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

IN THE
Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
Petitioner,
v.
JACOB LEWIS,
Respondent.

ERNST & YOUNG LLP, ET AL.,
Petitioners,
v.
STEPHEN MORRIS, ET AL.,
Respondents.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
MURPHY OIL USA, INC., ET AL.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Fifth, Seventh, and Ninth Circuits

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE COALITION FOR A DEMOCRATIC WORKPLACE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS EPIC SYSTEMS CORPORATION, ERNST & YOUNG, LLP ET AL., AND RESPONDENT MURPHY OIL USA, INC.

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INTEREST OF AMICI CURIAE

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of private-sector research and development in the nation. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. The Coalition for a Democratic Workplace ("CDW") comprises over 600 organizations representing millions of employers nationwide in nearly every industry. CDW provides a collective voice to its membership on issues related to labor law reform.[1]

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[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk. Further, amici curiae states that no counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the amici curiae, their members, or their counsel, have made a monetary contribution to this brief's preparation or submission. *See* S. Ct. Rule 37.6

The NAM and CDW advocate on behalf of their members on a range of matters, including labor and employment issues. They also file briefs as amici curiae in cases of importance, such as these. The organizations are made up of a vast number of employers with operations across the United States that utilize pre-dispute arbitration agreements with class action waivers[2] in the employment context.

The National Labor Relations Board ("NLRB" or "Board") has reversed course from the position held by its General Counsel as recently as 2010 and now maintains that arbitration agreements with class waivers, and which are governed by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*. ("FAA"), violate employees' rights to engage in protected, concerted activity under the National Labor Relations Act, 29 U.S.C. § 151 *et seq*. ("NLRA"). *See D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012) ("*D.R. Horton*"); *see also* 29 U.S.C. § 157. In taking this position, the NLRB has not acted as an administrative agency ruling on areas within its expertise; instead, it has interpreted statutes outside of its expertise and effectuated an anti-arbitration shift.

The U.S. Courts of Appeals for the Seventh, Ninth, and now Sixth Circuits have mistakenly deferred to the NLRB and held that arbitration agreements with class waivers violate the NLRA. *See Lewis v. Epic*

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[2] Amici use the term "class action waiver" or "class waiver" throughout this brief as a short hand way of describing a provision in an arbitration agreement that prohibits class actions under Rule 23 of the Federal Rules of Civil Procedure, collective actions under 29 U.S.C. § 216(b), and any other type of aggregate litigation allowed under federal or state procedure. The purpose of class waivers is to allow parties to engage only in bilateral arbitration.

Systems, 823 F.3d 1147 (7th Cir. 2016); *Morris et al. v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016); *Nat'l Labor Relations Bd. v. Alternative Entm't, Inc.*, No. 16-1385, 2017 WL 2297620 (6th Cir. May 26, 2017). But the Fifth Circuit has instead correctly rejected the NLRB's novel theory on class waivers. *See Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015). Amici curiae have an interest in ensuring arbitration agreements entered into between employers and employees are enforced according to their terms, as required by the FAA. The NAM and CDW also have an interest in ensuring the NLRB avoids ruling on issues outside of its congressionally–defined realm. The NAM and CDW also want to preserve the benefits of bilateral-arbitration—arbitration between the two parties to an arbitration agreement only—to resolve workplace disputes.

SUMMARY OF ARGUMENT

The NLRB deserves no deference in its interpretation of the FAA, because the FAA is outside the NLRB's congressionally–mandated role. For over seventy years, this Court has rejected the NLRB's forays into areas beyond its responsibility, and it should do so again now. *See, e.g., Southern. S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942) ("[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives.").

Further, the NLRB's interpretation of statutes beyond the NLRA is especially troublesome because of the NLRB's widely recognized inconsistent decisions. *See, e.g., Beverly Enters, Va., Inc. v. NLRB*, 165 F.3d

290, 296 (4th Cir. 1999) (noting that the Board's unexplained shifts regarding the supervisory status of nurses "has prompted widespread speculation that the Board's decisions on this subject are based not on the three-pronged test of the Act but on a 'policy bias'") and other cases noted *infra*. Also, by presenting a level of hostility to bilateral arbitration reminiscent of ancient judicial attitudes the FAA was designed to overcome, the NLRB has disregarded both Congress's objective in enacting the FAA and decades of FAA jurisprudence. The NLRB's position on class waivers brings the same concerns as courts and scholars have noted with the NLRB's positions in the past. The NLRB's well-noted inconsistencies, on display here again, heavily favor this Court rejecting the NLRB's reasoning on class waivers and presumption to go beyond its statutory role. Employers and employees should be able to rely on, and the NLRB must be required to accept, this Court's position in favor of bilateral arbitration and enforcement of arbitration agreements by their terms as required by the FAA.

ARGUMENT

I. The NLRB does not deserve deference when it interprets the FAA.

The NLRB deserves no deference on the class waiver question. The NLRB's decision in *D.R. Horton* relies on the Board's single-minded interpretation of the NLRA, without regard for the objectives of the FAA. The NLRB's purpose is circumscribed by the NLRA: to prevent unfair labor practices and protect representation elections. *See* 29 U.S.C. §§ 153, 159 & 160. Congress did not task the NLRB with interpreting statutes outside of the NLRA, and the NLRB should not do so.

Even within its realm of expertise—contractual agreements between employers and unions—Congress did not designate the NLRB as the proper forum to enforce or invalidate contractual provisions. *See Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 511 (1962) (noting that Congress made "collective bargaining agreements enforceable only in the courts" when enacting 29 U.S.C. § 185); *see also* H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 42. ("Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board."). Congress's decision not to give the NLRB the power to enforce or invalidate collective bargaining agreements, leads to the conclusion that the NLRB should not have the power to enforce or invalidate contracts in an area outside of its expertise.

The NLRB's meddling with contractual agreements is the very conduct the FAA was designed to prevent. The FAA was enacted in 1925 specifically to ensure arbitration agreements received the treatment due to them as binding contractual agreements. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (describing that the FAA was enacted to reverse the "longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.") The NLRB's invasion of the FAA is especially troubling because it has upended the purpose of the FAA and the benefits of bilateral arbitration. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

When the NLRB has stepped outside of its role by "single-mindedly" interpreting the NLRA in the past,

this Court has not hesitated to curtail its activities. *See, e.g., Southern S.S. Co.*, 316 U.S. at 47. The Court first found fault with the NLRB's overreach in *Southern S.S. Co.* when it rejected the NLRB's order to reinstate employees, after the NLRB found that employees striking on a ship had not committed the crime of mutiny as defined in 18 U.S.C. §§ 483-484. *See Southern S.S. Co.*, 316 U.S. at 48-49. And again, when the Board attempted to interpret the Bankruptcy Code, this Court concluded the Board's interpretation deserved no deference. *See N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 529 fn. 9 (1984) ("While the Board's interpretation of the NLRA should be given some deference, the proposition that the Board's interpretation of statutes outside its expertise is likewise to be deferred to is novel."). More recently, when the Board awarded back pay to individuals who lacked work authorization in the United States, this Court again rebuked the agency for frustrating the purpose of the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a *et seq.* ("IRCA"). *See Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 151 (2002) ("We therefore conclude that allowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA.") Although the NLRB has "discretion to fashion remedies when dealing only with the NLRA," it does not deserve the same deference when frustrating other laws. *See id.* at 151-52.

The NLRB's reasoning, relegating the FAA to second-class status, adopted by the Sixth, Seventh and Ninth Circuits, does not deserve deference. This Court should once again curb the NLRB's overreach and reject its position on class waivers.

II. The NLRB's attack on bilateral arbitration does not deserve deference.

The NLRB's position on class waivers is not only troubling because it is based on the NLRB's interpretation of a statute outside of its province; the NLRB's current position on class waivers is also seemingly part of yet another broader policy-driven shift. Board Member Miscimarra, in another context, characterized this shift in policy as a "hostility and suspicion towards arbitration that Congress repudiated and the FAA was enacted to reverse almost a century ago." *Babcock & Wilcox Constr. Co., Inc.*, 361 NLRB No. 132, slip op. 23 (2014) (Miscimarra, dissenting). While all agencies have some degree of susceptibility to advance their own objectives despite other valid legislative considerations, the NLRB has deserved special attention.[3] And, as the Seventh Circuit noted regarding the NLRB: "An administrative agency, like any other first-line tribunal, earns-or forfeits-deferential judicial review by its performance." *Children's Habilitation Ctr., Inc. v. N.L.R.B.*, 887 F.2d 130, 132 (7th Cir. 1989). The NLRB's historically inconsistent positions should therefore temper the judicial deference it deserves.

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[3] *See, e.g.*, Amy Semet, *Political Decision-Making at the National Labor Relations Board: An Empirical Examination of the Board's Unfair Labor Practice Decisions Through the Clinton and Bush II Years*, 37 Berkeley J. Emp. & Lab. L. 223, 225 (2016) ("The NLRB is not the only independent agency accused of political bias but it is often cited as the poster child for partisanship in agency decision-making."); Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 Duke L.J. 2013, 2020 (2009) ("Those familiar with the Board know that it changes the rules depending on which party occupies the White House. Eight years allows a Board to remake the law fairly significantly, as the Board issues hundreds of decisions each year.")

For example, the NLRB has drawn the rebuke of the Circuit Courts with its "supervisor" test. *See, e.g., Spentonbush/Red Star Cos. v. NLRB*, 106 F.3d 484, 492 (2d Cir. 1997) ("The Board's biased mishandling of cases involving supervisors increasingly has called into question our obeisance to the Board's decisions in this area."); *Beverly Enters, Va., Inc. v. NLRB*, 165 F.3d 290, 296 (4th Cir. 1999) (noting that the Board's unexplained shifts regarding the supervisory status of nurses "has prompted widespread speculation that the Board's decisions on this subject are based not on the three-pronged test of the Act but on a 'policy bias'"); *Children's Habilitation Ctr., Inc. v. NLRB*, 887 F.2d 130, 132 (7th Cir. 1989) ("More important than the verbal niceties in the standard of review is judicial impatience with the Board's well-attested manipulativeness in the interpretation of the statutory test for 'supervisor.'").[4]

The Board's inconsistent approach is also evident in its new hostility to arbitration. Since its 1955 decision in *Spielberg Mfg.*, the NLRB has facilitated the process of "deferral" where unfair labor practice charges are resolved through the grievance and arbitration process of a bargaining agreement between an employer and union. *See Spielberg Mfg.*, 112 NLRB 1080 (1955). The Board's deferential treatment of arbitration

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[4] Even after prior rebukes, the NLRB is again using vague standards to achieve policy goals. For example, the NLRB's current *Lutheran Heritage* standard, which prohibits employer policies, such as a prohibition on foul language, when the policy may be "reasonably construed" by an employee to chill Section 7 rights has led to confusion. *See Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Current Board Chairman Miscimarra even recently noted the Board's "reasonably construe" standard "has led to arbitrary results." *William Beaumont Hosp.*, 363 NLRB 162, slip op. 18 (Apr. 13, 2016).

awards and the arbitration process continued virtually unchanged for nearly sixty years, until the Board's decision in *Babcock & Wilcox*.[5] With no evidence that the previous deferral provisions were deficient, the NLRB heightened the deferral requirements, making arbitration of disputes more unlikely and showing "a deep-seated hostility towards arbitration that Congress rejected when it adopted the Federal Arbitration Act (in 1925) and again when it articulated a strong presumption favoring arbitration when adopting (in 1947) Section 203(d) of the LMRA." *Babcock & Wilcox*, 361 NLRB No. 132, slip op. 23 (Miscimarra, dissenting).

The Board's drastic turn on the class waiver issue is easy to trace; only 18 months before *D.R. Horton*, the NLRB's General Counsel issued a memorandum which directly contradicted the NLRB's eventual position in *D.R. Horton*.[6] *See* NLRB, Gen. Counsel Memorandum No. 10-06 (June 16, 2010). The NLRB's General Counsel stated "an employer does not violate Section 7 by seeking the enforcement of an individual employee's lawful *Gilmer* agreement to have all his or her individual employment disputes resolved in arbitration." *Id.* at 2. The General Counsel even advised "an employer may lawfully seek to have a class action complaint dismissed" when an employee has signed a class waiver. *Id*.

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[5] One minor change to the deferral standard came with *Olin Corp*., 268 NLRB 573 (1984) where the Board added the requirement that the arbitrator be presented with the general facts relevant to resolving the unfair labor practice for deferral to occur.

[6] Notably, the Acting Solicitor General requested an extension to the briefing schedule in the current proceedings because the Acting Solicitor General was reviewing the NLRB's novel theory on class waivers.

Now the Board has taken an entirely different position, attempting to elevate its current policy concerns over the FAA. The Board's newfound position on the enforceability of class waivers in FAA governed arbitration agreements is irreconcilable with its former General Counsel's previous policy statement on class waivers, Congress's objectives in enacting the FAA, and this Court's FAA jurisprudence. The Sixth, Seventh and Ninth Circuits were therefore wrong to adopt it.

CONCLUSION

The NLRB deserves no deference in its treatment of the FAA because the NLRB has single-mindedly interpreted the NLRA while rejecting Congress's intention in enacting the FAA. Furthermore, the NLRB's constantly-changing and inconsistent positions in advancing its own policy concerns undermine any deference afforded to it on the class waiver issue.

Respectfully submitted,

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