**Nos. 16-285, 16-300, 16-307**

# In the Supreme Court of the United States

EPIC SYSTEMS CORP.,
*Petitioner*,
v.
JACOB LEWIS,
*Respondent.*

ERNST & YOUNG, et al.,
*Petitioners*,
v.
STEPHEN MORRIS, et al.,
*Respondents*.

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, Seventh and Ninth Circuits

## BRIEF OF *AMICI CURIAE* MORTGAGE BANKERS ASSOCIATION AND STATE MORTGAGE LENDING ASSOCIATIONS SUPPORTING PETITIONERS AND REVERSAL IN NOS. 16-285 AND 16-300, AND SUPPORTING RESPONDENTS AND AFFIRMANCE IN NO. 16-307

[Amici State Associations Listed Inside Front Cover]

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NEW YORK MORTGAGE BANKERS ASSOCIATION,
OHIO MORTGAGE BANKERS ASSOCIATION, AND
TEXAS MORTGAGE BANKERS ASSOCIATION

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## INTEREST OF *AMICI CURIAE*[1]

*Amici* represent the residential real estate finance industry in their respective states and across the nation. *Amici*'s members include mortgage companies, mortgage brokers, commercial banks, thrifts, REITs, life insurance companies, Wall Street conduits and others in the mortgage lending field. *Amici* and their members seek to ensure the continued strength of the nation's residential real estate markets, to expand home ownership, and to extend access to affordable housing to all Americans.

*Amici,* their members, their members' employees, and home buyers generally, have a strong interest in controlling the costs and risks associated with class and collective litigation. Many of *amici*'s members are, or do significant business with, small, independent mortgage companies that typically focus exclusively on residential mortgage lending. In recent years, first-time home buyers have come to depend increasingly on such independent mortgage companies to finance the purchase of their homes.

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[1] No counsel for any party authored this brief in whole or in part, and no counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae*, their respective members and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3(a), counsel for the parties have consented to the filing of the brief, and writings expressing such consent have been filed with the Clerk of the Court.

Indeed, in 2015, independent mortgage companies accounted for 50 percent of first-lien home purchase loans, up from 47 percent in 2014.[2]

Most independent mortgage companies are "owned and operated by a single individual or small number of owners whose personal net worth is fully invested in the company."[3] Many have fewer than 100 employees.[4] However, while the number of employees on the payroll at a typical independent mortgage company may be small, class and collective actions frequently include both current and former employees and the number of claimants in such an action is often multiples of the current employee pool. This fact, combined with the potential for added penalties and damage multipliers, such as the provision for liquidated damages under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 216(b), means that a class or collective action can easily threaten the existence of many independent mortgage companies. Generally, low- and moderate-income families benefit from increased availability of

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[2] Board of Governors of the Federal Reserve System, "Residential Mortgage Lending from 2004 to 2015: Evidence from the Home Mortgage Disclosure Act Data," FED. RESERVE BULL. (NOV. 2016), *available at* https://www.federalreserve.gov/pubs/bulletin/2016/pdf/2015_HMDA.pdf.

[3] Mortgage Bankers Association, "IMB Fact Sheet: The Resurgent Role of the Independent Mortgage Bank," *available at* https://www.mba.org/Documents/Comment%20Letters/14524_GAR_IMB_Flyer.pdf.

[4] *Id.*

credit, and, by the same token, such families would be harmed if independent mortgage companies were to go out of business.[5] These independent companies are a major part of the Nation's housing finance system and are essential to a robust, competitive and affordable mortgage market for consumers.[6]

Therefore, *amici* support the enforceability of class and collective action waivers of the sort that the Seventh and Ninth Circuits, and the National Labor Relations Board, erroneously have concluded constitute an unfair labor practice under section 8 of the National Labor Relations Act (NLRA), 29 U.S.C. § 158.

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[5] Many low- and moderate-income first-time home buyers purchase their homes with loans insured by the Federal Housing Administration (FHA). Larger lenders have significantly reduced their share of FHA-insured loans in recent years, so these borrowers heavily depend on independent mortgage companies for their loans. *See*, *e.g.*, Diana Olick, *Chase Mortgage CEO Red Flags FHA Loans*, CNBC (Sept. 21, 2015), http://www.cnbc.com/2015/09/21/chase-mortgage-ceo-red-flags-fha-loans.html; Stephen Gandel, *Is JPMorgan Really Ditching Government Homeownership Programs?*, FORTUNE (JUL 17, 2014), http://fortune.com/2014/07/17/jpmorgan-fha-lending/.

[6] *See, e.g.*, "Concentration in Mortgage Lending, Refinancing Activity and Mortgage Rates," NBER Working Paper 19156, June 2013, *available at* www.nber.org/papers/w19156 (presenting evidence that interest rates on residential mortgage loans in more concentrated mortgage lending markets are less responsive to reductions in lenders' production costs, suggesting that cost savings are passed through to borrowers less effectively in such markets); *see also infra* note 10.

## SUMMARY OF THE ARGUMENT

The Fifth Circuit correctly held that class and collective action waivers in employment contracts do not violate employees' rights under the NLRA. The decisions of the Seventh and Ninth Circuits to the contrary are not well-founded.

The dispositive question in these cases is whether a class or collective action waiver in an employment contract inherently "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in section [7]" of the NLRA. 29 U.S.C. § 158(a)(1). The answer to that question is no. The proposition that employees have a right under section 7 to engage in class or collective litigation is dubious at best, but even assuming section 7 applies to such activity, an employee's knowing and voluntary waiver of these procedures as a condition of employment does not automatically become an unfair labor practice. "[I]t is only when the interference with § 7 rights outweighs the business justification for the employer's action that § 8(a)(1) is violated." *Textile Workers Union of Am. v. Darlington Mfg. Co.*, 380 U.S. 263, 269 (1965). There are ample business justifications for class and collective action waivers, particularly in conjunction with mandatory arbitration provisions, all of which have been thoroughly and convincingly articulated in decisions of this Court. Moreover, there are many good reasons why employees themselves rationally can, and do, agree to such waivers in their employment contracts. Therefore, the conclusion of the Seventh and Ninth Circuits, and the Board, that a class or collective action waiver automatically is an

unfair labor practice under section 8(a)(1) of the NLRA cannot be correct.

While the true crux of these cases is section 8(a)(1), the Seventh and Ninth Circuits, and the Board, mistakenly view the dispositive issue as whether class and collective litigation activity is "concerted activity" under section 7 of the NLRA. These tribunals erroneously reason that class and collective litigation are "concerted activities," and, therefore, any waiver of such activities by an employee must be unenforceable and, if unenforceable, then an unfair labor practice. No decision of this Court supports this conclusion. The two decisions relied on by all three of these tribunals, *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940), and *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944), address the *remedial* powers of the Board, *given* either that an unfair labor practice has been found or that an individual contract conflicts with a collectively bargained agreement. These decisions do not address the logically prior question of whether a waiver of activity under section 7 *is* an unfair labor practice that would trigger the Board's remedial power, and they cannot be cited for the proposition that any such waiver is unenforceable.

Lastly, though unnecessary for the resolution of these cases, treating class and collective litigation as "concerted activity" is not a reasonable construction of section 7, and the Fifth Circuit was right to reject it. Class litigation under Rule 23 is in fact the opposite of concerted activity. And while collective actions arguably are "concerted," this Court's decisions make clear that there can be no

substantive right to invoke such procedures that could be protected by section 7.

## ARGUMENT

### I. CLASS AND COLLECTIVE ACTION WAIVERS DO NOT INTERFERE WITH, RESTRAIN OR COERCE EMPLOYEES IN THE EXERCISE OF THEIR RIGHTS UNDER SECTION 7 OF THE NLRA.

The decisions of the Seventh and Ninth Circuits, and the Board decision that the Fifth Circuit properly refused to enforce, all rest on the premise that "contracts between employers and individual employees that stipulate away Section 7 rights necessarily interfere with employees' exercise of those rights in violation of Section 8." *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1155 (7th Cir. 2016); *see also Morris v. Ernst & Young, LLP*, 834 F.3d 975, 983 (9th Cir. 2016) (following *Lewis*); *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72 at 2 (2014) (concluding that "Respondent has violated Section 8(a)(1) of the [NLRA]" simply by "requiring its employees to agree to resolve all employment-related claims through individual arbitration"); *see also D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2280 (2012) (reasoning that if a workplace "rule explicitly restricts activities protected by Section 7," "the rule is unlawful"). Thus, these tribunals all assume that the analysis in these cases begins and ends with whether class and collective litigation are "concerted activities" under section 7. The Court should reject this approach.

Assuming *arguendo* that class and collective litigation are, or can be, "concerted activities" as that term is used in section 7, it does not follow that a class or collective litigation waiver automatically is an unfair labor practice. The controlling test is whether "the interference with § 7 rights outweighs the business justification for the employer's action." *Textile Workers*, 380 U.S. at 269; *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 339 (1965) (Goldberg, J. concurring in the result) ("[T]he correct test for determining whether § 8(a)(1) has been violated in cases not involving an employer's antiunion motive is whether the business justification for the employer's action outweighs the interference with § 7 rights involved.").

There are many reasons why both employers and employees agree to waive recourse to class or collective litigation procedures.[7] There is nothing in the record in any of these cases to suggest that any degree of "interference," however minimal, in employees' exercise of concerted activity under section 7 outweighs the well-settled justifications for such waivers.

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[7] Such waivers typically occur in the context of mandatory individual arbitration clauses. However, the justifications for class and collective action waivers discussed in this section do not depend on being embedded in an agreement to arbitrate. The same interests in controlling risks, reducing agency costs and avoiding estoppel animate any agreement to forego class or collective procedures, whether or not the parties also agree to an arbitral forum for adjudication of an individual claim.

First, there is the obvious justification that such waivers allow the parties to avoid the potentially crippling costs of class and collective litigation. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001). These costs are further enhanced in the employment context by statutes that allow for a damages multiplier. One example is the FLSA, which provides not only for an award of attorney's fees but an additional award of "liquidated damages" equal to the amount of actual damages recovered. 29 U.S.C. § 216(b). While such liquidated damages are also available to a single employee proceeding individually, the exposure to the employer is far greater when magnified across its current and former workforce. For an employer "owned and operated by a single individual or small number of owners whose personal net worth is fully invested in the company,"[8] such costs can easily constitute an existential threat. "Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). There

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[8] IMB Fact Sheet, *supra* note 3. The Department of Labor has concluded that loan officers cannot be treated as exempt under the administrative exemption of the FLSA. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. __ (2015) (Slip Op. at 5). Moreover, the SAFE Act limits the ability of mortgage companies to utilize independent contractors for loan processing and underwriting, *see* 12 U.S.C. § 5103(b)(2). Class and collective action waivers are, in practice, the only means available to lessen the risks of employee litigation. If such waivers are unenforceable, many independent mortgage companies may simply choose to exit the market, or will be forced to do so.

is ample justification for class and collective action waivers based on these considerations of cost and risk avoidance alone. No one benefits from liability exposure so extreme that operating a business becomes unviable. Certainly, employees suffer. And in the case of the real estate finance industry, which *Amici* represent, home mortgage consumers are harmed as well.[9]

Second, far from unilaterally benefiting only the employer, an employer actually *loses* one of the central benefits of class litigation when it agrees to a waiver with employees, namely, the avoidance of multiple inconsistent judgments. *See* Jaime Dodge, *Privatizing Mass Settlement*, 90 NOTRE DAME L. REV. 335, 392 (2014). Employees agreeing to such a waiver, on the other hand, avoid the risk of estoppel. Indeed, the employer, having agreed to waive class and collective litigation, may well be exposed to offensive collateral estoppel from other claimants if it

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[9] Numerous studies have analyzed the increased prices and other adverse effects of a reduction of lenders and lending capital on home mortgage borrowers. *See, e.g.,* Joshua Harris et al., "Concentration in US Mortgage Loans and the Impact of the Great Recession," University of Central Florida College of Business Administration, Working Paper 1507, available at http://realestateucf.com/wp-content/uploads/2015/10/wp-1507.pdf; Jason Allen et al., *The Effect of Mergers in Search Markets*: *Evidence from the Canadian Mortgage Industry*, 104 AM. ECON. REV. 3365 (2013); Herbert Baer & Larry R. Mote, *The Effects of Nationwide Banking on Concentration*: *Evidence from Abroad*, 9 ECON. PERSPECTIVES 3 (1985); Michael L. Marlow, *Bank Structure and Mortgage Rates*: *Implications for Interstate Banking*, 34 J. ECON. & BUS. 135 (1982).

unsuccessfully litigates an issue in an individual proceeding with any one employee, yet the employer cannot invoke defensive collateral estoppel against such other employees if it is successful. The benefits of this asymmetry inure only to employees, and may prove quite valuable in cases, such as those involving alleged discrimination, that in practice can be quite difficult to prove. *See, e.g.,* Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 127 (2009) ("Over the period of 1979-2006 in federal court, the plaintiff win rate [in employment discrimination] cases (15%) was much lower than for [other] cases (51%)."). Another employee, in a different proceeding, involving a different arbitrator, or a different judge, a different lawyer and better developed evidence, may well succeed in proving a claim where another employee failed. The Seventh and Ninth Circuits, and the Board, simply overlook this asymmetrical benefit that class and collective action waivers provide to employees.

Third, the costs of class litigation go beyond increased litigation expense and liability exposure for the employer. Such costs include agency costs to the claimants who necessarily cede control over the presentation of their claims to a representative who may be overincentivized to litigate issues unique to his or her own individual claim, or simply ill-positioned to litigate the case successfully. *See generally* Samuel Issacharoff, *The Governance Problem in Aggregate Litigation*, 81 FORDHAM L. REV. 3165 (2013); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action*

*and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991). While absent class members can, of course, opt out of certain classes, such an opportunity may come years after the litigation is filed, after the issues and evidence have been shaped by others. Moreover, absent class members have no right to opt out, or indeed even to be notified, of classes seeking primarily injunctive relief. *See* FED. R. CIV. P. 23(b)(2).[10] There is no reason why employees cannot rationally choose to avoid these potential agency costs by agreeing at the outset of their employment that any claim will be brought only in an individual capacity.

Neither the NLRB in *Murphy Oil*, nor the plaintiffs in *Morris* and *Lewis*, cited any evidence to show that any "interference" with employees' section 7 rights as a result of class and collective action waivers outweighs any, let alone all, of these justifications. Thus, there is no basis in the record of these cases for the conclusion that the employers committed an unfair labor practice merely by including such a waiver in their employment contracts.

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[10] For example, an individual employee may seek injunctive relief on behalf of a class pursuant to Federal Rule 23(b)(2) in civil actions under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-5(g); *Chicago Teachers Union, Local No. 1 v. Bd. of Educ.*, 797 F.3d 426, 441-42 (7th Cir. 2015).

## II. THIS COURT HAS NEVER SUGGESTED THAT ALL CONTRACTUAL WAIVERS OF CONCERTED ACTIVITY UNDER SECTION 7 ARE INVALID.

In addition to incorrectly supposing that any contract term waiving concerted activity under section 7 is automatically an unfair labor practice, the Seventh and Ninth Circuits, and the Board, also erroneously concluded that any waiver of concerted activity must be "invalid" or "unenforceable." *See Lewis*, 823 F.3d at 1155 ("Contracts that stipulate away employees' Section 7 rights . . . are unenforceable."); *Morris*, 834 F.3d at 983 (following *Lewis*); *Murphy Oil*, 361 N.L.R.B. No. 72 at 8 ("Because mandatory arbitration agreements . . . purport to extinguish a substantive right to engage in concerted activity under the NLRA, they are invalid.").

These tribunals cite as support for this proposition only two decisions of this Court, *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940), and *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944). Neither decision holds that any and all waivers of concerted activity under section 7 are invalid.

In *National Licorice*, the employer refused to bargain collectively with the union a majority of its employees had designated. When the workers went out on strike, the employer arranged for the creation of a friendly committee of employees with which it was willing to negotiate. 309 U.S. at 352-53. This committee, on the employer's instructions, convinced employees to sign individual contracts that

"relinquished the right to strike, the right to demand a closed shop or signed agreement with any union," as well as the right to arbitrate an employee's discharge. *Id.* at 354-55. This Court upheld the Board's determination that the employer had committed unfair labor practices because the contracts "were not only procured through the mediation of a company-dominated labor union, but they were the means to eliminate the Union as the collective bargaining agency of its employees." *Id.* at 539-60 (internal quotation marks omitted). This Court then concluded that "[*s*]*ince the contracts were the fruits of unfair labor practices*, stipulated for the renunciation by the employees of rights guaranteed by the [NLRA], and were a continuing means of thwarting the policy of the Act, they were appropriate subjects for the affirmative remedial action of the Board[.]" *Id.* at 361 (emphasis added).

*National Licorice* does not support the conclusion that a contractual provision is "invalid" or "unenforceable" merely because it involves a waiver of a particular type of "concerted activity" as that term is used in section 7. Instead, *National Licorice* recognizes that the Board's remedial power to declare a contract invalid can be exercised only "in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of [a] violation where those consequences are of a kind to thwart the purposes of the Act." *Id.* (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 188, 236 (1938)). Therefore, to cite *National Licorice* for the proposition that a class or collective action waiver in an employment contract is automatically invalid merely begs the question that such waivers are, in

fact, an unfair labor practice that should trigger remedial action by the Board. Such an argument does not demonstrate, but rather assumes, the very conclusion at issue in these cases.

*J.I. Case* likewise does not support the conclusion that any and all waivers of concerted activity under section 7 are invalid or unenforceable. That decision concludes that if "a collective trade agreement is to serve the purpose contemplated by the [NLRA], [an] individual contract cannot be effective as a waiver of any benefit to which the employee would otherwise be entitled under the trade agreement." 321 U.S. at 338. No one has argued that any class or collective action waiver at issue in these cases seeks to waive the terms of a collectively-bargained trade agreement. *J.I. Case* is therefore inapplicable.

Thus, neither *National Licorice* nor *J.I. Case* supports the needed conclusion that any and all waivers of concerted activity under section 7 are invalid. Certainly nothing in these decisions suggests that a class or collective action waiver should be rendered invalid merely because it is deemed a waiver of "concerted activity."

Indeed, there is no reason why a putative right under section 7 to engage in class or collective litigation should be any less waivable than the right to litigate collectively in the FLSA or the Age Discrimination in Employment Act of 1967 (ADEA). This Court made clear more than twenty-five years ago in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), that the collective litigation procedures in the ADEA, incorporated from the

FLSA, *see* 29 U.S.C. § 626(b), *can* be waived in favor of individual arbitration. *See* 500 U.S. at 29 ("[I]f Congress intended the substantive protection afforded [by the ADEA] to include protection against waiver of the right to a judicial forum, that intention [would be] deducible from the text or legislative history" (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). If the explicit provision "for the possibility of bringing a collective action" in the ADEA (and, by extension, the FLSA) is waivable, *Gilmer*, 500 U.S. at 32 (quoting *Nicholson v. CPC Int'l Inc.*, 877 F.2d 221, 241 (3d Cir. 1989) (Becker, J., dissenting)), then *a fortiori* there can be no nonwaivable right to engage in such litigation under section 7, which does not mention class or collective litigation (or, in fact, any type of litigation) at all.

The NLRB reasoned that the NLRA is somehow "*sui generis*" and confers a "substantive right to pursue . . . claims concertedly," while the FLSA and the ADEA "establish purely individual rights." *Murphy Oil*, 361 N.L.R.B. No. 72 at 8. This is incorrect. The NLRA cannot be the source of a purported substantive, nonwaivable right to litigate collectively because this Court held in *14 Penn Plaza LLC v. Pyett*, that "[t]he NLRA provide[s] [a] Union and [an employer] with *statutory authority* to collectively bargain for" individual dispute resolution procedures. 556 U.S. 247, 260 (2009) (emphasis added). The Court similarly concluded in *Emporium Capwell Co. v. Western Addition Community Organization* that the employer did not commit an unfair labor practice when it terminated employees

for refusing to utilize grievance procedures they alleged would address only "individual inequities" and would be "inadequate to handle a systemic grievance." 420 U.S. 50, 54-55 (1975).

If, as these decisions show, the NLRA does not prohibit a collectively-bargained agreement from waiving class or collective litigation procedures, the result should be precisely the same for individual employment contracts, contrary to the decisions at issue here. Indeed, *Gilmer* itself indicates that a waiver of class or collective litigation should be no less effective in an individual contract than it is in a collectively-bargained contract.

In sum, the consistent thrust of this Court's decisions is that the parties to an employment contract, whether in an individual or a union-represented setting, can waive resort to class and collective litigation procedures. Nothing in the NLRA says otherwise.

## III. CLASS AND COLLECTIVE LITIGATION ARE NOT "CONCERTED ACTIVITY" UNDER SECTION 7.

Lastly, the Seventh and Ninth Circuits and the Board all incorrectly concluded that class and collective litigation are "concerted activity" under section 7. The sole decision of this Court these tribunals cited for this conclusion is *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978). *See Lewis*, 823 F.3d at 1152; *Morris*, 834 F.3d at 981; *Murphy Oil*, 361 N.L.R.B. No. 72 at 1 n.4. Once again, this decision does not support the asserted conclusion.

First, *Eastex* addressed whether an employer committed an unfair labor practice when it prohibited the "distribut[ion] [of] a union newsletter in nonworking areas of [the employer's] property during nonworking time." 437 U.S. at 558. That question obviously has no application here.

Second, the Court merely noted in passing that "it has been held that the 'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums," and cited a string of decisions by the Board in a footnote. 437 U.S. at 565-66 & n.15. The Court then immediately commented that "[*w*]*e do not address here the question of what may constitute 'concerted' activities in this context*." *Id.* at 566 n.15 (emphasis added).

Third, far from endorsing the notion that employees have an immutable right to "resort to" class or collective litigation procedures in a "judicial forum," the Court explicitly referenced protection "*from retaliation*" for such litigation activity. Thus, what this Court recognized in *Eastex*, at most, is that an employer violates the NLRA by *retaliating* against employees for engaging in litigation to "improve working conditions." Nothing in *Eastex* suggests that an agreement to waive class or collective litigation is itself a violation of the NLRA.

In addition to lacking support in this Court's decisions, treating class or collective litigation as "concerted activity" is in any event not a reasonable construction of section 7.

First, as to class litigation under Federal Rule of Civil Procedure 23, such litigation is not "concerted activity." Indeed, it could fairly be characterized as the opposite of concerted activity. In class action litigation, the named plaintiff represents nonparticipating parties who are, by definition, absent from the case. Moreover, the suggestion that the substantive right of "concerted activity" under Section 7 somehow encompasses a right to utilize the procedural mechanism of Rule 23 is, at best, quite puzzling. Does the right of "concerted activity" mean that the named plaintiff and unnamed putative class members have the right to *seek* class treatment, or that they in fact have a substantive right to have the motion for class certification granted? The latter cannot be correct, and would foreclose the employer from opposing class certification where there are legitimate grounds to do so. The former also cannot be right. Prior to class certification, the named plaintiff is really only proceeding in an individual capacity. Thus, the position under review amounts to saying that an individual named plaintiff has the substantive right to *ask* a court to confer on him or her the ability to litigate in a representative capacity. Again, that is a very odd notion of "concerted activity," and not within the plain meaning of the phrase.

Second, as to collective litigation procedures such as those available under the FLSA or the ADEA, such litigation arguably *is* "concerted." However, construing such litigation as section 7 "concerted activity" would, as in the case of class litigation under Rule 23, convert a procedural mechanism into a substantive right. This Court has made clear that

"a party does not forego . . . substantive rights" by agreeing to an individual process for adjudicating disputes. *Gilmer*, 500 U.S. at 26. Thus, there can be no substantive right to invoke collective litigation procedures and, by definition, no such entitlement in the substantive rights set forth under section 7.

Nor is there any reason to treat class and collective litigation as "concerted activity" out of deference to the Board. The Board first announced this interpretation of section 7 in 2012, *see D.R. Horton*, 357 N.L.R.B. at 2277, after decades of jurisprudence in this Court, in the Courts of Appeals, and in the Board's own decisions, that contained no hint of such a construction. The Board's interpretation was properly rejected by the Fifth Circuit in *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). Nevertheless, the Board adhered to its interpretation in the case under review from the Fifth Circuit here. Effectively, the Board seeks to undo not only the Fifth Circuit's prior ruling in *D.R. Horton* but this Court's numerous decisions upholding individual arbitration clauses and grievance procedures by announcing a newly invented construction of section 7 and then claiming that this construction cannot be challenged out of deference to its authority to construe the NLRA. The Board is not entitled to such deference in these circumstances.

## CONCLUSION

For all these reasons, the Fifth Circuit should be affirmed and the Seventh and Ninth Circuits should be reversed.

Respectfully submitted,

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