15-2820-cv

United States Court of Appeals
for the
Second Circuit

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

Plaintiffs-Appellants,

– v. –

RAYMOURS FURNITURE COMPANY, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 3

I. *Sutherland* is Not Controlling 3

II. Federal Labor Law Guarantees Employees the Right to Pursue Workplace Claims on a Concerted Basis 5

III. The FAA Does Not Compel Courts to Disregard Employees' Substantive Federal Labor Law Right to Engage in Concerted Legal Activity 13

IV. In the Event of a Conflict Between the NLGA/NLRA and the FAA, Congress Intended the Federal Labor Laws to Take Precedence 17

V. Raymours' Remaining Arguments Are Unpersuasive 21

CONCLUSION 27

TABLE OF AUTHORITIES

Cases **Page(s)**

14 Penn Plaza LLC v. Pyett,
556 U.S. 247 (2009)....................15, 17

Am. Exp. Co. v. Italian Colors Rest.,
133 S. Ct. (2013)....................14, 17

Amex Card Servs. Co.,
363 NLRB No. 40, 2015 WL 6957289 (2015)....................7

Auciello Iron Works, Inc. v. NLRB,
517 U.S. 781 (1996)....................13

Boys Markets, Inc. v. Retail Clerks Union, Local 770,
398 U.S. 235 (1970)....................24, 25, 27

Bristol Farms,
363 NLRB No. 45, 2015 WL 7568339 (2015)....................8, 19

Bulova Watch Co. v. U.S.,
365 U.S. 753 (1961)....................18

Convergys Corp.,
363 NLRB No. 51, 2015 WL 7750753 (2015)....................1

Eddyleon Chocolate Co.,
301 NLRB 125, 1991 WL 46146 (1991)....................8

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991)....................15, 16

Higgins v. N.Y. Stock Exch., Inc.,
942 F.2d 829 (2d Cir. 1991)....................22

Hoot Winc, LLC,
363 NLRB No. 2, 2015 WL 5143098 (2015)....................7

J.I. Case Co. v. NLRB,
321 U.S. 332 (1944)....................6, 7

In re Joint E. and S. Dist. Asbestos Litig.,
129 B.R. 710 (E.D.N.Y. 1991) 20

Kaiser Steel Corp. v. Mullins,
455 U.S. 72 (1982)...6, 14

Lo Duca v. U.S.,
93 F.3d 1100 (2d Cir. 1996) 23

Looney v. Black,
702 F.3d 701 (2d Cir. 2012) 22

Marine Cooks & Stewards, AFL-CIO v. Panama S.S. Co.,
362 U.S. 365 (1940)...26, 27

Mesa Verde Constr. Co. v. N. Cal. Dist. Council of Laborers,
861 F.2d 1124 (9th Cir.1988) (en banc) 4

Mhany Mgmt., Inc. v. Cnty. of Nassau,
__ F.3d __, 2016 WL 1128424 (2d Cir. Mar. 23, 2016) 4

Murphy Oil USA, Inc.,
361 NLRB No. 72, 2014 WL 5465454 (2014)..*passim*

Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,
545 U.S. 967 (2005)...4

Nat'l Licorice Co. v. NLRB,
309 U.S. 350 (1940)...6

NLRB v. City Disposal Sys. Inc.,
465 U.S. 822 (1984)...5

NLRB v. J. Weingarten, Inc.,
420 U.S. 251 (1975)...21

On Assignment Staffing Servs., Inc.,
362 NLRB No. 189, 2015 WL 5113231 (2015)..7, 8, 27

Owen v. Bristol Care, Inc.,
702 F.3d 1050 (8th Cir. 2013) 3

Salt River Valley Water Users Ass'n,
99 NLRB 849 (1952) 5

Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.,
585 F.3d 58 (2d Cir. 2009) 5

SolarCity Corp.,
363 NLRB No. 83, 2015 WL 9315535 (2015)..11, 12

Supply Techs., LLC,
359 NLRB No. 38, 2012 WL 6800784 (2012)..8

Sutherland v. Ernst & Young LLP,
726 F.3d 290 (2d Cir. 2013) 3, 4

Totten v. Kellogg Brown & Root, LLC,
No. 14 Civ. 1766, 2016 WL 316019 (C.D. Cal. 2016) 7

In re Twenty Per Cent Cases,
80 U.S. 568 (1871)..20

United States v. Ortiz,
621 F.3d 82 (2d Cir. 2010) 4

United States v. Oshatz,
912 F.2d 534 (2d Cir. 1990) 3

Westinghouse Credit Corp. v. D'Urso,
371 F.3d 96 (2d Cir. 2004) 23

Statutes

9 U.S.C. § 1 19

9 U.S.C. § 2 ....*passim*

29 U.S.C. §102 ....8, 24

29 U.S.C. §103 ....6, 8, 24

29 U.S.C. §115 ....2, 18

Federal Arbitration Act 2, 11

National Labor Relations Act ....*passim*

Norris-LaGuardia Act 10, 26, 27

Rules Enabling Act, 28 U.S.C. §2072 21

Other Authorities

93 Cong. Rec. 6654 (1947) 10

93 Cong. Rec. 7000 (1947) 10

Legislative History of the Labor-Management Relations Act, 1947,
1588-89 (1948)..10

INTRODUCTION

For more than 80 years, the National Labor Relations Board has consistently held that an employer violates federal labor law by seeking to enforce any employment contract or workplace policy that prohibits its employees from acting in concert to vindicate workplace rights. *See* Brief for Plaintiffs-Appellants ("AOB") 13-25; Amicus Brief of the National Labor Relations Board ("NLRB Br.") 5-13; *see also* Amicus Brief of Labor Law Scholars ("LLS Br.") 9-12. The right to engage in "concerted activity" for the purpose of "mutual aid and protection" has long been the core, substantive right protected by the NLRA, and any effort by an employer to strip its employees of the right to pursue legal claims on a joint, collective, or class action basis thus violates both the NLRA and the NLGA. AOB 13-25; NLRB Br. 5-13.[1]

If Raymours Furniture Company, Inc. had inserted its prohibition against concerted legal activity in a stand-alone employment contract or in a stand-alone workplace policy, rather than as part of its Employment Arbitration Program ("EAP"), that prohibition would surely be unenforceable under Sections 7 and 8(a)(1) of the NLRA and Sections 2 and 3 of the NLGA. *See, e.g., Convergys*

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[1] The Board's construction of its own statute is entitled to enormous deference, *see* AOB 15-20, and that deference extends to the Board's analysis in its amicus brief to this Court, even though this is not a direct appeal from a Board decision. AOB 18 and cases cited.

Corp., 363 NLRB No. 51, 2015 WL 7750753 (2015); AOB 21-24, 28-30; NLRB Br. 10. The real issue on this appeal, then, is not whether Raymours' prohibition against all group legal activity in all possible forums violates the NLRA and NLGA—it certainly does—but whether an employer can insulate such an otherwise unenforceable prohibition from federal statutory challenge simply by including it in a mandatory pre-dispute employment arbitration agreement and then claim that the pro-enforcement policies of the Federal Arbitration Act immunize that otherwise-unenforceable provision from invalidation.

For the reasons Plaintiffs and their amici have previously stated, Raymours' arguments must be rejected. First, there is no actual conflict between the federal labor law rights guaranteed by the NLRA/NLGA and the arbitration policies of the FAA, particularly in light of the FAA's § 2 savings clause. *See* AOB 26-34. Second, even if there were a statutory conflict between the NLGA/NLRA and FAA, that conflict would have to be resolved in favor of the core substantive rights protected by the later-enacted and more specific federal labor laws, which Congress decreed should take precedence over previously enacted statutes. *See* 29 U.S.C. §115; AOB 34-47. The FAA is not a super-statute that trumps all others. Just as Raymours could not immunize itself from Title VII liability by inserting a clause in its EAP stating that all claims asserted by female and Hispanic employees must be arbitrated while all other employees may pursue claims in litigation,

neither can it negate its employees' substantive right to pursue concerted legal activity by inserting a prohibition against such protected activity into an otherwise-enforceable arbitration agreement.

ARGUMENT

I. *Sutherland* is Not Controlling.

Raymours begins by asking this Court to duck the important legal issues presented, contending that footnote 8 in *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013), precludes the panel from reaching the merits in the absence of full en banc review. Plaintiffs disagree for the reasons stated in AOB 47-53, NLRB Br. 24 & n.10, and LLS Br.15-19; *see also United States v. Oshatz*, 912 F.2d 534, 540 (2d Cir. 1990).

In the three years since *Sutherland* was decided, the NLRB has revisited its initial *D.R. Horton* ruling in dozens of cases, and has both expanded and deepened its analysis of the governing NLRA and NLGA principles in response to the facts of those cases and new arguments asserted by respondent employers. That analysis, which was not available to the *Sutherland* panel, demonstrates the fallacy of the Eighth Circuit's reasoning in *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013)—which was the principal case cited by the panel—and explains why the Board's rulings are supported by the NLGA no less than the NLRA, and why the re-codification of the U.S. Code in 1947 did not effect an

implied repeal of the core substantive protections of our federal labor law. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-86 (2005) (panel not bound by prior decision when subsequent agency ruling warrants *Chevron* deference); *Mhany Mgmt., Inc. v. Cnty. of Nassau*, __ F.3d __, 2016 WL 1128424, at *31 (2d Cir. Mar. 23, 2016) (same). The prior panel decision did not (and could not have) considered the Board's more recent decisions or their doctrinal underpinnings. *See United States v. Ortiz*, 621 F.3d 82, 87 n.3 (2d Cir. 2010); *Mesa Verde Constr. Co. v. N. Cal. Dist. Council of Laborers*, 861 F.2d 1124, 1136 (9th Cir.1988) (en banc).

This appeal raises pure questions of law that affect millions of workers and employers throughout the Second Circuit. The importance of getting the answers right is demonstrated by the sheer number of related cases now pending in federal and state appellate courts throughout the country and by the keen interest demonstrated by the notable amici that have presented their analytical perspectives. Given the importance of these issues, if the panel concludes that *Sutherland* precludes it from taking a fresh look at the questions presented, the panel should either call for en banc review so the merits of Plaintiffs' and the Board's arguments can be given full consideration, or it should seek "mini-en banc" review by circulating an opinion addressing the merits of those arguments to all active members of the Court to determine whether there are any objections to its issuance.

See, e.g., *Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 67 & n.9 (2d Cir. 2009) (panel may use this procedure to revisit prior decision it considers erroneous).

II. Federal Labor Law Guarantees Employees the Right to Pursue Workplace Claims on a Concerted Basis.

The fundamental cornerstone of federal labor policy since 1932 has been the right of workers to engage in concerted activity for mutual aid and protection. In countless cases since then, the Board and the courts have reiterated that this core statutory right fully encompasses the right to pursue adjudication of workplace claims on a concerted action basis. *See* AOB 13-21; NLRB Br. 5-8; LLS Br. 8-9. An employer can no more prohibit its workers from joining together to seek adjudication of claims for unpaid wages than it can prohibit them from protesting, striking, bargaining, or posting on social media to help accomplish that same goal. *Id.*; *see also NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 835 (1984) ("There is no indication that Congress intended to limit [concerted activity] protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way."); *Salt River Valley Water Users Ass'n*, 99 NLRB 849, 853-54 (1952), *enf'd*, 206 F.2d 325, 328 (9th Cir. 1953).[2]

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[2] While Raymours asserts that the Board's application of Section 7 protections to adjudicative activity has been "inconsistent," neither Raymours nor its amici have cited a single Board decision holding that collective pursuit of legal claims *is*

The Supreme Court has repeatedly held that employer policies that violate federal labor law, including policies set forth in contracts imposed as a condition of employment, are invalid and unenforceable:

> "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."

Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 83-84 (1982) (quoting *Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948) (footnotes omitted)); *see also Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 360-61 (1940) (employer may not enforce contract terms imposed in violation of the NLRA); 29 U.S.C. §103 ("Any undertaking or promise . . . in conflict with [the NLGA § 2 right to be "free from the interference, restraint, or coercion of employers [in pursuing] concerted activities for the purpose of . . . mutual aid or protection"] is contrary to the public policy of the United States [and] shall not be enforceable in any court of the United States . . .").[3]

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not protected or that an employer's prohibition of such activity is lawful under the NLRA or NLGA.

[3] Raymours misreads *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944), as holding that contracts that violate the NLRA should *not* be invalidated. In fact, the Court held that "[w]herever private contracts conflict with [the Board's] functions, they obviously must yield or the Act would be reduced to a futility." *Id.* at 337. Because the individual contracts in that case were lawful when entered into (as the

Raymours attempts to sweep away this authority by arguing that the federal labor statutes prohibit only *retaliation* against employees who seek to act collectively, and do not prohibit employers from imposing or otherwise enforcing prohibitions against concerted activity. Brief of Appellee ("Ans. Br.") 40-43. But of course, Section 8(a)(1) of the NLRA broadly prohibits any effort by an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7," as does Section 2 of the NLGA; and Section 3 of the NLGA prohibits judicial enforcement of "[a]ny undertaking or promise" that interferes with that right. *See also* AOB 13-15, 21-22, 25; NLRB 9-11 (citing cases applying § 8(a)(1)). For these reasons, "[i]t is a bedrock principle of federal labor law and policy that agreements in which individual employees purport to give up the statutory right to act concertedly for their mutual aid or protection are

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employees had not yet voted for union representation), the Court allowed them to expire by their own terms as long as they were not used to interfere with bargaining or organizing. *Id.* at 341-42. Here, by contrast, Raymour's contractual prohibitions violated the NLRA and NLGA from the outset, and directly interfered with the employees' Section 7 rights. *See also Totten v. Kellogg Brown & Root, LLC*, No. 14 Civ. 1766, 2016 WL 316019, at *17 (C.D. Cal. 2016) ("[t]he [class action] waiver violates federal labor law and thus is unenforceable"); *Amex Card Servs. Co.*, 363 NLRB No. 40, 2015 WL 6957289, at *4-5 (2015) (ordering employer to rescind or revise contract); *Hoot Winc, LLC*, 363 NLRB No. 2, 2015 WL 5143098, at *3 (2015) (same); *On Assignment Staffing Servs., Inc.*, 362 NLRB No. 189, 2015 WL 5113231, at *13 (2015) (same); *see also* AOB 2 n.1 (collecting cases).

void." *Bristol Farms*, 363 NLRB No. 45, 2015 WL 7568339, at *3 & n.6 (2015) (citing *J.I. Case*, 321 U.S. 332, and *Nat'l Licorice*, 309 U.S. 350); *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454, at *18 (2014). Indeed, having an unlawful employer policy that chills protected conduct constitutes a *separate* unfair labor practice from imposing discipline or otherwise retaliating against an employee for violating that unlawful policy. *See Supply Techs., LLC*, 359 NLRB No. 38, 2012 WL 6800784 (2012).

Raymours and its amici suggest that, even if employees have a protected statutory right to pursue workplace claims on a collective basis, nothing prevents them from anticipatorily waiving that right. Ans. Br. 13; Amicus Brief of National Retail Federation ("NRF Br.") 10-11. But employment contracts that purportedly waive employees' prospective right to engage in concerted, protected activity are precisely the type of unlawful waivers that Congress enacted the NLGA and NLRA to prohibit. *See* 29 U.S.C. §§102, 103; *Bristol Farms*, 2015 WL 7568339, at *3; *Eddyleon Chocolate Co.*, 301 NLRB 125, at 887, 1991 WL 46146, at *1 (1991). Because of the enormous economic disparity between employers and individual employees, Congress and the Board have repeatedly declared such waivers to be unenforceable. *See* 29 U.S.C. §102 (recognizing that "the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor"); *On Assignment Staffing Servs.*, 2015 WL

5113231, at *7. Raymours and its amici may disagree about how the term "yellow dog contract" was understood in the early 1930s, but their narrow characterization is contradicted by the statutory language, by the Board's consistent administrative construction, and by history, including the applicable legislative history. AOB 23, 32-33; LLS Br. 9-12 & n.8, 17-19.

The National Retail Federation argues that Raymours' prohibition against concerted legal activity actually *furthers* the NLRA's purposes, because since 1947 the Act has protected the right of employees to "refrain from" concerted activity no less than to "engage in" such activity. This argument ignores the important distinction between, say, an employee's decision to join or not to join with co-workers in filing a lawsuit or walking a picket line, and a decision, required as a condition of employment, *prospectively* to forfeit the right to engage in a form of concerted activity in the future. *See Murphy Oil*, 2014 WL 5465454, at *24 ("In prohibiting *employers* from requiring employees to pursue their workplace claims individually, *D.R. Horton* does not compel *employees* to pursue their claims concertedly.") (emphasis in original). No case has ever held that the "right to refrain" allows employers to obtain prospective waivers of statutory rights from their employees. And although the NRF asserts that its right-to-refrain argument would not justify a policy prohibiting workers from joining together to "fil[e] charges at the NLRB," NRF Br. 13, it never explains why its overbroad reading of

the Taft-Hartley amendments would not logically permit precisely such a prohibition.

When "right to refrain" language was proposed in the 1947 Taft-Hartley amendments, several U.S. Senators expressed concern that the new language might be misconstrued to enable employers to compel prospective waivers of Section 7 rights. *See*, *e.g.*, 93 Cong. Rec. 6654, 6682 (1947), *reprinted in* 2 NLRB, Legislative History of the Labor-Management Relations Act, 1947, 1588-89 (1948) (statement of Sen. Pepper) (the "right to refrain" "may sound innocent on its face, but I point out the possibility that that section may be used as the basis for future 'yellow dog' contracts"). The chief architect of the amendments reassured Congress that "[n]othing could be further from the truth," including because "[t]here is similar language in the Norris-LaGuardia Act [already] outlawing the yellow-dog contract." *Id.* 93 Cong. Rec. 7000, 7001 (1947) (statement of Sen. Taft). Nothing in that language gave employers the right to compel prospective waivers of Section 7 rights. *See also* NLRB Br. 10-13, 20-21.

Raymours also contends that federal labor law allows employers to prohibit *some* types of concerted activity as long as it permits *other* types of concerted activity—here, by allowing its employees to pursue wage-and-hour claims before state or federal administrative agencies. Ans. Br. 47. That argument fails both legally and factually: legally, because the NLGA and NLRA have never been held

to justify an employer's prohibition of one entire category of concerted activity as long as the employer does not prohibit *all* categories of concerted activity (*e.g.,* to bar strikes but permit picketing), *see* AOB 41 n.16; NLRB Br. 3 n.2; LLS Br. 17; and factually, because administrative enforcement is not an adequate substitute for private enforcement of workplace rights. *See* LLS Br. 17 n.12.

As the Board itself recently explained in rejecting this very argument:

> First, there is a wide range of employment-related claims—common-law claims, for example—that are not within the purview of any administrative agency. For such claims, resort to an administrative agency is meaningless. . . .
>
> Second, even if the administrative agency has the authority to pursue employees' claims, it typically also has the discretion to decline to do so . . . or to do so only on the agency's terms . . . . Employees cannot control whether the agency will pursue their claims, much less when, where, and how they will be pursued—all matters that employees do control when they are free to exercise their Section 7 right to bring their own group claims to court.

SolarCity Corp., 363 NLRB No. 83, 2015 WL 9315535, at *3 & n.8 (2015) (footnotes omitted; emphasis in original); *see also id*. at *5 n.15 ("'[I]f the Act makes it unlawful for employers to require employees to waive their right to engage in one form of activity, it is no defense that employees remain able to engage in *other* concerted activities.'").[4]

[4] "The exception to this rule is where an employer forecloses employees from pursuing joint, class, or collective claims in court, but permits them to do so in arbitration. This is because—as the Federal Arbitration Act and the Supreme

For these reasons, and because of the deference owed to the NLRB's construction of its own statute, this Court should conclude as a threshold matter that the NLRA and NLGA prohibit employers from interfering with their employees' statutory right to join together in seeking to vindicate workplace rights through concerted legal activity.[5]

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Court's decisions applying that statute make clear—arbitration must be treated as the equivalent of a judicial forum." *Solarcity Corp.*, 2015 WL 9315535, at *5 n.15; *see also* AOB 24.

Raymours contends that notwithstanding its ban on concerted legal activity as a means of vindicating workplace rights, its employees remain free to share information, develop common legal theories and strategies, and encourage other employees to assert similar but independent claims. Ans. Br. 47. But this still leaves employees to take the most daunting and dangerous step—suing their employer—by themselves. Moreover, if presenting claims to an administrative agency is an insufficient alternative to permitting employees to file joint claims in a judicial or arbitral forum, surely the ability to discuss claims informally with co-workers is not sufficient either. *See also SolarCity Corp.*, 2015 WL 9315535, at *5 n.15 (that employees can still discuss their claims with each other, hire a lawyer together, etc. is insufficient to make class action ban lawful). Besides, many or all of the informal activities mentioned by Raymours would almost certainly violate its EAP's strict confidentiality provision, which prohibits employees from "reveal[ing] or disclos[ing] the substance of the proceedings to any other person," including to "any members of the public, and . . . any current, future or former employees of Raymour & Flanigan" (although Raymours retains for itself the unfettered right to "disclose information regarding the arbitration proceedings internally or externally" to anyone with "a legitimate business reason"). App. A-61.

[5] The Amicus Brief of the Chamber of Commerce ("Chamber Br.") makes the surprising assertion that employees *benefit* from being deprived of the right to pursue workplace claims on a joint, class, or other concerted action basis. Chambers Br. 28-33. Although that assertion is not particularly relevant to the

III. The FAA Does Not Compel Courts to Disregard Employees' Substantive Federal Labor Law Right to Engage in Concerted Legal Activity.

Federal labor policy, as expressed in the NLGA and NLRA and as construed by decades of Board and federal court decisions, prohibits employers from imposing *any* contract term or workplace policy that interferes with, restrains, or coerces employees in the exercise of their statutory right to seek to improve workplace conditions through concerted activity. This longstanding federal policy does not treat arbitration agreements differently than any other contract; it precludes judicial enforcement of contract provisions prohibiting such concerted activity no matter what form those contracts take. Moreover, as long as federal labor law does not treat arbitration agreements differently than any other contracts, the statutory invalidation of a particular rights-stripping clause in those contracts falls squarely within the FAA's savings clause—meaning there is *no* conflict between the NLGA/NLRA and the FAA. *See* 9 U.S.C. § 2 (private arbitration

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legal issues before this Court, it is hard to imagine how depriving workers of the right to choose whether to pursue workplace claims collectively or individually could be to those workers' benefit. And of course, courts have long viewed with skepticism efforts by employers to insist that they, more than Congress or any administrative agency, should be entrusted with deciding that their rights-stripping policies are actually in the workers' best interests. *See Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996) ("There is nothing unreasonable in giving a short leash to the employer as vindicator of its employees' organizational freedom.").

agreements are generally enforceable *unless* they would be invalid on any "grounds as exist at law or in equity for the revocation of any contract"); AOB 26-30.[6]

None of the cases cited by Raymours and its amici require a different result. Raymours acknowledges that *Concepcion* involved federal preemption of a state law rule of contract unconscionability, not a potential conflict between two sets of federal statutes. Ans. Br. 19. Although Raymours asserts that *Italian Colors* clarified that "the *Concepcion* analysis applies equally to federal statutes," *id*. 19, in fact the 5-4 Court in *Italian Colors* undertook a completely different analysis, emphasizing that "a provision in an arbitration agreement forbidding the assertion of certain statutory rights" *would* be unenforceable, and asking whether the federal antitrust statutes expressed a sufficiently clear command that would preclude antitrust claimants from agreeing to arbitrate their claims on a non-class action basis. *Am. Exp. Co. v. Italian Colors Rest*., 133 S. Ct. at 2304, 2309-10 (2013); *see*

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[6] Raymours incorrectly asserts that the Board's analysis rested on some unwritten "common law 'public policy' [that] gave the Board discretion" to circumvent the FAA. Ans. Br. 28. To the contrary, the Board relied on federal labor statutes and Supreme Court precedent including *Kaiser Steel*, 455 U.S. at 83-84, which held that private agreements that violate the public policy of the United States as set forth in the federal labor statutes are unenforceable. *D.R. Horton*, 2012 WL 36274, at *14-15; *Murphy Oil*, 2014 WL 5465454, at *11 & nn.46-47.

also 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 273-74 (2009) (arbitration agreements may not require "substantive waiver of federally protected rights").

In this case, of course, the two federal labor statutes, on their face and as construed by the NLRB, establish Congress' intent that employers not be allowed to prohibit their workers from seeking to vindicate workplace rights on a collective action basis. Raymours' prohibition directly violates that command and therefore must be invalidated, notwithstanding its inclusion in an arbitration agreement.[7]

Next, Raymours cites *Gilmer* and *CompuCredit*, but those cases are equally unhelpful to its position. *Gilmer* stands for the well-settled principle "that '[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute . . .'" *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,

[7] The Chamber contends that to give effect to Congress' intent to allow class and other collective adjudication of workplace claims would unduly interfere with the streamlined procedures that are an "inherent attribute" of the arbitration model. Chamber Br. 9-11. This argument ignores that Raymours' prohibition extends not just to class actions but to *all* forms of concerted activity, including joint actions, collective actions, representative actions, and other types of concerted actions that have successfully been adjudicated in arbitration on a streamlined basis for decades. *See* AOB 38. Moreover, even in *Concepcion* the Supreme Court recognized that class actions *can* be arbitrated (which, of course, they frequently are, *id.* n.14). Besides, although "obstacle preemption" may preclude a state from enacting laws inconsistent with the inherent attributes of arbitration, nothing in FAA §2 limits the ability of *Congress*—acting alone or through its administrative agencies—to place limits on what claims can be arbitrated or how they may be pursued.

473 U.S. 614, 628 (1985)). In *Gilmer*, the Supreme Court held that plaintiff could be required to arbitrate his individual ADEA claim because his statutory right to be free from age discrimination under the ADEA could be enforced in arbitration, no less than in litigation.[8]

In *CompuCredit*, the Supreme Court applied the same principle to claims arising under the Credit Repair Organization Act, concluding that nothing in that statute demonstrated Congress's intent to preclude arbitration of statutory claims. Here, by contrast, Plaintiffs are relying on two federal statutes that expressly protect employees' "core, substantive" right to engage in concerted workplace action, and neither of those statutes was invoked in *Gilmer*, *Concepcion*, or any other Supreme Court case as a basis for challenging an employer's policy requiring all workplace claims to be adjudicated on an individual basis.

Raymours' efforts to rely on *Gilmer* and *CompuCredit* reveal the same basic flaw that pervades its entire argument. In contrast to the statutes invoked by plaintiffs in those cases, the *substantive statutory right* invoked by Plaintiffs here and established by Congress in the NLGA and the NLRA *is the very right to proceed collectively*. Correctly understood, *Gilmer* and *CompuCredit*, no less than

[8] Indeed, even though Gilmer pursued his ADEA claim individually, the applicable NASD rules expressly permitted brokers to file workplace claims on a collective basis and guaranteed the right to pursue any class action workplace claims in court, not arbitration. *See Gilmer*, 500 U.S. at 32; AOB 39-40.

Italian Colors and *Pyett*, fully support Plaintiffs. They reaffirm that under FAA §2, a mandatory arbitration agreement cannot be used as a mechanism to deprive plaintiffs of substantive statutory rights. Neither Raymours nor its amici have ever explained *why* that principle should be limited to exclude the statutory rights guaranteed by the NLGA and NLRA. If employees have the right under those statutes to join together to strike or picket to induce their employer to pay legally mandated wages, surely they have the same right to seek to pursue that goal through collective adjudication. Just as an employer cannot deprive its workers of that substantive statutory right by insisting that they agree to arbitrate all workplace disputes instead of picketing, bargaining, striking, or engaging in any other form of legally protected collective protest activity, neither can an employer unilaterally opt out of its NLGA/NLRA obligations by requiring its workers to waive their statutory right to improve workplace conditions through collective adjudication.

IV. In the Event of a Conflict Between the NLGA/NLRA and the FAA, Congress Intended the Federal Labor Laws to Take Precedence.

There is no conflict between the NLBA/NLRA and FAA, for the reasons stated above and in AOB 26-34. Nonetheless, if there were a conflict, the federal labor statutes would have to take precedence, as Congress intended. *See* AOB 34-47; NLRB Br. 21-23.

Raymours acknowledges that implied repeal is disfavored, that federal statutes should be reconciled wherever possible, and that only if statutory conflict is unavoidable should the courts look to legislative intent to determine how Congress would have intended that conflict to be resolved. *See* AOB 37-38. Raymours also recognizes that in discerning that intent, one well-established principle of statutory construction is that later-enacted statutes generally take precedence over earlier enacted statutes.

Nonetheless, Raymours mistakenly asserts that this basic principle supports its position here. Although it acknowledges that the FAA was enacted in 1925 and that the NLGA and NLRA were enacted in 1932 and 1935 respectively, it contends that the FAA is the later-enacted statute because it was re-codified in 1947, just after the NLRA was re-codified in the same sweeping re-codification of the United States Code. Ans. Br. 34-35. The answer, of course, is that the 1947 re-codification was not a substantive re-enactment of either statute—a point Raymours and its amici never address. *See* AOB 42-43; NLRB Br. 22 n.8; LLS Br. 15-16 & n.11; *Bulova Watch Co. v. U.S.*, 365 U.S. 753, 758 (1961). Moreover, Congress enacted a clear statement of its intent in Section 15 of the NLGA, which expressly provides that "[a]ll acts and parts of acts in conflict with the provisions of [the NLGA protecting the right to engage in concerted activity] are repealed." 29 U.S.C. §115. Raymours and its amici ignore that statutory provision as well.

Finally, Congress in 1925 could not have intended the FAA to override the statutory protections it *later* enacted in the NLGA and NLRA, not only because there was no reason for Congress to anticipate those later enacted statutes, but also because at the time the FAA was enacted, Congress's Commerce Clause jurisdiction did not extend to the employees later protected by the NLGA and NLRA, except for the small number of interstate transportation employees whom Congress completely *exempted* from the FAA in 9 U.S.C. § 1. *See* AOB 42-43; NLRB Br. 21-22.

The Chamber makes the novel argument that Congress impliedly intended the FAA to trump all other federal statutes in case of conflict, unless those other statutes expressly referred to the FAA and declared that their protections take precedence. Chamber Br. 12, 14 n.5. Nothing in the language of the FAA or its legislative history requires such special language or overcomes the usual rules of statutory construction. In any event, the right to engage in concerted protected activity is "a bedrock principle of federal labor law and policy" that has repeatedly been invoked by the Board and the courts over the past eight decades. *Bristol Farms*, 2015 WL 7568339, at *3. Just as a provision in an arbitration agreement that discriminates on the basis of race, gender, age, disability, or other protected category should be unenforceable notwithstanding the absence of an express reference to the FAA in Title VII, the ADEA, the OWBPA, or the ADA, so too

should a provision that prohibits the exercise of NLGA/NLRA protected rights be unenforceable, notwithstanding Congress's understandable failure to mention the FAA when enacting those statutes to protect workers whom the FAA at the time did not even cover. *See* LLS Br. 20-22 & n.13.

Raymours and its amici argue that Congress could not have intended the NLGA and NLRA to protect the right to pursue workplace class actions because the modern version of Rule 23 class actions did not exist when the NLRA and NLGA were enacted. This argument ignores that Raymours' prohibition extends to all forms of concerted legal activity, not just class actions, and that employees have been adjudicating workplace claims on a joint and other group basis since well before the NLGA and NLRA were enacted. *See*, *e.g.*, *In re Twenty Per Cent Cases*, 80 U.S. 568 (1871); AOB 38 & n.15.[9] Federal labor law protection of the right to collective action is not limited to any specific procedure, and Congress vested the Board with broad authority to construe the NLRA in a manner that reflects evolving workplace conditions, which includes current legal conditions.

[9] Indeed, representative actions date back at least to medieval England. *See In re Joint E. and S. Dist. Asbestos Litig.*, 129 B.R. 710, 803-04 (E.D.N.Y. 1991), *judgment vacated on other grounds*, 982 F.2d 721 (2d Cir. 1992).

NLRB Br. 8 n.4; *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975); *Murphy Oil*, 2014 WL at 5465454 *19.[10]

V. Raymours' Remaining Arguments Are Unpersuasive.

Raymours and its amici make a series of additional arguments, none of which require extended discussion.

First, Raymours contends that, if the NLGA and NLRA create a substantive right to pursue claims on a class action basis under Rule 23 (or logically, a right to pursue claims on a joint action basis under Rule 20), then Rule 23 (and Rule 20) would have the effect of expanding "substantive" rights in violation of the Rules Enabling Act, 28 U.S.C. §2072. Ans. Br. 49-52. That argument makes no sense. It is not Rule 20 and 23 that create a substantive right, but the NLGA and NLRA. The Federal Rules of Civil Procedure (and their state court counterparts) merely provide the procedural mechanism for pursuing those statutory rights—they are the

[10] Raymours also contends that there is no "rational difference for Section 7 purposes between Raymours responding to a class action lawsuit with a successful motion to compel individualized arbitration and responding with a successful opposition to class certification." Ans. Br. 63. But there is a critical difference. An opposition to class certification under Rule 23 or its state law counterpart would be based on the same rules, cases, and legal standards that apply to all litigants; while an opposition based on Raymours' EAP would be based on a specific provision that applies only to Raymours' employees and that violates federal labor law on its face.

legal equivalent of sidewalks on which the right to picket collectively can be exercised. *See* AOB 24-25 & n.9.

Second, Raymours contends that this Court should entirely ignore the impact of the NLGA on this appeal (and the analysis of that impact by Plaintiffs, the Board, and the Labor Law Scholar amici) because Plaintiffs failed to address that statute with sufficient clarity in the district court. But Raymours urges an overly narrow view of the waiver doctrine.

Plaintiffs rested their argument below on the Board's analysis in *D.R. Horton* and *Murphy Oil*, both of which relied in part on the Board's conclusion that an employer violates the NLGA as well as the NLRA by compelling forfeiture of the right to pursue workplace claims on a concerted basis. *See*, *e.g.*, App. A-190-91. Moreover, the parties and their amici have addressed the application of the NLGA at length in their briefs; the impact of the NLGA raises a pure question of law; and Raymours has not even hinted at how it might be prejudiced by this Court's consideration of the NLGA. For all these reasons, no waiver should be found. *See Higgins v. N.Y. Stock Exch., Inc.*, 942 F.2d 829, 832 (2d Cir. 1991) (no waiver where argument was effectively made below, despite "differen[ce] in emphasis from the point pressed on appeal"); *cf. Looney v. Black*, 702 F.3d 701, 711 (2d Cir. 2012) (argument preserved where district court and the opposing party had considered the issue and the applicable case law).

In any event, waiver is a prudential, not a jurisdictional rule, and the Court retains "broad discretion" to consider arguments raised for the first time on appeal. *Lo Duca v. U.S.*, 93 F.3d 1100, 1104 (2d Cir. 1996); *see Westinghouse Credit Corp. v. D'Urso*, 371 F.3d 96, 103 (2d Cir. 2004). "One such circumstance where [the Court] may rule on issues not raised in the district court is when the issues are solely legal ones not requiring additional factfinding." *Westinghouse*, 371 F.3d at 103. Additionally, the Court will not find waiver when the issues are "sufficiently important." *Lo Duca*, 93 F3d. at 1104. For all these reasons, the Court should decide all issues presented on their merits.

Next, Raymours contends that its ban on concerted legal activity is not technically a "yellow dog" contract because its "EAP in no way suggests, let alone requires, termination of employment of an employee who promises to arbitrate claims individually and is hired but then files a class action lawsuit in breach of that promise." Ans. Br. 30-31. Factually, Raymours is mistaken. *See* AOB 25 n.10. Besides, the NLGA's protections extend much further, because Congress was seeking to remedy a much broader set of social and historical problems. *See* AOB 33 n.13; LLS Br. 5-14; NLRB Br. 19.

By its express terms, the NLGA declares unenforceable "[*a*]*ny* undertaking or promise . . . in conflict with" an individual employee's right to be "free from the interference, restraint, or coercion of employers" in "concerted activities for the

purpose of . . . mutual aid or protection." 29 U.S.C. §§102, 103 (emphasis added). Yellow dog or not, that is what the Raymours' contract does, and Raymours' attempt to enforce the contract in federal court directly violates the NLGA. While one type of "undertaking or promise" prohibited by the NLGA is a "contract or agreement [in which an employee] undertakes or promises not to join, become, or remain a member of any labor organization," the express statutory language makes clear that the NLGA's prohibition extends much further. *See* AOB Br. 13-14 (citing legislative history and law review article); LLS Br. 7.

Raymours next mistakenly asserts that *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970), supports its argument that the NLGA should be interpreted to "accommodate" "the FAA and subsequent developments." *See* Ans. Br. 31-33. *Boys Markets* involved the anti-injunction provisions of the NLGA and the provision of the later-enacted Labor-Management Relations Act ("LMRA") that permitted suits in federal court to enforce contracts between employers and labor organizations. The question in *Boys Markets* was whether the NLGA's anti-injunction provision prohibited federal courts from ordering a union not to strike, if the union had entered into a collective bargaining agreement with a no-strike provision and an arbitration provision that encompassed the underlying grievance. In holding that the NLGA did not prohibit judicial enforcement of the no-strike clause in those circumstances, the Supreme Court stated that the literal

terms of the NLGA's anti-injunction provision "must be accommodated to the subsequently enacted provisions of [the LMRA]" because "[s]tatutory interpretation [requires] consideration [of] the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions." 398 U.S. at 250.

Boys Markets has no relevance here for at least three reasons. First, there is nothing in the FAA that the NLGA must "accommodate" because there is no conflict between the two statutes. The NLGA renders unenforceable any contract that bans collective action, whether that ban is set forth in an arbitration agreement or not; and the FAA §2 savings clause therefore eliminates any potential conflict. *See supra* at 13-14.

Second, Raymours' argument rests on the incorrect assumption that the NLGA must be construed to accommodate the FAA, when in fact (as in *Boys Markets*) the usual principles of statutory construction require the earlier statute (here, the FAA) to be construed to accommodate the later statute (here, the NLGA and NLRA—there, the LMRA). *See supra* at 17-19.

Third, the Supreme Court's "narrow" holding in *Boys Markets* rested on its reading of federal labor law as a whole and its conclusion that enforcing the union's no-strike provision was consistent with the "core purpose" of the NLGA—to protect concerted employee action (in that case, the union's agreement not to strike in return for all the benefits of a collective agreement). 398 U.S. at 253. The

same cannot be said here, where enforcement of Raymours' concerted activity prohibition would directly undermine the NLGA's guarantee of the right to engage in concerted activity for the purpose of mutual aid or protection.

The Chamber notes that the NLGA does not bar arbitration agreements. *See* Chamber Br. 27-28. That is true. The Chamber also cites several cases for the proposition that courts may order a party to arbitrate in accordance with the requirements of a collective bargaining agreement, notwithstanding the NLGA's anti-injunction provisions. That is also true. But Plaintiffs have never contended that the NLGA or NLRA prohibit arbitration of their disputes, and of course, labor disputes are arbitrated all the time (often on behalf of all members of a bargaining unit, in efficient arbitral proceedings). The issue on this appeal has never been whether Plaintiffs' claims are arbitrable *at all*, but whether Raymours can insist that they be arbitrated on an individual basis, given the concerted-activity protections of the NLGA and NLRA. Even under Plaintiffs' analysis, Raymours can still require arbitration of Plaintiffs' individual claims and can still choose to require arbitration (rather than litigation) of Plaintiffs' concerted action claims. AOB 23-24.[11]

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[11] The Chamber cites *Marine Cooks & Stewards, AFL-CIO v. Panama S.S. Co.*, 362 U.S. 365, 372 (1940), for the proposition that "'Congress passed the Norris-LaGuardia Act to curtail and regulate the jurisdiction of courts, not . . . to regulate the conduct of people engaged in labor disputes,'" and suggests that enforcing a

Finally, the Chamber contends that the Board "has previously *conceded* that the [NLGA] is not itself the basis for the *D.R. Horton* rule." Chamber Br. 23 n.11 (citing *Murphy Oil*). That is just wrong, as the Board has stated almost the exact opposite. *Murphy Oil*, 2014 WL 5465454, at *13 (explaining that in *D.R. Horton,* "it was 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"); *see also On Assignment Staffing Servs.*, 2015 WL 5113231, at *10 (NLGA has "particular relevance" in invalidating collective action waiver with opt-out provision).

CONCLUSION

For the reasons set forth above and in Plaintiffs' AOB, the district court's judgment should be vacated and the case remanded for further proceedings.

(continued)
concerted action ban is consistent with the goal of getting "the federal courts out of labor disputes." Chamber Br. 25 & 26 n.12 (emphasis omitted; alteration in Chamber's brief). This argument ignores both the *specific* purpose of the anti-injunction provision at issue in *Marine Cooks*, namely, to prevent union-hostile courts from enjoining lawful strikes, *see Boys Markets*, 398 U.S. at 251; *Marine Cooks*, 362 U.S. at 369 ("Congress was intent upon taking the federal courts out of the labor injunction business except in the very limited circumstances . . ."), and the indisputable fact that the NLGA had two *distinct* purposes—limiting injunctions in labor disputes and rendering unenforceable labor rights-stripping contracts such as Raymours' concerted action prohibition. The Chamber's argument regarding the role of the courts also misses the mark because Plaintiffs are not insisting on the right to take collective action in court, but only in *some* adequate forum.

Dated: April 15, 2016

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6,937 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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Dated: April 15, 2016

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