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IN THE SUPREME COURT OF THE UNITED STATES

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EPIC SYSTEMS CORPORATION,)
Petitioner,)

v.) No. 16-285

JACOB LEWIS,)
Respondent.)

- - - - -

ERNST & YOUNG LLP, et al.,)
Petitioners,)

v.) No. 16-300

STEPHEN MORRIS,)
Respondent.)

- - - - -

and

- - - - -

NATIONAL LABOR RELATIONS BOARD,)
Petitioner,)

v.) No. 16-307

OIL USA, INC., et al.,)
Respondents.)

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Washington, D.C.

Monday, October 2, 2017

1 The above-entitled matter came on
2 for oral argument before the Supreme Court of
3 the United States at 10:06 a.m.

4

5 APPEARANCES:

6 PAUL D . CLEMENT, Washington, D.C.; on behalf
7 of the

8 Petitioners in Nos. 16-285 and 16-300.

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11 Department of Justice, Washington, D.C.;
12 for

13 United States as amicus curiae, supporting the
14 Petitioners in Nos. 16-285 and 16-300, and
15 Respondents in No. 16-307.

16 RICHARD F. GRIFFIN, JR., Washington, D.C.; on
17 behalf

18 of the Petitioner in No. 16-307.

19 DANIEL R. ORTIZ, Charlottesville, Virginia; on
20 behalf

21 of the Respondents in Nos. 16-285 and 16-300.

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P R O C E E D I N G S

(10:06 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this term in Case 16-285, Epic Systems Corporation versus Lewis and the consolidated cases.

Mr. Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT, ESQ,
ON BEHALF OF PETITIONERS IN NOS. 16-285 AND
16-300

MR. CLEMENT: Mr. Chief Justice, and may it please the Court:

Respondents claim that arbitration agreements providing for individual arbitration that would otherwise be enforceable under the FAA are nonetheless invalid by operation of another federal statute.

This Court's cases provide a well-trod path for resolving such claims. Because of the clarity with which the FAA speaks to enforcing arbitration agreements as written, the FAA will only yield in the face of a contrary congressional command and the tie goes to arbitration. Applying those principles to Section 7 of the NLRA, the result is clear that

1 the FAA should not yield.

2 JUSTICE KENNEDY: Is that a concession
3 that this is a concerted action?

4 MR. CLEMENT: Well, I -- I don't know
5 that it is a concession that this --

6 JUSTICE KENNEDY: I mean, if we
7 adopted that premise for the opinion of the
8 Court, wouldn't we have to say we assume that
9 this is concerted action under the NLRA Section
10 7, but the FAA prevails?

11 MR. CLEMENT: Well, I think what you
12 would say, Justice Kennedy, is the concerted
13 activity that's protected by Section 7 at most
14 gets them to the threshold of the courthouse.
15 But Section 7 is directed to the workplace, not
16 the courthouse. And what it protects is their
17 right in the workplace to decide they want to
18 initiate action, but then, once they get to the
19 courthouse --

20 JUSTICE GINSBURG: But the courthouse,
21 Mr. Clement -- Mr. Clement, the courthouse is
22 not at issue here as I understand it. These
23 employees say we don't object to arbitration,
24 but what we do object to is the one-on-one, the
25 employee against the employer.

1 And the driving force of the NLRA was
2 the recognition that there was an imbalance,
3 that there was no true liberty of contract, so
4 that's why they said, in the NLRA, concerted
5 activity is to be protected against employ --
6 employer interference

7 MR. CLEMENT: That's right, Justice
8 Ginsburg, but it's collective action by the
9 employees in the workplace. And then, once
10 they get to their forum, be it the Board
11 itself --

12 JUSTICE GINSBURG: Where does -- where
13 does the NLRA say in the workplace? It says
14 for the mutual benefit, mutual benefit and
15 protection, mutual related protection.

16 MR. CLEMENT: Right. It doesn't say
17 in the workplace. I'm saying that's where it's
18 directed in -- in every context.

19 JUSTICE SOTOMAYOR: I'm sorry, but why
20 --

21 JUSTICE KAGAN: Well, why is it
22 directed there if it doesn't say that? I mean,
23 in fact, we said the opposite in Eastex. We
24 said employees seeking to improve working
25 conditions through resort to administrative and

1 judicial forums, essentially the legislatures
2 and the courthouses and the agencies, is
3 covered by the mutual aid or protection clause.

4 So, you know, in Eastex, we came up
5 against this question, said it was very clear
6 that the mutual aid and protection clause swept
7 further than the workplace itself, as long as
8 the ultimate goals were workplace-related,
9 whether you took those goals to the -- in the
10 -- you know, activity in the workplace or in
11 the agencies or in the courts, it didn't matter
12 at all, it was all covered by Section 7.

13 MR. CLEMENT: That's right, Justice
14 Kagan, but the key words there are "resort to."
15 There's no right in Section 7 or anywhere else
16 in the NLRA to proceed as a class once you get
17 there. And so --

18 JUSTICE BREYER: Well, that isn't the
19 issue, is it? I mean -- at least to me. And
20 you can explain this. You started out saying
21 this is an arbitration case. I don't know that
22 it is. I thought these contracts would forbid
23 -- would forbid joint action, which could be
24 just two people joining a case in judicial, as
25 well as arbitration forums.

1 Regardless, I'm worried about what you
2 are saying is overturning labor law that goes
3 back to, for FDR at least, the entire heart of
4 the New Deal. What we have here is a statute,
5 two of them, Norris-LaGuardia, the NLRA, which
6 for years have been interpreted the way Justice
7 Kagan said.

8 They say that they protect the
9 joint -- joining together, those are the words,
10 joining together, those are the words of our
11 interpretation -- you could have two workers to
12 seek to improve working conditions through
13 resort to administrative and judicial forums.
14 Okay?

15 So Cardozo said we exclude cases from
16 -- we exclude cases, that's the savings clause,
17 where the contract is in contravention of a
18 statute. The statute protects the worker when
19 two workers join together to go into a judicial
20 or administrative forum for the purpose of
21 improving working conditions, and the employers
22 here all said, we will employ you only if you
23 promise not to do that. Okay?

24 That's the argument against you. I
25 want to be sure that I didn't see, you know --

1 Concepcion, I've read it too, we all have, but
2 I haven't seen a way that you can, in fact, win
3 the case, which you certainly want to do,
4 without undermining and changing radically what
5 has gone back to the New Deal, that is, the
6 interpretation of Norris-LaGuardia and the
7 NLRA.

8 So I will stop. I would like to
9 listen, and I want to hear what your answer to
10 that is.

11 MR. CLEMENT: So the short answer,
12 Justice Breyer, and then I would like to try to
13 get out a longer answer, but the short answer
14 is that, for 77 years, the Board did not find
15 anything incompatible about Section 7 and
16 bilateral arbitration agreements, and that
17 includes in 2010 when the NLRB general counsel
18 looked at this precise issue.

19 Now, the longer answer is, from the
20 very beginning, the most that has been
21 protected is the resort to the forum, and then,
22 when you get there, you are subject to the
23 rules of the forum.

24 So, for example, if an atypical worker
25 decides that he wants to bring a class action

1 on behalf of a handful of fellow employees,
2 the -- he has the right to resort to the
3 courts, but when he gets there, if he's
4 confronted by an employer that says, wait a
5 second, you don't satisfy numerosity, you don't
6 satisfy typicality, then the employer doesn't
7 commit an unfair labor practice by raising that
8 argument.

9 JUSTICE BREYER: No, of course not.
10 But are you now conceding that, in these
11 contracts in front of us, that they do not
12 forbid two workers or three or four from going
13 together, approaching a judicial forum, asking
14 the judge to hear their case, or an arbitration
15 forum, and of course, if it violates some rule
16 of civil procedure other than that, it will be
17 thrown out.

18 Are you conceding that that's the
19 issue? And then I don't know which one it
20 violated, but nonetheless --

21 MR. CLEMENT: Well, the issue is just
22 as the employer can raise a numerosity defense
23 or a typicality defense, the employer can raise
24 a defense that you agreed to arbitrate this
25 claim.

1 JUSTICE SOTOMAYOR: Mr. Clement --

2 MR. CLEMENT: And that should be
3 enforceable -- and then, when you get to the
4 arbitration forum, just as you take Rule 23 as
5 a given, you should take the rules of the
6 arbitration forum as a given. And this is the
7 way it applies in every other context --

8 JUSTICE GINSBURG: Mr. Clement -- Mr.
9 Clement, do you recognize that this kind of
10 contract, this -- there is no true bargaining.
11 It's the employer says you want to work here,
12 you sign this.

13 It is what was called a "yellow dog"
14 contract. This has all the same -- the
15 essential features of the "yellow dog"
16 contract. That is, that there is no true
17 liberty to contract on the part of the
18 employee, and that's what Norris-LaGuardia
19 wanted to exclude.

20 MR. CLEMENT: I have two responses to
21 that, Justice Ginsburg. First, the Board
22 doesn't even take it that far. They agree that
23 arbitration agreements, as long as what's at
24 issue is an individual claim, are perfectly
25 fine and perfectly valid.

1 So this isn't a principle that says
2 that the employee's position is so weak they
3 can't agree to arbitrate at all.

4 The second part of that is I suppose
5 that's one way of asking the question in this
6 case, is a bilateral arbitration agreement
7 something that has been protected by the FAA
8 since 1925, is that really -- because all it
9 seeks to do is preserve what this Court on
10 three occasions has referred to as a
11 fundamental attribute of arbitration, is that
12 really a "yellow dog" contract?

13 JUSTICE SOTOMAYOR: Mr. Clement --

14 JUSTICE GINSBURG: Isn't it -- isn't
15 it so that the -- the FAA, in its inception,
16 was meant to deal with bargains between
17 merchants, bargains between merchants who said
18 the arbitration forum is much less expensive,
19 so we want to go there, rather than the court,
20 but it was commercial contracts that -- that
21 triggered the FAA?

22 MR. CLEMENT: Justice Ginsburg, this
23 Court crossed that bridge in Circuit City. And
24 what I find so remarkable is that in Circuit
25 City, nobody, not the AFL-CIO or anyone else,

1 was up in front of this Court saying, oh, by
2 the way, you are sort of wasting your time here
3 because the NLRA in Section 7 is going to
4 strictly prohibit the ability to enter
5 bilateral arbitration --

6 JUSTICE SOTOMAYOR: But that's not
7 true, Mr. Clement. Your -- your adversaries
8 are taking the position, logically so, that, if
9 a union wants to enter arbitration, we have
10 already heard the Court speak on this issue,
11 the union can substitute arbitration for a
12 judicial forum because then the collective body
13 of workers has acted together and contracted
14 together on an equal footing with the employer
15 for that term.

16 Now, the problem that I have with this
17 bilateral issue is you seem to be thinking that
18 somehow the NLRB can't invalidate a contractual
19 term, just as state law concepts like fraud,
20 duress, the normal contract terms that
21 invalidate contracts, Section 7 and Section 8
22 of the NLRB basically declare a contract -- a
23 contract illegal if it does a certain thing.

24 And that is if it stops an individual
25 from concerted activities. So what that starts

1 with is this contract is no longer valid.

2 There is nothing to take to the courthouse --

3 MR. CLEMENT: So --

4 JUSTICE SOTOMAYOR -- if what it is
5 doing is stopping you from taking activity that
6 you are legally entitled to take.

7 MR. CLEMENT: So a couple of things,
8 Justice Sotomayor. First of all, I'd have to
9 double-check, but I'm pretty sure the employer
10 in Circuit City was not a union employee. And
11 in all events, I think that the point is that
12 Circuit City said --

13 JUSTICE SOTOMAYOR: Well, this issue
14 wasn't raised there.

15 MR. CLEMENT: That is my point, which
16 is to say that if, in fact, employment
17 agreements were covered by the FAA, but if they
18 were bilateral, they would actually be unlawful
19 under the NLRA, boy, would that have been a
20 useful thing to tell the Court in Circuit City.

21 But no dog barked at that point. In
22 the Gilmer case, where you were dealing with an
23 employment issue, ADEA, and a collective action
24 provision, the AFL-CIO filed its own amicus
25 brief to raise a different issue that hadn't

1 been briefed, the issue the Court eventually
2 decided in Circuit City. But they didn't say,
3 oh, my goodness, what are we doing here,
4 Section 7 of the NLRA is directly on point.

5 And that's because the NLRA in no
6 other context extends beyond the workplace to
7 dictate the rules of the forum. And the best
8 example is the Board itself. Of course,
9 Section 7 protects the rights of employees to
10 file an unfair labor practice before the Board.

11 And, of course, they can collaborate
12 with their coworkers to file the unfair labor
13 practice. But guess what? When they get
14 before the Board, the Board doesn't have class
15 action procedures. Now, that doesn't create
16 some huge problem. That just reflects that, of
17 course, you get to resort to the courts, the
18 arbiter forum or the regulatory forum --

19 JUSTICE GINSBURG: But before the --

20 MR. CLEMENT: -- and when you get
21 there, you're subject to the rules of the
22 forum.

23 JUSTICE KENNEDY: Let's take -- let's
24 take two cases. One is a case where two
25 employees

1 get together and seek -- seek arbitration. The
2 other is when one employee seeks arbitration
3 but makes it a class action.

4 Is one case any easier than the other?
5 Or do we decide both on the same principle?

6 MR. CLEMENT: I think, ultimately, you
7 decide both on the same principle. I think the
8 way to think about that, though, is that
9 Section 7 requires two things. It requires
10 concerted activity for mutual aid and
11 protection.

12 Now, if you have two individuals that
13 are trying to collaborate, that's concerted
14 activity and then it -- it has to be for mutual
15 activity. So if a couple of workers are
16 talking off the shop and are helping one guy
17 get additional alimony, I mean that's not for
18 mutual aid and protection. It might be
19 concerted activity, but it's not the latter.

20 JUSTICE KENNEDY: Suppose it's for
21 their wages.

22 MR. CLEMENT: If it's for their wages,
23 I think if you have a couple of folks that are
24 doing it in the workplace, that's concerted
25 activity; they get to the forum and they get

1 whatever rights to proceed concertedly that are
2 available in the forum.

3 If it's class action, it's arguably
4 harder because you can file a class action and
5 not collaborate with anybody. And just, you
6 know, essentially seek to represent a class --

7 JUSTICE KAGAN: Well, Mr. Clement --

8 JUSTICE KENNEDY: You mean it's harder
9 for the employer to prevail or for --

10 MR. CLEMENT: For the employee. I'm
11 sorry. It's harder for the employee to prove
12 that it's concerted activity. But I don't
13 think as I answer your question --

14 JUSTICE KENNEDY: But your -- your
15 case is really my first case, is it not? This
16 is not really a class suit in its origins at
17 least.

18 MR. CLEMENT: Well, there's three --

19 JUSTICE KENNEDY: Or am I wrong -- or
20 am I wrong because there's Murphy Oil as well?

21 MR. CLEMENT: Yes, there's three cases
22 here. And I think that, you know, two of them
23 might be more like the class action case and
24 one might be like the concerted activity case.
25 I'm obviously representing all three of the

1 employers, but that's not why I'm telling you
2 that you don't have to make a distinction
3 between the two.

4 It's really because I think the way to
5 think about the Section 7 right is it gets you
6 to the courthouse, it gets you to the Board, it
7 gets you to the arbitrator.

8 JUSTICE SOTOMAYOR: Is this contract
9 --

10 MR. CLEMENT: But once you're there --

11 JUSTICE KAGAN: Mr. Clement, what
12 about --

13 MR. CLEMENT: -- you're subject to the
14 rules.

15 JUSTICE KAGAN: What about Section 102
16 and 103 of the Norris-LaGuardia Act? Because
17 let's take Justice Kennedy's example. You have
18 three guys and they all join claims, so we
19 don't have the question about a class action
20 and whether that's concerted. This is clearly
21 concerted. And they're seeking higher wages so
22 it's clearly for their mutual aid and
23 protection. So they're covered under Section
24 7.

25 And then Section 102 of the NLGA

1 basically just repeats Section 7. And then
2 Section 103 says -- and I am quoting now --
3 "Any undertaking or promise in conflict with"
4 -- essentially the language in Section 7 --
5 "Shall not be enforceable in any court."

6 So what about that? Any undertaking
7 or promise in conflict with Section 7 rights;
8 in other words, any waiver of Section 7 rights
9 "Shall not be enforceable in any court?"

10 MR. CLEMENT: Well, that -- that
11 assumes the conclusion with all respect,
12 Justice Kagan, which is, do you have --

13 JUSTICE KAGAN: The only thing it
14 assumed was that this was covered under Section
15 7. And you --

16 MR. CLEMENT: But --

17 JUSTICE KAGAN: You yourself said this
18 is concerted and it's for mutual aid and
19 protection. And once that's true, this
20 language of Norris-LaGuardia comes in and says
21 forget about a waiver because an undertaking in
22 conflict with Section 7 shall not be
23 enforceable.

24 MR. CLEMENT: I don't think that
25 that's the way to read the statute, and I think

1 the reason is that this isn't -- and I don't
2 think the way to see a traditional bilateral
3 arbitration agreement is as a waiver of a
4 Section 7 right or an NLGA right.

5 It is just an effort by the employer
6 and the employee to agree to set the rules for
7 the forum of arbitration when you get there.
8 And there's nothing sinister about leaving it
9 to bilateral arbitration.

10 JUSTICE KAGAN: Well, it's an
11 agreement, but it's an agreement to waive a
12 Section 7 right. I mean that's what it is.
13 It's saying I used to have this right for
14 concerted activity, and now I don't.

15 MR. CLEMENT: With all due respect, I
16 think that assumes the conclusion. You didn't
17 have a freestanding right to proceed with class
18 arbitration in an arbitral forum. You had a
19 right to go to whatever forum and abide by
20 those rules, and one of the rules in the
21 arbitral forum is no class action. So if I
22 could reserve the remainder of my time.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 Mr. Clement.

25 Mr. Wall.

1 ORAL ARGUMENT OF JEFFREY B. WALL, ESQ.,
2 FOR THE UNITED STATES, AS AMICUS CURIAE, SUPPORTING
3 PETITIONERS IN NOS. 16-285 AND 16-300, AND
4 RESPONDENTS IN NO. 16-307

5 MR. WALL: Mr. Chief Justice, and may
6 it please the Court:

7 I'd just like to highlight one point
8 in what Mr. Clement said. No one questions
9 that the FLSA permits the employees here to
10 forgo collective actions and arbitrate their
11 FLSA claims. In giving employees the right to
12 act in concert, the NLRA does not then extend
13 to concerted activities that they have validly
14 agreed to waive under other federal statutes
15 like the FLSA and the FAA. And for decades,
16 through the 2010 general counsel memo and until
17 D.R. Horton five years ago, the Board
18 recognized as much. Sections 7 and 8 were
19 understood as protecting employees --

20 JUSTICE GINSBURG: Mr. Wall, what
21 about --

22 MR. WALL: -- from dismissal or
23 retaliation.

24 JUSTICE GINSBURG: What about the
25 reality? I think we have in one of these

1 cases, in Ernst & Young, the individual claim
2 is 1800 dollars. To proceed alone in the
3 arbitral forum will cost much more than any
4 potential recovery for one. That's why this is
5 truly a situation where there is strength in
6 numbers, and that was the core idea of the
7 NLRA. There is strength in numbers. We have
8 to protect the individual worker from being in
9 a situation where he can't protect his rights.

10 MR. WALL: So, Justice Ginsburg, with
11 all respect, there are provisions in the
12 arbitration agreements here, and they differ,
13 that allow for payments of costs and fees. But
14 even if you thought that it just resulted in an
15 argument that the employees would be
16 practically unable to vindicate their claims,
17 those are exactly the kind of arguments this
18 Court rejected in Italian Colors, it rejected
19 in Concepcion, and said bilateral arbitration
20 agreements are enforceable under the plain
21 terms of Section 2 of the FAA.

22 JUSTICE SOTOMAYOR: Mr. Wall, we
23 didn't have in those cases a third -- or raised
24 a third statutory provision that protects a
25 particular action, in any type of action in

1 mutual aid or concerted activity like the NLRB
2 or the Norris-LaGuardia Act.

3 But putting that aside, I'm not sure
4 that the FAA is now a rule of statutory
5 construction. Basically, what you're saying is
6 the FAA trumps the NLRB's concerted activity
7 statement and its broadness, that somehow it
8 stops, you say, at the courtroom door. So does
9 your colleague. I don't know how you do that
10 when

11 at least one of these agreements, if not all
12 three, have confidentiality agreements that
13 prohibit the employers from talking to other
14 employers, from combining with other employers.

15 If it does that and it stops them from
16 going to the courtroom door, is that an unfair
17 labor act?

18 MR. WALL: So, Justice Sotomayor,
19 there's a lot there, and let me see if I can
20 unpack a handful of things. A half dozen
21 times, this Court has faced a claim that some
22 other federal statute overrode the FAA.

23 JUSTICE SOTOMAYOR: Only when it has
24 been a fight between whether that statute and
25 the cause of action it provided overrode the

1 FAA. This is more as to the making of a
2 contract, which is like a state law defense, a
3 common state law defense like fraud or duress,
4 except it's federal law here saying you can't
5 do this.

6 MR. WALL: Justice Sotomayor, with all
7 respect, this Court has always said, look, is
8 there a clear congressional command in the
9 other statute. The FAA is clear that these
10 agreements ought to be enforced; the NLRA
11 isn't. And --

12 JUSTICE SOTOMAYOR: Well, it was clear
13 in saying that concerted activity cannot be
14 interfered with.

15 MR. WALL: That's right, but for the
16 first 77 years, here's what everyone, including
17 the Board, understood that to mean. You can be
18 protected from dismissal or retaliation when
19 you seek class treatment up to the courthouse
20 doors or the doors of the arbitral forum, but
21 once you're inside, you don't have an
22 entitlement to proceed as a class,
23 notwithstanding the FAA or Rule 23 or other
24 federal rules. D.R. Horton was the first to
25 make that move, and that's a pretty radical

1 move, to say for the first time that the NLRA
2 overrides those other statutes. And the reason
3 you can't get there is that Section 7 doesn't
4 say anything about arbitration or class or
5 collective treatment, and unlike other
6 statutes, Congress didn't delegate to the Board
7 the ability to decide which predispute
8 arbitration would have to be --

9 JUSTICE BREYER: Why do we have to go
10 into all this class action business? I mean,
11 it seems to me that in each of these
12 agreements, the worker is forced to agree that
13 I will not proceed concertedly, that means
14 jointly, just one other person joining my
15 action with his and going into arbitration and
16 saying do both together. And maybe there is
17 some rule that forbids people from doing that
18 in arbitration -- AAA or something; I've never
19 seen it. And it also says you can't do the
20 same thing in court. You have to go to
21 arbitration, and then two of you can't get
22 together.

23 So simplifying it to its extreme case
24 like that, why can't we just say that's clearly
25 against what labor law, since the 1930s, has

1 said was an unfair labor practice, the employee
2 cannot -- the employer cannot impose such an
3 agreement. That would be simple, clear; it
4 would void our class action -- I don't want to
5 characterize it as a nightmare, but there is a
6 problem there. Okay? What's wrong with that?

7 MR. WALL: Justice Breyer, with all
8 respect, the historical premise is just wrong.
9 When you go back to 1935 and you come all the
10 way through the cases, they summarize them as
11 joint legal action or concerted legal activity,
12 but that's only true if what you mean is the
13 right to go to the forum and not be --

14 JUSTICE BREYER: That's what I'm
15 saying. Of course, I haven't said -- I'm
16 sorry, I wasn't clear perhaps, but nothing in
17 what I just said was that ordinary rules of the
18 courts like Rule 20 -- any other rule of the
19 court, Rule 23, you have to be clear, whatever
20 the rules are, they apply.

21 And the only rule that wouldn't apply
22 would be a rule that would say we're
23 automatically going to enforce the agreement
24 not to come here. You couldn't do that when
25 that would be a kind of trick.

1 MR. WALL: But, Justice Breyer,
2 that --

3 JUSTICE BREYER: But aside from that,
4 everything else would apply?

5 MR. WALL: But that's not going to get
6 them where they want to go. Take Murphy Oil.

7 JUSTICE BREYER: Maybe it won't.
8 That's too bad. But, I mean, doesn't that
9 resolve this case?

10 MR. WALL: I -- I think we're on the
11 same page. Take Murphy Oil.

12 JUSTICE BREYER: Does it resolve the
13 case or not?

14 MR. WALL: Well, the employees
15 attempted to file a class action. Murphy Oil
16 didn't retaliate against them. Murphy Oil just
17 came in and moved to compel individual
18 arbitration, pointing to the Fifth Circuit's
19 decision --

20 JUSTICE SOTOMAYOR: Well, that's the
21 point with this. What is stopping the
22 concerted activity is not that -- which forum
23 they choose, whether it's court or arbitration.
24 Where you are stopping the concerted activity
25 is in the very act of saying this can only be

1 an individual arbitration, an individual court
2 action.

3 What your adversaries have stipulated
4 to in resolving this question is, if they can
5 have collective activity in arbitration,
6 according to their argument, it is harder for
7 them to win. But this particular provision is
8 illegal because it is removing collective
9 activity from both forums, from any forum
10 whatsoever.

11 MR. WALL: Justice Sotomayor, again,
12 three quick points. One, they can't satisfy
13 the clear congressional command test if you
14 stack the NLRA up against the FLSA --

15 JUSTICE SOTOMAYOR: That's assuming
16 that test applies in this situation --

17 MR. WALL: That's right.

18 JUSTICE SOTOMAYOR: -- where a
19 contract has been invalidated by statute.

20 MR. WALL: So, second, even if you try
21 to go to the savings clause, which this Court
22 has never done in a case like this.

23 JUSTICE SOTOMAYOR: Why would we even
24 need to go there?

25 MR. WALL: Well --

1 JUSTICE SOTOMAYOR: Just read the
2 NLRB.

3 MR. WALL: Because the NLRB on its
4 face doesn't say anything about this. You've
5 got to go beyond the text. You've got to say
6 the Board can interpret Section 7, and five
7 years ago, when they made that move --

8 JUSTICE SOTOMAYOR: Counsel, let's
9 assume --

10 JUSTICE ALITO: I'd like, Mr. Wall, I
11 would like you to finish your answer, but I
12 have a question I would like to get in before
13 your time expires, if I could just note that.

14 MR. WALL: So --

15 JUSTICE SOTOMAYOR: Go ahead.

16 MR. WALL: So just to quickly finish
17 the answer, I think, again, the question
18 assumes the conclusion, which is it assumes
19 that, when the Board, five years ago, took the
20 concerted activities clause and stretched it
21 for the first time to cover your ability to go
22 pursue the rights, granted, collective
23 procedures granted to you by some other
24 statute, it assumes that those procedures that
25 it picked up, which in every other context,

1 like under the FLSA, are procedural, it somehow
2 converted to be substantive and non-waiveable.

3 And that's the move the Board can't
4 make because it can't interpret the NLRA's
5 ambiguity that way in the face of the FAA and
6 federal rules like Rule 23, so that's the move
7 that was off the table.

8 And if you understand Section 7 to
9 protect you from retaliation when you seek
10 class treatment but not to give you an
11 entitlement to proceed as a class in the forum,
12 then you are right, everything fits together
13 perfectly fine, and these arbitration
14 agreements are enforced.

15 JUSTICE KAGAN: Mr. Wall, can I
16 interrupt you because --

17 CHIEF JUSTICE ROBERTS: Justice Alito,
18 maybe this would be a good time --

19 JUSTICE KAGAN: Justice Alito has one
20 and then I do.

21 CHIEF JUSTICE ROBERTS: I'm sorry,
22 maybe it is a good time for Justice Alito, if
23 you would like to --

24 JUSTICE ALITO: Yeah, I just wanted to
25 know what the -- what the Government's position

1 is regarding the Norris-LaGuardia Act issue?
2 Is it not before us, is it so closely tied to
3 the NLRA issue that it is appropriate for us to
4 decide it? Did you have an opportunity to
5 brief it? What's your position on this?

6 MR. WALL: I think both of those,
7 Justice Alito. I think it is not before the
8 Court, but frankly, I don't think it matters
9 because I don't think it adds anything.

10 The text is -- is essentially
11 identical, and both statutes, for basically
12 three-quarters of a century, were understood to
13 coexist comfortably with the FAA, and it is
14 really only D.R. Horton that put them in
15 tension, by reading both Section 7 and the
16 equivalent sections of the Norris-LaGuardia Act
17 to grant the employees something that those
18 statutes had never been thought to grant them.

19 And it is resolving that ambiguity in
20 the face of the FAA that I think is a problem.

21 As we --

22 JUSTICE GINSBURG: Yes. If --

23 CHIEF JUSTICE ROBERTS: Justice, maybe
24 Justice Kagan can proceed now.

25 JUSTICE KAGAN: I take it that both

1 you and Mr. Clement agree that, if you had a
2 discriminatory arbitration agreement, let's say
3 an arbitration agreement that said that the
4 employer will pay the arbitration costs of men
5 but not women, that that would not be
6 enforceable. Why not?

7 MR. WALL: So I think a couple of
8 reasons, Justice Kagan. The first is I think,
9 if that case came to the Court, I think we
10 would have no trouble concluding that the ADEA
11 and Title VII and civil rights laws supply a
12 clear congressional command, and --

13 JUSTICE KAGAN: Okay. So, if that's
14 the case and you are saying there can be a
15 conflict between statutes and the Title VII
16 would supply a clear congressional command,
17 even though Title VII says absolutely nothing
18 about arbitration.

19 MR. WALL: Well, again, I don't think
20 it is a magic words test -- and we agree with
21 Petitioners on that. You can have a clear
22 congressional command absent that. You just
23 don't have it in Section 7. You have an agency
24 attempting to supply it, and the other thing
25 I'd say is it's not a fundamental attribute of

1 arbitration --

2 JUSTICE KAGAN: Well, here's -- here's
3 one understanding -- may I continue?

4 CHIEF JUSTICE ROBERTS: Sure.

5 JUSTICE KAGAN: Is one understanding
6 of Title VII says to the employer, you shall
7 not discriminate, and Section 7 says to the
8 employer, you shall not interfere with
9 concerted activity, such as three guys joining
10 together to bring a suit if they want to.

11 MR. WALL: Justice Kagan, it is not a
12 fundamental attribute of arbitration to
13 discriminate on the basis of race, age, or
14 gender. It is a fundamental attribute of
15 arbitration, and this Court said it three
16 times, to pick the parties with whom you
17 arbitrate.

18 And our simple point is this case is
19 at the heartland of the FAA. It is, at best,
20 at the periphery of the NLRA, on the margins of
21 its ambiguity, and you simply can't get there
22 under the Court's cases.

23 CHIEF JUSTICE ROBERTS: Thank you, Mr.
24 Wall.

25 Mr. Griffin.

1 ORAL ARGUMENT ON BEHALF
2 OF PETITIONER IN NO. 16-307

3 MR. GRIFFIN: Mr. Chief Justice, and
4 may it please the Court.

5 The Board's rule here is correct for
6 three reasons. First, it relies on
7 long-standing precedent, barring enforcement of
8 contracts that interfere with the right of
9 employees to act together concertedly to
10 improve their lot as employees.

11 Second, finding individual arbitration
12 agreements unenforceable under the Federal
13 Arbitrations Act savings clause because they
14 are legal under the National Labor Relations
15 Act gives full effect to both statutes.

16 And, third, the employer's position
17 would require this Court, for the first time,
18 to enforce an arbitration agreement that
19 violates an express prohibition in another
20 coequal federal statute.

21 JUSTICE GINSBURG: What do --

22 CHIEF JUSTICE ROBERTS: Mr. Griffin,
23 if -- I am not sure I fully understand your
24 position. Individual -- individuals can agree
25 to arbitrate disputes so long as they allow --

1 so long as the agreement allows collective
2 arbitration; is that correct?

3 MR. GRIFFIN: No, Your Honor. It is a
4 slight variation on that.

5 The Board's position is individuals
6 can agree to arbitrate individually, so long as
7 there is a collect -- a forum in which they can
8 proceed collectively.

9 CHIEF JUSTICE ROBERTS: So the
10 arbitral --

11 MR. GRIFFIN: It doesn't have to be
12 arbitration. It could be judicial.

13 CHIEF JUSTICE ROBERTS: Okay. Right.
14 But if they agree to act -- the agreement
15 requires that they act individually, although,
16 to arbitrate, but there is a collective
17 arbitral forum, that that's all right? In
18 other words, just they have to arbitrate,
19 whether they do it individually or
20 collectively, you cannot restrict that?

21 MR. GRIFFIN: The Board's position is
22 that, as this Court has said on multiple
23 occasions, that the arbitral forum is the
24 equivalent of the judicial forum for
25 effectively vindicating statutory rights.

1 So here, as has been mentioned, there
2 are four people who are seeking to get paid in
3 the Murphy Oil case for work that they did.
4 If -- if the forum is available to them to
5 proceed jointly --

6 CHIEF JUSTICE ROBERTS: Right.

7 MR. GRIFFIN: -- and the employer
8 agrees to have it done in arbitration, that's
9 fine from the Board's standpoint.

10 CHIEF JUSTICE ROBERTS: Okay. So the
11 point is they -- they can, in their arbitration
12 agreement, waive the right to proceed
13 collectively in court, so long as they have the
14 right to do it in arbitration?

15 MR. GRIFFIN: Because this Court has
16 said on multiple occasions that those two
17 forums are functionally equivalent for purposes
18 of effectively vindicating the rights at issue,
19 it is essentially like picking venue in --

20 CHIEF JUSTICE ROBERTS: Well, I don't
21 -- yeah, I don't understand --

22 MR. GRIFFIN: -- two different federal
23 courts.

24 CHIEF JUSTICE ROBERTS: Right, I don't
25 understand how that is consistent with your

1 position that these rights can't be waived.

2 MR. GRIFFIN: It goes back, Your
3 Honor, to the position the Board takes into
4 account this Court's views with respect to the
5 ability to effectively vindicate these rights
6 in an arbitral forum.

7 JUSTICE ALITO: We have said that with
8 respect to individual arbitration. Have we
9 said that with respect to class arbitration?

10 MR. GRIFFIN: Well, Your Honor, we're
11 talking about a rule here that doesn't just
12 stop class -- or stop -- it stops any kind of
13 joint activity. It stops two people proceeding
14 together, it stops collective, it stops class
15 actions.

16 So -- or class arbitrations.

17 JUSTICE KENNEDY: Excuse me, Justice
18 Alito, quickly. You said this rule means that
19 three people -- employees -- can't go to the
20 same attorney and say please represent us, and
21 we will share our information with you, we have
22 three individual arbitrations, but you
23 represent all three of us, they can do that.

24 MR. GRIFFIN: They could do that, Your
25 Honor, but it doesn't --

1 JUSTICE KENNEDY: Well, that is
2 collective action.

3 MR. GRIFFIN: But it's not the -- it's
4 not the collective action that is protected
5 here. The act protects the employees' rights
6 to proceed concertedly in the --

7 JUSTICE KENNEDY: Well, they are
8 proceeding concertedly. They have a single
9 attorney. They are presenting their case.
10 They're going to be decided maybe in three
11 different hearings.

12 MR. GRIFFIN: But it doesn't allow the
13 employer to choose which type of activities the
14 employees can engage in.

15 JUSTICE BREYER: Wait a minute. You
16 said to Justice Kennedy -- I didn't -- I think
17 I might have missed this.

18 Smith, Jones, and Brown are three
19 employees. Each believes that he has not
20 enough overtime or something like that, and he
21 goes to the same attorney, all three, and it
22 wasn't exactly the same time, it wasn't
23 exactly -- there are differences.

24 So what they want to do is file a
25 joint claim. They want to say: Our employer

1 violated the dah-dah-dah because they did not
2 pay us enough. Okay? They're not identical,
3 but they're very similar.

4 Now, can they go together to the
5 arbitrator under this agreement?

6 MR. GRIFFIN: No.

7 JUSTICE BREYER: No? Okay. So the
8 answer to Justice Kennedy was they cannot go to
9 the lawyer and have this brought in one action,
10 unless they just use one person?

11 MR. GRIFFIN: That's correct, Your
12 Honor.

13 JUSTICE KENNEDY: Well, but the -- but
14 the --

15 MR. GRIFFIN: This --

16 JUSTICE KENNEDY: The question Justice
17 Breyer asked is different than my question. My
18 question is that many of the advantages of
19 concerted action can be obtained by going to
20 the same attorney. Sure, the cases are
21 considered individually, but you see if -- if
22 you prevail, it seems to me quite rational for
23 many employers to say forget it, we don't want
24 arbitration at all. I don't think you've done
25 employees much -- much --

1 JUSTICE GINSBURG: In that event, you
2 would --

3 JUSTICE KENNEDY: -- much of an
4 advantage.

5 JUSTICE GINSBURG: You would have a
6 judicial forum, if the employer doesn't want
7 arbitration. In fact --

8 JUSTICE KENNEDY: I fully understand
9 that. But the point is you're saying that the
10 employers are now constrained in the kind of
11 arbitration agreements they can have.

12 MR. GRIFFIN: They're -- they're
13 constrained with respect to limiting employees'
14 ability to act concertedly in the same way
15 that, from the beginning of the National Labor
16 Relations Act, individual agreements could not
17 be used to require employees to proceed
18 individually in dealing with their employers --

19 JUSTICE GINSBURG: What about the
20 position that the Board -- I think both
21 Mr. Clement and Mr. Wall emphasized that for 70
22 odd years, the Board was not taking the
23 position that it is now taking, that it was not
24 objecting to bilateral one-on-one arbitration.

25 MR. GRIFFIN: Well, with due respect

1 to my colleagues, that's an inaccurate summary
2 of the Board's precedent, Your Honor. The
3 Board's precedent has always said that
4 individual agreements that require employees to
5 individually waive their right to proceed
6 collectively are violations of the National
7 Labor Relations Act. That's what this Court
8 held in 1940 in National Licorice.

9 JUSTICE GINSBURG: What do you do with
10 the GC's -- the general counsel memorandum
11 that said you can waive the right to file a
12 collective lawsuit?

13 MR. GRIFFIN: With all due respect to
14 the general counsel at the time, that
15 memorandum was never adopted by the Board as
16 the law of the Board and, in fact, was
17 explicitly rejected in the Horton decision and
18 subsequently in Murphy Oil.

19 JUSTICE ALITO: I'm curious about the
20 -- the point that has been made that the Board
21 doesn't allow class proceedings. There must be
22 a reason -- you must have some explanation for
23 how that can be reconciled with your position,
24 but I'd like to know what it is.

25 MR. GRIFFIN: Well, it's a misnomer to

1 say that the Board doesn't allow class
2 proceedings, Your Honor. The way a proceeding
3 under the National Labor Relations Act works is
4 the Board doesn't have any independent
5 investigatory authority or ability to initiate
6 suits on its own.

7 What happens is charges are filed.
8 Those charges are filed by employers,
9 employees, individuals -- they could be filed
10 by a group of as many employees as you want.

11 The general counsel of the Board
12 acting through the regions decides whether or
13 not to pursue the complaint, and then the
14 general counsel proceeds in the public interest
15 to litigate the case administratively.

16 So it's not the type of proceeding
17 that -- that lends itself to the concept of
18 class actions, but it doesn't stop as many
19 employees as want to. And, in fact, frequently
20 the union will be filing a charge that's a
21 representative charge in very much the same way
22 that a class representative would be pursuing a
23 class action in court.

24 JUSTICE ALITO: And the question I had
25 was -- how do you draw a distinction between a

1 -- an agreement precluding class arbitration
2 and all of the other Rules of Civil Procedure
3 that limit the ability of employees to engage
4 in collective litigation?

5 MR. GRIFFIN: Here, Your Honor, we --
6 we actually have agreement with -- with the
7 other side. The Board's rule does not require
8 any modification to the class procedures in
9 court. What the Board's rule says is you can't
10 preclude people from proceeding jointly by
11 virtue of an unlawful agreement imposed upon
12 them by their employer.

13 JUSTICE ALITO: Well, wait a minute.
14 Why -- you say that -- what is the scope of
15 the -- of the right to engage in concerted
16 activity? Why -- if that's the case, why would
17 it not abrogate any limitation in the rules of
18 procedure that predated the enactment of that?

19 MR. GRIFFIN: Well, the -- the Board's
20 position, Your Honor, is --

21 JUSTICE ALITO: I want to --

22 MR. GRIFFIN: -- is the employees have
23 to take these -- these provisions as they find
24 them. So I'll give you an example.

25 In your -- in this Court's decision in

1 Washington Aluminum, there were a group of
2 employees who were faced with a frigid
3 workplace. In response to those conditions,
4 they walked out. That was in 19-- and that
5 activity was held to be protected. That was in
6 1962.

7 Subsequently, in 1970, the
8 Occupational Safety and Health Act was passed.
9 After the Occupational Safety and Health Act
10 was passed, people had a choice. They could
11 either walk out, if they were faced with unsafe
12 conditions, or they could jointly file a
13 petition or a claim or a complaint with OSHA.
14 That was a subsequently enacted provision that
15 allowed employees to choose a different path to
16 address their workplace terms and conditions of
17 employment.

18 The same is true with the subsequently
19 enacted rules, whether it's 216(b) of the Fair
20 Labor Standards Act, whether it's Rule 23 of
21 the Federal Rules of Civil Procedure. These
22 are all means and mechanisms that were adopted
23 subsequently that employees can choose to use
24 if they're available --

25 JUSTICE ALITO: So is the argument is

1 that the -- that restrictions in Rule 23
2 abrogate Rule -- Section 7 because they were
3 enacted later?

4 MR. GRIFFIN: No, that's not it at
5 all, Your Honor.

6 JUSTICE ALITO: Well, then I don't
7 understand your answer.

8 MR. GRIFFIN: The -- the answer is
9 people who have Section 7 rights are just like
10 any other plaintiff and the requirements of
11 Rule 23 with respect to numerosity or
12 typicality --

13 JUSTICE KAGAN: Mr. Griffin, is this
14 one way to think about the question? Of
15 course, Section 7 doesn't extend to the ends of
16 the Earth. If there are three employees who go
17 out jointly rioting in the streets, they run up
18 against antiriot laws and they go to jail just
19 like everybody else.

20 What Section 7 does and what Section 8
21 does is to establish a set of rules that deal
22 with how employers can deal with employees.
23 And one of the things that Section 7 and
24 Section 8 say in concert, if you will, is that
25 employers can't demand as conditions of

1 employment the waivers of concerted rights.
2 And that's all you're saying here.

3 MR. GRIFFIN: That's -- that's
4 entirely correct, Your Honor. And -- and
5 specifically Section 8(a)(1) prohibits
6 interference with the employees' exercise of
7 their rights --

8 JUSTICE BREYER: You think all the
9 rules apply. The rules of the forums apply.

10 MR. GRIFFIN: Absolutely.

11 JUSTICE BREYER: And both sides are in
12 agreement on that.

13 MR. GRIFFIN: Yes.

14 JUSTICE BREYER: The question is
15 whether you can resort to -- can they stop you
16 from resorting to administrative and judicial
17 forums?

18 MR. GRIFFIN: That's correct, Your
19 Honor.

20 JUSTICE BREYER: And in grievance
21 arbitration, by the way, how -- I just wonder,
22 because that's very common. Are there
23 instances where -- there will probably be a
24 worker representative going to the employer,
25 but are there instances where the grievance is

1 a grievance that is shared by people, but not
2 perfectly shared, so Jones, Smith, and Brown
3 will go to the representative and say,
4 representative, please let's go before the
5 arbitrator, and you represent all three?

6 MR. GRIFFIN: Certainly, Your Honor,
7 there are many instances where the union will
8 take a grievance with respect to overtime
9 that's not paid to multiple people on the same
10 shift.

11 This Court's decisions with respect to
12 the Steelworkers Trilogy all involve
13 arbitration situations that involve multiple
14 parties' representative.

15 CHIEF JUSTICE ROBERTS: Let's say the
16 arbitral forum says -- the rules of the
17 arbitral forum says you can proceed
18 individually, but you can -- and you can
19 proceed collectively, but only if the class
20 represents more than 50 people. Is that all
21 right under your theory?

22 MR. GRIFFIN: That's a rule of the
23 arbitral forum, and the employee takes the
24 rules of the forum as they find them.

25 CHIEF JUSTICE ROBERTS: So you have a

1 right to act collectively, but only if there
2 are 51 or more of you?

3 MR. GRIFFIN: What -- no, Your Honor.
4 What you have an opportunity to do is to try
5 and utilize the rules that are available in the
6 forum without the employer intervening through
7 a -- a prohibition that's violative of Section
8 7.

9 JUSTICE KENNEDY: No, the hypothetical
10 -- and the Chief can protect his own question
11 -- the hypothetical is the contract says you
12 have to have 50.

13 MR. GRIFFIN: Oh, I understood -- I'm
14 sorry. I misunderstood --

15 JUSTICE KENNEDY: That's my
16 understanding of the question.

17 MR. GRIFFIN: Well, I misunderstood
18 the question. I thought we were talking about
19 the arbitral forum itself has rules --

20 CHIEF JUSTICE ROBERTS: Yes.

21 MR. GRIFFIN: -- as opposed to the
22 arbitration agreement between the --

23 CHIEF JUSTICE ROBERTS: No, the
24 arbitral forum has rules, just like the Federal
25 Rules of Civil Procedure. And what you're

1 saying is, well, once you get into federal
2 court, of course you've got to follow the rules
3 of the forum. And we have arbitral forums as
4 well, and I'm just saying --

5 MR. GRIFFIN: And I'm saying those
6 rules are equivalent, that you take -- the
7 employee takes the rules of the forum as they
8 find them.

9 What is prohibited here under the
10 National Labor Relations Act is an agreement by
11 the employer that's imposed that limits the
12 employee's right to take the rules as the --

13 CHIEF JUSTICE ROBERTS: Okay. Maybe
14 I'm not understanding.

15 MR. GRIFFIN: So it would be okay if
16 the forum said that.

17 CHIEF JUSTICE ROBERTS: Yes.

18 MR. GRIFFIN: It's not okay if there's
19 an agreement between the employer and the
20 employee that limits their right to proceed.

21 CHIEF JUSTICE ROBERTS: So -- so all
22 the employer -- well, and why can the arbitral
23 forum enforce the rule that says, basically,
24 you cannot act collectively if it's fewer than
25 50 people?

1 MR. GRIFFIN: Because the prohibition
2 in the National Labor Relations Act in Section
3 8(a)(1) runs to employer interference restraint
4 or coercion with respect to the rules, with
5 respect to exercise of the rights under Section
6 7. It doesn't say anything --

7 CHIEF JUSTICE ROBERTS: Okay. So the
8 employer has to say --

9 MR. GRIFFIN: -- about the forum's
10 involvement.

11 CHIEF JUSTICE ROBERTS: Well, but most
12 arbitration agreements tell you what the forum
13 is, whether it's the AAA or something else.

14 So, if the employer/employee agreement
15 says you shall arbitrate this under this
16 particular arbitration forum, and those rules
17 say we're -- we'll do collective arbitration,
18 but only if you have more than 51 people
19 because we think it's more efficient to have a
20 smaller number arbitrate individually, that
21 would be okay under your position?

22 MR. GRIFFIN: Yes, Your Honor.

23 JUSTICE ALITO: And what if the rules
24 of the arbitral forum say no class arbitration?

25 MR. GRIFFIN: Your Honor, it would

1 be -- it would be just as though, in the
2 analogous circumstances, Congress said there
3 were to be no class actions in court.

4 The employee -- our position is that
5 the employee's right to proceed is -- is in the
6 forum under the rules of the forum. If
7 anything is prohibited --

8 JUSTICE ALITO: If that's the -- if
9 that's the -- if that's the rule, you have not
10 achieved very much because, instead of having
11 an agreement that says no class, no class
12 action, no class arbitration, you have an
13 agreement requiring arbitration before the XYZ
14 arbitration association, which has rules that
15 don't allow class arbitration.

16 MR. GRIFFIN: Well, the provisions of
17 the National Labor Relations Act run to
18 prohibitions against employer restraint --

19 JUSTICE GINSBURG: Is that -- is that
20 -- is there any arbitral forum -- I know the
21 AAA allows class arbitration.

22 MR. GRIFFIN: The -- the National
23 Academy of Arbitrators filed a brief -- amicus
24 brief in this case, Your Honor, supporting the
25 position that the Board took in Murphy Oil, and

1 it addresses the circumstances under which, in
2 both labor arbitration and employment
3 arbitration, employees are able to proceed in
4 joint collective representative actions.

5 JUSTICE GINSBURG: There's one anomaly
6 here, and I think you agreed that the Fair
7 Labor Standards Act, where the substantive
8 right comes from --

9 MR. GRIFFIN: That's correct.

10 JUSTICE GINSBURG: -- that under the
11 Fair Labor Standards Act, which provides for an
12 opt-in class proceeding, that right can be
13 waived.

14 MR. GRIFFIN: Well, Your Honor,
15 we -- we don't agree with respect to employees
16 who have National Labor Relations Act rights,
17 who also have FLSA rights, that there can be a
18 waiver of the right to proceed jointly.

19 It's -- if -- if you imagine it in
20 mathematical terms, there's a set of people who
21 have rights under the Fair Labor Standards Act.
22 There's a lesser included subset of people who
23 have rights under both the Fair Labor Standards
24 Act and the National Labor Relations Act.

25 And as to that lesser-included set,

1 there's no ability to waive the right in an
2 agreement with an employer to proceed
3 collectively.

4 JUSTICE KAGAN: Do you have a view,
5 Mr. Griffin, as to whether bringing a class
6 action is itself concerted activity by a single
7 named plaintiff?

8 MR. GRIFFIN: Yeah -- yes, Your Honor.
9 That -- that law is essentially unchallenged
10 here, and the Board's law is that, if an
11 individual takes action to initiate, to induce,
12 or to prepare for group action, that that is
13 concerted activity as understood under Section
14 7.

15 And -- and the Board specifically held
16 in Murphy Oil -- and we've briefed this in our
17 brief -- that -- that a class action fits
18 within the notion of initiating, inducing,
19 preparing for.

20 In fact, the Lewis case involved an
21 individual who filed a class action and then
22 was joined immediately by a number of other
23 plaintiffs. And each of these cases involves
24 concerted activity.

25 There isn't a question of concert here

1 because there were four people involved in
2 filing the Murphy Oil action, there were two
3 involved in -- in Morris, and, as I said, Lewis
4 was joined by others in that action.

5 JUSTICE SOTOMAYOR: Counselor, do you
6 have any idea of how many union contracts
7 provide exclusively for arbitration of
8 disputes, individual and collective?

9 MR. GRIFFIN: It -- it is a fairly
10 ubiquitous term in -- in -- in union collective
11 bargaining agreements.

12 JUSTICE SOTOMAYOR: And so is this the
13 unusual case where the union hasn't negotiated
14 that kind of contract?

15 MR. GRIFFIN: Well, this -- this
16 involves individual employees. There's no
17 union present in these cases, Your Honor. And
18 pursuant to Circuit City, while there was an
19 issue up until that point whether or not the
20 FAA applied to employment contracts, this Court
21 has decided that, so now, these individual
22 cases are where they stand.

23 JUSTICE SOTOMAYOR: Involve non-union
24 members.

25 MR. GRIFFIN: Yes, exactly.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Mr. Ortiz.

4 ORAL ARGUMENT ON BEHALF OF
5 RESPONDENTS IN NOS. 16-285 AND 16-300

6 MR. ORTIZ: Mr. Chief Justice, and may
7 it please the Court.

8 If I may begin by answering a little
9 bit more fully Justice Sotomayor's question at
10 the end.

11 Apparently -- approximately 55 percent
12 of non-union private employees have contracts
13 that are covered by mandatory arbitration
14 agreements, and that covers about 60 million
15 people. 23 percent of those employees have
16 non-individual -- sorry, non-joint, non-class,
17 non-collective, research says, which represents
18 about 25 million employees.

19 If I may, I'd like to respond to a few
20 points --

21 CHIEF JUSTICE ROBERTS: So this
22 decision in your favor would invalidate the
23 25 -- agreements covering 25 million employees?

24 MR. ORTIZ: Yes, Your Honor.

25 If I may respond to a few points of

1 Mr. Wall's, there seems to be a belief on the
2 employer's side that allowing employees to
3 waive Section 20 -- Rule 23, Rule 20, and
4 Section 16(b) rights under the Fair Labor
5 Standards side -- Fair Labor Standards Act,
6 except when the -- Section 7 of the NLRA is in
7 the picture, somehow creates an anomaly.

8 That is not the case, Your Honors.
9 All these other -- Rule 20, Rule 23, and
10 Section 16 create remedial mechanisms, but they
11 create no substantive rights.

12 Rule -- Section 7 of the NLRA, Section
13 2 of the Norris-LaGuardia Act, on the other
14 hand, create substantive rights, but they
15 create no procedural mechanisms. There's
16 nothing really odd about not allowing employees
17 covered by Section 7 -- or sort of coercing
18 them in this way.

19 Second, Mr. Wall suggested the
20 Concepcion and Italian Colors actually control
21 here. They do not. Concepcion, for example,
22 concerns state law. This Court followed
23 preemption analysis and was very concerned, in
24 particular, about the application of the state
25 law in that case.

1 It was California's unconscionability
2 doctrine. And this Court found that it was
3 applied in a discriminatory manner which tended
4 to target arbitration. That was the problem
5 with it.

6 Also, Your Honor, although this Court
7 found that affecting an essential attribute of
8 arbitration was important in that case, that is
9 very different here as well.

10 Collective arbitration is much more
11 traditional in the labor and employment context
12 than it is in the consumer context.

13 It is --

14 JUSTICE BREYER: Is there anything
15 wrong, from your point of view, which taking
16 this case in a very unsatisfactory way to
17 everybody, except perhaps it's simple, is you
18 just simply read the words what the employer
19 cannot stop is joint effort, like making a
20 joint claim, nothing to do with class actions,
21 just making a joint claim, resorting to
22 administrative and judicial forums for the
23 purpose of making that joint claim?

24 Now, the contracts seem to be an
25 employer effort to stop an employee from doing

1 that because they don't allow him to do that
2 either in administrative or judicial forums.

3 Now, suppose end of opinion, okay?
4 Now, from your point of view, does that solve
5 the case? Or does it just create a lot of
6 problems? Is it totally out to lunch or what?

7 MR. ORTIZ: No, Your Honor. We think
8 that would absolutely solve the case correctly.

9 CHIEF JUSTICE ROBERTS: Well, but, of
10 course, there's another statute that has either
11 equally or plainer language which says that
12 arbitration agreements will be enforced
13 according to their terms.

14 Does it complicate the case to add
15 that into it?

16 MR. ORTIZ: It complicates it one
17 step, but what the FAA gives the FAA also takes
18 away, Your Honor. That same provision of the
19 FAA, Section 2, actually reserves -- creates an
20 exception for -- for contracts that -- for
21 contractual provisions that are illegal, and
22 this Court has also said that there are two
23 other doctrines that are --

24 CHIEF JUSTICE ROBERTS: Well, that
25 kind of begs the question. We're trying to

1 figure out if this is illegal. You can't
2 assume that that type of arbitration agreement
3 is illegal, and, therefore, it's covered by a
4 clause that prevents the enforcement of illegal
5 arbitration agreements.

6 MR. ORTIZ: Sure, you can, Your Honor.
7 Section 7 clearly prohibits this kind of
8 behavior, and in Kaiser Steel, this Court
9 itself said that such contracts are illegal and
10 cannot be enforced by a court. They easily fit
11 within the meaning of the savings clause.

12 JUSTICE BREYER: Why do you not -- I
13 mean, look, I quoted a statute, didn't I?

14 MR. ORTIZ: Yes, you did, Your Honor.
15 The language clearly controls.

16 JUSTICE BREYER: All right. And the
17 statute was passed after the Arbitration Act
18 wasn't it?

19 MR. ORTIZ: Yes, Your Honor.

20 JUSTICE BREYER: And Justice Cardozo
21 said when in a comparable context, we exclude
22 cases where the contract is in contravention of
23 a statute. And that's why Justice Kagan
24 provided the example of the discrimination
25 case.

1 MR. ORTIZ: Yes, Your Honor.

2 JUSTICE BREYER: So I'm not quite
3 ready to say it's more complicated.

4 MR. ORTIZ: No, no. It's -- Your
5 Honor, I'm sorry if I suggested that.

6 (Laughter.)

7 MR. ORTIZ: The section -- Section 2
8 of the FAA was taken -- was not just inspired
9 by the New York Arbitration Act but was taken
10 word for word from the New York Arbitration
11 Act. And then Judge Cardozo of the New York
12 Court of Appeals basically said, in
13 interpreting that provision of the New York
14 Arbitration Act, near the time when it was
15 enacted by the New York State legislature, that
16 it would not cover at all illegal agreements.

17 And Congress was aware of that history
18 of interpretation. In fact, the Berkowitz case
19 was brought to its attention when it was
20 considering the Federal Arbitration Act.

21 CHIEF JUSTICE ROBERTS: Where -- where
22 are you on my 50-employee hypothetical? Do you
23 agree with the NLRB that it is all right to
24 have a provision which says there is no class
25 arbitration unless there are more than 50

1 people involved?

2 MR. ORTIZ: The employer, Your Honor,
3 cannot coerce employees into that forum, unless
4 there is an alternative forum available with,
5 say, the courts where --

6 CHIEF JUSTICE ROBERTS: Well, okay.

7 MR. ORTIZ: -- fewer than 50 employees
8 could proceed.

9 CHIEF JUSTICE ROBERTS: But is your
10 answer then that you disagree with the position
11 of the NLRB? Because I understood them to say
12 that, yes, once you're in the forum, you have
13 to abide by the rules of the forum. And one of
14 the rules of the forum that I hypothesized is
15 one that's saying you've got to have at least
16 50 people before you can have a collective
17 action. Now, if it's an arbitration agreement,
18 that means you are already out of the courts.
19 So the question is, is that a valid agreement
20 or not?

21 MR. ORTIZ: Well, when you get to the
22 arbitral forum --

23 CHIEF JUSTICE ROBERTS: Yeah.

24 MR. ORTIZ: -- you are bound by cause.
25 But when an employer tries to coerce by making

1 it a condition of continued employment that
2 employees agree to a set of arbitral rules that
3 make collective action impossible and at the
4 same time takes away --

5 CHIEF JUSTICE ROBERTS: Well, my point
6 is it doesn't make collective action
7 impossible. It requires that there be at least
8 51 employees before you can have collective
9 action. In other words, it's a rule like the
10 Federal Rule of Civil Procedure which says you
11 cannot have a class action whenever you want
12 to, but you have to satisfy certain rules like
13 numerosity.

14 MR. ORTIZ: No, no, I -- I'm sorry,
15 Your Honor. I --

16 CHIEF JUSTICE ROBERTS: Sorry it's so
17 complicated.

18 MR. ORTIZ: No, no, no, no.

19 (Laughter.)

20 MR. ORTIZ: But so long as there's an
21 alternative available where a group of 50 -- of
22 less than 50 people could pursue, whether
23 that's before --

24 CHIEF JUSTICE ROBERTS: No, there's no
25 alternative available because you're agreeing

1 to arbitrate. You're agreeing to go to the
2 arbitral forum, and it has certain rules.

3 MR. ORTIZ: Well, under --

4 CHIEF JUSTICE ROBERT: The whole point
5 is no, you can't -- you can't engage in
6 collective action if there are fewer than 51
7 people.

8 MR. ORTIZ: Then, in our view, Your
9 Honor, no, the -- the employer could not insist
10 on that.

11 JUSTICE SOTOMAYOR: I'm sorry. Let's
12 assume for the sake of argument that the
13 employer here has 49 employees and he gives a
14 contract to the employee that says you have to
15 arbitrate with me in this forum that doesn't
16 have class actions unless there are 50 more
17 employees.

18 That would be a different claim than
19 involved here, wouldn't it?

20 MR. ORTIZ: Yes, Your Honor, it would
21 be.

22 JUSTICE SOTOMAYOR: It would be the
23 intent to interfere with collective action.
24 But let's assume it's an Ernst & Young that has
25 5,000 employees, I don't actually know the

1 number, but for sake of argument, 5,000
2 employees. What would be wrong by choosing an
3 arbitral forum that limits class actions to 50
4 people?

5 The federal rules say that you have to
6 have a class that's big enough in numerosity to
7 warrant class treatment. And, arguably -- and
8 if there's only 20 or 25 employees, a judge
9 could, using its -- his or her discretion, say:
10 No, I'm not going to have a class action with
11 25 people.

12 MR. ORTIZ: No, no, but the
13 difference, Your Honor, is that under the
14 federal rules, you can still have a joint
15 action with two, three, four, five people, up
16 to 50.

17 And as I was assuming the hypothetical
18 from the Chief Justice, under the -- the rules
19 of the -- the arbitral forum he was putting
20 forward, it would be either 50 or more, or
21 nothing or one.

22 JUSTICE SOTOMAYOR: And no joint
23 activity of any --

24 MR. ORTIZ: No joint activity below
25 50.

1 JUSTICE SOTOMAYOR: -- of any kind?

2 MR. ORTIZ: Right.

3 JUSTICE SOTOMAYOR: All right. Now I
4 understand.

5 MR. ORTIZ: That was the problem. So
6 I'm sorry if -- if I was not clear about that.

7 JUSTICE SOTOMAYOR: Yeah, that's --

8 CHIEF JUSTICE ROBERTS: No, your --
9 your understanding is correct, I just wanted to
10 make certain I understood that your position
11 was different than the position of the NLRB on
12 that.

13 MR. ORTIZ: Thank you, Your Honor.

14 JUSTICE ALITO: On the right to -- if
15 the right to engage in concerted activity
16 includes the right to have -- to file a class
17 action in federal court, how can an agreement
18 provide that -- waive that right and require
19 arbitration, even if arbitrations -- even if
20 class arbitration is allowed, or can it not do
21 that?

22 MR. ORTIZ: Your Honor, under Section
23 7, as long as joint legal action is available
24 in one forum, that would be sufficient.

25 JUSTICE ALITO: Why? Where do you get

1 that out of the language of the statute?

2 MR. ORTIZ: May I proceed, Your Honor?

3 CHIEF JUSTICE ROBERTS: Sure.

4 MR. ORTIZ: Your Honor, it's -- it
5 represents an accommodation, if you will, with
6 this Court's jurisprudence where this Court has
7 said in a series of cases that the arbitral
8 forum is equivalent to the judicial forum so as
9 long as one can proceed in one or the other,
10 there should be no Section 7 violation. Thank
11 you.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Mr. Clement, you have four minutes
15 remaining.

16 REBUTTAL ARGUMENT OF PAUL D. CLEMENT
17 ON BEHALF OF PETITIONERS IN NOS. 16-285 AND 16-300

18 MR. CLEMENT: Thank you, Mr. Chief
19 Justice. Just a few points in rebuttal.

20 First of all, I just want to emphasize
21 that as Justice Kennedy said, you do have the
22 right to concerted activity in the sense that
23 three or more employees could decide that they
24 want to go to the arbitral forum and then they
25 would arbitrate individually but they could

1 have the same lawyer and the like.

2 They also have other options.

3 JUSTICE GINSBURG: What about the
4 confidentiality agreements which, I take it,
5 puts a damper on how -- how jointly these
6 people can proceed?

7 MR. CLEMENT: Well, they can proceed
8 very jointly before they get there. The
9 confidentiality agreement's not going to take
10 -- stop the same lawyer from thinking about the
11 three cases in conjunction --

12 JUSTICE KAGAN: But, Mr. Clement,
13 usually, usually when you have a right, the
14 fact that there is one way to exercise a right
15 left over does not make it okay if we've taken
16 away another 25 ways of exercising the right.
17 You know, when we think about the First
18 Amendment, we don't say we can ban leafleting
19 because you can always write an op ed. And the
20 same thing applies here.

21 The fact that there's something left
22 over by way of concerted activity does not make
23 it okay under Section 7 and Section 8 to
24 deprive employees of many other means of
25 protected activity.

1 MR. CLEMENT: Well, Your Honor, I'm
2 not sure you should blame me for that, because
3 as I understood the colloquy with Justice
4 Alito, that's exactly their position. As long
5 as there's an avenue for concerted activity
6 open, that's good enough.

7 And I did want to mention there is
8 another avenue for concerted activity, which is
9 the three employers -- employees, rather, can
10 go to the Wage and Hour Division of the Labor
11 Department, and the Wage and Hour Division, if
12 it thinks there's a problem, can bring an
13 action that won't be subject to the arbitration
14 agreement under this Court's decision in Waffle
15 House.

16 JUSTICE SOTOMAYOR: Mr. Clement, how
17 -- and these are related questions, which is
18 how does an employee with these confidentiality
19 agreements or even with this agreement in
20 place -- how are they able to bring a pattern
21 or practice or disparate treatment cause of
22 action? And explain to me why employers would
23 prefer an arbitration of 100 different claims,
24 let's say in a religious accommodation case,
25 where half the arbitrators say you must honor

1 this -- those 50 people's religious claims and
2 the other 50 arbitrators say no, you don't have
3 to.

4 Where -- how are employers and
5 employees helped with such a system and how
6 with these individual arbitration claims that
7 have become more recent in -- in modern
8 times -- this is not -- these bilateral
9 arbitration agreements have not been the norm;
10 they've been the norm in more recent times.
11 When the Court said that we weren't going to
12 recognize class actions in arbitrations, that's
13 when employers jumped to this. But how do you
14 deal with those two policy considerations?

15 MR. CLEMENT: Let me try to deal with
16 them, Justice Sotomayor. But let me -- let me
17 first correct what I think is just a
18 disagreement between the two of us, which is I
19 think, and this Court said as much in *Italian*
20 *Colors* and *Concepcion*, bilateral arbitration is
21 actually the only kind of arbitration there was
22 until roughly *Basil*, and then you started
23 having the possibility of class arbitrations.

24 So the kind of arbitration that
25 Congress was trying to protect in 1925 was

1 bilateral arbitration. Now --

2 JUSTICE SOTOMAYOR: Well, it was
3 bilateral commercial arbitration.

4 MR. CLEMENT: Okay, but again, this
5 Court crossed that bridge in Circuit City.
6 Now, when you get to -- you raised a concern
7 about what if you can only bring a pattern and
8 practice case with, you know, more than one
9 plaintiff?

10 Well, you know, the parties really
11 haven't briefed that, but that did come up a
12 lot in Italian Colors because the Second
13 Circuit had a rule that said that you could
14 only bring a pattern and practice case pursuant
15 to a class action.

16 And try as I might to say that that
17 was a problem with effective vindication, I
18 only got four votes. So the Court seemed to
19 say that that wasn't a sufficient problem.
20 Thank you, Your Honor.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel. The cases are submitted.

23 (Whereupon, at 11:09 a.m., the case
24 was submitted.)

25

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50:18 62:8 63:6 55 [2] 3:19 55:11</p> <hr/> <p style="text-align: center;">6</p> <p>60 [1] 55:14 66 [1] 3:23</p> <hr/> <p style="text-align: center;">7</p> <p>7 [44] 4:25 5:10,13,15 7:12,15 9:15 13:3,21 15:4,9 16:9 18:5,24 19:1,4,7,8,15,22 20:4,12 21:18 25:3 29:6 30:8 31:15 32:23 33:7 45:2,9,15,20,23 48:8 50:6 53:14 56:6,12,17 59:7 65:23 66:10 67:23 70 [1] 40:21 77 [2] 9:14 24:16</p> <hr/> <p style="text-align: center;">8</p>	<p>8 [5] 13:21 21:18 45:20,24 67:23 8(a)(1) [2] 46:5 50:3</p> <hr/> <p style="text-align: center;">A</p> <p>a.m [3] 2:3 4:2 70:23 aaa [3] 25:18 50:13 51:21 abide [2] 20:19 61:13 ability [6] 13:4 25:7 29:21 37:5 40:14 42:5 43:3 53:1 able [2] 52:3 68:20 above-entitled [1] 2:1 abrogate [2] 43:17 45:2 absent [1] 32:22 absolutely [3] 32:17 46:10 58:8 academy [1] 51:23 accommodation [2] 66:5 68:24 according [2] 28:6 58:13 account [1] 37:4 achieved [1] 51:10 act [38] 18:16 21:12 23:2,17 27:25 31:1,16 34:9,13,15 35:14,15 38:5 40:14,16 41:7 42:3 44:8,9,20 48:1 49:10,24 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