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In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MURPHY OIL USA, INC., ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether arbitration agreements with individual employees that bar them from pursuing work-related claims on a collective or class basis in any forum are prohibited as an unfair labor practice under 29 U.S.C. 158(a)(1), because they limit the employees' right under the National Labor Relations Act to engage in "concerted activities" in pursuit of their "mutual aid or protection," 29 U.S.C. 157, and are therefore unenforceable under the saving clause of the Federal Arbitration Act, 9 U.S.C. 2.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Sheila M. Hobson was the charging party before the Board and an intervenor in the court of appeals.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions involved 2
Statement 2
Reasons for granting the petition 9
A. Agreements waiving employees' ability to pursue work-related claims on a class or collective basis in any forum interfere with the employees' right to engage in "other concerted activities" under 29 U.S.C. 157 and are therefore not enforceable in light of the saving clause in 9 U.S.C. 2 10
B. There is an acknowledged and growing conflict in the circuits concerning the invalidity of arbitration agreements that would preclude employees from pursuing class or collective actions in any forum 19
C. The enforceability of individual concerted-action waivers is a question of exceptional importance 24
Conclusion 26
Appendix A — Court of appeals opinion (Oct. 26, 2015) 1a
Appendix B — National Labor Relations Board decision and order (Oct. 28, 2014) 17a
Appendix C — Court of appeals order denying rehearing (May 13, 2016) 213a
Appendix D — Court of appeals judgment (Feb. 18, 2016) 215a
Appendix E — Statutory provisions 221a

TABLE OF AUTHORITIES

Cases:

AT&T Mobility LLC v. *Concepcion*, 563 U.S. 333 (2011) 5, 13, 17, 18

Cases—Continued: Page

American Express Co. v. *Italian Colors Rest.*, 133 S. Ct. 2304 (2013) 17

Brady v. *National Football League*, 644 F.3d 661 (8th Cir. 2011) 10

Buckeye Check Cashing, Inc. v. *Cardegna*, 546 U.S. 440 (2006) 13

Cellular Sales of Mo., LLC v. *NLRB*, 824 F.3d 772 (8th Cir. 2016) 23

CompuCredit Corp. v. *Greenwood*, 132 S. Ct. 665 (2012) 15

D.R. Horton, Inc., 357 N.L.R.B. 2277 (2012), enforcement denied in part, 737 F.3d 344 (5th Cir. 2013) .... *passim*

D.R. Horton, Inc. v. *NLRB*, 737 F.3d 344 (5th Cir. 2013) .... *passim*

DIRECTV, Inc. v. *Imburgia*, 136 S. Ct. 463 (2015) 13

Eastex, Inc. v. *NLRB*, 437 U.S. 556 (1978) 2, 10

14 Penn Plaza LLC v. *Pyett*, 556 U.S. 247 (2009) 12, 18

Gilmer v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) 15

Hoffman-La Roche Inc. v. *Sperling*, 493 U.S. 165 (1989) 4

Iskanian v. *CLS Transp. Los Angeles, LLC*, 327 P.3d 129, 133 (Cal. 2014), cert. denied, 135 S. Ct. 1155 (2015) 20

J.I. Case Co. v. *NLRB*, 321 U.S. 332 (1944) 5, 11

Kaiser Steel Corp. v. *Mullins*, 455 U.S. 72 (1982) 5

Lewis v. *Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), petition for cert. pending, No. 16-285 (filed Sept. 2, 2016) 12, 14, 16, 18, 20, 21

Mastro Plastics Corp. v. *NLRB*, 350 U.S. 270 (1956) 11

Cases—Continued: Page

Metropolitan Edison Co. v. *NLRB*, 460 U.S. 693 (1983) 11

Mitsubishi Motors Corp. v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) 15

Morris v. *Ernst & Young, LLP*, No. 13-16599, 2016 WL 4433080 (9th Cir. Aug. 22, 2016), petition for cert. pending, No. 16-300 (filed Sept. 8, 2016) 12, 14, 16, 18, 22

Morton v. *Mancari*, 417 U.S. 535 (1974) 13, 14

NLRB v. *City Disposal Sys. Inc.*, 465 U.S. 822 (1984) 12

National Licorice Co. v. *NLRB*, 309 U.S. 350 (1940) 5, 11

On Assignment Staffing Servs., Inc., 362 N.L.R.B. No. 189, 2015 WL 5113231 (Aug. 27, 2015), enforcement denied, No. 15-60642, 2016 WL 3685206 (5th Cir. June 6, 2016) 8

Owen v. *Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013) 19, 23

Patterson v. *Raymours Furniture Co.*, No. 15-2820 (2d Cir. Sept. 7, 2016) 23, 24

POM Wonderful LLC v. *Coca-Cola Co.*, 134 S. Ct. 2228 (2014) 13

Richards v. *Ernst & Young, LLP*, 744 F.3d 1072 (9th Cir. 2013), cert. denied, 135 S. Ct. 355 (2014) 19, 20

Rodriguez de Quijas v. *Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) 15

Shearson/Am. Express Inc. v. *McMahon*, 482 U.S. 220 (1987) 15

Stolt-Nielsen S.A. v. *Animal Feeds Int'l Corp.*, 559 U.S. 662 (2010) 19

Sutherland v. *Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013) 19, 24

Tallman v. *Eighth Judicial Dist. Ct.*, 359 P.3d 113 (Nev. 2015) 20

Case—Continued: Page

Walthour v. *Chipio Windshield Repair, LLC*, 745 F.3d 1326 (11th Cir.), cert. denied, 134 S. Ct. 2886 (2014) 19, 20

Statutes:

Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* 15

Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* 4

29 U.S.C. 216(b) 4

Federal Arbitration Act, 9 U.S.C. 1 *et seq.* 3

9 U.S.C. 2 .... 7, 9, 10, 13, 21, 221a

National Labor Relations Act, 29 U.S.C. 151 *et seq.* 2

29 U.S.C. 151 .... 2, 221a

29 U.S.C. 157 .... *passim*, 223a

29 U.S.C. 158(a)(1) .... *passim*, 224a

29 U.S.C. 160(a) 2

29 U.S.C. 160(f) 8, 25

Miscellaneous:

Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. Empirical Legal Stud. 1 (2011) 24

Nicole Wredberg, *Subverting Workers' Rights: Class Action Waivers and the Arbitral Threat to the NLRA*, 67 Hastings L.J. 881 (2016) 25

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PETITION FOR A WRIT OF CERTIORARI

The National Labor Relations Board respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 808 F.3d 1013. The decision and order of the National Labor Relations Board (App., *infra*, 17a-212a) are reported at 361 N.L.R.B. No. 72.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 215a-220a) was entered on February 18, 2016. A petition for rehearing was denied on May 13, 2016 (App., *infra*, 213a-214a). On August 10, 2016, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including September 9, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in the appendix to this petition. App., *infra*, 221a-224a.

STATEMENT

1. a. In the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, Congress has articulated "the policy of the United States" of encouraging collective bargaining and "protect[ing] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing." 29 U.S.C. 151. The NLRA expressly provides that "[e]mployees 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 "to refrain from any or all of such activities." 29 U.S.C. 157. This Court has described the rights under Section 157 as including employees' efforts "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship," including "through resort to administrative and judicial forums." *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 565-566 (1978).

In 29 U.S.C. 158(a)(1), the NLRA provides in turn that any employer that "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in section 157" has committed an unfair labor practice. The National Labor Relations Board (Board) "is empowered * * * to prevent any person from engaging in any unfair labor practice * * * affecting commerce." 29 U.S.C. 160(a).

b. The Federal Arbitration Act (FAA), 9 U.S.C. 1 *et seq.*, provides that any written contract "evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction * * * 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.

2. a. Murphy Oil USA, Inc. (respondent) operates more than 1000 gas stations in 21 States. See App., *infra*, 24a. It required each of its employees and job applicants to sign, as a condition of employment, a "Binding Arbitration Agreement and Waiver of Jury Trial" (Agreement), which provided, as relevant here, as follows:

> Excluding claims which must, by statute or other law, be resolved in other forums, Company and Individual agree to resolve any and all disputes or claims each may have against the other which relate in any manner whatsoever as to [sic] Individual's employment * * * by binding arbitration. * * *
>
> * * * *
>
> By signing this Agreement, Individual and the Company waive their right to commence, be a party to, or [act as a] class member [in, any class] or collective action in any court action against the other party relating to employment issues. Further, the parties waive their right to commence or be a party to any group, class or collective action claim in arbitration or any other forum. The parties agree that any claim by or against Individual or the Company shall be heard without consolidation of such claim with any other person or entity's claim.

Id. at 24a-26a (brackets in original).

In November 2008, Sheila Hobson signed the Agreement when she applied for employment with respondent. App., *infra*, 26a. She worked at respondent's Calera, Alabama, facility from then until September 2010. *Ibid.*

b. In June 2010, Hobson and three other employees filed a collective action against respondent in the United States District Court for the Northern District of Alabama, alleging violations of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.* App., *infra*, 26a-27a; see 29 U.S.C. 216(b); *Hoffman-La Roche Inc.* v. *Sperling*, 493 U.S. 165, 169-173 (1989) (describing Section 216(b) collective actions). Respondent, invoking the Agreement, moved to dismiss the collective action and compel individual arbitration of the employees' FLSA claims. *Id.* at 27a. The district court granted the motion over the employees' opposition. *Id.* at 28a.

Hobson filed an unfair-labor-practice charge with the Board. App., *infra*, 27a. In March 2011, on the basis of Hobson's charge, the Board's Acting General Counsel issued an administrative complaint alleging that respondent's maintenance of the Agreement interfered with its employees' right under 29 U.S.C. 157 to engage in concerted legal activity and thus constituted an unfair labor practice in violation of Section 158(a)(1). App., *infra*, 27a.

c. In January 2012—while the proceeding against respondent was still pending before the Board—the Board decided in a separate case that agreements with individual employees that require them to use individual arbitration for all work-related disputes with their employer interfere with their Section 157 right to

engage in concerted activities, in violation of Section 158(a)(1). *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2278-2283 (2012), enforcement denied in relevant part, 737 F.3d 344 (5th Cir. 2013). The Board's decision in *D.R. Horton* recognized that the FAA "generally makes employment-related arbitration agreements judicially enforceable," but the Board held that when such an agreement violates the NLRA, the FAA does not require its enforcement. *Id.* at 2277, 2283-2288. The Board explained that this Court has long recognized that individual contracts that restrict rights under Section 157 are unlawful and that illegality under the NLRA is a defense to contract enforcement. *Id.* at 2287 (discussing *National Licorice Co.* v. *NLRB*, 309 U.S. 350 (1940), *J.I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944), and *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72, 83-84 (1982)). The Board added that applying that principle to arbitration agreements does not conflict with the FAA because doing so does not treat arbitration agreements any "worse than any other private contract that conflicts with Federal labor law." *Id.* at 2285. Accordingly, the Board concluded that its unfair-labor-practice finding did not run afoul of this Court's invalidation under the FAA of contract "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Ibid.* (quoting *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011)).

On review, the Fifth Circuit rejected the Board's analysis in *D.R. Horton*, holding that the NLRA does not "override" the FAA and that the "use of class action procedures * * * is not a substantive right" under Section 157. *D.R. Horton, Inc.* v. *NLRB*, 737

F.3d 344, 357, 360-362 (2013).[1] The court recognized that prior decisions by the Board and by courts "give some support to the Board's analysis that collective and class claims * * * are protected by Section [157]." *Id.* at 357. Nevertheless, the court found that "[a] detailed analysis of [*AT&T Mobility*] leads to the conclusion that the Board's rule does not fit within the FAA's saving clause." *Id.* at 359. In the court's view, even though the Board's interpretation is "facially neutral" about arbitration—by prohibiting concerted-action waivers in the context of both arbitral and non-arbitral forums—its effect is still "to disfavor arbitration," because employees' ability to "seek class relief in court" would discourage employers "from using individual arbitration." *Ibid.* The court further determined that the NLRA does not "contain[] a congressional command to override the FAA." *Id.* at 360.

Judge Graves dissented in relevant part, explaining that he agreed with the Board's reasoning. See *D.R. Horton*, 737 F.3d at 364-365. He noted that the Board's finding of illegality under the NLRA does not conflict with the FAA because it satisfies the saving clause in Section 2 and treats the agreement "no worse than any other private contract that conflicts with Federal labor law." *Id.* at 365 (quoting *D.R. Horton*, 357 N.L.R.B. at 2285).

The Board sought rehearing en banc in *D.R. Horton*, but its petition was denied in April 2014. App., *infra*, 5a.

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[1] The Fifth Circuit's decision in *D.R. Horton* agreed with the Board that an arbitration agreement does constitute an unfair labor practice to the extent that it can be reasonably construed by employees as prohibiting them from filing unfair-labor-practice charges with the Board. 737 F.3d at 364.

d. In October 2014, the Board issued its decision in the proceeding against respondent. App., *infra*, 17a-212a. Notwithstanding the Fifth Circuit's contrary intervening decision, the Board reaffirmed its own decision in *D.R. Horton*, concluding that "[i]ts reasoning and its result were correct" and that "no decision of th[is] Court speaks directly to the issue." *Id.* at 22a-23a.

The Board explained that the Section 157 "right to engage in collective action—including collective *legal* action—is the *core* substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest." App., *infra*, 40a (quoting and adding second emphasis to *D.R. Horton*, 357 N.L.R.B. at 2286). The Board concluded that an agreement that "prevents employees from exercising their Section [157] right to pursue legal claims concertedly—by, as here, precluding them from filing joint, class, or collective claims addressing their working conditions in *any* forum, arbitral or judicial— * * * amounts to a prospective waiver of a right guaranteed by the NLRA" and therefore a violation of Section 158(a)(1). *Id.* at 43a. As a result, the Board further concluded, the FAA does not require enforcement of such an agreement. The Board explained, among other things, that the saving clause in 9 U.S.C. 2 makes an exception for "such grounds as exist at law or in equity for the revocation of any contract" and that illegality under the NLRA is an established defense to the enforcement of any contract. App., *infra*, 44a (quoting 9 U.S.C. 2).[2]

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[2] The individual arbitration agreements in *D.R. Horton* and in this case were conditions of employment and therefore did not require the Board to decide the legality of an employee's purely

Accordingly, the Board found that respondent committed an unfair labor practice by "requiring its employees to resolve all employment-related claims through individual arbitration, and by taking steps to enforce the unlawful agreements" in the FLSA collective action filed by Hobson and her co-employees. App., *infra*, 23a; see *id.* at 74a-84a.

e. Two members of the Board dissented in relevant part. App., *infra*, 89a-131a, 131a-208a.

3. Respondent elected to file its petition for review of the Board's decision in the Fifth Circuit, which it was entitled to do because it "transacts business" there. 29 U.S.C. 160(f); see App., *infra*, 1a. In light of that court's prior decision in *D.R. Horton*, the Board moved at the outset to have the case heard en banc, but its motion was denied. *Id.* at 1a-2a. The court adhered to its precedent in *D.R. Horton*, holding that the Agreement is enforceable and not unlawful to the extent that it requires employees to pursue all employment-related claims through individual arbitration and not through class or collective actions. *Id.* at 2a, 8a.[3]

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voluntary agreement to resolve all potential employment disputes through individual arbitration. See *D.R. Horton*, 357 N.L.R.B. at 2289 n.28 (reserving the issue); App., *infra*, 20a, 28a, 84a-85a (articulating rule in the context of a condition of employment and finding that respondent's Agreement was such a condition). The Board has since concluded that individual arbitration agreements prospectively waiving Section 157 rights are unlawful regardless of whether they are entered into voluntarily. See *On Assignment Staffing Servs., Inc.*, 362 N.L.R.B. No. 189, 2015 WL 5113231, at *9 (Aug. 27, 2015), enforcement denied, No. 15-60642, 2016 WL 3685206 (5th Cir. June 6, 2016) (summary disposition).

[3] The court of appeals also reversed the Board's finding that respondent had violated Section 158(a)(1) by seeking to enforce the

4. The Board filed a petition for rehearing en banc, which was denied on May 13, 2016. App., *infra*, 213a-214a.

REASONS FOR GRANTING THE PETITION

This case concerns an important and recurring question about the scope of employees' rights under the NLRA: whether an employer can lawfully require its employees to sign agreements mandating individual arbitration of workplace disputes, thereby prospectively waiving the employees' right to engage in collective legal action in any forum, whether arbitral or judicial. The Board, which is charged with enforcing the NLRA, has reasonably concluded that such agreements are unlawful under that Act, because they would deprive employees of their statutory right to engage in "concerted activities" in pursuit of their "mutual aid or protection." 29 U.S.C. 157. The court of appeals erred in concluding that contracts that are unlawful under the NLRA must nevertheless be enforced pursuant to the FAA. To the contrary, the saving clause in 9 U.S.C. 2 does not require enforcement when a contract is unlawful for such reasons (*i.e.*, reasons that are not limited to the context of arbitration agreements).

Agreement through its motion to dismiss the district-court FLSA action and to compel arbitration of Hobson's FLSA claim. App., *infra*, 12a-17a. In addition, as in *D.R. Horton* (see note 1, *supra*), the court held that the Agreement is unenforceable to the extent that it could reasonably be construed as prohibiting employees from filing unfair-labor-practice charges with the Board. App., *infra*, 10a-11a. The court found that the pre-March-2012 version of the Agreement signed by Hobson does violate the NLRA to that extent, and it enforced the Board's order that respondent take corrective action as to any employees that remain subject to that version of the Agreement. *Id.* at 11a, 217a-220a.

Since the court of appeals' denial of rehearing en banc in this case, two other circuits have agreed with the Board's reasoning and expressly disagreed with the reasoning and result of the decision below, and two circuits have reaffirmed prior decisions rejecting the Board's position. There is accordingly a square circuit conflict on the question presented. Moreover, the issue affects countless employees and employers nationwide. This Court's review is therefore warranted.

A. Agreements Waiving Employees' Ability To Pursue Work-Related Claims On A Class Or Collective Basis In Any Forum Interfere With The Employees' Right To Engage In "Other Concerted Activities" Under 29 U.S.C. 157 And Are Therefore Not Enforceable In Light Of The Saving Clause In 9 U.S.C. 2

1. The NLRA expressly provides that "[e]mployees 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 "to refrain from any or all of such activities." 29 U.S.C. 157 (emphases added). As this Court has explained, that right extends beyond collective bargaining and includes employees' efforts "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship," including "through resort to administrative and judicial forums." *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 565-566 (1978). Section 157's protection has therefore been seen as including the right to engage in the collective pursuit of work-related legal claims. See, *e.g.*, *Brady* v. *National Football League*, 644 F.3d 661, 673 (8th

Cir. 2011) (observing that "a lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment *is* 'concerted activity' under [Section 157]").

The Board's conclusion that individual employees may not prospectively waive their right under Section 157 to join with others in pursuing work-related legal claims is soundly anchored in decisions of this Court establishing that even voluntary agreements with individual employees are unlawful if they impede their right to engage in future concerted activity. For instance, in *National Licorice Co.* v. *NLRB*, 309 U.S. 350 (1940), the Court held that agreements between employers and individual employees in which the employees prospectively waive their right to present grievances to the employer "in any way except personally" are unenforceable and "a continuing means of thwarting the policy of the [NLRA]." *Id.* at 360-361, 364. Subsequently, in *J.I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944), the Court held that individual contracts that employees had freely entered into with their employer could not be used to "forestall bargaining or to limit or condition the terms of the collective agreement" if the employees thereafter exercised their Section 157 right to choose a union to negotiate a collective-bargaining agreement on their behalf. *Id.* at 337.[4]

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[4] Collective waivers of some rights, negotiated on employees' behalf by their exclusive bargaining representative, are distinguishable. For example, a union may waive the employees' right to engage in an economic strike, for the term of a collective-bargaining agreement, provided that the waiver is clear and unmistakable. *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693, 705-706 (1983); *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 280-283 (1956). The Board has recognized that such waivers are themselves the product of concerted activity—the choice of employees to exercise their

In light of such decisions, prospective waivers like respondent's Agreement—waivers that seek to excise specific forms of concerted activity from Section 157—directly contravene the NLRA. Accordingly, the Board reasonably found that respondent committed an unfair labor practice in violation of 29 U.S.C. 158(a)(1) by maintaining its Agreement purporting to bar Hobson and other employees from exercising their Section 157 right to engage in concerted action in pursuing the resolution of work-related legal disputes.

2. The court of appeals did not take issue with the Board's expert interpretation of Section 157, which is entitled to "considerable deference." *NLRB* v. *City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984); see *Morris* v. *Ernst & Young, LLP*, No. 13-16599, 2016 WL 4433080, at *5 & n.5 (9th Cir. Aug. 22, 2016) (finding "the Board's interpretation" of Sections 157 and 158 to bar such agreements "is correct"; noting in the alternative that if the statute were ambiguous, the Board's construction would be entitled to deference), petition for cert. pending, No. 16-300 (filed Sept. 8, 2016); *Lewis* v. *Epic Sys. Corp.*, 823 F.3d 1147, 1153 (7th Cir. 2016) (same), petition for cert. pending, No. 16-285 (filed Sept. 2, 2016). It nevertheless held that pro-arbitration policies underlying the FAA prevent the Board from giving effect to its finding that concerted-action waivers constitute a prohibited unfair labor practice. In the court of appeals' view, the NLRA cannot justify a departure from "the requirement under the FAA that arbitration agreements must

Section 157 right "to bargain collectively through representatives of their own choosing." 29 U.S.C. 157; see *D.R. Horton*, 357 N.L.R.B. at 2286; see also *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 257-260 (2009).

be enforced according to their terms." *D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344, 358 (5th Cir. 2013). That view, however, fails to heed the principle that "when 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." *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974); see also *POM Wonderful LLC* v. *Coca-Cola Co.*, 134 S. Ct. 2228, 2236-2239 (2014).

Here, co-existence is prescribed by the FAA itself, which provides that 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 (emphasis added). Read together, that enforcement mandate and the limitation in the saving clause reflect the FAA's purpose of placing arbitration agreements "on equal footing with all other contracts." *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463, 468, 471 (2015) (quoting *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 443 (2006)).

This Court has explained that the "saving clause permits agreements to arbitrate to be invalidated by generally applicable contract defenses * * *, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011) (citation and internal quotation marks omitted). The illegality under the NLRA of a concerted-action waiver by an individual employee falls within the saving clause because it applies to arbitral and judicial forums alike and because it does not derive its meaning from the fact that an agreement to arbitrate is at issue. "The problem with the contract * * * is not that it requires arbitra-

tion; it is that the contract term defeats a substantive federal right [under the NLRA] to pursue concerted work-related legal claims." *Morris*, 2016 WL 4433080, at *6. In such circumstances, if the Board's finding of a prohibited unfair labor practice under "the NLRA does not render an arbitration provision sufficiently illegal to trigger the saving clause, the saving clause does not mean what it says." *Lewis*, 823 F.3d at 1159.[5]

3. That straightforward application of the saving clause is not, as the court of appeals believed, foreclosed by this Court's decisions sustaining arbitration agreements against other kinds of challenges. This Court has never found enforceable an arbitration agreement that violates a federal statute as respondent's Agreement violates the NLRA.

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[5] For that reason, although the Board disagrees with the Fifth Circuit's analysis of the relevant statutory provisions and policies, it is unnecessary to reach the question of whether the NLRA contains a "contrary congressional command" overriding the FAA. See *D.R. Horton*, 737 F.3d at 360-361. That inquiry is designed to determine which statutory command controls when another federal statute conflicts with the FAA and the two cannot be reconciled. Here, in light of the saving clause, there is no conflict between the statutes; both can, and should, be given effect. *Morton*, 417 U.S. at 551; accord *Morris*, 2016 WL 4433080, at *7 ("[T]he FAA's saving clause prevents a conflict between the statutes by causing the FAA's enforcement mandate to yield."); *Lewis*, 823 F.3d at 1157 ("[T]here is no conflict between the NLRA and the FAA, let alone an irreconcilable one.").

Even assuming there were a conflict, the result would be the same. It is evident that Section 158(a)(1) expressly commands employers not to interfere with their employees' Section 157 right to engage in concerted activity for mutual aid or protection. To the extent an arbitration agreement bars concerted pursuit of claims in any forum, whether arbitral or judicial, its enforcement under the FAA would inherently conflict with the NLRA.

The Court has enforced arbitration agreements over challenges based on provisions in other federal statutes only where such agreements were not in conflict with the animating purposes of those statutes. For example, in *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), which involved a manager's challenge to arbitration of his discriminatory-discharge claim under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, the Court determined that Congress's purpose in enacting the ADEA was "to prohibit arbitrary age discrimination in employment." 500 U.S. at 27 (internal quotation marks omitted). Because the substantive rights of individual employees to be free from age-based discrimination could be adequately vindicated in individual arbitration, the Court held that the arbitration agreement could be enforced. *Id.* at 27-29. The Court rejected arguments that ADEA provisions affording a judicial forum and an optional collective-action procedure precluded enforcement of the arbitration agreement, explaining that Congress did not "intend[] the substantive protection afforded [by the ADEA] to include protection against waiver of the right to a judicial forum." *Id.* at 29, 32 (quoting *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (second alteration in original)).[6]

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[6] This Court has maintained that same analytical focus on central statutory purposes when assessing challenges to the enforcement of arbitration agreements based on provisions in other federal statutes. See, *e.g.*, *CompuCredit Corp.* v. *Greenwood*, 132 S. Ct. 665, 670-671 (2012) (judicial-forum provision not "principal substantive provision[]" of Credit Repair Organizations Act); *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989) (judicial-forum and venue provisions in Securities Act not "so critical that they cannot be waived"); *Shearson/Am. Ex-*

The NLRA is unlike the statutes at issue in FAA cases such as *Gilmer*, which do not have a core objective of protecting collective action and a concomitant bar to individual employees' waiver of that right. By contrast, the NLRA's core provision provides a *collective* right to band together for "mutual aid or protection" in efforts to improve working conditions, 29 U.S.C. 157, which makes the NLRA "unique among workplace statutes," App., *infra*, 18a. Thus, the ability to engage in concerted activities under the NLRA is not a mere procedural means for vindicating some other statutory right. It is, as the Board has concluded, "the *core* substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest." *Id.* at 40a (quoting and adding second emphasis to *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2286 (2012), enforcement denied in part, 737 F.3d 344 (5th Cir. 2013)); see *Morris*, 2016 WL 4433080, at *8 (describing "[t]he rights established in [Section 157]" as "substantive" and "the central, fundamental protections of the [NLRA]"); *Lewis*, 823 F.3d at 1160 (describing Section 157 as "the NLRA's *only* substantive provision," which "[e]very other provision of the statute serves to enforce"). Congress expressly protected that right from employer interference in 29 U.S.C. 158(a)(1). Therefore, arbitration agreements with individual employees covered by the NLRA that preclude them from engaging in concerted legal action are analogous to contracts providing that employees can be fired on the basis of age contrary to the ADEA or will not be paid the minimum wage dictated by the

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press Inc. v. *McMahon*, 482 U.S. 220, 235-236 (1987) (Exchange Act provision not intended to bar arbitration when "chief aim" was to preserve exchanges' self-regulatory role).

FLSA. This Court has never held that arbitration agreements may waive such substantive rights or be given effect in contravention of the statutes that create and protect those rights.

Nor was the court of appeals correct in concluding that the FAA's saving clause disallows the defense of illegality under the NLRA in light of "[a] detailed analysis of" this Court's decision in *AT&T Mobility*. *D.R. Horton*, 737 F.3d at 359. As described above, the Board's rule fits within the saving clause because it bars enforcement of agreements with individual employees to the extent that they violate a co-equal federal statute in a manner that would invalidate any contract. By contrast, in *AT&T Mobility*, a consumer asserted that an arbitration agreement was unenforceable under a judicial interpretation of California's state unconscionability principles that barred class-action waivers in most arbitration agreements. 563 U.S. at 340. The Court declined to read the saving clause as protecting that state policy of facilitating low-value claims brought under other laws, which "st[oo]d as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 340, 343; see also *American Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2310, 2312 & n.5 (2013).[7] That holding does not sug-

[7] In *Italian Colors*, this Court invoked *AT&T Mobility* in overturning a federal-court-imposed requirement that collective litigation must be available when individual arbitration would impose "prohibitive costs" on pursuing claims under the antitrust laws. 133 S. Ct. at 2308. The Court held that the antitrust laws do not guarantee an "affordable procedural path" for bringing such claims, *id.* at 2309, and that effective vindication of such claims does not require that the costs make the effort in a particular case worthwhile, *id.* at 2310-2312.

gest that the FAA mandates enforcement of a contract that directly violates the NLRA.

In rejecting the Board's position, the Fifth Circuit relied principally on *AT&T Mobility*'s analysis of the California rule's disincentives to individual arbitration. *D.R. Horton*, 737 F.3d at 359. But it failed to recognize, as the Seventh Circuit has, that "[n]either [*AT&T Mobility*] nor *Italian Colors* goes so far as to say that *anything* that conceivably makes arbitration less attractive automatically conflicts with the FAA." *Lewis*, 823 F.3d at 1158. Moreover, those cases analyzed whether judge-made or implicit statutory policies were incompatible with the FAA; in this case, the analysis entails "reconciling two federal statutes, which must be treated on equal footing." *Ibid.*

Far from being hostile to the principle that arbitration is an effective means of enforcing employees' statutory rights, the Board recognizes that arbitration is "a central pillar of Federal labor relations policy and in many different contexts the Board defers to the arbitration process." *D.R. Horton*, 357 N.L.R.B. at 2289; see, *e.g.*, *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 256 (2009). Unlike the rule invalidated in *AT&T Mobility*—under which California courts were "more likely" to invalidate "contracts to arbitrate * * * than other contracts," 563 U.S. at 342—the Board's application of Sections 157 and 158(a)(1) does not disfavor arbitration. Instead, it applies "[i]rrespective of the forum in which disputes are to be resolved," simply requiring that "[a]rbitration, like any other forum for resolving disputes, cannot be structured so as to exclude all concerted employee legal claims," *Morris*, 2016 WL 4433080, at *10, even those presented in judicial forums where collective or class actions are

expressly permitted. Nor has the Board required class procedures in arbitration, as did the California rule invalidated in *AT&T Mobility*. Rather, the Board acknowledges an employer's right "to insist that *arbitral* proceedings be conducted on an individual basis," so long as employees remain free to bring concerted actions in court. *D.R. Horton*, 357 N.L.R.B. at 2288; see *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010) ("[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party has *agreed* to do so.").

The court of appeals erred in concluding that the Board's application of Sections 157 and 158(a)(1) is precluded by the FAA.

B. There Is An Acknowledged And Growing Conflict In The Circuits Concerning The Invalidity Of Arbitration Agreements That Would Preclude Employees From Pursuing Class Or Collective Actions In Any Forum

In both *D.R. Horton* and the decision below, the Fifth Circuit noted that its holding accords with other courts of appeals' "express[] state[ments]" about the question presented. App., *infra*, 8a n.3 (citing, *inter alia*, *Sutherland* v. *Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013), and *Owen* v. *Bristol Care, Inc.*, 702 F.3d 1050, 1053-1054 (8th Cir. 2013)); *D.R. Horton*, 737 F.3d at 362 (same).[8] Two state courts of last resort

[8] The decision below also noted that other federal courts of appeals had "indicated" their agreement in decisions that are not directly on point. App., *infra*, 8a n.3 (citing *Walthour* v. *Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1336 (11th Cir.), cert. denied, 134 S. Ct. 2886 (2014); *Richards* v. *Ernst & Young, LLP*, 744 F.3d 1072, 1075 n.3 (9th Cir. 2013), cert. denied, 135 S. Ct. 355 (2014)). In *Walthour*, the Eleventh Circuit addressed whether the

have also expressed agreement with those cases. See *Tallman* v. *Eighth Judicial Dist. Ct.*, 359 P.3d 113, 123 (Nev. 2015); *Iskanian* v. *CLS Transp. Los Angeles, LLC*, 327 P.3d 129, 133, 141-143 (Cal. 2014) (agreeing with the Fifth Circuit with respect to the enforceability of a waiver of the right to proceed on a "class action" or "representative" basis, but noting that the waiver at issue was narrower than the one in *D.R. Horton*, since it permitted joint and consolidated claims before the arbitrator; declining to "decide whether an arbitration agreement that more broadly restricts collective activity would run afoul of section [157]"), cert. denied, 135 S. Ct. 1155 (2015).

There is, however, no longer unanimity. In the four months since the court of appeals denied the Board's petition for rehearing en banc in this case, four other circuits have addressed the validity, in light of the NLRA, of arbitration agreements that prohibit employees from pursuing work-related claims on a collective basis in any forum. Two of those courts expressly disagreed with the Fifth Circuit and agreed with the Board's position.

1. In *Lewis*, *supra*, the Seventh Circuit held that an employment agreement materially similar to the one at issue in this case (*i.e.*, one requiring any wage-and-hour claims against the employer to be brought only through individual arbitration) violates the NLRA and

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FLSA precludes a collective-action waiver, but it did not address the NLRA. See 745 F.3d at 1334-1336. In *Richards*, the Ninth Circuit found that the employees had waived any argument based on the Board's decision in *D.R. Horton*. See 744 F.3d at 1075 & n.3. The Ninth Circuit's more recent decision in *Morris* has squarely addressed the question and rejected the Fifth Circuit's position. See p. 22, *infra*.

is not enforceable in light of the FAA's saving clause. 823 F.3d at 1151. After describing decisions by the Board and by courts construing Section 157, the court concluded that the "text, history, and purpose" of that provision all show that it "should be read broadly to include resort to representative, joint, collective, or class legal remedies." *Id.* at 1152-1153. Although the court concluded that the statute unambiguously supports the Board's construction, the court further noted that, even if Section 157 were ambiguous, it would be bound to defer to the Board's reasonable determination that the NLRA "prohibit[s] employers from making agreements with individual employees barring access to class or collective remedies." *Id.* at 1153. As a result, the court held that an arbitration provision purporting to prohibit employees from pursuing a collective action under the FLSA violates the NLRA. *Id.* at 1156.

The Seventh Circuit in *Lewis* also rejected the employer's contention that the FAA nevertheless requires such an arbitration agreement to be enforced. 823 F.3d at 1156-1161. The court reasoned that, because the concerted-action waiver is prohibited by the NLRA, it falls squarely within the saving clause in 9 U.S.C. 2, and is therefore unenforceable under the FAA's own terms. 823 F.3d at 1157-1160.

The Seventh Circuit recognized that the Fifth Circuit had reached "the opposite conclusion" in *D.R. Horton*, but the *Lewis* court found "several problems with" the Fifth Circuit's "logic." 823 F.3d at 1157-1158. It acknowledged that its decision "would create a conflict in the circuits," but noted that no Seventh Circuit judge "wished to hear the case en banc." *Id.* at 1157 n.†.

The unsuccessful employer in *Lewis* did not seek rehearing in the court of appeals and has instead filed a petition for a writ of certiorari from this Court. See *Epic Sys. Corp.* v. *Lewis*, No. 16-285 (filed Sept. 2, 2016). There is accordingly little reason to expect the Seventh Circuit's express disagreement with the Fifth Circuit to be resolved without this Court's intervention.[9]

2. Moreover, that circuit split has grown, as the Ninth Circuit recently held that an arbitration agreement that precludes employees "from bringing, in any forum, a concerted legal claim regarding wages, hours, and terms and conditions of employment" constitutes a violation of the NLRA and is therefore unenforceable. *Morris*, 2016 WL 4433080, at *1. Like the Seventh Circuit, the Ninth Circuit concluded that the Board has correctly construed Sections 157 and 158 in finding that concerted-action waivers violate the NLRA, *id.* at *2-*5, and, further, that the FAA "does not dictate a contrary result" because, in light of the NLRA, "the saving clause of the FAA prevents the enforcement of that waiver," *id.* at *6, *8. The court in *Morris* recognized that its "sister Circuits are divided on this question," but it expressly "agree[d] with the Seventh Circuit." *Id.* at *10 n.16. Judge Ikuta dissented, expressing the view that the majority had "join[ed] the wrong side of a circuit split." *Id.* at *11.

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[9] The Board filed an amicus brief in the court of appeals in *Lewis*, but is not a party to that proceeding. This case—in which the Board is a party and is able to defend more directly its construction of Sections 157 and 158—would therefore be a better vehicle than *Lewis* for this Court's review of whether collective-action waivers are unenforceable in light of the FAA's saving clause because they are prohibited by the NLRA.

The unsuccessful employer in *Morris* has not pursued rehearing en banc and has instead filed a petition for a writ of certiorari from this Court. See *Ernst & Young, LLP* v. *Morris*, No. 16-300 (filed Sept. 8, 2016).[10]

3. The third court of appeals to have addressed the issue in the last several months is the Eighth Circuit. In *Cellular Sales of Missouri, LLC* v. *NLRB*, 824 F.3d 772 (8th Cir. 2016), that court reaffirmed, without analysis, its prior conclusion that an employer does not commit an unfair labor practice when it "requir[es] its employees to enter into an arbitration agreement that includes a waiver of class or collective actions in all forums to resolve employment-related disputes." *Id.* at 776 (citing *Owen*, 702 F.3d at 1053-1055).

4. Most recently, the Second Circuit also reaffirmed a previous decision that had declined to follow the Board's *D.R. Horton* approach. In a summary order in *Patterson* v. *Raymours Furniture Co.*, No. 15-2820 (2d Cir. Sept. 7, 2016) (Doc. 154, corrected summary order), the court noted that "[t]he circuit courts * * * are irreconcilably split on the question." *Id.* at 5. The court acknowledged that, "[i]f we were writing on a clean slate, we might well be persuaded, for the reasons forcefully stated in Chief Judge Wood's and Chief Judge Thomas's opinions in *Lewis* and *Morris*, to join the Seventh and Ninth Circuits and hold that [a] waiver of collective action is unenforceable." *Id.* at 6. But the court concluded it was bound by "a

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[10] As in *Lewis*, the Board was not a party to the proceeding in the court of appeals in *Morris*, but instead participated only as an amicus curiae, which again means that this case would be a better vehicle for this Court's consideration of the question presented. See note 9, *supra*.

brief footnote" in its earlier decision in *Sutherland*, which had "rejected the NLRB's analysis and embraced the Eighth Circuit's position in *Owen*." *Id.* at 6-7 (discussing *Sutherland*, 726 F.3d at 297 n.8).

5. The existing conflict may continue to grow in the near future. Apart from the recent decisions of the Second, Fifth, Seventh, Eighth, and Ninth Circuits, cases that raise the issue are pending in five additional circuits.[11]

C. The Enforceability Of Individual Concerted-Action Waivers Is A Question Of Exceptional Importance

The validity of agreements that waive workers' right under the NLRA to proceed on a class or collective basis is a question of exceptional importance that warrants this Court's review. The agency charged with implementing and enforcing the NLRA has concluded that such agreements threaten that important Act's "core objective": "the protection of workers' ability to act in concert, in support of one another." App., *infra*, 17a. Moreover, resolving the question presented will have a direct and immediate effect on countless employees and employers throughout the Nation, because individual-arbitration agreements have become so widespread.[12]

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[11] See, *e.g.*, *The Rose Group* v. *NLRB*, Nos. 15-4092 and 16-1212 (3d Cir.); *AT&T Mobility Servs., LLC* v. *NLRB*, Nos. 16-1099 and 16-1159 (4th Cir.); *NLRB* v. *Alternative Entm't, Inc.*, No. 16-1385 (6th Cir.); *Everglades Coll., Inc.* v. *NLRB*, Nos. 16-10341 and 16-10625 (11th Cir.); *Price-Simms, Inc.* v. *NLRB*, Nos. 15-1457 and 16-1010 (D.C. Cir.).

[12] See Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 2 (2011) ("Employment arbitration grew dramatically in the wake of * * * *Gilmer*" and "estimates suggest that for

Until this Court speaks to the question, many of those employees will be unable to predict whether the concerted-action waivers in their arbitration agreements will be enforceable in any particular instance. As illustrated by the facts of this case, employers may seek to have decisions of the Board reviewed in any circuit in which they transact business, without regard to where the underlying disputes arose. See 29 U.S.C. 160(f); App., *infra*, 8a-9a. As a result, even those employees who work outside the Second, Fifth, and Eighth Circuits may find themselves unable to seek the Board's assistance in vindicating the rights under the NLRA that the Board has recognized.

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perhaps a third or more of nonunion employees, arbitration, not litigation, is the primary mechanism of access to justice in the employment law realm."); Nicole Wredberg, *Subverting Workers' Rights: Class Action Waivers and the Arbitral Threat to the NLRA*, 67 HASTINGS L.J. 881, 893 (2016) ("In 2008, it was estimated that about fifteen percent to twenty-five percent of employers nationally had adopted mandatory arbitration procedures.").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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* The Acting Solicitor General is recused in this case.