Case No. 12-55578

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FATEMEH JOHNMOHAMMADI,

Plaintiff-Appellant,

v.

BLOOMINGDALE'S, INC.,

Defendant-Appellee.

From the United States District Court for the
Central District of California, Case No. 2:11-cv-06434-GW (AJWx)

District Court Judge George H. Wu

PETITION FOR REHEARING EN BANC OF FATEMEH JOHNMOHAMMADI

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1. RULE 35 STATEMENT

Pursuant to Rule 35 of the Federal Rules of Appellate Procedure and 35.1 of this Court, Fatemeh Johnmohammadi respectfully petitions for rehearing en banc of a June 23, 2014 panel opinion of Circuit Judges Noonan, Watford and Rhode Island District Judge Smith. The panel held that it is not unlawful for an employer to secure, from an employee, a promise prospectively waiving their right under the National Labor Relations Act (NLRA), and the Norris La Guardia Act (NLGA), to band together with other employees to collectively seek to enforce work-related claims, on condition that there is no immediate benefit provided to the employee in exchange for the promise. The panel also held that the District Court properly granted a Motion to Compel Arbitration on the basis that Johnmohammadi made such a promise. (Slip Op.9-12)

Rehearing en banc is warranted on this exceptionally important issue because the decision effectively resurrects "yellow dog" contracts that were put to rest over 80 years ago. The panel decision conflicts with the NLGA, the NLRA, and with *J.I. Case v. NLRB* (1944) 321 U.S. 332; *National Licorice v. NLRB* (1940) 309 U.S. 350; *Kaiser v. Mullins* (1982) 455 U.S. 72; *Stone v. NLRB* (1942) 125 F2d

752. The panel decision repudiates the law and cases that provide ***any contract promise*** between an employee and employer that interferes with a right to engage in concerted activity is unenforceable irrespective of the circumstances giving rise to the promise. By virtue of 29 USCS §103, and the NLRA, Courts cannot enforce such promises, and efforts at enforcement are unfair labor practices.

Rehearing is also necessary because, on a National basis, the last best hope for non-union working women and men, unsophisticated in the ways of employment promises, to enforce many of their rights, is preservation of class remedies. The substantive rights created by the NLGA and NLRA provide a formidable obstacle to blind application of Supreme Court FAA precedent that has arisen in other contexts.

2. STATEMENT OF THE ISSUES

Does an employer violate the NLGA and NLRA by securing promises from employees to refrain from future concerted activity for mutual aid or protection, and by taking steps to enforce such promises? Do Federal Courts have the authority to enforce such promises?

3. COURSE OF PROCEEDINGS AND DISPOSITION

The NLGA declares as the public policy of the United States:

> "...[T]hough the individual unorganized worker…should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from interference, restraint, or coercion of employers of labor. . . in the designation of such representatives or in self-organization *or in other concerted activities for the purpose of mutual aid or protection*; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted." 29 USCS §102 (emphasis added).

The very next section, 29 U.S.C. §103 follows by providing that any promise contrary to the policy declared in 29 USCS §102 is unenforceable:

> "*Any undertaking or promise*, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in Section 2 of this Act, is hereby declared to be contrary to the public policy of the United States, 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…"

The NLRA, enacted 3 years after the NLGA reiterated the right of employees "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. §157, ("Section 7"), and made it an Unfair Labor Practice for employers to interfere with employees in the exercise of their Section 7 rights, 29 U.S.C. 158(a)(1).

In *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-566 (1978), the Supreme Court recognized that Section 7's "mutual aid or protection" clause grants employees the right to act in concert to "seek to improve working conditions through resort to administrative and judicial forums," See also *Salt River Valley Water User's Ass'n v. NLRB* (9th

cir. 1953) 206 F2d 325, and *Brady v. National Football League* (8th Cir. 2011) 644 F.3d 661, 673.

In 1937 the Court found that the employee right to engage in concerted activity is fundamental. *NLRB v. Jones & Laughlin Steel* (1937) 301 U.S. 1. The rights provided in the Act are substantive. *Garner v. Teamsters* (1953) 346 U.S. 485.

Johnmohammadi, a former employee of Bloomingdale's, filed an action that was removed to Federal Court, seeking on behalf of herself and other current and former employees of Bloomingdale's, enforcement of wage rights under California law. Her claim was that the little overtime Bloomingdale's employees worked in California was not always calculated correctly because of the failure to factor certain types of incentive payments into the rate used to calculate overtime premiums required by law. (Docket No. 1; 2 ER 229, at 248)

Respondent Bloomingdale's moved to compel arbitration on an individual basis (Docket No. 21). The agreement it relied on extolled the "benefits" of individual arbitration, and specifically banned collective or class arbitration. The agreement was entered into by virtue of Johnmohammadi not taking steps to opt out of it within 30 days of her hire date. (Docket No. 25, 25-1:2 ER 63, 72)

Johnmohammadi opposed the motion to compel arbitration on the ground that the motion, and the contract upon which it was based, constituted unlawful interference with her right, pursuant to the NLGA and NLRA, to engage in concerted activity for mutual aid or protection, and on the ground that pursuant to the express provisions of the NLGA, the Court could not enforce a class action ban.

Bloomingdale's took the position that the class action ban was lawful pursuant to the FAA, 9 U.S.C. §1, et seq., which provides that arbitration agreements "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*." 9 U.S.C. §2. (Emphasis added)

The District Court granted the Motion to Compel Arbitration and dismissed the case, holding that Johnmohammadi voluntarily entered into the agreement, that she explicitly waived her right to bring claims on behalf of other employees as class or representative actions; and that the class action waiver is enforceable and does not violate or interfere with Sections 7 or 8 of the NLRA. (ER1-2).

The District Court decision followed by less than a month the NLRB decision in *D.R. Horton* 357 NLRB No. 184 (2012) that held class action bans in employee arbitration agreements that are a

condition of employment, unenforceable, and came on the heels of a series of Supreme Court cases on the issue of enforceability of class action waivers in consumer contexts where enforcement of the arbitration provisions at issue did not deprive a contracting party of a substantive right.

Just prior to oral argument before the panel, a Fifth Circuit panel, over a dissent, rejected the NLRB *Horton* decision 737 F3d 344 (2013). This circuit has commented on the NLRB *Horton* decision, but has expressly not ruled on it. *Richards v. Ernst & Young* (9th Cir. 2013) 744 F3d 1072, 1075 footnote 3.

4. THE PANEL DECISION

The panel completely avoided the core issues briefed and argued by the parties--- the questions raised as to the applicability of recent "arbitration" Supreme Court decisions given the substantive rights employees enjoy by virtue of the NLGA and NLRA, the FAA's savings clause, and holdings in cases such as *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, and *Mitsubishi v. Soler-Chrysler-Plymouth* (1985) 473 U.S. 614 that provide that arbitration agreements that deprive a contracting party of substantive rights are unenforceable. The panel avoided these issues by adopting

a rule that would effectively wipe out the 80+ year ban on "yellow dog contracts", in any form, irrespective of the circumstances leading up to their formation.

The panel held that an employer can secure a promise from an employee, through the employee's inaction in not opting out, to refrain from engaging in the concerted activity of prosecuting class claims so long as there is no immediate benefit to the employee for making the promise. Slip Opinion 9-12.

The Court justified its decision on the basis of two cases arising from a factual context that has nothing to do with this case; employer conduct in bestowing benefits on employees designed to garner votes against union representation. *NLRB v. Exchange Parts* (1964) 375 U.S. 405; *NLRB v. Anchorage Times* (9th Cir. 1981) 637 F2d 1359.

5. ARGUMENT

A. THE NATIONAL IMPORTANCE OF REHEARING ARISES, IN SIGNIFICANT PART, BECAUSE THE PANEL DECISION RESURRECTS YELLOW DOG CONTRACTS 80 YEARS AFTER THEY WERE PUT TO REST

The panel decision in this matter holds that an employer, without violating the NLRA or the NLGA, can secure un-coerced promises from employees not to engage in the concerted activity of

bringing or participating in class arbitrations or class court proceedings, and holds that the employer can take steps to enforce such promises.

A logical extension of the panel holding is a holding that employers could enforce un-coerced promises from employees not to join unions, not to collectively bargain, not to strike when terms and conditions of future employment are not agreed to, all without violating both the NLGA and NLRA. This logic derives from the fact that the NLGA and the NLRA, by their express terms, put *any* employee concerted activity for mutual aid or protection on the same plane as the types of concerted activity normally associated with union activity. See *Eastex, supra* 437 U.S. at 565, and at footnote 14.

The NLGA, at 29 U.S.C. §§ 102-103, clearly makes "any promise" that interferes with the right to engage in "concerted" activity unenforceable. The exception adopted by the panel herein, is clearly at odds with the law's unequivocal language that does not provide exceptions to the rule.

The ban on **any contract interfering** with concerted activity was a watershed moment in development of our country's Labor policy--the foundation of all that followed.

The fifty years leading up to the passage of the NLGA were among the most tumultuous and violent in the history of labor struggles in the United States.

Between 1877 and 1900, American presidents sent the U.S. Army into eleven strikes, governors mobilized the National Guard in somewhere between 118 and 160 labor disputes. Private militias were assembled, trained, and compensated by employers hostile to unionization. In 1890, the Pinkerton Detective Agency had 30,000 regular and reserve forces available to break strikes. Hundreds of lives were lost in labor management clashes. (Domhoff, The Rise and Fall of Labor Unions in the U.S., at pg.4-5).

In the later part of the 19th century, when employees tried to unite to press for favorable working conditions, they were accused of and prosecuted for engaging in criminal conspiracies. In 1890, the Sherman Act was passed by Congress, prohibiting association of persons that have an adverse impact on trade or commerce. One early use of court power derived from the Sherman Act involved the famous Pullman strike---concerted activity by railroad workers. Relying on the Sherman Act, lower courts enjoined the union and its

leaders. Eugene Debs was convicted of violating the injunction and he was sentenced to six months in jail.

The use of courts to prevent concerted activity was of ongoing concern to organized labor for many years to follow. Labor lobbied for provisions in the Clayton Act of 1914 that protected certain concerted activity by unions and placed limitations on the use of injunctions in labor disputes.

However, during this period, employers throughout the country were frequently using "Yellow Dog" contracts and injunctions based on such contracts to thwart concerted activity by employees. (Ernst, the Yellow-Dog Contract and Liberal Reform, 1917-1932 (1989) 30 Lab. Hist. 251, 252). State legislatures sought to stem the practice, and enacted statutes that prohibited contractual impediments to concerted activity. (Frankfurter & Greene, the Labor Injunction (1930) p. 146).

When Kansas banned "Yellow dog contracts", and arrested an employer's representative for entering into such contracts, the case found its way to the Supreme Court. The Court declared the Kansas law unconstitutional as an infringement of personal liberty. *Coppage v. State of Kansas* (1915) 236 U.S. 1. Two years later, in a case involving massive concerted efforts by mine workers, the Court once

again upheld an injunction grounded in a yellow dog contract. *Hitchman Coal v. Mitchell* (1917) 245U.S. 229.

With the Supreme Court legitimizing Yellow Dog contracts and lower courts regularly enjoining concerted activity based on them, labor turned to Congress.

Ultimately, worker advocates prevailed on Congress to enact the NLGA and NLRA, which, by their express terms, not only protected Labor Union concerted activity, but also protected against employer interference by contract, or otherwise, with the rights of individual employees to engage in or refrain from engaging in concerted activity for "mutual aid or protection".

As Congress pointed out in 29 U.S.C. §102, the law was passed because the individual worker is no match for employers in negotiating conditions of employment.

In 29 U.S.C. §103, Congress could have banned only those agreements that “condition employment” on abstinence from union activity, a classic "yellow dog" contract. However, it went much further, making **ANY PROMISE** by an employee to an employer not to engage in concerted activity for mutual aid or protection

unenforceable, irrespective of whether such promise was a condition of employment, or involved union activity.

Congress realized that union activity was not the only type of concerted activity employees might engage in, and was so set on protecting employees' rights to engage in concerted activity that it made promises that interfered with concerted activity unenforceable irrespective of the circumstances that generated the promises.

The panel here, by upholding enforcement of a promise not to engage in concerted activity in the context of an employee's efforts to bring a claim on behalf of herself and others has, absent en banc correction, resurrected that which Congress put to death with the NLGA, promises that interfere with the right to engage in concerted activity.

B. THE PANEL'S DECISION CONFLICTS WITH LONGSTANDING SUPREME COURT AND CIRCUIT COURT PRECEDENT.

The Supreme Court has long recognized that illegal contracts are not enforceable. In a case involving the NLRA, *Kaiser Steel Corp., supra* 455 U.S. at 77, the Court held:

> "There is no statutory code of federal contract law, but our cases leave no doubt that illegal promises will not be enforced in cases controlled by the Federal law."
>
> "The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in…federal statutes…Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power." *Id*, at 84-85, citing *Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948).

Here, the promise the District Court chose to enforce clearly violated the public policy of the United States set forth in the NLGA and NLRA.

In *J.I. Case Co., supra* 321 U.S. 332, employees entered into one year individual contracts with their employer. The contracts were "not a condition of employment." The contracts, unlike the Bloomingdale's contract, did not explicitly prohibit any type of concerted activity; yet the Court found them illegal as applied because

their application interfered with employee rights to engage in concerted activity. The Court found, just as the panel here, that the employees **were not coerced** into entering into the contracts. *Id*, 321 U.S. at 333. Yet, the *J.I. Case* contract provisions that interfered with concerted activity were, nonetheless, invalidated.

During the one year term of each contract in *J.I. Case*, a union petitioned the NLRB for certification as the representative of the employees. The company "urged the individual contracts as a bar to representation proceedings." The NLRB directed an election, the union won, and the company then refused to bargain on account of the individual contracts. *Id*, at 333-334.

The NLRB found the refusal to bargain on account of the contracts, an unfair labor practice, and the employer's use of the individual contracts as a bar to Section 7 activity, an unfair labor practice. The Supreme Court affirmed these findings. In *J.I. Case*, the Company invoked contracts to prevent union related concerted activity by employees. Here, Bloomingdale's invoked contracts to prevent another form of concerted activity protected by the law.

Rehearing is necessary here in order to align this matter with *J.I*

Case. The form of concerted activity interfered with does not make the contractual "interference" any less unlawful.

The panel decision is clearly at odds with *J.I. Case* in that it gives life to contract promises that interfere with concerted activity.

In *J.I. Case*, the Supreme Court held:

> "Individual contracts no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the NLRA looking to collective bargaining, nor to exclude their contracting employee from a duly ascertained bargaining unit…" *Id*, at 337.

Given that group litigation is a form of "concerted activity for mutual aid and protection" that is on the same footing as collective bargaining or participation in a bargaining unit, the foregoing holding of *J.I. Case* is necessarily applicable here. "Individual Contracts, no matter the circumstances of their execution, or their terms" may not be used to undermine NLRA protections or "exclude contracting employees" from group efforts to enforce wage laws to the same extent they cannot be used to get in the way of collective bargaining or bargaining unit membership.

"Individual contracts cannot be effective as a waiver" of the right to engage in concerted activity. *Id*, at 337.

The panel decision is also contrary to *National Licorice*, *supra* 309 U.S. 350, 360 where the Court upheld an NLRB finding that an employer's invocation of an arbitration agreement in an individual contract prohibiting concerted activity was an Unfair Labor Practice. In *National Licorice*, as here, employees were not compelled to enter into the individual agreements as a condition of employment. The Court found that the contracts were a continuing means of thwarting the policy of the Act. *Id*, at 361.

"Obviously," the Supreme Court concluded, "employers cannot set at naught the National Labor Relations Act by inducing their workmen to agree not to demand performance of the duties which it [the NLRA] imposes." *Id*, at 364. (e.g. the duty not to interfere with concerted activity)

Importantly, the Supreme Court, in rejecting the individual contract defense in *National Licorice* focused *on the effect of the contract promises* on the right to engage in concerted activity. The panel should have done the same here.

> "The effect of this [offending] clause was to discourage, if not forbid, any presentation of grievances to appellant [employer] through a labor organization or his chosen representatives, or in any way except personally. Since the contracts were the fruits of unfair labor practices, stipulated for the renunciation by the employees of rights guaranteed by the Act, and were a continuing means of thwarting the policy of the Act, they were appropriate subjects for the remedial action of the Board…[cites omitted]. Hence the Board was free by its order to direct that the [Employer] should take no benefit from the contracts…" *Id*, 360-361.

In this matter, the agreement at issue similarly stipulates "renunciation by employees of rights guaranteed by the Act"; therefore, *National Licorice* should control.

NLRB v. Stone, supra 125 F.2d 752 followed *National Licorice* and was cited favorably in *J.I. Case*. *Stone, supra* condemned un-coerced contract provisions that limited concerted activity in grievance representation, finding they were "per se" violative of the NLRA. *Id* 125 F.2d at 756.

In *Stone*, supra, 125 F.2d at 756, the Court pointed out that the unlawful contract provision obligated the employees to bargain individually, and waive their right to collective bargaining. *Id*. The Court found such contract clause an illegal "restraint upon collective action." Here the clause at issue is similarly an illegal "restraint on collective action."

C. THE CASES THE PANEL RELIED UPON HAVE NOTHING TO DO WITH UNENFORCEABLE PROMISES

To avoid the necessary arbitration jurisprudence assessment that this case compelled, and to support its conclusion that "yellow dog" contracts are legal under some circumstances, the panel turned to cases that involved prohibited forms of "interference' with concerted activity that have nothing to do with the central issue here.

It is obvious that unfair labor practices based on interference with rights to engage in concerted activity can take many forms (e.g. firing an employee for going to a union meeting, giving an employee an undesirable assignment for complaining about working conditions to co-workers).

This case involves a discrete form of employer "interference" with Section 7 rights – securing promises to never initiate or

participate in class claims, and using those promises in Court to bar said claims.

The cases relied on by the panel, *NLRB v. Exchange Parts* (1964) 375 U.S. 405, and *NLRB v. Anchorage Times* (9th Cir. 1981) 637 F.2d 1359, deal with a completely different form of interference with Section 7 rights, a form of interference that arises in the context of organizing drives and representation elections, where employers give money or other benefits to employees with the specific intent of dissuading them from voting for representation in an upcoming election, and where proof of anti-union motivation for the employer conduct is necessary to establish "interference"..

In the cases the panel cited, the Supreme Court and this Circuit recognized that 29 U.S.C. § 158(a)(1) prohibits pre-election "conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably calculated to have that effect." *Exchange Parts, supra* U.S. at 409; *Anchorage Times, supra* 637 F.3d at 1367. Obviously, the pre-election context of the unplanned benefits granted to employees in those cases, a few days before the

union vote, was a factor in finding an employer motive to unlawfully interfere with a union election.

Here, the express language of the arbitration policy prepared by Bloomingdale's expressly establishes Bloomingdale's desire to eliminate class arbitrations or court proceedings--future concerted activity. Different than the cases relied on by the panel, in this case, one does not need to look at timing or benefits conferred to ascertain "interference" with Section 7 rights. As the NLGA, NLRA, *J.I. Case, National Licorice* and *Stone, supra* provide, such contract provisions are per se unlawful "interference".

NLRB v. Great Dane Trailers, Inc. (1967) 388 U.S. 26, 34 is instructive. In a different context it pointed out that when an employer's conduct is "inherently destructive of employee rights", "no proof of anti-union [anti-concerted activity] motivation is needed."

In *Anchorage,* and *Exchange Parts, supra* motive to interfere with concerted activity on the part of the Employer had to be proven to establish unlawful interference. No such motive had to be proven here. In sharp contrast to those cases, an employer's securing of employee promises to refrain from class claims, and employer conduct to enforce such promises, is "inherently destructive" of

Section 7 rights, and necessarily constitutes unfair labor practices. The "benefit" rationale the panel used to uphold Bloomingdale's conduct is completely inapplicable here.

The interference with concerted activity manifested itself in the offending promise presented by Bloomingdale's to employees, and in Bloomingdale's effort to enforce that promise.

6. CONCLUSION

Legislators Norris and La Guardia exhibited extraordinary wisdom in prohibiting **any promise** that interfered with concerted activity. They eliminated the need for courts to examine consideration, unconscionability, fraud in the inducement, as well as other contract case complexities with their blanket prohibition of **any promises** that interfere with concerted activity by employees. Their wisdom is the foundation of our country's labor policy. The panel decision clearly undermines that policy for working men and women throughout the country.

There is no question that the panel had the prerogative of not addressing the inapplicability of recent FAA jurisprudence to the NLRA and NLGA that this case presented if the promises at issue were unlawful under the NLGA and NLRA, however, the panel

reasoning finding Bloomingdale's conduct lawful, that allowed it to avoid the FAA issues, conflicts with the "any promise" language of the NLGA, and conflicts with applicable Supreme Court precedent, rendering en banc review appropriate. This is especially so, where the consequence of the panel decision is the resurrection of "yellow dog" promises, a resurrection that can wreak havoc with the protections workers have enjoyed for generations through our national labor law policy.

Dated: July 25, 2014

Respectfully Submitted,

/s/ Dennis Moss

DENNIS F. MOSS
Attorneys for Appellant
FATEMEH JOHNMOHAMMADI

CERTIFICATE OF SERVICE

U.S. COURT OF APPEALS DOCKET NUMBER(S) 12-5578

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 2, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: July 25, 2014 /s/ Lea Garbe

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APPENDIX

COPY OF PANEL DECISION

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FATEMEH JOHNMOHAMMADI, individually and on behalf of other persons similarly situated, *Plaintiff-Appellant*, v. BLOOMINGDALE'S, INC., *Defendant-Appellee*.	No. 12-55578 D.C. No. 2:11-cv-06434-GW-AJW OPINION

Appeal from the United States District Court
for the Central District of California
George H. Wu, District Judge, Presiding

Argued and Submitted
December 6, 2013—Pasadena, California

Filed June 23, 2014

Before: John T. Noonan and Paul J. Watford, Circuit Judges, and William E. Smith, Chief District Judge.*

Opinion by Judge Watford

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* The Honorable William E. Smith, Chief District Judge for the U.S. District Court for the District of Rhode Island, sitting by designation.

SUMMARY[**]

Arbitration / Class Action

The panel affirmed the district court's order granting the motion of Bloomingdale's, Inc. to compel arbitration under the Federal Arbitration Act, and dismissing without prejudice the putative class action brought by a former employee to recover unpaid overtime wages.

The arbitration agreement, contained in Bloomingdale's employment documents, provided that employees who fail to opt out waive their right to pursue employment-related claims on a collective basis in any forum, judicial or arbitral.

The panel held that the district court correctly held that the arbitration agreement was valid, and under the Federal Arbitration Act it must be enforced according to its terms. The panel held that the employee had the right to opt out of the arbitration agreement, and had she done so she would be free to pursue this class action in court. The panel further held that having freely elected to arbitrate employment-related disputes on an individual basis, without interference from Bloomingdale's, the employee could not claim that enforcement of the arbitration agreement violated either the Norris-LaGuardia Act or the National Labor Relations Act.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

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Jeffrey A. Berman and James M. Harris, Seyfarth Shaw LLP, Los Angeles, California, for Amicus Curiae California Employment Law Council.

OPINION

WATFORD, Circuit Judge:

This is a class action brought by plaintiff Fatemeh Johnmohammadi to recover unpaid overtime wages from defendant Bloomingdale's, Inc., her former employer. All of Johnmohammadi's claims arise under state law and are asserted on behalf of similarly situated current and former California employees. Johnmohammadi initially filed the action in state court, but Bloomingdale's removed the action to federal court under the Class Action Fairness Act of 2005. *See* 28 U.S.C. §§ 1332(d)(2), 1453(b).

Once in federal court, Bloomingdale's moved to compel arbitration under the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq*., and asked the district court to stay the action pending completion of arbitration. The court granted the motion to compel. It determined that shortly after being hired by Bloomingdale's, Johnmohammadi entered into a valid, written arbitration agreement and that all of her claims fall within the scope of that agreement.

In these circumstances § 3 of the FAA, 9 U.S.C. § 3, seems to direct that the action "shall" be stayed pending completion of arbitration, as two other circuits have held. *Lloyd v. Hovensa, LLC*, 369 F.3d 263, 268–69 (3d Cir. 2004); *Adair Bus Sales, Inc. v. Blue Bird Corp.*, 25 F.3d 953, 955 (10th Cir. 1994). We have held that, notwithstanding the language of § 3, a district court may either stay the action or dismiss it outright when, as here, the court determines that all of the claims raised in the action are subject to arbitration. *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 638 (9th Cir. 1988). The choice matters for purposes of appellate

jurisdiction: An order compelling arbitration and staying the action isn't immediately appealable, 9 U.S.C. § 16(b)(1)–(2); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 87 n.2 (2000), but an order compelling arbitration and dismissing the action is. § 16(a)(3); *Green Tree*, 531 U.S. at 89. The district court chose to dismiss Johnmohammadi's action without prejudice, so we have jurisdiction to hear this appeal. *See Interactive Flight Techs., Inc. v. Swissair Swiss Air Transp. Co.*, 249 F.3d 1177, 1179 (9th Cir. 2001).

The relevant facts aren't in dispute. When Bloomingdale's hired Johnmohammadi as a sales associate, she received a set of documents describing the company's dispute resolution program. Those documents informed her that she agreed to resolve all employment-related disputes through arbitration unless she returned an enclosed form within 30 days electing, as the form put it, "NOT to be covered by the benefits of Arbitration." Johnmohammadi did not return the opt-out form. She does not contest the district court's findings that she made a fully informed and voluntary decision, and that no threats of termination or retaliation were made to influence her decision. By not opting out within the 30-day period, she became bound by the terms of the arbitration agreement. *See Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1199–1200 (9th Cir. 2002).

The arbitration agreement is quite detailed, but the provision that matters here is the one that forbids arbitration on a class-wide basis: "The Arbitrator shall not consolidate claims of different Associates into one (1) proceeding, nor shall the Arbitrator have the power to hear an arbitration as a class action . . . ." Employees who fail to opt out waive their right to pursue employment-related claims on a collective basis in any forum, judicial or arbitral. The only question

before us is whether this provision is enforceable; if it is, Johnmohammadi may not proceed with this action.

Johnmohammadi can't argue that the class-action waiver is unenforceable under California law. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750–51 (2011). She argues instead that federal law renders the waiver unenforceable, relying on provisions in two federal labor statutes. The first statute, the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.*, states that, as a matter of public policy, employees "shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of . . . representatives [of their own choosing] or in self-organization or in *other concerted activities* for the purpose of collective bargaining or other mutual aid or protection." § 102 (emphasis added).[1] The Act declares that

[1] Section 102 currently provides:

> In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:
>
> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions

any "undertaking or promise in conflict with the public policy declared in section 102 . . . shall not be enforceable in any court of the United States." § 103.

The second statute, the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.*, says essentially the same thing. Section 7 of the NLRA grants covered employees, *see* § 152(3), certain substantive rights, among them the right "to engage in *other concerted activities* for the purpose of collective bargaining or other mutual aid or protection." § 157 (emphasis added).[2] Section 8(a)(1), in turn, makes it

> of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

29 U.S.C. § 102.

[2] Section 7 currently provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a

illegal for an employer "to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 157." § 158(a)(1).

Johnmohammadi contends that filing this class action on behalf of her fellow employees is one of the "other concerted activities" protected by the Norris-LaGuardia Act and the NLRA. There is some judicial support for her position. *See, e.g.*, *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–66 (1978); *Brady v. Nat'l Football League*, 644 F.3d 661, 673 (8th Cir. 2011); *Mohave Elec. Coop, 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 (9th Cir. 1953). But we need not decide whether Johnmohammadi has correctly interpreted this statutory phrase. To prevail, she must still show that Bloomingdale's interfered with, restrained, or coerced her in the exercise of her right to file a class action. In our view, Bloomingdale's did none of these things.

We can quickly dismiss any notion that Bloomingdale's coerced Johnmohammadi into waiving her right to file a class action. Bloomingdale's did not require her to accept a class-action waiver as a condition of employment, as was true in *In re D.R. Horton, Inc.*, 357 N.L.R.B. No. 184, 2012 WL 36274 (Jan. 3, 2012), *enforcement denied in part*, 737 F.3d 344 (5th Cir. 2013). Bloomingdale's gave her the option of participating in its dispute resolution program, which would require her to arbitrate any employment-related disputes on an individual basis. As the district court found,

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> condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 157.

Johnmohammadi was fully informed about the consequences of making that election, and she did so free of any express or implied threats of termination or retaliation if she decided to opt out of arbitration. She has not challenged those findings. There is thus no basis for concluding that Bloomingdale's coerced Johnmohammadi into waiving her right to file a class action.

Nor is there any basis for concluding that Bloomingdale's interfered with or restrained Johnmohammadi in the exercise of her right to file a class action. If she wanted to retain that right, nothing stopped her from opting out of the arbitration agreement. Bloomingdale's merely offered her a choice: resolve future employment-related disputes in court, in which case she would be free to pursue her claims on a collective basis; or resolve such disputes through arbitration, in which case she would be limited to pursuing her claims on an individual basis. In the absence of any coercion influencing the decision, we fail to see how asking employees to choose between those two options can be viewed as interfering with or restraining their right to do anything.

Johnmohammadi attempts to analogize the choice Bloomingdale's offered her to other types of employer misconduct that violate § 8(a)(1) of the NLRA. Specifically, she invokes cases in which the employer offered its employees a benefit, such as a raise, in exchange for the employee's agreement to refrain from protected activity. *See, e.g.*, *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 360 (1940); *NLRB v. Stone*, 125 F.2d 752, 754, 756 (7th Cir. 1942); *In re Ishikawa Gasket Am., Inc.*, 337 N.L.R.B. 175, 175–76 (2001). She contends Bloomingdale's did the same thing by offering employees the "benefit" of resolving all employment-related

disputes through arbitration in exchange for the employee's agreement not to file or join a class action.

To prevail on this argument, Johnmohammadi would need to show that offering the arbitration agreement constitutes "conduct immediately favorable to employees," which Bloomingdale's undertook with the express purpose of impinging upon its employees' "freedom of choice" in deciding whether to waive or retain their right to participate in class litigation. *NLRB v. Exch. Parts Co.*, 375 U.S. 405, 409 (1964); *see also NLRB v. Anchorage Times Pub'g Co.*, 637 F.2d 1359, 1367 (9th Cir. 1981). We don't doubt that offering the arbitration agreement could be viewed as conduct favorable to employees, since the benefits of having an arbitral forum available to resolve workplace disputes can be substantial. For certain types of disputes the speed, informality, and lower costs of arbitration provide real advantages over litigating in court. *See Concepcion*, 131 S. Ct. at 1749, 1751. But arbitration comes with disadvantages of its own, which, depending on the nature of the dispute, may make it a less attractive forum for employees. At the outset of the employment relationship, before an employee knows what types of workplace-related disputes she may later encounter, the benefits (and costs) of prospectively agreeing to arbitrate all such disputes are decidedly uncertain, even putting aside the class-action waiver. We don't think the offer of those benefits is of such a character that it would tend to interfere with an employee's freedom of choice about whether to forgo future participation in class actions. And Johnmohammadi has offered no evidence that Bloomingdale's offered those benefits with the express purpose of curtailing its employees' freedom of choice. Indeed, it would be difficult for Johnmohammadi to make such a showing here, given that the presumed benefits of

agreeing to arbitrate all employment-related disputes would largely be lost if the agreement permitted class-wide arbitration. *See id.*

Johnmohammadi also argues that, whether procured by way of inducement or not, an employee may never waive the right to participate in class litigation by negotiating an individual contract with her employer. She relies principally on *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944), but that case does not support the broad proposition she urges us to adopt. The Court held in *J. I. Case* that an employer may not negotiate individual contracts with employees and then refuse to engage in collective bargaining with the employees' designated union representatives on the ground that doing so would violate the terms of the individual contracts. *Id.* at 337. The Court reasoned that any collective bargaining agreement reached between the union and the employer would necessarily supersede an employee's individual contract, to the extent that the terms of the collective bargaining agreement were more favorable to the employee. *Id.* at 338–39. But the Court also stressed that nothing prevents an employee from making an individual contract with her employer, "provided it is not inconsistent with a collective agreement or does not amount to or result from or is not part of an unfair labor practice." *Id.* at 339. Here, Johnmohammadi was not covered by a collective bargaining agreement, and for the reasons discussed above, we do not believe her decision to enter into the arbitration agreement amounted to or resulted from an unfair labor practice.

In sum, Johnmohammadi had the right to opt out of the arbitration agreement, and had she done so she would be free to pursue this class action in court. Having freely elected to arbitrate employment-related disputes on an individual basis,

without interference from Bloomingdale's, she cannot claim that enforcement of the agreement violates either the Norris-LaGuardia Act or the NLRA. The district court correctly held that the arbitration agreement is valid. Under the FAA it must be enforced according to its terms. *See Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013).

AFFIRMED.