Nos. 16-285, 16-300 & 16-307

In The
Supreme Court of the United States

EPIC SYSTEMS CORPORATION,

Petitioner,

v.

JACOB LEWIS,

Respondent.

ERNST & YOUNG LLP, et al.,

Petitioners,

v.

STEPHEN MORRIS, et al.,

Respondents.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

MURPHY OIL USA, INC., et al.,

Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Fifth, Seventh, And Ninth Circuits

BRIEF OF THE MAIN STREET ALLIANCE, THE AMERICAN SUSTAINABLE BUSINESS COUNCIL, AND NICK HANAUER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS IN NOS. 16-285 & 16-300, AND OF PETITIONER IN NO. 16-307

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INTEREST OF THE *AMICI CURIAE**

The Main Street Alliance ("MSA") is a national nonprofit organization dedicated to raising small business owners' voices on issues that affect their businesses, their employees, and the communities they serve. Founded in 2008, MSA has become a national network, representing 30,000 small business owners across the United States, with chapters and affiliates in 13 states. MSA represents a diverse group of small business owners in industries ranging from storefront service, retail and restaurants, to light manufacturing and food processing. The MSA supports employees' collective action rights because concerted advocacy benefits small businesses and the national economy.

The American Sustainable Business Council ("ASBC") is a national organization with state affiliates that advocates for economic, social, and environmental market and policy changes to build a more sustainable nation and world. Through its national member network, ASBC represents more than 250,000 U.S. businesses and more than 325,000 entrepreneurs, executives, managers and investors. ASBC supports employees' collective action rights because concerted activity is an important tool for building a fair, fulfilling, and prosperous economy for all.

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* Pursuant to S.Ct. R. 37.6, *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *Amici*, their members, or their counsel made a monetary contribution to its preparation or submission. All parties have filed blanket consents to the filing of *amicus curiae* briefs in this matter.

Nick Hanauer is a business leader, entrepreneur, venture capitalist, and author. He founded aQuantive, was the first non-family investor in Amazon.com, has successfully created many other businesses, and is the best-selling author of two books: The True Patriot and Gardens of Democracy. Based on his business experience, he believes that structures that favor large firms over small ones and that disempower workers – like collective action waivers – hurt our economy and are a key cause of America's growing inequality.

SUMMARY OF ARGUMENT

Responsible employers, particularly small employers, comply with employment laws to decrease employee turnover and to ensure worker productivity. These firms also rely on widespread compliance with employment laws to sustain consumer spending. Yet collective action waivers decrease incentives for competitors to comply with employment laws. When such waivers are permitted, responsible businesses are forced to compete on a tilted playing field; lawbreakers are advantaged; and the viability of small firms in particular is threatened. *See* pp. 3-20, *infra*.

Moreover, contrary to the claims of challengers, class arbitration is efficient, informal, and expeditious – for employers as well as employees. Its availability saves resources by avoiding multiple, duplicative adjudications and by fostering the development of innovative procedures. In addition, class procedures minimize

workplace disruption. Under the Board's rule, employees can take advantage of class procedures that reduce acrimony, but they also remain free to choose individual adjudication of their claims. *See* pp. 20-29, *infra*.

ARGUMENT

I. COLLECTIVE ACTION WAIVERS DISADVANTAGE RESPONSIBLE BUSINESSES, PARTICULARLY SMALL BUSINESSES, BY PROTECTING CORPORATE WRONGDOING.

Responsible employers, and particularly small employers, rely on worker protections as an integral component of their business models. Compliance with employment laws helps meet the unique needs of these businesses by increasing productivity and reducing long-term costs, and it helps ensure that customers receive sufficient wages to make purchases at local and law-abiding businesses. Collective action waivers endanger these firms because those waivers decrease incentives for other businesses to comply with employment laws. If employers are free to require their employees to waive their collective action rights, law-abiding businesses will be forced to compete on a tilted playing field. The result will be to advantage lawbreakers and threaten the viability of small firms in particular, and socially responsible firms more generally.

A. Responsible businesses comply with employment laws to reduce long-term costs and to increase productivity.

Many businesses comply with employment laws because compliance creates long-term benefits for their firms. Abiding by worker protections like the minimum wage, prohibitions on sex discrimination, and health and safety requirements reduces employee turnover and increases worker productivity. Small businesses in particular rely on these economic benefits to succeed in the market.

Responsible businesses provide workplace protections to retain their employees and to reduce the expenses associated with recruiting and training new workers. Turnover costs typically amount to about 20 percent of an employee's annual salary. *See* Heather Boushey & Sarah Jane Glynn, Center for American Progress, There Are Significant Costs to Replacing Employees 1-2 (Nov. 16, 2012), https://perma.cc/mxd2-gb32 (analyzing 30 case studies regarding costs of employee turnover).

Reducing turnover is particularly important for smaller employers. For businesses supervised by a few managers, hiring a new employee consumes valuable time and resources – a burden that larger competitors can avoid through economies of scale. Melissa S. Cardon & Christopher E. Stevens, *Managing Human Resources in Small Organizations*, 14 Human Resource Mgmt. Rev. 295, 297-99, 308-11 (2004). Large corporations utilize extensive human resources departments

to quickly find and train new workers. *Id. See also* Herman G. Heneman & Robyn A. Berkley, *Applicant Attraction Practices and Outcomes Among Small Businesses*, 37 J. Small Bus. Mgmt. 53, 66 (1999). In contrast, "in small firms, where resources are likely to be scarce, there may be a very small number of formal HR departments or professionals, increased difficulty in recruiting and retaining employees due to lack of financial resources, and an increased reluctance to engage in costly or restrictive practices." Cardon & Stevens, *supra*, at 297. Because of the disproportionate burden that they face in recruiting and training new employees, it is not surprising that a national survey of small business owners in 2013 reported that 60 percent of respondents stated that their "biggest challenge in hiring or managing staff is finding skilled professionals for the job." *Small Businesses, Big Recruiting Challenges*, Robert Half (Aug. 6, 2013), http://rh-us.mediaroom.com/index.php?s=487&item=1734.

Amici and their members rely on workplace protections to avoid the expenses associated with employee turnover. Jennifer and John Kimmich own the Alchemist Brewery in Vermont. They told MSA that their "employee turnover is relatively non-existent and our hiring and training line in the budget is $0," in large part because "our employees can count on a full paycheck each and every week of the year." *Shop Your Values*, Main Street Alliance, http://www.mainstreetalliance.org/shopyourvalues. Similarly, Rhonda Early, who owns a café in Oregon, successfully decreased employee turnover by providing access to earned paid sick

days. *Id.* By complying with workplace laws and providing valuable employee benefits, responsible small businesses increase their retention rates and avoid the disruptive costs of finding new employees.

Responsible businesses additionally rely on workplace protections to increase the productivity of their incumbent employees. Here, too, the benefit is particularly important for employers with modestly sized workforces. Researchers have found that "[t]he dependence of small employers on their workers is heightened by the fact that they typically employ [few employees]. Consequently, the poor performance – or absence – of one [worker] can have a disproportionately high impact on productivity." Richard Scase & Robert Goffee, *The Entrepreneurial Middle Class* 112 (2015).

Moreover, small businesses must maintain consistent productivity because they are more vulnerable to market disruptions. Large corporations are more able to endure those disruptions, because they "have advantages in raising capital, face better tax conditions and government regulations, and are in a better position to compete for qualified labor." Josef Bruderl and Rudolf Schussler, *Organizational Mortality: The Liabilities of Newness and Adolescence*, 35 Admin. Sci. Q. 530, 535 (1990). In contrast, small firms "are likely to bear the brunt of an economic downturn," and they respond to poor market conditions by "reduc[ing] their economic activity earlier and more sharply than do

others in the economy." Ben Bernanke et al., Nat'l Bureau of Econ. Research, *The Financial Accelerator and the Flight to Quality* 2 (1994).

Because of the importance of maintaining productivity, MSA and ASBC members, as well as other responsible employers, prioritize workplace protections and benefits. After New York State passed a paid family leave program, MSA member Brian Barnett stated that "[t]he most important thing I can do to help my bottom line is to take care of my employees; to be sure they are able to focus on providing my customers with the best possible service." Stephen Rouzer, *Small Business Owners Say Paid Family Leave Gives Them a Competitive Advantage – Without Hurting Bottom Line,* Main Street Alliance (Apr. 1, 2016), http://www.mainstreetalliance.org/new_york_business_owners_rally_for_paid_family_leave. MSA members across the country support paid sick time in order to increase their productivity. When President Obama announced that federal contractors would have access to paid sick time, MSA member Shannon Forney stated that she supported the measure because "[t]he advantages we gain in areas of employee acquisition, retention, and productivity will help us do our jobs better, and will make St. Paul, and our country a better place to do business." Stephen Rouzer, *DOL Issues Final Rule on President Obama's Executive Order Granting Paid Sick Days to Federal Contractors*, Main Street Alliance (Sept. 29, 2016), http://www.mainstreetalliance.org/dol_issues_final_rules_on_executive_order_paid_sick_days. Similarly, Sabrina Parsons explained that providing

the workers at her software company with workplace protections is "returned in full [with] hard work and dedication. We owe the growth of our company to the commitment of our employees, one we have fostered with our strong commitment to them." *Shop Your Values*, *supra*.

Social science research confirms that workplace protections increase productivity. The Occupational Safety and Health Administration has found that "businesses that implement injury and illness prevention programs . . . reduce injuries by 15 to 35 percent," which leads to $23 billion in worker compensation savings. U.S. Occupational Safety and Health Administration, *Injury and Illness Prevent Programs, White Paper* 7-8 (2012). Moreover, consistent research shows that state and local laws expanding access to paid sick leave improve business conditions. A study analyzing the effect of a paid sick leave law in Jersey City, New Jersey found that workplaces forced to change their benefits after the law's passage realized widespread advantages, including fewer sick employees coming to work, lower turnover, higher quality job applicants, and increased productivity. U.S. Dep't of Labor, *Get the Facts on Paid Sick Time* 5 (2015). Similarly, a study analyzing a paid sick leave law in Connecticut reported that over a quarter of employers found that their workers experienced "improved morale, and substantial numbers reported increases in employee motivation and loyalty." Eileen Applebaum et al., *Good For Business? Connecticut's Paid Sick Leave Law* 15 (2014). For small businesses that rely on productivity from few

employees, the gains realized from health and safety laws create important benefits.

Employment laws protecting the minimum wage and prohibiting sex discrimination improve productivity as well. Decades of research shows that the minimum wage maintains productivity because "workers proportionately withdraw effort as their actual wage falls short of their fair wage." George K. Akerlof & Janet L. Yellen, *The Fair Wage-Effort Hypothesis and Unemployment*, 105 Q. J. Econ. 255, 255 (1990). *See also*, Council of Economic Advisers, *The Economic Case for Raising the Minimum Wage* 9 (Feb. 12, 2014). Similarly, consistent research shows that workplaces that contain sexual harassment or discrimination experience lower productivity due to increased use of sick days, higher turnover, and lower employee morale. Chai R. Feldblum & Victoria A. Lipnic, U.S. Equal Emp. Opportunity Comm'n, *Select Task Force on the Study of Harassment in the Workplace* 17-25 (June 2016). Losses in productivity due to sex discrimination can create significant monetary burdens. For example, one study by the U.S. Merit Systems Protection Board found that sexual harassment between 1992 and 1994 cost the federal government $327 million. U.S. Merit Systems Protection Board, Sexual Harassment in the Federal Workforce 23-26 (1995). By complying with employment laws, *Amici* and their members create long-term benefits for their businesses that are integral to their economic success.

B. Small and responsible businesses rely on widespread compliance with employment laws to sustain consumer spending.

In addition to the benefits that individual firms realize when adhering to employment laws, general compliance with those laws creates macroeconomic benefits that are especially important to small businesses in particular, and socially responsible firms in general. If employers fail to compensate workers with adequate wages or fail to provide employees with essential benefits, workers have less money to spend in their communities – a result that will hit small and socially responsible firms especially hard.

Small businesses are more vulnerable than larger ones to reductions in consumer spending. When consumer spending declines, financial institutions are more likely to provide credit to large firms than to small ones, and large companies can lower their costs by exploiting tax loopholes and shifting profits overseas. *See* Bernanke, *supra*, at 2; Frank Clemente et al., *Corporate Tax Chartbook* 1-3 (2016); Janean Chun, *Small Businesses Pay the Price for Big Corporations: Study*, CNBC, Apr. 13, 2012 ("Responsible small businesses are further hurt by corporate tax dodging because they are put at a competitive disadvantage since they can't hire armies of well-paid lawyers and accountants to use offshore tax loopholes."). In contrast, reductions in consumer spending often lead to widespread small business failures. Because small firms have limited access to credit, they generally rely on their internal resources to finance their expenses.

Karen Gordon Mills & Brayden McCarthy, *The State of Small Business Lending* 15-17 (2014). During periods of low consumer spending, those resources quickly deplete. *Id.* The recent recession highlighted that vulnerability. Between 2007 and 2012, small businesses accounted for 60 percent of national job losses, and job losses were "even more significant among the smallest of small businesses." *Id.* at 3.

Because they are disproportionately sensitive to changes in consumer spending, small firms depend on widespread compliance with minimum wage laws to ensure that members of their community earn sufficient wages to allow for disposable income. When employers compensate their workers with dependable wages, their increased pay creates a multiplier effect that leads to greater consumer spending. Doug Hall & David Cooper, *How Raising the Federal Minimum Wage Would Help Working Families and Give the Economy a Boost* 8-11 (2012). Because higher wages increase demand, a survey in 2015 by Public Policy Polling showed that 60 percent of small businesses support gradually raising the minimum wage to $12 per hour by 2020. Small Business Majority, *Small Businesses Support Raising the Minimum Wage to $12* 1 (2015).

Amici and their members have learned from experience that when employers comply with their legal obligations their workers will increase spending at local firms. Catherine and Cheryl Reinhart, who own a bakery in Oregon, explained that "[i]t's simple economics: we sell more sweets when working families have more

money in their pockets to take their kids out for a treat." *Shop Your Values*, *supra*. Another Oregon small business owner, Deborah Field, reported that, "[m]y business, as with any small business, grows when customers have the money to spend at my shop. When patrons in my community are able to buy high-end paper goods and custom design services, my business thrives." *Id.* And one owner of a cafe told MSA that, "[b]y raising the minimum wage, we increase the amount of funds injected into the local economy. This allows others to spend more money in their local shops; shops like mine." *Id.*

Laws prohibiting wage theft are also critical to ensuring that individuals can afford to shop locally. Wage theft has become a pervasive problem in the United States. According to a 2009 study of more than 4,000 workers in low-wage industries in Chicago, Los Angeles, and New York, 26 percent of workers reported receiving less than the minimum wage in the prior week, and 76 percent reported that they did not receive compensation for overtime work. Annette Bernhardt et al., *Broken Laws, Unprotected Workers* 2 (2009). Across the United States, in fiscal year 2016, the Department of Labor's Wage and Hour Division recovered more than $266 million in back wages on behalf of 283,677 employees. U.S. Dep't of Labor, *Fiscal Year Data for WHD*, *WHD All Acts*, https://www.dol.gov/whd/statistics/statstables.htm. Moreover, employees are often unable to recover the full amount of their lost wages. Although wage theft in the United States leads to approximately $50 billion in lost wages annually, workers recover less

than 2 percent of those losses in legal proceedings. Brady Meixell & Ross Eisenbrey, Econ. Policy Inst., *An Epidemic of Wage Theft is Costing Workers Hundreds of Millions of Dollars a Year* 2 (2014). That unremedied harm inevitably prevents workers from spending at local small businesses.

In addition to wage and hour laws, laws prohibiting sex discrimination help ensure local spending because families increasingly rely on wages earned by working mothers. Nearly 40 percent of married women are their family's primary wage earner, and women contribute nearly 40 percent to the earnings of median households with a woman working outside the home. Joint Economic Committee Democratic Staff, *Gender Pay Inequality* 9-10 (2016). Because of the importance of wages earned by women, policies ensuring pay equity augment families' purchasing power. One 2014 study showed that eliminating the gender pay gap would have produced $447.6 billion in additional income for families in 2012. Heidi Hartman et al., *How Equal Pay for Working Women Would Reduce Poverty and Grow the American Economy* 1 (2014). Anti-discrimination laws also strengthen women's participation in the labor force, which further aids the broader economy. An OECD study found that increasing women's participation in the labor force by 50 percent would increase GDP growth by 2.9 percent. Organization for Economic Co-operation and Development, *Closing the Gender Gap: Act Now*, Table I.A3.1 (Dec. 17, 2012). MSA members want to ensure enforcement of pay equity laws because those laws help support their businesses. One member in Maryland

stated: "80% of my customers are women. When women aren't paid equally for equal work my business is put at a competitive disadvantage. Closing the wage gap is good for my business and my community."

C. Collective action waivers force responsible businesses to compete on a tilted playing field and threaten the viability of smaller firms.

Collective action proceedings encourage employers to abide by workplace protections. Allowing employers to force their workers to waive access to those proceedings would unfairly benefit corporate wrongdoers, disadvantage responsible firms, and threaten the viability of law-abiding businesses.

Collective action is an essential tool for achieving compliance with workplace law. First, in many cases the lack of a collective action device will mean that unlawful conduct goes entirely unchallenged. Many systemic violations of the employment laws – such as those involving disparate pay or discrimination in promotions – cause only small amounts of monetary harm to each individual victim. That is true even if the aggregate harm to all of an employer's workers is quite large. In those cases, "there is no feasible way to hold [the] defendants accountable or provide any compensation to people who actually might be worthy claimants." Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 Emory L.J. 293, 294 (2014). For individual claimants with small claims – even if there could be no

reasonable doubt as to their merit – the result would be, not "a multitude of individual suits," but no suits at all. *See id.* at 294-95.

Moreover, the size of collective proceedings creates a deterrent that individual claimants simply cannot achieve. A single collective action can include thousands of employees. For example, one recent study described "a race and gender discrimination claim brought by 15,000 employees against Boeing, a wage and hour claim brought by over 5,000 employees against IBP Inc., a working conditions suit brought by over 30,000 workers against The Gap, and a race discrimination claim brought by over 2,000 African-American employees against Coca-Cola." Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 Brook. L. Rev. 1309, 1346 (2015) (footnotes omitted).

Collective action proceedings also make it easier for employees to gather evidence to demonstrate pervasive wrongdoing. By relying on the experiences of multiple workers and by facilitating thorough discovery, collective action brings to light misdeeds that would otherwise remain hidden. *See, e.g.*, *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 115-16 (2d Cir. 2011).

And employees pursuing collective action can more easily encourage employers to institute changes to their overall workplace policies and procedures that will ensure compliance with the law. Although claimants acting alone may succeed in obtaining personal

relief, individual claimants often cannot force their employers to alter their general policies. Sternlight, *supra*, at 1350. In contrast, collective action proceedings may produce a settlement or final judgment that requires an employer to change basic workplace practices, such as policies concerning hiring, training, promotion, or compensation. To determine whether to grant injunctive relief, courts ask "whether the employer's discriminatory conduct could possibly persist in the future," *Bruso v. United Airlines, Inc.*, 239 F.3d 848, 864 (7th Cir. 2001), and multiple plaintiffs with shared experiences will have an easier time demonstrating that the employer's conduct will likely continue. For example, in 2014, some of the most significant class actions required employers to "abstain from inquiring into genetic information, make available American Sign Language interpreters for important workplace communications, adopt new interview policies, and develop and apply a new pension determination formula for all employees." Sternlight, *supra*, at 1350 n.253 (citation omitted).

When employers require their workers to waive their rights to collective action, employers enable themselves to engage in wrongdoing. As a result, law-abiding businesses find themselves at a competitive disadvantage. Every year, responsible firms lose billions of dollars to corporations that violate workplace laws. Evidence from federal contracts provides a snapshot of the significant business diverted annually to corporate wrongdoers. A report by the Senate Health, Education, Labor and Pensions Committee found that,

of the $518 billion in federal contracts awarded in fiscal year 2012, the federal government awarded $81 billion to companies that were responsible for "large violations of federal labor laws." Sen. Comm. on Health, Education, Labor and Pensions, Maj. Comm. Staff Rep., *Acting Responsibly? Federal Contractors Frequently Put Workers' Lives and Livelihoods at Risk* 1 (2013). Between 2007 and 2012, these corporations committed 1,776 separate violations of federal workplace laws, paid $196 million in fines and penalties, and were responsible for 42 workplace deaths. *Id.*; *The Blacklisting Executive Order: Rewriting Federal Labor Policies Through Executive Fiat, Joint Hearing Before the Subcomm. on Workforce Protections and the Subcomm. on Health, Employment, Labor and Pensions of the H. Comm. on Education and the Workforce*, 114th Cong. 61 (2015) (statement of Karla Walter, Assoc. Dir., Cent. Am. Progress); *see also* U.S. Gov't Accountability Off., GAO-10-1033, Assessments and Citations of Federal Labor Law Violations by Selected Federal Contractors 1 (2010). Particularly given the inherent vulnerabilities that small firms face, the federal government should not "bend the marketplace" to promote corporate wrongdoers. *See* Stacy Mitchell, *Testimony to Congress: Overhaul Federal Policy to Support Strong Local Economies*, Institute for Local Self Reliance (Apr. 16, 2015), https://ilsr.org/testimony-congress-overhaul-federal-policy/#_ftnref.

In addition to losing contracts to corporate wrongdoers, responsible businesses must subsidize employers that flout their corporate responsibilities. According to

the DOL, in 2010, "minimum wage violations in California reduced payroll taxes by $167 million," and minimum wage violations in California and New York alone "resulted in an estimated $113 million in lost federal income taxes." U.S. Dep't of Labor, *The Social and Economic Effects of Wage Violations: Estimates for California and New York by Eastern Research Group Inc.* 4 (2014). Similarly, the Internal Revenue Service concluded that corporations underreported and underpaid $41 billion in corporate income tax between 2008 and 2010. U.S. Internal Revenue Service, *Tax Gap Estimates for Tax Years 2008-2010*, at 4 (Apr. 2016). When corporations fail to satisfy their legal responsibilities, law-abiding firms must pay more. As the Illinois Department of Labor explains, corporate non-compliance with employment laws requires that responsible businesses pay "higher unemployment insurance contributions, higher workers' compensation premiums, and higher taxes." Illinois Department of Labor, *Employer Miscalculation of Workers*, https://www.illinois.gov/idol/Employees/Pages/Employer-Misclassification-of-Workers.aspx.

The problem is not simply one of fairness. By giving law-breaking firms a competitive advantage, collective action waivers encourage previously responsible employers to skirt the law themselves. Employers who violate labor protections may in the short term lower their costs, and thus the prices they charge their customers, thereby undercutting their competitors. To remain afloat, even those employers who want to comply with the law – and believe it is in their long-term

interest to do so – face pressure to sink to the level of less responsible businesses. MSA's members have experienced this dynamic firsthand. Sierra Dietz owns a gift store chain in Maine; she stated, "I care about my employees and I wish I could pay them more, but I have to compete with big box stores that pay poverty wages." *Shop Your Values*, *supra*. Similarly, Gloria Vargas, who owns a restaurant in Oregon, said, "I want to pay good wages and provide basic benefits like paid sick days, but in order for me to do that, my competitors, like the big chain restaurants, need to also." *Shop Your Values*, *supra*. *Amici* and their members want to maintain positive workplace environments in order to motivate their workers and to reduce long-term costs, but competition from corporate wrongdoers undercuts the benefits and protections that they can provide to their workers.

But the harms are more significant even than the systemic undermining of legal obligations. As we have shown, *see* pp. 4-7, *supra*, many small businesses cannot survive a race to the bottom. To flourish, they must attract and retain a productive labor force; doing so requires careful compliance with employment laws. If short-term competitive pressures force these firms to give up their high-road stance, many will simply not be viable.

This case thus presents an issue of great importance to *Amici*, their members, and other responsible businesses. Those firms rely on worker protections as part of their commitment to remain law-abiding,

profitable firms. If the Court permits employers to require their workers to waive their right to collective action, that decision will gravely affect responsible businesses overall, and small businesses in particular.

II. ALLOWING EMPLOYEES TO EXERCISE THEIR STATUTORILY PROTECTED COLLECTIVE ACTION RIGHTS WILL NOT SACRIFICE THE INFORMALITY, COST SAVINGS, OR EXPEDITION OF TRADITIONAL ARBITRATION.

The employers in these consolidated cases contend that collective adjudication of employees' claims necessarily destroys the informality, cost savings, and speed traditionally attributed to arbitration. They further argue that class procedures are incompatible with the arbitral form. They are wrong. Class arbitration is efficient, informal, and expeditious, with a history going back a century. *See, e.g.*, Imre S. Szalai, *Aggregate Dispute Resolution: Class & Labor Arbitration*, 13 Harv. Negot. L. Rev. 399 (2008) (tracing the development of representative relief in arbitration from the National War Labor Board during World War I through present day class arbitration). Employees, employers, and society save resources by avoiding multiple, duplicative adjudications and by fostering the development of innovative procedures. Finally, class procedures minimize workplace disruption and protect employee choice. Under the Board's rule, employees can take advantage of class procedures that reduce acrimony and

foster anonymity, but they also remain free to choose individual adjudication of their claims.

A. Class arbitration is informal and flexible.

Class arbitration is informal and flexible. Subject to limited constraints, the parties may contract for procedures that are suited both to their needs and to the particular claims presented to the tribunal. *See, e.g.*, Thomas E. Carbonneau, The Law & Practice of Arbitration 6-14 (4th ed. 2012); S.I. Strong, *Does Class Arbitration "Change the Nature" of Arbitration?*, 17 Harv. Negot. L. Rev. 201, 255-57 (2012). Where the parties cannot agree on specific rules, the arbitrator may fashion rules suited to the parties, dispute, and substantive law at issue. *See* W. Mark Weidemaier, *Arbitration and the Individuation Critique*, 49 Ariz. L. Rev. 69, 97 n.159 (2007).

The challengers to the NLRB's rule contend that reduced formalities in individualized arbitration increase access to justice and encourage employees to bring claims. To the contrary, empirical studies suggest that such informalities actually decrease access to justice in the vast majority of cases. Few employees subject to arbitration agreements bring small – or indeed, any – claims. When they do bring claims, regardless of size, they achieve systematically worse results against employers. *See, e.g.*, David Horton & Andrea Cann Chandrasekher, *Employment Arbitration After the Revolution*, 65 DePaul L. Rev. 457, 462 (2016). For example, individual employees who avail themselves of

telephonic hearings – which are often touted as a uniquely informal device that facilitates access to arbitration – have win rates that are significantly lower than those who do not take advantage of the informal procedure. *Id.* at 492. And although such informal procedures ostensibly allow employees to present claims without the assistance of lawyers, unrepresented employees prevail just 7% of the time. When represented, their success rate nearly triples: Employees represented by lawyers prevail between 19% and 28% of the time. *Id.* at 484; *see also* Alexander Colvin & Mark D. Gough, *Individual Employment Rights Arbitration in the United States: Actors & Outcomes*, 68 Indus. & Lab. Rel. Rev. 1019, 1037 (2015) (observing that self-represented employees have lower success rates, lower damages awards, and greater susceptibility to repeat player effects).

Class arbitration eliminates such systemic disadvantages while preserving procedural flexibility. An employee who chooses to bring a class arbitration obtains access to the "equipage that a group can provide," most notably in the form of counsel. *See* Judith Resnik, *Fairness in Numbers*, 125 Harv. L. Rev. 78, 135 (2011). The key flexibilities of bilateral arbitration remain available: the Rules of Evidence need not apply; there is no universal requirement of extensive and intrusive discovery; the parties and their counsel remain free to appear telephonically; and the arbitrator retains the discretion to "conduct the proceedings with a view toward expediting the resolution of the dispute," so long as he does not alter the burdens of proof or production,

see Employment Arbitration Rules, R. 28 (Am. Arbitration Ass'n 2009). Such a "flexible approach to adjudication is less destructive of business relationships and allows the parties to continue to do business once the dispute has been resolved." Carbonneau, *supra*, at 4.

Flexibility characterizes even the class procedures themselves. Class certification and other class procedures, even in arbitration, must necessarily observe some formalities to protect and to bind absent class members. But these procedures are more adaptable in arbitration than in litigation. For example, class arbitration may utilize an opt out procedure, as in Federal Rule of Civil Procedure 23 and the AAA class rules, *see* Supplementary Rules for Class Arbitrations R. 6 (Am. Arbitration Ass'n 2003); or it may utilize an opt in procedure, similar to that available under the Fair Labor Standards Act, 29 U.S.C. § 216(b) (2016), and found in the JAMS rules, *see* Class Action Procedures R. 3 (JAMS 2009); or, in smaller cases, an arbitrator may use simple joinder, which is available in many different systems. Because of such flexibility, class arbitration allows for procedures tailored to the claims and the claimants. The result is to allow expeditious processing of claims while providing fair process.

Finally, class arbitration allows for innovation and development of new and efficient procedures. "There is a flexibility that is possible in connection with private class arbitration that may not be possible in connection with traditional class actions[.]" Szalai, *supra*, at 477 (2008); *see also id.* at 474-79 (identifying potential avenues for development, including the use of electronic

resolution systems and a multiple step process incorporating other methods of dispute resolution prior to class certification).

B. Class arbitration is efficient and conserves the resources of employers, employees, and society.

Not only does class arbitration preserve flexibility; it also serves the goal of efficiency. Accepted rules governing class arbitration permit such proceedings only if they would be more efficient than individualized arbitration. *See, e.g.*, Supplementary Rules for Class Arbitrations R. 4 (Am. Arbitration Ass'n 2003); Class Action Procedures R. 3 (JAMS 2009) (requiring arbitrators to follow Fed. R. Civ. P. 23(a) and (b)); Fed. R. Civ. P. 23; *see also* Adam Raviv, *Too Darn Bad: How the Supreme Court's Class Arbitration Jurisprudence Has Undermined Arbitration*, 6 Y.B. on Arb. & Mediation 220, 229 (2014) (observing the relationship between class arbitration and Rule 23 and suggesting class arbitration may be "extra-efficient").

"[C]lass arbitration increases the efficiency and reduces the costs of the proceeding, as companies can avoid having to arbitrate numerous single disputes and claimants are offered the opportunity to bring a claim when the individual amounts do not justify initiating an individual proceeding." Francisco Blavi & Gonzalo Vial, *Class Actions in International Commercial Arbitration*, 39 Fordham Int'l L.J. 791, 826-27 (2014). Although the total costs of class arbitration

are higher than those in a single individual arbitration, they are almost certainly lower than the costs employers and employees incur by filing, pursuing, and defending numerous individual claims. As one practitioner has observed:

> [t]here is little doubt that filing dozens, hundreds, or thousands of individual arbitrations against the same company would be less efficient than a single class action. Indeed, most arbitral institutions may not even have the resources to handle such an endeavor, particularly if the underlying contract * * * does not allow any kind of aggregation, but rather requires separate written submissions, separate adjudicators, separate testimony, and separate hearings.

Raviv, *supra*, at 230; *see also* Miller, *supra*, at 326-27 ("A lack of effective collective dispute resolution formats will disadvantage all those who participate in the judicial (or arbitration) process.").

When allocated across the class, the per-claimant cost to file is significantly less than would be the case in individual arbitration. Such thrift enables individuals with smaller claims to pursue a remedy. *See id.* at 294-295; *see also* Carole J. Buckner, *Toward a Pure Arbitral Paradigm of Classwide Arbitration: Arbitral Power & Federal Preemption*, 82 Denv. U. L. Rev. 301, 349 (2004) (observing that a pure arbitral model of classwide arbitration corrects an imbalance of power between the parties by allowing plaintiffs "to join

collectively to seek redress[, which] is especially significant where the claims involve small dollar amounts, rendering it uneconomical for consumers or employees to pursue individual arbitrations").

In addition, class arbitration enables employees in the class to continue in their employment free from fear of retaliation. Just as the named claimant receives the support, resources, and counsel necessary to present the claims, she provides unnamed class claimants with anonymity and the prospect of representative relief. *See* Note, *Subverting Workers' Rights*, 67 Hastings L.J. 881, 888–892 (2016); Resnik, *Fairness in Numbers*, *supra*, at 135. Such representative relief, combined with the protection of anonymity, allows the vast majority of the claims in a class to be resolved in a way that is even less adversarial than bilateral arbitration, for there is no direct confrontation between employer and employee before a tribunal. *Cf.* Carbonneau, Practice of Arbitration, *supra*, at 2-3.

Invocation of the class procedure is more cost-effective not only for employees, but also for employers. Class arbitration procedures allow employers to avoid duplicative litigation and inconsistent results, enabling them to structure their affairs with certainty by relying on the uniform resolution of common or recurring questions of law or fact. *See* Carbonneau, *supra*, at 62-63; *cf.* Miller, *Aggregate Litigation*, *supra*, at 313 (suggesting that aggregation of claims may produce a binding effect for all potential claimants, prevent systemic inefficiencies, avoid inconsistent outcomes, and, crucially for defendants, promote "global peace").

The challengers' arguments regarding the time-consuming nature of class proceedings are similarly without merit. The flexibility of class arbitration ensures speedy adjudication of claims. Indeed, where claims are particularly time-sensitive, parties may agree to expedited or "fast-track" arbitration, which limits the length of arbitral proceedings and requires the arbitrators to render an award within a specific time. If implemented selectively, such a technique could result in even more expeditious class arbitrations. *See* Carbonneau, Practice of Arbitration, *supra*, at 70-71.

C. Class arbitration preserves choice and promotes workplace welfare.

Crucially, employees remain free to pursue their claims in individual arbitration, either by filing for bilateral arbitration in the first instance or by opting out of a proposed class. In this way, employees with small, widely shared claims obtain access to a cost-effective means of redress, while those with individualized claims or damages that are not amenable to class treatment (or, indeed, those who choose not to participate in class proceedings for any reason at all) remain free to proceed individually or not to pursue their claims at all. *See* Strong, *supra*, at 234 ("Regardless of the reason for declining to join the class, choosing not to participate preserves both the individual party's substantive legal claim and the right to name an arbitrator in any future legal dispute.").

In the employment context, the availability of the class mechanism is particularly important because it is less disruptive of the workplace and allows employees to calibrate their level of involvement in the proceedings. Minimizing disruptions is particularly important for small businesses, because they are acutely affected by turnover costs. *See* pp. 4-6, *supra*.

For all of these reasons, collective action waivers impede efficiency and access to justice. To the extent that these waivers produce gains for *anyone*, that is only because the benefits of mandatory individual adjudication flow disproportionately to large, law-evading actors, allowing them to escape liability at the expense of employees and law-abiding small businesses.

CONCLUSION

The judgments in Nos. 16-285 and 16-300 should be affirmed, and the judgment in No. 16-307 should be reversed.

Respectfully submitted,

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