No. 16-689

In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

24 HOUR FITNESS USA, INC., ET AL.

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

REPLY BRIEF FOR THE PETITIONER

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At every stage of this case, the claims at issue have been resolved in light of a central question: whether, under the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, arbitration agreements may validly preclude employees from pursuing class or collective actions that assert employment-related claims. After this petition for a writ of certiorari was filed, the Court granted petitions to resolve that very question. *Epic Sys. Corp.* v. *Lewis*, cert. granted, No. 16-285 (Jan. 13, 2017); *Ernst & Young LLP* v. *Morris*, cert. granted, No. 16-300 (Jan. 13, 2017); *NLRB* v. *Murphy Oil USA, Inc.*, cert. granted, No. 16-307 (Jan. 13, 2017). The petition in this case accordingly should be held pending disposition of those petitions and then disposed of as appropriate.

1. In finding that respondent 24 Hour Fitness USA, Inc. (respondent) violated the NLRA, the National Labor Relations Board stated (Pet. App. 3a) that its

decision was "based on" two of its prior decisions, *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012), enforcement denied in relevant part, 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72 (2014), enforcement denied in relevant part, 808 F.3d 1013 (5th Cir. 2015), cert. granted, No. 16-307 (Jan. 13, 2017). Respondent sought review of the Board's ruling in the court of appeals, and shortly thereafter the Board filed an unopposed motion to hold the case pending resolution of *Murphy Oil*, in which the Board intended to seek rehearing en banc. C.A. Doc. 513351157 (Jan. 21, 2016). The court granted the motion and "stay[ed] further proceedings in this case until [the] petition for rehearing en banc is resolved in * * * *Murphy Oil*." C.A. Doc. 513354859 (Jan. 25, 2016).

After en banc review in *Murphy Oil* was denied, respondent filed a motion for summary reversal. C.A. Doc. 513555561 (June 20, 2016). In its motion, respondent explained that "[i]n ruling that 24 Hour Fitness violated the NLRA, the Board relied on its decisions in *D.R. Horton, Inc.* and *Murphy Oil USA, Inc.*" *Id.* at 2 (citation omitted). Respondent argued that the court of appeals' "rulings in *D.R. Horton* and *Murphy Oil* make it clear that the NLRB will lose." *Id.* at 3. The court granted respondent's motion in a one-sentence per curiam order, stating simply that respondent's "motion for summary disposition is GRANTED." Pet. App. 1a.

As the procedural history of this case thus makes clear, both the Board's ruling and the court of appeals' ruling were based on their own prior decisions in *Murphy Oil*, as to which this Court has now granted plenary review. Under these circumstances, the course consistent with this Court's normal practice is to hold

the petition pending its disposition of *Murphy Oil* (and the other pending cases that present variants of the same question).

2. Respondent nevertheless asserts (Br. in Opp. 14) that certiorari should be denied because "[t]he Fifth Circuit's summary reversal of the Board * * * rests on multiple alternative grounds." That is incorrect. Respondent's motion for summary reversal was directly based on *Murphy Oil*, and the Fifth Circuit's one-sentence order granting the motion can only be read as expressing the court's agreement with respondent that the outcome in this case was controlled by *Murphy Oil*. Respondent offers no reason to believe that the court's order was instead based on some *other* argument, which was mentioned neither in respondent's motion nor in the order itself.

Respondent is also incorrect in arguing (Br. in Opp. 4) that the petition in this case should be denied because, even if this Court reverses the Fifth Circuit's ruling in *Murphy Oil*, respondent would inevitably prevail on an alternative argument "after still more litigation." Respondent's alternative argument is that the arbitration agreements at issue here, unlike the agreements at issue in *Murphy Oil*, contain an opt-out procedure. See *id.* at 11-14. As the Board noted in its petition (Pet. 4), the Board rejected respondent's opt-out argument based on its decision in *On Assignment Staffing Services, Inc.*, 362 N.L.R.B. No. 189 (2015), enforcement denied in relevant part, No. 15-60642, 2016 WL 3685206 (5th Cir. June 6, 2016) (*On Assignment Staffing*).[1]

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[1] Respondent briefly argues (Br. in Opp. 14) that the petition also should be denied because the arbitration agreement at issue in this case "expressly incorporates the Federal Rules of Civil Procedure so as to permit employees to engage in concerted activity

Respondent cannot show that it would necessarily prevail in the court of appeals, if this Court overturns *Murphy Oil*, on the basis of its opt-out argument. The Fifth Circuit has not yet considered that argument. As respondent notes (Br. in Opp. 2), the court denied enforcement of the Board's order in *On Assignment Staffing*, but it did so without addressing the opt-out issue: There, as here, the employer moved for summary reversal of the Board's order based on binding circuit precedent (*D.R. Horton*); there, as here, the court granted the employer's motion in a one-sentence per curiam order. *On Assignment Staffing*, 2016 WL 3685206, at *1. Respondent offers no reason that this Court should presume the Fifth Circuit's resolution of an issue that it has yet to consider.[2]

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through joinder of their claims." The Board concluded, however, "that employees would reasonably construe [respondent's] policy to *prohibit* the joinder of claims in arbitration," Pet. App. 7a, and so found that it "need not decide" whether a provision that clearly permitted joinder would be lawful, *id.* at 6a.

[2] Respondent further errs in relying (Br. in Opp. 2-3) on the Ninth Circuit's ruling in *Johnmohammadi* v. *Bloomingdale's, Inc.*, 755 F.3d 1072, 1076-1077 (2014), which upheld an arbitration agreement that contained an opt-out procedure. *Johnmohammadi* predated the Board's authoritative ruling in *On Assignment Staffing*, and the Ninth Circuit has not yet ruled on the issue in light of the deference principles set out in *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 545 U.S. 967, 982 (2005). Petitions for review that challenge the Board's ruling in *On Assignment Staffing* are currently pending in the Ninth Circuit, see, *e.g.*, *Nijjar Realty, Inc.* v. *NLRB*, No. 15-73921, and other courts of appeals, see, *e.g.*, *Singh* v. *Uber Techs., Inc.*, No. 17-1397 (3d Cir.); *AT&T Mobility Servs., LLC* v. *NLRB*, No. 16-1099 (4th Cir.); *Adecco USA, Inc.* v. *NLRB*, No. 16-60375 (5th Cir.); *Grill Concepts Servs., Inc.* v. *NLRB*, No. 16-1238 (D.C. Cir.).

Finally, and in any event, this Court's usual practice, after concluding that a court of appeals' judgment was predicated on an erroneous ground, is not to decide the merits of an alternative argument that was not addressed by the court of appeals, but rather to reverse or vacate the judgment of the court of appeals and remand for further proceedings. See, *e.g.*, *Zivotofsky* v. *Clinton*, 566 U.S. 189, 201-202 (2012); *Pacific Bell Tel. Co.* v. *Linkline Commc'ns, Inc.*, 555 U.S. 438, 456-457 (2009); *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7, 726 (2005); *United States* v. *Rutherford*, 442 U.S. 544, 559 n.18 (1979). The Court should follow that practice here.

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

Respectfully submitted.

EDWIN S. KNEEDLER[*]
Deputy Solicitor General

MARCH 2017

[*] The Acting Solicitor General is recused in this case.