SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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EPIC SYSTEMS CORPORATION,)

Petitioner,)

v.) No. 16-285

JACOB LEWIS,)

Respondent.)

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ERNST & YOUNG LLP, et al.,)

Petitioners,)

v.) No. 16-300

STEPHEN MORRIS,)

Respondent.)

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and

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NATIONAL LABOR RELATIONS BOARD,)

Petitioner,)

v.) No. 16-307

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

Respondents.)

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Washington, D.C.

Monday, October 2, 2017

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

APPEARANCES:

PAUL D. CLEMENT, Washington, D.C.; on behalf of the Petitioners in Nos. 16-285 and 16-300

JEFFREY B. WALL, Principal Deputy Solicitor General, Department of Justice, Washington, D.C.; for United States as amicus curiae, supporting the Petitioners in Nos. 16-285 and 16-300, and Respondents in No. 16-307

RICHARD F. GRIFFIN, JR., Washington, D.C.; on behalf of the Petitioner in No. 16-307

DANIEL R. ORTIZ, Charlottesville, Virginia; on behalf 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 the FAA should not yield.

JUSTICE GINSBURG: In that event, you would --

JUSTICE KENNEDY: -- much of an advantage.

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

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

MR. GRIFFIN: They're -- they're constrained with respect to limiting employees' ability to act concertedly in the same way that, from the beginning of the National Labor Relations Act, individual agreements could not be used to require employees to proceed individually in dealing with their employers on terms and conditions.

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

MR. GRIFFIN: Well, with due respect to my colleagues, that's an inaccurate summary of the Board's precedent, Your Honor. The Board's precedent has always said that individual agreements that require employees to individually waive their right to proceed collectively are violations of the National Labor Relations Act. That's what this Court held in 1940 in National Licorice.

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

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

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

what it is.

MR. GRIFFIN: Well, it's a misnomer to say that the Board doesn't allow class proceedings, Your Honor. The way a proceeding under the National Labor Relations Act works is the Board doesn't have any independent investigatory authority or ability to initiate suits on its own.

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

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

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

JUSTICE ALITO: And the other question I have is, how do you draw a distinction between a -- an agreement precluding class arbitration and all of the other Rules of Civil Procedure that limit the ability of employees to engage in collective litigation?

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

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

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

JUSTICE ALITO: Well, I want to --

MR. GRIFFIN: -- is the employees have to take these -- these provisions as they find

them. So I'll give you an example.

In your -- in this Court's decision in Washington Aluminum, there were a group of employees who were faced with a frigid workplace. In response to those conditions, they walked out. That was in 19-- and that activity was held to be protected. That was in 1962.

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

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

if they're available. Our position is the only --

JUSTICE ALITO: So -- so is the argument is that the -- that the -- that restrictions in Rule 23 abrogate Rule -- Section 7 because they were enacted later?

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

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

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

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

What Section 7 does and what Section 8 does is to establish a set of rules that deal with how employers can deal with employees.

And one of the things that Section 7 and Section 8 say in concert, if you will, is that employers can't demand as conditions of employment the waivers of concerted rights. And that's all you're saying here.

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

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

MR. GRIFFIN: Absolutely.

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

MR. GRIFFIN: Yes.

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

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

JUSTICE BREYER: And in grievance arbitration, by the way, how -- I just wonder, because that's very common. Are there

instances where -- there will probably be a worker representative going to the employer, but are there instances where the grievance is a grievance that is shared by people, but not perfectly shared, so Jones, Smith, and Brown will go to the representative and say, representative, please let's go before the arbitrator, and you represent all three?

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

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

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

MR. GRIFFIN: That's a rule of the

arbitral forum, and the employee takes the rules of the forum as they find them.

CHIEF JUSTICE ROBERTS: So you have a right to act collectively, but only if there are 51 or more of you?

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Yes.

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

CHIEF JUSTICE ROBERTS: No, the arbitral forum has rules, just like the Federal Rules of Civil Procedure. And what you're saying is, well, once you get into federal court, of course you've got to follow the rules of the forum. And we have arbitral forums as well, and I'm just saying --

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

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

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

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

CHIEF JUSTICE ROBERTS: Yes.

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

CHIEF JUSTICE ROBERTS: So -- so all the employer -- well, and why can the arbitral

forum enforce the rule that says, basically, you cannot act collectively if it's fewer than 50 people?

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

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

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

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

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

MR. GRIFFIN: Yes, Your Honor.

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

MR. GRIFFIN: Your Honor, it would be -- it would be just as though, in the analogous circumstances, Congress said there were to be no class actions in court.

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

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

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

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

MR. GRIFFIN: The -- the National

Academy of Arbitrators filed a brief -- amicus brief in this case, Your Honor, supporting the position that the Board took in Murphy Oil, and it addresses the circumstances under which, in both labor arbitration and employment arbitration, employees are able to proceed in joint collective representative actions.

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

MR. GRIFFIN: That's correct.

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

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

It's -- if -- if you imagine it in mathematical terms, there's a set of people who have rights under the Fair Labor Standards Act. There's a lesser included subset of people who

have rights under both the Fair Labor Standards Act and the National Labor Relations Act.

And as to that lesser-included set, there's no ability to waive the right in an agreement with an employer to proceed collectively.

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

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

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

In fact, the Lewis case involved an individual who filed a class action and then was joined immediately by a number of other

plaintiffs. And each of these cases involves concerted activity.

There isn't a question of concert here because there were four people involved in filing the Murphy Oil action, there were two involved in -- in Morris, and, as I said, Lewis was joined by others in that action.

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

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

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

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

JUSTICE SOTOMAYOR: Involve non-union members.

MR. GRIFFIN: Yes, exactly.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Ortiz.

ORAL ARGUMENT OF DANIEL R. ORTIZ, ESQ.,
ON BEHALF OF RESPONDENTS IN
NOS. 16-285 AND 16-300

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

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

Apparently -- approximately 55 percent of non-union private employees have contracts that are covered by mandatory arbitration agreements, and that covers about 60 million people. Twenty-three percent of those employees have non-individual -- sorry, non-joint, non-class, non-collective, research says, which represents about 25 million employees.

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

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

MR. ORTIZ: Yes, Your Honor.

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

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

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

Second, Mr. Wall suggested the Concepcion and Italian Colors actually control

here. They do not. Concepcion, for example, concerns state law. This Court followed preemption analysis and was very concerned, in particular, about the application of the state law in that case.

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

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

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

It is --

JUSTICE BREYER: Is there anything wrong, from your point of view, which taking this case in a very unsatisfactory way to everybody, except perhaps it's simple, is you just simply read the words what the employer cannot stop is joint effort, like making a joint claim, nothing to do with class actions,

just making a joint claim, resorting to administrative and judicial forums for the purpose of making that joint claim?

Now, the contracts seem to be an employer effort to stop an employee from doing that because they don't allow him to do that either in administrative or judicial forums.

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

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

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

Does it complicate the case to add that into it?

MR. ORTIZ: It complicates it one step, but what the FAA gives the FAA also takes away, Your Honor. That same provision of the FAA, Section 2, actually reserves -- creates an exception for -- for contracts that -- for

contractual provisions that are illegal, and this Court has also said that there are two other doctrines that are --

CHIEF JUSTICE ROBERTS: Well, that kind of begs the question. We're trying to figure out if this is illegal. You can't assume that that type of arbitration agreement is illegal, and, therefore, it's covered by a clause that prevents the enforcement of illegal arbitration agreements.

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

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

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

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

MR. ORTIZ: Yes, Your Honor.

JUSTICE BREYER: And Justice Cardozo

said when in a comparable context, we exclude cases where the contract is in contravention of a statute. And that's why Justice Kagan provided the example of the discrimination case.

MR. ORTIZ: Yes, Your Honor.

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

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

(Laughter.)

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

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

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

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

CHIEF JUSTICE ROBERTS: Well, okay.

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

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

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

CHIEF JUSTICE ROBERTS: Yeah.

MR. ORTIZ: -- you are bound by cause. But when an employer tries to coerce by making it a condition of continued employment that employees agree to a set of arbitral rules that make collective action impossible and at the same time takes away --

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

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

CHIEF JUSTICE ROBERTS: Sorry it's so complicated.

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

(Laughter.)

MR. ORTIZ: But so long as there's an

alternative available where a group of 50 -- of less than 50 people could pursue, whether that's before --

CHIEF JUSTICE ROBERTS: No, there's no alternative available because you're agreeing to arbitrate. You're agreeing to go to the arbitral forum, and it has certain rules.

MR. ORTIZ: Well, under --

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

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

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

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

MR. ORTIZ: Yes, Your Honor, it would

be.

JUSTICE SOTOMAYOR: It would be the intent to interfere with collective action. But let's assume it's an Ernst & Young that has 5,000 employees, I don't actually know the number, but for sake of argument, 5,000 employees. What would be wrong by choosing an arbitral forum that limits class actions to 50 people?

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

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

And as I was assuming the hypothetical from the Chief Justice, under the -- the rules of the -- the arbitral forum he was putting forward, it would be either 50 or more, or

nothing or one.

JUSTICE SOTOMAYOR: And no joint activity of any --

MR. ORTIZ: No joint activity below 50.

JUSTICE SOTOMAYOR: -- of any kind?

MR. ORTIZ: Right.

JUSTICE SOTOMAYOR: All right. Now I understand.

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

JUSTICE SOTOMAYOR: Yeah, that's --

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

MR. ORTIZ: Thank you, Your Honor.

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

that?

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

JUSTICE ALITO: Why? Where do you get that out of the language of the statute?

MR. ORTIZ: May I proceed, Your Honor?

CHIEF JUSTICE ROBERTS: Sure.

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Clement, you have four minutes remaining.

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

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

First of all, I just want to emphasize

that, as Justice Kennedy said, you do have the right to concerted activity in the sense that three or more employees could decide that they want to go to the arbitral forum and then they would arbitrate individually, but they could have the same lawyer and the like.

They also have other options.

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

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

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

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

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

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

JUSTICE SOTOMAYOR: Mr. Clement, how -- and these are related questions, which is how does an employee with these confidentiality agreements or even with this agreement in place -- how are they able to bring a pattern

or practice or disparate treatment cause of action? And explain to me why employers would prefer an arbitration of 100 different claims, let's say in a religious accommodation case, where half the arbitrators say you must honor this -- those 50 people's religious claims and the other 50 arbitrators say no, you don't have to.

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

MR. CLEMENT: Let me try to deal with them, Justice Sotomayor. But let me -- let me first correct what I think is just a disagreement between the two us, which is I think, and this Court said as much in Italian Colors and Concepcion, bilateral arbitration is

actually the only kind of arbitration there was until roughly Basil, and then you started having the possibility of class arbitrations.

So the kind of arbitration that Congress was trying to protect in 1925 was bilateral arbitration. Now --

JUSTICE SOTOMAYOR: Well, it was bilateral commercial arbitration.

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

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

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

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

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

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