15-2820-cv

U.S. Court of Appeals for the Second Circuit

CONNIE PATTERSON, on behalf of herself
and all others similarly situated, and DAVID AMBROSE,

Plaintiffs-Appellants

v.

RAYMOURS FURNITURE COMPANY, INC,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLEE
RAYMOURS FURNITURE COMPANY, INC.

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CORPORATE DISCLOSURE STATEMENT

Raymours Furniture Company, Inc., d/b/a Raymour & Flanigan, does not have a parent corporation, and no publicly held corporation owns 10% or more of its stock.

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ISSUES PRESENTED

Is this Court's decision in *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013) (per curiam) dispositive?

Are employment arbitration agreements waiving class action, collective action, and joinder procedures (collectively, "class procedures") enforceable under federal law?

STATEMENT OF THE CASE

Appellant Connie Patterson's Complaint asserts claims against Appellee Raymours Furniture Company, Inc. ("Raymours") under the Fair Labor Standards Act ("FLSA") and the New York Labor Law. JA.A-10. Patterson's complaint invoked the FLSA's collective action provision, 29 U.S.C. § 216(b), and the class action procedures of Federal Rule of Civil Procedure 23 ("Rule 23"). *Id.* Appellant David Ambrose later filed a consent to join the lawsuit as an FLSA opt-in plaintiff. JA.A-29. No other individual opted into the case.

Because Patterson was party to an arbitration agreement with Raymours containing a waiver of class procedures, the district court granted Raymours' motion to compel individual arbitration under the FAA. JA.A-179. The district court rejected Appellants' various arguments challenging the arbitration agreement, including their

assertion that it was unenforceable under the National Labor Relations Act ("NLRA") as interpreted by the Board in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012)("*Horton I*"), *enf. denied in relevant part,* 737 F.3d 344 (5th Cir. 2013) ("*Horton II"),* because it waived class procedures. Relying on Supreme Court precedent, *Sutherland*, and numerous federal court decisions rejecting *Horton I*, the district court held: "the NLRA does not stand in the way of the FAA's command to enforce arbitration agreements 'according to their terms.'" JA.A-191 (citation omitted). The district court therefore dismissed the case in favor of individual arbitration. JA.A-192.

STATEMENT OF FACTS

Patterson worked as a Sales Associate for Raymours from June 20, 2005 to February 2, 2014. JA.A-179. In February 2012, two years before Patterson's employment ended, Raymours adopted an Employment Arbitration Program ("EAP"), JA.A-180, which Patterson agreed to on two separate occasions, JA.A-70, A.162.

Under the EAP, Raymours and its employees agree to submit to arbitration all employment and compensation-related claims. JA.A-

132. The EAP further provides that "Claims" will be decided on an individual basis:

> ***CAN CLAIMS BE DECIDED BY CLASS OR COLLECTIVE ACTION?***
> **No. This section describes the "Class Action Waiver" of the Program. Claims under this Program cannot be litigated by way of class or collective action. Nor may Claims be arbitrated by way of a class or collective action. All Claims between you and us must be decided individually…. Thus, the arbitrator shall have no authority or jurisdiction to process, conduct or rule upon any class, collective, private attorney general or multiple-party proceeding under any circumstances.**

JA.A-140 (emphasis in original). It is undisputed that the EAP covers Appellants' claims.

SUMMARY OF THE ARGUMENT

The validity of the EAP is governed by the FAA, and neither the NLRA nor the Norris-LaGuardia Act ("NLGA") preclude enforcement of the class action waiver at issue. Applying Supreme Court and this Court's precedent, the district court correctly found the FAA requires enforcement of the EAP according to its terms and dismissed the complaint in favor of individual arbitration. Specifically, in accord with *Sutherland* and scores of other court decisions, the district court

correctly rejected Appellants' argument that the NLRA forecloses enforcement of the EAP under the Board's decision in *Horton I*.

This Court should affirm for multiple reasons. First, this Court's decision in *Sutherland,* which rejected *Horton I* and the arguments Appellants advance here, is dispositive. Second, under the FAA, the EAP is valid and enforceable, save upon grounds for the revocation of any contract. Appellants have not advanced arguments supporting revocation and cannot demonstrate that the parties intended to permit collective adjudication of claims, which they must do under Supreme Court precedent to overcome the presumptive validity of the EAP and its class action waiver. Third, Appellants have failed to carry their burden of showing Congress intended to preclude the waiver of class and collective action rights when enacting the NLRA and NLGA, the sole basis for their appeal. There is nothing in either statute evincing a congressional intent to preclude waiver of class and collective actions. To the contrary, both Acts are silent as to the collective adjudication of claims.

Appellants rely upon the Board's widely discredited rationale in *Horton I*. There, a two-member panel of the Board ruled for the first

time – in direct conflict with the FAA – that the 80-year-old NLRA bars class action waivers in arbitration agreements. The Board based its conclusion on the unprecedented premise that the NLRA grants employees a substantive right to class adjudicatory procedures. As scores of courts have since correctly held, the Board's attempt to construct this previously unknown "right" conflicts with the FAA and Supreme Court precedent. The NLRA does not grant employees a substantive right to class procedures, and there is no precedent suggesting the NLRA governs the ***adjudication*** of employees' legal claims. Rather, the adjudication of claims – collectively or otherwise – is governed by rules of procedure and statutes expressly addressing procedures such as Section 216 of the FLSA. Therefore, the overwhelming majority of courts, including the Supreme Court, have concluded (1) litigants do not possess substantive rights to have their claims adjudicated collectively, and (2) collective adjudication is a procedural device that may be waived in favor of individual arbitration under the FAA. *See* citations set forth *infra* at 54.

Finally, the Board has no authority under the NLRA to grant employees a substantive right to class procedures. The NLRA does not

delegate to the Board the power to dictate the procedures that must be used by courts and other decision-makers to adjudicate claims under other laws. The Board's attempt to do so directly conflicts with bodies of law outside the Board's jurisdiction and expertise, including the FAA, the Rules Enabling Act, the FLSA, and the Federal Rules of Civil Procedure.[1]

ARGUMENT

I. Standard of Review

A. Basic Legal Standard

This Court reviews *de novo* the grant of a motion to compel arbitration. *Cohen v. UBS Fin. Servs., Inc.*, 799 F.3d 174, 177 (2d Cir. 2015).

[1] Appellants and Labor Law Scholars Amici ("LLS Amici") also advance arguments relating to the NLGA. Br. Amici Labor Law Scholars in Support of Appellants and Reversal ("LLS.Br.") 1. These arguments are refuted below and, in any event, Appellants waived them. "[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal." *Bogle-Assegai v. Connecticut*, 470 F.3d 498, 504 (2d Cir. 2006). Appellants did not present any distinct NLGA-based arguments to the district court, failing even to cite the NLGA in their lower-court briefing in opposition to Raymour's motion to compel arbitration or in support of their motion for reconsideration. *See* Pl.'s Mem. Opp'n Def.'s Mot. Compel at vi, *Patterson v. Raymours Furniture Co.*, No. 14-CF-5882 (S.D.N.Y. Oct. 6, 2014), Doc. 20 at vi; *see also* Docs. 25, 29, and 32.

B. This Court owes no deference to *Horton I*.

Appellants challenge the district court's decision solely on the ground that the court refused to follow *Horton I*. Br. Pls.-Appellants ("App.Br.") 1-2. Their contention that this Court must defer to *Horton I* is wrong as a matter of law. App.Br. 17.

No deference is due the Board's interpretation of the NLRA where:

(1) the Board interprets laws outside the NLRA, *see Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002) ("[W]e have . . . never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA."); *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942) ("[T]he Board has not been commissioned to effectuate the policies of the [NLRA] so single-mindedly that it may wholly ignore other and equally important Congressional objectives.");

(2) the Board exceeds its authority under the NLRA, *see Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965); *NLRB v. Brown*, 380 U.S. 278, 291-92 (1965); *NLRB v. Ins. Agents' Int'l Union,* 361 U.S. 477, 499-500 (1960);

(3) the Board's decision is neither rational nor consistent with the Act, *see NLRB v. Health Care & Retirement Corp. of Am.*, 511 U.S. 571, 576 (1994); *NLRB v. Fin. Inst. Emps. of Am., Local 1182*, 475 U.S. 192, 202 (1986) ("Deference to the Board 'cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption . . . of major policy decisions properly made by Congress.'") (citation omitted); and

(4) the Board demonstrates uncertainty about what it thinks the law means, let alone what Congress intended when it adopted that law 80 years ago. As it assesses the interpretations of Section 7 set forth in the amicus brief submitted by the Board on this appeal, this Court is asked to "consider the consistency with which [its] interpretation has been applied." *NLRB v. United Food & Commercial Workers Union, Local 23,* 484 U.S. 112, 124 n.20 (1987).

All four of these limitations apply here.

II. ***Sutherland* is dispositive.**

In *Sutherland*, this Court expressly considered and agreed with the Eighth, Fifth, and Fourth Circuits in finding waivers of class procedures are enforceable:

> Although we have not directly or specifically addressed whether an employee's ability to proceed collectively under the FLSA can be waived in an arbitration agreement, every Court of Appeals to have considered this issue has concluded that the FLSA does not preclude the waiver of collective action claims. *See Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013); *Carter v. Countryside Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002). We agree with this consensus among our sister Circuits for multiple reasons.

Sutherland, 726 F.3d at 296.

Sutherland also considered and rejected the Board's reasoning in *Horton I*, the sole basis for Appellants' appeal:

> One of Sutherland's alternative arguments for affirming the District Court is that the [NLRB], in [*Horton I*], held that a waiver of the right to pursue a FLSA claim collectively in any forum violates the [NLRA]. Like the Eighth Circuit, however, we decline to follow the decision in [*Horton I*]. Even assuming that "*D.R. Horton* addressed the more limited type of class waiver present here, we still would owe no deference to its reasoning."

Id. at 297 n.8 (quoting *Owen*, 702 F.3d at 1053-54).

The *Sutherland* plaintiff raised the *Horton I* issues again in her Petition for Panel Rehearing / Rehearing *En Banc*. Pet. Panel Reh'g / Reh'g En Banc at 4, 11, *Sutherland*, No. 12-304 (Aug. 23, 2013), Doc. 261. In denying both requests, the *Sutherland* panel necessarily reconsidered and again rejected the plaintiff's *Horton I* contentions, and

the active members of the Second Circuit considered and rejected them as well. Order, *Sutherland*, No. 12-304 (2d Cir. Oct. 15, 2013), Doc. 265.

These holdings from *Sutherland* were correct, as explained below. For purposes of the present case, these holdings are also dispositive. This Court treats itself as "bound by the decisions of prior panels until such time as they are overruled either by an *en banc* panel of our Court or by the Supreme Court." *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004); *see In re Sokolowski*, 205 F.3d 532, 535 (2d Cir. 2000) (rejecting appellant's request to reconsider prior panel's decision).

Here, Appellants do not point to any intervening Supreme Court decision that has called *Sutherland* into question. Instead, Appellants contend *Sutherland* is not binding on this Court because the Board has continued to issue decisions subsequent to *Horton I,* such as *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014) ("*Murphy Oil I*"), that purportedly "expand and extend the Board's analysis and respond to every criticism of *D.R. Horton* that was asserted by the Fifth and Eighth Circuits." App.Br. 47. This contention is both (1) irrelevant, given the fundamental tenet that one panel of this Court cannot overrule another absent Supreme Court intervention, and (2) incorrect.

Appellants fail to identify any allegedly new argument offered by the Board in *Murphy Oil I* or other decisions that was not presented in *Horton I*. Furthermore, Appellants' contention that *Murphy Oil I* is somehow distinct from *Horton I* is contradicted by both the Board itself and the Fifth Circuit. Even before the Fifth Circuit considered *Murphy Oil I*, the Board asked the Fifth Circuit to hear the case *en banc*, explicitly recognizing that *Murphy Oil I* raised the same issues as *Horton I*. Pet. Hr'g En Banc, *Murphy Oil USA, Inc. v. NLRB*, No. 14-60800 (5th Cir. Apr. 1, 2015). Similarly, the Fifth Circuit rejected *Murphy Oil I* because it was bound by that court's prior rejection of *Horton I* in *Horton II*. *See Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1015 (5th Cir. 2015) ("*Murphy Oil II*") (noting the "Board will not be surprised that we adhere, as we must, to our prior ruling"); *see also Chesapeake Energy Corp. v. NLRB*, No. 15-60326, 2016 WL 573705, at *2 (5th Cir. Feb. 12, 2016) (noting the Board "urges this court to reconsider its decision in *D.R. Horton*" but explaining "[t]his court's rule of orderliness prevents one panel from overruling the decision of a prior panel" and "no intervening change in the law permits reconsideration of

our precedent."). Like the Fifth Circuit, this Court should adhere to its prior ruling in *Sutherland*.

Appellants also argue *Sutherland* "did not discuss the NLGA at all" and "does not constitute binding precedent." App.Br. 48. However, even if Appellants did not waive any NLGA arguments by failing to present them to the district court (*see supra* n.1), they ignore that the Board premised *Horton I* on its interpretation of the NLGA. *Horton I*, slip op. at 5-6, 12. Thus, *Sutherland*'s rejection of *Horton I* necessarily rejected these NLGA arguments. Indeed, the parties' briefing in *Sutherland* gave extensive attention specifically to the NLGA, and the *Sutherland* plaintiff made exactly the same argument Appellants present for the first time on appeal. *E.g.,* Opening Br. Pl.-Appellee at 8, 47-49, 54-58, *Sutherland*, No. 12-304 (2d Cir. May 11, 2012), Doc. 68. Respectfully, this Court is, therefore, bound by *Sutherland*'s rejection of *Horton I*.

III. The FAA requires that the EAP be enforced.

While Appellants lead their challenge to the validity of the class action waiver with *Horton I* and the NLGA, the analysis really begins with the FAA, which governs the EAP. The district court found that the

FAA mandates enforcement of the EAP, just as scores of other courts have held, and this Court should affirm. JA.A-182.

A. The FAA permits the waiver of class procedures.

The FAA provides arbitration agreements like the EAP "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This mandate reflects an "emphatic federal policy in favor of arbitral dispute resolution." *KPMG LLP v. Cocchi*, 565 U.S. ___, 132 S. Ct. 23, 25 (2011). The "overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011); *see Sutherland*, 726 F.3d at 295-96; *see also Cohen*, 799 F.3d at 177-78.

Under the FAA, parties may agree to the procedures governing their arbitrations. *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (parties may "specify by contract the rules under which that arbitration will be conducted"); *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994) ("Indeed, short of authorizing trial by battle or ordeal or, more

doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes.").

Pursuant to Section 2 of the FAA, a court may deem an arbitration agreement invalid only on grounds that exist "for the revocation of any contract," such as "fraud, duress, or unconscionability." *Concepcion*, 563 U.S. at 339. Appellants do not assert any such ground, nor does one exist. For instance, complaints about the "[m]ere inequality in bargaining power" between an employer and employee are insufficient to void an arbitration agreement. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991). Similarly, the Supreme Court repeatedly has rejected challenges to the "adequacy of arbitration procedures," concluding such attacks are "out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Id.* at 30. A party to an arbitration agreement "'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Id.* at 31 (citation omitted). As a result of this trade, an arbitration agreement is enforceable even if it permits less discovery than in

federal courts and even if a resulting arbitration ***cannot go forward as a class action or class relief cannot be granted by the arbitrator.*** *Id.* at 31-33. Raymours' EAP is thus entirely consistent with the FAA.

The FAA's directive is clear: courts "must enforce the [FAA] with respect to all arbitration agreements covered by that statute." *Marmet Health Care Ctr. v. Brown*, 565 U.S. ___, 132 S. Ct. 1201, 1202 (2012) (per curiam). "That is the case even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *CompuCredit Corp. v. Greenwood*, 565 U.S. ___, 132 S. Ct. 665, 669 (2012) (citation omitted).

There is no "contrary congressional command" for class procedures. *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. __, 133 S. Ct. 2304, 2309 (2013) ("congressional approval of Rule 23 [does not] establish an entitlement to class proceedings for the vindication of statutory rights."). The Supreme Court, moreover, has held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the

party *agreed* to do so." *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010) (emphasis in original). Raymours' EAP contains no such contractual agreement.

The district court applied these mandates and correctly held the EAP must be enforced according to its terms.

B. *Horton I* misapplied the Supreme Court's FAA precedent.

Disregarding the FAA, Appellants rely instead on *Horton I,* which grossly misapplied the following Supreme Court precedent and should not be followed by this Court.

1. *Concepcion*

In *Horton I*, the Board contended its ban on class action waivers is allowable under the FAA, because it is not limited to arbitration agreements and, therefore, does not treat arbitration agreements less favorably than other contracts. This contention ignores *Concepcion,* in which the Supreme Court expressly rejected the same attempt to circumvent the FAA and struck down a nearly identical California rule prohibiting class action waivers. 131 S. Ct. at 1746-48.

Concepcion recognized that courts could exhibit hostility to arbitration agreements by announcing facially neutral rules ostensibly

applicable to all contracts. *Id.* at 1747. For instance, a court might find unconscionable all agreements that fail to provide for "judicially monitored discovery." *Id.* "In practice, of course, the rule would have a disproportionate impact on arbitration agreements; but it would presumably apply to contracts purporting to restrict discovery in litigation as well." *Id.* To avoid this result, the Supreme Court concluded the permissible grounds for invalidating arbitration agreements under Section 2 of the FAA may not include a "preference for procedures that are incompatible with arbitration and 'would wholly eviscerate arbitration agreements.'" *Id.* at 1748 (citation omitted).

Therefore, a rule used to void an arbitration agreement is not saved under Section 2 of the FAA simply because it would apply to "any contract." Rather, the proper test is whether a facially neutral rule prefers procedures that are incompatible with arbitration and thus "stand[s] as an obstacle to the accomplishment of the FAA's objectives." *Id.*

Applying this test, *Concepcion* held that a rule mandating the availability of class procedures is incompatible with arbitration. *Concepcion,* 131 S. Ct. at 1750–52. Arbitration is intended to be less

formal than court proceedings, to allow for the speedy and inexpensive resolution of disputes. *Id.* at 1751. Such informality makes arbitration poorly suited to conducting class litigation with its heightened complexity, due process issues, and stakes. *Id.* at 1751–52. The Supreme Court held:

> The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.

Id. at 1748.

Appellants and the Board attempt to distinguish *Concepcion* by arguing that *Horton I* did not require class arbitration. *Horton I*, slip op. at 12. Rather, they claim, the decision requires only the availability of class procedures in ***some*** forum, thus forcing employers ***either*** (1) to permit class arbitration, ***or*** (2) to waive the arbitral forum to the extent an employee seeks to invoke class procedures in court. *Id.*; App.Br. 39-40. But this is a distinction without a difference. Like the California law at issue in *Concepcion*, *Horton I* "condition[s] the enforceability of certain arbitration agreements" on the availability of class procedures. *Concepcion,* 131 S. Ct. at 1744. *Horton I*'s addition of the option of

avoiding class arbitration only by agreeing ***to forgo arbitration*** does not reduce the degree to which its ban on class action waivers "interferes with fundamental attributes of arbitration" and "creates a scheme inconsistent with the FAA." *Id.* at 1748. To the contrary, requiring a party to abandon the arbitral forum altogether as the only way to avoid class arbitration is an even greater obstacle to the FAA's policies than mandating class arbitration alone.

Appellants and the Board in *Murphy Oil I* fail to defend *Horton I*'s effort to distinguish *Concepcion*. Instead, they attempt to dismiss *Concepcion* as dealing only with federal preemption of state law. *Murphy Oil I*, slip op. at 9; App.Br. 35-36. This attempt ignores *Italian Colors*, which makes clear that the *Concepcion* analysis applies equally to federal statutes. 133 S. Ct. at 2312.

Barely three months ago, the Supreme Court tersely rejected another attempt to circumvent *Concepcion*: "The Federal Arbitration Act is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act." *Direct TV, Inc. v. Imburgia,* __ U.S. __, 136 S. Ct. 463, 468 (2015). Appellants' attempt to ignore *Concepcion* must likewise fail.

2. *Gilmer*

Horton I also incorrectly concluded an individual employment arbitration agreement should not be enforced, because doing so would require employees to forgo a substantive statutory right in violation of *Gilmer*. *Horton I,* slip op. at 9-11; *see also* App.Br. 30-34. In fact, *Horton I*'s analysis was fundamentally inconsistent with *Gilmer*. In considering whether arbitration would violate an employee's substantive statutory rights, *Horton I* (1) looked to the wrong statute (the NLRA rather than the FLSA), (2) failed to ask the correct question (whether the employee could vindicate FLSA rights effectively in arbitration), and (3) came to the wrong answer (the agreement was unenforceable ***even if*** the employee could vindicate FLSA rights effectively in arbitration).

The issue in *Gilmer* was whether a claim under the Age Discrimination in Employment Act ("ADEA") was subject to compulsory arbitration. *Gilmer,* 500 U.S. at 23. Holding that it was, the Court observed, "'[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" *Id.* at 26

(citation omitted). The Court also confirmed that claims under statutes advancing important public policies may be arbitrated: "[S]o long as the prospective litigant effectively may vindicate [the] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.* at 28 (citation omitted).

Other Supreme Court decisions, decided before and after *Gilmer*, also hold that arbitration may be compelled where a particular statutory claim can be enforced effectively in arbitration. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89-90 (2000); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614 (1985).

Contrary to *Gilmer* and every other Supreme Court case on point, *Horton I* failed to treat as dispositive the question of whether an employee could vindicate statutory rights under the FLSA effectively pursuant to the arbitration agreement's procedures. *Horton I,* slip. op. at 10 & n.23. Instead, *Horton I* reasoned that "the right allegedly violated by the [arbitration agreement] is not the right to be paid the

minimum wage or overtime under the FLSA, but the right to engage in collective action under the NLRA." *Id.* at 10. *Murphy Oil I* merely repeated *Horton I*'s mischaracterization of the substantive federal right at issue. *Murphy Oil I,* slip op. at 6 n.32.

Horton I thus turned *Gilmer* on its head, a mistake Appellants would have this Court repeat. In *Gilmer* and other cases, the Supreme Court rejected a variety of challenges to arbitration procedures based on their differences from judicial procedures. Those cases concluded such differences did not render arbitration unsuitable for adjudicating statutory claims. Rather, statutory claims may be arbitrated, even though the arbitral procedures are different from judicial procedures, because those differences do not prevent a party from enforcing and obtaining relief on statutory claims.

Appellants ignore this fundamental teaching of *Gilmer,* its predecessors, and its progeny. Instead, Appellants argue that for an arbitration agreement to be enforceable under the FAA and the NLRA, it must allow an employee to invoke ***certain*** procedures in the course of obtaining an adjudication of statutory claims. This is directly contrary to *Gilmer* and related decisions, which held parties do ***not*** have a non-

waivable right to obtain an adjudication of their federal statutory claims ***by a particular means***. *Gilmer*, 500 U.S. at 30-32; *see 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009) ("At bottom, objections centered on the nature of arbitration do not offer a credible basis for discrediting the choice of that forum to resolve statutory antidiscrimination claims.").

Contravening *Gilmer*, the Board held an arbitration agreement was unenforceable even if the employee could vindicate FLSA rights effectively under it. *Horton I,* slip op. at 9-10 & n.23. *Horton I* thus deemed the arbitration agreement void ***solely due to the means*** it provided for arbitrators to adjudicate claims, regardless of the outcome of the adjudication. That is the very opposite of *Gilmer*'s rationale.

3. *CompuCredit*

Horton I failed to apply *Gilmer*'s test, as amplified later in *CompuCredit*, for determining whether Congress intended to preclude the waiver of a judicial forum and its procedures for a statutory claim. *Gilmer* requires a court to answer this question based on the relevant statutory text, the statute's legislative history, or an "inherent conflict" between arbitration and the statute's underlying purposes. *Gilmer,* 500

U.S. at 26. The Supreme Court has applied this paradigm repeatedly. *E.g.*, *McMahon*, 482 U. S. at 227; *Mitsubishi Motors*, 473 U. S. at 628. The Court re-affirmed it in *CompuCredit Corp.*, when analyzing the text of the Credit Repair Organizations Act ("CROA") to determine whether Congress intended to override the FAA and preclude the arbitration of CROA claims. *CompuCredit Corp.,* 132 S. Ct. at 669. *CompuCredit* also reiterated that ***if a statute "is silent on whether claims under [it] can proceed in an arbitr[al] forum, the FAA requires the arbitration agreement to be enforced according to its terms."*** *Id.* at 673 (emphasis added).

In contrast to the NLRA, which is silent on collective adjudication of claims, the CROA ***explicitly*** (1) mandates notices advising consumers of their "right to sue," (2) provides for "class actions," (3) lists factors "the court" is to consider in assessing damages, (4) provides that CROA rights cannot be waived, and (5) even declares that any attempt to secure a waiver of CROA rights is itself a violation. 15 U.S.C. §§ 1679c(a), 1679(f), 1679g(a)(2)(B), 1679g(b). *CompuCredit* nonetheless compelled arbitration, holding that these five expressed mandates were insufficient to show that Congress had evinced the requisite

unmistakable intent to override federal policy in favor of arbitration, contrasting the CROA with three other statutes that clearly prohibit or restrict arbitration.

Appellants essentially ignore *CompuCredit*. App.Br. 31 & n.12. Neither Appellants nor *Horton I* explore Congress' intention regarding the preclusion of arbitration for FLSA claims. If they had done so, they would have been compelled to find that FLSA claims are subject to arbitration, as courts have repeatedly found. *See, e.g.*, *Carter*, 362 F.3d at 297 (holding "there is nothing in the FLSA's text or legislative history" and "nothing that would even implicitly" suggest Congress intended to preclude arbitration of FLSA claims).

Appellants also fail to apply *CompuCredit*'s test to the NLRA. Specifically, neither Appellants nor *Horton I* look for any indication in the NLRA's text or legislative history of a congressional intent to override the FAA and require that employees have access to class procedures. Indeed, to the extent *Horton I* considered the issue, it got the inquiry backwards, concluding "nothing in the text ***of the FAA*** suggests that an arbitration agreement that is inconsistent with the NLRA is nevertheless enforceable." *Horton I,* slip op. at 11 (emphasis

added). If, instead, Appellants were to ask the question the Supreme Court requires, they would find that "there is no language in the NLRA (or in the related Norris-LaGuardia Act) demonstrating that Congress intended the employee concerted action rights therein to override the mandate of the FAA." *Jasso v. Money Mart Exp., Inc.,* 879 F. Supp. 2d 1038, 1047 (N.D. Cal. 2012); *see also Horton II*, 737 F.3d at 360. The simple fact that class procedures creating a means to represent other individuals in actions for money damages did not exist in federal court until after the NLRA was enacted makes it obvious that Congress could not have intended the NLRA to affect employees' access to those procedures.[2] Such "silence" in the NLRA means "the FAA requires the [EAP] to be enforced according to its terms." *CompuCredit Corp.*, 132 S. Ct. at 673.

In *Murphy Oil I*, the Board concedes "the NLRA does not explicitly override the FAA." *Murphy Oil I,* slip op. at 10. It argues that the "obvious reason" for this silence is that the FAA had not yet been

[2] Neither Appellants nor the Board point to any procedure that existed when the NLRA was enacted in 1935 for an employee to bring a representative action on behalf of other employees for money damages, because there was none. 1 *McLaughlin on Class Action*s § 1:1 (12th ed.) (a limited, seldom-used version of Rule 23 was first adopted in 1937, and the modern version of Rule 23 providing for representation of absent class members in money damages cases was adopted in 1966).

applied to employment arbitration agreements when the NLRA was enacted in 1935 and reenacted in 1947. *Id.* By this reasoning, of course, the Board nullifies *Horton I*'s conclusion that the 1932 NLGA somehow directly repealed, and the 1935 NLRA impliedly repealed, the FAA with respect to individual employment arbitration agreements decades ***before*** the FAA was recognized as applying to employment arbitration agreements. *Horton I,* slip op. at 12 & n.26; *see also* App.Br. 42; LLS.Br. 19-21 (conceding NLGA is silent with respect to the FAA).

In the end, rather than follow Supreme Court precedent, *Horton I* simply declared there was "an inherent conflict" between the NLRA and the arbitration agreement's waiver of class procedures. *Horton I,* slip op. at 11. The Board cited no authority for its remarkable finding. Indeed, the Supreme Court has never voided an arbitration agreement on "inherent conflict" grounds. To the contrary, courts have repeatedly found no "inherent conflict" prohibiting arbitration. *See, e.g.*, *Gilmer*, 500 U.S. at 27-29 (no inherent conflict between arbitration and the ADEA); *Rodriguez*, 490 U.S. at 485-86 ("resort to the arbitration process does not inherently undermine any of the substantive rights afforded to

petitioners under the Securities Act"); *McMahon*, 482 U.S. at 242 (no inherent conflict between arbitration and RICO).

C. Public policy cannot circumvent the FAA.

In addition to misapplying Supreme Court precedent, *Horton I* mistakenly assumed common law "public policy" gave the Board discretion to determine for itself whether the public policies underlying the NLRA and the NLGA rendered an arbitration agreement unenforceable despite the FAA's mandate and the absence of any indication that Congress intended to preclude individualized arbitrations. *Horton I,* slip op. at 11-12. Appellants fail to cite any precedent for this "public policy" balancing test because there isn't any. An administrative agency cannot deviate from the congressional commands in the FAA based on the agency's own assessment of public policy and absent an equally clear congressional directive in another statute to the contrary. *See CompuCredit*, 132 S. Ct. at 672 (when Congress restricts the use of arbitration, it does so clearly). In *Horton I*, the Board improperly relied on its own determination of "public interests" rather than deferring to congressional purpose. *Horton I,* slip

op. at 11-12. *Murphy Oil I* and Appellants simply repeat the same mistake.

D. The NLGA does not trump the FAA.

Appellants also repeat *Horton I*'s faulty reasoning that the NLGA voids employment arbitration agreements containing class action waivers and silently repealed the FAA so that it does not apply to employment arbitration agreements with such waivers.[3] App.Br. 41-43; *Horton I,* slip op. at 5-6, 12.

Both Appellants and *Horton I* fail to cite any court decision treating the NLGA as repealing the FAA. Enacted in 1932, the NLGA divested federal courts of jurisdiction to issue restraining orders and injunctions "in a case involving or growing out of a labor dispute," except as provided therein. 29 U.S.C. § 101. The statute further provides that "yellow-dog" contracts – contracts in which an employee agreed "not to join, become, or remain a member" of a labor organization and agreed his or her employment would terminate if he or she did – are unenforceable in federal courts. *Id.* § 103. The statute also provided that any agreement "in conflict with the public policy

[3] Again, Appellants have waived this argument by not raising it with the district court.

declared" therein is "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 by any such court." *Id.*

Recognizing the NLGA's silence as to either arbitration agreements or class action waivers, *Horton I* concluded the NLGA prohibits the enforcement of "agreements ***comparable*** to" an individual arbitration agreement. *Horton I,* slip op. at 5 (emphasis added). This extension of the NLGA to individual arbitration agreements distorts both history and the statute.

First, when the NLGA was adopted in 1932, the Federal Rules of Civil Procedure, the FLSA, and the modern class action device did not yet exist. To suggest the NLGA's public policy manifests any intention that employees have a substantive, non-waivable right to invoke class procedures that had not yet been adopted is nonsensical.

Second, the attempted analogy of the EAP to "yellow-dog" contracts fails. The EAP in no way suggests, let alone requires, termination of employment of an employee who promises to arbitrate claims individually and is hired but then files a class action lawsuit in

breach of the promise. That, however, is what "yellow-dog" contracts did, and that is why Congress outlawed them. Rather, the EAP simply permits Raymours to move to compel individualized arbitration under the FAA, without any effect on employment status whatsoever.

Third, even if some conflict did exist between the NLGA and the FAA, it would be up to courts, not the Board, to resolve a conflict between two federal statutes outside the Board's jurisdiction. *See, e.g.*, *Owen*, 702 F.3d at 1053. Moreover, if there existed a conflict between the NLGA and the FAA, this Court should reconcile the decades-old NLGA with the Supreme Court's more recent jurisprudence under the FAA. *See Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 250-252 (1970).

Neither Appellants nor the LLS Amici cite or discuss *Boys Markets*, and for good reasons. There, the Supreme Court made clear that the NLGA must accommodate the substantial changes in labor relations and the law since it was enacted. In that case, the Court considered whether the NLGA prohibited a federal court from enjoining a strike in breach of a no-strike obligation under a collective bargaining agreement, when that agreement provided for binding arbitration of the

dispute that was the subject of the strike. The Court concluded the NLGA "must be accommodated to the subsequently enacted" Labor Management Relations Act ("LMRA") "and the purposes of arbitration" as envisioned under the LMRA. *Boys Market, Inc.*, 398 U.S. at 250. The Court noted that through the LMRA, Congress attached significant importance to arbitration as a means of settling labor disputes. *Id.* at 252.

The Court also found the NLGA "was responsive to a situation totally different from that which exists today." *Id.* at 250. At the time it was passed, federal courts regularly entered injunctions "against the activities of labor groups." *Id.* To stop this, Congress passed the NLGA "to limit severely the power of the federal courts to issue injunctions" in labor disputes. *Id.* at 251. However, in following years, Congress' focus "shifted from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes." *Id.* Because this "shift in emphasis" occurred "without extensive revision of many of the older enactments, including the anti-injunction section of the Norris-LaGuardia Act," "it became the task of the courts to

accommodate, to reconcile the older statutes with the more recent ones." *Id.*

Here, even if the NLGA could be construed as applying to individual employment arbitration agreements, that construction would have to give way in light of the FAA and subsequent developments. An arbitration agreement with a waiver of class procedures is clearly not "the type of situation to which the Norris-LaGuardia Act was responsive." *Id.* at 251-52. An employment arbitration agreement is unrelated to the NLGA's purpose of fostering the growth of labor organizations at the dawn of the last century. Furthermore, just as the LMRA manifests a strong congressional policy in favor of labor arbitration, the FAA evinces a strong policy in favor of the enforcement of arbitration agreements. And just as the NLGA must be viewed as accommodating Congress' intentions under the LMRA, so too must it accommodate Congress' intentions under the FAA.

Fourth and finally, *Horton I* got the chronology wrong in evaluating whether the NLGA and/or NLRA should be viewed as impliedly repealing the FAA. *Horton I* assumed the FAA was enacted in 1925 and predated both the NLGA and the NLRA. *Horton I,* slip op.

at 8. Predicated upon this assumption, it reasoned that, if the FAA conflicted with either of those statutes, the FAA must have been repealed, either by the NLGA's express provision repealing statutes in conflict with it or impliedly by the NLRA. *Id.* at 12 & n.26.

What the Board failed to account for are the dates when the NLRA and FAA were ***re-enacted.*** Those are the relevant dates for this analysis. *See Chicago & N. W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 582 n.18 (1971) (looking to re-enactment date of the Railway Labor Act ("RLA") to determine that it post-dated the NLGA and concluding "[i]n the event of irreconcilable conflict" between the two statutes, the RLA would prevail).

The NLGA was enacted in 1932 and never re-enacted; the NLRA was re-enacted June 23, 1947; and the FAA was re-enacted July 30, 1947. *See* 47 Stat. 70; 61 Stat. 136; 61 Stat. 670. Accordingly, of these three statutes, the FAA is the most recently re-enacted. If there were any "irreconcilable conflict" among them, it is the FAA that prevails.

Murphy Oil I states the FAA's reenactment in 1947 should not be viewed as altering the scope of the NLGA or NLRA. *Murphy Oil I* reasons that "[i]t seems inconceivable that legislation effectively

restricting the scope of the [NLGA] and the NLRA could be enacted without debate or even notice." *Murphy Oil I*, slip op. at 11. However, *Horton I* and *Murphy Oil I* nevertheless assume the NLGA's enactment in 1932 and the NLRA's in 1935 restricted the scope of the 1925-enacted FAA with respect to the enforceability of arbitration agreements "without debate or even notice." *See also* LLS.Br. 15-16. In any event, rather than speculating which statute silently repealed or amended the other, it is far more plausible to read the NLGA and NLRA as simply not in conflict with the FAA because neither the NLGA nor the NLRA concerns the enforceability of individual employment arbitration agreements.

In conclusion, the NLGA is "outside the Board's interpretive ambit." *Horton II,* 737 F.3d at 362 n.10. As *Murphy Oil I* conceded, the Board is not entitled to deference in interpreting the NLGA (*Murphy Oil I,* slip op. at 10), its interpretation is unsupported and unsupportable, and this Court should reject it.

IV. The overwhelming weight of authority rejects *Horton I*'s flawed rationale.

In addition to asking this Court to ignore the well-established law under the FAA that was applied by the district court in this case and by

this Court in *Sutherland*, Appellants ask that all of the other authority rejecting *Horton I* also be ignored. Specifically, on direct review, the Fifth Circuit has repeatedly rejected the reasoning of *Horton I*, and outside of the Fifth Circuit, *Horton I* has been rejected by virtually every court to have examined it.

A. The Fifth Circuit has repeatedly rejected *Horton I* on direct review.

Although this Court does not give "automatic deference" to the decisions of other courts of appeals and reaches its own conclusions as to issues of federal law, the Court does give "most respectful consideration to the decisions of the other courts of appeals and follow[s] them whenever [it] can." *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85, 90 (2d Cir. 2006) (quoting *Colby v. J.C. Penney Co., Inc.*, 811 F.2d 1119, 1123 (7th Cir.1987)), *aff'd sub nom. Warner-Lambert Co., LLC v. Kent*, 552 U.S. 440 (2008). The Court recognizes an "interest in maintaining a reasonable uniformity of federal law and in sparing the Supreme Court the burden of taking cases merely to resolve conflicts between circuits." *Id.*

In deciding *Horton II*, the Fifth Circuit considered extensive briefing from the parties and over a dozen amici. The court also

received and reviewed a law review article that presented "[a] thorough explanation of the strongest arguments in favor of the Board's decision." *Horton II,* 737 F.3d at 362 n.11.[4]

After considering the arguments advocated by the parties and amici, the Fifth Circuit rejected the Board's reasoning and declined to enforce *Horton I* in relevant part. *Id.* at 357, 360–62. The court subsequently denied the Board's petition for *en banc* review. Order, *D.R. Horton v. NLRB*, No. 12-60031 (5th Cir. April 16, 2014). The Board elected not to seek Supreme Court review.

Following the issuance of *Horton II*, the Board announced it would not acquiesce to courts that rejected *Horton I* if they were lower than the Supreme Court. *See Murphy Oil I,* slip op. at 2 n.17. Thus, the Board re-affirmed its commitment to *Horton I* absent Supreme Court intervention, but deprived the Supreme Court of that opportunity.

The Fifth Circuit also directly reviewed *Murphy Oil I*. As stated above, because *Horton II* is binding authority within the Fifth Circuit, the Board moved the Court for *en banc* review at the outset, which the court denied. Order, *Murphy Oil USA v. NLRB*, No. 14-60800 (5th Cir.

[4] The article was drafted by two signatories of the Labor Law Scholars amicus brief in this case.

June 24, 2015). On October 26, 2015, a Fifth Circuit panel unanimously rejected *Murphy Oil I* and affirmed that court's adherence to *Horton II*. *Murphy Oil II*, 808 F.3d at 1015. The Fifth Circuit recently rejected the Board's *D.R Horton I* reasoning on direct review for a third time in *Chesapeake Energy Corp.*, 2016 WL 573705, at *2.

B. Scores of other courts have also rejected *Horton I*.

While not bound by it, this Court may also consider that the overwhelming weight of authority from other jurisdictions has rejected the rationale of *Horton I*. This authority includes decisions from multiple circuit courts, district courts from within this Circuit, and even the California Supreme Court. *See Johnmohammadi v. Bloomingdale's, Inc.,* 755 F.3d 1072 (9th Cir. 2014); *Richards v. Ernst & Young, LLP*, 744 F.3d 1072 (9th Circ. 2013); *Owen*, 702 F.3d at 1055; *Diaz v. Michigan Logistics Inc.*, No. CV 15-1415 (LDW), 2016 WL 866330 (E.D.N.Y. Mar. 1, 2016); *Lloyd v. J.P. Morgan Chase & Co.*, 2013 WL 4828588, at *6 n.7 (S.D.N.Y. Sept. 9, 2013); *Dixon v. NBCUniversal Media, LLC*, 947 F. Supp. 2d 390, 402-03 & n.11 (S.D.N.Y. May 28, 2013); *Ryan v. JPMorgan Chase & Co.*, 924 F. Supp. 2d 559, 563 (S.D.N.Y. 2013); *Torres v. United Healthcare Servs., Inc.*, 920 F. Supp.

2d 368, 378 (E.D.N.Y. 2013); *Cohen v. UBS Fin. Servs., Inc.*, 2012 WL 6041634 (S.D.N.Y. Dec. 4, 2012); *LaVoice v. UBS Fin. Servs.*, 2012 WL 124590 (S.D.N.Y. Jan. 13, 2012); *Iskanian v. CLS Transp. Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014), *cert. denied*, __ U.S. __, 135 S. Ct. 1155 (2015).[5]

V. There is no substantive right to class procedures.

Irrespective of the FAA's requirements, *Horton I* was also wrong for another basic reason: the NLRA does not provide a non-waivable right to invoke class procedures. The Board's unprecedented holding in *Horton I* far exceeds the Board's authority.

A. The NLRA does not grant employees a right to have their claims adjudicated collectively.

The plain text of the NLRA makes no mention of the procedures by which employees may seek to have employment-related claims adjudicated. Despite the statute's silence, Appellants urge this Court to

[5] For a longer list of cases rejecting *Horton I, see Murphy Oil II*, slip op. at 36 n.5 (Johnson, dissenting) (collecting cases). That list continues to grow. Appellants urge the Court to ignore this ample precedent in favor of a handful of law review articles. However, even Appellants' assertion that academic commentary is "universally supportive" of *Horton I* is wrong. App.Br. 19 n.7; *see, e.g.*, Michael C. Harper, "Class-Based Adjudication of Title VII Claims in the Age of the Roberts Court," 95 B.U. L. Rev. 1099, 1130-31 (2015) ("The NLRA's substantive protection of employees' concerted utilization of procedural rights does not mean that the NLRA requires employers to grant particular procedural adjudicatory rights.... The NLRA itself neither guarantees any right to proceed collectively in a judicial or arbitral forum nor assumes any such right exists.").

adopt *Horton I*'s widely rejected reasoning that employees' statutory right to act concertedly for mutual aid and protection includes a substantive right to invoke class procedures. *Horton I,* slip op. at 2. However, the cases Appellants cite show only that Section 7 protects employees from retaliation for concertedly ***asserting*** they have certain legal rights, not that employees have a right under the NLRA to seek collective ***adjudication*** of their legal claims.

Following *Horton I*, Appellants mistakenly argue *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978) recognizes a right to collective litigation procedures. App.Br. 16. In reality, *Eastex* addressed whether Section 7 protected a union's distribution of a newsletter touching on certain political issues outside the immediate employer-employee relationship. 437 U.S. at 563. The Court held this activity was protected because employees do not lose the protection of Section 7 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." *Id.* at 565-67. For context, but not as a holding, the Court observed:

> 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, and that employees' appeals to legislators to protect their interests as employees are within the scope of this clause.

Id.

What Appellants ignore is that *Eastex* expressly qualified this dicta regarding "resort to administrative and judicial forums" by declaring "***[w]e do not address here the question of what may constitute 'concerted' activities in this context.***" *Id.* at 566 n.15 (emphasis added). *Eastex* certainly makes no mention of a purported right under Section 7 to class procedures or to seek the collective adjudication of claims.

Appellants similarly miss the point of *Salt River Valley*. App.Br. 20. That case clarifies that the Section 7 right to "resort to judicial forums" is correctly understood as a right to assert legal rights concertedly, which is different from an alleged right to class adjudication procedures. There, a number of employees believed they were due back pay under the FLSA and grew dissatisfied when their union did not pursue the issue. *Salt River Valley Water Users Ass'n*, 99 NLRB 849, 863-64 (1952). One of the complaining employees circulated a petition among his co-workers designating him their agent "to take

any and all actions necessary to recover for [them] said monies, whether by way of suit or negotiation, settlement and/or compromise," and authorized him to employ an attorney to represent them. *Id.* at 864. Both the union and the employer learned of the petition, both opposed it, and the employment of the employee agent was soon terminated.

Critically, the employees never filed a lawsuit. Rather, their concerted activities in asserting their legal rights all occurred ***outside*** any adjudicatory proceeding. That protected conduct involved employees attempting to exert group pressure on their employer and union to negotiate a settlement of their claims or, if necessary, pooling resources to finance litigation. *Salt River Valley Water Users' Ass'n v. NLRB*, 206 F.2d 325, 328 (9th Cir. 1953). But Appellants and the Board fail to recognize that ***the employees' protected concerted activities in* Salt River Valley *did not utilize or depend on any class litigation procedures.*** Indeed, Appellants do not identify any protected activities undertaken by the employees in *Salt River Valley* that Raymours' EAP allegedly prohibits.

The other decisions cited by Appellants and *Horton I* similarly lack any hint that employees have a Section 7 right to collective

adjudication procedures. Rather, like *Salt River Valley*, those cases simply demonstrate the general proposition that employers may not retaliate against employees for concertedly asserting legal rights relating to the terms and conditions of their employment. *Horton I,* slip op. at 2-3 & n.3; App.Br. 16 n.5.[6]

B. The constantly shifting positions of NLRB personnel demonstrate the lack of a substantive right.

The contradictory positions of Board personnel in the course of litigating *Horton I* further confirm that: (1) Congress never demonstrated an intent to preclude the waiver of collective adjudication

[6] *See Mohave Elec. Co-op, Inc. v. NLRB*, 206 F.3d 1183 (D.C. Cir. 2000) (employer violated NLRA by discharging employee for filing petition jointly with co-worker); *Brad Snodgrass, Inc.*, 338 NLRB 917 (2003) (employer violated NLRA by laying off employees in retaliation for union's filing grievances on their behalf); *Le Madri Rest.*, 331 NLRB 269 (2000) (employer violated NLRA by discharging two employees who were named plaintiffs in lawsuit against employer); *Uforma/Shelby Bus. Forms*, 320 NLRB 71 (1985) (employer violated NLRA by eliminating third shift in retaliation for union's pursuit of a grievance); *United Parcel Serv., Inc.*, 252 NLRB 1015 (1980) (employer violated NLRA by discharging employee for initiating class action lawsuit, circulating petition among employees, and collecting money for retainer, among other activities); *Clara Barton Terrace Convalescent Ctr.*, 225 NLRB 1028 (1976) (employer violated NLRA by suspending employee without pay for submitting letter to management complaining on behalf of other employees about job assignments); *Trinity Trucking & Materials Corp.*, 221 NLRB 364 (1975) (alleging employer violated NLRA by discharging three employees who had filed suit against employer); *El Dorado Club*, 220 NLRB 886 (1975) (employer violated NLRA by discharging employee in retaliation for testifying at fellow employee's arbitration hearing); *Spandsco Oil & Royalty Co.*, 42 NLRB 942 (1942) (employer violated NLRA by discharging three union members for filing a lawsuit); *see also Brady v. Nat'l Football League*, 644 F.3d 661 (8th Cir. 2011) (noting in *dicta* that filing lawsuit concerning terms and conditions of employment was protected activity).

of claims when enacting the NLRA; (2) the NLRA does not provide a substantive right to class procedures, and (3) the Board's decision in *Horton I* is not entitled to deference.

The Regional Director, the Office of Appeals, the General Counsel, the ALJ, the Acting General Counsel, and the Board took wildly divergent positions. Initially, the Regional Director partially dismissed the unfair labor practice charge in *Horton I,* concluding "application of the class action mechanism is primarily a procedural device and the effect on Section 7 rights of prohibiting its use is not significant." *See* D.R. Horton, Inc.'s Record Excerpts at Tab 7 ("Regional Director's partial refusal to issue complaint"), *Horton II*, No. 12-60031 (5th Cir. Aug. 29, 2008).

On the charging party's appeal, the Office of Appeals took a different position, affirming denial of the charge with respect to class arbitrations but concluding the arbitration agreement "could be read as precluding employees from joining together to challenge the validity of the waiver by filing a class action lawsuit." *See* D.R. Horton, Inc.'s Record Excerpts at Tab 6 ("Office of Appeals' ruling"), *Horton II*, No. 12-60031 (5th Cir. June 16, 2012). This ruling was consistent with the

Board General Counsel's Memorandum GC 10-06 ("the GC Memo") issued that same day. *See* GC Memo[7] at 7. That Memo, entitled "*Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Employee Waivers in the Context of Employers' Mandatory Arbitration Policies,*" expressly provided that employers could "lawfully seek to have a class action complaint dismissed by the court on the ground that each purported class member is bound by his or her signing of a lawful *Gilmer* agreement/waiver." *Id.* at 2.

The ALJ in *Horton* then ruled he was "not aware of any Board decision holding that an arbitration clause cannot lawfully prevent class action lawsuits or joinder of arbitration claims." *Horton I,* slip op. at 16. The ALJ thus held that a class action waiver does ***not*** violate the NLRA.

Continuing the analytical carousel, the Acting General Counsel, in support of his exceptions to the ALJ's decision, initially argued "***an employer has the right to limit arbitration to individual claims*** – as long as it is clear that there will be no retaliation for concertedly challenging the agreement." *See* Acting General Counsel's Reply Brief

[7] Available at http://www.nlrb.gov/publications/general-counsel-memos.

to Respondent's Answering Brief at 1-2, *In re D.R. Horton, Inc.*, No. 12-CA-025764 (NLRB Apr. 25, 2011)[8] (emphasis added).

Finally, the Board in *Horton I* – diverging from the Regional Director's partial dismissal of the underlying charge, the Office of Appeals' ruling partially sustaining that dismissal, the GC Memo, the ALJ's decision, and the Acting General Counsel's arguments in his briefs – held that the arbitration agreement violated the NLRA because it required employees to waive class procedures "in any forum, arbitral or judicial." *Horton I,* slip op. at 1.

The varying positions of Board personnel belie the existence of a substantive right under the NLRA to the collective adjudication of claims. Rather, *Horton I* deviated from the text of the NLRA and decades of case law interpreting it.

VI. Raymours' EAP does not prohibit "concerted legal activity."

Setting aside *Horton I*'s flawed holding, Appellants' claim that the "EAP prohibits all concerted legal activity" is simply false. App.Br. 9. The Board concedes in *Horton I* that employers may preclude collective adjudication in an *arbitral* forum, provided that collective adjudication

[8] Available at http://apps.nlrb.gov/link/document.aspx/09031d458047d3c0.

remains open in some other forum, and the latter certainly exists under the EAP. Appellants at all times were free, collectively, to present their claims to the United States Department of Labor or the New York State Department of Labor, which could have pursued those claims on their behalf.

In addition and contrary to their claims, Appellants, like *Horton I*, completely ignore the ways in which employees may act concertedly in asserting legal rights and claims that do not depend on, and have nothing to do with, collective adjudication procedures. App.Br. 46. For example, irrespective of the EAP, Raymours' employees can work together in asserting their common legal rights by (1) pooling their finances, (2) making joint settlement demands and negotiating as a group, (3) sharing information, (4) soliciting other employees to assert the same claims, (5) acting in concert to initiate multiple individual arbitrations asserting the same claims, (6) obtaining common representation, (7) jointly investigating their claims, (8) developing common legal theories and strategies, and (9) testifying on behalf of one another in their arbitration proceedings and providing affidavits in those proceedings. *Cf.* Kenneth T. Lopatka, "A Critical Perspective on

the Interplay Between Our Federal Labor and Arbitration Laws," 63 S.C. L. Rev. 43, 92 (Autumn 2011) ("[A]n agreement to arbitrate rather than litigate, and to arbitrate only on an individual basis, does not mean that employees cannot act in concert with their coworkers when they pursue individual grievances. Rather, it limits only the scope of discovery, the hearing, the remedy, and the employee population bound by an adverse decision on the merits.").

Indeed, the record in this case shows Patterson and others ***are*** acting concertedly in asserting alleged legal rights, including by retaining the same counsel and alleging the same claims under the EAP. *See* JA.A-199-200 (arbitration demand by former Raymours employee represented by same counsel as Patterson and making same claims).

VII. The Board lacks authority under the NLRA to grant employees a new, substantive, non-waivable right to class procedures that intrudes on law outside its purview.

While the Board may have responsibility "to adapt the Act to changing patterns of industrial life," reviewing courts "are of course not 'to stand aside and rubber stamp' Board determinations that run contrary to the language or tenor of the Act." *NLRB v. J. Weingarten,*

Inc., 420 U.S. 251, 266 (1975) (citation omitted). The courts are charged with ensuring that the Board's remedial preferences do not "potentially trench upon federal statutes and policies unrelated to the NLRA." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. at 144. The Board's attempt to recognize a new, substantive, non-waivable right to class procedures "trench[es] upon" the FAA, multiple decisions of the Supreme Court, the Rules Enabling Act, the FLSA, and the Federal Rules of Civil Procedure.

A. The alleged right to class procedures conflicts with Supreme Court precedent applying the FAA.

As set forth above, *Horton I*'s holding violates the FAA. *See supra* at 16-35. Indeed, in *Sutherland*, this Court concluded that "Supreme Court precedents [under the FAA] ***inexorably*** lead to the conclusion that the waiver of collective action claims is permissible in the FLSA context." *Sutherland*, 726 F.3d at 298 (emphasis added). That conclusion remains valid today.

B. The alleged right to class procedures conflicts with the Rules Enabling Act and the Federal Rules of Civil Procedure.

The Board's attempt to create a substantive, non-waivable right to class procedures also violates the Rules Enabling Act ("REA"), which

Appellants fail to cite or address. In the REA, Congress delegated authority to the Supreme Court to promulgate the Federal Rules of Civil Procedure. 28 U.S.C. § 2072(b). The REA expressly provides the Federal Rules "shall not abridge, enlarge or modify any substantive right." *Id.*

In *Shady Grove Orthopedic Associates v. Allstate Insurance Co.,* a plurality of the Supreme Court differentiated a "substantive right" from a procedural one, explaining that a rule of procedure is valid under the REA only if it "really regulat[es] procedure, – the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." 559 U.S. 393, 406 (2010) (internal quotation marks and citation omitted). Regarding the validity under the REA of the Federal Rules' various joinder mechanisms, the plurality opinion reasoned:

> Applying that criterion, we think it obvious that rules allowing multiple claims (and claims by or against multiple parties) to be litigated together are also valid [under the REA]. *See, e.g.,* Fed. Rules Civ. Proc. 18 (joinder of claims), 20 (joinder of parties), 42(a) (consolidation of actions). Such rules neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights; they alter only how the claims are processed. For the same reason, Rule 23 – at least insofar as it allows willing plaintiffs to join their separate claims against the same defendants in a class

> action – falls within § 2072(b)'s authorization. A class action, no less than traditional joinder (of which it is a species), ***merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged.***

Id. at 408 (emphasis added).

Appellants and *Horton I* erroneously treat Rule 23 as enlarging substantive rights under the NLRA and abridging them under the FAA. On one hand, they contend employees have a substantive right under the NLRA to invoke Rule 23 and seek class certification. But a "right" to invoke Rule 23 could not exist without the rule itself. Consider a hypothetical in which Rule 23 was never promulgated. Section 7 standing alone obviously would not provide any right to seek class certification in Federal Court. Under the Board's view, this purported right grew out of Section 7 with the adoption of Rule 23. The Board, and Appellants, thus construe Rule 23 as expanding employees' substantive rights under Section 7, which, if they were right, would violate the REA.

Conversely, Appellants view Rule 23, when combined with Section 7, as limiting parties' substantive rights under the FAA to agree to

procedures governing their arbitrations. If they were right, this would also violate the REA. *See Italian Colors*, 133 S. Ct. at 2309-10 (an entitlement to class proceedings would abridge or modify substantive rights, in violation of the REA); *Parisi v. Goldman, Sachs & Co.*, 710 F.3d 483, 487-88 (2d Cir. 2013) (under the REA, "Rule 23 cannot create a non-waivable, substantive right to bring" a pattern-or-practice class action under Title VII).

The Board's attempt to create a substantive, non-waivable right to class procedures also is at odds with Rule 23, the Federal Rules generally, and other standards governing procedures for adjudication. Courts have held repeatedly and expressly that litigants do not have a substantive right to class action procedures under Rule 23 and such procedures are waivable. *E.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997); *Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims."); *Frazar v. Gilbert*, 300 F.3d 530, 545 (5th Cir. 2002) ("A class action is merely a procedural device; it does not create new substantive rights."), *rev'd on other grounds*, *Frew ex rel. Frew v. Hawkins*, 540 U.S.

431 (2004). State class action procedures are treated similarly. *See, e.g.*, *Blaz v. Belfer*, 368 F.3d 501, 504 (5th Cir. 2004) (holding there is no "substantive right to pursue a class action" in either state or federal court). Appellants and *Horton I* disregard this substantial body of case law interpreting rules outside the Board's jurisdiction and expertise.

Additionally, *Horton I*'s assumption that procedures are non-negotiable is inconsistent with courts and litigants' practices under the Federal Rules. Those rules (and their state counterparts) generally permit, and sometimes mandate, that litigants negotiate regarding the procedures governing the adjudication of their disputes. *E.g.*, Fed. R. Civ. P. Rules 16(b) & (c) and 26(f) (allowing parties to agree on procedures governing case); 29 (allowing parties to stipulate to changes in discovery procedures); 37(a)(1) (requiring parties to attempt to agree on resolution to discovery disputes before seeking court action). As a result, parties in litigation frequently negotiate, and courts routinely enforce, agreements regarding class procedures, including agreed scheduling orders setting deadlines for motions for certification or permissive joinder; agreements extending the time in which employees may move for certification; stipulations as to the scope of any certified

class; agreements by the parties as to the time period during which opt-ins to collective actions may file their consents to join a case or during which putative members of Rule 23 classes may file their notices to opt out; and stipulations and settlement agreements dismissing class allegations on agreed terms. Under the novel rule Appellants urge this Court to adopt, such routine agreements would be invalid because they narrow or waive employees' purported non-negotiable NLRA rights.

C. The alleged right to class procedures conflicts with the FLSA and court procedures administering cases filed under the FLSA.

Appellants' "right" to collective adjudication of their FLSA claims against Raymours is governed by section 216(b) of the FLSA, and their "right" to class adjudication of their remaining claims is governed by Rule 23 of the Federal Rules. Courts regularly hold that these gateways to collective and class adjudication do not involve substantive rights and are waivable. *Sutherland*, 726 F.3d at 296; *Owen*, 702 F.3d at 1055; *Carter*, 362 F.3d at 298; *Adkins*, 303 F.3d at 503.

Appellants' argument to the contrary is illogical. As an initial matter, their contention that the NLRA creates a substantive right to adjudicate claims collectively is belied by *Horton I*, where the Board

acknowledged the right of employers to preclude collective arbitration of claims, provided a ***judicial*** forum is left open for collective adjudication of claims. Such a distinction is hardly consistent with recognition of a substantive right; rather, it is consistent only with recognition of a procedural vehicle for asserting claims.

Furthermore, in arguing that the Board has authority to prohibit employers and employees from agreeing to arbitrate FLSA claims individually, Appellants fail to consider not only settled FLSA jurisprudence recognizing the waivable nature of the right to proceed collectively under the FLSA, but also that individual arbitration is fully consistent with the purposes underlying Section 216(b).

Congress adopted the Portal-to-Portal Act in 1947 to amend the FLSA to ***limit*** the number of collective actions filed and require every employee who participates in such actions to give his or her individual consent to be a party-plaintiff. *See Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 173 (1989) (Congress enacted §216(b) "for the purpose of limiting private FLSA plaintiffs to employees who asserted claims in their own right and freeing employers of the burden of representative actions"). There is no rational basis for finding an

arbitration agreement that includes a waiver of class procedures interferes more with employees' purported right to engage in concerted activity than the FLSA's own individual opt-in requirement, which is waivable.

Horton I also failed to discuss the procedures governing collective actions under the FLSA. The FLSA does not establish any procedures for identifying and notifying putative collective action members of their opportunity to opt into an FLSA collective action. Rather, such procedures have been developed by courts through their inherent, discretionary authority to manage cases. *Hoffmann-La Roche, Inc.,* 493 U.S. at 165. Appellants contend that employees have a substantive right under the NLRA to invoke these *ad hoc* procedures. However, the NLRA cannot reasonably be construed to provide employees a substantive right to invoke notification and certification procedures developed by courts in the exercise of judicial discretion.

D. The Board does not have a general authority under the NLRA to invalidate contracts.

Appellants also attempt to justify *Horton I* by arguing the NLRA authorizes the Board to "invalidate any employment contract or workplace policy that interfered with the fundamental statutory rights

guaranteed by the NLRA." App.Br. 15. They cite no decision during the NLRA's nearly 80-year history holding a contract unenforceable because it interfered with employees' general "right to engage in protected concerted action," and none appears in *Horton I*.[9] What they offer, instead, is a number of decisions pre-dating the Supreme Court's decision in *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944), in which various individual employment agreements were held unlawful under the NLRA because employers used them to violate certain specific and well-defined rights granted employees in Section 7, not the general "right to engage in protected concerted action."

Indeed, Appellants fail to acknowledge that Section 7's rights run from the well-defined and specific – for example, the rights "to form, join, or assist labor organizations" and "to bargain collectively through representatives of their own choosing" – to the very general right "to engage in other concerted activities for the purpose of . . . other mutual aid or protection." 29 U.S.C. § 157. In every decision Appellants and *Horton I* cite, a court held unlawful an individual agreement that

[9] Appellants and the LLS Amici similarly fail to cite any decision in the NLGA's eight-decade history holding any contract unenforceable on public policy grounds based on 29 U.S.C. § 102. LLS.Br. 13-14, 21-22.

attempted to restrict one of the specific, well-defined rights protected in Section 7; ***none*** held an agreement void because it allegedly violated an employee's far more amorphous Section 7 right to engage in concerted activities for mutual aid or protection. *Horton I,* slip op. at 4-5 & n.7.[10]

For example, in *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940), an employer refused to recognize a union and established a committee to negotiate individual employment contracts in lieu of collective bargaining. The Supreme Court found the individual contracts "were the fruits of unfair labor practices, stipulated for the renunciation by the employees of rights guaranteed by the Act, and

[10] *See, e.g.*, *Western Cartridge Co. v. NLRB*, 134 F.2d 240, 244 (7th Cir. 1943) (individual agreements served "to forestall union activity" and "create a permanent barrier to union organization"); *NLRB v. Adel Clay Prods. Co.*, 134 F.2d 342, 345 (8th Cir. 1943) (individual contracts served "as a means of defeating unionization and discouraging collective bargaining"); *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942) (under individual employment agreements, "the employee not only waived his right to collective bargaining but his right to strike or otherwise protest on the failure to obtain redress through arbitration"); *NLRB v. Jahn & Ollier Engraving Co.*, 123 F.2d 589, 593 (7th Cir. 1941) (individual contracts were unlawful where they waived employees' right to bargain collectively for a period of two years and were "adopted to eliminate the Union as the collective bargaining agency" of employees); *NLRB v. Superior Tanning Co.*, 117 F.2d 881, 888-91 (7th Cir. 1941) (individual contracts were part of employer's plan to discourage unionization); *NLRB v. Vincennes Steel Corp.*, 117 F.2d 169 (7th Cir. 1941) (individual employment agreements were promulgated to circumvent union and required each employee to refrain from requesting a raise in wages, which "deprive[d] the employee of the right to designate an agent to bargain with reference thereto"). Appellants and the Board also fail to acknowledge that *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982) involved an NLRA provision – Section 8(e) – that *expressly* voids certain contracts. App.Br. 27; *Horton I*, slip op. at 11.

were a continuing means of thwarting the policy of the Act." *Nat'l Licorice Co.,* 309 U.S. at 361.

Four years later, in *J.I. Case*, an employer claimed it did not need to bargain collectively, because it already had entered individual employment agreements with employees prior to a union being certified as their exclusive bargaining representative. The Supreme Court ***did not void the individual agreements***. Rather, it held their existence did not excuse the employer from bargaining collectively, because each individual employment agreement would be superseded by the terms of any collective bargaining agreement. *J.I. Case Co.,* 321 U.S. at 336-38.

Under *J.I. Case*, if a union were to come to represent Raymours' employees, and if the parties were to agree upon a collective agreement, that agreement might supersede the EAP to the extent its terms varied from the EAP, but that is not the scenario presented here or in *Horton I*. *See Johnmohammadi*, 755 F.3d at 1076-77.

The other decisions cited by Appellants and *Horton I* all involved employers' use of individual employment agreements prior to *J.I. Case* to attempt to avoid employees' specific Section 7 rights to form or join labor organizations and engage in collective bargaining. Appellants and

Horton I claim these decisions held individual agreements are unlawful merely because they "purport to restrict Section 7 rights. App.Br. 22-23; *Horton I,* slip op. at 4. But such an extrapolation goes much too far. *Webster v. Perales*, 2008 WL 282305 (N.D. Tex. Feb. 1, 2008) (rejecting characterization of *National Licorice* as barring "individual contracts which purport to waive rights protected by Section 7" as too broad). Those cases show only that there was a brief period before the Supreme Court's landmark decision in *J.I. Case,* during which courts invalidated individual agreements that employers used in willful attempts to avoid collective bargaining and interfere with well-defined and specific rights granted in Section 7. The employers in those cases acted with anti-union animus and required individual agreements that served no legitimate purpose, solely to interfere with those well-defined Section 7 rights.

The decisions relied upon by Appellants were thus irrelevant to the validity of an ordinary arbitration agreement containing a class waiver such as the EAP. The differences between their facts and an employer's routine use of an arbitration agreement with a class action waiver are stark:

- An employer that proposes or requires an arbitration agreement is not using it as a basis to avoid collective bargaining with a union, and often there is no union at issue.
- There is no allegation or evidence that Raymours created its EAP for an improper purpose under the law, in contrast to the employers in the cases cited by Appellants and *Horton I*. App.Br. 28-30. To the contrary, federal law recognizes the value and legitimacy of arbitration agreements and ***encourages*** them. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23 (2001) ("there are real benefits to the enforcement of arbitration provisions" in employment litigation). The Supreme Court has recognized that class-arbitration waivers, in particular, are legitimate and reasonable. *See Concepcion*, 131 S. Ct. at 1748.

VIII. ***Horton I*'s construction of Section 7 is unreasonable.**

Even if the Board had any authority under the NLRA to define Section 7 rights as guaranteeing employees' access to adjudicatory procedures, *Horton I*'s holding that employees have a right to invoke

class procedures was unreasonable and "wholly ignore[s] other and equally important Congressional objectives." *Southern S.S. Co.*, 316 U.S. at 47. For this reason as well, Appellants' effort to have this Court adopt its holding should be rejected.

A. A purported right to invoke class procedures would make no sense, because the NLRA cannot mandate class certification.

Under the Federal Rules, a court may deny an employee's motion for class certification. The Board concedes that Section 7 cannot grant employees a "right to class certification" and that employers may oppose employees' motions for certification without violating their Section 7 rights. *Horton I,* slip op. at 10 & 10 n.24.

In an effort to overcome this obstacle, the Board held in *Horton I* that Section 7 guarantees employees only a much more limited right: "to take the collective action inherent in ***seeking*** class certification, whether or not they are ultimately successful under Rule 23" and "to act concertedly by ***invoking*** Rule 23, Section 216(b), or other legal procedures." *Id.* (emphasis added).

Appellants' invite this Court adopt the Board's distinction (App.Br. 24 n.9), an invitation the Court should not accept, because the

limited "right" actually recognized by *Horton I* (to act concertedly by ***invoking*** Rule 23 and ***seeking*** class certification) makes no sense in practice.

Raymours' EAP does not abridge any purported right to concertedly "seek" class certification and "invoke" Rule 23 procedures, any more than would Raymours' filing an opposition to an employee's motion for class certification – which *Horton I* admits is permissible. The EAP does not, and cannot, prevent employees from filing a class action lawsuit that "seeks" class certification and "invokes" Rule 23. Under the EAP, Raymours may respond to such a lawsuit by moving to stay or dismiss the action and compel individualized arbitration, as it did here. But *Horton I* fails to identify any rational difference for Section 7 purposes between Raymours' responding to a class action lawsuit with a successful motion to compel individualized arbitration and responding with a successful opposition to class certification. In ***both*** instances, by the time Raymours files its pleading, the employees already will have taken "the collective action inherent in seeking class certification" and will already have acted concertedly by "invoking" class certification procedures. Indeed, here, Appellants fail to explain

why they have not already fully exercised the very narrow alleged right identified by *Horton I* when they filed their class action complaint ***invoking*** Rule 23 and Section 216(b). JA.A-7.

Further, *Italian Colors* forecloses any argument that Appellants have a non-waivable right under the NLRA to try to satisfy Rule 23's requirements before their complaint is dismissed under the EAP. 133 S. Ct. at 2310 ("One might respond, perhaps, that federal law secures a nonwaivable opportunity to vindicate federal policies by satisfying the procedural strictures of Rule 23 or invoking some other informal class mechanism in arbitration. But we have already rejected that proposition [in *Concepcion*].").

B. *Horton I* wrongly ignored parties' substantial interests in utilizing individualized arbitration.

Additionally, Appellants and *Horton I* unreasonably equate requiring the waiver of class procedures as a condition of employment with retaliating against employees for exercising NLRA rights, relying on decisions in which employers terminated employees for filing lawsuits. *Horton I,* slip op. at 2-3 & n.3. There is no reasonable justification for treating Raymours' EAP as equivalent to firing

employees because they concertedly sued their employer.[11] The former involves action that the law affirmatively declares legitimate. Again and by stark contrast, federal law acknowledges individual employment arbitration yields benefits to the parties and public by reducing the burdens and costs of litigation while preserving individuals' ability to vindicate their claims. Therefore, when an employer declines to employ individuals who refuse to agree to individualized arbitration, the employer's actions are in furtherance of ends that Congress and the courts have deemed legitimate and beneficial. Moreover, the employer's actions do not adversely affect employees' substantive claims against the employer, because they may vindicate such claims effectively through arbitration.

Appellants ignore the substantial interests in favor of individual employment arbitration and fail to recognize the harm that their desired holding would do to those interests. Individualized arbitration provides benefits to both parties – the employer and the employee – by providing a relatively low-cost and quick method of adjudicating

[11] Appellants' insinuation that Raymours might discipline an employee for filing a lawsuit in breach of the EAP is baseless. App.Br. 25 n.10. There is no evidence or allegation that any employee has ever been disciplined for filing a lawsuit against Raymours, including Appellants in this case.

disputes. *E.g.*, *Circuit City Stores, Inc.*, 532 U.S. at 122-23 ("We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context."); *see Stolt-Nielsen S.A.*, 559 U.S. at 685 ("In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."). Appellants may disagree with these pronouncements from the Supreme Court, but this Court should not follow Appellants' propensity for ignoring them. App.Br. 43-44.

C. *Horton I* unreasonably concluded that employees cannot waive access to class procedures.

The Supreme Court has already held that unions may waive an individual employee's right to a judicial forum. *14 Penn Plaza*, 556 US at 255-60. The effect of *Horton I* is that a union can waive an individual's rights, ***but that same individual cannot do so***. This is illogical under contract law principles and contrary to *14 Penn Plaza,* which found "[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those

agreed to by a union representative." *Id.* at 258. Whatever employees' right might be under the NLRA to access class procedures, there is no reasonable basis to prohibit employees from agreeing to waive such access as one component of a legitimate, good-faith arbitration agreement.

CONCLUSION

This Court should decline Appellants' invitation to follow the Board's discredited *Horton I* decision, which is contrary to the FAA and far exceeds the Board's limited authority under the NLRA. For the foregoing reasons, Raymours requests that this Court affirm the district court's order compelling individual arbitration of Patterson's claims and dismissing the action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 18th day of March, 2016, I caused this BRIEF FOR APPELLEE RAYMOURS FURNITURE COMPANY, INC. to be filed electronically with the Clerk of the Court using the CM/ECF System, thereby serving all counsel.

s/Ron Chapman, Jr.

CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 32(a)(7)(C), I certify that this Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this Brief contains 13,462 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

Dated this 18th day of March, 2016.

s/Ron Chapman, Jr.