16-300

No.

In the Supreme Court of the United States

ERNST & YOUNG LLP AND ERNST & YOUNG U.S. LLP,
PETITIONERS

v.

STEPHEN MORRIS AND KELLY MCDANIEL

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the collective-bargaining provisions of the National Labor Relations Act prohibit the enforcement under the Federal Arbitration Act of an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis.

CORPORATE DISCLOSURE STATEMENT

Petitioners Ernst & Young LLP and Ernst & Young U.S. LLP are limited liability partnerships. They have no parent corporations, and no publicly held companies own 10% or more of their stock.

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Ernst & Young LLP and Ernst & Young U.S. LLP respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-42a) is not yet reported. The order of the district court granting petitioner's motion to compel arbitration (App., *infra*, 43a-67a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. 2, 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.

Section 7 of the National Labor Relations Act, 29 U.S.C. 157, 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[.]

Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in relevant part:

> 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[.]

STATEMENT

This case presents a recognized and indisputably important circuit conflict concerning the interplay between two federal statutes. Under the Federal Arbitration Act (FAA), arbitration agreements "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. Section 7 of the National Labor Relations Act (NLRA) provides that "[e]mployees shall have the right to self-organization * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. 157. And under Section 8(a) of the NLRA, it is an unfair labor practice for an employer to "interfere with, restrain, or coerce employees" in the exercise of their Section 7 rights. 29 U.S.C. 158(a). The question presented is whether the foregoing provisions of the NLRA prohibit the enforcement under the FAA of an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis.

Respondents in this case are two of petitioners' former employees. Each signed an employment agreement that included an arbitration provision requiring all disputes with petitioners to be resolved in individual, rather than collective, arbitration. Respondents nevertheless filed a class-action lawsuit against petitioners in federal court. Petitioners moved to compel arbitration, and the district court granted the motion, holding that the arbitration provision was enforceable.

A divided panel of the Ninth Circuit reversed. Over a lengthy dissent, the majority held that the arbitration provision violated the collective-bargaining provisions of the NLRA and was thus unenforceable under the FAA. In so holding, the Ninth Circuit expressly disagreed with the prior decisions of three other courts of appeals—

including a decision of the Second Circuit that, in another case against petitioners, upheld the identical arbitration provision at issue here. The Ninth Circuit acknowledged that it was joining the minority side of a clear circuit conflict on the question presented. And petitioners are uniquely affected by that conflict, as a major employer that has been party to decisions on both sides. Because this case is the optimal vehicle for resolving the circuit conflict, the petition for a writ of certiorari should be granted.

A. Background

1. The Federal Arbitration Act guarantees that "[a] written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract * * * 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. As this Court has repeatedly recognized, the FAA reflects "both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011) (internal quotation marks and citations omitted).

Consistent with that understanding, courts must "rigorously enforce arbitration agreements according to their terms." *American Express Co.* v. *Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013) (internal quotation marks and citation omitted). That is true in the context of agreements requiring disputes to be resolved in individual arbitration. See *Concepcion*, 563 U.S. at 345-352. And it is true in the context of agreements to arbitrate claims under federal statutory schemes, unless "the FAA's mandate has been overridden by a contrary congressional command." *CompuCredit Corp.* v. *Green-*

wood, 132 S. Ct. 665, 669 (2012) (internal quotation marks and citations omitted).

2. Section 7 of the NLRA gives employees "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. Under Section 8(a) of the NLRA, it is "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). The question presented in this case is whether those provisions supply the requisite congressional command to render unenforceable an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis.

B. Facts and Procedural History

1. Petitioners are Ernst & Young LLP and Ernst & Young U.S. LLP (collectively "EY"). Ernst & Young LLP is an accounting firm serving clients in the United States; Ernst & Young U.S. LLP is an affiliate of Ernst & Young LLP. Virtually all of EY's approximately 40,000 employees in the United States have signed an arbitration provision as a condition of employment. That provision specifies that "[a]ll claims, controversies or other disputes between [petitioners] and an [e]mployee that could otherwise be resolved by a court" will instead be resolved through a program of alternative dispute resolution known as the Common Ground Dispute Resolution Program. App., *infra*, 44a. Under the program, "[c]overed [d]isputes pertaining to different [e]mployees will be heard in separate proceedings"; class or collective proceedings are not permitted. *Ibid.*

Respondents Stephen Morris and Kelly McDaniel began working in EY's audit division in 2005 and 2008, respectively. See App., *infra*, 45a. Both respondents agreed to be bound by the arbitration provision. See *ibid.*

2. In 2012, respondent Morris brought suit against petitioners in the United States District Court for the Southern District of New York on behalf of a class of California employees, alleging that petitioners had misclassified the employees for purposes of overtime pay under the Fair Labor Standards Act (FLSA) and California law. Respondent McDaniel later joined the lawsuit as a plaintiff. After the case was transferred to the Northern District of California, petitioners moved to compel arbitration. Respondents did not dispute that their claims were covered by the arbitration provision; as is relevant here, they argued that the collective-bargaining provisions of the NLRA conferred a nonwaivable right to collective litigation that rendered the arbitration provision unenforceable.

The district court granted petitioners' motion to compel arbitration and dismissed the case. App., *infra*, 43a-67a. As is relevant here, the court reasoned that it was required to "enforce the instant agreement according to its terms" "[b]ecause Congress did not expressly provide [in the NLRA] that it was overriding any provision in the FAA," which embodies a "strong policy choice in favor of enforcing arbitration agreements." *Id.* at 66a-67a (internal quotation marks and citation omitted; alterations in original).

3. A divided panel of the court of appeals reversed and remanded. App., *infra*, 1a-42a.

a. The court of appeals began its analysis not with the FAA, but with the NLRA. App., *infra*, 3a-11a. Citing case law construing Section 7 of the NLRA, the court

contended that Section 7 "protects a range of concerted employee activity, including the right to seek to improve working conditions through resort to administrative and judicial forums." *Id.* at 7a (internal quotation marks and citation omitted). According to the court, Section 7 thus establishes a "substantive right" for employees "to pursue work-related legal claims, and to do so together." *Id.* at 8a, 10a. Petitioners' arbitration provision, the court of appeals determined, "prevents concerted activity by employees in arbitration proceedings, and the requirement that employees only use arbitration prevents the initiation of concerted legal action anywhere else." *Id.* at 11a. As a result, the court reasoned, the provision "interferes with a protected [Section] 7 right in violation of [Section] 8" of the NLRA and "cannot be enforced." *Ibid.*

The court of appeals then dismissed the FAA, stating that it "does not dictate a contrary result." App., *infra*, 12a. In the court's view, "[t]he illegality of the 'separate proceedings' term here has nothing to do with arbitration as a forum." *Id.* at 13a. Rather, "[i]rrespective of the forum in which disputes are resolved, employees must be able to act in the forum *together*." *Id.* at 23a. Relying on 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," 9 U.S.C. 2, the court concluded that petitioners' arbitration provision was prohibited by the NLRA and thus unenforceable. App., *infra*, 16a, 24a.

In reaching that conclusion, the court of appeals "recognize[d] that our sister [c]ircuits are divided on this question," and acknowledged that the majority of the courts of appeals to have considered the issue had reached a contrary conclusion. App., *infra*, 24a n.16. The court of appeals specifically rejected the mode of analysis underlying those courts' contrary conclusion,

which would require a "contrary congressional command" in a federal statute in order to override the FAA's mandate to enforce arbitration agreements. *Id.* at 17a.

b. Judge Ikuta dissented. App., *infra*, 25a-42a. She contended that the majority had adopted reasoning "directly contrary" to this Court's arbitration jurisprudence and had "join[ed] the wrong side of a circuit split." *Id.* at 25a.

Judge Ikuta began by observing that, "[c]ontrary to the majority's focus on whether the NLRA confers 'substantive rights,' in every case considering a party's claim that a federal statute precludes enforcement of an arbitration agreement, the Supreme Court begins by considering whether the statute contains an express 'contrary congressional command' that overrides the FAA." App., *infra*, 29a (citing *Italian Colors*, 133 S. Ct. at 2309; *CompuCredit*, 132 S. Ct. at 669; and *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)). Under that test, Judge Ikuta reasoned, the NLRA contained nothing "remotely close" to a "contrary congressional command" that would trump the FAA. *Id.* at 35a. The collective-bargaining provisions of the NLRA "neither mention arbitration nor specify the right to take legal action at all, whether individually or collectively." *Ibid.* Nor do those provisions "expressly preserve any right for employees to use a specific *procedural* mechanism to litigate or arbitrate disputes collectively." *Id.* at 36a. Judge Ikuta likewise found no support in the NLRA's legislative history or underlying purposes for the conclusion that the NLRA precludes enforcement of an agreement requiring disputes to be resolved in individual arbitration. See *id.* at 38a.

Judge Ikuta proceeded to reject the majority's reliance on the FAA's saving clause. See App., *infra*, 38a-41a. At the outset, Judge Ikuta noted that this Court

"does not apply the saving clause to federal statutes"; instead, unless the supposedly conflicting statute contains a congressional command contrary to the use of arbitration, it "can be harmonized with the FAA." *Id.* at 39a. She contended that the majority's reasoning was based on the erroneous premise that collective-action waivers are illegal, when, in reality, such a waiver "would be illegal only if it were precluded by a 'contrary congressional command' in the NLRA, and here there is no such command." *Id.* at 40a. Judge Ikuta further reasoned that, even if the FAA's saving clause were applicable to federal statutes, it could not save the majority's construction of the NLRA as "giving employees a substantive, nonwaivable right to classwide actions." *Ibid.* As she explained, such a purported right would "disproportionately and negatively impact arbitration agreements by requiring procedures that 'interfere[] with fundamental attributes of arbitration.'" *Ibid.* (quoting *Concepcion*, 563 U.S. at 344). In *Concepcion*, she added, the Court "expressly rejected" the reasoning behind the majority's conclusion that "the nonwaivable right to class-wide procedures [that the majority] has discerned in [Section] 7" complies with the FAA simply because it "applies equally to arbitration and litigation." *Ibid.*

Judge Ikuta concluded by observing that the majority's rule was "directly contrary to Congress's goals in enacting the FAA." App., *infra*, 40a. She noted that "lawyers are unlikely to arbitrate on behalf of individuals when they can represent a class, and an arbitrator cannot hear a class arbitration unless such a proceeding is explicitly provided for by agreement." *Id.* at 40a-41a (citation omitted). As a result, "the employee's purported nonwaivable right to class-wide procedures virtually guarantees that a broad swath of workplace claims will be litigated" rather than arbitrated. *Id.* at 41a. The ma-

jority, in other words, "exhibit[ed] the very hostility to arbitration that the FAA was passed to counteract." *Ibid.*

REASONS FOR GRANTING THE PETITION

This case presents a straightforward conflict among the courts of appeals on an important and frequently recurring question involving the interplay between two federal statutes. In the decision below, the Ninth Circuit expressly recognized that it was deepening an existing conflict on the question whether the collective-bargaining provisions of the National Labor Relations Act prohibit the enforcement of an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis—an agreement that would otherwise plainly be enforceable under the Federal Arbitration Act. Five circuits have now decided the question. Three circuits have held that such agreements must be enforced pursuant to the FAA and that they do not violate the NLRA. Two circuits, including the Ninth Circuit in the decision below, have held that such agreements violate the NLRA and are thus unenforceable under the FAA.

That conflict necessitates the Court's review, and this case is the optimal vehicle in which to resolve it. The question presented is of substantial legal and practical importance. Its resolution will determine whether an enormous number of employment disputes are litigated in the federal and state courts. This case cleanly and squarely presents the question, and the parties to this case, as an employer and its employees, will be acutely affected by the outcome. Petitioners' interest is particularly strong because they employ tens of thousands of people nationwide who are subject to the arbitration provision at issue; remarkably, there is a circuit conflict

over the enforceability of that very provision, with the Second and Ninth Circuits reaching different results in cases involving EY. And uniquely among the decisions in the circuit conflict, the opinions below fully develop the arguments on both sides of the question. Because this case readily satisfies the criteria for certiorari and is the optimal vehicle for the Court's review, the petition for a writ of certiorari should be granted.

A. The Decision Below Deepens A Conflict Among The Courts Of Appeals

The Ninth Circuit's decision deepens a conflict among the courts of appeals concerning the enforceability of an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis. In the decision below, the Ninth Circuit expressly recognized that conflict. See App., *infra*, 24a n.16. Other courts of appeals have done the same, see *Lewis* v. *Epic Systems Corp.*, 823 F.3d 1147, 1155, 1157-1159 (7th Cir. 2016); *Patterson* v. *Raymours Furniture Co.*, No. 15-2820, 2016 WL 4598542, at *2 (2d Cir. Sept. 2, 2016) (summary order), as have legal commentators, see, *e.g.*, Jack S. Gearan, *Ninth Circuit Court of Appeals Widens Circuit Split as to Class Action Waivers in Employee Arbitration Agreements*, Nat'l L. Rev. (Sept. 1, 2016) <tinyurl.com/gearanarticle>. The circuit conflict plainly warrants resolution by this Court.

1. As the Ninth Circuit correctly noted, see App., *infra*, 24a n.16, three courts of appeals have held that an agreement requiring an employee to arbitrate claims against an employer on an individual basis is enforceable under the FAA and does not violate the NLRA.

In the earliest of the cited decisions, *Owen* v. *Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013), an employee sued her former employer under the Fair Labor Stand-

ards Act on behalf of herself and a class of similarly situated employees. See *id.* at 1051. The Eighth Circuit held that the employer's arbitration agreement must be enforced and the suit dismissed. See *id.* at 1055. The Eighth Circuit began from the premise that courts are required to "enforce arbitration agreements according to their terms," unless there is a "contrary congressional command for another statute to override the FAA's mandate." *Id.* at 1052 (internal quotation marks and citation omitted). Because neither the NLRA nor the FLSA contained such a command, the Eighth Circuit concluded that the arbitration agreement at issue was enforceable. *Id.* at 1053-1055; see *Cellular Sales of Missouri, LLC* v. *NLRB*, 824 F.3d 772, 776 (8th Cir. 2016) (holding, "in accordance with *Owen*," that an employer did not violate the NLRA by "requiring its employees to enter into an arbitration agreement that included a waiver of class or collective actions in all forums to resolve employment-related disputes").

The Second Circuit reached the same conclusion in *Sutherland* v. *Ernst & Young LLP*, 726 F.3d 290 (2013) (per curiam). There, as here, the plaintiff worked for EY and, pursuant to the same Common Ground Dispute Resolution Program at issue here, agreed to resolve all disputes with EY via individual arbitration. See *id.* at 293-294. After the plaintiff filed a class action in federal court, EY moved to compel arbitration. See *id.* at 294. The district court denied the motion, but the Second Circuit reversed. See *id.* at 299. Like the Eighth Circuit in *Owen*, the Second Circuit began from the premise that "arbitration agreements should be enforced according to their terms unless the FAA's mandate has been overridden by a contrary congressional command." *Id.* at 295 (internal quotation marks and citation omitted). The court found no such contrary command in either the

NLRA or the FLSA, and thus enforced the arbitration agreement as written. *Id.* at 297 n.8, 298-299; see *Patterson*, 2016 WL 4598542, at *3 (following *Sutherland*).

Finally, the Fifth Circuit followed suit in *D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344 (2013). Unlike *Owen* and *Sutherland*, that case arose not from an appeal in a class action by an employee, but rather on a petition for review of a decision by the National Labor Relations Board (NLRB) on a charge of unfair labor practices. See *id.* at 355. The NLRB had ruled that, by "requiring employees to refrain from collective or class claims," an arbitration agreement "infringed on the substantive rights protected by Section 7 [of the NLRA]" and therefore gave rise to a violation of Section 8(a)(1). *Ibid.* The Fifth Circuit granted the petition for review. See *id.* at 364. The court reasoned that arbitration agreements "must be enforced according to their terms," and neither the FAA's saving clause nor "another statute's contrary congressional command" precluded enforcement. *Id.* at 358. As to the saving clause, the Fifth Circuit explained that this Court's decision in *Concepcion* "leads to the conclusion that the Board's rule does not fit" within the clause. *Id.* at 359. And the court did not find a "contrary congressional command" or inherent conflict with the FAA in the text, legislative history, or purposes of the NLRA. *Id.* at 360-361. Judge Graves dissented in relevant part, arguing that the agreement was unenforceable because Section 7 conferred a substantive right to engage in class or collective actions. *Id.* at 364-365; see *Murphy Oil, U.S.A., Inc.* v. *NLRB*, 808 F.3d 1013, 1018 (5th Cir. 2015) (applying the rule of *D.R. Horton* without "repeat[ing] its analysis").

2. Before the Ninth Circuit's decision in this case, only the Seventh Circuit had adopted a contrary interpretation. In *Lewis* v. *Epic Systems Corp.*, 823 F.3d 1147

(2016), petition for cert. pending, No. 16-285 (filed Sept. 3, 2016), the Seventh Circuit held that an agreement requiring an employee to arbitrate claims against an employer on an individual basis violated the NLRA and was thus unenforceable under the FAA. See *id.* at 1161. Like the Ninth Circuit here, the Seventh Circuit started with the contention that Section 7 of the NLRA gives employees the right to pursue "concerted activities," which it construed to include the "filing a collective or class action suit." *Id.* at 1152. The Seventh Circuit reasoned that the arbitration agreement "impinges on 'Section 7 rights'" by preventing employees from "tak[ing] advantage of any collective procedures" otherwise available. *Id.* at 1155. The Seventh Circuit then proceeded to consider the FAA, concluding that the FAA did not conflict with the NLRA because "the provision at issue is unlawful under Section 7" and thus "meets the criteria of the FAA's saving clause for nonenforcement." *Id.* at 1157.

Unlike the Ninth Circuit's decision here, the Seventh Circuit's decision was unanimous. And while the Seventh Circuit recognized that it was creating a circuit conflict, it summarily rejected the Fifth Circuit's reasoning and dismissed the Second and Eighth Circuits' opinions altogether, asserting that they had not "engaged substantively with the relevant arguments." 823 F.3d at 1159.

Particularly in the wake of the Ninth Circuit's decision in this case, there can be no doubt that there is a substantial circuit conflict that is ripe for the Court's resolution. Further review is therefore warranted.

B. The Decision Below Was Incorrect

Further review is also warranted because the decision below was incorrect. The majority below followed the wrong mode of analysis, which unsurprisingly led it to the wrong result.

1. As this Court has repeatedly stated, the FAA embodies "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). Consistent with that policy, the Court has held, across a variety of contexts, that arbitration agreements must be enforced according to their terms. See, *e.g.*, *Italian Colors*, 133 S. Ct. at 2309; *Concepcion*, 563 U.S. at 339; *Shearson/American Express Inc.* v. *McMahon*, 482 U.S. 220, 225-227, 238-242 (1987).

The foregoing principle applies "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 (internal quotation marks and citation omitted). The party challenging the arbitration agreement has the burden of showing that "Congress intended to preclude a waiver of the judicial forum." *Gilmer*, 500 U.S. at 26. Indicia of such an intention "will be discoverable in the text of the [statute], its legislative history, or an inherent conflict between arbitration and the [statute's] underlying purposes." *Ibid.* (internal quotation marks omitted). Regardless of the source, however, Congress must demonstrate its intent to supersede the FAA with "clarity." *CompuCredit*, 132 S. Ct. at 672. And as is generally the case, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24-25.

2. The Ninth Circuit erred at the outset by refusing to follow this Court's mode of analysis and evaluate

whether the NLRA supplies a "contrary congressional command" overriding the FAA's instruction to enforce arbitration agreements according to their terms. App., *infra*, 17a. If it had done so, it would have found that the NLRA contains no congressional command contrary to collective-action waivers. See *id.* at 34a-38a (Ikuta, J., dissenting).

To begin with, the collective-bargaining provisions of the NLRA "neither mention arbitration nor specify the right to take legal action at all, whether individually or collectively." App., *infra*, 35a (Ikuta, J., dissenting). While Section 7 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, it contains no "command" concerning arbitration, much less the kind of "express contrary congressional command" that this Court has indicated would unseat the FAA's presumption that arbitration agreements should be enforced according to their terms. App., *infra*, 29a-31a (Ikuta, J., dissenting) (internal quotation marks and citation omitted).

As Judge Ikuta noted in her dissenting opinion, this Court has found that much clearer statutory language still lacked the kind of clear congressional command necessary to nullify an arbitration agreement. See App., *infra*, 29a-33a. For example, in *CompuCredit*, the Court considered language in the Credit Repair Organizations Act (CROA) that plaintiffs argued precluded consumers from entering an arbitration agreement that waived their right to litigate in a judicial forum. See 132 S. Ct. at 669. The plaintiffs cited language in the CROA that required businesses to tell consumers that "[y]ou have a right to sue," 15 U.S.C. 1679c(a), and that provided that "[a]ny waiver by any consumer of any protection provided by or any right of the consumer" was void and could

"not be enforced by any Federal or State court," 15 U.S.C. 1679f(a). See 132 S. Ct. at 669. Despite that language, the Court held that Congress did not intend to prevent arbitration of claims under CROA. See *id.* at 672-673. If Congress had so intended, "it would have done so in a manner less obtuse than what respondents suggest." *Id.* at 672. The Court gave examples of what sufficiently clear congressional commands look like:

> "No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section."
>
> "Notwithstanding any other provision of law, whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy."

Ibid. (quoting 7 U.S.C. 26(n)(2) and 15 U.S.C. 1226(a)(2)). Nothing in the language of the NLRA establishes congressional intent with remotely similar clarity.

The NLRA's legislative history similarly lacks any indication of a congressional command precluding courts from enforcing collective-action waivers according to their terms. Notably, in enacting the NLRA, "Congress did not discuss the right to file class or consolidated claims against employers"; as a result, "the legislative history also does not provide a basis for a congressional command to override the FAA." App., *infra*, 37a (Ikuta, J., dissenting) (citation omitted).

Nor is there any conflict between collective-action waivers and the NLRA's underlying purposes. See App., *infra*, 37a (Ikuta, J., dissenting). The NLRA may give

employees a right to bargain collectively, but "nothing in the NLRA suggests that this protection includes the right to resolve disputes using a particular legal procedure." *Ibid.* In short, because the NLRA does not contain the requisite "contrary congressional command," the Ninth Circuit should have enforced petitioners' arbitration agreement according to its terms. *CompuCredit*, 132 S. Ct. at 669.

3. The majority below used a different mode of analysis to reach a contrary conclusion. It first concluded that the NLRA gives employees a substantive right to pursue legal claims collectively. See App., *infra*, 3a-11a. It then considered whether the right it found in the NLRA could be reconciled with the FAA and concluded that it could based on the FAA's saving clause, which provides that an arbitration agreement may be invalidated "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2; see App., *infra*, 14a, 17a. The majority reasoned that, because the NLRA confers a substantive right to engage in collective litigation, a contract purporting to waive that right would be illegal and thus invalid under the FAA's saving clause. See *id.* at 15a-18a.

The majority's mode of analysis simply cannot be reconciled with this Court's arbitration jurisprudence. The majority expressly declined to search for a "contrary congressional command" and ignored the presumption in favor of arbitration by attempting to reconcile the NLRA and the FAA on an equal footing. See App., *infra*, 17a. But this Court's arbitration decisions require a different approach. See App., *infra*, 29a (Ikuta, J., dissenting). If the majority's approach were correct, the FAA would yield any time an arbitration agreement could conflict with another federal statute. See *id.* at 39a-40a.

The majority's understanding of the FAA's saving clause is also inconsistent with this Court's decision in *Concepcion*. There, the Court explained that, "when a doctrine normally thought to be generally applicable * * * [is] applied in a fashion that disfavors or interferes with arbitration," it does not trigger the saving clause. *Concepcion*, 563 U.S. at 341. The Court determined that a defense that precludes the waiver of class or collective arbitration is not generally applicable because "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 344. In the same way, the majority's approach here effectively "condition[s] enforcement of arbitration on the availability of class procedure," *Italian Colors*, 133 S. Ct. at 2312, and thus cannot be squared with *Concepcion*. In rejecting the reasoning of *Concepcion* and this Court's other arbitration decisions, the majority erred and "exhibit[ed] the very hostility to arbitration that the FAA was passed to counteract." App., *infra*, 41a (Ikuta, J., dissenting).

C. The Question Presented Is Exceptionally Important And Warrants Review In This Case

1. This case presents a critical question with significant ramifications for employers and employees alike. The use of arbitration in employment agreements is widespread—and for good reason. Arbitration allows the parties to design their own "efficient, streamlined procedures tailored to the type of dispute" at issue. *Concepcion*, 563 U.S. at 344. It provides "expeditious results." *Preston* v. *Ferrer*, 552 U.S. 346, 357-359 (2008). And it "reduc[es] the cost" of resolving disputes. *Concepcion*, 563 U.S. at 345. Accordingly, as the NLRB has recognized, "employers and employees alike may derive

significant advantages from arbitrating claims": "employers have a legitimate interest in controlling litigation costs, and employees too can benefit from the relative simplicity and informality of resolving claims before arbitrators." NLRB General Counsel Memo. No. 10-06 (June 16, 2010).

The Ninth Circuit's approach "effectively cripples the ability of employers and employees to enter into" these salutary agreements. App., *infra*, 27a (Ikuta, J., dissenting). A ban on the enforcement of agreements such as the one at issue here will not lead to more collective *arbitration*, unless employers expressly agree to allow it. See *Stolt-Nielsen S.A.* v. *AnimalFeeds International Corp.*, 559 U.S. 662, 685-687 (2010). And that is unlikely, because "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Concepcion*, 563 U.S. at 348. Nor are plaintiffs' attorneys likely to "arbitrate on behalf of individuals when they can represent a class" in federal or state court. App., *infra*, 40a (Ikuta, J. dissenting). The result, as Judge Ikuta explained in her dissenting opinion, is that "a broad swath of workplace claims will be litigated" instead of arbitrated as the parties agreed. *Id.* at 41a. That outcome is flatly inconsistent with the FAA's goal of promoting the use of arbitration.

If there were any doubt that the question presented here has sweeping legal and practical ramifications, the sheer volume of commentary would allay it. See, *e.g.*, Albina Gasanbekova, *Building A Circuit Split: Updating Moves by the NLRB on Class Waivers*, 34 Alternatives to High Cost Litig. 60 (2016); Michael Hoenig & Linda M. Brown, *Arbitration and Class Action Waivers Under* Concepcion*: Reason and Reasonableness Deflect*

Strident Attacks, 68 Ark. L. Rev. 669 (2015); Stephanie Greene & Christine Neylon O'Brien, *The NLRB v. the Courts: Showdown Over the Right to Collective Action in Workplace Disputes*, 52 Am. Bus. L.J. 75 (2015); Note, *Deference and the Federal Arbitration Act: The NLRB's Determination of Substantive Statutory Rights*, 128 Harv. L. Rev. 907 (2015); Catherine L. Fisk, *Collective Actions and Joinder of Parties in Arbitration: Implications of* D.R. Horton *and* Concepcion, 35 Berkeley J. Emp. & Lab. L. 175 (2014); James R. Montgomery, *'Horton and the Who': Determining Who Is Affected by the Emerging Statutory Battle Between the FAA and Federal Labor Law*, 2014 J. Disp. Resol. 363; Charles A. Sullivan & Timothy P. Glynn, Horton *Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution*, 64 Ala. L. Rev. 1013 (2013). Few cases come to the Court with such a substantial chorus highlighting the importance of the issue and the need for the Court's intervention.

2. This case is the optimal vehicle for considering and resolving the question presented. To check the obvious boxes: the question was pressed below, fully briefed by the parties, and passed on by the court of appeals as the sole basis for its decision. There are thus no impediments to the Court's resolution of the question presented in this case.

Beyond that, however, this case presents the question not only squarely but in depth. Uniquely among the decisions in the circuit conflict, the opinions below fully develop the arguments on both sides of the question. They debate whether to begin from the proposition that "employees have the right to pursue work-related legal claims together," App., *infra*, 3a, or the proposition that "agreements to arbitrate are valid, irrevocable, and enforceable," *id.* at 27a (Ikuta, J., dissenting) (internal quo-

tation marks and citation omitted). They extensively analyze this Court's arbitration-related case law. Compare *id.* at 12a-24a (majority opinion) (discussing, *inter alia*, *CompuCredit*, *Italian Colors*, and *Gilmer*), with *id.* at 27a-34a (Ikuta, J., dissenting) (similar). And they address the relevance of the FAA's saving clause, compare *id.* at 16a-18a (majority opinion), with *id.* at 38a-41a (Ikuta, J., dissenting), and the policy implications of the majority's rule, compare *id.* at 22a (majority opinion), with *id.* at 41a-42a (Ikuta, J., dissenting). No other decision has so clearly and thoroughly framed the competing arguments.

In addition, this case presents the paradigmatic context in which controversies about the validity of arbitration agreements arise—a private lawsuit brought by employees against their employer, in which the employer seeks to compel arbitration. See, *e.g.*, *Patterson*, *supra*; *Lewis*, 823 F.3d at 1147; *Sutherland*, 726 F.3d at 290; *Owen*, 702 F.3d at 1050; *Totten* v. *Kellogg Brown & Root, LLC*, 152 F. Supp. 3d 1243, 1254 (C.D. Cal. 2016); *Nanavati* v. *Adecco USA, Inc.*, 99 F. Supp. 3d 1072, 1077 (N.D. Cal. 2015); *Dixon* v. *NBCUniversal Media, LLC*, 947 F. Supp. 2d 390, 403 n.11 (S.D.N.Y. 2013). As a result, the parties to this case, an employer and its employees, are best situated to represent the two opposing viewpoints on the question presented under the FAA and the NLRA. To the extent the NLRB has taken a position on the issue, moreover, it participated in this case before the Ninth Circuit as an amicus curiae, and would presumably continue to do so in this Court if certiorari is granted.

Of particular note, moreover, the circuit conflict at hand affects petitioners in a particularly acute way, making this case a uniquely compelling vehicle in which to resolve the question presented. EY is one of the Na-

tion's largest professional-services firms, with approximately 40,000 employees in every corner of the country. Virtually all of those employees have signed the arbitration provision at issue here as a condition of employment. As noted above, however, the Second and the Ninth Circuits have reached different results concerning the very same arbitration provision, with the Second Circuit holding that it is valid and enforceable and the Ninth Circuit holding that it is not. Compare App., *infra*, 24a, with *Sutherland*, 726 F.3d at 297 n.8. As matters currently stand, therefore, EY's ability to enforce its uniform nationwide arbitration provision depends on where a given employee is located (or where the employee files suit). Petitioners thus have a particularly strong interest in defending the validity of agreements requiring an employee to arbitrate claims against an employer on an individual basis. In addition, should the Court grant review in this case, it will have the luxury of knowing that it is comparing apples to apples, considering an arbitration agreement that has divided the circuits without any concern about complicating peculiarities in the language (or method of adoption) of a less widely used agreement.

In sum, the Ninth Circuit's decision deepens a widely recognized conflict—and, indeed, creates a conflict specific to petitioners—on the question whether the National Labor Relations Act prohibits the enforcement under the Federal Arbitration Act of an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis. That question is undeniably important and recurring, and this case is the optimal vehicle for considering it. The Court should grant the petition for certiorari and resolve a circuit conflict that is affecting employers and employees across the country.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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