

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

D. R. HORTON, INC.

and

MICHAEL CUDA, an individual

NLRB Case No. 12-CA-25764

BRIEF FOR THE RETAIL INDUSTRY LEADERS ASSOCIATION, *AMICI CURIAE*

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TABLE OF CONTENTS

	Page No.
TABLE OF CONTENTS.....	i
INTEREST OF AMICUS CURIAE.....	1
INTRODUCTION	2
PERTINENT ARBITRAL CLAUSE.....	3
ARGUMENT.....	3
I. ENFORCEMENT OF SECTIONS 7 AND 8 OF THE NLRA MUST HARMONIZE WITH – NOT DISREGARD – THE FEDERAL ARBITRATION ACT AND THE IMPORTANT NATIONAL POLICIES THAT UNDERLIE IT.....	3
II. THE FEDERAL ARBITRATION ACT REQUIRES ENFORCING PARTIES’ AGREEMENTS AS TO WHETHER TO ARBITRATE DISPUTES, WITH WHOM, AND ON WHAT TERMS.....	8
III. THE NLRA DID NOT IMPLIEDLY PARTIALLY REPEAL THE FAA.....	11
A. The FAA Does Not Evidence Congressional Intention To Render It Inapplicable To Employment Agreements To Arbitrate On An Individualized Basis. .	12
B. The NLRA does not evidence congressional intention to render the FAA inapplicable.	12
C. Enforcing Arbitration Agreements Providing for Only Individual Arbitration Poses No Inherent Conflict with NLRA §§ 7 and 8.	13
CONCLUSION.....	17

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>14 Penn Plaza L.L.C. v. Pyett</i> , 556 U.S. 247 (2009).....	4, 8, 9, 11
<i>AT&T Mobility LLC v. Concepcion</i> , 131 S. Ct. 1740 (U.S. 2011).....	passim
<i>Britt v. Grocers Supply Co.</i> , 978 F.2d 1441 (5th Cir. 1992)	7
<i>Brown v. Pro Football, Inc.</i> , 518 U.S. 231 (1996).....	6
<i>Can-Am Plumbing, Inc.</i> , 350 NLRB 947 (2007), aff'd, 340 Fed. Appx. 354 (9th Cir. 2009).....	8, 16
<i>Can-Am Plumbing, Inc. v. NLRB</i> , 321 F.3d 145 (D.C. Cir. 2003)	6
<i>Carter v. Countrywide Credit Indus.</i> , 362 F.3d 294 (5th Cir. 2004)	8
<i>Circuit City Stores, Inc. v. Adams</i> , 532 U.S. 105 (2001).....	4
<i>D.R. Horton, Inc., 2011 WL 1194 (N.L.R.B. Jan. 3, 2011)</i>	8
<i>Dean Witter Reynolds Inc. v. Byrd</i> , 470 U.S. 213 (1985).....	9
<i>Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council</i> , 485 U.S. 568 (1988).....	7
<i>Gilmer v. Interstate/Johnson Lane Corp.</i> , 500 U.S. 20 (1991).....	passim
<i>Hall St. Assocs., L.L.C. v. Mattel, Inc.</i> , 552 U.S. 576 (2008).....	3

<i>Hoffman Plastic Compounds, Inc. v. NLRB</i> , 535 U.S. 137 (2002).....	6, 7, 16
<i>Horenstein v. Mortg. Mkt., Inc.</i> , 9 Fed. Appx. 618 (9th Cir. 2001).....	8
<i>Mastro Plastics Corp. v. NLRB</i> , 350 U.S. 270 (1956).....	15
<i>Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.</i> , 473 U.S. 614 (1985).....	4
<i>Morton v. Mancari</i> , 417 U.S. 535 (1974).....	5, 7
<i>Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.</i> , 460 U.S. 1 (1983).....	3, 9, 11
<i>NLRB v. Catholic Bishop of Chicago</i> , 440 U.S. 490 (1979).....	7
<i>Preston v. Ferrer</i> , 552 U.S. 346 (2008).....	4
<i>Shearson/American Express, Inc. v. McMahon</i> , 482 U.S. 220 (1987).....	9, 10, 11, 13
<i>Smith v. Nat’l Steel & Shipbuilding Co.</i> , 125 F.3d 751 (9th Cir. 1997)	7
<i>Southern S.S. Co. v. NLRB</i> , 316 U.S. 31 (1942).....	6, 16
<i>Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.</i> , 130 S. Ct. 1758 (2010).....	passim
<i>United Bhd. of Carpenters, Local Union No. 1506</i> , 355 NLRB No. 159 (Aug. 27, 2010)	7
<i>United States v. Boffa</i> , 688 F.2d 919 (3d Cir. 1982).....	7
<i>Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer</i> , 515 U.S. 528 (1995).....	6

<i>Volt Int’l Servs., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.</i> , 489 U.S. 468 (1989).....	4
---	---

STATUTES AND RULES

Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 <i>et seq.</i>	7
Americans With Disabilities Act, 42 U.S.C. § 12101 <i>et seq.</i>	7
Fed. R. Civ. P. 23.....	15, 16
Federal Arbitration Act of 1925, 9 U.S.C. § 1 <i>et seq.</i>	passim
9 U.S.C. § 2.....	8
Fair Labor Standards Act, 29 U.S.C. § 201 <i>et seq.</i>	8, 9
Immigration Reform and Control Act of 1986, 8 U.S.C. § 11521 <i>et seq.</i>	6
Labor Management Disclosure Act of 1959, 29 U.S.C. § 401 <i>et seq.</i>	7
National Labor Relations Act of 1935, 29 U.S.C. § 151 <i>et seq.</i>	passim
29 U.S.C. § 157.....	passim
29 U.S.C. § 158.....	passim

OTHER AUTHORITIES

David S. Clancy and Matthew M.K. Stein, <i>An Uninvited Guest: Class Arbitration and the Federal Arbitration Act’s Legislative History</i> , 63 <i>Business Lawyer</i> 55 (2007)	1
Office of General Counsel, <i>Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Employee Waivers in the Context of Employers’ Mandatory Arbitration Policies</i> , 10-06 (June 16, 2010).....	5, 14, 15

INTEREST OF AMICUS CURIAE

The Retail Industry Leaders Association (“RILA”) include the largest and fastest growing companies in the retail industry – retailers, product manufacturers and service suppliers – which together account for more than \$1.5 trillion in annual sales. RILA members provide millions of jobs and operate more than 100,000 stores, manufacturing facilities and distribution centers located both domestically and abroad.

In reliance on the Federal Arbitration Act and the Supreme Court’s forceful recognition that the FAA enacted a strong policy requiring enforcement of arbitration agreements according to their terms – and precluding class arbitration where the parties have not so consented – many RILA member companies have adopted standard agreements that mandate the arbitration of disputes arising from or related to those contracts and empower arbitrators to decide only individual claims. They have adopted such agreements because arbitration is a prompt, fair, expeditious, inexpensive, and effective method of resolving disputes with employees. RILA companies have adopted similar arbitration policies for consumers, suppliers, and other parties, providing for “efficient, streamlined procedures tailored to the type of dispute.” *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (U.S. 2011).

As both the Supreme Court (twice in just the past two terms) and commentators have observed, most of those advantages would be lost if the class-action device were superimposed on arbitration and on those who had not agreed to it. *See, e.g., AT&T Mobility*, 131 S. Ct. at 1750-53; *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1773 (2010) (slip op., at 17); David S. Clancy and Matthew M.K. Stein, An Uninvited Guest: Class Arbitration and the Federal Arbitration Act’s Legislative History, 63 *Business Lawyer* 55 (2007).

RILA appreciates the Board's care in framing the issues and inviting participation from interested parties. Because one possible resolution of the issue presented in this case would threaten to deprive RILA members of the considerable advantages that the Supreme Court has held the FAA guarantees, and at the request of the Board (Notice and Invitation to File Briefs, June 16, 2011), RILA submits this brief *amicus curiae*.

INTRODUCTION

This is a very odd case.

Notwithstanding that the Supreme Court has recently repeatedly reversed decisions below that failed to enforce arbitration agreements as required by the Federal Arbitration Act's broad, mandatory terms, the Acting General Counsel is asking the Board to hold that a perfectly clear arbitration agreement may not be enforced according to its terms, and instead constitutes an unfair labor practice.

Notwithstanding the Supreme Court's repeated holdings that class action arbitration cannot be imposed except with a party's express agreement, the Acting General Counsel is asking the Board to hold that an employer may not enforce the terms of its arbitration agreement, and must instead acquiesce in either arbitral procedures that it expressly rejected, or a judicial resolution of workplace disputes (notwithstanding its arbitration agreement).

Notwithstanding that the critical provision of the arbitral agreement, ¶ 6, is framed in terms of the limited power granted to the arbitrator, and says nothing about activities that the employee may (or may not) engage in, or proceedings that they may (or may not) file, the Acting General Counsel, supported by *amicus* SEIU, insists that the employer's maintenance of an

arbitration clause of the type twice enforced by the Supreme Court nonetheless restrains employee “concerted activities” because it could “reasonably be read by employees to prohibit them from concertedly pursuing class, collective or joint action employment-related claims . . . and to prohibit them from concertedly challenging the legality of Respondent’s mandatory arbitration agreement in tribunals outside of Respondent’s arbitration process.”

Saying it does not make it so. Fairly read, the respondent’s arbitration agreement does only what the Supreme Court has said that it can do: channel, by consensual agreement, the resolution of workplace disputes into an expeditious arbitration process that provides for mandatory arbitration of individual claims, and frames the authority that the arbitrator will (and will not) possess. Such provisions are valid and enforceable under the FAA, and obtaining employees’ agreement to them is not an unfair labor practice under the NLRA.

PERTINENT ARBITRAL CLAUSE

The Parties intend that this Agreement will operate to allow them to resolve any disputes between them as quickly as possible. Thus, the arbitrator will not have the authority to consolidate the claims of other employees into a proceeding originally filed by either the Company or the Employee. The arbitrator may hear only Employee’s individual claims and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding.

Joint Exh. 2, ¶ 6.

ARGUMENT

- I. ENFORCEMENT OF SECTIONS 7 AND 8 OF THE NLRA MUST HARMONIZE WITH – NOT DISREGARD – THE FEDERAL ARBITRATION ACT AND THE IMPORTANT NATIONAL POLICIES THAT UNDERLIE IT.

The Federal Arbitration Act was designed to promote arbitration and reflects “a liberal federal policy favoring arbitration agreements.” *Moses H. Cone Mem’l Hosp. v. Mercury*

Constr. Corp., 460 U.S. 1, 24 (1983); see also *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008). “A prime objective of an agreement to arbitrate is to achieve ‘streamlined proceedings and expeditious results.’” *Preston v. Ferrer*, 552 U.S. 346, 357 (2008). “Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts.” *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001). Courts generally may not interfere in the bargained-for exchange that produces contractual arbitration agreements, because “[j]udicial nullification of contractual concessions . . . is contrary to what the Court has recognized as one of the fundamental policies of the National Labor Relations Act—freedom of contract.” *14 Penn Plaza L.L.C. v. Pyett*, 556 U.S. 247 (2009) (citation omitted).

Whether construing or enforcing an agreement to arbitrate, courts and arbitrators must “give effect to the contractual rights and expectations of the parties.” *Volt Int’l Servs., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). “By agreeing to arbitrate . . . , [a party] trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

Moreover, it is not just the bare obligation to arbitrate that is presumptively valid and enforceable under the FAA, but also the particulars of whatever arbitration agreement is at issue: the precise terms to which the parties bound themselves. The “overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements *according to their terms so as to facilitate streamlined proceedings.*” *AT&T*, 131 S. Ct. at 1748; see also *Stolt-Nielsen*, 130 S. Ct.

at 1774. “[P]arties are ‘generally free to structure their arbitration agreements as they see fit’ We think it is also clear from our precedents and the contractual nature of arbitration that parties may specify with whom they choose to arbitrate their disputes.’” *Id.* (citations omitted).

The principal brief for the Acting General Counsel proceeds as if the NLRA were the only relevant statute to consider (even though the dispute concerns the procedures for resolving FLSA claims) and can only be read as implicitly contending that the NLRA operates as an implied repeal of the Federal Arbitration Act (“FAA”) – without any explanation or justification. The Acting General Counsel’s supplemental letter-brief (dated June 3, 2011) at least pays lip-service to the governing rule – that

The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.

See Supplemental letter brief at 1, quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974). But it does nothing more. The AGC’s brief (a) failed to mention what the FAA would require in this case but for the purported effect of the NLRA, (b) neglected to cite or discuss *Stolt-Nielsen* or recognize that the AGC’s proposed construction of NLRA §§ 7 and 8(a)(1) would deprive D.R. Horton of precisely those advantages of arbitration that *Stolt-Nielsen* and *AT&T Mobility* have recently held are central to the FAA, and (c) failed to accommodate the FAA in any way, or to explain why the Board should not prefer a construction of Section 7 that would “give effect to

both.”¹ In sum, the AGC’s proposed construction deprives D.R. Horton of the very rights that the Supreme Court has recently enforced in *Stolt-Nielsen* and *AT&T Mobility*.

It is long settled that the NLRA must be interpreted so as to not effectively repeal, or fail to give due effect to, other federal statutes whose provisions would otherwise be applicable. The nonstatutory labor exemption from the antitrust laws is a product of the effort of the Board and courts to reconcile the competing demands of the NLRA and the anti-trust laws. *Brown v. Pro Football, Inc.*, 518 U.S. 231, 235-36 (1996). In recent years the Supreme Court has reproved the Board for “subverting” the Immigration Reform and Control Act of 1986 by refusing to consider its requirements and conform its remedies with IRCA. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 149-50 (2002). The Court criticized the Board for rendering an award with a view only to the NLRA and for not considering the conflicting policies underlying immigration law. Quoting an earlier decision to the same effect, the Court recalled that it had previously set aside a Board award on the ground that “the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important [c]ongressional objectives.” *Id.* at 143, quoting *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942). As the D.C. Circuit held in *Can-Am Plumbing, Inc. v. NLRB*, 321 F.3d 145, 153-54 (D.C. Cir. 2003), “where the policies of the [NLRA] conflict with another federal statute, the Board cannot ignore the other statute,” but instead “must fully enforce the

¹ That failure is the more surprising because a construction that would give effect to both is readily at hand, having been adopted by the NLRB General Counsel just a year ago. Office of General Counsel, Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Employee Waivers in the Context of Employers’ Mandatory Arbitration Policies, 10-06 (June 16, 2010) (discussed below).

requirements of its own statute, but must do so, insofar as possible, in a manner that minimizes the impact of its actions on the policies of the other statute.” (Citations omitted.) *See also Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995) (“When two statutes are capable of co-existence . . . it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective”) (quoting *Morton*, 417 U.S. at 551).

The Board has been similarly corrected when it refused to consider and harmonize its enforcement of the NLRA with federal constitutional law. *See, e.g., Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 587 (1988) (affirming Court of Appeals, which had reversed the Board on concluding that the NLRA should be construed so as to avoid a serious First Amendment issue regarding handbilling); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (affirming Court of Appeals’ refusal to enforce a Board order taking jurisdiction over employees of religious schools).

The lower courts have also had to accommodate the NLRA to other statutes, and not prefer the NLRA or find that it impliedly repealed other federal statutes. *See, e.g., Britt v. Grocers Supply Co.*, 978 F.2d 1441, 1452 (5th Cir. 1992) (reversing district court which had held that the NLRA preempts, or displaces, the Age Discrimination in Employment Act); *Smith v. Nat’l Steel & Shipbuilding Co.*, 125 F.3d 751, 757 (9th Cir. 1997) (reversing district court which had held that the NLRA preempts the Americans With Disabilities Act); *United States v. Boffa*, 688 F.2d 919, 931-33 (3d Cir. 1982) (affirming district court decision rejecting arguments that a scheme to deprive employees of rights guaranteed by the LMRDA is subject to exclusive Board jurisdiction, and that the NLRA had impliedly repealed a prior statute). Construing the NLRA in a manner that “would unduly trench upon” competing federal statutes which reflect important

federal policy is impermissible. *Hoffman Plastic Compounds*, 535 U.S. at 151. The Board itself has on occasion acknowledged “the Board’s obligation to accommodate the NLRA to other Federal statutes.” See, e.g., *United Bhd. of Carpenters, Local Union No. 1506*, 355 NLRB No. 159 (Aug. 27, 2010) (secondary bannerer); *Can-Am Plumbing, Inc.*, 350 NLRB 947 (2007), aff’d, 340 Fed. Appx. 354 (9th Cir. 2009).

II. THE FEDERAL ARBITRATION ACT REQUIRES ENFORCING PARTIES’ AGREEMENTS AS TO WHETHER TO ARBITRATE DISPUTES, WITH WHOM, AND ON WHAT TERMS.

Courts have repeatedly held that the underlying overtime claims such as those pleaded by Mr. Cuda are subject to arbitration under the FAA, and that agreements providing for arbitration of such claims on specified terms, according defined power to the arbitrator and denying the power to fashion the proceedings on a class basis, are valid and enforceable. See, e.g., *Carter v. Countrywide Credit Indus.*, 362 F.3d 294, 298 (5th Cir. 2004) (rejecting argument that plaintiffs’ “inability to proceed collectively deprives them of substantive rights available under the FLSA”); *Horenstein v. Mortg. Mkt., Inc.*, 9 Fed. Appx. 618, 619 (9th Cir. 2001) (same).

The particular arbitration agreement here provides, in paragraph 6, for arbitration on specified terms, and expressly forecloses the arbitrator from consolidating the complaint’s claim with “the claims of other employees,” limits the arbitrator to hearing “only Employee’s individual claims,” and deprives the arbitrator of any “authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding.” *D.R. Horton, Inc.*, 2011 WL 1194 (N.L.R.B. Jan. 3, 2011). See Joint Exhibit 2, or page 3 *supra*.

Under FAA § 2, that agreement is “valid, irrevocable, and enforceable.” The Supreme Court has repeatedly held that arbitration agreements must be enforced even when some other federal statute is said to require a different result, unless the person resisting arbitration carries the burden of adducing some sufficient basis in congressional intention for not enforcing it. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *See generally Pyett*, 556 U.S. at 247; *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987). The FAA establishes a “federal policy favoring arbitration,” *Moses H. Cone Mem. Hosp.*, 460 U.S. at 24, requiring that that courts “rigorously enforce agreements to arbitrate” quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985). The Arbitration Act,

[s]tanding alone, therefore mandates enforcement of agreements to arbitrate statutory claims. Like any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command. The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. *See id.*, at 628 If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent “will be deducible from [the statute's] text or legislative history,” *ibid.*, or from an inherent conflict between arbitration and the statute's underlying purposes. *See id.*, at 632-637; *Dean Witter Reynolds Inc. v. Byrd*, 470 U. S., at 217.

Shearson/American Express, 482 U.S. at 226-7; *see also Pyett*, 556 U.S. at 247).

Thus, to preclude enforcement of the parties’ particular arbitration agreement under the FAA, the burden is on the parties opposing arbitration to show “that Congress intended to make an exception to the Arbitration Act” by pointing to either text, legislative history, of the kind of inherent conflict that compels the conclusion that the prior statute was intended to be displaced. *Shearson/American Express*, 482 U.S. at 227.

Nor is this conclusion undercut by the fact that the parties' arbitration agreement provided that arbitration would be the exclusive forum for dispute resolution, and the employee expressly waived "all rights to trial in court before a judge or jury on all claims between them," so that statutory claims (such as Mr. Cuda's FLSA claim) would be resolved only in individualized arbitration, thereby precluding any class action. Class treatment is a matter of procedure, not one of substantive right. As the Supreme Court held in *Gilmer*, "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." 500 U.S. at 26 (citation omitted). Neither of the Supreme Court's two recent decisions concerning class action arbitration contained any suggestion to the contrary.

From "the foundational FAA principle that arbitration is a matter of consent," the Supreme Court has concluded that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Stolt-Nielsen*, 130 S.Ct. at 1775 (emphasis in original). *Stolt-Nielsen* identified numerous ways in which the advantages of individual arbitration are lost in class-based arbitration, and held that "the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." *Id.* at 1776. *See also A&T Mobility*, 131 S. Ct. at 1751-52 (reviewing the ways that class-based arbitration differs from individual arbitration and deprives parties of the advantages of arbitration that underlie Congress's enactment and strong judicial enforcement of the FAA).

In this proceeding, it is beyond dispute that the parties' agreement squarely precludes class arbitration. Paragraph 6 of the agreement (see page 1, *supra*) expressly says so. D.R. Horton (and for that matter Cuda) therefore have a federal statutory right under the FAA to arbitration on an individual, not class, basis, *Stolt-Nielsen, supra; AT&T Mobility, supra*.

Unless the demanding *Shearson/American Express* criteria for finding a congressional exception to FAA enforcement are met, therefore – a point addressed in Point III below – the FAA requires enforcement of the parties' contractual agreement to have Mr. Cuda's workplace claims resolved on the basis of individualized arbitration (except, of course, for unfair labor practice cases and representation cases subject to the Board's primary jurisdiction). Absent congressional creation of an exception to FAA enforcement, *Stolt-Nielsen's* holding that the FAA requires enforcement of arbitration agreements "according to their terms" and precludes the manufacturing of consent from silent agreements, 130 S. Ct. at 1763, gives the parties a federal statutory right to have their statutory workplace disputes resolved in arbitration, according to the precise terms of their contractual agreement.

III. THE NLRA DID NOT IMPLIEDLY PARTIALLY REPEAL THE FAA.

The Supreme Court has repeatedly stressed that in assessing whether the FAA has been displaced by another federal statute, "it should be kept in mind that 'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.'" *Gilmer*, 500 U.S. at 26 (quoting *Moses H. Cone*, 460 U.S. at 24). The Acting General Counsel (and its amicus SEIU) have not attempted to meet, and cannot meet, the burden "on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue," an intention that, if it exists at all, is deducible only from the statute's

“text or legislative history . . . or from an inherent conflict between arbitration and the statute’s underlying purposes.” *Shearson/American Express*, 482 U.S. at 227.

A. The FAA Does Not Evidence Congressional Intention To Render It Inapplicable To Employment Agreements To Arbitrate On An Individualized Basis.

Neither the FAA’s text nor its history suggests that it is inapplicable to employment agreements, and the Supreme Court has repeatedly rejected that suggestion. *See, e.g., Gilmer*, 500 U.S. at 34-35; *Pyett*, 566 U.S. at 247. Nor does anything in the FAA’s text or history suggest that arbitration agreements cannot provide for individualized arbitration of claims, or deny arbitrators power to proceed on a class basis. *AT&T Mobility, supra*.

B. The NLRA does not evidence congressional intention to render the FAA inapplicable.

The NLRA was enacted just a scant ten years after the FAA. Nothing in its text or history evidence that it was intended to repeal the FAA in whole or in part. Nor, narrowing the focus, do the text or legislative history of NLRA §§ 7 and 8 show that Congress intended those particular provisions to preclude the waivers of judicial trials or class action treatment that the FAA vouchsafes to economic actors generally.

Nor, specifically, does § 7 reflect congressional intention to impliedly repeal the FAA as regards the duty to enforce arbitration agreements precluding class arbitration. The text of § 7 – providing that “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection” – lacks any reference to arbitration or dispute resolution whatever, much less to any hypothesized right for the arbitrator to be empowered to fashion a case as a class action.

Two independent canons of statutory construction – “noscitur sociis” (instructing that items in a list are “known by their neighbors”) and “ejusdem generis” (presuming that items in a list are of the same kind) – each counsel that § 7 should be understood as concerned at its core with the formation and operation of labor organizations and the kind of “mutual aid or protection” exemplified by collective bargaining, and cut strongly against reading it as an implied repeal of the FAA as regards class arbitration.

C. Enforcing Arbitration Agreements Providing for Only Individual Arbitration Poses No Inherent Conflict with NLRA §§ 7 and 8.

Absent any indication of congressional intention to have the NLRA operate as a repeal of the FAA, D.R. Horton’s agreement with Mr. Cuda is “valid, irrevocable, and enforceable,” unless NLRA § 7 is so “inherent[ly]” in conflict with the FAA as to demonstrate congressional intention “to preclude a waiver” otherwise enforceable under the FAA. *Shearson/ American Express*, 482 U.S. at 226-27. No such “inherent conflict” between the two statutes exists.

In the first place, ¶ 6 regulates not “activities” of the employee but the power of the arbitrator. It says nothing about the signatory employee may or may not do. It does not tell employees that they may not file or prosecute charges with the Board; or that they may not file and prosecute class claims in court, or in arbitration. (Other provisions make arbitration exclusive, and waive the right to a file a lawsuit or to secure resolution by judge or jury, but such judicial waiver provisions were long ago upheld by *Gilmer*.) Paragraph 6 does not warn or even hint to employees that they will be disciplined in any way for doing so. *It simply provides a rule*

*of decision for any such claims as may be asserted.*² That rationale is by itself sufficient to dismiss the charge here, as nothing in ¶ 6 deprives any employee of the right “to engage in . . . concerted activities for the purpose of . . . mutual aid or protection.” Arbitration clauses like D.R. Horton’s in Paragraph 6 cannot fairly be considered violative of § 8(a)(1) or (a)(4).

Moreover, even if a clause that limits only an arbitrator’s powers, and not an employee’s conduct, *could* be considered an interference with an employee’s right to engage in concerted activities, contrary to its purpose, structure, and evident meaning, ¶ 6 (whether alone or in combination with the judicial waiver provisions long ago upheld in *Gilmer*) cannot be found to interfere with or restrain § 7 rights. Both the Acting General Counsel and amicus SEIU cite decisions that state that filing collective or class suits *may be* “concerted activity” for purposes of §§ 7 and 8. But those cases do not answer the question here, which is not whether an employee can be discharged for bringing or attempting to join in such a suit, but whether § 7 regulates the content of arbitration agreements by precluding agreements that deny arbitrators authority to fashion such proceedings as class or collective actions.

The General Counsel’s “Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Employee Waivers in the Context of Employers’ Mandatory Arbitration Policies” (GC Memorandum 10-06, June 16, 2010) (hereinafter, General Counsel Memorandum) recognized that difference and made the proper distinctions. It correctly distinguished between what § 7 protects (*e.g.*, employees banding “together to test the validity of their individual

² The Acting General Counsel’s assertion that “Paragraph 6 of the MMA makes it clear that employees *are not allowed to attempt to litigate* their individual claims as on a class or collective basis in the arbitral forum,” and comparable assertions by amicus SEIU, are thus quite incorrect. Paragraph 6 does not say that employees may not attempt to style their individual claims in that way (or that doing so would subject them to discipline); it simply provides that any such claims would be dismissed.

agreements and to make their case to a court that class or collective action is necessary if their statutory rights are to be vindicated”) and what it was not intended to, and does not, regulate (e.g., the substantive content of arbitration agreements). *Id.* at 3-4, 6.

The cogent distinction drawn in the General Counsel Memorandum is supported, among other grounds, by the Board’s decisions holding that individual suits for relief are not “concerted activity” even where the individual employee (or, more likely, his attorneys) would like to prosecute that action on a class basis. *Id.* at 5 (citing *Meyers Industries* and other decisions).³

The logic of the argument made by the AGC and the SEIU proves too much and would make an employer’s objections to class certification under Fed. R. Civ. P. 23 an unfair labor practice even if the objection were based on the grounds recently upheld by the Supreme Court. If, as the SEIU suggests, there is a § 7 right to litigate statutory employment claims on a class basis (“in concert”), then an employer’s attempt to dismiss such claims “interferes with” or “restrains” that supposedly “concerted activity” equally and to the same extent whether the opposition is based on Rule 23 or on the terms of an arbitration agreement. The employer’s motion to have the class claims rejected “interferes with” and “restrains” employees in their exercise of this right to the same extent whether the opposition cites Rule 23 or an employment agreement. If the assertion of a Rule 23 objection is not an unfair labor practice (notwithstanding that it plainly does threaten to interfere with and restrain concerted activity), as the SEIU

³ There is broader authority supporting the distinction as well. The argument of the Acting General Counsel and the SEIU proves far too much, and fails to account for the settled authority that contractual agreements in which employees agree not to engage in certain activities that could fairly be termed “concerted” may nonetheless be quite permissible (and not barred by § 7 or remediable by § 8). *See, e.g., Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280 (1956) (recognizing lawfulness of “certain waivers of the employees’ right to strike”). It is simply not the case, therefore, that agreements that could be said to interfere with or restrain “concerted activities” are, without more, necessarily violative of § 7.

concedes, then neither is a motion to dismiss based on an arbitration clause like ¶ 6 of the D.R. Horton agreement.

The better view is the one asserted in the General Counsel Memorandum (which, notably, the Acting General Counsel never frontally attacks). The terms of an arbitration agreement that do what such agreements are supposed to do – specify the terms of arbitration, with whom it will be conducted, and the power of the arbitrator – are not, without more, an unfair labor practice. An employer’s obtaining of signed arbitration agreements that limit the arbitrator’s power to “fashion a proceeding as a class or collective proceeding” is not a violation of protected rights under § 8(a)(1) or (4).⁴

Only the path taken in the General Counsel Memorandum – which correctly treats ¶ 6 as an agreement about the terms of arbitration, and not as a limitation of any concerted activity in which the employees may engage – respects and properly enforces both the FAA and §§ 7 and 8.

By contrast, the position urged forcefully by the SEIU and implicitly by the Acting General Counsel reflects a single-minded approach that “wholly ignore[s] other and equally important Congressional objectives.” *Southern S.S. Co.*, *supra*, 316 U.S. at 47. It would deprive employers, in relationship to employees, of the very FAA rights that the Supreme Court held they were entitled to in *Stolt-Nielsen* and *AT&T Mobility*. Employers would henceforth be unable to enter into the very agreements providing for individual (not class-based) arbitration

⁴ We recognize that the SEIU, seeing that flaw in its argument, cautions that it of course does not go so far as to assert that an employer’s assertion of Rule 23 defenses would be an unfair labor practice. SEIU Amicus Br. at 6. But the inescapable logic of their position extends to any opposition to class treatment, whether rooted in statutes, rules, or arbitration agreements. To put it another way, it is hard to see why Congress would have thought it permissible for employers to attempt to defeat class actions by making aggressive Rule 23 objections but not by relying on contractual dispute resolution agreements providing for expedited, efficient, inexpensive individual arbitration only.

that the Supreme Court has just recently held are valid and enforceable under the FAA. That approach, instead of harmonizing the statutes, treating both as effective, and minimizing the impact on the FAA, “unduly trench[es] on” the FAA. *Hoffman Plastic Compounds*, 535 U.S. at 151, *Can-Am Plumbing*, 350 NLRB at 949.

CONCLUSION

For all the foregoing reasons, the Board should answer the question posed in the June 16 Notice and Invitation in the negative, and hold that employers do not violate NLRA § 8(a)(1) by maintaining and enforcing mutual arbitration agreements that submit all employment disputes to individual arbitration, where the agreement further provides that arbitrators lack authority to consolidate individual claims or to fashion proceeds as a class or collective action.

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Respectfully submitted,

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