No. 16-1385

In the

United States Court of Appeals

for the

Sixth Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

– v. –

ALTERNATIVE ENTERTAINMENT, INC.,

Respondent.

On petition for enforcement of a final decision and order of the National Labor Relations Board
Case 07-CA-144404

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a non-profit corporation organized under the laws of the District of Columbia. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America 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). 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), *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.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the four years since the National Labor Relations Board ("the Board") issued its decision in *In re D.R. Horton, Inc.,* 357 NLRB No. 184, 2012 WL 36274 (2012), *enf. denied in relevant part,* 737 F.3d 344 (5th Cir. 2013), holding that the National Labor Relations Act ("NLRA") prohibits agreements between employers and employees to arbitrate disputes on an individual basis, that decision has been widely disapproved by other courts. As the Fifth Circuit, Second Circuit, Eighth Circuit, California Supreme Court, and dozens of federal district courts have held, the *D.R. Horton* rule is irreconcilable with the FAA, which requires enforcement of arbitration agreements like respondent's according to their terms except in two limited circumstances. And as those same courts have also held, the Board's insistence that the *D.R. Horton* rule qualifies for either or both of these two limited exceptions is misguided.

The first exception is found in Section 2 of the FAA itself, which provides that agreements to arbitrate must be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Supreme Court held in *Concepcion* that this provision did not save from preemption California's rule that most class-action waivers in consumer arbitration provisions are unconscionable. The *D.R. Horton*

rule is functionally identical to the California rule invalidated in *Concepcion*. Accordingly, as court after court has held, it does not come within Section 2's savings clause.

The second exception applies when a federal statute evinces a congressional command to override the FAA. The two statutes relied on by the Board as bases for the *D.R. Horton* rule—the NLRA and the Norris-LaGuardia Act—do not evince such a command. As numerous courts have recognized, the NLRA's vague protection for "concerted activities" is not a sufficiently clear expression of congressional intent to override the FAA. The Norris La-Guardia Act, meanwhile, has nothing to do with arbitration or class actions: Its purpose was to keep federal courts ***out*** of labor disputes by prohibiting them from enjoining labor activity.

Because the *D.R. Horton* rule does not qualify for either of the FAA's exceptions, the FAA—not *D.R. Horton*—controls in this case. Under the FAA, the arbitration agreement used by respondent is lawful and must be enforced according to its terms.

ARGUMENT

I. THE *D.R. HORTON* RULE IS PRECLUDED BY THE FAA.

The Supreme Court's decisions interpreting the FAA establish beyond doubt that agreements between employers and employees to arbi-

trate disputes are valid and enforceable. But rather than accept that clear conclusion, the Board has resisted it at every step.

The Board concedes that the *D.R. Horton* rule has "met a skeptical reception in the * * * courts." *On Assignment Staffing Servs., Inc.,* 362 NLRB No. 189, 2015 WL 5113231, at *12 (2015). That is putting it mildly. The *D.R. Horton* rule has been rejected by the overwhelming majority of courts that have considered it—including three federal courts of appeals and the California Supreme Court.[2] But the Board has steadfastly contin-

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[2] *See, e.g.*, *D.R. Horton*, 737 F.3d at 362; *Sutherland v. Ernst & Young LLP,* 726 F.3d 290, 297 n.8 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013); *Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129, 142 (Cal. 2014), *cert. denied*, 135 S. Ct. 1155 (2015); *see also Richards v. Ernst & Young, LLP*, 744 F.3d 1072, 1075 n.3 (9th Cir. 2013) (noting that "the overwhelming majority of the district courts" have rejected *D.R. Horton* "on the ground that it conflicts with the explicit pronouncements of the Supreme Court concerning the policies undergirding the Federal Arbitration Act" and collecting cases).

The Seventh Circuit recently parted company with all of these other decisions. *See Lewis v. Epic Sys. Corp.*, 2016 WL 3029464 (7th Cir. May 26, 2016). In so doing, that court made at least two fundamental errors. First, in holding that the Board's rule declaring class waivers illegal is a generally applicable contract defense for purposes of Section 2's savings clause (*id.* at *6), the Seventh Circuit overlooked the fact that the Supreme Court rejected a functionally indistinguishable argument in *Concepcion*. *See* pp. 8-10, *infra*. Second, in holding that the FAA and NLRA are reconcilable—and hence that there is no need to identify in the NLRA a clear congressional command to override the FAA—(*id.* at *7), the court overlooked the Supreme Court's core holding in *Concepcion* that the purposes of the FAA

ued to apply the *D.R. Horton* rule, asserting that it "need not apologize" for its position, no matter how many courts disagree with it. *On Assignment*, 2015 WL 5113231, at *12. Despite the Board's relentless defense of it, however, the reasoning behind the *D.R. Horton* rule remains as flawed today as when the rule was first articulated.

A. The FAA Requires That Agreements To Arbitrate Disputes On An Individual Basis Be Enforced According To Their Terms.

The "Federal Arbitration Act reflects an 'emphatic federal policy in favor of arbitral dispute resolution.'" *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 25 (2011) (per curiam) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985)). Under the FAA, "courts must rigorously enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes, and the rules under which that arbitration will be conducted." *Italian Colors*, 133 S. Ct. at 2309 (internal quotation marks, brackets, and citations omitted). In short, the FAA "makes arbitration agreements 'valid, irrevocable, and enforceable' as written." *Concepcion*, 563 U.S. at 344 (quoting 9 U.S.C. § 2).

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will be thwarted if the enforceability of arbitration provisions is conditioned on the availability of class procedures. *See* pp. 9, 19, *infra*.

The FAA's guarantee of enforceability applies with particular force to agreements that require the parties to arbitrate disputes on an individual basis and to forgo aggregating their claims through class or collective actions. The Supreme Court has repeatedly held that such agreements are enforceable under the FAA. *See Italian Colors*, 133 S. Ct. at 2308-10 (holding that the FAA prohibits courts from "invalidat[ing] arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim") (internal quotation marks omitted); *Concepcion*, 563 U.S. at 340, 352 (holding that the FAA preempted California's *Discover Bank* rule, which declared "most collective-arbitration waivers in consumer contracts" to be unconscionable); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (holding that employee's claims under the Age Discrimination in Employment Act ("ADEA") must be arbitrated according to the terms of the parties' arbitration agreement, "even if the arbitration could not go forward as a class action") (internal quotation marks omitted); *see also Imburgia*, 136 S. Ct. at 471 (reiterating that state courts must enforce arbitration agreements containing class waivers).

Respondent's arbitration agreement, like the agreements at issue in the foregoing cases, requires disputes to be arbitrated on an individual ba-

sis. In that respect, the agreement is of precisely the sort that the Supreme Court has said must be enforced according to its terms.

B. Neither Of The Exceptions To The FAA's Mandate Applies Here.

In its decisions condemning arbitration agreements that require disputes to be resolved on an individual basis, the Board has invoked two exceptions to the FAA's mandate.[3] First, the Board argues that its interpretation of the NLRA is a generally applicable "ground[] * * * for the revocation of any contract" that comes within the FAA's "savings clause." *D.R. Horton*, 2012 WL 36274, at *14 (internal quotation marks omitted); *Murphy Oil*, 2014 WL 5465454, at *11. Second, the Board contends that the NLRA, read in light of the Norris-LaGuardia Act, "amounts to a 'contrary

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[3] The Board has also suggested that it need not show that either exception to the FAA applies. In the Board's view, the NLRA stands outside the "established framework of the Supreme Court's Federal Arbitration Act jurisprudence," entitling the Board to devise its own approach that "accommodate[s] *both* the NLRA and the FAA." *Murphy Oil USA, Inc.,* 361 NLRB No. 72, 2014 WL 5465454, at *9-10 (2014) (emphasis in original), *enf. denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015).

This position is misguided. The Supreme Court has already spelled out how courts and agencies are to strike the balance between the FAA and other statutes, stating that the FAA controls unless the other statute contains a "contrary congressional command" that overrides the FAA. *See, e.g.*, *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987). The Board is free to argue that some other statute governing employment agreements does override the FAA—but it is not free to argue that the FAA's framework is inapplicable.

congressional command' overriding the FAA." *Murphy Oil*, 2014 WL 5465454, at *12. But as many courts have concluded, both of these assertions are wrong. In fact, both are foreclosed by Supreme Court precedent.

1. The Supreme Court has already held that the savings clause does not apply to rules that condition the enforcement of arbitration provisions on the availability of classwide procedures.

The FAA's savings clause allows courts to refuse to enforce arbitration agreements ***only*** on grounds that apply equally to "any contract." 9 U.S.C. § 2. The *D.R. Horton* rule is not nearly so evenhanded. On the contrary, it disfavors arbitration agreements in a way that the FAA forbids.

The NLRB maintains that the *D.R. Horton* rule does no more than apply the general contract-law defense of illegality. *Murphy Oil*, 2014 WL 5465454, at *11. But the same was said of the *Discover Bank* rule at issue in *Concepcion*, which purported to do no more than apply the general contract-law defense of unconscionability. *See Iskanian*, 327 P.3d at 142 ("We do not find persuasive the Board's attempt to distinguish its [*D.R. Horton*] rule from *Discover Bank*."). The Supreme Court held in *Concepcion* that the savings clause does not apply to rules that are ostensibly based on "generally applicable contract defenses"—such as illegality or unconscionability—but in fact "stand as an obstacle to the accomplishment of the FAA's objectives." 563 U.S. at 343.

The Court held that the *Discover Bank* rule was just such an obstacle. "The point of affording parties discretion in designing arbitration," the Court explained, is "to allow for efficient, streamlined procedures tailored to the type of dispute" at issue. *Concepcion*, 563 U.S. at 344. And that purpose would be undermined if parties could not waive their ability to bring class or collective actions. Class proceedings "sacrifice[] the principal advantage of arbitration—its informality—and make[] the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 348. In addition, given the "higher stakes" of classwide arbitration and the limits on judicial review of arbitral awards, requiring class arbitration would create an "unacceptable" risk for defendants, causing them to avoid arbitration rather than to employ it as Congress intended. *Id.* at 350-51. In sum, the Court concluded, "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 344.

As the California Supreme Court has held, the *D.R. Horton* rule is indistinguishable from the *Discover Bank* rule. Thus, as in *Concepcion*, even if the *D.R. Horton* rule "applies equally to arbitration and nonarbitration agreements," by requiring the availability of class procedures, it "interferes with fundamental attributes of arbitration and, for

that reason, disfavors arbitration in practice." *Iskanian*, 327 P.3d at 141. Accordingly, "in light of *Concepcion*, the Board's [*D.R. Horton*] rule is not covered by the FAA's savings clause." *Id.*

2. Neither the NLRA nor the Norris-LaGuardia Act evinces a "contrary congressional command" sufficient to override the FAA.

The only other circumstance in which courts may refuse to enforce arbitration agreements containing class waivers is when "the FAA's mandate has been 'overridden by a contrary congressional command'" in another federal statute. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (quoting *McMahon*, 482 U.S. at 226). This congressional command must be ***clearly*** expressed; if the other 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.

To be sure, some federal statutes do expressly override the FAA. For example, in 2002 Congress enacted a law providing 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). And in 2006, it passed a statute

providing that "[n]otwithstanding section 2" of the FAA, "no agreement to arbitrate any dispute involving the extension of consumer credit shall be enforceable against any covered [armed service] member or dependent of such a member, or any person who was a covered member or dependent of that member when the agreement was made." 10 U.S.C. § 987(f)(4).

But neither the NLRA nor the Norris-LaGuardia Act contains any language remotely similar to the language in these statutes. In fact, neither so much as mentions either arbitration or class/collective actions. The Supreme Court has ***never*** found a federal statute to evince a congressional command sufficient to override the FAA, let alone when the statute at issue contained no language of this sort.[4]

1. ***The NLRA.*** As the Fifth Circuit observed, there is "no argument" that the text of the NLRA—which does not mention arbitration—evinces

[4] *See CompuCredit*, 132 S. Ct. at 673 (Credit Repair Organizations Act ("CROA") does not displace FAA); *Gilmer*, 500 U.S. at 35 (Age Discrimination in Employment Act of 1967 does not displace FAA); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480, 484 (1989) (Securities Act of 1933 does not displace FAA); *McMahon*, 482 U.S. at 238, 242 (Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act do not displace FAA); *Mitsubishi Motors*, 473 U.S. at 640 (Sherman Act does not displace FAA); *see also Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (noting parties' agreement that the Truth in Lending Act does not "evince[] an intention to preclude a waiver of judicial remedies").

an intent to override the FAA. *D.R. Horton*, 737 F.3d at 360.[5] The NLRA's legislative history similarly fails to address the issue: It "only supports a congressional intent to 'level the playing field' between workers and employers by empowering unions to engage in collective bargaining." *D.R. Horton*, 737 F.3d at 361. Congress "did not discuss the right to file class or consolidated claims against employers" at all. *Id.*; *accord Iskanian*, 327 P.3d at 141 ("As the Fifth Circuit explained, neither the NLRA's text nor its legislative history contains a congressional command prohibiting [class] waivers.").

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[5] Indeed, the Board concedes that "the NLRA does not explicitly override the FAA." *Murphy Oil*, 2014 WL 5465454, at *12. Asserting that the FAA was not thought to apply to employment contracts at the time the NLRA was enacted, it contends that no "explicit[]" reference to arbitration is required. *Id.* This reasoning is misguided. When the Sherman and Clayton Acts were enacted, the FAA did not even exist—yet the Supreme Court has held that those statutes do not override the FAA, because they "do not evince an intention to preclude a waiver of class-action procedure" or of judicial remedies generally. *Italian Colors*, 133 S. Ct. at 2309 (internal quotation marks and brackets omitted); *see also Mitsubishi Motors*, 473 U.S. at 628 (explaining that the necessary congressional intent to preclude arbitration must "be deducible from text or legislative history"). If it is appropriate to require that a statute's text and legislative history show an intent to override the FAA with respect to the antitrust laws, which predate the FAA altogether, *a fortiori* it is appropriate to require that showing with respect to the NLRA.

The fact that the NLRA is "silent" on the issue of arbitration should be the end of the matter. *See CompuCredit*, 132 S. Ct. at 673. The Board's various arguments to the contrary are unpersuasive.

First, the Board contends that Section 7 of the NLRA (29 U.S.C. § 157) ***implicitly*** overrides the FAA because it protects employees' right to engage in "concerted activities." But as the Fifth Circuit observed, Section 7's reference to concerted activities could not "implicitly" protect class and collective actions, because the NLRA was enacted "***prior*** to the advent in 1966 of modern class action practice" (*D.R. Horton*, 737 F.3d at 362 (emphasis added); *see also Iskanian*, 327 P.3d at 141) and the adoption of the Fair Labor Standards Act's collective-action provision in 1947. Thus, Congress could not have intended to protect "a right of access to" "procedure[s] that did not exist" when the NLRA was enacted (*D.R. Horton*, 737 F.3d at 362), much less to override the FAA in doing so.[6]

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[6] The Board relies on *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), for the proposition that Section 7 creates a "right" to engage in class or collective actions. *See Murphy Oil*, 2014 WL 5465454, at *9. It badly over reads that decision, however. *Eastex* held only that Section 7 "protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums" (437 U.S. at 565-66); it neither held nor implied that employees have an ***absolute right*** to pursue classwide resolution of causes of action under ***other*** statutes.

The Supreme Court employed this precise reasoning in *Italian Colors*. There, the Court held that the antitrust laws did not evince an intent to preclude arbitration provisions containing class-action waivers, in part because the Sherman and Clayton Acts "make no mention of class actions. In fact, they were enacted decades before the advent of Federal Rule of Civil Procedure 23." *Italian Colors*, 133 S. Ct. at 2309. By the same token, because the NLRA long predated the advent of class and collective actions, it cannot be deemed to be a congressional command to condition enforcement of arbitration provisions on the availability of class procedures. *See Iskanian*, 327 P.3d at 141 (citing *Italian Colors*, 133 S. Ct. at 2309).[7]

Temporal problems aside, the Supreme Court and other courts have repeatedly explained that the right of a litigant to invoke class or collective

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[7] The Board has argued that it does not matter that the NLRA predated Rule 23 because "[g]roup litigation * * * has long been part of the Anglo-American legal tradition." *Murphy Oil*, 2014 WL 5465454, at *19. That argument is meritless. Whatever forms of group litigation existed before Rule 23 bore little resemblance to the class action mechanism that Rule 23 created. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614-15 (1997) (noting that the opt-out damages class action was an "adventuresome innovation") (internal quotation marks omitted). Thus, the NLRA clearly could not have created any substantive right to ***that*** form of concerted legal action. And in any event, the Supreme Court has rejected the functionally identical argument that the antitrust laws—which were also passed at a time when group litigation was presumably "part of the Anglo-American legal tradition"—forbade class waivers. *Italian Colors*, 133 S. Ct. at 2309.

action mechanisms "is a ***procedural*** right only, ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 332 (1980) (emphasis added); *see also, e.g.*, *Amchem Prods.*, 521 U.S. at 612-13 (noting that Rule 23 does not "'abridge, enlarge or modify any substantive right'") (quoting 28 U.S.C. § 2072(b)); *D.R. Horton*, 737 F.3d at 357 ("The use of class action procedures[] * * * is not a substantive right."). The Board cannot transform an inherently procedural device into a ***substantive*** entitlement simply by declaring it to be within the ambit of Section 7.[8]

But even if Section 7 could be read to provide substantive protection for access to class- or collective-action mechanisms, that would still not be sufficient to override the FAA. The CROA expressly allows plaintiffs to bring actions in court and prohibits the waiver of "any right * * * under this sub-chapter," but the Supreme Court held that these were "common-

[8] The Board's concession in *D.R. Horton* that Section 7 does not create a substantive right to ***obtain*** class certification and instead creates "only" a right to seek class certification (2012 WL 36274, at *12 n.24, *19) serves only to confirm the procedural nature of this ostensible right. The concession amounts to an acknowledgment that Section 7 adds nothing to what Rule 23 itself provides for. And the Supreme Court has "already rejected th[e] proposition" that "federal law secures a nonwaivable," substantive "*opportunity* to vindicate federal policies by satisfying the procedural strictures of Rule 23 or invoking * * * class mechanism[s] in arbitration." *Italian Colors*, 133 S. Ct. at 2310 (citing *Concepcion*, 563 U.S. at 344).

place" provisions incapable of "do[ing] the heavy lifting" necessary to displace the FAA. *CompuCredit*, 132 S. Ct. at 669-70 (internal quotation marks omitted). The ADEA goes even further, expressly providing for collective actions (29 U.S.C. § 626(b))—yet the Supreme Court held that this was likewise insufficient to override the FAA. *Gilmer*, 500 U.S. at 32; *see also Italian Colors*, 133 S. Ct. at 2311 ("In *Gilmer*, *supra*, we had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue, the Age Discrimination in Employment Act, expressly permitted collective actions."). If the CROA's and the ADEA's language did not provide the necessary "contrary congressional command," Section 7's far vaguer reference to "concerted activit[y]" surely does not either.

Second, the Board seeks to distinguish away the Supreme Court's entire line of "congressional command" cases. It maintains that the arbitration agreements in *CompuCredit*, *Gilmer*, and other cases were enforceable because the plaintiffs could still assert their "statutory rights" and that the question in those cases was whether class or collective actions were available as a "means to vindicate" those rights. *Murphy Oil*, 2014 WL 5465454, at *10. By contrast, it contends, in cases like this one, "it is the NLRA that is the source of the relevant, substantive right to pursue

* * * claims concertedly." *Id.* Thus, it concludes, Section 7 overrides the FAA because the Supreme Court has said that even under the FAA, arbitration agreements may not waive federal "statutory rights." *Id.*

This purported distinction of the "congressional command" cases is patently invalid. The Supreme Court's decisions establish that the "statutory rights" that must not be waived in an arbitration agreement are ***causes of action***—not "process rights concerning how [a] claim is adjudicated." *Murphy Oil*, 361 NLRB No. 72, slip op. at 52 (Member Johnson, dissenting). Thus, the agreement to arbitrate in *CompuCredit* was enforceable because it preserved "*the legal power to impose* ***liability***" under the CROA. *CompuCredit*, 132 S. Ct. at 671 (emphasis added). Similarly, in *Mitsubishi Motors* the Court held that agreements to arbitrate antitrust claims were enforceable because a plaintiff could still "vindicate ***its statutory cause of action*** in the arbitral forum, [and] the statute [would] continue to serve both its remedial and deterrent function." 473 U.S. at 637 (emphasis added). Because employees can still assert any and all statutory causes of action in individual arbitration, enforcement of arbitration agreements does not run afoul of the Court's admonitions about waivers of "statutory rights."

Finally, the Board asserts that insofar as there is an "inherent conflict" between the policies of the FAA and the NLRA, the FAA should give way because the NLRA's policies are more compelling. *Murphy Oil*, 2014 WL 5465454, at *13. Specifically, the Board asserts that whereas Section 7 "manifests a strong federal policy" in favor of concerted action, "any intrusion on the policies underlying the FAA" by the *D.R. Horton* rule is "limited" because that rule applies only to one type of arbitration agreements—those in the employment context—and because employment class actions typically involve a small number of plaintiffs. *D.R. Horton*, 2012 WL 36274, at *14-15. Thus, the Board contends, prohibiting agreements to arbitrate on an individual basis is the proper way to "accommodate[]" the policies of the two statutes. *Id.* at *15.

But the Board has gotten the policy considerations exactly backwards. Even within the realm of employer-employee legal disputes, enforcing arbitration agreements like respondent's scarcely impinges at all on employees' concerted activities. Employees can still "speak to other employees about suspected violations of laws affecting their working conditions, actually solicit other employees to join with them in asserting such claims in court or arbitration, pool financial resources to fund the litigation, and actively participate with other employees as litigants in the

case"; they simply cannot access one "particular litigation ***mechanism***." *Murphy Oil*, 361 NLRB No. 72, slip op. at 42 (Member Johnson, dissenting) (emphasis added) (footnotes omitted). And, of course, enforcing arbitration agreements containing class waivers has no effect whatever on the many other forms of Section 7 activity—including the prototypical Section 7 activities of organizing, striking, and collective bargaining—that have nothing to do with legal disputes.

By contrast, the *D.R. Horton* rule strikes at the heart of the policies underlying the FAA. Although the Board has noted that the *D.R. Horton* rule does not preclude arbitration altogether, but instead conditions the enforceability of arbitration agreements on the availability of class- or collective-action procedures in some forum (*D.R. Horton*, 2012 WL 36274, at *16), that observation is irrelevant: *Concepcion* squarely held that the FAA prohibits "conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures," because imposing class procedures on arbitration "interferes with fundamental attributes of arbitration" and thus directly undermines the goals of the FAA. *Concepcion*, 563 U.S. at 336, 344. And although it is true that the *D.R. Horton* rule applies only to one type of arbitration agreement, that fact is likewise irrelevant. The plaintiffs in *Gilmer*, *CompuCredit*, and the

other "congressional command" cases also were arguing for rules that would have interfered with arbitration only in a limited number of cases (those involving particular statutes). But the Supreme Court held in each of those cases that the FAA controlled.

2. ***The Norris-LaGuardia Act.*** The Board ***conceded*** in *Murphy Oil* that the Norris-LaGuardia Act, 29 U.S.C. §§ 101 *et seq.*, is not itself the basis for the *D.R. Horton* rule. 2014 WL 5465454, at *13. It argues only that it is "appropriate * * * to look to the Norris-LaGuardia Act" as a way of understanding the policies furthered by the NLRA. *Id.* But even assuming that it is appropriate to look to one statute (the Norris-LaGuardia Act) to determine whether a ***different*** statute (the NLRA) contains a "contrary congressional command" overriding the FAA,[9] the Norris-LaGuardia Act does nothing to buttress the Board's reading of Section 7.

Section 2 of the Norris-LaGuardia Act (29 U.S.C. § 102), which states the policy of the Act in general terms, uses language that is quite similar to that of Section 7 of the NLRA. *Compare* 29 U.S.C. § 102 (stating that employees should be free to engage in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection"),

[9] The Board offers ***no*** authority indicating that a contrary congressional command can be found in this roundabout way.

with id. § 157 ("Employees shall have the right * * * to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."). Because that language is insufficient to create a contrary congressional command in the NLRA (*see* pp. 15-16, *supra*), it is likewise insufficient in the Norris-LaGuardia Act.

In any event, the Norris-LaGuardia Act was "responsive to a situation totally different from that which exists today." *Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 250 (1970). Congress attempted in the Norris-LaGuardia Act "to bring some order out of the industrial chaos that had developed and to correct the abuses that had resulted from the interjection of the federal judiciary into union-management disputes on the behalf of management." *Id.* at 251 (citing 29 U.S.C. § 102). In other words, "Congress passed the Norris-LaGuardia Act to curtail and regulate the ***jurisdiction of courts***, not * * * to regulate the conduct of people engaged in labor disputes." *Marine Cooks & Stewards, AFL v. Panama S.S. Co.*, 362 U.S. 365, 372 (1960) (emphasis added). Read in this historical context, Section 2's statement of policy does not address arbitration (or class actions) in any way and most definitely does not override the FAA.[10]

[10] Indeed, given that the Norris-LaGuardia Act was designed to keep the federal courts ***out*** of labor disputes, it would defy logic to read Section

Section 3 of the Norris-LaGuardia Act (29 U.S.C. § 103) is likewise insufficient to override the FAA. That provision renders "yellow dog" contracts unenforceable[11]; in keeping with the Act's jurisdiction-limiting purpose, Section 3 also prohibits courts from issuing injunctions to enforce such contracts. But an agreement to arbitrate disputes individually is no "yellow dog" contract. To be sure, Section 3 purports to cover all "undertaking[s]" that conflict with the public policy announced in Section 2, rather than only classic "yellow dog" agreements not to join unions—but as explained above (at p. 22), the "policy" of Section 2 has nothing to do with arbitration or concerted legal action at all. Thus, Section 3 cannot be read to prohibit arbitration agreements.

Indeed, the Supreme Court long ago ***rejected*** the notion that Section 3 bars arbitration agreements. "The failure to arbitrate," the Court has explained, "was not a part and parcel of the abuses against which the [Norris-LaGuardia] Act was aimed"; on the contrary, the Act "indicate[s] a

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2 to condition enforcement of arbitration agreements on the availability of class procedures—and thereby force all employment claims ***into*** court. *See Concepcion*, 563 U.S. at 351 ("We find it hard to believe that defendants would" enter into agreements permitting class arbitration).

[11] Yellow-dog contracts were pre-employment agreements "stating that the workers were not and would not become labor union members." *Lincoln Fed. Labor Union No. 19129, A.F. of L. v. Nw. Iron & Metal Co.*, 335 U.S. 525, 534 (1949).

congressional policy ***toward*** settlement of labor disputes by arbitration," because Section 8 of the Act (29 U.S.C. § 108) prevents persons from obtaining injunctive relief if they have not made efforts to settle disputes through arbitration and other informal means. *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 458-59 (1957). "The congressional policy in favor of the enforcement of agreements to arbitrate grievance disputes being clear, there is no reason to submit them to the requirements of" the Norris-LaGuardia Act. *Id.* (footnote omitted); *see also, e.g.*, *Gen. Elec. Co. v. Local 205, United Elec., Radio & Mach. Workers of Am. (U.E.)*, 353 U.S. 547, 548 (1957) ("[T]he Norris-LaGuardia Act does not bar the issuance of an injunction to enforce the obligation to arbitrate grievance disputes."); *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831, 844 (N.D. Cal. 2012) ("[T]he Norris-LaGuardia Act specifically defines those contracts to which it applies. An agreement to arbitrate is not one of those * * *.") (citing 29 U.S.C. § 103(a)-(b)).

In short, "[a]n order to compel arbitration of an existing dispute, or to stay a pending lawsuit over the dispute so that arbitration may be had, as redress for one party's breach of a prior agreement to submit such disputes to arbitration" "is not the 'temporary or permanent injunction' against whose issuance the formidable barriers of [the Norris-LaGuardia

Act] are raised." *Local 205, United Elec., Radio & Mach. Workers of Am. (U.E.) v. Gen. Elec. Co.*, 233 F.2d 85, 91 (1st Cir. 1956), *aff'd*, 353 U.S. 547 (1957); *see also id.* ("[J]urisdiction to compel arbitration is not withdrawn by the Norris-LaGuardia Act.").

Section 4 of the Norris-LaGuardia Act does not express a "contrary congressional command" to override the FAA, either. That section prohibits its courts from enjoining persons who, among many other things, are ***"[b]y all lawful means*** aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State." 29 U.S.C. § 104(d) (emphasis added). To begin with, an agreement to arbitrate disputes on an individual basis does not bar employees bound by it from assisting any other employees in prosecuting an action in court; it simply prevents them from proceeding in court themselves either individually or on behalf of a putative class. Even were that not so, this section would not bar the enforcement of arbitration agreements, because an employee who has agreed to arbitration has no "lawful" right to participate in a class action. Indeed, "a person who simply ignores the terms of an arbitration agreement to file a lawsuit instead acts in contravention" of the FAA. *Murphy Oil*, 361 NLRB No. 72, slip op. at 55 (Member Johnson, dissent-

ing). Thus, "[i]ntentionally breaching one's obligations under an arbitration agreement, as defined by the FAA, cannot rationally be deemed a lawful means" under Section 4. *Id.*[12]

Finally, the Board points to Section 15 of the Norris-LaGuardia Act (29 U.S.C. § 115), which repealed "[a]ll acts and parts of acts in conflict with" the Norris-LaGuardia Act, suggesting that this general provision repealed the FAA in the labor context. *Murphy Oil*, 2014 WL 5465454, at *14 (internal quotation marks omitted). But this argument is wrong. The Supreme Court has emphasized that a federal statute must contain a discernible "contrary congressional command" to displace the FAA, and it is clear that such a command cannot exist in a statute that does not mention arbitration. *See CompuCredit*, 132 S. Ct. at 673. In any event, as explained above (at pp. 21-25), there is no "conflict" between the FAA and the Norris-LaGuardia Act. Thus, the Norris-LaGuardia Act cannot be read to repeal any portion of the FAA. Accordingly, the Norris-LaGuardia Act does not justify prohibiting agreements to arbitrate on an individual basis.

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[12] In addition, because the Norris-LaGuardia Act was not intended to allow courts to enjoin arbitration (*see* pp. 22-24, *supra*), it would be contrary to congressional intent to read Section 4 to allow for such injunctions.

II. REJECTING THE *D.R. HORTON* RULE WILL BENEFIT EMPLOYEES, BUSINESSES, AND THE NATIONAL ECONOMY.

In the Board's view, any waiver of the option to bring class actions is a *per se* violation of the federal right to undertake concerted action, regardless of the basis for the substantive legal claims. But as the Supreme Court recognized in *Concepcion* and *Stolt-Nielsen*, arbitration is by its very nature individualized; superimposing collective- or class-action procedures on it would sacrifice the cost savings, informality, and expedition of traditional, individual arbitration. As a practical matter, given these trade-offs, no company would willingly enter into collective or class arbitration. *See Concepcion*, 563 U.S. at 350 ("[w]e find it hard to believe that defendants would" enter into agreements permitting class arbitration); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010) ("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"). Rather, conditioning the enforcement of arbitration provisions on the availability of class procedures would lead employers to abandon arbitration altogether—to the detriment of employees, businesses, and the economy as a whole.[13]

[13] The Board has suggested that employers could be allowed to require bilateral ***arbitration*** of individualized disputes as long as they allow

Arbitration is faster, easier, and less expensive than litigation. The Supreme Court has repeatedly observed, therefore, 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*, *e.g.*, *Concepcion*, 563 U.S. at 345 ("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"); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009) ("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, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (emphasis added).

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class/collective actions in ***court***. *D.R. Horton*, 2012 WL 36274, at *16. As the Supreme Court has explained, however, if required to submit to class procedures, "companies would have less incentive to continue resolving potentially duplicative claims on an individual basis." *Concepcion*, 563 U.S. at 347. That kind of roadblock to arbitration is precisely what the FAA was enacted to eradicate. *Id.* at 345 ("[O]ur cases place it beyond dispute that the FAA was designed to promote arbitration.").

These benefits of arbitration are especially pronounced for employees with individualized claims that are not amenable to being brought on a class or collective basis—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 very often be priced out of the judicial system entirely and hence would be left with no recourse or means to seek redress of their grievances. By contrast, the American Arbitration Association frequently handles 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). For many employees, in other words, 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).

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). Likely for that reason, employees tend to fare better in arbitration: Studies have shown that those who arbitrate their claims are more likely

to prevail than those who go to court. *See*, *e.g.*, Lewis L. Maltby, *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 were 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 both its informality and its celerity, arbitration is often less contentious than litigation, enabling 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 alternative-dispute-resolution 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 at another employer in the future.

Nor are employees who have grievances the only ones who benefit from arbitration. On the contrary, 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).

If the Board's arguments were accepted and its decision here upheld, all these benefits would be lost. Employees, consumers, businesses, and the national economy would all be worse off; and the many employment disputes in this Circuit that are routinely and effectively arbitrated every day would be diverted to an already-clogged court system—the very scenario that the FAA was designed to prevent.

CONCLUSION

For the foregoing reasons, the Board's petition for enforcement of its Decision and Order should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel for *amicus curiae* the Chamber of Commerce of the United States of America certifies that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 6,982 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: June 27, 2016 /s/ *Evan M. Tager*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* Supporting Respondent with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system on June 27, 2016.

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