

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

D. R. HORTON, INC.

and

MICHAEL CUDA, an individual

NLRB Case No. 12-CA-25764

**APPLICATION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF
GENERAL COUNSEL'S EXCEPTIONS**

**[PROPOSED] BRIEF AMICI CURIAE IN SUPPORT OF GENERAL COUNSEL'S
EXCEPTIONS ON BEHALF OF SERVICE EMPLOYEES INTERNATIONAL UNION,
ALTON SANDERS, AND TAYLOR BAYER**

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**APPLICATION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE
IN SUPPORT OF GENERAL COUNSEL'S EXCEPTIONS**

The Service Employees International Union ("SEIU"), Taylor Bayer, and Alton Sanders respectfully seek leave to file the accompanying amicus curiae brief in support of the General Counsel's exceptions to the Administrative Law Judge Decision ("ALJD") in *D.R. Horton, Inc.*, Case No. 12-CA-25764. The ALJD was issued on January 3, 2011, and the acting General Counsel filed timely exceptions on March 14, 2011.

INTERESTS OF THE AMICI CURIAE

SEIU is an international labor union that represents more than 2.2 million employees nationwide in such diverse fields as janitorial services, health services, long-term care, and public employment. SEIU represents many workers in low-wage industries who have little bargaining power, limited literacy skills or English-language ability, or who may be new to this country. SEIU has twice participated as an amicus in support of a charging party's unfair labor practice charge that challenged an employer's prohibition against class and collective actions, in *Neiman Marcus*, Case No. 20-CA-33510, which settled without issuance of a complaint (over the objections of the charging party and his amici), and in *24 Hour Fitness*, Case No. 20-CA-35419, in which the charging party's ULP charge and request for Section 10(j) injunctive relief remain pending before Region 20. SEIU has long been opposed to employers' increasingly frequent efforts to require workers, as a condition of their employment, to execute non-negotiable agreements that require the employees to waive their right to vindicate workplace rights on a collective basis. Based on SEIU's experience, the reason employers demand such waivers of their employees' right to pursue collective relief, particularly in low-wage industries, is because

by eliminating class, collective, and representative actions, such employers are largely able to avoid liability for their increasingly practice of committing wage theft and other violations of state and federal employment law against economically vulnerable workers who have little or no bargaining power or access to qualified lawyers.

Alton Sanders is an African-American employee of 24 Hour Fitness, Inc. and is the Charging Party in *24 Hour Fitness*, Case No. 20-CA-35419. 24 Hour Fitness, like respondent D.R. Horton, Inc., requires all of its employees, as a condition of their employment and continued employment, to waive their Section 7 right to file or participate in any class, collective, or representative action relating to their employment. Mr. Sanders is also a putative class member in *Fulcher v. 24 Hour Fitness*, RG 10524911 (Alameda County Superior Ct.), a California class action alleging unlawful race and gender discrimination on behalf of all of 24 Hour Fitness's similarly situated African-American and women employees. After 24 Hour Fitness took the position in that litigation that its class action prohibition precludes any affected employees from pursuing discrimination claims on a class action or representative basis, Mr. Sanders filed his Section 8(a)(1) charge and asked the General Counsel to pursue Section 10(j) injunctive relief against 24 Hour Fitness, to enjoin the company from continuing to impose and enforce its policy of prohibiting employees from concertedly filing and pursuing any class or collective action challenging its unlawful workplace practices. That request is pending.

Taylor Bayer is a disabled employee of Neiman Marcus, who filed a claim for disability discrimination with the EEOC on behalf of himself and similarly situated Neiman Marcus employees. Like D.R. Horton and 24 Hour Fitness, Neiman Marcus requires all of its employees as a condition of employment to forgo their right to bring any class or collective action in any

forum. In 2007, in *Neiman Marcus*, Case No. 20-CA-33510, Bayer filed a Section 8(a)(1) charge against Neiman Marcus, alleging that its prohibition against concerted litigation activity violated his and his co-workers' rights under Section 7 and Section 8(a)(1). The General Counsel settled that charge over Bayer's objection and the objections of amici SEIU and the AFL-CIO, after Neiman Marcus made modifications to its mandatory arbitration agreement that Bayer contends were not adequate to protect his and his co-workers' Section 7 rights.

The undersigned amici thus have a strong interest in this issue and in demonstrating why the ALJ's decision is contrary to the Act.

With increasing frequency, employers like D.R. Horton, 24 Hour Fitness, and Neiman Marcus have been including class action prohibitions in their mandatory employment arbitration agreements in order to eliminate or restrict their employees' ability to pursue workplace claims on a class, collective, or representative basis – not only in arbitration, but in *any* forum. These involuntary, non-negotiable agreements have the purpose and effect of preventing NLRA-covered employees from engaging in concerted activity to improve their working conditions or to vindicate statutory rights in violation of Section 7.

The ALJ decision in this case erroneously holds, among other things, that an employer's contractual prohibition against its employees' concerted filing or prosecution of a joint, class, collective, or representative action in any forum, whether arbitral or judicial, does not violate Section 7 and Section 8(a)(1) of the National Labor Relations Act.^{1/} That holding could have an

^{1/} The ALJ decision actually addressed two issues: 1) whether D.R. Horton's prohibition in its mandatory arbitration agreement against joint, class or collective actions in any forum violates Section 8(a)(1) by unlawfully prohibiting employees from engaging in protected concerted activities; and 2) whether D.R. Horton's prohibition in its mandatory arbitration

(continued...)

enormous practical impact on workers throughout the many industries represented by the SEIU, and is of particular concern to workers in low-wage industries (such the janitorial, homecare and nursing home, and security industries) who have little bargaining power, often limited literacy skills, and who may not speak English or may be new to this country. The increased use by employers of class action prohibitions in recent years has paralleled the increased levels of wage theft and an expansion of the underground economy in this country, greatly increasing the number of “outlaw” employers and industries. The large, sophisticated companies that employ these workers and operate in these low-wage industries use class action prohibitions as “get out of jail free” cards, knowing that in the absence of collective action these workers will often be unable to vindicate their workplace rights. For these reasons, the union and individual amici each strongly oppose such prohibitions.

REASONS FOR ACCEPTING THIS BRIEF

The accompanying brief will be of assistance to the Board in resolving the questions raised by the General Counsel’s exceptions. The brief demonstrates why an employer’s prohibition against filing, joining, or pursuing workplace-related claims on a joint, class, or collective basis in any forum “interferes with, coerces, or restrains” employees in the exercise of their Section 7 rights and thus violates Section 8(a)(1). It further shows why, contrary to the ALJ’s mistaken view, invalidation of the employer’s policy as a violation of Section 7 and

^{1/} (...continued)

agreement against pursuing any claim outside of arbitration violates Section 8(a)(4) by leading employees to believe they cannot file charges with the NLRB. The accompanying amicus brief addresses only the first of these two issues, as amici agree with the ALJ’s conclusion that D.R. Horton violated Section 8(a)(4) by contractually depriving its employees of their protected right to file unfair labor practice charges with the Board.

Section 8(a)(1) would still enable employers in the future to require arbitration rather than litigation of all workplace-related claims, and would still allow employers to oppose class certification on the grounds provided by Fed.R.Civ.Pro. 23 and its state law counterparts, while precluding employers from imposing class action prohibitions as a condition of their workers' employment.

The accompanying amicus brief also addresses the scope of relief requested by the General Counsel in its exceptions. While amici fully support the relief requested in Exception Nos. 7-9 and 11-12 (which would require D.R. Horton, on a company-wide basis, to rescind and no longer seek enforcement of its class action prohibition), as well as the relief requested in Exception No. 10 as written (which would appear to allow D.R. Horton to reinstate its arbitration agreement if it does *not* also reinstate its unlawful class action prohibition), there is some ambiguity in what Exception No. 10 is actually designed to accomplish. To the extent Exception No. 10 is intended to require D.R. Horton to give employees notice of their Section 7 rights while continuing to bar D.R. Horton from prohibiting joint, class, and collective actions, amici fully support the relief sought in that Exception. However, to the extent Exception No. 10 is intended to allow D.R. Horton to reinstate its class action prohibition if that reinstatement is coupled with the types of notice that the former General Counsel found sufficient to avoid a Section 8(a)(1) violation in General Counsel Memorandum 10-6, "Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Employee Waivers in the Context of Employers' Mandatory Arbitration Policies" (June 16, 2010) and in the *Neiman Marcus* settlement, amici oppose that Exception as inadequate to cure the company's Section 7 violation. Any proposed remedy that would allow D.R. Horton to keep its class action prohibition in effect, even if coupled with the

types of notice described in Exception No. 10, would be inadequate to remedy the Section 8(a)(1) violation caused by D.R. Horton's workplace rule prohibiting its employees from engaging in core protected Section 7 activity.^{2/}

Because this case raises an important question of first impression for the Board, and because amici analyze the issues and remedies differently than the General Counsel, amici request oral argument. *See Register-Guard*, 351 NLRB No. 70 (2007) (ordering oral argument in an important case raising a novel issue).

Conclusion

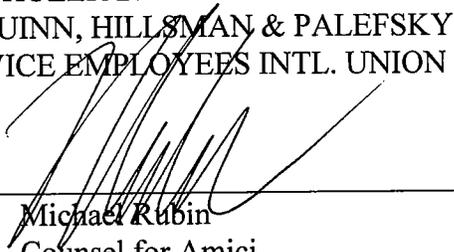
For the foregoing reason, this application for leave to file the accompanying amicus brief should be granted.

Dated: March 25, 2011

Respectfully submitted,

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By


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^{2/} In the experience of SEIU and amici's counsel, employers who impose contractual class action prohibitions on their workers have no hesitation about asserting those prohibitions as the first-line defense against any group of workers who seek to join together in challenging a workplace policy or practice as unlawful. GC Memo 10-6 may purport to protect the Section 7 rights of workers who are thereby prevented or impeded from banding together to vindicate mutually held rights, but telling workers that the employer promises to respect their Section 7 rights is no substitute for actually preserving and protecting those rights; just as allowing workers to bring an expensive, time-consuming, and difficult collateral challenge to a class action prohibition, in a court that has no jurisdiction to even consider the scope and application of Section 7, is no substitute for preserving access to the Board itself to adjudicate whether or not an across-the-board prohibition against all joint, class, collective, and representative actions violates Section 8(a)(1) of the Act.

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INTRODUCTION

Respondent D.R. Horton has a workplace rule that prohibits its employees from joining together to litigate or arbitrate any workplace-related claims on a joint, class, collective, or representative basis. Set forth in a mandatory arbitration agreement that all employees of D.R. Horton must sign “[a]s a condition of employment,” Joint Exhibit (“JX”) 2, ¶1, the rule provides that “all disputes and claims” between the company and its employees must be arbitrated, and that in the arbitration, “[t]he arbitrator may hear only Employee’s individual claims and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding.” *Id.* ¶6. Thus, not only does D.R. Horton require its employees to arbitrate all workplace-related claims (which, by itself, does not violate Section 7), but it also mandates that any such arbitration must be limited to an employee’s individual claims only, prohibiting employees from acting in concert with any co-workers, no matter how similarly situated or similarly treated, in pursuing their commonly held workplace claims. *Id.*; *see also* JX 1 Stipulation No. 2. In this way, D.R. Horton’s workplace rule violates Section 7 by prohibiting employees from taking steps to vindicate workplace rights on a joint, class, or collective basis in *any* forum, whether arbitral or judicial.

An employer’s explicit prohibition against concerted activity violates core Section 7 rights and thus “interferes with, restrains, or coerces employees in the exercise of the rights guaranteed in Section 7” in violation of Section 8(a)(1). For the reasons set forth below and in the General Counsel’s exceptions, the Board should reverse the decision of ALJ William N. Cates and conclude that D.R. Horton’s workplace rule prohibiting employees from filing joint, class, or collective actions violates Section 8(a)(1) and must be withdrawn.

BACKGROUND

Respondent D.R. Horton requires all of its employees to sign an agreement as a condition of employment that prohibits them from collectively filing or pursuing any challenge to the company's employment practices, either in court or in arbitration. That agreement broadly encompasses all workplace disputes the employees might have with D.R. Horton (including all "claims for discrimination or harassment; wages, benefits, or other compensation; breach of contract; violations of public policy; personal injury; and tort claims . . ."), and provides:

[T]he arbitrator will not have the authority to consolidate the claims of other employees into a proceeding originally filed by either the Company or the Employee. The arbitrator may hear only Employee's individual claims and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding.

JX 2, ¶¶1, 6.

On February 13, 2010, Charging Party Michael Cuda filed a demand for arbitration with D.R. Horton, naming himself and six co-workers as claimants and seeking certification of a "collective" action in arbitration on behalf of themselves and all similarly situated D.R. Horton employees who were misclassified as "exempt" employees and wrongfully denied overtime pay under the federal Fair Labor Standards Act, 29 U.S.C. §201, et seq. ("FLSA"). JX 4-7; *see also* JX 1 (Stipulation No. 3).^{3/} D.R. Horton refused to arbitrate, pointing to ¶6 of its Agreement, and

^{3/} A "collective" action, sometimes described as an "opt-in" class action, is an action filed by one or more workers on behalf of themselves and all others similarly situated under a statute (such as the Fair Labor Standards Act, 29 U.S.C. §216(b), or the Age Discrimination in Employment Act, 29 U.S.C. §626(b)) that requires each participating worker to file a "Consent to Sue" to be included in the class. In the more typical "class action," or "opt-out class action," which is governed by Fed.R.Civ.Pro. 23 and its state law counterparts, the action is filed by one or more workers on behalf of themselves and all others similarly situated and, if the class is certified as meeting the Rule 23 standards, all similarly situated workers are included in the class (continued...)

stating that Cuda and the others could only pursue their overtime claims individually, in separate arbitrations. *Id.*

After Cuda filed a Board charge to challenge this prohibition against concerted worker activity, Region 12 issued a Complaint against D.R. Horton. The complaint alleged, among other things, that the company’s prohibition against joint, class, and collective actions interferes with employees’ Section 7 rights and thereby violates Section 8(a)(1).

After considering the evidence and arguments, ALJ William N. Cates concluded, as a threshold matter, that “[f]iling a class action lawsuit constitutes protected activity” – which is undoubtedly correct. *See* ALJD at 4, citing *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978); *Harco Trucking, LLC*, 344 NLRB 478 (2005); *U Ocean Palace Pavilion, Inc.*, 345 NLRB 1162 (2005). Surprisingly, though, the ALJ went on to hold that the employer’s blanket prohibition against this core protected Section 7 activity did not violate Section 8(a)(1), stating that in the absence of controlling Board precedent to the contrary, he would “decline to conclude that the provision in question violates Section 8(a)(1) by unlawfully prohibiting employees from engaging in protected concerted activities.” ALJD at 4-5.

^{3/} (...continued)

unless they affirmatively opt out by filing a notice of exclusion. (There are also additional categories of class actions, such as those seeking classwide injunctive or declaratory relief under Rule 23(b)(2), in which certification results in all class members being included without any right to opt out). Many state and federal statutes include specific language protecting the right of injured workers to proceed on a class or collective basis. *See, e.g.*, 29 U.S.C. §216(b) (“An [FLSA] action . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.”); Cal. Govt. Code §12961 (explicitly allowing employment discrimination suit on behalf of an affected “group or class of persons of which the aggrieved person filing the complaint is a member, or where such an unlawful practice raises questions of law or fact which are common to such a group or class”).

The ALJ's discussion of this issue was short and superficial, comprising just three points, none of which actually analyzed the issues before him. First, the ALJ observed that "decisions of the Supreme Court in recent years reflect a strong sentiment favoring arbitration" and that "[t]he Eleventh Circuit Court of Appeals has also expressed judicial support for the use of arbitration in the employment arena," ALJD at 4-5, two generalizations that are entirely irrelevant to the Section 7 inquiry, since none of those court decisions arose under the NLRA or addressed the implications of an employer's class action prohibitions on protected Section 7 rights. *See also infra* at 13-18.

Next, the ALJ stated that he was "not aware of any Board decision holding that an arbitration clause cannot lawfully prevent class action lawsuits or joinder of arbitration claims," *id.* at 5, a statement that is likely true (because the Board has never *expressly* held that an employer's workplace rule prohibiting joint, class, and collective actions violates Section 7) but is also irrelevant, because the Board has never been asked to address that issue before (in part, because employer class action prohibitions are a relatively recent phenomenon).^{4/}

Finally, the ALJ cited *Stolt-Nielsen S.A. v. Animal Feeds*, 130 S. Ct. 1758 (2010), and its holding 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." ALJ at 5 (emphasis omitted). The ALJ's reliance on *Stolt-Nielsen* is entirely misplaced because no Section 7 issues were presented or decided in that case. Nor could they have been, as the dispute in *Stolt-Nielsen*

^{4/} Nonetheless, for the reasons explained *infra* at 6-12, the Board *has* repeatedly held that employees have a Section 7 right to collectively challenge their employer's workplace conduct in a class or collective action, and many Board cases further hold that a workplace rule prohibiting core protected Section 7 activity "interferes with, restrains, or coerces" the exercise of such protected rights in violation of Section 8(a)(1).

was not between an employee and his employer but between two commercial entities in the maritime industry with equal bargaining power who had agreed in an arms-length transaction to arbitrate all claims. *Stolt-Nielsen* involved the entirely unrelated question of how an arbitrator should evaluate evidence of those commercial entities' unstated intent regarding the scope of their maritime arbitration under the Federal Arbitration Act, 9 U.S.C. §1 et seq. ("FAA"). Consequently, it has no bearing, either directly or indirectly, on the application of Section 7 to an employer's mandatory workplace rule prohibiting employees from acting in concert (whether in court or in arbitration) to challenge their employer's employment policies and practices.

For the reasons set forth below, analysis of the Board's settled precedents under Section 7 and Section 8(a)(1) demonstrates that the ALJ's decision is wrong. Under the NLRA, an employer may not contractually prohibit its employees from exercising Section 7 rights. Moreover, even in those instances in which the FAA and state unconscionability law might permit an employer to require its employees to arbitrate their workplace claims on an individual basis, the NLRA still prohibits employers from interfering, coercing, or restraining employees in the exercise of their core Section 7 right to file and participate in a joint, class, or collective action to remedy the employer's violation of statutory and common law workplace rights.

Despite the ALJ's blurring of two issues, amici do not contend that an employer is prohibited by Section 7 from requiring its employees to arbitrate, rather than litigate, workplace claims in general (although some mandatory arbitration agreements may be invalid and unenforceable on other grounds not within the Board's jurisdiction). Nor do amici contend that an employer is precluded by Section 7 from defending against a class action brought by its employees or from arguing that its employees did not satisfy the prerequisites for joinder or for

class certification under Fed.R.Civ.Pro. 23 or its state law counterparts. But for the reasons set forth below, an employer may not impose a blanket workplace rule – as D.R. Horton, and 24 Hour Fitness, Neiman Marcus, and many other employers have done – that directly interferes with its employees’ Section 7 rights by altogether prohibiting them from collectively filing or seeking to prosecute commonly held workplace claims in all forums. Because the ALJ held otherwise, the Board should reverse the ALJ’s decision and hold that D.R. Horton has violated Section 8(a)(1). The appropriate remedy upon finding such a violation is to order D.R. Horton, on a company-wide basis, to rescind its class action prohibition and to cease and desist from seeking to enforce that prohibition against any employee or group of employees.

ARGUMENT

I. IT IS WELL-ESTABLISHED THAT CLASS, COLLECTIVE AND REPRESENTATIVE ACTIONS CONSTITUTE CONCERTED ACTIVITY PROTECTED BY SECTION 7.

We begin with the basic principle that Section 7 of the NLRA, 29 U.S.C. §157, guarantees employees the right “to engage in . . . concerted activities for the purposes of . . . mutual aid and protection.” This broad guarantee of the right to engage in collective activity has long been held to protect efforts by employees to improve their working conditions “through resort to administrative and judicial forums.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978); *see Trinity Trucking & Materials Corp.*, 221 NLRB 364, 365 (1975) (“filing of [a] civil action by a group of employees is protected activity”); *Mohave Elec. Coop., Inc. v. NLRB*, 206 F.3d 1183, 1188-89 (D.C. Cir. 2000) (filing of judicial petition “supported by fellow employees and joined by a co-employee” constitutes protected concerted activity); *Tri-County Transp., Inc.*, 331 NLRB 1153, 1155 (2000) (three employees engaged in protected activity by filing

unemployment claims together); *127 Restaurant Corp.*, 331 NLRB 269, 275-76 (2000) (“by joining together to file the lawsuit [the 19 employees] engaged in [protected] concerted activity”); *CJC Holdings, Inc.*, 315 NLRB 813, 814 (1994).

Applying these principles, the Board has repeatedly held that an employee’s effort to vindicate collective rights by bringing a joint, class, or collective action on behalf of similarly situated co-workers constitutes protected “concerted” activity within the meaning of Section 7. In *Harco Trucking, LLC*, for example, a former employee filed a class action lawsuit against Harco alleging that it had failed to pay the prevailing wage at certain job sites. See 344 NLRB at 481. The ALJ concluded that the employee had engaged in “protected concerted activity” by “filing and maintaining the class action lawsuit against Harco,” and the Board affirmed, ordering Harco to cease and desist from “[f]ailing and refusing to hire employees because they engage in protected concerted activities within the meaning of Section 7.” *Id.* at 479; see also *United Parcel Serv., Inc.*, 252 NLRB 1015, 1018 (1980) (stating, in case where employee filed class action lawsuit regarding rest breaks and solicited support from other employees, that “[i]t is well settled that activities of this nature are concerted, protected activities”); *Novotel New York*, 321 NLRB 624, 633 (1996) (holding that the filing of a collective action lawsuit under the FLSA is protected Section 7 activity); *Auto. Club of Michigan*, 231 NLRB 1179, 1181 (1977) (holding, in case involving class action by employees and union to recover unpaid commissions, that “the filing of a civil action by a group of employees against their employer is protected under the Act unless done with malice or in bad faith”).

The Board’s conclusion that class actions constitute “concerted” activity within the meaning of Section 7 follows logically from the nature of class actions. Under Rule 23 and its

state law counterparts (most of which are modeled on Rule 23), a class action can only be brought by one or more putative class representatives if they are seeking relief on behalf of themselves and other similarly situated co-workers. *See, e.g.*, Fed.R.Civ.Pro. 23(a)(2) (“members of a class may sue . . . as representative parties on behalf of all members . . . if . . . there are questions of law or fact common to the class”). In seeking class certification, the putative class representatives ask the presiding judge or arbitrator to authorize those plaintiffs, who have a legally enforceable duty under Rule 23(a)(4) to “fairly and adequately protect the interests of the class,” to disseminate a written notice under Rule 23(c)(2)(B) to all persons who are found to be similarly situated, advising those co-workers of their legal rights, inviting them to participate in the class action, and further informing them that they will be bound by any judgment in the class action unless they affirmatively opt out.^{5/} That is why class actions necessarily constitute concerted activity, even if they are only filed by a single named plaintiff (although more frequently, as with Charging Party Cuda’s FLSA claims, several co-workers join together as named class representatives in filing their complaint). *See Harco*, 344 NLRB at 481 (concluding that class action apparently filed by a single employee constituted concerted

^{5/} Similarly, in a collective action brought under the FLSA or ADEA, the notice to similarly situated workers (commonly referred to as a *Hoffman* notice) advises them of their legal rights and participatory rights, and customarily sets a deadline by which they may join the collective action by filing a Consent to Sue form. *See Hoffman-LaRoche Inc. v. Sperling*, 439 U.S. 165, 169-71 (1989). In the past few years, it has become quite common for employees to pursue class and collective claims in arbitration. The Supreme Court expressly approved the concept in *Green Tree v. Bazzle*, 539 U.S. 444 (2003), and several states had approved class arbitrations before that. *See, e.g., Keating v. Southland Corp.*, 31 Cal.3d 584, 612, *rev’d on other grounds*, 465 U.S. 1 (1984). Indeed, the website of one commonly used arbitration provider, the American Arbitration Association (which is the provider used by D.R. Horton, *see* JX 2 ¶4), identifies dozens of such cases that are being arbitrated on a class or collective basis. *See* American Arbitration Association, Searchable Class Arbitration Docket, *available at* <http://www.adr.org/sp.asp?id=25562>.

activity); *Int'l Transp. Serv., Inc. v. NLRB*, 449 F.3d 160, 166 (D.C. Cir. 2006) (“concerted activity includes circumstances where individual employees work to initiate, induce or prepare for group action”) (quotation marks and citation omitted); *Citizens Inv. Servs. Corp. v. NLRB*, 430 F.3d 1195, 1199 (D.C. Cir. 2005) (“individual acts taken in order to bring the complaints of a group of [employees] to the Company’s management” constitutes concerted activity); *Phillips Petroleum Co.*, 339 NLRB 916, 918 (2003) (“individual action [in enlisting the support of other employees] is concerted as long as it is engaged in with the object of initiating or inducing . . . group action.”) (quotation marks and footnotes omitted).^{6/}

In short, we begin from the unassailable threshold proposition that the filing and pursuit of employment claims on a class or collective basis is protected “concerted” activity under Section 7.

II. D.R. HORTON’S PROHIBITION AGAINST CLASS AND COLLECTIVE ACTIONS INTERFERES WITH, RESTRAINS, AND COERCES EMPLOYEES IN THE EXERCISE OF THEIR PROTECTED SECTION 7 RIGHTS IN VIOLATION OF SECTION 8(a)(1).

Any employer policy that unduly interferes with its employees’ Section 7 rights constitutes an unfair labor practice in violation of Section 8(a)(1) of the Act, 29 U.S.C.

§158(a)(1). *See ABF Freight Sys., Inc. v. NLRB*, 673 F.2d 228, 229 (8th Cir. 1982); *Brandeis*

^{6/} The three Demands for Arbitration giving rise to this case, for example, made clear that Michael Cuda and the six other named D.R. Horton employees who were seeking classwide relief were doing so on behalf of all similarly situated co-workers. *See* JX 4 (“The law firm of Morgan and Morgan, P.A., has been retained to represent Michael Cuda (‘Mr. Cuda’) and a class of similarly situated current and former ‘Superintendents’ employed by D.R. Horton on a national basis. The gravamen of Mr. Cuda’s claims, along with the claims of those who also will be joining this action, related to D.R. Horton’s misclassification of these ‘Superintendents’ as exempt employees under the Fair Labor Standards Act (‘FLSA’). . . . Mr. Cuda, along with the class of similarly situated individuals he seeks to represent, seek unpaid overtime and liquidated damages, declaratory relief, and attorneys’ fees and costs.”); JX 5 (identifying five other potential class representative plaintiffs); JX 6 (identifying the sixth potential class representative plaintiff).

Mach. & Supply Co. v. NLRB, 412 F.3d 822, 830-31 (7th Cir. 2005). The inquiry into whether a challenged workplace rule unlawfully interferes with the exercise of protected Section 7 rights “begins with the issue of whether the rule *explicitly* restricts activities protected by Section 7.” *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004) (emphasis in original). If a rule explicitly restricts Section 7 activities, the Board “will find the rule unlawful” without having to undertake further analysis. *Id.* at 646 n.5 (explaining that, “[f]or example, a rule prohibiting employee solicitation, which is not by its terms limited to working time, would violate Sec. 8(a)(1) under this standard, because the rule explicitly prohibits employee activity that the Board has repeatedly found to be protected by Sec. 7”).

D.R. Horton’s prohibition against joint, class, and collective actions could not be more explicit. It prohibits the arbitrator from “consolidat[ing]” claims, restricts the arbitrator to hearing the “Employee’s individual claims” only, and prohibits employees from pursuing a “class or collective action” in any forum. JX 2, ¶6. Through this plain language, D.R. Horton directly forbids its workers from joining together to seek redress in any court or any other forum to seek remediation of any workplace wrong. Moreover, D.R. Horton’s letters to Charging Party’s counsel refusing to proceed with the requested arbitration (on the ground that the Demands for Arbitration violated the contractual prohibition against class and collective arbitration, *see* JX 8-10) make clear that D.R. Horton’s workplace rule did in fact deprive Charging Party and his co-workers of their Section 7 right to challenge the company’s failure to pay FLSA overtime in a concerted collective action lawsuit. No further inquiry should be required to find a Section 8(a)(1) violation under these circumstances.

Even if there were some legitimate question about whether D.R. Horton’s class action prohibition explicitly prohibits protected Section 7 activity, there can be little doubt that “reasonable employees would construe the language to prohibit Section 7 activity,” which is an alternative basis for establishing Section 8(a)(1) liability. *See, e.g., U-Haul Co. of California*, 347 NLRB 375, 377-78 (2006), *citing Lutheran Heritage Village-Livonia*, 343 NLRB 646. In *U-Haul*, the respondent employer required all of its workers to sign a broad mandatory arbitration agreement, which did not have any language carving out the workers’ right to separately pursue ULP charges with the NLRB. *Id.* at 377. Instead, that agreement stated, among other things, that employees must arbitrate all causes of action recognized by “federal law or regulations.” *Id.* at 378. Although the Board acknowledged that nothing in the language of the agreement explicitly precluded the company’s workers from pursuing ULP charges before the Board, it concluded that those workers would reasonably interpret the agreement as prohibiting them from filing Board charges. *Id.* Based on this determination that the company’s employees would reasonably understand the rule to restrict their Section 8(a)(1) and 8(a)(4) rights, the Board held rule unlawful, even in the absence of evidence that it had ever been enforced to prevent exercise of Section 7 rights. *Id.*²¹

²¹ As *U-Haul* demonstrates, it is irrelevant whether the workplace rule prohibiting concerted activity is included in a contract signed by the employee rather than announced as a workplace policy. This Board has made clear that an employer cannot circumvent Section 7 by prospectively obtaining individual waivers of each employee’s right to engage in concerted activity with other employees. Any agreement between an individual worker and an employer, required as a condition of employment, that purports to waive the worker’s right to engage in protected concerted activity is a “yellow dog” contract that is unenforceable. *See Eddyleon Chocolate Co.*, 301 NLRB 887, 887 (1991) (“yellow dog” contracts and their solicitation are barred under the NLRA); *First Legal Support Servs.*, 342 NLRB 350, 362-63 (2004) (ALJ describing history of yellow dog contracts; requiring employees to relinquish Section 7 rights as a
(continued...)

A reasonable employee reading D.R. Horton’s mandatory arbitration agreement would similarly understand that it prevented that employee from exercising the Section 7 right to pursue relief on a joint, class, or collective action basis. Indeed, that is the only logical reading of the class action prohibition in ¶6 of D.R. Horton’s Agreement, that no worker may join with any co-worker(s) to challenge the legality of the company’s employment practices before a judge or an arbitrator.

It is equally clear that D.R. Horton’s class action prohibition has the purpose and effect of chilling the exercise of Section 7 rights – as confirmed by the actual circumstances of Michael Cuda’s and his co-workers’ overtime case, which never went forward after the company rejected the prospective named class representatives’ Demands for Arbitration. That is yet another reason to find a Section 8(a)(1) violation here. *See Lafayette Park Hotel*, 326 NLRB 824, 825 (1998) (“where [employer] rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement”); *Lutheran Heritage Village-Livonia*, 343 NLRB at 646 (“[A]n employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights.”); *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 374 (D.C. Cir. 2007) (standards governing Board’s two-step inquiry to determine when an employer’s rules

^{2/} (...continued)
condition of employment is unlawful); *see also Extencicare Homes*, 348 NLRB 1062, 1062 (2006) (employer could not lawfully condition return to work on a promise not to engage in Section 7 activity); *Bethany Medical Center*, 328 NLRB 1094, 1095 (1999) (ordering employer to cease and desist from requiring that employees waive their right to engage in concerted activity as a condition of rehire); *Carlisle Lumber Co.*, 2 NLRB 248, 266 (1936), *enf. as mod. on other grounds*, 94 F.2d 138 (1937), *cert. denied*, 304 U.S. 575 (1938) (an employer who refuses to hire union employees unless they renounce union membership “has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act”).

would “reasonably tend to chill employees in the exercise of their statutory rights”).

Even if D.R. Horton’s workers were able to overcome the company’s rejection of their arbitration demand and to bring a collateral challenge to the class action prohibition in court or before an arbitrator, the company’s class action prohibition would still interfere with their protected Section 7 rights (as it did in *Neiman Marcus* and *24 Hour Fitness*). That is because, before actually being able to exercise those rights, the workers would first need to find lawyers able and willing to bring a state law unconscionability challenge to the class action prohibition, and then individually incur the delays, expense, and uncertainties of litigating that threshold issue in court or arbitration – while thereby targeting themselves as complainers – before they could even begin to pursue their concerted action to vindicate substantive underlying rights in court or arbitration. As the history of this case demonstrates, many workers and their attorneys, when faced with the threat that the company will devote its considerable legal resources to obtaining enforcement of a contractual class action prohibition, will not even begin the process of seeking to proceed with such concerted action.

In sum, D.R. Horton’s prohibition on Section 7 rights is likely to chill or interfere with employees in the exercise of those rights, and therefore violates Section 8(a)(1).

III. CLASS ACTION PROHIBITIONS ARE NO LESS A VIOLATION OF SECTION 7 WHEN INCLUDED IN A MANDATORY ARBITRATION AGREEMENT THAN WHEN SET FORTH IN A FREESTANDING AGREEMENT.

The ALJ was correct as a threshold matter in concluding that an employee’s pursuit of joint, class, or collective action relief constitutes protected Section 7 activity. *See* ALJD at 4. The ALJ’s analysis went awry, however, when he began to focus on the mandatory arbitration context in which that class action prohibition happened to be incorporated. Analytically, for

purposes of Section 7, it should make no difference whether a company includes a class action prohibition in a stand-alone agreement, a mandatory arbitration agreement, or some other agreement or workplace policy. The critical factor is whether the employer prohibits workers from pursuing class action relief in *any* forum – for if it does, the prohibition violates Section 7.

The ALJ cited several judicial decisions of the U.S. Supreme Court and the Eleventh Circuit that upheld the enforceability of mandatory arbitration agreements. *Id.* at 4-5. None of those cases, however, addressed the question presented here: whether an employer’s workplace rule prohibiting all class actions in all possible forums violates Section 7 and Section 8(a)(1). Nor could they have addressed that question, because only the NLRB, and not the courts, has jurisdiction to determine whether an employer has committed an unfair labor practice under the NLRA; and if the Section 7 issue had been raised in any of those cases, it would have been *Garmon* preempted. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959) (“[w]hen an activity is arguably subject to Section 7 or Section 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the [Board]”). That is why, to the extent those cases involved challenges to the enforceability of an employer’s mandatory arbitration agreement, the only question before the courts was whether the disputed agreement was procedurally and substantively unconscionable under state law as incorporated by Section 2 of the FAA, 9 U.S.C. §2. *See, e.g., Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1367 (11th Cir. 2005); *Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307, 1313 (11th Cir. 2002).^{8/}

^{8/} Section 2 of the FAA provides that arbitration agreements within its scope “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” That provision allows challenges to the validity and enforceability of an arbitration agreement based on any generally applicable defense to contract enforcement (continued...)

If D.R. Horton had a mandatory arbitration agreement that prohibited its workers from pursuing class and collective actions in arbitration *while still permitting them to bring such class actions in court*, amici would have no quarrel with that prohibition (and we suspect the General Counsel would have no objection either, given the position taken by Advice in *O'Charley's Inc.*, Case No. 26-CA-19974 (Div. of Advice April 16, 2001), 2001 WL 1155416 (N.L.R.B. G.C.), that an employer may prohibit the exercise of Section 7 rights in one forum, as long as it allows the exercise of those rights in an equally adequate alternative forum, *see* 2001 WL 1155416 at *4 (“Section 7 does not provide a right to select *any particular* forum to concertedly engage in activities for mutual aid or protection”) (emphasis added)).^{9/}

Conversely, if D.R. Horton had a stand-alone policy that flatly barred its employees from pursuing any joint, class, or collective actions in any forum (as the employer did, for example, in *America Online, Inc. v. Superior Court*, 90 Cal.App.4th 1, 6, 14-18 (2001)), amici have little doubt that the ALJ would have properly found a Section 7 violation, since the ALJ would not have been distracted by the mandatory arbitration context in which the company's policy was

^{8/} (...continued)
under state law (such as unconscionability, duress, lack of consideration, etc.). *See, e.g., Doctor's Assocs. Inc. v. Cassarotto*, 517 U.S. 681, 687 (1996). Although the FAA preempts arbitration-specific *state* laws that interfere with federal arbitral policy, *id.*, nothing in the FAA preempts, or conceptually could preempt under the Supremacy Clause, the rights and obligations conferred by the *federal* statutes, such as the NLRA. *See Felt v. Atchison, Topeka & Santa Fe Ry. Co.*, 60 F.3d 1416, 1418-19 (9th Cir. 1995) (“preemption doctrine derives from the Supremacy Clause of the Constitution and concerns the primacy of federal laws. As defendant's motion concerns the interrelationship of two federal laws[,] preemption doctrine *per se* does not apply”) (internal alterations omitted).

^{9/} This is how the rules governing securities industry arbitration for the New York Stock Exchange and National Association of Securities Dealers operates, for example: all disputes *except* class actions must be arbitrated, while class actions must be litigated in court. *See* Financial Industry Regulatory Authority Rule 12204.

presented in this case.

In fact, though, D.R. Horton *does* bar its employees from pursuing joint, class, and collective actions in any forum. To be sure, it erects that bar through a two-step process: first, by requiring its workers to arbitrate all disputes; and second, by prohibiting those arbitrated disputes from being pursued on a joint, class, or collective action basis. But for Section 7 purposes, all that matters is that no forum remains in which an employee may pursue a collective claim.

Put another way, D.R. Horton has imposed two analytically distinct agreements on its workers: a mandatory arbitration agreement, whose enforceability does not as a general matter raise any Section 7 issues; and a prohibition against pursuing joint, class, or collective claims in *any* forum, whether arbitral or judicial, which does directly interfere with those workers Section 7 rights, for the reasons explained in this brief.

The ALJ's reliance on cases addressing the general validity of mandatory arbitration agreements is therefore entirely misplaced. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), for example, which is one of the cases the ALJ cites, the Supreme Court held that the NYSE's requirement that registered securities brokers must arbitrate their statutory claims is not inherently incompatible with a broker's ability to vindicate statutory rights. *Id.* at 26. As the Court in *Gilmer* explained, under the Federal Arbitration Act a mandatory arbitration agreement is generally enforceable if it provides procedural and substantive protections sufficient to ensure that claimants will be able to effectively vindicate their statutory rights. *Id.* at 24-26; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (“[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum”). However, even

under the FAA, such an agreement may be unenforceable if its terms and the manner of its presentation are unconscionable or otherwise invalid under principles of general state law, *Gilmer*, 500 U.S. at 30-33, or if the text or legislative history of a particular statute demonstrates that Congress intended to preserve a judicial or administrative forum for claims under that statute, 500 U.S. at 26-29. *Gilmer* simply does not speak to the issue presented here, because no Section 7 issue was raised or addressed, because the NYSE agreement at issue was not even an employment agreement, *see id.* at 25 n.2, and because under the NYSE arbitration procedures at issue, if Mr. Gilmer had wanted to pursue his ADEA claims on a collective action basis he would have been entitled – indeed, required – to pursue those claims in court.^{10/}

D.R. Horton has done something far more pernicious than simply requiring arbitration of employment disputes. In addition to imposing a requirement that employees must arbitrate all their workplace-related claims, it flatly prohibits those employees from pursuing their claims as class or collective actions in *any* forum, whether arbitral or judicial. However, there is nothing in *Gilmer* or any of the other cases cited by the ALJ that permits an employer to strip its workers of their Section 7 rights, or to prohibit them from engaging in the concerted protected activity of pursuing workplace claims on a joint, class, collective, or other representative basis. Although

^{10/} The plaintiff in *Gilmer* was a sophisticated, well-educated securities trader who brought an individual age discrimination action against his employer for damages – *not* a class action, not a joint action, not any other form of collective or representative action. 500 U.S. at 23-24, 33. Nonetheless, if Mr. Gilmer had grounds for pursuing any workplace claims against his employer on a class action basis, he could have done so by filing and prosecuting his case in court as a class action, because the applicable rules of the NYSE clearly stated at the time (as the superceding FINRA rules still state) that registered securities representatives may pursue class action employment law claims *in court*, although they must pursue all individual employment law claims in arbitration. 500 U.S. at 32; NYSE Arbitration Rule 600(d) (2001); *see also supra* at 15 n.9.

“Section 7 does not provide a right to select any particular forum to concertedly engage in activities for mutual aid or protection,” *O’Charley’s Inc.*, 2001 WL 1155416 at *4, it *does* prohibit employers from totally eliminating their workers’ right to pursue collective actions in *any* forum.

The ALJ’s reliance on *Stolt-Nielsen S.A. v. Animal Feeds*, 130 S. Ct. 1758, 1773-75 (2010), is even more off-base. *Stolt-Nielsen* involved an arbitration agreement in the maritime context between large commercial entities. 130 S. Ct. 1758, 1764. There was no employment agreement and no issue about arbitrating employment disputes. *Stolt-Nielsen* therefore had nothing to do, either directly or indirectly, with the Section 7 issues presented here. The issue in *Stolt-Nielsen* was whether, under the FAA, an arbitrator should permit a maritime arbitration to proceed on a classwide basis when the commercial entities’ agreement and bargaining history made no express reference to class arbitration and the parties expressly stipulated they had never reached an agreement concerning the permissibility of class arbitration. *Id.* at 1764. After considering all the evidence in light of the bargaining history and context, the Supreme Court concluded that the negotiating parties’ failure to reach agreement on permitting class arbitrations meant that the parties did not intend to permit such class arbitrations. *Id.* at 1764-65, 1776. That decision has no bearing on the issues before the Board.

IV. CLASS ACTION PROHIBITIONS INTERFERE WITH THE CORE SECTION 7 RIGHT OF WORKERS TO JOIN TOGETHER TO ENFORCE THEIR STATUTORY AND COMMON LAW WORKPLACE RIGHTS AND IMPERMISSIBLY PREVENT WORKERS FROM JOINING TO VINDICATE COMMONLY HELD WORKPLACE RIGHTS.

The core substantive right guaranteed by Section 7 is the right of employees to advance their interests on a collective basis. A prohibition against filing or pursuing a joint, class, or

collective action directly interferes with that right, and it does so whether or not the collective action is ever filed, and whether or not the affected employees bring a challenge in court to the enforceability of that prohibition under the FAA. *See Trinity Trucking & Materials Corp.*, 221 NLRB 364, 365 (1975) (Section 7 protects the right of employees to act collectively in pursuing workplace-related claims, as long as those claims are not pursued in bad faith); Ann C. Hodges, *Can Compulsory Arbitration Be Reconciled with Section 7 Rights?*, 38 Wake Forest L. Rev. 173, 217 (2003) (“the right that is being violated here is the substantive Section 7 right to concerted activity which is being effectuated through the class action device.”).

As a practical matter, moreover, the real world effect of an employer’s class action prohibition is unquestionably to impede its workers’ ability to effectively pursue jointly held workplace claims – *i.e.*, not only prohibiting employees directly from exercising their core Section 7 rights in the first instance, but also imposing significant procedural, economic, and other burdens upon any employee seeking to pursue workplace claims that are commonly held with similarly situated co-workers.

Experience demonstrates that the only reason employers impose class action prohibitions on their workers is to limit the employer’s liability for their unlawful conduct. Such class action prohibitions are designed to be exculpatory, reducing the employer’s exposure for statutory and public policy violations by making it “very difficult for those injured by unlawful conduct to pursue a remedy.” *Gentry v. Superior Court*, 42 Cal.4th 443, 457 (2007); *see also infra* at 23 n.12 (noting that under the FLSA and ADEA, the statute of limitations on each absent class action plaintiff’s claims is not tolled until he or she files a Consent to Sue). The employer’s purpose is to ensure that many meritorious workplace claims will not be brought at all, not that

they will be brought as individual arbitration actions.^{11/}

The case law and literature demonstrate many reasons why class action prohibitions, as a practical matter, impede or eliminate the ability of small groups of named class representatives to vindicate the statutory rights of larger groups of similarly situated workers – thus burdening their attempted exercise of protected Section 7 rights. First, in cases where potential damages are modest, many employees (and the attorneys from whom they seek representation) will lack sufficient economic incentive to pursue claims on an individual basis, where the barriers to entry (including the inability to spread the economic costs among a larger group of workers) are far higher than in a class action case. *See Gentry*, 42 Cal.4th at 457-58; Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 Stan. L. Rev. 1631, 1651-52 (2005). As the U.S. Supreme Court has explained, “[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.” *Amchem Products, Inc. v. Windsor*, 521 US 591, 617 (1997), quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir 1997); *see also Deposit Guaranty Nat. Bank v. Roper*, 445 US 326, 338 (1980) (“[A class action] may motivate [plaintiffs] to bring cases that for economic reasons might not be brought otherwise, [thereby]

^{11/} As a matter of simple economics, it would make no sense for an employer like D.R. Horton to mandate individual arbitrations if it actually believed that each similarly situated individual employee would separately pursue a claim in arbitration. Even aside from the staff time and lawyer time required to defend against hundreds or thousands of individual claims, D.R. Horton’s mandatory arbitration agreement requires it to “pay all costs unique to arbitration . . . including the regular and customary arbitration fees and expenses,” and to pay the prevailing employees’ attorneys’ fees and costs if they prevail on claims brought under a fee-shifting statute like the FLSA. *See* JX 2, ¶7. These additional fees and costs will in many instances far outstrip the company’s back pay liability – but only if those similarly situated workers actually pursued claims to vindicate their rights (which the overwhelming majority will not, in the absence of a class action).

vindicating the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost.”).

Even where a statutory fee-shifting provision might permit an employee to recover attorneys’ fees, moreover, the “risks and economic realities” of prosecuting a modest, individual claim may deter the employee from proceeding – and may make it impossible to find an attorney in the first place. *Gentry*, 42 Cal.4th at 459. This deterrent effect is particularly pronounced for low-wage workers. See Juliet M. Brodie, *Post-Welfare Lawyering: Clinical Education and a New Poverty Law Agenda*, 20 Wash. U. J.L. & Pol’y 201, 248-29 (2006) (“the wage and hour cases of the working poor . . . tend to involve relatively small dollar figures, prohibitively small for a private attorney”).

Second, the fear of employer retaliation or blacklisting is considerably more pronounced in the context of individual rather than class claims. “[F]ederal courts have widely recognized that fear of retaliation for individual suits against an employer is a justification for class certification in the arena of employment litigation” *Gentry*, 42 Cal.4th at 460 (citing cases); *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (“it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions”). It is an unfortunate but unquestionable reality of the modern workplace that fear of retaliation causes many employees to refrain from exercising their employment law rights. For many workers, filing an individual action against their employer is tantamount to painting a target on their chest. It is equally true that the strength in numbers and relative anonymity of the opt-out class action device under Rule 23 allows many workers to vindicate employment law rights that would otherwise remain unprotected. Cf. Edward H.

Cooper, *The (Cloudy) Future of Class Actions*, 40 Ariz. L. Rev. 923 (1998) (noting that “ongoing relationships are not jeopardized by comparatively anonymous participation in class litigation in the way that follows from direct adversary litigation.”). The effect of a total prohibition on joint, class, collective, and representative actions is to force every worker who wants to vindicate workplace rights to shed anonymity, identify him or herself to the employer as a litigant, and therefore risk retaliation, blackballing, or other negative consequences as a result of having taken affirmative steps to vindicate commonly held and legally protected workplace rights.

Third, the class action mechanism ensures that notice of legal rights – functionally, an invitation to join in a common legal effort – will be communicated to workers who would not otherwise be aware of their right to seek legal relief. It is simply not true, and could not possibly be true, that company-wide discrimination, misclassification, or other common employment law violations are necessarily limited only to current workers in small, single shop workplaces, who work the same shift and know each other and their legal rights. Class actions serve the vital purpose of helping protect those who might otherwise not know they have been the victims of illegal conduct, because victims of employer misconduct are often *not* known to each other and *not* aware of their rights. *See Gentry*, 42 Cal.4th at 461-62; *see also* DOL Fall 2009 Regulatory Agenda, 74 Fed. Regis. No. 233 (Dec. 7, 2009) at 51 (announcing DOL’s new regulations designed to create greater transparency to workers and explaining that providing increased information to workers about their rights and working conditions is essential to increased workplace law enforcement). Inadequate knowledge of workplace rights is particularly pronounced for workers with limited English language skills, who lack education, are transient,

are not organized, or who labor in high-turnover industries. *Id.*^{12/}

In sum, not only do class action prohibitions directly violate the Section 7 right to engage in concerted activity, but they also provide a dangerously efficient mechanism for ensuring that workers do not, in practice, have the ability, information, or opportunity to vindicate their and their co-workers' commonly held workplace rights. This adverse impact is particular hard on workers in low-wage industries, precisely where more effective enforcement of workers' rights is desperately needed. Cynthia Estlund, *Rebuilding the Law of the Workplace In An Era of Self-Regulation*, 105 Colum. L. Rev. 319, 347-52 (2005) (documenting the "outlaw" nature of many national industries in the area of wage enforcement; noting, for example, that the janitorial services industry operates as a "virtual outlaw in violation of . . . wage and hour laws, and other labor protections"); Ruth Milkman, Ana Luz Gonzalez, Victor Narro, *Wage Theft and Workplace Violations in Los Angeles: The Failure of Employment and Labor Law for Low-Wage Workers* (UCLA Inst. for Research on Labor and Employment 2010); Lora Jo Foo, *The Informal Economy: The Vulnerable & Exploitable Immigrant Workforce & the Need for Strengthening Worker Protective Legislation*, 103 Yale L.J. 2179, 2182 (1994).^{13/}

^{12/} In addition to preventing workers from pursuing joint or classwide claims on behalf of co-workers who would not otherwise have the knowledge or ability to file individual claims themselves, a class action prohibition like D.R. Horton's workplace rule at issue also has the effect of reducing the value of many absent class members' claims. When the plaintiffs' claims arise under a statute like the FLSA or ADEA (which require absent class members to file a Consent to Sue to be joined in the collective action, *see supra* at 2-3 n.3), the statute of limitations continues to run on each absent class member's claim until that worker's Consent to Sue form is filed – meaning that any delay caused by having to litigate threshold issues of enforceability has a demonstrably adverse economic impact on many absent class members.

^{13/} The 2010 Los Angeles Wage Theft study concludes that almost 30% of the low-wage workers sampled (based on a population of 744,220 workers) were paid less than the minimum
(continued...)

V. THE PROPOSED ALTERNATIVE REMEDY SET FORTH IN THE GENERAL COUNSEL'S EXCEPTION NO. 10 IS NOT ADEQUATE TO ELIMINATE THE EMPLOYER'S VIOLATION OF ITS EMPLOYEES' SECTION 7 RIGHTS.

For the reasons stated above, amici fully support the relief requested in the General Counsel's Exceptions Nos. 7-9 and 11-12. In particular, we agree that the Board should order D.R. Horton to rescind its class action prohibition and cease and desist from seeking to enforce that prohibition.^{14/}

Where we part ways with the General Counsel, however, is with respect to Exception No.

^{13/} (...continued)

wage, 79.2% of those workers who were employed more than 40 hours per week by a single employer were not paid the legal overtime rate, 71.2% of those who worked before or after their regular shifts were not paid for non-shift time, and 80.3% were denied their legally required meal periods. *Wage Theft and Workplace Violations in Los Angeles*, at 1-3. Nearly half of the workers in that survey who reported having complained about workplace conditions to their supervisors or having attempted to organize also reported that their employers later retaliated against them; and more than 20% of the surveyed workers reported that they would not complain about even the most serious workplace violations, such as dangerous workplace conditions, discrimination, and minimum wage violations, because they were afraid of losing their jobs (59.7%), they feared retaliatory loss of pay or hours (13.6%), or they thought it would make no difference (31.4%). *Id.* at 3.

^{14/} While the General Counsel's Exceptions broadly refer to requiring D.R. Horton to rescind and to cease seeking enforcement of its *entire* mandatory arbitration agreement ("MAA"), we understand that is because D.R. Horton took the position before the ALJ that if the class action prohibition in ¶6 of its MAA were held unlawful under Section 8(a)(1), it would prefer to have its entire MAA rescinded, and not just that one provision. Conceptually, though, the Board need only – and should only – order the company to rescind the class action prohibition itself. If D.R. Horton then decides, for its own reasons, to withdraw its entire MAA in the absence of that class action prohibition, it can do so in compliance with the remaining provisions of its MAA. *See* JX 2 ("This Agreement may be modified or revoked by the Company by providing thirty days written notice to employees. . . . If any provision or portion thereof of this Agreement is deemed invalid or unenforceable, such provision shall be modified and reformed to the extent necessary to render the Agreement valid and enforceable. If a provision cannot be modified, it will be severed from the Agreement or be deemed ineffective to the extent necessary to allow the remaining provisions to be valid and enforceable.").

10, which amici believe is unnecessary and perhaps inadequate, depending on what the General Counsel is actually suggesting.

In Exceptions Nos. 7-9 and 11-12, the General Counsel takes the position that the only way D.R. Horton can remedy its previous and current violations of Section 7 and Section 8(a)(1) is to rescind its class action prohibition in its entirety and to cease any ongoing efforts to enforce that prohibition. Amici fully support those exceptions.

Less clear is Exception No. 10 and the long paragraph near the end of the General Counsel's supporting brief. In that Exception and argument, the General Counsel takes the position that D.R. Horton should be allowed to impose a *new* mandatory arbitration agreement, after rescinding its present agreement, as long as the new agreement includes three additional provisions that are not present in its current agreement:

1. A notice to employees that the new Agreement is not intended to constitute a waiver of their Section 7 right to concertedly pursue any covered claim on a class, collective, or joint action basis;

2. A notice to employees that D.R. Horton recognizes their right to challenge the validity of the mandatory arbitration agreement under "such grounds as may exist at law or in equity," *i.e.*, as procedurally and substantively unconscionable; and

3. A notice to employees that they will not be disciplined, discharged, or otherwise retaliated against for exercising their Section 7 right to file or join a class action.

If these additional provisions are added to a new mandatory agreement that has *no* class action prohibition language – *i.e.*, if ¶6 is deleted in its entirety and not reinstated – then amici support the additional language requested by the General Counsel in Exception No. 10.

However, it is not entirely clear from the language of Exception No. 10 (or from the General Counsel's supporting brief) whether that proposed alternative remedy: 1) would only allow D.R. Horton to reinstate the mandatory agreement *without the class action prohibition*, if these additional disclosures are made; or 2) would allow D.R. Horton to reinstate its mandatory arbitration agreement *with its class action prohibition*, if these additional disclosures are made.

Nothing in the actual language of the General Counsel's Exceptions and supporting brief asks the Board to allow D.R. Horton to reinstate its class action prohibition in a future agreement. To the contrary, the General Counsel in his Exceptions asks the Board to find that the class action prohibition violates Section 7 and must be rescinded in its entirety on a company-wide basis; and the new disclosures requested by Exception No. 10 simply reaffirm the employees' Section 7 right to pursue claims on a joint, class, and collective basis and to "concertedly challenge the validity of the *forum waiver* in the Agreement" (emphasis added) – without making any reference to any newly reinstated class action prohibition.

Amici have some concern, though, that what the General Counsel actually *intends* in Exception No. 10 is not what Exception No. 10 actually *asks for*, and that in fact the General Counsel is suggesting that the Board may permit D.R. Horton to reinstate its class action prohibition going forward if the company also includes the new disclosure language. We express that concern because the previous General Counsel allowed Neiman Marcus to add similar disclaimers to its class action prohibition as a basis for settling amicus Taylor Bayer's charge against Neiman Marcus (over the objection of amici SEIU and Taylor Bayer, and the AFL-CIO) and because the previous General Counsel also declared in his General Counsel Memorandum 10-6, "Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Employee

Waivers in the Context of Employers' Mandatory Arbitration Policies" (June 16, 2010), that including these disclaimers would be sufficient to avoid a Section 8(a)(1) violation, even where the employer continued to prohibit class actions.

Amici's position is that class action prohibitions cannot be allowed under any circumstance, and that no form of supplemental notice is sufficient to remedy the Section 8(a)(1) violation resulting from such a prohibition. Informing employees that a class action prohibition is in effect, but that the employer does not intend that prohibition to constitute a waiver of the employees' Section 7 right to concertedly pursue any covered claim on a class, collective, or joint action basis, is of little value to employees who are still prohibited from "proceeding as a class or collective action" or from obtaining "relief [as] a group or class of employees in one arbitration proceeding," as currently provided in JX 2, ¶6. By way of analogy, to tell workers that they are prohibited from joining a union, but that the prohibition is not intended to constitute a waiver of their Section 7 rights, would surely not pass Section 8(a)(1) muster – yet that seems to be what GC Memo 10-6 is suggesting would be permissible.

Similarly, there is little utility in requiring D.R. Horton to provide notice to its employees telling them that the company recognizes their right to challenge the validity of the mandatory arbitration agreement (and presumably its class action prohibition) under "such grounds as may exist at law or in equity," if the workers are deprived of their right to have such a class action prohibition declared invalid and unenforceable by the Board under Section 7 and Section 8(a)(1). Again, no one would seriously argue that an employer could prohibit employees from joining a union, or engaging in other core Section 7-protected conduct, as long as the workers were told that they could challenge that Section 7 violation in some non-NLRB forum, under some non-

NLRA standard, that serves different purposes and goals than Section 7 was designed to protect.

If Exception No. 10 is intended to allow D.R. Horton to reinstate its class action prohibition and thus to prohibit workers from engaging in Section 7 activity, as long as the workers may challenge that prohibition as “unconscionable” under state law, that remedy is legally inadequate. The NLRA has never been construed, nor should it be, to allow an employer to avoid liability for a policy that violates Section 7 and Section 8(a)(1) by asserting as a defense that its workers will be allowed to challenge that policy on some grounds *other* than that it violates Section 7. State unconscionability law and Section 7 law are not parallel or co-extensive: they serve different purposes, implicate different policies, and protect different rights.^{15/} Any such remedy would transform Section 7 from a uniform, nationwide right protected by federal labor policy to a right whose scope and enforcement varies from state to state depending on the peculiarities of each state’s contract laws.

What is more, the mere possibility that an employee of D.R. Horton might succeed in showing that a particular class action prohibition is unconscionable under the law of Texas (which is the governing law designated in the Agreement’s choice-of-law clause, *see* JX 2 ¶2)

^{15/} State unconscionability law, after all, is a product of contract law, designed to address situations where there is “an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.” *Sonic-Calabasas A, Inc. v. Moreno*, __ Cal.4th __, 2011 WL 651877, at *12 (Feb. 24, 2011). State unconscionability law is not limited to the employment contract context, and is by no means designed to address the rights of employees under the NLRA. Section 7 protections, by contrast, do not depend on the existence of a contract at all, let alone a contract of adhesion or a procedurally unconscionable contract. An explicit prohibition on the Section 7 right to take concerted action violates Section 8(a)(1), moreover, regardless of whether it is contained in an unconscionable contract. Just as the courts have no power to consider whether an employment contract violates Section 7 (which is exclusively for the Board to decide), neither does the Board consider whether an agreement is procedurally and substantively unconscionable under state law in deciding it deprives workers of their Section 7 rights in violation of Section 8(a)(1).

does not negate the severe chilling effect of D.R. Horton's prohibition. The burden (and risk) of bringing such an unconscionability challenge (or in demonstrating as a threshold matter that the Texas choice-of-law clause is inapplicable and unenforceable, *see, e.g., Narayan v. EGL, Inc.*, 616 F.3d 895 (9th Cir. 2010)) is substantial, even in states with more robust unconscionability protections than Texas; and the imposition of that burden and is itself sufficient to chill the exercise of Section 7 rights.^{16/}

For largely these same reasons, D.R. Horton should not be able to escape its obligations under Section 7 by reassuring workers that they will not be disciplined, discharged, or otherwise retaliated against if they try to exercise their Section 7 right to file or join a class action. There is no meaningful distinction under Section 8(a)(1) between *prohibiting* concerted Section 7 activity and *disciplining* or *discharging* an employee for engaging in that activity. To the contrary, the Board has held that even where an employer does not couple its improper prohibition of concerted activity with an explicit threat that it will discipline any employee who violates that

^{16/} It is true that some state and federal courts in recent years have struck down class action prohibitions in adhesive employment (and consumer) contracts on state law public policy or unconscionability grounds, after finding that those prohibitions have the practical effect of depriving potential class action plaintiffs of the opportunity to vindicate underlying rights. *See, e.g., Gentry*, 42 Cal.4th at 465 & n.8 (class action prohibition violates statutory rights whether applied to litigating employee or arbitrating employee); *Murphy v. Check 'N Go*, 156 Cal.App.4th 138 (2007) (same); *McKenzie v. Betts*, ___ So. 3d ___, 2011 WL 309318, at *12 (Fla. App. Feb. 2, 2011); *Fiser v. Dell Computer Corp.*, 188 P.3d 1215 (N.M. 2008); *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976, 984 (9th Cir. 2007); *Kinkel v. Cingular Wireless, LLC*, 857 N.E.2d 250, 274-75 (Ill. 2006); *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 210 Or. App. 553 (2007). It is also true that some other courts, in other jurisdictions, have ruled otherwise. *See, e.g., Fonte v. AT&T Wireless Svcs., Inc.*, 903 So. 2d 1019, 1025 (Fla. App. 2005); *Rains v. Foundation Health Sys. Life and Health*, 23 P.3d 1249, 1253 (Colo. App. 2001). But whether or not D.R. Horton's class action prohibition is enforceable as a matter of state unconscionability law (either under the designated Texas law or some other applicable state's law) should have no bearing on whether that class action prohibition is enforceable under Section 7 and Section 8(a)(1) of the NLRA.

prohibition, the prohibition itself, standing alone, will “interfere with, restrain, or coerce” employees in the exercise of protected rights where it chills concerted activity. *See U-Haul*, 347 NLRB at 377-78; *see also supra* 10-13. After all, in such cases the employer will have retained a far more powerful weapon against the exercise of Section 7 rights than the threat of discipline – the threat that it will devote its considerable legal resources to obtaining judicial enforcement of its class action prohibition.

Thus, if D.R. Horton is allowed to reinstate and seek judicial enforcement of its class action prohibition, the fact that it may be willing in exchange not to discipline any worker who is bold enough (or sufficiently well-financed, or foolhardy enough) to challenge the enforceability of that prohibition in court does little to protect the Section 7 rights of workers who are still subject to the prohibition. Under those circumstances, D.R. Horton’s workplace rule would still impose a substantial chill on protected Section 7 activity, because it would still impose a significant economic and practical cost upon every employee who chooses to bring a collateral challenge to that rule: the enormous burden of having to litigate over the enforceability of the class action provision under state unconscionability law. To return to the previous analogy, a employer’s prohibition against its workers joining a union would surely be found to violate Section 7 whether or not the employer promised not to discipline any employee who decided to file a lawsuit to challenge the validity of that prohibition on non-NLRA grounds in court.

Finally, even apart from these substantive concerns, it seems apparent that coupling the proposed disclosures with a reinstated prohibition against joint, class, and collective actions would likely be confusing and highly misleading to most workers. An employee who read the proposed notice and its reference to the employees’ Section 7 rights would reasonably believe

that D.R. Horton will *not* seek to enforce its class action prohibition, because that would be inconsistent with the notice's articulation of Section 7 rights. As a result, the General Counsel's proposed alternative remedy – if that is in fact what Exception No. 10 is urging – could lead to a situation in which D.R. Horton's employees are affirmatively misled, because on the one hand they are told that they have a Section 7 right to pursue class action relief (especially if they learn that D.R. Horton was required to rescind its prior agreement which prohibited joint, class, and collective actions), yet they are never told that in fact D.R. Horton still has the right to seek judicial enforcement of its reinstated class action prohibition.

For all these reasons, the additional disclosures described in Exception No. 10 are not be nearly adequate to eliminate the Section 8(a)(1) violation that would result if D.R. Horton were permitted to reinstate its across-the-board prohibition against joint, class, and collective actions.

CONCLUSION

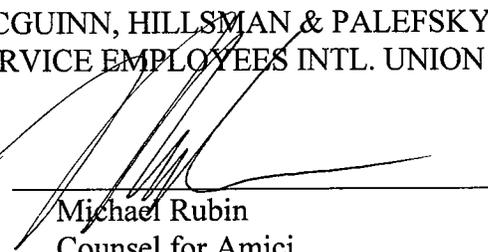
For the reasons stated above, the Board should reverse the ALJ's decision regarding Section 8(a)(1) and should hold that D.R. Horton's prohibition on all joint, class, and collective actions in any forum interferes, restrains, or coerces employees in the exercise of their Section 7 rights and violates Section 8(a)(1), and that it must permit its employees to pursue joint, class, and collective actions on any basis not expressly prohibited by law.

Dated: March 25, 2011

Respectfully submitted,

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By


Michael Rubin
Counsel for Amici

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

D. R. HORTON, INC.

and

MICHAEL CUDA, an individual

NLRB Case No. 12-CA-25764

CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2011, the foregoing document

**Application for Leave to File Brief as Amici Curiae in Support of General Counsel's
Exceptions; [Proposed] Brief Amici Curiae in Support of General Counsel's Exceptions on
Behalf of Service Employees International Union, Alton Sanders, and Taylor Bayer**

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A handwritten signature in black ink, appearing to read 'Michael Rubin', is written over a horizontal line.

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