No. 12-60031
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

D.R. HORTON, INC.,
Petitioner and Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent and Cross-Petitioner.

On Petition for Review from the National Labor Relations Board,
NLRB Case No. 12-CA-25764

BRIEF FOR *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER/CROSS-RESPONDENT

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No. 12-60031

D. R. Horton, Inc. v.
National Labor Relations Board

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, the Chamber of Commerce of the United States of America (the "Chamber"), is a non-profit corporation organized and existing under the laws of the District of Columbia. The Chamber is the largest federation of business, trade, and professional organizations in the United States. The Chamber represents 300,000 direct members and indirectly represents three million businesses and organizations. The Chamber has members of every size, in every sector, and in every region of the United States. A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community. Given the enormous costs, risks, and evolving burdens and liabilities confronting businesses in the United States, the interests of the business community at large encompass a statement of position that is broader and more far-reaching than the more limited interests of the litigants.

This case presents the question of whether an employer violates Section 8(a)(1) of the National Labor Relations Act ("NLRA") by requiring its employees as a condition of employment to agree to submit all employment

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

disputes to arbitration on an individual basis rather than proceeding before a judicial forum, and where as a consequence of the arbitration agreement, the parties may not proceed by a class or collective action.

The NLRB's decision declares that an employer may not require its employees to agree to arbitrate on an individual basis without violating Section 8(a)(1) of the NLRA. Such a holding is not authorized by the NLRA, conflicts with fundamental principles embodied within the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et. seq.*, and must be reversed. As one of the largest representatives of employers in the United States, the Chamber has a vital interest in ensuring that the federal labor law regime to which its members may be subject is rational, fair and consistent, and that the agency responsible for enforcing the NLRA at all times is acting within its authority in fulfilling its obligations and responsibilities under the Act.

This amicus brief is filed with the consent of all the parties pursuant to F.R.A.P. Rule 29(a).

INTRODUCTION

In a decision of astonishing sweep and significance, a two-member plurality of a three-member National Labor Relations Board ("NLRB or Board") held that Section 7 of the National Labor Relations Act ("NLRA") prohibits employers from entering into arbitration agreements with employees that preclude class or collective actions. *D.R. Horton Inc.,* 357 N.L.R.B. 184 (2012) ("*Horton*"). The ruling in *Horton* applies to both union and non-union arbitration agreements, even if the agreements otherwise pass muster under state and federal law. As such, it represents a full frontal attack on the Federal Arbitration Act's mandate that such agreements must be enforced "according to their terms."

The Board's blanket prohibition of class action waivers in *Horton* plainly overreaches its charter, ignores Supreme Court precedent and should not be enforced for two main reasons: First, nothing in Section 7 of the NLRA constitutes the "contrary Congressional command" that is necessary to permit overriding the FAA's mandate that arbitration agreements are to be "enforced according to their terms." Second, the Board failed to construe the NLRA consistent with the legal standard contained in the FAA. It failed to do so. The decision in *Horton* rests on a novel interpretation of Section 7 of the NLRA that yanks the statute from its roots: a provision intended to promote collective

bargaining, not a provision to prevent employees from exercising their right to enter into arbitration agreements protected by the FAA.

STANDARD OF REVIEW

In a conventional case that does not implicate another federal statutory scheme, "the NLRB is entitled to judicial deference when it interprets an ambiguous provision of a statute that it administers." *Lechmere v. NLRB,* 502 U.S. 527, 536 (1992). Deference is appropriate, however, *only* when the Board's interpretation is reasonable; takes into account "the doctrine of *stare decisis*" by following "prior [judicial] determination[s] of the statute's meaning"; and is embodied in a "sufficiently reasoned analysis." *NLRB v. Pneu Electric*, 309 F.3d 843, 854 (5th Cir. 2002). Moreover, "an agency decision cannot be sustained where it is based . . . on an erroneous view of the law." *Prill v. NLRB*, 755 F.2d 941, 947 (D.C.Cir. 1985) ("*Prill I*") quoting *Chenery Corp. v. SEC*, 318 U.S. 80, 95 (1943).

In this case, the NLRB is entitled to less deference than a conventional one. It is settled that "[t]he proposition that the Board's interpretation of statutes outside its expertise is likewise to be deferred to is novel." *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 144 (2002). A Board determination is therefore entitled to little or no judicial deference where "there is a conflict between the NLRA and another statute." *NLRB v. IBEW*, 345 F.3d 1049,

1057 (9th Cir. 2003). No judicial deference is appropriate here because the Board has no authority to construe, nor special expertise in construing, other federal statutes. *Hoffman Plastics*, 535 U.S. at 143-43.

ARGUMENT

I. THE BOARD EXCEEDED ITS STATUTORY AUTHORITY BY PROHIBITING ALL CLASS ACTION WAIVERS CONTAINED IN EMPLOYMENT ARBITRATION AGREEMENTS

Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the Act. 29 U.S.C. § 158(a)(1). The Board concluded that Section 7 guarantees each employee the substantive right to initiate a class action against the employer in all employment cases, without regard to the statutory provisions under which the claims are brought. Based on this premise, it held that an employer violates Section 8(a)(1) when it requires employees covered by the Act to sign employment agreements containing arbitration provisions waiving any right to initiate class actions in arbitration or in court.

The Board's conclusion is clearly erroneous as a matter of law. As the Supreme Court has repeatedly emphasized, the FAA mandates that all arbitration agreements--including agreements to arbitrate on an individual rather than class-wide basis--must be "enforced according to their terms" absent a "contrary congressional command." Section 7 contains no such command.

Nothing in the statutory text creates a right to initiate class actions or provides for the override of arbitration agreements. The Board's expansive reading is also inconsistent with the legislative purpose of the Act as well as with the Board's own precedents.

A. Under The FAA, All Arbitration Agreements--Including Agreements Prohibiting Class Arbitration-- Must Be Enforced "According To Their Terms" Absent A "Contrary Congressional Command.

1. The FAA establishes a strong federal policy presumptively compelling enforcement of arbitration agreements "according to their terms."

The FAA provides that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Enacted in 1925 to combat the "judicial hostility to arbitration agreements," the FAA "place[s] arbitration agreements upon the same footing as other contracts," and incorporate[s] a "liberal federal policy favoring arbitration agreements." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) ("*Gilmer")*; *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011) ("*Concepcion"*); *Compucredit Corporation v. Greenwood*, 132 S.Ct. 665 (2012) ("*Compucredit"*).

The primary purpose of the FAA is to "ensure that private agreements to arbitrate are enforced according to their terms," including "with whom a party will arbitrate its disputes." *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,

130 S.Ct. 1758, 1773 (2010) (authorization for class arbitration may not be inferred from agreement silent on issue). Arbitration clauses must be "rigorously enforce[d]" by the courts, which "*shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218, 221 (1985). Indeed, the policy in favor of arbitration and the presumptive arbitrability of statutory claims is so strong that federal law preempts any state law that prohibits the arbitration of a particular type of claim. *E.g. Concepcion, supra* (state common law rule holding class action arbitration waivers "unconscionable" preempted).

Even when an arbitration agreement covers claims involving federal statutory rights, the "duty to enforce arbitration" is "not diminished." *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987) ("*McMahon*"). As the Supreme Court reiterated earlier this year, "the FAA requires the arbitration agreement to be enforced according to its terms" unless another statute reveals a "contrary congressional command." *Compucredit* at 669. Moreover, "[t]he burden is on the party opposing arbitration to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *McMahon* at 227. Such a limitation must be "deducible from the [statute's] text or legislative history, or from an inherent conflict between arbitration and the statute's underlying purposes." *Id.*

In the quarter-century since *McMahon*, the Supreme Court has considered a wide spectrum of federal statutes and on every occasion has rejected the argument that the statute conflicts with the Federal Arbitration Act's purposes of enforcing arbitration agreements according to their terms. *E.g.*, *CompuCredit, supra* (Credit Repair Organization Act); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) (Securities Act of 1933); *Gilmer, supra,* (Age Discrimination in Employment Act); *McMahon, supra,* (Exchange Act of 1934 and RICO), and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (Sherman Act). The Court also has held repeatedly that employment claims are subject to mandatory arbitration agreements. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 102 (2001); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009).

2. The FAA policy applies with full force to agreements that require individual arbitration rather than class arbitration or class actions.

On several occasions the Supreme Court has considered arbitration agreements that directly or indirectly dealt with the availability of class arbitration. It has consistently ruled that such agreements, like all other arbitration agreements, must be enforced "according to their terms."

The Supreme Court concluded in *Gilmer* that ADEA claims could be subjected to compulsory arbitration. In reaching that conclusion, the Court considered, and rejected, the argument that ADEA claims were not suitable for

arbitration because arbitration agreements do not uniformly provide for class arbitration. *Gilmer*, 500 U.S. at 32.

In *Stolt-Nielsen, supra*, after reconfirming that arbitration agreements must be enforced "according to their terms," the Court squarely held that "from these principles, it follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." 130 S.Ct. at 1775. And because the "changes brought about by the shift from bilateral arbitration to class-action arbitration" are so "fundamental," it held the required agreement may not be inferred from contractual silence. *Id.*

More recently, the Supreme Court held that the FAA preempted a California Supreme Court decision that had declared an arbitration agreement containing a class action waiver to be unconscionable under state law. *Concepcion, supra.* Emphasizing that "the overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings," it confirmed that parties are free "to agree to limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit with whom a party will arbitrate its disputes." 131 S.Ct at 1748-49.

The Court went on to explain that requiring parties to engage in class arbitration would undermine one of arbitration's principle advantages--the cheaper

and more efficient resolution of disputes. *Id.* at 1751. That is because numerous issues that never arise in an individual arbitration would have to be considered and resolved for a class-action judgment to bind absentee class members: *e.g.* class certification, class notice, opt-out procedures, class discovery and class member participation. Additionally, it noted that class arbitration greatly increases the risk to a defendant, given the strict limitations on reviewing the merits of arbitral awards. *Id.* at 1752.

The Court noted it was "unlikely that in passing the FAA Congress meant to leave the disposition of these procedural requirements to an arbitrator". That is especially so, the Supreme Court explained, because when Congress enacted the FAA "to promote arbitration" (*id.* at 1749); and the type of arbitration that was contemplated necessarily was ***individual*** arbitration. At that time, all arbitration agreements called for arbitration on an individual basis: "class arbitration was not even envisioned by Congress when it passed the FAA in 1925," as it "is a 'relatively recent development.'" *Id.* at 1751. As the Court pointed out, the FAA's legislative history "contains nothing -- not even the testimony of a stray witness in committee hearings -- that contemplates the existence of class arbitration." *Id.* at 1749 n.5. Similarly, there is no reason to believe that Congress in 1925 contemplated arbitration of ***collective*** actions -- which did not take their current form until 1947. *Id.* at 1751-52.

Consequently, the Court in *Concepcion* held that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 1748.

The Second Circuit recently suggested that, because *Concepcion* addressed whether the FAA preempted state law, its reasoning does not apply to claims involving federal law. *In Re American Express Merchants' Litigation*, 667 F.3d 204 (2d Cir. 2012). But *Concepcion* was based on "federal arbitral law," grounded in Section 2 of the FAA, which created "a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24 (1983). And the Court's decision rested on its conclusion that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA" C*oncepcion,* 131 S.Ct. at 1748. The protection of the right to contract for arbitration consistent with the standards embodied in the FAA--including the protection for agreements that bar class proceedings--applies to federal claims, no less than state claims, so long as Congress has not exempted the federal claim from the FAA's mandate. *In Re American Express,*, 2012 U.S.App.LEXIS 10815 (Jacobs, C.J. dissenting from denial of rehearing en banc, Cabranes, Livingston, JJ. joining).

B. Section 7 of the NLRA Does Not Contain The "Contrary Congressional Command" Required To Empower The

Board To Invalidate Otherwise Lawful Class Action Arbitration Waivers

The Board characterizes its decision as simply applying existing law. Asserting that class action waivers "clearly and expressly bars employees from exercising substantive rights that have long been held protected by Section 7 of the NLRA," *Horton* at 4, the Board falsely implies that it has long construed Section 7 as it did here. In fact, the "right" the Board has created is novel and ungrounded in Section 7, precluding the possibility that Section 7 constitutes the "contrary Congressional command" required to justify the Board's sweeping repudiation of FAA policy.

1. The statutory text does not authorize the Board to invalidate otherwise lawful arbitration agreements.

Nothing in the statutory text, legislative history, or the Board's prior decisions establishes that Section 7 creates a substantive right for employees to initiate class actions, whether in arbitration or court. Likewise, nothing remotely provides for the override of arbitration agreements limiting class actions. In fact, the Supreme Court has long recognized that "the term 'concerted activity' is not [even] defined in the Act." *NLRB v. City Disposal*, 465 U.S. 822, 830 (1984). Given this generality, Section 7 cannot be considered to contain the "contrary Congressional command" necessary to permit the Board to invalidate otherwise lawful arbitration agreements. *McMahon*, *supra.*

This conclusion is confirmed by the Supreme Court's recent decision in *Compucredit.* The issue there was whether plaintiffs could pursue a judicial class action under the Credit Repair Organizations Act, notwithstanding their arbitration agreements. The Supreme Court held the statute lacked the "Congressional command" necessary to override the FAA, even though it allows consumers to bring judicial actions and prohibits the waiver of "any right . . . under this sub-chapter." 135 S.Ct. at 670. It explained that if such "commonplace" provisions could perform the "heavy lifting" required to override the FAA, "valid arbitration agreements covering federal causes of action would be rare indeed," which "is not the law." *Id.*

The same conclusion follows here. Congress did not intend Section 7 to authorize the Board to override otherwise lawful arbitration agreements generally, or to guarantee employees the unwaivable right to file class actions against their employers. Thus, Section 7 cannot perform the "heavy lifting" necessary to override the FAA.

2. The legislative history does not remotely suggest the Board has the power it purported to exercise here.

Nor is the Board's broad interpretation of Section 7 supported by the legislative history of the Wagner Act. In 1932, in the midst of the Depression, President Roosevelt pledged to stanch the economic bleeding with bold and novel economic programs intended to support fair business trade *and* to enhance

employment and employee purchasing power through minimum wages and maximum hours. The centerpiece of the President's plan was the National Industrial Recovery Act of 1933 ("NIRA"), which provided in Section 7(a) that "employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint or coercion of employers . . . in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining".

Senator Robert Wagner of New York, a supporter of labor, in 1934 had introduced a bill, S.2926, intended to strengthen the NIRA. The core provisions of S.2926 were incorporated into the NLRA which was signed into law by President Roosevelt in July, 1935 after the Supreme Court invalidated the NIRA in *Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935). These provisions included the language of Section 7 of the NLRA to guarantee workers the right to form unions and to bargain collectively through representatives of their own choosing with associations of employers. Without the right to engage in such activity free from employer intimidation and coercion, there would be no opportunity for the collective bargaining intended to "level the playing field" between workers and employers and to provide the mechanism for the greatest economic recovery in history.

Protected concerted activity as set forth in Section 7 was not limited to unionization and bargaining, but such activity comprised its essential core. That focus is reflected in Section 1 of the Act, which declares as national policy protecting "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of . . .mutual aid of protection." 29 U.S.C. § 1.

Pointedly, for purposes here, the right of employees to file class or consolidated claims against employers was neither discussed nor debated in the proceedings leading up to the enactment of Section 7 of the NLRA, much less embraced by the 79th Congress. Nor would one expect the discussion to include reference to Rule 23 class actions procedural devices, from the FLSA or Rule 23, as neither existed in 1935. This is significant because the Senate Report accompanying the NLRA states:

> [the] bill is specific in its terms. Neither the National Labor Relations Board nor the courts are given any blanket authority to prohibit whatever labor practices that in their judgment are deemed to be unfair.

Sen.Rep.No.573, 74th Cong., 1st Sess. 8 (1935). Since Congress had no intent to guarantee individual employees a statutory right to file putative class actions, Section 7 cannot perform the "heavy lifting" necessary to override the FAA.

The Board's reasoning here, purportedly based on an evolving statutory interpretation to '"reconstitute the gamut of values current at the time

when the words [of the statute] were uttered,'" *Horton*, at 5 (citing *National Woodwork Mfrs. Assn. v.* NLRB, 386 U.S. 612, 620 & ft 5 (1967)) falls far short of the "congressional command" *CompuCredit* requires -- as the examples cited therein make plain. Had Congress then or on the occasion of subsequent amendments intended to override the FAA, it presumably would have done so.[2]

3. The Board's Order is neither compelled, nor supported, by its prior decisions.

The Board suggests it has long held that Section 7 protects the right of employees to file putative class actions. *Horton* at 4. That assertion is incorrect. As the Supreme Court noted, "the term 'concerted activity' is not [even] defined in the Act." *City Disposal*, 465 U.S. at 830. "The courts have not found it easy to apply" the "concerted activities" concept, in part because "Congress scarcely had

[2] The Board also attempted to find support for its decision in the Norris-LaGuardia Act, 29 U.S.C. §101 *et. seq.* As the Board noted in *Horton*, however, that statute's focus was the abuse of so-called "yellow dog" contracts requiring individuals to give up their right to organize and to join a union. *Horton* at 5. In addition to specifying activities not subject to restraining orders or injunctions, 29 U.S.C. § 103 makes "yellow dog" contracts unenforceable. These provisions implement the policy of the Act to protect employees' right to organize and to associate with labor unions, or to refrain from doing so, none of which involve arbitration agreements concerning the forum for adjudicating controversies, "with whom" the parties agree to arbitrate, or the availability of class procedures. Agreements to arbitrate are *not* one of the contracts to which § 103 of the Norris-LaGuadia Act applies. *Movant v. P.F. Chang's China Bistro, Inc.*, 2012 WL 1604851 at *14 (N.D.Cal. 2012) citing *Local 205 v. Gen. Elec. Co.*, 233 F. 2d 85, 90 (1st Cir. 1956)("[I]t is our conclusion that jurisdiction to compel arbitration is not withdrawn by the Norris-LaGuardia Act.")

the problem in mind." *Ontario Knife v. NLRB*, 637 F.2d 840, 843 (2d. Cir. 1980). So too the Board has endorsed fundamentally different, indeed incompatible, definitions of the term over the years. *Prill v. NLRB*, 835 F.3d 1481 (D.C.Cir. 1987) ("*Prill II*"), *cert. denied*, 487 U.S. 1205 (1988).

As is pertinent here, the Board has held consistently "that the filing of a civil action by a group of employees is protected activity unless done with malice or in bad faith." *Harco Trucking*, 344 NLRB 478, 482 (2005); *see also United Parcel Service, Inc.*, 252 NLRB 1015, 1018 (1980); *Trinity Trucking & Materials Corp.,* 221 NLRB 364, 365 (1975); *Host International*, 290 NLRB 442, 443 (1988); *Leviton Manufacturing*, 203 NLRB 309 (1973), enforcement denied, 486 F.2d 686 (1st Cir. 1973); *Socony Mobil Oil*, 153 NLRB 1244 (1965), enfd. as modified 357 F2d. 662 (2d Cir. 1966); *Spandsco Oil Co.*, 42 NLRB 942, 949 (1942). Consequently, it is clear that employers under the Act may not fire employees in retaliation for filing lawsuits or other claims against them, whether styled as class actions or not. *Id.* Other decisions finding the filing of litigation to constitute "concerted activity" likewise involve group activity-- *e.g.* the filing of a lawsuit by an appointed "business agent" on behalf of a group of employees*, Brad Snodgrass, Inc.*, 338 NLRB 917, 923 (2003). All these cases, however, are far removed from the proposition that Section 7 prohibits arbitrations agreements in which employees waive the right to file a class action.

In contrast, prior to *Horton*, the Board has never declared that class procedures--whether in the FLSA, from Rule 23, or elsewhere-- standing alone are not only guaranteed by Section 7 but unwaivable. To be sure, some of the group actions that the Board found to be protected were styled as class actions. *E.g., United Parcel Service, supra and Harco Trucking, supra.* But that fact was irrelevant to those decisions. Rather, the rationale of these decisions was that the decision to file a lawsuit by a group of employees constituted "concerted activity" as *between those named plaintiffs*. *Id.* Styling the cases as class actions does not support the conclusion in *Horton*

Moreover, the Board has never been asked, and has never determined, that the filing of a putative class action constitutes "concerted activity" as between the named plaintiffs and the unnamed class members. It would make no sense to conclude that it does.

Section 7 does no more than prohibit employers from obstructing concerted efforts by employees who affirmatively *want to* join together. That is the ordinary meaning of "concerted activities" -- a voluntary coming together of individuals who wish to work together to obtain a common goal.

But a class action by definition involves employees who have not expressed any interest in doing that. Class actions invariably involve the representation by the named plaintiff or plaintiffs of a group of allegedly similarly-

situated individuals who have *not* come forward to join with the named plaintiffs -- that is why they are referred to as the "absent" class members and a large part of class-action jurisprudence is devoted to ensuring the protection of the due process rights of these "absent" parties.

The Board has long recognized that an employee's action is "concerted" only if it was "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Prill II,* 835 F.2d at 1483. As the D.C. Circuit explained, "concerted action cannot be imputed from the object of the action." *Id.* "In other words, if a worker takes action by himself without contacting his fellow employees, even though he has a desire to help all workers, not just himself, he will not have satisfied the concerted action requirement." *Id.* Thus, class action filings typically do not involve "concerted action." Insofar as an individual or individuals file a putative class action allegedly on behalf of potential class members, without action by each employee to affirmatively associate with the filing of the lawsuit, there is no concerted action. *Horton* recklessly casts a wide net without concern for such distinctions.

In sum, the Board's Order cannot stand because nothing in Section 7 of the NLRA constitutes the clear "contrary Congressional command" required to empower the Board to override the FAA rule that arbitration agreements must be "enforced according to their terms." Recognizing this fact, virtually *every* court to

consider *Horton* has rejected it. *Jasso v. Money Mart Express, et.al.*, 2012 U.S.Dist.LEXIS 52538 at *26-27 (C.D.Cal. 2012) ("Because Congress did not expressly provide that it was overriding any provision in the FAA, the Court cannot read such a provision into the NLRA."); *Ikanian v. CLS Transportation,* 2012 Cal.App.Lexis 650 at * 21 (Cal.App. 2012) (declining to follow *Horton* because Section 7 does not contain necessary "congressional command"); *Movant v. P.F. Chang's,, supra,* (enforcing class action waiver and declining to follow *Horton*), *Palmer v. Convergys Corp.*, 2012 WL 425256 (M.D. Ga. 2012) (same), *LaVoice v. UBS Fin. Servs., Inc.,* 2012 WL 124590 (S.D.N.Y. 2012) (same).

II. THE BOARD'S ORDER IS UNENFORCEABLE FOR THE ADDITIONAL REASON THAT SECTION 7 CANNOT OVERRIDE THE COMMAND OF THE FAA

The Board's novel construction of Section 7 cannot coexist with the policies of the FAA. The Board was required to construe the NLRA in a manner that would preserve the core policies underlying both statutes. The Board failed altogether to undertake the required analysis because it proceeded on the legally erroneous assumption that the statutory policies do not conflict. In fact, the Board's decision used the NLRA to override the FAA--precisely what the Supreme Court has forbidden the Board to do.

A. The Board May Not Construe the NLRA So That It Overrides Another Statutory Scheme.

The Supreme Court consistently has held that the Board's broad discretion under the NLRA does not permit it to disregard or invalidate other federal policies and legislation. Early on, the Supreme Court rejected a Board decision that had awarded reinstatement with backpay to five employees whose strike on a ship had amounted to mutiny under 18 U.S.C.A. § 2192, explaining:

> It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives.

Southern S.S. Co. v. N.L.R.B., 316 U.S. 31, 46-47 (1942).

More recently, in *Hoffman Plastic Compounds* the Court likewise refused to enforce a Board order awarding back pay under the NLRA to an undocumented illegal alien not legally authorized to work in the United States. 535 U.S. at 140. Noting that the award conflicted with the Immigration and Reform Control Act of 1986, which required the discharge of unauthorized employees, the Court held that "the Board's discretion to fashion remedies when dealing only with the NLRA, it is not so unbounded so as to authorize this sort of an award." *Id.* at 151-52; *see also Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883 (1984) ("[i]n devising remedies for unfair labor practices, the Board is obliged to take into account another 'equally important Congressional objectives.'").

Indeed, the Supreme Court has never permitted the Board to apply its powers under the NLRA in a way that would trample upon constitutional or other

federal statutory rights. *Edward J. DeBartolo Corp v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575-76 (1988) (prohibiting peaceful hand-billing improperly impaired Free Speech rights); *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 497-99 (1979) (Board may not exercise jurisdiction over church-operated school); *Bildisco, supra,* (refusing to enforce award that conflicted with the Bankruptcy Code); *Connell Constr. Co. v. Plumbers*, 421 U.S. 616, 626 (1975) (rejecting argument federal antitrust policy should be subordinated to NLRA).

Thus, where as here, conflicting federal policies are implicated, the Board may not single-mindedly apply the policies it regards as central to the NLRA at the expense of other significant federal policies. *NLRB v. IBEW,* 345 F.3d 1049, 1057 (9th Cir. 2003). "[I]f the Board 'wholly ignores equally important Congressional objectives,' 'then the circuit court should not enforce the Board's order.'" *IBEW,* 345 F.3d at 1057.

B. The Board Wholly Subordinated The FAA's Policies To Those Of The NLRA.

Against this legal backdrop, it was incumbent upon the Board to construe the NLRA within the limits of its authority and to leave intact the strong protection of arbitration agreements embodied in the FAA.

Rather than staying its hand, *Horton* construed the NLRA outside the limits of Section 7 and in a manner that collides with the FAA. Thus, the Board casually concluded that a blanket prohibition of class action arbitration waivers

"does not conflict with the letter or interfere with the policies underlying the FAA, and, even if it did, "represents an appropriate accommodation of the policies underlying the two statutes." *Horton* at 8.

1. The Board applied an incorrect standard for determining whether the policies underlying the FAA might be disregarded.

The Supreme Court repeatedly has held that the "duty to enforce arbitration" is "not diminished" in cases involving statutory rights, including federal statutory rights, and that arbitration may be denied only if another statute reveals a clear "contrary congressional command." *McMahon, supra, CompuCredit, supra.* The Board, however, never even mentioned--let alone applied--this controlling standard, nor the unbroken line of cases applying it. *See* Part I(A)(1) above.

Instead, the Board stated that in *Gilmer* the Supreme Court had "emphasized . . . that the FAA protects the right of parties to agree to resolve statutory claims in an arbitral forum *so long as* a 'party does not forego the substantive rights afforded by the statute." *Horton* at 9 (emphasis added). Based on this premise, the Board suggested the FAA would have no applicability here if enforcing the parties' arbitration agreement somehow impaired a claimant from "effectively vindicat[ing] his or her [Section 7] rights." *Id.*

Gilmer, however, never even mentioned the test the Board applied. The language which the Board quoted out of context was merely descriptive, as a reading of the *entire* sentence from *Gilmer* indicates:

> In these cases we recognized that by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statutes; it only submits to their resolution in an arbitral, rather than a judicial, forum.

500 U.S. at 26. By omitting the first clause of this sentence from the language it quoted, and replacing it with the contrived phrase "so long as," the Board fundamentally misstated *Gilmer.*

In fact, *Gilmer* faithfully applied the *McMahon* standard, explaining that, "having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* The Board reached its erroneous conclusion by ignoring this standard.

2. The Board's Order distorted the policies underlying the NLRA, while trivializing the policies underlying the FAA.

Fairly read, it is clear that the Board's Order gave no serious contemplation to the policies underlying the FAA. This is apparent from the rationales the Board offered in support of its decision.

(a) Class litigation involves procedural, not substantive, rights.

The premise of the Board's Order is that the right to file a putative class action on behalf of others, even those who have not consented to join, constitutes "collective legal action," "the core substantive right protected by the NLRA." *Horton* at 10.

On the contrary, it is well-established that class actions are merely a procedural device for the aggregate litigation of individual claims, and will only be certified by courts after "rigorous analysis" in accordance with strict requirements, as set out in Fed. R. Civ. Proc. 23. The Supreme Court reminds us that 'class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only."' *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2550 (2011). Accordingly, the Supreme Court long has recognized that "the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guarantee Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 332 (1980); *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 130 S.Ct. 1431, 1442 (2010) (upholding Rule 23 under the Rules Enabling Act because "it governs only 'the manner and the means' by which the litigants' rights are 'enforced'"); *Blas v. Belfer*, 368 F.3d 501, 505 (5th Cir. 2004) ("no substantive right to a class remedy; a class action is a procedural device.").

Contrary to the Board's fundamental premise, a class action waiver, therefore, implicates only a procedural right, and not an unwaivable statutory substantive right.

(b) The Board's purported distinctions of contrary Supreme Court precedents are incorrect.

The Board asserted that the rule of *Stolt-Nielsen* is inapplicable here because that case "neither involved" the NLRA nor employment agreements, *Horton* at 12. In holding that class arbitration may not be ordered where the parties have not agreed to it, however, the Supreme Court plainly was enunciating a rule of general applicability, not one limited to particular industries or to a particular class of cases. *Stolt-Nielsen*, 132 S.Ct at 1773-74.

The Board similarly asserted that *Concepcion* is inapplicable because it involved federal preemption pursuant to the Supremacy Clause. *Id.* But from *McMahon* through its recent decision in *CompuCredit*, sthe Supreme Court has consistently applied the FAA to arbitration claims arising under federal statutes, and has re-affirmed that arbitration agreements must be enforced "according to their terms" absent an express "congressional command." 132 S.Ct. at 669; *In Re American Express, supra,* 2012 U.S.App.LEXIS 10815 (Jacobs, C.J., dissenting from denial of rehearing en banc); *Jasso v. Money Mart Express, supra*, 2012 U.S. Dist.LEXIS 52538, at *25 (*Concepcion* "applies equally in the context of determining which federal statute controls here.")

Moreover, the Board's decision is not limited to claims arising under federal law--it would invalidate arbitration clauses that include class waivers even if the claims to be arbitrated arise solely under state law. The fact that the Board's decision purports to countermand the holding of the Supreme Court's decision in *Concepcion* confirms that the effect of the Board's decision is to override the FAA entirely, a result that is impermissible under Section 7.

(c) The Board's order will have widespread impact.

The Board also distinguishes *Concepcion* on the grounds that the "countervailing consideration" was "considerably greater" there, principally because retail adhesion contracts "might cover 'tens of thousands of potential claimants," whereas "the average number of employees employed by a single employer, in contrast, is 20." *Id.* This argument too is plainly flawed. That the "average" employer employs only 20 employees is insignificant because the "average" employer is unlikely to be the object of a class action claim or to have implemented a mandatory arbitration process with a limitation on class or collective claims.

The Board acknowledged that in 2008 there were 120,903,551 employees in the United States. *Horton* at 11, n. 25. Although that footnote goes on to suggest that many of these employees are beyond the Board's jurisdiction, in fact the opposite is true. As it acknowledges on its own web-site, "the Board's

jurisdiction is very broad and covers the great majority of non-government employers with a workplace in the United States." www/nlrb/gov/faq/poster. The Board's ruling in *Horton*, therefore, affects tens of millions of covered employers, many of whom are members of this *Amicus*, and represents nothing less than a tectonic shift in the national law of arbitrability.

Individually and collectively, these errors foreclose enforcement of the Board's decision, " for it is a fundamental principle of law 'that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.'" *Prill I,* 755 F.2d at 947. Moreover, the Board's decision manifests a wholesale subordination of the FAA to the NLRA in violation of its obligation to "reconcile" the statutory schemes insofar as they conflict. Because "the Board wholly ignore[d] equally important Congressional objectives," "'the circuit court should not enforce the Board's order.'" *IBEW,* 345 F.3d at 1057.

C. The Board's Construction of Section 7 Will Eliminate Employment Arbitration As We Know It.

If allowed to stand, the decision in *Horton* would have the practical effect of eliminating low-cost, speedy resolution of employment disputes through arbitration to the detriment of the very employees that the Board's decision purports to protect—injuring employers and the rest of society as well. No company would willingly enter into arbitration agreements if the price were to

require class arbitration or a dual system allowing both arbitration and civil litigation, whenever an employee claimed to be acting on behalf of a putative class. *Concepcion*, 131 S. Ct. at 1752. More likely, companies would abandon arbitration altogether.

That will harm employees, because for the most common type of employment dispute— individualized claims that are not amenable to being brought on a class or collective basis and that are too small to attract a contingent-fee lawyer—the choice is "arbitration—or nothing." Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J.L. Reform 783, 792 (2008); *see also Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) (arbitration important for small consumer claims, the costs and delays of proceeding in court "could eat up the value of an eventual small recovery); Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 DISP. RESOL. J. 44, 45 Nov. 2003/Jan. 2004 ("lower-paid employees seem to lack ready access to court, as other researchers have reported"). "Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Adams v. Circuit City Stores*, 532 U.S. 105, 123 (2001).

And employees tend to fare better in arbitration than in court. For example, one study of employment arbitration in the securities industry concluded that employees who arbitrate were 12% more likely to win their disputes than those litigating in court. Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58 Disp. Resol. J. 56, 58 (Nov. 2003-Jan. 2004); National Workrights Institute, *Employment Arbitration: What Does the Data Show?* (2004) (employees 20% more likely to prevail in arbitration).

Moreover, because arbitration "lower[s] [businesses'] dispute-resolution costs," it produces a "wage increase" for employees. Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. Am. Arb. 251, 254-56 (2006). Customers benefit as well. *Cf. Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594 (1991) (customers who accept contracts with forum-selection clauses "benefit in the form of reduced fares reflecting the savings that the [company] enjoys by limiting the fora in which it may be sued").

Claims that might be assertable through a class action can be vindicated effectively through arbitration. Individuals filing arbitration claims may share litigation expenses, including by hiring the same lawyer. Indeed, a lawyer seeking to represent employees should have no difficulty mustering cooperation

from a sufficient number of claimants needed to make individual arbitration cost effective—especially in view of the ability to reach multiple similarly situated individuals by means of websites and social media, client-recruitment avenues that plaintiffs' attorneys are already utilizing. Class actions, on the other hand, have been recognized to have considerable flaws. *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("[c]lass certification magnifies and strengthens the number of unmeritorious claims").

The Board makes no mention of these adverse consequences, which stand in stark opposition to the long-standing national policy to enforce arbitration agreements under the FAA.

CONCLUSION

For the reasons expressed above, this Court should refuse to enforce the Board's Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

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

/s Marshall B. Babson
MARSHALL B. BABSON

CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 32(a)(7)(C) and 5th Cir. R. 32.3, I certify that this Brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this Brief contains 6988 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

I further certify that this Brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this Brief has been prepared using Times New Roman 14-point font, a proportionately spaced typeface.

Dated this 7 day of June, 2012.

SEYFARTH SHAW, LLP

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