No. 15-1457

ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

PRICE-SIMMS, INC., doing business as
Toyota Sunnyvale,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

ON APPEAL FROM A DECISION OF THE NATIONAL LABOR RELATIONS BOARD, Case No. 32-CA-138015

BRIEF OF LABOR LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT/CROSS-PETITIONER

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES (Circuit Rule 28(a)(1))

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for *Amici* Labor Law Scholars submits the following certificate as to parties, rulings, and related cases:

A. Parties and *Amici*

To the best of my knowledge, with the exception of Labor Law Scholars appearing as *amici curiae* in this Court, all parties, intervenors, and *amici* appearing before the National Labor Relations Board and in this Court are listed in the Brief for Respondent/Cross-Petitioner National Labor Relations Board.[1]

B. Rulings Under Review

The ruling under review is the Board's Decision and Order, Case 32-CA-138015, issued November 30, 2015 and published at 363 NLRB No. 52.

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[1] The Labor Law Scholars appearing as *amici curiae* in this Court, and who are signatories to this brief, are: Matt Finkin, University of Illinois College of Law; Catherine Fisk, University of California, Irvine School of Law; Julius Getman, University of Texas School of Law; Tim Glynn, Seton Hall University School of Law; Ann Hodges, University of Richmond School of Law; Katherine Stone, University of California, Los Angeles School of Law; and Charles Sullivan, Seton Hall University School of Law. Labor Law Scholars' institutional affiliations are listed for identification purposes only.

C. Related Cases

This case was never previously before this Court or any other court. *Amici* Labor Law Scholars are not aware of any cases pending in this Court that involve the same parties or substantially the same issues, or of any such cases previously before this Court.

Dated: June 3, 2016

Respectfully submitted,

/s/Michael Rubin

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CORPORATE DISCLOSURE STATEMENT

Amici Labor Law Scholars state that they are not affiliated with any publicly owned corporation, nor do they have stock owned by a publicly owned company.

CERTIFICATE OF CONSENT TO FILE AND IN SUPPORT OF SEPARATE BRIEF

All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a); D.C. Cir. Rule 29(b). In accordance with Federal Rule of Appellate Procedure 29(c)(5) and Circuit Rule 29(b), *Amici* affirm that no counsel for a party authored this brief in whole or in part, and no person other than *Amici* and their counsel made a monetary contribution to its preparation or submission. Professor Matthew Finkin was the principal author of this brief.

Pursuant to Circuit Rule 29(d), *Amici* certify that this separate brief is necessary because it establishes that the prohibition against concerted adjudicative activity in the mandatory employment arbitration agreement at issue is unenforceable under not only the National Labor Relations Act, but also under the Norris-LaGuardia Act. This issue has not been fully addressed by the parties.

Dated: June 3, 2016

Respectfully submitted,

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GLOSSARY

Chamber	Chamber of Commerce
FAA	Federal Arbitration Act
NLRA	National Labor Relations Act
NLRB	National Labor Relations Board
the Board	National Labor Relations Board

STATUTES AND REGULATIONS

Except for the provision in the Statutory Addendum to this brief, all relevant statutes are in the Brief for Respondent/Cross-Petitioner.

INTEREST OF *AMICI CURIAE*

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

Our interest here derives from our responsibilities as law professors. We teach students to understand the law as a system faithful to professional

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

standards of analytical care, and we emphasize that statutes are to be read with close attention to their texts, histories, and policies in an effort to achieve their legislated ends. We believe fidelity to those standards compels the conclusion that Norris-LaGuardia precludes federal court enforcement of the provision in Petitioner's mandatory employment arbitration agreement prohibiting employees from pursuing adjudication of workplace claims on a joint, class, collective, or representative action basis.[3]

SUMMARY OF ARGUMENT

The plain language of Norris-LaGuardia prevents federal courts from enforcing "any … undertaking or promise in conflict with the public policy" that employees "shall be free from interference … of employers … in … concerted activities for the purpose of … mutual aid or protection." 29 U.S.C. §§102, 103. The Supreme Court has construed the term "concerted activities for the purpose of … mutual aid or protection" to include seeking redress in court. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978). The history leading to enactment of Norris-

[3] We also agree with Respondent NLRB that the concerted-action prohibition in Petitioner's mandatory arbitration agreement is unlawful and unenforceable under the NLRA. Because the Board's brief fully addresses the NLRA, *amici* focus exclusively on Norris-LaGuardia.

LaGuardia makes clear that Congress aimed to bar enforcement of not only agreements through which employees agreed not to join unions, but also a wider set of agreements, including agreements to settle all grievances individually. Norris-LaGuardia thus bars enforcement of the employees' agreement not to act in concert to enforce their workplace rights. The concerted action waiver provision in Price-Simms' mandatory arbitration agreement therefore cannot be judicially enforced.

ARGUMENT

In finding Price-Simms' concerted-action waiver unenforceable, the Board here reaffirmed its analysis in *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), *enf. denied in relevant part, D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454 (Oct. 28, 2014), *enf. denied in relevant part*, *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), concluding that the NLRA and Norris-LaGuardia bar enforcement of agreements requiring employees to waive their right to pursue – in any forum, judicial or arbitral – claims on a joint, class, or collective action basis, and that the illegality of such agreements renders them unenforceable in light of the saving clause under FAA §2, 9 U.S.C. §2.

Notwithstanding the Board's thorough discussion of the NLRA *and* Norris-LaGuardia in its recent decisions, Petitioner entirely ignores the latter statute, neglecting even to mention Norris-LaGuardia in its Opening Brief. But Norris-LaGuardia's text, history, and policy demand this Court's attention, not only because they inform the proper construction of the NLRA (as the Board has concluded), but also because Norris-LaGuardia provides a second, independent basis for concluding that Petitioner's ban on concerted legal activity violates federal labor law and is unenforceable.

I. Norris-LaGuardia Prohibits Enforcement of Any "Promise" or "Undertaking" that Prevents an Employee from Seeking to Combine with Co-Workers in Protecting Workplace Rights.

Price-Simms requires its employees, as a condition of employment, to arbitrate rather than litigate any workplace claims, and prohibits them from pursuing any workplace claims on a joint, class, collective, or representative action basis, either in arbitration or in any other forum. This compelled waiver of the right to pursue legal redress on a concerted action basis is, plain and simple, a "yellow dog" contract – a term of opprobrium applied to any employment agreement restricting workers' freedom of association. Under Norris-LaGuardia, that compelled waiver is unlawful and unenforceable in federal court. To show

why this is so, we look to the Act's plain language, the historical circumstances that gave rise to it, and the important public policies it articulates.

A. Plain Language

Section 2 of Norris-LaGuardia expressly declares it to be the "public policy of the United States" that employees are entitled to be free from employer "interference" or "restraint" when they engage in "concerted activities for the purpose of … mutual aid or protection." 29 U.S.C. §102. Section 3 states that "[*a*]*ny* undertaking or promise" contrary to the policy declared in section 2 "shall not be enforceable in any court of the United States." 29 U.S.C. §103 (emphasis added).[4] Together, these sections on their face preclude judicial enforcement of Petitioner's compelled waiver.

By its plain terms, section 2 protects workers' ability to pursue joint, class,

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[4] Three years after enacting Norris-LaGuardia, Congress incorporated its statement of policy as the core substantive right protected by section 7 of the NLRA, 29 U.S.C. §157. Congress also made it an unfair labor practice for any employer to interfere with employees' exercise of this section 7 right to engage in concerted activity for mutual aid or protection. 29 U.S.C. §158(a)(1). The NLRA thus denied employers the power to impose terms of employment that Norris-LaGuardia had already stripped courts of the power to enforce, *i.e.*, any employee promise to abjure the right to participate with others in seeking vindication of workplace rights.

or collective legal actions in furtherance of workplace rights. Norris-LaGuardia does not define the phrase "concerted activities," but in the absence of a statutory definition the words of a statute must be given "their ordinary meaning," *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1165 (2014) (citation omitted), and "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Interpreting the identical phrase under section 7 of the NLRA, the Seventh Circuit recently concluded that "[c]ollective or class legal proceedings fit well within the ordinary understanding of 'concerted activities.'" *Lewis v. Epic Sys. Corp.*, __ F.3d __, 2016 WL 3029464, *2 (7th Cir. May 26, 2016). Likewise, the Supreme Court has unequivocally concluded that the phrase "concerted activities … for the purpose of 'mutual aid or protection'" in section 7 encompasses employee efforts to seek redress in any forum – legislative, judicial, administrative – in which they may "protect their interests as employees." *Eastex*, 437 U.S. at 565-66. Many courts have similarly recognized that "concerted activities" includes filing group lawsuits. *See* NLRB Brief at 9-13 & n.4 (discussing cases).

The language and structure of section 3 of Norris-LaGuardia make clear that Congress intended to bar enforcement of not only the narrow category of classic

"yellow dog" contracts prohibiting union membership, but also the far broader array of "promises" and "undertakings" preventing workers from acting in concert to improve working conditions. The Chamber of Commerce concedes as much in its *amicus* brief. *See Amicus* Brief of Chamber of Commerce ("Chamber") at 23 ("To be sure, Section 3 purports to cover all 'undertaking[s]' that conflict with the public policy announced in Section 2, rather than only classic 'yellow dog' agreements not to join unions ….").

Section 3 prohibits enforcement of two categories of contracts:

(1) "Any undertaking or promise, such as is described in *this* section" *and*
(2) "any other undertaking or promise in conflict with the public policy declared in section [2] of this [Act]."

29 U.S.C. §103 (emphasis added). The undertakings or promises "described in *this* section" are promises not to join or remain a member of a labor organization. *Id.* §103(a)-(b). The second category of unenforceable contracts − "any *other* undertaking or promise in conflict with the public policy declared in section 102 of this Act" (emphasis added) − necessarily encompasses a wider array of agreements interfering with employees' right to engage in any other form of concerted action. Under the Act's plain statutory language, then, any agreement requiring employees prospectively to waive their right to pursue workplace employee rights through mutual legal action is unenforceable.

Section 4 provides further textual support for the conclusion that Congress intended Norris-LaGuardia to protect a broad range of concerted activity, *including* concerted litigation. That section provides:

> No court of the United States shall have jurisdiction to issue any … injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute … from doing, whether singly or in concert, any of the following acts:
> …
> (d) By all lawful means aiding any person participating or interested in any labor dispute who is . . . *prosecuting, any action or suit in any court of the United States or of any State*;
> …
> (h) Agreeing with other persons to do or not to do any of the acts heretofore specified.

29 U.S.C. §104 (emphasis added). Read together, subsections (d) and (h) make clear that Congress intended the category of "concerted activity for the purpose of … mutual aid and protection" to include joining or seeking to join with others in a legal action to remedy a labor-related dispute. Because any employer "interference, restraint, or coercion" with that protected conduct violates the public policy set forth in section 2, "any undertaking or promise" made by an employee that purports to prospectively waive the right to engage in such group

action must be held unenforceable under section 3.[5]

The plain language of Norris-LaGuardia thus prohibits enforcement of agreements that require employees to waive their right to pursue collective enforcement of workplace rights. Just as that Act prohibits enforcement of any promise not to form a union or not to join with co-workers in presenting a grievance about low wages, so does it prohibit enforcement of a promise not to join with co-workers in an effort to be paid wages that are legally owed – whether that grievance is presented in a petition to the employer, on picket signs held by protesting employees, or in legal pleadings presented to an arbitrator or judge.

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[5] The Chamber argues that Congress did not intend Norris-LaGuardia to protect the right of workers to pursue concerted legal action because an employee subject to an agreement requiring individual arbitration of all claims still remains free to "assist[] any other employees in prosecuting an action in court," just not as a co-plaintiff. Chamber at 25. That employees remain free to engage in *some* forms of concerted activity, however, does not render enforceable an agreement to refrain from *other* forms of collective action. *See infra* at 25-26. Nor is there logic to the Chamber's circular argument that "an employee who has agreed to [individual] arbitration has no 'lawful' right to participate in a class action." Chamber at 25. Under the Act, any agreement to forego concerted legal action is unenforceable.

B. History

The historical context and legislative history of Norris-LaGuardia further reinforce the conclusion compelled by the statutory text.

Norris-LaGuardia was enacted as a response to decades of labor-management struggle. During those struggles, employers increasingly responded to group efforts to advocate for better workplace conditions by requiring workers, as a condition of employment, to submit to contract terms prohibiting them from joining a union (or certain disfavored unions) or from engaging in other group or concerted activity. *See Iskanian v. CLS Transp. L.A., LLC*, 59 Cal.4th 348, 397-400 (2014), *cert. denied*, 135 S. Ct. 1155 (2015) (Werdegar, J., concurring and dissenting) (describing history of Norris-LaGuardia).

Congress' initial efforts to regulate employers' imposition of such one-sided terms on workers were struck down in a series of *Lochner*-era cases as an impermissible infringement on employers' "freedom of contract." *See, e.g., Adair v. United States*, 208 U.S. 161, 172-76 (1908); *see also Coppage v. Kansas*, 236 U.S. 1, 9-14 (1915) (striking down similar state legislation). In *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917), the Supreme Court gave its express imprimatur to such yellow-dog contracts, upholding an injunction against collective organizing efforts on the ground that the contracts gave employers an

enforceable property right.

Congress enacted Norris-LaGuardia in 1932 to address the same problem in a different way: by eliminating the authority of the federal courts to enforce such agreements. *See* 29 U.S.C. §103; *see generally* Irving Bernstein, THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER 1920-1933, Ch. 11 (1960).[6] As the Senate Report states, "One of the objects of this legislation is to outlaw this 'yellow dog' contract." S. Rep. No. 72-163, at 15; *see also* H. Rep. No. 72-669, at 6 (1932) ("Section 3 is designed to outlaw the so-called yellow-dog contract."); *see generally* Joel I. Seidman, THE YELLOW DOG CONTRACT (1932) (contemporaneous doctoral dissertation on history and content of yellow dog contracts).

Today, the phrase "yellow dog contract" connotes for most people (not labor law professors) a worker's compelled promise not to join a union. But more was packed into the prohibition against yellow dog contracts than the foreswearing of union membership.

Historically, the term "yellow dog" contract was first applied to leases of

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[6] This historical context explains why Congress attacked the problem of employer-imposed yellow-dog contracts by "'curtail[ing] and regulat[ing] the jurisdiction of courts,'" rather than trying to regulate employers directly (as Congress was unable to do at the time). *See* Chamber at 21-22.

company housing in mining towns that prohibited anyone other than the miners' immediate family members, doctors, and morticians, from having access to miners' homes, on pain of eviction. Seidman, at 31. Mining companies feared that allowing miners to talk to union organizers – or even to fellow workers in the privacy of the home – might lead to group action.[7]

Because *Hitchman Coal* opened the door to employer coercion, "an almost endless array of legal games were played by employers that made almost all collective action by workers subject to legal prohibition." Daniel Jacoby, LABORING FOR FREEDOM: A NEW LOOK AT THE HISTORY OF LABOR IN AMERICA 62 (1998). These included employer-mandated promises to "adjust all differences by means of individual bargaining," as, for example, by waitresses at the Exchange Bakery & Restaurant in New York City; to renounce any "'concerted' action [with co-workers] with a view of securing greater compensation" at the Moline Plow Company; or to "arbitrate all differences" according to the machinery set up by the employer and its company union at United Railways & Electronic Company.

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

Seidman, at 58, 66, 69. A contract offered by the Clinton Saddlery Company provided, "No employee can unite with his fellow workers in any effort to regulate wages, hours, etc." Seidman, at 65.

Congress was well aware of the breadth of these contractual limitations on group efforts, and it enacted Norris-LaGuardia to outlaw the full gamut of such "yellow dog" contracts. As the Senate Report made clear, "Not all of these contracts are the same, but, in … all of them the employee waives his right of free association … in connection with his wages, the hours of labor, and other conditions of employment." S. Rep. No. 72-163, at 14.

In fact, just two years before adoption of Norris-LaGuardia, Senator William E. Borah answered the question, "What is [a] 'yellow dog' contract?" on the Senate floor by citing one that provided, "I agree during employment under this contract that I will not … unite with employees in concerted action to change hours, wages or working conditions." 72 Cong. Rec. 7931 (April 29, 1930).[8]

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[8] Senator Borah and several colleagues, including Senators Norris and Wagner, spoke at length about yellow dog contracts in the successful opposition to the nomination of Judge John J. Parker in 1930 to be a Supreme Court Justice. The opposition centered on Judge Parker's affirmance of an injunction against striking miners who had signed a yellow dog contract. *See Int'l Org., United Mine Workers of America v. Red Jacket Consol. Coal and Coke Co.*, 18 F.2d 839, 849 (continued)

Congress thus understood all promises or undertakings that restricted employees to a course of individual dealing with their employer as an evil to be extirpated as fully as possible under federal law.

The Chamber attempts to dismiss Norris-LaGuardia's relevance by focusing exclusively on a different purpose of the statute: to limit the use of anti-labor injunctions in labor disputes, which Congress accomplished through sections 1 and 7. *See* Chamber at 21-22. But as the plain text of sections 2 and 3 and the legislative history make clear, Congress was equally intent on preventing employers from requiring employees to foreswear all forms of concerted activity as a condition of employment. That Congress had more than one statutory goal in no way diminishes the force of the Act's objectives.

The Chamber conflates these two aspects of the statute in misleadingly

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(4th Cir. 1927). Several of the speeches informed Senators of the variety of yellow dog contracts. *See*, *e.g.*, 72 Cong. Rec. 6574-79 (Apr. 7, 1930); 72 Cong. Rec. 7932 (Apr. 29, 1930) (citing Exchange Bakery contract described in text *supra*). In fact, Senator Norris spoke specifically about the use of yellow dog contracts to preclude concerted legal action: "It would enjoin anyone from coming to our aid, from furnishing an appeal bond . . . ." 72 Cong. Rec. 8191 (May 2, 1930). The legislative record in 1930, fast upon Congress's initial failure to enact Norris-LaGuardia in 1928 and just prior to its subsequent enactment in 1932, further evidences Congress's contemporaneous understanding of what its law was designed to prohibit.

asserting that "the Supreme Court long ago *rejected* the notion that Section 3 bars arbitration agreements." Chamber at 23. The Chamber relies on *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 458-59 (1957), but that case did not involve section 3 at all, and certainly did not involve an agreement prohibiting employees from pursuing their rights collectively in all judicial or arbitral forums. Rather, the issue in *Lincoln Mills* was whether the "stiff procedural requirements for issuing an injunction in a labor dispute" set forth in section 7 were intended to prohibit judicial enforcement of an agreement to arbitrate grievances pursuant to a collective bargaining agreement. *Id.* at 457-58. It is in this context that the Supreme Court observed, "The failure to arbitrate was not a part and parcel of the abuses against which the Act was aimed." *Id.* at 458. *Lincoln Mills* thus has no bearing on whether section 3 prohibits enforcement of an agreement that requires employees to waive their right to engage in concerted legal activity. For the same reason, the Chamber's reliance on *Gen. Elec. Co. v. Local 205, United Elec., Radio & Mach. Workers of Am.*, 353 U.S. 547 (1957) (relying solely on *Lincoln Mills*) and the First Circuit's opinion in the same case is also misplaced. *See* Chamber at 24.[9] In any event, neither the Board nor *amici*

[9] The Chamber cites *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 (continued)

suggests that section 3 bars *all* arbitration agreements, only that it precludes enforcement of any agreement or workplace policy that requires employees to waive their right to concerted activity.

C. Policy

Norris-LaGuardia's statement of the "public policy of the United States" rests on Congress's finding that "the individual unorganized worker is commonly helpless to exercise actual liberty of contract." 29 U.S.C. §102. For that reason, the Act provides that "the public policy of the United States is hereby declared as follows: … [I]t is necessary that [the employee] have full freedom of association … and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in … self-organization or in other concerted activities for the purpose … mutual aid or protection." *Id*. That express statement of public policy was a direct response to the widespread efforts by employers at the

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F.Supp.2d 831, 844 (N.D. Cal. 2012), for the proposition that "the Norris-LaGuardia Act specifically defines those contracts to which it applies [in section 3(a)-(b)]. An agreement to arbitrate is not one of those." *Id.* But that statement is incorrect on the face of Norris-LaGuardia, for as previously discussed, section 3 bars enforcement of not only those contracts specifically identified in sections 3(a) and (b), but also "any *other* undertaking or promise in conflict with the public policy declared in section 102 of this title." 29 U.S.C. §103 (emphasis added).

time to require worker grievances to be presented exclusively on an individual basis.

In this way, Congress set its face against the prevailing "moral vision" that American society attached to individual action, a vision captured by the judiciary's embrace of "freedom of contract." S. Rep. No. 72-163, at 15; *see generally* Daniel Ernst, *The Yellow-Dog Contract and Liberal Reform, 1917-1923*, 30 Lab. Hist. 251, 251-52 (1989).[10] The Supreme Court has long understood Norris-LaGuardia to repudiate that embrace, which it characterized in hindsight as the judiciary's "self-mesmerized views of economic and social theory." *Burlington N.R.R. Co. v. Bhd. of Maint. of Way Emps.*, 481 U.S. 429, 453 (1987) (quoting *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 382 (1969)).

In other words, it was and remains the public policy of the United States that

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[10] As stated in the debate on Norris-LaGuardia:

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

75 Cong. Rec. 5515 (1932).

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

The statutory language and history thus establish that Norris-LaGuardia's policy guaranteeing the right to pursue collective action rights is not limited to joining a union or engaging in collective bargaining, but extends to enforcement of legal rights. Any promise or undertaking by which an employee abjures the capacity to join with another in securing a workplace right, or to vindicate one secured by law in any forum, is unenforceable by any "court of the United States."

II. There is No Conflict Between the Federal Arbitration Act and Norris-LaGuardia.

The text of the FAA's saving clause, like that of Norris-LaGuardia, is unambiguous: an agreement to arbitrate shall be enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. By this language, Congress in 1925 placed agreements to arbitrate on the same footing as all other contracts, declaring that judicial hostility *or* favoritism to

arbitration was contrary to federal policy. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967). Thus, a contract provision that violates Congress's expressly stated public policy is just as unenforceable in an arbitration agreement as it would be in any other type of contract. The FAA's saving clause precludes enforcement of Petitioner's prohibition against concerted legal action – just as if that prohibition had been included in a stand-alone agreement or workplace policy rather than inserted in a mandatory employment arbitration agreement.

In asking this Court to deny enforcement of the Board's order, Petitioner and the Chamber argue that the FAA requires enforcement of agreements to arbitrate "unless the FAA's mandate has been overridden by a contrary congressional command." *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (quotation marks and citations omitted); *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2014); *see* Petitioner's Opening Brief at 17-18; Chamber at 10-11. But it is axiomatic that one need only look for a "contrary congressional command" (*i.e.*, evidence of implied repeal) *if* an arbitration provision is otherwise enforceable under the FAA. *See Lewis*, 2016 WL 3029464 at *5-6; *see also Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995). The first step in any FAA analysis must be to determine whether

the arbitration agreement is enforceable or, under FAA §2, is "to be declared unenforceable 'upon such grounds as exist at law or in equity for the revocation of any contract.'" *AT&T Mobility v. Concepcion*, 563 U.S. 333, 339 (2011). Because an arbitration clause requiring employees to foreswear concerted legal action is unenforceable under sections 2 and 3 of Norris-LaGuardia, it "meets the criteria of the FAA's saving clause for nonenforcement," and the Court need not look for any further evidence of a contrary congressional command. *Lewis*, 2016 WL 3029464 at *6 (reaching same conclusion with respect to section 7 of the NLRA).[11]

Even if there were an actual conflict between Norris-LaGuardia and the FAA (which there is not), Congress has clearly stated that such conflict must be resolved in favor of Norris-LaGuardia. When enacting Norris-Guardia in 1932,

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[11] A statute articulating a clear public policy need not expressly refer to the FAA to preclude enforcement of an arbitration provision violating that public policy. For example, Title VII did not include any reference to arbitration when it was enacted in 1964 and amended in 1991. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 286, 288 (2002) ("no language" dealing with arbitration). Yet no one can seriously dispute that a discriminatory provision in an arbitration agreement that allows men, but not women, to pursue legal claims on a concerted basis, or that gives docketing preference to some racial or ethnic groups but not others, would violate that law and thus be unenforceable despite the FAA. According to Petitioner, the FAA would require that such discriminatory terms "must be enforced according to their terms" because Title VII does not contain an express "contrary congressional command." That cannot be.

seven years after the 1925 FAA, Congress expressly provided in section 15 that the new statute repealed "[a]ll acts and parts of acts in conflict with" its provisions. 29 U.S.C. §115; *see Iskanian*, 59 Cal.4th at 403 (Werdegar, J., concurring and dissenting).

Nothing in the Supreme Court's FAA case law is inconsistent with this conclusion. After all, none of those cases considered the substantive right of employees, protected under the NLRA and Norris-LaGuardia, to engage in concerted legal activity for their mutual aid and protection. To treat the Supreme Court's prior jurisprudence as stating a categorical imperative requiring enforcement of all arbitration agreements, without regard for the dictates of federal labor law, would be to return to the *Lochner*-era embrace of individual freedom of contract, as in *Hitchman Coal*. Had there been no Norris-LaGuardia, perhaps such an outcome would be defensible. But in fashioning Norris-LaGuardia, Congress set its sights against *Hitchman Coal* and against an absolutist approach to freedom of contract in the employment context.[12] The sea change in social and economic

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[12] S. Rep. No. 72-163, at 14-15. As Representative Schneider put it in arguing for the bill that became Norris-LaGuardia:

(continued)

theory embodied in Norris-LaGuardia presaged the tide of social and economic legislation of the twentieth century. Accordingly, in the event of a claimed conflict between the FAA and Norris-LaGuardia, Congress' unambiguous command in 1932 was that specified forms of employment contracts may *not* be enforced "according to their terms."[13]

III. This is an Issue of First Impression in this Circuit, and No Court of Appeals Has Yet Fully Engaged with Norris-LaGuardia.

This Court has not yet addressed Norris-LaGuardia in this context, and no federal appellate court has yet fully engaged with Norris-LaGuardia or explained why it is not controlling.

In *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n. 8 (2d Cir. 2013), the Second Circuit discussed the NLRA in dicta in a short footnote, but did not discuss Norris-LaGuardia at all – although it is expected to address that issue in *Patterson v. Raymours Furniture Company, Inc*., No. 15-2820 (2d Cir.), now fully

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(continued)

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

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

briefed and awaiting argument-setting.

In *Owen v. Bristol Care, Inc*., 702 F.3d 1050 (8th Cir. 2013), where plaintiff cited Norris-LaGuardia only as support for her NLRA argument,[14] the Eighth Circuit dismissed Norris-LaGuardia as irrelevant based on a misunderstanding about historical sequence and neither considered nor addressed an independent and fully articulated Norris-LaGuardia argument. That court noted that although the FAA was enacted in 1925, it was codified as part of the re-codification of United States Code in 1947, which according to the Eighth Circuit "suggests that Congress intended its arbitration protections to remain intact even in light of the earlier passage of three major labor relations statutes [the Railway Labor Act, Norris-LaGuardia, and the NLRA]." 702 F.3d at 1053. As the NLRB pointed out in *Murphy Oil*, though, that suggestion was thoroughly rebutted by two of the signatory *amici* to this brief. 361 NLRB No. 72, at 15 n. 64 (*citing* Sullivan & Glynn, 64 Ala. L. Rev. at 1046-1051). The Board summarized:

> Under established canons of statutory construction, "it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly

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[14] *See Owen*, 702 F.3d at 1053 ("She also argues that in passing the NLRA, Congress intended to build upon the Norris-LaGuardia Act").

> expressed." [quoting *Finley v. U.S.*, 490 U.S. 545, 554 (1989) in turn quoting *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187, 199 (1912).] There is no such clearly expressed Congressional intention either in the statute codifying the FAA, see 61 Stat. 669, or in its legislative history…. It seems inconceivable that legislation effectively restricting the scope of the Norris-LaGuardia Act and the NLRA could be enacted without debate or even notice, especially in 1947, when those labor laws were both relatively new and undeniably prominent.

Id. at 15.[15]

The Eighth Circuit also sought to distinguish *D.R. Horton* on the ground that the arbitration agreement in *Owen* did "not preclude an employee from filing a complaint with an administrative agency such as the Department of Labor." *Owen*, 702 F.3d at 1053. That supposed distinction is entirely immaterial under Norris-LaGuardia's text, history, and policy. First, by its plain language, Norris-

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[15] In other words, re-codification by itself is not a substantive amendment. *See, e.g.*, *Finley*, 490 U.S. at 554 (1989); *United States v. Welden*, 377 U.S. 95, 98 (1964); *Fourco Glass Co. v. Transmirra Corp.*, 353 U.S. 222, 227 (1957); *Anderson*, 225 U.S. at 198-99. To that point, the Supreme Court has held for purposes of applying the general principle that a later-enacted statute takes precedence in case of irreconcilable statutory conflict, *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936), that a non-substantive re-enactment is not considered a later enactment. *See Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961). Thus, even if Congress in enacting Norris-LaGuardia had not expressly repealed all laws in conflict with its provisions, 29 U.S.C. §15, the 1932 Norris-LaGuardia Act would still take precedence over the 1925 FAA *if* there were an actual conflict.

LaGuardia reaches "*any*" promise or undertaking, not "some" promises or undertakings. The drafters used the categorical because that is what they meant. *See* Finkin, 93 Neb. L. Rev. at 14-15.

Second, that purported distinction is contrary to Norris-LaGuardia's historical roots. Although the term "yellow dog" contracts encompassed more than promises not to join a union, *see supra* at 7-8, 11-15, when such contracts did preclude union membership they could be highly selective, prohibiting some while permitting others. Some proscribed membership in unions active in the area, allowing support for unions elsewhere. Seidman, at 63-64. Some were more fine-tuned, such as the United States Gypsum Plaster Company contract that "bound its employees not to join 'the I.W.W. or any other communistic or like organization,' apparently placing no obstacle in the way of a union of the American Federation of Labor type." *Id*. There is little doubt that Congress intended Norris-LaGuardia to preclude enforcement of any of those proscriptions, notwithstanding the contractual allowance of other concerted action. Norris-LaGuardia does not permit employers to prohibit employees from joining union A so long as they can join union B; it does not permit employers to prohibit employee strikes so long as they can picket; and it does not permit employers to prohibit employees from filing collective claims in court or arbitration so long as they can file claims with an

administrative agency. In other words, what the contract allows the employee to do has no bearing on the enforceability of what the contract prohibits her from doing. "Any" means any.

The only other stated ground for the Eighth Circuit's decision was the conclusion that the panel "owe[d] no deference to [the Board's] reasoning." *Owen*, 702 F.3d at 1054. The assertion is plainly wrong as applied to the Board's construction of the NLRA. But even as to Norris-LaGuardia, it cannot excuse the Court's failure to undertake an independent examination of that statute's text, history, and policy.

In *Cellular Sales of Missouri, LLC v. NLRB.*, No. 15-1860, Slip Op. at 6 (8th Cir. June 2, 2016), the Eighth Circuit simply followed *Owen* without further analysis, and without mention (let alone discussion) of Norris-LaGuardia or the Seventh Circuit's *Lewis* decision.

The Fifth Circuit in *D.R. Horton* and *Murphy Oil* was even less attentive to Norris-LaGuardia's commands. By footnote, the majority in *D.R. Horton* dismissed the relevance of Norris-LaGuardia without any analysis. *See* 737 F.3d at 362 n. 10. And the panel in *Murphy Oil* simply adopted the court's prior holding in *D.R. Horton* without further discussion. *Murphy Oil*, 808 F.3d at 1018.

The Ninth Circuit's reference to Norris-LaGuardia in *Richards v. Ernst &*

Young, LLP, 744 F.3d 1072 (9th Cir. 2013) is equally non-substantive, consisting of nothing more than an acknowledgment of *Owen* and several district court cases and the following quoted language from a district court in parentheses, in a footnote string-cite: "'Congress did not expressly provide that it was overriding any provision in the FAA when it enacted the NLRA or the Norris- LaGuardia Act.'" *Id*. at 1075 n.3 (quoting *Morvant*, 870 F.Supp.2d at 845).[16] The district court in *Morvant*, however, erred in at least two material respects. First, it erroneously accepted the historical-sequence argument that *amici* have dispelled above (and ignored the impact of section 15 of Norris-LaGuardia on potential statutory conflicts). Second, it rested its analysis on a historical anachronism.

When Congress enacted the FAA in 1925 (and Norris-LaGuardia in 1932), it had no power under the Commerce Clause as then narrowly defined to legislate the terms and conditions of employment for the majority of American workers – those who did not physically cross state lines in performing their job duties. The Norris-LaGuardia drafters were aware of that limit: they focused the Act on the power of

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[16] A different Ninth Circuit panel currently has under submission the full range of issues raised by this case in *Morris v. Ernst & Young*, No. 13-16599 (9th Cir.) (argued November 17, 2015).

the federal courts, which Congress could control, not on the power over employment contracts under the Commerce Clause, which it could not. H. Rep. No. 72-669, at 7 ("This section in no wise is concerned with interstate commerce … but the Federal courts obtain jurisdiction in cases involving such [yellow dog] contracts by virtue of diversity of citizenship….").

In 1925, Congress only had the power to legislate regarding the contracts of workers who actually crossed a state or national line in the course of their employment – seamen, railroad workers, and interstate truckers. Yet Congress expressly *exempted* these workers in section 1 of the FAA, 9 U.S.C. §1. *See generally* Matthew W. Finkin, *"Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 Berkeley J. Emp. & Lab. L. 282 (1996). In 2001, the Supreme Court read that FAA exemption as applying *only* to those line-crossing employees over whom Congress in 1925 had Commerce Clause power. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001). Thus, the non-line-crossers for whom Congress could not (and so did not) legislate did not become covered by the FAA until after the Court revisited its Commerce Clause jurisprudence in *NLRB v. Jones & Laughlin Steel Corp*., 301 U.S. 1 (1937), to broaden Congress's jurisdiction. *Circuit City Stores*, 532 U.S. at 116.

Those historical circumstances explain why Norris-LaGuardia makes no

reference to the FAA. There was no reason for Congress to have given any thought to the FAA when it drafted Norris-LaGuardia because all employees whose contracts Congress had power to regulate were at the time expressly excluded from the FAA. Congress could scarcely anticipate how the Supreme Court would later broaden the Commerce Clause power, let alone how it would construe the employment contract exemption in section 1 of the FAA seven decades later. *See* Fisk, at 200; Finkin, 93 Neb. L. Rev. at 23.

IV. The Contemporary Importance of Norris-LaGuardia

Though this Court need not proceed beyond Norris-LaGuardia's plain text and legislative history, we nevertheless emphasize that Norris-LaGuardia's policies have as much practical purchase today as they did 84 years ago, perhaps more. Systematic violations of federal and state wage and hour law have become common among companies employing millions of some of the most vulnerable workers in today's economy. *See generally* Ruth Milkman, Ana Luz Gonzàlez & Peter Ikeler, *Wage and hour violations in urban labor markets: a comparison of Los Angeles, New York and Chicago*, 43 Indus. Rel. J. 378 (2012); Annette Bernhardt, Michael Spiller & Diane Polson, *All Work and No Pay: Violations of Employment and Labor Laws in Chicago, Los Angeles and New York City*, 91 Social Forces 725 (2013). And state and federal labor enforcement agencies are

notoriously overburdened and often incapable of providing prompt – or, at times, any – relief for those violations. *See* Zach Schiller & Sarah DeCarlo, POLICY MATTERS OHIO, INVESTIGATING WAGE THEFT: A SURVEY OF THE STATES (2010); *GAO's Undercover Investigation: Wage Theft of America's Vulnerable Workers: Hearings before the Committee on Education and Labor*, 111th Cong., 1st sess. (2009); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-629, REPORT TO THE COMMITTEE ON EDUCATION AND LABOR, WAGE AND HOUR DIVISION NEEDS IMPROVED INVESTIGATIVE PROCESSES AND ABILITY TO SUSPEND STATUTE OF LIMITATIONS TO BETTER PROTECT WORKERS AGAINST WAGE THEFT, p. 8 (June 2009) ("Our work clearly shows that Labor has left thousands of actual victims of wage theft who sought federal government assistance with nowhere to turn.").

Where individual sums taken from each worker tend to be relatively small, aggregation of claims through group recourse to the courts or arbitration may be the only effective means of securing redress – and securing employer conformity to law. Yet the widespread practice among employers of inserting concerted-action waivers in their employees' mandatory arbitration agreements renders the law's protection a chimera. Natiya Ruan, *What's Left to Remedy Wage Theft? How Arbitration Mandates that Bar Class Actions Impact Low Wage Workers*, 2012 Mich. St. L. Rev. 1103 (2012).

No one would dispute that under Norris-LaGuardia an employer could not require its employees to promise that they will not seek a higher wage as a group. According to Price-Simms, however, an employer *can* prohibit its employees from seeking to enforce their rights collectively. That assertion contradicts the text, history, and policy of Norris-LaGuardia.

CONCLUSION

In the debate on Norris-LaGuardia, Representative Schneider expressed the hope that, even though the nation's emerging industrial and social problems would call for future legislative address, "[a]t least the problem of …'yellow dog' contracts will have been removed from the arena and we can then take up other questions." 75 Cong. Rec. 5515 (1932). Alas, that has not been the reality. The yellow dog contract has re-entered the arena, and courts have thus far failed to fully engage the law that Congress fashioned precisely to eradicate such agreements.

The recent lack of fidelity to Norris-LaGuardia may be due to lapses in research or a failure to grasp the contemporary significance of a law now eight decades old. We hope this brief will assist the Court in those respects.

Dated: June 3, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation set forth in Fed. R. App. P. 28.1(e) and 32(a)(7)(B). According to the word count provided in Microsoft Office Word 2010, which was the word-processing system used to prepare the brief, the foregoing brief contains 7,000 words. The text of the brief is composed in 14-point Times New Roman typeface.

Dated: June 3, 2016

/s/ Michael Rubin
Michael Rubin

CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2016, I electronically filed a true and correct copy of the foregoing using the CM/ECF system, thereby sending notification of such filing to all counsel of record.

/s/ Michael Rubin
Michael Rubin

STATUTORY ADDENDUM

Table of Contents

9 U.S.C. § 1 - "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

(July 30, 1947, ch. 392, 61 Stat. 670.)