Case No. 12-55578

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FATEMEH JOHNMOHAMMADI,

Plaintiff-Appellant,

v.

BLOOMINGDALE'S, INC.,

Defendant-Appellee.

From the United States District Court for the
Central District of California, Case No. 2:11-cv-06434-GW (AJWx)

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Bloomingdale's adheres to a position that an arbitration agreement can supersede employee rights under the Norris La Guardia Act ("NLGA") and National Labor Relations Act ("NLRA") to be free from employer interference with the right to engage in concerted activity for mutual aid or protection. In doing so, Bloomingdale's misapprehends the letter and import of the NLGA and NLRA, and attempts to repudiate decades of Supreme Court and NLRB authority defining "concerted activity," and prohibiting employer interference with such activity.

Bloomingdale's has stripped those employees who did not contractually opt out of arbitration of fundamental NLGA and NLRB rights by precluding them from prosecuting their employment-related legal claims collectively in any forum, arbitral or judicial. The NLRB's expert judgment that contracts that deprive employees of the right to collectively litigate employee claims violate the NLGA and NLRA is supported by the language of those statutes, the policies underlying them, and the case law interpreting and applying them. The FAA does not warrant a contrary position.

II. ARGUMENT

A. Congress Has Evinced a Clear Congressional Command to Override Contracts That Inhibit Worker Concerted Activity

Bloomingdale's recognizes that the FAA places arbitration agreements "on the same footing as other contracts and 'shall be valid, irrevocable, and enforceable, save upon such ground as exist at law or in equity for the revocation of any contract.' 9 U.S.C. § 2" (Appellee's Brief pg. 17-18) See also *Scherk v. Albert-Culver Co.* (1974) 417 U.S. 506, 511.

Under the "savings clause," therefore, invalidation of an arbitration agreement does not conflict with either the language or the policies of the FAA if the basis of the invalidity would serve to nullify any other contract under the same circumstances.

In *CompuCredit Corp. v. Greenwood* (2012) 132 S.Ct. 665, 669, the Court confirmed this one vulnerability of FAA agreements, stating that the FAA requirement that arbitration agreements be enforced can be "overridden by a contrary congressional command."

For example, since the NLGA and the NLRA make it illegal for an employee and employer to enter into a contract that would preclude an employee from joining a union, such illegality would not, given the FAA's "saving clause," disappear simply because the promise not to

join a union was in exchange for an agreement to arbitrate individual workplace disputes.

NLRB v. National Licorice (1940) 309 U.S. 350, upheld an NLRB invalidation of individual contracts between an employer and individual employees because, in part, they contained "illegal restraints" on Section 7 rights.

In *National Licorice*, the Court upheld a finding of an unfair labor practice by the NLRB, because the individual contracts entered into by 118 of the 140 employees discouraged, if they did not forbid, employees from having their claims pursued through a "chosen representative or in any way except personally." *Id*, 309 U.S. at 360. Analogously, Johnmohammadi was prevented by the District Court from attempting to engage in, and benefit from collective action, and from having her wage claims "adjudicated in any way except personally."

Bloomingdale's fails to apprehend that both the NLGA and NLRA reflect a Congressional Command to override all contracts between employers and employees, whether or not they are arbitration agreements, if they inhibit or preclude "concerted activity" by employees. Since class actions are a form of "concerted activity," the

express provisions of the NLGA and NLRA reflect a Congressional Command to override arbitration agreements that preclude workers from initiating or joining together to pursue class actions.

The NLGA, at 29 U.S.C. § 102, makes "emphatically" clear that Congress holds an employee's right to engage in concerted activity without employer interference, in the highest regard, pointing out, as a matter of Congressional finding, that the unorganized worker, like Johnmohammadi, is "commonly helpless to exercise actual liberty of contract to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment." Congress declared that such unorganized workers must necessarily have "full freedom of association, self-organization, and *designation of representatives of his own choosing*," and most importantly, "be free from the interference, restraint, or coercion of employers of labor...in self organization or *in other concerted activities for the purpose* of collective bargaining or *other mutual aid and protection*..." 29 U.S.C. § 102. (Emphasis added)

This proclamation was followed up with a prohibition of "yellow dog contracts" and, more importantly here, a prohibition of

any contract in conflict with the free exercise of rights to engage in concerted activity for mutual aid and protection.

"[A]ny other undertaking or promise in conflict with the public policy declared in Section 2 of this act is hereby declared to be contrary to the public policy of the United States**, shall not be enforceable in any Court of the United States, and shall not afford any basis for the granting of legal or equitable relief."** 29 U.S.C. § 103. (Emphasis added)

The "emphatic" nature of Congress' position on worker "concerted activity" did not have to be discerned from Legislative history, it was declared in the Act itself. 29 U.S.C. §§102-103.

The NLGA went so far as to broadly withhold from federal district courts, jurisdiction to enter injunctions "in any case involving or growing out of a labor dispute." 29 U.S.C. §§ 103-104[1].

A "labor dispute" is defined broadly in 29 U.S.C. § 113 as follows:

> "(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or ...

[1] Section 104 of the NLGA contains an "enumeration of specific acts" that cannot be enjoined, but that list "is not an exclusive list." *Triangle Constr. & Maint. Corp. v. Our V.I. Labor Union*, 425 F.3d 938, 946 (11th Cir. 2005).

> regardless of whether or not the disputants stand in the proximate relation of employer and employee."

Here, the District Court ruling violated the NLGA, enjoining Johnmohammadi from proceeding with the concerted activity of a "class action" in which she sought to represent co-workers in a "controversy concerning terms and conditions of employment". The Court enforced an unenforceable [29 USC 103] ban on worker class actions, a concerted activity.

Amici Chamber of Commerce relies on *Morvant v. P.F. Chang's* (N.D. Cal. 2012) 870 F. Supp.2d 831, 844 for the proposition that the NLGA only bars "yellow dog" contract provisions in which employees agree not to join unions. The District Court in *Morvant* got it completely wrong, ignoring the clear language of Labor Code § 103(a) that declared that "yellow dog" contracts as described in 29 U.S.C. § 103, "**or any other undertaking or promise in conflict with the public policy declared in Section 2 shall not be enforceable in any court**…and shall not afford any basis for granting of legal or equitable relief by such court…" (Emphasis added).

Building on the NLGA, with the passage of the NLRA, Congress reiterated that it was the policy of the United States to protect the exercise by workers of "full freedom of association...for

the purpose of mutual aid or protection." 29 U.S.C. § 151; and then followed up with the prohibition on employer's interference with the rights of employees to engage in any concerted activities for "mutual aid or protection," 29 U.S.C. § 157-158(a)(1), not just concerted activity in the form of collective bargaining activities.

More than that, the NLRA establishes a comprehensive set of procedures for policing conduct. The Supreme Court explained:

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide **primary interpretation and application of its rules to a specific and specially constituted tribunal [the NLRB]…**Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules..." (emphasis added) *Garner v. Teamsters*, 346 U.S. 485, 490-91 (1953)[2]

B. Concerted Activity, Including Class Actions, as Comtemplated by the NLGA and NLRA, are a Species of the Hallowed Right of Association

It is not coincidental that 29 U.S.C. § 102 and 29 U.S.C. § 151, both reference *"freedom of association*."

[2] *Talbot v. Robert Matthews Distrib. Co.* 961 F.2d 654, 659 (7th Cir. 1992) ("the NLRB [has] exclusive jurisdiction to determine whether given conduct falls within the NLRA")

Bloomingdale's attempts to minimize concerted activity in the form of "class actions" by employees, as a mere procedural device, not as a substantive right. (Appellee's Brief pg. 25-29).

The right to engage in concerted activity is a fundamental right. *NLRB v. Jones & Laughlin Steel Corp.* (1977) U.S. 1, 33. *DR. Horton* 357 NLRB 857 (2012). The Legislative history of the NLRA as well as the references to "freedom of association" in the text of the NLRA and NLGA clearly analogize Section 7 rights to associational rights embraced by the first amendment. *National Ass'n for Advancement of Colored People v. State of Alabama* (1958) 357 U.S. 449, 460 establishes the nexus between the Fourteenth Amendment, First Amendment and the "Freedom of Association".

The committee report submitted together with the first draft of the bill that ended up the NLRA, expressly declared that Section 4 (which in later drafts became Section 7):

> "[R]estates the familiar law already enacted by Congress in Section 2 of the NLGA....the language restrains employers from attempting by interference or coercion, to impair the exercise by employees of rights which are admitted everywhere to be the basis of industrial no less than political democracy. A worker in the field of industry, like a citizen in the field of government, ought to be free to form or join organizations, to designate representatives, and to engage in concerted activities."

S. Rep No. 1184, 73 Cong.; 2d Sess.4 (1934), reprinted in 1 NLRB, Legislative History of the National Labor Relations Act, 1935, at 1099, 1103 (1949).

When it came to workers, Congress recognized that the importance of preserving the right of workers to engage in association, in concerted activity, was so profound, that it rendered contract provisions between employers and employees disallowing employee concerted activity unenforceable in the NLGA.

C. "Concerted Activity" Is Not Limited to Union Related Activity

Bloomingdale's argues that the concerted activity provisions of both the NLGA and NLRA were only concerned with collective bargaining and union organizing (Appellee's Brief pg. 39-42).

This contention is belied by the express language of the law and applicable precedent. Both the NLGA and NLRA are written in the disjunctive, recognizing selection of representatives and collective bargaining as forms of concerted activity, but expressly also protecting *other* forms of concerted activity for mutual aid and protection. 29 U.S.C. § 102 and § 157.

This Circuit, relying on Supreme Court and other precedent, early on, dispelled any reading of the NLGA and NLRA that limited

the scope of "concerted activity" to union organizing and collective bargaining.

In *NLRB v. Tanner* (9th Cir. 1965) 349 F.2d 1, 3, the Court was faced with a circumstance where two employees engaged in activities, outside the context of organizing and collective bargaining, to convince their employer not to discriminate in hiring. They were fired. The question arose as to whether their non-union conduct was protected activity.

The Court held that "Section 7...specifically protects both the right to bargain collectively and the right to engage in other concerted activities and specifically distinguishes between the purpose of collective bargaining and the purpose of other mutual aid or protection...[T]aken together, these provisions protect concerted activities, even though not through collective bargaining, which have to do with terms and conditions of employment." *Id*, 349 F.2d at 3.

In support of the foregoing ruling, the *Tanner* Court went on to cite the breadth of the definition of "labor dispute" in 29 U.S.C.§ 113(c), and the holding in *New Negro Alliance v. Sanitary Grocery Co.* (1938) 303 U.S. 552, 561, that upheld non-union, non-collective

bargaining activity pertaining to employment, as protected concerted activity. *Tanner, supra* 349 F.2d at, 3-4.

More recently, *Brady v. National Football League* (8th Cir. 2011) 644 F.3d 661 reinforced the obvious, that "concerted activity" is not limited to union activity:

> "Section 2 [of the NLGA] declares, among other things, that the 'individual unorganized worker' shall be free from the interference of employers in the 'designation of...representatives or in self-organization or in other concerted activities for the purpose of collective bargaining *or other mutual aid or protection* (emphasis added) Employees may engage in activities for the purpose of 'mutual aid and protection' *without* the present existence of a union. [cites omitted]." *Id* 644 F.3d at 672.

Brady went on to hold:

> "[A] **lawsuit filed in good faith**, by a group of employees to achieve more favorable terms or conditions of employment is 'concerted activity' under § 7 of the National Labor Relations Act. *Mohave Elec. Co-op, Inc. v. NLRB* 206 F.3d 1183, 1189 & n.8 (D.C. Cir. 2000)...; see *Id, Eastex Inc. v. NLRB* 437 U.S. 556, 565-566 & n.15, (1978)." *Brady, supra* 644 F.3d at 673.

In *Eastex, supra* 437 U.S. at 566 the Supreme Court expressly repudiated Bloomingdale's position herein, finding that resort to a judicial forum is a type of concerted activity:

> "We also find no warrant for petitioners view that employees lose their protection under the 'mutual aid or protection' clause when they seek to improve terms and

> conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship. The 74th Congress knew well enough that labor's cause is often advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context. It recognized this fact by choosing, as the language of § 7 makes clear, to protect concerted activities for the somewhat broader purpose of 'mutual aid or protection' as well as for the narrower purposes of 'self-organization' and 'collective bargaining.' Thus, it has been held that the 'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums..."

D. Initiation of Litigation Seeking Relief on Behalf of a Group Of Workers Is "Concerted Activity"

Aside from incorrectly arguing that the NLGA and NLRA do not contemplate "concerted activity" other than activity associated with union organizing and collective bargaining, Bloomingdale's contends that "class actions" to enforce wage rights are not "concerted activity." (Appellee's Brief 38, 42)

The Supreme Court, in the above-quoted cite from *Eastex, supra* 437 U.S. at 566, and the 8th Circuit in *Brady, supra* 644 F.3d at 673, with their references to judicial proceedings, hold to the contrary.

In a context where an employee, like Johnmohamaddi here, sought to induce others to collectively litigate unpaid wage claims, the Ninth Circuit held, in *Salt River Valley Water Users Ass'n* v. *NLRB*

(9th Cir. 1953) 206 F.2d 325, consistent with *Eastex*, that such conduct was protected concerted activity for "mutual aid and protection." *Id*, 206 F.2d at 328.

As pointed out in Johnmohammadi's opening brief, the NLRB, even long before *D.R. Horton* 357 NLRB No. 184 (2012), consistently held that litigation intended to benefit a group, is a form of protected concerted activity. See *52nd St. Hotel Associates* 321 NLRB No. 93 at 633, and cases cited therein; *Harco Trucking LLC* 344 NLRB 478 (2005); *Le Madri Restaurant* 331 NLRB 269, 275-276 (2000); *United Parcel Service* 252 NLRB 1015, (1980), enfd. 677 F.2d 421 (6th Cir. 1982), and *Saigon Gourmet* 353 NLRB 1063, 1064 (2009).

Such rulings by the NLRB, interpreting the NLRA, should clearly be applied by this Court. *Bayside Enterprises, Inc. v. NLRB* (1977) 429 U.S. 298, 304; *NLRB v. City Disposal Systems, Inc.* (1984) 465 U.S. 822, 829.

The rulings of the NLRB, and the Courts in *Eastex, Brady* and in *Salt River*, that Section 7 of the NLRA protects employee pursuit of employment-related legal claims is clearly consistent with the language of the NLRA and NLGA. More fundamentally, these holdings effectuate the principal goal of the NLRA and NLGA; they

protect employees' core right to work in concert, with or without a union, to advance their workplace concerns as a counterbalance to their employers' greater clout.

Bloomingdale's and its amici fail to demonstrate that the Board's and courts' interpretation of Section 7 is unreasonable, much less inconsistent with the language of the law. Their policy arguments – reflecting their assessment of the relative benefits of arbitration and court litigation, of individual and concerted pursuit of legal rights are, as are policy arguments extolling the virtues of class actions, all beside the point. What is at stake here are employees' Section 7 and NLGA rights to decide for themselves among the options that the law affords them to address their employment-related concerns. Section 7 does not impose collective activity on any employee. Instead, the NLRA protects each employee's "freedom of association" – or ability to *choose* concerted action.

E. Contrary to Bloomingdale's Contention, Class Actions Existed Before the FAA Was Enacted

Bloomingdale's and its supporters incorrectly assert that Class Actions were actually or virtually non-existent before enactment of the FAA and before enactment of the NLRA.

In 1833, the first provision for group litigation in Federal Courts was set forth as Equity Rule 48 (1843). This rule allowed for representative suits when the parties on either side were too numerous. At first the outcomes of the group litigation were not binding on similarly situated absent parties. Ten years later, the U.S. Supreme Court held that absent parties could be bound by the outcomes of cases brought under Equity Rule 48. (*Smith v. Swormstedt*, 57 U.S. (16 How.) 288 (1853)).

The equity rules were overhauled in the beginning of the 20th century, but the representative action device remained in the books as Equity Rule 38. The new rule stated:

> "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole." 226 U.S. 659 (1912)

For 25 years, until the passage of the Rules of Civil Procedure, this language provided the basis for class actions in federal courts. See *Class Action Dilemmas*, Rand Institute for Civil Justice (2000) pg. 10-11.

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F. One Worker Attempting to Initiate or Induce Action By or on Behalf of Other Workers is Engaged in "Concerted Activity"

Bloomingdale's Amici California Employment Law Council ("Law Council") misstates the state of the law in connection with what constitutes "concerted activity".

Citing *Prill v. NLRB*, 835 F.3d 1481 (D.C. Cir. 1987), ("*Prill II")*, the Law Council brief asserts, in contravention of applicable precedent, that a worker taking action by himself without contacting his fellow employees is not engaged in concerted activity. (Law Council Amicus Brief at pg. 13)**.** In fact *Prill I* and *Prill II* stand for the opposite proposition.

In *Mushroom Transportation Co., v. NLRB* (3rd Cir. 1964) 330 F.2d 683, 685, the 3rd Circuit held that the test for concerted activity should consider whether the activity, even if engaged in by only one person, was "engaged in with the object of initiating or inducing or preparing for group action or [whether] it had some relation to group action in the interest of the employees." Clearly, Johnmohammadi here, was attempting to initiate and induce group action for wages.

Mushroom Transportation Co., supra was embraced, not repudiated by *Prill v. NLRB ("Prill I")* (D.C. Cir. 1985) 755 F.2d 941,

955, *Prill II, supra* 835 F.3d 1481, and the NLRB decisions that they addressed.

In the second NLRB decision in the *Prill* cases, *Meyers Industries, Inc. (And Kenneth P. Prill)* 281 NLRB No.118 ("Meyers II"), the NLRB reiterated its support for *Mushroom Transportation*:

> "[W]e [the NLRB] intend that *Meyers I* be read as fully embracing the view of concertedness exemplified by the *Mushroom Transportation* line of cases. .. [O]ur definition of concerted activity in *Meyers I* encompasses those circumstances where individual employees **seek to initiate or induce or to prepare for group action**, ..." (Emphasis added).

Prill v. NLRB ("Prill I") (D.C. Cir. 1985) 755 F.2d 941, 955 upheld the *Mushroom Transportation* position, pointing out:

> " [T]he courts have long followed the Board's view that individual efforts to enlist other employees in support of common goals is protected by Section 7.... As the Supreme Court indicated in *City Disposal*, practically all Courts follow *Mushroom Transportation* in holding such conduct protected. [104 S.Ct. at 1511]" *Prill I, supra* at 955.

As recent as last month, an NLRB ALJ reasserted the foregoing, stating that "individual action is concerted so long as it is engaged in with the object of initiating or inducing group action." *Greater Omaha Packing Co., Inc*. 2012 WL 6755114 (NLRB Div. of Judges).

Simply put, Amici Law Council is wrong in asserting that Johnmohammadi's effort to induce participation in a class action was not "concerted activity."

G. ***AT&T Mobility v. Concepcion*** **and** ***CompuCredit v. Greenwood*** **Do Not Undermine the NLGA and NLRA**

Bloomingdale's, and their amici, rely extensively on *AT&T Mobility LLC v. Concepcion*, 131 S.Ct 1740 (2011) and *CompuCredit v. Greenwood* 132 S.Ct. 665 (2012).

If one accepts Bloomingdale's arguments, the Supreme Court's recent decisions involving the FAA in consumer contexts, have radically empowered employers to limit employees' NLRA Section 7 rights, and NLGA Section 2 rights. Relatively speaking, *Concepcion* and *CompuCredit* have little, if anything, to do with arbitration in the context of the employer-employee relationship when employees exercise their unwaivable right to engage in "concerted activity."

Bloomingdale's reliance on *Concepcion, supra* fails to confront the reality that the NLRB has the authority to interpret what constitutes "concerted activity for mutual aid or protection," and has an unfettered right to determine what constitutes "interference" with concerted activities.

Bloomingdale's reliance on *Concepcion* also ignores the clear and "emphatic" Congressional command that contracts that interfere with concerted activity for mutual aid and protection "are contrary to the public policy of the United States and shall not be enforceable in any Court of the United States …" 29 U.S.C. § 102 and § 103.

Concepcion is a case in which the Supreme Court held that the FAA's requirement that courts enforce private arbitration agreements preempted the California Supreme Court's holding in *Discover Bank v. Superior Court* (2005) 30 Cal. Rptr.3d 76, a case where a state court held that arbitration agreements containing class-action waivers in certain consumer contracts of adhesion were unenforceable. This matter is completely different. Here, Bloomingdales seeks to destroy, on the basis of a contract, decades old Congressionally created statutory rights of employees to engage in concerted activities, including the concerted activity of pursuing class cases without employer interference.

There should be no mistake about how Bloomingdale's position is a radical departure from the manner in which the NLGA and NLRA have been applied in the past. Here, the core issue is whether or not Bloomingdale's can buy, with any consideration, such as a raise,

arbitration promise, a job, or a decent parking space in the employee parking lot, an employee's agreement not to engage, in the future, in concerted activity. Though instructive with respect to the FAA's standing in the world of general consumer litigation, the arguments Respondent and its allies have fashioned from *Concepcion*, would require that statutory rights of employees be wiped out in order to reach the conclusions they advocate.

> "Employer devised agreements that seek to restrict employees from acting in concert with each other are the *raison d'etre* for both the Norris La Guardia Act and Section 7 of the NLRA. The congressional findings giving rise to the NLRA and NLGA plainly state that these statutes were intended to correct the massive imbalance in bargaining power between the individual worker and his employer. To correct this imbalance, Congress empowered workers to act concertedly for their mutual aid and benefit in the workplace."

24 Hour Fitness USA, Inc. 2012 WL 549 5007 (NLRB ALJ Decision) (Nov. 16, 2012). In *24 Hour Fitness* 2012 WL 5495007, applying *D.R. Horton* 357 NLRB No. 184 (2012), *Eastex*, *supra*, *J.I. Case*, *supra*, and other authority, the NLRB ALJ set aside a class action bar in an arbitration agreement where, as here, employees had the option to opt-out of arbitration.

Bloomingdale's agreements with workers compelling them to give up a future right to seek class relief, in exchange for the right to

arbitrate disputes, serves to restore the imbalance between the individual worker and employers that the NLGA and NLRA were intended to eliminate by prohibiting employees from pursuing the resolution of workplace grievances through concerted activity.

"Obviously," the Court concluded, in *National Licorice, supra* 309 U.S. at 364, "employers cannot set at naught the NLRA by inducing their workmen to agree not to demand performance of the duties which it imposes." (e.g. the employer duty to refrain from interfering with and restraining employee rights to engage in concerted activities).

CompuCredit v. Greenwood (2012) 132 S.Ct. 665, relied on extensively by Bloomingdale's, similarly does not address the fact that the NLGA and NLRA protect "concerted activities" by employees.

CompuCredit is essentially a statutory case. It arose after lower courts decided to deny the defendant's motion to compel contractual arbitration based on their conclusion that certain statutory language evidenced a congressional intent that class claims arising under the Credit Repair Organizations Act (CROA) were not precluded by an arbitration agreement with a class action bar. In its decision, the

Supreme Court concluded that the lower courts had misconstrued specific statutory language in CROA as precluding litigation in an arbitral forum. It concluded that the remedial language in CROA did not foreclose the parties from adopting "a reasonable forum-selection clause" that included arbitration and, if they did so, the courts were obliged to enforce the parties' agreement under the FAA. 132 S.Ct. at 671-672.

In stark contrast, the right of workers to engage in class actions pursuant to the NLGA and NLRA is not an open question of statutory construction, but rather an NLRB and Supreme Court recognized settled form of "concerted activity" for mutual aid and protection that Employers cannot interfere with.

H. Bloomingdale's Wrongfully Asserts That The NLRB is Improperly Interpreting the FAA

Bloomingdale's argues that the NLRB has no business interpreting the FAA.

Careful scrutiny of the NLRB and Court rulings regarding "concerted activity" and "unfair labor practices" establish that the centerpiece of the NLRA and Court jurisprudence in this area is interpretation and application of the NLRA and NLGA, not the FAA.

As Bloomingdale's points out, the FAA, when enacted, was not focused on class actions. Similarly, Congress, when it enacted the FAA, did not have in mind "concerted activity by employees" and employer "interference" with employee rights to engage in concerted activity. It was, and remains, up to the NLRB to ascertain the meaning of "mutual aid and protection" "concerted activity," and "interference" with the exercise of concerted activity. The FAA cannot inform the NLRB's judgment as to the meaning of those terms because Congress had not contemplated the NLRA when the FAA was enacted.

The holdings of the NLRB, as to the meaning of the law it was created to enforce, are unassailable on the basis of the FAA. They do not pretend to interpret the FAA in defining concerted activity, mutual aid and protection, and interference with concerted activity.

The NLRA rulings on these issues do not run afoul of the FAA, especially since arbitration agreements are valid and enforceable "save upon such grounds as exist at law or equity for revocation of any contract."

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I. Voluntary Consent to a Waiver of Section 7 Rights Does Not Affect the Analysis Herein.

Although Johnmohammadi does not concede that her failure to opt out constitutes effective consent to a class action waiver, even if it did, such waiver is not enforceable but remains an illegal impairment of her right to engage in concerted activity.

In *J.I. Case Co. v. NLRB* (1944) 321 U.S. 332, quoted with approval in *D.R. Horton*, the Supreme Court observed that:

> "Individual contracts **no matter what the circumstances that justify their execution** or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act…
>
> Wherever private contracts conflict with [the Board's] functions [of preventing unfair labor practices], they obviously must yield or the Act would be reduced to a futility." *Id.* at 337.

In *Ishikawa Gasket America, Inc.* 337 NLRB No. 29, the employer paid a worker money in exchange for a promise not to engage in concerted activity in the future. The Board held:

> "[T]his separation agreement is overly broad in that it forces Brown [in exchange for payment] to prospectively waive her lawful Section 7 rights. '[F]uture rights of employees as well as the rights of the public may not be traded away in this manner.' [cite omitted]." *Ishikawa, supra* 337 NLRB at 175-176 See also *Bon Harbor Nursing & Rehab Ctr.* 348 NLRB 1062 (2006).

Here, Bloomingdale's is using a contract as an excuse for a restraint on future concerted activity. Such a contract conflicts with the Board's authority and, as in *National Licorice*, and *J.I. Case*, cannot be enforced.

> "During this same period of time [as the decision in *J.I. Case*], the Board held unlawful a clause in individual employment contracts that required employees to attempt to resolve employment disputes individually with the employer and then provided for arbitration. *J.H. Stone & Sons*, 33 NLRB 1014 (1941), enfd. in relevant part 125 F.2d 752 (7th Cir. 1942). 'The effect of this restriction,' the Board explained, 'is that, at the earliest and most crucial stages of adjustment of any dispute, the employee is denied the right to act through a representative and is compelled to pit his individual bargaining strength against the superior bargaining power of the employer. *Id*. at 1023. (footnote omitted). The Seventh Circuit affirmed the Board's holding, describing the contract clause as a per se violation of the Act, **even if 'entered into without coercion'**, because it 'obligated [the employee] to bargain individually' and was a 'restraint upon collective action.' *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942). These precedents compel the conclusion the MAA [arbitration agreement with class action bar] violates the NLRA." *D.R. Horton, supra*, 357 NLRB No. 184, at 4-5.

Not one word of the FAA conflicts with any of the aforementioned rulings of the NLRA. If the NLRB holds, as it did in *D.R. Horton*, that a contract that bars class actions by employees is a form of unlawful interference with concerted activity protected by the NLGA and NLRA, then that illegality necessarily has to factor into

the "save upon such grounds as exist at law or in equity" caveat of the FAA.

The NLRA and NLGA make it illegal for an employer and an unorganized worker to enter into any contract, let alone an arbitration contract, that would interfere with or restrain the rights of the worker to engage in class actions for mutual aid and protection.

As *J.I. Case, J.H. Stone & Sons, NLRB v. Stone, National Licorice*, and *Ishikawa* make clear, the voluntariness of such agreements, does not render them valid.

J. Invalidation of a Contractual Class Action Ban Asserted Against Employees Does Not Conflict With the FAA.

An invalidation of Bloomingdale's class action ban would fall comfortably within the FAA's savings clause. Such required invalidation is premised on the prohibition of employees' collective pursuit of employment-related legal claims in arbitral or judicial forums, and express restriction of their Section 7 and NLGA concerted activity rights. Individual contracts requiring such a waiver of Section 7 rights have long been held to violate the NLRA. Accordingly, as the Board explained in *D.R. Horton* "[t]o find that an arbitration agreement must yield to the NLRA is to treat it no worse than any other private contract that conflicts with Federal labor law."

The invalidity of Bloomingdale's contract turns not on any NLRB preference for court litigation, but on a determination that an employer may not leave its employees with no avenue, in court or arbitration, to "concertedly" seek redress for *legal* wrongs.

The NLRA violation here depends entirely on Bloomingdale's restriction of employees' federal statutory right to act concertedly and not on any judgment regarding particular arbitral procedures available under the Bloomingdale's program.

The concerted-action waiver in Bloomingdale's contract constrains federal rights under the NLRA and NLGA. It is well established that the FAA's reach extends not only to arbitration agreements covering contractual disputes, but also to agreements to arbitrate federal statutory claims under, for example, Federal Securities and Anti-Discrimination laws. See *Gilmer v. Interstate* (1991), 500 U.S. 20, at 26-27. See also *CompuCredit, supra* 132 S.Ct. 665, 669 (2012). Without question, private parties may agree to arbitrate employment-related claims. But nothing in the FAA's language suggests, nor do the decades of Supreme Court and Circuit Court cases interpreting it hold, that such agreement – any more than other contracts – may nullify substantive federal protections like those

in the NLGA and NLRA, which are otherwise insulated from contractual restriction.

Bloomingdale's points to several cases holding that arbitration agreements with various types of class or concerted-action waivers are enforceable and do not restrict litigants' federal statutory rights, which can be vindicated through arbitration. But those cases do not hold that arbitration never impairs federal statutory rights, only that the particular agreements in those cases were enforceable, in part because they did not prevent the complaining parties from vindicating the individual rights they asserted. Specifically, the courts held that the statutes in question did not create substantive rights to a judicial (as opposed to arbitral) forum, to proceed using particular collective procedures. *CompuCredit*, *supra* 132 S.Ct. at 699-671.

In none of the cases Bloomingdale's cites, did the parties challenging the arbitration agreements' class-action waivers raise – or the courts consider – employees' NLGA and NLRA right to pursue legal claims concertedly. In *Gilmer*, *supra,* for example, the Supreme Court upheld application of an arbitration agreement to individual ADEA claims, rejecting Gilmer's assertions that he had a substantive right under the ADEA to either a judicial forum or to a particular type

of collective action provided for in that statute. *Gilmer, supra* 500 U.S. at 29, 32.

The Court's analysis was based on its determination that the agreement would not prevent Gilmer from vindicating, in arbitration, his right to be free from age-based discrimination. *Id*, at 28-32. The facts of the case did not present, Gilmer did not argue, and thus the Court did not consider whether an employer could prevent employees qualifying for Section 7 protection from pursuing their employment-related claims in a concerted manner in any forum, arbitral or judicial.

The *Gilmer*-based argument of Bloomingdale's and its amici rests entirely on the mistaken assumption that because an employee's individual waiver of collective action does not violate employment statutes such as the ADEA, that same contractual waiver cannot violate the NLRA. However, there is nothing anomalous about the same agreement violating one substantive statute but not another if the statutes perform different functions.[3] That is the key to understanding Johnmohammadi's rights here.

[3] *New York Shipping Ass'n v. Fed. Maritime Comm'n*, 854 F.2d 1338, 1367 (D.C. Cir. 1988) ("[T]here is no anomaly if conduct privileged under one statute is nonetheless condemned by another.")

The critical distinction that Bloomingdale's arguments obscure is the difference between the statutory rights at issue in cases like *Gilmer*, and those at issue here. The substantive right protected by the ADEA is the right to be free from age-based discrimination. The substantive right protected by California overtime law is the right to statutory wages. The remedial purposes of both laws may be served if the substantive rights of individual employees can be adequately vindicated in individual arbitration. However, protecting collective/concerted action against individual employee waiver is not an objective of either statute.

The substantive right protected by the NLGA's and NLRA's "mutual aid or protection" clause includes the right to take collective action in order to ensure that employment statutes are widely enforced among employees generally. For the purposes of the NLGA and NLRA, it is not dispositive that an employee may be able to vindicate his own defined rights through individual action, whether in arbitration or litigation. To the contrary, what Congress protected in enacting the NLGA and NLRA is the employee's right to choose concerted action to achieve benefits for a greater number of employees. That Section 7 right to mutual aid or protection is what

Bloomingdale's strips away by depriving those employees who do not opt out, of any future opportunity to prosecute their statutory employment rights in concert with others. And, as the Board stated in *D.R. Horton*, protecting employees against individual agreements requiring they waive their right to engage in concerted activity for mutual aid or protection "lies at the core" of the NLRA's objectives.

Accordingly, contrary to Bloomingdale's claim, the question presented in this case is not whether employees can effectively vindicate their individual rights under wage laws in arbitration despite a prohibition against class or collective proceedings, but whether employees can, in an employment agreement, waive their rights under the NLRA and NLGA. Because the Bloomingdale's agreement prospectively removes the non-opt out employee's choice to assist his fellow employees, or receive their assistance, in pursuing work-related class claims, Bloomingdale's maintenance of the agreement violates the NLRA. That violation does not depend on curtailment of rights under substantive wage and hour laws.

The inherent conflict between Bloomingdale's class action ban and the NLGA and NLRA, also distinguishes the Supreme Court's state-law preemption analysis in *Concepcion*. In that decision, the

Court rejected the argument that the FAA's savings clause preserved generally applicable California unconscionability and exculpatory contract defenses as applied to invalidate a class-action waiver in an arbitration agreement. In doing so, it emphasizes that a federal statute cannot reasonably be construed to "destroy itself" by ceding to common-law rights or defenses "that stand as an obstacle to the accomplishment of the [statute's] objectives." *Concepcion* 131 S.Ct. at 1748. By contrast, the Bloomingdale's class action ban is unenforceable under the FAA's savings clause because it curtails substantive rights created by two other federal statutes.

K. Amici Chamber of Commerce Misapprehends the NLGA by Invoking a Case That Involves a Collectively Bargained For Arbitration Agreement

Amici Chamber of Commerce cites the First Circuit decision in *Local 205, v. Gen. Elec. Co.*, (1st Cir. 1956) 233 F.2d 85, 91, aff'd 353 U.S. 547 (1957) for the broad proposition that the NLGA anti-injunction provisions do not apply to arbitration agreements. (Chamber Brief pg. 16).

Local 205, supra, involves enforcement of a collectively bargained for arbitration agreement. The Chamber also cites the Supreme Court decision in that matter. *Gen. Elec. Co. v. Local 205,*.

(1959) 353 U.S. 547, 548, stating "[The] Supreme Court has straightforwardly held that the Norris La Guardia Act does not bar enforcement of arbitration agreements." (Chamber Brief pg. 2).

Close scrutiny of the two decisions actually supports Johnmohammadi's position herein. The First Circuit relied, in substantial part, on the FAA to uphold its decision favoring arbitration. *Local 205, supra* 233 F.2d at 97-101. The Supreme Court noted and rejected the Circuit's reliance on the FAA:

> "We follow a different path than the Court of Appeals, though we reach the same result, relying instead on the interplay between 301(a) of Taft Hartley and Norris La Guardia as articulated in *Textile Workers Union of America v. Lincoln Mills of Alabama* (1957) 353 U.S. 448. *Gen. Electric*, supra 353 U.S. at 548.

The Supreme Court, in rejecting the 1st Circuit's reliance on the FAA, highlighted the fact that the NLRA's (Taft Hartley) collective bargaining provisions enacted after the NLGA, impacted application of the NLGA anti-injunction provisions, once employees voted for union representation in an exercise of Section 7 rights and negotiated collective bargaining agreements. See also *Mastro Plastics Corp. v. NLRB* 350 U.S. 270, 280 (1956). It did not rely on the FAA.

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III. CONCLUSION

Congress has clearly chosen to protect the interests of workers by enshrining their unwaiveable right to come together for mutual aid or protection in the NLGA and NLRA, by expressly making contract terms that deny employees' rights to engage in concerted activity unenforceable, and by declaring that employer interference with such rights is unlawful.

There is no question that the Bloomingdale's class action ban is illegal, irrespective of the FAA, violating both the NLGA and NLRA. Given that such a ban would be illegal whether or not it is tethered to an arbitration agreement, the FAA cannot be invoked to render Bloomingdale's illegal conduct legal, to validate an illegal contractual ban on a recognized form of "concerted activity."

> "The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in … federal statutes … Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power." *Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948).

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For the foregoing reasons, and those set forth in Appellant's Opening Brief, the District Court decision in this matter should be reversed.

Dated: January 9, 2013

Respectfully Submitted,

_ /s/ Dennis Moss

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CERTIFICATE OF WORD COUNT

The undersigned counsel certifies that the text of this Brief uses a proportionately spaced Times New Roman 14-point typeface, and that the text of this Brief (including the Tables of Contents and Authorities) consists of 6,846 words as counted by the word processing program used to generate this Brief.

DATED: January 10, 2013 /s/ Dennis Moss

CERTIFICATE OF SERVICE

U.S. COURT OF APPEALS DOCKET NUMBER(S) 12-5578

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 10, 2013.

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.

DATED: January 10, 2013 /s/ Lea Garbe