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**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

**PINNACLE PROPERTY MANAGEMENT SERVICES, LLC,
a Delaware LLC, and HEATHER LAGAT, individually
and the marital community comprised thereof,**

Appellants,

v.

KIRANDEEP CZERWINSKI,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Pinnacle’s Issue Resolution Agreement (“arbitration agreement” or “Agreement”) is not enforceable. Pinnacle has not met its burden of proving that Mrs. Czerwinski is the one who e-signed the Agreement. Nor has Pinnacle met its burden of proving that each of the parties objectively manifested their intent to be bound by it. The document itself shows that they did not. Moreover, the Agreement and purported arbitration rules are procedurally and substantively unconscionable. The trial court, therefore, was right to deny Appellants’ (“Pinnacle”) motion to compel arbitration of Mrs. Czerwinski’s claims.

II. ISSUES PERTAINING TO APPELLANTS’ ASSERTED ASSIGNMENT OF ERROR

1. Whether Mrs. Czerwinski can be held to have voluntarily, knowingly and intelligently waived her constitutional right to a jury trial, when Pinnacle has failed to meet its burden of proving that she signed the Agreement and that she received all of its material terms.

2. Whether Pinnacle has met its burden of establishing the parties’ objective manifestation of intent to be bound by the Agreement, when the document itself shows that they did not.

3. Whether the Agreement is procedurally unconscionable, when its terms are unclear, and when Mrs. Czerwinski was not given a reasonable opportunity to understand them.

4. Whether the Agreement is enforceable, when substantively unconscionable terms pervade the purported Rules governing arbitration.

III. STATEMENT OF THE CASE

A. **It is Questionable Whether Mrs. Czerwinski Received, or Signed, the Arbitration Agreement.**

Mrs. Czerwinski's employment application process with Pinnacle was on-line. Clerk's Papers ("CP") at 112 ¶ 3. Presumably, Pinnacle attempts to have applicants sign its Agreement as part of the application process. Appellants' Brief at 4.

Mrs. Czerwinski does not recall seeing, or agreeing to, Pinnacle's Agreement prior to, during, or after completing her on-line application with the company. CP at 113 ¶ 6. The Agreement's "signature" block does not contain Mrs. Czerwinski's handwritten signature; rather, it contains an electronic designation of Mrs. Czerwinski's name. Appellants' Brief at 4. The block also contains the last four digits of Mrs. Czerwinski's social security number. *Id.* Pinnacle had access to Mrs. Czerwinski's social security number once she became its employee, and potentially earlier. CP at 99 ¶ 2 - 100 ¶ 4, 105-06. Pinnacle asserts that the

Agreement was part of her personnel file. CP at 43 ¶ 5. But, neither the purported March 2016 nor the purported April 2016 Agreement were included as part of Mrs. Czerwinski's personnel file Pinnacle produced to Mrs. Czerwinski's counsel on October 13, 2017 in response to a request under state law. CP at 99 ¶ 2 - 100 ¶ 4, 102-111.

B. Even if Mrs. Czerwinski Did “Sign” the Agreement, She Did Not Agree to Be Bound By It.

The Agreement's "signature" block contains a box for the applicant to check, stating "AGREED." Appellants Brief at 4. Even if Mrs. Czerwinski did sign the Agreement, there can be no dispute: she did not check the "AGREED" box. CP at 83, 143.

C. The Agreement Presented by Pinnacle is Unclear, and Appears Incomplete.

The Agreement presented by Pinnacle is 15 pages long. CP at 69–83, 129–143. The first four pages are an "Issue Resolution Agreement," and refer to applicable rules governing arbitration as the "Issue Resolution Rules." CP at 69–72, 129–132. For example, the bottom of the first page states:

If you wish to be considered for employment, you must read and sign the following Issue Resolution Agreement. This Agreement requires you to arbitrate any legal dispute related to your application for employment, employment with, or termination from Pinnacle Property Management Services, LLC. You will not be considered as an applicant

until you have signed the Agreement. By signing this Issue Resolution Agreement, you acknowledge receipt of this ISSUE RESOLUTION RULES.

CP at 69, 129 (emphasis in original). The third page states: “I further agree that **if I commence arbitration, it will be conducted in accordance with the “Issue Resolution Rules.”** CP at 71, 131 (emphasis added).¹ The fourth page states: “**The Issue Resolution Agreement and the Issue Resolution Rules affect your legal rights.**” CP at 72, 132 (emphasis in original).

Thus, Pinnacle suggests that the next ten pages are the “Issue Resolution Rules” applicable to the “Issue Resolution Agreement.” Appellants’ Brief at 3 - 4. Those pages, however, begin by referencing an “Issue Resolution Program (“IRP”)” between American Management Services and its Employees – not an Issue Resolution Agreement between Pinnacle and its applicants / employees. CP at 73, 133 (Rule 1). Further down that paragraph, it states that “these Issue Resolution Rules” govern all arbitrations held pursuant to the IRP.” *Id.* (underline added). It does not say that they govern arbitrations held pursuant to the Issue Resolution Agreement. Mrs. Czerwinski does not recall seeing, or agreeing to, these purported Rules. CP at 113 ¶ 5-6.

¹ This does not state that Pinnacle will be bound by such rules if it initiates arbitration.

On the fifteenth page, the document states “I recognize that if I sign the Agreement and do not withdraw within three (3) days of signing, I will be required to arbitrate any and all employment-related claims I may have against Pinnacle Property Management Services, LLC, whether or not I become employed by Pinnacle Property Management Services, LLC.” CP at 83, 143. This does not specify whether the “Agreement” is referring to the immediately preceding ten pages concerning the Issue Resolution Program with American Management Services, or the “Issue Resolution Agreement” found on the first four pages of the document.

D. Applicants Are Not Given A Resource to Ask Questions About the Agreement Before “Signing” It.

To the extent applicants are provided with the Agreement, this occurs online. CP at 43 ¶ 7. The Agreement does not provide applicants with contact information for a Pinnacle representative to whom they may direct questions about the Agreement. CP at 69–83, 129-143. While it provides applicants with a mailing address for its Human Resources department, this is only for purposes of revoking the Agreement. CP at 69, 72, 129, 132.

E. Pinnacle Did Not Agree To Be Bound By the Agreement.

The fifteenth page of the Agreement has a signature block for Pinnacle, which states:

Pinnacle Property Management Services, LLC agrees to follow this Issue Resolution Agreement and the Issue Resolution Rules in connection with the Employee whose signature appears above.

CP at 83, 143. Pinnacle did not sign in the space provided. *Id.* And again, even if Pinnacle had signed the Agreement, the purported Rules state they apply to an IRP between American Management Services and that company's Employees; they do not state that they apply to Pinnacle's and its applicant / employees. *Supra* at 4-5.

F. Unconscionable Terms Pervade the Issue Resolution Program's Rules.

As noted by Pinnacle, the Issue Resolution Program (1) provides employees with a one-year limitations period to file claims in arbitration; (2) limits discovery; (3) requires "all aspects" of the arbitration to be confidential; (4) allows the arbitrator to sanction a party for failing to comply with the Issue Resolution Rules; and (5) allows Pinnacle (or, rather, American Management Services) to "alter or terminate the Agreement and [the] Rules" on an annual basis. Appellants' Brief at 10-14. As also noted by Pinnacle, Mrs. Czerwinski has challenged these provisions as unconscionable. *Id.*

IV. ARGUMENT

A. Review of The Issues Concerning the Enforceability of Pinnacle's Arbitration Agreement is De Novo.

As noted by Pinnacle, "[t]his Court reviews de novo the denial of a motion

to compel arbitration.” Appellants’ Brief at 19 (*citing Zuver v. Airtouch Commn’s, Inc.*, 153 Wn.2d 293, 302, 103 P.3d 753 (2004)). As such, this Court may affirm the trial court ruling on any ground presented to the trial court; indeed, Ms. Czerwinski “may present a ground for affirming [the] trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground.” RAP 2.5(a) (emphasis added).

B. Pinnacle Bears the Burden of Proving A Contract Was Formed.

Pinnacle – the party seeking to enforce the Agreement – first bears the burden of proving that a contract was formed, including that each party exhibited an objective manifestation of intent to be bound by the Agreement. *See, e.g., Jacob’s Meadow Owners Ass’n v. Plateau 44 II, LLC*, 139 Wash.App. 743, 765, 162 P.3d 1153 (2007); *Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket*, 96 Wn.2d 939, 944, 640 P.2d 1051 (1982). In this regard, “[i]t is essential to the formation of a contract that the parties manifest to each other their mutual assent to the same bargain at the same time.” *Pac. Cascade Corp. v. Nimmer*, 25 Wash.App. 552, 555–56, 608 P.2d 266 (1980). “In determining the mutual intention of contracting parties, the unexpressed, subjective intentions of the parties are irrelevant; the mutual assent of the parties must be gleaned from their outward manifestations.” *United Fin. Cas. Co. v. Coleman*, 173 Wn. App.

463, 295 P.3d 763 (2012) (quoting *Saluteen–Maschersky v. Countrywide Funding Corp.*, 105 Wash.App. 846, 854, 22 P.3d 804 (2001)). Moreover, with regards to determining mutual assent to an arbitration agreement, and the corresponding waiver of one’s constitutional right to a jury trial, the waiver must be knowing, voluntary, and intelligent. *See Adler v. Fred Lind Manor*, 153 Wn.2d 331, 103 P.3d 773 (2004).

If Pinnacle meets its burden of proof, the burden then moves to Mrs. Czerwinski (the party seeking to avoid the contract) to prove a defense to the Agreement’s enforcement. *Shopland*, 96 Wn.2d at 944.

C. Arbitration Agreements Are Subject to the Same Scrutiny As Any Other Contract Concerning Their Formation and Defenses.

The U.S. Supreme Court has recently reaffirmed that, even under the Federal Arbitration Act (“FAA”), arbitration agreements are subject to the same defenses as any other contract. *See Epic Systems Corp. v. Lewis*, ___ S.Ct. ___, 2018 WL 2292444, at *6 (U.S. May 21, 2018) (stating the FAA’s “savings allows courts to refuse to enforce arbitration agreements ‘upon such grounds as exist at law or in equity for the revocation of any contract.’”).

Pinnacle contends that courts follow federal substantive law when interpreting arbitration agreements under the FAA. But, under the FAA, courts apply state law principles that govern the formation of contracts to determine

whether an arbitration agreement is valid and enforceable, which is at issue here. *First Options of Chi, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). Pinnacle relies on a Fifth Circuit case for its proposition that federal substantive law supports the enforceability of arbitration agreements without signatures. See Appellants' Brief at 23 (citing *Marino v. Dillard's, Inc.*, 413 F.3d 530 (5th Cir. 2005)). But *Marino*, and the proposition that continued employment can constitute acceptance of an offer, relies on Louisiana contract formation law, not "federal substantive law," as intimated by Pinnacle. 413 F.3d at 532-33; cf. *EEOC v. Fry's Elecs., Inc.*, No. C10-1562RSL, 2011 U.S. Dist. LEXIS 20407 at *1 (W.D. Wash. Feb. 14, 2011) (under Washington law, mere continued at-will employment, without more, does not constitute valid consideration to create an enforceable agreement).

Here, Washington law applies as to whether the Agreement is valid and enforceable. Under Washington law, the party seeking to rely on a contract bears the burden of proving that a contract was formed. *Jacob's Meadow Owners Ass'n*, 139 Wash.App. at 765. Thus, regardless of any presumption favoring arbitration under the FAA, Pinnacle still has the burden of proving that the Agreement is valid and enforceable under Washington law. Here, the trial court correctly decided that Pinnacle failed to meet its burden.

With these principles in mind, and as discussed below, Pinnacle has not met its initial burden of proving the existence of a contract, or that the parties exhibited their objective manifestation of intent to be bound by it. Even assuming *in arguendo* that Pinnacle has met its burden, the Agreement is unenforceable because it is procedurally unconscionable and the purported rules governing arbitration are substantively unconscionable.

D. Pinnacle Has Not Met Its Burden of Proving The Parties' Objective Manifestation of Intent to Be Bound By the Agreement.

1. Pinnacle Has Not Met its Burden of Proof that Mrs. Czerwinski Signed the Agreement.

Mrs. Czerwinski has no recollection of reviewing the Agreement or completing its signature block. *Supra* at 2. Pinnacle relies on the electronic designation of Mrs. Czerwinski's name and last four digits of her social security number to assert that she signed the document. Appellants' Brief at 4, 26. But, Pinnacle has failed to provide any evidence establishing that Mrs. Czerwinski, as opposed to anyone else, is the one who inserted this information into the Agreement.

Pinnacle had access to Mrs. Czerwinski's social security number once she was hired, and potentially earlier. *Supra* at 2. Thus, an agent for Pinnacle could

have “signed” the Agreement for Mrs. Czerwinski. Pinnacle has not proven otherwise.

Faced with similar concerns regarding an employee’s purported electronic signature, the Court of Appeals reversed a decision to compel arbitration, stating:

The resolution of the underlying factual dispute here is complicated by the use of an electronic signature. This signature is essential to Macy’s position that Ms. Neuson received the materials and form necessary to opt out of arbitration. It is not a signature in the traditional sense but rather a string of numbers consisting of an employee’s social security number, birth date, and zip code. The information in Ms. Neuson’s electronic signature is unique to her, and Macy’s urges that it is sufficient to show that Ms. Neuson received the opt-out form. We find evidence that the Northtown Macy’s has a procedure and that its procedure was followed, but we do not find evidence of how or why the information on this electronic signature would be unavailable to anyone other than Ms. Neuson and, ultimately, why it is the same as or better than a traditional signature.

Neuson v. Macy’s Dep’t Stores, 160 Wn.App. 786, 796, 249 P.3d 1054 (Div. 3 2011). As in *Neuson*, Pinnacle has failed to establish that Mrs. Czerwinski “signed” the Agreement.

At the trial court, Pinnacle tried to distinguish *Neuson*, arguing that case involved the mailbox rule. CP at 116:18-21. This distinction is immaterial. In *Neuson*, as here, the issue was whether the evidence sufficiently established that the employee had signed a document, when that “signature” was electronic

information available to both parties. Here, as in *Neuson*, the answer is “no.”²

Also at the trial court, Pinnacle argued that a different case, *Sturtevant v. Xerox Commercial Solutions, LLC*, Case No. C16-1158-RSM, 2016 WL 4992468, 2016 U.S. Dist. LEXIS 127441 (W.D. Wash. Sept. 19, 2016) was more analogous. CP at 117:2-5. In *Sturtevant*, however, evidence that the employee had e-signed the agreement was compelling. This included exhibits showing that, as an applicant, Sturtevant created an account with a private login name and password to access and e-sign various policies, and that he later used the same login and password as an employee to e-sign several other documents. *Sturtevant*, 2016 WL 4992468 at *1. Evidence also showed that, years later, the company sent an e-mail notification regarding revisions to the arbitration agreement, and evidence from a computer program that Sturtevant opened that e-mail. *Id.* at *2. The company also presented evidence that Sturtevant completed training concerning the arbitration agreement, that he was asked to confirm that he reviewed the course material for the training, and that such training included the revised arbitration agreement and the applicable e-mail concerning it. *Id.* Here, Pinnacle has proffered no such

² There is one distinction between *Neuson* and this matter worth noting. Because *Neuson* implicated the mailbox rule, the employer was given a presumption (of mailing and receipt) that the employee then had to overcome. 160 Wn.App. at 793-794. Here, as the mailbox rule is not implicated, no such presumption exists.

compelling evidence.

Pinnacle also suggests that Mrs. Czerwinski has not provided sufficient evidence that she did not sign the Agreement, since she stated in her declaration that she does not recall signing it, as opposed to saying that she did not sign it. Appellants' Brief at 5. This, too, misses the mark. It is Pinnacle's burden to prove that Mrs. Czerwinski manifested her assent to be bound to the Agreement. It is not Mrs. Czerwinski's burden to prove that she did not sign it.

Thus, as in *Neuson*, Pinnacle has failed to establish Mrs. Czerwinski signed the Agreement. For this reason alone, the trial court's denial of Pinnacle's Motion to Compel Arbitration should be affirmed.

2. Even if Mrs. Czerwinski Signed the Agreement, Pinnacle Has Not Proven Mrs. Czerwinski's Objective Manifestation of Intent to Be Bound By It.

As expressed by Pinnacle, under both the FAA and Washington law, for an arbitration agreement to be valid and enforceable, the parties must "objectively manifest their mutual assent" to be bound by it. Appellants' Brief at 23 - 24. Even assuming, *in arguendo*, Pinnacle has proven Mrs. Czerwinski signed the Agreement, which it hasn't, Pinnacle has failed to establish Mrs. Czerwinski's objective manifestation of intent to be bound by the Agreement.

Here, the Agreement objectively shows Mrs. Czerwinski did not agree to be

bound by it. The signature block contains a box marked “AGREED” for the applicant to check. In Mrs. Czerwinski’s purported signature block, this box is not checked. As such, the objective evidence is that Mrs. Czerwinski did not agree to be bound by the Agreement.

In the lower court, Pinnacle asserted that Mrs. Czerwinski simply “forgot” to check this box. CP at 117:6-7. First, Pinnacle offers no evidence for this baseless assumption. Second, again, the standard is not what might have been the parties’ subjective intent; it is whether there is objective manifestation of intent. *Coleman*, 173 Wn. App. at 473 (“In determining the mutual intention of contracting parties, the unexpressed, subjective intentions of the parties are irrelevant; the mutual assent of the parties must be gleaned from their outward manifestations.” (citations omitted)). Here, Mrs. Czerwinski did not objectively manifest her assent to the Agreement; she did not check the “AGREED” box.

Thus, even if Mrs. Czerwinski did complete the signature block, the objective evidence is that she did not intend to be bound by it. Accordingly, and again for this reason alone, the trial court’s ruling should be affirmed.

3. Nor Has Pinnacle Established Its Own Objective Manifestation of Intent to Be Bound by the Agreement.

The Agreement provides a signature line for Pinnacle to manifest its intent to be bound by it:

Pinnacle Property Management Services, LLC agrees to follow this Issue Resolution Agreement and the Issue Resolution Rules in connection with the Employee whose signature appears above.

CP at 83, 143. Pinnacle did not sign in the space provided. *Id.* Pinnacle's failure to sign the Agreement fails to objectively manifest its intent to be bound by the Agreement under Washington law.

To argue around this fact, Pinnacle cites to cases where the arbitration agreement does not include the signature of the offeror. The Washington cases cited by Pinnacle do not analyze this present situation: where the agreement includes a signature line which objectively evidences the offering party's agreement to be bound thereby. Rather, in those cases, it was clear to the courts from the nature of the offer that the offeror's signature was not applicable or necessary to show that party's intent to be bound by it. *See, e.g., Yakima Cty. (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 388–89, 858 P.2d 245, 255 (1993); *Marcus & Millichap Real Estate Inv. Servs. of Seattle, Inc. v. Yates, Wood & MacDonald, Inc.*, 192 Wn. App. 465, 474–75, 369 P.3d 503, 507 (2016), *review denied sub nom. Marcus & Millichap Real Estate Inv. v. Yates, Wood & MacDonald*, 185 Wn.2d 1041, 377 P.3d 764 (2016); *Employees of Intalco Aluminum Corp. v. Employment Sec. Dep't*, 128 Wn. App. 121, 130, 114 P.3d 675,

679–80 (2005).³

In contrast, here, at the time the parties purportedly entered into the Agreement, Pinnacle failed to objectively manifest its intent to be bound by it, by failing to sign the Agreement where it states Pinnacle agrees to be bound by it. Moreover, unlike the Washington cases cited by Pinnacle, the purported “Rules” state they are binding on American Management Services (“AMS”) and its Employees – not on Pinnacle and its employees. *Supra* at 4. The Rules further state that they apply to the IRP between AMS and its Employees; again, they don’t say that they apply to Pinnacle’s Agreement. *Id.*

Thus, the objective evidence is that Pinnacle did not intend to be bound by the Agreement. Pinnacle did not sign in the place provided for establishing its agreement to be bound. And, the purported Rules do not state they are applicable to arbitrations between Pinnacle and its applicants / employees; rather they state they apply to arbitrations between a different entity (American Management Services) and that company’s employees. Thus, Pinnacle did not objectively

³ A recent California case involving Pinnacle, *Prasad v. Pinnacle Mgmt. Svs. LLC*, Case No. 5:17-cv-02794-HRL, 2018 WL 401231, 2018 U.S. Dist. LEXIS 6232 (N.D. Cal. Jan 12, 2018), did not address this issue, as it does not appear the plaintiff was challenging whether Pinnacle assented to the Agreement; rather *Prasad* focused on whether Pinnacle had proffered sufficient evidence that the plaintiff had electronically signed the Agreement under California’s version of the Uniform Electronics Transactions Act. *Id.* at 2018 U.S. Dist. LEXIS 6232, at *6-14.

manifest its intent to be bound by the Agreement.

4. Pinnacle’s Judicial Estoppel Argument Misses The Mark.

Pinnacle asserts that, even if it did not objectively manifest its intent to be bound by the Agreement, this constitutes “no harm no foul” – since it would be judicially estopped from backing out of any arbitration in this case now, having moved to enforce the Agreement against Mrs. Czerwinski. Appellant’s Brief at 27-28. This argument is reminiscent of Br’er Rabbit’s plea to “don’t throw me into the briar patch.” It is also legally unavailing.

Under Washington law, “[i]t is essential to the formation of a contract that the parties manifest to each other their mutual assent to the same bargain at the same time.” *Pac. Cascade Corp.*, 25 Wash.App. at 555–56 (underline added). Trying to wiggle off this hook by citing conduct occurring this late in the game fails to establish that a contract was formed in the first place.

E. Pinnacle’s Arbitration Agreement is Procedurally, and Substantively, Unconscionable.

Washington recognizes two types of unconscionability for invalidating agreements: procedural and substantive. *McKee v. AT & T Corp.*, 164 Wn.2d 372 (2008). Procedural unconscionability applies to impropriety during the formation of the contract; substantive unconscionability applies to terms in the contract that are overly harsh or are “one-sided.” *Hill v. Garda*, 179 Wn.2d 47, 55 308 P.3d 635

(2013). The presence of either substantive or procedural unconscionability is sufficient to void the agreement. *Hill*, 179 Wn.2d at 55. Whether the agreement is unconscionable is a question of law for the courts. *Id.* at 54.

While only one type of unconscionability is sufficient to void the agreement, here both types are present.

1. Pinnacle’s Arbitration Agreement is Procedurally Unconscionable.

Procedural unconscionability is the lack of meaningful choice, considering all the circumstances surrounding the transaction including the manner in which the contract was entered, whether each party had a reasonable opportunity to understand the contract’s terms, and whether the important terms were hidden, such as in fine print, or were “set forth in such a way that an average person could not understand them.” *Zuver v. Airtouch Commc’ns, Inc.*, 153 Wn.2d 293, 304, 307, 103 P.3d 753 (2004); *see also Torgerson v. One Lincoln Tower*, 166 Wn.2d 510, 518–19, 210 P.3d 318 (2009).

These factors should not be applied mechanically without regard to whether in truth a meaningful choice existed. *Torgerson*, 166 Wn.2d at 518–19; *Zuver*, 153 Wn.2d at 303. Procedural unconscionability applies here.

- a. **If Mrs. Czerwinski is deemed to have agreed to the Arbitration Agreement, then such application of the Agreement constitutes procedural unconscionability.**

The Agreement shows Mrs. Czerwinski did not check the “AGREED” box in the signature block – objectively manifesting her intent to not be bound by it. If, however, Mrs. Czerwinski is deemed to have so agreed notwithstanding the clear evidence to the contrary, then the Agreement is procedurally unconscionable, given its unclear terms.

On its first page, the Agreement states, “**If you wish to be considered for employment you must read and sign the following [Agreement.]**” *Supra* at 3-4. This does NOT say that the applicant must actually agree to be bound by the Agreement to be considered for employment. Nor does it say that, by signing the Agreement (without also checking the “AGREED” box), the applicant is agreeing to be bound by it.

Similarly, further down that same paragraph, the Agreement states, “**By signing this [Agreement], you acknowledge receipt of this ISSUE RESOLUTION RULES.**” *Supra* at 4. Again, this is not stating that signing constitutes agreement to be bound by the Agreement. It is only saying that signing constitutes acknowledgement of receipt of the Rules.

An average person could easily interpret the above provisions, coupled by

the signature block's inclusion of "AGREED," to mean that s/he is free to sign the agreement for purposes of being considered an applicant and /or to acknowledge receipt of the Rules, but that s/he is not agreeing to be bound by the Agreement unless s/he checks the "AGREED" box. *Jones Assoc., Inc. v. Eastside Properties*, 41 Wn. App. 462, 468, 704 P.2d 781, 685 (1985) (ambiguous contract language is strictly construed against the drafter). Why else would that box be provided?

Apparently recognizing this fatal flaw to its position, Pinnacle asserts that the "AGREED" box is "redundant." Appellant's Brief at 4. Even if one were to believe this *post hoc* rationalization as to why the box should now be ignored, it still fails. Again, "the unexpressed, subjective intentions of the parties are irrelevant." *Coleman*, 173 Wn. App. at 473. Here, nowhere in the Agreement does it state that the "AGREED" box is redundant, or that an applicant will be deemed to have agreed to the Agreement even if s/he does not check that box.

Not only does Pinnacle offer a flawed rationalization for why its "AGREED" box should be ignored but, if the Agreement operates in this fashion, then no applicant can be said to have a meaningful choice as to whether or not to agree to the Agreement (since the applicant will be bound if they choose not to be by not checking the "AGREED" box). If anything, Pinnacle's position – that it can provide applicants with the apparent illusion of a meaningful choice as to whether

to be bound by the Agreement (by giving them a box to check), and then bind them to the Agreement even if they do not check that box - is akin to deceit or misrepresentation.⁴

Pinnacle also asserts that it “does not further require job applicants to check that box if they have already signed the Agreement;” and “[e]ntering an electronic signature is sufficient for Pinnacle to proceed with the application process.” Appellant’s Brief at 4. This proves Mrs. Czerwinski’s point: signing the Agreement is sufficient for the applicant to proceed with the application process – which is precisely what occurred here. That does not mean, however, that signing the Agreement, without also checking the “AGREED” box, is legally sufficient to bind the applicant to the Agreement. Again, otherwise, the only point to Pinnacle

⁴ Indeed, Washington courts recognize “If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.” *City of Yakima*, 122 Wn.2d at 390 (quoting Restatement (Second) of Contracts § 164(1) (1981)). A misrepresentation is “an assertion that is not in accord with the facts.” *Id.* (quoting Restatement (Second) of Contracts § 159 (1981)). Here, Pinnacle provided the “AGREED” box thereby allowing Ms. Czerwinski the option to choose to accept the Agreement or not. Simply put, Pinnacle’s assertion that the check-box does not mean anything is not in accord with the fact of its existence, and applicants, including Ms. Czerwinski, who chose not to click the “AGREED” box, would be justified by relying on the fact that the “AGREED” box means what it says and that they were not agreeing to the terms of the Agreement when they did not check the box. *See Douglas Nw., Inc. v. Bill O'Brien & Sons Const., Inc.*, 64 Wn.App. 661, 679, 828 P.2d 565, 577 (1992) (“A party to whom a positive, distinct and definite representation has been made is entitled to rely on that representation and need not make further inquiry concerning the particular facts involved.”)

providing that box is to deceive the applicant.

Accordingly, if Mrs. Czerwinski is deemed to have agreed to be bound by the Agreement despite having not checked the “AGREED” box, the Agreement is procedurally unconscionable and cannot be enforced as a matter of law.

b. Mrs. Czerwinski did not have a reasonable opportunity to understand the Agreement’s unclear terms.

In addition to the above, the Agreement has other terms an average person could not reasonably be expected to understand. The document presented by Pinnacle is fifteen pages long. The first four pages are the Issue Resolution Agreement. That Agreement references Issue Resolution Rules, which purportedly dictate the arbitration proceedings. *Supra* at 3-4. The Agreement states that the applicant must review the Rules, and that signing the Agreement constitutes receipt of the Rules.

The purported Rules, however, do not say that they apply to arbitrations conducted per the Agreement; or even that they are binding on Pinnacle and the applicant / employee. Rather, they state that they apply to arbitrations conducted per an “Issue Resolution Program” that is binding between American Management Services and its Employees. *Supra* at 4.

On the fifteenth page, the document states “I recognize that if I sign the Agreement and do not withdraw within three (3) days of signing, I will be required

to arbitrate any and all employment-related claims I may have against Pinnacle Property Management Services, LLC, whether or not I become employed by Pinnacle Property Management Services, LLC.” *Supra* at 5. This does not specify whether the “Agreement” is referring to the immediately preceding ten pages concerning the Issue Resolution Program with American Management Services, or the “Issue Resolution Agreement” found on the first four pages of the document.

Thus, the terms concerning the impact of signing the Agreement, versus checking the “AGREED” box, are confusing. So too is whether the purported “Rules” apply to the Issue Resolution Agreement, or whether they apply instead to an Issue Resolution Program between American Management Services and its Employees. Compounding this confusion is that the Agreement is purportedly completed on-line, and does not provide applicants with contact information for a Pinnacle representative to whom they may direct questions about the Agreement. *Supra* at 5. Accordingly, Mrs. Czerwinski did not have a meaningful opportunity to understand these confusing terms, assuming she even received them.

Thus, the Agreement is procedurally unconscionable, and the trial court’s ruling should therefore be affirmed.⁵

⁵ For the same reasons that the Agreement is procedurally unconscionable, Mrs. Czerwinski could not have knowingly, voluntarily, and intelligently waived her constitutional right to a jury trial. *See Adler*, 153 Wn.2d at 350 n.9.

2. The Rules Pinnacle seeks to impose in arbitration are substantively unconscionable.

A contract term is substantively unconscionable when it is “one-sided or overly harsh.” *Adler*, 153 Wn.2d at 344 (citations omitted). Here, the Rules that Pinnacle contends apply to the Agreement (even though they state they apply to arbitrations between American Management Services and its Employees) are replete with unconscionable terms.

a. The Agreement unconscionably limits the time to bring an action.

Contract provisions that give employees a shorter limitations period to file a claim than that to which they would otherwise be entitled are substantively unconscionable, as they give the employer “unfair advantages.” *Adler*, 153 Wn.2d at 356-57 (“agree[ing] with the Ninth Circuit” that “even one-year limitations provisions are substantively unconscionable”). Mrs. Czerwinski’s claims fall under the Washington Law Against Discrimination (“WLAD”), the Washington Minimum Wage Act (“MWA”), the Washington Industrial Welfare Act (“IWA”), and the Washington common law concerning wrongful termination. CP at 7-13. The statute of limitations under each of these laws is three years. *See* RCW 4.16.080(2). In contrast, the Rules provide employees with only a one-year

limitations period. Appellants' Brief at 33. Per *Adler*, this provision is unconscionable.

b. The Agreement unconscionably requires confidentiality.

In *Zuver*, the Washington Supreme Court deemed unconscionable an employment arbitration agreement's confidentiality provision, explaining:

The effect of the provision here benefits only Airtouch. As written, the provision hampers an employee's ability to prove a pattern of discrimination or to take advantage of findings in past arbitrations. Moreover, keeping past findings secret undermines an employee's confidence in the fairness and honesty of the arbitration process and thus, potentially discourages that employee from pursuing a valid discrimination claim. Therefore, we hold that this confidentiality provision is substantively unconscionable.

153 Wn.2d at 315. A few years later, in *McKee*, the Court again deemed a confidentiality provision unconscionable - this time in the context of a consumer claim - explaining:

A confidentiality clause in a contract of adhesion is a one-sided provision designed to disadvantage claimants and may even help conceal consumer fraud. Confidentiality unreasonably favors repeat players such as AT & T. Secrecy conceals any patterns of illegal or abusive practices. It hampers plaintiffs in learning about potentially meritorious claims and serves no purpose other than to tilt the scales in favor of AT & T. It ensures that AT & T will 'accumulate[] a wealth of knowledge' about arbitrators, legal issues, and tactics. Meanwhile, consumers are prevented from sharing discovery, fact patterns, or even work product, such as briefing, forcing them to reinvent the wheel in each and every claim, no matter how similar.

McKee, 164 Wn.2d at 398.⁶

Here, as in *Zuver*, the Rules require “all aspects” of the arbitration be confidential. CP at 79, 139. While the Rule carves out certain narrow exceptions (Appellants’ Brief at 34), they do not cure the provision’s unconscionable effects so well set forth in *Zuver* and *McKee*.

Thus, as in *Zuver* and *McKee*, the Rules’ confidentiality provision unreasonably favors Pinnacle, and therefore is unconscionable.

c. The Agreement unconscionably limits the right to discovery.

Civil litigants have a right to engage in broad discovery, based on the principle that litigants have a “right to every man’s evidence.” *United States v. Bryan*, 339 U.S. 323, 331 (1950). Per the Superior Court Civil Rules of Procedure (“CRP”), parties are entitled to serve unlimited interrogatories, requests for production of documents, requests for admissions, and take unlimited depositions. *See generally*, CRP Rules 30-36. Pierce County Superior Court Civil Rules (“PCLR”) place some limits on discovery. In Standard Track Cases, for example, the parties are limited to thirty-five interrogatories. *See* PCLR 3(h)(2). The parties in such cases are not limited in depositions, requests for admissions, or requests for

⁶ In *McKee*, the Court further pointed out that “Washington has a strong policy that justice should be administered openly and publicly”, and that “consumer adhesion contracts that require secrecy violate this important public policy.” *Id.* at 398-99.

production. *Id.*

Here, the Rules considerably limits Mrs. Czerwinski's right to discovery. It limits Mrs. Czerwinski to (a) twenty interrogatories, (b) three depositions, (c) only those documents upon which Pinnacle relied in support of its answers to interrogatories, and (d) no requests for admissions. Appellants' Brief at 10-11 (citing CP at 76-77). The arbitrator has the discretion to allow for additional discovery only upon a showing of substantial need, and that the additional discovery is not overly burdensome and will not unduly delay the arbitration. *Id.*

Limiting an employee's right to discovery presents an overwhelming advantage to the employer, and is unconscionable. For example, in *Woodward v. Emeritus Corp.*, the court ruled that an arbitration agreement's limits on discovery were unconscionable even though they applied to both parties, stating, "And it is not enough to argue, as Emeritus does, that it will be equally disadvantaged by the limitations of the Rules. It is foreseeable that most of the relevant evidence is in the possession of Emeritus . . . , not the estate. And the estate bears the burden of proof." 192 Wn.App. 584, 610, 368 P.3d 487 (2016).

The same is true here. Just as in *Woodward*, it is foreseeable that most of the relevant evidence is in the possession of Pinnacle, not Mrs. Czerwinski. And Mrs. Czerwinski bears the burden of proof. For this reason, the provisions limiting

discovery unduly favor Pinnacle and, as such, are unconscionable.⁷

In arguing otherwise, Pinnacle attempts to distinguish *Woodward*, based on the comparative scope of the discovery limitations. Appellants' Brief at 35-36. But, per the above analysis, the *Woodward* ruling was not because of the scope of the discovery limitations but, rather, because of the unfair impact they had on the party who did not draft the agreement. Likewise, it is that same unfair impact these discovery limitations have on Mrs. Czerwinski that make them unconscionable.⁸

d. The Rules' sanctions provision is unconscionable.

The Rules explicitly allow the arbitrator to issue sanctions against a party for failing to comply with the Agreement. Appellants' Brief at 14. Accordingly, if Pinnacle succeeds in compelling arbitration, it may try to obtain sanctions against Mrs. Czerwinski for pursuing her claims in court. Such sanctions may include assessment of costs or, "if justified by a Party's wanton or willful disregard of these

⁷ At the very least, including these discovery limits in this Agreement that unduly favors Pinnacle reinforces the fact that the entire Agreement is unconscionable. *See, e.g., Ferguson v. Countrywide Credit Industries*, 298 F.3d 778, 786-87 (9th Cir. 2002) ("the discovery provisions alone are not unconscionable, but in the context of an arbitration agreement which unduly favors Countrywide at every turn, . . . their inclusion reaffirms our belief that the arbitration agreement as a whole is substantively unconscionable.")

⁸ For example, regarding document requests, the party is limited to "a request for all documents upon which the responding party relies on in support of its answers to interrogatories." Appellants' Brief at 11. So, to avoid turning over documents harmful to its position, Pinnacle simply need not rely on them in answering interrogatories.

[Rules], an adverse ruling . . . against the [noncompliant Party].”⁹ *Id.*

This Rule is similar to a bilateral “loser pays” provision – except as to its scope, and its even harsher penalties. Pinnacle may argue the Rule is similar to the provision upheld in *Zuver*.¹⁰ Respectfully, this is more akin to the provision struck down in *Gandee v. LDL Freedom Enterprises*, 176 Wn.2d 598 (2013), and the reasoning applied to that provision applies here.

In *Gandee*, the Court invalidated a bilateral “loser pays” provision, concluding the provision “serves to benefit only [defendant] and, contrary to the legislature’s intent, effectively chills [plaintiff’s] ability to bring suit under the CPA.” 176 Wn.2d at 606. Similarly, the practical effect of the sanctions provision is that it only benefits Pinnacle, and it chills employees’ willingness to bring a suit in court and challenge the enforceability of the Agreement.

Arguing otherwise, Pinnacle asserts that the sanctions provision is basically akin to civil rules that apply in litigation, and applies equally to both parties. Appellants’ Brief at 36. But, the civil rules do not favor one party over another;

⁹ This may explain opposing counsel’s otherwise seemingly irrelevant declaration. CP at 46 ¶ 2.

¹⁰ In *Zuver*, a provision permitting either party to recover fees on a successful motion to stay an action and/or compel arbitration was not “so one-sided and harsh as to render it substantively unconscionable.” 153 Wn.2d at 319.

nor do they operate to sanction a party for filing a lawsuit in the first instance (except in extreme situations, such as it being deemed frivolous). By contrast, the Rules as a whole overwhelmingly favor the employer. Pinnacle, therefore, would not fail to comply with the Rules – let alone in a “wanton or willful” manner. Only an employee would likely be deemed in violation of the Agreement (e.g., by filing a claim in court as a means of challenging the enforceability of the Agreement).

Simply put, the sanctions provision was put in place to favor the employer. And, as in *Gandee*, the sanctions provision has a chilling effect on employees, as it increases their risks in pursuing their rights in court and challenging whether the Agreement is enforceable in the first instance. Accordingly, as in *Gandee*, this provision is one-sided, overly harsh, and is therefore unconscionable.

e. The disparity between the parties’ ability to withdraw from the Agreement is unconscionable.

In *Zuver*, the Court ruled that an arbitration provision disallowing the employee from obtaining punitive damages while allowing the employer to do so was unconscionable, as it was one-sided and “appears to heavily favor [the employer].” 153 Wn.2d at 318. The same is true here, concerning similarly one-sided and unfair provisions in Pinnacle’s Agreement and Rules.

Pinnacle’s Agreement provides an applicant with only three days to withdraw from it after agreeing to be bound by it. Appellants’ Brief at 6. By

contrast, the Rules allow the employer to “alter or terminate the Agreement and [its] Rules on December 31st of any year upon giving 30 calendar days written notice to Employees . . .” *Id.* at 12-13 (quoting Rule 19).

In essence, the Agreement attempts to shield Pinnacle from virtually all employment-related claims being filed in court -- allowing it to, among other things, hide all employment claims against it under the cloak of confidentiality. At the same time, the Rules attempt to allow the employer to decide, every year, whether it wants to file a lawsuit against any employee or former employee. If so, it can simply terminate its agreement with that individual, sue them in court and, in the process, create a public record of such affirmative lawsuits.

Thus, Rule 19 is one-sided, favors Pinnacle, and is therefore unconscionable.

f. Severance of the unconscionable provisions is not appropriate.

Pinnacle asserts that any unconscionable provisions can simply be severed from the Agreement. Appellants’ Brief at 33, 34. Severability is not appropriate here, as the unconscionable provisions pervade the Rules. *See, e.g., Gandee*, 176 Wn.2d at 603 (“Severance is the usual remedy for substantively unconscionable terms, but where such terms ‘pervade’ an arbitration agreement, we ‘refuse to sever those provisions and declare the entire agreement void.’” (citations omitted)).

As our Supreme Court explained in striking an arbitration agreement containing four unconscionable terms:

[p]ermitting severability. . . in the face of a contract that is permeated with unconscionability only encourages those who draft contracts of adhesion to overreach. If the worst that can happen is the offensive provisions are severed and the balance enforced, the dominant party has nothing to lose by inserting one-sided, unconscionable provisions.

McKee, 164 Wn.2d at 402; *see also Hill*, 179 Wn.2d at 58 (denying severability because three unconscionable provisions “pervade” the agreement, and striking them would “significantly alter both the tone of the arbitration clause and the nature of the arbitration. . .”) (citation omitted); *Ferguson*, 298 F.3d at 788 (same, concerning an agreement containing three objectionable provisions); *Woodward*, 192 Wn. App. at 610-611 (2016).

Pinnacle may continue its attempts to minimize the breadth of the unconscionable provisions by asserting it will simply waive them. *See, e.g.*, Appellants’ Brief at 33 (arguing the unconscionable one-year limitations provision shouldn’t really count, since Pinnacle has offered to waive it). Any such efforts are simple “too little, too late.” As our Supreme Court has explained:

Freedom attempts to escape this result [of voiding the arbitration agreement] by offering to ‘waive’ objectionable provisions, which it suggests somehow moots Gandee’s challenges. Contracts are generally interpreted as of the time of contracting, making any

subsequent offer to waive unconscionable terms irrelevant. We have, however, recognized an exception to this rule in the context of arbitration agreements. But *Zuver* did not announce a broad rule requiring courts to simply accept all offers of waiver, especially where the offer is presented in appellate briefing . . . Strong reasons exist for encouraging contracts to be conscionable at the time they are written, and allowing after-the-fact waiver to moot unconscionability challenges is the exception, not the rule. Parties should not be able to load their arbitration agreements full of unconscionable terms and then, when challenged in court, offer a blanket waiver. This would encourage rather than discourage one-sided agreements and would lead to increased litigation. Any other approach is inconsistent with the principle that contracts--especially the adhesion contracts common today--should be conscionable and fairly drafted.

Gandee, 176 Wn.2d at 607-09.

Thus, unconscionable provisions pervade the arbitration agreement. Even if Pinnacle continues to try to “waive” those unconscionable provisions away, it is stuck with them. Accordingly, severance of those provisions is not appropriate, and the entire Agreement should be declared void and unenforceable.

V. CONCLUSION

Mrs. Czerwinski respectfully requests the Court affirm the trial court’s ruling, denying Pinnacle’s Motion to Compel Arbitration. Pinnacle has not met its burden of proving Mrs. Czerwinski signed the Agreement, it has not met its burden of proving the parties’ objective manifestation of intent to be bound by the Agreement, and the Rules are procedurally and substantively unconscionable.

RESPECTFULLY SUBMITTED this 18th day of June, 2018.

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CERTIFICATE OF SERVICE

I, Jeff Mead, certify that a copy of the foregoing **BRIEF OF RESPONDENT** was caused to be electronically served (through the consent of opposing counsel) on June 18, 2018, to the following counsel of record at the following email addresses:

Counsel for Defendant/Appellant Pinnacle, etc.

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The foregoing statement is made under the penalty of perjury under the laws of the United States of America and the State of Washington and is true and correct.

DATED this 18th day of June, 2018.

By: 
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APPENDIX

770 F.Supp.2d 1168
United States District Court,
W.D. Washington.

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, Plaintiff,
v.
FRY'S ELECTRONICS, INC., Defendant.

No. C10-1562RSL.
|
March 17, 2011.

Synopsis

Background: Equal Employment Opportunity Commission (EEOC) filed lawsuit to correct employer's allegedly discriminatory and retaliatory employment practices and to recover appropriate relief for the two individuals adversely affected thereby. Parties agreed that one of those individuals should be permitted to intervene as of right, and the other individual moved to intervene.

Holdings: The District Court, Robert S. Lasnik, J., held that:

[1] individual did not have unconditional right to intervene in matter because she did not file administrative charge of discrimination with EEOC, and

[2] "single filing rule" did not excuse her failure to file administrative charge because her hostile work environment claim was not nearly identical to retaliation claim filed by the other individual.

Motion denied.

Attorneys and Law Firms

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Patricia A. Eakes, Rachel L. Hong, Yarmuth Wilsdon Calfo PLLC, Seattle, WA, for Defendant.

ORDER DENYING AMERICA RIOS' MOTION TO INTERVENE

ROBERT S. LASNIK, District Judge.

I. INTRODUCTION

This matter comes before the Court on "Intervenor Plaintiff America Rios' Motion *1170 to Intervene." Dkt. # 29. Plaintiff, the Equal Employment Opportunity Commission ("EEOC"), filed this lawsuit under Title VII of the Civil Rights Act of 1964 and Title I of the Civil Rights Act of 1991 to correct defendant Fry's Electronics' allegedly discriminatory and retaliatory employment practices and to recover appropriate relief for the two individuals who were adversely affected by those practices, namely Ka Lam and America Rios. The parties agreed that Mr. Lam should be permitted to intervene as of right in the above-captioned matter, and he was permitted to intervene by the Court's February 14, 2011 order, 2011 WL 666328. Dkt. # 44. Ms. Rios now moves to intervene.

Having considered the memoranda, declarations, and exhibits submitted by the parties, the Court finds as follows:

II. ANALYSIS

Title VII of the Civil Rights Act of 1964 authorizes the EEOC, upon the filing of a charge of discrimination, to notify the employer, investigate the charge, and attempt to conciliate. 42 U.S.C. § 2000e-5(b). If conciliation fails, the EEOC is authorized to bring a civil action against the employer on behalf of the complainant. 42 U.S.C. § 2000e-5(f). The EEOC is also authorized to bring suit on behalf of individuals who did not file a charge if it discovers other violations in the course of a "reasonable investigation" into a valid charge. *EEOC v. Occidental Life Ins. Co. of California*, 535 F.2d 533, 541-42 (9th Cir.1976).

Aggrieved individuals who wish to file suit or to intervene in a suit brought by the EEOC on their behalf are ordinarily required to exhaust their administrative remedies. *See Sosa v. Hiraoka*, 920 F.2d 1451, 1456 (9th Cir.1990). Plaintiffs exhaust their administrative remedies by, inter alia, filing a charge of discrimination with the EEOC within the limitation period contained in Section 2000e-5(e). "Incidents of discrimination not included in an EEOC charge may not be considered by a federal

court unless the new claims are 'like or reasonably related to the allegations contained in the EEOC charge.' ” *Green v. Los Angeles Cty. Superintendent of Schools*, 883 F.2d 1472, 1475–76 (9th Cir.1989) (quoting *Brown v. Puget Sound Elec. Apprent. & Training Trust*, 732 F.2d 726, 729 (9th Cir.1984)). The purpose behind the exhaustion requirement “is to place the employer on notice of an impending suit that he can try to head off by negotiating with the complainant, utilizing the conciliation services offered by the EEOC.” *Horton v. Jackson Cty. Bd. of Cty. Comm'rs*, 343 F.3d 897, 899 (7th Cir.2003) (citation omitted); see also *Moore v. City of San Jose*, 615 F.2d 1265, 1271 (9th Cir.1980) (“In enacting Title VII, Congress has specifically endorsed voluntary compliance and settlement as the preferred means of achieving the elimination of unlawful employment discrimination.” (citation omitted)).

Individuals who file a charge of discrimination with the EEOC (like Mr. Lam) have an unconditional right to intervene in suits that the EEOC brings on their behalf. 42 U.S.C. § 2000e–5(f)(1). The right to intervene of individuals who do not file a charge with the EEOC, on the other hand, is not clear from the statutory text and is the subject of some debate. See, e.g., *Anson v. Univ. of Tex. Health Science Center at Houston*, 962 F.2d 539, 541–42 (5th Cir.1992) (discussing treatment of non-charging Title VII intervenors among various circuits). While these individuals have failed to exhaust their administrative remedies, one could argue that barring an individual from intervening in a suit brought on his or her behalf is overly formalistic and at odds with the policies behind Title VII.

*1171 Plaintiff-intervenor Rios puts forth two arguments why she should be able to intervene in this matter: a) because the statutory text affords her an unconditional right to intervene; and alternatively b) because her claims are so related to those of plaintiff Lam that they should be excepted from the exhaustion requirement under the “single filing rule.”

A. Statutory Right of Intervention

Plaintiff-intervenor Rios argues that she must be permitted to intervene under Rule 24 of the Federal Rules of Civil Procedure, which requires that “[o]n timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute.” Fed.R.Civ.P. 24(a). With respect to the timeliness requirement, the parties debate whether Ms.

Rios' motion to intervene was submitted in accordance with the deadlines established in the Court's December 7, 2010 order (Dkt. # 23). The Court's order set a January 4, 2011 deadline for joining additional parties, and Ms. Rios filed her motion to intervene on December 23, 2010. See Minute Order (Dkt. # 23) at 1; Motion to Intervene (Dkt. # 29). Because the Court finds Ms. Rios' motion to be submitted in a timely fashion, it must grant her motion if a statute of the United States grants her an unconditional right to intervene.

[1] [2] [3] Ms. Rios relies on the provision of Title VII that states that “[t]he person or persons aggrieved shall have the right to intervene in a civil action brought by the [EEOC].” 42 U.S.C. § 2000e–5(f)(1). This right to intervene granted to “persons aggrieved” must be read in concert with Title VII's exhaustion requirement. See *Lyons v. England*, 307 F.3d 1092, 1104 (9th Cir.2002) (“To establish federal subject matter jurisdiction, a plaintiff is required to exhaust his or her administrative remedies before seeking adjudication of a Title VII claim.” (citation omitted)). Furthermore, the structure of Section 2000e–5(f)(1) as a whole supports the interpretation that only complainants who have filed a charge with the EEOC have an unconditional right to intervene. Section 2000e–5(f)(1) elsewhere requires the EEOC to notify “the person aggrieved” if it dismisses their administrative charge or decides not to pursue a civil action; upon receipt of such notice, the individual may bring a civil action against the respondent named in the charge. Under this provision, the person whom the EEOC is required to notify, and who thereby gains the right to sue, is clearly the person who filed the charge rather than every person who might have constitutional standing to sue because they were injured or “aggrieved.” This specific use of the term “person aggrieved” is within the same statutory subsection that describes the right of intervention. Because courts “interpret identical phrases used in the same statute to bear the same meaning,” the Court finds that Congress intended to limit the right of intervention to those “persons aggrieved” who previously filed a charge with the EEOC. *United States v. Maciel–Alcala*, 612 F.3d 1092, 1098 (9th Cir.2010) (citing *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995)). “[I]f Congress intended for the person who filed the charge (“the person aggrieved”) to be the only person statutorily entitled to notice and consequently to file suit in the event the EEOC dismissed or declined to act on the charge, Congress must also have intended for the person who

filed the charge (“the person aggrieved”) to be the only person statutorily entitled to intervene in the event the EEOC determined to commence a civil action based on the charge.” *Spirit v. Teachers Ins. and Annuity Ass'n*, 93 F.R.D. 627, 640 (S.D.N.Y.1982), *rev'd on *1172 other grounds*, 691 F.2d 1054 (2d Cir.1982).¹

Accordingly, the Court finds that plaintiff-intervenor Rios does not have an unconditional right to intervene under 42 U.S.C. § 2000e–5(f)(1). Ms. Rios may thus be permitted to intervene only if her failure to exhaust her administrative remedies is excused by the “single filing rule.”

B. The “Single Filing Rule”

[4] The single filing rule is an exception to the exhaustion requirement “which provides that ‘in a multiple-plaintiff, non-class action suit, if one plaintiff has filed a timely EEOC complaint as to that plaintiff’s individual claim, then co-plaintiffs with individual claims arising out of similar discriminatory treatment in the same time frame need not have satisfied the filing requirement.’ ” *Foster v. Ruhrpumpen, Inc.*, 365 F.3d 1191, 1197 (10th Cir.2004) (quoting *Allen v. United States Steel Corp.*, 665 F.2d 689, 695 (5th Cir.1982)). The rule is “universally recognized.” *Foster*, 365 F.3d at 1197; *see also Anson*, 962 F.2d at 541 (federal courts “universally hold” that rule applies “under certain conditions”). “The policy behind the single filing rule is that it would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints with the EEOC.” *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1110 (10th Cir.2001) (internal quotation omitted). If “[t]he purpose of requiring exhaustion of administrative remedies in Title VII cases is to place the employer on notice of an impending suit that he can try to head off by negotiating with the complainant, utilizing the conciliation services offered by the EEOC,” that purpose “is not engaged when the same claim has been the subject of a timely charge by another employee of this employer.” *Horton*, 343 F.3d at 899.

[5] In order for a non-charging party to be exempt from the exhaustion requirement under the single filing rule, district courts typically require that the claims be “nearly identical” to the claims raised by the charging individuals. *See, e.g., E.E.O.C. v. Albertson's LLC*, 579 F.Supp.2d 1342, 1345 (D.Colo.2008) (allowing intervention where

“claims for class-wide retaliation, and the supporting allegations, are ‘nearly identical’ or verbatim to those asserted in this case by [the charging party] and the EEOC”); *Outback Steak House of Fla., Inc.*, 245 F.R.D. at 659 (allowing intervention by “individuals with ‘nearly identical’ claims to the charging parties”); *E.E.O.C. v. Von Maur, Inc.*, 237 F.R.D. 195, 200 (S.D.Iowa 2006) (addressing right of intervention under “the ‘nearly identical’ inquiry”). In an oft-cited decision, the Seventh Circuit criticized use *1173 of the doctrine outside of the class-action setting and limited the doctrine to cases “in which the unexhausted claim arises from the *same* unlawful conduct.” *Horton*, 343 F.3d at 900 (emphasis in original); *see also id.* (in two-complainant cases “the rationale of the doctrine is attenuated to the point of nonexistence”). The Third Circuit limits the doctrine strictly to class actions where all class members are by definition similarly situated. *See Commc'n Workers of Am. v. N.J. Dep't of Personnel*, 282 F.3d 213, 217–18 (3d Cir.2002).

Defendant argues that application of the single filing rule is barred by the Ninth Circuit’s decision in *Inda v. United Air Lines*, 565 F.2d 554 (9th Cir.1977). Unlike this case, however, *Inda* involved a non-charging plaintiff’s attempt to rely on another individual’s charge in a separate, independent lawsuit. *See id.* at 559. *Inda* has since been held to permit application of the single filing rule in cases where a non-charging party seeks to join a class action or intervene in a suit filed by the EEOC. *See Dukes v. Wal-Mart Stores, Inc.*, No. C 01–2252 MJJ, 2002 WL 32769185, at *6–7 (N.D.Cal. Sept. 9, 2002) (recognizing *Inda*’s limited application); *see also E.E.O.C. v. NCL Am. Inc.*, 504 F.Supp.2d 1008, 1011–12 (D.Haw.2007) (discussing in dicta *Inda*’s inapplicability where non-charging party intervenes in EEOC suit). Because Ms. Rios is attempting to intervene in a pending suit, and not to file a separate suit on her own behalf, *Inda* would not bar application of the single filing rule in this case.

[6] That *Inda* does not bar the application of the single filing rule in this case, however, does not necessarily mean that Ms. Rios may intervene. Here, the discriminatory conduct Ms. Rios alleges is not “nearly identical” or even substantially similar to that charged by Mr. Lam. While Ms. Rios’ discrimination claim is a factual predicate of Mr. Lam’s retaliation claim, the two claims involve different elements and are legally independent. *See Little v. Windermere Relocation, Inc.*, 265 F.3d 903, 913 (9th

Cir.2001) (plaintiff in retaliation action need not show that opposed employment practice was actually unlawful). Furthermore, the two claims involve different conduct: Mr. Lam alleges he was fired for opposing workplace discrimination, while Ms. Rios alleges that she was subjected to a hostile work environment. Judge Posner's analysis of a comparable pairing in *Horton* is instructive:

“While it is true that [the intervenor]'s and [the charging party]'s claims are intertwined, that is true in every retaliation case in which a worker is retaliated against for having supported another worker's claim. It would be a curious interpretation of the doctrine to rule that a timely charge need never be filed in such a case; yet that is the implication of allowing mere similarity to excuse the failure to file ... Unless the single-filing doctrine is limited to cases in which the claims arise from the same facts rather than merely from facts that resemble each other or are causally linked to each other, courts will perforce be excusing the filing of a timely charge in *every* case in which an employee alleges retaliation for supporting another employee's charge.” *Horton*, 343 F.3d at 901 (emphasis in original).

While *Horton* involved a scenario that was the inverse of this matter, in which the charging party alleged discrimination and the intervenor alleged retaliation, its reasoning is equally applicable to cases in which the intervenor alleges the primary discrimination. If Ms. Rios were allowed to intervene solely because Mr. Lam's retaliation claim is causally linked to her own claim, it

would excuse her failure to file a timely administrative charge even though defendant had neither notice of her intent to sue nor the opportunity to avail itself of *1174 the EEOC's conciliation services. Accordingly, the Court finds that Ms. Rios' claim is not “nearly identical” to Mr. Lam's retaliation claim and that her failure to exhaust her administrative remedies by filing a timely charge with the EEOC is not excused by the single filing rule.

Because the Court finds that Ms. Rios should not be permitted to intervene, it does not reach her supplemental jurisdiction argument.

III. CONCLUSION

For the reasons discussed above, the Court finds that Ms. Rios does not have an unconditional right to intervene in this matter because she did not file an administrative charge of discrimination with the EEOC. The Court also finds that the “single filing rule” does not excuse Ms. Rios' failure to file an administrative charge because her hostile work environment claim is not “nearly identical” to the retaliation claim filed by Mr. Lam.

ACCORDINGLY, Ms. Rios' motion to intervene is DENIED.

All Citations

770 F.Supp.2d 1168

Footnotes

- 1 This interpretation of the term “the person aggrieved” has been adopted by other courts that have addressed this issue. See, e.g., *E.E.O.C. v. Univ. of Phoenix, Inc.*, No. CV-06-2303-PHX-MHM, 2008 WL 1971396, at *3 (D.Ariz. May 2, 2008) (ruling that “[b]ecause none of these individuals brought religious discrimination claims with the EEOC, the Court cannot conclude that they are aggrieved persons within the meaning of the statute.”); *E.E.O.C. v. GMRI, Inc.*, 221 F.R.D. 562, 563 n. 4 (D.Kan.2004) (“Under the provisions of 42 U.S.C. § 2000e-5(f)(1), ‘an aggrieved person is defined as a person who has filed a charge with the EEOC.’ ” (quoting *E.E.O.C. v. Rappaport, Hertz, Cherson & Rosenthal, P.C.*, 273 F.Supp.2d 260, 263 (E.D.N.Y.2003))). Other courts incorporate the single filing rule into the statute's definition of an “aggrieved person.” See, e.g., *E.E.O.C. v. Outback Steak House of Fla., Inc.*, 245 F.R.D. 657, 660 (D.Colo.2007) (“[A] plaintiff who failed to file a charge of discrimination with the EEOC, but who asserts she was subject to similar discrimination by the same actors during the same time frame as the charging parties, is an ‘aggrieved person’ within the meaning of [Section 2000e-5(f)(1)].”).

138 S.Ct. 1612

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.

Nos. 16–285, 16–300, 16–307.

|

Argued Oct. 2, 2017.

|

Decided May 21, 2018.

Synopsis

Background: In first action, employee brought putative collective and class action against an employer, alleging that employer violated Fair Labor Standards Act (FLSA) and Wisconsin law by misclassifying him and his fellow employees and thereby depriving them of overtime pay. The United States District Court for the Western District of Wisconsin, Barbara B. Crabb, J., 2015 WL 5330300, denied employer's motion to dismiss and to compel individual arbitration. Employer appealed. The United States Court of Appeals for the Seventh Circuit, Wood, Chief Judge, 823 F.3d 1147, affirmed. In second action, employees brought similar putative collective and class action claims against an employer under the FLSA and California law. The United States District Court for the Northern District of California, Ronald M. Whyte, Senior District Judge, 2013 WL 3460052, granted employer's motion to compel individual arbitration and dismissed. Employees appealed. The United States Court of Appeals for the Ninth Circuit, Thomas, Chief Judge, 834 F.3d 975, reversed and remanded. In third action, employer filed petition for review of order of the National Labor Relations Board, 361 NLRB No. 72, 2014 WL 5465454, finding that employer had unlawfully required employees to sign arbitration agreement waiving their right to pursue class and collective actions. The United States Court of Appeals for the Fifth Circuit, Leslie H. Southwick, Circuit Judge, 808 F.3d 1013, granted in part and denied in part the petition. Certiorari was granted in each case.

Holdings: The Supreme Court, Justice Gorsuch, held that:

[1] Federal Arbitration Act's (FAA) saving clause did not provide a basis for refusing to enforce arbitration agreements waiving collective action procedures for claims under the FLSA and class action procedures for claims under state law;

[2] provision of National Labor Relations Act (NLRA), which guarantees to workers the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, does not reflect a clearly expressed and manifest congressional intention to displace the FAA and to outlaw class and collective action waivers, abrogating *National Labor Relations Board v. Alternative Entertainment, Inc.*, 858 F.3d 393; and

[3] Supreme Court would not accord *Chevron* deference to National Labor Relations Board's (NLRB) interpretation of federal statutes as outlawing class and collective action waivers by employees.

Affirmed in part, reversed in part, and remanded in part.

Justice Thomas filed a concurring opinion.

Justice Ginsburg filed a dissenting opinion, in which Justices Breyer, Sotomayor, and Kagan joined.

1616 Syllabus

In each of these cases, an employer and employee entered into a contract providing for individualized arbitration proceedings to resolve employment disputes between the parties. Each employee nonetheless sought to litigate Fair Labor Standards Act and related state law claims through class or collective actions in federal court. Although the Federal Arbitration Act generally requires courts to enforce arbitration agreements as written, the employees argued that its "saving clause" removes this obligation if an arbitration agreement violates some other federal law and that, by requiring individualized proceedings, the agreements here violated the National Labor Relations Act. The employers countered that the Arbitration Act

protects agreements requiring arbitration from judicial interference and that neither the saving clause nor the NLRA demands a different conclusion. Until recently, courts as well as the National Labor Relations Board's general counsel agreed that such arbitration agreements are enforceable. In 2012, however, the Board ruled that the NLRA effectively nullifies the Arbitration Act in cases like these, and since then other courts have either agreed with or deferred to the Board's position.

Held : Congress has instructed in the Arbitration Act that arbitration agreements providing for individualized proceedings must be enforced, and neither the Arbitration Act's saving clause nor the NLRA suggests otherwise. Pp. 1621 - 1632.

(a) The Arbitration Act requires courts to enforce agreements to arbitrate, including the terms of arbitration the parties select. See 9 U.S.C. §§ 2, 3, 4. These emphatic directions would seem to resolve any argument here. The Act's saving clause—which allows courts to refuse to enforce arbitration agreements “upon such grounds as exist at law or in equity for the revocation of any contract,” § 2—recognizes only “ ‘generally applicable contract defenses, such as fraud, duress, or unconscionability,’ ” *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S.Ct. 1740, 179 L.Ed.2d 742, not defenses targeting arbitration either by name or by more subtle methods, such as by “interfer[ing] with fundamental attributes of arbitration,” *id.*, at 344, 131 S.Ct. 1740. By challenging the agreements precisely because they require individualized arbitration instead of class or collective proceedings, the employees seek to interfere with one of these fundamental attributes. Pp. 1621 - 1624.

(b) The employees also mistakenly claim that, even if the Arbitration Act normally requires enforcement of arbitration agreements like theirs, the NLRA overrides that guidance and renders their agreements unlawful yet. When confronted with two Acts allegedly touching on the same topic, this Court must strive “to give effect to both.” *1617 *Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474, 41 L.Ed.2d 290. To prevail, the employees must show a “ ‘clear and manifest’ ” congressional intention to displace one Act with another. *Ibid.* There is a “stron[g] presum[ption]” that disfavors repeals by implication and that “Congress will specifically address” preexisting law before suspending the law's normal operations in a later

statute. *United States v. Fausto*, 484 U.S. 439, 452, 453, 108 S.Ct. 668, 98 L.Ed.2d 830.

The employees ask the Court to infer that class and collective actions are “concerted activities” protected by § 7 of the NLRA, which guarantees employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively ..., and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,” 29 U.S.C. § 157. But § 7 focuses on the right to organize unions and bargain collectively. It does not mention class or collective action procedures or even hint at a clear and manifest wish to displace the Arbitration Act. It is unlikely that Congress wished to confer a right to class or collective actions in § 7, since those procedures were hardly known when the NLRA was adopted in 1935. Because the catchall term “other concerted activities for the purpose of ... other mutual aid or protection” appears at the end of a detailed list of activities, it should be understood to protect the same kind of things, *i.e.*, things employees do for themselves in the course of exercising their right to free association in the workplace.

The NLRA's structure points to the same conclusion. After speaking of various “concerted activities” in § 7, the statute establishes a detailed regulatory regime applicable to each item on the list, but gives no hint about what rules should govern the adjudication of class or collective actions in court or arbitration. Nor is it at all obvious what rules should govern on such essential issues as opt-out and opt-in procedures, notice to class members, and class certification standards. Telling too is the fact that Congress has shown that it knows exactly how to specify certain dispute resolution procedures, *cf.*, *e.g.*, 29 U.S.C. §§ 216(b), 626, or to override the Arbitration Act, see, *e.g.*, 15 U.S.C. § 1226(a)(2), but Congress has done nothing like that in the NLRA.

The employees suggest that the NLRA does not discuss class and collective action procedures because it means to confer a right to use *existing* procedures provided by statute or rule, but the NLRA does not say even that much. And if employees do take existing rules as they find them, they must take them subject to those rules' inherent limitations, including the principle that parties may depart from them in favor of individualized arbitration.

In another contextual clue, the employees' underlying causes of action arise not under the NLRA but under the Fair Labor Standards Act, which permits the sort of collective action the employees wish to pursue here. Yet they do not suggest that the FLSA displaces the Arbitration Act, presumably because the Court has held that an identical collective action scheme does not prohibit individualized arbitration proceedings, see *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32, 111 S.Ct. 1647, 114 L.Ed.2d 26. The employees' theory also runs afoul of the rule that Congress “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions,” *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1, as it would allow a catchall term in the NLRA to dictate the particulars of dispute resolution procedures in Article III courts or arbitration proceedings—matters that are usually left to, e.g., the Federal Rules of Civil Procedure, the *1618 Arbitration Act, and the FLSA. Nor does the employees' invocation of the Norris–LaGuardia Act, a predecessor of the NLRA, help their argument. That statute declares unenforceable contracts in conflict with its policy of protecting workers' “concerted activities for the purpose of collective bargaining or other mutual aid or protection,” 29 U.S.C. § 102, and just as under the NLRA, that policy does not conflict with Congress's directions favoring arbitration.

Precedent confirms the Court's reading. The Court has rejected many efforts to manufacture conflicts between the Arbitration Act and other federal statutes, see, e.g. *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 133 S.Ct. 2304, 186 L.Ed.2d 417; and its § 7 cases have generally involved efforts related to organizing and collective bargaining in the workplace, not the treatment of class or collective action procedures in court or arbitration, see, e.g., *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 82 S.Ct. 1099, 8 L.Ed.2d 298.

Finally, the employees cannot expect deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694, because *Chevron*'s essential premises are missing. The Board sought not to interpret just the NLRA, “which it administers,” *id.*, at 842, 104 S.Ct. 2778, but to interpret that statute in a way that limits the work of the Arbitration Act, which the agency does not administer. The Board and the Solicitor General also dispute the NLRA's meaning, articulating no single position on which the Executive

Branch might be held “accountable to the people.” *Id.*, at 865, 104 S.Ct. 2778. And after “employing traditional tools of statutory construction,” *id.*, at 843, n. 9, 104 S.Ct. 2778, including the canon against reading conflicts into statutes, there is no unresolved ambiguity for the Board to address. Pp. 1623 - 1630.

No. 16–285, 823 F.3d 1147, and No. 16–300, 834 F.3d 975, reversed and remanded; No. 16–307, 808 F.3d 1013, affirmed.

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

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Opinion

Justice GORSUCH delivered the opinion of the Court.

Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?

As a matter of policy these questions are surely debatable. But as a matter of law the answer is clear. In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings. Nor can we agree with the employees' suggestion that the National Labor Relations Act (NLRA) offers a conflicting command. It is this Court's duty to interpret Congress's statutes as a harmonious whole rather than at war with one another. And abiding that duty here leads to an unmistakable conclusion. The NLRA secures to employees rights to organize unions and bargain collectively, but it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum. This Court has never read a right to class actions into the NLRA—and for

three quarters of a century neither did the National Labor Relations Board. Far from conflicting, the Arbitration Act and the NLRA have long enjoyed separate spheres of influence and neither permits this Court to declare the parties' agreements unlawful.

I

The three cases before us differ in detail but not in substance. Take *Ernst & Young LLP v. Morris*. There Ernst & Young and one of its junior accountants, Stephen Morris, entered into an agreement providing that they would arbitrate any disputes that might arise between them. The agreement stated that the employee could choose the arbitration provider and that the arbitrator could “grant any relief that could be granted by ... a court” in the relevant jurisdiction. *1620 App. in No. 16–300, p. 43. The agreement also specified individualized arbitration, with claims “pertaining to different [e]mployees [to] be heard in separate proceedings.” *Id.*, at 44.

After his employment ended, and despite having agreed to arbitrate claims against the firm, Mr. Morris sued Ernst & Young in federal court. He alleged that the firm had misclassified its junior accountants as professional employees and violated the federal Fair Labor Standards Act (FLSA) and California law by paying them salaries without overtime pay. Although the arbitration agreement provided for individualized proceedings, Mr. Morris sought to litigate the federal claim on behalf of a nationwide class under the FLSA's collective action provision, 29 U.S.C. § 216(b). He sought to pursue the state law claim as a class action under Federal Rule of Civil Procedure 23.

Ernst & Young replied with a motion to compel arbitration. The district court granted the request, but the Ninth Circuit reversed this judgment. 834 F.3d 975 (2016). The Ninth Circuit recognized that the Arbitration Act generally requires courts to enforce arbitration agreements as written. But the court reasoned that the statute's “saving clause,” see 9 U.S.C. § 2, removes this obligation if an arbitration agreement violates some other federal law. And the court concluded that an agreement requiring individualized arbitration proceedings violates the NLRA by barring employees from engaging in the

“concerted activit[y],” 29 U.S.C. § 157, of pursuing claims as a class or collective action.

Judge Ikuta dissented. In her view, the Arbitration Act protected the arbitration agreement from judicial interference and nothing in the Act's saving clause suggested otherwise. Neither, she concluded, did the NLRA demand a different result. Rather, that statute focuses on protecting unionization and collective bargaining in the workplace, not on guaranteeing class or collective action procedures in disputes before judges or arbitrators.

Although the Arbitration Act and the NLRA have long coexisted—they date from 1925 and 1935, respectively—the suggestion they might conflict is something quite new. Until a couple of years ago, courts more or less agreed that arbitration agreements like those before us must be enforced according to their terms. See, e.g., *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (C.A.8 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (C.A.2 2013); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (C.A.5 2013); *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal.4th 348, 173 Cal.Rptr.3d 289, 327 P.3d 129 (2014); *Tallman v. Eighth Jud. Dist. Court*, 131 Nev.Adv.Op. 71, 359 P.3d 113 (2015); 808 F.3d 1013 (C.A.5 2015) (case below in No. 16–307).

The National Labor Relations Board's general counsel expressed much the same view in 2010. Remarking that employees and employers “can benefit from the relative simplicity and informality of resolving claims before arbitrators,” the general counsel opined that the validity of such agreements “does not involve consideration of the policies of the National Labor Relations Act.” Memorandum GC 10–06, pp. 2, 5 (June 16, 2010).

But recently things have shifted. In 2012, the Board—for the first time in the 77 years since the NLRA's adoption—asserted that the NLRA effectively nullifies the Arbitration Act in cases like ours. *D.R. Horton, Inc.*, 357 N.L.R.B. 2277. Initially, this agency decision received a cool reception in court. See *D.R. Horton*, 737 F.3d, at 355–362. In the last two years, though, some circuits have either agreed with the Board's conclusion or *1621 thought themselves obliged to defer to it under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). See 823 F.3d 1147 (C.A.7 2016) (case below in No. 16–285); 834

F.3d 975 (case below in No. 16–300); *NLRB v. Alternative Entertainment, Inc.*, 858 F.3d 393 (C.A.6 2017). More recently still, the disagreement has grown as the Executive has disavowed the Board's (most recent) position, and the Solicitor General and the Board have offered us battling briefs about the law's meaning. We granted certiorari to clear the confusion. 580 U.S. —, 137 S.Ct. 809, 196 L.Ed.2d 595 (2017).

II

We begin with the Arbitration Act and the question of its saving clause.

[1] Congress adopted the Arbitration Act in 1925 in response to a perception that courts were unduly hostile to arbitration. No doubt there was much to that perception. Before 1925, English and American common law courts routinely refused to enforce agreements to arbitrate disputes. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510, n. 4, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974). But in Congress's judgment arbitration had more to offer than courts recognized—not least the promise of quicker, more informal, and often cheaper resolutions for everyone involved. *Id.*, at 511, 94 S.Ct. 2449. So Congress directed courts to abandon their hostility and instead treat arbitration agreements as “valid, irrevocable, and enforceable.” 9 U.S.C. § 2. The Act, this Court has said, establishes “a liberal federal policy favoring arbitration agreements.” *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967)); see *id.*, at 404, 87 S.Ct. 1801 (discussing “the plain meaning of the statute” and “the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts”).

[2] Not only did Congress require courts to respect and enforce agreements to arbitrate; it also specifically directed them to respect and enforce the parties' chosen arbitration procedures. See § 3 (providing for a stay of litigation pending arbitration “in accordance with the terms of the agreement”); § 4 (providing for “an order directing that ... arbitration proceed in the manner provided for in such agreement”). Indeed, we have often observed that the Arbitration Act requires

courts “rigorously” to “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*, 570 U.S. 228, 233, 133 S.Ct. 2304, 186 L.Ed.2d 417 (2013) (some emphasis added; citations, internal quotation marks, and brackets omitted).

On first blush, these emphatic directions would seem to resolve any argument under the Arbitration Act. The parties before us contracted for arbitration. They proceeded to specify the rules that would govern their arbitrations, indicating their intention to use individualized rather than class or collective action procedures. And this much the Arbitration Act seems to protect pretty absolutely. See *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011); *Italian Colors*, *supra*; *DIRECTV, Inc. v. Imburgia*, 577 U.S. —, 136 S.Ct. 463, 193 L.Ed.2d 365 (2015). You might wonder if the balance Congress struck in 1925 between arbitration *1622 and litigation should be revisited in light of more contemporary developments. You might even ask if the Act was good policy when enacted. But all the same you might find it difficult to see how to avoid the statute's application.

Still, the employees suggest the Arbitration Act's saving clause creates an exception for cases like theirs. By its terms, the saving clause allows courts to refuse to enforce arbitration agreements “upon such grounds as exist at law or in equity for the revocation of any contract.” § 2. That provision applies here, the employees tell us, because the NLRA renders their particular class and collective action waivers illegal. In their view, illegality under the NLRA is a “ground” that “exists at law ... for the revocation” of their arbitration agreements, at least to the extent those agreements prohibit class or collective action proceedings.

The problem with this line of argument is fundamental. Put to the side the question whether the saving clause was designed to save not only state law defenses but also defenses allegedly arising from federal statutes. See 834 F.3d, at 991–992, 997 (Ikuta, J., dissenting). Put to the side the question of what it takes to qualify as a ground for “revocation” of a contract. See *Concepcion*, *supra*, at 352–355, 131 S.Ct. 1740 (THOMAS, J., concurring); *post*, at 1632 - 1633 (THOMAS, J., concurring). Put to the side for the moment, too, even the question whether the

NLRA actually renders class and collective action waivers illegal. Assuming (but not granting) the employees could satisfactorily answer all those questions, the saving clause still can't save their cause.

[3] [4] [5] It can't because the saving clause recognizes only defenses that apply to “any” contract. In this way the clause establishes a sort of “equal-treatment” rule for arbitration contracts. *Kindred Nursing Centers L.P. v. Clark*, 581 U.S. —, —, 137 S.Ct. 1421, 1426, 197 L.Ed.2d 806 (2017). The clause “permits agreements to arbitrate to be invalidated by ‘generally applicable contract defenses, such as fraud, duress, or unconscionability.’ ” *Concepcion*, 563 U.S., at 339, 131 S.Ct. 1740. At the same time, the clause offers no refuge for “defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” *Ibid*. Under our precedent, this means the saving clause does not save defenses that target arbitration either by name or by more subtle methods, such as by “interfer[ing] with fundamental attributes of arbitration.” *Id.*, at 344, 131 S.Ct. 1740; see *Kindred Nursing*, *supra*, at 1621, 137 S.Ct., at 1426.

This is where the employees' argument stumbles. They don't suggest that their arbitration agreements were extracted, say, by an act of fraud or duress or in some other unconscionable way that would render *any* contract unenforceable. Instead, they object to their agreements precisely because they require individualized arbitration proceedings instead of class or collective ones. And by attacking (only) the individualized nature of the arbitration proceedings, the employees' argument seeks to interfere with one of arbitration's fundamental attributes.

We know this much because of *Concepcion*. There this Court faced a state law defense that prohibited as unconscionable class action waivers in consumer contracts. The Court readily acknowledged that the defense formally applied in both the litigation and the arbitration context. 563 U.S., at 338, 341, 131 S.Ct. 1740. But, the Court held, the defense failed to qualify for protection under the saving clause because it interfered with a fundamental attribute of arbitration all the same. It *1623 did so by effectively permitting any party in arbitration to demand classwide proceedings despite the traditionally individualized and informal nature of arbitration. This “fundamental” change to the traditional arbitration process, the Court said, would “sacrific[e] the

principal advantage of arbitration—its informality—and mak[e] the process slower, more costly, and more likely to generate procedural morass than final judgment.” *Id.*, at 347, 348, 131 S.Ct. 1740. Not least, *Concepcion* noted, arbitrators would have to decide whether the named class representatives are sufficiently representative and typical of the class; what kind of notice, opportunity to be heard, and right to opt out absent class members should enjoy; and how discovery should be altered in light of the classwide nature of the proceedings. *Ibid.* All of which would take much time and effort, and introduce new risks and costs for both sides. *Ibid.* In the Court’s judgment, the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness, would be shorn away and arbitration would wind up looking like the litigation it was meant to displace.

[6] [7] Of course, *Concepcion* has its limits. The Court recognized that parties remain free to alter arbitration procedures to suit their tastes, and in recent years some parties have sometimes chosen to arbitrate on a classwide basis. *Id.*, at 351, 131 S.Ct. 1740. But *Concepcion*’s essential insight remains: courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties’ consent. *Id.*, at 344–351, 131 S.Ct. 1740; see also *Stolt–Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 684–687, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010). Just as judicial antagonism toward arbitration before the Arbitration Act’s enactment “manifested itself in a great variety of devices and formulas declaring arbitration against public policy,” *Concepcion* teaches that we must be alert to new devices and formulas that would achieve much the same result today. 563 U.S., at 342, 131 S.Ct. 1740 (internal quotation marks omitted). And a rule seeking to declare individualized arbitration proceedings off limits is, the Court held, just such a device.

[8] [9] The employees’ efforts to distinguish *Concepcion* fall short. They note that their putative NLRA defense would render an agreement “illegal” as a matter of federal statutory law rather than “unconscionable” as a matter of state common law. But we don’t see how that distinction makes any difference in light of *Concepcion*’s rationale and rule. Illegality, like unconscionability, may be a traditional, generally applicable contract defense in many cases, including arbitration cases. But an argument that a contract is unenforceable *just because it requires bilateral arbitration* is a different creature. A defense of

that kind, *Concepcion* tells us, is one that impermissibly disfavors arbitration whether it sounds in illegality or unconscionability. The law of precedent teaches that like cases should generally be treated alike, and appropriate respect for that principle means the Arbitration Act’s saving clause can no more save the defense at issue in these cases than it did the defense at issue in *Concepcion*. At the end of our encounter with the Arbitration Act, then, it appears just as it did at the beginning: a congressional command requiring us to enforce, not override, the terms of the arbitration agreements before us.

III

But that’s not the end of it. Even if the Arbitration Act normally requires us to *1624 enforce arbitration agreements like theirs, the employees reply that the NLRA overrides that guidance in these cases and commands us to hold their agreements unlawful yet.

[10] [11] [12] This argument faces a stout uphill climb. When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at “liberty to pick and choose among congressional enactments” and must instead strive “ ‘to give effect to both.’ ” *Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing “ ‘a clearly expressed congressional intention’ ” that such a result should follow. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533, 115 S.Ct. 2322, 132 L.Ed.2d 462 (1995). The intention must be “ ‘clear and manifest.’ ” *Morton, supra*, at 551, 94 S.Ct. 2474. And in approaching a claimed conflict, we come armed with the “stron[g] presum[ption]” that repeals by implication are “disfavored” and that “Congress will specifically address” preexisting law when it wishes to suspend its normal operations in a later statute. *United States v. Fausto*, 484 U.S. 439, 452, 453, 108 S.Ct. 668, 98 L.Ed.2d 830 (1988).

[13] [14] [15] These rules exist for good reasons. Respect for Congress as drafter counsels against too easily finding irreconcilable conflicts in its work. More than that, respect for the separation of powers counsels restraint. Allowing judges to pick and choose between statutes risks transforming them from expounders of what the law *is* into policymakers choosing what the law *should be*.

Our rules aiming for harmony over conflict in statutory interpretation grow from an appreciation that it's the job of Congress by legislation, not this Court by supposition, both to write the laws and to repeal them.

[16] Seeking to demonstrate an irreconcilable statutory conflict even in light of these demanding standards, the employees point to Section 7 of the NLRA. That provision guarantees workers

“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.

From this language, the employees ask us to infer a clear and manifest congressional command to displace the Arbitration Act and outlaw agreements like theirs.

But that much inference is more than this Court may make. Section 7 focuses on the right to organize unions and bargain collectively. It may permit unions to bargain to prohibit arbitration. Cf. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 256–260, 129 S.Ct. 1456, 173 L.Ed.2d 398 (2009). But it does not express approval or disapproval of arbitration. It does not mention class or collective action procedures. It does not even hint at a wish to displace the Arbitration Act—let alone accomplish that much clearly and manifestly, as our precedents demand.

Neither should any of this come as a surprise. The notion that Section 7 confers a right to class or collective actions seems pretty unlikely when you recall that procedures like that were hardly known when the NLRA was adopted in 1935. Federal Rule of Civil Procedure 23 didn't create the modern class action until 1966; class arbitration didn't emerge until later still; and even the Fair Labor Standards Act's collective action provision postdated Section 7 by years. See Rule 23—Class *1625 Actions, 28 U.S.C. App., p. 1258 (1964 ed., Supp. II); 52 Stat. 1069; *Concepcion*, 563 U.S., at 349, 131 S.Ct. 1740; see also *Califano v. Yamasaki*, 442 U.S. 682, 700–701, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979) (noting that the “usual rule” then was litigation “conducted by and on behalf of individual named parties only”). And while some forms of group litigation existed even in 1935, see 823 F.3d, at 1154, Section 7's failure to mention them only reinforces that the statute doesn't speak to such procedures.

[17] A close look at the employees' best evidence of a potential conflict turns out to reveal no conflict at all. The employees direct our attention to the term “other concerted activities for the purpose of ... other mutual aid or protection.” This catchall term, they say, can be read to include class and collective legal actions. But the term appears at the end of a detailed list of activities speaking of “self-organization,” “form[ing], join[ing], or assist [ing] labor organizations,” and “bargain[ing] collectively.” 29 U.S.C. § 157. And where, as here, a more general term follows more specific terms in a list, the general term is usually understood to “ ‘embrace only objects similar in nature to those objects enumerated by the preceding specific words.’ ” *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001) (discussing *ejusdem generis* canon); *National Assn. of Mfrs. v. Department of Defense*, 583 U.S. —, —, 138 S.Ct. 617, 628–629, 199 L.Ed.2d 501 (2018). All of which suggests that the term “other concerted activities” should, like the terms that precede it, serve to protect things employees “just do” for themselves in the course of exercising their right to free association in the workplace, rather than “the highly regulated, courtroom-bound ‘activities’ of class and joint litigation.” *Alternative Entertainment*, 858 F.3d, at 414–415 (Sutton, J., concurring in part and dissenting in part) (emphasis deleted). None of the preceding and more specific terms speaks to the procedures judges or arbitrators must apply in disputes that leave the workplace and enter the courtroom or arbitral forum, and there is no textually sound reason to suppose the final catchall term should bear such a radically different object than all its predecessors.

The NLRA's broader structure underscores the point. After speaking of various “concerted activities” in Section 7, Congress proceeded to establish a regulatory regime applicable to each of them. The NLRA provides rules for the recognition of exclusive bargaining representatives, 29 U.S.C. § 159, explains employees' and employers' obligation to bargain collectively, § 158(d), and concribes certain labor organization practices, §§ 158(a)(3), (b). The NLRA also touches on other concerted activities closely related to organization and collective bargaining, such as picketing, § 158(b)(7), and strikes, § 163. It even sets rules for adjudicatory proceedings under the NLRA itself. §§ 160, 161. Many of these provisions were part of the original NLRA in 1935, see 49 Stat. 449, while others

were added later. But missing entirely from this careful regime is any hint about what rules should govern the adjudication of class or collective actions in court or arbitration. Without some comparably specific guidance, it's not at all obvious what procedures Section 7 might protect. Would opt-out class action procedures suffice? Or would opt-in procedures be necessary? What notice might be owed to absent class members? What standards would govern class certification? Should the same rules always apply or should they vary based on the nature of the suit? Nothing in the NLRA even whispers to us on any of these essential questions. And it is hard to fathom *1626 why Congress would take such care to regulate all the other matters mentioned in Section 7 yet remain mute about this matter alone—unless, of course, Section 7 doesn't speak to class and collective action procedures in the first place.

[18] Telling, too, is the fact that when Congress wants to mandate particular dispute resolution procedures it knows exactly how to do so. Congress has spoken often and clearly to the procedures for resolving “actions,” “claims,” “charges,” and “cases” in statute after statute. *E.g.*, 29 U.S.C. §§ 216(b), 626; 42 U.S.C. §§ 2000e-5(b), (f)(3)-(5). Congress has likewise shown that it knows how to override the Arbitration Act when it wishes—by explaining, for example, that, “[n]otwithstanding any other provision of law, ... arbitration may be used ... only if” certain conditions are met, 15 U.S.C. § 1226(a)(2); or that “[n]o predispute arbitration agreement shall be valid or enforceable” in other circumstances, 7 U.S.C. § 26(n)(2); 12 U.S.C. § 5567(d)(2); or that requiring a party to arbitrate is “unlawful” in other circumstances yet, 10 U.S.C. § 987(e)(3). The fact that we have nothing like that here is further evidence that Section 7 does nothing to address the question of class and collective actions.

In response, the employees offer this slight reply. They suggest that the NLRA doesn't discuss any particular class and collective action procedures because it merely confers a right to use *existing* procedures provided by statute or rule, “on the same terms as [they are] made available to everyone else.” Brief for Respondent in No. 16–285, p. 53, n. 10. But of course the NLRA doesn't say even that much. And, besides, if the parties really take existing class and collective action rules as they find them, they surely take them subject to the limitations inherent in those rules—including the principle that parties may (as here) contract to depart from them in favor of individualized arbitration procedures of their own design.

Still another contextual clue yields the same message. The employees' underlying causes of action involve their wages and arise not under the NLRA but under an entirely different statute, the Fair Labor Standards Act. The FLSA allows employees to sue on behalf of “themselves and other employees similarly situated,” 29 U.S.C. § 216(b), and it's precisely this sort of collective action the employees before us wish to pursue. Yet they do not offer the seemingly more natural suggestion that the FLSA overcomes the Arbitration Act to permit their class and collective actions. Why not? Presumably because this Court held decades ago that an identical collective action scheme (in fact, one borrowed from the FLSA) does *not* displace the Arbitration Act or prohibit individualized arbitration proceedings. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991) (discussing Age Discrimination in Employment Act). In fact, it turns out that “[e]very circuit to consider the question” has held that the FLSA allows agreements for individualized arbitration. *Alternative Entertainment*, 858 F.3d, at 413 (opinion of Sutton, J.) (collecting cases). Faced with that obstacle, the employees are left to cast about elsewhere for help. And so they have cast in this direction, suggesting that one statute (the NLRA) steps in to dictate the procedures for claims under a different statute (the FLSA), and thereby overrides the commands of yet a third statute (the Arbitration Act). It's a sort of interpretive triple bank shot, and just stating the theory is enough to raise a judicial eyebrow.

[19] Perhaps worse still, the employees' theory runs afoul of the usual rule that Congress “does not alter the fundamental *1627 details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.” *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001). Union organization and collective bargaining in the workplace are the bread and butter of the NLRA, while the particulars of dispute resolution procedures in Article III courts or arbitration proceedings are usually left to other statutes and rules—not least the Federal Rules of Civil Procedure, the Arbitration Act, and the FLSA. It's more than a little doubtful that Congress would have tucked into the mousehole of Section 7's catchall term an elephant that tramples the work done by these other laws; flattens the parties' contracted-for dispute resolution procedures;

and seats the Board as supreme superintendent of claims arising under a statute it doesn't even administer.

Nor does it help to fold yet another statute into the mix. At points, the employees suggest that the Norris–LaGuardia Act, a precursor of the NLRA, also renders their arbitration agreements unenforceable. But the Norris–LaGuardia Act adds nothing here. It declares “[un]enforceable” contracts that conflict with its policy of protecting workers’ “concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. §§ 102, 103. That is the same policy the NLRA advances and, as we’ve seen, it does not conflict with Congress’s statutory directions favoring arbitration. See also *Boys Markets, Inc. v. Retail Clerks*, 398 U.S. 235, 90 S.Ct. 1583, 26 L.Ed.2d 199 (1970) (holding that the Norris–LaGuardia Act’s anti-injunction provisions do not bar enforcement of arbitration agreements).

[20] [21] What all these textual and contextual clues indicate, our precedents confirm. In many cases over many years, this Court has heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes. In fact, this Court has rejected *every* such effort to date (save one temporary exception since overruled), with statutes ranging from the Sherman and Clayton Acts to the Age Discrimination in Employment Act, the Credit Repair Organizations Act, the Securities Act of 1933, the Securities Exchange Act of 1934, and the Racketeer Influenced and Corrupt Organizations Act. *Italian Colors*, 570 U.S. 228, 133 S.Ct. 2304, 186 L.Ed.2d 417; *Gilmer*, 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26; *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 132 S.Ct. 665, 181 L.Ed.2d 586 (2012); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989) (overruling *Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953)); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987). Throughout, we have made clear that even a statute’s express provision for collective legal actions does not necessarily mean that it precludes “ ‘individual attempts at conciliation’ ” through arbitration. *Gilmer*, *supra*, at 32, 111 S.Ct. 1647. And we’ve stressed that the absence of any specific statutory discussion of arbitration or class actions is an important and telling clue that Congress has not displaced the Arbitration Act. *CompuCredit*, *supra*, at 103–104, 132 S.Ct. 665; *McMahon*, *supra*, at 227, 107 S.Ct. 2332; *Italian Colors*, *supra*, at 234, 133 S.Ct. 2304. Given so much

precedent pointing so strongly in one direction, we do not see how we might faithfully turn the other way here.

Consider a few examples. In *Italian Colors*, this Court refused to find a conflict between the Arbitration Act and the Sherman Act because the Sherman Act *1628 (just like the NLRA) made “no mention of class actions” and was adopted before Rule 23 introduced its exception to the “usual rule” of “individual” dispute resolution. 570 U.S., at 234, 133 S.Ct. 2304 (internal quotation marks omitted). In *Gilmer*, this Court “had no qualms in enforcing a class waiver in an arbitration agreement even though” the Age Discrimination in Employment Act “expressly permitted collective legal actions.” *Italian Colors*, *supra*, at 237, 133 S.Ct. 2304 (citing *Gilmer*, *supra*, at 32, 111 S.Ct. 1647). And in *CompuCredit*, this Court refused to find a conflict even though the Credit Repair Organizations Act expressly provided a “right to sue,” “repeated[ly]” used the words “action” and “court” and “class action,” and even declared “[a]ny waiver” of the rights it provided to be “void.” 565 U.S., at 99–100, 132 S.Ct. 665 (internal quotation marks omitted). If all the statutes in all those cases did not provide a congressional command sufficient to displace the Arbitration Act, we cannot imagine how we might hold that the NLRA alone and for the first time does so today.

The employees rejoin that our precedential story is complicated by some of this Court’s cases interpreting Section 7 itself. But, as it turns out, this Court’s Section 7 cases have usually involved just what you would expect from the statute’s plain language: efforts by employees related to organizing and collective bargaining in the workplace, not the treatment of class or collective actions in court or arbitration proceedings. See, e.g., *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 82 S.Ct. 1099, 8 L.Ed.2d 298 (1962) (walkout to protest workplace conditions); *NLRB v. Textile Workers*, 409 U.S. 213, 93 S.Ct. 385, 34 L.Ed.2d 422 (1972) (resignation from union and refusal to strike); *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975) (request for union representation at disciplinary interview). Neither do the two cases the employees cite prove otherwise. In *Eastex, Inc. v. NLRB*, 437 U.S. 556, 558, 98 S.Ct. 2505, 57 L.Ed.2d 428 (1978), we simply addressed the question whether a union’s distribution of a newsletter in the workplace qualified as a protected concerted activity. We held it did, noting that it was “undisputed that the union undertook the distribution in order to boost its

support and improve its bargaining position in upcoming contract negotiations,” all part of the union’s “‘continuing organizational efforts.’ ” *Id.*, at 575, and n. 24, 98 S.Ct. 2505. In *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 831–832, 104 S.Ct. 1505, 79 L.Ed.2d 839 (1984), we held only that an employee’s assertion of a right under a collective bargaining agreement was protected, reasoning that the collective bargaining “process—beginning with the organization of the union, continuing into the negotiation of a collective-bargaining agreement, and extending through the enforcement of the agreement—is a single, collective activity.” Nothing in our cases indicates that the NLRA guarantees class and collective action procedures, let alone for claims arising under different statutes and despite the express (and entirely unmentioned) teachings of the Arbitration Act.

That leaves the employees to try to make something of our dicta. The employees point to a line in *Eastex* observing that “it has been held” by other courts and the Board “that the ‘mutual aid or protection’ clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums.” 437 U.S., at 565–566, 98 S.Ct. 2505; see also Brief for National Labor Relations Board in No. 16–307, p. 15 (citing similar Board decisions). But even on its own *1629 terms, this dicta about the holdings of other bodies does not purport to discuss what *procedures* an employee might be entitled to in litigation or arbitration. Instead this passage at most suggests only that “resort to administrative and judicial forums” isn’t “entirely unprotected.” *Id.*, at 566, 98 S.Ct. 2505. Indeed, the Court proceeded to explain that it did not intend to “address ... the question of what may constitute ‘concerted’ activities in this [litigation] context.” *Ibid.*, n. 15. So even the employees’ dicta, when viewed fairly and fully, doesn’t suggest that individualized dispute resolution procedures might be insufficient and collective procedures might be mandatory. Neither should this come as a surprise given that not a single one of the lower court or Board decisions *Eastex* discussed went so far as to hold that Section 7 guarantees a right to class or collective action procedures. As we’ve seen, the Board did not purport to discover that right until 2012, and no federal appellate court accepted it until 2016. See *D.R. Horton*, 357 N.L.R.B. 2277, 823 F.3d 1147 (case below in No. 16–285).

[22] With so much against them in the statute and our precedent, the employees end by seeking shelter in *Chevron*. Even if this Court doesn’t see what they see in Section 7, the employees say we must rule for them anyway because of the deference this Court owes to an administrative agency’s interpretation of the law. To be sure, the employees do not wish us to defer to the general counsel’s judgment in 2010 that the NLRA and the Arbitration Act coexist peaceably; they wish us to defer instead to the Board’s 2012 opinion suggesting the NLRA displaces the Arbitration Act. No party to these cases has asked us to reconsider *Chevron* deference. Cf. *SAS Institute Inc. v. Iancu*, — U.S. —, —, 138 S.Ct. 1348, 1358, — L.Ed.2d — (2018). But even under *Chevron*’s terms, no deference is due. To show why, it suffices to outline just a few of the most obvious reasons.

[23] The *Chevron* Court justified deference on the premise that a statutory ambiguity represents an “implicit” delegation to an agency to interpret a “statute which it administers.” 467 U.S., at 841, 844, 104 S.Ct. 2778. Here, though, the Board hasn’t just sought to interpret its statute, the NLRA, in isolation; it has sought to interpret this statute in a way that limits the work of a second statute, the Arbitration Act. And on no account might we agree that Congress implicitly delegated to an agency authority to address the meaning of a second statute it does not administer. One of *Chevron*’s essential premises is simply missing here.

[24] It’s easy, too, to see why the “reconciliation” of distinct statutory regimes “is a matter for the courts,” not agencies. *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 685–686, 95 S.Ct. 2598, 45 L.Ed.2d 463 (1975). An agency eager to advance its statutory mission, but without any particular interest in or expertise with a second statute, might (as here) seek to diminish the second statute’s scope in favor of a more expansive interpretation of its own—effectively “‘bootstrap[ping] itself into an area in which it has no jurisdiction.’ ” *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650, 110 S.Ct. 1384, 108 L.Ed.2d 585 (1990). All of which threatens to undo rather than honor legislative intentions. To preserve the balance Congress struck in its statutes, courts must exercise independent interpretive judgment. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144, 122 S.Ct. 1275, 152 L.Ed.2d 271 (2002) (noting that this Court has “never deferred to the Board’s remedial preferences

where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA”).

***1630 [25]** Another justification the *Chevron* Court offered for deference is that “policy choices” should be left to Executive Branch officials “directly accountable to the people.” 467 U.S., at 865, 104 S.Ct. 2778. But here the Executive seems of two minds, for we have received competing briefs from the Board and from the United States (through the Solicitor General) disputing the meaning of the NLRA. And whatever argument might be mustered for deferring to the Executive on grounds of political accountability, surely it becomes a garble when the Executive speaks from both sides of its mouth, articulating no single position on which it might be held accountable. See Hemel & Nielson, *Chevron Step One—and-a-Half*, 84 U. Chi. L. Rev. 757, 808 (2017) (“If the theory undergirding *Chevron* is that voters should be the judges of the executive branch's policy choices, then presumably the executive branch should have to take ownership of those policy choices so that voters know whom to blame (and to credit)”). In these circumstances, we will not defer.

[26] Finally, the *Chevron* Court explained that deference is not due unless a “court, employing traditional tools of statutory construction,” is left with an unresolved ambiguity. 467 U.S., at 843, n. 9, 104 S.Ct. 2778. And that too is missing: the canon against reading conflicts into statutes is a traditional tool of statutory construction and it, along with the other traditional canons we have discussed, is more than up to the job of solving today's interpretive puzzle. Where, as here, the canons supply an answer, “*Chevron* leaves the stage.” *Alternative Entertainment*, 858 F.3d, at 417 (opinion of Sutton, J.).

IV

The dissent sees things a little bit differently. In its view, today's decision ushers us back to the *Lochner* era when this Court regularly overrode legislative policy judgments. The dissent even suggests we have resurrected the long-dead “yellow dog” contract. *Post*, at 1633 - 1642, 1648 - 1649 (opinion of GINSBURG, J.). But like most apocalyptic warnings, this one proves a false alarm. Cf. L. Tribe, *American Constitutional Law* 435 (1978) (“*Lochnerizing*” has become so much an epithet

that the very use of the label may obscure attempts at understanding”).

[27] Our decision does nothing to override Congress's policy judgments. As the dissent recognizes, the legislative policy embodied in the NLRA is aimed at “safeguard[ing], first and foremost, workers' rights to join unions and to engage in collective bargaining.” *Post*, at 1636. Those rights stand every bit as strong today as they did yesterday. And rather than revive “yellow dog” contracts against union organizing that the NLRA outlawed back in 1935, today's decision merely declines to read into the NLRA a novel right to class action procedures that the Board's own general counsel disclaimed as recently as 2010.

Instead of overriding Congress's policy judgments, today's decision seeks to honor them. This much the dissent surely knows. Shortly after invoking the specter of *Lochner*, it turns around and criticizes the Court for trying *too hard* to abide the Arbitration Act's “‘liberal federal policy favoring arbitration agreements,’ ” *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002), saying we “‘ski’ ” too far down the “‘slippery slope’ ” of this Court's arbitration precedent, *post*, at 1644 - 1645. But the dissent's real complaint lies with the mountain of precedent itself. The dissent spends page after page relitigating our Arbitration Act precedents, rehashing arguments this Court has heard and rejected many times in many cases that no party ***1631** has asked us to revisit. Compare *post*, at 1642 - 1645, 1646 - 1647 (criticizing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985), *Gilmer*, 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26, *Circuit City*, 532 U.S. 105, 121 S.Ct. 1302, 149 L.Ed.2d 234, *Concepcion*, 563 U.S. 333, 131 S.Ct. 1740, 179 L.Ed.2d 742, *Italian Colors*, 570 U.S. 228, 133 S.Ct. 2304, 186 L.Ed.2d 417, and *CompuCredit*, 565 U.S. 95, 132 S.Ct. 665, 181 L.Ed.2d 586), with *Mitsubishi, supra*, at 645-650, 105 S.Ct. 3346 (Stevens, J., dissenting), *Gilmer, supra*, at 36, 39-43, 111 S.Ct. 1647 (Stevens, J., dissenting), *Circuit City, supra*, at 124-129, 121 S.Ct. 1302 (Stevens, J., dissenting), *Concepcion, supra*, at 357-367, 131 S.Ct. 1740 (BREYER, J., dissenting), *Italian Colors, supra*, at 240-253, 133 S.Ct. 2304 (KAGAN, J., dissenting), and *CompuCredit, supra*, at 116-117, 132 S.Ct. 665 (GINSBURG, J., dissenting).

When at last it reaches the question of applying our precedent, the dissent offers little, and understandably

so. Our precedent clearly teaches that a contract defense “conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures” is inconsistent with the Arbitration Act and its saving clause. *Concepcion, supra*, at 336, 131 S.Ct. 1740 (opinion of the Court). And that, of course, is exactly what the employees' proffered defense seeks to do.

[28] [29] Nor is the dissent's reading of the NLRA any more available to us than its reading of the Arbitration Act. The dissent imposes a vast construction on Section 7's language. *Post*, at 1637. But a statute's meaning does not always “turn solely” on the broadest imaginable “definitions of its component words.” *Yates v. United States*, 574 U.S. —, —, 135 S.Ct. 1074, 1081, 191 L.Ed.2d 64 (2015) (plurality opinion). Linguistic and statutory context also matter. We have offered an extensive explanation why those clues support our reading today. By contrast, the dissent rests its interpretation on legislative history. *Post*, at 1633 - 1635; see also *post*, at 1642 - 1644. But legislative history is not the law. “It is the business of Congress to sum up its own debates in its legislation,” and once it enacts a statute “[w]e do not inquire what the legislature meant; we ask only what the statute means.” *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384, 396, 397, 71 S.Ct. 745, 95 L.Ed. 1035 (1951) (Jackson, J., concurring) (quoting Justice Holmes). Besides, when it comes to the legislative history here, it seems Congress “did not discuss the right to file class or consolidated claims against employers.” *D.R. Horton*, 737 F.3d, at 361. So the dissent seeks instead to divine messages from congressional commentary directed to different questions altogether—a project that threatens to “substitute [the Court] for the Congress.” *Schwegmann, supra*, at 396, 71 S.Ct. 745.

Nor do the problems end there. The dissent proceeds to argue that its expansive reading of the NLRA conflicts with and should prevail over the Arbitration Act. The NLRA leaves the Arbitration Act without force, the dissent says, because it provides the more “pinpointed” direction. *Post*, at 1646. Even taken on its own terms, though, this argument quickly faces trouble. The dissent says the NLRA is the more specific provision because it supposedly “speaks directly to group action by employees,” while the Arbitration Act doesn't speak to such actions. *Ibid*. But the question before us is whether courts must enforce particular arbitration agreements according to their terms. And it's the Arbitration Act

that speaks directly to the enforceability of arbitration agreements, *1632 while the NLRA doesn't mention arbitration at all. So if forced to choose between the two, we might well say the Arbitration Act offers the more on-point instruction. Of course, there is no need to make that call because, as our precedents demand, we have sought and found a persuasive interpretation that gives effect to all of Congress's work, not just the parts we might prefer.

[30] [31] Ultimately, the dissent retreats to policy arguments. It argues that we should read a class and collective action right into the NLRA to promote the enforcement of wage and hour laws. *Post*, at 1646 - 1649. But it's altogether unclear why the dissent expects to find such a right in the NLRA rather than in statutes like the FLSA that actually regulate wages and hours. Or why we should read the NLRA as mandating the availability of class or collective actions when the FLSA expressly authorizes them yet allows parties to contract for bilateral arbitration instead. 29 U.S.C. § 216(b); *Gilmer, supra*, at 32, 111 S.Ct. 1647. While the dissent is no doubt right that class actions can enhance enforcement by “spread[ing] the costs of litigation,” *post*, at 1637, it's also well known that they can unfairly “plac[e] pressure on the defendant to settle even unmeritorious claims,” *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445, n. 3, 130 S.Ct. 1431, 176 L.Ed.2d 311 (2010) (GINSBURG, J., dissenting). The respective merits of class actions and private arbitration as means of enforcing the law are questions constitutionally entrusted not to the courts to decide but to the policymakers in the political branches where those questions remain hotly contested. Just recently, for example, one federal agency banned individualized arbitration agreements it blamed for underenforcement of certain laws, only to see Congress respond by immediately repealing that rule. See 82 Fed.Reg. 33210 (2017) (cited *post*, at 1647, n. 15); Pub.L. 115–74, 131 Stat. 1243. This Court is not free to substitute its preferred economic policies for those chosen by the people's representatives. *That*, we had always understood, was *Lochner*'s sin.

*

The policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written. While Congress is of course always free to amend this judgment, we

see nothing suggesting it did so in the NLRA—much less that it manifested a clear intention to displace the Arbitration Act. Because we can easily read Congress's statutes to work in harmony, that is where our duty lies. The judgments in *Epic*, No. 16–285, and *Ernst & Young*, No. 16–300, are reversed, and the cases are remanded for further proceedings consistent with this opinion. The judgment in *Murphy Oil*, No. 16–307, is affirmed.

So ordered.

Justice THOMAS, concurring.

I join the Court's opinion in full. I write separately to add that the employees also cannot prevail under the plain meaning of the Federal Arbitration Act. The Act declares arbitration agreements “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 I have previously explained, grounds for revocation of a contract are those that concern “ ‘the formation of the arbitration agreement.’ ” *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 239, 133 S.Ct. 2304, 186 L.Ed.2d 417 (2013) (concurring opinion) (quoting *1633 *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 353, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011) (THOMAS, J., concurring)). The employees argue, among other things, that the class waivers in their arbitration agreements are unenforceable because the National Labor Relations Act makes those waivers illegal. But illegality is a public-policy defense. See Restatement (Second) of Contracts §§ 178–179 (1979); *McMullen v. Hoffman*, 174 U.S. 639, 669–670, 19 S.Ct. 839, 43 L.Ed. 1117 (1899). Because “[r]efusal to enforce a contract for public-policy reasons does not concern whether the contract was properly made,” the saving clause does not apply here. *Concepcion*, *supra*, at 357, 131 S.Ct. 1740. For this reason, and the reasons in the Court's opinion, the employees' arbitration agreements must be enforced according to their terms.

Justice GINSBURG, with whom Justice BREYER, Justice SOTOMAYOR, and Justice KAGAN join, dissenting.

The employees in these cases complain that their employers have underpaid them in violation of the wage and hours prescriptions of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201 *et seq.*, and

analogous state laws. Individually, their claims are small, scarcely of a size warranting the expense of seeking redress alone. See Ruan, *What's Left To Remedy Wage Theft? How Arbitration Mandates That Bar Class Actions Impact Low-Wage Workers*, 2012 Mich. St. L. Rev. 1103, 1118–1119 (Ruan). But by joining together with others similarly circumstanced, employees can gain effective redress for wage underpayment commonly experienced. See *id.*, at 1108–1111. To block such concerted action, their employers required them to sign, as a condition of employment, arbitration agreements banning collective judicial and arbitral proceedings of any kind. The question presented: Does the Federal Arbitration Act (Arbitration Act or FAA), 9 U.S.C. § 1 *et seq.*, permit employers to insist that their employees, whenever seeking redress for commonly experienced wage loss, go it alone, never mind the right secured to employees by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.*, “to engage in ... concerted activities” for their “mutual aid or protection”? § 157. The answer should be a resounding “No.”

In the NLRA and its forerunner, the Norris–LaGuardia Act (NLGA), 29 U.S.C. § 101 *et seq.*, Congress acted on an acute awareness: For workers striving to gain from their employers decent terms and conditions of employment, there is strength in numbers. A single employee, Congress understood, is disarmed in dealing with an employer. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33–34, 57 S.Ct. 615, 81 L.Ed. 893 (1937). The Court today subordinates employee-protective labor legislation to the Arbitration Act. In so doing, the Court forgets the labor market imbalance that gave rise to the NLGA and the NLRA, and ignores the destructive consequences of diminishing the right of employees “to band together in confronting an employer.” *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 835, 104 S.Ct. 1505, 79 L.Ed.2d 839 (1984). Congressional correction of the Court's elevation of the FAA over workers' rights to act in concert is urgently in order.

To explain why the Court's decision is egregiously wrong, I first refer to the extreme imbalance once prevalent in our Nation's workplaces, and Congress' aim in the NLGA and the NLRA to place employers and employees on a more equal footing. I then explain why the Arbitration Act, sensibly read, does not shrink the NLRA's protective sphere.

I

It was once the dominant view of this Court that “[t]he right of a person to sell *1634 his labor upon such terms as he deems proper is ... the same as the right of the purchaser of labor to prescribe [working] conditions.” *Adair v. United States*, 208 U.S. 161, 174, 28 S.Ct. 277, 52 L.Ed. 436 (1908) (invalidating federal law prohibiting interstate railroad employers from discharging or discriminating against employees based on their membership in labor organizations); accord *Coppage v. Kansas*, 236 U.S. 1, 26, 35 S.Ct. 240, 59 L.Ed. 441 (1915) (invalidating state law prohibiting employers from requiring employees, as a condition of employment, to refrain or withdraw from union membership).

The NLGA and the NLRA operate on a different premise, that employees must have the capacity to act collectively in order to match their employers' clout in setting terms and conditions of employment. For decades, the Court's decisions have reflected that understanding. See *Jones & Laughlin Steel*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (upholding the NLRA against employer assault); cf. *United States v. Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941) (upholding the FLSA).

A

The end of the 19th century and beginning of the 20th was a tumultuous era in the history of our Nation's labor relations. Under economic conditions then prevailing, workers often had to accept employment on whatever terms employers dictated. See 75 Cong. Rec. 4502 (1932). Aiming to secure better pay, shorter workdays, and safer workplaces, workers increasingly sought to band together to make their demands effective. See *ibid.*; H. Millis & E. Brown, *From the Wagner Act to Taft–Hartley: A Study of National Labor Policy and Labor Relations* 7–8 (1950).

Employers, in turn, engaged in a variety of tactics to hinder workers' efforts to act in concert for their mutual benefit. See J. Seidman, *The Yellow Dog Contract* 11 (1932). Notable among such devices was the “yellow-dog contract.” Such agreements, which employers required employees to sign as a condition of employment, typically commanded employees to abstain from joining labor unions. See *id.*, at 11, 56. Many of the employer-designed

agreements cast an even wider net, “proscrib[ing] all manner of concerted activities.” Finkin, *The Meaning and Contemporary Vitality of the Norris–LaGuardia Act*, 93 Neb. L. Rev. 6, 16 (2014); see Seidman, *supra*, at 59–60, 65–66. As a prominent United States Senator observed, contracts of the yellow-dog genre rendered the “laboring man ... absolutely helpless” by “waiv[ing] his right ... to free association” and by requiring that he “singly present any grievance he has.” 75 Cong. Rec. 4504 (remarks of Sen. Norris).

Early legislative efforts to protect workers' rights to band together were unavailing. See, e.g., *Coppage*, 236 U.S., at 26, 35 S.Ct. 240; Frankfurter & Greene, *Legislation Affecting Labor Injunctions*, 38 Yale L.J. 879, 889–890 (1929). Courts, including this one, invalidated the legislation based on then-ascendant notions about employers' and employees' constitutional right to “liberty of contract.” See *Coppage*, 236 U.S., at 26, 35 S.Ct. 240; Frankfurter & Greene, *supra*, at 890–891. While stating that legislatures could curtail contractual “liberty” in the interest of public health, safety, and the general welfare, courts placed outside those bounds legislative action to redress the bargaining power imbalance workers faced. See *Coppage*, 236 U.S., at 16–19, 35 S.Ct. 240.

In the 1930's, legislative efforts to safeguard vulnerable workers found more receptive audiences. As the Great Depression shifted political winds further in favor of worker-protective laws, Congress passed two statutes aimed at protecting *1635 employees' associational rights. First, in 1932, Congress passed the NLGA, which regulates the employer-employee relationship indirectly. Section 2 of the Act declares:

“Whereas ... the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, ... it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, ... and that he shall be free from the interference, restraint, or coercion of employers ... 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.” 29 U.S.C. § 102.

Section 3 provides that federal courts shall not enforce “any ... undertaking or promise in conflict with the public policy declared in [§ 2].” § 103.¹ In adopting

these provisions, Congress sought to render ineffective employer-imposed contracts proscribing employees' concerted activity of any and every kind. See 75 Cong. Rec. 4504–4505 (remarks of Sen. Norris) (“[o]ne of the objects” of the NLGA was to “outlaw” yellow-dog contracts); Finkin, *supra*, at 16 (contracts prohibiting “all manner of concerted activities apart from union membership or support ... were understood to be ‘yellow dog’ contracts”). While banning court enforcement of contracts proscribing concerted action by employees, the NLGA did not directly prohibit coercive employer practices.

But Congress did so three years later, in 1935, when it enacted the NLRA. Relevant here, § 7 of the NLRA guarantees 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 (emphasis added). Section 8(a)(1) safeguards those rights by making it an “unfair labor practice” for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§ 7].” § 158(a)(1). To oversee the Act’s guarantees, the Act established the National Labor Relations Board (Board or NLRB), an independent regulatory agency empowered to administer “labor policy for the Nation.” *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 242, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959); see 29 U.S.C. § 160.

Unlike earlier legislative efforts, the NLGA and the NLRA had staying power. When a case challenging the NLRA’s constitutionality made its way here, the Court, in retreat from its *Lochner*-era contractual-“liberty” decisions, upheld the Act as a permissible exercise of legislative authority. See *Jones & Laughlin Steel*, 301 U.S., at 33–34, 57 S.Ct. 615. The Court recognized that employees have a “fundamental right” to join together to advance their common interests and that Congress, in lieu of “ignor[ing]” that right, had elected to “safeguard” it. *Ibid.*

B

Despite the NLRA’s prohibitions, the employers in the cases now before the Court required their employees to sign *1636 contracts stipulating to submission of wage

and hours claims to binding arbitration, and to do so only one-by-one.² When employees subsequently filed wage and hours claims in federal court and sought to invoke the collective-litigation procedures provided for in the FLSA and Federal Rules of Civil Procedure,³ the employers moved to compel individual arbitration. The Arbitration Act, in their view, requires courts to enforce their take-it-or-leave-it arbitration agreements as written, including the collective-litigation abstinence demanded therein.

In resisting enforcement of the group-action foreclosures, the employees involved in this litigation do not urge that they must have access to a judicial forum.⁴ They argue only that the NLRA prohibits their employers from denying them the right to pursue work-related claims in concert in any forum. If they may be stopped by employer-dictated terms from pursuing collective procedures in court, they maintain, they must at least have access to similar procedures in an arbitral forum.

C

Although the NLRA safeguards, first and foremost, workers’ rights to join unions and to engage in collective bargaining, the statute speaks more embracively. In addition to protecting employees’ rights “to form, join, or assist labor organizations” and “to bargain collectively through representatives of their own choosing,” the Act protects employees’ rights “to engage in *other* concerted activities for the purpose of ... mutual aid or protection.” 29 U.S.C. § 157 (emphasis added); see, e.g., *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14–15, 82 S.Ct. 1099, 8 L.Ed.2d 298 (1962) (§ 7 protected unorganized employees when they walked off the job to protest cold working conditions). See also 1 J. Higgins, *The Developing Labor Law* 209 (6th ed. 2012) (“Section 7 protects not only union-related activity but also ‘other concerted *1637 activities ... for mutual aid or protection.’ ”); 1 N. Lareau, *Labor and Employment Law* § 1.01[1], p. 1–2 (2017) (“Section 7 extended to employees three federally protected rights: (1) the right to form and join unions; (2) the right to bargain collectively (negotiate) with employers about terms and conditions of employment; and (3) the right to work in concert with another employee or employees to achieve employment-related goals.” (emphasis added)).

Suits to enforce workplace rights collectively fit comfortably under the umbrella “concerted activities for the purpose of ... mutual aid or protection.” 29 U.S.C. § 157. “Concerted” means “[p]lanned or accomplished together; combined.” American Heritage Dictionary 381 (5th ed. 2011). “Mutual” means “reciprocal.” *Id.*, at 1163. When employees meet the requirements for litigation of shared legal claims in joint, collective, and class proceedings, the litigation of their claims is undoubtedly “accomplished together.” By joining hands in litigation, workers can spread the costs of litigation and reduce the risk of employer retaliation. See *infra*, at 1647 - 1648.

Recognizing employees' right to engage in collective employment litigation and shielding that right from employer blockage are firmly rooted in the NLRA's design. Congress expressed its intent, when it enacted the NLRA, to “protec[t] the exercise by workers of full freedom of association,” thereby remedying “[t]he inequality of bargaining power” workers faced. 29 U.S.C. § 151; see, e.g., *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567, 98 S.Ct. 2505, 57 L.Ed.2d 428 (1978) (the Act's policy is “to protect the right of workers to act together to better their working conditions” (internal quotation marks omitted)); *City Disposal*, 465 U.S., at 835, 104 S.Ct. 1505 (“[I]n enacting § 7 of the NLRA, Congress sought generally 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.”). See also *supra*, at 1634 - 1636. There can be no serious doubt that collective litigation is one way workers may associate with one another to improve their lot.

Since the Act's earliest days, the Board and federal courts have understood § 7's “concerted activities” clause to protect myriad ways in which employees may join together to advance their shared interests. For example, the Board and federal courts have affirmed that the Act shields employees from employer interference when they participate in concerted appeals to the media, e.g., *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505–506 (C.A.2 1942), legislative bodies, e.g., *Bethlehem Shipbuilding Corp. v. NLRB*, 114 F.2d 930, 937 (C.A.1 1940), and government agencies, e.g., *Moss Planing Mill Co.*, 103 N.L.R.B. 414, 418–419, enf'd, 206 F.2d 557 (C.A.4 1953). “The 74th Congress,” this Court has noted, “knew well enough that labor's cause often is advanced on fronts other than collective bargaining and grievance

settlement within the immediate employment context.” *Eastex*, 437 U.S., at 565, 98 S.Ct. 2505.

Crucially important here, for over 75 years, the Board has held that the NLRA safeguards employees from employer interference when they pursue joint, collective, and class suits related to the terms and conditions of their employment. See, e.g., *Spandsco Oil and Royalty Co.*, 42 N.L.R.B. 942, 948–949 (1942) (three employees' joint filing of FLSA suit ranked as concerted activity protected by the NLRA); *Poultrymen's Service Corp.*, 41 N.L.R.B. 444, 460–463, and n. 28 (1942) (same with respect to employee's filing of *1638 FLSA suit on behalf of himself and others similarly situated), enf'd, 138 F.2d 204 (C.A.3 1943); *Sarkes Tarzian, Inc.*, 149 N.L.R.B. 147, 149, 153 (1964) (same with respect to employees' filing class libel suit); *United Parcel Service, Inc.*, 252 N.L.R.B. 1015, 1018 (1980) (same with respect to employee's filing class action regarding break times), enf'd, 677 F.2d 421 (C.A.6 1982); *Harco Trucking, LLC*, 344 N.L.R.B. 478, 478–479 (2005) (same with respect to employee's maintaining class action regarding wages). For decades, federal courts have endorsed the Board's view, comprehending that “the filing of a labor related civil action by a group of employees is ordinarily a concerted activity protected by § 7.” *Leviton Mfg. Co. v. NLRB*, 486 F.2d 686, 689 (C.A.1 1973); see, e.g., *Brady v. National Football League*, 644 F.3d 661, 673 (C.A.8 2011) (similar).⁵ The Court pays scant heed to this longstanding line of decisions.⁶

D

In face of the NLRA's text, history, purposes, and longstanding construction, the Court nevertheless concludes that collective proceedings do not fall within the scope of § 7. None of the Court's reasons for diminishing § 7 should carry the day.

1

The Court relies principally on the *ejusdem generis* canon. See *ante*, at 1625. Observing that § 7's “other concerted activities” clause “appears at the end of a detailed list of activities,” the Court says the clause should be read to “embrace” only activities “similar in nature” to those set forth first in the list, *ibid.* (internal quotation marks

omitted), *i.e.*, “ ‘self-organization,’ ‘form[ing], join[ing], or assist[ing] labor organizations,’ and ‘bargain[ing] collectively,’ ” *ibid.* The Court concludes that § 7 should, therefore, be read to protect “things employees ‘just do’ for themselves.” *Ibid.* (quoting *NLRB v. Alternative Entertainment, Inc.*, 858 F.3d 393, 415 (C.A.6 2017) (Sutton, J., concurring in part and dissenting in part); emphasis deleted). It is far from apparent why joining hands in litigation would not qualify as “things employees just do for themselves.” In any event, there is no sound reason to employ the *ejusdem generis* canon to narrow § 7’s protections in the manner the Court suggests.

***1639** The *ejusdem generis* canon may serve as a useful guide where it is doubtful Congress intended statutory words or phrases to have the broad scope their ordinary meaning conveys. See *Russell Motor Car Co. v. United States*, 261 U.S. 514, 519, 43 S.Ct. 428, 67 L.Ed. 778 (1923). Courts must take care, however, not to deploy the canon to undermine Congress’ efforts to draft encompassing legislation. See *United States v. Powell*, 423 U.S. 87, 90, 96 S.Ct. 316, 46 L.Ed.2d 228 (1975) (“[W]e would be justified in narrowing the statute only if such a narrow reading was supported by evidence of congressional intent over and above the language of the statute.”). Nothing suggests that Congress envisioned a cramped construction of the NLRA. Quite the opposite, Congress expressed an embracing purpose in enacting the legislation, *i.e.*, to “protect the exercise by workers of full freedom of association.” 29 U.S.C. § 151; see *supra*, at 1637.

2

In search of a statutory hook to support its application of the *ejusdem generis* canon, the Court turns to the NLRA’s “structure.” *Ante*, at 1625. Citing a handful of provisions that touch upon unionization, collective bargaining, picketing, and strikes, the Court asserts that the NLRA “establish [es] a regulatory regime” governing each of the activities protected by § 7. *Ante*, at 1625 - 1626. That regime, the Court says, offers “specific guidance” and “rules” regulating each protected activity. *Ante*, at 1625 - 1626. Observing that none of the NLRA’s provisions explicitly regulates employees’ resort to collective litigation, the Court insists that “it is hard to fathom why Congress would take such care to regulate all the other matters mentioned in [§ 7] yet remain mute about

this matter alone—unless, of course, [§ 7] doesn’t speak to class and collective action procedures in the first place.” *Ibid.*

This argument is conspicuously flawed. When Congress enacted the NLRA in 1935, the only § 7 activity Congress addressed with any specificity was employees’ selection of collective-bargaining representatives. See 49 Stat. 453. The Act did not offer “specific guidance” about employees’ rights to “form, join, or assist labor organizations.” Nor did it set forth “specific guidance” for any activity falling within § 7’s “other concerted activities” clause. The only provision that touched upon an activity falling within that clause stated: “Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike.” *Id.*, at 457. That provision hardly offered “specific guidance” regarding employees’ right to strike.

Without much in the original Act to support its “structure” argument, the Court cites several provisions that Congress added later, in response to particular concerns. Compare 49 Stat. 449–457 with 61 Stat. 142–143 (1947) (adding § 8(d) to provide guidance regarding employees’ and employers’ collective-bargaining obligations); 61 Stat. 141–142 (amending § 8(a) and adding § 8(b) to proscribe specified labor organization practices); 73 Stat. 544 (1959) (adding § 8(b)(7) to place restrictions on labor organizations’ right to picket employers). It is difficult to comprehend why Congress’ later inclusion of specific guidance regarding some of the activities protected by § 7 sheds any light on Congress’ initial conception of § 7’s scope.

But even if each of the provisions the Court cites had been included in the original Act, they still would provide little support for the Court’s conclusion. For going on 80 years now, the Board and federal courts—including this one—have understood § 7 to protect numerous activities ***1640** for which the Act provides no “specific” regulatory guidance. See *supra*, at 1637 - 1638.

3

In a related argument, the Court maintains that the NLRA does not “even whispe[r]” about the “rules [that] should govern the adjudication of class or collective actions in court or arbitration.” *Ante*, at 1625 - 1626.

The employees here involved, of course, do not look to the NLRA for the procedures enabling them to vindicate their employment rights in arbitral or judicial forums. They assert that the Act establishes their right to act in concert using existing, generally available procedures, see *supra*, at 1636, n. 3, and to do so free from employer interference. The FLSA and the Federal Rules on joinder and class actions provide the procedures pursuant to which the employees may ally to pursue shared legal claims. Their employers cannot lawfully cut off their access to those procedures, they urge, without according them access to similar procedures in arbitral forums. See, e.g., American Arbitration Assn., *Supplementary Rules for Class Arbitrations* (2011).

To the employees' argument, the Court replies: If the employees “really take existing class and collective action rules as they find them, they surely take them subject to the limitations inherent in those rules—including the principle that parties may (as here) contract to depart from them in favor of individualized arbitration procedures.” *Ante*, at 1626. The freedom to depart asserted by the Court, as already underscored, is entirely one sided. See *supra*, at 1633 - 1635. Once again, the Court ignores the reality that sparked the NLRA's passage: Forced to face their employers without company, employees ordinarily are no match for the enterprise that hires them. Employees gain strength, however, if they can deal with their employers in numbers. That is the very reason why the NLRA secures against employer interference employees' right to act in concert for their “mutual aid or protection.” 29 U.S.C. §§ 151, 157, 158.

4

Further attempting to sow doubt about § 7's scope, the Court asserts that class and collective procedures were “hardly known when the NLRA was adopted in 1935.” *Ante*, at 1624 - 1625. In particular, the Court notes, the FLSA's collective-litigation procedure postdated § 7 “by years” and Rule 23 “didn't create the modern class action until 1966.” *Ibid*.

First, one may ask, is there any reason to suppose that Congress intended to protect employees' right to act in concert using only those procedures and forums available in 1935? Congress framed § 7 in broad terms, “entrust[ing]” the Board with “responsibility to

adapt the Act to changing patterns of industrial life.” *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975); see *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212, 118 S.Ct. 1952, 141 L.Ed.2d 215 (1998) (“[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.” (internal quotation marks omitted)). With fidelity to Congress' aim, the Board and federal courts have recognized that the NLRA shields employees from employer interference when they, e.g., join together to file complaints with administrative agencies, even if those agencies did not exist in 1935. See, e.g., *Wray Electric Contracting, Inc.*, 210 N.L.R.B. 757, 762 (1974) (the NLRA protects concerted filing of complaint with the Occupational Safety and Health Administration).

Moreover, the Court paints an ahistorical picture. As Judge Wood, writing for the Seventh Circuit, cogently explained, *1641 the FLSA's collective-litigation procedure and the modern class action were “not written on a clean slate.” 823 F.3d 1147, 1154 (2016). By 1935, permissive joinder was scarcely uncommon in courts of equity. See 7 C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 1651 (3d ed. 2001). Nor were representative and class suits novelties. Indeed, their origins trace back to medieval times. See S. Yeazell, *From Medieval Group Litigation to the Modern Class Action* 38 (1987). And beyond question, “[c]lass suits long have been a part of American jurisprudence.” 7A Wright, *supra*, § 1751, at 12 (3d ed. 2005); see *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 363, 41 S.Ct. 338, 65 L.Ed. 673 (1921). See also Brief for Constitutional Accountability Center as *Amicus Curiae* 5–16 (describing group litigation's “rich history”). Early instances of joint proceedings include cases in which employees allied to sue an employer. E.g., *Gorley v. Louisville*, 23 Ky.L.Rptr. 1782, 65 S.W. 844 (1901) (suit to recover wages brought by ten members of city police force on behalf of themselves and other officers); *Guiliano v. Daniel O'Connell's Sons*, 105 Conn. 695, 136 A. 677 (1927) (suit by two employees to recover for injuries sustained while residing in housing provided by their employer). It takes no imagination, then, to comprehend that Congress, when it enacted the NLRA, likely meant to protect employees' joining together to engage in collective litigation.⁷

E

Because I would hold that employees' § 7 rights include the right to pursue collective litigation regarding their wages and hours, I would further hold that the employer-dictated collective-litigation stoppers, *i.e.*, "waivers," are unlawful. As earlier recounted, see *supra*, at 1635 - 1636, § 8(a)(1) makes it an "unfair labor practice" for an employer to "interfere with, restrain, or coerce" employees in the exercise of their § 7 rights. 29 U.S.C. § 158(a)(1). Beyond genuine dispute, an employer "interfere[s] with" and "restrain[s]" employees in the exercise of their § 7 rights by mandating that they prospectively renounce those rights in individual employment agreements.⁸ The law could hardly be otherwise: Employees' rights to band together to meet their employers' superior strength would be worth precious little if employers could condition employment on workers signing away those rights. See *National Licorice Co. v. NLRB*, 309 U.S. 350, 364, 60 S.Ct. 569, 84 L.Ed. 799 (1940). Properly assessed, then, the "waivers" rank as unfair labor practices outlawed by the NLRA, and therefore unenforceable in court. See *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 77, 102 S.Ct. 851, 70 L.Ed.2d 833 (1982) ("[O]ur cases leave no doubt that illegal promises will not be enforced in cases controlled by *1642 the federal law.").⁹

II

Today's decision rests largely on the Court's finding in the Arbitration Act "emphatic directions" to enforce arbitration agreements according to their terms, including collective-litigation prohibitions. *Ante*, at 1621 - 1622. Nothing in the FAA or this Court's case law, however, requires subordination of the NLRA's protections. Before addressing the interaction between the two laws, I briefly recall the FAA's history and the domain for which that Act was designed.

A

1

Prior to 1925, American courts routinely declined to order specific performance of arbitration agreements. See

Cohen & Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265, 270 (1926). Growing backlogs in the courts, which delayed the resolution of commercial disputes, prompted the business community to seek legislation enabling merchants to enter into binding arbitration agreements. See *id.*, at 265. The business community's aim was to secure to merchants an expeditious, economical means of resolving their disputes. See *ibid.* The American Bar Association's Committee on Commerce, Trade and Commercial Law took up the reins in 1921, drafting the legislation Congress enacted, with relatively few changes, four years later. See Committee on Commerce, Trade & Commercial Law, *The United States Arbitration Law and Its Application*, 11 A.B.A.J. 153 (1925).

The legislative hearings and debate leading up to the FAA's passage evidence *1643 Congress' aim to enable merchants of roughly equal bargaining power to enter into binding agreements to arbitrate *commercial* disputes. See, *e.g.*, 65 Cong. Rec. 11080 (1924) (remarks of Rep. Mills) ("This bill provides that where there are commercial contracts and there is disagreement under the contract, the court can [en]force an arbitration agreement in the same way as other portions of the contract."); Joint Hearings on S. 1005 and H.R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess. (1924) (Joint Hearings) (consistently focusing on the need for binding arbitration of commercial disputes).¹⁰

The FAA's legislative history also shows that Congress did not intend the statute to apply to arbitration provisions in employment contracts. In brief, when the legislation was introduced, organized labor voiced concern. See Hearing on S. 4213 and S. 4214 before the Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 9 (1923) (Hearing). Herbert Hoover, then Secretary of Commerce, suggested that if there were "objection[s]" to including "workers' contracts in the law's scheme," Congress could amend the legislation to say: "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce." *Id.*, at 14. Congress adopted Secretary Hoover's suggestion virtually verbatim in § 1 of the Act, see Joint Hearings 2; 9 U.S.C. § 1, and labor expressed no further opposition, see H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924).¹¹

Congress, it bears repetition, envisioned application of the Arbitration Act to voluntary, negotiated agreements. See, e.g., 65 Cong. Rec. 1931 (remarks of Rep. Graham) (the FAA provides an “opportunity to enforce ... an agreement to arbitrate, when voluntarily placed in the document by the parties to it”). Congress never endorsed a policy favoring arbitration where one party sets the terms of an agreement while the other is left to “take it or leave it.” Hearing 9 (remarks of Sen. Walsh) (internal quotation marks omitted); see *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403, n. 9, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967) (“We note that categories of contracts otherwise within the Arbitration Act but in which one of the parties characteristically has little bargaining power are expressly excluded from the reach of the Act. See § 1.”).

2

In recent decades, this Court has veered away from Congress' intent simply to afford merchants a speedy and economical means of resolving commercial disputes. See Sternlight, *1644 Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration, 74 Wash. U.L.Q. 637, 644–674 (1996) (tracing the Court's evolving interpretation of the FAA's scope). In 1983, the Court declared, for the first time in the FAA's then 58-year history, that the FAA evinces a “liberal federal policy favoring arbitration.” *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) (involving an arbitration agreement between a hospital and a construction contractor). Soon thereafter, the Court ruled, in a series of cases, that the FAA requires enforcement of agreements to arbitrate not only contract claims, but statutory claims as well. E.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987). Further, in 1991, the Court concluded in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991), that the FAA requires enforcement of agreements to arbitrate claims arising under the Age Discrimination in Employment Act of 1967, a workplace antidiscrimination statute. Then, in 2001, the Court ruled in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001), that the Arbitration

Act's exemption for employment contracts should be construed narrowly, to exclude from the Act's scope only transportation workers' contracts.

Employers have availed themselves of the opportunity opened by court decisions expansively interpreting the Arbitration Act. Few employers imposed arbitration agreements on their employees in the early 1990's. After *Gilmer* and *Circuit City*, however, employers' exaction of arbitration clauses in employment contracts grew steadily. See, e.g., Economic Policy Institute (EPI), A. Colvin, The Growing Use of Mandatory Arbitration 1–2, 4 (Sept. 27, 2017), available at <https://www.epi.org/files/pdf/135056.pdf> (All Internet materials as visited May 18, 2018) (data indicate only 2.1% of nonunionized companies imposed mandatory arbitration agreements on their employees in 1992, but 53.9% do today). Moreover, in response to subsequent decisions addressing class arbitration,¹² employers have increasingly included in their arbitration agreements express group-action waivers. See Ruan 1129; Colvin, *supra*, at 6 (estimating that 23.1% of nonunionized employees are now subject to express class-action waivers in mandatory arbitration agreements). It is, therefore, this Court's exorbitant application of the FAA—stretching it far beyond contractual disputes between merchants—that led the NLRB to confront, for the first time in 2012, the precise question *1645 whether employers can use arbitration agreements to insulate themselves from collective employment litigation. See *D.R. Horton*, 357 N.L.R.B. 2277 (2012), enf. denied in relevant part, 737 F.3d 344 (C.A.5 2013). Compare *ante*, at 1620 - 1621 (suggesting the Board broke new ground in 2012 when it concluded that the NLRA prohibits employer-imposed arbitration agreements that mandate individual arbitration) with *supra*, at 1637 - 1638 (NLRB decisions recognizing a § 7 right to engage in collective employment litigation), and *supra*, at 1641, n. 8 (NLRB decisions finding employer-dictated waivers of § 7 rights unlawful).

As I see it, in relatively recent years, the Court's Arbitration Act decisions have taken many wrong turns. Yet, even accepting the Court's decisions as they are, nothing compels the destructive result the Court reaches today. Cf. R. Bork, *The Tempting of America* 169 (1990) (“Judges ... live on the slippery slope of analogies; they are not supposed to ski it to the bottom.”).

B

Through the Arbitration Act, Congress sought “to make arbitration agreements as enforceable as other contracts, but not more so.” *Prima Paint*, 388 U.S., at 404, n. 12, 87 S.Ct. 1801. Congress thus provided in § 2 of the FAA that the terms of a written arbitration agreement “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). Pursuant to this “saving clause,” arbitration agreements and terms may be invalidated based on “generally applicable contract defenses, such as fraud, duress, or unconscionability.” *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996); see *ante*, at 1622.

Illegality is a traditional, generally applicable contract defense. See 5 R. Lord, *Williston on Contracts* § 12.1 (4th ed. 2009). “[A]uthorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract.” *Kaiser Steel*, 455 U.S., at 77, 102 S.Ct. 851 (quoting *McMullen v. Hoffman*, 174 U.S. 639, 654, 19 S.Ct. 839, 43 L.Ed. 1117 (1899)). For the reasons stated *supra*, at 1636 - 1642, I would hold that the arbitration agreements' employer-dictated collective-litigation waivers are unlawful. By declining to enforce those adhesive waivers, courts would place them on the same footing as any other contract provision incompatible with controlling federal law. The FAA's saving clause can thus achieve harmonization of the FAA and the NLRA without undermining federal labor policy.

The Court urges that our case law—most forcibly, *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011)—rules out reconciliation of the NLRA and the FAA through the latter's saving clause. See *ante*, at 1621 - 1624. I disagree. True, the Court's Arbitration Act decisions establish that the saving clause “offers no refuge” for defenses that discriminate against arbitration, “either by name or by more subtle methods.” *Ante*, at 1622. The Court, therefore, has rejected saving clause salvage where state courts have invoked generally applicable contract defenses to discriminate “covertly” against arbitration. *Kindred Nursing Centers L.P. v. Clark*, 581 U.S. —, —, 137 S.Ct. 1421, 1426, 197 L.Ed.2d 806 (2017). In *Concepcion*, the Court held that the saving clause did

not spare the California Supreme Court's invocation of unconscionability doctrine to establish a rule blocking enforcement of class-action waivers in adhesive consumer *1646 contracts. 563 U.S., at 341–344, 346–352, 131 S.Ct. 1740. Class proceedings, the Court said, would “sacrific[e] the principal advantage of arbitration—its informality—and mak[e] the process slower, more costly, and more likely to generate procedural morass than final judgment.” *Id.*, at 348, 131 S.Ct. 1740. Accordingly, the Court concluded, the California Supreme Court's rule, though derived from unconscionability doctrine, impermissibly disfavored arbitration, and therefore could not stand. *Id.*, at 346–352, 131 S.Ct. 1740.

Here, however, the Court is not asked to apply a generally applicable contract defense to generate a rule discriminating against arbitration. At issue is application of the ordinarily superseding rule that “illegal promises will not be enforced,” *Kaiser Steel*, 455 U.S., at 77, 102 S.Ct. 851, to invalidate arbitration provisions at odds with the NLRA, a pathmarking federal statute. That statute neither discriminates against arbitration on its face, nor by covert operation. It requires invalidation of *all* employer-imposed contractual provisions prospectively waiving employees' § 7 rights. See *supra*, at 1641, and n. 8; cf. *Kindred Nursing Centers*, 581 U.S., at —, n. 2, 137 S.Ct., at 1428, n. 2 (States may enforce generally applicable rules so long as they do not “single out arbitration” for disfavored treatment).

C

Even assuming that the FAA and the NLRA were inharmonious, the NLRA should control. Enacted later in time, the NLRA should qualify as “an implied repeal” of the FAA, to the extent of any genuine conflict. See *Posadas v. National City Bank*, 296 U.S. 497, 503, 56 S.Ct. 349, 80 L.Ed. 351 (1936). Moreover, the NLRA should prevail as the more pinpointed, subject-matter specific legislation, given that it speaks directly to group action by employees to improve the terms and conditions of their employment. See *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153, 96 S.Ct. 1989, 48 L.Ed.2d 540 (1976) (“a specific statute” generally “will not be controlled or nullified by a general one” (internal quotation marks omitted)).¹³

Citing statutory examples, the Court asserts that when Congress wants to override the FAA, it does so expressly. See *ante*, at 1625 - 1626. The statutes the Court cites, however, are of recent vintage.¹⁴ Each was enacted during the time this Court's decisions increasingly alerted Congress that it would be wise to leave not the slightest room for doubt if it wants to secure access to a judicial forum or to provide a green light for group litigation before an arbitrator or court. See *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 116, 132 S.Ct. 665, 181 L.Ed.2d 586 (2012) (GINSBURG, J., dissenting). The Congress that drafted the NLRA in 1935 was scarcely on similar alert.

III

The inevitable result of today's decision will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers. See generally Sternlight, *1647 Disarming Employees: How American Employers Are Using Mandatory Arbitration To Deprive Workers of Legal Protections, 80 Brooklyn L. Rev. 1309 (2015).

The probable impact on wage and hours claims of the kind asserted in the cases now before the Court is all too evident. Violations of minimum-wage and overtime laws are widespread. See Ruan 1109–1111; A. Bernhardt et al., Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities 11–16, 21–22 (2009). One study estimated that in Chicago, Los Angeles, and New York City alone, low-wage workers lose nearly \$3 billion in legally owed wages each year. *Id.*, at 6. The U.S. Department of Labor, state labor departments, and state attorneys general can uncover and obtain recoveries for some violations. See EPI, B. Meixell & R. Eisenbrey, An Epidemic of Wage Theft Is Costing Workers Hundreds of Millions of Dollars a Year 2 (2014), available at <https://www.epi.org/files/2014/wage-theft.pdf>. Because of their limited resources, however, government agencies must rely on private parties to take a lead role in enforcing wage and hours laws. See Brief for State of Maryland et al. as *Amici Curiae* 29–33; Glover, The Structural Role of Private Enforcement Mechanisms in Public Law, 53 Wm. & Mary L. Rev. 1137, 1150–1151 (2012) (Department of Labor investigates fewer than 1% of FLSA-covered employers each year).

If employers can stave off collective employment litigation aimed at obtaining redress for wage and hours infractions, the enforcement gap is almost certain to widen. Expenses entailed in mounting individual claims will often far outweigh potential recoveries. See *id.*, at 1184–1185 (because “the FLSA systematically tends to generate low-value claims,” “mechanisms that facilitate the economics of claiming are required”); *Sutherland v. Ernst & Young LLP*, 768 F.Supp.2d 547, 552 (S.D.N.Y.2011) (finding that an employee utilizing Ernst & Young's arbitration program would likely have to spend \$200,000 to recover only \$1,867.02 in overtime pay and an equivalent amount in liquidated damages); cf. Resnik, Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights, 124 Yale L.J. 2804, 2904 (2015) (analyzing available data from the consumer context to conclude that “private enforcement of small-value claims depends on collective, rather than individual, action”); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (class actions help “overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights” (internal quotation marks omitted)).¹⁵

Fear of retaliation may also deter potential claimants from seeking redress alone. See, e.g., Ruan 1119–1121; Bernhardt, *supra*, at 3, 24–25. Further inhibiting single-file claims is the slim relief obtainable, even of the injunctive kind. See *Califano v. Yamasaki*, 442 U.S. 682, 702, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979) (“[T]he scope of injunctive relief is dictated by the extent of the violation established.”). The upshot: Employers, aware that employees will be disinclined to pursue small-value claims when confined to proceeding one-by-one, will no doubt perceive that the cost-benefit *1648 balance of underpaying workers tips heavily in favor of skirting legal obligations.

In stark contrast to today's decision,¹⁶ the Court has repeatedly recognized the centrality of group action to the effective enforcement of antidiscrimination statutes. With Court approbation, concerted legal actions have played a critical role in enforcing prohibitions against workplace discrimination based on race, sex, and other protected characteristics. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 111 S.Ct. 1196, 113 L.Ed.2d 158 (1991). In this context, the Court

has comprehended that government entities charged with enforcing antidiscrimination statutes are unlikely to be funded at levels that could even begin to compensate for a significant dropoff in private enforcement efforts. See *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968) (*per curiam*) (“When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law.”). That reality, as just noted, holds true for enforcement of wage and hours laws. See *supra*, at 1647.

I do not read the Court's opinion to place in jeopardy discrimination complaints asserting disparate-impact and pattern-or-practice claims that call for proof on a group-wide basis, see Brief for NAACP Legal Defense & Educational Fund, Inc., et al. as *Amici Curiae* 19–25, which some courts have concluded cannot be maintained by solo complainants, see, e.g., *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 147 (C.A.2 2012) (pattern-or-practice method of proving race discrimination is unavailable in non-class actions). It would be grossly exorbitant to read the FAA to devastate Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and other laws enacted to eliminate, root and branch, class-based employment discrimination, see *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417, 421, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). With fidelity to the Legislature's will, the Court could hardly hold otherwise.

I note, finally, that individual arbitration of employee complaints can give rise to anomalous results. Arbitration agreements often include provisions requiring that outcomes be kept confidential or barring arbitrators from giving prior proceedings precedential effect. See, e.g.,

App. to Pet. for Cert. in No. 16–285, p. 34a (Epic's agreement); App. in No. 16–300, p. 46 (Ernst & Young's agreement). As a result, arbitrators may render conflicting awards in cases involving similarly situated employees—even employees working for the same employer. Arbitrators may resolve differently such questions as whether certain jobs are exempt from overtime laws. Cf. *Encino MotorCars, LLC v. Navarro*, — U.S. —, 138 S.Ct. 1134, 200 L.Ed.2d 433 (2018) (Court divides on whether “service advisors” are exempt from overtime-pay requirements). With confidentiality and no-precedential-value provisions operative, irreconcilable answers would remain unchecked.

* * *

If these untoward consequences stemmed from legislative choices, I would be obliged to accede to them. But the edict that employees with wage and hours claims may seek relief only one-by-one does not come from Congress. It is the *1649 result of take-it-or-leave-it labor contracts harking back to the type called “yellow dog,” and of the readiness of this Court to enforce those unbargained-for agreements. The FAA demands no such suppression of the right of workers to take concerted action for their “mutual aid or protection.” Accordingly, I would reverse the judgment of the Fifth Circuit in No. 16–307 and affirm the judgments of the Seventh and Ninth Circuits in Nos. 16–285 and 16–300.

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Footnotes

- * 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, 26 S.Ct. 282, 50 L.Ed. 499.
- 1 Other provisions of the NLGA further rein in federal-court authority to disturb employees' concerted activities. See, e.g., 29 U.S.C. § 104(d) (federal courts lack jurisdiction to enjoin a person from “aiding any person participating or interested in any labor dispute who is being proceeded against in, or [who] is prosecuting, any action or suit in any court of the United States or of any State”).
- 2 The Court's opinion opens with the question: “Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration?” *Ante*, at 1619. Were the “agreements” genuinely bilateral? Petitioner Epic Systems Corporation e-mailed its employees an arbitration agreement requiring resolution of wage and hours claims by individual arbitration. The agreement provided that if the employees “continue[d] to work at Epic,” they

would “be deemed to have accepted th[e] Agreement.” App. to Pet. for Cert. in No. 16–285, p. 30a. Ernst & Young similarly e-mailed its employees an arbitration agreement, which stated that the employees’ continued employment would indicate their assent to the agreement’s terms. See App. in No. 16–300, p. 37. Epic’s and Ernst & Young’s employees thus faced a Hobson’s choice: accept arbitration on their employer’s terms or give up their jobs.

- 3 The FLSA establishes an opt-in collective-litigation procedure for employees seeking to recover unpaid wages and overtime pay. See 29 U.S.C. § 216(b). In particular, it authorizes “one or more employees” to maintain an action “in behalf of himself or themselves and other employees similarly situated.” *Ibid.* “Similarly situated” employees may become parties to an FLSA collective action (and may share in the recovery) only if they file written notices of consent to be joined as parties. *Ibid.* The Federal Rules of Civil Procedure provide two collective-litigation procedures relevant here. First, Rule 20(a) permits individuals to join as plaintiffs in a single action if they assert claims arising out of the same transaction or occurrence and their claims involve common questions of law or fact. Second, Rule 23 establishes an opt-out class-action procedure, pursuant to which “[o]ne or more members of a class” may bring an action on behalf of the entire class if specified prerequisites are met.
- 4 Notably, one employer specified that if the provisions confining employees to individual proceedings are “unenforceable,” “any claim brought on a class, collective, or representative action basis must be filed in ... court.” App. to Pet. for Cert. in No. 16–285, at 35a.
- 5 The Court cites, as purported evidence of contrary agency precedent, a 2010 “Guideline Memorandum” that the NLRB’s then-General Counsel issued to his staff. See *ante*, at 1620 - 1621, 1629, 1630 - 1631. The General Counsel appeared to conclude that employees have a § 7 right to file collective suits, but that employers can nonetheless require employees to sign arbitration agreements waiving the right to maintain such suits. See Memorandum GC 10–06, p. 7 (June 16, 2010). The memorandum sought to address what the General Counsel viewed as tension between longstanding precedent recognizing a § 7 right to pursue collective employment litigation and more recent court decisions broadly construing the FAA. The memorandum did not bind the Board, and the Board never adopted the memorandum’s position as its own. See *D.R. Horton*, 357 N.L.R.B. 2277, 2282 (2012), *enf. denied* in relevant part, 737 F.3d 344 (C.A.5 2013); Tr. of Oral Arg. 41. Indeed, shortly after the General Counsel issued the memorandum, the Board rejected its analysis, finding that it conflicted with Board precedent, rested on erroneous factual premises, “defie[d] logic,” and was internally incoherent. *D.R. Horton*, 357 N.L.R.B., at 2282–2283.
- 6 In 2012, the Board held that employer-imposed contracts barring group litigation in any forum—arbitral or judicial—are unlawful. *D.R. Horton*, 357 N.L.R.B. 2277. In so ruling, the Board simply applied its precedents recognizing that (1) employees have a § 7 right to engage in collective employment litigation and (2) employers cannot lawfully require employees to sign away their § 7 rights. See *id.*, at 2278, 2280. It broke no new ground. But cf. *ante*, at 1619 - 1620, 1629.
- 7 The Court additionally suggests that something must be amiss because the employees turn to the NLRA, rather than the FLSA, to resist enforcement of the collective-litigation waivers. See *ante*, at 1626 - 1627. But the employees’ reliance on the NLRA is hardly a reason to “raise a judicial eyebrow.” *Ante*, at 1626 - 1627. The NLRA’s guiding purpose is to protect employees’ rights to work together when addressing shared workplace grievances of whatever kind.
- 8 See, e.g., *Bethany Medical Center*, 328 N.L.R.B. 1094, 1105–1106 (1999) (holding employer violated § 8(a)(1) by conditioning employees’ rehiring on the surrender of their right to engage in future walkouts); *Mandel Security Bureau Inc.*, 202 N.L.R.B. 117, 119, 122 (1973) (holding employer violated § 8(a)(1) by conditioning employee’s reinstatement to former position on agreement that employee would refrain from filing charges with the Board and from circulating work-related petitions, and, instead, would “mind his own business”).
- 9 I would similarly hold that the NLGA renders the collective-litigation waivers unenforceable. That Act declares it the public policy of the United States that workers “shall be free from the interference, restraint, or coercion of employers” when they engage in “concerted activities” for their “mutual aid or protection.” 29 U.S.C. § 102; see *supra*, at 1621. Section 3 provides that federal courts shall not enforce any “promise in conflict with the [Act’s] policy.” § 103. Because employer-extracted collective-litigation waivers interfere with employees’ ability to engage in “concerted activities” for their “mutual aid or protection,” see *supra*, at 1622 - 1625, the arm-twisted waivers collide with the NLGA’s stated policy; thus, no federal court should enforce them. See Finkin, *The Meaning and Contemporary Vitality of the Norris–LaGuardia Act*, 93 Neb. L. Rev. 6 (2014).
- Boys Markets, Inc. v. Retail Clerks*, 398 U.S. 235, 90 S.Ct. 1583, 26 L.Ed.2d 199 (1970), provides no support for the Court’s contrary conclusion. See *ante*, at 1627. In *Boys Markets*, an employer and a union had entered into a collective-bargaining agreement, which provided that labor disputes would be resolved through arbitration and that the union would not engage in strikes, pickets, or boycotts during the life of the agreement. 398 U.S., at 238–239, 90 S.Ct. 1583. When a dispute later arose, the union bypassed arbitration and called a strike. *Id.*, at 239, 90 S.Ct. 1583. The question presented:

Whether a federal district court could enjoin the strike and order the parties to arbitrate their dispute. The case required the Court to reconcile the NLGA's limitations on federal courts' authority to enjoin employees' concerted activities, see 29 U.S.C. § 104, with § 301(a) of the Labor Management Relations Act, 1947, which grants federal courts the power to enforce collective-bargaining agreements, see 29 U.S.C. § 185(a). The Court concluded that permitting district courts to enforce no-strike and arbitration provisions in collective-bargaining agreements would encourage employers to enter into such agreements, thereby furthering federal labor policy. 398 U.S., at 252–253, 90 S.Ct. 1583. That case has little relevance here. It did not consider the enforceability of arbitration provisions that require employees to arbitrate disputes only one-by-one. Nor did it consider the enforceability of arbitration provisions that an employer has unilaterally imposed on employees, as opposed to provisions negotiated through collective-bargaining processes in which employees can leverage their collective strength.

- 10 American Bar Association member Julius H. Cohen, credited with drafting the legislation, wrote shortly after the FAA's passage that the law was designed to provide a means of dispute resolution “particularly adapted to the settlement of commercial disputes.” Cohen & Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265, 279 (1926). Arbitration, he and a colleague explained, is “peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact—quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like.” *Id.*, at 281. “It has a place also,” they noted, “in the determination of the simpler questions of law” that “arise out of th[e] daily relations between merchants, [for example,] the passage of title, [and] the existence of warranties.” *Ibid.*
- 11 For fuller discussion of Congress' intent to exclude employment contracts from the FAA's scope, see *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 124–129, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001) (Stevens, J., dissenting).
- 12 In *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003), a plurality suggested arbitration might proceed on a class basis where not expressly precluded by an agreement. After *Bazzle*, companies increasingly placed explicit collective-litigation waivers in consumer and employee arbitration agreements. See Gilles, *Opting Out of Liability: The Forthcoming, Near–Total Demise of the Modern Class Action*, 104 Mich. L. Rev. 373, 409–410 (2005). In *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011), and *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 133 S.Ct. 2304, 186 L.Ed.2d 417 (2013), the Court held enforceable class-action waivers in the arbitration agreements at issue in those cases. No surprise, the number of companies incorporating express class-action waivers in consumer and employee arbitration agreements spiked. See 2017 Carlton Fields Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation 29 (2017), available at <https://www.classactionsurvey.com/pdf/2017-class-action-survey.pdf> (reporting that 16.1% of surveyed companies' arbitration agreements expressly precluded class actions in 2012, but 30.2% did so in 2016).
- 13 Enacted, as was the NLRA, after passage of the FAA, the NLGA also qualifies as a statute more specific than the FAA. Indeed, the NLGA expressly addresses the enforceability of contract provisions that interfere with employees' ability to engage in concerted activities. See *supra*, at 1642, n. 9. Moreover, the NLGA contains an express repeal provision, which provides that “[a]ll acts and parts of acts in conflict with [the Act's] provisions ... are repealed.” 29 U.S.C. § 115.
- 14 See 116 Stat. 1836 (2002); 120 Stat. 2267 (2006); 124 Stat. 1746 (2010); 124 Stat. 2035 (2010).
- 15 Based on a 2015 study, the Bureau of Consumer Financial Protection found that “pre-dispute arbitration agreements are being widely used to prevent consumers from seeking relief from legal violations on a class basis, and that consumers rarely file individual lawsuits or arbitration cases to obtain such relief.” 82 Fed.Reg. 33210 (2017).
- 16 The Court observes that class actions can be abused, see *ante*, at 1631 - 1632, but under its interpretation, even two employees would be stopped from proceeding together.

2018 WL 401231

Only the Westlaw citation is currently available.
United States District Court, N.D. California,
San Jose Division.

Stephanie PRASAD, Plaintiff,

v.

PINNACLE MANAGEMENT SERVICES
COMPANY, LLC, et al., Defendants.

Case No.5:17-cv-02794-HRL

|
Signed 01/12/2018

Attorneys and Law Firms

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INTERIM ORDER RE DEFENDANT'S MOTION TO COMPEL ARBITRATION

Re: Dkt. No. 14

HOWARD R. LLOYD, United States Magistrate Judge

*1 After submitting an online job application, plaintiff Stephanie Prasad was hired in May 2016 by defendant Pinnacle Property Management Services, LLC (Pinnacle)¹ as a property manager for the “Domus on the Boulevard” apartment complex in Mountain View, California. Her employment was terminated just under a year later. Prasad says that she suffers from type I diabetes and generally was able to perform her work duties, but occasionally required certain accommodations, such as a modified work schedule. She claims that, due in part to lengthy work hours, she began experiencing health complications related to her diabetes. Plaintiff was placed on medical leave for two weeks in October 2016. Upon her return, Prasad says her position was filled by another employee, and she was given a new position as a “Roving Manager.” Plaintiff considered this reassignment a demotion because she says it was temporary in nature

and she earned less money than she did as a property manager.

Claiming that Pinnacle misclassifies its property managers as exempt from overtime pay, Prasad filed this putative class, collective, and representative action, asserting wage-and-hour claims under the Fair Labor Standards Act, 29 U.S.C. §§ 201, et seq. and various provisions of the California Labor Code. She also asserts several individual state law claims for relief based on Pinnacle’s alleged disability discrimination and intentional infliction of emotional distress.

Pinnacle now moves to compel arbitration pursuant to an Issue Resolution Agreement (IRA or Agreement) it claims Prasad assented to and signed when she applied for employment with the company. That IRA provides, in relevant part:

I agree that I will settle any and all previously unasserted claims, disputes or controversies arising out of or relating to my application or candidacy for employment, employment [sic], and/or cessation of employment with Pinnacle Property Management Services, LLC exclusively by final and binding arbitration before a neutral Arbitrator. By way of example only, such claims include claims under federal, state and local statutory or common law, such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans With Disabilities Act, state and federal anti-discrimination statutes, the law of contract, and law of tort.

(Dkt. 14-1, Decl. of Erinn Cassidy (“Cassidy Decl.”), Ex. A at ECF p. 6). Further, the Agreement states that “[e]ach arbitration proceeding shall cover the claims of only one Employee. Unless the parties mutually agree, the parties agree that the arbitrator has no authority to adjudicate a ‘class action.’ ” (Id. at ECF p. 15, Rule 9.f.ii.). As such, Pinnacle contends that Prasad must arbitrate her individual claims and that

the putative class claims must be dismissed without prejudice. Prasad opposes the motion, arguing that no arbitration agreement was ever formed. But even if there was a valid agreement to arbitrate, she contends that the Agreement is (1) unenforceable because it contains an unlawful concerted action waiver and (2) procedurally and substantively unconscionable for a number of reasons. Upon consideration of the moving and responding papers, as well as the arguments of counsel, the court rules as follows.²

LEGAL STANDARD

*2 The Federal Arbitration Act (FAA) governs the enforceability and scope of an arbitration agreement and provides that “[a] party to a valid arbitration agreement may ‘petition any United States district court ... for an order directing that such arbitration proceed in the manner provided for in such agreement.’” Lifescan, Inc. v. Premier Diabetic Servs., Inc., 363 F.3d 1010, 1012 (9th Cir. 2004) (quoting 9 U.S.C. § 4). When ruling on such a petition, the court must determine (1) whether a valid arbitration agreement exists and, if so, (2) whether it encompasses the dispute at issue. Id.; see also Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126, 1130 (9th Cir. 2000). “If the answer is yes to both questions, the court must enforce the agreement.” Lifescan, Inc., 363 F.3d at 1012; Chiron Corp., 207 F.3d at 1130. “[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).

“Arbitration is a matter of contract and the FAA requires courts to honor parties’ expectations.” AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 351 (2011). A court may compel the parties to arbitration only when they have agreed to arbitrate the dispute at issue. Granite Rock Co. v. Int’l Bhd. of Teamsters, 561 U.S. 287, 302-03 (2010). Additionally, arbitration should be denied if the court finds “grounds as exist at law or in equity for the revocation of any contract,” such as fraud, duress, or unconscionability. 9 U.S.C. § 2; Rent-A-Center, West, Inc. v. Jackson, 130 S.Ct. 2772, 2776 (2010). In making this determination, courts generally apply ordinary state-law principles that govern the formation of contracts. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995).

DISCUSSION

At the threshold, Prasad contends that Pinnacle has not met its burden of proving the existence of a valid arbitration agreement because defendant has not demonstrated that she agreed to enter any agreements electronically or that she herself signed the IRA. Pinnacle maintains that only Prasad could have filled out the personal information in her online job application and that, based on its application procedures, it would be impossible for Prasad to have submitted an employment application without first agreeing to the IRA.

In California, “[t]he petitioner bears the burden of proving the existence of a valid arbitration agreement by a preponderance of the evidence, while a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense.” Ruiz v. Moss Bros. Auto Group, Inc., 232 Cal. App. 4th 836, 842 (2014) (internal citation omitted). “The trial court sits as the trier of fact, weighing all the affidavits, declarations, and other documentary evidence, and any oral testimony the court may receive at its discretion, to reach a final determination.” Id. (internal citation omitted).

Under California law, adopted as part of the Uniform Electronic Transactions Act (UETA), an electronic signature has the same legal effect as a handwritten signature. Ruiz, 232 Cal. App.4th at 843 (citing Cal. Civ. Code § 1633.7). “Still, any writing must be authenticated before the writing, or secondary evidence of its content, may be received in evidence.” Id. “ ‘Authentication of a writing means (a) the introduction of evidence *sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is* or (b) the establishment of such facts by any other means provided by law.’ ” Id. at 843 (quoting Cal. Evid. Code § 1400). “An electronic record or electronic signature is attributable to a person if it was the act of the person.” Cal. Civ. Code § 1633.9(a). “The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable.” Id.

*3 The California UETA “applies only to a transaction between parties each of which has agreed to conduct the transaction by electronic means.” Cal. Civ. Code § 1633.5(b). “Whether the parties agree to conduct a

transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct." Id.; J.B.B. Investment Partners, Ltd. v. Fair, 232 Cal. App.4th 974, 990-91 (2014).

Pinnacle argues that under Condee v. Longwood Mgmt. Corp., 88 Cal. App.4th 215 (2001), it need not authenticate Prasad's electronic signature as part of its burden of proof. "Properly understood, Condee holds that a petitioner is not required to authenticate an opposing party's signature on an arbitration agreement *as a preliminary matter* in moving for arbitration *or* in the event the authenticity of the signature is not challenged." Ruiz, 232 Cal. App.4th at 846. But where, as here, the employee contests the validity of the electronic signature, the employer has the burden of proving by a preponderance of the evidence that the signature is authentic. Id.; see also Nanvati v. Adecco USA, Inc., 99 F. Supp.3d 1072, 1076 n.3 (N.D. Cal. 2015) (same).

In this case, Pinnacle submitted a copy of the purported Agreement through the initial declaration of its Vice President of Human Resources, Erinn Cassidy, who avers that the document is contained in Prasad's personnel file as maintained in the ordinary course of Pinnacle's business. (Cassidy Decl. ¶¶ 5-6). The Agreement is dated "05/03/2016" and contains a signature line with the typed name "Stephanie K Prasad," as well as the last four digits of Prasad's Social Security Number. (Id., Ex. A). Although a box next to the signature line labeled "AGREED" is not checked, Cassidy states that Pinnacle does not require applicants to check that box and deems a typed signature sufficient for applicants to agree to the IRA and to proceed with the application process. (Id. ¶ 8). Thus, according to defendant, the fact that an individual is hired by the company signifies that they have agreed to the IRA. (Id.). Pinnacle acknowledges that the Agreement is not signed by the company. But, says Cassidy, the IRA is offered by Pinnacle as a condition of employment; so, by drafting the agreement as a pre-hire document using Pinnacle's name and letterhead, Pinnacle says it intends to be bound by the IRA. (Id. ¶ 9).

Plaintiff, on the other hand, avers that she "do[es] not have a specific recollection of reviewing the [Agreement]" and says that she "did not type [her] name, the date, or the last four digits of [her] social security on the [Agreement]." (Dkt. 15-1, Declaration of Stephanie Prasad (Prasad Decl.) ¶¶ 7-8). She also "do[es] not recall

authorizing anyone to do so on [her] behalf." (Id. ¶ 8). Further, Prasad attests that, to her knowledge, she was not required to review the IRA or to assent to its terms prior to or in conjunction with her employment application. (Id. ¶ 7). Plaintiff also claims that, in applying for a job with Pinnacle, she never agreed to enter any agreements electronically. (Id. ¶ 9). Indeed, she says that she did not know that the Agreement existed, until she received a copy of it with her personnel file shortly before filing this suit. (Id. ¶ 10). As such, Prasad maintains that Cassidy's declaration is insufficient to establish that she actually signed the IRA.

*4 In a supplemental declaration, Cassidy supplies additional details about the electronic application process. Specifically, she states that Pinnacle posts open employment positions on various locations online, including its own website and others such as Indeed.com and CareerBuilder.com. (Dkt. 16-1, Cassidy Reply Decl. ¶ 3). To apply for employment, an applicant clicks on an "Apply Now" button on these websites and is then taken to a website hosted by PeopleAnswers, a third party vendor. (Id.). Cassidy says that applications are only available through the PeopleAnswers site, which in turn, is only accessible through the online job posting. (Id.). Further, Cassidy currently (and at the time Prasad applied), PeopleAnswers manages defendant's online application system; posts application material created by and received from Pinnacle; and maintains active applications for employment. (Id. ¶ 4). At the time Prasad applied, for every single job application, Cassidy says that the initial documents presented on the PeopleAnswers system were the Issue Resolution Program and the IRA. (Id. ¶ 5).

According to Cassidy, an applicant cannot access the job application form unless she first consents to the IRA; and, it is only after consenting to the IRA that the applicant can proceed to fill in her personal information on the online application form. (Id.). Once the application is filled in, Cassidy says it is submitted to the PeopleAnswers online platform, and PeopleAnswers notifies Pinnacle that an applicant submitted an application, complete with the IRA. (Id. ¶ 7). Additionally, Cassidy says that the PeopleAnswers system "locked" application materials, such that Pinnacle representatives could view content entered by the applicant, but no one from Pinnacle or PeopleAnswers could make any changes to it. (Id.). Pinnacle also submits a copy of Prasad's employment

application and points out that it was signed and dated the same day as the IRA. (*Id.*, Ex. A). Simply put, Pinnacle says that the fact that Prasad was able to submit an application at all, and that Pinnacle processed her application and hired her, is proof that she assented to the IRA.

Authenticating a signature under the UETA depends on the particular facts presented in any given case. There is no bright line rule as to what constitutes sufficient evidence, but cases cited by the parties provide some guidance. Summary assertions without foundation are clearly insufficient; and, the mere fact that an agreement bears an electronic signature with a date and time stamp, by itself, is not enough. See *Ruiz*, 232 Cal. App.4th at 843-44. In concluding that the defendant's evidence was insufficient, the *Ruiz* court remarked that something more was needed, e.g., that the signature could only have been placed on the document by someone using the plaintiff's unique username and password; the date and time printed next to the signature indicated when the signature was made; and all employees were required to use their unique user name and password to log on to the defendant's human resources system to electronically sign documents. *Id.* Cf. *Espejo v. Southern California Permanente Med. Group*, 246 Cal. App.4th 1047, 1053-54 (2016) (concluding that declarations established the existence of an agreement to arbitrate where the declarant explained the electronic review and signature process, including the use of a unique user name and password, as well as what the plaintiff would have been required to do as he moved through various screens and prompts).

In this case, there is no evidence that plaintiff was required to use a unique user name or password. But that, by itself, is not dispositive. Defendant presents an IRA bearing plaintiff's typed name, the last four digits of her Social Security number, and the same date as her employment application form (which application form Prasad indisputably signed). Moreover, Pinnacle contends that Prasad's application papers contain information that only she would know—an assertion that Prasad does not deny. Plus, says Pinnacle, plaintiff merely disclaims a “specific” memory of reviewing the IRA—suggesting that she may have a general recollection of doing so.

Footnotes

*5 Perhaps the strongest evidence in plaintiff's favor is the unchecked AGREED box. While that unchecked box is not a problem from Pinnacle's perspective, it cuts against defendant with respect to Prasad's assent. Prasad also denies typing her name, date, or the last four digits of her Social Security number on the IRA and does not recall allowing anyone else to do so on her behalf. She does not recall reviewing or agreeing to the IRA, or even being required to do so prior to or in conjunction with her job application. But, Pinnacle argues that, notwithstanding what Prasad may or may not recall, she must have agreed to the IRA because her electronic consent to the arbitration agreement necessarily was a condition precedent to filling out an online application. Prasad argues that Cassidy's declaration is simply a second-hand account of how that process works. However, “the burden of authenticating an electronic signature is not great,” *Ruiz*, 232 Cal. App.4th at 844, and courts have found declarations from human resources employees sufficient to authenticate electronic signatures. *Tagliabue v. J.C. Penney Corp.*, No. 1:15-cv-01443-SAB, 2015 WL 8780577 at *2 (E.D. Cal., Dec. 15, 2015) (citing cases). Accordingly, the court accepts Cassidy's explanation and, on balance, concludes that Pinnacle has submitted sufficient evidence to authenticate the signature on the IRA and that there exists a valid agreement to arbitrate.

Even so, Prasad contends that the IRA is unenforceable because it contains a concerted action waiver and is, in any event, procedurally and substantively unconscionable for various reasons. Because the court's ruling on these contentions may be affected by the Supreme Court's review of the Ninth Circuit's decision in *Morris v. Ernst & Young*, 834 F.3d 975 (9th Cir. 2016), the court defers ruling on those issues and grants Pinnacle's request to stay this action pending the Supreme Court's decision.

SO ORDERED.

All Citations

Slip Copy, 2018 WL 401231

- 1 Defendant says that it erroneously was sued as “Pinnacle Management Services Company, LLC.” Further, Pinnacle says that it is not affiliated with any entity by that name, no such entity employed plaintiff, and, as far as it is aware, no such company exists. (Dkt. 14-1, Decl. of Erinn Cassidy ¶¶ 2; Dkt. 14-2, Decl. of Douglas G.A. Johnston, ¶ 3).
- 2 All parties have expressly consented that all proceedings in this matter may be heard and finally adjudicated by the undersigned. 28 U.S.C. § 636(c); Fed. R. Civ. P. 73.

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Only the Westlaw citation is currently available.

United States District Court,
W.D. Washington,
at Seattle.

Robert Sturtevant, Plaintiffs,

v.

Xerox Commercial Solutions, LLC, Defendant.

Case No. C16-1158RSM

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Signed 09/19/2016

Attorneys and Law Firms

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ORDER GRANTING MOTION TO DISMISS AND COMPEL ARBITRATION

RICARDO S. MARTINEZ, CHIEF UNITED STATES
DISTRICT JUDGE

I. INTRODUCTION

*1 This matter comes before the Court on Defendant's Motion to Dismiss and Compel Arbitration. Dkt. #7. Defendant argues that Plaintiff signed an agreement that arbitration would be the exclusive method of resolving most legal issues, and therefore this Court lacks jurisdiction to hear his claims. *Id.* Plaintiff opposes the motion, primarily arguing that he never entered into such an agreement. Dkt. #9. For the reasons discussed below, the Court now finds Plaintiff's arguments contrary to the evidence in the record and GRANTS Defendant's motion.

II. BACKGROUND

On June 27, 2016, Plaintiff Robert Sturtevant served a Summons and Complaint against Defendant, his former employer. Dkt. #1 at ¶ 1 and Ex. 1 thereto. In

his Complaint, Plaintiff alleges three causes of action: (1) discrimination under Washington's Law Against Discrimination ("WLAD"); (2) retaliation under the WLAD; and (3) failure to accommodate under the WLAD. Dkt. #1, Ex. 1 at ¶¶ 3.2 to 3.14. The Complaint reflected that the lawsuit was to proceed in King County Superior Court; however, it does not appear that the lawsuit was ever filed in that Court. *See* Dkt. #8. In any event, on July 27, 2016, Defendant removed the matter to this Court. Dkt. #1.

Plaintiff's allegations arise out of his former employment with Defendant. On or about September 11, 2008, Plaintiff applied for employment with Affiliated Computer Services ("ACS"). Dkt. #7, Ex. A at ¶ 13. He applied using ACS's electronic application process. *Id.* That process allowed applicants to electronically complete, review and sign documents. *Id.* at ¶ 14. Likewise, it allowed new hires to electronically review and sign documents. *Id.* In order to utilize the process, applicants were required to create an account with a private login name and password. *Id.* at ¶ 15. As part of his application process, Plaintiff provided his personal information, and electronically agreed to various company policies, including a consent to be bound by a Dispute Resolution Plan ("DRP"). *Id.* at ¶¶ 16-17 and Ex. A-3. That DRP included a provision that the plan provided the exclusive means for resolving disputes relating to the terms and conditions of employment. *Id.* Plaintiff also electronically signed a Pre-Employment Consent to Alcohol/Drug Screening and an Agreement not to Use Former Employers' Confidential or Trade Secret Information, the day before. Dkt. #11, Ex. A at ¶¶ 7-8 and Ex. A-9 thereto.

On or around October 2008, Plaintiff was hired by Affiliated Computer Services ("ACS") as a supervisor in King County, WA. Dkt. #1-1 at ¶ 2.2. On October 15, 2008, using the same personal login name and password, Plaintiff electronically signed seven other documents, including a direct deposit form and acknowledgement of the Employee Guidebook. *Id.* and Dkt. #7, Ex. A at ¶ 21 and Ex. A-6 thereto. The Employee Guidebook also referenced the DRP. Dkt. #7, Ex. A at ¶ 21 and Ex. A-7 thereto.

Plaintiff was subsequently promoted to Operations Manager. Dkt. #1-1 at ¶ 2.2.

In 2010, Defendant Xerox Commercial Solutions, LLC (“XCS”) merged with ACS. *Id.* at ¶ 2.3.

*2 Plaintiff was subsequently promoted to Strategic Business Unit Manager. *Id.* at ¶ 2.4.

On September 14, 2012, Defendant sent an email notification regarding revisions to the DRP. Dkt. #7, Ex. A. at ¶ 18. The email was sent to Plaintiff at his business email address. It included a hyperlink to the Revised DRP. *Id.* at Ex. A-4. XCS utilized a computer program to track employee receipt of the email. *Id.* at ¶ 19. That program reflects that Plaintiff opened the email on September 27, 2012. *Id.* at ¶ 19 and Ex. A-5 thereto. The email stated, “by continuing your employment with [Defendant] after the Effective Date you are accepting and consenting to be bound by the revised DRP.” Dkt. #7, Ex. A at ¶ 19 and Ex. A-5 thereto.

On May 8, 2013, Plaintiff completed a training entitled “Dispute Resolution Plan Rules (September 2012 revision)”. Dkt. #11-1 at and Ex. A-11 thereto. As part of the training, Plaintiff was asked to confirm that he reviewed the course material for the presentation. That course material contained the revised DRP and a version of the email notice that had been sent in September of 2012. *Id.* at Ex. A-12.

On or about March 17, 2015, Plaintiff suffered a debilitating illness. Dkt. #1-1 at ¶ 2.5. A couple of days later, he collapsed at work and received emergency medical attention. *Id.* at ¶¶ 2.7-2.8. On March 24, 2015, Plaintiff requested medical leave for March 26, 2015. *Id.* at ¶ 2.9. The request was denied. *Id.* at ¶ 2.10. On March 25, 2016, Defendant terminated Plaintiff’s employment. *Id.* at ¶ 2.11. The instant lawsuit followed.

After Defendant removed the action to this Court, Defendant moved to dismiss Plaintiff’s claims and compel arbitration. Dkt. #7. Defendant argues that Plaintiff accepted the Xerox DRP, which clearly notified him that “virtually all legal Disputes (as defined in the DRP) concerning your employment, the terms and conditions of your employment and/or your separation from employment are subject to final and binding resolution exclusively by arbitration.” Dkt. #7, Ex. A-4. Plaintiff opposes the motion, stating that he never signed an arbitration agreement during his employment, or made

any agreement to be bound by the Revised DRP. Dkt. #10 at ¶¶ 9-10 [sic].

III. DISCUSSION

A. Plaintiff’s Motion to Strike

As an initial matter, the Court addresses Plaintiff’s motion to strike. Plaintiff has moved to strike the Declaration of Shirley Pierce filed in support of Defendant’s motion. Dkt. #9 at 3. Plaintiff argues that Ms. Pierce cannot properly authenticate the records attached to her Declaration because she has no actual knowledge of either Plaintiff’s agreement to the DRP or the company’s operations at the time Defendant initially signed the agreement. *Id.* Plaintiff’s motion is DENIED.

Ms. Pierce is the Vice-President of Human Resources for Xerox Business Services, LLC (“XBS”), and has been employed in that role since August of 2013. Dkt. #7, Ex. A at ¶ 2. XBS is a wholly-owned subsidiary of Xerox Corporation. *Id.* at ¶ 3. XBS was formerly known as ACS. *Id.* at ¶ 4. Xerox Commercial Solutions, LLC, the Defendant in this action, is a wholly owned subsidiary of XBS. *Id.* at ¶ 5. In her position, Ms. Pierce has access to the business and personnel records of current and former employees of XBS and its subsidiaries, including XCS. Dkt. #7, Ex. A at ¶ 7.

*3 Courts in the Ninth Circuit have long found that the Declaration of a records custodian may satisfy person knowledge requirements for business records as evidence. *See Washington Cent. R.R. Co., Inc. v. Nat’l Mediation Bd.*, 830 F. Supp. 1343, 1352–53 (E.D. Wash. 1993); *Edwards v. Toys ‘R Us*, 527 F.Supp.2d 1197, 1201 (C.D. Cal. 2007) (citing *In re Kaypro*, 218 F.3d 1070, 1075 (9th Cir. 2000) (“Personal knowledge may be inferred from a declarant’s position.”). Indeed, “personal knowledge can come from review of the contents of files and records.” *Washington Cent. R.R. Co.*, 830 F. Supp. at 152-53. Washington State courts have found the same. *See Barkley v. GreenPoint Mortg. Funding, Inc.*, 190 Wn. App. 58, 67, 358 P.3d 1204 (2015).

Accordingly, the Court finds Ms. Pierce’s Declaration and Supplemental Declaration appropriate and declines to strike them or the Exhibits attached thereto.

B. Agreement Between the Parties

The Court next addresses whether there is a binding agreement between Plaintiff and Defendant to exclusively use arbitration to resolve Plaintiff's employment complaints. Plaintiff argues that there is a genuine issue of material fact as to whether he signed the arbitration agreement under Washington law, and therefore that question must be submitted to a jury in this Court for resolution. Dkt. #9 at 4-8. Specifically, he argues that there is no valid agreement under Washington law, Defendant has presented no evidence of an agreement between the parties, and a new agreement was never created in 2012 binding Plaintiff. *Id.* For the reasons discussed herein, the Court disagrees.

Plaintiff first argues that there was no mutual assent to the DRP when Mr. Sturtevant began employment, and therefore he never agreed to arbitration. Dkt. #9 at 5-6. Plaintiff relies on *Neuson v. Macy's Dept. Stores, Inc.*, 160 Wn. App. 786, 796, 249 P.3d 1054 (2011), for the proposition that an e-signature on an arbitration agreement is not reliable when the employer had access to the employee's identifying information. Dkt. #9 at 5. Plaintiff's argument is misguided.

Neuson involved an in-house program that Macy's had implemented to resolve disputes. *Id.* at 789. Employees had to affirmatively opt out of arbitration to avoid being bound to arbitrate. Macy's produced declarations that it mailed the in-house program materials and election forms to the employee, who denied receiving them by mail. The Spokane Superior Court found that Macy's had made a necessary showing to establish the presumption of mailing and that the employee failed to opt out of the program, and then ordered arbitration. *Id.* at 789-91. On appeal, the Washington State Court of Appeals reversed and remanded. *Id.* at 797. The Court of Appeals discussed "the mailbox rule" at length, and agreed that Macy's had made the requisite showing for a presumption of mailing. *Id.* at 793. Further, the court agreed that the Declarations supported the trial court's findings, but ultimately found that the trial court was not privileged to weigh the evidence in ruling on this summary proceeding. The court of appeals determined that the employee had met her burden to produce sufficient evidence to rebut the presumption that the employer mailed and she received the materials necessary to opt out of the in-house arbitration program. Thus, questions of fact existed for the trier of fact. *Id.* at 793-97.

The case is distinguishable from the instant matter. Indeed, in *Neuson* there was no dispute about the electronic process used to verify notice of the arbitration program. Rather, this was a dispute about whether the Plaintiff has received hard copy forms in the mail that would have allowed her to opt out of the program. The court of appeals explained:

*4 Macy's gives each new employee a Solutions InSTORE brochure and an election form. The new employee then uses a computer terminal to complete the majority of the new hire paperwork electronically. The electronic paperwork includes an acknowledgment form that the employee received the Solutions InSTORE brochure and understands her opportunity to decline arbitration. The employee reads and signs each document electronically using her Social Security number, month and day of birth, and zip code. Macy's computer program uses that personal information to generate an electronic signature unique to that employee. Once the employee electronically signs a document, the computer then generates a confirmation page that lists the employee's name, the store site, the name of the form signed, and the date and time the employee signed it. All completed new hire paperwork is stored in on-line personnel files. It is also stored in a hard copy file. The Northtown Macy's human resources assistant, Sarah Allie, recalled asking Ms. Neuson to complete new hire paperwork. And Ms. Neuson's employee file includes a document confirming that she signed the acknowledgment form, which shows she received the Solutions InSTORE brochure and understood she had 30 days to opt out of arbitration.

...

We, then, turn to the evidence supporting Ms. Neuson's position that she did not receive an opt-out form and, therefore, could not opt out of arbitration.

Ms. Neuson lived at three separate addresses while working at the Silverdale Macy's. She swore that an attorney advised her to opt out of arbitration when in Silverdale and that she did so....But she ultimately denies by sworn affidavit that Macy's gave her the documents necessary to opt out of the Solutions InSTORE arbitration provision.

Ms. Neuson had a 30-day break in employment between the Macy's in Silverdale and the Northtown Macy's in

Spokane. But she says she was treated as a new hire by the Northtown Macy's. She claims that break in service and her treatment as a new hire voids whatever efforts Macy's might have made to notify her in Silverdale of the opportunity to opt out of arbitration. Macy's responds there must be a 60-day break in service to trigger its obligation to again send the opt-out materials to an employee but that it did so anyway.

...

The resolution of the underlying factual dispute here is complicated by the use of an electronic signature. This signature is essential to Macy's position that Ms. Neuson received the materials and form necessary to opt out of arbitration. It is not a signature in the traditional sense but rather a string of numbers consisting of an employee's Social Security number, birth date, and zip code. The information in Ms. Neuson's electronic signature is unique to her, and Macy's urges that it is sufficient to show that Ms. Neuson received the opt-out form. We find evidence that the Northtown Macy's has a procedure and that its procedure was followed, but we do not find evidence of how or why the information on this electronic signature would be unavailable to anyone other than Ms. Neuson and, ultimately, why it is the same as or better than a traditional signature.

Neuson, 160 Wn. App. at 793-96.

This last portion of the court's opinion is critical, because that is where Mr. Sturtevant points in support of his argument in the instant matter. However, the reason that the Court discussed the "complication" of the electronic signature was because Ms. Neuson had argued "that the paperwork could have been completed and backdated by someone other than her because the individual forms used her maiden name and one form referred to a driver's license number that was not issued to her until [after her start date]." *Neuson*, 160 Wn. App. at 791. As a result, the Court found that there was a question of fact as to whether she received the opt-out form.

Mr. Sturtevant has made no similar arguments in the instant matter. He does not claim that his company email address has changed over time, nor does he assert that he did not receive the other forms he reviewed and signed electronically on the same dates as he acknowledged the DRP, or that his signature does not appear on such forms.

In fact, as Defendant notes, to make such an assertion would beg the question of how he was hired in the first place. *See* Dkt. #11 at 9-10. Moreover, Mr. Sturtevant has presented no evidence to support his bald assertion that he did not agree to an arbitration agreement, that he did not consent electronically to such an agreement, or that he did not open his email providing notice of the agreement. *See* Dkt. #10. He has simply failed to refute the evidence in this record demonstrating his receipt and review of the DRP.

*5 In addition, the Court rejects Plaintiff's argument that there is no agreement between Plaintiff and Defendant because Defendant failed to provide evidence that it acquired all employment contracts of ACS at the time it merged with Xerox. *See* Dkt. #9 at 6-7. Defendant provides the details of the acquisition through Ms. Pierce. Dkt. #7, Ex. A at ¶¶ 3-6. Further, Plaintiff fails to provide any legal support for his argument.

Likewise, Plaintiff's argument that he did not receive or agree to the 2012 Amended DRP fails for the same reasons as discussed above with respect to the original DRP. Moreover, Plaintiff fails to acknowledge the evidence in the record that he completed a training on the amendment on May 8, 2013. For all of these reasons, the Court finds that there was an agreement to arbitrate between Plaintiff and Defendant.

C. Federal Arbitration Act

Plaintiff does not dispute that the original and amended DRP are governed by the Federal Arbitration Act ("FAA"). Instead, he has argued only that an agreement does not exist between these parties. *See* Dkt. #11. Under Local Civil Rule 7, "[e]xcept for motions for summary judgment, if a party fails to file papers in opposition to a motion, such failure may be considered by the court as an admission that the motion has merit." LCR 7(b)(2). The Court considers Plaintiff's failure to respond as such an admission on this motion.

Further, the Court has reviewed Defendant's legal arguments pertaining to the FAA and motions to compel thereunder, and agrees that the original and amended DRP are governed by the FAA, and that Plaintiff should be compelled to arbitrate. *See* Dkt. #7 at 9-11.

IV. CONCLUSION

Having reviewed Defendant's motion, Plaintiff's opposition thereto, Defendant's reply, and the Declarations and Exhibits in support thereof, along with the remainder of the record, the Court hereby finds and ORDERS:

1. Defendant's Motion to Dismiss and Compel Arbitration (Dkt. #7) is GRANTED.
2. All of Plaintiff's claims against Xerox Commercial Solutions, LLC are hereby DISMISSED WITH

PREJUDICE, and they shall be resolved in accordance with the Xerox Business Services Dispute Resolution Plan.

3. This matter is now CLOSED.

DATED this 19 day of September, 2016.

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REKHI AND WOLK, P.S.

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