

No. 16-801

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IN THE  
**Supreme Court of the United States**

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NATIONAL LABOR RELATIONS BOARD,  
*Petitioner,*

v.

SF MARKETS, L.L.C. DBA SPROUTS FARMERS MARKET,  
*Respondent.*

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

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**RESPONDENT'S RESPONSE TO  
PETITION FOR A WRIT OF CERTIORARI**

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January 23, 2017

## **QUESTION PRESENTED**

Whether an employer may require employees, as a condition of employment or continued employment, to forego class or collective action litigation and instead resolve employment-related disputes on an individual basis in arbitration pursuant to the Federal Arbitration Act, notwithstanding the provisions of the National Labor Relations Act.

**RULE 29.6 STATEMENT**

Respondent SF Markets, L.L.C. dba Sprouts Farmers Market is the registered business name of SFM, L.L.C. in California. SFM, L.L.C. is a wholly owned subsidiary of Sprouts Farmers Market Holdings, L.L.C. Sprouts Farmers Market Holdings, L.L.C. is a wholly owned subsidiary of Sprouts Farmers Market, Inc. Sprouts Farmers Market, Inc. is a publicly traded company.

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## **RESPONDENT'S POSITION ON THE PETITION**

The question presented in this case is essentially identical to the question presented in six other cases presently pending before the Court. The Court has granted *certiorari* in three of those cases – *Epic Sys. Corp. v. Lewis*, No. 16-285; *Ernst & Young LLP, et al. v. Morris, et al.*, No. 16-300; and *NLRB v. Murphy Oil USA, Inc., et al.*, No. 16-307 (petitions for cert. granted and consolidated Jan. 13, 2017) (collectively, the “Class Waiver Cases”) – and petitions for a writ of *certiorari* are pending in the other three. *Patterson, et al. v. Raymours Furniture Co., Inc.*, No. 16-388 (petition for cert. filed Sept. 22, 2016); *NLRB v. 24 Hour Fitness USA, Inc., et al.*, No. 16-689 (petition for cert. filed Nov. 23, 2016); and *NLRB v. PJ Cheese, Inc.*, No. 16-800 (petition for cert. filed Dec. 22, 2016). At issue in each of these cases is whether an employer’s requirement that, as a condition of employment or continued employment, employees forego class and collective action litigation and instead agree to resolve most employment-related disputes on an individual basis in arbitration is enforceable under the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1, *et seq.* or whether that requirement constitutes an unfair labor practice under Section 8(a)(1) of the National Labor Relations Act (“NLRA”), 29 U.S.C. § 158(a)(1), and thereby renders the parties’ agreement to arbitrate invalid and unenforceable. Because of the identity of issues in this case to those in the Class Waiver Cases, Petitioner requests that the Court “hold the petition in this case pending its disposition in *Murphy Oil* and the other petitions presenting variants of the same question presented . . . and then dispose of this case accordingly.” *Petition*, at 7-8.

Respondent asserts that the United States Court of Appeals for the Fifth Circuit correctly granted Respondent's motion for summary disposition, and in so doing, properly granted its petition for review and denied Petitioner's application for enforcement of its underlying administrative decision and order. The court of appeals' decision to grant Respondent summary disposition was properly based on its previous 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), which each held that the NLRA does not prevent enforcement of arbitration agreements between employers and employees pursuant to which the parties agree to resolve most employment-related disputes on an individual basis, and which preclude the use of class or collective action litigation procedures. In response to Respondent's motion for summary disposition before the court of appeals, Petitioner conceded that the issue in this case is identical to that presented in *Murphy Oil*. Based upon that admission, the court of appeals correctly applied its "well-settled Fifth Circuit rule of orderliness that one panel of [the] court may not overturn another panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our en banc court" to grant Respondent summary disposition. *Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375 (5th Cir. 2008).

Although Respondent agrees with the court of appeals' decision below granting summary disposition in its favor, Respondent does not oppose Petitioner's request that the Court hold its petition for a writ of *certiorari* pending the Court's decision in the Class



Waiver Cases.<sup>1</sup> That decision will resolve the substantial split in the circuits that has emerged on the issue presented in this case and the Class Waiver Cases. As described in the Petition (at 6-7), the Second, Fifth,

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<sup>1</sup> Notwithstanding Respondent's agreement with Petitioner's request that the Court hold its petition for a writ of *certiorari* in this case, Respondent does disagree with the position taken by Petitioner in footnote 1 of the Petition. That footnote references Respondent's objection, maintained from the inception of administrative proceedings in this case, to the underlying unfair labor practice complaint issued by Petitioner, based on the Federal Vacancies Reform Act of 1998, 5 U.S.C. § 3345, *et seq.* ("FVRA"), and the arguments related thereto which are at issue in *NLRB v. SW General, Inc.*, No. 15-1251 (argued Nov. 7, 2016), presently pending before the Court. Respondent disagrees with Petitioner's assertion, both in its administrative decision below and in the Petition, that Respondent waived any arguments related to the application of the FVRA to this proceeding. To the extent Petitioner notes that "Respondent did not raise an FVRA issue in its motion for summary disposition in the court of appeals" in the proceedings below (*Petition*, at 4, n. 1), Respondent submits that raising any FVRA issue below was unnecessary in light of Petitioner's admission before the court of appeals that the issues in this case are identical to those resolved by that court in *Murphy Oil* and the Fifth Circuit's rule of orderliness, which prevented any deviation from that controlling precedent absent a change in the law or an *en banc* ruling from that court. In light of Petitioner's admission and this rule of orderliness, the court of appeals properly granted summary disposition to Respondent because Respondent's position was "clearly right as a matter of law so that there c[ould] be no substantial question as to the outcome of the case." *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158 (5th Cir. 1969). Respondent's raising an FVRA issue in the context of its motion for summary disposition thus was not necessary to resolving the appeal below, and the fact that Respondent did not additionally, and unnecessarily, raise that issue before the court of appeals specifically in connection with its motion for summary disposition did not constitute any waiver of any FVRA issue or argument, which was preserved via the petition for review Respondent filed in that court.

and Eighth Circuits each have held that the NLRA does not render mandatory arbitration agreements containing a waiver of class or collective action procedures unenforceable. The Seventh and Ninth Circuits have reached the opposite conclusion. As an employer with operations (and thus employees) in thirteen states, including states located in the Fifth, Eighth, and Ninth Circuits, resolution of this issue is of substantial importance to Respondent, as it is to the employers in each of the pending Class Waiver Cases (and the related cases cited above presenting the same question) which similarly operate in multiple states and judicial circuits, as well as to the likely tens of thousands of other employers and hundreds of thousands (if not millions) of employees who are impacted by this issue.

### CONCLUSION

Accordingly, for the foregoing reasons, Respondent does not oppose Petitioner's request that the Court hold its petition for a writ of *certiorari* pending its decision in the Class Waiver Cases.

Respectfully submitted,

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