No. 12-1719

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SHARON OWEN,

Appellee,

v.

BRISTOL CARE, INC.,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI
(2:11-CV-04258-FJG)

BRIEF FOR *AMICI CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, THE EMPLOYEE RIGHTS ADVOCACY INSTITUTE FOR LAW & POLICY, AND NATIONAL EMPLOYMENT LAW PROJECT

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CORPORATE DISCLOSURE STATEMENT (FED. R. APP. P. 26.1)

Amici Curiae National Employment Lawyers Association, The Employee Rights Advocacy Institute for Law & Policy, and National Employment Law Project hereby disclose that they are not-for-profit corporations, with no parent corporation and no publicly-traded stock.

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STATEMENTS OF AMICI CURIAE

Amici movants are organizations dedicated to securing enforcement of state, federal, and local laws, regulations, and ordinances that have been enacted for the purpose of protecting workers in the area of wages, hours, and working conditions, and thereby promoting the general welfare. The organizational interests of *Amici* in this case are set forth below.

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 Court's holding regarding the issues presented by this case may have a major impact on the thousands of NELA's members and clients nationwide, as well as on the litigation of Fair Labor Standards Act cases

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generally. Given its members' extensive experience litigating these issues nationwide, NELA is uniquely positioned to provide the Court with a thorough and legally accurate treatment of the issues, which will be of benefit to the Court in deciding the merits of this appeal.

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 mandatory pre-dispute arbitration of employment claims through its public education work.

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 employees, and especially the most vulnerable ones, receive the basic workplace protections guaranteed in our nation's labor and employment laws. 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 workplace rights laws. Depriving workers of the ability to fully enforce their rights to be paid minimum

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wage and overtime pay by prohibiting collective action in any forum undermines the wage floor and the policies of the Fair Labor Standards Act, and rewards unfair competition by employers engaging in wage theft.

SUMMARY OF ARGUMENT

For decades, federal labor law has accorded a fundamental guarantee to workers: the right to engage in concerted action to improve their employment conditions. The right to concerted action is a substantive entitlement that cannot be abridged by contract. Limiting an employee's ability to engage in concerted activity by way of a class-action ban directly interferes with an employee's substantive rights and must be held unenforceable.

Refusing to enforce a contract because it infringes on a substantive right does not conflict with the Federal Arbitration Act ("FAA"). The FAA demonstrates only a congressional preference for an arbitral forum; it says nothing about the right to act collectively in such a forum. The National Labor Relations Act ("NLRA") and the Norris-LaGuardia Act, in contrast, specifically guarantee workers the right to concerted action and forbid employers from interfering with those rights. Accordingly, the substantive mandate of the NLRA and the Norris-LaGuardia Act must control over the FAA's preference for an arbitral forum where the forum selection clause extinguishes the right to concerted action.

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In addition to the substantive right to act collectively provided by the NLRA and the Norris-LaGuardia Act, Congress enacted the Fair Labor Standards Act ("FLSA") to ensure all covered workers are paid minimum wage and overtime for hours worked over forty. Included within the FLSA is a collective action provision that is a central enforcement tool for wage and hour matters. A collective action ban cannot be enforced because it strips workers of a substantive right guaranteed by the FLSA.

The principal effect of an arbitration agreement requiring workers to forfeit their statutory right to bring claims collectively is not to provide an alternative forum to court; it is to suppress workers' ability to bring collective actions addressing wage and hour claims. It is well established that federal statutory rights cannot be eviscerated by an employer under the guise of a forum-selection clause because doing so would impermissibly elevate the preference for arbitration to a position superior to fundamental rights enjoyed by citizens. As such, the district court's order denying Defendant's motion to stay proceedings and compel arbitration should be affirmed.

ARGUMENT

I. PROHIBITIONS ON COLLECTIVE ACTIONS ARE UNENFORCEABLE AS CONTRARY TO FEDERAL LABOR LAW.

Both the NLRA, 29 U.S.C. § 151 *et seq.*, and the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.*, accord a common, fundamental guarantee to workers: the

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right to engage in concerted action to improve their employment conditions. 29 U.S.C. § 157; 29 U.S.C. § 102. This workers' right to act collectively has long been recognized as broader than simply protecting the right to strike or sign a petition, and it specifically includes workers' efforts to collectively "seek to improve working conditions through resort to administrative *and judicial* forums." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978) (emphasis added); *accord Brady v. Nat'l Football League*, 644 F.3d 661, 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 of the National Labor Relations Act [29 U.S.C. § 157].").

The right to concerted action—through administrative process, court action, or some other means—is a substantive entitlement that cannot be abridged by contract. Nonetheless, employers attempt to circumvent workers' statutory protections by way of arbitration agreements such as the one in this case, which includes a putative ban on class, collective, or group actions. As the National Labor Relations Board ("NLRB" or "the Board") recently held, courts cannot give effect to such prohibitions, for doing so would conflict directly with "the foundation on which the [NLRA] and Federal labor policy rest": the right to engage in concerted activity, including "collective *legal* action." *In re D.R. Horton*, 357 NLRB No. 184, 2012 WL 36274, at *12 (Jan. 3, 2012). In contrast,

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excising a ban on concerted activity from an arbitration agreement does no violence to the FAA's preference for the arbitral forum. On the contrary, it places the arbitration agreement on the same ground as any other contract—enforceable except to the extent it would impede upon a party's substantive rights. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627-28 (1985).

A. Bristol Care, Inc.'s Collective Action Ban Violates Workers' Right to Engage in Concerted Activity.

Section 7 of the NLRA guarantees workers "the right to . . . engage in . . . concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 157. This right includes efforts "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Eastex, Inc.*, 437 U.S. at 565. An employee need not provoke a strike, sign a petition, or internally allege some unfair labor practice to engage in concerted activity—it has long been recognized (and recently reaffirmed by this Court) that "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 of the National Labor Relations Act." *Brady*, 644 F.3d at 673; *accord Eastex*, 437 U.S. at 566. And it is axiomatic that employee action aimed at seeking their employer's compliance with the FLSA is an effort to improve the conditions of employment.

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In *D.R. Horton*, the NLRB considered whether the same conduct as this case—an employer's use of a class action ban in an arbitration agreement to prevent an FLSA collective action—was consistent with the right of workers to engage in concerted action. The Board first explained that an FLSA claim, filed by a single plaintiff as a collective action on behalf of similarly-situated workers, constitutes "concerted activity" within the meaning of Section 7:

> [T]he Board has long held that concerted activity includes conduct by a single employee if he or she "seek[s] to initiate or to induce or to prepare for group action." Clearly, an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7.

D.R. Horton, 2012 WL 36274, at *4 (citations omitted). According to the Board, "[t]hese forms of collective efforts to redress workplace wrongs or improve workplace conditions are at the core of what Congress intended to protect by adopting the broad language of Section 7. *Such conduct is not peripheral but central to the Act's purpose.*" *Id.* (emphasis added). The NLRB further clarified its conclusion by analogy to other rights clearly protected by the NLRA: "After all, if the Respondent's employees struck in order to induce the Respondent to comply with the FLSA, that form of concerted activity would clearly have been protected." *Id.*

After confirming that Section 7's concerted-action right provided workers the freedom to litigate collectively, the NLRB next turned to whether an attempt to

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restrict that collective-action right constitutes an unfair labor practice under Section 8(a) of the NLRA. That inquiry begins with a comparison of the questionable workplace practice to the language of Section 7 itself, to determine first "whether the [workplace] rule explicitly restricts activities protected by Section 7." *D.R. Horton*, 2012 WL 36274, at *5. If it does, that ends the matter, as the employment practice is an unlawful attempt "'to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in' Section 7." *D.R. Horton*, 2012 WL 36274, at *5 (quoting 29 U.S.C. § 158(a)(1)).

The NLRB concluded that on its face, the employer conduct in *D.R. Horton* violated Section 8(a)(1)'s guarantees of freedom from interference with Section 7's collective-action rights:

> Just as the substantive right to engage in concerted activity aimed at improving wages, hours, or working conditions through litigation or arbitration lies at the core of the rights protected by Section 7, the prohibition of individual agreements imposed on employees as a means of requiring that they waive their right to engage in protected, concerted activity lies at the core of the prohibitions contained in Section 8.

D.R. Horton, 2012 WL 36274, at *7. For guidance, the Board consulted the Norris-LaGuardia Act, as that Act represented the origins of modern federal labor policy. *Id.* Section 2 of the Act indicates that it is setting forth a declaration of the public policy of the United States on labor matters, and contains identical prohibitions on attempts to limit workers' rights to engage in concerted activity.

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Id.; *see also* 29 U.S.C. §§ 102 (Norris LaGuardia Act public policy declaration), 113(c) (defining "labor dispute" to include "any controversy concerning terms or conditions of employment"). If the NLRA left any ambiguity regarding whether employers could legally prohibit concerted activity through collective-action bans, the Norris-LaGuardia Act resolved the matter: federal labor policy expressly forbids employers from interfering with workers' collective action rights, whether through striking, arbitration, or court. *D.R. Horton*, 2012 WL 36274, at *7-*8.

The circumstances of *D.R. Horton* are indistinguishable from the instant case. Both matters involve an employee's attempt to pursue a collective action for alleged violations of the FLSA, and a company's attempt to ban the right to concerted action by way of a class action ban contained in an arbitration agreement. *Compare D.R. Horton*, 2012 WL 36274, at *1 *with Owen v. Bristol Care, Inc.*, No. 2:11-cv-04258-FJG, R. Doc. 21, at 1-2 (W.D. Mo. Feb. 28, 2012). That decision is entitled to "the greatest deference," since it expresses the NLRB's views on the interpretation of the NLRA. *ABF Freight Sys., Inc. v. NLRB*, 510 U.S. 317, 324 (1994). Applied here, *D.R. Horton* demonstrates that Chief Judge Gaitan correctly concluded that Bristol Care, Inc.'s collective action ban is unenforceable.

If anything, the prohibition on collective actions contained in Bristol Care, Inc.'s arbitration agreement is more offensive to the NLRA and the Norris-

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LaGuardia Act than the one presented to the Board in *D.R. Horton*. Both agreements purport to require workers to pursue workplace grievances individually, rather than through concerted action. Bristol Care, Inc.'s agreement goes further, however. By its terms, if a Bristol Care, Inc. employee attempts to prosecute an arbitral claim through a court action, the arbitrator is specifically empowered "to assess reasonable costs and expenses, including an award of reasonable attorney's fees," against the party who opposed arbitration. *Owen v. Bristol Care, Inc.*, No. 2:11-cv-4258-FJG, R. Doc. 6-1 at 12 (W.D. Mo. Nov. 7, 2011). But the Supreme Court has counseled that generally, the appropriate manner for a worker to challenge an arbitration-based ban on concerted activity such as Bristol's *is* through a court action. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010). In *Stolt-Nielsen*, the Supreme Court held "a party may not be compelled under the [Federal Arbitration Act] to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." 130 S. Ct. at 1775.

Bristol Care, Inc.'s arbitration agreement specifically bans class arbitrations. *Owen v. Bristol Care, Inc.*, No. 2:11-cv-4258-FJG, R. Doc. 6-1 at 11 (W.D. Mo. Nov. 7, 2011) ("The parties to this Agreement are prohibited from arbitrating claims subject to this Agreement as, or on behalf of, a class."). Thus, the way for workers to redress Bristol Care, Inc.'s FLSA violations is *not* through class

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arbitration, but rather through a collective court action. Yet Bristol Care, Inc.'s arbitration agreement would shift Bristol Care, Inc.'s costs and attorney's fees to the worker if she unsuccessfully pursues such collective court action. If the ban on collective actions in *D.R. Horton* ran afoul of Section 8(a) because it interfered with workers' rights to engage in concerted activity, Bristol Care, Inc.'s agreement is doubly nefarious: it interferes with the right to act collectively, and foreshadows punitive sanctions against a worker who unsuccessfully challenges the agreement.

B. Contract Provisions That Violate Workers' Statutory Rights Are Unenforceable.

Generally, conduct that is subject to NLRA Sections 7 and 8 is within the province of the Board, and courts "must defer to the [Board's] exclusive competence" to resolve such matters. *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83 (1982) (citations and internal quotation marks omitted). "It is also well established, however, that a federal court has a duty to determine whether a contract violates federal law before enforcing it." *Id.* Thus, where, as here, an employer's collective action prohibition violates the NLRA, a court may not enforce the ban. *Id.* at 86. The NLRB is authorized to take parallel action, or even more robust enforcement action than simply invalidating the contract, but that does not divest a court of the authority to determine the contract's validity. "Were the rule otherwise, parties could be compelled to comply with contract clauses, the lawfulness of which would be insulated from review by any court." *Id.*

Another federal court has recently given effect to the NLRB's decision in *D.R. Horton* by finding a collective action prohibition in an FLSA action unenforceable. *Herrington v. Waterstone Mortgage Corp.*, 2012 WL 1242318 (W.D. Wis. Mar. 16, 2012). The *Herrington* court explained that under *Kaiser Steel*, courts cannot enforce contracts that violate the NLRA. *Id.*, 2012 WL 1242318, at *3. Indeed, there would be a peculiar incongruence in the law if the NLRB found a contractual attempt to ban collective actions to be an unfair labor practice, yet a court nonetheless enforced the contract. Rather, as *Herrington* correctly held, courts must give the Board's decision in *D.R. Horton* effect so long as it represents a "reasonably defensible" interpretation of the NLRA. *Herrington*, 2012 WL 1242318, at *6 (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984)); *accord 14 Penn Plaza, LLC v. Pyett*, 556 U.S. 247, 257-58 (2009) (recognizing "the NLRA's broad sweep" in federal labor-relations law).

C. The Board's Holding in *D.R. Horton* Does Not Conflict With The Federal Arbitration Act.

D.R. Horton recognized that the FAA cannot serve to insulate an employer from compliance with federal labor law. Bristol Care, Inc. argues that *D.R. Horton* conflicts with both *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) and *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012), recent decisions interpreting the FAA. *Concepcion*, which refused to strike down a class action ban in a consumer contract, did so based on the FAA's preemptive effect on state law.

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131 S. Ct. at 1747, 1753. But *D.R. Horton* involved the interplay of *federal* statutes—the FAA, the NLRA, and the FLSA—statutes for which the FAA has no preemptive effect.

When the FAA appears in tension with another federal statute, courts must first analyze whether any actual conflict exists. "[W]hen two federal statutes 'are capable of co-existence,' both should be given effect 'absent a clearly expressed congressional intention to the contrary.'" *D.R. Horton*, 2012 WL 36274, at *10 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). As the Supreme Court has recognized, the FAA was enacted "to reverse the longstanding judicial hostility to arbitration agreement that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). By invalidating the collective action ban in *D.R. Horton*, the Board did not "treat[] arbitration agreements less favorably than other private contracts." 2012 WL 36274, at *11. The fact that the collective action prohibition was contained in an arbitration agreement was immaterial to the violation—it would violate the NLRA (and the Norris-LaGuardia Act) even if the ban were contained in an agreement that said nothing about arbitration. Certainly, if an employer insisted on arbitrating all disputes and in the process prohibited workers from striking, the NLRA's concerted action guarantee is violated. A ban on collective

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actions presents no substantive distinction. The Board's holding did "not rest on 'defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Id.* (quoting *Concepcion*, 131 S. Ct. at 1746). Rather, the Board merely refused to allow an employer to use an arbitration clause to subvert federal labor law.

The Board's analysis is fully consistent with *CompuCredit*, in which the Supreme Court considered whether the federal Credit Repair Organizations Act ("CROA"), 15 U.S.C. § 1679 *et seq*., precluded enforcement of an arbitration agreement that was otherwise consistent with the FAA. *CompuCredit*, 132 S. Ct. at 668. The Court observed that federal policy favoring arbitration should be given effect for federal statutory claims, absent a contrary indication that the statutory right ought not be subject to arbitration. *Id.* at 669. *CompuCredit* quoted *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987) for the proposition that the FAA should govern absent "contrary congressional command." 132 S. Ct. at 669. *McMahon* is not so limited; it recognizes that if Congress intended to preclude waiver of a judicial forum for a particular federal statute, it *may* be apparent by virtue of an explicit statement in the statute itself, but it may also be deducible from the statute's legislative history, or where there is "an inherent conflict between arbitration and the statute's underlying purposes." 482 U.S. at 227. In any event, this oversight was inconsequential to the result in

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CompuCredit: the CROA only had a requirement that credit repair organizations disclose to consumers that they had a "right to sue" if the organization violated the CROA, and a liability provision setting out available remedies. 132 S. Ct. at 669-70. The Supreme Court concluded that (1) the disclosure requirement was intended to convey to consumers that they could seek redress for CROA violations through some forum, and (2) the civil liability provision simply set out the remedies available to an aggrieved consumer; neither provision indicated that a consumer was entitled to *judicial* enforcement of the Act. *Id.* at 669-71. In other words, arbitrating a CROA claim would not result in a party forgoing "the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

Unlike the CROA, which set out proscriptions on the conduct of credit repair organizations, the NLRA and the Norris-LaGuardia Act *specifically* guarantee workers the right to concerted action, and forbid employers from interfering with those rights. 29 U.S.C. §§ 102, 157, 158; *see also Herrington*, 2012 WL 1242318, at *4-*6; *accord D.R. Horton*, 2012 WL 36274, at *4 ("[C]ollective efforts to redress workplace wrongs or improve workplace conditions are at the core of what Congress intended to protect by adopting the broad language of Section 7. Such conduct is not peripheral but central to the Act's purpose."). In contrast, the FAA

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demonstrates only a congressional preference for an arbitral *forum*; it says nothing about the right to act collectively (or not) in such a forum. As the Court held in *CompuCredit*, the substantive mandate of the NLRA and the Norris-LaGuardia Act must control over the FAA's preference for an arbitral forum, where the forum selection clause in fact extinguishes the substantive right to concerted action.[1] 132 S. Ct. at 668-69. While Bristol Care, Inc. complains that applying *D.R. Horton* here portends "that arbitration agreements could not be enforced according to their terms," (Appellant's Br. at 31), in actuality it means that the agreement will be enforced *to the extent it is legal*, placing the agreement "on an equal footing with other contracts." *Concepcion*, 131 S. Ct. at 1745.[2]

II. FLSA COLLECTIVE ACTIONS ARE A CRITICAL VEHICLE FOR VINDICATING WORKERS' SUBSTANTIVE RIGHTS TO FAIR LABOR CONDITIONS.

A. The Goal of the FLSA is to Eliminate Substandard Working Conditions.

In enacting the FLSA, Congress declared its purpose is "to correct and as rapidly as practicable to eliminate" substandard labor conditions which did not

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[1] As a forum selection statute, the FAA's arbitral preference cannot be given effect where doing so would tread on a party's substantive statutory rights. *Gilmer*, 500 U.S. at 26.

[2] As the NLRB explained, even if there were a conflict between the FAA and federal labor law as set forth in the NLRA and the Norris-LaGuardia Act, the FAA would have to yield because its enactment predated both federal labor laws. *D.R. Horton*, 2012 WL 36274, at *16 & n.26. Indeed, the Norris-LaGuardia Act specifically repealed all prior acts that conflict with it, including the FAA. *Id.* at *16.

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permit workers to maintain a "minimum standard of living necessary for health, efficiency, and general well-being." 29 U.S.C. § 202. To achieve this goal, the FLSA established a comprehensive remedial scheme designed to ensure all covered workers are paid minimum wage and overtime for hours over forty per week. *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) ("The principal congressional purpose in enacting the [FLSA] was to protect all covered workers from substandard wages and oppressive working hours. . . . [and to ensure that employees] would be protected from the 'evil of overwork as well as underpay.'") (citations omitted); *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 710 (1945) (noting "the Congressional policy of uniformity in the application of the provisions of the [FLSA] to all employers subject thereto"). This included an overtime provision whose purpose was "to compensate those who labored in excess of the statutory maximum number of hours for the wear and tear of extra work and to spread employment through inducing employers to shorten hours because of the pressure of extra cost." *Bay Ridge Operating Co., Inc. v. Aaron*, 334 U.S. 446, 460 (1948).

Incident to protecting workers from substandard labor conditions, the FLSA also ensures that employers will not engage in "unfair method[s] of competition" through a race to the bottom—by compensating employees less and less for their work. 29 U.S.C. § 202(a)(3); *accord Tony & Susan Alamo Found. v. Sec'y of*

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Labor, 471 U.S. 290, 302 (1985) (recognizing that allowing employees to opt out of FLSA protections would result in an impermissible downward pressure on wages across the market).

B. Private Enforcement of the FLSA through Collective Actions is Vital to the Act's Goals.

Congress provided for both public and private enforcement of the FLSA's minimum wage and overtime premium pay provisions, as well as allowing for enforcement actions brought by the Secretary of Labor (29 U.S.C. § 216 (c)); the right of workers to bring their own private actions; the right to proceed collectively to enforce the statute; the right to liquidated damages; and the right to shift fees and costs onto the employer. 29 U.S.C. § 216 (b) ("Section 16(b)"). The collective action provision is integral to FLSA's comprehensive remedial scheme and a statutory right in and of itself. *See Raniere v. Citigroup, Inc.*, 827 F. Supp. 2d 294, 311 (S.D.N.Y. 2011) ("Unlike employment-discrimination class suits under Title VII or the Americans with Disabilities Act that are governed by Rule 23, Congress created a unique form of collective actions for minimum-wage and overtime pay claims brought under the FLSA."). The Supreme Court has emphasized that, by "expressly authoriz[ing] employees to bring collective . . . actions . . . Congress has stated its policy that [Section 16(b)] plaintiffs should have the opportunity to proceed collectively." *Hoffmann-La Roche, Inc. v. Sperling*, 493

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U.S. 165, 170 (1989).[3] Other courts have noted that Section 16(b) collective actions are a vital "supplement" to the enforcement powers of the Department of Labor. *Ervin v. OS Rest. Servs.*, 632 F.3d 971, 978 (7th Cir. 2011).

Further, "FLSA collective actions allow 'plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources.'" *Raniere*, 827 F. Supp. 2d at 313 (quoting *Hoffmann-La Roche*, 493 U.S. at 170). Without a collective action provision, plaintiffs would not be able to seek redress for violations of FLSA rights at all where damages amounts are prohibitively small for themselves and their counsel to pursue their claims individually. *See Sutherland v. Ernst & Young, LLP*, 768 F. Supp. 2d 547, 554 (S.D.N.Y. 2011) (collective action waiver provision unenforceable where FLSA damages were eclipsed by expected fees and costs; holding otherwise would grant employer "de facto immunity from liability for alleged violations of the labor laws"). Costs of seeking relief increase considerably where, as here, the proponent of arbitration insists that the proceeding be entirely confidential,[4] precluding resource sharing. *See In re Electronic Books*

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[3] *Hoffman-La Roche* involved a collective action brought under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, which incorporates the FLSA's collective action provision in 29 U.S.C. § 626(b). Courts have looked to *Hoffman-La Roche* for guidance on interpretation of the FLSA because of its extended discussion of the FLSA's collective action provision.

[4] *See Owen v. Bristol Care, Inc.*, No. 2:11-cv-4258-FJG, R. Doc. 6-1, at 12 (W.D. Mo. Nov. 7, 2011) ("Except as may be required by law, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties.").

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Antitrust Litigation, 2012 WL 2478462, at *3-*4 (S.D.N.Y. June 27, 2012) (rejecting suggestion that potential plaintiffs could pool resources in several individual, confidential arbitral proceedings because the "argument blinkers reality").

Against the indisputably high costs associated with prosecuting an FLSA action, one must consider the likely results for affected workers. According to the Department of Labor's enforcement statistics, minimum wage claims handled by the Department in 2008 (the most recent year published) averaged a recovery of only $392 per worker, and overtime claims averaged only $676. *See* U.S. Dep't of Labor, Employment Standards Admin., Wage & Hour Div., *Wage and Hour Collects Over $1.4 Billion In Back Wages for Over 2 Million Employees Since Fiscal Year 2001*, at 2, *available at* www.dol.gov/whd/statistics/2008FiscalYear.pdf (last visited July 21, 2012).

Low-wage workers are particularly hard hit by violations of wage and hour laws. One study of 4,387 workers in low-wage industries in Los Angeles, New York, and Chicago, found that 26% were paid less than the minimum wage in the previous work week. Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, at 2 (2009), *available at* http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1 (last visited July 21, 2012).

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For low-wage workers who had come to work early or stayed late, 70% were not paid for work they performed outside their scheduled shift. *Id.* at 3. Finding an FLSA collective action ban unenforceable would have its greatest impact on low-wage workers who seek to recover lost wages resulting from such violations.

Of those low-wage industries cited by the Department as subject to 2008 enforcement actions, the health care industry had 15,768 affected workers, second only to restaurants. U.S. Dep't of Labor, Employment Standards Admin., Wage & Hour Div., *Wage and Hour Collects Over $1.4 Billion In Back Wages for Over 2 Million Employees Since Fiscal Year 2001*, at 3, *available at* www.dol.gov/whd/statistics/2008FiscalYear.pdf (last visited July 21, 2012). Wage theft within the industry is not a recent phenomenon; the Department's 1999-2000 *Report on Initiatives* included a survey of wage and hour compliance rates for the long-term care industry which showed staggering low levels: 40% for nursing homes; and 57% for residential care facilities (such as Bristol Care, Inc.). U.S. Dep't of Labor, Employment Standards Admin., Wage & Hour Div., *1999-2000 Report on Initiatives*, at 19 (Feb. 2001) *available at* http://nelp.3cdn.net/a5c00e8d7415a905dd_o4m6ikkkt.pdf (last visited July 21, 2012). For nursing homes, "[o]vertime violations resulting from misapplied administrative/executive/professional exemptions were identified in most [noncompliance] cases." *Id.* at 20.

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Despite widespread violations, government agencies are unable to enforce our nation's wage and hour laws alone. Resources allocated to the Department of Labor's Wage and Hour Division are insufficient to meet the demand for workplace investigations and enforcement of federal law. From 1941 to 2009, Department of Labor experienced a thirteen-fold decrease in enforcement capacity. Progressive States Network, *Cracking Down on Wage Theft*, at 2 (Apr. 2012) *available at* http://www.progressivestates.org/sync/pdfs/ PSN.CrackingDownonWageTheft.pdf (last visited on July 21, 2012). The total number of enforcement actions pursued by the DOL's Wage and Hour Division declined from 47,000 in 1997 to fewer than 30,000 in 2007. U.S. GAO, *Fair Labor Standards Act: Better Use of Available Resources and Consistent Reporting Could Improve Compliance*, GAO-08-962T, at 5-6 (July 15, 2008), *available at* http://www.gao.gov/assets/130/120636.pdf (last visited on July 21, 2012).

This reduction in public enforcement of the wage and hour laws has led employees to rely almost entirely on private enforcement actions.[5] In 2007, for instance, there were 6,825 FLSA cases filed in federal court, but only 138 of these were filed by the Department of Labor. James C. Duff, *Judicial Business of the*

[5] It should be noted that in recent years the DOL has begun hiring additional wage and hour investigators. *DOL News Release* (Nov. 19, 2009), available at http://www.dol.gov/opa/media/press/whd/whd20091452.htm (last visited on July 21, 2012). While a welcome development, there is still a great disparity in capacity when compared to earlier years.

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United States Courts, 2010 Annual Report of the Director, at 146 (Table C-2), Administrative Office of the U.S. Courts (2010), available at http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/JudicialBusinespdfversion.pdf (last visited on July 21, 2012).

In providing workers with the statutory right to proceed collectively, Congress struck a careful balance between promoting enforcement through "lower individual costs to vindicate rights by the pooling of resources" and limiting the litigation to "party plaintiff[s]" who have an actual stake in the claims and affirmatively consent to pursuing them. *Hoffmann-La Roche*, 493 U.S. at 170, 168. Section 16(b) initially allowed third parties, such as labor unions, to file FLSA actions on behalf of unnamed workers, and no written consent to join the case was required. *Hoffmann-La Roche*, 493 U.S. at 173. In response "to excessive litigation spawned by plaintiffs lacking a personal interest in the outcome, the representative action by plaintiffs not themselves possessing claims," Congress removed that provision in the Portal-to-Portal Act of 1947 and instead required interested "party plaintiff[s]" to affirmatively opt into the litigation, while leaving in place the "similarly situated" language providing for collective actions. *Id.*; 29 U.S.C. § 216 (b). Had Congress wanted to instead deprive workers of any right to go forward collectively, it certainly could have done so by way of the Portal-to-Portal Act, eliminating the language providing a right to collective action. However, that was

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not what Congress did. Although it limited plaintiffs' collective action right, it did not eliminate it as a statutory right.

In short, the FLSA's goals of eliminating substandard working conditions have yet to be met. Unfortunately, it continues to be low-wage workers who are often subject to exploitation. Yet because of the low value of most claims, it would be economically infeasible to prosecute the matters individually. Meanwhile, the Department of Labor's resources have declined, leaving these workers without the prospect of agency enforcement of their FLSA rights. The FLSA's collective action mechanism is intended to bridge this enforcement gap, and remains a critical medium for protecting workers' rights.

C. A Ban on Collective Actions Creates Limitations on Substantive Rights Guaranteed by the FLSA.

The principle that arbitration cannot preclude the vindication of statutory rights is a foundational tenet of FAA interpretation, expressed by the Supreme Court time and again. *See Mitsubishi Motors*, 473 U.S. at 637; *Gilmer*, 500 U.S. at 26. Simply put, federal statutory rights cannot be eviscerated by an employer under the guise of a forum-selection clause—doing so would impermissibly elevate the preference for arbitration to a position superior to the most basic fundamental rights enjoyed by citizens. *Mitsubishi Motors*, 473 U.S. at 637 n.19 ("[I]n the event the [arbitration agreement] operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we

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would have little hesitation in condemning the agreement as against public policy.") (citation omitted).

While sometimes improperly characterized as a mere procedural device, the collective action mechanism is in fact a central enforcement tool for FLSA matters:

> Not the least integral aspect of [the FLSA] remedy is the ability of employees to pool resources in order to pursue a collective action, in accordance with the specific balance struck by Congress. The particular FLSA collective action mechanism was additionally a Congressional determination regarding the allocation of enforcement costs, as the ability of employees to bring actions collectively reduces the burden borne by the public fisc . . . . It is not enough to respond that [a collective action] waiver should be upheld in the name of broad federal policy favoring arbitration, simply because the waiver was included in an arbitration agreement. An otherwise enforceable arbitration agreement should not become a vehicle to invalidate the particular Congressional purposes of the collective action provision and the policies on which that provision is based.

Raniere, 827 F. Supp. 2d at 314. If left unchallenged, collective action bans such as the one in this case will do precisely what the Supreme Court prohibits: inhibit workers' exercise of their substantive FLSA rights. Where plaintiffs may only vindicate their federal rights by proceeding collectively, a defendant's attempt to ban class or collective action cannot be enforced. *Cf. Chen-Oster v. Goldman, Sachs & Co.*, 785 F. Supp. 2d 394, 406-11 (S.D.N.Y. 2011) (invalidating class action ban that would have prevented plaintiff's complete vindication of Title VII rights).

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D. The FAA's Preference for an Arbitral Forum Must Yield to the Substantive Rights Guaranteed by the FLSA.

In *CompuCredit*, the Supreme Court sought some signal that another federal statute should be given precedence over the FAA's preference for an arbitral forum. 132 S. Ct. at 668-69. The FLSA provides it: the statute itself (and courts uniformly interpreting it) prohibit private, contractual waivers of FLSA rights. *Copeland v. ABB, Inc.*, 521 F.3d 1010, 1014 (8th Cir. 2008). This distinguishes the FLSA from other statutes in which courts have accepted the use of an arbitral forum. For instance, although the ADEA and the FLSA share an enforcement mechanism, the ADEA demonstrates a preference for informal dispute resolution, quite the opposite of the FLSA. *See Gilmer*, 500 U.S. at 28-30 (underscoring that the ADEA's enforcement mechanism permits private settlement of disputes and requires agency attempts to conciliate disputes).[6] Employers cannot be permitted to do by virtue of an arbitration clause that which they cannot do by virtue of another contract.

At bottom, an arbitration agreement is nothing more than a contract. For well over half a century, the Supreme Court has recognized that the FLSA was intended to—and did—limit the right of employers to contract. *Brooklyn Sav.*

[6] *Gilmer* involved a claim of age discrimination based on the termination of a 62-year-old Manager of Financial Services. 500 U.S. at 23. If successful, such a claim would obviously be of higher value than the typical FLSA claim; indeed, Gilmer himself prosecuted his matter individually, not collectively. *Id.*

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Bank v. O'Neil, 324 U.S. 697, 706-07 (1945). An employer cannot contract itself out of the FLSA's enforcement plan. *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740-41 (1981) (FLSA rights "cannot be abridged by contract or otherwise waived" because this would nullify purpose of the Act). As stated by this Court:

> It is well established that FLSA rights are statutory and cannot be waived. There are only two statutory exceptions to this general rule. First, an employee may accept payment of unpaid wages under the supervision of the Secretary of Labor and if the back wages are paid in full. Second, if an employee brings suit directly against a private employer pursuant to § 216(b) of the statute, and the district court enters a stipulated judgment, it will have res judicata effect on any subsequent claim for damages.

Copeland, 521 F.3d at 1014.

The principal purpose of an arbitration agreement requiring workers to forfeit their statutory right to bring claims collectively is not genuinely to select an alternative forum to court; it is to prevent workers from bringing wage and hour claims collectively, as Congress intended. *Raniere*, 827 F. Supp. 2d at 314 n.13 ("Indeed, were employers beyond [defendant] to embrace these waivers, the deluge of individual wage and hour claims that would be arbitrated, notwithstanding those that would simply be foregone absent collectivization, would quite obviously run counter to the values of simplicity, expedience, and cost-saving that underlie the federal policy preference for arbitration."). Yet the FLSA's Congressional

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command prohibits the private waiver of workers' FLSA rights, whether contained in an arbitration agreement or not. *Copeland*, 521 F.3d at 1014.

For this reason, *Bailey v. Ameriquest Mortgage Co.*, 346 F.3d 821 (8th Cir. 2003) is inapposite. There, the Court permitted arbitration of FLSA claims, but the Court was not presented with an explicit ban on the right to proceed collectively, since the arbitration clause was silent on that matter. *Id.* at 822, n.1. There was no occasion to consider whether an individual's FLSA rights are impeded by an explicit ban on collective action. Since *Bailey*, the United States District Court for the District of Minnesota (the venue for *Bailey*) concluded that a similar arbitration clause *permitted* a collective-action arbitration. *See Mork v. Loram Maintenance of Way, Inc.*, 2012 WL 38628 (D. Minn. Jan. 9, 2012). Thus, the Court was correct to conclude in *Bailey* that there was no showing that the substantive right to proceed collectively had been curtailed—the claims could proceed through arbitration individually and, under *Mork*, collectively as well.

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CONCLUSION

For these reasons, the Court should affirm the district court's order denying Defendant Bristol Care, Inc.'s motion to stay proceedings and compel arbitration.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 6,708 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: July 30, 2012

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