

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

24 HOUR FITNESS USA, INC.

and

ALTON J. SANDERS, an individual

Case 20-CA-35419

**BRIEF *AMICUS CURIAE* OF CHAMBER OF COMMERCE OF THE UNITED STATES
OF AMERICA IN SUPPORT OF 24 HOUR FITNESS USA, INC.**

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S. 2926, 78 Cong. Rec. 10560 (1934) (statement of Sen. Walsh), reprinted in 1 NLRB, Legis. History of the National Labor Relations Act of 1935 (1959) 20-21

The Chamber of Commerce of the United States of America (the “Chamber”) respectfully submits this brief *amicus curiae*, which addresses whether an employer violates Section 7 and Section and Section 8(a)(1) of the National Labor Relations Act (“NLRA”) by placing new employees in an arbitration program in which such employees agree to waive the procedural right to participate in a class or collective action unless they choose to opt-out of the arbitration program as part of the new hire process. The Chamber asks the Administrative Law Judge to rule that such an agreement does not violate the NLRA as a contrary ruling would conflict with Supreme Court precedent, be an inappropriate extension of the wrongly decided National Labor Relations Board (“Board” or “NLRB”) holding in *D.R. Horton, Inc.*, 357 NLRB No. 184 (Jan. 3, 2012) and would create substantial uncertainty for employers.

STATEMENT OF INTEREST

The Chamber is the world’s largest business federation. It represents 300,000 direct members and indirectly represents an underlying membership of more than three million businesses and professional organizations of every size, in every industry sector, and from every geographic region of the country. A principal function of the Chamber is to represent the interest of its members by filing amicus briefs in cases involving issues of vital concern to the nation’s business community. Given the enormous costs, risks, and evolving burdens and liabilities confronting businesses in the United States, the interests of the business community at large are much broader and more far-reaching than the limited interests of the litigants.

Many of the Chamber’s members and affiliates regularly enter into agreements to arbitrate with their employees because arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Arbitration is effective, speedy, fair, inexpensive and less adversarial than litigation in court. Based on the legislative policy reflected in the Federal Arbitration Act (“FAA”) and the Supreme Court’s consistent

endorsement of arbitration over the past several decades, Chamber members have entered into countless agreements to arbitrate with their employees. These arbitration agreements typically provide that disputes be resolved individually rather than as class or collective actions. Many employers choose to structure their agreements this way because, as the Supreme Court has observed several times, class arbitration would interfere with the simplicity, informality, and expeditiousness that are characteristic of arbitration. These agreements are already under attack under the Board's decision in *D.R. Horton, Inc.*, in which the Board held that an arbitration agreement containing a class action waiver that is entered into as a term or condition of employment violates Sections 7 and 8(a)(1) of the NLRA.

Under the Board's own limiting language describing its holding in *D.R. Horton*, it did not purport to address the specific variation of an arbitration agreement at issue here, in which the employee may choose to opt out of the class action waiver and continue employment. A decision in this matter finding that such an agreement to arbitrate violates the NLRA would further undermine existing agreements and erode the benefits offered by arbitration as an alternative to litigation. Because the advantages of arbitration would be lost if the Board finds that this arbitration agreement violates the NLRA, the Chamber has a strong interest in the outcome of this case. The Chamber's extensive interest in the issues presented by this case is further demonstrated by previous submission of amicus briefs in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), Case No. 12-60031 (5th Cir. 2012) and amicus letters in *Neiman Marcus*, Case No. 20-CA-33510.

STATEMENT OF THE CASE

This case involves allegations that Respondent 24 Hour Fitness USA, Inc. ("24 Hour Fitness") violated Sections 7 and 8(a)(1) of the Act by maintaining an arbitration policy under

which employees agree to participate in individual arbitration unless they opt-out within 30 days of hire.

The Chamber has no independent knowledge of the facts in this case and its interest is in the legal and policy arguments at issue. We recite the facts as we understand them from the record for purposes of properly articulating the Chamber's legal and policy positions. Since at least 2005, 24 Hour Fitness has maintained an Arbitration of Disputes Policy ("Arbitration Policy") that provides that all employment-related claims be arbitrated on an individual basis. (Joint Exhibit (Jt. Ex.) 1, No. 2.) Though the exact language has been modified over the years, the Arbitration Policy has fairly consistently stated that the Arbitrator shall have no right or authority to hear any dispute brought, heard or arbitrated as a class or collective action or in a representative or private attorney general capacity on behalf of a class of persons or the public. (Jt. Ex. 2.) Since January 1, 2007, 24 Hour Fitness has allowed new employees to opt-out of this arbitration program, including the class or collective action waiver, within 30 days of their date of hire. (Jt. Ex. 14; Respondent's Ex. 2A-2B; Tr. at 84-85.) Generally since that time, if an employee wishes to opt-out, the employee contacts a confidential hotline and someone sends the employee the opt-out form, which the employee then sends to HR, where it remains confidential. (Tr. at 65-68, 88-89.) As a result, an employee's supervisor never becomes aware that the employee opted out of the arbitration program. (Tr. at 66.)

On or about February 15, 2011, Charging Party Alton Sanders filed a charge with the National Labor Relations Board ("NLRB" or the "Board") against 24 Hour Fitness, alleging that 24 Hour Fitness' Arbitration Policy is an unfair labor practice under Sections 7 and 8(a)(1) of the NLRA. (General Counsel Ex. 1.) On April 30, 2012, the General Counsel issued a Complaint against 24 Hour Fitness based on the charge. (General Counsel Ex. 2.) A hearing was held

before an Administrative Law Judge (“ALJ”) on June 28, 2012 and the matter is currently pending.

SUMMARY OF THE ARGUMENT

First, the FAA requires that 24 Hour Fitness’ Arbitration Policy be enforced. The FAA requires that arbitration agreements be enforced according to their terms, including any applicable class or collective action waivers contained in such agreements. Agreements in which parties agree to arbitrate federal statutory claims are enforced absent a clear Congressional command that requires the agreement to be invalidated. The NLRA does not contain any such Congressional “command” or even any suggestion that arbitration agreements containing class action waivers are or should be impermissible under the statute.

To the extent that the General Counsel claims that the Board’s recent decision in *D.R. Horton* mandates a different result, that decision was wrongly decided. Not only did the Board lack the authority to rule that the NLRA trumped the strong federal policy in favor of arbitration as manifested by the FAA, but its reasoning for doing so is flawed in a number of ways. Further, the decision is currently on appeal before the Fifth Circuit Court of Appeals. As such, it should not be followed.

Second, employers have a right to enter into individual contracts with their employees. Under Supreme Court precedent and the NLRA’s own legislative history, the NLRB has very limited authority to regulate the terms and conditions of employment set forth in those contracts. In *D.R. Horton*, the Board inserted itself improperly into the regulation of terms and conditions set forth in individual contracts between employers and non-unionized employees when it held that an arbitration agreement containing a class action waiver that is entered into as a term or condition of employment violates Sections 7 and 8(a)(1) of the NLRA. Nonetheless, the Board itself purported to limit its holding only to such agreements that are entered into as a term or

condition of employment. Thus, by its own terms, *D.R. Horton* is not binding precedent in this case in which 24 Hour Fitness' Arbitration Policy permits an employee to opt-out of the term and continue employment.¹ It would be an unprecedented and inappropriate further extension of this wrongly decided Board holding for the ALJ to now find that arbitration agreements containing opt-out clauses also violate the NLRA, particularly in light of the pending appeal of *D.R. Horton*.

Finally, if 24 Hour Fitness' Arbitration Policy is found to violate the NLRA, it would create substantial uncertainty for employers as to the permissible scope of employment arbitration agreements. The law in this area is already unsettled due to the current conflict between the Board's decision in *D.R. Horton* and Supreme Court precedent applying the FAA. Additional NLRB decisions extending *D.R. Horton* to all manner of circumstances beyond those specified in that decision will only add to the uncertainty. Such a decision would also further erode the strong federal policy under the FAA of enforcing arbitration agreements according to their terms. If the NLRB continues down this path, at a minimum, it will cast a shadow over the lawfulness of many arbitration agreements. As a practical matter, it could lead to elimination of arbitration agreements in the employment setting, decidedly a negative outcome for employers and employees alike.

ARGUMENT

I. THERE IS A STRONG FEDERAL POLICY IN FAVOR OF ARBITRATION AS A MEANS OF DISPUTE RESOLUTION

Federal law and policy generally favor arbitration, and in particular, the use of predispute arbitration agreements. The FAA states that arbitration agreements are "valid, irrevocable and enforceable" as a matter of law "save upon such grounds as exist in law or equity for the

¹ This is not to say that analytically there is any meaningful difference between an arbitration agreement that permits employees to opt-out and one that does not. Both are clearly bilateral, both are fully enforceable under the FAA, and neither should be deemed to violate the NLRA.

revocation of any contract.” 9 U.S.C. § 2. Enacted in 1925 to combat the “judicial hostility to arbitration agreements,” this provision of the FAA “place[s] arbitration agreements on an equal footing with other contracts,” and incorporate[s] a “liberal federal policy favoring arbitration.” *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1745 (2011); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). The liberal federal policy applies “even when the claims at issue are federal statutory claims, unless the FAA’s mandate has been ‘overridden by a contrary congressional command.’” *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 669 (2012) (quoting *Shearson/Am. Ex. Inc. v. McMahon*, 482 U.S. 220, 226 (1987)).

As such, in determining whether an arbitration agreement is valid, the states may only apply generally applicable contract principles, and cannot create special rules to limit or expand the terms of arbitration agreements, even where they purport to do so as a matter of their strongly held public policy. *See Concepcion*, 131 S.Ct. at 1748 (“Although § 2’s saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.”); *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 281 (1995); *Perry v. Thomas*, 482 U.S. 483 (1987). Similarly, the NLRB or other federal agencies cannot ignore applicable federal statutory law. *See Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942) (“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.”); *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002). Only Congress can create different rules regarding the permissible scope of arbitration agreements.

II. THE FAA REQUIRES THAT 24 HOUR FITNESS' ARBITRATION POLICY BE ENFORCED ACCORDING TO ITS TERMS

A. The FAA Mandates that Arbitration Agreements, Including Any Applicable Class or Collective Action Waivers, Be Enforced According to Their Terms

Under the FAA, the procedures governing private arbitration are determined solely by the contract between the employer and the employee in question. *See Concepcion*, 131 S.Ct. at 1748 (“The ‘principle purpose’ of the FAA is to ‘ensure that private arbitration agreements are enforced according to their terms.’”) (internal citation omitted). Whether class arbitration is permissible is not an exception to the rule of private party determination; that question, like others about the scope and nature of the process, must be decided by “enforcing the parties’ arbitration agreement[] according to [its] terms.” *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 454 (2003). Indeed, the Supreme Court recently categorically 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. Animal Feeds Int’l Corp.*, 130 S.Ct. 1758, 1775 (2010). In other words, if the agreement between the parties does not provide for class arbitration, courts should not and may not impose it on the parties. Similarly, if the agreement prohibits class arbitration, courts should enforce the agreement including its terms prohibiting class arbitration.

This point is underscored by the Supreme Court’s recent decision in *Concepcion*. There, the Court found that an arbitration agreement that did not allow class arbitration was fully enforceable in spite of a California state law rule whereby consumer contracts providing for mandatory arbitration of low-value claims were deemed to be unconscionable. 131 S.Ct. 1740. The Court held that “[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” *Id.*

at 1748. Thus, in that case, the California rule was held to be “preempted by the FAA” and therefore the contract had to be enforced as written. *Id.* at 1750, 1753.

In sum, the FAA and Supreme Court precedent developed under it require that 24 Hour Fitness’ Arbitration Policy, including its prohibition on class arbitration, be enforced according to its terms.

B. There Is No Congressional Command in the NLRA That Overrides the FAA’s Mandate That Arbitration Agreements Should Be Enforced According to Their Terms

The FAA requires that agreements to arbitrate be enforced according to their terms unless another statute reveals a “contrary congressional command.” *CompuCredit*, 132 S.Ct. at 669.

“If such a[] [Congressional] intention exists, it will be discoverable in the text of the [statute], its legislative history, or an ‘inherent conflict’ between arbitration and the [statute]’s underlying purposes.” *Gilmer*, 500 U.S. at 26. Significantly, “[t]he burden is on the party opposing arbitration to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue.” *McMahon*, 482 U.S. at 227.

The Supreme Court has consistently applied this rule to federal statutory claims and has not found the requisite “congressional command” in any federal statute to date. *See, e.g., Pacificare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003) (ordering arbitration of federal RICO claims despite provision in arbitration agreement that may bar punitive damages awards); *Gilmer*, 500 U.S. 20 (predispute agreement to arbitrate enforceable as to ADEA claims); *Rodriguez v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) (claims under the Securities Act subject to arbitration); *McMahon*, 482 U.S. 220 (agreement to arbitrate Securities Exchange Act and RICO claims enforceable); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (ordering international antitrust claims to be arbitrated under terms of agreement). *Cf. Stolt-Nielsen*, 130 S.Ct. at 1777 (2010) (antitrust claims subject to arbitration);

Hall Street Assocs. v. Mattel, Inc., 552 U.S. 576 (2008) (arbitrator decided claims arising under environmental laws).

The Court also has found that agreements requiring arbitration of federal statutory claims and containing class action waivers are fully enforceable. *See Gilmer*, 500 U.S. at 32 (1991) (rejecting the argument that “arbitration procedures cannot adequately further the purposes of [federal age discrimination law] because they do not provide for broad equitable relief and class actions.”). Most recently, in *CompuCredit*, the Court considered whether the Credit Repair Organizations Act contained a “contrary congressional command” that would prohibit an arbitration agreement containing a class action waiver from being enforced according to its terms. The Supreme Court held the statute lacked the “Congressional command” necessary to override the FAA, even though it allows consumers to bring judicial actions, refers to “class actions,” and prohibits the waiver of “any right . . . under this sub-chapter.” 135 S.Ct. at 670. It explained that if such “commonplace” provisions could perform the “heavy lifting” required to override the FAA, “valid arbitration agreements covering federal causes of action would be rare indeed,” which “is not the law.” *Id.*

Not only is there no “congressional command” in the NLRA that would prohibit enforcement of 24 Hour Fitness’ Arbitration Policy according to its terms, but nothing in the statutory text, legislative history or any purported “inherent conflict” establishes that Sections 7 or 8(a)(1) creates any substantive right for employees to initiate and maintain class actions in court or in arbitration. Section 7 merely sets forth the very broad statement that “[e]mployees shall have the right . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .” 29 U.S.C. § 157. Section 8(a)(1) makes it an unfair labor practice to “interfere with, restrain, or coerce employees in the exercise of the rights

guaranteed in section 7.” 29 U.S.C. § 158(a)(1). When the language of Sections 7 and 8(a)(1) is compared to the provisions of the Credit Repair Organizations Act at issue in *CompuCredit*, it is plain that the “commonplace” language in these provisions is even further removed from the “heavy lifting” required to override the FAA.

The legislative history of the NLRA also contains no indication that Congress intended Sections 7 or 8(a)(1) to cover the right of employees to file class or collective action claims against their employers. That purported “right” was never discussed or raised in the proceedings leading up to the enactment of Section 7. Further, it is clear that though protected concerted activity as discussed in Section 7 was not expressly limited to collective bargaining and organizing, those activities were at the core of the Act’s protections:

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self- organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151. Moreover, given the complete lack of any indication that Congress intended to bar class action waivers in arbitration agreements with its passage of the NLRA, there cannot possibly be an “inherent conflict” between the two statutes. In sum, the NLRA does not provide the necessary “contrary congressional command” to rebut the FAA’s requirement that arbitration agreements be enforced according to their terms. The FAA thus requires that 24 Hour Fitness’ Arbitration Policy be upheld.

C. To The Extent the Board’s Decision in *D.R. Horton* Requires a Different Result, It Should be Disregarded

To the extent the Board’s recent decision in *D.R. Horton*, 357 NLRB No. 184 (Jan. 3, 2012), suggests that 24 Hour Fitness’ Arbitration Policy violates the NLRA, it conflicts with the FAA and should be disregarded.² In *D.R. Horton*, the Board held that an arbitration agreement containing a class action waiver that is entered into as a term or condition of employment violates Sections 7 and 8(a)(1) of the NLRA. As discussed above, such a finding is in clear conflict with the FAA and should be rejected. The Board’s assertions to the contrary in its decision should not be followed because (1) the Board does not have authority to disregard the FAA in favor of the NLRA; (2) the Board’s reasons for its finding that its holding did not conflict with the FAA are without merit; and (3) nearly every court to consider the Board’s decision in *D.R. Horton* has rejected it.

1. The Board Did Not Have Authority to Disregard the FAA in *D.R. Horton*

The Board is not permitted to disregard other statutory law in making its decisions, including the clear Supreme Court precedent developed under the FAA. Where a Board Order conflicts with another federal statute, the Supreme Court has repeatedly struck down those Orders because “the Board has not been commissioned to effectuate the policies of the Labor

² The Board found that class action waivers, in addition to violating Section 8(a)(1) of the NLRA, were also unenforceable under the Norris-LaGuardia Act. 357 NLRB No. 184 at 5–6. This finding also is erroneous as the Board has no authority to interpret and enforce the terms of the Norris-LaGuardia Act. 29 U.S.C. § 160 (“The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in [section 8] section 158 of this title)”). Further, even if the Board did have jurisdiction to interpret and enforce the Norris-LaGuardia Act, there is nothing in that statute that could be interpreted to prohibit waivers in dispute resolution procedures of class action filings. The primary purposes of that statute were to (1) limit the circumstances in which labor injunctions were permitted because “there have been abuses of judicial power in granting injunctions in labor disputes,” and (2) prevent employers from requiring employees to sign contracts in which “the employee waives his right of free association and genuine representation in connection with his wages, the hours of labor, and other conditions of employment.” S. 935, Report of the Senate Committee on the Judiciary, To Define and Limit the Jurisdiction of Courts Sitting in Equity, *reprinted in 2 American Landmark Legislation: The Federal Anti-Injunction Act of 1932* at 34, 40 (Irving J. Sloan, ed. 1984). In other words, it was intended to cover contracts where employees gave up their rights to unionize. Its reach was not intended to invalidate individual non-union contracts that have no impact on employees’ rights to organize or bargain collectively.

Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives.” *Southern S.S.*, 316 U.S. at 47.

For example, in *NLRB v. Bildisco and Bildisco*, 465 U.S. 513 (1984), the Supreme Court overturned a Board Order finding a unilateral employer change in terms and conditions of employment to be a violation of the NLRA where the employer was a debtor-in-possession under the bankruptcy law. The Court held that “Board enforcement of a claimed violation of § 8(d) under these circumstances would run directly counter to the express provisions of the Bankruptcy Code and to the Code’s overall effort to give a debtor-in-possession some flexibility and breathing space.” *Id.* at 532. *See also Hoffman*, 535 U.S. 137 (overturning Board Order issuing backpay to undocumented aliens as being inconsistent with the mandate under federal immigration law prohibiting undocumented aliens from obtaining employment in the country); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 903 (1984) (reversing Board backpay award to undocumented residents because the Board was obligated to take into account the “objective of deterring unauthorized immigration that is embodied in the [immigration laws]”); *Southern S.S.*, 316 U.S. at 47–48 (overturning Board Order requiring reinstatement of employees who struck while at sea away from their home port because the employees were guilty of mutiny under federal criminal laws and finding that the Board’s Order exceeded its authority under the NLRA).

In *D.R. Horton*, the Board tried to avoid the holdings in these decisions in two ways, neither of which is persuasive. First, the Board essentially responded that the purported right to maintain class and collective actions is simply too important to yield, regardless of whether it conflicts with the FAA. *See* 357 NLRB No. 184 at 8, n. 19 (“We do not understand the Court’s statement to suggest that the Board’s exercise of remedial discretion under the NLRA must

always yield to the policies underlying other federal statutes no matter how important the chosen remedy is to vindication of rights protected by the NLRA...”).

As noted above, this supposed important right granted by the NLRA is nowhere to be found in the text or legislative history of the statute. Moreover, the Board’s conclusion that employees signing arbitration agreements containing class action waivers violates the Act is not supported by the past decisions it cites. Those decisions merely support the unremarkable conclusion that the act of employees communicating for purposes of determining whether they should seek redress on a class or collective basis is protected activity under some circumstances. *See, e.g., Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556 (1978) (noting that efforts by employees to improve their working conditions “through resort to administrative and judicial forums” constitutes protected activity). Asking employees to give up this right to communicate about concerted activity would unquestionably be problematic. A class action waiver in an arbitration agreement does not seek to regulate this potentially substantive right and conduct, and thus it plainly does not support the Board’s decision in that matter. Indeed, the act of filing a class action lawsuit may also in some circumstances be protected activity and employees may not be fired for doing so. *See, e.g., Le Madri Restaurant*, 331 NLRB 269, 275 (2000); *Trinity Trucking & Materials Corp.*, 221 NLRB 364, 365 (1975); *Spandsco Oil & Royalty Co.*, 42 NLRB 942 (1942).

More importantly, whether or not the act of filing a class action lawsuit is protected activity, it is clear that there is no Section 7 or 8(a)(1) right to actually *litigate* a matter as a class action. Never before *D.R. Horton* had the Board held that it would be a violation of Section 7 or 8(a)(1) merely to ask employees in an arbitration agreement to agree to certain rules of the forum, including that there is no right to maintain a class or collective action. Contrary to the Board’s

decision in *D.R. Horton*, 357 NLRB No. 184 at 4-5, asking employees to agree to these types of rules of the forum is not by any stretch of the imagination even remotely analogous to a yellow-dog contract where employees are asked to give up their rights to unionize, strike, or bargain as a group. None of the decisions cited by the Board as purportedly supporting the proposition that a class action waiver violates Section 8(a)(1) of the Act supports such an idea or such an extension of prior Board precedent. All of those cases involve individual employee contracts that were used to impede employee organizing or as a weapon in collective bargaining. *See, e.g., J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944) (company attempted to use the individual contracts as a means to “impede employees” from organizing); *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940) (company threatened employees that if they did not sign individual agreements requiring them to waive the right to strike, among other things, their jobs would not be protected and therefore such individual contracts were a “means of thwarting the policy of the Act”); *J.H. Stone & Sons*, 33 NLRB 1014 (1941), *enfd. in rel. part* 125 F.2d 752 (7th Cir. 1942) (employer sought to enforce individual contracts with employees shortly after a union made a recognition request in order to avoid unionization); *Jahn & Ollier Engraving Co.*, 24 NLRB 893, 909 (1940) (finding profit-sharing contracts offered to employees to be “another weapon to offset the union organization of its employees”) *enfd.* 123 F.2d 589 (7th Cir. 1941); *Vincennes Steel Corp.*, 17 NLRB 825, 826, 833 (1939) (finding a “stock-purchase plan” given to employees to “discourage said employees from becoming or remaining members of the union” unlawful) *enfd. in rel. part* 117 F.2d 169 (7th Cir. 1941).

Second, the Board stated that its “holding here is that the [agreement] violates the substantive terms of the NLRA; it does not rest on an exercise of remedial discretion.” 357 NLRB No. 184 at 8, n.19. In other words, for example, in *Hoffman*, where the Supreme Court

overturned a Board Order issuing backpay to undocumented workers as being in conflict with the federal immigration laws, the Court struck down the Board's remedy rather than the substance of the Board's decision. But, this attempt to distinguish *Hoffman* and its progeny falls far short of the mark. It ignores the fact that the only effect the Board's decision could possibly have would be through a remedy invalidating the Arbitration Policy, an arbitration agreement that is valid under the FAA, which is equally as problematic as the Board Order issued in *Hoffman*. Thus, *Hoffman* and its progeny apply with full force and prevent the Board from disregarding the FAA in its decision-making. As such, it was plainly improper for the Board to ignore the strong federal policy under the FAA requiring arbitration agreements to be enforced according to their terms.

2. The Board in *D.R. Horton* Failed to Give the Required Weight to the Important Policies Mandated By the FAA

The Board in its decision claimed to engage in a “careful accommodation” of the FAA and the NLRA and determined that there was no conflict between the two statutes. 357 NLRB No. 184 at 8. Each of the Board's reasons for finding no conflict between its holding and the FAA is flawed for a number of reasons.

First, the Board argued that “[h]olding that the [arbitration agreement] violates the NLRA does not conflict with the FAA or undermine the pro-arbitration policy underlying the FAA” because “the purpose of the FAA was to prevent courts from treating arbitration agreements less favorably than other private contracts”, and other private contracts that conflict with the NLRA must yield to it. 357 NLRB No. 184 at 9. The Supreme Court expressly rejected the same attempt to circumvent the FAA in *Concepcion* and struck down a nearly identical California rule prohibiting class action waivers because, otherwise, courts could announce facially neutral rules that purport to apply to all contracts, but would have an obvious disproportionate impact on

arbitration agreements. *Concepcion*, 131 S. Ct. at 1746-48. Therefore, a rule used to void an arbitration agreement is not saved simply because it would apply to “any contract.” The appropriate inquiry is whether such a rule “stand[s] as an obstacle to the accomplishment of the FAA’s objectives.” *Id.* A rule that class action waivers in arbitration agreements are unlawful under the NLRA either forces an employer into class arbitration, which as the Court has found several times, is inconsistent with arbitration, or worse yet, out of arbitration completely and into class action litigation. Either way, it is plain that such a rule would “stand as an obstacle to the accomplishment of the FAA’s objectives.”

Second, the Board relied on *Gilmer*’s purported holding that arbitration agreements “may not require a party to ‘forego the substantive rights afforded by the statute.’” 357 NLRB No. 184, at 9 (citing *Gilmer*, 500 U.S. at 26). The Section 7 right to class or collective action proceedings, according to the Board, is a “substantive right[] vested in employees.” The Board was wrong on several counts. Most importantly, the Board misconstrued the language in *Gilmer* as purporting to create a requirement that a party not be required to waive any substantive rights created by a statute in order to uphold an arbitration agreement. *Gilmer* stated only that “we recognized that by agreeing to arbitrate a statutory claim, a party does *not* forego the substantive rights afforded by the statutes.” *Gilmer*, 500 U.S. at 26 (emphasis added). In fact, *Gilmer* held that Congress must have “evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue” in the text of the statute, the legislative history, or an inherent conflict between the purposes of the statutes in order to invalidate the arbitration agreement as applied to those statutory claims. *Id.* The Board in *D.R. Horton* did not even look to the text or legislative history of the NLRA but rather pulled out of thin air its conclusion that the NLRA afforded

“substantive rights” that would be lost by signing an arbitration agreement containing a class action waiver.

There is no such “substantive right” to any class proceeding under the NLRA. The right to maintain a class action is a procedural right, not a substantive one. The Rules Enabling Act, 28 U.S.C. § 2072(b), which governs Federal Rule of Civil Procedure 23 (the federal rule authorizing class actions in federal litigation), states that its rules “shall not abridge, enlarge or modify any substantive right.” *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S.Ct. 1431, 1443 (2010) (finding Rule 23 to be valid because it only affects procedural rights, while “it leaves the parties’ legal rights and duties intact and the rules of decision unchanged”); *Johnson v. West Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000) (stating that “right [to class action device] is merely a procedural one, arising under Fed.R.Civ.P. 23, that may be waived by agreeing to an arbitration clause.”). Indeed, the court in *Gilmer* itself recognized that an arbitration agreement did *not* have to provide for class procedures to be enforceable. *See Gilmer*, 500 U.S. at 32 (rejecting the argument that “arbitration procedures cannot adequately further the purposes of [federal age discrimination law] because they do not provide for broad equitable relief and class actions.”).

Third, the Board claimed that arbitration agreements with class action waivers fell within the FAA’s savings clause and were void as a matter of public policy. The FAA’s savings clause, as outlined above, states that arbitration agreements are enforceable “save upon such grounds as exist in law or equity for the revocation of any contract.” 9 U.S.C. § 2. Since contracts can theoretically be voided if they are against public policy and previous cases had found contracts that violate the NLRA to be against public policy, the Board found that D.R. Horton’s arbitration agreement could be voided under the savings clause. However, to hold an agreement

unenforceable based on public policy, that policy “must be well defined and dominant, and is to be ascertained ‘by reference to the laws and legal precedents and not from general considerations of supposed public interests.’” *W.R. Grace & Co. v. Local Union 759, Int’l Union of United Rubber Workers*, 461 U.S. 757, 766 (1983) (citation omitted). The Board identified no well defined public policy underlying the NLRA that would void a class action waiver. And again, its holding on this point ignores completely the strong federal policy evidenced by years of Supreme Court precedent in favor of enforcing arbitration agreements according to their terms, including any class action waivers. The Board certainly cannot use any vague purported public policy to avoid following the Supreme Court’s express pronouncements that arbitration agreements should be enforced according to their terms.

The Board’s efforts to distinguish the key Supreme Court decisions under the FAA as being inapplicable to employment proceedings are similarly without merit. The Board stated that the holding of *Concepcion* was more critical in that case because a consumer class arbitration may cover tens of thousands of people, whereas in the employment setting, it would cover fewer people, thus sacrificing less of the informality that is advantageous in arbitration. 357 NLRB No. 184 at 11-12. This conclusion is completely unfounded, as class actions in the employment setting can also be huge and a class arbitration requirement would be similarly contrary to the informality that is characteristic of arbitration. The Board also found that *Concepcion* and *Stolt-Nielsen* were inapplicable because they did not involve employment claims, but did not provide any further explanation as to why that mattered. *Id.* at 12. But in these binding Supreme Court cases the Supreme Court’s broad recognition of the FAA’s overriding federal policy in favor of arbitration did not in any way hinge on the non-employment nature of the disputes at issue. Nor did the Supreme Court identify any statutory carve out in the

FAA for employment disputes. Instead, it has repeatedly held that it is for Congress to exempt any particular class of federal claims from the FAA's far-reaching application. *See* Section II.B. Thus, *Concepcion* and *Stolt-Nielsen* apply with full force here.

3. Nearly Every Court to Consider *D.R. Horton* Has Declined to Follow It

Based on this flawed reasoning and the Board's failure to truly consider the Supreme Court's decisions on this matter, nearly every federal court to consider *D.R. Horton* has declined to follow it. *See Delock v. Securitas Security Servs., USA Inc.*, No. 11-cv-520, __ F. Supp. 2d __, 2012 WL 3150391, at *6 (E.D. Ark. Aug. 1, 2012) ("Delock has not demonstrated that the National Labor Relations Act's protection of concerted activities overrides the FAA's mandate to enforce his arbitration agreement with Securitas."); *Morvant v. P.F. Chang's China Bistro, Inc.*, No. 11-cv-05405, __ F. Supp. 2d __, 2012 WL 1604851, at *12 (N.D. Cal. May 7, 2012) (finding the "reasoning [in *D.R. Horton*] does not overcome the direct, controlling authority holding that arbitration agreements, including class action waivers contained therein, must be enforced according to their terms"); *Jasso v. Money Mart Express, Inc.*, No. 11-cv-5500, __ F. Supp. 2d __, 2012 WL 1309171, at *10 (N.D. Cal. Apr. 13, 2012) ("Because Congress did not expressly provide that it was overriding any provision in the FAA, the Court cannot read such a provision into the NLRA and is constrained by *Concepcion* to enforce the instant agreement according to its terms."); *LaVoice v. UBS Fin. Servs.*, No. 11-cv-2308, 2012 WL 124590, at *6 (S.D.N.Y. Jan. 13, 2012) (declining to follow *D.R. Horton*).

Several appellate courts in California have similarly declined to follow *D.R. Horton*. *See Truly Nolen of Am. v. Superior Ct.*, --- Cal.Rptr.3d ----, 2012 WL 3222211 (Cal. Ct. App. Aug. 9, 2012) (refusing to follow *Horton* based on *CompuCredit*); *Nelsen v. Legacy Partners Residential, Inc.*, 144 Cal.Rptr.3d 198 (Cal. Ct. App. July 18, 2012) (declining to follow *Horton* because only

two members subscribed to it, the subject matter was outside the Board's core expertise and many district courts have declined to follow it); *Iskanian v. CLS Transportation L.A. LLC*, No. 142 Cal.Rptr.3d 372 (Cal. Ct. App. June 4, 2012) (declining to follow *Horton* because it is inconsistent with *CompuCredit*).

In sum, as many courts have already found, the Board in *D.R. Horton* had no principled basis for finding that the NLRA trumped the FAA and that arbitration agreements containing class action waivers that were entered into as a term or condition of employment should be rejected. We urge the ALJ to join those courts and reject the proposition that *D.R. Horton* should be followed in this proceeding.

III. EXTENDING *D.R. HORTON*'S FLAWED REASONING TO ARBITRATION AGREEMENTS CONTAINING OPT-OUT PROVISIONS WOULD TREAD EVEN FURTHER DOWN THE PATH OF IMPROPER REGULATION OF TERMS AND CONDITIONS OF EMPLOYMENT

There is nothing unlawful about employers entering into individual agreements with their employees and the Board has very limited authority to regulate the terms of those agreements. One of the key principles underlying the Act is that "the National Labor Relations Act[] does not undertake governmental regulation of wages, hours, or working conditions." *NLRB v. C&C Plywood Corp.*, 385 U.S. 421, 427 (1967) (finding that the Board had authority to regulate collective bargaining agreements only to the extent necessary to resolve unfair labor practice charges). Statements made by the sponsor of a predecessor bill to the NLRA, S. 2926, which included virtually identical requirements as those in existing Sections 7 and 8(a)(1) of the Act, support this position. Senator Wagner, a key sponsor of the legislation that ultimately became the NLRA, requested that the Congressional Record include a statement from Senator Walsh noting that "[n]othing in this bill allows the Federal Government or any agency to...effect or govern any working condition in any establishment or place of employment." S.2926, 78 Cong.

Rec. 10560 (1934) (statement of Sen. Walsh), *reprinted in* 1 NLRB, Legis. History of the National Labor Relations Act of 1935, at 1124 (1959). The statement also noted that “[the bill] leaves the discussion between the employer and the employee, and the agreements which they may or may not make, voluntary and with that sacredness and solemnity to a voluntary agreement with which both parties to an agreement should be enshrouded.” *Id.*

Following this guidance, early in the history of the NLRA, the Supreme Court very narrowly interpreted the Board’s power to regulate individual contracts voluntarily entered into between employers and employees. The NLRA was interpreted “‘not as precluding such individual contracts’ as the company might ‘elect to make directly with individual employees.’” *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937). Indeed, the Supreme Court has recognized that nothing “prevent[s] [employers] from contracting with individual employees under circumstances which negative any intent to interfere with the employees’ right under the Act.” *See J.I. Case*, 321 U.S. at 340–41. “As the employer in these circumstances may be under no legal obligation to bargain collectively, he may be free to enter into individual contracts.” *Id.* at 337.

In *D.R. Horton*, the Board improperly sought to regulate the terms of perfectly lawful individual agreements between employers and employees. Its holding trenches upon the pronouncements of Congress and the Supreme Court that the Board does not have general authority to regulate contracts and employee working conditions by expanding the scope of protected activity under Section 7 beyond its logical limit. If the Board continues down this path, it could continually expand its definition of protected activity under Section 7, thereby expanding its authority to regulate virtually any term of employment in any agreements entered into between employers and their employees. The Chamber believes that the arbitration agreements

at issue here and in *D.R. Horton* are both fully enforceable under the FAA. However, under the Board's own limitation of its holding in *D.R. Horton*, a holding here that 24 Hour Fitness' Arbitration Policy violates the NLRA would go one step further into regulating lawful individual agreements between employers and employees. Accordingly, the Chamber believes that the ALJ should find 24 Hour Fitness' Arbitration Policy lawful.

D.R. Horton purported to hold only that arbitration agreements containing class or collective action waivers that are entered into as a term or condition of employment violate Section 7 and 8(a)(1) of the NLRA. In fact, the Board expressly stated that "we do not reach the more difficult question[] of...whether, if arbitration is a mutually beneficial means of dispute resolution, an employer can enter into an agreement that is not a condition of employment with an individual employee to resolve either a particular dispute or all potential employment disputes through non-class arbitration rather than litigation in court," precisely the issue here. 357 NLRB No. 184 at 13, n.28. 24 Hour Fitness' Arbitration Policy does *not* require employees to agree to arbitrate as a term or condition of employment but allows employees to opt out of the Arbitration Policy within 30 days of hire. (Jt. Ex. 14; Respondent's Ex. 2A, 2B; Tr. at 84-85.) There is no basis in Board law, much less, in logic or the FAA, for finding that 24 Hour Fitness' Arbitration Policy violates Sections 7 and 8(a)(1) of the Act. *See* Section II. As such, 24 Hour Fitness' arbitration program, which permits employees to opt out of the class action waiver and continue employment, should be found lawful under the NLRA.

IV. IF 24 HOUR FITNESS' ARBITRATION POLICY IS FOUND TO VIOLATE THE NLRA IT WILL CREATE SUBSTANTIAL UNCERTAINTY FOR EMPLOYERS AND CONTINUE TO ERODE RIGHTS GUARANTEED BY THE FAA

In *D.R. Horton*, currently on appeal to the Fifth Circuit, the Board found that arbitration agreements entered into as a term or condition of employment containing class action waivers violated the Act, and expressly reserved deciding the question before the ALJ today. If the

Board finds that other types of arbitration agreements between employers and employees, such as the one at issue here, violate the NLRA, it will cause substantial uncertainty among members of the Chamber as to what types of arbitration agreements between employers and employees, if any, are enforceable under the NLRB's construction of the law. Employers will be unclear as to what types of arbitration agreements they can enter into with their employees and may be reticent to enter into any arbitration agreements at all given the Board's evolving positions on these issues.

A decision that 24 Hour Fitness' Arbitration Policy violates the NLRA would also represent a continued erosion of the rights guaranteed by the FAA. Eventually, even arbitration agreements entered into between employees and employers that are negotiated separately from the hiring process could be under attack. As employers become more reluctant to enter into these agreements knowing that they may or may not be enforceable, this could ultimately result in the complete obliteration of arbitration agreements in the employment setting, agreements which were found lawful and enforceable in Supreme Court cases like *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). As a matter of policy, this would be a poor outcome. As has repeatedly been noted by the courts, including the Supreme Court, arbitration represents a speedy, effective and informal way for employment disputes to be resolved and has existed for years as a key element of labor relations in this country. A decision finding the 24 Hour Fitness Arbitration Policy unlawful would be a serious disservice to employers and employees alike.

CONCLUSION

For these reasons, the Chamber respectfully requests that the ALJ rule in favor of 24 Hour Fitness and find that its Arbitration Policy does not violate Sections 7 or 8(a)(1) of the NLRA.

Dated: September 4, 2012

Respectfully submitted,

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STATEMENT OF SERVICE

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years, and not a party to the within action. My business address is 555 California Street, 26th Floor, San Francisco, California 94104. On September 4, 2012, I served the within document:

BRIEF *AMICUS CURIAE* OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF 24 HOUR FITNESS USA, INC.

- by placing a true copy of the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at San Francisco, California addressed as set forth below.

- Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses on the attached service list on the dates and at the times stated thereon. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. The electronic notification address of the person making the service is saltamirano@JonesDay.com.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on September 4, 2012, at San Francisco, California.

/s/ Sandra Altamarino
Sandra Altamirano