Case No. 12-60031

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

D.R. HORTON, INC.

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

Respondent.

Petition for Review of a Decision and Order of
The National Labor Relations Board

BRIEF OF THE COALITION FOR A DEMOCRATIC WORKPLACE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER D.R. HORTON, INC. FOR REVERSAL OF THE DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

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CERTIFICATE OF INTERESTED PERSONS

Case No. 12-60031

D.R. Horton, Inc. v.
National Labor Relations Boards

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT OF INTEREST

Coalition for a Democratic Workplace ("CDW") represents employers and associations and their workforces in traditional labor law issues. Consisting of over 600 member organizations, CDW was formed to give its members a voice on labor reform, specifically, the Employee Free Choice Act. More recently, CDW has advocated for its members on a number of labor issues including non-employee access, an employee's right to have access to organizing information from multiple sources, and unit determinations. CDW's members—the vast majority of whom are covered by the National Labor Relations Act ("NLRA") or represent organizations covered by the NLRA—have a strong interest in the way the NLRA is interpreted and applied by the National Labor Relations Board (the "Board").

INTRODUCTION

The National Labor Relations Board's *D.R. Horton* decision suffers from many flaws, the chief of which is a refusal to accommodate the policies Congress advanced in the Federal Arbitration Act (FAA). The FAA encourages private alternative dispute resolution, with informal, inexpensive, and bilateral arbitration as its focus. The FAA has its own prerogatives, and the Supreme Court has held that because of the FAA's mandate, an arbitration agreement containing a class waiver must be enforced as written. *AT&T Mobility LLC v. Concepcion,* 131 S. Ct.

1740, 1748-53 (2011). Exceptions to the FAA's reach apply only when the party opposing arbitration can show an express contrary congressional command in another federal statute, and such a command does not exist when, as here, the National Labor Relations Act (NLRA) is silent on the question of whether bilateral arbitration only may be mandated by an employment arbitration agreement governed by the FAA. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012).

The Supreme Court has repeatedly instructed the NLRB that it must defer to the policies of other federal statutes when enforcing the NLRA. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002); *Southern S.S. Co. v. NLRB,* 316 U.S. 31, 47 (1942). Although the NLRB pays lip service to that instruction in the present case, as a practical matter, the instruction is ignored. Here, the issue is pronounced because the NLRB will not defer to controlling Supreme Court authority.

Although the NLRB attempts to minimize the intrusiveness of its decision to invalidate arbitration agreements covered by the FAA, in reality its impact is wide and deep. Indeed, the NLRB itself stated in 2011 that "the civilian work force includes some 108 million workers potentially subject to the NLRA." Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54006, 54017 (Aug. 30, 2011). In addition, Board Member Hayes noted that as many as 6

million private employers could be subject to the NLRA. *Id.* at 54037 (Member Hayes, dissenting). Clearly, then, millions of people are affected by the NLRB's decision in *Horton*, which impacts employment class actions—an area of law significant for its large class sizes.

The *Horton* decision affects not only existing agreements, but also parties who have yet to enter into agreements. As *Concepcion* holds, the "overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms *so as to facilitate streamlined proceedings*." 131 S. Ct. at 1748 (emphasis added). Because of *Horton*, however, employers that would like their disputes with workers to be resolved bilaterally in "streamlined proceedings" now face the opprobrium of a federal agency whose agenda does not square with controlling authority of the highest court in the land.

The NLRB's authority does not extend to disregarding acts of Congress and Supreme Court precedent, and therefore this Court should decline enforcement of the *Horton* decision.[1]

[1] The *Horton* decision was issued by NLRB Chairman Mark Pearce and Member Craig Becker on January 3, 2012. Member Brian Hayes was recused and two seats on the Board were vacant. Member Becker was recess-appointed in 2010 and his appointment expired at the end of the Senate's next session. *See* Board Members Since 1935, https://www.nlrb.gov/who-we-are/board/board-members-1935. The new session of the Senate began at noon on January 3, 2012. U.S. CONST., art. II, § 2. The NLRB has not established that the *Horton* decision was issued before *noon* on that date, and thus it is not clear that Member Becker was still a member of the NLRB when it was issued. The Court should require *proof* of this fact as the Supreme

ARGUMENT

I. THE NLRB IS REQUIRED TO DEFER TO THE SUPREME COURT'S INTERPRETATION OF THE FEDERAL ARBITRATION ACT.

A. The FAA Requires That Arbitration Agreements Be Enforced According To Their Terms—Including Class or Collective Waivers.

In *Concepcion,* 131 S. Ct. at 1745, the Supreme Court upheld a class action waiver in an arbitration agreement and invalidated a state law that conditioned the enforceability of such an agreement on the availability of classwide arbitration. The Court concluded that the state law was "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," and that it was therefore preempted by the FAA. *Id.* at 1753.

The *Concepcion* decision reaffirmed the following principles, which have guided the Supreme Court's arbitration decisions over the last several decades:

First, the "overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Id.* at 1748. This is the "principal purpose" of the FAA. *Id.*

Court has held that the NLRB must have a quorum of at least three members to decide cases. *New Process Steel v. NLRB*, 130 S. Ct. 2635, 2640-45 (2010); *see also Chamber of Commerce of the U.S. v. NLRB*, 2012 U.S. Dist. LEXIS 66626, at *14-31 (D.D.C. May 14, 2012) (invalidating new election rules for lack of a quorum as only two members of the NLRB had participated in adopting the rules). In this regard, the NLRB's Inspector General has announced that a decision is not final until it is issued, and a decision is not issued until it is posted on the NLRB's website. *See* supplemental report at p. 8, http://democrats.edworkforce.house.gov/press-release/rep-george-miller-calls-nlrb-board-member-terence-flynn-resign-after-new-evidence (May 2, 2012).

Second, the "FAA was designed to promote arbitration." It establishes "a national policy favoring arbitration" and a "liberal federal policy favoring arbitration agreements." *Id.* at 1749 (citation omitted). The enactment of the FAA was "in response to widespread judicial hostility to arbitration agreements." *Id.* at 1745, 1747 (citations omitted).

Third, the FAA establishes the "fundamental principle that arbitration is a matter of contract," and that "courts must place arbitration agreements on an equal footing with other contracts . . . and enforce them according to their terms." *Id.* at 1746 (citations omitted). Thus, arbitration agreements can be invalidated only on grounds that would apply to the revocation of any contract. 9 U.S.C. § 2.

Fourth, the FAA permits the parties to an arbitration agreement to limit the issues that will be subject to arbitration; to arbitrate only according to specific rules; and to limit the parties with whom they will arbitrate disputes. *Concepcion,* 131 S. Ct. at 1748-49.

Fifth, a "prime objective of an agreement to arbitrate is to achieve streamlined proceedings and expeditious results." *Id.* at 1749 (citations omitted). Moreover, the "point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute." *Id.* This reflects a policy decision that the "informality of arbitral

proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution." *Id.*

Finally, class arbitration, unless agreed to by the parties, is inconsistent with the FAA because the changes brought about by the shift from bilateral arbitration to class arbitration are fundamental. *Id.* at 1750-51.

In light of these guiding principles, the Supreme Court held in *Concepcion* that the FAA preempts any state law that prohibits a class waiver in an arbitration agreement. *Id.* at 1753. The Court reasoned that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id*. at 1748.

The Court explained that the switch from bilateral arbitration to class arbitration would sacrifice the principal advantage of arbitration—its informality—and make the process slower, more costly, and more likely to generate procedural morass than final judgment. In addition, the Court emphasized that class arbitration would require formality in order to bind absent class members to the results of the arbitration, and that arbitration is poorly suited to the higher financial stakes of class litigation. *Id*. at 1750-52.

Accordingly, the Court concluded that the state law in *Concepcion* would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in adopting the FAA. *Id*. at 1753.

In a previous decision, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp*., 130 S. Ct. 1758, 1768-71 (2010), the Court held that an arbitration panel had exceeded its powers by deciding, as a policy matter, that class arbitration could be ordered under an arbitration agreement when the agreement was silent on that subject. The Court emphasized that the "central or primary purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms," and as with any other contract, the intention of the parties must control, including their intent as to the parties with whom they will arbitrate. *Id.* at 1773-75 (citations omitted).

In addition, the Court explained in *Stolt-Nielsen* that classwide arbitration changes the nature of arbitration so much that the parties could not be presumed to have consented to it. *Id*. at 1775. For example, the Court stated that instead of resolving a dispute between two parties, the arbitrator would resolve many disputes between hundreds or thousands of parties; that the privacy and confidentiality of bilateral arbitration would be lost; that the arbitrator's award would adjudicate the rights of absent parties as well as the parties to the agreement; and that the commercial stakes of class arbitration are comparable to those of class action litigation, even though the scope of judicial review is much more limited. *Id*. at 1775-77.

The pro-arbitration trend continued in a very recent decision, *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1202 (2012), in which the Supreme

Court instructed courts that they must enforce the FAA "with respect to all arbitration agreements covered by that statute." The Court emphasized that the FAA "requires courts to enforce the bargain of the parties to arbitrate"; and that it "reflects an *emphatic federal policy in favor of arbitral dispute resolution*." *Id.* at 1203 (citations omitted; emphasis added).

Thus, the FAA establishes a strong federal policy in favor of enforcing arbitration agreements in accordance with their terms—including provisions that waive the right to pursue class or collective relief in arbitration. This is because the FAA advances the congressional objective of establishing *an alternative way to resolve disputes* that does not simply import the panoply of court rules and processes to the arbitral forum, but rather creates a system that is supposed to be less formal and less expensive than litigation in court. *That is the point of the FAA*, a point unfortunately lost on the NLRB when it issued its flawed decision in *D.R. Horton*.

B. The FAA Applies Even When the Claims at Issue Are Federal Statutory Claims, Unless the Party Opposing Arbitration Shows That the FAA's Mandate Has Clearly Been Overridden By a Contrary Congressional Command.

Although many of the Supreme Court's arbitration decisions have involved the preemption of state laws under the Supremacy Clause, the primacy of the FAA is not limited to laws on the state level. Federal statutes are also subject to the FAA's policy favoring the arbitration of disputes, unless Congress has made a

decision to override the FAA's mandate in unambiguous terms in a specific federal statute.

The applicability of the FAA to federal statutory claims has been well established for several decades. For example, in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991), the Supreme Court applied the FAA to a federal employment statute, the Age Discrimination in Employment Act ("ADEA"), and explained that it was "clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA." The Court pointed out that it had previously applied the FAA to claims arising under federal antitrust, securities and civil RICO statutes. *Id.* Furthermore, the Court emphasized that arbitration agreements must be enforced as to federal statutory claims "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.*

The Supreme Court reaffirmed these principles shortly after the NLRB's *Horton* decision in *CompuCredit Corp.*, 132 S. Ct. at 669. In that case, the Court reiterated that the FAA "requires courts to enforce agreements to arbitrate according to their terms." *Id.* at 669. The Court emphasized that this requirement applies "even when the claims at issue are federal statutory claims, unless the FAA's mandate has been overridden by a contrary congressional command." *Id.*

(citations omitted). In support of this conclusion, the Court relied upon *Gilmer*—an employment case arising under a federal statute. *Id.* at 669-71.

In addition, *CompuCredit* held that the burden rests on the party opposing arbitration to show that Congress intended to preclude a waiver of judicial remedies, and that a federal statute's silence on the subject of arbitration must lead to the enforcement of an arbitration agreement in accordance with its terms. *Id.* at 672 n.4. To meet this burden, a "congressional command" must be found in an unambiguous statement in the statute and cannot be gleaned from ambiguous statutory language. *See id.* at 670-73. Thus, the Court held that if a federal statute "is silent on whether claims under [it] can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms." *Id.* at 673.

Applying these concepts, the Court concluded that claims under a federal consumer statute were subject to arbitration under the FAA even though the statute provided that an aggrieved party had a "right to sue" and, in fact, used the terms "action," "class action," and "court." *Id.* at 669-70. The Court found that this language was not clear enough to amount to a "congressional command" that the FAA would not apply; and because the consumer statute was silent on whether claims could proceed in an arbitral forum, the FAA required that the arbitration agreement be enforced according to its terms. *Id.* at 670-73.

Lower courts have recently come to the same conclusion even in the face of the Board's *Horton* decision, finding that the NLRA must contain a clear "congressional command" to override the FAA, but that the NLRA fails to do so. *See, e.g.*, *Morvant v. P.F. Chang's China Bistro*, 2012 U.S. Dist. LEXIS 63985, at *32-35 (N.D. Cal. May 7, 2012); *Jasso v. Money Mart Express, Inc.*, 2012 U.S. Dist. LEXIS 52538, at *24-27 (N.D. Cal. April 13, 2012). These courts also found that the NLRA is essentially silent on the matter and that no such provision may be read into it, particularly in light of the fact that the FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements, while the NLRA was enacted later in 1935 and subsequently amended in 1947—providing Congress with two opportunities to express its command. *Morvant*, 2012 U.S. Dist. LEXIS 63985, at *33; *Jasso*, 2012 U.S. Dist. LEXIS 52538, at *26-27 & n.3.

While the NLRA protects concerted activity, it does not preclude defenses that might undermine the ability of the group to succeed in its claim. Thus, if a group of employees brings claims that lack commonality or typicality, as required by Rule 23 of the Federal Rules of Civil Procedure, the group's ability to proceed concertedly is thwarted, and the NLRA will not trump the other federal law. Certainly, it is not an unfair labor practice to assert procedural hurdles to the class claims as a bar. Likewise, if the employees agreed to arbitrate individually only, the Board cannot forbid enforcement of that agreement, and the FAA provides a

defense to the class claims through the arbitration agreement that, consistent with the FAA's purposes, requires informal, bilateral dispute resolution. Nothing in the NLRA's text evinces a "congressional command" forbidding enforcement of an agreement to arbitrate bilaterally only formed in accordance with the FAA.

C. The Arbitral Class Waiver Precedent Established Under Consumer Statutes Applies With Equal Force to Employment Cases.

The *Concepcion* and *CompuCredit* decisions involved consumer contracts, but the principles underlying these cases apply equally to employment cases. Any doubt about this conclusion that may have existed after the *Concepcion* decision no longer exists in light of the Court's summary disposition of an employer's petition for certiorari in another recent case, *Sonic-Calabasas A, Inc., v. Moreno*, 51 Cal. 4th 659 (2011), *vacated by* 132 S. Ct. 496 (2011). In that case, the California Supreme Court had held that the FAA did not preempt a requirement of the state Labor Code that an otherwise arbitrable employment claim first be heard through a state administrative adjudicative process. *Id.* The U.S. Supreme Court granted the employer's petition for certiorari, summarily vacated the judgment of the California court, and remanded the case for further consideration in light of *Concepcion*—thus applying the precedent of that decision to an employment case. *Moreno*, 132 S. Ct. 496. In addition, the Eighth Circuit recently upheld a class action waiver in an employment case in light of the *Concepcion* decision,

explaining that the challenge to the waiver was barred by the FAA. *Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766, 769 (8th Cir. 2011).

Furthermore, the principles relied upon in *Concepcion* emerged from employment arbitration law settled some two decades earlier in *Gilmer*. In that case, the Supreme Court enforced an agreement that required the arbitration of statutory claims under the ADEA, a federal statute, rejecting an argument that arbitration procedures could not adequately further the purposes of that statute because they did not provide for class actions. *Gilmer*, 500 U.S. at 32. The Court explained that "having made the bargain to arbitrate, the [employee] should be held to it unless Congress itself had evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* at 26 (citation omitted).

Furthermore, this Court already has, following *Gilmer,* rejected the claim that an arbitral provision preventing plaintiffs from proceeding collectively in an employment case under the ADEA or FLSA deprived them of substantive rights. *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294 (5th Cir. 2004).

CompuCredit also expressly relied on *Gilmer*, holding that the mere statutory reference in the ADEA to relief in a "civil action" did not constitute a "contrary congressional command" overriding the FAA. 132 S. Ct. at 670-71. This reasoning does not depend on whether the case arises under employment or consumer law. Rather, it applies to all agreements covered by the FAA.

Finally, numerous other lower court decisions recently held that *Concepcion* applies with equal force to employment cases, finding "no principled basis to distinguish" between these types of cases. *See Morvant*, 2012 U.S. Dist. LEXIS 63985, at *19; *see also Jasso*, 2012 U.S. Dist. LEXIS 52538, at *9-14; *LaVoice v. UBS Fin. Servs.*, 2012 U.S. Dist. LEXIS 5277, at *19-27 (S.D.N.Y. Jan. 13, 2012); *Iskanian v. CLS Transportation Los Angeles, LLC*, 2012 Cal. App. LEXIS 650, at *21 (June 4, 2012) ("*Concepcion* (which *is* binding authority) made no exception for employment-related disputes.").

Indeed, the vast majority of lower courts that have examined *Horton* have refused to follow it. *Morvant*, 2012 U.S. Dist. LEXIS 63985, at *19; *Jasso*, 2012 U.S. Dist. LEXIS 52538, at *9-14; *LaVoice*, 2012 U.S. Dist. LEXIS 5277, at *6, 19-27 (declining to follow *Horton* and instead concluding that *Concepcion* and *Stolt-Nielsen* mandated enforcement of the arbitration agreement according to its terms); *Palmer v. Convergys Corp*., 2012 U.S. Dist. LEXIS 16200 at *7, n. 2 (M.D. Ga. Feb. 9, 2012) (finding that *Horton* did not "meaningfully apply" to the facts of the case, which involved the validity of employee class action waiver agreements); *Oliveira v. Citicorp N. Am., Inc.*, 2012 U.S. Dist. LEXIS 69573, at *6-7 (M.D. Fla. May 18, 2012); *Coleman v. Jenny Craig, Inc.*, Case No. 11-cv-1301-MMA (DHB) (S.D. Cal. May 15, 2012); *Johnmohammadi v. Bloomingdales Inc*., No. 11-cv-6434 (C.D. Cal. 2012); *see also Iskanian*, 2012 Cal. App. LEXIS

650, at *23 (finding that *Horton* "does not withstand scrutiny in light of *Concepcion* and *CompuCredit*."). [2]

Thus, in the few short months following the NLRB's ruling, the overwhelming weight of authority holds that *Horton* was wrongly decided, *Concepcion* controls, and the distinction between "consumer" and "employment" arbitration agreements is irrelevant to the FAA.

D. In Enforcing the NLRA, the NLRB Is Required to Respect Other Congressional Objectives and Avoid Trenching Upon Other Federal Statutes.

The FAA applies unless it has been overridden by a contrary congressional command. *See supra*, Part I.B. In this case, of course, the NLRA does not address arbitral class waivers, and *CompuCredit* requires that Horton be rejected on that ground alone. But the limits of the NLRB's authority are even more circumscribed because the NLRA must yield to the policies of other federal statutes. The Supreme Court has rejected Board rulings on this independent ground several times, and for this reason as well, *Horton* should not be enforced.

In *Southern S.S. Co. v. NLRB,* 316 U.S. 31, 47-49 (1942), the Court set aside a reinstatement order by the Board in favor of employees who had engaged in a

[2] The limited number of cases that have followed *Horton*'s holding are unpersuasive as they simply accept *Horton*'s conclusion without meaningful analysis. *See Herrington v. Waterstone Mortg. Corp*., 2012 U.S. Dist. LEXIS 36220, *18-19 (W.D. Wis. Mar. 16, 2012) (applying *Horton* to invalidate a collective action waiver "because the Board's interpretation of the NLRA in *D.R. Horton*, is 'reasonably defensible'"); *Owen v. Bristol Care, Inc.*, 2012 U.S. Dist. LEXIS 33671, at *12 (W.D. Mo. Feb. 28, 2012) (citing, without examining, *Horton* for the blanket proposition that "[i]n the employment context, waivers of class arbitration are not permissible.").

strike on shipboard, which amounted to a mutiny in violation of federal criminal statutes. Although the order appeared to be justified by the literal terms of the NLRA, the Court stated that the NLRB could not "effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives." *Id.* at 47. The Court also emphasized that the "Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task." *Id.*

Subsequently, in *NLRB v. Bildisco & Bildisco,* 465 U.S. 513 (1984), the Supreme Court precluded the Board from enforcing orders that were in conflict with the Bankruptcy Code. *Id*. at 528-29. The Court stated that "the proposition that the Board's interpretation of statutes outside its expertise is likewise to be deferred to is novel," and that it saw "no need to defer to the Board's interpretation of Congress' intent in passing the Bankruptcy Code." *Id.* at 529, n. 9.

A similar result was reached in *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 634-35 (1975), *rh'g denied*, 423 U.S. 884 (1975), where the Supreme Court rejected a claim that federal antitrust policy should defer to the NLRA. The Court concluded that, although a

subcontracting agreement negotiated by a union satisfied the literal language of the NLRA, it resulted in a violation of the antitrust statutes. *Id.* at 626-35.

In another case, the Supreme Court held that, in interpreting the secondary boycott provisions of the NLRA, the Board improperly adopted its own interpretation of the Interstate Commerce Act. *United Bhd. of Carpenters & Joiners v. NLRB*, 357 U.S. 93, 108-111 (1958).

In *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883, 898-906 (1984), the Supreme Court held that the Board's remedial authority was limited by federal immigration policy, explaining that the Board was obliged to take into account the equally important congressional objective adopted in the Immigration and Nationality Act.

Furthermore, in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140 (2002), the Supreme Court held that the Board had improperly awarded back pay to an illegal alien because such relief was foreclosed by federal immigration policy in the Immigration Reform and Control Act, which the Board has no authority to enforce or administer. Summarizing the entire line of cases discussed above, the Court declared that "where the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield." *Id*. at 147.

In short, the Supreme Court has made it clear that the NLRB must respect the objectives of other federal statutes and avoid trenching upon their underlying

policies. The same principle must apply in the case of the FAA, a federal statute regarding which the NLRB has no administrative responsibilities or expertise.

For more than a decade, until the *Horton* decision, the NLRB had heeded this directive of the Supreme Court in several cases. In the most recent case involving this policy, the NLRB acknowledged its "obligation to accommodate the NLRA to other Federal statutes such as the Davis-Bacon Act." *Can-Am Plumbing, Inc*., 350 NLRB 947, 947-48 (2007). And in *Int'l Bhd. Of Electrical Workers, Local 48*, 332 NLRB 1492, 1501 (2000), the NLRB deferred to the Labor Department's interpretation of the same statute.

In *OXY USA, Inc*., 329 NLRB 208, 210-12 (1999), the NLRB deferred to the Department of Labor and the Department of Justice on the legality, under Section 302 of the Labor Management Relations Act, of an employer's proposal in collective bargaining negotiations. And in two other cases, the NLRB deferred to the Equal Employment Opportunity Commission in construing the Americans with Disabilities Act when a question under that statute overlapped with issues under the NLRA. *Roseburg Forest Prods. Co.*, 331 NLRB 999, 1001-03 (2000); *PCC Structurals, Inc*., 330 NLRB 868, 871-872 (2000).

Unfortunately, as will be shown below, in *Horton*, the Board devoted only lip service to the Supreme Court's directive that it defer to other federal statutes and avoid trenching upon their policies.

II. BY FOCUSING SOLELY ON THE POLICIES OF THE NLRA, THE NLRB HAS FAILED TO DEFER TO THE SUPREME COURT'S DECISIONS CONSTRUING THE FAA AND ITS POLICIES.

A. Because the NLRA Is Silent on the Subject of Arbitration and Does Not Express a Clear Congressional Command to Override the FAA, the FAA Controls and Requires the Arbitration Agreement to Be Enforced According to Its Terms.

In support of its attempt to nullify the Supreme Court's *Concepcion* decision for all employees covered by the NLRA, the NLRB makes a two-pronged argument. First, it asserts that under all circumstances an employee has a substantive right under the NLRA to file a class or collective action. *D.R Horton, Inc.*, 357 NLRB No. 184, at slip op. pp. 9-10 (Jan. 3, 2012). Second, it relies on the statement in *Gilmer* that the FAA mandates the arbitration of federal statutory claims only if "a party does not forgo the substantive rights afforded by the statute." *Id.* at slip op. p. 9 (citation omitted).

This argument, however, fails to take into account principles articulated by the Supreme Court in the *CompuCredit* decision discussed above, which was issued one week after the *Horton* decision. The Court declared in that case that (1) the FAA applies to any federal statute unless it contains a clear congressional command that the FAA shall not apply; (2) a congressional command does not exist when the statute is silent on this question; and (3) the party opposing arbitration has the burden of proving that the FAA's mandate has clearly been overridden by such a command. *CompuCredit Corp.*, 132 S. Ct. at 669-73.

In the present case, the federal statute in question is the NLRA, which is completely silent on the issue of class action waivers contained in agreements to arbitrate formed under the FAA. Thus, the NLRA, regardless of its other terms, does not override the FAA's mandate to promote alternative, bilateral dispute resolution, and *CompuCredit* controls the analysis.

The NLRB therefore has it backwards when it argues in *Horton* that nothing in the FAA suggests that an arbitration agreement that is inconsistent with the NLRA is nevertheless enforceable. *Horton*, 357 NLRB No. 184, at slip op. p. 11. *CompuCredit*, instead, makes it very clear that the NLRA must contain language that clearly rules out the enforceability of bilateral arbitration agreements under the FAA; however, the NLRA contains no such language.

This Court's recent decision in *Reed v. Florida Metropolitan University Inc*., 2012 U.S. App. LEXIS 10048 (5th Cir. May 18, 2012), reaffirms that the FAA promotes informal, bilateral and inexpensive dispute resolution as an alternative to litigation in court. In *Reed*, this Court held that an arbitrator exceeded his powers in ordering class arbitration absent a contractual or legal basis, noting that "in light of the *significant disadvantages of class arbitration* as discussed in both *Stolt-Nielsen* and *Concepcion*, an arbitrator (or a court) should not conclude that parties—and defendants in particular—consented to such a proceeding absent a contractual basis for doing so." *Id*. at *27-28 (emphasis added). The *Reed*

decision supports the conclusion that the agreement attacked in *Horton* is the very type advanced by the FAA, and the NLRA nowhere states that its objectives trump those of the FAA. As *CompuCredit* makes clear, such intent must be *express*. Accordingly, absent such an explicit statement, there is no basis to hold that the NLRA invalidates the agreement addressed in *Horton*.

The NLRB also argues that the purpose of the FAA was to prevent courts from treating arbitration agreements less favorably than other private contracts; that agreements not to engage in concerted activity are not enforceable under the NLRA; and therefore that the FAA must conform to the NLRA. *Horton*, 357 NLRB No. 184, at slip op. pp. 4-5, 8-10. Again, the NLRB has it backwards. The FAA provides that all arbitration agreements must be enforced except those that are struck down on grounds that would apply to all contracts. 9 U.S.C. § 2. Here, again, the FAA prevails under *CompuCredit* because the NLRA does not clearly provide that its prerogatives override the FAA's promotion of bilateral, informal dispute resolution.

B. The *Horton* Decision Interferes With and Trenches Upon the FAA.

As explained in detail above, the NLRB is also required by Supreme Court precedent to respect other congressional objectives and avoid trenching upon the policies of other federal statutes. In this case, however, the NLRB attempts to override the Supreme Court's decisions by relying on the right of employees to

engage in "concerted activity" under the NLRA. But there are many opportunities for employees to engage in concerted activity under the NLRA, and filing a class or collective action is only one example. For example, as the NLRB acknowledges in *Horton*, the employees in this case could discuss their claims with one another, pool their resources to hire a lawyer, seek advice and litigation support from a union, solicit support from other employees, and file similar or coordinated individual claims. *Horton*, 357 NLRB No. 184, at slip op. p. 6. All such "concerted activity" is unaffected by the duty to arbitrate claims individually.

Moreover, the right to bring class claims is not substantive, but rather is governed by Rule 23 of the Federal Rules of Civil Procedure (and the comparable procedural right to file a collective action under the Fair Labor Standards Act). FED. R. CIV. P. 23; 29 U.S.C. §§ 201 *et seq.* The inherently procedural nature of the class action device is a recurring theme in the Supreme Court's decisions, which have emphasized that in the Rules Enabling Act (28 U.S.C. §2072(b)), Congress authorized the courts to promulgate rules of procedure, but that those rules "shall not abridge, enlarge or modify any substantive rights." *See, e.g.,Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011); *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1442 (2010); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999). As the Court stated, the "right of a litigant to employ Rule 23 *is a procedural right only*, ancillary to the litigation of substantive

claims." *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980) (emphasis added).

Despite the Supreme Court's clear confinement of class actions to the realm of court procedure, the NLRB, in derogation of the Rules Enabling Act, transformed the procedure into a substantive entitlement and, at the same time, reduced the substantive entitlement guaranteed by the FAA to a disfavored nullity. In doing so, the NLRB favored policies it holds dear, but it also violated a clear congressional directive that arbitration agreements be enforced in accordance with their terms—particularly where, as here, the agreements embody the desire of Congress to promote informal dispute resolution. The Board has no authority to interfere with that Congressional objective.

As explained above, the NLRB has in recent years shown appropriate flexibility in deferring to the objectives of the Davis Bacon Act, the Labor Management Relations Act, and the Americans with Disabilities Act when conflicts arose between the NLRA and those federal statutes. In the *Horton* decision, however, the NLRB failed to show similar deference to the objectives of the FAA and the precedent of the Supreme Court. This error should be corrected by this Court.

The NLRB contends that it is not requiring class or collective arbitration, only that employees must be allowed to file a class or collective lawsuit in court

regardless of the terms of their agreement to have their disputes resolved informally and bilaterally in arbitration. But imposing a rule that certain claims must be heard in court, if not arbitration, violates the FAA, which allows parties to agree that their disputes will *not* be heard in court and will be resolved bilaterally and informally. The FAA requires that those agreements be enforced in accordance with their terms. *Concepcion*, 131 S. Ct. at 1748. *Horton* rejects those agreements and holds that employment disputes must be resolved in accordance with terms the NLRB dictates. Where does the NLRA provide that authority? Where does the FAA transfer the authority to come to contract terms from the parties to the NLRB? The answer to both questions is the same: nowhere.

It is hard to imagine a Board decision that more flagrantly trenches on another federal law than *Horton*. The net result of the Board's directive is that the employer would be prohibited from enforcing the arbitration agreement—hardly a result that respects the overarching purposes of the FAA, which are to ensure the enforcement of arbitration agreements according to their terms and to promote an *alternative* form of dispute resolution. This Court's recent decision in *Reed* strongly reaffirms these basic principles. 2012 U.S. App. LEXIS 10048, at *27-28. *Horton* disregards them.

In support of its conclusions, the NLRB, citing no empirical proof, baldly asserts that class and collective action employment litigation cases tend to be

small, and that classwide arbitration would not be cumbersome. *Horton*, 357 NLRB No. 184, at slip op. pp. 11-12. As shown above, in *Reed, Stolt-Nielsen* and *Concepcion*, this Court and the Supreme Court concluded just the opposite, finding arbitration ill-suited for class actions.

Indeed, one need only look at the landmark U.S. Supreme Court decision, *Wal-Mart Stores, Inc. v. Dukes*, as a prime example of the potential scope of an employment class action against a single employer. In *Dukes*, the plaintiffs sought, and the district court and court of appeal had earlier approved, certification of an employee class comprising approximately *one and a half million* individuals. 131 S. Ct. at 2547.

Dukes shows that class and collective action employment litigations can be rather large, indeed. Moreover, even though *Dukes* was decided before *Horton* and expressly addressed the procedural nature of class actions and the application of the Rules Enabling Act to Federal Rule 23, the Board failed even to cite that Supreme Court case in *Horton.*

C. The NLRB Has No Statutory Authority to Enforce the Norris LaGuardia Act and Its Interpretation of That Statute In *Horton* Is Incorrect.

1. The NLRB Has Exceeded Its Jurisdiction.

Apparently for the first time, the NLRB has attempted in *Horton* to assume responsibility for the enforcement of an independent federal statute, the Norris

LaGuardia Act, 29 U.S.C §§ 101-115. The NLRB, however, is not authorized to stretch its jurisdiction that far under its enabling statute, the NLRA, 29 U.S.C §§ 151-169. Instead, the NLRB's jurisdiction is limited to responding to petitions for elections and charges of unfair labor practices. Furthermore, the sole purpose of the Norris LaGuardia Act is to limit the jurisdiction of the federal courts to issue injunctions in certain labor disputes or to enforce certain agreements that were found to be contrary to public policy. Every substantive provision of that statute expresses such a limitation. The federal courts were apparently deemed capable by Congress of construing a statute that limits their authority without the assistance of the NLRB. Thus, one lower court recently found that the Board's reliance in *Horton* on the Norris-LaGuardia Act is not entitled to even "some deference," and that Norris-LaGuardia did not bar enforcement of the arbitration agreement in that case. *Morvant*, 2012 U.S. Dist. LEXIS 63985, at *28-29.

2. The NLRB's Interpretation of Norris LaGuardia Is Incorrect and Barred by *CompuCredit*.

The NLRB contends in *Horton* that (a) an agreement prohibiting a person from aiding another person in a labor dispute who is prosecuting an action in federal or state court violates Section 4(d) of Norris LaGuardia; and (b) an arbitration agreement that would prohibit a class action is such a prohibited agreement. *Horton*, 357 NLRB No. 184, at slip op. pp. 5-6, 12. This contention,

however, is incorrect. The NLRB conflates two separate provisions of Norris LaGuardia—Sections 3 and 4—to arrive at its erroneous conclusion.

Section 3 of Norris LaGuardia, 29 U.S.C. § 103, deprives the federal courts of jurisdiction to enforce (a) agreements not to join, become, or remain a union member (known as "yellow dog contracts"), or (b) agreements that conflict with a public policy statement in Section 2 of the same statute, 29 U.S.C. § 102, which provides that employees should be free to engage in various forms of concerted activity.

By contrast, Section 4 of Norris LaGuardia, 29 U.S.C. § 104, deprives the federal courts of jurisdiction to issue injunctions to prevent individuals from engaging in a variety of acts relating to labor disputes. Section 4(d), on which the NLRB incorrectly relies, prohibits an injunction to prevent a person from aiding another person in a labor dispute who is being proceeded against in, or is prosecuting, an action in a federal or state court. This section does not deal with agreements or contracts of any kind, much less FAA arbitration agreements.

In this regard, *CompuCredit* commands the same result. Because Norris LaGuardia does not expressly foreclose enforcement of an FAA agreement that provides for bilateral dispute resolution in a cost-efficient, expedited process, as FAA agreements are supposed to do, it cannot be relied on to defeat enforcement of the duty to arbitrate bilaterally.

In summary, even if the NLRB had jurisdiction to enforce or interpret the Norris LaGuardia Act, its attempt to establish a violation of that statute for the purpose of overriding the Supreme Court's *Concepcion* decision is based on a faulty premise, is barred by *CompuCredit*, and should be rejected by this Court.

CONCLUSION

For all of the reasons set forth above, the Court should grant D.R. Horton's petition for review and deny the NLRB's application for enforcement of the order in this case.

Respectively submitted,

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

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2012, I caused this **BRIEF OF THE COALITION FOR A DEMOCRATIC WORKPLACE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER D.R. HORTON, INC. FOR REVERSAL OF THE DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD** to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ William J. Emanuel
William J. Emanuel

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