Case No. 12-55578

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FATEMEH JOHNMOHAMMADI,

Plaintiff-Appellant,

v.

BLOOMINGDALE'S, INC.,

Defendant-Appellee.

From the United States District Court for the
Central District of California, Case No. 2:11-cv-06434-GW (AJWx)
District Court Judge George H. Wu

BRIEF AMICUS CURIAE OF THE NATIONAL WORKRIGHTS INSTITUTE, LEGAL AID SOCIETY – EMPLOYMENT LAW CENTER AND EQUAL RIGHTS ADVOCATES IN SUPPORT OF THE APPELLANT'S PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

The National Workrights Institute (NWI) is a not-for-profit research and advocacy organization. Legal Aid Society – Employment Law Center ("LAS-ELC") is a public interest nonprofit legal organization. Equal Rights Advocates (ERA) is a national non-profit legal organization.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

<u>Statutes</u>

Other Authorities

INTEREST OF AMICI

Pursuant to Fed. R. App. Pro. 29, National Workrights Institute, Legal Aid Society—Employment Law Center, and Equal Rights Advocates, with the consent of all parties, submits this amici brief in support of the Petition for Rehearing En Banc filed by appellant Fatemeh Johnmohammadi. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparation or submission of this brief. No person other than amici and its counsel funded preparation and submission of this brief (Fed. R. App. Pro. 29 (c) (5)

The National Workrights Institute, is a not-for-profit research and advocacy organization focused exclusively on issues involving human rights in the workplace. NWI was founded in 1990 as the national employment rights project of the American Civil Liberties Union. It became an independent organization in 2000.

NWI has been active on issues regarding labor law and has been deeply involved in employment arbitration issues for over 20 years. NWI believes that voluntary pre-dispute arbitration agreements, if crafted to assure fairness, can make justice more accessible to employees. It believes the preclusion of group access to arbitration is not fair. Accordingly, NWI has participated as amicus before the United States Supreme Court in both *Circuit City Stores v. Adams*, 532 U.S. 105 (2001) and *AT&T Mobility v Concepcion*, –U.S.–, 131 S. Ct. 1740 (2011). NWI submits that it is particularly well situated to address this court as *amicus curiae*.

Legal Aid Society – Employment Law Center ("LAS-ELC") is a public interest nonprofit legal organization located in San Francisco, California that works nationally to protect, preserve, and advance the workplace rights of individuals from traditionally underrepresented communities. Since 1970, LAS-ELC has represented plaintiffs in cases involving the rights of employees in the workplace, particularly those cases of special import to communities of color, women, recent immigrants, individuals with disabilities, the LGBT community, and the working poor. LAS-ELC represents low-wage workers individually and in employment-related class actions in state and federal courts.

Equal Rights Advocates (ERA) is a national non-profit legal organization dedicated to protecting and expanding economic and educational access and opportunities for women and girls. Since its inception in 1974 as a teaching law firm focused on sex-based discrimination, ERA's advocacy has resulted in the establishment of new laws and legal standards and has conferred significant benefits on large groups of women. ERA has litigated some of the nation's most important and high impact cases on issues of gender discrimination in employment and education, including *Dukes v. Wal-Mart Stores, Inc.*, and has participated as amicus curiae in scores of cases involving the interpretation and application of substantive laws and rules of civil procedure affecting employment-related civil rights and low-wage workers' access to justice.

I. INTRODUCTION

Bloomingdale's, Inc. submitted an arbitration agreement to its employee. The employee was not compelled to accept its terms; she could opt out. But if she did not opt out, she would be required to submit legal claims arising out of her employment, including, as here, claims of violation of state wage and hour law, to arbitration. Even as employees governed by the policy lose the capacity to bring a lawsuit and are bound instead to arbitrate their claims, the arbitration cannot proceed on a class basis – each claim must be heard individually. As the panel put it, "Employees who fail to opt out waive their right to pursue employment-related claims on a collective basis in any forum, judicial or arbitral." Slip opinion at 5.

In the commercial setting there is little dispute that such a provision, waiving the availability of a class arbitration, would be given effect under the Federal Arbitration Act. *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011); *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013). But this is not a commercial setting. The instant agreement plays out in an employment relationship. Two federal statutes speak to the issue of the preclusion of group resort in the employment setting – the Norris LaGuardia Act of 1932 and the National Labor Relations Act of 1935. They share a common policy basis and goal: employees must be able to protect and advance their interests as employees by engaging freely in concerted activity for mutual aid or protection. This is set out in Section 2 as the policy of Norris-LaGuardia, 29 U.S.C. § 102; and in Section 7 as an employee right under the Labor Act, 29 U.S.C. § 157.

The two laws achieve that end by different means. Section 3 of the Norris-LaGuardia Act provides that "any promise or undertaking" in conflict with section 2 is "contrary to the public policy of the United States" and is unenforceable in any court of the United States. Section 8(a)(1) of the Labor Act makes it an unfair labor practice for an employer to interfere (as well as to coerce or restrain employees) in the exercise of section 7 rights. In other words, any contractual provisions – any "promise or undertaking" – reached by section 2, which employers could lawfully offer prior to 1932, could not be enforced in federal court thereafter. Nor, after 1935, could employers offer them.

The plaintiff argued that participation in a class action seeking the payment of wages legally due was "concerted activity for mutual aid or protection" within the meaning of both these laws. The panel did not disagree, nor, *amici* submit, could it, for such plainly is the law. Rather than accept the soundness of the proposition, however, the panel acknowledged it for the sake of what followed.[1] But what followed rests on a profound misunderstanding of the law.

II. THE PANEL'S APPROACH IS CONTRARY TO FOUNDATIONAL PRINCIPLES OF LABOR LAW

The panel held the arbitration agreement's opt-out negated any application of the Norris-LaGuardia and Labor Acts: as the decision to accept or not was voluntary, the court reasoned that the waiver of the right to pursue a class

[1] Slip opinion at 8 (emphasis added):

> Johnmohammadi contends that filing this class action on behalf of her fellow employees is one of the "other concerted activities" protected by the Norris-LaGuardia Act and the NLRA. There is *some* judicial support for her position. *See, e.g.*, *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978); *Brady v. Nat'l Football League*, 644 F.3d 661, 673 (8th Cir. 2011); *Mohave Elec. Coop, Inc. v. NLRB*, 206 F. 3d 1183, 1189 (D.C. Cir. 2000); *Salt River Valley Water Users' Ass'n v. NLRB*, 206 F.2d 325, 328 (9th Cir. 1953). But we need not decide whether Johnmohammadi has correctly interpreted this statutory phrase. To prevail, she must still show that Bloomingdale's interfered with, restrained, or coerced her in the exercise of her right to file a class action. In our view, Bloomingdale's did none of these things.

arbitration contained in the arbitration agreement is not subject to statutory attack. That is not a correct statement of the law.

A. The Judicial Prohibition in Section 3 of the Norris-LaGuardia Act is Not Waivable by Individual Agreement

Section 3 of the Norris-LaGuardia directs the federal courts to deny enforcement to "*any* promise or undertaking" (italics added) by which the individual eschews the capacity to join with others to protect or advance her – and their – employment rights; that is, for example, not only to seek a better wage, but also to have the wages paid that are legally due. *Any* under the statute means "any." Not "some;" and certainly not only those promises to which an employee had not "voluntarily" assented. The text is – and was meant to be – categorical.[2] It is a per se rule.

Section 3 prohibits the enforcement of what was called the "yellow dog" contract. It was intended to reach provisions that, as Senator Norris put it, would deny the worker the capacity to "join with his fellows…[to] make his demands effective." 75 Cong. Rec. 4504 (1932) (remarks of Sen. Norris). So, for example, individual contracts providing for the arbitration of wages on an individual basis precluding the presentation of collective wage demands and could not be enforced. *Cf.* Joel Seidman, THE YELLOW DOG CONTRACT 69 (1932). It would make no sense

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[2] The history of the Act and its application in this setting is explored in a scholarly work to appear next month, Matthew Finkin, *The Meaning and Contemporary Vitality of the Norris-LaGuardia Act,* 93 Neb. L. Rev. — (2014). The manuscript is available online via the Social Science Research Network (SSRN): papers.ssrn.com/5013/papers.cfm?abstract_id=2360260. *Amici* respectfully direct the court to this work which, it believes, need not be rehearsed here.

for the law to reach only those promises or undertakings that are not "voluntary," howsoever that would be determined. The text allows no such exemption; nor is there anything in the legislative history even so much as to hint at such a possibility.[3] Notably, the panel adverted to no authority in support of its reasoning for, over the course of the law's eighty year longevity, none exists.

B. The Right to Engage in Concerted Activity Under the National Labor Relations Act is Not Waivable By Individual Agreement

It is hornbook law that,

> An employer may not condition employment on the relinquishment of section 7 rights. Employer rules, employee-handbook provisions, *or individual contracts* that could reasonably be read to do that…violate the Act.

Robert A. Gorman & Matthew Finkin, LABOR LAW: ANALYSIS AND ADVOCACY § 16.1 at 475 (2013) (italics added). This foundational principle was established early in the Labor Act's history.

Following the Act's passage there was widespread adoption by employers of the "Balleisen formula" by which employers offered employees a contract that provided *inter alia* for the arbitration of their wages on an individual basis in return for a promise not to strike, *i.e.* not to engage in concerted activity for mutual aid or protection to secure a wage increase. Under the Balleisen formula, employees were perfectly free to accept these terms or not. Nevertheless, the scheme violated the Labor Act. *National Licorice Co. v. NLRB*, 309 U.S. 350, 360 (1940). *See*

[3] *Id.*

Joseph Rosenfarb, THE NATIONAL LABOR POLICY AND HOW IT WORKS, 70-72 (1940) (discussing the Balleisen formula) ("Although the cases show that these contracts have been obtained through coercion in one form or another, there would appear to be no need of a showing of coercion in their obtaining. They are intrinsically violative of the act… The guaranties of the act are so fundamental that they are not for sale.") As the Board explained in just such a case:

> [T]he individual employees allege that they entered into the individual agreements "freely and voluntarily, without influence or coercion," and that the individual agreements of employment "have been and now are acceptable and satisfactory" to them. . . . [A]s we find below, these individual agreements are *per se* illegal in so far as they purport to bind the employees to bargain individually, the fact that these agreements were entered into "freely and voluntarily, without influence or coercion" and are "acceptable and satisfactory" to the employees cannot remove this illegality. The right to bargain collectively is a right guaranteed by the Act in furtherance of a valid public policy, and, therefore, may not be stipulated away or renounced by employees.

Killefer Mfg. Corp., 22 NLRB 484, 490–91 (1940) (referencing *National Licorice* and other decisions).

Assume that an employer were to say to its employees today:

> "These are uncertain economic times. I'm prepared to offer you a contract that will set your wages for a year; but, in return, you will promise not to ask for more. If conditions worsen, you will come out better. If conditions improve, I will benefit because you can't ask for more. The choice is yours."

Assume further that most, but by no means all, of the workforce is risk averse. They sign this contract. They do so voluntarily; and, unlike *National*

Licorice, these contracts are not offered in the context of any other unfair labor practices. An agreement on a year's wage is perfectly lawful. The contractual eschewal of the right collectively to seek a better wage, to engage in concerted activity for mutual aid or protection, is not waivable. *J.I. Case v. NLRB*, 321 U.S. 332 (1944).

It is important to stress, as the Supreme Court did in *Eastex*, *supra* n. 1, that the right to engage in concerted activity for mutual and or protection extends beyond self-help, beyond the right collectively to demand a wage increase from an employer. It extends to resort to administrative and judicial fora in which employees can advance their interests as employees. 437 U.S. 565-566. It follows that where arbitration has been substituted for the courts, which substitution is lawful under the Federal Arbitration Act, the change of forum has no effect on the right of collective resort to it.

> Is there any meaningful difference between a contract that says, "I agree that I will present any grievance I might have arising out of my employment only as a single individual; I will not join with nor be joined by any others in seeking to present a common grievance," and one that says, "I agree that any grievance I might have grounded in an alleged violation of any statutory right arising out of my employment will be heard exclusively to my employer's arbitration system and I will not join with nor be joined by any others in the presentation of a common claim?"

Finkin, *supra* The Meaning and Contemporary Vitality of the Norris-LaGuardia Act at Note 115.

The right collectively to proceed into a legal forum to secure wages legally due cannot be distinguished from the right collectively to demand an increase in wages that would be due – and would thus become enforceable as a matter of state wage payment law in either a judicial or arbitral forum. Collective resort in either forum would be concerted activity for mutual aid or protection within the meaning of the Labor Act, and Norris-LaGuardia.

The panel opined that in this case the arbitration alternative could have been of benefit to the individual, or not, just as the employer in the above hypothetical case said. The choice was the individual's. Again, the individual is free to agree to substitute the arbitral for the judicial forum. But as an employer may not purchase an individual waiver of the right of collective action for a specific benefit – say, a wage increase – even less may it do so for that which may not actually confer a benefit.[4] The distinction is nonsensical.

C. Summary

The panel's apparent assumption is that the right to engage in concerted activity for mutual aid or protection is a private good for the benefit of the individual and so waivable by her. That is not correct. These statutes create public goods for the better ordering of society. *National Licorice*, *supra* at 362 ("The proceedings authorized to be taken by the Board under the National Labor Relations Act is not for the adjudication of private rights"); *Emporium Capwell*

[4] If no benefit is conferred, it would be questionable whether there would be consideration to support a contract. *Exchange Bakery & Rest., Inc. v. Rifkin*, 157 N.E. 130, 134 (N.Y. 1927). ("This paper [promising to adjust grievances only individually] was not a contract. It was merely a promise based upon no consideration by the plaintiff [employer].") Thus, the draftsmen of Norris-LaGuardia were careful to deny enforcement to "any promise or undertaking," not to "any contract," thereby obviating the question of consideration.

Co. v. Western Addition Community Org., 420 U.S. 50, 62 (1975) (section 7 rights are protected "not for their own sake but as instruments of national labor policy"). Congress sought in these laws to realize a world in which the individual would be free to seek the aid and support of others and in which others would be free to provide that aid and support. *Peter Cailler Kohler Swiss Choc. Co. v. NLRB*, 130 F.2d 503 (2d. Cir. 1942). Individual contracts that interfere in the capacity of the individual to seek aid from others or to lend support to others are contrary to the public policy of the United States. These guaranties are not waivable by individual contract.

III. CONCLUSION

Amici are not claiming that there is any legal infirmity in the substitution of an arbitral for a judicial forum for the disposition of an employee claim of a violation of a workplace right. The question is whether such an arbitration system may preclude the presentation of class or group claims by employees, as the panel put it, "in any forum."

The lawfulness of waivers of collective resort as a component of employment arbitration schemes is hotly contested terrain today.[5] From the foregoing it is clear that these provisions pose significant statutory issues.[6] The

[5] Most recently, *Iskanian* v. *CLS Transportation Los Angeles, LLC*. 59 Cal. 4th 348 (2014) (and the partial dissent of Werdegar, J. treating the Norris-LaGuardia Act, which the majority does not address).

[6] Finkin, *supra* n. 1; Catherine Fisk, *Collective Action and Joinder of Parties in Arbitration: Implications of* D.R. Horton *and* Concepcion, 35 Berkeley J. Employment & Lab. L. 175 (2014); Nantiya 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 (2012); Charles Sullivan & Timothy Glynn,

panel chose not to deal with them. It chose to go off on a ground that avoids deciding the statutory challenge to the preclusion of collective resort. But it did so by charting a course that is outright contrary to foundational principles of labor law. Rehearing is required.

Dated: August 4, 2013

Respectfully submitted,

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(continued…)
Horton *Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution*, 64 Ala. L. Rev. 1013 (2013).

CERTIFICATE OF COMPLIANCE
(Fed. R. App. P. 32(a) & 9th Cir. Rule 32-l)

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 word processing program, a 14-point font size, and the Times New Roman type style.

Dated: August 4, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2014, I electronically filed the foregoing and all attachments with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all the participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: August 4, 2013

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