No. 16-689

In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

24 HOUR FITNESS USA, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether arbitration agreements with individual employees that bar them from pursuing work-related claims on a collective or class basis in any forum are prohibited as an unfair labor practice under 29 U.S.C. 158(a)(1), because they limit the employees' right under the National Labor Relations Act to engage in "concerted activities" in pursuit of their "mutual aid or protection," 29 U.S.C. 157, and are therefore unenforceable under the saving clause of the Federal Arbitration Act, 9 U.S.C. 2.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Alton J. Sanders was the charging party before the National Labor Relations Board and an intervenor in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

The National Labor Relations Board respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals granting summary reversal of the National Labor Relations Board's decision (App., *infra*, 1a) is not published in the *Federal Reporter* but is available at 2016 WL 3668038. The decision and order of the Board (App., *infra*, 2a-60a) are reported at 363 N.L.R.B. No. 84.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 2016. On September 21, 2016, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including October 26, 2016. On October 19, 2016, Justice Thomas further

extended the time to November 23, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in the appendix to this petition. App., *infra*, 77a-80a.

STATEMENT

1. a. The National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," and "to refrain from any or all of such activities." 29 U.S.C. 157. This Court has described the rights under Section 157 as including employees' efforts "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship," including "through resort to administrative and judicial forums." *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 565-566 (1978). An employer that "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in section 157" commits an unfair labor practice. 29 U.S.C. 158(a)(1). The National Labor Relations Board (Board) "is empowered * * * to prevent any person from engaging in any unfair labor practice * * * affecting commerce." 29 U.S.C. 160(a).

b. The Federal Arbitration Act (FAA), 9 U.S.C. 1 *et seq.*, provides that any written contract "evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction * * * shall be valid, irrevocable, and en-

forceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2.

c. In decisions issued in 2012 and 2014, the Board held that an employer could not, as a condition of employment, require its employees to limit the resolution of employment-related claims to individual arbitration and thereby prevent them from pursuing class or collective actions about such claims in any forum. See *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012), enforcement denied in relevant part, 737 F.3d 344 (5th Cir. 2013); *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72 (2014), enforcement denied in relevant part, 808 F.3d 1013 (5th Cir. 2015), petition for cert. pending, No. 16-307 (filed Sept. 9, 2016).

In both of those cases, the Fifth Circuit denied enforcement of the Board's orders in relevant part, holding that the NLRA does not override the FAA and that the use of class-action or collective procedures is not a substantive right under the NLRA. See App., *infra*, 62a-76a (reprinting the Fifth Circuit's decision in *Murphy Oil*); *id.* at 62a-63a, 65a-66a, 68a-69a (describing, and treating as controlling, the Fifth Circuit's prior holding in *D.R. Horton*).

2. The material facts in this case are similar to those in *Murphy Oil*. Respondent 24 Hour Fitness USA, Inc. (respondent), required its employees, nationwide, to agree to an Arbitration of Disputes Policy. That policy provided, as relevant here, that employment-related disputes would be submitted exclusively to binding arbitration and that "there will be no right or authority for any dispute to be brought, heard or arbitrated as a class action (including without limitation opt out class actions or opt in collective class actions)." App., *infra*, 27a; see *id.* at 23a-32a. Unlike in *Murphy*

Oil, the policy allowed employees to follow a procedure to opt out of mandatory arbitration. *Id.* at 23a-32a. Respondent sought to enforce the policy's class-action ban in several court cases filed against it by its employees or former employees. *Id.* at 33a-38a.

a. In April 2012, on the basis of an unfair-labor-practice charge filed by Alton J. Sanders, the Board's Acting General Counsel issued an administrative complaint alleging that respondent's arbitration policy constituted an unfair labor practice in violation of Section 158(a)(1) because it interfered with its employees' Section 157 right to engage in concerted legal activity.[1] App., *infra*, 19a-20a. In December 2015, the Board held that respondent's class-action ban is invalid in light of the Board's own decisions in *D.R. Horton* and *Murphy Oil*, as applied to cover agreements with opt-out procedures in *On Assignment Staffing Services, Inc.*, 362 N.L.R.B. No. 189 (2015), enforcement denied in relevant part, No. 15-60642, 2016 WL 3685206 (5th Cir. June 6, 2016). App., *infra*, 2a-5a.

b. As he had done in *Murphy Oil*, Member Miscimarra dissented, adhering to his view that the Board's decision in *Murphy Oil* was incorrect, and also concluding that it should not be extended to agreements that include an opt-out procedure. App., *infra*, 10a-15a.

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[1] In *NLRB* v. *SW General, Inc.*, No. 15-1251 (argued Nov. 7, 2016), the Court is currently considering whether the Acting General Counsel's service in that capacity was consistent with the Federal Vacancies Reform Act of 1988 (FVRA), 5 U.S.C. 3345 *et seq.* Respondent in this case has not objected to the Board's unfair-labor-practice proceeding on FVRA grounds.

3. Respondent elected to file its petition for review of the Board's decision in the Fifth Circuit. See 29 U.S.C. 160(f). The Board moved to stay proceedings pending resolution of its petition for rehearing en banc in *Murphy Oil*. On January 25, 2016, the court of appeals granted the Board's motion. App., *infra*, 61a. On June 8, 2016, after the court had denied rehearing in *Murphy Oil*, the Board moved for a further stay of this case pending the filing and resolution of any petition for a writ of certiorari in *Murphy Oil*. On June 13, 2016, the court denied that motion.

On June 20, 2016, respondent filed a motion for summary disposition of its petition for review and reversal of the Board's decision in light of the court of appeals' decisions in *D.R. Horton* and *Murphy Oil*. On June 27, 2016, the court of appeals granted that motion. App., *infra*, 1a.

4. On September 9, 2016, this Office filed, on behalf of the Board, a petition for a writ of certiorari to review the Fifth Circuit's decision in *Murphy Oil*. See *NLRB* v. *Murphy Oil USA, Inc.*, No. 16-307. As that petition explains (at 19-24), there is an acknowledged conflict in the courts of appeals about the invalidity of arbitration agreements that would preclude employees from pursuing class or collective actions that assert employment-related claims. The respondent in *Murphy Oil* agrees with the Fifth Circuit's decision on the merits but supports the Board's petition for a writ of certiorari and agrees that "the Board's petition provides an appropriate vehicle for the Court to resolve the issue that has caused the courts of appeals to issue conflicting opinions." Br. for Resp. in Support of Granting Pet. at 11, *Murphy Oil*, *supra* (No. 16-307).

Three additional petitions for writs of certiorari—arising from other cases in the circuit split—are also pending in this Court. The Seventh and Ninth Circuits have expressly rejected the Fifth Circuit's analysis in *Murphy Oil*, and the employers in those cases are seeking this Court's review. See *Morris* v. *Ernst & Young, LLP*, 834 F.3d 975, 990 n.16 (9th Cir. 2016), petition for cert. pending, No. 16-300 (filed Sept. 8, 2016); *Lewis* v. *Epic Sys. Corp.*, 823 F.3d 1147, 1157 & n.† (7th Cir. 2016), petition for cert. pending, No. 16-285 (filed Sept. 2, 2016). Meanwhile, the Second Circuit has reaffirmed an earlier decision that declined to follow the Board's approach in *D.R. Horton*, and the employees in that case are seeking this Court's review. See *Patterson* v. *Raymours Furniture Co.*, No. 15-2820, 2016 WL 4598542, at *2-*3 (Sept. 14, 2016), petition for cert. pending, No. 16-388 (filed Sept. 22, 2016).[2]

REASONS FOR GRANTING THE PETITION

In this case, the court of appeals granted a motion for summary reversal of the Board's decision in light of its earlier decisions in *D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.* v. *NLRB*, 808 F.3d 1013 (5th Cir. 2015), petition for cert. pending, No. 16-307 (filed Sept. 9, 2016). App., *infra*, 1a. There is a clear conflict in the courts of appeals regarding the validity, in light of the NLRA, of arbitration agreements that would preclude employees from pursuing class or collective actions that

[2] After *Murphy Oil*, the Eighth Circuit also reaffirmed an earlier decision rejecting the Board's position. See *Cellular Sales of Mo., LLC* v. *NLRB*, 824 F.3d 772, 776 (2016). The Board did not seek further review of that decision.

assert employment-related claims. See pp. 5-6, *supra*. The Board has already filed an unopposed petition for a writ of certiorari seeking this Court's review of the decision in *Murphy Oil*, on which the decision below relies.

The Court should hold the petition in this case pending its disposition of *Murphy Oil* and the other petitions presenting variants of the same question presented (*i.e.*, *Patterson* v. *Raymours Furniture Co.*, No. 16-388; *Ernst & Young, LLP* v. *Morris*, No. 16-300; and *Epic Systems Corp.* v. *Lewis*, No. 16-285) and then dispose of this case accordingly.[3]

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[3] The Board's decision in this case acknowledged that the ability of respondent's employees to opt out of the Arbitration of Disputes Policy presented a further question that had not been resolved in *Murphy Oil* itself. App., *infra*, 5a. Because the court of appeals did not reach that question, this Court would not typically address it in the first instance. If the Court were to grant review in one or more of the four petitions mentioned above and ultimately to agree with the Board's position in *Murphy Oil* that employees' class- or collective-action waivers are invalid, it would be appropriate to grant certiorari in this case, vacate the decision below, and remand for further proceedings to consider the additional question about the presence of an opt-out provision. See, *e.g.*, *Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430 (2012) ("[W]hen we reverse on a threshold question, we typically remand for resolution of any claims the lower courts' error prevented them from addressing.").

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of the petition for a writ of certiorari in *NLRB* v. *Murphy Oil USA, Inc.*, No. 16-307, as well as those in *Patterson* v. *Raymours Furniture Co.*, No. 16-388, *Ernst & Young, LLP* v. *Morris*, No. 16-300, and *Epic Systems Corp.* v. *Lewis*, No. 16-285, and then be disposed of as appropriate.

Respectfully submitted.

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NOVEMBER 2016

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* The Acting Solicitor General is recused in this case.