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SUPREME COURT WATCH

TUESDAY, AUGUST 29, 2017
5:30 PM - 6:30 PM

UC Hastings School of Law, Alumni Reception Center
200 McAllister St., 2nd Floor, San Francisco, CA 94102

Join distinguished speakers Professor Evan Lee of UC Hastings, Professor Marina Hsieh of Santa Clara Law, and Kevin Fong of Pillsbury Winthrop Shaw Pittman LLP in an exciting discussion about past and future cases in the U.S. Supreme Court.

Our panel will discuss many of the most important cases decided during the 2016-2017 term, involving issues pertaining to the intersection between First Amendment rights and racially-charged trademarks in *The Slants case (Matal v. Tam)*, the battle over patent venue (*TC Heartland v. Kraft Foods*), limits on state courts' exercise of personal jurisdiction (*Bristol-Myers Squibb v. Superior Court of California*); legal standing of cities (*Bank of America v. Miami*), and more. In addition, our panel will preview the most anticipated cases in the next term, including those involving arbitration in class actions.

Speakers:

EVAN LEE, Acting Provost, U.C. Hastings School of Law

MARINA HSIEH, Senior Fellow, Santa Clara University School of Law

KEVIN FONG, Appellate Partner, Pillsbury Winthrop Shaw Pittman LLP

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*The Respondent filed a brief on August 19, 2017 but it is not yet available for download as of August 24, 2017.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES**Syllabus****BRISTOL-MYERS SQUIBB CO. v. SUPERIOR COURT
OF CALIFORNIA, SAN FRANCISCO COUNTY, ET AL.****CERTIORARI TO THE SUPREME COURT OF CALIFORNIA**

No. 16–466. Argued April 25, 2017—Decided June 19, 2017

A group of plaintiffs, most of whom are not California residents, sued Bristol-Myers Squibb Company (BMS) in California state court, alleging that the pharmaceutical company’s drug Plavix had damaged their health. BMS is incorporated in Delaware and headquartered in New York, and it maintains substantial operations in both New York and New Jersey. Although it engages in business activities in California and sells Plavix there, BMS did not develop, create a marketing strategy for, manufacture, label, package, or work on the regulatory approval for Plavix in the State. And the nonresident plaintiffs did not allege that they obtained Plavix from a California source, that they were injured by Plavix in California, or that they were treated for their injuries in California.

The California Superior Court denied BMS’s motion to quash service of summons on the nonresidents’ claims for lack of personal jurisdiction, concluding that BMS’s extensive activities in the State gave the California courts general jurisdiction. Following this Court’s decision in *Daimler AG v. Bauman*, 571 U. S. ___, the State Court of Appeal found that the California courts lacked general jurisdiction. But the Court of Appeal went on to find that the California courts had specific jurisdiction over the claims brought by the nonresident plaintiffs. Affirming, the State Supreme Court applied a “sliding scale approach” to specific jurisdiction, concluding that BMS’s “wide ranging” contacts with the State were enough to support a finding of specific jurisdiction over the claims brought by the nonresident plaintiffs. That attenuated connection was met, the court held, in part because the nonresidents’ claims were similar in many ways to the California residents’ claims and because BMS engaged in other activities in the State.

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Held: California courts lack specific jurisdiction to entertain the nonresidents' claims. Pp. 4–12.

(a) The personal jurisdiction of state courts is "subject to review for compatibility with the Fourteenth Amendment's Due Process Clause." *Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 U. S. 915, 918. This Court's decisions have recognized two types of personal jurisdiction: general and specific. For general jurisdiction, the "paradigm forum" is an "individual's domicile," or, for corporations, "an equivalent place, one in which the corporation is fairly regarded as at home." *Id.*, at 924. Specific jurisdiction, however, requires "the suit" to "aris[e] out of or relat[e] to the defendant's contacts with the forum." *Daimler, supra*, at ___ (internal quotation marks omitted).

The "primary concern" in assessing personal jurisdiction is "the burden on the defendant." *World-Wide Volkswagen Corp. v. Woodson*, 444 U. S. 286, 292. Assessing this burden obviously requires a court to consider the practical problems resulting from litigating in the forum, but it also encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question. At times, "the Due Process Clause, acting as an instrument of interstate federalism, may . . . divest the State of its power to render a valid judgment." *Id.*, at 294. Pp. 4–7.

(b) Settled principles of specific jurisdiction control this case. For a court to exercise specific jurisdiction over a claim there must be an "affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State." *Goodyear, supra*, at 919 (internal quotation marks and brackets omitted). When no such connection exists, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State. The California Supreme Court's "sliding scale approach"—which resembles a loose and spurious form of general jurisdiction—is thus difficult to square with this Court's precedents. That court found specific jurisdiction without identifying any adequate link between the State and the nonresidents' claims. The mere fact that other plaintiffs were prescribed, obtained, and ingested Plavix in California does not allow the State to assert specific jurisdiction over the nonresidents' claims. Nor is it sufficient (or relevant) that BMS conducted research in California on matters unrelated to Plavix. What is needed is a connection between the forum and the specific claims at issue. Cf. *Walden v. Fiore*, 571 U. S. ___. Pp. 7–9.

(c) The nonresident plaintiffs' reliance on *Keeton v. Hustler Magazine, Inc.*, 465 U. S. 770, and *Phillips Petroleum Co. v. Shutts*, 472 U. S. 797, is misplaced. *Keeton* concerned jurisdiction to determine

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the scope of a claim involving in-state injury and injury to residents of the State, not, as here, jurisdiction to entertain claims involving no in-state injury and no injury to residents of the forum State. And *Shutts*, which concerned the due process rights of *plaintiffs*, has no bearing on the question presented here. Pp. 9–11.

(d) BMS's decision to contract with McKesson, a California company, to distribute Plavix nationally does not provide a sufficient basis for personal jurisdiction. It is not alleged that BMS engaged in relevant acts together with McKesson in California or that BMS is derivatively liable for McKesson's conduct in California. The bare fact that BMS contracted with a California distributor is not enough to establish personal jurisdiction in the State. Pp. 11–12.

(e) The Court's decision will not result in the parade of horribles that respondents conjure up. It does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over BMS. Alternatively, the nonresident plaintiffs could probably sue together in their respective home States. In addition, since this decision concerns the due process limits on the exercise of specific jurisdiction by a State, the question remains open whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court. P. 12.

1 Cal. 5th 783, 377 P. 3d 874, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, GINSBURG, BREYER, KAGAN, and GORSUCH, JJ., joined. SOTOMAYOR, J., filed a dissenting opinion.

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 16–466

BRISTOL-MYERS SQUIBB COMPANY, PETITIONER *v.*
SUPERIOR COURT OF CALIFORNIA, SAN
FRANCISCO COUNTY, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
CALIFORNIA

[June 19, 2017]

JUSTICE ALITO delivered the opinion of the Court.

More than 600 plaintiffs, most of whom are not California residents, filed this civil action in a California state court against Bristol-Myers Squibb Company (BMS), asserting a variety of state-law claims based on injuries allegedly caused by a BMS drug called Plavix. The California Supreme Court held that the California courts have specific jurisdiction to entertain the nonresidents' claims. We now reverse.

I
A

BMS, a large pharmaceutical company, is incorporated in Delaware and headquartered in New York, and it maintains substantial operations in both New York and New Jersey. 1 Cal. 5th 783, 790, 377 P.3d 874, 879 (2016). Over 50 percent of BMS's work force in the United States is employed in those two States. *Ibid.*

BMS also engages in business activities in other jurisdictions, including California. Five of the company's research and laboratory facilities, which employ a total of

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around 160 employees, are located there. *Ibid.* BMS also employs about 250 sales representatives in California and maintains a small state-government advocacy office in Sacramento. *Ibid.*

One of the pharmaceuticals that BMS manufactures and sells is Plavix, a prescription drug that thins the blood and inhibits blood clotting. BMS did not develop Plavix in California, did not create a marketing strategy for Plavix in California, and did not manufacture, label, package, or work on the regulatory approval of the product in California. *Ibid.* BMS instead engaged in all of these activities in either New York or New Jersey. *Ibid.* But BMS does sell Plavix in California. Between 2006 and 2012, it sold almost 187 million Plavix pills in the State and took in more than \$900 million from those sales. 1 Cal. 5th, at 790–791, 377 P. 3d, at 879. This amounts to a little over one percent of the company’s nationwide sales revenue. *Id.*, at 790, 377 P. 3d, at 879.

B

A group of plaintiffs—consisting of 86 California residents and 592 residents from 33 other States—filed eight separate complaints in California Superior Court, alleging that Plavix had damaged their health. *Id.*, at 789, 377 P. 3d, at 878. All the complaints asserted 13 claims under California law, including products liability, negligent misrepresentation, and misleading advertising claims. *Ibid.* The nonresident plaintiffs did not allege that they obtained Plavix through California physicians or from any other California source; nor did they claim that they were injured by Plavix or were treated for their injuries in California.

Asserting lack of personal jurisdiction, BMS moved to quash service of summons on the nonresidents’ claims, but the California Superior Court denied this motion, finding that the California courts had general jurisdiction over

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BMS “[b]ecause [it] engages in extensive activities in California.” App. to Pet. for Cert. 150. BMS unsuccessfully petitioned the State Court of Appeal for a writ of mandate, but after our decision on general jurisdiction in *Daimler AG v. Bauman*, 571 U. S. ____ (2014), the California Supreme Court instructed the Court of Appeal “to vacate its order denying mandate and to issue an order to show cause why relief sought in the petition should not be granted.” App. 9–10.

The Court of Appeal then changed its decision on the question of general jurisdiction. 228 Cal. App. 4th 605, 175 Cal. Rptr. 3d 412 (2014). Under *Daimler*, it held, general jurisdiction was clearly lacking, but it went on to find that the California courts had specific jurisdiction over the nonresidents’ claims against BMS. 228 Cal. App. 4th 605, 175 Cal. Rptr. 3d, at 425–439.

The California Supreme Court affirmed. The court unanimously agreed with the Court of Appeal on the issue of general jurisdiction, but the court was divided on the question of specific jurisdiction. The majority applied a “sliding scale approach to specific jurisdiction.” 1 Cal. 5th, at 806, 377 P. 3d, at 889. Under this approach, “the more wide ranging the defendant’s forum contacts, the more readily is shown a connection between the forum contacts and the claim.” *Ibid.* (internal quotation marks omitted). Applying this test, the majority concluded that “BMS’s extensive contacts with California” permitted the exercise of specific jurisdiction “based on a less direct connection between BMS’s forum activities and plaintiffs’ claims than might otherwise be required.” *Ibid.* This attenuated requirement was met, the majority found, because the claims of the nonresidents were similar in several ways to the claims of the California residents (as to which specific jurisdiction was uncontested). *Id.*, at 803–806, 377 P. 3d, at 887–889. The court noted that “[b]oth the resident and nonresident plaintiffs’ claims are based on the same alleg-

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edly defective product and the assertedly misleading marketing and promotion of that product.” *Id.*, at 804, 377 P. 3d, at 888. And while acknowledging that “there is no claim that Plavix itself was designed and developed in [BMS’s California research facilities],” the court thought it significant that other research was done in the State. *Ibid.*

Three justices dissented. “The claims of . . . nonresidents injured by their use of Plavix they purchased and used in other states,” they wrote, “in no sense arise from BMS’s marketing and sales of Plavix in California,” and they found that the “mere similarity” of the residents’ and nonresidents’ claims was not enough. *Id.*, at 819, 377 P. 3d, at 898 (opinion of Werdegar, J.). The dissent accused the majority of “expand[ing] specific jurisdiction to the point that, for a large category of defendants, it becomes indistinguishable from general jurisdiction.” *Id.*, at 816, 377 P. 3d, at 896.

We granted certiorari to decide whether the California courts’ exercise of jurisdiction in this case violates the Due Process Clause of the Fourteenth Amendment. 580 U. S. ____ (2017).¹

II

A

It has long been established that the Fourteenth Amendment limits the personal jurisdiction of state courts. See, e.g., *Daimler*, *supra*, at ____ (slip op., at 6–13); *World-Wide Volkswagen Corp. v. Woodson*, 444 U. S. 286, 291 (1980); *International Shoe Co. v. Washington*, 326 U. S. 310, 316–317 (1945); *Pennoyer v. Neff*, 95 U. S. 714,

¹ California law provides that its courts may exercise jurisdiction “on any basis not inconsistent with the Constitution . . . of the United States,” Cal. Civ. Proc. Code Ann. §410.10 (West 2004); see *Daimler AG v. Bauman*, 571 U. S. ___, ___ (2014) (slip op., at 6).

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733 (1878). Because “[a] state court’s assertion of jurisdiction exposes defendants to the State’s coercive power,” it is “subject to review for compatibility with the Fourteenth Amendment’s Due Process Clause,” *Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 U. S. 915, 918 (2011), which “limits the power of a state court to render a valid personal judgment against a nonresident defendant,” *World-Wide Volkswagen*, *supra*, at 291. The primary focus of our personal jurisdiction inquiry is the defendant’s relationship to the forum State. See *Walden v. Fiore*, 571 U. S. ___, ___–___ (2014) (slip op., at 5–8); *Phillips Petroleum Co. v. Shutts*, 472 U. S. 797, 806–807 (1985).

Since our seminal decision in *International Shoe*, our decisions have recognized two types of personal jurisdiction: “general” (sometimes called “all-purpose”) jurisdiction and “specific” (sometimes called “case-linked”) jurisdiction. *Goodyear*, 564 U. S., at 919. “For an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.” *Id.*, at 924. A court with general jurisdiction may hear *any* claim against that defendant, even if all the incidents underlying the claim occurred in a different State. *Id.*, at 919. But “only a limited set of affiliations with a forum will render a defendant amenable to” general jurisdiction in that State. *Daimler*, 571 U. S., at ___ (slip op., at 18).

Specific jurisdiction is very different. In order for a state court to exercise specific jurisdiction, “the *suit*” must “aris[e] out of or relat[e] to the defendant’s contacts with the *forum*.” *Id.*, at ___ (slip op., at 8) (internal quotation marks omitted; emphasis added); see *Burger King Corp. v. Rudzewicz*, 471 U. S. 462, 472–473 (1985); *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U. S. 408, 414 (1984). In other words, there must be “an affiliation between the forum and the underlying controversy, princi-

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pally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Goodyear*, 564 U. S., at 919 (internal quotation marks and brackets omitted). For this reason, "specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Ibid.* (internal quotation marks omitted).

B

In determining whether personal jurisdiction is present, a court must consider a variety of interests. These include "the interests of the forum State and of the plaintiff in proceeding with the cause in the plaintiff's forum of choice." *Kulko v. Superior Court of Cal., City and County of San Francisco*, 436 U. S. 84, 92 (1978); see *Daimler*, *supra*, at ____—____, n. 20 (slip op., at 21–22, n. 20); *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.*, 480 U. S. 102, 113 (1987); *World-Wide Volkswagen*, 444 U. S., at 292. But the "primary concern" is "the burden on the defendant." *Id.*, at 292. Assessing this burden obviously requires a court to consider the practical problems resulting from litigating in the forum, but it also encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question. As we have put it, restrictions on personal jurisdiction "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." *Hanson v. Denckla*, 357 U. S. 235, 251 (1958). "[T]he States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State . . . impie[s] a limitation on the sovereignty of all its sister States." *World-Wide Volkswagen*, 444 U. S., at 293. And at times, this federal-

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ism interest may be decisive. As we explained in *World-Wide Volkswagen*, “[e]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.” *Id.*, at 294.

III
A

Our settled principles regarding specific jurisdiction control this case. In order for a court to exercise specific jurisdiction over a claim, there must be an “affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State.” *Goodyear*, 564 U. S., at 919 (internal quotation marks and brackets in original omitted). When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant’s unconnected activities in the State. See *id.*, at 931, n. 6 (“[E]ven regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales”).

For this reason, the California Supreme Court’s “sliding scale approach” is difficult to square with our precedents. Under the California approach, the strength of the requisite connection between the forum and the specific claims at issue is relaxed if the defendant has extensive forum contacts that are unrelated to those claims. Our cases provide no support for this approach, which resembles a loose and spurious form of general jurisdiction. For specific jurisdiction, a defendant’s general connections with the forum are not enough. As we have said, “[a] corporation’s

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'continuous activity of some sorts within a state . . . is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.'" *Id.*, at 927 (quoting *International Shoe*, 326 U. S., at 318).

The present case illustrates the danger of the California approach. The State Supreme Court found that specific jurisdiction was present without identifying any adequate link between the State and the nonresidents' claims. As noted, the nonresidents were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California. The mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents' claims. As we have explained, "a defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction." *Walden*, 571 U. S., at ___ (slip op., at 8). This remains true even when third parties (here, the plaintiffs who reside in California) can bring claims similar to those brought by the nonresidents. Nor is it sufficient—or even relevant—that BMS conducted research in California on matters unrelated to Plavix. What is needed—and what is missing here—is a connection between the forum and the specific claims at issue.

Our decision in *Walden*, *supra*, illustrates this requirement. In that case, Nevada plaintiffs sued an out-of-state defendant for conducting an allegedly unlawful search of the plaintiffs while they were in Georgia preparing to board a plane bound for Nevada. We held that the Nevada courts lacked specific jurisdiction even though the plaintiffs were Nevada residents and "suffered foreseeable harm in Nevada." *Id.*, at ___ (slip op., at 11). Because the "relevant conduct occurred entirely in Georgi[a] . . . the mere fact that [this] conduct affected plaintiffs with con-

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nections to the forum State d[id] not suffice to authorize jurisdiction." *Id.*, at ____ (slip op., at 14) (emphasis added).

In today's case, the connection between the nonresidents' claims and the forum is even weaker. The relevant plaintiffs are not California residents and do not claim to have suffered harm in that State. In addition, as in *Walderen*, all the conduct giving rise to the nonresidents' claims occurred elsewhere. It follows that the California courts cannot claim specific jurisdiction. See *World-Wide Volkswagen*, *supra*, at 295 (finding no personal jurisdiction in Oklahoma because the defendant "carr[ied] on no activity whatsoever in Oklahoma" and dismissing "the fortuitous circumstance that a single Audi automobile, sold [by defendants] in New York to New York residents, happened to suffer an accident while passing through Oklahoma" as an "isolated occurrence").

B

The nonresidents maintain that two of our cases support the decision below, but they misinterpret those precedents.

In *Keeton v. Hustler Magazine, Inc.*, 465 U. S. 770 (1984), a New York resident sued Hustler in New Hampshire, claiming that she had been libeled in five issues of the magazine, which was distributed throughout the country, including in New Hampshire, where it sold 10,000 to 15,000 copies per month. Concluding that specific jurisdiction was present, we relied principally on the connection between the circulation of the magazine in New Hampshire and damage allegedly caused within the State. We noted that "[f]alse statements of fact harm both the subject of the falsehood and the readers of the statement." *Id.*, at 776 (emphasis deleted). This factor amply distinguishes *Keeton* from the present case, for here the nonresidents' claims involve no harm in California and no harm to California residents.

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The nonresident plaintiffs in this case point to our holding in *Keeton* that there was jurisdiction in New Hampshire to entertain the plaintiff's request for damages suffered outside the State, *id.*, at 774, but that holding concerned jurisdiction to determine the scope of a claim involving in-state injury and injury to residents of the State, not, as in this case, jurisdiction to entertain claims involving no in-state injury and no injury to residents of the forum State. *Keeton* held that there was jurisdiction in New Hampshire to consider the full measure of the plaintiff's claim, but whether she could actually recover out-of-state damages was a merits question governed by New Hampshire libel law. *Id.*, at 778, n. 9.

The Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U. S. 797 (1985), which involved a class action filed in Kansas, is even less relevant. The Kansas court exercised personal jurisdiction over the claims of nonresident class members, and the defendant, Phillips Petroleum, argued that this violated the due process rights of these class members because they lacked minimum contacts with the State.² According to the defendant, the out-of-state class members should not have been kept in the case unless they affirmatively opted in, instead of merely failing to opt out after receiving notice. *Id.*, at 812.

Holding that there had been no due process violation, the Court explained that the authority of a State to entertain the claims of nonresident class members is entirely different from its authority to exercise jurisdiction over an out-of-state defendant. *Id.*, at 808–812. Since *Shutts* concerned the due process rights of plaintiffs, it has no

²The Court held that the defendant had standing to argue that the Kansas court had improperly exercised personal jurisdiction over the claims of the out-of-state class members because that holding materially affected the defendant's own interests, specifically, the res judicata effect of an adverse judgment. 472 U. S., at 803–806.

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bearing on the question presented here.

Respondents nevertheless contend that *Shutts* supports their position because, in their words, it would be “absurd to believe that [this Court] would have reached the exact opposite result if the petitioner [Phillips] had only invoked its own due-process rights, rather than those of the non-resident plaintiffs.” Brief for Respondents 28–29, n. 6 (emphasis deleted). But the fact remains that Phillips did not assert that Kansas improperly exercised personal jurisdiction over it, and the Court did not address that issue.³ Indeed, the Court stated specifically that its “discussion of personal jurisdiction [did not] address class actions where the jurisdiction is asserted against a *defendant* class.” *Shutts, supra*, at 812, n. 3.

C

In a last ditch contention, respondents contend that BMS’s “decision to contract with a California company [McKesson] to distribute [Plavix] nationally” provides a sufficient basis for personal jurisdiction. Tr. of Oral Arg. 32. But as we have explained, “[t]he requirements of *International Shoe* . . . must be met as to each defendant over whom a state court exercises jurisdiction.” *Rush v. Savchuk*, 444 U. S. 320, 332 (1980); see *Walden*, 571 U. S., at ____ (slip op, at 8) (“[A] defendant’s relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction”). In this case, it is not alleged that BMS engaged in relevant acts together with McKesson in California. Nor is it alleged that BMS is derivatively liable for McKesson’s conduct in California. And the nonresidents “have adduced no evidence to show how or by whom the

³Petitioner speculates that Phillips did not invoke its own due process rights because it was believed at the time that the Kansas court had general jurisdiction. See Reply Brief 7, n. 1.

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Plavix they took was distributed to the pharmacies that dispensed it to them.” 1 Cal. 5th, at 815, 377 P. 3d, at 895 (Werdegar, J., dissenting) (emphasis deleted). See Tr. of Oral Arg. 33 (“It is impossible to trace a particular pill to a particular person It’s not possible for us to track particularly to McKesson”). The bare fact that BMS contracted with a California distributor is not enough to establish personal jurisdiction in the State.

IV

Our straightforward application in this case of settled principles of personal jurisdiction will not result in the parade of horrors that respondents conjure up. See Brief for Respondents 38–47. Our decision does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over BMS. BMS concedes that such suits could be brought in either New York or Delaware. See Brief for Petitioner 13. Alternatively, the plaintiffs who are residents of a particular State—for example, the 92 plaintiffs from Texas and the 71 from Ohio—could probably sue together in their home States. In addition, since our decision concerns the due process limits on the exercise of specific jurisdiction by a State, we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court. See *Omni Capital Int’l, Ltd. v. Rudolf Wolff & Co.*, 484 U. S. 97, 102, n. 5 (1987).

* * *

The judgment of the California Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SOTOMAYOR, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 16–466

BRISTOL-MYERS SQUIBB COMPANY, PETITIONER *v.*
SUPERIOR COURT OF CALIFORNIA, SAN
FRANCISCO COUNTY, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
CALIFORNIA

[June 19, 2017]

JUSTICE SOTOMAYOR, dissenting.

Three years ago, the Court imposed substantial curbs on the exercise of general jurisdiction in its decision in *Daimler AG v. Bauman*, 571 U. S. ____ (2014). Today, the Court takes its first step toward a similar contraction of specific jurisdiction by holding that a corporation that engages in a nationwide course of conduct cannot be held accountable in a state court by a group of injured people unless all of those people were injured in the forum State.

I fear the consequences of the Court’s decision today will be substantial. The majority’s rule will make it difficult to aggregate the claims of plaintiffs across the country whose claims may be worth little alone. It will make it impossible to bring a nationwide mass action in state court against defendants who are “at home” in different States. And it will result in piecemeal litigation and the bifurcation of claims. None of this is necessary. A core concern in this Court’s personal jurisdiction cases is fairness. And there is nothing unfair about subjecting a massive corporation to suit in a State for a nationwide course of conduct that injures both forum residents and nonresidents alike.

I

Bristol-Myers Squibb is a Fortune 500 pharmaceutical

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company incorporated in Delaware and headquartered in New York. It employs approximately 25,000 people worldwide and earns annual revenues of over \$15 billion. In the late 1990's, Bristol-Myers began to market and sell a prescription blood thinner called Plavix. Plavix was advertised as an effective tool for reducing the risk of blood clotting for those vulnerable to heart attacks and to strokes. The ads worked: At the height of its popularity, Plavix was a blockbuster, earning Bristol-Myers billions of dollars in annual revenues.

Bristol-Myers' advertising and distribution efforts were national in scope. It conducted a single nationwide advertising campaign for Plavix, using television, magazine, and Internet ads to broadcast its message. A consumer in California heard the same advertisement as a consumer in Maine about the benefits of Plavix. Bristol-Myers' distribution of Plavix also proceeded through nationwide channels: Consistent with its usual practice, it relied on a small number of wholesalers to distribute Plavix throughout the country. One of those distributors, McKesson Corporation, was named as a defendant below; during the relevant time period, McKesson was responsible for almost a quarter of Bristol-Myers' revenue worldwide.

The 2005 publication of an article in the *New England Journal of Medicine* questioning the efficacy and safety of Plavix put Bristol-Myers on the defensive, as consumers around the country began to claim that they were injured by the drug. The plaintiffs in these consolidated cases are 86 people who allege they were injured by Plavix in California and several hundred others who say they were injured by the drug in other States.¹ They filed their suits

¹Like the parties and the majority, I refer to these people as "residents" and "nonresidents" of California as a convenient shorthand. See *ante*, at 2; Brief for Petitioner 4–5, n. 1; Brief for Respondents 2, n. 1.

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in California Superior Court, raising product-liability claims against Bristol-Myers and McKesson. Their claims are “materially identical,” as Bristol-Myers concedes. See Brief for Petitioner 4, n. 1. Bristol-Myers acknowledged it was subject to suit in California state court by the residents of that State. But it moved to dismiss the claims brought by the nonresident plaintiffs—respondents here—for lack of jurisdiction. The question here, accordingly, is not whether Bristol-Myers is subject to suit in California on claims that arise out of the design, development, manufacture, marketing, and distribution of Plavix—it is. The question is whether Bristol-Myers is subject to suit in California only on the residents’ claims, or whether a state court may also hear the nonresidents’ “identical” claims.

II
A

As the majority explains, since our pathmarking opinion in *International Shoe Co. v. Washington*, 326 U. S. 310 (1945), the touchstone of the personal-jurisdiction analysis has been the question whether a defendant has “certain minimum contacts with [the State] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” *Id.*, at 316 (quoting *Milliken v. Meyer*, 311 U. S. 457, 463 (1940)). For decades this Court has considered that question through two different jurisdictional frames: “general” and “specific” jurisdiction. See *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U. S. 408, 414, nn. 8–9 (1984). Under our current case law, a state court may exercise general, or all-purpose, jurisdiction over a defendant corporation only if its “affiliations with the State are so ‘continuous and systematic’ as

For jurisdictional purposes, the important question is generally (as it is here) where a plaintiff was injured, not where he or she resides.

to render [it] essentially at home in the forum State.” *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U. S. 915, 919 (2011).²

If general jurisdiction is not appropriate, however, a state court can exercise only specific, or case-linked, jurisdiction over a dispute. *Id.*, at 923–924. Our cases have set out three conditions for the exercise of specific jurisdiction over a nonresident defendant. 4A C. Wright, A. Miller, & A. Steinman, *Federal Practice and Procedure* §1069, pp. 22–78 (4th ed. 2015) (Wright); see also *id.*, at 22–27, n. 10 (collecting authority). First, the defendant must have “‘purposefully avail[ed] itself of the privilege of conducting activities within the forum State’” or have purposefully directed its conduct into the forum State. *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U. S. 873, 877 (2011) (plurality opinion) (quoting *Hanson v. Denckla*, 357 U. S. 235, 253 (1958)). Second, the plaintiff’s claim must “arise out of or relate to” the defendant’s forum conduct. *Helicopteros*, 466 U. S., at 414. Finally, the exercise of jurisdiction must be reasonable under the circumstances. *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.*, 480 U. S. 102, 113–114 (1987); *Burger King Corp. v. Rudzewicz*, 471 U. S. 462, 477–478 (1985). The factors relevant to such an analysis include “the burden on the defendant, the forum State’s interest in adjudicating the dispute, the plaintiff’s interest in obtaining convenient

² Respondents do not contend that the California courts would be able to exercise general jurisdiction over Bristol-Myers—a concession that follows directly from this Court’s opinion in *Daimler AG v. Bauman*, 571 U. S. ____ (2014). As I have explained, I believe the restrictions the Court imposed on general jurisdiction in *Daimler* were ill advised. See *BNSF R. Co. v. Tyrrell*, 581 U. S. ___, ___ (2017) (SOTOMAYOR, J., concurring in part and dissenting in part); *Daimler*, 571 U. S., at ____ (SOTOMAYOR, J., concurring in judgment). But I accept respondents’ concession, for the purpose of this case, that Bristol-Myers is not subject to general jurisdiction in California.

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and effective relief, the interstate judicial system’s interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies.” *Id.*, at 477 (internal quotation marks omitted).

B

Viewed through this framework, the California courts appropriately exercised specific jurisdiction over respondents’ claims.

First, there is no dispute that Bristol-Myers “purposefully avail[ed] itself,” *Nicastro*, 564 U. S., at 877, of California and its substantial pharmaceutical market. Bristol-Myers employs over 400 people in California and maintains half a dozen facilities in the State engaged in research, development, and policymaking. *Ante*, at 1–2. It contracts with a California-based distributor, McKesson, whose sales account for a significant portion of its revenue. *Supra*, at 2. And it markets and sells its drugs, including Plavix, in California, resulting in total Plavix sales in that State of nearly \$1 billion during the period relevant to this suit.

Second, respondents’ claims “relate to” Bristol-Myers’ in-state conduct. A claim “relates to” a defendant’s forum conduct if it has a “connect[ion] with” that conduct. *International Shoe*, 326 U. S., at 319. So respondents could not, for instance, hale Bristol-Myers into court in California for negligently maintaining the sidewalk outside its New York headquarters—a claim that has no connection to acts Bristol-Myers took in California. But respondents’ claims against Bristol-Myers look nothing like such a claim. Respondents’ claims against Bristol-Myers concern conduct materially identical to acts the company took in California: its marketing and distribution of Plavix, which it undertook on a nationwide basis in all 50 States. That respondents were allegedly injured by this nationwide course of conduct in Indiana, Oklahoma, and Texas, and

not California, does not mean that their claims do not “relate to” the advertising and distribution efforts that Bristol-Myers undertook in that State. All of the plaintiffs—residents and nonresidents alike—allege that they were injured by the same essential acts. Our cases require no connection more direct than that.

Finally, and importantly, there is no serious doubt that the exercise of jurisdiction over the nonresidents’ claims is reasonable. Because Bristol-Myers already faces claims that are identical to the nonresidents’ claims in this suit, it will not be harmed by having to defend against respondents’ claims: Indeed, the alternative approach—litigating those claims in separate suits in as many as 34 different States—would prove far more burdensome. By contrast, the plaintiffs’ “interest in obtaining convenient and effective relief,” *Burger King*, 471 U. S., at 477 (internal quotation marks omitted), is obviously furthered by participating in a consolidated proceeding in one State under shared counsel, which allows them to minimize costs, share discovery, and maximize recoveries on claims that may be too small to bring on their own. Cf. *American Express Co. v. Italian Colors Restaurant*, 570 U. S. ___, ___ (2013) (KAGAN., J., dissenting) (slip op., at 7) (“No rational actor would bring a claim worth tens of thousands of dollars if doing so meant incurring costs in the hundreds of thousands”). California, too, has an interest in providing a forum for mass actions like this one: Permitting the nonresidents to bring suit in California alongside the residents facilitates the efficient adjudication of the residents’ claims and allows it to regulate more effectively the conduct of both nonresident corporations like Bristol-Myers and resident ones like McKesson.

Nothing in the Due Process Clause prohibits a California court from hearing respondents’ claims—at least not in a case where they are joined to identical claims brought by California residents.

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III

Bristol-Myers does not dispute that it has purposefully availed itself of California’s markets, nor—remarkably—did it argue below that it would be “unreasonable” for a California court to hear respondents’ claims. See 1 Cal. 5th 783, 799, n. 2, 377 P. 3d 874, 885, n. 2 (2016). Instead, Bristol-Myers contends that respondents’ claims do not “arise out of or relate to” its California conduct. The majority agrees, explaining that no “adequate link” exists “between the State and the nonresidents’ claims,” *ante*, at 8—a result that it says follows from “settled principles [of] specific jurisdiction,” *ante*, at 7. But our precedents do not require this result, and common sense says that it cannot be correct.

A

The majority casts its decision today as compelled by precedent. *Ibid.* But our cases point in the other direction.

The majority argues at length that the exercise of specific jurisdiction in this case would conflict with our decision in *Walden v. Fiore*, 571 U. S. ____ (2014). That is plainly not true. *Walden* concerned the requirement that a defendant “purposefully avail” himself of a forum State or “purposefully direc[t]” his conduct toward that State, *Nicastro*, 564 U. S., at 877, not the separate requirement that a plaintiff’s claim “arise out of or relate to” a defendant’s forum contacts. The lower court understood the case that way. See *Fiore v. Walden*, 688 F. 3d 558, 576–582 (CA9 2012). The parties understood the case that way. See Brief for Petitioner 17–31, Brief for Respondent 20–44, Brief for United States as *Amicus Curiae* 12–18, in *Walden v. Fiore*, O. T. 2013, No. 12–574. And courts and commentators have understood the case that way. See, e.g., 4 Wright §1067.1, at 388–389. *Walden* teaches only that a defendant must have purposefully availed itself of the forum, and that a plaintiff cannot rely solely on a

defendant's contacts with a forum resident to establish the necessary relationship. See 571 U. S., at ___ (slip op., at 8) ("[T]he plaintiff cannot be the only link between the defendant and the forum"). But that holding has nothing to do with the dispute between the parties: Bristol-Myers has purposefully availed itself of California—to the tune of millions of dollars in annual revenue. Only if its language is taken out of context, *ante*, at 8–9, can *Walden* be made to seem relevant to the case at hand.

By contrast, our decision in *Keeton v. Hustler Magazine, Inc.*, 465 U. S. 770 (1984), suggests that there should be no such barrier to the exercise of jurisdiction here. In *Keeton*, a New York resident brought suit against an Ohio corporation, a magazine, in New Hampshire for libel. She alleged that the magazine's nationwide course of conduct—its publication of defamatory statements—had injured her in every State, including New Hampshire. This Court unanimously rejected the defendant's argument that it should not be subject to "nationwide damages" when only a small portion of those damages arose in the forum State, *id.*, at 781; exposure to such liability, the Court explained, was the consequence of having "continuously and deliberately exploited the New Hampshire market," *ibid.* The majority today dismisses *Keeton* on the ground that the defendant there faced one plaintiff's claim arising out of its nationwide course of conduct, whereas Bristol-Myers faces many more plaintiffs' claims. See *ante*, at 10. But this is a distinction without a difference: In either case, a defendant will face liability in a single State for a single course of conduct that has impact in many States. *Keeton* informs us that there is no unfairness in such a result.

The majority's animating concern, in the end, appears to be federalism: "[T]erritorial limitations on the power of the respective States," we are informed, may—and today do—trump even concerns about fairness to the parties. *Ante*,

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at 6. Indeed, the majority appears to concede that this is not, at bottom, a case about fairness but instead a case about power: one in which “the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; . . . the forum State has a strong interest in applying its law to the controversy; [and] the forum State is the most convenient location for litigation” but personal jurisdiction still will not lie. *Ante*, at 7 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U. S. 286, 294 (1980)). But I see little reason to apply such a principle in a case brought against a large corporate defendant arising out of its nationwide conduct. What interest could any single State have in adjudicating respondents’ claims that the other States do not share? I would measure jurisdiction first and foremost by the yardstick set out in *International Shoe*—“fair play and substantial justice,” 326 U. S., at 316 (internal quotation marks omitted). The majority’s opinion casts that settled principle aside.

B

I fear the consequences of the majority’s decision today will be substantial. Even absent a rigid requirement that a defendant’s in-state conduct must actually cause a plaintiff’s claim,³ the upshot of today’s opinion is that plaintiffs

³ Bristol-Myers urges such a rule upon us, Brief for Petitioner 14–37, but its adoption would have consequences far beyond those that follow from today’s factbound opinion. Among other things, it might call into question whether even a plaintiff *injured* in a State by an item identical to those sold by a defendant in that State could avail himself of that State’s courts to redress his injuries—a result specifically contemplated by *World-Wide Volkswagen Corp. v. Woodson*, 444 U. S. 286, 297 (1980). See Brief for Civil Procedure Professors as Amici Curiae 14–18; see also *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U. S. 873, 906–907 (2011) (GINSBURG, J., dissenting). That question, and others like it, appears to await another case.

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cannot join their claims together and sue a defendant in a State in which only some of them have been injured. That rule is likely to have consequences far beyond this case.

First, and most prominently, the Court's opinion in this case will make it profoundly difficult for plaintiffs who are injured in different States by a defendant's nationwide course of conduct to sue that defendant in a single, consolidated action. The holding of today's opinion is that such an action cannot be brought in a State in which only some plaintiffs were injured. Not to worry, says the majority: The plaintiffs here could have sued Bristol-Myers in New York or Delaware; could "probably" have subdivided their separate claims into 34 lawsuits in the States in which they were injured; and might have been able to bring a single suit in federal court (an "open . . . question"). *Ante*, at 12. Even setting aside the majority's caveats, what is the purpose of such limitations? What interests are served by preventing the consolidation of claims and limiting the forums in which they can be consolidated? The effect of the Court's opinion today is to eliminate nationwide mass actions in any State other than those in which a defendant is "essentially at home."⁴ See *Daimler*, 571 U. S., at ___ (slip op., at 8). Such a rule hands one more tool to corporate defendants determined to prevent the aggregation of individual claims, and forces injured plaintiffs to bear the burden of bringing suit in what will often be far flung jurisdictions.

Second, the Court's opinion today may make it impossi-

⁴The Court today does not confront the question whether its opinion here would also apply to a class action in which a plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs, not all of whom were injured there. Cf. *Devlin v. Scardelletti*, 536 U. S. 1, 9–10 (2002) ("Nonnamed class members . . . may be parties for some purposes and not for others"); see also Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 Ind. L. J. 597, 616–617 (1987).

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ble to bring certain mass actions at all. After this case, it is difficult to imagine where it might be possible to bring a nationwide mass action against two or more defendants headquartered and incorporated in different States. There will be no State where both defendants are “at home,” and so no State in which the suit can proceed. What about a nationwide mass action brought against a defendant not headquartered or incorporated in the United States? Such a defendant is not “at home” in any State. Cf. *id.*, at ____—____ (SOTOMAYOR, J., concurring in judgment) (slip op., at 18–19). Especially in a world in which defendants are subject to general jurisdiction in only a handful of States, see *ibid.*, the effect of today’s opinion will be to curtail—and in some cases eliminate—plaintiffs’ ability to hold corporations fully accountable for their nationwide conduct.

The majority chides respondents for conjuring a “parade of horribles,” *ante*, at 12, but says nothing about how suits like those described here will survive its opinion in this case. The answer is simple: They will not.

* * *

It “does not offend ‘traditional notions of fair play and substantial justice,’” *International Shoe*, 326 U. S., at 316, to permit plaintiffs to aggregate claims arising out of a single nationwide course of conduct in a single suit in a single State where some, but not all, were injured. But that is exactly what the Court holds today is barred by the Due Process Clause.

This is not a rule the Constitution has required before. I respectfully dissent.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES**Syllabus****BANK OF AMERICA CORP. ET AL. v. CITY OF MIAMI,
FLORIDA****CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT**

No. 15–1111. Argued November 8, 2016—Decided May 1, 2017*

The City of Miami filed suit against Bank of America and Wells Fargo (Banks), alleging violations of the Fair Housing Act (FHA or Act). The FHA prohibits, among other things, racial discrimination in connection with real-estate transactions, 42 U. S. C. §§3604(b), 3605(a), and permits any “aggrieved person” to file a civil damages action for a violation of the Act, §§3613(a)(1)(A), (c)(1). The City’s complaints charge that the Banks intentionally targeted predatory practices at African-American and Latino neighborhoods and residents, lending to minority borrowers on worse terms than equally creditworthy nonminority borrowers and inducing defaults by failing to extend refinancing and loan modifications to minority borrowers on fair terms. The City alleges that the Banks’ discriminatory conduct led to a disproportionate number of foreclosures and vacancies in majority-minority neighborhoods, which impaired the City’s effort to assure racial integration, diminished the City’s property-tax revenue, and increased demand for police, fire, and other municipal services. The District Court dismissed the complaints on the grounds that (1) the harms alleged fell outside the zone of interests the FHA protects and (2) the complaints failed to show a sufficient causal connection between the City’s injuries and the Banks’ discriminatory conduct. The Eleventh Circuit reversed.

Held:

1. The City is an “aggrieved person” authorized to bring suit under the FHA. In addition to satisfying constitutional standing require-

*Together with No. 15–1112, *Wells Fargo & Co. et al. v. City of Miami, Florida*, also on certiorari to the same court.

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ments, see *Spokeo, Inc. v. Robins*, 578 U. S. ___, ___, a plaintiff must show that the statute grants the plaintiff the cause of action he or she asserts. It is presumed that a statute ordinarily provides a cause of action “only to plaintiffs whose interests ‘fall within the zone of interests protected by the law invoked.’” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U. S. ___, ___.

The City’s claims of financial injury are, at the least, “arguably within the zone of interests” the FHA protects. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U. S. 150, 153. The FHA defines an “aggrieved person” as “any person who” either “claims to have been injured by a discriminatory housing practice” or believes that such an injury “is about to occur,” 8 U. S. C. §3602(i). This Court has said that the definition of “person aggrieved” in the original version of the FHA “showed ‘a congressional intention to define standing as broadly as is permitted by Article III of the Constitution,’” *Trafficante v. Metropolitan Life Ins. Co.*, 409 U. S. 205, 209; and has held that the Act permits suit by parties similarly situated to the City, see, e.g., *Gladstone, Realtors v. Village of Bellwood*, 441 U. S. 91 (village alleging that it lost tax revenue and had the racial balance of its community undermined by racial-steering practices). Against the backdrop of those decisions, Congress did not materially alter the definition of person “aggrieved” when it reenacted the current version of the Act.

The Banks nonetheless contend that the definition sets boundaries that fall short of those the Constitution sets. Even assuming that some form of their argument is valid, this Court concludes that the City’s financial injuries fall within the zone of interests that the FHA protects. The City’s claims are similar in kind to those of the Village of Bellwood, which the Court held in *Gladstone, supra*, could bring suit under the FHA. The Court explained that the defendants’ discriminatory conduct adversely affected the village by, among other things, producing a “significant reduction in property values [that] directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services.” *Id.*, at 110–111. The City’s alleged economic injuries thus arguably fall within the FHA’s zone of interests, as this Court has previously interpreted that statute. *Stare decisis* principles compel the Court’s adherence to those precedents, and principles of statutory interpretation demand that the Court respect Congress’ decision to ratify those precedents when it reenacted the relevant statutory text. Pp. 5–9.

2. The Eleventh Circuit erred in concluding that the complaints met the FHA’s proximate-cause requirement based solely on the finding that the City’s alleged financial injuries were foreseeable results

Syllabus

of the Banks’ misconduct. A claim for damages under the FHA is akin to a “tort action,” *Meyer v. Holley*, 537 U. S. 280, 285, and is thus subject to the common-law requirement that loss is attributable “to the proximate cause, and not to any remote cause,” *Lexmark*, 572 U. S., at _____. The proximate-cause analysis asks “whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits.” *Id.*, at _____. With respect to the FHA, foreseeability alone does not ensure the required close connection. Nothing in the statute suggests that Congress intended to provide a remedy for any foreseeable result of an FHA violation, which may “‘cause ripples of harm to flow’ far beyond the defendant’s misconduct, *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U. S. 519, 534; and doing so would risk “massive and complex damages litigation,” *id.*, at 545. Rather, proximate cause under the FHA requires “some direct relation between the injury asserted and the injurious conduct alleged.” *Holmes v. Securities Investors Protection Corporation*, 503 U. S. 258, 268. The Court has repeatedly applied directness principles to statutes with “common-law foundations.” *Anza v. Ideal Steel Supply Corp.*, 547 U. S. 451, 457. “‘The general tendency’ in these cases, “‘in regard to damages at least, is not to go beyond the first step.’” *Hemi Group, LLC v. City of New York*, 559 U. S. 1, 10. What falls within that step depends in part on the “nature of the statutory cause of action,” *Lexmark*, *supra*, at _____, and an assessment “‘of what is administratively possible and convenient,’” *Holmes*, *supra*, at 268.

The Court declines to draw the precise boundaries of proximate cause under the FHA, particularly where neither the Eleventh Circuit nor other courts of appeals have weighed in on the issue. Instead, the lower courts should define, in the first instance, the contours of proximate cause under the FHA and decide how that standard applies to the City’s claims for lost property-tax revenue and increased municipal expenses. Pp. 10–12.

No. 15–1111, 800 F. 3d 1262, and No. 15–1112, 801 F. 3d 1258, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed an opinion concurring in part and dissenting in part, in which KENNEDY and ALITO, JJ., joined. GORSUCH, J., took no part in the consideration or decision of the cases.

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 15–1111 and 15–1112

BANK OF AMERICA CORPORATION, ET AL.,
PETITIONERS

15–1111 *v.*
CITY OF MIAMI, FLORIDA

WELLS FARGO & CO., ET AL., PETITIONERS
15–1112 *v.*
CITY OF MIAMI, FLORIDA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

[May 1, 2017]

JUSTICE BREYER delivered the opinion of the Court.

The Fair Housing Act (FHA or Act) forbids

“discriminat[ing] against any person in the terms,
conditions, or privileges of sale or rental of a dwelling,
or in the provision of services or facilities in connec-
tion therewith, because of race” 42 U. S. C.
§3604(b).

It further makes it unlawful for

“any person or other entity whose business includes
engaging in residential real estate-related transac-
tions to discriminate against any person in making
available such a transaction, or in the terms or condi-
tions of such a transaction, because of race”
§3605(a).

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The statute allows any “aggrieved person” to file a civil action seeking damages for a violation of the statute. §§3613(a)(1)(A), 3613(c)(1). And it defines an “aggrieved person” to include “any person who . . . claims to have been injured by a discriminatory housing practice.” §3602(i).

The City of Miami claims that two banks, Bank of America and Wells Fargo, intentionally issued riskier mortgages on less favorable terms to African-American and Latino customers than they issued to similarly situated white, non-Latino customers, in violation of §§3604(b) and 3605(a). App. 185–197, 244–245, 350–362, 428. The City, in amended complaints, alleges that these discriminatory practices have (1) “adversely impacted the racial composition of the City,” *id.*, at 232, 416; (2) “impaired the City’s goals to assure racial integration and desegregation,” *ibid.*; (3) “frustrate[d] the City’s longstanding and active interest in promoting fair housing and securing the benefits of an integrated community,” *id.*, at 232–233, 416–417; and (4) disproportionately “cause[d] foreclosures and vacancies in minority communities in Miami,” *id.*, at 229, 413. Those foreclosures and vacancies have harmed the City by decreasing “the property value of the foreclosed home as well as the values of other homes in the neighborhood,” thereby (a) “reduc[ing] property tax revenues to the City,” *id.*, at 234, 418, and (b) forcing the City to spend more on “municipal services that it provided and still must provide to remedy blight and unsafe and dangerous conditions which exist at properties that were foreclosed as a result of [the Banks’] illegal lending practices,” *id.*, at 233–234, 417. The City claims that those practices violate the FHA and that it is entitled to damages for the listed injuries.

The Banks respond that the complaints do not set forth a cause of action for two basic reasons. First, they contend that the City’s claimed harms do not “arguably” fall within the “zone of interests” that the statute seeks to protect,

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Association of Data Processing Service Organizations, Inc. v. Camp, 397 U. S. 150, 153 (1970); hence, the City is not an “aggrieved person” entitled to sue under the Act, §3602(i). Second, they say that the complaint fails to draw a “proximate-cause” connection between the violation claimed and the harm allegedly suffered. In their view, even if the City proves the violations it charges, the distance between those violations and the harms the City claims to have suffered is simply too great to entitle the City to collect damages.

We hold that the City’s claimed injuries fall within the zone of interests that the FHA arguably protects. Hence, the City is an “aggrieved person” able to bring suit under the statute. We also hold that, to establish proximate cause under the FHA, a plaintiff must do more than show that its injuries foreseeably flowed from the alleged statutory violation. The lower court decided these cases on the theory that foreseeability is all that the statute requires, so we vacate and remand for further proceedings.

I

In 2013, the City of Miami brought lawsuits in federal court against two banks, Bank of America and Wells Fargo. The City’s complaints charge that the Banks discriminatorily imposed more onerous, and indeed “predatory,” conditions on loans made to minority borrowers than to similarly situated nonminority borrowers. App. 185–197, 350–362. Those “predatory” practices included, among others, excessively high interest rates, unjustified fees, teaser low-rate loans that overstated refinancing opportunities, large prepayment penalties, and—when default loomed—unjustified refusals to refinance or modify the loans. *Id.*, at 225, 402. Due to the discriminatory nature of the Banks’ practices, default and foreclosure rates among minority borrowers were higher than among otherwise similar white borrowers and were concentrated

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in minority neighborhoods. *Id.*, at 225–232, 408–415. Higher foreclosure rates lowered property values and diminished property-tax revenue. *Id.*, at 234, 418. Higher foreclosure rates—especially when accompanied by vacancies—also increased demand for municipal services, such as police, fire, and building and code enforcement services, all needed “to remedy blight and unsafe and dangerous conditions” that the foreclosures and vacancies generate. *Id.*, at 238–240, 421–423. The complaints describe statistical analyses that trace the City’s financial losses to the Banks’ discriminatory practices. *Id.*, at 235–237; 419–420.

The District Court dismissed the complaints on the grounds that (1) the harms alleged, being economic and not discriminatory, fell outside the zone of interests the FHA protects; (2) the complaints fail to show a sufficient causal connection between the City’s injuries and the Banks’ discriminatory conduct; and (3) the complaints fail to allege unlawful activity occurring within the Act’s 2-year statute of limitations. The City then filed amended complaints (the complaints now before us) and sought reconsideration. The District Court held that the amended complaints could solve only the statute of limitations problem. It consequently declined to reconsider the dismissals.

The Court of Appeals reversed the District Court. 800 F. 3d 1262 (CA11 2015); 801 F. 3d 1258 (CA11 2015). It held that the City’s injuries fall within the “zone of interests,” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U. S. ___, ___ (2014) (slip op., at 10), that the FHA protects. 800 F. 3d, at 1274–1275, 1277 (relying on *Trafficante v. Metropolitan Life Ins. Co.*, 409 U. S. 205 (1972); *Gladstone, Realtors v. Village of Bellwood*, 441 U. S. 91 (1979); and *Havens Realty Corp. v. Coleman*, 455 U. S. 363 (1982)); 801 F. 3d, at 1266–1267 (similar). It added that the complaints adequately allege proximate cause. 800 F. 3d, at 1278; 801 F. 3d, at 1267. And it

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remanded the cases while ordering the District Court to accept the City’s complaints as amended. 800 F. 3d, at 1286; 801 F. 3d, at 1267.

The Banks filed petitions for certiorari, asking us to decide whether, as the Court of Appeals had in effect held, the amended complaints satisfied the FHA’s zone-of-interests and proximate-cause requirements. We agreed to do so.

II

To satisfy the Constitution’s restriction of this Court’s jurisdiction to “Cases” and “Controversies,” Art. III, §2, a plaintiff must demonstrate constitutional standing. To do so, the plaintiff must show an “injury in fact” that is “fairly traceable” to the defendant’s conduct and “that is likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 578 U. S. ___, ___ (2016) (slip op., at 6) (citing *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992)). This Court has also referred to a plaintiff’s need to satisfy “prudential” or “statutory” standing requirements. See *Lexmark*, 572 U. S., at ___–___, and n. 4 (slip op., at 6–9, and n. 4). In *Lexmark*, we said that the label “‘prudential standing’” was misleading, for the requirement at issue is in reality tied to a particular statute. *Ibid.* The question is whether the statute grants the plaintiff the cause of action that he asserts. In answering that question, we presume that a statute ordinarily provides a cause of action “only to plaintiffs whose interests fall within the zone of interests protected by the law invoked.” *Id.*, at ___ (slip op., at 10) (internal quotation marks omitted). We have added that “[w]hether a plaintiff comes within ‘the zone of interests’ is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff’s claim.” *Id.*, at ___ (slip op., at 8) (some internal quotation marks

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omitted).

Here, we conclude that the City’s claims of financial injury in their amended complaints—specifically, lost tax revenue and extra municipal expenses—satisfy the “cause-of-action” (or “prudential standing”) requirement. To use the language of *Data Processing*, the City’s claims of injury it suffered as a result of the statutory violations are, at the least, “arguably within the zone of interests” that the FHA protects. 397 U. S., at 153 (emphasis added).

The FHA permits any “aggrieved person” to bring a housing-discrimination lawsuit. 42 U. S. C. §3613(a). The statute defines “aggrieved person” as “any person who” either “claims to have been injured by a discriminatory housing practice” or believes that such an injury “is about to occur.” §3602(i).

This Court has repeatedly written that the FHA’s definition of person “aggrieved” reflects a congressional intent to confer standing broadly. We have said that the definition of “person aggrieved” in the original version of the FHA, §810(a), 82 Stat. 85, “showed ‘a congressional intention to define standing as broadly as is permitted by Article III of the Constitution.’” *Trafficante, supra*, at 209 (quoting *Hackett v. McGuire Brothers, Inc.*, 445 F. 2d 442, 446 (CA3 1971)); see *Gladstone, supra*, at 109 (similar); *Havens Realty, supra*, at 372, 375–376 (similar); see also *Thompson v. North American Stainless, LP*, 562 U. S. 170, 176 (2011) (“Later opinions, we must acknowledge, reiterate that the term ‘aggrieved’ [in the FHA] reaches as far as Article III permits”); *Bennett v. Spear*, 520 U. S. 154, 165–166 (1997) (“[*Trafficante*] held that standing was expanded to the full extent permitted under Article III by §810(a) of the Civil Rights Act of 1968”).

Thus, we have held that the Act allows suits by white tenants claiming that they were deprived benefits from interracial associations when discriminatory rental practices kept minorities out of their apartment complex,

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Trafficante, 409 U. S., at 209–212; a village alleging that it lost tax revenue and had the racial balance of its community undermined by racial-steering practices, *Gladstone*, 441 U. S., at 110–111; and a nonprofit organization that spent money to combat housing discrimination, *Havens Realty*, 455 U. S., at 379. Contrary to the dissent’s view, those cases did more than “sugges[t]” that plaintiffs similarly situated to the City have a cause of action under the FHA. *Post*, at 5. They held as much. And the dissent is wrong to say that we characterized those cases as resting on “ill-considered dictum.” *Post*, at 4 (quoting *Thompson, supra*, at 176). The “dictum” we cast doubt on in *Thompson* addressed who may sue under Title VII, the employment discrimination statute, not under the FHA.

Finally, in 1988, when Congress amended the FHA, it retained without significant change the definition of “person aggrieved” that this Court had broadly construed. Compare §810(a), 82 Stat. 85, with §5(b), 102 Stat. 1619–1620 (codified at 42 U. S. C. §3602(i)) (changing “person aggrieved” to “aggrieved person” and making other minor changes to the definition). Indeed, Congress “was aware of” our precedent and “made a considered judgment to retain the relevant statutory text,” *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U. S. ___, ___ (2015) (slip op., at 13). See H. R. Rep. No. 100–711, p. 23 (1988) (stating that the “bill adopts as its definition language similar to that contained in Section 810 of existing law, as modified to reaffirm the broad holdings of these cases” and discussing *Gladstone* and *Havens Realty*); cf. *Lorillard v. Pons*, 434 U. S. 575, 580 (1978) (Congress normally adopts our interpretations of statutes when it reenacts those statute without change).

The Banks do not deny the broad reach of the words “aggrieved person” as defined in the FHA. But they do contend that those words nonetheless set boundaries that fall short of those the Constitution sets. Brief for Petition-

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ers in No. 15–1112, p. 12 (Brief for Wells Fargo); Brief for Petitioners in No. 15–1111, pp. 19–20 (Brief for Bank of America). The Court’s language in *Trafficante*, *Gladstone*, and *Havens Realty*, they argue, was exaggerated and unnecessary to decide the cases then before the Court. See Brief for Wells Fargo 19–23; Brief for Bank of America 27–33. Moreover, they warn that taking the Court’s words literally—providing everyone with constitutional standing a cause of action under the FHA—would produce a legal anomaly. After all, in *Thompson*, 562 U. S., at 175–177, we held that the words “person claiming to be aggrieved” in Title VII of the Civil Rights Act of 1964, the employment discrimination statute, did not stretch that statute’s zone of interest to the limits of Article III. We reasoned that such an interpretation would produce farfetched results, for example, a shareholder in a company could bring a Title VII suit against the company for discriminatorily firing an employee. *Ibid.* The Banks say it would be similarly farfetched if restaurants, plumbers, utility companies, or any other participant in the local economy could sue the Banks to recover business they lost when people had to give up their homes and leave the neighborhood as a result of the Banks’ discriminatory lending practices. Brief for Wells Fargo 18–19; Brief for Bank of America 22, 24–25. That, they believe, cannot have been the intent of the Congress that enacted or amended the FHA.

We need not discuss the Banks’ argument at length, for even if we assume for argument’s sake that some form of it is valid, we nonetheless conclude that the City’s financial injuries fall within the zone of interests that the FHA protects. Our case law with respect to the FHA drives that conclusion. The City’s complaints allege that the Banks “intentionally targeted predatory practices at African-American and Latino neighborhoods and residents,” App. 225; *id.*, at 409 (similar). That unlawful conduct led to a “concentration” of “foreclosures and vacancies” in

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those neighborhoods. *Id.*, at 226, 229, 410, 413. Those concentrated “foreclosures and vacancies” caused “stagnation and decline in African-American and Latino neighborhoods.” *Id.*, at 225, 409. They hindered the City’s efforts to create integrated, stable neighborhoods. *Id.*, at 186, 351. And, highly relevant here, they reduced property values, diminishing the City’s property-tax revenue and increasing demand for municipal services. *Id.*, at 233–234, 417.

Those claims are similar in kind to the claims the Village of Bellwood raised in *Gladstone*. There, the plaintiff village had alleged that it was “‘injured by having [its] housing market . . . wrongfully and illegally manipulated to the economic and social detriment of the citizens of [the] village.’” 441 U. S., at 95 (quoting the complaint; alterations in original). We held that the village could bring suit. We wrote that the complaint in effect alleged that the defendant-realtors’ racial steering “affect[ed] the village’s racial composition,” “reduce[d] the total number of buyers in the Bellwood housing market,” “precipitate[d] an exodus of white residents,” and caused “prices [to] be deflected downward.” *Id.*, at 110. Those circumstances adversely affected the village by, among other things, *producing a “significant reduction in property values [that] directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services.”* *Id.*, at 110–111 (emphasis added).

The upshot is that the City alleges economic injuries that arguably fall within the FHA’s zone of interests, as we have previously interpreted that statute. Principles of *stare decisis* compel our adherence to those precedents in this context. And principles of statutory interpretation require us to respect Congress’ decision to ratify those precedents when it reenacted the relevant statutory text. See *supra*, at 7.

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III

The remaining question is one of causation: Did the Banks’ allegedly discriminatory lending practices proximately cause the City to lose property-tax revenue and spend more on municipal services? The Eleventh Circuit concluded that the answer is “yes” because the City plausibly alleged that its financial injuries were foreseeable results of the Banks’ misconduct. We conclude that foreseeability alone is not sufficient to establish proximate cause under the FHA, and therefore vacate the judgment below.

It is a “well established principle of [the common] law that in all cases of loss, we are to attribute it to the proximate cause, and not to any remote cause.” *Lexmark*, 572 U. S., at ___ (slip op., at 13). We assume Congress “is familiar with the common-law rule and does not mean to displace it *sub silentio*” in federal causes of action. *Ibid.* A claim for damages under the FHA—which is akin to a “tort action,” *Meyer v. Holley*, 537 U. S. 280, 285 (2003)—is no exception to this traditional requirement. “Proximate-cause analysis is controlled by the nature of the statutory cause of action. The question it presents is whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits.” *Lexmark, supra*, at ___ (slip op., at 14).

In these cases, the “conduct the statute prohibits” consists of intentionally lending to minority borrowers on worse terms than equally creditworthy nonminority borrowers and inducing defaults by failing to extend refinancing and loan modifications to minority borrowers on fair terms. The City alleges that the Banks’ misconduct led to a disproportionate number of foreclosures and vacancies in specific Miami neighborhoods. These foreclosures and vacancies purportedly harmed the City, which lost property-tax revenue when the value of the properties in those neighborhoods fell and was forced to spend more on mu-

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nicipal services in the affected areas.

The Eleventh Circuit concluded that the City adequately pleaded that the Banks' misconduct proximately caused these financial injuries. 800 F. 3d, at 1282. The court held that in the context of the FHA "the proper standard" for proximate cause "is based on foreseeability." *Id.*, at 1279, 1282. The City, it continued, satisfied that element: Although there are "several links in the causal chain" between the charged discriminatory lending practices and the claimed losses, the City plausibly alleged that "none are unforeseeable." *Id.*, at 1282.

We conclude that the Eleventh Circuit erred in holding that foreseeability is sufficient to establish proximate cause under the FHA. As we have explained, proximate cause "generally bars suits for alleged harm that is 'too remote' from the defendant's unlawful conduct." *Lexmark, supra*, at ____ (slip op., at 14). In the context of the FHA, foreseeability alone does not ensure the close connection that proximate cause requires. The housing market is interconnected with economic and social life. A violation of the FHA may, therefore, "'be expected to cause ripples of harm to flow'" far beyond the defendant's misconduct. *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U. S. 519, 534 (1983). Nothing in the statute suggests that Congress intended to provide a remedy wherever those ripples travel. And entertaining suits to recover damages for any foreseeable result of an FHA violation would risk "massive and complex damages litigation." *Id.*, at 545.

Rather, proximate cause under the FHA requires "some direct relation between the injury asserted and the injurious conduct alleged." *Holmes v. Securities Investors Protection Corporation*, 503 U. S. 258, 268 (1992). A damages claim under the statute "is analogous to a number of tort actions recognized at common law," *Curtis v. Loether*, 415 U. S. 189, 195 (1974), and we have repeatedly applied

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directness principles to statutes with “common-law foundations,” *Anza v. Ideal Steel Supply Corp.*, 547 U. S. 451, 457 (2006). “The general tendency” in these cases, “in regard to damages at least, is not to go beyond the first step.” *Hemi Group, LLC v. City of New York*, 559 U. S. 1, 10 (2010). What falls within that “first step” depends in part on the “nature of the statutory cause of action,” *Lexmark, supra*, at ___ (slip op., at 14), and an assessment “of what is administratively possible and convenient,” *Holmes, supra*, at 268.

The parties have asked us to draw the precise boundaries of proximate cause under the FHA and to determine on which side of the line the City’s financial injuries fall. We decline to do so. The Eleventh Circuit grounded its decision on the theory that proximate cause under the FHA is “based on foreseeability” alone. 800 F. 3d, at 1282. We therefore lack the benefit of its judgment on how the contrary principles we have just stated apply to the FHA. Nor has any other court of appeals weighed in on the issue. The lower courts should define, in the first instance, the contours of proximate cause under the FHA and decide how that standard applies to the City’s claims for lost property-tax revenue and increased municipal expenses.

IV

The judgments of the Court of Appeals for the Eleventh Circuit are vacated, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GORSUCH took no part in the consideration or decision of these cases.

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SUPREME COURT OF THE UNITED STATES

Nos. 15-1111 and 15-1112

BANK OF AMERICA CORPORATION, ET AL.,
PETITIONERS

15-1111 *v.*
CITY OF MIAMI, FLORIDA

WELLS FARGO & CO., ET AL., PETITIONERS
15-1112 v.

CITY OF MIAMI, FLORIDA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

[May 1, 2017]

JUSTICE THOMAS, with whom JUSTICE KENNEDY and JUSTICE ALITO join, concurring in part and dissenting in part.

These cases arise from lawsuits filed by the city of Miami alleging that residential mortgage lenders engaged in discriminatory lending practices in violation of the Fair Housing Act (FHA). The FHA prohibits “discrimination” against “any person” because of “race, color, religion, sex, handicap, familial status, or national origin” with respect to the “sale or rental” of “a dwelling.” 42 U. S. C. §3604; accord, §3605(a); §3606. Miami’s complaints do not allege that any defendant discriminated against it within the meaning of the FHA. Neither is Miami attempting to bring a lawsuit on behalf of its residents against whom petitioners allegedly discriminated. Rather, Miami’s theory is that, between 2004 and 2012, petitioners’ allegedly discriminatory mortgage-lending practices led to defaulted loans, which led to foreclosures, which led to

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vacant houses, which led to decreased property values, which led to reduced property taxes and urban blight. See 800 F. 3d 1262, 1268 (CA11 2015); 801 F. 3d 1258, 1266 (CA11 2015). Miami seeks damages from the lenders for reduced property tax revenues and for the cost of increased municipal services—“police, firefighters, building inspectors, debris collectors, and others”—deployed to attend to the blighted areas. 800 F. 3d, at 1269; 801 F. 3d, at 1263.

The Court today holds that Congress intended to remedy those kinds of injuries when it enacted the FHA, but leaves open the question whether Miami sufficiently alleged that the discriminatory lending practices caused its injuries. For the reasons explained below, I would hold that Miami’s injuries fall outside the FHA’s zone of interests. I would also hold that, in any event, Miami’s alleged injuries are too remote to satisfy the FHA’s proximate-cause requirement.

I

A plaintiff seeking to bring suit under a federal statute must show not only that he has standing under Article III, *ante*, at 5, but also that his “complaint fall[s] within the zone of interests protected by the law” he invokes, *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U. S. ___, ___ (2014) (slip op., at 7) (internal quotation marks omitted). The zone-of-interests requirement is “root[ed]” in the “common-law rule” providing that a plaintiff may “recover under the law of negligence for injuries caused by violation of a statute” only if “the statute ‘is interpreted as designed to protect the class of persons in which the plaintiff is included, against the risk of the type of harm which has in fact occurred as a result of its violation.’” *Id.*, at ___, n. 5 (slip op., at 11, n. 5) (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* §36, pp. 229–230 (5th ed. 1984)).

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We have “made clear” that “Congress is presumed to legislate against the background” of that common-law rule. *Lexmark*, 572 U. S., at ____ (slip op., at 10) (internal quotation marks omitted). We thus apply it “to all statutorily created causes of action . . . unless it is *expressly negated*.¹” *Ibid.* (emphasis added; internal quotation marks omitted). “Whether a plaintiff comes within the zone of interests is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff’s claim.” *Id.*, at ____ (slip op., at 8) (internal quotation marks omitted).

A

Nothing in the text of the FHA suggests that Congress intended to deviate from the zone-of-interests limitation. The statute’s private-enforcement mechanism provides that only an “aggrieved person” may sue, §3613(a)(1)(A), and the statute defines “aggrieved person” to mean someone who “claims to have been injured by a discriminatory housing practice” or who believes he “will be injured by a discriminatory housing practice that is about to occur,” §§3602(i)(1), (2). That language does not hint—much less expressly provide—that Congress sought to depart from the common-law rule.

We have considered similar language in other statutes and reached the same conclusion. In *Thompson v. North American Stainless, LP*, 562 U. S. 170 (2011), for example, we considered Title VII’s private-enforcement provision, which provides that “a person claiming to be aggrieved” may file an employment discrimination charge with the Equal Employment Opportunity Commission. *Id.*, at 173 (quoting §2000e–5(b)). We unanimously concluded that Congress did not depart from the zone-of-interests limitation in Title VII by using that language. *Id.*, at 175–178. And in *Lexmark*, we interpreted a provision of the Lan-

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ham Act that permitted “any person who believes that he or she is likely to be damaged by a defendant’s false advertising” to sue. 572 U. S., at ___ (slip op., at 10) (internal quotation marks omitted). Even when faced with the broader “any person” language, we expressly rejected the argument that the statute conferred a cause of action upon anyone claiming an Article III injury in fact. We observed that it was unlikely that “Congress meant to allow all factually injured plaintiffs to recover,” and we concluded that the zone-of-interests test was the “appropriate tool for determining who may invoke the cause of action” under the statute. *Id.*, at ___, ___ (slip op., at 10, 11) (internal quotation marks omitted).

To be sure, some language in our older precedents suggests that the FHA’s zone of interests extends to the limits of Article III. See *Trafficante v. Metropolitan Life Ins. Co.*, 409 U. S. 205, 209 (1972); *Gladstone, Realtors v. Village of Bellwood*, 441 U. S. 91, 109 (1979); *Havens Realty Corp. v. Coleman*, 455 U. S. 363, 372 (1982). But we have since described that language as “ill-considered” dictum leading to “absurd consequences.” *Thompson*, 562 U. S., at 176. And we have observed that the “holdings of those cases are compatible with the ‘zone of interests’ limitation” described in *Thompson*. *Ibid.* That limitation provides that a plaintiff may not sue when his “interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot be assumed that Congress intended to permit the suit.” *Id.*, at 178 (internal quotation marks omitted). It thus “exclud[es] plaintiffs who might technically be injured in an Article III sense but whose interests are unrelated to the statutory prohibitions.” *Ibid.*

B

In my view, Miami’s asserted injuries are “so marginally related to or inconsistent with the purposes” of the FHA

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that they fall outside the zone of interests. Here, as in any other case, the text of the FHA defines the zone of interests that the statute protects. See *Lexmark*, *supra*, at ____ (slip op., at 9). The FHA permits “[a]n aggrieved person” to sue, §3613(a)(1)(A), if he “claims to have been injured by a *discriminatory housing practice*” or believes that he “will be injured by a *discriminatory housing practice* that is about to occur,” §§3602(i)(1), (2) (emphasis added). Specifically, the FHA makes it unlawful to do any of the following on the basis of “race, color, religion, sex, handicap, familial status, or national origin”: “refuse to sell or rent . . . a dwelling,” §3604(a); discriminate in the “terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith,” §3604(b); “make, print, or publish . . . any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination,” §3604(c); “represent to any person . . . that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available,” §3604(d); “induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of” certain characteristics, §3604(e); or discriminate in the provision of real estate or brokerage services, §§3605, 3606. The quintessential “aggrieved person” in cases involving violations of the FHA is a prospective home buyer or lessee discriminated against during the home-buying or leasing process. Our cases have also suggested that the interests of a person who lives in a neighborhood or apartment complex that remains segregated (or that risks becoming segregated) as a result of a discriminatory housing practice may be arguably within the outer limit of the interests the FHA protects. See *Trafficante*, *supra*, at 211 (concluding that one purpose of the FHA was to promote “truly integrated and balanced

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living patterns” (internal quotation marks omitted)).

Miami’s asserted injuries are not arguably related to the interests the statute protects. Miami asserts that it received “reduced property tax revenues,” App. 233, 417, and that it was forced to spend more money on “municipal services that it provided and still must provide to remedy blight and unsafe and dangerous conditions,” *id.*, at 417; see also *ante*, at 2. The city blames these expenditures on the falling property values and vacant homes that resulted from foreclosures. But nothing in the text of the FHA suggests that Congress was concerned about decreased property values, foreclosures, and urban blight, much less about strains on municipal budgets that might follow.

Miami’s interests are markedly distinct from the interests this Court confronted in *Trafficante*, *Gladstone*, and *Havens*. In *Trafficante*, one white and one black tenant of an apartment complex sued on the ground that the complex discriminated against nonwhite rental applicants. 409 U. S., at 206–208. They argued that this discrimination deprived them of the social and economic benefits of living in an integrated community. *Id.*, at 208. In *Gladstone*, residents in a village sued based on alleged discrimination in the home-buying process. 441 U. S., at 93–95. They contended that white home buyers were steered away from a racially integrated neighborhood and toward an all-white neighborhood, whereas black home buyers were steered away from the all-white neighborhood and toward the integrated neighborhood. *Id.*, at 95. The plaintiffs thus alleged that they were “denied their right to select housing without regard to race.” *Ibid.* (internal quotation marks omitted). The village also sued, alleging that the FHA violations were affecting its “racial composition, replacing what is presently an integrated neighborhood with a segregated one” and that its budget was strained from resulting lost tax revenues. *Id.*, at 110. Finally, in *Havens*, one white and one black plaintiff sued

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after having posed as “testers,” for the purpose of “collecting evidence of unlawful steering practices.” 455 U. S., at 373. According to their complaint, the owner of an apartment complex had told the white plaintiff that apartments were available, but had told the black plaintiff that apartments were not. *Id.*, at 368. The Court held that the white plaintiff could *not* sue, because he had been provided truthful information, but that the black plaintiff *could* sue, because the FHA requires truthful information about housing without regard to race. *Id.*, at 374–375. In all three of these cases, the plaintiffs claimed injuries based on racial steering and segregation—interests that, under this Court’s precedents, at least arguably fall within the zone of interests that the FHA protects.

Miami’s asserted injuries implicate none of those interests. Miami does not assert that it was injured based on efforts by the lenders to steer certain residents into one neighborhood rather than another. Miami does not even assert that it was injured because its neighborhoods were segregated. Miami therefore is not, as the majority describes, “similarly situated” to the plaintiffs in *Trafficante*, *Gladstone*, and *Havens*. *Ante*, at 7. Rather, Miami asserts injuries allegedly resulting from foreclosed-upon and then vacant homes. The FHA’s zone of interests is not so expansive as to include those kinds of injuries.

C

The Court today reaches the opposite conclusion, resting entirely on the brief mention in *Gladstone* of the village’s asserted injury of reduced tax revenues, and on principles of *stare decisis*. See *ante*, at 9. I do not think *Gladstone* compels the conclusion the majority reaches. Unlike these cases, *Gladstone* involved injuries to interests in “racial balance and stability,” 441 U. S., at 111, which, our cases have suggested, arguably fall within the zone of interests protected by the FHA, see *supra*, at 6. The fact that the

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village plaintiff asserted a budget-related injury *in addition* to its racial-steering injury does not mean that a city alleging *only* a budget-related injury is authorized to sue. A budget-related injury might be necessary to establish a sufficiently concrete and particularized injury for purposes of Article III, but it is not sufficient to satisfy the FHA's zone-of-interests limitation.

Although the Court's reliance on *Gladstone* is misplaced, its opinion today is notable primarily for what it does not say. First, the Court conspicuously does not reaffirm the broad language from *Trafficante*, *Gladstone*, and *Havens* suggesting that Congress intended to permit any person with Article III standing to sue under the FHA. The Court of Appeals felt bound by that language, see 800 F. 3d, at 1277; 801 F. 3d, at 1266, and we granted review, despite the absence of a circuit conflict, to decide whether the language survived *Thompson* and *Lexmark*, see Brief for Petitioner in No. 15–1111, p. i (“By limiting suit to ‘aggrieved person[s],’ did Congress require that an FHA plaintiff plead more than just Article III injury-in-fact?”); Brief for Petitioner in No. 15–1112, p. i (“Whether the term ‘aggrieved’ in the Fair Housing Act imposes a zone-of-interests requirement more stringent than the injury-in-fact requirement of Article III”). Today’s opinion avoids those questions presented and thus cannot be read as retreating from our more recent precedents on the zone-of-interests limitation.

Second, the Court does not reject the lenders’ arguments about many other kinds of injuries that fall outside of the FHA’s zone of interests. We explained in *Thompson* that an expansive reading of Title VII’s zone of interests would allow a shareholder “to sue a company for firing a valuable employee for racially discriminatory reasons, so long as he could show that the value of his stock decreased as a consequence.” 562 U. S., at 177. Petitioners similarly argue that, if Miami can sue for lost tax revenues under

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the FHA, then “plumbers, utility companies, or any other participant in the local economy could sue the Banks to recover business they lost when people had to give up their homes and leave the neighborhood as a result of the Banks’ discriminatory lending practices.” *Ante*, at 8 (citing petitioners’ briefs). The Court today decides that it “need not discuss” this argument because *Gladstone* and *stare decisis* compel the conclusion that Miami can sue. *Ante*, at 8. That conclusion is wrong, but at least it is narrow. Accordingly, it should not be read to authorize suits by local businesses alleging the same injuries that Miami alleges here.

II

Although I disagree with its zone-of-interests holding, I agree with the Court’s conclusions about proximate cause, as far as they go. The Court correctly holds that “foreseeability alone is not sufficient to establish proximate cause under the FHA.” *Ante*, at 10. Instead, the statute requires “some direct relation between the injury asserted and the injurious conduct alleged.” *Ante*, at 11 (quoting *Holmes v. Securities Investor Protection Corporation*, 503 U. S. 258, 268 (1992)).

After articulating this test for proximate cause, the Court remands to the Court of Appeals because it “decline[s]” to “draw the precise boundaries of proximate cause under the FHA” or to “determine on which side of the line the City’s financial injuries fall.” *Ante*, at 12. But these cases come to the Court on a motion to dismiss, and the Court of Appeals has no advantage over us in evaluating the complaint’s proximate-cause theory. Moreover, the majority opinion leaves little doubt that neither Miami nor any similarly situated plaintiff can satisfy the rigorous standard for proximate cause that the Court adopts and leaves to the Court of Appeals to apply. See *ante*, at 11 (“The general tendency in these cases, in regard to damages

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at least, is not to go beyond the first step” (internal quotation marks omitted)).

Miami’s own account of causation shows that the link between the alleged FHA violation and its asserted injuries is exceedingly attenuated. According to Miami, the lenders’ injurious conduct was “target[ing] black and Latino customers in Miami for predatory loans.” Brief for Respondent in No. 15–1111, p. 4 (internal quotation marks omitted). And according to Miami, the injuries asserted are its “loss of tax revenues” and its expenditure of “additional monies on municipal services to address” the consequences of urban blight. *Id.*, at 6.

As Miami describes it, the chain of causation between the injurious conduct and its asserted injuries proceeds as follows: As a result of the lenders’ discriminatory loan practices, borrowers from predominantly minority neighborhoods were likely to default on their home loans, leading to foreclosures. *Id.*, at 5–6. The foreclosures led to vacant houses. *Id.*, at 6. The vacant houses, in turn, led to decreased property values for the surrounding homes. *Ibid.* Finally, those decreased property values resulted in homeowners paying lower property taxes to the city government. *Ibid.* Also, Miami explains, the foreclosed-upon, vacant homes eventually led to “vagrancy, criminal activity, and threats to public health and safety,” which the city had to address through the expenditures of municipal resources. *Ibid.* And all this occurred, according to Miami, between 2004 and 2012. See *ibid.* The Court of Appeals will not need to look far to discern other, independent events that might well have caused the injuries Miami alleges in these cases.

In light of this attenuated chain of causation, Miami’s asserted injuries are too remote from the injurious conduct it has alleged. See *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U. S. 519, 532, n. 25 (1983). Indeed, any other conclusion would lead to disquieting con-

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sequences. Under Miami’s own theory of causation, its injuries are one step further removed from the allegedly discriminatory lending practices than the injuries suffered by the neighboring homeowners whose houses declined in value. No one suggests that those homeowners could sue under the FHA, and I think it is clear that they cannot. Accordingly, I would hold that Miami has failed to sufficiently plead proximate cause under the FHA.

III

For the foregoing reasons, I would reverse the Court of Appeals.

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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES**Syllabus****TC HEARTLAND LLC v. KRAFT FOODS GROUP
BRANDS LLC****CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT**

No. 16–341. Argued March 27, 2017—Decided May 22, 2017

The patent venue statute, 28 U. S. C. §1400(b), provides that “[a]ny civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.” In *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U. S. 222, 226, this Court concluded that for purposes of §1400(b) a domestic corporation “resides” only in its State of incorporation, rejecting the argument that §1400(b) incorporates the broader definition of corporate “residence” contained in the general venue statute, 28 U. S. C. §1391(c). Congress has not amended §1400(b) since *Fourco*, but it has twice amended §1391, which now provides that, “[e]xcept as otherwise provided by law” and “[f]or all venue purposes,” a corporation “shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court’s personal jurisdiction with respect to the civil action in question.” §§1391(a), (c).

Respondent filed a patent infringement suit in the District Court for the District of Delaware against petitioner, a competitor that is organized under Indiana law and headquartered in Indiana but ships the allegedly infringing products into Delaware. Petitioner moved to transfer venue to a District Court in Indiana, claiming that venue was improper in Delaware. Citing *Fourco*, petitioner argued that it did not “resid[e]” in Delaware and had no “regular and established place of business” in Delaware under §1400(b). The District Court rejected these arguments. The Federal Circuit denied a petition for a writ of mandamus, concluding that §1391(c) supplies the definition of “resides” in §1400(b). The Federal Circuit reasoned that because pe-

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titioner resided in Delaware under §1391(c), it also resided there under §1400(b).

Held: As applied to domestic corporations, “reside[nce]” in §1400(b) refers only to the State of incorporation. The amendments to §1391 did not modify the meaning of §1400(b) as interpreted by *Fourco*. Pp. 3–10.

(a) The venue provision of the Judiciary Act of 1789 covered patent cases as well as other civil suits. *Stonite Products Co. v. Melvin Lloyd Co.*, 315 U. S. 561, 563. In 1897, Congress enacted a patent specific venue statute. This new statute (§1400(b)’s predecessor) permitted suit in the district of which the defendant was an “inhabitant” or in which the defendant both maintained a “regular and established place of business” and committed an act of infringement. 29 Stat. 695. A corporation at that time was understood to “inhabit” *only* the State of incorporation. This Court addressed the scope of §1400(b)’s predecessor in *Stonite*, concluding that it constituted “the exclusive provision controlling venue in patent infringement proceedings” and thus was not supplemented or modified by the general venue provisions. 315 U. S., at 563.

In 1948, Congress recodified the patent venue statute as §1400(b). That provision, which remains unaltered today, uses “resides” instead of “inhabit[s].” At the same time, Congress also enacted the general venue statute, §1391, which defined “residence” for corporate defendants. In *Fourco*, this Court reaffirmed *Stonite*’s holding, observing that Congress enacted §1400(b) as a standalone venue statute and that nothing in the 1948 recodification evidenced an intent to alter that status, even the fact that §1391(c) by “its terms” embraced “all actions,” 353 U. S., at 228. The Court also concluded that “resides” in the recodified version bore the same meaning as “inhabit[s]” in the pre-1948 version. See *id.*, at 226.

This landscape remained effectively unchanged until 1988, when Congress amended the general venue statute, §1391(c). The revised provision stated that it applied “[f]or purposes of venue under this chapter.” In *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F. 2d 1574, 1578, the Federal Circuit held that, in light of this amendment, §1391(c) established the definition for all other venue statutes under the same “chapter,” including §1400(b). In 2011, Congress adopted the current version of §1391, which provides that its general definition applies “[f]or all venue purposes.” The Federal Circuit reaffirmed *VE Holding* in the case below. Pp. 3–7.

(b) In *Fourco*, this Court definitively and unambiguously held that the word “reside[nce]” in §1400(b), as applied to domestic corporations, refers only to the State of incorporation. Because Congress has not amended §1400(b) since *Fourco*, and neither party asks the Court

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to reconsider that decision, the only question here is whether Congress changed §1400(b)'s meaning when it amended §1391. When Congress intends to effect a change of that kind, it ordinarily provides a relatively clear indication of its intent in the amended provision's text. No such indication appears in the current version of §1391.

Respondent points out that the current §1391(c) provides a default rule that, on its face, applies without exception "[f]or all venue purposes." But the version at issue in *Fourco* similarly provided a default rule that applied "for venue purposes," 353 U. S., at 223, and those phrasings are not materially different in this context. The addition of the word "all" to the already comprehensive provision does not suggest that Congress intended the Court to reconsider its decision in *Fourco*. Any argument based on this language is even weaker now than it was when the Court rejected it in *Fourco*. *Fourco* held that §1400(b) retained a meaning distinct from the default definition contained in §1391(c), even though the latter, by its terms, included no exceptions. The current version of §1391 includes a saving clause, which expressly states that the provision does not apply when "otherwise provided by law," thus making explicit the qualification that the *Fourco* Court found implicit in the statute. Finally, there is no indication that Congress in 2011 ratified the Federal Circuit's decision in *VE Holding*. Pp. 7–10.

821 F. 3d 1338, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which all other Members joined, except GORSUCH, J., who took no part in the consideration or decision of the case.

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NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 16–341

TC HEARTLAND LLC, PETITIONER *v.* KRAFT
FOODS GROUP BRANDS LLCON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FEDERAL CIRCUIT

[May 22, 2017]

JUSTICE THOMAS delivered the opinion of the Court.

The question presented in this case is where proper venue lies for a patent infringement lawsuit brought against a domestic corporation. The patent venue statute, 28 U. S. C. §1400(b), provides that “[a]ny civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.” In *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U. S. 222, 226 (1957), this Court concluded that for purposes of §1400(b) a domestic corporation “resides” only in its State of incorporation.

In reaching that conclusion, the Court rejected the argument that §1400(b) incorporates the broader definition of corporate “residence” contained in the general venue statute, 28 U. S. C. §1391(c). 353 U. S., at 228. Congress has not amended §1400(b) since this Court construed it in *Fourco*, but it has amended §1391 twice. Section 1391 now provides that, “[e]xcept as otherwise provided by law” and “[f]or all venue purposes,” a corporation “shall be deemed to reside, if a defendant, in any

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judicial district in which such defendant is subject to the court’s personal jurisdiction with respect to the civil action in question.” §§1391(a), (c). The issue in this case is whether that definition supplants the definition announced in *Fourco* and allows a plaintiff to bring a patent infringement lawsuit against a corporation in any district in which the corporation is subject to personal jurisdiction. We conclude that the amendments to §1391 did not modify the meaning of §1400(b) as interpreted by *Fourco*. We therefore hold that a domestic corporation “resides” only in its State of incorporation for purposes of the patent venue statute.

I

Petitioner, which is organized under Indiana law and headquartered in Indiana, manufactures flavored drink mixes.¹ Respondent, which is organized under Delaware law and has its principal place of business in Illinois, is a competitor in the same market. As relevant here, respondent sued petitioner in the District Court for the District of Delaware, alleging that petitioner’s products infringed one of respondent’s patents. Although petitioner is not registered to conduct business in Delaware and has no meaningful local presence there, it does ship the allegedly infringing products into the State.

Petitioner moved to dismiss the case or transfer venue

¹The complaint alleged that petitioner is a corporation, and petitioner admitted this allegation in its answer. See App. 11a, 60a. Similarly, the petition for certiorari sought review on the question of “corporate” residence. See Pet. for Cert. i. In their briefs before this Court, however, the parties suggest that petitioner is, in fact, an unincorporated entity. See Brief for Respondent 9, n. 4 (the complaint’s allegation was “apparently inaccurat[e]”); Reply Brief 4. Because this case comes to us at the pleading stage and has been litigated on the understanding that petitioner is a corporation, we confine our analysis to the proper venue for corporations. We leave further consideration of the issue of petitioner’s legal status to the courts below on remand.

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to the District Court for the Southern District of Indiana, arguing that venue was improper in Delaware. See 28 U. S. C. §1406. Citing *Fourco*'s holding that a corporation resides only in its State of incorporation for patent infringement suits, petitioner argued that it did not "resid[e]" in Delaware under the first clause of §1400(b). It further argued that it had no "regular and established place of business" in Delaware under the second clause of §1400(b). Relying on Circuit precedent, the District Court rejected these arguments, 2015 WL 5613160 (D Del., Sept. 24, 2015), and the Federal Circuit denied a petition for a writ of mandamus, *In re TC Heartland LLC*, 821 F. 3d 1338 (2016). The Federal Circuit concluded that subsequent statutory amendments had effectively amended §1400(b) as construed in *Fourco*, with the result that §1391(c) now supplies the definition of "resides" in §1400(b). 821 F. 3d, at 1341–1343. Under this logic, because the District of Delaware could exercise personal jurisdiction over petitioner, petitioner resided in Delaware under §1391(c) and, therefore, under §1400(b). We granted certiorari, 580 U. S. ____ (2016), and now reverse.

II
A

The history of the relevant statutes provides important context for the issue in this case. The Judiciary Act of 1789 permitted a plaintiff to file suit in a federal district court if the defendant was "an inhabitant" of that district or could be "found" for service of process in that district. Act of Sept. 24, 1789, §11, 1 Stat. 79. The Act covered patent cases as well as other civil suits. *Stonite Products Co. v. Melvin Lloyd Co.*, 315 U. S. 561, 563 (1942). In 1887, Congress amended the statute to permit suit only in the district of which the defendant was an inhabitant or, in diversity cases, of which either the plaintiff or defendant was an inhabitant. See Act of Mar. 3, 1887, §1, 24

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Stat. 552; see also *Stonite, supra*, at 563–564.

This Court’s decision in *In re Hohorst*, 150 U. S. 653, 661–662 (1893), arguably suggested that the 1887 Act did not apply to patent cases. As a result, while some courts continued to apply the Act to patent cases, others refused to do so and instead permitted plaintiffs to bring suit (in line with the pre-1887 regime) anywhere a defendant could be found for service of process. See *Stonite, supra*, at 564–565. In 1897, Congress resolved the confusion by enacting a patent specific venue statute. See Act of Mar. 3, 1897, ch. 395, 29 Stat. 695. In so doing, it “placed patent infringement cases in a class by themselves, outside the scope of general venue legislation.” *Brunette Machine Works, Ltd. v. Kockum Industries, Inc.*, 406 U. S. 706, 713 (1972). This new statute (§1400(b)’s predecessor) permitted suit in the district of which the defendant was an “inhabitant,” or a district in which the defendant both maintained a “regular and established place of business” and committed an act of infringement. 29 Stat. 695. At the time, a corporation was understood to “inhabit” *only* the State in which it was incorporated. *Shaw v. Quincy Mining Co.*, 145 U. S. 444, 449–450 (1892).

The Court addressed the scope of §1400(b)’s predecessor in *Stonite*. In that case, the two defendants inhabited different districts within a single State. The plaintiff sought to sue them both in the same district, invoking a then governing general venue statute that, if applicable, permitted it to do so. 315 U. S., at 562–563. This Court rejected the plaintiff’s venue choice on the ground that the patent venue statute constituted “the exclusive provision controlling venue in patent infringement proceedings” and thus was not supplemented or modified by the general venue provisions. *Id.*, at 563. In the Court’s view, the patent venue statute “was adopted to define the exact jurisdiction of the federal courts in actions to enforce patent rights,” a purpose that would be undermined by

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interpreting it “to dovetail with the general provisions relating to the venue of civil suits.” *Id.*, at 565–566. The Court thus held that the patent venue statute “alone should control venue in patent infringement proceedings.” *Id.*, at 566.

In 1948, Congress recodified the patent venue statute as §1400(b). See Act of June 25, 1948, 62 Stat. 936. The recodified provision, which remains unaltered today, states that “[a]ny civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.” 28 U. S. C. §1400(b) (1952 ed.). This version differs from the previous one in that it uses “resides” instead of “inhabit[s].” At the same time, Congress also enacted the general venue statute, §1391, which defined “residence” for corporate defendants. That provision stated that “[a] corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.” §1391(c) (1952 ed.).

Following the 1948 legislation, courts reached differing conclusions regarding whether §1400(b)’s use of the word “resides” incorporated §1391(c)’s definition of “residence.” See *Fourco*, 353 U. S., at 224, n. 3 (listing cases). In *Fourco*, this Court reviewed a decision of the Second Circuit holding that §1391(c) defined residence for purposes of §1400(b), “just as that definition is properly . . . incorporated into other sections of the venue chapter.” *Transmirra Prods. Corp. v. Fourco Glass Co.*, 233 F. 2d 885, 886 (1956). This Court squarely rejected that interpretation, reaffirming *Stonite’s* holding that §1400(b) “is the sole and exclusive provision controlling venue in patent infringement actions, and . . . is not to be supplemented by . . . §1391(c).” 353 U. S., at 229. The Court observed that

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Congress enacted §1400(b) as a standalone venue statute and that nothing in the 1948 recodification evidenced an intent to alter that status. The fact that §1391(c) by “its terms” embraced “all actions” was not enough to overcome the fundamental point that Congress designed §1400(b) to be “complete, independent and alone controlling in its sphere.” *Id.*, at 228.

The Court also concluded that “resides” in the recodified version of §1400(b) bore the same meaning as “inhabit[s]” in the pre-1948 version. See *id.*, at 226 (“[T]he [w]ords ‘inhabitant’ and ‘resident,’ as respects venue, are synonymous” (internal quotation marks omitted)). The substitution of “resides” for “inhabit[s]” thus did not suggest any alteration in the venue rules for corporations in patent cases. Accordingly, §1400(b) continued to apply to domestic corporations in the same way it always had: They were subject to venue only in their States of incorporation. See *ibid.* (The use of “resides” “negat[es] any intention to make corporations suable, in patent infringement cases, where they are merely ‘doing business,’ because those synonymous words [“inhabitant” and “resident”] mean *domicile* and, in respect of corporations, mean the state of incorporation only”).

B

This landscape remained effectively unchanged until 1988, when Congress amended the general venue statute, §1391(c), to provide that “[f]or purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced.” Judicial Improvements and Access to Justice Act, §1013(a), 102 Stat. 4669. The Federal Circuit in *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F. 2d 1574 (1990), announced its view of the effect of this amendment on the meaning of the patent venue statute.

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The court reasoned that the phrase “[f]or purposes of venue under this chapter” was “exact and classic language of incorporation,” *id.*, at 1579, and that §1391(c) accordingly established the definition for all other venue statutes under the same “chapter.” *Id.*, at 1580. Because §1400(b) fell within the relevant chapter, the Federal Circuit concluded that §1391(c), “on its face,” “clearly applies to §1400(b), and thus redefines the meaning of the term ‘resides’ in that section.” *Id.*, at 1578.

Following *VE Holding*, no new developments occurred until Congress adopted the current version of §1391 in 2011 (again leaving §1400(b) unaltered). See Federal Courts Jurisdiction and Venue Clarification Act of 2011, §202, 125 Stat. 763. Section 1391(a) now provides that, “[e]xcept as otherwise provided by law,” “this section shall govern the venue of all civil actions brought in district courts of the United States.” And §1391(c)(2), in turn, provides that, “[f]or all venue purposes,” certain entities, “whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court’s personal jurisdiction with respect to the civil action in question.” In its decision below, the Federal Circuit reaffirmed *VE Holding*, reasoning that the 2011 amendments provided no basis to reconsider its prior decision.

III

We reverse the Federal Circuit. In *Fourco*, this Court definitively and unambiguously held that the word “re-side[nce]” in §1400(b) has a particular meaning as applied to domestic² corporations: It refers only to the State of

²The parties dispute the implications of petitioner’s argument for foreign corporations. We do not here address that question, nor do we express any opinion on this Court’s holding in *Brunette Machine Works, Ltd. v. Kockum Industries, Inc.*, 406 U. S. 706 (1972) (determining proper venue for foreign corporation under then existing statutory

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incorporation. Congress has not amended §1400(b) since *Fourco*, and neither party asks us to reconsider our holding in that case. Accordingly, the only question we must answer is whether Congress changed the meaning of §1400(b) when it amended §1391. When Congress intends to effect a change of that kind, it ordinarily provides a relatively clear indication of its intent in the text of the amended provision. See *United States v. Madigan*, 300 U. S. 500, 506 (1937) (“[T]he modification by implication of the settled construction of an earlier and different section is not favored”); A. Scalia & B. Garner, *Reading Law* 331 (2012) (“A clear, authoritative judicial holding on the meaning of a particular provision should not be cast in doubt and subjected to challenge whenever a related though not utterly inconsistent provision is adopted in the same statute or even in an affiliated statute”).

The current version of §1391 does not contain any indication that Congress intended to alter the meaning of §1400(b) as interpreted in *Fourco*. Although the current version of §1391(c) provides a default rule that applies “[f]or all venue purposes,” the version at issue in *Fourco* similarly provided a default rule that applied “for venue purposes.” 353 U. S., at 223 (internal quotation marks omitted). In this context, we do not see any material difference between the two phrasings. See *Pure Oil Co. v. Suarez*, 384 U. S. 202, 204–205 (1966) (construing “for venue purposes” to cover “all venue statutes”). Respondent argues that “‘all venue purposes’ means ‘all venue purposes’—not ‘all venue purposes *except* for patent venue.’” Brief for Respondent 21. The plaintiffs in *Fourco* advanced the same argument. See 353 U. S., at 228 (“The main thrust of respondents’ argument is that §1391(c) is clear and unambiguous and that its terms include all actions—including patent infringement actions”). This

regime).

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Court was not persuaded then, and the addition of the word “all” to the already comprehensive provision does not suggest that Congress intended for us to reconsider that conclusion.

This particular argument is even weaker under the current version of §1391 than it was under the provision in place at the time of *Fourco*, because the current provision includes a saving clause expressly stating that it does not apply when “otherwise provided by law.” On its face, the version of §1391(c) at issue in *Fourco* included no exceptions, yet this Court still held that “resides” in §1400(b) retained its original meaning contrary to §1391(c)’s default definition. *Fourco*’s holding rests on even firmer footing now that §1391’s saving clause expressly contemplates that certain venue statutes may retain definitions of “resides” that conflict with its default definition. In short, the saving clause makes explicit the qualification that this Court previously found implicit in the statute. See *Pure Oil*, *supra*, at 205 (interpreting earlier version of §1391 to apply “to all venue statutes using residence as a criterion, at least in the absence of contrary restrictive indications in any such statute”). Respondent suggests that the saving clause in §1391(a) does not apply to the definitional provisions in §1391(c), Brief for Respondent 31–32, but that interpretation is belied by the text of §1391(a), which makes clear that the saving clause applies to the entire “section.” See §1391(a)(1) (“Except as otherwise provided by law— . . . this *section* shall govern the venue of all civil actions” (emphasis added)).

Finally, there is no indication that Congress in 2011 ratified the Federal Circuit’s decision in *VE Holding*. If anything, the 2011 amendments undermine that decision’s rationale. As petitioner points out, *VE Holding* relied heavily—indeed, almost exclusively—on Congress’ decision in 1988 to replace “for venue purposes” with “[f]or

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purposes of venue *under this chapter*" (emphasis added) in §1391(c). Congress deleted "under this chapter" in 2011 and worded the current version of §1391(c) almost identically to the original version of the statute. Compare §1391(c) (2012 ed.) ("[f]or all venue purposes") with §1391(c) (1952 ed.) ("for venue purposes"). In short, nothing in the text suggests congressional approval of *VE Holding*.

* * *

As applied to domestic corporations, "reside[nce]" in §1400(b) refers only to the State of incorporation. Accordingly, we reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GORSUCH took no part in the consideration or decision of this case.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES**Syllabus****MATAL, INTERIM DIRECTOR, UNITED STATES
PATENT AND TRADEMARK OFFICE *v.* TAM****CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT**

No. 15–1293. Argued January 18, 2017—Decided June 19, 2017

Simon Tam, lead singer of the rock group “The Slants,” chose this moniker in order to “reclaim” the term and drain its denigrating force as a derogatory term for Asian persons. Tam sought federal registration of the mark “THE SLANTS.” The Patent and Trademark Office (PTO) denied the application under a Lanham Act provision prohibiting the registration of trademarks that may “disparage . . . or bring . . . into contemp[t] or disrepute” any “persons, living or dead.” 15 U. S. C. §1052(a). Tam contested the denial of registration through the administrative appeals process, to no avail. He then took the case to federal court, where the en banc Federal Circuit ultimately found the disparagement clause facially unconstitutional under the First Amendment’s Free Speech Clause.

Held: The judgment is affirmed.

808 F. 3d 1321, affirmed.

JUSTICE ALITO delivered the opinion of the Court with respect to Parts I, II, and III–A, concluding:

1. The disparagement clause applies to marks that disparage the members of a racial or ethnic group. Tam’s view, that the clause applies only to natural or juristic persons, is refuted by the plain terms of the clause, which uses the word “persons.” A mark that disparages a “substantial” percentage of the members of a racial or ethnic group necessarily disparages many “persons,” namely, members of that group. Tam’s narrow reading also clashes with the breadth of the disparagement clause, which by its terms applies not just to “persons,” but also to “institutions” and “beliefs.” §1052(a). Had Congress wanted to confine the reach of the clause, it could have used the

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phrase “particular living individual,” which it used in neighboring §1052(c). Tam contends that his interpretation is supported by legislative history and by the PTO’s practice for many years of registering marks that plainly denigrated certain groups. But an inquiry into the meaning of the statute’s text ceases when, as here, “the statutory language is unambiguous and the statutory scheme is coherent and consistent.” *Barnhart v. Sigmon Coal Co.*, 534 U. S. 438, 450 (internal quotation marks omitted). Even if resort to legislative history and early enforcement practice were appropriate, Tam has presented nothing showing a congressional intent to adopt his interpretation, and the PTO’s practice in the years following the disparagement clause’s enactment is unenlightening. Pp. 8–12.

2. The disparagement clause violates the First Amendment’s Free Speech Clause. Contrary to the Government’s contention, trademarks are private, not government speech. Because the “Free Speech Clause . . . does not regulate government speech,” *Pleasant Grove City v. Summum*, 555 U. S. 460, 467, the government is not required to maintain viewpoint neutrality on its own speech. This Court exercises great caution in extending its government-speech precedents, for if private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints.

The Federal Government does not dream up the trademarks registered by the PTO. Except as required by §1052(a), an examiner may not reject a mark based on the viewpoint that it appears to express. If the mark meets the Lanham Act’s viewpoint-neutral requirements, registration is mandatory. And once a mark is registered, the PTO is not authorized to remove it from the register unless a party moves for cancellation, the registration expires, or the Federal Trade Commission initiates proceedings based on certain grounds. It is thus far-fetched to suggest that the content of a registered mark is government speech, especially given the fact that if trademarks become government speech when they are registered, the Federal Government is babbling prodigiously and incoherently. And none of this Court’s government-speech cases supports the idea that registered trademarks are government speech. *Johanns v. Livestock Marketing Assn.*, 544 U. S. 550; *Pleasant Grove City v. Summum*, 555 U. S. 460; and *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U. S. ___, distinguished. Holding that the registration of a trademark converts the mark into government speech would constitute a huge and dangerous extension of the government-speech doctrine, for other systems of government registration (such as copyright) could easily be characterized in the same way. Pp. 12–18.

JUSTICE ALITO, joined by THE CHIEF JUSTICE, JUSTICE THOMAS, and

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JUSTICE BREYER, concluded in Parts III–B, III–C, and IV:

(a) The Government’s argument that this case is governed by the Court’s subsidized-speech cases is unpersuasive. Those cases all involved cash subsidies or their equivalent, *e.g.*, funds to private parties for family planning services in *Rust v. Sullivan*, 500 U. S. 173, and cash grants to artists in *National Endowment for Arts v. Finley*, 524 U. S. 569. The federal registration of a trademark is nothing like these programs. The PTO does not pay money to parties seeking registration of a mark; it requires the payment of fees to file an application and to maintain the registration once it is granted. The Government responds that registration provides valuable non-monetary benefits traceable to the Government’s resources devoted to registering the marks, but nearly every government service requires the expenditure of government funds. This is true of services that benefit everyone, like police and fire protection, as well as services that are utilized by only some, *e.g.*, the adjudication of private lawsuits and the use of public parks and highways. Pp. 18–20.

(b) Also unpersuasive is the Government’s claim that the disparagement clause is constitutional under a “government-program” doctrine, an argument which is based on a merger of this Court’s government-speech cases and subsidy cases. It points to two cases involving a public employer’s collection of union dues from its employees, *Davenport v. Washington Ed. Assn.*, 551 U. S. 177, and *Ysursa v. Pocatello Ed. Assn.*, 555 U. S. 353, but these cases occupy a special area of First Amendment case law that is far removed from the registration of trademarks. Cases in which government creates a limited public forum for private speech, thus allowing for some content- and speaker-based restrictions, see, *e.g.*, *Good News Club v. Milford Central School*, 533 U. S. 98, 106–107; *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 831, are potentially more analogous. But even in those cases, viewpoint discrimination is forbidden. The disparagement clause denies registration to any mark that is offensive to a substantial percentage of the members of any group. That is viewpoint discrimination in the sense relevant here: Giving offense is a viewpoint. The “public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.” *Street v. New York*, 394 U. S. 576, 592. Pp. 20–23.

(c) The dispute between the parties over whether trademarks are commercial speech subject to the relaxed scrutiny outlined in *Central Hudson Gas & Elect. v. Public Serv. Comm’n of N. Y.*, 447 U. S. 557, need not be resolved here because the disparagement clause cannot withstand even *Central Hudson* review. Under *Central Hudson*, a restriction of speech must serve “a substantial interest” and be “nar-

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rowly drawn.” *Id.*, at 564–565 (internal quotation marks omitted). One purported interest is in preventing speech expressing ideas that offend, but that idea strikes at the heart of the First Amendment. The second interest asserted is protecting the orderly flow of commerce from disruption caused by trademarks that support invidious discrimination; but the clause, which reaches any trademark that disparages *any person, group, or institution*, is not narrowly drawn. Pp. 23–26.

JUSTICE KENNEDY, joined by JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN, agreed that 15 U. S. C. §1052(a) constitutes viewpoint discrimination, concluding:

(a) With few narrow exceptions, a fundamental principle of the First Amendment is that the government may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys. See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 828–829. The test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed. Here, the disparagement clause identifies the relevant subject as “persons, living or dead, institutions, beliefs, or national symbols,” §1052(a); and within that category, an applicant may register a positive or benign mark but not a derogatory one. The law thus reflects the Government’s disapproval of a subset of messages it finds offensive, the essence of viewpoint discrimination. The Government’s arguments in defense of the statute are unpersuasive. Pp. 2–5.

(b) Regardless of whether trademarks are commercial speech, the viewpoint based discrimination here necessarily invokes heightened scrutiny. See *Sorrell v. IMS Health Inc.*, 564 U. S. 552, 566. To the extent trademarks qualify as commercial speech, they are an example of why that category does not serve as a blanket exemption from the First Amendment’s requirement of viewpoint neutrality. In the realm of trademarks, the metaphorical marketplace of ideas becomes a tangible, powerful reality. To permit viewpoint discrimination in this context is to permit Government censorship. Pp. 5–7.

ALITO, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III–A, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined, and in which THOMAS, J., joined except for Part II, and an opinion with respect to Parts III–B, III–C, and IV, in which ROBERTS, C. J., and THOMAS and BREYER, JJ., joined. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed an opinion concurring in part and concurring in the judgment. GORSUCH, J., took no part in the consideration or decision of the case.

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NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 15–1293

JOSEPH MATAL, INTERIM DIRECTOR, UNITED
STATES PATENT AND TRADEMARK OFFICE,
PETITIONER *v.* SIMON SHIAO TAM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FEDERAL CIRCUIT

[June 19, 2017]

JUSTICE ALITO announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III–A, and an opinion with respect to Parts III–B, III–C, and IV, in which THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE BREYER join.

This case concerns a dance-rock band’s application for federal trademark registration of the band’s name, “The Slants.” “Slants” is a derogatory term for persons of Asian descent, and members of the band are Asian-Americans. But the band members believe that by taking that slur as the name of their group, they will help to “reclaim” the term and drain its denigrating force.

The Patent and Trademark Office (PTO) denied the application based on a provision of federal law prohibiting the registration of trademarks that may “disparage . . . or bring . . . into contemp[t] or disrepute” any “persons, living or dead.” 15 U. S. C. §1052(a). We now hold that this provision violates the Free Speech Clause of the First Amendment. It offends a bedrock First Amendment principle: Speech may not be banned on the ground that it

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expresses ideas that offend.

I
A

“The principle underlying trademark protection is that distinctive marks—words, names, symbols, and the like—can help distinguish a particular artisan’s goods from those of others.” *B&B Hardware, Inc. v. Hargis Industries, Inc.*, 575 U. S. ___, ___ (2015) (slip op., at 3); see also *Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*, 529 U. S. 205, 212 (2000). A trademark “designate[s] the goods as the product of a particular trader” and “protect[s] his good will against the sale of another’s product as his.” *United Drug Co. v. Theodore Rectanus Co.*, 248 U. S. 90, 97 (1918); see also *Hanover Star Milling Co. v. Metcalf*, 240 U. S. 403, 412–413 (1916). It helps consumers identify goods and services that they wish to purchase, as well as those they want to avoid. See *Wal-Mart Stores, supra*, at 212–213; *Park ’N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U. S. 189, 198 (1985).

“[F]ederal law does not create trademarks.” *B&B Hardware, supra*, at ___ (slip op., at 3). Trademarks and their precursors have ancient origins, and trademarks were protected at common law and in equity at the time of the founding of our country. 3 J. McCarthy, *Trademarks and Unfair Competition* §19:8 (4th ed. 2017) (hereinafter McCarthy); 1 *id.*, §§5:1, 5:2, 5:3; Pattishall, *The Constitutional Foundations of American Trademark Law*, 78 *Trademark Rep.* 456, 457–458 (1988); Pattishall, *Two Hundred Years of American Trademark Law*, 68 *Trademark Rep.* 121, 121–123 (1978); see *Trade-Mark Cases*, 100 U. S. 82, 92 (1879). For most of the 19th century, trademark protection was the province of the States. See *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U. S. 763, 780–782 (1992) (Stevens, J., concurring in judgment); *id.*, at 785 (THOMAS, J., concurring in judgment). Eventually,

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Congress stepped in to provide a degree of national uniformity, passing the first federal legislation protecting trademarks in 1870. See Act of July 8, 1870, §§77–84, 16 Stat. 210–212. The foundation of current federal trademark law is the Lanham Act, enacted in 1946. See Act of July 5, 1946, ch. 540, 60 Stat. 427. By that time, trademark had expanded far beyond phrases that do no more than identify a good or service. Then, as now, trademarks often consisted of catchy phrases that convey a message.

Under the Lanham Act, trademarks that are “used in commerce” may be placed on the “principal register,” that is, they may be federally registered. 15 U. S. C. §1051(a)(1). And some marks “capable of distinguishing [an] applicant’s goods or services and not registrable on the principal register . . . which are in lawful use in commerce by the owner thereof” may instead be placed on a different federal register: the supplemental register. §1091(a). There are now more than two million marks that have active federal certificates of registration. PTO Performance and Accountability Report, Fiscal Year 2016, p. 192 (Table 15), <https://www.uspto.gov/sites/default/files/documents/USPTO FY16PAR.pdf> (all Internet materials as last visited June 16, 2017). This system of federal registration helps to ensure that trademarks are fully protected and supports the free flow of commerce. “[N]ational protection of trademarks is desirable,” we have explained, “because trademarks foster competition and the maintenance of quality by securing to the producer the benefits of good reputation.” *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U. S. 522, 531 (1987) (internal quotation marks omitted); see also *Park ’N Fly, Inc., supra*, at 198 (“The Lanham Act provides national protection of trademarks in order to secure to the owner of the mark the goodwill of his business and to protect the ability of consumers to distinguish among competing producers”).

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B

Without federal registration, a valid trademark may still be used in commerce. See 3 McCarthy §19:8. And an unregistered trademark can be enforced against would-be infringers in several ways. Most important, even if a trademark is not federally registered, it may still be enforceable under §43(a) of the Lanham Act, which creates a federal cause of action for trademark infringement. See *Two Pesos, supra*, at 768 (“Section 43(a) prohibits a broader range of practices than does §32, which applies to registered marks, but it is common ground that §43(a) protects qualifying unregistered trademarks” (internal quotation marks and citation omitted)).¹ Unregistered trademarks may also be entitled to protection under other federal statutes, such as the Anticybersquatting Consumer Protection Act, 15 U. S. C. §1125(d). See 5 McCarthy §25A:49, at 25A–198 (“[T]here is no requirement [in the Anticybersquatting Act] that the protected ‘mark’ be registered: unregistered common law marks are protected by the Act”). And an unregistered trademark can be enforced under state common law, or if it has been registered in a State, under that State’s registration system. See 3 *id.*, §19:3, at 19–23 (explaining that “[t]he federal system of registration and protection does not preempt parallel state

¹In the opinion below, the Federal Circuit opined that although “Section 43(a) allows for a federal suit to protect an unregistered trademark,” “it is not at all clear” that respondent could bring suit under §43(a) because “there is no authority extending §43(a) to marks denied under §2(a)’s disparagement provision.” *In re Tam*, 808 F. 3d 1321, 1344–1345, n.11 (en banc), as corrected (Feb. 11, 2016). When drawing this conclusion, the Federal Circuit relied in part on our statement in *Two Pesos* that “the general principles qualifying a mark for registration under §2 of the Lanham Act are for the most part applicable in determining whether an unregistered mark is entitled to protection under §43(a).” 505 U. S., at 768. We need not decide today whether respondent could bring suit under §43(a) if his application for federal registration had been lawfully denied under the disparagement clause.

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law protection, either by state common law or state registration” and “[i]n the vast majority of situations, federal and state trademark law peacefully coexist”); *id.*, §22:1 (discussing state trademark registration systems).

Federal registration, however, “confers important legal rights and benefits on trademark owners who register their marks.” *B&B Hardware*, 575 U. S., at ____ (slip op., at 3) (internal quotation marks omitted). Registration on the principal register (1) “serves as ‘constructive notice of the registrant’s claim of ownership’ of the mark,” *ibid.* (quoting 15 U. S. C. §1072); (2) “is *prima facie* evidence of the validity of the registered mark and of the registration of the mark, of the owner’s ownership of the mark, and of the owner’s exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate,” *B & B Hardware*, 575 U. S. ____ (slip op., at 3) (quoting §1057(b)); and (3) can make a mark “‘incontestable’” once a mark has been registered for five years,” *ibid.* (quoting §§1065, 1115(b)); see *Park ’N Fly*, 469 U. S., at 193. Registration also enables the trademark holder “to stop the importation into the United States of articles bearing an infringing mark.” 3 McCarthy §19:9, at 19–38; see 15 U. S. C. §1124.

C

The Lanham Act contains provisions that bar certain trademarks from the principal register. For example, a trademark cannot be registered if it is “merely descriptive or deceptively misdescriptive” of goods, §1052(e)(1), or if it is so similar to an already registered trademark or trade name that it is “likely . . . to cause confusion, or to cause mistake, or to deceive,” §1052(d).

At issue in this case is one such provision, which we will call “the disparagement clause.” This provision prohibits the registration of a trademark “which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols,

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or bring them into contempt, or disrepute.” §1052(a).² This clause appeared in the original Lanham Act and has remained the same to this day. See §2(a), 60 Stat. 428.

When deciding whether a trademark is disparaging, an examiner at the PTO generally applies a “two-part test.” The examiner first considers “the likely meaning of the matter in question, taking into account not only dictionary definitions, but also the relationship of the matter to the other elements in the mark, the nature of the goods or services, and the manner in which the mark is used in the marketplace in connection with the goods or services.” Trademark Manual of Examining Procedure §1203.03(b)(i) (Apr. 2017), p. 1200–150, <http://tmepp.uspto.gov>. “If that meaning is found to refer to identifiable persons, institutions, beliefs or national symbols,” the examiner moves to the second step, asking “whether that meaning may be disparaging to a substantial composite³ of the referenced group.” *Ibid.* If the examiner finds that a “substantial composite, although not necessarily a majority, of the referenced group would find the proposed mark . . . to be disparaging in the context of contemporary attitudes,” a *prima facie* case of disparagement is made out, and the burden shifts to the applicant to prove that the trademark is not disparaging. *Ibid.* What is more, the PTO has specified that “[t]he fact that an applicant may be a member of that group or has good intentions underlying its use of a term does not obviate the fact that a substantial composite of the referenced group would find the term objectionable.” *Ibid.*

D

Simon Tam is the lead singer of “The Slants.” *In re Tam*, 808 F.3d 1321, 1331 (CA Fed. 2015) (en banc), as

²The disparagement clause also prevents a trademark from being registered on the supplemental register. §1091(a).

³By “composite,” we assume the PTO means component.

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corrected (Feb. 11, 2016). He chose this moniker in order to “reclaim” and “take ownership” of stereotypes about people of Asian ethnicity. *Ibid.* (internal quotation marks omitted). The group “draws inspiration for its lyrics from childhood slurs and mocking nursery rhymes” and has given its albums names such as “The Yellow Album” and “Slanted Eyes, Slanted Hearts.” *Ibid.*

Tam sought federal registration of “THE SLANTS,” on the principal register, App. 17, but an examining attorney at the PTO rejected the request, applying the PTO’s two-part framework and finding that “there is . . . a substantial composite of persons who find the term in the applied-for mark offensive.” *Id.*, at 30. The examining attorney relied in part on the fact that “numerous dictionaries define ‘slants’ or ‘slant-eyes’ as a derogatory or offensive term.” *Id.*, at 29. The examining attorney also relied on a finding that “the band’s name has been found offensive numerous times”—citing a performance that was canceled because of the band’s moniker and the fact that “several bloggers and commenters to articles on the band have indicated that they find the term and the applied-for mark offensive.” *Id.*, at 29–30.

Tam contested the denial of registration before the examining attorney and before the PTO’s Trademark Trial and Appeal Board (TTAB) but to no avail. Eventually, he took the case to federal court, where the en banc Federal Circuit ultimately found the disparagement clause facially unconstitutional under the First Amendment’s Free Speech Clause. The majority found that the clause engages in viewpoint-based discrimination, that the clause regulates the expressive component of trademarks and consequently cannot be treated as commercial speech, and that the clause is subject to and cannot satisfy strict scrutiny. See 808 F.3d, at 1334–1339. The majority also rejected the Government’s argument that registered trademarks constitute government speech, as well as the

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Government’s contention that federal registration is a form of government subsidy. See *id.*, at 1339–1355. And the majority opined that even if the disparagement clause were analyzed under this Court’s commercial speech cases, the clause would fail the “intermediate scrutiny” that those cases prescribe. See *id.*, at 1355–1357.

Several judges wrote separately, advancing an assortment of theories. Concurring, Judge O’Malley agreed with the majority’s reasoning but added that the disparagement clause is unconstitutionally vague. See *id.*, at 1358–1363. Judge Dyk concurred in part and dissented in part. He argued that trademark registration is a government subsidy and that the disparagement clause is facially constitutional, but he found the clause unconstitutional as applied to THE SLANTS because that mark constitutes “core expression” and was not adopted for the purpose of disparaging Asian-Americans. See *id.*, at 1363–1374. In dissent, Judge Lourie agreed with Judge Dyk that the clause is facially constitutional but concluded for a variety of reasons that it is also constitutional as applied in this case. See *id.*, at 1374–1376. Judge Reyna also dissented, maintaining that trademarks are commercial speech and that the disparagement clause survives intermediate scrutiny because it “directly advances the government’s substantial interest in the orderly flow of commerce.” See *id.*, at 1376–1382.

The Government filed a petition for certiorari, which we granted in order to decide whether the disparagement clause “is facially invalid under the Free Speech Clause of the First Amendment.” Pet. for Cert. i; see *sub. nom. Lee v. Tam*, 579 U. S. ____ (2016).

II

Before reaching the question whether the disparagement clause violates the First Amendment, we consider Tam’s argument that the clause does not reach marks that

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disparage racial or ethnic groups. The clause prohibits the registration of marks that disparage “persons,” and Tam claims that the term “persons” “includes only natural and juristic persons,” not “non-juristic entities such as racial and ethnic groups.” Brief for Respondent 46.

Tam never raised this argument before the PTO or the Federal Circuit, and we declined to grant certiorari on this question when Tam asked us to do so, see Brief Responding to Petition for Certiorari, pp. i, 17–21. Normally, that would be the end of the matter in this Court. See, e.g., *Yee v. Escondido*, 503 U. S. 519, 534–538 (1992); *Freytag v. Commissioner*, 501 U. S. 868, 894–895 (1991) (Scalia, J., concurring in part and concurring in judgment).

But as the Government pointed out in connection with its petition for certiorari, accepting Tam’s statutory interpretation would resolve this case and leave the First Amendment question for another day. See Reply Brief 9. “[W]e have often stressed” that it is “importan[t] [to] avoid[d] the premature adjudication of constitutional questions,” *Clinton v. Jones*, 520 U. S. 681, 690 (1997), and that “we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable,” *Spector Motor Service, Inc. v. McLaughlin*, 323 U. S. 101, 105 (1944). See also *Alabama State Federation of Labor v. McAdory*, 325 U. S. 450, 461 (1945); *Burton v. United States*, 196 U. S. 283, 295 (1905). We thus begin by explaining why Tam’s argument about the definition of “persons” in the Lanham Act is meritless.

As noted, the disparagement clause prohibits the registration of trademarks “which may disparage . . . persons, living or dead.” 15 U. S. C. §1052(a). Tam points to a definition of “person” in the Lanham Act, which provides that “[i]n the construction of this chapter, unless the contrary is plainly apparent from the context . . . [t]he term ‘person’ and any other word or term used to designate the applicant or other entitled to a benefit or privi-

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lege or rendered liable under the provisions of this chapter includes a juristic person as well as a natural person.” §1127. Because racial and ethnic groups are neither natural nor “juristic” persons, Tam asserts, these groups fall outside this definition. Brief for Respondent 46–48.

Tam’s argument is refuted by the plain terms of the disparagement clause. The clause applies to marks that disparage “persons.” A mark that disparages a “substantial” percentage of the members of a racial or ethnic group, Trademark Manual §1203.03(b)(i), at 1200–150, necessarily disparages many “persons,” namely, members of that group. Tam’s argument would fail even if the clause used the singular term “person,” but Congress’ use of the plural “persons” makes the point doubly clear.⁴

Tam’s narrow reading of the term “persons” also clashes with the breadth of the disparagement clause. By its terms, the clause applies to marks that disparage, not just “persons,” but also “institutions” and “beliefs.” 15 U. S. C. §1052(a). It thus applies to the members of any group whose members share particular “beliefs,” such as political, ideological, and religious groups. It applies to marks that denigrate “institutions,” and on Tam’s reading, it also reaches “juristic” persons such as corporations, unions, and other unincorporated associations. See §1127. Thus, the clause is not limited to marks that disparage a particular natural person. If Congress had wanted to confine

⁴Tam advances a convoluted textual argument that goes as follows. The definition of a “person” in 15 U. S. C. §1127 does not include a “non-juristic person,” *i.e.*, a group that cannot sue or be sued in its own right. Brief for Respondent 46–47. Such groups consist of multiple natural persons. Therefore, the members of such groups are not “persons” under the disparagement clause. *Id.*, at 46–48.

This argument leads to the absurd result that no person is a “person” within the meaning of the disparagement clause. This is so because every person is a member of a “non-juristic” group, *e.g.*, right-handers, left-handers, women, men, people born on odd-numbered days, people born on even-numbered days.

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the reach of the disparagement clause in the way that Tam suggests, it would have been easy to do so. A neighboring provision of the Lanham Act denies registration to any trademark that “[c]onsists of or comprises a name, portrait, or signature identifying a *particular living individual* except by his written consent.” §1052(c) (emphasis added).

Tam contends that his interpretation of the disparagement clause is supported by its legislative history and by the PTO’s willingness for many years to register marks that plainly denigrated African-Americans and Native Americans. These arguments are unpersuasive. As always, our inquiry into the meaning of the statute’s text ceases when “the statutory language is unambiguous and the statutory scheme is coherent and consistent.” *Barnhart v. Sigmon Coal Co.*, 534 U. S. 438, 450 (2002) (internal quotation marks omitted). Here, it is clear that the prohibition against registering trademarks “which may disparage . . . persons,” §1052(a), prohibits registration of terms that disparage persons who share a common race or ethnicity.

Even if resort to legislative history and early enforcement practice were appropriate, we would find Tam’s arguments unconvincing. Tam has not brought to our attention any evidence in the legislative history showing that Congress meant to adopt his interpretation. And the practice of the PTO in the years following the enactment of the disparagement clause is unenlightening. The admitted vagueness of the disparagement test⁵ and the huge

⁵The PTO has acknowledged that the guidelines “for determining whether a mark is scandalous or disparaging are somewhat vague and the determination of whether a mark is scandalous or disparaging is necessarily a highly subjective one.” *In re In Over Our Heads, Inc.*, 16 USPQ 2d 1653, 1654 (TTAB 1990) (brackets and internal quotation marks omitted). The PTO has similarly observed that whether a mark is disparaging “is highly subjective and, thus, general rules are difficult

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volume of applications have produced a haphazard record of enforcement. (Even today, the principal register is replete with marks that many would regard as disparaging to racial and ethnic groups.⁶) Registration of the offensive marks that Tam cites is likely attributable not to the acceptance of his interpretation of the clause but to other factors—most likely the regrettable attitudes and sensibilities of the time in question.

III

Because the disparagement clause applies to marks that disparage the members of a racial or ethnic group, we must decide whether the clause violates the Free Speech Clause of the First Amendment. And at the outset, we must consider three arguments that would either eliminate any First Amendment protection or result in highly permissive rational-basis review. Specifically, the Government contends (1) that trademarks are government speech, not private speech, (2) that trademarks are a form of government subsidy, and (3) that the constitutionality of the disparagement clause should be tested under a new “government-program” doctrine. We address each of these arguments below.

A

The First Amendment prohibits Congress and other government entities and actors from “abridging the freedom of speech”; the First Amendment does not say that Congress and other government entities must abridge their own ability to speak freely. And our cases recognize that “[t]he Free Speech Clause . . . does not regulate government speech.” *Pleasant Grove City v. Summum*, 555

to postulate.” *Harjo v. Pro-Football Inc.*, 50 USPQ 2d 1705, 1737 (TTAB 1999), rev’d, 284 F. Supp. 2d 96 (DC 2003), rev’d and remanded in part, 415 F. 3d 44 (CADC 2005) (*per curiam*).

⁶See, e.g., App. to Brief for Pro-Football, Inc., as *Amicus Curiae*.

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U.S. 460, 467 (2009); see *Johanns v. Livestock Marketing Assn.*, 544 U.S. 550, 553 (2005) (“[T]he Government’s own speech . . . is exempt from First Amendment scrutiny”); *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 235 (2000).

As we have said, “it is not easy to imagine how government could function” if it were subject to the restrictions that the First Amendment imposes on private speech. *Summum, supra*, at 468; see *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. ___, ___–___ (2015) (slip op., at 5–7). “[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others,” *Lamb’s Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 394 (1993), but imposing a requirement of viewpoint-neutrality on government speech would be paralyzing. When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others. The Free Speech Clause does not require government to maintain viewpoint neutrality when its officers and employees speak about that venture.

Here is a simple example. During the Second World War, the Federal Government produced and distributed millions of posters to promote the war effort.⁷ There were posters urging enlistment, the purchase of war bonds, and the conservation of scarce resources.⁸ These posters expressed a viewpoint, but the First Amendment did not demand that the Government balance the message of these posters by producing and distributing posters encouraging Americans to refrain from engaging in these activities.

But while the government-speech doctrine is important—indeed, essential—it is a doctrine that is suscep-

⁷ See, e.g., D. Nelson, *The Posters That Won the War* (1991).

⁸ *Ibid.*

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tible to dangerous misuse. If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints. For this reason, we must exercise great caution before extending our government-speech precedents.

At issue here is the content of trademarks that are registered by the PTO, an arm of the Federal Government. The Federal Government does not dream up these marks, and it does not edit marks submitted for registration. Except as required by the statute involved here, 15 U. S. C. §1052(a), an examiner may not reject a mark based on the viewpoint that it appears to express. Thus, unless that section is thought to apply, an examiner does not inquire whether any viewpoint conveyed by a mark is consistent with Government policy or whether any such viewpoint is consistent with that expressed by other marks already on the principal register. Instead, if the mark meets the Lanham Act's viewpoint-neutral requirements, registration is mandatory. *Ibid.* (requiring that “[n]o trademark . . . shall be refused registration on the principal register on account of its nature unless” it falls within an enumerated statutory exception). And if an examiner finds that a mark is eligible for placement on the principal register, that decision is not reviewed by any higher official unless the registration is challenged. See §§1062(a), 1071; 37 CFR §41.31(a) (2016). Moreover, once a mark is registered, the PTO is not authorized to remove it from the register unless a party moves for cancellation, the registration expires, or the Federal Trade Commission initiates proceedings based on certain grounds. See 15 U. S. C. §§1058(a), 1059, 1064; 37 CFR §§2.111(b), 2.160.

In light of all this, it is far-fetched to suggest that the content of a registered mark is government speech. If the federal registration of a trademark makes the mark government speech, the Federal Government is babbling

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prodigiously and incoherently. It is saying many unseemly things. See App. to Brief for Pro-Football, Inc., as *Amicus Curiae*. It is expressing contradictory views.⁹ It is unashamedly endorsing a vast array of commercial products and services. And it is providing Delphic advice to the consuming public.

For example, if trademarks represent government speech, what does the Government have in mind when it advises Americans to “make.believe” (Sony),¹⁰ “Think different” (Apple),¹¹ “Just do it” (Nike),¹² or “Have it your way” (Burger King)¹³? Was the Government warning about a coming disaster when it registered the mark “EndTime Ministries”¹⁴?

The PTO has made it clear that registration does not constitute approval of a mark. See *In re Old Glory Condom Corp.*, 26 USPQ 2d 1216, 1220, n. 3 (TTAB 1993) (“[I]ssuance of a trademark registration . . . is not a government imprimatur”). And it is unlikely that more than a tiny fraction of the public has any idea what federal registration of a trademark means. See *Application of National Distillers & Chemical Corp.*, 49 C. C. P. A. (Pat.) 854, 863, 297 F.2d 941, 949 (1962) (Rich, J., concurring) (“The purchasing public knows no more about trademark registrations than a man walking down the street in a

⁹ Compare “Abolish Abortion,” Registration No. 4,935,774 (Apr. 12, 2016), with “I Stand With Planned Parenthood,” Registration No. 5,073,573 (Nov. 1, 2016); compare “Capitalism Is Not Moral, Not Fair, Not Freedom,” Registration No. 4,696,419 (Mar. 3, 2015), with “Capitalism Ensuring Innovation,” Registration No. 3,966,092 (May 24, 2011); compare “Global Warming Is Good,” Registration No. 4,776,235 (July 21, 2015), with “A Solution to Global Warming,” Registration No. 3,875,271 (Nov. 10, 2010).

¹⁰ “make.believe,” Registration No. 4,342,903 (May 28, 2013).

¹¹ “Think Different,” Registration No. 2,707,257 (Apr. 15, 2003).

¹² “Just Do It,” Registration No. 1,875,307 (Jan. 25, 1995).

¹³ “Have It Your Way,” Registration No. 0,961,016. (June 12, 1973)

¹⁴ “EndTime Ministries,” Registration No. 4,746,225 (June 2, 2015).

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strange city knows about legal title to the land and buildings he passes” (emphasis deleted)).

None of our government speech cases even remotely supports the idea that registered trademarks are government speech. In *Johanns*, we considered advertisements promoting the sale of beef products. A federal statute called for the creation of a program of paid advertising “to advance the image and desirability of beef and beef products.” 544 U. S., at 561 (quoting 7 U. S. C. § 2902(13)). Congress and the Secretary of Agriculture provided guidelines for the content of the ads, Department of Agriculture officials attended the meetings at which the content of specific ads was discussed, and the Secretary could edit or reject any proposed ad. 544 U. S., at 561. Noting that “[t]he message set out in the beef promotions [was] from beginning to end the message established by the Federal Government,” we held that the ads were government speech. *Id.*, at 560. The Government’s involvement in the creation of these beef ads bears no resemblance to anything that occurs when a trademark is registered.

Our decision in *Summum* is similarly far afield. A small city park contained 15 monuments. 555 U.S., at 464. Eleven had been donated by private groups, and one of these displayed the Ten Commandments. *Id.*, at 464–465. A religious group claimed that the city, by accepting donated monuments, had created a limited public forum for private speech and was therefore obligated to place in the park a monument expressing the group’s religious beliefs.

Holding that the monuments in the park represented government speech, we cited many factors. Governments have used monuments to speak to the public since ancient times; parks have traditionally been selective in accepting and displaying donated monuments; parks would be overrun if they were obligated to accept all monuments offered by private groups; “[p]ublic parks are often closely identified in the public mind with the government unit that

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owns the land”; and “[t]he monuments that are accepted . . . are meant to convey and have the effect of conveying a government message.” *Id.*, at 472.

Trademarks share none of these characteristics. Trademarks have not traditionally been used to convey a Government message. With the exception of the enforcement of 15 U. S. C. §1052(a), the viewpoint expressed by a mark has not played a role in the decision whether to place it on the principal register. And there is no evidence that the public associates the contents of trademarks with the Federal Government.

This brings us to the case on which the Government relies most heavily, *Walker*, which likely marks the outer bounds of the government-speech doctrine. Holding that the messages on Texas specialty license plates are government speech, the *Walker* Court cited three factors distilled from *Summum*. 576 U. S., at ____ (slip op., at 7–8). First, license plates have long been used by the States to convey state messages. *Id.*, at ____ (slip op., at 9–10). Second, license plates “are often closely identified in the public mind” with the State, since they are manufactured and owned by the State, generally designed by the State, and serve as a form of “government ID.” *Id.*, at ____ (slip op., at 10) (internal quotation marks omitted). Third, Texas “maintain[ed] direct control over the messages conveyed on its specialty plates.” *Id.*, at ____ (slip op., at 11). As explained above, none of these factors are present in this case.

In sum, the federal registration of trademarks is vastly different from the beef ads in *Johanns*, the monuments in *Summum*, and even the specialty license plates in *Walker*. Holding that the registration of a trademark converts the mark into government speech would constitute a huge and dangerous extension of the government-speech doctrine. For if the registration of trademarks constituted government speech, other systems of government registration

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could easily be characterized in the same way.

Perhaps the most worrisome implication of the Government's argument concerns the system of copyright registration. If federal registration makes a trademark government speech and thus eliminates all First Amendment protection, would the registration of the copyright for a book produce a similar transformation? See 808 F.3d, at 1346 (explaining that if trademark registration amounts to government speech, "then copyright registration" which "has identical accoutrements" would "likewise amount to government speech").

The Government attempts to distinguish copyright on the ground that it is "'the engine of free expression,'" Brief for Petitioner 47 (quoting *Eldred v. Ashcroft*, 537 U. S. 186, 219 (2003)), but as this case illustrates, trademarks often have an expressive content. Companies spend huge amounts to create and publicize trademarks that convey a message. It is true that the necessary brevity of trademarks limits what they can say. But powerful messages can sometimes be conveyed in just a few words.

Trademarks are private, not government, speech.

B

We next address the Government's argument that this case is governed by cases in which this Court has upheld the constitutionality of government programs that subsidized speech expressing a particular viewpoint. These cases implicate a notoriously tricky question of constitutional law. "[W]e have held that the Government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.'" *Agency for Int'l Development v. Alliance for Open Society Int'l, Inc.*, 570 U. S. ___, ___ (2013) (slip op., at 8) (some internal quotation marks omitted). But at the same time, government is not required to subsidize activities that it does not wish to

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promote. *Ibid.* Determining which of these principles applies in a particular case “is not always self-evident,” *id.*, at ____ (slip op., at 11), but no difficult question is presented here.

Unlike the present case, the decisions on which the Government relies all involved cash subsidies or their equivalent. In *Rust v. Sullivan*, 500 U. S. 173 (1991), a federal law provided funds to private parties for family planning services. In *National Endowment for Arts v. Finley*, 524 U. S. 569 (1998), cash grants were awarded to artists. And federal funding for public libraries was at issue in *United States v. American Library Assn., Inc.*, 539 U. S. 194 (2003). In other cases, we have regarded tax benefits as comparable to cash subsidies. See *Regan v. Taxation With Representation of Wash.*, 461 U. S. 540 (1983); *Cammarano v. United States*, 358 U. S. 498 (1959).

The federal registration of a trademark is nothing like the programs at issue in these cases. The PTO does not pay money to parties seeking registration of a mark. Quite the contrary is true: An applicant for registration must pay the PTO a filing fee of \$225–\$600. 37 CFR §2.6(a)(1). (Tam submitted a fee of \$275 as part of his application to register THE SLANTS. App. 18.) And to maintain federal registration, the holder of a mark must pay a fee of \$300–\$500 every 10 years. §2.6(a)(5); see also 15 U. S. C. §1059(a). The Federal Circuit concluded that these fees have fully supported the registration system for the past 27 years. 808 F.3d, at 1353.

The Government responds that registration provides valuable non-monetary benefits that “are directly traceable to the resources devoted by the federal government to examining, publishing, and issuing certificates of registration for those marks.” Brief for Petitioner 27. But just about every government service requires the expenditure of government funds. This is true of services that benefit everyone, like police and fire protection, as well as services

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that are utilized by only some, *e.g.*, the adjudication of private lawsuits and the use of public parks and highways.

Trademark registration is not the only government registration scheme. For example, the Federal Government registers copyrights and patents. State governments and their subdivisions register the title to real property and security interests; they issue driver's licenses, motor vehicle registrations, and hunting, fishing, and boating licenses or permits.

Cases like *Rust* and *Finley* are not instructive in analyzing the constitutionality of restrictions on speech imposed in connection with such services.

C

Finally, the Government urges us to sustain the disparagement clause under a new doctrine that would apply to "government-program" cases. For the most part, this argument simply merges our government-speech cases and the previously discussed subsidy cases in an attempt to construct a broader doctrine that can be applied to the registration of trademarks. The only new element in this construct consists of two cases involving a public employer's collection of union dues from its employees. But those cases occupy a special area of First Amendment case law, and they are far removed from the registration of trademarks.

In *Davenport v. Washington Ed. Assn.*, 551 U. S. 177, 181–182 (2007), a Washington law permitted a public employer automatically to deduct from the wages of employees who chose not to join the union the portion of union dues used for activities related to collective bargaining. But unless these employees affirmatively consented, the law did not allow the employer to collect the portion of union dues that would be used in election activities. *Id.*, at 180–182. A public employee union argued that this law unconstitutionally restricted its speech based on its con-

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tent; that is, the law permitted the employer to assist union speech on matters relating to collective bargaining but made it harder for the union to collect money to support its election activities. *Id.*, at 188. Upholding this law, we characterized it as imposing a “modest limitation” on an “extraordinary benefit,” namely, taking money from the wages of non-union members and turning it over to the union free of charge. *Id.*, at 184. Refusing to confer an even greater benefit, we held, did not upset the marketplace of ideas and did not abridge the union’s free speech rights. *Id.*, at 189–190.

Ysursa v. Pocatello Ed. Assn., 555 U. S. 353 (2009), is similar. There, we considered an Idaho law that allowed public employees to elect to have union dues deducted from their wages but did not allow such a deduction for money remitted to the union’s political action committee. *Id.*, at 355. We reasoned that the “the government . . . [was] not required to assist others in funding the expression of particular ideas.” *Id.*, at 358; see also *id.*, at 355 (“The First Amendment . . . does not confer an affirmative right to use government payroll mechanisms for the purpose of obtaining funds for expression”).

Davenport and *Ysursa* are akin to our subsidy cases. Although the laws at issue in *Davenport* and *Ysursa* did not provide cash subsidies to the unions, they conferred a very valuable benefit—the right to negotiate a collective-bargaining agreement under which non-members would be obligated to pay an agency fee that the public employer would collect and turn over to the union free of charge. As in the cash subsidy cases, the laws conferred this benefit because it was thought that this arrangement served important government interests. See *Abood v. Detroit Bd. of Ed.*, 431 U. S. 209, 224–226 (1977). But the challenged laws did not go further and provide convenient collection mechanisms for money to be used in political activities. In essence, the Washington and Idaho lawmakers chose to

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confer a substantial non-cash benefit for the purpose of furthering activities that they particularly desired to promote but not to provide a similar benefit for the purpose of furthering other activities. Thus, *Davenport* and *Ysursa* are no more relevant for present purposes than the subsidy cases previously discussed.¹⁵

Potentially more analogous are cases in which a unit of government creates a limited public forum for private speech. See, e.g., *Good News Club v. Milford Central School*, 533 U. S. 98, 106–107 (2001); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 831 (1995); *Lamb’s Chapel*, 508 U. S., at 392–393. See also *Legal Services Corporation v. Velazquez*, 531 U. S. 533, 541–544 (2001). When government creates such a forum, in either a literal or “metaphysical” sense, see *Rosenberger*, 515 U. S., at 830, some content- and speaker-based restrictions may be allowed, see *id.*, at 830–831. However, even in such cases, what we have termed “viewpoint discrimination” is forbidden. *Id.*, at 831.

Our cases use the term “viewpoint” discrimination in a broad sense, see *ibid.*, and in that sense, the disparagement clause discriminates on the bases of “viewpoint.” To be sure, the clause evenhandedly prohibits disparagement of all groups. It applies equally to marks that damn Democrats and Republicans, capitalists and socialists, and those arrayed on both sides of every possible issue. It denies registration to any mark that is offensive to a substantial percentage of the members of any group. But in the sense relevant here, that is viewpoint discrimination: Giving offense is a viewpoint.

We have said time and again that “the public expression

¹⁵While these cases resemble subsidy cases insofar as the free speech rights of unions and their members are concerned, arrangements like those in these cases also implicate the free speech rights of non-union members. Our decision here has no bearing on that issue.

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of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.” *Street v. New York*, 394 U. S. 576, 592 (1969). See also *Texas v. Johnson*, 491 U. S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”); *Hustler Magazine, Inc. v. Falwell*, 485 U. S. 46, 55–56 (1988); *Coates v. Cincinnati*, 402 U. S. 611, 615 (1971); *Bachellar v. Maryland*, 397 U. S. 564, 567 (1970); *Tinker v. Des Moines Independent Community School Dist.*, 393 U. S. 503, 509–514 (1969); *Cox v. Louisiana*, 379 U. S. 536, 551 (1965); *Edwards v. South Carolina*, 372 U. S. 229, 237–238 (1963); *Terminiello v. Chicago*, 337 U. S. 1, 4–5 (1949); *Cantwell v. Connecticut*, 310 U. S. 296, 311 (1940); *Schneider v. State (Town of Irvington)*, 308 U. S. 147, 161 (1939); *De Jonge v. Oregon*, 299 U. S. 353, 365 (1937).

For this reason, the disparagement clause cannot be saved by analyzing it as a type of government program in which some content- and speaker-based restrictions are permitted.¹⁶

IV

Having concluded that the disparagement clause cannot be sustained under our government-speech or subsidy cases or under the Government’s proposed “government-program” doctrine, we must confront a dispute between the parties on the question whether trademarks are commercial speech and are thus subject to the relaxed scrutiny outlined in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N. Y.*, 447 U. S. 557 (1980). The Government and *amici* supporting its position argue that all

¹⁶We leave open the question whether this is the appropriate framework for analyzing free speech challenges to provisions of the Lanham Act.

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trademarks are commercial speech. They note that the central purposes of trademarks are commercial and that federal law regulates trademarks to promote fair and orderly interstate commerce. Tam and his *amici*, on the other hand, contend that many, if not all, trademarks have an expressive component. In other words, these trademarks do not simply identify the source of a product or service but go on to say something more, either about the product or service or some broader issue. The trademark in this case illustrates this point. The name “The Slants” not only identifies the band but expresses a view about social issues.

We need not resolve this debate between the parties because the disparagement clause cannot withstand even *Central Hudson* review.¹⁷ Under *Central Hudson*, a restriction of speech must serve “a substantial interest,” and it must be “narrowly drawn.” *Id.*, at 564–565 (internal quotation marks omitted). This means, among other things, that “[t]he regulatory technique may extend only as far as the interest it serves.” *Id.*, at 565. The disparagement clause fails this requirement.

It is claimed that the disparagement clause serves two interests. The first is phrased in a variety of ways in the briefs. Echoing language in one of the opinions below, the Government asserts an interest in preventing “underrepresented groups” from being “bombarded with demeaning messages in commercial advertising.” Brief for Petitioner 48 (quoting 808 F.3d, at 1364 (Dyk, J., concurring in part and dissenting in part)). An *amicus* supporting the Government refers to “encouraging racial

¹⁷As with the framework discussed in Part III–C of this opinion, we leave open the question whether *Central Hudson* provides the appropriate test for deciding free speech challenges to provisions of the Lanham Act. And nothing in our decision should be read to speak to the validity of state unfair competition provisions or product libel laws that are not before us and differ from §1052(d)’s disparagement clause.

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tolerance and protecting the privacy and welfare of individuals.” Brief for Native American Organizations as *Amici Curiae* 21. But no matter how the point is phrased, its unmistakable thrust is this: The Government has an interest in preventing speech expressing ideas that offend. And, as we have explained, that idea strikes at the heart of the First Amendment. Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express “the thought that we hate.” *United States v. Schwimmer*, 279 U. S. 644, 655 (1929) (Holmes, J., dissenting).

The second interest asserted is protecting the orderly flow of commerce. See 808 F. 3d, at 1379–1381 (Reyna, J., dissenting); Brief for Petitioner 49; Brief for Native American Organizations as *Amicus Curiae* 18–21. Commerce, we are told, is disrupted by trademarks that “involv[e] disparagement of race, gender, ethnicity, national origin, religion, sexual orientation, and similar demographic classification.” 808 F. 3d, at 1380–1381 (opinion of Reyna, J.). Such trademarks are analogized to discriminatory conduct, which has been recognized to have an adverse effect on commerce. See *ibid.*; Brief for Petitioner 49; Brief for Native American Organizations as *Amici Curiae* 18–20.

A simple answer to this argument is that the disparagement clause is not “narrowly drawn” to drive out trademarks that support invidious discrimination. The clause reaches any trademark that disparages *any person, group, or institution*. It applies to trademarks like the following: “Down with racists,” “Down with sexists,” “Down with homophobes.” It is not an anti-discrimination clause; it is a happy-talk clause. In this way, it goes much further than is necessary to serve the interest asserted.

The clause is far too broad in other ways as well. The

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clause protects every person living or dead as well as every institution. Is it conceivable that commerce would be disrupted by a trademark saying: “James Buchanan was a disastrous president” or “Slavery is an evil institution”?

There is also a deeper problem with the argument that commercial speech may be cleansed of any expression likely to cause offense. The commercial market is well stocked with merchandise that disparages prominent figures and groups, and the line between commercial and non-commercial speech is not always clear, as this case illustrates. If affixing the commercial label permits the suppression of any speech that may lead to political or social “volatility,” free speech would be endangered.

* * *

For these reasons, we hold that the disparagement clause violates the Free Speech Clause of the First Amendment. The judgment of the Federal Circuit is affirmed.

It is so ordered.

JUSTICE GORSUCH took no part in the consideration or decision of this case.

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SUPREME COURT OF THE UNITED STATES

No. 15–1293

JOSEPH MATAL, INTERIM DIRECTOR, UNITED
STATES PATENT AND TRADEMARK OFFICE,
PETITIONER *v.* SIMON SHIAO TAM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FEDERAL CIRCUIT

[June 19, 2017]

JUSTICE KENNEDY, with whom JUSTICE GINSBURG,
JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, concurring
in part and concurring in the judgment.

The Patent and Trademark Office (PTO) has denied the substantial benefits of federal trademark registration to the mark THE SLANTS. The PTO did so under the mandate of the disparagement clause in 15 U. S. C. §1052(a), which prohibits the registration of marks that may “disparage . . . or bring . . . into contemp[t] or disrepute” any “persons, living or dead, institutions, beliefs, or national symbols.”

As the Court is correct to hold, §1052(a) constitutes viewpoint discrimination—a form of speech suppression so potent that it must be subject to rigorous constitutional scrutiny. The Government’s action and the statute on which it is based cannot survive this scrutiny.

The Court is correct in its judgment, and I join Parts I, II, and III–A of its opinion. This separate writing explains in greater detail why the First Amendment’s protections against viewpoint discrimination apply to the trademark here. It submits further that the viewpoint discrimination rationale renders unnecessary any extended treatment of other questions raised by the parties.

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I

Those few categories of speech that the government can regulate or punish—for instance, fraud, defamation, or incitement—are well established within our constitutional tradition. See *United States v. Stevens*, 559 U. S. 460, 468 (2010). Aside from these and a few other narrow exceptions, it is a fundamental principle of the First Amendment that the government may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys. See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 828–829 (1995).

The First Amendment guards against laws “targeted at specific subject matter,” a form of speech suppression known as content based discrimination. *Reed v. Town of Gilbert*, 576 U. S. ___, ___ (2015) (slip op., at 12). This category includes a subtype of laws that go further, aimed at the suppression of “particular views . . . on a subject.” *Rosenberger*, 515 U. S., at 829. A law found to discriminate based on viewpoint is an “egregious form of content discrimination,” which is “presumptively unconstitutional.” *Id.*, at 829–830.

At its most basic, the test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed. See *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 806 (1985) (“[T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject”). In the instant case, the disparagement clause the Government now seeks to implement and enforce identifies the relevant subject as “persons, living or dead, institutions, beliefs, or national symbols.” 15 U. S. C. §1052(a). Within that category, an applicant may register a positive or benign mark but not a derogatory one. The law thus reflects the Government’s disapproval of a subset of mes-

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sages it finds offensive. This is the essence of viewpoint discrimination.

The Government disputes this conclusion. It argues, to begin with, that the law is viewpoint neutral because it applies in equal measure to any trademark that demeans or offends. This misses the point. A subject that is first defined by content and then regulated or censored by mandating only one sort of comment is not viewpoint neutral. To prohibit all sides from criticizing their opponents makes a law more viewpoint based, not less so. Cf. *Rosenberger, supra*, at 831–832 (“The . . . declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways”). The logic of the Government’s rule is that a law would be viewpoint neutral even if it provided that public officials could be praised but not condemned. The First Amendment’s viewpoint neutrality principle protects more than the right to identify with a particular side. It protects the right to create and present arguments for particular positions in particular ways, as the speaker chooses. By mandating positivity, the law here might silence dissent and distort the marketplace of ideas.

The Government next suggests that the statute is viewpoint neutral because the disparagement clause applies to trademarks regardless of the applicant’s personal views or reasons for using the mark. Instead, registration is denied based on the expected reaction of the applicant’s audience. In this way, the argument goes, it cannot be said that Government is acting with hostility toward a particular point of view. For example, the Government does not dispute that respondent seeks to use his mark in a positive way. Indeed, respondent endeavors to use The Slants to supplant a racial epithet, using new insights, musical talents, and wry humor to make it a badge of pride. Respondent’s application was denied not because the Government thought his object was to demean or offend but

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because the Government thought his trademark would have that effect on at least some Asian-Americans.

The Government may not insulate a law from charges of viewpoint discrimination by tying censorship to the reaction of the speaker's audience. The Court has suggested that viewpoint discrimination occurs when the government intends to suppress a speaker's beliefs, *Reed, supra*, at ____ (slip op., at 11–12), but viewpoint discrimination need not take that form in every instance. The danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate. That danger is all the greater if the ideas or perspectives are ones a particular audience might think offensive, at least at first hearing. An initial reaction may prompt further reflection, leading to a more reasoned, more tolerant position.

Indeed, a speech burden based on audience reactions is simply government hostility and intervention in a different guise. The speech is targeted, after all, based on the government's disapproval of the speaker's choice of message. And it is the government itself that is attempting in this case to decide whether the relevant audience would find the speech offensive. For reasons like these, the Court's cases have long prohibited the government from justifying a First Amendment burden by pointing to the offensiveness of the speech to be suppressed. See *ante*, at 23 (collecting examples).

The Government's argument in defense of the statute assumes that respondent's mark is a negative comment. In addressing that argument on its own terms, this opinion is not intended to imply that the Government's interpretation is accurate. From respondent's submissions, it is evident he would disagree that his mark means what the Government says it does. The trademark will have the effect, respondent urges, of reclaiming an offensive term for the positive purpose of celebrating all that Asian-

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Americans can and do contribute to our diverse Nation. Brief for Respondent 1–4, 42–43. While thoughtful persons can agree or disagree with this approach, the dissonance between the trademark’s potential to teach and the Government’s insistence on its own, opposite, and negative interpretation confirms the constitutional vice of the statute.

II

The parties dispute whether trademarks are commercial speech and whether trademark registration should be considered a federal subsidy. The former issue may turn on whether certain commercial concerns for the protection of trademarks might, as a general matter, be the basis for regulation. However that issue is resolved, the viewpoint based discrimination at issue here necessarily invokes heightened scrutiny.

“Commercial speech is no exception,” the Court has explained, to the principle that the First Amendment “requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys.” *Sorrell v. IMS Health Inc.*, 564 U. S. 552, 566 (2011) (internal quotation marks omitted). Unlike content based discrimination, discrimination based on viewpoint, including a regulation that targets speech for its offensiveness, remains of serious concern in the commercial context. See *Bolger v. Youngs Drug Products Corp.*, 463 U. S. 60, 65, 71–72 (1983).

To the extent trademarks qualify as commercial speech, they are an example of why that term or category does not serve as a blanket exemption from the First Amendment’s requirement of viewpoint neutrality. Justice Holmes’ reference to the “free trade in ideas” and the “power of . . . thought to get itself accepted in the competition of the market,” *Abrams v. United States*, 250 U. S. 616, 630 (1919) (dissenting opinion), was a metaphor. In the realm

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of trademarks, the metaphorical marketplace of ideas becomes a tangible, powerful reality. Here that real marketplace exists as a matter of state law and our common-law tradition, quite without regard to the Federal Government. See *ante*, at 2. These marks make up part of the expression of everyday life, as with the names of entertainment groups, broadcast networks, designer clothing, newspapers, automobiles, candy bars, toys, and so on. See Brief for Pro-Football, Inc., as *Amicus Curiae* 8 (collecting examples). Nonprofit organizations—ranging from medical-research charities and other humanitarian causes to political advocacy groups—also have trademarks, which they use to compete in a real economic sense for funding and other resources as they seek to persuade others to join their cause. See *id.*, at 8–9 (collecting examples). To permit viewpoint discrimination in this context is to permit Government censorship.

This case does not present the question of how other provisions of the Lanham Act should be analyzed under the First Amendment. It is well settled, for instance, that to the extent a trademark is confusing or misleading the law can protect consumers and trademark owners. See, e.g., *FTC v. Winstead Hosiery Co.*, 285 U. S. 483, 493 (1922) (“The labels in question are literally false, and . . . palpably so. All are, as the Commission found, calculated to deceive and do in fact deceive a substantial portion of the purchasing public”). This case also does not involve laws related to product labeling or otherwise designed to protect consumers. See *Sorrell, supra*, at 579 (“[T]he government’s legitimate interest in protecting consumers from commercial harms explains why commercial speech can be subject to greater governmental regulation than noncommercial speech” (internal quotation marks omitted)). These considerations, however, do not alter the speech principles that bar the viewpoint discrimination embodied in the statutory provision at issue here.

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It is telling that the Court’s precedents have recognized just one narrow situation in which viewpoint discrimination is permissible: where the government itself is speaking or recruiting others to communicate a message on its behalf. See *Legal Services Corporation v. Velazquez*, 531 U. S. 533, 540–542 (2001); *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U. S. 217, 229, 235 (2000); *Rosenberger*, 515 U. S., at 833. The exception is necessary to allow the government to stake out positions and pursue policies. See *Southworth*, *supra*, at 235; see also *ante*, at 13–14. But it is also narrow, to prevent the government from claiming that every government program is exempt from the First Amendment. These cases have identified a number of factors that, if present, suggest the government is speaking on its own behalf; but none are present here. See *ante*, at 14–18.

There may be situations where private speakers are selected for a government program to assist the government in advancing a particular message. That is not this case either. The central purpose of trademark registration is to facilitate source identification. To serve that broad purpose, the Government has provided the benefits of federal registration to millions of marks identifying every type of product and cause. Registered trademarks do so by means of a wide diversity of words, symbols, and messages. Whether a mark is disparaging bears no plausible relation to that goal. While defining the purpose and scope of a federal program for these purposes can be complex, see, e.g., *Agency for Int’l Development v. Alliance for Open Society Int’l, Inc.*, 570 U. S. ___, ___ (2013) (slip op., at 8), our cases are clear that viewpoint discrimination is not permitted where, as here, the Government “expends funds to encourage a diversity of views from private speakers,” *Velazquez*, *supra*, at 542 (internal quotation marks omitted).

Opinion of KENNEDY, J.

* * *

A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government's benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society.

For these reasons, I join the Court's opinion in part and concur in the judgment.

Opinion of THOMAS, J.

SUPREME COURT OF THE UNITED STATES

No. 15–1293

JOSEPH MATAL, INTERIM DIRECTOR, UNITED
STATES PATENT AND TRADEMARK OFFICE,
PETITIONER *v.* SIMON SHIAO TAM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FEDERAL CIRCUIT

[June 19, 2017]

JUSTICE THOMAS, concurring in part and concurring in
the judgment.

I join the opinion of JUSTICE ALITO, except for Part II. Respondent failed to present his statutory argument either to the Patent and Trademark Office or to the Court of Appeals, and we declined respondent’s invitation to grant certiorari on this question. *Ante*, at 9. I see no reason to address this legal question in the first instance. See *Star Athletica, L. L. C. v. Varsity Brands, Inc.*, 580 U. S. ___, ___ (2017) (slip op., at 6).

I also write separately because “I continue to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as ‘commercial.’” *Lorillard Tobacco Co. v. Reilly*, 533 U. S. 525, 572 (2001) (THOMAS, J., concurring in part and concurring in judgment); see also, e.g., *44 Liquormart, Inc. v. Rhode Island*, 517 U. S. 484, 518 (1996) (same). I nonetheless join Part IV of JUSTICE ALITO’s opinion because it correctly concludes that the disparagement clause, 15 U. S. C. §1052(a), is unconstitutional even under the less stringent test announced in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N. Y.*, 447 U. S. 557 (1980).

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES**Syllabus****ZIGLAR v. ABBASI ET AL.****CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT**

No. 15–1358. Argued January 18, 2017—Decided June 19, 2017*

In the immediate aftermath of the September 11 terrorist attacks, the Federal Government ordered hundreds of illegal aliens to be taken into custody and held pending a determination whether a particular detainee had connections to terrorism. Respondents, six men of Arab or South Asian descent, were detained for periods of three to six months in a federal facility in Brooklyn. After their release, they were removed from the United States. They then filed this putative class action against petitioners, two groups of federal officials. The first group consisted of former Attorney General John Ashcroft, former Federal Bureau of Investigation Director Robert Mueller, and former Immigration and Naturalization Service Commissioner James Ziglar (Executive Officials). The second group consisted of the facility’s warden and assistant warden Dennis Hasty and James Sherman (Wardens). Respondents sought damages for constitutional violations under the implied cause of action theory adopted in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, alleging that petitioners detained them in harsh pretrial conditions for a punitive purpose, in violation of the Fifth Amendment; that petitioners did so because of their actual or apparent race, religion, or national origin, in violation of the Fifth Amendment; that the Wardens subjected them to punitive strip searches, in violation of the Fourth and Fifth Amendments; and that the Wardens knowingly allowed the guards to abuse them, in violation of the Fifth Amendment. Respondents also brought a claim under 42 U. S. C. §1985(3), which forbids certain

*Together with No. 15–1359, *Ashcroft, Former Attorney General, et al. v. Abbasi et al.*, and No. 15–1363, *Hasty et al. v. Abbasi et al.*, also on certiorari to the same court.

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conspiracies to violate equal protection rights. The District Court dismissed the claims against the Executive Officials but allowed the claims against the Wardens to go forward. The Second Circuit affirmed in most respects as to the Wardens but reversed as to the Executive Officials, reinstating respondents' claims.

Held: The judgment is reversed in part and vacated and remanded in part.

789 F. 3d 218, reversed in part and vacated and remanded in part.

JUSTICE KENNEDY delivered the opinion of the Court, except as to Part IV–B, concluding:

1. The limited reach of the *Bivens* action informs the decision whether an implied damages remedy should be recognized here. Pp. 6–14.

(a) In 42 U. S. C. §1983, Congress provided a specific damages remedy for plaintiffs whose constitutional rights were violated by state officials, but Congress provided no corresponding remedy for constitutional violations by agents of the Federal Government. In 1971, and against this background, this Court recognized in *Bivens* an implied damages action to compensate persons injured by federal officers who violated the Fourth Amendment's prohibition against unreasonable searches and seizures. In the following decade, the Court allowed *Bivens*-type remedies twice more, in a Fifth Amendment gender-discrimination case, *Davis v. Passman*, 442 U. S. 228, and in an Eighth Amendment Cruel and Unusual Punishments Clause case, *Carlson v. Green*, 446 U. S. 14. These are the only cases in which the Court has approved of an implied damages remedy under the Constitution itself. Pp. 6–7.

(b) *Bivens*, *Davis*, and *Carlson* were decided at a time when the prevailing law assumed that a proper judicial function was to "provide such remedies as are necessary to make effective" a statute's purpose. *J. I. Case Co. v. Borak*, 377 U. S. 426, 433. The Court has since adopted a far more cautious course, clarifying that, when deciding whether to recognize an implied cause of action, the "determinative" question is one of statutory intent. *Alexander v. Sandoval*, 532 U. S. 275, 286. If a statute does not evince Congress' intent "to create the private right of action asserted," *Touche Ross & Co. v. Redington*, 442 U. S. 560, 568, no such action will be created through judicial mandate. Similar caution must be exercised with respect to damages actions implied to enforce the Constitution itself. *Bivens* is well-settled law in its own context, but expanding the *Bivens* remedy is now considered a "disfavored" judicial activity. *Ashcroft v. Iqbal*, 556 U. S. 662, 675.

When a party seeks to assert an implied cause of action under the Constitution, separation-of-powers principles should be central to the

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analysis. The question is whether Congress or the courts should decide to authorize a damages suit. *Bush v. Lucas*, 462 U. S. 367, 380. Most often it will be Congress, for *Bivens* will not be extended to a new context if there are “‘special factors counselling hesitation in the absence of affirmative action by Congress.’” *Carlson, supra*, at 18. If there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong, courts must refrain from creating that kind of remedy. An alternative remedial structure may also limit the Judiciary’s power to infer a new *Bivens* cause of action. Pp. 8–14.

2. Considering the relevant special factors here, a *Bivens*-type remedy should not be extended to the claims challenging the confinement conditions imposed on respondents pursuant to the formal policy adopted by the Executive Officials in the wake of the September 11 attacks. These “detention policy claims” include the allegations that petitioners violated respondents’ due process and equal protection rights by holding them in restrictive conditions of confinement, and the allegations that the Wardens violated the Fourth and Fifth Amendments by subjecting respondents to frequent strip searches. The detention policy claims do not include the guard-abuse claim against Warden Hasty. Pp. 14–23.

(a) The proper test for determining whether a claim arises in a new *Bivens* context is as follows. If the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new. Meaningful differences may include, e.g., the rank of the officers involved; the constitutional right at issue; the extent of judicial guidance for the official conduct; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors not considered in previous *Bivens* cases. Respondents’ detention policy claims bear little resemblance to the three *Bivens* claims the Court has approved in previous cases. The Second Circuit thus should have held that this was a new *Bivens* context and then performed a special factors analysis before allowing this damages suit to proceed. Pp. 15–17.

(b) The special factors here indicate that Congress, not the courts, should decide whether a damages action should be allowed.

With regard to the Executive Officials, a *Bivens* action is not “a proper vehicle for altering an entity’s policy,” *Correctional Services Corp. v. Malesko*, 534 U. S. 61, 74, and is not designed to hold officers responsible for acts of their subordinates, see *Iqbal, supra*, at 676. Even an action confined to the Executive Officials’ own discrete conduct would call into question the formulation and implementation of a high-level executive policy, and the burdens of that litigation could prevent officials from properly discharging their duties, see *Cheney v.*

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United States Dist. Court for D. C., 542 U. S. 367, 382. The litigation process might also implicate the discussion and deliberations that led to the formation of the particular policy, requiring courts to interfere with sensitive Executive Branch functions. See *Clinton v. Jones*, 520 U. S. 681, 701.

Other special factors counsel against extending *Bivens* to cover the detention policy claims against any of the petitioners. Because those claims challenge major elements of the Government's response to the September 11 attacks, they necessarily require an inquiry into national-security issues. National-security policy, however, is the prerogative of Congress and the President, and courts are "reluctant to intrude upon" that authority absent congressional authorization. *Department of Navy v. Egan*, 484 U. S. 518, 530. Thus, Congress' failure to provide a damages remedy might be more than mere oversight, and its silence might be more than "inadvertent." *Schweiker v. Chilicky*, 487 U. S. 412, 423. That silence is also relevant and telling here, where Congress has had nearly 16 years to extend "the kind of remedies [sought by] respondents," *id.*, at 426, but has not done so. Respondents also may have had available "other alternative forms of judicial relief," *Minneci v. Pollard*, 565 U. S. 118, 124, including injunctions and habeas petitions.

The proper balance in situations like this, between deterring constitutional violations and freeing high officials to make the lawful decisions necessary to protect the Nation in times of great peril, is one for the Congress to undertake, not the Judiciary. The Second Circuit thus erred in allowing respondents' detention policy claims to proceed under *Bivens*. Pp. 17–23.

3. The Second Circuit also erred in allowing the prisoner abuse claim against Warden Hasty to go forward without conducting the required special factors analysis. Respondents' prisoner abuse allegations against Warden Hasty state a plausible ground to find a constitutional violation should a *Bivens* remedy be implied. But the first question is whether the claim arises in a new *Bivens* context. This claim has significant parallels to *Carlson*, which extended *Bivens* to cover a failure to provide medical care to a prisoner, but this claim nevertheless seeks to extend *Carlson* to a new context. The constitutional right is different here: *Carlson* was predicated on the Eighth Amendment while this claim was predicated on the Fifth. The judicial guidance available to this warden with respect to his supervisory duties was less developed. There might have been alternative remedies available. And Congress did not provide a standalone damages remedy against federal jailers when it enacted the Prison Litigation Reform Act some 15 years after *Carlson*. Given this Court's expressed caution about extending the *Bivens* remedy, this context

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must be regarded as a new one. Pp. 23–26.

4. Petitioners are entitled to qualified immunity with respect to respondents' claims under 42 U. S. C. §1985(3). Pp. 26–32.

(a) Assuming that respondents' allegations are true and well pleaded, the question is whether a reasonable officer in petitioners' position would have known the alleged conduct was an unlawful conspiracy. The qualified-immunity inquiry turns on the "objective legal reasonableness" of the official's acts, *Harlow v. Fitzgerald*, 457 U. S. 800, 819, "assessed in light of the legal rules that were 'clearly established' at the time [the action] was taken," *Anderson v. Creighton*, 483 U. S. 635, 639. If it would have been clear to a reasonable officer that the alleged conduct "was unlawful in the situation he confronted," *Saucier v. Katz*, 533 U. S. 194, 202, the defendant officer is not entitled to qualified immunity. But if a reasonable officer might not have known that the conduct was unlawful, then the officer is entitled to qualified immunity. Pp. 27–29.

(b) Here, reasonable officials in petitioners' positions would not have known with sufficient certainty that §1985(3) prohibited their joint consultations and the resulting policies. There are two reasons. First, the conspiracy is alleged to have been among officers in the same Department of the Federal Government. And there is no clearly established law on the issue whether agents of the same executive department are distinct enough to "conspire" with one another within the meaning of 42 U. S. C. §1985(3). Second, open discussion among federal officers should be encouraged to help those officials reach consensus on department policies, so there is a reasonable argument that §1985(3) liability should not extend to cases like this one. As these considerations indicate, the question whether federal officials can be said to "conspire" in these kinds of situations is sufficiently open that the officials in this suit would not have known that §1985(3) applied to their discussions and actions. It follows that reasonable officers in petitioners' positions would not have known with any certainty that the alleged agreements were forbidden by that statute. Pp. 29–32.

KENNEDY, J., delivered the opinion of the Court with respect to Parts I, II, III, IV–A, and V, in which ROBERTS, C. J., and THOMAS and ALITO, JJ., joined, and an opinion with respect to Part IV–B, in which ROBERTS, C. J., and ALITO, J., joined. THOMAS, J., filed an opinion concurring in part and concurring in the judgment. BREYER, J., filed a dissenting opinion, in which GINSBURG, J., joined. SOTOMAYOR, KAGAN, and GORSUCH, JJ., took no part in the consideration or decision of the cases.

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NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 15–1358, 15–1359 and 15–1363

JAMES W. ZIGLAR, PETITIONER

15–1358

v.

AHMER IQBAL ABBASI, ET AL.

JOHN D. ASHCROFT, FORMER ATTORNEY
GENERAL, ET AL., PETITIONERS

15–1359

v.

AHMER IQBAL ABBASI, ET AL.

DENNIS HASTY, ET AL., PETITIONERS

15–1363

v.

AHMER IQBAL ABBASI, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[June 19, 2017]

JUSTICE KENNEDY delivered the opinion of the Court, except as to Part IV–B.

After the September 11 terrorist attacks in this country, and in response to the deaths, destruction, and dangers they caused, the United States Government ordered hundreds of illegal aliens to be taken into custody and held. Pending a determination whether a particular detainee had connections to terrorism, the custody, under harsh conditions to be described, continued. In many instances custody lasted for days and weeks, then stretching into months. Later, some of the aliens who had been detained

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filed suit, leading to the cases now before the Court.

The complaint named as defendants three high executive officers in the Department of Justice and two of the wardens at the facility where the detainees had been held. Most of the claims, alleging various constitutional violations, sought damages under the implied cause of action theory adopted by this Court in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971). Another claim in the complaint was based upon the statutory cause of action authorized and created by Congress under Rev. Stat. §1980, 42 U. S. C. §1985(3). This statutory cause of action allows damages to persons injured by conspiracies to deprive them of the equal protection of the laws.

The suit was commenced in the United States District Court for the Eastern District of New York. After this Court's decision in *Ashcroft v. Iqbal*, 556 U. S. 662 (2009), a fourth amended complaint was filed; and that is the complaint to be considered here. Motions to dismiss the fourth amended complaint were denied as to some defendants and granted as to others. These rulings were the subject of interlocutory appeals to the United States Court of Appeals for the Second Circuit. Over a dissenting opinion by Judge Raggi with respect to the decision of the three-judge panel—and a second unsigned dissent from the court's declining to rehear the suit en banc, joined by Judge Raggi and five other judges—the Court of Appeals ruled that the complaint was sufficient for the action to proceed against the named officials who are now before us. See *Turkmen v. Hasty*, 789 F. 3d 218 (2015) (panel decision); *Turkmen v. Hasty*, 808 F. 3d 197 (2015) (en banc decision).

The Court granted certiorari to consider these rulings. 580 U. S. ___ (2016). The officials who must defend the suit on the merits, under the ruling of the Court of Appeals, are the petitioners here. The former detainees who seek relief under the fourth amended complaint are the

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respondents. The various claims and theories advanced for recovery, and the grounds asserted for their dismissal as insufficient as a matter of law, will be addressed in turn.

I

Given the present procedural posture of the suit, the Court accepts as true the facts alleged in the complaint. See *Iqbal*, 556 U. S., at 678.

A

In the weeks following the September 11, 2001, terrorist attacks—the worst in American history—the Federal Bureau of Investigation (FBI) received more than 96,000 tips from members of the public. See *id.*, at 667. Some tips were based on well-grounded suspicion of terrorist activity, but many others may have been based on fear of Arabs and Muslims. FBI agents “questioned more than 1,000 people with suspected links to the [September 11] attacks in particular or to terrorism in general.” *Ibid.*

While investigating the tips—including the less substantiated ones—the FBI encountered many aliens who were present in this country without legal authorization. As a result, more than 700 individuals were arrested and detained on immigration charges. *Ibid.* If the FBI designated an alien as not being “of interest” to the investigation, then he or she was processed according to normal procedures. In other words the alien was treated just as if, for example, he or she had been arrested at the border after an illegal entry. If, however, the FBI designated an alien as “of interest” to the investigation, or if it had doubts about the proper designation in a particular case, the alien was detained subject to a “hold-until-cleared policy.” The aliens were held without bail.

Respondents were among some 84 aliens who were subject to the hold-until-cleared policy and detained at the

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Metropolitan Detention Center (MDC) in Brooklyn, New York. They were held in the Administrative Maximum Special Housing Unit (or Unit) of the MDC. The complaint includes these allegations: Conditions in the Unit were harsh. Pursuant to official Bureau of Prisons policy, detainees were held in “tiny cells for over 23 hours a day.” 789 F. 3d, at 228. Lights in the cells were left on 24 hours. Detainees had little opportunity for exercise or recreation. They were forbidden to keep anything in their cells, even basic hygiene products such as soap or a toothbrush. When removed from the cells for any reason, they were shackled and escorted by four guards. They were denied access to most forms of communication with the outside world. And they were strip searched often—any time they were moved, as well as at random in their cells.

Some of the harsh conditions in the Unit were not imposed pursuant to official policy. According to the complaint, prison guards engaged in a pattern of “physical and verbal abuse.” *Ibid.* Guards allegedly slammed detainees into walls; twisted their arms, wrists, and fingers; broke their bones; referred to them as terrorists; threatened them with violence; subjected them to humiliating sexual comments; and insulted their religion.

B

Respondents are six men of Arab or South Asian descent. Five are Muslims. Each was illegally in this country, arrested during the course of the September 11 investigation, and detained in the Administrative Maximum Special Housing Unit for periods ranging from three to eight months. After being released respondents were removed from the United States.

Respondents then sued on their own behalf, and on behalf of a putative class, seeking compensatory and punitive damages, attorney’s fees, and costs. Respondents, it seems fair to conclude from the arguments pre-

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sented, acknowledge that in the ordinary course aliens who are present in the United States without legal authorization can be detained for some period of time. But here the challenge is to the conditions of their confinement and the reasons or motives for imposing those conditions. The gravamen of their claims was that the Government had no reason to suspect them of any connection to terrorism, and thus had no legitimate reason to hold them for so long in these harsh conditions.

As relevant here, respondents sued two groups of federal officials in their official capacities. The first group consisted of former Attorney General John Ashcroft, former FBI Director Robert Mueller, and former Immigration and Naturalization Service Commissioner James Ziglar. This opinion refers to these three petitioners as the “Executive Officials.” The other petitioners named in the complaint were the MDC’s warden, Dennis Hasty, and associate warden, James Sherman. This opinion refers to these two petitioners as the “Wardens.”

Seeking to invoke the Court’s decision in *Bivens*, respondents brought four claims under the Constitution itself. First, respondents alleged that petitioners detained them in harsh pretrial conditions for a punitive purpose, in violation of the substantive due process component of the Fifth Amendment. Second, respondents alleged that petitioners detained them in harsh conditions because of their actual or apparent race, religion, or national origin, in violation of the equal protection component of the Fifth Amendment. Third, respondents alleged that the Wardens subjected them to punitive strip searches unrelated to any legitimate penological interest, in violation of the Fourth Amendment and the substantive due process component of the Fifth Amendment. Fourth, respondents alleged that the Wardens knowingly allowed the guards to abuse respondents, in violation of the substantive due process component of the Fifth Amendment.

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Respondents also brought a claim under 42 U. S. C. §1985(3), which forbids certain conspiracies to violate equal protection rights. Respondents alleged that petitioners conspired with one another to hold respondents in harsh conditions because of their actual or apparent race, religion, or national origin.

C

The District Court dismissed the claims against the Executive Officials but allowed the claims against the Wardens to go forward. The Court of Appeals affirmed in most respects as to the Wardens, though it held that the prisoner abuse claim against Sherman (the associate warden) should have been dismissed. 789 F. 3d, at 264–265. As to the Executive Officials, however, the Court of Appeals reversed, reinstating respondents’ claims. *Ibid.* As noted above, Judge Raggi dissented. She would have held that only the prisoner abuse claim against Hasty should go forward. *Id.*, at 295, n. 41, 302 (opinion concurring in part in judgment and dissenting in part). The Court of Appeals declined to rehear the suit en banc, 808 F. 3d, at 197; and, again as noted above, Judge Raggi joined a second dissent along with five other judges, *id.*, at 198. This Court granted certiorari. 580 U. S. ____ (2016).

II

The first question to be discussed is whether petitioners can be sued for damages under *Bivens* and the ensuing cases in this Court defining the reach and the limits of that precedent.

A

In 1871, Congress passed a statute that was later codified at Rev. Stat. §1979, 42 U. S. C. §1983. It entitles an injured person to money damages if a state official violates his or her constitutional rights. Congress did not create an analogous statute for federal officials. Indeed, in the

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100 years leading up to *Bivens*, Congress did not provide a specific damages remedy for plaintiffs whose constitutional rights were violated by agents of the Federal Government.

In 1971, and against this background, this Court decided *Bivens*. The Court held that, even absent statutory authorization, it would enforce a damages remedy to compensate persons injured by federal officers who violated the prohibition against unreasonable search and seizures. See 403 U. S., at 397. The Court acknowledged that the Fourth Amendment does not provide for money damages “in so many words.” *Id.*, at 396. The Court noted, however, that Congress had not foreclosed a damages remedy in “explicit” terms and that no “special factors” suggested that the Judiciary should “hesitat[e]” in the face of congressional silence. *Id.*, at 396–397. The Court, accordingly, held that it could authorize a remedy under general principles of federal jurisdiction. See *id.*, at 392 (citing *Bell v. Hood*, 327 U. S. 678, 684 (1946)).

In the decade that followed, the Court recognized what has come to be called an implied cause of action in two cases involving other constitutional violations. In *Davis v. Passman*, 442 U. S. 228 (1979), an administrative assistant sued a Congressman for firing her because she was a woman. The Court held that the Fifth Amendment Due Process Clause gave her a damages remedy for gender discrimination. *Id.*, at 248–249. And in *Carlson v. Green*, 446 U. S. 14 (1980), a prisoner’s estate sued federal jailers for failing to treat the prisoner’s asthma. The Court held that the Eighth Amendment Cruel and Unusual Punishments Clause gave him a damages remedy for failure to provide adequate medical treatment. See *id.*, at 19. These three cases—*Bivens*, *Davis*, and *Carlson*—represent the only instances in which the Court has approved of an implied damages remedy under the Constitution itself.

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B

To understand *Bivens* and the two other cases implying a damages remedy under the Constitution, it is necessary to understand the prevailing law when they were decided. In the mid-20th century, the Court followed a different approach to recognizing implied causes of action than it follows now. During this “*ancien régime*,” *Alexander v. Sandoval*, 532 U. S. 275, 287 (2001), the Court assumed it to be a proper judicial function to “provide such remedies as are necessary to make effective” a statute’s purpose, *J. I. Case Co. v. Borak*, 377 U. S. 426, 433 (1964). Thus, as a routine matter with respect to statutes, the Court would imply causes of action not explicit in the statutory text itself. See, e.g., *id.*, at 430–432; *Allen v. State Bd. of Elections*, 393 U. S. 544, 557 (1969); *Sullivan v. Little Hunting Park, Inc.*, 396 U. S. 229, 239 (1969) (“The existence of a statutory right implies the existence of all necessary and appropriate remedies”).

These statutory decisions were in place when *Bivens* recognized an implied cause of action to remedy a constitutional violation. Against that background, the *Bivens* decision held that courts must “adjust their remedies so as to grant the necessary relief” when “federally protected rights have been invaded.” 403 U. S., at 392 (quoting *Bell, supra*, at 678); see also 403 U. S., at 402 (Harlan, J., concurring) (discussing cases recognizing implied causes of action under federal statutes). In light of this interpretive framework, there was a possibility that “the Court would keep expanding *Bivens* until it became the substantial equivalent of 42 U. S. C. §1983.” Kent, Are Damages Different?: *Bivens* and National Security, 87 S. Cal. L. Rev. 1123, 1139–1140 (2014).

C

Later, the arguments for recognizing implied causes of action for damages began to lose their force. In cases

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decided after *Bivens*, and after the statutory implied cause-of-action cases that *Bivens* itself relied upon, the Court adopted a far more cautious course before finding implied causes of action. In two principal cases under other statutes, it declined to find an implied cause of action. See *Piper v. Chris-Craft Industries, Inc.*, 430 U. S. 1, 42, 45–46 (1977); *Cort v. Ash*, 422 U. S. 66, 68–69 (1975). Later, in *Cannon v. University of Chicago*, 441 U. S. 677 (1979), the Court did allow an implied cause of action; but it cautioned that, where Congress “intends private litigants to have a cause of action,” the “far better course” is for Congress to confer that remedy in explicit terms. *Id.*, at 717.

Following this expressed caution, the Court clarified in a series of cases that, when deciding whether to recognize an implied cause of action, the “determinative” question is one of statutory intent. *Sandoval*, 532 U. S., at 286. If the statute itself does not “displa[y] an intent” to create “a private remedy,” then “a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.” *Id.*, at 286–287; see also *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U. S. 11, 15–16, 23–24 (1979); *Karahalios v. Federal Employees*, 489 U. S. 527, 536–537 (1989). The Court held that the judicial task was instead “limited solely to determining whether Congress intended to create the private right of action asserted.” *Touche Ross & Co. v. Redington*, 442 U. S. 560, 568 (1979). If the statute does not itself so provide, a private cause of action will not be created through judicial mandate. See *Transamerica, supra*, at 24.

The decision to recognize an implied cause of action under a statute involves somewhat different considerations than when the question is whether to recognize an implied cause of action to enforce a provision of the Constitution itself. When Congress enacts a statute, there are

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specific procedures and times for considering its terms and the proper means for its enforcement. It is logical, then, to assume that Congress will be explicit if it intends to create a private cause of action. With respect to the Constitution, however, there is no single, specific congressional action to consider and interpret.

Even so, it is a significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation. When determining whether traditional equitable powers suffice to give necessary constitutional protection—or whether, in addition, a damages remedy is necessary—there are a number of economic and governmental concerns to consider. Claims against federal officials often create substantial costs, in the form of defense and indemnification. Congress, then, has a substantial responsibility to determine whether, and the extent to which, monetary and other liabilities should be imposed upon individual officers and employees of the Federal Government. In addition, the time and administrative costs attendant upon intrusions resulting from the discovery and trial process are significant factors to be considered. In an analogous context, Congress, it is fair to assume, weighed those concerns in deciding not to substitute the Government as defendant in suits seeking damages for constitutional violations. See 28 U. S. C. §2679(b)(2)(A) (providing that certain provisions of the Federal Tort Claims Act do not apply to any claim against a federal employee “which is brought for a violation of the Constitution”).

For these and other reasons, the Court’s expressed caution as to implied causes of actions under congressional statutes led to similar caution with respect to actions in the *Bivens* context, where the action is implied to enforce the Constitution itself. Indeed, in light of the changes to

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the Court’s general approach to recognizing implied damages remedies, it is possible that the analysis in the Court’s three *Bivens* cases might have been different if they were decided today. To be sure, no congressional enactment has disapproved of these decisions. And it must be understood that this opinion is not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose. *Bivens* does vindicate the Constitution by allowing some redress for injuries, and it provides instruction and guidance to federal law enforcement officers going forward. The settled law of *Bivens* in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain it in that sphere.

Given the notable change in the Court’s approach to recognizing implied causes of action, however, the Court has made clear that expanding the *Bivens* remedy is now a “disfavored” judicial activity. *Iqbal*, 556 U. S., at 675. This is in accord with the Court’s observation that it has “consistently refused to extend *Bivens* to any new context or new category of defendants.” *Correctional Services Corp. v. Malesko*, 534 U. S. 61, 68 (2001). Indeed, the Court has refused to do so for the past 30 years.

For example, the Court declined to create an implied damages remedy in the following cases: a First Amendment suit against a federal employer, *Bush v. Lucas*, 462 U. S. 367, 390 (1983); a race-discrimination suit against military officers, *Chappell v. Wallace*, 462 U. S. 296, 297, 304–305 (1983); a substantive due process suit against military officers, *United States v. Stanley*, 483 U. S. 669, 671–672, 683–684 (1987); a procedural due process suit against Social Security officials, *Schweiker v. Chilicky*, 487 U. S. 412, 414 (1988); a procedural due process suit against a federal agency for wrongful termination, *FDIC v. Meyer*, 510 U. S. 471, 473–474 (1994); an Eighth Amend-

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ment suit against a private prison operator, *Malesko, supra*, at 63; a due process suit against officials from the Bureau of Land Management, *Wilkie v. Robbins*, 551 U. S. 537, 547–548, 562 (2007); and an Eighth Amendment suit against prison guards at a private prison, *Minneci v. Pollard*, 565 U. S. 118, 120 (2012).

When a party seeks to assert an implied cause of action under the Constitution itself, just as when a party seeks to assert an implied cause of action under a federal statute, separation-of-powers principles are or should be central to the analysis. The question is “who should decide” whether to provide for a damages remedy, Congress or the courts? *Bush*, 462 U. S., at 380.

The answer most often will be Congress. When an issue “involves a host of considerations that must be weighed and appraised,” it should be committed to “those who write the laws” rather than “those who interpret them.” *Ibid.* (quoting *United States v. Gilman*, 347 U. S. 507, 512–513 (1954)). In most instances, the Court’s precedents now instruct, the Legislature is in the better position to consider if “the public interest would be served” by imposing a “new substantive legal liability.” *Schweiker, supra*, at 426–427 (quoting *Bush, supra*, at 390). As a result, the Court has urged “caution” before “extending *Bivens* remedies into any new context.” *Malesko, supra*, at 74. The Court’s precedents now make clear that a *Bivens* remedy will not be available if there are “special factors counselling hesitation in the absence of affirmative action by Congress.” *Carlson*, 446 U. S., at 18 (quoting *Bivens*, 403 U. S., at 396).

This Court has not defined the phrase “special factors counselling hesitation.” The necessary inference, though, is that the inquiry must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed. Thus, to be a “special

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factor counselling hesitation,” a factor must cause a court to hesitate before answering that question in the affirmative.

It is not necessarily a judicial function to establish whole categories of cases in which federal officers must defend against personal liability claims in the complex sphere of litigation, with all of its burdens on some and benefits to others. It is true that, if equitable remedies prove insufficient, a damages remedy might be necessary to redress past harm and deter future violations. Yet the decision to recognize a damages remedy requires an assessment of its impact on governmental operations systemwide. Those matters include the burdens on Government employees who are sued personally, as well as the projected costs and consequences to the Government itself when the tort and monetary liability mechanisms of the legal system are used to bring about the proper formulation and implementation of public policies. These and other considerations may make it less probable that Congress would want the Judiciary to entertain a damages suit in a given case.

Sometimes there will be doubt because the case arises in a context in which Congress has designed its regulatory authority in a guarded way, making it less likely that Congress would want the Judiciary to interfere. See *Chappell, supra*, at 302 (military); *Stanley, supra*, at 679 (same); *Meyer, supra*, at 486 (public purse); *Wilkie, supra*, at 561–562 (federal land). And sometimes there will be doubt because some other feature of a case—difficult to predict in advance—causes a court to pause before acting without express congressional authorization. In sum, if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong, the courts must refrain from creating the remedy in order to respect the role of Congress in determining the nature

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and extent of federal-court jurisdiction under Article III.

In a related way, if there is an alternative remedial structure present in a certain case, that alone may limit the power of the Judiciary to infer a new *Bivens* cause of action. For if Congress has created “any alternative, existing process for protecting the [injured party’s] interest” that itself may “amoun[t] to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.” *Wilkie, supra*, at 550; see also *Bush, supra*, at 385–388 (recognizing that civil-service regulations provided alternative means for relief); *Malesko*, 534 U. S., at 73–74 (recognizing that state tort law provided alternative means for relief); *Minneci, supra*, at 127–130 (same).

III

It is appropriate now to turn first to the *Bivens* claims challenging the conditions of confinement imposed on respondents pursuant to the formal policy adopted by the Executive Officials in the wake of the September 11 attacks. The Court will refer to these claims as the “detention policy claims.” The detention policy claims allege that petitioners violated respondents’ due process and equal protection rights by holding them in restrictive conditions of confinement; the claims further allege that the Wardens violated the Fourth and Fifth Amendments by subjecting respondents to frequent strip searches. The term “detention policy claims” does not include respondents’ claim alleging that Warden Hasty allowed guards to abuse the detainees. That claim will be considered separately, and further, below. At this point, the question is whether, having considered the relevant special factors in the whole context of the detention policy claims, the Court should extend a *Bivens*-type remedy to those claims.

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A

Before allowing respondents' detention policy claims to proceed under *Bivens*, the Court of Appeals did not perform any special factors analysis at all. 789 F. 3d, at 237. The reason, it said, was that the special factors analysis is necessary only if a plaintiff asks for a *Bivens* remedy in a new context. 789 F. 3d, at 234. And in the Court of Appeals' view, the context here was not new. *Id.*, at 235.

To determine whether the *Bivens* context was novel, the Court of Appeals employed a two-part test. First, it asked whether the asserted constitutional right was at issue in a previous *Bivens* case. 789 F. 3d, at 234. Second, it asked whether the mechanism of injury was the same mechanism of injury in a previous *Bivens* case. 789 F. 3d, at 234. Under the Court of Appeals' approach, if the answer to both questions is "yes," then the context is not new and no special factors analysis is required. *Ibid.*

That approach is inconsistent with the analysis in *Malesko*. Before the Court decided that case, it had approved a *Bivens* action under the Eighth Amendment against federal prison officials for failure to provide medical treatment. See *Carlson*, 446 U. S., at 16, n. 1, 18–19. In *Malesko*, the plaintiff sought relief against a private prison operator in almost parallel circumstances. 534 U. S., at 64. In both cases, the right at issue was the same: the Eighth Amendment right to be free from cruel and unusual punishment. And in both cases, the mechanism of injury was the same: failure to provide adequate medical treatment. Thus, if the approach followed by the Court of Appeals is the correct one, this Court should have held that the cases arose in the same context, obviating any need for a special factors inquiry.

That, however, was not the controlling analytic framework in *Malesko*. Even though the right and the mechanism of injury were the same as they were in *Carlson*, the Court held that the contexts were different. 534 U. S., at

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70, and n. 4. The Court explained that special factors counseled hesitation and that the *Bivens* remedy was therefore unavailable. 534 U. S., at 74.

For similar reasons, the holding of the Court of Appeals in the instant suit is inconsistent with this Court's analytic framework in *Chappell*. In *Davis*, decided before the Court's cautionary instructions with respect to *Bivens* suits, see *supra*, at 11–12, the Court had held that an employment-discrimination claim against a Congressman could proceed as a *Bivens*-type action. *Davis*, 442 U. S., at 230–231. In *Chappell*, however, the cautionary rules were applicable; and, as a result, a similar discrimination suit against military officers was not allowed to proceed. It is the *Chappell* framework that now controls; and, under it, the Court of Appeals erred by holding that this suit did not present a new *Bivens* context.

The proper test for determining whether a case presents a new *Bivens* context is as follows. If the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new. Without endeavoring to create an exhaustive list of differences that are meaningful enough to make a given context a new one, some examples might prove instructive. A case might differ in a meaningful way because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.

In the present suit, respondents' detention policy claims challenge the confinement conditions imposed on illegal aliens pursuant to a high-level executive policy created in

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the wake of a major terrorist attack on American soil. Those claims bear little resemblance to the three *Bivens* claims the Court has approved in the past: a claim against FBI agents for handcuffing a man in his own home without a warrant; a claim against a Congressman for firing his female secretary; and a claim against prison officials for failure to treat an inmate's asthma. See *Bivens*, 403 U. S. 388; *Davis*, 442 U. S. 228; *Chappell*, 462 U. S. 296. The Court of Appeals therefore should have held that this was a new *Bivens* context. Had it done so, it would have recognized that a special factors analysis was required before allowing this damages suit to proceed.

B

After considering the special factors necessarily implicated by the detention policy claims, the Court now holds that those factors show that whether a damages action should be allowed is a decision for the Congress to make, not the courts.

With respect to the claims against the Executive Officials, it must be noted that a *Bivens* action is not "a proper vehicle for altering an entity's policy." *Malesko, supra*, at 74. Furthermore, a *Bivens* claim is brought against the individual official for his or her own acts, not the acts of others. "The purpose of *Bivens* is to deter the *officer*." *Meyer*, 510 U. S., at 485. *Bivens* is not designed to hold officers responsible for acts of their subordinates. See *Iqbal*, 556 U. S., at 676 ("Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*").

Even if the action is confined to the conduct of a particular Executive Officer in a discrete instance, these claims would call into question the formulation and implementation of a general policy. This, in turn, would necessarily require inquiry and discovery into the whole course of the discussions and deliberations that led to the policies and

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governmental acts being challenged. These consequences counsel against allowing a *Bivens* action against the Executive Officials, for the burden and demand of litigation might well prevent them—or, to be more precise, future officials like them—from devoting the time and effort required for the proper discharge of their duties. See *Cheney v. United States Dist. Court for D. C.*, 542 U. S. 367, 382 (2004) (noting “the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties”).

A closely related problem, as just noted, is that the discovery and litigation process would either border upon or directly implicate the discussion and deliberations that led to the formation of the policy in question. See *Federal Open Market Comm. v. Merrill*, 443 U. S. 340, 360 (1979) (noting that disclosure of Executive Branch documents “could inhibit the free flow of advice, including analysis, reports, and expression of opinion within an agency”). Allowing a damages suit in this context, or in a like context in other circumstances, would require courts to interfere in an intrusive way with sensitive functions of the Executive Branch. See *Clinton v. Jones*, 520 U. S. 681, 701 (1997) (recognizing that “[e]ven when a branch does not arrogate power to itself . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties” (quoting *Loving v. United States*, 517 U. S. 748, 757 (1996))). These considerations also counsel against allowing a damages claim to proceed against the Executive Officials. See *Cheney*, *supra*, at 385 (noting that “special considerations control” when a case implicates “the Executive Branch’s interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications”).

In addition to this special factor, which applies to the claims against the Executive Officials, there are three

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other special factors that apply as well to the detention policy claims against all of the petitioners. First, respondents' detention policy claims challenge more than standard "law enforcement operations." *United States v. Verdugo-Urquidez*, 494 U. S. 259, 273 (1990). They challenge as well major elements of the Government's whole response to the September 11 attacks, thus of necessity requiring an inquiry into sensitive issues of national security. Were this inquiry to be allowed in a private suit for damages, the *Bivens* action would assume dimensions far greater than those present in *Bivens* itself, or in either of its two follow-on cases, or indeed in any putative *Bivens* case yet to come before the Court.

National-security policy is the prerogative of the Congress and President. See U. S. Const., Art. I, §8; Art. II, §1, §2. Judicial inquiry into the national-security realm raises "concerns for the separation of powers in trenching on matters committed to the other branches." *Christopher v. Harbury*, 536 U. S. 403, 417 (2002). These concerns are even more pronounced when the judicial inquiry comes in the context of a claim seeking money damages rather than a claim seeking injunctive or other equitable relief. The risk of personal damages liability is more likely to cause an official to second-guess difficult but necessary decisions concerning national-security policy.

For these and other reasons, courts have shown deference to what the Executive Branch "has determined . . . is 'essential to national security.'" *Winter v. Natural Resources Defense Council, Inc.*, 555 U. S. 7, 24, 26 (2008). Indeed, "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs" unless "Congress specifically has provided otherwise." *Department of Navy v. Egan*, 484 U. S. 518, 530 (1988). Congress has not provided otherwise here.

There are limitations, of course, on the power of the

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Executive under Article II of the Constitution and in the powers authorized by congressional enactments, even with respect to matters of national security. See, e.g., *Hamdi v. Rumsfeld*, 542 U. S. 507, 527, 532–537 (2004) (plurality opinion) (“Whatever power the United States Constitution envisions for the Executive . . . in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake”); *Boumediene v. Bush*, 553 U. S. 723, 798 (2008) (“Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law”). And national-security concerns must not become a talisman used to ward off inconvenient claims—a “label” used to “cover a multitude of sins.” *Mitchell v. Forsyth*, 472 U. S. 511, 523 (1985). This “danger of abuse” is even more heightened given “the difficulty of defining” the “security interest” in domestic cases. *Ibid.* (quoting *United States v. United States Dist. Court for Eastern Dist. of Mich.*, 407 U. S. 297, 313–314 (1972)).

Even so, the question is only whether “congressionally uninvited intrusion” is “inappropriate” action for the Judiciary to take. *Stanley*, 483 U. S., at 683. The factors discussed above all suggest that Congress’ failure to provide a damages remedy might be more than mere oversight, and that congressional silence might be more than “inadvertent.” *Schweiker*, 487 U. S., at 423. This possibility counsels hesitation “in the absence of affirmative action by Congress.” *Bivens*, 403 U. S., at 396.

Furthermore, in any inquiry respecting the likely or probable intent of Congress, the silence of Congress is relevant; and here that silence is telling. In the almost 16 years since September 11, the Federal Government’s responses to that terrorist attack have been well documented. Congressional interest has been “frequent and intense,” *Schweiker, supra*, at 425, and some of that interest has been directed to the conditions of confinement at

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issue here. Indeed, at Congress' behest, the Department of Justice's Office of the Inspector General compiled a 300-page report documenting the conditions in the MDC in great detail. See 789 F. 3d, at 279 (opinion of Raggi, J.) (noting that the USA PATRIOT Act required "the Department's Inspector General to review and report semi-annually to Congress on any identified abuses of civil rights and civil liberties in fighting terrorism"). Nevertheless, "[a]t no point did Congress choose to extend to any person the kind of remedies that respondents seek in this lawsuit." *Schweiker*, 487 U. S., at 426.

This silence is notable because it is likely that high-level policies will attract the attention of Congress. Thus, when Congress fails to provide a damages remedy in circumstances like these, it is much more difficult to believe that "congressional inaction" was "inadvertent." *Id.*, at 423.

It is of central importance, too, that this is not a case like *Bivens* or *Davis* in which "it is damages or nothing." *Bivens, supra*, at 410 (Harlan, J., concurring in judgment); *Davis*, 442 U. S., at 245. Unlike the plaintiffs in those cases, respondents do not challenge individual instances of discrimination or law enforcement overreach, which due to their very nature are difficult to address except by way of damages actions after the fact. Respondents instead challenge large-scale policy decisions concerning the conditions of confinement imposed on hundreds of prisoners. To address those kinds of decisions, detainees may seek injunctive relief. And in addition to that, we have left open the question whether they might be able to challenge their confinement conditions via a petition for a writ of habeas corpus. See *Bell v. Wolfish*, 441 U. S. 520, 526, n. 6 (1979) ("[W]e leave to another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement"); *Preiser v. Rodriguez*, 411 U. S. 475, 499 (1973) ("When a prisoner is put under additional and unconstitutional restraints during his

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lawful custody, it is arguable that habeas corpus will lie to remove the restraints making custody illegal").

Indeed, the habeas remedy, if necessity required its use, would have provided a faster and more direct route to relief than a suit for money damages. A successful habeas petition would have required officials to place respondents in less-restrictive conditions immediately; yet this damages suit remains unresolved some 15 years later. (As in *Bell* and *Preiser*, the Court need not determine the scope or availability of the habeas corpus remedy, a question that is not before the Court and has not been briefed or argued.) In sum, respondents had available to them "other alternative forms of judicial relief." *Minneci*, 565 U. S., at 124. And when alternative methods of relief are available, a *Bivens* remedy usually is not. See *Bush*, 462 U. S., at 386–388; *Schweiker*, *supra*, at 425–426; *Malesko*, 534 U. S., at 73–74; *Minneci*, *supra*, at 125–126.

There is a persisting concern, of course, that absent a *Bivens* remedy there will be insufficient deterrence to prevent officers from violating the Constitution. In circumstances like those presented here, however, the stakes on both sides of the argument are far higher than in past cases the Court has considered. If *Bivens* liability were to be imposed, high officers who face personal liability for damages might refrain from taking urgent and lawful action in a time of crisis. And, as already noted, the costs and difficulties of later litigation might intrude upon and interfere with the proper exercise of their office.

On the other side of the balance, the very fact that some executive actions have the sweeping potential to affect the liberty of so many is a reason to consider proper means to impose restraint and to provide some redress from injury. There is therefore a balance to be struck, in situations like this one, between deterring constitutional violations and freeing high officials to make the lawful decisions necessary to protect the Nation in times of great peril. Cf.

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Stanley, *supra*, at 681 (noting that the special-factors analysis in that case turned on “how much occasional, unintended impairment of military discipline one is willing to tolerate”). The proper balance is one for the Congress, not the Judiciary, to undertake. For all of these reasons, the Court of Appeals erred by allowing respondents’ detention policy claims to proceed under *Bivens*.

IV
A

One of respondents’ claims under *Bivens* requires a different analysis: the prisoner abuse claim against the MDC’s warden, Dennis Hasty. The allegation is that Warden Hasty violated the Fifth Amendment by allowing prison guards to abuse respondents.

The warden argues, as an initial matter, that the complaint does not “state a claim to relief that is plausible on its face.” *Iqbal*, 556 U. S., at 678 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U. S. 544, 570 (2007)). Applying its precedents, the Court of Appeals held that the substantive standard for the sufficiency of the claim is whether the warden showed “deliberate indifference” to prisoner abuse. 789 F. 3d, at 249–250. The parties appear to agree on this standard, and, for purposes of this case, the Court assumes it to be correct.

The complaint alleges that guards routinely abused respondents; that the warden encouraged the abuse by referring to respondents as “terrorists”; that he prevented respondents from using normal grievance procedures; that he stayed away from the Unit to avoid seeing the abuse; that he was made aware of the abuse via “inmate complaints, staff complaints, hunger strikes, and suicide attempts”; that he ignored other “direct evidence of [the] abuse, including logs and other official [records]”; that he took no action “to rectify or address the situation”; and that the abuse resulted in the injuries described above, see

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supra, at 4. These allegations—assumed here to be true, subject to proof at a later stage—plausibly show the warden’s deliberate indifference to the abuse. Consistent with the opinion of every judge in this case to have considered the question, including the dissenters in the Court of Appeals, the Court concludes that the prisoner abuse allegations against Warden Hasty state a plausible ground to find a constitutional violation if a *Bivens* remedy is to be implied.

Warden Hasty argues, however, that *Bivens* ought not to be extended to this instance of alleged prisoner abuse. As noted above, the first question a court must ask in a case like this one is whether the claim arises in a new *Bivens* context, *i.e.*, whether “the case is different in a meaningful way from previous *Bivens* cases decided by this Court.” *Supra*, at 16.

It is true that this case has significant parallels to one of the Court’s previous *Bivens* cases, *Carlson v. Green*, 446 U. S. 14. There, the Court did allow a *Bivens* claim for prisoner mistreatment—specifically, for failure to provide medical care. And the allegations of injury here are just as compelling as those at issue in *Carlson*. This is especially true given that the complaint alleges serious violations of Bureau of Prisons policy. See 28 CFR §552.20 (2016) (providing that prison staff may use force “only as a last alternative after all other reasonable efforts to resolve a situation have failed” and that staff may “use only that amount of force necessary to [ensure prison safety and security]”); §552.22(j) (“All incidents involving the use of force . . . must be carefully documented”); §542.11 (requiring the warden to investigate certain complaints of inmate abuse).

Yet even a modest extension is still an extension. And this case does seek to extend *Carlson* to a new context. As noted above, a case can present a new context for *Bivens* purposes if it implicates a different constitutional right; if

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judicial precedents provide a less meaningful guide for official conduct; or if there are potential special factors that were not considered in previous *Bivens* cases. See *supra*, at 13.

The constitutional right is different here, since *Carlson* was predicated on the Eighth Amendment and this claim is predicated on the Fifth. See 446 U. S., at 16. And the judicial guidance available to this warden, with respect to his supervisory duties, was less developed. The Court has long made clear the standard for claims alleging failure to provide medical treatment to a prisoner—“deliberate indifference to serious medical needs.” *Estelle v. Gamble*, 429 U. S. 97, 104 (1976). The standard for a claim alleging that a warden allowed guards to abuse pre-trial detainees is less clear under the Court’s precedents.

This case also has certain features that were not considered in the Court’s previous *Bivens* cases and that might discourage a court from authorizing a *Bivens* remedy. As noted above, the existence of alternative remedies usually precludes a court from authorizing a *Bivens* action. *Supra*, at 14. And there might have been alternative remedies available here, for example, a writ of habeas corpus, *Wolfish*, 441 U. S., at 526, n. 6; an injunction requiring the warden to bring his prison into compliance with the regulations discussed above; or some other form of equitable relief.

Furthermore, legislative action suggesting that Congress does not want a damages remedy is itself a factor counseling hesitation. See *supra*, at 14. Some 15 years after *Carlson* was decided, Congress passed the Prison Litigation Reform Act of 1995, which made comprehensive changes to the way prisoner abuse claims must be brought in federal court. See 42 U. S. C. §1997e. So it seems clear that Congress had specific occasion to consider the matter of prisoner abuse and to consider the proper way to remedy those wrongs. This Court has said in dicta that the

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Act's exhaustion provisions would apply to *Bivens* suits. See *Porter v. Nussle*, 534 U. S. 516, 524 (2002). But the Act itself does not provide for a standalone damages remedy against federal jailers. It could be argued that this suggests Congress chose not to extend the *Carlson* damages remedy to cases involving other types of prisoner mistreatment.

The differences between this claim and the one in *Carlson* are perhaps small, at least in practical terms. Given this Court's expressed caution about extending the *Bivens* remedy, however, the new-context inquiry is easily satisfied. Some differences, of course, will be so trivial that they will not suffice to create a new *Bivens* context. But here the differences identified above are at the very least meaningful ones. Thus, before allowing this claim to proceed under *Bivens*, the Court of Appeals should have performed a special factors analysis. It should have analyzed whether there were alternative remedies available or other "sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy" in a suit like this one. *Supra*, at 15.

B

Although the Court could perform that analysis in the first instance, the briefs have concentrated almost all of their efforts elsewhere. Given the absence of a comprehensive presentation by the parties, and the fact that the Court of Appeals did not conduct the analysis, the Court declines to perform the special factors analysis itself. The better course is to vacate the judgment below, allowing the Court of Appeals or the District Court to do so on remand.

V

One issue remains to be addressed: the claim that petitioners are subject to liability for civil conspiracy under 42 U. S. C. §1985(3). Unlike the prisoner abuse claim just discussed, this claim implicates the activities of

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all the petitioners—the Executive Officials as well as the Wardens—in creating the conditions of confinement at issue here.

The civil-conspiracy prohibition contained in §1985(3) was enacted as a significant part of the civil rights legislation passed in the aftermath of the Civil War. See *Carpenters v. Scott*, 463 U. S. 825, 834–837 (1983) (detailing the legislative history of §1985(3)); *Griffin v. Breckenridge*, 403 U. S. 88, 99–101 (1971) (same); *Great American Fed. Sav. & Loan Assn. v. Novotny*, 442 U. S. 366, 379 (1979) (Powell, J., concurring) (describing §1985(3) as a “Civil War Era remedial statute”). The statute imposes liability on two or more persons who “conspire . . . for the purpose of depriving . . . any person or class of persons of the equal protection of the laws.” §1985(3). In the instant suit, respondents allege that petitioners violated the statute by “agreeing to implement a policy” under which respondents would be detained in harsh conditions “because of their race, religion, ethnicity, and national origin.” Assuming these allegations to be true and well pleaded, the question is whether petitioners are entitled to qualified immunity.

A

The qualified immunity rule seeks a proper balance between two competing interests. On one hand, damages suits “may offer the only realistic avenue for vindication of constitutional guarantees.” *Harlow v. Fitzgerald*, 457 U. S. 800, 814 (1982). “On the other hand, permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.” *Anderson v. Creighton*, 483 U. S. 635, 638 (1987). As one means to accommodate these two objectives, the Court has held that Government officials are entitled to qualified immunity with respect to “discretionary functions” per-

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formed in their official capacities. *Ibid.* The doctrine of qualified immunity gives officials “breathing room to make reasonable but mistaken judgments about open legal questions.” *Ashcroft v. al-Kidd*, 563 U. S. 731, 743 (2011).

The Court’s cases provide additional instruction to define and implement that immunity. Whether qualified immunity can be invoked turns on the “objective legal reasonableness” of the official’s acts. *Harlow, supra*, at 819. And reasonableness of official action, in turn, must be “assessed in light of the legal rules that were clearly established at the time [the action] was taken.” *Anderson, supra*, at 639 (internal quotation marks omitted); see also *Mitchell*, 472 U. S., at 528. This requirement—that an official loses qualified immunity only for violating clearly established law—protects officials accused of violating “extremely abstract rights.” *Anderson, supra*, at 639.

The Fourth Amendment provides an example of how qualified immunity functions with respect to abstract rights. By its plain terms, the Amendment forbids unreasonable searches and seizures, yet it may be difficult for an officer to know whether a search or seizure will be deemed reasonable given the precise situation encountered. See *Saucier v. Katz*, 533 U. S. 194, 205 (2001) (“It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts”). For this reason, “[t]he dispositive question is ‘whether the violative nature of *particular* conduct is clearly established.’” *Mullenix v. Luna*, 577 U. S. ___, ___ (2015) (*per curiam*) (slip op., at 5) (quoting *Ashcroft, supra*, at 742).

It is not necessary, of course, that “the very action in question has previously been held unlawful.” *Anderson, supra*, at 640. That is, an officer might lose qualified immunity even if there is no reported case “directly on point.” *Ashcroft, supra*, at 741. But “in the light of pre-existing law,” the unlawfulness of the officer’s conduct

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“must be apparent.” *Anderson, supra*, at 640. To subject officers to any broader liability would be to “disrupt the balance that our cases strike between the interests in vindication of citizens’ constitutional rights and in public officials’ effective performance of their duties.” *Davis v. Scherer*, 468 U. S. 183, 195 (1984). For then, both as a practical and legal matter, it would be difficult for officials “reasonably [to] anticipate when their conduct may give rise to liability for damages.” *Ibid.*

In light of these concerns, the Court has held that qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law.” *Malley v. Briggs*, 475 U. S. 335, 341 (1986). To determine whether a given officer falls into either of those two categories, a court must ask whether it would have been clear to a reasonable officer that the alleged conduct “was unlawful in the situation he confronted.” *Saucier, supra*, at 202. If so, then the defendant officer must have been either incompetent or else a knowing violator of the law, and thus not entitled to qualified immunity. If not, however—*i.e.*, if a reasonable officer might not have known for certain that the conduct was unlawful—then the officer is immune from liability.

B

Under these principles, it must be concluded that reasonable officials in petitioners’ positions would not have known, and could not have predicted, that §1985(3) prohibited their joint consultations and the resulting policies that caused the injuries alleged.

At least two aspects of the complaint indicate that petitioners’ potential liability for this statutory offense would not have been known or anticipated by reasonable officials in their position. First, the conspiracy recited in the complaint is alleged to have been between or among officers in the same branch of the Government (the Executive Branch) and in the same Department (the Department of

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Justice). Second, the discussions were the preface to, and the outline of, a general and far-reaching policy.

As to the fact that these officers were in the same Department, an analogous principle discussed in the context of antitrust law is instructive. The Court's precedent indicates that there is no unlawful conspiracy when officers within a single corporate entity consult among themselves and then adopt a policy for the entity. See *Copperweld Corp. v. Independence Tube Corp.*, 467 U. S. 752, 769–771 (1984). Under this principle—sometimes called the intracorporate-conspiracy doctrine—an agreement between or among agents of the same legal entity, when the agents act in their official capacities, is not an unlawful conspiracy. *Ibid.* The rule is derived from the nature of the conspiracy prohibition. Conspiracy requires an agreement—and in particular an agreement to do an unlawful act—between or among two or more separate persons. When two agents of the same legal entity make an agreement in the course of their official duties, however, as a practical and legal matter their acts are attributed to their principal. And it then follows that there has not been an agreement between two or more separate people. See *id.*, at 771 (analogizing to “a multiple team of horses drawing a vehicle under the control of a single driver”).

To be sure, this Court has not given its approval to this doctrine in the specific context of §1985(3). See *Great American*, 442 U. S., at 372, n. 11. There is a division in the courts of appeals, moreover, respecting the validity or correctness of the intracorporate-conspiracy doctrine with reference to §1985 conspiracies. See *Hull v. Shuck*, 501 U. S. 1261, 1261–1262 (1991) (White, J., dissenting from denial of certiorari) (discussing the Circuit split); *Bowie v. Maddox*, 642 F. 3d 1122, 1130–1131 (CADC 2011) (detailing a longstanding split about whether the intracorporate-conspiracy doctrine applies to civil rights conspiracies). Nothing in this opinion should be interpreted as either

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approving or disapproving the intracorporate-conspiracy doctrine’s application in the context of an alleged §1985(3) violation. The Court might determine, in some later case, that different considerations apply to a conspiracy respecting equal protection guarantees, as distinct from a conspiracy in the antitrust context. Yet the fact that the courts are divided as to whether or not a §1985(3) conspiracy can arise from official discussions between or among agents of the same entity demonstrates that the law on the point is not well established. When the courts are divided on an issue so central to the cause of action alleged, a reasonable official lacks the notice required before imposing liability. See *Wilson v. Layne*, 526 U. S. 603, 618 (1999) (noting that it would be “unfair” to subject officers to damages liability when even “judges . . . disagree”); *Reichle v. Howards*, 566 U. S. 658, 669–670 (2012) (same).

In addition to the concern that agents of the same legal entity are not distinct enough to conspire with one another, there are other sound reasons to conclude that conversations and agreements between and among federal officials in the same Department should not be the subject of a private cause of action for damages under §1985(3). To state a claim under §1985(3), a plaintiff must first show that the defendants conspired—that is, reached an agreement—with one another. See *Carpenters*, 463 U. S., at 828 (stating that the elements of a §1985(3) claim include “a conspiracy”). Thus, a §1985(3) claim against federal officials by necessity implicates the substance of their official discussions.

As indicated above with respect to other claims in this suit, open discussion among federal officers is to be encouraged, so that they can reach consensus on the policies a department of the Federal Government should pursue. See *supra*, at 17–18. Close and frequent consultations to facilitate the adoption and implementation of policies are essential to the orderly conduct of governmental affairs.

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Were those discussions, and the resulting policies, to be the basis for private suits seeking damages against the officials as individuals, the result would be to chill the interchange and discourse that is necessary for the adoption and implementation of governmental policies. See *Cheney*, 542 U. S., at 383 (discussing the need for confidential communications among Executive Branch officials); *Merrill*, 443 U. S., at 360 (same).

These considerations suggest that officials employed by the same governmental department do not conspire when they speak to one another and work together in their official capacities. Whether that contention should prevail need not be decided here. It suffices to say that the question is sufficiently open so that the officials in this suit could not be certain that §1985(3) was applicable to their discussions and actions. Thus, the law respondents seek to invoke cannot be clearly established. It follows that reasonable officers in petitioners' positions would not have known with any certainty that the alleged agreements were forbidden by law. See *Saucier*, 533 U. S., at 202. Petitioners are entitled to qualified immunity with respect to the claims under 42 U. S. C. §1985(3).

* * *

If the facts alleged in the complaint are true, then what happened to respondents in the days following September 11 was tragic. Nothing in this opinion should be read to condone the treatment to which they contend they were subjected. The question before the Court, however, is not whether petitioners' alleged conduct was proper, nor whether it gave decent respect to respondents' dignity and well-being, nor whether it was in keeping with the idea of the rule of law that must inspire us even in times of crisis.

Instead, the question with respect to the *Bivens* claims is whether to allow an action for money damages in the absence of congressional authorization. For the reasons

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given above, the Court answers that question in the negative as to the detention policy claims. As to the prisoner abuse claim, because the briefs have not concentrated on that issue, the Court remands to allow the Court of Appeals to consider the claim in light of the *Bivens* analysis set forth above.

The question with respect to the §1985(3) claim is whether a reasonable officer in petitioners' position would have known the alleged conduct was an unlawful conspiracy. For the reasons given above, the Court answers that question, too, in the negative.

The judgment of the Court of Appeals is reversed as to all of the claims except the prisoner abuse claim against Warden Hasty. The judgment of the Court of Appeals with respect to that claim is vacated, and that case is remanded for further proceedings.

It is so ordered.

JUSTICE SOTOMAYOR, JUSTICE KAGAN, and JUSTICE GORSUCH took no part in the consideration or decision of these cases.

Opinion of THOMAS, J.

SUPREME COURT OF THE UNITED STATES

Nos. 15-1358, 15-1359 and 15-1363

JAMES W. ZIGLAR, PETITIONER

15–1358 *v.*

AHMER IQBAL ABBASI, ET AL.

JOHN D. ASHCROFT, FORMER ATTORNEY
GENERAL, ET AL., PETITIONERS

$$15=1359$$

AHMER IQBAL ABBASI, ET AL.

DENNIS HASTY, ET AL., PETITIONERS

15=1363

AHMER IQBAL ABBASI, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[June 19, 2017]

JUSTICE THOMAS, concurring in part and concurring in the judgment.

I join the Court's opinion except for Part IV-B. I write separately to express my view on the Court's decision to remand some of respondents' claims under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), and my concerns about our qualified immunity precedents.

I

With respect to respondents' *Bivens* claims, I join the opinion of the Court to the extent it reverses the Second Circuit's ruling. The Court correctly applies our precedents to hold that *Bivens* does not supply a cause of action against petitioners for most of the alleged Fourth and

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Fifth Amendment violations. It also correctly recognizes that respondents' claims against petitioner Dennis Hasty seek to extend *Bivens* to a new context. See *ante*, at 24.

I concur in the judgment of the Court vacating the Court of Appeals' judgment with regard to claims against Hasty. *Ante*, at 29. I have previously noted that "'*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action.'" *Wilkie v. Robbins*, 551 U. S. 537, 568 (2007) (concurring opinion) (quoting *Correctional Services Corp. v. Malesko*, 534 U. S. 61, 75 (2001) (Scalia, J., concurring)). I have thus declined to "extend *Bivens* even [where] its reasoning logically applied," thereby limiting "*Bivens* and its progeny . . . to the precise circumstances that they involved." *Ibid.* (internal quotation marks omitted). This would, in most cases, mean a reversal of the judgment of the Court of Appeals is in order. However, in order for there to be a controlling judgment in this suit, I concur in the judgment vacating and remanding the claims against petitioner Hasty as that disposition is closest to my preferred approach.

II

As for respondents' claims under 42 U. S. C. §1985(3), I join Part V of the Court's opinion, which holds that respondents are entitled to qualified immunity. The Court correctly applies our precedents, which no party has asked us to reconsider. I write separately, however, to note my growing concern with our qualified immunity jurisprudence.

The Civil Rights Act of 1871, of which §1985(3) and the more frequently litigated §1983 were originally a part, established causes of action for plaintiffs to seek money damages from Government officers who violated federal law. See §§1, 2, 17 Stat. 13. Although the Act made no mention of defenses or immunities, "we have read it in harmony with general principles of tort immunities and

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defenses rather than in derogation of them.” *Malley v. Briggs*, 475 U. S. 335, 339 (1986) (internal quotation marks omitted). We have done so because “[c]ertain immunities were so well established in 1871 . . . that ‘we presume that Congress would have specifically so provided had it wished to abolish’ them.” *Buckley v. Fitzsimmons*, 509 U. S. 259, 268 (1993); accord, *Briscoe v. LaHue*, 460 U. S. 325, 330 (1983). Immunity is thus available under the statute if it was “historically accorded the relevant official” in an analogous situation “at common law,” *Imbler v. Pachtman*, 424 U. S. 409, 421 (1976), unless the statute provides some reason to think that Congress did not preserve the defense, see *Tower v. Glover*, 467 U. S. 914, 920 (1984).

In some contexts, we have conducted the common-law inquiry that the statute requires. See *Wyatt v. Cole*, 504 U. S. 158, 170 (1992) (KENNEDY, J., concurring). For example, we have concluded that legislators and judges are absolutely immune from liability under §1983 for their official acts because that immunity was well established at common law in 1871. See *Tenney v. Brandhove*, 341 U. S. 367, 372–376 (1951) (legislators); *Pierson v. Ray*, 386 U. S. 547, 553–555 (1967) (judges). We have similarly looked to the common law in holding that a prosecutor is immune from suits relating to the “judicial phase of the criminal process,” *Imbler, supra*, at 430; *Burns v. Reed*, 500 U. S. 478, 489–492 (1991); but see *Kalina v. Fletcher*, 522 U. S. 118, 131–134 (1997) (Scalia, J., joined by THOMAS, J., concurring) (arguing that the Court in *Imbler* misunderstood 1871 common-law rules), although not from suits relating to the prosecutor’s advice to police officers, *Burns, supra*, at 493.

In developing immunity doctrine for other executive officers, we also started off by applying common-law rules. In *Pierson*, we held that police officers are not absolutely immune from a §1983 claim arising from an arrest made

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pursuant to an unconstitutional statute because the common law never granted arresting officers that sort of immunity. 386 U. S., at 555. Rather, we concluded that police officers could assert “the defense of good faith and probable cause” against the claim for an unconstitutional arrest because that defense was available against the analogous torts of “false arrest and imprisonment” at common law. *Id.*, at 557.

In further elaborating the doctrine of qualified immunity for executive officials, however, we have diverged from the historical inquiry mandated by the statute. See *Wyatt*, *supra*, at 170 (KENNEDY, J., concurring); accord, *Crawford-El v. Britton*, 523 U. S. 574, 611 (1998) (Scalia, J., joined by THOMAS, J., dissenting). In the decisions following *Pierson*, we have “completely reformulated qualified immunity along principles not at all embodied in the common law.” *Anderson v. Creighton*, 483 U. S. 635, 645 (1987) (discussing *Harlow v. Fitzgerald*, 457 U. S. 800 (1982)). Instead of asking whether the common law in 1871 would have accorded immunity to an officer for a tort analogous to the plaintiff’s claim under §1983, we instead grant immunity to any officer whose conduct “does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Mullenix v. Luna*, 577 U. S. ___, ___–___ (2015) (*per curiam*) (slip op., at 4–5) (internal quotation marks omitted); *Taylor v. Barkes*, 575 U. S. ___, ___ (2015) (slip op., at 4) (a Government official is liable under the 1871 Act only if “existing precedent . . . placed the statutory or constitutional question beyond debate” (quoting *Ashcroft v. al-Kidd*, 563 U. S. 731, 741 (2011))). We apply this “clearly established” standard “across the board” and without regard to “the precise nature of the various officials’ duties or the precise character of the particular rights alleged to

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have been violated.” *Anderson, supra*, at 641–643 (internal quotation marks omitted).* We have not attempted to locate that standard in the common law as it existed in 1871, however, and some evidence supports the conclusion that common-law immunity as it existed in 1871 looked quite different from our current doctrine. See generally Baude, Is Qualified Immunity Unlawful? 106 Cal. L. Rev. (forthcoming 2018) (manuscript, at 7–17), online at <https://papers.ssrn.com/abstract=2896508> (as last visited June 15, 2017).

Because our analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act, we are no longer engaged in “interpret[ing] the intent of Congress in enacting” the Act. *Malley, supra*, at 342; see *Burns, supra*, at 493. Our qualified immunity precedents instead represent precisely the sort of “free-wheeling policy choice[s]” that we have previously disclaimed the power to make. *Rehberg v. Paulk*, 566 U. S. 356, 363 (2012) (internal quotation marks omitted); see also *Tower, supra*, at 922–923 (“We do not have a license to establish immunities from” suits brought under the Act “in the interests of what we judge to be sound public policy”). We have acknowledged, in fact, that the “clearly established” standard is designed to “protec[t] the balance between vindication of constitutional rights and government officials’ effective performance of their duties.” *Reichle v. Howards*, 566 U. S. 658, 664 (2012) (internal quotation marks omitted); *Harlow, supra*, at 807 (explaining that “the recognition of a qualified immunity defense . . . reflected an attempt to balance competing values”).

*Although we first formulated the “clearly established” standard in *Bivens* cases like *Harlow* and *Anderson*, we have imported that standard directly into our 1871 Act cases. See, e.g., *Pearson v. Callahan*, 555 U. S. 223, 243–244 (2009) (applying the clearly established standard to a §1983 claim).

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The Constitution assigns this kind of balancing to Congress, not the Courts.

In today's decision, we continue down the path our precedents have marked. We ask "whether it would have been clear to a reasonable officer that the alleged conduct was unlawful in the situation he confronted," *ante*, at 29 (internal quotation marks omitted), rather than whether officers in petitioners' positions would have been accorded immunity at common law in 1871 from claims analogous to respondents'. Even if we ultimately reach a conclusion consistent with the common-law rules prevailing in 1871, it is mere fortuity. Until we shift the focus of our inquiry to whether immunity existed at common law, we will continue to substitute our own policy preferences for the mandates of Congress. In an appropriate case, we should reconsider our qualified immunity jurisprudence.

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SUPREME COURT OF THE UNITED STATES

Nos. 15-1358, 15-1359 and 15-1363

JAMES W. ZIGLAR, PETITIONER

15–1358 *v.*

AHMER IQBAL ABBASI, ET AL.

**JOHN D. ASHCROFT, FORMER ATTORNEY
GENERAL, ET AL., PETITIONERS**

15-1359 v.

AHMER IQBAL ABBASI, ET AL.

DENNIS HASTY, ET AL., PETITIONERS

15–1363

AHMER IQBAL ABBASI, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[June 19, 2017]

JUSTICE BREYER, with whom JUSTICE GINSBURG joins, dissenting.

In *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), this Court held that the Fourth Amendment provides a damages remedy for those whom federal officials have injured as a result of an unconstitutional search or seizure. In *Davis v. Passman*, 442 U. S. 228 (1979), the Court held that the Fifth Amendment provides a damages remedy to an individual dismissed by her employer (a Member of Congress) on the basis of her sex in violation of the equal protection component of that Amendment's Due Process Clause. And in *Carlson v. Green*, 446 U. S. 14 (1980), the Court held that the Eighth Amendment provides a damages remedy to a prisoner who

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died as a result of prison official’s deliberate indifference to his medical needs, in violation of the Amendment’s prohibition against cruel and unusual punishment.

It is by now well established that federal law provides damages actions at least in similar contexts, where claims of constitutional violation arise. Congress has ratified *Bivens* actions, plaintiffs frequently bring them, courts accept them, and scholars defend their importance. See J. Pfander, *Constitutional Torts and the War on Terror* (2017) (canvassing the history of *Bivens* and cataloguing cases). Moreover, the courts, in order to avoid deterring federal officials from properly performing their work, have developed safeguards for defendants, including the requirement that plaintiffs plead “plausible” claims, *Ashcroft v. Iqbal*, 556 U. S. 662, 679 (2009), as well as the defense of “qualified immunity,” which frees federal officials from both threat of liability and involvement in the lawsuit, unless the plaintiffs establish that officials have violated “clearly established . . . constitutional rights,” *id.*, at 672 (quoting *Harlow v. Fitzgerald*, 457 U. S. 800, 818 (1982)). “[This] Court has been reluctant to extend *Bivens* liability ‘to any new context or new category of defendants.’” *Iqbal, supra*, at 675 (quoting *Correctional Services Corp. v. Malesko*, 534 U. S. 61, 68 (2001)). But the Court has made clear that it would not narrow *Bivens’* existing scope. See *FDIC v. Meyer*, 510 U. S. 471, 485 (1994) (guarding against “the evisceration of the *Bivens* remedy” so that its “deterrent effects . . . would [not] be lost”).

The plaintiffs before us today seek damages for unconstitutional conditions of confinement. They alleged that federal officials slammed them against walls, shackled them, exposed them to nonstop lighting, lack of hygiene, and the like, all based upon invidious discrimination and without penological justification. See *ante*, at 4–5. In my view, these claims are well-pleaded, state violations of clearly established law, and fall within the scope of

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longstanding *Bivens* law. For those reasons, I would affirm the judgment of the Court of Appeals. I shall discuss at some length what I believe is the most important point of disagreement. The Court, in my view, is wrong to hold that permitting a constitutional tort action here would “extend” *Bivens*, applying it in a new context. To the contrary, I fear that the Court’s holding would significantly shrink the existing *Bivens* contexts, diminishing the compensatory remedy constitutional tort law now offers to harmed individuals.

I shall explain why I believe this suit falls well within the scope of traditional constitutional tort law and why I cannot agree with the Court’s arguments to the contrary. I recognize, and write separately about, the strongest of the Court’s arguments, namely, the fact that plaintiffs’ claims concern detention that took place soon after a serious attack on the United States and some of them concern actions of high-level Government officials. While these facts may affect the substantive constitutional questions (e.g., were any of the conditions “legitimate”?) or the scope of the qualified-immunity defense, they do not extinguish the *Bivens* action itself. If I may paraphrase Justice Harlan, concurring in *Bivens*: In wartime as well as in peacetime, “it is important, in a civilized society, that the judicial branch of the Nation’s government stand ready to afford a remedy” “for the most flagrant and patently unjustified,” unconstitutional “abuses of official power.” 403 U. S., at 410–411 (opinion concurring in judgment); cf. *Boumediene v. Bush*, 553 U. S. 723, 798 (2008).

I

The majority opinion well summarizes the particular claims that the plaintiffs make in this suit. All concern the conditions of their confinement, which began soon after the September 11, 2001, attacks and “lasted for days

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and weeks, then stretching into months.” *Ante*, at 1. At some point, the plaintiffs allege, all the defendants knew that they had nothing to do with the September 11 attacks but continued to detain them anyway in harsh conditions. Official Government policy, both before and after the defendants became aware of the plaintiffs’ innocence, led to the plaintiffs being held in “tiny cells for over 23 hours a day” with lights continuously left on, “shackled” when moved, often “strip searched,” and “denied access to most forms of communication with the outside world.” *Ante*, at 4 (internal quotation marks omitted). The defendants detained the plaintiffs in these conditions on the basis of their race or religion and without justification.

Moreover, the prison wardens were aware of, but deliberately indifferent to, certain unofficial activities of prison guards involving a pattern of “physical and verbal abuse,” such as “slam[ming] detainees into walls; twist[ing] their arms, wrists, and fingers; [breaking] their bones;” and subjecting them to verbal taunts. *Ibid.* (internal quotation marks omitted).

The plaintiffs’ complaint alleges that all the defendants—high-level Department of Justice officials and prison wardens alike—were directly responsible for the official confinement policy, which, in some or all of the aspects mentioned, violated the due process and equal protection components of the Fifth Amendment. The complaint adds that, insofar as the prison wardens were deliberately indifferent to the unofficial conduct of the guards, they violated the Fourth and the Fifth Amendments.

I would hold that the complaint properly alleges constitutional torts, *i.e.*, *Bivens* actions for damages.

A

The Court’s holdings in *Bivens*, *Carlson*, and *Davis* rest upon four basic legal considerations. First, the *Bivens* Court referred to longstanding Supreme Court precedent

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stating or suggesting that the Constitution provides federal courts with considerable legal authority to use traditional remedies to right constitutional wrongs. That precedent begins with *Marbury v. Madison*, 1 Cranch 137 (1803), which effectively placed upon those who would deny the existence of an effective legal remedy the burden of showing why their case was special. Chief Justice John Marshall wrote for the Court that

“[t]he very essence of civil liberty [lies] in the right of every individual to claim the protection of the laws, whenever he receives an injury.” *Id.*, at 163.

The Chief Justice referred to Blackstone’s Commentaries stating that there

“is a general and indisputable rule, that where there is a legal right, there is also a legal remedy . . . [and that] it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.” 1 Cranch, at 163.

The Chief Justice then wrote:

“The government of the United States has been emphatically termed a government of laws, and not of men. It will [not] deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.” *Ibid.*

He concluded for the Court that there must be something “peculiar” (*i.e.*, special) about a case that warrants “exclu[ding] the injured party from legal redress . . . [and placing it within] that class of cases which come under the description of *damnum absque injuria*—a loss without an injury.” *Id.*, at 163–164; but cf. *id.*, at 164 (placing “political” questions in the latter, special category).

Much later, in *Bell v. Hood*, 327 U. S. 678, 684 (1946),

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the Court wrote that,

“where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.”

See also *Bivens*, 403 U. S., at 392 (citing opinions of Justices Cardozo and Holmes to similar effect).

The *Bivens* Court reiterated these principles and confirmed that the appropriate remedial “adjust[ment]” in the case before it was an award of money damages, the “remedial mechanism normally available in the federal courts.” *Id.*, at 392, 397. Justice Harlan agreed, adding that, since Congress’ “general” statutory “grant of jurisdiction” authorized courts to grant equitable relief in cases arising under federal jurisdiction, courts likewise had the authority to award damages—the “traditional remedy at law”—in order to “vindicate the interests of the individual” protected by the Bill of Rights. *Id.*, at 405–407 (opinion concurring in judgment).

Second, our cases have recognized that Congress’ silence on the subject indicates a willingness to leave this matter to the courts. In *Bivens*, the Court noted, as an argument favoring its conclusion, the absence of an “explicit congressional declaration that persons injured by a federal officer’s violation of the Fourth Amendment may not recover money damages from the agents.” *Id.*, at 397. Similarly, in *Davis v. Passman*, the Court stressed that there was “no evidence . . . that Congress meant . . . to foreclose” a damages remedy. 442 U. S., at 247. In *Carlson*, the Court went further, observing that not only was there no sign “that Congress meant to pre-empt a *Bivens* remedy,” but there was also “clear” evidence that Congress intended to preserve it. 446 U. S., at 19–20.

Third, our *Bivens* cases acknowledge that a constitutional tort may not lie when “special factors counse[l]

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hesitation” and when Congress has provided an adequate alternative remedy. 446 U. S., at 18–19. The relevant special factors in those cases included whether the court was faced “with a question of ‘federal fiscal policy,’” *Bivens, supra*, at 396, or a risk of “deluging federal courts with claims,” *Davis, supra*, at 248 (internal quotation marks omitted). *Carlson* acknowledged an additional factor—that damages suits “might inhibit [federal officials’] efforts to perform their official duties”—but concluded that “the qualified immunity accorded [federal officials] under [existing law] provides adequate protection.” 446 U. S., at 19.

Fourth, as the Court recognized later in *Carlson*, a *Bivens* remedy was needed to cure what would, without it, amount to a constitutional anomaly. Long before this Court incorporated many of the Bill of Rights’ guarantees against the States, see Amar, The Bill of Rights and the Fourteenth Amendment, 101 Yale L. J. 1193 (1992), federal civil rights statutes afforded a damages remedy to any person whom a state official deprived of a federal constitutional right, see 42 U. S. C. §1983; *Monroe v. Pape*, 365 U. S. 167, 171–187 (1961) (describing this history). But federal statutory law did not provide a damages remedy to a person whom a federal official had deprived of that same right, even though the Bill of Rights was at the time of the founding primarily aimed at constraining the Federal Government. Thus, a person harmed by an unconstitutional search or seizure might sue a city mayor, a state legislator, or even a Governor. But that person could not sue a federal agent, a national legislator, or a Justice Department official for an identical offense. “[Our] ‘constitutional design,’” the Court wrote, “would be stood on its head if federal officials did not face at least the same liability as state officials guilty of the same constitutional transgression.” *Carlson, supra*, at 22 (quoting *Butz v. Economou*, 438 U. S. 478, 504 (1978)).

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The *Bivens* Court also recognized that the Court had previously inferred damages remedies caused by violations of certain federal statutes that themselves did not explicitly authorize damages remedies. 403 U. S., at 395–396. At the same time, *Bivens*, *Davis*, and *Carlson* treat the courts’ power to derive a damages remedy from a constitutional provision not as included within a power to find a statute-based damages remedy but as flowing from those statutory cases *a fortiori*.

As the majority opinion points out, this Court in more recent years has indicated that “expanding the *Bivens* remedy is now a ‘disfavored’ judicial activity.” *Ante*, at 11 (quoting *Iqbal*, 556 U. S., at 675; emphasis added). Thus, it has held that the remedy is not available in the context of suits against *military* officers, see *Chappell v. Wallace*, 462 U. S. 296, 298–300 (1983); *United States v. Stanley*, 483 U. S. 669, 683–684 (1987); in the context of suits against *privately* operated prisons and their employees, see *Minneci v. Pollard*, 565 U. S. 118, 120 (2012); *Malesko*, 534 U. S., at 70–73; in the context of suits seeking to vindicate procedural, rather than substantive, constitutional protections, see *Schweiker v. Chilicky*, 487 U. S. 412, 423 (1988); and in the context of suits seeking to vindicate two quite different forms of important substantive protection, one involving free speech, see *Bush v. Lucas*, 462 U. S. 367, 368 (1983), and the other involving protection of land rights, see *Wilkie v. Robbins*, 551 U. S. 537, 551 (2007). Each of these cases involved a context that differed from that of *Bivens*, *Davis*, and *Carlson* with respect to the kind of defendant, the basic nature of the right, or the kind of harm suffered. That is to say, as we have explicitly stated, these cases were “fundamentally different from anything recognized in *Bivens* or subsequent cases.” *Malesko, supra*, at 70 (emphasis added). In each of them, the plaintiffs were asking the Court to “authoriz[e] a new kind of federal litigation.” *Wilkie, supra*,

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at 550 (emphasis added).

Thus the Court, as the majority opinion says, repeatedly wrote that it was not “expanding” the scope of the *Bivens* remedy. *Ante*, at 11. But the Court nowhere suggested that it would narrow *Bivens*’ existing scope. In fact, to diminish any ambiguity about its holdings, the Court set out a framework for determining whether a claim of constitutional violation calls for a *Bivens* remedy. See *Wilkie, supra*, at 549–550. At Step One, the court must determine whether the case before it arises in a “new context,” that is, whether it involves a “new category of defendants,” *Malesko, supra*, at 68, or (presumably) a significantly different kind of constitutional harm, such as a purely procedural harm, a harm to speech, or a harm caused to physical property. *If the context is new, then* the court proceeds to Step Two and asks “whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.” *Wilkie*, 551 U. S., at 550. *If there is none, then* the court proceeds to Step Three and asks whether there are “any special factors counselling hesitation before authorizing a new kind of federal litigation.” *Ibid.*

Precedent makes this framework applicable here. I would apply it. And, doing so, I cannot get past Step One. This suit, it seems to me, arises in a context similar to those in which this Court has previously permitted *Bivens* actions.

B

1

The context here is not “new,” *Wilkie, supra*, at 550, or “fundamentally different” than our previous *Bivens* cases, *Malesko, supra*, at 70. First, the plaintiffs are civilians, not members of the military. They are not citizens, but the Constitution protects noncitizens against serious

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mistreatment, as it protects citizens. See *United States v. Verdugo-Urquidez*, 494 U. S. 259, 271 (1990) (“[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country”). Some or all of the plaintiffs here may have been illegally present in the United States. But that fact cannot justify physical mistreatment. Nor does anyone claim that that fact deprives them of a *Bivens* right available to other persons, citizens and noncitizens alike.

Second, the defendants are Government officials. They are not members of the military or private persons. Two are prison wardens. Three others are high-ranking Department of Justice officials. Prison wardens have been defendants in *Bivens* actions, as have other high-level Government officials. One of the defendants in *Carlson* was the Director of the Bureau of Prisons; the defendant in *Davis* was a Member of Congress. We have also held that the Attorney General of the United States is not entitled to absolute immunity in a damages suit arising out of his actions related to national security. See *Mitchell v. Forsyth*, 472 U. S. 511, 520 (1985).

Third, from a *Bivens* perspective, the injuries that the plaintiffs claim they suffered are familiar ones. They focus upon the conditions of confinement. The plaintiffs say that they were unnecessarily shackled, confined in small unhygienic cells, subjected to continuous lighting (presumably preventing sleep), unnecessarily and frequently strip searched, slammed against walls, injured physically, and subject to verbal abuse. They allege that they suffered these harms because of their race or religion, the defendants having either turned a blind eye to what was happening or themselves introduced policies that they knew would lead to these harms even though the defendants knew the plaintiffs had no connections to terrorism.

These claimed harms are similar to, or even worse than,

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the harms the plaintiffs suffered in *Bivens* (unreasonable search and seizure in violation of the Fourth Amendment), *Davis* (unlawful discrimination in violation of the Fifth Amendment), and *Carlson* (deliberate indifference to medical need in violation of the Eighth Amendment). Indeed, we have said that, “[i]f a federal prisoner in a [Bureau of Prisons] facility alleges a constitutional deprivation, he may bring a *Bivens* claim against the offending individual officer, subject to the defense of qualified immunity.” *Malesko*, 534 U. S., at 72; see also *Farmer v. Brennan*, 511 U. S. 825, 832 (1994) (*Bivens* case about prisoner abuse). The claims in this suit would seem to fill the *Bivens*’ bill. See *Sell v. United States*, 539 U. S. 166, 193 (2003) (Scalia, J., dissenting) (“[A] [*Bivens*] action . . . is available to federal pretrial detainees challenging the conditions of their confinement”).

It is true that the plaintiffs bring their “deliberate indifference” claim against Warden Hasty under the Fifth Amendment’s Due Process Clause, not the Eighth Amendment’s Cruel and Unusual Punishment Clause, as in *Carlson*. But that is because the latter applies to convicted criminals while the former applies to pretrial and immigration detainees. Where the harm is the same, where this Court has held that both the Fifth and Eighth Amendments give rise to *Bivens*’ remedies, and where the only difference in constitutional scope consists of a circumstance (the absence of a conviction) that makes the violation here worse, it cannot be maintained that the difference between the use of the two Amendments is “fundamental.” See *City of Revere v. Massachusetts Gen. Hospital*, 463 U. S. 239, 244 (1983) (“due process rights” of an unconvicted person “are at least as great as the Eighth Amendment protections available to a convicted prisoner”); *Kingsley v. Hendrickson*, 576 U. S. ___, ___–___ (2015) (slip op., at 10–11) (“pretrial detainees (unlike convicted prisoners) cannot be punished at all”); *Zadvydas v. Davis*,

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533 U. S. 678, 721 (2001) (KENNEDY, J., dissenting) (detention “incident to removal . . . cannot be justified as punishment nor can the confinement or its conditions be designed in order to punish”). See also *Bistrian v. Levi*, 696 F. 3d 352, 372 (CA3 2012) (permitting *Bivens* action brought by detainee in administrative segregation); *Thomas v. Ashcroft*, 470 F. 3d 491, 493, 496–497 (CA2 2006) (detainee alleging failure to provide adequate medical care); *Magluta v. Samples*, 375 F. 3d 1269, 1271, 1275–1276 (CA11 2004) (detainee in solitary confinement); *Papa v. United States*, 281 F. 3d 1004, 1010–1011 (CA9 2002) (due process claims arising from death of immigration detainee); *Loe v. Armistead*, 582 F. 2d 1291, 1293–1296 (CA4 1978) (detainee’s claim of deliberate indifference to medical need). If an arrestee can bring a claim of excessive force (*Bivens* itself), and a convicted prisoner can bring a claim for denying medical care (*Carlson*), someone who has neither been charged nor convicted with a crime should also be able to challenge abuse that causes him to need medical care.

Nor has Congress suggested that it wants to withdraw a damages remedy in circumstances like these. By its express terms, the Prison Litigation Reform Act of 1995 (PLRA) does not apply to immigration detainees. See 42 U. S. C. §1997e(h) (“[T]he term ‘prisoner’ means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law . . . ”); see also *Agyeman v. INS*, 296 F. 3d 871, 886 (CA9 2002) (“[W]e hold that an alien detained by the INS pending deportation is not a ‘prisoner’ within the meaning of the PLRA”); *LaFontant v. INS*, 135 F. 3d 158, 165 (CADC 1998) (same); *Ojo v. INS*, 106 F. 3d 680, 683 (CA5 1997) (same). And, in fact, there is strong evidence that Congress assumed that *Bivens* remedies would be available to prisoners when it enacted the PLRA—e.g., Congress continued to permit prisoners to

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recover for physical injuries, the typical kinds of *Bivens* injuries. See 28 U. S. C. §1346(b)(2); Pfander, Constitutional Torts, at 105–106.

If there were any lingering doubt that the claim against Warden Hasty arises in a familiar *Bivens* context, the Court has made clear that conditions-of-confinement claims and medical-care claims are subject to the same substantive standard. See *Hudson v. McMillian*, 503 U. S. 1, 8 (1992) (“[*Wilson v. Seiter*, 501 U. S. 294, 303 (1991)] extended the deliberate indifference standard applied to Eighth Amendment claims involving medical care to claims about conditions of confinement”). Indeed, the Court made this very point in a *Bivens* case alleging that prison wardens were deliberately indifferent to an inmate’s safety. See *Farmer*, *supra*, at 830, 834.

I recognize that the Court finds a significant difference in the fact that the confinement here arose soon after a national-security emergency, namely, the September 11 attacks. The short answer to this argument, in respect to at least some of the claimed harms, is that some plaintiffs continued to suffer those harms up to eight months after the September 11 attacks took place and after the defendants knew the plaintiffs had no connection to terrorism. See App. to Pet. for Cert. in No. 15–1359, p. 280a. But because I believe the Court’s argument here is its strongest, I will consider it at greater length below. See Part III–C, *infra*.

Because the context here is not new, I would allow the plaintiffs’ constitutional claims to proceed. The plaintiffs have adequately alleged that the defendants were personally involved in imposing the conditions of confinement and did so with knowledge that the plaintiffs bore no ties to terrorism, thus satisfying *Iqbal*’s pleading standard. See 556 U. S., at 679 (claims must be “plausible”); see also *id.*, at 699–700 (BREYER, J., dissenting). And because it is clearly established that it is unconstitutional to subject

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detainees to punitive conditions of confinement and to target them based solely on their race, religion, or national origin, the defendants are not entitled to qualified immunity on the constitutional claims. See *Bell v. Wolfish*, 441 U. S. 520, 535–539, and n. 20 (1979); *Davis*, 442 U. S., at 236 (“It is equally clear . . . that the Fifth Amendment confers on petitioner a constitutional right to be free from illegal discrimination”). (Similarly, I would affirm the judgment of the Court of Appeals with respect to the plaintiffs’ statutory claim, namely, that the defendants conspired to deprive the plaintiffs of equal protection of the laws in violation of 42 U. S. C. §1985(3). See *Turkmen v. Hasty*, 789 F. 3d 218, 262–264 (CA2 2015). I agree with the Court of Appeals that the defendants are not entitled to qualified immunity on this claim. See *ibid.*)

2

Even were I wrong and were the context here “fundamentally different,” *Malesko*, 534 U. S., at 70, the plaintiffs’ claims would nonetheless survive Step Two and Step Three of the Court’s framework for determining whether *Bivens* applies, see *supra*, at 9. Step Two consists of asking whether “any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and free-standing remedy in damages.” *Wilkie*, 551 U. S., at 550. I can find no such “alternative, existing process” here.

The Court does not claim that the PLRA provides plaintiffs with a remedy. *Ante*, at 25–26. Rather, it says that the plaintiffs *may* have “had available to them” relief in the form of a prospective injunction or an application for a writ of habeas corpus. *Ante*, at 22. Neither a prospective injunction nor a writ of habeas corpus, however, will normally provide plaintiffs with redress for harms they have *already* suffered. And here plaintiffs make a strong claim that neither was available to them—at least not for a

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considerable time. Some of the plaintiffs allege that for two or three months they were subject to a “communications blackout”; that the prison “staff did not permit them visitors, legal or social telephone calls, or mail”; that their families and attorneys did not know where they were being held; that they could not receive visits from their attorneys; that subsequently their lawyers could call them only once a week; and that some or all of the defendants “interfered with the detainees’ effective access to legal counsel.” Office of Inspector General (OIG) Report, App. 223, 293, 251, 391; see App. to Pet. for Cert. in No. 15–1359, at 253a (incorporating the OIG report into the complaint). These claims make it virtually impossible to say that here there is an “elaborate, comprehensive” alternative remedial scheme similar to schemes that, in the past, we have found block the application of *Bivens* to new contexts. *Bush*, 462 U. S., at 385. If these allegations are proved, then in this suit, it is “damages or nothing.” *Bivens*, 403 U. S., at 410 (Harlan, J., concurring in judgment).

There being no “alternative, existing process” that provides a “convincing reason” for not applying *Bivens*, we must proceed to Step Three. *Wilkie, supra*, at 550. Doing so, I can find no “special factors [that] counse[l] hesitation before authorizing” this *Bivens* action. 551 U. S., at 550. I turn to this matter next.

II

A

The Court describes two general considerations that it believes argue against an “extension” of *Bivens*. First, the majority opinion points out that the Court is now far less likely than at the time it decided *Bivens* to imply a cause of action for damages from a statute that does not explicitly provide for a damages claim. See *ante*, at 8–9. Second, it finds the “silence” of Congress “notable” in that Con-

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gress, though likely aware of the “high-level policies” involved in this suit, did not “choose to extend to any person the kind of remedies” that the plaintiffs here “seek.” *Ante*, at 20–21 (internal quotation marks omitted). I doubt the strength of these two general considerations.

The first consideration, in my view, is not relevant. I concede that the majority and concurring opinions in *Bivens* looked in part for support to the fact that the Court had implied damages remedies from *statutes* silent on the subject. See 403 U. S., at 397; *id.*, at 402–403 (Harlan, J., concurring in judgment). But that was not the main argument favoring the Court’s conclusion. Rather, the Court drew far stronger support from the need for such a remedy when measured against a common-law and constitutional history of allowing traditional legal remedies where necessary. *Id.*, at 392, 396–397. The Court believed such a remedy was necessary to make effective the Constitution’s protection of certain basic individual rights. See *id.*, at 392; *id.*, at 407 (opinion of Harlan, J.). Similarly, as the Court later explained, a damages remedy against federal officials prevented the serious legal anomaly I previously mentioned. Its existence made basic constitutional protections of the individual against *Federal* Government abuse (the Bill of Rights’ pre-Civil War objective) as effective as protections against abuse by *state* officials (the post-Civil War, post selective-incorporation objective). See *supra*, at 7.

Nor is the second circumstance—congressional silence—relevant in the manner that the majority opinion describes. The Court initially saw that silence as indicating an absence of congressional hostility to the Court’s exercise of its traditional remedy-inferring powers. See *Bivens, supra*, at 397; *Davis*, 442 U. S., at 246–247. Congress’ subsequent silence contains strong signs that it accepted *Bivens* actions as part of the law. After all, Congress rejected a proposal that would have eliminated

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Bivens by substituting the U. S. Government as a defendant in suits against federal officers that raised constitutional claims. See Pfander, Constitutional Torts, at 102. Later, Congress expressly immunized federal employees acting in the course of their official duties from tort claims *except* those premised on violations of the Constitution. See Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly known as the Westfall Act, 28 U. S. C. §2679(b)(2)(A). We stated that it is consequently “crystal clear that Congress views [the Federal Tort Claims Act] and *Bivens* as [providing] parallel, complementary causes of action.” *Carlson*, 446 U. S., at 20; see *Malesko*, 534 U. S., at 68 (similar). Congress has even assumed the existence of a *Bivens* remedy in suits brought by noncitizen detainees suspected of terrorism. See 42 U. S. C. §2000dd–1 (granting qualified immunity—but not absolute immunity—to military and civilian federal officials who are sued by alien detainees suspected of terrorism).

B

The majority opinion also sets forth a more specific list of factors that it says bear on “whether a case presents a new *Bivens* context.” *Ante*, at 16. In the Court’s view, a “case might differ” from *Bivens* “in a meaningful way because of [1] the rank of the officers involved; [2] the constitutional right at issue; [3] the generality or specificity of the individual action; [4] the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; [5] the statutory or other legal mandate under which the officer was operating; [6] the risk of disruptive intrusion by the Judiciary into the functioning of other branches; [7] or the presence of potential special factors that previous *Bivens* cases did not consider.” *Ante*, at 16. In my view, these factors do not make a “meaningful difference” at Step One of the *Bivens* frame-

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work. Some of them are better cast as “special factors” relevant to Step Three. But, as I see it, none should normally foreclose a *Bivens* action and none is determinative here. Consider them one by one:

(1) *The rank of the officers.* I can understand why an officer’s rank might bear on whether he violated the Constitution, because, for example, a plaintiff might need to show the officer was willfully blind to a harm caused by lower ranking officers or that the officer had actual knowledge of the misconduct. And I can understand that rank might relate to the existence of a legal defense, such as qualified, or even absolute, immunity. But *if*—and I recognize that this is often a very big *if*—a plaintiff proves a clear constitutional violation, say, of the Fourth Amendment, *and* he shows that the defendant does not possess any form of immunity or other defense, *then* why should he not have a damages remedy for harm suffered? What does rank have to do with *that* question, namely, the *Bivens* question? Why should the law treat differently a high-level official and the local constable where each has similarly violated the Constitution and where neither can successfully assert immunity or any other defense?

(2) *The constitutional right at issue.* I agree that this factor can make a difference, but only when the substance of the right is distinct. See, *e.g.*, *Wilkie*, 551 U. S. 537 (land rights). But, for reasons I have already pointed out, there is no relevant difference between the rights at issue here and the rights at issue in our previous *Bivens* cases, namely, the rights to be free of unreasonable searches, invidious discrimination, and physical abuse in federal custody. See *supra*, at 10–11.

(3) *The generality or specificity of the individual action.* I should think that it is not the “generality or specificity” of an official action but rather the nature of the official action that matters. *Bivens* should apply to some generally applicable actions, such as actions taken deliberately to

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jail a large group of known-innocent people. And it should not apply to some highly specific actions, depending upon the nature of those actions.

(4) *The extent of judicial guidance.* This factor may be relevant to the existence of a constitutional violation or a qualified-immunity defense. Where judicial guidance is lacking, it is more likely that a constitutional violation is not clearly established. See *Anderson v. Creighton*, 483 U. S. 635, 640 (1987) (Officials are protected by qualified immunity unless “[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right”). But I do not see how, assuming the violation is clear, the presence or absence of “judicial guidance” is relevant to the existence of a damages remedy.

(5) *The statutory (or other) legal mandate under which the officer was operating.* This factor too may prove relevant to the question whether a constitutional violation exists or is clearly established. But, again, assuming that it is, I do not understand why this factor is relevant to the existence of a damages remedy. See *Stanley*, 483 U. S., at 684 (the question of immunity is “analytically distinct” from the question whether a *Bivens* action should lie).

(6) *Risk of disruptive judicial intrusion.* All damages actions risk disrupting to some degree future decisionmaking by members of the Executive or Legislative Branches. Where this Court has authorized *Bivens* actions, it has found that disruption tolerable, and it has explained why disruption is, from a constitutional perspective, desirable. See *Davis*, 442 U. S., at 242 (Unless constitutional rights “are to become merely precatory, . . . litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for . . . protection”); *Malesko, supra*, at 70 (“The purpose of *Bivens* is to

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deter individual federal officers from committing constitutional violations"). Insofar as the Court means this consideration to provide a reason why there should be no *Bivens* action where a Government employee acts in time of security need, I shall discuss the matter next, in Part C.

(7) *Other potential special factors.* Since I am not certain what these other "potential factors" are and, since the Court does not specify their nature, I would not, and the Court cannot, consider them in differentiating this suit from our previous *Bivens* cases or as militating against recognizing a *Bivens* action here.

C

In my view, the Court's strongest argument is that *Bivens* should not apply to policy-related actions taken in times of national-security need, for example, during war or national-security emergency. As the Court correctly points out, the Constitution grants primary power to protect the Nation's security to the Executive and Legislative Branches, not to the Judiciary. But the Constitution also delegates to the Judiciary the duty to protect an individual's fundamental constitutional rights. Hence when protection of those rights and a determination of security needs conflict, the Court has a role to play. The Court most recently made this clear in cases arising out of the detention of enemy combatants at Guantanamo Bay. Justice O'Connor wrote that "a state of war is not a blank check." *Hamdi v. Rumsfeld*, 542 U. S. 507, 536 (2004) (plurality opinion). In *Boumediene*, 553 U. S., at 732–733, the Court reinforced that point, holding that noncitizens detained as enemy combatants were entitled to challenge their detention through a writ of habeas corpus, notwithstanding the national-security concerns at stake.

We have not, however, answered the specific question the Court places at issue here: Should *Bivens* actions continue to exist in respect to policy-related actions taken

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in time of war or national emergency? In my view, they should.

For one thing, a *Bivens* action comes accompanied by many legal safeguards designed to prevent the courts from interfering with Executive and Legislative Branch activity reasonably believed to be necessary to protect national security. In Justice Jackson's well-known words, the Constitution is not "a suicide pact." *Terminiello v. Chicago*, 337 U. S. 1, 37 (1949) (dissenting opinion). The Constitution itself takes account of public necessity. Thus, for example, the Fourth Amendment does not forbid *all* Government searches and seizures; it forbids only those that are "unreasonable." Ordinarily, it requires that a police officer obtain a search warrant before entering an apartment, but should the officer observe a woman being dragged against her will into that apartment, he should, and will, act at once. The Fourth Amendment makes allowances for such "exigent circumstances." *Brigham City v. Stuart*, 547 U. S. 398, 401 (2006) (warrantless entry justified to forestall imminent injury). Similarly, the Fifth Amendment bars only conditions of confinement that are not "reasonably related to a legitimate governmental objective." *Bell v. Wolfish*, 441 U. S., at 539. What is unreasonable and illegitimate in time of peace may be reasonable and legitimate in time of war.

Moreover, *Bivens* comes accompanied with a qualified-immunity defense. Federal officials will face suit only if they have violated a constitutional right that was "clearly established" at the time they acted. *Harlow*, 457 U. S., at 818.

Further, in order to prevent the very presence of a *Bivens* lawsuit from interfering with the work of a Government official, this Court has held that a complaint must state a claim for relief that is "plausible." *Iqbal*, 556 U. S., at 679. "[C]onclusory" statements and "[t]hreadbare" allegations will not suffice. *Id.*, at 678.

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And the Court has protected high-level officials in particular by requiring that plaintiffs plead that an official was personally involved in the unconstitutional conduct; an official cannot be vicariously liable for another's misdeeds. *Id.*, at 676.

Finally, where such a claim is filed, courts can, and should, tailor discovery orders so that they do not unnecessarily or improperly interfere with the official's work. The Second Circuit has emphasized the "need to vindicate the purpose of the qualified immunity defense by dismissing non-meritorious claims against public officials at an early stage of litigation." *Iqbal v. Hasty*, 490 F. 3d 143, 158 (2007). Where some of the defendants are "current or former senior officials of the Government, against whom broad-ranging allegations of knowledge and personal involvement are easily made, a district court" not only "may, but 'must exercise its discretion in a way that protects the substance of the qualified immunity defense . . . so that'" those officials "'are not subjected to unnecessary and burdensome discovery or trial proceedings.'" *Id.*, at 158–159. The court can make "all such discovery subject to prior court approval." *Id.*, at 158. It can "structure . . . limited discovery by examining written responses to interrogatories and requests to admit before authorizing depositions, and by deferring discovery directed to high-level officials until discovery of front-line officials has been completed and has demonstrated the need for discovery higher up the ranks." *Ibid.* In a word, a trial court can and should so structure the proceedings with full recognition that qualified immunity amounts to immunity from suit as well as immunity from liability.

Given these safeguards against undue interference by the Judiciary in times of war or national-security emergency, the Court's abolition, or limitation of, *Bivens* actions goes too far. If you are cold, put on a sweater, perhaps an overcoat, perhaps also turn up the heat, but do

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not set fire to the house.

At the same time, there may well be a particular need for *Bivens* remedies when security-related Government actions are at issue. History tells us of far too many instances where the Executive or Legislative Branch took actions during time of war that, on later examination, turned out unnecessarily and unreasonably to have deprived American citizens of basic constitutional rights. We have read about the Alien and Sedition Acts, the thousands of civilians imprisoned during the Civil War, and the suppression of civil liberties during World War I. See W. Rehnquist, All the Laws but One: Civil Liberties in Wartime 209–210, 49–50, 173–180, 183 (1998); see also *Ex parte Milligan*, 4 Wall. 2 (1866) (decided after the Civil War was over). The pages of the U. S. Reports themselves recite this Court’s refusal to set aside the Government’s World War II action removing more than 70,000 American citizens of Japanese origin from their west coast homes and interning them in camps, see *Korematsu v. United States*, 323 U. S. 214 (1944)—an action that at least some officials knew at the time was unnecessary, see *id.*, at 233–242 (Murphy, J., dissenting); P. Irons, Justice at War 202–204, 288 (1983). President Franklin Roosevelt’s Attorney General, perhaps exaggerating, once said that “[t]he Constitution has not greatly bothered any wartime President.” Rehnquist, *supra*, at 191.

Can we, in respect to actions taken during those periods, rely exclusively, as the Court seems to suggest, upon injunctive remedies or writs of habeas corpus, their retail equivalent? Complaints seeking that kind of relief typically come during the emergency itself, when emotions are strong, when courts may have too little or inaccurate information, and when courts may well prove particularly reluctant to interfere with even the least well-founded Executive Branch activity. That reluctance may itself set an unfortunate precedent, which, as Justice Jackson

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pointed out, can “li[e] about like a loaded weapon” awaiting discharge in another case. *Korematsu, supra*, at 246 (dissenting opinion).

A damages action, however, is typically brought after the emergency is over, after emotions have cooled, and at a time when more factual information is available. In such circumstances, courts have more time to exercise such judicial virtues as calm reflection and dispassionate application of the law to the facts. We have applied the Constitution to actions taken during periods of war and national-security emergency. See *Boumediene*, 553 U. S., at 732–733; *Hamdi v. Rumsfeld*, 542 U. S. 507; cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579 (1952). I should think that the wisdom of permitting courts to consider *Bivens* actions, later granting monetary compensation to those wronged at the time, would follow *a fortiori*.

As is well known, Lord Atkins, a British judge, wrote in the midst of World War II that “amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace.” *Liversidge v. Anderson*, [1942] A. C. 206 (H. L. 1941) 244. The Court, in my view, should say the same of this *Bivens* action.

With respect, I dissent.

Nos. 16-285 & 16-307

IN THE
Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
Petitioner,
v.

JACOB LEWIS,
Respondent.

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 and Seventh Circuits

BRIEF FOR PETITIONER
EPIC SYSTEMS CORPORATION AND
RESPONDENT MURPHY OIL USA, INC.

THOMAS P. SCHMIDT
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022

NEAL KUMAR KATYAL
Counsel of Record
FREDERICK LIU
COLLEEN E. ROH SINZDAK
DANIEL J.T. SCHUKER
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com

*Counsel for Epic Systems Corporation and
Murphy Oil USA, Inc.*

[additional counsel listed on inside cover]

Additional counsel:

NOAH A. FINKEL
ANDREW SCROGGINS
SEYFARTH SHAW LLP
233 South Wacker Drive
Suite 8000
Chicago, IL 60606

*Counsel for Epic Systems
Corporation*

JEFFREY A. SCHWARTZ
JACKSON LEWIS P.C.
1155 Peachtree Street, NE
Suite 1000
Atlanta, GA 30309

DANIEL D. SCHUDROFF
JACKSON LEWIS P.C.
666 Third Avenue
New York, NY 10017

*Counsel for Murphy Oil
USA, Inc.*

QUESTION PRESENTED

Whether an agreement that requires an employer and an employee to resolve employment-related disputes through individual arbitration, and waive class and collective proceedings, is enforceable under the Federal Arbitration Act, notwithstanding the provisions of the National Labor Relations Act.

(i)

PARTIES TO THE PROCEEDINGS

1. In No. 16-285, petitioner Epic Systems Corporation was the defendant-appellant in the Seventh Circuit.

Respondent Jacob Lewis was the plaintiff-appellee in the Seventh Circuit.

2. In No. 16-307, petitioner National Labor Relations Board was the respondent/cross-petitioner in the Fifth Circuit.

Respondent Murphy Oil USA, Inc., was the petitioner/cross-respondent in the Fifth Circuit.

Respondent Sheila M. Hobson was the charging party before the Board and an intervenor in the Fifth Circuit.

RULE 29.6 DISCLOSURE STATEMENT

Epic Systems Corporation has no parent corporation, and no publicly held company owns 10% or more of Epic Systems Corporation's stock.

Murphy Oil USA, Inc.'s parent company is Murphy USA, Inc. Murphy USA, Inc., is the only publicly held company that owns 10% or more of Murphy Oil USA, Inc.'s stock.

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IN THE
Supreme Court of the United States

Nos. 16-285 & 16-307

EPIC SYSTEMS CORPORATION,
Petitioner,
v.

JACOB LEWIS,
Respondent.

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 and Seventh Circuits

BRIEF FOR PETITIONER
EPIC SYSTEMS CORPORATION AND
RESPONDENT MURPHY OIL USA, INC.

INTRODUCTION

Employers and employees often enter into employment contracts providing for the arbitration of any disputes. And the arbitration provisions in those contracts often include waivers of class or collective proceedings (referred to here as “class waivers”),

(1)

requiring that claims be resolved on an individual basis.

It is not hard to understand why. As this Court has recognized, there are “real benefits” to arbitration, and those benefits do not “somehow disappear” in “the employment context.” *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-123 (2001). In fact, “[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation.” *Id.* at 123. Yet class or collective proceedings (“class proceedings,” for short) would “sacrifice[]” arbitration’s “principal” benefits by “mak[ing] the process slower, more costly, and more likely to generate procedural morass than final judgment.” *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011). To preserve the “fundamental attributes of arbitration,” then, employers and employees often agree to class waivers. *Id.* at 344.

The question in these consolidated cases is whether those class waivers are enforceable. The answer is yes. The Federal Arbitration Act (FAA) unambiguously mandates their enforcement, and the National Labor Relations Act (NLRA) contains no contrary congressional command. Rather, the NLRA can be reasonably construed as consistent with the FAA’s unambiguous mandate, so the Court should adopt that construction to harmonize the two statutes.

The upshot is that the advantages of arbitration need not be sacrificed in the employment context. Like other contracts, employment contracts may require that arbitration be conducted on an individual basis.

OPINIONS BELOW

In No. 16-285 (*Epic*), the opinion of the United States Court of Appeals for the Seventh Circuit is reported at 823 F.3d 1147. *Epic* Pet. App. 1a-23a. The District Court's opinion denying Epic Systems Corporation's motion to dismiss and compel individual arbitration is not published in the *Federal Supplement*, but it is available at 2015 WL 5330300. *Epic* Pet. App. 24a-29a.

In No. 16-307 (*Murphy Oil*), the opinion of the United States Court of Appeals for the Fifth Circuit is reported at 808 F.3d 1013. *Murphy Oil* Pet. App. 1a-16a. The National Labor Relations Board's decision and order are reported at 361 N.L.R.B. No. 72. *Murphy Oil* Pet. App. 17a-212a.

JURISDICTION

In *Epic*, the Seventh Circuit entered judgment on May 26, 2016. *Epic* Pet. App. 1a. On July 29, 2016, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including September 23, 2016, and the petition was filed on September 2, 2016.

In *Murphy Oil*, the Fifth Circuit entered judgment on February 18, 2016. *Murphy Oil* Pet. App. 215a. It then denied the Board's petition for rehearing en banc on May 13, 2016. *Id.* at 213a. On August 10, 2016, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including September 9, 2016, and the petition was filed on that date.

On January 13, 2017, this Court granted the petitions in *Epic*, *Murphy Oil*, and *Ernst & Young LLP v.*

Morris, No. 16-300, and consolidated the three cases. The Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in an addendum to this brief. Add. 1a-17a.

STATEMENT

A. *Murphy Oil*

1. Murphy Oil USA, Inc., operates retail gas stations in 26 States throughout the country. In 2008, Sheila Hobson entered into an arbitration agreement with Murphy Oil when she applied to work at a gas station in Calera, Alabama. *Murphy Oil* Pet. App. 2a, 26a. Hobson eventually got the job and was employed by Murphy Oil until September 2010. *Id.* at 26a.

By signing the agreement, Hobson “agree[d] to resolve any and all disputes or claims *** which relate *** to [her] employment *** by binding arbitration.” J.A. 8. She “waive[d] the[] right to commence or be a party to any group, class or collective action claim in arbitration or any other forum.” J.A. 11. And she agreed that “any claim by or against [her] or [Murphy Oil] shall be heard without consolidation of such claim with any other person or entity’s claim.” *Id.*

2. In June 2010, Hobson and three other employees brought a collective action against Murphy Oil under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201 *et seq.*, alleging that they had been denied compensation for overtime and other work-related activities. J.A. 14, 23-24. Murphy Oil moved to compel individual arbitration, as provided in the agreement signed by Hobson and the other employ-

ees. *Murphy Oil* Pet. App. 2a-3a. The District Court granted that motion and entered a stay pending arbitration. *Id.* at 4a. After the employees failed to submit their claims to arbitration, however, the District Court dismissed the case with prejudice in July 2015. *Id.* at 4a n.1.

3. In a separate proceeding, Hobson filed a charge with the National Labor Relations Board in January 2011. *Id.* at 3a. Two months later, the Board's then-Acting General Counsel issued a complaint asserting that Murphy Oil had committed an unfair labor practice under Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), by maintaining an arbitration agreement that interfered with an employee's right under Section 7 of the same statute to engage in "concerted activities," *id.* § 157. See *Murphy Oil* Pet. App. 27a.

While the proceeding against Murphy Oil was pending, the Board issued its decision in *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012). There, the Board concluded that an arbitration agreement containing a class waiver "unlawfully restricts employees' Section 7 right to engage in concerted action for mutual aid or protection, notwithstanding the [FAA], which generally makes employment-related arbitration agreements judicially enforceable." *Id.* On review, the Fifth Circuit disagreed, explaining that such an agreement "must be enforced according to its terms" because the NLRA does not "contain a congressional command overriding application of the FAA." *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013).

Undeterred by the Fifth Circuit's ruling, the Board reaffirmed its own *D.R. Horton* decision in October 2014 and concluded that Murphy Oil had violated

the NLRA by “requiring its employees to agree to resolve all employment-related claims through individual arbitration.” *Murphy Oil* Pet. App. 22a-23a. Two of the five Board members dissented. *Id.* at 89a-208a.

4. Murphy Oil petitioned for review in the Fifth Circuit. *See* 29 U.S.C. § 160(f). The court granted the petition in relevant part, holding that Murphy Oil had not committed any unfair labor practice by maintaining and enforcing its arbitration agreement. *Murphy Oil* Pet. App. 2a. Given that the Fifth Circuit had decided the same issue in *D.R. Horton*, the court saw no need to “repeat its analysis.” *Id.* at 8a. The court subsequently denied rehearing en banc. *Id.* at 213a-214a.

B. Epic

1. Epic Systems Corporation is a Wisconsin-based company that makes software for recording, organizing, and sharing healthcare data. Hospitals, academic medical facilities, retail clinics, safety-net providers, and other healthcare organizations use Epic’s software every day across the country. Epic relies on its own employees to develop, install, and support its software.

In April 2014, Epic sent an email containing an arbitration agreement to many of its employees. *Epic* Pet. App. 2a. A day after receiving the email, Jacob Lewis, who was then a technical communications employee, responded by acknowledging that he understood and consented to the terms of the arbitration agreement. *Id.* In doing so, Lewis “agree[d] to use binding arbitration, instead of going to court, for any ‘covered claims’”—a category that included any “claimed violation of wage-and-hour practices or

procedures under local, state or federal statutory or common law.” *Id.* at 30a-31a.

The arbitration agreement also contained a “Waiver of Class and Collective Claims.” *Id.* at 31a. By accepting that waiver, Lewis “agree[d] that covered claims will be arbitrated only on an individual basis,” and “waive[d] the right to participate in or receive money or any other relief from any class, collective, or representative proceeding.” *Id.* The agreement further provided that “if the Waiver of Class and Collective Claims is found to be unenforceable, then any claim brought on a class, collective, or representative action basis must be filed in a court of competent jurisdiction.” *Id.* at 35a.

2. Lewis continued to work for Epic until December 2014. App. to Epic C.A. Br. 9. Then, in February 2015, Lewis sued Epic in federal court on behalf of a putative class and collective of certain technical communications employees, claiming that they had been denied overtime wages in violation of the FLSA and Wisconsin law. *Epic Pet.* App. 2a.

Epic moved to dismiss the complaint and compel individual arbitration, citing its arbitration agreement with Lewis. *Id.* Although Lewis acknowledged that his claims fell within the scope of that agreement, the District Court denied Epic’s motion. *Id.* at 24a, 29a. According to the District Court, the class waiver was unenforceable because it violated an employee’s right to engage in “concerted activities” under Section 7 of the NLRA. *Id.* at 25a-28a.

3. The Seventh Circuit affirmed. *See* 9 U.S.C. § 16(a); *Epic Pet.* App. 2a. Turning first to the NLRA, the court held that a “collective, representative, or class legal proceeding is *** a ‘concerted

activit[y]” under Section 7, *Epic* Pet. App. 10a (brackets in original), and that the class waiver interfered with Lewis’s “substantive” Section 7 right to concerted activity, in violation of Section 8(a)(1). *Id.* at 9a-12a. The court then turned to the FAA, holding that it does not require enforcement of an arbitration provision that is “illegal” under the NLRA. *Id.* at 15a. The court thus deemed the class waiver unenforceable. *Id.* at 20a.

SUMMARY OF ARGUMENT

I.A. In cases involving the interaction of two federal statutes, the first objective is to harmonize the competing provisions, if at all possible. So long as the “two statutes are capable of co-existence, it is the duty of the courts *** to regard each as effective.” *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

The FAA and NLRA can indeed co-exist. The FAA unambiguously mandates enforcement of class waivers in arbitration agreements, and the NLRA contains no “clearly expressed congressional intention to the contrary.” *Id.* So the Court should do what it has done in prior cases involving the FAA and other federal statutes: construe the other statute in a way that harmonizes it with the FAA.

B. Start with the FAA. Section 2 declares that arbitration provisions “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. The first part is unequivocal: Arbitration provisions must be enforced. And the latter part—the so-called saving clause—offers no escape hatch here, for any one of four reasons.

First, the saving clause saves *inferior* laws; it has no application to other federal statutes like the

NLRA. Second, the NLRA is not a ground for the revocation of “any contract,” because only one type of contract—between employers and employees—is subject to the NLRA. *Id.* (emphasis added); *see Southland Corp. v. Keating*, 465 U.S. 1, 16 n.11 (1984). Third, if the NLRA were construed to prohibit class waivers, it would “interfere[] with fundamental attributes of arbitration,” *Concepcion*, 563 U.S. at 344, and the saving clause does not apply to any ground that disfavors arbitration’s “defining features,” *Kindred Nursing Ctrs. Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1426 (2017). Fourth, a rule prohibiting class waivers under the NLRA would not be a ground “for the revocation of any contract,” 9 U.S.C. § 2 (emphasis added), because it would have nothing to do with the contract’s “formation”—that is, “whether the contract was properly made.” *Concepcion*, 131 S. Ct. at 355, 357 (Thomas, J., concurring) (emphases added).

Because the saving clause does not apply, the FAA unequivocally declares that the class waivers in these cases shall be enforceable. The question, then, is whether the NLRA can plausibly be read so as not to conflict with that mandate. The Court has a duty to find a way to harmonize the NLRA with the FAA if it can, and only a “clearly expressed congressional intention to the contrary,” *Morton*, 417 U.S. at 551—also known as a “contrary congressional command,” *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012)—can prevent the Court from doing so.

C. The NLRA does not contain a “clearly expressed congressional intention” to bar class waivers. The text of the NLRA makes no mention of class proceedings, and the NLRA was enacted long before the rules governing class and collective actions. The

NLRA is thus just like the antitrust laws in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), which this Court held contained no congressional command requiring rejection of class waivers. Like those antitrust laws, the NLRA can be reasonably construed to permit class waivers, consistent with the FAA.

In fact, that is not just *a* reasonable construction of the NLRA; it is *the only* reasonable construction. Every tool of statutory construction points to the same conclusion: Though Section 7 protects a right to “engage in *** concerted activities,” those activities do not include class proceedings. 29 U.S.C. § 157. The traditional tools of statutory interpretation make clear that Section 7 creates rights for employees; it does not impose any corresponding obligations on employers or third parties. Reading “concerted activities” to include class proceedings would violate that rule because employees cannot exercise a right to litigate as a class unless employers and tribunals are obligated to treat them as a class.

In any event, even if class proceedings could be considered a form of concerted activity, Section 8(a)(1) of the NLRA does not unambiguously make class waivers an unfair labor practice. Section 8(a)(1) bars employers from “interfer[ing] with” an employee’s *substantive* right to engage in concerted activities. *Id.* § 158(a)(1). It does not unambiguously prevent employers from channeling concerted activities into particular *procedural* forms. And even if it did, employees would be free to waive that *procedural* right, as they did here. The Seventh Circuit’s reading of the NLRA as prohibiting class waivers would lead to absurd results—making employment arbitration a thing of the past, and

forcing employers and courts alike to acquiesce whenever employees seek class certification. The NLRA can—and should—be interpreted harmoniously with the FAA by construing the NLRA to permit the class waivers here.

D. The Board's contrary view is not entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Most fundamentally, there is no room for any deference. The NLRA unambiguously does *not* prohibit class waivers. And even if the NLRA were ambiguous, there would be only one way of construing it in harmony with the FAA's unambiguous mandate—making that the only permissible construction that a court or agency could adopt. In addition, Congress has not delegated any authority to the Board to administer the FAA, so the Board's attempt to balance the policies underlying both statutes should not be given any special weight.

II. Even if the two statutes could not be reconciled, the class waivers should still be enforced. A specific statute should trump a general one, and the FAA is the specific statute here because it contemplates the precise scenario at issue: arbitration provisions in employment contracts. See 9 U.S.C. § 1; *Circuit City*, 532 U.S. at 114-119. Indeed, when displacing the FAA in other statutes, Congress has spoken with much more specificity than it has in the NLRA. Moreover, prohibiting class waivers would strike at the core of the FAA's protections while addressing what is, at most, a peripheral concern of the NLRA. In the event of an irreconcilable conflict, therefore, the FAA should be given priority.

For these reasons, class waivers in arbitration agreements between employers and their employees should be enforced. The Fifth Circuit should be affirmed, and the Seventh Circuit should be reversed.

ARGUMENT

These cases concern the enforceability of class waivers in arbitration agreements between employers and employees. That issue lies at the intersection of two federal statutes—one about arbitration agreements and the other about employer-employee relations.

The statute about arbitration agreements is the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, enacted in 1925. *See Ch. 213, 43 Stat. 883 (1925); Ch. 392, 61 Stat. 669 (1947)* (codifying the FAA as Title 9). The FAA’s “primary” provision is Section 2, *Gilmer v. Interstate/Johson Lane Corp.*, 500 U.S. 20, 24 (1991), which states:

A written provision in *** a 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 enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

The other statute—about employer-employee relations—is the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, enacted in 1935. Ch. 372, 49 Stat. 449 (1935). Section 7 of the NLRA gives employees 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.” 29 U.S.C. § 157. An employer that “interfere[s] with, restrain[s], or coerce[s] employees in the exercise of th[ose] rights” commits an “unfair labor practice” under Section 8(a)(1) of the NLRA. *Id.* § 158(a)(1).

I. THE FAA AND THE NLRA SHOULD BE INTERPRETED HARMONIOUSLY TO MANDATE ENFORCING THE CLASS WAIVERS

The FAA unambiguously mandates the enforcement of the class waivers in these cases, and the NLRA contains no clearly expressed congressional intention to the contrary. Because the NLRA can be reasonably construed as consistent with the FAA’s mandate, this Court should adopt that construction and declare the class waivers enforceable.

A. Absent A Clearly Expressed Congressional Intention To The Contrary, The FAA And The NLRA Should Be Interpreted Harmoniously

1. In cases involving the interaction of two federal statutes, a court’s first task is to determine whether the two statutes can be interpreted harmoniously. That is because the U.S. Code is presumed to have a single, intelligent drafter. See William N. Eskridge, Jr., *Interpreting Law: A Primer on How To Read Statutes and the Constitution* 118 (2016). And “intelligent drafters” presumably “do not contradict themselves.” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 180 (2012). Hence the harmonization principle: “[W]hen two statutes are capable of co-existence, it is the duty of

the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.” *Morton*, 417 U.S. at 551; *see also W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100 (1991) (explaining that a statutory term should be construed “to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law”).

Reinforcing this harmonization principle is the “cardinal rule” that “repeals by implication are not favored.” *Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936). That rule rests on a “strong[]” presumption that “Congress will specifically address language on the statute books that it wishes to change.” *United States v. Fausto*, 484 U.S. 439, 453 (1988); *see also Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 664 n.8 (2007) (“[I]mplied amendments are no more favored than implied repeals.”). Thus, a repeal will not be inferred “unless the intention of the legislature to repeal is clear and manifest.” *Hui v. Castaneda*, 559 U.S. 799, 810 (2010) (internal quotation marks omitted).

2. This Court’s decisions involving the FAA and other federal statutes reflect these principles. In those prior cases, the FAA unambiguously mandated enforcement of the arbitration provisions at issue. Applying the harmonization principle, the Court then proceeded to determine whether the other statute could be read to be consistent with the FAA’s unambiguous mandate. And in case after case, the Court answered yes, finding in the other statute no “clearly expressed congressional intention to the contrary,” *Morton*, 417 U.S. at 551, or “contrary congressional command,” *CompuCredit*, 565 U.S. at 98—two ways of saying the same thing.

*Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefs-*er, 515 U.S. 528 (1995), for example, involved the FAA and the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. app. § 1300 *et seq.* COGSA imposes liability on carriers of goods by sea for violating certain standards of conduct. *Vimar*, 515 U.S. at 534-535. COGSA further provides that any agreement “lessening such liability *** shall be null and void and of no effect.” 46 U.S.C. app. § 1303(8). The petitioner challenged an arbitration agreement as void under COGSA, while the respondents argued that the agreement was enforceable under the FAA. See *Vimar*, 515 U.S. at 531-532. Starting from the premise that “it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each [statute] as effective,” *id.* at 533 (quoting *Morton*, 417 U.S. at 551), the Court concluded that COGSA should be construed to permit enforcement of the arbitration agreement, thereby avoiding any conflict with the FAA, see *id.* at 533-539. Because both statutes could be “given full effect,” *id.* at 541, the Court found it “unnecessary to resolve the further question whether the [FAA] would override COGSA were [COGSA] interpreted otherwise,” *id.* at 530.

Shearson/American Express Inc. v. McMahon, 482 U.S. 220 (1987), involved the FAA and two other federal statutes, the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.* The respondents argued that the Exchange Act and RICO invalidated agreements to arbitrate claims under those two statutes, while the petitioners argued that the agreements were enforceable under the FAA. See *McMahon*, 482 U.S.

at 223, 227. The Court concluded that the FAA, “standing alone,” “mandate[d] enforcement of [the] agreements.” *Id.* at 226. It then placed the “burden” on the respondents—the parties “opposing arbitration”—to show that the Exchange Act and RICO could not be reconciled with that “mandate.” *Id.* at 226-227. After considering those two statutes, the Court held that there was no such “contrary congressional command” in either one. *Id.* at 226, 238, 242. Rather than read the Exchange Act and RICO as “exception[s]” to the FAA, *id.* at 227, the Court harmonized the statutes and deemed the arbitration agreements enforceable, *id.* at 238, 242.

The Court followed a similar path in *Gilmer*, a case involving the FAA and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* The petitioner argued that the ADEA invalidated an agreement to arbitrate claims under that statute, while the respondent argued that the agreement was enforceable under the FAA. See *Gilmer*, 500 U.S. at 23-24, 26-27. As in *McMahon*, the Court placed the “burden” on the party opposing arbitration to show that the other statute could not be reconciled with the FAA’s mandate. *Id.* at 26. Because the petitioner failed to meet that burden, the Court upheld the enforceability of the arbitration agreement. *Id.* at 35.

CompuCredit is another example. The other federal statute in that case was the Credit Repair Organizations Act (CROA), 15 U.S.C. § 1679 *et seq.* The respondents argued that the CROA precluded enforcement of an agreement to arbitrate claims under that statute, while the petitioners argued that the agreement was enforceable under the FAA. See *CompuCredit*, 565 U.S. at 97. The Court reasoned

that the FAA’s “mandate” had to be obeyed, unless the CROA contained “a contrary congressional command”—that is, unless the CROA could not be reconciled with the FAA. *Id.* at 98 (quoting *McMahon*, 482 U.S. at 226). The Court found no such command in the CROA; indeed, the Court explained, “[w]hen [Congress] has restricted the use of arbitration in other contexts, it has done so with a clarity that far exceeds the claimed indications in the CROA.” *Id.* at 103.

Concurring in the judgment, Justice Sotomayor, joined by Justice Kagan, emphasized that while the respondents had advanced a “plausible” interpretation of the CROA, it was “no more compelling than the contrary construction that petitioners [had] urge[d].” *Id.* at 108-109 (Sotomayor, J., concurring in the judgment). The parties’ arguments were thus “in equipoise,” leaving the meaning of the CROA in “doubt[].” *Id.* at 109. Given that ambiguity, Justice Sotomayor concluded that “[the Court’s] precedents require that petitioners prevail,” “because respondents, as the opponents of arbitration, bear the burden of showing that Congress disallowed arbitration of their claims, and because [the Court] resolve[s] doubts in favor of arbitration.” *Id.* Thus, like the majority, Justice Sotomayor construed the CROA to avoid any conflict with the FAA.

The pattern in these cases is undeniable. In each, the FAA unambiguously “mandate[d] enforcement” of the arbitration agreement at issue. *McMahon*, 482 U.S. at 226. So it was the Court’s “duty” to reconcile the other federal statute with that mandate, “absent a clearly expressed congressional intention to the contrary.” *Vimar*, 515 U.S. at 533 (quoting *Morton*, 417 U.S. at 551). And in each case, the parties

opposing arbitration failed to meet their “burden” of showing such a “contrary congressional command.” *McMahon*, 482 U.S. at 226; see also *Italian Colors*, 133 S. Ct. at 2309-2310 (no “congressional command” in the Sherman and Clayton Acts “contrary” to the FAA); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627-629 (1985) (no “intention” in the Sherman Act to preclude enforcing an international arbitration agreement); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519-520 (1974) (Exchange Act does not preclude enforcing an international arbitration agreement).

Of course, there may have been times when the other statute could have “plausibl[y]” been read as contrary to the FAA. *CompuCredit*, 565 U.S. at 108 (Sotomayor, J., concurring in the judgment). But as Justice Sotomayor has explained, that is not enough: To avoid needless conflict, the Court’s precedent requires that any “doubts” in the other statute be resolved “in favor of arbitration.” *Id.* at 109. It should come as no surprise, then, that in the more than 90 years the FAA has been on the books, the Court has been unable to reconcile another federal statute with the FAA only once—in a decision the Court eventually overruled. See *Wilko v. Swan*, 346 U.S. 427 (1953), overruled by *Rodriguez de Quijas v. Shearson /Am. Express, Inc.*, 490 U.S. 477, 479-485 (1989) (Securities Act of 1933 does not preclude enforcing an arbitration agreement).

B. The FAA Unambiguously Mandates Enforcement Of The Class Waivers

These consolidated cases are no different from the cases discussed above. The question is identical: Can the FAA and another statute be harmonized? In

each of the cases above, the FAA unambiguously “mandate[d] enforcement” of the arbitration provisions at issue. *McMahon*, 482 U.S. at 226. The same is true here.

Section 2 of the FAA establishes “a liberal federal policy favoring arbitration agreements.” *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Its “purpose was to place an arbitration agreement upon the same footing as other contracts *** and to overrule the judiciary’s longstanding refusal to enforce agreements to arbitrate.” *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-220 (1985) (internal quotation marks omitted). To that end, Section 2 “requires courts to enforce agreements to arbitrate according to their terms.” *CompuCredit*, 565 U.S. at 98. It declares that an “arbitration” provision in a “contract evidencing a transaction involving commerce *** shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2.

The class waivers here are provisions requiring that arbitration be conducted on an individual, rather than collective, basis. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010) (“[P]arties may specify *with whom* they choose to arbitrate their disputes.”). Those provisions are undisputedly part of “contract[s] evidencing *** transaction[s] involving commerce.” 9 U.S.C. § 2; *see also EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (“Employment contracts, except for those covering workers engaged in transportation, are covered by the FAA.”). Section 2 of the FAA thus declares them “valid, irrevocable, and enforceable,” unless the saving clause applies to the NLRA.

This Court has *never* applied the saving clause in a case involving an alleged conflict between the FAA and another federal statute. Indeed, in each of the cases discussed above, the Court asked whether the other statute contained a contrary congressional command, not whether it fell within the saving clause. *See Italian Colors*, 133 S. Ct. 2304; *Compu-Credit*, 565 U.S. 95; *Vimar*, 515 U.S. 528; *Gilmer*, 500 U.S. 20; *Rodriguez de Quijas*, 490 U.S. 477; *McMahon*, 482 U.S. 220; *Mitsubishi Motors*, 473 U.S. 614; *Scherk*, 417 U.S. 506. The saving clause is similarly inapplicable here. It does not apply to the NLRA, for four independent reasons.

First, saving clauses in federal statutes save *inferior* laws, like state law or federal common law; they do not save “other federal statutes enacted by the same sovereign.” *NLRB v. Alt. Entm’t, Inc.*, No. 16-1385, 2017 WL 2297620, at *18 (6th Cir. May 26, 2017) (Sutton, J., concurring in part and dissenting in part); *see Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). That is because “[f]ederal statutes do not need to be ‘saved’ by a coequal statute in order to have effect.” *Alt. Entm’t*, 2017 WL 2297620, at *18. If Congress wanted another federal statute to override the FAA, it could simply say so. That explains why the saving clause has *never* played a role in this Court’s cases involving the FAA and another federal statute.

Second, the saving clause applies only to grounds for the revocation of “*any* contract.” 9 U.S.C. § 2 (emphasis added). By its plain meaning, that phrase includes “generally applicable contract defenses, such as fraud, duress, or unconscionability,” that may be invoked with respect to *any* contract, regardless of its subject matter. *Doctor’s Assocs., Inc. v.*

Casarotto, 517 U.S. 681, 687 (1996). The phrase in turn excludes defenses—like any contained in the NLRA—that may be invoked only with respect to a specific subset of contracts, such as employment agreements.

The Court confirmed this straightforward reading in *Southland*, a case involving the California Franchise Investment Law. *See* 465 U.S. at 3-4. That law set out a series of unwaivable protections for franchisees, which California’s highest court had construed to invalidate arbitration provisions in franchise agreements. *Id.* at 10. This Court concluded that, so construed, the franchise law “directly conflict[ed]” with Section 2 of the FAA, which “mandated the enforcement” of such provisions. *Id.*

The Court specifically considered whether the franchise law might nevertheless be permitted to invalidate the arbitration provisions under Section 2’s saving clause. The Court “agree[d], of course, that a party may assert *general* contract defenses such as fraud to avoid enforcement of an arbitration agreement.” *Id.* at 16 n.11 (emphasis added). But the Court held that, unlike fraud, “the defense to arbitration found in the California Franchise Investment Law is not a ground that exists at law or in equity ‘for the revocation of *any* contract.’” *Id.* Rather, it was “merely a ground that exists for the revocation of arbitration provisions in contracts *subject to the California Franchise Investment Law*”—namely, franchise agreements. *Id.* (emphasis added). The Court therefore concluded that the saving clause did not apply.

Southland compels the same conclusion here. Like the franchise law, the NLRA is “not a ground that

exists at law or in equity ‘for the revocation of *any* contract.’” *Id.* Rather, the NLRA is merely a ground that exists for the revocation of arbitration provisions in contracts *subject to the NLRA*. And the NLRA “covers only one type of contract, that between an employer and its covered employees.” *D.R. Horton*, 357 N.L.R.B. at 2287.¹ Statutes like the franchise law and the NLRA—which govern *some* contracts but not *others*—are beyond the scope of the saving clause.

This, too, explains why this Court has *never* relied on the saving clause in a decision involving the FAA and another federal statute. Like the NLRA, the federal statutes at issue in the Court’s prior cases governed a particular subject matter—for instance, the carriage of goods in *Vimar*, the employment relationship in *Gilmer*, and the practices of credit repair organizations in *CompuCredit*. Thus, to the extent those statutes could have been grounds for revocation at all, they would not have been grounds for revocation of “*any* contract”; they would have merely been grounds for revocation of contracts of *the same subject matter*—bills of lading in *Vimar*, contracts involving employment in *Gilmer*, and consumer contracts in *CompuCredit*. Because the saving clause covers only “general contract defenses,” it had no application in those prior cases—just as it has no application here. *Southland*, 465 U.S. at 16 n.11; *see*

¹ The NLRA does not even cover *all* employment contracts. For instance, “significant numbers of workers typically considered to be ‘employees’ in lay terms—supervisors, government employees, and independent contractors being perhaps the largest groups—are not covered by Sec. 7.” *D.R. Horton*, 357 N.L.R.B. at 2288 n.27; *see* 29 U.S.C. § 152(2), (3), (11).

also, e.g., *Doctor's Assocs., Inc. v. Hamilton*, 150 F.3d 157, 163 (2d Cir. 1989); *Carter v. SSC Odin Operating Co.*, 927 N.E.2d 1207, 1219 (Ill. 2010).

In reaching a contrary conclusion, the Seventh Circuit reasoned that the NLRA renders the arbitration provision at issue “illegal,” and that “[i]llegality is one of th[e] grounds” for revocation cognizable under the saving clause. *Epic Pet.* App. 15a. In *Southland*, Justice Stevens adopted that very reasoning—in *lone dissent*. In his view, the franchise law rendered the arbitration provisions “void as a matter of public policy,” and “[a] contract which is deemed void is surely revocable at law or in equity.” *Southland*, 465 U.S. at 20 (Stevens, J., concurring in part and dissenting in part). Thus, according to Justice Stevens, the saving clause provided a “textual basis” for “avoiding” a conflict between the FAA and the franchise law. *Id.* at 19.

The Court in *Southland* disagreed. *Id.* at 16 n.11 (majority opinion). It made clear that cloaking a narrowly applicable law (like the franchise law or the NLRA) in the garb of a generally applicable contract defense (like public policy or illegality) is not enough to bring the law within the saving clause. *Id.* Otherwise, this simple dodge would make the saving clause applicable to *all* contrary laws, federal or state. That cannot be squared with either *Southland* or this Court’s unbroken line of cases enforcing the FAA in the face of narrowly applicable federal statutes without even a mention of the saving clause.²

² In *Vimar*, Justice Stevens reiterated his view of the saving clause—again in solo dissent. See 515 U.S. at 556 (Stevens, J., dissenting). In addressing whether the FAA and COGSA were

Because—like those other federal laws—the NLRA is not a “general contract defense[],” *id.*, it is not a ground covered by the saving clause.

Third, the saving clause does not preserve any ground that would “interfere[] with fundamental attributes of arbitration.” *Concepcion*, 563 U.S. at 344. That is because Section 2 of the FAA “establishes an equal-treatment principle”: A court may not invalidate an arbitration provision based on “legal rules that ‘apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.’” *Kindred Nursing*, 137 S. Ct. at 1426 (quoting *Concepcion*, 563 U.S. at 339). Accordingly, the saving clause does not preserve any “rule discriminating on its face against arbitration.” *Id.* Nor does it preserve “any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements.” *Id.*; see also *Concepcion*, 563 U.S. at 343 (explaining that the saving clause “cannot in reason be construed” as preserving defenses “absolutely inconsistent with” the FAA (internal quotation marks omitted)).

Applying this principle in *Concepcion*, the Court held that the saving clause could not be construed to preserve California’s so-called *Discover Bank* rule—a rule prohibiting certain class waivers as unconscionable. 563 U.S. at 340. Such a rule, the Court explained, “interferes with fundamental attributes of arbitration.” *Id.* at 344. After all, the point of arbi-

“capable of co-existence,” the Court in *Vimar* did not reference the saving clause even once. *Id.* at 533 (majority opinion) (quoting *Morton*, 417 U.S. at 551).

tration is to “allow for efficient, streamlined procedures tailored to the type of dispute.” *Id.* Yet “the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.” *Id.* at 348. In fact, “class arbitration requires procedural formality,” at least if it is to bind absent class members. *Id.* at 349. Worse still, it “greatly increases risks to defendants,” who must face all the risks of class proceedings without any “effective means of review.” *Id.* at 350-351. The *Discover Bank* rule thus discriminated against arbitration by disfavoring one of arbitration’s defining features—namely, the absence of class proceedings. And so the Court found the *Discover Bank* rule preempted, declining to construe the saving clause to preserve it. *Id.* at 352.

The lesson of *Concepcion* is plain: Because “[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration,” the saving clause cannot be construed to preserve such a rule. *Id.* at 344. Thus, even if such a rule could be derived from the NLRA, it would not be covered by the saving clause. *See Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129, 141-142 (Cal. 2014) (Liu, J.) (finding the issue here indistinguishable from *Concepcion*).

Attempting to escape that conclusion, the Seventh Circuit observed that *Concepcion* was a case about the FAA’s relationship with a state law, as opposed to another federal statute. *Epic Pet.* App. 17a. But whether the other law is state or federal matters only to what happens if that law *conflicts* with the FAA: A conflicting state law is necessarily preempt-

ed, whereas a conflicting federal law may or may not be given priority. *See infra* pp. 54-57. *Concepcion's* interpretation of the saving clause goes to an antecedent question: whether the FAA can be read to *accommodate* the other law, thereby avoiding any conflict in the first place. And the answer to that question does not depend on whether the other law is state or federal. A federal law “[r]equiring the availability of classwide arbitration” would “interfere[] with fundamental attributes of arbitration” no less than a state law would. For purposes of the saving clause, therefore, whether the other law is the *Discover Bank* rule or the NLRA makes no difference: Either way, the saving clause “cannot in reason be construed” to accommodate a rule requiring the availability of class arbitration. *Concepcion*, 563 U.S. at 343 (internal quotation marks omitted); *see also Italian Colors*, 133 S. Ct. at 2310, 2312 & n.5 (relying on *Concepcion* in a case where the other law was federal, and rejecting the dissent’s “dismiss[al]” of *Concepcion* as “a case involving pre-emption”).

The Seventh Circuit also maintained that the rule in *Concepcion* was “directed toward arbitration,” whereas the NLRA is a “general principle.” *Epic Pet.* App. 17a. That misunderstands both the *Discover Bank* rule and the NLRA. The *Discover Bank* rule was an application of the unconscionability doctrine, a “generally applicable contract defense[].” *Concepcion*, 563 U.S. at 339 (internal quotation marks omitted). The NLRA, by contrast, applies only to a narrow subset of contracts. *See supra* pp. 20-24. In any event, what mattered in *Concepcion* was what a rule prohibiting class waivers would “accomplish[].” *Kindred Nursing*, 137 S. Ct. at 1426. And because both the NLRA and the *Discover Bank* rule would

accomplish the same thing—namely, both would “interfere[] with fundamental attributes of arbitration”—*Concepcion* compels the conclusion that the saving clause does not apply here. 563 U.S. at 344.

Fourth, the saving clause applies only to grounds “for the *revocation* of any contract.” 9 U.S.C. § 2 (emphasis added). Though Section 2 provides that an arbitration provision shall be “valid, irrevocable, and enforceable,” the saving clause “does not parallel” those words “by referencing the grounds as exist for the ‘invalidation, revocation, or nonenforcement’ of any contract.” *Concepcion*, 563 U.S. at 354 (Thomas, J., concurring). Instead, the saving clause “repeat[s] only one of the three concepts”: “revocation.” *Id.* The text thus demonstrates that the saving clause “does not include all defenses applicable to any contract but rather some subset of those defenses.” *Id.* Lewis seems to acknowledge as much. *See Epic Br. in Opp.* 34 n.7 (explaining that “revocable” has a narrower meaning than “unenforceable” in the context of a saving clause).

The question, then, is which defenses the saving clause includes. Section 4 of the FAA provides the answer. That section gives a party aggrieved by the failure to arbitrate the right to seek an order compelling arbitration. 9 U.S.C. § 4. And it authorizes a court to grant such an order “upon being satisfied that the *making* of the agreement for arbitration or the failure to comply therewith is not in issue.” *Id.* (emphasis added). Section 4 thus clarifies that a court, before directing the parties to arbitration, may consider only certain defenses—defenses relating to “the making of the agreement.” *Id.*; *see also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-404 (1967) (“[I]f the claim is fraud in the

inducement of the arbitration clause itself—an issue which goes to the ‘making’ of the agreement to arbitrate—the federal court may proceed to adjudicate it.”). And for the statutory scheme to make sense, the grounds for “revocation” preserved by the saving clause must be understood to track those same defenses. *See Concepcion*, 563 U.S. at 354-355 (Thomas, J., concurring). Otherwise, Section 2 would preserve defenses pertaining to the arbitration agreement that a court would not be able to consider under Section 4—which would be absurd.

This reading of Section 2 is reinforced by the history of the FAA. “The text of the FAA was based upon that of New York’s arbitration statute.” *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 589 n.7 (2008); *see also* S. Rep. No. 68-536, at 3 (1924); 1920 N.Y. Laws ch. 275, art. 2, § 2 (providing that arbitration provisions “shall be valid, enforceable, and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract”). And in 1923, New York’s highest court construed the text of New York’s law and explained that the “word ‘irrevocable,’ here used, means that the contract to arbitrate *** can only be set aside for facts existing at or before *the time of its making* which would move a court of law or equity to revoke any other contract or provision of a contract.” *Zimmerman v. Cohen*, 139 N.E. 764, 766 (N.Y. 1923) (emphasis added). New York’s highest court thus tied the concept of revocability to the “time of the [agreement’s] making”—suggesting that the saving clause’s concern was limited to whether the agreement was properly made. When Congress enacted the FAA two years later, it was presumably aware of that authoritative

interpretation of the statute it was copying. *See Lorillard v. Pons*, 434 U.S. 575, 581 (1978).

The NLRA does not relate to the making of an agreement. If the NLRA were read to prohibit the arbitration provisions here, it would be not because of how the provisions were made, but rather because of what they contained—a waiver of class proceedings. The objection, in other words, would be to the substance of the provisions, not to their formation. Indeed, the objection would be no different from one based on California’s *Discover Bank* rule, which Justice Thomas had no trouble concluding related to “public-policy reasons,” not to “whether the contract was properly made.” *Concepcion*, 563 U.S. at 357 (Thomas, J., concurring); *see also Italian Colors*, 133 S. Ct. at 2312-2313 (Thomas, J., concurring) (concluding that an argument that a class waiver contravened the antitrust laws did not “concern[] whether the contract was properly made” (internal quotation marks omitted)). Because the NLRA does not relate to contract formation, it is not a ground “for the revocation” of a contract within the meaning of the saving clause.

For each of these reasons, the saving clause does not apply. The Court is left with the unequivocal terms of the rest of Section 2: Arbitration provisions such as these “shall be valid, irrevocable, and enforceable.” 9 U.S.C. § 2. The FAA unambiguously mandates enforcement of the class waivers in these cases.

C. The NLRA Can Be Reasonably Construed To Avoid Conflicting With The FAA

The question, then, is whether the NLRA can be construed to avoid conflicting with the FAA’s unam-

biguous mandate. If there is any ambiguity in the NLRA, the answer must be yes, because this Court has a “duty” to harmonize two statutes “capable of co-existence.” *Morton*, 417 U.S. at 551. Indeed, that duty is particularly strong here, given the presumption that the later-enacted NLRA did not impliedly repeal or amend the FAA. *Fausto*, 484 U.S. at 453. Accordingly, only a “clearly expressed congressional intention” can stand in the way of reconciling the NLRA with the FAA, *Morton*, 417 U.S. at 551, and the “burden” rests with the parties resisting enforcement of the arbitration agreement to point to such a “contrary congressional command,” *McMahon*, 482 U.S. at 226-227.

That burden cannot be met here. Congress did not clearly express any intention to include class proceedings within the right to “engage in *** concerted activities” under Section 7. 29 U.S.C. § 157. Even if it did, Section 8(a)(1)’s bar on employer actions that “interfere with, restrain, or coerce” the exercise of that right does not unambiguously prohibit employers from channeling concerted activities into a particular procedural form. *Id.* § 158(a)(1). And in any event, nothing in the NLRA suggests that employees cannot voluntarily waive a procedural right to take part in class proceedings. For any one of these reasons, the NLRA can—and should—be interpreted harmoniously with the FAA, and the class waivers should be enforced.

**1. “Concerted activities” under Section 7
do not unambiguously include class
proceedings**

- a. Section 7 of the NLRA gives employees the right to engage in “concerted activities.” 29 U.S.C. § 157.

To establish a congressional command contrary to the FAA, the other side would have to identify a “clearly expressed congressional intention” in the NLRA to include class proceedings within the meaning of “concerted activities.” *Morton*, 417 U.S. at 551. No such intention, however, can be clearly discerned “in the text of the [NLRA], its legislative history, or an inherent conflict between [individual] arbitration and the [NLRA’s] underlying purposes.” *Gilmer*, 500 U.S. at 26 (internal quotation marks omitted).

When it comes to the NLRA’s text and history, this Court’s decision in *Italian Colors* is all but dispositive. *Italian Colors* involved the Sherman and Clayton Acts; the respondents argued that those antitrust laws invalidated a class waiver in an arbitration agreement, while the petitioners argued that the class waiver was enforceable under the FAA. 133 S. Ct. at 2308-2309. The Court held that the antitrust laws contained no “congressional command” “contrary” to “the FAA’s mandate.” *Id.* at 2309. The antitrust laws “make no mention of class actions” and, “[i]n fact,” “were enacted decades before the advent of Federal Rule of Civil Procedure 23.” *Id.* It would be “remarkable for a court to erase” a class waiver based on statutes enacted at a time when the “usual rule” was “individual” dispute resolution. *Id.* (internal quotation marks omitted). The Court thus concluded that the “antitrust laws do not evince an intention to preclude a waiver of class-action procedure.” *Id.* (internal quotation marks and brackets omitted).

There are no grounds for a different conclusion here. Like the text of the antitrust laws, the text of the NLRA makes no mention of class actions or class arbitration. In fact, Section 7 makes no mention of

adjudication or arbitration at all. The text of Section 7 thus stands in stark contrast to that of other statutes, which *do* clearly express a congressional intention contrary to the FAA. *See CompuCredit*, 565 U.S. at 103-104 (citing, e.g., 7 U.S.C. § 26(n)(2), providing that “[n]o predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section”); *infra* pp. 55-56 (providing other examples).

Also like the antitrust laws, the NLRA was enacted before Rule 23 and the FLSA, neither of which existed until 1938. *See Italian Colors*, 133 S. Ct. at 2311 (noting the “adoption of the class action for legal relief in 1938”); Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060, 1069 (codified at 29 U.S.C. § 216(b)). Given that history, Congress could not have intended “concerted activities” to include class actions under Rule 23 or collective actions under the FLSA. Nor could Congress have intended them to include class arbitrations, which were barely recognized before the twenty-first century; the American Arbitration Association (AAA) and JAMS did not even adopt rules governing class proceedings until 2003 and 2005, respectively. *See* S.I. Strong, *Class, Mass, and Collective Arbitration in National and International Law* ¶ 2.35, at 43 (2013).

As for the NLRA’s underlying purposes, they do not clearly express any intention to prohibit class waivers either. Congress enacted the NLRA to “encourage[e] practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions.” 29 U.S.C. § 151. Just as collective bargaining is such a practice, so is individual arbitration. In fact, this Court has held that arbitration is of “particular

importance” in the employment context, in which disputes “often involve[] smaller sums of money” that would otherwise be dwarfed by the “costs of litigation.” *Circuit City*, 532 U.S. at 123. The NLRA’s purposes thus do not “inherent[ly] conflict” with individual arbitration. *Gilmer*, 500 U.S. at 26.

One could stop there, for the foregoing is enough to establish that there is no “clearly expressed congressional intention” in the NLRA to include class proceedings within the meaning of “concerted activities.” *Morton*, 417 U.S. at 551. Even if “concerted activities” could “plausibl[y]” be read to include class proceedings, that reading is hardly compelled, and any “doubts” about the meaning of the NLRA must be resolved in favor of harmonizing the statute with the FAA. *CompuCredit*, 565 U.S. at 108-109 (Sotomayor, J., concurring in the judgment); *see McMahon*, 482 U.S. at 226-227.

b. In any event, construing “concerted activities” to include class proceedings is not even a *plausible* interpretation of Section 7. The traditional tools of statutory construction affirmatively rule out that interpretation, making clear beyond doubt that Congress did *not* intend “concerted activities” to encompass class proceedings.

i. Start with the settled principle that “[w]ords in a list are generally known by the company they keep.” *Logan v. United States*, 552 U.S. 23, 31 (2007). “[W]hen a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows.” *Hall St.*, 552 U.S. at 586; *see also Circuit City*, 532 U.S. at 114-115 (applying the *eiusdem generis* canon to the FAA).

In Section 7, the general term “other concerted activities” follows a series of specific items: (1) “self-organization”; (2) “form[ing], join[ing], or assist[ing] labor organizations”; and (3) “bargain[ing] collectively.” 29 U.S.C. § 157. These examples have one basic characteristic in common: They are all things that employees can engage in either on their own or with the involvement of no one other than their employers. If, for example, employees want to self-organize or form a union, that is something they can simply do, without the involvement of anyone else. If they want to bargain collectively, the only other party that has to participate is their employer.

“But class litigation is not something that employees just *do*,” even with their employers. *Alt. Entm’t*, 2017 WL 2297620, at *15 (Sutton, J., concurring in part and dissenting in part). Class proceedings require the involvement of third parties—at a minimum, the courts or arbitrators that hear the claims. Thus, unlike the specific activities listed in Section 7, class proceedings burden parties extrinsic to the employer-employee relationship. This is no small distinction. The general term “other concerted activities” should not be read in a way that imposes obligations on outside parties, where the specifically enumerated activities do no such thing. *See NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 831 & n.8 (1984) (reading “other concerted activities” in light of the “enumerated activities”).

ii. The structure of the NLRA confirms this interpretation. When Congress intended to place obligations on any party, including courts and mediators, it expressly set out those obligations. For example, Section 8(d)(3) requires a party to notify the “Federal Mediation and Conciliation Service” when it desires

to modify or terminate a collective-bargaining agreement in certain industries. 29 U.S.C. § 158(d)(3). If “the collective bargaining involves employees of a health care institution,” Section 8(d)(C) provides that the Service “shall promptly communicate with the parties and use its best efforts *** to bring them to agreement.” *Id.* § 158(d)(C). Similarly, Sections 10(e) and 10(f) give the Board or an aggrieved person the right to obtain judicial review, but they also specify what the courts “shall” do when such a suit is filed. *Id.* § 160(e), (f).

Indeed, even with respect to the employer-employee relationship, Congress did not assume that the creation of a right for one party was sufficient to impose a corresponding obligation on the other. Most significantly, the right of employees to “bargain collectively through representatives of their own choosing” is specifically listed in Section 7. *Id.* at § 157. Yet Congress clearly did not believe that the enumeration of that right, even when coupled with Section 8(a)(1)’s prohibition on employer “interfere[nce],” *id.* § 158(a)(1), was sufficient to obligate employers to bargain with their employees as a unit. So, in Section 8(a)(5), Congress made it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees.” *Id.* § 158(a)(5). Similarly, in Section 8(d), Congress imposed an express “obligation” on employers to “meet” and “confer” with their employees’ collective-bargaining “representative[s].” *Id.* § 158(d). Sections 8(a)(5) and 8(d) accomplish what Sections 7 and 8(a)(1) alone do not: They require employers to treat employees as a unit at the bargaining table.

Congress chose not to enact any similar provisions requiring courts, arbitrators, or employers to treat

employees as a unit within a judicial or arbitral forum. *See Dep’t of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015) (“Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another.”). This Court should not override that choice by reading “concerted activities” to encompass class proceedings.

iii. This Court’s precedent leads to the same conclusion. The Court has recognized “concerted activities” in numerous cases. In each case, those activities took the form of things that employees could do without the involvement of anyone else; none imposed any novel obligation on employers or outside parties to treat employees as a unit. *See City Disposal*, 465 U.S. at 830-837 (unilaterally asserting benefits conferred in a collective-bargaining agreement); *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 703 (1983) (holding union office); *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 260 (1975) (“seeking to have the assistance of [the] union representative”); *Hous. Insulation Contractors Ass’n v. NLRB*, 386 U.S. 664, 668-669 (1967) (refusing to work); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233-234 (1963) (striking); *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 13-14 (1962) (walking out of work); *NLRB v. Drivers*, 362 U.S. 274, 279 (1960) (recruiting new union members).

Eastex v. NLRB, 437 U.S. 556 (1978), is no exception. There, the Court noted that some lower courts, as well as the Board, had held that employees engage in “mutual aid or protection” when “they seek to improve working conditions through resort to administrative and judicial forums.” *Id.* at 565-566 & n.15. But the Court then stated that it was “not address[ing] *** the question of what may constitute

‘concerted’ activities in this context.” *Id.* at 566 n.15. To the extent *Eastex* was even contemplating the possibility that “resort to” a forum might constitute concerted activity, it may have simply had in mind the assertion of rights contained in a collective-bargaining agreement, which this Court has held qualifies as “concerted activit[y]” even when done by “a single employee, acting alone.” *City Disposal*, 465 U.S. at 835.

In any event, even if the NLRA were construed to protect *resort to* a forum by a group of employees, that would not mean that it protected their litigating as a class *once inside*. Filing a lawsuit is something that employees can do without placing any new obligations on their employers or the tribunal. Litigating a class action is not. In 2010, the Board’s then-General Counsel issued a guideline memorandum distinguishing the two. That memorandum stated that an “employee is still protected by Section 7 of the Act if he or she concertedly *files* an employment-related class action lawsuit in the face of [an arbitration agreement containing a class waiver] and may not be threatened or disciplined for doing so.” NLRB, Gen. Counsel Memorandum No. 10-06, at 7 (June 16, 2010) (emphasis added). Nevertheless, the memorandum continued, “[t]he employer *** may lawfully seek to have a class action complaint *dismissed* by the court on the ground that each purported class member is bound by his or her signing of [the arbitration agreement].” *Id.* (emphasis added).

iv. The history of the NLRA confirms that class proceedings are not included within the right to engage in “concerted activities.” To be sure, “there is nothing in the legislative history of § 7 that specifically expresses the understanding of Congress in

enacting the ‘concerted activities’ language.” *See City Disposal*, 465 U.S. at 834. But the broader historical context in which Congress enacted the NLRA does suggest that, to the extent Congress contemplated Section 7’s application in the context of litigation, it did not contemplate class proceedings.

The “source of the language enacted in § 7” was the Norris-LaGuardia Act, a major piece of labor legislation enacted in 1932. *Id.* at 835; *see also* S. Rep. No. 74-573, at 9 (1935) (tracing the language of the NLRA back through various statutes). Section 2 of that Act declared it the “public policy of the United States” that a “worker” “shall be free from the interference, restraint, or coercion of employers *** in self-organization or in *other concerted activities* for the purpose of collective bargaining or other mutual aid or protection.” Ch. 90, § 2, 47 Stat. 70, 70 (1932) (emphasis added) (codified at 29 U.S.C. § 102). In turn, Section 4 of the Act sought to advance that policy by broadly prohibiting federal courts in cases involving labor disputes from enjoining certain activities, whether done “singly or in concert.” *Id.* § 4, 47 Stat. at 70 (codified at 29 U.S.C. § 104).

All of the activities specified in Section 4 were things employees could do on their own, like “[c]easing or refusing to perform any work” or “[b]ecoming or remaining a member of any labor organization.” *Id.* § 4(a), (b), 47 Stat. at 70-71 (codified at 29 U.S.C. § 104(a), (b)). Even the one specified activity relating to litigation—“aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court”—fit that description. *Id.* § 4(d), 47 Stat. at 71 (codified at 29 U.S.C. § 104(d)). What Congress had in mind was employ-

ees helping one another by, for instance, “sending money” to litigants—something employees can do of their own accord, without obligating a tribunal or employer to treat them as a class. *Int'l Org. v. Red Jacket Consol. Coal & Coke Co.*, 18 F.2d 839, 842 (4th Cir. 1927), cited in Felix Frankfurter & Nathan Greene, *The Labor Injunction* 218 n.37 (1930). Given that none of the specified activities had anything to do with class proceedings, there is no reason to think Congress intended “concerted activities” to include class proceedings in the NLRA either. In fact, the sponsor of the NLRA assured his colleagues that Sections 7 and 8 were “grounded in long-established congressional policy.” 79 Cong. Rec. 7569 (1935) (statement of Sen. Wagner).

c. Because the tools of statutory construction all point in the same direction, the meaning of the NLRA is unambiguous: Section 7 does *not* confer a right to “engage in *** concerted activities” *by litigating as a class*. At a minimum, there is no “clearly expressed congressional intention” that it *does*. *Morton*, 417 U.S. at 551. Section 7 should thus be interpreted harmoniously with the FAA, and the class waivers should be enforced.

2. *Section 8 does not unambiguously prohibit employers from channeling concerted activities into individual arbitration*

The problems with reading the NLRA to prohibit class waivers do not end with Section 7. To establish a clearly expressed congressional intention to prohibit class waivers, the other side must demonstrate not only that class proceedings unambiguously qualify as a form of “concerted activit[y],” but also that barring

this particular mechanism for engaging in concerted activity is unambiguously a violation of Section 8(a)(1). Even if the other side could conquer the first obstacle, it would still be unable to overcome the second.

a. Section 8(a)(1) makes it unlawful for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7].” 29 U.S.C. § 158(a)(1). The Seventh Circuit held that preventing employees from litigating as a class interferes with, restrains, or coerces their “*substantive*” right to engage in concerted activities within a judicial or arbitral forum. *Epic Pet. App.* 21a (emphasis added); *see also Ernst & Young Pet. App.* 16a (same); *Murphy Oil Pet. App.* 41a (same); *D.R. Horton*, 357 N.L.R.B. at 2278 (same).

Not so. Class waivers leave employees free to work together at every step of the judicial or arbitral process. Employees may cooperate in hiring a lawyer, drafting their complaints, developing their legal strategies, finding and preparing witnesses, writing briefs, and seeking appellate review. They may even pool their financial and legal resources and present the exact same case in the exact same way for every plaintiff. Indeed, the other side cannot point to a single activity that employees can engage in “concerted[ly]” by litigating as a class that they cannot engage in “concerted[ly]” by litigating individually with the support and assistance of their colleagues. To be sure, a class waiver may channel their “concerted activities” into a different *procedural* form, but their exercise of the *substantive* right remains the same. *See Alt. Entm’t*, 2017 WL 2297620, at *15 (Sutton, J., concurring in part and dissenting in part) (“[T]he ‘concertedness’ of litigation does not turn on

the particular procedural form that litigation takes.”).

b. Because class waivers merely channel concerted activities into a particular *procedural* form, they may be viewed as an unfair labor practice under Section 8(a)(1) only if one of two things is true: *First*, it could be that an employer “interfere[s] with, restrain[s], or coerce[s]” the right to concerted activity whenever it places *any* limit on the procedural mechanisms for exercising the right. *Second*, it could be that class proceedings in particular are necessary to the *effective vindication* of the right to concerted activity, such that employers must keep this specific procedural pathway open. Neither of these propositions is true—let alone unambiguously so.

i. As to the proposition that Section 8(a)(1) prohibits employers from restricting *any* procedural avenue for engaging in concerted activities: The Court has repeatedly upheld—and even praised the importance of—agreements mandating arbitration in the employment context. *See, e.g., Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 65-66 (2010); *Circuit City*, 532 U.S. at 123; *Gilmer*, 500 U.S. at 32. By waiving a judicial forum, however, such agreements eliminate an entire set of procedural avenues for engaging in concerted activities—including those under Rule 23 and the FLSA.

It would be passing strange if, after repeatedly affirming an employer’s ability to place limits on the procedural mechanisms for concerted activity, this Court declared it an unfair labor practice to do so. It would also be surprising to discover that Section 8(a)(1) has prohibited arbitration agreements this whole time, given that “the NLRA is in fact pro-

arbitration,” as even the Seventh Circuit acknowledged. *Epic Pet.* App. 16a; *see also NLRB v. Acme Indus. Co.*, 385 U.S. 432, 439 (1967) (describing “the national policy favoring arbitration” underlying the NLRA).

It is no answer to say that the Court’s prior decisions upholding employment arbitration agreements did not reference the NLRA. That merely confirms the point: Neither this Court nor the employees in those cases apparently even considered the possibility that an arbitration agreement would constitute impermissible interference with the right to engage in concerted activities. That in and of itself forecloses the notion that Section 8(a)(1) *unambiguously* requires employers to refrain from placing limits on the procedural mechanisms for concerted activity.

ii. This Court’s precedent also forecloses the proposition that there is something about class proceedings in particular that requires employers to make them available in order to avoid violating Section 8(a)(1). In *Gilmer*, for example, the Court “had no qualms in enforcing a class waiver in an arbitration agreement,” even though that agreement was being enforced by an employer against its employee, and “even though the federal statute at issue, the Age Discrimination in Employment Act, expressly permitted collective actions.” *Italian Colors*, 133 S. Ct. at 2311 (citing *Gilmer*, 500 U.S. at 32). And in *Italian Colors*, the Court explicitly rejected the proposition that the “effective vindication” of a statutory right depends on the availability of class proceedings, when the statute in question was enacted “before [the] adoption of the class action for legal relief in 1938.” *Id.* “[T]he individual suit that was considered adequate to assure ‘effective vindication’

of a federal right before adoption of class-action procedures did not suddenly become ‘ineffective vindication’ upon their adoption.” *Id.*

Just so here. When Congress enacted Section 8 of the NLRA in 1935—years before the enactment of Rule 23 or the FLSA and decades before the adoption of class procedures by AAA or JAMS—it could not possibly have believed that class proceedings were necessary to vindicate the right to engage in “concerted activities.”

Indeed, class proceedings do not even serve the purpose of that right. Congress granted employees their substantive rights under the NLRA in order to ameliorate the “inequality of bargaining power between employees *** and employers.” 29 U.S.C. § 151. In Congress’s view, that inequality led to unfair salaries and working conditions, which in turn led to industrial strife. *Id.* Granting employees the right to engage in “concerted activities” increased their bargaining power and thereby increased the possibility of fair outcomes in interactions between management and labor.

But in a judicial or arbitral forum, outcomes are not dependent on whether claims are heard as a class or individually. See, e.g., *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion) (“[R]ules allowing multiple claims (and claims by or against multiple parties) to be litigated together *** neither change plaintiffs’ separate entitlements to relief nor abridge defendants’ rights; they alter only how the claims are processed.”); *Stolt-Nielsen*, 559 U.S. at 696 (Ginsburg, J., dissenting) (quoting same); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980) (“[T]he

right of a litigant to employ Rule 23 is a procedural right only ***.”). A fair result is assured by a neutral decision-maker, not the number of litigants on one side. For that reason, class proceedings do not serve the purpose of the right to engage in “concerted activities,” and foreclosing the class option cannot be said to preclude the effective vindication of that right.

c. In short, Section 8(a)(1) does not clearly express a congressional intention to make class waivers an unfair labor practice. That provision should not be read to bar agreements requiring individual arbitration.

3. *The NLRA does not unambiguously prohibit employees from voluntarily waiving class proceedings*

In any event, even if the other side could establish that the NLRA *must* be read to protect a right to take part in class proceedings, employees may still voluntarily waive that procedural right. And under Section 8, there can be no “interfere[nce] with” a right that has been validly waived. 29 U.S.C. § 158(a)(1).

Start from what should be common ground: Employees may validly waive their right to class proceedings in agreements reached through collective bargaining. “This Court long has recognized that a union may waive a member’s statutorily protected rights, including his right to strike during the contract term, and his right to refuse to cross a lawful picket line.” *Metro. Edison*, 460 U.S. at 705 (internal quotation marks omitted); *see, e.g., Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 105-106 (1962). Such waivers are valid, “[p]rovided the selection of the

bargaining representative remains free.” *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280 (1956) (emphasis omitted). Class waivers impose no constraints on the selection of a bargaining representative, so a collective-bargaining agreement may validly waive class proceedings, thereby mandating individual arbitration of each employee’s claims. Not even the Seventh Circuit disputed this point. *See Epic Pet.* App. 17a.

The only difference here is that each employee waived his or her right in an individual agreement. “Nothing in the law,” however, “suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative.” *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258 (2009). Indeed, Section 7 itself contemplates that the right to engage in concerted activities may be individually waived because it explicitly gives each employee “the right to *refrain from* any or all of such activities.” 29 U.S.C. § 157 (emphasis added).

Nor does it matter that a union might have more bargaining power than an individual when contracting with an employer. As this Court held in *Gilmer*, the mere possibility of unequal bargaining power does not justify a categorical rule “hold[ing] that [individual] arbitration agreements are *never* enforceable.” 500 U.S. at 33 (emphasis added). Rather, the Court explained, the “claim of unequal bargaining power is best left for resolution in specific cases,” as part of an inquiry into whether the particular agreement at issue “resulted from the sort of fraud or overwhelming economic power that would provide grounds ‘for the revocation of any contract.’” *Id.* (some internal quotation marks omitted).

Here, as in *Gilmer*, there is “no indication” that the employees in question were “coerced or defrauded” into agreeing to the class waivers. *Id.* On the contrary, as the Board’s General Counsel once explained, “the relative simplicity and informality” of arbitration benefits “employers and employees alike.” NLRB, Gen. Counsel Memorandum No. 10-06, *supra*, at 2. So it should come as no surprise that employees would voluntarily—and thus validly—waive their right to take part in class proceedings.

The Seventh Circuit believed that *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940), and *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944), dictate otherwise. They do not. *National Licorice* involved contracts entered into between employers and individual employees waiving certain Section 7 rights. 309 U.S. at 355. The Court held those contracts unenforceable for two reasons, neither of which applies here. First, the Court held that the contracts were “procured through the mediation of a *company-dominated* labor organization.” *Id.* at 360 (emphasis added). In other words, the contracts were not truly *voluntary*. Second, the Court held that the contracts served to “eliminate the Union as the collective bargaining agency of its employees.” *Id.* (internal quotation marks omitted). That means the employees were no longer free to select their own bargaining representative. *Id.* As explained, the class waivers here do not suffer from either of those flaws.

J.I. Case is similarly inapposite. That case involved a collective-bargaining agreement governing substantive benefits relating to work and pay. *See* 321 U.S. at 334-335. The issue was whether an individual contract could “be effective as a waiver” of those benefits, and the Court answered no. *Id.* at

338. Unlike the individual contracts in *J.I. Case*, however, the class waivers here do not waive any substantive rights. As explained, employees' substantive right to engage in concerted activities remains intact. See *supra* pp. 40-41. The right to take part in class proceedings "is a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guar.*, 445 U.S. at 332; see also *Italian Colors*, 133 S. Ct. at 2311 ("The class-action waiver merely limits arbitration to the two contracting parties."). And, just as this procedural right could be waived in *Gilmer* and *Italian Colors*, it may be waived here. See *Italian Colors*, 133 S. Ct. at 2310-2311 (citing *Gilmer*, 500 U.S. at 32).

Thus, even if the NLRA does create a right to take part in class proceedings, employees are perfectly free to enter into contracts waiving that procedural right, as they did here.

4. Construing the NLRA to prohibit class waivers would lead to absurd results

For the other side to prevail, this Court would have to hold that "concerted activities" unambiguously include class proceedings, that barring class proceedings unambiguously interferes with an employee's substantive right to engage in "concerted activities," and that the NLRA unambiguously prohibits employees from waiving that right in these circumstances. Not only would that require disregarding text, structure, history, purpose, and precedent, but it would also lead to "absurd results." *McNeill v. United States*, 563 U.S. 816, 822 (2011).

For starters, mandatory arbitration in the employment context would be a thing of the past. *Every* agreement requiring arbitration bars proceedings—

including class proceedings—in a *judicial* forum. If barring class proceedings truly interferes with an employee's substantive right to engage in "concerted activities," then every mandatory arbitration agreement would be an unfair labor practice. That would be so even if the agreement provided for class proceedings in an *arbitral* forum. For if the right at issue is truly a substantive right, an employer could not make up for violating it in *one* forum by saying that employees remain able to exercise it in *another* forum. See *D.R. Horton*, 357 N.L.R.B. at 2282 ("[I]f the Act makes it unlawful for employers to require employees to waive their right to engage in one form of activity, it is no defense that employees remain able to engage in *other* concerted activities."). Every employment agreement would have to "leave[] open a judicial forum for class and collective claims." *Id.* at 2288; *cf. id.* at 2289 n.28 (purporting to reserve judgment on this question).

What is more, employers would be forever prohibited from opposing a request for class certification, no matter the forum. That is because any opposition to class certification would stand in the way of—and thus "interfere with"—an employee's substantive right to engage in concerted activities. 29 U.S.C. § 158(a)(1). Employers would be guilty of an unfair labor practice every time they insisted that the strictures of Rule 23 (or some other class-action provision) be obeyed.

It gets worse. Not only would employers be unable to oppose requests for class certification, but courts would be unable to deny them. The reason is simple: The Rules Enabling Act provides that the federal rules—including Rule 23—"shall not abridge *** or modify any substantive right." 28 U.S.C. § 2072(b).

So even though Rule 23 “imposes stringent requirements for certification that in practice exclude most claims,” *Italian Colors*, 133 S. Ct. at 2310, courts would be powerless to enforce those requirements to bar class proceedings, lest the Rule “abridge” or “modify” an employee’s substantive right to engage in concerted activities.

The upshot of all this is that, if the other side’s reading of the NLRA is correct, employees could *always* litigate their claims as a class in court, where class certification could *never* be opposed or denied. Congress could not have intended such an outcome. *See* 79 Cong. Rec. at 7569 (statement of Sen. Warner) (“emphasiz[ing]” to his colleagues “how limited” Sections 7 and 8 are “in their scope”). Because the Court should avoid interpretations of a statute that would produce “absurd results,” *McNeill*, 563 U.S. at 822, it should not construe the NLRA to bar the class waivers in these cases.

* * *

In the end, the Court is left with one statute (the FAA) that unambiguously mandates enforcement of the class waivers, and another statute (the NLRA) that can—at a minimum—be reasonably construed to permit those waivers. Under these circumstances, the Court’s “duty” is plain: to bring the two statutes into harmony by adopting that reasonable construction of the NLRA. *Morton*, 417 U.S. at 551.

D. The Board’s Contrary View Is Not Entitled To Deference

In 2012, the Board adopted a different view. *D.R. Horton*, 357 N.L.R.B. at 2277. Having found what it believed to be “an appropriate accommodation of the policies underlying the two statutes,” *id.* at 2284, the

Board held that the NLRA renders class waivers unenforceable in arbitration agreements between employers and employees, notwithstanding the FAA. *Id.* at 2277; *see also Murphy Oil Pet.* App. 22a (“reaffirm[ing]” the Board’s *D.R. Horton* decision). That view is not entitled to *Chevron* deference.

1. Most fundamentally, there is no room for deference here. At *Chevron*’s first step, a court, after applying the “traditional tools of statutory construction,” “must give effect to the unambiguously expressed intent of Congress.” *Chevron*, 467 U.S. at 843 & n.9. Here, the NLRA unambiguously does *not* prohibit class waivers. *See supra* pp. 33-49; *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 576 (1994) (rejecting Board interpretation inconsistent with the NLRA). But even if the NLRA were ambiguous, construing the statute *not* to prohibit class waivers would be the only way of harmonizing it with the unambiguously expressed intent of the FAA. *See supra* pp. 29-49. Because the NLRA is capable of such a construction, a court applying the harmonization principle has a “duty” to adopt it, regardless of the Board’s views. *Morton*, 417 U.S. at 551; *see also Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2207 (2014) (plurality opinion) (“Were there an interpretation that gave each clause full effect, the [agency] would have been required to adopt it.”). The traditional tools of statutory construction thus resolve any ambiguity in the NLRA, leaving only one permissible construction. Any other construction of the NLRA would bring the two federal statutes into conflict, which is something only *Congress* may choose to do. *See CompuCredit*, 565 U.S. at 98 (no conflict absent a “contrary congressional command” (emphasis added)); *Morton*, 417

U.S. at 551 (no conflict absent a “clearly expressed congressional intention to the contrary” (emphasis added)).

The Court has declined to defer to the Board in similar circumstances. For example, in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), the Board construed the NLRA as authorizing it to remedy an employer’s violation of the statute by awarding “backpay to an undocumented alien who ha[d] never been legally authorized to work in the United States.” *Id.* at 140. The Court acknowledged that “the Board’s discretion to select and fashion remedies for violations of the NLRA” is “generally broad.” *Id.* at 142. But it held that this particular remedy was “foreclosed by federal immigration policy, as expressed by Congress in the Immigration Reform and Control Act of 1986 (IRCA).” *Id.* at 140. IRCA “made it criminally punishable for an alien to obtain employment with false documents.” *Id.* at 149. And because “awarding backpay to illegal aliens r[an] counter to policies underlying IRCA,” the Court held that there was no room for deference: The award lay “beyond the bounds of the Board’s remedial discretion.” *Id.*; see also *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575-578 (1988) (Board interpretation foreclosed by canon of constitutional avoidance); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 532 (1984) (Board interpretation foreclosed by Bankruptcy Code); *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 40-46 (1942) (Board interpretation foreclosed by federal maritime statute).

Just as IRCA foreclosed the Board’s position in *Hoffman*, the FAA forecloses the Board’s position here. However broad the Board’s discretion to con-

strue the NLRA may generally be, it cannot be exercised in a way that “trenches upon” another federal statute, such as the FAA. *Hoffman*, 535 U.S. at 147. Where, as here, there is only one way of harmonizing a statute with Congress’s unambiguously expressed intent in another, the court, as well as the agency, is required to adopt that interpretation. *See Morton*, 417 U.S. at 551; *Scialabba*, 134 S. Ct. at 2207 (plurality opinion). Accordingly, there is no room for deference; the inquiry should end at *Chevron* Step One.

2. Deference is inappropriate for another reason: Congress has not delegated to the Board any authority to interpret the FAA. Under *Chevron*, courts may defer only to “an agency’s construction of the statute *which it administers*.” 467 U.S. at 842 (emphasis added). That is because deference rests on a presumption that an agency has been delegated the authority to fill in statutory gaps. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). And an agency cannot claim such a delegation unless it has been “charged with the administration of the statute.” *Chevron*, 467 U.S. at 865-866; *see also Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 138 n.9 (1997) (no deference where the Administrative Procedure Act “is not a statute that the Director is charged with administering”); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-650 (1990) (no deference where the Labor Secretary lacked the necessary “congressional delegation of administrative authority” to interpret the Migrant and Seasonal Agricultural Worker Protection Act).

Congress has charged the Board with administering the NLRA—and only the NLRA. *See* 29 U.S.C. § 156; *NLRB v. Sw. Gen., Inc.*, 137 S. Ct. 929, 937

(2017). Accordingly, this Court has declined to defer to the Board’s construction of other federal laws, including maritime laws, the Bankruptcy Code, the Immigration and Nationality Act, IRCA, and the Interstate Commerce Act. *See Hoffman*, 535 U.S. at 151 n.5 (collecting cases). In *Southern S.S.*, for example, the Board ordered the reinstatement of striking sailors after concluding that their conduct did not violate a federal maritime statute, but the Court held that “the Board’s interpretation of a statute so far removed from its expertise merited no deference.” *Id.* at 143-144 (citing *Southern S.S.*, 316 U.S. at 40-46). Since then, the Court has “never deferred to the Board’s remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA.” *Id.* at 144. And the Court has continued to regard deference to “the Board’s interpretation of statutes outside its expertise” as a “novel” proposition. *Bildisco*, 465 U.S. at 529 n.9.

Here, the Board’s position rests not just on an interpretation of the NLRA, but also on an interpretation of the FAA. The Board attempted to “accommodate[] the policies underlying both statutes” by construing the FAA’s saving clause to apply to the NLRA. *D.R. Horton*, 357 N.L.R.B. at 2284, 2287. But Congress has not charged the Board—or any other agency—with administering the FAA. The Board thus has no special role in construing the FAA or in applying this Court’s FAA decisions. *See NLRB v. Int’l Bhd. of Elec. Workers, Local 340*, 481 U.S. 573, 596 (1987) (Scalia, J., concurring in the judgment) (no deference to the Board’s interpretation of this Court’s opinions).

For these reasons, the Court owes the Board no deference on how to harmonize the NLRA with the FAA. Rather, the Court has a duty to harmonize the two statutes in the only way that it can: by reasonably construing the NLRA as consistent with the FAA's unambiguous mandate that the class waivers be enforced.

II. IF THE FAA AND THE NLRA CANNOT BE HARMONIZED, THE FAA SHOULD BE GIVEN PRIORITY

Even if the Court is unable to harmonize the two statutes, the outcome should be the same. If the Court concludes that the FAA *unambiguously mandates* enforcement of the class waivers and that the NLRA *unambiguously prohibits* their enforcement, the two statutes would be in irreconcilable conflict; the clearly expressed intention of one would be contrary to the clearly expressed intention of the other. The question would then be which of those two contrary congressional commands should be given "priority." *Vimar*, 515 U.S. at 533. The answer is the FAA.

First, the FAA is the more specific of the two statutes. "[A] specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton*, 417 U.S. at 550-551. Which of two statutes is the specific one depends on which "comes closer to addressing the very problem posed by the case at hand." *Scalia & Garner, supra*, at 183; *see also Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (explaining that the specific statute is the statute enacted "when the mind of the legislator [was] turned to the details of a subject" (internal quotation marks omitted)).

At a certain level, the FAA and the NLRA have comparable claims to specificity: The FAA focuses on arbitration, while the NLRA focuses on labor relations. But only the FAA discusses arbitration provisions in the context of individual employment contracts. In its very first section, the FAA exempts “*contracts of employment* of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” 9 U.S.C. § 1 (emphasis added). In other words, it provides that arbitration provisions must be enforced, *id.* § 2, except in “contracts of employment of transportation workers.” *Circuit City*, 532 U.S. at 119. The clear implication, as this Court has recognized, is that arbitration provisions in *other* employment contracts remain subject to the FAA. *See id.* at 114-119. Thus, in enacting the FAA, Congress focused on the very subject at hand: the use of arbitration provisions in individual employment contracts.

The same cannot be said of the NLRA, which never squarely addresses that subject. Accordingly, the FAA should control. *See United States v. Estate of Romani*, 523 U.S. 517, 532 (1998) (giving effect to “the more specific statute” whose “provisions are comprehensive”).

Second, when Congress does want to override the FAA, it does so in the most specific language—reinforcing the conclusion that the language of the NLRA is too general to accomplish the same result. One federal statute, for example, specifies that “arbitration may be used *** only if” certain conditions are met. 15 U.S.C. § 1226(a)(2). Other federal statutes specify that “[n]o predispute arbitration agreement shall be valid or enforceable” in a particular context. 7 U.S.C. § 26(n)(2); *see also* 12 U.S.C.

§ 5567(d)(2) (similar); 18 U.S.C. § 1514A(e)(2) (similar). And still other federal statutes specify that an agency may “prohibit” or “impose conditions or limitations on the use of” agreements to “arbitrate” certain disputes. 15 U.S.C. § 80b-5(f) (Securities and Exchange Commission); *see also* 12 U.S.C. § 5518(b) (similar authorization to Consumer Financial Protection Bureau).

Congress, in short, has restricted arbitration agreements in several discrete contexts. Each time, it has specifically mentioned arbitration agreements in the relevant statute. If Congress had wanted the NLRA to trump the FAA, one would have expected Congress to have used similarly specific language.

Third, the enforceability of class waivers forms the core of the FAA, while such waivers are at most a peripheral concern of the NLRA. *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 243 (1959) (explaining that the NLRA does not preempt the regulation of activity that is “merely” a “peripheral concern” of the statute). The rule that arbitration provisions “shall be valid, irrevocable, and enforceable,” 9 U.S.C. § 2, is the FAA’s “primary” command, *Gilmer*, 500 U.S. at 24. That command has particular force when it comes to class waivers, which preserve the “fundamental attributes of arbitration.” *Concepcion*, 563 U.S. at 344. And arbitration is of “particular importance” in the employment context, where “the costs of litigation” often exceed the “smaller sums of money” at stake. *Circuit City*, 532 U.S. at 123. Indeed, “employers and employees alike may derive significant advantages” from the “relative simplicity and informality of resolving claims before arbitrators,” NLRB, Gen. Counsel Memorandum No. 10-06, *supra*, at 2—which is why

“individual-arbitration agreements have become so widespread,” *Murphy Oil* Pet. 24. A rule prohibiting class waivers in employment arbitration agreements would thus strike at the very heart of the FAA—contradicting the statute’s “primary” command with respect to a “fundamental” provision in a wide swath of cases in which arbitration is of “particular importance.”

By contrast, if the right to take part in class proceedings is a right the NLRA protects at all, it is at most a “peripheral” one. *Garmon*, 359 U.S. at 243. The “essence” of the NLRA is “[c]ollective bargaining, with the right to strike at its core.” *Motor Coach Emps. v. Missouri*, 374 U.S. 74, 82 (1963). Rule 23 and the FLSA did not even exist when the NLRA was enacted. Giving priority to the FAA would preserve the bulk of the NLRA’s protections, whereas giving priority to the NLRA would carve out a large portion of contracts from the FAA’s core. Because the NLRA is the statute “whose policy and principle would be relatively less impaired by nonapplication,” the FAA should prevail. William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 Duke L.J. 1215, 1260 (2001).

Thus, even if the commands of the two statutes were contrary to each other, it is the command of the FAA that should take precedence. The Court should enforce the class waivers at issue.

CONCLUSION

The judgment of the Fifth Circuit in *Murphy Oil* should be affirmed, and the judgment of the Seventh Circuit in *Epic* should be reversed.

Respectfully submitted,

NOAH A. FINKEL
 ANDREW SCROGGINS
 SEYFARTH SHAW LLP
 233 South Wacker Drive
 Suite 8000
 Chicago, IL 60606
Counsel for Epic Systems Corporation

JEFFREY A. SCHWARTZ
 JACKSON LEWIS P.C.
 1155 Peachtree Street, NE
 Suite 1000
 Atlanta, GA 30309

 DANIEL D. SCHUDROFF
 JACKSON LEWIS P.C.
 666 Third Avenue
 New York, NY 10017

Counsel for Murphy Oil USA, Inc.

NEAL KUMAR KATYAL
Counsel of Record
 FREDERICK LIU
 COLLEEN E. ROH SINZDAK
 DANIEL J.T. SCHUKER
 HOGAN LOVELLS US LLP
 555 Thirteenth Street, NW
 Washington, DC 20004
 (202) 637-5600
 neal.katyal@hoganlovells.com

 THOMAS P. SCHMIDT
 HOGAN LOVELLS US LLP
 875 Third Avenue
 New York, NY 10022

Counsel for Epic Systems Corporation and Murphy Oil USA, Inc.

JUNE 2017

ADDENDUM

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STATUTORY PROVISIONS INVOLVED

**Section 1 of the Federal Arbitration Act (FAA),
9 U.S.C. § 1, provides:**

“Maritime transactions” and “commerce” defined;
exceptions to operation of title

“Maritime transactions”, as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; “commerce”, as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

Section 2 of the FAA, 9 U.S.C. § 2, provides:

Validity, irrevocability, and
enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the

(1a)

refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 3 of the FAA, 9 U.S.C. § 3, provides:

Stay of proceedings where issue
therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Section 4 of the FAA, 9 U.S.C. § 4, provides:

Failure to arbitrate under agreement; petition to
United States court having jurisdiction for order to
compel arbitration; notice and service thereof;
hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil

action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a

default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Section 1 of the National Labor Relations Act (NLRA), 29 U.S.C. § 151, provides:

Findings and declaration of policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of

competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Section 2 of the NLRA, 29 U.S.C. § 152, provides:

Definitions

When used in this subchapter—

- (1) The term “person” includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under Title 11, or receivers.
- (2) The term “employer” includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

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- (3) The term “employee” shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.
- (4) The term “representatives” includes any individual or labor organization.
- (5) The term “labor organization” means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.
- (6) The term “commerce” means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United

States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

- (7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.
- (8) The term "unfair labor practice" means any unfair labor practice listed in section 158 of this title.
- (9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.
- (10) The term "National Labor Relations Board" means the National Labor Relations Board provided for in section 153 of this title.
- (11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with

the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(12) The term “professional employee” means—

- (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or
- (b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

(13) In determining whether any person is acting as an “agent” of another person so as to make such other person responsible for his acts, the ques-

tion of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

- (14) The term "health care institution" shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person.

Section 6 of the NLRA, 29 U.S.C. § 156, provides:

Rules and regulations

The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by subchapter II of chapter 5 of Title 5, such rules and regulations as may be necessary to carry out the provisions of this subchapter.

Section 7 of the NLRA, 29 U.S.C. § 157, provides:

Right of employees as to organization,
collective bargaining, etc.

Employees 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 shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8 of the NLRA, 29 U.S.C. § 158, provides in pertinent part:

Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
- (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;
- (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement,

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whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

- (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this sub-chapter;
- (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

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* * *

- (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—
- (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;
 - (2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;
 - (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and

simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

- (4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of

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status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

- (A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.
- (B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.
- (C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

* * *

Section 10 of the NLRA, 29 U.S.C. § 160, provides in pertinent part:

* * *

- (e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be con-

clusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

- (f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in

question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * *

No. 16-285

In the Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
PETITIONER

v.

JACOB LEWIS

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT*

BRIEF FOR THE RESPONDENT

DAVID C. ZOELLER	DANIEL R. ORTIZ
WILLIAM E. PARSONS	<i>Counsel of Record</i>
CAITLIN M. MADDEN	TOBY J. HEYTENS
KATELYNN M. WILLIAMS	UNIVERSITY OF VIRGINIA
HAWKS QUINDEL, S.C.	SCHOOL OF LAW
222 West Washington	SUPREME COURT
Ave., Suite 450	LITIGATION CLINIC
Madison, WI 53701	580 Massie Road
(608) 257-0040	Charlottesville, VA 22903
	(434) 924-3127
	<i>dro@virginia.edu</i>

[Additional Counsel Listed on Inside Cover]

ADAM HANSEN
APOLLO LAW LLC
*400 South 4th Street,
Suite 401M - 250
Minneapolis, MN 55415
(612) 927-2969*

QUESTION PRESENTED

Whether arbitration agreements with individual employees that bar them from pursuing work-related claims on a joint basis in any forum are illegal because they limit the employees' right under the National Labor Relations and Norris-LaGuardia Acts to engage in "concerted activities" in pursuit of their "mutual aid or protection," 29 U.S.C. 157, 102, and are therefore unenforceable under the Federal Arbitration Act, 9 U.S.C. 1 *et seq.*

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<i>Extendicare Homes, Inc.</i> , 348 N.L.R.B. 1062 (2006).....	34
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<i>Green Tree Fin. Corp.-Ala. v. Randolph</i> , 531 U.S. 79 (2000).....	45
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<i>Hishon v. King & Spalding</i> , 467 U.S. 69 (1984)....	55
<i>In re Nat'l Gypsum Co.</i> , 118 F.3d 1056 (5th Cir. 1997)	49, 50
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<i>Iskanian v. CLS Transp. L. A., LLC</i> , 327 P.3d 129 (Cal. 2014)	22
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<i>Nat'l Licorice Co. v. NLRB</i> , 309 U.S. 350 (1940).....	28, 29, 30
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<i>NLRB v. City Disposal Sys., Inc.</i> , 465 U.S. 822 (1984).....	<i>passim</i>
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<i>NLRB v. J. Weingarten, Inc.</i> , 420 U.S. 251 (1975)	6, 15, 16
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<i>NLRB v. Pilgrim Foods, Inc.</i> , 591 F.2d 110 (1st Cir. 1978)	34
<i>NLRB v. Wash. Aluminum Co.</i> , 370 U.S. 9 (1962).....	25
<i>Paramount Famous Lasky Corp. v. United States</i> , 282 U.S. 30 (1930)	54
<i>Phillips Petroleum Co. v. Shutts</i> , 472 U.S. 797 (1985)	18
<i>Posadas v. Nat'l City Bank of New York</i> , 296 U.S. 497 (1936)	51

<i>Prima Paint Corp. v. Flood & Conklin Mfg. Co.</i> , 388 U.S. 395 (1967)	7-8
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<i>Spandsco Oil & Royalty Co.</i> , 42 N.L.R.B. 942 (1942)	26
<i>TC Heartland LLC v. Kraft Foods Group Brands LLC</i> , 137 S. Ct. 1514 (2017)	38
<i>Testa v. Katt</i> , 330 U.S. 386 (1947)	37-38
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<i>Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer</i> , 515 U.S. 528 (1995)	44, 46
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<u>Statutes:</u>	
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Legislative Materials:

<i>Arbitration of Interstate Commercial Disputes: Joint Hearings before the Subcomms. of the H. & S. on the Judiciary on S. 1005 & H.R. 646, 68th Cong., 1st Sess. 19 (1924).....</i>	42-43
<i>Hearings Before the Senate Comm. on Educ. & Labor on S. 1958, 74th Cong., 1st Sess. (1935), reprinted in 1 NLRB, Legislative History of the National Labor Relations Act 1935 (1949)</i>	16, 19
H.R. Rep. No. 80-255, 80th Cong., 1st Sess. (1947)	51
H.R. Rep. No. 80-251, 80th Cong., 1st Sess. (1947)	51
H.R. Rep. No. 72-669, 72d Cong., 1st Sess. (1932)	24
S. Rep. No. 80-664, 80th Cong., 1st Sess. (1947)	51
S. Rep. No. 72-163, 72d Cong., 1st Sess. (1932)	23-24
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78 Cong. Rec. 3,679 (1934)	24-25
75 Cong. Rec. 4,504 (1932)	24
<u>Miscellaneous:</u>	
<i>Black's Law Dictionary</i> (Garner ed., 10th ed. 2014).....	12
<i>Black's Law Dictionary</i> (3d ed. 1933).....	12
Daniel T. Deacon, <i>Agencies and Arbitration</i> , 117 Colum. L. Rev. 991 (2017).....	18
Matthew W. Finkin, <i>The Meaning and Contemporary Vitality of the Norris- LaGuardia Act</i> , 93 Neb. L. Rev. 6 (2014)	23
Arthur Allen Leff, <i>Unconscionability and the Code—The Emperor's New Clause</i> , 115 U. Pa. L. Rev. 485 (1967).....	40-41
<i>New Oxford American Dictionary</i> (3d ed. 2010)	11
Harry G. Prince, <i>Unconscionability in Califor- nia: A Need for Restraint and Consistency</i> , 46 Hastings L.J. 459 (1995)	41
Restatement (Second) of Contracts (Am. Law. Inst. 1981).....	36
Joel I. Seidman, <i>The Yellow Dog Contract (1932))</i>	23
U.S. Coal Comm'n, <i>Report of the United States Coal Commission</i> (1923).....	23
<i>Webster's New International Dictionary of the English Language</i> (2d ed. 1936)	12, 27, 28

*Webster's Third New International Dictionary,
Unabridged* (Gove ed., 1993) 11, 27, 28

BRIEF FOR THE RESPONDENT

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are set out in the appendix. App. 1a-7a.

STATEMENT

A. Statutory Background

1. In the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, Congress articulated “the policy of the United States” of “protecting the exercise by workers of full freedom of association.” 29 U.S.C. 151. Section 7 of the NLRA expressly provides that “[e]mployees shall have the right * * * to engage in * * * concerted activities for the purpose of * * * mutual aid or protection.” 29 U.S.C. 157. This Court has described the rights under section 7 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).

The NLRA also provides that any employer that “interfere[s] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in section [7]” commits an unfair labor practice, 29 U.S.C. 158(a)(1), and this Court has held that the “acts which constitute the unfair labor practice [are] unlawful,” *NLRB v. Express Publ’g Co.*, 312 U.S. 426, 436 (1941). In addition, the Norris-LaGuardia Act of 1932 (NLGA), 29 U.S.C. 101 *et seq.*, declares that employees “shall be free from the interference, restraint, or coercion of

employers *** in *** concerted activities for the purpose of *** mutual aid or protection,” *id.* 102, and that any contrary “undertaking or promise *** shall not be enforceable,” *id.* 103.

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

B. Factual Background And Court Proceedings

1. On April 2, 2014, petitioner Epic Systems Corporation (Epic), a healthcare software company, sent an email containing an arbitration agreement to some of its employees, including respondent Jacob Lewis. Pet. App. 1a-2a. The agreement required employees to bring all wage-and-hour claims through individual arbitration and stated that the employees waived “the right to participate *in* or receive money or any other relief from any class, collective, or representative proceeding.” *Id.* at 2a. The agreement included a clause stating that if this ban was deemed unenforceable, “any claim brought on a class, collective, or representative action basis must be filed *in* a court of competent jurisdiction.” *Ibid.* It also stated that employees were “deemed to have accepted this Agreement” if they “continue[d] to work at Epic.” *Ibid.* “Epic gave employees no option to decline [the agreement] if they wanted to keep their jobs.” *Ibid.*

2. In February 2015, Lewis sued Epic in federal court on behalf of a putative group of technical communications employees, claiming that Epic had denied them required overtime pay. Pet. App. 2a. Although the court did not notify other employees of the suit, several joined shortly thereafter. See, e.g., Notice of Consent to Join Lawsuit, Ex. A, ECF No. 18 (Brittaini Maul); Notice of Consent to Join Lawsuit, Ex. A, ECF No. 14 (Charles Blackburn). Epic moved to dismiss the complaint, arguing that Lewis, through the arbitration agreement, had waived his right to bring in court any claim involving the payment of wages and any right to participate in joint actions. Pet. App. 2a, 24a. Lewis responded that the agreement was unenforceable because, among other reasons, it interfered with his and his coworkers' right to engage in "concerted activities" under section 7 of the NLRA. *Id.* at 2a-3a. He also argued that pursuant to the arbitration agreement's own saving clause his class suit was properly brought in federal court. *Id.* at 25a. The district court agreed. *Id.* at 28a.

3. The Seventh Circuit unanimously affirmed. The court noted first that section 7 of the NLRA provides that "[e]mployees shall have the right * * * to engage in * * * concerted activities for the purpose of * * * mutual aid or protection"; that section 8 "enforces Section 7 unconditionally by deeming that it 'shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 7]'"'; and that "the [National Labor Relations] Board [(NLRB)] has, 'from its earliest days,' held that 'employer-imposed, individual agreements that purport to restrict Section 7 rights' are unenforceable" and "has

done so with ‘uniform judicial approval.’” Pet. App. 3a-4a (citations omitted; first brackets in original). “[B]oth courts and the [NLRB],” the court added, “have held that filing a collective or class action suit constitutes ‘concerted activit[y]’ under Section 7.” *Id.* at 4a.

“Section 7’s text, history, and purpose,” the court argued, “support this rule.” Pet. App. 5a. “Collective or class legal proceedings fit well within the ordinary understanding of ‘concerted activities,’ ” *ibid.*, the relevant statutory term, and “[t]he NLRA’s history and purpose confirm that the phrase *** should be read broadly to include resort to representative, joint, collective, or class legal remedies,” *id.* at 6a. The court alternatively held that “even if Section 7 *were* ambiguous—and it is not”—the NLRB’s interpretation is “entitled to *Chevron* deference.” Pet. App. 7a.

With these legal principles established, the court determined that “[t]he question thus becomes whether Epic’s arbitration provision impinges on ‘Section 7 rights.’ The answer is yes.” Pet. App. 9a. The collective action ban, it held, “runs straight into the teeth of Section 7” and is therefore “unenforceable.” *Id.* at 10a.

The court then turned to the FAA. It first rejected Epic’s argument that the “FAA trumps the NLRA.” Pet. App. 12a. “[T]his argument,” the court noted, “puts the cart before the horse.” *Id.* at 13a. As the court explained, “[b]efore we rush to decide whether one statute eclipses another, we must stop to see if the two statutes conflict at all.” *Ibid.* Because the FAA’s own saving clause forecloses arbitration

‘upon such grounds as exist at law or in equity for the revocation of any contract’ [and i]llegality is one of those grounds[, a] contract provision[] like Epic’s, which strip[s] away employees’ rights to engage in ‘concerted activities’ * * * is illegal, and meets the criteria of the FAA’s saving clause for nonenforcement.

Id. at 15a (internal citation omitted).

Then the court rejected Epic’s argument that section 7’s right to collective action “is procedural only, not substantive, and thus the FAA demands enforcement.” Pet. App. 20a. “The right to collective action,” it stated, “lies at the heart of the restructuring of employer/employee relationships that Congress meant to achieve in the statute.” *Ibid.* In fact, it held, “Section 7 is the NLRA’s *only* substantive provision. Every other provision of the statute serves to enforce the rights Section 7 protects.” *Id.* at 21a.

SUMMARY OF ARGUMENT

The court of appeals correctly held that the right to engage in “concerted activities” guaranteed by section 7 of NLRA includes joint legal action and that any contract that violates this right is illegal. It also correctly held that that this illegal contract could not be resuscitated by requiring an employee to sign an arbitration agreement.

I. Section 7 of the NLRA grants employees a broad right to pursue joint legal action. Employees have the right, it states, “to engage in * * * concerted activities for the purpose of * * * mutual aid or protection.” 29 U.S.C. 157. In particular, this Court has explained that section 7 protects the right to “seek to improve

working conditions through resort to administrative and judicial forums.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-566 (1978). Courts and the NLRB have consistently held that section 7 includes the right to jointly pursue work-related legal claims.

The text, purpose, and history of section 7 strongly support this judicial consensus. The plain meaning of “concerted activities” undoubtedly includes joint legal activities. Indeed, courts have read “concerted activities” broadly to protect many individual employee actions even when “the employee alone may have an immediate stake in the outcome.” *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 260 (1975). The NLRA’s legislative history, moreover, supports this common-sense interpretation of section 7’s text.

In addition, the NLRA’s underlying purpose compels a reading of “concerted activities” that includes joint legal action. This Court has recognized that section 7 was passed “to equalize the bargaining power of the employee with that of his employer by allowing employees to band together.” *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 835 (1984). Joint legal action advances this purpose by enabling employees to jointly seek those protections that law gives them. This purpose is made particularly clear by the history of the NLRA and the NLGA. Both statutes were enacted specifically to give employees the ability to band together in a wide variety of ways, including through legal action, a means less confrontational and disruptive to the employer-employee relationship than traditional economic weapons, like striking.

Consistent with the NLRA’s plain language, purpose, and history, the NLRB has interpreted

section 7 to protect joint legal action, stating unambiguously that “the substantive right to engage in concerted activity *** through litigation or arbitration lies at the core of the rights protected by section 7.” *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2281 (2012) (*Horton I*). This longstanding and consistent interpretation is entitled to deference.

Section 8 of the NLRA renders unlawful any contract that violates the rights granted by section 7. This section asserts that “[i]t shall be an unfair labor practice for an employer *** to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7].” 29 U.S.C. 158. By forcing employees to sign an agreement which “interfere[d] with, restrain[ed], [and] coerce[d]” their “exercise of the rights guaranteed in section [7,]” Epic engaged in an illegal “unfair labor practice.” *Ibid.* The ban against joint legal action thus violates federal law and federal courts cannot enforce it.

II. Nothing in the FAA revives Epic’s ban. First, even if the FAA were applicable, its own terms would preclude enforcement. The Act provides three grounds for doing so: (1) its saving clause, (2) the prospective waiver doctrine, and (3) a contrary congressional command as shown by congressional intent. All three grounds bar enforcement here.

The FAA’s saving clause provides that arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds *** for the revocation of any contract.” 9 U.S.C. 2. It recognizes that the FAA was designed “to make arbitration agreements as enforceable as other contracts, but not more so.” *Prima Paint Corp. v. Flood & Conklin Mfg.*

Co., 388 U.S. 395, 404 n.12 (1967). Hence, where arbitration contracts are subject to “generally applicable contract defenses,” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (citation omitted), such as illegality, the FAA prevents enforcement to avoid offering *extra* protection.

Epic’s ban is illegal because it “interfer[es]” with employees’ right to pursue joint action in violation of the NLRA and NLGA. 29 U.S.C. 102; 158(a)(1). Thus, the FAA’s saving clause renders it unenforceable. This illegality defense is “generally applicable,” moreover, because it rests on Epic’s forbidding *all* forms of joint legal action. It does not target arbitration.

Epic’s ban also violates the prospective waiver doctrine, which nullifies specific terms in “arbitration agreements that ‘operat[e] . . . as a prospective waiver’ of core federal statutory rights. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013) (citation omitted). The doctrine patently applies to Epic’s ban, which not only conflicts with federal statutes, but also infringes the right *most* central to their purposes.

The NLRA and NLGA also represent a strong signal from Congress that courts should not uphold joint-action bans. Although arbitration agreements are generally enforced “according to their terms,” *Italian Colors*, 133 S. Ct. at 2309, “th[at] mandate may be overridden by a contrary congressional command” evidenced by a statute’s text, its legislative history, or “an inherent conflict between arbitration and the statute’s underlying purposes.” *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226-227 (1987).

There is certainly such a command here. The NLRA's and NLGA's text, history, and purposes unambiguously conflict with contract terms, such as Epic's, that ban employees from "band[ing] together," *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 835 (1984), "for the purpose of *** mutual aid or protection," 29 U.S.C. 157. No magic words are required.

Lastly, the employers read this Court's contrary-congressional-command jurisprudence so narrowly, allowing only specific and emphatic textual directives to count, that they would require enforcement of *any* arbitration provision, even one violating another federal statute, so long as that statute failed to reference arbitration specifically. Not only is this outcome absurd, but it would also render arbitration agreements substantially *more* enforceable than other contracts.

In sum, Epic's ban against joint legal action is unlawful under both the NLRA and NLGA. Further analysis is unnecessary since courts cannot enforce illegal contract provisions. Even were the FAA relevant, however, it would foreclose enforcement by its own terms.

ARGUMENT

I. Epic's Joint-Action Ban Is Unlawful Under Sections 7 & 8 Of The NLRA

The Seventh Circuit correctly determined that section 7 of the NLRA grants employees a substantive right to pursue joint legal actions. Both the plain language and purpose of the NLRA, as well as this

Court's and the NLRB's interpretations of section 7, support this conclusion.

A. The Plain Text Of Section 7 Encompasses A Right To Joint Legal Action

Section 7 provides: "Employees 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." 29 U.S.C. 157 (emphasis added). This Court has explained that section 7's protections cover employees' "seek[ing] to improve working conditions through resort to administrative and judicial forums." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-566 (1978).¹ Both lower courts and the NLRB have consistently held that section 7 includes a right to jointly pursue work-related legal claims. See, e.g., *Brady v. Nat'l Football*

¹ Employers and their amici try to minimize *Eastex*'s implications by arguing that in a footnote the Court effectively reserved "the question of what may constitute 'concerted' activities in this context." Pet. Br. 36-37 (Epic Br.) (quoting *Eastex*, 437 U.S. at 566 n. 15); Pet. Br. 27, *Ernst & Young LLP v. Morris*, No. 16-300 (June 9, 2017) (E&Y Br.) (same); U.S. Amicus Br. 24 n.3 (same). That is mistaken. Concertedness was not contested in the case. The Court made the remark only to avoid appearing to approve the particular legal theories of concertedness adopted by the Board and the lower courts in the cases it cited as supporting its view of "mutual aid or protection." In any event, the Court made clear in the very next sentence that joint legal action could meet both the "concertedness" and "mutual aid or protection" requirements of section 7 when it noted that "to hold that activity of this nature is entirely unprotected * * * would leave employees open to retaliation for much legitimate activity [and] could frustrate the policy of the Act." 437 U.S. at 566.

League, 644 F.3d 661, 673 (8th Cir. 2011) (“[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment *is* ‘concerted activity’ under § 7 of the [NLRA].”); *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 296-297 (5th Cir. 1976) (similar); *Leviton Mfg. Co. v. NLRB*, 486 F.2d 686, 689 (1st Cir. 1973) (same).

The judicial consensus favoring a right to engage in joint legal action is unsurprising given the plain language of section 7. This Court has instructed that “[a]bsent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive.” *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). When interpreting a statute’s language, the Court “giv[es] the words used their ordinary meaning.” *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1165 (2014) (quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990)).

Joint legal action fits easily within the ordinary meaning of “concerted activities.” “Concerted” means “jointly arranged, planned, or carried out; coordinated.” *New Oxford American Dictionary* 359 (3d ed. 2010); see also *Webster’s Third New International Dictionary* 470 (Gove ed., 2016), (defining “concerted” as “performed in unison”). “Activities” are “thing[s] that a person or group does or has done” or “actions taken by a group in order to achieve their aims.” *New Oxford American Dictionary* at 16. Similarly, *Black’s Law Dictionary* defines “concerted activity” as “[a]ction by employees concerning wages or working conditions; esp., a conscious commitment to a common scheme designed

to achieve an objective.” *Black’s Law Dictionary* 349 (Garner ed., 10th ed. 2014). These meanings have remained essentially the same since the NLRA’s enactment. See *Webster’s New International Dictionary of the English Language* 553 (2d ed. 1936) (defining “concert”); *id.* at 27 (defining “activity”); *Black’s Law Dictionary* 385 (3d ed. 1933) (defining “concerted action”).

Additionally, the definition of “concerted activities” must include something beyond “the right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of [employees’] own choosing.” 29 U.S.C. 157. Otherwise, the statute’s next phrase, “to engage in *other* concerted activities,” *ibid.* (emphasis added), would be rendered superfluous. This Court has repeatedly “hesita[ted] to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.” *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988).

Employers invoke the canon of *eiusdem generis* in an attempt to narrow the broad reach of section 7. See Epic Br. 33; E&Y Br. 27. Ernst & Young argues that this canon limits section 7’s “other concerted activities” to only “self-organization and collective bargaining,” *ibid.*, while Epic argues that it limits “other concerted activities” to actions “that employees can engage in either on their own or with the involvement of no one other than their employers,” Epic Br. 34. Both arguments fail.

Ernst & Young misapplies the canon by reading the final clause as practically identical to the preceding

ones. In Ernst & Young's view, "other concerted activities for the purpose of collective bargaining or other mutual aid or protection," merely restates the general category established by the preceding ones: "self-organization and collective bargaining." E&Y Br. 27. As this Court has held, however,

[i]f the particular words exhaust the [class], there is nothing *ejusdem generis* left, and in such case we must give the general words a meaning outside of the class indicated by the particular words, or we must say that they are meaningless, and thereby sacrifice the general to preserve the particular words. In that case the rule would defeat its own purpose.

United States v. Mescall, 215 U.S. 26, 31-32 (1909); see also *Mason v. United States*, 260 U.S. 545, 554 (1923). Unless the final six words, "or other mutual aid or protection," 29 U.S.C. § 157, have no meaning, then, they must encompass more than what Ernst & Young allows.

This Court has, in fact, already rejected Ernst & Young's position. In *Eastex*, the Court held, "Congress knew well enough that labor's cause often is advanced on fronts other than collective bargaining [and] recognized this fact by choosing, as the language of § 7 makes clear, to protect concerted activities for the somewhat *broader* purpose of 'mutual aid or protection' as well as for the *narrower* purposes of 'self-organization' and 'collective bargaining.'" 437 U.S. at 565 (emphasis added). It then specifically noted that the NLRB and lower courts "have held that the 'mutual aid or protection' clause protects employees * * * when they seek to improve working conditions

through resort to administrative and judicial forums.” *Id.* at 565-566. Although, it is true, the Court did not specifically “address the question of what may constitute ‘concerted’ activities in this context,” see pp. 10 n.1, *supra*, it did hold that finding “activity of this nature [to be] entirely unprotected,” as the employers would here, “would leave employees open to retaliation for much legitimate activity [and] could frustrate the policy of the Act to protect the right of workers to act together to better their working conditions,” 437 U.S. 566-567 (quotations omitted). It thus rejected the idea “that Congress could have intended the protection of § 7 to be as narrow as [the employer] insists.” *Id.* at 567.

Epic’s more novel argument succumbs to a different difficulty. It proves incoherent—and too much. First, “self-organization, * * * form[ing] labor organizations, [and] bargain[ing] collectively through representatives of their own choosing,” all activities section 7 expressly protects, are hardly things “that employees just *do*,” Epic Br. 34 (quoting *NLRB v. Alt. Entm’t, Inc.*, 858 F.3d 393, 415 (6th Cir. 2017) (Sutton, J. concurring in part and dissenting in part)), let alone by themselves or with only the aid of their employers. To certify a union as their exclusive bargaining representative, for example, employees must typically first petition the NLRB. See 29 U.S.C. 159(c)(1)(A). If the NLRB finds after investigation that “a question of representation exists,” *id.* 159(c)(1), and determines that the employee group represents an appropriate “bargaining unit,” *id.* 159(b), it then “direct[s] an election through secret ballot,” *id.* 159(c)(1), which it conducts itself, 29 C.F.R. 102.69(a). The employer can then contest the petition before the NLRB, 29 C.F.R. 101.30, and, if the

employees are ultimately successful, the election result itself, 29 C.F.R. 102.69(c)(1)(ii). And, if the NLRB rules against the employer at either stage, the employer can challenge the decision in court. 29 U.S.C. 160(f). In a typical case, then, forming a union requires the participation of not only the employees, but also the employer, the NLRB, and the courts. The “concerted activities” specifically and individually mentioned in section 7, in other words, often require more extensive participation by third-parties than filing a joint law suit. If, as Epic contends, section 7 excludes activities that require the participation of “third parties,” Epic Br. 34, it necessarily excludes “form[ing] labor organizations,” one of the NLRA’s express core rights. That makes no sense.

Understanding section 7 to protect joint legal action makes particular sense given how broadly this Court has defined “concerted activities” in related labor contexts. This Court has stated that section 7’s protection “clearly enough embraces the activities of employees who have joined together in order to achieve common goals.” *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 830 (1984). As such, this Court has held that “concerted activities” can include even a single employee bringing a complaint in his *individual* capacity to protect his own rights simply because those rights arose out of a collective bargaining agreement. *Id.* at 832. Likewise, this Court has explained that “the literal wording” of section 7 “clearly” encompasses an individual union member’s right to have a union representative present at an informal hearing he worries may lead to discipline. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 254-256, 260 (1975). “This is true even though the employee *alone* may have

an immediate stake in the outcome.” *Id.* at 260 (emphasis added). If section 7’s “concerted activit[y]” protections are so broad as to protect individuals acting alone and only for themselves, they are clearly broad enough to include *joint* legal action taken to benefit themselves as a group.

The NLRA’s legislative history supports this common-sense understanding of section 7’s plain text. The NLRA’s principal author—Senator Robert F. Wagner—explained that “[s]till less open to question is the proposition that workers also should be allowed to cooperate fully. * * * In order that the strong may not take advantage of the weak, every group must be equally strong.” 78 Cong. Rec. 12,017 (1934) (referencing S. 2926, a predecessor to the NLRA). Senator Wagner also testified that the Act’s unfair labor practices should be articulated “without in any way placing limitations upon the broadest reasonable interpretation of its omnibus guaranty of freedom.” *Hearings Before the Senate Comm. on Educ. & Labor on S. 1958*, 74th Cong., 1st Session 38 (1935), reprinted in 1 NLRB, *Legislative History of the National Labor Relations Act 1935* 1414 (1949). Joint legal action, which allows employees to protect themselves and improve their condition, therefore fits easily within Congress’s intentions for section 7’s protections. Employees who can pursue legal action jointly will fear employer retaliation less and be able to share the costs with others.

B. The NLRA's Underlying Purpose Supports An Inclusive Interpretation Of "Concerted Activities"

The NLRA's underlying purpose further supports interpreting "concerted activities" to include joint legal action. The best source to discover Congress's purpose is the statute itself. The Act's declaration of policy states:

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce *** by protecting the exercise by workers of full freedom of association*** for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. 151. A protection as broad as "full freedom of association" certainly includes the right to joint legal action. And joint suits involving wage-and-hour claims—such as this one, Epic Pet. App. 2a—fall within the comprehensive umbrella of "mutual aid or protection." They seek to jointly vindicate rights gained through legislation or bargaining.

Congress enacted section 7 "to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment." *City Disposal*, 465 U.S. at 835. Joint legal actions level the playing field exactly in the way. By lessening fear of employer retaliation and spreading the cost of seeking vindication, employees' banding together allows them

to improve their condition. See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) (explaining that class action procedures allow plaintiffs who otherwise would “have no realistic day in court” to enforce their rights). This Court has found, moreover, “no indication that Congress intended to limit [section 7’s] protection to situations in which an employee’s activity and that of his fellow employees combine with one another in any particular way.” *City Disposal*, 465 U.S. at 835. The Court continued: “[W]hat emerges from the general background of § 7—and what is consistent with the Act’s statement of purpose—is a congressional intent to create an equality in bargaining power between the employee and the employer throughout the entire process.” *Ibid.* Adopting this Court’s inclusive understanding of section 7, the court below appropriately concluded that “other concerted activities” include joint legal action. Pet. App. 4a-7a.²

² Epic argues that since “in a judicial or arbitral forum[] outcomes are not dependent on whether claims are heard as a class or individually,” joint proceedings “do not serve the purpose of the right to engage in ‘concerted activities’ and thus should not be protected under section 8.” Epic Br. 43-44. Although Epic may be correct that the number of employees joining in a dispute does not affect how a court or arbitrator ultimately *decides* the issue, it certainly affects whether the employees can and do *present* the issue for decision. As many have noted, unless employees can share the cost of dispute resolution by proceeding through joint action, it is simply irrational for them to arbitrate or litigate many claims. See Daniel T. Deacon, *Agencies and Arbitration*, 117 Colum. L. Rev. 991, 992 & nn.1-2 (2017) (collecting authorities). They may also fear retaliation and decline to challenge their employers unless they can band together, which makes retaliation more difficult.

C. The NLRA’s Enactment History Confirms That Congress Intended Section 7 To Protect Employees’ Joint Legal Activity

The context of the NLRA’s enactment offers yet more support that section 7’s protected “concerted activities” include joint legal action. The text, purpose, and history of the NLGA, 29 U.S.C. 102 *et seq.*, for example, provide such support. Enacted three years before the NLRA, the NLGA established the right to joint action as the basic premise of national labor policy. As Senator Wagner explained to the Senate Committee on Education and Labor, “[t]he language [of section 7 of the NLRA] follows practically verbatim the familiar principles already embedded in our law by * * * section 2 of the [NLGA].” *Hearings Before the Senate Comm. on Educ. and Labor on S. 1958*, 74th Cong., 1st Sess. 38 (1935), reprinted in 1 NLRB, *Legislative History of the National Labor Relations Act 1935* 1414 (1949); see also *City Disposal*, 465 U.S. at 834-835 (“[Section 2 of the NLGA] was the source of the language enacted in § 7 [of the NLRA].”); *Eastex, Inc. v. NLRB*, 437 U.S 556, 565 n.14 (1978) (“Congress modeled the language of § 7 after that found in § 2 of the [NLGA.]”). Section 2 of the NLGA declares the following to be the “public policy of the United States”:

Whereas * * * the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment * * * it is necessary that he have full freedom of association [and] be free from the interference, restraint, or coercion of employers * * * in self-organization or in other

concerted activities for the purpose of * * * mutual aid or protection.

29 U.S.C. 102 (emphasis added). Section 3 enforces this policy by requiring that “any other undertaking or promise in conflict with the public policy declared in [section 2] * * * shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court.” 29 U.S.C. 103. The NLGA and NLRA thus protect employees’ right to engage in “concerted activities” in two distinct yet complementary ways. First, sections 2 and 3 of the NLGA prohibit federal courts from enforcing contracts that interfere with, restrain, or coerce employee concerted activity. Second, sections 7 and 8 of the NLRA extend this protection by declaring any employer interference, restraint, or coercion of employee concerted activity an “unfair labor practice.” 29 U.S.C. 158(a)(1).

The language and structure of sections 2 and 3 make clear that Congress intended the NLGA—and thus the NLRA—to protect a broad class of “concerted activities,” including joint legal action. As explained above, joint legal action fits easily within the ordinary meaning of “concerted activities.” See pp. 10-16, *supra*. Section 3, moreover, prohibits federal courts from enforcing *two* categories of contracts: (1) “[a]ny undertaking or promise, such as is described in this section”; and (2) “any *other* undertaking or promise in conflict with the public policy declared in section [2].” 29 U.S.C. 103 (emphasis added). The “undertaking[s] or promise[s] * * * described in this section” are promises not to join or remain in a labor organization, which section 3 explicitly proscribes. *Ibid.* Thus, the

second category of unenforceable contracts—those which *otherwise* conflict with the public policy of section 2—necessarily refers to agreements interfering with a broader class of concerted activities than membership in a labor organization.

Section 4 of the NLGA, which identifies specific acts that are not subject to restraining orders or injunctions, provides additional textual support for interpreting “concerted activities” to include joint legal action. Section 4 states:

No court of the United States shall have jurisdiction to issue any * * * injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute * * * from doing, *whether singly or in concert*, any of the following acts:

* * *

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against, *or is prosecuting, any action or suit in any court of the United States or of any State.*

29 U.S.C. 104 (emphasis added). While the NLGA does not expressly define the activities listed in section 4 as “concerted activities,” the character of the activities protected implies that they are specific types of concerted activity encompassed by section 2’s public policy. Other activities explicitly protected by section 4 include striking, joining labor organizations, and assembling peaceably to promote collective interests in a labor dispute—all indisputable forms of concerted activity protected by the NLRA and NLGA. See 29

U.S.C. 104(a), (b) and (f). Section 4(d) therefore demonstrates that Congress intended section 2's protection to encompass certain concerted legal activities. Any protection of the right to "aid" persons involved in legal actions arising from labor disputes must *a fortiori* protect the right to *join* in bringing such actions since that is the most helpful and direct form of "aid" available. As a result, section 4(d) makes clear that joint legal action, like striking or joining a labor organization, is a form of concerted activity protected by both section 2 of the NLGA and section 7 of the NLRA.³

The NLGA's underlying purpose also supports this interpretation of "concerted activities." Congress enacted sections 2 and 3 of the NLGA in response to widespread judicial enforcement of "yellow dog contracts" that prospectively waived the right to various forms of concerted activity. See *Iskanian v. CLS Trasp. L.A., LLC*, 327 P.3d 129, 159-162 (Cal. 2014) (Werdegar, J., concurring in part and dissenting in part); see also *Lincoln Fed. Labor Union No. 19129 v. Nw. Iron & Metal Co.*, 335 U.S. 525, 534 (1949) (explaining the historical conditions that "prompted

³ Epic's reading of section 4 of the NGLA is extremely puzzling. In its view, "[w]hat Congress had in mind [in section 4] was employees helping one another by, for instance, 'sending money' to litigants—something employees can do of their own accord" without involving "a tribunal or employer." Epic Br. 38-39 (omitting citations). But it defies common sense to think that Congress would specifically protect an employee's sending money to a co-employee to support her law suit against their common employer and not protect his right to file a joint legal action together with her concerning the same dispute. This is *Hamlet* without the prince.

passage of state and federal laws to ban employer discrimination against union members and to outlaw yellow dog contracts"). While most people now associate the term "yellow dog contract" with prospective waiver of an employee's right to join a union, at the time of the NLGA's enactment the term was generally understood to encompass prospective waivers of a far broader class of concerted activity. See Matthew W. Finkin, *The Meaning and Contemporary Vitality of the Norris-LaGuardia Act*, 93 Neb. L. Rev. 6, 10-17 (2014). Indeed, the term was first applied not to unionization waivers, but to company housing leases prohibiting anyone other than the employee's immediate family, doctors, or morticians from having access to his home. U.S. Coal Comm'n, *Report of the United States Coal Commission* 169-170 (1923). When Congress passed the NLGA, moreover, the term was understood to include prospective bars of joint *legal* action. See Joel I. Seidman, *The Yellow Dog Contract* 58 (1932) (discussing an employer-mandated promise to "adjust all differences by means of individual bargaining" as an example of a yellow dog contract).

The NLGA's legislative history confirms that Congress was well aware of the breadth of contractual limitations on employee concerted activity and sought to bar enforcement of all such agreements. In describing the types of contracts rendered unenforceable by section 3, the Senate Report explains: "Not all of these contracts are the same, but, in general, the conditions are such [that] the employee waives his right of free association and genuine representation in connection with his wages, the hours of labor, and other conditions of employment." S. Rep. No. 72-163, 72d Cong., 1st Sess. 14 (1932). The House

Report describes such contracts in equally broad terms: “[T]he character of contract condemned *** prevents a man from joining with his fellows for collective action.” H. R. Rep. No. 72-669, 72d Cong., 1st Sess. 7 (1932). Similarly, in debate, Senator George W. Norris—the Act’s co-sponsor—described the contracts rendered unenforceable by section 3 as those in which an “employee waives his right absolutely to free association *** in connection with his *** conditions of employment.” 75 Cong. Rec. 4,504 (1932). Senator Norris further explained that the agreements proscribed include contracts requiring employees to “singly present any grievances [they have].” *Ibid.* The NLGA’s legislative history—like its plain language and purpose—thus confirms Congress’s intent to protect joint legal action as “concerted activities.” Nothing in the NLRA suggests that Congress intended to limit the scope of protected activities when it adopted the same language in section 7 of the NLRA.

The right to joint legal action guaranteed by the NLRA and NLGA is critical to both Acts’ structures. Without the joint action guarantees at the heart of these laws, the statutes would lack practical meaning. Congress passed these statutes to enable employees “to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship.” *Eastex, Inc. v. NLRB*, 437 U.S 556, 565 (1978). It recognized that there is no freedom of contract between “a single workman[] with only his job between his family and ruin” and “a tremendous organization having thousands of workers.” 78 Cong. Rec. 3,679 (statement of Sen. Wagner) (1934). The

Acts were not designed to regulate the minute details of employee-employer interactions, but rather to allow for joint action so that “the strong may not take advantage of the weak.” 78 Cong. Rec. 12,017 (statement of Senator Wagner).

The Acts, moreover, protect collective action rights “not for their own sake but as an instrument of the national labor policy of minimizing industrial strife.” *Emporium Capwell Co. v. W. Addition Cnty. Org.*, 420 U.S. 50, 62 (1975). Protecting employees’ ability to jointly resolve workplace disputes in an adjudicatory forum critically serves that purpose. Joint pursuit of legal remedies has far less potential for economic disruption than many indisputably protected concerted activities, like strikes and boycotts. Denying employees the safety valve of joint legal action, like denying them the safety valve of walking out in protest of working conditions, “would only tend to frustrate the policy of the [NLRA].” *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 14 (1962).

D. The NLRB’s Interpretation Of Section 7 Is Entitled To Deference

The NLRB, furthermore, has long and consistently interpreted section 7 to include a right to engage in joint legal action, and the Board’s interpretation is entitled to deference. This Court has “often reaffirmed that the task of defining the scope of § 7 ‘is for the [NLRB] to perform in the first instance as it considers the wide variety of cases that come before it.’” *City Disposal*, 465 U.S. at 829 (quoting *Eastex*, 437 U.S. at 568) (noting also that the NLRB’s interpretations of

ambiguous provisions of the NLRA are entitled to “considerable deference”).⁴

For more than seventy years, the NLRB has consistently interpreted the NLRA to protect joint legal action—whether in court or arbitration. The interpretation stems from *Spandsco Oil & Royalty Co.*, 42 N.L.R.B. 942, 948-949 (1942), decided shortly after the passage of the NLRA, where the NLRB held that “the filing of a [FLSA] suit by three employees was protected concerted activity.” *Horton I*, 357 N.L.R.B. at 2278; see also *127 Rest. Corp.*, 331 N.L.R.B. 269, 275 (2000) (“[T]he filing of a civil action by employees is protected activity unless done with malice or in bad faith.”); *52nd St. Hotel Assocs.*, 321 N.L.R.B. 624, 633 (1996) (“48 * * * employees * * * join[ing] together to seek legal redress for their wage claims [are] engaged in protected, concerted activity under Section 7.”); *Health Enters. of Am., Inc.*, 282 N.L.R.B. 214, 218 (1986) (holding that a group of employees’ “filing a civil lawsuit against” an employer is “concerted activity”); *Clara Barton Terrace Convalescent Ctr.*, 225 N.L.R.B. 1028, 1033 (1976) (“It is * * * well settled that the advancement of a collective grievance is protected activity.”).

E. Bans Against Joint Legal Action Violate Section 8(a)(1) Of The NLRA And Are Therefore Unlawful

While section 7 of the NLRA establishes a right to joint legal action, the Act’s enforcement provision,

⁴ To be clear, the NLRB is entitled to deference only on its interpretation of the NLRA, a statute which it administers. There is no need to defer to the NLRB’s interpretation of the FAA or the NLGA, nor has the Board requested such deference.

section 8, renders contractual provisions that violate that right unlawful. Section 8 provides: “It shall be an unfair labor practice for an employer * * * to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7].” 29 U.S.C. 158(a)(1). The plain text of section 8, as well as this Court’s and lower courts’ precedents, make clear that contracts requiring employees to forswear the possibility of joint legal action as a condition of continued employment are unlawful.

To “interfere” means “to come in collision[;] to be in opposition[;] to run at cross-purposes[;] clash,” or “to enter into or take a part in the concerns of others[;] intermeddle, interpose, intervene.” *Webster’s Third New International Dictionary, Unabridged* 1178 (Gove ed., 2016) (some words capitalized in original). This meaning has not changed since Congress first enacted the NLRA. See *Webster’s New International Dictionary of the English Language* 1294 (2d ed. 1936) (defining “interfere” as “[t]o come in collision; to clash; also, to be in opposition; to run at cross-purposes”; “[t]o enter into, or take a part in, the concerns of others; to intermeddle; interpose; intervene”). Similarly, to “restrain” has not varied in definition. Compare *Webster’s Third New International Dictionary Unabridged* 1936 (Gove ed., 1993) (defining “restrain” as “to hold (as a person) back from some action, procedure, or course[;] prevent from doing something”; “to limit or restrict to or in respect to a particular action or course[;] keep within bounds or under control”; “to moderate or limit the force, effect, development, or full exercise of”; “to keep from being manifested or performed[;] repress”) (some words capitalized in original), with *Webster’s New*

International Dictionary of the English Language 2125 (2d ed. 1936) (“To draw back again; to hold back; to check; to keep in check; to hold back from acting, proceeding, or advancing, either by physical or moral force, or by any interposing obstacle; to repress or suppress; to curb.”). Finally, to “coerce” was defined at the passage of the NLRA as “[t]o constrain or restrain by force, esp. by law or authority; to repress; curb,” or “[t]o compel to any action,” *id.* 519, and today holds the same meaning, see *Webster’s Third New International Dictionary, Unabridged* 439 (Gove ed., 1993) (defining “coerce” as “to restrain, control, or dominate, nullifying individual will or desire (as by force, power, violence, or intimidation); “to compel to an act or choice by force, threat, or other pressure”). Section 8 thus plainly makes illegal any agreement that preconditions continued employment on the waiver of section 7 rights.

Consistent with section 8’s plain text, this Court’s precedent makes clear that requiring individuals to prospectively waive section 7 rights is illegal. This Court has held that contracts that “stipulate[] for the renunciation by the employees of rights guaranteed by the [NLRA]” are illegal. *Nat’l Licorice Co. v. NLRB*, 309 U.S. 350, 361 (1940). In *National Licorice Co.*, for example, this Court held that individual contracts in which employees waived their right to present grievances “in any way except personally” were unenforceable as “a continuing means of thwarting the policy of the [NLRA].” *Id.* at 360-361. The Court further explained in *J.I. Case Co. v. NLRB* that “[w]herever private contracts conflict with [the NLRB’s] functions, they obviously must yield or the [NLRA] would be reduced to a futility.” 321 U.S. 332,

337 (1944); see also *ibid.* (“Individual contracts no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the [NLRA].”).

Epic tries to spin these two cases as inapposite.⁵ Epic Br. 46-47. *Nat'l Licorice*, it surmises, rested on a finding that the contracts the employer made with its individual employees “were not truly voluntary.” *Id.* at 46. That is odd. The Court never described the individual contracts as such. See 309 U.S. at 360.

⁵ The United States also tries to duck the implications of these cases by arguing that “both decisions were highly dependent on a key factual feature that is absent here.” U.S. Amicus Br. 28. Both, it claims, concerned agreements “adopted to eliminate the Union as the collective bargaining agency of [the] employees,” *ibid.*, a “concern” that “the present cases do not implicate,” *id.* at 29. The very first sentence of *Nat'l Licorice* itself, however, describes its holding in broader terms that do not turn on this “key factual feature”: “the question[] presented [is] whether the Board has the authority to order an employer not to enforce contracts with its employees, found to have been procured in violation of the National Labor Relations Act and to contain provisions violating that act.” 309 U.S. at 351. And in *J.I. Case*, this Court restated its holding in *Nat'l Licorice* without even mentioning this purported “key factual feature”—“We have * * * held that individual contracts obtained as the result of an unfair labor practice may not be the basis of advantage to the violator of the Act nor of disadvantage to employees. *National Licorice Co. v. National Labor Relations Board*, 309 U.S. 350.”—and then proceeded to apply that broader holding again without mentioning this feature: “Wherever private contracts conflict with [the Board’s] functions, they obviously must yield or the Act would be reduced to a futility.” *Id.* at 337. The “factual feature” the United States points to, in short, may help explain why the particular contracts in those cases violated the NLRA but it does not serve to arbitrarily limit the kinds of violations that count.

Instead it identified three different and specific ways in which the individual contracts “by their terms * * * imposed illegal restraints upon the employees’ rights to organize and bargain collectively guaranteed by § 7 and 8 of the Act.” *Ibid.* Their illegality, not any question of their voluntariness, was the reason the Court did not permit them to be enforced.

Epic’s take on *J.I. Case*, 321 U.S. 332, is odder still. Epic contends that it is inapposite because it “involved a collective-bargaining agreement governing *substantive* benefits relating to work and pay.” Epic Br. 46 (emphasis added). “The issue,” it claims, “was whether an individual contract could [waive] those benefits, and the Court answered no.” *Ibid.* The case, however, involved no “collective-bargaining agreement,” let alone one “governing *substantive* benefits related to work and pay.” Since the employer had cited the individual contracts as a reason why it could not even negotiate with the union over terms the individual contracts covered, no collective-bargaining agreement was ever reached. 321 U.S. at 334 (“The union then asked the Company to bargain. It refused, declaring that it could not deal with the union in any manner affecting rights and obligations under the individual contracts.”). Rather, the Court invalidated the contracts because “[i]ndividual contracts * * * may not be availed of to defeat or delay the *procedures* prescribed by the National Labor Relations Act.” *Id.* at 337 (emphasis added). An individual contract, it held, could not interfere with the core protections of the NLRA, even if they concerned “procedures.”

Throughout their briefs, the employers work hard in an attempt to distinguish substantive from

procedural NLRA rights. The latter can be waived, they claim,⁶ e.g., Epic Br. 10, 30, 44-47; E&Y Br. 45-48, and, in any event, are overridden by the FAA, e.g., Epic Br. 39-42. As this Court held in *J.I. Case*, however, the characterization of core section 7 rights as procedural or substantive makes no difference. A contract that conflicts with a core section 7 right is a nullity, no matter how one characterizes it. That makes perfect sense. After all, nearly all the core protections of section 7, including ones that the employers themselves believe cannot be individually waived or displaced by the FAA, like collective bargaining, see, e.g., *id.* at 34 (arguing that specific terms in section 7, like “bargaining collectively,” are protected), are “procedural” in some sense. Collective bargaining is no more “substantive” than joint legal

⁶ The employers’ waivability argument rests on a flawed syllogism. They reason that since “[e]mployees may validly waive their right to class proceedings in agreements reached through collective bargaining,” and “[n]othing *** suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative,” Epic Br. 44-45 (quoting *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258 (2009)), then individuals may waive their rights to joint legal action as well. The syllogism’s secondary premise, however, is mistaken. In context, the Court in *Penn Plaza* was saying only that whatever section 7 rights an individual employee could waive a union could also waive through collective bargaining. That makes sense. But its converse—whatever section 7 rights a union can waive through collective bargaining an individual may as well—does not, as this Court has repeatedly held. See, e.g., *J.I. Case*, 321 U.S. at 337 (holding that “[i]ndividual contracts no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the [NLRA.] *** Wherever private contracts conflict with [the NLRA], they obviously must yield or the Act would be reduced to a futility”).

action. It is a procedural mechanism through which employees can better bargain for “substantive benefits related to work and pay.” *Id.* at 46. In that respect, it resembles core constitutional procedural protections, like freedom of association, that allow individuals to band together to achieve their ends.

Nearly all the arguments employers make against the centrality of joint legal action, in fact, could be made just as easily against collective bargaining itself. Collective bargaining, just like joint legal action, often requires participation—indeed, more participation—by “third-parties,” like agencies and courts. See pp. 14-15, *supra*. And the substantive fruits of collective bargaining, just like those of joint legal action, can be achieved—albeit to a much smaller degree—through individual action. See, e.g., Epic Br. 41 (arguing that an employee can waive a procedure that might be necessary to ensure “effective vindication” of substantive rights). Under the employers’ reasoning, in fact, a waiver of collective bargaining itself “would leave employees free to work together at every step of the [bargaining] process.” Epic Br. 40. In Epic’s words, “[e]mployees [could] cooperate in hiring [the same bargaining agent], drafting their [bargaining demands], developing their [bargaining] strategies, finding and preparing [experts], [and]writing [bargaining proposals],” all while bargaining individually with their employer. *Ibid.* (replacing legal action terms in original quotation with collective bargaining ones). “To be sure,” as Epic puts it, “a [collective-bargaining] waiver may channel [employees’] ‘concerted activities’ into a different *procedural* form, but their exercise of the substantive right remains the same.” *Ibid.* (same). In short, the

employers cannot displace joint legal action from section 7 without displacing collective bargaining itself. In their view, doing either would merely “channel[] concerted activities into individual [proceedings.]” Epic Br. 39 (emphasis deleted). That is an argument too far.

Also, although, as employers and their amici repeatedly argue, modern Rule 23 class-action litigation and FLSA class proceedings developed after the FAA was enacted, see, e.g., Epic Br. 32, they are wrong to conclude that the NLRA and NGLA cannot therefore protect joint legal proceedings. At the time both the NLRA and NGLA were enacted, of course, federal law recognized joint legal action. Indeed, it had done so since the beginning of the federal court system. The first case docketed in this Court, for example, *Van Staphorst v. Maryland*, 2 U.S. (2 Dall.) 401 (1791), concerned a suit by two brothers against the state of Maryland. Likewise, the one civil jury trial this Court has held in its history concerned a suit over a debt involving multiple defendants. *Georgia v. Brailsford*, 3 U.S. (1 Dall.) 1 (1794). The employers’ joint-action bars would, of course, make impossible traditional actions like these involving more than one plaintiff or more than one defendant—in court or in arbitration. Although the NLRA and NLGA protect appeals to forms of joint legal action fashioned after their enactment, the employers’ position sweeps much more broadly. It would invalidate the most traditional and long-standing forms of legal action, not just two particular forms developed more recently.

* * *

As this Court has explained, “our cases leave no doubt that illegal promises will not be enforced in cases controlled by federal law.” *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 77 (1982). “Where the enforcement of private agreements would be violative of [federal] policy, it is the obligation of the courts to refrain from such exertions of judicial power.” *Id.* at 84. To that end, both courts and the NLRB consistently invalidate under section 8 contractual provisions that interfere with employees’ section 7 rights and provisions like joint-action bans contained in arbitration agreements should be no exception. See, e.g., *NLRB v. Pilgrim Foods, Inc.*, 591 F.2d 110 (1st Cir. 1978); *Extendicare Homes, Inc.*, 348 N.L.R.B. 1062, 1078 (2006). The joint-action ban’s illegality alone is thus enough to decide this case—without any reference to the FAA.

II. Nothing In The FAA Revives Epic’s Illegal Joint-Action Ban

The fact that the joint-action ban is illegal under federal law completely resolves this case. There is “no doubt” that agreements made illegal by federal statute “will not be enforced.” *Kaiser Steel*, 455 U.S. at 77 (permitting an illegality defense to a collective bargaining agreement on the grounds that it violated the NLRA and the Sherman Act).

Notwithstanding the plain illegality of Epic’s ban, petitioner alleges that the FAA somehow resurrects it and demands enforcement. This is not so. In fact, even if the FAA applies, it offers at least three independent grounds for invalidating the joint-action ban. The first springs from the language of the FAA itself, which states that arbitration contracts “shall be valid,

irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*” 9 U.S.C. 2 (emphasis added). This “saving clause” invalidates agreements made unenforceable by federal statute. The second is the “rule against prospective waivers,” an FAA doctrine designed to ensure that particular terms in arbitration agreements do not obstruct parties’ core federal statutory rights, even when the underlying claims are otherwise arbitrable. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310-2311 (2013); *id.* at 2314 (Kagan, J., dissenting). And the third is the “contrary-congressional-command” doctrine much noted by the employers.

Each of these lines of argument is sufficient to nullify contract terms subject to the FAA. Accordingly, the employers must overcome all three to sustain their position. But, properly construed, none of these approaches support them: the NLRA and NLGA render joint-action bans illegal, such agreements prospectively waive the core rights these statutes protect, and both statutes represent a contrary congressional command sufficient to override the FAA’s mandate.

A. The FAA’s Saving Clause Prohibits Enforcement Of Arbitration Provisions That Violate Federal Statutes Such As The NLRA And NLGA

The FAA provides that arbitration agreements “shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*” 9 U.S.C. 2 (emphasis added). Epic’s joint-action ban is an illegal contract

provision that falls squarely within the FAA's saving clause and is thus unenforceable.

It is a fundamental principle of contract law that illegal promises cannot be enforced. See, e.g., Restatement (Second) of Contracts § 178 (Am Law Inst. 1981) ("A promise or other term of an agreement is unenforceable * * * if legislation provides that it is unenforceable."). This Court has unequivocally held that its "cases leave no doubt that illegal promises will not be enforced in cases controlled by * * * federal law." *Kaiser Steel*, 455 U.S. at 77. Thus, if a contract formed under state law violates a federal law, as joint-action bans do, pp. 26-33, *supra*, no court should enforce it.

Wisconsin contract law, which governs the dispute in question, is clear, moreover, that "[t]he general rule of law is, that all contracts which are * * * contrary to the provisions of any statute, are void." *Melchoir v. McCarty*, 31 Wis. 252, 254 (1872). Under generally applicable state law, then, the ban is a legal nullity and an agreement without legal effect cannot force employees into individual arbitrations.

The saving clause, of course, does not recognize grounds of contract illegality that target arbitration. In particular, this Court has held that the saving clause allows arbitration agreements to be invalidated by "generally applicable contract defenses" but not by "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339 (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). Here, the contract defense of illegality does not apply only to arbitration nor does it

derive its meaning from the fact that an agreement to arbitrate is at issue. As the Ninth Circuit explained in analyzing the arbitration agreement in *Morris*, “[t]he problem with the contract at issue is not that it requires arbitration; it is that the contract term defeats a substantive federal right [under the NLRA] to pursue concerted work-related legal claims.” Pet. App. at 14a, *Ernst & Young LLC v. Morris*, (No. 16-300). The problem with the joint-action ban, in short, is not that it requires arbitration as a forum, but rather that it forbids joint action in *any* forum in violation of the NLRA and NLGA. The Epic agreement also bars any non-individual—*i.e.*, injunctive—relief, Pet. App. 2a, and thus strips employees of additional statutory rights. Asserting illegality under the NLRA and NLGA, moreover, hardly disfavors arbitration. A contract forbidding joint action in court (without mentioning arbitration) would be equally invalid. Because the defense of illegality is a “generally applicable contract defense” that does not attack the arbitration clause itself, it falls squarely within the FAA’s saving clause.

Epic makes four arguments as to why the saving clause should not apply to defenses of illegality.⁷ First,

⁷ Ernst & Young makes a separate argument as novel as it is wrong. It suggests that state-law contract defenses of illegality cannot recognize contract illegality under federal law. See E&Y Br. 35. That reasoning disregards both the Supremacy Clause and this Court’s reasoning in *Testa v. Katt*, 330 U.S. 386 (1947). There, this Court held, “[w]hen Congress *** adopt[s] an act, it spe[a]k[s] for all the people and all the states, and thereby establishe[s] a policy for all. That policy is as much the policy of [a state] as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state.” *Id.* at

it claims, “saving clauses in federal statutes save *inferior* laws, like state law or federal common law; they do not save ‘other federal statutes enacted by the same sovereign.’” Epic Br. 20 (quoting *Alt. Entm’t*, 858 F.3d at 418 (Sutton, J., concurring in part and dissenting in part)). That is simply—there is no polite way to put it—wrong. Just two weeks before Epic filed its opening brief, for example, this Court held that the federal venue statute’s “saving clause,” 28 U.S.C. 1391(a), saved the venue provisions of another federal statute, 28 U.S.C. 1400(b). *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514 (2017). Other examples where this Court has found federal saving clauses saving other federal statutory provisions include *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 386-387 (1982) (noting that “saving clause [of] exclusive-jurisdiction provision [of federal securities law]” saved general statutory “jurisdiction conferred on courts of the United States”), and *Abbott Labs. v. Gardner*, 387 U.S. 136, 144-146 (1967) (holding that saving clause of Food, Drug, and Cosmetic Act saved judicial review provisions available under the APA).

Second, Epic claims that, by its terms, the FAA’s saving clause “applies only to grounds for the revocation of ‘any contract’” and “in turn excludes defenses *** that may be invoked only with respect to a specific subset of contracts.” Epic Br. 20-21 (quoting 9 U.S.C. 2). The single authority it extensively discusses, however, *Southland*, 465 U.S. 1, concerns a defense that specifically *targeted* arbitration, *id.* at 10.

392 (quoting *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 57 (1912)).

The saving clause has never recognized such targeted defenses. Epic’s general argument, moreover, surprises on its face. Under its reasoning, the saving clause would not recognize the defense of incapacity, for example, because it “may be invoked only with respect to a specific subset of contracts,” namely those involving an underaged party or one otherwise incapable of forming consent.

Third, Epic contends, “the saving clause does not preserve any ground that would interfere[] with fundamental attributes of arbitration.” Epic Br. 24. At such a lofty level of generality, however, that cannot be right. If taken seriously, it would undercut *all* contract defenses, whenever they would invalidate a “fundamental attribute of arbitration.” Consider someone raising the defense of fraud-in-the-inducement to an arbitration provision. Under Epic’s reasoning, that defense could not succeed since it would invalidate the arbitration itself—surely one of its own “fundamental attributes.” Such a view, however, would turn the saving clause into a nullity.

Epic also makes a narrower form of this argument resting on *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). Epic Br. 24-27. But that case is not to the contrary. In *Concepcion*, consumers asserted that an arbitration provision was unenforceable under a judicially-created California state law that barred class-action waivers in most arbitration agreements on the grounds that they were unconscionable. *Id.* at 337-340. This Court declined to read the FAA’s saving clause as facilitating a state policy which “st[oo]d as an obstacle to the accomplishment of the FAA’s objectives.” *Id.* at 343.

Concepcion is inapposite for several reasons. First, the holding in *Concepcion* turned on the fact that a *state* law disfavored arbitration. The Court explicitly recognized that there were certain procedures “not *** envisioned by the FAA” that “*States* may not superimpose on arbitration.” *Concepcion*, 563 U.S. at 351 (emphasis added). The Court went on to explain that some procedures “may not be required by *state* law” and that “*States* cannot require a procedure that is inconsistent with the FAA.” *Ibid.* (emphasis added). At no point did this Court suggest that the FAA requires enforcement of a contractual provision that directly violates *federal* statutes such as the NLRA and NLGA.

Second, the focus of the Court’s concern in *Concepcion* was California’s law of unconscionability, a state contract doctrine which the Court noted could be applied in a way that was “toothless and malleable” and “ha[d] no limiting effect.” *Concepcion*, 563 U.S. at 347. The doctrine gave judges who disfavored arbitration great discretion to restrict the practice at will. Its standards were flexible, moreover, and were not susceptible to effective appellate supervision. These characteristics made the doctrine less than neutral and generally applicable and meant that in a particular case the doctrine “derive[d its] meaning from the fact that an agreement to arbitrate is at issue.” *Id.* at 339. The Court specifically “not[ed, moreover,] that California’s courts have been more likely to hold contracts to arbitrate unconscionable than other contracts.” *Id.* at 342. Indeed, numerous scholars have attacked unconscionability for its ad hoc application and many have seen California as the paradigm of its abuse. See, e.g., Arthur Allen Leff,

Unconscionability and the Code—The Emperor’s New Clause, 115 U. Pa. L. Rev. 485, 488 (1967) (noting the “amorphous intelligibility” of California’s unconscionability statute); Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency* 46 Hastings L.J. 459, 465 (1995) (“California courts have been both less restrained and more inconsistent than courts in other jurisdictions in applying the unconscionability doctrine.”). Illegality, on the other hand, which includes violations of the public policies expressly set forth in the NLRA and NLGA, is not a pliable contract defense, is not subjective, and is subject to effective appellate supervision. Statutes are limited in scope, and the justification for holding a contract unenforceable when it violates a federal statute is much greater than when it offends a malleable and amorphous state-law doctrine.

This Court’s decision in *CompuCredit*, 565 U.S. 95, a choice-of-forum case, also does not help petitioner. In that case, the Court characterized the issue as “whether claims under the [Credit Repair Organization Act (CROA)] can proceed in an arbitrable forum.” *Id.* at 104. Here, the issue is not whether any particular forum, including arbitration, is appropriate, but rather whether a provision that illegally bans joint action in *any* forum can be enforced under the FAA. *CompuCredit* concerned, moreover, a completely different objection to arbitration: whether the CROA represents a “contrary congressional command,” *id.* at 98-101, foreclosing arbitration (discussed pp. 47-52, *infra*). It nowhere discussed whether an illegal provision of a contract could be enforced under the FAA’s saving clause.

Fourth, Epic argues that since the text of the saving clause “applies only to grounds ‘for the revocation of any contract’” it recognizes only those defenses specified in a *different* FAA provision going to “the making of the agreement for arbitration.”⁸ Epic Br. 27 (quoting 9 U.S.C. 2, 4). Even if Epic’s statutory argument were correct, however—and it is not—the saving clause would still recognize the defense of illegality. If, as Epic contends, the “word ‘irrevocable[]’ means that the contract to arbitrate * * * can be set aside for facts existing at or before the time of its making which would move a court of law or equity to revoke any other contract or provision of a contract,” *id.* at 28 (quoting *Zimmerman v. Cohen*, 139 N.E. 764, 766 (N.Y. 1923)), illegality is exactly such a defense. A court, if asked, would revoke a provision of a contract illegal “at or before the time of its making.” That is, in fact, exactly the situation here. Contracts barring joint legal action have been illegal since the NLRA and NLGA were enacted, see pp. 9-33, *supra*, long before Epic forced its employees to waive that right.

The history of the FAA is more helpful, moreover, than Epic allows. It makes clear that the saving clause was never understood to require enforcement of illegal agreements. The language of the FAA originated in the New York Arbitration Act (NYAA), 120 N.Y. Laws, ch. 275. Indeed, Congress itself acknowledged that the FAA is based on the NYAA. See *Arbitration of Interstate Commercial Disputes: Joint Hearings before*

⁸ Epic also ignores that the saving clause in the *Lewis* contract itself does not rest on revocability but on unenforceability. See Pet. App. 35a. Thus, even if Epic’s fourth argument were correct as to the FAA itself, it would not control in this case.

the Subcomms. of the H. & S. on the Judiciary on S. 1005 & H.R. 646, 68th Cong., 1st Sess. 19 (1924) (statement of Sen. Sterling) (*Arbitration: Joint Hearings*). And this Court has considered New York courts' understanding of the NYAA instructive when interpreting the FAA. See, e.g., *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 286-287 (1995) (interpreting the FAA in light of New York precedents). Indeed, this Court has noted that "the FAA was copied" from the NYAA. *Id.* at 287.

The NYAA and the FAA were passed to remedy a particular problem: the so-called "revocability doctrine," which denied specific performance as a remedy for breach of an arbitration agreement. See *Arbitration: Joint Hearings* 16 (describing how FAA overturns revocability doctrine). In the first major lawsuit challenging the new law, then-Judge Cardozo, writing for the New York Court of Appeals, held that the NYAA permitted specific performance but that "[o]f course, we exclude cases where the contract is inherently immoral or *in contravention of a statute*."⁹ *Berkovitz*, 130 N.E. at 290 (emphasis added). This view of the NYAA's scope was widely shared around the time of the FAA's enactment in 1925. See, e.g., *Am. Eagle Fire Ins. Co. v. N.J. Ins. Co.*, 148 N.E. 562, 566 (N.Y. 1925) (Crane, J., dissenting) ("The contract of arbitration is to be construed like any other contract and all its terms and conditions given force and effect unless they are against public policy or illegal."

⁹ Then-Judge Cardozo's exception also puts paid to Epic's argument that saving clauses can save only inferior laws, see p. 37, *supra*. What New York inferior statutes could then-Judge Cardozo have been referring to? Municipal ordinances?

(emphasis added)); *Zimmerman v. Cohen*, 139 N.E. 764, 765 (N.Y. 1923) (“The [NYAA] was passed to provide a means for enforcing an agreement to arbitrate; it did not otherwise change the law of contracts which is as applicable to such an agreement as to other terms and conditions.”). *Berkovitz* was also frequently mentioned in congressional hearings during the enactment of the FAA, alerting Congress to New York’s interpretation. See *Arbitration: Joint Hearings* 17, 33, 34, 39.

B. By Preventing Employees From Exercising Core Rights Under The NLRA And NLGA, Epic’s Joint-Action Ban Violates The Rule Against Prospective Waivers

The FAA’s prospective-waiver doctrine also forbids enforcement of Epic’s joint-action ban. As a general matter, courts will not enforce even agreed-upon waivers of federal statutory rights necessary to achieving Congress’s purposes. See *Brooklyn Sav. Bank*, 324 U.S. at 707 (“No one can doubt but that to allow waiver of statutory wages by agreement would nullify the purposes of the Act.”). For example, in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, this Court drew a distinction between parties’ inability to alter by agreement “applicable liability principles,” *i.e.*, “substantive obligations and particular procedures” protected by the statute at issue, which were “designed to correct specific abuses,” and parties’ freedom to decide “the forum in which the[se principles] are to be vindicated.” 515 U.S. 528, 534-536, 540-541 (1995); see also *CompuCredit*, 565 U.S. at 102 (“The parties remain free to [arbitrate], so long as *** *the guarantee of the legal power to impose*

*liability—is preserved.”). This Court has long acknowledged this basic maxim in its FAA jurisprudence by recognizing that “arbitration agreements that ‘operat[e] . . . as a prospective waiver of a party’s right to pursue statutory remedies’ will not be enforced. *Italian Colors*, 133 S. Ct. at 2310 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985)).*

Under this “prospective-waiver doctrine,” courts evaluate whether specific provisions of an arbitration agreement obstruct parties’ core federal statutory rights. See *Italian Colors*, 133 S. Ct. at 2310-2311; *Randolph*, 531 U.S. at 90. If a provision does so, it is unenforceable, even if it is not formally illegal or the relevant statute does not reflect a congressional command forbidding arbitration. See *Italian Colors*, 133 S. Ct. at 2310; *Randolph*, 531 U.S. at 90.

The doctrine most conclusively applies where a party can demonstrate that an arbitration agreement prohibits the exercise of federal statutory rights, *Italian Colors*, 133 S. Ct. at 2310 (“[The doctrine] would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights.”), as joint-action bans do. It is beyond doubt that the right to joint action is an “essential feature[],” *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481-482 (1989), of the NLRA and NLGA and that it was fundamental to Congress’s objectives in enacting these statutes. The statutes’ text affirmatively grants and protects the right of workers to act jointly to promote their employment interests. See pp. 10-16, 19-25 *supra*.

The history and purposes of the NLRA and NLGA do the same. The Acts' history plainly reflects the importance of the right to joint action. See pp. 19-22, *supra*. Their public policy declarations equally do so. See pp. 17, 19-20, *supra*; 29 U.S.C. 102, 151. And adjudicative interpretations of the Acts' purposes further highlight the right's "essential" nature. For example, this Court has described section 7 of the NLRA, including its "mutual protection" clause, as "a fundamental right" *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937). The NLRB has likewise held that joint action "is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest." *Horton I*, 357 N.L.R.B. at 2286.

This Court's discussion of *Vimar*, 515 U.S. at 530-536, and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991), in *Italian Colors*, 133 S. Ct. at 2311-2312, reinforces this analysis. There, this Court observed that, in *Vimar*, "[t]he Court rejected the argument that the 'inconvenience and costs of [arbitrating]' abroad 'lessen[ed]' the defendants' liability" under the Carriage of Goods by Sea Act, and it indicated that "[s]uch a 'tally[ing] [of] the costs and burdens'" is impermissible in the FAA context. *Ibid.* (citations omitted). Here, however, Epic's joint-action ban directly proscribes exercising rights protected by the NLRA and NLGA. See pp. 9-33 *supra*. It does not simply make doing so costly or inconvenient. Likewise, this Court explained that, "[i]n *Gilmer*, we had no qualms in enforcing a class waiver in an arbitration agreement even though the *** Age Discrimination in Employment Act[] expressly permitted collective actions." *Italian Colors*, 133 S. Ct.

at 2311. This decision, however, was premised on the fact that, under the ADEA, joint action is not a core, unwaivable right akin to freedom from discrimination. See *Gilmer*, 500 U.S. at 27-28, 32. *Gilmer*, in fact, did not involve any NLRA or NLGA claims. Under the NLRA and NLGA, by contrast, joint action *is* a core right. See pp. 9-16, 19-22, *supra*. Accordingly, enforcing Epic’s contract would not be comparable to sustaining the class waiver in *Gilmer*, but rather to upholding a prospective waiver of liability for age discrimination or of any other “essential” federal right. Cf. *14 Penn Plaza*, 556 U.S. at 265 (“[F]ederal antidiscrimination rights may not be prospectively waived.”).

C. The NLRA And NLGA Represent A Contrary Congressional Command Sufficient To Override The FAA

This Court need not inquire whether the NLRA “overrides” the FAA because, as demonstrated above, the statutes can be read in harmony by applying the FAA’s saving clause or the prospective-waiver doctrine. If the Court does reach this inquiry, however, and finds that the FAA and NLRA conflict, the NLRA and NLGA announce a strong “contrary congressional command” against the enforcement of joint-legal action bans in individual employment-related arbitration agreements. In addition, if the Court were to find an irreconcilable conflict between the FAA, on the one hand, and the NLRA and NLGA, on the other, the later-enacted NLRA and NLGA would repeal the FAA to that extent.

This Court has explained that “[l]ike any statutory directive, the [FAA’s] mandate may be overridden by a

contrary congressional command.” *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). Such a command can be deduced from the conflicting statute’s “text or legislative history,” or “from an inherent conflict between arbitration and the statute’s underlying purpose,” *id.* at 227, and can apply to specific provisions of an arbitration agreement, see *Italian Colors*, 133 S. Ct. at 2309 (analyzing class-action waiver). The question is simple: did Congress “evince[] an intention to preclude” the disputed directive. *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628). Such a command requires no specially emphatic force, specificity, or magic words.

Both the text and underlying purpose of the NLRA and NLGA evince precisely this type of narrow contrary congressional command against the enforcement of joint-action bans in individual employment-related arbitration agreements. First, the text of the NLRA unambiguously protects employees’ right to engage in joint action. See pp. 10-16 *supra*. Section 7 explicitly declares that employees have a right to “engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. 157. Similarly, section 3 of the NLGA bars enforcement of any “agreement” that violates the Act’s public policy guaranteeing employees’ right to act concertedly for mutual aid and protection. *Ibid.* Section 3 further declares that such agreements “shall not afford any basis for the granting of legal or equitable relief by any [court of the United States].” 29 U.S.C. 103. And, as this Court has explained, an order compelling arbitration pursuant to an agreement between parties is a form of specific performance, a remedy in equity. See *Southland Corp.*

v. *Keating*, 465 U.S. 1, 13 (1984) (“The [FAA] sought to ‘overcome the rule of equity, that equity will not specifically enforce any arbitration agreement.’”) (citation omitted) (emphasis added); *Red Cross Line v. Atl. Fruit Co.*, 264 U.S. 109, 118-122 (1924) (describing orders compelling arbitration as a type of specific performance).

Although these statutes lack specific language referencing arbitration, this is hardly surprising given that when the Acts were passed courts had never applied the FAA to individual employment contracts. In fact, it was not until 2001 that this Court definitively ruled that the FAA applied to them. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). By prohibiting employer interference with employees’ right to engage in joint legal action, the plain text of the NLRA and NLGA establishes a contrary congressional command precluding the enforcement of employer-mandated joint-action bans in individual arbitration agreements.

Pursuant to this Court’s explanation in *McMahon*, federal courts have consistently found a contrary congressional command when the FAA’s enforcement mandate inherently conflicts with the underlying purpose of another federal statute. See, e.g., *In re Nat'l Gypsum Co.*, 118 F.3d 1056, 1067-1069 (5th Cir. 1997) (finding that arbitration of some core bankruptcy proceedings conflicts with the underlying purposes of the Bankruptcy Code). In the bankruptcy context, for example, federal courts have concluded that arbitration of some bankruptcy proceedings would conflict with the Bankruptcy Code’s underlying purposes of “centraliz[ing] [the] resolution of purely

bankruptcy issues [and] protect[ing] creditors and reorganizing debtors from piecemeal litigation.” *Id.* at 1069; see also *In re White Mountain Mining Co., LLC*, 403 F.3d 164, 169-170 (4th Cir. 2005) (similarly concluding that arbitration of certain core bankruptcy proceedings would conflict with the Bankruptcy Code’s purposes of “[c]entralization of disputes concerning a debtor’s legal obligations” and “protect[ion of] reorganizing debtors and their creditors from piecemeal litigation”).

Although the Court failed to find a contrary congressional command in *CompuCredit*, 565 U.S. 95, in the Credit Repair Organization Act (CROA), the history and purpose of that Act differ markedly from those of the NLRA and NLGA. As the Court noted, the CROA was designed only to create “the guarantee of the legal power to impose liability,” not to specify the forum that must impose such liability. *CompuCredit*, 565 U.S. at 102 (emphasis not included). As demonstrated above, the text, purpose, and history of the NLRA and NLGA make clear that the statutes were designed to allow employees to join together in legal actions “for the purpose of * * * mutual aid or protection.”

Furthermore, the later-enacted NLRA (1935) and NLGA (1932) repealed conflicting provisions of the FAA (1925) and therefore supersede its mandates. Section 15 of the NLGA *expressly* repeals provisions of the FAA that conflict with the NLGA. 29 U.S.C. 115 (“All acts and parts of acts in conflict with the provisions of this chapter are repealed.”). And, although the NLRA contains no similar express repeal, this Court has instructed that in the rare cases

where statutes “irreconcilabl[y] conflict,” the later-enacted Act impliedly repeals the earlier. *Posadas v. Nat'l City Bank of New York*, 296 U.S. 497, 503 (1936). In both acts, then, Congress repealed any conflicting provisions within the FAA. See *Lockhart v. United States*, 546 U.S. 142, 149 (2005) (Scalia, J., concurring) (“When the plain import of a later statute directly conflicts with an earlier statute, the later enactment governs.”); *Marcello v. Bonds*, 349 U.S. 302, 310 (1955) (“Unless we are to require the Congress to employ magical passwords in order to effectuate an exemption * * * we must hold that the present statute expressly supersedes the [earlier-enacted, conflicting] provisions.”). And, while the FAA was recodified in 1947, this Court has held that a non-substantive re-enactment of a statute does not affect last-in-time analysis. See *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961) (re-enacted “identical” provision “can[not] fairly be regarded as a later enactment”); *Anderson v. Pac. Coast S.S. Co.*, 225 U.S. 187, 199 (1912) (“[I]t will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect, unless such intention is clearly expressed.”). When Congress recodified the FAA, it had no intention of substantively changing the Act. See S. Rep. No. 80-664, 80th Cong., 1st Sess. 1 (1947) (recodification made no “material change[s]” and “[n]o attempt * * * to make amendments in existing law”); H.R. Rep. No. 80-251, 80th Cong., 1st Sess. 1 (1947) (same); H.R. Rep. No. 80-255, 80th Cong., 1st Sess. 1 (1947) (same). Congress substantively amended the NRLA, on the other hand, in 1947, 1959, and 1974, further supporting an implied repeal of any irreconcilably conflicting provisions in the FAA. See

Labor Management Relations Act, Pub. L. No. 80-101, 61 Stat. 136 (1947); Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 136 (1959); Labor Relations Act, amendments, Pub. L. 93-360, 88 Stat. 395 (1974).

* * *

Employers and their amici mistakenly and repeatedly rely on two faulty assumptions about arbitration. First, they assert that there is a federal policy favoring arbitration agreements. While there is no doubt that the FAA was originally enacted in response to “hostility to arbitration agreements,” this federal policy applies only to put arbitration contracts “on an equal footing with other contracts.” *Concepcion*, 563 U.S. at 339. After that, the policy has little applicability, especially to provisions, like the joint-action bans here, that would have exactly the same scope and effect if they appeared in a contract that did not mention arbitration. Thus, the FAA cannot resuscitate a contract that clearly violates federal law. That would put the contract not “on equal footing” but on steroids—far beyond what Congress intended.

Second, the employers argue that there is a presumption in favor of arbitrability. Any such presumption applies, however, “only where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand” and controls only “where the presumption is not rebutted.” *Granite Rock v. Int’l Bhd. of Teamsters*, 561 U.S. 287, 301 (2010). Since the joint-action ban is illegal, however, it cannot “cover[]” any dispute and,

even if it somehow did, its illegality would conclusively rebut any presumption that it should apply.

D. The Employers' View Of The FAA, Not The Employees', Would Lead To Absurd Results

Epic makes several eye-popping claims about where requiring the availability of joint proceedings would lead. All are unfounded. First, Epic argues, “mandatory arbitration in the employment context would be a thing of the past.” Epic Br. 47. Not true. So long as employees can pursue joint legal action through a law suit *or* arbitration their section 7 rights are preserved and joint arbitration has long been a feature of labor law. Second, Epic fancifully contends that “employers would be forever prohibited from opposing a request for class certification, no matter the forum [and that] courts would be unable to deny them.” *Id.* at 48. Again, untrue. Section 7 does not mean that otherwise inappropriate joint action can proceed, just that an employer cannot take away all types of otherwise available joint action.¹⁰

¹⁰ The employers and their amici’s various arguments sounding in the Rules Enabling Act, 28 U.S.C. 2072(b), *e.g.*, Epic Br. 48-49, are especially puzzling. Epic, for example, argues that a court could never enforce Rule 23’s certification requirements without “abridg[ing]” or “modify[ing]” the employees’ section 7 right. *Id.* at 49. But section 7 requires only that a generally available joint procedural device be made available to employees on the same terms as it is made available to everyone else. It does not require that it be made available on preferential or unconditional terms.

Amici push the Rules Enabling Act even further. They argue in various ways that if section 7 grants a right to pursue joint legal action, then Rule 23 “modif[ies]” that right and is therefore an invalid rule of federal procedure. See, *e.g.*, Amicus Br. Retail

Rather it is Epic’s position that leads to absurd results. It would require courts to uphold arbitration provisions that are *themselves* illegal because “[a] defense that exists only because of the presence of a particular arbitration provision in a contract is not generally applicable.” Pet. 19. Thus, under Epic’s view, its joint-action ban would be impervious to legal challenge even if, for instance, it were adopted by collusive arrangement with other employers for the purpose of restraining trade. Such an interpretation, however, is foreclosed by this Court’s decision in *Paramount Famous Lasky Corp. v. United States*, in which an arbitration agreement was held unlawful under the Sherman Act because it “provide[d] for compulsory joint action [against violators]” and major film industry participants “refus[ed] to contract for display of pictures” using any other arrangement. 282 U.S. 30, 40-41 (1930); see also *Ross v. Am. Express Co.*, 35 F. Supp. 3d 407, 456 (S.D.N.Y. 2014) (“[T]he collusive adoption of mandatory class-action-barring arbitration clauses, if proven, would have constituted an unreasonable restraint on trade.”). Likewise, the employers’ view would require courts to enforce arbitration agreements inserted into contracts solely on the basis of race or sex. But see 42 U.S.C. 1981(b); *Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984) (“A

Litigation Center 20-22; Amicus Br. Council on Labor Law Equality 24-26. They fail to see, however, that their argument would eat through all the federal rules. As the employers admit, for example, section 7 clearly protects the right to pursue individual legal action to vindicate rights secured by a collective bargaining agreement. See, e.g., Epic Br. 37. Under the employers’ amici’s view, however, most of the federal rules would “modify” that right since they determine how it can be exercised in a judicial proceeding and would thus be invalid.

benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion.”). But, as this Court has held, “where the judgment of the Court would itself be enforcing the precise conduct made unlawful by [an] Act,” a court cannot require such conduct. *Kelly v. Kosuga*, 358 U.S. 516, 520 (1959).

The sole exception Epic would allow is when Congress has not only made certain conduct illegal but also specifically and expressly referenced arbitration or the manner in which it is carried out. But that would require Congress to add otherwise unnecessary language expressly addressing arbitration in *every* statute that makes conduct illegal.¹¹ Surely, the FAA does not require Congress to act so redundantly. If Congress has declared something illegal, the courts cannot require it.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

¹¹ This view of illegality does not, as the employers contend, “gut,” E&Y Br. 35, “circumvent,” *id.* at 36, or “swallow,” *e.g.*, Amicus Br. Washington Legal Foundation 19, this Court’s contrary-congressional-command analysis. That analysis applies primarily to *legal* arbitration provisions and practices, not *illegal* ones. That explains why prior cases in this Court addressing the conflict between the FAA and other federal statutes turned on contrary congressional commands rather than the FAA’s saving clause, see, *e.g.*, Epic Br. 20. These cases alleged conflict but no illegality.

Respectfully submitted.

DAVID C. ZOELLER
WILLIAM E. PARSONS
CAITLIN M. MADDEN
KATELYNN M. WILLIAMS
HAWKS QUINDEL, S.C.
*222 West Washington
Ave., Suite 450*
Madison, WI
53701
(608) 257-0040
dzoeller@hq-law.com

DANIEL R. ORTIZ
Counsel of Record
TOBY J. HEYTENS
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
SUPREME COURT
LITIGATION CLINIC
580 Massie Road
Charlottesville, VA
22903
(434) 924-3127
dro@virginia.edu

ADAM HANSEN
APOLLO LAW LLC
400 South 4th Street,
Suite 401M - 250
Minneapolis, MN 55415
(612) 927-2969

AUGUST 2017

Appendix of Relevant Statutory Provisions

Section 2 of the Federal Arbitration Act (FAA), 9 U.S.C.A. § 2, provides:

Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 1 of the Norris-LaGuardia Act (NLGA), 29 U.S.C.A. § 101, provides:

Issuance of restraining orders and injunctions; limitation; public policy

No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

**Section 2 of the Norris-LaGuardia Act
(NLGA), 29 U.S.C.A. § 102, provides:**

Public policy in labor matters declared

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

**Section 3 of the Norris-LaGuardia Act
(NLGA), 29 U.S.C.A. § 103, provides:**

Nonenforceability of undertakings in conflict with public policy; “yellow dog” contracts

Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 102 of this title, is declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following:

Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby

(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.

**Section 4 of the Norris-LaGuardia Act
(NLGA), 29 U.S.C.A. § 104 provides in pertinent
part:**

Enumeration of specific acts not subject to restraining orders or injunctions

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

* * *

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

* * *

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified.

**Section 15 of the Norris-LaGuardia Act
(NLGA), 29 U.S.C.A. § 115 provides:**

Repeal of conflicting acts

All acts and parts of acts in conflict with the provisions of this chapter are repealed.

**Section 1 of the National Labor Relations Act
(NLRA), 29 U.S.C.A. § 151 provides:**

Findings and declaration of policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or

interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

**Section 7 of the National Labor Relations Act
(NLRA), 29 U.S.C.A. § 157 provides:**

Right of employees as to organization, collective bargaining, etc.

Employees 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 shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

**Section 8 of the National Labor Relations Act
(NLRA), 29 U.S.C.A. § 158 provides in pertinent part:**

Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer-

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

No. 16-300

In the Supreme Court of the United States

ERNST & YOUNG LLP, ET AL., PETITIONERS

v.

STEPHEN MORRIS, ET AL.

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

BRIEF FOR THE PETITIONERS

REX S. HEINKE
GREGORY W. KNOPP
AKIN GUMP STRAUSS HAUER
& FELD LLP
*1999 Avenue of the Stars,
Suite 600
Los Angeles, CA 90067*

PRATIK A. SHAH
DANIEL L. NASH
AKIN GUMP STRAUSS HAUER
& FELD LLP
*1333 New Hampshire
Avenue, N.W.
Washington, DC 20036*

KANNON K. SHANMUGAM
Counsel of Record
ALLISON JONES RUSHING
A. JOSHUA PODOLL
WILLIAM T. MARKS
EDEN SCHIFFMANN
WILLIAMS & CONNOLLY LLP
*725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com*

QUESTION PRESENTED

Whether the collective-bargaining provisions of the National Labor Relations Act prohibit the enforcement under the Federal Arbitration Act of an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis.

(I)

**PARTIES TO THE PROCEEDING
AND CORPORATE DISCLOSURE STATEMENT**

Petitioners are Ernst & Young LLP and Ernst & Young U.S. LLP. Petitioners are limited liability partnerships. They have no parent corporations, and no publicly held companies own 10% or more of their stock.

Respondents are Stephen Morris and Kelly McDaniel.

(II)

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In the Supreme Court of the United States

No. 16-300

ERNST & YOUNG LLP, ET AL., PETITIONERS

v.

STEPHEN MORRIS, ET AL.

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-42a) is reported at 834 F.3d 975. The order of the district court granting petitioners' motion to compel arbitration (Pet. App. 43a-67a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2016. The petition for a writ of certiorari was filed on September 8, 2016, and granted on January 13, 2017. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

(1)

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. 2, provides:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 7 of the National Labor Relations Act, 29 U.S.C. 157, provides:

Employees 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 shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in relevant part:

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title[.]

STATEMENT

This case presents an extraordinarily important question concerning the enforceability of agreements requiring employees and employers to arbitrate claims against one another on an individual, rather than collective, basis. Under the Federal Arbitration Act, arbitration provisions “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. 2. The question presented is whether the collective-bargaining provisions of the National Labor Relations Act prohibit the enforcement under the Arbitration Act of arbitration provisions of the type at issue here.

Petitioners are Ernst & Young LLP and Ernst & Young U.S. LLP (collectively “EY”). Virtually all of EY’s approximately 40,000 employees in the United States have agreed to an arbitration provision as a condition of employment, requiring all disputes with petitioners to be resolved in individual arbitration. Respondents are two of petitioners’ former employees. Despite the arbitration provisions in their employment agreements, respondents filed a class action against petitioners in federal court, asserting claims under the Fair Labor Standards Act and California law. Petitioners moved to compel arbitration, and the district court granted the motion, holding that the arbitration provision at issue was enforceable.

A divided panel of the Ninth Circuit reversed. Over a lengthy dissent, the majority held that the arbitration provision violated the collective-bargaining provisions of the National Labor Relations Act and was thus unenforceable under the Arbitration Act. In so holding, the Ninth Circuit specifically rejected the mode of analysis this Court has established for evaluating a potential conflict between the Arbitration Act and another federal

statute, under which the other federal statute must contain a clear congressional command to override the Arbitration Act's express mandate to enforce arbitration provisions according to their terms. The Ninth Circuit's decision was incorrect, and its judgment should be reversed.

A. Background

1. Arbitration is an alternative form of dispute resolution that offers many benefits over traditional litigation. Arbitration allows the parties to design their own “efficient, streamlined procedures tailored to the type of dispute” at issue. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011). It produces “expeditious results.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985). And it “reduc[es] the cost” of dispute resolution. *AT&T Mobility*, 563 U.S. at 345.

Despite those benefits, there was a long history of “judicial hostility” to arbitration. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-511 (1974). That hostility dates from the English common law, which “traditionally considered irrevocable arbitration agreements as ‘ousting’ the courts of jurisdiction, and refused to enforce such agreements for this reason.” *Id.* at 510 n.4. Judicial hostility to arbitration was “firmly embedded” in English law and carried over into American law. H.R. Rep. No. 96, 68th Cong., 1st Sess. 1-2 (1924). It “manifested itself in a great variety of devices and formulas declaring arbitration against public policy.” *AT&T Mobility*, 563 U.S. at 342 (internal quotation marks and citation omitted).

In 1925, Congress enacted the Federal Arbitration Act, 9 U.S.C. 1-16, to reverse the “old common-law hostility toward arbitration.” *Southland Corp. v. Keating*,

465 U.S. 1, 14 (1984). In its primary substantive provision, Section 2, the Arbitration Act states that “[a] written provision in any * * * contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. 2.

As this Court has repeatedly recognized, the Arbitration Act reflects “both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract.” *AT&T Mobility*, 563 U.S. at 339 (internal quotation marks and citation omitted). Consistent with that understanding and Section 2’s express mandate, “courts must rigorously enforce arbitration agreements according to their terms.” *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013) (internal quotation marks and citation omitted). That principle applies in the context of employment agreements. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001). It applies in the context of agreements that require individual arbitration. See *AT&T Mobility*, 563 U.S. at 345-352. And it applies in the context of agreements to arbitrate federal statutory claims, unless “the [Arbitration Act’s] mandate has been overridden by a contrary congressional command.” *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012) (internal quotation marks and citations omitted).

2. This case presents a question at the intersection of the foregoing contexts: namely, whether an arbitration provision in an employment agreement that requires an employee to arbitrate claims on an individual basis is valid and enforceable under the Arbitration Act. Arbitration of employment disputes has long been routine for unionized employees, and it has become increasingly

common for non-unionized employees over the last fifty years. See Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 Hofstra L. Rev. 83, 84 (1996).

The argument that arbitration provisions of the type at issue here are unenforceable relies on the National Labor Relations Act (NLRA). In enacting the NLRA in 1935, Congress found that “[t]he denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest.” 29 U.S.C. 151. Accordingly, Congress sought to promote industrial peace by “encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.” *Ibid.*

Of relevance here, Section 7 of the NLRA 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.” 29 U.S.C. 157. And Section 8(a) of the NLRA makes it an “unfair labor practice” for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed” by Section 7. 29 U.S.C. 158(a). The NLRA does not contain any reference to class or other collective dispute-resolution procedures, whether in court or in arbitration.

B. Facts And Procedural History

1. Petitioner Ernst & Young LLP is an accounting firm serving clients in the United States; petitioner

Ernst & Young U.S. LLP is an affiliate of Ernst & Young LLP. Virtually all of EY's approximately 40,000 employees in the United States have consented to an arbitration provision as a condition of employment. The agreement between EY and those employees specifies that “[a]ll claims, controversies or other disputes between [petitioners] and an [e]mployee that could otherwise be resolved by a court” will instead be resolved through the Common Ground Dispute Resolution Program. J.A. 37.

The Common Ground Program is designed to “provide a fair, prompt, and cost-effective mechanism for resolving disputes” between EY and its employees. J.A. 36. The program has existed since 2002, with amendments not relevant here. *Ibid.* It expressly preserves an employee’s right to file a charge with the Equal Employment Opportunity Commission or any other administrative agency. J.A. 47.

Under the Common Ground Program, dispute resolution proceeds in two phases. The first phase is mediation. To initiate mediation, the employee need only provide EY with notice in writing of a dispute and pay a fee equivalent to the fee for filing a lawsuit in a local court of general jurisdiction or the fee specified in the dispute-resolution provider’s rules, whichever is less. EY pays the remaining fees and costs associated with the mediation. The employee then has the option of selecting among the available dispute-resolution providers to conduct the mediation. The employee is entitled to counsel in the mediation; if the employee chooses not to hire a lawyer (and is not himself a lawyer), EY will not use a lawyer either. If mediation does not resolve the dispute within 90 days, the process proceeds to the next phase unless the parties agree to an extension. J.A. 39-41.

The second phase of the Common Ground Program is binding arbitration. In that phase, “[c]overed [d]isputes pertaining to different [e]mployees will be heard in separate proceedings”; class or other collective proceedings are not permitted. The employee can initiate arbitration without paying an additional fee, and the employee again has the option of choosing the dispute-resolution provider and retaining counsel. EY pays the filing and administrative fees associated with the arbitration. The parties pay their own attorney’s fees and split the arbitrator’s fees and costs evenly, although EY will pay a larger portion of the arbitrator’s fees and costs under certain circumstances. The arbitrator also has the authority to order EY to reimburse the employee’s attorney’s fees. J.A. 42, 44-46.

Both parties may take discovery, including “reasonable” document requests; three depositions of fact witnesses of each party’s choosing; depositions of any expert witnesses designated by the other party; and additional discovery as necessary to ensure “adequate[]” arbitration of the claim. The arbitrator then holds a hearing in which the employee and EY present their cases through testimony and documentary evidence. The arbitrator’s award is final and binding. J.A. 44-45.

2. Respondent Stephen Morris worked in the audit division of EY’s Los Angeles, California, office from 2005 to 2007. Respondent Kelly McDaniel worked in the audit division of EY’s San Jose, California, office from 2008 to 2011. During her tenure at EY, McDaniel became a licensed accountant. Both respondents agreed to resolve their employment-related disputes through the Common Ground Program. J.A. 17-18, 25-26; Pet. App. 45a.

3. In 2012, respondent Morris brought suit against petitioners in the United States District Court for the Southern District of New York on behalf of a nationwide

class of employees and a separate class of California employees, alleging that petitioners had misclassified the employees for purposes of overtime pay under the Fair Labor Standards Act (FLSA) and California law. Respondent McDaniel later joined the lawsuit as a named plaintiff. After the case was transferred to the Northern District of California, petitioners moved to compel arbitration. Respondents did not dispute that their claims were covered by the arbitration provision; they argued that the arbitration provision was unenforceable because, among other things, the collective-bargaining provisions of the NLRA conferred a nonwaivable right to collective litigation. J.A. 14; Pet. App. 45a, 50a.

The district court granted petitioners' motion to compel arbitration and dismissed the case. Pet. App. 43a-67a. As is relevant here, the court reasoned that it was required to "enforce the instant agreement according to its terms" because "Congress did not expressly provide [in the NLRA] that it was overriding any provision in the [Arbitration Act]," which embodies a "strong policy choice in favor of enforcing arbitration agreements." *Id.* at 66a-67a (first alteration in original) (internal quotation marks and citation omitted).

4. A divided panel of the court of appeals reversed and remanded. Pet. App. 1a-42a.

a. The court of appeals began its analysis by examining the NLRA. Pet. App. 3a-11a. Citing case law construing Section 7 of the NLRA, the court asserted that "Section 7 protects a range of concerted employee activity, including the right to seek to improve working conditions through resort to administrative and judicial forums." *Id.* at 7a (internal quotation marks and citation omitted). According to the court, Section 7 thus establishes a "substantive right" for employees "to pursue work-related legal claims, and to do so together." *Id.* at

8a, 10a. The employment agreements' arbitration provision, the court of appeals determined, "prevents concerted activity by employees in arbitration proceedings, and the requirement that employees only use arbitration prevents the initiation of concerted legal action anywhere else." *Id.* at 11a. As a result, the court reasoned, the provision "interfere[s] with a protected [Section] 7 right in violation of [Section] 8" of the NLRA and "cannot be enforced." *Ibid.*

Having not yet even mentioned the Arbitration Act, the court of appeals proceeded to dismiss it, stating that the Arbitration Act "does not dictate a contrary result." Pet. App. 12a. In the court's view, "[t]he illegality of the 'separate proceedings' term here has nothing to do with arbitration as a forum." *Id.* at 13a. Rather, "[i]rrespective of the forum in which disputes are resolved, employees must be able to act in the forum *together*." *Id.* at 23a. Relying on the Arbitration Act's saving clause, which provides that an arbitration agreement is enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. 2, the court concluded that petitioners' arbitration provision was prohibited by the NLRA and thus was unenforceable. Pet. App. 16a, 24a.

In reaching that conclusion, the court of appeals recognized that the majority of circuits to have considered the issue had reached the opposite conclusion. Pet. App. 24a n.16. The court of appeals specifically rejected the mode of analysis underlying those courts' logic, which would require a "contrary congressional command" in a federal statute in order to override the Arbitration Act's mandate to enforce arbitration agreements. *Id.* at 17a.

b. Judge Ikuta dissented. Pet. App. 25a-42a. In her view, the majority's reasoning was "directly contrary" to this Court's arbitration jurisprudence. *Id.* at 25a.

Judge Ikuta began by observing that, “[c]ontrary to the majority’s focus on whether the NLRA confers ‘substantive rights,’ in every case considering a party’s claim that a federal statute precludes enforcement of an arbitration agreement, the Supreme Court begins by considering whether the statute contains an express ‘contrary congressional command’ that overrides the [Arbitration Act].” Pet. App. 29a (citing *Italian Colors*, 133 S. Ct. at 2309; *CompuCredit*, 565 U.S. at 98; and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)).

Under that test, Judge Ikuta reasoned, the NLRA contained nothing “remotely close” to a “contrary congressional command” that would displace the Arbitration Act’s clear mandate to enforce arbitration agreements according to their terms. Pet. App. 35a. The collective-bargaining provisions of the NLRA “neither mention arbitration nor specify the right to take legal action at all, whether individually or collectively.” *Ibid.* Nor do those provisions “expressly preserve any right for employees to use a specific procedural mechanism to litigate or arbitrate disputes collectively.” *Id.* at 36a. In addition, Judge Ikuta found no support in the NLRA’s legislative history or underlying purposes for the conclusion that the NLRA precludes enforcement of an agreement requiring disputes to be resolved in individual arbitration. *Id.* at 37a-38a.

Judge Ikuta proceeded to reject the majority’s reliance on the Arbitration Act’s saving clause. Pet. App. 38a-41a. At the outset, Judge Ikuta noted that this Court “does not apply the savings clause to federal statutes”; instead, unless the supposedly conflicting statute contains a congressional command contrary to the use of arbitration, it “can be harmonized with the [Arbitration Act].” *Id.* at 39a. She contended that the majority’s reasoning was based on the erroneous premise that collec-

tive-action waivers are illegal, when in fact such a waiver “would be illegal only if it were precluded by a ‘contrary congressional command’ in the NLRA, and here there is no such command.” *Id.* at 40a.

Judge Ikuta further reasoned that, even if the Arbitration Act’s saving clause were applicable to federal statutes, it could not save the majority’s construction of the NLRA as “giving employees a substantive, nonwaivable right to classwide actions.” Pet. App. 40a. As she explained, such a purported right would “disproportionately and negatively impact arbitration agreements by requiring procedures that ‘interfere[] with fundamental attributes of arbitration.’” *Ibid.* (alteration in original) (quoting *AT&T Mobility*, 563 U.S. at 344). In *AT&T Mobility*, she added, the Court “expressly rejected” the reasoning behind the majority’s conclusion that “the nonwaivable right to class-wide procedures [that the majority] has discerned in [Section] 7” complies with the Arbitration Act simply because it “applies equally to arbitration and litigation.” *Ibid.*

Judge Ikuta concluded by observing that the majority’s rule was “directly contrary to Congress’s goals in enacting the [Arbitration Act].” Pet. App. 40a. She noted that “lawyers are unlikely to arbitrate on behalf of individuals when they can represent a class, and an arbitrator cannot hear a class arbitration unless such a proceeding is explicitly provided for by agreement.” *Id.* at 40a-41a (citation omitted). As a result, “the employee’s purported nonwaivable right to class-wide procedures virtually guarantees that a broad swath of workplace claims will be litigated” rather than arbitrated. *Id.* at 41a. The majority, in other words, “exhibit[ed] the very hostility to arbitration that the [Arbitration Act] was passed to counteract.” *Ibid.*

SUMMARY OF ARGUMENT

I. This case concerns an alleged conflict between the Federal Arbitration Act, which mandates that arbitration agreements be enforced according to their terms, and the National Labor Relations Act, which respondents contend prohibits individual-arbitration provisions such as the one contained in the agreement between respondents and EY. To avoid arbitration according to the terms of their agreement, respondents bear the burden of demonstrating that the NLRA contains a clear command contrary to the Arbitration Act's command to enforce arbitration agreements according to their terms. They cannot do so.

A. Section 2 of the Arbitration Act provides that “[a] written provision in any * * * contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. 2. Consistent with that clear directive, courts must enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes.

When two federal statutes are allegedly in conflict, courts must harmonize the statutes if they are capable of coexistence, absent a clearly expressed congressional intention to the contrary. In the specific context of the Arbitration Act, the Court has distilled that principle into a rule that the Arbitration Act's clear command to enforce arbitration agreements according to their terms will yield only when it has been overridden by a contrary congressional command in another federal statute. The burden of proving that a federal statute displaces the Arbitration Act is heavy. In fact, that burden has not

been met in any case in which the statute in question does not expressly prohibit arbitration. In every such instance, this Court has rejected litigants' attempts to avoid arbitration by asserting that another federal statute displaces the Arbitration Act.

B. This case is no different. Respondents cannot carry their burden of showing that Congress intended in the NLRA to override the Arbitration Act by precluding agreements to arbitrate generally or agreements to arbitrate on an individual basis specifically. Nothing in the text of the NLRA demonstrates a congressional command contrary to agreements to arbitrate, much less agreements to arbitrate on an individual basis. Section 7 of the NLRA, which respondents invoke, contains no language about the availability of a judicial forum or collective dispute-resolution procedures in disputes between employers and employees. Nor does it refer to arbitration. Indeed, no provision anywhere in the NLRA guarantees a judicial forum or collective procedures for dispute resolution or disavows arbitration for resolving such disputes. Respondents rely on Section 7's residual clause, but its general language falls far short of the much more specific language in other statutes that this Court has held is still insufficient to demonstrate a congressional command contrary to the Arbitration Act.

The legislative history of the NLRA similarly lacks any indication of a congressional intent to preclude agreements to arbitrate generally or agreements to arbitrate on an individual basis specifically. To the extent there was discussion of arbitration in the legislative history of the NLRA, it was primarily in the context of a proposal to have the National Labor Relations Board *conduct* arbitrations. There was no discussion whatsoever of a right to pursue claims on a class or other collective basis against employers—which makes sense, given

that the NLRA was enacted decades before the adoption of the modern class-action mechanism in the Federal Rules of Civil Procedure and years before the adoption of the collective-action mechanism in the Fair Labor Standards Act.

Nor can the underlying purposes of the NLRA be said to be in inherent conflict with individual arbitration. The principal purpose of the NLRA is to minimize industrial strife by encouraging self-organization and collective bargaining. To the extent the NLRA protects employees' rights, it does so not for their own sake but rather to serve that purpose. Moreover, federal labor policy has long favored and promoted arbitration in the collective-bargaining process. This Court has observed that the advantages of arbitration, including the use of efficient procedures that reduce the cost and increase the speed of dispute resolution, may be of particular importance in employment litigation. Nothing suggests that the underlying purposes of the NLRA are irreconcilable with individual arbitration. Because the statute evinces no clear congressional intent to supersede the Arbitration Act, the arbitration provisions at issue here must be enforced according to their terms.

II. In holding that employment agreements requiring the parties to arbitrate on an individual basis are unenforceable, the court of appeals relied on erroneous interpretations both of the Arbitration Act's saving clause and of the NLRA.

A. The saving clause of the Arbitration Act permits courts to withhold enforcement of an arbitration agreement "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. That clause applies where a generally applicable doctrine of contract law—which, with rare exception, is supplied by state, not federal, law—prohibits the enforcement of an arbitration

agreement. The saving clause thus “saves” generally applicable state-law contract defenses such as fraud, but not defenses that discriminate against or apply only to arbitration. By its terms, the saving clause does not apply where another *federal* statute allegedly discriminates against arbitration. And for good reason. Unlike the States, Congress is entitled to enact laws discriminating against arbitration; no “saving” is necessary. That explains why this Court has never relied on the saving clause to resolve an alleged conflict between the Arbitration Act and another federal statute.

The court of appeals attempted to circumvent the foregoing logic by invoking the generally applicable “illegality” defense recognized at common law in most States. The court reasoned that the NLRA confers a nonwaivable substantive right to invoke collective-litigation procedures, making it “illegal” to enforce a contract that waives the right and thereby triggering the saving clause. That reasoning does not withstand scrutiny. For purposes of an “illegality” defense, the relevant public policy is that of the State. State public policy does not automatically embody federal public policy, and a State need not adopt federal public policy as its own. And if a State adopted a public policy of prohibiting agreements that require employees to arbitrate claims on an individual basis, that state law would be preempted by the Arbitration Act.

If the court of appeals were correct that state-law “illegality” defenses incorporate the policies of every federal statute, a litigant could circumvent the requirement of a clear congressional command simply by asserting that it would be “illegal” to enforce a contract that contravenes a federal statute. Such an approach would turn the saving clause against the Arbitration Act itself and would eviscerate the framework established by this

Court for analyzing conflicts between the Arbitration Act and other federal statutes.

B. Even if the saving clause applied, there is no nonwaivable substantive right to collective-litigation procedures at issue here. As an initial matter, this case does not involve any substantive rights under the NLRA. The rights respondents seek to vindicate arise under the Fair Labor Standards Act and California state law, and respondents can fully vindicate those rights in individual arbitration.

Respondents assert, however, that the NLRA confers on employees a right to invoke class or other collective procedures in litigating their non-NLRA rights. To state the obvious, the right to class or other collective procedures is a procedural right, not a substantive one. And a right to collective procedures can be waived.

In any event, the court of appeals erred in construing the NLRA to confer a nonwaivable right to invoke class or other collective procedures in dispute resolution between employees and employers. Both the text of Section 7, which guarantees a right to “engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,” and its context counsel against that interpretation. As for the text, “concerted activities” do not include activities in which an individual acts alone, such as an opt-out class action. And this litigation does not concern “mutual” rights, but rather employees’ individual causes of action under the FLSA and California law. As for the context, the clause upon which respondents rely is a residual clause that must be construed in a manner consistent with the more specific words preceding it. That context demonstrates that the residual clause protects concerted activities such as the enumerated activities of self-organization and collective bargaining; it does not reach into the courtroom

to protect particular procedures by which non-NLRA claims are adjudicated.

Even if Section 7 did confer a right to invoke class or other collective procedures, that right would be waivable. Employers and employees are free to negotiate terms limiting the methods by which employees exercise their collectively bargained rights. Rights that are not central to the collective-bargaining process are not absolute and can be waived in a collective-bargaining agreement. Any right to invoke class or other collective procedures for dispute resolution falls in the category of waivable rights. And where no union exists, employees are not precluded from waiving their own procedural rights. That conclusion is consistent with the presumption that an individual may waive legal protections intended for his or her benefit, absent an affirmative indication by Congress to the contrary.

C. Finally, the NLRB is not entitled to deference regarding the interplay between the Arbitration Act and the NLRA. This case does not present a question concerning the best interpretation of Section 7 when arbitration is not at issue, but rather a question concerning the reconciliation of the Arbitration Act and the NLRA. The NLRB does not administer the Arbitration Act. Nor can it supply, by virtue of its interpretation of the NLRA, the contrary *congressional* command necessary to override the Arbitration Act. The question whether such a congressional command exists is one for this Court to answer. Because there is no irreconcilable conflict between the Arbitration Act and the NLRA, the Arbitration Act's mandate that arbitration provisions are to be enforced according to their terms should be given effect, and the agreements at issue here enforced.

ARGUMENT

I. EMPLOYMENT AGREEMENTS REQUIRING THE PARTIES TO ARBITRATE ON AN INDIVIDUAL BASIS ARE ENFORCEABLE UNDER THE FEDERAL ARBITRATION ACT

This case involves an alleged conflict between the Federal Arbitration Act and another federal statute. The Court has faced similar conflicts many times before, and it has consistently held that the Arbitration Act applies unless the other federal statute contains a “congressional command” “contrary” to arbitration according to the terms of the parties’ agreement. Such a command must be “clearly” observable in the statute’s text, legislative history, or underlying purposes that inherently conflict with arbitration.

To avoid arbitration according to the terms of their agreement with petitioners, therefore, respondents must demonstrate that the National Labor Relations Act is irreconcilable with the Arbitration Act because the NLRA contains a clear command that is contrary to the Arbitration Act’s command to enforce arbitration agreements according to their terms. They cannot make that showing; indeed, in holding that the arbitration provision at issue was unenforceable, the Ninth Circuit did not even try. Nothing in the NLRA’s text, legislative history, or purposes clearly evinces a congressional intent to preclude arbitration generally or to preclude individual arbitration specifically. Respondents’ arbitration provision is therefore enforceable under the Arbitration Act. The Ninth Circuit erred in concluding otherwise, and its judgment should be reversed.

A. A Federal Statute Cannot Override The Arbitration Act's Clear Command To Enforce Arbitration Agreements According To Their Terms Unless It Contains A Clear Contrary Command

1. As this Court has repeatedly noted, the Arbitration Act embodies a “liberal federal policy favoring arbitration agreements.” *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). Section 2 of the Arbitration Act provides that “[a] written provision in any * * * contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. 2.

Section 2 “reflects the fundamental principle that arbitration is a matter of contract.” *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010). Consistent with that principle, “courts must rigorously enforce arbitration agreements according to their terms, including terms that specify *with whom* the parties choose to arbitrate their disputes, and the rules under which that arbitration will be conducted.” *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013) (internal quotation marks, citations, and brackets omitted).

“Like any statutory directive, the Arbitration Act’s mandate may be overridden by a contrary congressional command.” *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987). When two federal statutes allegedly conflict, “it is the duty of the courts, absent a clearly expressed congressional intention to the contrary,” to harmonize the statutes if they are “capable of co-existence.” *Morton v. Mancari*, 417 U.S. 535, 551 (1974); see *United States v. Estate of Romani*, 523 U.S.

517, 530-532 (1998). A merely “plausible” conflict between the statutes will not suffice to prevent harmonization. *American Bank & Trust Co. v. Dallas County*, 463 U.S. 855, 868-869 (1983).

Only when the two statutes are in “irreconcilable conflict” or when the later-enacted statute “covers the whole subject of the earlier one and is clearly intended as a substitute” will courts find that one statute impliedly repeals another. *Branch v. Smith*, 538 U.S. 254, 273 (2003) (plurality opinion) (internal quotation marks and citation omitted). And because “it can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change,” *United States v. Fausto*, 484 U.S. 439, 453 (1988), “repeals by implication are not favored.” *Branch*, 538 U.S. at 273 (internal quotation marks and citation omitted).

In the specific context of the Arbitration Act, this Court has synthesized those principles into a rule that the Arbitration Act’s clear command to enforce arbitration provisions according to their terms will yield only when it has been “overridden by a contrary congressional command” in another federal statute. *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012) (internal quotation marks and citation omitted). The party resisting enforcement of an arbitration provision bears the burden of showing that “Congress intended to preclude a waiver of a judicial forum” or the other terms waived in the agreement. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). Congress must demonstrate such an intention with “clarity.” *CompuCredit*, 565 U.S. at 103. And consistent with that standard, “any doubts * * * should be resolved in favor of arbitration.” *Moses H. Cone*, 460 U.S. at 24-25; see *CompuCredit*, 565 U.S. at 109 (Sotomayor, J., concurring in the judgment).

2. As this Court's decisions demonstrate, the burden of proving that a federal statute displaces the Arbitration Act is a heavy one. Indeed, where the statute in question does not expressly prohibit arbitration, the Court has uniformly rejected litigants' attempts to invoke another federal statute to displace the Arbitration Act. See, e.g., *Italian Colors*, 133 S. Ct. at 2309-2312 (Sherman Act); *CompuCredit*, 565 U.S. at 99-105 (Credit Repair Organizations Act); *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 90-92 (2000) (Truth in Lending Act); *Gilmer*, 500 U.S. at 26-33 (Age Discrimination in Employment Act); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 480-484 (1989) (Securities Act of 1933, overruling *Wilko v. Swan*, 346 U.S. 427 (1953)); *McMahon*, 482 U.S. at 227-242 (Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628-639 (1985) (Sherman Act); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-521 (1974) (Securities Exchange Act of 1934).

a. Three of the Court's decisions are particularly instructive. To begin with, take the decision in *CompuCredit*. The plaintiffs there filed a putative class action against their credit-card issuer under the Credit Repair Organizations Act (CROA), 15 U.S.C. 1679-1679j, and the issuer moved to compel arbitration in accordance with the plaintiffs' credit-card agreements. See 565 U.S. at 96-97.

In response, the plaintiffs argued that the CROA prohibited the arbitration of claims arising under its provisions. See 565 U.S. at 98-103. To support that view, the plaintiffs pointed to three of the CROA's provisions. One of the statute's provisions required credit-card issuers to include the following statement in contracts with

their customers: “You have a right to sue a credit repair organization that violates the [CROA].” 15 U.S.C. 1679c(a). A second provision, setting out the CROA’s civil cause of action, specifically and repeatedly used the terms “court,” “action,” and “class action,” arguably suggesting that the “right to sue” described in the first provision includes a right to bring a civil action in court. 15 U.S.C. 1679g. And a third provision stated that “[a]ny waiver by any consumer of any [of the CROA’s] protection[s]” was “void” and “may not be enforced.” 15 U.S.C. 1679f(a).

This Court nevertheless held that the CROA did not contain the requisite congressional command and thus did not prohibit the arbitration of claims arising under its provisions. See *CompuCredit*, 565 U.S. at 103-104. The Court noted that the CROA was “silent” on arbitration and that nothing in the CROA created a “right to bring an action *in a court of law.*” *Id.* at 99, 104 (emphasis added). Instead, the Court reasoned, the provisions the plaintiffs cited simply demonstrated that the CROA provided a “guarantee of the legal power to impose liability.” *Id.* at 102.

If Congress meant to prohibit the arbitration of claims under the CROA, the Court continued, “it would have done so in a manner less obtuse than what [the plaintiffs] suggest[ed].” 565 U.S. at 103. Citing the following examples, the Court noted that, when Congress has “restricted the use of arbitration,” it has done so with a “clarity that far exceeds the claimed indications in the CROA”:

“No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.”

“Notwithstanding any other provision of law, whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy.”

Id. at 103-104 (quoting 7 U.S.C. 26(n)(2) and 15 U.S.C. 1226(a)(2)). Because the CROA lacked that clarity, the Court held that it did not override the Arbitration Act and the arbitration provisions at issue were thus valid and enforceable. *Id.* at 104; see also *id.* at 108 (Sotomayor, J., concurring in the judgment) (agreeing that Congress did not “evince[] a contrary intent” in the CROA against enforcement of arbitration agreements).

b. The Court’s decision in *McMahon* is to the same effect. Of particular relevance here, the Court addressed whether the civil-liability provision in the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961-1968, precluded the arbitration of claims arising under that statute. That provision stated that “[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains.” 18 U.S.C. 1964(c).

Although the civil-liability provision specifically provided that an injured party may sue in court, the Court held that the provision did not “even arguably evince[] congressional intent to exclude civil RICO claims from the dictates of the Arbitration Act.” *McMahon*, 482 U.S. at 238. The Court added that there was no “hint in the[] legislative debates” to that effect, nor was there any “irreconcilable conflict” between the purposes of RICO’s

civil-liability provision and the Arbitration Act. *Id.* at 238-239. To the contrary, the purpose of the civil-liability provision was “remedial,” and arbitration would “adequately serve th[at] purpose[.]” *Id.* at 240, 241.

c. Finally, consider the Court’s decision in *Gilmer*. There, the plaintiff conceded that neither the text nor the legislative history of the statute at issue, the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621-634, contained the requisite congressional command. See 500 U.S. at 26. Accordingly, the Court analyzed only whether the ADEA’s “framework and purposes” conflicted with arbitration. *Id.* at 26-27.

In conducting its analysis, the Court accepted that the ADEA was designed to “further important social policies,” whereas “arbitration focuses on specific disputes between the parties involved.” 500 U.S. at 27. But the Court rejected the notion that the bilateral nature of arbitration created an “inherent inconsistency” with any statute designed to promote broader social goals. *Ibid.* Accordingly, the Court held that the Arbitration Act mandated enforcement of the arbitration provision—which contained a waiver of access to a collective-action mechanism identical to the one at issue here under the FLSA. See *id.* at 35.

d. Together, those decisions, and others like them, demonstrate that a party seeking to avoid arbitration based on a conflict between the Arbitration Act and another federal statute must show that Congress clearly intended for the other statute to displace the Arbitration Act. See *Mitsubishi Motors*, 473 U.S. at 628-640. It is not enough that a statute could be construed as conflicting with the Arbitration Act. See *CompuCredit*, 565 U.S. at 98-102; *McMahon*, 482 U.S. at 238-239. Nor will the Arbitration Act yield simply because the competing stat-

ute seeks to further a broad social policy. See *Gilmer*, 500 U.S. at 27.

Instead, only when a statute “evinces” a clear “congressional intent to exclude” the class of claims at issue “from the dictates of the Arbitration Act” will the Arbitration Act be displaced. *McMahon*, 482 U.S. at 238. Absent such a clear expression of intent, courts must give effect to the Arbitration Act’s unambiguous mandate to enforce arbitration provisions according to their terms. See, e.g., *CompuCredit*, 565 U.S. at 104.

B. The NLRA Does Not Contain A Clear Contrary Command To Override The Arbitration Act

Respondents agreed to arbitrate all employment disputes with EY on an individual, rather than collective, basis. They now maintain that EY cannot enforce the arbitration provision because the NLRA guarantees them a nonwaivable right to pursue collective litigation. In other words, respondents allege a conflict between the Arbitration Act, which requires enforcement of arbitration provisions according to their terms, and the NLRA.

Accordingly, respondents bear the burden of showing a clear contrary command in “the text of the [NLRA], its legislative history, or an inherent conflict between [individual] arbitration and the [NLRA’s] underlying purposes.” *Gilmer*, 500 U.S. at 26 (internal quotation marks and citation omitted). Because respondents cannot show that Congress intended in the NLRA to preclude agreements to arbitrate generally or agreements to arbitrate on an individual basis specifically, there is no irreconcilable conflict between the statutes, and the parties’ agreement must be enforced.

1. Nothing in the text of the NLRA evinces a congressional command contrary to agreements to arbitrate

trate, much less agreements to arbitrate on an individual basis. The key section respondents invoke, Section 7, provides in relevant part: “Employees 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.” 29 U.S.C. 157. That provision contains no language guaranteeing the availability of a judicial forum in disputes between employers and employees. Nor does it contain any reference to class or other collective dispute-resolution procedures. And it does not even refer to arbitration.

Indeed, no provision in the entire NLRA guarantees the availability of a judicial forum or collective dispute-resolution procedures in disputes between employers and employees. Nor does the NLRA mention arbitration at all, aside from acknowledging that an employee may request that his union “use the grievance-arbitration procedure on the employee’s behalf.” 29 U.S.C. 169.

In particular, respondents rely on Section 7’s residual clause, which gives employees the right to “engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. 157. But the general language of that residual clause does not come close to doing the “heavy lifting” required to evince a clear intent to preclude individual arbitration. *CompuCredit*, 565 U.S. at 100. The clause is most naturally understood to be of a piece with the list of specific rights that it follows. That list, in turn, concerns self-organization and collective bargaining. See 29 U.S.C. 157. “Where general words follow specific words in a statutory enumeration, the general words are usually construed to embrace only objects similar in nature to those objects enumerated by the preceding specific

words.” *Yates v. United States*, 135 S. Ct. 1074, 1086 (2015) (brackets omitted).

Even if it were “plausible” to read the broad language of the residual clause as encompassing a right for employees to pursue individualized employment claims collectively, that would not be enough. See *American Bank & Trust Co.*, 463 U.S. at 868-873. It would mean only that Section 7 is ambiguous on the relevant point. And it should go without saying that an ambiguous statute cannot provide the requisite clear congressional command to displace the Arbitration Act. In any event, ambiguous statutes should be “construe[d] * * * to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law”—not to create statutory conflicts when alternative interpretations are available. *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 100 (1991).

In fact, this Court has addressed much clearer language than Section 7’s and found no contrary congressional command. Although the CROA contains an express right to file suit in federal court, this Court held in *CompuCredit* that the statute was insufficient to “establish the contrary congressional command overriding the [Arbitration Act].” 565 U.S. at 100-101 (internal quotation marks and citation omitted). Similarly, in *Gilmer*, the Court “had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue, the Age Discrimination in Employment Act, expressly permitted collective actions.” *Italian Colors*, 133 S. Ct. at 2311 (discussing *Gilmer*). Section 7 does not contain anything close to the express language used in the CROA or the ADEA, and it thus falls far short of providing the clear command necessary to supersede the Arbitration Act.

2. The legislative history of the NLRA also does not evince a congressional intent to preclude agreements to arbitrate, much less agreements to arbitrate on an individual basis. To the extent there was discussion of arbitration in the legislative history of the NLRA, it was primarily in the context of a proposal to have the NLRB *conduct* arbitrations. See S. 1958, 74th Cong., 1st Sess. § 12 (introduced Feb. 21, 1935). There was no “discuss[ion] [of] the right to file class or consolidated claims against employers” at all. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 361 (5th Cir. 2013). That is hardly surprising, since the NLRA was enacted decades before Federal Rule of Civil Procedure 23, which created the modern class action, see Pet. App. 37a, and years before the FLSA, which contains its own collective-action mechanism, see 29 U.S.C. 216(b).

There is thus no indication that, when Congress enacted the NLRA, it was concerned about protecting the ability to invoke class or other collective procedures when pursuing claims arising under other statutes. The silence of the legislative history further confirms that Congress did not intend in the NLRA to override the Arbitration Act’s command to enforce arbitration provisions according to their terms.

3. In addition, individual arbitration does not inherently conflict with the underlying purposes of the NLRA such that a congressional intent to displace the Arbitration Act might be inferred. The stated purpose of the NLRA was to minimize industrial strife by “encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.” 29 U.S.C. 151.

Consistent with that statutory purpose, the clear focus of the NLRA is on collective bargaining. Provisions of the NLRA create a right to self-organization, 29 U.S.C. 157; set limits on employers' and unions' behavior, 29 U.S.C. 158; and establish a government agency intended to oversee relations between employers and unions, 29 U.S.C. 153, 160. As the Court has observed, to the extent the NLRA protects employees' rights, it does so "not for their own sake but as an instrument of the national labor policy" of "encouraging the practice and procedure of collective bargaining." *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 62 (1975).

The NLRA is hardly hostile to arbitration, moreover, as federal labor policy has long favored and promoted arbitration in the collective-bargaining process, as this Court has recognized for decades (including in cases where it was the employer that resisted arbitration). See, e.g., *Nolde Bros. v. Bakery Workers*, 430 U.S. 243, 254-255 (1977); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 439 (1967); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). The Court has repeatedly construed the NLRA to permit arbitration and to require enforcement of arbitration provisions in the context of collective-bargaining agreements. See, e.g., *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257-258 (2009); *Nolde Bros.*, 430 U.S. at 253-255.

Nor is the NLRA's policy of promoting collective bargaining at odds with the concept of *individual* arbitration. Although individual arbitration "focuses on specific disputes between the parties involved," it "nevertheless also can further broader social purposes." *Gilmer*, 500 U.S. at 27-28. Accordingly, while this Court has considered numerous statutes "designed to advance important public policies," it has consistently held that

“claims under those statutes are appropriate for arbitration.” *Id.* at 28.

So too here. In upholding the validity of arbitration provisions in employment agreements, this Court has rejected the proposition that “the advantages of the arbitration process somehow disappear when transferred to the employment context.” *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001). Those now-familiar advantages include the use of “efficient, streamlined procedures” that “reduc[e] the cost and increas[e] the speed of dispute resolution.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344, 345 (2011). If anything, those advantages may be “of particular importance” in the context of employment litigation, which “often involves smaller sums of money than disputes concerning commercial contracts,” *Circuit City*, 532 U.S. at 123.

Regardless of the existence of an arbitration provision, moreover, the NLRB retains the authority to issue a complaint against an employer that engages in unfair labor practices and to prosecute that complaint or to facilitate a settlement between the parties. See NLRB, *What We Do—Investigate Charges* <tinyurl.com/nlrb-charges> (last visited June 9, 2017). The arbitration provision at issue here also preserves an employee’s right to file a charge with the Equal Employment Opportunity Commission or any other administrative agency. J.A. 47.

Put simply, nothing suggests that the underlying purposes of the NLRA are irreconcilable with individual arbitration. Indeed, it is difficult to fathom how there could be an *inherent* conflict between the purposes of the NLRA and individual arbitration when the procedures the NLRA allegedly protects—class actions under Rule 23 and collective actions under the FLSA—did not even exist when the NLRA was enacted. See p. 29, *supra*.

Arbitration has been, and continues to be, a common feature of federal labor relations under the NLRA. There is no valid reason to believe that individual arbitration gives rise to an inherent conflict with the purposes of the NLRA so as to supersede the Arbitration Act's clear mandate to enforce arbitration provisions according to their terms.

* * * *

The burden is on respondents to show that Congress intended in the NLRA to supersede the Arbitration Act, and they cannot carry it. Neither the text, legislative history, nor the underlying purposes of the NLRA reveal anything even approaching a clear congressional command precluding agreements to arbitrate generally or agreements to arbitrate on an individual basis specifically. Pursuant to the Arbitration Act, therefore, the arbitration provision at issue here should be enforced. The court of appeals' contrary holding was erroneous.

II. NOTHING IN THE ARBITRATION ACT'S SAVING CLAUSE OR THE NLRA DICTATES A DIFFERENT CONCLUSION

The few courts of appeals to have held that employment agreements requiring the parties to arbitrate on an individual basis are unenforceable have relied on a misreading both of the Arbitration Act's saving clause and of the NLRA itself. The saving clause permits courts to withhold enforcement of an arbitration agreement "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. According to the court of appeals here, any attempt to waive collective-litigation procedures was illegal under Section 7 of the NLRA and thus unenforceable under the saving clause. See Pet. App. 14a.

That reasoning is deeply flawed. The Arbitration Act's saving clause applies to generally applicable doctrines of contract law (mainly state contract law). It has no purchase where, as here, the claim is that another federal statute supersedes the Arbitration Act. And even if it were otherwise, the NLRA does not confer a nonwaivable substantive right to invoke class or other collective procedures. The court of appeals reached the wrong result, and it did so by employing the wrong methodology. Its judgment should be reversed.

A. The Arbitration Act's Saving Clause Does Not Apply Where Another Federal Statute Is Alleged To Prohibit Or Limit Arbitration

1. Section 2 of the Arbitration Act provides that an arbitration provision shall be valid or enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. By its terms, the saving clause refers to "grounds * * * for the revocation of any contract": that is, to generally applicable doctrines of contract law. See *Kindred Nursing Centers Limited Partnership v. Clark*, 137 S. Ct. 1421, 1426 (2017). With rare exception, the substance of contract law is supplied by state law, rather than federal law. See *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Accordingly, this Court has described the saving clause as a "choice-of-law" provision for "choosing between state-law principles [of contract law] and the principles of federal * * * law envisioned by [the Arbitration Act]." *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

As the Court has explained, the saving clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mo-*

bility, 563 U.S. at 339 (quoting *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)); see also *Southland Corp. v. Keating*, 465 U.S. 1, 16 n.11 (1984) (rejecting application of the saving clause to a law that did not provide a ground for “revocation of *any* contract,” but rather only of contracts pertaining to a certain subject). A doctrine of state law that applies equally to “any contract” will therefore be “saved” by the saving clause, but a state law that discriminates against arbitration will be preempted because it conflicts with the substantive provisions of the Arbitration Act. See *Perry*, 482 U.S. at 491-492 & n.9; *Kindred Nursing*, 137 S. Ct. at 1426 (explaining that the saving clause “preempts any state rule discriminating * * * against arbitration”).

By its terms, therefore, the saving clause does not apply where another federal statute allegedly discriminates against arbitration. Unlike the States, Congress is free to enact laws that discriminate against arbitration. When it does so, however, it is governed by the principles discussed above: Congress must clearly evince its intent to displace the Arbitration Act’s command to enforce arbitration provisions according to their terms. Not surprisingly, in articulating that standard time and again, this Court has never suggested that the saving clause has any bearing on the analysis. See, e.g., *CompuCredit*, 565 U.S. at 99-105; *Gilmer*, 500 U.S. at 26-33; *McMahon*, 482 U.S. at 227-242.

2. The court of appeals attempted to circumvent the foregoing reasoning in a manner reminiscent of the “great variety” of “devices and formulas” “declaring arbitration against public policy” that prompted the enactment of the Arbitration Act in the first place. *AT&T Mobility*, 563 U.S. at 342 (internal quotation marks and citation omitted). The court noted that the common law of most States provides a generally applicable “illegality”

defense that precludes the enforcement of contracts that violate public policy. Pet. App. 14a; see, e.g., *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 42 (1987). If the NLRA confers a nonwaivable substantive right to invoke class or other collective procedures, the court reasoned, it would be “illegal” to enforce a contract that waives that right, and the saving clause would therefore be triggered. Pet. App. 11a, 14a.

That argument is unavailing. To begin with, when assessing an “illegality” defense to contract enforcement under state law, the relevant public policy is that of the *State*. See, e.g., *Vidal v. Girard’s Executors*, 43 U.S. (2 How.) 127, 197 (1844). “It is for the [S]tate to say whether a contract * * * is so offensive to its view of public welfare as to require its courts to close their doors to its enforcement.” *Griffin v. McCoach*, 313 U.S. 498, 507 (1941). Accordingly, in cases arising under diversity jurisdiction, federal courts typically analyze state public policy, not federal policy, when illegality defenses are raised. See 5 Richard A. Lord, *Williston on Contracts* § 12:1, at 755-756 & nn.20-21 (4th ed. 2009) (compiling cases). While state public policy may mirror federal policy, it does not automatically embody it; a State is free to pursue its own public-policy goals, subject only to preemption by conflicting federal law. And if the relevant *State* adopted a public policy of prohibiting agreements that require employees to arbitrate claims on an individual basis, that state law would be preempted by the Arbitration Act. See, e.g., *AT&T Mobility*, 563 U.S. at 343-344.

A contrary understanding would circumvent the inapplicability of the saving clause to other federal statutes and would gut the ordinarily applicable framework for analyzing conflicts between two federal statutes. As discussed above, “it is the duty of the courts” to harmonize

two statutes alleged to be in conflict if they are “capable of co-existence.” *Morton*, 417 U.S. at 551; see *Estate of Romani*, 523 U.S. at 530-532. In the absence of “a clearly expressed congressional intention” for one statute to supersede another, therefore, courts will find an implied repeal only when the two statutes are in “irreconcilable conflict” or when the later-enacted statute “covers the whole subject of the earlier one and is clearly intended as a substitute.” *Branch*, 538 U.S. at 273 (internal quotation marks and citation omitted). That is why the Court has adopted and repeatedly applied a rule that the Arbitration Act’s command to enforce arbitration provisions according to their terms will yield only when it has been “overridden by a contrary congressional command” in another federal statute. *CompuCredit*, 565 U.S. at 98 (internal quotation marks and citation omitted).

But if the Ninth Circuit were correct about state-law “illegality” defenses, a party could always circumvent the requirement of a clear congressional command by re-packaging an allegation that another federal statute conflicts with the Arbitration Act as an allegation that it would be “illegal” (and thus impermissible under the saving clause) to enforce a contract that contravenes the other statute. That cannot be what Congress intended when it included the saving clause in the Arbitration Act. Cf. *Kindred Nursing*, 137 S. Ct. at 1428 (rejecting an interpretation of the Arbitration Act that “would make it trivially easy * * * to undermine the Act”); *AT&T Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 228 (1998) (reasoning, when interpreting a saving clause, that “the act cannot be held to destroy itself” (internal quotation marks and citation omitted)).

* * * *

In short, the Arbitration Act's saving clause has no bearing on the correct analysis here. Because the NLRA does not contain a clear congressional command precluding agreements to arbitrate generally or agreements to arbitrate on an individual basis specifically, the parties' agreement must be enforced according to its terms. That is all the Court need decide in order to resolve the question presented. As we will now explain, however, it would be erroneous to conclude, even without reference to the requirement of a clear congressional command, that the NLRA confers a nonwaivable substantive right to invoke class or other collective procedures.

B. The NLRA Does Not Create A Nonwaivable Substantive Right To Collective-Litigation Procedures

The court of appeals concluded that the arbitration provision at issue here was "illegal" because it waived respondents' "substantive" rights under the NLRA. See Pet. App. 14a-15a. Specifically, the court construed the NLRA to confer a nonwaivable substantive right on employees to invoke class or other collective procedures in dispute resolution with their employers, whether in court or in arbitration. See *id.* at 16a-17a. That is incorrect. Accordingly, even if the saving clause applied here—and it does not—the judgment of the court of appeals should be reversed.

1. a. As a threshold matter, no substantive rights under the NLRA are at issue here. The substantive rights respondents seek to vindicate are asserted rights to back pay under the Fair Labor Standards Act and California state law. See J.A. 27-34. Respondents in no way waived *those* rights when they agreed to submit those claims to individual arbitration. Indeed, this Court

has expressly distinguished between “employees’ substantive right[s]” and “the procedures available under [Section 7] for securing these rights,” cautioning that the two should not be “confuse[d].” *Emporium Capwell*, 420 U.S. at 69.

In addition, respondents no longer argue that the arbitration provision at issue here somehow prevents them from *effectively* vindicating their underlying rights (which this Court has suggested, though never held, could lead to the invalidation of an arbitration provision). See *Italian Colors*, 133 S. Ct. at 2310; *Mitsubishi Motors*, 473 U.S. at 637 & n.19; see generally *Italian Colors*, 133 S. Ct. at 2313, 2315 (Kagan, J., dissenting) (suggesting that the effective-vindication doctrine applies when an arbitration provision “operates to confer immunity from potentially meritorious federal claims” by “foreclos[ing] (not diminish[ing]) a plaintiff’s opportunity to gain relief for a statutory violation”). The arbitration provision at issue does not foreclose respondents in any way from gaining relief for the alleged statutory violations; it merely requires that the relief be sought in individual arbitration.

b. Respondents nevertheless claim that another statute—the NLRA—confers a right on employees to invoke class or other collective *procedures*. But as the last sentence reflects, that is the very definition of a procedural right, not a substantive one. After all, “[a] class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits.” *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393, 408 (2010) (plurality opinion). “And like traditional joinder, it leaves the parties’ legal rights and duties intact and the rules of decision unchanged.” *Ibid.*

Thus, while Federal Rule of Civil Procedure 23 provides a “right” to class litigation if certain prerequisites are met, see, e.g., *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613-616 (1997), the right “is a procedural right only, ancillary to the litigation of substantive claims.” *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980). That explains why Rule 23 satisfies the Rules Enabling Act and need not yield to conflicting state law under *Erie*. See *Shady Grove*, 559 U.S. at 406-410 (plurality opinion); *id.* at 429-436 (Stevens, J., concurring in the judgment). It also explains why a party can waive access to class procedures under Rule 23 in an arbitration provision, even if doing so renders some claims economically irrational to pursue. See *Italian Colors*, 133 S. Ct. at 2309, 2311.

The same analysis applies to other types of collective litigation, such as the “opt-in” collective-action mechanism of the FLSA. See 29 U.S.C. 216(b). Indeed, the ADEA expressly incorporates that collective-action mechanism, see 29 U.S.C. 626(b), and this Court has held that access to that mechanism can be waived in an arbitration provision without in any way suggesting that the right to invoke that mechanism is a substantive one. See *Gilmer*, 500 U.S. at 32; cf. *Italian Colors*, 133 S. Ct. at 2311 (discussing *Gilmer*).

Contrary to the court of appeals’ reasoning, therefore, the fact that a statute confers a right to invoke class or other collective procedures indicates the existence only of a procedural right, which can be waived. See Pet. App. 15a. Such statutory rights “provide[] an opportunity to proceed collectively, not an invitation to plaintiffs that they could not refuse.” *Nicholson v. CPC International Inc.*, 877 F.2d 221, 241 (3d Cir. 1989) (Becker, J., dissenting) (internal quotation marks and citation omitted); see *Gilmer*, 500 U.S. at 32 (citing Judge Becker’s

opinion in *Nicholson* with approval). Because a waiver of the right to invoke collective-litigation procedures “merely limits arbitration to the two contracting parties” and does not “eliminate[] those parties’ right to pursue their statutory remedy,” *Italian Colors*, 133 S. Ct. at 2311, it is not somehow inherently invalid under the Arbitration Act. Conversely, under the Arbitration Act, parties have broad discretion to structure the procedures by which they may resolve their disputes—including whether to permit class arbitration. See *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 683-684 (2010). The procedural nature of the right at issue resolves the matter.

2. To the extent that the court of appeals construed the NLRA to confer a nonwaivable right on employees to invoke class or other collective procedures in dispute resolution with their employers, see Pet. App. 16a-17a, it was mistaken. It bears repeating that the correct inquiry here is whether the NLRA contains a *clear command* precluding agreements to arbitrate on an individual basis—and, for the reasons discussed above, it plainly does not. See pp. 26-32. In any event, the NLRA does not confer a right to invoke class or other collective procedures; even if it did, there is no reason to believe that it renders any such right nonwaivable.

a. To reiterate, Section 7 of the NLRA provides in relevant part 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.” 29 U.S.C. 157. That language does not specifically confer any right on employees to pursue actions against their employers in court, nor does it say anything about class or other collective proce-

dures—much less does it elevate those procedures to the status of a nonwaivable substantive right. And even without the requirement of a clear command, there is no valid justification for concluding that the general right to engage in “concerted activities for * * * mutual aid or protection” encompasses the “right to resolve disputes using a particular legal procedure.” Pet. App. 37a (Ikuta, J., dissenting).

In fact, the text and context of Section 7 decisively counsel against such a conclusion. As to the text: the NLRB has long recognized that “concerted activities” do not include activities in which an individual acts alone, even when that individual’s activity is directed toward an issue of general interest to other employees. See *NLRB v. City Disposal Systems Inc.*, 465 U.S. 822, 829 n.6 (1984) (citing *Meyers Industries, Inc.*, 268 N.L.R.B. 493 (1984)). A class action (or other type of collective action) may be initiated by an individual employee, and it may be litigated without the involvement of any other employee. See 16-307 Pet. App. 148a (Member Johnson, dissenting). Indeed, at least as to an opt-out class action, the very point of the procedure is to allow an individual to represent absent parties *without* their participation.

Employees, moreover, cannot agree on their own to use class or other collective dispute-resolution procedures. Instead, the judge (or arbitrator) must determine that the employees satisfy the prerequisites of the relevant rule. A plaintiff cannot proceed as a class representative unless the judge finds that the plaintiff has satisfied the requirements of Rule 23, and an FLSA case does not qualify as a “collective action” unless the judge finds that all employees are “similarly situated.” 29 U.S.C. 216(b). Even basic joinder requires a determination that the claims being joined arose out of the same transaction. See Fed. R. Civ. P. 20(a). “It would make

little sense for the ‘concertedness’ of a litigation campaign to turn on judicial decisions over which workers have no control.” *NLRB v. Alternative Entertainment, Inc.*, No. 16-1385, 2017 WL 2297620, at *15 (6th Cir. May 26, 2017) (Sutton, J., concurring in part and dissenting in part).

But even if collective litigation did constitute “concerted activity,” it would not constitute a “concerted activit[y] for * * * mutual aid or protection.” This case well illustrates the point. Respondents are not pursuing “mutual” rights in any sense of the term. Instead, they are pursuing individual causes of action under the FLSA and California state law, seeking overtime pay to which they claim they are individually entitled.

While other EY employees may (or may not) be similarly situated, therefore, each respondent (and each purported class member) possesses his or her own cause of action under federal or state law, seeking his or her own individualized damages, even if those causes of action can be considered together in a single lawsuit through a collective-litigation mechanism. Again, there is no indication that, when Congress enacted the NLRA, it was concerned about protecting the ability to invoke class or other collective procedures when raising individualized employment claims arising under other statutes—especially because the procedures at issue in cases such as this one did not even exist at the time the NLRA was enacted. See p. 29, *supra*.

As to the context: the residual clause at issue here follows Section 7’s core guarantees of the rights to organize and to engage in collective bargaining. As discussed above, familiar canons of construction dictate that the catch-all category of “other concerted activities for * * * mutual aid or protection” encompasses only ac-

tivities similar to the more specific guarantees that precede it. See pp. 27-28.

When considered in context, it is clear that Section 7's residual clause does not reach into the courtroom and "create an affirmative right to use or pursue [particular] procedures" to resolve an employee's claim against an employer. *Alternative Entertainment*, 2017 WL 229-7620, at *15 (Sutton, J., concurring in part and dissenting in part). While "mutual aid or protection" may be "somewhat broader" than the "narrower" protections for "self-organization" and "collective bargaining," *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978), collective-litigation procedures are still further removed. They do not go to the participatory rights at the heart of the NLRA or the underlying substantive rights over which the NLRA allows employers and employees to bargain. Instead, they merely provide the procedures by which disputes concerning those underlying rights are resolved. For that reason, employers and employees are free (whether through collective bargaining or otherwise) to negotiate terms such as whether employment disputes will be resolved through arbitration or litigation, or whether such disputes will be resolved individually or collectively.

However the residual clause may expand on Section 7's protection for the substantive self-organization and collective-bargaining rights of employees, therefore, it does not protect or prohibit particular procedures by which non-NLRA claims are adjudicated. See *Alternative Entertainment*, 2017 WL 2297620, at *15 (Sutton, J., concurring in part and dissenting in part) (noting that "the 'concertedness' of litigation does not turn on the particular procedural form that litigation takes"). Such a purpose would be entirely beyond, and indeed unlike, the rights protected by the remainder of Section 7. In fact,

the NLRA nowhere contemplates collective-litigation procedures as essential to its purposes—nor could it have, given that collective-litigation procedures of the type at issue here did not even exist at the time the NLRA was enacted. There is simply no indication that Section 7 confers on employees a right to invoke class or other collective procedures in dispute resolution with their employers.

In support of its construction of Section 7, the court of appeals cited this Court’s decision in *Eastex* for the proposition that Section 7 protects the “right to ‘seek to improve working conditions through resort to administrative and judicial forums.’” Pet. App. 7a (quoting 437 U.S. at 566). But *Eastex* cannot bear the weight the Ninth Circuit put on it. There, the Court expressly declined to address the question of “what may constitute ‘concerted’ activities in this context” (*i.e.*, in the context of litigation). 437 U.S. at 566 n.15; see Pet. App. 36a n.5 (Ikuta, J., dissenting).

Instead, the questions presented in *Eastex* were (1) whether distribution of a union newspaper was an activity protected by the NLRA and, (2) if so, how the fact that the distribution was to take place on the employer’s property affected the analysis. See 437 U.S. at 563. The Court did not consider whether the NLRA confers a right to litigate against employers as a class; if it exists, when that right may be waived; or how the NLRA interacts with other federal statutes such as the Arbitration Act.

Nor would *Eastex* resolve the issue even if the Court had squarely held that Section 7 protects employees’ rights to seek judicial relief in concert. That Section 7 might protect employees from adverse employment action after *filing* a lawsuit does not mean that it reaches into the courthouse and dictates how the litigation must

proceed. Indeed, the NLRB’s General Counsel drew exactly that distinction in a 2010 guidance memorandum clarifying that an employer does not run afoul of Section 7 by moving to “enforce[]” the employee’s agreement to arbitrate employment claims on an individual basis. See NLRB, General Counsel Mem. No. 10-06, at 2, 5-6 (June 16, 2010). Neither *Eastex* nor any other decision of this Court speaks to the question whether Section 7 confers a right to proceed on a class or other collective basis once in court.

b. In any event, even if Section 7 did confer such a right, it would be waivable. As this Court has explained, “[t]he fact that an activity is concerted * * * does not necessarily mean that an employee can engage in the activity with impunity.” *City Disposal Systems*, 465 U.S. at 837. Instead, “if an employer does not wish to tolerate certain methods by which employees invoke their collectively bargained rights, he is free to negotiate a provision in his collective-bargaining agreement that limits the availability of such methods.” *Ibid.*

Thus, this Court has held that rights that are not central to the collective-bargaining process are not absolute and can be waived by unions on behalf of their members. For example, the Court and the NLRB have upheld a union’s waiver of the right of its members to use particular methods, such as the right to engage in an economic strike, the right to picket, and even, in some circumstances, the right to ongoing collective bargaining through a “zipper” clause. See, e.g., *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 705-707 (1983); *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 105-106 (1962); *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71, 79-80 (1953); *GTE Automatic Electric Inc.*, 261 N.L.R.B. 1491, 1491-1492 (1982).

Even assuming that Section 7 conferred a right to invoke class or other collective procedures, therefore, that right would be waivable. It would be anomalous for the NLRA to protect against waiver of a right to collective-litigation procedures for non-NLRA claims when the NLRA allows for waiver of rights as significant as the rights to strike and to picket in order to enforce collectively bargained rights. And because the alleged right at issue here has nothing to do with the terms of a collective-bargaining agreement, there is nothing odd about the notion that an individual, as opposed to only a union representative, would be able to waive that right.

Indeed, where, as here, no union has been formed, it would make no sense to preclude individual employees from waiving their procedural rights for themselves. Cf. *14 Penn Plaza*, 556 U.S. at 258 (noting that “[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative”); 29 U.S.C. 157 (giving employees “the right to refrain” from bargaining through a representative). Accordingly, employers and employees remain free to negotiate whether employment disputes will be resolved through arbitration or litigation, or whether such disputes will be resolved individually or collectively.

The principle that any right to invoke class or other collective procedures may be waived is consistent with the broader background principle that parties have a presumptive right to waive legal protections intended for their benefit. See *United States v. Mezzanatto*, 513 U.S. 196, 200-201 (1995). That presumption applies regardless of the source of the protections at issue—whether the Constitution, a statute, or the common law. See *ibid*; *Shutte v. Thompson*, 82 U.S. (15 Wall.) 151, 159 (1873). Relying on that presumption, the Court has permitted

the waiver of a wide variety of individual rights in both the civil and criminal contexts. See, e.g., *Evans v. Jeff D.*, 475 U.S. 717, 730-732 (1986) (right to attorney's fees in Section 1983 actions); *Kearney v. Case*, 79 U.S. (12 Wall.) 275, 281 (1871) (Seventh Amendment right to jury trial); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (Fifth Amendment privilege against compulsory self-incrimination, Sixth Amendment right to jury trial, and Sixth Amendment right to confront one's accusers); *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938) (Sixth Amendment right to counsel).

To be sure, the presumption in favor of waiver will yield if waiver is “inconsistent with the provision creating the right sought to be secured.” *New York v. Hill*, 528 U.S. 110, 116 (2000). But in the statutory context, that generally requires some “affirmative indication of Congress’ intent to preclude waiver.” *Mezzanatto*, 513 U.S. at 201. The NLRA contains no such indication, either generally or with regard to any (unenumerated) right to invoke collective-litigation procedures specifically. Cf. 15 U.S.C. 1679f(a) (CROA provision explicitly prohibiting “[a]ny waiver by any consumer of any protection” provided by the statute). Quite to the contrary, holding that Section 7 precludes an employee from waiving class proceedings would “create[] a bizarre alchemy,” because “[i]t would mean that Section 7 guarantees an employee the right to pursue a collective action” that the underlying statute (here, the FLSA) permits to be waived. *Alternative Entertainment*, 2017 WL 2297620, at *16 (Sutton, J., concurring in part and dissenting in part).

In sum, the NLRA does not confer a nonwaivable substantive right on employees to invoke class or other collective procedures in dispute resolution with their employers. And in any event, because the NLRA does

not contain a *clear command* to preclude agreements to arbitrate on an individual basis, and because enforcement of the arbitration provision at issue will not interfere with the vindication of respondents' underlying substantive rights, that provision should be enforced according to its terms under the Arbitration Act. See, e.g., *CompuCredit*, 565 U.S. at 102; *Italian Colors*, 133 S. Ct. at 2318 (Kagan, J., dissenting).

C. The NLRB Is Not Entitled To Deference On The Interplay Between The Arbitration Act And The NLRA

Finally, the NLRB is not entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in its assessment of how the provisions of the NLRA should be reconciled with the Arbitration Act. See Pet. App. 5a.

1. As a preliminary matter, the relevant inquiry here is not whether the NLRA can be construed *in vacuo* to confer a nonwaivable right to invoke class or other collective procedures, but rather how the Arbitration Act and the NLRA can be reconciled. The NLRB does not administer the Arbitration Act, and this Court has “never deferred to the [NLRB’s] remedial preferences” when it comes to “federal statutes and policies unrelated to the NLRA.” *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002).

In the specific context of the Arbitration Act, moreover, this Court has made clear that the Arbitration Act’s command to enforce arbitration provisions according to their terms will yield only when it has been “overridden by a contrary *congressional command*” in another federal statute. *CompuCredit*, 565 U.S. at 98 (emphasis added) (internal quotation marks and citation omitted). The NLRB cannot supply the requisite clear “congressional command” by construing a purportedly ambiguous

statute. It is the Court's task to determine whether such a "congressional command" exists, and to resolve the interplay between the two statutes. In other words, once a potential conflict between the Arbitration Act and another federal statute has been identified, "the presumption against implied repeals sets in, and *Chevron* leaves the stage." *Alternative Entertainment*, 2017 WL 2297620, at *17 (Sutton, J., concurring in part and dissenting in part).

2. In any event, the NLRB's position that the NLRA confers a nonwaivable right to invoke class or other collective procedures is of only recent vintage. As noted above, see p. 45, the General Counsel issued a guidance memorandum in 2010 advising that an employer does *not* violate the NLRA by requiring "non-NLRA employment claims [to] be resolved" through individual arbitration, as long as employees can "challenge [arbitration] agreements through concerted activity" and "only individual rights are waived." NLRB, General Counsel Mem. No. 10-06, *supra*, at 2.

The NLRB abruptly reversed course in *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012). The NLRB began its analysis by noting that it had interpreted Section 7's protection of "concerted action" as encompassing some forms of collective litigation. *Id.* at 2278. The NLRB then proceeded to diverge from the guidance memorandum by concluding that, because Section 7 created a substantive right to engage in collective employment litigation, *any* attempt to waive that right would violate public policy and would thus be unenforceable under the Arbitration Act's saving clause. See *id.* at 2285-2288. And the NLRB went further in *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72 (2014), when it stated that the "broad language of Section 7" constituted a congressional command contrary to individual arbitration. *Id.* at 9.

3. Even on its own terms, the NLRB's analysis suffers from a host of flaws, and it would not warrant deference even if deference were due. Section 7 unambiguously does not create a nonwaivable right to class or other collective procedures in employment-related disputes. See pp. 40-48, *supra*. But even if Section 7 were ambiguous, that is of no moment. This case does not present a question concerning the best interpretation of Section 7 when arbitration is not at issue. Instead, it presents the question whether Section 7 contains the requisite "congressional command" prohibiting or limiting arbitration. However it is construed by an agency, an ambiguous statute cannot provide the "clarity" necessary to override the Arbitration Act, because the statute and the Arbitration Act must be reconciled on their own terms. *CompuCredit*, 565 U.S. at 103; see pp. 48-49, *supra*.

Section 7 does not compel the conclusion that employees have a nonwaivable right to class or other collective procedures in employment-related disputes. And under the established principles this Court applies in cases involving claimed conflicts between the Arbitration Act and another federal statute, that is the end of the analysis. Because there is no irreconcilable conflict between the Arbitration Act and the NLRA, the Arbitration Act's mandate that arbitration provisions are to be enforced according to their terms should be given effect. The arbitration provision at issue here is valid, and the judgment of the court of appeals should therefore be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX S. HEINKE GREGORY W. KNOPP AKIN GUMP STRAUSS HAUER & FELD LLP <i>2029 Century Park East, Suite 2400 Los Angeles, CA 90067</i>	KANNON K. SHANMUGAM ALLISON JONES RUSHING A. JOSHUA PODOLL WILLIAM T. MARKS EDEN SCHIFFMANN WILLIAMS & CONNOLLY LLP <i>725 Twelfth Street, N.W. Washington, DC 20005 (202) 434-5000 kshanmugam@wc.com</i>
PRATIK A. SHAH DANIEL L. NASH AKIN GUMP STRAUSS HAUER & FELD LLP <i>1333 New Hampshire Avenue, N.W. Washington, DC 20036</i>	

JUNE 2017

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

In the Supreme Court of the United States

EPIC SYSTEMS CORPORATION, PETITIONER

v.

JACOB LEWIS

ERNST & YOUNG LLP, ET AL., PETITIONERS

v.

STEPHEN MORRIS, ET AL.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MURPHY OIL USA, INC., ET AL.

*ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE FIFTH, SEVENTH, AND NINTH CIRCUITS*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING PETITIONERS IN NOS. 16-285 AND 16-300
AND SUPPORTING RESPONDENTS IN NO. 16-307

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
MALCOLM L. STEWART
Deputy Solicitor General
ALLON KEDEM
Assistant to the Solicitor
General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether arbitration agreements that bar individual employees from pursuing work-related claims on a collective or class basis 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 whether such agreements are enforceable under the Federal Arbitration Act, 9 U.S.C. 2.

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In the Supreme Court of the United States

No. 16-285

EPIC SYSTEMS CORPORATION, PETITIONER

v.

JACOB LEWIS

No. 16-300

ERNST & YOUNG LLP, ET AL., PETITIONERS

v.

STEPHEN MORRIS, ET AL.

No. 16-307

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MURPHY OIL USA, INC., ET AL.

*ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE FIFTH, SEVENTH, AND NINTH CIRCUITS*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING PETITIONERS IN NOS. 16-285 AND 16-300
AND SUPPORTING RESPONDENTS IN NO. 16-307

INTEREST OF THE UNITED STATES

These cases present the question whether arbitration agreements that bar individual employees from pursuing work-related claims on a collective or class basis impermissibly limit the employees' right under the National Labor Relations Act (NLRA) to engage in "concerted activities" in pursuit of their "mutual aid or protection," 29 U.S.C. 157, or whether such agreements instead are enforceable under the Federal Arbitration Act (FAA), 9 U.S.C. 2. The United States and the National Labor Relations Board (NLRB or Board) have responsibility for enforcing the NLRA, and the NLRB filed a petition for a writ of certiorari in No. 16-307.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-13a.

STATEMENT

1. In 1925, Congress enacted the Federal Arbitration Act, 9 U.S.C. 1 *et seq.*, to "overcome judicial resistance to arbitration." *Buckeye Check Cashing, Inc. v. Cardega*, 546 U.S. 440, 443 (2006). "The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985). The FAA provides that any "written provision in any maritime transaction or a 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 enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. If a suit is brought concerning "any issue referable to arbitration under an agreement in writing for such arbitration,

the court in which such suit is pending” must, “on application of one of the parties,” stay the proceedings and refer the matter to arbitration in accordance with the parties’ agreement. 9 U.S.C. 3.

2. The National Labor Relations Act, 29 U.S.C. 151 *et seq.*, was enacted in 1935 to encourage collective bargaining and to “protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing.” 29 U.S.C. 151. The NLRA 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.” 29 U.S.C. 157. An employer that “interfere[s] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in section 157” has committed “an unfair labor practice.” 29 U.S.C. 158(a)(1). The National Labor Relations Board “is empowered * * * to prevent any person from engaging in any unfair labor practice * * * affecting commerce.” 29 U.S.C. 160(a).

In January 2012, the Board ruled that agreements between individual employees and their employers that require arbitration of work-related disputes on a bilateral (rather than collective or classwide) basis interfere with the employees’ right under Section 157 to engage in concerted activities, in violation of Section 158(a)(1). *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2278-2283. The Board determined that, “[j]ust as the substantive right to engage in concerted activity aimed at improving wages, hours or working conditions through litigation or arbitration lies at the core of the rights protected by Section [157], the prohibition of individual agreements

imposed on employees as a means of requiring that they waive their right to engage in protected, concerted activity lies at the core of the prohibitions contained in Section [158].” *Id.* at 2281.

The Board also expressed the view that its ruling did not conflict with the FAA. The Board stated that its rationale was not specific to arbitration, and that the contractual term at issue “would equally violate the NLRA if it said nothing about arbitration, but merely required employees, as a condition of employment, to agree to pursue any claims in court against the [employer] solely on an individual basis.” *D.R. Horton*, 357 N.L.R.B. at 2285. The Board also noted that, under the FAA’s saving clause, see 9 U.S.C. 2 (requiring enforcement of arbitration agreements “save upon such grounds as exist at law or in equity for the revocation of any contract”), arbitration agreements “remain subject to the same defenses against enforcement to which other contracts are subject.” 357 N.L.R.B. at 2284.

On review, the Fifth Circuit rejected the Board’s analysis. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 360-362 (2013). The court held that enforcement of the challenged arbitration agreement would not “deny a party any statutory right” because “use of class action procedures * * * is not a substantive right” under Section 157. *Id.* at 357.¹ Judge Graves dissented in relevant part, explaining that he agreed with the Board’s reasoning. *Id.* at 364-365.

3. These consolidated cases involve agreements, signed by individual employees and their employers, in

¹ The Fifth Circuit in *D.R. Horton* agreed with the Board that an arbitration agreement constitutes an unfair labor practice to the extent that it prohibits employees from filing unfair-labor-practice charges with the Board. 737 F.3d at 364.

which the parties have agreed to resolve work-related disputes through bilateral arbitration.

a. Epic Systems Corporation makes healthcare software. 16-285 (*Epic*) Pet. App. 1a. In April 2014, it sent an email to its employees requiring them, as a condition of employment, to agree to arbitrate all wage-and-hour claims. The agreement specified that the employees waived “the right to participate in or receive money or any other relief from any class, collective, or representative proceeding.” *Id.* at 2a (emphasis omitted).

Jacob Lewis, an employee who had consented to the arbitration agreement, filed a federal-court suit against Epic Systems “individually and on behalf of all others similarly situated.” *Epic* Pet. App. 2a, 24a. Lewis alleged that Epic Systems had violated the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, and state law by denying overtime pay to him and other employees. When Epic Systems moved to dismiss the suit and to compel bilateral arbitration, Lewis argued that the arbitration agreement was invalid and unenforceable under the NLRA. *Epic* Pet. App. 2a-3a. The district court agreed with Lewis and denied Epic Systems’ motion. *Id.* at 24a-29a.

The Seventh Circuit affirmed. *Epic* Pet. App. 1a-23a. The court concluded that the “text, history, and purpose” of Section 157 show that it “should be read broadly to include resort to representative, joint, collective, or class legal remedies.” *Id.* at 5a-6a. The court also stated that, even if Section 157 were ambiguous, the court would defer to the Board’s determination that the NLRA “prohibit[s] employers from making agreements with individual employees barring access to class or collective remedies.” *Id.* at 7a (citing *D.R. Horton*). The court rejected Epic Systems’ contention that the FAA

required enforcement of the agreement. *Id.* at 12a-23a. The court concluded that, because Epic Systems' concerted-action waiver is prohibited by the NLRA, and because illegality is a "ground[] * * * for the revocation of any contract" within the meaning of the FAA's saving clause, 9 U.S.C. 2, the waiver is unenforceable under the FAA's own terms. *Epic* Pet. App. 12a-15a.

b. Ernst & Young LLP and its U.S.-based affiliate (collectively, Ernst & Young) provide accounting services. 16-300 (*E&Y*) Pet. App. 2a, 43a-44a. Ernst & Young required its employees, as a condition of employment, to sign a "concerted action waiver" in which they agreed to arbitrate any legal claims against the company and to do so "only as individuals and in separate proceedings." *Id.* at 2a (internal quotation marks omitted). Despite signing that agreement, two Ernst & Young employees filed suit in federal court, on behalf of themselves and others similarly situated, alleging that the company had improperly denied them overtime wages in violation of the FLSA and state law. *Ibid.* The district court granted Ernst & Young's motion to compel bilateral arbitration and dismissed the suit. *Id.* at 43a-67a.

The Ninth Circuit reversed. *E&Y* Pet. App. 1a-25a. The court held that the NLRA gives employees a "right to pursue work-related legal claims together," and that Ernst & Young had violated that right by requiring its employees to resolve their legal claims in separate arbitration proceedings. *Id.* at 3a; see *id.* at 3a-11a. The court held that the FAA "does not dictate a contrary result" because that statute requires only that arbitration contracts be placed "'on equal footing with all other contracts,'" and the collective-action waiver would contravene the NLRA even if it were not contained in an

arbitration agreement. *Id.* at 12a (quoting *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015)) (citation omitted); see *id.* at 12a-14a. The court also characterized the employees' right to seek redress collectively as a non-waivable "substantive federal right," thereby distinguishing it from other cases involving "procedural" rights that may be limited by agreement. *Id.* at 15a-16a; see *id.* at 14a-21a.

Judge Ikuta dissented. *E&Y Pet. App.* 25a-42a. She explained that, "[i]n determining whether the FAA's mandate requiring 'courts to enforce agreements to arbitrate according to their terms' has been overridden by a different federal statute, the Supreme Court requires a showing that such a federal statute includes an express 'contrary congressional command.'" *Id.* at 28a (quoting *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012)). Because the NLRA does not expressly prohibit the type of arbitration agreement that is at issue here, Judge Ikuta would have enforced the agreement as written. *Id.* at 34a-38a.

c. Murphy Oil USA, Inc. operates more than 1000 gas stations in 21 States. 16-307 (*Murphy Oil*) Pet. App. 24a. Murphy Oil required each of its employees and job applicants to sign a "Binding Arbitration Agreement and Waiver of Jury Trial" in which the parties waived their "right to commence, be a party to, or act as a class member in, any class or collective action" in any judicial or arbitration proceeding "relating to employment issues." *Id.* at 24a-25a (brackets omitted). In June 2010, four employees sued Murphy Oil in federal court, alleging FLSA violations. Invoking the arbitration agreement, Murphy Oil successfully moved to dismiss the collective action and to compel arbitration. *Id.* at 26a-28a.

One of the employees then filed an unfair-labor-practice charge with the Board, and the Board's General Counsel issued an administrative complaint against Murphy Oil. *Murphy Oil* Pet. App. 27a. In October 2014, the Board sustained the charge, reaffirming its prior decision in *D.R. Horton* and finding that Murphy Oil had violated the employee's right under the NLRA "to engage in collective action." *Id.* at 40a (quoting *D.R. Horton*, 357 N.L.R.B at 2286); see *id.* at 17a-89a. The Board stated that the NLRA creates "a substantive right to engage in concerted activity," and that the challenged arbitration agreement therefore "amounts to a prospective waiver of a right guaranteed by the NLRA." *Id.* at 43a. The Board also determined that its ruling did not conflict with the FAA because "the mandatory arbitration agreement is invalid under Section 2 of the FAA, the statute's savings clause," and because 29 U.S.C. 157 "amounts to a 'contrary congressional command' overriding the FAA." *Murphy Oil* Pet. App. 44a-46a (footnote omitted) (quoting *CompuCredit*, 565 U.S. at 98). Two members of the Board dissented in relevant part. See *id.* at 89a-131a (Member Miscimarra); *id.* at 131a-208a (Member Johnson).

Murphy Oil filed a petition for review, which the Fifth Circuit granted in relevant part. *Murphy Oil* Pet. App. 1a-16a. The court adhered to its precedent in *D.R. Horton*, holding that an employer may lawfully require its employees to agree to pursue all employment-related claims through bilateral arbitration, rather than through class or collective actions. *Id.* at 2a, 7a-8a & n.3.

SUMMARY OF ARGUMENT

Under the FAA, agreements to resolve disputes through arbitration “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. 2. Courts must enforce agreements to arbitrate federal claims unless the FAA’s mandate has been overridden by a contrary congressional command or unless enforcing the parties’ agreement would deprive the plaintiff of a substantive federal right. Neither of those justifications for non-enforcement is applicable here. The parties’ agreements, including their prohibition on class-wide or collective proceedings, should therefore be enforced according to their terms.

A. The FAA’s strong presumption in favor of enforcing arbitration agreements may yield where “Congress itself” has overridden that presumption in another statute. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (citation omitted). In mandating enforcement of agreements to arbitrate a variety of federal statutory claims, the Court has made clear that statutory authorization to pursue class actions in court for violations of particular federal laws is insufficient to override the FAA’s directive that agreements to arbitrate must be enforced.

Although the FLSA authorizes employees to pursue collective actions in court, that authorization is not meaningfully different from similar provisions of other laws that this Court has found insufficient to override the FAA’s mandate to enforce arbitration agreements as written. Presumably for that reason, plaintiffs in these cases have not argued, and the courts of appeals that ruled in their favor did not suggest, that the FLSA—the statute under which plaintiffs’ federal

claims arise—overrides the FAA’s directive that their arbitration agreements should be enforced. Plaintiffs’ argument thus depends on the proposition that the NLRA’s recognition of a general right to engage in “concerted activities,” 29 U.S.C. 157, confers greater rights to pursue FLSA claims collectively than does the FLSA itself.

In no other context, however, has Section 157 been construed to expand the availability of class or collective remedies beyond those that are authorized by the laws that directly address those issues. Section 157 would not, for example, allow employees who do not satisfy the numerosity and typicality requirements of Federal Rule of Civil Procedure 23 to pursue a class action against their employer. Similarly here, Section 157 does not supersede the balance struck in the FAA and FLSA, or expand the range of circumstances in which collective litigation can go forward.

Nothing in the NLRA’s legislative history indicates that Congress intended to bar enforcement of arbitration agreements like those at issue here. The legislative record accompanying bills that became the NLRA mentioned arbitration only briefly, in stating that Congress had declined to impose mandatory arbitration or to make the Board an arbitration agency. And while the NLRB’s reading of ambiguous NLRA language is entitled to judicial deference, the Board’s analysis of the interplay between the NLRA and the FAA is not.

B. In mandating enforcement of pre-dispute agreements to arbitrate various federal statutory claims, this Court has often emphasized that an agreement to arbitrate does not entail any surrender of substantive statutory rights. Similarly here, the parties’ arbitration

agreements do not purport to authorize employer conduct that would violate the FLSA’s wage-and-hour provisions, and they do not prevent a successful plaintiff from recovering (through arbitration) the full relief that a court could award for an FLSA violation.

Nor does enforcement of the arbitration agreements deprive plaintiffs of any substantive right under the NLRA. Although Section 157 unquestionably confers important substantive rights to organize and to engage in collective bargaining, the arbitration agreements do not constrain plaintiffs’ exercise of those rights. Even assuming that the right to utilize collective dispute-resolution mechanisms for FLSA claims is encompassed within Section 157’s residual phrase (“other concerted activities”), there is no evident reason for viewing it as a substantive NLRA right, when it is clearly a procedural right under the FLSA itself.

This Court’s decisions in *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940), and *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944), do not support a different conclusion. In those cases, the Court invalidated agreements between employers and their employees to resolve work-related disputes on a bilateral basis. But it did so because the employers had used the agreements as a basis for refusing to engage in collective bargaining. The agreements at issue here do not have any analogous anti-union purpose.

C. The FAA’s saving clause provides no sound basis for declining to enforce the parties’ arbitration agreements. The FAA’s strong policy in favor of enforcing arbitration agreements applies equally to the parties’ right to “specify *with whom* they choose to arbitrate their disputes.” *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 683 (2010). The Seventh and

Ninth Circuits understood the NLRA to prohibit enforcement of agreements to arbitrate work-related disputes bilaterally. The courts found that to be the sort of arbitration-neutral rule that the saving clause preserves because the rule focuses on the requirement of *bilateral* arbitration, rather than on the agreement to arbitrate as such.

This Court’s decisions make clear, however, that the saving clause does not preserve rules of contract enforceability that would impede the achievement of the FAA’s objectives, even when those rules are capable of application to contracts other than arbitration agreements. The Court in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), applied that principle to hold that a state-law rule against enforcement of class-action waivers contained in certain consumer contracts fell outside the saving clause. For substantially the same reasons, the saving clause does not encompass the analogous federal-law rule that the Seventh and Ninth Circuits derived from the FAA.

ARGUMENT

WHEN PARTIES AGREE TO ARBITRATE EMPLOYMENT-RELATED CLAIMS BILATERALLY, THE FAA REQUIRES ENFORCEMENT OF THOSE AGREEMENTS

The FAA establishes a “liberal federal policy favoring arbitration,” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), the “central” feature of which is a directive that “private agreements to arbitrate are enforced according to their terms.” *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 682 (2010) (citation omitted). When contracting parties have agreed to resolve federal claims through bilateral arbitration, that choice must be honored “unless the

FAA’s mandate has been overridden by a contrary congressional command.” *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (*Italian Colors*) (citations and internal quotation marks omitted).

Under that approach, the agreements at issue here must be enforced. Although plaintiffs in these cases assert causes of action under the FLSA (as well as under state law), they do not contend that the FLSA itself precludes enforcement of their agreements to arbitrate those statutory claims. And neither the text nor the history of the NLRA suggests that it gives plaintiffs greater rights to pursue collective litigation than they can assert under other sources of law like the FLSA. Enforcement of plaintiffs’ arbitration agreements would not deprive them of their substantive right under the FLSA to proper wage-and-hour compensation, or any procedural right under the NLRA to invoke whatever class or collective procedures are otherwise available to them.

In *Murphy Oil*, this Office previously filed a petition for a writ of certiorari on behalf of the NLRB, defending the Board’s view that agreements of the sort at issue here are unenforceable. After the change in administration, the Office reconsidered the issue and has reached the opposite conclusion. Although the Board’s interpretation of ambiguous NLRA language is ordinarily entitled to judicial deference, courts do not defer to the Board’s conclusion as to the interplay between the NLRA and other federal statutes. We do not believe that the Board in its prior unfair-labor-practice proceedings, or the government’s certiorari petition in *Murphy Oil*, gave adequate weight to the congressional policy favoring enforcement of arbitration agreements that is reflected in the FAA.

More specifically, the Board's view that the phrase "other concerted activities" in 29 U.S.C. 157 encompasses participation in collective or class litigation may reflect a permissible interpretation of that language, such that an employer might commit an unfair labor practice by discharging employees who initiated or joined such suits in accordance with other provisions of law. It does not follow, however, that Section 157 *expands* the range of circumstances in which such litigation can go forward, by allowing employees who validly waived their collective-litigation rights under the FLSA to escape the consequences of that choice. The Board's approach fails to respect the FAA's directive that arbitration agreements should be enforced unless they run afoul of arbitration-neutral rules of contract validity.

A. The NLRA Does Not Preclude Enforcement Of An Agreement To Arbitrate Employees' Work-Related Claims Bilaterally

The FAA "reflects the overarching principle that arbitration is a matter of contract." *Italian Colors*, 133 S. Ct. at 2309. When parties agree in writing to resolve disputes through arbitration, the agreement is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. The FAA requires courts to "rigorously enforce arbitration agreements according to their terms, including terms that specify *with whom* the parties choose to arbitrate their disputes, and the rules under which that arbitration will be conducted." *Italian Colors*, 133 S. Ct. at 2309 (brackets, citations, and internal quotation marks omitted). To be sure, "[l]ike any statutory directive, the [FAA's] mandate may be overridden by a contrary congressional command." *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220,

226 (1987). But a party resisting enforcement of an arbitration agreement bears the “burden” of showing “that Congress intended to preclude” enforcement. *Id.* at 227.

1. Bilateral arbitration agreements should be enforced absent a specific congressional command to the contrary

a. Although the policy in favor of arbitration applies to both federal- and state-law claims, see, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991), this Court was initially reluctant to enforce agreements to arbitrate disputes that involved federal statutory rights. In *Wilko v. Swan*, 346 U.S. 427 (1953), the Court considered whether to enforce the parties’ agreement to arbitrate a claim under the Securities Act of 1933. The Court observed that the Securities Act contained provisions “conferring jurisdiction” on federal district courts, *id.* at 433 & n.16 (citing 15 U.S.C. 77v(a) (1952)), and declaring “void” any agreement “to waive compliance with any provision of the Securities Act,” *id.* at 430 (quoting 15 U.S.C. 77n). Based on those provisions, and on its skepticism of arbitration and arbitrators, see *id.* at 435-436, the Court determined that “the protective provisions of the Securities Act require the exercise of judicial direction to fairly assure their effectiveness,” *id.* at 437. The Court thus held that “the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the [Securities] Act.” *Id.* at 438.

The *Wilko* Court’s skepticism of arbitration, and its approach to reconciling the FAA with other federal statutes, were short-lived. In *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), the Court held that the FAA

required enforcement of an agreement to arbitrate a dispute under the Securities Exchange Act of 1934, despite a statutory provision giving federal district courts “exclusive jurisdiction” over such suits. *Id.* at 514 (quoting 15 U.S.C. 78aa (1970)); see *id.* at 513-521. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), the Court explicitly acknowledged that the balance it had previously struck in reconciling the FAA with other federal statutes had been colored by an inappropriate hostility toward arbitration. *Id.* at 626-628. And in *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989), the Court overruled *Wilko*, a step the Court described as necessary “to correct a seriously erroneous interpretation of statutory language that would undermine congressional policy.” *Id.* at 484.

b. In more recent decisions addressing the enforceability of agreements to arbitrate federal statutory claims, the Court has asked whether “Congress itself,” in enacting the statute that created the plaintiff’s cause of action, “evinced an intention to preclude” enforcement of the parties’ agreement. *Gilmer*, 500 U.S. at 26 (citation omitted). “If such an intention exists, it will be discoverable in the text of the [statute], its legislative history, or an ‘inherent conflict’ between arbitration and the [statute’s] underlying purposes.” *Ibid.* (quoting *McMahon*, 482 U.S. at 227). The Court has further explained that “the burden” rests with the party resisting enforcement of the arbitration agreement “to show that Congress intended” that result. *Ibid.* In each of those cases, after examining relevant text, history, and purpose, the Court concluded that Congress did not speak with the necessary specificity. See, e.g., *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89-92

(2000) (Truth in Lending Act); *Gilmer*, 500 U.S. at 26-33 (Age Discrimination in Employment Act of 1967); *Rodriguez de Quijas*, 490 U.S. at 479-484 (Securities Act of 1933); *McMahon*, 482 U.S. at 227-242 (Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act); *Mitsubishi Motors*, 473 U.S. at 628-629 (Sherman Act).

CompuCredit Corp. v. Greenwood, 565 U.S. 95 (2012), is illustrative. There, individuals who had agreed to arbitrate their disputes with a credit-card company filed a class-action complaint in federal court under the Credit Repair Organizations Act (CROA), 15 U.S.C. 1679 *et seq.* See 565 U.S. at 96. When the defendants moved to compel arbitration under the FAA, the plaintiffs invoked various CROA provisions that required disclosure of a consumer’s “right to sue” for statutory violations, *id.* at 99 (quoting 15 U.S.C. 1679c(a)); imposed liability for violations and “repeated[ly]” used “the terms ‘action,’ ‘class action,’ and ‘court,’” *id.* at 100 (quoting 15 U.S.C. 1679g); and declared that “[a]ny waiver by any consumer of * * * any right of the consumer under” CROA would be “void” and unenforceable, *id.* at 99 (quoting 15 U.S.C. 1679f(a)).

The Court found those provisions insufficient to demonstrate that Congress intended to preclude enforcement of the plaintiffs’ agreement to arbitrate their statutory claims. The disclosure provision (Section 1679c(a)) created no consumer right other than “the right to receive the [disclosure] statement” itself. *CompuCredit*, 565 U.S. at 99. The liability provision (Section 1679g) was merely a “guarantee of the legal power to impose liability,” not a guarantee of access to any particular forum. *Id.* at 102 (emphasis omitted). And because neither of those provisions entitled a consumer to proceed in court, there

was no “right of the consumer” to which the non-waiver provision (Section 1679f(a)) might apply. *Id.* at 101-102 (citation omitted). The Court concluded that CROA was “silent on whether claims under the Act can proceed in an arbitral forum,” and it accordingly held that “the FAA requires the arbitration agreement to be enforced according to its terms.” *Id.* at 104.

CompuCredit demonstrates the formidable burden a party bears when seeking to show that “the FAA’s mandate has been ‘overridden by a contrary congressional command.’” 565 U.S. at 98 (quoting *McMahon*, 482 U.S. at 226). One feature of *CompuCredit* and other decisions is especially notable for present purposes: When examining text and legislative history, the Court has looked for evidence that Congress intended to address arbitration agreements *in particular*. A statute’s general reference to litigation rights, even when combined with a provision forbidding the waiver of statutory protections, is insufficient to overcome the FAA’s presumption of enforceability. See, e.g., *id.* at 99-102; *Rodriguez de Quijas*, 490 U.S. at 481-482; *McMahon*, 482 U.S. at 227-228.

2. *The NLRA does not contain a specific congressional command precluding enforcement of plaintiffs’ bilateral arbitration agreements*

a. Plaintiffs in these cases have not argued, and neither the Seventh nor the Ninth Circuit suggested, that the FLSA precludes enforcement of the agreements at issue here. Although the FLSA authorizes suit “by any one or more employees for and in behalf of himself or themselves and other employees similarly situated,” 29 U.S.C. 216(b), that provision is no different from other “utterly commonplace” provisions that “describe the details of * * * causes of action, including the relief

available, in the context of a court suit,” *CompuCredit*, 565 U.S. at 100. “[M]ere formulation of the cause of action in this standard fashion” is not “sufficient to establish [a] ‘contrary congressional command’ overriding the FAA.” *Id.* at 100-101 (quoting *McMahon*, 482 U.S. at 226); see *NLRB v. Alternative Entm’t, Inc.*, No. 16-1385, 2017 WL 2297620, at *13 (6th Cir. May 26, 2017) (Sutton, J., concurring in part and dissenting in part) (“Every circuit to consider the question has concluded that an employee may waive the right to bring a collective action under the [FLSA].”).

Plaintiffs’ argument thus depends on the premise that the NLRA imposes greater restrictions on the arbitrability of FLSA claims than does the FLSA itself. Nothing in the NLRA’s text supports that proposition. Unlike many federal statutes, the NLRA does not specifically bar enforcement of agreements to arbitrate statutory claims or declare such agreements to be unlawful.² Plaintiffs therefore rely on general language in

² See, e.g., 7 U.S.C. 26(n)(2) (“No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.”); 10 U.S.C. 987(e)(3) (“It shall be unlawful for any creditor to extend consumer credit to a covered member or a dependent of such a member with respect to which * * * the creditor requires the borrower to submit to arbitration.”); 12 U.S.C. 5567(d)(2) (“[N]otwithstanding any other provision of law, no predispute arbitration agreement shall be valid or enforceable to the extent that it requires arbitration of a dispute arising under this section.”); 18 U.S.C. 1514A(e)(2) (“No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.”); see also, e.g., 15 U.S.C. 1226(a)(2); 15 U.S.C. 1639c(e)(1); 22 U.S.C. 290k-11(a); 22 U.S.C. 1650a(a). In addition, Congress has delegated authority to preclude arbitration of certain statutory claims to agencies charged with administering the relevant statutes. See 12 U.S.C.

Section 157, which affirms the “Right of employees as to organization, collective bargaining, etc.,” by providing as follows:

Employees 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 shall also have the right to refrain from any or all of such activities.

29 U.S.C. 157.

None of the specific rights enumerated in Section 157 involves the conduct of litigation. And even assuming that the residual phrase—“other concerted activities for the purpose of *** mutual aid or protection”—encompasses the filing and prosecution of a collective or class suit asserting employment-related claims, see pp. 23-24, *infra*, that language clearly does not *focus* on litigation conduct. Any application that Section 157 may have to employees’ litigation activities is much less direct and specific than the statutory language that was at issue in cases like *CompuCredit*, which the Court found insufficient to override the FAA. It is also much less direct and specific than the FLSA provision that authorizes employees to sue “for and in behalf of *** themselves and other employees similarly situated.” 29 U.S.C. 216(b). If that language (in the very statute

5518(b) (“The Bureau, by regulation, may prohibit or impose conditions or limitations on the use of an agreement *** providing for arbitration of any future dispute between the parties.”); 15 U.S.C. 78o(o) (authorizing the Securities and Exchange Commission to “prohibit, or impose conditions or limitations on the use of, agreements” to arbitrate disputes “arising under the Federal securities laws”).

that creates plaintiffs' cause of action) is insufficient to bar enforcement of plaintiffs' agreement to bilateral arbitration of their FLSA claims, it would be anomalous to conclude that the NLRA's more general language has that effect. See *Alternative Entm't*, 2017 WL 2297620, at *16 (Sutton, J., concurring in part and dissenting in part).

Neither plaintiffs nor the courts of appeals that ruled in their favor have identified any *other* context in which Section 157 could give employees greater rights to pursue class or collective remedies in court than they would have under the laws that directly address those issues. An employee who sought certification of a plaintiff class, for example, could not invoke Section 157 as a basis for excusing non-compliance with Rule 23's numerosity and commonality requirements. See Fed. R. Civ. P. 23(a)(1) and (2). Rather than *expanding* the collective-litigation rights that employees possess, Section 157 at most provides employees additional protection when they exercise the collective-litigation rights that other laws confer. See pp. 23-25, *infra*. And in determining the scope of the collective-litigation rights that are otherwise available to plaintiffs in these cases, it is essential to take into account the FAA as well as the FLSA. Although the FLSA confers a right to sue, including in a collective action, plaintiffs waived that right by executing arbitration agreements that were valid under the terms of the FAA. Because plaintiffs had no right to pursue collective actions under the FLSA and FAA, any collective-litigation right that Section 157 may confer does not encompass their suits.

The NLRA further provides that an employer who "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in section 157" has

committed “an unfair labor practice.” 29 U.S.C. 158(a)(1). But that provision simply protects the rights set forth in Section 157, which do not include any collective-litigation right beyond those conferred by other provisions of law. An employer would not commit an unfair labor practice by opposing certification of an employee class on the ground that Rule 23’s requirements were not satisfied. By the same token, because Section 157 does not clearly displace the rule announced in the FAA, under which an employee’s agreement to bilateral arbitration of workplace disputes is “valid, irrevocable, and enforceable,” 9 U.S.C. 2, an employer does not “interfere with, restrain, or coerce employees in the exercise of the[ir] rights” by entering into or enforcing such an agreement, 29 U.S.C. 158(a)(1). Cf. *CompuCredit*, 565 U.S. at 101 (“But if a cause-of-action provision mentioning judicial enforcement does not create a right to initial judicial enforcement, the waiver of initial judicial enforcement is not the waiver of a ‘right of the consumer,’ § 1679f(a).”).

b. The NLRA’s legislative history does not suggest that Congress intended to preclude agreements to arbitrate bilaterally. Congress’s primary goal in enacting the statute was to “promot[e] industrial peace by the recognition of the rights of employees to organize and bargain collectively.” S. Rep. No. 573, 74th Cong., 1st Sess. 1 (1935) (Senate Report). Congress focused on “collective bargaining” in the traditional sense of the term—*i.e.*, “the right of employees to bargain collectively through representatives of their own choosing,” *id.* at 12—and sought to remove known obstacles such as so-called “company unions,” anti-union discrimination by employers, and employer interference with union elections. *Id.* at 9-14; see H.R. Rep. No. 1147, 74th Cong.,

1st Sess. 8-9 (1935). To the extent arbitration was discussed at all, it was only briefly, in making clear that Congress had declined to subject labor disputes to “any form of compulsory arbitration.” Senate Report 2; see *id.* at 8 (“The committee does not believe that the Board should serve as an arbitration agency.”).

c. Because the question is whether the NLRA contains a specific command from *Congress* precluding bilateral arbitration, the Board cannot supply the requisite clarity by gap-filling. The specific rights enumerated in Section 157 involve self-organization, association with labor unions, and collective bargaining. Plaintiffs’ asserted right is very different from those, both because it concerns dispute resolution outside the workplace (whether in litigation or in arbitration) and because, unlike the enumerated Section 157 rights, it cannot plausibly be derived from the NLRA alone but depends on the FLSA’s authorization of collective actions. Those differences cast doubt on whether the pursuit of an FLSA collective action is among the “other concerted activities for * * * mutual aid or protection” to which Section 157 refers. See *Murphy Oil* Pet. App. 100a-110a (Miscimarra, Member, dissenting in part); *id.* at 146a-156a (Johnson, Member, dissenting); *Alternative Entm’t*, 2017 WL 2297620, at *15-*16 (Sutton, J., concurring in part and dissenting in part).

The Board’s interpretation of ambiguous NLRA language is entitled to judicial deference, however, and its reading of Section 157’s residual phrase may govern in contexts where the FAA does not apply. For example, an employer may commit an unfair labor practice under Section 158 if it discharges an employee for utilizing collective dispute-resolution mechanisms that are made available by other provisions of law (and that the

employee has not validly agreed to waive). Cf. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-566 (1978) (“[I]t has been held [by the Board and lower courts] that the ‘mutual aid or protection’ clause [of Section 157] protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums.”).³ Construing the NLRA to bar such retaliation would not implicate the FAA, and it would be unlikely to conflict with any other federal law.

But the Board is not entitled to deference when it determines how the NLRA should be harmonized with *other* federal statutes—here, the FAA. Cf. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002) (This Court has “never deferred to the Board’s remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the

³ Contrary to the Board’s decision in *Murphy Oil*, see Pet. App. 18a, this statement from *Eastex* does not indicate that employees have an unwaivable right to pursue collective or class claims. The statement relates only to employees’ right to be free from “retaliation,” not their right to proceed collectively in litigation even if the employees have agreed to bilateral arbitration. The Court in *Eastex* expressly reserved “the question of what may constitute ‘concerted’ activities in th[e] context” of litigation, 437 U.S. at 566 n.15, because the particular activity at issue there was “distribut[ing] a union newsletter in nonworking areas of [the employer’s] property during nonworking time urging employees to support the union,” *id.* at 558. The Court in *Eastex* likewise did not address, and these cases do not present, the question whether an employee is protected from retaliation for invoking collective dispute-resolution mechanisms that he reasonably, but incorrectly, believes are legally available to him. Cf. *Alternative Entm’t*, 2017 WL 2297620, at *16 (Sutton, J., concurring in part and dissenting in part) (“The employees’ pursuit of collective procedures may or may not bear fruit, but the pursuit will nonetheless be protected from retaliation.”).

NLRA.”). As explained above, the question in these cases is not whether Section 157 provides additional protection for employees who invoke collective-action mechanisms that are available to them under other statutes or procedural rules. At the times they filed suit in these cases, plaintiffs had no FLSA rights to pursue collective actions because they had waived those rights through contracts that were “valid, irrevocable, and enforceable” under the terms of the FAA. 9 U.S.C. 2. The question in these cases is whether Section 157’s residual language supersedes that FAA directive and thereby gives plaintiffs *greater* rights to pursue collective litigation than they could assert under the FLSA itself. The Board’s determination that the NLRA trumps the FAA in that manner is not entitled to judicial deference.

B. Enforcing The Parties’ Arbitration Agreements In These Cases, In Accordance With The FAA, Would Not Deprive Plaintiffs Of Any Substantive Right Conferred By Another Federal Statute

In holding that pre-dispute agreements to arbitrate federal statutory claims are enforceable, this Court has explained that, “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.” *Mitsubishi Motors*, 473 U.S. at 628. The Court has contrasted that type of enforceable contract term with a hypothetical “provision in an arbitration agreement forbidding the assertion of certain statutory rights.” *Italian Colors*, 133 S. Ct. at 2310. In holding that the NLRA bars enforcement of the arbitration agreements at issue here, the Seventh and Ninth Circuits viewed those agreements as restricting “substantive” rather than

“procedural” rights. See *Epic* Pet. App. 17a; *E&Y* Pet. App. 14a. That analysis is misconceived.

1. Enforcement of the arbitration agreements at issue here would not deprive plaintiffs of any substantive right under the FLSA. Most obviously, the agreements do not purport to authorize the defendant-employers to engage in conduct inconsistent with the FLSA’s wage-and-hour provisions. See 29 U.S.C. 206 (minimum wages); 29 U.S.C. 207 (maximum hours). Nor do the agreements prevent any employee who has suffered a statutory violation from obtaining (through arbitration) the full measure of relief that a court could award.

The Court’s decisions also make clear that, for purposes of determining the enforceability of the arbitration agreements at issue here, the right to pursue a collective action under 29 U.S.C. 216(b) is a procedural rather than a substantive FLSA right. A “class-action waiver merely limits arbitration to the two contracting parties. It no more eliminates those parties’ right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938.” *Italian Colors*, 133 S. Ct. at 2311. An agreement not to proceed collectively also does not undermine substantive FLSA rights, because collective dispute resolution “leaves the parties’ legal rights and duties intact and the rules of decision unchanged.” *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (opinion of Scalia, J.).

2. Enforcement of the parties’ arbitration agreements likewise would not deprive plaintiffs of any substantive right under the NLRA. To be sure, the rights enumerated in Section 157—*i.e.*, the rights “to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of

their own choosing”—are core substantive rights conferred by the NLRA itself. Plaintiffs in these cases do not contend, however, and the courts below did not suggest, that the arbitration agreements at issue here impair plaintiffs’ ability to self-organize, to form or associate with labor organizations, or to engage in collective bargaining.

Section 157’s residual phrase confers on employees additional rights “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. 157. Although that residual language could be read to encompass only substantive workplace-related rights closely akin to self-organization or collective bargaining, the Board has construed it more broadly to cover litigation conduct. Assuming that is a permissible interpretation, it does not follow that the right to prosecute a collective action is a *substantive* NLRA right, simply because the enumerated rights are substantive in nature. Rather, if the Board’s reading is permissible, it is because the residual phrase can reasonably be construed to cover procedural matters as well as substantive ones. There is no evident reason to treat the right to pursue collective FLSA litigation as “procedural” under the FLSA and yet “substantive” under the NLRA.

3. In reaching the contrary conclusion, the Board incorrectly relied on *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940), and *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944). See *Murphy Oil* Pet. App. 33a, 44a-45a, 67a.

In *National Licorice*, an employer whose employees had recently taken action in favor of a union responded by requiring all employees to sign contracts “relinquish[ing] the right to strike, [and] the right to demand a closed shop or signed agreement with any union.”

309 U.S. at 355. This Court concluded that the contracts “by their terms * * * imposed illegal restraints upon the employees’ rights to organize and bargain collectively guaranteed by” the NLRA. *Id.* at 360.

In *J.I. Case*, after an employee union was certified, the employer refused to bargain with the union, relying on individual contracts it had signed with its employees. 321 U.S. at 333-334. The Court held that the “[i]ndividual contracts * * * may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement.” *Id.* at 337. The Court accordingly ordered the employer to stop using the individual contracts as a ground for declining to bargain collectively. *Id.* at 340-342.

National Licorice and *J.I. Case* did not establish any general rule that “employers may not condition employment on the waiver of employees’ right to take collective action by seeking class certification or the equivalent.” *Murphy Oil* Pet. App. 33a. Rather, both decisions were highly dependent on a key factual feature that is absent here. The agreements at issue in those cases “were the means adopted to eliminate the Union as the collective bargaining agency of [the] employees.” *National Licorice*, 309 U.S. at 360 (internal quotation marks omitted); see *J.I. Case*, 321 U.S. at 337 (The employer “used [the agreements] to forestall bargaining or to limit or condition the terms of the collective agreement.”); see also *Murphy Oil* Pet. App. 175a-178a (Johnson, Member, dissenting).

To be sure, the Court in *National Licorice* did say that “[t]he effect of [the anti-union] clause [in the employer-created contracts] was to discourage, if not forbid, any presentation of the discharged employee’s grievances to appellant through a labor organization or his chosen representatives, or in any way except personally.” 309 U.S. at 360. But as the sentence preceding that one makes clear, the Court’s concern was that such an agreement would “forestall[] collective bargaining with respect to discharged employees.” *Ibid.* The present cases do not implicate that concern. And the Court in *National Licorice* and *J.I. Case* did not confront a situation where another federal statute (like the FAA in the present cases) specifically condoned the employers’ conduct.

**C. The FAA’s Saving Clause Provides No Sound Basis
For Declining To Enforce The Parties’ Arbitration
Agreements**

The Seventh and Ninth Circuits relied in part on the FAA’s saving clause, 9 U.S.C. 2, which provides that written arbitration agreements are valid and enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract.” Those courts viewed “illegality” as one of the generally applicable grounds for contract revocation referenced in the saving clause. *Epic* Pet. App. 15a; *E&Y* Pet. App. 14a. They construed the NLRA to “prohibit employers from making agreements with individual employees barring access to class or collective remedies,” *Epic* Pet. App. 7a; see *E&Y* Pet. App. 9a-11a, and concluded that such agreements are “illegal, and meet[] the criteria of the FAA’s saving clause for nonenforcement.” *Epic* Pet. App. 15a; see *E&Y* Pet. App. 14a, 16a-18a; see also *Murphy Oil* Pet. App. 44a. That analysis is incorrect.

1. The congressional policy judgment that the FAA reflects is not simply a preference for an arbitral rather than judicial forum. The FAA mandates enforcement of a “written provision in *** a contract *** to settle by arbitration a controversy thereafter arising out of such contract.” 9 U.S.C. 2. In addition to memorializing the parties’ agreement to arbitrate, the “written provision” that the FAA declares to be enforceable can and typically does describe the procedures by which the arbitration will be conducted. Indeed, a principal virtue of contracted-for arbitration is that it allows contracting parties to choose procedures tailored to their own circumstances. See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344-345 (2011).

The FAA thus reflects Congress’s belief in “the consensual nature of private dispute resolution,” including the freedom of contracting parties “to structure their arbitration agreements as they see fit.” *Stolt-Nielsen*, 559 U.S. at 683 (citation omitted). That freedom encompasses the right to “agree on rules under which any arbitration will proceed,” including a right of contracting parties to “specify with whom they choose to arbitrate their disputes.” *Ibid.*; see *Italian Colors*, 133 S. Ct. at 2309. Forcing parties to arbitrate collectively or on a classwide basis, when they have not “agreed to do so,” is just as inconsistent with the FAA as requiring them to litigate when they have agreed to arbitrate. *Stolt-Nielsen*, 559 U.S. at 684; cf. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 200-201 (1991) (noting “the strong statutory principle, found in both the language of the NLRA and its drafting history, of consensual rather than compulsory arbitration”).

2. The saving clause permits courts to “invalidate an arbitration agreement based on ‘generally applicable

contract defenses' like fraud or unconscionability, but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, No. 16-32 (May 15, 2017), slip op. 4 (quoting *Concepcion*, 563 U.S. at 339). The types of generally applicable rules of contract enforceability that the saving clause covers are at least predominantly, if not exclusively, the province of state law.⁴ This Court has never applied the saving clause to a case in which another *federal* statute was alleged to render the parties' arbitration agreement unenforceable.

To be sure, the saving clause is not explicitly limited to state-law grounds for contract revocation, and in theory it would cover a (hypothetical) federal law that barred enforcement of contracts on a generally applicable ground like fraud. But the Seventh and Ninth Circuits' interpretation of the NLRA is not that type of arbitration-neutral rule. Those courts viewed their rule as being

⁴ State-law defenses were thus at issue in every case in which this Court has applied the saving clause—or, more commonly, declined to do so because the defense was found to discriminate against arbitration. See, e.g., *Kindred Nursing Ctrs.*, slip op. 4-7 (invalidating defense under Kentucky law that discriminated against arbitration); *Preston v. Ferrer*, 552 U.S. 346, 354-356 (2008) (California law); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) (Montana law); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 269, 281-282 (1995) (Alabama law); *Southland Corp. v. Keating*, 465 U.S. 1, 10, 16 & n.11 (1984) (California law). And in considering and rejecting various claims that other *federal* statutes precluded enforcement of arbitration agreements, the Court has never treated the FAA's saving clause as relevant to its inquiry. See, e.g., *Compu-Credit*, 565 U.S. at 99-104; *Randolph*, 531 U.S. at 89-92; *Gilmer*, 500 U.S. at 26-33; *Rodriguez de Quijas*, 490 U.S. at 479-484; *McMahon*, 482 U.S. at 227-242; *Mitsubishi Motors*, 473 U.S. at 628-629; see also pp. 16-17, *supra*.

arbitration-neutral because it focuses on the agreements' requirement of *bilateral* arbitration, rather than on the obligation to arbitrate as such. The Ninth Circuit stated that “[i]t would equally violate the NLRA for [an employer] to require its employees to sign a contract requiring the resolution of all work-related disputes *in court* and in ‘separate proceedings.’” *E&Y Pet.* App. 13a. The Seventh Circuit likewise described the purported flaw in the challenged agreement as its requirement of bilateral dispute-resolution procedures: “If Epic’s provision had permitted collective arbitration, it would not have run afoul of Section [157].” *Epic Pet.* App. 17a.

This Court’s decisions make clear, however, that the FAA’s saving clause does not encompass every rule of contract enforceability that is *capable* of application to contracts other than arbitration agreements. See, e.g., *Kindred Nursing Ctrs.*, slip op. 5-6; *Concepcion*, 563 U.S. at 341-342. The Court in *Concepcion* applied that principle in the specific context of a state-law rule against enforcement of class-action waivers contained in certain consumer contracts. See 563 U.S. at 340 (describing relevant state-law rule). The Court described the ways in which use of class procedures can be expected to subvert the advantages that ordinarily attend arbitration. See *id.* at 348-351. The Court explained that the FAA’s saving clause should not be construed “to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives” because “the act cannot be held to destroy itself.” *Id.* at 343 (citations omitted). It concluded that the FAA preempted the state-law rule barring enforcement of class-action waivers because “[r]equiring the availability of classwide arbitration interferes with fundamental attributes of

arbitration and thus creates a scheme inconsistent with the FAA.” *Id.* at 344.

Principles of conflict preemption do not directly govern the interpretive question that is currently before the Court, which involves the proper harmonization of two *federal* statutes. But *Concepcion* underscores that the rule adopted by the Seventh and Ninth Circuits substantially disserves the FAA’s purposes, even though that rule would not preclude enforcement of *all* agreements to arbitrate employee claims, and even though it would also preclude enforcement of hypothetical employee-employer contracts that mandated individual suits in court. As the dissenting judge in *Ernst & Young* explained, the rule those circuits found to be implicit in the NLRA “would disproportionately and negatively impact arbitration agreements by requiring procedures that ‘interfere with fundamental attributes of arbitration.’” *E&Y Pet. App.* 40a (*Ikuta, J., dissenting*) (brackets omitted) (quoting *Concepcion*, 563 U.S. at 344). Just as the saving clause was held not to encompass the state-law rule at issue in *Concepcion*, it does not encompass the analogous federal-law rule that the Seventh and Ninth Circuits derived from the NLRA. See *ibid.* Congress remains free to adopt such a rule, of course, but it must clearly and specifically express its intent to override the FAA’s general federal policy—which Congress did not do in the NLRA.

CONCLUSION

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

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
MALCOLM L. STEWART
Deputy Solicitor General
ALLON KEDEM
*Assistant to the Solicitor
General*

JUNE 2017

APPENDIX

1. 9 U.S.C. 2 provides:

Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

2. 29 U.S.C. 157 provides:

Right of employees as to organization, collective bargaining, etc.

Employees 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 shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

3. 29 U.S.C. 158 provides:

Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an

election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

- (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;
- (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents—

- (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or reten-

tion of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of

such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consum-

ers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

(c) Expression of views without threat of reprisal or force or promise of benefit

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry

affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

- (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;
- (2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;
- (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and
- (4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representa-

tive of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

- (A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.
- (B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.
- (C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts,

by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

(e) Enforceability of contract or agreement to boycott any other employer; exception

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable¹ and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on

¹ So in original. Probably should be "unenforceable".

the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) Agreement covering employees in the building and construction industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with

such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3): *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

(g) Notification of intention to strike or picket at any health care institution

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d) of this section. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.