

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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

Pages: 1 through 71
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23 Washington, D.C.

24 Monday, October 2, 2017

25

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:

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7 the Petitioners in Nos. 16-285 and 16-300
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11 supporting the Petitioners in Nos. 16-285 and
12 16-300, and Respondents in No. 16-307

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14 behalf of the Petitioner in No. 16-307

15 DANIEL R. ORTIZ, Charlottesville, Virginia; on
16 behalf of the Respondents in Nos. 16-285 and
17 16-300

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7	JEFFREY B. WALL, ESQ.,	
8	For United States, as amicus curiae,	
9	Supporting Petitioners in Nos. 16-285	
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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.

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

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

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

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

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

25 And the driving force of the NLRA was

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

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

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

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

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

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

1 and the courthouses and the agencies, is
2 covered by the mutual aid or protection clause.

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

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

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

25 Regardless, I'm worried about what you

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

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

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

23 That's the argument against you. I
24 want to be sure that I didn't see, you know --
25 Concepcion, I've read it too, we all have, but

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

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

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

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

23 So, for example, if an atypical worker
24 decides that he wants to bring a class action
25 on behalf of a handful of fellow employees,

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

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

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

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

25 JUSTICE SOTOMAYOR: Mr. Clement --

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

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

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

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

25 So this isn't a principle that says

1 that the employee's position is so weak they
2 can't agree to arbitrate at all.

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

12 JUSTICE SOTOMAYOR: Mr. Clement --

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

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

1 the way, you're sort of wasting your time here
2 because the NLRA in Section 7 is going to
3 strictly prohibit the ability to enter
4 bilateral arbitration --

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

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

23 And that is if it stops an individual
24 from concerted activities. So what that starts
25 with is this contract's no longer valid.

1 There's nothing to take to the courthouse --

2 MR. CLEMENT: So --

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

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

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

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

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

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

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

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

18 JUSTICE GINSBURG: But before the --

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

22 JUSTICE KENNEDY: Let's take -- let's
23 take two cases. One is a case where two
24 employees get together and seek -- seek
25 arbitration. The other is when one employee

1 seeks arbitration but makes it a class action.

2 Is one case any easier than the other?

3 Or do we decide both on the same principle?

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

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

18 JUSTICE KENNEDY: Suppose it's for
19 their wages.

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

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

5 JUSTICE KAGAN: Well, Mr. Clement --

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

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

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

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

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

19 MR. CLEMENT: Yeah, there's three
20 cases here. And I think that, you know, two of
21 them might be more like the class action case
22 and one might be like the concerted activity
23 case. I'm obviously representing all three of
24 the employers, but that's not why I'm telling
25 you that you don't have to make a distinction

1 between the two.

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

6 JUSTICE SOTOMAYOR: Is this contract
7 --

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

9 JUSTICE KAGAN: Mr. Clement, what
10 about --

11 MR. CLEMENT: -- you're subject to the
12 rules.

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

23 And then Section 102 of the NLGA
24 basically just repeats Section 7. And then
25 Section 103 says -- and I'm quoting now --

1 "Any undertaking or promise in conflict with"
2 -- essentially the language in Section 7 --
3 "Shall not be enforceable in any court."

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

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

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

14 MR. CLEMENT: But --

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

22 MR. CLEMENT: I don't think that
23 that's the way to read the statute, and I think
24 the reason is that this isn't -- I don't
25 think the way to see a traditional bilateral

1 arbitration agreement is as a waiver of a
2 Section 7 right or an NLGA right.

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

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

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

21 CHIEF JUSTICE ROBERTS: Thank you,
22 Mr. Clement.

23 Mr. Wall.

24

25

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 \$1,800. 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 at least one of these agreements, if not
11 all three, have confidentiality agreements that
12 prohibit the employers from talking to other
13 employers, from combining with other employers.

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

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

22 JUSTICE SOTOMAYOR: Only when it's
23 been a fight between whether that statute and
24 the cause of action it provided overrode the
25 FAA. This is more as to the making of a

1 contract, which is like a state law defense, a
2 common state law defense like fraud or duress,
3 except it's federal law here saying you can't
4 do this.

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

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

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

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

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

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

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

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

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

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

25 MR. WALL: But, Justice Breyer,

1 that --

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

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

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

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

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

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

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

1 action.

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

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

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

16 MR. WALL: That's right.

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

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

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

24 MR. WALL: Well --

25 JUSTICE SOTOMAYOR: Just read the

1 NLRB.

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

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

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

13 MR. WALL: So --

14 JUSTICE SOTOMAYOR: Go ahead.

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

1 converted to be substantive and non-waiveable.

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

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

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

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

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

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

23 JUSTICE ALITO: Yeah, I just wanted to
24 know what the -- what the Government's position
25 is regarding the Norris-LaGuardia Act issue?

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

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

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

18 And it's resolving that ambiguity in
19 the face of the FAA that I think is a problem.
20 As we --

21 JUSTICE GINSBURG: Yes. If --

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

24 JUSTICE KAGAN: I take it that both
25 you and Mr. Clement agree that, if you had a

1 discriminatory arbitration agreement, let's say
2 an arbitration agreement that said that the
3 employer will pay the arbitration costs of men
4 but not women, that that would not be
5 enforceable. Why not?

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

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

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

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

3 CHIEF JUSTICE ROBERTS: Sure.

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

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

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

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

24 Mr. Griffin.

25

1 ORAL ARGUMENT OF RICHARD D. GRIFFIN, ESQ.,
2 ON BEHALF OF PETITIONER,
3 ACTING AS RESPONDENT IN NO. 16-307

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

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

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

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

22 JUSTICE GINSBURG: What do --

23 CHIEF JUSTICE ROBERTS: Mr. Griffin,
24 if -- if -- I'm not sure I fully understand
25 your position. Individual -- individuals can

1 agree to arbitrate disputes so long as they
2 allow -- so long as the agreement allows
3 collective arbitration; is that correct?

4 MR. GRIFFIN: No, Your Honor. It's a
5 slight variation on that.

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

10 CHIEF JUSTICE ROBERTS: So the
11 arbitral --

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

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

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

1 effectively vindicating statutory rights.

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

7 CHIEF JUSTICE ROBERTS: Right.

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

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Right, I don't

1 understand how that's consistent with your
2 position that these rights can't be waived.

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

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

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

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'll 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's
2 collective action.

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

7 JUSTICE KENNEDY: Well, they're
8 proceeding concertedly. They have a single
9 attorney. They're 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 on
19 terms and conditions.

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

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

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

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

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

1 what it is.

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

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

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

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

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

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

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

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

23 JUSTICE ALITO: Well, I want to --

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

1 them. So I'll give you an example.

2 In your -- in this Court's decision in
3 Washington Aluminum, there were a group of
4 employees who were faced with a frigid
5 workplace. In response to those conditions,
6 they walked out. That was in 19-- and that
7 activity was held to be protected. That was in
8 1962.

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

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

1 if they're available. Our position is the only
2 --

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

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

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

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

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

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

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

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

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

13 MR. GRIFFIN: Absolutely.

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

16 MR. GRIFFIN: Yes.

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

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

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

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

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

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

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

25 MR. GRIFFIN: That's a rule of the

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

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

6 MR. GRIFFIN: What -- no, Your Honor.
7 What you have an opportunity to do is to try
8 and utilize the rules that are available in the
9 forum without the employer intervening through
10 a -- a prohibition that's violative of Section
11 7.

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

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

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

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

23 CHIEF JUSTICE ROBERTS: Yes.

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

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

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

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

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

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

20 CHIEF JUSTICE ROBERTS: Yes.

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

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

1 forum enforce the rule that says, basically,
2 you cannot act collectively if it's fewer than
3 50 people?

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

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

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

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

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

25 MR. GRIFFIN: Yes, Your Honor.

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

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

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

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

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

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

25 MR. GRIFFIN: The -- the National

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

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

12 MR. GRIFFIN: That's correct.

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

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

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

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

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

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

11 MR. GRIFFIN: Yeah -- yes, Your Honor.
12 That -- that law is essentially unchallenged
13 here, and the Board's law is that, if an
14 individual takes action to initiate, to induce,
15 or to prepare for group action, that that is
16 concerted activity as understood under Section
17 7.

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

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

1 plaintiffs. And each of these cases involves
2 concerted activity.

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

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

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

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

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

1 JUSTICE SOTOMAYOR: Involve non-union
2 members.

3 MR. GRIFFIN: Yes, exactly.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Mr. Ortiz.

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

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

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

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

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

1 CHIEF JUSTICE ROBERTS: So this
2 decision in your favor would invalidate the
3 25 -- agreements covering 25 million employees?

4 MR. ORTIZ: Yes, Your Honor.

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

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

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

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

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

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

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

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

18 It is --

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

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

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

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

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

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

19 Does it complicate the case to add
20 that into it?

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

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

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

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

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

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

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

24 MR. ORTIZ: Yes, Your Honor.

25 JUSTICE BREYER: And Justice Cardozo

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

6 MR. ORTIZ: Yes, Your Honor.

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

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

11 (Laughter.)

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

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

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

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

11 CHIEF JUSTICE ROBERTS: Well, okay.

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

14 CHIEF JUSTICE ROBERTS: But is your
15 answer then that you disagree with the position
16 of the NLRB? Because I understood them to say
17 that, yes, once you're in the forum, you have
18 to abide by the rules of the forum. And one of
19 the rules of the forum that I hypothesized is
20 one that's saying you've got to have at least
21 50 people before you can have a collective
22 action. Now, if it's an arbitration agreement,
23 that means you are already out of the courts.
24 So the question is, is that a valid agreement
25 or not?

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

3 CHIEF JUSTICE ROBERTS: Yeah.

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

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

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

21 CHIEF JUSTICE ROBERTS: Sorry it's so
22 complicated.

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

24 (Laughter.)

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

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

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

8 MR. ORTIZ: Well, under --

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

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

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

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

25 MR. ORTIZ: Yes, Your Honor, it would

1 be.

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

10 The federal rules say that you have to
11 have a class that's big enough in numerosity to
12 warrant class treatment. And, arguably -- and
13 if there's only 20 or 25 employees, a judge
14 could, using its -- his or her discretion, say:
15 No, I'm not going to have a class action with
16 25 people.

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

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

1 nothing or one.

2 JUSTICE SOTOMAYOR: And no joint
3 activity of any --

4 MR. ORTIZ: No joint activity below
5 50.

6 JUSTICE SOTOMAYOR: -- of any kind?

7 MR. ORTIZ: Right.

8 JUSTICE SOTOMAYOR: All right. Now I
9 understand.

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

12 JUSTICE SOTOMAYOR: Yeah, that's --

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

18 MR. ORTIZ: Thank you, Your Honor.

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

1 that?

2 MR. ORTIZ: Your Honor, under Section
3 7, as long as joint legal action is available
4 in one forum, that would be sufficient.

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

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

8 CHIEF JUSTICE ROBERTS: Sure.

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

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Mr. Clement, you have four minutes
20 remaining.

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

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

25 First of all, I just want to emphasize

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

7 They also have other options.

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

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

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

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

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

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

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

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

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

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

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

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

7 JUSTICE SOTOMAYOR: Well, it was
8 bilateral commercial arbitration.

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

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

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

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

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

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