NLRB

No. 16-701

IN THE

Supreme Court of the United States

ALTON J. SANDERS,

Petitioner,

NATIONAL LABOR RELATIONS BOARD,

Real Party in Interest,

v.

24 HOUR FITNESS USA, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER ALTON J. SANDERS

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REPLY BRIEF FOR PETITIONER

This Court has granted certiorari in *NLRB v. Murphy Oil USA, Inc.*, *cert. granted*, 2017 WL 125666 (U.S. Jan. 13, 2017) (No. 16-307), *Epic Systems Corp. v. Lewis*, *cert. granted*, 2017 WL 125664 (U.S. Jan. 13, 2017) (No. 16-285), and *Ernst & Young, LLP v. Morris*, *cert. granted*, 2017 WL 125665 (U.S. Jan. 13, 2017) (No. 16-300), to answer precisely the same question raised by this Petition: whether a provision in an employment arbitration agreement prohibiting employees from pursuing workplace claims on a concerted basis is unlawful and unenforceable under Sections 2 and 3 of the Norris-LaGuardia Act ("NLGA"), 29 U.S.C. §§ 102, 103, and Sections 7 and 8(a)(1) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 157, 158(a)(1). This Petition should be held pending the outcome of those cases, because the Fifth Circuit's summary disposition below rested exclusively on its ruling in *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, No. 16-307, and its prior ruling in *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). The Fifth Circuit's decision in this case did not address either of the purported factual distinctions now raised by Respondent 24 Hour Fitness.

Respondent asserts that the Court should deny certiorari because the Fifth Circuit could have decided this case on alternative grounds, based on language in 24 Hour Fitness's arbitration agreement that: (1) describes "an 'opt-out' procedure that allows an employee to adopt or reject [the agreement] at the outset of employment," Opp. 1; and (2) "specifically incorporates the Federal Rules of Civil Procedure," which "includes the right to permissive joinder of

claims," *id.* at 3. Although neither of these factual distinctions was presented or briefed in the Fifth Circuit, both were considered and their materiality squarely rejected by the Administrative Law Judge and the National Labor Relations Board. *See* Sanders Pet. App. 8a-10a, 48a-59a. For the reasons discussed below and in the Petitions of the United States at 2-3 and Sanders at 23-31, an employer violates Section 8(a)(1) of the NLRA (and the NLGA) whenever it imposes contract terms on an individual employee that "interfere with" the employee's right to engage in concerted activity for mutual aid and protection, including by forcing the employee to take affirmative steps to preserve that right. Allowing joinder of individual claims in arbitration does not save the employer's prohibition against all other forms of concerted legal activity; but in any event, the ALJ and Board in this case found that 24 Hour Fitness's arbitration agreement *does* prohibit such joinder of claims.

I. 24 Hour Fitness's New-Hire 30-Day Opt-Out Provision Does Not Save Its Otherwise Unlawful Prohibition Against Concerted Legal Activity from Invalidity.

24 Hour Fitness contends that even if this Court agrees with the Board in *Murphy Oil* and the plaintiffs in *Morris* and *Lewis* that the NLRA and NLGA prohibit employers from prohibiting concerted legal actions by their employees, this case is different because Respondent gives its new employees 30 days in which to submit a form allowing them to opt out of the company's arbitration agreement. Opp. 1-3, 11-14. The Board has repeatedly held, though, that opt-out provisions like Respondent's do not save otherwise unlawful prohibitions against concerted legal activity. *See, e.g.*, *On Assignment Staffing Servs., Inc.*, 362 NLRB No. 189, 2015 WL 5113231 (Aug. 27, 2015), *enf. denied*, 2016 WL 3685206 (5th Cir. June 6, 2016) (per curiam summary disposition); *Nijjar Realty, Inc.*, 363 NLRB No. 38, 2015 WL 7444737 (Nov. 20, 2015), *cross-petitions for review docketed*, No. 15-73921 (9th Cir. Dec. 30, 2015), No. 16-70336 (9th Cir. Feb. 4, 2016); Sanders Pet. App. 8a. As the Board has explained, an employer cannot require forfeiture of an employee's Section 7 rights as the default condition of employment and impose on that employee the burden of taking affirmative steps to reinstate those statutory rights. *See On Assignment Staffing*, 362 NLRB No. 189 at *3-*7. Any individual employment agreement that requires prospective waiver of an employee's right to engage in concerted legal activity is unlawful, and the requirement that employees take affirmative steps to opt out of such an agreement itself constitutes an impermissible burden on Section 7 rights within the meaning of Section 8(a)(1). *Id.*; *cf.*, *e.g.*, *Chromalloy Gas Turbine Corp.*, 331 NLRB 858, 858 (2000) (unlawful to require employees to seek permission before engaging in concerted activity), *enf'd*, 262 F.3d 184 (2d Cir. 2001); *Savage Gateway Supermarket, Inc.*, 286 NLRB 180, 183 (1987) (unlawful to require employees to notify their employer before engaging in concerted activity), *enf'd*, 865 F.2d 1269 (6th Cir. 1989).

Thus, even for the small number of newly hired employees who timely opt out (suggesting that they either already have a legal claim against the company or believe that they and their co-workers may later want to pursue claims against the company that

just hired them), 24 Hour Fitness's arbitration policy violates Section 8(a)(1) by "interfer[ing] with" their Section 7 rights by requiring such affirmative conduct at the outset of their employment. 29 U.S.C. §158(a)(1). Such a requirement imposes on these employees the burden of having to "make an observable choice that demonstrates their support for or rejection of concerted activity." *On Assignment Staffing*, 362 NLRB No. 189 at *6 (internal quotation marks and citation omitted); *see id.* at *7. This is inherently coercive and reasonably likely to chill such activity, and is thus unlawful. *Id.* at *6-*7; *see also Allegheny Ludlum Corp.*, 333 NLRB 734, 739 (2001), *enf'd*, 301 F.3d 167 (3d Cir. 2002); *Stoner Lumber, Inc.*, 187 NLRB 923, 930 (1971) ("Employees' right to remain silent to protect the secrecy of their concerted activities[] is protected by Section 7 of the Act."), *enf'd*, 1972 WL 3035 (6th Cir. May 26, 1972).

The identical analysis applies under the NLGA as well, which prohibits courts of the United States from enforcing "[a]ny undertaking or promise in conflict with the public policy declared in section [2 of the NLGA]." 29 U.S.C. § 103. That statement of national labor policy in the NLGA prohibits enforcement of any employment agreement that interferes with the right of employees to engage in concerted action for mutual aid and protection. *Id.* §§ 102, 103.

If the Court were to allow employers to skirt their obligations under the NLRA and NLGA by the simple expedient of making available to new employees a limited-time, pre-dispute opt-out mechanism, that loophole would become the new norm for employers seeking to immunize themselves from concerted

workplace claims. As a practical matter, confirmed by the empirical evidence and the uniform conclusions of behavioral economists cited in the post-trial briefs to the ALJ, only a tiny percentage of new employees would exercise such an opt-out option, especially because they must exercise that option in the first weeks of work before any employment disputes are likely to have arisen. In this very case, the parties stipulated before trial that only 0.04% to 0.08% of 24 Hour Fitness's employees timely exercised the company's opt-out option, *see* Sanders Pet. 15 – although the violation of Section 8(a)(1) found by the ALJ and the Board did not depend on that undisputed fact.

Finally, despite Respondent's assertion that the Fifth Circuit's decision in *On Assignment Staffing* definitively resolves the opt-out issue, several other circuits are currently considering the impact of such opt-out agreements in light of the Board's more recent Section 8(a)(1) analysis. *See AT&T Mobility Servs., LLC v. NLRB, cross-petitions for review docketed*, No. 16-1099 (4th Cir. Feb. 1, 2016), No. 16-1159 (4th Cir. Feb. 16, 2016); *Nijjar Realty, Inc. v. NLRB, cross-petitions for review docketed*, No. 15-73921 (9th Cir. Dec. 30, 2015), No. 16-70336 (9th Cir. Feb. 4, 2016); *O'Connor v. Uber Technologies, Inc., appeals docketed*, No. 15-17420 (9th Cir. Dec. 10, 2015), No. 15-17422 (9th Cir. Dec. 10, 2015). The pendency of those cases is another reason not to deny certiorari, because by the time the three pending cases are decided by this Court, the Fourth and Ninth Circuits will likely have decided those fully briefed cases.[1]

[1] Although the Ninth Circuit considered this issue in *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1075-77

II. The Absence of an Express Joinder Prohibition in Respondent's Employment Agreement Does Not Provide an Alternative Ground for Affirmance.

Equally unavailing is 24 Hour Fitness's argument that certiorari should be denied because, unlike in the three pending cases, the employer's prohibition against concerted legal activity in this case applied only to class, collective, and representative actions and not also to joint actions filed by two or more individual employees. Opp. 3. Respondent does not explain why that distinction might matter; but in any event, both the ALJ and Board rejected 24 Hour Fitness's narrow characterization of its agreement.

The Board in this case explained that it had no reason to decide whether "an unambiguous provision [that permitted] arbitral joinder, standing alone, would satisfy the *D.R. Horton* standard" because "the Respondent's policy lacks such a provision." Sanders Pet. App. 9a. As the Board pointed out, nothing in 24 Hour Fitness's arbitration agreement gave notice to the company's employees that

(9th Cir. 2014), that case predated the Board's decision in *On Assignment Staffing* and therefore will not be binding on the panels that hear the pending appeals in *Nijjar Realty* and *Uber Technologies*. *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); *Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235, 1240, 1245-46 (9th Cir. 2013) (circuit precedent not controlling in light of agency's subsequent reasonable statutory interpretation, where prior panel decision "did not hold that [the court's] view of [the provision] represented the *only* reasonable interpretation of that statute").

they could jointly file claims in arbitration; and the mere reference to motions practice under the federal rules was insufficient to provide such notice. *Id.* at 31a ("In arbitration, the parties will have the right to conduct civil discovery and bring motions as provided by the Federal Rules of Civil Procedure."). The Board found that "this spare language, which makes no specific mention of joinder, is insufficient to put employees on notice that the policy permits them to pursue joint claims together with their coworkers." *Id.* at 9a.

The Board further found that the confidentiality provision in 24 Hour Fitness's arbitration agreement effectively precludes individual claimants in arbitration from being able to share with co-workers the information that would be necessary for those workers to pursue claims jointly, or even to learn that a co-worker had filed a workplace claim. Respondent's arbitration agreement states that "[e]xcept as may be required by law, neither a party nor an arbitrator may disclose the existence, content or results of any arbitration hereunder without the prior consent of both parties." *Id.* at 10a, 32a. That sweeping confidentiality provision makes it impossible as a practical matter for two workers to file a joint complaint or for one worker to join another worker's pending arbitration case. The Board thus had ample basis for finding that 24 Hour Fitness's employees would reasonably construe the company's agreement as prohibiting the joinder of claims in arbitration, just as it prohibits other forms of concerted legal activity. Respondent's purported factual distinction is therefore no distinction at all, and is immaterial to the issues in this case.

CONCLUSION

For the reasons stated above and in the pending Petitions, the Court should defer ruling on those Petitions until after it has resolved the merits issues next Term in *NLRB v. Murphy Oil USA, Inc.*, No. 16-307, *Epic Systems Corp. v. Lewis*, No. 16-285, and *Ernst & Young, LLP v. Morris*, No. 16-300.

Respectfully submitted,

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