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No. 16-60375

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**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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**ADECCO USA, INC.,**

*Petitioner and Cross-Respondent,*

v.

**NATIONAL LABOR RELATIONS BOARD,**

*Respondent and Cross-Petitioner.*

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On Petition for Review of Order and Decision of the  
National Labor Relations Board  
No. 32-CA-142303

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**ADECCO'S MOTION FOR ORDER  
SUMMARILY GRANTING ITS PETITION FOR REVIEW  
IN LIGHT OF SUPREME COURT'S DECISION IN *EPIC***

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In light of the U.S. Supreme Court’s decision in *Epic Systems Corp. v. Lewis* (“*Epic*”),<sup>1</sup> Petitioner and Cross-Respondent Adecco USA, Inc. respectfully moves for an order summarily granting its Petition for Review and denying the National Labor Relations Board’s (“Board”) cross-petition for enforcement. *Epic* held that the National Labor Relations Act (“NLRA”) does not preclude enforcement of employer-employee arbitration agreements, like Adecco’s, that require individualized proceedings and prohibit class/collective actions.

The Board found that Adecco’s agreement violates the NLRA for two reasons: (i) it prohibited class or collective actions; and (ii) employees *could* read the agreement as restricting their right to file unfair labor practice (“ULP”) charges, even though the employee who challenged Adecco’s agreement in this case did file a ULP charge with the Board. Thus, as the Board’s own decision makes clear, the real issue below was Adecco’s “*maintenance* of a mandatory arbitration agreement,” which explains why the Board’s remedy was that Adecco had to “rescind” or “revise” the agreement, inform all its employees that it did so, and alert the court in which the charging party’s lawsuit was pending that Adecco would no longer seek to enforce the agreement. The lesson of *Epic*, however, is that the NLRA does not give the Board authority to undo or modify the terms of an otherwise enforceable arbitration agreement.

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<sup>1</sup> A copy of the May 21, 2018 slip opinion is attached as Exhibit A. Citations to *Epic* herein are to the “Slip op.”

Because *neither* of the Board's findings survives *Epic*, there's nothing left to do except grant Adecco's Petition in its entirety and end this case. Accordingly, the Court should grant this Motion and deny the Board's motion for a partial remand on whether Adecco's agreement restricts employees' right to file ULP charges.

#### **FIFTH CIRCUIT RULE 27.4 CERTIFICATION**

Counsel for Adecco contacted Board counsel and states that (i) the Board does not oppose summary review of its finding that Adecco violated the NLRA by maintaining and/or enforcing an arbitration agreement requiring that employees waive the right to maintain a class or collective action, but (ii) the Board does oppose review, and, as explained in the Board's own motion, seeks a remand of its finding that Adecco violated the NLRA by maintaining an arbitration agreement that employees reasonably would believe bars or restricts the right to file ULP charges.

#### **BACKGROUND**

This case arose when Nanavati, a former Adecco employee, brought a wage-and-hour class action in federal district court. Adecco moved to dismiss based on its arbitration agreement with Nanavati, which required individualized proceedings before an arbitrator. Nanavati then filed a ULP charge with the Board, alleging that Adecco's agreement was unlawful. Nanavati's ULP charge did not allege that Adecco's agreement interfered with his right to file ULP charges (ROA.18), and

there's no evidence (and the Board cited none) that the agreement did interfere with his right to file ULP charges.

Indeed, Adecco arbitration agreement specifically included an exception for proceedings before certain agencies, including the NLRB:

*Regardless of any other terms of this ... Agreement, claims may be brought before an administrative agency if applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate. Such administrative claims may include without limitations claims or charges brought before the ... National Labor Relations Board (www.nlr.gov).....*

(ROA.104 (emphasis added).) Nevertheless, in addition to finding that Adecco violated the NLRA by “[m]aintaining and/or enforcing a mandatory arbitration agreement” with a class action waiver, the Board similarly found Adecco violated the NLRA by “[m]aintaining a mandatory arbitration agreement” that employees reasonably would believe bars or restricts their right to file ULP charges.<sup>2</sup>

(ROA.112.) ***This additional finding also targeted the class action waiver:*** as the Board put it, the agreement “requires employees to bring claims only in their individual capacity,” which, according to the Board, “reasonably conveys to

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<sup>2</sup> The “and/or enforcing” clause was included because the Board found that Adecco unlawfully enforced its agreement by filing a motion to compel arbitration in Nanavati’s federal district court action.

employees that ... they must forfeit their ... right to file and pursue administrative charges with the Board.” (ROA.111.)<sup>3</sup>

Adecco petitioned for review of the Board’s decision. The Board cross-petitioned for enforcement. Merits briefing in this Court was completed on November 22, 2016. On January 20, 2017, this Court placed this case in abeyance pending resolution of *NLRB v. Murphy Oil USA*, 808 F.3d 1013 (5th Cir. 2015), on which the Supreme Court also granted certiorari and consolidated with *Epic*.

On May 21, 2018, the Supreme Court issued its decision in *Epic*. On May 30, 2018, the Board moved this Court to lift its stay of proceedings, summarily grant Adecco’s Petition in part, and remand the remainder of the case to the Board. (Doc. #514491033.)

The Board’s motion concedes that *Epic* bars enforcement of its finding that Adecco violated the NLRA by maintaining an arbitration agreement with a class action waiver. However, as to the Board’s additional finding that the same agreement violated the NLRA because it interfered with the right to file ULP charges, the Board seeks a remand so that it can reconsider that issue in light of *The Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017), which overruled *Lutheran Heritage*, 343 NLRB 646 (2004), on which that additional finding relied.

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<sup>3</sup> As the Board explained in its Answering Brief (at p.14), its additional finding regarding the filing of ULP charges “*follows from* the Agreement’s broad requirement that employees arbitrate ‘any and all disputes, claims or controversies’ arising out of their employment.” (Emphasis added.)

Adecco opposes the Board’s motion because *Epic* disposes of the Board’s entire attack on Adecco’s agreement,<sup>4</sup> not just its argument that the agreement is unlawful because of its class action waiver. If, however, this Court disagrees and denies this Motion, Adecco agrees with the Board that the proper course is to remand the Board’s additional finding (regarding ULP charges) for reconsideration in light of *Boeing*.

### ARGUMENT

Nanavati did not—and could not—allege that his access to the Board was restricted: he filed the ULP charge that gave rise to this case. Thus, the Board’s finding in that regard was just belt-and-suspenders to its finding regarding the class action waiver. It was, to put it simply, a means to an (unlawful) end: force Adecco to rescind or revise its arbitration agreement. That is precisely what *Epic* says the Board cannot do. Under *Epic*, an employer’s arbitration agreement is valid and enforceable, *as written*, without regard to how the Board interprets the NLRA.

**A. After *Epic*, the Board cannot use the NLRA to order an employer to rescind its arbitration agreement.**

*Epic* held that “the savings clause” in the Federal Arbitration Act “recognizes only defenses that apply to ‘any’ contract.” Slip op. 7. Thus, the Supreme Court rejected the employees’ argument in *Epic* that “the NLRA is a

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<sup>4</sup> On June 11, 2018, Adecco separately filed a Response to the Board’s motion, incorporating the arguments herein that this Court should grant its Petition in its entirety.

‘ground’ that ‘exists at law ... for the revocation’ of their arbitration agreements.” *Id.* at 6 (“[t]he problem with this line of argument is fundamental”). “The clause permits agreements to arbitrate to be invalidated by generally applicable defenses, such as fraud, duress, or unconscionability.” Slip op. 7 (quotations omitted). The clause “offers no refuge for defenses,” like the Board’s arguments in this case, “that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” *Id.*

Like the employees in *Epic*, the Board does not allege that Adecco’s agreement “w[as] extracted, say, by an act of fraud or duress or in some other unconscionable way that would render any contract unenforceable.” *Id.* Instead, the Board objected to Adecco’s agreement, just like the employees in *Epic* objected to theirs, “precisely because they require individualized arbitration proceedings instead of class or collective ones.” *Id.*

In other words, the Board’s charge that Adecco must rescind or revise its arbitration agreement is premised solely on an employee’s NLRA right to engage in concerted activity, whether by filing a class or collective action or filing (hypothetically) a ULP charge. Because they are specific to the NLRA and not a general contract defense that applies to *any* arbitration agreement, the Board’s case is foreclosed by *Epic*. *Id.* (“savings clause does not save defenses that target arbitration either by name *or by more subtle methods*” (emphasis added)).

**B. *Epic* confirmed that the Board lacks authority to dictate or modify the terms of arbitration agreements.**

Ultimately, the question in *Epic* was “whether courts must enforce particular arbitration agreements according to their terms.” Slip op. 24. “And it’s the Arbitration Act,” the Supreme Court concluded, “that speaks directly to the enforceability of arbitration agreements, while the NLRA *doesn’t mention arbitration at all.*” *Id.* (emphasis added). As the Supreme Court put it, “At the end of our encounter with the Arbitration Act, then, it appears just as it did at the beginning: a congressional command requiring us to enforce, *not override*, the terms of the arbitration agreements before us.” Slip op. 9 (emphasis added).

After *Epic*, the Board has no authority to require Adecco (or any other employer) to “revise” the class action waiver language in its arbitration agreement. Slip op. 25 (“Congress has instructed that arbitration agreements like those before us must be enforced *as written.*” (emphasis added)). A class action waiver must be enforced according to its terms in the absence of a “contrary congressional command” in the federal statute at issue. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013). Put another way, the Supreme Court’s “emphatic federal policy in favor” of arbitration does not permit agencies such as the Board to regulate an agreement’s contents, unless the statute (here, the NLRA) expressly permits the agency to do so. *KPMG, LLP v. Cocchi*, 565 U.S. 18, 21 (2011). *Epic* made clear that the NLRA contains no such authority.

Thus, just as the Board cannot insist that employers remove class action waivers from their arbitration agreements, it cannot insist that employers add or subtract language expounding on the employee's right to file ULP charges:

It's easy, too, to see why the 'reconciliation' of distinct statutory regimes is a matter for the courts, not agencies. An agency eager to advance its statutory mission, but without any particular interest in or expertise with a second statute [the Arbitration Act], might (as here) seek to diminish the second statute's scope in favor of a more expansive interpretation of its own—*effectively bootstrapping itself into an area in which it has no jurisdiction.*

Slip op. 20 (quotations & alternation omitted; emphasis added). As Adecco explained in its merits brief to this Court, if each and every federal and state agency insisted that employees add to arbitration agreements language about employee rights to pursue claims or charges in that agency's realm, the agreements would become unwieldy and needlessly complicated despite the parties' intent to resolve their disputes in an efficient manner. This result flies in the face of the Arbitration Act's mandate. Slip op. 7-8 (noting that "one of arbitration's fundamental attributes" is its "speed and simplicity and inexpensiveness").

In the end, any effort by the Board to enforce its finding that Adecco must rescind or revise its agreement because the Board believes it restricts the right to file ULP charges—despite the fact that the agreement says the opposite—is nothing more than a clever end-around *Epic*. But as *Epic* cautioned:

Just as judicial antagonism toward arbitration before the Arbitration Act's enactment manifested itself in a great variety of devices and

formulas declaration arbitration against public policy ... *we must be alert to new devices and formulas that would achieve much the same result today.*

Slip op. 9 (emphasis added). Allowing this case to continue would only feed the Board's craving for creative ways to circumvent employee arbitration agreements. 362 NLRB No. 189, 2015 WL 5113231, at 16 (Johnson, dissenting) ("This war ... between the [NLRA] and arbitration ... should have never started, and it should have stopped right here in this opinion.").

Of course, Adecco is not contending that it has the right to restrict an employee's access to the Board. If, in a future case, an employee actually proves that Adecco interfered with his or her right to file ULP charges, the Board (and this Court) can take appropriate action to remedy the resulting damage. But that didn't happen in *this* case. Regardless, such a finding would not give the Board authority to change the terms of an arbitration agreement that is otherwise lawful and enforceable under the Arbitration Act. It shouldn't take another Supreme Court opinion squelching yet another collateral attack on the Arbitration Act for the Board to understand that.

#### CONCLUSION

The Court should grant Adecco's Motion for an order summarily granting its Petition for Review in its entirety.

DATED this 11th day of June, 2018.

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**CERTIFICATE OF COMPLIANCE**

Pursuant to FRAP 27(d)(2)(A) and 32(g)(1), I certify that the foregoing Motion contains 2,149 words of proportionally-spaced, 14-point type, and that the word processing system used was Microsoft Word 2010.

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**CERTIFICATE OF SERVICE**

I certify that on June 11, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the Court's CM/ECF system. I further certify that counsel for parties listed below are registered users who have been served through the CM/ECF system.

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I further certify that on June 11, 2018, I mailed a copy of the foregoing via First Class U.S. mail, to:

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