15-2820-cv

United States Court of Appeals for the Second Circuit

CONNIE PATTERSON, on behalf of herself and all others similarly situated, 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 THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING DEFENDANT-APPELLEE

Kate Comerford Todd
Warren Postman
U.S. CHAMBER LITIGATION CENTER
1615 H Street NW
Washington, DC 20062
Tel.: (202) 463-5337

Andrew J. Pincus
Evan M. Tager
Archis A. Parasharami
Matthew A. Waring
MAYER BROWN LLP
1999 K Street NW
Washington, DC 20006
Tel.: (202) 263-3000
Fax: (202) 263-3300

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent company and has issued no stock.

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country.[1] The Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community, including cases involving the enforceability of arbitration agreements. *See*, *e.g.*, *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63 (2010); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). Because the simplicity, informality, and expedition of arbitration depend on the courts' consistent recognition and application of the

[1] In accordance with Federal Rule of Appellate Procedure 29(c)(5) and Local Rule 29.1, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief.

principles underlying the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, the Chamber and its members have a strong interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The district court correctly held that Plaintiffs' agreements to arbitrate disputes with their employer on an individual basis are valid and enforceable. As the Supreme Court has repeatedly made clear, the FAA requires that such agreements be enforced according to their terms. *See, e.g.*, *Imburgia*, 136 S. Ct. at 468; *Italian Colors*, 133 S. Ct. at 2309; *Concepcion*, 563 U.S. at 344.

Plaintiffs attempt to avoid the clear mandate of the FAA by invoking the legal reasoning of the National Labor Relations Board ("NLRB" or "Board") in *In re D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), *enf. denied in relevant part*, 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), *enf. denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015). Those agency decisions announced a rule that agreements between employers and employees to arbitrate disputes on an individual basis violate the National Labor Relations Act

("NLRA"), notwithstanding the FAA's mandate that such agreements are enforceable.

But as the court below noted, the NLRB effectively "stands alone in holding that the NLRA overrides the FAA." A-191. Indeed, the *D.R. Horton* rule has been rejected by virtually every court to consider it—including this one. *See Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013). And for good reason. The only two circumstances in which the FAA does not require enforcement of agreements to arbitrate are (1) when the FAA's "savings clause" applies, or (2) when another federal statute evinces a "contrary congressional command" that displaces the FAA, but the *D.R. Horton* rule falls within neither of these exceptions.

As the Supreme Court explained in *Concepcion*, the FAA's savings clause does not apply to rules that frustrate the FAA's objectives by imposing class procedures on arbitration. And that is exactly what the *D.R. Horton* rule does: Indeed, the *D.R. Horton* rule is functionally identical to the *Discover Bank* rule that *Concepcion* held to be outside the savings clause. Accordingly, the savings clause does not exempt the *D.R. Horton* rule from the FAA.

Nor do the federal labor statutes invoked by Plaintiffs and the Board—the NLRA and the Norris-LaGuardia Act—evince a "contrary congressional command" that overrides the FAA. The NLRA does not even mention arbitration, and neither statute says a word about class or collective actions—which is unsurprising since both long predate the adoption of Rule 23 and the Fair Labor Standards Act's (FLSA) collective-action provision (29 U.S.C. § 216(b)). In similar circumstances, the Supreme Court consistently has held that there is no "congressional command" to override the FAA. *See, e.g.*, *Italian Colors*, 133 S. Ct. at 2309 (holding that antitrust laws contain no congressional command to superimpose class procedures on arbitration); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669-70 (2012) (statute that allows plaintiffs to bring actions in court and prohibits the waiver of "any right" under the statute does not override FAA).

The district court's decision also accords with the powerful federal policies underlying the FAA. Arbitration is faster, easier, and less expensive than litigation. It thus benefits everyone—most especially, ***employees***, who, as the Supreme Court and legal scholars alike have recognized, are particularly likely to have small, individualized claims

that would necessarily go unredressed if a civil action in court were their only recourse.

To reverse the district court, as Plaintiffs urge, would thus frustrate the will of Congress and eliminate all the benefits that arbitration offers. The judgment should therefore be affirmed.

ARGUMENT

I. The District Court Correctly Held That The FAA Requires Enforcement Of Voluntary Agreements To Arbitrate On An Individual Basis.

A. The FAA requires courts to enforce arbitration agreements according to their terms.

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

agreements 'valid, irrevocable, and enforceable' as written." *Concepcion*, 563 U.S. at 344 (quoting 9 U.S.C. § 2).

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

enforce arbitration agreements containing class waivers). Thus, as the district court observed (A-188), the FAA requires enforcement of Plaintiffs' arbitration agreements, including their class-action waivers.

B. Neither of the exceptions to the FAA's mandate applies here.

Plaintiffs seek to avoid the FAA by invoking the NLRB's position, first articulated in *D.R. Horton*, that arbitration agreements containing class waivers violate the NLRA. According to Plaintiffs, the *D.R. Horton* rule qualifies for either or both of the two recognized exceptions to the FAA's mandate. First, they argue that the *D.R. Horton* rule falls within the FAA's "savings clause." Opening Br. 26-30. Second, they contend that the FAA must "yield" to federal labor law. *Id.* at 30, 34-47. But as this Court and many other courts have concluded, both of these assertions are wrong.[2] In fact, both are foreclosed by Supreme Court precedent.

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[2] Indeed, the *D.R. Horton* rule has been rejected by ***all*** of the federal courts of appeals that have considered it, the California Supreme Court, and virtually every federal district court to address it. *See, e.g.*, *Sutherland*, 726 F.3d at 297 n.8 ("[W]e decline to follow the decision in *D.R. Horton*."); *D.R. Horton*, 737 F.3d at 362 (holding that *D.R. Horton* rule violates the FAA); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013) ("[W]e reject [the] invitation to follow the NLRB's rationale in *D.R. Horton*."); *Iskanian v. CLS Transp. L.A., LLC*,

The argument that the *D.R. Horton* rule falls within the savings clause is foreclosed by *Concepcion*, in which the Supreme Court held that the functionally identical *Discover Bank* rule did not fall within the savings clause. The ***only*** difference between the *Discover Bank* rule and the *D.R. Horton* rule is that the latter is ostensibly based on a federal statute, rather than a state statute. But that just means that the case boils down to whether the second, "contrary congressional command" exception applies—and *Italian Colors* confirms that it does not. In *Italian Colors*, the Supreme Court held that the antitrust laws "do not evince an intention to preclude a waiver of class-action procedure," because they "make no mention of class actions" and "[i]n fact, they were enacted decades before the advent of Federal Rule of Civil Procedure 23." 133 S. Ct. at 2309 (internal quotation marks and brackets omitted). The same is true of the statutory provisions on which the NLRB relies for the *D.R. Horton* rule.

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327 P.3d 129, 142 (Cal. 2014) (rejecting *D.R. Horton* rule, "consistent with the judgment of all the federal circuit courts and most of the federal district courts that have considered the issue"), *cert. denied*, 135 S. Ct. 1155 (2015).

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

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

The Board denies that the *D.R. Horton* rule disfavors arbitration, arguing that it does no more than apply the general contract-law defense of illegality. NLRB Br. 20; *Murphy Oil*, 361 NLRB No. 72, slip op. at 8-9. But the same was said of the *Discover Bank* rule at issue in *Concepcion*, which purported to do no more than apply the general contract-law defense of unconscionability. *See Iskanian*, 327 P.3d at 142 ("We do not find persuasive the Board's attempt to distinguish its [*D.R. Horton*] rule from *Discover Bank*."). The Supreme Court held in *Concepcion* that the savings clause does not apply to rules that are ostensibly based on "generally applicable contract defenses"—such as

illegality or unconscionability—but in fact "stand as an obstacle to the accomplishment of the FAA's objectives." 563 U.S. at 343.

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

arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 344.

As the California Supreme Court noted in *Iskanian*, "in light of *Concepcion*, the Board's [*D.R. Horton*] rule is not covered by the FAA's savings clause." 327 P.3d at 141. Even if the *D.R. Horton* rule "applies equally to arbitration and nonarbitration agreements," by requiring the availability of class procedures, it "interferes with fundamental attributes of arbitration and, for that reason, disfavors arbitration in practice." *Id.* Thus, the *D.R. Horton* rule—just like the functionally identical *Discover Bank* rule—finds no refuge in the savings clause.

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

The only other circumstance in which courts may refuse to enforce arbitration agreements and class waivers under the FAA is when "the FAA's mandate has been 'overridden by a contrary congressional command'" in another federal statute. *CompuCredit*, 132 S. Ct. at 669 (quoting *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226

(1987)).[3] This congressional command must be ***clearly*** expressed; if the other statute is "silent on whether claims * * * can proceed in an arbitrable forum, the FAA requires [an] arbitration agreement to be enforced according to its terms." *Id.* at 673.

To be sure, some federal statutes do expressly override the FAA. For example, in 2002, Congress enacted a law providing that "whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy." 15 U.S.C. § 1226(a)(2). And in 2006, it passed a statute providing that "[n]otwithstanding section 2 of [the FAA] * * *, no agreement to arbitrate any dispute involving the extension of consumer credit shall be enforceable against any covered [armed service] member or dependent of such a member, or any person

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[3] Plaintiffs fail even to ***mention*** that this is the proper legal test, instead asserting variously that the FAA must "yield" to the labor statutes (Opening Br. 30) or that the *D.R. Horton* rule "properly reconciles" those statutes with the FAA. *Id.* at 40. In contrast, the NLRB correctly acknowledges that Plaintiffs must show that the NLRA or Norris-LaGuardia Act contains a "contrary congressional command" overriding the FAA. NLRB Br. 21-23.

who was a covered member or dependent of that member when the agreement was made." 10 U.S.C. § 987(f)(4).

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

1. ***The NLRA.*** As the Fifth Circuit observed, there is "no argument" that the text of the NLRA—which does not mention arbitration—evinces an intent to override the FAA. *D.R. Horton*, 737

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

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

The fact that the NLRA is "silent" on the issue of arbitration should be the end of the matter. *See CompuCredit*, 132 S. Ct. at 673.

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[5] Indeed, the NLRB concedes that no "explicit language in the NLRA overrid[es] the FAA." NLRB Br. 22. Asserting that the FAA was not thought to apply to employment contracts at the time the NLRA was enacted, it contends that no "explicit" reference to arbitration is required. *Id.* This reasoning is misguided. At the time the Sherman and Clayton Acts were enacted, the FAA did not even exist—yet the Supreme Court has held that those statutes do not override the FAA, because they "do not evince an intention to preclude a waiver of class-action procedure" or of judicial remedies generally. *Italian Colors*, 133 S. Ct. at 2309 (internal quotation marks and brackets omitted); *see also Mitsubishi Motors*, 473 U.S. at 628 (explaining that the necessary congressional intent to preclude arbitration must "be deducible from text or legislative history"). If it is appropriate to require that a statute's text and legislative history show an intent to override the FAA with respect to the antitrust laws, which predate the FAA altogether, *a fortiori* it is appropriate to require that showing with respect to the NLRA.

Plaintiffs and the Board make several arguments in an effort to evade this conclusion, but none are persuasive.

First, Plaintiffs and the Board contend that Section 7 of the NLRA (29 U.S.C. § 157) ***implicitly*** overrides the FAA because it protects employees' right to engage in "concerted legal activity." NLRB Br. 5-13; Opening Br. 15-26. But as the Fifth Circuit observed, Section 7's reference to concerted activity could not "implicitly" protect class and collective actions, because the NLRA was enacted "***prior*** to the advent in 1966 of modern class action practice" (*D.R. Horton*, 737 F.3d at 362 (emphasis added); *see also Iskanian*, 327 P.3d at 141) and the adoption of the FLSA's collective-action provision in 1947. Thus, Congress could not have intended to protect "a right of access to" "procedure[s] that did not exist" when the NLRA was enacted (*D.R. Horton*, 737 F.3d at 362), much less to override the FAA in doing so.[6]

[6] Plaintiffs and the Board rely on *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), for the proposition that Section 7 "[p]rotects" concerted legal activity, including class and collective actions. Opening Br. 16; NLRB Br. 5. They badly over read that decision, however. *Eastex* held only that Section 7 "protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums" (437 U.S. at 565-66); it neither held nor implied that employees have an ***absolute right*** to pursue classwide

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

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resolution of causes of action under ***other*** statutes. Nor did any of the cases following *Eastex* that the Board also cites. NLRB Br. 7 & n.3.

[7] The NLRB argues that it does not "matter that modern class-action procedures were not available to employees in 1935" because the NLRA was "drafted to allow the Board to respond to new developments." NLRB Br. 8 n.4. But in light of the FAA-specific requirement that the governing ***statute*** express a "contrary congressional command" to preclude or limit arbitration, whatever general power the Board has to "respond to new developments" is not enough to allow it to displace the FAA in the absence of clear statutory authorization to do so. *Iskanian*, 327 P.3d at 141; *see also POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2241 (2014) ("An agency may not reorder federal statutory rights without congressional authorization.").

Temporal problems aside, the Supreme Court and other courts have repeatedly explained that the right of a litigant to invoke class or collective action mechanisms "is a ***procedural*** right only, ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 332 (1980) (emphasis added); *see also, e.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997) (noting that Rule 23 does not "'abridge, enlarge or modify any substantive right'") (quoting 28 U.S.C. § 2072(b)); *D.R. Horton*, 737 F.3d at 357 ("The use of class action procedures[] * * * is not a substantive right."). The Board cannot transform an inherently procedural device into a ***substantive*** entitlement simply by declaring it to be within the ambit of Section 7.[8]

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[8] The Board's concession in *D.R. Horton* that Section 7 does not create a substantive right to ***obtain*** class certification and instead creates "only" a right to seek class certification (2012 WL 36274, at *12 n.24, *19), which Plaintiffs embrace (*see* Opening Br. 24 n.9), serves only to confirm the procedural nature of this ostensible right. The concession amounts to an acknowledgment that Section 7 adds nothing to what is provided for in Rule 23 itself. And the Supreme Court has "already rejected th[e] proposition" that "federal law secures a nonwaivable," substantive "*opportunity* to vindicate federal policies by satisfying the procedural strictures of Rule 23 or invoking * * * class mechanism[s] in arbitration." *Italian Colors*, 133 S. Ct. at 2310 (emphasis in original) (citing *Concepcion*, 563 U.S. at 344).

But even if Section 7 could be read to protect access to class- or collective-action mechanisms, that would still not be sufficient to override the FAA. The Credit Repair Organizations Act ("CROA") expressly allows plaintiffs to bring actions in court and prohibits the waiver of "any right * * * under this sub-chapter," but the Supreme Court held that these were "commonplace" provisions incapable of "do[ing] the heavy lifting" necessary to displace the FAA. *CompuCredit*, 132 S. Ct. at 669-70 (internal quotation marks omitted). The ADEA goes even further, expressly providing for collective actions (29 U.S.C. § 626(b))—yet the Supreme Court held that this was likewise insufficient to override the FAA. *Gilmer*, 500 U.S. at 32. If the CROA's and the ADEA's language did not provide the necessary "contrary congressional command," Section 7's far vaguer reference to "concerted activit[y]" surely does not either.[9]

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[9] Plaintiffs and the NLRB both argue that *National Licorice Co v. NLRB*, 309 U.S. 350 (1940), establishes that "individual agreements between employers and employees that prospectively waive" class and collective actions are "unlawful" notwithstanding the FAA. NLRB Br. 9; *see also* Opening Br. 28-29. Again, they badly over read the case. In *National Licorice*, the Supreme Court held that an employer violated the NLRA by circumventing the union and directly agreeing to contracts with individual employees that, among other things, provided for arbitration of certain disputes while excluding wrongful-discharge

Second, Plaintiffs and the Board seek to distinguish away the entire line of "congressional command" cases. They maintain that the arbitration agreements in *CompuCredit*, *Gilmer*, and other cases were enforceable because class and collective actions were merely "ancillary" to the other rights created by the statutes at issue. NLRB Br. 16. By contrast, they argue, class and collective actions are "a right core to" Section 7. *Id.* at 16-17. Thus, they conclude, Section 7 overrides the FAA because the Supreme Court has said that even under the FAA, arbitration agreements may not waive federal "statutory rights." NLRB Br. 15-19; Opening Br. 30-34.

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claims from arbitration. 309 U.S. at 353-55. The effect of these agreements, the Court explained, was to prevent a discharged employee from presenting his grievances "through a labor organization or his chosen representatives, or in any way except personally" and thereby "forestall[] collective bargaining with respect to discharged employees." *Id.* at 360. Wrongful-discharge claims are inherently individualized, so the problem the Court referred to in stating that the agreements required presenting disputes "personally" was that the agreements prevented discharged employees from obtaining union representation—***not*** that they required dispute resolution on an individual basis.

In any event, *National Licorice* does not mention the FAA, and it predates by some 45 years the Supreme Court's many decisions recognizing that the FAA can be overridden only by a sufficiently clear "congressional command"—a command not found in the NLRA. Thus, even if *National Licorice* offered any support for Plaintiffs' position, it has been superseded by the Court's subsequent case law.

This purported distinction of the "congressional command" cases is patently invalid. The Supreme Court's decisions establish that the "statutory rights" that must not be waived in an arbitration agreement are ***causes of action***—not "process rights concerning how [a] claim is adjudicated." *Murphy Oil*, 361 NLRB No. 72, slip op. at 52 (Johnson, dissenting) (emphasis omitted). Thus, the agreement to arbitrate in *CompuCredit* was enforceable because it preserved "*the legal power to impose liability*" under the CROA. *CompuCredit*, 132 S. Ct. at 671 (emphasis in original). Similarly, in *Mitsubishi Motors* the Court held that agreements to arbitrate antitrust claims were enforceable because a plaintiff could still "vindicate ***its statutory cause of action*** in the arbitral forum, [and] the statute [would] continue to serve both its remedial and deterrent function." 473 U.S. at 637 (emphasis added). Because Plaintiffs can still assert any and all statutory causes of action in individual arbitration, enforcement of their arbitration agreements does not run afoul of the Court's admonitions about waivers of "statutory rights," irrespective of whether class actions are "core" to the goals of Section 7.

Finally, Plaintiffs and the Board assert that insofar as there is an "inherent conflict" between the policies of the FAA and the NLRA, the FAA should give way because the NLRA's policies are more compelling. NLRB Br. 22-23; Opening Br. 44-47. Specifically, the Board asserts that whereas Section 7 has a "central role" in the NLRA (NLRB Br. 22), "any intrusion on the policies underlying the FAA" by the *D.R. Horton* rule is "limited" because that rule applies only to one type of arbitration agreements—those in the employment context—and because employment class actions typically involve a small number of plaintiffs. *D.R. Horton*, 2012 WL 36274, at *15. Thus, it argues, the FAA must give way to the NLRA's "statutory scheme." NLRB Br. 22; *see also* Opening Br. 44 (urging this Court to "take into account the relative significance of [the] competing policies to their respective statutory schemes").

But Plaintiffs and the Board have gotten the policy considerations at stake exactly backwards. Even within the realm of employer-employee legal disputes, enforcing arbitration agreements like Plaintiffs' scarcely impinges at all on employees' activities. Employees can still "speak to other employees about suspected violations of laws

affecting their working conditions, actually solicit other employees to join with them in asserting such claims in court or arbitration, pool financial resources to fund the litigation, and actively participate with other employees as litigants in the case"; they simply cannot access one "particular litigation ***mechanism***." *Murphy Oil*, 361 NLRB No. 72, slip op. at 42 (Johnson, dissenting) (emphasis added) (footnotes omitted). And, of course, enforcing arbitration agreements like Plaintiffs' has no effect whatever on the many other forms of Section 7 activity—including the prototypical Section 7 activities of organizing, striking, and collective bargaining—that have nothing to do with legal disputes.

By contrast, the *D.R. Horton* rule strikes at the very heart of the policies underlying the FAA. Although the Board correctly notes (NLRB Br. 4) that the *D.R. Horton* rule does not preclude arbitration altogether, but instead conditions the enforceability of arbitration agreements on the availability of class- or collective-action procedures in some forum, that observation is irrelevant: *Concepcion* squarely held that the FAA prohibits "conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures," because imposing class procedures on arbitration

"interferes with fundamental attributes of arbitration" and thus directly undermines the goals of the FAA. *Concepcion*, 563 U.S. at 336, 344.[10] And although it is true that the *D.R. Horton* rule applies only to one type of arbitration agreement, that fact is likewise irrelevant. The plaintiffs in *Gilmer*, *CompuCredit*, and the other "congressional command" cases also were arguing for rules that would have interfered with arbitration only in a limited number of cases (those involving particular statutes). But the Supreme Court held in each of those cases that the FAA controlled. This Court should do the same here.

2. ***The Norris-LaGuardia Act.*** The Norris–LaGuardia Act similarly does not evince a "contrary congressional command" that overrides the FAA.[11] Nothing in its text and legislative history so much

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[10] In light of *Concepcion*, Plaintiffs' assertion that there is "no irreconcilable conflict between class and collective actions and arbitration" (Opening Br. 38-39) is clearly wrong. To be sure, the Court has held that parties may agree to class arbitration if they wish. *See Stolt-Nielsen*, 559 U.S. at 684-87. But the fact that contracting parties retain the freedom to ***choose*** class arbitration is no basis for concluding that the FAA permits them to be ***forced*** into class arbitration. On the contrary, "[r]equiring the availability of classwide arbitration * * * creates a scheme inconsistent with the FAA." *Concepcion*, 563 U.S. at 344.

[11] Tellingly, the NLRB does not even argue this point. Indeed, it has previously ***conceded*** that the Norris-LaGuardia Act is not itself the

as mentions arbitration or class actions, and as with the NLRA, this "silen[ce]" precludes the conclusion that the Norris-LaGuardia Act displaces the FAA. *See CompuCredit*, 132 S. Ct. at 673.

Plaintiffs again are forced to argue that the Norris-LaGuardia Act impliedly overrides the FAA because Sections 2 and 3 of that Act (29 U.S.C. §§ 102-03) purportedly create a "right to engage in concerted activity." Opening Br. 13. But neither of those provisions sets out a "contrary congressional command" sufficient to preclude enforcement of agreements to arbitrate on an individual basis any more than the NLRA does.

Section 2 of the Norris-LaGuardia Act (29 U.S.C. § 102), which states the policy of the Act in general terms, uses language highly similar to that of Section 7 of the NLRA. *Compare* 29 U.S.C. § 102 (stating that employees should be free to engage in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection"), *with id.* § 157 ("Employees shall have the right * * * to engage in other concerted activities for the purpose of collective

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basis for the *D.R. Horton* rule, which it asserts is grounded solely on Section 7 of the NLRA. *Murphy Oil*, 361 NLRB No. 72, slip op. at 10.

bargaining or other mutual aid or protection."). Because that language is insufficient to create a contrary congressional command as used in the NLRA (*see* pp. 13-15, 18, *supra*), it is likewise insufficient as used in the Norris-LaGuardia Act.

In any event, the Norris-LaGuardia Act was "responsive to a situation totally different from that which exists today." *Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 250 (1970). Congress attempted in the Norris-LaGuardia Act "to bring some order out of the industrial chaos that had developed and to correct the abuses that had resulted from the interjection of the federal judiciary into union-management disputes on the behalf of management." *Id.* at 251 (citing 29 U.S.C. § 102). In other words, "Congress passed the Norris-LaGuardia Act to curtail and regulate the ***jurisdiction of courts***, not * * * to regulate the conduct of people engaged in labor disputes." *Marine Cooks & Stewards, AFL v. Panama S.S. Co.*, 362 U.S. 365, 372 (1960) (emphasis added); *see also, e.g.*, *Milk Wagon Drivers' Union, Local No. 753 v. Lake Valley Farm Prods., Inc.*, 311 U.S. 91, 101 (1940) ("The Norris-LaGuardia Act—considered as a whole and in its various parts—was intended drastically to curtail the equity jurisdiction of

federal courts in the field of labor disputes."). Read in this historical context, Section 2's statement of policy does not address arbitration (or class actions) in any way and most definitely does not override the FAA.[12]

Section 3 of the Norris-LaGuardia Act (29 U.S.C. § 103) is likewise insufficient to override the FAA. That provision renders "yellow dog" contracts unenforceable[13]; in keeping with the Act's jurisdiction-limiting purpose, Section 3 also prohibits courts from issuing injunctions to enforce such contracts. But contrary to the inventive argument of the *amici* Labor Law Scholars (Scholars Br. 9), an agreement to arbitrate disputes individually is no "yellow dog" contract. To be sure, Section 3 purports to cover all "undertaking[s]" that conflict with the public policy announced in Section 2, rather than only classic "yellow dog"

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[12] Indeed, given that the Norris-LaGuardia Act was designed to keep the federal courts ***out*** of labor disputes, it would defy logic to read Section 2 to condition enforcement of arbitration agreements on the availability of class procedures—and thereby force all employment claims ***into*** court. *See Concepcion*, 563 U.S. at 351 ("We find it hard to believe that defendants would" enter into agreements permitting class arbitration).

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

agreements not to join unions—but as explained above (at pp. 25-26), the "policy" of Section 2 has nothing to do with arbitration or concerted legal action at all. Thus, Section 3 cannot be read to prohibit arbitration agreements.

Indeed, the Supreme Court long ago ***rejected*** the notion that Section 3 bars arbitration agreements. "The failure to arbitrate," the Court has explained, "was not a part and parcel of the abuses against which the [Norris-LaGuardia] Act was aimed"; on the contrary, the Act "indicate[s] a congressional policy ***toward*** settlement of labor disputes by arbitration," because Section 8 of the Act (29 U.S.C. § 108) prevents persons from obtaining injunctive relief if they have not made efforts to settle disputes through arbitration and other informal means. *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 458-59 (1957) (emphasis added). "The congressional policy in favor of the enforcement of agreements to arbitrate grievance disputes being clear, there is no reason to submit them to the requirements of" the Norris-LaGuardia Act. *Id.* (footnote omitted); *see also, e.g.*, *Gen. Elec. Co. v. Local 205, United Elec., Radio & Mach. Workers of Am. (U.E.)*, 353 U.S. 547, 548 (1957) ("[T]he Norris-LaGuardia Act does not bar the issuance

of an injunction to enforce the obligation to arbitrate grievance disputes."); *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831, 844 (N.D. Cal. 2012) ("[T]he Norris-LaGuardia Act specifically defines those contracts to which it applies. An agreement to arbitrate is not one of those * * *.") (citing 29 U.S.C. § 103(a)-(b)).

In short, "[a]n order to compel arbitration of an existing dispute, or to stay a pending lawsuit over the dispute so that arbitration may be had, as redress for one party's breach of a prior agreement to submit such disputes to arbitration" "is not the 'temporary or permanent injunction' against whose issuance the formidable barriers of [the Norris-LaGuardia Act] are raised." *Local 205, United Elec., Radio & Mach. Workers of Am. (U.E.) v. Gen. Elec. Co.*, 233 F.2d 85, 91 (1st Cir. 1956), *aff'd*, 353 U.S. 547 (1957); *see also id.* ("[J]urisdiction to compel arbitration is not withdrawn by the Norris-LaGuardia Act."). Accordingly, the Norris-LaGuardia Act does not justify refusing to enforce Plaintiffs' agreements to arbitrate on an individual basis.

II. Affirmance Of The District Court's Decision Will Benefit Employees, Businesses, And The National Economy.

In Plaintiffs' view, any waiver of the option to bring class actions is a *per se* violation of the federal right to undertake concerted action.

But as the Supreme Court recognized in *Concepcion* and *Stolt-Nielsen*, arbitration is by its very nature individualized; superimposing collective- or class-action procedures on it would sacrifice the cost savings, informality, and expedition of traditional, individual arbitration. As a practical matter, given these trade-offs, no company would willingly enter into collective or class arbitration. *See Concepcion*, 563 U.S. at 351 ("We find it hard to believe that defendants would" enter into agreements permitting class arbitration); *Stolt-Nielsen*, 559 U.S. at 685 ("class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator"). Rather, companies faced with the prospect of class arbitration would simply abandon arbitration altogether—to the detriment of employees, businesses, and the economy as a whole.

Arbitration is faster, easier, and less expensive than litigation. The Supreme Court has repeatedly observed, therefore, that "arbitration's advantages often would seem helpful to individuals * * * who need a less expensive alternative to litigation." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995); *see also*, *e.g.*,

Concepcion, 563 U.S. at 345 ("the informality of arbitral proceedings * * * reduc[es] the cost and increas[es] the speed of dispute resolution"); *Stolt-Nielsen*, 559 U.S. at 685 (observing that "the benefits of private dispute resolution" include "lower costs" and "greater efficiency and speed"); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution."). Indeed, the Court has specifically recognized that "[a]rbitration agreements allow parties to avoid the costs of litigation, ***a benefit that may be of particular importance in employment litigation***, which often involves smaller sums of money than disputes concerning commercial contracts." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (emphasis added).

These benefits of arbitration are especially pronounced for employees with individualized claims that are not amenable to being brought on a class or collective basis—the most common type of employee dispute. If employees did not have access to simplified, low-cost arbitration and were forced into court to adjudicate disputes, they would very often be priced out of the judicial system entirely and hence would be left with no recourse or means to seek redress of their

grievances. By contrast, the American Arbitration Association frequently handles employment disputes involving modest sums, making it possible for employees to bring claims that otherwise would have gone unremedied. *See*, *e.g.*, Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 DISP. RESOL. J. 9, 11 (2003). For many employees, in other words, the choice is "arbitration—or nothing." Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. MICH. J.L. REFORM 783, 792 (2008).

Employees also benefit from the informality of arbitration, which frees them from the procedural and evidentiary hurdles that often stymie plaintiffs in traditional, judicial-system litigation. *See*, *e.g.*, JOHN W. COOLEY & STEVEN LUBET, ARBITRATION ADVOCACY ¶ 1.3.1, at 5 (2d ed. 2003). Likely for that reason, employees tend to fare better in arbitration: Studies have shown that those who arbitrate their claims are more likely to prevail than are those who go to court. *See*, *e.g.*, Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 46 (1998).

For example, one study of employment arbitration in the securities industry found that employees who arbitrated were 12% more

likely to win their disputes than were employees who litigated in the Southern District of New York. *See* Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58 DISP. RESOL. J. 56, 58 (Nov. 2003-Jan. 2004). And the arbitral awards that the employees obtained were typically the same as, or larger than, the court awards. *See id.*

Moreover, because of both its informality and its celerity, arbitration is often less contentious than litigation, enabling employees to resolve disputes without permanently damaging their relationships with their employers and coworkers. And because one of the hallmarks of employment arbitration is confidentiality, this alternative-dispute-resolution mechanism reduces the risk that potentially embarrassing information about an employee will become public—including even the very fact that the employee pursued a claim against the employer, which may benefit the employee if she applies for a job at another employer in the future.

Nor are employees who have grievances the only ones who benefit from arbitration. On the contrary, the benefits also extend to those who

never have a dispute with their employer, because arbitration "lower[s] [businesses'] dispute-resolution costs," which results in "wage increase[s]" for employees. Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 254-56 (2006).

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

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted,

Kate Comerford Todd
Warren Postman
U.S. CHAMBER LITIGATION CENTER
1615 H Street NW
Washington, DC 20062
(202) 463-5337

/s/ Evan M. Tager
Andrew J. Pincus
Evan M. Tager
Archis A. Parasharami
Matthew A. Waring
MAYER BROWN LLP
1999 K Street N.W.
Washington, DC 20006
(202) 263-3000

Counsel for Amicus Curiae

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a), counsel for *amicus curiae* The Chamber of Commerce of the United States of America hereby certifies as follows:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,927 words, excluding the parts of the brief exempted by Fed. R. App. R. 32(a)(7)(B)(iii).

2. 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Century Schoolbook.

Dated: March 25, 2016

/s/ Evan M. Tager
Evan M. Tager

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(c) and Local Rule 25.1(h), that on March 25, 2016, I electronically filed the foregoing brief with the Clerk of the Court using the ECF system, which will send notification of the filing to the attorneys on that system.

/s/ Evan M. Tager
Evan M. Tager

Counsel for Amicus Curiae