No. 12-60031

United States Court Of Appeals
For The Fifth Circuit

D.R. HORTON, INC.,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner.

On Petition For Review and Cross Application for Enforcement of an Order of The National Relations Board, Case No. 12-CA-25764

BRIEF OF *AMICI CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION *ET AL.* IN SUPPORT OF RESPONDENT AND CROSS-PETITIONER NATIONAL LABOR RELATIONS BOARD

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

(1) *D.R. Horton, Inc. v. National Labor Relations Board*, Case No. 12-60031

(2) 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.

Amici Curiae National Employment Lawyers Association (NELA) *et al*. identifies and incorporates the representations contained in the briefs filed by Petitioner and Cross-Respondent D.R. Horton, Inc.; Respondent and Cross-Petitioner the National Labor Relations Board; and *Amici Curiae* National Association of Manufacturers, Equal Employment Advisory Council, and Coalition for a Democratic Workplace.

None of *Amici Curiae* NELA *et al.* are financially interested in the outcome of the litigation. *Amici Curiae* NELA *et al.* have a professional and public policy interest in the outcome of this litigation. Those interests are as follows:

The **National Employment Lawyers Association ("NELA")** is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 circuit, state,

and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

The Employee Rights Advocacy Institute For Law & Policy ("The Institute") is a charitable non-profit organization whose mission is to advocate for employee rights by advancing equality and justice in the American workplace. The Institute achieves its mission through a multi-disciplinary approach combining innovative legal strategies, policy development, grassroots advocacy, and public education. In particular, The Institute has sought to eliminate forced pre-dispute arbitration of employment claims through its public education initiatives.

The **Asian American Justice Center ("AAJC")**, member of Asian American Center for Advancing Justice, is a national non-profit, non-partisan organization whose mission is to advance the civil and human rights of Asian Americans and promote a fair and equitable society for all. Founded in 1991, AAJC engages in litigation, public policy, and community education and outreach on a range of civil rights issues, including fairness and non-discrimination in the

workplace. Workers from immigrant and other underserved communities such as those for whom AAJC advocates are particularly vulnerable to unfair employment practices, and AAJC's interest in the effective vindication of their rights has resulted in the organization's participation in numerous *amicus curiae* briefs supporting access to the class or collective action mechanism.

Founded in 1972, the **Asian Law Caucus ("ALC")** is the nation's oldest legal organization dedicated to advancing the civil rights of Asian American and Pacific Islander communities. ALC is a member of the Asian American Center for Advancing Justice, whose other members include the Asian American Institute, Asian American Justice Center and Asian Pacific American Legal Center. ALC has a long history of advocating on behalf of low-wage immigrant workers through direct legal services, impact litigation, community education and policy work. ALC's clients include vulnerable workers in service industries where wage theft and other violations of state and federal employment law are widespread. ALC has depended on class and collective actions to vindicate its clients' rights.

Asian Pacific American Legal Center ("APALC"), member of Asian American Center for Advancing Justice, is the largest legal organization in the country serving the Asian and Pacific Islander communities. Founded in 1983 and based in Los Angeles, APALC is a unique organization that combines traditional legal services with civil rights advocacy and leadership development. APALC is

committed to challenging discrimination and safeguarding the constitutional and civil rights of the Asian Pacific American communities and other communities of color. APALC has a long history of challenging workplace exploitation and abuse in low-wage industries, including protecting the rights of immigrant workers to bring collective or class actions. Accordingly, APALC has a strong interest in the outcome of this case.

California Rural Legal Assistance Foundation ("CRLAF") is a non-profit legal services provider which advocates for the rural poor in California and promotes the interests of low-wage workers, particularly farmworkers. Since 1986 CRLAF has recovered wages and other compensation for thousands of farm-workers, nearly all of whom are seasonal workers. These workers have been subjected to a variety of schemes intended to defraud them of their minimum wages, contract wages and overtime wages, and have been forced to endure working conditions which expose them to pesticides, heat stress, and acute and sustained ergonomic stress. They routinely face retaliation, and many of CRLAF's clients have been fired for bringing unsafe and/or illegal conditions to their employers' attention. CRLAF has litigated numerous workforce-wide and class cases for low-wage workers in both state and federal courts. CRLAF relies on the ability of workers to bring class and collective cases as this is often the only effective means to improving working conditions in agriculture and other low-

wage industries.

El Comité de Apoyo a Los Trabajadores Agrícolas ("CATA"), the Farmworker Support Committee, is a farmworker and low-wage worker membership organization which for over 30 years has assisted farmworkers and low-wage workers in education, organization, and action on work and other issues. CATA has offices in New Jersey and Pennsylvania. CATA assists farmworkers and low-wage workers who are subject to systematic problems of unpaid wages and poor working conditions. Retaliation has been a significant problem, and being able to act in a group manner has been important. Specifically, CATA has been working with groups of NLRA-covered packing house workers who would have their rights substantially diminished if they could not file class or collective actions. For such immigrant workers, these rights have been an important method of obtaining redress for wage violations.

The **D.C. Employment Justice Center ("DC-EJC")** is a non-profit organization whose mission is to secure, protect, and promote workplace justice in the D.C. metropolitan area. DC-EJC provides legal assistance on employment law matters to the working poor and supports a local workers' rights movement, bringing together low-wage workers and advocates for the poor. DC-EJC also represents low-income workers in state and federal court, including several class and/or collective actions. Class and collective actions provide low-wage workers

with a practical and economical means by which to pursue their rights; indeed, many of the workers whom DC-EJC represents would be precluded from vindicating their workplace rights at all if their only option was to proceed on an individual basis. In addition, such legal means are necessary to avoid piecemeal litigation of similar claims that would otherwise be too onerous for workers to pursue on their own and too costly for nonprofit organizations to litigate.

The **Equal Justice Center ("EJC")** is a non-profit employment justice organization specializing in promoting workplace fairness for low-income working men and women. From its offices in Austin and San Antonio, the EJC provides legal services and employment rights assistance to help low-wage construction laborers, janitors, dishwashers, housekeepers, and similar low-paid working people throughout Texas in their efforts to recover unpaid wages and protect their rights under the Fair Labor Standards Act and related wage-hour laws. EJC's constituents and clients are the very people the wage-hour laws were intended to protect: those whose livelihood is dependent on finding employment in the business of others and who have very limited bargaining power over their terms and conditions of employment. The EJC and its constituents and clients have a vital interest in this case because these employees' ability to minimally support themselves and their families through their own low-wage labor is gravely undermined if they are prohibited from joining together to address wage violations

in class or collective actions – in many cases effectively precluding any chance of enforcing their wage rights at all.

Equal Rights Advocates (ERA) is a national non-profit legal organization dedicated to protecting and expanding economic and educational access and opportunities for women and girls. ERA litigates class actions and other high-impact cases on issues of gender discrimination in employment and education. ERA provides advice and counseling to hundreds of individuals each year through a toll-free, multi-lingual hotline on issues concerning employers' noncompliance with worker protective legislation. ERA has also participated as *amicus curiae* in scores of cases involving the interpretation and application of procedural and substantive laws affecting low-income workers' access to justice, and the enforcement of anti-discrimination and other worker protective laws in the state and federal courts.

Friends of Farmworkers, Inc. is a Pennsylvania non-profit legal services organization founded in 1975 whose purpose is to improve the living and working conditions of workers from immigrant and migrant communities. Friends of Farmworkers has represented significant numbers of workers in food processing and landscaping industries subject to NLRB jurisdiction, and has represented worker organization clients as well. Friends of Farmworkers has undertaken nationwide representation of non-immigrant temporary non-agricultural workers

under the H-2B program, and such workers are particularly vulnerable to employers who establish pre-employment arbitration agreements which would restrict their ability to collectively enforce workplace rights. The right to pursue collective actions is critical for low-wage immigrant workers who face severe fears of employer and labor contractor retaliation and who often have claims of limited individual economic damages.

The **Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee")** is a tax-exempt, non-profit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, law school deans and professors, and many of the nation's leading lawyers. The Lawyers' Committee is dedicated, among other goals, to eradicating all forms of workplace discrimination affecting racial and ethnic minorities, women, individuals with disabilities, and other disadvantaged populations. Since the 1960s the Lawyers' Committee has relied on the class action mechanism and all available remedies under the Civil Rights Act of 1964 and other federal statutes as essential tools for combating unlawful discrimination in the workplace. The Lawyers' Committee, through its Employment Discrimination Project, has been involved in cases before the United States Supreme Court involving the interplay

of arbitration clauses and the exercise of rights guaranteed by civil rights laws prohibiting employment discrimination.

The **Lawyers' Committee for Civil Rights of the San Francisco Bay Area ("LCCR")** is affiliated with the national Lawyers' Committee for Civil Rights Under Law. LCCR was formed to support the rights of minority and low-income persons by offering free legal assistance in civil matters and by litigating cases on behalf of the traditionally under-represented, often as class actions. In addition, LCCR frequently files *amicus* briefs in cases raising important civil rights issues. Class and other collective actions are integral to LCCR's civil rights agenda, and practices that inhibit the ability of individuals to bring such actions harm LCCR's ability to advance the interests of its client communities.

The Legal Aid Society ("The Society") is one of the oldest and largest providers of legal assistance to low-income people in the United States. The Society's Civil Practice operates trial offices in all five boroughs of New York City providing comprehensive legal assistance in employment, housing, public assistance, and other civil areas of primary concern to New Yorkers with low incomes. The Society's Employment Law Unit represents low-wage workers in employment-related matters such as claims for unpaid wages, claims of discrimination, and unemployment insurance hearings. The Unit develops litigation, outreach, and advocacy projects designed to assist the most vulnerable

workers in New York City, among them, immigrant workers who are afraid to raise claims of illegal exploitation on their own and whose only hope for legal redress is through collective action initiated by co-workers.

The **Low Wage Workers Legal Network** is an affiliation of over 215 advocates from more than 92 organizations in 29 states, the District of Columbia and Mexico City that are engaged in legal advocacy on behalf of low-wage workers in employment matters. Clients of these advocates will be seriously impacted by the decision in this matter, in that their rights to engage in collective action to enforce statutory rights could be impaired.

The **National Employment Law Project ("NELP")** is a non-profit legal organization with 40 years of experience advocating for the employment and labor rights of low-wage workers. In partnership with community groups, unions, and state and federal public agencies, NELP seeks to ensure that all workers, and especially the most vulnerable, receive the basic workplace protections guaranteed in our nation's labor and employment laws. The availability of class and collective actions is vital for effective enforcement of these workplace rights. NELP has litigated and participated as *amicus* in numerous cases addressing the rights of workers under the Fair Labor Standards Act as well as other federal and state workplace laws.

The **National Lawyers Guild (the "Guild") Labor and Employment**

Committee has a long record of action on behalf of workers, both as *amicus* and through strategic coordination, scholarship, and advocacy. The National Lawyers Guild is a non-profit corporation formed in 1937 as the nation's first racially integrated voluntary bar association, with a mandate to advocate for the protection of rights granted by the United States Constitution and fundamental principles of human and civil rights. Since then the Guild has been at the forefront of efforts to develop and ensure respect for the rule of law and basic legal principles. The members of the Guild's Labor and Employment Committee provide direct representation to individual and organized workers in a variety of local, state, federal, and international forums, including the NLRB. The Committee has a particular interest in ensuring that the NLRA is properly interpreted to vindicate workers' ability to act in concert to protect their rights and engage in concerted protected activity.

The **National Partnership for Women & Families** ("**National Partnership**," formerly the Women's Legal Defense Fund) is a non-profit, nonpartisan organization that uses public education and advocacy to promote fairness in the workplace, access to quality health care, and policies that help women and men meet the dual demands of work and family. Since its founding in 1971, the National Partnership has devoted significant resources to combating sex, race, age, and other forms of invidious workplace discrimination. The National

Partnership has filed numerous briefs *amicus curiae* in the U.S. Supreme Court and in the federal circuit courts of appeal to advance the opportunities of protected individuals in employment.

The **National Whistleblowers Center ("NWC")** is a non-profit, tax-exempt public interest organization. Since 1988, NWC has assisted corporate employees who suffer from illegal retribution for lawfully disclosing violations of federal law. The NWC provides assistance to whistleblowers, helps them obtain legal counsel, provides representation for important precedent-setting cases and urges Congress and administrative agencies to enact laws, rules, and regulations that will assist in helping employees report fraud both within their corporate compliance programs and directly to government agencies. The NWC does not have the resources to provide legal representation to all the whistleblowers who apply for assistance. The courageous employees who risk their careers to raise concerns about frauds, pollution, transportation dangers and other violations of law must often depend on unions, private arbitration and other forms of concerted activity for their aid and protection. In this sense, the availability of collective and class actions is important in the protection of whistleblowers.

The **National Women's Law Center ("NWLC")** is a non-profit legal advocacy organization dedicated to the advancement and protection of women's legal rights. Since 1972, NWLC has worked to secure equal opportunity for

women in the workplace. This includes not only the right to a workplace that is free from all forms of discrimination and exploitation, but also access to effective means of enforcing that right and remedying discrimination and exploitation.

The **North Carolina Justice Center ("Justice Center")** is a non-profit legal advocacy organization whose mission is to secure economic justice for disadvantaged persons and communities. The Justice Center provides legal assistance in civil matters to poor people, including cases involving labor and employment issues. The Justice Center's goal is to ensure justice and fair treatment for all, particularly those whose poverty renders them powerless to demand accountability from the economic marketplace and their employers. The Justice Center has represented thousands of working people in North Carolina through collective actions under the Fair Labor Standards Act and class actions under North Carolina's wage and hour law who would not have been able to bring individual lawsuits because the cost of litigation would far exceed each individual amount of unpaid minimum wage, overtime or other wage claims.

Northwest Workers' Justice Project ("NWJP") is a non-profit law firm in Portland, Oregon, that represents low-wage workers and their organizations in the Pacific Northwest in employment matters, including organizing rights, wage and discrimination claims. *See* www.nwjp.org. In a number of cases clients of NWJP have encountered difficulty in asserting statutory employment rights in court due to

language in an arbitration agreement forbidding collective action. They will be seriously impacted by the decision in this matter.

The **Public Justice Center ("PJC")** is a non-profit legal services organization founded in 1985 that seeks to enforce and expand the rights of people who are denied justice because of their economic status or because of discrimination. Its Workplace Justice Project has a long-standing commitment to advocating on behalf of workers in class and collective actions. In particular, the PJC frequently relies on the class action as a vehicle to promote justice on behalf of groups of employees whose individual claims are too small to enable them to find private counsel. The PJC has represented thousands of workers in both trial and appellate courts nationwide, including poultry processing employees seeking to enforce fair labor standards and women fighting gender discrimination in pay and promotions. Further, the PJC has represented employees before the NLRB and has an interest in ensuring that the National Labor Relations Act is properly interpreted to protect workers' rights to engage in concerted protected activity.

The **Maurice & Jane Sugar Law Center for Economic & Social Justice ("Sugar Law Center")** is a national non-profit law center extensively engaged in labor and employment law litigation, including class and collective actions in support of workers' rights. The Sugar Law Center is deeply interested in this case because its outcome could affect the right of thousands of workers to proceed in

court and obtain a fair remedy through the legal system where an employer seeks to impose a contractual ban on class and collective actions. The judgment of *amici* is based on over 15 years of experience in advocacy and representation on behalf of thousands of workers before federal and state trial and appellate courts throughout the country.

The **University of Texas Law School-Transnational Worker Rights Clinic ("Worker Rights Clinic")** is a formal clinical education program of the University of the Texas School of Law in Austin, Texas. The Worker Rights Clinic's clients include low-wage employees in construction, hotel and restaurant work, landscaping, janitorial services, domestic work, health care services, and similar low-paid service and production jobs, who seek to recover unpaid wages and protect their rights under the Fair Labor Standards Act and related wage-hour laws. The Worker Rights Clinic's clients are the very people the wage-hour laws and the NLRA were intended to protect: those whose livelihood is dependent on finding employment in the business of others and who have very limited bargaining power over their terms and conditions of employment. The Worker Rights Clinic and its clients have a vital interest this case because these employees' ability to minimally support themselves and their families through their own low-wage labor is gravely undermined if they are prohibited from joining together to address wage violations in class or collective actions – in many cases effectively

precluding any chance of enforcing their wage rights at all.

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici Curiae are 25 organizations dedicated to representing poor and powerless individuals who often cannot safeguard their fundamental labor and anti-discrimination protections in the workplace without class or collective actions. They advocate on behalf of some of the most vulnerable and exploited low-wage and immigrant worker populations – for example, in the building maintenance, car wash, construction, landscaping, food processing, food service, hospitality, light manufacturing, warehousing and shipping, child care and nursing home industries – all across this country. While the workers represented by *amici* continue to confront widespread poor working conditions, wage and hour and civil rights violations, as well as retaliation for asserting their rights, they lack the financial and legal resources necessary to enforce their rights through individual lawsuits. For them, meaningful enforcement of broad, remedial statutes intended to protect workers depends upon the availability of joint, class, and collective actions.

Amici increasingly encounter workers whose ability to pursue effective relief is curtailed by forced arbitration agreements that prohibit the pursuit of joint, class, or collective actions. Somewhere between 15 and 25 percent of employers have adopted forced arbitration policies, covering 30 million employees, or one-fourth of all U.S. non-union workers. FAIR ARBITRATION NOW, "*Employment Arbitration*," http://www.fairarbitrationnow.org/content/employment-arbitration

(last visited August 17, 2012). *Amici Curiae*'s interest in this matter is to preserve access to the joint, class, and collective action legal devices for low-wage workers who too often face insurmountable barriers to enforcing their rights individually, whether in court or in arbitration. More specific statements of interest of *amici* are listed in the Supplemental Certificate of Interested Persons.

All parties have consented to the filing of this *amicus* brief.

FEDERAL RULE 29(c)(5) STATEMENT

(A) No party's counsel authored this brief in whole or in part;

(B) No party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(C) No person, other than *amici curiae*, their members, or their counsel, contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

This Court should enforce the decision of the National Labor Relations Board ("NLRB") in *D.R. Horton Inc. and Michael Cuda*, 357 NLRB No. 184 (2012) ("Decision"), as it rests on three long-established and unassailable legal principles:

(1) Employees covered by the National Labor Relations Act ("NLRA") have a substantive right under section 7 of that statute to bring joint, collective, and class actions related to the terms and conditions of their employment,

whether or not those employees are unionized. Legions of federal judicial and NLRB decisions spanning seven decades recognize this right. Neither Petitioner nor its *amici* have cited a single decision to the contrary.

(2) Courts cannot enforce private contractual provisions that violate the NLRA. The U.S Supreme Court so held in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83-84, 86 (1982). Petitioner has not cited a single decision to the contrary and its *amici* have ignored this controlling Supreme Court precedent altogether.

(3) The Federal Arbitration Act ("FAA") does not permit enforcement of an arbitration agreement that is illegal under federal law or deprives one of the parties of its substantive federal rights. The United States Supreme Court has repeatedly so held. Neither Petitioner nor its *amici* have cited a single decision to the contrary.

The NLRB correctly held that because Petitioner D.R. Horton's so-called "Mutual Arbitration Agreement" deprives its employees of their substantive right under section 7 of the NLRA to engage in concerted legal action, the contract violates section 8(a)(1) of the NLRA, and the FAA does not save the agreement from invalidity. This Court should defer to the NLRB's construction of the statute it administers and enforce the decision of the agency.

ARGUMENT

I. EMPLOYEE CLASS, COLLECTIVE, AND JOINT LEGAL ACTIONS EPITOMIZE THE SUBSTANTIVE RIGHT TO CONCERTED ACTIVITY THAT SECTION 7 PROTECTS.

Courts have long held that section 7 of the NLRA protects the rights of workers to improve the terms and conditions of their employment "through resort to administrative and judicial forums." *Eastex Inc. v. NLRB*, 437 U.S. 556, 566 (1978). Employees may engage in concerted activities for their mutual aid or protection without the existence of a union. *Brady v. NFL*, 644 F.3d 661, 672-673 (8th Cir. 2011). "[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment *is* 'concerted activity' under § 7 under the National Labor Relations Act." *Id.* at 673 (emphasis in original) (citing *Mohave Elec. Co-op Inc. v. NLRB*, 206 F.3d 1183, 1189 & n.8 (D.C. Cir. 2000); *Altex Ready Mixed Concrete v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976); *Leviton Mfg. Co. v. NLRB*, 486 F.2d 686, 689 (1st Cir. 1973)).

Prior to its decision in this case, the Board had repeatedly held that the filing of a civil action regarding the terms and conditions of employment by or on behalf of a group of employees constitutes concerted protected activity under section 7. *E.g., Saigon Gourmet Restaurant, Inc.*, 353 NLRB No. 110 (2009) (wage and hour lawsuit); *Harco Trucking, LLC*, 344 NLRB 478, 481 (2005) (class action filed by one employee); *In re 127 Restaurant Corp.*, 331 NLRB 269, 275-76 (1996) (joint

action by 17 employees); *52 Street Hotel Assoc.*, 321 NLRB 624, 633-636 (2000) (collective action), *abrogated on other grounds by Stericycle, Inc.*, 357 NLRB No. 61 (2011); *Host International*, 290 NLRB 442, 443 (1988) (joint action by seven employees); *United Parcel Serv., Inc.*, 252 NLRB 1015, 1018 (1980) (class action filed by 12 employees); *Trinity Trucking & Materials Corp.*, 221 NLRB 364, 365 (1978) (civil action by three employees); *Automobile Club of Michigan*, 231 NLRB 1179, 1181 (1977) (class action lawsuit); *Moss Planning Mill Co.*, 103 NLRB 414, 419 (1953) (wage claims by two employees); *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 949-50 (1942) (lawsuit by three employees).

The Board correctly held here that class, collective, and joint employee actions constitute the exercise of a "core substantive right" under section 7. Decision at 10. By definition any individual who brings a class action does so only as a "representative" party on behalf of all other members of the class. *See* Fed. R. Civ. P. 23(a). Likewise, a collective action brought under the Fair Labor Standards Act ("FLSA"), the Equal Pay Act ("EPA"), or the Age Discrimination in Employment Act ("ADEA") requires the participation of more than one employee in order to constitute "a collective action." *See* 29 U.S.C. § 216(b) (collective action is one brought by employee(s) "in behalf of . . . other employees similarly situated").

Employees bring class, collective, and joint actions rather than individual

cases for the same reasons they engage in any other form of section 7 activity. One such reason is that there is some safety in numbers. *See* Decision at 3 n. 5. An employee who brings an individual claim against his or her employer (either in court or in arbitration) makes a visible target. The risk of retaliation against workers who complain about working conditions "is no imaginary horrible given the documented indications that '[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns . . . .'" *Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 555 U.S. 271, 279 (2009) (citing Deborah L. Brake, *Retaliation*, 90 Minn. L. Rev. 18, 20, 37 & n.58 (2005)). The risk of retaliation is especially poignant for the low-wage and immigrant workers *amici* represent, due to their dependence on each pay check and their tendency to work in low-skilled jobs where employers too frequently consider them expendable. Joint, class, and collective actions protect employees who wish to challenge and improve their working conditions from the retaliation that often follows from pursuit of an individual action. *See* Conte & Newburg, *Newburg on Class Actions,* § 24.61 (4th Ed. 2002).

As recognized by the Board, employees who bring individual actions against their employers run a greater risk of retaliation than those who participate in class actions. Decision at 3 n.5 (citing *Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81, 85-86 (S.D.N.Y 2001); *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 701

(N.D. Ga. 2001); *Adames v. Mitsubishi Bank Ltd.*, 133 F.R.D. 82, 89 (E.D.N.Y. 1989); *Slanina v. William Penn Parking Corp.*, 106 F.R.D. 419, 423-24 (W.D. Pa. 1984)). The Board understood the breadth of employee participation in a class action affords each individual worker a degree of anonymity and cover. *Id*. Thus, joint, class and collective actions are truly a form of "mutual aid and protection" under section 7, as the Board held.

Joint, class, and collective actions educate and empower workers in the same way as other section 7 activities. The Board correctly reasoned that "employees are both more likely to assert their legal rights and also more likely to do so effectively if they can do so collectively." Decision at 3. Both class actions and collective bargaining allow employees to promote their rights through representatives rather than through individual, personal activity. The Board noted that class and collective actions allow employees to pool their claims and resources for the greater collective good. *Id*.; *see also Phillips Petroleum v. Shutts*, 472 U.S. 797, 809 (1985). "[T]he class action is the only economically rational alternative when a large group of individuals . . . has suffered an alleged wrong but the damages due to any single individual . . . are too small to justify bringing an individual action." *In re American Express Merchants Litigation*, 634 F.3d 187, 194 (2d Cir. 2011). The potential recovery in an individual wage case, particularly one involving low-paid workers, may be so small that no rational person would be

willing or able to pursue it unless as part of a larger class or collective action. *See, e.g., Scholtisek v. Eldre Corp.,* 229 F.R.D. 381, 394 (W.D.N.Y. 2005); *Jarvaise v. Rand Corp.*, 212 F.R.D. 1, 4 (D.D.C. 2002). Thus, group participation in joint, class, and collective actions regarding conditions of employment is an essential method of workplace organization and "at the core of what Congress intended to protect by adopting the broad language of section 7." Decision at 3.

While class actions often involve multiple named plaintiffs asserting claims on behalf of a group of employees, as the Board recognized, a class action initiated by a single worker is no less *per se* protected activity under section 7. The Board and the courts have long held that concerted activity includes the actions of one individual if undertaken on behalf of a group of employees or in preparation for subsequent group action. *See, e.g., International Transp. Sev., Inc. v. NLRB,* 449 F.3d 160, 166 (D.C. Cir. 2006); *Citizens Inv. Servs. Corp. v. N.L.R.B.*, 430 F.3d 1195, 1199 (D.C. Cir. 2005); *Phillips Petroleum Co.*, 339 NLRB 916, 918 (2003). Indeed, the Board has repeatedly recognized that a single plaintiff class action constitutes concerted activity within the meaning of section 7. *Harco*, 344 NLRB at 441; *UPS*, 252 NLRB at 1018. The filing of a class action by a single employee is necessarily *on behalf of* a group of employees and *in preparation for* a subsequent group action intended to be certified by the court under Rule 23. The Board correctly held that such a class action is by definition concerted action

within the meaning of section 7. Decision at 3. The numerosity, commonality, typicality, and adequacy of representation requirements of Fed. R. Civ. P. 23(a) (and its state law analogues) guarantee that an employee who brings a class action cannot do so for purely individual claims or for purely personal reasons. *Cf. Meyers Indus. Inc.*, 281 NLRB 882, 887-888 (1986) (*Meyers II)* (recognizing that when an employee files an individual legal action claiming an employer has violated his or her rights under a statute enacted for the protections of employees generally, that act may or may not be protected concerted activity under section 7, depending on the circumstances.)

For all these reasons, this Court should defer to and adopt the Board's holding that an employee's participation in a workplace class, collective, or joint legal action is *per se* concerted activity under section 7. Indeed, concerted employee legal action can be just as effective an organizing tool as a traditional unionization campaign. The Board's decision in this case is fully consistent with NLRB precedent that an employer policy that requires a promise by an NLRA-covered employee to refrain from section 7 activity is *per se* unlawful under section (8)(a)(1). *See, e.g., Martin Luther Memorial Home*, 343 NLRB 646 (2004); *Barrow Utilities & Electric*, 308 NLRB 4, 11 n. 5 (1992). A class (or collective) action ban inevitably chills the effective protection of interests common to employees as a group. *Ingle v. Circuit City*, 328 F.3d 1165, 1176 n.13 (9th Cir.

2003). An employer prohibition on joining a class or collective action is no more lawful than an employer prohibition against joining a union. "The law has long been clear that all variations of the venerable 'yellow dog contract' are invalid as a matter of law." *Barrow Utilities*, 308 NLRB at 11 n.5. *See also* 29 U.S.C. §§ 102-103 (contracts barring concerted activity are unenforceable under the Norris-LaGuardia Act). D.R. Horton's no-class, collective, or joint action employment contract is of the same pedigree.

The Board's holding that an employee's ability to file or participate in a class, collective, or joint legal action regarding the terms and conditions of employment is a substantive legal right guaranteed by section 7 of the NLRA in no way conflicts with *Carter v. Countrywide Credit Indus. Inc.*, 362 F.3d 294, 298-299 (5th Cir. 2004). There this Court held that the right to bring a collective action under 29 U.S.C. § 216(b) is procedural rather than substantive. As the Board properly observed: "[T]he question presented in this case is not whether employees can effectively vindicate their rights under the FLSA in arbitration despite a prohibition against class or collective proceedings, but whether employees can be required, as a condition of employment, to enter into an agreement waiving their rights under the NLRA" to engage in concerted legal activity. Decision at 10. *Carter* does not address the question in this case.

In sum, this Court should defer to and affirm the Board's decision that D.R.

Horton's requirement that its employees waive their rights to concerted legal activity under the NLRA violates sections 7 and 8(a)(1) of the NLRA.

II. D.R. HORTON'S INCLUSION OF ITS PROHIBITION ON EMPLOYEE JOINT, CLASS AND COLLECTIVE ACTIONS IN A FORCED ARBITRATION AGREEMENT DOES NOT SAVE IT FROM INVALIDITY.

The Board properly rejected the contention that the FAA required the agency to uphold D. R. Horton's concerted legal activity waiver despite its blatant invalidity under the NLRA. Neither the U.S. Supreme Court nor any other federal appellate court has ever suggested that an employer can use the vehicle of a forced arbitration agreement to impose a total ban on workplace class or collective actions in violation of sections 7 and 8(a)(1) of the NLRA.

Thirty years ago the Supreme Court ruled that a federal court cannot enforce a contract that violates the NLRA. *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 86 (1982). In *Kaiser Steel* the Supreme Court considered a contract that arguably violated section 8(e) of the NLRA. The Supreme Court held that if a contract contains an obligation that violates federal labor law, a federal court cannot enforce such a promise. *Id.* at 83-84 D.R. Horton's one-sentence effort to distinguish *Kaiser Steel* on the basis that it involved conduct made illegal by section 8(e) rather than 8(a)(1) is unavailing. The central teaching of *Kaiser Steel* is that a court cannot enforce the provisions of a private contract that violate the NLRA. The FAA specifically provides that an arbitration agreement can be invalidated on

the same basis as any other contract. 9 U.S.C. § 2. Therefore, an arbitration agreement that violates the NLRA is just as unenforceable as any other contract that violates that statute.

Moreover, the Supreme Court has repeatedly held that an employee who signs an agreement to arbitrate a statutory claim does not thereby agree to forego any of his or her federal substantive statutory rights. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295 n.10 (2002); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273-74 (2009); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *accord Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985); *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 90 (2000). The Supreme Court has not limited the rule that an arbitration agreement may not waive substantive federal statutory rights to apply only to the statute that supplies the cause of action in the particular case. Numerous federal circuit courts have struck down workplace arbitration provisions that limit an employee's substantive statutory rights, despite the pro-arbitration policy of the FAA. *E.g., Spinetti v. Service Corp. Intern.*, 324 F.3d 212, 216 (3d Cir. 2003); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 670 (6th Cir. 2003) (en banc); *McCaskill v. SCI Management Corp.*, 298 F.3d 677 (7th Cir. 2002). *Accord In re American Express Merchants Litigation*, 634 F.3d 187, 199 (2d Cir. 2011) ("Thus, as the class action waiver in this case precludes plaintiffs from enforcing their statutory rights, we

find the arbitration provision unenforceable.") By requiring employees to arbitrate their workplace claims on an individual basis, D.R. Horton has deprived them of a federal statutory right under the NLRA to engage in protected concerted legal activity that by definition can be undertaken only on a collective basis or not at all.

The Board held that nothing in the FAA requires enforcement of a forced arbitration agreement that violates the NLRA. In doing so, the Board correctly distinguished the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). Decision at 9. In *Concepcion* the Court held that the FAA preempted the application of California unconscionability law to invalidate an arbitration agreement that prohibited consumers from pursing their claims as a class action. *Concepcion* was not an employment case. The contract at issue there did not violate the NLRA or any other federal statute. The Supreme Court expressly stated that the issue decided in *Concepcion* was whether "the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." *Id.* at 1741. The consumer plaintiffs had no right under federal law to engage in concerted legal activity for their mutual aid and protection. *Cf.* 29 U.S.C. § 157. Therefore, the *Concepcion* Court had no reason to apply the settled rule that nothing in the FAA permits an employer to use a forced arbitration agreement to deprive its workers of their substantive federal rights.

The *Concepcio*n majority held section 2 of the FAA does not permit a court to invalidate an arbitration agreement based on "defenses that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue." 131 S. Ct. 1746. The majority further held that section 2 does not preserve "state law rules that stand as an obstacle to the obstacle of the FAA's objectives." *Id.* at 1748. None of these principles apply to the case at hand. Sections 7 and 8(a)(1) of the NLRA are not state law rules. These federal statutory provisions do not "apply only to arbitration" and the Board's invocation of them in no way depended on the fact that an arbitration agreement was at issue. The Board expressly held that D.R. Horton's requirement that its employees waive their section 7 rights to concerted legal activity as a condition of employment would be just as unlawful under the NLRA if it applied only to court actions and did not address arbitration. *See* Decision at 9. The Board properly determined that *Kaiser Steel* and *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942), provided the controlling Supreme Court jurisprudence rather than *Concepcion*. *See* Decision at 11-12.

The challenge to the workplace arbitration clause that the Supreme Court rejected in *Gilmer v. Interstate/Johnson Lane Corp.* does not in any way undermine the Board's reasoning. In *Gilmer*, the plaintiff argued that the arbitration of his *individual* claim was inconsistent with the statutory purposes of

the ADEA in part because the arbitration would not allow for class actions. 500 U.S. at 32. The NYSE arbitration agreement permitted collective proceedings. *Id.* Moreover, Mr. Gilmer's argument was a *non-sequitur*. As the Court explained, "'even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.'" *Id.* (quoting *Nicholson v. CPC Int'l Inc.*, 877 F.2d 221, 241 (3d Cir. 1989) (Becker, J. dissenting)).

Gilmer and the case it cited, *Nicholson*, both involved individual employee lawsuits. The argument the Court rejected in *Gilmer* was one asserting the ADEA precluded the arbitration of *individual* claims of discrimination because the statute permits collective actions by way of 29 U.S.C. § 216(b). As the Board recognized here, nothing in the NLRA prohibits an employer from requiring the arbitration of individual claims. Decision at 12. Neither Mr. Gilmer nor Mr. Nicholson attempted to bring a collective or a class action, and neither engaged in statutorily protected concerted activity under section 7 of the NLRA. Moreover, neither case involved an employer's categorical bar of concerted legal activity. *See Nicholson*, 877 F.2d at 241 n.12. The arbitration agreement in *Gilmer* was not between employer and employee but between Mr. Gilmer and the New York Stock Exchange. 500 U.S. at 23. In short, *Gilmer* in no way implicated section 7 rights.

The Supreme Court's recent decision in *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012), does not cast any doubt on the soundness of the NLRB's rulings in this case. The issue there was whether a provision in the Credit Repair Organizations Act ("CROA") requiring companies to inform consumers that they "have the right to sue" for conduct that violates the Act, 15 U.S.C. § 1679f(a), precluded enforcement of an arbitration agreement between a consumer and a credit card company. The Supreme Court held 8-1 that the "right to sue" language did not provide consumers with an unwaiveable statutory right to bring their claims in a court of law rather than in arbitration. 132 S. Ct. at 669-70. The Justices also rejected the proposition that if Congress sets forth explicit procedures allowing for judicial enforcement of a claim in court that *ipso facto* precludes one party from requiring the other to waive the right to a court determination of the claim through an arbitration agreement. *Id.* at 671.

In contrast to *CompuCredit*, the issue in this case is not whether the NLRA forbids employers from requiring its employees to agree to exercise their right to concerted legal activity in arbitration rather than in court. The Board explicitly did not reach that question. Decision at 13 n.28. Arbitration is a central pillar of federal labor policy. *Id.* at 13 (citing *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960)). A union may agree to a collective bargaining agreement clause that requires member employees to arbitrate their

statutory legal claims against the employer and waives their right to go to court. *14 Penn Plaza*, 556 U.S at 251. But, as the Board held, the NLRA prohibits an employer from requiring its employees as a condition of employment to forgo in any forum whatsoever their statutory right to engage in concerted legal activity. Decision at 12, 13. *CompuCredit* does not undermine in the slightest the Board's determination the FAA does not require enforcement of a forced arbitration agreement that violates the NLRA by prohibiting the exercise of the right to engage in concerted legal activity in arbitration as well as in court.

CONCLUSION

A contract that requires employees to give up entirely their section 7 rights to bring a joint, class or collective action regarding their working conditions deprives the employees of a substantive statutory right and is unenforceable under both the NLRA and the FAA. This Court should enforce the Board's determination that D.R. Horton's "Mutual Arbitration Agreement" violates sections 7 and 8(a)(1) of the NLRA and dismiss the petition for review.

RESPECTFULLY SUBMITTED this 11th of SEPTEMBER 2012

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CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2012, I filed the BRIEF OF *AMICI CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION *ET AL*. IN SUPPORT OF RESPONDENT AND CROSS-PETITIONER NATIONAL LABOR RELATIONS BOARD with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system, which caused a copy to be delivered to all parties

Dated this 11th day of September 2012.

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CERTIFCATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 4090 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P.32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, the Firm's word processing system in 14 point, Times New Roman.

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