Docket 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-AJW
Honorable George H. Wu

APPELLEE'S RESPONSE TO APPELLANT'S PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

A. The Panel's Decision 2

B. The Panel's Decision is Consistent with all of the Circuit Courts Who Have Considered Whether Mandatory Arbitration Agreements Containing Class Action Waivers Violate the NLRA and the NLGA....................4

C. The Panel's Decision is Consistent with the Employee's Right to Refrain from "Concerted Activities" Embedded in both the NLRA and NLGA..6

D. The Panel's Decision Does Not "Conflict with" the Supreme Court's Decisions in *National Licorice* and *J. I. Case* 10

E. The Panel's Decision Does Not Resurrect Yellow Dog Contracts 13

F. The Panel's Decision Does Not Warrant En Banc Review 15

TABLE OF AUTHORITIES

Page(s)

Federal Cases

AT&T Mobility, LLC v. Concepcion,
131 S. Ct. 1740 (2011) 14

Bloomingdale's, Inc.,
2013 NLRB LEXIS 460 (June 25, 2013) 9

Booster Lodge No. 405 v. NLRB,
459 F.2nd 1143, 1153 (D.C. Cir. 1972) 7

Chamber of Commerce v. Brown,
554 U.S. 60 (2008) 7, 10

D. R. Horton v. NLRB,
737 F.3d 344 (5th Cir. 2013) 4, 5, 8

Davis v. Nordstrom, Inc.,
755 F.3d 1089 (9th Cir. 2014) 6

Hart v. Massanari,
266 F.3d 1144 (9th Cir. 2001) 1

J. I. Case v. NLRB,
321 U.S. 332 (1944) 1, 10, 11, 12

Johnmohammadi v. Bloomingdale's,
755 F.3d 1072 (9th Cir. 2014) ....*passim*

KPMG, LLP v. Cocchi,
132 S. Ct. 23 (2011) 15

Makaeff v. Trump Univ., LLC,
736 F.3d 1180 (9th Cir. 2013) 16

Morvant v. P. F. Chang's China Bistro, Inc.,
870 F. Supp. 2d 831 (N.D. Cal. 2012) 15

National Licorice v. NLRB,
309 U.S. 350 (1940), and (iii) 1, 10, 11, 12

NLRB v. Allis-Chalmers Mfg. Co.,
388 U.S. 175 (White, J. dissent)..8

NLRB v. Anchorage Times Pub'g Co.,
637 F.3d 1359 (9th Cir. 1981)..14

NLRB v. Exch. Parts Co.,
375 U.S. 405 (1964) 14

NLRB v. Magnovox Co. of Tenn.,
415 U.S. 322 (1974) 7

NLRB v. Stone,
125 F.2d 752 (7th Cir. 1942)...12

Owen v. Bristol Care, Inc.,
702 F.3d 1050 (8th Cir. 2013)...6

Pattern Makers' League v. NLRB,
724 F.2d 57 (7th Cir. 1983)...7

Richards v. Ernst & Young LLP,
744 F.3d 1072 (9th Cir. 2013)...6

Salt River Valley Users Assoc. v. NLRB,
206 F.2d 325 (9th Cir. 1953)..9, 10, 16

Sutherland v. Ernst & Young LLP,
726 F.3d 290 (2nd Cir. 2013)..6

California Cases

Iskanian v. CLS Transportation Los Angeles, LLC,
59 Cal. 4th 348 (Cal. 2014) 6, 15

Federal Statutes

Federal Arbitration Act

9 U.S.C. § 1, *et seq.* 4
9 U.S.C. § 2 5

Norris-LaGuardia Act
29 U.S.C. § 101 ....1, 3, 13
29 U.S.C. § 102 ....7, 13
29 U.S.C. § 103 13

National Labor Relations Act
29 U.S.C. § 157 3
29 U.S.C. § 158 3

Petitions for rehearing en banc are "not favored" and are granted only in "exceptional" circumstances. Fed. R. App. P. 35. To warrant en banc review, the panel's decision must either create an "intra-circuit" conflict or present "questions of exceptional importance." *Id.* En banc review is not designed or intended to correct simple "errors" in the panel's decision or to afford the petitioner a "second bite of the apple." *Hart v. Massanari*, 266 F.3d 1144, 1172, fn. 29 (9th Cir. 2001).

Johnmohammadi does not contend that the panel decision at issue here creates an "intra-circuit" conflict with existing Ninth Circuit precedent. Rather, she contends that the panel decision raises an "exceptionally important issue" as it (i) "conflicts" with the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, *et seq.*, and the Norris-LaGuardia Act ("NLGA"), 29 U.S.C. § 101, *et seq.*, (ii) "conflicts" with the Supreme Court's decisions in *J. I. Case v. NLRB*, 321 U.S. 332 (1944) and *National Licorice v. NLRB*, 309 U.S. 350 (1940), and (iii) "effectively resurrects 'yellow dog' contracts." (Petition, at 1-2.)

The panel's decision, however, is neither as broad nor as far-reaching as Johnmohammadi suggests. Put simply, the panel held that an arbitration agreement containing a class action waiver, knowingly and voluntarily entered into by an employee, does not run afoul of either the NLRA or the NLGA. Upholding and enforcing an agreement, entered into by an employee without employer interference, coercion, or restraint, does not warrant en banc review.

A. The Panel's Decision

The facts before the panel were undisputed. After Bloomingdale's hired Johnmohammadi, Bloomingdale's provided Johnmohammadi with detailed materials explaining its arbitration agreement. Bloomingdale's informed Johnmohammadi that she would have 30 days from the date of her hire to decide whether to enter into the arbitration agreement. Bloomingdale's further informed Johnmohammadi that her decision in this regard would be strictly voluntary, would not be disclosed to her supervisors, and would not subject her to any adverse employment action. If she decided not to enter into the arbitration agreement, Bloomingdale's informed her that she had to complete and return an opt-out form within the prescribed 30-day time period. Johnmohammadi conceded that she did not return the opt-out form and thereby agreed to submit any employment-related disputes she may thereafter assert against Bloomingdale's in arbitration. *Johnmohammadi v. Bloomingdale's*, 755 F.3d 1072, 1074 (9th Cir. 2014); Brief of Appellee, at 4-5, 10-13.

The critical question before the panel was whether Bloomingdale's, by asking Johnmohammadi to voluntarily enter into the arbitration agreement, "interfere[d]" with, "restrain[ed], or "coerced" Johnmohammadi in the exercise of her right "to engage in . . . concerted activities for the . . . mutual aid or protection" of her co-workers within the meaning of the NLRA or NLGA.

Johnmohammadi, 755 F.3d at 1074-75; 29 U.S.C. §§ 157, 158(a)(1); 29 U.S.C. § 101. Assuming without deciding that the filing of a class action constitutes protected "concerted activity," the panel held that Bloomingdale's did not interfere with, coerce, or restrain Johnmohammadi in the exercise of her right to file a class action.

First, it turned to the undisputed findings of the district court that "Johnmohammadi was fully informed about the consequences of making [her] election, and [that] she did so free of any express or implied threats of termination or retaliation if she decided to opt out of arbitration." Based on these findings, the panel held that Bloomingdale's had not coerced Johnmohammadi into waiving her right to file a class action. *Johnmohammadi*, 755 F.3d at 1074-75. Second, the panel found that Bloomingdale's had simply presented Johnmohammadi with a choice: either opt out of arbitration and "resolve future employment-related disputes in court, in which case she would be free to pursue her claims on a collective basis," or agree to arbitration and "resolve such disputes through arbitration, in which case she would be limited to pursuing her claims on an individual basis." *Id.* at 1075-76. In "the absence of any coercion influencing [her] decision," Bloomingdale's request that Johnmohammadi "choose between those two options . . . [could not] be viewed as interfering with or restraining [her] right[s]." *Id.*

Based on these findings, the panel concluded:

> . . . 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 [NLGA] or the NLRA. The district court correctly held that the arbitration agreement is valid. Under the [Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.*,] it must be enforced according to its terms. *See Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013).

Id. at 1077.

B. The Panel's Decision is Consistent with all of the Circuit Courts Who Have Considered Whether Mandatory Arbitration Agreements Containing Class Action Waivers Violate the NLRA and the NLGA

Although only mentioned in passing in her Petition, Johnmohammadi's contentions rest on the National Labor Relations Board's ("Board") now discredited decision in *In re D. R. Horton*, 357 N.L.R.B. No. 184, 2012 NLRB LEXIS 11 (Jan. 3 2012), *enforcement denied in part*, 737 F.3d 344 (5th Cir. 2013). In *D. R. Horton*, the Board held that *mandatory* arbitration agreements containing class action waivers, that are *imposed on employees as a condition of their employment*, impermissibly impinge on an employee's substantive right to engage in concerted activities within the meaning of §§ 7 and 8(a)(1) of the NLRA.

Relying on the Supreme Court's decisions construing the FAA, the Fifth Circuit rejected the Board's decision as, among other reasons, the Board had failed to give "proper weight" to the FAA's mandate to enforce arbitration agreements as

written, including those containing class action waivers. *D. R. Horton v. NLRB*, 737 F.3d 344, 348 (5th Cir. 2013). More specifically, the Fifth Circuit found that the Board improperly relied on the "savings clause" in § 2 of the FAA – which allows for the invalidation of an arbitration agreement on the same "grounds as exist at law or in equity for the revocation of any contract"— to invalidate the arbitration agreement's class action waiver because it would have the effect of "disfavor[ing] arbitration" in contravention of the FAA's purpose. *Id.* at 358-60. The Fifth Circuit further found that, when enacting the NLRA, Congress did not manifest, either in the statute's text, legislative history or purpose, the requisite "contrary congressional command" necessary to override the FAA's mandate to enforce arbitration agreements as written. *Id.* at 360-362. Indeed, it questioned whether there was even a "conflict between the FAA and the NLRA" since, to find a conflict, the "NLRA would have to be [construed as] protecting the right of access to a procedure"—the modern class action procedure—"that did not exist when the NLRA" was enacted. *Id.* at 362.

Every Circuit Court and the California Supreme Court, when called upon to decide if *mandatory* arbitration agreements containing class action waivers are enforceable under either the NLRA or the NLGA, have likewise rejected the Board's decision in *D. R. Horton* and have held that they are enforceable. *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013); *Sutherland v. Ernst &*

Young LLP, 726 F.3d 290, 297-98, fn.8 (2nd Cir. 2013); *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 367-72 (Cal. 2014). *See also Richards v. Ernst & Young LLP*, 744 F.3d 1072, 1075, fn. 3 (9th Cir. 2013) (where a Ninth Circuit panel opined, without deciding, that the NLRA did not preclude the enforcement of a mandatory arbitration agreement containing a class action waiver).

C. The Panel's Decision is Consistent with the Employee's Right to Refrain from "Concerted Activities" Embedded in both the NLRA and NLGA

Although the panel's decision addresses only the enforceability of voluntary arbitration agreements entered into by an employee without employer interference, coercion, or restraint,[1] it stands to reason that, if the NLRA and NLGA do not preclude the enforcement of a *mandatory* arbitration agreement containing a class action waiver, they would also not preclude the enforcement of a voluntary arbitration agreement.

Although not discussed in her Petition, both the NLRA and NLGA studiously protect the rights of employees to refrain from concerted activity. Section 7 of the NLRA provides that employees "*shall also have the right to*

[1] In another decision issued the same day as the *Johnmohammadi* decision, the same panel was careful to note that its *Johnmohammadi* decision held "only that a *voluntary* arbitration program does not violate the NLRA" and did not touch upon the question of whether a "mandatory arbitration program" would also be held not to violate the NLRA. *Davis v. Nordstrom, Inc.*, 755 F.3d 1089, 1095, fn. 5 (9th Cir. 2014).

refrain from any and all such [concerted] activities"; Section 102 of the NLGA similarly provides that employees "*shall be free to decline to associate with his fellows*." 29 U.S.C. § 7 (emphasis added); 29 U.S.C. § 102 (emphasis added).

As pointed out to the panel at oral argument, in 1947 when Congress enacted the Taft Hartley Act and amended the NLRA, Congress highlighted the employee's "freedom of choice" when it inserted the language in Section 7 protecting the employee's "right to refrain from any and all . . . [concerted] activities." *Chamber of Commerce v. Brown*, 554 U.S. 60, 67 (2008). Following the amendment to Section 7, the Supreme Court and the Circuit Courts have consistently affirmed the employees' freedom to refrain from engaging in each of the "concerted activities" set forth in Section 7, including but not limited to the right to join or assist a union or to bargain collectively. *See*, *e.g.*, *NLRB v. Magnovox Co. of Tenn.*, 415 U.S. 322, 324 (1974) ("[e]mployees have the right . . . 'to form, join, or assist labor organizations' or 'to refrain' from such activities"); *Pattern Makers' League v. NLRB*, 724 F.2d 57, 59, 60 (7th Cir. 1983) ("employees should not be restrained from exercising their right to refrain from collective bargaining activities"; "[t]he overriding policy of labor law" is to ensure "employees [remain] free to choose whether to engage in concerted activities"); *Booster Lodge No. 405 v. NLRB*, 459 F.2nd 1143, 1153 (D.C. Cir. 1972)("an

employee [has the right] to refrain from any and all of the concerted activities guaranteed employees under the Act").[2]

It is no doubt for this reason that the Board, in its now discredited *D. R. Horton* decision, distinguished *mandatory* from *voluntary* arbitration agreements and exempted *voluntary* arbitration agreements from its reach:

> We do not reach the more difficult question[] of whether . . . if arbitration is a mutually beneficial means of dispute resolution, an employer can enter into an agreement that is not a condition of employment with an individual employee to resolve either a particular dispute or all potential employment disputes through non-class arbitration rather than litigation in court.

In re D. R. Horton, 2012 NLRB LEXIS 11, *57, fn. 28. Indeed, in collateral proceedings initiated by Johnmohammadi and brought by the NLRB against Bloomingdale's involving the identical arbitration agreement at issue here, the Administrative Law Judge assigned to the case held that her voluntary agreement

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[2] As explained by Justice White in construing the effect of this amendment:

> Sections 7 and 8 bespeak a strong purpose of Congress to leave workers wholly free to determine in what concerted labor activities they will engage or decline to engage. This freedom of workers to go their own way is this field, completely unhampered by pressures of employers or unions, is and always has been a basic purpose of the [NLRA].

NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 216 (White, J. dissent).

to arbitrate did not violate the NLRA. *Bloomingdale's, Inc.*, 2013 NLRB LEXIS 460 (June 25, 2013).[3]

Johnmohammadi's contention that the panel's decision "conflicts with" the NLRA and NLGA is therefore without basis. Moreover, the panel's decision is consistent with existing Ninth Circuit precedent. *See Salt River Valley Users Assoc. v. NLRB*, 206 F.2d 325 (9th Cir. 1953). As the panel did here, the Ninth Circuit in *Salt River* recognized an employee's right to "refrain from" participating in a class or collective action. Specifically, the Ninth Circuit reversed an NLRB decision holding that an employer had committed an unlawful labor practice when, in discussions with one of its employees, the employer allegedly coerced the employee to remove his name from a petition authorizing the filing of an FLSA collective action. The Ninth Circuit did so because it found that the employee removed his name *voluntarily*, notwithstanding the employer's expression of

[3] Following the trial in this matter, the Administrative Law Judge ("ALJ") found that Bloomingdale's "adequately notified" its employees about the arbitration agreement (including its class action waiver), that it "encouraged employees to educate themselves about both 'the benefits and limitations of arbitration,'" and that it provided employees "a not insubstantial or unjustifiable period of time" to decide, simply and without undue or "unlawful[] burden[]," whether to enter into the agreement. *Johnmohammadi*, 2013 NLRB LEXIS 460, at *24-25. In the absence of any evidence that Bloomingdale's "threatened employees with reprisals or retaliated against them" if they declined to enter into the agreement, the ALJ concluded that employees enjoyed the right to "voluntarily" accept or reject Bloomingdale's arbitration agreement and that their decisions in this regard were not the product of interference, restraint, or coercion. *Id.* As such, the ALJ held that Bloomingdale's enforcement of Johnmohammadi's arbitration agreement did not violate the NLRA. *Id.* at *31.

displeasure with the petition, and not as a result of employer interference, coercion, or restraint. *Salt River*, 206 F.2d at 329.

D. The Panel's Decision Does Not "Conflict with" the Supreme Court's Decisions in *National Licorice* and *J. I. Case*

Although the Supreme Court in *Chamber of Commerce v. Brown* makes clear that an employee enjoys the "freedom" to "refrain from any and all . . . [concerted] activities," Johnmohammadi contends that an employee may never exercise that "freedom" when entering into a contract with his employer, even if the employee voluntarily enters into the contract without employer interference, coercion or restraint. (Petition, 13-19.) For support, Johnmohammadi relies on the Supreme Court's decisions in *National Licorice* and *J. I. Case*. Neither of these cases supports Johnmohammadi's contention.

In both *National Licorice* and *J. I. Case*, the Supreme Court considered the enforceability of individual contracts between employers and employees that were intended either to impede union organizing or to be used as a weapon in collective bargaining. In *National Licorice*, the employer, following a disputed union election, threatened employees that, if they wished to protect their jobs and receive a pay increase, they had to sign individual contracts promising not "to demand a closed shop or a signed agreement by his employer with any Union." *National Licorice*, 309 U.S. at 353-55. The Court held that that the employer intended to use the contracts as a means to "'eliminate the Union as the collective bargaining

agency of its employees'" and that the terms of the contracts "imposed illegal restraints upon the employees' rights to organize and bargain collectively guaranteed by" the NLRA. *Id.* at 359-60.

In *J. I. Case*, the employer entered into individual contracts with its employees and then, following a union election resulting in the certification of the union as the exclusive bargaining representative of the employees, refused to bargain with the union over any issue covered by the individual contracts. *J. I.* Case, 321 U.S. at 333-34. The Court held that the individual contracts could not be used to exclude the contracting employees from the union, to "defeat or delay" collective bargaining, or to "limit or condition the terms" of any resulting collective bargaining agreement. *Id.* at 337.

The Supreme Court held that these individual contracts were unenforceable as they encroached upon clearly defined rights in the workplace – the right to join a union, the right to bargain collectively – and evidenced the employer's transparent effort to circumvent those rights.[4] Moreover, as the Supreme Court emphasized in *J. I. Case*, these cases do not stand for the proposition that employees cannot exercise their "freedom" to contract with employers "under circumstances that

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[4] A Seventh Circuit case, also relied on by Johnmohammadi, is similar in effect. *See NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942) (invalidating individual contracts between an employer and employee wherein the "employee not only waived his right to collective bargaining but his right to strike or otherwise protest on the failure to obtain redress through arbitration").

negat[e] any intent to interfere with employees' rights under the [NLRA]." *J. I. Case*, 329 U.S. at 340-41. Indeed, employees and employers remain "free to enter into individual contracts" when the employer is "under no legal obligation to bargain collectively. *Id.* at 337.

As pointed out to the panel at oral argument, Johnmohammadi's arbitration agreement does not evidence any of the anti-union animus of the contracts on display in *National Licorice* and *J. I. Case*. Johnmohammadi's arbitration agreement neither impedes union organizing nor interferes with the bargaining process. To the contrary, it recognizes an employee's right to engage in these activities as it excludes from its terms employees who are or may become "covered by the terms of a collective bargaining agreement." (Plan Document, 2 ER 181-82.) If at any time during Johnmohammadi's employment she became subject to a collective bargaining agreement, her arbitration agreement would no longer apply. Moreover, her arbitration agreement preserves her right to seek redress before the NLRB as it excludes from its ambit claims brought under the NLRA. (Plan Document, 2 ER 183.) If, for example, she believes Bloomingdale's prevented her from banding together with her co-workers while presenting her case in arbitration, she retains the right to file a claim directly with the NLRB.

E. The Panel's Decision Does Not Resurrect Yellow Dog Contracts

Johnmohammadi's contention that the panel's decision "effectively resurrects 'yellow dog' contracts put to rest over 80 years ago" is similarly devoid of legal support. (Petition, at 8-13.) According to Johnmohammadi, Bloomingdale's, by offering her the "benefit" of arbitration, coercively "bought out" her right to file a class action. As such, her voluntary arbitration agreement constitutes a "yellow dog" contract within the meaning of §§ 101 and 102 of the NLGA.

The NLGA specifically defines a "yellow dog" contract as one in which an employee either "promises not to join, become, or remain a member of any labor organization" or promises to forgo employment if he or she does become a member. 29 U.S.C. § 103. In short, it is a contract where an unscrupulous employer seeks to "buy off" an employee's right to form or join a union in exchange for a job, money, or some other tangible benefit.

A "yellow dog" contract bears absolutely no resemblance to a voluntary arbitration agreement where both an employer and an employee exchange a *mutual promise* to resort to arbitration to resolve their disputes. The consideration for the agreement is the *mutual promise*; it is not the employer's promise to extend the "benefit" of arbitration. The class action waiver is simply one of the terms of the agreement, the absence of which, as the Supreme Court observed, would tend to

unduly burden the streamlined procedure that is the hallmark of arbitration and to "interefere[] with fundamental attributes of arbitration." *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011). It is not some illegal advantage the employer is seeking to "buy" from the employee to impede or frustrate concerted activities.

Moreover, as the panel points out in its decision, whatever the "benefit" of arbitration, that "benefit" is not as tangible or as immediate a "benefit" as the promise of a job, a pay raise, or extra vacation days that an employer may offer with the intent to impinge upon the employee's freedom of choice. *Johnmohammadi*, 755 F.3d at 1076. A mutual agreement to arbitrate carries with it both benefits and limitations for employer and employee alike that are decidedly uncertain at the time the agreement is made. As such, and in the absence of specific proof to the contrary, the "benefit" of arbitration is not "of such character that it would tend to interfere with an employee's freedom of choice about whether to forgo future participation in class actions." *Id.*[5] Indeed, it makes no sense to

[5] In weighing the "benefit" of arbitration against those "benefits" that courts have held impinged upon an employee's freedom of choice, the panel cited to decisions from both the Supreme Court and the Ninth Circuit. *NLRB v. Exch. Parts Co.*, 375 U.S. 405, 409 (1964) (holding that employer's promise of additional overtime and vacation benefits to its employees during a union election campaign constituted illegal "conduct immediately favorable to employees which [was] undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably calculated to have that effect"); *NLRB v. Anchorage Times Pub'g Co.*, 637 F.3d 1359, 1367 (9th Cir. 1981) (holding that

argue that Congress intended, when it enacted the NLGA, to single out arbitration agreements – agreements the Supreme Court has repeatedly held federal policy "emphatically . . . favors" – for the opprobrium of a "yellow dog" contract. *KPMG, LLP v. Cocchi*, 132 S. Ct. 23, 25 (2011). As Judge Rodgers succinctly put it, "the Norris-LaGuardia Act specifically defines those contracts to which it applies. An agreement to arbitrate is not one of those contracts . . . ." *Morvant v. P. F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831, 844 (N.D. Cal. 2012). *See Iskanian*, 59 Cal. 4th at 366-74, 401 (holding that mandatory arbitration agreements containing class action waivers do not violate either the NLRA or the NLGA notwithstanding the dissent's contention that "[t]oday's class waivers are the descendants of last century's yellow dog contracts").

F. The Panel's Decision Does Not Warrant En Banc Review

Johnmohammadi asserts that en banc review is necessary as it may well represent "the last best hope for non-union men and women" to enforce their rights on a class or representative basis. (Petition, at 2.) However, she has failed to

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employer who provided its employees with wage increases two days before a union election supported a finding that the employer illegally "intended the wage increases to influence voting in the election"). Johnmohammadi roundly criticizes the panel for relying on these cases as they "have nothing to do with the central issue here." (Petition, at 19-22.) In so doing, Johnmohammadi ignores that the "central issue" is whether, in holding out the "benefit" of arbitration, Bloomingdale's secured Johnmohammadi's agreement as a result of employer interference, coercion, or restraint. The cases cited by the panel as illustrating the type of "immediately favorable" conduct impinging on an employee's freedom of choice are directly relevant to that issue.

proffer any legal justification warranting en banc review. She has simply repeated the contentions she raised before the panel which the panel carefully considered and rejected in its decision.

The panel's decision, in recognizing an employee's right to forgo participation in class actions, is consistent with the Ninth Circuit decision in *Salt River*; it is, in acknowledging an employee's right to refrain from "concerted activities" when exercised in the absence of employer interference, coercion or restraint, consistent with the rights embedded in both the NLRA and NLGA; and it is, in enforcing a voluntary agreement to arbitrate, consistent with every Circuit Court decision that has been called upon to consider the more difficult issue of enforcing mandatory agreements to arbitrate. The panel's decision does not conflict with Supreme Court precedent and does not sanction "yellow dog" contracts.

As the panel's decision "faithfully follows our circuit's precedent, creates no inter-circuit split, [and] does not present an issue of exceptional importance," en banc review is inappropriate. *Makaeff v. Trump Univ., LLC*, 736 F.3d 1180, 1180 (9th Cir. 2013) (J. Wardlaw, *concur. opn.*). Accordingly, Bloomingdale's submits that Johnmohammadi's request for en banc review should be denied.

Dated: September 22, 2014

Respectfully submitted,

s/ David E. Martin
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