No. 16-285

In the
Supreme Court of the United States

EPIC SYSTEMS CORPORATION,

Petitioner,

v.

JACOB LEWIS,

Respondent.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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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.

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioner, Epic Systems, Inc., petitioner Ernst & Young LLP, and respondent Murphy Oil USA.[1] Founded over 40 years ago, PLF litigates matters affecting the public interest at all levels of state and federal court, representing the views of thousands of supporters nationwide. Among other things, PLF's Free Enterprise Project defends the freedom of contract, including the right of parties to agree by contract to the process for resolving disputes that might arise between them. To that end, PLF has participated as amicus curiae in many important cases involving contractual arbitration and class actions in both the consumer and employment context. *See, e.g.*, *ABM Indus., Inc. v. Castro*, 137 S. Ct. 82 (2016); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *D.R. Horton, Inc. v. National Labor Relations Board*, 737 F.3d 344 (5th Cir. 2013); and *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (2014), *cert. denied*, 135 S. Ct. 1155 (2015).

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[1] Pursuant to this Court's Rule 37.3, all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

These consolidated cases ask this Court to determine whether the "concerted activities" provision of the National Labor Relations Act (NLRA), 29 U.S.C. § 157 (also known as "Section 7"), prohibits employers and employees from agreeing to individual arbitral resolution of workplace disputes; an agreement generally protected by the Federal Arbitration Act (FAA).

While federal law places some substantive limits on the ability of adults to freely contract to arrange their affairs, courts generally respect people's rights to determine the procedures by which they will resolve their disputes. *See H.K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 108 (1970) ("One of the fundamental policies" underlying the NLRA is "freedom of contract."). This policy controls here as well. Section 7 does not create a substantive, non-waivable right to pursue claims unrelated to the NLRA on a class basis. Aggregation of claims is a procedural choice, not a substantive right. Under the FAA, employees and employers are free to contract for dispute resolution in any manner that they so desire, including individualized resolution without an option for aggregated claims in a class action or class arbitration procedure. *AT&T Mobility*, 563 U.S. at 339. Because aggregation does not alter the substance of an underlying claim, and because arbitral resolution similarly does not alter the substance of an underlying claim (even claims based on federal statutes), employment contracts that require individual arbitration must be upheld.

Moreover, there is nothing inherently wrong or unfair with an employer requiring arbitration of work-

related disputes. This outlook, which reflects congressional policy favoring arbitration, is codified in the FAA. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). Some job seekers may appreciate the benefits of arbitration; others may want to retain the right to go to court. Job seekers who place a high value on the ability to go to court should seek employment with an employer who does not require arbitration. Similarly, a job seeker who places a high value on the expressive nature of his sartorial style should not apply for a job that requires a uniform.

Finally, these cases arise because of the NLRB's longstanding "policy of nonacquiescence," a troubling anti-constitutional doctrine in which executive agencies refuse to comply with federal court decisions. While this Court need not rule on the constitutionality of the policy itself, it shapes the context in which these consolidated cases arise.

For all these reasons, the decision below should be reversed.

ARGUMENT

I

ARBITRATION OF WORKPLACE DISPUTES REFLECTS CONTRACTUAL FREEDOM PROTECTED BY THE FAA

A. Aggregate Litigation Is a Matter of Procedure, Not a Substantive Right

The FAA provides that arbitration agreements are "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 Act also "mandates that district courts '*shall*' direct the parties to proceed

to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (citing 9 U.S.C. §§ 3, 4). Accordingly, "agreements to arbitrate must be enforced, absent a ground for revocation of the contractual agreement." *Id.* The FAA was designed "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate." *Id.* at 219-20. In this case, the NLRB's hostility to individual arbitration recently found refuge in two circuit courts.

Current law considers collective litigation, however styled, to be a matter of procedure, not a substantive right. This Court held in *American Express Co. v. Italian Colors Restaurant* that the antitrust laws and Federal Rule of Civil Procedure 23 do not counteract the procedural choices made by parties in arbitration contracts. 133 S. Ct. 2304, 2310 (2013). *See also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991); *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, ancillary to the litigation of substantive claims."); *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1336 (11th Cir. 2014) ("Congress's decision to specifically include the procedural right to a collective action in the FLSA does not somehow transform that procedural right into a substantive right.").

In *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009), this Court held that "the recognition that arbitration procedures are more streamlined than federal litigation is not a basis for finding the forum somehow inadequate; the relative informality of arbitration is one of the chief reasons that parties select arbitration." *See also Circuit City Stores, Inc. v.*

Adams, 532 U.S. 105, 123 (2001) ("The Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law."); *Gilmer*, 500 U.S. at 26 ("[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."). In short, plaintiffs do not forego any federal substantive rights by arbitrating their disputes. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). The agreement to arbitrate simply substitutes one forum for another; plaintiffs "trade the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Id*.

The Board's position, that an employee's agreement to pursue employment disputes on an individual basis violates a core purpose of the NLRA, cannot be reconciled with the Board's acceptance of arbitration encompassed within collective bargaining agreements. *See, e.g.*, *Olin Corp.*, 268 N.L.R.B. 573, 577 (1984); *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080, 1082 (1955) (After collectively bargained-for arbitration, Board defers to arbitrators' awards, even when it would have decided the underlying statutory issue differently.); Kenneth T. Lopatka, *A Critical Perspective on the Interplay Between Our Federal Labor and Arbitration Laws*, 63 S.C. L. Rev. 43, 48 (2011). The Board's differing approach to arbitration when agreed to by unions versus individuals cannot stand. This Court has consistently allowed and enforced

waivers of the right to strike, which waive employees' rights to engage in concerted activity, where a "no-strike" clause was part of a freely negotiated collective bargaining agreement. *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 455 (1957) ("Plainly the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike."); *Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 238-39 (1970) (exclusive bargaining representative may waive Section 7 rights of the employees it represents in exchange for other concessions); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280-83 (1956) (same). This Court even implied an agreement not to strike where a collective bargaining agreement contains an arbitration provision. *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104-05 (1962).

In these cases, this Court expressly held arbitration to be procedural in nature. It should do so here, in the context of individual workplace disputes, because neither the NLRA nor FAA bars employees from contracting to modify the procedures by which they will resolve disputes about substantive rights.

B. The FAA Applies to Independent Employment Contracts, Even in Cases Involving Statutory Claims

To the extent that an employment contract contains an arbitration clause, the FAA provides special protection as a matter of substantive federal law, reflecting congressional favor of this form of alternative dispute resolution. *Preston v. Ferrer*, 552 U.S. 346, 349 (2008) ("The Act, which rests on Congress' authority under the Commerce Clause, supplies not simply a procedural framework applicable

in federal courts; it also calls for the application, in state as well as federal courts, of federal substantive law regarding arbitration."). *See also AT&T Mobility*, 563 U.S. at 339 ("Section 2 reflects a 'liberal federal policy favoring arbitration,' and the 'fundamental principle that arbitration is a matter of contract.') (citations omitted). The FAA generally applies to contracts of employment except those involving "transportation workers." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).

In enacting the FAA, Congress's primary concern was resolution of individual claims: "[T]he FAA's legislative history indicates that Congress was opening the door to a particular *kind* of non-judicial dispute resolution proceeding, and class arbitration is a different kind of proceeding—apart from its non-judicial nature, it has little in common with what Congress approved in 1925." David S. Clancy & Matthew M. K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 Bus. Law. 55, 57 (Nov. 2007). In this regard, congressional testimony by FAA proponents described arbitration as "face to face" in nature and prompt, inexpensive, and procedurally streamlined. *Id*. at 59-60. Arbitrations followed this individual model for most of their existence.

As such, employees and employers may agree to resolve wage-and-hour and other statute-based disputes in arbitration. In *Caley v. Gulfstream Aerospace Corp*., 428 F.3d 1359, 1367 (11th Cir. 2005), *cert. denied*, 547 U.S. 1128 (2006), the plaintiff asserted a Fair Labor Standards Act (FLSA) wage claim against her employer, arguing that a binding arbitration provision in her employment contract was

unconscionable because it precluded class actions. *Id.* The Eleventh Circuit rejected that argument, on the principle that "the fact that certain litigation devices may not be available in an arbitration is part and parcel of arbitration's ability to offer 'simplicity, informality, and expedition.' " *Id.* (citation omitted). Other courts came to the same conclusion.[2]

This Court has considered the interaction of the FAA with other federal statutes that provide substantive causes of action, and in each case, so long as aggrieved individuals can pursue their claims in arbitration, there is no diminution in the substantive rights offered by the statutes. *See Circuit City*, 532 U.S. at 123 (arbitration required of claims arising out of California's Fair Employment and Housing Act and state common law tort claims); *Gilmer*, 500 U.S. at 26 (federal age discrimination claim was arbitrable); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (antitrust claims arising

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[2] *See Slawienski v. Nephron Pharm. Corp.*, No. 1:10-CV-0460-JEC, 2010 WL 5186622, at *3 (N.D. Ga. Dec. 9, 2010) (plaintiffs pursuing FLSA claims in an attempt to collect allegedly unpaid overtime wages are bound by arbitration, notwithstanding argument that mandatory arbitration was an unfair labor practice under the NLRA); *Grabowski v. C. H. Robinson Co.*, 817 F. Supp. 2d 1159, 1169 (S.D. Cal. 2011) ("[T]he NLRA does not operate to invalidate or otherwise render unenforceable the arbitration provisions of the Bonus Incentive Agreements [containing a class-action waiver] signed by Plaintiff."); *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 377 (6th Cir. 2005) (statutory claims may be the subject of an arbitration agreement, including claims under the FLSA); *Winn v. Tenet Healthcare Corp.*, No. 2:10-CV-02140-JPM, 2011 WL 294407, at *2 & n.2 (W.D. Tenn. Jan. 27, 2011) (finding FLSA claim subject to arbitration and collecting cases reaching same conclusion); *Aracri v. Dillard's, Inc.*, No. 1:10-CV-253, 2011 WL 1388613, at *4 (S.D. Ohio Mar. 29, 2011) (same).

out of the Sherman Act are arbitrable). For example, in *Gilmer*, the Court considered whether a claim under the Age Discrimination in Employment Act of 1967 (ADEA) could be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application. 500 U.S. at 23. The Court upheld the arbitration agreement, finding that nothing in the text of the ADEA forbade resolution by arbitration, and that such resolution presented no inherent conflict with the purposes of the ADEA. *Id.* at 26.[3] *See also Bender v. A. G. Edwards & Sons, Inc.*, 971 F.2d 698, 700 (11th Cir. 1992) (sexual harassment claims under Title VII are arbitrable); *Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307, 1313 (11th Cir. 2002) ("Courts have consistently found that claims arising under federal statutes may be the subject of arbitration agreements and are enforceable under the FAA.").

This Court similarly held that arbitration contracts in the employment context present no conflict with the Sherman Act, the Securities Exchange Act of 1934, the Racketeering Influenced and Corrupt Organizations Act, and the Securities Act of 1933. The bottom line is that "[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Mitsubishi Motors*, 473 U.S. at 637 (addressing the Sherman Act); *see also Circuit City*, 532 U.S. at 123 ("[A]rbitration agreements can be enforced under the

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[3] *Cf. Bailey v. Ameriquest Mortg. Co.*, 346 F.3d 821, 823 (8th Cir. 2003) ("The [United States Supreme] Court upheld the arbitrability of federal age discrimination claims in *Gilmer* . . . and the age discrimination statute there at issue had borrowed its remedial provisions from the previously enacted FLSA.").

FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law; as we noted in *Gilmer*, 'by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.' " (citation omitted)); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 222 (1987) (arbitration upheld with regard to Securities Act of 1934 and RICO claims); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989) (upholding arbitration of claims arising under the Securities Act of 1933).

These decisions reflect the Court's consensus that individual resolution of claims in arbitration provides full relief to claimants. This premise follows from the general rule regarding collective adjudication: The substantive rights at issue in a lawsuit are not altered by aggregating claims, such as in class action litigation. *See*, *e.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) ("Rule 23's requirements must be interpreted in keeping with . . . the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right.' " (citation omitted)); *Microsoft Corp. v. Baker*, 582 U.S. ___, No. 15-457, slip op. at 4 (June 12, 2017) (Thomas, J., concurring in the judgment) (Class "allegations are simply the means of invoking a procedural mechanism that enables a plaintiff to litigate his individual claims on behalf of a class.") (citation omitted).

For example, the elements of a tort claim remain the same regardless of whether plaintiffs proceed

individually or jointly, in a unified trial or in separate bifurcated proceedings. *Alabama v. Blue Bird Body Co., Inc.*, 573 F.2d 309, 318 (5th Cir. 1978). Similarly, changing the rules for proof of damages depending on whether a lawsuit is brought on behalf of an individual plaintiff or aggregates many plaintiffs in a class action would improperly alter substantive rights. *Windham v. Am. Brands, Inc.*, 565 F.2d 59, 66 (4th Cir. 1977); *see also* James A. Henderson, Jr., *The Lawlessness of Aggregative Torts*, 34 Hofstra L. Rev. 329 (2005) ("[W]hile class actions sacrifice individual autonomy in collective claiming processes to achieve consistent outcomes and economies of scale, the underlying claims remain individual in nature.").

The FAA and the federal substantive law of arbitration protect individual rights to freely choose the method of dispute resolution, in the workplace and elsewhere. The NRLB's determination to eliminate this individual right cannot be countenanced.

II

INDIVIDUAL ARBITRATION OF WORKPLACE DISPUTES IS BOTH COMMON AND FAIR

A. Empirical Studies Show That Individual Arbitration Has Fair Results

Suspicion against an arbitral forum is unwarranted on the mere basis that arbitration operates under procedures that differ from court rules. *14 Penn Plaza*, 556 U.S. at 269 ("[T]he recognition that arbitration procedures are more streamlined than federal litigation is not a basis for finding the forum somehow inadequate; the relative informality of

arbitration is one of the chief reasons that parties select arbitration."). There is, moreover, no evidence that arbitration is worse than litigation at achieving just results. In fact, arbitrators decide cases much as judges do, and without the distortions common in cases tried to juries. Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. Disp. Res. 469, 480 n.86 (citing Christopher R. Drahozal, *A Behavioral Analysis of Private Judging*, 67 Law & Contemp. Probs. 105, 107 (2004)).[4]

Studies show that "plaintiffs do not fare significantly better in litigation, that arbitration provides a quicker resolution than litigation, and that available data do not indicate whether damages are fairer under either system." *Id.* at 480-81 n.87 (citing David Sherwyn, *et al.*, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1564 (2005)). Multiple studies have found that workers who pursue their claims in arbitration prevail more frequently than those who pursue their claims in court. *See* Rutledge, *Whither Arbitration?*, 6 Georgetown J. of L. and Pub. Poly at 551 ("arbitration generally results in higher win rates and higher awards for employees than litigation"); Michael H. LeRoy & Peter Feuille, *Happily Never After: When Final and Binding Arbitration Has No Fairy Tale Ending*, 13 Harv. Negot. L. Rev. 167, 184 (2008).

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[4] Arbitration is only one means of alternative dispute resolution. Mediation is used more frequently than arbitration, by a wide measure. Peter B. Rutledge, *Whither Arbitration*, 6 Geo. J. L. & Pub. Pol'y 549, 555 (2008) (citing multiple studies).

One study found that female employees prevailed in arbitration much more often than similarly situated women in litigation, though the amounts of the awards were lower. Michael H. LeRoy, *Getting Nothing for Something: When Women Prevail in Employment Arbitration Awards*, 16 Stan. L. & Pol'y Rev. 573, 589-90 (2005). Another study of construction industry arbitration found that "[w]hen it came to perceived fairness in decisionmaking, arbitrators generally compared favorably with judges and juries. On average, moreover, arbitration was a speedier means of dispute resolution than either jury trial or bench trial, and somewhat less costly overall." Thomas J. Stipanowich, *The Multi-Door Contract and Other Possibilities*, 13 Ohio St. J. on Disp. Resol. 303, 339 (1998) (internal citations omitted)). Thus, employees reasonably may prefer to resolve their claims in arbitration. *See* Michael Z. Green, *Tackling Employment Discrimination with ADR: Does Mediation Offer a Shield for the Haves or Real Opportunity for the Have-Nots?*, 26 Berkeley J. Emp. & Lab. L. 321, 327-30 (2005) (noting potential benefits for employees in pursuing arbitration given the harsh results presented by the court system).

When arbitration is equally likely to end in a just result as a lawsuit, it cannot be deemed "unfair" for employees to arbitrate employment disputes on an individual basis.[5] Therefore, it is not "unfair" for

[5] Class actions or arbitrations should not be presumed to offer any particular advantages either, given that many class actions result in a settlement of minimal value to class members, much of which is unclaimed given the need for class members to complete affirmative steps to obtain their remedy. *See* Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in* (continued...)

employees and employers to contract for that specific, individual method of arbitration.

B. An Employer's Requirement of Individual Arbitration of Workplace Disputes Should Be Viewed in the Same Manner as Any Other Potential Trade-Off

The FAA directs courts to place arbitration agreements on equal footing with other contracts, and it "does not require parties to arbitrate when they have not agreed to do so." *Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279, 293 (2002), a directive that applies with equal force to class arbitration. Meanwhile, people do not have any fundamental right to work for a specific employer. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976); *Kubik v. Scripps College*, 118 Cal. App. 3d 544, 549 (1981) (upholding mandatory retirement for university professors in part because "there is no fundamental right to work for a particular employer, public or private"). Thus, in looking for a job, applicants consider the various perceived benefits and burdens of each particular employment opportunity.

While the FAA demands that courts apply a neutral view of the availability of arbitral remedies, individual job applicants may perceive arbitration (or other alternative dispute resolution procedures) favorably or unfavorably. *See* Ellis B. Murov & Beverly A. Aloisio, *Arbitration of Employment Disputes Before and After* Circuit City, 17 Lab. Law. 327, 343 n.151

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[5] (...continued)
Antitrust and Consumer Class Action Litigation, 49 U.C.L.A. L. Rev. 991, 994 (2002).

(2001) (noting questions of bias where employers are repeat players in arbitration, and further noting that unions also are repeat players, representing workers under collective bargaining agreements). In this way, an arbitration requirement is no different than many other job requirements that affect individual preferences, and even legally protected rights.

When contemplating where to work, job-seekers contemplate all manner of trade-offs. Some employers offer shifts that start very early in the morning, on weekends, or extend quite late at night.[6] Employers may require workers to wear uniforms[7] or costumes,[8]

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[6] *See*, *e.g.*, *Turco v. Hoechst Celanese Chem. Group, Inc.*,101 F.3d 1090, 1091 (5th Cir. 1996) (Plaintiff "worked a rotating shift, as there was no 'day shift' for any process operator, and was routinely required to work through the night."); *Cooper Tire & Rubber Co. v. NLRB*, 957 F.2d 1245, 1248 n.4 (5th Cir. 1992) ("Employees are assigned to four groups. Each group is required to work seven consecutive days in each shift: 7 a.m. to 3 p.m. (day shift); 3 p.m. until 11 p.m. (afternoon shift); and 11 p.m. to 7 a.m. (night shift).").

[7] *See*, *e.g.*, *Commc'ns Workers of Am. v. Ector Cty. Hosp. Dist.*, 467 F.3d 427, 431 (5th Cir. 2006) ("Under the Hospital's established dress code policy, all employees were and are required to wear a uniform while on duty."); *Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299, 302 (5th Cir. 1998) (delivery truck company employee drivers are required to wear a uniform).

[8] *See*, *e.g.*, *Reich v. Circle C Invs., Inc.*, 998 F.2d 324, 330 (5th Cir. 1993) (noting that employee dancers, disc jockeys and waitresses wore "costumes and uniforms"); *Kutrom Corp. v. City of Center Line*, 979 F.2d 1171, 1171 (6th Cir. 1992) (health club masseuses required to wear "harem costumes"); *Hill v. Moskin Stores, Inc.*, 159 A.2d 299, 300 (Del. Super. Ct. 1960) (porter required to wear "snowman" costume and pass out candy to children outside the store).

refrain from certain personal adornments,[9] or stick to a script when speaking to customers.[10] Some employers demand a heavy travel schedule[11] or require workers to report for duty on holidays.[12] Potential

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[9] *See Cloutier v. Costco Wholesale Corp*., 390 F.3d 126, 135-36 (1st Cir. 2004), *cert. denied*, 545 U.S. 1131 (2005) (finding that it would constitute an undue hardship to require Costco to modify its no-facial-jewelry policy as a reasonable accommodation for an employee who claimed membership in the Church of Body Modification, given Costco's determination that facial piercings detract from the "neat, clean and professional image" that it aimed to cultivate).

[10] Scripted communications are standard practice in the telecommunications industry. *See* Patrick E. Michela, Comment, *"You May Have Already Won . . .": Telemarketing Fraud and the Need for a Federal Legislative Solution*, 21 Pepp. L. Rev. 553, 560 (1994) ("[T]elemarketers encourage, or sometimes require, fronters to read verbatim from a script provided by the telemarketer that is designed to induce the customer to buy the product or service being offered. A typical script allows the recipient of the phone call to ask questions and provide certain information to the salesperson. The script provides the fronter with different messages to read depending on the customer's responses to the questions posed by the fronter." (citations omitted)).

[11] *See Noble Drilling Co. v. Drake*, 795 F.2d 478, 480 (5th Cir. 1986) (plaintiff's job "entailed extensive travel by helicopter to offshore drilling rigs where he inspected the rigs, showed safety films and spoke to groups of employees on subjects related to safety."); *Johnson v. RGIS Inventory Specialists*, 554 F. Supp. 2d 693, 705 (E.D. Tex. 2007) ("extensive travel was 'a contemplated, normal occurrence' of Johnson's employment at RGIS because she accepted the job with the understanding that she would be working in diverse store locations.").

[12] These include such public service industries as police officers, *Perry v. Ft. Lauderdale*, 352 So. 2d 1194, 1195 (Fla. Dist. Ct. App.

(continued...)

workers weigh the trade-offs of various places of employment every day, accepting some offers and declining others.

A job applicant who disdains arbitration as a dispute resolution mechanism can look for work with employers who do not require arbitration as a condition of employment. *See National Union Fire Ins. Co. of Pittsburgh, Pennsylvania v. Guardtronic, Inc.*, 76 Ark. App. 313, 320 (2002) (party to a contract may voluntarily accept even non-negotiable provisions because the party remains free to take his business elsewhere); *Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc.*, 89 Cal. App. 4th 1042, 1056 (2001) (noting, in discussion of procedural unconscionability, that plaintiff could take his business elsewhere if he did not like the contract terms one vendor provided). Class action arbitration waivers have been adopted by some companies, but they are far from universal. *See* Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in The Contracts of Publicly Held Companies*, 56 DePaul L. Rev. 335, 348 (2007). Professors Eisenberg and Miller studied contracts made by 2,858 publicly held companies during a seven-month period in 2002, including 111 specifically identified "employment contracts." About 63% of the employment contracts did not mandate

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[12] (...continued)
1977); *City of McAllen v. Zellers*, 216 S.W.3d 913, 914 (Tex. 2007), firefighters, *Miami v. Gioia*, 215 So. 2d 780, 782 (Fla. 1968); *Perrodin v. City of Lafayette*, 696 So. 2d 223, 224 (La. 1997), and hospital workers, *Lester v. Sec'y of Veterans Affairs*, 514 F. Supp. 2d 866, 876 (W.D. La. 2007), as well as certain private sector industries, *NLRB v. Houston Chronicle Publ'g. Co.*, 300 F.2d 273, 277 (5th Cir. 1962) (some newspaper employees work on holidays).

arbitration. *Id.*[13] Another study of employment contracts for senior executives found about 58% did not mandate arbitration of workplace disputes. Stewart J. Schwab & Randall S. Thomas, *An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain For?*, 63 Wash. & Lee L. Rev. 231, 234 (2006).

Employers may require a particular type of dispute resolution, but as a practical matter, this is no different than other aspects of employment that are not open to negotiation. For example, employers may offer a particular 401(k) matching plan, or a specific type of health insurance. These aspects of employment are determined unilaterally by the employer and a potential employee who is looking for a particular benefits package may have to shop around or may simply conclude that the ideal package is unavailable in his market. In viewing the wide variety of trade-offs that exists in the acceptance of any job, an individual who highly values class-based dispute resolution, or who does not want to arbitrate workplace disputes at all should not apply to work for a company that requires it.

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[13] Eisenberg and Miller also learned that arbitration clauses were more common in contracts that also had a choice-of-law provision specifying use of California law. *Id.* at 358-61. *See also* Geoffrey P. Miller, *Bargains Bicoastal: New Light on Contract Theory*, 31 Cardozo L. Rev. 1475, 1522 (2010) (comparing New York's contract law approach to arbitration as "formalistic, literalistic, nonjudgmental, and deferential to the freedom of parties to bargain for mutual advantage" with California courts' approach that elevates judge's perceptions of "context, morality, and fairness" over "the written agreement of the parties.").

C. In Stark Contrast to Individual Arbitration, Class Arbitration Creates More Problems than it Solves

Class arbitration simply did not exist until very recently, *AT&T Mobility*, 563 U.S. at 348, and is generally considered an awkward hybrid procedure. "Courts addressing the concept of class actions in arbitration have largely contemplated a continued, significant judicial role in overseeing key aspects of the class arbitration under a hybrid approach, in order to protect the rights of the absent members." *See* Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 Wm. & Mary L. Rev. 1711, 1764 n.224 (2006) (acknowledging a hybrid class arbitration procedure whereby a court certifies a class and then orders an arbitration to proceed on a class-wide basis, citing *Izzi v. Mesquite Country Club*, 186 Cal. App. 3d 1309 (1986)); *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860 (Pa. Super. Ct. 1991) ("[W]e find that this class action, if properly certified, may continue through arbitration on a class-wide basis. We therefore remand to the trial court for class certification proceedings. After this ruling, the trial court must compel arbitration."). In response to this new hybrid procedure, this Court issued important guidance to lower tribunals as to how class arbitration procedures should be viewed in relation to traditional, individual arbitration. Where parties have contracted for individual arbitration, imposing class arbitration effects a "fundamental change" to the parties' agreement. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 686 (2010). Class arbitration "no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes

between hundreds or perhaps even thousands of parties," including absent parties. *Id.* The parties' expectations about privacy and confidentiality in individual arbitration are also "potentially frustrat[ed]" when disputes are litigated on a class-wide basis. *Id.* Perhaps most critically, class arbitration drastically raises the stakes "even though the scope of judicial review is much more limited." *Id.*; *see also* Linsday R. Androski, *A Contested Merger: The Intersection of Class Actions and Mandatory Arbitration Clauses*, 2003 U. Chi. Legal F. 631, 649 (class procedure "subjects arbitration to the very judicial burden that the contracting parties sought to avoid through arbitration").

In *AT&T Mobility*, 563 U.S. at 344, the Court held that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." This Court distinguished class arbitration from individual arbitration on both structural and policy grounds. As a structural matter,

> [c]lasswide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties.

Id. at 348. The Court then identified three policy reasons why class arbitration should not be imposed

upon non-consenting parties, and why class arbitration in general is an inferior method of dispute resolution than individual arbitration: First, class arbitration is "slower, more costly, and more likely to generate procedural morass." *Id.* Second, class arbitration *requires* procedural formality if members of the class are to be bound by the result. These procedural formalities would have to include requirements that "class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class." *Id.* at 349 (citing *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 811-12 (1985)). Third, class arbitration greatly increases risks to defendants because the absence of multilayered review makes it more likely that errors will go uncorrected. *AT&T Mobility*, 563 U.S. at 350. That is, if an arbitrator errs in the resolution of an individual employee's claim, defendant companies can accept that potential cost; but if the error occurs in a case involving potentially tens of thousands of employees with aggregated claims, the defendant companies will be pressured into settling questionable claims rather than bet the company on the outcome of the essentially unreviewable arbitration. *Id.* (citing *Kohen v. Pac. Inv. Mgmt. Co. LLC & PIMCO Funds*, 571 F.3d 672, 677-78 (7th Cir. 2009)) (describing the risk of "in terrorem" settlements in class actions).

Parties to a contract may reasonably decide to avoid these pitfalls in favor of individual arbitration, and the courts should respect that freedom of choice.

III

THE NLRB'S POLICY OF NONACQUIESCENCE UNDERMINES OUR CONSTITUTIONAL STRUCTURE

This Court can determine that arbitration contracts do not implicate, much less violate, the "concerted action" provision of the NLRA without determining whether agency policies of nonacquiescence are constitutional in all their varieties. *See* Dan T. Coenen, *The Constitutional Case Against Intracircuit Nonacquiescence*, 75 Minn. L. Rev. 1339, 1351 (1991) (intracircuit nonacquiescence vulnerable to separation of powers, due process, and equal protection challenges). However, the NLRB's persistent invocation of its policy of nonacquiescence provides an important context to the question directly presented in this case.

Nonacquiescence refers to the "selective refusal of administrative agencies to conduct their internal proceedings consistently with adverse rulings of the courts of appeals." Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679, 681 (1989). The NLRB, "more than most [agencies], has openly asserted the authority to decline to acquiesce." *Id.* at 706. The Board is committed to pressing its own view of the law until the Board itself or this Court overrules it; it claims that piecemeal acceptance of particular circuits' interpretations of the law would frustrate its development of a national labor policy. *Id.* at 706 (citing *Insurance Agents' Int'l Union*, 119 N.L.R.B. 768, 773 (1957)). The Board's sole nod to the rule of law established by federal courts is with regard to an

appellate court's "treatment of a particular case on remand." *Id.* at 706 n.148.

Decisions by federal courts hold no sway over the NLRB and its administrative law judges (ALJs) in light of the NLRB's "policy of non-acquiescence" that instructs ALJs to follow Board precedent rather than the precedent of courts of appeals. *See, e.g.*, *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1018 (5th Cir. 2015) ("We do not celebrate the Board's failure to follow our *D.R. Horton* reasoning, but neither do we condemn its nonacquiescence."); *Sheet Metal Workers' Int'l Ass'n, Local 15, AFL-CIO v. NLRB*, 491 F.3d 429, 435 (D.C. Cir. 2007) (NLRB refuses even to recognize the existence of circuit court decisions contrary to its own policies.).

Other agencies may invoke a policy of nonacquiescence as well. For example, like the NLRA, the Immigration and Naturalization Act provides for appellate review in such a way that Immigration Judges cannot know for certain which court of appeals will review their decisions. *Rosendo-Ramirez v. INS*, 32 F.3d 1085, 1093-94 (7th Cir. 1994). In *Rosendo-Ramirez*, the Immigration and Naturalization Service (INS), urged the Seventh Circuit to apply the law of the Fifth Circuit, which adopted the INS's position, while disregarding the Seventh Circuit's own decision in *Leal-Rodriguez v. INS*, 990 F.2d 939 (7th Cir. 1993), which rejected the INS's position. The *Rosendo-Ramirez* court interpreted INS's argument as "an inartful (or maybe in fact cleverly disguised) attempt at nonacquiescence to [the] rule in *Leal-Rodriguez*." 32 F.3d at 1093. The court declined to adopt the INS's proposal.

District of Columbia Circuit Chief Judge Abner Mikva decried the United States Railroad Retirement Board's policy of nonacquiescence that led it to deny benefits to the spouses and widows of railroad workers even after multiple appellate courts held that denial to be unlawful. *Johnson v. U.S. R.R. Retirement Bd.*, 969 F.2d 1082, 1083 (D.C. Cir. 1992) ("In a bold challenge to judicial authority, the United States Railroad Retirement Board argues that it is free, when it chooses, to ignore the decisions of United States courts of appeals."). The Retirement Board declined to petition this Court for review of adverse circuit court rulings while continuing to apply the rejected interpretation of its controlling statute. *Id.* at 1087. *See also id.* at 1092 ("When an agency honestly believes a circuit court has misinterpreted the law, there are two places it can go to correct the error: Congress or the Supreme Court. The Railroad Retirement Board has done neither."). The Board—and the decision below (Pet. App. 7a)—applied *Chevron* deference[14] to the agency interpretation. The *Johnson* court held that *Chevron* deference does not apply because the Board was "not interpreting its governing statute alone, but rather the relationship between" the governing statute and another federal statute (the Social Security Act). *Id.* at 1088. Moreover, a policy of nonacquiescence creates an inherently non-uniform application of the law because it "results in very different treatment for those who seek and who do not seek judicial review." *Id.* at 1092. *See also Ruppert v. Bowen*, 871 F.2d 1172, 1178 (2d Cir. 1989) (noting the Social Security Administration's "history of uncooperativeness" in its

[14] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

failure to follow circuit court decisions); *cf. Atchison, Topeka and Santa Fe Ry. Co. v. Peña*, 44 F.3d 437, 446 (7th Cir. 1994) (en banc) (without Supreme Court review, "nonacquiescence may yield entrenched differences among the circuits") (Easterbrook, J., concurring).

The Environmental Protection Agency (EPA) also issued a directive adhering to a judicially-invalidated interpretation of the Clean Air Act. *Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, 752 F.3d 999 (D.C. Cir. 2014). The case involved an EPA regulation broadly defining what constitutes a "major" source of pollution. *Id.* at 1002. The Sixth Circuit, in *Summit Petroleum Corp. v. EPA*, 690 F.3d 733, 740-41 (6th Cir. 2012), held that the EPA's definition was "arbitrary and capricious" and then denied the EPA's petition for rehearing. The EPA continued to apply its own definition everywhere outside the Sixth Circuit. *Nat'l Envtl. Dev. Ass'n's Clean Air Project*, 752 F.3d at 1003. The D.C. Circuit found "no merit in EPA's arguments" and struck down the directive to ignore *Summit*. *Id.* at 1004, 1011 ("The doctrine of intercircuit nonaquiescence does not allow EPA to ignore the plain language of its own regulations" that require uniformity.) *See also id.* at 1010 (EPA could have petitioned this Court to review *Summit* but failed to do so). EPA responded to the D.C. Circuit opinion by amending its regulations to provide an exception to the uniformity requirement and "fully accommodate intercircuit nonacquiescence." *Amendments to Regional Consistency Regulations*, 81 F.R. 51102-01, 51103, 2016 WL 4089445 (Aug. 3, 2016).

The NRLB used the nonacquiescence doctrine in this case to bide its time until it could convince just one

federal court to adopt its position, even after multiple other courts that declined to do so. It steadfastly refused to petition this Court to answer the question of whether the NRLA forbids class action waivers in arbitration contracts until the Epic Systems and Ernst & Young petitions forced its hand. The Court now has the opportunity to opine on the legitimacy of the Board's practice of rejecting federal court decisions in favor of its own policies as well as holding that employers and employees may agree to individual arbitral resolution of workplace disputes without running afoul of the NRLA.

CONCLUSION

The National Labor Relations Board "has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives." *S. S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942). The Federal Arbitration Act's protection of individual freedom of choice when it comes to contracting for arbitral resolution of disputes is just such an important Congressional objective. The Court should reverse the decision below to uphold workers' and employers' freedom of contract.

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Respectfully submitted,

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