No. 16-1099

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

AT&T MOBILITY SERVICES, LLC,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON APPEAL FROM AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

Kate Comerford Todd
Warren Postman
U.S. Chamber Litigation Center
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

William S. Consovoy
Thomas R. McCarthy
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
(703) 243-9423

Counsel for Amicus Curiae

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country.[1] The Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community, including cases involving the enforceability of arbitration agreements. *See, e.g.*, *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63 (2010); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). Because the simplicity, informality, and expedition of arbitration depend on the courts' consistent recognition and application of the principles underlying the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, the Chamber and its members have a strong interest in this case.

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[1] In accordance with Federal Rule of Appellate Procedure 29(c)(5) and Local Rule 29-1, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The Supreme Court has repeatedly held that the FAA requires courts to enforce agreements requiring arbitration of employment disputes. *See, e.g.*, *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). But the National Labor Relations Board ("NLRB" or "the Board") found that Petitioner AT&T Mobility Services, LLC violated the National Labor Relations Act ("NLRA") and the Norris-LaGuardia Act by entering into an individual arbitration agreement with managerial employees. The NLRB's ruling squarely conflicts with settled FAA precedent and the longstanding federal policy favoring enforcement of arbitration agreements.

The NLRB's two-page decision attempts to avoid the FAA based on Board decisions concluding that individual arbitration agreements violate the employee's statutory right under the NLRA to engage in "concerted action." *See In re D.R. Horton, Inc.*, 357 NLRB No. 184, 2012 WL 36274 (Jan. 3, 2012), *enf. denied in part*, 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454 (Oct. 18, 2014), *enf. denied in part*, 808 F.3d 1013 (5th Cir. 2015). But the "*D.R. Horton* rule," which interprets the NLRA to implicitly supersede the FAA, conflicts with controlling Supreme Court precedent and the decision of virtually every other court to consider the issue.

Federal laws may not supersede the FAA by implication. Only a "contrary congressional command" may override the FAA. That requires Congress, in turn, to express its intention in the statutory text. Since 1925, the FAA has guaranteed that contracting parties may decide for themselves the manner in which they will resolve their disputes. The Supreme Court thus has made clear that textual silence, vague legislative history, and policy objections may not be used to read into a federal law a limitation on arbitration that cannot be found in the language of the statute itself. The FAA was enacted to overcome the hostility of some courts to arbitration. Such hostility may not be restored by wrapping it in diffuse claims of statutory policy, unsupported by an express congressional command to override the FAA.

The Supreme Court has committed to enforcing this principle. Time and again, the Court has rejected arguments that various federal statutes implicitly override the FAA. Notably, the Court has rejected the contention that creating a federal right to sue in a "court of competent jurisdiction," or even express language assuming the availability of a "class action," is sufficient to override the FAA and signal a non-waivable right to a judicial forum. The creation of a statutory cause of action shows that Congress wanted individuals to be able to vindicate their federal rights; it does not, however, show that Congress wanted to invalidate contracts that required those statutory rights to be vindicated through bilateral arbitration. Rather,

as the Supreme Court has recognized, when Congress wants to make arbitration agreements unenforceable—or place conditions on their enforceability—it can and does speak clearly through the statutory text. Requiring such a limitation on arbitration to be reflected in the statute's text respects Congress's right to make that choice for itself.

The NLRA and the Norris-LaGuardia Act contain no evidence of a clear congressional choice to override the FAA. Neither statute expressly references arbitration; and the Board does not argue otherwise. That ought to be the end of the matter. The Board nevertheless asserts that the right to engage in "concerted activities" requires that employees be permitted to pursue grievances through class procedures. But that argument is no stronger (and is in fact considerably weaker) than the claim that a statutory right to sue in a "court of competent jurisdiction" encompasses a non-waivable right to bring a class action. Both contentions wrongly confuse the substantive rights that federal law protects (such as the right to be free from age discrimination and the right to overtime compensation) with procedural mechanisms such as class procedures. Absent a contrary congressional command, employers and employees are free to decide for themselves that these substantive rights will be vindicated through bilateral arbitration instead of through class procedures. That is the FAA's fundamental point.

The Board's decision also contravenes the powerful federal policies underlying the FAA. Arbitration is faster, easier, and less expensive than litigation. It thus benefits not only employers, but also employees, who are particularly likely to have small, individualized claims that would often go unredressed if a civil action in court were their only recourse. In short, the Board's decision frustrates the will of Congress and undermines the benefits that arbitration offers. The order below should be reversed.

ARGUMENT

I. THE NLRA AND NORRIS-LAGUARDIA ACT DO NOT OVERRIDE THE FEDERAL ARBITRATION ACT.

The Board's decision is rooted in an unsustainable proposition: that the NLRA and the Norris-LaGuardia Act implicitly override the FAA. The Board's proposition is untenable because the Supreme Court has repeatedly held that the FAA may not be "implicitly" overridden. Only an express congressional command may abrogate the contractual rights the FAA protects. In case after case, the Supreme Court has rejected reliance on oblique statutory references, vague legislative history, and policy goals to supersede the FAA's textual commitment to enforcing arbitration agreements according to their terms. Yet that is what the Board seeks to do here. Nothing in the text or history of the federal labor laws upon which the Board relies indicates that Congress sought to make bilateral arbitration unavailable in the employment setting.

A. Only A "Contrary Congressional Command" May Override The FAA's Requirement That Arbitration Agreements Be Enforced According To Their Terms.

The FAA, which "makes arbitration agreements 'valid, irrevocable, and enforceable' as written," *Concepcion*, 563 U.S. at 344 (quoting 9 U.S.C. § 2), reflects an "emphatic federal policy in favor of arbitral dispute resolution," *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 25 (2011) (per curiam) (citation and quotations omitted); *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) ("Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements."). Indeed, the Supreme Court has "said on numerous occasions that the central or 'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced according to their terms.'" *Stolt-Nielsen S.A.*, 559 U.S. at 682 (quoting *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (other citations omitted)). In short, "[t]he preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered, and that concern requires that [courts] rigorously enforce agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

Importantly, "[t]his duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights." *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). Any "concern

for statutorily protected classes provides no reason to color the lens through which the arbitration clause is read. By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). The FAA's command is enforceable, then, "even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (quoting *McMahon,* 482 U.S. at 226). This is an exacting standard. The "contrary congressional command" must be clearly expressed; if the statute is "silent on whether claims … can proceed in an arbitrable forum, the FAA requires [an] arbitration agreement to be enforced according to its terms." *Id.* at 673; *see also Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831, 845 (N.D. Cal. 2012) ("[A]bsent a clear statement in a federal statute showing Congressional intent to override the use of arbitration, the FAA prevails.").

The Supreme Court's unwillingness to allow other federal laws to implicitly override the FAA recognizes that the FAA embodies a strong federal policy favoring arbitration. Before the FAA's enactment in 1925, there was "widespread judicial hostility to arbitration agreements." *Concepcion*, 563 U.S. at 339. Courts routinely invalidated them on policy grounds. Accordingly, the FAA's "purpose

was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts" *Gilmer,* 500 U.S. at 24, and to install a "liberal federal policy favoring arbitration," *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24. This pro-arbitration policy is accordingly part of "a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Id.* Another federal statute may not override that body of substantive law unless the "qualification" is "found in its text." *Penn Plaza*, 556 U.S. at 270.

The rule that a federal statute will not be interpreted to forbid arbitration of those claims within its ambit unless it does so *expressly* also follows from ordinary principles of statutory construction. As explained above, the right the FAA protects is unambiguous: judicial enforcement of arbitration agreements as written. Courts are appropriately reluctant to read another statute to defeat that right. "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). A court's duty to reconcile two laws is especially important when, as here, there is a claim that a more recent statute has superseded an older one. Repeals by implication are disfavored. *See Cook Cty. v. U.S. ex rel. Chandler*, 538 U.S. 119, 132 (2003). "A new statute will not be read as

wholly or even partially amending a prior one unless there exists a positive repugnancy between the provisions of the new and those of the old that cannot be reconciled." *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 134 (1974) (citations and quotations omitted).

The Board's decision violates all of these principles. There is no doubt that these parties agreed to bilaterally arbitrate this dispute. Pet. Br. 7-11. As a result, the FAA requires that their contract be enforced according to its terms absent a contrary congressional command. The Board nevertheless interprets the NLRA and the Norris-LaGuardia Act, which do not so much as mention arbitration, to impliedly override the FAA. *See infra* at 15-17. Moreover, it is apparent why the Board has disregarded controlling Supreme Court precedent. The Board's decision is "pervaded by the old … hostility to arbitration." *Penn Plaza*, 556 U.S. at 266 (citation and quotations omitted). The Board believes that "[e]mployees are both more likely to assert their legal rights and also more likely to do so effectively if they can do so collectively." *In re D.R. Horton, Inc.*, 2012 WL 36274, at *3. In other words, the Board believes that bilateral arbitration is inferior to class or collective actions as a procedural mechanism for vindicating federal statutory rights. But the Board is not entitled to elevate its policy preference regarding arbitration above Congress's policy favoring the ability of parties to agree to arbitration. That is the entire point of the FAA.

B. Numerous Supreme Court Decisions Show That The "Contrary Congressional Command" Standard Sets A High Bar.

The "contrary congressional command" rule is straightforward. If Congress expressly precludes or limits arbitration of certain federal claims, that law prevails over the FAA. In 2002, for example, Congress provided that "whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy." 15 U.S.C. § 1226(a)(2). Similarly, Congress has empowered the Consumer Financial Protection Bureau to "impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers." 12 U.S.C. § 5518. As these examples (and the others that Petitioner highlights, Pet. Br. 27) demonstrate, "Congress is fully equipped 'to identify any category of claims as to which agreements to arbitrate will be held unenforceable.'" *Penn Plaza*, 556 U.S. at 270 (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 627).

If Congress does not expressly override the FAA, however, then the federal statute cannot be construed to abrogate or amend the parties' arbitration agreement.

The Supreme Court has enforced this principle in case after case. Take the Court's decisions regarding the Age Discrimination in Employment Act ("ADEA") for example. Under the ADEA, "[a]ny person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter." 29 U.S.C. § 626(c)(1). The Supreme Court has twice held that this statutory language does not abrogate an employment agreement—whether bargained for collectively or individually—that requires bilateral arbitration of ADEA claims. *See Gilmer*, 500 U.S. at 26-27; *Penn Plaza*, 556 U.S. at 258-260.

In *Gilmer*, the Supreme Court explained that "[a]lthough all statutory claims may not be appropriate for arbitration, 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." 500 U.S. at 26. The ADEA did not override the FAA because "nothing in the text of the ADEA or its legislative history explicitly precludes arbitration." *Id*. at 26; *see also id*. at 29 ("[I]f Congress intended the substantive protection afforded by the ADEA to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history.").

In *Penn Plaza*, the Supreme Court reaffirmed this interpretation and took it one step further. After *Gilmer*, Congress amended the ADEA to provide that "[a]n

individual may not waive any right or claim under [the ADEA] unless the waiver is knowing and voluntary." 29 U.S.C. § 626(f)(1). The legislative history indicated, moreover, that "any agreement to submit disputed issues to arbitration ... in the context of a collective bargaining agreement ... does not preclude the affected person from seeking relief under the enforcement provisions of Title VII." H.R. Rep. No. 102-40(1), at 97 (1991). This amendment also did not rise to the level of a contrary congressional command. Even assuming that the amendment's legislative history expressed a congressional desire to curtail arbitration in the collective-bargaining setting, the Court refused to find a contrary congressional command to override the FAA in the absence of textual proof. *Penn Plaza*, 556 U.S. at 259 n.6.

Similarly, the Supreme Court has held that a cause of action created by the Racketeer Influenced and Corrupt Organizations Act ("RICO") does not override the FAA. *See McMahon*, 482 U.S. at 238-42. RICO provides that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit." 18 U.S.C. § 1964(c). Here too, the creation of a judicial cause of action did not supersede the FAA. The Court found "nothing in the text of the RICO statute that even arguably evinces congressional intent to exclude civil RICO claims from the dictates of the

Arbitration Act. This silence in the text is matched by silence in the statute's legislative history." *McMahon*, 482 U.S. at 238.

In *Mitsubishi Motors*, the Court reached the same conclusion with respect to a provision of the Clayton Act, which states that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States ... and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15(a). "Having made the bargain to arbitrate," the Court explained, "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." *Mitsubishi Motors Corp.*, 473 U.S. at 628 (citation omitted). The Clayton Act evinced no such intent on Congress's part. That was the end of the matter. As the Court explained, any "concern for statutorily protected classes provides no reason to color the lens through which the arbitration clause is read." *Id*.

The Credit Repair Organizations Act ("CROA") likewise creates a private cause of action, *see* 15 U.S.C. § 1679g, expressly sets a method for assessing damages in "the case of a class action," *id.* § 1679g(2)(B), and prohibits the waiver of "any right of the consumer under this subchapter," *id*. § 1679f(a). Accordingly, plaintiffs have argued that this express language reflects a non-waivable right to bring class claims in a judicial forum. *CompuCredit Corp.*, 132 S. Ct. at 670. The

Supreme Court rejected this argument, however, explaining that even this express language could not "do the heavy lifting" needed to override the FAA and confer not only a substantive right to a cause of action, but also a non-waivable right to a judicial forum. *Id.* "It is utterly commonplace for statutes that create civil causes of action to describe the details of those causes of action, including the relief available, in the context of a court suit. If the mere formulation of the cause of action in this standard fashion were sufficient to establish the 'contrary congressional command' overriding the FAA, valid arbitration agreements covering federal causes of action would be rare indeed. But that is not the law." *Id*. (citation omitted). Put simply, "[h]ad Congress meant to prohibit these very common provisions in the CROA, it would have done so in a manner less obtuse than what respondents suggest. When it has restricted the use of arbitration in other contexts, it has done so with a clarity that far exceeds the claimed indications in the CROA." *Id*. at 672.

The Supreme Court has reached this same conclusion with respect to other statutes as well. *See, e.g.*, *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480, 484 (1989). But the point of all of these cases is the same: "[I]f a cause-of-action provision mentioning judicial enforcement does not create a right to initial judicial enforcement," only an express statutory directive altering the FAA will be

sufficient to negate the substantive contract rights that important statute protects. *CompuCredit Corp.*, 132 S. Ct. at 670. That is the legal standard against which the Board's decision must be measured.

C. Neither The NLRA Nor The Norris-LaGuardia Act Includes A "Contrary Congressional Command."

The NLRA and the Norris-LaGuardia Act do not include statutory language that even comes close to overriding the FAA. The Board claims that "Section 7 of the NLRA vests employees with a substantive right to engage in specified forms of associational activity" by permitting them "'to engage in … concerted activities for the purpose of collective bargaining or other mutual aid or protection ….'" *D.R. Horton, Inc.*, 2012 WL 36274, at *2 (quoting 29 U.S.C. §157). According to the Board, an individual arbitration agreement "that waives the right to maintain class or collection action" violates that statutorily protected right and thus must yield to the NLRA. *See id*. at *17.

As nearly every court to address the issue has held, *see* Pet. Br. 19-20 n.4, the Board's conclusion is untenable. Indeed, the Board has conceded that "the NLRA does not explicitly override the FAA." *Murphy Oil USA, Inc.*, 2014 WL 5465454, at *12. The NLRA's "text does not even mention arbitration." *D.R. Horton, Inc. v. NLRB*, 737 F.3d at 360. No further inquiry is required. Pet. Br. 28. As explained above, only an express congressional command may abrogate the contractual rights the FAA protects. *See supra* at 6-9. Because the NLRA "is silent

on whether claims under [it] can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms." *CompuCredit Corp.*, 132 S. Ct. at 673.

In any event, the Board's arguments are misplaced even if the NLRA could implicitly override the FAA. The Board assumes, for instance, that the right to pursue a collective action is a substantive right that the NLRA protects. That assertion is wrong three times over. First, as the Supreme Court has repeatedly held, the right to pursue a collective action is a *procedural* right. Pet. Br. 30-31 (collecting cases). Second, even if it were a substantive right, the pursuit of a collective action cannot be a substantive right that the NLRA protects; the NLRA was enacted "prior to the advent in 1966 of modern class action practice." *D.R. Horton*, 737 F.3d at 362; *see also Italian Colors Rest.*, 133 S. Ct. at 2309. And, third, even if the NLRA protected the right to bring a collective action, and even if that right were substantive, that does not mean that employers and employees cannot agree to waive that right in favor of bilateral arbitration. After all, the ADEA and other federal laws afford employees the express right to bring statutory claims in court. Yet the Supreme Court squarely held in *Gilmer*, *Penn Plaza*, and *CompuCredit*, among many other decisions, that this right can be waived. Pet. Br. 31-32.

The suggestion that the Norris-LaGuardia Act overrides the FAA is weaker still. Pet. Br. 36-43. The Board has conceded as much. It has not even claimed that the Norris-LaGuardia Act implicitly forbids bilateral arbitration agreements such as the one at issue here. Instead, the Board has argued that it may "look to the Norris-LaGuardia Act both in identifying Federal labor policy and in seeking an accommodation between Federal labor policy and the Federal policy favoring arbitration." *Murphy Oil*, 2014 WL 5465454, at *13. More broadly, the Board's arbitration rulings are premised on its belief that the FAA's policy goals are both inconsistent with, and less important than, the policy goals underlying federal labor laws. *See id.*; *see also D.R. Horton*, 2012 WL 36274, at *14-15.

The Board's premise is flawed. It has no authority to balance the FAA and the NLRA. That is Congress's job. And the Supreme Court has definitively ruled that a policy preference for class procedures is not a basis for invalidating an arbitration agreement. *See Concepcion*, 563 U.S. at 343-44; Pet. Br. 24-25. "This is a 'battle that should be fought among the political branches and the industry. Those parties should not seek to amend the statute by appeal to the Judicial Branch.'" *Penn Plaza*, 556 U.S. at 270 (quoting *Barnhart v. Sigmon Coal Co.,* 534 U.S. 438, 462 (2002)). The Board may not, as it has done here, read a restriction on bilateral arbitration into federal labor law that is not found in the text of the NLRA or the Norris-LaGuardia Act.

II. THERE IS A FEDERAL POLICY IN FAVOR OF ARBITRATION BECAUSE IT BENEFITS EMPLOYEES, BUSINESSES, AND THE NATIONAL ECONOMY.

Not only has the Board inappropriately invoked policy considerations, it has ignored the many benefits of bilateral arbitration. Arbitration is by nature individualized; superimposing collective- or class-action procedures on it would sacrifice the cost savings, informality, and expedition of traditional, individual arbitration. "Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Concepcion*, 563 U.S. at 344. As a practical matter, given these trade-offs, no company would willingly enter into collective or class arbitration. *See id.* at 351 ("We find it hard to believe that defendants would" enter into agreements authorizing class arbitration.); *Stolt-Nielsen S.A.*, 559 U.S. at 685 (explaining that "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator"). If forced to choose between class arbitration or no arbitration, most companies would abandon arbitration. That would, in turn, harm employees, businesses, and the economy as a whole.

Arbitration is faster, easier, and less costly than litigation. The Supreme Court has therefore repeatedly observed that "arbitration's advantages often would seem helpful to individuals … who need a less expensive alternative to litigation."

Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995); *see also Concepcion*, 563 U.S. at 345 (explaining that "the informality of arbitral proceedings … reduc[es] the cost and increas[es] the speed of dispute resolution"); *Stolt-Nielsen*, 559 U.S. at 685 (observing that "the benefits of private dispute resolution" include "lower costs" and "greater efficiency and speed"); *Penn Plaza*, 556 U.S. at 257 ("Parties generally favor arbitration precisely because of the economics of dispute resolution."). Indeed, the Court has specifically recognized that "[a]rbitration 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." *Circuit City Stores*, 532 U.S. at 123.

These benefits of arbitration are especially pronounced for employees with individualized claims that are not amenable to class or collective actions—the most common type of employee dispute. If employees did not have access to simplified, low-cost arbitration and were forced into court to adjudicate disputes, they would often be priced out of the judicial system entirely and hence would be left with no means to seek redress of their grievances. By contrast, the Judicial Arbitration and Mediation Service ("JAMS") and American Arbitration Association ("AAA") frequently handle employment disputes involving modest sums, making it possible for employees to bring claims that otherwise would have gone unremedied. *See,*

e.g., Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 Disp. Resol. J. 9, 11 (2003); Pet. Br. 45 n.16.

Employees also benefit from the informality of arbitration, which frees them from the procedural and evidentiary hurdles that often stymie plaintiffs in traditional, judicial-system litigation. *See, e.g.*, John W. Cooley & Steven Lubet, Arbitration Advocacy ¶ 1.3.1, at 5 (2d ed. 2003). As a result, employees tend to fare better in arbitration. Studies have shown that those who arbitrate their claims are more likely to prevail than are those who go to court. *See, e.g.*, Lewis L. Malty, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 46 (1998).

For example, one study of employment arbitration in the securities industry found that employees who arbitrated were 12% more likely to win their disputes than employees who litigated in the Southern District of New York. *See* 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). And the arbitral awards that the employees obtained were typically the same as, or larger than, the court awards. *See id.*

Moreover, because of its informality, arbitration is often less contentious than litigation, providing an opportunity for employees to resolve disputes without permanently damaging their relationships with their employers and coworkers.

And because one of the hallmarks of employment arbitration is confidentiality, this mechanism reduces the risk that potentially embarrassing information about an employee will become public—including even the very fact that the employee pursued a claim against the employer, which may benefit the employee if she applies for a job with another employer in the future. Nor are employees with grievances the only ones who benefit from arbitration. The benefits also extend to those who never have a dispute with their employer because arbitration "lower[s] [businesses'] dispute-resolution costs," which results in "wage increase[s]" 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).

By focusing exclusively on those employees who sign a pre-dispute arbitration agreement and then decide later that they wish to bring a class or collective action, the Board's decision ignores and threatens all of these benefits. Employees, consumers, businesses, and the national economy will all be worse off; and the many employment disputes in this Circuit that are routinely and effectively arbitrated every day will be diverted to an already clogged court system—the very scenario that the FAA was designed to prevent.

CONCLUSION

For the foregoing reasons, the judgment of the Board should be reversed.

Dated: April 11, 2016

/s/ William S. Consovoy

Kate Comerford Todd
Warren Postman
U.S. Chamber Litigation Center
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

William S. Consovoy
Thomas R. McCarthy
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
(703) 243-9423
will@consovoymccarthy.com

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the page limitations of Fed. R. App. P. 29(d) because it contains no more than one-half the maximum length authorized by this Court's rules for a party's principal brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

s/ William S. Consovoy
William S. Consovoy
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
(703) 243-9423
will@consovoymccarthy.com

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of April, 2016, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the Fourth Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

s/ William S. Consovoy
William S. Consovoy*
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
(703) 243-9423
will@consovoymccarthy.com

Counsel for Amicus Curiae