No. 12-55578
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FATEMEH JOHNMOHAMMADI,
Plaintiff and Appellant,

v.

BLOOMINGDALE'S, INC.,

Defendant and Appellee.

On Appeal from the United States District Court For the Central District Of California, Case No. 2:11-cv-06434-GW-AJW

BRIEF FOR *AMICUS CURIAE* CALIFORNIA EMPLOYMENT LAW COUNCIL IN SUPPORT OF AFFIRMANCE

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, CELC, is a voluntary, nonprofit organization that promotes the common interests of employers and the general public in fostering the development in California of reasonable, equitable, and progressive rules of employment law. CELC's membership includes approximately 50 private-sector employers in the State of California, who collectively employ hundreds of thousands of Californians.

CELC has been granted leave as amicus curiae to orally argue and/or file briefs in many of California's leading employment cases, including *Foley v. Interactive Data Corp*., 47 Cal. 3d 654 (1988); *Cassista v. Community Foods, Inc*., 5 Cal. 4th 1050 (1993); *Turner v. Anheuser-Busch, Inc*., 7 Cal. 4th 1238 (1994); *Coltran v. Rollins Hudig Hall Int'l, Inc*., 17 Cal. 4th 93 (1998); *White v. Ultramar, Inc*., 21 Cal. 4th 563 (1999); *Asmus v. Pacific Bell*, 23 Cal. 4th 1 (2000); *Cortez v. Purolator Air filtration Products Co*., 23 Cal. 4th 163 (2000); *Armendariz v. Foundation Health Psychcare Services, Inc*., 24 Cal. 4th 83 (2000); *Guz v. Bechtel National, Inc*., 24 Cal. 4th 317 (2000); *Richards v. CH2M Hill, Inc*., 26 Cal. 4th 798 (2001); and *Brinker v. Superior Court*, 53 Cal. 4th 1004 (2012).

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

CELC also has participated in significant employment-law decisions of this Court and the United States Supreme Court, including *Bins v. Exxon Co. U.S.A.*, 220 F.3d 1042 (9th Cir. 2000); *Asmus v. Pacific Bell*, 159 F.3d 422 (9th Cir. 1998); *Duffield v. Robertson Stephens & Co*., 144 F.3d 1182 (9th Cir. 1998); *Lapine Tech. Corp. v. Kyocera Corp*., 130 F.3d 884 (9th Cir. 1997); *Vizcaino v. Microsoft Corp*., 120 F.3d 1006 (9th Cir. 1997); *Miller v. Fairchild Industries, Inc*., 885 F.2d 498 (9th Cir. 1989); *Sorosky v. Burroughs Corp*., 826 F.2d 794 (9th Cir. 1987); and *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011).

This case presents the question of whether an otherwise lawful arbitration agreement must be denied enforcement solely because it contains a class action waiver. Plaintiff maintains the District Court erred by not following a recent decision of the National Labor Relations Board ("Board") which held an employer may not require its employees to agree to arbitrate on an individual basis without violating the National Labor Relations Act ("NLRA"). *D.R. Horton Inc.*, 357 N.L.R.B. 184 (2012).

As representative of some of California's largest employers, CELC has a vital interest in ensuring that the federal labor law regime to which its members may be subject is rational, fair and consistent. The Board's ruling in *Horton* conflicts with fundamental principles embodied within the Federal Arbitration Act ("FAA"), and is not authorized by the NLRA. If followed, *Horton*

would, contrary to the interests of CELC members specifically and arbitration users generally, undermine the strong federal policy requiring arbitration agreements to be enforced "according to their terms."

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

INTRODUCTION

Plaintiff argues the District Court erred in enforcing the parties' otherwise enforceable arbitration agreement simply because it contains a class action waiver.

Specifically, he contends the District Court was required to follow the Board's recent decision in *D.R. Horton Inc.*, 357 N.L.R.B. 184 (2012). In *Horton*, the Board concluded that Section 7 of the NLRA, 29 U.S.C. §157, guarantees each employee the substantive right to initiate a class action against the employer in all employment cases. Based on this premise, it held an employer necessarily violates Section 8(a)(1) of the Act, *id.*, §158(a)(1), whenever it requires employees to sign arbitration agreements containing class action waivers.

Plaintiff is incorrect. As virtually every court to consider the matter has concluded, the Board's blanket prohibition of class action waivers is incorrect as a matter of law, and should not be followed by federal courts. *See* cases cited in Defendant's brief at 58-59. Simply put, nothing in Section 7 of the NLRA constitutes the "contrary Congressional command" that is necessary to permit overriding the FAA's mandate that arbitration agreements are to be "enforced according to their terms." Additionally, nothing in the Board's own precedents compels--even supports--its novel conclusion that the NLRA creates an unwaivable substantive right to prosecute class actions.

The decision of the District Court is correct and should be affirmed.

ARGUMENT

I. THE BOARD'S BLANKET PROHIBITION OF CLASS ACTION WAIVERS IS INCORRECT AS A MATTER OF LAW

A. The Board Has No Authority To Override Otherwise Applicable Federal Law

It is well-settled that "[a]n agency decision cannot be sustained where it is based . . . on an erroneous view of the law." *Prill v. NLRB*, 755 F.2d 941, 947 (D.C.Cir. 1985) ("*Prill I*") quoting *Chenery Corp. v. SEC*, 318 U.S. 80, 95 (1943). It is also well-settled that an agency has no authority to override other statutory schemes. *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 144 (2002) ("the proposition that the Board's interpretation of statutes outside its expertise is likewise to be deferred to is novel.").

Early on, the Supreme Court rejected a Board decision that had awarded reinstatement with backpay to five employees whose strike on a ship had amounted to mutiny under 18 U.S.C.A. § 2192, explaining:

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

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

In *Hoffman Plastic Compounds*, the Supreme Court likewise refused to enforce a Board order awarding back pay to an undocumented illegal alien not

authorized to work in the United States. 535 U.S. at 140. Noting that the award conflicted with the federal Immigration and Reform Control Act of 1986, which required the discharge of unauthorized employees, the Court held that "however broad the Board's discretion to fashion remedies when dealing only with the NLRA, it is not so unbounded so as to authorize this sort of an award." *Id.* at 151-52; *see also Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 903k (1984) ("[i]n devising remedies for unfair labor practices, the Board is obliged to take into account another 'equally important Congressional objective.'").

Indeed, the Supreme Court has never permitted the Board to apply the NLRA in derogation of constitutional or other federal statutory rights. *Edward J. DeBartolo Corp v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575-76 (1988) (restricting peaceful hand-billing under the NLRA would impair Free Speech rights); *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 497-99 (1979) (Board may not exercise jurisdiction over church-operated school); *Connell Constr. Co. v. Plumbers*, 421 U.S. 616, 626 (1975) (rejecting argument federal antitrust policy should be subordinated to NLRA).

Thus, the Board may not single-mindedly apply the policies it regards as central to the NLRA where "there is a conflict between the NLRA and another statute." *NLRB v. IBEW*, 345 F.3d 1049, 1057 (9th Cir. 2003). "[I]f the Board

'wholly ignores equally important Congressional objectives,' 'then the circuit court should not enforce the Board's order.'" *Id.*

B. The FAA Establishes A Strong Federal Policy Compelling Enforcement Of Arbitration Agreements "According To Their Terms" Absent A "Contrary Congressional Command"

The Board's conclusion in *Horton* is flatly foreclosed by the Supreme Court's repeated recognition that the FAA mandates that all arbitration agreements--including agreements to arbitrate on an individual rather than class-wide basis--must be "enforced according to their terms" absent a "contrary congressional command." Section 7 contains no such command.

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

The primary purpose of the FAA is to "ensure that private agreements to arbitrate are enforced according to their terms," including "with whom a party will arbitrate its disputes." *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S.Ct. 1758, 1773 (2010). Arbitration clauses must be "rigorously enforce[d]" by the courts, which "*shall* direct the parties to proceed to arbitration on issues as

to which an arbitration agreement has been signed." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218, 221 (1985).

Even when an arbitration agreement covers claims involving federal statutory rights, the "duty to enforce arbitration" is "not diminished." *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987). Rather, "the FAA requires the arbitration agreement to be enforced according to its terms" unless another statute reveals a "contrary congressional command," *Compucredit*, 132 S.Ct. at 669, which must be "deducible from the [statute's] text or legislative history, or from an inherent conflict between arbitration and the statute's underlying purposes." *McMahon*, 482 U.S.at 227.

Since *McMahon*, the Supreme Court has invariably rejected the argument that a statute conflicts with the FAA's purposes of enforcing arbitration agreements according to their terms. *E.g.*, *CompuCredit*, (Credit Repair Organizations Act); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) (Securities Act of 1933); *Gilmer*,(ADEA); *McMahon*, (Exchange Act of 1934 and RICO), and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (Sherman Act).

2. The Supreme Court has consistently concluded that arbitration agreements affecting class arbitration must, like all other arbitration agreements, be enforced "according to their terms."

In *Gilmer*, for example, the Court held ADEA claims could be subjected to compulsory arbitration. It expressly rejected the argument that ADEA claims were not suitable for arbitration because arbitration agreements do not uniformly provide for class arbitration. *Gilmer*, 500 U.S. at 32.

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

More recently, the Court held that the FAA preempted a California Supreme Court decision that had declared a class action arbitration waiver to be unconscionable under state law. *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011). The Court made clear parties not only are free "to agree to limit the issues subject to arbitration," but also "to limit with whom a party will arbitrate its disputes." *Id.*at 1748-49.

The Court explained that requiring parties to engage in class arbitration not only would greatly increase the risks to defendant, it would disserve the FAA's underlying policies by making dispute resolution less efficient and cost-effective. *Id.* at 1751-52. Such a result, it further explained, was never

contemplated by Congress, as the FAA's legislative history "contains nothing -- not even the testimony of a stray witness in committee hearings -- that contemplates the existence of class arbitration." *Id.* at 1749 n.5.[2]

C. Section 7 of the NLRA Does Not Contain The "Contrary Congressional Command" Necessary To Overcome The FAA's Clear Mandate

In *Horton,* the Board implied the right to proceed by class action was a "substantive right[] that ha[d] long been held protected by Section 7 of the NLRA," *Horton* at 4. In fact, that so-called "right" is novel and ungrounded in Section 7, thereby precluding the possibility that Section 7 constitutes the "contrary Congressional command" required to justify the Board's sweeping repudiation of FAA policy. In fact, as expected, since Section 7 does not preclude class action waivers, the alleged *Horton* "right" is contained in no earlier Board cases. Of course, even if this fictitious "right" did appear in earlier Board decisions, such would be irrelevant as the cases would have been decided incorrectly.

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[2] The Second Circuit recently suggested that, because *Concepcion* addressed whether the FAA preempted state law, its reasoning does not apply to claims arising under federal law. *In Re American Express Merchants' Litigation*, 667 F.3d 204 (2d Cir. 2012). But *Concepcion* was based on "federal arbitral law," grounded in Section 2 of the FAA, 131 S.Ct. at 1748, which created "a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

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

Section 7 of the NLRA states in part "employees shall have the right to self-organization . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . ."

On its face, nothing in that statutory text can be read as creating a substantive right for employees to initiate class actions, whether in arbitration or court. Likewise, nothing in the statutory text remotely sanctions the NLRB to override arbitration agreements containing class action waivers.[3]

Indeed, the Supreme Court has long recognized that "the term 'concerted activity' is not [even] defined in the Act." *NLRB v. City Disposal*, 465 U.S. 822, 830 (1984). "The courts have not found it easy to apply" the "concerted activities" concept, in part because "Congress scarcely had the problem in mind." *Ontario Knife v. NLRB*, 637 F.2d 840, 843 (2d. Cir. 1980). Given this generality,

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[3] Whether employees would have a substantive right to file class or consolidated claims against employers was neither discussed nor debated in the legislative history of Section 7, which is not surprising as FRCP Rule 23 did not exist in 1935. This silence is significant because the Senate Report accompanying the NLRA states:

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

Sen.Rep.No.573, 74th Cong., 1st Sess. 8 (1935).

Section 7 cannot be considered to contain the "contrary Congressional command" necessary to invalidate otherwise lawful arbitration agreements. *McMahon*, *supra*.

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

In sum, nothing in Section 7 suggests Congress intended to authorize the Board to override otherwise lawful arbitration agreements generally, or to guarantee employees an unwaivable right to file class actions against their employers. Thus, Section 7 cannot perform the "heavy lifting" necessary to override the FAA and falls far short of the necessary "congressional command" -- as the examples cited in *CompuCredit* make plain.

2. The Board's *D.R. Horton* decision is neither compelled, nor supported, by its prior decisions

The Board suggests it has long held that Section 7 protects the right of employees to file putative class actions. *Horton* at 4. The Board has rightly been criticized for having over the years endorsed fundamentally different, indeed

incompatible, definitions of the statutory term "concerted activities." *Prill v. NLRB*, 835 F.3d 1481 (D.C.Cir. 1987) ("*Prill II*"), *cert. denied*, 487 U.S. 1205 (1988). Nonetheless, it has *never* held that Section 7 protects the right it purported to recognize in *Horton*.

The bedrock principle underlying the Board's Section 7 jurisprudence is that an employee's action is "concerted" *only* if it was "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Prill II*, 835 F.2d at 1483.

As the D.C. Circuit has explained, "concerted action cannot be imputed from the object of the action." *Id.* "In other words, if a worker takes action by himself without contacting his fellow employees, even though he has a desire to help all workers, not just himself, he will not have satisfied the concerted action requirement." *Id.*

From this premise, the Board has long recognized that the filing of litigation, even by a single employee, may constitute protected "concerted activity" under Section 7, if the statutorily required "concerted" element has been satisfied. For example, "concerted action" has been found "where complaint letter written by single employee was 'approved in advance by several other employees.'" *Mohave Electric Cooperative v. NLRB*, 206 F.3d 1183, 1189, n.6 (D.C.Cir. 2000) quoting

International Ladies' Garment Workers' Union v. NLRB, 299 F.2d 114, 115-116 (D.C. Cir. 1962).

Likewise, a "complaint of [a] single employee is deemed concerted action when taken 'with the actual participation or on the authority of his coworkers.'" *Id.*, quoting *Prill II, supra*, 835 F.2d at 1483. The same is true when a duly appointed "business agent" files a lawsuit on behalf of a group of employees, *Brad Snodgrass, Inc.*, 338 NLRB 917, 923 (2003).

And, the Board has concluded "that the filing of a civil action by a group of employees is protected activity unless done with malice or in bad faith." *Harco Trucking*, 344 NLRB 478, 482 (2005); *see also United Parcel Service, Inc.*, 252 NLRB 1015, 1018 (1980); *Trinity Trucking & Materials Corp.*, 221 NLRB 364, 365 (1975); *Host International*, 290 NLRB 442, 443 (1988); *Leviton Manufacturing*, 203 NLRB 309 (1973), enforcement denied, 486 F.2d 686 (1st Cir. 1973); *Socony Mobil Oil*, 153 NLRB 1244 (1965), enfd. as modified 357 F2d. 662 (2d Cir. 1966); *Spandsco Oil Co.*, 42 NLRB 942, 949 (1942).

All the foregoing cases involved true "concerted" activities--that is cooperative or collective efforts between employees respecting statutorily protected subject areas.

In contrast, prior to *Horton*, the Board had never declared that individual recourse to class procedures (whether under the FLSA, Rule 23, or

otherwise) is not only guaranteed by Section 7, but unwaivable. To be sure, some of the group actions that the Board found to be protected were nominally styled as class actions. *E.g., United Parcel Service, supra and Harco Trucking, supra.* But that fact was irrelevant to those decisions. Rather, the rationale of those decisions was that the decision to file a lawsuit by a group of employees constituted "concerted activity" as *between those named plaintiffs*. *Id.*

In fact, the Board has never been asked, and has never determined, that the filing of a putative class action constitutes "concerted activity" as between the named plaintiffs and the *unnamed* class members. It would make no sense to conclude that it does. And, even if the Board had reached this conclusion pre-*Horton,* this would be of no moment as it would only show that the Board had earlier misinterpreted Section 7 and elevated the NLRA over the FAA, something it is not permitted to do.

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

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

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

Thus, class action filings typically do not involve "concerted action" other than between the named plaintiffs. Conversely, there is no concerted action insofar as a putative class action purports to be on behalf of unnamed class members. That is because, as the D.C. Circuit has explained: "if a worker takes action by himself without contacting his fellow employees, even though he has a desire to help all workers, not just himself, he will not have satisfied the concerted action requirement." *Prill II*, 835 F.2d at 1483.

Consequently, the District Court correctly concluded that it was not compelled by *Horton* to deny Macy's petition to compel arbitration. Because Section 7 protects only "concerted" activities, *Horton* should not be followed.

CONCLUSION

For the reasons expressed above, this Court should affirm the District Court's order granting Defendant's Petition to Compel Arbitration. Simply put, the Board's Order in *Horton* misstates the law because nothing in Section 7 of the NLRA constitutes the clear "contrary Congressional command" required to empower it to override the FAA rule that arbitration agreements must be "enforced according to their terms."

Moreover, if followed by federal courts, the decision in *Horton* would have the practical effect of eliminating low-cost, speedy resolution of employment disputes through arbitration—injuring employers and society generally. No company would willingly enter into arbitration agreements if the price were to require class arbitration whenever an employee claimed to be acting on behalf of a putative class. *Concepcion*, 131 S. Ct. at 1752. That would harm employees, because for the most common employment disputes— individual claims too small to attract a contingent-fee lawyer—the choice is "arbitration—or nothing." Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J.L. Reform 783, 792 (2008).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rule 32-1, Amicus hereby certifies that the text of this brief is double spaces, uses a proportionately spaced typeface, and contains a total of 3,607 words, based on the word count program in Microsoft Word.

Dated this 19th day of December, 2012.

SEYFARTH SHAW, LLP

s/ James M. Harris
James M. Harris

9th Circuit Case Number(s) 12-55578

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