Nos. 16-285 & 16-307

IN THE
Supreme Court of the United States

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

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
MURPHY OIL USA, INC., *et al.*,
Respondents.

On Writs of Certiorari to the
United States Courts of Appeals for the
Fifth and Seventh Circuits

BRIEF FOR PETITIONER EPIC SYSTEMS CORPORATION AND RESPONDENT MURPHY OIL USA, INC.

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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 PROCEEDINGS

1. In No. 16-285, petitioner Epic Systems Corporation was the defendant-appellant in the Seventh Circuit.

Respondent Jacob Lewis was the plaintiff-appellee in the Seventh Circuit.

2. In No. 16-307, petitioner National Labor Relations Board was the respondent/cross-petitioner in the Fifth Circuit.

Respondent Murphy Oil USA, Inc., was the petitioner/cross-respondent in the Fifth Circuit.

Respondent Sheila M. Hobson was the charging party before the Board and an intervenor in the Fifth Circuit.

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.

Murphy Oil USA, Inc.'s parent company is Murphy USA, Inc. Murphy USA, Inc., is the only publicly held company that owns 10% or more of Murphy Oil USA, Inc.'s stock.

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BRIEF FOR PETITIONER EPIC SYSTEMS CORPORATION AND RESPONDENT MURPHY OIL USA, INC.

INTRODUCTION

Employers and employees often enter into employment contracts providing for the arbitration of any disputes. And the arbitration provisions in those contracts often include waivers of class or collective proceedings (referred to here as "class waivers"),

requiring that claims be resolved on an individual basis.

It is not hard to understand why. As this Court has recognized, there are "real benefits" to arbitration, and those benefits do not "somehow disappear" in "the employment context." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 122-123 (2001). In fact, "[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation." *Id.* at 123. Yet class or collective proceedings ("class proceedings," for short) would "sacrifice[]" arbitration's "principal" benefits by "mak[ing] the process slower, more costly, and more likely to generate procedural morass than final judgment." *AT & T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 348 (2011). To preserve the "fundamental attributes of arbitration," then, employers and employees often agree to class waivers. *Id.* at 344.

The question in these consolidated cases is whether those class waivers are enforceable. The answer is yes. The Federal Arbitration Act (FAA) unambiguously mandates their enforcement, and the National Labor Relations Act (NLRA) contains no contrary congressional command. Rather, the NLRA can be reasonably construed as consistent with the FAA's unambiguous mandate, so the Court should adopt that construction to harmonize the two statutes.

The upshot is that the advantages of arbitration need not be sacrificed in the employment context. Like other contracts, employment contracts may require that arbitration be conducted on an individual basis.

OPINIONS BELOW

In No. 16-285 (*Epic*), the opinion of the United States Court of Appeals for the Seventh Circuit is reported at 823 F.3d 1147. *Epic* Pet. App. 1a-23a. The District Court's opinion denying Epic Systems Corporation's motion to dismiss and compel individual arbitration is not published in the *Federal Supplement*, but it is available at 2015 WL 5330300. *Epic* Pet. App. 24a-29a.

In No. 16-307 (*Murphy Oil*), the opinion of the United States Court of Appeals for the Fifth Circuit is reported at 808 F.3d 1013. *Murphy Oil* Pet. App. 1a-16a. The National Labor Relations Board's decision and order are reported at 361 N.L.R.B. No. 72. *Murphy Oil* Pet. App. 17a-212a.

JURISDICTION

In *Epic*, the Seventh Circuit entered judgment on May 26, 2016. *Epic* Pet. App. 1a. 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, and the petition was filed on September 2, 2016.

In *Murphy Oil*, the Fifth Circuit entered judgment on February 18, 2016. *Murphy Oil* Pet. App. 215a. It then denied the Board's petition for rehearing en banc on May 13, 2016. *Id.* at 213a. 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, and the petition was filed on that date.

On January 13, 2017, this Court granted the petitions in *Epic*, *Murphy Oil*, and *Ernst & Young LLP* v.

Morris, No. 16-300, and consolidated the three cases. The Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in an addendum to this brief. Add. 1a-17a.

STATEMENT

A. *Murphy Oil*

1. Murphy Oil USA, Inc., operates retail gas stations in 26 States throughout the country. In 2008, Sheila Hobson entered into an arbitration agreement with Murphy Oil when she applied to work at a gas station in Calera, Alabama. *Murphy Oil* Pet. App. 2a, 26a. Hobson eventually got the job and was employed by Murphy Oil until September 2010. *Id.* at 26a.

By signing the agreement, Hobson "agree[d] to resolve any and all disputes or claims *** which relate *** to [her] employment *** by binding arbitration." J.A. 8. She "waive[d] the[] right to commence or be a party to any group, class or collective action claim in arbitration or any other forum." J.A. 11. And she agreed that "any claim by or against [her] or [Murphy Oil] shall be heard without consolidation of such claim with any other person or entity's claim." *Id.*

2. In June 2010, Hobson and three other employees brought a collective action against Murphy Oil under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201 *et seq.*, alleging that they had been denied compensation for overtime and other work-related activities. J.A. 14, 23-24. Murphy Oil moved to compel individual arbitration, as provided in the agreement signed by Hobson and the other employ-

ees. *Murphy Oil* Pet. App. 2a-3a. The District Court granted that motion and entered a stay pending arbitration. *Id.* at 4a. After the employees failed to submit their claims to arbitration, however, the District Court dismissed the case with prejudice in July 2015. *Id.* at 4a n.1.

3. In a separate proceeding, Hobson filed a charge with the National Labor Relations Board in January 2011. *Id.* at 3a. Two months later, the Board's then-Acting General Counsel issued a complaint asserting that Murphy Oil had committed an unfair labor practice under Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), by maintaining an arbitration agreement that interfered with an employee's right under Section 7 of the same statute to engage in "concerted activities," *id.* § 157. *See Murphy Oil* Pet. App. 27a.

While the proceeding against Murphy Oil was pending, the Board issued its decision in *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012). There, the Board concluded that an arbitration agreement containing a class waiver "unlawfully restricts employees' Section 7 right to engage in concerted action for mutual aid or protection, notwithstanding the [FAA], which generally makes employment-related arbitration agreements judicially enforceable." *Id.* On review, the Fifth Circuit disagreed, explaining that such an agreement "must be enforced according to its terms" because the NLRA does not "contain a congressional command overriding application of the FAA." *D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344, 362 (5th Cir. 2013).

Undeterred by the Fifth Circuit's ruling, the Board reaffirmed its own *D.R. Horton* decision in October 2014 and concluded that Murphy Oil had violated

the NLRA by "requiring its employees to agree to resolve all employment-related claims through individual arbitration." *Murphy Oil* Pet. App. 22a-23a. Two of the five Board members dissented. *Id.* at 89a-208a.

4. Murphy Oil petitioned for review in the Fifth Circuit. *See* 29 U.S.C. § 160(f). The court granted the petition in relevant part, holding that Murphy Oil had not committed any unfair labor practice by maintaining and enforcing its arbitration agreement. *Murphy Oil* Pet. App. 2a. Given that the Fifth Circuit had decided the same issue in *D.R. Horton*, the court saw no need to "repeat its analysis." *Id.* at 8a. The court subsequently denied rehearing en banc. *Id.* at 213a-214a.

B. *Epic*

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

In April 2014, Epic sent an email containing an arbitration agreement to many of its employees. *Epic* Pet. App. 2a. A day after receiving the email, Jacob Lewis, who was then a technical communications employee, responded by acknowledging that he understood and consented to the terms of the arbitration agreement. *Id.* In doing so, Lewis "agree[d] to use binding arbitration, instead of going to court, for any 'covered claims' "—a category that included 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. App. to Epic C.A. Br. 9. Then, in February 2015, Lewis sued Epic in federal court on behalf of a putative class and collective of certain technical communications employees, claiming that they had been denied overtime wages in violation of the FLSA and Wisconsin law. *Epic* Pet. App. 2a.

Epic moved to dismiss the complaint and compel individual arbitration, citing its arbitration agreement with Lewis. *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 class waiver was unenforceable because it violated an employee's right to engage in "concerted activities" under Section 7 of the NLRA. *Id.* at 25a-28a.

3. The Seventh Circuit affirmed. *See* 9 U.S.C. § 16(a); *Epic* Pet. App. 2a. Turning first to the NLRA, the court held that a "collective, representative, or class legal proceeding is * * * a 'concerted

activit[y]'" under Section 7, *Epic* Pet. App. 10a (brackets in original), and that the class waiver interfered with Lewis's "substantive" Section 7 right to concerted activity, in violation of Section 8(a)(1). *Id.* at 9a-12a. The court then turned to the FAA, holding that it does not require enforcement of an arbitration provision that is "illegal" under the NLRA. *Id.* at 15a. The court thus deemed the class waiver unenforceable. *Id.* at 20a.

SUMMARY OF ARGUMENT

I.A. In cases involving the interaction of two federal statutes, the first objective is to harmonize the competing provisions, if at all possible. So long as the "two statutes are capable of co-existence, it is the duty of the courts * * * to regard each as effective." *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974).

The FAA and NLRA can indeed co-exist. The FAA unambiguously mandates enforcement of class waivers in arbitration agreements, and the NLRA contains no "clearly expressed congressional intention to the contrary." *Id.* So the Court should do what it has done in prior cases involving the FAA and other federal statutes: construe the other statute in a way that harmonizes it with the FAA.

B. Start with the FAA. Section 2 declares that arbitration provisions "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. The first part is unequivocal: Arbitration provisions must be enforced. And the latter part—the so-called saving clause—offers no escape hatch here, for any one of four reasons.

First, the saving clause saves *inferior* laws; it has no application to other federal statutes like the

NLRA. Second, the NLRA is not a ground for the revocation of "*any* contract," because only one type of contract—between employers and employees—is subject to the NLRA. *Id.* (emphasis added); *see Southland Corp.* v. *Keating*, 465 U.S. 1, 16 n.11 (1984). Third, if the NLRA were construed to prohibit class waivers, it would "interfere[] with fundamental attributes of arbitration," *Concepcion*, 563 U.S. at 344, and the saving clause does not apply to any ground that disfavors arbitration's "defining features," *Kindred Nursing Ctrs. Ltd. P'ship* v. *Clark*, 137 S. Ct. 1421, 1426 (2017). Fourth, a rule prohibiting class waivers under the NLRA would not be a ground "for the *revocation* of any contract," 9 U.S.C. § 2 (emphasis added), because it would have nothing to do with the contract's "*formation*"—that is, "whether the contract was properly *made*." *Concepcion*, 131 S. Ct. at 355, 357 (Thomas, J., concurring) (emphases added).

Because the saving clause does not apply, the FAA unequivocally declares that the class waivers in these cases shall be enforceable. The question, then, is whether the NLRA can plausibly be read so as not to conflict with that mandate. The Court has a duty to find a way to harmonize the NLRA with the FAA if it can, and only a "clearly expressed congressional intention to the contrary," *Morton*, 417 U.S. at 551—also known as a "contrary congressional command," *CompuCredit Corp.* v. *Greenwood*, 565 U.S. 95, 98 (2012)—can prevent the Court from doing so.

C. The NLRA does not contain a "clearly expressed congressional intention" to bar class waivers. The text of the NLRA makes no mention of class proceedings, and the NLRA was enacted long before the rules governing class and collective actions. The

NLRA is thus just like the antitrust laws in *American Express Co.* v. *Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), which this Court held contained no congressional command requiring rejection of class waivers. Like those antitrust laws, the NLRA can be reasonably construed to permit class waivers, consistent with the FAA.

In fact, that is not just *a* reasonable construction of the NLRA; it is *the only* reasonable construction. Every tool of statutory construction points to the same conclusion: Though Section 7 protects a right to "engage in * * * concerted activities," those activities do not include class proceedings. 29 U.S.C. § 157. The traditional tools of statutory interpretation make clear that Section 7 creates rights for employees; it does not impose any corresponding obligations on employers or third parties. Reading "concerted activities" to include class proceedings would violate that rule because employees cannot exercise a right to litigate as a class unless employers and tribunals are obligated to treat them as a class.

In any event, even if class proceedings could be considered a form of concerted activity, Section 8(a)(1) of the NLRA does not unambiguously make class waivers an unfair labor practice. Section 8(a)(1) bars employers from "interfer[ing] with" an employee's *substantive* right to engage in concerted activities. *Id.* § 158(a)(1). It does not unambiguously prevent employers from channeling concerted activities into particular *procedural* forms. And even if it did, employees would be free to waive that *procedural* right, as they did here. The Seventh Circuit's reading of the NLRA as prohibiting class waivers would lead to absurd results—making employment arbitration a thing of the past, and

forcing employers and courts alike to acquiesce whenever employees seek class certification. The NLRA can—and should—be interpreted harmoniously with the FAA by construing the NLRA to permit the class waivers here.

D. The Board's contrary view is not entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Most fundamentally, there is no room for any deference. The NLRA unambiguously does *not* prohibit class waivers. And even if the NLRA were ambiguous, there would be only one way of construing it in harmony with the FAA's unambiguous mandate—making that the only permissible construction that a court or agency could adopt. In addition, Congress has not delegated any authority to the Board to administer the FAA, so the Board's attempt to balance the policies underlying both statutes should not be given any special weight.

II. Even if the two statutes could not be reconciled, the class waivers should still be enforced. A specific statute should trump a general one, and the FAA is the specific statute here because it contemplates the precise scenario at issue: arbitration provisions in employment contracts. *See* 9 U.S.C. § 1; *Circuit City*, 532 U.S. at 114-119. Indeed, when displacing the FAA in other statutes, Congress has spoken with much more specificity than it has in the NLRA. Moreover, prohibiting class waivers would strike at the core of the FAA's protections while addressing what is, at most, a peripheral concern of the NLRA. In the event of an irreconcilable conflict, therefore, the FAA should be given priority.

For these reasons, class waivers in arbitration agreements between employers and their employees should be enforced. The Fifth Circuit should be affirmed, and the Seventh Circuit should be reversed.

ARGUMENT

These cases concern the enforceability of class waivers in arbitration agreements between employers and employees. That issue lies at the intersection of two federal statutes—one about arbitration agreements and the other about employer-employee relations.

The statute about arbitration agreements is the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*., enacted in 1925. *See* Ch. 213, 43 Stat. 883 (1925); Ch. 392, 61 Stat. 669 (1947) (codifying the FAA as Title 9). The FAA's "primary" provision is Section 2, *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991), which states:

> A written provision in * * * a 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.

The other statute—about employer-employee relations—is the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, enacted in 1935. Ch. 372, 49 Stat. 449 (1935). 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. An employer that "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of th[ose] rights" commits an "unfair labor practice" under Section 8(a)(1) of the NLRA. *Id.* § 158(a)(1).

I. THE FAA AND THE NLRA SHOULD BE INTERPRETED HARMONIOUSLY TO MANDATE ENFORCING THE CLASS WAIVERS

The FAA unambiguously mandates the enforcement of the class waivers in these cases, and the NLRA contains no clearly expressed congressional intention to the contrary. Because the NLRA can be reasonably construed as consistent with the FAA's mandate, this Court should adopt that construction and declare the class waivers enforceable.

A. Absent A Clearly Expressed Congressional Intention To The Contrary, The FAA And The NLRA Should Be Interpreted Harmoniously

1. In cases involving the interaction of two federal statutes, a court's first task is to determine whether the two statutes can be interpreted harmoniously. That is because the U.S. Code is presumed to have a single, intelligent drafter. *See* William N. Eskridge, Jr., *Interpreting Law: A Primer on How To Read Statutes and the Constitution* 118 (2016). And "intelligent drafters" presumably "do not contradict themselves." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 180 (2012). Hence the harmonization principle: "[W]hen two statutes are capable of co-existence, it is the duty of

the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton*, 417 U.S. at 551; *see also W. Va. Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 100 (1991) (explaining that a statutory term should be construed "to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law").

Reinforcing this harmonization principle is the "cardinal rule" that "repeals by implication are not favored." *Posadas* v. *Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936). That rule rests on a "strong[]" presumption that "Congress will specifically address language on the statute books that it wishes to change." *United States* v. *Fausto*, 484 U.S. 439, 453 (1988); *see also Nat'l Ass'n of Home Builders* v. *Defs. of Wildlife*, 551 U.S. 644, 664 n.8 (2007) ("[I]mplied amendments are no more favored than implied repeals."). Thus, a repeal will not be inferred "unless the intention of the legislature to repeal is clear and manifest." *Hui* v. *Castaneda*, 559 U.S. 799, 810 (2010) (internal quotation marks omitted).

2. This Court's decisions involving the FAA and other federal statutes reflect these principles. In those prior cases, the FAA unambiguously mandated enforcement of the arbitration provisions at issue. Applying the harmonization principle, the Court then proceeded to determine whether the other statute could be read to be consistent with the FAA's unambiguous mandate. And in case after case, the Court answered yes, finding in the other statute no "clearly expressed congressional intention to the contrary," *Morton*, 417 U.S. at 551, or "contrary congressional command," *CompuCredit*, 565 U.S. at 98—two ways of saying the same thing.

Vimar Seguros y Reaseguros, S.A. v. *M/V Sky Reefer*, 515 U.S. 528 (1995), for example, involved the FAA and the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. app. § 1300 *et seq.* COGSA imposes liability on carriers of goods by sea for violating certain standards of conduct. *Vimar*, 515 U.S. at 534-535. COGSA further provides that any agreement "lessening such liability * * * shall be null and void and of no effect." 46 U.S.C. app. § 1303(8). The petitioner challenged an arbitration agreement as void under COGSA, while the respondents argued that the agreement was enforceable under the FAA. *See Vimar*, 515 U.S. at 531-532. Starting from the premise that "it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each [statute] as effective," *id.* at 533 (quoting *Morton*, 417 U.S. at 551), the Court concluded that COGSA should be construed to permit enforcement of the arbitration agreement, thereby avoiding any conflict with the FAA, *see id.* at 533-539. Because both statutes could be "given full effect," *id.* at 541, the Court found it "unnecessary to resolve the further question whether the [FAA] would override COGSA were [COGSA] interpreted otherwise," *id.* at 530.

Shearson/American Express Inc. v. *McMahon*, 482 U.S. 220 (1987), involved the FAA and two other federal statutes, the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.* The respondents argued that the Exchange Act and RICO invalidated agreements to arbitrate claims under those two statutes, while the petitioners argued that the agreements were enforceable under the FAA. *See McMahon*, 482 U.S.

at 223, 227. The Court concluded that the FAA, "standing alone," "mandate[d] enforcement of [the] agreements." *Id.* at 226. It then placed the "burden" on the respondents—the parties "opposing arbitration"—to show that the Exchange Act and RICO could not be reconciled with that "mandate." *Id.* at 226-227. After considering those two statutes, the Court held that there was no such "contrary congressional command" in either one. *Id.* at 226, 238, 242. Rather than read the Exchange Act and RICO as "exception[s]" to the FAA, *id.* at 227, the Court harmonized the statutes and deemed the arbitration agreements enforceable, *id.* at 238, 242.

The Court followed a similar path in *Gilmer*, a case involving the FAA and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq*. The petitioner argued that the ADEA invalidated an agreement to arbitrate claims under that statute, while the respondent argued that the agreement was enforceable under the FAA. *See Gilmer*, 500 U.S. at 23-24, 26-27. As in *McMahon*, the Court placed the "burden" on the party opposing arbitration to show that the other statute could not be reconciled with the FAA's mandate. *Id.* at 26. Because the petitioner failed to meet that burden, the Court upheld the enforceability of the arbitration agreement. *Id.* at 35.

CompuCredit is another example. The other federal statute in that case was the Credit Repair Organizations Act (CROA), 15 U.S.C. § 1679 *et seq*. The respondents argued that the CROA precluded enforcement of an agreement to arbitrate claims under that statute, while the petitioners argued that the agreement was enforceable under the FAA. *See CompuCredit*, 565 U.S. at 97. The Court reasoned

that the FAA's "mandate" had to be obeyed, unless the CROA contained "a contrary congressional command"—that is, unless the CROA could not be reconciled with the FAA. *Id.* at 98 (quoting *McMahon*, 482 U.S. at 226). The Court found no such command in the CROA; indeed, the Court explained, "[w]hen [Congress] has restricted the use of arbitration in other contexts, it has done so with a clarity that far exceeds the claimed indications in the CROA." *Id.* at 103.

Concurring in the judgment, Justice Sotomayor, joined by Justice Kagan, emphasized that while the respondents had advanced a "plausible" interpretation of the CROA, it was "no more compelling than the contrary construction that petitioners [had] urge[d]." *Id.* at 108-109 (Sotomayor, J., concurring in the judgment). The parties' arguments were thus "in equipoise," leaving the meaning of the CROA in "doubt[]." *Id.* at 109. Given that ambiguity, Justice Sotomayor concluded that "[the Court's] precedents require that petitioners prevail," "because respondents, as the opponents of arbitration, bear the burden of showing that Congress disallowed arbitration of their claims, and because [the Court] resolve[s] doubts in favor of arbitration." *Id.* Thus, like the majority, Justice Sotomayor construed the CROA to avoid any conflict with the FAA.

The pattern in these cases is undeniable. In each, the FAA unambiguously "mandate[d] enforcement" of the arbitration agreement at issue. *McMahon*, 482 U.S. at 226. So it was the Court's "duty" to reconcile the other federal statute with that mandate, "absent a clearly expressed congressional intention to the contrary." *Vimar*, 515 U.S. at 533 (quoting *Morton*, 417 U.S. at 551). And in each case, the parties

opposing arbitration failed to meet their "burden" of showing such a "contrary congressional command." *McMahon*, 482 U.S. at 226; *see also Italian Colors*, 133 S. Ct. at 2309-2310 (no "congressional command" in the Sherman and Clayton Acts "contrary" to the FAA); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627-629 (1985) (no "intention" in the Sherman Act to preclude enforcing an international arbitration agreement); *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 519-520 (1974) (Exchange Act does not preclude enforcing an international arbitration agreement).

Of course, there may have been times when the other statute could have "plausibl[y]" been read as contrary to the FAA. *CompuCredit*, 565 U.S. at 108 (Sotomayor, J., concurring in the judgment). But as Justice Sotomayor has explained, that is not enough: To avoid needless conflict, the Court's precedent requires that any "doubts" in the other statute be resolved "in favor of arbitration." *Id.* at 109. It should come as no surprise, then, that in the more than 90 years the FAA has been on the books, the Court has been unable to reconcile another federal statute with the FAA only once—in a decision the Court eventually overruled. *See Wilko* v. *Swan*, 346 U.S. 427 (1953), *overruled by Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 479-485 (1989) (Securities Act of 1933 does not preclude enforcing an arbitration agreement).

B. The FAA Unambiguously Mandates Enforcement Of The Class Waivers

These consolidated cases are no different from the cases discussed above. The question is identical: Can the FAA and another statute be harmonized? In

each of the cases above, the FAA unambiguously "mandate[d] enforcement" of the arbitration provisions at issue. *McMahon*, 482 U.S. at 226. The same is true here.

Section 2 of the FAA establishes "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Its "purpose was to place an arbitration agreement upon the same footing as other contracts * * * and to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate." *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 219-220 (1985) (internal quotation marks omitted). To that end, Section 2 "requires courts to enforce agreements to arbitrate according to their terms." *CompuCredit*, 565 U.S. at 98. It declares that an "arbitration" provision in a "contract evidencing a transaction involving commerce * * * 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.

The class waivers here are provisions requiring that arbitration be conducted on an individual, rather than collective, basis. *See Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010) ("[P]arties may specify *with whom* they choose to arbitrate their disputes."). Those provisions are undisputedly part of "contract[s] evidencing * * * transaction[s] involving commerce." 9 U.S.C. § 2; *see also EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 289 (2002) ("Employment contracts, except for those covering workers engaged in transportation, are covered by the FAA."). Section 2 of the FAA thus declares them "valid, irrevocable, and enforceable," unless the saving clause applies to the NLRA.

This Court has *never* applied the saving clause in a case involving an alleged conflict between the FAA and another federal statute. Indeed, in each of the cases discussed above, the Court asked whether the other statute contained a contrary congressional command, not whether it fell within the saving clause. *See Italian Colors*, 133 S. Ct. 2304; *CompuCredit*, 565 U.S. 95; *Vimar*, 515 U.S. 528; *Gilmer*, 500 U.S. 20; *Rodriguez de Quijas*, 490 U.S. 477; *McMahon*, 482 U.S. 220; *Mitsubishi Motors*, 473 U.S. 614; *Scherk*, 417 U.S. 506. The saving clause is similarly inapplicable here. It does not apply to the NLRA, for four independent reasons.

First, saving clauses in federal statutes save *inferior* laws, like state law or federal common law; they do not save "other federal statutes enacted by the same sovereign." *NLRB* v. *Alt. Entm't, Inc.*, No. 16-1385, 2017 WL 2297620, at *18 (6th Cir. May 26, 2017) (Sutton, J., concurring in part and dissenting in part); *see Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987). That is because "[f]ederal statutes do not need to be 'saved' by a coequal statute in order to have effect." *Alt. Entm't,* 2017 WL 2297620, at *18. If Congress wanted another federal statute to override the FAA, it could simply say so. That explains why the saving clause has *never* played a role in this Court's cases involving the FAA and another federal statute.

Second, the saving clause applies only to grounds for the revocation of "*any* contract." 9 U.S.C. § 2 (emphasis added). By its plain meaning, that phrase includes "generally applicable contract defenses, such as fraud, duress, or unconscionability," that may be invoked with respect to *any* contract, regardless of its subject matter. *Doctor's Assocs., Inc.* v.

Casarotto, 517 U.S. 681, 687 (1996). The phrase in turn excludes defenses—like any contained in the NLRA—that may be invoked only with respect to a specific subset of contracts, such as employment agreements.

The Court confirmed this straightforward reading in *Southland*, a case involving the California Franchise Investment Law. *See* 465 U.S. at 3-4. That law set out a series of unwaivable protections for franchisees, which California's highest court had construed to invalidate arbitration provisions in franchise agreements. *Id.* at 10. This Court concluded that, so construed, the franchise law "directly conflict[ed]" with Section 2 of the FAA, which "mandated the enforcement" of such provisions. *Id.*

The Court specifically considered whether the franchise law might nevertheless be permitted to invalidate the arbitration provisions under Section 2's saving clause. The Court "agree[d], of course, that a party may assert *general* contract defenses such as fraud to avoid enforcement of an arbitration agreement." *Id.* at 16 n.11 (emphasis added). But the Court held that, unlike fraud, "the defense to arbitration found in the California Franchise Investment Law is not a ground that exists at law or in equity 'for the revocation of *any* contract.'" *Id.* Rather, it was "merely a ground that exists for the revocation of arbitration provisions in contracts *subject to the California Franchise Investment Law*"—namely, franchise agreements. *Id.* (emphasis added). The Court therefore concluded that the saving clause did not apply.

Southland compels the same conclusion here. Like the franchise law, the NLRA is "not a ground that

exists at law or in equity 'for the revocation of *any* contract.'" *Id.* Rather, the NLRA is merely a ground that exists for the revocation of arbitration provisions in contracts *subject to the NLRA*. And the NLRA "covers only one type of contract, that between an employer and its covered employees." *D.R. Horton*, 357 N.L.R.B. at 2287.[1] Statutes like the franchise law and the NLRA—which govern *some* contracts but not *others*—are beyond the scope of the saving clause.

This, too, explains why this Court has *never* relied on the saving clause in a decision involving the FAA and another federal statute. Like the NLRA, the federal statutes at issue in the Court's prior cases governed a particular subject matter—for instance, the carriage of goods in *Vimar*, the employment relationship in *Gilmer*, and the practices of credit repair organizations in *CompuCredit*. Thus, to the extent those statutes could have been grounds for revocation at all, they would not have been grounds for revocation of "*any* contract"; they would have merely been grounds for revocation of contracts *of the same subject matter*—bills of lading in *Vimar*, contracts involving employment in *Gilmer*, and consumer contracts in *CompuCredit*. Because the saving clause covers only "general contract defenses," it had no application in those prior cases—just as it has no application here. *Southland*, 465 U.S. at 16 n.11; *see*

[1] The NLRA does not even cover *all* employment contracts. For instance, "significant numbers of workers typically considered to be 'employees' in lay terms—supervisors, government employees, and independent contractors being perhaps the largest groups—are not covered by Sec. 7." *D.R. Horton*, 357 N.L.R.B. at 2288 n.27; *see* 29 U.S.C. § 152(2), (3), (11).

also, e.g., *Doctor's Assocs., Inc.* v. *Hamilton*, 150 F.3d 157, 163 (2d Cir. 1989); *Carter* v. *SSC Odin Operating Co.*, 927 N.E.2d 1207, 1219 (Ill. 2010).

In reaching a contrary conclusion, the Seventh Circuit reasoned that the NLRA renders the arbitration provision at issue "illegal," and that "[i]llegality is one of th[e] grounds" for revocation cognizable under the saving clause. *Epic* Pet. App. 15a. In *Southland*, Justice Stevens adopted that very reasoning—in *lone dissent*. In his view, the franchise law rendered the arbitration provisions "void as a matter of public policy," and "[a] contract which is deemed void is surely revocable at law or in equity." *Southland*, 465 U.S. at 20 (Stevens, J., concurring in part and dissenting in part). Thus, according to Justice Stevens, the saving clause provided a "textual basis" for "avoiding" a conflict between the FAA and the franchise law. *Id.* at 19.

The Court in *Southland* disagreed. *Id.* at 16 n.11 (majority opinion). It made clear that cloaking a narrowly applicable law (like the franchise law or the NLRA) in the garb of a generally applicable contract defense (like public policy or illegality) is not enough to bring the law within the saving clause. *Id.* Otherwise, this simple dodge would make the saving clause applicable to *all* contrary laws, federal or state. That cannot be squared with either *Southland* or this Court's unbroken line of cases enforcing the FAA in the face of narrowly applicable federal statutes without even a mention of the saving clause.[2]

[2] In *Vimar*, Justice Stevens reiterated his view of the saving clause—again in solo dissent. *See* 515 U.S. at 556 (Stevens, J., dissenting). In addressing whether the FAA and COGSA were

Because—like those other federal laws—the NLRA is not a "general contract defense[]," *id.*, it is not a ground covered by the saving clause.

Third, the saving clause does not preserve any ground that would "interfere[] with fundamental attributes of arbitration." *Concepcion*, 563 U.S. at 344. That is because Section 2 of the FAA "establishes an equal-treatment principle": A court may not invalidate an arbitration provision based on "legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Kindred Nursing*, 137 S. Ct. at 1426 (quoting *Concepcion*, 563 U.S. at 339). Accordingly, the saving clause does not preserve any "rule discriminating on its face against arbitration." *Id.* Nor does it preserve "any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Id.*; *see also Concepcion*, 563 U.S. at 343 (explaining that the saving clause "cannot in reason be construed" as preserving defenses "absolutely inconsistent with" the FAA (internal quotation marks omitted)).

Applying this principle in *Concepcion*, the Court held that the saving clause could not be construed to preserve California's so-called *Discover Bank* rule—a rule prohibiting certain class waivers as unconscionable. 563 U.S. at 340. Such a rule, the Court explained, "interferes with fundamental attributes of arbitration." *Id.* at 344. After all, the point of arbi-

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"capable of co-existence," the Court in *Vimar* did not reference the saving clause even once. *Id.* at 533 (majority opinion) (quoting *Morton*, 417 U.S. at 551).

tration is to "allow for efficient, streamlined procedures tailored to the type of dispute." *Id*. Yet "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." *Id.* at 348. In fact, "class arbitration *requires* procedural formality," at least if it is to bind absent class members. *Id.* at 349. Worse still, it "greatly increases risks to defendants," who must face all the risks of class proceedings without any "effective means of review." *Id.* at 350-351. The *Discover Bank* rule thus discriminated against arbitration by disfavoring one of arbitration's defining features—namely, the absence of class proceedings. And so the Court found the *Discover Bank* rule preempted, declining to construe the saving clause to preserve it. *Id.* at 352.

The lesson of *Concepcion* is plain: Because "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration," the saving clause cannot be construed to preserve such a rule. *Id.* at 344. Thus, even if such a rule could be derived from the NLRA, it would not be covered by the saving clause. *See Iskanian* v. *CLS Transp. L.A., LLC*, 327 P.3d 129, 141-142 (Cal. 2014) (Liu, J.) (finding the issue here indistinguishable from *Concepcion*).

Attempting to escape that conclusion, the Seventh Circuit observed that *Concepcion* was a case about the FAA's relationship with a state law, as opposed to another federal statute. *Epic* Pet. App. 17a. But whether the other law is state or federal matters only to what happens if that law *conflicts* with the FAA: A conflicting state law is necessarily preempt-

ed, whereas a conflicting federal law may or may not be given priority. *See infra* pp. 54-57. *Concepcion*'s interpretation of the saving clause goes to an antecedent question: whether the FAA can be read to *accommodate* the other law, thereby avoiding any conflict in the first place. And the answer to that question does not depend on whether the other law is state or federal. A federal law "[r]equiring the availability of classwide arbitration" would "interfere[] with fundamental attributes of arbitration" no less than a state law would. For purposes of the saving clause, therefore, whether the other law is the *Discover Bank* rule or the NLRA makes no difference: Either way, the saving clause "cannot in reason be construed" to accommodate a rule requiring the availability of class arbitration. *Concepcion*, 563 U.S. at 343 (internal quotation marks omitted); *see also Italian Colors*, 133 S. Ct. at 2310, 2312 & n.5 (relying on *Concepcion* in a case where the other law was federal, and rejecting the dissent's "dismiss[al]" of *Concepcion* as "a case involving pre-emption").

The Seventh Circuit also maintained that the rule in *Concepcion* was "directed toward arbitration," whereas the NLRA is a "general principle." *Epic* Pet. App. 17a. That misunderstands both the *Discover Bank* rule and the NLRA. The *Discover Bank* rule was an application of the unconscionability doctrine, a "generally applicable contract defense[]." *Concepcion*, 563 U.S. at 339 (internal quotation marks omitted). The NLRA, by contrast, applies only to a narrow subset of contracts. *See supra* pp. 20-24. In any event, what mattered in *Concepcion* was what a rule prohibiting class waivers would "accomplish[]." *Kindred Nursing*, 137 S. Ct. at 1426. And because both the NLRA and the *Discover Bank* rule would

accomplish the same thing—namely, both would "interfere[] with fundamental attributes of arbitration"—*Concepcion* compels the conclusion that the saving clause does not apply here. 563 U.S. at 344.

Fourth, the saving clause applies only to grounds "for the *revocation* of any contract." 9 U.S.C. § 2 (emphasis added). Though Section 2 provides that an arbitration provision shall be "valid, irrevocable, and enforceable," the saving clause "does not parallel" those words "by referencing the grounds as exist for the 'invalidation, revocation, or nonenforcement' of any contract." *Concepcion*, 563 U.S. at 354 (Thomas, J., concurring). Instead, the saving clause "repeat[s] only one of the three concepts": "revocation." *Id.* The text thus demonstrates that the saving clause "does not include all defenses applicable to any contract but rather some subset of those defenses." *Id.* Lewis seems to acknowledge as much. *See Epic* Br. in Opp. 34 n.7 (explaining that "revocable" has a narrower meaning than "unenforceable" in the context of a saving clause).

The question, then, is which defenses the saving clause includes. Section 4 of the FAA provides the answer. That section gives a party aggrieved by the failure to arbitrate the right to seek an order compelling arbitration. 9 U.S.C. § 4. And it authorizes a court to grant such an order "upon being satisfied that the *making* of the agreement for arbitration or the failure to comply therewith is not in issue." *Id.* (emphasis added). Section 4 thus clarifies that a court, before directing the parties to arbitration, may consider only certain defenses—defenses relating to "the making of the agreement." *Id.*; *see also Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-404 (1967) ("[I]f the claim is fraud in the

inducement of the arbitration clause itself—an issue which goes to the 'making' of the agreement to arbitrate—the federal court may proceed to adjudicate it."). And for the statutory scheme to make sense, the grounds for "revocation" preserved by the saving clause must be understood to track those same defenses. *See Concepcion*, 563 U.S. at 354-355 (Thomas, J., concurring). Otherwise, Section 2 would preserve defenses pertaining to the arbitration agreement that a court would not be able to consider under Section 4—which would be absurd.

This reading of Section 2 is reinforced by the history of the FAA. "The text of the FAA was based upon that of New York's arbitration statute." *Hall St. Assocs., L.L.C.* v. *Mattel, Inc.*, 552 U.S. 576, 589 n.7 (2008); *see also* S. Rep. No. 68-536, at 3 (1924); 1920 N.Y. Laws ch. 275, art. 2, § 2 (providing that arbitration provisions "shall be valid, enforcible, and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract"). And in 1923, New York's highest court construed the text of New York's law and explained that the "word 'irrevocable,' here used, means that the contract to arbitrate * * * can only be set aside for facts existing at or before *the time of its making* which would move a court of law or equity to revoke any other contract or provision of a contract." *Zimmerman* v. *Cohen*, 139 N.E. 764, 766 (N.Y. 1923) (emphasis added). New York's highest court thus tied the concept of revocability to the "time of the [agreement's] making"—suggesting that the saving clause's concern was limited to whether the agreement was properly made. When Congress enacted the FAA two years later, it was presumably aware of that authoritative

interpretation of the statute it was copying. *See Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978).

The NLRA does not relate to the making of an agreement. If the NLRA were read to prohibit the arbitration provisions here, it would be not because of how the provisions were made, but rather because of what they contained—a waiver of class proceedings. The objection, in other words, would be to the substance of the provisions, not to their formation. Indeed, the objection would be no different from one based on California's *Discover Bank* rule, which Justice Thomas had no trouble concluding related to "public-policy reasons," not to "whether the contract was properly made." *Concepcion*, 563 U.S. at 357 (Thomas, J., concurring); *see also Italian Colors*, 133 S. Ct. at 2312-2313 (Thomas, J., concurring) (concluding that an argument that a class waiver contravened the antitrust laws did not "concern[] whether the contract was properly made" (internal quotation marks omitted)). Because the NLRA does not relate to contract formation, it is not a ground "for the *revocation*" of a contract within the meaning of the saving clause.

For each of these reasons, the saving clause does not apply. The Court is left with the unequivocal terms of the rest of Section 2: Arbitration provisions such as these "shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. The FAA unambiguously mandates enforcement of the class waivers in these cases.

C. The NLRA Can Be Reasonably Construed To Avoid Conflicting With The FAA

The question, then, is whether the NLRA can be construed to avoid conflicting with the FAA's unam-

biguous mandate. If there is any ambiguity in the NLRA, the answer must be yes, because this Court has a "duty" to harmonize two statutes "capable of co-existence." *Morton*, 417 U.S. at 551. Indeed, that duty is particularly strong here, given the presumption that the later-enacted NLRA did not impliedly repeal or amend the FAA. *Fausto*, 484 U.S. at 453. Accordingly, only a "clearly expressed congressional intention" can stand in the way of reconciling the NLRA with the FAA, *Morton*, 417 U.S. at 551, and the "burden" rests with the parties resisting enforcement of the arbitration agreement to point to such a "contrary congressional command," *McMahon*, 482 U.S. at 226-227.

That burden cannot be met here. Congress did not clearly express any intention to include class proceedings within the right to "engage in * * * concerted activities" under Section 7. 29 U.S.C. § 157. Even if it did, Section 8(a)(1)'s bar on employer actions that "interfere with, restrain, or coerce" the exercise of that right does not unambiguously prohibit employers from channeling concerted activities into a particular procedural form. *Id.* § 158(a)(1). And in any event, nothing in the NLRA suggests that employees cannot voluntarily waive a procedural right to take part in class proceedings. For any one of these reasons, the NLRA can—and should—be interpreted harmoniously with the FAA, and the class waivers should be enforced.

1. "Concerted activities" under Section 7 do not unambiguously include class proceedings

a. Section 7 of the NLRA gives employees the right to engage in "concerted activities." 29 U.S.C. § 157.

To establish a congressional command contrary to the FAA, the other side would have to identify a "clearly expressed congressional intention" in the NLRA to include class proceedings within the meaning of "concerted activities." *Morton*, 417 U.S. at 551. No such intention, however, can be clearly discerned "in the text of the [NLRA], its legislative history, or an inherent conflict between [individual] arbitration and the [NLRA's] underlying purposes." *Gilmer*, 500 U.S. at 26 (internal quotation marks omitted).

When it comes to the NLRA's text and history, this Court's decision in *Italian Colors* is all but dispositive. *Italian Colors* involved the Sherman and Clayton Acts; the respondents argued that those antitrust laws invalidated a class waiver in an arbitration agreement, while the petitioners argued that the class waiver was enforceable under the FAA. 133 S. Ct. at 2308-2309. The Court held that the antitrust laws contained no "congressional command" "contrary" to "the FAA's mandate." *Id.* at 2309. The antitrust laws "make no mention of class actions" and, "[i]n fact," "were enacted decades before the advent of Federal Rule of Civil Procedure 23." *Id.* It would be "remarkable for a court to erase" a class waiver based on statutes enacted at a time when the "usual rule" was "individual" dispute resolution. *Id.* (internal quotation marks omitted). The Court thus concluded that the "antitrust laws do not evince an intention to preclude a waiver of class-action procedure." *Id.* (internal quotation marks and brackets omitted).

There are no grounds for a different conclusion here. Like the text of the antitrust laws, the text of the NLRA makes no mention of class actions or class arbitration. In fact, Section 7 makes no mention of

adjudication or arbitration at all. The text of Section 7 thus stands in stark contrast to that of other statutes, which *do* clearly express a congressional intention contrary to the FAA. *See CompuCredit*, 565 U.S. at 103-104 (citing, *e.g.*, 7 U.S.C. § 26(n)(2), providing that "[n]o predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section"); *infra* pp. 55-56 (providing other examples).

Also like the antitrust laws, the NLRA was enacted before Rule 23 and the FLSA, neither of which existed until 1938. *See Italian Colors*, 133 S. Ct. at 2311 (noting the "adoption of the class action for legal relief in 1938"); Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060, 1069 (codified at 29 U.S.C. § 216(b)). Given that history, Congress could not have intended "concerted activities" to include class actions under Rule 23 or collective actions under the FLSA. Nor could Congress have intended them to include class arbitrations, which were barely recognized before the twenty-first century; the American Arbitration Association (AAA) and JAMS did not even adopt rules governing class proceedings until 2003 and 2005, respectively. *See* S.I. Strong, *Class, Mass, and Collective Arbitration in National and International Law* ¶ 2.35, at 43 (2013).

As for the NLRA's underlying purposes, they do not clearly express any intention to prohibit class waivers either. Congress enacted the NLRA to "encourag[e] practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions." 29 U.S.C. § 151. Just as collective bargaining is such a practice, so is individual arbitration. In fact, this Court has held that arbitration is of "particular

importance" in the employment context, in which disputes "often involve[] smaller sums of money" that would otherwise be dwarfed by the "costs of litigation." *Circuit City*, 532 U.S. at 123. The NLRA's purposes thus do not "inherent[ly] conflict" with individual arbitration. *Gilmer*, 500 U.S. at 26.

One could stop there, for the foregoing is enough to establish that there is no "clearly expressed congressional intention" in the NLRA to include class proceedings within the meaning of "concerted activities." *Morton*, 417 U.S. at 551. Even if "concerted activities" could "plausibl[y]" be read to include class proceedings, that reading is hardly compelled, and any "doubts" about the meaning of the NLRA must be resolved in favor of harmonizing the statute with the FAA. *CompuCredit*, 565 U.S. at 108-109 (Sotomayor, J., concurring in the judgment); *see McMahon*, 482 U.S. at 226-227.

b. In any event, construing "concerted activities" to include class proceedings is not even a *plausible* interpretation of Section 7. The traditional tools of statutory construction affirmatively rule out that interpretation, making clear beyond doubt that Congress did *not* intend "concerted activities" to encompass class proceedings.

i. Start with the settled principle that "[w]ords in a list are generally known by the company they keep." *Logan* v. *United States*, 552 U.S. 23, 31 (2007). "[W]hen a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows." *Hall St.*, 552 U.S. at 586; *see also Circuit City*, 532 U.S. at 114-115 (applying the *ejusdem generis* canon to the FAA).

In Section 7, the general term "other concerted activities" follows a series of specific items: (1) "self-organization"; (2) "form[ing], join[ing], or assist[ing] labor organizations"; and (3) "bargain[ing] collectively." 29 U.S.C. § 157. These examples have one basic characteristic in common: They are all things that employees can engage in either on their own or with the involvement of no one other than their employers. If, for example, employees want to self-organize or form a union, that is something they can simply do, without the involvement of anyone else. If they want to bargain collectively, the only other party that has to participate is their employer.

"But class litigation is not something that employees just *do*," even with their employers. *Alt. Entm't,* 2017 WL 2297620, at *15 (Sutton, J., concurring in part and dissenting in part). Class proceedings require the involvement of third parties—at a minimum, the courts or arbitrators that hear the claims. Thus, unlike the specific activities listed in Section 7, class proceedings burden parties extrinsic to the employer-employee relationship. This is no small distinction. The general term "other concerted activities" should not be read in a way that imposes obligations on outside parties, where the specifically enumerated activities do no such thing. *See NLRB* v. *City Disposal Sys., Inc.*, 465 U.S. 822, 831 & n.8 (1984) (reading "*other* concerted activities" in light of the "enumerated activities").

ii. The structure of the NLRA confirms this interpretation. When Congress intended to place obligations on any party, including courts and mediators, it expressly set out those obligations. For example, Section 8(d)(3) requires a party to notify the "Federal Mediation and Conciliation Service" when it desires

to modify or terminate a collective-bargaining agreement in certain industries. 29 U.S.C. § 158(d)(3). If "the collective bargaining involves employees of a health care institution," Section 8(d)(C) provides that the Service "shall promptly communicate with the parties and use its best efforts * * * to bring them to agreement." *Id.* § 158(d)(C). Similarly, Sections 10(e) and 10(f) give the Board or an aggrieved person the right to obtain judicial review, but they also specify what the courts "shall" do when such a suit is filed. *Id.* § 160(e), (f).

Indeed, even with respect to the employer-employee relationship, Congress did not assume that the creation of a right for one party was sufficient to impose a corresponding obligation on the other. Most significantly, the right of employees to "bargain collectively through representatives of their own choosing" is specifically listed in Section 7. *Id.* at § 157. Yet Congress clearly did not believe that the enumeration of that right, even when coupled with Section 8(a)(1)'s prohibition on employer "interfere[nce]," *id.* § 158(a)(1), was sufficient to obligate employers to bargain with their employees as a unit. So, in Section 8(a)(5), Congress made it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." *Id.* § 158(a)(5). Similarly, in Section 8(d), Congress imposed an express "obligation" on employers to "meet" and "confer" with their employees' collective-bargaining "representative[s]." *Id.* § 158(d). Sections 8(a)(5) and 8(d) accomplish what Sections 7 and 8(a)(1) alone do not: They require employers to treat employees as a unit at the bargaining table.

Congress chose not to enact any similar provisions requiring courts, arbitrators, or employers to treat

employees as a unit within a judicial or arbitral forum. *See Dep't of Homeland Sec.* v. *MacLean*, 135 S. Ct. 913, 919 (2015) ("Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another."). This Court should not override that choice by reading "concerted activities" to encompass class proceedings.

iii. This Court's precedent leads to the same conclusion. The Court has recognized "concerted activities" in numerous cases. In each case, those activities took the form of things that employees could do without the involvement of anyone else; none imposed any novel obligation on employers or outside parties to treat employees as a unit. *See City Disposal*, 465 U.S. at 830-837 (unilaterally asserting benefits conferred in a collective-bargaining agreement); *Metro. Edison Co.* v. *NLRB*, 460 U.S. 693, 703 (1983) (holding union office); *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 260 (1975) ("seeking to have the assistance of [the] union representative"); *Hous. Insulation Contractors Ass'n* v. *NLRB*, 386 U.S. 664, 668-669 (1967) (refusing to work); *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 233-234 (1963) (striking); *NLRB* v. *Wash. Aluminum Co.*, 370 U.S. 9, 13-14 (1962) (walking out of work); *NLRB* v. *Drivers*, 362 U.S. 274, 279 (1960) (recruiting new union members).

Eastex v. *NLRB*, 437 U.S. 556 (1978), is no exception. There, the Court noted that some lower courts, as well as the Board, had held that employees engage in "mutual aid or protection" when "they seek to improve working conditions through resort to administrative and judicial forums." *Id.* at 565-566 & n.15. But the Court then stated that it was "not address[ing] * * * the question of what may constitute

'concerted' activities in this context." *Id.* at 566 n.15. To the extent *Eastex* was even contemplating the possibility that "resort to" a forum might constitute concerted activity, it may have simply had in mind the assertion of rights contained in a collective-bargaining agreement, which this Court has held qualifies as "concerted activit[y]" even when done by "a single employee, acting alone." *City Disposal*, 465 U.S. at 835.

In any event, even if the NLRA were construed to protect *resort to* a forum by a group of employees, that would not mean that it protected their litigating as a class *once inside*. Filing a lawsuit is something that employees can do without placing any new obligations on their employers or the tribunal. Litigating a class action is not. In 2010, the Board's then-General Counsel issued a guideline memorandum distinguishing the two. That memorandum stated that an "employee is still protected by Section 7 of the Act if he or she concertedly *files* an employment-related class action lawsuit in the face of [an arbitration agreement containing a class waiver] and may not be threatened or disciplined for doing so." NLRB, Gen. Counsel Memorandum No. 10-06, at 7 (June 16, 2010) (emphasis added). Nevertheless, the memorandum continued, "[t]he employer * * * may lawfully seek to have a class action complaint *dismissed* by the court on the ground that each purported class member is bound by his or her signing of [the arbitration agreement]." *Id.* (emphasis added).

iv. The history of the NLRA confirms that class proceedings are not included within the right to engage in "concerted activities." To be sure, "there is nothing in the legislative history of § 7 that specifically expresses the understanding of Congress in

enacting the 'concerted activities' language." *See City Disposal*, 465 U.S. at 834. But the broader historical context in which Congress enacted the NLRA does suggest that, to the extent Congress contemplated Section 7's application in the context of litigation, it did not contemplate class proceedings.

The "source of the language enacted in § 7" was the Norris-LaGuardia Act, a major piece of labor legislation enacted in 1932. *Id.* at 835; *see also* S. Rep. No. 74-573, at 9 (1935) (tracing the language of the NLRA back through various statutes). Section 2 of that Act declared it the "public policy of the United States" that a "worker" "shall be free from the interference, restraint, or coercion of employers * * * in self-organization or in *other concerted activities* for the purpose of collective bargaining or other mutual aid or protection." Ch. 90, § 2, 47 Stat. 70, 70 (1932) (emphasis added) (codified at 29 U.S.C. § 102). In turn, Section 4 of the Act sought to advance that policy by broadly prohibiting federal courts in cases involving labor disputes from enjoining certain activities, whether done "singly or in concert." *Id.* § 4, 47 Stat. at 70 (codified at 29 U.S.C. § 104).

All of the activities specified in Section 4 were things employees could do on their own, like "[c]easing or refusing to perform any work" or "[b]ecoming or remaining a member of any labor organization." *Id.* § 4(a), (b), 47 Stat. at 70-71 (codified at 29 U.S.C. § 104(a), (b)). Even the one specified activity relating to litigation—"aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court"—fit that description. *Id.* § 4(d), 47 Stat. at 71 (codified at 29 U.S.C. § 104(d)). What Congress had in mind was employ-

ees helping one another by, for instance, "sending money" to litigants—something employees can do of their own accord, without obligating a tribunal or employer to treat them as a class. *Int'l Org.* v. *Red Jacket Consol. Coal & Coke Co.*, 18 F.2d 839, 842 (4th Cir. 1927), *cited in* Felix Frankfurter & Nathan Greene, *The Labor Injunction* 218 n.37 (1930). Given that none of the specified activities had anything to do with class proceedings, there is no reason to think Congress intended "concerted activities" to include class proceedings in the NLRA either. In fact, the sponsor of the NLRA assured his colleagues that Sections 7 and 8 were "grounded in long-established congressional policy." 79 Cong. Rec. 7569 (1935) (statement of Sen. Wagner).

c. Because the tools of statutory construction all point in the same direction, the meaning of the NLRA is unambiguous: Section 7 does *not* confer a right to "engage in *** concerted activities" *by litigating as a class*. At a minimum, there is no "clearly expressed congressional intention" that it *does*. *Morton*, 417 U.S. at 551. Section 7 should thus be interpreted harmoniously with the FAA, and the class waivers should be enforced.

2. Section 8 does not unambiguously prohibit employers from channeling concerted activities into individual arbitration

The problems with reading the NLRA to prohibit class waivers do not end with Section 7. To establish a clearly expressed congressional intention to prohibit class waivers, the other side must demonstrate not only that class proceedings unambiguously qualify as a form of "concerted activit[y]," but also that barring

this particular mechanism for engaging in concerted activity is unambiguously a violation of Section 8(a)(1). Even if the other side could conquer the first obstacle, it would still be unable to overcome the second.

a. Section 8(a)(1) makes it unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]." 29 U.S.C. § 158(a)(1). The Seventh Circuit held that preventing employees from litigating as a class interferes with, restrains, or coerces their "*substantive*" right to engage in concerted activities within a judicial or arbitral forum. *Epic* Pet. App. 21a (emphasis added); *see also Ernst & Young* Pet. App. 16a (same); *Murphy Oil* Pet. App. 41a (same); *D.R. Horton*, 357 N.L.R.B. at 2278 (same).

Not so. Class waivers leave employees free to work together at every step of the judicial or arbitral process. Employees may cooperate in hiring a lawyer, drafting their complaints, developing their legal strategies, finding and preparing witnesses, writing briefs, and seeking appellate review. They may even pool their financial and legal resources and present the exact same case in the exact same way for every plaintiff. Indeed, the other side cannot point to a single activity that employees can engage in "concerted[ly]" by litigating as a class that they cannot engage in "concerted[ly]" by litigating individually with the support and assistance of their colleagues. To be sure, a class waiver may channel their "concerted activities" into a different *procedural* form, but their exercise of the *substantive* right remains the same. *See Alt. Entm't*, 2017 WL 2297620, at *15 (Sutton, J., concurring in part and dissenting in part) ("[T]he 'concertedness' of litigation does not turn on

the particular procedural form that litigation takes.").

b. Because class waivers merely channel concerted activities into a particular *procedural* form, they may be viewed as an unfair labor practice under Section 8(a)(1) only if one of two things is true: *First*, it could be that an employer "interfere[s] with, restrain[s], or coerce[s]" the right to concerted activity whenever it places *any* limit on the procedural mechanisms for exercising the right. *Second*, it could be that class proceedings in particular are necessary to the *effective vindication* of the right to concerted activity, such that employers must keep this specific procedural pathway open. Neither of these propositions is true—let alone unambiguously so.

i. As to the proposition that Section 8(a)(1) prohibits employers from restricting *any* procedural avenue for engaging in concerted activities: The Court has repeatedly upheld—and even praised the importance of—agreements mandating arbitration in the employment context. *See, e.g.*, *Rent-A-Center, W., Inc.* v. *Jackson*, 561 U.S. 63, 65-66 (2010); *Circuit City*, 532 U.S. at 123; *Gilmer*, 500 U.S. at 32. By waiving a judicial forum, however, such agreements eliminate an entire set of procedural avenues for engaging in concerted activities—including those under Rule 23 and the FLSA.

It would be passing strange if, after repeatedly affirming an employer's ability to place limits on the procedural mechanisms for concerted activity, this Court declared it an unfair labor practice to do so. It would also be surprising to discover that Section 8(a)(1) has prohibited arbitration agreements this whole time, given that "the NLRA is in fact *pro-*

arbitration," as even the Seventh Circuit acknowledged. *Epic* Pet. App. 16a; *see also NLRB* v. *Acme Indus. Co.*, 385 U.S. 432, 439 (1967) (describing "the national policy favoring arbitration" underlying the NLRA).

It is no answer to say that the Court's prior decisions upholding employment arbitration agreements did not reference the NLRA. That merely confirms the point: Neither this Court nor the employees in those cases apparently even considered the possibility that an arbitration agreement would constitute impermissible interference with the right to engage in concerted activities. That in and of itself forecloses the notion that Section 8(a)(1) *unambiguously* requires employers to refrain from placing limits on the procedural mechanisms for concerted activity.

ii. This Court's precedent also forecloses the proposition that there is something about class proceedings in particular that requires employers to make them available in order to avoid violating Section 8(a)(1). In *Gilmer*, for example, the Court "had no qualms in enforcing a class waiver in an arbitration agreement," even though that agreement was being enforced by an employer against its employee, and "even though the federal statute at issue, the Age Discrimination in Employment Act, expressly permitted collective actions." *Italian Colors*, 133 S. Ct. at 2311 (citing *Gilmer*, 500 U.S. at 32). And in *Italian Colors*, the Court explicitly rejected the proposition that the "effective vindication" of a statutory right depends on the availability of class proceedings, when the statute in question was enacted "before [the] adoption of the class action for legal relief in 1938." *Id.* "[T]he individual suit that was considered adequate to assure 'effective vindication'

of a federal right before adoption of class-action procedures did not suddenly become 'ineffective vindication' upon their adoption." *Id.*

Just so here. When Congress enacted Section 8 of the NLRA in 1935—years before the enactment of Rule 23 or the FLSA and decades before the adoption of class procedures by AAA or JAMS—it could not possibly have believed that class proceedings were necessary to vindicate the right to engage in "concerted activities."

Indeed, class proceedings do not even serve the purpose of that right. Congress granted employees their substantive rights under the NLRA in order to ameliorate the "inequality of bargaining power between employees * * * and employers." 29 U.S.C. § 151. In Congress's view, that inequality led to unfair salaries and working conditions, which in turn led to industrial strife. *Id.* Granting employees the right to engage in "concerted activities" increased their bargaining power and thereby increased the possibility of fair outcomes in interactions between management and labor.

But in a judicial or arbitral forum, outcomes are not dependent on whether claims are heard as a class or individually. *See, e.g.*, *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.,* 559 U.S. 393, 408 (2010) (plurality opinion) ("[R]ules allowing multiple claims (and claims by or against multiple parties) to be litigated together * * * neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights; they alter only how the claims are processed."); *Stolt-Nielsen*, 559 U.S. at 696 (Ginsburg, J., dissenting) (quoting same); *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 332 (1980) ("[T]he

right of a litigant to employ Rule 23 is a procedural right only * * *."). A fair result is assured by a neutral decision-maker, not the number of litigants on one side. For that reason, class proceedings do not serve the purpose of the right to engage in "concerted activities," and foreclosing the class option cannot be said to preclude the effective vindication of that right.

c. In short, Section 8(a)(1) does not clearly express a congressional intention to make class waivers an unfair labor practice. That provision should not be read to bar agreements requiring individual arbitration.

3. The NLRA does not unambiguously prohibit employees from voluntarily waiving class proceedings

In any event, even if the other side could establish that the NLRA *must* be read to protect a right to take part in class proceedings, employees may still voluntarily waive that procedural right. And under Section 8, there can be no "interfere[nce] with" a right that has been validly waived. 29 U.S.C. § 158(a)(1).

Start from what should be common ground: Employees may validly waive their right to class proceedings in agreements reached through collective bargaining. "This Court long has recognized that a union may waive a member's statutorily protected rights, including his right to strike during the contract term, and his right to refuse to cross a lawful picket line." *Metro. Edison*, 460 U.S. at 705 (internal quotation marks omitted); *see, e.g.*, *Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 105-106 (1962). Such waivers are valid, "[p]rovided the selection of the

bargaining representative remains free." *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 280 (1956) (emphasis omitted). Class waivers impose no constraints on the selection of a bargaining representative, so a collective-bargaining agreement may validly waive class proceedings, thereby mandating individual arbitration of each employee's claims. Not even the Seventh Circuit disputed this point. *See Epic* Pet. App. 17a.

The only difference here is that each employee waived his or her right in an individual agreement. "Nothing in the law," however, "suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative." *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 258 (2009). Indeed, Section 7 itself contemplates that the right to engage in concerted activities may be individually waived because it explicitly gives each employee "the right to *refrain from* any or all of such activities." 29 U.S.C. § 157 (emphasis added).

Nor does it matter that a union might have more bargaining power than an individual when contracting with an employer. As this Court held in *Gilmer*, the mere possibility of unequal bargaining power does not justify a categorical rule "hold[ing] that [individual] arbitration agreements are *never* enforceable." 500 U.S. at 33 (emphasis added). Rather, the Court explained, the "claim of unequal bargaining power is best left for resolution in specific cases," as part of an inquiry into whether the particular agreement at issue "resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'" *Id.* (some internal quotation marks omitted).

Here, as in *Gilmer*, there is "no indication" that the employees in question were "coerced or defrauded" into agreeing to the class waivers. *Id.* On the contrary, as the Board's General Counsel once explained, "the relative simplicity and informality" of arbitration benefits "employers and employees alike." NLRB, Gen. Counsel Memorandum No. 10-06, *supra*, at 2. So it should come as no surprise that employees would voluntarily—and thus validly—waive their right to take part in class proceedings.

The Seventh Circuit believed that *National Licorice Co.* v. *NLRB*, 309 U.S. 350 (1940), and *J.I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944), dictate otherwise. They do not. *National Licorice* involved contracts entered into between employers and individual employees waiving certain Section 7 rights. 309 U.S. at 355. The Court held those contracts unenforceable for two reasons, neither of which applies here. First, the Court held that the contracts were "procured through the mediation of a *company-dominated* labor organization." *Id.* at 360 (emphasis added). In other words, the contracts were not truly *voluntary*. Second, the Court held that the contracts served to "eliminate the Union as the collective bargaining agency of its employees." *Id.* (internal quotation marks omitted). That means the employees were no longer free to select their own bargaining representative. *Id.* As explained, the class waivers here do not suffer from either of those flaws.

J.I. Case is similarly inapposite. That case involved a collective-bargaining agreement governing substantive benefits relating to work and pay. *See* 321 U.S. at 334-335. The issue was whether an individual contract could "be effective as a waiver" of those benefits, and the Court answered no. *Id.* at

338. Unlike the individual contracts in *J.I. Case*, however, the class waivers here do not waive any substantive rights. As explained, employees' substantive right to engage in concerted activities remains intact. *See supra* pp. 40-41. The right to take part in class proceedings "is a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guar.*, 445 U.S. at 332; *see also Italian Colors*, 133 S. Ct. at 2311 ("The class-action waiver merely limits arbitration to the two contracting parties."). And, just as this procedural right could be waived in *Gilmer* and *Italian Colors*, it may be waived here. *See Italian Colors*, 133 S. Ct. at 2310-2311 (citing *Gilmer*, 500 U.S. at 32).

Thus, even if the NLRA does create a right to take part in class proceedings, employees are perfectly free to enter into contracts waiving that procedural right, as they did here.

4. Construing the NLRA to prohibit class waivers would lead to absurd results

For the other side to prevail, this Court would have to hold that "concerted activities" unambiguously include class proceedings, that barring class proceedings unambiguously interferes with an employee's substantive right to engage in "concerted activities," and that the NLRA unambiguously prohibits employees from waiving that right in these circumstances. Not only would that require disregarding text, structure, history, purpose, and precedent, but it would also lead to "absurd results." *McNeill* v. *United States*, 563 U.S. 816, 822 (2011).

For starters, mandatory arbitration in the employment context would be a thing of the past. *Every* agreement requiring arbitration bars proceedings—

including class proceedings—in a *judicial* forum. If barring class proceedings truly interferes with an employee's substantive right to engage in "concerted activities," then every mandatory arbitration agreement would be an unfair labor practice. That would be so even if the agreement provided for class proceedings in an *arbitral* forum. For if the right at issue is truly a substantive right, an employer could not make up for violating it in *one* forum by saying that employees remain able to exercise it in *another* forum. *See D.R. Horton*, 357 N.L.R.B. at 2282 ("[I]f the Act makes it unlawful for employers to require employees to waive their right to engage in one form of activity, it is no defense that employees remain able to engage in *other* concerted activities."). Every employment agreement would have to "leave[] open a judicial forum for class and collective claims." *Id.* at 2288; *cf. id.* at 2289 n.28 (purporting to reserve judgment on this question).

What is more, employers would be forever prohibited from opposing a request for class certification, no matter the forum. That is because any opposition to class certification would stand in the way of—and thus "interfere with"—an employee's substantive right to engage in concerted activities. 29 U.S.C. § 158(a)(1). Employers would be guilty of an unfair labor practice every time they insisted that the strictures of Rule 23 (or some other class-action provision) be obeyed.

It gets worse. Not only would employers be unable to oppose requests for class certification, but courts would be unable to deny them. The reason is simple: The Rules Enabling Act provides that the federal rules—including Rule 23—"shall not abridge * * * or modify any substantive right." 28 U.S.C. § 2072(b).

So even though Rule 23 "imposes stringent requirements for certification that in practice exclude most claims," *Italian Colors*, 133 S. Ct. at 2310, courts would be powerless to enforce those requirements to bar class proceedings, lest the Rule "abridge" or "modify" an employee's substantive right to engage in concerted activities.

The upshot of all this is that, if the other side's reading of the NLRA is correct, employees could *always* litigate their claims as a class in court, where class certification could *never* be opposed or denied. Congress could not have intended such an outcome. *See* 79 Cong. Rec. at 7569 (statement of Sen. Warner) ("emphasiz[ing]" to his colleagues "how limited" Sections 7 and 8 are "in their scope"). Because the Court should avoid interpretations of a statute that would produce "absurd results," *McNeill*, 563 U.S. at 822, it should not construe the NLRA to bar the class waivers in these cases.

* * *

In the end, the Court is left with one statute (the FAA) that unambiguously mandates enforcement of the class waivers, and another statute (the NLRA) that can—at a minimum—be reasonably construed to permit those waivers. Under these circumstances, the Court's "duty" is plain: to bring the two statutes into harmony by adopting that reasonable construction of the NLRA. *Morton*, 417 U.S. at 551.

D. The Board's Contrary View Is Not Entitled To Deference

In 2012, the Board adopted a different view. *D.R. Horton*, 357 N.L.R.B. at 2277. Having found what it believed to be "an appropriate accommodation of the policies underlying the two statutes," *id.* at 2284, the

Board held that the NLRA renders class waivers unenforceable in arbitration agreements between employers and employees, notwithstanding the FAA. *Id.* at 2277; *see also Murphy Oil* Pet. App. 22a ("reaffirm[ing]" the Board's *D.R. Horton* decision). That view is not entitled to *Chevron* deference.

1. Most fundamentally, there is no room for deference here. At *Chevron*'s first step, a court, after applying the "traditional tools of statutory construction," "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843 & n.9. Here, the NLRA unambiguously does *not* prohibit class waivers. *See supra* pp. 33-49; *NLRB* v. *Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 576 (1994) (rejecting Board interpretation inconsistent with the NLRA). But even if the NLRA were ambiguous, construing the statute *not* to prohibit class waivers would be the only way of harmonizing it with the unambiguously expressed intent of the FAA. *See supra* pp. 29-49. Because the NLRA is capable of such a construction, a court applying the harmonization principle has a "duty" to adopt it, regardless of the Board's views. *Morton*, 417 U.S. at 551; *see also Scialabba* v. *Cuellar de Osorio*, 134 S. Ct. 2191, 2207 (2014) (plurality opinion) ("Were there an interpretation that gave each clause full effect, the [agency] would have been required to adopt it."). The traditional tools of statutory construction thus resolve any ambiguity in the NLRA, leaving only one permissible construction. Any other construction of the NLRA would bring the two federal statutes into conflict, which is something only *Congress* may choose to do. *See CompuCredit*, 565 U.S. at 98 (no conflict absent a "contrary *congressional* command" (emphasis added)); *Morton*, 417

U.S. at 551 (no conflict absent a "clearly expressed *congressional* intention to the contrary" (emphasis added)).

The Court has declined to defer to the Board in similar circumstances. For example, in *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137 (2002), the Board construed the NLRA as authorizing it to remedy an employer's violation of the statute by awarding "backpay to an undocumented alien who ha[d] never been legally authorized to work in the United States." *Id.* at 140. The Court acknowledged that "the Board's discretion to select and fashion remedies for violations of the NLRA" is "generally broad." *Id.* at 142. But it held that this particular remedy was "foreclosed by federal immigration policy, as expressed by Congress in the Immigration Reform and Control Act of 1986 (IRCA)." *Id.* at 140. IRCA "made it criminally punishable for an alien to obtain employment with false documents." *Id.* at 149. And because "awarding backpay to illegal aliens r[an] counter to policies underlying IRCA," the Court held that there was no room for deference: The award lay "beyond the bounds of the Board's remedial discretion." *Id.*; *see also Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575-578 (1988) (Board interpretation foreclosed by canon of constitutional avoidance); *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 532 (1984) (Board interpretation foreclosed by Bankruptcy Code); *Southern S.S. Co.* v. *NLRB*, 316 U.S. 31, 40-46 (1942) (Board interpretation foreclosed by federal maritime statute).

Just as IRCA foreclosed the Board's position in *Hoffman*, the FAA forecloses the Board's position here. However broad the Board's discretion to con-

strue the NLRA may generally be, it cannot be exercised in a way that "trenches upon" another federal statute, such as the FAA. *Hoffman*, 535 U.S. at 147. Where, as here, there is only one way of harmonizing a statute with Congress's unambiguously expressed intent in another, the court, as well as the agency, is required to adopt that interpretation. *See Morton*, 417 U.S. at 551; *Scialabba*, 134 S. Ct. at 2207 (plurality opinion). Accordingly, there is no room for deference; the inquiry should end at *Chevron* Step One.

2. Deference is inappropriate for another reason: Congress has not delegated to the Board any authority to interpret the FAA. Under *Chevron*, courts may defer only to "an agency's construction of the statute *which it administers*." 467 U.S. at 842 (emphasis added). That is because deference rests on a presumption that an agency has been delegated the authority to fill in statutory gaps. *See FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). And an agency cannot claim such a delegation unless it has been "charged with the administration of the statute." *Chevron*, 467 U.S. at 865-866; *see also Metro. Stevedore Co.* v. *Rambo*, 521 U.S. 121, 138 n.9 (1997) (no deference where the Administrative Procedure Act "is not a statute that the Director is charged with administering"); *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638, 649-650 (1990) (no deference where the Labor Secretary lacked the necessary "congressional delegation of administrative authority" to interpret the Migrant and Seasonal Agricultural Worker Protection Act).

Congress has charged the Board with administering the NLRA—and only the NLRA. *See* 29 U.S.C. § 156; *NLRB* v. *Sw. Gen., Inc.*, 137 S. Ct. 929, 937

(2017). Accordingly, this Court has declined to defer to the Board's construction of other federal laws, including maritime laws, the Bankruptcy Code, the Immigration and Nationality Act, IRCA, and the Interstate Commerce Act. *See Hoffman*, 535 U.S. at 151 n.5 (collecting cases). In *Southern S.S.*, for example, the Board ordered the reinstatement of striking sailors after concluding that their conduct did not violate a federal maritime statute, but the Court held that "the Board's interpretation of a statute so far removed from its expertise merited no deference." *Id.* at 143-144 (citing *Southern S.S.*, 316 U.S. at 40-46). Since then, the Court has "never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA." *Id.* at 144. And the Court has continued to regard deference to "the Board's interpretation of statutes outside its expertise" as a "novel" proposition. *Bildisco*, 465 U.S. at 529 n.9.

Here, the Board's position rests not just on an interpretation of the NLRA, but also on an interpretation of the FAA. The Board attempted to "accommodate[] the policies underlying both statutes" by construing the FAA's saving clause to apply to the NLRA. *D.R. Horton*, 357 N.L.R.B. at 2284, 2287. But Congress has not charged the Board—or any other agency—with administering the FAA. The Board thus has no special role in construing the FAA or in applying this Court's FAA decisions. *See NLRB* v. *Int'l Bhd. of Elec. Workers, Local 340*, 481 U.S. 573, 596 (1987) (Scalia, J., concurring in the judgment) (no deference to the Board's interpretation of this Court's opinions).

For these reasons, the Court owes the Board no deference on how to harmonize the NLRA with the FAA. Rather, the Court has a duty to harmonize the two statutes in the only way that it can: by reasonably construing the NLRA as consistent with the FAA's unambiguous mandate that the class waivers be enforced.

II. IF THE FAA AND THE NLRA CANNOT BE HARMONIZED, THE FAA SHOULD BE GIVEN PRIORITY

Even if the Court is unable to harmonize the two statutes, the outcome should be the same. If the Court concludes that the FAA *unambiguously mandates* enforcement of the class waivers and that the NLRA *unambiguously prohibits* their enforcement, the two statutes would be in irreconcilable conflict; the clearly expressed intention of one would be contrary to the clearly expressed intention of the other. The question would then be which of those two contrary congressional commands should be given "priority." *Vimar*, 515 U.S. at 533. The answer is the FAA.

First, the FAA is the more specific of the two statutes. "[A] specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton*, 417 U.S. at 550-551. Which of two statutes is the specific one depends on which "comes closer to addressing the very problem posed by the case at hand." Scalia & Garner, *supra*, at 183; *see also Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (explaining that the specific statute is the statute enacted "when the mind of the legislator [was] turned to the details of a subject" (internal quotation marks omitted)).

At a certain level, the FAA and the NLRA have comparable claims to specificity: The FAA focuses on arbitration, while the NLRA focuses on labor relations. But only the FAA discusses arbitration provisions in the context of individual employment contracts. In its very first section, the FAA exempts "*contracts of employment* of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (emphasis added). In other words, it provides that arbitration provisions must be enforced, *id.* § 2, except in "contracts of employment of transportation workers." *Circuit City*, 532 U.S. at 119. The clear implication, as this Court has recognized, is that arbitration provisions in *other* employment contracts remain subject to the FAA. *See id.* at 114-119. Thus, in enacting the FAA, Congress focused on the very subject at hand: the use of arbitration provisions in individual employment contracts.

The same cannot be said of the NLRA, which never squarely addresses that subject. Accordingly, the FAA should control. *See United States* v. *Estate of Romani*, 523 U.S. 517, 532 (1998) (giving effect to "the more specific statute" whose "provisions are comprehensive").

Second, when Congress does want to override the FAA, it does so in the most specific language—reinforcing the conclusion that the language of the NLRA is too general to accomplish the same result. One federal statute, for example, specifies that "arbitration may be used * * * only if" certain conditions are met. 15 U.S.C. § 1226(a)(2). Other federal statutes specify that "[n]o predispute arbitration agreement shall be valid or enforceable" in a particular context. 7 U.S.C. § 26(n)(2); *see also* 12 U.S.C.

§ 5567(d)(2) (similar); 18 U.S.C. § 1514A(e)(2) (similar). And still other federal statutes specify that an agency may "prohibit" or "impose conditions or limitations on the use of" agreements to "arbitrate" certain disputes. 15 U.S.C. § 80b-5(f) (Securities and Exchange Commission); *see also* 12 U.S.C. § 5518(b) (similar authorization to Consumer Financial Protection Bureau).

Congress, in short, has restricted arbitration agreements in several discrete contexts. Each time, it has specifically mentioned arbitration agreements in the relevant statute. If Congress had wanted the NLRA to trump the FAA, one would have expected Congress to have used similarly specific language.

Third, the enforceability of class waivers forms the core of the FAA, while such waivers are at most a peripheral concern of the NLRA. *See San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 243 (1959) (explaining that the NLRA does not preempt the regulation of activity that is "merely" a "peripheral concern" of the statute). The rule that arbitration provisions "shall be valid, irrevocable, and enforceable," 9 U.S.C. § 2, is the FAA's "primary" command, *Gilmer*, 500 U.S. at 24. That command has particular force when it comes to class waivers, which preserve the "fundamental attributes of arbitration." *Concepcion*, 563 U.S. at 344. And arbitration is of "particular importance" in the employment context, where "the costs of litigation" often exceed the "smaller sums of money" at stake. *Circuit City*, 532 U.S. at 123. Indeed, "employers and employees alike may derive significant advantages" from the "relative simplicity and informality of resolving claims before arbitrators," NLRB, Gen. Counsel Memorandum No. 10-06, *supra*, at 2—which is why

"individual-arbitration agreements have become so widespread," *Murphy Oil* Pet. 24. A rule prohibiting class waivers in employment arbitration agreements would thus strike at the very heart of the FAA—contradicting the statute's "primary" command with respect to a "fundamental" provision in a wide swath of cases in which arbitration is of "particular importance."

By contrast, if the right to take part in class proceedings is a right the NLRA protects at all, it is at most a "peripheral" one. *Garmon*, 359 U.S. at 243. The "essence" of the NLRA is "[c]ollective bargaining, with the right to strike at its core." *Motor Coach Emps.* v. *Missouri*, 374 U.S. 74, 82 (1963). Rule 23 and the FLSA did not even exist when the NLRA was enacted. Giving priority to the FAA would preserve the bulk of the NLRA's protections, whereas giving priority to the NLRA would carve out a large portion of contracts from the FAA's core. Because the NLRA is the statute "whose policy and principle would be relatively less impaired by nonapplication," the FAA should prevail. William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 Duke L.J. 1215, 1260 (2001).

Thus, even if the commands of the two statutes were contrary to each other, it is the command of the FAA that should take precedence. The Court should enforce the class waivers at issue.

CONCLUSION

The judgment of the Fifth Circuit in *Murphy Oil* should be affirmed, and the judgment of the Seventh Circuit in *Epic* should be reversed.

Respectfully submitted,

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ADDENDUM

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STATUTORY PROVISIONS INVOLVED

Section 1 of the Federal Arbitration Act (FAA), 9 U.S.C. § 1, provides:

"Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

Section 2 of the FAA, 9 U.S.C. § 2, provides:

Validity, irrevocability, and enforcement of agreements to arbitrate

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 3 of the FAA, 9 U.S.C. § 3, provides:

Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Section 4 of the FAA, 9 U.S.C. § 4, provides:

Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil

action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a

default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Section 1 of the National Labor Relations Act (NLRA), 29 U.S.C. § 151, provides:

Findings and declaration of policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of

competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Section 2 of the NLRA, 29 U.S.C. § 152, provides:

Definitions

When used in this subchapter—

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under Title 11, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United

States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 158 of this title.

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(10) The term "National Labor Relations Board" means the National Labor Relations Board provided for in section 153 of this title.

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with

the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(12) The term "professional employee" means—

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

(13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the ques-

tion of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

(14) The term "health care institution" shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person.

Section 6 of the NLRA, 29 U.S.C. § 156, provides:

Rules and regulations

The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by subchapter II of chapter 5 of Title 5, such rules and regulations as may be necessary to carry out the provisions of this subchapter.

Section 7 of the NLRA, 29 U.S.C. § 157, provides:

Right of employees as to organization, collective bargaining, etc.

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.

Section 8 of the NLRA, 29 U.S.C. § 158, provides in pertinent part:

Unfair labor practices

(a) Unfair labor practices by employer

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;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement,

whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

* * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and

simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of

status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

* * *

Section 10 of the NLRA, 29 U.S.C. § 160, provides in pertinent part:

* * *

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be con-

clusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in

question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * *