Case No. S204032

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ARSHAVIR ISKANIAN,
Plaintiff and Appellant,

v.

CLS TRANSPORTATION LOS ANGELES, LLC,
Defendant and Respondent.

After a Decision of the Court of Appeal, Second Appellate District, Division Two, Case Number B235158, from Superior Court of California, County of Los Angeles, Case No. BC356521, Hon. Robert Hess, Dept. 24

APPLICATION OF SERVICE EMPLOYEES INTERNATIONAL UNION AND CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT

[PROPOSED] AMICI CURIAE BRIEF

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT ISKANIAN

Pursuant to California Rule of Court 8.520(f), Service Employees International Union ("SEIU") and California Employment Lawyers Association ("CELA") respectfully seek permission to file the accompanying amicus brief in support of plaintiff-appellant Arshavir Iskanian.

Interest of the Amici Curiae

SEIU is an international labor union that represents more than 2.2 million employees nationwide in such diverse fields as janitorial services, health services, long-term care, and public employment.

Many of the workers represented by SEIU are employed in low-wage industries, where workers have limited literacy skills or English-language ability and little or no power to bargain with their employers. For these workers and countless others, union and non-union alike, the statutory right to act in concert with fellow employees for the purpose of mutual aid and protection – which has been the centerpiece of federal labor policy since the 1930's – is the central right from which all other worker protection rights flow. As Congress, the NLRB, and the courts have repeatedly found, workers who cannot join together to exercise workplace rights are powerless in the face of their economically dominant employers, and can neither bargain effectively for new rights nor enforce their existing rights.

SEIU has frequently participated as an amicus in appellate and administrative cases involving the employment and labor law rights of American workers, including as an amicus in support of the Charging Party in *D.R. Horton, Inc.*, 357 NLRB No. 184, 2012 WL 36274 (2012), *cross-petitions for review and enforcement pending*, 5th Cir. No. 12-60031, and in other cases affecting workers' fundamental right to join together in pursuing legal remedies for violations of workplace protections.

CELA is a statewide non-profit organization dedicated to protecting workers' rights. CELA's member attorneys represent employees in a broad range of employment cases in state and federal courts and administrative agencies in California. CELA frequently appears as amicus curiae in employment-related cases before this Court, including many prior cases involving the scope and enforceability of mandatory pre-dispute arbitration agreements, including *Armendariz v. Foundation Health Psychcare Svcs.*, 24 Cal.4th 83 (2000); *Little v. Auto Steigler, Inc.*, 29 Cal.4th 1064 (2003); *Gentry v. Superior Court*, 42 Cal.4th 443 (2007); and *Sonic-Calabasas, Inc. v. Moreno*, No. S174475.

Reasons for Accepting This Brief

The right of employees to engage in concerted activity for their mutual aid and protection has long been the fundamental cornerstone of

national labor policy. Enshrined in the 1932 Norris-LaGuardia Act, 29 U.S.C. §102, and the 1935 National Labor Relations Act, 29 U.S.C. §157(a), this core statutory right has long been held to protect the ability of workers to join together, and to represent and be represented by others, in seeking to vindicate workplace rights guaranteed by Congress and the states.

An employer's workplace policy or employment agreement that strips workers of their right to engage in concerted activities for their mutual aid and protection is unenforceable in any "court of the United States," state or federal, as a matter of national labor law. 29 U.S.C. §103. In *D.R. Horton, Inc.*, 357 NLRB No. 184, the National Labor Relations Board held that an employer's prohibition of class actions, collective actions, or other concerted legal activities in all forums violates this "core substantive right" under federal labor law to act in concert to improve workplace conditions and is thus for that reason unenforceable. 2012 WL 36274 at *7, *12. SEIU and CELA's proposed amicus brief demonstrates why ¶16(b) of defendant-appellee CLS Transportation Los Angeles, LLC's mandatory arbitration agreement is invalid and unenforceable under *D.R. Horton* and the well-established doctrines of federal labor law and policy that underlie it. *See also Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83-84 (1982) (contracts that violate the NLRA may not be judicially enforced). Amici further

demonstrate why judicial invalidation of CLS's unlawful prohibition against concerted activity would not conflict with the FAA, especially given the FAA §2 "savings clause" and the longstanding effective-vindication-of-rights doctrine, and that even if some conflict existed, the core substantive right to engage in concerted legal activity under federal labor law must take precedence over any implied policies of the earlier enacted FAA.

No party or counsel for a party authored this brief in whole or in part, or made a monetary contribution intended to fund the preparation of submission of this brief. No person other than amici, its members or its counsel made a monetary contribution to its preparation or submission.

Conclusion

For the reasons stated, amici SEIU and CELA respectfully request the Court to accept the attached proposed amicus brief for filing.

Dated: May 10, 2013 Respectfully submitted,

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INTRODUCTION

Amici SEIU and CELA agree with plaintiff Arshavir Iskanian that the employment relationship is materially different, for purposes of the issues presented, than the commercial relationship between consumers and corporate retailers. Legal doctrines that apply one way in the consumer arena often apply differently in the workplace, because employees are protected by a unique series of statutory enactments that Congress, the state legislatures, and the courts have declared fundamental and non-waivable.

Since the early 1930's, federal law has guaranteed employees the right to engage in "concerted activity" for the purpose of "mutual aid and protection." This fundamental principle of national labor policy was first established in 1932 by the Norris-LaGuardia Act ("NLGA"). In that Act, Congress declared as "the public policy of the United States" that individual employees have the right to be "free from the interference, restraint, or coercion of employers" in the "designation of . . . representatives" and "other concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. §102. Congress further stated in the NLGA that "[a]ny undertaking or promise . . . in conflict with" that policy is itself "contrary to the public policy of the United States [and] *shall not be enforceable in any court* of the United States . . . ." 29 U.S.C. §103 (emphasis added).

Just three years later, in the National Labor Relations Act ("NLRA"), Congress again declared that "[e]mployees shall have the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U.S.C. §157, and it provided that "[i]t shall be an unfair labor practice for an employer – (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title," 29 U.S.C. §158(a)(1).

Defendant CLS's workplace policy prohibiting its employees from joining with co-workers to pursue legal claims on a joint, class, collective, or representative basis violates these fundamental federal law rights. For that reason, CLS's contractual prohibition of concerted legal activities in all forums is both unlawful and unenforceable. *See* AOB 33-38; ARB 14-21; *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83-84 (1982); *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944) (courts may not enforce individual employment contract provisions that violate the NLRA).

In this amicus brief, SEIU and CELA focus solely upon why the Court of Appeal should have invalidated CLS's prohibition against concerted legal actions (including not just class actions, but representative actions and jointly filed actions as well) as a matter of federal labor law. Amici agree with the full range of arguments asserted by plaintiff Iskanian,

including his analysis of the continuing vitality of *Gentry v. Superior Court*, 42 Cal.4th 443 (2007), the reasons why representative claims under PAGA cannot be compelled to mandatory arbitration, and the facts establishing waiver. We limit the analysis in this brief, however, to the important federal labor law issues presented by the Court of Appeal's decision.

FACTUAL BACKGROUND

Defendant-appellee CLS Transportation Los Angeles, LLC requires all employees to be bound by a non-negotiable, nine-page, single-spaced "PROPRIETARY INFORMATION AND ARBITRATION POLICY/AGREEMENT," which by its terms applies even to employees who do not sign that agreement. *See* Appellant's Appendix ("AA") 75-83; AA 82 ¶17. Paragraph 16 of that Policy/Agreement imposes a mandatory pre-dispute employment arbitration requirement, which includes the following broad prohibition of all forms of concerted legal activity:

> [*E*]*xcept as otherwise required under applicable law*, (1) EMPLOYEE and COMPANY expressly intend and agree that *class action and representative action procedures shall not be asserted*, nor will they apply in any arbitration pursuant to this Policy/Agreement; (2) EMPLOYEE and COMPANY agree that each will not assert class action or representative actions claims against the other in arbitration or otherwise; and (3) each of EMPLOYEE and COMPANY *shall only submit their own, individual claims in arbitration and will not seek to represent the interests of any other person.*

AA 81 ¶16(b) (emphasis added). In this provision (which, by its terms,

should have no legal effect because the right to pursue concerted legal actions *is* "otherwise required under applicable law," as explained below), CLS seeks to deprive its employees of their ability to pursue legal claims in any forum on any concerted action basis – including joint, class, collective, and representative actions.

For the reasons set forth below and by the NLRB in *D.R. Horton, Inc.*, 357 NLRB No. 184, 2012 WL 36274 (2012), *cross-petitions for review and enforcement pending*, 5th Cir. No. 12-60031, the Court of Appeal erred in enforcing this prohibition. *See* Slip Op. at 11-13. Employees like plaintiff Iskanian have a well-established, substantive federal labor law right to join with their co-workers in pursuing workplace rights on a "concerted action" basis under Section 7 and 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §§157, 158(a)(1), and Sections 2 and 3 of the Norris-LaGuardia Act, 29 U.S.C. §§102, 103. Under the analysis presented in *D.R. Horton* and further developed below, an employer's prohibition of concerted legal action to pursue workplace claims in all forums violates federal labor law and cannot be enforced in state or federal court.[1/]

[1/] As plaintiff Iskanian correctly notes, this result is required no matter what the Fifth Circuit ultimately rules on the cross-petitions for review and enforcement in *D.R. Horton*. *See* ARB 14-15 n.11. Even if the Board's decision were vacated under *Noel Canning v. NLRB,* 705 F.3d 490 (continued...)

ARGUMENT

I. A Long and Consistent Line of Board and Court Decisions Holds that Employees Have a "Fundamental," Substantive Statutory Right to Participate in Concerted Legal Actions to Improve Workplace Conditions.

We begin with the basic principle that Section 7 of the NLRA, 29 U.S.C. §157, like Section 2 of NLGA, 29 U.S. C. §102, guarantees employees the right "to engage in . . . concerted activities for the purposes of . . . mutual aid and protection." These broad statutory guarantees of the right to engage in collective activity, which the Supreme Court has characterized as "fundamental" to national labor policy, *see, e.g., NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937), have long been held to protect collective efforts by employees to improve working conditions "through resort to administrative and judicial forums" – *i.e.*, collective legal actions. *See, e.g., Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978).

Applying these principles, the Board and the courts have consistently held that an employee's effort to vindicate collective rights by bringing workplace claims on a joint, class, or collective action basis on behalf of

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[1/] (...continued)
(D.C. Cir. 2013), *pet. for cert. pending*, No. 12-1281, on the ground that the Board lacked a proper quorum when it decided the case (which is unlikely), the *analysis* in that Board decision remains compelling, and the result is required both by the NLRA and, independently, by the NLGA.

similarly situated co-workers (which also implicates the statutory right to represent and be represented by co-workers) constitutes "concerted" activity that is protected by federal labor law. *See, e.g., Brady v. National Football League*, 644 F.3d 661, 673 (8th Cir. 2011) (a "lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment *is* 'concerted activity' under §7 of the National Labor Relations Act"); *Trinity Trucking & Materials Corp.*, 221 NLRB 364, 365 (1975) ("filing of the civil action by a group of employees is protected activity"), *enf'd NLRB v. Trinity Trucking & Materials Corp.*, 567 F.2d 391 (7th Cir. 1977) (mem. disp.), *cert. denied*, 438 U.S. 914 (1978).[2/]

[2/] *Accord, NLRB v. City Disposal Systems*, 465 U.S. 822 (1984) (collective grievances in arbitration); *Mohave Elec. Co-op., Inc. v. NLRB*, 206 F.3d 1183, 1188-89 (D.C. Cir. 2000) (filing of judicial petition "supported by fellow employees and joined by a co-employee" constitutes protected concerted activity); *United Parcel Serv., Inc.*, 252 NLRB 1015, 1018, 1022 n.26 (1980) ("It is well settled that activities of this nature [filing class action and soliciting support from fellow workers] are concerted, protected activities"), *enf'd, NLRB v. United Parcel Service, Inc.*, 677 F.2d 421 (6th Cir. 1982); *Salt River Valley Water Users Ass'n*, 99 NLRB 849, 853-54 (1952), *enf'd* 206 F.2d 325 (9th Cir. 1953) (designating employee as co-workers' representative to seek FLSA back wages); *Harco Trucking, LLC*, 344 NLRB 478, 479, 481 (2005) (former employee engaged in "protected concerted activity" by "filing and maintaining the class action lawsuit against Harco"); *Tri-County Transp., Inc.*, 331 NLRB 1153, 1155 (2000) (three employees engaged in protected activity by filing unemployment claims together); *127 Restaurant Corp.*, 331 NLRB 269, 275-76 (2000) ("by joining together to file the lawsuit [the 19 employees] engaged in [protected] concerted activity"); *Novotel New York*, 321 NLRB

(continued...)

We start, then from the unassailable proposition that the filing and pursuit of employment claims on a joint, class, representative, or other concerted action basis constitutes protected "concerted" activity under federal labor law.

The statutory right to engage in collective legal activity is clearly established by the cases cited above. Even if there were some ambiguity in the prior case law, though, the Board's construction of Section 7 in the long line of cases up to and including *D.R. Horton* would be controlling under established principles of administrative deference. Congress has delegated to the NLRB the task of interpreting and applying the NLRA in furtherance of national labor policy. *See* 29 U.S.C. §§153-156. Responsibility for construing Section 7 thus "is for the Board to perform in the first instance," *City Disposal Systems*, 465 U.S. at 829 (citing *Eastex,* 437 U.S. at 568); and, "on an issue that implicates its expertise in labor relations, a reasonable construction by the Board is entitled to considerable deference." *Id.* at 829-30 (citing *NLRB v. Iron Workers*, 434 U.S. 335, 350 (1978); *accord*,

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[2/] (...continued)
624, 633 (1996) (filing FLSA collective action lawsuit is protected Section 7 activity); *Auto. Club of Michigan*, 231 NLRB 1179, 1181 (1977) ("the filing of a civil action by a group of employees against their employer is protected under the Act unless done with malice or in bad faith"); *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948-49 (1942) (three employees' joint FLSA lawsuit).

NLRB v. Hearst Publications, 322 U.S. 111, 130-31 (1944)). "Because it is to the Board that Congress entrusted the task of 'applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms,' that body, if it is to accomplish the task which Congress set for it, necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 500-01 (1978) (quoting *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945)).

The Board held in *D.R. Horton* that the longstanding "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." *D.R. Horton, Inc.*, 2012 WL 36274 at *12 (emphasis in original). As the first step in the analysis, then, this Court should find that CLS's prohibition against concerted legal activity violates Section 7 of the NLRA and Section 2 of the NLGA.

II. An Employer's Prohibition of Protected Concerted Activity Violates Federal Labor Law and Policy Because it Interferes with, Restrains, and Coerces Employees in the Exercise of Protected Rights.

Any employer policy that interferes with, restrains, or coerces its employees in their exercise of Section 7 rights constitutes an unfair labor practice in violation of Section 8(a)(1) of the NLRA, 29 U.S.C. §158(a)(1).

See, e.g., ABF Freight Sys., Inc. v. NLRB, 673 F.2d 228, 229 (8th Cir. 1982); *Brandeis Mach. & Supply Co. v. NLRB*, 412 F.3d 822, 830-31 (7th Cir. 2005). As the Board has long held, the most straightforward violations of Section 8(a)(1) are those where an employer's workplace policy or agreement "*explicitly* restricts activities protected by Section 7," because such a policy necessarily interferes with, restrains, or coerces employees in the exercise of Section 7 rights. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004) (emphasis in original). Where an employer's policy or agreement explicitly restricts the ability of employees to exercise their Section 7 right to engage in concerted legal activities, as here, that prohibition is unlawful on its face (even if it would not otherwise be unenforceable under state contract law). *Id.* at 646 n.5; *Ashley Furniture Indus. Inc.*, 353 NLRB No. 71, 2008 WL 5427716, at *9-11 (2008).

CLS's prohibition against joint, class, collective actions, and representative actions could not be more explicit. The company prohibits any workplace actions pursued on a class or representative basis, limits employees to pursuing only "their own, individual claims," and bars employees from "seek[ing] to represent the interests of any other person" – such as by pursuing class, collective, or PAGA representative claims. AA 81 ¶16(b). Through this naked prohibition, CLS directly forbids its workers

from joining together to seek redress in any court or any other forum to seek remediation of any workplace wrong. No further inquiry should be required to find a Section 8(a)(1) violation.[3/]

Because ¶16(b) of CLS's employment agreement interferes with the substantive statutory right of employees like plaintiff Iskanian and his co-workers to engage in concerted activity protected by federal labor law, that paragraph is unlawful and unenforceable. It was error for the Court of

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[3/] Even if there were some question about the impact of CLS's prohibition, there could be little doubt that "reasonable employees would construe the language to prohibit Section 7 activity" – which is an alternative basis for establishing Section 8(a)(1) liability. *See, e.g.*, *U-Haul Co. of California*, 347 NLRB 375, 377-78 (2006), *citing Lutheran Heritage Village-Livonia*, 343 NLRB 646. It makes no difference that CLS's rule is included in a written agreement, because any agreement required as a condition of employment that purports to waive a worker's right to engage in protected concerted activity is an unenforceable "yellow dog" contract. *D.R. Horton*, 2012 WL 36274 at *7; *see Eddyleon Chocolate Co.*, 301 NLRB 887, 887 (1991) ("yellow dog" contracts and their solicitation are barred under the NLRA); *First Legal Support Servs.*, 342 NLRB 350, 362-63 (2004) (ALJ describing history of yellow dog contracts; requiring employees to relinquish Section 7 rights as a condition of employment is unlawful); *see also Extendicare Homes*, 348 NLRB 1062, 1062 (2006) (employer could not lawfully condition return to work on a promise not to engage in Section 7 activity); *Bethany Medical Center*, 328 NLRB 1094, 1095 (1999) (ordering employer to cease and desist from requiring that employees waive their right to engage in concerted activity as a condition of rehire); *Carlisle Lumber Co.*, 2 NLRB 248, 266 (1936), *enf. as mod. on other grounds*, 94 F.2d 138 (9th Cir. 1937), *cert. denied*, 304 U.S. 575 (1938) (an employer who refuses to hire union employees unless they renounce union membership "has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act").

Appeal to hold otherwise.

III. The Fundamental Federal Labor Law Right of Employees to Join With and Represent Their Co-Workers In Seeking to Improve Workplace Conditions Through Concerted Legal Activity Does Not Conflict With Any Federal Arbitration Policy

If this case were just about the validity of a workplace policy prohibiting employees from exercising their legally protected right to engage in concerted legal activity, application of these federal labor law principles would be relatively straightforward. Section 7 of the NLRA and Section 2 of the NLGA guarantee workers the right to engage in concerted legal action. Section 8(a)(1) of the NLRA and Section 3 of the NLGA prohibit courts from enforcing employment agreements that prohibit the exercise of those rights. CLS's Policy/Agreement by its express terms prohibits its employees from engaging in concerted legal action. That prohibition violates federal labor law. End of story.

As plaintiff Iskanian notes, though, this case (like *D.R. Horton*) requires one more level of analysis, because CLS included its unlawful prohibition in a mandatory employment arbitration agreement. *See* AOB 35; ARB 15.

Had CLS implemented its ¶16(b) prohibition against concerted legal activity as a stand-alone policy, separate and apart from its arbitration

agreement (as the employer did, for example, in *America Online, Inc. v. Superior Court*, 90 Cal.App.4th 1, 6, 14-18 (2001)), there would be little doubt that the prohibition would violate Sections 7 and 8(a)(1) of the NLRA and Sections 2 and 3 of the NLGA, and would for that reason be unenforceable. *See D.R. Horton*, 2012 WL 36274 at *11. Indeed, precisely such an agreement was recently held unenforceable in *Grant v. Convergys Corp.*, _ F.Supp.3d _, 2013 WL 781989 (E.D. Mo. 2013), which plaintiff cites in ARB at 19.

What make this case different, at least according to CLS and the Court of Appeal, is that CLS chose to include its otherwise unlawful prohibition in a mandatory arbitration agreement rather than as a stand-alone policy. CLS relies on that placement as a basis for contending that the otherwise straightforward application of federal labor law in this case must yield to the "implied policies" of the Federal Arbitration Act ("FAA") as described by the U.S. Supreme Court in *AT&T Mobility LLC v. Concepcion*, 563 U.S. _, 131 S. Ct. 1740 (2011), and *CompuCredit Corp. v. Greenwood*, 565 U.S. _, 132 S.Ct. 665 (2012).

The issue raised by the facts of this case, then, is not whether an employer violates the NLRA and NLGA by prohibiting employees from engaging in concerted legal activity. Surely it does, under a long line of

precedent culminating in *D.R. Horton*, because such a prohibition unquestionably prevents workers from acting in concert to improve workplace conditions. The real issue here is whether an employer can avoid invalidation of such an unlawful policy by incorporating it into a mandatory arbitration agreement, and then contending that its prohibition – which applies in *all* forums, not just in arbitration – is thereby protected by the implied policies of the FAA. For the reasons we explain, the answer to that question must be no.

A. CLS's Reliance on *Concepcion* is Misplaced.

The Supreme Court's decision in *AT&T Mobility v. Concepcion* does not control the federal labor law issues raised by the facts of this case, for several reasons. The question in *Concepcion* was whether, under the Supremacy Clause, the FAA impliedly preempted *state* unconscionability law as applied to class action prohibitions in FAA-covered *consumer* arbitration agreements. No federal statutory rights were at issue. The Court majority focused its implied preemption analysis on the consumer context only (where the NLRA and NLGA have no application, and where individual claimants have no fear or retaliation or blacklisting remotely comparable to what employees routinely risk in asserting workplace claim on an individual basis, *see Gentry*, 42 Cal.4th at 460 (citing cases); *Mitchell*

v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960); *Crawford v. Metro. Govt. of Nashville & Davidson County*, 555 U.S. 271, 279 (2009); *D.R. Horton,* 2012 WL 36274 at *3 n.5, and cases cited). The Supreme Court stated no view on how its analysis might apply to the unique circumstances of the modern workplace or to the longstanding federal labor laws protecting concerted workplace activity.

The doctrine of "implied preemption," which was the sole basis for decision in *Concepcion*, has no application to the present case. Under the Supremacy Clause, the preemption doctrine only applies where a conflict exists between federal law and inconsistent *state* law. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (FAA preempts state laws that are contrary to the FAA's language, purposes, or objectives); *Concepcion*, 131 S.Ct. at 1744 (emphasis added) ("We consider whether the FAA prohibits *States* from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures"); *accord, id.*, at 1747, 1748, 1749, 1752, 1753 . One federal statute (like the FAA) cannot preempt another federal statute (like the NLRA or NLGA), even if an actual, direct conflict exists. *See Felt v. Atchison, Topeka, & Santa Fe Ry. Co.*, 60 F.3d 1416, 1418-19 (9th Cir. 1995).

Where a case involves two federal statutes and a question arises

concerning a potential conflict, the relevant inquiry is not one of "preemption," but of "implied repeal" – whether Congress intended to repeal part or all of a previously enacted statute as a result of its enactment of a subsequent, inconsistent statute. Findings of implied repeal, though, are highly disfavored and may never be presumed. *See, e.g., J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Intern., Inc.*, 534 U.S. 124, 142 (2001) ("stringent" standard requires "irreconcilable conflict"); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) (intention must be "clear and manifest"). Even when two federal statutes cover the same subject, "the rule is to give effect to both if possible." *Id.*; *see D.R. Horton*, 2012 WL 36274, at *10 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)) ("when two federal statutes 'are capable of co-existence,' both should be given effect 'absent a clearly expressed congressional intention to the contrary.'").

There are several reasons why the Board in *D.R. Horton* was correct to conclude that no conflict actually exists between the FAA and federal labor law. *D.R. Horton,* 2012 WL 36274 at *10-*17.

First, there is obviously no express conflict between the FAA and NLRA §7 or NLGA §2. The FAA says nothing about arbitration being limited to individual claims only. Moreover, CLS's policy prohibits its employees from pursuing joint, class, and representative claims in *every*

forum, including in court. While it may be true that class arbitrations are a relatively recent phenomenon (although an increasingly common one, according to publicly available American Arbitration Association statistics),[4/] jointly filed and other multiparty proceedings have been routine in arbitration for decades and are entirely consistent with the traditional arbitration model.[5/] In addition, the U.S. Supreme Court has expressly acknowledged on several occasions (including in *Concepcion* itself) that the arbitration device is flexible enough to accommodate classwide adjudication and that consensual class arbitration is still permitted under the FAA – so although class arbitration is of fairly recent lineage, class action procedures are not inherently incompatible with the arbitration model.[6/]

[4/] *See* American Arbitration Association, Searchable Class Arbitration Case Docket, *available at* http://www.adr.org/aaa/faces/services/disputeresolutionservices/casedocket?_afrLoop=367618993057317&_afrWindowMode=0&_afrWindowId=v8l584wbl_1#%40%3F_afrWindowId%3Dv8l584wbl_1%26_afrLoop%3D367618993057317%26_afrWindowMode%3D0%26_adf.ctrl-state%3Dv8l584wbl_47 (last visited May 1, 2013).

[5/] *See, e.g., Great W. Ins. Co. v. United States*, 19 Ct.Cl. 206, 215-16 (1884) (referring to post-Civil War "tribunal of arbitration" that considered "'all the claims growing out of acts committed'" by Confederate ships launched from ports in Great Britain); *Donahue v. Susquehanna Collieries Co.*, 138 F.2d 3 (3d Cir. 1943) (staying court proceedings pending arbitration of FLSA collective action).

[6/] *Concepcion*, 131 S.Ct at 1750-51; *see also Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003).

The second reason why there is no conflict between the FAA and the right to engage in concerted legal activity under the NLRA and NLGA is because of the FAA §2 "savings clause," which provides that private arbitration agreements are generally enforceable *unless* they would be invalid on any "grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2; *see D.R. Horton*, 2012 WL 36274 at *11-*12.

Contracts that violate expressly stated public policy are void and unenforceable, both under common law and under applicable statutes. *See, e.g., Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987); *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal.4th 83, 100 (2000); 29 U.S.C. §103. Because any contract term that violates the NLRA and/or NLGA is legally invalid and unenforceable as a matter of federal law and national labor policy, *see, e.g., Kaiser Steel Corp.,* 455 U.S. at 83-84; *J.I. Case Co.*, 321 U.S. at 337, incorporating such a term into an otherwise enforceable arbitration agreement cannot, under FAA §2, transform that provision from unlawful to lawful. The FAA simply does not permit unlawful terms to be given greater force and effect when incorporated into an arbitration agreement than when they stand alone. After all, it has long been a central tenet of federal arbitration law that the validity of a contract provision cannot depend on whether or not that provision has been

incorporated into an arbitration agreement. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) ("To immunize an arbitration agreement from judicial challenge" on grounds applicable to other agreements "would be to elevate it over other forms of contract" in violation of the FAA).[7/]

Consistent with FAA §2, the Supreme Court has repeatedly held that any federal policy favoring arbitrability reaches its endpoint once it begins to interfere with the exercise of statutory rights. The whole point of the effective-vindication-of-statutory-rights doctrine is to ensure that arbitration is "just another forum," and that forcing a claimant to arbitrate rather than litigate does not cause any forfeiture of protected rights – in this case, an employee's "core substantive" right under the NLRA and NLGA to pursue legal redress on a concerted action basis. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 1, 26, 28 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 637 (1985)); *D.R. Horton*, 2012 WL 36274 at *12. FAA §2 thus expresses Congress's intent to have the FAA's general policy favoring enforcement of arbitration agreements

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[7/] As the Board in *D.R. Horton* correctly noted, one reason its analysis is fully consistent with the FAA is because it "treat[s the employer's contractual prohibition] no worse than any other private contract that conflicts with Federal labor law." 2012 WL 36274 at *11.

yield to, rather than override, conflicting statutory policies and directives.

B. CLS's Reliance on *CompuCredit* is Misplaced.

The Supreme Court's *post-D.R. Horton* decision in *CompuCredit* also does not undermine the Board's analysis. That case addressed an entirely different issue: not what rights are created by federal statute, but whether Congress intended to preclude arbitration of those federal statutory rights.

The issue in *CompuCredit* was whether a consumer credit company could enforce an arbitration agreement that encompassed statutory claims arising under the Credit Repair Organization Act ("CROA"), 15 U.S.C. §1679. The sole issue in that case was one of statutory construction: Did Congress intend the CROA to guarantee the right to sue in court for violation of the CROA, despite the parties' contractual agreement to arbitrate all disputes arising between themselves?

Using traditional indicia of statutory construction, the Supreme Court held that Congress's reference to a claimant's "right to sue" in the disclosure statement mandated by the CROA, and its designation of statutory CROA rights as "non-waivable," did *not* reflect Congress's intent to guarantee a judicial rather than arbitral forum. Instead, the Court found that Congress had intended only to provide aggrieved individuals with a right to pursue in a judicial or judicial-equivalent forum any claim they may have for violation

of their CROA rights. *See* 132 S.Ct. at 669-70.

As the Supreme Court pointed out, Congress has shown that it knows how to draft statutes when it wants to preserve a judicial *rather than* an arbitral forum (although that is not the issue in this case). It cannot be presumed that Congress intended to prohibit arbitration of statutory claims unless that intent is reflected in "the text of [the statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute's] underlying purposes." *Gilmer*, 500 U.S. at 26; *see CompuCredit*, 132 S.Ct. at 672 (citing statutes).[8/]

The issue raised by plaintiff Iskanian's reliance on the NLRA and NLGA in this case is not, as in *CompuCredit*, whether Congress intended

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[8/] Congress has enacted several statutes that carve out various categories of workers and claims from the FAA (in addition to the transportation employees already excluded by FAA §1). *See, e.g.*, 48 CFR §222.7400 (2011) (extending Defense Department Appropriations Act prohibition against mandatory employment arbitration agreements by contractors receiving $1 million or more in Defense Department contracts); Wall Street Reform and Consumer Protection Act of 2010, 18 U.S.C. §1514A(e) (claims by whistleblowers who disclose violations of Sarbanes-Oxley Act) and 7 U.S.C. §26(n)(2) (claims by whistleblowers who disclose violations of Commodity Exchange Act); Federal Rail Safety Act, 49 U.S.C. §20109 (whistleblower disputes with railway employees); Surface Transportation Assistance Act, 49 U.S.C. §31105 (whistleblower disputes with commercial motor carrier employees); National Transit Systems Security Act, 6 U.S.C. §1142 (whistleblower disputes with public transit employees); American Recovery and Reinvestment Act of 2009, P.L. 111-5 (2009), §1553(d) (whistleblower disputes with employees).

those particular federal statutes to *preclude arbitration* of claims arising under those statutes (*e.g.*, to preclude access to the NLRB for an unfair labor practice claim under the NLRA). Rather, the issue here is quite different – whether Sections 7 and 8(a)(1) of the NLRA and Sections 102 and 103 of the NLGA guarantee employees a statutory right to pursue legal claims in concert with their co-workers on a joint, class, collective, or representative basis, in some meaningful forum.[9/]

The answer to that question, under Sections 7 and 8(a)(1) of the NLRA and Sections 2 and 3 of the NLGA, is that Congress did *not* intend to let employers use their dominant bargaining power to force employees to waive the rights guaranteed by those statutes. Under federal labor law, an employer can no more prohibit its workers from joining together to pursue workplace rights through legal activity than it can prohibit them from joining

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[9/] *See D.R. Horton*, 2012 WL 36274 at *12 & n.24 (distinguishing between the Section 7-protected right to *seek* class certification, and the non-protected right to *obtain* certification); Ann C. Hodges, "Can Compulsory Arbitration Be Reconciled with Section 7 Rights?," 38 Wake Forest L. Rev. 173, 217 (2003) ("the right that is being violated here is the substantive Section 7 right to concerted activity which is being effectuated through the class action device."); *see generally* Michael Schwartz, "A Substantive Right to Class Proceedings: The False Conflict Between the FAA and NLRA," 81 Fordham L.Rev. 2945 (2013); Charles Sullivan, Timothy Glynn, "*Horton* Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution," 64 Alabama L. Rev. __ (2013) (forthcoming).

a union – or joining together to protest workplace discrimination. *See supra* at 10 n.3. As the Board held in *D.R. Horton*, federal labor law prohibitions against "yellow dog" contracts apply not only to agreements prohibiting union activity, but also to any individual contracts requiring employees "to forego engaging in concerted activity . . . ." 2012 WL 36274 at *7.

To our knowledge, no appellate court, state or federal, has ever construed the FAA as precluding the enforcement of substantive statutory rights under federal law. While the U.S. Supreme Court is currently considering the enforceability of an arbitration agreement whose terms have the *practical effect* of impairing the exercise of statutory rights, *see American Express Co. v. Italian Colors Restaurant*, No. 12-133, it has long been settled under the FAA that arbitration agreements may not be enforced if they preclude a party from vindicating non-waivable statutory rights. *See, e.g., Mitsubishi Motors Corp.*, 473 U.S. at 636-37; *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1247 (9th Cir. 1994), *cert. denied*, 516 U.S. 907 (1995). There is no reason why the core statutory rights under the NLRA or NLGA should be treated with any less respect than rights under other federal statutes.[10/]

[10/] To the extent CLS is arguing that the NLRA and NLGA do not explicitly define "concerted activities for the purpose of . . . mutual aid or (continued...)

For these reasons, the Board was surely correct in holding in *D.R. Horton* that no actual conflict existed between the FAA and the federal labor statutes guaranteeing employees the right to engage in concerted legal activity.

IV. Even if a Conflict Existed Between the "Core Substantive" Right to Engage in Concerted Legal Activity under the NLRA and NLGA and the "Implied" Policy of the FAA Favoring Consensual, Streamlined Dispute Resolution, that Conflict Would Have to be Resolved in Favor of the Federal Labor Statutes

Even if there were some actual conflict between federal labor and arbitration policy, it would have to be resolved in favor of what the Board in *D.R. Horton* properly characterized as "the [NLRA's] core substantive right" and "the foundation on which the [NLRA] and Federal labor policy rest" – the right of an employee to join with co-workers in attempting to vindicate workplace rights on a collective basis. 2012 WL 36274 at *12; *id.* at *4 ("such conduct is . . . central to the Act's purposes"); *7 ("the substantive right to engage in concerted activity . . . through litigation or arbitration lies

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[10/] (...continued)
protection" as including concerted legal activity, the answer is that Congress delegated that interpretative power to the Board under the NLRA. That Congress did not expressly add to the NLRA and NLGA's language the specific phrase, "including the filing of joint, collective, class, and representative actions," does not mean it intended to *exclude* concerted legal activities from the broadly written protections of those statutes that it delegated to the Board to construe and apply.

at the core of the rights protected by Section 7"); *8 (these rights "are central to modern Federal labor policy").

The statutory right of employees to engage in concerted activity is the core provision of federal labor law and the wellspring from which all other workplace protections flow. CLS may characterize the right to engage in collective *legal* activity as a mere "procedural" right having no consequence, but the Board and the courts have long held otherwise, *see supra*, at 5-8. A workplace policy forcing workers to waive their future Section 7 right to engage in concerted legal activity, as a non-negotiable condition of employment, violates federal labor policy in many ways, such as by: stripping employees of their group voice and collective power (including negotiating power); increasing their individual costs of adjudication and the resulting burden of pursuing workplace relief; impairing their ability to alert co-workers about workplace rights (including through class and collective action notice) and to help co-workers vindicate such rights; diminishing their chances of obtaining representation by well-qualified counsel (and to represent each other, as federal labor policy expressly permits); and increasing the employees' legitimate fear of workplace retaliation – all to their individual and collective detriment and in derogation of the federal labor policies underlying the NLRA and NLGA. *See D.R. Horton*, 2012 WL

36274 at *2-*4 & nn.4-5; *Eastex*, 437 U.S. at 566; *City Disposal Systems*, 465 U.S. at 834-35; *Salt River Valley Water Users*, 206 F.2d at 328; *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942). As Congress declared in language that is as applicable today as it was in 1932, protecting the right to engage in concerted activity is the critical first step in ensuring workplace fairness and equality, because without the ability to join together with co-workers, "the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor." 29 U.S.C. §102; *see also* 29 U.S.C. §151 (NLRA statement of policy).

Nothing in the FAA itself suggests that Congress intended to prevent workers from pursuing workplace claims in concert with their co-workers, or designating a co-worker as their representative (including as their class or collective action representative) – which are the central substantive rights that Congress enshrined in the 1932 NLGA and the 1935 NLRA. The 1925 FAA certainly did not repeal *in advance* the fundamental labor law right to join with co-workers in seeking to vindicate workplace rights through collective legal activity. The NLRA and NLGA were both enacted *after* the FAA; and Congress specifically provided in the NLGA that "[a]ll acts and parts of acts in conflict with the provisions of this chapter are repealed," 29 U.S.C. §115 (which necessarily includes the provision in NLGA §3

declaring that courts may not enforce any agreement that violates the NLGA §2 right to engage in concerted activity). *See, e.g., NLRB v. Bratten Pontiac Corp.*, 406 F.2d 349, 352 (4th Cir. 1969); *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936) (in the rare case of an "irreconcilable" statutory conflict, the *later*-enacted statute controls). Indeed, when Congress enacted the FAA in 1925, it expressly exempted from statutory coverage the only workers whom Congress at the time had the power to regulate (interstate transportation workers, *see Circuit City v. Adams*, 532 U.S. 105, 120-21 (2001)) – making it even less likely that Congress intended the FAA to trump the statutory right to engage in concerted activity that it later enacted and made applicable to the far broader categories of workers covered by the NLGA and NLRA.

Although some courts have cited the 1947 recodification of the FAA in concluding that Congress intended the FAA to trump any inconsistent provisions in the NLGA and NLRA (which was itself amended in 1947), the legislative history of the FAA's recodification makes clear that no substantive change was made or intended. *See* H.R. Rep. No. 80-251 (1947), *reprinted in* 1947 U.S.C.C.A.N. 1511 (1947 recodification made "no attempt" to amend existing law); H.R. Rep. No. 80-225 (1947), *reprinted in* 1947 U.S.C.C.A.N. 1515 (same); *see also Bulova Watch Co. v. United*

States, 365 U.S. 753, 758 (1961) (non-substantive re-enactment of statute does not take precedence over earlier enacted statute). Re-codification by itself is not a substantive amendment. *See, e.g., Finley v. United States*, 490 U.S. 545, 554 (1989); *United States v. Welden*, 377 U.S. 95, 98 (1964); *Fourco Glass Co. v. Transmirra Corp.*, 353 U.S. 222, 227 (1957); *Anderson v. Pacific Coast S. S. Co.*, 225 U.S. 187, 198-99 (1912). Consequently, for purpose of last-in-time analysis, the NLRA and NLGA would take precedence over the FAA even if there were an actual, irreconcilable conflict and even if that conflict affected equally core statutory policies.

Arbitration under the FAA is designed to be a flexible dispute-resolution procedure, elastic enough to allow resolution of all manner of claims, including employment law claims filed on behalf of two or more employees. In determining whether Congress intended to preserve substantive federal labor law rights in the face of an arbitration agreement that prohibits the exercise of those rights, it bears emphasis that the right to engage in concerted activity has been the expressly protected centerpiece of federal labor policy for more than seven decades, while any supposed preference for the "streamlined" model of arbitration is neither expressly stated in the FAA nor absolute, but is instead subject to many limitations, including in FAA §2 itself. Surely the Board's obligation to accommodate

other statutory concerns is at its weakest where the alleged conflict involves concerns that are central to the NLRA yet only implicit, or of limited import, under another statute. ARB at 18 n.15.[11/]

Thus, if any tensions between federal labor and arbitration policy did exist, the Board appropriately reconciled them in *D.R. Horton* by invalidating the employer's sweeping prohibition of *all* concerted legal activity while still permitting the company to require arbitration of workplace disputes. *See* 2012 WL 36274 at *10 (citing *Southern Steamship Co.,* 316 U.S. at 47; *Direct Press Modern Litho*, 328 NLRB 860, 861 (1999); *Image Systems*, 285 NLRB 370, 371 (1987)).

Striking down CLS's prohibition of concerted legal activity does not

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[11/] *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984) (Board must condition backpay remedy on legal readmittance to United States because INA explicitly bars unlawful entry); *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 43 (1942) (Board's remedy "ignore[d] the plain Congressional mandate that a rebellion by seamen against their officers on board a vessel anywhere within the admiralty and maritime jurisdiction of the United States is to be punished as mutiny"); *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147-50 (2002) (backpay could not be awarded to undocumented immigrant employee as it would encourage violations of Immigration Reform and Control Act's "central" policy against employment of undocumented immigrants). There is no such explicit or direct conflict with the FAA in this case. Nor, of course, does the Board's holding in *D.R. Horton* involve a discretionary remedial order as in the cases cited above. As the Board emphasized: "our holding here is that the MAA violates the substantive terms of the NLRA; it does not rest on an exercise of remedial discretion." 2012 WL 36274 at *10 n.19.

prevent CLS from continuing to require arbitration of individual claims. To the contrary, it preserves CLS's option either to require arbitration of individual claims only (allowing employees to pursue any joint, class, collective, or representative claims in court or some other equally protective forum), or to continue to require arbitration of individual and concerted action claims in arbitration.

Under *D.R. Horton*, an employer that wishes to compel arbitration of workplace disputes has a choice: it may allow all such disputes to be arbitrated, including on a concerted action basis; or it may prohibit concerted actions in arbitration (thus preserving arbitration as a forum for speedy resolution of individual actions) while allowing concerted actions to be pursued in court – as the national brokerage exchanges, for example, have done for decades.[12/] Employers may continue to limit arbitration to individual employment claims, as long they offer a meaningful alternative forum (such as court) for adjudicating such claims when brought on a joint, class, or representative basis. *See* 2012 WL 36274 at *16; *accord*, *O'Charley's, Inc.*, Case No. 26-CA-19974, 2001 WL 1155416, at *4 (NLRB GC Div. of Advice Apr. 16, 2001). This approach fully "accommodates" the

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[12/] http://finra.complinet.com/en/display/display.html?rbid=2403&record_id=5189&element_id=4110&highlight=elects#r5189 (last visited May 1, 2013).

FAA by not precluding arbitration, while ensuring that an employer's contractual prohibition of concerted legal activity that would be contrary to public policy outside the arbitration context is not treated any differently simply because it has been incorporated into an arbitration agreement. *See* 2012 WL 36274 at *14 (citing *Town of Newton*, 480 U.S. at 392).

Resolving any potential conflict in favor of federal labor statutes also makes sense because the Section 7 right is far more central to national labor policy than any preference for "streamlined" arbitration is to the FAA. CLS's prohibition against all forms of concerted legal activity sweeps broadly; it encompasses not only class actions, as were at issue in *Concepcion* (although employment class actions rarely involve the large number of class members at issue in consumer class actions like *Concepcion*, *see* 131 S.Ct. at 1752), but also actions involving two, or just a handful, of employees with similar or identical claims. There is nothing incompatible with the traditional arbitration model in permitting such concerted actions to proceed in arbitration; and thus there is no reason to conclude that enforcement of CLS's sweeping ban is necessarily central to national arbitration policy – especially where it conflicts with well-established federal labor law.

Federal labor policy broadly protects *any* concerted legal activity

involving two or more employees, including the simple joinder of the identical claims of two employees and other actions where one or more employees seek to act as representatives of their co-workers (as here). For that reason, the concerns expressed in *Concepcion* about the potential unsuitability of the traditional arbitration model for *class action* adjudication have little relevance to the vast majority of potential claims encompassed by CLS's sweeping prohibition.

Even as to the traditional opt-out class action, the Court in *Concepcion* took pains to emphasize that any conflict with the FAA is at most implied, not express, because class actions can be (and often are) adjudicated in an arbitral forum. Not only does the American Arbitration Association (the designated ADR provider under CLS's policy, *see* AA 80 ¶16(a)) have its own well-established rules and procedures for employment class actions,[13/] but the AAA itself has concluded, based on its experience with class arbitration, that its class arbitration procedures provide "a fair, balanced, and efficient means of resolving class disputes." Brief for AAA as Amicus Curiae in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, U.S. Sup.Ct. Oct. Term 2009 No. 08-1198, at 25. In any event, CLS's violation of labor

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[13/] *See* AAA, Supplementary Rules for Class Arbitration, *available at* http://www.adr.org.

law rests not upon its prohibition of concerted legal activity *in arbitration alone*, but upon its prohibition of such protected activity *in all forums*, including courts *and* arbitration. *D.R. Horton*, 2012 WL 36274 at *16; *see* AA 81 ¶16(b) ("except as otherwise required under applicable law, (1) EMPLOYEE and COMPANY expressly intend and agree that class action and representative action procedures shall not be asserted . . . .")..

A final factor that should bear on the limited weight to be given the FAA's "implied" policies is that in many cases, an employer violates Sections 7 and 8(a)(1) as soon as it announces a new policy prohibiting concerted legal activity, even before any arbitration agreements are actually executed – *i.e.,* even before an agreement exists to which the FAA's implied policies might attach. CLS's Policy/Agreement, for example, makes clear that its prohibition of joint, class, and representative actions applies even to employees who choose not to sign its policy. *See* AA 82 ¶17. That requirement by itself makes CLS's policy unlawful under the NLRA.[14/] For

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[14/] *See, e.g., Eddyleon Chocolate Co.*, 301 NLRB 887, 887 (1991) (employer violates Sections 7 and 8(a)(1) by telling prospective employee during employment interview that she must sign document agreeing not to join a union, even if the document was never provided or executed: violation occurs when employee "could reasonably have anticipated that her future employment depended on whether she refrained from union activity, regardless of whether the pledge . . . was reduced to writing."); *Newport News Shipbuilding*, 233 NLRB 1443, 1451 (1977) (maintenance of a policy (continued...)

purposes of Sections 7 and 8(a)(1), it makes no difference whether a particular worker signs the required waiver agreement as directed, or instead quits his job or withdraws his application. Either way, the employer's sign-it-or-quit directive constitutes interference, restraint, or coercion in violation of Section 8(a)(1).

CONCLUSION

For the reasons set forth above and in *D.R. Horton*, an employer may not impose a blanket workplace rule – as CLS has done – that interferes with its employees' NLRA and NLGA rights by prohibiting them from acting in concert to file or join commonly held workplace claims. The Court of Appeal's enforcement of CLS's prohibition in this case should therefore be reversed.

Dated: May 10, 2013

Respectfully submitted,

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[14/] (...continued)
prohibiting Section 7 activity is a "continuing violation").

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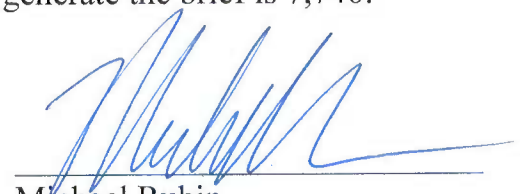
CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.520(c) of the California Rules of Court, I certify that the foregoing Brief Amici Curiae was produced on a computer in 13-point type. The word count, including footnotes, as calculated by the word processing program used to generate the brief is 7,746.

Dated: May 10, 2013



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CASE: *Arshavir Iskanian v. CLS Transportation of Los Angeles*,
California Supreme Court, Case No. S204032
(2d App. Dist., Div. 2, No. B235158;
Los Angeles Superior Ct. No. BC356521)

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. On May 10, 2013, I served the following document(s):

Application of Service Employees International Union and California Employment Lawyers Association for Leave to File Brief as Amici Curiae in Support of Plaintiff-Appellant; [Proposed] Amici Curiae Brief

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this May 10, 2013, at San Francisco, California.

Jean Perley