Nos. 16-689, 16-701

In The Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

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

Respondents.

ALTON J. SANDERS,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *et al*.,

Respondents.

On Petition For Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION FOR 24 HOUR FITNESS USA, INC.

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QUESTION PRESENTED

Whether arbitration agreements with individual employees that prohibit class-action lawsuits are prohibited as an unfair labor practice under 29 U.S.C. § 158(a)(1), even if the employees may opt out of the arbitration agreement by giving the employer notice in a manner that does not affect employment.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The petitions accurately list the parties to the proceedings.

Respondent 24 Hour Fitness USA, Inc. ("24 Hour Fitness") states that 24 Hour Fitness United States, Inc., 24 Hour Fitness Worldwide, Inc., 24 Hour Holdings II LLC, and 24 Hour Holdings I Corp. are parent companies to 24 Hour Fitness.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

RULES

STATEMENT OF THE CASE

Pending in this Court are three cases presenting the issue of whether agreements to forego litigation or arbitration on a class basis violate the National Labor Relations Act. See *NLRB* v. *Murphy Oil USA, Inc.*, No. 16-307 (5th Cir.); *Epic Sys. Corp.* v. *Lewis*, No. 16-285 (7th Cir.); *Ernst & Young LLP* v. *Morris*, No. 16-300 (9th Cir.). Petitioners ask the Court to hold this case in the meantime and remand to the Fifth Circuit should its precedent in *Murphy Oil* be overturned.

That request would only make sense if this Court's disposition of the *Murphy Oil* trio might change the outcome in this case—but it will not. If the Court rules for the employers in those cases—as it should—the Fifth Circuit's summary reversal of the Board in this case, based on its *Murphy Oil* precedent, unquestionably would stand. But even if the Court were to side with the Board, the Fifth Circuit's decision in this case rests on multiple alternative grounds, so it would be affirmed regardless. It is therefore unnecessary for the Court to hold this case, and the petitions should simply be denied.

Most important, the arbitration agreements in this case, unlike the arbitration agreements in the *Murphy Oil* trio, are not conditions of employment. They contain an "opt-out" procedure that allows an employee to adopt or reject an arbitration agreement at the outset of employment. The employee need only notify the company—without the knowledge of a supervisor—that she does not wish to enter into the

agreement, and the clause is struck from the employment contract.

That distinction puts this case on different footing than the *Murphy Oil* trio and provides an alternative ground for affirmance regardless of this Court's resolution of those cases—rendering a hold unnecessary. Indeed, the relevance of an opt-out provision was a question explicitly "left open in *D.R. Horton*." NLRB Pet. App. 5a. The Board has since held, in *On Assignment Staffing Services, Inc.*, 362 NLRB No. 189 (2015), that an opt-out provision does not make an arbitration agreement permissible, "holding that an opt-out procedure still imposes an unlawful mandatory condition of employment" covered by its logic in *D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344 (2013). NLRB Pet. App. 5a. But, as in *D.R. Horton*, the Fifth Circuit reversed the Board in that case, too, see *On Assignment Staffing Servs., Inc.* v. *NLRB*, No. 15-60642, 2016 WL 3685206 (5th Cir. June 6, 2016), and the Board did not seek further review either before the full Fifth Circuit or in this Court. Without irony, the Board in this case reaffirmed its conclusion in *On Assignment Staffing Services* that "even if *non-mandatory*, an arbitration policy precluding collective action in all forums is unlawful because it *requires* employees to prospectively waive their Section 7 right to engage in concerted activity." NLRB Pet. App. 5a (emphases added).

Unsurprisingly, there is no split on the issue of opt-out procedures—no court of appeals has yet to rule in favor of the Board on this question. Even the Ninth Circuit—which sided with the Board in *Ernst &*

Young—would enforce the agreement in this case because it contains an opt-out procedure so that employees can make a "fully informed" decision whether to enter into an arbitration agreement that precludes class actions. See, e.g., *Johnmohammadi* v. *Bloomingdale's, Inc.*, 755 F.3d 1072, 1075-77 (9th Cir. 2014). The propriety of agreements, like the one in this case, that contain an opt-out procedure is not before the Court in the cases it has granted—so there is no need to hold the petition, as the government has requested. And there is no split on the issue, so there is no reason to grant the petition, as the employee has requested.

In addition, the agreement in this case specifically incorporates the Federal Rules of Civil Procedure. See Employer's Brief in Support of Exceptions to the Administrative Law Judge's Decision, at 22 (hereinafter "Employer's Brief") (citing Joint Ex. 1, ¶ 2).[1] This incorporation includes the right to permissive joinder of claims. Thus even assuming that class actions are a substantive right that cannot be waived to secure the benefits of arbitration—which 24 Hour Fitness strongly disputes—that would not affect the outcome of this case because joinder allows employees to combine their claims against the company and the agreement—so the agreement could not be held to violate the Act in any event.

Indeed, if anything, it is the Board majority's position here that contravenes the Act. This Court has

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[1] Available at http://apps.nlrb.gov/link/document.aspx/09031d4580ede1c5.

held that courts have jurisdiction "to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act." *Leedom* v. *Kyne*, 358 U.S. 184, 188 (1958). Section 9 allows employees "to present grievances to their employer" and Section 7 allows individuals to "refrain from" exercising the collective rights provided in the Act. 29 U.S.C. §§ 157 & 159(a). But outlawing voluntary agreements of the type here effectively prevents individuals from choosing their own path for presenting grievances. See NLRB Pet. App. 11a. Thus in doing so, the Board is transgressing the Act—a separate ground for affirming the Fifth Circuit's decision.

As a result, there is little point in holding this case pending resolution of the *Murphy Oil* trio. Even if the Board's *D.R. Horton* rule is upheld by this Court—and it should not be—the Fifth Circuit's decision in this case would, after still more litigation and costs to the parties, inevitably be affirmed. The petitions for certiorari should be denied.

1. Respondent 24 Hour Fitness operates fitness clubs throughout the United States. Employer's Brief, *supra*, at 5 (citing Joint Ex. 1, ¶ 21). The company employs over 20,000 individuals, the vast majority of which are employees under Section 2(3) of the Act. *Ibid.* Petitioner Alton Sanders was one of these employees, and worked as an exercise instructor for 24 Hour Fitness from 2008 to 2010. *Ibid.* (citing Tr. 38:12-21).

2. Each of respondent's employment agreements since 2007 has offered employees the choice of arbitrating all disputes with the company. It binds both the employer and employee, and provides 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)." Employer's Brief, *supra*, at 7 (alteration omitted) (quoting Joint Ex. 2(B)). The agreement gives parties the "right to conduct civil discovery and bring motions, as provided by the Federal Rules of Civil Procedure." *Ibid.* This includes the joinder provisions set forth in Rule 20.

Crucially, for purposes of this case, 24 Hour Fitness also gives its employees an opportunity to "opt out" of the arbitration agreement by signing a form and returning it through inter-office mail within a month of being hired. Employer's Brief, *supra*, at 8 (quoting Joint Ex. 5) (citing Joint Ex. 1, ¶ 5). Many employees have used this process over the years, and there is no evidence that any employee who desired to opt out of the agreement was unable to do so. Instead, the record specifically recounts the example of two employees who were able to opt out of the agreement after initially being unable to connect with a company representative through the employee hotline established to answer questions on the process. Employer's Brief, *supra*, at 8 n.5 (citing G.C. Exs. 4(a)-(e) & 5(a)-(g); Tr. 50:5-51:22 & 52:8-54:4).

3. When Sanders applied for employment with 24 Hour Fitness in August 2008, he was informed that,

if hired, he would have the opportunity to sign an agreement allowing the resolution of any subsequent employment disputes through arbitration. The employment application he signed states:

> I understand that as an expeditious and economical way to settle employment disputes without need to go through courts, 24 Hour Fitness agrees to submit such disputes to final and binding arbitration. ***I understand that I may opt out of the arbitration procedure, within a specified period of time, as the procedure provides.*** 24 Hour Fitness and I also understand that if I am offered employment and I do not opt out, we both will submit exclusively to final and binding arbitration all disputes arising out of or relating to my employment. This means a neutral arbitrator, rather than a court or jury, will decide the dispute.

Employer's Brief, *supra*, at 5-6 (emphasis added) (quoting Resp. Ex. 1 at 3).

Once Sanders was hired, 24 Hour Fitness notified him again about the choice to agree to arbitration. As is customary for each employee, 24 Hour Fitness gave Sanders a copy of the Team Member Handbook and asked to him sign a form acknowledging its receipt. The form specifically highlights the arbitration agreement for new employees to ensure that their choice is informed. It reads:

> In particular, I agree that if there is a dispute arising out of or related to my employment as described in the "Arbitration of Disputes" policy, I will submit it exclusively to binding and final arbitration according to its terms, ***unless I elect to opt out of the "Arbitration of Disputes" policy as set forth below***.
>
> I understand that I may opt out of the "Arbitration of Disputes" policy by signing the Arbitration of Disputes Opt-Out Form ("Opt-Out Form") and returning it through interoffice mail to the CAC/HR File Room—no later than 30 calendar days after the date I received this Handbook * * * * I understand that if I do not opt out, disputes arising out of or related to my employment will be resolved under the "Arbitration of Disputes" policy. I understand that my decision to opt out or not opt out will not be used as a basis for the Company taking any retaliatory action against me.

NLRB Pet. App. 24a-25a (emphasis added) (quoting G.C. Ex. 2).

To further ensure that employees need not fear any retaliation by making the choice to opt out, 24 Hour Fitness did not provide the opt-out form with the other materials at orientation, so that employees would not have to sign the form in a manager's presence or return it to a manager. *Ibid.* The entire process is now done electronically. Employer's Brief, *supra*, at 9 (citing Joint Ex. 1, ¶¶ 7 & 8).

4. Sanders did not choose to opt out of the agreement and never brought any legal action against 24 Hour Fitness. The record is devoid of any evidence that he was subjected to any threats, coercion, or pressure that prevented him from opting out of the agreement. Employer's Brief, *supra*, at 7 (citing Tr. 38:12-44:2). Likewise, there is no evidence that Sanders did not understand the agreement or his right to opt out of it. *Ibid.*

5. A year after Sanders left 24 Hour Fitness, he filed a charge with the Board attacking the arbitration agreement's legality. The Board subsequently issued a complaint and the parties participated in a hearing before an Administrative Law Judge. Despite acknowledging the lack of any evidence regarding interference, restraint, or coercion involved with any employee's choice on opting out of arbitration at the beginning of their employment, the ALJ determined that 24 Hour Fitness violated Section 8(a)(1) of the Act. Sanders Pet. App. 48a, 59a. The ALJ ruled that notwithstanding the agreement's plain language—which gives employees the choice to "opt out of the arbitration procedure"—the agreement "requires" employees to "surrender" their right to bring or participate in a class or collective action, *id.* at 54a, and that the opt-out provision is an "illusion" and thus the agreement is involuntary. *Id.* at 54a-55a.

6. On appeal to the Board, a divided panel affirmed—over then-Member Miscimarra's dissent—based on the Board's *D.R. Horton* and *Murphy Oil* decisions. NLRB Pet. App. 3a. The panel majority first

rejected the argument "that the opt-out provision of the arbitration policy places it outside the scope of the prohibition against mandatory individual arbitration agreements under *D.R. Horton*." *Id.* at 5a. This argument, the panel majority noted, had been foreclosed by the Board's ruling in *On Assignment Staffing Services*. *Ibid.* "[E]ven if non-mandatory, an arbitration policy precluding collective action in all forums is unlawful because it requires employees to prospectively waive their Section 7 right to engage in concerted activity." *Ibid.*

The Board next rejected the argument that, at a minimum, the ability to join claims under the arbitration agreement rendered it lawful. *Id.* at 6a. The panel majority opined that it would consider whether an "unambiguous provision for arbitral joinder, standing alone, would satisfy the *D.R. Horton* standard," but nonetheless concluded that the "spare language [noting that arbitrations would follow the FRCP] makes no specific mention of joinder [and thus] is insufficient to put employees on notice that the policy permits them to pursue joint claims together with their coworkers." *Ibid.*

Finally, the Board rejected the argument that the complaint was time-barred with respect to employees hired before 2007. The panel concluded that the "maintenance of an unlawful workplace rule * * * constitutes a continuing violation that is not time-barred by Section 10(b)." *Id.* at 7a.

In dissent, now–Acting Chairman Miscimarra "disagree[d] with the Board's finding * * * that class-action waiver agreements violate the NLRA even when they contain an opt-out provision." *Id.* at 11a (citing *On Assignment Staffing Services*). He argued that "Section 9(a) protects the right of every employee as an 'individual' to 'present' and 'adjust' grievances 'at any time'" and that Section 7 "protects each employee's right to 'refrain from' exercising the collective rights enumerated in Section 7." *Ibid.* Based on those rights, "the legality of such a waiver is even more self-evident [because] the agreement contains an opt-out provision." *Id.* at 13a.

The dissent further noted that "questions may arise regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims." *Id.* at 13a-14a. These questions would arise, for example, from allegations—absent in the instant case—that particular agreements or employer actions were overly restrictive of employee rights or coercive. These questions, the dissent explained, should be "exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims." *Id.* at 14a.

7. 24 Hour Fitness petitioned the U.S. Court of Appeals for the Fifth Circuit for review, and moved for summary reversal of the Board based on the Fifth Circuit's *D.R. Horton* and *Murphy Oil* precedents. The Fifth Circuit granted 24 Hour Fitness's motion

and summarily reversed the Board in a one-line *per curiam* order. NLRB Pet. App. 1a.

REASONS FOR DENYING THE PETITIONS

I. The Fifth Circuit's Summary Reversal Should Be Affirmed Regardless Of This Court's Disposition Of The Collective-Action-Waiver Cases.

24 Hour Fitness agrees with the employers in *Murphy Oil* (Br. for Resp. in Support of Granting Pet. at 24-30), *Epic Systems* (Pet. for Certiorari at 13-20), and *Ernst & Young* (Pet. for Certiorari at 15-19) that—for the reasons they and their *amici* explain—class or collective-action waivers do not violate the Act. As the Fifth Circuit's summary reversal of the Board in this case underscores, this Court's resolution of that issue in the employers' favor would require affirmance in this case, as well. But affirmance is required here regardless of how the Court resolves those cases. That is because the agreement here not only contains an opt-out provision, but also allows for joinder of claims—thereby offering multiple, alternative bases for affirming the Fifth Circuit's summary reversal of the Board.

As then-Member Miscimarra explained in his Board dissent in this case, "the legality of [a class- or collective-action] waiver is even more self-evident when the agreement contains an opt-out provision." NLRB Pet. App. 13a (Miscimarra, M., dissenting). So long as that agreement is not coercive or unlawfully

restrictive of substantive rights under the Act—and there is no suggestion, allegation, or evidence of that here—it is enforceable. In the instant case, 24 Hour Fitness notifies prospective hires (when they apply for a job) and current employees (when they begin work) that agreeing to arbitration is not a condition of employment with 24 Hour Fitness—*i.e.*, they can choose not to agree to arbitrate and still remain employed with the company. Further guarding against any possibility of coercion or retaliation, 24 Hour Fitness provides for the opt-out decision to be made by the employee virtually anonymously. As a result, even if the Court were to hold in the Board's favor in the pending cases, the non-mandatory nature of the arbitration agreement in this case provides an alternate basis for affirming the Fifth Circuit.

In addition, as now–Acting Chairman Miscimarra explained in his Board dissent in this case, the legality of the arbitration agreement here "is further reinforced by the fact that it authorizes the parties to 'bring motions as provided by the Federal Rules of Civil Procedure' and thus permits joinder of claims before an arbitrator under FRCP 20." *Id.* at 13a n.4 (Miscimarra, M., dissenting). That feature provides yet another alternative basis for affirming the Fifth Circuit—regardless of the outcome of the pending collective-action-waiver cases. It is undisputed that the agreements here were entered into voluntarily—and "the Board's position is even less defensible [than in *Murphy Oil*] when the Board finds that NLRA 'protection' operates in reverse—not to *protect* employees'

rights * * * but to *divest* employees of those rights by denying them the right to *choose* whether to be covered by an agreement." NLRB Pet. App. 13a n.4 (Miscimarra, M., dissenting) (emphases in original).

Employees remain free, of course, to argue that a particular form or method of opting out is so cumbersome that it amounts to an effective infringement on their Section 7 rights. After all, as now–Acting Chairman Miscimarra noted, "[Q]uestions may arise regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims." NLRB Pet. App. 13a-14a. But no such question has arisen in this case—and regardless, such questions should be "exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims." *Id.* at 14a.

Moreover, the Board's position against opt-out provisions is itself a violation of the Act. Section 9 provides that "any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted." 29 U.S.C. § 159(a). Section 7 makes this guarantee explicit by protecting the individual's right to "refrain from" exercising collective rights under the Act. *Id.* § 157. Yet, as now–Acting Chairman Miscimarra has noted, to prevent employees from voluntarily exercising their right to handle claims through arbitration also prevents them from presenting grievances as individuals. NLRB Pet. App. 11a. By effectively precluding an employee's ability to bargain on an individual basis with the employer, the Board

majority is transgressing the Act. And under this Court's precedent in *Leedom*, courts should "strike down an order of the Board made * * * contrary to a specific prohibition in the Act." 358 U.S. at 188.

The Fifth Circuit's summary reversal of the Board thus rests on multiple alternative grounds besides rejection of the Board's *D.R. Horton* rule, so there is no need to hold the petitions pending resolution of the *Murphy Oil* trio.

II. There Is No Split On The Legality Of The Type Of Arbitration Agreement At Issue.

The petitions in *Murphy Oil*, *Epic Systems*, and *Ernst & Young* each involve the same type of arbitration agreement addressed by the Board in *D.R. Horton*. They do not involve the type of agreement at issue in this case. Contrary to the Board's assertion (at 3), the "material facts in this case" are not similar to *Murphy Oil*—at least not on the relevant questions. Unlike the questions this Court agreed to resolve in the pending petitions, there is no split on the question presented here—*i.e.*, whether an arbitration agreement violates the Act even if the agreement (i) is not a mandatory condition of employment and permits employees to opt out of arbitration, and (ii) expressly incorporates the Federal Rules of Civil Procedure so as to permit employees to engage in concerted activity through joinder of their claims. The petitions should be denied for that reason, too.

The employee's petition attempts to introduce a measure of conflict by arguing that there is "disagreement as to whether, if otherwise unlawful, such a prohibition may be saved by permitting employees * * * to opt out of the arbitration agreement." Sanders Pet. at 7. But the purported "disagreement" is only between the Ninth Circuit and the Board itself. Compare *Johnmohammadi*, 755 F.3d at 1075-77 (enforcing arbitration agreement with opt-out mechanism when employee is "fully informed" and decision is "free of any express or implied threats of termination or retaliation"), with *On Assignment Staffing Servs., Inc.*, 362 NLRB No. 189 (2015) (rejecting any arbitration agreement that waives class-action rights).[2]

Indeed, the Ninth Circuit—which sided with the Board on the *D.R. Horton* question presented in *Ernst & Young*—took pains to distinguish the type of agreement at issue here (but not there): "In contrast, there was no § 8 violation in [*Johnmohammadi*] because the employee there could have opted out of the individual dispute resolution agreement and chose not to." *Morris* v. *Ernst & Young, LLP*, 834 F.3d 975, 982 n.4 (9th Cir. 2016). So too here. To be clear, 24 Hour Fitness's position is that the agreement at issue in *Ernst & Young* is perfectly lawful, too. But regardless, the Ninth Circuit would have been constrained by its own precedent (*Johnmohammadi*) to reach the same conclusion the Fifth Circuit did here. And the Seventh Circuit in *Epic Systems* did not opine on the issue at

[2] No court has addressed the joinder issue raised here.

all, even in *dicta*. There is no split for this Court to resolve, and thus no need for the Court's review. The petitions should be denied.

III. There Is No Need To Hold This Case Pending The Court's Disposition Of The *Murphy Oil* Trio.

Petitioners ask the Court to hold the petitions so that, if this Court determines that "employees' class- or collective-action waivers are invalid," the Court may "remand for further proceedings to consider the additional question about the presence of an opt-out provision." NLRB Pet. at 7 n.3; see also Sanders Pet. at 5-6. The Court should decline that invitation and simply deny the petitions.

Where, as here, the judgment can rest on multiple alternative bases that do not warrant certiorari, the Court should deny review—not grant the petitions, vacate the judgment, and remand for further proceedings. See *United States* v. *Tinklenberg*, 563 U.S. 647, 661 (2011) (noting that this Court "may consider, or 'decline to entertain,' alternative grounds for affirmance"). In particular, having chosen not to pursue further review in *On Assignment Staffing Services*, the government should not be permitted to further prolong this litigation just to get a second bite at the apple in the Fifth Circuit.

CONCLUSION

The petitions for certiorari should be denied.

Respectfully submitted,

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