

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

**BRIEF OF *AMICI CURIAE* THE EQUAL EMPLOYMENT ADVISORY COUNCIL, THE  
HR POLICY ASSOCIATION, THE SOCIETY FOR HUMAN RESOURCE  
MANAGEMENT, THE CALIFORNIA EMPLOYMENT LAW COUNCIL AND  
EMPLOYERS GROUP IN SUPPORT OF THE RESPONDENT EMPLOYER**

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The Equal Employment Advisory Council, the HR Policy Association, the Society for Human Resource Management, the California Employment Law Council and Employers Group (collectively, “*Amici*”) respectfully submit this brief *amici curiae*, which addresses whether including class action waivers in predispute arbitration agreements required to be signed by employees as a condition of employment violates Section 8(a)(1) of the National Labor Relations Act (“NLRA” or the “Act”), 29 U.S.C. §§ 151 *et seq.* *Amici* urge the Board to hold that such agreements do not violate Section 8(a)(1) of the Act, as a contrary ruling would contradict long-standing federal law, Supreme Court precedent, and important federal policy goals.

### **STATEMENT OF INTEREST**

*Amici* are organizations comprised of human resources professionals working for employers covered by the Act. The Equal Employment Advisory Council (“EEAC”) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 300 major U.S. corporations collectively employing close to twenty million people. EEAC’s directors and officers include many of the nation’s leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and practices. EEAC member companies, many of which conduct business in numerous states, are strongly committed to equal employment opportunity and seek to establish and enforce internal policies that are consistent with federal employment non-discrimination laws. This commitment extends to the prompt and effective resolution of employment disputes using arbitration and other forms of alternative dispute resolution. A number of EEAC member companies thus have adopted company-wide policies requiring the use of arbitration to resolve all employment-related disputes. Some of those arbitration

agreements contain class action waiver provisions, which primarily are designed to preserve the benefits of arbitration while at the same time avoiding costly, complex, and protracted class-based litigation.

HR Policy Association is a public policy advocacy organization representing the chief human resource officers of major employers. The Association consists of more than 325 of the largest corporations doing business in the United States and globally, and these employers are represented in the organization by their most senior human resource executive. Collectively, their companies employ more than 10 million employees in the United States, nearly nine percent of the private sector workforce. Since its founding, one of HR Policy Association's principal missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to the realities of the workplace.

The Society for Human Resource Management ("SHRM") is the world's largest association devoted to human resource management. Representing more than 250,000 members in over 140 countries, the Society serves the needs of human resource ("HR") professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China and India. Part of its mission is to work with various lawmaking entities to ensure that they are aware of important issues facing employers and human resource professionals.

The Employers Group, a California non-profit organization, is the nation's oldest and largest human resources management organization for employers. It represents nearly 3,500 California employers of all sizes and every industry, which collectively employ nearly 3 million employees. The Employers Group also provides live helpline assistance, online resources/tools, and in-company human resources consulting services and support to its members. As part of its

mission, the Employers Group seeks to enhance the predictability and fairness of the laws and decisions regulating employment relationships. As such, the Employers Group has a vital interest in seeking clarification and guidance from the Board for the benefit of its employer members and the millions of individuals they employ.

The California Employment Law Council (“CELC”) is a voluntary, nonprofit organization that promotes the common interests of employers and the general public in fostering the development of reasonable, equitable, and progressive rules of employment law in California. CELC’s membership includes approximately 50 private sector employers in the State of California, who collectively employ well in excess of a half-million Californians.

All *Amici* represent organizations and HR professionals who use or have seriously considered using arbitration programs as a means of providing a fair, cost-effective resolution of employment disputes, for employers and employees alike. In some cases, these predispute arbitration agreements have been required as a condition of obtaining and retaining employment. In accordance with the “Due Process Protocol” adhered to by the leading arbitration organizations, employer arbitration programs provide fair procedures, authorize arbitrators to apply statutory as well as contractual law, and provide arbitrators with the ability to issue legally authorized remedies where violations are found. The ability of the members of *Amici* to design and implement such arbitration programs is important to the members’ organizational objectives in dealing with their most important resource, their employees, and to the leadership role provided by the labor relations and human resources professionals in each of the *Amici* organizations. *Amici* submit this brief in support of allowing employers and employees to negotiate individual employment agreements providing for the mandatory arbitration of disputes

and containing a class action waiver clause; and do not believe that such agreements abridge any rights guaranteed to employees under Section 7 of the Act.

### **SUMMARY OF POSITION OF *AMICI***

Well-designed arbitration programs save employers and employees alike time and valuable resources. Arbitration is best viewed as a bilateral process agreed to by the affected parties themselves. As the U.S. Supreme Court recently affirmed, *see AT&T Mobility LLC v. Concepcion*, 563 U.S. \_\_\_, 131 S.Ct. 1740 (2011); *Stolt-Nielsen S.A. v. Animal Feeds Int’l Corp.*, 559 U.S. \_\_\_, 130 S.Ct. 1758 (2010), any direct or indirect legal imposition of classwide proceedings is inimical to the concept of consensual arbitration. Mandating that employers be subject to class action arbitration would not only significantly increase the cost of this important dispute resolution mechanism, but as a matter of policy, would significantly lessen the comparative advantages of arbitration over litigation.

The Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1 *et seq.*, provides an opportunity for parties to design their own arbitration agreements within the provisions of the statute. Indeed, it bars the states from interpreting their state law to block an arbitration from going forward except on a classwide basis or erecting special roadblocks that have the effect of barring enforcement of class action waivers. *See Concepcion*, 131 S.Ct. at 1751 (holding that “class arbitration, to the extent it is...[not] consensual, is inconsistent with the FAA.”); *Stolt-Nielsen*, 130 S.Ct. at 1775 (holding that a party may not be compelled to submit to class arbitration without both parties’ consent in the arbitration agreement).

In *Amici*’s view, the NLRA does not provide authority for the National Labor Relations Board (“NLRB” or the “Board”) to rule that a class action waiver concerning only non-NLRA claims in non-union settings violates Section 7. In addition to the issue of the Board’s authority *vel non*, any such ruling would, in effect, be mandating that the parties provide for the use of

class arbitration in order for a predispute arbitration agreement to be valid. There is a strong national policy favoring the enforcement of arbitration agreements according to their terms, and if class arbitration were required to be part of predispute arbitration agreements, it would take the decision as to whether class proceedings should be permitted to proceed out of the hands of the parties and instead allow the Board to dictate the terms of such private agreements. This outcome would be contrary to federal arbitration policy and a disservice to the interests of employers and employees alike.

### **STATEMENT OF THE CASE**

As the parties' briefs and the Administrative Law Judge ("ALJ") describe in greater detail, this case involves allegations that Respondent D.R. Horton ("D.R. Horton"): (1) violated Section 8(a)(1) of the NLRA by requiring a mandatory arbitration agreement containing a class arbitration waiver as a condition of employment; and (2) violated Section 8(a)(1) and Section 8(a)(4) of the Act by promulgating mandatory arbitration agreements that led employees to reasonably believe they were barred or restricted from filing charges with the NLRB. *See* Decision of Administrative Law Judge William N. Cates, No. 12-CA-25764, slip. op. at 2 (Jan. 3, 2011) (hereinafter "ALJ Dec."). On June 16, 2011, the Board invited interested persons or organizations to file *amici* briefs on the first issue, stated as:

Did the Respondent violate Section 8(a)(1) of the Act by maintaining and enforcing its Mutual Arbitration Agreement, under which employees are required, as a condition of employment, to agree to submit all employment disputes to individual arbitration, waiving all rights to a judicial forum, where the arbitration agreement further provides that arbitrators will have no authority to consolidate claims or to fashion a proceeding as a class or collective action?

The Board's notice also stated: "[t]he judge concluded, however, that the Respondent violated Sec. 8(a)(4) and (1) because, he found, employees would reasonably read the arbitration

agreement as barring them from filing charges with the Board; and the Respondent has excepted. The Board does not invite briefs on this issue.” Given the scope of the Board’s invitation, this brief does not reach the latter issue. This brief addresses only the issue of whether a class action waiver clause, standing alone, interferes with the employee’s Section 7 right to engage in protected concerted activity.

The arbitration agreement at issue is D.R. Horton’s Mutual Arbitration Agreement (“MAA”), which requires that, as a condition of employment, employees agree that “all employment disputes and claims shall be determined exclusively by final and binding arbitration before a single, neutral arbitrator.” ALJ Dec. at 2. The agreement contains a clause which states the following:

[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.

*Id.*

On February 13, 2008, attorney for the charging party Michael Cuda sent D.R. Horton a letter explaining that the attorney’s firm had been retained to represent Cuda, five other named employees and a class of similarly situated employees alleging claims under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. §§ 201-219, and that they sought to pursue their claims in arbitration on a classwide basis. ALJ Dec. at 3. After some additional correspondence, D.R. Horton’s counsel notified Cuda’s attorney that the MAA barred classwide arbitration and it would not agree to arbitrate the FLSA claims on that basis. *Id.* Thereafter, an unfair labor practice charge was filed by Cuda and the Acting General Counsel of the Board issued a

complaint against D.R. Horton alleging that its class action waiver clause violated Section 8(a)(1) of the Act.

After a hearing, the ALJ ruled that the class action waiver D.R. Horton included in its MAA did not violate Section 8(a)(1) of Act because (1) the Supreme Court has allowed compulsory arbitration of employment claims in unionized and non-unionized settings; (2) there are no Board decisions finding that arbitration clauses cannot “lawfully prevent class action lawsuits or joinder of arbitration claims”; and (3) the Supreme Court’s recent decision in *Stolt-Nielsen S.A. v. Animal Feeds Int’l Corp.*, 559 U.S. \_\_\_, 130 S.Ct. 1758, 1773-75 (2010), makes clear that a party cannot be required to submit to class arbitration unless that party has agreed to do so. ALJ Dec. at 4-5. The Acting General Counsel then submitted exceptions to the ALJ decision, the most pertinent (for present purposes) being that the ALJ erred by failing to find that the class action waiver violated Section 8(a)(1). He argued that: (1) the filing of class and collective lawsuits is protected activity under Section 7; (2) an employer’s requirement that an employee waive his or her right to file a class or collective action violates Section 8(a)(1) of the Act; and (3) D.R. Horton’s mandatory arbitration agreement either explicitly waived employees’ rights to file class or collective claims inside or out of the judicial forum or it is reasonably read as preventing employees from filing class or collective lawsuits.<sup>1</sup> *Amici* agree that in some instances proposition (1) is correct, but maintain that propositions (2) and (3) are legally erroneous and, if they mean that the parties cannot negotiate binding class action waivers, are beyond the Board’s authority. D.R. Horton’s arbitration agreement did not itself prevent employees from filing class suits or discriminate against employees who file such suits. Whether

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<sup>1</sup> D.R. Horton also submitted exceptions to the ALJ decision, but the Board has not invited amicus briefs on those exceptions, so they are not discussed in this brief.

such a filing would have a legal effect depends on the law of the forum, which is governed by the Federal Arbitration Act, not the NLRA as construed by the Board.

### **SUMMARY OF ARGUMENT**

The Federal Arbitration Act (“FAA”), which governs predispute and postdispute arbitration agreements, requires that arbitration agreements be enforced according to their terms, including any applicable rules regarding whether class actions are prohibited or permissible under the agreement. There is no requirement under the FAA that class arbitration be offered as part of an arbitration agreement. Indeed, the Supreme Court has held that a classwide proceeding in arbitration, unless consented to by the parties, may be fundamentally inconsistent with the arbitration process. There is a strong federal policy set forth by the FAA and the Supreme Court’s recent decisions favoring predispute arbitration agreements, even if they are: (1) obtained as a condition of employment, (2) cover statutory as well as contractual claims, and (3) the parties agree to exclude class actions or class arbitration.

The Supreme Court has made it equally clear that the Board cannot disregard federal laws and policies outside the NLRA in carrying out its mission. As such, the Board does not have the authority to require that the terms of arbitration agreements covering non-NLRA claims be vacated or to mandate that certain procedural devices be included in those arbitration agreements in order for them to be enforceable. The Board has extremely limited authority over the interpretation and enforcement of collective bargaining agreements; and even less authority regarding policies, procedures and employment agreements of non-union employees. In June 2010, then General Counsel Meisburg issued a memorandum to the regions determining that “an individual employee’s agreement not to utilize class action procedures...does not involve a waiver of any Section 7 right.” This memorandum, which remains in effect, was rightly decided; an individual employee’s agreement to arbitrate non-NLRA claims in an arbitral forum without a

class action or class claim procedure involves a procedural, lawful rule of the forum which has nothing to do with the NLRA; such an agreement certainly does not violate Section 7. If the Board in this case were to bypass this Memorandum, which was issued less than a year ago, it would create uncertainty in the Board regions in their enforcement efforts and create confusion among employees, employers and labor organizations as to the current state of Board law in this important area.

Moreover, the Board should not involve itself any further in non-union, non-NLRA employment law matters far removed from its core mission by revisiting arguments that class action waivers violate Section 7 that were thoroughly considered and rejected in the recent General Counsel Memorandum. Further, if the Board were to find a violation of Section 7 rights in individual non-union employment agreements requiring arbitration of non-NLRA claims without a class action mechanism, the issue would certainly be appealed to the Court of Appeals and possibly the Supreme Court, where it would be overturned based on several decades of well-established Supreme Court precedent.

## **ARGUMENT**

### **I. THE FEDERAL ARBITRATION ACT AND SUPREME COURT PRECEDENT REQUIRES ENFORCEMENT OF PREDISPUTE ARBITRATION AGREEMENTS ACCORDING TO THEIR TERMS, INCLUDING ANY APPLICABLE CLASS ACTION WAIVERS, AND THE BOARD LACKS AUTHORITY TO ACT IN DISREGARD OF THIS LAW**

The Supreme Court has made it clear that arbitration agreements, including any class action waivers contained in such agreements, should be enforced according to their terms, and that the FAA does not bar employers from including class action waivers in arbitration agreements. The Board lacks authority to disregard the mandate of the FAA that arbitration agreements are to be interpreted according to their terms. The Acting General Counsel's position would essentially interpose a class action or class arbitration mechanism which has not

been agreed to by the parties. A Board ruling here that class action waivers, otherwise lawful under the FAA, violate Section 7 rights, and are therefore unenforceable, would fly in the face of binding Supreme Court precedent that such agreements are lawful and fully enforceable.

**A. Federal Law Favors Enforcement Of Predispute Arbitration Agreements Even If Required As A Condition Of Employment**

Federal law and policy generally favor arbitration, and in particular, the use of predispute arbitration agreements. The FAA requires that all covered arbitration agreements are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. As such, in determining whether an arbitration agreement is valid, the states may only apply generally applicable contract principles, and cannot create special rules to limit or expand the terms of arbitration agreements, even where they purport to do so as a matter of their strongly held public policy. *See Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 281 (1995); *Perry v. Thomas*, 482 U.S. 483 (1987). Similarly, the NLRB or other federal agencies also cannot ignore applicable federal statutory law. *See Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942) (“It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives.”); *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002). Only Congress can create different rules regarding the permissible scope of arbitration agreements.

The Supreme Court has squarely ruled that the FAA applies fully to predispute arbitration agreements required as a condition of employment. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Court held that predispute arbitration agreements could lawfully encompass arbitration of statutory claims, including claims under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* In *Circuit City Stores, Inc. v. Adams*, 532 U.S. 102

(2001), the Court further decided that the FAA mandated enforcement of predispute arbitration agreements obtained from all new and existing employees as a condition of employment, even if the disputes to be arbitrated involved federal statutory employment claims.

**B. Predispute Arbitration Agreements Must Be Interpreted According To Their Terms Under the FAA, Whether Or Not They Provide For Class Actions**

The procedures governing private arbitration under individual agreements, including the availability of the class action joinder device, are determined solely by the contract between the employer and the employee in question. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. \_\_\_, 131 S.Ct. 1740, 1748 (2011) (“The ‘principal purpose’ of the FAA is to ‘ensur[e] that private arbitration agreements are enforced according to their terms.’”) (internal citation omitted).

Whether class arbitration is permissible is no exception to the rule of private party determination; that question, like others about the scope and nature of the proceeding, should be decided by “enforcing the parties’ arbitration agreement[] according to [its] terms.” *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 454 (2003). Indeed, the Supreme Court recently categorically held that “a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.” *Stolt-Nielsen S.A. v. Animal Feeds Int’l Corp.*, 559 U.S. \_\_\_, 130 S.Ct. 1758, 1775 (2010). In other words, if the agreement between the parties does not provide for class arbitration, courts should not and may not impose it on the parties. Similarly, if the agreement prohibits class arbitration, courts should enforce the agreement including its terms.

This point is illuminated by the recent Supreme Court decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. \_\_\_, 131 S.Ct. 1740, 1748 (2011). There, the Court rejected the application of the California state “unconscionability” doctrine where an arbitration agreement did not provide for class arbitration. The Court held that “[r]equiring the availability of classwide

arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” Thus, in that case, the judicially-created California *Discover Bank* rule, whereby a consumer contract providing for mandatory arbitration of claims worth small amounts of money is deemed to be unconscionable, was held to be “preempted by the FAA” because while it “does not *require* classwide arbitration, it allows any party to a consumer contract to demand it *ex post*.” *Id.* at 1750, 1753. *See Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005).

Further, the Supreme Court has determined that arbitration agreements that do not provide for class actions can adequately further the purposes of federal statutory law. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (rejecting the argument that “arbitration procedures cannot adequately further the purposes of [federal age discrimination law] because they do not provide for broad equitable relief and class actions.”). The federal courts of appeals have held that the FAA requires enforcement of predispute arbitration agreements dealing with claims under a wide range of federal statutes, including the FLSA (the statute that charging party Cuda relied upon in his demand for arbitration) and the Truth-in-Lending Act (“TILA”). *See, e.g., Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1366, 1378 (11th Cir. 2005) (provision barring covered claims from being “brought as a class or collective action” in arbitration “consistent with the goals of ‘simplicity, informality, and expedition’ touted by the Supreme Court in *Gilmer*”); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298, 301 (5th Cir. 2004) (provision in arbitration agreement preventing “joinder” permissible under Texas law and the FLSA); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002) (arbitration agreement precluding class actions permissible because there is no evidence that “Congress intended to confer a nonwaivable right to a class action under [the FLSA]”); *Johnson v. West*

*Suburban Bank*, 225 F.3d 366, 369, 377-78 (3d Cir. 2000) (holding that the right to class actions for federal statutory violations, including the TILA claims at issue, can be waived as part of an arbitration agreement because it is merely a procedural right); *Bowen v. First Family Fin. Servs., Inc.*, 233 F.3d 1331 (11th Cir. 2000) (holding that “neither the text nor the legislative history of the TILA establishes that the plaintiffs have a non-waivable right to pursue a class action, or even to pursue an individual lawsuit, as distinguished from pursuing arbitration in order to obtain remedies for violations of the statute”).

Thus, in establishing a procedural rule that an arbitrator does not have the power to consolidate arbitration proceedings or arbitrate claims on a classwide basis, D.R. Horton’s MAA is in full compliance with the FAA. As such, the FAA requires that the class action waiver in the MAA be enforced according to the parties’ agreement.

### **C. The Board Cannot Disregard Federal Statutory Law Under The FAA**

By issuing a complaint on the theory that somehow Section 7 rights are violated by class action waivers in non-union individual arbitration agreements covering non-NLRA claims, the Acting General Counsel is effectively disregarding the above federal statutory law under the FAA that arbitration agreements should be enforced according to their terms.

The Board, like other federal agencies, cannot disregard applicable federal statutory law in enforcing the NLRA. *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942) (“It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives.”). In instances where Board orders have conflicted with other federal laws, including criminal mutiny laws and immigration laws, the Supreme Court has refused to enforce those orders. For example, in *Southern S.S.*, the Court considered a Board Order that required the reinstatement of five employees who had been discharged because of their

participation in a labor strike undertaken while aboard a ship away from their home port. Because the strike was found to violate federal mutiny laws barring work stoppages by seamen while away from home port, the Court held that the portion of the Board's order calling for reinstatement of the terminated employees exceeded the Board's authority under the NLRA. *Id.* at 47-48. Similarly, in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), the Court ruled that the Board lacked authority to issue a backpay award to an undocumented resident because such an award conflicted with federal immigration law prohibiting an undocumented resident from gaining employment in the country. The Court made clear that it would not defer to the "Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA." *Id.* at 144. *See also Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 903 (1984) (reversing Board backpay award to undocumented residents because the Board was obligated to take into account the "objective of deterring unauthorized immigration that is embodied in the [immigration laws]"); *cf. Detroit Edison Co. v. NLRB*, 440 U.S. 301, 316 (1979) (even the Board's remedial discretion to redress violations "does not constitute a blank check for arbitrary action" and cannot ignore employer's important interests in maintaining the integrity of employment and the privacy of employee test scores).

The Board simply cannot ignore other applicable federal law. In *NLRB v. Bildisco and Bildisco*, 465 U.S. 513 (1984), the Supreme Court overturned a Board Order finding a unilateral employer change in terms and conditions to be a violation of Section 8(d) of the Act where the employer was a debtor-in-possession under the bankruptcy law. The Court held that "Board enforcement of a claimed violation of § 8(d) under these circumstances would run directly counter to the express provisions of the Bankruptcy Code and to the Code's overall effort to give a debtor-in-possession some flexibility and breathing space." *Id.* at 532. *See also Denver & Rio*

*Grande W. R.R. Co. v. United States*, 387 U.S. 485, 492 (1967) (Interstate Commerce Commission must not “close its eyes to facts indicating that [a] transaction may exceed limitations imposed by other relevant laws”) (emphasis added); *Carpenters v. NLRB*, 357 U.S. 93, 108-10 (1958) (the Board is not permitted to choose remedies based on its own interpretation of the Interstate Commerce Act); *NLRB v. Lee Hotel*, 13 F.3d 1347, 1351 (9th Cir. 1994) (stating that “if the Board wholly ignores equally important Congressional objectives, the courts should refuse to enforce that Order.”).

Similarly, a Board Order effectively outlawing employment arbitration agreements containing class action waivers, which are lawful and fully enforceable under the FAA, would offend both the FAA and the strong federal policy announced by repeated Supreme Court decisions favoring arbitration of statutory and other claims in employment and other contexts. The Court has made clear that even though as a technical matter the FAA does not “preempt” federal statutory law, it erects a strong presumption of arbitrability that can be overridden only by statutory language displacing the FAA. As the Court explained in the *Gilmer* decision, “having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.” 500 U.S. at 26 (internal citation and quotation marks omitted).<sup>2</sup> See also *Rodriguez v.*

*Shearson/Am. Express, Inc.*, 490 U.S. 477, 483 (1989) (stating that “the party opposing

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<sup>2</sup> The Supreme Court has found arbitration agreements requiring arbitration of various federal statutory claims to be enforceable, including the federal securities laws, antitrust laws, RICO, environmental laws, the ADEA and the ADA. See, e.g., *Pacificare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003) (ordering arbitration of federal RICO claims despite provision in arbitration agreement that may bar punitive damages awards); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (predispute agreement to arbitrate enforceable as to ADEA claims); *Rodriguez v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) (claims under the Securities Act subject to arbitration); *Shearson/Am. Express, Inc. v. McMahan*, 482 U.S. 220 (1987) (agreement to arbitrate Securities Exchange Act and RICO claims enforceable); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (ordering international antitrust claims to be arbitrated under terms of agreement). Cf. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. \_\_\_, 130 S.Ct. 1758, 1777 (2010) (antitrust claims subject to arbitration); *Hall Street Assocs. v. Mattel, Inc.*, 552 U.S. 576 (2008) (arbitrator decided claims arising under environmental laws).

arbitration carries the burden of showing that Congress intended in a separate statute to preclude a waiver of judicial remedies, or that such a waiver of judicial remedies inherently conflicts with the underlying purposes of that other statute.”). Even waivers of the rights to a judicial forum negotiated as part of a collective bargaining agreement are enforceable under the FAA to the extent they require the arbitration of non-NLRA rights. *See 14 Penn Plaza LLC v. Pyett*, 129 S.Ct. 1456, 1465 (2009) (“The *Gilmer* Court’s interpretation of the ADEA fully applies in the collective-bargaining context.”). As such, if the Board in this case were to ban the negotiation and enforcement of class action waivers in an attempt to require classwide arbitration as a condition for enforcing mandatory arbitration agreements, any such order would be in direct conflict with applicable federal law, as interpreted by controlling Supreme Court precedent.

There is no doctrine that holds, as the charging party suggests in this case, that the NLRA, as interpreted by the NLRB, takes precedence over other federal law. Indeed, the law is clear that the Supreme Court’s interpretation of federal law takes precedence over any agency’s interpretation of any federal law. Moreover, the Board by its pronouncements cannot provide the requisite legislative override of the FAA. The FAA requires enforcement of predispute arbitration agreements covering non-NLRA claims, despite the absence of a class arbitration mechanism, “unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.” *Gilmer*, 500 U.S. at 26; *Pyett*, 129 S. Ct. at 1465.

## **II. CLASS ACTION WAIVERS DO NOT VIOLATE SECTION 7 OF THE NLRA**

At the outset, the Office of the General Counsel of the Board itself has already found that class action waivers do not violate Section 7 of the Act. The applicable General Counsel Memorandum (“GCM”) remains in effect and presumably any complaint in this case should not conflict with General Counsel’s extant policy. Although the NLRA may prohibit employer retaliation for the acts of filing an employment law class claim or attempting to pursue that claim,

whether a class or collective proceeding can be maintained is determined by the law of the forum – here, the FAA governing predispute arbitration agreements. Employees have no right under the NLRA to any particular rules of the arbitration forum, such as a class claim mechanism. The negotiation, maintenance and adherence to rules of the arbitral forum simply do not constitute protected concerted activity covered by Section 7. Further, the limitation on the maintenance of a class or collective action is merely procedural; employees are not deprived of any substantive statutory rights by being required to sign class action waivers.

**A. A General Counsel Memorandum Establishes That Predispute Arbitration Agreements Do Not Violate Section 7**

The GCM, issued only one year ago, conclusively states that while two or more employees have a right to file a lawsuit, whether denominated as an individual or class action lawsuit, “an employer’s conditioning employment on an employee’s agreeing that the employee’s individual non-NLRA statutory employment claims will be resolved in a arbitral forum is permissible under the Supreme Court’s holding in *Gilmer*”; and “*an employer does not violate Section 7 by seeking the enforcement of an individual employee’s lawful Gilmer agreement to have all his or her individual employment disputes resolved in arbitration.*” GCM 10-06, (June 16, 2010), p. 2 (emphasis added). Indeed, the General Counsel stated, “no issue cognizable under the NLRA is presented by an employer’s making and enforcing an individual employee’s agreement that his or her non-NLRA employment claims will be resolved through the employer’s mandatory arbitration system.” *Id.* at 2. Similarly, “an individual’s pursuing class action litigation for purely personal reasons is not protected by Section 7 merely because of the incidental involvement of other employees as a result of normal class action procedures...[and] an individual employee’s agreement not to utilize class action procedures in

pursuit of purely personal individual claims does not involve a waiver of any Section 7 right.” *Id.* at 6.

We are not aware of any action of the Acting General Counsel abrogating the policies stated in GCM 10-06. As long as GCM 10-6 remains in effect, the agency is bound by that policy: the Acting General Counsel should not be able to issue, nor should the Board consider any aspect of, a complaint inconsistent with GCM 10-06. *See, e.g., Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (agency required to abide by its own regulations). As a practical matter, policy determinations set forth by the Office of the General Counsel should not be changed in an *ad hoc* manner if the Board wishes to promote consistent enforcement of and compliance with the NLRA. To the extent the complaint in this case is predicated on the theory that a mandatory predispute arbitration agreement containing a class claim waiver violates Section 7, without more, it is in conflict with GCM 10-06, and should not be considered by the Board.

**B. Requiring Employees To Abide By the Rules Of The Forum Does Not Violate Section 7**

The Board has scant authority to regulate even collective bargaining contracts, *see NLRB v. C&C Plywood Corp.*, 385 U.S. 421, 427 (1967) (stating that “the National Labor Relations Act[] does not undertake governmental regulation of wages, hours, or working conditions.”), let alone agreements covering non-NLRA subjects reached between employers and individual employees in the non-unionized sector.

The Board’s authority to find an arbitration agreement unlawful is limited by the concept of protected concerted activities in support of Section 7 goals. The Board has no authority to find any agreement unlawful under Section 8(a)(1) unless it truly infringes upon Section 7 protected concerted activities. In many cases, two or more employees can certainly file class action lawsuits or appear together at a court hearing or deposition to pursue their employment

claims. They cannot be disciplined by the employer for such activity. However, employees have no right under the NLRA to any particular forum for addressing their non-NLRA employment claims; and they have no NLRA right to succeed in that forum, whether on the merits or any procedural issue, in disregard of the law governing claims in that forum. Therefore, while the act of filing of the lawsuit by two or more employees may be protected in some circumstances, any lawsuit that is filed is subject to the rules of the forum, including the enforcement of arbitration agreements under the FAA. For example, if the court or an arbitrator were to require sequestration of witnesses, there is no Section 7 right for an employee to be allowed joint witness presentation. The same holds true for other rules of the forum, such as the enforceability of class action waivers.

If, in the forum where the lawsuit is brought, arbitration agreements are enforceable as a matter of federal law, as they are under the FAA, there is no Section 7 right to litigate in court as opposed to arbitration; and an employer cannot possibly violate Section 8(a)(1) by enforcing its right under *Gilmer* and its progeny to compel arbitration, in accordance with the rules of the forum. If the rule in the forum is that arbitration agreements otherwise silent on classwide arbitration do not authorize classwide proceedings – as is the case under the FAA, *see Stolt-Nielsen S.A. v. Animal Feeds Int’l Corp.*, 559 U.S. \_\_\_, 130 S.Ct. 1758, 1775 (2010), there can be no Section 7 right to compel a classwide proceeding. If the rule in the forum is that the parties can negotiate express class action waivers to make sure that arbitrators do not order classwide proceedings, again there is no Section 7 right to bar such agreements. At least one federal district court has concurred that class action waivers in predispute arbitration agreements required as condition of employment do not violate Section 7 and can be enforced. *See, e.g., Slawinski v. Nephron Pharma. Corp.*, No. 1:10-CV-0460, 2010 U.S. Dist. LEXIS 130365 (N.D.

Ga. Dec. 9, 2010) (ordering plaintiffs in FLSA suit to arbitrate claims on individual basis). In sum, there is no basis for arguing, as the Acting General Counsel does in the face of the still-extant GMC 10-06, that somehow in the penumbras of Section 7, employees have an NLRA right to a particular joinder device in an arbitration proceeding addressing only non-NLRA federal or state employment laws. The Board simply has no authority to find that the MAA violates Section 7.

**C. Employers' Arbitration Programs Which Contain Class Action Waivers Do Not Require Employees To Waive Any Substantive Right**

It is irrelevant whether a predispute arbitration agreement waives any substantive non-NLRA rights or merely waives a procedural mechanism. Regulation of agreements concerning non-NLRA rights is outside the Board's authority.

In any event, the class action device is a procedural one, not a substantive one, and it does not violate Section 7 rights to change procedural rules. The federal class action rule is a product of the federal rulemaking process that itself cannot create or modify any substantive rights. The Rules Enabling Act, 28 U.S.C. § 2072(b), which governs Federal Rule of Civil Procedure 23 (the federal rule authorizing class actions in federal litigation), states that its rules “shall not abridge, enlarge or modify any substantive right.” *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S.Ct. 1431, 1443 (finding Rule 23 to be valid because it only affects procedural rights, while “it leaves the parties’ legal rights and duties intact and the rules of decision unchanged”); *Johnson v. West Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000) (stating that “right [to class action device] is merely a procedural one, arising under Fed.R.Civ.P. 23, that may be waived by agreeing to an arbitration clause.”).<sup>3</sup> Similarly, there is no substantive right to

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<sup>3</sup> The SEIU, as *amici*, argue that the notice procedures required by Fed. R. Civ. P. Rule 23 and/or the FLSA/ADEA necessarily show that class actions constitute concerted activity. SEIU Amicus Brief at 7-8. This argument is beside the point. Once an employee files a class or collective action, the employer cannot take adverse

a collective action under the FLSA and the ADEA. *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004) (stating that “we reject the [] claim that the[] inability to proceed collectively deprives [individuals] of substantive rights available under the FLSA.”). The Court in *14 Penn Plaza LLC v. Pyett*, 129 S.Ct. 1456, 1465 (2009), held that a collective bargaining agreement requiring union members to arbitrate ADEA claims was enforceable as a matter of law, using the same analysis set forth by *Gilmer*. Indeed, the Supreme Court rested this holding on the premise that by submitting statutory claims to arbitration, the union was not waiving any “substantive right[s].” Even in a unionized setting, the right to a class joinder device as it pertains to non-NLRA claims is not a “substantive right,” but merely a procedural mechanism to be negotiated by the parties.

**D. Whether Employees Are Likely To Bring Individual Claims Where Agreements Do Not Provide For The Class Action Joinder Device Is Irrelevant To Whether Such Agreements Violate Section 7 of the NLRA**

From an NLRA perspective, it is irrelevant whether class action waivers make it more or less likely that individual employees will seek to vindicate their non-NLRA statutory and other claims. Section 7 rights are exclusively enforced by the NLRB. There is no private right of action under the NLRA. Therefore, any mandatory arbitration agreement cannot possibly affect

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(continued...)

action against the employee based on the employee’s mere filing of a group lawsuit without violating Section 8(a)(1) of the Act. A class action waiver, however, does not seek to discipline any employees for filing or participating in notice procedures authorized by Rule 23 or a particular statute. It simply establishes one of the ground rules for an arbitration displacing the court action, which is lawful under the FAA. In the alternative, the test of *Meyers* and its progeny indicates that notice procedures alone would *not* constitute concerted activity. Pursuant to *Meyers*, to be concerted, an employee must “be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.” *Meyers Indus., Inc.* (Meyers I), 268 N.L.R.B. 493, 497 (1984), remanded, 755 F.2d 941 (D.C. Cir. 1985), reaffirmed, *Meyers Indus., Inc.* (Meyers II), 281 N.L.R.B. 882, 885 (1986), enforced, 835 F.2d 1481 (D.C. Cir. 1987). In other words, the filing of a class action lawsuit by an individual employee itself cannot be presumed to be concerted activity without some evidence that the putative plaintiff has engaged in activity with co-workers. The mere fact that notice may go out during class certification proceedings does not show that at the time of filing a class action lawsuit any employee is “engaged in with or on the authority of other employees.” The SEIU cites no case law indicating as such. Further, the notice procedures themselves likely do not even constitute concerted activity, as class action opt-in/opt-out procedures are typically undertaken between plaintiffs’ lawyers and potential class members, rather than between employees acting collectively.

the NLRB's ability to enforce the NLRA. *Cf. EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002) (government agency as a non-signatory to the arbitration agreement is not bound by that agreement). Whether or not employees choose to bring individual arbitrations or lawsuits for their non-NLRA claims has no bearing on whether their Section 7 rights are violated.

**III. IF THE BOARD FINDS THAT CLASS ACTION WAIVERS IN INDIVIDUAL, NON-UNION EMPLOYMENT AGREEMENTS VIOLATE SECTION 7, IT WOULD RESULT IN THE BOARD INVOLVING ITSELF IN MATTERS PLAINLY OUTSIDE ITS PROPER MISSION**

Class action waivers of non-NLRA statutes in individual, non-union employment agreements are not at the core of the NLRB's mission and adjudicating disputes over them would waste vital Board resources. The NLRB's mission, according to its website, is "to safeguard employees' rights to organize and to determine whether to have unions as their bargaining representative. The agency also acts to prevent and remedy unfair labor practices committed by private sector employers and unions."<sup>4</sup> Class action waivers do not impact an employee's ability to organize. They do not restrain employees' ability to form a union, to work as a group to organize a union, to vote for or against a union, or to communicate with other employees regarding a union. Class action waivers do not impact the process whereby unions are certified. While the Acting General Counsel would argue that a class action waiver, in some instances, might constitute an unfair labor practice, this would be a case of a private plaintiff's "tail" (the same private counsel who earlier initiated the proceeding resulting in GCM 10-06) wagging the NLRB's regulatory mission. The Board would find itself at the center of a mountain of employment litigation involving non-union employers and non-union employees dealing with non-NLRA employment claims.

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<sup>4</sup> See <http://www.nlr.gov/what-we-do>.

If the Board did find that the class action waiver in this case violates Section 7, undoubtedly the case would be appealed to a Court of Appeals, and subsequently, the Supreme Court. The Supreme Court has made it abundantly clear that FAA-covered arbitration agreements, as in the instant case, are the product of the negotiations of the parties themselves and that class arbitration may not be imposed directly or indirectly on the parties unless agreed to by the parties. *AT&T Mobility LLC v. Concepcion*, 563 U.S. \_\_\_, 131 S.Ct. 1740 (2011); *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. \_\_\_, 130 S.Ct. 1758 (2010); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 454 (2003). The FAA is clear that arbitration agreements are valid and enforceable unless there are generally applicable state contract law grounds under which a non-arbitration agreement could be voided. 9 U.S.C. § 2. Thus, a ruling by this agency that class action waivers violate Section 7 would flout Supreme Court precedent, be unauthorized by the NLRA, and would ultimately result in a waste of Board and court resources that could be better spent adjudicating the NLRA's core issues.

### **CONCLUSION**

For the reasons given above, *Amici* respectfully request that the Board hold that class action waivers in mandatory predispute arbitration agreements required as a condition of employment do not abridge employees' Section 7 rights or violate Section 8(a)(1) of the Act.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 27th day of July, 2011, an electronic copy of the foregoing was filed on the NLRB e-filing website and served by electronic mail on:

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