15-2820-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CONNIE PATTERSON, on behalf of herself and all others similarly situated, and DAVID AMBROSE,
Plaintiffs-Appellants,

v.

RAYMOURS FURNITURE CO.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
HON. VALERIE CAPRONI, DISTRICT JUDGE
CASE NO. 14-CV-5882 (VEC)

BRIEF OF AMICI LABOR LAW SCHOLARS IN SUPPORT OF APPELLANTS AND REVERSAL

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INTEREST OF THE AMICI CURIAE

Amici are professors long engaged in the study and teaching of labor law.[1] All of us have published articles about the relationship of federal labor law – the Norris-LaGuardia Act of 1932 (Norris-LaGuardia) and the National Labor Relations Act of 1935 (NLRA) – to the Federal Arbitration Act of 1925 (FAA).[2]

Our interest here derives from our responsibilities as law professors. We teach students to comprehend the law as a system faithful to professional standards of analytical care: that statutes are to be read with close attention to their texts, histories, and policies in a sympathetic effort to achieve their legislated ends. We believe fidelity to those standards leads to only one conclusion in this case – under Norris-LaGuardia, a federal court cannot enforce the agreement at issue.

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[1] Professor Matthew Finkin was the primary author of this brief. No counsel for a party authored this brief *amici curiae* in whole or in part, and no person or entity, other than the *amici*, made a monetary contribution to the preparation or submission of this brief.

[2] See Matthew W. Finkin, *The Meaning and Contemporary Vitality of the Norris-LaGuardia Act*, 93 Neb. L. Rev. 6 (2014); Catherine Fisk, *Collective Actions and Joinder of Parties in Arbitration: Implications of DR Horton and Concepcion*, 35 Berkeley J. Emp. & Lab. L. 175 (2014); Julius Getman & Dan Getman, *Worlds of Work Employment Dispute Resolution Systems Across the Globe: Winning the FLSA Battle: How Corporations Use Arbitration Clauses to Avoid Judges, Juries, Plaintiffs, and Laws*, 86 St. John's L. Rev. 447 (2012); Ann C. Hodges, *Can Compulsory Arbitration be Reconciled with Section 7 Rights?*, 38 Wake Forest L. Rev. 173 (2003); Katherine V. W. Stone, *Procedure, Substance, and Power: Collective Litigation and Arbitration Under the Labor Law*, 61 UCLA L. Rev. Disc. 164 (2013); Charles A. Sullivan & Timothy P. Glynn, *Horton Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution*, 64 Ala. Rev. 1013 (2013).

SUMMARY OF THE ARGUMENT

The plain language of Norris-LaGuardia prevents federal courts from enforcing "any . . . undertaking or promise in conflict with the public policy" that employees "shall be free from interference . . . of employers . . . in . . . concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. §§ 102, 103. The Supreme Court has construed the term "concerted activities for the purpose of . . . mutual aid or protection" to include seeking redress in court. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66, 98 S. Ct. 2505, 2512 (1978). The history leading to passage of Norris-LaGuardia makes clear that Congress aimed to bar enforcement not only of agreements through which employees agreed not to join unions but a wider set of agreements, including agreements to settle all grievances individually. Norris-LaGuardia thus bars enforcement of the employees' agreement, coerced by threat of termination, not to act in concert to enforce their workplace rights.

ARGUMENT

In this case, the District Court erred by dismissing Plaintiffs-Appellants employees' class and collective action under federal and state wage and hour laws and compelling them to arbitrate their claims individually. The employees' brief argues that the District Court's ruling is inconsistent with both the NLRA and Norris-LaGuardia. The NLRA argument is grounded on a series of National Labor Relations Board (NLRB) decisions holding that employers commit an unfair labor practice

when they require or request that employees waive their right to take collective action to enforce their legal rights, even when the waiver is contained in an arbitration agreement. The Board jurisprudence on this precise question begins with *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), *enforcement denied*, 737 F.3d 344 (5th Cir. 2013), but was reaffirmed and significantly elaborated on in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), *enforcement denied*, 2015 U.S. App. LEXIS 18673 (5th Cir. Oct. 26, 2015) and *On Assignment Staffing Services, Inc.*, 362 NLRB No. 189 (2015). *See also* Patterson Br. at 2 n.1 (citing additional NLRB cases)

Because the employees' brief fully articulates the argument under the NLRA, this brief attends to Norris-LaGuardia. It thus supports the employees' NLRA argument in three respects.

First, the NLRB's holdings were expressly based, in part, on Norris-LaGuardia. The Board concluded, "An arbitration agreement between an individual employee and an employer that completely precludes the employee from engaging in concerted legal activity clearly conflicts with the express federal policy declared in the Norris-LaGuardia Act." *On Assignment Staffing*, 362 NLRB No. 189 at 7. For that reason, the Board concluded that such agreements are "unenforceable." *Murphy Oil*, 361 NLRB No. 72 at 16. *See also id.* at 10; *D.R. Horton*, 357 NLRB No. 184 at 6.

Second, the Board reasoned that the policy announced in Norris-LaGuardia must inform the construction of the NLRA and bolsters the conclusion that these agreements

violate the NLRA. In *Murphy Oil*, 361 NLRB No. 72 at 10, the Board stated that it is "entirely appropriate for the Board to look to the Norris-LaGuardia Act both in identifying Federal labor policy and in seeking an accommodation between Federal labor policy and the Federal policy favoring arbitration." It could hardly be otherwise given that the key term in the NLRA – "concerted activities for the purpose of . . . other mutual aid or protection" derived from Norris-LaGuardia. Thus, in *D.R. Horton*, 357 NLRB No. 184 at 6, the Board observed, "The NLRA, passed in 1935, built upon and expanded the policies reflected in the Norris-LaGuardia Act, echoing much of the language of the earlier law." The Board continued:

> Modern Federal labor policy begins not with the NLRA, but with earlier legislation, the Norris-LaGuardia Act of 1932, which aimed to limit the power of Federal courts both to issue injunctions in labor disputes and to enforce "yellow dog" contracts prohibiting employees from joining labor unions. Thus, Congress has aimed to prevent employers from imposing contracts on individual employees requiring that they agree to forego engaging in concerted activity since before passage of the NLRA. [*Id*. at 5]

Third, the District Court held that the Board's decisions are contrary to the FAA. But the Board concluded that Norris-LaGuardia bars enforcement of these agreements in federal court, and thus that their nonenforcement falls within the savings clause of the FAA or, if it does not and "even if there were a direct conflict between the NLRA and the FAA, the Norris-LaGuardia Act . . . indicates that the FAA would have to yield insofar as necessary to accommodate Section 7 rights." *Murphy Oil*, 361 NLRB No. 72 at 6. *See also On Assignment Staffing*, 362 NLRB No. 189 at 7 ("the Norris-LaGuardia

Act has particular relevance" to the conclusion that the FAA does not compel enforcement of agreements of the type at issue here).

Thus the information presented here concerning Norris-LaGuardia is critical to evaluating the employees' argument under the NLRA.

I. Under the Norris-LaGuardia Act Any "Promise" or "Undertaking" that Prevents an Employee from Combining with Co-Workers to Protect Their Employment Rights Is Unenforceable in Federal Court

Raymours required that its employees agree to substitute an arbitral for a judicial forum for the vindication of their employment rights, including the protections afforded by wage and hour laws. The agreement precludes an employee from joining with others to make a common claim in that arbitral forum and, consequently, in a judicial or arbitral forum. *See* Patterson Br. at 7-9. This is a yellow dog contract: a term of opprobrium applied by workers to contracts that restrict their freedom of association. It is unenforceable in federal court by virtue of Norris-LaGuardia. To demonstrate this, we look to the plain language of the Act, historical circumstances that gave rise to it, and the policy it articulates.

A. Plain Language

Section 2 of Norris-LaGuardia declares it to be the "public policy of the United States" that the individual employee be free of "interference" or "restraint" by employers when they engage in "concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 102. Section 3 of the Act provides that, "[*a*]*ny*

undertaking or promise" that is contrary to the policy declared in section 2 "shall not be enforceable in any court of the United States." 29 U.S.C. § 103 (emphasis added).[3] Thus, taken together, sections 2 and 3 of the Act provide that "any . . . undertaking or promise in conflict with the public policy" that employees "shall be free from the interference . . . of employers . . . in . . . concerted activities for the purpose of . . . mutual aid or protection" "shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court." 29 U.S.C. § 102, 103. On their face, these provisions bar enforcing the agreement at issue.

The language and structure of section 3 of the Act make clear that it was intended to do more than bar enforcement of contracts prohibiting union membership. It denies enforcement to a broad array of "promises" and "undertakings" that would bar concerted activity to improve working conditions. Section 3 prohibits enforcement of two categories of contracts:

(1) "Any undertaking or promise, such as is described in *this* section" *and*

[3] Three years after Norris-LaGuardia was enacted, Congress took the policy set out in § 2 and reiterated it verbatim as part of the affirmative right created by § 7 of the NLRA. 29 U.S.C. § 157. Congress also made it an unfair labor practice for an employer to interfere with employees' exercise of their right to engage in concerted activity for mutual aid or protection. 29 U.S.C. § 158(a)(1). Employers were thus denied the power to impose terms of employment that the courts had been denied the power to enforce, *i.e.*, terms containing any promise by which employees abjure the right to seek or come to the aid of others in the vindication of their rights as employees.

> (2) "any other undertaking or promise in conflict with the public policy declared in section 2 of this Act." 29 U.S.C. § 103 (emphases added).

The undertakings or promises "described in *this* section" are those to refrain from joining or withdrawing from membership in labor organizations.[4] Consequently, the second category of unenforceable contracts − "any *other* undertaking or promise in conflict with the public policy declared in section 102 of this Act" (emphasis added) − necessarily encompasses a wider array of agreements not to take concerted action to improve working conditions, such as the agreement at issue here.

Section 4 of the Act embodies Congress' intent to protect a broad range of concerted activity engaged in to improve working conditions, expressly including collective litigation. It provides:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or

[4] Section 3 provides that the prohibition "specifically" includes:

> Every undertaking or promise hereafter made . . . constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby
>
> > (a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or
> >
> > (b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.

> persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts:
> . . . .
> (d) By all lawful means aiding any person participating or interested in any labor dispute who is . . . *prosecuting, any action or suit in any court of the United States or of any State*;
> . . . .
> (h) Agreeing with other persons to do or not to do any of the acts heretofore specified.

29 U.S.C. § 104 (emphasis added). Read together, subsections (d) and (h) of section 4 of the Act make clear that Congress intended that joining with another person in a suit seeking a remedy in a labor dispute be within the category of "concerted activity for the purpose of . . . mutual aid and protection." Such group legal action is insulated from employer "interference, restraint, or coercion" by section 2. As a result, "any undertaking or promise" made by the employee purportedly to eschew the right to engage in such group resort is unenforceable under section 3 – it is contrary to the "public policy of the United States."

The language of Norris-LaGuardia thus encompasses collective enforcement of workplace rights. The Supreme Court has unequivocally stated that with respect to the identical language in section 7 of the NLRA: "concerted activities . . . for the purpose of 'mutual aid or protection'" encompasses seeking redress in any forum – legislative, judicial, administrative – in which employees may "protect their interests as employees." *Eastex*, 437 U.S. at 565-66. This includes filing group lawsuits. *Brady v. NFL*, 644 F.3d 661, 677 (8th Cir. 2011); *Mohave Elec. Co-op., Inc. v.*

NLRB, 206 F.3d 1183, 1189 (D.C. Cir. 2000); *Salt River Valley Water Users' Ass'n v. NLRB*, 206 F.2d 325, 328-29 (9th Cir. 1953).

Just as a promise not to form a union or an informal group to present a grievance about low wages cannot be enforced under Norris-LaGuardia, neither can a promise not to present a group grievance seeking to have a promised or statutorily guaranteed wage actually paid – whether the grievance is presented to the employer directly or in any forum where relief may be granted: in court or in arbitration as the forum substituted for court. As the Senate Report on the measure presciently observed, "If these contracts are held to be legal in one type of litigation, it would follow that they must be legal in all other controversies. . . ." S. Rep. No. 72-163 15 (1932), hence the broad sweep of the prohibition. *Id*.

B. History

Norris-LaGuardia was the fruit of decades of struggle. The text resulted from an exacting drafting process by experts, including Professors Felix Frankfurter and Francis Sayre, who had drafted proposed legislation in 1923. *See generally*, Irving Bernstein, THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER 1920-1933, Ch. 11 (1960). As the Senate Report states, "One of the objects of this legislation is to outlaw this 'yellow dog' contract." S. Rep. No. 72-163, *supra*, at 15. *See also* H. Rep. No. 72-669, at 6 (1932) ("Section 3 is designed to outlaw the so-called yellow-dog contract."). *See generally* Joel I. Seidman, THE YELLOW DOG CONTRACT (1932)

(a contemporaneous doctoral dissertation on the history and content of yellow dog contracts).[5]

Today, the phrase "yellow dog contract" conjures up the image of a worker's promise not to join a union. This is understandable as that was the issue in one of the most controversial decisions giving rise to Norris-LaGuardia – *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917) – and, as we have seen, it was the express evil dealt with in section 3. But more was packed into the targeted yellow dog contracts than the foreswearing of union membership. In fact, the term was first applied to leases of company housing in mining towns that prohibited anyone other than the miners' immediate family members, doctors, and morticians, from having access to miners' homes, on pain of eviction. Seidman, *supra*, at 31. The mining companies feared that miners' talking to union organizers – or even to fellow workers in the privacy of the home – might lead to group action.[6]

Because the *Hitchman* decision opened the door to the foreswearing of all manner of collective resort, "an almost endless array of legal games were played by employers that made almost all collective action by workers subject to legal

[5] Seidman became a professor of industrial relations at the University of Chicago Business School. *See* Seidman, Joel, The University of Chicago Photographic Archive, http://photoarchive.lib.uchicago.edu/db.xqy?show=maroon.xml|655.

[6] The United States Coal Commission of 1922 condemned the "yellow dog" leases used by mining companies in a part of its report: Civil Liberties in the Coal Fields. U.S. COAL COMM'N, S. Doc. No. 68-195, REPORT OF THE UNITED STATES COAL COMM'N, pt. 1 at 169-70 (1925).

prohibition." Daniel Jacoby, LABORING FOR FREEDOM: A NEW LOOK AT THE HISTORY OF LABOR IN AMERICA 62 (1998). These included promises to "adjust all differences by means of individual bargaining," as, for example, by waitresses at the Exchange Bakery & Restaurant in New York City; to renounce any "'concerted' action [with co-workers] with a view of securing greater compensation," as at the Moline Plow Company in Moline, Illinois; or to "arbitrate all differences" according to the machinery set up by the employer and its company union at the United Railways & Electronic Company of Baltimore. Seidman, *supra,* at 58, 66, 69. A contract offered by the Clinton Saddlery Company provided, "No employee can unite with his fellow workers in any effort to regulate wages, hours, etc." Seidman, *supra,* at 65. The record is unequivocal that Congress intended to outlaw the full gamut of such "yellow dog" contracts. As the Senate Report made clear, "Not all of these contracts are the same, but, in . . . all of them the employee waives his right of free association . . . in connection with his wages, the hours of labor, and other conditions of employment." S. Rep. No. 72-163, *supra*, at 14.

In fact, just two years before adoption of Norris-LaGuardia, Senator William E. Borah answered the question, "What is [a] 'yellow dog' contract?" on the Senate floor by citing one that provided "I agree during employment under this contract that I will not . . . unite with employees in concerted action to change hours, wages

or working conditions." 72 Cong. Rec. 7931 (April 29, 1930).[7] Congress thus understood all promises or undertakings that restricted employees to a course of individual dealing with their employer to be an evil to be extirpated as fully as possible under federal law. Due to the limited reach of the Commerce Clause at the time, Congress grounded the prohibitions of Norris-LaGuardia in its power to control the federal courts, depriving these contractual provisions of legal effect in those courts.

C. Policy

Norris-LaGuardia's statement of the "public policy of the United States" is premised on the finding that "the individual unorganized worker is commonly helpless to exercise actual liberty of contract." 29 U.S.C. § 102. For that reason, the Act provides that "the public policy of the United States is hereby declared as

[7] Borah and several other Senators, including Senators Norris and Wagner, spoke at length about yellow dog contracts in the successful opposition to the nomination of Judge John J. Parker to be an Associate Justice of the Supreme Court in 1930. The opposition centered on Judge Parker's affirmance of an injunction against striking miners who had signed a yellow dog contract. *See Int'l Org., United Mine Workers of America v. Red Jacket Consol. Coal and Coke Co.*, 18 F.2d 839, 849 (4th Cir. 1927). Several of the speeches clearly informed Senators of the variety of yellow dog contracts. *See, e.g*, 72 Cong. Rec. 6574-79 (April 7, 1930), 72 Cong. Rec. 7932 (April 29, 1930) (citing Exchange Bakery contract described in text *supra*). In fact, Senator Norris spoke specifically about the use of yellow dog contracts to preclude concerted legal action: "It would enjoin anyone from coming to our aid, from furnishing an appeal bond . . . ." 72 Cong. Rec. 8191 (May 2, 1930). The legislative record in 1930, fast upon the failure to enact the Norris-LaGuardia Act in 1928 and just prior to its enactment in 1932, amply evidences the legislature's understanding of what the law was devised to reach.

follows:. . . it is necessary that [the employee] have full freedom of association . . . and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in . . . self-organization." *Id*. That express statement of public policy is significant in the face of widespread efforts by employers at the time to require that any complaint or grievance be dealt with exclusively on an individual basis.

In this way, Congress set its face against the prevailing "moral vision" that American society attached to individual action, a vision captured by the judiciary's embrace of "freedom of contract." S. Rep. No. 72-163, *supra*, at 15.[8] *See generally* Daniel Ernst, *supra* at 251-252. The Supreme Court has long understood Norris-LaGuardia to repudiate that embrace, which it characterized in hindsight as the judiciary's "self-mesmerized views of economic and social theory." *Burlington N.R.R. Co. v. Bhd. of Maint. of Way Emps*., 481 U.S. 429, 453 (1987) (*quoting Bhd. of R.R. Trainmen v. Jacksonville Terminal Co*., 394 U.S. 369, 382 (1969)).

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[8] As said in the debate on Norris-LaGuardia:

> This doctrine presupposes that the girl who seeks a position in a department store, and the owner of that store deal with each other on terms of equality. She is free to work or not to work; he is free to employ or not to employ her. Or, to take another illustration, that a worker seeking employment with the United States Steel Corporation and the manager, acting for the corporation, deal on terms of equality. One who still believes that will believe anything.

75 Cong. Rec. 5515 (1932).

In other words, it was, and is, the public policy of the United States that employees be free to join together, to seek and come to the aid of others in making common cause in any matter of workplace rights without interference by their employer. The Act conceives of the right to seek or come to the aid of another as a substantive right, a civil liberty insulated from any promise or undertaking that would blunt its exercise. As Senator Norris stated, "Human liberty is at stake." 72 Cong. Rec. 8190 (May 2, 1930). Congress viewed employees' protected right to act in concert as no less a substantive right than the First Amendment right "peaceably to assemble."

As the language of the statute and its history demonstrate, the policy in favor of collective action is not limited to joining a union or engaging in collective bargaining, but extends to enforcement of legal rights. The statutory policy is that any promise or undertaking by which an employee abjures the capacity to join with another in securing a workplace right, or to vindicate one secured by law, in any forum may not be enforced in the federal courts.

II. This is an Issue of First Impression in This Court and No Court of Appeals Has Fully Engaged With Norris-LaGuardia

This Court has not yet addressed Norris-LaGuardia in this context and while several courts of appeals have rejected the Board's application of the NLRA, for reasons we do not believe are sound, none has fully engaged with Norris-LaGuardia or explained why it is not controlling.

In *Sutherland v. Earnst & Young LLP*, 726 F.3d 290, 297 n. 8 (2d Cir. 2013), this Court discussed the NLRA in dicta in a short footnote. But this Court in no way discussed Norris-LaGuardia.

In *Owen v. Bristol Care, Inc*., 702 F.3d 1050 (8th Cir. 2013), Plaintiff cited Norris-LaGuardia only to bolster her argument under the NLRA. *See id*. at 1053 ("She also argues that in passing the NLRA, Congress intended to build upon the Norris-LaGuardia Act").[9] The Eighth Circuit thus did not address an independent and fully articulated Norris-LaGuardia argument, but merely dismissed the relevance of Norris-LaGuardia based on a misunderstanding about historical sequence. The FAA was adopted in 1925 and codified (in that limited sense, re-enacted) as part of the United States Code in 1947. The *Owen* court states that this sequence "*suggests* that Congress intended its arbitration protections to remain intact even in light of the earlier passage of three major labor relations statutes [the Railway Labor Act, Norris-LaGuardia, and the NLRA]." 702 F.2d at 1053 (emphasis added). As the NLRB pointed out in *Murphy Oil*, the argument was rebutted by two signatory *amici* here. 361 NLRB No. 72, at 11 n. 64 (*citing* Sullivan & Glynn, 64 Ala. L. Rev. at 1046-1051). Their definitive critique need not be rehearsed in detail. The Board put the gist thusly:

[9] In fact, the Plaintiff's reference to Norris-LaGuardia was even more attenuated as her argument concerning the NLRA was in support of an argument that the FLSA barred waiver of collective enforcement. *Id*. at 1053.

> Under established canons of statutory construction, "it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed." [quoting *Finley v. U.S.*, 490 U.S. 545, 554 (1989) in turn quoting *Anderson v. Pacific Coast S.S. Co*., 225 U.S. 187, 199 (1912).] There is no such clearly expressed Congressional intention either in the statute codifying the FAA, see 61 Stat. 669, or in its legislative history…. It seems inconceivable that legislation effectively restricting the scope of the Norris-LaGuardia Act and the NLRA could be enacted without debate or even notice, especially in 1947, when those labor laws were both relatively new and undeniably prominent.

Id. at 11.[10] No more need be said.

The *Owen* court next distinguished the agreement before it from that at issue in *D.R. Horton* on the ground that the *Owen* agreement did "not preclude an employee from filing a complaint with an administrative agency such as the Department of Labor." *Id*. at 1053. This is not the case here in relation to wage and hour claims. *See* J.A. 55-56. Moreover, the rationale fails to attend to Norris-LaGuardia's text, history, and policy. First, by its plain language, the Act reaches "*any*" promise or undertaking, not "some" promises or undertakings. The drafters used the categorical because that is what they meant. *See* Finkin, *supra* n. 2, at 14-15.

Second, the distinction is contrary to the Act's historical roots. Though yellow

[10] In other words, re-codification by itself is not a substantive amendment. *See, e.g., Finley*, 490 U.S. at 554 (1989); *United States v. Welden*, 377 U.S. 95, 98 (1964); *Fourco Glass Co. v. Transmirra Corp.*, 353 U.S. 222, 227 (1957); *Anderson*, 225 U.S. at 198-99. And the Supreme Court has held that, for purposes of the last-in-time rule, a non-substantive re-enactment of a statute does not take precedence over an earlier enacted statute. *See Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961).

dog contracts contained more than promises not to join a union, when they did preclude union membership they could be highly selective. Some proscribed membership in unions active in the area, allowing support for unions elsewhere. Seidman, *supra,* at 63-64. Some were more fine-tuned. The United States Gypsum Plaster Company's contract "bound its employees not to join 'the I.W.W. or any other communistic or like organization,' apparently placing no obstacle in the way of a union of the American Federation of Labor type." *Id*. Yet, there should be no doubt that Congress intended Norris-LaGuardia to deny enforcement to those proscriptions notwithstanding the contractual allowance of other concerted action. Norris-LaGuardia does not permit employers to prohibit employees from joining union A so long as they can join union B, it does not permit employers to prohibit employee strikes so long as they can picket, and it does not permit employers to prohibit employees from filing collective claims in court or in arbitration so long as they can do so with an administrative agency.[11] In other words, what the contract

[11] Even if the law was not unambiguous on this point, the inefficacy of permitting employees to collectively complain to the Department of Labor concerning the alleged FLSA violation at issue here is evident because the Department has no obligation to take action on meritorious complaints and is able to do so in relation to only a tiny fraction of the complaints filed by employees. *See* 29 U.S.C. § 216(a) ("The Secretary *may* bring an action . . . .") (emphasis added); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-629, REPORT TO THE COMMITTEE ON EDUCATION AND LABOR, WAGE AND HOUR DIVISION NEEDS IMPROVED INVESTIGATIVE PROCESSES AND ABILITY TO SUSPEND STATUTE OF LIMITATIONS TO BETTER PROTECT WORKERS AGAINST WAGE THEFT, p. 8 (June 2009) ("Our work clearly shows that Labor has left thousands of actual victims of wage theft who sought federal government

allows the employee to do has no bearing on the enforceability of what the contract prohibits her from doing. "Any" meant – and means – any.

The only other grounds for the panel's decision in *Owen* was that the Court "owe[d] no deference to [the Board's] reasoning." 702 F.3d at 1054. The assertion is unsound insofar as it applies to the significant aspects of the Board's decisions based on a construction of the NLRA. But even were it sound with respect to the Board's reliance on the Norris-LaGuardia Act, the conclusion should have drawn close judicial attention to the text, history, and policy of that statute. No such independent judicial examination was undertaken.

The Fifth Circuit was even less attentive to the commands of Norris-LaGuardia. By footnote, the majority in the Fifth Circuit decision in *D.R. Horton* dismisses the relevance of Norris-LaGuardia without any analysis whatsoever. In full, the note states:

> The Board also relied on the Norris-LaGuardia Act ("NLGA") to support its view that the FAA must give way to the NLRA. It is undisputed that the NLGA is outside the Board's interpretive ambit. *See Lechmere*, 502 U.S. at 536. We also conclude that the Board's reasoning drawn from the NLGA is unpersuasive.

737 F.3d at 362 n. 10. No further heed to Norris-LaGuardia was paid. The Fifth Circuit recently followed its holding in *D.R. Horton* with no further analysis. *Murphy Oil USA, Inc. v. NLRB,* 2015 U.S. App. LEXIS 18673 (5th Cir. Oct. 26, 2015).

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assistance with nowhere to turn.")

While the Ninth Circuit's decision in *Richards v. Ernst & Young, LLP*, 744 F.3d 1072 (9th Cir. 2013), makes reference to Norris- LaGuardia, Plaintiffs did not argue that Norris-LaGuardia prevented enforcement of the agreement at issue there. Rather, they relied on the NLRA, but the panel held the Plaintiffs had waived the argument by failing to make it in the District Court. The panel then simply "note[d]" the decision in *Owen* and several District Court cases and quoted the following language from a District Court in parentheses, in a footnote string-cite:

> 'Congress did not expressly provide that it was overriding any provision in the FAA when it enacted the NLRA or the Norris- LaGuardia Act.'

Id. at 1075 n. 2 (quoting *Morvant v. P.F. Chang's China Bistro, Inc*., 870 F. Supp. 2d 831, 845 (N.D. Cal. 2012)). The quoted District Court thus accepted the argument to historical sequence that amici have dispelled above. As amici have explained, the argument ignores the standard rule of construction, that, in the event of a conflict between two laws, the later law, Norris-LaGuardia, controls. But apart from that – and more importantly – the argument rests on an anachronism.

Under Commerce Clause jurisprudence in 1925 – and 1932 – Congress had no power to legislate the terms and conditions of employment for the majority of employees – in manufacturing, mining, sales, and more. The Norris-LaGuardia draftsmen were aware of that limit: they focused on the power of the federal courts, which Congress could control, not on the power over employment contracts under the Commerce Clause. H. Rep. No. 72-669, *supra*, at 7 ("This section in no wise is

concerned with interstate commerce . . . but the Federal courts obtain jurisdiction in cases involving such [yellow dog] contracts by virtue of diversity of citizenship . . . .").

Congress did have the power to legislate regarding the contracts of those workers who actually crossed a state or national line in the course of their employment – seamen, railroad workers, and interstate truckers. But these workers, the only workers for whom Congress could legislate, Congress exempted from the FAA. 9 U.S.C. §1. *See generally* Matthew W. Finkin, "*Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 Berkeley J. Emp. & Lab. L. 282 (1996). In 2001, the Supreme Court read the exemption as reaching *only* those employees over whom Congress had power in 1925. *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105 (2001). As a result, after the Court reversed its Commerce Clause jurisprudence in 1937 to give Congress jurisdiction over almost all other employees, *NLRB v. Jones & Laughlin Steel Corp*., 301 U.S. 1 (1937), the contracts of those other employees – employees for whom Congress could not and so did not legislate in 1925 – were covered by the FAA. *Circuit City Stores, Inc. v. Adams, supra.*

This disposes of the argument based on the absence of any reference in Norris-LaGuardia to the FAA. There was no reason for the draftsmen or the Congress to have given thought to the FAA when Norris-LaGuardia was drafted in

1928, and enacted in 1932, for this reason: at that time, all employees with respect to whom Congress had power to legislate were expressly excluded from the FAA. The draftsmen, the bill's congressional supporters, and the Congress as a whole could scarcely anticipate how the Supreme Court would later broaden the Commerce power, let alone how the Court would read the FAA's employment contract exemption seven decades later. At the time there was nothing in the FAA for Norris-LaGuardia to address. *See* Fisk, *supra* n. 1, at 200; Finkin, *supra* n. 1, at 23.

In sum, no court of appeals' precedent adequately addresses Norris-LaGuardia.

III. The Supreme Court's Reliance on Freedom of Contract Under the FAA Did Not Address – and Cannot Negate – Norris-LaGuardia

The text of the FAA, like that of Norris-LaGuardia, is unambiguous: the FAA placed agreements to arbitrate on the same footing as all other contracts; any judicial hostility to arbitration *qua* arbitration was contrary to federal policy. And just as any contract provision that abridges public policy must be denied enforcement, so must any such provision in an agreement to arbitrate. *See* 29 U.S.C. § 102. This includes a provision in an arbitration agreement rendered unenforceable by Norris-LaGuardia.[12]

[12] The following hypotheticals make it clear that the statute articulating a contrary public policy need not expressly negate the FAA in order to render an arbitration provision unenforceable. Neither in 1964, when it was enacted, nor in 1991, when it was amended, did Title VII of the Civil Rights Act "mention arbitration proceedings," *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 286 (2002); *id*. at 288 ("no language"

However, in commercial cases, the Court has stated that, under the FAA, arbitration provisions are to be enforced "according to their terms," including terms waiving the right to proceed collectively in court and in arbitration. *AT&T Mobility v. Concepcion*, 563 U.S. 333, 339 (2011). *See also American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2312 (2014), *both quoting Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 487 (1989).

It is not clear what role the Court intended that statement to play outside the context of commercial transactions. It could be read as stating a categorical imperative. If so, it would draw sustenance from the tenor of the time when the FAA was enacted, in 1925. At that time, the prevailing economic and social view embraced individual freedom of contract as a hallowed principle. That embrace was reaffirmed by the *Hitchman* Court: freedom of contract "is a part of the constitutional rights of personal liberty and private property, not to be taken away even by legislation . . . ." *Hitchman Coal*, 245 U.S. at 251. In fact, the initial effort to enact Norris-LaGuardia in 1930 foundered on the shoal of *Hitchman*

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dealing with arbitration). Yet it is beyond doubt that an arbitration agreement that allowed men, but not women, to bring group claims, or that assigned precedence in docketing dispute for arbitration along racial or ethnic lines, would violate that law and thus be unenforceable despite the FAA. Yet the District Court's logic would suggest that such agreements "must be enforced according to their terms" because Title VII does not contain an express "contrary congressional command."

Coal. *See* S. Rep. No. 71-1060, pt. 1, at 6-8 (1930). Consequently, when the Court says that contracts governed by the FAA must be enforced "according to their terms," we might well hear the unmistakable voice of the prevailing social and economic theory at the time of its passage: *pacta sunt sevanda*, contracts must be performed as written.

Had there been no Norris-LaGuardia, analysis could stop there. But, in fashioning Norris-LaGuardia, Congress set its sights against *Hitchman Coal* and against freedom of contract in an absolute sense in the context of employment.[13] The sea change in social and economic theory embodied in Norris-LaGuardia presaged the tide of social and economic legislation of the twentieth century. Accordingly, in the event of a claimed conflict between the FAA and Norris-LaGuardia, Congress' unambiguous command in 1932 was that specified forms of employment contracts were *not* to be enforced "according to their terms."[14]

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[13] S. Rep. No. 72-163, supra, at 14-15. As Representative Schneider put it in arguing for the bill:

> In our efforts to outlaw these [yellow dog contracts] or to make them unenforceable, we shall run the danger of meeting the argument on which a good deal of judge-made law rests: namely, that there is a "liberty of contract" which is basic under our Constitution….

[14] We note the narrowness of the argument advanced here. The argument applies only to agreements to arbitrate employment disputes. And even in that context, it does not apply to agreements to arbitrate purely individual claims.

IV. The Contemporary Importance of Norris-LaGuardia

Though the court need not proceed beyond the plain text of Norris-LaGuardia and certainly not beyond its legislative history and underlying policy, we nevertheless stress that Norris-LaGuardia's policy has as much practical purchase today as it did eighty-three years ago, perhaps more. The systematic violation of federal and state wage and hour law has become common among companies employing millions of some of the most vulnerable workers in today's economy. *See generally* Ruth Milkman, Ana Luz Gonzàlez & Peter Ikeler, *Wage and hour violations in urban labor markets: a comparison of Los Angeles, New York and Chicago,* 43 Indus. Rel. J. 378 (2012). However, the sums taken from each worker tend to be relatively small. One study estimates an underpayment of roughly $1.52 a week for a cohort of about a third of those most at risk. Annette Bernhardt, Michael Spiller & Diane Polson, *All Work and No Pay: Violations of Employment and Labor Laws in Chicago, Los Angeles and New York City*, 91 Social Forces 725 (2013). In the aggregate, however, this comes to about $56 million in unpaid wages a year in three major cities alone. *Id*. These employees can, and do, resort to administrative agencies for relief, but they are notoriously overburdened, often incapable of providing prompt – or, at times, any – relief. *See* Zach Schiller & Sarah DeCarlo, POLICY MATTERS OHIO, INVESTIGATING WAGE THEFT: A SURVEY OF THE STATES (2010); *GAO's Undercover Investigation: Wage Theft of America's*

Vulnerable Workers: Hearings before the Committee on Education and Labor, 111th Cong., 1st sess. (2009).

Thus, recourse to the courts or arbitration may be the only effective means of securing redress – and securing employer conformity to law. However, an individual employee who has been underpaid by $1.52 a week will be hard pressed to secure legal representation to present her claim. If similarly situated co-workers join together as fellow claimants, these employees would be far more likely to be able to secure counsel to vindicate their rights. The employer's preclusion of the employee's ability to seek group resort to arbitration, where it is the forum substituted for the courts, renders the law's protection a chimera. Natiya Ruan, *What's Left to Remedy Wage Theft? How Arbitration Mandates that Bar Class Actions Impact Low Wage Workers*, 2012 Mich. St. L. Rev. 1103 (2012).

In other words, no one would dispute that under Norris-LaGuardia an employer cannot require its employees to promise that they will not seek a higher wage as a group. According to Raymours, however, if employees obtain a promise of higher wages from their employer or a minimum wage law, the employer can foreclose their group proceeding before an arbitrator or judge. To echo Senator Norris, they must "singly present any grievance" they may have – here, in the employer's chosen forum. As a result, employees precluded from joining with their co-workers have no realistic way to make "their demands effective." According to

the text, history, and policy of the Act, such an agreement may not be enforced in federal court.

CONCLUSION

In the debate on Norris-LaGuardia, Representative Schneider expressed the hope that, even though the nation's emerging industrial and social problems would call for future legislative address, "At least the problem of…'yellow dog' contracts will have been removed from the arena and we can then take up other questions." 75 Cong. Rec. 5515 (1932). Alas, he was not prescient. The yellow dog contract has re-entered the arena, in the wake of the Supreme Court's extension of the FAA to most employment contracts. Thus far, however, some courts, have failed to fully engage the law that Congress fashioned to take that very issue out of the arena.

The lack of fidelity to Norris-LaGuardia may be due to lapses in research or a failure to grasp the contemporary significance of a law now eight decades old. We hope that this brief will assist this Court in those respects. Norris-LaGuardia speaks to this dispute. It must be heard. The profession's standards of care demand it.

Respectfully submitted,

/s/James Reif
James Reif

Counsel for Amici Labor Law Scholars

Appendix A
List of signers[15]

Matt Finkin, University of Illinois College of Law;
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 28(a)(10) and 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 29(d) because this brief contains 6,991 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/James Reif
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CERTIFICATE OF FILING AND SERVICE

Pursuant to Fed. R. App. P. 25(D)(1)(b) and (2), I hereby certify that a true and correct copy of this brief was served on Plaintiffs-Appellants' counsel, Michael Rubin and Eric P. Brown, Altshuler Berzon LLP and Justin M. Swartz, Outten & Golden LLP and Defendant-Appellee's counsel, David M. Wirtz, Littler Mendelson P.C., via the Court's electronic filing system and filed both via the Court's electronic filing system and by first class U.S. Mail this 23rd day of December 2015.

/s/James Reif
James Reif
Attorney for Amici Labor Law Scholars

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this motion and memorandum was served on Plaintiff-Appellants' counsel, Michael Rubin and Eric P. Brown, Altshuler Berzon LLP and Justin M. Swartz, Outten & Golden LLP, and Defendant-Appellee's counsel, David M. Wirtz, Littler Mendelson P.C., via the Court electronic filing system this 23rd day of December 2015.

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