NO. 12-0201

IN THE

SUPREME COURT OF THE UNITED STATES

SPRING TERM, 2012

MARY LOU COSTANZA, et al.,

Petitioners/Cross-Respondents,

— against —

FLY ABOVE WAREHOUSES, INC.,

Respondent/Cross-Petitioner.

On Writ of Certiorari to the
United States Court of Appeals
for the Thirteenth Circuit

BRIEF FOR PETITIONERS/ CROSS-RESPONDENTS

TEAM 41

Attorneys for Petitioners/
Cross-Respondents

QUESTIONS PRESENTED

I. Whether obesity may qualify as an actual or perceived disability within the meaning of the Americans with Disability Act, as amended in 2008.

II. Whether Union members' workplace discrimination claims should be subjected to group arbitration despite a class action waiver in a collective bargaining agreement when individual arbitration would be cost prohibitive, would limit the scope of claims that could be brought, and would interfere with Union members' right to engage in joint actions protected by Section 7 of the National Labor Relations Act.

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OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Wagner is reported at 185 F. Supp. 3d 1 (E.D. Wag. 2011) and is included in the record at pages 2–19. The opinion of the United States Court of Appeals for the Thirteenth Circuit is reported at 521 F.3d 409 (13th Cir. 2011) and is included in the record at pages 20–30.

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation of the Americans with Disabilities Act, as amended, which provides in part, that a disability is "a physical or mental impairment that substantially limits one or more major life activities of such individual, having a record of such impairment, or being regarded as having such an impairment." 42 U.S.C. § 12102(1) (2008). In addition, this case involves Section 2 of the Federal Arbitration Act, which provides, agreements to arbitrate are "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 (2006).

This case also involves the interpretation of Section 7 of the National Labor Relations Act, which provides, "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C. § 157 (2006). Likewise, this case involves Section 8 of the National Labor Relations Act, which provides, it is unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the[se] rights . . . ." *Id.* § 158.

STATEMENT OF THE CASE

This is a lawsuit brought under federal antidiscrimination law. Fly Above Warehouses, Inc. ("the Employer") operates one of the largest warehouse storage facilities in the State of

Wagner, with over 2,000 employees in ten regional offices. R. at 3. Petitioner, Mary Lou Costanza, sued the Employer after she was discriminated against and terminated because of her obesity. R. at 2.

A Single, Working Parent. Mary Lou Costanza is a forty-three-year-old single mother of two sons. R. at 3. In 2001, Costanza secured a job as a full-time warehouse worker in Employer's large warehouse storage facility in Wagner City. R. at 3. When she began her employment in 2001, Costanza stood 5'4" tall and weighed 230 pounds. R. at 3. At the time Costanza was terminated in 2010, she had gained almost 100 more pounds and had a body mass index of 56.6. R. at 3. Despite her size, Costanza received satisfactory performance reviews and had an unblemished disciplinary record. R. at 3.

A Collectively Bargained Agreement. Costanza is a member of Froessel Union, Local 87 ("the Union"). R. at 1. The Union and the Employer are parties to a collective bargaining agreement ("CBA") covering the wages, hours and other terms and conditions of the Union members' employment. R. at 4. As part of the bargaining process, a warehouse worker's base rate was set at $14.00/hour. R. at 4. Additionally, the CBA provides that no employee will be discharged except for just cause and that there shall be no discrimination against any employee by reason of any characteristic protected by law. R. at 4. Further, the CBA dictates that all disputes must be resolved through individual arbitration. R. at 5.

Working Takes a Physical Toll. As part of the typical duties of a warehouse worker, Costanza frequently walked to various locations in the warehouse, in addition to lifting boxes on to shelves. R. at 3. Costanza engaged in these activities on a daily basis for years. R. at 3. In November 2010, Costanza began to experience pain in her knees and in her back because of the physical demands of her position as warehouse person. R. at 3. Although the Employer had a

forklift available for use, generally, employees were permitted to use a forklift only to place particularly heavy boxes on upper level shelves, or when recovering from surgery or experiencing other physical ailments. R. at 3.

An Unsympathetic Denial. Costanza discussed her ailments with her supervisor, and asked permission to use a forklift more often in an effort to ameliorate her knee and back pain. R. at 3. Her supervisor refused to allow the accommodation, suggesting the Employer could not provide her with regular use of a forklift because "all the other complainers" would seek to do so as well. R. at 3. The supervisor further added that the forklift was only for employees who "actually needed the forklift, not for lazy people who like to make things more difficult for everyone, especially themselves." R. at 3.

Collective Action Leads to a Discharge. Recognizing that she was not the only person to experience pain associated with work-related tasks, Costanza suggested to other obese warehouse workers that they demand to use a forklift if they experienced pain associated with walking across the warehouse or lifting boxes. R. at 4. Costanza and thirty other obese employees signed a petition demanding more frequent use of forklifts. R. at 4. The company denied this request and fired all signatories to the petition, including Costanza, less than a week later. R. at 4.

The District Court. Costanza sued the Employer under the Americans with Disabilities Act, as amended ("ADAAA"), on behalf of herself and all former employees ("Employees") fired after the forklift request. R. at 2. Specifically, the claim alleged a pattern and practice of unlawful discrimination based on disability in violation of the ADA. R. at 5.

The Employer contended that obesity, morbid or otherwise, is not a disability under the ADA. R. at 7. Further, the Employer averred that the arbitration clause in the collective

bargaining agreement did not allow for group arbitration. R. at 10. On these grounds, the Employer moved to dismiss for failure to state a claim upon which relief can be granted, and alternatively, moved to compel arbitration of each individual plaintiff's claim. R. at 2. The district court denied Employer's motion to dismiss, denied Employer's motion to compel individual arbitration, and ordered the case to be submitted to group arbitration. R. at 19.

The Court of Appeals. The Employer appealed the adverse judgment pursuant to § 16 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 16, which authorizes an interlocutory appeal of an order refusing a stay of any action under section 3 of that title or denying a petition under section 4 of that title to order arbitration to proceed. R. at 20. The court of appeals affirmed-in-part and reversed-in-part. R. at 20. Specifically, the court affirmed the district court's denial of appellant's motion to dismiss for the reasons set forth by the district court. R. at 21. However, the appellate court reversed the district court's order of group arbitration. R. at 20. Finding that the collective bargaining agreement does not allow for group arbitration, the court compelled individual arbitration of Employees' claims according to the terms of the CBA. R. at 28.

SUMMARY OF THE ARGUMENT

Costanza may pursue her workplace discrimination claim because obesity can qualify as a disability. Under the ADAAA's expanded definition of actual disability, obesity is a physical impairment that substantially limits the major life activities of walking, standing, lifting, bending, and breathing. The underlying policies of the ADAAA favor the extension of its protections to her and similarly situated individuals. Additionally, Costanza's supervisor regarded her as disabled, which invokes the ADA's protections. Costanza's supervisor made disparaging remarks about the impact her morbid obesity had on her ability to work under the same conditions as other employees of normal weight. As her employer regarded Costanza as disabled, she is disabled under the ADAAA and should therefore benefit from its protections. The actual or perceived disability is sufficient to meet Costanza's burden to proceed on her workplace disability claim.

Moreover, Costanza is not bound by the collective bargaining agreement to the extent that it limits her only dispute resolution mechanism to an individual arbitration. Enforcement of the class-action waiver in the arbitration clause effectively prevents Costanza from vindicating her statutory rights. Because the cost of pursuing an employment discrimination claim like Costanza's far exceeds any potential recovery, and the likelihood of obtaining legal counsel is remote, Costanza has no incentive to bring her statutory antidiscrimination claim in arbitration. Additionally, because individual arbitration by its nature does not permit a pattern or practice claim, Costanza and all other discharged employees are prevented from seeking class-wide relief. Furthermore, limiting the employees to individual arbitration to resolve disputes directly violates the National Labor Relations Act's statutory authorization of collective action for mutual aid and protection. Although the Union may waive some of its members' rights in the pursuit of

peaceable labor relations, the ability to pursue a class action in any form is not one of them. Because the agreement denies employees the ability to pursue their claims as a class in either a judicial or an arbitral forum, the arbitration clause in the collective bargaining agreement violates the National Labor Relations Act's right to concerted activity.

Thus, this Court should affirm the court of appeals' judgment with respect to the motion to dismiss and reverse the court of appeals' judgment with respect to the arbitration order. This Court should reinstate the district court's order requiring group arbitration of the employment discrimination claims.

STANDARD OF REVIEW

This is an interlocutory appeal of two motions. The district court denied a motion to dismiss and a motion to compel individual arbitration. R. at 2. Federal Rule of Civil Procedure 12(b)(6) authorizes federal courts to dismiss cases for failing "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). However, to survive a motion to dismiss, the complaint must contain merely "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). When faced with a motion to dismiss, this Court must accept as true all material factual allegations in the complaint. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2079 (2011). This Court reviews a motion to dismiss for failure to state a claim *de novo*. *Id.* Likewise, as an order granting a motion to compel arbitration involves issues of contract interpretation and substantive arbitrability, this issue is reviewed *de novo*. *Sherer v. Green Tree Servicing, L.L.C.*, 548 F.3d 379, 381 (5th Cir. 2008).

ARGUMENT AND AUTHORITIES

I. COSTANZA STATED A VIABLE EMPLOYMENT DISCRIMINATION CLAIM BECAUSE OBESITY CAN BE A DISABILITY UNDER THE AMERICANS WITH DISABILITIES ACT, AS AMENDED IN 2008.

Congress promulgated the Americans with Disabilities Act to combat pervasive discrimination against those persons with disabilities in a number of different aspects of society. *See* 42 U.S.C. § 12101 (2008). The ADAAA provides protection in a number of different areas including employment, public services, and public accommodations. *See id.* To prevail on an ADA claim, a plaintiff must demonstrate: (1) a disability within the meaning of the ADAAA, (2) the complaining party is a "qualified individual with a disability," and (3) the complaining party suffered an adverse employment decision because of the disability. *Hamilton v. Sw. Bell Tel. Co.*, 136 F.3d 1047, 1050 (5th Cir. 1998). The threshold inquiry raised here is whether or not a plaintiff has a disability within the meaning of the ADAAA. *Id.* Costanza is disabled under the ADAAA because she is morbidly obese.

A. Obesity May Be Considered a Disability Under the Plain Language of the Americans with Disabilities Act, as Amended in 2008.

The ultimate issue in this case involves a straightforward question of statutory interpretation. *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990) ("The starting point for interpretation of a statute is the language of the statute itself."). This Court "begin[s] with the understanding that Congress 'says in a statute what it means and means in a statute what it says there.'" *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992)). When the statutory language is plain, '"the sole function of courts'—at least where the disposition required by the text is not absurd—'is to enforce it according to its terms.'" *Id.* (quoting *United States v.*

Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989)). The plain language supports a finding that obesity can be a disability under the ADA.

Under the ADAAA, a disability is "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(1). An individual is disabled if any one of the three prongs is met. The question before this Court is not whether obesity is categorically a disability under the ADAAA. Rather, as the appeal comes from a denial of a motion to dismiss, the question is whether Costanza has pled enough facts, taken as true, to allege that obesity may be a disability within the meaning of the ADAAA. She has done so.

1. Obesity may qualify as an actual disability.

Under the first prong, a plaintiff is disabled if she has a "physical or mental impairment that substantially limits one or more major life activities of such individual." 42 U.S.C. § 12102(1)(A). Courts evaluating claims under this prong have traditionally interpreted these words narrowly. *See, e.g.*, *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) (using a strict definition of disability). However, the statute's plain language does not support such a narrow interpretation.

In fact, the district court in this case deferred to the EEOC's position that morbid obesity is a disability under the ADAAA. R. at 9 (citing Compl. ¶ 12 in *EEOC v. BAE Systems*, No. 4:11-cv-03497 (S.D. Tex. Sept. 28, 2011). The Court will not defer to agency litigating positions that are wholly unsupported by regulations, ruling, or administrative practice, and agency counsel's interpretation of a statute will not be given deference when the agency itself has articulated no position on the question. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988). The

district court's deference to the EEOC's position in *BAE* was not error because a finding that morbid obesity is a disability under the ADAAA is supported by the EEOC's final regulations defining disability and its stated position that severe obesity is an impairment.

a. Obesity is a physical impairment.

Although the statute's plain language does not define the term "impairment," many courts took it upon themselves to hold that obesity was not a recognized impairment under the pre-amendment ADA. *See, e.g.*, *Merker v. Miami-Dade Cnty. Fla.*, 485 F. Supp. 2d 1349, 1353 (S.D. Fla. 2007) (citing *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436, 440–43 (6th Cir. 2007) ("[W]e hold that to constitute an ADA impairment, a person's obesity, even morbid obesity, must be the result of a physiological condition.")); *Francis v. City of Meriden*, 129 F.3d 281, 286 (2d Cir. 1997) ("[O]besity, except in special cases where the obesity relates to a physiological disorder, is not 'physical impairment' within the meaning of the [ADA] statutes."). However, as the court in *Lowe v. American Eurocopter, L.L.C.*, No. 1:10CV24-A-D, 2010 WL 5232523 (N.D. Miss. Dec. 16, 2010), recognized, these cases were all decided before the amendments to the ADA took effect. In its final regulations interpreting the ADAAA, the EEOC defined impairment as (1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or (2) any mental or psychological disorder, such as an intellectual disability (formerly termed "mental retardation"), organic brain syndrome, emotional or mental illness, and specific learning disabilities. 29 C.F.R. § 1630.2 (2011). Obesity qualifies under that definition.

i. Under *Chevron*, this Court defers to the definition of impairment promulgated by the Equal Employment Opportunity Commission.

Congress delegated the administration of the relevant provisions of the ADAAA to the Equal Employment Opportunity Commission. *See* 42 U.S.C. § 12205a (2008). Whether deference is given to its interpretation that obesity is an impairment is resolved by employing the two-step analysis articulated in *Chevron*. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). The first step under *Chevron* requires this Court to determine "whether Congress has directly spoken to the precise question at issue." *Id.* If Congress has not, then under *Chevron*'s second step, deference is only given to the agency's interpretation if the interpretation is based on a "permissible construction of the statute." *Id.* at 843. According to this Court, an agency's interpretation need only be *reasonable* to be a "permissible construction of the statute." *Id.* at 844 ("a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency").

Congress left a gap in the ADAAA. Congress neither defined what constitutes an impairment nor provided a provision that clearly or categorically excludes obesity from its scope. Therefore, under step one of *Chevron*, Congress has not directly spoken to the precise question at issue. Under step two, the definition of impairment provided by the EEOC is only entitled to deference if it is reasonable. An agency's interpretation is reasonable when it is consistent with the statute's plain language. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). Because the EEOC's conclusion that morbid obesity is a disability under the ADAAA is supported by the federal regulations, the definition is reasonable and consistent with the ADAAA's plain language. Therefore, this interpretation of impairment is entitled to deference.

ii. The ADAAA does not require disabilities to have a physiological basis.

Historically, courts interpreting the term impairment have often required a physiological basis for the impairment to qualify it as a disability under the pre-amendment ADA. *See, e.g.*, *Watkins Motor Lines*, 463 F.3d at 440–43 ("[W]e hold that to constitute an ADA impairment, a person's obesity, even morbid obesity, must be the result of a physiological condition."). However, nothing in the plain language supports this position. In fact, the EEOC has expressed the irrelevance of a physiological basis for finding of disability, specifically within the context of obesity.

However, the EEOC has stated that the definition of impairment does not include physical characteristics, including eye color, hair color, left-handedness, height, or weight that is within a "normal range" and is not the result of a physiological disorder. 29 C.F.R. § 1630.2(h). Yet, this general proposition does not apply to those who are morbidly obese. In the ADA compliance manual, the EEOC states that "being overweight, in and of itself, is not generally an impairment . . . . On the other hand, severe obesity, which has been defined as body weight more than 100-percent over the norm, is clearly an impairment." EEOC Compliance Guidelines § 902.2(c)(5), *available at* http://www.eeoc.gov/policy/docs/902cm.html. In other words, if an individual's weight is outside the normal range, there is no physiological requirement. *EEOC v. Res. for Human Dev., Inc.*, No. 10-3322, 2011 WL 6091560, at *4 (E.D. La. Dec. 7, 2011); 29 C.F.R. § 1630.2(h).

iii. The ADAAA does not mandate that impairments must be involuntary.

The Employer's contention that obesity, morbid or otherwise, is not a disability under the ADAAA rests partly on pre-amendment ADA case law establishing that obesity was not a

disability, except in "rare circumstances" where the obesity was a result of a physiological disorder. *See, e.g.*, *Marsh v. Sunoco, Inc.*, No. 06-CV-2856, 2006 U.S. Dist. LEXIS 88887 (E.D. Pa. Dec. 6, 2006) (finding that Plaintiff's weight—unless it is the result of a physiological disorder—would not bring him under the protection of the ADA). Implicit in this contention is that obesity is not an impairment if caused, or at least exacerbated, by voluntary conduct. However, this suggestion is contrary to the ADAAA's plain language. The statutory text makes no reference to the impairment's cause or nature. Instead, the EEOC Compliance Manual specifically provides that "[t]he cause of a condition has no effect on whether that condition is an impairment." EEOC Compliance Guidelines, *supra,* § 902.2(e). Similarly, voluntariness is also irrelevant when determining if a condition is or is not an impairment. *Res. for Human Dev.*, 2011 WL 6091560, at *4. "To require establishment of the underlying cause of the impairment in a morbid obesity [case], but not in any other disability cases, would epitomize the very prejudices and stereotypes which the ADA was passed to address." [1] *Id.* (citing 42 U.S.C. § 12101).

b. Costanza has pled sufficient facts that her obesity substantially limits a major life activity.

Under the ADAAA's definition of disability, it is not enough to simply have an impairment. The impairment must "substantially limit one or more major life activities." 42 U.S.C. § 12102(1). Costanza's complaint satisfies this burden.

[1] In fact, even the pre-amendment ADA applied to numerous conditions that may be caused or exacerbated by voluntary conduct such as voluntary conduct such as alcoholism, AIDS, diabetes, cancer from smoking and heart disease resulting from excesses of various types. *Cook v. R.I. Dept. of Mental Retardation & Hosp.*, 10 F.3d 17, 24 (1st Cir. 1993).

i. Obesity affects many major life activities.

Rather than define major life activities, Congress provided a non-exhaustive list of activities that qualify as major life activities. 42 U.S.C. § 12102(2)(A). Additionally, Congress provided that the major life activities include the operation of a major bodily function and provided a non-exhaustive list of bodily systems and functions. 42 U.S.C. § 12102(2)(B).

In her original complaint, Costanza asserted that her obesity affects the major life activities of walking, standing, lifting, bending, and breathing. R. at 8. Without exception, each one of these activities is listed as a major life activity under the definition of disability in the ADAAA. *See* 42 U.S.C. § 12102(2)(A). Further, obesity can affect multiple bodily systems. Specifically, obesity can affect the respiratory system, which is one function specifically listed under the definition of disability in the ADAAA. *See* 42 U.S.C. § 12102(2)(B). Therefore, Costanza has alleged sufficient facts that if taken as true, would establish that obesity affects major life activities as described under the ADAAA.

ii. The "substantially limits" standard is intentionally broad.

To qualify as a disability under the ADAAA, the impairment must "substantially limit" one or more major life activities. 42 U.S.C. § 12102(1)(A). Before Congress amended the ADA in 2008, courts construed the Act strictly, finding that an individual was "substantially limited" only if she had "an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 185 (2002).

Although the 2008 amendments to the ADA do not provide a definition of the term substantially limits, the statute's plain language explains that "[t]he term 'substantially limits' shall be interpreted consistently with the findings and purposes of the [ADAAA]." 42 U.S.C.

§ 12102(4)(B). With the passage of the amendments, Congress explicitly rejected *Toyota* and *Sutton*, thereby demanding a less restrictive definition. *Fleck v. Wilmac Corp.*, No. 10-05562, 2011 WL 1899198 (E.D. Pa. May 19, 2011). The plain language shows that the statute is meant to cover as many people as possible. *See* 42 U.S.C. § 12102(4)(A) ("[T]he definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.").

As a result of some of the tasks that her position required, Costanza experienced discomfort in her knees and in her back. R. at 3. The position of warehouse person requires frequent walking, which Costanza's physical size makes difficult. Due to the ADAAA's broadening of the term "substantially limits," Costanza pled sufficient facts to survive a motion to dismiss, showing that her obesity substantially limited the major life activities of walking, standing, lifting, bending, and breathing.

2. The employer regarded Costanza as disabled.

Separate and apart from proving an "actual disability," an employee is considered disabled under the ADAAA if she is "regarded as having such an impairment." 42 U.S.C. § 12102(1)(C). This prong recognizes that "societies' accumulated myths and fears about disability and diseases are as handicapping as the physical limitations that flow from actual impairment." *EEOC v. Tex. Bus Lines*, 923 F. Supp. 965, 975 (S.D. Tex. 1996). Under this standard, an employee is regarded as disabled if she establishes that "she has been subjected to an action prohibited under this Act because of an actual or *perceived* physical or mental impairment "whether or not the impairment limits or is perceived to limit a major life activity." 42 U.S.C. § 12102(3)(A) (emphasis added).

Accordingly, the court of appeals properly recognized that Costanza might be considered disabled under the ADAAA if her employer perceived her weight as an impairment. *See Lowe*, 2010 WL 5232523, at *8 (holding that the plaintiff had pled enough facts to allege she qualified as "disabled" within the meaning of the ADAAA). The record supports the court's finding that Costanza's employer did, in fact, perceive her weight as an impairment. In an effort to ameliorate her back and knee pain, Costanza informed her supervisor, Jerry Kramer, of the pain and requested permission to use a forklift more often. R. at 3. In denying this request, Kramer stated that the forklift was only for employees who "actually needed the forklift, not for lazy people who like to make things more difficult for everyone, especially themselves." R. at 3. Implicit in this statement was Kramer's belief that Costanza was experiencing pain and needed a forklift because she is obese.

This straightforward analysis is all that the plain language contemplates. *See Cook v. R.I. Dep't of Mental Health, Retardation & Hosps.*, 10 F.3d 17 (1st Cir. 1993) (holding that plaintiff had been "regarded as disabled and impaired" upon a showing that the defendant treated plaintiff's obesity as if it actually affected her musculoskeletal and cardiovascular systems); *Melson v. Chetofield*, No. 08-3683, 2009 WL 537457 (E.D. La. Mar. 4, 2009) (finding that plaintiff pled sufficient facts showing that her obesity was a disabling impairment to overcome a motion to dismiss); *see also Tex. Bus Lines*, 923 F. Supp. at 979 (holding that whether or not obesity met the ADA's definition of impairment, the claimant was disabled based on the defendant's perception deriving from myths, fear or stereotypes). Indeed, the Employer's contention that obesity cannot be considered a disability is simply not true.

B. The ADAAA's Legislative History Supports a Finding That Congress Did Not Intend to Categorically Exclude Obese Employees from Coverage Under the ADAAA.

Because obesity can be a disability under the ADAAA's plain language, this Court's inquiry into the meaning of the statutory text should go no further. *See BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004). However, this Court may look to legislative history to resolve any remaining ambiguity in the ADAAA statutory language. *See id.* Even a cursory glance at the ADAAA's legislative history indicates that Congress intended broad coverage of workplace discrimination, not to categorically preclude obesity as a disability under the ADAAA.

1. In 1990, Congress created the ADA to provide broad coverage to employees with disabilities.

Congress enacted the Americans with Disabilities Act against the backdrop of our nation's other civil rights laws and the Fourteenth Amendment's Equal Protection Clause. *See Tennessee v. Lane*, 541 U.S. 509 (2004); U.S. Const. amend. XIV, § 1. Congress designed the ADA to extend to disabled individuals the same protection against discrimination provided by existing law to racial minorities and women. *See* 42 U.S.C. § 12101(a)(4) ("[U]nlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination."). In fact, on the day President George H.W. Bush signed the Act into law, he remarked, "The Civil Rights Act of '64 took a bold step . . . [b]ut the stark fact remained that people with disabilities were still victims of segregation and discrimination, and this was intolerable. Today's legislation brings us closer to that day when no Americans will ever again be deprived of their basic guarantee of life, liberty, and the pursuit of happiness." Office of the Press Secretary, The White House, *Remarks by the President During Ceremony for the Signing of the Americans with Disabilities Act of 1990*, *in* National Foundation

for the Study of Employment Policy, *Legislative History of the Americans with Disabilities Act* 844, 845 (1990).

Of primary importance to members of Congress was the need to integrate Americans with disabilities into the mainstream of society to the fullest extent possible. *See, e.g.*, 134 Cong. Rec. S5106–08 (daily ed. Apr. 28, 1988) (statement of Sen. Weicker, explaining bill's purpose as providing protections that parallel those afforded against discrimination on the basis of race, sex, religion and national origin); 135 Cong. Rec. E2812–13 (daily ed. Aug. 3, 1989) (statement of Rep. Owens, comparing disability movement to the African-American civil rights struggles); 136 Cong. Rec. H2421, H2428 (daily ed. May 17, 1990) (statement of Rep. Bartlett, noting that ADA provides same protection available to others on the basis of race, sex, national origin and age). In essence, the ADA was originally intended to provide "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). The ADA's provisions were meant to combat deep-rooted and widely held feelings of irrational prejudice against, fear of, and ignorance about persons with disabilities. Obese individuals face exactly this type of prejudice.

2. In 2008, Congress amended the ADA to restore the original intent that the ADA existed to provide broad coverage to individuals with disabilities.

Though the ADA was originally intended to provide broad coverage, Congress recognized that courts were interpreting the definition of disability too narrowly. Pub. L. No. 110-325, § 2. In effect, rather than reaching the merits of individual claims, as a threshold matter, courts found that the plaintiffs were not "disabled" under the ADA. *See* 42 U.S.C. § 12101(a)(2), (8), App. 36, at 2. In turn, Congress adopted the ADAAA to quell the Court's misinterpretation of the

statute and reaffirm its commitment to provide broad coverage to protect disabled individuals from discrimination. Pub. L. No. 110-325, § 2.

With the ADAAA's passage, Congress explicitly overruled the standard used by two cases that eliminated protection for many individuals whom Congress intended to protect. Pub. L. No. 110-325, § 2(a)(4) (overruling *Sutton*, 527 U.S. 471, and *Toyota*, 534 U.S. 184). These cases failed to meet Congress's expectation that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973.[2] *Id.* For that reason, a primary goal of the ADAAA was to signal a shift away from the restrictive definition of disability adopted by the courts. *Id.*

The 2008 Amendments similarly reflected Congress' intention that courts analyze an employer's action as opposed to the employee's condition. As Senator Reid pointedly stated, "[t]hanks to the newly enacted amendments, the ADA's focus can return to where it should be—the question of whether the discrimination occurred, not whether the person with a disability is eligible in the first place." 154 Cong. Rec. S9626-01 (daily ed. Sept. 26, 2008). As Congress saw it, "the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." Pub. L. No. 110-325, § 2(a)(5).

Even so, Congress' intent is best illustrated in its view on coverage under the "regarded as" prong. Indeed, the EEOC stated, "[C]overage under the 'regarded as' prong . . . should not be difficult to establish." *See* H.R. Rep. No. 101-485, pt. 3, at 17 (1990), *reprinted in* 1990

[2] The ADA and the Rehabilitation Act cover different employers, but the definition used to analyze their coverage was once identical. H.R. Rep. No. 101-485, pt. 2, at 23 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 332 ("The ADA incorporates many of the standards of discrimination set out in regulations implementing section 504 of the Rehabilitation Act of 1973 . . . .").

U.S.C.C.A.N. 445, 468 (noting that Congress never expected or intended it would be a difficult standard to meet).[3] Instead, Congress sought to prohibit discrimination stemming from misguided perceptions of disabilities—oftentimes finding their basis in "unfounded concerns, mistaken beliefs, fears, myths, or prejudice." ADAAA § 2(b)(5), App. 36, at 20. Of significant importance to the facts of this case is a Senate Committee Report summarizing the purpose behind this prong: "[a] person who is excluded from any activity covered under this Act or is otherwise discriminated against because of a covered entity's negative attitudes toward disability is being treated as having a disability which affects a major life activity." Christopher J. Kuczynski, *Statement at Meeting on Proposed Rulemaking Implementing the ADA Amendments Act of 2008* (June 17, 2009), *available at* http://www.eeoc.gov/eeoc/meetings/6-17-09/kuczynski.cfm. Thus, the legislative history is convincing evidence that Congress did not intend to categorically exclude obese individuals from the ADA's protections against discrimination. Likewise, the Employer's assertion that obesity cannot be considered a disability is misplaced.

C. A Categorical Refusal to Extend the ADA's Protections to Obese Individuals Undermines Significant Public Policy Considerations.

Congress never intended to place an unqualified ban on obese individuals receiving the protections afforded by the ADA. However, any lingering doubt should be resolved in favor of a meaning most consistent with public policy. As one commentator recognized,

> Public policy retains a place of great importance in the process of statutory interpretation[.] [C]ourts favor an interpretation . . . consistent with public policy. In fact . . . all the interpretative rules in regard to strict and liberal interpretation are founded upon public policy in one form or another . . . . [I]t serves as a tremendous influence in the formation, interpretation, and application of legal principles.

[3] To illustrate, Congress noted that if an employer believes a disfigured employee will generate negative reactions from customers or employees, the individual is regarded as having a disability. 42 U.S.C. § 12102(2); H.R. Rep. No 101-485, pt. 3, at 30. Obesity is no different—often generating the same negative reactions. *Id.* at 29–31.

Earl Crawford, *The Construction of Statutes* 374 (1940). The Employer's assertion that Costanza's weight can never be considered a disability conflicts with this fundamental principle.

1. Finding that obesity is a disability is consistent with **Congress' larger** goal of combating demoralizing stereotypes.

Malicious and unfounded opinions can threaten a person's psychological well-being and economic livelihood. *See* M. Neil Browne et al., *Obesity as a Protected Category: The Complexity of Personal Responsibility for Physical Attributes*, 14 Mich. St. U. J. Med. & L. 1 (2010). Workplace discrimination against obese people is fundamentally unfair as many obese individuals can do nothing about their size. *See* Elizabeth Kristen, *Addressing the Problem of Weight Discrimination in Employment*, 90 Cal. L. Rev. 57, 69–70 (2002). A double stigma attaches to obesity—the stigma of associated with appearance and the stigma that obesity is caused by a moral failure. Jane Korn, *Too Fat*, 17 Va. J. Soc. Pol'y & L. 209, 221. These judgments frequently lead to adverse decisions in the employment context, even though obese individuals may be just as, if not more qualified, than their skinnier colleagues. *Id.* at 225. These adverse decisions are made on the basis of ill-founded assumptions and biases. *See id.* at 222 ("many believe that gluttony and sloth are the cause of obesity"). Thus, public policy dictates that obesity may be a disability under the ADAAA.

2. Weight discrimination in the workplace is a prevalent, pervasive problem.

Congressional antidiscrimination legislation established a statutory framework for protecting certain classifications of employees or job applicants from employment discrimination. One reason for extending statutory protection to groups such as older workers and disabled workers was the substantial and growing size of the affected class. Karol V. Mason, *Employment Discrimination Against the Overweight*, 15 U. Mich. J.L. Reform 337, 343

(1982). This rationale is certainly applicable to the class of obese individuals. Weight discrimination in employment has become pervasive; more people suffer from weight discrimination than from racial discrimination. *Id.* at 344. Prevalent afflictions such as this, which affect many individuals. However, Congress need not pass any new legislation to address the problem. The ADAAA already does so.

3. Society has an interest in preventing employment discrimination against obese individuals.

Weight-based discrimination hurts the economy and society as a whole. If obese individuals are arbitrarily or unnecessarily denied the opportunity to work, they are less likely than wealthier individuals to have the resources necessary to support themselves. Mason, *supra*, at 346. This, in turn, forces these individuals to look to public assistance or charity for support. For that reason, qualifying obesity as a disability under the ADAAA's protection would lighten the financial burden caused by weight discrimination. *Id.*

Additionally, allowing weight discrimination to continue unabated would create a "vicious cycle" in which obese people are unable to secure unemployment, discouraged because of it, and as a result become less objectively employable. Kristen, *supra*, at 71. Ultimately, society loses as a result of this cycle because it suffers the loss of potential contributions that obese individuals would make through their jobs. Mason, *supra*, at 347. Society would be deprived of expertise obese individuals developed through their education and other background that could positively affect the communities in which they live and work.

II. THE CLASS ACTION WAIVER IN THE COLLECTIVE BARGAINING AGREEMENT IS UNENFORCEABLE BECAUSE IT COMPROMISES UNION MEMBERS' FEDERAL STATUTORY RIGHTS BY REQUIRING INDIVIDUAL ARBITRATION OF WORKPLACE DISCRIMINATION CLAIMS.

Section 2 of the Federal Arbitration Act ("FAA") makes agreements to arbitrate "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. Because of the fundamental principle that arbitration is a matter of contract, courts must place arbitration agreements on an equal footing with other contracts and enforce them according to their terms. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). Thus, similar to contracts, arbitration agreements which conflict with the underlying purposes of a federal statute will not be enforced. *See Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20 (1991).

The arbitration agreement circumvents Costanza's ability to seek vindication for statutory rights to proper compensation and, if enforced, gives all large employers a free pass to heedlessly ignore the very antidiscrimination laws that exist to protect employees. "By preventing a failure of justice in our judicial system the class action not only benefits the individual litigant but serves the public interest in the enforcement of legal rights and statutory sanctions." *Bell v. Farmers Ins. Exch.*, 9 Cal. Rptr. 3d 544, 566 (Ct. App. 2004). For that reason, the class action waiver in this case should be found unenforceable.

A. Enforcing the Class-Action Waiver Leaves Plaintiffs with No Effective Way to Vindicate Their Statutory Rights.

Admittedly, federal policy favors arbitration as an alternative means of dispute resolution. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). However, this Court has made clear that arbitration agreements involving statutory rights, unlike common law rights, are only enforceable if the arbitral forum provides an effective vehicle for vindicating the

statutory rights at issue. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985). A contractual clause barring class arbitration is not automatically enforceable. *In re Am. Express Merchs.' Litig.*, 634 F.3d 187, 193 (2d Cir. 2011). Rather, the focus is on whether the "class action waiver is enforceable when it would effectively strip plaintiffs of their ability to prosecute alleged [antidiscrimination] violations." *Id.* at 194. Otherwise, the statute's "remedial and deterrent function" would be circumvented, and the arbitral forum would "lose[] its claim as a valid alternative to traditional litigation." *Kristian v. Comcast Corp.*, 446 F.3d 25, 37 (1st Cir. 2006). Members of this Court have consistently expressed their desire to avoid such a result—"were we persuaded that the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies . . . we would have little hesitation in condemning the agreement as against public policy." *Vimer Seguros y Reaseguros v. M/V Sky Reefer*, 515 U.S. 528, 540–41 (1995).

1. Individual arbitration would have prohibitive costs.

As lower wage earners, employees like Costanza are not likely to have the financial resources to independently pursue individual actions. Indeed, class actions are the only rational alternative when a large group of individuals has suffered an alleged wrong, but the damages due to any single individual are too small to justify bring an individual action. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974). "[C]lass actions are designed in large part to [provide that incentive to] plaintiffs when the economic benefit would otherwise be too small.". *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 549 F.3d 137, 144 (2d Cir. 2008). As a result, this Court has stated if "large arbitration costs" preclude a litigant from effectively vindicating her statutory rights in the arbitral forum, the arbitral agreement at issue may be held unenforceable. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000).

At its core, eliminating the class action process in this case belies the "remedial and deterrent function" of the ADAAA and removes any incentive for employers to discontinue the conduct that gave rise to this litigation in the first place. By ignoring the core policy of the class action mechanism, the unfortunate but realistic alternative is not too many individual suits, but zero individual suits. *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004); *Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir. 2007) ("Corporations should not be permitted to use class action waivers as a means to exculpate themselves from liability for small value claims.").

a. The cost of pursuing an employment discrimination claim in individual arbitration far exceeds any potential recovery.

The notion of protecting individual rights though class actions is not foreign to this Court. "Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980).

"Cost-splitting provisions, where each party to an arbitration is required to pay one-half of the costs, often force claimants to incur prohibitive costs. *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 655 (6th Cir. 2003). Article VI of the arbitration agreement between Employer and Employees contains such a provision.[4]

[4] Article VI of the collective bargaining agreement establishes the procedures for arbitration and post arbitration judicial review. As part of this provision, the agreement specifically states, "The parties will share equally the costs of arbitration." R. at 4.

The Sixth Circuit Court of Appeals in *Morrison* adopted a revised case-by-case approach,[5] which looks to the possible "chilling effect" of the cost-splitting provision on similarly situated potential litigants, as opposed to its effect merely on the actual plaintiff in any given case. *Id.* at 663. This approach reflects the concern that cost-splitting provisions undermine the deterrent effect of the anti-discrimination statutes. *Id.* ("[I]f the reviewing court finds that the cost-splitting provision would deter a substantial number of similarly situated potential litigants, it should refuse to enforce the cost-splitting provision in order to serve the underlying functions of the federal statute.").

To determine whether a cost-splitting provision gives rise to prohibitive expense, a court should take into account the cost of initiating the action, without respect to possible success on the merits. *Id.* at 664. With respect to Costanza, although a $2,000 cost to pay the arbitrator may not appear prohibitive, this cost would most likely preclude her and other similarly situated plaintiffs from bringing their claims. As a warehouse worker, Costanza is paid approximately $14.00 an hour. R. at 29, appendix "A." Recently terminated, Costanza must continue to pay for housing, utilities, transportation, food, and other expenses despite losing her only source of income. In light of these considerations, $2,000 is a hefty financial burden for Costanza to bear. Thus, the default cost-splitting provision would deter a substantial amount of potential litigants

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[5] *Morrison* based its approach on one used by the Fourth Circuit Court of Appeals. In *Bradford v. Rockwell Semiconductor Systems, Inc.*, 238 F.3d 549, 556 (4th Cir. 2001), the Fourth Circuit Court of Appeals set forth the following test to determine whether a cost-splitting provision in an arbitration agreement is invalid:

> [T]he appropriate inquiry is one that evaluates whether the arbitral forum in a particular case is an adequate and accessible substitute to litigation, i.e., a case-by-case analysis that focuses, among other things, upon the claimant's ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether the cost differential is so substantial as to deter the bringing of claims. . . . [T]he proper inquiry under *Gilmer* is not where the money goes but rather the amount of money that ultimately will be paid by the claimant.

from bringing their claims in the arbitral forum. *See id.* at 669–70. ("[F]aced with this choice [to pay $1,622]—which really boils down to risking one's scarce resources in the hopes of an uncertain benefit—it appears to us that a substantial number of similarly situated persons would be deterred from seeking to vindicate their statutory rights under these circumstances.").

b. A requirement of individual arbitration of employment discrimination claims would make it difficult for employees with workplace discrimination claims to find counsel.

Even if an individual were willing to incur the costs of individual arbitration, that person would likely not be able to find it. *See Eisen,* 417 U.S. at 161 (emphasis added.) ("Economic reality dictates that petitioner's suit proceed as a class action or not at all.") Legal representation will be near-impossible to obtain in cases where costs far exceed expected recovery. *Id.* Common sense dictates that it is impractical for a lawyer to advance thousands of dollars in fees or costs to collect a mere fraction of that amount.

Even the prospect of recovering attorney's fees would not increase the attractiveness of these claims. Under the ADAAA, a court or agency "may" fashion relief in the form of attorney's fees. 42 U.S.C. § 12205. However, as this is a discretion remedy, it can hardly be relied upon to induce attorneys to take on small claims. *Id.*

c. Plaintiffs have met their burden to show that prohibitive costs are not "speculative."

This Court in *Randolph* expressed its concern with invalidating arbitration clauses on the basis of "speculative" cost estimates. 531 U.S. at 91. Large arbitration costs preclude a litigant from effectively vindicating her federal statutory rights in the arbitral forum when a particular arbitration clause is "likely" to cause her to incur prohibitive costs, or otherwise precludes her from effectively vindicating federal rights. *See id.* at 92 ("We believe that where, as here, a party

seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs).

The court of appeals erred in finding that the information provided by Costanza is too speculative to justify the invalidation of the arbitration agreement. The figures are anything but speculative. Costanza cited costs of the arbitration under the Labor Rules of the American Arbitration Association ("AAA"). R. at 14. These costs include a $225 filing fee to the AAA, half of an arbitrator's fees averaging $4,000 per case and attorney's fees in the range of $15,000 to $25,000. R. at 14–15. Although these figures are not exact, they are sufficient to show that the risk of incurring prohibitive costs is not speculative. *See Morrison*, 317 F.3d at 664 ("In addressing the effect of arbitration costs on a class, the reviewing court should look to average or typical arbitration costs, because that is the kind of information that potential litigants will take into account in deciding whether to bring their claims in the arbitral forum.").

The lower court accepted these figures as fact findings. As such, the court of appeals erred by not affording appropriate deference. The court of appeals did not review these figures for clear error. Instead, the court of appeals indulged in a whimsical invalidation of the lower court's findings. For that reason, Costanza has met her burden to show that the arbitration agreement is likely to cause prohibitive costs.

2. The class action waiver bars employees' pattern or practice discrimination claims which cannot be brought in an individual capacity.

In the original filing to the district court, Costanza did not file an individual discrimination claim, but rather a class action in which she alleged a pattern and practice of unlawful discrimination based on disability in violation of the ADA. R. at 5. The class action mechanism is particularly necessary for resolving pattern or practice claims of discrimination. *See Amchem*

Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997) ("Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of when class actions are appropriate.); 1 Barbara Lindemann & Paul Grossman, *Employment Discrimination Law* 44 n.168 (3d ed. 1994) ("Pattern-or-practice suits, by their very nature, involve claims of class wide discrimination."). In fact, several federal courts have held that individuals cannot bring pattern or practice claims except in a class action. *See, e.g.*, *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 968–69 (11th Cir. 2008) (noting the potential res judicata and collateral estoppel issues that would arise if the law permitted an individual to prosecute a pattern or practice claim without formally representing all similarly-situated employees).[6] The class waiver in the CBA is directly contrary to this statutory principle. It therefore prevents the vindication of a statutory right and is unenforceable. *Gilmer*, 500 U.S. at 26 (prohibiting enforcement of arbitration clauses which create an inherent conflict between arbitration and statutory purposes).

B. The Court of Appeals' Reliance on *Concepcion* Does Not Support a Holding Contrary to the Vindication of Unwaivable Statutory Rights Doctrine.

The power to vindicate statutory rights requires that the class action waiver here be held unenforceable. However, the court of appeals largely ignored this principle. The court instead relied on this Court's decision in *Concepcion* to conclude that a class action waiver in a *mandatory* arbitration clause is enforceable. This was error.

[6] The inability to bring a class action claim as an individual is also significant because the difference between the showings required for individual and pattern or practice discrimination claims is substantive. *Chen-Oster v. Goldman, Sachs & Co.*, 785 F. Supp. 2d 394, 409 (S.D.N.Y. 2011). Because plaintiffs in pattern or practice cases may rely entirely on statistical data to prove their case, the class action waiver prevents plaintiffs from introducing key evidence and theories of liability. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 360 (1977).

1. *Concepcion* did not involve an individual's ability to vindicate federally protected statutory rights.

The crux of the courts of appeals' holding was grounded on the notion that the arbitration agreement in Article XX contains a class action waiver and is therefore enforceable under the FAA. *See AT&T Mobility, L.L.C. v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) (emphasizing that federal policy favors arbitration agreements and that "[t]he overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms . . . ."). In the court of appeals' view, this Court's decision in *Concepcion* suggests the class action waiver in Article XX is enforceable. R. at 24. Yet, *Conception* was legally and factually different from this case. *Concepcion*, which overruled only the categorical *Discover Bank* rule applicable to *consumer contracts*, involved a conflict between the FAA and state law, which is governed by the Supremacy Clause.[7] *Concepcion*, 131 S. Ct. at 1751–53 (recognizing that a claim that a class-action waiver in a consumer arbitration agreement was unconscionable under state law was preempted by FAA); *see* U.S. Const. art. VI, cl. 2.

Unlike *Concepcion*, this case is based neither on consumer law nor state unconscionability principles, but rather on the "vindication of unwaivable statutory rights" doctrine, which has its provenance not in state law but federal common law. *See, e.g.*, *Mitsubishi Motors*, 473 U.S. 614; *Gilmer*, 500 U.S. 20; *Davis v. O'Melveny & Myers*, 485 F.3d 1066 (9th Cir. 2007). To be sure, *Concepcion* did not address the impact of a class action waiver where, as here, it has had the effect of waiving the ability to vindicate unwaivable statutory rights. *See* 131 S. Ct. at 1747 ("[W]hen *state law* prohibits outright the arbitration of a particular type of claim, . . . [t]he

[7] In *Discover Bank*, the California Supreme Court held that class waivers in consumer arbitration agreements are *per se* unconscionable if the agreement is in an adhesion contract, disputes between the parties are likely to involve small amounts of damages, and the party with inferior bargaining power alleges a deliberate scheme to defraud. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005).

conflicting rule is displaced by the FAA.") (emphasis added).[8] *Concepcion* did not discuss, much less disturb, the "vindication of unwaivable statutory rights" doctrine. Had it done so, it would have had to confront and overrule a long line of its own precedent. That *Concepcion* did not do so speaks to the limitations of its holding. *See Shalala v. Ill. Council on Long Term Care*, 529 U.S. 1, 18 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*.").

2. Allowing class-wide arbitration here does not implicate the FAA concerns articulated in *Concepcion*.

The court of appeals improperly injected *Concepcion*'s reluctance to permit group arbitration in the *consumer* context, to an employment discrimination case. Justice Scalia, writing for the majority in *Concepcion*, expressed his concern that group arbitration did not further the FAA's goal of efficiency. *Id.* at 1749. ("A prime objective of an agreement to arbitrate is to achieve streamlined proceedings and expeditious results"). Specifically, Justice Scalia condemned group arbitration as sacrificing some of individual arbitration's most appealing features: comparatively quick proceedings, low cost, informality and lower risk to defendants. *Id.* at 1750. As this Court recognized, these concerns are specific to contracts of

[8] Although *Concepcion* did not face the issue of vindicating *statutory* rights, it did uphold the principle that arbitration agreements will be enforced so long as the individual may properly vindicate the claim. 131 S. Ct. at 1753 (holding that a state court may not require class arbitration, as long as the defendant's arbitration procedures "virtually guarantee" to make the claimants whole). In fact, this Court essentially found the terms of the arbitration agreement at issue in *Concepcion* were much more favorable to the individual and in fact provided incentives for individuals to prosecute their claims. 131 S. Ct. at 1753 (noting that the claim there was "most unlikely to go unresolved" and acknowledging the generous arbitration agreement providing for double attorneys' fees and a $7,500 premium if the arbitrator awarded more than the defendant's last offer). Under the terms of the agreement, the plaintiffs were *better off* than they would have been as participants in a class action. *Id.* No such provisions exist in the arbitration agreement at issue here.

adhesion in the retail and service industries because claims arising from these types of contracts might cover "tens of thousands of potential claimants." *Id.* at 1752.

This rationale does not extend to agreements between employers and their employees. Most class-wide employment litigation, like the case at issue here, involves only a specific subset of an employer's employees. *In re D.R. Horton, Inc.*, 357 N.L.R.B. No. 184, at 15 (2012). Thus, group arbitration in the employment context is consistent with the underlying purposes of the FAA. *See id.* ("A class-wide arbitration is thus far less cumbersome and more akin to an individual arbitration proceeding along each of the dimensions considered by the Court in [*Concepcion*]—speed, cost, informality, and risk—when the class is so limited in size."). The court of appeals improperly extended the holding of *Concepcion* beyond the scope of its narrow facts. *Concepcion* does not foreclose the issue before the Court.

C. The Arbitration Agreement's Class Action Waiver Violates Employees' Rights to Concerted Activity Under the National Labor Relations Act.

The practical effect of the arbitration agreement is that the employment discrimination claim cannot be brought as a class, neither in a judicial nor in an arbitral forum. This undercuts the purpose of the NLRA, which vests employees with a substantive right to engage in concerted activity. 29 U.S.C. § 157 (2006). Section 7 of the NLRA provides, in part, that "employees shall have the right to . . . engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." *Id.* Likewise, it is unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the[se] rights . . . ." 29 U.S.C. § 158(a)(1) (2006). Indeed, by enacting Section 7 of the NLRA, Congress sought to equalize the bargaining power of the employee with that of his employer by providing a way for employees to band together in confronting an employer regarding the terms and conditions of their employment. *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 834–35 (1984). The outright

prohibition of class action in any forum contravenes Congress' efforts and is directly violative of the substantive rights granted by the NLRA. *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350 (1940). ("Obviously, employers cannot set at naught the [NLRA] by inducing their [employees] to agree not to demand performance of the duties which it imposes.").

1. A class action seeking remedy for antidiscrimination claims is a concerted activity for mutual aid and protection.

The NLRB has determined, and this Court has agreed, that class actions constitute concerted activity under the NLRA. *See, e.g.*, *Horton*, 357 N.L.R.B. No. 184, at 3 ("[E]mployees who join together to bring employment-related claims on a classwide or collective basis in court or before an arbitrator are exercising rights protected by Section 7 of the NLRA."); *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978) (recognizing that pursuing legal remedies in court is a form of protected concerted activity). The Employer discharged all thirty-one employees who signed the petition demanding more frequent use of a forklift. R. at 4. As individuals with shared circumstances, the discharged employees filed a class action in the Wagner District Court to redress their collective grievance. R. at 5. As this Court has recognized, when the grievance is pursued under a collectively-bargained grievance-arbitration procedure, "[n]o one doubts that the processing of [that] grievance . . . is concerted activity within the meaning of Section 7." *City Disposal Sys.*, 465 U.S. at 836. The class action waiver in this case is directly targeted at the concerted activity of employees who engage in mutual aid of their fellow employee class members and as such, a waiver violates the public policies embodied in the NLRA. *See Eastex*, 437 U.S. at 560.

2. The Union lacks the authority to waive all NLRA Section 7 rights.

In the collective bargaining process, unions may waive some Section 7 rights in the pursuit of industrial peace. *See Fournelle v. NLRB*, 670 F.2d 331, 335 (D.C. Cir. 1982). For example, a

union may waive the right to strike in exchange for concessions from the employer. *See, e.g.*, *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280 (1956). The interests of the union and the employees in the economic arena normally coincide, and "it can fairly be assumed that employee rights will not be surrendered except in return for bargained-for concessions from the employer of benefit to employees." *NLRB v. Mid-States Metal Producers, Inc.*, 403 F.2d 702, 705 (5th Cir. 1968).

The theory underlying the waiver of economic rights is not applicable to all Section 7 rights, however. Allowing a union to waive its members' right to collective legal action would be contrary to the entire collective bargaining process. It cannot be assumed that the Union bargained away its members' right to collective legal action. This right stands in stark contrast with other rights such as wages and hours for which the union gained concessions from the Employer. Nonetheless, even if the Union secured some bona fide employee benefits — though no evidence suggests it has — it is unlikely that those benefits could adequately compensate for the impairment of employee rights that would result from the ban.

Although this Court in *Pyett* noted that agreements to arbitrate were in the permissible scope of a union's authority pursuant to collective bargaining agreements, the holding from that case cannot be read as broadly as the court of appeals suggests. There, the arbitration agreement did not include a class action waiver. *See 14 Penn Plaza, L.L.C. v. Pyett*, 556 U.S. 247 (2009). In fact, the Court did not address the issue of mandatory *individual* arbitration. Because the availability of class arbitration was not foreclosed, the NLRA was not implicated. Thus, *Pyett* does not foreclose the NLRA's applicability to bar union waivers of class proceeding.[9]

[9] The court of appeals also compelled individual arbitration because it concluded that Article XX clearly and unmistakably waives the employees' right to group arbitration. R. at 25. However, the clear and unmistakable standard relied upon by the court of appeals only extends to the

3. The NLRA and the FAA do not conflict in this case.

If capable of coexistence, two seemingly-conflicting federal statutes must be resolved in a way that accommodates the policies underlying both. *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Finding the class action waiver unenforceable is consistent with the underlying purposes of both the NLRA and the FAA. The FAA's purpose was to prevent courts from treating arbitration agreements less favorably than other private contracts. *Horton*, 357 N.L.R.B. No. 184, at 11. Yet, contracts that violate federal law cannot be enforced as a matter of federal common law. *California v. United States*, 271 F.3d 1377, 1383 (Fed. Cir. 2001) ("Without a doubt, contractual provisions made in contravention of a statute are void and unenforceable."). As this Court has stated, "[w]herever private contracts conflict with [the] functions" of the National Labor Relations Act, "they obviously must yield or the Act would be reduced to a futility." *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944). As private contracts must yield to the NLRA, so too must arbitration agreements under the FAA. To find as such is to treat arbitration agreements no worse than any other private contract that conflicts with Federal Labor law. *See Gilmer*, 500 U.S. at 24 (noting the FAA's purpose was to place arbitration agreements "upon the same footing as other contracts"). Holding this class action waiver unenforceable is consistent with this policy.

Further, under the FAA, permitting enforcement of agreements may not require a party to "forgo the substantive rights afforded by statute." *Horton*, 357 N.L.R.B. No. 184, at 12 (quoting

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threshold issue of whether a claim must proceed in arbitration, as opposed to in a judicial forum. *See Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 80 (1998). Petitioner's contention is not that a clear and unmistakable waiver of a judicial forum did not occur. It did. Rather, a clear and unmistakable waiver of the right to a judicial forum is not determinative of whether a claimant has the right to arbitrate as part of a group. *See id.* Nothing in *Pyett*'s holding suggests that the use of this standard is appropriate to determine a class action waiver's validity when it compels individual arbitration.

Gilmer, 500 U.S. at 26). The right to engage in collective action—including collective legal action—is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest. *Id.* The class action waiver violates that substantive right. Finding the class-action waiver unenforceable supports both the NLRA and the FAA.

The arbitration agreement at issue has the practical effect of ensuring Costanza cannot bring a class claim in any forum. The arbitration agreement precludes a judicial forum to resolve disputes, and the class action waiver disallows group arbitration. *See Horton*, 357 N.L.R.B. No. 184, at 5 (holding that an arbitration agreement that waives a judicial form while also waiving class actions in arbitration clearly and expressly bars employees from exercising substantive rights in violation of Section 7 of the NLRA). As a result, this Court should find the class action waiver unenforceable.

CONCLUSION

This Court should affirm-in-part and reverse-in-part. This Court should affirm the court of appeals' judgment with respect to the denial of the motion to dismiss. This Court should reverse the court of appeals' judgment with respect to the arbitration order and reinstate the district court's order requiring group arbitration of the employment discrimination claims.

Respectfully submitted,

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ATTORNEYS FOR PETITIONERS/
CROSS-RESPONDENTS