmonize" the FAA with the NLRA. *Id.* at 14a, 16a. In this way, the court of appeals started in the wrong place and conducted the wrong analysis—and the result of its backward methodology was to nullify, not harmonize.

The court of appeals should have begun the analysis with the FAA—specifically, the Act's presumption that arbitration agreements are enforceable as written. *See* 9 U.S.C. § 2; *CompuCredit*, 132 S. Ct. at 668-669; *Moses H. Cone*, 460 U.S. at 24-25. It should have imposed the burden on the party opposing arbitration (Lewis) to show that the agreement was unenforceable, resolving all doubts in favor of arbitration. *McMahon*, 482 U.S. at 227. And it should have asked whether the NLRA was a congressional command "contrary" to the FAA. *CompuCredit*, 132 S. Ct. at 669.

Instead, the court began with the NLRA and imposed the "burden" "to show that the FAA clashes with the NLRA" on the party seeking to enforce arbitration (Epic). Pet. App. 14a. The court also asked the wrong question: whether the NLRA's protection of employees' right to engage in "concerted activities" *could* be read to cover class and collective proceedings. *Id.* at 3a-9a. And only after the court answered the wrong question affirmatively did it consider, as a secondary inquiry, whether the FAA "resuscitates" the class waiver. *Id.* at 12a. The court's analysis thus was flawed from start to finish.

2. Under the standards this Court has laid down, the NLRA is not a "contrary congressional command" that bars class waivers in arbitration agreements. *CompuCredit*, 132 S. Ct. at 669; *see Morris*, 2016 WL 4433080, at *14-*16 (Ikuta, J., dissenting). Section 7 of the NLRA does not expressly prohibit class waivers; it grants employees the right "to engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. To qualify as a contrary congressional command, therefore, Section 7 would have to actually give employees the right to arbitrate or litigate a dispute as a class or collective action. But that interpretation is not compelled by the statutory language, and it makes little sense.

If the NLRA were indeed the source of employees' putative right to proceed as a class or collective action in litigation or arbitration, employees could commence such proceedings directly under the NLRA. *See Bekele* v. *Lyft, Inc.*, No. 15-cv-11650, 2016 WL 4203412, at *20 (D. Mass. Aug. 9, 2016) (criticizing the decision below, including on this ground), *appeal docketed*, No. 16-2109 (1st Cir. Aug. 30, 2016). They presumably could have done so even before the federal rules were revised to provide for class litigation of legal claims. *See generally Italian Colors*, 133 S. Ct. at 2311 (describing the advent of Federal Rule of Civil Procedure 23). Yet there was no rush to the courthouse by employees seeking a class or collective remedy under the NLRA, then or now, because no such right exists.

Moreover, if NLRA Section 7 gives employees the right to proceed in a class or collective action, NLRA Section 8 makes it an unfair labor practice for an

employer "to interfere with" that "right[]." 29 U.S.C. § 158(a)(1). The logical consequence is that any employer opposition to employees' efforts to certify a class or collective action or arbitration "interfere[s] with" the employees' "right[]." *See id.* That would make certification of class or collective actions *automatic* when they are brought by employees against their employer. *See Bekele*, 2016 WL 4203412, at *20 (making a similar observation). Nothing in the NLRA suggests that was Congress's intended result, however. Accordingly, the NLRA does not give employees a right to proceed in class arbitration, and certainly not a right that trumps the FAA's presumption that arbitration agreements are enforceable as written.

C. The Court Of Appeals' Analysis Is Not Salvageable Through the FAA's Saving Clause.

1. The court of appeals said it found support for its decision in the FAA's saving clause, which provides that an arbitration agreement is enforceable "'save upon such grounds as exist at law or in equity for the revocation of any contract.'" Pet. App. 14a-15a (quoting 9 U.S.C. § 2). The court reasoned as follows: the class waiver here is "illegal" under Section 7 of the NLRA; "illegality" is a defense allowing for the revocation of a contract; therefore, the case falls within the FAA's saving clause, and there is no conflict between the NLRA and the FAA. *Id.* at 15a.

In this way, the court of appeals used the saving clause as a means to sidestep the analysis required by *CompuCredit*. Under its reasoning, there is never any need to determine whether another federal statute qualifies as a contrary congressional com-

mand because the saving clause allows courts to decide simply whether the other federal law *could* be interpreted to disfavor arbitration. That rule would eviscerate the presumption of enforceability created by the FAA, however, converting enforcement into the exception rather than the rule. *See Morris*, 2016 WL 4433080, at *16-*17 (Ikuta, J., dissenting).

2. The court of appeals' analysis is also wrong. The saving clause allows courts to decline to enforce arbitration agreements based on generally applicable contract defenses; that is, those that provide "for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). A defense that exists only because of the presence of a particular arbitration provision in a contract is not generally applicable. As *Concepcion* explained, "when a doctrine normally thought to be generally applicable, such as duress or *** unconscionability, is *** applied in a fashion that disfavors arbitration," it falls outside the saving clause. 563 U.S. at 341. Likewise, a defense that precludes the waiver of class or collective arbitration is not truly generally applicable: "Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 344; *cf. Italian Colors*, 133 S. Ct. at 2310, 2312 & n.5 (relying on *Concepcion*'s general analysis in a case where the law competing with the FAA was federal, and rejecting the dissent's "dismiss[al]" of *Concepcion* as "a case involving pre-emption"). *But see Morris*, 2016 WL 4433080, at *17 (Ikuta, J., dissenting) (stating that this Court "does not apply the saving[] clause to federal statutes").

The court of appeals in this case interpreted the NLRA to render class or collective waivers in employment arbitration agreements illegal. But that illegality-based defense—which arises only in *some* contracts, not "*any* contract," 9 U.S.C. § 2 (emphasis added)—can hardly be likened to classic universal defenses such as fraud and mistake. Instead, it has the effect of "conditioning enforcement of arbitration on the availability of class procedure." *Italian Colors*, 133 S. Ct. at 2312. Under *Concepcion*, that means the defense disfavors arbitration and is not generally applicable. *See* 563 U.S. at 341, 344. Accordingly, the saving clause does not apply, and the Seventh Circuit's decision is wrong on the merits.

III. REVIEW IS NEEDED TO ESTABLISH A NATIONWIDE RULE ON AN IMPORTANT ISSUE FOR BOTH EMPLOYERS AND EMPLOYEES.

The question presented in this case holds critical importance to employers and employees around the country. Arbitration agreements with class and collective waivers are commonly used in the employment context, but the split of authority over the enforceability of those waivers creates tremendous uncertainty for employers and employees alike. And the problem is particularly acute for entities whose operations span multiple circuits.

1. The viability of class and collective arbitration waivers affects a broad spectrum of industries across the country. Consider the range of companies whose cases are part of the split of authorities: Epic (healthcare software), D.R. Horton (home construction), Murphy (convenience stores), Bristol Care (residential care services), Cellular Sales of Missouri

(telecommunications retail), Ernst & Young (professional services), Bloomingdale's (department stores), CLS Transportation (trucking), and CPS Security (security services; in *Tallman*, the Nevada Supreme Court case). Beyond those cases, class and collective arbitration waivers are used in a wide variety of employment contexts. *See, e.g.*, *Killion* v. *KeHE Distribs., LLC*, 761 F.3d 574 (6th Cir. 2014) (foodservice); *Walthour* v. *Chipio Windshield Repair, LLC*, 745 F.3d 1326 (11th Cir. 2014) (automobile repair); *Raniere* v. *Citigroup Inc.*, 533 F. App'x 11 (2d Cir. 2013) (unpublished) (financial services); *Adkins* v. *Labor Ready, Inc.*, 303 F.3d 496 (4th Cir. 2002) (temporary staffing); *Bekele*, 2016 WL 4203412 (ride-hailing); *Bell* v. *Ryan Transp. Serv., Inc.*, No. 15-9857, 2016 WL 1298083 (D. Kan. Mar. 31, 2016) (third-party logistics); *Morvant* v. *P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831 (N.D. Cal. 2012) (restaurants).

Unsurprisingly, then, the enforceability of class waivers in employment arbitration agreements is an issue that arises frequently. Since the NLRB's 2012 *D.R. Horton* decision—which declared class and collective waivers in employment arbitration agreements invalid under the NLRA—the Board has handled "a steady stream of cases, by now numerous," on the same issue. *Century Fast Foods, Inc.*, No. 31-CA-116102, 2015 WL 1885197 (N.L.R.B. Apr. 24, 2015). In just the short time since the Seventh Circuit's decision below, the Board has issued at least ten new administrative decisions applying the same view of the FAA and the NLRA that it has

advanced since 2012.[2] The NLRB's approach, combined with the continued flow of private suits, ensures that this issue will recur frequently in the federal courts.

2. The divide among the authorities on this frequently recurring question is particularly problematic because of the NLRA's judicial-review provision, 29 U.S.C. § 160(f). That provision broadly allows those aggrieved by NLRB decisions to seek review in (1) the circuit "wherein the unfair labor practice in question was alleged to have been engaged," (2) the circuit "wherein such person resides or transacts business," or (3) the D.C. Circuit. *Id.* Because "[t]he Board may well not know which circuit's law will be applied on a petition for review," *Murphy Oil*, 808 F.3d at 1018, the Board has held firm to its view that class waivers in employment arbitration agreements are unenforceable, even after its decisions have been overturned again and again by certain courts of

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[2] *See, e.g.*, *Arise Virtual Sols., Inc.*, No. 12-CA-144223, 2016 WL 4362210 (N.L.R.B. Aug. 12, 2016) (applying the Board's position and noting that "the courts of appeals are now split"); *Briad Wenco, LLC*, No. 29-CA-165942, 2016 WL 3626602 (N.L.R.B. July 6, 2016); *Grill Concepts Servs., Inc.*, 364 N.L.R.B. 36 (June 30, 2016); *Bristol Farms*, 364 N.L.R.B. 34 (July 6, 2016); *Scherzinger Corp.*, No. 09-CA-165460, 2016 WL 3383761 (N.L.R.B. June 17, 2016) (adhering to the same position and stating that the Seventh Circuit's opinion opened "a circuit split that will likely have to be resolved by the Supreme Court" (footnote omitted)); *California Commerce Club, Inc.*, 364 N.L.R.B. 31 (June 16, 2016); *SJK, Inc.*, 364 N.L.R.B. 29 (June 16, 2016); *Rim Hosp.*, No. 21-CA-137250, 2016 WL 3345349 (N.L.R.B. June 15, 2016); *Adriana's Ins. Servs., Inc.*, 364 N.L.R.B. 17 (May 31, 2016); *Lincoln E. Mgmt. Corp.*, 364 N.L.R.B. 16 (May 31, 2016).

appeals. Thus, employers located in the Second, Fifth, and Eighth Circuits will continue to be subjected to NLRB enforcement actions against their use of class waivers. And when the NLRB inevitably finds that the waivers are unenforceable, the employers must go through the hassle of filing a petition for review, even though the issue has been decided squarely in their favor in those circuits.

The Fifth and Eighth Circuits have already confronted this problem. The Fifth Circuit has rejected the Board's position in four additional cases since *D.R. Horton*. *Citi Trends*, 2016 WL 4245458, at *1 ("The Board concedes, as it must, that its order contravenes our published decisions * * * , [but] this Court is bound by its prior published decisions."); *PJ Cheese*, 2016 WL 3457261, at *1 (granting the employer's motion for summary disposition); *Chesapeake Energy*, 633 F. App'x at 615 ("[N]o intervening change in the law permits reconsideration of our precedent."); *Murphy Oil*, 808 F.3d at 1018, 1021 (neither "celebrat[ing]" nor "condemn[ing]" the Board's "nonacquiescence" to the Fifth Circuit's *D.R. Horton* decision, but rebuking the Board for "hold[ing] that an employer who followed the reasoning of [the] *D.R. Horton* decision had no basis in fact or law * * * in doing so"). The Eighth Circuit has likewise rebuffed the Board in another opinion published after *Owen*. *Cellular Sales*, 824 F.3d at 776 (noting that the Eighth Circuit had rejected the Board's request to reconsider *Owen*, a precedent that the Board recognized was "fatal" to its contentions).

Absent action by this Court, courts will continue to face repeat litigation on this question. In the meantime, Section 160(f)'s review procedures will leave

enforcement of employment arbitration agreements with class waivers uncertain for both employers and employees.

3. The proper resolution of this issue thus carries significant implications for the employer-employee relationship. Employers need to know whether class waivers in arbitration provisions will actually be enforced. Employees need to know whether they are actually bound by these provisions. Without a decision by this Court establishing a uniform rule, the law governing a given dispute will remain unclear until the case is litigated—and the place of filing dictates the rule that applies.

The split of authority is especially troublesome for companies with employees in workplaces across the United States. So long as this split persists, large employers will need to have one set of employment policies for employees in the Seventh and Ninth Circuits, and another set of policies for employees elsewhere. And even then, employers operating in California or Nevada cannot know which law will govern, because the answer will depend on whether litigation is brought in state or federal court.

In effect, the decision below "condition[s] enforcement of arbitration on the availability of class procedure," *Italian Colors*, 133 S. Ct. at 2312, despite this Court's admonition that "[r]equiring the availability of classwide arbitration * * * creates a scheme inconsistent with the FAA," *Concepcion*, 563 U.S. at 344. And yet this is the choice now faced by employers in the Seventh and Ninth Circuits: if they want to resolve employment disputes through arbitration, class arbitration must be kept available. The result is a regime that—at least in those two circuits—

disfavors arbitration and the "'lower costs, greater efficiency and speed'" that attend individual arbitration, contrary to the purpose of the FAA. *Id.* at 348 (quoting *Stolt-Nielsen*, 559 U.S. at 685).

This Court's review is therefore needed, now. Only this Court can rectify the myriad problems caused by competing standards for employment arbitration agreements. Only this Court can establish a uniform standard for employers and employees nationwide. And only this Court can bring predictability and stability back to the dispute-resolution process in employer-employee relationships.

4. Finally, this case is an excellent vehicle to decide the question presented. The question was pressed below, fully briefed by the parties and amici (including the NLRB), and passed on by the court of appeals. The question was the single issue on appeal, and the court of appeals' resolution of the issue was the sole basis for its decision. And in that decision, the court acknowledged that it was departing from the holdings of other courts of appeals.

Moreover, the parties to this case—an employer and an employee—are best situated to represent the two opposing viewpoints on the issue. They are the real parties in interest subject to both the FAA and the NLRA: their arbitration agreement is governed by the FAA, and their employer-employee relationship is governed by the NLRA. They have the most direct stake in courts' interpretations of these statutes and therefore are the parties most acutely interested in the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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SEPTEMBER 2016