

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 EPIC SYSTEMS CORPORATION,)

4 Petitioner,)

5 v.) No. 16-285

6 JACOB LEWIS,)

7 Respondent.)

8 - - - - -

9 ERNST & YOUNG LLP, et al.,)

10 Petitioners,)

11 v.) No. 16-300

12 STEPHEN MORRIS,)

13 Respondent.)

14 - - - - -

15 and

16 - - - - -

17 NATIONAL LABOR RELATIONS BOARD,)

18 Petitioner,)

19 v.) No. 16-307

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

21 Respondents.)

22 - - - - -

23 Washington, D.C.

24 Monday, October 2, 2017

25

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

4

5 APPEARANCES:

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

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

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

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

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1 P R O C E E D I N G S

2 (10:06 a.m.)

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

7 Mr. Clement.

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

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

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

17 This Court's cases provide a well-trod
18 path for resolving such claims. Because of the
19 clarity with which the FAA speaks to enforcing
20 arbitration agreements as written, the FAA will
21 only yield in the face of a contrary
22 congressional command and the tie goes to
23 arbitration. Applying those principles to
24 Section 7 of the NLRA, the result is clear that
25 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 not
21 an 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
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, a
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 would 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 are 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 that he has the right to resort to the courts,
2 but when he gets there, if he's confronted by
3 an employer that says, wait a second, you don't
4 satisfy numerosity, you don't satisfy
5 typicality, then the employer doesn't commit an
6 unfair labor practice by raising that argument.

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

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

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

24 JUSTICE SOTOMAYOR: Mr. Clement --

25 MR. CLEMENT: And that should be

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

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

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

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

24 So this isn't a principle that says
25 that the employee's position is so weak they

1 can't agree to arbitrate at all.

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

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

19 MR. CLEMENT: Justice Ginsburg, this
20 Court crossed that bridge in Circuit City. And
21 what I find so remarkable is in Circuit City,
22 nobody, not the AFLCIO or anyone else, was up
23 in front of this Court saying, oh, by the way,
24 you are sort of wasting your time here because
25 the NLRA in Section 7 is going to strictly

1 prohibit the ability to enter bilateral
2 arbitration --

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

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

21 And that is if it stops an individual
22 from concerted activities. So what that starts
23 with is this contract is no longer valid.
24 There is nothing to take to the courthouse if
25 what it is doing is stopping you from taking

1 activity that you are legally entitled to take.

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

8 JUSTICE SOTOMAYOR: Well, this issue
9 wasn't raised there.

10 MR. CLEMENT: That is my point, which
11 is to say that if, in fact, employment
12 agreements were covered by the FAA, but if they
13 were bilateral, they would actually be unlawful
14 under the NLRA, boy, would that have been a
15 useful thing to tell the court in Circuit City.

16 But no dog barked at that point. In
17 the Gilmer case, where you were dealing with an
18 employment issue, ADEA, and a collective action
19 provision, the AFLCIO filed its own amicus
20 brief to raise a different issue that hadn't
21 been briefed, the issue the Court eventually
22 decided in Circuit City. But they didn't say,
23 oh, my goodness, what are we doing here,
24 Section 7 of the NLRA is directly on point.

25 And that's because the NLRA in no

1 other context extends beyond the workplace to
2 dictate the rules of the forum. And the best
3 example is the Board itself. Of course,
4 Section 7 protects the rights of employees to
5 file an unfair labor practice before the Board.

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

16 JUSTICE GINSBURG: But before the --

17 JUSTICE KENNEDY: Let's take two
18 cases. One is a case where two employees get
19 together and seek -- seek arbitration. The
20 other is when one employee seeks arbitration
21 but makes it a class action.

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

24 MR. CLEMENT: I think, ultimately, you
25 decide both on the same principle. I think the

1 way to think about that, though, is that
2 Section 7 requires two things. It requires
3 concerted activity for mutual aid and
4 protection.

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

13 JUSTICE KENNEDY: Suppose it's for
14 their wages.

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

21 If it's class action, it's arguably
22 harder because you can file a class action and
23 not collaborate with anybody. And just, you
24 know, essentially seek to represent a class--

25 JUSTICE KENNEDY: You mean it's harder

1 for the employer to prevail or for --

2 MR. CLEMENT: For the employee. I'm
3 sorry. It's harder for the employee to prove
4 that it's concerted activity. But I don't
5 think as I answer your question --

6 JUSTICE KENNEDY: But your -- your
7 case is really my first case, is it not? This
8 is not really a class suit in its origins at
9 least.

10 MR. CLEMENT: But it's --

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

13 MR. CLEMENT: Yes, there's three cases
14 here. And I think that, you know, two of them
15 might be more like the class action case and
16 one might be like the concerted activity case.
17 I'm obviously representing all three of the
18 employers, but that's not why I'm telling you
19 that you don't have to make a distinction
20 between the two.

21 It's really because I think the way to
22 think about the Section 7 right is it gets you
23 to the courthouse, it gets you to the Board, it
24 gets you to the arbitrator. But once you're
25 there --

1 JUSTICE KAGAN: Mr. Clement, what
2 about --

3 MR. CLEMENT: -- you're subject to the
4 rules.

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

15 And then Section 102 of the NLGA
16 basically just repeats Section 7. And then
17 Section 103 says -- and I am quoting now --
18 "Any undertaking or promise in conflict with"
19 -- essentially the language in Section 7 --
20 "shall not be enforceable in any court."

21 So what about that? Any undertaking
22 or promise in conflict with Section 7 rights;
23 in other words, any waiver of Section 7 rights
24 shall not be enforceable in any court?

25 MR. CLEMENT: Well, that -- that

1 assumes the conclusion with all respect,
2 Justice Kagan, which is do you have-

3 JUSTICE KAGAN: The only thing it
4 assumed was that this was covered under Section
5 7. And you -- you yourself said this is
6 concerted and it's for mutual aid and
7 protection. And once that's true, this
8 language of Norris-LaGuardia comes in and says
9 forget about a waiver because an undertaking in
10 conflict with Section 7 shall not be
11 enforceable.

12 MR. CLEMENT: I don't think that
13 that's the way to read the statute, and I think
14 the reason is that this isn't -- and I don't
15 think the way to see a traditional bilateral
16 arbitration agreement is as a waiver of a
17 Section 7 right or an NLGA right.

18 It is just an effort by the employer
19 and the employee to agree to set the rules for
20 the forum of arbitration when you get there.
21 And there's nothing sinister about leaving it
22 to bilateral arbitration.

23 JUSTICE KAGAN: Well, it's an
24 agreement, but it's an agreement to waive a
25 Section 7 right. I mean that's what it is.

1 It's saying I used to have this right for
2 concerted activity, and now I don't.

3 MR. CLEMENT: With all due respect, I
4 think that assumes the conclusion. You didn't
5 have a freestanding right to proceed with class
6 arbitration in an arbitral forum. You had a
7 right to go to whatever forum and abide by
8 those rules, and one of the rules in the
9 arbitral forum is no class action. So if I can
10 reserve the remainder of my time.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 Mr. Clement.

13 Mr. Wall.

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

18 MR. WALL: Mr. Chief Justice, and may
19 it please the Court:

20 I'd just like to highlight one point
21 in what Mr. Clement said. No one questions
22 that the FLSA permits the employees her to
23 forgo collective actions and arbitrate their
24 FLSA claims. In giving employees the right to
25 act in concert, the NLRA does not then extend

1 to concerted activities that they have validly
2 agreed to waive under other federal statutes
3 like the FLSA and the FAA. And for decades,
4 through the 2010 general counsel memo and until
5 D.R. Horton five years ago, the Board
6 recognized as much. Sections 7 and 8 were
7 understood as protecting employees --

8 JUSTICE GINSBURG: Mr. Wall, what
9 about --

10 MR. WALL: -- from dismissal or
11 retaliation.

12 JUSTICE GINSBURG: What about the
13 reality? I think we have in one of these
14 cases, in Ernst & Young, the individual claim
15 is 1800 dollars. To proceed alone in the
16 arbitral forum will cost much more than any
17 potential recovery for one. That's why this is
18 truly a situation where there is strength in
19 numbers, and that was the core idea of the
20 NLRA. There is strength in numbers. We have
21 to protect the individual worker from being in
22 a situation where he can't protect his rights.

23 MR. WALL: So, Justice Ginsburg, with
24 all respect, there are provisions in the
25 arbitration agreements here, and they differ,

1 that allow for payments of costs and fees. But
2 even if you thought that it just resulted in an
3 argument that the employees would be
4 practically unable to vindicate their claims,
5 those are exactly the kind of arguments this
6 Court rejected in *Italian Colors*, it rejected
7 in *Concepcion*, and said bilateral arbitration
8 agreements are enforceable under the plain
9 terms of Section 2 of the FAA.

10 JUSTICE SOTOMAYOR: Mr. Wall, we
11 didn't have in those cases a third -- or raised
12 a third statutory provision that protects a
13 particular action, in any type of action in
14 mutual aid or concerted activity like the NLRB
15 or the Norris-LaGuardia Act.

16 But putting that aside, I'm not sure
17 that the FAA is now a rule of statutory
18 construction. Basically, what you're saying is
19 the FAA trumps the NLRB's concerted activity
20 statement and its broadness, that somehow it
21 stops at the courtroom door. So does your
22 colleague. I don't know how you do that when
23 at least one of these agreements, if not all
24 three, have confidentiality agreements that
25 prohibit the employers from talking to other

1 employers, from combining with other employers.

2 If it does that and it stops them from
3 going to the courtroom door, is that an unfair
4 labor act?

5 MR. WALL: So, Justice Sotomayor,
6 there's a lot there, and let me see if I can
7 unpack a handful of things. A half dozen
8 times, this court has faced a claim that some
9 other federal statute overrode the FAA.

10 JUSTICE SOTOMAYOR: Only when it has
11 been a fight between whether that statute and
12 the cause of action it provided overrode the
13 FAA. This is more as to the making of a
14 contract, which is like a state law defense, a
15 common state law defense like fraud or duress,
16 except it's federal law here saying you can't
17 do this.

18 MR. WALL: Justice Sotomayor, with all
19 respect, this Court has always said, look, is
20 there a clear congressional command in the
21 other statute. The FAA is clear that these
22 agreements ought to be enforced; the NLRA
23 isn't. And --

24 JUSTICE SOTOMAYOR: Well, it was clear
25 in saying that concerted activity cannot be

1 interfered with.

2 MR. WALL: That's right, but for the
3 first 77 years, here's what everyone, including
4 the Board, understood that to mean. You can be
5 protected from dismissal or retaliation when
6 you seek class treatment up to the courthouse
7 doors or the doors of the arbitral forum, but
8 once you're inside, you don't have an
9 entitlement to proceed as a class,
10 notwithstanding the FAA or Rule 23 or other
11 federal rules. D.R. Horton was the first to
12 make that move, and that's a pretty radical
13 move, to say for the first time that NLRA
14 overrides those other statutes. And the reason
15 you can't get there is that Section 7 doesn't
16 say anything about arbitration or class or
17 collective treatment, and unlike other
18 statutes, Congress didn't delegate to the Board
19 the ability to decide which predispute
20 arbitration would have to be --

21 JUSTICE BREYER: Why do we have to go
22 into all this class action business? I mean,
23 it seems to me that in each of these
24 agreements, the worker is forced to agree that
25 I will not proceed concertedly, that means

1 jointly, just one other person joining my
2 action with his and going into arbitration and
3 saying do both together. And maybe there is
4 some rule that forbids people from doing that
5 in arbitration -- AAA or something; I've never
6 seen it. And it also says you can't do the
7 same thing in court. You have to go to
8 arbitration, and then two of you can't get
9 together.

10 So simplifying it to its extreme case
11 like that, why can't we just say that's clearly
12 against what -- labor law, since the 1930s, has
13 said was an unfair labor practice, the employee
14 cannot -- the employer cannot impose such an
15 agreement. That would be simple, clear; it
16 would void our class action -- I don't want to
17 characterize it as a nightmare, but there is a
18 problem there. Okay? What's wrong with that?

19 MR. WALL: Justice Breyer, with all
20 respect, the historical premise is just wrong.
21 When you go back to 1935 and you come all the
22 way through the cases, they summarize them as
23 joint legal action or concerted legal activity,
24 but that's only true if what you mean is the
25 right to go to the forum and not be --

1 JUSTICE BREYER: That's what I'm
2 saying. Of course, I haven't said -- I'm
3 sorry, I wasn't clear perhaps, but nothing in
4 what I just said was that ordinary rules of the
5 courts like Rule 20 -- any other rule of the
6 court, Rule 23, you have to be clear, whatever
7 the rules are, they apply.

8 And the only rule that wouldn't apply
9 would be a rule that would say we're
10 automatically going to enforce the agreement
11 not to come here. You couldn't do that when
12 that would be a kind of trick.

13 MR. WALL: Well, Justice Breyer,
14 that --

15 JUSTICE BREYER: But aside from that,
16 everything else would apply.

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

19 JUSTICE BREYER: Maybe it won't.
20 That's too bad. But, I mean, doesn't that
21 resolve this case?

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

24 JUSTICE BREYER: Does it resolve the
25 case or not?

1 MR. WALL: Well, the employees
2 attempted to file a class action. Murphy Oil
3 didn't retaliate against them. Murphy Oil just
4 came in and moved to compel individual
5 arbitration, pointing to the Fifth Circuit's
6 decision --

7 JUSTICE SOTOMAYOR: Well, that's the
8 point with this. What is stopping the
9 concerted activity is not that -- which forum
10 they choose, whether it's court or arbitration.
11 Where you are stopping the concerted activity
12 is in the very act of saying this can only be
13 an individual arbitration, an individual court
14 action.

15 What your adversaries have stipulated
16 to in resolving this question is, if they can
17 have collective activity in arbitration,
18 according to their argument, it is harder for
19 them to win. But this particular provision is
20 illegal because it is removing collective
21 activity from both forums, from any forum
22 whatsoever.

23 MR. WALL: Justice Sotomayor, again,
24 three quick points. One, they can't satisfy
25 the clear congressional command test if you

1 stack the NLRA up against the FLSA --

2 JUSTICE SOTOMAYOR: That's assuming
3 that test applies in this situation --

4 MR. WALL: That's right.

5 JUSTICE SOTOMAYOR: -- where a
6 contract has been invalidated by statute.

7 MR. WALL: So, second, even if you try
8 to go to the savings clause, which this court
9 has never done in a case like this.

10 JUSTICE SOTOMAYOR: Why would we even
11 need to go there?

12 MR. WALL: Well --

13 JUSTICE SOTOMAYOR: Just read the
14 NLRB.

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

20 JUSTICE SOTOMAYOR: Counsel, let's
21 assume --

22 JUSTICE ALITO: I'd like, Mr. Wall, I
23 would like you to finish your answer, but I
24 have a question I would like to get in before
25 your time expires, if I could just note that.

1 MR. WALL: So --

2 JUSTICE SOTOMAYOR: Go ahead.

3 MR. WALL: So just to quickly finish
4 the answer, I think, again, the question
5 assumes the conclusion, which is it assumes
6 that, when the Board, five years ago, took the
7 concerted activities clause and stretched it
8 for the first time to cover your ability to go
9 pursue the rights, granted, collective
10 procedures granted to you by some other
11 statute, it assumes that those procedures that
12 it picked up, which in every other context,
13 like under the FLSA, are procedural, it somehow
14 converted to be substantive and non-waiveable.

15 And that's the move the Board can't
16 make because it can't interpret the NLRA's
17 ambiguity that way in the face of the FAA and
18 federal rules like Rule 23, so that's the move
19 that was off the table.

20 And if you understand Section 7 to
21 protect you from retaliation when you seek
22 class treatment but not to give you an
23 entitlement to proceed as a class in the forum,
24 then you are right, everything fits together
25 perfectly fine, and these arbitration

1 agreements are enforced.

2 CHIEF JUSTICE ROBERTS: Justice Alito,
3 maybe this would be a good time --

4 JUSTICE KAGAN: Mr. Wall, can I
5 interrupt you because Justice Alito has one and
6 then I do.

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

10 JUSTICE ALITO: Yeah, I just wanted to
11 know what the -- what the Government's position
12 is regarding the Norris-LaGuardia Act issue?
13 Is it not before us, is it so closely tied to
14 the NLRA issue that it is appropriate for us to
15 decide it? Did you have an opportunity to
16 brief it? What's your position on this?

17 MR. WALL: I think both of those,
18 Justice Alito. I think it is not before the
19 Court, but frankly, I don't think it matters
20 because I don't think it adds anything.

21 The text is -- is essentially
22 identical, and both statutes, for basically
23 three-quarters of a century, were understood to
24 coexist comfortably with the FAA, and it is
25 really only D.R. Horton that put them in

1 tension, by reading both Section 7 and the
2 equivalent sections of the Norris-LaGuardia Act
3 to grant the employees something that those
4 statutes had never been thought to grant them.

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

7 As we --

8 JUSTICE GINSBURG: Yes. If --

9 CHIEF JUSTICE ROBERTS: Justice, in
10 the interest of time, maybe Justice Kagan can
11 proceed now.

12 JUSTICE KAGAN: I do think both you
13 and Mr. Clement agree that, if you had a
14 discriminatory arbitration agreement, let's say
15 an arbitration agreement that said that the
16 employer will pay the arbitration costs of men
17 but not women, that that would not be
18 enforceable. Why not?

19 MR. WALL: So I think a couple of
20 reasons, Justice Kagan. The first is I think,
21 if that case came to the Court, I think we
22 would have no trouble concluding that the ADA
23 and Title VII and civil rights laws supply a
24 clear congressional command, and --

25 JUSTICE KAGAN: Okay. So, if that's

1 the case and you are saying there can be a
2 conflict between statutes and the Title VII
3 would supply a clear congressional command,
4 even though Title VII says absolutely nothing
5 about arbitration.

6 MR. WALL: Well, again, I don't think
7 it is a magic words test -- and we agree with
8 Petitioners on that. You can have a clear
9 congressional command absent that. You just
10 don't have it in Section 7. You have an agency
11 attempting to supply it, and the other thing
12 I'd say is it's not a fundamental attribute of
13 arbitration --

14 JUSTICE KAGAN: Well, here's -- here's
15 one understanding -- may I continue?

16 CHIEF JUSTICE ROBERTS: Sure.

17 JUSTICE KAGAN: Is one understanding
18 of Title VII says to the employer, you shall
19 not discriminate, and Section 7 says to the
20 employer, you shall not interfere with
21 concerted activity, such as three guys joining
22 together to bring a suit if they want to.

23 MR. WALL: Justice Kagan, it is not a
24 fundamental attribute of arbitration to
25 discriminate on the basis of race, age, or

1 gender. It is a fundamental attribute of
2 arbitration, and this Court said it three
3 times, to pick the parties with whom you
4 arbitrate.

5 And our simple point is this case is
6 at the heartland of the FAA. It is, at best,
7 at the periphery of the NLRA, on the margins of
8 its ambiguity, and you simply can't get there
9 under the court's cases.

10 CHIEF JUSTICE ROBERTS: Thank you, Mr.
11 Wall.

12 Mr. Griffin?

13 ORAL ARGUMENT ON BEHALF
14 OF PETITIONER IN NO. 16-307

15 MR. GRIFFIN: Mr. Chief Justice, and
16 may it please the court.

17 The Board's rule here is correct for
18 three reasons. First, it relies on
19 long-standing precedent, barring enforcement of
20 contracts that interfere with the right of
21 employees to act together concertedly to
22 improve their lot as employees.

23 Second, finding individual arbitration
24 agreements unenforceable under the Federal
25 Arbitrations Act savings clause because they

1 are legal under the National Labor Relations
2 Act gives full effect to both statutes.

3 And, third, the employer's position
4 would require this Court, for the first time,
5 to enforce an arbitration agreement that
6 violates an express prohibition in another
7 coequal federal statute.

8 CHIEF JUSTICE ROBERTS: Mr. Griffin,
9 if -- I am not sure I fully understand your
10 position. Individual -- individuals can agree
11 to arbitrate disputes so long as they allow --
12 so long as the agreement allows collective
13 arbitration; is that correct?

14 MR. GRIFFIN: No, Your Honor. It is a
15 slight variation on that.

16 The Board's position is individuals
17 can agree to arbitrate individually, so long as
18 there is a collect -- a forum in which they can
19 proceed collectively.

20 CHIEF JUSTICE ROBERTS: So they are
21 controlled --

22 MR. GRIFFIN: It doesn't have to be
23 arbitration. It could be judicial.

24 CHIEF JUSTICE ROBERTS: Okay. Right.
25 But if they agree to act -- the agreement

1 requires that they act individually, although,
2 to arbitrate, but there is a collective
3 arbitral forum, that that's all right? In
4 other words, just they have to arbitrate,
5 whether they do it individually or
6 collectively, you cannot restrict that?

7 MR. GRIFFIN: The Board's position is
8 that, as this Court has said on multiple
9 occasions, that the arbitral forum is the
10 equivalent of the judicial forum for
11 effectively vindicating statutory rights.

12 So here, as has been mentioned, there
13 are four people who are seeking to get paid in
14 the Murphy Oil case for work that they did.
15 If -- if the forum is available to them to
16 proceed jointly --

17 CHIEF JUSTICE ROBERTS: Right.

18 MR. GRIFFIN: -- and the employer
19 agrees to have it done in arbitration, that's
20 fine from the Board's standpoint.

21 CHIEF JUSTICE ROBERTS: Okay. So the
22 point is they -- they can, in their arbitration
23 agreement, waive the right to proceed
24 collectively in Court, so long as they have the
25 right to do it in arbitration?

1 MR. GRIFFIN: Because this Court has
2 said on multiple occasions that those two
3 forums are functionally equivalent for purposes
4 of effectively vindicating the rights at issue,
5 it is essentially like picking venue in --

6 CHIEF JUSTICE ROBERTS: Well, I don't
7 -- yeah, I don't understand --

8 MR. GRIFFIN: -- two different federal
9 courts.

10 CHIEF JUSTICE ROBERTS: Right, I don't
11 understand how that is consistent with your
12 position that these rights can't be waived.

13 MR. GRIFFIN: It goes back, Your
14 Honor, to the position the Board takes into
15 account this Court's views with respect to the
16 ability to effectively vindicate these rights
17 in an arbitral forum.

18 JUSTICE ALITO: We have said that with
19 respect to individual arbitration. Have we
20 said that with respect to class arbitration?

21 MR. GRIFFIN: Well, Your Honor, we're
22 talking about a rule here that doesn't just
23 stop class -- or stop -- it stops any kind of
24 joint activity. It stops two people proceeding
25 together, it stops collective, it stops class

1 actions.

2 So -- or class arbitrations.

3 JUSTICE KENNEDY: Excuse me, Justice
4 Alito, quickly. You said this rule means that
5 three people -- employees -- can't go to the
6 same attorney and say please represent us, and
7 we will share our information with you, we have
8 three individual arbitrations, but you
9 represent all three of us, they can do that.

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

12 JUSTICE KENNEDY: Well, that is
13 collective action.

14 MR. GRIFFIN: But it's not the -- it's
15 not the collective action that is protected
16 here. The act protects the employees' rights
17 to proceed concertedly in the --

18 JUSTICE KENNEDY: Well, they are
19 proceeding concertedly. They have a single
20 attorney. They are presenting their case. It
21 is going to be decided maybe in three different
22 hearings.

23 MR. GRIFFIN: But it doesn't allow the
24 employer to choose which type of activities the
25 employees can engage in.

1 JUSTICE BREYER: Wait a minute. You
2 said to Justice Kennedy -- I didn't -- I think
3 I might have missed this.

4 Smith, Jones, and Brown are three
5 employees. Each believes that he has not
6 enough overtime or something like that, and he
7 goes to the same attorney, all three, and it
8 wasn't exactly the same time, it wasn't
9 exactly -- there are differences.

10 So what they want to do is file a
11 joint claim. They want to say: Our employer
12 violated the dah-dah-dah because they did not
13 pay us enough. Okay? They're not identical,
14 but they're very similar.

15 Now, can they go together to the
16 arbitrator under this agreement?

17 MR. GRIFFIN: No.

18 JUSTICE BREYER: No? Okay. So the
19 answer to Justice Kennedy was they cannot go to
20 the lawyer and have this brought in one action,
21 unless they just use one person?

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

24 JUSTICE KENNEDY: Well, but the -- but
25 the --

1 MR. GRIFFIN: This --

2 JUSTICE KENNEDY: The question Justice
3 Breyer asked is different than my question. My
4 question is that many of the advantages of
5 concerted action can be obtained by going to
6 the same attorney. Sure, the cases are
7 considered individually, but you see if -- if
8 you prevail, it seems to me quite rational for
9 many employers to say forget it, we don't want
10 arbitration at all. I don't think you've done
11 employees much -- much --

12 JUSTICE GINSBURG: In that event, you
13 would --

14 JUSTICE KENNEDY: -- much of an
15 advantage.

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

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

23 MR. GRIFFIN: They're -- they're
24 constrained with respect to limiting employees'
25 ability to act concertedly in the same way

1 that, from the beginning of the National Labor
2 Relations Act, individual agreements could not
3 be used to require employees to proceed
4 individually in dealing with their employers --

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

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

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

24 MR. GRIFFIN: With all due respect to
25 the general counsel at the time, that

1 memorandum was never adopted by the Board as
2 the law of the Board and, in fact, was
3 explicitly rejected in the Horton decision and
4 subsequently in Murphy Oil.

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

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

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

22 The general counsel of the Board
23 acting through the regions decides whether or
24 not to pursue the complaint, and then the
25 general counsel proceeds in the public interest

1 to litigate the case administratively.

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

10 JUSTICE ALITO: Another question I had
11 was -- how do you draw a distinction between a
12 -- an agreement precluding class arbitration
13 and all of the other Rules of Civil Procedure
14 that limit the ability of employees to engage
15 in collective litigation?

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

24 JUSTICE ALITO: Well, wait a minute.
25 Why -- you say that -- what is the scope of

1 the -- of the right to engage in concerted
2 activity? Why -- if that's the case, why would
3 it not abrogate any limitation in the rules of
4 procedure that predated the enactment of that?

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

7 JUSTICE ALITO: I want to --

8 MR. GRIFFIN: -- is the courts have to
9 take these -- these provisions as they find
10 them. So I'll give you an example.

11 In your -- in this court's decision in
12 Washington Aluminum, there were a group of
13 employees who were faced with a frigid
14 workplace. In response to those conditions,
15 they walked out. That was in 19-- and that
16 activity was held to be protected. That was in
17 1962.

18 Subsequently, in 1970, the
19 Occupational Safety and Health Act was passed.
20 After the Occupational Safety and Health Act
21 was passed, people had a choice. They could
22 either walk out, if they were faced with unsafe
23 conditions, or they could jointly file a
24 petition or a claim or a complaint with OSHA.
25 That was a subsequently enacted provision that

1 allowed employees to choose a different path to
2 address their workplace terms and conditions of
3 employment.

4 The same is true with the subsequently
5 enacted rules, whether it's 216(b) of the Fair
6 Labor Standards Act, whether it's Rule 23 of
7 the Federal Rules of Civil Procedure. These
8 are all means and mechanisms that were adopted
9 subsequently that employees can choose to use
10 if they're available --

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

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

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

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

24 JUSTICE KAGAN: Mr. Griffin, is this
25 one way to think about the question? Of

1 course, Section 7 doesn't extend to the ends of
2 the Earth. If there are three employees who go
3 out jointly rioting in the streets, they run up
4 against antiriot laws and they go to jail just
5 like everybody else.

6 What Section 7 does and what Section 8
7 does is to establish a set of rules that deal
8 with how employers can deal with employees.
9 And one of the things that Section 7 and
10 Section 8 say in concert, if you will, is that
11 employers can't demand as conditions of
12 employment the waivers of concerted rights.
13 And that's all you're saying here.

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

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

21 MR. GRIFFIN: Absolutely.

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

24 MR. GRIFFIN: Yes.

25 JUSTICE BREYER: The question is

1 whether you can resort to -- can they stop you
2 from resorting to administrative and judicial
3 forums?

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

6 JUSTICE BREYER: And even grievance
7 arbitration, by the way. I just wonder,
8 because that's very common. Are there
9 instances where -- there will probably be a
10 worker representative going to the employer,
11 but are there instances where the grievance is
12 a grievance that is shared by people, but not
13 perfectly shared, so Jones, Smith, and Brown
14 will go to the representative and say,
15 representative, please let's go before the
16 arbitrator, and you represent all three?

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

22 This Court's decisions with respect to
23 the Steelworkers trilogy all involve
24 arbitration situations that involve multiple
25 parties' representative.

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

8 MR. GRIFFIN: That's a rule of the
9 arbitral forum, and the employee takes the
10 rules of the forum as they find them.

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

14 MR. GRIFFIN: What -- no, Your Honor.
15 What you have an opportunity to do is to try
16 and utilize the rules that are available in the
17 forum without the employer intervening through
18 a -- a prohibition that's violative of Section
19 7.

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

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

1 JUSTICE KENNEDY: Understanding of the
2 question.

3 MR. GRIFFIN: Well, I misunderstood
4 the question. I thought we were talking about
5 the arbitral forum itself has rules as opposed
6 to the arbitration agreement between the --

7 CHIEF JUSTICE ROBERTS: The arbitral
8 forum has rules, just like the Federal Rules of
9 Civil Procedures. And what you're saying is,
10 well, once you get into federal court, of
11 course you've got to follow the rules of the
12 forum. And we have arbitral forums as well.

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Yes.

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

4 CHIEF JUSTICE ROBERTS: So -- so all
5 the employer -- well, and why can the arbitral
6 forum enforce the rule that says, basically,
7 you cannot act collectively if it's fewer than
8 50 people?

9 MR. GRIFFIN: Because the prohibition
10 in the National Labor Relations Act in Section
11 8(a)(1) runs to employer interference restraint
12 or coercion with respect to the rules, with
13 respect to exercise of the rights under Section
14 7. It doesn't say anything --

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

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

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

22 So, if the employer/employee agreement
23 says you shall arbitrate this under this
24 particular arbitration forum, and those rules
25 say we're -- we'll do collective arbitration,

1 but only if you have more than 51 people
2 because we think it's more efficient to have a
3 smaller number arbitrate individually, that
4 would be okay under your position?

5 MR. GRIFFIN: Yes, Your Honor.

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

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

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

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

24 MR. GRIFFIN: Well, the provisions of
25 the National Labor Relations Act run to

1 prohibitions against employer restraint --

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

5 MR. GRIFFIN: The -- the National
6 Academy of Arbitrators filed a brief, a amicus
7 brief in this case, Your Honor, supporting the
8 position that the Board took in Murphy Oil, and
9 it addresses the circumstances under which, in
10 both labor arbitration and employment
11 arbitration, employees are able to proceed in
12 joint collective representative actions.

13 JUSTICE GINSBURG: There's one anomaly
14 here. I think you agree that the Fair Labor
15 Standards Act, where the substantive right
16 comes from --

17 MR. GRIFFIN: That's correct.

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

22 MR. GRIFFIN: Well, Your Honor,
23 we -- we don't agree with respect to employees
24 who have National Labor Relations Act rights,
25 who also have FLSA rights, that there can be a

1 waiver of their right to proceed jointly.

2 It's -- if -- if you imagine it in
3 mathematical terms, there's a set of people who
4 have rights under the Fair Labor Standards Act.
5 There's a lesser included subset of people who
6 have rights under both the Fair Labor Standards
7 Act and the National Labor Relations Act.

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

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

16 MR. GRIFFIN: Yeah -- yes, Your Honor.
17 That -- that law is essentially unchallenged
18 here, and the Board's law is that, if an
19 individual takes action to initiate, to induce,
20 or to prepare for group action, that that is
21 concerted activity as understood under Section
22 7.

23 And -- and the Board specifically held
24 in *Murphy Oil* -- and we briefed this in our
25 brief -- that -- that a class action fits

1 within the notion of initiating, inducing,
2 preparing for.

3 In fact, the Lewis case involved an
4 individual who filed a class action and then
5 was joined immediately by a number of other
6 plaintiffs. And each of these cases involves
7 concerted activity.

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

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

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

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

23 MR. GRIFFIN: Well, this -- this
24 involves individual employees. There's no
25 union present in these cases, Your Honor. And

1 pursuant to Circuit City, while there was an
2 issue up until that point whether or not the
3 FAA applied to employment contracts, this Court
4 has decided that, so now, these individual
5 cases are where they stand.

6 JUSTICE SOTOMAYOR: Involve non-union
7 members.

8 MR. GRIFFIN: Yes, exactly.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 Counsel.

11 Mr. Ortiz?

12 ORAL ARGUMENT ON BEHALF OF

13 RESPONDENTS IN NOS. 16-285 AND 16-300

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

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

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

1 about 25 million employees.

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

4 CHIEF JUSTICE ROBERTS: So this
5 decision in your favor would invalidate the
6 25 -- agreements covering 25 million employees?

7 MR. ORTIZ: Yes, Your Honor.

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

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

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

1 them in this way.

2 Second, Mr. Wall suggested the
3 Concepcion and Italian Colors actually control
4 here. They do not. Concepcion, for example,
5 concerns state law. This Court followed
6 preemption analysis and was very concerned, in
7 particular, about the application of the state
8 law in that case.

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

14 Also, Your Honor, although this Court
15 found that affecting a central attribute of
16 arbitration was important in that case, that is
17 very different here as well.

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

21 It is --

22 JUSTICE BREYER: Is there anything
23 wrong, from your point of view, which taking
24 this case in a very unsatisfactory way to
25 everybody, except perhaps it's simple, is you

1 just simply read the words what the employer
2 cannot stop is joint effort, like making a
3 joint claim, nothing to do with class actions,
4 just making a joint claim, resorting to
5 administrative and judicial forums for the
6 purpose of making that joint claim?

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

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

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

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

22 Does it complicate the case to add
23 that into it?

24 MR. ORTIZ: It complicates it one
25 step, but what the FAA gives the FAA also takes

1 away, Your Honor. That same provision of the
2 FAA, Section 2, actually reserves -- creates an
3 exception for -- for contracts that -- for
4 contractual provisions that are illegal, and
5 this Court has also said that there are two
6 other doctrines that are --

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

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

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

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

24 JUSTICE BREYER: All right. And the
25 statute was passed after the Arbitration Act

1 wasn't it?

2 MR. ORTIZ: Yes, Your Honor.

3 JUSTICE BREYER: And Justice Cardozo
4 said when in a comparable context, we exclude
5 cases where the contract is in contravention of
6 a statute. And that's why Justice Kagan
7 provided the example of the discrimination
8 case.

9 MR. ORTIZ: Yes, Your Honor.

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

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

14 (Laughter.)

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

25 And Congress was aware of that history

1 of interpretation. In fact, the Berkovitz case
2 was brought to its attention when it was
3 considering the Federal Arbitration Act.

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

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

14 CHIEF JUSTICE ROBERTS: Well, okay.

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

17 CHIEF JUSTICE ROBERTS: But is your
18 answer then that you disagree with the position
19 of the NLRB? Because I understood them to say
20 that, yes, once you're in the forum, you have
21 to abide by the rules of the forum. And one of
22 the rules of the forum that I hypothesized is
23 one that's saying you've got to have at least
24 50 people before you can have a collective
25 action. Now, if it's an arbitration agreement,

1 that means you are already out of the courts.
2 So the question is, is that a valid agreement
3 or not?

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

6 CHIEF JUSTICE ROBERTS: Yeah.

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

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

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

24 CHIEF JUSTICE ROBERTS: Sorry it's so
25 complicated.

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

2 (Laughter.)

3 MR. ORTIZ: But so long as there's an
4 alternative available where a group of 50 -- of
5 less than 50 people could pursue, whether
6 that's before --

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

11 MR. ORTIZ: Well, under --

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

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

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

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

3 MR. ORTIZ: Yes, Your Honor, it would
4 be.

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

13 The federal rules say that you have to
14 have a class that's big enough in numerosity to
15 warrant class treatment. And, arguably -- and
16 if there's only 20 or 25 employees, a judge
17 could, using its -- his or her discretion, say:
18 No, I'm not going to have a class action with
19 25 people.

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

25 And as I was assuming the hypothetical

1 from the Chief Justice, under the -- the rules
2 of the -- the arbitral forum he was putting
3 forward, it would be either 50 or more, or
4 nothing or one.

5 JUSTICE SOTOMAYOR: And no joint
6 activity of any --

7 MR. ORTIZ: No joint activity below
8 50.

9 JUSTICE SOTOMAYOR: -- of any kind?

10 MR. ORTIZ: Right.

11 JUSTICE SOTOMAYOR: All right. Now I
12 understand.

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

15 JUSTICE SOTOMAYOR: Yeah, that's --

16 CHIEF JUSTICE ROBERTS: Your -- your
17 understanding is correct, I just wanted to make
18 certain I understood that your position was
19 different than the position of the NLRB on
20 that.

21 MR. ORTIZ: Thank you, Your Honor.

22 JUSTICE ALITO: On the right to -- if
23 the right to engage in concerted activity
24 includes the right to have -- to file a class
25 action in federal court, how can an agreement

1 provide that -- waive that right and require
2 arbitration, even if arbitrations -- even if
3 class arbitration is allowed, or can it not do
4 that?

5 MR. ORTIZ: Your Honor, under Section
6 7, as long as joint legal action is available
7 in one forum, that would be sufficient.

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

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

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

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

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

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

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

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

8 They also have other options.

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

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

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

1 same thing applies here.

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

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

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

22 JUSTICE SOTOMAYOR: Mr. Clement, how
23 -- these are related questions, which is how
24 does an employee with these confidentiality
25 agreements or even with this agreement in

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

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

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

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

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

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

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

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

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

1 Thank you, Your Honor.

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

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

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